The Global Trade in Hazardous Wastes: Domestic and International Attempts to Cope with a Growing Crisis in Waste Management

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Concern over the issue of hazardous waste\(^1\) export appeared on the international regulatory agenda\(^2\) just ten years ago\(^3\) as a consequence of the inter-

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1. The term "hazardous waste" lacks a single globally accepted definition. See infra notes 39-43 and accompanying text. This Comment adopts the definition of hazardous waste used by the United States Environmental Protection Agency (EPA). Prior to classifying waste as "hazardous," the EPA first determines if the substance at issue is a "solid waste." "Solid waste" is defined in the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1988), as:

any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges, ... or source, special nuclear, or byproduct material.

Id. § 6903(27). RCRA defines "hazardous waste" as:

A solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

Id. § 6903(5). Waste is characterized as "hazardous" if expressly listed as such by the EPA, see id. § 6921; 40 C.F.R. § 261.30-.33 (1992), or if the waste contains any of four qualities: ignitability, corrosivity, reactivity, or toxicity. See id. § 6921; 40 C.F.R. § 261.20-24.

national crisis in waste management. The typical export scenario involves hazardous waste shipments exiting an industrialized country in which the waste is generated and ending up in a foreign country for treatment, including recycling, incineration or disposal.

Waste management is a crucial issue for nations facing increases in waste production as a result of population and industrial growth. A subset of general waste management is the disposal of hazardous wastes. Hazardous waste must be disposed of by precise means due to its potential for harming human health or the environment if improperly handled. The dangers as-


7. “Hazardous waste generation” is defined as “the act or process of producing hazardous waste.” 42 U.S.C. § 6903(6).

8. “Solid waste management” is defined as “the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste.” Id. at § 6903(28).

9. See id. § 6901(a)(2). The economic and population growth in the United States, as well as improvements in the standard of living, has compelled increased industrial, commercial and agricultural production in order to meet the needs of the American people. Id. This increased production has resulted in a “rising tide of scrap, discarded, and waste materials.” Id.

10. See Jonathan T. Cain, Routes and Roadblocks: State Controls on Hazardous Waste Imports, 23 NAT. RESOURCES J. 767, 770-71 (1983) (reporting a House Oversight Subcommittee finding that contamination of groundwater with toxic wastes has led to increased occurrences of miscarriage, birth defects, respiratory and urinary tract disease, cancer and disorders
associated with such waste increase when it is transported from one site to another. For example, there is a risk that during transportation, a spill or accident will cause discharge of the hazardous cargo directly into the environment. Furthermore, there exists the potential for illegal dumping of the waste between the time it leaves the generating facility and when it reaches the designated disposal facility. Hazardous waste illegally dumped into bodies of water, along roads, or into sewer systems could contaminate water supplies and damage ecosystems. Accidents and illegal disposal practices substantially increase the possibility of human exposure to virulent components of the hazardous waste.

Recent incidents involving waste disposal symbolize the problems associated with the burgeoning international hazardous waste trade. One such incident involved a barge, the Khian Sea, carrying approximately 15,000 tons of incinerator ash from Philadelphia. The voyage of the Khian Sea began in 1986 when the city of Philadelphia could not find space to dispose of this ash. Although city officials attempted unsuccessfully to dispose of the nervous system); see also William Tuohy, 116 Nations Adopt Treaty on Toxic Waste, L.A. TIMES, Mar. 23, 1989, at 6 (stating that all the delegates to a recent international conference on hazardous waste agreed that hazardous wastes improperly disposed of may result in birth defects, miscarriages, disease and environmental contamination).

11. See Mary E. Kelly, Comment, International Regulation of Transfrontier Hazardous Waste Shipments: A New EEC Environmental Directive, 21 Tex. Int'l L.J. 85, 86 n.3 (1985) (stating that shipments can occur by "road, rail, inland waterways, or ocean-going vessels").

12. See SAMUEL S. EPSTEIN ET AL., HAZARDOUS WASTE IN AMERICA 32 (1982) (explaining that evaporation, spillage or accidents during transport may result in concentrated exposure to hazardous waste).

13. Id. at 133-78.

14. See id. at 26-31; see also Cain, supra note 10, at 770-71 (reporting that wastes leaking from surface impoundments and landfills have contaminated water in every state with hazardous chemicals); John Langone, A Stinking Mess, TIME, Jan. 2, 1989, at 44 (describing "a poisonous chemical soup, the product of coal mines and metal smelters, [which] roils Polish waters" as a result of indiscriminate dumping of waste).

15. EPSTEIN ET AL., supra note 12, at 32 (noting the risk to the public from accidents); id. at 37 (describing the risk to certain occupational groups from improper waste disposal).


17. The barge left Philadelphia as the Khian Sea. In the course of its journey it was renamed the Felicia and the Pelicano. Philadelphia Ash Gone After 2-Year Odyssey, N.Y. TIMES, Nov. 27, 1988, at 30 [hereinafter 2-Year Odyssey].

18. BLUMBERG & GOTTLIEB, supra note 16, at 4.
the ash in other states, ultimately they were left with no choice but to send the waste abroad.20

The Khian Sea left the United States originally bound for the Bahamas, but upon arrival its cargo was refused by the Bahamian government.21 The barge's crew subsequently attempted to dispose of the ash in several other ports, eventually making its way to Haiti.22 The shipping company initially identified the ash as fertilizer and dumped approximately 3,000 tons of the ash before the Haitian government discovered the true nature of the cargo and halted the dumping.23 The Khian Sea left the Haitian port and returned to the open water.24 Eventually, the barge's cargo disappeared.25 Although the disappearance is under investigation, for many there is only one logical explanation: The ash was dumped into the sea.27

19. Id. When Philadelphia tried to dispose of the waste in Ohio, for example, residents near the disposal site blocked the ash-filled trucks from entering the landfill, and prevented the waste from being dumped. Id.

20. See Gilmore, supra note 4, at 879. Steep costs and the lack of other immediate solutions forced the city to hire a contractor to export its solid waste. Id. Philadelphia's Deputy Streets Commissioner reported that the incident was inevitable because of the dearth of landfills in the United States. Id.


22. The number of ports in which the cargo was refused differs among the sources. See, e.g., 2-Year Odyssey, supra note 17, at 30 (reporting that the ship was turned away by at least eleven countries); Ship With Philadelphia Ash Rejected by Six Countries Disappears Without Trace, 11 Int'l Envtl. Rep. (BNA) 325 (June 8, 1988) [hereinafter Ship With Philadelphia Ash] (stating that during an eighteen month journey six countries refused the cargo).

23. See Julienne I. Adler, Comment, United States' Waste Export Control Program: Burying Our Neighbors in Garbage, 40 Am. U. L. Rev. 885, 886 n.6 (1991). Haitian military authorities initially consented to the ash's deposit on the beach and informed dock employees that the cargo was harmless fertilizer. Id. After Greenpeace notified the political opposition of the true nature of the cargo, however, the ensuing public response prevented most of the ash from being dumped. Id. See GREENPEACE, INTERNATIONAL WASTE TRADE 1 (1989) (stating that "[a] permit was issued for 'engrais pour du sol'—that is, fertilizer"); see also Haiti Returning Ash Dump, supra note 21, at 3.

24. Haiti Returning Ash Dump, supra note 21, at 3 (stating that the vessel made its way "around the Caribbean, along the African coast, across the Mediterranean Sea and through the Indian Ocean").

25. 2-Year Odyssey, supra note 17, at 30 (reporting that "[a] man who identified himself as Capt. Arturo Fuentes told the reporters . . . that the [ship] unloaded the ash in port but refused to say in what country. 'I do not know what they did with the ash,' he said").

26. Gilmore, supra note 4, at 881 n.11.

27. See Ship with Philadelphia Ash, supra note 22, at 325-26 (discussing the Khian Sea's unauthorized departure from the Delaware Bay as raising concerns that the crew intended to illegally dump the ash in the United States or international waters); see also David P. Hackett, An Assessment of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 5 Am. U. J. Int'l L. & Pol'y 291, 296 (1990) (stating that the ash was dumped).
As a result of the *Khian Sea* and similar incidents, pressure for improved regulation of the international shipment of hazardous wastes has been applied to the national and international bodies responsible for such regulation. Recently over one hundred multinational representatives convened at the United Nations Environment Programme Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes to discuss and negotiate regulation of the hazardous waste trade from an international perspective. The end result of this meeting, The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, represents the latest attempt at international cooperation in this field.

The Basel Convention seeks to ensure the environmentally sound transboundary movement and disposal of hazardous wastes. To achieve this objective, the Convention expands the liability of waste exporting nations for the mismanagement of waste beyond their own territory, augments the

28. The odyssey of the *Khian Sea* combined several elements that have characterized other hazardous waste incidents. Lesser known incidents have involved accidents during the transportation process, see Freighter Sinkings Prompt Dutch Look at Hazardous Cargo, Shipping Regulations, 10 Int'l Envtl. Rep. (BNA) 504 (Oct. 14, 1987) (discussing the Junior, and the *Olav*, each which capsized, spilling their toxic cargo into the ocean). In addition, barrels of waste were improperly handled and stored due to false or mismarked labels, see Hackett, supra note 27, at 296, and shipments of wastes were made without proper authorization resulting in damaged international relations and unnecessary expense. Arti K. Vir, *Toxic Trade With Africa*, 23 Env't Sci. & Tech. 23, 25 (1989) (describing an Italian waste broker's failed attempt to dispose of wastes carried on board the *Zanoobia*). The waste was carried to Lebanon, Venezuela, Djibouti and Syria without prior permission from the destination countries. *Id.* After being refused in each port the *Zanoobia* eventually returned to Italy with its cargo. *Id.*


32. *Id.* at 657-59. The Convention defines “[e]nvironmentally sound management” 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 which may result from such wastes.” *Id.* art. 2, para. 8, 28 I.L.M. at 660.
power of transit countries to restrict the use of their territories for the transportation of waste, encourages waste production minimization, and fosters the exchange of waste management information and technology among the Convention's parties. The Basel Convention significantly enhances the regulatory controls over international hazardous waste trading and signifies the augmented desire of the global community to protect human health and the environment. This concern is manifested by the community insisting on, and taking responsibility for, proper and safe waste management.

This Comment examines the extent of the international hazardous waste trade and the issues that arise when attempting to establish guidelines for its control. This Comment focuses on the Basel Convention's efforts to foster international cooperation concerning hazardous waste exporting practices. In particular, this Comment discusses current legislative attempts to bring United States waste trade practices into compliance with the Basel Convention, or alternatively, to ban U.S. exports and imports of hazardous waste entirely. This Comment finds that it is unrealistic to consider a complete prohibition of international shipments of hazardous waste. The environmental problem posed by disposal of hazardous waste is global in nature and for the United States to alienate itself from the international community with respect to this issue would, in the long run, prove detrimental to the world environment and to the U.S. economy. This Comment concludes that the United States should become a party to the Basel Convention and thereby influence the future development of hazardous waste management.

I. DEVELOPMENT OF A TOXIC COMMERCE

A. Overview of the Hazardous Waste Trade

The exact amount of hazardous waste crossing international borders every year is unknown. Two factors are responsible for the incomplete data: illegal traffic in hazardous waste and international disagreement as to what constitutes hazardous waste. Illegal disposal of hazardous waste normally

34. Thirty-Four Countries Sign Convention on Transport, Disposal of Hazardous Wastes, 12 Int'l Envtl. Rep. (BNA) 159, 160-61 (Apr. 12, 1989) [hereinafter Thirty-Four Countries] (reporting that the size of the global hazardous waste trade was hotly debated at the Basel meeting and stating that “not even UNEP has a true figure”).
36. See infra notes 39-43 and accompanying text.
Global Trade in Hazardous Wastes

eludes tracking. It is impossible, therefore, to ascertain the extent to which official statements underestimate the true extent of the trade. Statistics on illegal hazardous waste trading are rare and potentially unreliable. This lack of information frustrates official calculation of the magnitude of the hazardous waste trade.

Discussion of the international trade in hazardous wastes is further hindered by the lack of a commonly agreed upon definition of "hazardous waste." Thus, any regulation of hazardous waste must begin by defining "hazardous" and distinguishing hazardous waste from other wastes. Whether particular waste is considered "hazardous" depends on the specific definition under consideration. The definition applied by the regulatory legislation of one country may differ from the definition used in another country. These differences stem from the varied capabilities that nations

37. See, e.g., Daily Rep. for Executives (BNA) No. 102, at A9 (May 28, 1991) (recounting the statement of a United States Attorney that a recent federal prosecution in which a California man pled guilty to illegally transporting hazardous waste to Mexico was the first conviction for illegal hazardous waste exportation under the Act).

38. See Cain, supra note 10, at 770 (placing the number of hazardous waste sites illegally created and abandoned in the thousands and reporting that an undetermined number of state landfills have also been used for toxic waste disposal); see also F. James Handley, Exports of Waste From the United States to Canada: The How and Why, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,061, 10,174 (1990) (stating that the number of waste exports may be as much as eight times higher than the number of exports reported, not even including smugglers who evade customs). But cf. Di Leva, supra note 2, at 10,078 (expressing the opinion that illegal waste exports may not be as prevalent as believed). An incident in 1976 demonstrated the ease with which hazardous waste could be moved across borders undetected. The incident involved a chemical plant explosion in Seveso, Italy. See Missing Drums of Dioxin Waste from Seveso Found in Barn in Northeastern French Village, 6 Int'l Envtl. Rep. (BNA) 257 (June 8, 1983). In the aftermath of the explosion, dioxin contaminated waste was removed from the plant, shipped by contractors, and subsequently lost. Id. at 258. Seven years later, barrels of the waste were discovered in a barn in San Quenten, France, having avoided detection leaving Italy and arriving in France. Id. (reporting that upon request of his son's friend, the owner of the barn agreed to store the barrels of waste mistakenly believing that they were filled with tar).

39. See Gilmore, supra note 4, at 888 (explaining the impact of this "definitional dilemma" on the regulatory issues surrounding nonhazardous waste).

40. See Mohan A. Prabhu, Toxic Chemicals and Hazardous Wastes: An Overview of National and International Regulatory Programs, 11 Int'l Envtl. Rep. (BNA) 687, 692 (Dec. 14, 1988) (discussing the lack of uniformity among industrialized nations in their definitions of hazardous waste); Gilmore, supra note 4, at 889-92 (comparing the definition of hazardous waste used in RCRA with the definition included in the Draft International Agreement on Control of Transfrontier Movements of Hazardous Wastes drafted by the Organization for Economic Cooperation and Development (OECD)).

41. See Prabhu, supra note 40, at 692. The EC Directive on Toxic and Dangerous Wastes, Council Directive 78/319 EEC of 29 March 1978, for example, called for EC member states to enact regulations concerning 27 "generic" types of waste, yet allowed the states to create their own hazardous waste definitions. See id. Such a system results in the same directive eventually causing regulation of different substances among the member countries. See id. Moreover, Germany, in passing domestic legislation to implement the EC directive, provided a technical definition of hazardous waste to which the German state governments are then per-
have to manage hazardous waste.\textsuperscript{42} A country with few resources or facilities to handle hazardous waste often takes this into account and limits the number of wastes defined as hazardous in its legislation accordingly. This lack of uniformity is a major obstacle to cooperative international regulation of hazardous wastes.\textsuperscript{43} Moreover, the definitional block contributes to the difficulty of compiling statistics on the quantity of hazardous waste produced and the amount that eventually crosses national borders.\textsuperscript{44} The existence of illegal hazardous waste trading and the various definitions of hazardous waste used by different countries result in significant discrepancies among the statistics compiled on hazardous waste generation and disposal.\textsuperscript{45} Nonetheless, these statistics provide a general perspective on the magnitude of the hazardous waste trade.

According to one report, the volume of hazardous waste generated annually increased worldwide from an estimated five million metric tons in 1947 to more than 300 million metric tons in 1988.\textsuperscript{46} Another source, however, estimated that the United States alone generates nearly 575 million tons of toxic waste annually.\textsuperscript{47} The production of waste, including hazardous

\textsuperscript{42} Gilmore, supra note 4, at 889 (explaining that an entity responsible for regulation of waste will not regulate more than it has the resources and administrative capacity to manage).

\textsuperscript{43} See Hackett, supra note 27, at 314. The different definitions of hazardous waste among countries cause confusion when the countries attempt to regulate the movement of such wastes through international agreements because the parties do not agree on the specific substances that they are agreeing to regulate. \textit{Id.} On at least one occasion this ambiguity in the definition of hazardous waste resulted in the failure of some EC member countries to enact domestic legislation to implement an EC directive on international shipment of hazardous waste. \textit{Id.}


\textsuperscript{45} See id. In addition to the statistical problems caused by illegal waste shipments and definitional differences, statistics on hazardous waste generation and disposal typically refer only to wastes generated by industry during the production process without regard to subsequent consumer wastes occurring after a consumer uses and discards a product. See Erstein et al., supra note 12, at 7. Reliable estimates for the sum of industrial and consumer wastes are unavailable, \textit{Id.} at 13, thus, the available statistics underestimate the amount of hazardous waste produced and discarded. \textit{See id.} at 7.

\textsuperscript{46} Hackett, supra note 27, at 294.

waste, is an inevitable byproduct of industry. 48 It is hardly surprising, therefore, that as industries expand across the globe, the annual worldwide production of hazardous waste increases correspondingly.

In contrast to the uncertainty of statistics on the amount of hazardous waste produced, there is no question as to which countries are the main producers. The United States and western European countries generate the vast majority of waste. 49 In 1988, the United States produced an estimated 265 million metric tons of waste, while the countries of Western Europe generated approximately thirty-five million metric tons. The bulk of this waste never crosses an international border, but rather remains within the generating country for disposal. 50 In 1990, for example, of the approximately 250 million tons of hazardous waste produced by over 50,000 generators within the United States, "less than one-tenth of one percent . . . was exported." 51 Similarly, exports of hazardous waste from the European Community (EC) 52 amount to less than ten percent of the hazardous waste

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48. See Prabhu, supra note 40, at 692 (referring to hazardous waste as a "byproduct of our chemical society"); see also Epstein et al., supra note 12, at 6 (explaining that the production of all useful items concurrently results in the production of nonuseful materials (wastes), only a small percentage of which is harmful).

49. Hackett, supra note 27, at 294.

50. Johnson, supra note 33, at 299 (explaining that this is true for both hazardous and nonhazardous solid waste).


52. Basel Convention Hearing, supra note 44, at 145 (statement of Dr. Harvey Alter, Manager, Resources Policy Dep't, U.S. Chamber of Commerce) (citing the EPA as the source of domestic hazardous waste export statistics).

53. Id. Although this statistic is more or less agreed upon, whether it is considered reasonable varies with one's perspective. See, e.g., id. at 146 (declaring that the statistics do not support the claims that the United States is exporting "burgeoning amounts" of toxic wastes). But cf. Sokolosky & Young, supra note 3, at 20 (stating that the subject matter of the Basel Convention is "of great importance because of the sheer volume of hazardous waste exports" and placing the amount exported from the United States at 160,000 tons of the 220 million tons generated); see also Greenpeace Calls for World Ban, supra note 29, at 433 (reporting on Greenpeace's opinion that waste exports and imports are increasing at an "alarming rate" with "a flood of schemes" to ship United States wastes to developing countries).

generated within EC member nations. Nonetheless, these figures are larger today than several years ago.

As with any problem, understanding the catalyst for this increase is necessary in order to counteract and reverse this trend of foreign disposal of hazardous waste. Several factors, in addition to the quantity of hazardous waste generated, are responsible for the growth of the hazardous waste export industry. Skyrocketing expenses and difficulties in finding adequate disposal sites within the industrialized countries stimulate international shipment of hazardous waste. Furthermore, the cost of disposal within industrialized countries at times surpasses the combined cost of transportation to and disposal of waste in a foreign country.

55. Johnson, supra note 33, at 299-300 n.2 (explaining that a greater percentage of wastes generated within the EC is exported because of the close proximity of the member states to one another).

56. See id. at 302 (stating that the amount of hazardous waste generated in the United States has increased from 9 million metric tons per year in 1970 to approximately 265 million metric tons today, and that the number of hazardous waste exports rose from 30 per year in 1980 to 400 in 1986).

57. See Shabecoff, supra note 16, at C4. The cost of proper disposal of toxic waste in some instances is as much as $2,500 per ton. Id. Average landfill costs increased nationally by 24 percent between 1983 and 1986. In some areas, however, the increase was significantly greater. In Boston and Philadelphia, for instance, costs increased by 300 percent and 500 percent respectively. Blumberg & Gottlieb, supra note 16, at 125-26.

58. See Porter, supra note 16, at 11 (explaining that one-third of existing domestic landfills will be closed by 1993); Debra K. Judy, Hazardous Substances in Developing Countries: Who Should Regulate Foreign Corporations?, 6 VA. J. NAT. RESOURCES 143, 149 (1986) (discussing the public furor over hazardous wastes in industrialized nations such as the United States which led to the enactment of more stringent environmental regulations); Shabecoff, supra note 16, at C4 (explaining that "[i]n 1984, Congress effectively barred the disposal of most toxic materials in landfills").

Some countries are geographically unable to handle the wastes generated within their borders. As a result of its high water table, the Netherlands, for example, has been forced to ban landfills. Handley, supra note 47, at 10,171-72. Similarly, Greece, Luxembourg and Denmark, all small countries, simply do not have adequate space for hazardous waste disposal facilities. Id.

59. See Worrell, supra note 51, at 373. The United States exported 30 shipments of hazardous waste in 1980 and 400 shipments in 1986. Id. at 374 n.10. But cf. Basel Convention Hearing, supra note 44, at 86 (testimony of Rep. Ed Towns) (stating that the EPA received 550 notices to export in 1990 and noting that this was double the number submitted in 1986); The International Trade in Wastes: A Greenpeace Inventory at preface (Jim Vallette & Heather Spalding eds., 5th ed. 1990) (stating that almost 5.2 million tons of toxic waste were exported to less-developed nations since 1986).

60. In 1985 this cost differential was estimated at $75 per metric ton. Organization for Economic Cooperation and Development, Transfrontier Movements of Hazardous Wastes 8-9 (1985) [hereinafter OECD]. From an economic perspective, the latter option is clearly preferable to businesses, which by definition seek to minimize costs in order to maximize profits. See Epstein et al., supra note 12, at 6 (explaining that industrial producers seek to dispose of useless wastes in the easiest and least expensive manner).
In addition to these practical and economic incentives, legal and environmental commentators also accuse industrial producers of seeking to avoid strict disposal safety standards within the generating country.\(^6\) Arguably, businesses export wastes in order to avoid domestic waste disposal laws in the country of origin that are more stringent than those of the receiving country,\(^6\) and to avoid potential liability for improper waste management under domestic environmental laws that do not apply extraterritorially.\(^6\) Thus, when exporting hazardous waste to a foreign country, industrial waste producers from the United States are subject only to the hazardous waste disposal laws of the importing country.\(^6\) These factors have combined to create a profitable industry in international shipments of hazardous waste.\(^6\)

**B. Obstacles Precluding Change**

The ability of industry to avoid hazardous waste disposal regulations by shipping waste abroad suggests that international cooperation and regulation of this trade is necessary to ensure safe management of hazardous waste. Geographic boundaries between states,\(^6\) although vitally important in de-

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63. Johnson, *supra* note 33, at 304. Waste generators may be liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for damage they cause within the United States. See *id.* When the damage occurs abroad, however, injured parties must rely on the American tort system for relief. *Id.* at 306 n.37.

Without evidence of clear congressional intent, domestic laws do not apply extraterritorially. Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949). In *Foley Bros.*, the Court affirmed that: The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions. *Id.* (citing Blackmer v. United States, 284 U.S. 421, 437 (1932)). No such extraterritorial intent is evident in federal hazardous waste laws. See 42 U.S.C. §§ 6901-87; Handley, *supra* note 47, at 10,171 n.1. (explaining that the major laws governing solid waste, RCRA and CERCLA, do not express a clear congressional intent that the laws apply outside the United States).

64. Johnson, *supra* note 33, at 306 n.37. To explain this aspect of the hazardous waste trade one commentator remarked that "hazardous wastes inevitably will be disposed of along the path of least resistance and expense." Porterfield & Weir, *supra* note 5, at 344 (quoting Rep. Florio).


66. The term "State" is used in international law to refer to sovereign nations, rather than the component states which comprise federal unions. See Mark W. Janis, *An Introduc-
ciding many disputes, are irrelevant to the effort to solve global environmental problems. "[B]oth pollution and ecosystems cross state lines," and domestic legislation which stops at national borders does not effectively protect the environment. International law, therefore, may be part of the solution. If disposal regulations within a foreign country are as strict as within the generating country, exporters have less incentive to export their wastes. If an exporter nonetheless chooses to proceed with a shipment, international controls will ensure that the transport and final disposition of the waste occur in an environmentally sound manner.

Un fortunately, significant obstacles hinder the formulation and implementation of effective international environmental agreements. The first obstacle involves the hesitancy of sovereign nations to relinquish any portion of their sovereign power. Upon enactment, international agreements have the force and effect of law as between the parties to the agreement. As a result, in signing such an agreement sovereign states often must cede author-


68. See Di Leva, supra note 2, at 10,083 (concluding that domestic law will primarily continue to control national and international environmental practices, but recognizing the increasing influence of international environmental law as well).

69. Cf. Allegra Helfenstein, Comment, U.S. Controls on International Disposal of Hazardous Waste, 22 Int'l L. Rev. 775, 790 (1988) (stating that exports will continue even if this primary export incentive is removed because waste generators simply cannot find disposal sites in the United States).

70. See discussion infra part IV.

71. See generally International Environmental Agreements, supra note 67. See also Hackett, supra note 27, at 291 n.3. Several issues must be dealt with before transboundary environmental agreements can be effective. These issues caused prolonged quarrelling among nations as to major provisions of the Basel Convention. Two areas of significant disagreement involved the issue of prior informed consent in relation to transit countries and the definition of a "hazardous" waste. Id.; see also id. at 292 n.3.

72. International Environmental Agreements, supra note 67, at 1552-53 (explaining that "[a]ll else being equal, States are less likely to assent to proposed agreements that sacrifice a greater degree of sovereignty . . . . States . . . defend their sovereignty because they weigh their physical integrity and continued political existence as important elements in their foreign policy"); see also Kenneth Neal Waltz, Theory of International Politics 91-92 (1970).

73. International Environmental Agreements, supra note 67, at 1552. It is a general principle of international law that nations can impose obligations on themselves through international agreements. Id. Upon entering into an international agreement the principle of "pacta sunt servanda" charges that the nation then fulfill its commitments in good faith. Id. The Vienna Convention on the Law of Treaties declares that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." The Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339.
Before a State will sign an international agreement its representatives must be convinced their State's sovereignty will not be unreasonably impinged. If not convinced, States will push for limitations on the scope of the agreement, vague treaty provisions, or the inclusion of opt-out and exemption clauses in the treaty. Such provisions detract from the enforceability, and ultimate effectiveness, of the resulting agreement.

The second obstacle to concluding an international environmental agreement involves convincing potential participants that the subject matter of the agreement is relevant and important to their State. If a State questions the relevance of the environmental issue to itself, then the burden of negotiating and assenting to an international environmental agreement appears unjustified. Unless convinced that this burden is overcome by the benefits to be achieved through the agreement, the State will not choose to involve itself in the agreement. Unfortunately, States often miscalculate the extent of environmental damage caused by their deleterious action and inaction. As a result of these factors, a State may underestimate environmental consequences and, thus, question whether the benefits of the environmental agreement justify the costs.

Another obstacle to concluding international environmental agreements is the concern of developing countries that such agreements are a mechanism for enhancing the economic superiority of developed countries over developing countries. An agreement concerning the protection of an endangered species, for example, which imposes restrictions on the exportation or importation of that species, although intended as a conservation measure by the importing country, may be perceived as a trade treaty by the exporting coun-

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74. See International Environmental Agreements, supra note 67, at 1553 (explaining that States fear that their freedom of action may be reduced if, after entering an international agreement, other States or persons form expectations as to the future conduct of the State).
75. Id. at 1554-55.
76. Id.
77. See id. at 1550-51.
78. See id.
79. Id. This miscalculation is derived from the State's failure to recognize that actions within state borders cause damage outside the borders. Id. at 1550. Moreover, miscalcation occurs when legislators, focusing strictly on short-term solutions for a current state of affairs, fail to recognize that anti-environmental state actions may have long-term impacts. Id. at 1551 (stating that "[b]ecause environmental harm spans generations, traditional cost-benefit analysis may fail").
80. See id.
81. Id. at 1551 n.5 (citing by way of example the Convention on International Trade in Endangered Species of Wild Fauna and Flora [hereinafter Endangered Species Convention], Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243, which was viewed by some as an "'imperialistic effort by foreigners to conserve species at the exporting countries' expense'" (quoting Kathryn S. Fuller et al., Wildlife Trade Law Implementation in Developing Countries: The Experience in Latin America, 5 B.U. INT'L L.J. 289, 292 (1987)).
try. Thus, a developing nation may refuse to enter into any environmental agreement that has objectionable economic side effects, especially one that limits its trading opportunities.

To achieve international cooperation in the regulation of the hazardous waste trade, issues specific to such trade must also be addressed. Initially, agreement must be reached on defining the substances that should be subject to regulation. This definitional task poses a formidable barrier to creating transnational hazardous waste legislation. More significant barriers, however, arise from the different interests brought into hazardous waste negotiations by developed and developing countries, as well as environmentalists and industrial forces. Specifically, developing countries and environmentalists tend to support an outright ban on transboundary movement of hazardous wastes, whereas developed countries and industries prefer to restrict hazardous waste exports and imports only to the extent necessary to protect human health and the environment.

Transboundary movement of toxic wastes is one environmental issue currently receiving much attention. Many of the obstacles to international environmental cooperation discussed above are clearly evident in recent at-

82. See Fuller et al., supra note 81, at 292 & n.27 (quoting portions of Endangered Species Convention, which defines those species threatened by uncontrolled International Trade as being protected species).

83. See supra notes 39-43 and accompanying text.

84. See, e.g., Thirty-Four Countries, supra note 34, at 159 (stating that most of the difficult negotiations surrounding the Basel Convention occurred between developed and developing nations).

85. See, e.g., 116 Nations OK Limits, supra note 30, at 55 (stating that African delegates to a conference on transboundary movements of wastes, with the support of Greenpeace, had been pressing for a complete ban on the practice). Greenpeace endorses an unequivocal ban on hazardous waste trading because it doubts the ability of any regulatory system to "'safeguard environmental integrity and human health from wastes moved from one country to another.'" Greenpeace Calls for World Ban, supra note 29, at 433. It declares the international traffic in hazardous wastes to be simply "environmental pollution." Id.

86. See, e.g., Basel Convention Hearing, supra note 44, at 94 (prepared statement of William K. Reilly, Administrator, U.S. Environmental Protection Agency) (expressing concern over congressional bills that prohibit or severely curtail waste trading and explaining that the Administration's Bill permits controlled waste trading which benefits the United States and its trading partners); id. at 176 (statement of James F. Collins, President, Steel Manufacturers Association) (explaining that legislation preventing waste exports to Mexico would result in landfill disposal in the United States of 40,000 tons of waste currently sent to Mexico for recycling).

tempts by the international community to come to terms with hazardous waste trading.

II. AN INTERNATIONAL REACTION: THE BASEL CONVENTION

A. History of the Convention

In March 1989, multinational delegates convened at the Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Waste hosted by the United Nations Environment Programme in Basel, Switzerland. The Conference was aimed at negotiating an international accord on the transboundary movement of hazardous waste. The final act of this Conference, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal [hereinafter the “Basel Convention” or “Convention”], sets forth guidelines for international regulation of the transboundary movement of hazardous wastes by sovereign nations. The Basel Convention is


The Draft Convention served as the basis for deliberations at the Basel meeting. Final Act, supra note 88, at 655. The Draft Convention was revised several times by UNEP and by an ad hoc working group of legal and technical experts. Cusack, supra note 3, at 410-11 (stating that four revisions of the Draft Convention were adopted by the working group). These efforts were followed by two years of intense debate and negotiation between delegates from 116 nations. Thirty-Four Countries, supra note 34, at 159 (observing that the difficult negotiations occurred mainly between the industrialized and developing states); see also, William Tuohy, 100 Nations Striving to Agree on Pact to Curb Toxic Waste Exports, L.A. TIMES, Mar. 22, 1989, at 9 (reporting that after 18 months of negotiations many delegates remained unsatisfied with parts of the Draft Convention). Finally, the Draft Convention was adopted as the final act of the Conference of Plenipotentiaries on March 22, 1989. See Final act, supra note 88, at 655.

90. See Basel Convention, supra note 31; see also infra notes 114-136 and accompanying text.
currently the focus of debate in national legislatures around the world,\textsuperscript{91} including the United States Congress.\textsuperscript{92}

The Basel Convention was prepared by the United Nations Environment Programme (UNEP) at the request of the United Nations General Assembly.\textsuperscript{93} UNEP was established in 1972 upon recommendation of the United Nations Conference on the Human Environment at Stockholm.\textsuperscript{94} UNEP began its mission of dealing with worldwide environmental issues by developing an international infrastructure for the exchange of environmental data.\textsuperscript{95} Eventually, UNEP also began to promulgate guidelines and regulations applicable to specific environmental problems.\textsuperscript{96} Ten years after its creation, UNEP, responding to the pressures of environmental groups,\textsuperscript{97} decided to address the specific issue of international transportation and disposal of hazardous wastes.\textsuperscript{98}

\textsuperscript{91} See, e.g., Foreign Affairs Hearings, supra note 87, at 23 (statement accompanying letter to the Hon. Sam Gejdenson from the Hon. D.H. Burney, Canadian Ambassador) (stating that since 1987 Canada has worked to bring about the Basel Convention, and that recently the Canadian federal and provincial governments have been striving to implement legislation to ratify the Convention).

\textsuperscript{92} Id.

\textsuperscript{93} Di Leva, supra note 2, at 10,079 (stating that concerns about the disposal of wastes in Third World countries prompted a 1987 General Assembly resolution calling for the Secretary General of the United Nations, through the United Nations Environment Programme, to formulate an international convention on the transnational movement of hazardous wastes).

\textsuperscript{94} Helfenstein, supra note 69, at 784; see also Sokolosky & Young, supra note 3, at 19 (discussing the impact of the 1972 Stockholm Declaration and the upcoming reevaluation of the Declaration at the 1992 United Nations Conference on Environment and Development in Brasilia, Brazil).

\textsuperscript{95} Helfenstein, supra note 69, at 784; see How UNEP Works, UN CHRON., May 1983, at 47. The General Assembly intended UNEP to serve "as a focal point for environmental action and coordination within the UN system." Id. UNEP initiatives have resulted in the establishment of intergovernmental organizations, such as the South Asia Co-operative Environment Programme, through which states convene to share information and develop strategies for coping with environmental issues. Id.

\textsuperscript{96} Helfenstein, supra note 69, at 784.

\textsuperscript{97} See supra note 29 and accompanying text.

\textsuperscript{98} See Cusack, supra note 3, at 410.
B. Implementation of the Basel Convention

Once a state delegate\(^{99}\) represents an intention to adopt an international agreement\(^{100}\) and signs it on behalf of the state,\(^{101}\) the agreement does not become a source of international law\(^{102}\) until ratified by the domestic legisla-

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99. Prior to commencement of the treaty-making process, delegates of negotiating States must establish their authority to execute the formalities required for drawing up of the text of an international agreement or in the conclusion of an agreement. \textit{Ian M. Sinclair, The Vienna Convention on the Law of Treaties 27-28 (1973).} A delegate's authority is ascertained by the issuance of a document entitled “full power.” \textit{Id.} at 28. This instrument designates specifically named persons to represent the country in the negotiation and conclusion of an international agreement. \textit{Id.} An individual may also be recognized as an authorized delegate of a negotiating State if the practice of the States involved, or other circumstances, manifests an intention to consider that individual as representing the State for the purposes of treaty negotiation without the formality of “full powers.” \textit{Id.} at 29.

100. “The [second] stage in conclusion of a treaty is the adoption of the text.” \textit{Id.} at 32. “Adoption” refers to the act whereby negotiating parties agree to the form and substance of the proposed international agreement. \textit{Id.} The text of a treaty is adopted at an international conference, such as the Basel Conference, by the affirmative vote of two-thirds of the delegates present and voting unless two-thirds of the parties present and voting agree to apply a different rule for adoption of the text. \textit{Id.} at 34.

101. Historically, there was a question as to what acts amounted to an expression of a State’s consent to be bound by an international agreement. \textit{Id.} at 36. The Vienna Convention on the Law of Treaties provides that consent “to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or... any other means if so agreed.” \textit{Janis, supra} note 66, at 18 (quoting the 1969 Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27, art. 11 (1969)). A point of contention among legal scholars concerned the necessity for ratification of a treaty in the absence of a textual clause in the treaty specifically calling for ratification. \textit{Sinclair, supra} note 99, at 36. The Vienna Convention left this dispute unresolved. \textit{Id.} at 38.

The Vienna Convention grants states wide discretion to choose the manner in which they will demonstrate their consent to be legally bound to a treaty. \textit{See id.} at 36. Nonetheless, the current perspective is that the mere signing of a treaty by a delegate does not ordinarily establish a State’s intention to be legally bound by that treaty. \textit{Janis, supra} note 66, at 18. Rather, international law treats signatures as an affirmation by state representatives as to the content and authenticity of final agreements. \textit{Id.} (citing Vienna Convention, \textit{supra}, art. 10). Of the possible methods by which States may express their consent to be bound, two methods are most frequently employed: ratification and accession. \textit{Id.} at 18.

“Ratification” is the means by which a negotiating state may consent to be bound by a treaty previously signed by the state delegate. \textit{Id.} “Ratification” involves domestic and international formalities. In the United States, for example, the domestic formality for treaty ratification requires an affirmative vote of two-thirds of the Senate. On the international side, agreements themselves often specify the necessary action to be taken by ratifying parties, such as the deposit of instruments of ratification with a central authority or the exchange of documents between ratifying States. \textit{Id.} at 19.

“Accession” is the means by which a State not involved in a treaty’s negotiation expresses its intention to abide by the agreement. \textit{Id.} Individual treaties typically specify the exact means by which States may express their intention to “accede” to that agreement. \textit{Id.}

102. The International Court of Justice recognizes the following sources of international law:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
tures of a designated number of States.103 The Basel Convention requires ratification by the domestic legislatures of twenty countries before taking effect.104 As of April 28, 1992, twenty-two nations had ratified the Basel Convention;105 104 nations had signed the Convention, and 116 nations had endorsed it.106 The Convention entered into force on May 5, 1992, three months after ratification by the 20th State.107 The first meeting of the Parties is scheduled for November 1992.108

Although the United States Senate has given the necessary "advice and consent" to U.S. involvement in the Basel Convention,109 the United States is not yet a party to the Convention. Implementing legislation is still needed

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103. Di Leva, supra note 2, at 10,077 n.11.

104. Basel Convention, supra note 31, art. 25, para. 1, 28 I.L.M. at 676 (proclaiming that "[t]his Convention shall enter into force on the ninetieth day after the date of deposit of the twentieth instrument of ratification, acceptance, formal confirmation, approval or accession").


106. Basel Treaty Limping, supra note 105; see also Hackett, supra note 27, at 291 n.1 (stating that the Basel Convention was endorsed by the countries in attendance as the Final Act of the Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes).


108. Government Announces Ratification, supra note 105, at 584; see also Basel Convention, supra note 31, art. 15, para. 1, 28 I.L.M. at 670 (stating that "[t]he first meeting of the Conference of the Parties shall be convened . . . no later than one year after the entry into force of this Convention").

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before the United States will deposit its instrument of ratification.\textsuperscript{110} These instruments must be deposited with the Secretary-General of the United Nations\textsuperscript{111} prior to the first Conference of the Parties in order for the United States to participate in that meeting.\textsuperscript{112} The Convention will enter into force for the United States on the ninetieth day after submission of its instrument of ratification.\textsuperscript{113}

C. Provisions of the Convention

Prompted in part by the known risks to human health and the environment posed by waste materials,\textsuperscript{114} the Basel Convention is designed to regulate the transboundary movement of hazardous and “other” wastes.\textsuperscript{115} The major provisions of the Convention address the definition of hazardous waste,\textsuperscript{116} transboundary movement of hazardous waste between signatories,\textsuperscript{117} international cooperation,\textsuperscript{118} and establishment of a Conference of the Parties.\textsuperscript{119} Each of these provisions represents a significant increase in protection of human health and the environment through management of hazardous waste. Moreover, in comparison with the present level of interna-

\textsuperscript{111} Basel Convention, supra note 31, art. 28, 28 I.L.M. at 677 (designating the Secretary-General of the United Nations as the Depository of the Convention).
\textsuperscript{112} David Clark Scott, Central American Presidents Seek a Regional Solution to Toxic Waste Imports, CHRISTIAN SCI. MONITOR, Mar. 10, 1992, at 5.
\textsuperscript{113} See Basel Convention, supra note 31, art. 25, para. 2, 28 I.L.M. at 677.
\textsuperscript{114} Id. at 657-59. The preamble to the Convention mentions several other motivations for the creation of the agreement including recognition of the growing desire of developing countries to prohibit transboundary movement of hazardous waste and disposal in States other than the generating State, concern over illegal waste trading, and recognition of the importance of promoting the exchange of waste management technology among nations. Id.
\textsuperscript{115} Id. The terms of the Basel Convention apply to “hazardous wastes” and “other wastes,” as defined by the Convention, which are subject to transnational movement. Id. art. 1, 28 I.L.M. at 659. Annex I to the Convention sets forth specific categories of waste that are subject to its provisions unless the waste listed in Annex I does not possess any of the characteristics listed in Annex III to the Convention. Id. art. 1, para. 1(a), 28 I.L.M. at 659. Furthermore, wastes considered hazardous by the domestic legislation of any country involved in a transboundary shipment are subject to the Convention even if not specifically referred to in Annex I. Id. art. 1, para. 1(b), 28 I.L.M. at 659. Finally, materials listed in Annex II of the Convention, specifically wastes collected from households and residues arising from incineration of household wastes, are deemed to be “other wastes” and are subject to the Convention when transported across national boundaries. Id. art. 1, para. 2, 28 I.L.M. at 659.
\textsuperscript{116} Id. art. 1, 28 I.L.M. at 659 (indicating the scope of the Convention).
\textsuperscript{117} Id. art. 6, 28 I.L.M. at 663 (detailing procedures to be followed prior to and during a waste shipment).
\textsuperscript{118} Id. art. 10, 28 I.L.M. at 667-68 (including, for example, cooperation in monitoring effects of the management of hazardous waste on human health and the environment and in developing new technologies to reduce the amount of waste produced).
\textsuperscript{119} Id. art. 15, 28 I.L.M. at 670-71 (stating, for example, that regular and special meetings of the Conference may be called as the Conference of Parties deems necessary and requiring the Conference to evaluate the effectiveness of the Convention at regular intervals).
tional cooperation existing under a system of individual domestic legislation, the Basel Convention's provisions provide for substantial improvement in multi-national cooperation with respect to hazardous waste trading regulation.

Article 1 of the Convention establishes the substances that the Convention will regulate and brings within the scope of international regulation an extensive quantity of hazardous wastes. A list of waste categories to be specifically controlled by the Convention is set forth in Annex I to the Convention. A waste fitting within one of the categories of "waste streams" or specific substances named in Annex I constitutes a hazardous waste and must be managed in a manner consistent with the terms of the Convention whenever subject to transboundary movement. If a waste designated in Annex I does not possess any of the characteristics listed in Annex III, however, it will be exempt from regulation under the Convention even though engaged in transboundary movement. In addition, any wastes considered hazardous by the domestic legislation of the Party of export, import or transit are subject to the terms of the Convention when moved across national borders. Finally, Annex II expands the definition even further and classifies certain household wastes as hazardous.

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120. See id. art. 1, 28 I.L.M. at 659.
121. Id. Annex I, 28 I.L.M. at 678. The categories of wastes are subdivided into "waste streams" and "wastes having [listed substances] as constituents." Id. Within the category of waste streams are clinical wastes from medical care in hospitals, waste mineral oils unfit for their originally intended use, and waste chemical substances arising from research and development activities which are not identified or are new and whose effects on humans and the environment are unknown. Id. Eighteen such streams are listed. Id.

Within the category of specific substances which, if a component of the waste will render the waste hazardous, are listed: metal carbonyls, arsenic or arsenic compounds, and acidic or basic solutions in solid form. Id. Twenty-seven such substances are specified in Annex I. Id.

122. Id. art. 1, 28 I.L.M. at 659.
123. Id. Annex III, 28 I.L.M. at 679-80. Among the hazardous characteristics listed in Annex III are explosiveness, corrosivity, toxicity, and flammability. Id.

124. Id. art. 1, para. 1(b), 28 I.L.M. at 659. Parties to the Convention must inform the Secretariat of the Convention of any wastes defined as hazardous under the domestic legislation of the State within six months of becoming a party, id. art. 3, para. 1, 28 I.L.M. at 661, and must keep the Secretariat informed of any significant changes to the information so provided. Id. art. 3, para. 2, 28 I.L.M. at 661.

125. Id. art. 1, para. 2, 28 I.L.M. at 559. Household wastes and the residue from incineration of household waste, so called "other wastes," are subject to the terms of the Convention when involved in transnational movement. Id.
Article 6 of the Convention addresses the transfrontier movement of hazardous waste between the Parties. By its terms, the state of export must ensure that a competent authority in the import state, and in each of the transit states, receive written notification of any proposed shipment of hazardous or other wastes. The state of import may then choose to consent to shipment, with or without conditions, refuse the import, or request additional information. Transit countries similarly have the option to prohibit movement of the waste through their territory, request additional information, or conditionally consent to the movement. Only when the state of export has received written confirmation of consent from the importing and transit countries, as well as written confirmation of a contract between the exporter and the Party that will ultimately dispose of the waste specifying the environmentally sound manner in which the wastes will be managed, may the export proceed.

Article 10 of the Convention provides for international co-operation of the Parties in order to improve and achieve environmentally sound management of hazardous and other wastes. Under Article 10, Parties are required, upon request, to share with one another available information that will promote the environmentally sound management of hazardous and other wastes. Moreover, by ratifying the Convention, the Parties agree to cooperate actively in the transfer of hazardous waste technology and management systems, particularly with those Parties that may need and request such technical assistance. Enforcement of this obligation on all Parties to the Convention, including the most industrialized nations, will provide de-

126. Id. art. 6, 28 I.L.M. at 664-65. The Convention prohibits hazardous waste trading between Parties and non-Parties. Id. art. 4, para. 5, 28 I.L.M. at 662, unless the Party enters into an agreement with the non-Party specifying that hazardous waste exports and imports pursuant to the agreement will be managed in an environmentally sound manner as required by the Convention. Id. art. 11, para. 1, 28 I.L.M. at 668.
127. Id. art. 2, para. 10, 28 I.L.M. at 660. A “state of export” is defined as “a Party from which a transboundary movement of hazardous wastes or other wastes is planned to be initiated or is initiated.” Id.
128. Id. art. 2, para. 11, 28 I.L.M. at 660. A “state of import” is defined as “a Party to which a transboundary movement of hazardous wastes or other wastes is planned or takes place for the purpose of disposal therein or for the purpose of loading prior to disposal in an area not under the national jurisdiction of any state.” Id.
129. Id. art. 2, para. 12, 28 I.L.M. at 660. A “state of transit” is “any State, other than the State of export or import, through which a movement of hazardous wastes or other wastes is planned or takes place.” Id.
130. Id. art. 6, para. 1, 28 I.L.M. at 664.
131. Id. art. 6, para. 2, 28 I.L.M. at 664.
132. Id. art. 6, para. 4, 28 I.L.M. at 664.
133. Id. art. 6, para. 3, 28 I.L.M. at 664.
134. Id. art. 10, para. 1, 28 I.L.M. at 667.
135. Id. art. 10, para. 2(a), 28 I.L.M. at 667.
136. Id. art. 10, para. 2(d), 28 I.L.M. at 667.
veloping countries access to technology for the environmentally sound management of hazardous waste to which they might otherwise not have access.

III. A Domestic Reaction: Increasing Regulatory Control

A. Current U.S. Waste Export Legislation

Hazardous waste generated within the United States is currently governed by the Resources Conservation and Recovery Act (RCRA) and agency regulations. Enacted in 1976, RCRA empowered the United States Environmental Protection Agency (EPA) to regulate domestic hazardous waste from generation through disposal. The EPA issued limited regulations and guidelines on the export of such wastes pursuant to this statutory authority. In 1984, the Hazardous and Solid Waste Amendments (HSWA) to RCRA made the United States among the first countries to enact legislation specifically governing hazardous waste exports.

Beginning twenty-four months after enactment, HSWA prohibited transnational shipments of hazardous waste unless certain prerequisites were fulfilled. Under HSWA, waste exporters are required to inform the Administrator of the EPA of any proposed export, and to obtain consent for the export from the government of the importing country. The exporter may pro-

139. Epstein et al., supra note 12, at 6 (stating that the EPA is the government agency responsible for regulating hazardous waste disposal).
140. See, e.g., 42 U.S.C. § 6922(b)(1) (requiring waste generators to certify that they have a program in place to decrease the amount and toxicity of such hazardous waste to the extent economically feasible).
141. See, e.g., id. § 6924 (setting forth standards applicable to persons responsible for hazardous waste treatment, storage and disposal facilities).
144. See supra note 2 and accompanying text; see also Cusack, supra note 3, at 398 (stating that Congress was prompted to pass the amendments as a result of lobbying by environmentalists and several foreign policy embarrassments).
145. 42 U.S.C. § 6938(a). The amendments were enacted on November 8, 1984, and enforcement of their provisions began two years later. Id.
146. Id. § 6938(c). Included in this notification must be the name and address of the exporter, the types and quantities of hazardous waste to be exported, the approximate frequency and period of time at which the waste is to be exported, the ports of entry in the importing country, a description of the methods to be employed for transportation to and treatment, storage, or disposal in the importing state, and the name and address of the final facility where the waste will be handled. Id.
147. Id. § 6938(d). After notification from the exporter of the intended export, the Secretary of State, acting on behalf of the EPA, forwards a copy of the notification to the government of the importing country along with a statement that the export will be prevented under United States law unless the importing country agrees to accept the hazardous waste. Id. Also included in this notification to the importing government is a description of the federal
ceed with the shipment after written consent to a shipment is received from the importing country.\textsuperscript{148} An exemption from these procedures exists where an exporter wishes to send the waste to a country with which the United States has entered into a bilateral agreement on the transport of wastes.\textsuperscript{149} In such a situation, notification of the EPA and consent from the receiving country need not be obtained prior to each export of wastes.\textsuperscript{150}

The procedures in place under HSWA do not provide the EPA with the power to prevent an export once consent from the importing country is obtained.\textsuperscript{151} This is true even if the EPA has reason to believe that the importing country will be unable to manage the hazardous waste in an environmentally sound manner.\textsuperscript{152} Similarly, HSWA does not authorize the EPA to order a shipment's return to the United States if the EPA learns that the hazardous materials are being mismanaged.\textsuperscript{153} These areas in which the EPA lacks the authority to act must be amended before the United States can ratify the Basel Convention.\textsuperscript{154}

\begin{itemize}
\item regulations applicable to the treatment, storage, and disposal of the hazardous waste in the United States. \textit{Id.} § 6938(d)(4).
\item Upon enactment of HSWA, the United States became the first country to require consent of an importing country prior to an export of hazardous waste from the United States. \textit{Basel Convention Hearing, supra} note 44, at 95 (prepared statement of EPA Administrator Reilly).
\item 42 U.S.C. § 6938(e). Within thirty days after the Secretary of State receives written notice of the importing country’s consent or objection to the shipment, the EPA must inform the exporter of the importing country’s decision. \textit{Id.}
\item \textit{Id.} § 6938(f). The United States currently has agreements with Mexico and Canada. \textit{See} Johnson, \textit{supra} note 33, at 303.
\item \textit{See} 42 U.S.C. § 6938(f). The treaty with Canada requires that the exporting nation notify the government of the importing country of a proposed shipment of wastes but the export may proceed without further action if the exporter does not receive an objection from the importer within thirty days of notification. Johnson, \textit{supra} note 33, at 303 n.21.
\item Foreign Affairs Hearings, \textit{supra} note 87, at 42 (prepared statement of Associate EPA Administrator Hajost) (discussing the limitations of the United States’ existing statutory authority).
\item \textit{Id.}
\item \textit{Id.}
\item \textit{See} Johnson, \textit{supra} note 33, at 312. The Basel Convention’s regulations apply to certain nonhazardous wastes as well as hazardous wastes. \textit{Id.} The EPA currently lacks the authority under RCRA to regulate nonhazardous waste. \textit{Id.} The EPA’s authority to control nonhazardous waste will have to be expanded, therefore, if the United States chooses to ratify the Convention. \textit{Id.} at 313-14; \textit{see also} Basel Convention Hearing, \textit{supra} note 44, at 95 (statement of EPA Administrator Reilly). The United States is unable to ratify the Convention until Congress grants the administration statutory authority to fulfill three requirements of the Convention. \textit{Basel Convention Hearing, supra} note 44, at 97. First, the EPA needs authority to control all substances governed by the Convention, including wastes not regulated by RCRA. \textit{Id.} Second, the statutory authority must permit the EPA to prohibit an export under circumstances in which there is reason to believe that the wastes will be mismanaged in the importing country. \textit{Id.} Third, the EPA must be authorized to recall mismanaged waste exports to the United States. \textit{Id.} “Legislation providing for these new legislative authorities must be enacted before [the United States] can comply with the Basel Convention.” \textit{Id.}
B. Proposed Legislation in the 102nd Congress

Reauthorization of the Resource Conservation and Recovery Act is a priority for the 102nd Congress. Among the topics discussed in connection with RCRA reauthorization will be reforming U.S. waste regulations to bring them into conformity with the Basel Convention. Before the United States can ratify the Basel Convention, its domestic hazardous waste legislation must authorize regulation of transboundary movements of waste in the manner and to the extent required by the Convention.

In order to regulate hazardous wastes in accordance with the Basel Convention, the Executive Branch of the United States government must, initially, possess the authority to control shipments of all substances covered by the Convention. The Administration currently lacks the authority under RCRA necessary to fulfill the terms of the Basel Convention. Certain wastes, such as wastes collected from households and residues arising from the incineration of such household wastes, if involved in transfrontier movement, are classified in the Convention as "other wastes" and are governed by its terms. The import and export of these wastes are not currently included within the scope of RCRA. Without expanded authority


156. Mounteer, supra note 155, at 10,085-86.

157. See Basel Convention Hearing, supra note 44, at 97 (statement of EPA Administrator Reilly) (stating that the President cannot ratify the Basel Convention without the statutory authority to control trading of all substances subject to the convention, to stop an export to which a receiving country has consented, and to order domestic exporters to return exported wastes to the United States under certain circumstances).

158. Id.


160. See, e.g., supra note 154 and accompanying text. Two actions of Congress are necessary before the United States may become a Party to the Basel Convention. Basel Convention Hearing, supra note 44, at 97 (prepared statement of EPA Administrator Reilly) (calling for expanded legislative authority and Senate approval of the Convention). First, the President must obtain the advice and consent of the Senate to enter into the Convention. U.S. Const. art. II, § 2 (stating that "[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties"). Second, Congress must grant the President the statutory authority to regulate international exports of wastes to the extent required by the Convention. Basel Convention Hearing, supra note 44, at 97.


to control these substances the United States is unable to comply with the
terms of the Convention.\footnote{Id.}

Further, Congress must authorize the administration to prevent a particu-
lar shipment of wastes despite the fact that the importing country has agreed
to the shipment, if the administration believes that the shipment will not be
handled in an environmentally sound manner.\footnote{Id.} \footnote{RCRA procedures cur-
currently lack any requirement that the foreign government explain the treat-
ment, storage or disposal procedures that will be employed in the importing
country.\footnote{Id.} If the EPA knows, however, that the waste will not be handled
in an environmentally sound manner, the EPA is powerless under RCRA to
prohibit the export.\footnote{Id.} Upon ratifying the Basel Convention, Parties under-
take a general obligation to prohibit exports of hazardous waste under such
circumstances.\footnote{Id.}

Finally, Congress must empower the Administration to order the return
to the United States of exported wastes that are mismanaged abroad.\footnote{Id.} \footnote{Domestic legislation granting these powers must be enacted by Congress in or-
der for U.S. export controls to comply with the Convention, thereby
enabling the President to ratify it.\footnote{Id.}}

Three main pieces of legislation under consideration in the 102nd Con-
gress address the issue of hazardous waste export.\footnote{Id. at 185 \footnote{statement of James Vallette, Coordinator, Greenpeace}.} Two of the proposed
bills, the Waste Export Control Act (WECA)\footnote{Id. at 185 \footnote{prepared statement of EPA Administrator Reilly}} and the Hazardous and
text of these bills are identical. This Comment will refer only to the House of Representatives' Bill.} if enacted, would bring U.S. waste export and import laws into accord with the terms of the Basel

163. Id.
164. Id.
165. RCRA requires only that the EPA, upon receipt of a notice of proposed hazardous
waste shipment, 42 U.S.C. § 6938(c), provide complete notification to the government of the
intended import country. \textit{Id.} § 6938(d). The notification must inform the foreign government
that the export will be prohibited by federal law unless it is agreed to by the importing country.
\textit{Id.} § 6938(d)(2). The notice must also include a description of the federal regulations which
would apply to the treatment, storage, and disposal of the hazardous waste if it remained in the
United States. \textit{Id.} § 6938(d)(4). After the EPA has received written consent from the foreign
government, a copy is forwarded to the exporter. \textit{Id.} § 6938(e). The export may proceed after
receipt of the copy.
166. \textit{See Basel Convention Hearing, supra note 44, at 97} (prepared statement of EPA Ad-
ministrator Reilly) (calling for Congress to expand the EPA's authority to prevent waste ship-
ments under such circumstances).
168. \textit{See id.} art. 8, 28 I.L.M. at 666; \textit{Basel Convention Hearing, supra note 44, at 97} (pre-
pared statement of EPA Administrator Reilly).
169. \textit{See Basel Convention Hearing, supra note 44, at 97.}
170. Id. at 185 (statement of James Vallette, Coordinator, Greenpeace).
Convention. The third regulatory approach under consideration would not result in U.S. involvement in the hazardous waste trade because, as its name suggests, the Waste Export and Import Prohibition Act\textsuperscript{173} would prohibit U.S. hazardous waste exports and imports with only slight exception.

1. The Waste Export and Import Prohibition Act

The Waste Export and Import Prohibition Act (WEIPA), by far the most straightforward of the proposed bills, seeks a comprehensive ban on the export of solid waste from the United States and the import of solid waste from abroad,\textsuperscript{174} with only the slightest of exceptions.\textsuperscript{175} Harsh criminal penalties against willful violators of the bill's provisions strengthen the force of this prohibition.\textsuperscript{176}

The WEIPA\textsuperscript{177} represents an unrealistic\textsuperscript{178} and reactionary attempt to deal with a complex, multi-faceted issue.\textsuperscript{179} Underlying domestic waste generation and disposal problems\textsuperscript{180} must be addressed before outlawing the export and import of hazardous wastes. The dearth of adequate disposal facilities, resulting from the closure of many domestic waste treatment and

\begin{footnotesize}
\begin{enumerate}
\item Id. § 2(b).
\item Id. § 3(c). The bill provides, in relevant part, the following exceptions:
  The prohibition [on exports and imports] ... shall not apply to baled waste paper, scrap textiles, or waste glass, if all of the following conditions are met with respect to such waste:
  \begin{enumerate}
  \item The waste is exported or imported for the purposes of recycling.
  \item The waste is separated from the waste stream.
  \item The waste does not contain any substances whose storage, treatment, or disposal within the United States is regulated under the Toxic Substances Control Act ... or which are [low-level radioactive waste, hazardous or nonhazardous waste mixed with low-level radioactive waste, or any waste covered by the Basel Convention].
  \end{enumerate}
\item Id. Small amounts of "personal household waste carried by individuals traveling abroad" are also excluded. Id. § 3(a).
\item See id. Penalties under the legislation include fines and imprisonment for up to ten years. Id. § 3(d).
\item Id. 2580, 102d Cong., 1st Sess. (1991).
\item Basel Convention Hearing, supra note 44, at 153 (statement of Dr. Harvey Alter) (stating that the bill, which would terminate up to $7 billion in trade, fails to "recognize the realities of a world economy").
\item Not surprisingly, the Waste Export and Import Prohibition Act has strong support from Greenpeace, as well as from the "greater environmental community," Id. at 188, 195 (prepared statement of James Vallette, Coordinator, Greenpeace) (stating that, if Congress must ratify the Basel Convention, the Waste Export and Import Prohibition Act should be enacted simultaneously), which frequently considers only the environmental aspects of an issue without due regard to other aspects.
\end{enumerate}
\end{footnotesize}
Global Trade in Hazardous Wastes

disposal facilities unable to comply with new federal regulations\textsuperscript{181} and the increased production of hazardous waste, prompted the development of an international hazardous waste trade.\textsuperscript{182} Prohibiting industries from sending hazardous waste abroad without simultaneously providing adequate disposal sites within the United States will provoke illegal disposals of hazardous waste.\textsuperscript{183}

A prohibition on waste exports and imports would be counterproductive in other ways as well.\textsuperscript{184} Developing countries, as sovereign states, should have the opportunity to receive hazardous waste imports if they so choose. These countries receive significant financial benefits from accepting hazardous waste and rely on such imports to capitalize other areas of their economies.\textsuperscript{185} Developing nations should not be denied the right to reap such benefits. To do so would be clearly paternalistic and potentially illegal.\textsuperscript{186}

\textsuperscript{181} One reason United States industries increasingly export their hazardous waste abroad is the difficulty in finding adequate domestic disposal facilities. See Porter, \textit{supra} note 16, at 11. Two factors have led to this shortage of waste disposal facilities in the United States—the "not in my backyard" (NIMBY) philosophy of the American people, Langone, \textit{supra} note 14, at 44, and the work of environmental groups. The NIMBY philosophy essentially rejects all proposed hazardous waste disposal sites "\[r\]egardless of the quality of the facility, its environmental controls, or the restrictions imposed upon its operation." Cain, \textit{supra} note 10, at 772. Strong public opposition and environmental special interest groups have prevented construction of new waste facilities. \textit{Id.} (stating that "[p]ublic opposition is the single most significant factor restricting the growth of the number of hazardous waste sites"). Environmental interest groups have also played a role in the passage of stricter waste management laws in the United States.

\textsuperscript{182} See \textit{supra} notes 57-58 and accompanying text.

\textsuperscript{183} See, e.g., \textit{supra} notes 16-27 and accompanying text. The mysterious disappearance of the waste on board the \textit{Khian Sea} illustrates the likely result of denying waste generators places to dispose of waste overseas as well as at home. Eventually, the owner of the waste has no alternative but to dispose of the waste clandestinely. Attempts by environmentalists to halt this trade, although ultimately desirable, are currently premature and counterproductive.

\textsuperscript{184} Exports to foreign disposal facilities are more economically efficient for many countries, and for other countries are simply unavoidable. See \textit{supra} note 58 (discussing the disposal problems faced by Greece, Luxembourg, and Denmark). Moreover, exports provide a means by which states can deal with hazardous wastes which they are unable to dispose of in an environmentally safe manner within their own borders.

\textsuperscript{185} See Anderson et al., \textit{supra} note 87, at 66. One recent deal would have brought $600 million to a small West African nation, Guinea-Bissau, over a five year period. \textit{Id.} The deal was entered into between a United States attorney and Guinea-Bissau. Guinea-Bissau agreed to accept 15 million tons of hazardous waste for storage over five years under the contract. In exchange, Guinea-Bissau was to receive $600 million—an amount thirty-five times greater than the value of the country's yearly exports and twice its foreign debt. The $120 million annual payment Guinea-Bissau would have nearly equalled its gross national product of $150 million. \textit{Id.} at 66-67. When "[a]sked why his country had accepted the deal in the first place, [the] Tourism and Trade Minister \ldots{} responded sadly: 'We need the money.' " \textit{Id.} Unfortunately, the storage methods anticipated in this particular transaction were not environmentally sound and, after public opposition, the country rescinded the contract. \textit{Id.}

\textsuperscript{186} The United States Supreme Court has held invalid a law prohibiting the importation into a state of any waste which originated outside the state. Philadelphia v. New Jersey, 437
In addition, such action might well convince developing nations that environmental agreements are truly a means for industrialized nations to secure their own economic superiority.

2. The Waste Export Control Act

The Waste Export Control Act (WECA)\(^\text{187}\) provides the President with the necessary statutory authority to regulate movements of hazardous waste across U.S. borders to facilitate U.S. ratification of the Basel Convention.\(^\text{188}\) WECA brings under EPA regulation wastes not currently subject to RCRA controls.\(^\text{189}\) For example, household wastes and residue from the incineration of household wastes, subject to regulation under the Basel Convention as “other wastes,” are not defined as hazardous and therefore are not subject to regulation under RCRA.\(^\text{190}\) WECA expands the definition of hazardous waste and thereby provides for EPA supervision of all substances governed by the Basel Convention when the substances move across national borders.\(^\text{191}\)

WECA provides that industrial generators of hazardous waste may not export to foreign facilities employing waste management standards “less strict than” corresponding United States standards.\(^\text{192}\) The “less strict than” language is not intended to require that foreign facilities be identical to those in which the hazardous waste would be treated, stored or disposed of in the United States.\(^\text{193}\) Rather, the language assures that the foreign fa-

\(^{187}\) U.S. 617 (1978). The statute prevented importation into New Jersey of “any solid or liquid waste which originated . . . outside the territorial limits of the State.” \textit{Id.} at 618 (quoting N.J. STAT. ANN. § 131-10 (West Supp. 1978), \textit{repealed by} 1981 N.J. Laws ch. 78, § 1). The Court held that the New Jersey law violated the Commerce Clause. \textit{Id.} at 629. Although the Court’s decision specifically addressed the movement of wastes in interstate commerce, the reasoning is in many ways applicable to the international movement of hazardous waste as well. Specifically, those who wish to ban the international shipment of waste should heed the Court’s advice to New Jersey: “Today, [certain states] find it . . . necessary to [export] their waste . . . for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow . . . New Jersey may find it . . . necessary to [export its] waste . . . and those states might then claim the right to close their borders.” \textit{Id.} at 629. The Court concluded its discussion by stating that the law would protect the exporting states today, just as the law will protect New Jersey tomorrow if it should become the exporter. \textit{Id.}


\(^{189}\) \textit{See id.} § 2(b) (explaining in the purpose clause that, among other things, acceptance of the bill will satisfy the prerequisites for United States compliance with the Basel Convention).

\(^{190}\) \textit{Mounteer, supra} note 155, at 10,086.

\(^{191}\) \textit{Basel Convention Hearing, supra} note 44, at 97 (statement of EPA Administrator Reilly).

\(^{192}\) \textit{See id.} at 83 (statement of Rep. Snyar) (explaining that the bill requires reporting on all hazardous and non-hazardous waste exports).

ccilities yield the same level of protection to human health and the environment as would the domestic facilities. The bill's sponsor insists that the EPA will retain flexibility under WECA to waive specific technological requirements for foreign facilities if the alternatives employed are proven to be as effective. In addition, WECA calls for renegotiation of existing waste trade agreements with Mexico and Canada to incorporate the "no less strict than" standard for management of hazardous wastes outside the United States.

Finally, WECA calls for a permit program administered by the EPA. The bill prohibits the export of solid waste without a permit issued by the Administrator of the EPA. The Administrator is authorized by WECA to issue a permit only after determining that the waste producers have undertaken source reduction measures to minimize or eliminate waste production prior to export.

Exports of hazardous waste under WECA are strictly prohibited unless made in accordance with an international agreement between the United States and the importing country containing a provision that the "[management] of the solid waste will be conducted in a manner which is . . . no less strict than that which would [apply] if the solid waste were managed in the United States." WECA sets forth guidelines for the EPA to apply in making the determination of whether a foreign country's waste management regulations are "no less strict than" the corresponding federal regulation. For example, WECA mandates that the waste treatment facilities, treatment methods, and standards be "equivalent" to those required by the legislation for waste management in the United States. The effect of these requirements is to require the foreign country to adopt the U.S. law as its own or forfeit any opportunity to trade with the United States.

194. Id. 195. Id. at 81 (statement of Rep. Synar). 196. H.R. 2358, § 3(a); Basel Convention Hearing, supra note 44, at 79 (statement of Rep. Wolpe) (stating that, unlike the Hazardous and Additional Waste Export and Import Act of 1991, WECA requires new agreements with Canada and Mexico that increase regulation of traded wastes to satisfy the Basel Convention's standards). 197. H.R. 2358, § 3(a). 198. Id. 199. Id. 200. Id. 201. See id. The Administrator is to follow these guidelines when issuing permits for waste exportation under the permit program set up by the Act. Id. 202. Id. 203. See Basel Convention Hearing, supra note 44, at 154 (prepared statement of Dr. Harvey Alter) (explaining that importing countries would have to adopt RCRA themselves in order to receive hazardous waste from the United States).
WECA would effectively eliminate waste exports for disposal.\textsuperscript{204} As a consequence the legislation suffers from the same weaknesses as the Waste Export and Import Prohibition Act, which expressly bans the hazardous waste trade,\textsuperscript{205} and is, therefore, an unacceptable means by which to ratify the Basel Convention.

3. \textit{The Hazardous and Additional Waste Export and Import Act of 1991}

Similar to WECA, the Hazardous and Additional Waste Export and Import Act of 1991 (the Administration's Bill),\textsuperscript{206} provides the President with sufficient authority to regulate hazardous waste exports and imports for the United States to ratify the Basel Convention.\textsuperscript{207} The definition of hazardous waste employed by the Administration's Bill also incorporates household wastes and residue from household wastes which are not regulated by RCRA\textsuperscript{208} but must be governmentally controlled if the United States is to ratify the Convention. The Administration's Bill, therefore, enlarges the definition of wastes subject to federal hazardous waste regulation.

The Administration's Bill approaches the issue of bilateral waste trade agreements differently from WECA. Currently, bilateral agreements governing waste exports exist between the United States and both Mexico and Canada.\textsuperscript{209} The Administration's Bill exempts these agreements from the new standards imposed on hazardous waste shipments and thus exports to Mexico and Canada would not be subject to the terms of the Basel Convention.\textsuperscript{210}

Unlike WECA's restriction that export permits be issued only to parties who undertake measures to minimize waste production, the Administration's Bill requires only that waste generators make and document their efforts to minimize waste generation.\textsuperscript{211} The Administration's Bill does not provide the EPA with authority to stop an export if this requirement is not

\textsuperscript{204} \textit{Basel Convention Hearing, supra} note 44, at 79 (statement of Rep. Wolpe) (explaining that elimination of hazardous waste disposal in Third World countries is the primary goal of the bill's sponsors).

\textsuperscript{205} \textit{See supra} notes 174-86 and accompanying text.


\textsuperscript{207} \textit{See id.} § 1(b) (providing that the sole purpose of the bill is to implement the terms of the Basel Convention).

\textsuperscript{208} \textit{Id.} § 2 (including within the definition of "additional wastes" governed by the bill "any waste identified in regulations promulgated by the President as necessary to implement the Basel Convention").

\textsuperscript{209} \textit{See infra} notes 234-37 and accompanying text.

\textsuperscript{210} \textit{Basel Convention Hearing, supra} note 44, at 79 (statement of Rep. Wolpe). These agreements currently cover over \textit{90}\% of domestic waste exports. \textit{Id.}

\textsuperscript{211} \textit{H.R.} 2398, § 2.
fulfilled, nor does it provide any other enforcement mechanism for ensuring the minimization of waste generation.\textsuperscript{212}

The main difference between WECA and the Administration's Bill, however, is the language used to describe the level of waste management technology required in a foreign country before United States exporters may send their hazardous waste to that country for disposal. The Administration's Bill requires that waste be handled in an "environmentally sound manner,"\textsuperscript{213} whereas WECA prohibits waste exports to foreign destinations employing waste management standards "less strict than" the corresponding domestic standard.\textsuperscript{214} The Administration's Bill bans international shipments of hazardous waste to and from the United States absent an international agreement between the United States and the foreign country involved in the particular export or import, and a determination by the countries that the waste will be managed in an "environmentally sound manner."\textsuperscript{215} This language parallels that of the Basel Convention.\textsuperscript{216} The Administration's proposal makes it illegal to export wastes subject to the legislation when the exporter knows or should know that the waste will not be managed in an environmentally sound manner.\textsuperscript{217} Similarly, the Convention requires that Parties assume a general obligation to prohibit an export of waste from their territory until each is certain that the waste will be managed in an environmentally sound manner.\textsuperscript{218}

A major criticism of both the Administration's Bill and the Basel Convention is that they fail adequately to define "environmentally sound manner"
at the outset.219 The Administration has defended its proposal by explaining that the United States will ensure that any waste generated within the country will be handled and disposed of in an environmentally sound manner, regardless of the ultimate place of disposal.220 In doing so, however, the Administration will respect the sovereignty of foreign countries by allowing them to choose a method of waste management other than that employed in the United States, so long as the method chosen will result in environmentally sound waste management.221 Furthermore, the definition of “environmentally sound management” will be a major focus of the first meeting of the Convention Parties.222 The international community will move substantially toward solving the hazardous waste disposal crisis by establishing a uniform standard for technology that minimally produces “environmentally sound” waste management. Such a standard will enable the parties to know unequivocally, for the first time, whether or not their operations are acceptable to the rest of the world.

IV. COMMENT: THE BASEL CONVENTION—A REALISTIC APPROACH

Although critics charge that the Basel Convention is unacceptable—because it does not prohibit international shipments of waste entirely223—the Convention is nonetheless considered by many to be a positive step in the

219. See Basel Convention Hearing, supra note 44, at 80. Representative Wolpe expressed this criticism as follows:

[The Administration’s Bill] fails to define the term and offers nothing more than assurances that the administration will come up with some kind of definition within 18 months after enactment of the bill. . . . [I]f the EPA can not get a definition . . . prior to introduction of its bill, why should we believe that it can get an acceptable definition after Congress has passed legislation?

Id. The Basel Convention defines “environmentally sound management of hazardous wastes” 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 which may result from such wastes.” Basel Convention, supra note 31, art. 2, para. 8, 28 I.L.M. at 660.


221. Id. The Bush Administration is confident that the process of negotiating agreements with the United States’ waste trading partners will provide an opportunity to assess the quality of the waste management system in these countries. Id. Moreover, the Administration has assured Congress that if, in the Administration’s opinion, waste will not be managed by an importing country in a manner protective of human health and the environment, the United States will not enter into an agreement with that country. Id.

222. Id. at 98.

223. See id. at 186 (statement of Greenpeace Coordinator Vallette) (calling for a waste export and import ban and stating that “[t]he Basel Convention simply establishes a global toxic waste trade notification system . . . designed to facilitate a free trade in toxic wastes and ignore the poisoning of air, water, soil and human health which inevitably accompanies the fate of toxic waste”); Tuohy, supra note 10, at 6 (reporting that Greenpeace, as well as certain national delegates, fear that without an absolute prohibition on international waste shipments
battle to bring the world's waste problem under control. The Convention greatly augments current regulation of the hazardous waste trade by increasing the responsibility of exporting countries for the management of their waste exports, expanding the ability of transit countries to restrict the use of their territory for the transportation of waste, promoting waste reduction, and encouraging the exchange of waste management information between parties.

The Basel Convention does not seek to prohibit international shipment of hazardous waste. Instead, it seeks to prevent the uncontrolled international trafficking of such waste. Substantial portions of the Convention focus on disclosure among Parties of the terms of their waste exports and imports and require strict compliance with the notification and consent procedures prior to any shipment of hazardous waste. These provisions are designed to eradicate fraud and illegal transportation and disposal of wastes, thereby increasing the accountability of exporting nations for waste exports while simultaneously encouraging parties to minimize waste generation and seek sufficiency in waste treatment and disposal.

The ability of hazardous waste generators to avoid hazardous waste disposal regulations by shipping waste abroad suggests a need for international cooperation and regulation of the hazardous waste trade in order to ensure safer management of hazardous waste. As with all environmental concerns, waste disposal must ultimately be addressed on an international level. The Basel Convention marks an unprecedented example of international cooperation concerning hazardous waste management. The United States must not miss the opportunity to participate in this achievement.

Much of the criticism surrounding United States involvement in the hazardous waste trade revolves around the practice of dumping U.S. wastes on unscrupulous governments may allow imports of hazardous waste in exchange for large sums of money).

See generally Hackett, supra note 27 (discussing the strengths and weaknesses of the Convention); see also Tuohy, supra note 10, at 6 (quoting the opinion of UNEP's Executive Director that "[this] agreement . . . has signaled the international resolve to eliminate the menace [that] hazardous wastes pose to the welfare of our shared environment and to the health of all the world's peoples") (second alteration in original).

Johnson, supra note 33, at 312.

Basel Convention Hearing, supra note 44, at 143 (prepared statement of Dr. Harvey Alter).

Basel Convention, supra note 31, art. 6, 28 I.L.M. at 664-65.

Basel Convention Hearing, supra note 44, at 143.

Id.

See supra notes 61-65 and accompanying text.

See supra notes 66-70 and accompanying text.
an unwary Third World. Opponents of the hazardous waste trade portray United States exporters as dumping toxic wastes on Third World nations which are unaware of the dumping or are unable to refuse the shipments out of economic desperation. In reality, approximately eighty-five percent of the hazardous wastes exported from the United States are bound for Canada and another twelve percent are sent to Mexico. Both Canada and Mexico have entered into agreements with the United States governing the exporting and importing of hazardous waste. The shipment of such waste is not unidirectional; wastes also come into the United States from Canada for recycling or disposal. Moreover, the fact that the wastes destined for Mexico are recycled rather than dumped in landfills further reduces the validity of this accusation of imperialistic dumping of hazardous waste in Third World countries.

If the accusation were true that hazardous waste exports from the United States frequently result in unsafe conditions for countries that did not willingly consent to the waste imports, then a complete prohibition on exports of hazardous wastes from the United States would be in order. Under those conditions...
circumstances, a ban on exports to the victimized countries would be necessary to protect human health and the environment from unsafe disposal of hazardous wastes. Moreover, under such circumstances, a ban on exports would be necessary to safeguard foreign relations between the United States and the foreign countries. Fortunately, the evidence does not support the conclusion that the United States is imposing such burdens on the rest of the world.\textsuperscript{238} There is no reason, therefore, why the United States should not continue to allow the exporting of hazardous waste if it is accomplished in accordance with strict regulations set forth in domestic legislation and in compliance with the terms of the Basel Convention.\textsuperscript{239}

The Bush Administration is urging Congress to quickly ratify the Convention so that the United States will be involved in the first meeting of the Convention Parties during which important issues surrounding implementation of the Convention will take place.\textsuperscript{240} It is questionable whether the United States will in fact be among the nations involved with the Convention's implementation. In addition to statements by congressional leaders that they will not be rushed through the legislative process,\textsuperscript{241} there have also been threats that the committee intends to link the domestic waste management problem to ratification of the Convention.\textsuperscript{242} Several congressional leaders have expressed anger over President Bush's aggressive support of the Basel Convention and concurrent refusal to cooperate in discussion on the reauthorization of the RCRA—the domestic waste management policy.\textsuperscript{243}

Although there is no question that the United States must find a way to cope with its domestic waste disposal problems, the attempt to inextricably link RCRA to the Basel Convention is unwise. A waste management program in the United States that incorporates more environmental protections than are found in other countries will encourage waste producing industries

\textsuperscript{238} \textit{Basel Convention Hearing, supra} note 44, at 141 (prepared statement of Dr. Harvey Alter) (refuting the accusation that the United States dumps wastes on unsuspecting Third World nations by explaining that 99.5% of U.S. waste trading is for recycling); \textit{see also id.} at 95 (prepared statement of EPA Administrator Reilly). Ninety-six percent of waste exports from the United States are destined for countries that have voluntarily concluded bilateral waste trade agreements with the United States. The remaining 4% of exports are sent to member states of the OECD. \textit{Id.} at 95-96.


\textsuperscript{240} \textit{Basel Convention Hearing, supra} note 44, at 97 (statements of EPA Administrator Reilly and Dr. Harvey Alter). In response to the Administration's repeated suggestions that Congress should ratify the Basel Convention quickly, the Chairman of the Subcommittee on Transportation and Hazardous Materials, Rep. Swift, noted that it took the Administration more than two years to submit it to Congress, and promised that the Congress would deal with the matter at least as expeditiously. \textit{Id.} at 206.

\textsuperscript{241} \textit{See id.} at 206.

\textsuperscript{242} \textit{Id.} at 105.

\textsuperscript{243} \textit{Id.} at 91-92, 105-06.
to move to those other countries in a similar fashion as lower labor costs prompt U.S. industries to set up production plants abroad.\footnote{244} Although moving these industries out of the United States would decrease the quantity of hazardous wastes generated in the United States and minimize the dangers associated with the wastes, forcing industries out of the United States will severely injure U.S. economic interests in the long run.\footnote{245} Therefore, to ensure the safest possible transboundary movements of hazardous waste without sacrificing domestic economic interests, Congress should adopt the Hazardous and Additional Waste Export and Import Act of 1991.\footnote{246} Unlike the other bills proposed to implement the Basel Convention, the Administration's Bill will not sacrifice profitable trade between the United States and foreign countries for the sake of the environment.\footnote{247} Upon receipt of the statutory authority necessary to implement the Basel Convention, the President should promptly submit the articles of ratification necessary for the United States to become a Party to the Convention.

One important reason for the United States to promptly ratify the Basel Convention is that the first meeting of the Parties is scheduled for November 1992. This meeting will focus on refining important aspects of the Convention's implementation.\footnote{248} In particular, the Parties will discuss crucial issues such as the specific meaning of "environmentally sound management"\footnote{249} and of liability and compensation for damages resulting from transfrontier movement and disposal of hazardous and other wastes.\footnote{250} Failure to participate in the Basel Convention will deprive the United States of an opportunity to influence hazardous waste management around the world and to ultimately help protect the global environment. Furthermore, because the Convention forbids a Party to engage in hazardous waste trading with a non-Party,\footnote{251} the United States is presently unable to trade in recycl-

\footnote{244. See Keith Bradsher, Global Issues Weigh on Town as Factory Heads to Mexico, N.Y. TIMES, Sept. 1, 1992, at A1 (referring to "the continuing loss of high-wage manufacturing jobs to countries where labor costs are significantly lower"); see also Tim Coone, Making Management Options Crystal Clear, FIN. TIMES, Aug. 25, 1992, at 16 (discussing potential plans to move a traditionally Irish industry, the Waterford Crystal factory, to a country with lower labor costs in order to aid the ailing company).}

\footnote{245. Basel Convention Hearing, supra note 44, at 142 (prepared statement of Dr. Harvey Alter) (explaining that a positive trade deficit of $4.8 billion per year is at stake if the United States does not ratify the Convention).}

\footnote{246. H.R. 2398, 102d Cong., 1st Sess. (1991); see supra notes 206-10 and accompanying text.}

\footnote{247. See Basel Convention Hearing, supra note 44, at 138 (statement of Dr. Harvey Alter) (explaining that the Waste Export and Import Prohibition Act, unlike the Administration's Bill, would eliminate $7 billion dollars in U.S. exports).}

\footnote{248. Id. at 96 (statement of EPA Administrator Reilly).}

\footnote{249. Id.; see also Basel Convention, supra note 31, art. 4, para. 2(e), 28 I.L.M. at 662.}

\footnote{250. Basel Convention, supra note 31, art. 12, 28 I.L.M. at 668.}

\footnote{251. Id. art. 4, para. 5, 28 I.L.M. at 662.}
ables with countries that are Parties in the absence of bilateral agreements with each individual country. 252 Although such agreements can be negotiated separately between the United States and its potential trading partners, the monetary and personnel resources required to do so could be saved if the United States becomes a Party to the Convention.

The United States will not be precluded from participating in the Basel Convention even if implementing legislation is not passed, or instruments of ratification deposited, prior to the first meeting of the Parties. Although having lost the opportunity to influence the development of technical guidelines for the environmentally sound management of waste, as well as other issues addressed at the meeting, 253 the United States should nonetheless enact legislation and become a Party to the Convention. The same considerations previously supporting ratification would remain despite this lost opportunity. 254 Moreover, future meetings of the Parties will provide opportunities for the United States to influence the international regulation of hazardous waste trading. 255

Ratification and adherence to the Basel Convention by developed and developing nations will aid in the elimination of illegal hazardous waste trafficking 256 and provide for the safest possible international shipment of hazardous waste. 257 While not prohibiting such shipments of wastes altogether, the Convention provides for close scrutiny by Parties of the toxic traffic that occurs. 258

252. Id. art. 11, para. 1, 28 I.L.M. at 668 (permitting Parties to enter into other agreements or arrangements regarding international shipments of hazardous waste or other wastes with non-Parties provided that the agreement or arrangement employs management techniques for hazardous and other wastes that are no less environmentally sound than those required by the Convention).


254. See supra part IV.

255. Basel Convention, supra note 31, art. 15, para. 7, 28 I.L.M. at 671. Three years after the Convention's entry into force the Parties must meet to evaluate the Convention's effectiveness and may, depending on the relevant scientific, environmental, technical, and economic information then available, consider adopting a ban on international waste trading. Id. Similar meetings will occur at least every six years thereafter. Id.

256. Illegal Traffic, supra note 35, at 33 (stating that the Basel Convention will substantially further chances for abolishing the illegal movement of toxic and dangerous products and wastes).

257. See supra notes 114-36 and accompanying text.

258. See, e.g., Basel Convention, supra note 31, art. 4, para. 2(f), 28 I.L.M. at 662 (requiring delivery of detailed information about proposed waste trades to all states involved in the shipment); id. art. 4, para. 7(c), 28 I.L.M. at 663 (mandating that movement documents accompany hazardous waste cargoes from the outset of the transboundary movement to the point of disposal).
V. CONCLUSION

The Basel Convention symbolizes the dawn of a promising era of international waste management cooperation. As the production of hazardous waste increases, landfills reach capacity across the globe, and developing countries struggle to build disposal facilities and acquire the necessary technology to dispose of hazardous waste in an environmentally sound manner, members of the international community must unite their efforts and assist one another to discover solutions. Although not the ultimate solution to the waste management crisis, an international waste trade is a realistic and feasible option for the current state of affairs.

The Basel Convention sets forth a plan that will encourage developed and developing nations to cooperate with one another with respect to the trans-frontier movements of hazardous waste. While respecting a country's sovereign right to refuse participation in the hazardous waste trade, the Convention encourages Parties to share with one another advances in waste management technology. The Basel Convention will help make the international shipment of hazardous waste as environmentally safe as possible. Congress should act quickly to enact legislation enabling the President to ratify the Convention. Failure to do so will ultimately injure United States economic interests and will deprive the United States of a significant opportunity to employ its influence and hazardous waste management skills for the benefit of the global environment.

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