International Law and the Transboundary Shipment of Hazardous Waste to the Third World: Will the Basel Convention Make a Difference?

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INTRODUCTION

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

NOTES AND COMMENTS

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

Marguerite M. Cusack*

INTRODUCTION

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

3. See infra notes 26-112 and accompanying text (discussing the restrictive regulations of the European Community, the OECD, and the United States).
4. See Handley, Hazardous Waste Exports: A Leak in the System of International Legal Controls, 19 ENVTL. L. REP. 10,171, 10,171 n.3 (1989) (estimating the amount of savings to be approximately $75 per ton).
5. See Wassermann, Attempts at Control Over Toxic Waste, 15 J. WORLD TRADE L. 410, 410 (1981) (describing the problems of toxic waste in several industrialized countries); Italy Moves to Resolve Problem with Nigeria on Dumping of Toxic Waste, 11 Int'l Env't Rep. (BNA) 379 (July 13, 1988) [hereinafter Italy Resolves Problem with Nigeria] (stating that only ten percent of the approximate five million tons of
World nations. Indeed, the hazardous waste industry has evolved into a lucrative business.

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

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

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

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

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

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

with the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), industrialized nations' attitudes, positions, and international negotiations have changed dramatically. Developing nations that once accepted the dumping of industrialized nations' toxic wastes in exchange for the economic benefits the industrialized nations provided today are vehemently opposed to the importation of hazardous wastes.

Moreover, industrialized nations have recognized the moral, political, and environmental implications of exporting toxic wastes to developing nations.

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

113-32 and accompanying text (tracing the history of the Basel Convention).
12. See Africa: The Wastebasket of the West, 67 Bus. & Soc'y Rev. 48, 48-50 (1988) [hereinafter Africa: The Wastebasket] (discussing the various African countries that have accepted toxic wastes from developed countries). The West African nation of Guinea-Bissau, for example, has reportedly agreed to import three million tons of European waste each year for five years, potentially earning S150-S600 million. Id. at 48. Guinea-Bissau has an annual gross national product worth approximately S150 million. Id.
13. See Leonard & Morell, Emergence of Environmental Concern in Developing Countries: A Political Perspective, 17 Stan. J. Int'l L. 281, 282 (1981) (stating that developing countries consider the control of global pollution within their own barriers irrelevant compared to the crucial economic problems they face). Indeed, according to Sri Lanka's United Nations ambassador during the 1970s, Third World nations would be willing to accept one hundred percent of the developed nations' toxic wastes and the associated risks in exchange for the opportunity to industrialize their economies. Id. at 282 n.2.
14. See Africa: The Wastebasket, supra note 12, at 49 (discussing an Organization of African Unity (OAU) member's description of disposal of hazardous waste in Africa as an "attack on Africa's dignity").
15. See infra note 53 (stating various testimony of Senators regarding the unethical practice of hazardous waste dumping in developing countries).
16. See Italy Resolves Problem with Nigeria, supra note 5, at 379 (stating that Nigeria discovered 2,000 tons of illegal Italian wastes in southern Nigeria). Consequently, Nigeria severed diplomatic ties with Italy. Id.
17. See Helfenstein, supra note 9, at 788 (noting that the improper disposal of toxic wastes can harm not only the host country, but also nearby countries sharing the air or water).
18. See infra notes 26-146 and accompanying text (discussing resolutions adopted by the United States Environmental Protection Agency (EPA), European Community (EC), Organization for Economic Cooperation and Development (OECD), and United Nations Environment Programme (UNEP)).
agreements lack the crucial elements necessary to satisfy all parties involved.\textsuperscript{19} Indeed, it appears that the industrialized and developing nations have reached an impasse.\textsuperscript{20} As a result, many nations hope the Basel Convention will be the most far-reaching and comprehensive international agreement to date.\textsuperscript{21}

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

\textsuperscript{19} Id.
\textsuperscript{20} See infra notes 160-99 and accompanying text (noting that despite the ratification of the Basel Convention, developing countries and industrialized nations continue to disagree on fundamental objectives and key provisions).
\textsuperscript{21} BASEL CONVENTION, supra note 11.
\textsuperscript{22} The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984), (codified as amended at 42 U.S.C. §§ 6901-91) [hereinafter HSWA]; see infra note 41 and accompanying text (discussing 42 U.S.C. § 6938(f) which specifically addresses the export of hazardous wastes, including bilateral agreements between the United States and other countries).
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I. INTERNATIONAL REGULATIONS OF TRANSFRONTIER MOVEMENTS OF HAZARDOUS WASTES

A. THE UNITED STATES

1. Historical Development

In 1969, the United States passed the National Environmental Policy Act (NEPA) in an effort to establish environmental protection policies. Because NEPA does not apply extraterritorially, however, President Carter issued Executive Order No. 12,264 which established, inter alia, procedures for the export of hazardous substances. Although President Reagan revoked Order No. 12,264 in 1981, RCRA had been passed in 1980.

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


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


31. Id.

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

33. See Porterfield & Weir, supra note 32, at 341 (stating that the cost of disposal
capacity of domestic disposal sites,\textsuperscript{34} and the public opposition to the location of disposal sites known as “Not In My Backyard” (NIMBY) compelled American businesses to view exportation of toxic wastes as a viable alternative. As a result, pressures from environmental interest groups and several foreign policy embarrassments\textsuperscript{35} compelled Congress to address the exportation of hazardous waste and pass the HSWA to RCRA in 1984.\textsuperscript{36}

Pursuant to HSWA, the exporter must notify the United States Environmental Protection Agency (EPA) of its proposed shipment of hazardous waste\textsuperscript{37} to another country. Within thirty days thereafter, the EPA and the State Department must inform the importing government that the law of the United States prohibits the exportation of hazardous waste without consent from the importing nation.\textsuperscript{38} Following the receipt of consent or objection from the importing nation, the EPA must notify the exporter within thirty days.\textsuperscript{39} HSWA also requires that the primary exporter report annually to the EPA a summary of the


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

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

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

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

\textsuperscript{39} 40 C.F.R. § 262.53(f) (1988).
types, quantities, frequency, and final destinations of all toxic wastes exported during the previous year. HSWA's specific notification, consent, and annual report provisions are waived if the United States and the importing government have a formal bilateral agreement regarding the transfer of toxic waste.

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

2. Inadequacies

Although HSWA reflects the commitment and responsibility of the United States to control the exportation of hazardous wastes, it lacks adequate enforcement mechanisms. Generally, HSWA is poorly implemented due to the inefficient coordination between the EPA and the United States Customs Service, as well as the inadequate resources of both government agencies. More particularly, the lack of specificity in the notice of intent provision concerning what information the exporter...
must provide and the ambiguity in the definition of hazardous waste further detract from proper implementation of HSWA. In addition, HSWA does not contain provisions which require an exporter to receive the prior consent of transit countries through which toxic wastes may travel, nor prohibit exportation if reason exists to believe that inadequate disposal is occurring. Finally, the lack of detailed obligations concerning liability creates large loopholes within HSWA.

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

48. See Handley, supra note 4, at 10,174 n.63 (citing EPA, PROGRAM TO CONTROL EXPORTS OF HAZARDOUS WASTE, Audit Report No. EID37-05-04560-80855, at 14 (1988)) (stating that exporters often give insufficient information regarding the handling and disposal of the hazardous waste in their notices of intent). Indeed, there have been cases in which exports of toxic wastes have occurred without any notice of intent. EPA's Program Needs Improvements, supra note 46, at 434.

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

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

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

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

53. H.R. 2525, 101st Cong., 1st Sess. (1989). The bill was introduced in the House Government Operations Subcommittee on Environment, Energy & Natural Resources. Id.; see Handley, supra note 4, at 10,181 (stating that an interagency working group, representing the EPA and the State Department, met at the end of President Reagan's second term). The working group recommended two possibilities to modify the 1986 amendment under this bill: (1) an increase in information supplied to the importing country, including the domestic disposal requirements of the United States, and (2) a ban on hazardous waste export, except with regard to any bilateral agreement between the United States and the importing nation. Id. Because the United States Office of Management and Budget (OMB), however, considered the transboundary movement of
ment that the importing nation handles the toxic waste in as strict a fashion as the United States; second, a waste minimization screening procedure that compels an exporter to make "reasonable efforts" to halt the generation of the waste; third, a waste export permit mechanism; and, fourth, an expansion of the Superfund liability system. The bill, however, does not define "reasonable efforts" and does not include a provision that would enable the United States to halt exports of waste that are found not to be handled in an environmentally sound manner. The Bush administration is supporting other draft legislation that does not contain the "as strict as" language. Instead, an exporter would be permitted to transport toxic wastes only if the developing nation could manage the waste in an "environmentally sound manner."

B. THE EUROPEAN COMMUNITY

1. Historical Development

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

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

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

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

56. Id.

57. Id.


59. European Communities Commission, TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES, (1983) [hereinafter TREATIES], at 23. The EC is presently composed of twelve member nations: Belgium, Denmark, the Federal Republic of Germany, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom. COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN COMMUNITY ENVIRONMENTAL LEGISLATION, 1967-1987 (1987) [hereinafter EC ENVIRONMENTAL LEGISLATION], at i. Institutionally, the EC is divided into four main bodies: the Commission, the Council, the Court of Justice, and the European Parliament. TREATIES, supra, at 23. The Commission, consisting of seventeen Commissioners who the Community chooses, has the power to propose legislation and represent the interest of the EC. Id. at 25. The Council is the EC's main legislative branch and consists of one representative minister from each nation; moreover, the Council has the power to act upon the Commission's proposals. Id. at 36. The Commission meets once a week while the Council gathers twice a year. EC ENVIRONMENTAL LEGISLATION, supra, at i-ii. Members of the Parliament, elected every four years by the citizens of each nation, are divided into political groupings rather than groups designated by nationality. Id. at iii. The Parliament primarily functions as an advisory body. TREATIES, supra, at 32. With
pressly address environmental issues. The EC, like the United States, eventually became aware of the need to formulate internal environmental policies. Accordingly, the Community initiated a series of Environmental Action Programmes as well as legislation addressing environmental issues. As the Community generated more waste, however, member states were confronted with the increasing cost of disposal as well as a decreasing number of adequate disposal sites. Because of these emerging problems, member states began to export hazardous wastes to other member nations and to developing countries.

prior notice to the competent authorities within the member state when hazardous waste is shipped to another member state, to nonmember states, or from a nonmember state to a Community member state. When the competent authorities acknowledge receipt of the notification, a shipment accompanied by the uniform consignment note may proceed. The 1984 Directive requires each member state to file a report every two years regarding all exports of hazardous wastes. The EC Directive on Toxic and Dangerous Waste of 1978 (1978 Directive) defines hazardous waste. Although the 1978 Directive sets forth a list of toxic substances, each member state must ultimately legislate the nature, quantities, and concentrations of toxic wastes which constitute a danger to the environment. Furthermore, member states may desig-
nate border crossing points through which the hazardous waste must pass.\(^74\)

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

2. Inadequacies

Both the 1984 Directive and the 1986 Amendment, however, lack provisions that expressly delineate liability obligations,\(^77\) or require exporters to have insurance.\(^78\) Moreover, inadequate specificity of the 1984 Directive and 1986 Amendment on what constitutes hazardous waste has resulted in either insufficient or inconsistent national laws.\(^79\)

This ambiguity in definition presents problems for the exporters and dangerous consequences for Third World transit and importing countries.\(^80\)

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

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74. 1984 Directive, supra note 23, art. 9, at 35.
76. Id. art. 3(4), at 14.
77. See 1984 Directive and 1986 Amendment, supra note 23 (noting the absence of any liability provision); O'Connor, supra note 65, at 540 (stating that in 1987, it appeared that products liability was considered inapplicable to hazardous waste). But see Handley, supra note 4, at 10,176 (discussing article 11 of the 1984 Directive in which products liability was being considered as applicable to hazardous wastes); Commission Proposes 'Polluter Pays' Rule for Recovering Environmental Damage Costs, 12 Int'l Envt Rep. (BNA) 379 (Aug. 9, 1989) (discussing the EC's new proposal which would hold producers of toxic waste strictly liable for any damages resulting from the waste).

The new proposal attempts to harmonize legislation within the EC, provide an incentive to invest in clean technologies, and encourage the minimization of waste generation. Id. Although it also constructs a separate category of liability for damage to the environment, the new proposal restricts coverage to "major and persistent" environmental damage, prohibits the imposition of punitive damages, and limits legal action to public authorities. Id.

78. See supra notes 77-84 and accompanying text (discussing the member nations' inadequate implementation of EC directives).
79. See Comment, International Regulation, supra note 5, at 102 (noting that the 1984 Directive only grants member nations an opportunity to inquire into insurance coverage); see also Proposal for a Council Directive on Hazardous Waste, 31 O.J. EUR. COMM. (No. C 295) 4 (1988) (discussing that although the 1984 Directive instructed the Council to propose an insurance provision by September 1988, the 1988 Proposal does not address insurance); O'Connor, supra note 65, at 542 (stating that the working party on civil liability considered the insurance question to be a political rather than a legal issue).
80. See Comment, International Regulation, supra note 5, at 100 (noting that due to different definitions of waste, confusion may arise when a shipment of hazardous waste involves more than one member nation).
any legislation controlling the exportation of toxic waste to developing countries pursuant to the 1984 Directive and 1986 Amendment. This fact reflects an underlying defect in the entire EC institutional structure. However, in December 1989, during negotiations for the Lome IV Convention the EC agreed to ban all hazardous waste exports to sixty-eight African, Caribbean, and Pacific nations (ACP).

C. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT

1. Historical Development

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

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

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


84. Id; see Greenpeace Waste Trade Update, supra note 53, at 4 (discussing the prior agreement in principle reached between the EC and ACP); Id. (noting that the ACP nations disagreed on the EC’s proposed exceptions to the ban on waste exportation).

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

86. Rublack, supra note 9, at 119.

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

88. 1984 Final Decision, supra note 24; see Hannenquart, The Responsibilities of
1984 Final Decision required member nations to notify the countries involved of any transboundary movement of hazardous waste.60

The OECD also recommended principles for member nations to follow in the implementation of the 1984 Final Decision. First, any party involved in the export of toxic waste must obtain authority from the nations of origin, transit, and final destination.60 Second, the nation of generation must apply its domestic laws of toxic waste exportation as stringently to exports as to domestic movements.61 Third, the exporter must provide the exporting, transit, and importing nations with adequate and timely information regarding the origin, composition, and quantities of waste; any environmental risks involved in transport; the conditions of carriage; and the identity of all parties.62 Fourth, an importer may object to a toxic waste shipment if the objection is in accordance with its own domestic law.63 Fifth, if the importer cannot complete safe disposal, the generator must reassume responsibility for the waste, or alternatively, reimport it.64

The OECD improved the 1984 Final Decision by adopting the Decision-Recommendation on Exports of Hazardous Wastes in 1986 (1986 Export Decision).65 In addition to the notification requirements imposed on exporting countries, the 1986 Export Decision requires member nations to prohibit exports unless the importing nation consents to the Competent Authorities in Regard to the Transfrontier Movements of Hazardous Wastes, in TRANSFRONTIER MOVEMENTS OF HAZARDOUS WASTE 23-29 (1985) (analyzing the various obligations of governments working to control the transboundary shipment of toxic wastes under the decisions of the EC, OECD, and UNEP); Helfenstein, supra note 9, at 780 n.52 (noting that although OECD decisions are binding on member nations, they obligate only those nations that approve of the decision). Decisions must also comply with each approving nation’s domestic constitutional procedures. Id.; Lutz, supra note 66, at 654 (stating that although OECD recommendations are non-binding, they strongly influence the international legal community).

89. Helfenstein, supra note 9, at 785; see 1984 Final Decision, supra note 24, at 15 (noting that the 1984 Decision requires member nations to ensure that the competent authorities of the countries concerned receive adequate and timely information).
90. 1984 Final Decision, supra note 24, at 14.
91. Id. at 4.
92. Id. at 5.1, 5.2.
93. Id. at 7.
94. Id. at 3; see Depuy, International Law Measure to Implement the Principles in the OECD Decision on Transfrontier Movements of Hazardous Waste, in TRANSFRONTIER MOVEMENTS OF HAZARDOUS WASTE 39 (1985) (discussing the content and implications of the 1984 Final Decision and the measures that member countries need to take for implementation).
the exports.\textsuperscript{96} Furthermore, an OECD member country must provide prior notification to any transit country involved.\textsuperscript{97} Finally, according to the 1986 Export Decision, a member nation must ensure that the importing country has adequate disposal facilities.\textsuperscript{98}

2. Present Status

Because the 1984 Final Decision and the 1986 Export Decision neglected to resolve several key issues,\textsuperscript{99} the OECD decided to make improvements and aimed to finalize a draft law in time for the Basel Convention.\textsuperscript{100} Because several parties usually collect, treat, and handle the waste, the Group debated the proper definition of "exporter."\textsuperscript{101} It considered the type and extent of notification that the exporting country must provide to the importing country.\textsuperscript{102} Further debate focused on the issue of whether consent from transit countries should be required prior to the shipment of toxic waste,\textsuperscript{103} as well as the general issue of liability.\textsuperscript{104} The Group also addressed the issue of whether "bona fide"
recyclable waste should have less stringent notification procedures, including a shorter response time.\textsuperscript{105} Finally, the Group feverishly contested the definitions of "hazardous waste"\textsuperscript{106} and "adequate disposal facilities."\textsuperscript{107}

The OECD finally adopted a number of resolutions and decisions designed to control the transboundary movement of hazardous waste to developing countries.\textsuperscript{108} The OECD will use the EC's core list of hazardous chemicals to resolve the most contentious issue which is the definition of "hazardous waste."\textsuperscript{109} Moreover, a member nation must pro-
hibit any export of hazardous waste if there is reason to believe that the waste will not be disposed of in an environmentally sound manner.\textsuperscript{110} The OECD, however, fails to require exporting nations to receive consent from a transit country before shipping the waste.\textsuperscript{111} Moreover, the OECD decided to leave the issue of liability for a future international meeting.\textsuperscript{112}

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

A. THE HISTORY OF THE BASEL CONVENTION

The 1972 United Nations Conference on the Human Environment at Stockholm\textsuperscript{113} recommended the establishment of the United Nations Environment Programme (UNEP).\textsuperscript{114} Initially providing an interna-

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

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

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


\textsuperscript{114} See Helfenstein, supra note 9, at 784 (stating that the United Nations estab-
tional mechanism for the exchange of environmental information, UNEP established specific environmental agendas and recommendations. In 1982, UNEP formally decided to tackle the international transportation and disposal of toxic wastes after an ad hoc working group of environmental experts met in Montevideo, Paraguay. Thereafter, in 1985, UNEP issued the Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes.

In June 1987, UNEP established a Draft Convention on the Transboundary Shipment of Hazardous Waste and created an ad hoc
working group composed of legal and technical experts (Working Group). Over the course of five sessions, the Working Group considered several UNEP revised draft conventions on the transportation of toxic wastes and ultimately developed a final recommendation for the Basel Convention. The Working Group focused less on regulating the actual physical movements of hazardous wastes across international borders than on the reduction and safe disposal of toxic wastes. Accordingly, the Working Group concentrated on specific issues including: the definitions of waste, liability and noncompliance assistance

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

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

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

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

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

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

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

126. See Third Session, supra note 118, at 3 (listing compensation, monitoring facilities, and state's responsibilities as recurring central issues that the Convention should address).
to developing nations regarding the notification and testing of toxic shipments;\textsuperscript{127} environmentally sound receiving facilities;\textsuperscript{128} emergency responses;\textsuperscript{129} illegal trafficking of toxic waste;\textsuperscript{130} criteria for the permit and approval of disposal facilities;\textsuperscript{131} and lack of adequate infrastructure within developing countries.\textsuperscript{132}

B. ADOPTIONS OF THE DRAFT CONVENTION

The Draft Convention adopted the OECD's\textsuperscript{133} core list of wastes\textsuperscript{134} and hazardous characteristics.\textsuperscript{135} The members of the Draft Convention hoped that the core list would resolve the dilemma created by two competing interests: the industrialized nations' exclusive regulations which did not include certain materials in the definition of "hazardous waste," and the developing countries' demand for a comprehensive definition of "hazardous waste."\textsuperscript{136}

The Draft Convention set forth two lists noting potential recycling operations,\textsuperscript{137} and required that specific information be included both in the notification\textsuperscript{138} and transport documents.\textsuperscript{139} Furthermore, the ex-

\textsuperscript{127} Id.
\textsuperscript{128} See Working Group Reaches Agreement, supra note 124, at 165 (noting that the Working Group must deliberate the issues of disposal sites and methods of disposal at the Caracas meeting).
\textsuperscript{129} Third Session, supra note 118, at 3.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.; see Waste Shipments Incidents Spur Interest, supra note 122, at 471 (discussing the desires of developing nations for technical guidance in the treatment and disposal of waste).
\textsuperscript{133} See Rublack, supra note 9, at 122 (stating that unlike the OECD, however, the UNEP included transit countries' legislation in its definition of hazardous wastes); see also Waste 'A Difficult Issue', supra note 108, at 377 (noting the introduction of the OECD's core list at the UNEP meeting in Caracas, Venezuela).
\textsuperscript{134} Fifth Revised Draft Convention [on the Control of Transboundary Movements of Hazardous Wastes], UNEP/WG.189/3, Annex I [hereinafter Fifth Revised Draft Convention]. The core list, however, expressly excluded radioactive waste. Id. Annex I, at 4. A waste which is not covered in the core list, can be considered "hazardous" if included in the domestic legislation of the exporter, importer, or transit country. Id.
\textsuperscript{135} Id. annex II at 58.
\textsuperscript{136} Developed, Developing Countries Disagree, supra note 109, at 376.
\textsuperscript{137} Fifth Revised Draft Convention, supra note 134, annex I at 61; see id. annex III at 60 (noting operations which do not lead to resource recovery, recycling, reclamation, direct re-use, or alternative uses).
\textsuperscript{138} Id. annex IV at 62. The pre-notification information required to be provided includes: the names of the exporter, transit nations, and importer, and their respective competent authorities; the date of export, the time period over which the waste will be exported, and a proposed itinerary; insurance information; physical and composite description of the waste; the method of disposal; and information from the disposer indicating that the waste will be disposed in an environmentally sound manner and in accordance with the importer's domestic laws. Id.
porter must notify any nation involved in the transport of the waste and receive the consent of the importing country.\textsuperscript{140} Finally, the Convention would only permit the transport if the exporter has received satisfactory information that the importing nation has adequate technical capacity for disposal.\textsuperscript{142}

The Draft Convention failed, however, to address several issues. Rather than require an exporter to receive a transit country's prior informed consent, the Convention decided that a transit nation's lack of response should be interpreted as tacit approval.\textsuperscript{149} Moreover, the Draft Convention neglected to articulate the extent to which an exporter is obligated to make technical assessments of the importer's disposal facilities.\textsuperscript{143} Accordingly, the issue of national sovereignty remains unresolved.\textsuperscript{144}

\begin{itemize}
\item \textsuperscript{139} Id. annex IV at 64. The information movement document required the inclusion of "certification of receipt at the designated disposal facility and indication of the approximate date of disposal." \textit{Id.}
\item \textsuperscript{140} Rublack, \textit{supra} note 9, at 122; see \textit{Working Group Reaches Agreement}, \textit{supra} note 124, at 165 (discussing the successful breakthrough in negotiations regarding prior informed consent).
\item \textsuperscript{141} Rublack, \textit{supra} note 9, at 123-24; see Third Session, \textit{supra} note 118, at 14 (requiring that each party to the agreement export hazardous wastes from its borders in a way that is as "environmentally sound" as waste disposal within its borders); \textit{Developed, Developing Countries Disagree, supra} note 109, at 376 (reporting that the head of the toxic chemicals program of UNEP believes that inspection and verification mechanisms will ensure proper and safe disposal). Developing countries are also pressing for a technological transfer mechanism whereby industrialized nations will assist Third World countries in the construction and maintenance of disposal facilities. \textit{Id.}
\item \textsuperscript{142} Rublack, \textit{supra} note 9, at 123 (discussing the Third Draft Convention's allocation of duties to provide information to the receiving country); see \textit{Waste Shipment Incidents Spur Interest, supra} note 122, at 472 (noting the disagreement on informed consent for transit countries that existed between the industrialized countries and Third World nations, represented by the Group 77, a group of over 100 developing countries); \textit{Delegates of 50 Countries Fail to Agree on Draft Covering Movement of Toxic Waste}, 12 \textit{Int'l Env't Rep. (BNA)} 49 (Feb. 8, 1989) (discussing the failure to reach a consensus on the issue of a transit country's prior consent and the developing nations' determination to block any convention which does not include such consent); \textit{Western, African Nations Fail to Agree on Transboundary Movement of Toxic Wastes, 12 Int'l Env't Rep. (BNA)} 49 (Feb. 8, 1989) [hereinafter \textit{Western, African Nations Fail to Agree}] (noting that although prior notification must be given to a transit nation and the transit nation may then object within a reasonable time, agreement has not yet been reached on whether silence means tacit consent); \textit{Developed, Developing Countries Disagree, supra} note 109, at 376 (noting that although Third World countries may agree to a time limit regarding a transit country's objection to a shipment of waste passing through its borders, they oppose the idea that the failure to respond in time means tacit consent to the shipment). The developing countries assert that the absence of a reply should be assumed to be an objection. \textit{Id.}
\item \textsuperscript{143} Rublack, \textit{supra} note 9, at 124; see \textit{Waste Shipment Incidents Spur Interest, supra} note 122, at 471 (noting that Third World nations prefer technological assistance in waste disposal rather than a United Nations police force verifying proper disposal).
\item \textsuperscript{144} Rublack, \textit{supra} note 9, at 124.
\end{itemize}
of liability, reserving it instead for a future international forum. Finally, the Draft Convention failed to specifically define terms which are critically important for adequate enforcement, i.e., "adequate technical capacity for disposal", "environmentally sound management of hazardous waste", and "reason to believe."

The ambiguity of these concepts foreshadowed the Basel Convention's deliberations and dissensions.

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

1. Introduction

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

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

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

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

148. Thirty-Four Countries Sign Convention on Transport, Disposal of Hazardous Wastes, 12 Int'l Env't Rep. (BNA) 159 (Apr. 12, 1989) [hereinafter Thirty-Four Countries Sign Convention]; see GREENPEACE WASTE TRADE UPDATE, supra note 53,
the Basel Convention is to enhance the control of the transfrontier movement of toxic wastes in order to encourage safe management and reduction in volume of transboundary shipments. The Basel Convention has yet to be implemented, however, because the required twenty nations have not ratified its provisions. Many nations view the Basel Convention as signaling the international community's commitment to protect both human health and the world environment. Proponents suggest that the Basel Convention, suggest proponents and envelops a larger global community than previous international agreements, thereby resulting in implementation on a larger economic and political scale. Supporters further contend that the Basel Convention qualitatively expands and improves on the presently existing international and regional agreements which attempt to control the transfrontier move-

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

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

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

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

152. Tuohy, supra note 147, at 6.

153. See id. (noting other regional and international organizations that have addressed the commerce of toxic waste). The Basel Convention's preamble strongly implies that although regional agreements are beneficial, a global convention will provide greater incentive to control shipments of hazardous waste and implement safeguards. BASEL CONVENTION, supra note 11, at 1; see also Marshall, supra note 8, at 10 (discussing that the purpose of the Basel Convention is to expand and improve regional agreements); Tuohy, 116 Nations Adopt Treaty on Toxic Waste, L.A. Times, Mar. 23, 1989, at 6 (noting that although the Basel Convention has not stopped the commerce of toxic waste, it has signalled an international commitment to prevent the danger that toxic wastes pose to the global environment and human health).
ments of hazardous waste. Several international environmental organizations and most developing countries, on the other hand, believe the Basel Convention is laden with ambiguities and loopholes.\textsuperscript{154} Opponents point to the Convention's ambiguous language and the exclusion of fundamental and important concepts.\textsuperscript{156} They assert that the Basel Convention does not restrict the transboundary shipment of hazardous waste; instead, it merely provides a global tracking system for toxic waste movement.\textsuperscript{168} Accordingly, critics contend the Basel Convention grants industrialized nations formal permission to use developing nations as dumping grounds for their hazardous wastes.\textsuperscript{167} Finally, critics charge that the Basel Convention simply reiterates the existing, yet inadequate international toxic waste agreements.\textsuperscript{168} As evidence, opponents note that the Basel Convention does not include important amendments proposed by several Third World countries.\textsuperscript{169}

\textsuperscript{154} GREENPEACE \textit{Waste Trade Update}, \textit{supra} note 53, at 2-3.

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

\textsuperscript{156} GREENPEACE \textit{Waste Trade Update}, \textit{supra} note 53, at 3.

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

\textsuperscript{158} GREENPEACE \textit{Waste Trade Update}, \textit{supra} note 53, at 3.

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

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

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

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

\(^{160}\) BASEL CONVENTION, supra note 11, at 41, 78-79.

\(^{161}\) See supra notes 134-36 and accompanying text (discussing the goals and benefits of the adoption of the OECD’s core list of wastes and hazardous characteristics).

\(^{162}\) BASEL CONVENTION, supra note 11, art. 1(3), at 41.

\(^{163}\) Thirty-Four Countries Sign Convention, supra note 148, at 161.

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

\(^{165}\) BASEL CONVENTION, supra note 11, art. 6(11), at 50.

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

\(^{167}\) BASEL CONVENTION, supra note 11, art. 8, at 52.

\(^{168}\) Id. art. 9(2), at 53.

\(^{169}\) Id. art. (2)(a).

\(^{170}\) Id. art. 9(3), at 63.
it dispose of the waste in an "environmentally sound manner." Thus, the ambiguity in these standards may allow industrialized nations to avoid the requirement of reimportation.

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

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

171. Id. 172. See GREENPEACE WASTE TRADE UPDATE, supra note 53, at 2 (noting that exporters have the discretion not to re-import illegal waste).
173. BASEL CONVENTION, supra note 11, art. 4(8), at 46; see supra notes 169, 171 and accompanying text (noting that an exporter can choose whether or not to re-import the hazardous waste).
174. Id. 175. Id.
176. See supra notes 169-71 and accompanying text (comparing the exporter's discretion to re-import illegally exported toxic waste and the importing nation's duty to dispose of illegally imported hazardous waste).
177. Id. 178. See GREENPEACE WASTE TRADE UPDATE, supra note 53, at 5 (noting the African Trade Union Unity's call on African nations to severely punish any importers of toxic wastes); see also Greenpeace, Developments in National Politics, GREENPEACE TRADE UPDATE, Mar. 1, 1989, at 3 (noting that Nigeria has outlawed the "purchase, sale, import, transport, and storage" of hazardous waste). Any person convicted of hazardous waste dumping will receive life imprisonment. Id.
179. See Rublack, supra note 9, at 115 (noting developing nations' lack of administrative structures and legislation to specifically control the environmental risks of hazardous waste disposal); see also Handley, supra note 4, at 10,182 (discussing whether consent is truly consent, because Third World nations lack the necessary scientific and institutional infrastructures to develop policies to manage toxic waste); infra notes 209-11 and accompanying text (discussing developing nations' fragile political systems).
import and transit of the proposed shipment of hazardous wastes.\textsuperscript{180} The Convention also requires that specific information accompany both the shipment of waste\textsuperscript{181} and the exporter's notification.\textsuperscript{182} In addition, the exporting nation must secure the consent of the state of transit and the importing country.\textsuperscript{183}

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

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

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

\textsuperscript{180} BASEL CONVENTION, supra note 11, art. 6(1), at 53.
\textsuperscript{181} Id. annex VB, at 88.
\textsuperscript{182} Id. annex VA, at 85.
\textsuperscript{183} Id. art. 6(4), at 49.
\textsuperscript{184} Id. art. 6(3)(b).
\textsuperscript{185} Id. at 3.
\textsuperscript{186} Id. art. 4(2)(b), at 45.
\textsuperscript{187} Id. art. 4(2)(g), at 46.
\textsuperscript{188} Id. art. 10(2)(c), 10(3), at 55.
\textsuperscript{189} Id. art. 4(13), at 47.
\textsuperscript{190} Id.
\textsuperscript{191} Id. annex IV at 83-84 (listing operations which do and do not lead to the possibility of resource recovery, recycling, reclamations, direct re-use or alternative uses).
\textsuperscript{192} Id.
\textsuperscript{193} Id. art. 11(1), at 56.
native agreements. It says only that accords established independent of the Basel Convention must contain provisions that conform to the Convention’s requirement of environmentally sound management of hazardous waste.  

III. RECOMMENDATIONS

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

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

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

194. Id.; see also Greenpeace Waste Trade Update, supra note 53, at 3 (suggesting that bilateral or multilateral agreements need not conform to the Basel Convention’s provisions).

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

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

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

198. Id.

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

200. See generally J. Vallette, supra note 2, at 15-44 (discussing various schemes
toxic waste trade between industrialized nations and the Third World resembles economic blackmail.\textsuperscript{203} Only the Third World's complete ban of toxic waste imports will challenge industrialized nations to confront the uncontrolled generation of hazardous waste.\textsuperscript{202} Therefore, the true aim regarding hazardous waste management is to minimize waste generation and develop new recycling methods.\textsuperscript{203}

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

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

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

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

207. See Helfenstein, supra note 9, at 789 (stating that the developing nation's disposal facility should meet the same standards of operation, management, and worker protection as the exporting country's waste facilities).
208. Id. at 790 (stating that if the costs of safe disposal are paid in advance, the issues of liability and compensation will rarely arise).
210. Id. at 308.
211. Id.
212. Id.
214. See Handley, supra note 4, at 10,176 (noting the EC's recent discussions concerning the implementation of strict liability provisions).
215. BASEL CONVENTION, supra note 11, art. 14(2), at 60 (requiring parties to consider the establishment of a fund). The Basel Convention, however, fails to address emergency funding by nonparties. Id.
CONCLUSION

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

216. See J. Valette, supra note 2, at 15-133 (describing cases of illegal toxic waste shipping); see also Greenpeace Waste Trade Update, supra note 53, at 3 (quoting a well known international trader who said that the Basel Convention’s requirements would not prevent him from shipping waste).

217. Leonard & Morell, supra note 13, at 282 (quoting A. Miller, A Planet to Choose 49 (1978)).