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BANNING WASTE EXPORTS: MUCH ADO ABOUT NOTHING

Mark A. Montgomery*

INTRODUCTION

In March of this year, representatives of the sixty-four states that have ratified the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal¹ met for the second time in Geneva.² At this meeting of the Conference of the Parties, these sixty-four states unanimously decided to ban the export of hazardous waste from members of the Organization for Economic Cooperation and Development (OECD) to non-OECD countries.³ This ban took immediate effect for all waste shipments bound for disposal. It was also agreed that shipments bound for recycling or recovery will be phased out by the end of 1997.

Environmental organizations cheered the export ban as a "historic victory,"⁴ as well as a giant step toward solving the waste trade "crisis."⁵ These organizations felt that the export ban would mean that the poor nations

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1. U.N. Doc. UNEP/IG 80/3, 1989, *reprinted in*, I.L.M. 657 (1989). (The current text with revisions made by the First and Second Conferences of the Parties is available from the Basel Convention Secretariat, Geneva. The Convention entered into force in May 1992, when Australia became the 20th state to ratify it. See *UNEP Director Tolba Announces Basel Convention Effective May 5*, BNA, Apr. 17, 1992, available in LEXIS, Nexis Library, Int'l Env'tl Daily File. (Since March 1994, six more countries have ratified the Convention, bringing the total to seventy.)

2. *Basel Treaty Partners Agree to Ban Waste Exports to Nations Outside OECD*, 17 INT'L ENV'TL REP. (BNA) 297-298 (Apr. 6, 1994).

3. *Decision II/12 of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* adopted in Geneva Mar. 21-25, 1994, reprinted in 17 INT'L ENV'TL REP. (BNA) 338 (Apr. 6, 1994). All of the decisions made by the Parties, including Decision II/12, are contained in *The Report of the Second Meeting of the Conference of the Parties to the Basel Convention*, U.N. Doc. UNEP/CHW.2/30 (1994).

4. *Basel Treaty Partners Agree to Ban Waste Exports to Nations Outside OECD*, *supra* note 2.

5. See Mary Critharis, *Third World Nations are Down in the Dumps: The Exportation of Hazardous Waste*, 16 BROOK. J. INT'L L. 311, 313 (1990); (characterizes the international waste trade as a "crisis").

of the world no longer would be victims of "toxic colonialism."⁶ Such praise, however, is overly effusive. This article examines the newly-adopted ban on hazardous waste exports, and it concludes that the ban is largely inconsequential in both its legal and practical effect. This paper also argues that attempts to tighten the ban on waste exports are unwarranted.

THE BASEL CONVENTION

The Basel Convention was signed in March 1989, after several years of negotiations sponsored by the United Nations Environment Programme (UNEP).⁷ A thorough analysis of the Convention lies outside the scope of this paper. However, many scholars, including this author,⁸ have evaluated it elsewhere.⁹

The Basel Convention provides for a system of "prior informed consent" or PIC.¹⁰ This means that any state seeking to export waste must first notify the would-be importing state of the intended transfer. This written notification must contain detailed information about the nature of the waste, its constituent elements, and its hazardous characteristics. The importing state then has the opportunity to accept or reject the shipment.¹¹ The Convention

6. Cathleen Fogel, *Perils of the Era of Toxic Colonialism*, Sac. Bee, Aug. 22, 1993, at F03 (Ms. Fogel is Political Advisor to the Toxic Trade Campaign for Greenpeace International).

7. See Suzanne Rublack, *Controlling Transboundary Movements of Hazardous Waste: The Evolution of a Global Convention*, 13 FLETCHER F. WORLD AFF. 113 (1989).

8. Mark A. Montgomery, *Traveling Toxic Trash: An Analysis of the 1989 Basel Convention*, 14 FLETCHER F. WORLD AFF. 314 (1990).

9. See Katharina Kummer, *The International Regulation of Transboundary Traffic in Hazardous Wastes: The 1989 Basel Convention*, 41 INT'L & COMP. L.Q. 530 (1992); David J. Abrams, Note *Regulating the International Hazardous Waste Trade: A Proposed Global Solution*, 28 COLUM. J. TRANSNAT'L L. 801 (1990); Marguerite M. Cusak, Comment, *International Law and the Transboundary Shipment of Hazardous Waste to the Third World: Will the Basel Convention Make a Difference?*, 5 AM. U. J. INT'L L. & POL'Y 393 (1990); David P. Hackett, *An Assessment of the Basel Convention on the Control of Hazardous Waste and Their Disposal*, 5 AM. U. J. INT'L L. & POL'Y 291 (1990).

10. See Lothar Gundling, *PRIOR INFORMED NOTIFICATION AND CONSULTATION IN TRANSFERRING HAZARDOUS TECHNOLOGIES AND SUBSTANCES: THE INTERNATIONAL LEGAL CHALLENGE* 63-82 (Gunther Handl and Robert E. Lutz eds., 1989).

11. See *supra* note 1, Article 6 of the Basel Convention outlines the procedures for notification and consent.

states that the transfer cannot occur until the competent authority¹² in the importing state gives its express, written approval. If for some reason a state receives imports of hazardous waste without having given its consent, the exporting state has a duty to re-import the waste.¹³

Critics of the Convention have focused upon its weaknesses: potential loopholes,¹⁴ vague definitions,¹⁵ and inadequate enforcement mechanisms.¹⁶ These criticisms, although justifiable, are neither surprising nor unique. It is the nature of law to have loopholes of one sort or another. The trademark of diplomacy is vague language, and all international law has "inadequate" enforcement mechanisms. Because international law lacks a supranational enforcement authority, it is both imperfect and self-enforcing.

Other critics have condemned the Convention on moral grounds. Greenpeace has been the most strident, and the most effective, of these moral critics. Greenpeace believes that any attempt to legitimize the waste trade, especially from rich to poor countries, is morally unconscionable. Greenpeace has asserted that the Basel Convention has done little if anything to stem the tide of illegal waste shipments to developing countries, and that all waste exports should be prohibited.¹⁷

Textual weaknesses and moral arguments aside, the true test of the Convention is in its implementation: how well has it enabled states to control transboundary movements of hazardous waste in such a way that all states, rich and poor alike, can protect human health and the environment? Alas, answering this question is not so easy.

One difficulty in analyzing this question is that the Basel Convention has been in force for only two years. This may be an inadequate length of

12. See *supra* note 1, "Competent authority" is defined in Article 2.6 of the Basel Convention as the "one governmental authority designated by a Party to be responsible, within such geographical areas as the Party may think fit, for receiving the notification of a transboundary movement of hazardous wastes or other wastes, and any information related to it, and for responding to such notification . . .".

13. See *supra* note 1, Article 8 of the Basel Convention outlines the duty to re-import.

14. See, e.g., Hackett, *supra* note 9, at 313-23.

15. See, e.g., Brian Wynne, *The Toxic Waste Trade: International Regulatory Issues and Options*, 11 *THIRD WORLD Q.* 120, 139-41 (1984).

16. See, e.g., Critharis, *supra* 5, at 333-34.

17. GREENPEACE, INTERNATIONAL WASTE TRADE PROJECT, THE INTERNATIONAL TRADE IN WASTES: A GREENPEACE INVENTORY AT 5-9 (Jim Vallette and Heather Spaulding, eds., 5th ed., 1990) [hereinafter GREENPEACE INVENTORY]. See also Bill Lambrecht, *Waste Tightening: Third World Acts Against Toxic Garbage*, ST. LOUIS POST-DISPATCH, Apr. 3, 1994, at 1E (quoting Jim Vallette of Greenpeace as saying there was a "moral mandate" to ban waste exports.)

time in which to judge the effectiveness of any international legal instrument. The second, and more troublesome, problem is that there have been few comprehensive empirical studies of transboundary waste movements. Most of the information we have about the international waste trade, legal or illegal, is inconsistent, anecdotal, and unreliable.

DOUBTS ABOUT THE MAGNITUDE OF THE WASTE TRADE

It is widely acknowledged that the overwhelming majority of transboundary shipments of hazardous waste occur legally between industrialized countries with well developed regulatory regimes that ensure the environmentally sound management of the waste.¹⁸ The amount of toxic waste legally transferred to non-OECD countries has been quite small, especially in relation to the total quantity of hazardous waste generated in the world.¹⁹ Only a small portion—less than one-half of 1%—of the hazardous waste generated in industrialized countries ever crosses a national frontier, and at least 80-90% of all exported waste moves from one OECD country to another.²⁰

Governments and international organizations have compiled some statistics on the movement of waste shipments from rich to poor countries,

18. See, for example, Sean D. Murphy, *Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes*, 88 AM. J. INT'L L. 30-31 (1994).

19. A report co-edited by Mostafa Tolba, former Executive Director of UNEP, and published under its auspices, says that Europe legally exports 120,000 tons of hazardous waste to developing countries each year. MOSTAFA K. TOLBA and OSAMA A. EL-KHOLY, *THE WORLD ENVIRONMENT 1972-1992: TWO DECADES OF CHALLENGE* 268 (1992). European countries generate approximately 30 million tons of hazardous waste per year. This means that Europe legally exports 0.4% of its hazardous waste to developing countries. But these figures are unreliable. Tolba and El-Kholy cite the source of their statistics as ANDY CRUMP, *DICTIONARY OF ENVIRONMENT AND DEVELOPMENT: PEOPLE, PLACES, IDEAS AND ORGANIZATIONS* 122 (1993). Crump, for his part, gives no reference to support his statistic regarding legal hazardous waste exports from Europe. Drawing upon data compiled by the OECD, Hilz notes that OECD countries generated about 287,586,000 tons of hazardous waste per year in the 1980s, and exported 1,197,000 per year. This would mean that OECD countries exported 0.4% the waste they generated, with most of that going to other OECD countries. Hilz speculates, but is unable to document, that over half of all exported waste has been to non-OECD countries. CHRISTOPH HILZ, *THE INTERNATIONAL TOXIC WASTE TRADE* 18-24 (1992). Greenpeace Canada has reported that of the eight million tons of hazardous waste produced in 1992, Canada exported 209,000 tons to developing countries (which amounts to 2.6% of the total production), *Environment Minister Says Canada Support System to Monitor Hazardous Waste Exports*, 17 INT'L ENV'TL. REP. (BNA) 252 (Mar. 23, 1994).

20. See, also, UNITED NATIONS, UNITED NATIONS ENVIRONMENT PROGRAMME, *ENVIRONMENTAL DATA REPORT* 345 (3rd. ed. 1991).

but these statistics reflect primarily legal transfers.²¹ A handful of non-OECD countries have knowingly and willingly given their express, written consent to receive shipments of hazardous waste from an OECD member country. Mexico, for example, has received hazardous waste imports from the United States. Most of this imported waste was sent to a single zinc reprocessing plant that was licensed and inspected by the Mexican environmental protection agency.²² Brazil has also received, and has approved of, hazardous waste imports from the United States on numerous occasions.²³ Despite the dearth of good comparative statistics, it is relatively easy to track legal waste exports, as most European and North American governments keep records of these transfers.²⁴ Still, these data are imperfect, and more work needs to be done collecting and comparing this official information.

Quantifying the illegal trade is a much more difficult task.²⁵ Greenpeace is the most widely-cited source of information about international waste transfers to developing countries.²⁶ Because UNEP does not yet collect

21. *United Nations, Report of the Secretary General, Development and International Economic Cooperation: Environment (Illegal Traffic in Toxic and Dangerous Products and Wastes, U.N. Doc. A/44/362 (1989). Given its date of publication, this report does not take into account waste transfers since the Basel Convention was ratified. UNEP has compiled other statistics, but these do not reflect legal waste transfers since the Convention has been in force. UNITED NATIONS, UNITED NATIONS ENVIRONMENT PROGRAMME, supra note 20.*

22. For more on hazardous waste imports into Mexico, see Barbara Seramstad, Comment, *Transboundary Movement of Hazardous Wastes from the United States to Mexico*, 4 *TRANSNAT'L LAW* 253 (1991). See also, Adam L. Moskowitz, *Criminal Environmental Law: Stopping the Flow of Hazardous Waste to Mexico*, 22 *CAL. W. INT'L L. J.* 159 (1991-1992).

23. *United States Environmental Protection Agency Waste Export Notification Log, Notice Numbers 3017-26, 3017-29, 3017-C48, 3017-C-49, 3017 C-51, 3017 C-52, 3017-7/88, 3017-25/88, 3017-5/89, 3017-21/89, 3016-66/89, 9301706689. See also, GREENPEACE INVENTORY, supra note 17, at 131-134.*

24. These are compiled in UNITED NATIONS, UNITED NATIONS ENVIRONMENT PROGRAMME, *supra* note 20, at 335-336.

25. Decision II/4 of the Conference of the Parties to the Basel Convention has adopted an action plan to begin to address the lack of reliable information regarding the illegal traffic of hazardous waste. The plan provides for the establishment of a well-defined reporting system by which Parties would inform the Secretariat of the Basel Convention of instances of illegal traffic. The Decision also proposes cooperation with the Customs Cooperation Council Secretariat, the International Maritime Organization, and Interpol.

26. Recent references to the statistics compiled by Greenpeace as important and reliable sources of information about transboundary movements of hazardous waste to developing countries include: Laura A. Strohm, *The Environmental Politics of the International Waste Trade*, 2 *J. ENV'TL. & DEV.* 131-32 (1993); D. Kofi Asante-Duah, F. Frank Saccomanno & John H. Shortreed, *The Hazardous Waste Trade: Can It Be Controlled?* 269 *ENV'TL. SCI. & TECH.* 1687 (1992); Julienne

waste trade data of its own,²⁷ it has in the past relied upon Greenpeace's information in publishing its own reports on the waste trade.²⁸ Greenpeace has documented a number of proposals to ship toxic waste to developing countries.²⁹ However, these proposals never went further than the front pages of the international press: the proposals apparently died in the glare of the media spotlight. These proposals were either flatly rejected by the would-be importing state, or were abandoned by the brokers. An illustrative example is the case of Somalia. Waste brokers apparently proposed to ship hundreds of thousands of tons of hazardous waste to Somalia in 1991, at the height of its civil war.³⁰ The proposal was abandoned.³¹ There have only been a handful of incidents in which a developing country received shipments of hazardous waste without the importing government's knowledge or permission, and in the majority of these cases, the waste was returned to the originating country.³²

I. Adler, *United States' Waste Export Control Program: Burying Our Neighbors in Garbage*, 40 AM. U. L. REV. 885 (1991); Christoph Hilz and John R. Ehrenfeld, *Transboundary Movements of Hazardous Wastes—A Comparative Analysis of Policy Options to Control the International Waste Trade*, 3 INT'L ENVTL. AFF. 27-28 (1991); CENTER FOR INVESTIGATIVE REPORTING AND BILL MOYERS, *Global Dumping Ground: The International Traffic in Hazardous Waste* 5 (1990); Briane Wynne, *supra* note 15 at 120 (1989); Barbara D. Huntoon, *Emerging Controls on Transfers of Hazardous Waste to Developing Countries*, 21 J. WORLD TRADE L. 248 (1989); Peter Obstler, *Toward a Working Solution to Global Pollution: Importing CERCLA to Regulate the Export of Hazardous Waste*, 16 YALE J. INT'L L. 73 (1991); Barry G. Rabe, *Exporting Hazardous Waste in North America*, 3 INT'L ENV'TL. AFF. 109-10 (1991); Marguerite M. Cusack, *supra* note 9.

27. The Secretariat of the Basel Convention has recently begun the process of compiling statistics on the legal and illegal trade in hazardous waste, but this information is not yet publicly available. Telephone Interview with Mr. Pierre Portas, Secretariat of the Basel Convention (Aug. 17, 1994).

28. *United Nations, United Nations Environment Programme*, *supra* note 20, at 335-36.

29. The number of these proposals is unclear. One press report cites 693 proposals uncovered by Greenpeace between 1989 and March 1994: Bill Lambrecht, *supra* note 17. Even if this figure is accurate, it contains proposals that were made prior to May 1992 when the Basel Convention entered into force, and it does not indicate how many of those proposals actually resulted in a waste transfer. Greenpeace has not compiled a complete inventory of waste trade proposals since 1990. Vallette and Spalding, eds., GREENPEACE INVENTORY, *supra* note 17.

30. Aidan Hartley, *Contract Shows Plan to Dump Toxic Waste in Somalia*, Reuter Library Rep., Sept. 7, 1992, available in LEXIS, Nexis Library, Reuter file.

31. Agence France Presse, *Toxic Waste Shipment to Somalia Believed Aborted: UNEP*, Agence France Press, Oct. 6, 1992 available in LEXIS, Nexis Library, APF File.

32. See GREENPEACE INVENTORY *supra* note 17. For an attempt to objectively analyze the Greenpeace data, see Mark A. Montgomery, *The Waste Trade "Crisis" What Do We Really Know?* (unpublished manuscript, on file with *The Buffalo Journal of International Law*).

What seems to have become a common type of illegal waste trade is the importation of what a buyer perceives to be a good-quality, usable product, but upon delivery, the buyer discovers that he has received useless, contaminated, or even dangerous materials. This is fraud. It can occur in any kind of trade, and its victims have no socio-economic boundaries—they can be rich importers and poor importers alike.³³ One often cited incident occurred in Bangladesh, in 1991; importers bought fertilizer that they later discovered had been mixed with dust from a copper smelter.³⁴ It is interesting to note that this transfer would have been considered illegal under the terms of the Basel Convention, had it been in force.³⁵ Furthermore, the United States government prosecuted and convicted the South Carolina company that exported the waste³⁶ and agreed to take back the remaining toxic fertilizer even though the United States was under no formal, legal obligation to do so.³⁷ Similar incidents have taken place in Haiti,³⁸ Zimbabwe,³⁹ Sierra

33. For example, in 1988, a French firm knowingly (and legally) imported hazardous waste from West Germany. When the firm tested the waste, it found that the waste contained more heavy metals than were found when it was tested in West Germany. The firm rejected the waste. GREENPEACE INVENTORY, *supra* note 17, at 318. In another case, a firm in the Netherlands received contaminated oil from West Germany. GREENPEACE INVENTORY, *supra* note 17, at 342. Also, in 1990, a British company found that waste imported from Ireland did not conform to mutually agreeable specifications. This involved a dispute with the Irish firm over who should pay for disposal of the waste. GREENPEACE INVENTORY, *supra* note 17, at 366.

34. Masud Hasan Khan, *Bangladesh—Environment: Shipping Back Toxic Fertilizer*, INTER PRESS SERVICE, July 18, 1994 available in LEXIS, Nexis Library, Inter Press Service File.

35. Neither Bangladesh nor the United States have ratified the Convention to date. See also *supra* note 1.

36. John H. Cushman, Jr., *Clinton Seeks Ban on Export of Most Hazardous Waste*, NEW YORK TIMES, Mar. 1, 1994, at A18. The judgment on this case was handed down in federal district court in South Carolina, on November 1, 1993. Two companies, Gaston Copper Recycling Company and its parent, Southwire Corporation, were handed a \$1 million fine as part of a plea bargain, U.S. v. Stoller Chemical Co., U.S.D.C. for South Carolina, no. CR2:92:289.

37. *Government Firms Submit Plan to Return Tainted Fertilizer from Bangladesh to US*, BNA, July 6, 1994 available in CAL. ENV'TL. DAILY (BNA) LEXIS, Nexis Library, BNA file; Masud Hasan Khan, *supra* note 34.

38. See GREENPEACE INVENTORY, *supra* note 17, at 21-23. This incident involved the notorious "pariah ship," *Khian Sea*. This ship was loaded with incinerator ash, and it wandered the world seeking a port where it could unload its cargo. At one point during its two-year odyssey, the ship's owners approached the Haitian government for permission to unload. Haitian officials issued a permit to allow the *Khian Sea* to unload what they were told was fertilizer. As the ship's crew began unloading the ash, the Haitian government learned of the ship's true cargo, and sent the police and the army to forcibly reload the ash and expel the *Khian Sea* from Haitian waters. To avoid such a confrontation, the *Khian Sea* set sail in the middle of the night, leaving a portion

Leone,⁴⁰ and Poland.⁴¹ However, once again, without a systematic, empirical study of the quantity and direction of illegal waste movements, it is difficult to say with any certainty that non-OECD countries are subject to greater environmental damage from this sort of trade than OECD countries.

Greenpeace and others stress the possibility that these cases of fraud represent the "tip of the iceberg" of illegal waste transfers to developing countries.⁴² This may be true, but it remains only a possibility because of the anecdotal nature of these reports; it is not an established fact.⁴³ A number of anecdotes seem to support the idea that developing countries have become

of its cargo behind. The ash remains in Haiti. Though Greenpeace asserts that the ash from the *Khian Sea* contained high levels of dioxin that posed extreme risks to health and the environment, the Pan American Health Organization, which sent technicians to Haiti to test the toxicity of the waste and to investigate alleged health problems, found traces of toxins so small that the technicians concluded that the waste posed no serious threat to human health or the environment. See United States Department of State Telegram Limited Official Use Port-au-Prince 02003, March 23, 1988.

39. GREENPEACE INVENTORY, *supra* note 17, at 112-14. In this case a Zimbabwean business imported what it believed were usable resins and cleaning fluids. Instead, they received useless waste materials from two brokers in the United States, who have since been imprisoned for violating American waste disposal regulations.

40. GREENPEACE INVENTORY, *supra* note 17, at 102. In this case, citizens of Sierra Leone imported what they thought was road construction material from Europe. It was found to be of poor quality and tainted with ammonia, formaldehyde, and carbon monoxide. Several hundred bags of this mixture was then dumped in a municipal garbage dump. The government of Sierra Leone arrested the importers for illegal dumping.

41. Steve Coll, *Free Market Intensifies Waste Problem: Rich Nations Dumping on Poorer Ones*, WASH. POST, March 23, 1994 at A1. Poland has received shipments of what were characterized as donations of medical supplies, but upon inspection were found to be used syringes, tights, underwear, and other unusable medical waste.

42. GREENPEACE INVENTORY, *supra* note 17, Preface. This assumption is echoed by Christoph Hiltz, *supra* note 19, at 18-24; Wynne, *supra* note 15, at 120; Rabe, *supra* note 26, at 110.; Danny Worrell, *Issues and Policy Considerations Regarding Hazardous Waste Exports*, 11 HOU. J. INT'L L. 379 (1989); Cusack, *supra* note 9, at 393.

43. Strohm admits that "the overall scale of the international waste trade appears relatively minor at this time" (Strohm, *supra* note 26, at 130). Yet she leaves the impression that the waste trade to developing countries might have been—or even must have been—a problem in the past without citing any empirical studies to support this conclusion. Hackett states that "the amount of hazardous waste exported either globally or to developing countries is unknown," and then bases his critique of the Basel Convention upon the anecdotal evidence that indicates "the existence of at least some problems, and more importantly, the perception of such problems." Hackett, therefore, suggests that the hazardous waste trade problem may be more "perceived" than real. See Hackett, *supra* note 9, at 297.

the "global dumping ground"⁴⁴ through fraud. But a number of "anecdotes" is not the logical equivalent to "data". It could be that Greenpeace's anecdotes are only exceptions to an otherwise unexciting rule: most waste traders operate legally and openly. While theories of waste trade icebergs are logically coherent and conceivably possible, these theories have not yet been systematically tested through empirical observation. The fact is that no one knows how big the illegal trade really is. Furthermore, as will be argued below, the size of the illegal waste trade will remain unaffected by the new waste export ban.

Taking a justifiably conservative, skeptical view of the best available data on waste transfers to non-OECD countries, it becomes apparent that the evidence is inconclusive: it is difficult to gauge the effectiveness of the Basel Convention, with or without the new export ban.

THE NEW WASTE EXPORT BAN

The Parties to the Basel Convention unanimously decided to ban all hazardous waste exports from OECD countries destined for disposal in non-OECD countries, effective immediately. They also decided to phase out all hazardous waste exports to these countries for recycling and recovery by the end of 1997. Although the decision was unanimous, there was bitter dissension among the Parties during the negotiations. Days before the March meeting, the governments of Britain, France, Germany, and the United States signaled their refusal to go along with the ban.⁴⁵ These countries were reluctant to impose an export ban on waste materials that can be profitably and safely recycled. Developing countries and environmental groups interpreted opposition by rich countries, particularly the United States, as an attempt to perpetuate illegal waste dumping in poorer, weaker countries.⁴⁶ Greenpeace labeled these opponents "The Sinister Seven."⁴⁷ Australia, Japan, and Canada were the last hold-outs, but in the end, all agreed to the decision.⁴⁸

44. CENTER FOR INVESTIGATIVE REPORTING AND BILL MOYERS, *Global Dumping Ground: The International Traffic in Hazardous Waste* (1990), *supra* note 26.

45. Charles P. Wallace, *Asia Tires of Being the Toxic Waste Dumping Ground for Rest of World*, L.A. TIMES, Mar. 23, 1994, at 16; Michael J. Satchell, *Deadly Trade in Toxics*, US NEWS & WORLD REP., Mar. 7, 1994, at 64.

46. *Basel Treaty Partners Agree to Ban Waste Exports to Nations Outside OECD*, *supra* note 2, at 297.

47. Greenpeace, *Toxic Trade Update*, *supra* note 19, at 12.

48. *Basel Treaty*, *supra* note 2, at 297.

Upon superficial analysis, it appears that the industrialized opponents voted to board the "ban wagon" once they were convinced of the wisdom of this policy. A deeper analysis, however, leads one to conclude that negotiators for the industrialized countries finally agreed to the ban because it does not significantly alter the fundamental provisions of the Convention—it maintains the status quo.⁴⁹ Because the ban was presented as a "Decision of the Parties," it will not be incorporated into the text of the Convention itself. Had the parties agreed to an amendment or protocol to the Convention,⁵⁰ the ban would have the force of a formal prohibition. Instead, the ban is a "decision," which is more like a non-binding resolution or pronouncement.

Though the decision is not strictly binding on present or future Parties to the Convention, some Parties may wish to interpret it as such; others may not. In any case, there is no requirement that Parties adopt the language of the decision in their domestic legislation or instrument of ratification. Advocates of the ban seem satisfied with the decision of the Parties to the Convention, and some analysts have stressed that it has legal effect.⁵¹ Practically speaking, however, the ban will neither affect the central rights and responsibilities of the Convention, nor will it alter the way that hazardous waste is currently traded.

The ban is not entirely irrelevant, however; it has important "moral" implications. It reemphasizes the principal that it is wrong to dump on countries who are unwilling and unable to manage it safely. Currently, those countries which do not want to import hazardous waste are, by and large, non-OECD countries. Thus, the ban reinforces the status quo. It advises those responsible for waste generation that they should also be responsible for waste disposal. It also reminds more affluent nations that they have an obligation to ensure that their affluence does not come at the poor nations. These moral injunctions aside, the ban will not have much of an effect on where waste moves.

TIGHTENING THE BAN IS A BAD IDEA

Advocates of the waste export ban can be expected to seek more and more stringent controls on waste exports. It is likely that some Parties to the Convention, spurred on by environmental groups, will move to strengthen the

49. One observer believed that the United States gave up its opposition to the ban when it perceived that it did not have the votes to quash the ban. See *US Business Group Withdraws Support for Basel Treaty After Ban on Waste Trade*, 17 INT'L ENVTL. REP. (BNA) 463 (1994).

50. Article 17 of the Basel Convention *supra* note 1, outlines procedures for amending it.

51. Bill Lambrecht, *supra* note 17.

ban, or to make it universal. This would be misguided for a number of reasons.

The Illegal Trade Will Be Unaffected

Broadening the definition of what constitutes "illegal" waste trade will not make it any easier for the international community to monitor and control illegal transboundary movements (whatever their magnitude).⁵² The anecdotes that Greenpeace and others cite as evidence of large-scale movements of hazardous waste to developing countries were already illegal under the terms of the Basel Convention. Merely reemphasizing their illegality does not make these movements more controllable. In fact, sometimes legalizing certain kinds of commerce can make exchanges more susceptible to governmental regulation.

Consider the case of illegal drugs in the United States. Thoughtful analyses from both ends of the political spectrum have argued that the best way to control the use of marijuana, cocaine, and heroin in the U.S. would be to legalize them.⁵³ Despite their high moral tone, policies of "zero tolerance" have not been at all effective in reducing the flow of illegal drugs into the United States. Legalization might make the market for drugs more transparent and, therefore, easier for the government to control. If all waste trade were legal, there would be no guarantee, of course, that all environmentally damaging waste trade would end (just as with the drug trade, legalization would not necessarily mean that drug use would decline). Nevertheless, a legal market can be better regulated than an illegal one.

A waste export ban, even a tightened one, will have no effect on waste transfers that are made under false pretenses. Commercial fraud can be expected to exist as before, because this trade was already illegal under the original terms of the Basel Convention. The Convention classified any transboundary movement that occurs without prior notification and consent of the importing country, or that occurs "with consent obtained by States concerned through falsification, misrepresentation or fraud" as illegal.⁵⁴ The Basel Convention's system of controls to make waste trading more transparent was intended to guard potential importers of waste against being billed of their money. The case of tainted fertilizer in Bangladesh testifies to the fact that the system is not foolproof, and that some illegal waste trade fraud may be

52. Barry James, *Waste Racketeers Threaten to Soil Cleanup Trade*, INT'L HERALD TRIB., Mar. 25, 1994, at 6.

53. See, e.g., Martin Richardson, *Trade Policy and the Legalization of Drugs*, S. ECON. J. 655-70 (1992); Lester Grinspoon, *A Harmfulness Tax: Legalize and Tax Drugs*, J. ST. GOV'T 46-49 (1990).

54. Article 9 of the Basel Convention, *supra* note 1.

occurring. But the new waste export ban will make little difference in eliminating current waste trade fraud.

Trade in Non-hazardous Waste Will Continue

The Basel Convention purports only to regulate the international trade in hazardous waste.⁵⁵ It is important to keep in mind that not all exported waste is hazardous, yet non-hazardous waste can still pose risks to human health and the environment.⁵⁶ A recent proposal to export waste from the United States to Suriname illustrates the problem. The government of the Suriname reported to the government of the United States that it had learned of two separate plans to import waste into the South American country.⁵⁷ The government of Suriname did not want to import either the municipal waste or sludge mentioned in the two proposals. The U.S. government expressed its support of the Surinamese government position, but replied that the U.S. government had no legal authority to restrict these waste exports unless they were defined under U.S. law as hazardous.⁵⁸ Since neither the Basel Convention, nor U.S. law regards these materials as "hazardous,"⁵⁹

55. The scope of the Convention is defined in Article 1 *supra* note 1. The Convention does not regulate trade in radioactive waste, though as Decision II/8 of the Conference of the Parties *supra* note 3, indicates, the Parties will continue to strengthen links with the International Atomic Energy Administration's Code of Practice regarding the control international transboundary movements of radioactive wastes.

56. The distinction between "hazardous" and "non-hazardous" is a fine one. For a discussion of the complexity of defining hazardous waste, see Michael Dowling & Joanne Linnerooth, *The Listing and Classifying of Hazardous Wastes* in RISK MANAGEMENT AND HAZARDOUS WASTE: IMPLEMENTATION AND THE DIALECTICS OF CREDIBILITY 115 (Brian Wynne, ed., 1987).

57. *Hazardous Waste: Possible Basel Waste Export to Suriname Cannot Be Controlled by US Government*, 17 INT'L ENVTL. REP. (BNA) 409 (May 4, 1994).

58. The U.S. government does have legal authority to control exports of hazardous waste. 42 U.S.C. § 3017 (1991). Hazardous and Solid Waste Amendments of 1984 to the Resource Conservation and Recovery Act. These amendments necessitate that importing countries be notified and give their consent before exports of hazardous waste will be allowed. The problem with the Surinamese case is that the waste in question does not fit the Federal definition of "hazardous waste," and therefore does not fall under this legislation. Furthermore, the Export Administration Act of 1979 (50 U.S.C. § 2402(1)(B) (1977 and Supp. 1994) enables the President "to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations."

59. Article 1 of the Basel Convention *supra* note 1, defines its scope to include specific categories of waste, as well as wastes with specific characteristics. These categories and characteristics are listed in Annexes I and III, respectively. Also note that the United States has perhaps the broadest national definition of hazardous waste in the world. For a comparison of national definitions among OECD countries, see *International Perspectives on Hazardous Waste Management*, (William

the Surinamese government could restrict their import under the Basel Convention only if it declared the waste "hazardous" and refused to import it under the prior informed consent rules of the Convention.⁶⁰ Otherwise, even with the new ban, the transfer of waste to Suriname would be perfectly legal, despite its possible negative environmental consequences. In the end, the importing country is responsible for ensuring that its own environmental standards are upheld: in short, only Suriname can protect Suriname.

Non-OECD Countries May Become Complacent

One of the arguments in favor of the ban on waste exports is that it makes exporting countries responsible for whatever leaves their borders.⁶¹ Countries that have outlawed hazardous waste imports—103 in all⁶²—may believe that the export ban now relieves them of their own responsibility to ensure that no waste enters their borders. Yet, the illegal trade will continue to cause problems—perhaps even greater ones than that of the legal trade. Cases like the one in Bangladesh could become even more common if non-OECD countries now relax their efforts to keep out unwanted waste.

Moreover, by placing responsibility for waste trade problems on the shoulders of OECD countries, some non-OECD countries may think it unnecessary to develop their own waste control laws, or to worry about creating effective environmental institutions. This thinking undermines the Basel Convention because the Convention encourages governments to create "focal points" and "competent authorities" responsible for hazardous waste import policies.⁶³ Some non-OECD countries may believe themselves rid of the annoyance and expense of developing these mechanisms now that a waste export ban has been imposed. Ironically, while it may have been intended as an "additional protective measure" for developing countries,⁶⁴ a waste export ban may actually retard the creation of environmental awareness and responsibility among some non-OECD governments. Specifically, the ban

S. Forester & John H. Skinner, eds., 1987).

60. Article 6 of the Basel Convention, *supra* note 1.

61. Cathleen Fogel, *Break the Toxic Waste Habit*, CHRISTIAN SCI. MONITOR, August 2, 1993, at 19. (Fogel is political advisor for the Toxic Trade Campaign of Greenpeace International.)

62. According to Greenpeace, 103 countries have banned hazardous waste exports, or have voted to ban them in international fora. Greenpeace, *supra* note 47, at 16.

63. Article 5 of the Convention, *supra* note 1, requires Parties to "designate or establish one or more competent authorities and one focal point" to facilitate the flow of information and the prior informed consent (PIC) procedures.

64. Telephone Interview with Pierre Portas, *supra* note 27.

may hinder efforts of non-OECD countries to improve their own hazardous waste management systems.⁶⁵

Some Non-Parties May Now Refuse To Ratify the Convention

Some countries remain opposed to efforts to ban the waste trade⁶⁶. The U.S. and New Zealand are the only major industrialized countries not to have ratified the Basel Convention. The U.S. had little bargaining leverage at the March meeting because it was a non-Party. Although the U.S. finally agreed to accept the waste export ban, U.S. government negotiators continued to express their disagreement with the ban on exports for recycling.⁶⁷

In the past, the United States has repeatedly affirmed its support of the Convention as well as its intention to ratify it. The Americans have been slow to adopt enabling legislation, however, because there has been a great deal of disagreement between the executive and legislative branches of the American government about what this legislation should resemble.⁶⁸ American businesses that would be most affected by the provisions of the Basel Convention have supported it.⁶⁹ The United States Chamber of Commerce, however, recently withdrew its support after the adoption of the decision to ban waste exports from OECD countries.⁷⁰ The new ban may delay the ratification process in the United States even further.⁷¹

Legitimate Recycling Will Be Undermined

Environmental activists, among others, have been telling us for years that recycling is good. Recycling slows the consumption of non-renewable resources, decreases waste, and makes good economic sense. Even recovery operations that specialize in handling hazardous waste are perceived as helpful, even though they do not solve every problem associated with the hazardous

65. Hilz and Ehrenfeld, *supra* note 26 at 42.

66. See *supra* notes 45-50 and accompanying text.

67. Bill Lambrecht, *supra* note 17 (quoting Rage Pomerance, United States Deputy Assistant Secretary of State for the Environment).

68. See Sean D. Murphy, *The Basel Convention on Hazardous Wastes*, 35 ENVIRONMENT 42-44 (1993).

69. *Industry, Administration Urge Senate to Ratify Convention on Waste Shipments*, (BNA), Mar. 16, 1992, available in LEXIS, Nexis Library, Int'l Env'tl Daily File.

70. *U.S. Business Group Withdraws Support for Basel Treaty After Ban on Waste Trade*, 15 INT'L ENVTL. REP. (BNA) 463-64, June 1, 1994.

71. Bill Lambrecht, *supra* note 17.

waste generation. No form of recycling is cost-free or risk-free.⁷² Yet, even the most deleterious of waste materials, like lead-acid car batteries, can be profitably and safely recycled.⁷³ The new waste export ban, however, will make it illegal to export waste to non-OECD countries for the purpose of recycling at the end of 1996. The waste export ban may actually impede global recycling efforts that are otherwise environmentally wise and economically sensible.

One particular subcategory of waste trade fraud is what is known as "sham recycling". This occurs when importers buy certain waste products, like metal or electronic scrap, with the intention of recycling or reprocessing this waste to extract usable materials for profit, but they discover that the shipment they bought is useless, and then must be dumped domestically.⁷⁴ This sort of fraud is classified as illegal under the Basel Convention, and its victims would be justified in requiring the exporting state to re-import the bogus recyclables.⁷⁵

"Sham recycling" is not the same thing, however, as legitimate recycling activities that are done poorly, or that harm people or the environment. Some governments permit waste imports for recycling or recovery, but make little effort to ensure that these activities are carried out safely.⁷⁶ It is deplorable when people die in connection with poorly managed recycling facilities abroad, as has occurred at a notoriously dangerous mercury recovery facility in South Africa.⁷⁷ But two things must be kept in mind about these facilities. First, the majority of materials being treated at these

72. For a general introduction to the pros and cons of recycling, see Bill Breen, *Is Recycling Succeeding?*, 5 (3) GARBAGE 36-43 (1993).

73. *Greenpeace Claims U.S. Auto Batteries Source of Worker Lead Poisoning Overseas*, 17 INT'L ENV'TL REP. (BNA) 283 (Mar. 23, 1994): "The Battery Council International, a Chicago-based group that represents manufacturers and recyclers of lead-acid batteries, said in a March 10 statement that 96 percent of the battery lead available in the United States is recycled domestically." Furthermore, lead recycling is not necessarily safe just because it takes place in an OECD country; an American lead recycler has come under fire for not protecting its workers. See Randy Lee Loftis and Craig Flournoy, *Union Accuse Lead Recycler of Environmental Abuse*, DALLAS MORNING NEWS, Feb. 18, 1994, at 28A.

74. GREENPEACE INVENTORY, *supra* note 17, at 5-6.

75. Article 8 of the Basel Convention, *supra* note 1, outlines the duty to re-import illegal waste exports.

76. *Greenpeace Claims U.S. Auto Batteries Source of Worker Lead Poisoning Overseas*, BNA, Mar. 11, 1994, available in LEXIS, Nexis Library, Int'l Env'tl Daily File. See also, *Lead Astray: The Poisonous Lead Battery Waste Trade* (1994).

77. Michael J. Satchell, *supra* note 45, at 68.

facilities are of domestic origin. Second, it is only the governments of these countries which have the capability and the authority to protect the local environment and human health. While one may argue that industrialized countries should champion worker rights in developing countries,⁷⁸ this issue should not be confused with legitimate waste recycling.

Moreover, just because recycling or recovery operations are carried out in a non-OECD country does not necessarily mean that the environment or human health will be at risk. Greenpeace has condemned the government of Singapore for permitting the importation of scrap aluminum (including aluminum cans) and then "dumping" it.⁷⁹ The Ministry of Environment responded with the assertion that the aluminum processing facilities in question were approved by the Ministry and met Singapore's environmental standards.⁸⁰ The Ministry has also argued that the waste export ban on recyclables will hinder legitimate, cross-border recycling.⁸¹ Some non-OECD countries are, in fact, able to ensure the safety of recycling and recovery operations.

The new ban will permit a non-OECD country to import hazardous waste for recycling after 1997, as long as its government informs the Secretariat of the Basel Convention that it would allow imports from an OECD country, and provided that the government specifies the categories and quantities of hazardous waste permitted, the specific recycling or recovery process to be used, and the final destination of the residues remaining at the end of the recycling process.⁸² These requirements will encourage governments to increase their oversight of domestic recycling operations. However, given that some OECD countries do not carefully regulate these operations themselves, one wonders whether these reporting requirements ought to be imposed on all states, and whether they could have been instituted without a waste export prohibition.

78. See Terry Collingsworth, J. William Goold, and Pharis J. Harvey, *Time for A Global New Deal*, 73 FOREIGN AFFAIRS 8-13 (1994). For an opposing view, see Benn Steil, "Social Correctness" Is the New Protectionism, *ibid.*, 14-20.

79. Greenpeace, Toxic Trade Campaign, *The Waste Invasion of Asia: A Greenpeace Inventory* 77 (1994).

80. *Singapore Opposed to Illegal Waste Shipments: Ministry*, Business Times (Singapore) Feb. 8, 1994, available in LEXIS, Nexis Library, Bus. Times File.

81. Dominic Nathan, *Ban on Waste Imports Will Hamper Recycling*, THE STRAITS TIMES (Singapore), Feb. 7, 1994, at 21.

82. Decision II/12 of the Conference of the Parties of the Basel Convention, *supra* note 3, at paragraph 3.

Not All Non-OECD Countries Are Alike

The example of Singapore highlights the fact that all non-OECD countries were created equal. Within this group of 150-odd states, there are enormous differences in their levels of economic development and their governmental structures. In discussions of international environmental issues, some have a tendency to divide the world into two competing groups (North vs. South, developed vs. developing, OECD vs. non-OECD).⁸³ While this bifurcation is convenient; it ignores the essential differences among states on both sides of the divide.

For example, Taiwan and Haiti are both non-OECD countries, but their economic and political circumstances could not be more diametrically opposed. Likewise, Turkey bears little resemblance politically or economically to the United States, yet both are members of the OECD. Mexico, which has been categorized as a country unable to prevent or safety manage hazardous waste imports,⁸⁴ will soon become a member of the OECD.⁸⁵

Some have emphasized official corruption as an indicator of a country's likelihood to import hazardous waste.⁸⁶ Certainly corruption exists in a number of non-OECD countries; yet both Japan and Italy have also been plagued by recent corruption scandals.⁸⁷ Spain has been cited by Greenpeace as notoriously incapable of handling hazardous waste imports.⁸⁸ Hong Kong, on the other hand, has a brand new, government-regulated, state-of-the-art

83. See, e.g., Gareth Porter and Janet Welsh Brown, *Global Environmental Politics*, chapter 4 (1991).

84. GREENPEACE INVENTORY, *supra* note 17, at 157-63.

85. *OECD Official Says Mexican Membership Will Not Improve Environmental Regulations*, 17 INT'L ENVTL. REP. (BNA) 427 (May 18, 1994).

86. See Pratap Chatterjee, *Environment: Bribes Help Sidestep Toxic Waste Ban, Say Activists*, Inter Press Service, Mar. 22, 1994 available in LEXIS, Nexis Library, Inter Press Service File.

87. On Japan, see Masumi Ishikawa, *Why the LDP Debacle?* 36 JAPAN QUARTERLY 386-91 (1989) and Takabatake Michitoshi, *The Liberal-Democratic Party in Crisis*, 36 Japan Quarterly 244-51 (1989). On Italy, see Sarah Waters, *Tangentopoli: and the Emergence of a New Political Order in Italy*, 17 WEST EUROPEAN POLITICS 169-82 (1994).

88. Jim Puckett and Dolores Romano (Greenpeace International), *The Great Cover-Up: The Transport and Dumping of Foreign Hazardous Wastes in Almaden, Spain: A Greenpeace Report*, Mar. 27, 1991 (available from Greenpeace International); Greenpeace International, *Dumping By Another Name: The Recycling of Imported Hazardous Wastes in Bilbao, Spain by the ASER Company: A Greenpeace Report*, June 26, 1991 (available from Greenpeace International). See also *Basque Government Progresses in Efforts to Get German Firms to Clean Up Toxic Dump* 17 INT'L ENVTL REP. (BNA) 276-77 (Mar. 23, 1994).

hazardous waste treatment facility that is still operating below its capacity.⁸⁹ Based on these facts, it would be hard to argue that OECD members are necessarily better able to handle waste imports than non-OECD members.

If, as advocates of the ban insist, it is morally reprehensible for OECD countries to send their toxic filth to developing countries, regardless of the circumstances, it would seem equally immoral for OECD countries to send waste to each other. Likewise, it would seem immoral if one non-OECD country wanted to export hazardous waste to another non-OECD country. Such a situation is not far-fetched. Malaysia is building a chemical waste treatment and disposal facility with the aid of a Danish firm.⁹⁰ The government has contemplated the idea of permitting waste imports from neighboring countries, which apparently have no immediate plans to build such facilities of their own. The advantages of importing hazardous waste would be two-fold: Malaysia would be able to operate its treatment facility at a higher capacity, thus increasing return on its investment; and Malaysia's neighbors would be able to dispose of their toxic waste much more safely than they otherwise could. But because of strident opposition by environmental groups,⁹¹ the Malaysian government has abandoned any further discussion of waste imports or regional cooperation on hazardous waste disposal.⁹²

The Organization of African Unity (OAU) foresaw a day when African countries might cooperate with each other to manage regional hazardous waste disposal facilities. While banning all imports of hazardous waste into Africa, the 1990 Bamako Convention would permit the

89. Kathy Griffin, *\$1B Plant Fails to Halt Toxic Dumping*, SOUTH CHINA MORNING POST (Hong Kong), Feb. 7, 1994, at 3.

90. Ab. Rahman Awang and Ibrahim Shafii, *Country Report: Malaysia*, at 34-37 in Proceedings of the Regional Seminar on the Implementation of the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, Apr. 11-13, 1994, Kuala Lumpur, Malaysia. (Seminar organized by the Centre for Environment, Technology and Development, Malaysia [CETDEM], in collaboration with the Department of Environment, Malaysia, and the UNEP Secretariat of the Basel Convention, Geneva.)

91. Consumers Association of Penang (Malaysia), *Dangers of Toxic Waste Dumps*, UTUSAN KONSUMER, no. 291 (1992).

92. Interview with Dato Dr. Abu Bakar Jaafar, Director General of the Department of Environment, Malaysia, at the Regional Seminar on the Implementation of the Basel Convention (Apr. 11-13, 1994), Kuala Lumpur, Malaysia *supra* note 89. Although Malaysia backed the recent waste export ban, its Environment Minister does not want all waste trade to be banned; rather, "non-OECD countries should be allowed to export their toxic waste to OECD countries, since they have the necessary facilities to treat and dispose of it", *Basel Convention: Malaysia Backs Export Ban*, Greenwire, Mar. 10, 1994, available in LEXIS, Nexis Library, Greenwire File (compiled from an article by Pan Hin Yue in the NEW STRAITS TIMES (Kuala Lumpur), Mar. 3, 1994).

transboundary movement of hazardous waste among its members.⁹³ An environmental group in the Philippines is spearheading a drive to adopt a similar Convention within the Association of Southeast Asian Nations (ASEAN).⁹⁴ Ironically, a Bamako-type convention would legitimize the Malaysian government's interest in importing toxic waste from its neighbors.⁹⁵

Environmental Protection, Not Politics, Should Guide Policy

Most environmental writers emphasize the primacy of the natural world over the political.⁹⁶ Yet, with regard to the waste trade, questions of environmental protection tend to become lost in arguments about: membership in certain organizations, relative levels of economic development, or the legitimacy of certain governments. Ironically, the origin of a particular barrel full of waste has come to matter more to waste trade activists than how it is managed.

Hazardous waste is nasty. But it is no more deleterious for having crossed a political boundary. Unsafe disposal of hazardous waste is deplorable, whether the waste in question originated from next door or across the world. Hazardous waste ought to be treated and disposed of in ways—and in places—that insure protection of human health and the environment. From an environmental point of view, it does not matter whether the government in power is rich or poor, democratic or totalitarian, honest or corrupt. What matters is whether that political entity in question has the will and the ability to protect the environment.

The measure of morality on this issue ought to be the degree to which a state can protect the health and the environment of those people living within its jurisdiction. If a government allows its people to be poisoned (by local waste or foreign waste), then that government should be made accountable. If a country is unable to protect the health and welfare of its

93. *Bamako Convention on the Ban of the Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa* adopted in Bamako, Mali, Jan. 29, 1991 reprinted in 30 . . . 773 (1991). (not yet in force). For analyses of the Convention, see C. Russel H. Shearer, *Comparative Analysis of the Basel and Bamako Conventions on Hazardous Waste*, 23 *Env'tl L.* 107 (1993); and J. Wylie Donald, *The Bamako Convention as a Solution to the Problem of Hazardous Waste Exports to Less Developed Countries*, 17 *COLUM. J. ENVTL. L.* 419 (1992).

94. Interview with Anita M. Celdran, Campaign Coordinator on Toxic Wastes, Green Forum-Philippines, April 12, 1994. Ms. Celdran was part of the Philippine delegation to the Second Conference of the Parties.

95. Article 6 of the Bamako Convention, *supra* note 92, outlines procedures for prior informed consent (PIC) for waste traded within Africa.

96. See, e.g., Jeremy Rifkin, *Biosphere Politics: A New Consciousness for a New Century* (1991).

citizens, then it should close down the offending disposal or recycling facilities, or, better yet, make more concerted efforts to regulate the domestic waste management industry. Such changes in policy are possible in non-OECD countries, and are happening. In South Africa, for example, a notoriously dirty mercury recovery facility, where two workers have died, has finally come under heavy government scrutiny.⁹⁷ In the past, waste trade activists have repeatedly focused on the foreign origin of a small portion of the waste treated at this plant,⁹⁸ but even if none of the waste processed at this plant had come from abroad, the facility still would have continued polluting the environment and endangering public health by processing waste of *domestic* origin until the South African government mustered the political will to do something about it.

It might be more preferable to ban waste movements to states that have inadequate disposal facilities.⁹⁹ But even this concept is very controversial because which entity should determine what is "adequate"? Ideally, a global authority who would sit in judgment, declaring this facility as "adequate" and the other as "inadequate", but, as yet, no such world authority exists, on this issue or any other. Thus, the old, Wilsonian principle of self-determination¹⁰⁰ would seem to apply: each state, or each community within a state, should be able to decide what is good for themselves. Opponents of this view, however, argue that some states are not sophisticated enough to make this decision for themselves.¹⁰¹ Which brings us to a further criticism of waste export bans.

Rich Countries May Become the "Environmental Nannies" of the Poor

Perhaps the worst thing about a waste export ban is that it sets up the OECD countries as "protectors" of developing countries. This has sweeping implications because as "environmental nannies", rich countries will be able to make decisions that will affect not only the environment, but the economies

97. *Thor Chemicals Can No Longer Burn Mercury Waste, Department of Health Decides*, 17 INT'L ENV'TL. REP. (BNA), June 1, 1994 at 480.

98. GREENPEACE INVENTORY, *supra* note 17, at 27-41.

99. Both the United States and Canada have considered this option. See John H. Cushman, Jr., *supra* note 36; and *Environment Minister Says Canada Supports System to Monitor Hazardous Waste Exports*, (BNA), Mar. 23, 1994, available in LEXIS, Nexis Library, Int'l Env't Daily File.

100. The "Fourteen Points" Address of the President of the United States Delivered at a Joint Session of the Two Houses of Congress (Jan. 8, 1918), in *The Papers of Woodrow Wilson*, at 537, Arthur S. Link, David W. Hirst, John E. Little, et al., eds., vol. 45 (1966).

101. Mitchell Zuckoff, *A River of Waste from Rich Nations Flows to the Poor*, BOSTON GLOBE, July 12, 1994, at 1.

of other countries. The OECD countries will be able to decide whether a non-OECD country should or should not receive a certain kind of waste. If a waste fits any of the descriptions of "hazardous" found in the Annexes to the Basel Convention, or is defined as hazardous under the domestic law of the exporting country, the exporting government could refuse to export that waste—even if the non-OECD country indicated its consent to receive the shipment. In effect, the rich country will be able to decide whether the poor country is able to handle the waste effectively, resulting in a "new form of paternalism".¹⁰²

Many developing countries have bitterly fought "environmental imperialism" on the part of industrialized countries who seek to impose their environmental standards upon them. Developing countries have sought to assert their sovereignty over their own environmental resources as provided for in the Stockholm Declaration of 1972.¹⁰³ Malaysia's Prime Minister Datuk Seri Mahathir Mohamad has been one of the most vocal critics of "imperial pressures" on environmental issues.¹⁰⁴ Unfortunately, this contradiction between sovereignty and international management of hazardous waste disposal has not been seriously addressed in academia.¹⁰⁵

The politically-correct thing to do would be to allow states to assert their sovereignty and choose for themselves. Of course, this would permit states to make bad decisions. Ultimately, however, the responsibility for providing a clean, healthy environment rests with individual governments. Rather than creating a system in which "nanny states" act as environmental custodians for the rest of the world, it is more desirable to let all countries decide for themselves how to manage their environment, including whether or not to import hazardous waste. If they decide to refuse the waste imports, the original terms of the Basel Convention protect their right to do so, and the

102. Christoph Hilz and John R. Ehrenfeld, *supra* note 26. Recently a noted Kenyan scholar has argued that African countries, in particular, may need a new, benign form of colonialism in order to develop economically and politically; Ali A. Mazrui, *Decaying Parts of Africa Need Benign Colonialization*, INT'L HERALD TRIBUNE Aug. 4, 1994, at 6.

103. United Nations, *Report of the United Nations Conference on the Human Environment (Stockholm Declaration)*, UN Doc. A/CONF/48.14 and Corr.1 reprinted in 11 . . . 1416 (1972), *supra* note 1.

104. Michael Vatikiotis, *Priming for Rio: Malaysia Sets Tone for Earth Summit Agenda*, FAR E.W. ECON. REV. May 14, 1992, at 22. See also *Officials Blast Industrialized Nations for "Attempts" to Link Trade, Environment*, 17 INT'L ENV'T REP. (BNA) 351 (Apr. 20, 1994).

105. Hilz and Ehrenfeld, *supra* note 26, at 55-56, recommended a "redefinition of sovereignty in environmental protection issues," which would require states to relinquish their sovereign rights to supranational authority. This may seem like an ideal solution, but it ignores political realities.

Convention empowers them to force the exporting state to take back unwanted, illegally imported waste.¹⁰⁶

CONCLUSION

This article has criticized the recent decision by the Conference of the Parties to the Basel Convention to ban the export of hazardous waste from OECD countries to non-OECD countries. These criticisms have focused on three areas. First, there is very little reliable information about the waste trade that would enable an objective and systematic analysis of the effects of the Basel Convention. The statistics are contradictory and unreliable, and anecdotal reports do not amount to clear and convincing evidence. It is unclear whether the Basel Convention was, or would have been, effective at controlling transboundary movements of hazardous waste without imposing an export ban on the industrialized nations.

Second, the ban itself may have little legal effect because it was adopted as a non-binding "Decision of the Parties," rather than as an amendment or protocol to the Convention. The unanimity among the Parties was undermined by the fact that many still disagree with the export ban, but went along with it when it was presented as a sort of resolution or declaration of principle. In terms of its legal effect, the decision does not make much of a difference. In practical effect, it will matter even less.

Third, the ban does not make much sense from an environmental point of view. Advocates of the ban have portrayed OECD countries as "sinister" criminals, and the non-OECD countries as the helpless victims of "toxic terror." This view, while rhetorically attractive, oversimplifies the many complex issues involved in the cooperative management of hazardous waste. In the end, all the world's governments bear an equal responsibility to ensure that all the world's environment is protected and human health is safeguarded. While it is fine to "think globally" about hazardous waste management, individual governments must "act locally" to manage whatever hazardous waste, domestic or foreign, exists within their jurisdiction. All states should have the right to choose for themselves how best to manage hazardous waste, including whether or not to accept waste imports. Asserting this right, however, does not diminish a state's responsibility for the health and environmental welfare of its own citizens.

The Basel Convention is an important piece of international environmental law, and there is much in it to be commended. The Parties should also be encouraged to pursue many of the goals that they have laid out for themselves at their first and second meetings. Specifically, more effort

106. Article 8 of the Basel Convention, *supra* note 1, obligates Parties to re-import waste that is not exported in compliance with the provisions of the Basel Convention.

needs to be spent on drawing up model national legislation for the regulation of transboundary movement and management of hazardous waste;¹⁰⁷ establishing technical guidelines for the environmentally sound management of hazardous waste,¹⁰⁸ preparing guidelines for the safe management of waste destined for recovery facilities,¹⁰⁹ collecting and disseminating reliable information regarding both the legal and illegal trade,¹¹⁰ creating an emergency fund to minimize damage from accidents,¹¹¹ and encouraging training and technology transfer so that all countries can safely manage their own hazardous waste problems.¹¹² As with any international environmental issue, there is more that can and should be done to resolve the many problems associated with the international waste trade. However, to seek a universal waste trade ban would be unnecessary and unwise.

107. Decision II/5 of the Conference of the Parties, *supra* note 3.

108. Decision II/13 of the Conference of the Parties, *supra* note 3.

109. Decision II/15 of the Conference of the Parties, *supra* note 3. *See also* United Nations, U.N. Doc. UNEP/CHW.2/12, *Implementation of the Decision I/16 of the First Meeting of the Conference of the Parties on Transboundary Movements of Hazardous Wastes Destined for Recovery Operations* (Dec. 17, 1993).

110. Decisions II/4, II/18, II/22, and II/26 of the Conference of the Parties address the collection and dissemination of information, *supra* note 3.

111. Decision II/2 of the Conference of the Parties, *supra* note 3.

112. Decisions II/19 and II/20 of the Conference of the Parties, *supra* note 3.

