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Basel Convention on Transboundary Movement of Hazardous Wastes: Total Ban Amendment

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ARTICLES

BASEL CONVENTION ON TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTES: TOTAL BAN AMENDMENT

Muthu S. Sundram†

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Executive Summary

Moving with an unusual speed, the third meeting of the Conference of Parties to the Basel Convention, held in Geneva, Switzerland, during September 18-22, 1995, adopted an amendment to the Convention that immediately bans transboundary movement of hazardous wastes destined for permanent disposal and would also phase out, by December 31, 1997, even those wastes that could be recycled, reused or reclaimed. The “total ban” selectively applies to transboundary movement of hazardous wastes and other wastes from developed countries to developing coun-

tries. The total ban, essentially a North/South ban, does not affect the movements between the developing countries themselves.

Theoretically, after December 31, 1977, no hazardous waste can cross the boundaries of any developed country, if that "cargo" was destined for a developing country, regardless of whether the cargo was for permanent disposal or for recovery of valuable products from it. But the deadline could be missed if the Working Group is unable to come up with an acceptable, workable and definitive definition of the term "waste" which, so far, has proved to be too contentious, vague and confusing. Without a clear-cut definition of "waste," the expeditious amendment to the Convention appears to be both unnecessary and unwise.

Even if the Conference of Parties was right, that imposing stern control measures banning "all wastes" was a proper thing to do, the amendment presents substantial questions about Conventions' authority and jurisdiction to implement the measures, at least now. In addition, some concern has been raised whether the Convention would achieve its intended goal without the United States ratifying it.

Though one may read the amendment to the Basel Convention with an accusation that the Conference of Parties was in a rush to validate an unfinished "law" affecting the international community as a whole, such an accusation may not be valid because the Amendment simply fielded the question the Conference "wanted" to decide on a future date and set an ambitious schedule for the same.

However while the future Conference of Parties decides to define "waste," many other elements of the Convention still remain to be addressed without the resolution of which the real effectiveness of the Convention appears to be somewhat doubtful. Of them, the most important is the development of the Liability Protocol. Already too late and crippled with too little funds, the Working Group of the Legal and Technical Experts, that is responsible for the development of the Liability Protocol, did not succeed in finalizing the draft Liability Protocol by the fourth Conference of the parties held in October 1997. The Working Group has requested an extension to finish the Liability Protocol. The Working Group's target is now the fifth Conference of the Parties likely to be held in the latter part of 1998.

The Basel Convention is as much of a Convention affecting the international trade, as it is to protect the global environment. Whatever the discussions among the contracting parties may have been, the amendment still has to respond to the concerns of

many developing countries that would be affected by the lack of ready availability of cheap raw materials to fuel their fast-paced economic development.

The decision to amend the Convention should have been taken with utmost deliberation, but, a penetrating inquiry reveals that it was, however, done with rather unseemly haste. For example, one wonders why the Conference of the Parties did not consider least restrictive alternatives to a "total ban," such as requiring the exporters and importers of covered wastes to jointly undertake an Environmental Impact Statement before the wastes are exported and before the establishment of an United Nations "inspection team" to monitor the process is established.

The Basel Convention, as amended, is certainly an important international document that establishes a "framework" to regulate, control or ban "something" that is yet to be defined clearly. In its present form, the Convention falls much short of being a rule of law.

1 INTRODUCTION

"Beauty is in the eyes of the beholder." What this simply means is that perception generally means a lot. This may be why there is so much difficulty in defining the "simple" term "waste,"¹ leave alone its exotic variation, "hazardous waste."² For a chemist or a chemical engineer, "hazardous waste" is an inevitable by-product of a chemical reaction or an engineering process; for a recycling guru or a trade enthusiast, it is another valuable "commodity" which is worth something in return whatever that may be; and for a tree-hugging environmentalist or the innocent public, it is nothing more a poison that destructs

¹ The Basel Convention itself defines "waste" in a circular fashion as "substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law." Basel Convention on the Control of Transboundary Movement of Hazardous Waste and Their Disposal, UNEP Doc. IG.80/L.12 *adopted and open for signature*, Mar. 22, 1989, *reprinted* in 28 I.L.M. 649 (1989) [hereinafter Basel Convention]. The document is available in the Internet through the Home Page of United Nations Environmental Program (UNEP), Geneva Executive Center, Geneva, Switzerland. The World Wide Web Universal Resource Locator (URL) is: <<http://www.unep.ch/sbc/baselcon.html>>. UNEP Home Page is an excellent resource for browsing and downloading Basel Convention documents.

² "Hazardous waste" refers to generally unusable by-products resulting from industrial manufacture of goods and agriculture. THE ENCYCLOPEDIA OF THE ENVIRONMENT 314 (1994).

the lives the people and slowly kills them in the long run. Trying to determine which is a correct view or a better perception would be an exercise in waste.

“The true amount of hazardous wastes generated is not known, although the approximate amount is 400 million tonnes a year.”³ While it is a common knowledge that a vast amount of this waste is produced in a handful of developed countries, more and more of this waste ended up in underdeveloped and developing countries, some of those countries being more than half way across the globe from the point of generation of the waste.⁴ The transboundary movement of hazardous wastes did not happen overnight and the trend in the transboundary movement of hazardous wastes can be easily traced.⁵

Beginning from the early eighties, concern for cleaner environment took greater momentum in the developed countries, thanks to events like Love Canal disasters.⁶ As the NIMBY (not in my back yard) syndrome took roots, elected officials responded in kind - with NIMTO (not in my term of office) syndrome.⁷ A continuous stream of complicated environmental regulations started pouring in from all levels of governments that greatly reduced the flexibility that the private businesses once enjoyed in disposing their wastes.⁸ What used to be a routine matter now became an enormous task and also an expensive one. As increased regulatory controls became common

³ Iwona Rummel-Bulska, *The Basel Convention: A Global Approach for the Management of Hazardous Wastes, in International Programs*, Hazardous Waste Conference 1993, <<http://atsdr1.atsdr.cdc.gov:8080/cx3b.html>> [hereinafter BULSKA].

⁴ See generally, M. K. Tolba, *The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, UNEP Environmental Law Library No.2. [hereinafter “TOLBA”]. See also United Nations General Assembly Resolution 42/183, *Traffic in Toxic and Dangerous Products and Wastes*, Resolution adopted by the United Nations General Assembly on Dec. 11, 1987; BULSKA *supra*. See generally, *The International Trade in Waste: A Greenpeace Inventory*, Greenpeace International Waste Trade Project (Jim Vallette and Heather Spalding eds., 5th ed., 1990), [hereinafter *Trade in Waste*].

⁵ See generally Winfried Lang, *The International Waste Regime*, Ch. 5 in ENVIRONMENTAL PROTECTION AND INTERNATIONAL LAW, 148-49 (W. Lang, H. Neuhold, and K. Zemanek, eds. 1991) [hereinafter WASTE REGIME].

⁶ *Id.* at 148. (WASTE REGIME does not use the acronym NIMBY, but it is commonly referred to newspapers and political speeches).

⁷ *Id.* (WASTE REGIME does not use the acronym NIMTO, but it is occasionally referred to newspapers and political speeches).

⁸ *Id.* at 149.

place, the cost of disposal of waste generated, particularly hazardous waste, grew beyond leaps and bounds within a short few years.⁹ This prompted the private businesses, and the elected governments as well, to look for cheaper ways of getting rid of the wastes that were no longer welcome in their own countries.¹⁰ With the cash-starved developing countries, whose concern for the protection of the environment being not on the top of their economic order or the social agenda, being ready and willing to accept the wastes of the West, a saga of international trade in hazardous waste was born - silently, of course.¹¹ Put simply, the primary reason for traffic in hazardous wastes is likely due to differences in the levels of economic development.¹²

Though there are numerous treaties and multilateral international conventions that deal with the protection of the global environment,¹³ the transboundary pollution,¹⁴ however, contin-

⁹ See D. Hackett, *An Assessment of the Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal*, AM. U. J. OF INT'L LAW AND POL'Y 294 (1990).

¹⁰ See, e.g., Brooke, *African Nations Barring Foreign Toxic Waste*, N.Y. TIMES, Sept. 25, 1988, at 18, col. 1 (average toxic disposal costs in United States' landfills rose from \$15 a ton in 1980 to \$250 a ton in 1988).

¹¹ See *Illegal Traffic in Toxic and Dangerous Products and Wastes*, Report to the Secretary-General in the General Assembly of the United Nations at its 44th Session, July 18, 1989, U.N. Doc. A/44/362 (1989).

¹² See BULSKA, *supra* note 3.

¹³ The list of such multilateral treaties and international conventions are too numerous to list here. Some important treaties and conventions include: Agreement Between the United States and Canada on Great Lakes Water Quality, 30 U.S.T. 1983, T.I.A.S. No. 9257 (Nov. 22, 1978); Agreement on Cooperation in the Field of Environmental Protection, 23 U.S.T. 845, T.I.A.S. No. 7345 (USA v. USSR, May 23, 1972); Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, T.I.A.S. No. 10827 (USA - Mexico Aug. 14, 1983); Convention on the Long-Range Transboundary Air Pollution, T.I.A.S. No. 10541, *reprinted* in 18 I.L.M. 1442, (Nov. 13, 1979); Convention for the Protection of Rhine Against Chemical Pollution, 1124 U.N.T.S. 375 (Dec. 3, 1976); Hauge Declaration on the Environment, 28 I.L.M. 1308 (Mar. 11, 1989); Montreal Protocol on Substances That Deplete the Ozone Layer, 26 I.L.M., 1541; Stockholm Declaration on the Human Environment: Report of the Third United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14 (1972), *reprinted* in 11 I.L.M. 1416; United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122, *reprinted* in 21 I.L.M. 1261 (opened for signature Dec. 10, 1982); Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (concluded on May 23, 1969) [(Jan. 27, 1980)]. See also A. Boyle, *International Law and the Protection of the Global Atmosphere: Concepts, Categories and Principles*, in INTERNATIONAL LAW AND GLOBAL CLIMATIC CHANGE 7-21 (Robin R. Churchill, and David Freestone, eds. 1991) (for a good discussion of instruments dealing with

ues unabated. As the trade in hazardous waste began to intensify, horror stories of the victims from the recipient countries began to surface.¹⁵ The thin line between trade in waste and protection of the environment became fuzzier than ever.¹⁶ The transboundary movement of hazardous wastes took global proportions requiring close coordination and genuine cooperation at international levels for its resolution.¹⁷ It was under this backdrop that the Basel Convention¹⁸ came into life. The Basel Convention is a global legal instrument that specifically addresses the problems of transfrontier movement of hazardous wastes and other wastes.¹⁹

global climatic change); Guruswamy et al., Documents Supplement to International Environmental Law, West (1994).

¹⁴ Transboundary pollution generally includes emissions and discharges originating from one country and affecting another country; import, export, and other cross-border movement of hazardous and non-hazardous wastes; and pollution of the marine environment. See Handley, *Hazardous Waste Exports: A Leak in the System of International Legal Controls*, 19 ENVTL. L. REP. 10171 (1989).

¹⁵ See C. R. Shearer, *Comparative Analysis of the Basel and Bamako Conventions on Hazardous Waste*, in 23 ENVIRONMENTAL LAW WASTE CONVENTIONS 141 (1993) (citing JOHN MAY, *THE GREENPEACE BOOK OF THE NUCLEAR AGE: THE HIDDEN STORY*, THE HUMAN COST 364 (1990)).

¹⁶ See generally M. M. Vilcheck, *The Controls on the Transfrontier Movement of Hazardous Waste from Developed to Developing Nations: The Goal of a "Level Playing Field"*, J. INT'L L. & BUS. (1991).

¹⁷ See generally Ved. P. Nanda and Bruce C. Bailey, *Export of Hazardous Wastes and Hazardous Technology: Challenge for International Environmental Law*, 17 DEN. J. INT'L L. & POL'Y 155 (1989); W. PAUL GORMLEY, *HUMAN RIGHTS AND ENVIRONMENT: THE NEED FOR INTERNATIONAL COOPERATION*, 217 (1976) ("[a]s concerns serious disputes involving governments, binding arbitral commissions and judicial tribunals are required, provided these governments have accepted to be bound by such verdicts").

¹⁸ The Basel Convention, *supra* note 1. See Appendix A, Table 9 for Articles of the Basel Convention and Table 2 for Annexes to it.

¹⁹ *Id.* For an excellent review of social, political and legal aspects of the Basel Convention, see KATHARINA KUMMER, *INTERNATIONAL MANAGEMENT OF HAZARDOUS WASTE: THE BASEL CONVENTION AND RELATED LEGAL RULES* (1995). This book contains an exhaustive list of bibliography on international waste regimes. 165. See also Alan Neff, *Not in their Backyards, Either: A Proposal for Foreign Environmental Practices Act*, 17 ECOLOGY L. Q., 477 (1990); David J. Abrams, *Regulating the International Hazardous Waste Trade: A Proposed Global Solution*, 28 COLUM. J. TRANSNAT'L L. 801 (1990); Valentina O. Okaru, *The Basel Convention: Controlling the Movement of Hazardous Wastes to Developing Countries*, 4 FORDHAM ENVTL. L. REP. 137 (1993); Alexandre Kiss, *The International Control of Transboundary Movement of Hazardous Waste*, 26 TEX. INT'L L. J. 521 (1991); Sean D. Murphy, *Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes*, 88 AM. J. INT'L L. 24 (1994); Constance O'Keefe, *Transboundary Pollution and the Strict Liability Issue: The Work of the International Law Commission on*

The Basel Convention recognizes the rights and obligations of States with respect to each other as related to transfrontier movement of hazardous wastes.²⁰ It establishes an international control mechanism to block and prevent illicit traffic in hazardous waste trade.²¹ From the very beginning of the Basel Convention, a total ban on transboundary movement of hazardous waste, as opposed to a mere regulatory control of it, has been a volatile and contentious issue.²² After much deliberations, a recent Conference of the Parties (COP) to the Basel Convention ultimately decided to impose a total ban on the movement of hazardous wastes from developed countries to developing countries and amended the Basel Convention accordingly.²³

Though the Basel Convention has yet to define the term "waste," and yet to develop a viable Protocol for Liability, one hundred countries of all different sizes and economies have already ratified the *Basel Convention*.²⁴ It does, however, appear

the Topic of International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, 18 DENV. J. INT'L L. & POL'Y 145 (1990); Jennifer R. Kitt, *Waste Exports to the Developing World: A Global Response*, 7 GEO. INT'L ENVTL L. REV. 485 (1995).

²⁰ Basel Convention, *supra* note 1 art. 4. *Environmental Fact Sheet: Principles for Basel Convention Aim to Prevent Pollution, Reduce Risk, and Promote Recycling*, U.S. EPA 530-F-94-011, Mar. 1994, U.S. Environmental Protection Agency, Washington, D.C.

²¹ Before the total ban on export of hazardous waste was adopted, Greenpeace argued that the Convention "simply" established a global "toxic waste trade notification system" and "globalized existing rules of waste trade in the United States and Europe" which were "designed" to facilitate free trade in toxic waste that ignored the poisoning of air, waste, soil and human health. *Supra* note 4, Trade in Waste.

²² See generally Greenpeace Testimony, SUBCOMMITTEE ON TRANSPORTATION AND HAZARDOUS MATERIALS, COMMITTEE ON ENERGY AND COMMERCE, 188-89 (Oct. 10, 1991) [hereinafter Greenpeace Testimony] ("A total ban on hazardous waste exports is the legislative expression of a commitment made by all countries, including the United States" and "States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.").

²³ REPORT OF THE THIRD MEETING OF THE CONFERENCE OF THE PARTIES TO THE BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL, U.N. Environment Programme at ¶ 19, U.N. Doc. UNEP/CHW.3/34 (1995) [hereinafter COP-3 Report].

²⁴ See *Status of Signatures and Ratification for Basel Convention* (Aug. 16, 1996) <<http://www.unep.ch/sbc/ratif.html>>. As noted in Tables 3 through 9 of Appendix A, many of these countries now have their own national legislations of different scopes (Table 3). They cover diverse areas such as Waste Definition (Table

that the enthusiasm for ratification of the ban amendment is somewhat mixed, particularly among the major producers of hazardous wastes.²⁵ This does not appear to be due to some irreconcilable differences in political philosophies, but to practical problems in carrying out the mandate while a definition for what is being banned is still incomplete.

A singular purpose of this article is to address the two major issues facing the Basel Convention at present: (1) Effectiveness of the Total Ban Amendment; and (2) Development of Liability Protocol. The article accomplishes this by first presenting a brief overview of the general scheme of the Basel Convention, and then proceeding to the heart of the subject matter directly. In order to maintain its focus on matters that would aid in the improvement of the much-awaited Liability Protocol, the article does not waste time in revisiting the historical perspectives and legislative history surrounding the Basel Convention. Neither does the article attempt to make an elaborate comparative analysis of the Basel Convention to developments in any particular national jurisdiction. Any comparison to specific United States environmental statutes, which has been conscientiously kept to an absolute minimum, is only for the purpose of making certain points clear.

2 PRELUDE TO BASEL CONVENTION

In an effort to assist governments to develop a 'cradle to grave' system of "environmentally sound management" of hazardous wastes, United Nations Environmental Program (UNEP) adopted certain guidelines, known as the "Cairo Guide-

4), Export (Table 5), Import (Table 6), Transit (Table 7), Duty to Re-import (Table 8), and Illegal Traffic (Table 9) of Hazardous Waste.

²⁵ *Basel Trade Ban and Liability Protocol*, ENV. LIAB. REP. 18, WL 9767585, Sept. 1, 1995 stating that

[t]he ban is controversial for several reasons: in principle, because it is restraint on trade and thereby arguably an obstacle to economic development; because it will interrupt a lucrative export market with beneficiaries in both industrialized and developing countries; and because it will reduce the opportunities for recovery, recycling and re-use of secondary raw materials

Id. See also *U.S. Business Group Withdraws Support for Basel Treaty After Ban on Waste Trade*, 17 INT'L ENV. L. REP. 463 (June 1, 1994); "Wait and See may Become U.S. Policy on Recent Export Ban Under Basel Treaty," 17 INT'L ENV. L. REP. 556 (June 29, 1994).

lines and Principles for the Environmentally Sound Management of Hazardous Wastes" in 1987.²⁶

These general guidelines cover the management of hazardous wastes from their generation to their final disposal and, in particular, the problem of transfrontier movements of such wastes, which calls for international cooperation between exporting and importing countries in the light of their joint responsibility for the protection of the global environment.²⁷

The Cairo guidelines lay out the following general principles: (1) States should keep transfrontier movements of hazardous wastes to a minimum;²⁸ (2) States should refrain from discriminating between wastes that are exported and wastes that are kept within their own territories, i.e., exported wastes should not be subject to less stringent standards than the wastes retained within its borders;²⁹ (3) States should seek and offer international cooperation in the development and promotion of control technologies for environmentally sound management of hazardous wastes;³⁰ and (4) States should pursue pollution minimization techniques through appropriate treatment methods.³¹

3 BASEL CONVENTION

The Cairo Guidelines were merely guidelines. They were non-binding even upon the States that adopted the principles embodying it.³² However, it set the stage for the detailed discussion and negotiation of the Basel Convention and steered the negotiating parties in the right direction.³³ After about two years of tough negotiations, the Basel Convention was born with its highly ambitious goals of establishing rules and proce-

²⁶ U. N. ENV. PROG., CAIRO GUIDELINES AND PRINCIPLES FOR THE ENVIRONMENTALLY SOUND MANAGEMENT OF HAZARDOUS WASTES, 1987, U.N. Doc. UNEP/GC, 14/30 [hereinafter Cairo Guidelines].

²⁷ *Id.* Introduction.

²⁸ *Id.* pt. 1, § 2.

²⁹ *Id.* pt. 1, § 3.

³⁰ *Id.* pt. 1, § 4.

³¹ Cairo Guidelines pt. 1, § 6.

³² See Cairo Guidelines, *supra* note 26.

³³ See generally Marguerite M. Cusack, 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, 409-16 (1990).

dures in law for governing the transboundary movements³⁴ and disposal of hazardous wastes.³⁵ The Basel Convention is best understood not as one that merely provides for rules for control of transfrontier movement of hazardous wastes, but as one that provides for accountability for waste movement and that promotes self sufficiency in waste management.³⁶ It is designed to cut down illegal trafficking in waste and is formulated to protect the poor nations of the world from becoming dumping grounds.³⁷ Some of the key elements of the Convention are:

- prohibition of export of hazardous wastes to a country that is not a Contracting Party to the Convention;³⁸
- responsibility of States involved in the transboundary movements of hazardous wastes;³⁹
- principle of non-discrimination with respect to exports;⁴⁰
- prior notice and informed consent of receiving and transit countries;⁴¹ and
- duty to re-import.⁴²

3.1 *General Scheme*

At the time the Basel Convention's terms were negotiated, the guiding principle of the parties was to "regulate" the waste trade, rather than banning the movement of wastes completely.⁴³ Consequently, the Basel Convention established a general scheme and minimum standards for "environmentally sound management"⁴⁴ of waste, requiring the ultimate respon-

³⁴ "Transboundary movement" means any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement. The Basel Convention, *supra* note 1, art. 2, ¶ 3.

³⁵ For a definition of hazardous wastes, see The Basel Convention, *supra* note 1.

³⁶ See The Basel Convention, *supra* note 1.

³⁷ See *id.*

³⁸ *Id.* art. 4.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ The Basel Convention, *supra* note 1, art. 4.

⁴² *Id.*

⁴³ Cusak, *supra* note 33.

⁴⁴ The Basel Convention, *supra* note 1, art. 1 ¶ 8.

sibility for safe disposal of waste obligatory upon the country generating it.⁴⁵

3.1.1 *Definition of Hazardous Waste*

The Basel Convention covers both hazardous wastes⁴⁶ and other wastes⁴⁷ such as household wastes and incinerator ash from household wastes,⁴⁸ but not radioactive wastes⁴⁹ and wastes from ships.⁵⁰ It defines wastes as "substances that are disposed of or are intended to be disposed of . . . by the provision of *national law*."⁵¹ If a national law specifically exempts or omits a specific substance, then whether it will be deemed a "waste" depends on whether it comes within the grab of certain

⁴⁵ See Appendix A, Tables 3 through 9. *Supra* note 24.

⁴⁶ The Basel Convention, *supra* note 1, art. 1, ¶ I(a). A waste is hazardous if it belongs to any of the categories listed in Annex I, or the hazard classes of which are listed in Annex III. The Basel Convention, *supra* note 1, art. 1, ¶ 1(a). Even if the waste is not included in any of the above annexes, it may be hazardous if it is so designated by the national legislation of the "any" of the parties in the transboundary movement of it. *Id.* ¶ 1(b).

Annex I of the Convention provides for a list of 45 categories of wastes divided into two distinct categories: first category comprising waste streams (e.g., clinical wastes, waste mineral or, PCB, etc.); and a second category comprising wastes having as constituents certain enumerated substances such as copper compounds, arsenic, cadmium, lead, organic cyanides, halogenated solvents, etc.).

The Basel Convention, *supra* note 1, at Annex I.

Annex III of the Convention lists 14 classes of hazardous characteristics and each hazard class of the Convention also corresponds to hazard classification 1 to 9 of the United Nations recommendations on the transport of dangerous goods. The Basel Convention, *supra* note 1, at Annex III.

The 14 hazard characteristics, along with their UN class codes shown in parentheses, are: explosives (1); flammable liquids (3); flammable solids (4.1); substances or wastes liable to spontaneous combustion (4.2); substances or wastes which, in contact with water emit flammable gases (4.3); oxidizers (5.1); organic peroxides (5.2); poisons (6.1); infectious substances (6.2); corrosives (8); substances that liberate toxic gases in contact with air or water (9); toxics (9); ecotoxics; (9) and substances, after disposal, that are capable of generating materials with above characteristics (9).

Id. at Annex II

⁴⁷ *Id.* art. I, ¶ 2.

⁴⁸ *Id.* at Annex II.

⁴⁹ *Id.* art. I, ¶ 3.

⁵⁰ Article I, ¶ 4 of the Convention provides that the wastes covered by the International Convention for the Prevention of Pollution from Ships (MARPOL) are excluded from the scope of the Convention. The Basel Convention, *supra* note 1, art. 1, ¶ 4.

⁵¹ *Id.* art. 2, ¶ 1.

“disposal” operations, as listed in Annex IV of the Convention.⁵² Those operations that do not lead to the “possibility” of resource recovery, recycling, reclamation, direct reuse or alternative uses are defined as “disposal” operations.⁵³ Under certain circumstances, even operations that *may* lead to resource recovery, recycling, reclamation, direct reuse or alternative uses may constitute “disposal” operations.⁵⁴

3.1.2 “Environmentally Sound Management”

If one considers the heart of the Convention to be the control of transboundary movement of hazardous wastes,⁵⁵ then its soul is disposal of hazardous wastes in an “environmentally sound manner.” Article 2 of the Convention defines “environmentally sound management” of hazardous wastes or other wastes as taking all *practicable*⁵⁶ “steps to ensure that hazardous wastes or others wastes are managed in a manner which will protect human health and the environment against the ad-

⁵² *See id.* Annex IV.

⁵³ All of the following operations fall into the category of disposal operations: deposit into or onto land, (e.g., landfill, etc.); land treatment, (e.g., biodegradation of liquid or sludgy discards in soils, etc.); deep injection, (e.g., injection of pumpable discards into wells, salt domes or naturally occurring repositories, etc.); surface impoundments, (e.g., placement of liquid or sludge into pits, ponds or lagoons, etc.); specially engineered landfill, (e.g., placement into lined discrete cells which are capped and isolated from one another and the environment, etc); release into a water body except seas/oceans; release into seas/oceans including sea-bed insertion; other biological treatment and physico chemical treatment that result in final compounds or compounds discarded by operations enumerated herein; incineration at land or sea; permanent storage such as emplacement of containers in a mine; and blending, mixing, repackaging, or storing of wastes for any of the above operations. *See id.* Annex IV, § A. Other reuse, recycling and recovery operations such as reclamation/regeneration of solvents, acids or bases; recycling /reclamation of metals, metal compounds, and other inorganic materials; and recovery of catalyst components and compounds used for pollution abatement “may” also constitute disposal. *See id.*, § B.

⁵⁴ *See id.* In view of the total ban on the movement of hazardous wastes and other wastes, this distinction becomes less important, at least with respect to movement of wastes from developed countries to developing countries.

⁵⁵ *See id.* art. 4, ¶ 7(a) (Each party shall “prohibit all persons under its national jurisdiction from transporting or disposing of hazardous wastes or other wastes unless such persons are authorized or allowed to perform such types of operations.”).

⁵⁶ The use of the word “practicable” in the definition may open doors for infinite interpretation. It may also permit defense of particular methods of waste management on economic considerations. *Greenpeace Testimony, supra* note 22, at 191.

verse effects which may result from such wastes.”⁵⁷ This encompasses minimization of generation of hazardous wastes, “taking into account social, technological and economic aspects . . . [ensuring] the availability of adequate disposal facilities”⁵⁸ As an additional measure, parties to the Convention are expected to “require that hazardous wastes and other wastes subject to transboundary movement be packaged, labelled, and transported in conformity with generally accepted and recognized international rules and standards in the field of packaging, labelling, and transport, and that due account is taken of relevant internationally recognized practices.”⁵⁹

To guide the parties in building their capacities to manage in an environmentally sound and efficient way, the Convention required the parties at their first meeting to adopt “technical guidelines for the environmentally sound management of wastes.”⁶⁰ In accordance with that directive, a number of such guidelines have been published⁶¹ which include guidance for Specially Engineered Landfill,⁶² Incineration on Land,⁶³ Used Oil Re-Refining or other Reuses of Previously Used Oil,⁶⁴ the Production and Use of Organic Solvents,⁶⁵ Waste Oils from Petroleum Origins and Sources,⁶⁶ Wastes Comprising or Containing PCBs, PCTs, and PBBs.⁶⁷ A guideline on physico-chemical

⁵⁷ The Basel Convention, *supra* note 1, art. 2, ¶ 8.

⁵⁸ *Id.* art. 4, ¶ 2(a)-(b).

⁵⁹ *Id.* art. 4, ¶ 7(b).

⁶⁰ *Id.* art. 4, ¶ 8.

⁶¹ See generally *Basel Convention Technical Guidelines* (Oct. 25, 1994) <<http://www.unep.ch/sbc/guidelns.html>>.

⁶² See *Draft Technical Guidelines on Specially Engineered Landfilled* (last modified July 31, 1995) <<http://www.unep.ch/sbc/tech-d5.html>>.

⁶³ See *Draft Technical Guidelines on Incineration on Land* (last modified July 31, 1995) <<http://www.unep.ch/sbc/tech-d10.html>>.

⁶⁴ See *Draft Technical Guidelines on Used Oil Re-Refining or Other Reuses of Previously Used Oil* (last modified July 31, 1995) <<http://www.unep.ch/sbc/tech-r9.html>>.

⁶⁵ See *Technical Guidelines on Hazardous Waste from the Production and Use of Organic Solvents* (last modified July 31, 1995) <<http://www.unep.ch/sbc/tech-y6.html>>.

⁶⁶ See *Technical Guidelines on Hazardous Waste: Waste Oils from Petroleum Origins and Sources* (last modified July 31, 1995) <<http://www.unep.ch/sbc/tech-y8.html>>.

⁶⁷ PCB is polychloro biphenyl, PCT is polychloro terphenyl, PBB is polybromo biphenyl. These are suspected carcinogens and because of their toxic nature, they may can cause various health problems to humans. See *Technical Guidelines on*

treatment of wastes is currently under development.⁶⁸ These guidelines provide essential information to parties to become familiar with the standards that are not less environmentally sound than that required by the Basel Convention.

3.1.3 *Control Measures*

Any transboundary movement of wastes, if allowed, is subject to elaborate control measures based on the principle of prior informed consent. The exporting state⁶⁹ has a duty to provide detailed information about the waste so that an importing state would be able to assess the nature and risks of the intended movement.⁷⁰ The information, such as the nature of the waste, the site of its generation, the process by which it was generated, the method of disposal and the parties involved in the export, import, and disposal, is required as part of the notice.⁷¹ An informed written consent, and approval of the importing state, must be obtained before actual movement of the waste.⁷² Though a transit state, through which the movement of the waste takes place, need not be a party to the Convention, the exporting state must provide it with the same notification as provided to the importing state,⁷³ and obtain written consent from the states of transit.⁷⁴ Thus, every state is accorded certain rights pertaining to transactions involving movement of wastes through its territories, if that state considers those wastes hazardous, even if other concerned states do not treat the waste to be hazardous.⁷⁵ In addition, every person who is involved in the movement must sign a movement document and must also provide for adequate insurance coverage.⁷⁶

Wastes Comprising or Containing PCBs, PCTs and PBBs (Y10) (last modified July 31, 1995) <<http://www.unep.ch/sbc/tech-y10.html>>.

⁶⁸ See generally Basel Convention Technical Guidelines, *supra* note 61.

⁶⁹ Throughout this article, a "State" means the competent authority of that State.

⁷⁰ The Basel Convention, *supra* note 1, art. 6, ¶ I. See also Annex V A.

⁷¹ *Id.*

⁷² *Id.* arts. 4, ¶ I (c), and 6, ¶ 2, 3.

⁷³ *Id.* art. 6, ¶¶ 1 and 4, and art. 7.

⁷⁴ A transit state which is a party may waive the prior consent requirement, but a non-party transit state has to reply to the notification. The Basel Convention, *supra* note 1, art. 6, ¶ 4 and art. 13.

⁷⁵ *Id.* art. 6, ¶ 5(a)-(c).

⁷⁶ *Id.* art. 6, ¶¶ 9 and 11. See also Annex V B.

3.2 *Parties to Basel Convention*

The Basel Convention was adopted on March 22, 1989, by one hundred and sixteen States that participated in the Conference of Plenipotentiaries on the Global Convention convened by the UNEP. The Basel Convention was entered into force on May 5, 1992. As of August 16, 1996, one hundred countries and the European Council Community have ratified the Convention.⁷⁷

The United States signed the "Final Act" of the Conference of Plenipotentiaries⁷⁸ and the Convention,⁷⁹ but have not ratified the Convention as of this writing. In support of the draft Convention, the United States pledged that it strongly supported an environmentally sound global control scheme for transboundary movements of hazardous wastes⁸⁰ and made the following declaration:

[t]he United States is firmly committed to the principle of strong control over exports of hazardous wastes. To further this goal nationally, the President has decided to seek legislative authority *to ban all exports of hazardous wastes*, except where we have an agreement with the receiving country providing for the safe holding and management of those wastes.⁸¹

3.3 *Conference of Parties*

The Convention established a Conference of the Parties (COP).⁸² The duties of COP included:

- promoting the harmonization of relevant policies, strategies and measures for minimizing the harmful effects of hazardous wastes and other wastes upon human health and environment;⁸³

⁷⁷ See Status of Signatures and Ratification for Basel Convention, *supra* note 24.

⁷⁸ See U.N. ENV. PROG., 1989, BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL: FINAL ACT OF THE CONFERENCE OF PLENIPOTENTIARIES ON THE GLOBAL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES at 23, UNEP, INIS-mf-13150, March 1989.

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ *Id.*

⁸² THE BASEL CONVENTION, *supra* note 1, art. XV, ¶ 1.

⁸³ *Id.* ¶ 5(a).

- improving and updating the terms of the convention based on available scientific, technical, economic and environmental information;⁸⁴
- undertaking additional actions necessary to advance the causes of the convention;⁸⁵
- considering and adopting protocols as required;⁸⁶ and
- establishing subsidiary bodies necessary for the implementation of the Convention.⁸⁷

Pursuant to its authority under Article XV, paragraph 5(e), COP created the following subsidiary bodies:

- the Open-Ended Ad Hoc Committee for the Implementation of the Basel Convention;⁸⁸
- the Ad Hoc Working Group of Legal and Technical Experts to consider and develop a draft Protocol on Liability and Compensation for damage resulting from transboundary movements of hazardous wastes and their disposal;⁸⁹
- the Technical Working Groups to prepare draft guidelines for the environmentally sound management of hazardous wastes subject to the Basel Convention;⁹⁰ and
- the Extended Bureau of the Meetings of the Conference of the Parties.⁹¹

The first meeting of COP was held at Piriapolis, Uruguay in December 1992.⁹² During the second meeting of COP (COP-2), which was held at Geneva in March 1994, the Nordic countries proposed an amendment to the Convention itself imposing a total ban on the transboundary movement of hazardous wastes.⁹³ The signatories of the Basel Convention agreed for a total ban.⁹⁴ The third meeting of the conference of Parties con-

⁸⁴ *Id.* ¶ 5(b).

⁸⁵ *Id.* ¶ 5(c).

⁸⁶ *Id.* ¶ 5(d).

⁸⁷ *Id.* ¶ 5(e).

⁸⁸ *See Decisions Adopted By the First Meeting of the Conference of the Parties in Piriapolis, Uruguay on 4 December, 1992* <<http://www.unep.ch/sbc/cop-1.html>> [hereinafter COP-1 Decisions].

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *See id.*

⁹³ *See Decisions Adopted By the Second Meeting of the Conference of the Parties in Geneva, Switzerland on 25 March, 1994* <<http://www.unep.ch/sbc/cop-2.html>> [hereinafter COP-2 Decisions].

⁹⁴ *See id.*

vened in Geneva during September 18-22, 1995 (COP-3).⁹⁵ As summarized in Appendix B, Table 1, COP-3 adopted a total of twenty-seven decisions of which seven dealt with substantive matters, and the rest were procedural in nature.⁹⁶ A key issue addressed by COP-3 was formalization of the amendment to the Convention, adopted earlier by COP-2, that would completely ban the export of hazardous waste from developed countries to developing countries.⁹⁷ The reason for converting the decision II/12 of COP-2, to ban transboundary movement, into a formal part of the Convention, was that doubts arose as to the legal enforceability of the decision.⁹⁸

Among other decisions, COP-3 urged the importance of development of protocol on liability and compensation clarifying who pays when a damage arises from transboundary movement of hazardous waste and where the money will come from.⁹⁹ It accepted the Report of the first evaluation of the Convention's effectiveness stating that the Convention exerted considerable influence on national programs¹⁰⁰ and adopted the manual for implementing the convention¹⁰¹ and also the Model National Legislation for the Transboundary Movements and Managements of Hazardous Wastes.¹⁰² In addition, COP-3 established and accepted proposal for various regional and sub-regional training centers to facilitate technology transfer.¹⁰³

⁹⁵ See *Basel Convention Adopts Amendments Banning Hazardous Waste Exports From Developed to Developing Countries* (last modified Sept. 31, 1995) <<http://www.unep.ch/sbc/pr9-95a.html>>.

⁹⁶ For the full text of the decisions, see *Decisions adopted by the Third Meeting of the Basel Convention, U.N. Doc. UNEP/CHW.3/35* (last modified Jan. 24, 1996) <<http://www.unep.ch/sbc/cop3-b.html>> [hereinafter COP-3 Decisions]. Of a total of 27, the Decisions numbered 1,2,5,6,12,14, and 15 dealt with substantive matters and the rest were concerned with various procedural aspects such as creation of emergency funds, notification procedures, cooperation with other UN bodies. See Table 1 of Appendix B for titles of all of the Decisions.

⁹⁷ Statement of Iwona Rummel-Bulska, Chief, Environmental Law and Institutions Unit, UNEP, Int'l Env't Rep. (BNA), Sept. 6, 1995, at 667.

⁹⁸ See *Basel Trade Ban and Liability Protocol*, ENV. LIAB. REP., Sept. 1, 1995.

⁹⁹ See COP-3 Report, *supra* note 23.

¹⁰⁰ See *id.* ¶¶ 26, 47 and 48.

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ See *id.* ¶ 19.

3.3.1 *Amendment of Convention for Total Ban*

COP-3 ratified the decision of the second meeting of the Conference of Parties to impose a total ban on the transboundary movement of hazardous waste by adopting an amendment to the Convention itself.¹⁰⁴ This amendment immediately bans “all” export of hazardous wastes destined for “final disposal” in non-OECD countries and would phase out exports for recycling or recovery before banning them completely on December 31, 1997.¹⁰⁵

The decision to adopt the total ban, instead of control of transboundary movement, was due to the belief that there was a “high risk” of hazardous wastes being disposed of in the non-OECD countries, which are generally the recipients of hazardous wastes, in a manner that would not be “environmentally sound.”¹⁰⁶

Whether to impose a total ban or not has been an issue of contention. Since the adoption of this amendment via decision II/12 of COP-2, the international community has gone through a very intense process in the analysis of its implications. The ban is controversial for several reasons: first, the description of

¹⁰⁴ See *Basel Meeting Gets Under Way with Hope of Adopting Export Ban on Hazardous Waste*, 18 INT'L ENVTL. REP. 707 (Sept. 20, 1995). See also COP-3 Decisions, *supra* note 96.

¹⁰⁵ See COP-3 Decisions, *supra* note 96. Decision III/1.3 adopted the following amendment to the Convention:

“Insert new preambular paragraph 7bis:

Recognizing that transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous wastes as required by this Convention;

Insert new Article 4A:

1. Each Party listed in Annex VII shall prohibit all transboundary movement of hazardous wastes which are destined for operations according to Annex IVA, to States not listed in Annex VII.

2. Each Party listed in Annex VII shall phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes under Article 1(i)(a) of the convention which are destined for operations according to Annex IV B to States not listed in Annex VII. Such transboundary movement shall not be prohibited unless the wastes in question are characterized as hazardous under the Convention.”

Id. at Decision III/1.3. Annex IV A lists operations that are deemed permanent disposal and Annex IV B lists operations that typically constitute recovery, reuse or reclamation. The Basel Convention, *supra* note 1, at Annex IVA and B.

¹⁰⁶ See COP-3 Decisions, *supra* note 96, at Decision III/1.3.

“waste” is vague and the definition for “hazardous waste” is still unclear;¹⁰⁷ second, it is an indirect restraint on free trade and therefore an obstacle for economic development;¹⁰⁸ third, it will practically bring the lucrative export market in waste that benefits both exporters (developed countries) and importers (almost always developing countries) to a halt;¹⁰⁹ and fourth, it will be an impediment to economical recovery, recycling and reuse of spent waste.¹¹⁰

The amendment itself left no room for doubt that a clear consensus for what constitutes hazardous waste is wanting.¹¹¹ The COP-3 charged the Technical Working Group (TWG) with identifying and characterizing the waste materials,¹¹² but in all likelihood, it appears that the complexity of the mammoth task of hazard characterization was not fully appreciated. A partial list prepared by the TWG offered “useful guidance” to COP-3, but the list was far from being complete or was not in a fully acceptable form.¹¹³ While the amendment went into immediate effect, COP-3 instructed the TWG to give “full priority” to “completing” the work on hazard characterization.¹¹⁴

The monumental task of hazard characterization takes extreme significance because a number of countries would not ratify the amendment prior to the outcome of the TWG.¹¹⁵ For

¹⁰⁷ See The Basel Convention, *supra* note 1.

¹⁰⁸ Basel Trade Ban & Liability Protocol, ENVTL. LIAB. REP., Sept. 1, 1995, at [18]. An Ad Hoc Group, on Trade and Environment, of the United Nations Committee for Trade and Development (UNCTAD) is now exploring alternative mechanisms that would be less trade-restrictive in the broader context of Basel Convention. See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ Decision III/1 states in part: “. . . - the Technical Working Group has already commenced its work on the development of lists of wastes which are hazardous and wastes which are not subject to the Convention; - those lists (document UNEP/CHW.3/Inf.4) already offer useful guidance but are *not yet complete or fully accepted.*” (emphasis added). See COP-3 Decisions, *supra* note 96, at Decision III/1.

¹¹² See COP-3 Decisions, *supra* note 96, at Decision III/1.1.

¹¹³ See *id.* at Decision III/1.

¹¹⁴ COP-3 instructs TWG “to give full priority to completing the work on hazard characterization and the development of lists and technical guidelines in order to submit them for approval to the fourth meeting of the Conference of the Parties.” See COP-3 Decisions, *supra* note 96, at Decision III/1. See also Decision III/12 (concerning “Hazard Characterization”).

¹¹⁵ See COP-3 Report, *supra* note 23, at Annexes II and III.

example, Canada went along with the consensus on the decision adopting a total ban and would not permit shipment of hazardous waste for "final disposal" in a developing country, or for resource recovery "to countries that prohibit such imports."¹¹⁶ Nevertheless, Canada regards consideration of adoption of legally binding amendment "premature" at this time, because of "insufficient clarity as to which recyclable materials would be subject to the total ban amendment."¹¹⁷ Canada did not ratify the amendment because it believes that there is an acute need for recycling of hazardous wastes "today, tomorrow, and for many years to come"¹¹⁸ and Canada will not ratify the amendment unless it is assured that "trade in non-hazardous recyclables will not be jeopardized."¹¹⁹

Australia also took the same stand as Canada, with respect to ratification of total ban amendment.¹²⁰ It will consider ratifying the amendment only if it is satisfied with the definition of hazardous characteristics after it is completed by the TWG.¹²¹ Australia considers Article 11 of the Convention, that enables countries to enter into bilateral, multilateral or regional agreements voluntarily, an important provision of the Basel Convention and would not yield that right despite its adoption of the ban amendment.¹²²

The main contention of those who oppose the total ban is that due to lack of clarity on what constitutes waste, many non-hazardous waste could become easily included in a list of hazardous wastes and therefore banned.¹²³ "There is so much confusion and misunderstanding about what is supposed to be regulated under the Basel Convention that no secondary raw material can be regarded as beyond the scope of individual mis-

¹¹⁶ *Id.* at Annex II.

¹¹⁷ Besides Canada, there were a few other delegations at COP-3 that also felt that "the amendment of the Convention, in particular related to hazardous wastes destined for recovery operations was "somehow premature." *See id.* ¶ 30.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ COP-3 Report, *supra* note 23, at Annex III.

¹²¹ *See id.*

¹²² *See id.*

¹²³ Paragraph 29 states that in the context of ban amendment to the Convention, "the need for further work to be done under the Convention on the hazard characteristics of wastes was emphasized by *all* speakers as a very crucial one." (emphasis added). COP-3 Report, *supra* note 23, ¶29.

representation.”¹²⁴ For example, non-contaminated scrap metals,¹²⁵ ferrous scrap and unmixed paper,¹²⁶ and the majority of waste on the OECD Green List which pose no threat to public health or “amenity,”¹²⁷ not referred to in Article 1 of the Basel Convention, were not covered by the Basel Convention and, therefore, would not be covered by the ban. This is, however, not clear from the way “waste” is defined under Article 1 of the Basel Convention. The COP-3 itself was concerned about this dilemma and requested the TWG to “identify those chemical constituents which require further description in order to differentiate better between those constituents that *always* cause a waste . . . to be hazardous and those that do not necessarily cause a waste to be hazardous.”¹²⁸

A total ban may put pressure on virgin materials¹²⁹ and could potentially have big impact on scrap metal. Echoing the same concern, a number of newly industrializing countries such as India, Brazil, China, and Nigeria believe that a total ban on the movement of hazardous wastes that could be otherwise recycled would slow their industrial development.¹³⁰ In fact, COP-3 does recognize this problem as evident in its Decision III/14 concerning the transboundary movement of hazardous wastes solely destined for recovery operations.¹³¹ In a similar vein, Decision III/14 specifically excludes ozone-depleting chemicals of the Montreal Protocol which can be reclaimed and purified to usable purity.¹³² In an effort to fully assess the viability of recovery operations, in conjunction with the Basel Convention’s declared goal of environmentally sound management of wastes, COP-3 recommended that the TWG prepare draft tech-

¹²⁴ *Id.*, quoting statement of Francis Veys, Secretary General of Bureau of International Recycling (BIR).

¹²⁵ See COP-3 REPORT, *supra* note 23, ¶ 44.

¹²⁶ See COP-3 REPORT, *supra* note 23, at Annex III.

¹²⁷ *Id.*

¹²⁸ COP-3, Decision III/12.3(b). In addition, COP-3 emphasized the perceived need for hazard characterization of classes H10 through H13 in Annex III of the Basel Convention which deal with substances or wastes that are capable of producing toxic materials upon reaction with air or water, or after disposal.

¹²⁹ See *id.*, quoting statement of Rafe Pomerance, Deputy Assistant Secretary of State for Environment and Development and Head of U.S. Delegation to COP-3.

¹³⁰ See *id.*

¹³¹ COP-3 Decisions *supra* note 96, at Decision III/14.

¹³² See *id.* at Decision III/15.

nical guidelines on recycling/reclamation of metals and metal compounds,¹³³ and initiate case studies¹³⁴ to understand, comprehend and determine the following:

- elements for improving the recovery of hazardous wastes in non-OECD countries;¹³⁵
- the functioning of recovery facilities;¹³⁶
- ways and means to aim at the environmentally sound management of the hazardous wastes to be recovered and the recovery operations themselves.¹³⁷

The total ban provision applies only to exports of hazardous wastes from OECD to non-OECD countries, and does not affect exports of hazardous wastes from developing country to another. Though the ban, in effect, is a North/South ban and does not affect any South/South movement, and appears to be somewhat discriminatory on its face, it is, nevertheless, well established that the primary movement of hazardous waste is from developed countries to developing countries and not vice versa.¹³⁸

As far as the United States is concerned, it appears that the Clinton Administration is not as much opposed to the total ban as to the lack of clarity of what is being banned.¹³⁹ In support of the total ban, and with a positive view that restricting the export of waste may even reduce domestic waste production, the U.S. Environmental Protection Agency (EPA) Administrator Carol Browner said:

the U.S. must set an example for the world by taking responsibility for our own wastes. Citizens in other countries should not be asked to bear the burden of U.S. pollution . . . The U.S. exports

¹³³ See *id.* at Decision III/13.2(b).

¹³⁴ See *id.* at Decision III/14.

¹³⁵ COP-3 Decisions *supra* note 96, at Decision III/14.3.

¹³⁶ See *id.*

¹³⁷ See *id.*

¹³⁸ See *Basel Trade Ban and Liability Protocol*, ENV. LIAB. R. 18, Sept. 1, 1995 (WL 9767585) (the ban does not affect trade in such wastes and materials between non-OECD countries, only shipments involving the industrialized world). See also Press Release from the UNEP Secretariat for Basel Convention. *Basel Convention Adopts Amendment Banning Hazardous Waste Exports from Developed to Developing Countries*, Geneva, Sept. 22, 1995, <<http://www.unep.ch/sbc/pr9-95a.html>>.

¹³⁹ See *Basel Meeting Gets Under Way with Hope of Adopting Export Ban on Hazardous Waste*, *supra* note 104, at 707.

only a fraction of a percent of our hazardous wastes. But that fraction adds up to a significant amount. The current policy puts people in other countries at risk of dangerous exposures to toxic materials. *That has to stop.*¹⁴⁰

3.4 *Development of Liability Protocol*

The Ad Hoc Working Group of Legal and Technical Experts (LTE) is a subsidiary body of the COP charged with the development of Model National Legislation and preparation of a draft Protocol on Liability and Compensation for damages resulting from transboundary movements of hazardous wastes and their disposal.¹⁴¹ This group also has the general responsibility of coordinating all legal and institutional aspects to the implementation of the Basel Convention.¹⁴² While the Group continues to work towards completion of the Draft Protocol on Liability and Compensation so as to have it finished by COP-5, likely to be in late 1988, the draft Model National Legislation prepared under the auspices of this Group was accepted by COP-3.¹⁴³

The LTE responsible for the development of Liability Protocol (hereinafter Protocol Working Group or PWG) approved a first draft of a *Protocol on Liability and Compensation in its meeting in Geneva on September 13-17, 1993.*¹⁴⁴ This version toned down the Convention's emphasis on "generator" liability and added disposers and other parties in control of wastes at the time of polluting incidents as liable persons.¹⁴⁵ In addition, the draft included unlimited, joint and several liability, compulsory insurance or financial guarantee, creation of Trust Fund for emergency response and compensation not covered by the liability regime.¹⁴⁶

¹⁴⁰ See *Export Ban Proposed*, ENV. LIAB. REP., Apr. 25, 1994 (quoting U. S. E.P.A. Administrator Browner).

¹⁴¹ See *Draft Articles of a Protocol on Liability for Damage Resulting from the Transboundary Movements of Hazardous Wastes and Their Disposal*, Report of the Ad Hoc Working Group on the Work of its Third Session, Annex, Article 1, Geneva, Feb. 20-24, 1995 at 21, U.N. Doc. UNEP/CHW.1/WG.1/3/2 (March 17, 1995) (emphasis supplied) [hereinafter Draft Protocol].

¹⁴² See *id.*

¹⁴³ See COP-3 Report, *supra* note 23.

¹⁴⁴ See *Basel Liability Protocol Drafted*, ENV. LIAB. REP. 10, Oct. 29, 1993, WL 10912079 (1993).

¹⁴⁵ See *Liability on Basel Convention Agenda*, ENV. LIAB. REP. 9, Mar. 29, 1994.

¹⁴⁶ See *id.*

As the first draft of Liability Protocol was far from complete, COP-2, in its March 1994 meeting, instructed the LTE to continue the work with an eye toward completion of development of the Protocol before the COP-3.¹⁴⁷ In accordance with decision II/1 of COP-2, the third session of the LTE was held in Geneva from 20 to 24 February 1995¹⁴⁸ and deliberated in detail appropriate language for inclusion in the final draft Protocol.¹⁴⁹ Once again, there were serious disagreements among the parties and therefore, the revised draft Protocol was not accepted by COP-3. As of COP-4, held in October 1997, the PWG has “not yet succeed[ed] in finalizing the draft [Liability P]rotocol.”¹⁵⁰

3.5 *General Objectives of the Protocol*

The Protocol attempts to provide for “comprehensive regime for liability and for *adequate* and prompt compensation”¹⁵¹ for damage¹⁵² which results “from the transboundary movement and disposal of hazardous wastes and other wastes due to incidents occurring during the time from the transboundary movement has *commenced* until completion of the disposal of

¹⁴⁷ COP-3 Decisions, *supra* note 93, at Decision II/1[.5].

¹⁴⁸ Though not a party to the Convention, United States sent observers to the session.

¹⁴⁹ See COP-3 Report, *supra* note 23.

¹⁵⁰ *Talks on Basel Convention Liability Protocol to Continue into Late 1998, Report Indicated*, INT'L ENV'T. REP. Sep. 17, 1997 at 863 (citing an unidentified United Nations document prepared by the PWG).

¹⁵¹ See Draft Protocol, *supra* note 141.

¹⁵² Damage means:

- (i) loss of life or personal injury;
- (ii) loss or *damage* to property other than property held by the person liable for the damage in accordance with the present Protocol;
- (iii) loss of profit from impairment of the environment;
- (iv) impairment of the environment, in so far as this is not considered to be *damage* within the meaning of sub-paragraphs (i), (ii), and (iii) above;
- (v) the cost of preventive measures;
- (vi) any loss or *damage* caused by preventive measures, to the extent that the damage arises out of or results from the transboundary movement and disposal of hazardous wastes and other wastes under the Convention.

See *id.* art. 2, ¶ 2(b). While attempting to define the term “damage,” the Article, in a circular fashion, says that “damage” means “*damage* to property” and “*damage* caused by preventive measures.” See *id.* Furthermore, the term “impairment” is not defined in the text.

the wastes [including aftercare of disposal sites]."¹⁵³ These issues are not new to the Basel Convention. Similar issues were successfully dealt with during the negotiations of European Council Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, known as the Lugano Convention.¹⁵⁴ The deliberation in the development of *Liability Protocol for Basel Convention* are, however, more complicated than the Lugano Convention for several reasons:

- Basel Convention has larger number of participants which has been ratified by one hundred countries as of August 16, 1996;¹⁵⁵
- the Basel waste chain consists of a number of insufficiently capitalized countries;¹⁵⁶
- extra sensitivity is attached to a number of liability issues because of special considerations for the needs of developing countries;¹⁵⁷ and
- greater political awareness is required in setting up the parameters partly due to the suspicion with which the developing countries look upon developed countries.¹⁵⁸

The first two sessions of the Protocol Working Group (PWG) considered the first Six Articles of the draft Protocol

¹⁵³ *Id.* art. 3, ¶ 1.

¹⁵⁴ Lugano Convention, Europ. T.S. No.150, June 21, 1993. See also Simcox, D., *The Future of Europe Lies in Waste: The Importance of the Proposed Directive on Civil Liability for Damage Caused by Waste to the European Community and its Environmental Policy*, 28 VAND. J. TRANSN'L L. 543 (1995).

¹⁵⁵ See Status of Signatures and Ratification for Basel Convention, *supra* note 24.

¹⁵⁶ *Id.*

¹⁵⁷ See Preamble to Basel Convention stating: "Recognizing also the increasing desire for the prohibition of transboundary movements of hazardous wastes and their disposal in other States, especially developing countries" The Basel Convention, *supra* note 1.

¹⁵⁸ See *Developed, Developing Countries Disagree Over Elements of Waste Shipment Agreement*, 11 INT'L ENV'T. REP. 376 (July 13, 1988); see generally H. Marbury, *Hazardous Waste Exportation: The Global Manifestation of Environmental Racism*, 28 VAND. J. TRANSNAT'L L. 251 (1995); B. Ovink, *Transboundary Shipments of Toxic Waste: The Basel and Bamako Conventions: Do Third World Countries Have a Choice?*, 13 DICK. J. INT'L L. 281, 1995; D. Godwin, *The Basel Convention on Transboundary Movements of Hazardous Wastes: An Opportunity for Industrialized Nations to Clean Up Their Acts?*, 22 DENV. J. INTN'L L. & POL'Y 193 (1993); K. McCrory, *The International Exportation of Waste: The Battle Against the Path of Least Resistance*, 9 DICK. J. INT'L L. REV. 339 (1991).

though not completely resolving all the issues.¹⁵⁹ In the third session of the PWG (PWG-3),¹⁶⁰ the drafting group revisited Articles 3 (Scope of the Protocol) and 4 (liability) and deliberated Articles 7 (Insurance and other financial guarantees), 10 (Competent Courts), 11 (Applicable Law), and 12 (Mutual Recognition and Enforcement of Judgments).¹⁶¹

The informal plenary considered new Articles related to *lis pendens* and related actions based on the present text of the Lugano Convention and a new Article 10 bis on Technical assistance based on the original text of Article 10, paragraph 3.¹⁶² In addition, it considered the Chairman's paper related to the scope of application (Article 3) comprising the cases of transboundary movement to where the Protocol may possibly apply and the further condition to be met if the Protocol is to apply.¹⁶³

3.5.1 *Scope of the Protocol*

3.5.1.1 "Point of Commencement"

In determining the scope of the Protocol, PWG deliberated three main issues. The first issue was: in transboundary movement of hazardous waste and other wastes, at which point does the transboundary movement actually commence?¹⁶⁴ Is it at the point when the waste leaves the territory of the exporting country or when a party contracting to undertake the export

¹⁵⁹ See COP-1 Decisions, *supra* note 88 and COP-2 Decisions, *supra* note 93.

¹⁶⁰ See *Report of the Ad Hoc Working Group on the Work of its Third Session*, Ad Hoc Working Group of the Legal and Technical Experts to Consider and Develop a Draft Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, Annex, Article 1, Geneva, Feb. 20-24, 1995 at 21, U.N. Doc UNEP/CHW.1/WG.1/3/2 (March 17, 1995) (emphasis supplied) [hereinafter PWG-3 Report].

¹⁶¹ See Appendix B, Table 2 *infra* which lists the Articles in the DRAFT PROTOCOL that were considered by the TWG in its Third Meeting in Geneva during 20-24 February, 1994. The Report, itself, did not follow any particular order in its presentation of deliberations of various Articles of the Protocol. Column three of Appendix B, Table 2 shows which paragraphs in the Report made reference to a particular Article of the Protocol. The last column identifies the paragraphs that were the result of the plenary meeting of the parties; it also identifies the work of sub-groups.

¹⁶² See PWG-3 Report, *supra* note 160.

¹⁶³ See *id.* See also Appendix B, Table 1, *infra*.

¹⁶⁴ PWG-3 Report, *supra* note 160, ¶ 26.

takes possession of the waste?¹⁶⁵ Three alternatives were presented. A transboundary movement commences: (a) at a certain point within the State of export;¹⁶⁶ (b) at the point where the wastes leave the land territory of the State of export;¹⁶⁷ or (c) at the point where the wastes leave the land territory or the territorial sea of the State of export.¹⁶⁸ Another proposal attempted to narrow the point of commencement of the maritime transboundary movement as one that commenced "at a point [12] [200] nautical miles seaward from the point where the wastes left the land territory."¹⁶⁹ This was, however, not considered. The Protocol would not, however, apply:

(a) to damage suffered in an area under the national jurisdiction of a State which is not a Party to this Protocol, with the exception of transit States under Article 7 of the Convention; (b) to damage suffered in the State of export caused by an incident which takes place in the area under the national jurisdiction of that State of export; (c) to damage that arose from transboundary movement of hazardous wastes and other wastes that had commenced before the entry into force of this Protocol for the Party concerned."¹⁷⁰

3.5.1.2 "Completion of Disposal and Aftercare of Disposal Sites"

The second issue was whether the "completion of disposal" should encompass aftercare of disposal sites.¹⁷¹ "Completion of disposal" means the

notification of completion of disposal provided by the disposer pursuant to Article 6 (9), except that: (a) in the case of residues resulting from a recovery operation, completion of disposal extends to the disposal of the residues; (b) in the case of temporary storage, completion of disposal means the completion of the disposal operation taking place after the storage; and (c) in the case of permanent storage, landfill or geological disposal, completion of dis-

¹⁶⁵ *See id.*

¹⁶⁶ *See id.* ¶ 26 (1)(bis) Alternative 1.

¹⁶⁷ *See id.* at Alternative 2.

¹⁶⁸ *See id.* at Alternative 3.

¹⁶⁹ PWG-3 Report, *supra* note 160, ¶ 28(a).

¹⁷⁰ *Id.* ¶ 26(2)(a)-(c).

¹⁷¹ *See id.* ¶ 27.

posal means the completion of the process of loading the wastes into the facility.¹⁷²

Some delegations proposed to extend the scope of the Protocol to include damages resulting from incidents occurring during the period of "aftercare disposal of sites."¹⁷³ An argument in support thereof was that "the Protocol is not dealing exclusively with the simple transportation of hazardous wastes but with transboundary movements of real sources of pollution which stay in the territory of the State."¹⁷⁴ Still another suggestion was that the obligation for aftercare disposal of sites should be limited to a certain period of time.¹⁷⁵ The PWG did not resolve the issue, but kept it within brackets.¹⁷⁶

3.5.2 *Potential Applications*

The third issue was to what cases of transboundary movement the Protocol will apply and what further conditions will have to be met if the Protocol is to apply.¹⁷⁷ In order to be bound and to benefit from it, a party must also separately ratify the Protocol on liability, i.e., mere ratification of the Basel Convention alone is not sufficient to take advantage of the projections afforded by the Liability Protocol.¹⁷⁸ Thus, depending on whether or not a party has ratified both the Convention and the Protocol a number of different situations could arise. These situations are shown in Table 3.¹⁷⁹

If both the exporting State and the importing State are parties to the Convention, Article 6 of the Convention dealing with the transboundary movement between *parties* would apply.¹⁸⁰ This is true even if the transit State is not a party to the Convention because pursuant to Article 7 of the Convention, Article

¹⁷² PWG-3 Report, *supra* note 160, ¶ 27(1)(ter)(a)-(c).

¹⁷³ *Id.* ¶ 46.

¹⁷⁴ *Id.*

¹⁷⁵ In the United States, the post-closure operation and management period usually lasts about 30 years. *See, e.g.*, 40 C.F.R. § 265.117 (1995).

¹⁷⁶ *See* PWG-3 Report *supra* note 160, ¶ 47.

¹⁷⁷ *See id.* ¶ 37.

¹⁷⁸ *See id.* ¶ 40.

¹⁷⁹ *See* Appendix B, Table 3, *infra*.

¹⁸⁰ *See* The Basel Convention, *supra* note 1, art. 6. *See also* Appendix B, Table 3, Situation 1, *infra*.

6 would apply *mutatis mutandis*.¹⁸¹ If only one of the exporting, importing or transit States is a party to the convention, then the Protocol would apply by virtue of general obligation requirements of Article 4(5) and (11) of the Basel Convention.¹⁸² This is mandated by a literal reading of Article 4(5) which states that “[a] party shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party.”¹⁸³ On the other hand, as provided under Article 11 of the Convention:

[p]arties may enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with Parties or non-Parties provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this convention.¹⁸⁴

There are, however, some situations where a party to the Convention may not be able to invoke the Protocol, when the party is damaged and the damage arises from the transboundary movement of hazardous wastes or other wastes.¹⁸⁵ One such situation is where only the transit State is a party to the Convention and the transit State it is damaged.¹⁸⁶ The Convention provides coverage when all exporting, importing and transit States are parties,¹⁸⁷ or, at least, one of the exporting or importing States is a party.¹⁸⁸ If neither exporting nor importing State is a party to the Convention, then a transit State is not protected even if it had ratified both the Convention and the

¹⁸¹ Article VII of THE CONVENTION reads as follows: “TRANSBOUNDARY MOVEMENT FROM A PARTY THROUGH STATES WHICH ARE NOT PARTIES: Paragraph 1 of Article 6 of the Convention shall apply *mutatis mutandis* to transboundary movement of hazardous wastes or other wastes from a Party through a State or States which are *not* parties.” The Basel Convention, *supra* note 1, art. 7 [or VII]. The phrase *mutatis mutandis* means “matters and things are generally the same, but to be altered when necessary, as to names, offices, and the like.” BLACK’S LAW DICTIONARY, 1069 (6th ed., 1990). See Appendix B, Table 3, Situation 2, *infra*.

¹⁸² See the Basel Convention, *supra* note 1, art. 4 ¶¶ 5 and 11.

¹⁸³ See *id.* ¶ 5.

¹⁸⁴ *Id.* art. 11. Note, however, that in view of the ban amendment ratified by COP-3, the utility of Article 11 may be seriously limited. See Appendix B, Table 3, Situations 3 and 6, *infra*.

¹⁸⁵ PWG-3 Report, *supra* note 160, ¶ 38.

¹⁸⁶ See Appendix B, Table 3, Situation 7 *infra*.

¹⁸⁷ See *id.* Situation 1.

¹⁸⁸ See *id.* Situation 2.

Protocol.¹⁸⁹ Another situation arises when a party to the Convention is damaged due to the transboundary movement of hazardous wastes or other wastes from that party's to another State through a transit State, none of which is a party to the convention.¹⁹⁰ PWG did not resolve all issues pertaining to the applicability of the Protocol, though it recognized that (i) "a State could only be a Party to the Protocol if it would also be a Party to the Basel Convention,"¹⁹¹ (ii) "there had to be at least one Protocol State which would appoint a competent court"¹⁹² and (iii) as a further condition for application of the Protocol, "damage had to be suffered by a Contracting Party to the Protocol."¹⁹³

3.5.3 *Liable Persons*

A broad objective of the Basel Convention is to promote global environmental protection through minimization of production of hazardous wastes and other wastes, rather than find ways to impose liability upon persons after a harm is caused from such substances. Another objective is to manage the wastes covered under the Convention within the country that generated the waste, if it can do so in an "environmentally sound" manner and in an efficient way.

The Basel Convention attempts to accomplish these goals by placing greater obligations on generators/exporters, i.e., the supply side of the scale, by controlling the transboundary movement of hazardous wastes and other wastes, and thus providing for an elaborate control mechanism which includes both (i) notice to and consent from importing and transit countries¹⁹⁴ and also (ii) a requirement that an exporting country may not export covered wastes, if there is a reason to believe that the exported

¹⁸⁹ See *id.* Situations 7 and 8.

¹⁹⁰ See *id.* Situation 9.

¹⁹¹ PWG-3 Report, *supra* note 160, ¶ 40.

¹⁹² *Id.* ¶ 39.

¹⁹³ *Id.* ¶ 40.

¹⁹⁴ See The Basel Convention, *supra* note 1, art. 4, ¶ 2(f) which states in relevant part: "Require that information about a proposed transboundary movement of hazardous wastes and other wastes be provided to the States concerned . . . to state clearly the effects of the proposed movement on human health and the environment." *Id.* While Article 4, ¶ 5 of the Convention does not allow import or export of hazardous and other wastes from or to a non-Party, illegal traffic in such wastes, pursuant to art. 4, ¶ 3, is deemed *criminal*. (emphasis added).

waste will not be handled in an environmentally sound manner in the importing country.¹⁹⁵ In this sense, the Basel Convention is far different from the liability provisions of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹⁹⁶ which imposes liability upon “owners and operators”¹⁹⁷ of a “facility”¹⁹⁸ from which there is a “release.”¹⁹⁹

Though CERCLA, a backward looking statute, is primarily intended to be a “compensation and liability act” for past harms,²⁰⁰ and the Basel Convention is a forward looking statute and is, therefore, more akin to Resource Conservation and Recovery Act (RCRA)²⁰¹ which, through an elaborate permit system,²⁰² requires that “hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date,”²⁰³ a close inspection reveals that the Basel Convention is a hybrid of both CERCLA and RCRA. For example, an important provision of RCRA is that it establishes a permit system for “treatment, storage, and disposal” of all regulated hazardous wastes.²⁰⁴ To obtain a permit, a “facility operator,” must comply with a vast amount of regulations that deal with a number of different aspects of “treatment, storage, and disposal” pertaining to incineration, landfills, chemical treatment, liquid disposal restrictions, siting of facilities, groundwater and leachate monitoring, fencing and warning signs, special employee training, emergency procedures and site closures.²⁰⁵ The Basel Convention shifts this burden to genera-

¹⁹⁵ See The Basel Convention, *supra* note 1, art. 4, ¶ 2(e) which states in relevant part: “Not allow the export of hazardous wastes or other wastes to a State or group of States belonging to an economic and/or political integration organization that are Parties . . . if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner” *Id.* See also Article 4, ¶ 2(g) which states in relevant part: “Prevent the import of hazardous wastes and other wastes if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner.” See *id.*, art. 4, ¶ 2(g).

¹⁹⁶ 42 U.S.C. § 9601 (1994).

¹⁹⁷ 42 U.S.C. § 9607(a)(1) (1994).

¹⁹⁸ See *id.* § 9601(9) (1994).

¹⁹⁹ See *id.* § 9601(22).

²⁰⁰ See *id.* § 9607.

²⁰¹ 42 U.S.C. § 6901.

²⁰² 42 U.S.C. § 6925.

²⁰³ 42 U.S.C. § 6902(a)(5).

²⁰⁴ 42 U.S.C. § 6925(a).

²⁰⁵ See *id.* § 6925.

tors/exporters themselves, rather than placing the onus on importers who would, in a strict sense, be “facility operators,” because the clientele that the Basel Convention intends to protect is mainly from developing countries who lack the sophisticated knowledge and technical know-how of “environmentally sound management” of hazardous wastes and other wastes.

As a result, an objective definition of “persons” liable under the Basel Convention has not been easy and is still elusive. The PWG discussed numerous definitions and exemptions, and at one point, a delegation even suggested introduction of fault-based liability either as an alternative or as supplement to strict liability proposals.²⁰⁶ Though this suggestion was quickly rebuffed by most of the delegates on the ground that a “subjective” fault-based liability would be a far cry from the Convention’s goals to set “objective” strict liability standards,²⁰⁷ it is a clear example of the enormous complexity faced by the PWG which is obligated to “consider” every proposal advanced by the parties. The PWG, in its Third session, took up three alternatives for consideration, and ran out of time to consider a fourth alternative proposed by a delegation.²⁰⁸ In the end, as discussed below, the alternatives still remain unresolved.

3.5.3.1 First Alternative

In the first alternative, “the generator; the exporter; and any person, including the disposer, who at the time of *the* incident *is* in [possession and/or] control of the hazardous wastes or other wastes shall be liable for damage.”²⁰⁹

Though the drafters may have meant broad coverage of persons under “*any* person,” for example, waste brokers and arrangers, the text does not convey that meaning. First, the Protocol defines neither the term “person” nor the term “disposer”. Second, the phrase “any person” in the draft is, indeed, modified by “who at the time of the incident is in possession and/or control”²¹⁰ where an “incident” is “any occurrence or series of occurrences having the same origin in relation to the

²⁰⁶ PWG-3 Report, *supra* note 160, ¶ 46.

²⁰⁷ The Basel Convention, *supra* note 1.

²⁰⁸ PWG-3 Report, *supra* note 160, ¶ 29.

²⁰⁹ *See id.* ¶ 29, Alternative 1.

²¹⁰ *See id.*

transboundary movement and disposal of hazardous wastes and other wastes under the Convention, that causes damage or creates a grave and imminent threat of causing damage.”²¹¹ Third, what sort of “occurrence or series of occurrences” would be deemed to have “relation to” the transboundary movement is not clear. Finally, the draft defines neither the term “imminent” nor the phrase “imminent threat of causing damage.” Do the drafters actually mean “threat of” “imminent endangerment?”

What if an “arranger,” through appropriate “notice and consent,” and, pursuant to Article 11 of the Basel Convention which allows transboundary movement of hazardous wastes and other wastes under a “bilateral, multilateral, or regional agreement,”²¹² transfers the ownership of Basel-covered waste to a Basel-importer and an “incident” occurs because of the negligence of, rather than intentional conduct of, but, “*at the time of ownership*” of the importing Basel party? What is the status of the “arranger” who in this case is not a generator? Is he or she a “person?” or, an “exporter?” or, a “disposer?” Would a distinction in the classification of liable “persons” have any bearing in a claim for contribution which, as will be discussed later, is an action in equity?

A most disturbing aspect of this alternative is the language “who at the time of the incident *is* in [possession and/or] control of the hazardous wastes or other wastes.” Almost always, the contemplated incident, e.g., damage to the environment from the disposal of hazardous waste or other wastes, will happen *at the time* the hazardous waste and other wastes is in the possession, control or custody of the importing party or a facility operator. In other words, an innocent importer or facility operator, whom the Convention intends to protect, will now become strictly liable for the damages to the same extent as the generator or the exporter of the hazardous waste and other wastes. Because the Liability Protocol also establishes “joint and several liability” regimes, any protection to an innocent importing State is only illusory.

²¹¹ See *id.* art. 2, ¶ 2(h).

²¹² The Basel Convention, *supra* note 1, art. 11(1).

As a way of comparison, CERCLA 107(a)²¹³ provides that the following “persons” are liable:

(1) the owner and operator of a vessel or facility;²¹⁴

(2) any person who *at the time* of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . ;²¹⁵

from which there is a release, or a threatened release of a hazardous substance which causes the incurrence of response costs, . . . shall be liable”²¹⁶

Courts have construed this to mean that a present owner or operator of a facility from which there is a “release” is always liable even if that owner or operator did not in any way contribute to the release. But, a past owner is not liable unless it owned the site *at the time of disposal*.²¹⁷

Clearly, the focal point in CERCLA §107(a)(1)&(2) is the facility from which there is a release and its owners or operators, and the “at the time of disposal” language serves a substantive purpose. Because the Basel Convention’s primary goal is to put a lid on the export of the hazardous waste and other wastes, and thus, its focal point is on the generators and exporters of the wastes, imposing liability on those who “owned” the waste at the time of the incident should be considered outside the Scope of the Protocol and the Convention. All of these issues must be considered by the PWG before adopting Alternative 1.

3.5.3.2 Second Alternative

Under the Second alternative: “the generator; the exporter; and any person, including the broker, importer and disposer, *involved* in the transboundary movement or disposal of the hazardous wastes or other wastes shall be liable for damage.”²¹⁸

One problem with this alternative is that it is too broad and does not provide an objective “standard.” The phrase “*involved* in the transboundary movement” may be subject to varying interpretations and does not provide a clear notice to would be

²¹³ 42 U.S.C. § 9607.

²¹⁴ *Id.* at § 9607 (a)(1).

²¹⁵ *Id.* at § 9607 (a)(2).

²¹⁶ *Id.* at § 9607 (a)(4).

²¹⁷ *See generally* New York v. Shore Realty, 759 F.2d 1032 (2d Cir. 1985).

²¹⁸ PWG-3 Report, *supra* note 160, ¶ 29, Alternative 2.

violators. The PWG did not consider Alternative 2 in the Third session and, in fact, deletion of Alternative 2 has been suggested.²¹⁹ Therefore, it does not appear that it will be taken up for consideration in the future.

3.5.3.3 Third Alternative

Under the third alternative of the draft, “any person who at the time of the incident has operational control of the wastes, shall be liable for damages.”²²⁰

Among all the three alternatives, this provides the broadest coverage. The coverage under this alternative is joint, strict and several. However, clarification of what is an “operational control” is needed as well as an unambiguous definition for “incident.”

One delegation which supported this alternative, also recommended that the PWG consider giving some weight to fault-based concept of liability that could apply to other persons who did not have “operational control of the wastes,” but were involved in the transboundary movement of hazardous wastes.²²¹ A number of delegates supported this view. A number of other delegations, however, opposed the introduction of any fault-based liability into the Protocol because they were concerned that it would divert the Protocol’s declared goal of developing a “comprehensive regime of liability.”²²² These delegations argued that because the PWG is charged with making a “special law with objective and not subjective liability,” developing a Protocol that would enable examining fault liability on a case-by-case basis would be difficult.²²³

Another delegation proposed to expand the existing joint and several liability provisions of Article 4 by adding a right of contribution from other liable parties and including a set of

²¹⁹ See *id.* ¶ 60.

²²⁰ *Id.* ¶ 29, Alternative 3.

²²¹ See *id.* ¶ 59.

²²² See Draft Protocol *supra* note 141, art. 1. The objective of this Protocol is to provide for a comprehensive regime for liability and for adequate and prompt consideration, including reinstatement of the environment, for damage resulting from the transboundary movement of hazardous wastes and other wastes and their disposal. See *id.*

²²³ PWG-3 Report, *supra* note 160, ¶ 59.

“permissive factors”²²⁴ that the courts may consider in resolving contribution claims:

each Contracting Party shall ensure that any person who shall be liable in accordance with Article 4(1) and, as a result, is defending a claim for compensation in its courts, shall have the ability in the same action to seek contribution from any other person who shall be liable thereunder.

4(2)(ter) It is further proposed to include a number of *permissive factors* that may be considered by the competent courts of the Parties in resolving contribution claims as follows:

a) In resolving claims for contribution among those who are liable pursuant to Article 4(1), above, the competent court of a contracting Party may allocate damages among such liable Parties using such equitable factors as the court determines are appropriate²²⁵

The plenary ran out of time before discussion of this proposal. It is worth noting that the “permissive factors” that this proposal advances are similar to the so-called Gore Factors debated by Congress in its Superfund legislative reform.²²⁶

3.5.3.4 Author’s Proposed Alternative

A common problem to all alternatives considered so far is that they relate the damage resulting from the hazardous wastes or other wastes to vaguely defined “incidents” and appear to be more concerned with disposal operations than storage or treatment. This may be because the Convention, before the ban amendment, viewed treatments such as resource recovery and reclamation, as beneficial to “environmentally sound” management of wastes. This may be one reason why harms that could arise from treatment operations were not directly addressed in the Convention or the Draft Protocol.

In an effort to overcome the shortcomings of the proposed alternatives, and taking into consideration the comments, criticisms and deliberations of the delegates and the drafting committees, this author proposes the following Draft Article 4 to the Drafting Committee for its consideration:

²²⁴ See *id.*, ¶ 41(4)(2)(ter).

²²⁵ *Id.* ¶ 41(4)(2)(bis).

²²⁶ Draft Protocol *supra* note 141, art. 4, ¶ 2(bis).

Article 4: Liability

1. Notwithstanding any other rule or law, domestic or international, and subject only to defenses as provided in paragraph 4 of this Article:

- any generator,
- any exporter, and
- any person, including any broker, importer, and disposer, who arranged, caused to arrange, or caused transboundary movement of hazardous wastes or other wastes for any purpose including storage, disposal, and treatment in a site, vessel, or a facility shall be liable for all damages resulting from the movement, storage, disposal, and treatment of, or other incidents involving, the hazardous waste and other wastes.

3.5.4 Contribution

The Draft Protocol, in a bracketed text, provides for joint and several liability against all liable persons and states:

[Each contracting Party shall ensure that any person who shall be liable in accordance with Article 4, paragraph 1, and is defending a claim for compensation in its courts, is entitled to seek contribution from any other person who shall be liable thereunder.]²²⁷

Thus, “a claim for compensation” is technically divorced from “determination of liability.” This is similar to the case law on contribution claims in Superfund cases.²²⁸ A bracketed text of the draft allows the court to take into consideration a number of equitable factors in allocating damages which may include the following:

- (i) the amount of hazardous wastes and other wastes contributed by each liable person;

²²⁷ *Id.*

²²⁸ 42 U.S.C. §9613(f), CERCLA §113(f) provides in part:

Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following, any civil action under section 106 or under 107(a). . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107.

Id.

- (ii) the degree of hazards of hazardous wastes and other wastes contributed by each liable person;
- (iii) the *degree of fault* borne by each liable person for the inability to determine (i) and (ii) above;
- (iv) the mobility of hazardous wastes and other wastes contributed by each person;
- (v) the degree and nature of involvement of each liable person in the generation, transportation, treatment, storage, or disposal of the hazardous wastes and other wastes;
- (vi) the degree of care exercised by each liable person with respect to hazardous wastes and other wastes taking into the characteristics of the hazardous wastes and other wastes;
- (vii) the cooperation of each liable person in providing complete and timely information during the allocation process; and
- (viii) the relative *degree of fault* borne by each liable person with respect to the incident giving rise to the damage.²²⁹

Indeed, these are similar to what is known as “Gore Factors” debated in Congress as part of superfund reform.²³⁰

In relation to the right of recourse, one delegation presented the following proposal for contribution claims:

Each Contracting Party shall ensure that any person who shall be liable in accordance with Article 4(1) and, as a result, is defending a claim for compensation in its courts, *shall have the ability in the same action* to seek contribution from any other person who shall be liable thereunder. (emphasis added)

Under this proposal, one who seeks contribution has the option of initiating a separate contribution action or have it heard in the same action at the conclusion of the liability phase of the trial, as provided under CERCLA §113(f).²³¹ Several delegations expressed reservation related to the phrase *shall have the ability in the same action* and recommended that it be replaced with the phrase “is entitled to seek contribution.”²³²

Though the contribution provisions are at present included in Article 4 of the draft that deals with liability, it is felt that it would be more appropriate to move it to Article 10 governing “Competent Courts.” Regardless of at which point of the Proto-

²²⁹ Draft Protocol, *supra* note 141, art. 4, ¶ 2(ter).

²³⁰ PWG-3 Report, *supra* note 160, ¶ 41.

²³¹ See CERCLA § 113(f) or (F).

²³² PWG Report, *supra* note 160, ¶ 62.

col the contribution provision is inserted, the draft seems to be somewhat ambiguous with respect to persons from whom contribution may be *sought*.

The draft permits a person already found liable “to seek” contribution only from another person “*who shall be liable thereunder*.” It appears that “thereunder” refers to the contribution claim itself. Though “shall be liable” would imply that a liable person may not be able to “obtain” contribution from another person unless the latter person is also found liable, there appears to be some confusion between “seeking” contribution and actually succeeding in “obtaining” contribution. In other words, a liable person should be able “to seek” contribution merely by being able to haul any other “liable-party” or a “*potentially* liable party” into a court of law; and if the court determines that the once-potentially-liable-party is indeed liable, it may allocate damages on equitable considerations.

3.5.4.1 Author’s First Alternative Proposal

In view of the foregoing, this author proposes the following revision for consideration of the Drafting Committee (text within { } denotes proposed deletion and text in *italics* shows proposed addition in comparison to Article 4, ¶ 2(bis) of the Draft Protocol):

Each contracting Party shall ensure that any person who {shall be} *is* found liable in accordance with Article 4, paragraph 1, and is defending a claim for compensation in its courts, is entitled to seek contribution from any other person who *is liable, or shall be potentially* liable {thereunder}.

The above proposed revision is much less ambiguous than the provision in the Draft Protocol. The proposed revision allows contribution claim or action against all those who have already been found liable for damages by “a” competent court. In addition, it also permits suit against those other parties who could be potentially liable for the damages.

3.5.4.2 Author’s Second Alternative Proposal

One difficulty with all the Draft Proposals presented to by the PWG and the First Alternative Proposal advanced herein is that while the claims for *compensation* may be brought only in

the courts of a Contracting party where either “(a) the damage was suffered; (b) the incident occurred; or (c) the defendant has his habitual residence, or has his principal place of business”²³³ and a contribution claim may be heard in the course of “defending a claim for compensation in *its* courts,”²³⁴ there is nothing to prevent a liable party from engaging in forum-shopping with respect to a separate *contribution* action. This may lead to inequitable results. To avoid this from happening, the author proposes a Second Alternative Proposal to the Drafting Committee for its consideration:

Each contracting Party shall ensure that any person who {shall be} is found liable in accordance with Article 4, paragraph 1, and is defending a claim for compensation in its courts, is entitled to seek contribution from any other person who *is liable or potentially liable* {thereunder}, *providing that a claim for contribution, in the first instance, shall not be brought in any court other than the court of the Contracting Party [hearing] [adjudicating]*²³⁵ *the related*²³⁶ *claim for compensation.*

This alternative draft may suitably be placed as a new subparagraph 3 under Paragraph 1 of Article 10. In any case, “compensation may be reduced or disallowed if the person who suffered damage or a person for whom he is responsible under national law has, by his own fault, contributed to or is the sole cause of the damage having regard to all circumstances.”²³⁷ On the other hand, if the damage is a result of an incident involving both the wastes covered under the Protocol and wastes not cov-

²³³ *Id.* ¶ 19, 1(a)-(c).

²³⁴ See PWG-3 Report, *supra* note 160, ¶ 41.

²³⁵ I prefer “adjudicating” over “hearing.” To the extent, no contribution claim can be brought in a different court, then the court “hearing” the compensation claim must “adjudicate” the dispute between the parties with respect to liability, usually in the first phase. The term “hearing” appears to be less formal as if it is an administrative hearing and creates an illusion that there would be an opportunity for a “judicial” review whereas what we are contemplating here is judicial in itself.

²³⁶ First I constructed the last part of the sentence as follows: “*providing that a claim for contribution, in the first instance, shall not be brought in any court other than the court of the Contracting Party adjudicating a claim for compensation, in a related action.*” I think that such construction may lead to different interpretations, unless a definition is inserted for “related action.” In a similar vein, “a claim for compensation” lacks definiteness. I believe that “*the court of the Contracting Party adjudicating the related claim for compensation*” conveys a clear meaning.

²³⁷ PWG-3 Report, *supra* note 160, ¶ 50.

ered by the Protocol, "a person otherwise liable . . . shall only be liable in proportion to the contribution made by the waste covered by this Protocol to the damage occurring,"²³⁸ where the volume and properties of the wastes involved will be taken into consideration in determining the divisibility of damage.²³⁹

3.5.5 *Defenses to Liability*

As would be expected in a comprehensive liability regime considered under the Protocol, the defenses to liability are minimal. The Draft Protocol provides that:

There shall be no liability if the damage is exclusively:

- a) a result of armed conflict, hostilities, civil war or insurrection which was not reasonably foreseeable;
- b) a result of a natural phenomenon of an exceptional, inevitable and irresistible character provided that all reasonable safety measures have been taken to prevent the damage;
- c) a result of the wrongful intentional conduct of a third person provided that all reasonable safety measures have been taken, to prevent the consequences of such conduct;
- d) a result of compliance with a compulsory measure of a public authority; or
- [(e) a result of a negligent or other wrongful act of any government or other authority].²⁴⁰

The PWG did not consider paragraphs (d) and (e) due to lack of time. The author proposes the following version to the TWG for its consideration:

There shall be no liability under paragraph 1 of this Article for a person otherwise liable who establishes that the damage covered under this Protocol resulted solely from:

- a) an armed conflict, hostility, civil war or insurrection, none of which was reasonably foreseeable;
- b) a natural phenomenon of an exceptional, inevitable and irresistible character, provided that the defendant took all reasonable safety measures to prevent all reasonably foreseeable damages;

²³⁸ See *id.* ¶ 29 proposing Article 4 (1)(ter) (3)(a).

²³⁹ See *id.*

²⁴⁰ See *id.* ¶ 29, Alternatives 3 and 4(a)-(e).

- c) an intentional act or intentional omission of an act of a private third person, provided that the defendant took all reasonable safety measures to prevent the consequences of such act;
- d) mandatory compliance with published rule, law, regulation or other measures of a public authority; or
- (e) a negligent or other wrongful act of any governmental authority.

3.5.6 *Judgments*

The Draft Protocol attempts to empower the Contracting Parties to give mutual recognition and enforcement of judgments without review of the merits of the case, provided that the judgment is enforceable in the State of origin.²⁴¹ Suggestions were made to recognize the judgments resulting from the following: Article 23 of Convention on Civil Liability for Damages Resulting from Activities Dangerous to the Environment,²⁴² Article 10 of the International Convention on Civil Liability for Oil Pollution Damage,²⁴³ Article 20 of the 1989 ECE Convention on the Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigational Vessels,²⁴⁴ Article 12 of the Vienna Convention on Civil Liability for Nuclear Damage,²⁴⁵ and Article 32 of the Draft International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances at Sea.²⁴⁶

Many delegates emphasized the importance of including in the Protocol an Article concerning mutual recognition and enforcement of judgments.²⁴⁷ It was, however, pointed out that it is impossible to know all legal systems of the Parties to the Protocol and some countries may not recognize foreign judgments without bilateral agreements.²⁴⁸ Because of lack of agreement among the parties, the plenary decided to leave Article 12 on

²⁴¹ Draft Protocol, *supra* note 141, art. 12.

²⁴² *See id.*

²⁴³ *See id.*

²⁴⁴ *See id.*

²⁴⁵ *See id.*

²⁴⁶ Draft Protocol, *supra* note 141, art. 12.

²⁴⁷ PWG-3 Report, *supra* note 160, ¶ 75.

²⁴⁸ *See id.* ¶ 76.

mutual recognition and enforcement of judgments within brackets.²⁴⁹

4 CONCLUSION

A major achievement of the Basel Convention is that as a result of the Convention, the international community has now entered an era in which hazardous waste will not be able to move legally across national boundaries without being subject to stringent regulatory controls.²⁵⁰ Nevertheless, a hastily adopted total ban on the movement of hazardous waste, without clearly defining what it intends to ban, has made the Convention's scope somewhat uncertain. As it stands now, the Convention still has to establish unambiguous rules of law and set forth definitive guidelines for the nations of the world. Without a rule of law, it would be impossible to enforce any violations. The Basel Convention, is an important international document that establishes a "framework" to regulate, control or ban "something;" but, at this time, one has yet to figure out what that "something" is.

Some critics argue that the non-ratification of the Convention by the United States would weaken the Convention's overall effectiveness and the Convention might have already lost its meaning.²⁵¹ Given the mature state of development of environmental laws and treatment technologies in the United States and the recently enacted U.S. Hazardous Waste Export Control Act,²⁵² it appears that such criticisms are unwarranted. Furthermore, the quantity of hazardous wastes exported from the United States is significantly low compared to the total volume of world-wide waste export. It is, however, possible that the total ban amendment might cost the Convention some of its most

²⁴⁹ See *id.* ¶ 77.

²⁵⁰ *Basel Meeting Gets Under Way with Hope of Adopting Export Ban on Hazardous Waste*, *supra* note 104 at 708 quoting Bakari Kante of Senegal, President of COP-3, at 708.

²⁵¹ *Export Ban to Non-OECD Nations Expected to be Formalized at Basel Meeting*, 18 INT'L ENVTL. REP. 667 (Sept. 6, 1995) ([a]nd if the U.S. doesn't ratify the Basel Convention, the convention loses its meaning) (quoting Veys, F. Secretary General of the International Recycling Bureau (known by its French acronym BIR - Bureau International de Recyclément)).

²⁵² Hazardous and Additional Waste Export and Import Act of 1991, May 15, 1991, S. 1082, 102d Cong., 1st Sess. (1991)

staunchest supporters who are among the major producers of recyclable wastes, e.g., Australia and Canada.

No one predicts that the Convention's road ahead will be easy. But where the world only recently saw frustration and hopelessness in preventing the immoral and unlawful transport and disposal of hazardous chemicals and poisonous wastes on the most unsuspecting who were least equipped to deal with the same, thanks to the ill-conceived, ill-fated, and well-publicized adventures of *Khian Sea*²⁵³ and the like, many now see a tremendous opportunity for less fortunate nations to have another crack at thwarting illegal dumping and averting silent disasters. This is, indeed, a major, highly-commendable accomplishment of the Basel Convention. One cannot, however, deny the fact that the Contracting Parties to the Basel Convention could have taken the high road towards a total ban after some lengthy deliberations.

²⁵³ See *Greenpeace Calls for World Ban on International Traffic in Waste*, 11 INT'L ENV'T. REP. 433 (Aug. 10, 1988). *Khian Sea*, a cargo ship containing incinerator ash from the United States, unloaded a part of the cargo as fertilizer on a beach in Haiti; the ship left the ash as construction material in the Kassa Island of Guinea. See *id.*

APPENDIX A

TABLE 1
ARTICLES OF BASEL CONVENTION

Article	Title
1	Scope of the Convention
2	Definitions
3	National Definitions of Hazardous Wastes
4	General Obligations
5	Designation of Competent Authorities and Focal Point
6	Transboundary Movement Between PARTIES
7	Transboundary Movement From a PARTY through States Which Are NOT Parties
8	Duty to Re-Import
9	Illegal Traffic
10	International Cooperation
11	Bilateral, Multilateral and Regional Agreements
12	Consultations on Liability
13	Transmission of Information
14	Financial Aspects
15	Conference of Parties
16	Secretariat
17	Amendment of the Convention
18	Adoption and Amendment of Annexes
19	Verification
20	Settlement of Disputes
21	Signature
22	Ratification, Acceptance, Formal Confirmation or Approval
23	Accession
24	Right to Vote
25	Entry into Force
26	Reservations and Declarations
27	Withdrawal
28	Depository
29	Authentic Texts

TABLE 2
ANNEXES TO BASEL CONVENTION

Annex I	Categories of Wastes to be Controlled
Annex II	Categories of Wastes Requiring Special consideration
Annex III	List of Hazardous Characteristics
Annex IV	Disposal Operations
Annex V A	Information to be Provided on Notification
Annex V B	Information to be Provided on the Movement Document
Annex VI	Arbitration

TABLE 3
SCOPE OF THE LEGISLATION/CONVENTION

Country	National Legislation
Australia	Hazardous Waste (Regulation of Exports and Imports) Act of 1989, assented to Jan. 17, 1990
Austria	325th Federal Act of June 6, 1990 on Prevention and Treatment of Wastes (Waste Management Act)
Canada	Export and Import of Hazardous Wastes Regulation, Nov. 12, 1992
Denmark	Statutory Order from the Ministry of Environment No. 804 of Dec. 15, 1989, on Oil and Chemical Wastes
Finland	Waste Management Act No. 673, Aug. 31, 1978.
India	Hazardous Wastes (Management and Handling) Rules, 1989.
The Netherlands	Chemical Waste Act, assented July 7, 1988, entered into force October 15, 1988.
Nicaragua	Law Prohibiting the Importation and Transit of Any Type of Hazardous Wastes, Managua, 1991.
Saudi Arabia	The Environmental Protection Standards for Waste, EPS-W 1991 (Hazardous Waste Regulations)
Singapore	The Environmental Public Health (Toxic Industrial Waste) Act, 1988
United States	Hazardous and Additional Waste Export and Import Act of 1991, May 15, 1991
Uruguay	Decree of the Executive Power of May 30, 1989 Banning the Introduction into the areas under the National Jurisdiction of any type of Hazardous Wastes in any form or under any Region

TABLE 4
WASTE DEFINITION

Country	National Legislation
Argentina	National Act No. 24051, promulgated Jan. 8, 1992
Australia	Hazardous Waste (Regulation of Exports and Imports) Act of 1989, assented to Jan. 17, 1990
Austria	325th Federal Act of June 6, 1990 on Prevention and Treatment of Wastes (Waste Management Act)
Canada	Export and Import of Hazardous Wastes Regulation, Nov. 12, 1992
Finland	Waste Management Act No. 673, Aug. 31, 1978.
Gambia	The Environmental Protection Act (Prevention of Dumping) Act of 1988, assented Aug. 26, 1988
Hungary	Order No. 56/1981/XI.18 of the Council of Ministers on the Control of the Production of Hazardous and the Activities Related to its Neutralization
India	Hazardous Wastes (Management and Handling) Rules, 1989; Hazardous Wastes (Management and Handling) Second Amendment Rules, 1990.
The Netherlands	Chemical Waste Act, assented July 7, 1988, entered into force October 15, 1988.
Nicaragua	Law Prohibiting the Importation and Transit of Any Type of Hazardous Wastes, Managua, April 1991
Nigeria	Federal Environmental Protection Decree, 1988
Singapore	The Environmental Public Health (Toxic Industrial Waste) Act, 1988
United Kingdom	Control of Pollution (Special Waste) Regulations, 1980
United States	Hazardous and Additional Waste Export and Import Act of 1991, May 15, 1991
Uruguay	Decree of the Executive Power of May 30, 1989 Banning the Introduction into the areas under the National Jurisdiction of any type of Hazardous Wastes in any form or under any Region

TABLE 5
EXPORT OF HAZARDOUS WASTES

Country	National Legislation
Australia	Hazardous Waste (Regulation of Exports and Imports) Act of 1989, assented to Jan. 17, 1990
Austria	325th Federal Act of June 6, 1990 on Prevention and Treatment of Wastes (Waste Management Act)
Canada	PCB Waste Export Regulations, 1990
Denmark	Statutory Order from the Ministry of Environment No. 804 of Dec. 15, 1989, on Oil and Chemical Wastes
Finland	Waste Management Act No. 673, Aug. 31, 1978.
The Netherlands	Chemical Waste Act, assented July 7, 1988, entered into force October 15, 1988.
Saudi Arabia	The Transboundary Movement of Hazardous Waste Regulations, 1991
Sweden	Ordinance (1985:840) on Hazardous Waste, Nov. 21, 1985.
United Kingdom	Transfrontier Shipment of Hazardous Waste Regulations, 1988
United States	Hazardous and Additional Waste Export and Import Act of 1991, May 15, 1991

TABLE 6
IMPORT OF HAZARDOUS WASTES

Country	National Legislation
Argentina	Decree No. 181 of the National Executive, Jan. 24, 1992
Australia	Hazardous Waste (Regulation of Exports and Imports) Act of 1989, assented to Jan. 17, 1990
Austria	325th Federal Act of June 6, 1990 on Prevention and Treatment of Wastes (Waste Management Act)
Canada	Export and Import of Hazardous Wastes Regulation, Nov. 12, 1992
Denmark	Statutory Order from the Ministry of Environment No. 804 of Dec. 15, 1989, on oil and Chemical Wastes
Finland	Waste Management Act No. 673, Aug. 31, 1978.2
Gambia	The Environmental Protection (Prevention of Dumping) Act, 1988, assented to by The President, Aug. 26, 1988.
Hungary	Order No. 56/1981/X1.18 of the Council of Ministers on the Control of the Production of Hazardous and the Activities Related to its Neutralization
India	Article 11, Import of Hazardous Wastes of the Hazardous Wastes (Management and Handling) Rules, 1989.
The Netherlands	Chemical Waste Act, assented July 7, 1988, entered into force October 15, 1988.
Nicaragua	Law Prohibiting the Importation and Transit of Any Type of Hazardous Wastes, Managua, 1991.
Nigeria	Harmful Waste (SPECIAL CRIME PROVISIONS), Decree No. 42, Nov. 25, 1988.
Saudi Arabia	The Transboundary Movement of Hazardous Waste Regulations, 1991
United Kingdom	Transfrontier Shipment of Hazardous Waste Regulations, 1988
United States	Hazardous and Additional Waste Export and Import Act of 1991, May 15, 1991
Uruguay	Decree of the Executive Power of May 30, 1989 Banning the Introduction into the areas under the National Jurisdiction of any type of Hazardous Wastes in any form or under any Region

TABLE 7
TRANSIT OF HAZARDOUS WASTES

Country	National Legislation
Australia	Hazardous Waste (Regulation of Exports and Imports) Act of 1989, assented to Jan. 17, 1990
Canada	Export and Import of Hazardous Wastes Regulation, Nov. 12, 1992
Finland	Waste Management Act No. 673, Aug. 31, 1978.2
The Netherlands	Chemical Waste Act, assented July 7, 1988, entered into force October 15, 1988.
Nicaragua	Law Prohibiting the Importation and Transit of Any Type of Hazardous Wastes, Managua, 1991.
Nigeria	Harmful Waste (SPECIAL CRIME PROVISIONS), Decree No. 42, Nov. 25, 1988.
Saudi Arabia	The Transboundary Movement of Hazardous Waste Regulations, 1991
United Kingdom	Transfrontier Shipment of Hazardous Waste Regulations, 1988
United States	Hazardous and Additional Waste Export and Import Act of 1991, May 15, 1991

TABLE 8
DUTY TO RE-IMPORT HAZARDOUS WASTES

Country	National Legislation
Australia	Hazardous Waste (Regulation of Exports and Imports) Act of 1989, assented to Jan. 17, 1990
Canada	Export and Import of Hazardous Wastes Regulation, Nov. 12, 1992
The Netherlands	Chemical Waste Act, assented July 7, 1988, entered into force October 15, 1988.
Norway	Regulations Concerning Export and Import of Hazardous Wastes, May 23, 1990
United States	Hazardous and Additional Waste Export and Import Act of 1991, May 15, 1991

TABLE 9
ILLEGAL TRAFFIC OF HAZARDOUS WASTES

Country	National Legislation
Australia	Hazardous Waste (Regulation of Exports and Imports) Act of 1989, assented to Jan. 17, 1990
Austria	325th Federal Act of June 6, 1990 on Prevention and Treatment of Wastes (Waste Management Act)
Denmark	Statutory Order from the Ministry of Environment No. 804 of Dec. 15, 1989, on oil and Chemical Wastes
Gambia	The Environmental Protection (Prevention of Dumping) Act, 1988, assented to by The President, Aug. 26, 1988.
Nicaragua	Law Prohibiting the Importation and Transit of Any Type of Hazardous Wastes, Managua, 1991.
Nigeria	Harmful Waste (SPECIAL CRIME PROVISIONS), Decree No. 42, Nov. 25, 1988.
Norway	Regulations Concerning Export and Import of Hazardous Wastes, May 23, 1990
Saudi Arabia	The Transboundary Movement of Hazardous Waste Regulations, 1991
Singapore	The Environmental Public Health (Toxic Industrial Waste) Act, 1988
United States	Hazardous and Additional Waste Export and Import Act of 1991, May 15, 1991
Uruguay	Decree of the Executive Power of May 30, 1989 Banning the Introduction into the areas under the National Jurisdiction of any type of Hazardous Wastes in any form or under any Regime

APPENDIX B

TABLE 1
 DECISIONS ADOPTED BY THE THIRD MEETING OF THE
 CONFERENCE OF THE PARTIES TO THE BASEL CONVENTION²⁵⁴

Decision No.	Decision
III/1	Amendment to the Basel Convention
III/2	Liability and Compensation
III/3	Emergency Fund
III/4	Subsidiary Bodies under the COP of the Basel Convention
III/5	Illegal traffic in hazardous wastes and other wastes
III/6	Model National Legislation for the transboundary movement of hazardous wastes
III/7	Designation of competent authorities and focal points
III/8	Manual for the implementation of the Basel Convention
III/9	Bilateral, multilateral and regional agreements or arrangements
III/10	Evaluation of the effectiveness of the Basel Convention
III/11	Monitoring the implementation of and compliance with the obligations set out by the Basel Convention
III/12	Hazard characterization
III/13	Technical Guidelines for environmentally sound management of wastes
III/14	Transboundary movement of hazardous wastes destined for recovery operations
III/15	Possible effects of the Basel Convention on the transboundary movements of reclaimed ozone-depleting chemicals
III/16	Documentation: Notification and Movement Document
III/17	Transmission of information
III/18	Establishment of the Information Management System on Wastes (IMSW) of the Basel Convention
III/19	Establishment of Regional or Sub-Regional Centers for Training and Technology Transfer regarding the management of hazardous wastes and other wastes and the minimization of their generation
III/20	Training and seminars related to the Basel Convention
III/21	Technical assistance under the Basel Convention including for the Implementation of Agenda 21
III/22	Cooperation with the International Atomic Energy Agency
III/23	Relationship of the Basel Convention and the London Convention
III/24	Cooperation between the International Organization and the Basel Convention, in the review of existing rules, regulations, and practices with respect to transport of hazardous wastes by sea
III/25	Follow-up of UNEP Governing Council decisions concerning environmentally sound management of hazardous wastes
III/26	Cooperation with UN bodies, specialized agencies and regional systems and organizations
III/27	Cooperation between the Basel Convention and the activities undertaken at the global level leading to the development of the legally binding instrument on trade in hazardous chemicals including the Prior Informed Consent (PIC) concept.

²⁵⁴ In this situation, Article VII of the Convention may not be applied. See PWG-3 Report, *supra* note 160, ¶ 38.

TABLE 2
THIRD SESSION OF THE WORKING GROUP OF LEGAL AND
TECHNICAL EXPERTS: DEVELOPMENT OF PROTOCOL ON LIABILITY

Article in Protocol	Subject Matter	Paragraph in the Report of III PWG	Remarks
2	Waste Definition	43, 62	Plenary: 43
3	Scope	25, 26, 27, 28, 37, 38, 39, 42, 44 - 56, 62	I Group: 26, 27, 28 Chairman: 37, 38, 48 Plenary: 42, 47, 55, 56,
4	Liability	25, 29, 30, 41, 42, 57-61, 63	I Group: 26, 27, 28 II Group: 30, Plenary: 42
7	Insurance	12, 15, 16, 25, 42, 64-67	Plenary: 42, 67
10	Competent Courts	17, 18, 19-22, 25, 31, 32-35, 40, 42, 68, 84	Plenary: 35, 36, 42, 68, 84
11	Applicable Law	17,18, 42, 69-74	Plenary: 42
12	Judgments	17, 18, 42, 75-83	Plenary: 42

TABLE 2
 THIRD SESSION OF THE WORKING GROUP OF LEGAL AND
 TECHNICAL EXPERTS: DEVELOPMENT OF PROTOCOL ON LIABILITY

¶ # of III Sess.	Subject Matter
1	Introduction
2, 3	Opening of the Session
4-7	Attendance
8	Election of Officers
9	Adoption of Agenda
10-11	Organization of Work
12	Article 7 : Insurance: Ceiling
13-14	Missing
15	Link between Article 7 and Art. 6(11) of Convention
16	Referral to Drafting Group (DG)
17-18	General discussion on need for inclusion of Art. 10-12
19	Redrafting of Article 10 by meeting
20-22	Article 10: suggestions by delegations
23-24	Allocation of works between two different drafting groups
25	Drafting groups' consideration of Art. 3,4,7, and a new ¶10(d)
26	Article 3: Scope : Group I: Non-bracketed text
27	Article 3: Scope : Group I: Completion of Disposal
28	Article 3: Scope : Group I: Point of Commencement
29	Article 4: Liability: Liable Persons
30	Article 7: II Group: Non -bracketed Text on Insurance & Financial Guarantees
31	Article 10: II Group
32	No resolution of "lis pendens" and "related actions" & Opposition to "lis pendens"
34	On including the text of Lugano Convention on "Related Actions"
35, 36	Plenary consideration of Article 10bis on "Technical Assistance"
37	Article 3: Scope: Chairman's proposal
38	Discussion on various situations of transboundary movements
39	Lack of time to consider all situations
40	To be Party to Protocol, must be party to Convention
41	New Proposal for Article 4 Liability
42	Plenary consideration of Art. 2,4,7,10(d), 12, and 12bis.
43	Plenary decision to add a definition of hazardous waste in Article 2
44	Definition for "completion of disposal"
45	Distinction between temporary and permanent storage
46	Expanding the scope of definition of "completion of disposal" to include "aftercare of disposal sites"
47	Plenary to keep "aftercare of disposal sites" within brackets
48	Chairman's proposal for "point of commencement"
49	Coverage for incidents taking place in the exporting states
50-54	Legal duty & need for defining "point of commencement"
55	Plenary's decision on "point of commencement"
56	Exclusion clauses from the scope of the Convention
57	Discussion of Article 4 on Liability
58	Art. 4 Liability: Treatment defendants from non-Protocol countries
59	Fault-based alternative to liability (in addition to strict liability) and opposition to it
60	Chairman's recommendation for removal of alternative 2 of Article 4
61	Retention of Alternative 2 for the time being
62-63	Article 3: Wastes not covered by the Protocol
64-66	Minimum threshold and its replacement by "maximum amount"
67-68	Inability to decide on maximum amount
69	Request for deletion of Article 11 (Choice of Court v. Applicable law)
70	Retention of Art. 11 because it established the primacy of the Protocol and guaranteed its application
71	Scope of Protocol is dealing with geographical issue; not applicable law
72-74	New formulations of the WG on Article 11
75	Article 12 on Enforcement of Judgments and its relation to Lugano Convention
76	Art. 12 provision should be optional; impossible to know all legal systems
77	Decision to retain Article 12 and add a number of Articles from other Conventions
78	Article 12 : Relation between the Protocol and the law of the competent court
79	Relation between Article 11 and Article 12.
80	Article 12 provides priority to Protocol, not to national law
81-83	Changes to Article 12 - decision to keep it within brackets
84	Review of Article 10bis by plenary
85-88	Other Int'l bodies
89-92	Closure of the meeting

TABLE 3
CASES OF TRANSBOUNDARY MOVEMENT TO WHICH THE
PROTOCOL MAY POSSIBLY APPLY

Situation	Exporting State	Transit State	Importing State	Applicable Basel Article
1	Basel Party	Basel Party	Basel Party	Article 6
2	Basel Party	Non-Basel State	Basel Party	Article 7
3	Basel Party & Protocol Party OR Non-Protocol Party	Basel Party & Protocol Party OR Non-Protocol Party	Non-Basel State & Non-Protocol State	Art. 4(5) & 11
4	Basel Party & Protocol Party OR Non-Protocol Party	Non-Basel State	Non-Basel State	Articles 4(5) & 11
5	Non-Basel State & Non-Protocol State	Basel Party & Protocol Party OR Non-Protocol Party	Basel Party & Protocol Party	Articles. 4(5) & 11
6	Non-Basel State	Non-Basel State & Non-Protocol State	Basel Party & Protocol Party OR Non-Protocol Party	Articles. 4(5) & 11
7	Non-Basel State & Non-Protocol State	Basel Party, & Protocol Party	Non-Basel State & Non-Protocol State	Convention is Silent ²⁵⁵
8	Non-Basel Party	Non-Basel Party	Non-Basel Party	Not Eligible
9	Non-Basel Party	Non-Basel Party	Non-Basel Party	Convention is Silent

Here, no Basel Party is affected. Clearly, no complications can arise.

Here, a Basel party is affected by acts of a non-Basel party, the acts themselves *originating* outside of the Basel State.

²⁵⁵ See COP-3 Decisions, *supra* note 96, Decision III/1-27.