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The Basel Convention on Transboundary Movements of Hazardous Wastes: An Opportunity for Industrialized Nations to Clean up Their Acts

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STUDENT COMMENT

The Basel Convention on Transboundary Movements of Hazardous Wastes: An Opportunity for Industrialized Nations to Clean Up Their Acts?

I. INTRODUCTION

Increasing environmental activism and awareness is forcing industrialized and developing countries to recognize the treacherous consequences of ignorance and complacency towards our rapidly deteriorating global environment. Widely publicized problems and incidents have spurred public concern over health, safety, and the future vitality of our fragile world ecosystem. Some commentators see the right to environment as an emerging human right under international law.¹ However, while the area of environmental law has progressed rapidly since it first became an item of global concern in the 1970's, even existing conventions and treaties may not be enough to protect the world environment for future generations. More drastic measures may be necessary.

Transboundary movement of hazardous waste, especially uncontrolled incidents of third world toxic dumping, is an issue of global concern that has stirred a great deal of activism. This paper explores the historical progression of the law of transboundary movements of hazardous wastes to the recent implementation of the Basel Convention. It then offers recommendations for how the United States and the world community should strengthen the Basel Convention, especially by creating more stringent requirements for liability and an international agency to supervise and enforce the convention to make it binding on all parties, and therefore more effective. The issue of the environment as a human right will also be discussed in this context, emphasizing the author's resolve that the strictest standards must be adhered to where materials that

1. See Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103 (1991); Melissa Thorne, *Establishing Environment As a Human Right*, 19 DENV. J. INT'L L. & POL'Y 301 (1991). See also Dana J. Jacob, Comment, *Hazardous Exports from a Human Rights Perspective*, 14 SW. U. L. REV. 81 (1983).

threaten human life are concerned.

II. HISTORY OF THE TRAGEDY

The 1972 Stockholm Declaration on the Human Environment² was the first indication of environmental consciousness among the nations of the world.³ While showing some signs of promise, Principle 21 of the Declaration laid a weak, conflicting foundation for international actions:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that the activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.⁴

In order to compensate for the inadequacies of Principle 21, the more forward-looking and expansive Principle 22 urged states to "co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by the activities within the jurisdiction or control of such States to areas beyond their jurisdiction."⁵

The need for control of hazardous wastes became an item of global concern following several major tragic incidents during the 1970's and 80's. In 1976, an explosion occurred at a chemical plant near Seveso, Italy, causing a vapor cloud of toxins to be released into the atmosphere.⁶ Although the chemicals released were highly lethal, it took the plant managers seven days to inform local authorities about their toxicity, and another five days for the officials to act.⁷ Certain highly affected areas were evacuated, and an intensive clean-up plan was instigated. Although there were no immediate deaths caused by the chemical release, over 500 cases of skin irritation were reported, and numerous animals and acres of food were destroyed as a result of contamination.⁸

Following the Seveso incident, the Organization for Economic Cooperation and Development (OECD) in 1984 showed its concern through adoption of a Decision/Recommendation that requires countries to ensure

2. Stockholm Declaration on the Human Environment, *adopted by* the UN Conference on the Human Environment at Stockholm, June 16, 1972, Section I of Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14 and Corr.1 (1972), *reprinted in* 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration].

3. Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 266 (1992).

4. Stockholm Declaration, *supra* note 2, Principle 21.

5. *Id.*, Principle 22.

6. Ved Nanda & Bruce Bailey, *Export of Hazardous Waste and Hazardous Technology: Challenge for International Environmental Law*, 17 DEN. J. INT'L L. & POL'Y 155, 161 (1988). Prior to the explosion, plant workers complained of inadequate safety measures. *Id.*

7. *Id.* at 162.

8. *Id.* at 162-63.

that hazardous waste situated within their borders is managed responsibly, in order to protect both human health and the environment.⁹ Although this was one of many "first steps" taken by international organizations toward managing the problem of toxic wastes, it was hardly the solution.

As if the Seveso incident had not been adequate warning, in 1984 toxic gas escaped overnight from a storage tank at a Union Carbide chemical manufacturing plant in Bhopal, India, covering a 25 square-mile area. The toxic gas immediately caused the death of over 1,600 people and injured over 200,000 people.¹⁰ Several hundred more people died during the next several months due to lingering effects of the gas,¹¹ and even as late as 1987 victims continued to die daily.¹²

Following the Bhopal incident, and after many other disastrous incidents,¹³ a second OECD Recommendation¹⁴ was produced that enlarged the first, and in 1986 the United Nations Environment Programme (UNEP) helped establish an international environment bureau. The primary focus of these and other efforts was information generation, rather than regulation.¹⁵

Of primary concern was the effect of hazardous wastes on the environment in developing countries. The World Bank addressed this problem by creating a program to help developing countries effectuate policies concerning toxic wastes.¹⁶ The effectiveness of such programs has been questioned by some commentators who believe the World Bank lacks the ability to effectively address environmental concerns in its lending policies because of internal and external constraints.¹⁷

9. OECD, DECISION AND RECOMMENDATION OF THE COUNCIL ON TRANSFRONTIER MOVEMENTS OF HAZARDOUS WASTE, OECD Doc. C(83) 180, *reprinted in* 23 I.L.M. 214 (1984).

10. Nanda & Bailey, *supra* note 6, at 165-66.

11. *Id.* at 166. The Indian government reported that 30,000 to 40,000 people had suffered serious injuries from the incident, and that it had received 500,000 other claims related to the leak. *Id.* citing Matt Miller, *Two Years After Bhopal's Gas Disaster, Lingering Effects Still Plague Its People*, WALL ST. J., Dec. 5, 1986, at 30.

12. Jeffrey D. Williams, Comment, *Trashing Developing Nations: The Global Hazardous Waste Trade*, 39 BUFF. L. REV. 275 n.5 (1991), citing WALL ST. J., Feb. 15, 1987, at A15. The Indian government estimated the death toll at 3,329 by early 1987. *Id.*

13. The Chernobyl nuclear reactor meltdown in 1986 killed 31 people, injured several hundred more, and caused concern over abnormally high radiation levels in food and water worldwide. Chernobyl caused the international community to take a hard look at the lack of regulations and systems of liability and compensation available. Similarly, a chemical fire and major toxic chemical spill in Basel, Switzerland in 1986 threatened the countries along Rhine River (France, Switzerland, the Netherlands and Germany) and raised concern over the lack of an international regulatory scheme. See Nanda & Bailey, *supra* note 6, at 161-179 for a detailed analysis of these and the previously discussed incidents.

14. OECD, COUNCIL DECISION ON EXPORTS OF HAZARDOUS WASTES FROM THE OECD AREA. OECD Doc. C(86) 64, *reprinted in* 25 I.L.M. 1010 (1986).

15. Nanda & Bailey, *supra* note 6, at 189.

16. Ved Nanda, *International Environmental Protection and Developing Countries' Interests: The Role of International Law*, 26 TEX. INT'L L. J. 497, 505 (1991).

17. See *id.* at 506; Ved P. Nanda, *International Development Agencies (IDAs), Human*

During 1986, public awareness of hazardous waste issues grew. The *Khian Sea*, a Philadelphia ship, arrived in the Bahamas with 13,000 tons of incinerator ash, only to be turned away.¹⁸ After two years of searching for a disposal site, the crew of the *Khian Sea* attempted to unload her cargo in Haiti.¹⁹ After three thousand tons of the cargo, listed as "fertilizer ash," were dumped, the Haitian government ordered the ship to leave.²⁰ The ship departed, changed its name, and travelled through the Middle East and Far East in search of a disposal site. When next seen in Singapore, it was empty.²¹ This is one of many similar incidents²² in which developed countries have persistently abused developing countries in an effort to dispose of waste that is harder or more expensive to dispose of in developed countries.²³

The issue of toxic waste dumping in developing countries is controversial. In considering whether the World Bank should "encourage more migration of the dirty industries to the third world," Lawrence Summers, the chief economist of World Bank, stated that "the economic logic of dumping a load of toxic waste in the lowest-wage country is impeccable."²⁴ Summers' major contentions were:

First, the costs of pollution depend on earnings foregone through death or injury; these costs are lowest in the poorest countries. Second, costs rise disproportionately as pollution increases; so shifting pollution from dirty places to clean ones reduces costs. Third, people value a clean environment more as their incomes rise; if other things are equal, costs fall if pollution moves from rich places to poor ones.²⁵

The basic problem with this economic model is obvious: can such a price tag be placed on human lives? The problem is complicated by the fact

Rights, and Environmental Considerations, 17 DEN. J. INT'L L. & POL'Y 29, 34 (1988).

18. Robert M. Rosenthal, *Ratification of the Basel Convention: Why the United States Should Adopt the No Less Environmentally Sound Standard*, 11 TEMP. ENVTL. & TECH. J. 61, 62 (1992).

19. *Id.*

20. *Id.*

21. *Id.* at 63.

22. In 1988, another shipment from Philadelphia was marketed and sold to Kassa (Guinea) as "raw materials for bricks" and dumped in an abandoned quarry. After the island's vegetation started dying and investigators found the substance to be toxic, Guinea protested. Since then the company has sent a ship to remove the ash. Williams, *supra* note 12, at 178-79.

23. The estimated cost of disposing a ton of hazardous waste in the United States during 1988 was \$2,500. Nanda, *supra* note 16, at 506 n.71.

Therefore, even though, as in 1988, when a Detroit attorney offered the government of Guinea-Bissau (Northwest Africa) \$600 million (two times the foreign debt and thirty-five times the value of all annual exports of Guinea-Bissau), he could have stood to make \$400 million off the deal. Rosenthal, *supra* note 18, at 63 n.30.

24. *Pollution and the Poor: Why "Clean Development" at Any Price is a Curse on the Third World*, ECONOMIST, Feb. 15, 1992, at 18 [hereinafter *Pollution and the Poor*].

25. *Id.* This purely economic view, which the author sees as a balance of costs and benefits, ignores humanitarian issues, which will be discussed later in this paper. See *infra* notes 103-106 and accompanying text.

that some developing countries feel they need the capital created by hazardous waste dumping so desperately that for the industrialized nations to ban all dumping would be to deprive these countries of their right to have fair access to the means of industrialization.²⁶

Developing countries often see environmental regulation, as one commentator aptly remarked, "as a wolf in sheep's clothing designed to perpetuate the existing cycle of impoverishment."²⁷ Many see the situation as coercive; one in which the developing countries, with enormous amounts of money being waved in their faces, have no option but to choose the short term gain and long term disaster of hazardous waste dumping.²⁸ Furthermore, because of high environmental standards in industrialized countries, many see waste dumping in developing countries as a "double standard" in which industrialized countries allow chemicals that have been banned for domestic disposal due to hazardous health and environmental effects to be exported to developing countries that do not have such stringent environmental standards.²⁹

The problem is not merely one of acceptance of the waste. The fact that developing countries lack the infrastructure to control hazardous waste in a manner which would be acceptable to industrialized nations greatly increases the likelihood of accidents or improper disposal.³⁰ Furthermore, once environmental havoc is created by toxic waste, the costs of reversing the process are exorbitant, it is nearly impossible to entirely

26. Williams, *supra* note 12, at 292. Although developing countries usually accept waste as a tool for industrialization (either through disposal for quick cash or recycling as industry in itself), environmentalist groups such as Greenpeace view waste as unnecessary for sustainable development and intolerable because of the unnecessary hazards it exposes people of developing countries to. A commentator makes the statement that

If clean growth means slower growth, as it sometimes will, its human cost will be lives blighted by a poverty that would otherwise have been mitigated. That is why it would be wrong for the World Bank or anybody else to insist upon rich-country standards of environmental protection in developing countries.

Pollution and the Poor, *supra* note 24.

27. Williams, *supra* note 12, at 292.

28. The inequity between industrialized and developing countries has been likened to a sport where the participants are not playing on a level field, where "industrialized countries may take unfair advantage of their impoverished neighbors, who may be willing to trade an increased public health and environmental risk for a short term infusion of capital." Stephen Johnson, *The Basel Convention: The Shape of Things to Come for United States Waste Exports?*, 21 ENVTL. L. 299, 300-01 (1991).

29. See Williams, *supra* note 12, at 288-289.

30. In Koko, Nigeria, hazardous waste packed in steel drums was stored in the midst of a residential area for over seven months between 1987 and 1988 for only \$100 per month. See Nanda & Bailey, *supra* note 6, at 156.

The situation is further exacerbated by the fact that developing countries have some of the worst pollution problems and most lax disposal regulations in the world. For example, in the southeastern suburbs of Algiers lies one of the world's largest municipal waste dumps.

The refuse of the entire city, an average of 1,400 tonnes a day, is efficiently collected from the city and trucked to an area hundreds of metres square. Industrial waste is added indiscriminately. Spontaneous fires fuelled by gases emitted from the fermenting heap produce clouds of foul smoke sometimes

remove,³¹ and the human misery created is irreversible.³²

III. THE BASEL CONVENTION — THE SOLUTION?

In 1987 UNEP sponsored the "Cairo Guidelines" as a resolution to address concern about exports of waste to other countries and to assist developing countries in implementing safe hazardous waste disposal systems.³³ However, since resolutions are not legally binding, and because of growing public concern,³⁴ the UNEP sponsored a working group of technical and legal experts to prepare a global convention on the control of transboundary movements of hazardous wastes.³⁵

The resulting document, referred to as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their

creating a fog in the neighbouring areas. On occasions, the choking smoke is so thick that motorists on the highway running through the dump become disoriented and crash.

In Cairo, an open canal of raw effluent runs through residential areas to a large lake that has been converted into a reeking open cesspit. From there, the effluent drains through a further canal into the Mediterranean, contaminating the sea and beaches and killing fish and wildlife.

Middle East: Earth Summit—Environment Debate Gathers Momentum, Middle East Economic Digest, Reuter Textline, May 29, 1992, available in LEXIS, World Library, ALLWLD File.

After witnessing the Bhopal incident and its aftermath, the devastation to be inflicted on developing countries by improper management of hazardous wastes should be convincing.

31. The problem is not limited to "Third World" countries. Eastern European countries have more than their share of environmental problems. Since reunification, Germany has had to deal with a wide spectrum of environmental problems, the least of which are abandoned coal mines that were frequently used for illegal dumping of hazardous waste. The Environment Ministry has determined that pumps will be needed for the next 50 to 100 years to prevent water from seeping into the mines, potentially causing extensive groundwater contamination. See *Government Reaches Accord on Financing Cleanup of Contaminated Sites in East*, 15 Int'l Env't Rep. (BNA) 706, Nov. 4, 1992.

The Europe Commission had to take emergency action recently when a dam in Yugoslavia, holding back millions of tons of toxic waste from such abandoned mines, was found to be crumbling into disrepair. The Commission is planning on emergency repair of the dam, which could collapse at any time; if this happens, it has been estimated that up to 7 million tons of toxic waste would flow into the Tara, Drijna, and Sava rivers, and onwards into the Danube and the Black Sea. See *Yugoslavia: Crumbling Dam's Toxic Waste "Threatens Millions"*, Reuter Textline, Guardian, Nov. 26, 1992, available in LEXIS, World Library, ALLWLD File.

32. Improper solid waste management can cause groundwater contamination, crop contamination, increased incidence of cancer and birth defects, and, in the case of serious contamination, severely shortened lifespan. See Johnson, *supra* note 28, at 306. Because in developing countries ill-health and shortage of food are already problems, the toxic waste legacy merely incurs increased misery. *Id.*

33. Rosenthal, *supra* note 18, at 72. See also *id.* at n.117.

34. See *supra* notes 18-23 and accompanying text.

35. Michelle M. Vilcheck, Comment, *The Controls on the Transfrontier Movement of Hazardous Waste From Developed to Developing Nations: The Goal of a "Level Playing Field,"* 11 Nw. J. INT'L L. & Bus. 643, 656 (1991); U.N. Doc. UNEP/GC.14/30, (1987).

Disposal³⁶ (Basel Convention), was signed by thirty-five countries of 116 countries participating in the negotiations in Basel, Switzerland that ended on March 22, 1989.³⁷ The Convention was designed to become effective upon actual ratification by twenty countries.³⁸ On May 6, 1992, over three years after its creation, the Basel Convention finally came into effect.³⁹ Yet how effective it has actually been, or has the potential to be, will depend on whether the world community can come to a consensus as to its terms and achieve full implementation of the Convention.

A. *The Ends and Means of the Basel Convention*

Dr. Mostafa Tolba, former Executive Director of UNEP, stated that the aim of the Basel Convention is "a major reduction in the generation of hazardous wastes."⁴⁰ The first objective of the Convention is "to protect countries against the uncontrolled dumping of toxic wastes."⁴¹ The Basel Convention broadly defines waste to include "substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law."⁴² Hazardous wastes are

36. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, UNEP Doc. I.G.80/3, *reprinted in* 28 I.L.M. 657(1989) [hereinafter *Basel Convention*].

37. Vilcheck, *supra* note 35.

Signatories to the Convention include Afghanistan, Bahrain, Belgium, Bolivia, Canada, Columbia, Cyprus, Denmark, Ecuador, Finland, France, Greece, Guatemala, Haiti, Hungary, Israel, Italy, Jordan, Kuwait, Lebanon, Liechtenstein, Luxembourg, Mexico, Netherlands, Norway, Panama, Philippines, Saudi Arabia, Spain, Sweden, Switzerland, Turkey, United Arab Emirates, Uruguay, and Venezuela. *Basel Convention, supra* note 36.

38. *Id.*

39. *United Nations Officials See Basel Treaty As "Limping" Into Effect With Limited Support*. 15 Int'l Env't Rep. (BNA) 275, May 6, 1992 [hereinafter *Treaty "Limping" Into Effect*].

40. Vilcheck, *supra* note 35, at 658.

The Preamble to the Convention also recognizes that the protection of human health and the environment should be maintained by states in their control of movement and disposal of wastes, that "any state has the sovereign right to ban the entry or disposal of foreign hazardous wastes and other wastes in its territory," that

hazardous wastes and other wastes should, as far as is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated, that transboundary movements of such wastes from the State of their generation to any other state should be permitted only when conducted under conditions which do not endanger human health and the environment, and under conditions in conformity with the provisions of this Convention,

that information exchange is condoned, and, of special controversy, that there is a "need to continue the development and implementation of environmentally sound low-waste technologies, recycling options, good house-keeping and management systems with a view to reducing to a minimum the generation of hazardous wastes and other wastes." Finally, the Preamble takes into account "the limited capabilities of the developing countries to manage hazardous wastes and other wastes." *Basel Convention, supra* note 36, at Preamble, 657-59.

41. Alexandre Kiss, *The International Control of Transboundary Movement of Hazardous Waste*, 26 TEX. INT'L L. J. 521, 535 (1991).

42. *Basel Convention, supra* note 36, art. 2(1).

identified by their origin or component parts⁴³ and are specifically listed in the convention.⁴⁴ Industrialized countries such as the United States lobbied hard for the national definitions of waste clause to be included.⁴⁵

Annex II of the Convention requires wastes collected from households and residues arising from the incineration of household wastes to be considered separately.⁴⁶ This broadens the definition of wastes more than most countries have had to previously deal with, and some have interpreted this to go as far as to include nonhazardous recyclables.⁴⁷

The Convention requires States to reduce the generation of hazardous wastes,⁴⁸ and when this is unavoidable, to dispose of the waste as close as possible to the source of production.⁴⁹ The crux of the Convention is that an exporting state must guarantee "environmentally sound management" of the waste⁵⁰ and may only export waste where it does not have the technical capacity and facilities to dispose of the wastes in an environmentally sound manner.⁵¹

The Basel Convention prohibits the export of hazardous wastes to a developing country (Party) that has prohibited all imports by its legislation, or if the exporting country has reason to believe that the wastes in question will not be managed in an environmentally sound manner.⁵² The Convention also creates an affirmative duty in a contracting state to prohibit the import of hazardous wastes into its territory if it has reason to believe the waste would not be managed in an environmentally sound manner.⁵³

The Basel Convention does not allow parties to the Convention to permit hazardous or other wastes to be exported to or imported from a nonparty state.⁵⁴ There is one important exception to this standard that may hinder the effectiveness of the Convention. Article 11 allows parties to enter into bilateral, multilateral, or regional agreements or arrangements with nonparties,

provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this convention. These agreements or

43. *Id.* art. 1 (a), (b).

44. *Id.* annex I, III.

45. See Kiss, *supra* note 41, at 536.

46. Basel Convention, *supra* note 36, at annex II.

47. See 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, 334 (1992).

48. Basel Convention, *supra* note 36, art. 4(2)(a).

49. *Id.* art. 4(8).

50. *Id.* art. 4(2)(d).

51. *Id.* art. 4(9)(a).

52. *Id.* art. 4(2)(e).

53. *Id.* art. 4(2)(g).

54. *Id.* art. 4(5).

arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries.⁵⁵

The Basel Convention requires a permit to be issued by party states for each transboundary movement of waste that occurs.⁵⁶ It also requires an authority to be established⁵⁷ to ensure compliance with the requirement of notice⁵⁸ to and consent from (via a written response) the receiving state.⁵⁹ An exporting state may not allow commencement of transboundary movement of waste until it has received such written consent, which also confirms that there will be adequate, "environmentally sound management" of the wastes.⁶⁰

Since the Convention did not establish an international police force to monitor the international hazardous waste shipments, the Basel Convention requires much international cooperation and control, placing a great deal of responsibility on each individual member state. Enforcement, therefore, must take place at the national level through the establishment of strict domestic regulations in compliance with the Convention.⁶¹ While a Secretariat provided by the convention is responsible for oversight of its implementation, the Secretariat's principle responsibility will be facilitating the flow of information, not enforcing compliance with Convention regulations.⁶²

B. *Do the Means Adequately Fulfill the Ends?*

Although the Basel Convention is undoubtedly the most comprehensive and stringent effort to date to attempt some form of control over transboundary movements of hazardous wastes,⁶³ it is not without its critics. African nations have been opposed to the Convention from the beginning.⁶⁴ They feel the convention does not do enough to protect developing nations against dumping by industrialized countries.⁶⁵ In response to this dissatisfaction with the convention, in 1991 the Organization of African Unity (OAU) drafted the Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa.⁶⁶ The Bamako Convention is

55. *Id.* art. 11(1).

56. *Id.* art. 4(7)(a).

57. *Id.* art. 5(1).

58. *Id.* art. 6(1).

59. *Id.* art. 6(2).

60. *Id.* art. 6(3)(a),(b).

61. Christina L. Douglas, *Hazardous Waste Export: Recommendations for United States Legislation to Ratify the Basel Convention*, 38 WAYNE L. REV. 289, 308 (1991).

62. *Id.* at 310.

63. See Vilcheck, *supra* note 35.

64. Myra McDonald, *Africans Challenge International Accord on Toxic Waste*, Reuter Libr. Rep., Jan. 28, 1989, available in LEXIS, World Library, ALLWLD file.

65. Kiss, *supra* note 41, at 537.

66. Organization of African Unity: Bamako Convention on the Ban on the Import into

very similar to the Basel Convention, except it is obviously more strict in that it bans all waste imports into Africa.

The executive director of the Kenya Energy and Environment Organization (KENGO), Achoka Awori, says the Basel Convention contains "slippery" language and limited provisions for monitoring disposal sites. "There are loopholes which can be exploited."⁶⁷ One of the most controversial loopholes presently is the recycling exception, which allows waste that would normally be banned under the convention to be transported and disposed of in countries for "recycling."⁶⁸

Are the fears of the African Nations⁶⁹ and other developing countries⁷⁰ well-founded? Although there is great support among academics for the Basel Convention, at least one commentator sees the Convention

Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, *reprinted in* 30 I.L.M. 773 (1991).

67. *Treaty "Limping" Into Effect*, *supra* note 39.

68. Kevin Stairs, Greenpeace's adviser on treaties and conventions, says that most hazardous waste trade is executed as recycling trade. For instance, in March the German government was forced to pay for two trains to go to Romania to recover more than 400 tons of toxic German pesticides it had sent there earlier. Greenpeace says that Romanian farmers were told by Germany that the pesticides could be re-used, but when Greenpeace investigated, they found damaged and rusting barrels with the pesticides leaking into the environment. Greenpeace claims the pesticides were illegal under Romanian and German law. Alecia McKenzie, *Environment: EC Hazardous Waste Proposal Opposed by Germany*, Inter Press Service, March 22, 1993, available in LEXIS, World Library, ALLWLD File.

During 1992 Britain exported 165 tons of lead wastes to the Philippines, and 280 tons to Indonesia for recycling. These are only two of 60 countries where Britain sent toxic waste last year. When Greenpeace visited lead recovery plans in Indonesia, they found workers stirring "huge vats of molten lead by hand with inadequate cloths over their faces to protect them from highly toxic lead fumes." *Id.*

In 1990, 40 million tons of waste, with a price tag of \$19 billion, were exported from OECD countries for recycling in other parts of the world. The high cost of pollution control in industrialized countries is expected to cause plant closures, thus further driving recycling processes into countries with less stringent controls. *World: Europe's Green Channel for Toxic Waste*, Reuter Textline, April 23, 1993, available in LEXIS, World Library, ALLWLD File [hereinafter *Green Channel for Toxic Waste*].

69. Many developing countries are grappling with cleaning up past environmental damage, and because money allocated to the environment may be subtracted from that going towards feeding hungry mouths, there is a great deal of concern with stopping such environmental problems from occurring in the first place. Other nations who are not themselves as concerned — and are more concerned with the profitability of hazardous waste trade — are being pressured by neighboring developing countries, who feel threatened by the possibility of having to share waste dilemmas due to their proximity. This may be the driving force behind the OAU's insistence on a unified ban to developing countries, even though the Basel Convention clearly allows individual nations to ban imports of waste. *See supra* note 52 and accompanying text.

70. Belize has passed legislation explicitly prohibiting the importation or transit of hazardous wastes, Panama has established criminal penalties to prevent all traffic and imports of hazardous waste, the Nicaraguan and Salvadoran National Assemblies are considering bills dealing with hazardous waste trafficking, while Guatemala and Costa Rica have been criticized by Greenpeace for the loopholes in their laws that prohibit dumping toxic wastes. *See Central American Nations Considering Laws to Restrict or Prohibit Toxic Waste Imports*, 14 Int'l Env't Rep. (BNA) 551, Oct. 9, 1991.

as "add[ing] nothing new to the existing rules, and there is little reason to expect the Convention to impact seriously upon the burgeoning international hazardous waste trade."⁷¹ A great deal depends upon who participates in the convention and how they implement its values into their national legislation, since enforcement of the Convention depends entirely upon national legislation and each country's enforcement thereof.

A liability mechanism is still not in place for the convention, even after the first meeting of the contracting parties to the Convention in December of 1992 in Uruguay to discuss implementation of the convention. The parties put off important decisions such as liability and compensation for damages and the creation of mechanisms for full treaty implementation, giving key countries such as the U.S., Japan, and the European Community more time to implement the Convention.⁷² The former executive director of the UNEP, which founded the Convention, Mostafa Tolba, said of these countries' failures to ratify the convention, "[w]ithout their ratifications and active participation in implementing the treaty, obviously the Basel Convention will get nowhere."⁷³ The only developed nations that have thus far ratified the convention are France, Canada, Australia, and only six days after the meeting of the parties to the Convention, Japan also passed a bill to amend domestic laws to enforce the Basel Convention.⁷⁴

The most controversial issue to be addressed at the meeting of the parties was whether the Convention would implement a ban on exports of hazardous waste to developing countries. While no hard-line agreement was reached, to the disappointment of environmental groups, the Uruguay meeting ended with a plea for such a ban, while maintaining that recycling of waste will be permitted.⁷⁵ A technical group is also being formed to create guidelines, give advice on, and have expertise in identifying, evaluating, and safely handling hazardous waste that is labeled recyclable.⁷⁶

Other important issues which were decided at the meeting of the parties were the budget;⁷⁷ the establishment of a working group to draft a protocol on liability and accidents involving hazardous waste;⁷⁸ the planned preparation of a manual on how to manage hazardous waste in an environmentally sound manner; an agreement to create technical

71. Williams, *supra* note 12, at 301.

72. *UNEP Conference Ends Without Calling for Toxic Trade Ban*, Int'l Env't Daily (BNA), Dec. 8, 1992. The European Community is currently in the process of implementation. See *infra* notes 80-85 and accompanying text.

73. *Id.*

74. *Basel Convention: Bill Approved to Implement Treaty on Trade in Hazardous Substances*, Int'l Env't Daily (BNA), Dec. 11, 1992. This Bill provides for immediate implementation of the Convention. *Id.*

75. *Id.*

76. *Id.*

77. The two-year budget for the Convention will be \$4.9 million. *Id.*

78. A compensation fund was also arranged. *Id.*

guidelines on how to dispose of hazardous waste in an "environmentally acceptable" way; and the consideration of an emergency fund for hazardous waste accidents.⁷⁹ Thus, as in the past, the key mechanism of the convention seems to be transfer of information, leaving regulation to the states.

C. *Europe — The European Community*

The European Community has felt increased pressure to ratify the Basel Convention since a second meeting of the parties was set to occur between February and May of 1994.⁸⁰ Disagreements between Member States concerning when to ratify caused initial conflicts.⁸¹ Denmark, the Community's current president country, has been a driving force in calling for a ban of all exports of hazardous wastes to developing countries.⁸² The pronouncement is controversial, and has created greater struggle within the Community, since the United Kingdom and Germany vehemently oppose the ban.⁸³ Nevertheless, the initial steps towards ratification have been taken after a recent Council of Ministers and Parliament decision to ratify the convention.⁸⁴ It is estimated that it will take as long as a year to apply the Community Regulation, before which time the Convention cannot be ratified.⁸⁵

D. *The United States*

The United States Congress failed in both the 102nd and 103rd Congresses to accept legislation which would implement the Basel Convention. The Bush administration's efforts were rejected by Democrats who didn't feel the language was protective enough.⁸⁶ Democratic efforts to draft implementing legislation have gone farther, and compromise legisla-

79. *Id.*

80. European Report, Dec. 19, 1992, available in LEXIS, World Library, ALLWLD File.

81. *Id.*

82. Denmark itself is not a party to the Convention. *Environment: EC Hazardous Waste Proposal Opposed by Germany*, Inter Press Service, March 22, 1993, available in LEXIS, World Library, ALLWLD File. The European Community adopted legislation in February of 1993 that allows hazardous waste to be labelled as non-hazardous, thus falling outside the Basel Convention. *Green Channel for Toxic Waste*, supra note 68.

83. *Greenpeace Accuses Germany, Britain of "Toxic Colonialism,"* Agence France Presse, March 22, 1993, available in LEXIS, World Library, ALLWLD File. Germany and the United Kingdom are two of the largest exporters of toxic waste in Europe who have shipped waste to developing countries. *EC: The EC Decides to Sign the Basel Agreement on the Export of Dangerous Wastes*, Reuter Textline, April 24, 1993, available in LEXIS, World Library, ALLWLD File.

84. *See Council Formally Adopts Waste Shipments Regulation*, Europe Information Service, February 16, 1993, available in LEXIS, World Library, ALLWLD File; *Waste: Court Refuses to Annul Framework Directive*, Europe Information Service, March 30, 1993, available in LEXIS, World Library, ALLWLD File.

85. *Id.*

86. INSIDE E.P.A., July 23, 1993, at 15.

tion has also been attempted.⁸⁷ Progress during the 102nd Congress was halted by attempts to tie the implementing legislation into the Resource Conservation and Recovery Act, which is up for reauthorization.⁸⁸ This proved to be too great a feat for Congress to accomplish in one session. The United States Environmental Protection Agency has recently been drafted to aid in this effort.⁸⁹

Several bills have been proposed that would either require a "no less strict" standard⁹⁰ to fulfill the vague "environmentally sound management" language of the Convention, a complete ban on the international trade of hazardous wastes,⁹¹ or require that waste is managed in a manner "no less strict" than U.S. standards.⁹² It will take a two-thirds vote from the Senate to create the necessary changes for ratification of the Basel Convention. Although the United States would like to participate in the Convention, most of its trade in hazardous waste is legislated through bilateral agreements with Canada and Mexico, so there is less pressure for the United States to ratify at this point. Even so, industry and government officials remain concerned that the United States is at a competitive disadvantage to its trading partners who have ratified the Convention.⁹³ Pressure is mounting to meet the March 1994 deadline for the next meeting.⁹⁴

The text of the North American Free Trade Agreement (NAFTA) was released in September of 1992.⁹⁵ Fears that NAFTA would relax U.S. and Canadian standards and create problems with Mexican border industries stirred heated debate during the NAFTA negotiations.⁹⁶ However, NAFTA itself does not create any hazardous waste regulations and will not eliminate the current requirement for U.S. industries in Mexico to export their waste back to the United States.⁹⁷ NAFTA also prohibits parties from relaxing environmental regulations to promote investment and encourages increasingly stringent environmental standards.⁹⁸ Most importantly in terms of transboundary hazardous waste trade, NAFTA will be subject to the Basel Convention, and to the extent it is inconsistent with it, the latter will prevail.⁹⁹

87. *Id.*

88. *Id.*

89. *Id.*

90. H.R. RES. 2358, The Waste Export Control Act. Kratz, *supra* note 47, at 329.

91. H.R. RES. 2580, The Waste Export and Import Prohibition Act. This Act is primarily sponsored by environmental groups. *Id.*

92. S. 1082, The Bush Administration's Proposal. This seems to be most highly favored, since it is the most middle-of-the-road. *Id.*

93. INSIDE E.P.A., *supra* note 86.

94. *Id.*

95. *Environmental Compromise: Striking the Balance Between Trade and Ecology*, Int'l Env't Daily (BNA), Nov. 20, 1992.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

E. *Alternatives/Additions to the Current Basel Convention*

One commentator has described UNEP as having no "teeth" because it lacks executive authority,¹⁰⁰ and therefore it will not be able to coerce states into compliance with the Basel Convention. An international environmental agency within the United Nations is suggested¹⁰¹ that would have the powers, such as those suggested by the Hague Declaration on the Environment,¹⁰² to force countries into compliance, even without unanimous agreements. Such an innovative, radical solution may be required to combat the illegal hazardous waste trade or other trade excluded from the Basel Convention, if we are to take the goals of the convention seriously.

Furthermore, developing countries may have more than a mere right to environment stake in transboundary dumping of wastes in their territories because of the potential harmful effects to people and endangerment of their lives such dumping engenders.¹⁰³ These rights extend into the arena of human rights, which should be guaranteed to all human beings.¹⁰⁴ These rights have been specifically recognized in cases where individuals have brought petitions to international human rights tribunals alleging violations of guaranteed rights as a result of environmental damage due to hazardous wastes.¹⁰⁵ Even though the Basel Convention is an attempt to restrict trade in hazardous waste, and does allow countries to instigate their own bans, it still allows trade under the auspices of recycling, and does not altogether ban exporting hazardous wastes to developing countries. There remains, therefore, the possibility that industrialized countries may invade the province of these human rights.¹⁰⁶

100. Palmer, *supra* note 3, at 261.

101. *Id.* at 262.

102. Hague Declaration on the Environment, Mar. 11, 1989, *reprinted in* 28 I.L.M. 1308 (1989).

103. The Stockholm Declaration implies that the exercise of human rights - other than the right to environment - requires basic environmental health. Human rights threatened by environmental deterioration may include the right to life, health, suitable working conditions, an adequate standard of living, and rights to political participation and information. See Shelton, *supra* note 1, at 112.

104. *Id.*

105. *Id.* at 113.

106. This raises issues of great concern, especially when illegal trade, which may occur because of lax liability and enforcement standards, results in unthinkable human rights violations. For instance, attempts have recently been made to dump shipments of hazardous waste (500,000 tons) in Somalia, after an illegal agreement was made between a Swiss firm and a Somali official. Somalia is currently in a state of war and famine. The former UNEP Executive Director, Mostafa Talba, said "[t]he Somali affair should remind us that wherever there is human suffering, there is someone ready to make a profit." *UNEP Official Urges African Nations to Approve Basel Accord on Waste Shipments*, 15 Int'l Env't Rep. (BNA) 654, Oct. 7, 1992.

Such outrageous actions by multi-national corporations are precisely why stronger action must be taken to halt the problem of transboundary dumping of hazardous wastes in developing countries.

The concept of an international environmental institution with real "teeth," combined with the possibility that the deleterious effects on the environment and humans by hazardous waste might be recognized as a human right protected under international law, could be the necessary solution to the inequities of hazardous waste trade.

IV. CONCLUSION

The UNEP and signatory states to the Basel Convention should be applauded for their attempts and accomplishments toward creating a workable system of regulation for the transboundary movements of hazardous wastes. However, they should be wary of allowing the economic goals underlying some of the vagaries of the Convention's provisions to override the basic human rights entailed in charging developing countries with handling hazardous wastes. The developed countries of the world have learned their lesson of the dangers involved in hazardous substances through instances such as the Bhopal, Seveso, and Basel chemical leaks, and the lessons learned were hard and tragic, and cost many human lives. Now industrialized nations are largely unwilling to deal with the many wastes they create and would prefer to export them to developing countries who lack the infrastructure to adequately understand or manage the wastes with which they are entrusted.

The Basel Convention, while a good step forward, is not a universal panacea. As industrialized nations, we have a responsibility to protect the human rights of the many citizens of developing countries whose governments may choose to accept hazardous waste for money or to build industry through recycling. While the Basel Convention has shown clear intent to control such situations, after the first meeting of the parties has convened there still is no ban on hazardous wastes exported into developing countries, and the vague language that allows room for varying national interpretations and other bilateral agreements could provide a loophole for abuse of developing countries by multi-national corporations.

Furthermore, as the discussion of liability under the convention has been put off another year, and since the UNEP lacks actual enforcement capabilities, developing countries or other states may be left without a remedy if a state refuses to accept responsibility for the actions of its multi-national corporations or, as we have seen elsewhere in international law, hides under the principle of sovereign immunity. In these situations the international community may be left virtually powerless to force a remedy. The world community should therefore establish an International Environmental Agency to enforce the regulations through actual police power, and strict guidelines for liability should be outlined. Finally, even if these measures are instigated, the Basel Convention will be virtually meaningless to the international community without implementation

by the United States and the European Community and willingness by the industrialized nations to allow humanitarian concerns to override nationalistic economic motives for maintaining loopholes and lax standards.

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