

June 2001

## The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal: 1999 Protocol on Liability and Compensation

Sejal Choksi

Follow this and additional works at: <http://scholarship.law.berkeley.edu/elq>

---

### Recommended Citation

Sejal Choksi, *The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal: 1999 Protocol on Liability and Compensation*, 28 *ECOLOGY L.Q.* (2001).

Available at: <http://scholarship.law.berkeley.edu/elq/vol28/iss2/13>

### Link to publisher version (DOI)

<http://dx.doi.org/doi:10.15779/Z38D84V>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact [jcera@law.berkeley.edu](mailto:jcera@law.berkeley.edu).

# The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal: 1999 Protocol on Liability and Compensation

Sejal Choksi\*

*The 1989 Basel Convention Treaty regulates the transboundary movement and disposal of hazardous wastes. In 1999, the Parties to the Convention negotiated and reached agreement upon a significant new Protocol on Liability and Compensation. The Protocol is the first mechanism in international environmental law to assign liability and provide adequate and prompt compensation for damages resulting from hazardous waste trade. The Protocol lacks teeth, however, and has yet to enter into force. The United States remains a non-signatory to both the initial Treaty and the liability Protocol largely because industry and environmental criticism of the Treaty and Protocol and a current lack of political will create disincentives for U.S. ratification. This lack of support from the world's leading generator of hazardous wastes poses a clear threat to the potential success of the Basel Treaty and Protocol.*

## CONTENTS

Introduction .....	510
I. Background of the Basel Convention .....	512
A. Need for the Basel Convention .....	512
B. Formation of the Basel Convention .....	516
C. Goals and Key Provisions of the Basel Convention ..	516

---

\* J.D. candidate, University of California at Berkeley School of Law (Boalt Hall), 2002; B.S., Emory University, 1998. I am grateful to Prahlad, Ranna, and Semil Choksi and Neeraj Chugh for their loving support. I would also like to thank Professor Peter Menell, Cinnamon Gilbreath, Leah Sturtz, Jean Wu, Jeff Brax, and Hudson Henry for their helpful contributions.

D. Criticisms of the Basel Convention .....	518
E. Attempts to Strengthen the Basel Convention .....	520
II. The Basel Protocol on Liability and Compensation .....	522
A. Brief History of the Protocol and its Significance .....	522
B. International Disputes and Potential Loopholes .....	524
III. The United States' Efforts to Ratify the Basel Convention .....	526
A. Ratification Procedure .....	526
B. Efforts to Implement the Convention, 1990-1992 .....	527
C. Efforts to Implement the Convention, 1992-Present .....	528
IV. Obstacles to Ratification .....	531
A. Industry and Environmental Opposition to the Basel Convention and Protocol .....	531
B. Lack of Incentives .....	533
C. Disincentives .....	535
Conclusion .....	537

#### INTRODUCTION

The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal<sup>1</sup> (Basel Convention) is a groundbreaking international environmental treaty that regulates transnational hazardous waste trade. In addition to following the limits imposed by the Convention itself, member nations have gradually tightened the management of hazardous waste transportation by banning hazardous waste movement into developing countries, implementing a uniform classification system for hazardous wastes, and committing to establish a liability protocol<sup>2</sup> to assign responsibility and provide compensation for damages resulting from hazardous waste transportation.<sup>3</sup>

As a result of efforts to strengthen the Convention, the Protocol on Liability and Compensation (hereinafter Protocol)<sup>4</sup>

---

1. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657, 1673 U.N.T.S. 57, available at <http://www.basel.int/text/con-e.pdf> (last visited Apr. 15, 2001) [hereinafter Basel Convention].

2. *Id.* art. 12 ("The Parties shall co-operate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes.")

3. Hazardous Waste: Agreement on Liability Protocol Reached at Basel Conference of Parties, INT'L ENV'T DAILY, Dec. 13, 1999, at D2.

4. Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, Dec. 10, 1999, at <http://www.basel.int/COP5/docs/prot-e.pdf> (last visited Apr. 15, 2001) [hereinafter Basel Protocol].

was finalized on December 10, 1999, after years of contentious negotiations between industrialized nations, developing countries, and environmental groups. The Protocol functions as a supplement to the Basel Convention treaty and must be ratified separately before it enters into force.<sup>5</sup> If the Protocol is approved, the Basel Convention will become the first international environmental agreement to provide compensation for nations injured by the transport of hazardous wastes.

Although 142 nations and the EU are currently Parties to the Basel Convention, the United States has repeatedly rejected efforts to ratify the Treaty. Despite the fact that the United States dominated many of the Basel Convention negotiations, endorsed the treaty in 1990, and gained Senate approval for U.S. participation in 1992,<sup>6</sup> Congress has failed to adopt the national legislation necessary to officially ratify the treaty and has failed to address the liability Protocol. Therefore, more than ten years after the establishment of the Basel Convention, the United States remains one of the few non-Parties to the Treaty.<sup>7</sup> At least one commentator has suggested that the failure of the United States to ratify the Basel Convention has justified its international reputation as the "ugly American garbage dumper."<sup>8</sup>

This Note addresses the reasons behind, and the implications of, the United States' failure to officially ratify the Basel Convention in a timely manner. Part I briefly describes the impetus for an international treaty on hazardous wastes and the background of the Basel Convention. Part II discusses the most recent addition to the Convention, the Protocol on Liability and Compensation. Part III analyzes the various U.S. positions on the Basel Convention and the United States' failed attempts to implement the Basel regulations. Part IV discusses the United States' lack of incentives to become a member of the Treaty, especially in light of the new Protocol. The Note concludes by asserting that even though U.S. participation in the emerging international hazardous waste regulation regime is crucial to preserve the health of the global environment, the United States

---

5. Brief Description of the Basel Protocol on Liability and Compensation, at <http://www.basel.int/Protocol/Protodes.html> (last visited Apr. 23, 2001).

6. 138 Cong. Rec. S12,291 (1992).

7. The United States is the only industrialized country among the thirty countries that have yet to ratify the Basel Convention. *News Focus: Basel Convention*, PORTLAND OREGONIAN, Apr. 22, 1999, at A10.

8. Peter Obstler, *Toward a Working Solution to Global Pollution: Importing CERCLA to Regulate the Export of Hazardous Waste*, 16 YALE J. INT'L L. 73, 97 (1991).

is unlikely to implement the entire Basel Convention, with the 1995 Ban Amendment and 1999 Liability Protocol, unless government, industry, and environmental sentiments shift significantly.

## I

## BACKGROUND OF THE BASEL CONVENTION

A. *Need for the Basel Convention*

The worldwide generation of hazardous wastes has expanded exponentially over the last thirty years, primarily as a result of increased consumer demand and industrial production.<sup>9</sup> The world produced five million metric tons of hazardous wastes in 1947.<sup>10</sup> By 1990, the total annual global production of hazardous wastes had skyrocketed sixty-fold, to 300 million metric tons,<sup>11</sup> and as of 1997 these estimates had risen to over 400 million metric tons.<sup>12</sup>

The United States is the world's largest producer of wastes. It annually generates well over 250 million tons, of which 40.7 million are identified as hazardous under domestic law.<sup>13</sup> According to the federal government, however, the United States disposes of most of this waste domestically<sup>14</sup> and only exports

---

9. See Maureen T. Walsh, *The Global Trade in Hazardous Wastes: Domestic and International Attempts to Cope with a Growing Crisis in Waste Management*, 42 CATH. U. L. REV. 103, 111 (1992).

10. *Id.* at 110.

11. Dean M. Poulakidas, *Waste Trade and Disposal in the Americas: the Need for and Benefits of a Regional Response*, 21 VT. L. REV. 873, 873 (1997). Greenpeace and other environmental non-governmental organizations (NGOs) currently provide the primary statistics regarding international hazardous waste transport. See *id.* at 876. The Basel Convention Secretariat may become a viable source for waste transport statistics in the future if the international reporting system established by the treaty succeeds.

12. UNEP, *THE WORLD ENVIRONMENT: TWO DECADES OF CHALLENGE, 1972-1992* 264 (1992).

13. This figure constitutes an eleven percent rise in U.S. generation of hazardous wastes since 1995. These estimates only include wastes produced by large quantity generators and defined as hazardous by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6991 (2000), however, and completely exclude wastewater data. The National Biennial RCRA Hazardous Waste Report (Based on 1997 Data) ES-5, at [http://www.epa.gov/epaoswer/hazwaste/data/br97/na\\_all.pdf](http://www.epa.gov/epaoswer/hazwaste/data/br97/na_all.pdf) (last visited Apr. 15, 2001). It is likely that the actual amount of U.S. generated hazardous waste is much higher under the Basel Convention's different definition of hazardous waste. See generally Obstler, *supra* note 8, at 77.

14. Poulakidas, *supra* note 11, at 876. Exact figures on hazardous waste transportation do not exist due to illegal dumping, improper reporting, and international disagreements over the definition of hazardous waste. Obstler, *supra* note 8, at 77-79.

one-tenth of one percent of hazardous wastes generated.<sup>15</sup> This percentage seems small only because it does not account for undetected and misreported waste exports,<sup>16</sup> and does not adjust for the fact that the U.S. uses a more narrow definition of "hazardous" than the Basel Convention and the rest of the world.<sup>17</sup> A 1994 industry estimate, for example, revealed that the United States actually exports almost three million tons of hazardous wastes annually.<sup>18</sup> This expanded volume of hazardous waste exports is especially significant in light of the potential international environmental consequences.

It thus appears that the U.S. exports much more potentially dangerous waste than the nation would like to admit. Moreover, U.S. waste exports have increased in recent years due to higher domestic disposal costs, stricter national legislation, and increased liability concerns.<sup>19</sup> The increase in waste exports is

---

15. This figure amounted to approximately 150,000 tons in 1990. Obstler, *supra* note 8, at 77.

16. At least one author has argued that noncompliance with RCRA export requirements is rampant. *See id.* at 84. The first U.S. criminal prosecution of an illegal hazardous waste export did not occur until 1993, when a federal jury convicted two exporters of knowingly exporting hazardous wastes from the United States to Pakistan without notifying the EPA and without acquiring the consent of the importing country, as required under RCRA. *See* Henry Weinstein, *2 Found Guilty of Exporting Toxic Waste*, L.A. TIMES, Apr. 16, 1993, at 3. This lack of prosecution suggests that illegal trade has gone largely undetected. In a more recent discovery of illegal toxic trade in December 2000, Greenpeace brought the world's attention to 118 tons of U.S. mercury waste in illegal transit to an undisclosed dumping destination in India. When environmental activists and the governor of Maine tried to prevent the export, the U.S. refused to accept its own factory-recovered mercury, claiming the federal government lacked authority. Greenpeace Press Release, *U.S. Scheme to Dump Used Mercury in India Faces Strong Opposition*, Dec. 26, 2000, at [http://www.greenpeaceusa.org/media/press\\_releases/01\\_01\\_05text.htm](http://www.greenpeaceusa.org/media/press_releases/01_01_05text.htm) (last visited Apr. 15, 2001). For more information on current events regarding illegal waste activity, see Greenpeace Toxics Campaign, at <http://www.greenpeace.org/~toxics> (last visited Apr. 15, 2001); Basel Action Network (BAN), at <http://www.ban.org> (last visited Apr. 15, 2001).

17. For instance, in 1992 the U.S. exported twenty million tons of Basel hazardous wastes, but industry groups claimed that only 150,000 tons were hazardous under RCRA. Donna Valin, *The Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal: Should the United States Ratify the Accord?*, 6 IND. INT'L & COMP. L. REV. 267, 283 (1995).

18. *See Ban Sought on Toxic Exports*, AM. METAL MARKET, Mar. 8, 1994, at 8, available at 1994 WL 2893265.

19. Although recent figures were published in 1997, Poulakidas, *supra* note 11, new developments have caused government officials in the U.S. and Canada to suggest that U.S. hazardous waste exports are on the rise. *Canada Becomes a Pollution Haven for U.S. Hazwaste* (July 28, 2000), at [http://www.ban.org/ban\\_news/canada\\_becomes.html](http://www.ban.org/ban_news/canada_becomes.html) (last visited Mar. 15, 2001); *Hazardous Waste: Former UNEP Chief Blasts United States for Failing to Ratify 10-Year-Old Basel Pact*, INT'L ENV'T DAILY, Dec. 10, 1999, at D3 (citing figures showing that U.S. exports increased by almost fifty percent between 1993 and 1995).

the direct result of generators choosing the "path of least resistance and least expense."<sup>20</sup> Rather than incinerating wastes in the United States, where it may cost more than \$2,000 per ton, many generators are instead dumping wastes in the landfills of developing countries at a cost of approximately \$40 per ton.<sup>21</sup> In addition, the potential liability for damage due to mismanagement of the wastes is greater under U.S. environmental laws, such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),<sup>22</sup> than under the weak enforcement mechanisms of international law and lax environmental laws in many developing countries.<sup>23</sup> Even if a developing country has stringent environmental laws, it often lacks the administrative infrastructure for adequate enforcement; customs officials may even circumvent national regulations by accepting bribes and ignoring dumping activities.<sup>24</sup> Finally, the number of adequate waste disposal sites in the United States continues to diminish. As a result of stricter disposal regulations, cheaper disposal alternatives abroad, media attention to environmental health hazards, and the growth of the Not In My Backyard (NIMBY) movement, more than 2,700 U.S. landfills were shut down in the 1980s alone.<sup>25</sup> U.S. generators thus not only have profit and liability incentives to export their wastes to developing countries, but public policy and land use reasons as well.

---

20. Obstler, *supra* note 8, at 80.

21. Jennifer Kitt, *Waste Exports to the Developing World: A Global Response*, 7 GEO. INT'L ENVTL. L. REV. 485, 488 (1995). The discrepancy can be even larger. For example, U.S. treatment of PCBs can cost more than \$3,000 per ton, whereas the cost to dump them in a developing country's landfill can be as low as \$2.50 per ton. Sean D. Murphy, *Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes*, 88 AM. J. INT'L L. 24, 31 (1994).

22. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 42 U.S.C. §§ 9601-9675 (2000).

23. See Kitt, *supra* note 21, at 488-89.

24. In 1998, the Taiwanese company Formosa Plastic Group illegally dumped 3,000 tons of mercury-laden sludge, labeled as "construction waste," in Sihanoukville, Cambodia. Cambodian news reports later alleged that customs officials were bribed more than \$3 million to accept the toxic shipment. See Jud Lohnes, *Taiwanese Company Dumps 3000 Tons of Toxic Waste in Cambodia*, 1999 COLO. J. INT'L ENVTL. L. & POL'Y 262, 266 (2000). In June of 1999, two Cambodian customs officials were acquitted because the prosecution dropped charges. In a separate trial, a waste importer was sentenced to seven months in prison and fined \$1,315, and three Taiwanese business men were convicted in absentia for their involvement in the dumping incident. See Ker Munthit, *Cambodians Not Surprised at Acquittals in Toxic Waste Trial*, ASSOC. PRESS NEWSWIREs, June 17, 1999.

25. Poulakidas, *supra* note 11, at 877.

Dumping hazardous wastes in a foreign country can potentially create serious environmental problems, however. Environmental justice concerns arise when industrialized countries profit by exploiting the precarious economic positions of developing nations.<sup>26</sup> Impoverished developing countries forced to prioritize economic development over environmental concerns have been offered foreign payments equivalent to four times their entire gross national product in exchange for accepting toxic waste shipments.<sup>27</sup> Because these countries often lack the technology and infrastructure to properly manage these wastes, soil and groundwater pollution, human morbidity, and irreversible environmental catastrophes result.<sup>28</sup> The 1970s and 1980s brought various instances of "toxic terrorism"<sup>29</sup>— one of the most notorious of which was the United States' embarrassing *Khian Sea* incident.<sup>30</sup> Due to media coverage of that catastrophe and other similar incidents, the world became aware of the international waste-disposal crisis. Public outcry and government concern helped create the international political will necessary for the formation of uniform waste-trade regulations.<sup>31</sup>

---

26. The environmental justice movement addresses the adverse environmental effects that activities such as hazardous waste disposal can wreak on minority communities, which often lack the political and economic clout to express their right to a healthy environment. Environmental justice concerns arise in the case of hazardous waste disposal, because industrialized countries often have economic incentives to dump their wastes in developing nations, which are frequently populated by disadvantaged communities who cannot afford to manage long-term environmental damages.

27. See Obstler, *supra* note 8, at 79.

28. Many residents of developing countries drink untreated water and fall victim to poisonous industrial contaminants because heavy precipitation causes landfilled waste to quickly leach into the groundwater. Additionally, as in the United States, landfills are often located in economically disadvantaged areas, and impoverished residents have been known to search landfills for possible items to use or sell. Kitt, *supra* note 21, at 491.

29. Representatives of developing nations used this term to discuss the industrialized countries' hazardous waste dumping. William N. Doyle, *United States Implementation of the Basel Convention: Time Keeps Ticking, Ticking Away*, 9 TEMP. INT'L & COMP. L.J. 141, 142 n.13 (1995).

30. In 1986, after attempts at domestic disposal failed, the city of Philadelphia loaded 15,000 tons of incinerator ash, labeled as "fertilizer," onto the ship *Khian Sea*. Refused by numerous ports including the Bahamas and Haiti and controversially publicized by Greenpeace, the crew changed the name of the ship to the *Pelicano* and continued to search for a dumping ground. Eventually reports emerged that the hazardous cargo had "disappeared." While 3,000 to 4,000 tons of the toxic ash continue to contaminate a Haitian beach, many suspect that the rest lies on the floor of the Indian Ocean. See Walsh, *supra* note 9, at 105-06; Valin, *supra* note 17, at 268.

31. See David J. Abrams, *Regulating the International Hazardous Waste Trade: A Proposed Global Solution*, 28 COLOM. J. TRANSNAT'L L. 801, 817 (1990).



### B. Formation of the Basel Convention

In 1982, the United Nations Environment Program (UNEP) established a working group to develop guidelines for safer methods to trade hazardous wastes.<sup>32</sup> In 1987, this group led to UNEP sponsorship of the "Cairo Guidelines,"<sup>33</sup> a set of proposals primarily intended to encourage countries to regulate their own hazardous waste trade.<sup>34</sup> Although these guidelines lacked real authority, they served as an impetus for countries concerned about the increased trade in toxic wastes to form a legally binding treaty. To this end, UNEP spearheaded a working group to establish a mechanism to "ensure adequate control and full availability of information on transboundary movements of hazardous wastes."<sup>35</sup> The group officially met six times, with the final gathering in 1989.

At the final meeting, in Basel, Switzerland, 116 countries and a host of non-governmental organizations (NGOs) and international agencies participated in the drafting of the final version of the Basel Convention.<sup>36</sup> On March 22, 1989, 104 nations signed the Final Act of the international treaty.<sup>37</sup> The Basel Convention came into force on May 5, 1992, after twenty countries formally ratified the agreement.<sup>38</sup> The United States is currently not among the 146 Parties that have ratified and officially implemented the Basel Convention.<sup>39</sup>

### C. Goals and Key Provisions of the Basel Convention

The Basel Convention has three main objectives.<sup>40</sup> The first goal aims to minimize both the amount and the hazard level of

---

32. Jason L. Gudofsky, *Transboundary Shipments of Hazardous Waste for Recycling and Recovery Operations*, 34 STAN. J. INT'L L. 219, 224-25 (1998).

33. Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes, Apr. 2, 1987, Annex II, U.N. Doc. EP/GC.14/17.

34. The Cairo Guidelines specifically addressed developing countries' hazardous waste treatment concerns and offered a framework to develop effective policies to self-manage hazardous wastes. See Abrams, *supra* note 31, at 816.

35. *Id.* at 817 (quoting Report of the Ad Hoc Working Group on the Work of Its Second Session 3, U.N. Doc. EP/WG.186/3 (1988)).

36. *Special Report: U.N. Officials See Basel Treaty as 'Limping' into Effect*, INT'L ENV'T DAILY, May 22, 1992.

37. *Id.*

38. See *id.*

39. Ratifications, at <http://www.basel.int/ratif/ratif.html#conratif> (last visited Apr. 15, 2001) (the United States, Haiti, and Afghanistan are currently the only signatories that have failed to ratify the Convention).

40. About the Basel Convention, at <http://www.basel.int/about.html> (last visited Apr. 15, 2001). See generally Basel Convention, *supra* note 1, art. 4.

wastes generated worldwide. Where generation is unavoidable, the second objective promotes the disposal of wastes as close as possible to the source of generation. The third main principle of the Basel Convention encourages "environmentally sound management"<sup>41</sup> and disposal of hazardous wastes.

To further these objectives, Articles 1 and 2 and Annexes I and II of the Basel Convention establish a broad definition of hazardous wastes.<sup>42</sup> The scope of the coverage encompasses not only commonly accepted hazardous wastes (such as medical wastes and wastes containing chemicals like mercury and lead) but also household wastes.<sup>43</sup> Additionally, if a Party nation lists any other waste as hazardous within its borders, the Convention requires any country trading with that nation to respect the listing as if it were a waste covered under the Convention itself.<sup>44</sup>

Article 6 of the Basel Convention establishes notice and consent procedures for hazardous waste trades.<sup>45</sup> Exporting Parties must notify the transit and importing countries and provide both with information regarding the wastes.<sup>46</sup> Until these countries provide their written consent, the Convention prohibits exportation. Even with written consent, the Convention goes further than traditional informed consent regulations by barring the exporting country from shipping hazardous wastes if it believes the importing country cannot or will not manage the wastes in an environmentally sound manner.<sup>47</sup> Moreover, if it is discovered after exportation that the importing country cannot manage the hazardous wastes in an environmentally sound manner, the Convention requires the exporting nation to re-

---

41. The Basel Convention defines this term vaguely, as "taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects that may result from such wastes." Basel Convention, *supra* note 1, art. 2, § 8.

42. *Id.* art. 1 (describing the scope of Convention coverage); *id.* art. 2 (defining wastes as "substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law"); *id.* Annex I (listing the hazardous wastes covered under the Treaty); *id.* Annex II (listing "Categories of Wastes Requiring Special Consideration" including household wastes).

43. *Id.* Annex II.

44. *Id.* art. 1, § 1(b).

45. *Id.* art. 6.

46. The information to be provided includes the reason for waste export, names of the exporter, generator and disposer, expected countries of transport, information relating to insurance, estimated quantity in weight and volume and the process by which the wastes were generated. For a complete list of the twenty requirements, see *id.* Annex V A.

47. See Kitt, *supra* note 21, at 497. See generally Basel Convention, *supra* note 1, art. 6.

import the wastes.<sup>48</sup> The Basel Convention also limits hazardous waste transportation (and encourages membership in the Convention) by barring Parties from trading wastes with non-Parties,<sup>49</sup> or even with another Party if that nation has banned the import of a particular waste.<sup>50</sup>

Finally, Article 10 of the Basel Convention further requires Parties to cooperate actively "in the transfer of technology and management systems" especially to those Parties "which may need and request technical assistance."<sup>51</sup> To this end, the Convention established a Secretariat responsible for gathering information regarding technical standards, monitoring, and national waste listings and for preparing periodic reports.<sup>52</sup>

In light of these accomplishments, the Basel Convention has been touted as "the broadest and most significant international treaty on hazardous waste" in existence today,<sup>53</sup> and UNEP has praised the agreement as its "most important contribution to date to international environmental law."<sup>54</sup>

#### D. Criticisms of the Basel Convention

Many environmental organizations and developing countries severely criticize the Basel Convention, however.<sup>55</sup> They argue that the Convention's biggest flaw is its failure to create a fund to minimize the damage from international hazardous waste accidents under Article 14 of the Convention.<sup>56</sup> If environmental damage occurs and the responsible party is either unknown or lacks funds, developing countries may not be able to afford immediate and proper clean up, and injured parties may be inadequately compensated.<sup>57</sup> Developing countries are currently pushing for the creation of an interim fund, although industrialized countries claim that no fund is necessary because

---

48. Basel Convention, *supra* note 1, art. 8.

49. *Id.* art. 4, § 5.

50. Kitt, *supra* note 21, at 496.

51. Basel Convention, *supra* note 1, art. 10, § 2 (d).

52. *Id.* art. 16. No transfer of technology from an industrialized to a developing country has thus far been documented, however. See Kitt, *supra* note 21, at 497-98.

53. UNEP: Basel Convention, at <http://www.basel.int/index.html> (last visited Apr. 15, 2001).

54. *United Nations: New UNEP Boss Says U.N. Must Help Restore Agency's Environmental Impact*, INT'L ENV'T DAILY, Feb. 26, 1998, at D-2.

55. See, e.g., *Special Report*, *supra* note 36; Basel Action Network, at <http://www.ban.org> (last visited Apr. 16, 2001).

56. See Basel Convention, *supra* note 1, art. 14, § 2.

57. *Hazardous Waste: Negotiations Stall on Basel Protocol on Liability, Compensation for Spills*, INT'L ENV'T DAILY, Sept. 10, 1999, at D-2.

few incidents have thus far required international monetary assistance.<sup>58</sup>

A second complaint is that Article 11 of the Convention completely exempts all waste transports made pursuant to bilateral or multilateral agreements with non-Parties.<sup>59</sup> Although Article 11 requires the bilateral and multilateral agreements to be “[no] less environmentally sound” than the Basel regulations,<sup>60</sup> critics argue that this language is vague and that industrialized countries can circumvent and weaken the Convention by cutting deals and preying on the economic needs of developing nations.<sup>61</sup>

A third criticism is that no formal policing mechanism exists to enforce the Basel Convention regulations.<sup>62</sup> The Convention fails to establish an official authority to enforce compliance and instead asks Parties to implement national legislation to prevent and punish illegal waste activities.<sup>63</sup> Compliance monitoring and enforcement currently rely on the good-faith cooperation of nations—Parties must self-enforce their behavior, notify the Secretariat and breaching Party of activities in contravention to the Convention, mutually agree upon the meaning of vague terms like “environmentally sound” management, and honor one another’s national listings of wastes.<sup>64</sup> Disputes under the Convention can be submitted to the International Court of Justice or an arbitral tribunal only after diplomatic negotiations break down.<sup>65</sup>

---

58. *Id.* The Basel Secretariat is not aware of any transboundary accidents requiring funds and has stated that there have been no requests from developing countries for international monetary assistance. E-mail from Pavel Suiian, Official for the Basel Secretariat, to author (Apr. 14, 2001) (on file with author).

59. Basel Convention, *supra* note 1, art. 11 (“Parties may enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with Parties or non-Parties provided that such agreements or arrangements do not derogate from the environmentally sound management . . . as required by this Convention.”).

60. *Id.*

61. Kitt, *supra* note 21, at 499. Many Parties have notified the Basel Secretariat of the formation of art. 11 agreements, but thus far the Secretariat has not received any complaints that an outside agreement has circumvented the Convention. E-mail from Pavel Suiian, Official for the Basel Secretariat, to author (Apr. 14, 2001) (on file with author).

62. Kitt, *supra* note 21, at 500.

63. William Schneider, *The Basel Convention Ban on Hazardous Waste Exports: Paradigm of Efficacy or Exercise in Futility?*, 20 SUFFOLK TRANSNAT’L L. REV. 247, 280-82 (1996). See generally Basel Convention, *supra* note 1, art. 9, § 5.

64. Basel Convention, *supra* note 1, art. 19.

65. *Id.* art. 20. Under the Convention, nations in dispute “shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.” Disputes that cannot be settled in this manner should be submitted to the

Finally, environmentalists argue that a fourth and more general deficiency is that the Basel Convention has not actually advanced its own goals.<sup>66</sup> Greenpeace, the Basel Action Network, and other monitoring organizations claim that the Convention has failed to reduce wastes in industrialized nations because it facilitates waste transportation rather than waste minimization. They also maintain that the Convention has failed to activate the transfer of waste-management technology from industrialized to developing nations.<sup>67</sup>

### E. Attempts to Strengthen the Basel Convention

The Parties have worked to strengthen several facets of the Basel Convention since its entry into force. Before 1995, for example, the Convention legitimized and actually provided a framework for industrialized countries to send their wastes to the developing world so long as both nations were Parties to the Convention and there was prior informed consent.<sup>68</sup> Parties could even export hazardous wastes to non-Parties and developing nations without being subject to Basel regulations if they formed an "environmentally sound" bilateral or multilateral agreement.<sup>69</sup> Many developing nations and environmentalists particularly criticized the Convention for not imposing a total ban on the movement of wastes from industrialized to developing countries.<sup>70</sup>

On September 26, 1995, in an unprecedented effort to address this particular criticism and fortify the Basel Convention's regulation of hazardous wastes, the Parties authorized a ban on the movement of wastes from Organization for Economic Cooperation and Development (OECD) nations—

---

International Court of Justice or to an arbitral tribunal to be established according to the procedures in Annex V. *Id.*

66. Telephone interview with Jim Puckett, Basel Action Network (Jan. 29, 2001).

67. *Id.* Greenpeace has actually denounced "bad" technology transfers, such as the transfer of incinerator technology which produces hazardous substances such as dioxin, and generates ash by-products that must be safely disposed. See Greenpeace Toxics Campaign, *supra* note 16.

68. Valin, *supra* note 17, at 275; *Special Report*, *supra* note 36.

69. Basel Convention, *supra* note 1, art. 11.

70. Gudofsky, *supra* note 32, at 246. African nations expressed their dissatisfaction with the Basel Convention's vague control mechanisms by forming their own convention in 1991. The Organization for African Unity (OAU) nations refused to sign the Basel Convention because of its lack of a total ban, impotent Secretariat, and ambiguous liability provisions. On January 29, 1991, OAU adopted the Bamako Agreement—a strict ban that prohibits the import of any hazardous wastes into Africa from non-Member countries and requires members to reduce their hazardous waste generation. See *id.*

the world's twenty-nine industrialized democracies—to non-OECD (or developing) nations. Although the “Ban Amendment” imposed a total ban on all waste transfers, including those destined for recycling and recovery, as of January 1, 1998,<sup>71</sup> it will not come into force until it is ratified by sixty-two nations.<sup>72</sup> Thus far, only twenty-four countries have ratified the 1995 Amendment.<sup>73</sup>

In 1998, the Parties revised the waste classification system in another effort to clarify and strengthen the Basel Convention. They amended the Convention to form two categories of wastes.<sup>74</sup> Hazardous wastes in List A cannot be transported under the 1995 Ban Amendment, while those in List B may be transported to developing nations (unless the material exhibits hazardous characteristics such as flammability, explosivity, or toxicity).<sup>75</sup> Industrialized nations approved of this new system since it opened trade for recyclables with non-OECD nations.<sup>76</sup>

Most recently, in a long-anticipated attempt to empower the Basel Convention, the drafters remedied the most glaring deficiency: the lack of a sufficient mechanism to impose liability and provide compensation in the case of environmental damage.

---

71. *Hazardous Waste: Basel Convention Partners Ban Exports from OECD to Developing World*, INT'L ENV'T DAILY, Sept. 26, 1995, at D-2.

72. Basel Convention, *supra* note 1, art. 17. Three-fourths of the Parties present at the adoption of the Amendment must ratify. See *The Basel Ban*, at <http://www.basel.int/pub/BaselBan.html> (last visited Apr. 16, 2001).

73. Ratifications, at <http://www.basel.int/ratif/ratif.html#banratif> (last visited Apr. 16, 2001).

74. *Hazardous Waste: U.S. Chamber Reconsidering Opposition to Basel Pact in Wake of Recent Changes*, INT'L ENV'T DAILY, Mar. 10, 1998, at D3.

75. Under the 1998 agreement, prohibited List A wastes include arsenic, lead, and mercury, while permissible List B wastes materials include gold, silver, tin, and aluminum. There is also a List C that contains unclassified wastes which will eventually be placed on either List A or List B. See *Hazardous Waste: Some Industry Opposition to Basel Treaty Addressed in Proposed Waste List System*, INT'L ENV'T DAILY, Feb. 11, 1998, at D-5. For complete lists, see Report of the Fourth Meeting of the Conference of the Parties to the Basel Convention, at <http://www.basel.int/meetings/sbc/cop/feb4sess.pdf> (last visited Apr. 16, 2001).

76. See *supra* notes 74-75. Greenpeace opposes the listing system because it believes the categories allow industrialized nations to weaken the Ban by sham recycling. Environmentalists claim that sham recycling permits industrialized countries to ship toxic, List A wastes to the developing world under the guise of recyclable wastes.

## II

## THE BASEL PROTOCOL ON LIABILITY AND COMPENSATION

A. *Brief History of the Protocol and its Significance*

Since the Basel Convention entered into force in 1992, the Parties have anticipated adopting a mechanism to assign liability and provide compensation for damages resulting from the international movement of hazardous wastes.<sup>77</sup> After more than six years of negotiations, 115 nations endorsed the Protocol on Liability and Compensation on December 10, 1999.<sup>78</sup> The Protocol represents a landmark international enforcement mechanism that will enter into force and become part of the Basel Convention when twenty countries ratify the provision.<sup>79</sup> As of April 16, 2001, however, only thirteen nations have ratified the Protocol.<sup>80</sup>

UNEP touts the Protocol as the first international environmental law mechanism to assign comprehensive liability and provide adequate and prompt compensation to those injured by both the legal and illegal international transportation of hazardous wastes.<sup>81</sup> For this reason, UNEP believes the Protocol constitutes "a major breakthrough" in international environmental law.<sup>82</sup>

Articles 4 and 5 of the Protocol establish guidelines for two types of liability: strict and fault-based. Strict liability applies in two situations. First, when both the importing and exporting nations are Parties to the Basel Convention, the Protocol imposes strict liability on the notifying entity<sup>83</sup> until the

---

77. Basel Convention, *supra* note 1, art. 12.

78. *Hazardous Waste: Agreement on Liability Protocol Reached at Basel Conference of Parties*, INT'L ENV'T DAILY, Dec. 13, 1999, at D2.

79. *Id.*

80. Signatures of the Basel Protocol on Liability and Compensation, at <http://www.basel.int/ratif/ratprot.htm> (last visited Apr. 16, 2001). Chile, Colombia, Costa Rica, Denmark, Finland, France, Hungary, Luxembourg, Monaco, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, and the United Kingdom of Great Britain and Northern Ireland have signed the Basel Protocol.

81. *Hazardous Waste: Agreement on Liability Protocol Reached at Basel Conference of Parties*, INT'L ENV'T DAILY, Dec. 13, 1999, at D2.

82. Text: UNEP Press Release on Hazardous Wastes, Dec. 14, 1999, at <http://www.usinfo.state.gov/topical/global/envIRON/latest/99121401.htm> (last visited Apr. 18, 2001).

83. The "notifying entity" is the nation, waste generating company, or exporting/shipping company that notifies the importing nation of the pending waste shipment. If the notifying entity is the exporting nation, the exporter (not the generator) is held liable. See Basel Protocol, *supra* note 4, art. 4.

disposer<sup>84</sup> takes control of the wastes.<sup>85</sup> Second, when only one of the contractors is a Party to the Convention, the Protocol applies strict liability for damages that occur while the Party possesses control of the wastes.<sup>86</sup> The Protocol imposes fault-based liability for failure to comply with the Basel provisions or "wrongful intentional, reckless or negligent acts or omissions."<sup>87</sup>

The Protocol attempts to impose a ceiling on Article 4 damages by requiring Parties to establish individual national caps on liability.<sup>88</sup> It also imposes financial minimums, however, on the amount that claimants must be awarded when the violator is strictly liable.<sup>89</sup> These minimum limits are proportional to the amount of waste involved in the harmful trade.<sup>90</sup> In contrast, where the liability is fault-based, the Protocol does not impose any financial limit on the compensation that can be awarded to injured parties.<sup>91</sup>

Finally, the Protocol requires notifiers, exporters, and importers to carry insurance, bonds or other financial guarantees to cover their liability.<sup>92</sup> Insurance premiums may depend on the type of operation (whether it is an isolated trade or a continuous operation) and the degree of specialization of the operator, among other factors.<sup>93</sup> Claims for damages can be

---

84. The "disposer" is the entity that carries out the disposal of the wastes at their final destination. This entity can be a waste recycling or recovery company or a landfill agency. See Basel Convention, *supra* note 1, art. 2.

85. Basel Protocol, *supra* note 4, art. 4.

86. *Id.*

87. *Id.* art. 5.

88. *Id.* Annex B.

89. *See id.*

90. *See id.* For shipments of up to five tons of waste, for example, the award cannot be less than one million SDR (Special Drawing Rights, an international currency) or U.S. \$1.38 million. In contrast to the method of liability determination outlined for notifiers, exporters, and importers, disposers are liable for at least two million SDR for any one harmful incident. *Hazardous Waste: Agreement on Liability Protocol Reached at Basel Conference of Parties*, INT'L ENV'T DAILY, Dec. 13, 1999, at D2.

91. Basel Protocol, *supra* note 4, art. 12.

92. *Id.* art. 14. Insurance companies have criticized the Protocol's liability provisions. They complain that the inclusion of both strict and fault-based liability complicates responsibility and makes insurance assessments difficult. They also argue that assigning liability for illegal waste shipments or negligent or reckless acts, as the Protocol attempts to do through Article 5, runs counter to the established principles of liability insurance. *Hazardous Waste: Compromise Text on Liability Protocol Done; Final Draft of Basel Change Expected by Fall*, INT'L ENV'T DAILY, June 29, 1999, at D2.

93. Despite the capacity for coverage, only a limited number of insurers offer these international environmental liability policies. *Hazardous Waste: Insurers Seen Ready to Meet Demand for Cross-Border Liability Coverage*, INT'L ENV'T DAILY, Dec. 10, 1999 (citing a report titled Financial Limits of Liability and Compulsory Insurance



brought in the courts of the Party where damages were suffered, where the incident occurred, or where the Defendant resides or has a place of business.<sup>94</sup> Failure to pay the deductible or co-payment cannot be a defense in an action brought by an injured claimant.<sup>95</sup>

### B. *International Disputes and Potential Loopholes*

Despite these provisions, environmentalists have branded the Protocol "a text with as many holes and exclusions as Swiss cheese,"<sup>96</sup> and decried the compromises by both industrialized and developing nations that significantly weakened the Protocol's liability provisions.<sup>97</sup>

The environmentalists' chief complaint is that the Protocol actually creates new loopholes allowing hazardous waste generators to escape liability.<sup>98</sup> The Protocol places full responsibility for any damage resulting from the movement of hazardous wastes on the entity in "operational control."<sup>99</sup> Critics point out that generators can therefore circumvent their liability merely by hiring exporters to act as notifying and controlling entities.<sup>100</sup> In addition, U.S. generators can avoid stringent CERCLA liability by exporting their hazardous wastes instead of managing them domestically.<sup>101</sup> The relative ease with which one of the world's largest hazardous waste generators may evade both national and international liability undermines the Basel

---

Under the Draft Protocol on Liability and Compensation for Damage Resulting from Transboundary Movement of Hazardous Wastes and Their Disposal, at <http://www.unep.ch/basel/COP5/predocs/Eng/cop5-inf14e.pdf> (last visited Apr. 17, 2001)).

94. Basel Protocol, *supra* note 4, art. 17.

95. *Id.* art. 14.

96. Toxic Waste Treaty Declares Next Decade: No Time for Waste, Dec. 10, 1999, at [http://www.ban.org/ban\\_news/no\\_time\\_for\\_waste.html](http://www.ban.org/ban_news/no_time_for_waste.html) (last visited Apr. 17, 2001) (quoting Dr. Kevin Stairs of Greenpeace International).

97. *Hazardous Waste: Negotiations Stall on Basel Protocol on Liability, Compensation for Spills*, INT'L ENV'T DAILY, Sept. 10, 1999, at D-2. As UNEP stated after the tumultuous negotiations, "[t]he difficulties were not technical or legal but rather political." *Id.*

98. Saving the Basel Liability Protocol, Aug. 30, 1999, at <http://www.ban.org/subsidiary/liability10.html> (last visited Apr. 17, 2001).

99. Basel Protocol, *supra* note 4, art. 4.

100. *Hazardous Waste: Agreement on Liability Protocol Reached at Basel Conference of Parties*, INT'L ENV'T DAILY, Dec. 13, 1999, at D2 ("[CERCLA joint liability is] undercut by the option to terminate liability under the protocol, which acts as a significant and real incentive to export.").

101. *Id.* As a non-Party to the Basel Convention, U.S. generators only have to deal with OECD regulations and the requirements of relevant bilateral agreements.

Convention's fundamental objective to reduce the production of hazardous wastes.

Critics claim that the Protocol opens another "monster loophole" by failing to assign liability for the "aftercare" of disposed wastes.<sup>102</sup> One of the most crucial problems associated with the import, treatment, and storage of hazardous wastes in developing nations is gradual, long-term soil and groundwater pollution.<sup>103</sup> The Protocol fails to hold either generators or exporters liable for these future damages to the environment and public health. Industrialized nations therefore have little incentive to assist developing countries in the design and implementation of environmentally-sound hazardous waste management technology.

Developing countries also point out that the Protocol still fails to establish an international fund to aid developing countries. The Protocol's drafters attempted to effect a compromise by including a provision stating that the Parties shall review the "need for and possibility of improving existing mechanisms or establishing a new [funding] mechanism."<sup>104</sup> Both industrialized and developing nations are skeptical of this language, however.<sup>105</sup>

Finally, the most contentious issue continues to be the bilateral and multilateral agreement exemption under Article 11 of the Basel Convention and, now, under Article 3(7)(a) of the Protocol. Not only does Article 11 permit waste trade with non-Parties, as discussed earlier, but now Article 3(7)(a) of the Protocol exempts Parties from liability and compensation when they have made outside agreements that provide liability regimes that "fully meet or exceed" the Protocol provisions.<sup>106</sup> Developing

---

102. See Saving the Basel Liability Protocol, *supra* note 98.

103. Many developing countries lack the technology to treat hazardous wastes properly, and thus wastes usually end up in landfills or in leaking waste storage facilities close to settlements. Additionally, the climate in many developing nations creates even more danger, as monsoons can cause chemicals from landfills and waste facilities to seep into the groundwater more quickly. Kitt, *supra* note 21, at 491; Abrams, *supra* note 31, at 808.

104. Basel Protocol, *supra* note 4, at art. 15(2).

105. *Hazardous Waste: Agreement on Liability Protocol Reached at Basel Conference of Parties*, INT'L ENV'T DAILY, Dec. 13, 1999, at D2 (developing countries lobbied for stronger wording that would make financing obligatory); *Hazardous Waste: Negotiators Hit a Snag on Protocol on Spill Liability, Schedule Final Meeting*, INT'L ENV'T DAILY, Feb. 9, 1999, at D4 (industrialized nations argue that they should not have to commit to an international fund since they are already prohibited from shipping hazardous wastes to developing countries).

106. Basel Protocol, *supra* note 4, art. 3(7)(a) ("The Protocol shall not apply to damage due to an incident occurring during a transboundary movement of

countries argue that the Protocol exemption is vague and allows the majority of hazardous waste transports to go unregulated. They claim that most of these OECD wastes eventually make their way to the developing world, where only the importing country is left responsible for the damages.<sup>107</sup> Industrialized countries argue, however, that OECD nations do not need the Protocol because the OECD already imposes adequate liability.<sup>108</sup> These criticisms and lack of agreement make widespread ratification of the Protocol less likely.

### III

#### THE UNITED STATES' EFFORTS TO RATIFY THE BASEL CONVENTION

##### A. Ratification Procedure

Implementation of the Basel Convention requires more than a simple presidential signature. The Convention agreement is a non-self-executing treaty that becomes binding only upon ratification. Thus, for the United States to become a Party, the Senate must approve participation in the Basel Convention, and the entire Congress must incorporate the international regulations into U.S. law.<sup>109</sup> Ratifying the new Protocol similarly requires separate Senate approval and Congressional implementation.

Incorporating the Convention's regulations is particularly problematic since the Resource Conservation and Recovery Act (RCRA),<sup>110</sup> which currently regulates all domestic hazardous waste creation and disposal in the United States, is silent on the issue of international hazardous waste.<sup>111</sup> To implement the

---

hazardous wastes . . . pursuant to a bilateral, multilateral or regional agreement or arrangement").

107. Jerrold A. Long, *Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wastes and Their Disposal*, 1999 COLO. J. INT'L ENVTL. L. & POL'Y 253, 259 (1999); Gudofsky, *supra* note 32, at 237 (ninety-five percent of trade is OECD waste).

108. *Hazardous Waste: Agreement on Liability Protocol Reached at Basel Conference of Parties*, INT'L ENV'T DAILY, Dec. 13, 1999, at D2.

109. Mark Bradford, *The United States, China & The Basel Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal*, 8 FORDHAM ENVTL. L.J. 305, 325-28 (1997).

110. 42 U.S.C. §§ 6901-6991 (2000).

111. RCRA has no extraterritorial effect, so all enforcement under the statute must take place before the wastes leave the United States. RCRA also defines hazardous wastes less expansively than the Basel Convention (it does not include household wastes, for example) and lacks requirements that the importing state be able to properly manage the wastes. See Kenneth D. Hirschi, *Possibilities for a Unified International Convention on the Transboundary Shipments of Hazardous Wastes*, 10

Basel Convention regulations, Congress must therefore amend RCRA or enact new hazardous waste statutes controlling waste exports and imports.

Implementing the Basel Convention would also require Congress to give EPA far more authority than RCRA currently allows.<sup>112</sup> Specifically, Congress would have to grant three powers that the agency currently lacks. EPA would first have to be empowered to stop a waste export if it knows the waste will not be handled in an environmentally sound manner. Second, EPA would have to have the ability to re-import wastes that were illegally exported. Finally, Congress would have to give EPA authority over solid wastes not currently classified as hazardous under RCRA, hazardous waste exports, and imports<sup>113</sup>—three areas it does not currently control under RCRA.<sup>114</sup>

### B. Efforts to Implement the Convention, 1990-1992

Despite the difficulties accompanying full implementation of the agreement, President George Bush signed the Basel Convention in 1990, and his administration pushed for immediate treaty ratification.<sup>115</sup> The Bush administration argued

---

GEO. INT'L ENVTL. L. REV. 169, 181-83 (1997); Doyle, *supra* note 29, at 147 (noting that the 1984 Hazardous and Solid Waste Amendments attempt to address U.S. exports but do not go as far as the Basel Convention).

112. See *Hazardous Waste: Administration Commits to Begin Process of Implementing Basel Early Next Congress*, INT'L ENV'T DAILY, Aug. 27, 1998, at D2. RCRA currently authorizes EPA to develop criteria for identifying hazardous wastes, impose standards upon domestic generators, transporters, and disposers, and solicit waste export documentation such as notification and consent papers. See Kate Sinding, *The Transboundary Movement of Waste: A Critical Comparison of U.S. Interstate Policy and the Emerging International Regime*, 5 N.Y.U. ENVTL. L.J. 796, 819 (1996). Unfortunately, as one federal government official has complained, even baseline data is so lacking under RCRA that EPA "does not know whether it is controlling 90 percent of the existing waste or 10 percent." Obsler, *supra* note 8, at 78.

113. Many U.S. industry groups claim that any attempt to delegate control over hazardous wastes to the EPA would give the agency arbitrary power over U.S. trade. The most recent draft legislation gives EPA "a lot of discretion. They can refuse a shipment for any reason" and there would be no judicial review of such EPA decisions. *Hazardous Waste: EPA Faulted for Grabbing Too Much Power Under Draft Basel Convention Legislation*, INT'L ENV'T DAILY, Apr. 5, 1999, at D4.

114. Although the U.S. government intends for RCRA to protect residents from hazardous waste calamities, the federal government has no authority to reject an international waste import unless it violates a U.S. law. In fact, existing U.S. environmental waste laws provide such insufficient protection that, in the past, the United States has been forced to turn to the law of the exporting country to protect U.S. residents from hazardous waste imports. See *Hazardous Waste: Taiwan Waste Shipment Controversy Raises Questions about Import Policies*, INT'L ENV'T DAILY, Aug. 22, 2000, at D5.

115. Bradford, *supra* note 109, at 327.

that remaining a non-Party would both damage many of the U.S.' existing export arrangements<sup>116</sup> as well as prevent the U.S. from participating fully in subsequent Basel Convention negotiations.

Despite the President's support, Congress failed to adopt any of three 1991 bills implementing the Basel Convention. The Waste Export and Import Prohibition Act (WEIPA) sought a total ban on all waste exports from the United States and on all waste imports from abroad.<sup>117</sup> Opponents in Congress rejected the legislation as unrealistic, reactionary, and paternalistic; developing countries, they argued, can decide whether it is in their own best interests to import wastes.<sup>118</sup> The Waste Export Control Act (WECA) proposed amending RCRA to expand the U.S. definition of hazardous wastes and require importing countries to have waste management systems "no less strict" than U.S. standards.<sup>119</sup> Congressional opponents rejected this bill as well, claiming that the "no less strict than" standard again imposed U.S. regulations paternalistically and extraterritorially.<sup>120</sup> Finally, the Hazardous and Additional Waste Export and Import Act (HWEI) would have also expanded the definition of hazardous wastes and required, like the Basel Convention, that importing countries handle wastes in an environmentally sound manner.<sup>121</sup> Opponents criticized and rejected both the Basel Convention and the proposed legislation for insufficiently defining "environmentally sound," thereby creating a potential loophole for bilateral agreements.<sup>122</sup>

### C. *Efforts to Implement the Convention, 1992-Present*

After taking office in 1992, the Clinton Administration continued the record of presidential support for the Basel Convention. Although the Clinton Administration opposed some

---

116. As a non-Party, the United States may not conduct hazardous waste trades with Basel Convention Parties unless it convinces Parties to form bilateral agreements under Article 11 of the Convention. Since the United States is now a member of NAFTA, a Basel-exempted multilateral agreement, the United States' non-party status does not affect its waste trade with Canada and Mexico.

117. H.R. 2580, 102d Cong. (1991) (sponsored by Representative Towns (D-NY)). This bill was also supported by environmentalists. See Doyle, *supra* note 29, at 149.

118. Walsh, *supra* note 9 at 129.

119. H.R. 3736, 101st Cong. (1989) (sponsored by Representative Synar (D-OK)). See Obstler, *supra* note 8, at 85.

120. Walsh, *supra* note 9, at 132.

121. H.R. 2398, 102d Cong. (1991) (introduced by the Bush Administration). See Walsh, *supra* note 9, at 132.

122. Doyle, *supra* note 29, at 153.

of the documentation and waste classification methods set forth in the Basel Convention,<sup>123</sup> the administration nevertheless favored ratification to deter U.S. companies from exporting hazardous wastes overseas, because these actions adversely affect other countries.<sup>124</sup>

Following the Clinton Administration's lead, Congress in 1992 again tried to implement the Basel Convention into U.S. law, this time as part of a RCRA reauthorization bill. Congress specifically proposed amending RCRA to ban all exports of hazardous wastes, unless the United States had entered into a bilateral agreement with the importing country, and unless that country would handle the wastes in an "environmentally sound manner."<sup>125</sup> In 1992, Congress also tried to re-introduce the WEIPA with minor changes. This bill called for a selective ban on certain wastes and increased EPA's authority to retrieve illegally exported wastes.<sup>126</sup> Congressional opponents rejected both proposals as attempts to restrict free trade between nations.<sup>127</sup> In 1994, the administration countered with new principles outlining legislation to implement the Basel Convention,<sup>128</sup> and the Waste Export Act was introduced.<sup>129</sup>

After the Convention endorsed the Ban Amendment in 1995, however, the U.S. Department of Commerce withdrew its support and Congress halted any further discussion of implementation.<sup>130</sup> Although some U.S. officials have proposed adopting the Basel Convention without signing on to the Ban

---

123. *Hazmat Transport: Disputes Over Documentation, Classification Expected at U.N. Meeting, U.S. Officials Say*, INT'L ENV'T DAILY, June 28, 1999, at D3. The Clinton Administration specifically complained that the Convention is too broad and that some wastes covered by the agreement are not subject to U.S. hazardous waste regulations. The Department of Transportation has stated that "some wastes" that U.S. companies are currently permitted to transport under RCRA as recyclable would be restricted under the Basel Convention. *Id.*

124. *Ban Sought on Toxic Exports*, AM. METAL MARKET, Mar. 8, 1994, at 8, available at 1994 WL 2893265.

125. Doyle, *supra* note 29, at 155.

126. H.R. 3706, 103d Cong. (1992) (sponsored by Representative Towns (D-NY)).

127. Doyle, *supra* note 29, at 158.

128. *Principles For Basel Convention Implementing Legislation*, Extension of Remarks, Proceedings, and Debates of the 103d Congress, at 1994 WL 69847, Mar. 8, 1994.

129. H.R. 3965, 103d Cong. (1994) (introduced by Representatives Al Swift (D-WA) and Mike Synar (D-OK)); Valin, *supra* note 17, at 286-87.

130. Bradford, *supra* note 109, at 328. Industry groups vehemently oppose waste trade restrictions on shipments intended for recycling and recovery. Not only does the U.S. economy profit from trade in recyclables and recoverables to foreign countries, but officials claim that developing nations rely on this access to essential raw materials. Doyle, *supra* note 29, at 155.

Amendment by making a reservation excluding the United States from the Ban's legal effect, other government officials, environmentalists, and developing nations are wary that this reservation could undermine the objectives of the Convention.<sup>131</sup>

Subsequent events in 1998 and 1999 have further undermined support for U.S. ratification. While some U.S. officials have praised the Parties' 1998 adoption of a new waste-classification system that resembles the OECD system to which the United States already adheres,<sup>132</sup> EPA has identified several inconsistencies between the OECD system and the 1998 classification system, hindering the push for U.S. ratification.<sup>133</sup> In addition, passage of the 1999 Protocol further weakened the Clinton Administration's support for the Basel Convention. The United States is generally "skeptical" about treaties that assign liability, and it has negotiated to keep similar liability requirements out of other multilateral agreements.<sup>134</sup> The administration specifically pushed for a clarification of the bilateral agreement exemption in Article 3 of the Protocol and the elimination of minimum penalties for recyclable waste transportation.<sup>135</sup> Absent changes to these provisions, "it would be a very serious question whether [the United States] would ratify."<sup>136</sup> This governmental waffling has led some critics to claim that "'there's no push from the White House' to implement the terms of the Basel Convention."<sup>137</sup>

---

131. More controversially, ratification of the Basel Convention without the Ban Amendment could be viewed as an endorsement of the practice of dumping wastes in economically impoverished developing nations. Telephone interview with Jim Puckett, *supra* note 66.

132. *Hazardous Waste: U.S. Chamber Reconsidering Opposition to Basel Pact in Wake of Recent Changes*, INT'L ENV'T DAILY, Mar. 10, 1998, at D3 (hailing the classification system as "a milestone . . . 'a big advance' in international policy on hazardous waste trade").

133. *Hazardous Waste: EPA Seeks Comment on Plan to Harmonize OECD Waste System with Basel Convention*, INT'L ENV'T DAILY, Aug. 18, 1999, at D2.

134. *Hazardous Waste: Basel Liability Protocol Would Not Help Countries Expand Capacity, Attorney Says*, INT'L ENV'T DAILY, Oct. 21, 1996, at D7.

135. The Protocol sets minimum financial limits for compensation in strict liability situations. See *supra* Part II. The U.S. State Department believes these minimums will impact trade in recyclable materials. Industrialized nations also want to clarify the Protocol to exempt OECD waste activities. *Hazardous Waste: Agreement on Liability Protocol Reached at Basel Conference of Parties*, INT'L ENV'T DAILY, Dec. 13, 1999, at D2.

136. Long, *supra* note 107, at 260 (citing Daniel Pruzin, *Hazardous Waste: Agreement on Liability Protocol Reached at Basel Conference of Parties*, DAILY ENV'T REP., Dec. 13, 1999, at AA-1).

137. Doyle, *supra* note 29, at 159 (quoting *Hazardous Waste: Administration Bill on Basel Convention Said Delayed by Lack of White House Moves*, DAILY REP. FOR EXECs, No. 205, Oct. 26, 1993, at A2).

Since 1994, Congress has not voted on any other legislative proposals to incorporate the Basel Convention or the Protocol.<sup>138</sup> Furthermore, the strongest Congressional proponent for U.S. ratification recently retired, adding yet another obstacle to any future attempts to implement the Convention.<sup>139</sup> EPA has issued draft administrative legislation as recently as April 2000, but issues regarding the Department of Defense's inability to re-import hazardous wastes from non-Party countries have blocked government support.<sup>140</sup>

## IV

## OBSTACLES TO RATIFICATION

A. *Industry and Environmental Opposition to the Basel Convention and Protocol*

Environmental and industry group opposition represents the biggest obstacle to U.S. implementation of the Basel Convention. Prior to 1995 and the introduction of the Ban Amendment, environmental NGOs loudly criticized the treaty, claiming it was too weak to protect developing countries,<sup>141</sup> and opposed U.S. ratification. These NGOs argued that the bilateral agreement exemption provision in Article 11 legalized waste-dumping in the developing world,<sup>142</sup> and they advocated a total ban on exports to developing nations.<sup>143</sup> After the 1995 Ban Amendment, however, many environmental groups switched their positions, pushed to strengthen the treaty, and lobbied the United States to ratify and implement the Convention with the Ban Amendment.<sup>144</sup>

---

138. Search of the Congressional Record, Westlaw (executed Nov. 30, 2000). See also Telephone interview with Jim Puckett, *supra* note 66; Telephone interview with Julie Gourley, Foreign Affairs Officer at the State Dep't, former Environmental Protection Specialist at the EPA (Office of Solid Wastes), Feb. 28, 2001; Telephone interview with Paul Hagen, Attorney at Beveridge & Diamond, Feb. 27, 2001.

139. Congressman Thomas Bliley (R-VA) was a leading proponent of ratification. See Telephone interview with Julie Gourley, *supra* note 138.

140. *Id.* The wastes at issue are from U.S. military bases located in non-Party countries. If the United States became a Basel Party, it would be prohibited from importing the wastes under the ban on trade with non-Parties. Any military waste imports would have to be conducted under separate bilateral agreements, requiring a large expenditure of time and resources.

141. *Special Report*, *supra* note 36.

142. *Id.*

143. *Id.*

144. Basel Action Network, Briefing Paper: Why the U.S. Must Ratify the Entire Basel Convention, Dec. 1998, at <http://www.ban.org/Library/briefp2.pdf> (last visited Apr. 23, 2001).



The development of the 1999 Protocol has caused environmental NGOs to change position yet again, however, and they now oppose U.S. ratification of the weak Protocol. As discussed above, these NGOs argue that the Convention now actually provides incentives for generators to pollute.<sup>145</sup> They particularly object to the Convention's continued failure to create an international emergency fund for developing countries, and the Protocol's failure to assign liability to the generators and for the "after-care" environmental problems caused by long-term waste treatment and disposal.<sup>146</sup> The Protocol "had potential but is now a joke. It has a short-term scope that ends at the shore."<sup>147</sup>

Although the environmental community has hailed the Parties' apparent resolution to reduce waste production and transportation during the next decade<sup>148</sup> as "a very positive development" and the "only solution to the hazardous waste crisis,"<sup>149</sup> many NGOs remain strongly opposed to the U.S. government's desire for partial ratification—ratification of the Basel Convention without the 1995 Ban Amendment.<sup>150</sup>

Industry groups have responded to the recent developments in the Convention in the opposite manner.<sup>151</sup> Although industry officials initially supported U.S. ratification of the Basel Convention because they wanted the United States to have a meaningful role in the decisionmaking process, they strongly objected to any U.S. involvement legitimizing the 1995 Ban

---

145. Basel Action Network, *Saving the Basel Liability Protocol*, Aug. 30, 1999, at <http://www.ban.org/subsidiary/liability10.html> (last visited Apr. 17, 2001).

146. *Id.*

147. Telephone interview with Jim Puckett, *supra* note 66. Mr. Puckett stressed the lack of environmental presence during the final moments of the Protocol discussions as one reason for the weak provisions. Greenpeace missed two meetings due to lack of resources, and the Parties dropped the originally strong language regarding the international fund. Additionally, Mr. Puckett mentioned that the entire Protocol process was conducted in English and without interpreters, even though the Protocol debates were highly technical and legal.

148. Basel Basics, at <http://www.basel.int/pub/basics.html#min> (last visited Apr. 23, 2001).

149. *Hazardous Waste: Basel Parties Call for Minimizing Waste, Improving Capacity-Building for Handling*, INT'L ENV'T DAILY, Dec. 13, 1999, at D3.

150. Ratification without the Ban Amendment would allow the United States to benefit from trading wastes with Convention Parties, but continue to ship hazardous wastes to developing countries. In effect, partial ratification would undermine the efficacy of both the Amendment and the Basel Convention.

151. Industry groups with a stake in U.S. participation in the Basel Convention include the Scrap Metal Industry, the Chemical Manufacturers Association, and the Ship Scrapping Industry.

Amendment.<sup>152</sup> Industry groups resolutely opposed any prohibition on the export of hazardous wastes to developing countries because they believed that the Convention should permit shipments for recycling and recovery management.<sup>153</sup>

While the 1998 proposal of the OECD-style waste classification system has ameliorated some industry opposition to U.S. ratification, industry groups continue to demand clearer guidelines regarding bilateral agreements, narrower waste definitions and clarification of the legal implications of the 1999 liability protocol.<sup>154</sup>

Ironically, it thus appears that neither environmentalists nor industry groups currently support U.S. ratification and implementation of the Basel Convention and Protocol. As a result, these key actors are spending few resources to lobby the government for the necessary implementing legislation.<sup>155</sup>

### B. Lack of Incentives

Absent a push from either environmental or industrial NGOs, the United States currently has very little incentive to ratify the Basel Convention.

First, the argument (initially made by the Bush Administration in 1990) that ratification is necessary to assure the United States a meaningful role in shaping the international regime has largely evaporated, since many of the important decisions, including the Ban Amendment, classification and definition system, and liability regime have already taken place.

Second, the United States has little incentive to ratify the Convention since it claims that most of its waste trading is covered under the Article 11 exemption for bilateral and multilateral agreements. Ninety-seven percent of U.S. hazardous waste exports already go to Mexico and Canada under separate bilateral agreements,<sup>156</sup> and the OECD agreement regulates the

---

152. See *Hazardous Waste: U.S. Chamber Reconsidering Opposition to Basel Pact in Wake of Recent Changes*, INT'L ENV'T DAILY, Mar. 10, 1998, at D3.

153. Environmental groups argue that these activities will ultimately lead to sham recycling, in which industrialized countries send toxic wastes to the developing world under the guise of recyclable wastes. Telephone interview with Jim Puckett, *supra* note 66.

154. *Hazardous Waste: U.S. Chamber Reconsidering Opposition to Basel Pact in Wake of Recent Changes*, INT'L ENV'T DAILY, Mar. 10, 1998, at D3.

155. Telephone interview with Julie Gourley, *supra* note 138.

156. Walsh, *supra* note 9, at 136. The Philippines and Japan have also recently approached the United States about forming bilateral trading agreements. See *Hazardous Waste: Philippine Group Urges Ratification of Treaty on Waste Traffic with U.S.*, INT'L ENV'T DAILY, June 15, 2000, at D6; *Hazardous Waste: U.S. Embassy Says*

majority of the United States' remaining international waste trade. As long as the United States conducts all of its trade under its existing bilateral and multilateral agreements, it has little reason to expose itself to additional liability and regulations under the Basel Convention.

Third, the U.S. has little incentive to ratify because one of the largest purported benefits of the Convention—an additional layer of protection from illegal hazardous waste crimes—has not materialized in practice. UNEP has in fact admitted that “implementation of new international environmental agreements has provided new opportunities for evasion” and that hazardous wastes are now “being illegally disposed or exported, often by organized crime.”<sup>157</sup> The lucrative trade “makes a mockery” of the Basel Convention.<sup>158</sup> Moreover, recent blatant violations of the Convention show that the regulations have failed to control even transparent, nation-to-nation hazardous waste trading.<sup>159</sup> Since the United States already uses a prior informed consent mechanism to regulate hazardous wastes under RCRA and imposes its own joint and several liability regime, it has no reason to ratify a weaker and more narrow international law requiring domestic legislation on identical environmental issues.<sup>160</sup>

---

*Cargo of PCB Waste Soon to be Sent to Wake Island in Pacific*, INT'L ENV'T DAILY, May 9, 2000, at D2.

157. Austria, Germany, and Italy have all reported a rise in illegal waste trading. See *Enforcement: Experts Urge UNEP to Take Lead in Efforts to Combat Environmental Crimes*, INT'L ENV'T DAILY, Aug. 19, 1999, at D7.

158. *Anger over Import of Hazardous Waste*, Panafrican News Agency Daily Newswire, Sept. 18, 2000, available at 2000 WL 26654711.

159. Australia and South Africa allegedly violated the Basel Convention's 1995 Ban Amendment and the Bamako Agreement in 2000. Australia (an OECD nation) exported sixty tons of hazardous wastes to South Africa (a developing country). While Australia had not ratified the Ban Amendment and South Africa had not signed the Bamako Agreement, both were Parties to the Basel Convention and were therefore obligated to comply with the agreement. *Id.* Additionally, Switzerland and Japan allegedly violated the Basel Convention by dumping ninety-two trucks of hazardous, mislabeled medical and industrial wastes in the Philippines in 1999. The Philippines initiated criminal prosecution against the countries, but Japan recently agreed to prevent the recurrences of such events by forming a bilateral agreement under the Basel Convention. *Philippines: Government Alleged Swiss, Japanese Plan to Dump Hazardous Waste in Manila*, INT'L ENV'T DAILY, Dec. 30, 1999, at D3.

160. Telephone interview with Paul Hagen, *supra* note 138. The EPA's latest draft implementation proposal also puts forward a “stronger ban” than the 1995 Ban Amendment. As one observer has noted:

The plan imposes a strict control on U.S. exports that would set the bar so high that developing countries could not receive the waste unless they could manage it in an environmentally sound manner, in effect a de facto ban. It's

Fourth, the Basel Convention's second main goal—the disposal of wastes as close as possible to the source of generation—runs counter to current political realities and economic incentives in the United States. First, Congress holds the power to regulate interstate hazardous waste movements under the Commerce Clause, leaving the states with little ability to control the international or interstate importation of wastes.<sup>161</sup> Until the U.S. system resolves the issue of individual state control of hazardous wastes, there is little chance of implementing the Convention's close-to-home objective. In addition, in response to NIMBY sentiments and public health and safety concerns, state legislatures are increasingly exercising their general police powers to increase disposal fees and add permit requirements to restrict imports of hazardous wastes into local facilities.<sup>162</sup> These state restrictions, coupled with CERCLA and RCRA regulations, provide strong incentives for U.S. generators to export their hazardous wastes to other countries.

Finally, and perhaps most importantly, there is little or no political will among the U.S. public to implement the Basel Convention.<sup>163</sup> Americans no longer consider hazardous wastes transportation crucially important.<sup>164</sup> Newer topics, including biological diversity, global warming, and ozone depletion, are occupying local media headlines more persistently than international waste transport.

### C. Disincentives

The United States not only lacks incentives to ratify the Basel Convention and Protocol, but actually has disincentives to ratify because the Convention's export restrictions conflict with existing U.S. political and economic interests.

---

up to the Bush administration, now. The problem is that the environmentalists don't trust the U.S. government or EPA.

Telephone interview with Julie Gourley, *supra* note 138.

161. Kate Sinding, *supra* note 112, at 813; Theodore Waugh, *Where Do We Go From Here: Legal Controls and Future Strategies for Addressing the Transportation of Hazardous Wastes Across International Borders*, 11 *FORDHAM ENVTL. L.J.* 477, 498 (2000).

162. Waugh, *supra* note 161, at 498.

163. *Hazardous Waste: Bliley 'Disappointed' as Administration Fails to Respond to Inquiry on Basel Convention*, *INT'L ENV'T DAILY*, Feb. 7, 2000, at D2.

164. *Hazardous Waste: Attempts to Implement Basel Treaty Delayed by Administration Conflicts*, *INT'L ENV'T DAILY*, June 15, 1998, at D6.

First, the Basel Convention regulations could interfere with U.S. free trade policy, embodied in the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA). Although both GATT and NAFTA provide that international environmental obligations should prevail over free trade guarantees in cases of conflict, the Basel Convention could be illegal under GATT<sup>165</sup> because it restricts the movement of goods in the form of recyclable or recoverable wastes between Party and non-Party nations.<sup>166</sup> In addition, many critics find it hard to reconcile the 1995 Ban Amendment with U.S. free trade policy.<sup>167</sup> The U.S. maintains that "legitimate trade in recyclable materials must be . . . considered" in the interests of free trade.<sup>168</sup> Recent developments between the United States and Canada have also shown that NAFTA and the Basel Convention may be more than just irreconcilable—NAFTA may actually undermine the Convention.<sup>169</sup>

Second, the United States has an economic disincentive to ratify the Basel Convention because current hazardous waste regulation creates a very favorable trade surplus through trade in recyclable wastes. In 1992, for example, the United States exported \$6 billion in recyclable wastes and imported \$1.5

---

165. GATT promotes the nondiscrimination of trade through Article I's "most favored nation" principle, Article III's "national treatment" guarantee, and Article XI's prohibition on quantitative restrictions.

166. These GATT violations may qualify as exceptions under Article XX, which states that violations can be justified if they are "necessary" to protect human, animal, and plant life and health. The Basel trade restrictions may be viewed as simply a mechanism to pressure countries to ratify the Convention, rather than as "necessary" to protect life and health, however. For more information on GATT and potential interference with environmental protection, see Mike Meier, *GATT, WTO, and the Environment: To What Extent do GATT/WTO Rules Permit Member Nations to Protect the Environment When Doing So Adversely Affects Trade?*, 8 *COLO. J. INT'L ENVTL. L. & POLY* 241 (1997).

167. Since the Ban Amendment has yet to enter into force and actions under the Basel Convention have yet to reach the judicial system, it is too soon to tell whether the Convention and existing free trade treaties can be reconciled. See *id.* at 281-82.

168. Hirschi, *supra* note 111, at 189.

169. *NAFTA Flouts Global Toxic Waste Treaty*, Nov. 15, 2000, at [http://www.ban.org/ban\\_news/nafta.html](http://www.ban.org/ban_news/nafta.html) (last visited Apr. 22, 2001). Canada, a Party to the Basel Convention, recently refused to export PCB waste to U.S. waste management companies under Article 4.9 of the Basel Convention. The court held, under NAFTA, that Canada was obligated to export the toxic waste shipment and awarded a judgement of \$50 million to the United States. This NAFTA decision undermines the Basel Convention by demonstrating that free-trade interests trump the Convention, even though NAFTA provides and proponents insist that environmental interests should prevail. Many environmentalists claim that environmental interests were mocked in this first power struggle between international treaties.

billion.<sup>170</sup> The recent increase in recycling of U.S. military ships (or "shipbreaking") exemplifies the clash between U.S. economic interests and the Basel Convention.<sup>171</sup> While exporting ships laden with asbestos, lead, and PCBs to India may be a potential violation of the Convention, domestic scrapping may cause the industry and government to lose money.<sup>172</sup> Industry groups oppose any restriction on their ability to export materials to their own economic advantage, and the federal government is loathe to ratify any agreements that reduce U.S. profits.

Finally, the 1999 Protocol increases the economic disincentives for U.S. ratification. Though the Protocol has yet to be debated in Congress, several officials have already highlighted potential U.S. complaints. One argument is that the imposition of minimum penalties under the Protocol will effectively hinder trade in non-dangerous recyclable wastes and other profitable U.S. industries.<sup>173</sup> There is also a tangible fear that because the Protocol lacks specific limits on liability, it may be used to gouge deep pockets. This fear is manifested in the U.S. concern that the Protocol lacks specific limits on liability, and that developing countries may interpret and implement the vague provisions differently from the United States, leading to lengthened increased liability.<sup>174</sup>

#### CONCLUSION

The Basel Secretariat confirms that it has been notified of several instances of illegal trafficking since the Convention's 1992 entry into force.<sup>175</sup> Environmental NGOs such as

---

170. See Hirschi, *supra* note 111, at 191.

171. Some observers have opposed U.S. ratification of the Basel Convention because scrap metal meant for recycling could be considered a hazardous waste under the Basel regulations. *Asbestos & Lead Abatement Report: Basel Convention Approves Final Pact, But Some Question Fate of Agreement*, Dec. 1, 1999, at 1999 WL 10391434.

172. *Hazardous Waste: Recycling Industry Urges Military not to Export Ships for Scrapping*, NAT'L ENV'T DAILY, Mar. 6, 1998, at D2. Scrap metal represents a major resource in many developing countries, such as India, and ships are usually sold to the "highest bidder," with little consideration of worker safety and environmental regulations regarding asbestos, PCBs, and other toxic substances contained by the obsolete ships.

173. *Hazardous Waste: Agreement on Liability Protocol Reached at Basel Conference of Parties*, INT'L ENV'T DAILY, Dec. 13, 1999, at D2 (It is "unreasonable to have the . . . levels of liability floors stipulated in the agreement" because there may be a low level of risk associated with the activity, yet the trade would be "unreasonably choked off.").

174. Telephone interview with Julie Gourley, *supra* note 138.

175. E-mail from Pavel Suian, *supra* note 61 ("We cannot name them or the countries involved.").

Greenpeace and BAN have also investigated and publicized a staggering number of environmentally dangerous waste activities on the part of both industrialized and developing countries, including the United States.<sup>176</sup>

The United States nevertheless seems unmotivated to ratify the Basel Convention, especially with the 1995 Ban Amendment and the 1999 Liability Protocol.<sup>177</sup> Industrial and environmental groups are either indifferent or opposed to U.S. ratification of the current agreement, and the lack of political will among the American public reduces the spotlight on the international hazardous waste trade.<sup>178</sup> Additionally, implementation of the regulations into existing RCRA legislation would be extremely cumbersome given conflicting administrative and Congressional positions.<sup>179</sup> In fact, existing U.S. environmental laws currently provide incentives to export wastes.

Regardless of whose backyards are involved, however, hazardous waste dumping remains an international problem. The United States imports several billion dollars worth of food annually, and evidence indicates that many of these agricultural imports contain high levels of toxicity.<sup>180</sup> Hazardous waste sludge illegally dumped in a developing country leaches into the soil and contaminates the groundwater, which in turn pollutes the very crops that are transported across international borders for consumption. The relationship between U.S. waste exports and the health of U.S. citizens thus creates a "circle of poison."<sup>181</sup> In today's global market, environmental degradation is no longer a local issue that can be dealt with by a few neighboring countries. To preserve and restore the planet's natural resources and health, international attention must be focused on global

---

176. See Greenpeace and BAN websites. Greenpeace Toxics Campaign, at <http://www.greenpeace.org/~toxics> (last visited Apr. 15, 2001); Basel Action Network (BAN), at <http://www.ban.org> (last visited Apr. 15, 2001).

177. See General Public Policy Issues: New Protocol Sets Liability & Compensation Scheme in Europe for Transboundary Shipment & Disposal of Hazardous Waste, Mar. 9, 2000, at [http://www.emi.org/public\\_policy/general\\_eu\\_waste\\_protocol.htm](http://www.emi.org/public_policy/general_eu_waste_protocol.htm) (last visited Apr. 22, 2001).

178. Public awareness may require an international hazardous waste disaster, a Hollywood dramatization of the international situation, or a charismatic champion.

179. The new Bush Administration may introduce Basel implementation legislation solely for the United States to regain its political clout in the international treaty making arena. If it ratifies the Basel Convention, however, it will most likely do so without the 1995 Ban and the 1999 Protocol. Telephone interview with Paul Hagen, *supra* note 138.

180. See *Hearings Before the Subcomm. on Env't, Energy and Natural Resources*, 100th Cong. 2 (1988).

181. *Id.*; see also Obstler, *supra* note 8, at 82.

solutions; this requires the United States to be an environmental leader, not a polluting bystander.<sup>182</sup>

---

182. The Basel Convention ratification ordeal, coupled with continued U.S. failure to ratify the Biodiversity Convention, Kyoto Protocol, and various human rights treaties, has hurt the United States' international reputation in terms of foreign relations and environmental solutions. See *Hazardous Waste: Bliley 'Disappointed' as Administration Fails to Respond to Inquiry on Basel Convention*, INT'L ENV'T DAILY, Feb. 7, 2000, at D2.



