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International Law and E-waste trafficking

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Presentation

This lecture will address the challenges posed by the transfer of used and waste electrical and electronic equipment (e-waste) from developed to less developed countries to the international rule of law. It will discuss the interrelationship between international environmental law and international maritime law and the need for developing innovative and targeted maritime policies to respond to the e-waste issue both at the national, regional and global levels.

While actions of both export and import countries are necessary to effectively control and prevent the transboundary movements of e-waste, the current focus of international rules is primarily to support capacity building in the countries of import concerned with health and environmental issues related to e-waste management and disposal. It reveals the lack of attention that has been put on the liability of the country of export in controlling seaborne transport and preventing illegal trafficking of e-waste.

Presentation

The aim of this lecture is to give a broader legal perspective in international law and comparative law to address the problem of electronic waste in general and in the context of Mauritius in particular.

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Introduction

Defining e-waste

- Electrical and electronic equipment (EEE) such as personal computers, printers, televisions, mobile phones, refrigerators or air-conditioning units, when becoming waste because they have reached end of life, are commonly refered to as e-waste, which stands for electrical and electronic waste or, under European Union law, for Waste Electrical and Electronic Equipment (WEEE).

- Electrical and electronic equipments have become the fastest-growing market as a result of digitalization and continuous technological innovation leading to rapid purchase, renewal and replacement of electronic devices and therefore generating the most rapidly expanding solid waste stream in the world. The global quantity of e-waste generation in 2014 was estimated to be 41.8 Mt (by The Global e-waste Monitor – 2014, United Nations University)

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An issue of growing concern for domestic policy

E-waste have consequently become an issue of growing concern for domestic policy for two main reasons :

1°) Due to the presence of **toxic materials** that may cause adverse effects on health and the environment, e-waste are considered as **hazardous waste** which cannot be disposed of by common means and require a special management process ;
2°) Second, due to the presence of **precious metals** such as gold, copper and nickel and **rare earth elements** (REEs), e-waste have been considered as **strategic resources** that must be subject to a resource efficiency policy. In fact, some of these components are considered as critical raw materials because of their importance in a number of industrial and technological applications and the risk arising from the dependence on a very few foreign sources of supply, if not a unique one, China.

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An increase in e-waste international maritime trade

While these two environmental and strategic considerations should be reasons for both developed and developing countries to prevent the export and import of e-waste, the trade of e-waste from developed countries to developing countries, whether legal or illegal, has increased significantly over the past decade irrespective of the legal restrictions elaborated at the international, regional and national levels to control it.

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An international framework to control/forbid this transboundary movement

- The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* of 1989 is a multilateral treaty that was set up to regulate the transboundary movement of hazardous waste. It was translated into regional agreements and national legislations by a large number of countries which, for some of them, forbid the export or import of e-waste to prevent hazardous e-waste from being dumped into developing countries that lack the infrastructure to safely dispose of it.

- For instance, the Basel Convention has been translated into EU law by the EU Waste Shipment Regulation (WSR) which forbids the export of Waste Electrical and Electronic Equipment (WEEE) to non-EU countries; nevertheless it is estimated that around 2 Mt of WEEE illegally leave Europe each year (EFFACE, 2015)

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E-waste trafficking as an environmental crime

E-waste trafficking can be defined as the **illicit trade of electrical and electronic waste that involves the export of e-waste that is subject to restriction or prohibition legislations** in the export, the transit or the import country under international, regional or national rules.

E-waste trafficking can be considered as an international **environmental crime** because it encompasses a cross-border illegal activity that has adverse effects on the environment and that impacts a large number of people for the benefit of others.

Introduction

A challenge for the international rule of law

In fact, e-waste trafficking poses challenges to two areas of international law: international environmental law and international maritime law. .

Because of its cross-border nature, illicit trade of e-waste involves numerous actors that operate in different countries along the international waste and seaborne shipping chain. Today, a lack of international collaboration hinders concerted efforts to detect, investigate and prosecute e-waste crime and counter e-waste trafficking and prevent the dumping of e-waste in developing countries.

This lecture will be considering how international competition in seaborne trade is a relevant explanation to the illegal shipments of e-waste and a key driver for the lack of effectiveness of regional and domestic legislations to counter these shipments.

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I. E-WASTE AND INTERNATIONAL ENVIRONMENTAL LAW

The illegal shipment of e-waste from developed countries to third countries provides an example of a complex and serious environmental crime but also of a international environmental law lacks efficient means of action for its implementation.

A. A LACK OF MUTUAL LEGAL UNDERSTANDING AS A MITIGATING CIRCUMSTANCE FOR ILLEGALITY FOR EXPORTING COUNTRIES

B. A LACK OF CONTROL FROM IMPORTING COUNTRIES AS THE REASON PUT FORWARD FOR INEFFICIENCY

I. E-WASTE AND INTERNATIONAL ENVIRONMENTAL LAW

A. A LACK OF MUTUAL LEGAL UNDERSTANDING AS A MITIGATING CIRCUMSTANCE FOR ILLEGALITY FOR EXPORTING COUNTRIES

E-waste export and import countries did not yet reach a mutual understanding at the international level on the distinction to be made between used electrical and electronic equipment and e-waste, leaving a legal loophole for the e-waste trafficking from developed countries to developing countries.

1°) Distinction between e-waste and non-waste under the Basel Convention

2°) EU legislation and its refusal to prohibit the export of used electrical and electronic equipment

I. E-WASTE AND INTERNATIONAL ENVIRONMENTAL LAW

1°) Distinction between e-waste and non-waste under the Basel Convention

The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* of 1989 is a multilateral treaty that was set up to regulate the transboundary movement of hazardous waste. It was adopted on March 22nd 1989 in Basel, Switzerland, and entered into force on May 5th 1992. As of today, 185 states and the European Union are parties to the Convention while the United States have signed the Convention but did not ratify it.

The Basel Convention is based on two principles that are meant to govern the transboundary movement of hazardous waste and thus of e-waste : the prior informed consent principle and the environmentally sound manner principle.

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a) *Prior informed consent* refers to a requirement that any recipient or transit state for the waste must be fully informed of the hazardous waste that has been proposed to enter its territory and that it must give its consent to accept such waste. If this consent is withheld then the waste is not granted entry into the country and must be re-imported by the state of origin if this decision is violated.

b) *Environmentally sound manner* means that the waste must be handled in a manner that is protective of the environment and it is the responsibility of the waste producer to ensure it. The waste producer must either dispose of the waste in such a manner at source or ensure that the recipient state has the means and technology to do so.

We will see how the later has become the focus of exporting countries.

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Consequently, under the Basel Convention, is considered to be **legal shipment** of e-waste the transboundary movement of e-waste that received prior consent from the import country or the legal shipment of used electrical and electronic equipment that become waste in the import country.

When considering the **illegal shipment** of hazardous e-waste, **two difficulties** emerge.

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- First, the **line between legality and illegality** is thin. A lack of mutual understanding among exporting and importing countries concerning the e-waste definition, especially regarding the concept of « reusable » and « hazardous » when applicable to electrical and electronic equipment, allows for illegal shipment of e-waste under the **claim of being for reuse/repair**.

- Second, even legal shipment of e-waste based on the Basel Convention may cause **harm to the health and environment of the import country**. The differences between developed and developing countries are here fundamental as what is considered waste for the former will not necessarily be considered as such by the latter and vice-versa.

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In order to provide guidance on how to distinguish between electrical and electronic **waste and non-waste** under the Basel Convention, the Basel Convention Conference of the Parties (COP) during its 9th meeting (COP9) held in **June 2008**, agreed to develop technical guidelines.

The ***draft technical guidelines on transboundary movements of electrical and electronic waste and used electrical and electronic equipment, in particular regarding the distinction between waste and non-waste under the Basel Convention*** (e-waste technical guidelines) were adopted seven years later at COP12 in **May 2015**. Despite there being no consensus, the technical guidelines were adopted temporarily on what was supposed to be "**an interim basis**" with a commitment to conduct further work on revised guidelines for full adoption at Basel COP13 in 2017.

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An ongoing debate was taking place regarding the drafting of paragraph 26b on the status of non-functional equipment going for repair or refurbishment as to :

- whether they should be considered as hazardous waste and therefore controlled by the Basel Convention
- or if they should not be considered as hazardous waste and hence should remain outside the Basel Convention framework leaving it outside its control.

Instead, in 2017, through decision BC-13/5 the Conference of the Parties at its thirteenth session (COP13) established an Expert Working Group chaired by the government of China to undertake further work on the technical guidelines.

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As of today, three years later after the adoption, the revision of the technical guidelines is not completed.

What was supposed to be temporary and thus enabled the adoption of the incomplete technical guidelines has created a **loophole** that allows exporters to claim used electronic waste to be repairable and thus export them with no Basel control and thus without prior informed consent from the importer country or a binding requirement for environmentally sound management (ESM). Under the 2015 technical guidelines, hazardous e-waste can thus be legally shipped to development countries advocating what hitherto was considered to be illegal traffic

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Besides the Basel Convention, a number of regional agreements and national legislations have further regulated or restricted the trade in hazardous and other waste in general or e-waste in specific.

Some exporting countries went so far as to forbid the export of e-waste and have been confronted to the same difficulties regarding the status of used of electrical and electronic equipment and the distinction with e-waste.

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2°) EU legislation and its lack of efficiency to prohibit the export of e-waste

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal has been translated into EU legislation in 2006 under ***Regulation (EC) n°1013/2006 on shipments of waste*** *(Waste Shipment Regulation – WSR)* which forbids the export of Waste Electrical and Electronic Equipment (WEEE) to non-EU countries.

According to *directive 2012/19/EU of 4 July 2012 on waste electrical and electronic equipment (WEEE)*, e-waste "means electrical or electronic equipment which is waste within the meaning of Article 3(1) of Directive 2008/91/EC, including all components, sub-assemblies and consumables which are part of the product at the time of discarding". The Waste Framework Directive (2008/91/EC) defines waste as "any substance or object which the holder discards or intends or is required to discard".

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As regard to the export of used electrical and electronic equipment, the *correspondents' guidelines n°1 on Shipments of Waste Electrical and Electronic Equipment (WEEE) and of used Electrical and Electronic Equipment (EEE) suspected to be WEEE* have been agreed upon by EU Member States and represent their common understanding of how WSR should be interpreted.

These guidelines are **applicable since 3rd April 2017** but are not legally binding.

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The purpose of the correspondents' guidelines according to paragraphe 2 is to provide **guidance on how to distinguish EEE from WEEE** for different actors and especially :

- persons arranging shipments of e-waste,
- holders of electrical and electronic equipment (EEE) arranging transboundary transports of this EEE who wish to avoid non-compliance with the WSR and the WEEE-Directive, and
- authorities responsible for the enforcement of the WSR and the WEEE-Directive.

One may note that these actors are not only related to control of the e-waste chain but also to the control of the maritime transport chain, especially member states authorities such as customs.

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Under these guidelines, « EEE becomes WEEE if its holder discards it, or intends or is required to discard it. To make this judgement it may be necessary to examine **all circumstances including the history of an item on a case by case basis**. However, there are characteristics of used EEE that are likely to indicate whether it is waste or not » (paragraphe 8).

After describing situations where used EEE should normally be considered WEEE (Point 2), the guidelines indicate **situations where used EEE suspected to be WEEE should normally not be considered WEEE** (Point 3).

Key findings

- The status of non-waste attributed to used EEE by EU member states has thus been made **without regard to the ongoing debate at the international level** under the Basel Convention e-waste technical guidelines between export and import countries as regard to the fundamental question of ever considering used EEE to be non-waste (this without, entering the issue of planned obsolescence).

- The EU guidelines have thus established the asymmetry between export and import countries' legislation as to what is to be considered legal or illegal shipment of e-waste.

- Besides, it is obvious that the possibility to effectively implement these guidelines is extremely limited when considering the human and financial resources they require from EU member states to control when used EEE suspected to be WEEE should or should not be considered as WEEE. Import countries are to bear the weight of control.

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B. A LACK OF CONTROL FROM IMPORTING COUNTRIES AS THE REASON PUT FORWARD FOR INEFFICIENCY

Acknowledging the rapid expansion in the transboundary movements of e-waste worldwide despite ban on the import of e-waste from a certain number of developing countries, the international community and especially developed countries seem to have concentrated their efforts on improving the environmentally sound management of e-waste worldwide. in particular in developing countries that do not possess the capacity for the environmentally sound management of e-waste because of its adverse effects on the environment and human health.

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1°) The international focus on the environmentally sound management of e-waste worldwide

The international community, under the Conference of the Parties to the Basel Convention, seems to have been focusing on the environmentally sound management of e-waste which thus allows for the export of e-waste in developing countries that meet this criteria.

In all cases, the Convention requires that the standard of environmentally sound management of hazardous wastes or other wastes is met. Environmentally sound management 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.

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At COP8, parties to the Basel Convention adopted the *Nairobi declaration on the environmentally sound management of electrical and electronic waste* on 1st December 2016.

In the preamble parties note that :

- They are "Conscious of the importance of minimizing the generation of e-waste and reducing transboundary movements of such waste"

- But are also "Mindful of the opportunities, from an economic and social perspective, that recycling and recovery of used and end-of-life e-products can bring when properly managed in an environmentally sound manner throughout the life-cycle of such products"

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Under the Nairobi declaration, parties to the Basel Convention thus declare that they "shall encourage and promote the exchange of information and **the transfer of best available technologies for the environmentally sound management of e-waste from developed countries to developing countries** and countries with economies in transition" (§2).

The focus of the Nairobi declaration is thus **capacity building on a voluntary basis** of import countries to improve the environmentally sound management of e-waste, acknowledging thereby the lack of effectiveness of the control of the transboundary movement of e-waste.

2°) The financing and setting up of e-waste management system in import countries (Mauritius)

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"New developments are taking place regarding the introduction of E-Waste Management System in Mauritius following the signature of a Memorandum of Understanding between the Ministry of Environment, Sustainable Development and Disaster and Beach Management and the Mauritius Chamber of Commerce and Industry (MCCI) in February 2016 for setting up and operating an E-Waste Management System in Mauritius (…) In this context, a consultancy exercise has been jointly commissioned by the MCCI and the Agence Française de Développement (AFD) to assist the MCCI for setting up and operating an economically sustainable and effective E-Waste Management system in Mauritius" (MCCI, February 2017).

Conclusion

E-waste trafficking is caught between governments' will to punish environmental crime related to e-waste and governments' wish to promote trade and recover market share compared to other States. This is particularly true between neighboring states.

In fact, the different actors that are responsible for the enforcement of the legislation to control or prevent the illegal export or import of e-waste are the same actors that are in charge of the facilitation of international maritime traffic.

Such "legal schizophrenia" is characteristic of the challenges posed by e-waste trafficking to the international rule of law.

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II. E-WASTE AND INTERNATIONAL MARITIME LAW

International maritime law refers to the area of international law that includes the law of the sea, marine environmental law and shipping law as defined by the International Maritime Law Institute established under the auspice the International Maritime Organization (IMO), the United Nations specialized agency responsible for the safety and security of maritime transport and the prevention of the pollution of the seas by ships. International maritime law has been kept outside the debate related to the transboundary movement of e-waste to protect international maritime trade and the efficiency of shipping.

A. THE FACILITATION OF INTERNATIONAL MARITIME TRADE AS AN OBSTACLE TO THE FIGHT AGAINST E-WASTE TRAFFICKING

B. RECOMMENDATIONS FOR THE UNIFICATION OF CUSTOMS PROCEDURES CONTROL TO PREVENT DISTORTION OF COMPETITION IN E-WASTE LEGISLATION ENFORCEMENT

II. E-WASTE AND INTERNATIONAL MARITIME LAW

A. The facilitation of international maritime trade as an obstacle to the fight against e-waste trafficking

To promote competitivity, the IMO and governments have been involved in the facilitation of international maritime traffic that is to be implemented by customs agents and port authorities. In fact these actors are also those involved in illegal e-waste shipments as line between legal and illegal shipment is thin.

1°) The difficult distinction between legal and illegal shipment
2°) The simplification of customs procedures to promote competitive passage through ports

II. E-WASTE AND INTERNATIONAL MARITIME LAW

1°) The difficult distinction between legal and illegal shipment

The enforcement of e-waste transboundary shipment regulation is the competence of each States and the responsibility to control waste flows is often divided between different competent authorities.

For instance, in France the following actors have a political responsibility for waste flows :

- Customs administration
- Ministry of ecological and solidarity transition
- Regional directions of the environment, town planning and housing (*DREAL*)
- Port authorities (*capitainerie des ports*)

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However, under French law "it is not the responsibility of the customs administration to proceed to the classification of the goods as waste, except in the case of control".

Since 1 January 2016, the department from the Ministry of ecological and solidarity transition in charge of investigating the notification files and the sole point of contact for the shipment operators and the authorities in charge of controls is the National Center for Transboundary Waste Shipments (*Pôle national des transferts transfrontaliers de déchets-TDD*). The TDD is the responsible authority for the legal qualification of electrical equipment as waste or non-waste In case of difficulties to determine the legal qualification of the goods (waste or not) upstream of customs control, as well as the applicable procedure (information or notification), the operator are required to contact takes the attachment with the TTD.

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The enforcement of e-waste transboundary shipment regulation thus greatly varies between States.

Evidence have been made that export and import companies tend to use those ports where enforcement is the weakest and thus the least effective (*EFFACE: Illegal shipment of e-waste from the EU*, 2015)

In fact, it has also been demonstrated that traditional mafia-like organized crime groups seem to be rather marginally involved, mostly as facilitators of the e-waste crime, and that the actors involved in the e-waste trafficking are mostly legal actors.

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2°) The simplification of customs procedures to promote competitive passage through ports

A the international level, the *Convention to Facilitate International Maritime Traffic (FAL)* was adopted on 9 April 1965 by the International Conference for the Facilitation of Travel and Maritime Transport of the IMO, and entered into force in 1967. The number of Contracting Governments to the Convention amounts to 118, and their merchant fleets represent a total of approximately 93.78% of the tonnage of the world fleet (IHS Fairplay, 2016).

The objective of the FAL Convention "is to make shipping as profitable as possible by easing the transfer of ships, cargo and passengers to port. Such profitability obviously has an influence on the growth of the sector and, consequently, on the economy" (*FAL Convention*, IMO)

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B. RECOMMENDATIONS FOR THE UNIFICATION OF CUSTOMS PROCEDURES CONTROL TO PREVENT DISTORTION OF COMPETITION IN E-WASTE LEGISLATION ENFORCEMENT

A certain number of recommendations can me given to prevent e-waste export countries to compete on the least implementation of the control of e-waste illegal shipment.

In fact, best practices in the implementation of customs and other states authorities control related to e-waste should be reason for export developing countries to favor ports where the control of e-waste is the most efficient.

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- Smarter inspections and investigations : According to the European Commission, only 2% of all the world's maritime containers are physically inspected by Customs authorities, and of the 2%, only a small number of inspections are done for WEEE shipments.

- As regards to investigation procedures, general methodology for investigating e-waste crime, should be put in place and the number of investigation should be increased.

- These issues can be appropriately handled by ensuring more effective and successful inspections through targeted border inspections.

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