

## Basel Efforts in the Fight Against Toxic E-waste Colonialism: What Prospects for Effectiveness?

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### Abstract

The invasion of developing countries by hazardous e-waste traders in quests for sites to dispose of their consignments of waste is not a recent phenomenon. These activities have continued regardless and in defiance of the Basel Convention as the main global instrument regulating the Transboundary movement of hazardous wastes. This article therefore provides a concise overview of the effectiveness of the Basel Convention in the fight against the Transboundary movement of e-waste from developed Countries to third world countries. Adopting an analytical research method, it is uncovered that even though the Basel Convention is instrumental in the regulation of Transboundary movements of e-waste to developing countries, its effectiveness is marred by inherent loopholes in the convention, namely: the verification problem in the PIC procedure and the recycling and reuse loopholes amongst others. It is argued that in order to halt the movement of e-waste to developing countries, the recycling and reuse loopholes must be mended. The PIC procedure in the Convention must also be manned with monitoring structures.

**Keywords:** E-Waste, Developing Countries, Hazardous Waste, Environmental Hazard, Occupational Hazard.

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### INTRODUCTION

Technological advancement and the increasing desire to lead tech-savvy lives have led to an increase in the demand for Electrical and Electronic Equipment (EEE). The high demand for EEE coupled with early obsolescence rate of these products makes Waste Electrical and Electronic Equipment (WEEE) one of the fastest growing waste streams [1]. The global quantity of e-waste and waste destined for landfills and incineration is increasing at an alarming rate of almost 2 Mt per year [2]. E-waste constitutes a significant global environmental and health emergency, with implications far broader than occupational exposure as its effects will be felt by posterity. As a result, there has been growing concern about the negative impacts that the electronic industry and its products are having on both society and the environment in which we live [3]. At the global level, worldwide concern about the Transboundary movement and disposal of hazardous waste was heightened in the late 1970s and early 1980s. The emergence of the concept of environmental stewardship in the 1980s led to a dramatic increase in the cost of properly disposing of hazardous waste [4].

Faced with the high cost of compliance with domestic environmental regulations, the increase in domestic generation of toxic waste and disposal costs, the decrease in the number and capacity of domestic disposal sites, and the public opposition to the location of disposal sites known as the “*Not in My Backyard*” (NIMBY syndrome) [5]. NIMBY is a protectionist and oppositional tactic adopted by community groups facing unwelcome land-use development in their neighborhoods such as landfill sites and hazardous waste facilities [6]. Indeed inhabitants of these neighborhoods acknowledged the importance and necessity of landfill sites and hazardous waste facilities, but maintained that these facilities should not be located near their homes. The NIMBY syndrome therefore became the war whoop for inhabitants of neighborhoods in developed countries to oppose the location of local hazardous waste facilities, thus making developing countries the new destination for illicit disposal of hazardous waste.

As the NIMBY syndrome took roots, elected officials responded in kind with the “*Not In My Term of*

*Office*" (NIMTO) syndrome [7]. The result was a reduction in the laxity once enjoyed by private businesses in disposing of their wastes. The disposal of hazardous waste did not just become a gargantuan task, but an expensive one as well. This led to the birth of the silent saga of international trade in hazardous waste, as private businesses in looking for cheaper ways to dispose of wastes found fertile grounds in the pristine environments of developing countries with weak environmental legislation and poor economic realities. So-called "toxic traders" exploited these legislative weaknesses to ship hazardous waste to developing countries [8].

A comment attributed to Larry Summers, a former economist of the World Bank has always been a reference point to justify the export of the pollution [9]. Speaking on the economic sense of exportation of e-waste to developing countries, he is said to have stated that:

*The least developed countries, specifically those in Africa, were seriously under polluted and thus could stand to benefit pollution trading schemes as they have air, water and land to spare; and that Environmental protection for health and aesthetic reasons is essentially a luxury of the rich, as mortality is such a great problem in these developing countries that the relative minimal effects of increased pollution would pale in comparison to the problems these areas already face* [10].

The economy of such disposal allows developed countries to dispose of e-waste at far lower costs while still providing the receiving nation with considerable revenue. However, because these developing nations are ill equipped to handle e-waste properly, the waste can present health and environmental problems for the receiving nation [11].

The attendant public outcry due to the adverse environmental and human rights consequences of the dumping galvanized governments to take legislative measures against the hazardous waste scourge [12], and this led to the adoption in 1989 of the Basel Convention on the Control of Trans-boundary movements of Hazardous Wastes [13]. The Basel Convention is the main global initiative towards the management of WEEE and its origin can be traced to a combination of United Nations Environment Programme (UNEP) Policy Initiatives and high-profile media events surrounding actual or attempted waste dumping in African, Asian and Central American countries between 1986 and 1988 [14]. The adoption of the Basel Convention was necessitated by the need to protect human health and the environment against the adverse effects resulting from the generation, management, Transboundary movements of hazardous wastes and other wastes [15], as the 1970s and 1980s brought various instances of 'toxic Terrorism' [16]. There are

currently 175 parties to the convention with the notable absence of the USA. This legally binding agreement adopted under the auspices of the United Nations Environment Programme in 1989 heralded a new era in international cooperation with regard to dealings in trans-boundary trade in hazardous waste.

The sole purpose of this article is to address the effectiveness of the Basel Convention in regulating Transboundary movement of e-waste to developing countries. This aim is accomplished by first presenting an overview of the Basel Convention and then proceeding to the crux of the subject matter directly.

## KEY TENETS OF THE BASEL CONVENTION

They include the following:

### *Proximity Principle and Hazardous Waste Minimization as Heralded by the Convention*

According to the proximity principle as heralded by the Convention, whenever possible, the waste should be managed close to where it is generated. The convention urges Parties to take appropriate measures to reduce wastes generated within to a minimum [17], and ensure that waste generated is treated or disposed of as close as possible to its source of generation [18]. This principle goes with the self-sufficiency principle which is to the effect that each country should manage its own waste whenever possible [19]. This obligation to minimize the generation of the hazardous waste is held high in the Basel Convention because of the increase in the export of large quantities of hazardous WEEE from developed countries to developing countries [20]. Even though these principles have particular application in the context of the Basel Convention, there may be in tension in some cases for example when the closest facility (and therefore inconsistent with the proximity principle) for dealing with waste could be across a national border (and therefore inconsistent with the self-sufficiency principle) [21].

### *Tackling Illegal Movements of Hazardous Waste (e-waste) and other Waste and Imposition of the Duty to Re-import*

Transboundary movements of wastes carried out in contravention of states obligations stated in the Basel Convention are denoted by the term "illegal traffic". During the negotiation phase of the Convention, there were several disputable issues, one of which was the definition of illegal traffic. This amongst other issues had developing countries taking the stance that the exporter ought to be responsible for illegal traffic, while developed countries opposed this stance and took on the stance that responsibility for illegal traffic ought to fall on the state. In striking a balance however, the Convention jointly holds the state and the exporter responsible in cases of illegal traffic of hazardous waste. In this instance, the state of export is responsible for actions of the exporter and the generator, and the state of import is responsible for the

actions of the importer and the disposer [22]. Illegal waste traffic as stated in the Convention includes any Transboundary movement of hazardous wastes or other wastes in contravention of the notification or consent obligations of the Convention. It also refers to movement of waste with consent obtained fraudulently, in a way that does not conform to the documents accompanying such movements, or in a way that results in deliberate disposal of hazardous wastes or other wastes in contravention of the Basel Convention and principles of international law [23].

The Convention criminalizes illegal traffic in hazardous waste and engages Parties to take appropriate legal, administrative and other measures to address such conduct [24], and beseeches state parties to introduce national legislation and provide the secretariat with an annual report that provides details of each movement of wastes, pursuant to the Basel Convention disposal methods, accidents, and information pertaining to the breach of the convention by a Party [25]. In addition, the convention imposes a responsibility on the State of export to re-import if the trans-boundary movement was illegal *ab initio*. This stipulation throws light on the issue of responsibility for illegally exported waste. Thus, by mandating that exporters would have the responsibility to recover the waste rejected elsewhere, Article 9 of the Convention was intended to effectively put pressure exporting states to try increase efforts in policing their shores more carefully [26]. This would also help to reduce illegal traffic and to alleviate some of the complications resulting from situations where unsuccessful attempt are made to dump toxic waste in different countries [27].

In instances where trans-boundary movement of the waste has commenced legally but cannot pull through in conformity with terms of the contract, the exporter and the disposer, together with the state of export have the obligation to make certain that wastes are re-imported by the exporter in situations where substitute arrangements for sound environmental management cannot be made with a 90 days period of time from the time the state of export and the secretariat are informed. There is some uncertainty surrounding this provision as it does not stipulate instances that may render compliance unfeasible, and whether this provision also covers instances where the unfeasibility of compliance is the result of errors on the part of persons or states authorities involved, or a result of changes in the relevant circumstances after consent was given, or unforeseen action by a third party.

The Basel Convention has as well made efforts in establishing bodies within the Convention to deal with prevention, punishment and compensation for illegal trades in hazardous wastes and other wastes. A compliance Committee for promoting the implementation and compliance of the Basel Convention which was first convened in 2003, was

established as a “non-confrontational” “non-binding” “preventive in nature body, with the duty to review collected information in order to monitor compliance and aid Parties in achieving compliance. In addition to the preventive mechanism, the Basel Convention also adopted the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal [28]. The Protocol was adopted in 1999 at the fifth Conference of Parties (COP5) and is considered as an important step forward in increasing the effectiveness of the convention as it has liability provisions dealing with illegal Transboundary trade in hazardous waste. It is the first international environmental agreement to provide compensation for nations injured by the transportation of hazardous waste. It lays down the conditions under which liability for damage can be assigned to different stakeholders; it also lays time and financial limits for seeking recourse for liability.

#### ***Restatement of the Precautionary Principle through the Requirement of Prior Informed Consent in the Transboundary Movement of E-waste***

The Convention relies on the precautionary principle of environmental justice through its prior informed consent (PIC) procedure, which requires nations of import to receive full disclosure regarding potential waste transports and send approval for such transports before a nation of export may permit the exporter to commence shipment [29]. “Prior Informed Consent” has been defined in international trade as the principle that “international shipment of a chemical is banned or severely restricted in order to protect health or the environment and should not proceed without the agreement... or contrary to the decision, of the designated national authority in the importing country” [30]. Informed consent or notification systems first appeared in the national legislation of the USA in the 1970s [31]. The Basel Convention defines an *exporter* as any person under the exporting states jurisdiction who arranges for hazardous wastes or other wastes to be exported. The definition of an *importer* is similar in form and content [32].

Prior informed consent is the Central Regulatory mechanism of the Convention. It establishes notice and consent procedures for hazardous waste trades in its Article 6. By extension, it subjects the export of e-waste that is not prohibited and which is in conformity with general obligations, to a consent procedure and obligates the licensing requirement for persons transporting or disposing of hazardous wastes. Exporting parties must notify the transit and importing countries and provide information regarding the e-wastes [33]. This duty is the preserve of competent authorities in concerned countries. The designated notifications information as stipulated in Annex V A of the Convention includes physical description, quantity, composition and methods of disposal. The information

provided must be sufficiently detailed to enable the authorities of the state of import and transit to assess the nature and the risks of the intended movement.

Exportation is prohibited in the Convention unless the importing country gives its consent. It is only upon receiving such notice that the state of import must respond in writing, consenting to the movement with or without conditions, denying permission for the movement, or requesting further information. It may base its restrictions or refusal upon any grounds [34]. The state of import must also confirm the existence of a contract between the exporter and the disposer, which specifies the environmentally sound management of the wastes [35]. The State of import's final response is sent in copies to the competent authorities of all States involved in the transaction [36]. The exporting State may not allow movement to commence until the notifier has received the importing state's written consent, together with the confirmation of the existence of the contract. There are no time limits under the Convention in relation to the response of the importing state. Given that the consent of the importing state needs to be explicit and free of conditions, a movement may not be permitted to commence if no response is given by that state. Once the response pulls through, on the completion of the disposal, the exporting state and the exporter must be informed accordingly [37].

With regards to the rights of the transit state and the PIC procedure, these rights were one of the most contentious issues during the negotiation process. Developing countries wanted to accord transit states same rights as import countries. This was strongly contradicted by developed countries on the grounds that according transit states same rights as import states go against navigational rights and freedoms guaranteed under international law. Numerous proposals were put out and the rights of the transit state were adopted thus: In first place, upon reception of notification, a party transit State must "promptly acknowledge receipt of the notification [38]. Even though no deadline is given, the term "promptly" is indicative of a short time frame, since no assessment, major decisions or administrative procedures are necessary. It is therefore only reasonable that acknowledgement should be done within few days [39]. Movement of the hazardous waste may only commence with the response of the transit state upon reception of the written consent of the transit State [40]. The transit state which is a party can waive requirement of prior written consent, either generally or under specific conditions. Notice of such decisions is given to the other parties through the secretariat. Failure to respond to notice within 60 days implies a waiver of the requirement of prior written consent for the movement of waste. The State of export may then allow the movement to proceed through the state if it has received no response within 60 days after a receipt of notification by the State of transit.

Basel Conventions PIC procedure has been replicated in scores of international and regional multilateral environmental agreements relating to potentially hazardous substances adopted in their wake. Worthy of note are: the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the 2001 Stockholm Convention on Persistent Organic Pollutants, and the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa. The PIC procedure is very instrumental in the e-waste trade; even though for its effectiveness to be felt there is need for concerted and strict enforcement at national levels.

### ***The Basel Call for International Cooperation in Ensuring Environmentally Sound Management of Hazardous Wastes***

In line with the goal of minimizing the generation and transfrontier movement of hazardous wastes on a global level, the Basel Convention calls for co-operation between parties in the domain of environmentally sound waste management. This co-operation could be in the harmonization of technical standards and practices, monitoring of the effects of e-waste management on human health and the environment, developing sound e-waste management systems, transfer of technology, and development of technical guidelines and codes of practice. Given that developing countries often lack the technical capacity and know-how, developing countries would not be able to implement the provisions of the Convention and this will mean that the regulatory system of the Convention has failed in its objective of protecting developing countries against illegal imports of hazardous wastes. There is therefore need for co-operation between parties to the Convention and competent international organizations as encapsulated in Article 10 (4). Article 13 of the Basel Convention in addition to the information exchange required by the PIC process, calls for information exchange between States parties over a broad range of issues. To meet this end, the Convention has put in place a Secretariat responsible for gathering information regarding technical standards, monitoring and national waste listings, and for preparing periodic reports [41].

Flowing from the Basel Conventions requirement of co-operation between relevant environmental agencies of country parties to the Convention, in order to control the global Transboundary movement of e-waste, environmental agencies in some developed countries have been working actively with environmental agencies in developing countries to track down illegal waste traders. The incarceration of a Nigerian National, Joe Benson to 16 months imprisonment at Snaresbrook crown court, UK, for illegally exporting huge tones-of hazardous e-waste to countries in Africa, was the result



of the cooperation between the UK environmental Agency and the Nigerian Environmental Agency-NESREA [42]. The consignments of waste he sent to Africa were discovered to consist of broken CRT TVs and ozone-depleting fridges/freezers amongst other hazardous e-wastes [43]. This ruling is a landmark ruling as it was the first time anyone was sentenced to prison for illegal e-waste exports, and again, the first time cooperation between environmental agencies on e-waste traffic bore visible fruits.

### ***Incorporation of the Principle of Environmentally Sound Management of Hazardous Waste***

An underlying principle of the Basel Convention is environmentally sound management of wastes. Environmental sound management is a minimum baseline which parties to the convention are required to achieve [44]. Parties are ensued to take all practicable steps to ensure that hazardous wastes subject to Transboundary movement are managed in a manner that will protect human health and the environment from the adverse effects that may result from such movement [45]. The Basel requires Parties to ensure availability of disposal facilities for environmental sound management local, to the extent possible, within its own territory [46]. The state of generation may not allow the exports of hazardous wastes if it has reason to believe that their environmental sound management and disposal would not be guaranteed in the prospective state of import [47].

In the same light, a state can prohibit the import of e-waste into its territory if it has reason to believe that they would not be managed in an environmentally sound manner [48]. The Convention makes a difference between “hazardous waste” and “other wastes”, and asserts jurisdiction over wastes from both categories specified in the annexes to the Convention [49]. Several provisions although not throwing light on the definition of ESM give some guidance for the management of hazardous waste in accordance with the Convention’s aims. Each party is required to establish an authorization system for persons handling hazardous wastes and ensure that every hazardous waste movement is accompanied from start to finish by a movement document containing the information specified in Annex V (B) to be signed by each person who takes charge of the wastes [50].

The Secretariat to the Basel Convention specifies that “environmental Sound management” (ESM) involves “strictly controlling the storage, transport, treatment, reuse, recycling, recovery and final disposal” of wastes [51]. Parties to the Convention have developed technical guidelines to define what ESM is in essence for several types of wastes regulated under the convention. By COP-2, the Parties applauded the work of the Open-ended Ad-hoc Committee on Technical Guidelines for the Environmentally Sound Management

of Wastes and provisionally adopted three other draft guidelines on incineration, land filling and refining oil [52]. The COP extended the TWG’s mandate to continue preparation of new Technical Guidelines on two priority waste streams including recycling of compounds and clinical wastes. The guidelines acknowledge the difficulties faced by government authorities to assess and differentiate bona fide used electronic equipment shipped for repair, refurbishment, resale, or humanitarian-aid reuse from defunct electronic waste destined for environmental disposal and unsafe mining [53].

Even with written consent, the Convention goes further than traditional informed consent obligations by barring the exporting country from shipping the hazardous e-wastes if it believes the importing country cannot or will not manage the wastes in an environmentally sound manner [54]. The Convention as well requires exporting nations to re-import e-wastes if it is discovered after exportation that the importing country cannot manage the wastes in an environmentally sound manner [55]. Environmental sound management of e-waste means taking all practicable steps to ensure that e-wastes are managed in such a way that do not endanger human health and the environment [56].

The Conference of parties to the Basel Convention in 2002, recognized e-waste as a “priority waste stream”, and adopted measures to address them, including a unique public private partnership programme on mobile phones [57]. E-waste was described in a round-table discussion on ESM held on the 12<sup>th</sup> of December 2002 as an issue requiring cooperative actions by all stakeholders including governments, manufacturers, service providers and consumers, in order to ensure proper collection, treatment and recycling of valuable materials as well as the disposal of end-of-life EEE [58].

### ***DRAWBACKS TO THE BASEL CONVENTIONS EFFORTS IN COUNTERING THE E-WASTE TRADE TO DEVELOPING COUNTRIES: INHERENT LOOPHOLES IN THE BASEL CONVENTION***

Even though the adoption and ratification of the Basel Convention indicates a global consensus on combating illegal Transboundary movement of hazardous wastes, the Basel Convention has proved ineffective and inadequate in curbing the Transboundary movements of e-waste. Instances in Africa and elsewhere in the world indicate that the convention has failed to protect poor nations from the harmful effects of the international trade in hazardous waste [59]. This failure is attributable to weaknesses in the Conventions institutions and procedures.

### ***The PIC procedure and the Verification Problem***

The details of the PIC procedure in the Basel Convention leave much to be desired. The PIC

procedure is under attack for being very weak and inefficient. This is because the PIC procedure does not ensure that the exporting country properly verifies that adequate management facilities are available in the importing country. It is true that the Convention obligates the exporting country to ensure the availability of adequate e-waste disposal facilities on the country of disposal; it does not however prescribe the manner in which this information should be ascertained. The parties are therefore left with no option but to rely on the Conventions information exchange stipulation, which in any case means that the exporting party is relying on the information providing by the importing countries' authorities. This is problematic because a number of difficulties arise, particularly in situations where a developed country is exporting e-waste to a developing country. The difficulties are as follows:

Firstly, the developing countries often lack the technical and administrative capacity to conduct an accurate assessment of the environmental and health risks of a particular shipment of e-waste [60]. This may lead to developing countries giving consent to the importation of a shipment of e-waste on a genuine but mistaken belief that they possess adequate facilities for disposal [61].

Secondly, the PIC procedure is vulnerable to abuse by corrupt officials. The information provided by officials of developing countries could be false. There are almost no limits to the compromise that officials in developing countries will make for monetary benefits [62]. Corruption is an endemic problem that has devotedly accompanied environmental degradation in Africa. The United Nations Environment Program (UNEP) based in Nairobi Kenya, has asserted that, owing to poverty and political instability, "some African governments or groups resort to accepting hazardous wastes in exchange for money, weapons or other needs" [63]. This theory has played out in many African countries [64]. Take the case of Somalia for example, whose long coastline, raging war and absence of functioning government created the perfect environment for the dumping of hazardous waste by unscrupulous brokers who offered guns in exchange for being allowed to unload their waste [65]. So, while the rights of states to refuse imports of hazard causing wastes is pronounced by the Convention, in reality, governments may surrender this right where economic incentives are sufficiently high [66]. The PIC procedure in these circumstances is powerless in preventing government officials from knowingly overstating their capacity to cope with hazardous waste imports in order to secure revenue.

### ***Controversy of Legal Terminology Surrounding the Concept of Waste***

The Basel Convention has used several ambiguous legal terminologies, the meanings of which

have been notoriously difficult for domestic courts to discover. This is further compounded by the fact that the concepts are subjective, creating considerable challenges for lawmakers and judiciaries around the world to adopt a standard view. It is difficult to delineate for example whether equipment is just waste or hazardous waste, and what actually constitutes environmental sound management as upheld by the Convention. In the face of these ambiguities, domestic courts are left to decide these definitions and answer these questions created by the Convention. Prejudiced by dubious legal terminology used in the Basel Convention and different vested interests, domestic authorities and courts have frequently succumbed to inconsistencies [67].

In addition, the loose drafting of the Basel Convention's provisions has provided a wide range of opportunities for contracting parties to manipulate the wordings of the Convention based on their needs and circumstances. This ties with the by environmental activists that hazardous e-waste typically follows the path of least resistance [68]. This is accurate because wealthy developed nations are in the business of discharging or disposing of their e-wastes in underdeveloped and poorer nations for money [69]. For these poverty-stricken countries and people, the need to put food on the table is a daily necessity and comes first, before the benefit of a pollution free world, which is indeed a shared benefit but comes much later [70]. With this perspective, a proper judgment is therefore not expected from parties on the both sides of the waste transaction because of their apparent conflicting interests. The result is that hazardous waste (including e-waste) keeps flowing steadily from developed to developing countries- predominantly African countries.

### ***The Recycling and Reuse Loopholes***

A critical setback of the Convention stems from the recycling and reuse exemptions clauses embedded in the Convention. The Basel Action Network in what it terms the recycling loophole argues that most e-waste trade to developing countries under the guise of reuse or recycling is either sham recycling, where it not really for recycling at all, but will be dumped or burned by the importer, or informal recycling, where the recycling itself will involve pollution of the environment and risk the health of workers. Same is the case with equipment donated as charity. The current loophole allows anyone to simply claim used electronic waste as repairable and export it completely outside of the rules and obligations of the Basel Convention. And yet repair operations, like recycling operations, can be just as highly dangerous and polluting as many other types of waste management. While these operations, if done correctly, are preferred options over disposal and recycling, they usually involve the importation of non-functional parts (requiring repair) and then discarding residual material (non-repairable components) to an Annex IV

destination, meaning that the used equipment, at least in part, is waste and thus is exported and imported as waste [71].

No importing country would even be asked if it would like to receive container loads of broken e-waste destined for “repair”. These business-to-business shipments would simply cross borders with no Basel controls whatsoever. There is some degree of truth in the fact that the reuse exemption was incorporated into the Basel Convention so that hazardous waste controls do not hinder developing countries access to second-hand technologies, which continue to be an essential factor to their economic growth and digital and social advancement. Waste traders who put on the ‘green’ hat of recycling have however circumvented the Basel Convention by re-labeling their wastes as commodities bound for recovery operations [72]. The problems associated with the existing loophole and the implications are as follows:

In first place, the requirements of the Technical Guideline on the Transboundary Movement of e-wastes are rather weak requirements instead of real controls. The Guideline simply states that broken, untested, or non-functional equipment destined for failure analysis, or for repair and refurbishment operations are considered to fall outside the scope of the Basel Convention. The guideline is silent on the requirement of controls, and it would seem that as long as the export arrangements meet the five minimal requirements contained in the Guidelines, they fall outside the scope of the convention. The minimum requirements are as follows:

Firstly, the trader must claim that the non-functional electronic equipment is being exported for failure analysis, or for repair or for refurbishment [73]. This provision is very lenient as it fails to realize that anyone can do this even if such wastes are not destined for failure analysis, given that inspection happens in very rare instances. Waste traders often exploit this requirement by claiming that wastes exported are intended for repair and refurbishment operations, when in reality, these consignments of waste are indeed meant for disposal. A Greenpeace report indicates that of the containers filled with used electronic equipment were exported to poor countries in Africa and Asia, only an insignificant quantity of this equipment was in a resalable state, while majority were dumped directly in landfills, while others were burnt, releasing dangerous substances into the environment [74]. These actions raise questions as to whether these dumping activities can be called recycling at all.

Secondly, that the trader who arranges the shipment needs to establish a partner in the importing country and not only sign a contract to the effect that the operations to be carried out will be environmentally sound, include proper management of residuals, but also agree to make a final report. The shortcoming of this provision however results from the fact that there are no parameters put in place to ensure that the parties keep to the contract. This is a mere contract between the waste trader and their partner, and whether or not the provisions are upheld is difficult to keep a mark on because there will be rarely be any government or court even looking at it unless there is a dispute between the two contractors, which is unlikely to happen. Even if a dispute arises between the contracting parties, a breach of a contract is a civil law matter; hence, it will be virtually impossible for the government to enforce the contract to protect its interests, (in this case human health and environmental protection).

In third place, the Guideline establishes that the exporter must make a declaration that none of the equipments within the consignment are defined as waste, or considered to be waste in any country involved in the transit of such waste [75]. It is however entirely inappropriate for a non-state entity (in this case the broker or recycler) to make a declaration of law to assert that they are compliant. They might not know how to correctly interpret the laws of other countries and can simply claim ignorance if they are hooked on making the wrong determination. This form of self-regulation postulated by the Guideline is utterly useless from a legal view point. Again, the burden of proof of waste and non-waste swirls on the traders head. The default assumption according to the EU, Africa, Mobile Phone Partnership Initiative (MPPI) and the Partnership for Action on Computing Equipment (PACE) should be that countries consider non-functional equipment as waste. After all, 31(b) is written into the Guideline as an exception. Thus, this exception should only be considered when countries specifically pre-announce that they believe that non-functional repairable equipment is not waste.

In fourth place, the Guidelines require that each piece of equipment is individually protected against damage in order to prevent hazards during transportation, loading and unloading in particular through sufficient packaging and stacking of the load [76]. The prevailing practice is that trader’s equipment in plastic shrink wrap or cardboard separators. These are very cheap and so this requirement is easily accommodated. However an insurance policy against receiving shipments of junk toxic e-scrap that will never be reused is most suitable [77].

Lastly, the Guideline requires that documentation accompanies the shipments as to the origin, nature of the equipment, the existence of the contract and declaration. Such documentation is

however easy to provide once the trader has a partner, but of what good is it going to be given that Parties will not have prior notification that the waste shipment is going to cross their border, so the burden will be placed on the importing countries to detect such at the border and then analyze accompanying paperwork for compliance. These defeat the purpose of the “Prior Informed Consent” requirement as contained in the Basel Convention and it does not make sense that it is given away without a workable alternative for the most-traded hazardous waste stream- e-waste.

The Second problem Associated with the recycling loophole is the impossibility of monitoring or controls by the importing states. Given that the Guidelines removes the prior informed consent requirement for wastes that are deemed repairable, it is difficult for importing or transit states (in which case are mostly developing countries) to know what e-wastes they are receiving; thus they have diminished ability to conduct enforcement of any of the five conditions stated in the Guideline unless they open each and every Transboundary shipment and spend time determining if the paperwork is correct or not. Even so, by the time enforcement is possible, the shipment has already been made and is likely to be abandoned in the importing state, if found illegal. Rather than asking customs officials to parse out what is in a shipment and if it is safe to import, developed countries should not be able to send the shipment in the first place [78].

Thirdly, the exporting states have limited ability to check on exporters. The obligations that the Basel Convention places the on Parties to ensure that the exports are handled correctly and by responsible companies, is lost. Any company or broker, no matter their track record, can exercise this loophole and it is only when the contract comes to fruition that the Parties will be in the know of who the exporters are, what they are exporting, and to whom. There is also the possibility that fake recycling companies would export waste under the guise of recycling [79].

To add, the loophole impedes the ability to check repair operations to ensure environmentally sound management. The Guideline provides no formal registry of where these repair activities will take place. It is all embedded under the cloak of contractual secrecy. It is going to be difficult for a state concerned to know with certainty whether the facility to carry out the repair or refurbishment operations is environmentally sound, permitted or not and what they are set to do with the wastes.

Furthermore, it can be said confidently that the Guideline incentivizes export of hazardous waste. It is ironical that the Guideline actually requires stricter conditions of exports of fully functional equipment than it does for the export of broken equipment. What then can be said if not that the Guideline incentivizes the

exportation of broken equipment? The weak requirements for the export of broken equipment is a vast portal that incentivizes the export of hazardous waste parts (bad batteries, mercury lamps, and Cathode Ray Tubes just to name a few) to developing countries from developed countries as this materials are more expensive to deal with in the developed countries because of strict environmental standards and regulations. These incentives run against the primary objective of the Convention- minimization of wastes exports including hazardous waste, in particular to developing countries.

More so, the repair loophole violates the Ban Amendment. With the coming to force of the Basel Ban Amendment in 2019, the exports of repairable from Annex VII to non-Annex VII countries violates the Ban Amendment and this is not an exaggeration. This is because the export of equipment for repair often involves the export of hazardous components that will be discarded upon repair in the country of import. A Liquid Crystal Display (LCD) computer monitor for example which must have its mercury-laden lamps replaced in order to repair it, is as much an export of hazardous waste as would be the export of those same broken mercury lamps exported from an Annex VII country to a non-Annex VII country for disposal. The Guideline however, states that miraculously, if one claims the LCD is exported for repair, even when the mercury lamps cannot be repaired but only replaced, that export does not need to be controlled. This is a direct violation of the Ban Amendment and the principles under which it was conceived.

## THE BASEL BAN AMENDMENT

The Basel Ban is an extension of the Basel Convention that was previewed in the convention.[80] The Basel Ban Amendment was adopted by the parties to the Basel Convention in 1995. It was born out of a notion that economically motivated waste exports particularly from developed to developing countries were in effect cost externalization and were both an affront to human rights and the environment [81]. With the coming into force of the Basel Convention in May 1992, Parties began to push for a more stringent option to completely stop the trade in hazardous wastes between developed and developing countries. The Basel Convention was criticized for its porosity and at the time it was felt that the Basel Ban Amendment was the only way to protect developing countries and countries with economies in transition who suffered the injustice of having to receive tones-of hazardous waste shipments and other waste they were unable to manage through environmentally sound means [82]. This Ban amendment prohibits all export of hazardous wastes, electronic waste inclusive, from developed countries to developing countries.

Meeting for the first time in Paraguay in 1992, parties in the Conference of Parties (COP-1) adopted a



decision calling on industrialized countries to prohibit Transboundary movements of hazardous wastes and other wastes destined for disposal in developing countries. At the Second Meeting of the Conference of the Parties (COP2) held in Geneva, parties agreed to an immediate ban (Basel Ban) on the export of OECD to non-OECD countries of hazardous wastes intended for final disposal. They also came to a consensus in banning the export of waste for purposes of recovery and recycling. This decision however was never part of the final text of the Convention and there are some doubts as to whether it is legally binding on the parties or not. Therefore at COP3, 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” [83]. The Basel Ban Amendment, a global waste dumping prohibition, has become law after its ratification by Croatia on September 6, 2019.

A wide range of recyclable hazardous wastes listed as presumptively hazardous in Annex VIII of the Convention are covered by the Ban Amendment, including certain types of end-of-life electrical and electronic equipment and scrap, certain types of waste batteries, and some spent catalysts. In addition to the prevention of waste dumping on poorer countries, the Basel Ban is also designed to support the Basel Conventions goal of minimizing toxic waste generation [84]. The Basel ban attempts to achieve this by preventing the movement of waste, forcing waste generating countries to increase their self-sufficiency in managing their waste, which includes minimizing toxic inputs in production processes [85].

## CONCLUSION

The Basel Convention has had considerable success in its fight against the Transboundary movement and trade in hazardous waste and this has led to it being referred to as “the broadest and most significant international treaty on hazardous waste” [86] that is in existence today. It is apparent that, despite the very impressive appeal of this instrument, its practical implications on Transboundary movements of e-wastes have been almost *nil*. If the Basel Convention has to succeed in its mission of environmental justice to least developed countries, some of the inherent loopholes of the Convention have to be mended; to wit- the lack of monitoring structures within PIC schemes, and the reuse and recycling loopholes. This is because a total ban might not be the best way to protect developing nations from the hooks of trans- frontier movements of toxic e-waste, if other provisions of the Basel Convention in reality are not working to totally protect the interests of these countries. To ensure the protection of developing countries, in the stages prior to a trade in waste, a reviewing body should be created with the sole mission of ensuring compliance with environmentally sound management standards set forth by the parties. This body will have the two-pronged assignment of

inspection and authorization, with the latitude to deny or grant authorizations to disposal facilities on an inspection basis. This system of inspection and authorization may be better-off to the Basel Ban Amendment.

Meeting in June 2022, Parties to the Convention agreed to tighten up WEEE export through an amendment put forward by Ghana and Switzerland. The changes introduce a requirement for all Transboundary movements of WEEE, whether hazardous or not, to be subject to prior informed consent of the importing state and any state of transit. The changes are due to come into force at the start of 2025, and were welcomed by the BAN. Ban however highlighted the fact that the reuse loophole still loomed in this amendment. In the words of Jim Puckett, BAN Executive Director, “While everyone realizes reuse plays an important role, it cannot be used as a free ticket to export all manner of wastes on an empty claim and thereby hide from the Basel rules of the road” He adds that “...this loophole opens the barn door to all manner of exploitative waste trade business. A loophole which BAN along with developing countries, aims to close to prevent abuse of in the name of reuse” [87]. So while the amendment is yet to come into force, it has already been noticed that the reuse loophole will persist.

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  16. Used by O'keefe, P. (1988), "Toxic Terrorism", *Review of African Political Economy*, Vol. 15(42), Pp. 84- 90, to mean the dumping of unprocessed and hazardous waste in third world countries.
  17. One of the most notorious of which was the United States' embarrassing *Khian Sea Incident*. In 1986, after attempts at domestic disposal failed, the city of Philadelphia loaded 15,000 tons of incinerator ash, labeled "fertilizer", onto the ship *Khian Sea*. Refused by numerous ports including the Bahamas and Haiti and controversially publicized by Greenpeace, the crew changed the name of the ship to the *Pelicano* and continued to search for a dumping ground. Eventually, reports emerged that the hazardous cargo had "disappeared". While 3,000 to 4,000 tons of the toxic ash continues to contaminate a Haitian beach, many suspect that the rest lies on the floor of the Indian Ocean.
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