
THE PROBO KOALA INCIDENT IN ABIJAN CÔTE D'IVOIRE: A CRITIQUE OF THE BASEL CONVENTION COMPLIANCE MECHANISM

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SUMMARY

The alarming rate of illegal dumping of hazardous wastes witnessed in the late 1980s appeared to have been checked in the early 1990s by the adoption and subsequent entry into force of the Basel Convention and some regional instruments on the subject. The Probo Koala incident in Abidjan, Cote d'Ivoire in August 2006, however, has brought to the remembrance of the global community the harsh health and environmental consequences of this unwholesome practice. More importantly, it constitutes a litmus test for the existing instruments, revealing their strengths and weaknesses. Thus, against the background of the Probo Koala incident, this paper undertakes a critical analysis of the Basel Convention compliance mechanism, identifying inadequacies in the mandate of the Basel Secretariat and the poor exchange of information requirements under the Convention as major contributors to the Cote d'Ivoire tragedy.

1 INTRODUCTION

The dumping of hazardous wastes in Abidjan, Cote d'Ivoire in August 2006 by the tanker - The Probo Koala (hereinafter "the Probo Koala incident") has brought to the limelight, not only the thriving business of transboundary movement of hazardous wastes around the world, but also the adverse health and environmental implications of this infamous trade.¹ It has also brought to light institutional and operational deficiencies, as well as a drastic lack of capacity of a large number of countries to manage waste in an environmentally sound manner.² It questions the effectiveness of the existing relevant international instruments in combating this trade around the world, particularly from the developed to the developing countries, and underscores the questionable nature of the parties' compliance with the regulatory instruments. Recognizing this fact, the former Executive Secretary of the Basel Secretariat, Mrs. Kuwabara-Yamamoto stated that: One of the important lessons from the situation in Abidjan is that we have a serious problem with enforcement. National and international laws are in place to regulate these exports, but problems arise because of the lack of legal and technical institutional capacity in many developing countries to monitor traffic across their borders. Strengthening the enforcement capacity of the Parties will therefore remain a priority for the Basel Convention in years to come³

Furthermore, besides revealing cracks in the current structure of international environment governance,⁴ the incident specifically questions the efficacy of the Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and their Disposal (“the Basel convention”)⁵ in fulfilling its mandate of protecting human health and the environment against the adverse effects of the generation, transboundary movements and management of hazardous wastes.

In light of the Probo Koala incident, this paper undertakes a critical analysis of the Basel Convention compliance mechanism. In order to address the relevant issues raised by the subject, the paper is divided into five parts. Part II provides an account of the Probo Koala incident and Part III discusses the existing compliance mechanism under the Basel Convention. Part IV critically assesses the Basel Compliance mechanism against the events of the Probo Koala. Part V concludes the discussion, making recommendations for improving the compliance mechanism of the Basel Convention.

2 THE PROBO KOALA INCIDENT

The series of events which culminated in the Cote d’Ivoire tragedy began when a Korean-built, Greek-managed, but Panamanian-flagged tanker chartered by the multibillion dollar (euro) Dutch commodities trading company *Trafigura Beheer BV* (“Trafigura”) docked in Amsterdam to discharge its load on 2 July 2006. As the ship discharged a portion of its cargo in a barge that was moored alongside the ship, a west wind carried its sharp stench into nearby residential neighborhoods, where residents notified the police. “This is the worst stench we have ever experienced here,” said an employee of Amsterdam Port Services, a waste disposal company.⁶ Amsterdam Port Services took a sample of the black substance from one of the tanker’s tanks. Though declared as “waste water” used to clean gasoline shipping tanks, chemical analysis told a different story. The hydrocarbons in the material contained high concentrations of mercaptan, a substance which is highly toxic and odorous in high concentrations.⁷ After an analysis of the residues, it was decided that the disposal operation required the use of specialist facilities in Rotterdam and would cost in the range of Euros 250,000 – 300,000 and not Euros 19,000 as originally envisaged, due to the high toxicity of the waste. Trafigura stopped the discharge of the residues, refusing Amsterdam Port Services’ new quotation for the disposal of the slops. The slops were reloaded on the Probo Koala and the tanker left with the consent of the Amsterdam Port Authorities. Trafigura assured the Port Authorities that the residues would be managed safely elsewhere.

Three days later, the Probo Koala set sail to Estonia. Amsterdam port officials sent an urgent message to their counterparts in Paldiski, an Estonian port, informing them that a ship with a “suspicious cargo” was headed their way. Thus, the Probo Koala was unable to get rid of its ‘chemical soup’ in Paldiski, where it took on a consignment of gasoline bound for Africa. After unloading the gasoline in the port of Lagos, Nigeria, it arrived in Cote d’Ivoire in August. A company called *Tommy*, which had just been established in July, took delivery of the slop which

the European ports had turned away. Ivorian officials and witnesses say more than a dozen trucks contracted by *Tommy* simply poured 528 tons of the waste at 17 public sites around Abidjan after midnight of August 19. In the early hours of Monday 21 August 2006, residents of several parts of the district of Abidjan were awoken by a thick and suffocating smell. By morning, eyes were stinging, noses bleeding, stomachs, chests and ears were aching. Tests later confirmed the sludge contained mercaptans and hydrogen sulfide, a potent poison that, particularly in confined spaces, can cause blackouts, respiratory failure and death. Alerted, the Ministry of Environment and Forestry mobilized its services whose initial investigations led to the discovery of the dumping of some substance on several sites of the district of Abidjan.

The incident evolved into a crisis and a tragedy from sanitary, psychological, ecological and socio-economical perspectives. It led to massive displacement of residents living near the dump sites, and violent public demonstrations throughout the district of Abidjan. In view of the magnitude of the crisis, the Prime Minister and the Government resigned on 7 September 2006. A new Government was formed with the Ministers of Environment and Transport replaced by new individuals. The heads of the Customs Services, the Abidjan Harbour and the Governor of the District of Abidjan were all relieved of their duties.⁸ Interestingly, it has also led to an upsurge in calls for a reassessment of the compliance mechanism of the Basel Convention.

3 THE BASEL CONVENTION COMPLIANCE MECHANISM

Articles 4 and 6 of the Basel Convention impose obligations on parties to prevent pollution due to hazardous wastes. With the object of preventing the adverse health and environmental implications of hazardous wastes generation, movement and disposal, the Convention regulates the generation, movement and disposal of hazardous wastes. Adopting a preventive approach, the Convention enjoins parties to take appropriate measures to ensure the reduction, to a minimum, of the generation of hazardous wastes within their territories, taking into account social, technological and economic aspects.⁹ It also requires parties to cooperate in the development and implementation of new low-waste technologies, with a view to eliminating, as far as practicable, the generation of hazardous wastes.¹⁰ In regulating the transboundary movement of wastes, it prescribes the Prior Informed Consent procedure.¹¹ The Prior Informed Consent procedure imposes a duty on the state of export to notify the prospective states of import or transit, of any intended transboundary movement of hazardous wastes. The state of export can either provide this information itself or require the generator or exporter to do so through the channel of its competent authority.¹² The state of import shall respond to the notifier in writing, either consenting to the movement with or without conditions, or denying permission for the movement, or requesting additional information.¹³ A copy of the final response of the state of import shall be sent to the competent authorities of the states parties concerned. In this regard, the state of export shall not allow the generator or exporter to commence the transboundary movement until it has received written confirmation that:

- (a) The notifier has received the written consent of the state of import; and
- (b) The notifier has received from the state of import confirmation of the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question.¹⁴

More so, each state of transit is obligated to promptly acknowledge to the notifier receipt of the notification. It may subsequently respond to the notifier in writing, within 60 days, consenting to the movement with or without conditions, or denying permission for the movement, or requesting additional information. To this end, the state of export shall not allow the transboundary movement to commence until it has received the written consent of the state of transit.¹⁵ When the waste finally arrives in the state of import, the Convention enjoins parties to dispose of such wastes in an environmentally sound manner. This entails taking all practicable steps to ensure that the wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.¹⁶

In addition, the Convention obliges parties to take appropriate measures to ensure *inter alia*: (a) the availability of adequate disposal facilities for the environmentally sound management of hazardous wastes;¹⁷ (b) that the transboundary movement of hazardous wastes is reduced to the minimum;¹⁸ and (c) prevent the import of hazardous wastes if it has reason to believe that it will not be managed in an environmentally sound manner.¹⁹

4 THE PROBO KOALA INCIDENT AND THE BASEL CONVENTION COMPLIANCE MECHANISM: A CRITICAL ANALYSIS

The sequence of events that precipitated the Probo Koala incident reveals the inadequacies of the regulatory procedures/mechanism of the Basel Convention. As earlier noted, the tanker – Probo Koala carried the hazardous wastes from the port of Amsterdam to Paldiski, Estonia, and further down the road to the port of Lagos, Nigeria before its final dumping in Abidjan, Côte d’Ivoire. I am persuaded that a more efficient international regulatory framework would have intercepted the waste in transit and averted the eventual disaster in Abidjan. There are obvious weaknesses in the policing of parties’ compliance under the Basel Convention. Two areas of weakness that facilitated the Côte d’Ivoire tragedy are discussed in this paper, namely, (1) the absence of the duty on parties to inform neighbouring states of the presence of a vessel with hazardous wastes within their region; and (2) the lack of supervisory role for the Basel Secretariat in waste shipments. It is noteworthy that these two are not the only areas of weakness in the Basel Convention, but the ones that provided a leeway for the Probo Koala incident.²⁰

4.1 Absence of the duty to inform

The notification requirement under the Prior Informed Consent procedure, article 13(1) of the Basel Convention obligates parties to inform other states which are

likely to be affected by an accident which occurred during the transboundary movement of wastes or their disposal. Clearly, this duty arises only after the occurrence of an accident, and the information should be given to states which are likely to be affected by the accident only. There is no obligation in the Basel Convention for a party to inform its neighbours of the movement or transit of hazardous wastes within their coastal waters. The absence of this duty is particularly worrisome given the widespread capacity deficiency amongst parties to the Convention. In the case of the Probo Koala, Amsterdam port officials had to send an urgent message to their counterparts in Paldiski, Estonian using the Port State Control database as required by the EU Directive,²¹ but the Estonian authorities found themselves under no obligation to inform African countries when the ship headed for Africa. Similarly, after offloading its consignment of gasoline in Nigeria, the Nigerian authorities, even though informally informed of the ship and its cargo,²² did not find themselves obliged to alert fellow African countries of the 'suspicious cargo' aboard the Probo Koala. This gives room for the assumption that, had there been such a duty to inform, information about the slop aboard the Probo Koala would have been made available to the appropriate authorities, thereby foreclosing any reason why any state might have for accepting the waste.

This point is aptly supported by the UNEP Project Document on the Capacity-building Programme for the Monitoring and Control of Hazardous Wastes and Toxic Chemicals in the Gulf of Guinea, which identified the need for proper information sharing among neighbouring states as a veritable tool for averting a reoccurrence of such incident, thus –

The sequence of events and the route followed by the Probo Koala in the Gulf of Guinea before she eventually discharged the waste in the port of Abidjan confirms the regional dimension of the problem. It also highlights the absolute need for the sharing of appropriate information between port facilities in the sub-region. It also confirms the necessity for a fluid and efficient mechanism for information sharing as well as early warning procedures in the case of illegal traffic. *This mechanism should be regulated under an adequate legal framework.*²³

I sympathize with this observation and will reiterate that the absence of a duty to inform in the Basel Convention is a major limitation of the instrument and a key contributor to the Côte d'Ivoire incident.

4.2 Lack of supervisory role for the Basel Secretariat in waste shipments

Article 16 of the Basel Convention enumerates the functions of the Basel Secretariat to include arranging and servicing meetings provided by the Convention, preparing and transmitting reports of meetings, communicating with focal points and competent authorities of parties, compiling information concerning authorized national sites and facilities. Hence, the core functions of the Basel Secretariat are

that of coordinating and monitoring, with very limited supervisory functions.²⁴ This limited supervisory authority of the Secretariat in wastes shipments (e.g., in the Prior Informed Consent procedure) has been identified as a major weakness of the Convention.²⁵ Consequently, the effective implementation of the Convention depends on the extent and quality of its implementation at the national level. Thus, given the prevalent lack of capacity to dispose wastes in an environmentally sound manner amongst parties to the Convention, breach should be expected.

This weakness played-out in the Cote d'Ivoire episode. Had the Secretariat been clothed with adequate supervisory functions over waste shipments, it could have been notified by one of the parties that had business with the Probo Koala before the incident (i.e., the Netherlands, Estonia, or Nigeria). This could have triggered the intervention of the Secretariat to prevent the eventual health and environmental disaster in Cote d'Ivoire. As long as the Secretariat is expected to stay aloof of wastes shipments, expecting parties to play according to rules in the absence of an umpire, more disasters may be looming. It is indeed a great pity that the Secretariat is to be notified concerning any given transboundary movement of hazardous wastes only when a party which considers that its environment may be affected by such movement has requested that this should be done.²⁶ Apart from this situation, the Secretariat will be considered a trespasser or a meddlesome interloper if it ventures into issues relating to the transboundary movement of wastes between parties. The Bamako Convention on the Ban of the Importation into Africa and the Control of Transboundary Movement and Management of Hazardous wastes within Africa²⁷ makes a better provision in this respect. It obligates its parties to ensure that copies of each notification concerning any transboundary movement of hazardous wastes and the response to it are sent to the Secretariat. Clearly, such notification requirement enhances the Secretariat's participation in the shipment of wastes.

5 CONCLUSION

The dumping of hazardous wastes in Abidjan, Cote d'Ivoire has once again awoken the global community to the adverse health and environmental consequences of the hazardous wastes trade. As efforts are being made in several fora to prevent a reoccurrence of such an incident, and to improve the capacity of states in handling similar disasters, it is necessary that the international community returns to the drawing board, by taking a look at the legal superstructure upon which waste trades are regulated. Since the Basel Convention is the principal instrument in this regard, the foregoing analysis has revealed areas of possible amendment of the instrument in order to strengthen its regulatory framework. To this end, there is need to impose a duty on parties, to inform neighbouring states of the presence of vessel(s) with suspicious cargo within their region, and to accord the Secretariat a supervisory role over inter-parties shipment of wastes. It would appear wanting in discretion to expect parties to conduct themselves in accordance with the provisions of the Convention in the event of waste shipments without a supervisory body to ensure compliance.

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¹ The adverse health and environmental dangers posed by the transboundary movement of hazardous wastes are frightening: (i) In the village of some developing countries, children have been found playing with spheres containing radioactive isotopes formerly used in x-ray machines. John May, *The Greenpeace Book of The Nuclear Age: The Hidden History, The Human Cost* (1990) 364; (ii) In another instance, some Mexicans split open an x-ray machine sphere that contained a radioactive isotope dust. As a result of its luminescent quality, the Mexicans believed the dust to be a good luck charm. In the course of venerating the deadly dust, it was spread throughout the city, and placed upon bodies of many of those who came in contact with it. Consequently, some of the city ground was contaminated and had to be removed and replaced. All of those who came in contact with the dust became ill, and some died; (iii) Residents of developing nations also find dangerous uses for the container of improperly disposed hazardous wastes - old x-ray machines have been cut up and the metal which may be radioactive, sold for scrap and latter combined into new metal or built into a house, World Common on Environment and Development, *Our Common Future* (1987) 226; (iv) In 1988, many drums of toxic wastes were dumped at the backyard of a compound in a village located along the Delta of the River Niger, Nigeria. Several months later, the contents had eaten up the drums and spilled to the land, thereby creating very serious environmental pollution problems. Many people lost their lives and the health of several people was adversely affected. See Ekosse, George. "Transboundary Movement of Hazardous Wastes" in *Pollution Control and Waste Management in Developing Countries* edited by Rogers W'O Okot-Uma *et al*, (2000) UK, London, Commonwealth Secretariat, 417 at 425; (v) The Peruvian incident seems more pathetic. On June 2nd, 2000, a truck from the Yanacocha Mine spilled 151 kilograms of liquid mercury along a 40-kilometer stretch of highway passing through Choropampa and two neighboring villages. People gathered up the mercury, believing it to be a valuable metal. According to conservative government estimates, more than 900 people were poisoned. Symptoms of mercury poisoning (skin irritation, headaches, diminished eye sight, kidney problems, stomach aches, etc.) emerged a few days after the spill. Several of the victims were hospitalized, and one woman went blind. Juana Martínez from the Choropampa Defense Front said: "Several children have been born missing fingers and toes. Nothing like this ever happened in our village before the mercury spill." Miscarriages are also occurring at an alarming rate, while children suffer from chronic nosebleeds, respiratory infections, loss of sight and hearing, chronic migraine headaches and an inability to concentrate. See *Dividing and Polluting - Yanacocha Gold Mine in Peru*, online: Friends of the Earth International, <http://www.foei.org/publications/link/mining/22.html>; (vi) More recently, following the Abidjan illegal dumping of hazardous wastes, the name of one Jean Jacques Kakou has been added to the list of victims of this infamous trade. Jean, a 27 years old construction worker, like thousands of others awoke to an overpowering stench that burned his eyes and made it hard to breathe. Three weeks later, he was dead. Authorities suspect that one out of 10 deaths could be linked to the

illegally dumped hazardous waste. See *From Rich to Poor: Ivory Coast Tragedy Highlights Hazardous Waste Trade on Rise* by The Associated Press, International Herald Tribune (France) 17 October 2006, online: Basel Action Network, <http://www.ban.org/ban_news/2006/061017_rich_to_poor.html>. The probe panel blames the illegal dump on administrative failures and negligence. See Ivorian Toxic Waste Probe slams errors by officials, online: Basel Convention Regional Centre Pretoria, <<http://www.baselpretoria.org.za/News.htm#un>>. For similar examples, see Gwan, Cyril Uchenna. "Adverse Effects of the Illicit Movement and Dumping of Hazardous, Toxic and Dangerous Wastes and Products on the Enjoyment of Human Rights" (2002) 14 Florida Journal of International Law 427 at 432-433.

² For an account of the paucity of capacity in handling the wastes by the Ivorian government, see the United Nations Environment Programme "Regional Capacity-building Programme for the Monitoring and Control of Transboundary Movement of Hazardous Wastes and Toxic Chemicals in the Context of the Implementation of the Basel Convention and other Related Multilateral Environmental Agreements in the Gulf of Guinea." [Unpublished] (Hereinafter "The UNEP Project Document").

³ United Nations Environment Programme, "Liability for Côte D'Ivoire Hazardous Waste Clean-Up", online at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=485&Article>

⁴ This incident reveals a gap in the existing multilateral instruments as it has remained unclear whether the incident falls within the mandate of the Basel Convention or that of the International Convention for the Prevention of Pollution from ships 1973/78 (MARPOL 1973/78). As the waste in question was generated in a vessel, some analysts see it as wastes derived from the normal operations of a ship, the discharge of which is covered by another international instrument, expressly excluded from the regulation of the Basel Convention by its article 1(4). Similarly, others argue that there was no transboundary movement of the waste in question to trigger the application of the Basel Convention. On the contrary, some have contended that the offloading and reloading of the wastes in Amsterdam before its final disposal in Cote d'Ivoire satisfies the requirement of transboundary movement etc. Obviously, there are points in each argument, revealing the gap in the current global regime on the transboundary movement of hazardous wastes.

⁵ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ("The Basel Convention") is the main multilateral instrument regulating the transboundary movements of hazardous wastes around the world.

⁶ See Sebastian Knauer, Thilo Thielke and Gerald Traufetter, *Profits for Europe, Industrial Slop for Africa*, on 18 September 2006, online at <http://www.spiegel.de/international/spiegel/html>

⁷ *Ibid.*

⁸ For detailed account of the Probo Koala incident, see Eze, Chukwuka N. "Bamako Convention on the Ban of the Import into Africa and the Control of the Transboundary Movement and Management of Hazardous Wastes within Africa: A Milestone in Environmental Protection?" (2007) 15:2 African Journal of International and Comparative Law, 208 at 211; The UNEP Project Document, *supra*, note 2; *From Rich to Poor: Ivory Coast Tragedy Highlights Hazardous Waste Trade*

on Rise by The Associated Press, International Herald Tribune (France) 17 October 2006, *supra*, note 1.

⁹ Basel Convention, Article 4(2)(a); See also Kummer, Katharina. *International Management of Hazardous Wastes: The Basel Convention and Related Legal Rules* (Oxford: Oxford University Press, 1995) at 55.

¹⁰ Basel Convention, Article 10(2)©; Kummer, Katharina, *ibid*.

¹¹ The PIC procedure is regulated by Articles 6, 7 & Annex VA of the Basel Convention.

¹² Basel Convention, Article 6(1); Kummer, Katharina, *supra*, note 9 at 65 and 66.

¹³ Basel Convention, *supra*, Article 6(2).

¹⁴ *Ibid.*, Article 6(3).

¹⁵ *Ibid.*, Article 6(4).

¹⁶ *Ibid.*, Article 2(8) defines the Environmentally Sound Management (ESM). This definition has been criticized for being very general in terms, see Abrams David. "Regulating the International Hazardous Waste Trade: A Proposed Global Solution" (1990) 28 Columbian Journal of Transnational Law, 801 at 828.

¹⁷ *Ibid.*, Article 4(2)(b).

¹⁸ *Ibid.*, Article 4(2)(d).

¹⁹ *Ibid.*, Article 4(2)(e).

²⁰ There are other areas of weakness in the compliance mechanism of the Basel Convention. One such example is the Compliance Committee of the Convention which has not handled any case for over six years of its establishment, owing to the negative perception amongst Parties that "resort to the Committee could be a strong diplomatic act." See Report of the Fifth Session of the Compliance Committee of the Basel Convention, online at http://www.basel.int/legalmatters/compcommittee/reports/cc5_06.doc

²¹ See The UNEP Project Document *supra*, note 2 at 14, where it was stated that "The officials of the Shipping Division of the Transport and Water Management Inspectorate (IVW) notified the next port using the PSC (Port State Control) database in order to ask this port to carry out a check on the quantity of slops on board the Probo Koala."

²² See the Report of the International Enquiry Commission on the Discharge of Toxic Waste in Abidjan, 24 February 2007.

²³ Emphasis supplied, See The UNEP Project Document *supra*, note 2 at 15.

²⁴ See Basel Convention, Article 13; Kummer, Katharina, *supra*, note 9 at 82.

²⁵ *Ibid*; Abrams David. *supra*, note 16 at 835.

²⁶ Basel Convention, Article 13(4).

²⁷ The Bamako Convention, 1991 was adopted in Bamako, Mali, on 30 January 1991 and came into force on 10 March 1999. As at 31 October 2007, there are 29 African states signatories and 22 parties to the convention. Bamako Convention, online: Basel Action Network http://www.ban.org/Library/bamako_treaty.html

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