

ARTICLES

CALLS FOR NATIONAL INTERVENTION IN THE TOXIC WASTE TRADE WITH AFRICA: A CONTEMPORARY ISSUE IN THE ENVIRONMENTAL JUSTICE DEBATE

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I. INTRODUCTION

“[T]he greatest environmental injustices are between the developed and the developing world. There is injustice internationally which those of us who believe in a fairer distribution of power, wealth and opportunity cannot and will not accept.”¹

Environmentalists argue that “calls for ‘environmental justice’ have grown recently,”² while economists argue that globalization has placed a disproportionate burden on the environment of developing countries.³ The “international waste trade” provides a common link between these two notions. This Article focuses on the international toxic waste trade with African

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1. Donald A. Brown, *The Strong Scottish Moral Leadership On Climate Change Compared To The Absence Of Any Acknowledged Ethical Duty In The US Debate*, PENN. STATE: ROCK ETHICS INSTITUTE: CLIMATE ETHICS: ETHICAL ANALYSIS OF CLIMATE SCIENCE AND POLICY (Aug. 31, 2009, 12:11 PM), <http://rockblogs.psu.edu/climate/2009/08/the-strong-scottish-moral-leadership-on-climate-change-compared-to-the-absence-of-any-acknowledged-ethical-duty-in-the-us-debate.html> (quoting The Right Honourable Jack McConnell, Member of Scottish Parliament and First Minister for Scotland).

2. David Schlosberg, *Reconceiving Environmental Justice: Global Movements and Political Theories*, 13 ENVTL. POLITICS 517, 517 (Autumn 2004), available at <http://astepback.com/EVSS695/Reconceiving%20EJ.pdf>.

3. Ingrid A. de Graff, *Hazardous Waste Trade: U.S. Ratification of the Basel Convention Is Still Needed*, 4 CURRENTS: INT’L TRADE L. J. 44 (Winter 1995).

countries.⁴ International toxic waste trading “involves the trans-boundary export of hazardous waste from developed to developing countries.”⁵ Its bearing on environmental justice stems from how industrialized countries have embraced the idea of transferring the “burden” of their industrial output to developing countries,⁶ essentially turning developing countries into “trash bins.”⁷ However, such developing countries are the least capable of harboring such waste safely.⁸

Academics argue that the genesis of this injustice is twofold.⁹ First, the lenient environmental laws of these developing countries make them attractive for and conducive to uncontrolled toxic waste dumping, as it is more cost-effective to dump in a developing country.¹⁰ The second factor is the prevalent need for fiscal relief in the developing world, which leads governments to accept even officially sanctioned payments in return for harboring such waste.¹¹ This Article argues that regulation of the waste trade will prove pivotal in the struggle for environmental justice in these countries. Although complete eradication of this practice may be impossible to achieve, regulation that embraces citizens’ rights to the environment will see that such waste is dealt with safely. However, there are major social, economic, and legal barriers to such regulation, which must be overcome if meaningful regulation is to come to fruition.

This Article focuses on the dominant ideologies of environmental justice and the international waste trade by critically assessing the regulatory tools available to African countries in their effort to police this practice. It argues that such regulation is fundamental in the struggle for environmental

4. See, e.g., RUCHI ANAND, *INTERNATIONAL ENVIRONMENTAL JUSTICE: A NORTH-SOUTH DIMENSION* 63 (1st ed. 2004).

5. *Id.*

6. Francis O. Adeola, *Cross-National Environmental Injustice and Human Rights Issues: A Review of Evidence in the Developing World*, 43 *AMERICAN BEHAVIORAL SCIENTIST* 686, 695 (Jan. 2000).

7. ANAND, *supra* note 4, at 63.

8. *Id.*

9. de Graff, *supra* note 3, at 44.

10. Kenda Jo M. McCrory, *The International Exportation of Waste: The Battle of the Path of Least Resistance*, 9 *DICK. INT’L L. ANN.* 339 (1991).

11. David N. Pellow et al., *The Environmental Justice Movement: Equitable Allocation of the Costs and Benefits of Environmental Management Outcomes*, 14 *SOC. JUSTICE RESEARCH* 423-439 (2003).

justice on the “dark continent.” Section II of this Article considers the historical background of environmental justice and provides various definitions of that term in an attempt to adopt one that encapsulates the toxic waste trade. This will prove instrumental in regulating the uncontrolled incidents of toxic waste dumping in Africa because it is difficult to police an indeterminate activity when mandated authorities lack a basic mechanism with which to determine an activity’s legitimacy. Section III focuses on the unjust practice of exporting toxic waste to developing countries and provides a case study of three African countries that have fallen victim to this practice. Academics argue that the only reason this activity has increased in popularity is because laws in the industrialized world have become more stringent in regulating such practices.¹² Section IV discusses policies promulgated by the industrialized world for the regulation of the toxic waste trade. Because this practice is promoted by the industrialized world, any regulation by industrialized countries represents a conflict of interest detrimental to their economic competitiveness. Thus, this practice creates an ineptitude of Northern-promulgated regulatory policy.¹³

This Article suggests that African countries “shield” themselves from such practices by enacting national toxic waste trade policies instead of relying on self-interested Northern-oriented policies. A mixture of such national policies, as well as active participation on the part of governments and private parties alike, would serve as a major development in curtailing this malevolent practice and promote environmental justice in the South. Finally, Section V discusses how, notwithstanding the previous arguments, the impoverishment of the South—a result of underdevelopment and corrupt government authorities—serves as a major barrier to regulation and needs to be addressed if the international trade of harmful materials is to ever be effectively regulated in that region.

12. McCrory, *supra* note 10, at 340.

13. Adeola, *supra* note 6, at 694. When referring to the “North,” or “Northern” countries, the Author applies a metaphor used in international trade terms to refer to industrialized countries, whereas “South” refers to developing and least developed countries. The United States is the most notorious of the Northern countries, having the largest economy in the world.

II. DEVELOPMENT OF THE ENVIRONMENTAL JUSTICE DEBATE AND THE INTERNATIONAL WASTE TRADE

A. ENVIRONMENTAL JUSTICE AS A MOVEMENT

Environmental justice is allied with the Civil Rights Movement of the 1960s and 1970s in the United States.¹⁴ Early incarnations of environmental justice specifically targeted injustices suffered by minorities, whose neighborhoods were being used as dump sites for noxious substances.¹⁵ Such policies were implemented primarily because it was thought that public authorities were unlikely to experience resistance from these communities, as they lacked the resources to retaliate.¹⁶ Although there had been awareness for many years of the disproportionate burden borne by minorities in low-income communities, a “movement” did not arise until 1982 in Warren County, North Carolina.¹⁷ In Warren County, local industry used a town predominantly occupied by African-Americans,¹⁸ which had the third lowest per capita income in the country at that time, as a dumping ground for polychlorinated biphenyl (PCB).¹⁹ This was the impetus for a mass movement for racial justice, led by Dr. Benjamin Chavis.²⁰ Although fruitless initially, these protests gathered the attention of civil rights leaders and

14. Julie Sze and Jonathan K. London, *Environmental Justice at the Crossroads*, SOCIOLOGY COMPASS 2/4 1331, 1334 (2008), available at http://ej.ucdavis.edu/includes/docs/SzeLondon-EJCrossroads_2008.pdf.

15. *Id.* at 1337.

16. Conner Bailey et al., *Environmental Justice and the Professional*, in ENVIRONMENTAL JUSTICE: ISSUES, POLICIES AND SOLUTIONS 35, 38 (Bryant Bunyan, ed., Island Press 1995).

17. Eileen Gauna et al., *Environmental Justice*, CENTER FOR PROGRESSIVE REGULATION 2 (Mar. 2005), http://www.progressivereform.org/articles/EJ_505.pdf (discussing various dates for the beginning of the environmental justice movement).

18. *Brief History of Environmental Justice*, EELINK.NET, <http://eelink.net/EJ/history.html> (last visited Apr. 13, 2012).

19. *A Brief History of Environmental Justice*, PACIFIC WEST COMMUNITY FORESTRY CENTRE, http://www.sierrainstitute.us/PWCFC/projects/ej_brief_history.htm (last visited June 27, 2012) [hereinafter PACIFIC WEST COMMUNITY FORESTRY CENTRE]; *Environmental Justice: History*, A VOICE: AFRICAN AMERICAN VOICES IN CONGRESS, <http://www.avoiceonline.org/environmental/history.html> (last visited Apr. 13, 2012) [hereinafter A VOICE].

20. Pellow et al., *supra* note 11, at 2.

environmentalists.²¹ At the request of Congressman Walter Fauntroy, a study of eight southern states²² revealed overwhelming evidence of bias in the placement of the landfills: three out of every four landfills were located near minority communities.²³ A National Law Journal survey revealed that the Environmental Protection Agency (EPA) took twenty percent longer to cite abandoned sites in minority communities as a priority, compared to the time it took the EPA to prioritize sites in white communities.²⁴ Hence, on February 11, 1994, President Bill Clinton issued Executive Order 12898,²⁵ which required that federal agencies make achieving environmental justice part of their mission.²⁶

Chester Residents Concerned for Quality Living v. Seif marked a turning point in environmental justice activism.²⁷ In May 1996, Chester residents filed a lawsuit in the United States District Court for the Eastern District of Pennsylvania, accusing the Pennsylvania Department of Environmental Protection of discrimination.²⁸ This case wound up in the United States

21. A VOICE, *supra* note 19.

22. Dr. Benjamin F. Chavis Jr. and Charles Lee, *Toxic Waste and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites*, COMMISSION FOR RACIAL JUSTICE: UNITED CHURCH OF CHRIST 2-3 (1987),

https://docs.google.com/viewer?a=v&q=cache:K0I-A5ow8cAJ:www.ucc.org/about-us/archives/pdfs/toxwrace87.pdf+Toxic+Waste+and+Race+in+the+United+States&hl=en&gl=us&pid=bl&srcid=ADGEEShmXW2i-XT6U3Mu-LodZrFzPA0ARU-a_togO4Kq772q_NduG0tO—EoFlwNVnmTNrIm1sYVupAY3dntWL6V7Bk7KuQQ6-F4bCD2vaD4TYbOgxxC4_b8DCF6FZeotGppu_saLDN&sig=AHIEtbSopq-09zWCJK31aDbdvkSiv0lFfg.

23. Pellow et al., *supra* note 11, at 2. In 1982, Dr. Benjamin Chavis, then director of the United Church of Christ's Commission for Racial Justice (CRJ) coined the term in response to an incident in Warren County, North Carolina. At the urging of community leaders, Chavis and others, including the Southern Christian Leadership Conference's (SCLC) Joseph Lowery and Congressional Black Caucus (CBC) member Walter Fauntroy, participated in a month-long protest against the siting of a chemical landfill in Warren County. See PACIFIC WEST COMMUNITY FORESTRY CENTRE, *supra* note 19.

24. Samantha P. Fairchild, *Environmental Justice: An Overview*, 18 TEMP. ENVTL. L. & TECH. J. 111, 115 (2000).

25. Exec. Order No. 12898, 59 Fed. Reg. 32 (Feb. 11, 1994).

26. Fairchild, *supra* note 24, at 117.

27. See generally *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413 (E.D. Pa. 1996), *rev'd*, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 524 U.S. 915 (1998), *vacated*, 119 S.Ct. 22 (1998).

28. Gregory F. Kinzel, *Empowering Victims of Environmental Injustice through Private Actions Under Federal Law: The Third Circuit's Decision in Chester*

Supreme Court, where it was declared moot because the specific reason for the suit—the state’s granting permission to Soil Reclamation Services to begin business in Chester—was a dead issue, as the group had been denied their operations permit while the case was on appeal.²⁹ This disappointing blow, given that the Supreme Court did not get the opportunity to consider the issues at stake and lay the matter to rest once and for all, however, was short-lived because the two-year trial drew significant attention to “environmental racism” and the Chester community.³⁰ Although the plaintiffs were unsuccessful, this case was crucial to the environmental justice struggle because it increased awareness and gave other communities nationwide fresh impulse to bring lawsuits of their own.³¹ Nevertheless in 2001, the Supreme Court, led by Justice Scalia, “dealt a major blow to the environmental justice movement,” by drastically departing from its previous jurisprudence—holding in *Alexander v. Sandoval* that there is no “private right of action to enforce regulations promulgated” under § 602 of Title VI of the Civil Rights Act of 1964.³²

B. DEFINING GLOBAL ENVIRONMENTAL JUSTICE: ENCAPSULATING THE TOXIC WASTE TRADE

According to the EPA, environmental justice involves “the fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income, with respect to the development, implementation and enforcement of environmental laws, regulations and policies.”³³ This definition represents a modest attempt at delineating this new legal concept in the industrialized world; however, its application to the developing world is debatable. As such, in their quest to promote

Residents for Quality Living v. Seif, 2 RUTGERS RACE & L. REV. 211, 234 (2000).

29. *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413 (E.D. Pa. 1996), *rev'd*, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 524 U.S. 915 (1998), *vacated*, 119 S. Ct. 22 (1998); *see also* Rick Kearns, *Chester Lawsuit Declared Moot by U.S. Supreme Court*, EJNET.ORG: WEB RESOURCES FOR ENVIRONMENTAL JUSTICE ADVOCATES (Oct. 6, 1998), <http://www.ejnet.org/chester/moot.html>.

30. *See* Kearns, *supra* note 29.

31. *See Alexander v. Sandoval*, 532 U.S. 275 (2001).

32. Kyle W. La Londe, *Who Wants to be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval*, 31 B.C. ENVTL. AFF. L. REV. 27, 27-28 (2004).

33. *Environmental Justice*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (May 7, 2012), <http://www.epa.gov/environmentaljustice>.

environmental justice in the Third World, developing country scholars have defined environmental justice as “the equitable distribution of environmental amenities, the rectification and retribution of environmental abuse, the restoration of nature, and the fair exchange of resources . . .”³⁴ or “any undue imposition of environmental burdens on innocent bystanders or communities that are not parties to the activities generating such burdens.”³⁵

Although these definitions are not necessarily inaccurate, environmental justice scholarship points toward a different characterization; namely, because environmental justice transcends state boundaries, these definitions do not capture the movement of hazardous waste to periphery nations. Therefore, some have asserted that instead of imposing a restrictive boundary around the concept of environmental justice, work in this emerging field should embrace its wide ranging and integrative character, while remaining grounded in political theory, to address the sources and impacts of social–power disparities associated with the environment.³⁶ Consequently, this Article endorses Dr. Özgüç Orhan’s definition, which appears to encapsulate the international toxic waste trade. Orhan defines “*global environmental justice*” as “*a fair and just distribution among countries of benefits, burdens, and decision-making authority associated with international environmental relations.*”³⁷ While several definitions have been considered, lack of a definitive description of environmental justice that impliedly encompasses the international toxic waste trade may have influenced and stimulated the genesis of the trade—it is difficult to regulate an undefined concept.

In theory, the definitions are all plausible because they all address the issue of environmental justice in different jurisdictions and to varying degrees. However, justification for the evolution of these regulatory norms is based on the fact that prejudice has moved beyond national borders to global inequity.³⁸

34. L. Amede Obiora, *Symbolic Episodes in the Quest for Environmental Justice*, 21 HUM. RTS. Q. 464, 477 (1999).

35. Adeola, *supra* note 6, at 688.

36. Sze & London, *supra* note 14, at 1335.

37. Özgüç Orhan, *Environmental Justice in World Politics*, 8 ALTERNATIVES: TURK. J. INT’L REL. 59, 65 (Spring 2009), available at <http://www.alternativesjournal.net/volume8/number1/orhan.pdf>.

38. Sze & London, *supra* note 14, at 1331.

Therefore, from a pragmatic perspective, only Orhan's definition appears to encompass the full capacity to adopt the international waste trade within its domain.³⁹

III. INTERNATIONAL WASTE TRADE & THE LACK OF CONSIDERATION FOR DEVELOPING COUNTRIES

Although scholars note that “[t]oday, environmental justice covers a wide spectrum of serious social concerns,”⁴⁰ one cannot appreciate the gravity of the situation on a global scale until one considers the toxic waste trade.⁴¹ Since the end of World War II, industrialized nations have generated increasing volumes of hazardous chemical waste—the result of “technological advances” in areas such as manufacturing, transportation, and the military sector, among others. Today, it is estimated that nearly 3 million tons of hazardous waste from the United States and other industrialized nations cross international borders each year. Of the total volume of hazardous waste produced worldwide, 90% of it originates in industrialized nations. Much of this waste is being shipped from Europe and the United States to nations in South America, Southeast Asia, and Africa—the Third World.⁴² The enactment and enforcement of stringent laws in the North in the 1980s⁴³ saw the move from domestic dumpsites to the export of such waste to the South.⁴⁴ The international waste trade is an issue of global significance; thus, the laws have evolved accordingly, in an attempt to regulate this practice.⁴⁵

A. CASE STUDY: DUMPING IN AFRICA

This subsection presents a case study of three African countries that fell victim to the unjust practices of the North in the 1980s. It also provides the gross domestic product (GDP) per

39. Sze & London, *supra* note 14, at 1331.

40. Charles Lee, *Developing the Vision of Environmental Justice: A Paradigm for Achieving Healthy and Sustainable Communities*, 14 VA. ENVTL. L.J. 571 (Summer 1995).

41. Pellow, *supra* note 11, at 432-433.

42. *Id.*

43. See, e.g., David M. Bearden et al., *Environmental Laws: Summaries of Major Statutes Administered by the Environmental Protection Agency*, CONG. RES. SERV. 51-53 (Oct. 8, 2010), available at <http://www.fas.org/sgp/crs/misc/RL30798.pdf> (describing the 1984 Amendments to the Resource Conservation and Recovery Act (RCRA), and adding Section 3017).

44. Adeola, *supra* note 6, at 694.

45. de Graff, *supra* note 3, at 44.

capita of the countries involved, measured in U.S. dollars. In addition, it sheds light on the point that underdevelopment has been a key factor in importing toxic waste in these countries.

1. NIGERIA

At the Organization of African Unity (OAU) summit, in May 1988, Ibrahim Babangida, the president of Nigeria at the time, commented that “[n]o government, no matter the financial inducement, has the right to mortgage the destiny of future generations of African children.”⁴⁶ Ironically, within one week of Babangida’s comments, eight Nigerian students living in Italy alerted Nigerian authorities that two Italian businessmen had signed an illegal agreement with a Nigerian businessman. The agreement called for the Nigerian businessman to use his property for storage of 18,000 drums of hazardous waste containing PCB and asbestos fibers for approximately \$100 a month.⁴⁷ The drums were imported as building materials, as well as residual and allied chemicals.⁴⁸ Nigerian officials soon discovered the illegal toxic waste and employed 100 port workers to remove the waste.⁴⁹ In 1988, Nigeria’s GDP per capita was \$247.51,⁵⁰ while Italy’s GDP per capita was \$15,169.83.⁵¹

2. BENIN

In January 1988, Mathieu Kerekou, the president of Benin at the time, signed a contract with a Gibraltar firm, for the shipment of the hazardous waste of a British Company affiliated with South Africa,⁵² agreeing that Benin would take up to 5

46. Rachel’s Hazardous Waste News #126, *Dumping on the Developing World*, EJNET.ORG (Apr. 25, 1989), <http://www.ejnet.org/rachel/rhwn126.htm>.

47. *Nigeria Waste Imports from Italy (NIGERIA)*, AMERICAN.EDU, <http://www1.american.edu/ted/nigeria.htm> (last visited Apr. 13, 2012). See also Steven Greenhouse, *Toxic Waste Boomerang: Ciao Italy!*, N.Y. TIMES, Sept. 3, 1988, <http://www.nytimes.com/1988/09/03/world/toxic-waste-boomerang-ciao-italy.html>.

48. *Id.*

49. *Id.*

50. *GDP Per Capita (US Dollar) in Nigeria*, TRADING ECONOMICS, <http://www.tradingeconomics.com/nigeria/gdp-per-capita-us-dollar-wb-data.html> (last visited Apr. 13, 2012).

51. *Italy - GDP Per Capita (US Dollar)*, INDEX MUNDI, <http://www.indexmundi.com/facts/italy/gdp-per-capita> (last visited Apr. 13, 2012) (citing World Bank statistics).

52. Odimegwu Onwumere, *Toxic Waste Dumping: Africa at the Mercy of God*, NIGERIANS IN AMERICA, Feb. 14, 2007,

million tons per year of non-nuclear industrial wastes from North America and Europe at a price of \$2.50 per ton.⁵³ Benin's GDP per capita at that time was \$360.51,⁵⁴ while the UK's GDP per capita was \$15,204.70.⁵⁵

3. ZIMBABWE

Again in the 1980s, an undetermined quantity of hazardous wastes from United States military agencies was dumped in a phosphate-mine pit in Zimbabwe. The United States-based exporters responsible were sentenced in February 1988 to thirteen years of imprisonment for fraudulent business practices.⁵⁶ That year, Zimbabwe had a GDP per capita of \$793.20,⁵⁷ while the United States had a GDP per capita of \$20,703.⁵⁸

These are only three African examples. Nonetheless, these examples illustrate the complacency of the North in displacing the consequence of industrial productivity on the developing world; the effects on the developing countries are immeasurable.

B. WHAT IS TOXIC WASTE?

One major difficulty facing attempts at combating the international toxic waste trade has been the lack of a uniform definition of toxic waste.⁵⁹ In an attempt to overcome this hurdle, Article 2(1) of the 1989 Basel Convention⁶⁰ defines waste as

<http://www.nigeriansinamerica.com/articles/1522/1/Toxic-Waste-Dumping-Africa-At-The-Mercy-Of-God/Page1.html>.

53. Rachel's Hazardous Waste News, *supra* note 46.

54. *Benin - GDP Per Capita (US Dollar)*, INDEX MUNDI, <http://www.indexmundi.com/facts/benin/gdp-per-capita>, (last visited June 27, 2012).

55. *UK - GDP Per Capita (US Dollar)*, INDEX MUNDI, [http://www.indexmundi.com/united_kingdom/gdp_per_capita_\(ppp\).html](http://www.indexmundi.com/united_kingdom/gdp_per_capita_(ppp).html) (last visited June 27, 2012).

56. Rachel's Hazardous Waste News, *supra* note 46.

57. *Zimbabwe - GDP Per Capita (US Dollar)*, INDEX MUNDI, <http://www.indexmundi.com/facts/zimbabwe/gdp-per-capita> (last visited June 27, 2012).

58. *United States - GDP Per Capita (US Dollar)*, INDEX MUNDI, <http://www.indexmundi.com/facts/united-states/gdp-per-capita> (last visited June 27, 2012).

59. ANAND, *supra* note 4, at 62.

60. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, art. 2(1), Mar. 22, 1989, 1673 U.N.T.S. 57, [hereinafter *Basel Convention*], available at

“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.”⁶¹ Some examples of these include mercury and cadmium, byproducts of industries, pharmaceutical products, wood preserving chemicals, oils and emulsions, inks and dyes, and paints and lacquers.⁶² These wastes may be explosive, corrosive, or toxic—examples include copper, zinc, arsenic, lead compounds, ethers, asbestos, and halogenated solvents.⁶³

Notwithstanding these examples, research reveals that the open-ended nature of Article 2(1) may lead to a situation whereby countries may claim that they are legitimately trading in commodities. This can be seen in the case of West Africa, where firms in industrialized countries export outdated electronics to developing countries in an effort to get rid of the lead and other toxic materials inherent in this “obsolete” merchandise.⁶⁴ For example, what is considered an obsolete television or PC monitor in the industrialized world, due to technological advances in flat screen TVs and monitors, will be shipped to the developing world to get rid of the lead components in these electronic devices.⁶⁵ Although “[t]here is an increasing knowledge of the devastating consequences of the export of hazardous waste, the complacency of international law to address satisfactorily the threats to health and safety of importing countries” has led the industrialized world to adopt this practice with no regard for the welfare of the developing world.⁶⁶

C. INTERNATIONAL TOXIC WASTE TRADE: CONSEQUENCES OF GLOBALIZATION

It must be highlighted that “the bulk of the international

<http://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf>.

61. *Basel Convention*, *supra* note 60.

62. ANAND, *supra* note 4, at 61.

63. *Id.*

64. UNITED NATIONS OFFICE OF DRUG AND CRIME, TRANSNATIONAL TRAFFICKING AND THE RULE OF LAW IN WEST AFRICA: A THREAT ASSESSMENT 56 (July 2009) [hereinafter *Transnational Trafficking*], available at http://www.unodc.org/documents/data-and-analysis/Studies/West_Africa_Report_2009.pdf.

65. *Id.*

66. ANAND, *supra* note 4, at 62-63.

waste trade occurs between industrialized nations.”⁶⁷ For example, in the United States, industrial production accounts for at least 250 million tons of hazardous waste a year.⁶⁸ Canada, in particular, imports large volumes of this toxic waste, approximately 70,000 kilograms per year.⁶⁹ “The bulk of this waste ends up at an incinerator in Ontario or at a landfill in Quebec.”⁷⁰ However, this example illustrates that industrialized nations possess the facilities to harbor such waste safely, the technical know-how to deal with the waste, and more importantly, the resources to remedy any accidents. Hence, developed countries are the ideal places for such waste. Further, this Article argues that industrial efficiency has put the North in a very comfortable economic position and developing countries and their citizens should not have to be “burdened” with the discomfort of the “side effects.” Such developing countries are already fraught with their own economic, political, and social tribulations, and it is unjust for the North to add environmental issues to this list.

However, research reveals that developing countries receive large amounts of Northern generated toxic waste.⁷¹ Toxic waste from the North has been found in Benin, Nigeria, South Africa, and Zimbabwe. As of 2004, plans were underway for major United States dumpsites in Congo, Ethiopia, Guinea-Bissau, and Sierra Leone.⁷² Because waste disposal regulations in these countries are less stringent, landfill operators and other providers of waste disposal services can charge lower fees than similar disposal sites in industrialized countries.⁷³ For example, as a result of the 1984 amendments to the United States’ Resource Conservation and Recovery Act (RCRA), waste generators were forced to pay \$250 to \$350 per ton for waste disposal.⁷⁴ Conversely, developing countries were charging \$40 per ton.⁷⁵

67. *International Trade in Toxic Waste*, BOOKRAGS, <http://www.bookrags.com/research/international-trade-in-toxic-waste-enve-01/> (last visited Apr. 13, 2012).

68. McCrory, *supra* note 10, at 339.

69. *International Trade in Toxic Waste*, *supra* note 67.

70. *Id.*

71. ANAND, *supra* note 4, at 63.

72. *Id.*

73. *International Trade in Toxic Waste*, *supra* note 67.

74. McCrory, *supra* note 10, at 340.

75. *Id.*

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The realization that toxic waste can be disposed of more “cost-effectively” in the developing world led many industrialized countries to endorse this idea. For this reason, one question that automatically emerges is: what measures are available to developing countries to safeguard their environments?

IV. INEFFECTIVE REGULATION OF THE TOXIC WASTE TRADE WITH AFRICA

A. INTERNATIONAL PROVISIONS

From the outset, “[e]ven though concerted efforts have been launched to address environmental justice issues in the United States, similar efforts to curtail the export of hazardous materials from core countries to periphery nations are grossly inadequate.”⁷⁶ Thus, this section considers the main international provisions available to African countries to control the flow of toxic waste into their countries. It considers the Basel Convention,⁷⁷ as the only treaty that attempts to regulate this practice;⁷⁸ the Aarhus Convention, as the only existing treaty that makes an explicit reference to the promotion of environmental justice; and finally, the Lomé Convention, which has banned the exportation of toxic waste from European Countries to African, Caribbean, and Pacific (ACP) countries.⁷⁹

1. BASEL CONVENTION

As a result of the uncontrolled incidents of toxic waste dumping in the 1980s,⁸⁰ the Basel Convention was negotiated and ratified by 105 countries in 1989 and came into force in 1992.⁸¹ Nonetheless, attempts to regulate the international waste trade by crafting international law have proven difficult. The Secretariat of the Basel Convention identified various reasons for the export of hazardous waste to developing countries, including: increasing the cost of disposal and differences in disposal costs; high profit margins; differences in domestic law and regulation;

76. Adeola, *supra* note 6, at 694.

77. *Basel Convention*, *supra* note 60.

78. de Graff, *supra* note 3, at 44.

79. *Transnational Trafficking*, *supra* note 64, at 56.

80. Adeola, *supra* note 6, at 694-95.

81. *Waste, International Trade In*, POLLUTION ISSUES, <http://www.pollutionissues.com/Ve-Z/Waste-International-Trade-in.html>, (last visited June 27, 2012).

the lack of a uniform definition of waste or hazardous waste; and “trade liberalization.”⁸² Yet, the treaty’s attempt at restricting this practice has been in vain.⁸³ Further, the “provisions are vague, and there are loopholes to avoid compliance.”⁸⁴

Literature emanating from the United Nations suggests that the Basel Convention is insufficient to regulate the international waste trade because it is unable to prevent the flow of toxic waste from rich to poor countries.⁸⁵ Several reasons can explain this failure. First, this convention makes no express reference to environmental justice. Nonetheless, one may deduce that this convention seeks to promote environmental justice from the wording of the preamble, which ensures the “protection of human health”⁸⁶—an ideology central to the environmental justice principle. Second, in an effort to rebut the popular misconception that the Basel Convention seeks to ban the international waste trade, the Author highlights that this treaty only sought to *prevent* the uncontrolled trafficking of this waste.⁸⁷ Hence, it still gave industrialized countries some discretion to export toxic waste to developing countries if these countries were willing to accept the waste.⁸⁸ Thus, this convention was amended in 1995 to impose a full ban on toxic substances from signatories to the Organization for Economic Co-Operation (OECD) to non-OECD countries.⁸⁹ Members of the OECD are industrialized countries, while recipients of this waste (non-OECD) are all developing countries or among the least developed countries. Third, Article 11 of the Basel Convention appears to conflict with the general objective of the treaty, as it mandates contracting parties to “*enter into bilateral, multilateral, or regional agreements.*”⁹⁰ This is contrary to Article 4, which grants parties the authority to

82. ANAND, *supra* note 4, at 62. Trade liberalization refers to the reduction or removal of restrictions or barriers on the free exchange of goods between nations.

83. Adeola, *supra* note 6, at 695.

84. *Id.*

85. *Transnational Trafficking*, *supra* note 64, at 56.

86. *Basel Convention*, *supra* note 60, at 3.

87. de Graff, *supra* note 3, at 45.

88. *Id.*

89. ANAND, *supra* note 4, at 84. See *List of OCED Member Countries – Ratification of the Convention on the OCED*, OECD, http://www.oecd.org/document/58/0,3746,en_2649_201185_1889402_1_1_1_1,00.html (last visited Apr. 15, 2012).

90. McCrory, *supra* note 10, at 348. See also *Basel Convention*, *supra* note 60, at 33 (emphasis added).

prohibit such trade.

Finally, enforcement rules under the Basel Convention are not very effective. Article 20 provides for submission of a dispute to the International Court of Justice⁹¹ or alternatively, to arbitration.⁹² The settlement of a dispute in the International Court of Justice in favor of a developing country, like any other court, depends on the quality of legal services. It is a well-established fact that industrialized countries have a competitive advantage in legal services. The European Union and the United States are not only the leading host members of legal services but also the leading home members; thus, they have legal-service establishments in other host members, including, importantly, each other.⁹³ Likewise, arbitration is a futile method of dispute resolution because arbitration, to a large extent, depends exclusively on cooperation between the parties, and it has been recorded that arbitration is rarely accepted in developing countries,⁹⁴ as most Third World countries view international arbitration as a method of international dispute settlement that is biased in favor of industrialized countries.⁹⁵ Lack of such cooperation makes arbitration proceedings hopeless. Also, the treaty is not clear on what the penalties are if a country is found to be in contravention of the 1995 ban—the literature reveals that industrialized countries are still exporting waste to the developing world.⁹⁶ In short, while the Basel Convention has provided the ability to monitor the movement of toxic waste from rich countries to poor ones, it has not been able to prevent this flow.⁹⁷

2. AARHUS CONVENTION

The Aarhus Convention is the only international norm that

91. *Basel Convention*, *supra* note 60, at 45-46.

92. *Id.*

93. Sydney M. Cone III, *Legal Services in the Doha Round*, J. OF WORLD TRADE 37 (Feb. 2003).

94. ALAN REDFERN AND MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL COMMERCIAL ARBITRATION 289 (3d ed. 1999).

95. James Thuo Gathi, *Third World Approaches to International Economic Governance*, in INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 262 (Richard Falk, Jaqueline Stevens, & Balakrishnan Rajagopal eds., London Routledge 2008).

96. Adeola, *supra* note 6, at 695-96.

97. *Transnational Trafficking*, *supra* note 65, at 56.

expressly seeks to promote environmental justice,⁹⁸ and it may prove useful in regulating the export of toxic waste from Europe. One of the essential features of this treaty is that it links environmental rights to human rights by acknowledging that we owe an obligation to future generations.⁹⁹ Nonetheless, while this convention seeks to promote environmental justice, it does not make any reference to the exportation of toxic waste by non-European countries. This treaty apparently only applies to European countries. Thus, African countries may only invoke this treaty's provisions in relation to waste coming from Europe. Consequently, it leaves room for non-European perpetrators of this activity to argue that the practice of exporting toxic substances lies outside of the jurisdiction of the Aarhus Convention. Thus, this convention creates further barriers for African countries in their attempts to control the toxic waste trade that brings waste to their shores. Therefore, the United States, which is a major exporter of toxic waste to Africa, falls outside the remit of this treaty.

3. LOMÉ CONVENTION

Another international agreement that endeavors to regulate the international waste trade is the 1989 ban on the waste trade between the European Community and ACP countries¹⁰⁰ under Article 39 of the Lomé Convention (Lomé IV).¹⁰¹ Despite this agreement, numerous ships have been intercepted in Europe with toxic waste destined for Africa.¹⁰²

One of the shortcomings of international treaties, however, is the generally accepted principle in international law that a state

98. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998 38 I.L.M. 157, available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> [hereinafter *Convention on Access to Information*].

99. *Convention on Access to Information*, *supra* note 98.

100. *Transnational Trafficking* *supra* note 64, at 56.

101. Lomé IV Convention, art. 39, Dec. 15, 1989, 29 I.L.M. 783, available at http://ban.org/library/lome4_article39.html; see also *Council Directive 84/631/EEC of 6 December 1984 on the Supervision and Control within the European Community of the Transfrontier Shipment of Hazardous Waste*, EUR-LEX: ACCESS TO EUROPEAN UNION LAW (1984), http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&type_doc=Directive&an_doc=1984&nu_doc=631&lg=en (last visited Apr. 14, 2012).

102. *Transnational Trafficking* *supra* note 64, at 56.

is not bound by a treaty to which it is not a party.¹⁰³ The United States, a major exporter of toxic waste, has never ratified the Basel Convention¹⁰⁴ and falls outside the scope of both the Aarhus and Lomé Conventions. As such, their provisions do not bind the U.S. Hence, countries like the U.S. may continue such practices if they choose. This deficiency of international law to regulate such trade has prompted the adoption of alternative measures by some African States.

B. REGIONAL PROVISIONS: THE BAMAKO CONVENTION

Pursuant to Article 4 of the Basel Convention, which grants parties the right to prohibit the importation of hazardous waste, a group of African States within the framework of the OAU signed the Bamako Convention in 1991.¹⁰⁵ This convention prohibits outright the importation of waste into participating African nations.¹⁰⁶ While this appears to be a commendable effort at combating this problem, the wording of the Bamako Convention reveals that it is not much more effective than the Basel Convention. The only difference appears to be in the wording, which bans the importation of hazardous waste into African countries, while the wording of the Basel Convention highlights its regulatory role, as seen in the titles of these international instruments.¹⁰⁷ For instance, an example of the similarities is that the definitions of hazardous waste under these provisions are of the same open-ended nature discussed earlier in Section III.¹⁰⁸ Also, Article 3 of the Bamako Convention and Article 3 of

103. Vienna Convention on the Law of Treaties, art. 2(1)(d), May 23, 1969, 8 I.L.M. 679 (1969).

104. McCrory, *supra* note 10, at 340.

105. Bamako Convention on the Ban of the Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Waste within Africa, Jan. 30, 1991, 30 I.L.M. 773, available at http://au.int/en/sites/default/files/Convention_En_Bamako_Ban_Import_into_Africa_and_Transboundary_Movement_hazardouswastes_Bamako_30January1991.pdf [hereinafter *Bamako Convention*].

106. *Id.*

107. See *Bamako Convention*, *supra* note 105, at art. 4 (stating that “[a]ll Parties shall take appropriate legal, administrative and other measures within the area under their jurisdiction to prohibit the import of all hazardous wastes, for any reason, into Africa from non-Contracting Parties. Such import shall be deemed illegal and a criminal act.”). *Contra Basel Convention*, *supra* note 60, at art. 4 (placing the onus on contracting parties to regulate the international toxic waste trade).

108. See *supra* Section III.B.

the Basel Convention both require that states adopt national definitions.¹⁰⁹ However, the onus is placed on individual countries, which makes it more ineffective because countries can implement definitions that suit their own needs.¹¹⁰ Enforcement under this treaty is also questionable, as the Bamako Convention also provides for arbitration as the forum of choice.¹¹¹

In short, the Bamako Convention appears only to be an African version of the Basel Convention. As such, the inefficiencies discussed under the Basel Convention also apply under this treaty. Further, like the United States, Ghana and Nigeria never ratified the Bamako Convention.¹¹² Nonetheless, it appears that the Bamako Convention has been made redundant by the 1995 “ban” imposed under the Basel Convention.

C. DOMESTIC LAW

Developing countries should not rely on industrialized countries to undertake measures to combat the practice of exporting toxic waste. A case in point is the United States’ RCRA Section 3017, which restrains the dumping of toxic substances in the U.S., but makes it possible for such waste to be exported to other countries that are willing to accept it.¹¹³ Even regional provisions have not achieved the ultimate objective prompted by the need to promote environmental justice with regard to the banning of toxic waste trade with Africa. Hence, combating the toxic waste trade demands a high level of commitment on the domestic level and a legal system with solid infrastructure that seeks to promulgate and enforce regulatory policies.

Yet many hurdles must be crossed if the waste trade is to be regulated domestically. First, the partiality of judicial systems in developing countries reflects the familiar problem of corruption at the domestic level.¹¹⁴ Therefore, apart from lacking the resources to bring an individual action to court, aggrieved citizens may also

109. *Basel Convention*, *supra* note 60, at art. 3; *Bamako Convention*, *supra* note 107, at art. 3.

110. *Bamako Convention*, *supra* note 105.

111. *Id.*

112. *Transnational Trafficking*, *supra* note 64, at 56.

113. McCrory, *supra* note 10, at 341.

114. Sope Williams and Ama Eyo, *Fighting Corruption in Public Procurement Through the OECD: A Review of Recent Initiatives*, 3 PUB. PROCUREMENT L.REV. 103-113 (2009).

encounter difficulties when attempting to protect their environment by bringing a legal action, which is a main feature of environmental justice. Second, domestic policies may make it impossible to enforce this new legal concept. One example exists in Nigeria's Land Use Act of 1990.¹¹⁵ Under this legislation, the government owns all the land,¹¹⁶ and an individual is only endowed with usufructuary rights.¹¹⁷ Thus, in the event that the government imports 100,000 tons of PCB, citizens have no standing to bring any legal action, as they lack the requisite proprietary rights. From this, it is easily ascertained that the waste trade is not even effectively regulated at the domestic level. Nonetheless, Nigeria appears to be one African country that has endeavored to combat this activity from a domestic level, enacting its Harmful Waste (Special Criminal Provisions) Act in 1988 to deal specifically with the illegal dumping of harmful waste.¹¹⁸

V. A CASE FOR COOPERATION

A. WORKING TOWARD A SOLUTION

From an environmental justice perspective, export of waste to developing countries is a pervasive problem. A key feature has been the lack of uniformity in delineating factors associated with this practice. For example, the definition of toxic waste provided by the Basel Convention is too broad¹¹⁹ and creates a situation where one person's trash becomes another person's treasure. Exporters can simply argue that they are legitimately trading in chemicals, despite the fact that such chemicals have been deemed as waste in the country of origin. From this, it can correctly be ascertained that multilateral treaties have had limited success in their attempts to regulate this practice for reasons already discussed.

Hence, developing country governments and citizens must cooperate if the fight for environmental justice is to ever bear fruit in the developing world. This concept goes beyond enacting

115. Land Use Act 1978, Chapter 202 § 5 (1990) (Nigeria), available at <http://www.nigeria-law.org/Land%20Use%20Act.htm>.

116. *Id.*

117. *Land Management Under the Land Use Act*, ONLINE NIGERIA DAILY NEWS, <http://www.onlinenigeria.com/land/?blurb=530> (last visited June 27, 2012).

118. Dr. S. Gozie Ogbodo, *Environmental Protection in Nigeria: Two Decades After the Koko Incident*, 15 ANN. SURV. OF INT'L COMP. L. 2 (2009).

119. *Basel Convention*, *supra* note 60.

environmental laws and incorporates factors such as rural and urban planning and waste collection management and disposal.¹²⁰ The Author suggests establishing environmental courts, similar to what is being considered in China,¹²¹ and has already been established in countries such as New Zealand.¹²² Arguably, an environmental court composed of environmental lawyers will be more sympathetic towards the plight of citizens in relation to environmental hazards than one made up of commercial lawyers who are more interested in the country's economy.

B. INSTITUTIONAL CONSTRAINTS

Notwithstanding the discussion so far, the issues of poverty, as a result of underdevelopment and inter-governmental corruption, must be addressed if the toxic waste trade is to ever be controlled. One of the incentives of exporting waste to developing countries is the cost effectiveness of exportation.¹²³ The concept of cost effectiveness originates from the high levels of poverty in African countries, especially in sub-Saharan Africa. This poverty leads governments to accept a fraction of the remuneration that would have been due had this same waste been imported by another developed country. For example, Benin, in the above case study, accepted \$2.50 per ton of toxic waste, while, in the United States, the disposal of this same waste can cost as much as \$4,000 per ton.¹²⁴ The case study in

120. Sze & London, *supra* note 14, at 1337.

121. Tun Lin et al., *Green Benches: What Can the People's Republic of China Learn from Environment Courts of Other Countries?* 1 ASIAN DEVELOPMENT BANK: MUNICH PERSONAL REPEC ARCHIVE 6 (2009), available at http://mpra.ub.uni-muenchen.de/21107/1/MPRA_paper_21107.pdf.

122. See ENVIRONMENT COURT OF NEW ZEALAND, <http://www.justice.govt.nz/courts/environment-court/> (last visited July 20, 2012).

The court is a specialist court, and, as such, it sits outside the pyramid for courts of general jurisdiction Most of the court's work involves issues arising under the Resource Management Act, largely dealing with appeals about the contents of regional and district statements and plans; and appeals arising out of applications for resource consents. The consents applied for may be for a land use, for a subdivision, a coastal permit, a water permit, or a discharge permit; or a combination of those Some issues that arise in Environment Court proceedings are: . . . water and hydrothermal resources, including use for electricity generation, . . . the physical environment, including the coast, bush, landform, lakes, rivers, [and] productive soil, . . . [and] social issues, including social effects of mining and other industrial projects.

Id.

123. ANAND, *supra* note 4, at 63.

124. Pellow et al., *supra* note 11, at 436.

Section III illustrates the vast disparity between the economies of the exporting state in comparison to that of the importing state at the time these incidents occurred. This trend has led countries to accept remuneration for storing toxic waste, which they otherwise would not have accepted; thus, making the regulation of toxic waste increasingly difficult. In addition, some countries make it difficult to regulate the waste trade—exporters are not liable to foreign citizens, despite attempts by the Basel Convention to establish a liability regime.¹²⁵

On a disturbing note, international officials seem to promote such policies as being the economically sensible thing to do. For instance, on December 12, 1991, in an official statement, Lawrence Summers, then Chief Economist of the World Bank, openly justified the idea of using developing countries as trash bins.¹²⁶ He stated that “*the economic logic of dumping a load of toxic waste in the lowest-wage country is impeccable . . .*”¹²⁷ In essence, Summers suggested that exportation to low-income countries is justifiable because they have little to offer, and they have the least to lose from the implementation of such policies.¹²⁸ Essentially, lives in the developing world are treated as less important than lives in the industrialized world.¹²⁹ As draconian as this may sound, from an economic perspective, many find this argument persuasive. Nonetheless, this reveals the lack of regard for the welfare of Third World citizens by the industrialized North, where strict measures have been implemented to avoid the wanton disregard for the environment by their own citizens.

Furthermore, many developing countries receive aid from industrialized countries.¹³⁰ One condition for such aid, even if it is unstated, may be the acceptance of 15 million tons of PCB per year. For example, the African nation of Benin was colonized by France. After independence, Benin is now deeply in debt to France and several financial institutions. French waste traders

125. Sean D. Murphy, *Prospective Liability Regimes for the Transboundary Movement of Hazardous Waste*, 88 AM. J. INT'L L. 24, 75 (1994).

126. Hugh J. Marbury, *Hazardous Waste Exportation: The Global Manifestation of Environmental Racism*, 28 VAND. J. TRANSNAT'L L. 251, 253 (1995).

127. Marbury, *supra* note 126.; ANAND, *supra* note 4, at 64 (emphasis added).

128. ANAND, *supra* note 4, at 64.

129. *Id.*; Adeola, *supra* note 6, at 695.

130. See Alberto Alesina & David Dollar, *Who Gives Foreign Aid to Whom and Why?*, 5 J. OF ECON. GROWTH 33, 63 (2000).

have recently offered to pay Benin large sums of money, as compensation for accepting toxins. Benin's motivation to accept such payment stems largely from its desire to repay its loans to France.¹³¹ Such development policies have devastating effects on developing countries by leaving them with the disproportionate cost of cleanup. The remuneration they receive for accepting toxic substances is insignificant in comparison to the damage caused to the environment and the health of citizens.

Finally, a pervasive problem, which must be addressed if toxic waste trade regulation is to ever be truly effective, is the problem of corruption at inter-governmental levels. This is an indirect consequence of poverty in developing countries and represents yet another major barrier to the regulation of the international toxic waste trade as a feature of the promotion of environmental justice.¹³² The case study in Section III reveals that governments, or persons closely linked to the government, are often the host parties in such transactions, as seen in the case of Benin,¹³³ making it difficult to sanction culprits.

VI. CONCLUDING REMARKS

By adopting a socio-economic approach in addressing the issue of environmental justice and the international toxic waste trade, this Article points out that one reason why the North is able to impose such burdens on the South is because of the relative economic positions of these two categories of countries. Particularly, the Article addresses the regulation of the toxic waste trade with African countries and contends that curtailing such global discrimination is essential if environmental justice is to form part of the legal paradigm of these countries. While it focuses on sub-Saharan Africa, the Article depicts the inherent difficulties in regulating the export of waste to developing countries around the globe.

This Article also attempts to shed light on the ineffectiveness of Northern-oriented policies. Any rigorous regulation by Northern countries would curtail the productivity that is the source of their wealth.¹³⁴ Thus, it appears that implementation of

131. Pellow et al., *supra* note 11, at 434.

132. McCrory, *supra* note 10, at 339.

133. *Transnational Trafficking*, *supra* note 64, at 56.

134. de Graff, *supra* note 3, at 44.

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national policies is currently the only viable option if this activity is to be effectively controlled and environmental justice is to be promoted. Yet, the issues of underdevelopment and corruption have significantly hindered the regulation of the international waste trade. Governments will have to take the lead to contain their corruptive activity in order for the initiative to carry any weight.

Toxic waste generated by developing countries is the consequence of Northern industrial output. This is reflected in the economy of industrialized countries, which are significantly better-suited economically than developing countries. Hence, it is an injustice for the North to transfer the environmental burdens that come with this productivity and wealth to a group of countries already fraught with their own problems. Thus, the Author advocates that national regulation and control of this practice will prove fruitful in the struggle for environmental justice in Africa.