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NOTES AND COMMENTS

INTERNATIONAL LAW AND THE TRANSBOUNDARY SHIPMENT OF HAZARDOUS WASTE TO THE THIRD WORLD: WILL THE BASEL CONVENTION MAKE A DIFFERENCE?

Marguerite M. Cusack*

INTRODUCTION

In 1983, the Organization for Economic Cooperation and Development (OECD) reported an astonishing statistic—a shipment of toxic waste crosses a national frontier approximately once every five minutes, 365 days a year.¹ Between 1986 and 1988, the industrialized nations shipped over three million tons of hazardous waste to the Third World.² Businesses have powerful economic and legal incentives to dump their hazardous wastes in developing countries. These incentives include: severe regulations covering domestic hazardous waste disposal,³ a greater cost of legal disposal of toxic waste within the nation of origin than the cost of transportation to and disposal in a developing nation,⁴ a shortage of adequate disposal sites within the industrialized nation,⁵ and the lack of hazardous waste disposal regulations in Third

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1. *OECD Adopts New Resolution to Control Transfrontier Movements*, 12 Int'l Env't Rep. (BNA) 116 (Mar. 9, 1989) [hereinafter *OECD Adopts New Resolution*].

2. J. VALLETTE, *THE INTERNATIONAL TRADE IN WASTES: A GREENPEACE INVENTORY* 7 (1989).

3. See *infra* notes 26-112 and accompanying text (discussing the restrictive regulations of the European Community, the OECD, and the United States).

4. See Handley, *Hazardous Waste Exports: A Leak in the System of International Legal Controls*, 19 ENVTL. L. REP. 10,171, 10,171 n.3 (1989) (estimating the amount of savings to be approximately \$75 per ton).

5. See Wassermann, *Attempts at Control Over Toxic Waste*, 15 J. WORLD TRADE L. 410, 410 (1981) (describing the problems of toxic waste in several industrialized countries); *Italy Moves to Resolve Problem with Nigeria on Dumping of Toxic Waste*, 11 Int'l Env't Rep. (BNA) 379 (July 13, 1988) [hereinafter *Italy Resolves Problem with Nigeria*] (stating that only ten percent of the approximate five million tons of

World nations.⁶ Indeed, the hazardous waste industry has evolved into a lucrative business.⁷

Within the last several years, however, internal and external pressures⁸ have forced industrialized nations to reconsider their domestic regulations and international agreements concerning the transfrontier shipment of hazardous waste to developing countries.⁹ Consequently, beginning with the 1972 United Nations Conference on the Human Environment in Stockholm (Stockholm Convention)¹⁰ and concluding

Italian toxic wastes can be disposed of in Italy); Handley, *supra* note 4, at 10,171 (describing how economies of scale may foster the export of toxic wastes). For example, Greece, Luxembourg, and Denmark cannot build complex disposal sites due to their small size. *Id.* at 10,171-72. Topographical and geological factors may also prevent nations from building adequate disposal facilities. *Id.* at 10,172; see also Comment, *International Regulation of Transfrontier Hazardous Waste Shipments: A New EEC Environmental Directive*, 21 TEX. INT'L L.J. 85, 86 (1985) [hereinafter Comment, *International Regulation*] (discussing the numerous reasons for the transfrontier movements of hazardous wastes from industrialized nations to the Third World).

6. See Handley, *supra* note 4, at 10,171 (stating that developing countries lack experience regarding the disposal of industrial hazardous byproducts).

7. See Main & Fromsom, *Who Will Clean Up by Cleaning Up*, FORTUNE, Mar. 17, 1986, at 96 (estimating that the toxic waste industry may be worth approximately \$300 billion).

8. See Marshall, *West Europe Has Its Fill of Toxic Waste*, L.A. Times, Feb. 28, 1989, at 1 (retelling the story of the *Karin B*, the Italian ship which searched for a port in which to dispose of its 2,000 tons of waste, only to be rejected and sent back to Italy); see also J. VALLETTE, *supra* note 2, at 11 (recounting the journey of the *Khian Sea*, a ship carrying 13,476 tons of incinerator ash from Philadelphia to Haiti, where it was rejected). The *Khian Sea* subsequently sailed to Yugoslavia, changed its name to the *Felicia* and attempted to port in fifteen different countries. *Id.* at 13. After each nation rejected *Felicia*, the ship appeared off the coast of Singapore—without any ash and with a new name—the *Pelicano*. *Id.*; see also *Outcry Grows in Africa over West's Waste-Dumping*, Wash. Post, June 22, 1988, at A15 [hereinafter *Outcry Grows*] (discussing Third World nations' recent anger and frustration over the increase in toxic waste disposal contracts between many industrialized and developing countries).

9. See generally Handley, *supra* note 4, at 10,171 (discussing the past and current efforts of the United States and European Community to regulate the transboundary shipment of toxic wastes); Rublack, *Controlling Transboundary Movements of Hazardous Waste: The Evolution Of A Global Convention*, 13 FLETCHER F. 113 (1989) (summarizing international agreements, including the development of the United Nations Draft Convention); Helfenstein, *U.S. Controls on International Disposal of Hazardous Waste*, 22 INT'L LAW. 775 (1988) (discussing the development of the efforts of the United States to control the extraterritorial disposal of toxic waste); Note, *Prior Informed Consent: An Emerging Compromise for Hazardous Exports*, 21 CORNELL INT'L L.J. 365 (1988) [hereinafter Note, *Prior Informed Consent*] (discussing various international agreements which have adopted prior informed consent procedures); Comment, *International Regulation*, *supra* note 5, at 85 (comparing the European Community's directives with the efforts of the United States and OECD to control the toxic waste exports).

10. *Stockholm Declaration on the Human Environment*, in *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 and Corr. 1 (1972), U.N. Sales No. E.73.II.A.14 and corr., reprinted in 11 I.L.M. 1416 (1972) [hereinafter U.N. Conference on the Human Environment]; see *infra* notes

with the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention),¹¹ industrialized nations' attitudes, positions, and international negotiations have changed dramatically. Developing nations that once accepted the dumping of industrialized nations' toxic wastes¹² in exchange for the economic benefits the industrialized nations provided¹³ today are vehemently opposed to the importation of hazardous wastes.¹⁴ Moreover, industrialized nations have recognized the moral,¹⁵ political,¹⁶ and environmental¹⁷ implications of exporting toxic wastes to developing nations.

Today, several national, regional, and international¹⁸ agreements exist, which restrict the transboundary shipment of toxic wastes. Although vastly improved in comparison to their predecessors, these

113-32 and accompanying text (tracing the history of the Basel Convention).

11. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *adopted and opened for signature* Mar. 22, 1989, reprinted in UNITED NATIONS ENVIRONMENTAL PROGRAMME, *BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL: FINAL ACT* [hereinafter *BASEL CONVENTION*], also reprinted in 28 I.L.M. 649 (1989).

12. See *Africa: The Wastebasket of the West*, 67 BUS. & SOC'Y REV. 48, 48-50 (1988) [hereinafter *Africa: The Wastebasket*] (discussing the various African countries that have accepted toxic wastes from developed countries). The West African nation of Guinea-Bissau, for example, has reportedly agreed to import three million tons of European waste each year for five years, potentially earning \$150-\$600 million. *Id.* at 48. Guinea-Bissau has an annual gross national product worth approximately \$150 million. *Id.*

13. See Leonard & Morell, *Emergence of Environmental Concern in Developing Countries: A Political Perspective*, 17 STAN. J. INT'L L. 281, 282 (1981) (stating that developing countries consider the control of global pollution within their own barriers irrelevant compared to the crucial economic problems they face). Indeed, according to Sri Lanka's United Nations ambassador during the 1970s, Third World nations would be willing to accept one hundred percent of the developed nations' toxic wastes and the associated risks in exchange for the opportunity to industrialize their economies. *Id.* at 282 n.2.

14. See *Africa: The Wastebasket*, *supra* note 12, at 49 (discussing an Organization of African Unity (OAU) member's description of disposal of hazardous waste in Africa as an "attack on Africa's dignity").

15. See *infra* note 53 (stating various testimony of Senators regarding the unethical practice of hazardous waste dumping in developing countries).

16. See *Italy Resolves Problem with Nigeria*, *supra* note 5, at 379 (stating that Nigeria discovered 2,000 tons of illegal Italian wastes in southern Nigeria). Consequently, Nigeria severed diplomatic ties with Italy. *Id.*

17. See Helfenstein, *supra* note 9, at 788 (noting that the improper disposal of toxic wastes can harm not only the host country, but also nearby countries sharing the air or water).

18. See *infra* notes 26-146 and accompanying text (discussing resolutions adopted by the United States Environmental Protection Agency (EPA), European Community (EC), Organization for Economic Cooperation and Development (OECD), and United Nations Environment Programme (UNEP)).

agreements lack the crucial elements necessary to satisfy all parties involved.¹⁹ Indeed, it appears that the industrialized and developing nations have reached an impasse.²⁰ As a result, many nations hope the Basel Convention will be the most far reaching and comprehensive international agreement to date.²¹

This Comment examines existing national and international laws and agreements regulating the transfrontier shipments of hazardous waste, focusing on the Basel Convention as the latest attempt at resolution. Part II presents a brief overview of the United States Hazardous and Solid Waste Amendments of 1984 (HSWA) to the Resource Conservation and Recovery Act (RCRA),²² the European Community (EC or the Community) Directive on Transfrontier Shipment of Hazardous Waste,²³ and the OECD Decision and Recommendation on Transfrontier Movements of Hazardous Wastes.²⁴ Part III discusses the Basel Convention's final adoptions, comparing them to the United Nations Environment Programme's Draft Conventions on the Control of Transboundary Movements of Hazardous Wastes.²⁵ Part IV sets forth recommendations concerning the solution to the dilemma of transportation of hazardous waste, and Part V provides conclusory remarks.

19. *Id.*

20. *See infra* notes 160-99 and accompanying text (noting that despite the ratification of the Basel Convention, developing countries and industrialized nations continue to disagree on fundamental objectives and key provisions).

21. BASEL CONVENTION, *supra* note 11.

22. The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984), (codified as amended at 42 U.S.C. §§ 6901-91) [*hereinafter* HSWA]; *see infra* note 41 and accompanying text (discussing 42 U.S.C. § 6938(f) which specifically addresses the export of hazardous wastes, including bilateral agreements between the United States and other countries).

23. *Council Directive on the Supervision and Control Within the European Community of the Transfrontier Shipment of Hazardous Waste*, 27 O.J. EUR. COMM. (No. L 326) 31 (1984) [*hereinafter* 1984 Directive], amended by 29 O.J. EUR. COMM. (No. L 181) 13 (1986) [*hereinafter* 1986 Amendment].

24. *Decision and Recommendation on Transfrontier Movements of Hazardous Wastes*, OECD Doc. C(83)180 (Feb. 13, 1984), reprinted in TRANSFRONTIER MOVEMENTS OF HAZARDOUS WASTE 13 (1985) [*hereinafter* 1984 Final Decision], also reprinted in 25 I.L.M. 1010 (1986).

25. *Second Revised Draft Convention on the Transboundary Movements of Hazardous Wastes*, UNEP/WG.182/3 (June 1988); *Third Revised Draft Convention on the Control of Transboundary Movements of Hazardous Wastes*, UNEP/WG.186/3 (June 1988).

I. INTERNATIONAL REGULATIONS OF TRANSFRONTIER MOVEMENTS OF HAZARDOUS WASTES

A. THE UNITED STATES

1. Historical Development

In 1969, the United States passed the National Environmental Policy Act (NEPA) in an effort to establish environmental protection policies.²⁶ Because NEPA does not apply extraterritorially,²⁷ however, President Carter issued Executive Order No. 12,264 which established, inter alia, procedures for the export of hazardous substances.²⁸ Although President Reagan revoked Order No. 12,264 in 1981,²⁹ RCRA had been passed in 1980.³⁰

Initially, RCRA only established regulations regarding domestic generation, treatment, transport, storage, and disposal of solid wastes.³¹ Consequently, factors such as the increase in the domestic generation of toxic waste³² and disposal costs,³³ the decrease in the number and

26. National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. § 4321 (1982 & Supp. III 1985)).

27. See *United States v. Catz Am. Co.*, 53 F.2d 425, 425-26 (9th Cir. 1931) (stating that a product banned by both an exporter and importer can still be exported). The importing nation, however, has the responsibility to make the product comply with its domestic laws. *Id.* at 426; see also *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1347-48 (D.C. Cir. 1981) (*construed in Helfenstein, supra* note 9, at 777) (stating that the environmental impacts of nuclear exports on a foreign nation should not be considered under NEPA); *Conservation Council v. Aluminum Co.*, 518 F. Supp. 270, 274-76 (W.D. Pa. 1981) (holding that no jurisdiction existed to stop a mining project in Australia on the grounds of environmental harm); Galli, *Hazardous Exports to the Third World: The Need to Abolish the Double Standard*, 12 COLUM. J. ENVTL. L. 71 (1987) (examining the difficulties of applying the law of the United States extraterritorially).

28. Exec. Order No. 12,264, 46 Fed. Reg. 4,659 (1981). This order sets forth guidelines regarding the export of banned or significantly restricted substances. *Id.*; see Helfenstein, *supra* note 9, at 778-9 (addressing Executive Order No. 12,264 as using notification and reporting requirements in addition to the Federal Hazardous Substance Act, 15 U.S.C. §§ 1261-76 (1988), and the Toxic Substances Control Act, 15 U.S.C. §§ 2604-06 (1988), which regulate both hazardous and chemical substances).

29. Exec. Order No. 12,290, 46 Fed. Reg. 12,943 (1981) *construed in Helfenstein, supra* note 9, at 779.

30. 42 U.S.C. §§ 6901-87 (1982).

31. *Id.*

32. See Porterfield & Weir, *The Export of U.S. Toxic Wastes*, NATION, Oct. 3, 1987, at 341 (stating that the amount of toxic waste produced in the United States is continually rising). According to the General Accounting Office, the volume of toxic waste produced increased from 9 to 247 million metric tons from 1970 to 1984. *Id.*; see also Handley, *supra* note 4, at 10,171 n.1 (stating that in 1985, the Chemical Manufacturer's Association approximated that the United States generated 212 million tons of toxic waste per year). The Office of Technology Assessment, however, estimated that the United States produces 575 million tons of hazardous waste each year. *Id.*

33. See Porterfield & Weir, *supra* note 32, at 341 (stating that the cost of disposal

capacity of domestic disposal sites,³⁴ and the public opposition to the location of disposal sites known as "Not In My Backyard" (NIMBY) compelled American businesses to view exportation of toxic wastes as a viable alternative. As a result, pressures from environmental interest groups and several foreign policy embarrassments³⁵ compelled Congress to address the exportation of hazardous waste and pass the HSWA to RCRA in 1984.³⁶

Pursuant to HSWA, the exporter must notify the United States Environmental Protection Agency (EPA) of its proposed shipment of hazardous waste³⁷ to another country. Within thirty days thereafter, the EPA and the State Department must inform the importing government that the law of the United States prohibits the exportation of hazardous waste without consent from the importing nation.³⁸ Following the receipt of consent or objection from the importing nation, the EPA must notify the exporter within thirty days.³⁹ HSWA also requires that the primary exporter report annually to the EPA a summary of the

in 1976 was approximately \$10 per ton; however, by 1987, the cost ranged from \$60 to over \$140 per ton); Postel, *Defusing the Toxics Threat: Controlling Pesticides and Industrial Waste*, in *WORLDWATCH PAPER* 79, 41 (1987) (stating that landfill prices have increased to \$240 per ton since the early 1970s and organic waste incineration in 1987 cost between \$500 and \$1,200 per ton).

34. See Pollock, *Mining Urban Wastes: The Potential for Recycling*, in *WORLDWATCH PAPER* 76, 15 (1987) (stating that according to the Institute for Local Self Reliance, over 50% of American cities will deplete their current landfills by 1990).

35. See Marshall, *supra* note 8, at 1 (discussing recent stories of international and Third World opposition to toxic waste dumping); see also Note, *Prior Informed Consent*, *supra* note 9, at 376 n.64 (stating that the United States State Department feared that the United States would be accused of "dumping its waste in the black man's backyard"); J. VALLETTE, *supra* note 2, at 17-91 (reporting a vast number of past, present, and pending schemes regarding the exportation of hazardous wastes).

36. HSWA, *supra* note 22; see Background and Summary of Final Rule, 51 Fed. Reg. 28,664 (1986), *codified at* 40 C.F.R. §§ 260-63, 271 (1988) (reviewing the 1984 amendment to RCRA (HSWA) as well as promulgating the provisions regulating the export of toxic wastes).

37. 40 C.F.R. § 262.53(a)-(b) (1988). Notification must be in writing, signed by the primary exporter, and include a description of: (1) the waste, (2) the estimated frequency of export of the waste, (3) the estimated total quantity, (4) points where the waste will enter and depart from each foreign country, (5) the method of transportation, (6) the manner in which the waste will be treated, stored, or disposed of in the importing country, (7) the name and address of the final receiver, and (8) the name of any of the transit countries. *Id.* at 262.53(a)(i)-(vii).

38. 40 C.F.R. § 262.53(c) (1988); see Handley, *supra* note 4, at 10,173 n.37 (stating that after the State Department receives the information within the notice of intent from the EPA Office of International Activities, it cables the information to the importing country). The embassy then submits a translated version to the importing nation's appropriate environmental agency. *Id.* Once the importing nation consents or objects, the process is reversed. *Id.*

39. 40 C.F.R. § 262.53(f) (1988).

types, quantities, frequency, and final destinations of all toxic wastes exported during the previous year.⁴⁰ HSWA's specific notification, consent, and annual report provisions are waived if the United States and the importing government have a formal bilateral agreement regarding the transfer of toxic waste.⁴¹

HSWA broadly defines "hazardous wastes" as substances that cause significant illnesses, an increase in mortality, or harm to individuals' health or to the environment.⁴² Accordingly, the EPA has listed specific solid wastes and characteristics of waste that HSWA regulates.⁴³ Concerning liability, however, HSWA lacks the requisite clear legislative intent to enable it to have extraterritorial effect.⁴⁴ Although private citizens and the United States government may bring suit regarding the noncompliance of HSWA's notification and consent requirements, foreign nations can only seek redress through the American tort system when imported toxic wastes cause injury within their borders.⁴⁵

2. Inadequacies

Although HSWA reflects the commitment and responsibility of the United States to control the exportation of hazardous wastes, it lacks adequate enforcement mechanisms. Generally, HSWA is poorly implemented due to the inefficient coordination between the EPA and the United States Customs Service,⁴⁶ as well as the inadequate resources of both government agencies.⁴⁷ More particularly, the lack of specificity in the notice of intent provision concerning what information the exporter

40. 40 C.F.R. § 262.56(a) (1988).

41. 42 U.S.C. § 6938(f) (Supp. V 1987). The United States currently has international agreements with Canada and Mexico. Rublack, *supra* note 9, at 116. Deviating from the EPA's notification-consent requirement, the treaty states that if Canada does not object to the notice of intent within thirty days, consent is implied. *Id.*

42. 42 U.S.C. § 6903(5) (1982).

43. 40 C.F.R. § 261.3(a)-(c) (1988) (defining solid waste); *see* 40 C.F.R. § 261.20-.24 (1988) (stating that a solid waste is considered a hazardous waste if it exhibits any of the following four characteristics: corrosivity, ignitability, reactivity, or toxicity).

44. *See* Handley, *supra* note 4, at 10,174 n.56 (citing *Foley Bros. v. Filardo*, 336 U.S. 281 (1949)) (discussing the need for legislative intent if the law is to have an extraterritorial effect).

45. Handley, *supra* note 4, at 10,174.

46. *See EPA's Program on Hazardous Waste Exports Needs Improvements, Inspector General Says*, 11 Int'l Env't Rep. (BNA) 434 (Aug. 10, 1988) [hereinafter *EPA's Program Needs Improvements*] (denoting the inadequate control of toxic waste exports due to the insufficient communication between the Customs Service and the EPA).

47. *See* Porterfield & Weir, *supra* note 32, at 341 (noting EPA enforcement official Gary Steakley's discussion of the consistent lack of funding for enforcement).

must provide⁴⁸ and the ambiguity in the definition of hazardous waste⁴⁹ further detract from proper implementation of HSWA. In addition, HSWA does not contain provisions which require an exporter to receive the prior consent of transit countries through which toxic wastes may travel,⁵⁰ nor prohibit exportation if reason exists to believe that inadequate disposal is occurring.⁵¹ Finally, the lack of detailed obligations concerning liability⁵² creates large loopholes within HSWA.

On May 31, 1989, Congressman Synar, a Democrat from Oklahoma, and Congressman Conyers, a Democrat from Missouri, introduced the Waste Export Control Act of 1989.⁵³ The bill includes: first, a require-

48. See Handley, *supra* note 4, at 10,174 n.63 (citing EPA, PROGRAM TO CONTROL EXPORTS OF HAZARDOUS WASTE, Audit Report No. E1D37-05-04560-80855, at 14 (1988)) (stating that exporters often give insufficient information regarding the handling and disposal of the hazardous waste in their notices of intent). Indeed, there have been cases in which exports of toxic wastes have occurred without any notice of intent. *EPA's Program Needs Improvements, supra* note 46, at 434.

49. See *EPA Adopts New Enforcement Strategy to Curb Illegal Exports of Hazardous Waste*, 11 Int'l Env't Rep. (BNA) 274 (May 11, 1988) [hereinafter *EPA Adopts New Strategy*] (discussing sham recycling, methods by which generators or handlers classify waste as recyclable to avoid HSWA regulations). The regulations also exempt recycled waste, such as commercial chemical materials that are to be reclaimed. 40 C.F.R. § 261.4 (1988). The EPA has further determined that certain toxic wastes defined in state regulations should not be included in HSWA's provisions. 40 C.F.R. § 261 (1988).

50. Helfenstein, *supra* note 9, at 782. Although the exporter must notify any transit country of the shipment of hazardous waste, the transit country's prior consent is not a prerequisite of exportation. 40 C.F.R. § 262.53(e)-(f) (1988). EPA requires prior consent only for a country "which is actually ending up with the waste whether through disposal, treatment or long-term storage," not one in which "mere transportation through or temporary storage incidental to transportation" would occur. *Id.* at 28,666-67. However, EPA did not place a time limit on the length of "temporary" storage vis-a-vis "ultimate" storage. *Id.* at 28,672.

51. Handley, *supra* note 4, at 10,181; see *U.S. Would Tie Waste Exports to Bilateral Agreements, Thomas Says*, 11 Int'l Env't Rep. (BNA) 472 (Sept. 1988) (discussing how the United States favors "a basic presumption" that it would not export waste if a Third World country opposed importation or an inadequate mechanism existed for handling or disposal of the waste).

52. HSWA, *supra* note 22, at 42 U.S.C. § 6928 (stating that although HSWA does provide criminal penalties for knowingly exporting toxic wastes without the prior consent of the importing nation or in contravention of an agreement between the United States and the importer, an exporter's liability does not extend to personal injury).

53. H.R. 2525, 101st Cong., 1st Sess. (1989). The bill was introduced in the House Government Operations Subcommittee on Environment, Energy & Natural Resources. *Id.*; see Handley, *supra* note 4, at 10,181 (stating that an interagency working group, representing the EPA and the State Department, met at the end of President Reagan's second term). The working group recommended two possibilities to modify the 1986 amendment under this bill: (1) an increase in information supplied to the importing country, including the domestic disposal requirements of the United States, and (2) a ban on hazardous waste export, except with regard to any bilateral agreement between the United States and the importing nation. *Id.* Because the United States Office of Management and Budget (OMB), however, considered the transboundary movement of

ment that the importing nation handles the toxic waste in as strict a fashion as the United States; second, a waste minimization screening procedure that compels an exporter to make "reasonable efforts" to halt the generation of the waste; third, a waste export permit mechanism; and, fourth, an expansion of the Superfund liability system.⁵⁴ The bill, however, does not define "reasonable efforts" and does not include a provision that would enable the United States to halt exports of waste that are found not to be handled in an environmentally sound manner.⁵⁵ The Bush administration is supporting other draft legislation that does not contain the "as strict as" language.⁵⁶ Instead, an exporter would be permitted to transport toxic wastes only if the developing nation could manage the waste in an "environmentally sound manner."⁵⁷

B. THE EUROPEAN COMMUNITY

1. Historical Development

The Treaty of Rome⁵⁸ established the EC in 1957,⁵⁹ but did not ex-

hazardous waste to be a "free-market" issue which should be limited to agreements between businesses and government, Congress never acted on the recommendation. *Id.* at 10,182; see also *U.S. Congress Considers Limiting Waste Exports*, GREENPEACE WASTE TRADE UPDATE, July 15, 1989, at 4 [hereinafter GREENPEACE WASTE TRADE UPDATE] (analyzing House Report 2525 from the 101st Congress in 1989).

54. GREENPEACE WASTE TRADE UPDATE, *supra* note 53, at 4-5; see *House Bill Outlines Strict Standards for Limiting Hazardous Waste Export*, 13 INSIDE EPA WEEKLY REP., July 14, 1989, at 7 (restating the tougher requirements demanded by the Synar and Conyers legislation).

55. GREENPEACE WASTE TRADE UPDATE, *supra* note 53, at 4.

56. *Id.*

57. *Id.*

58. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 G.R. Brit. T.S. No. 1 (Cmd. 5179—II) (official English trans.), 298 U.N.T.S. 11 (1958) (unofficial English trans.) [hereinafter *Treaty of Rome*].

59. European Communities Commission, TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES, (1983) [hereinafter TREATIES], at 23. The EC is presently composed of twelve member nations: Belgium, Denmark, the Federal Republic of Germany, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom. COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN COMMUNITY ENVIRONMENTAL LEGISLATION, 1967-1987 (1987) [hereinafter EC ENVIRONMENTAL LEGISLATION], at i. Institutionally, the EC is divided into four main bodies: the Commission, the Council, the Court of Justice, and the European Parliament. TREATIES, *supra*, at 23. The Commission, consisting of seventeen Commissioners who the Community chooses, has the power to propose legislation and represent the interest of the EC. *Id.* at 25. The Council is the EC's main legislative branch and consists of one representative minister from each nation; moreover, the Council has the power to act upon the Commission's proposals. *Id.* at 36. The Commission meets once a week while the Council gathers twice a year. EC ENVIRONMENTAL LEGISLATION, *supra*, at i-ii. Members of the Parliament, elected every four years by the citizens of each nation, are divided into political groupings rather than groups designated by nationality. *Id.* at iii. The Parliament primarily functions as an advisory body. TREATIES, *supra*, at 32. With

pressly address environmental issues. The EC, like the United States, eventually became aware of the need to formulate internal environmental policies. Accordingly, the Community initiated a series of Environmental Action Programmes⁶⁰ as well as legislation addressing environmental issues.⁶¹ As the Community generated more waste,⁶² however, member states were confronted with the increasing cost of disposal as well as a decreasing number of adequate disposal sites.⁶³ Because of these emerging problems, member states began to export hazardous wastes to other member nations and to developing countries.⁶⁴

Propelled by the Seveso disaster in 1976,⁶⁵ however, the EC adopted the Directive on the Transfrontier Movement of Toxic Waste in 1984 (1984 Directive).⁶⁶ The 1984 Directive requires that exporters give

the advent of the Single European Act, however, in limited instances the Council cannot act without the Parliament's consent. EC ENVIRONMENTAL LEGISLATION, *supra*, at iii. The Court of Justice's thirteen appointed judges decide cases brought between the EC institutions, the member states and the Commission, and by individuals against member nations or the Commission. TREATIES, *supra*, at 39-42.

60. See EC ENVIRONMENTAL LEGISLATION, *supra* note 59, at vi (noting that the EC has presently adopted four such programs during the following time periods: (1) 1973-77, (2) 1977-82, (3) 1982-86, and (4) 1987-92); *Fourth Environment Action Programme*, 30 O.J. EUR. COMM. (No. C 328) 6 (1987) [hereinafter *Fourth Environment Action Program*] (noting the four EC environmental programs). Applying the Fourth Environment Action Program, the EC intends to focus its efforts on implementation of EC legislation by member nations. EC ENVIRONMENTAL LEGISLATION, *supra* note 59, at vi; see also Geddes, *1992 and the Environment—Sovereignty Well Lost?*, New L.J., Nov. 11, 1988, at 826 (discussing how the Fourth Environment Action Program elevates environmental issues to a central position on the EC agenda).

61. See *Fourth Environment Action Program*, *supra* note 60, at 7 (noting that the Single European Act, as amending the Treaty of Rome, reflects the EC's pursuit of environmental protection). Title VII of the Single European Act, through Articles 130R to 130T, focuses on preventive action and the protection and improvement of the quality of the environment. *Id.*; see also EC ENVIRONMENTAL LEGISLATION, *supra* note 59, at I.1-6 (providing a brief overview of past EC legislation regarding the environment); Comment, *International Regulation*, *supra* note 5, at 96 (describing how transportation of toxic wastes between member nations was once based on ad hoc bilateral agreements).

62. Handley, *supra* note 4, at 10,171 (estimating that the EC generates approximately 30 million metric tons of waste each year).

63. Rublack, *supra* note 9, at 115.

64. Comment, *International Regulation*, *supra* note 5, at 96 (stating that approximately ten to fifteen percent of EC hazardous waste is disposed outside of the generating country).

65. *Id.* at 95 (noting that the removal of hazardous waste was required after a chemical factory in Seveso, Italy exploded). In 1983, 41 barrels of Seveso waste were found hidden in France after having entered the country undetected. *Id.*; see O'Connor, *Issues Involved in Draft Proposal for Directive on Civil Liability for Damage Caused by Waste Examined*, 10 Int'l Env't Rep. (BNA) 540 (Oct. 14, 1987) (referring to the 1984 Directive as the "Seveso 2").

66. 1984 Directive, *supra* note 23; see EC ENVIRONMENTAL LEGISLATION, *supra* note 59, at iv (stating that the 1984 Directive takes its authority from the Treaty of Rome in which article 100 gives authority to the Council to pass directives affecting

prior notice to the competent authorities within the member state⁶⁷ when hazardous waste is shipped to another member state, to nonmember states, or from a nonmember state to a Community member state.⁶⁸ When the competent authorities acknowledge receipt of the notification,⁶⁹ a shipment accompanied by the uniform consignment note may proceed.⁷⁰ The 1984 Directive requires each member state to file a report every two years regarding all exports of hazardous wastes.⁷¹ The EC Directive on Toxic and Dangerous Waste of 1978 (1978 Directive) defines hazardous waste.⁷² Although the 1978 Directive sets forth a list of toxic substances, each member state must ultimately legislate the nature, quantities, and concentrations of toxic wastes which constitute a danger to the environment.⁷³ Furthermore, member states may desig-

member nations, and article 235 allows the Council to address objectives). *Id.*; Lutz, *The Export of Danger: A View from the Developed World*, 20 INT'L L. & POL. 629, 651 n.75 (1988) (reviewing briefly articles 100 and 235). The EC Council uses directives to harmonize members' national laws and regulations. *Id.* at 652 n.79. The Treaty of Rome, however, failed to provide the Council with the specific power of implementation. *Id.*; see also Anderson, *Inadequate Implementation of EEC Directives: A Roadblock on the Way to 1992?*, 11 B.C. INT'L & COMP. L. REV. 91, 91 (1988) (noting that according to article 189 of the Treaty of Rome, directives are binding upon each member nation); *But see EC Rules on Waste Exports Often Ignored, Ministers Disagree on Tightening Standards*, 11 Int'l Env't Rep. (BNA) 375 (July 13, 1988) [hereinafter *EC Rules Often Ignored*] (stating that individual EC countries often ignore the EC legislation controlling the export of toxic wastes); Lutz, *supra*, at 652 n.79 (discussing that because member nations are permitted to choose the forms and methods of implementing a directive, instances of inefficient and inadequate legislation on the part of EC members arise); Shackleton, *The Politics of Fishing in Britain and France: Some Lessons for Community Integration*, 9 J. EUR. INTEGRATION 29, 29 (1985) (stating that differences in economic priorities and policies between two member nations may reveal the reasons for broadly worded directives).

67. 1984 Directive, *supra* note 23, art. 3(2), at 33 (stating that notification is made through the use of a "uniform consignment note").

68. *Id.* art. 3(1), at 33. The notice must include information on:
the source and composition of the waste . . . the provisions made for routes and insurance against damage to third parties, the measures taken for safe transit and . . . compliance by the carrier with any conditions laid down by the [m]ember [s]tates concerned . . . and existence of a contractual agreement with the consignee . . . who should possess adequate technical capacity for the disposal of the waste.

Id. art. 3, at 33. The consignee is defined as the party "to whom the waste is shipped for disposal." *Id.* art. 2, at 33.

69. 1984 Directive, *supra* note 23, art. 4(b), at 34 (stating that authorities have 15 days to request that the exporter comply with conditions).

70. Handley, *supra* note 4, at 10,175.

71. 1984 Directive, *supra* note 23, art. 13(1), at 35. Each report must contain irregularities in the transport of waste, and a description of the quantity and type of waste that has been generated and exported, as well as received. *Id.*

72. EC ENVIRONMENTAL LEGISLATION, *supra* note 59, at III.6.

73. Comment, *International Regulation*, *supra* note 5, at 99; see O'Connor, *supra* note 65, at 541 (noting that permitting member nations to define waste often results in inconsistent national laws).

nate border crossing points through which the hazardous waste must pass.⁷⁴

In 1986, the EC Council amended the 1984 Directive (1986 Amendment).⁷⁵ The 1986 Amendment improved the 1984 Directive by requiring every exporter to obtain the agreement of the receiving nonmember or the transit country before the hazardous waste is exported, i.e., prior informed consent.⁷⁶

2. *Inadequacies*

Both the 1984 Directive and the 1986 Amendment, however, lack provisions that expressly delineate liability obligations,⁷⁷ or require exporters to have insurance.⁷⁸ Moreover, inadequate specificity of the 1984 Directive and 1986 Amendment on what constitutes hazardous waste has resulted in either insufficient or inconsistent national laws.⁷⁹ This ambiguity in definition presents problems for the exporters and dangerous consequences for Third World transit and importing countries.⁸⁰

In addition, a number of EC member states have not implemented

74. 1984 Directive, *supra* note 23, art. 9, at 35.

75. 1986 Amendment, *supra* note 23, at 13.

76. *Id.* art. 3(4), at 14.

77. See 1984 Directive and 1986 Amendment, *supra* note 23 (noting the absence of any liability provision); O'Connor, *supra* note 65, at 540 (stating that in 1987, it appeared that products liability was considered inapplicable to hazardous waste). *But see* Handley, *supra* note 4, at 10,176 (discussing article 11 of the 1984 Directive in which products liability was being considered as applicable to hazardous wastes); Commission Proposes 'Polluter Pays' Rule for Recovering Environmental Damage Costs, 12 Int'l Env't Rep. (BNA) 379 (Aug. 9, 1989) (discussing the EC's new proposal which would hold producers of toxic waste strictly liable for any damages resulting from the waste). The new proposal attempts to harmonize legislation within the EC, provide an incentive to invest in clean technologies, and encourage the minimization of waste generation. *Id.* Although it also constructs a separate category of liability for damage to the environment, the new proposal restricts coverage to "major and persistent" environmental damage, prohibits the imposition of punitive damages, and limits legal action to public authorities. *Id.*

78. See Comment, *International Regulation*, *supra* note 5, at 102 (noting that the 1984 Directive only grants member nations an opportunity to inquire into insurance coverage); see also *Proposal for a Council Directive on Hazardous Waste*, 31 O.J. EUR. COMM. (No. C 295) 4 (1988) (discussing that although the 1984 Directive instructed the Council to propose an insurance provision by September 1988, the 1988 Proposal does not address insurance); O'Connor, *supra* note 65, at 542 (stating that the working party on civil liability considered the insurance question to be a political rather than a legal issue).

79. See *supra* notes 77-84 and accompanying text (discussing the member nations' inadequate implementation of EC directives).

80. See Comment, *International Regulation*, *supra* note 5, at 100 (noting that due to different definitions of waste, confusion may arise when a shipment of hazardous waste involves more than one member nation).

any legislation controlling the exportation of toxic waste to developing countries pursuant to the 1984 Directive and 1986 Amendment.⁸¹ This fact reflects an underlying defect in the entire EC institutional structure.⁸² However, in December 1989, during negotiations for the Lome IV Convention⁸³ the EC agreed to ban all hazardous waste exports to sixty-eight African, Caribbean, and Pacific nations (ACP).⁸⁴

C. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT

1. Historical Development

In 1974, the OECD⁸⁵ established the Waste Management Policy Group (the Group)⁸⁶ to address international waste problems on three fronts: first, source reduction; second, material reclamation; and, third, transportation and disposal of toxic waste.⁸⁷ In 1984, however, the OECD focused exclusively on the transfrontier movement of toxic waste when it adopted the Decision and Recommendation on Transfrontier Movements of Hazardous Waste (1984 Final Decision).⁸⁸ The

81. See J. VALLETTE, *supra* note 2, at 114 (noting that only Greece, Belgium, and Denmark have implemented the 1984 Directive and the 1986 Amendment into national law); Humphrey, *Effective Supervision of Community Law: Liability of Governments*, SWISS REV. INT'L COMPETITION L. 81, 82 (1984) (observing that it is common for more than two years to pass before an EC member nation implements a judgment from the Court of Justice); see also *EC Rules Often Ignored*, *supra* note 66, at 375 (discussing a scheme which passed off highly toxic waste as safe industrial chemicals in an illegal agreement between an Italian businessman and a Nigerian laborer).

82. See Easson, *The Court of Justice of the European Communities: Jurisprudence During 1985*, 10 J. EUR. INTEGRATION 79, 79 (1986) (noting that of the 113 cases brought before the Court of Justice in 1984, 74 of the cases concerned the failure to implement EC directives).

83. GREENPEACE WASTE TRADE UPDATE, Dec. 1989, at 2 [hereinafter UPDATE] (noting that the Lome Convention focuses on trade and development aid between the EC and ACP).

84. *Id.*; see GREENPEACE WASTE TRADE UPDATE, *supra* note 53, at 4 (discussing the prior agreement in principle reached between the EC and ACP); *Id.* (noting that the ACP nations disagreed on the EC's proposed exceptions to the ban on waste exportation).

85. Lutz, *supra* note 66, at 654 n.88 (stating that the OECD is exclusively composed of industrialized democracies: Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States).

86. Rublack, *supra* note 9, at 119.

87. *Id.*; see *OECD Nations Agree to Strict Controls on Hazardous Waste Exports to Non-Members*, 9 Int'l Env't Rep. (BNA) 238 (July 9, 1986) [hereinafter *OECD Nations Agree*] (noting that OECD member countries were confronted with the growing problem of waste disposal both within each member's borders as well as between OECD countries).

88. 1984 Final Decision, *supra* note 24; see Hannenquart, *The Responsibilities of*

1984 Final Decision required member nations to notify the countries involved of any transboundary movement of hazardous waste.⁸⁹

The OECD also recommended principles for member nations to follow in the implementation of the 1984 Final Decision. First, any party involved in the export of toxic waste must obtain authority from the nations of origin, transit, and final destination.⁹⁰ Second, the nation of generation must apply its domestic laws of toxic waste exportation as stringently to exports as to domestic movements.⁹¹ Third, the exporter must provide the exporting, transit, and importing nations with adequate and timely information regarding the origin, composition, and quantities of waste; any environmental risks involved in transport; the conditions of carriage; and the identity of all parties.⁹² Fourth, an importer may object to a toxic waste shipment if the objection is in accordance with its own domestic law.⁹³ Fifth, if the importer cannot complete safe disposal, the generator must reassume responsibility for the waste, or alternatively, reimport it.⁹⁴

The OECD improved the 1984 Final Decision by adopting the Decision-Recommendation on Exports of Hazardous Wastes in 1986 (1986 Export Decision).⁹⁵ In addition to the notification requirements imposed on exporting countries, the 1986 Export Decision requires member nations to prohibit exports unless the importing nation consents to

the Competent Authorities in Regard to the Transfrontier Movements of Hazardous Wastes, in TRANSFRONTIER MOVEMENTS OF HAZARDOUS WASTE 23-29 (1985) (analyzing the various obligations of governments working to control the transboundary shipment of toxic wastes under the decisions of the EC, OECD, and UNEP); Helfenstein, *supra* note 9, at 780 n.52 (noting that although OECD decisions are binding on member nations, they obligate only those nations that approve of the decision). Decisions must also comply with each approving nation's domestic constitutional procedures. *Id.*; Lutz, *supra* note 66, at 654 (stating that although OECD recommendations are non-binding, they strongly influence the international legal community).

89. Helfenstein, *supra* note 9, at 785; see 1984 Final Decision, *supra* note 24, at 15 (noting that the 1984 Decision requires member nations to ensure that the competent authorities of the countries concerned receive adequate and timely information).

90. 1984 Final Decision, *supra* note 24, at 14.

91. *Id.* at 4.

92. *Id.* at 5.1, 5.2.

93. *Id.* at 7.

94. *Id.* at 3; see DePuy, *International Law Measure to Implement the Principles in the OECD Decision on Transfrontier Movements of Hazardous Waste*, in TRANSFRONTIER MOVEMENTS OF HAZARDOUS WASTE 39 (1985) (discussing the content and implications of the 1984 Final Decision and the measures that member countries need to take for implementation).

95. Handl, *Environmental Protection and Development in Third World Countries: Common Destiny-Common Responsibility*, 20 N.Y.U.J. INT'L L. & POL. 603, 617 n.50 (1988) (citing Council Decision-Recommendation on Exports of Hazardous Wastes from the OECD Area, OECD Doc. C(86)64 1(iii) (June 5, 1986) [hereinafter 1986 Export Decision]).

the exports.⁹⁶ Furthermore, an OECD member country must provide prior notification to any transit country involved.⁹⁷ Finally, according to the 1986 Export Decision, a member nation must ensure that the importing country has adequate disposal facilities.⁹⁸

2. Present Status

Because the 1984 Final Decision and the 1986 Export Decision neglected to resolve several key issues,⁹⁹ the OECD decided to make improvements and aimed to finalize a draft law in time for the Basel Convention.¹⁰⁰ Because several parties usually collect, treat, and handle the waste, the Group debated the proper definition of "exporter."¹⁰¹ It considered the type and extent of notification that the exporting country must provide to the importing country.¹⁰² Further debate focused on the issue of whether consent from transit countries should be required prior to the shipment of toxic waste,¹⁰³ as well as the general issue of liability.¹⁰⁴ The Group also addressed the issue of whether "bona fide"

96. Helfenstein, *supra* note 9, at 785.

97. *Id.*; see *OECD Nations Agree*, *supra* note 87, at 238 (discussing the OECD 1986 Export Decision).

98. Helfenstein, *supra* note 9, at 785.

99. See *infra* notes 101-07 and accompanying text (discussing the variety of issues the Waste Management Policy Group has debated).

100. See *OECD Adopts New Waste Resolution to Control Transfrontier Movements*, 12 Int'l Env't Rep. (BNA) 116 (Mar. 1989) (discussing the waste control resolution that the OECD prepared for the Basel Convention); see also *Resolution of the Council on Control of Transfrontier Movements of Hazardous Wastes*, OECD Doc. C(89)1 (Jan. 30, 1989) [hereinafter *Resolution 1989*] (declaring that progress has been made in the development of a draft pursuant to the Resolution of the Council on International Cooperation Concerning Transfrontier Movements of Hazardous Wastes of June 20, 1985).

101. *Group Proposes Notification Procedures for Transborder Hazardous Waste Shipments*, 10 Int'l Env't Rep. (BNA) 57 (Feb. 11, 1987) [hereinafter *Group Proposes Notification*].

102. *Pace Slow on Proposed OECD Agreement on Transfrontier Toxic Waste Movement*, 11 Int'l Env't Rep. (BNA) 220 (Apr. 13, 1988) [hereinafter *Pace Slow*]. Prior informed choice requires the exporting nation to advise the importer of the shipment and provides the importer with a period in which to refuse receipt. *Id.* Prior notification enables the importing nation to refuse toxic waste shipments only if it has national laws requiring refusal. *Id.*; see *Group Proposes Notification*, *supra* note 101, at 57 (discussing the possibility of the OECD's adoption of a prior notification policy similar to the EC).

103. See *OECD Environment Official Optimistic About Accord on Movement of Toxic Wastes*, 12 Int'l Env't Rep. (BNA) 116 (Mar. 1989) [hereinafter *OECD Official Optimistic*] (discussing the various problematic issues that the OECD solved).

104. See *Group Proposes Notification*, *supra* note 101, at 57 (discussing the different issues presented to the Waste Management Policy Group); see also *OECD Official Optimistic*, *supra* note 103, at 116 (stating that the issue of liability remained one of the crucial issues to be resolved prior to the Basel Convention); *United States Alone in Seeking to Limit Scope of New OECD System on Waste Movement*, 10 Int'l Env't

recyclable waste should have less stringent notification procedures, including a shorter response time.¹⁰⁵ Finally, the Group feverishly contested the definitions of "hazardous waste"¹⁰⁶ and "adequate disposal facilities."¹⁰⁷

The OECD finally adopted a number of resolutions and decisions designed to control the transboundary movement of hazardous waste to developing countries.¹⁰⁸ The OECD will use the EC's core list of hazardous chemicals to resolve the most contentious issue which is the definition of "hazardous waste."¹⁰⁹ Moreover, a member nation must pro-

Rep. (BNA) 315 (July 8, 1987) [hereinafter *U.S. Alone*] (discussing the position of the United States that under the OECD draft, an exporting nation may take legal action against an exporter who provides false information).

105. See *Group Proposes Notification*, *supra* note 101, at 57 (discussing the issues of the amount of time given to an importing nation to respond to an exporter's notification and the result if the importing nation fails to respond in a timely fashion).

106. See *OECD System on Transborder Waste Shipments Faces Legal Snags from U.S., EEC Systems*, 10 Int'l Env't Rep. (BNA) 199 (May 13, 1987) (stating that the United States claimed that the OECD's core list of definitions was overly broad and could not be enforced under HSWA); *U.S. Alone*, *supra* note 104, at 314-15 (discussing the opposition of many of the OECD member countries to the demand of the United States to reduce the OECD's core list of wastes); *U.S. Position Seen Jeopardizing Work on Transboundary Waste Shipments*, 10 Int'l Env't Rep. (BNA) 371 (Aug. 12, 1987) (noting that the sudden demand of the United States to limit the definition of hazardous waste was due in large part to the Reagan administration's conclusion that the American industry's desire to reduce costs should outweigh environmental protection); *U.S. Looking for Acceptable Definition of Hazardous Waste to Enable Agreement*, 10 Int'l Env't Rep. (BNA) 437 (Sept. 9, 1987) (noting the opinion of the United States that an expansion of the hazardous waste definition would cause heavy administrative burdens); *Pace Slow*, *supra* note 102, at 220 (stating the EC's opinion that the position of the United States on the definition of hazardous waste was untenable). The EC noted that inherent in international agreements is the demand to "upgrade internal legislation." *Id.*; see also Rublack, *supra* note 9, at 121 (reiterating the EC's opinion that the objective of global agreements was to "upgrade national legislation toward a jointly defined standard"); *U.S. Alone*, *supra* note 104, at 315 (noting that at one point, the United States considered "splitting the difference" - the UNEP would determine what material was "hazardous" and the OECD would determine the definition for "waste").

107. See *OECD Group Makes Progress on Agreement to Control Transfrontier Shipments of Waste*, 9 Int'l Env't Rep. (BNA) 111 (Apr. 9, 1986) [hereinafter *OECD Group Makes Progress*] (discussing the difficulty in deciding on a workable definition of "adequate").

108. See *OECD Adopts New Resolution*, *supra* note 1, at 116 (discussing the new OECD resolution of January 30, 1989); *Transfrontier Waste 'A Difficult Issue' Despite Caracas Conference, Long Stale*, 11 Int'l Env't Rep. (BNA) 377 (July 13, 1988) [hereinafter *Waste 'A Difficult Issue'*] (discussing the OECD's May 27, 1988 Final Decision).

109. See *Waste 'A Difficult Issue'*, *supra* note 108, at 377 (discussing the OECD's decision on June 6, 1988 in Caracas, Venezuela); see also *Developed, Developing Countries Disagree Over Elements of Waste Shipment Agreement*, 11 Int'l Env't Rep. (BNA) 377 (July 13, 1988) [hereinafter *Developed, Developing Countries Disagree*] (acknowledging the OECD's consideration of the core list of hazardous wastes); *Resolution 1989*, *supra* note 100, at 1-2 (noting the OECD's adoption of a definition for

hibit any export of hazardous waste if there is reason to believe that the waste will not be disposed of in an environmentally sound manner.¹¹⁰ The OECD, however, fails to require exporting nations to receive consent from a transit country before shipping the waste.¹¹¹ Moreover, the OECD decided to leave the issue of liability for a future international meeting.¹¹²

II. THE BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL, FINAL ACT

A. THE HISTORY OF THE BASEL CONVENTION

The 1972 United Nations Conference on the Human Environment at Stockholm¹¹³ recommended the establishment of the United Nations Environment Programme (UNEP).¹¹⁴ Initially providing an interna-

both "wastes" and "hazardous wastes"); Rublack, *supra* note 9, at 121 (noting that the core list of hazardous wastes consists of wastes which originate from industrial sources or wastes having particular constituents). Additionally, the OECD's list covers hazardous waste of both the importing and exporting country. *Id.*

110. See Handley, *supra* note 4, at 10,181 n.179 (citing OECD, *Finalization of the Draft International Agreement on Control of Transfrontier Movements of Hazardous Wastes* (Sept. 5, 1988)) (discussing the proposed provisions of the UNEP and OECD treaties); see also GREENPEACE WASTE TRADE UPDATE, *supra* note 53, at 3 (noting Greenpeace's and several African nations' criticism of the phrase "environmentally sound manner" as ambiguous).

111. See *Waste 'A Difficult Issue'*, *supra* note 108, at 377 (stating that the OECD Conference in Caracas did not resolve the rights of transit countries); *Differences Said to Remain on Accords Being Developed Separately by OECD, UNEP*, 11 Int'l Env't Rep. (BNA) 587 (Nov. 1988) [hereinafter *Differences Said to Remain*] (noting that although the OECD would require the exporter to send a 15 day notification to both the importing and transit country, the transit country's tacit consent is presumed if the time period elapses).

112. See *infra* note 145 and accompanying text (stating that industrial nations do not like to consider the issue of liability despite the urging of some of the African nations).

113. *U.N. Conference on the Human Environment, supra* note 10; *The United Nations Environment Programme After a Decade: The Nairobi Session of a Special Character, May 1981*, 12 DEN. J. INT'L L. & POL'Y 269, 269-70 (1983) [hereinafter *After a Decade: The Nairobi Session*]. The United Nations Conference on the Human Environment at Stockholm gathered together 1,200 delegates from over 400 international organizations and 113 countries. *Id.*; see Stein, *The Settlement of Environmental Disputes: Towards a System of Flexible Dispute Settlement*, 12 SYR. J. INT'L L. & COM. 283, 284 (1985) (discussing principles 21 and 22 of the Declaration on the Human Environment). Principle 21 acknowledges all nations' sovereign right to exploit domestic resources, but sets forth each nation's responsibility to ensure that activities conducted within domestic borders do not damage the environment of other countries. *Id.* Principle 22 directs nations to cooperate and establish international laws regarding liability and compensation in the event that a nation's activities cause environmental harm within another nation. *Id.* at 285.

114. See Helfenstein, *supra* note 9, at 784 (stating that the United Nations estab-

tional mechanism for the exchange of environmental information,¹¹⁵ UNEP established specific environmental agendas and recommendations.¹¹⁶ In 1982, UNEP formally decided to tackle the international transportation and disposal of toxic wastes after an ad hoc working group of environmental experts met in Montevideo, Paraguay.¹¹⁷ Thereafter, in 1985, UNEP issued the Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes.¹¹⁸

In June 1987, UNEP established a Draft Convention on the Transboundary Shipment of Hazardous Waste¹¹⁹ and created an ad hoc

lished UNEP to focus on global environmental problems); *see also After a Decade: The Nairobi Session, supra* note 113, at 271 (noting that the UNEP consists of a three-part functional framework: environmental assessment, environmental management, and supporting measures). The Environmental Assessment mechanism collects and reviews scientific data. *Id.* The environmental management component establishes goals, consults and coordinates, and examines the practical application of the data compiled through the environmental assessment branch. *Id.* Supporting measures include education, training, financing, public information and technical coordination. *Id.*

115. *See Helfenstein, supra* note 9, at 784 (discussing the role of the United States in international agreements, including UNEP).

116. *See id.* (noting the accomplishments of UNEP); *see also After a Decade: The Nairobi Session, supra* note 113, at 270 (stating that the UNEP's purpose is to act as a catalyst which would coordinate and stimulate action on an international level).

117. *See Bohte, UNEP's Environmental Law Activity on International Transport and Disposal of Toxic and Dangerous Wastes, 4 UNEP INDUST. & ENV'T 1, 1 (1983)* (discussing the Conclusions and Recommendations of Montevideo and its Programme for the Development and Periodic Review of Environmental Law of November 1981). Two ad hoc meetings of experts laid the foundation for the Montevideo Environmental Law Programme: (1) developing nations met in Geneva, Switzerland between September 7-9, 1981, and published the Summary of the Deliberations at the Meeting of Experts of Some Developing Countries on Environmental Law (UNEP/IG.28/3, Annex IV); and (2) a group of experts on environmental law met between September 9-18, 1981, in Geneva, Switzerland. *Id.* at 1-2.

118. Helfenstein, *supra* note 9, at 784 (citing U.N. Environment Programme, U.N. Doc. EP/WG.122/L.1/Add.3/Rev.1 (1985)); *see* UNEP, AD HOC WORKING GROUP OF LEGAL AND TECHNICAL EXPERTS WITH A MANDATE TO PREPARE A GLOBAL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES, UNEP/WG.189/3, Third Session 1 (Nov. 16, 1988) [hereinafter Third Session] (stating that the UNEP Governing Council approved the Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes on June 17, 1987 (UNEP/GC.14/17, Annex II)).

119. *Draft Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, UNEP/IG.80/L.4/Add.1-5 (1989)* [hereinafter *Draft Convention*] (cited in BASEL CONVENTION, *supra* note 11, at 4); *see* Rublack, *supra* note 9, at 122 n.46, 123 n.52, 124 n.55 (noting that the Draft Convention consisted of: (1) First Revised Draft Convention on the Control of Transboundary Movements of Toxic Wastes (UNEP/WG.182/2); (2) Second Revised Draft Convention on the Control of Transboundary Movements of Toxic Wastes (UNEP/WG.182/3); and (3) Third Revised Draft Convention on the Control of the Transboundary Movements of Toxic Wastes (UNEP/WG.186/3)); Third Session, *supra* note 118, at 5-8 (noting that during the Third Session, the Working Group adopted the Fourth Revised Draft Convention on the Control of the Transboundary Movements of Toxic Wastes); *ECE Called on to Draft Agreement on Transboundary Impact Assessment, 11 Int'l Env't*

working group composed of legal and technical experts (Working Group).¹²⁰ Over the course of five sessions, the Working Group considered several UNEP revised draft conventions¹²¹ on the transportation of toxic wastes and ultimately developed a final recommendation for the Basel Convention.¹²² The Working Group focused less on regulating the actual physical movements of hazardous wastes across international borders than on the reduction and safe disposal of toxic wastes.¹²³ Accordingly, the Working Group concentrated on specific issues including: the definitions of waste,¹²⁴ liability,¹²⁵ and noncompliance;¹²⁶ assistance

Rep. (BNA) 216 (Apr. 13, 1988) (discussing the UN Economic Commission for Europe's (ECE) draft of an international environmental impact assessment policy on transboundary pollution, including transfrontier shipments of hazardous wastes).

120. Third Session, *supra* note 118, at 1.

121. See *Draft Convention*, *supra* note 119 (noting the various conventions); see also *infra* note 133 and accompanying text (discussing UNEP and OECD definitions of hazardous waste as part of draft conventions).

122. See Third Session, *supra* note 118, at 1 (noting that the Working Group held its first session in February 1988 in Geneva, Switzerland; second session in June 1988 in Caracas, Venezuela; and third session in November 1988 in Geneva, Switzerland); see also UNEP, AD HOC WORKING GROUP OF LEGAL AND TECHNICAL EXPERTS WITH A MANDATE TO PREPARE A GLOBAL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES, UNEP/WG.190/4, Fourth Session 1 (Feb. 3, 1988) (noting that the Working Group held the fourth session from January 30 to February 3, 1988 in Luxembourg); UNEP, AD HOC WORKING GROUP OF LEGAL AND TECHNICAL EXPERTS WITH A MANDATE TO PREPARE A GLOBAL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES, UNEP/WG.191/5, Fifth Session 1 (Mar. 13, 1989) (noting that the Working Group convened the fifth Session from March 13 to 17, 1989, in Basel, Switzerland); *Waste Shipment Incidents Spur Interest in UNEP Agreement to Deal with Problem*, 11 Int'l Env't Rep. (BNA) 471 (Sept. 1988) [hereinafter *Waste Shipment Incidents Spur Interest*] (noting that 40 countries were present at the Caracas meeting and 50 were expected at the third session in Geneva).

123. See Third Session, *supra* note 118, at 2-3. The Third session focused on such measures as: (1) reducing hazardous waste generation, thereby eliminating the necessity of its movement; (2) making receipt of approval for moving hazardous wastes difficult to obtain, and permitting movement only when it is environmentally safe to dispose of it outside of the origin, and (3) ensuring that the shipment is internationally transported under the highest standards of environmental safety. *Id.*

124. See Third Session, *supra* note 118, at 3 (discussing the importance of clearly defining the wastes that the Convention should have as its concern); see also UNEP Working Group Reaches Agreement on Question of 'Prior Informed Consent', 11 Int'l Env't Rep. (BNA) 165 (Mar. 9, 1988) [hereinafter *Working Group Reaches Agreement*] (discussing the need for future negotiations concerning the adoption of the OECD's core list of hazardous wastes).

125. Third Session, *supra* note 118, at 3; see U.N. International Law Commission Split on Transboundary Pollution Liability, 11 Int'l Env't Rep. (BNA) 166 (Mar. 9, 1988) (discussing that although some industrialized nations oppose strict liability, developing countries demand that multinational corporations be held strictly liable for inherently dangerous activities).

126. See Third Session, *supra* note 118, at 3 (listing compensation, monitoring facilities, and state's responsibilities as recurring central issues that the Convention should address).

to developing nations regarding the notification and testing of toxic shipments;¹²⁷ environmentally sound receiving facilities;¹²⁸ emergency responses;¹²⁹ illegal trafficking of toxic waste;¹³⁰ criteria for the permit and approval of disposal facilities;¹³¹ and lack of adequate infrastructure within developing countries.¹³²

B. ADOPTIONS OF THE DRAFT CONVENTION

The Draft Convention adopted the OECD's¹³³ core list of wastes¹³⁴ and hazardous characteristics.¹³⁵ The members of the Draft Convention hoped that the core list would resolve the dilemma created by two competing interests: the industrialized nations' exclusive regulations which did not include certain materials in the definition of "hazardous waste," and the developing countries' demand for a comprehensive definition of "hazardous waste."¹³⁶

The Draft Convention set forth two lists noting potential recycling operations,¹³⁷ and required that specific information be included both in the notification¹³⁸ and transport documents.¹³⁹ Furthermore, the ex-

127. *Id.*

128. *See Working Group Reaches Agreement, supra* note 124, at 165 (noting that the Working Group must deliberate the issues of disposal sites and methods of disposal at the Caracas meeting).

129. Third Session, *supra* note 118, at 3.

130. *Id.*

131. *Id.*

132. *Id.*; *see Waste Shipments Incidents Spur Interest, supra* note 122, at 471 (discussing the desires of developing nations for technical guidance in the treatment and disposal of waste).

133. *See Rublack, supra* note 9, at 122 (stating that unlike the OECD, however, the UNEP included transit countries' legislation in its definition of hazardous wastes); *see also Waste 'A Difficult Issue', supra* note 108, at 377 (noting the introduction of the OECD's core list at the UNEP meeting in Caracas, Venezuela).

134. *Fifth Revised Draft Convention [on the Control of Transboundary Movements of Hazardous Wastes]*, UNEP/WG.189/3, Annex I [hereinafter *Fifth Revised Draft Convention*]. The core list, however, expressly excluded radioactive waste. *Id.* Annex I, at 4. A waste which is not covered in the core list, can be considered "hazardous" if included in the domestic legislation of the exporter, importer, or transit country. *Id.*

135. *Id.* annex II at 58.

136. *Developed, Developing Countries Disagree, supra* note 109, at 376.

137. *Fifth Revised Draft Convention, supra* note 134, annex I at 61; *see id.* annex III at 60 (noting operations which do not lead to resource recovery, recycling, reclamation, direct re-use, or alternative uses).

138. *Id.* annex IV at 62. The pre-notification information required to be provided includes: the names of the exporter, transit nations, and importer, and their respective competent authorities; the date of export, the time period over which the waste will be exported, and a proposed itinerary; insurance information; physical and composite description of the waste; the method of disposal; and information from the disposer indicating that the waste will be disposed in an environmentally sound manner and in accordance with the importer's domestic laws. *Id.*

porter must notify any nation involved in the transport of the waste and receive the consent of the importing country.¹⁴⁰ Finally, the Convention would only permit the transport if the exporter has received satisfactory information that the importing nation has adequate technical capacity for disposal.¹⁴¹

The Draft Convention failed, however, to address several issues. Rather than require an exporter to receive a transit country's prior informed consent, the Convention decided that a transit nation's lack of response should be interpreted as tacit approval.¹⁴² Moreover, the Draft Convention neglected to articulate the extent to which an exporter is obligated to make technical assessments of the importer's disposal facilities.¹⁴³ Accordingly, the issue of national sovereignty remains unresolved.¹⁴⁴ In addition, the Draft Convention did not address the issue

139. *Id.* annex IV at 64. The information movement document required the inclusion of "certification of receipt at the designated disposal facility and indication of the approximate date of disposal." *Id.*

140. Rublack, *supra* note 9, at 122; see *Working Group Reaches Agreement*, *supra* note 124, at 165 (discussing the successful breakthrough in negotiations regarding prior informed consent).

141. Rublack, *supra* note 9, at 123-24; see Third Session, *supra* note 118, at 14 (requiring that each party to the agreement export hazardous wastes from its borders in a way that is "environmentally sound" as waste disposal within its borders); *Developed, Developing Countries Disagree*, *supra* note 109, at 376 (reporting that the head of the toxic chemicals program of UNEP believes that inspection and verification mechanisms will ensure proper and safe disposal). Developing countries are also pressing for a technological transfer mechanism whereby industrialized nations will assist Third World countries in the construction and maintenance of disposal facilities. *Id.*

142. Rublack, *supra* note 9, at 123 (discussing the Third Draft Convention's allocation of duties to provide information to the receiving country); see *Waste Shipment Incidents Spur Interest*, *supra* note 122, at 472 (noting the disagreement on informed consent for transit countries that existed between the industrialized countries and Third World nations, represented by the Group 77, a group of over 100 developing countries); *Delegates of 50 Countries Fail to Agree on Draft Covering Movement of Toxic Waste*, 12 Int'l Env't Rep. (BNA) 49 (Feb. 8, 1989) (discussing the failure to reach a consensus on the issue of a transit country's prior consent and the developing nations' determination to block any convention which does not include such consent); *Western, African Nations Fail to Agree on Transboundary Movement of Toxic Wastes*, 12 Int'l Env't Rep. (BNA) 49 (Feb. 8, 1989) [hereinafter *Western, African Nations Fail to Agree*] (noting that although prior notification must be given to a transit nation and the transit nation may then object within a reasonable time, agreement has not yet been reached on whether silence means tacit consent); *Developed, Developing Countries Disagree*, *supra* note 109, at 376 (noting that although Third World countries may agree to a time limit regarding a transit country's objection to a shipment of waste passing through its borders, they oppose the idea that the failure to respond in time means tacit consent to the shipment). The developing countries assert that the absence of a reply should be assumed to be an objection. *Id.*

143. Rublack, *supra* note 9, at 124; see *Waste Shipment Incidents Spur Interest*, *supra* note 122, at 471 (noting that Third World nations prefer technological assistance in waste disposal rather than a United Nations police force verifying proper disposal).

144. Rublack, *supra* note 9, at 124.

of liability, reserving it instead for a future international forum.¹⁴⁵ Finally, the Draft Convention failed to specifically define terms which are critically important for adequate enforcement, i.e., "adequate technical capacity for disposal", "environmentally sound management of hazardous waste", and "reason to believe."¹⁴⁶ The ambiguity of these concepts foreshadowed the Basel Convention's deliberations and dissensions.

C. THE BASEL CONVENTION ON THE TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL

1. Introduction

On March 22, 1989, after two years of intense and divisive debate,¹⁴⁷ thirty-four nations¹⁴⁸ signed the Basel Convention.¹⁴⁹ The purpose of

145. *Id.* at 124 n.60 (citing *Recommendation No. VII of the OECD Conference on International Cooperation Concerning Transfrontier Movements of Hazardous Wastes*, in OECD Resolution C (85)100 5 (1985)); see *Western, African Nations Fail To Agree*, *supra* note 142, at 50 (noting that although Nigeria pressed the Fourth Draft Convention to address the issue of liability, industrialized nations preferred to delay deliberation). But see *OECD Extends Polluter Pays Principle to Include Costs of Industrial Accidents*, 12 Int'l Env't Rep. (BNA) 380 (Aug. 1989) (discussing Resolution C(89)88 which demands that operators of waste facilities reimburse public authorities for costs incurred in preventing, controlling, or cleaning up pollution which accidentally occurred within their installations). The new resolution also requires operators to restore the damaged environment. *Id.* The OECD further noted that member governments should not use subsidies or tax advantages to facilitate the polluter's ability to bear pollution control costs. *Id.* Member nations may tax or impose fees on facilities that are inherently hazardous and use the proceeds to control and prevent accidental pollution. *Id.*

146. Third Session, *supra* note 118, art. IV(4)(g), at 11; see Handley, *supra* note 4, at 10,181 n.176 (noting that the Third Draft Convention prevents nations from exporting hazardous wastes, especially to developing countries, if there is "reason to believe" that the hazardous wastes will not be "managed in an environmentally sound manner"); *Fifth Revised Draft Convention*, *supra* note 134, annex I at 1 (noting that because the Working Group feared that a more detailed annex would not be completed in time for the Basel Convention, it recommended during the Third Session the creation of an annex that would generally define "environmentally sound manner"). Accordingly, the Fifth Revised Draft Convention defined "environmentally sound management of hazardous wastes" as the "management of wastes so as to prevent [appreciable] [significant] harm to human health and the environment." *Id.* art. I(7), annex I at 6. However, the words "appreciable" and "significant" contained within the bracketed material are alternative words which were to be considered at a later date. *Id.* at n.5; see also *Western, African Nations Fail to Agree*, *supra* note 142, at 50 (discussing what criteria should be employed for approval of disposal facilities as "environmentally sound").

147. Tuohy, *100 Nations Striving to Agree on Pact to Curb Toxic Waste Exports*, L.A. Times, Mar. 22, 1989, at 9 (discussing that although more than 100 nations had been negotiating for 18 months, many nations were still objecting to parts of the draft for the Basel Convention).

148. *Thirty-Four Countries Sign Convention on Transport, Disposal of Hazardous Wastes*, 12 Int'l Env't Rep. (BNA) 159 (Apr. 12, 1989) [hereinafter *Thirty-Four Countries Sign Convention*]; see GREENPEACE WASTE TRADE UPDATE, *supra* note 53,

the Basel Convention is to enhance the control of the transfrontier movement of toxic wastes in order to encourage safe management and reduction in volume of transboundary shipments.¹⁵⁰ The Basel Convention has yet to be implemented, however, because the required twenty nations have not ratified its provisions.¹⁵¹ Many nations view the Basel Convention as signaling the international community's commitment to protect both human health and the world environment.¹⁵² Proponents suggest that the Basel Convention, suggest proponents and envelops a larger global community than previous international agreements, thereby resulting in implementation on a larger economic and political scale.¹⁵³ Supporters further contend that the Basel Convention qualitatively expands and improves on the presently existing international and regional agreements which attempt to control the transfrontier move-

at 2 (noting that although 116 nations endorsed the Basel Convention, only 34 countries signed: (1) Western Europe—Belgium, Cyprus, Denmark, Finland, France, Greece, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Spain, Sweden, Switzerland, and the European Community Commission; (2) Eastern Europe—Hungary; (3) North America—Canada; (4) Latin America—Bolivia, Columbia, Guatemala, Haiti, Mexico, Panama, Uruguay, and Venezuela; (5) Middle East—Afghanistan, Bahrain, Israel, Kuwait, Lebanon, Saudi Arabia, Turkey and United Arab Emirates; and (6) Asia/South Pacific—Philippines). Neither the United States nor any African nations signed the Basel Convention. *Id.*; *Thirty-Four Countries Sign Convention*, *supra*, (stating that unlike signatures of the Basel Convention, endorsements do not have the equivalent binding authority).

149. BASEL CONVENTION, *supra* note 11; see Cody, *105 Nations Back Treaty on Toxic-Waste Shipping*, Wash. Post, Mar. 23, 1989, at 12 (stating that the Basel Convention represented a compromise between developed countries which preferred flexibility for safe exports of toxic wastes, and Third World nations that sought a complete ban on transfrontier movements of waste); Abrahams, *Treaty on Disposal of Hazardous Waste Agreed*, Fin. Times, Mar. 23, 1989, at 3 (quoting the British Minister of State for the Environment that the Basel Convention is seen as the "first stepping stone on the road forward").

150. BASEL CONVENTION, *supra* note 11, at 39.

151. *Thirty-Four Countries Sign Convention*, *supra* note 148, at 160; see GREENPEACE WASTE TRADE UPDATE, *supra* note 53, at 2 (describing "ratification" as meaning "being incorporated into national law"); Abrahams, *supra* note 149, at 3 (stating that the process of gathering 20 signatures to ratify the Basel Convention could take almost two years); UPDATE, *supra* note 83, at 2 (noting that Argentina and Portugal have recently joined the Basel agreement and Jordan has become the first nation to ratify it).

152. Tuohy, *supra* note 147, at 6.

153. See *id.* (noting other regional and international organizations that have addressed the commerce of toxic waste). The Basel Convention's preamble strongly implies that although regional agreements are beneficial, a global convention will provide greater incentive to control shipments of hazardous waste and implement safeguards. BASEL CONVENTION, *supra* note 11, at 1; see also Marshall, *supra* note 8, at 10 (discussing that the purpose of the Basel Convention is to expand and improve regional agreements); Tuohy, *116 Nations Adopt Treaty on Toxic Waste*, L.A. Times, Mar. 23, 1989, at 6 (noting that although the Basel Convention has not stopped the commerce of toxic waste, it has signalled an international commitment to prevent the danger that toxic wastes pose to the global environment and human health).

ments of hazardous waste. Several international environmental organizations and most developing countries, on the other hand, believe the Basel Convention is laden with ambiguities and loopholes.¹⁵⁴ Opponents point to the Convention's ambiguous language and the exclusion of fundamental and important concepts.¹⁵⁵ They assert that the Basel Convention does not restrict the transboundary shipment of hazardous waste; instead, it merely provides a global tracking system for toxic waste movement.¹⁵⁶ Accordingly, critics contend the Basel Convention grants industrialized nations formal permission to use developing nations as dumping grounds for their hazardous wastes.¹⁵⁷ Finally, critics charge that the Basel Convention simply reiterates the existing, yet inadequate international toxic waste agreements.¹⁵⁸ As evidence, opponents note that the Basel Convention does not include important amendments proposed by several Third World countries.¹⁵⁹

154. GREENPEACE WASTE TRADE UPDATE, *supra* note 53, at 2-3.

155. *Id.*; see *supra* note 154 and *infra* notes 156-59 and accompanying text (reviewing developing nations' and international environmental organizations' various complaints).

156. GREENPEACE WASTE TRADE UPDATE, *supra* note 53, at 3.

157. See *Thirty-Four Countries Sign Convention*, *supra* note 148, at 160 (stating that the President of the OAU declared that unless African nations' interests are secured, they would not ratify the Basel Convention); GREENPEACE WASTE TRADE UPDATE, *supra* note 53, at 3 (reiterating the contention that the Basel Convention actually reinforces irresponsible dumping of toxic wastes on the Third World); Tuohy, *supra* note 147, at 6 (describing developing nations' fear that unless a complete ban is implemented, corrupt Third World governments will accept hazardous waste in exchange for large payments); Abrahams, *supra* note 149, at 6 (discussing the fact that many developing nations' proposed amendments were not included in the Basel Convention); Cody, *supra* note 149, at 32 (stating a Greenpeace observer's view that the Basel Convention provided the industrial nations with the opportunity to protect hazardous waste trade, not the environment). Shortly after the Basel Convention, Greenpeace activists unfurled a large banner opposite the conference center which read, "[D]anger. Basel Convention Legalizes Toxic Terror". *Id.*; see also *Thirty-Four Countries Sign Convention*, *supra* note 148, at 161 (noting Greenpeace's criticism that the United States believes it is not required to protect less developed nations to the same degree as its own citizens and, consequently, is engaging in "immoral exploitation of . . . politics and poverty.").

158. GREENPEACE WASTE TRADE UPDATE, *supra* note 53, at 3.

159. See *Thirty-Four Countries Sign Convention*, *supra* note 148, at 160 (stating that the excluded amendments proposed by the Third World countries include: (1) generating countries would be liable for the ultimate disposal of their waste, (2) the importation of wastes would be prohibited if the receiving nation did not have the same mechanisms for disposal as the exporting country, and (3) the adoption-verification procedures implemented would include United Nations officials inspecting the disposal site); see also Abrahams, *supra* note 149, at 3 (noting that the amendments were rejected after pressures from Western industrialized countries).

2. Content and Analysis

The Basel Convention adopts the core list of hazardous wastes from the EC and OECD lists.¹⁶⁰ The breadth and depth of the core list creates a dependable and encompassing framework which is necessary for nations to successfully implement the Convention's provisions.¹⁶¹ The Basel Convention, however, excludes radioactive wastes from its scope.¹⁶² Supporters of the Convention point to the United Nations International Atomic Energy Agency's (IAEA) existing regulations which control the shipment of radioactive hazardous wastes.¹⁶³ The IAEA, however, does not cover the transboundary shipment of nonfissile radioactive wastes.¹⁶⁴

In addition, the Basel Convention grants the nations of import and transit the right to require the exporter to insure the toxic waste shipment.¹⁶⁵ Although the Convention's insurance provision could furnish developing nations with greater bargaining power, its effectiveness is questionable because the Convention currently lacks a liability provision.¹⁶⁶

The Basel Convention also requires exporting nations to reimport hazardous waste if they cannot make alternative arrangements for disposal.¹⁶⁷ The provision covering the reimportation of illegal waste, however, contains a loophole.¹⁶⁸ Article 9 requires the exporting nation to reimport an illegal shipment of waste within thirty days.¹⁶⁹ The exporting country, however, can avoid reimportation if it determines that to do so would be "impracticable."¹⁷⁰ If the exporting nation determines that reimportation is impracticable, the Convention requires only that

160. BASEL CONVENTION, *supra* note 11, at 41, 78-79.

161. *See supra* notes 134-36 and accompanying text (discussing the goals and benefits of the adoption of the OECD's core list of wastes and hazardous characteristics).

162. BASEL CONVENTION, *supra* note 11, art. I(3), at 41.

163. *Thirty-Four Countries Sign Convention*, *supra* note 148, at 161.

164. *See GREENPEACE WASTE TRADE UPDATE*, *supra* note 53, at 3 (reiterating the absence of nonfissile radioactive wastes in the Basel Convention).

165. BASEL CONVENTION, *supra* note 11, art. 6(11), at 50.

166. *See id.* art. 12, at 57 (stating that the Convention parties shall cooperate to adopt a protocol defining rules and procedures governing liability and compensation as soon as practicable); *see also id.* at 39 (noting that nations are "liable in accordance to international law" for the fulfillment of their obligations to protect the global environment and human health); *supra* notes 52, 77, 112 and accompanying text (noting that the United States, the EC, and the OECD presently do not have any liability provisions). *But see* Handley, *supra* note 4, at 10,176-77 (noting the EC's new proposal which would implement strict liability on generators of toxic waste).

167. BASEL CONVENTION, *supra* note 11, art. 8, at 52.

168. *Id.* art. 9(2), at 53.

169. *Id.* art. (2)(a).

170. *Id.* art. 9(3), at 63.

it dispose of the waste in an "environmentally sound manner."¹⁷¹ Thus, the ambiguity in these standards may allow industrialized nations to avoid the requirement of reimportation.¹⁷²

In addition, Article 9 appears to contain a double standard.¹⁷³ While the exporting nation has two options if the exporter's conduct results in an illegal shipment, an importing nation has only one option when an importer's or disposer's conduct is illegal.¹⁷⁴ The importing nation must dispose of the illegal shipment in an "environmentally sound manner."¹⁷⁵ Consequently, an importing nation is subject to frontal assaults from both sides on the issue. An exporting nation can dispose of illegal toxic waste in the importing country if reimportation is "impracticable," and the Convention requires the importing nation to dispose of any illegally imported waste.¹⁷⁶ Moreover, this double standard may encourage illegal importation of hazardous waste since the illegal importer may rely on the Article 9 requirement, which obligates the importing nation to dispose of illegally accepted toxic waste.¹⁷⁷ Although a number of Third World countries have enacted laws which severely penalize any party who illegally imports toxic waste,¹⁷⁸ these same nations often lack the adequate infrastructure and resources to enforce their domestic laws.¹⁷⁹

The Basel Convention duplicates as well as expands the EC and OECD notification and consent requirements. The exporting country must notify the authorized competent authorities within the nations of

171. *Id.*

172. See GREENPEACE WASTE TRADE UPDATE, *supra* note 53, at 2 (noting that exporters have the discretion not to re-import illegal waste).

173. BASEL CONVENTION, *supra* note 11, art. 4(8), at 46; see *supra* notes 169, 171 and accompanying text (noting that an exporter can choose whether or not to re-import the hazardous waste).

174. *Id.*

175. *Id.*

176. See *supra* notes 169-71 and accompanying text (comparing the exporter's discretion to re-import illegally exported toxic waste and the importing nation's duty to dispose of illegally imported hazardous waste).

177. *Id.*

178. See GREENPEACE WASTE TRADE UPDATE, *supra* note 53, at 5 (noting the African Trade Union Unity's call on African nations to severely punish any importers of toxic wastes); see also Greenpeace, *Developments in National Politics*, GREENPEACE TRADE UPDATE, Mar. 1, 1989, at 3 (noting that Nigeria has outlawed the "purchase, sale, import, transport, and storage" of hazardous waste). Any person convicted of hazardous waste dumping will receive life imprisonment. *Id.*

179. See Rublack, *supra* note 9, at 115 (noting developing nations' lack of administrative structures and legislation to specifically control the environmental risks of hazardous waste disposal); see also Handley, *supra* note 4, at 10,182 (discussing whether consent is truly consent, because Third World nations lack the necessary scientific and institutional infrastructures to develop policies to manage toxic waste); *infra* notes 209-11 and accompanying text (discussing developing nations' fragile political systems).

import and transit of the proposed shipment of hazardous wastes.¹⁸⁰ The Convention also requires that specific information accompany both the shipment of waste¹⁸¹ and the exporter's notification.¹⁸² In addition, the exporting nation must secure the consent of the state of transit and the importing country.¹⁸³

The Basel Convention also compels the exporting country to obtain confirmation of the contract between the exporter and the importing country, which verifies that the importing country will dispose of the hazardous waste in an "environmentally sound manner."¹⁸⁴ The applicable article, however, contains several vague terms which may enable countries to disregard the article's requirements.¹⁸⁵ For example, the Basel Convention requires the importing nation to have "adequate disposal facilities,"¹⁸⁶ and prohibits export if the exporting country has a "reason to believe" that the toxic waste will not be "managed in an environmentally sound manner."¹⁸⁷ The Convention further urges the participants to extend aid to developing nations for the development of disposal facilities.¹⁸⁸

The Basel Convention also seeks to address the origin of the trans-frontier shipment of toxic wastes.¹⁸⁹ The Convention requires nations to periodically review efforts to reduce hazardous waste production, especially with regard to those toxic wastes that are commonly shipped to Third World nations.¹⁹⁰ Additionally, the Basel Convention provides a list of specific operations which nations may use to produce evidence of legitimate recycling.¹⁹¹ The list acts as an enforcement mechanism because it prevents nations from attempting to ship toxic wastes under the guise of recyclable materials.¹⁹²

Finally, the Basel Convention permits the establishment of bilateral or multilateral agreements between a party and a nonparty.¹⁹³ The provision, however, fails to thoroughly articulate the scope of these alter-

180. BASEL CONVENTION, *supra* note 11, art. 6(1), at 53.

181. *Id.* annex VB, at 88.

182. *Id.* annex VA, at 85.

183. *Id.* art. 6(4), at 49.

184. *Id.* art. 6(3)(b).

185. *Id.* at 3.

186. *Id.* art. 4(2)(b), at 45.

187. *Id.* art. 4(2)(g), at 46.

188. *Id.* art. 10(2)(c), 10(3), at 55.

189. *Id.* art. 4(13), at 47.

190. *Id.*

191. *Id.* annex IV at 83-84 (listing operations which do and do not lead to the possibility of resource recovery, recycling, reclamations, direct re-use or alternative uses).

192. *Id.*

193. *Id.* art. 11(1), at 56.

native agreements. It says only that accords established independent of the Basel Convention must contain provisions that conform to the Convention's requirement of environmentally sound management of hazardous waste.¹⁹⁴

III. RECOMMENDATIONS

The transboundary movement of hazardous wastes should be banned. International environmental problems are not restricted to one nation's land, air, space, or water. Each nation's policies and pollution affect another nation's health. The hazardous waste problem cannot be played as if it were a chess game.¹⁹⁵ Thus far, regional and international agreements reflect strategies of gamesmanship, as each nation maneuvers to checkmate the other.¹⁹⁶

The Basel Convention reflects most industrial nations' strategy to checkmate developing nations into accepting hazardous waste exports. Under such terms as "prior informed consent," "environmentally sound manner," and "adequate disposal activities," the Basel Convention has legitimized the international toxic waste game and proclaimed industrial nations the winners.

Supporters of the Convention maintain that developing countries benefit from the jobs, income, business activity, and technological education associated with the transboundary waste business.¹⁹⁷ The potential benefits of education and employment, however, are mere short term gains and apply only to the limited market of waste importation.¹⁹⁸ More importantly, those who seek to protect these benefits are not challenging the fundamental bipolar economic inequities that force Third World nations to accept shipments of toxic waste.¹⁹⁹ Developing countries acquiesce to the importation of hazardous wastes because they are poor and have unequal bargaining power.²⁰⁰ Consequently, the

194. *Id.*; see also GREENPEACE WASTE TRADE UPDATE, *supra* note 53, at 3 (suggesting that bilateral or multilateral agreements need not conform to the Basel Convention's provisions).

195. See Handley, *supra* note 4, at 10,182 (analogizing the present solution to the toxic waste problem to a shell game in which wastes are moved around the world).

196. *Id.* (noting that any solutions other than a ban constitute half-way measures).

197. See Helfenstein, *supra* note 9, at 788 (suggesting that if the United States banned exports of hazardous waste totally, the ban would harm developing countries by eliminating benefits like jobs and technological education).

198. *Id.*

199. See Handley, *supra* note 4, at 10,182 (noting that the existing legal mechanisms do not address the heart of the problem of toxic waste commerce, which is "the economic force that drives hazardous waste . . . to seek the country with the least costly disposal requirements.").

200. See generally J. VALLETTE, *supra* note 2, at 15-44 (discussing various schemes

toxic waste trade between industrialized nations and the Third World resembles economic blackmail.²⁰¹ Only the Third World's complete ban of toxic waste imports will challenge industrialized nations to confront the uncontrolled generation of hazardous waste.²⁰² Therefore, the true aim regarding hazardous waste management is to minimize waste generation and develop new recycling methods.²⁰³

Industrialized countries should expend the revenue necessary to adequately prevent waste generation, or dispose of domestic waste within their own borders.²⁰⁴ If an industrialized country does not have the topographical capacity to dispose of waste, it should rely on multilateral or bilateral treaties with other industrialized nations to resolve its waste problem. Unlike developing countries, industrialized nations have the economic, political, and technological infrastructures to manage hazardous waste movement and disposal.

Because many developing nations will be unable to ignore the potential revenue, the transboundary shipment of toxic wastes to developing countries may be an unavoidable reality.²⁰⁵ Therefore, the Basel Convention must be amended to clarify its terms and improve its enforcement mechanisms. First, instead of relinquishing the definition of terms to the parties' subjective discretion, the Basel Convention should be amended to clearly define these terms.²⁰⁶ On a macro scale, the Basel Convention should either completely prohibit agreements which are in-

of hazardous waste commerce).

201. See Rublack, *supra* note 9, at 115 (stating that the deliberate exploitation of differences between environmental requirements in developed and Third World nations results in the sacrifice of long-term environmental health in exchange for foreign exchange earnings).

202. See Pollock, *supra* note 34, at 9 (noting that in 1980 the city of New York generated 1.80 kilograms of waste per capita per day, and Tokyo generated 1.38 kilograms per capita per day, as compared to Tunis, Tunisia with only 0.56 kilograms and Kano, Nigeria with 0.46 kilograms per capita per day).

203. See *id.* at 16-17 (describing the advantages of waste to energy plants). According to Pollock, "intelligent plastics," which are biodegradable plastics, are the wave of the future because they can replace nonbiodegradable packaging materials and thus reduce waste. *Id.* at 12.

204. See Postel, *supra* note 33, at 37 (describing advanced technologies in the Netherlands and West Germany that have prevented most domestic hazardous wastes from entering the environment). In the Netherlands, only about one-quarter of all waste, most of which consists of nontoxic materials, is placed into landfills. *Id.* at 38. In West Germany, government subsidies help reduce the cost of hazardous disposal. *Id.*; see also Handley, *supra* note 4, at 10,182 (stating that the Office of Technology Assessment in 1987 concluded that at least half of the toxic waste generated in the United States could be eradicated in a few years using currently available technology).

205. See Tuohy, *supra* note 147, at 9 (noting that it may be two years before the requisite 20 countries ratify the Basel Convention).

206. See *supra* notes 184-87 and accompanying text (noting the ambiguity in the Basel Convention's terminology).

dependent of the Basel Convention or clearly define the scope and terms of independent bilateral agreements.

Definitional clarification would likely result in industrialized nations bearing a heavier financial burden of implementing more specific safeguards.²⁰⁷ Because industrialized countries generate most of the world's hazardous waste, equity as well as the dangerous long term environmental repercussions demand that these countries carry the greater financial responsibility.²⁰⁸ Moreover, to a greater extent than in industrialized nations, factionalism, patron-client relationships, and corruption influence environmental decisions in Third World countries.²⁰⁹ Because developing countries' executive branches often control bureaucratic mechanisms,²¹⁰ implementation of environmental legislation is typically unsuccessful. Furthermore, developing nations' single-party political systems invariably dominate the judiciaries.²¹¹ Accordingly, developing countries' judiciaries are commonly not autonomous decisionmakers, and therefore cannot ensure that the government is properly implementing legislation.²¹² Therefore, it would be a grave mistake to burden Third World nations with the initiation, implementation, and enforcement of toxic waste laws.

Because international environmental emergencies such as Bhopal²¹³ are apt to occur with more frequency, establishing a framework of proper distribution of liability is also crucial.²¹⁴ Therefore, the Basel Convention should be amended to provide equitable obligations of liability and compensation. One possibility is the establishment of a fund which would assist nations in the event of an international emergency arising from the transport or disposal of hazardous wastes.²¹⁵ Financial contributions to the fund could be based on each nation's pro rata share of hazardous waste generation and exportation.

207. See Helfenstein, *supra* note 9, at 789 (stating that the developing nation's disposal facility should meet the same standards of operation, management, and worker protection as the exporting country's waste facilities).

208. *Id.* at 790 (stating that if the costs of safe disposal are paid in advance, the issues of liability and compensation will rarely arise).

209. Leonard & Morell, *supra* note 13, at 307.

210. *Id.* at 308.

211. *Id.*

212. *Id.*

213. See *India Gas Disaster Toll Soars*, L.A. Times, Dec. 4, 1984, at A1; *Gas Leak Kills 395 in India*, Wash. Post, Dec. 4, 1984, at A1; Hazarika, *Gas Leak in India Kills at Least 410 in City of Bhopal*, N.Y. Times, Dec. 4, 1989, at A1.

214. See Handley, *supra* note 4, at 10,176 (noting the EC's recent discussions concerning the implementation of strict liability provisions).

215. BASEL CONVENTION, *supra* note 11, art. 14(2), at 60 (requiring parties to consider the establishment of a fund). The Basel Convention, however, fails to address emergency funding by nonparties. *Id.*

CONCLUSION

The Basel Convention attempts to achieve the grand feat of assembling over one hundred diverse nations with varying objectives in order to build a consensus on an extremely divisive issue. Control of the transboundary movement of hazardous waste, however, increasingly appears to be an oxymoron. Despite the existence of EC, OECD, and United States regulations, toxic waste continues to be shipped both legally and illegally.²¹⁶ Although developing nations are beginning to ban imports of toxic wastes, shipments will continue to find ports of hold due to the lucrative profits Third World countries receive in return for storing toxic waste. Moreover, developing nations do not have the infrastructure or resources to realistically ensure safe disposal or handling of toxic waste. Nor do developing countries have the financial resources to place the issue of hazardous waste importation high on their priority lists. As Indira Ghandi said, "How can we speak to those who live in the villages and in the slums about keeping the oceans, the rivers, and the air clean? Are not poverty and need the greatest polluters?"²¹⁷ Fundamentally, therefore, the issue of exportation of toxic waste to the Third World is thoroughly grounded in the existing global economic structure. Until this global economic inequity is resolved, wealth will continue to permit industrialized nations to proclaim "Not In My Backyard."

216. See J. VALLETTE, *supra* note 2, at 15-133 (describing cases of illegal toxic waste shipping); see also GREENPEACE WASTE TRADE UPDATE, *supra* note 53, at 3 (quoting a well known international trader who said that the Basel Convention's requirements would not prevent him from shipping waste).

217. Leonard & Morell, *supra* note 13, at 282 (quoting A. MILLER, A PLANET TO CHOOSE 49 (1978)).