International law and the question of waste in developing countries

By Matthieu Thébault

Abstract

This communication deals with international law and the recurring issue of waste management in developing countries. An overview of ad hoc international and regional conventions is to be made as well as the elements of prevention made in that matter. China and India also have a rather new yet meaningful role within the global management of wastes, especially in the e-wastes part. This communication will lay emphasis on the spreading role of international law especially on the question of knowing whether all types of waste (household refuse, industrial and nuclear wastes, etc) are taken into account and their fate (storage, recycling, etc). The efficiency of these legal tools at a regional level or international level will be checked to see if they cannot simply be considered as soft law elements, today’s burden of international environmental law. Finally, the issue of wastes will be related to essential principles of international environmental law and the obligations they involve for developing economies.

Keywords: wastes, environment, international law, environmental impact assessment, duty to notify and inform, no-harm rule, Basel Convention, Bamako Convention, Waigani Convention, developing countries.

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One of the recent affairs dealing with wastes, as far as France is concerned, is the issue of the clearing of the asbestos and other toxic chemicals contained in the first French aircraft-carrier called Le Clemenceau in India. The probabilities of contaminating both the Indian population and the environment were so important that the Indian Supreme Court refused to let the French vessel be dismantled on its territory, an argument based on the Basel Convention, strongly supported by environmental NGOs, especially Greenpeace.

The recurring issue of waste management has always been a very important and burning question because it has always involved not only a risky situation for human health but also an ecological catastrophe for the environment and natural resources.

The United Nations through its Millennium Declaration emphasized the will to protect the future generation by protecting the environment: « We must spare no effort to free all of humanity, and above all our children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs ». Indeed, the need to protect the environment has always been a priority of the United Nations, being the leaders of the making of international law, especially

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international environmental law. A great number of conventions – Stockholm, Rio, Johannesburg, etc – were organized under the aegis of the United Nations aiming at protecting the environment and find solutions to help developing countries cope with the creation of new legal obligations.

It appears that developing countries agreed to receive toxic wastes from western countries in exchange of a new source of money. This economic management led to a gigantic issue since those countries – especially the African ones – « were not equipped to handle those wastes in such a way as to protect people’s health and environment ». Indeed, the lack of stringent regulations was a solution to increase revenues. In addition, the problem shown in these countries in Africa, Latin America and the Caribbean is simple: « the cost of disposing wastes is usually significantly lower than either instituting waste minimization techniques at the source or utilizing an approved disposal facility located in the generating country ». This profitable way of making an enormous amount of money would be tolerable if the local population could handle this transfer which is impossible since, most of the time, locals who deal with the management of these wastes are unskilled workers. Even the transportation is problematic since the risk of pollution is aggravated in case of land pollution or an accidental spillage in the waters. The campaigning of NGOs and developing countries found a common interest in denouncing the various problems created by the transfers of wastes which finally led to the signature of the Basel Convention in 1989 followed by a certain number of agreements.

The creation of an international legal system regarding the question of waste is mainly due to several international or regional conventions. A few international or regional organizations tried to implement measures in this sector. Some obvious organizations like the World Trade Organization (WTO) clearly have no important role in this matter but do not necessarily neglect a future involvement.

To understand this subject, the notion of waste has to be cleared from a scientific to a legal aspect. Generally, the definition of wastes depends on a certain number of specific characteristics. A waste is most of the time an object or a substance which is disposed of, losing its economic value or presenting a danger to environment. Categories of waste can be made. Scientists are used to categorizing wastes. Wastes can be biodegradable – i.e. at least naturally and partially destroyed by bacteria or micro-organisms – recyclable, ultimate – i.e. household refuses ending in municipal dumps – or special wastes, including hazardous wastes like toxic and radioactive wastes as well as e-wastes.

If the scientific reasoning and knowledge can sometimes be different than a legal perspective, international law clearly tried in the recent years to control and supervise the fate of those wastes. The biodegradable category finds itself an eco-friendly ending by « assimilating itself to the biomass ». The wastes that can be recycled are not part of this study since they find

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8 Basel Convention, supra
9 See the WTO website on its environmental section. One can read that « The WTO’s Trade and Environment Committee does not intend to duplicate [the work of international agreements] but it also notes that the WTO could play a complementary role ». Online: www.wto.org/
10 See eg www.techno-science.net/
11 Ibid.
their way in other sectors avoiding a health risk or an environmental issue. On the contrary, the other categories clearly involve a risk. Ultimate wastes cannot be put aside even though they depend on nationally implemented measures. Each country can choose its national legislation in that matter thanks to its sovereignty and its exclusive territorial competence. However, a State might want to export and get rid of its wastes. The most dangerous wastes had to be taken into account by the international society which led to the adoption of several conventions and agreements. International law is thus concerned.

The Cairo guidelines gathered a certain number of principles about the management of hazardous wastes. This tool is considered « as a non binding legal instrument, [...] primarily designed to assist government in the development and implementation of their national management policies for hazardous wastes ». Indeed, the end of the 1980s was the awakening of international preoccupations and a common will to find solutions to the waste management, especially hazardous wastes. Instruments of hard law were discussed to put an end to soft law guidelines.

The Organisation for Economic Co-operation and Development (OECD) an international organization which helps governments to manage economic, social and environmental challenges, took many decisions dealing with wastes in a transboundary approach. It defines wastes as « substances or objects, other than radioactive materials covered by other international agreements, which i) are disposed of or are being recovered; or ii) are intended to be disposed of or recovered; or iii) are required, by the provisions of national law, to be disposed of or recovered ». Hazardous wastes are also mentioned referring to specific categories. They are generally detailed in Appendix or Annexes. OECD classified “classical” wastes in its Appendix 1 from specific streams (clinical and pharmaceuticals wastes, wastes from the production and use of preserving chemicals, organic solvents, wastes containing

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13 UNEP GC Decision 14/30 (1987).
16 See www.oecd.org.
17 See OECD documents: C(83)180(Final), C(85)100, C(86)64(Final), C(90)178/FINAL, C(92)39/FINAL, C(2001)107/FINAL.
PCBs, PCTs, PBB etc\textsuperscript{19} to the use of a specific constituent (mercury, asbestos, cadmium, etc\textsuperscript{20})

Many OECD conferences – Cancun, Wien, Washington – led to a working definition of Environmentally Sound Management (ESM) of waste which is « a scheme for ensuring that wastes and used and scrap materials are managed in a manner that will save natural resources, and protect human health and the environment against adverse effects that may result from such wastes and materials ».\textsuperscript{21} This encouraging work primarily concerns developed States which are the Members of this international organization. Nevertheless, this is interesting to see that it also pertains to developing States since the Basel Convention – explained later in this work – uses a very similar approach on the ESM\textsuperscript{22} and the same definition of waste.\textsuperscript{23} It is all the more important as the Basel convention deals with hazardous wastes and « wastes requiring special consideration » in a context of international law, thus touching developing States which largely ratified this important convention. A total of 175 parties is very important involving a large number of developing countries from Africa, South America, the Caribbean, the Middle East, Pacific States and even China.\textsuperscript{24}

What is important to note is that there is a common definition throughout the world. Today’s question on the waste issue is to know whether a State can take care of it in a sustainable approach. Sustainable development has become an emerging principle of law i.e not legally binding yet. This principle is particularly relevant because it « meets the needs of the present without compromising the ability of future generations to meet their own needs » according to Mrs Gro Harlem Brundtland in her 1987 report for the World Commission on Environment

\begin{itemize}
\item \textsuperscript{19} Clinical wastes from medical care in hospitals, medical centres and clinics, from the production and preparation of pharmaceutical products, Waste pharmaceuticals, drugs and medicines, from the production, formulation and use of biocides and phytopharmaceuticals, from the manufacture, formulation and use of wood preserving chemicals, from the production, formulation and use of organic solvents, from heat treatment and tempering operations containing cyanides, wastes mineral oils unfit for their originally intended use, Waste oil/water, hydrocarbon/water mixtures, emulsions, waste substances and articles containing or contaminated with polychlorinated biphenyls (PCB's) and/or polychlorinated terphenyls (PCT's) and/or polychlorinated bipheny1s (PBB's), Waste tarry residues arising from refining, distillation and any pyrolytic treatment, Wastes from production, formulation and use of inks, dyes, pigments, paints, laquers, varnish, from production, formulation and use of resins, latex, plasticizers, glues/adesives, Waste chemical substances arising from research and development or teaching activities which are not identified and/or are new and whose effects on man and/or the environment are not known, Wastes of an explosive nature not subject to other legislation, Wastes from production, formulation and use of photographic chemicals and processing materials, Wastes resulting from surface treatment of metals and plastics as well as residues arising from industrial waste disposal operations.
\item \textsuperscript{20} Metal carbonyls, Beryllium; beryllium compounds, Hexavalent chromium compounds, Copper compounds, Zinc compounds, Arsenic; arsenic compounds, Selenium; selenium compounds, Cadmium; cadmium compounds, Antimony; antimony compounds, Tellurium; tellurium compounds, Mercury; mercury compounds, Thallium; thallium compounds, Lead; lead compounds, Inorganic fluorine compounds excluding calcium fluoride, Inorganic cyanides, Acidic solutions or acids in solid form, Basic solutions or bases in solid form, Asbestos (dust and fibres), Organic phosphorous compounds, Organic cyanides, Phenols; phenol compounds including chlorophenols, Ethers Halogenated organic solvents, Organic solvents excluding halogenated solvents, Any congener of polychlorinated dibenzo-furan, Any congener of polychlorinated dibenzo-p-dioxin, Organohalogen compounds other than substances referred to in this Appendix.
\item \textsuperscript{22} Article 02.8 states that ESM means « taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner that will protect human health and the environment against the adverse effects which may result from such wastes »
\item \textsuperscript{23} Basel Convention, Ibid, article 02.1.
\item \textsuperscript{24} On 175 parties, only Afghanistan, Haiti and the United States of America have not deposed instruments of ratification.
\end{itemize}
and Development. It also means that a State cannot advocate an unlimited economic growth. It has to take into account the protection of the environment combined to economic growth and social development. Waste in this context can be a perfect example of what should be done in the area of the protection of environment, supported by international environmental law measures.

On the legal field, the importance of sustainable development was emphasized by the visionary ICJ judge Weeramantry, who developed the idea that it is an obligatory principle showing that « [t]he concept of sustainable development is thus a principle accepted not merely by the developing countries, but one which rests on a basis of worldwide acceptance » 25 and that « [t]he principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community ». 26 Although this encouraging opinion of treating sustainable development as a principle of international law – combined to the recent Johannesburg declaration on sustainable development – seems innovative, it has no legal binding effect yet and is still today a soft law principle. If one day, this principle should become legally binding, it could obviously take into account the eco-friendly management of wastes which is necessary to the poorest countries.

International law, especially international environmental law is often criticized by its non-binding effect. Some legal scholars explain that the soft law aspect of this discipline is too important to have a meaningful impact in international relations. Therefore, how can international law, in a large sense include some specific international environmental law elements, and help handle the management of wastes in developing countries?

To answer this important question, international treaties and conventions will be put to the test (I) in order to check the efficiency of international conventional law. Principles of international environmental law will be developed in relation to the waste issue (II) to see if obligatory principles can help States respect the environmental management of wastes, especially in developing countries.

I. International agreements and wastes in developing countries.

Examining the meaning of waste in international law necessarily leads to different degrees of definition and understandings of wastes from international law, with a specific convention on the transboundary movements of wastes (a), to other agreements of regional law (b).


The importance of the Basel convention in the question of wastes is crucial because it helped create a system of responsibility both for exporters and importers in international law. Indeed, it « makes [importer States’] management of imported wastes a matter of legitimate international concern. [It is ] based on a system of environmental responsibility shared among all states involved in each transaction ». 27 This synthesis of the Basel convention is

26 Ibid, p.95.
essential to understand what was at stake at the end of the 1980s, i.e. an illegal trade system incompatible with the protection of the environment.

In the waste management issue, specialists observed that « only States, constantly in relation with industrialists, are powerful enough to deal with toxic wastes from their beginning to their eco-friendly rational elimination ». This is the reason why an international convention was needed.

During its first decade, the aim of the convention was to control as thoroughly as possible the transboundary movement of hazardous wastes as well as to confirm the setting up of an environmentally sound management of the wastes. The Cold War context during the long negotiation process was central since it was the first international environmental convention on wastes whose provisions were numerous and legally binding at a time of international uncertainty.

It is unnecessary to specify again the definition of wastes in the convention, except for a significant precision: nuclear wastes (art.01.3) are excluded from the scope of the convention leaving that matter to the International Atomic Energy Agency. Another category of wastes was added, those « which derive from the normal operations of a ship, the discharge of which is covered by another international instrument » (art 01.4) which is still a real problem. These operations currently performed by a handful of States – India, Bangladesh, Pakistan, China and Turkey – can be extremely dangerous, especially because of toxic chemicals in different parts of the ships in question. Apparently, the 1972 London Convention does not seem to be the adequate tool to deal with the prevention of ships pollution – in the dismantling process – because it deals with global marine pollution and wastes. As far as ship recycling is concerned, only a recent Annex IV contains requirements to control pollution of the sea by sewage. More recently, international negotiations for a legally binding text was organized by the International Maritime Organization (IMO) and led to the adoption of the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships in May 2009. The ratification process has not been completed yet. We cannot be sure that developing countries will have enough resources and technical support – as planned e.g. in the Basel Convention – leading to the strict respect of this convention and an equal level of control. Some countries like Pakistan already specified they had problems in the enforcement of the provisions contained in those conventions proving that the current system is probably not sufficient yet.

29 To understand the context of the negotiations, see Alain Clerc, « la convention de Bâle de 1989 sur le contrôle des mouvements transfrontières de déchets dangereux et de leur élimination », in Le droit international face à l'éthique et à la politique de l'environnement, Série SEBES, Genève, Georg Ed., 1996 ; Fouad Bitar, op.cit., p.33.
30 See www.iaea.org.
31 Note that the Convention for the Prevention of Pollution from Ships, IMO, MARPOL 73/78, London, 02 November 1972[MARPOL Convention] is not relevant in this article. Article 02.3(a) states that « “discharge” does not include: (i) dumping within the meaning of the Convention of Marine Pollution by Dumping of Wastes and Other Matter, done at London on 13 November 1972 ». 32 See online: the Basel Convention Bulletin - September 2010.
These precisions made, the interest of the Basel convention lies in several points. First of all, an « obligatory minimum standard for States » for hazardous wastes is thus needed (art.01.1) for Member States of the convention, a rather new experience for many developing countries. It is obviously a good manner of improving the conditions of wastes management. The idea is to create an environmentally sound management of wastes. It is a clear announcement of an agreed reduction of the generation of hazardous wastes to a minimum, even though the convention clearly mentions the need to « [take] into account social, technological and economic aspects » as well as the creation of « adequate disposal facilities » on its own territory with a capable staff able to take care of those facilities and prevent pollution. Here lies a real problem for developing countries which do not necessarily own or have the capacity to set up specific facilities for waste management, because of a lack of technology, of money or a lack of interest from the governments. Encouraging progress in that matter was made through international meetings to improve developing countries’ capacity in the development of an environmentally sound management of wastes using e.g. ISO 14000 norms or EMAS. The setting up of an environmentally sound management and its provisions refers to the due diligence principle which was recognized by the International court of Justice. Furthermore, cooperation between States is of course essential for a good functioning of the prevention process established in the provisions of the convention which means that the exchange of information is required and the monitoring of effects too. As a matter of fact, information is all the more crucial as the convention creates a process called the prior informed consent which consists in the need for a prior, informed and written consent from transit states to states of import. The only possibility for such consent to be waived is due to a tacit agreement by the State Members.

A specific provision was inserted in the general obligations section specifically for developing countries. It underlines the fact that exporting any waste « to a State or group of States belonging to an economic and/or political integration organization that are Parties, particularly developing countries which have prohibited by their legislation all imports, or if it has reason to believe that the wastes in question will not be managed in an environmentally

37 Patricia Birnie, op.c it. p.477.
38 Article 02.8 states that «“Environmentally sound management of hazardous wastes or other wastes” means taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes ». 39 Ibid, Article 04.2 (a).
40 Article 04.2 (b).
41 Article 04.2 (c).
43 ISO 14000 norms deal with environmental management and the certification regarding your knowledge in that matter.
44 Eco-Management and Audit Scheme (EMAS) is a management tool for companies and other organisations to evaluate, report and improve their environmental performance.
45 In the Gabicikovo-Nagymaros Project Case, the ICJ stated that « in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage ». 46 Article 10.1
47 Article 10.2
48 Articles 04.1(c), 04.2(f), 06(1), 06 (2), 06(10), and 07.
49 « […]if no response is received by the State of export within 60 days of the receipt of a given notification by the State of transit, the State of export may allow the export to proceed through the State of transit ». 
sound manner » will not be allowed. It is a way to prevent pollution in a developing country in case this country cannot host wastes in the needed facilities as previously said.

The exporter or generator or the importer of wastes who wants to export or import wastes must notify both exporting and importing States. Every actor needs to inform each Member State – even States of transit – so that any State can control and accept or refuse the transboundary movement of wastes. This is a safe way to prevent any potential damage to the environment from any side of the actors involved. In case of a problem regarding the movement of wastes, it is the exporter’s responsibility to make arrangements to take back the wastes unless the importing State finds a more suitable solution to the problem in an environmentally sound manner.

Consequently, a transboundary movement which is not carried out in a proper way – no notification (a), no consent (b), falsification misrepresentation or fraud of document (c), or the use of wastes against the provisions of the convention or international law (d) – is considered as illegal traffic and shall be punished as such. The creation of specific measures and their implementation, if they do not already exist, in the national legal order of any Member State, is required to qualify the illegal traffic of wastes as criminal. This question is related to the right of a healthy environment promoted by several international conventions involving developing countries: The protocol of San Salvador (art.11) or the African Charter on Human and People’s Rights (art.24). Today’s concern is also the trafficking of e-wastes. In fact, precious and strategic metals and other high-tech materials can have a certain value as well as some equipment which can sometimes be reused. Such traffic has become a major source of income according to UNEP. It can be very dangerous to the populations’ health and the environment as it is the case in India and China. The important element that should be emphasized is the relevance of the Basel convention as far as e-wastes are concerned. In its recent Annex IX and XIII,

50 Article 04.2 (e).
51 Article 06.
52 Article 07.
53 Article 09.
54 Interpol is currently trying to create a Global E-Waste Crime Group and a strategy to control the illegal trade of e-waste.
57 UNEP explains that E-waste is « a generic term encompassing various forms of electronic and electrical equipment (EEE) which are old, end-of-life electronic appliances and which have ceased to be of any value to their owners ».
58 See online http://www.unep.fr/scp/waste/ewm/links.htm
60 The amendment whereby Annex IX was added to the Convention entered into force on 6 November 1998, six months following the issuance of depositary notification C.N.77.1998 (reflecting Decision IV/9 adopted by the Conference of the Parties at its fourth meeting). The amendment to Annex IX whereby new entries were added entered into force on 20 November 2003 (depositary notification C.N.1314.2003), six months following the issuance of depositary notification C.N.399.2003 of 20 May 2003 (reflecting Decision VI/35 adopted by the Conference of the Parties at its sixth meeting). The amendment to Annex IX whereby one entry was added entered into force on 8 October 2005 (depositary notification C.N.1044.2005), six months following the issuance of depositary notification C.N.263.2005 of 8 April 2005 (re-issued on 13 June 2005, reflecting Decision VII/19 adopted by the Conference of the Parties at its seventh meeting). The present text includes all amendments.
major parts of electronic components are taken into account. A certain number of actions were and are engaged by the secretariat of the Basel convention to update their information on that matter. In 2006, a Conference of Parties (CoP) took place in Nairobi to discuss several points of the e-waste issue but without taking legally binding decisions. The need for prevention about illegal trafficking requires more control from every Party. The CoP recognized a very important point: the difficulty for developing countries and countries in transition to deal with an increasing amount of e-wastes which specifically needs a complementary training and specific disposal facilities. It is an additional cost for those countries because they need to create several points of disposal on their territory. Burning wastes outside, acid baths and e-wastes dumpings are current practices in these countries. It proves they do not have the adequate facilities to tackle the problem. Traceability and transparency of this market or of transboundary movements are imperative to find a solution.\(^{61}\)

To implement the Basel convention at the full extent as far as liability is concerned, the parties adopted the Basel Protocol on Liability and Compensation at the Fifth Conference of Parties (COP-5) ten years after the signature of the convention i.e. 10 December 1999. It only concerns «damage due to an incident occurring during a transboundary movement of hazardous wastes and other wastes and their disposal, including illegal traffic» (art.03) from the loading point of the wastes, to the transportation – export, transit and import – and to the final disposal of the wastes. The notion of damage involves several cases: «the loss of life or personal injury», the «loss of or a damage to property other than property held by the person liable», «the loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment, taking into account savings and costs» and «the costs of preventive measures, including any loss or damage caused by such measures». This large definition is probably one of the reasons why the Protocol has not entered into force yet. There is indeed a lack of «ratification, acceptance, formal confirmation, approval or accession» (art.29) of the Protocol for now.

The absence of ratification from a lot of developing States is also due to the Annex B that sets up a system in which a minimum level of units (i.e. money) is indicated on the ground of the amount of the waste knowing that insurance and financial guarantees are obligatory. This is a serious financial burden in case of a trial.

Another impediment to the ratification of the protocol is that a conflict of norms might apply between the protocol and any other «bilateral, multilateral or regional agreement» (art.11). The possibility of «alternative liability arrangements thereby [create] confusion and [protract] litigation as to which liability is applicable».\(^{62}\) It is seen as a serious problem troubling legal certainty.

To conclude on the Basel convention and its protocol, it is true that the improvements of transboundary movements of wastes and hazardous wastes were significant and helped the reduction of illegal traffic and contributed to help technically and financially developing countries on that matter. Yet, problems still remain after the convention entered into force. The solution for developing countries probably lies in a closer approach: regional law.

\(^{61}\) Regional and Coordinating Centres based in Senegal and Nigeria and the national focal points in Liberia, Ghana, Côte d’Ivoire, Benin and Nigeria often gather for exchanges on the subject.

\(^{62}\) Patricia Birnie, op.cit., p.483.
b. A conscious progress made thanks to regional agreements

In a globalized world, it has become clear that the global development between developed and developing economies has been different. The creation of a serious gap is certain. If saying that « [t]he main increasing factor of energetic expenditure is linked to the industrialization of emerging countries »\(^{63}\), one must acknowledge that the risk of aggravating the fate of some developing countries is undisputable through major issues: desertification, erosion, the boom of megalopolis, the access to water, etc. Pr. Kiss explained during the negotiations of the Basel Convention that « a phenomenon such as the export of pollution that is the introduction of toxic substances, wastes or illegal activities on that matter in countries without sufficient protection of the legislation opened their eyes to those risky dangers »\(^{64}\). It is obvious that albeit innovative, the Basel convention did not solve every problem and developing countries remained vulnerable to waste trade especially the illegal one.

Such awareness led to the adoption of legally binding agreements. Africa and the Pacific area are the two zones in the developing world, where regional law has provided the most protective tools in the waste issue. To analyze this situation, it is very interesting to compare with what is regarded by legal experts as the most complex, developed and integrated legal systems at a regional level, i.e. the European Union and its measures.

Indeed, the European Union (EU) has based its definition of wastes, both on its legal texts and on its jurisprudence whereas the African\(^{65}\) and Pacific States\(^{66}\) only gathered their efforts in a single convention dedicated to specific hazardous wastes. At this stage, we already see the contrast between developed and developing countries: the EU has tackled this problem in a larger way and developing countries managed to get an agreement on hazardous wastes only.

While the Bamako Convention deals with a vast definition of hazardous wastes, including nuclear wastes, the Waigani convention specifically states that « Radioactive wastes »\(^{67}\) shall not fall into that scope. The South Pacific States treated this very question of nuclear wastes regionally through the specific South Pacific nuclear Free Zone Treaty.

The three regional areas, as far as wastes are concerned, revolve around the idea of protecting the environment. The different preambles are very clear on that subject. Indeed, the preamble of the European directive dealing with waste reminds us that « [t]he essential objective of all provisions relating to waste management should be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste »\(^{68}\) which is a constant preoccupation. The Waigani convention adopted enactments which are close to the idea of sustainable development involving the future


\(^{64}\) A. Kiss, « Emergence de principes généraux du droit international et d’une politique internationale de l’environnement », Le droit international face à l’éthique et à la politique de l’environnement, Série SEBES, Genève, Georg Ed., 1996.


\(^{67}\) Ibid, article 02.4.

\(^{68}\) Article 289 of the TFEU (Treaty on the Functioning of the European Union) states that « [t]he ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. […] ». 
generations of the South Pacific. In the very same sense, African States declared in a very long Preamble in reference to every significant international text protecting the environment that they recognized there might be potential problems on the African continent. Obviously the importance of human beings is underlined as well as the will to protect the environment.

The African and South Pacific conventions go to the essential in their definition of wastes. They have the exact same definition of what wastes are: « substances or materials which are disposed of, or are intended to be disposed of, or are required to be disposed of by the provisions of national law ». It is a simple copy of the 1989 Basel Convention. The Bamako convention directly refers to an Annex 1 and 2 where a list of hazardous wastes and specific characteristics are detailed. The definition also includes wastes that are considered as such by national legislation of the Member States. The Waigani convention plans the giving of a list from each Member State to the Secretariat of the Convention as long as they are not on the list of the Annexes. Developing countries during the Conference of Parties (CoP) apparently did not go further and avoid the complexity of the European Union definition of waste.

Indeed, the proper definition of the term « waste » is to be read in the directive 2006/12/CE in its article 1.1a): « ‘waste’ shall mean any substance or object […] which the holder discards or intends or is required to discard ». This definition is so large in its meaning that it cannot embrace all wastes. A communication form the European Commission was published so that everyone could clearly understand and interpret the directive, and the elements within, the proper way, to assure « legal certainty ». The document states that « [o]bjects or substances that are defined as 'waste' are controlled by Community waste legislation in order to protect human health and the environment ». Therefore, the key element is to know whether an object or a substance is considered as waste or not in a

69 « Conscious of their responsibility to protect, preserve and improve the environment of the South Pacific for the good health, benefit and enjoyment of present and future generations of the people of the South Pacific ».
70 Bamako Convention article 01.1; Waigani Convention article 01.
71 Article 02.1(b) « Wastes that are not covered under paragraph (a) above but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the State of import or transit »; Article 02.1(d) « Hazardous substances which have been banned, cancelled or refused registration by government regulatory action, or voluntarily withdrawn from registration in the country of manufacture, for human health or environmental reasons ».
72 Waigani Convention Article 03, 06.7 and 07.3.
73 Let’s not forget that a directive « shall be binding, as to the result to be achieved, upon each Member State to which it is addressed » (Article 288 of the TFEU). The form and method to transpose in the national legislation is the Member State’s choice as long as it is done.
75 As a matter of fact, « gaseous effluents emitted into the atmosphere » (art.2.1.a) and other specific wastes already covered by other legislation (art.2.1.b) especially: « radioactive waste, waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries, animal carcasses and the following agricultural waste: faecal matter and other natural, non dangerous substances used in farming, waste waters, with the exception of waste in liquid form and decommissioned explosives » are not to be categorized as ‘classic’ wastes and are to be found in other specific directives.
77 « This Communication seeks to guide competent authorities in making case by case judgements on whether a given material is a waste or not, and to give economic operators information on how these decisions should be taken. The Communication will also help to smooth out differences in the interpretation of these provisions throughout the EU ».
78 Ibid, p.03.
process of production ».

Apparently the European Court of Justice (ECJ) decided that the decision to declare an object or a substance, a waste should be taken in concreto.

The procedures concerning the general obligations of both the Bamako and the Waigani conventions are simple: every state has to « take appropriate legal, administrative and other measures within the area under their jurisdiction to prohibit the import of all hazardous wastes ». Therefore, this system is based on the principle of cooperation so as to protect both the African continent and the South Pacific area from receiving such dangerous materials especially by preventing the « dumping at sea » or the pollution of « internal waters, territorial seas, [and] exclusive economic zones ». International law provides for where transit takes place through maritime areas: in the exclusive economic zone, foreign vessels enjoy high-seas freedom of navigation and in the territorial seas or waters, they have a right of innocence passage and should not be discriminated against even if it falls under the competence of the state.

The Bamako convention opened to a significant difference from the Basel convention in prohibiting all hazardous wastes into African from non-Parties. The Waigani convention followed this approach and adopted the same legal obligation (Art. 04.1) for its Member States. The control of the producers of hazardous wastes is also essential for the smooth functioning of the system. Reports have to be sent to the Secretariat by wastes generators (Art. 04.3). These waste generators have to reduce the wastes to a minimum and base their

79 This precision is important because it emphasizes the situation of industrial wastes that are the most likely to be exported abroad. These industrial wastes may contain toxic substances and be consequently a risk to human health and the environment.
80 In the Palin Granit jurisprudence, the ECJ ruled that « [t]he place of storage of leftover stone, its composition and the fact, even if proven, that the stone does not pose any real risk to human health or the environment are not relevant criteria for determining whether the stone is to be regarded as waste ». (ECJ, Palin Granit Oy, Case C-9/00, 18 April 2002, ECR I-03533) Therefore, the Court stated that to be classified a non-waste by-product and not a waste, three cumulative elements are needed: « where the further use of the material was not a mere possibility but a certainty, without any further processing prior to reuse and as part of a continuing process of production, then the material would not be a waste ». (Communication, Ibid, p.07) On the contrary, it is elementary to understand that the legal European definition of a waste means that the object or substance is the result of an uncertain use of a material, without further processing as a part of the production process and out of the integral part of the production process. In other cases (ECJ, Vessoso et Zanetti, Cases C-206/88 and 207/88, 28 March 1990, ECR. 1461 ; ECJ Tombesi, Cases C-304/94, C-330/94, C-342/94 and C-224/95, 25 June 1997, ECR. I-3561), the ECJ explained that wastes can have an economic value. Finally, some hints might help the Court decide if the concerned product is a waste or not: No other use than disposal can be envisaged, The treatment method for the material in question is a standard waste treatment method (ECJ, Niselli, Case C-457/02, 11 November 2004, ECR. I-10853), the undertaking perceives the material as waste (ECJ, Archo Chemie, Cases C-418/97 and C-419/97, 15 June 2000, ECR. I-04475.), the undertaking seeks to limit the quantity of material produced. This complex approach on the waste issue in the European Union could become rather meaningful or a model to adopt for certain developing countries.
81 Bamako convention article 04.1 ; Waigani convention article 04.1 and 04.2
82 The principle of cooperation has become an effective principle especially with the UN Charter whose principles – especially article 01.3 – were declared, by the International Court of Justice in the Nicaragua Affair (1989), customary principles. This so-called large principle in its meaning is now a general principle of international law as far as the prevention of transboundary pollution is concerned. Cf. Lake Lanoux, Award of 16 november 1957, I.L.R. 1957.
83 Ibid, article 04.2a) and Waigani convention article 04.3: basing its obligation on the 1972 London Convention and the UNCLOS.
84 UNCLOS article 58.
85 UNCLOS article2 and 17-21.
86 Art 22-5
87 Article 04.1
88 Bamako convention, article 04.3 ; Waigani convention article 05.3
actions on a precautionary approach. If a transboundary movement occurs, both regimes are strict. On the movement itself, States have to establish a limit on the point of entry/exit or focal points and have to notify their Secretariat.\(^89\) It appears to be a rather smart choice to avoid any possible problem in case of a leak or a spillage during transportation. Controlling the same points of entry reinforce the effective control of the transportation of these wastes.

The need of a secure facility is crucial to the parties of the convention since « [a] Party shall not permit hazardous wastes to be exported to a State which does not have the facilities for disposing of them in an environmentally sound manner » according to the Bamako convention.\(^90\) This is a clear will to protect human health and the environment. Indeed, people in charge of these wastes have to be authorized by their country to transport, store or dispose of hazardous wastes.\(^91\) On top of that, a specific notification to the countries organized by both the conventions with the designation of documents (Annex IV.a) and a specific document – Annex IV.b – specifically drafted to authorize the transboundary movement of hazardous wastes between Parties gathering the maximum information on wastes transportation. If those are not submitted, the transboundary movement will be regarded as illicit as mentioned in their article 09. It is even possible for a country to be more severe and demanding. Both convention underline that point in their article 09.2 mentioning the authorization of implementing penal sanctions if they do not exist as long as they are in accordance with the provisions of the conventions and the rules of international law.

Eventually, a member State has the possibility to enforce more principles and legal tools from international environmental law on its territory, especially the Basel convention and therefore benefit from the transfer of resources. This is the reason why many African countries ratified both the Bamako and the Basel convention.

Thanks to this system, there is a distinct legal text applying to the poorest economies, a place where a dumping of waste, especially hazardous wastes, is likely to happen. Even if several NGOs have blown the whistle on the situation of several African countries: Ghana, Nigeria, Ivory Coast, etc. in the media\(^92\) the exports of dangerous wastes have stopped at least for hazardous wastes form outside Africa. The obligations were really ambitious in the Bamako Convention and succeeded.

The situation of the South Pacific Forum is more specific because of its geographical location. The will to avoid a highway of hazardous wastes transportations in this area of the world is thus limited and show the complementary role of these local legal instruments and with international agreements like the Basel convention.

On that matter, it is interesting to see that the European Union also has a strong bond to developing countries especially with the African-Caribbean-Pacific\(^93\) (ACP) countries. From the beginning of the European Union – that started as the European Economic Community (EEC) – trade was organized between the EEC and the ACP countries to benefit from each other’s advantages. On one side, the ACP countries were sure to have a new market with better prices to sell their goods and, on the other side, the EEC had an enormous source of

\(^{89}\) Bamako convention, article 06.7; Waigani convention, article 05.4 and 07.2(a).
\(^{90}\) Article 04.3(j).
\(^{91}\) Ibid, article 04.3 (m)1.
\(^{92}\) Cahal Milmo, « Dumped in Africa: Britain’s toxic waste », The Independent, 18 February 2009.
\(^{93}\) The creation of this specific group of former European colonies was made possible thanks to the 1975 Georgetown Agreement.
supply. Thanks to various agreements especially the 1989 Lomé Convention\textsuperscript{94} (called Lomé IV) all exports of hazardous wastes were banned from the EEC to the ACP States. The provision also mentioned that ACP States stopped the import of hazardous wastes.\textsuperscript{95} The EU contributed to the decrease of hazardous wastes exports.

What is more, the Caribbean countries established its own agreement on the waste issue – specifically marine debris – through the Cartagena convention\textsuperscript{96} whose State Members are encouraged to sign specific agreements – bilateral or regional agreements – which shall rely on international law.\textsuperscript{97}

As a conclusion, international treaties clearly encouraged the responsibility of developing States. They did not hesitate to handle the situation and sometimes try to improve the legal system through innovative measure. Thanks to those regional conventions, developing countries show they are on tracks to continue and improve with time the prevention of the environment.

If conventional law has partly answered the waste issue, general international law can provide a certain number of elements States have to respect in international relations.

\textbf{II. Certain principles of international environmental law confronted to wastes.}

The evolution of international environmental law lies in the development of certain principles that were revealed by the judge – becoming principles of customary law – or thanks to the codification of several of those principles, thus compelling States to respect them. The purpose is always the same i.e. a greater protection of the environment thanks to the no harm rule (a) and the notification of information (b).

\textbf{a. The no-harm rule.}

In international relations, every State has to respect its commitments. Act \textit{bona fide} is fundamental even more when environmental issues are involved. This is the reason why States have to exercise a sufficient surveillance over its territory to prevent any potential damage on other States. This is the \textit{sic utere tuo ut alienum non laedas} principle.

The problem of wastes in that matter necessarily implies that a State might act, either frivolously or foolhardy, on its territory without taking the proper decisions to supervise the procedures concerning the collect, the transportation, the treatment, the stocking or even the recycling of wastes which might have a terrible effect on the environment. The gap between States is of course an important element and one would understand that developing economies generally have less means of actions and response than developed States. Indeed, UNEP states that nearly every State is likely to experience land contamination because of an increasing amount of household wastes containing toxics.\textsuperscript{98} Every State is thus subject to transboundary

\textsuperscript{95} Ibid, article 39.1.
\textsuperscript{96} Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 22 ILM 1983, Cartagena de Indias. [Cartagena Convention]
\textsuperscript{97} Article 03 « The Contracting Parties shall endeavour to conclude bilateral or multilateral agreements including regional or subregional agreements, for the protection of the marine environment of the Convention area. Such agreements shall be consistent with this Convention and in accordance with international law ».
land contamination or even worse. The Trail Smelter arbitration between the USA and Canada established this principle: « no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence. ».

This case of pollution could easily be applied to the waste issue. Different programmes dedicated to waste minimization are obviously an answer to the potential transboundary harm between States.

States have to respect the no-harm rule. In the 1990s, the question of the threat or the use of nuclear weapons and the potential nuclear wastes included in that interrogation – happened to be clarified by the ICJ. After clarifying the definition of the environment, the Court added that:

« the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment. » (§29).

The potential dumping of nuclear wastes or accident during transportation or disposal is thus a threat that should encourage every State to take the necessary administrative and procedural decisions to avoid at all cost such a potential catastrophe. This principle was symbolically adopted in the Stockholm and Rio Declarations as well as in the Montego Bay Convention confirming that « States have the obligation to protect and preserve the marine environment » (Art.192).

As a consequence, States undoubtedly know that they must not environmentally harm with wastes or any other objects or substances a part of their territory on which they exercise their sovereignty, as well as another State in their neighbourhood. To contribute in such a good behaviour, international law recognized that States have to give any information which is relevant in case of a potential harm.

b. The criterion of information

Information has become an extremely important element especially in international environmental law because it is the key to prevent the environment from potential damages. A specific duty is required (a) as well as an impact assessment to be sure human activities will not endangered the environment (b).

a. The duty to notify and inform

Cooperation is a basis to international relations. To realize this cooperation, the criterion of information is essential hence the precision in the Lake Lanoux arbitration: « International

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100 The application of the 3R (Reduce, Reuse, Recycle) is part of programmes developed by the International Environment Technology Centre (IETC), a branch of UNEP.
102 See principle 21 of the Stockholm Declaration and principle 02 of the Rio Declaration.
104 Lake Lanoux arbitration (France/Espagne), 24 I.L.R. 101, 16 november 1957.
practice reflects the conviction that States ought to strive to conclude such agreements: there would thus appear to be an obligation to accept in good faith all communications and contracts which could, by a broad comparison of interests and by reciprocal good will, provide States with the best conditions for concluding agreements. It was an innovating jurisprudence at the time and the will to lay emphasis on international practice was made to see the principle of the duty to inform to prevent transboundary pollution, a customary one.

In addition, the World Charter for Nature in its article 21a as well as the Rio convention in its 19th principle codified this principle: «States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith». In a 2010 decision, the ICJ underlined the principle of cooperation: «it is by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question». This can easily take into account the problem of wastes and the involvement of States to prevent transboundary pollution in developing countries.

In fact, even if the reference to the environment was not explicitly made by the ICJ, the duty to inform in case of an emergency is real and was stressed in the Corfu Channel Case dealing with a minefield in territorial waters: «The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them». The Court reached the conclusion that «nothing was attempted by the Albanian authorities to prevent the disaster» judging that «[t]hese grave omissions involve the international responsibility of Albania». The analogy to the waste issue is simple. Imagine the landmine explodes and the remnants of the mine being considered as wastes. This is a very important principle that fits the situation perfectly. Pr. P-M Dupuy explains that at the time of the case, the relation to environment was not obvious, yet the duty to inform and provide sufficient notification to other States was necessary to avoid damaging actions on the environment. This case enabled the foundation of international environmental customary law. It is a complementary principle to the, henceforth irrefutable, environmental impact assessment.

b. Environmental impact assessment

This principle is fundamental in the waste issue. It consists of a teleological approach that has to be organized by every State. It is all the more essential as it is a principle that tends to be minimized by developing States whose environmental considerations are not as essential as developed States. Yet, the increasing use of chemicals in all sectors of international society has led to a multiplication of residues that have hazardous properties. Some legal experts like

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105 The idea was to put an end to the Harmon doctrine which consisted in a total and absolute sovereignty of every State located upstream of rivers that runs on their territory. See Stephen C. McCaffrey, « The Harmon Doctrine One Hundred Years Later: Buried, Not Praised », *Natural Resources Journal*, vol.36, pp.549-590.
106 Article 21a states that «[c]o-operate in the task of conserving nature through common activities and other relevant actions, including information exchange and consultations».
Judge Weeramantry\textsuperscript{111}, campaigned for the recognition of this principle as a general principle of international law since a lot of countries recognized it – mainly developed States – or a customary principle of international law. Needless to mention that both these statuses involve specific obligations for States.

International agreements confirmed this principle. The World Charter of Nature in its article 11c) adds that « [a]ctivities which may disturb nature shall be preceded by assessment of their consequences, and environmental impact studies of development projects shall be conducted sufficiently in advance, and if they are to be undertaken, such activities shall be planned and carried out so as to minimize potential adverse effects ». The Rio declaration too in its principle 17 states that « [e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority ». Those provisions reflect the pragmatic management that should be organized by every country especially in the creation of specific facilities which are supposed to be the final disposal of wastes, in a transboundary movement of wastes.

Even the ICJ in its jurisprudence confirmed this principle in the recent case opposing Argentina and Uruguay on pump mills on the river Uruguay. The Court explained that « in order for the Parties properly to comply with their obligations […], they must, for the purposes of protecting and preserving the aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment »\textsuperscript{112}. Judge Weeramantry must have been pleased when he read a few lines below : « the obligation to protect and preserve, […] has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource ». Thanks to those provisions the environmental impact assessment finally become a legally binding operation States have to honour. If specific environmental impact assessments have been made by developing countries in traditional area of environmental concerns like air, water, forestry or wildlife, the issue of wastes remains poorly covered, despite interesting initiatives.\textsuperscript{113}

As a conclusion, it is clear that the issue of wastes is on its way to find a solution thanks to those different international law tools. It appears that the most effective solution will probably be for developing States to be sure to ratify several other treaties\textsuperscript{114} in order to tackle the global questions of toxics even if some developing countries finally decided to ban the trade of wastes on their territory. The Basel Action Network, involved in the protection of the environment and the reduction of health risks for human beings, confirms that albeit a lack of resource and capacity to implement those conventions, the CoPs are the right places to discuss this problem for developing countries. Not ratifying those conventions are not the solutions.

\textsuperscript{111} Gabcikovo-Nagymaros Project, op. cit., separate opinion.
\textsuperscript{112} Case concerning pulp mills on the river Uruguay (Argentina/Uruguay), op. cit., §204.
\textsuperscript{113} UNEP’s Division of Technology, Industry, and Economics (DTIE) has undertaken a series of project in India to inform and encourage such assessments, especially in Mumbai.
This Network shows that developing countries have at least ratified one of those treaties, which is rather encouraging but obviously not enough.

The role of NGOs and the individual is essential to awake the international society to tackle the waste issue. The neglected status of NGOs in international law is not enough but States tried to implement and increase the access to information and to encourage the increasing participation of the peoples. The promotion and the negotiation of an international text – based on the European Aarhus convention\textsuperscript{115} – should be organized at an international level. Creating specific rights for any individual in access to information and justice in environmental matters is for sure the path to follow to improve environmental management and the protection of natural resources.