

The Law of Treaties and the Export of Hazardous Waste

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INTRODUCTION

The public generally sees toxic waste exports as a wrong, not a legitimate activity. This perception is due, in part, to reports indicating a pattern in which a rich country dumps its hazardous wastes in a Third World country, often in an unsafe manner and without properly informing the local community. Accounts of such misdeeds abound.

In one notorious case, the ship *Khian Sea* left Philadelphia in 1986 carrying twenty-eight million pounds of toxic incinerator ash. Misinforming Haiti that the ship carried "fertilizer ash," the ship's operators dumped 3000 tons of hazardous waste on the beach at Gonaives before the Haitian government rescinded permission.¹ The *Khian Sea* then wandered about the oceans for eighteen months, changed its name twice, changed its country of registration at least as many times, and finally showed up in Singapore as the *Pelicano* with its cargo empty.² The ship's operators told reporters that they had legally disposed of the ash,³ and later repeated that story to a U.S. federal grand jury.⁴ They were

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1. Mark Jaffe, *Phila. Ash Reported in the Mail from Haiti*, PHILA. INQUIRER, Dec. 21, 1990, at B1; see also Mark Jaffe, *Tracking the Khian Sea: Port to Port, Deal to Deal*, PHILA. INQUIRER, July 15, 1988, at B1; Joel Millman, *Exporting Hazardous Waste: From Developed to Third World Nations*, TECH. REV., Apr. 1989, at 6.

2. *After 2 Years, Ship Dumps Toxic Ash*, N.Y. TIMES, Nov. 27, 1988, at A22.

3. *Id.*

4. *Ship Operators Accused of Lying*, WASH. POST, July 15, 1992, at A4.

eventually indicted for perjury when investigators concluded that the ash had actually been illegally dumped in the Indian Ocean.⁵

In 1988, the Nigerian government discovered that an Italian company had been dumping toxic waste in its port city of Koko.⁶ An international furor ensued, forcing the Italian government to take back the waste. In a dramatic twist, the ships sent by Italy to retrieve the waste were denied docking permission at several European ports. After traveling for several months, the ship finally returned to Italy, but not without local protests.⁷

In 1992, Italian and Swiss companies took advantage of the confused political situation in war-torn, famine-stricken Somalia to secure a \$80 million, twenty-year contract for dumping toxic wastes there. The contract was supposedly signed by the Somali Minister of Health, but at the time none of the warring factions in Somalia truly held power.⁸

The Third World reacted swiftly to these shipments. Following the Koko dumping incident, the Nigerian government declared the import of hazardous waste a capital crime.⁹ The Organization of African Unity (OAU) followed suit, passing a resolution urging their members to ban all imports of waste chemicals, metals, and radioactive materials, calling such transactions "a crime against Africa and the African people."¹⁰ Meanwhile, Central American nations, concerned that they might become the next dumping ground, created the Central American Commission for the Environment and Development, with the goal of developing environmental guidelines and legislation.¹¹ By May of 1992, Be-

5. *Id.*

6. James Brooke, *Waste Dumpers Turning to West Africa*, N.Y. TIMES, July 17, 1988, at A1.

7. Steven Greenhouse, *Europe's Failing Effort to Exile Toxic Trash*, N.Y. TIMES, Oct. 16, 1988, at E6.

8. Didrikke Schanche, *Somali Official Said to OK Toxic Dump*, PHILA. INQUIRER, Sep. 11, 1992, at A16.

9. Millman, *supra* note 1. The government later enacted a decree making the dumping of toxic waste punishable only by life imprisonment. Kingsley Moghalu, *Nigeria Gets Tough on Toxic Dumping*, CHRISTIAN SCI. MONITOR, Mar. 30, 1989, at 6.

10. Organization of African Unity: Council of Ministers Resolution on Dumping of Nuclear and Industrial Waste in Africa, May 23, 1988, reprinted in 28 I.L.M. 568 (1989) [hereinafter OAU Resolution]; see also Philip Shabecoff, *Irate and Afraid, Poor Nations Fight Efforts to Use Them as Toxic Dumps*, N.Y. TIMES, July 5, 1988, at C4.

11. See David C. Scott, *Central American Presidents Seek a Regional Solution to Toxic Waste Imports*, CHRISTIAN SCI. MONITOR, Mar. 10, 1992, at 5 ("Old tires for Nicaragua. Contaminated incinerator ash for El Salvador. Radioactive boxes for Honduras."); see also Nathaniel C. Nash, *Latin Nations Getting Others' Waste*, N.Y.

lize, Panama, Guatemala, and Costa Rica had banned hazardous waste imports.¹²

These news reports convey the notion that *all* exports of toxic waste¹³ are environmental hazards. However, that notion is not necessarily correct. A country that lacks safe disposal facilities for the unrecyclable toxic wastes it generates faces three choices: (1) disposing of the wastes locally (and, by hypothesis, in an unsafe manner); (2) halting waste generation; or (3) shipping the wastes elsewhere, preferably somewhere with safe disposal facilities. If the country continues its waste-generating economic activities, it must allow its wastes to be disposed of safely outside its boundaries. Thus, as long as hazardous wastes are generated, their international transport should be permitted and regulated, rather than banned.¹⁴

A question arises: Should the regulation of transboundary transport of hazardous waste take the form of individual states' domestic laws or international law? To some, it may be intuitively obvious that international problems ought to be solved by international law.¹⁵ Even if this assertion were generally true, it

TIMES, Dec. 16, 1991, at A10 (suggesting that African restrictions on imports contribute to the West's interest in Latin America).

12. Scott, *supra* note 11. May, 1992 is used as a time mark because that is when the Basel Convention, the topic of this comment, went into effect. See *infra* note 127 and accompanying text.

13. Because of the narrow scope of this Comment, the words "international transport," "transboundary transport," "transfrontier transport," and "export" will be used interchangeably. By using the word "export," however, this Comment does not ignore the fact that it takes two to export and the problem may well lie in the import side of the waste movement. Likewise, the words "toxic" and "hazardous" will be used interchangeably.

14. Some have argued that the generation of hazardous wastes is not inevitable and that waste minimization is in fact profitable. See Joseph R. Biden Jr., *A New Direction for Environmental Policy: Hazardous Waste Prevention, Not Disposal*, 17 *Env'tl. L. Rep. (Env'tl. L. Inst.)* at 10400 (1987). Some environmental groups have called for a ban on international transport of hazardous waste as a means to force a reduction in its production. See *Waste Export Control, Hearing Before the Subcomm. on Transportation and Hazardous Materials of the Comm. on Energy and Commerce*, 101st Cong., 1st Sess., 157 (1989) (testimony of Jim Vallette, International Waste Trade Project Coordinator, Greenpeace) [hereinafter *House Hearing*].

This Comment does not address that issue. Suffice it to say that the call for a ban is not inconsistent with the assertion that *as long as* hazardous wastes are produced, safety efficiency may be achieved by allowing some form of international transport. Indeed, banning transboundary waste transports without some parallel measures to reduce waste generation will only force local disposal, leading to a proliferation of waste disposal sites—a true nightmare for regulators trying to ensure safety.

15. See, e.g., *Developments in the Law—International Environmental Law, Part IV, Assent to and Enforcement of International Environmental Agreements*, 104 *HARV. L. REV.* 1550 (1991) (citing Note, *Carbon Dioxide's Threat to Global Climate*:

may not be true for all of international law. This Comment examines the effectiveness of one form of international law, namely multilateral treaties, as a tool for environmental protection.

All states have the sovereign right to unilaterally ban imports of hazardous waste into their territories.¹⁶ This is theoretically possible, but may not be practical, as the importing state may not have the resources necessary to enforce the ban. In fact, the stories above illustrate the futility of unilateral bans. The waste may be imported clandestinely, the government may be misled about the nature of the imported materials, or a landowner may accept waste without the government's knowledge. An international agreement on the control of hazardous waste exports will require the exporting country to participate in the control. For exports from a developed to a developing country, this will serve as a *de facto* transfer of enforcement technology and resources.

This Comment examines the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.¹⁷ Part I looks at the framework of international law governing toxic waste exports. It examines the intrinsic nature of international treaties, and considers what makes an international treaty "good" or "bad." Part II analyzes and evaluates the Basel Convention and its predecessors, providing details of the political aspects of the Basel Convention and a political understanding of the level of environmental protection the Convention provides. Part III examines the effects of the Convention in various regions of the world, both in terms of legislative actions and real-life

An International Solution, 17 STAN. J. INT'L L. 389, 402 (1981)) [hereinafter *Developments Part IV*].

16. There is one notorious exception, examined *infra* notes 213-217 and accompanying text, for members of the European Community. Each has agreed not to impede intra-community commerce, and so cannot unilaterally block waste imports.

The United States has a similar domestic rule under *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (states may not block waste imports from other states, as such ban would unconstitutionally burden interstate commerce). See also *Rollins Envtl. Servs. v. St. James Parish*, 775 F.2d 627 (5th Cir. 1985) (holding that cities and counties may not keep out hazardous waste dump sites).

17. *Open for signature* Mar. 22, 1989, reprinted in 28 I.L.M. 649 (1989) [hereinafter *Basel Convention*]. This Comment does not examine issues not related to the Basel Convention, such as the transport of hazardous waste within a country, the transport of low level radioactive waste, which is regulated by the International Atomic Energy Agency, and the disposal of wastes from the normal operations of ships, which is governed by the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships. See Marian N. Leich, *Contemporary Practice of the United States Relating to International Law; Transboundary Movements of Hazardous Wastes: Basel Convention*, 85 AM. J. INT'L L. 668, 674 (1991).

problems, and evaluates whether the Convention is effective in practice. This Comment concludes that international agreements cannot by themselves effectively regulate the transboundary shipment of hazardous toxic waste, but they can help impose minimum standards on reluctant nations, and also spur other efforts by serving as foundations on which stronger domestic regulations can be built.

I.

THE INTERNATIONAL LAW FRAMEWORK

There are three traditionally recognized sources of international law: conventional international law, customary law, and general principles of law.¹⁸ Conventional law consists of treaties, conventions, and other express agreements among the states.¹⁹ Customary law consists of those rules created by the general and consistent practice of the states.²⁰ The third source, general principles of law, embodies the common themes in the domestic laws of the states.²¹ International environmental law consists almost entirely of treaties²² and, therefore, has all the advantages and pitfalls that treaties have.

18. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 4-5 (1988).

19. *Id.* at 4.

20. *Id.* at 36. Within customary law is a special subset called *jus cogens*, or peremptory norms, consisting of those principles which are considered so compelling as to invalidate all other rules that are in conflict with it. *Id.* at 53-54. Professor Janis does not seem to consider *jus cogens* as part of customary law, because the latter needs consent by the states, but not the former. However, a principle can achieve the compelling status of *jus cogens* only if it has been accepted and practiced by many, if not most or all, states. *Jus cogens*, then, must first be customary law. The term "peremptory norm" is that used by the 1969 Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

21. JANIS, *supra* note 18, at 5. This category includes natural law, those rules that are natural to the organization of all communities and so are adaptable to the community of nations. *Id.* at 50-53. Some international lawyers, do not concede that there is such a thing as a rule adaptable by all nations. For example, marxist theorists consider capitalist and socialist states to be fundamentally different because they are "based on radically dissimilar socio-economic foundations." *Id.* at 53; NGUYEN QUOC DINH ET AL., DROIT INTERNATIONAL PUBLIC 70 (1980).

22. See Developments in the Law—International Environmental Law, Part III. *The Creation of International Environmental Agreements*, 104 HARV. L. REV. 1521, 1521 (1991) [hereinafter *Developments Part III*]. There are exceptions to this generalization. For example, at customary law, a state is required to notify affected states of an event having possible adverse environmental effects. However, after the Soviet Union failed to give the necessary notices following the Chernobyl nuclear power plant explosion, the rule was codified. ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 106 (1991).

A. *The Nature and Law of Treaties*

A treaty is an "agreement concluded between [s]tates in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."²³ A treaty is formed in two steps: first, representatives of the states negotiate and sign the treaty;²⁴ then, it must be ratified by each state.²⁵ The principle of *pacta sunt servanda* makes treaty obligations binding on the ratifying states.²⁶

Like contracts and unlike other sources of international law,²⁷ treaties are agreed to by the party states and adaptable to any and every subject matter. Applied in the area of environmental law, treaties can be negotiated and concluded on any new environmental concern.²⁸ However, treaties' main value—that they

23. Vienna Convention, *supra* note 20. This definition technically does not include those treaties concluded by an international body with a state or another international body, which is covered under the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, *opened for signature* Mar. 21, 1986, art. 2, ¶ 1(a)(i), *reprinted in* 25 I.L.M. 543 (1986). The definition given also does not include any unwritten international agreement. JANIS, *supra* note 18, at 14. Although these distinctions are noted here, they play no significant part in this Comment.

24. Domestic laws of the party state determine who has the power to negotiate treaties. JANIS, *supra* note 18, at 16. The act of signing a treaty signifies the adoption and authentication of the text being signed. *Id.* at 17.

25. *Id.* at 18. The method of ratification is an issue of both domestic and international law. *Id.* at 18-19. The treaty itself may set forth terms regarding notification of ratification, e.g., an exchange of instruments of ratification. *Id.* at 19. For a short but illuminating view on the political aspect of the negotiation and ratification process in the United States, see President Jimmy Carter, *Jackson H. Ralston Lecture: Principles of Negotiation*, 23 STAN. J. INT'L L. 1 (1987).

26. JANIS, *supra* note 18, at 9-10. *Pacta sunt servanda*, literally "agreement must be observed," has its origin in customary international law and is said to have the force of preemptory norms. *Id.* at 11, 54. It has since been codified into conventional international law. Vienna Convention, *supra* note 20, art. 26.

27. No claim is made here that treaties are like contracts, only that treaties have certain aspects that are like contracts. See generally EVANGELOS RAFTOPOULOS, *THE INADEQUACY OF THE CONTRACTUAL ANALOGY IN THE LAW OF TREATIES* (1990) (arguing that while treaties are like contracts in form, they are unlike contracts in interpretation and enforcement).

28. E.g., Antarctic Treaty, Dec. 1, 1959, 402 U.N.T.S. 71; Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 I.L.M. 1455 (exploration of the Antarctic); Convention on the Protection of the Rhine Against Pollution by Chlorides, Dec. 3, 1976, 1124 U.N.T.S. 375 [hereinafter Rhine Agreement] (redressing the polluting of the Rhine river); Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, *reprinted in* 26 I.L.M. 1516; Montreal Protocol on Substances that Deplete the Ozone Layer, Sep. 16, 1987, *reprinted in* 26 I.L.M. 1541 [hereinafter Montreal Protocol]; London Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer and Non-Compli-

are binding on the party states—also causes their major drawback: they encroach upon the states' sovereignties.

1. Sovereignty

A state that is party to a treaty is bound by its terms, which, like all legal obligations, will require that the state take some action, refrain from taking some action, or both. This rule conflicts with the rule that states are sovereign and free to do or not to do whatever they choose.²⁹ The conflict between these two norms is usually resolved in favor of the former, on the theory that states willingly surrender parts of their sovereignties when they agree to a treaty.³⁰

A corollary follows that a state will not agree to a treaty that encroaches too much on its sovereignty.³¹ Normally this is not a problem. A state will agree to a treaty if it thinks the value of the sovereignty that it surrenders is less than the value of what it gets from the treaty, *i.e.* what it gets from the reciprocal surrendering of sovereignty by the other party state. In matters of foreign relations, a state is quite willing to restrain its international behavior in exchange for the right to restrict another state's international behavior. Thus, in an arms control agreement, state X may agree to stockpile fewer nuclear missiles (presumably to fight state Y), in exchange for state Y having fewer missiles to fight it.

However, environmental treaties typically seek to regulate the behavior not of the states but, via the states, of their citizens.³² A state is thus asked to shape its domestic laws in a certain way, possibly at a considerable political cost. At the same time, it is

ance Procedure, June 29, 1990, *reprinted in* 30 I.L.M. 541 (1991) (redressing the depletion of the ozone layer).

29. The concept of state sovereignty, self-evident as it is today, has not always been the norm. During the nineteenth century, colonial powers set up "protectorates" in their colonies, creating supposedly independent states without sovereignty. *See, e.g.,* HOANG VAN CHI, *FROM COLONIALISM TO COMMUNISM* 11 (1964) (northern and central parts of Vietnam were set up as protectorates of France). In Europe, before Reformation all Christian states were vassals of the Papacy. In that sense, England was the first European state to become sovereign. NGUYEN QUOC, *supra* note 21, at 35. A system of sovereign states was not created in Europe until the signing of the Treaties of Westphalia. *Id.* at 36-7. In an ironic twist of history, the Holy See is now considered a prime example of a state with unclear sovereignty. *Id.* at 373-77.

30. Conversely, the act of agreeing to a treaty is itself an exercise of sovereignty. NGUYEN QUOC, *supra* note 21, at 119.

31. *See* *Developments Part IV, supra* note 15, at 1553.

32. *Id.* at 1551.

not clear exactly what it is the state gets from the other treaty parties. The exchange is not transparent, and the loss of sovereignty too obvious. While any state can make this complaint, Third World nations, whose sovereignties are often violated in other contexts,³³ are most likely to raise the issue. Efforts to limit the ivory trade,³⁴ protect rain forests,³⁵ and ban the production of ozone-depleting chemicals³⁶ have all been met with resistance from Third World countries. By complying, these countries have to limit their economic developments without clearly receiving benefits from the reciprocal compliance by the developed world.³⁷ International environmental obligations, therefore, are viewed as an invasive regulation of the internal economic affairs of the Third World, or worse yet, as a cynical attempt by the First World to maintain its economic advantages.³⁸

2. Free-Riders

The flip side of the problem of sovereignty is that of free-riders.³⁹ From a sovereignty point of view, a benefit that is unclear will not convince a state to cede sovereignty and agree to a treaty. From a free-ride point of view, a benefit that is not limited to the treaty parties will not entice a state to become one. Instead, some states may choose to shoulder no burden and still

33. The most notable examples are treaties for the maintenance of a foreign power's military bases in a Third World country. See INGRID D. DE LUPIS, *INTERNATIONAL LAW AND THE INDEPENDENT STATE* 200-19 (2d ed. 1987).

34. Convention on the International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243 [hereinafter CITES]; see Dennis McAuliffe, Jr., *U.N. Conference Bars Ivory Imports*, WASH. POST, Oct. 17, 1989, at A13 (Five southern African countries would not abide by the ban on ivory trade, calling American environmentalists "fat little puppies from urban environments who don't know a thing about African reality").

35. See, e.g., Eugene Linden, *Playing with Fire*, TIME, Sep. 18, 1989, at 76 (Brazil considers criticism of its management of the rain forests "unjust, defamatory, cruel and indecent").

36. *Supra*, note 28; see Jonathan C. Randal, *Third World Seeks Aid Before Joining Ozone Pact*, WASH. POST, Mar. 7, 1989, § 1, at A16.

37. This analysis ignores the impact a country's compliance has on its own environment. First, such a purely domestic effect should have no bearing on the country's rational valuation of the international treaty. In addition, although sometimes an international treaty can help enact legislation over domestic opposition, the latter, if well-organized, would have prevented the government from agreeing to the treaty in the first place.

38. Linden, *supra* note 35, at 78.

39. For an exposition of the problem of free-riders in economics, see, for example, HARVEY ROSEN, *PUBLIC FINANCE* 70-72 (1988); HAL VARIAN, *INTERMEDIATE MICROECONOMICS* 574-76 (1987). See also *Developments Part III*, *supra* note 22, at 1534-37.

derive advantages from the fact that others adhere to the limitations imposed by the treaty.⁴⁰

For example, all states in a given area benefit from a reduction in the emission of sulfur oxide, a chemical that causes acid rain. If these states negotiate a treaty for that purpose, some may hold out and let the others take the burden of implementing cleaner emissions.⁴¹ While the hold-out state continues to emit the same amount of sulfur oxide, it nonetheless benefits from the reduction of aggregate emission. As a result, either there will be more sulfur oxide than desirable, or the other states will have to reduce more than their fair share of emission in order to achieve the necessary environmental protection. If the success of the treaty depends on uniform implementation by all relevant states, a free-rider can make it difficult for an agreement to be reached, even among the rest of the states.⁴²

One solution that has been used is to isolate the free-rider.⁴³ Nations that are parties to a treaty are prohibited from carrying out the regulated transaction with non-parties.⁴⁴ Although this pay-to-play approach may create an incentive for states to join, it has the peculiar nice-guys-finish-last effect that if such a prohib-

40. Game theorists analyzing the collective-action scenario have concluded that in groups with three or more members, free-riding will occur if all members act rationally. Per Molander, *The Prevalence of Free-Riding*, 36 J. CONFLICT RESOLUTION 756, 768 (1992).

41. The concern here is with a free-rider who should otherwise be a party to the treaty, *i.e.* one whose participation is needed for the treaty's effectiveness. The mere fact that someone is getting a free ride should not prevent the relevant parties from concluding the treaty. Some would consider the "pure" free-rider to be different from the type of free-rider discussed here. *See, e.g., Developments Part III, supra* note 22, at 1534. While a "pure" free-rider causes the remainder of the parties to be worse off than total cooperation, the parties may still cooperate if cooperation is better than complete defection. Some game theoreticians have suggested, however, that if not enough cooperators are left, the remaining parties will cease cooperating simultaneously. *See* Robert Axelrod & Douglas Dion, *The Further Evolution of Cooperation*, 242 Sci. 1385, 1386 (1988).

42. That fate has befallen the Organization of Petroleum Exporting Countries' oil production quota agreements, with all members holding out for concessions from everybody else. *See, e.g.,* Barbara Rudolph, *OPEC Takes a Stand, Maybe*, TIME, Aug. 18, 1986, at 36.

43. If the multi-national negotiations were viewed as an *n*-person Prisoner's Dilemma, the use of isolation (commonly called ostracism) helps encourage cooperation among the participants. Axelrod & Dion, *supra* note 41, at 1386.

44. *See* Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 276 (1992). The Basel Convention adopts this approach: parties may not transport hazardous waste to or from non-parties. Basel Convention, *supra* note 17, art. 4 ¶ 5. This is also the approach taken by the Montreal Protocol, *supra* note 28, art. 4, and by CITES, *supra* note 34, art. 10.

ited transaction does take place, it is the party-state that will be in violation of the treaty and thus subject to any penalty or sanction, not the hold-out free-rider state.

3. Compliance and Verification

A treaty is also vulnerable after it has been concluded. As a general rule, a state that agrees to a treaty must execute it in good faith.⁴⁵ This rule gives practical meaning to *pacta sunt servanda* by putting into context the binding nature of treaties. The concrete meaning of "good faith" has been shaped by practice.⁴⁶ Broadly speaking, good faith requires that the parties refrain from fraud, adhere to the purpose of the treaty, and affirmatively work to advance its spirit.⁴⁷ In that sense, the treaty is controlled not only by its wordings but also by the agreed intent of the parties.⁴⁸

It is not always clear whether a party is complying in good faith to a treaty.⁴⁹ Unlike private contracts, most activities that a state may conduct in violation of a treaty take place within its own sovereign territory, and so are difficult to detect. Often, interna-

45. Vienna Convention, *supra* note 20, art. 26. Although good faith is an abstract concept difficult to define, that has not prevented lawyers from trying. *E.g.*, Vienna Convention, *supra* note 20, art. 18 (good faith means to "refrain from acts which would defeat the object and purpose" of the treaty); UCC § 1-201(1990) ("honesty in fact"); RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a ("faithfulness to an agreed common purpose and consistency with the justified expectations of the other party").

46. NGUYEN QUOC, *supra* note 21, at 208.

47. *Id.*

48. For example, a clause in the Versailles Peace Treaty prohibits discrimination against Polish nationals in the Free City of Danzig. Treaty of Peace Between the Allies and Associated Powers and Germany, June 28, 1919, 1919 Gr. Brit. TS No. 4 (Cmd. 153), 225 Parry's TS 188 (ending World War I). This clause was interpreted to prohibit facially neutral laws that had a discriminatory effect on Poles, even though the language of the Treaty did not prohibit such laws. P.C.I.J. Advisory Opinion #36, Feb. 4, 1932, at 28, *reprinted in* WORLD COURT REPORTS 806 (Manly O. Hudson ed. 1969). (The city of Danzig was given international status by the Versailles Peace Treaty, to be used as a port by Poland without being actually annexed to it. Its laws, therefore, needed to conform to the treaty's standards. After World War II, the city was made a part of Poland and renamed Gdansk. NGUYEN QUOC, *supra* note 21, at 376.)

This is not to say that the wording of a treaty has no value. In fact, the text of a treaty should be the primary source from which the intent is deduced. Vienna Convention, *supra* note 34, art. 31(1); *see also* JANIS, *supra* note 18, at 25-26; NGUYEN QUOC, *supra* note 21, at 247-50.

49. During the post-*détente* period, a frequent and often unverifiable complaint raised by both the United States and the Soviet Union was that the other was violating their arms control agreements.

tional non-governmental organizations (NGOs) have served as watchdogs to make sure countries adhere to their international obligations.⁵⁰ NGOs have the advantage of not having to follow any government's political agenda, and are usually zealous in ensuring that treaties are carried out in good faith. Some NGOs are also known to be adept at swaying international public opinion, and can use that reputation to influence local governments.⁵¹ On the other hand, any government that is unhappy with an NGO can restrict or ban its activities.⁵² Relying on NGOs is therefore not the complete solution.

To ensure compliance, some treaties allow for mutual verification by the parties.⁵³ Others designate an international agency—sometimes created ad hoc—as the competent authority to verify compliance.⁵⁴ The use of international agencies is particularly attractive with respect to international environmental problems. Often, these agencies have more staff and funding than develop-

50. An example of an NGO is Greenpeace, which advocates for environmental protection.

51. Greenpeace has accumulated a mixed record in influencing governments, but is generally very adept at calling attention to certain environmental problems. See generally Tyler Marshall, *Flair for Publicity: Greenpeace: A Maverick Protest Group*, L.A. TIMES, May 31, 1986, at 1.

52. This assumes that the government can change domestic laws to allow such a ban. In the United States, such a ban may be unconstitutional. See, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (holding Subversive Activities Control Act banning Communist party members from applying for, using, or attempting to use a passport violative of First Amendment).

Examples abound of human rights groups being banned from countries committing atrocities against its citizens. HUMAN RIGHTS, a publication that tracks human rights situations around the world, contains frequent accounts of human rights monitoring groups being closed down, their individual members jailed or expelled from various countries.

53. These include treaties of such an adversarial nature that neither side would trust anyone else to do the verification. For example, most of the haggling in arms control negotiation between the United States and the Soviet Union was over mutual verification procedures. See, e.g., VERIFICATION AND ARMS CONTROL (William C. Potter ed., 1985).

54. These include most multilateral treaties, where there may be too many parties to allow all mutual verification. E.g., the Rhine Agreement allows for monitoring by the International Commission for the Protection of the Rhine against Pollution. Rhine Agreement, *supra* note 28, arts. 10-11. Also included in this category are treaties with strong repercussions in international politics, or when the parties involved cannot trust each other not to make frivolous claims of violations, or both. E.g., the 1991 agreement on Kampuchea provides for a United Nations Transitional Authority to practically run the country according to the terms of the agreement. Paris Conference On Cambodia: Agreements Elaborating the Framework for a Comprehensive Political Settlement of the Cambodia Conflict, art. 2, October 23, 1991, U.N. Doc. A/46/608, S/23177, reprinted in 31 I.L.M. 174, 184 (1992).

ing countries can give to their national agencies. Given the political as well as scientific complications involved, international agencies can help maintain objectivity in monitoring compliance and provide scientific expertise to nations that need it. Finally, because the agencies were designated by the treaty to be the monitoring and enforcing entities, they cannot be unilaterally prevented from doing their work.⁵⁵

4. Breach and Enforcement

The best way to ensure compliance is to provide disincentives against breach. However, treaties are traditionally self-policing and silent on the issue of breach, and instead rely on politics to provide the necessary disincentives. A state that breaches its international obligations risks being branded 'untrustworthy' and may find it difficult to conclude more treaties.⁵⁶ Thus, it is often good politics for states to fulfill their treaties.⁵⁷

On the other hand, the breaching party may pre-empt the potential negative political effects by denying any breach and instead claiming that the terms of the treaty allow its actions. While gross distortions of treaty terms will probably not help, reasonable yet self-serving interpretation of ambiguous terms will at least mitigate negative public opinions. It is in such cases that an authoritative interpretation is needed. Some treaties foresee this event and designate a tribunal for that purpose.⁵⁸ Alternatively, the United Nations Charter empowers the International Court of Justice ("ICJ") to interpret all treaties, make

55. Such a ban would be a facial violation of the terms of the treaty. But when a country does not want to abide by the terms of a treaty and is not concerned that other countries know, it will not hesitate to obstruct the work of the international agencies. For example, in the aftermath of the Persian Gulf War, Iraq did not hesitate to obstruct in various ways the work of United Nations inspection teams, violating peace treaty terms allowing those teams unlimited access in its search for weapons of mass destructions. See, e.g., Art Pine & Melissa Healy, *Bush Decides on Major Iraq Raids if Defiance Goes On*, L.A. TIMES, Jan. 13, 1993, at A1 (Iraq refused to allow flights by U.N. planes carrying U.N. inspectors); Art Pine & Douglas Jehl, *U.N.-Iraq Accord Ends Threat of Allied Strike*, L.A. TIMES, July 27, 1992, at A1 (Iraq blocks U.N. inspectors' access to ministry building).

56. WERNER LEVI, LAW AND POLITICS IN THE INTERNATIONAL SOCIETY 95 (1976).

57. *Id.*

58. For example, the Rome Treaty which created the European Community also created the European Court of Justice to hear disputes involving the treaty itself. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [hereinafter EEC TREATY], art. 177; see also JANIS, *supra* note 18, at 221-28; NGUYEN QUOC, *supra* note 21, at 243.

factual findings, and determine reparations.⁵⁹ The ICJ has proven itself to be an eminent, albeit only occasional, actor in international law,⁶⁰ but its effectiveness is restricted by the facts that it has no enforcement authority and that only governments that voluntarily consent can be parties before it.⁶¹ NGOs and individuals, often the most zealous enforcers of international environmental obligations, have no standing before the ICJ.

One solution is to build into the treaty a mechanism for authoritative interpretation, as well as clear disincentives for breach. A provision that makes a polluter responsible for its own waste will provide incentive for states to fulfill its environmental obligations and enforce related domestic laws. In this context, a liability regime plays an important part in international environmental treaties.⁶²

B. *The Effects on Environmental Treaties*

All of the above pitfalls of treaties can affect the making, the contents, and the implementation of environmental treaties. Sovereignty concerns often result in propounding general principles rather than specific requirements.⁶³ Treaty obligations then become ambiguous, and, since ambiguities are resolved in favor of state independence,⁶⁴ the result is less protection for the environment than was intended. In order to win over the free-riders, negotiators may soften the requirements for compliance, again lessening the level of environmental protection.⁶⁵ Issues of verification tend to be technical and lack the glamour of grandiose environmental schemes, so they may be resolved in ways that do not assure an adequate level of environmental protection.

To be effective, negotiators for environmental treaties ought to resist such tendencies. To enhance compliance, appropriate incentive and disincentive should be provided. Thus, technical

59. Statute of the International Court of Justice, as annexed to the Charter of the United Nations, 59 Stat. 1055, T.S. No. 993, June 26, 1945, art. 36(20) [hereinafter ICJ Statute].

60. See JANIS, *supra* note 18, at 100-01.

61. ICJ Statute, *supra* note 59, art. 34.

62. Cf. KISS & SHELTON, *supra* note 22, at 348-60 (discussing problems in setting up an effective international liability regime for environmental harms).

63. New Zealand's Sir Geoffrey Palmer calls this approach the "soft law" method to "secure agreement where agreement may otherwise not be achieved." Palmer, *supra* note 44, at 269-70.

64. See LEVI, *supra* note 56, at 55, n.1.

65. Developments Part III, *supra* note 22 ("Hold-out problems frequently necessitate lowest-common-denominator solutions that result in underregulation").

assistance should be provided for countries that may not be able to afford it,⁶⁶ and definite liability should be imposed on violators.⁶⁷ International agencies and NGOs should be allowed wide participation in providing assistance as well as verifying compliance.

These concerns about international treaties' effectiveness inform analysis of existing waste export agreements.

II.

THE BASEL CONVENTION AND ITS PREDECESSORS

The Basel Convention represents the culmination of efforts by the United Nations Environmental Programme (UNEP) to bring together waste exporting and importing nations to work out a feasible mechanism of controlling the transboundary transports of hazardous waste. Most of these nations, however, were already parties to various international agreements on the same problem. Some of these agreements seek to regulate waste exports, while others seek to ban them outright. This Part examines the Basel Convention in the historical context of its predecessors, thus bringing out the influences the differing approaches bear on the Basel Convention.

A. *Previous International Agreements*

Before the Convention, many countries took it upon themselves to regulate the import and export of hazardous waste. Some do so exclusively by domestic laws,⁶⁸ while others supplement domestic laws with bilateral or regional agreements. This section surveys some of these agreements.

66. This is in fact the demand made by China and India during the Montreal Protocol negotiations. Randal, *supra* note 36. The issue was finally resolved when industrialized countries agreed to a technological transfer clause in the Protocol. Glenn Frankel, *Governments Agree on Ozone Fund; Negotiations Speed Pace of CFC Ban*, WASH. POST, June 30, 1990, at A1.

67. This is not always possible. For example, monetary damage cannot be accurately assessed against a nation causing excessive harm to the ozone layer, nor can such damages be accurately distributed among the "victim" nations. Proving causation will also be problematic.

68. For example, the U.S. enacted the Resources Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987 (1988), to track hazardous waste from "cradle to grave." For a description of RCRA, see, e.g., David P. Hackett, *An Assessment of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, 5 AM. U. J. INT'L L. & POL'Y 291, 298-303 (1990).

1. The Organisation for Economic Cooperation and Development (OECD)

The OECD grew out of Europe's post-World War II reconstruction efforts and now consists of twenty-four industrialized nations.⁶⁹ Before the Basel Convention was enacted, OECD actions consisted of two separate decisions:⁷⁰ The first decision ("Movements Decision") regulates transports among OECD members,⁷¹ the second ("Exports Decision") between members and nonmembers.⁷²

The Movements Decision contains only one binding term: "Member countries shall control the transfrontier movements of hazardous waste and . . . shall ensure that the competent authorities of the countries concerned are provided with adequate and timely information concerning such movements."⁷³

The decision sets forth, as nonbinding recommendations, general principles on transport of hazardous waste, for example, that a member nation manage wastes "in such a way as to protect man and the environment,"⁷⁴ apply laws and regulations "as stringently in the case of waste intended for export as in the case of waste managed domestically,"⁷⁵ and prohibit a waste export if there is objection from a country involved.⁷⁶

69. The members of the OECD are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

70. OECD decisions are binding on the signatory states, recommendations are not. Convention on the Organization for Economic Co-operation and Development, Dec. 14, 1960, 12 U.S.T. 1728, art. 5(a). It is not unusual for international alliances to make nonbinding recommendations and other pronouncements as a way to endorse a particular approach to a given problem without encroaching on the member states' sovereignty.

71. Organisation for Economic Cooperation and Development, Council Decision and Recommendation on Transfrontier Movements of Hazardous Waste, Feb. 1, 1984, OECD C(83)180(Final), *reprinted in* 23 I.L.M. 214 (1984), Annex, para. 1 [hereinafter Movements Decision]. Australia and Greece abstained.

72. OECD Council Decision - Recommendation on Exports of Hazardous Wastes from the OECD Area, June 5, 1986, OECD C(86)64 (Final), *reprinted in* 25 I.L.M. 1010 (1986) [hereinafter Exports Decision]. Australia abstained. Because OECD's membership constitutes almost all of the world's developed nations (South Korea and Taiwan seem to be the only industrialized non-members), *see supra* note 67, this Decision practically regulates all exports from the developed to the Third World.

73. Movements Decisions, *supra* note 71, at General Principles, art. I.

74. *Id.*, at General Principles, ¶ 1.

75. *Id.*, at General Principles, ¶ 4.

76. *Id.*, at General Principles, ¶ 8.

Unfortunately, these recommendations do not bind the members. Besides propounding grand principles, the Movements Decision only requires that countries involved in a waste exporting plan be told about it. Even the scope of the information required is not clear.⁷⁷ It is even unclear whether actual consent is required or whether tacit consent can be implied by a lack of response.⁷⁸

The generally liberal regulation of toxic waste transport within OECD reflects the volume of the business. Each year, it is estimated that two million tons of toxic waste are exported from OECD countries,⁷⁹ at least eighty percent of which is destined for another OECD member.⁸⁰ Imposing stricter controls would reduce these shipments, but would also disrupt the industrial activities that produce them.⁸¹ The loose standards probably result from a desire to protect OECD's industrial base, plus a complacent confidence that private industries are able and willing to properly ship and dispose of its hazardous waste.

The Exports Decision,⁸² regulating the movement of wastes from OECD member countries to non-members, contains stricter standards. This decision requires that members do the following: first, monitor exports of hazardous wastes and set up authorities with the power to prohibit such exports when appropriate; second, use "no less strict" standards on controlling exports to non-members than to members; third, prohibit any export without the consent of the importing country or notification of the transit countries; and fourth, prohibit the export if the intended disposal facility is not "adequate."⁸³ Like the Movements Decision, this decision also fails to specify the type of in-

77. Hackett, *supra* note 68, at 309.

78. *Id.*

79. John Hunt, *Waste Management; Climate of New Rules*, FINANCIAL TIMES, Nov. 26, 1991, at 1. Estimates of toxic waste exports vary from year to year and also according to who does the estimating. These fluctuations are mostly due to different definitions of toxic waste.

80. The number is 80% for the European members of the OECD. Steven Greenhouse, *U.N. Conference Supports Curbs On Exporting of Hazardous Waste*, N.Y. TIMES, Mar. 23, 1989, at A1. Japan maintains a policy of not exporting waste. House Hearing, *supra* note 14, at 221 (document supplied by Greenpeace). Australia and New Zealand's only known exports of waste consist of shipments to the United Kingdom. *Id.* at 218 & 223 (document supplied by Greenpeace). Of the waste exported by the U.S., between 80 to 90% is to Canada. *Id.* at 24 (statement by Rep. John Conyers, Jr.).

81. Hackett, *supra* note 68, at 309-10.

82. *Supra* note 72.

83. *Id.*, ¶ I.

formation required for notification of the transit countries, or the form of consent required of the importing country. In addition, consent is not required of the transit countries,⁸⁴ even though these countries bear the risk of leakage or accidents involving the wastes.

The stricter standards of the Exports Decision are probably due to its timing. Two years after the Movements Decision, the OECD countries must have seen the effect of enacting limited measures: to avoid the regional controls, waste producers could simply ship the waste to nonmember nations.⁸⁵ By the time the Exports Decision was enacted, the OECD had realized that it ought to be concerned about the environment in all waste importing countries, whether OECD members or not.⁸⁶

Nonetheless, both OECD decisions suffer from the lack of both specific consent and notification requirements and of a liability regime for waste dumping. Thus, it is possible for a waste producer to give ambiguous notification to the importing country, wait a while, claim that silence implies tacit consent, ship the wastes, then leave the importing country with the unwanted garbage. With adequate notification, the importing country could have prohibited the import in time. With clear prior consent requirements, the exporting country could have blocked the export. Finally, an exporter-pays liability regime for unsafe dumping would have provided an incentive for the exporting country—which benefits from the economic activities that generated the wastes—to better monitor and control waste exports.⁸⁷ This makes even more sense when the export is to a Third World country, because the exporting country has the better technical capability to identify and control waste export schemes that are harmful to the environment.

84. The Exports Decision does make a non-binding recommendation that the exporting country prohibit the export of the hazardous wastes if "an objection is made by any country of transit and no appropriate alternative route can be found by the exporter." *Id.*

85. *A New Step in Controlling International Shipments of Hazardous Waste*, OECD OBSERVER, Sept. 1986, at 27, 28 [hereinafter OECD OBSERVER].

86. *Id.* This realization led to a number of non-binding protective recommendations attached to the Exports Decision. Exports Decision, *supra* note 72, para. II(ii).

87. *Cf. supra* text accompanying note 61 (discussing polluter-pays liability as means to prevent breach of environmental treaties).

2. The European Community Directives

Even though many members of the European Community (EC)⁸⁸ were involved in controversies over the export of hazardous wastes to Africa,⁸⁹ the events leading to the adoption of the EC hazardous waste exports directives took place within Europe. The incident was termed by some the "Saga of the Seveso Drums."⁹⁰ The "saga" began in 1976 with the explosion of a fertilizer factory in Seveso, Italy, releasing a cloud of dioxin.⁹¹ In 1982 the Italian government ordered the Swiss company that owned the factory to move forty-one barrels of dioxin waste out of the country. The company hired an Italian subsidiary of a West German firm, which then hired a French subcontractor to dispose of the waste. The subcontractor took the drums, drove to France, and the waste "disappeared."⁹² For ten months, four governments engaged in a frantic search, as did the environmental group Greenpeace.⁹³ The waste barrels were finally found in an abandoned slaughterhouse in France.⁹⁴

As a result, the EC countries realized that proper monitoring and regulation could have avoided this waste scandal. In December 1984, seven months after the wastes were found, the EC passed a directive regulating the transboundary transport of hazardous waste.⁹⁵ This directive was later amended in 1986.⁹⁶ In

88. The EC members are: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. JANIS, *supra* note 18, at 217. Since all EC members are also members of the OECD, compare with *supra* note 69, they are subject to regulation by both organizations. This Comment evaluates each body of rules separately to see how they would fare standing alone. This Comment does not consider all bodies of law possibly affecting a waste transport; specifically, it does not examine the domestic laws of the various countries involved in waste transport.

89. See, e.g., *supra* notes 6-9 and accompanying text.

90. OECD OBSERVER, *supra* note 85, at 28; see also Gary Yerkey, *EC Nations May Try to Halt Dumping of Toxic Waste in One Another's Backyard*, CHRISTIAN SCI. MONITOR, June 9, 1983, at 10.

91. E.J. Dionne Jr., *Europe's Dioxin Drama: A Slaughterhouse Finale*, N.Y. TIMES, June 13, 1983, at A2. A narration of the Seveso story up to 1978 appears in TOM MARGERISON ET AL., *THE SUPERPOISON* (1981).

92. Dionne, *supra* note 91.

93. *Id.* The West German government became involved after a French minister suggested that the waste had gone there. *Id.*

94. *Id.* The scandal continued after the wastes were found. The West German government accused France of attempting to cover up the discovery hoping to first secretly sneak the wastes out of the country. *Id.*

95. Directive on the Supervision and Control Within the European Community of the Transfrontier Shipment of Hazardous Waste, 1984 O.J.C.E. (L 326) 31 (1984) [hereinafter 1984 Directive], amended by Directive amending Directive 84/631/EEC

case of transports from one EC country to another, the directives require that the waste exporter notify the importing and all the transit countries of the contents of the waste,⁹⁷ and give the importing country an opportunity to object.⁹⁸ For exports outside the EC, the 1984 Directive only required notification, but this was later amended by the 1986 Directive to require that the exporter not only receive consent from the importing country but also demonstrate the intended disposer's capability to handle the waste safely.⁹⁹ Unlike the OECD decisions, the directives require a uniform notification scheme with details on the nature of the waste as well as of the transporting routes and logistics.¹⁰⁰

Nonetheless, the EC directives are still weak in some respects. EC directives are only enforceable after the member states enact domestic laws to implement it. For example, on the eve of the Basel Convention, only four of the twelve EC members had implemented the directives.¹⁰¹ This meant that waste generators in the remaining countries, including highly industrialized Germany, France, and the United Kingdom, were still unregulated. Dissatisfied with the slow response, the Commission transformed the directive into Regulation (EEC) No/259/93, thus making the legislation directly applicable to the member states.¹⁰²

The EC directives also fail to allow EC members to ban all imports of hazardous wastes.¹⁰³ Instead, the directives allow only a delay of particular imports, either by a substantiated objection

on the Supervision and Control Within the European Community of the Trans-frontier Shipment of Hazardous Waste, 1986 O.J.C.E. (L 181) 13 (1986) [hereinafter 1986 Directive].

96. 1986 Directive, *supra* note 95.

97. 1984 Directive, *supra* note 95, art. 3 ¶ 3, amended by 1986 Directive, *supra* note 95, art. 1.

98. 1984 Directive, *supra* note 95, art. 4, amended by 1986 Directive, *supra* note 95, art. 1.

99. 1984 Directive, *supra* note 95, art. 3 ¶ 4, amended by 1986 Directive, *supra* note 95, art. 1.

100. 1984 Directive, *supra* note 95, Annex I.

101. F. James Handley, *Hazardous Waste Exports: A Leak in the System of International Legal Controls*, 19 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,171 (1989) (showing Denmark, Greece, Belgium and Luxembourg implemented the directives).

102. Coopers & Lybrand, *EC Commentaries*, *ENV'T*, Aug. 24, 1994 9.13. The European Parliament and several companies have challenged the regulation in the European Court of Justice.

103. Because the EC is a free-trade zone, a member country may not ban imports into its territories unless such a ban is allowed by EC law. See *Commission v. Belgium*, 9 July 1992, C-2/90 (E.C.R.), examined *infra* text accompanying notes 227-232.

or by attaching a condition that is not more stringent than those attached to domestic toxic waste transports.¹⁰⁴ In addition, the directives do not require prior consent of non-EC member transit countries before shipment.¹⁰⁵

Finally, the directives do not apportion liability for improper disposal or accidents in transport. In fact, while the directives require that accident instructions accompany the waste,¹⁰⁶ they do not even require that accidents and spills be reported to anybody.¹⁰⁷ It is puzzling that the directives foresaw the risk of accidents and yet said nothing about the clean-up cost. It appears that the drafters were on the one hand confident that domestic laws could resolve the issue, and on the other hand unwilling to concede a liability claim made by a non-member.¹⁰⁸ The lack of a liability regime thus fails to provide enough incentive for countries to control their waste exports.¹⁰⁹

3. The Organisation of African Unity

While the developed countries sought a way to monitor and control toxic waste exports, the Organisation of African Unity ("OAU") Council of Ministers passed the Resolution on Dumping of Nuclear and Industrial Waste in Africa,¹¹⁰ calling for a ban on dumping. Reacting to the dumping at Koko,¹¹¹ the OAU Resolution calls the dumping of toxic wastes in Africa a "crime against Africa and the African people,"¹¹² condemns such dumping by multinational corporations,¹¹³ and urges members to stop arranging for waste dumping.¹¹⁴ The OAU Resolution also requires that waste dumpers "clean up the areas that have already

104. 1984 Directive, *supra* note 95, art. 4. *But see* Mary E. Kelly, Comment, *International Regulation of Transfrontier Hazardous Waste Shipments: A New EEC Environmental Directive*, 21 TEX. INT'L L. J. 85, 105 (arguing that since there is no deadline required for resolving objections, a member state can effectively block the transport).

105. *Cf.* 1986 Directive, *supra* note 95, art. 1 (*amending* 1984 Directive, *supra* note 95, art. 3 ¶ 4).

106. 1984 Directive, *supra* note 95, art. 8 ¶ 1(c).

107. Kelly, *supra* note 104, at 112.

108. Of course, the drafters may merely have avoided a thorny political issue that could anger industry.

109. *Cf. supra* text accompanying note 86.

110. OAU Resolution, *supra* note 10.

111. *See supra* text accompanying notes 6-8.

112. OAU Resolution, *supra* note 10, art. 1.

113. *Id.* art. 2.

114. *Id.* art. 3.

been contaminated by them.”¹¹⁵ Despite its strong wordings, the OAU Resolution is only a non-binding political statement. In addition, while it seems to ban the import of toxic waste from outside Africa,¹¹⁶ its text does not distinguish between waste imports and local waste disposal, so that a multinational corporation located in one of the OAU countries could not dispose even locally of the wastes it generates.¹¹⁷ The OAU Resolution clearly states the African countries’ position on the imports of toxic wastes from outside Africa, and it is this position that they took to the Basel Convention.

B. *The Basel Convention*

1. Background

The Basel Convention is the direct product of the Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes (Cairo Guidelines),¹¹⁸ adopted in 1987 by the United Nations Environmental Programme (“UNEP”).¹¹⁹ The principles set forth by the Cairo Guidelines include ensuring safe disposal facilities for the transported wastes and requiring prior notification of and consent by the importing and transit nations.¹²⁰ Simultaneously, the UNEP Governing Council created a working group to incorporate the Cairo Guidelines into international law via a convention.¹²¹ As work began,

115. *Id.* art. 2.

116. *See id.* Preamble (“Aware of the growing practice of dumping nuclear and industrial wastes in African countries by transnational corporations and other enterprises from industrialized countries . . .”).

117. Although this may be a welcome development to some, it is doubtful that the OAU Council intended it: the oversight was later corrected in the Organisation of African Unity, Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Jan. 29, 1991, *reprinted in* 30 I.L.M. 773 (1991), art. 1(1) [hereinafter Bamako Convention]. *See infra* note 126 and accompanying text.

118. Cairo Guidelines and Principles for the Environmentally Sound Management and Disposal of Hazardous Wastes, Annex II, U.N. Doc. U.N.E.P./GC.14/17 (1987) [hereinafter Cairo Guidelines], *reprinted in* Final Report of the Working Group, Annex III, U.N. Doc. U.N.E.P./WG.122/3, (1985). The Cairo Guidelines were finalized in December 1985 but were not enacted until the UNEP Governing Council met in June 1987. *See Hackett, supra* note 68, at 310.

119. The Cairo Guidelines in turn are the result of UNEP’s concern with hazardous wastes first expressed in 1980. For a history of UNEP’s involvement in solving the hazardous waste problem, see Carol A. Petsonk, Recent Developments, *The Role of the United Nations Environment Programme (UNEP) in the Development of International Environmental Law*, 5 AM. U. J. INT’L L. & POL’Y 351, 373-74 (1990).

120. *See Hackett, supra* note 68, at 310.

121. *Id.*

negotiations bogged down over such issues as the consent requirement and the definition of hazardous wastes.¹²² Soon, however, the Seveso, *Khian Sea*, and Koko incidents¹²³ caught up with the negotiators, and in March 1989, delegates from 116 countries concluded the negotiations and produced the text of the convention.¹²⁴

The Basel Convention needed ratification by only twenty countries before becoming effective.¹²⁵ As it turned out, ratification took more than three years.¹²⁶ Except for Nigeria, OAU countries refused to ratify the Convention because it did not ban waste transports outright. EC ratification was delayed by politicking between the European Commission and the European Parliament.¹²⁷ Other industrialized nations—Canada, Japan, the U.S.—were also slow.¹²⁸ On May 5, 1992, the Convention finally went into effect after Australia ratified it.¹²⁹

122. See, e.g., *Developed, Developing Countries Disagree over Elements of Waste Shipment Agreement*, 11 Int'l Envtl. Rep. (BNA) 376 (1988) [hereinafter *Developed, Developing Countries Disagree*].

123. See *supra* notes 1-6, 117-121 and accompanying text.

124. Only 34 of the 116 countries signed the convention. Delegates from the other countries said they must first consult their governments. William Tuohy, *116 Nations Adopt Treaty on Toxic Waste*, L.A. TIMES, Mar. 23, 1989, at 6; see also Paul Abrahams & John Hunt, *Treaty on Disposal of Hazardous Waste Agreed*, FIN. TIMES, Mar. 23, 1989 [hereinafter *Treaty on Hazardous Waste Agreed*]. As of March, 1994, 64 countries ratified the convention. Paul Lewis, *Western Lands, Except U.S., Ban Export of Hazardous Waste*, N.Y. TIMES, Mar. 26, 1994, at 3.

125. Basel Convention, *supra* note 17, art. 25 ¶ 1.

126. This bit of reality is to be compared with a then-pessimistic prediction by the press that the process "could take two years," *Treaty on Hazardous Waste Agreed*, *supra* note 122; UNEP's optimistic prediction that "by the middle of [1990], at least 20 signatory nations will ratify the treaty," Steven Greenhouse, *U.N. Conference Supports Curbs on Exporting of Hazardous Waste*, N.Y. TIMES, Mar. 23, 1989, at A1; and U.S. Deputy Secretary of State Lawrence Eagleburger's assertion that "[m]ore nations, including most European nations, are expected to become parties by the end of 1991." Leich, *supra* note 17, at 679 (quoting report from Eagleburger to President Bush).

127. *United Nations Officials See Basel Treaty as "Limping" into Effect with Limited Support*, Int'l Envtl. Daily (BNA), May 22, 1992, available in Westlaw, IED File [hereinafter *Basel Treaty Limping into Effect*]. For three years, France was the only EC member who had ratified the convention. *Id.*

128. *Id.*

129. *Accession to Basel Treaty Means End to "Worrying Situation," Official Says*, Int'l Envtl. Daily (BNA), Mar. 24, 1992, available in Westlaw, IED File. Some UNEP officials worried that the weak ratification history of the Basel Convention would undermine its effectiveness. *Basel Treaty Limping into Effect*, *supra* note 127. Two more countries ratified the Convention after Australia, bringing the total to 22. By the time the Convention became effective, the countries that had ratified it were: Argentina, Australia, China, Czechoslovakia, El Salvador, Finland, France, Hun-

The compromise reached at the Basel Convention regulates rather than bans exports of hazardous wastes. The Convention's recurrent themes are the safe disposal of hazardous wastes and the minimization of their transboundary transport.

2. The Scope of the Basel Convention: Defining "Transboundary Transport of Hazardous Waste"

The technical issue in addressing the problem of transboundary transport of hazardous waste is to define three terms: "hazardous," "waste," and "transboundary transport."

"Transboundary transport," like "export," is an established commercial concept, so the Basel Convention's definition ("movement [from] one State to or through . . . 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"¹³⁰) is uniformly accepted. It is more difficult to define "hazardous" and "waste."

Most definitions of "waste" are similar to the Basel Convention's definition: "substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by . . . law[]."¹³¹ This definition shows that there are two aspects to waste: it is useless ("intended to be disposed of"), and it should be disposed of. The "useless" character of waste must be distinguished from the "useful" character of finished products and from the "yet-to-be-useful" character of raw material, and the disposal process must be distinguished from production

gary, Jordan, Latvia, Liechtenstein, Mexico, Nigeria, Norway, Panama, Poland, Romania, Saudi Arabia, Sweden, Switzerland, Syria, and Uruguay. *Id.*

130. Basel Convention, *supra* note 17, art. 2(3). This definition is simply a technical version of the everyday usage of the word "export." See, e.g., WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1981) ("to carry or send (a commodity) to some other country or place"); 5 OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("to send out (commodities of any kind) from one country to another").

131. Basel Convention, *supra* note 17, art. 2(1); *accord* Bamako Convention, *supra* note 115; *Movements Decision*, *supra*, note 69.

The Resource Control and Reduction Act ("RCRA") defines "solid waste" as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities." 42 U.S.C. § 6903(27). In other words, the RCRA defines waste as something already discarded. See also *American Mining Congress v. United States Env'tl. Protection Agency*, 824 F.2d 1177 (D.C. Cir. 1987) (RCRA only includes discarded not recyclable materials).

processes. The advent of recycling technology makes both distinctions difficult, as waste becomes raw material for recycling,¹³² and disposal becomes production.¹³³ As regulations become more stringent, the distinction becomes more important and errors become less affordable. Overinclusion will provoke industrial opposition and possibly block enactment of the regulations, while underinclusion will undercut the intended environmental protection. In addition, a good balance must be struck between the desire to encourage recycling on the one hand, a point which argues for laxer regulations, and, on the other hand, the need to prevent the disguising of disposal as recycling, and to monitor even *bona fide* recycling of hazardous waste, points that support more stringent regulations.

A typical method used to specify what constitutes waste is to make two lists, one consisting of processes from which wastes rather than raw material or end products are generated, and the other of known disposal processes.¹³⁴ A substance or object is then "waste" if it either comes from a waste generating process or is about to be routed into a disposal process. "Off-specification products," "[s]ubstances which no longer perform satisfactorily" and "[u]nusable parts" are examples of items from the first list.¹³⁵ Examples of items from the second list are: "[d]eposit into or onto land," "[d]eep injection [into] wells, salt domes or naturally occurring repositories" and "[i]ncineration."¹³⁶ These examples illustrate the fact that defining "waste" by finite lists necessarily results in a mixing of specific with general (and potentially misleading) items, thus impeding enforcement.¹³⁷

Hard as it is to define waste, it is even harder to define "hazardous." Generally, waste is considered hazardous if it can cause harm to humans or the environment, and therefore needs to be controlled.¹³⁸ This harm can be identified either by the type of waste (*e.g.*, waste mineral oils), its origin (*e.g.*, hospitals, or a spe-

132. Cf. Harvey Yakowitz, *Identifying, Classifying and Describing Hazardous Wastes*, *INDUSTRY & ENV.*, Jan.-Mar. 1988, at 3.

133. Even without any recycling technology, some wastes can readily be re-used, as fertilizer for example.

134. In controlling hazardous waste, the first list is usually limited to only those processes that produce wastes considered hazardous, so that only one list, of the second type, is used to define all waste.

135. *Movements Decision*, *supra* note 71, at 264.

136. *Id.* at 265.

137. For example, there are discount stores specializing in selling "irregular" clothing, clearly "off-specification products" that are yet not "waste."

138. See Yakowitz, *supra* note 132, at 5.

cifically named company), its contents (*e.g.*, dioxin), or some hazard characteristics determined by a standard scientific methodology (*e.g.*, carcinogenic).¹³⁹ In addition, if waste is to be labeled hazardous because of its contents, a threshold level of hazardous concentration should also be defined.¹⁴⁰

Typical definitions of wastes considered hazardous also consist of lists of one or more of the above types. The problem with making finite lists, as with defining "waste," is that the lists can never be complete or precise. Enforcement will become easier in some areas and harder in others, causing a distortion in industrial responses. Just as no two countries are alike, no two lists they have made are alike either,¹⁴¹ causing mismatched regulations and weakening enforcement of international transactions.¹⁴²

The differences in definition probably result from weighing the level of environmental protection desired, the stringency of the intended regulations, administrative feasibility, and industrial resistance. A list of wastes to be monitored would encompass more items than a list of wastes to be banned, both because it is easier to implement and because industry will be less likely to oppose mere monitoring. An environment-conscious country will include more wastes in the hazardous category than one

139. *Id.* at 3. U.S. laws define hazardous wastes by their ignitability, corrosivity, reactivity, and "EP toxicity." 40 C.F.R. §§ 261.21-.24 (1993).

140. *Id.* Requiring regulation for merely a trace of hazardous substance is not only useless but may also lead to callousness in regulating the truly hazardous waste. This is, of course, the proverbial "cry wolf" problem.

The concentration condition becomes important when the problem of enforcement is considered. In fact, it may well be intractable. If concentration is defined by percentage, then a waste generator/transporter can dilute the waste in nonhazardous materials and legally evade control. A German company has tried this before; it mixed PCB's with wood chips, legally shipped the "nonhazardous" waste to Turkey where the PCB seeped out into the ground. Harry Anderson, *The Global Poison Trade*, NEWSWEEK, Nov. 7, 1988, at 67. If concentration is defined by an absolute amount, then a waste generator/transporter can simply break up the transport into smaller loads and end up with an amount below the threshold for each shipment.

U.S. laws do not allow the dilution of waste to render it non-hazardous. See *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991) (holding that contamination with other non-hazardous chemicals would not render soil that was also contaminated with toluene non-hazardous waste).

141. Yakowitz, *supra* note 132, at 3. Examples of definitions by various countries are shown in *id.*, at 7-8.

142. Although finite lists are always both under- and overinclusive, the problem is exacerbated in the international setting where overinclusiveness in one country conflicts with underinclusiveness in another, making both enforcement and compliance difficult. The problems multinational corporations face in trying to comply to conflicting rules and regulations may compel some countries to give them concessions that they otherwise would not.

more concerned with industrial development. And, if one believes that nations can be selfish, countries importing wastes will find more wastes to be hazardous than countries exporting them.¹⁴³

The Basel Convention's definition of hazardous waste solves this balancing problem by giving the most weight to environmental protection within the constraints of administrative feasibility. It recognizes a uniform "core" list of the most hazardous forms of waste in order to allow for uniform control of international transactions in those wastes.

First, a "core" group of hazardous wastes is defined as those of certain listed type (*e.g.*, asbestos, acidic solutions), or coming from certain listed sources (*e.g.*, hospitals, production of resins or latex),¹⁴⁴ which also exhibit a hazardous property as defined by the Convention (*e.g.*, flammable, corrosive, poisonous).¹⁴⁵ In addition, for each particular transport, the Convention includes a catch-all definition of hazardous waste: if any country involved—the exporting, transit, or importing country—defines the waste as hazardous, then it is hazardous.¹⁴⁶ This provision allows for individual countries to adapt the scope of the Convention to their own environmental concerns.

3. Other Terms of the Convention

a. Prior Informed Consent Requirement

All countries, as sovereigns, may use domestic law to ban all waste imports, or, alternatively, require prior consent before an import may take place. However, many of the importing countries may lack the technical resources to enforce their own re-

143. There is dual externalization at work here. The environmental harm of hazardous waste disposal is external to the exporting country, while the economic cost of producing less hazardous waste is external to the importing country.

144. These lists, Basel Convention, *supra* note 17, Annex I, are based on the OECD's definitions, OECD Council Decision on Transfrontier Movements of Hazardous Waste, C(88)90(Final), May 27, 1988, *reprinted in* 28 I.L.M. 257 (1989). *See Developed, Developing Countries Disagree, supra* note 122, at 376. These lists can only be amended by a Conference of the Parties, which requires a three-fourth majority vote for adoption. Basel Convention, *supra* note 17, arts. 18(3), 18(2)(a), 17(2)-(5).

145. Basel Convention, *supra* note 17, art. 1 ¶ 1(a); *cf.* 40 C.F.R. §§ 261.10, .21-.24 (hazardous wastes defined by combination of hazardous properties). Thus, sewage sludge that does not possess any of the hazardous property listed in the Convention is not considered hazardous. In all fairness, it is rather difficult to imagine such clean sludge.

146. Basel Convention, *supra* note 17, art. 1 ¶ 1(b).

strictions. A prior informed consent requirement written into an international treaty will place an affirmative duty on the exporting country to block the export if consent is not received from the importing country. This becomes a *de facto* technology transfer scheme, where the technical expertise of the exporting country is used to help the importing country assert its sovereign rights. The Convention contains two types of informed consent requirements.

(i) From Importing States

First, the Convention squarely places the responsibility on the exporting country to block the waste movement "until it has received written confirmation that . . . [t]he [exporter] has received the written consent of the State of import."¹⁴⁷ The notification must include the nature and quantity of the waste, the route it is expected to take, and information concerning the contract between the exporter and disposer.¹⁴⁸ The waste must be described according to the nature and the concentration of the most hazardous components and the process by which it was generated.¹⁴⁹ On the import side, the written consent by the destination country must include a confirmation that facilities and a contract exist for the environmentally sound disposal of the wastes.¹⁵⁰

(ii) From Transit States

The exporter must also receive prior informed consent from states through which the wastes pass.¹⁵¹ This is an improvement over the OECD and EC approaches, where the level of protection for transit states is lower.¹⁵² The prior informed consent requirement protects coastal states, which bear the double burden

147. *Id.*, art. 6; *cf.* 42 U.S.C. § 6938(a) (1988) (requiring hazardous waste exporters to notify EPA prior to scheduled export).

148. Basel Convention, *supra* note 17, Annex V A; *see* 42 U.S.C. § 6938(c) (1988) (requiring exporters to include the frequency of export and ports of entry).

149. Basel Convention, *supra* note 17, Annex V A. However, there are no criteria for comparing the level of hazard posed by two different substances. In addition, these descriptions are simply code numbers taken from the lists used to define hazardous waste, so that any ambiguity in composing the list will be directly translated into an ambiguity in this notification scheme.

150. *Id.*, art. 6 ¶ 3.

151. *Id.*, art. 6, ¶ 4.

152. It also represents a negotiating victory for developing countries, which defeated the developed countries' preference for tacit consent by importing nations. *See UNEP Transboundary Transport Draft Bogged Down over Prior-Consent Issue*, 11 Int'l Env'tl. Rep. (BNA) 660 (Dec. 14, 1988).

of being both a convenient disposal site and an accessible transit route. In addition, the coastal states may also be subject to navigational treaties allowing freedom of access to their ports, treaties that have been developed to protect maritime commerce and landlocked countries.¹⁵³ A transit state's right to interfere in the waste trade between the exporting and importing states is thus not a special privilege but simply a counter-balance to its free-trade burdens.

b. Liability

In the event a legally exported batch of hazardous waste cannot be disposed of safely, the Convention imposes on the exporting state the duty to take back the waste.¹⁵⁴ For illegal transports, the Convention imposes the disposal duty on the state at fault.¹⁵⁵ When the fault lies with the exporter, the exporting state must take back the waste, but it also has the option, if re-import proves to be "impracticable," to "otherwise dispose[] of" the waste in an environmentally sound manner.¹⁵⁶

c. Enforcement

The Convention enforces itself by prohibiting parties from making reservations or exceptions.¹⁵⁷ By ensuring that no country may weaken its terms, the Convention also runs the risk of not being ratified by countries concerned about their sovereignty.¹⁵⁸

To secure ratification, the Convention imposes a penalty on non-parties: no transport of hazardous waste is allowed between

153. See, e.g., United Nations Convention on the Law of the Sea, *open for signature* Dec. 10, 1982, reprinted in 21 I.L.M. 1261. For a history of the access and innocent passage rights to and from seaports, see INGRID D. DELUPIS, INTERNATIONAL LAW AND THE INDEPENDENT STATE 65-75 (1987).

154. Basel Convention, *supra* note 17, art. 8. The Convention calls this the "re-import" requirement, even though to the exporting state, taking back the waste would be its first import (the first shipment was an export).

155. *Id.*, art. 9 ¶ 2-3. The state at fault is the state in which the party at fault is based, i.e., the exporting state if it is the exporter's or the generator's fault, and the importing state if it is the importer's or the disposer's fault.

156. *Id.*, art. 9 Para. 2(b). The Convention does not define impracticability, thus opening itself to claims that impracticability includes economic infeasibility.

157. *Id.*, art. 26 ¶ 1. A reservation to a treaty is a declaration by a signatory state that it shall not abide by certain terms of the treaty. JANIS, *supra* note 18, at 20. An examination of the legality and effects of reservations appears in NGUYEN QUOC, *supra* note 21, at 168-73.

158. See *supra* text accompanying notes 29-38.

a party and a non-party.¹⁵⁹ Thus, the Convention's drafters wagered that enough countries would become parties to make it necessary for others to become parties as well. The wager appeared to pay off for at least one country: industry groups in the United States urged ratification precisely because they would otherwise have nowhere to ship their hazardous waste.¹⁶⁰

To monitor compliance, the Convention creates a Secretariat to oversee its implementation.¹⁶¹ The Secretariat is primarily an information clearinghouse on technical matters and known illegal transport schemes.¹⁶² The Secretariat is also charged with receiving complaints on breaches of the Convention,¹⁶³ but does not have the power to do anything about them. Instead, disputes among parties to the Convention, presumably including noncompliance claims, must be resolved by negotiation, or if the parties agree, by arbitration by an ad hoc tribunal or by resolution by the International Court of Justice.¹⁶⁴

d. Escape Clause For Non-Parties: Bilateral Agreements

The Convention also contains a loop-hole to allow non-party countries to engage in hazardous waste transports with party countries, notwithstanding the outright ban of such transactions. Waste transports are allowed if a bilateral, multilateral, or regional agreement exists for such a purpose, as long as such agreements are "not less environmentally sound" than the Convention.¹⁶⁵

3. Analysis of the Convention

The Convention comprehensively covers the problem of hazardous waste exports. However, the approaches taken by the Convention frequently fall short of its environmental protection

159. Basel Convention, *supra* note 17, art. 4 ¶ 5.

160. See *Industry, Administration Urge Senate to Ratify Convention on Waste Shipments*, BNA Int'l Env'tl. Daily, Mar. 16, 1992, available in Westlaw, IED File. Greenpeace opposes the Basel Convention precisely because it preserves waste transporting activities. See, e.g., *Greenhouse*, *supra* note 126.

161. Basel Convention, *supra* note 17, art. 16.

162. *Id.*, art. 16 ¶ 1.

163. *Id.*, art. 19.

164. *Id.*, art. 20 and Annex VI. See also Hackett, *supra* note 68, at 319.

165. Basel Convention, *supra* note 17, art. 11. A somewhat similar clause appears in the Montreal Protocol: trade with a non-party is allowed if a meeting of current parties determines that the non-party is in compliance with the Protocol. Montreal Protocol, *supra* note 28, art. 4 ¶ 8.

goal. Problems with each area of the Convention are laid out below.

a. Problems with the Definition of Hazardous Waste

By defining hazardous waste by its type, source and hazardous property, the Convention gives the impression that it is the hazardous property of the waste that truly necessitates its regulation. Closer examination shows that it is not so. For example, wastes that possess a hazardous property, but are not of a listed type and do not come from a listed source, are not considered hazardous. New, unlisted industries creating new, unlisted forms of, say, flammable waste will not be subject to the Convention.¹⁶⁶

Allowing the adoption of domestic definition of hazardous wastes appears to allow for uniform control and monitoring of a core group of hazardous waste, plus some degree of flexibility for the more environment-conscious nations. However, this approach has some drawbacks. The varying definitions of hazardous waste among nations¹⁶⁷ make it difficult for signatory countries to control transboundary shipments; the task of drawing up a different set of regulations for each waste trading partner is massive indeed.¹⁶⁸ The Convention definition also does not specify what concentration of hazardous materials would make the waste hazardous, rendering enforcement even more haphazard and difficult.¹⁶⁹ Finally, the Convention attempts to distinguish between waste and recyclable products by listing activities considered recycling.¹⁷⁰ This list too suffers from the same flaws as the list of hazardous wastes, namely, it is ambiguous and incomplete.¹⁷¹ The failure to clearly distinguish recyclable products may impede efforts to develop comprehensive

166. This loophole may be bad, or it may be good: If the industry is new, maybe it should be regulated by new regulations rather than by the Basel Convention, which could not even foresee its existence. Much then depends on whether timely regulations will be enacted.

167. See *supra* note 132.

168. Drawing up such regulations may be even more complicated if those waste trading partners simply serve as transit nations, and regulations will have to be written for the ultimate destination countries as well.

169. See *supra* note 140 and accompanying text.

170. Basel Convention, *supra* note 17, Annex IV B.

171. In what amounts to an exercise in circularity, many recycling processes are defined as the "recycling/reclamation of" one substance or another, without explaining exactly what "recycling" or "reclamation" means. See *id.*

recycling programs, considered by many to be an effective way to deal with wastes.¹⁷²

b. Problems with the Prior Consent Requirement

The extensive notice and acknowledgment system required by the Convention apparently serves to prevent the exporters from lying about their disposal plans. But mere confirmation of the existence of adequate disposal facilities and a contract does not say much. What the importing country considers environmentally sound may not be so considered by the exporting country. If the Basel Convention tries to minimize waste movements by establishing multiple layers of consent the exporter must obtain, merely requiring notification and confirmation fails to achieve this objective.¹⁷³

c. Problems with the Liability Regime

While the Convention imposes on the exporting state the duty to take back wastes that were legally exported but cannot be disposed of safely, the Convention does not say who should bear the resulting cost. By hypothesis, the importing state has consented to the import, so it seems unfair that the exporting state should pay the expenses incurred because of problems with the disposal facilities in the importing state.¹⁷⁴ On the other hand, the cost of cleaning up and shipping back may be too high for developing countries to afford, especially if they lack technical expertise in regulating disposal facilities. Thus, while an explicit polluter-pays scheme forces the exporting states to better monitor waste exports,¹⁷⁵ the Basel Convention's silence on liability could serve as a back-door encouragement to developing countries to ban hazardous waste imports, at least until they develop the neces-

172. See generally Grant L. Kratz, *Implementing the Basel Convention into U.S. Law: Will it Help or Hinder Recycling Efforts?*, 6 B.Y.U. J. PUB. L. 323 (1991) (examining proposed laws implementing the Basel Convention and their effects on recycling).

173. In addition, if the importing country's bureaucracy is corrupt, buying off an official there will not only help the exporter receive an import permit, but also indirectly an export permit as well. Some may question why the exporting country ought to worry about the importing country's waste import, if the latter's government is too corrupt to care. The answer lies in the fact that in evaluating the Basel Convention, we need to look at all scenarios where it may fail its stated purpose of ensuring the safe transport and disposal of hazardous waste. See Basel Convention, *supra* note 17, Preamble.

174. Hackett, *supra* note 68, at 321.

175. See *supra* text accompanying note 61.

sary resources to regulate their own hazardous waste disposal industry.¹⁷⁶

For illegal transports, the Convention's allowance for the exporting country to claim "impracticability" puts the importing state in a dilemma. Suppose the import consent was obtained illegally, *e.g.*, by fraud, and the importing state claims the import was illegal. The exporting state may dispose of the waste on the spot, by claiming "impracticability." On the other hand, if the importing state does not claim the illegality, it may have to pay for the clean-up and the shipment back to the exporting state. This bizarre effect can only be avoided if the Convention is interpreted to require the exporting state to pay the clean-up expenses even in legal shipments. This interpretation appears unfair and is plausible only if the Basel Convention is also interpreted to require the exporting state (which generated the waste) to be responsible for the waste up until disposal.

d. Enforcement Problems

The Convention created the Secretariat to monitor compliance, but without any enforcement power. It is merely an information clearinghouse. Thus, while the Secretariat may become very knowledgeable on the issue of hazardous waste transports, it can do nothing more than compile reports about it.¹⁷⁷ This information could help spur action by NGO's and governments, but is not enough. Passing the buck to the International Court of Justice or to the negotiating table does not help either: there is no provision for the case of a recalcitrant party that does not negotiate seriously and yet refuses to submit itself to either arbitration or the ICJ's jurisdiction. Except for public relations effects,¹⁷⁸ that country is still free to transport hazardous wastes to and from other parties to the Convention. No sanction or any other penalty is provided for. Viewed from this angle, the Convention favors a party who cheats to one who is never a party at all. Such

176. The Convention requires that the exporting state ban exports to states that have banned imports. Thus, an import ban is enforced twice. *Cf. supra* text accompanying note 146.

177. Some have suggested that UNEP itself be an enforcement agency. Hackett, *supra* note 68, at 320 & n.187. On the other hand, extensive reporting of violations may cajole offending countries into compliance through public opinion.

178. *Cf. supra* text accompanying notes 89-93. However, public opinions may actually support the misbehaving government if it is shoring up support by thumbing its nose at any foreign country that happens to be the favorite "bad guy" at the time.

an easy way out for cheaters threatens to undermine the effectiveness and legitimacy of the Convention.

e. Problems with the Bilateral Agreement Exception

The Convention induces countries to subject themselves to its regime by isolating non-parties. However, this approach is then weakened by the exception for parties of bilateral agreements. This obviously helps parties which need to transport waste to or from non-parties, and apparently would encourage countries to ratify the Convention before ensuring all their trading partners are doing so as well. The “not less environmentally sound” requirement appears to guarantee that the Convention’s standards are followed.

However, assuming that “not less environmentally sound” means containing at least the requirements of the Convention, it is hard to imagine a need for this exception. If a country would enter with its trade partners into a series of separate agreements that has all the requirements of the Convention, there is no good reason for that country not to agree to the Convention as well.

Therefore, the logical conclusion is that it is somehow possible to be “not less environmentally sound” and still miss some of the Convention’s requirements, *i.e.*, more stringent in some aspects but less stringent in others.¹⁷⁹ This shows that the Convention cannot represent the absolute threshold standards for regulating the transports of hazardous wastes.

4. Conclusion

Despite the problems of the Basel Convention, it cannot be categorically concluded that the Basel Convention is (or is not) a good approach to regulating hazardous waste transport. Certainly, it has been faulted by environmental groups such as Greenpeace for legalizing hazardous waste exports,¹⁸⁰ and indeed it does not ban such transactions. Even within the limited objectives that it has set out—to minimize transboundary transports of hazardous wastes and ensure their safe disposal—the Convention sometimes falls short. However, seen in the context of a global treaty, with delegations from 116 countries participat-

179. An alternative explanation is that it may be easier for a country to ratify a treaty with its next-door neighbor than a global agreement like the Basel Convention. In the long run, however, a country should find it easier to ratify the Convention than a series of bilateral agreements with all its waste trading partners.

180. Greenhouse, *supra* note 126.

ing,¹⁸¹ and the haphazard approaches taken by regional agreements preceding it, the mere existence of the Convention is already an achievement. It has successfully set forth the principle of prior informed consent for both importing and transit states, instituted a comprehensive information requirement that will help track wastes, and excluded non-parties from waste shipments unless they agree to at least as stringent requirements for protecting the environment. A full evaluation of the Convention must consider its practical effects.

III.

THE EFFECTS OF THE BASEL CONVENTION

A. *Creation of Minimal Standards for Transboundary Shipments*

Reactions to the Basel Convention were varied. The OAU imposed a unilateral ban on waste imports. The OECD installed a new set of regulations of waste transfers among members. The EC engaged in several measures involving the problem of waste transports. As the different political alliances continue tackling the problem of hazardous waste exports, a clear pattern emerges: the Basel Convention gradually becomes the threshold standard on which subsequent agreements are based.

1. Reactions by the OAU: The Bamako Convention

The strongest reaction to the Basel Convention came from African countries. As a bloc, they demanded a global ban on hazardous waste exports, and refused to sign the Basel Convention because it contained no such ban.¹⁸² Instead, the OAU met in the Mali capital Bamako and passed what became known as the Bamako Convention.¹⁸³ This Convention has essentially two components: the first adopts the Basel Convention's approach to waste shipments within the OAU territory;¹⁸⁴ the second bans hazardous waste imports into the OAU from the outside.¹⁸⁵

181. The complete list of participants appears at the beginning of the Convention, *supra* note 17.

182. Tuohy, *supra* note 124. Nigeria eventually signed and ratified the Convention. See *Five More Countries Sign Basel Convention Just Before Deadline, Bringing Total to 54*, 13 Int'l Env'tl. Rep. (BNA) 147 (Apr. 11, 1990); *Basel Treaty Limping into Effect*, *supra* note 127.

183. *Supra* note 117.

184. *Id.*, art. 4 ¶ 3.

185. *Id.*, art. 4 ¶ 1. The Bamako Convention has no provisions regulating the export of hazardous waste from Africa to the outside, except for provisions regulat-

The Bamako Convention also imposes "strict, unlimited liability as well as joint and several liability on hazardous waste generators."¹⁸⁶ If this rule is strictly enforced to the letter, then it will severely curtail all forms of waste shipments, transboundary or otherwise. No rational business would ship its wastes and run the risk of paying for environmental harm resulting from the transporter's negligence.¹⁸⁷ A waste-generating business then faces three options, one legal—dispose of the waste on site and safely, and two illegal—dispose on site and unsafely, or ship the waste clandestinely.¹⁸⁸ If the cost of setting up safe on-site disposal facilities is high,¹⁸⁹ and the cost for taking the illegal choices is further reduced by the low chance of getting caught, the new liability rule may inadvertently cause a proliferation in unsafe disposal and transports of hazardous wastes.¹⁹⁰

ing their in route transports. This reflects the reality that those African countries that do generate hazardous wastes do not have safe facilities to dispose of them. For example, Nigeria is itself an exporter of waste to Great Britain. Thomas Land, *Managing Toxic Waste; International Regulation of Hazardous Waste Materials*, NEW LEADER, Nov. 27, 1989, at 4.

186. Bamako Convention, *supra* note 117, art. 4 ¶ 3(b). A waste "generator" is defined to be "any person whose activity produces hazardous wastes, or, if that person is not known, the person who is in possession and/or control of those wastes." *Id.*, art. 1 ¶ 20.

187. This result also means that unless domestic laws allow for subrogation by the generator against the transporter, there will be no incentive for the waste transport industry to improve safety.

Even when subrogation is available, the generator still bears more of the cost: it is subject to strict liability, while the transporter (or whoever is at fault for the environmental harm) is not. In a perfect world, the generator would try to reduce its expected cost by forcing the transporters to improve safety, perhaps by forcing a price reduction to compensate for the risk of harm. As things are, however, the waste generators may not have that much clout, or experience, to ensure that the transporters are actually improving safety. For example, the firm that hired the ship *Khian Sea*, see *supra* text accompanying notes 1-4, was as ignorant as the general public as to where the waste was dumped. See Mark Jaffe, *Somewhere, City Ash Has Found a Spot*, PHILA. INQUIRER, Nov. 8, 1988, at B1 (firm that hired the *Khian Sea* had to file suit "to find out exactly what happened to that ash").

188. A fourth option, which may well be the Bamako Convention's purpose, is for the firm to reduce its waste production.

189. The cost reflects not only the high price of constructing safe hazardous waste disposal facilities, but also the fact that the waste generator may have no experience operating such a facility.

190. This situation can be viewed as an extension of the "Hand formula." See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

The waste generator must balance the cost of safe on-site disposal (denoted X) with the cost of illegal disposal (denoted Y) and the fines and penalties for illegal dumping (denoted Z) but reduced by the probability of getting caught (denoted p). The balancing, then, is taken between X and the sum of $Y+pZ$. If X is high, Y is low,

The enactment of the Bamako Convention illustrates two special effects of the Basel Convention. First, the Bamako Convention uses the Basel Convention as the standard of conduct for intra-Africa transports of waste. The sections in the Bamako Convention dealing with the transports of hazardous waste within Africa are almost verbatim copies of the Basel Convention. The second effect lies in a possible interaction between the Bamako Convention and the Basel Convention which should encourage the African nations to ratify the Basel Convention: the latter places an affirmative duty on its parties to block exports intended for nations that have banned imports of hazardous wastes, either by their own laws, or through an "economic and/or political integration organization."¹⁹¹ Thus, the Basel Convention can obligate the waste exporting countries to help enforce the Bamako Convention's ban on imports of hazardous wastes into Africa.

2. The New OECD Decision

Following the Basel Convention, the OECD developed a system for the control of hazardous waste transports among its members. In April 1992, the OECD adopted a new decision instituting a three-tier approach to the transport of waste intended for recycling.¹⁹² The decision divides waste into three categories by color code: green, amber, and red, according to the waste's hazardous characteristics.¹⁹³ "Green" wastes are those showing none of the hazardous characteristics defined in the Basel Convention and meeting certain other criteria, and are treated like normal goods.¹⁹⁴ Other wastes are divided between "amber" and "red," and their transports are strictly controlled.¹⁹⁵ A waste exporter is required to have prior consent from, and the recycling

and p is so low that the product pZ is also low, then there is a strong incentive for the generator to choose the illegal choice.

191. Basel Convention, *supra* note 17, art. 4 ¶ 2(e).

192. Japan abstained from the vote and was therefore not bound by the agreement. *Japan Not Bound by OECD Controls of International Transfers of Hazardous Wastes*, Int'l Env'tl. Daily (BNA), Apr. 4, 1992, available in Westlaw, IED File.

193. *Transboundary Movements of Toxic Wastes for Recovery Covered by New OECD Decision*, Int'l Env'tl. Daily (BNA), Apr. 22, 1992, available in Westlaw, IED File.

194. *Id.*

195. *Id.*

facilities must comply with domestic laws of the importing country.¹⁹⁶

The new OECD Decision has been criticized for putting in the "green" category toxic waste metals that should be controlled, such as lead and thallium waste and scrap.¹⁹⁷ Thus, while the effects of the Decision may actually be to allow for freer trade of potentially hazardous waste metals within the OECD, the Decision is in fact compliant with the Basel Convention because such metals may not exhibit any hazardous property listed in the Convention.¹⁹⁸

The OECD's use of the Basel Convention standard illustrates one problem with codified standards in general: while the Basel Convention may have been intended to be a minimum standard, it has been taken, at least by OECD, as the maximum standard as well.

3. New EC Actions

a. *Lomé Convention*

The EC's reactions to the Basel Convention were most noticeable for what did not happen: for three years, neither the EC nor any of its members (except France) ratified the Convention.¹⁹⁹ On the other hand, the EC actively developed its own series of measures to control the transports of hazardous wastes. The most visible measure was the signing of the fourth Lomé agreement (Lomé IV) with sixty-nine African, Caribbean, and Pacific states (ACP). Article 39 of Lomé IV calls for the EC to "prohibit all direct or indirect export of [hazardous] waste to the ACP States while at the same time the ACP States shall prohibit the direct or indirect import into their territory of such waste from the Community or from any other country."²⁰⁰ This prohibition

196. *Id.* The consent procedure must be completed within thirty days, and for "amber" wastes the consent may be tacit by silence and will be valid for one year. *Id.*

197. Randall Palmer, *Toxic Waste Pact to Start up Without Main Parties*, Reuters, Apr. 9, 1992, available in Lexis, News Library, REUTER File. Lead and thallium are included in the Basel Convention's list of potentially hazardous waste constituents. Basel Convention, *supra* note 17, at Annex I.

198. See *supra* text accompanying notes 155-156 (hazardous waste must have both a listed constituent and a listed hazardous property). Greenpeace calls this categorization of waste the "greenwash" of hazardous waste exports. Palmer, *supra* note 197.

199. Basel Treaty Limping into Effect, *supra* note 127.

200. Fourth ACP - EEC Convention, Dec. 15, 1989, reprinted in 29 I.L.M. 783 (1990), art. 39(1) [hereinafter Lomé IV].

gives the ACP states, most of whom are African, the protection they did not receive from the Basel Convention. However, this clause, embedded in the massive document on economic relations between the EC and the ACP, is not supported by the technical details seen in either the Basel or Bamako conventions. Thus, it is not self-executing, but depends on implementation by the EC and its member states.

b. Proposed Directive on Liability

Even before EC members ratified the Basel Convention, the EC proposed to change the liability framework of waste transporters and producers. The EC Commission's amendment imposes no-fault and strict liability on the waste producer for all resulting damages and injuries, including the "impairment of the environment."²⁰¹ The strict liability requirement is eased by allowing for a showing of *force majeure*,²⁰² of a third-party's intentional act,²⁰³ or of contributory negligence by the injured party.²⁰⁴ On the other hand, the waste producer may not contract out of liability.²⁰⁵ Because the waste producer can subrogate from the actual party responsible for the damages, this liability scheme provides for strict liability only when the producer is at fault, thus softening the effect of no-fault. In addition, because the producer will be the one actually having to collect the subrogation money from the party at fault, this proposal may induce the waste producers to contract only with environmentally safe and financially secure waste transporters. These criteria will lead to the elimination of most smaller operations and also increase the demand for environmental insurance. Such in-

201. Amended Proposal for a Council Directive on Civil Liability for Damage Caused by Waste, 1991 O.J.C.E. (C 192) 6, art. 3 [hereinafter EC Liability Amendment]. The "producer" is defined to include not only the person who generated the waste, *id.*, art. 1(a), but also the person importing the waste into the EC, or, if that person cannot be identified, the person who had control of the waste at the time of the injury, or the person responsible for the disposal site, *id.*, art. 2. On March 17, 1993, the Commission also adopted a "Green Paper" on environmental liability. The goal was to provide a framework for a system of shared responsibility for restoring environmental damage. Coopers & Lybrand, *EC Commentaries*, Env't, Aug. 25, 1994, § 9.15

202. EC Liability Amendment, art. 6 ¶ 1(a).

203. *Id.*

204. *Id.*, art. 7, ¶ 2.

205. *Id.*, art. 8.

urance may not be available, leading some observers to doubt the practicability of the proposed liability scheme.²⁰⁶

c. Proposed Regulation on Waste Transports

In 1992 the Commission proposed a new Council Regulation on waste transports "within, into and out of the European Community."²⁰⁷ A major part of the proposed Regulation was devoted to the notification requirements for waste transports within the EC.²⁰⁸ The proposed Regulation also restricts exports of waste for disposal only to members of the European Free Trade Association (EFTA) who are parties to the Basel Convention.²⁰⁹ In addition, exports of waste for recovery are restricted to "OECD countries which are parties to the Basel Convention" and "third countries which are parties to the Basel Convention and with which a bilateral agreement with the European Community has been concluded."²¹⁰ The Regulation also repeats the ban of exports to ACP countries, in accordance with Lomé IV.²¹¹ Finally, imports of hazardous waste into the Community are allowed only from parties to the Basel Convention.²¹² The extensive use of the Basel Convention ratification as the pre-requisite for waste transports is puzzling, considering that France was the only EC member that had ratified the Convention at the time the Regulation was proposed.²¹³ Nonetheless, it points out the importance the EC attaches to the Basel Convention as the standard of conduct for the transports of hazardous waste.

While the EC was considering the proposed Regulation, the European Court of Justice handed down a decision that was to alter the EC's fundamental approach to waste transports. In

206. See, e.g., *EC Action on Environmental Liability Could Repeat U.S. Errors, Conference Told*, 15 Int'l Env'tl. Rep. (BNA) 429 (1992) (relating problems of insuring companies with Superfund liability).

207. Amended Proposal for a Council Regulation (EEC) on the Supervision and Control of Shipments of Waste Within, into and out of the European Community [hereinafter 1992 Amended Proposal], 1992 O.J.E.C. (C 115) 4; see also Tim Jackson, *EC Row Looms over Exports of Toxic Waste*, INDEPENDENT, Mar. 14, 1992, at 14.

208. 1992 Amended Proposal, art. 3-8.

209. *Id.*, art. 9, ¶ 1. EFTA members are: Austria, Sweden, Switzerland, Norway, Finland, Iceland, and Liechtenstein.

210. *Id.*, art. 9, ¶ 1(a).

211. *Id.*, art. 9, ¶ 2.

212. *Id.*, art. 11, ¶ 1.

213. The Regulation was proposed in March 1992. Cf. the list of countries that have ratified the Basel Convention by May 5, 1992, *supra* note 129.

Commission v. Belgium,²¹⁴ the court held that a ban on waste imports imposed by the Wallonia region of Belgium violated the 1984 Directive,²¹⁵ which does not allow for total bans on waste imports.²¹⁶ However, the court stated in dicta that local bans on waste imports may be allowed by article 130R of the Rome Treaty establishing the EC, which calls for EC actions to "preserve, protect and improve the quality of the environment, . . . human health[, and] natural resources."²¹⁷ At the same time the court rejected the Commission's argument that the free-trade requirement of the Rome Treaty prohibits unilateral bans on waste imports.²¹⁸ Thus, in the narrowest interpretation, the court held for the first time that waste cannot be considered normal goods deserving of free-trade protection.

In a reaction atypical of a group of countries well imbedded in the civil law tradition, the EC environment ministers took the hint from the court, and, before approving the proposed Regulation, changed its legal basis from the free-trade requirements in the Rome Treaty²¹⁹ to the environmental protection requirement.²²⁰ Thus, the ministers seem to have approved an expansive reading of *Commission v. Belgium*, that environmental concerns may trump free trade.²²¹

4. Conclusion

A pattern appears in the international agreements that are examined in this section. They all reflect the acceptance of the Basel Convention as the threshold standard of conduct required in the transportation of hazardous waste. This is done either by requiring an exporting or importing state to be a party to the Con-

214. 9 July 1992, C-2/90 (E.C.J.).

215. *Supra* note 94.

216. *Commission v. Belgium*, at Holding ¶ 1.

217. *Commission v. Belgium*, at ¶ 34, citing Rome Treaty, *supra* note 58, art. 130R, amended by Single European Act, Feb. 17, 1986 and Feb. 28, 1986, 30 O.J.E.C. (L 169) 8 (1987), reprinted in 25 I.L.M. 506 (1986).

218. *Id.*, at Holding ¶ 2.

219. *Supra* note 58, art. 100a & 113.

220. *Environmental Ministers Agree on Waste Shipment Regulations*, Int'l Env'tl. Daily (BNA), Oct. 21, 1992, available in Westlaw, IED File.

221. At least that was the conclusion drawn by the French government, which had been pushing for allowing individual states to ban waste imports. In the words of the French environment minister, the "environment's logic must win over that of free movement, wastes cannot be considered merchandise." Philippe Lemaitre, *Une Entorse au Principe de Libre-Circulation*, LE MONDE, Oct. 22, 1992 (translated by author).

vention, or by incorporating the requirements of the Convention into the agreement.

It appears, however, that the opposite is also true, that many of these agreements consider the Basel Convention as the maximum regulation required for hazardous waste transports. Thus, except for total bans, hazardous waste transports are not regulated by standards higher than the Convention's. This is done, again, either by requiring an exporting or importing state to be a party to the Convention, or by incorporating the requirements of the Convention into the agreement.

B. *Basel's Loop-Hole: Dumping in Somalia*

The efficacy of the Basel Convention cannot be fully known without an assessment of its effects. A 1992 example illustrates the Convention in action. Some Swiss and Italian firms attempted to dispose of hazardous waste in Somalia. Despite a political furor surrounding the attempted disposal, the Basel Convention failed to affect the crisis because a loop-hole in the Convention rendered it inapplicable. The crisis was abated, but the loop-hole remains.

1. The Story

In September 1992, the world received a news report that injected an element of absurdity into the tragic situation of Somalia. The country was in a civil war, the Somali people were dying of famine, and the government was practically non-existent, as the several warlords each laid claim to a different piece of the country.²²² In that setting, an aide to one of the warlords held himself out as Somalia's Minister of Health and concluded with a Swiss company and an Italian intermediary a twenty-year, \$80-million contract to dump hazardous waste in the country.²²³ News reports appeared, courtesy of the exiled Somali ex-dictator.²²⁴ The Italian intermediary identified by Greenpeace denied

222. See, e.g., Michael A. Hiltzik, *Somali Warlord Covets Control Amid Anarchy*, L.A. TIMES, Sept. 3, 1992 at A8.

223. Schanche, *supra* note 8. This is not Somalia's only hazardous waste dumping problem. At about the same time, reports appear of off-shore dumping by Italian companies, and of other Italian companies building hazardous waste incinerators in the Mogadishu area. The involvement of Italian companies can be explained by the fact that Italy ruled southern Somalia from 1905 to 1960.

224. Aida & Hartles, *Contract Shows Plan to Dump Toxic Waste in Somalia*, Reuters Library Report, Sept. 7, 1992, available in LEXIS, World library, ALLNEWS File.

all involvement.²²⁵ So did the Somali "President" for whom the minister supposedly worked.²²⁶ The office of the Swiss company named in the contract apparently doubled as a private home,²²⁷ and the two partners were travelling in Spain and Indonesia when the story broke.²²⁸ Suspicions quickly arose that the Swiss company named in the contract was no more than a front.

International reactions, quite predictably, were strong and swift. UNEP charged "the mafia" with being behind it all.²²⁹ The OAU issued a terse statement calling the waste-dumping contract an "inhuman" act with a "contempt for the helpless victims."²³⁰ Italy, Somalia's old colonial ruler, sent its prime minister to Somalia to promise investigations and more aid to Somalia.²³¹ Switzerland also promised an investigation, but would not take all the blame; it asked UNEP for help in the investigation.²³²

One month later, the crisis died down. UNEP claimed that the international uproar over the planned dump forced the companies to abandon the venture.²³³ The story ended there. News reports disappeared as fast as they had emerged. No one even seemed to wonder whether the travelling business partners had returned to their office.

2. How the Basel Convention Could Not Help

The first failure of the Basel Convention is one common to all international regulatory schemes: international treaties only bind

225. *Dechets Toxiques: Greenpeace Accuse la Societe Italienne Progresso S.R.L.*, AFP, Sep. 10, 1992, available in Lexis, Euro Library, PRESSE File.

226. Schanche, *supra* note 8. A search on both Lexis and Westlaw revealed no news report on what the self-proclaimed minister said about the contract.

227. *Italy Promises Help to Rebuild Somalia*, Reuters, Sept. 9, 1992, available in Lexis, Nexis Library, WIRES File.

228. *Contract to Dump Toxic Waste in Somalia Linked to Firm in Small Village Outside Geneva*, Int'l Envtl. Daily (BNA), Oct. 2, 1992, available in Westlaw, IED File.

229. Aidan Hartley, *U.N., Italy Probe Toxic Waste Dumping in Somalia*, Reuters, Sept. 8, 1992, available in Lexis, Nexis Library, WIRES File.

230. *Somalia: OAU Concerned Over Toxic Waste Dumping*, Inter Press Service, Sept. 24, 1992, available in Lexis, Nexis Library, WIRES File.

231. Paddy Agnew, *Somalia: Italy Under Fire for Toxic Dumping Reports*, Inter Press Service, Sept. 11, 1992, available in Lexis, Nexis Library, WIRES File.

232. *Switzerland Asks UN Help on Somalia Toxic Waste Links*, Reuters, Sept. 11, 1992, available in Lexis, Nexis Library, WIRES File [hereinafter *Switzerland Asks UN Help*].

233. *Toxic Waste Shipment to Somalia Believed Aborted: UNEP*, AFP, Oct. 6, 1992, available in Lexis, Nexis Library, WIRES File [hereinafter *Shipment to Somalia Believed Aborted*].

governments, not individuals.²³⁴ Any binding force on the individuals would be effective only through local governments' actions. Somalia had no government, so there was nothing for international treaties to bind.

On the other hand, the Basel Convention was supposed to be doubly effective because it imposed dual control on both the export and import sides of a waste transport. In this case, Somalia and Italy were not parties to the Convention, but Switzerland was.²³⁵ Thus, Switzerland was obligated to ensure that its citizens not violate the Convention. However, the Swiss government, which had fully implemented the Basel Convention into its law, found out that the Convention did not apply without proof that the intended waste would either originate from or be transported through Switzerland.²³⁶ The contract between the Somalis and the Swiss firm made no mention of where the waste would come from and how it would get to Somalia.²³⁷ In fact, because the Swiss company was merely a front, as most people believed,²³⁸ it was very likely that the waste would not come from or go through Switzerland. The Basel Convention simply failed to reach this type of brokerage activity.

The Convention's oversight is serious. In this age of increasing specialization and globalization, more and more services are being provided by brokers working for international clients, and there is no reason why transports of hazardous wastes should not be so handled. Therefore, if anything, the Somalia incident has exposed a loop-hole in the Basel Convention that was both easy and logical for businesses to use. It is thus unfortunate that the Somalia crisis was allowed to die quietly without a re-examination of the effectiveness (or lack thereof) of the Basel Convention in real life.

More generally, the Somalia incident taught the valuable lesson that businesses can walk around international agreements faster than nations can write them. Thus, the world should never be allowed to rest comfortably on the laurels of international standards. Instead, nations must be willing to impose more stringent standards, if only to adapt to changing business practices.

234. See *supra* text accompanying note 34.

235. *Shipment to Somalia Believed Aborted*, *supra* note 233.

236. *Switzerland Asks UN Help*, *supra* note 232.

237. *Id.*

238. *Id.*

C. *What Nations Should Agree To: A Proposal*

In order to rectify the current shortfalls in the Basel Convention and assure its effectiveness in solving real-life crises, changes will have to be made, not only to the domestic laws of individual nations, but also to the Convention itself. This section proposes some approaches.

1. Expand Regulations of Waste Brokerage

Most waste generators are not waste experts; they are experts at producing goods, with wastes as by-products. Thus, as the Somalia crisis shows, the waste trade is increasingly being handled by brokers and other intermediaries, who may be in neither the exporting nor the importing country. To be effective, the Basel Convention must take this trend into account and regulate activities by waste brokers. This can be done in at least two simple ways.

One way to regulate brokering activities is to consider the broker's country as a transit country. This will require waste exporters to receive consent from the broker's country before the waste can be shipped,²³⁹ thereby allowing waste brokering activities to be closely monitored. However, unlike an actual pass-through transit country, the broker's country may not actually be at any risk of pollution by the transport, so there is no incentive for that country to deny consent, especially when it stands to gain by its citizen receiving brokerage income.²⁴⁰

239. See *supra* text accompanying note 150.

240. There may be some incentive if the transit state is liable for damages in the importing state caused by illegal transport of waste. At least one case supports this liability. *Corfu Channel*, 1949 I.C.J. 4 (Apr. 9, 1949), involves the mining of the Corfu Channel by Albania, damaging British warships. There, the court established "the obligation of every state not to allow its territory to be used for acts contrary to the rights of other states." Thus, the transit state may be liable for its decision to allow its territory to be used to transport waste to an unsafe disposal site in the importing state.

Corfu Channel was narrowed by *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 14 (June 27, 1986), where the court emphasized the fact that in *Corfu Channel* there was a lack of notice, *id.* ¶ 112, thus limiting the holding of *Corfu Channel* to cases where there was no notice. Where the importing state has notice of the waste transport, the transit state may not be liable. This is, however, not a foregone conclusion. *Nicaragua's* interpretation may be based on the fact that in *Corfu Channel* the lack of notice was part of the "acts contrary to the rights of other states," in the sense that the lack of notice was a but-for cause of the resulting damages. Where notice would not have avoided the damages, *Nicaragua* is distinguishable and the presence of notice may not avoid liability.

A better alternative is to expand the definition of waste exporters to include waste brokers. This has the advantage of imposing upon the brokers the same duty for safe disposal as is required of waste exporters, and is equivalent to expanding the definition of a waste exporting state to include the broker's country. Because a waste exporting state has the duty to re-import hazardous waste that has not been safely disposed,²⁴¹ nations may not agree to this expanded definition (and liability). On the other hand, if such a definition were adopted, more countries would have an interest in ensuring that the waste is disposed of safely, thus increasing the level of environmental protection.

Undoubtedly there may be other methods of adapting the Basel Convention to the regulation of waste brokers. The point here is simply to point out that brokerage activities must be regulated to avoid an end-run around the Convention.

2. Strengthen the Secretariat

This common fund can be administered by the Secretariat, which currently is just a monitor of waste movements around the world.²⁴² However, as a monitor, the Secretariat can become the expert agency on the issue of waste transports. Thus, the Secretariat should be given the power to use that expertise to ensure compliance with the Basel Convention.

The Secretariat should be given the power to adjudicate disputes between nations who are parties to the Convention. Concerns for sovereignty may prevent giving the Secretariat the power to compel or penalize nations, but the Secretariat should have at least the power to make factual findings of fault in cases of unsafe disposal. A finding by an authoritative international body may generate enough negative publicity to encourage countries to remedy environmental harms and to take steps to prevent future embarrassment.

The Secretariat should also be allowed to adapt the Convention to technological changes. For example, the Secretariat should be given the power to add more substances to the list of hazardous wastes, so that the Convention can at least keep up with changes in manufacturing technologies around the world. Decisions of this day-to-day nature should not require the agreement of delegates from hundreds of nations to implement.

241. See *supra* text accompanying note 153.

242. See *supra* notes 160-163 and accompanying text.

The strengthening of the Secretariat should not be viewed as a threat to nations' powers or sovereignty. First, the Secretariat's technological activities does not affect any country's power. In addition, its fact-finding activities, while certainly embarrassing to the offending nations, would give others an objective authority to which they can point to enforce their own environmental protection rights.

CONCLUSION

The Basel Convention illustrates that international treaties are double-edged swords in the battle to control hazardous waste exports. A major breakthrough may spur other agreements based on it, proliferating the intended environmental protection. However, it may also spur complacency. The Basel Convention displays its complacency in two different ways: one, in failing to follow up and build more protection based on the Convention, and two, in failing to adjust the Convention for actual non-performance. Many treaties formed after the Basel Convention consider a nation's status as a party to the Convention to be the sufficient condition to allow hazardous waste transports. When the Convention proved itself to be useless in Somalia — a crisis it was meant to prevent — no attempt was made to modify it. These forms of complacency threaten to stall progress in solving environmental problems. The lesson is that a major breakthrough in international environmental law is never an end but always just a beginning.