

The Basel Convention: Will it Curtail Hazardous Waste Exports?

by Diane Kilcoyne

Industrialized nations produce millions of tons of hazardous waste every year, with many countries exporting the waste for treatment or disposal. The U.S. alone produces more than 250 million tons of hazardous waste per year, approximately 160,000 tons of which is exported.¹ Hazardous waste treatment facilities in the U.S. and other industrialized nations are filling to capacity, and as the public becomes more conscious of the environmental impact, fewer new facilities are built. The scarcity of facilities and costs of compliance with stringent environmental regulations has caused the costs of disposal in the U.S. to skyrocket in some areas to more than \$2000 per ton, whereas developing nations charge as little as \$20 per ton.² Businesses around the globe, seeking to minimize their hazardous waste disposal costs, regularly transport wastes to less expensive countries for disposal.³ Thus, in recent years, the transportation of hazardous wastes has become a global issue, which requires both control and cooperation on a global level by the members of the international community.

Organizations in the international community, such as the OECD, the EC, and the UN, have been looking at this problem over the last decade, and have proposed several different solutions, culminating in the UN's Basel Convention on the Control of Transboundary Movements of Hazardous Wastes (Basel Convention). The Basel Convention, which was approved by 105 nations in 1989, signed by 53 nations, and has currently been ratified by more than 20, entered into force internationally on May 5, 1992. The Convention was signed by the U.S. in 1989, and was ratified by the U.S. Senate in August of 1992. However, it has yet to be implemented into U.S. law. It is expected that provisions for implementation will be included in the RCRA reauthorization bill, which was stalled in committee during the 102nd congress.

The Basel Convention has been criticized as having several deficiencies, including vague definitions in critical areas and loopholes which allow extra-treaty bilateral agreements on transfers of waste, thus circumventing the Convention entirely. The greatest problem of the Basel Convention is that it has no enforcement mechanism; nations who break the requirements of the treaty face no penalties, nor do private companies. I propose that the international community, including the U.S., should at the very least implement the liability protocol required by the Basel Convention to give incentives for compliance, by allowing civil liability to attach to the shippers or the producers for any damage caused by their waste. The severity of the problem of hazardous waste transportation is such that the current measures being taken in the international arena are insufficient.

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Incidents of Toxic Waste Dumping

Studies have shown that an average of 25% of the hazardous wastes produced in Europe and North America are sent to places other than their origin for treatment and recycling or ultimate disposal.⁴ The transporters, who are generally paid at the beginning of the journey, do not insure the safe delivery of their cargo, and in fact have an economic incentive to "lose" their cargo on the journey to reduce their costs of transportation. Unlawful⁵ dumping of wastes at sea is therefore a common practice, as is the tactic of falsifying the transport documents to allow toxic materials to be transported as if they were ordinary and safe materials.

Another tactic used by waste generators, transporters, or brokers to avoid paying the costs of disposal is to classify the hazardous waste materials as "fertilizer" or "roadfill." There have been several recent egregious attempts at pawning off hazardous wastes on Third World nations under these pretenses.

One of the most widely publicized instances of such an event occurred in 1986, when the ship *Khian Sea*, loaded with 15,000 tons of municipal incinerator ash from Philadelphia, tried to dispose of the waste in Panama, which rejected the shipment. The ship then headed for Haiti, where unscrupulous Haitian military leaders would have allowed the waste to be dumped on Haiti's beaches as "fertilizer." However, the group Greenpeace alerted the environmental community and the resulting public outcry stopped the action, but only after three to four thousand tons of the ash waste had already been dumped.⁶

The *Khian Sea* then moved from port to port for eighteen months, looking for a recipient

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country for their hazardous cargo. Due to the diligence of Greenpeace activists worldwide, the ship was never allowed to sneak into a port unannounced, and was therefore rejected by the Bahamas, Bermuda, Honduras, the Dominican Republic, and the Philippines. The ship later showed up with empty cargo holds, and it is suspected that the toxic ash was dumped in the Indian Ocean.⁷ The *Khian Sea* episode was one incident where the

public was made aware of the shipment of hazardous wastes, and the outcry effectively stopped the dumping on an unsuspecting Third World nation. However, many other such shipments have taken place without mention, and are constantly ongoing.

Another illicit toxic shipment which attracted public outrage is the Koko incident which occurred in 1988. The tiny port town of Koko, Nigeria discovered that it had unwittingly received 4,000 tons of toxic industrial waste from Italy, including polychlorinated biphenyls (PCBs), among other noxious chemicals.⁸ This dumping scheme was launched by an Italian businessman living in Nigeria, who then fled the country when Nigerian officials discovered the nature of the chemicals. As a result of the moral and political pressures put on the Italian government as this incident became public, Italy agreed to accept responsibility for the wastes and to reimport them for disposal, at a cost of more than fifteen million dollars.

An unfortunate incentive for developing nations is the fact that staggering amounts of money can be made by the nation for receiving hazardous wastes. This was clearly demonstrated when the public learned that the West African nation of Guinea-Bissau had agreed with an American company, Lindaco, to dispose of three million tons of toxic by-products from the tanning and pharmaceutical industries.⁹ If the deal had been transacted, Guinea-Bissau would have made more than \$600 million over 5 years, an amount larger than the GNP for the whole

nation. Pressure from neighboring countries forced the country to withdraw from the deal, however, when it was discovered that the wastes to be received included methyl isocyanate, the same lethal gas which caused many deaths in the Bhopal incident.

As a result of the publicity garnered by these episodes, many Third World countries have called for a total ban on the import of hazardous wastes, calling the trade in wastes "toxic imperialism".¹⁰ The European Community, United Nations, and other international organizations have worked on solutions to the problem for more than a decade.

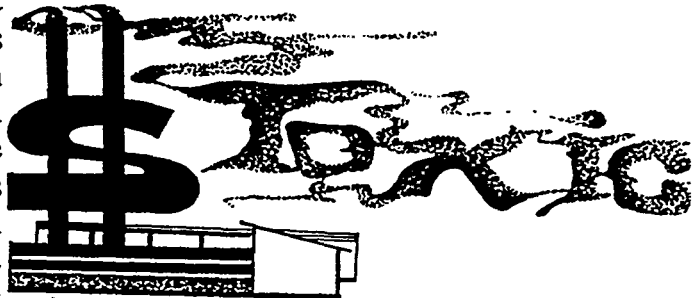
International Attempts at a Solution

The Organization for Economic Cooperation and Development (OECD) recognized and began working on the problem of transboundary movement of wastes in 1983. Since that time, the OECD has adopted four legally binding Decisions for its members. These Decisions require advance notification of OECD members receiving wastes, provide for an overall tracking system, require prior consent of non-OECD states receiving wastes.¹¹ The OECD Environment Committee produced a draft Convention in 1989 which would regulate the international hazardous waste trade.¹² This draft, however, was slanted to protect the interests of industrialized nations who wanted to continue trading in hazardous waste, rather than protecting the interests of developing nations who wish to restrict the trade. The OECD delegates held up the release of their final draft, apparently to allow the UNEP Convention to be released first.¹³

The OECD agreed in April, 1992, to have guidelines on the transfrontier movements of wastes that are destined for recovery (i.e.- recycling) operations.¹⁴ The OECD Decision classifies wastes into three tiers; green, amber, and red, based on the relative dangerousness of the chemical to be transported for recycling, and requires different levels of tracking and scrutiny for the differing tiers. The OECD Decision is not as strict as the Basel Convention in defining hazardous waste, allowing several products that are listed as hazardous by the Basel Convention to be shipped as green (non-hazardous) or amber (slightly hazardous). This attempt by the OECD to regulate wastes destined for recovery, in an agreement separate from the Basel Convention, indicates the need for further definition of the terms of the Convention.

The European Commission (EC), the legislative body of the European Economic Community (EEC) has the ability to create legislation which is technically binding on its member states. In recent years, it has begun to use this power to create environmental regulations which bind its members, by requiring them to enact equivalent provisions into their domestic laws.¹⁵

The EC Council in 1984 adopted the *Directive on the Supervision and Control Within the European Community of the Transfrontier Shipment of Hazardous Wastes* (EC Directive).¹⁶ This first step by the EC contains requirements that member states notify the "competent authorities" when shipping hazardous wastes across international borders. Additionally, the EC Directive requires that the notification of authorities include information on the source and composition of the waste, the routes the shipment will take, and insurance taken out against damage to third parties. The EC Directive requires that no shipment be made until the "competent authorities" have



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acknowledged receipt of the shipment notice, and have had 15 days to object.

In 1982, the United Nations Environmental Programme (UNEP) mandated the development of guidelines for environmentally sound management of hazardous wastes.¹⁷ A working group started the process of establishing international guidelines by creating draft guidelines in 1983, which eventually became the *Cairo Guidelines for the Environmentally Sound Management of Hazardous Wastes* (Cairo Guidelines), adopted by UNEP in 1987.¹⁸ The Cairo Guidelines established that international cooperation was a necessity in the control of the transportation and disposition of hazardous wastes. The Guidelines proposed a prior informed consent mechanism whereby the receiving country must be made fully aware of the nature of the material being shipped and must impliedly accept the responsibility for proper management of the waste. While the Cairo Guidelines contained provisions for monitoring, control, remedial action, liability and compensation, the provisions were nonbinding and unenforceable on their own, designed only as a code of practice.

To further the goals of compliance, after adopting the Cairo Guidelines, UNEP convened a working group to prepare a convention which would implement the basic principles of the Guidelines, and establish "a mechanism which would ensure adequate control and full availability of information on transboundary movements of hazardous waste and to prevent imports or exports that did not meet basic environmental standards." The UNEP working group eventually produced the final version of a convention which set out to provide workable guidelines for the safe transportation of hazardous wastes, over the objections of many countries which demanded an outright ban on such movements. The final version has come to be known as the Basel Convention.¹⁹

The Basel Convention

The Convention includes provisions for notification of any country which will receive a hazardous waste shipment, and requires notification of any country which the shipment must pass through. It provides for a tracking system through the use of a "moving document", which follows the waste shipment from point of origin to point of disposal.

The Convention requires participant States to not allow the export of hazardous wastes

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if the State has reason to believe that the wastes will not be managed in an "environmentally sound" manner. This standard is not clearly defined, although the convention defines it as "taking all practicable steps to ensure that hazardous wastes...are managed in a manner which will protect human health and the environment against the adverse effects which may result from such

wastes." This crucial provision is designed to discourage the irresponsible shipping of wastes to Third World countries which lack the facilities to properly dispose of the waste, as such shipments are not allowed by Basel participants. Technical guidelines for defining "environmentally sound" standards will be determined by the Parties to the Convention at their first meeting, scheduled for later this year.

If a country exports wastes which cannot be accepted by the designated recipient, and alternative arrangements cannot be made for environmentally sound disposal, the country of export has a duty to re-import the wastes. Parties to the Convention are required to prohibit any waste transport activities by unauthorized persons. Wastes covered by the Convention include

incinerator ash, medical waste, and household waste, in addition to the traditionally regulate hazardous chemical wastes.

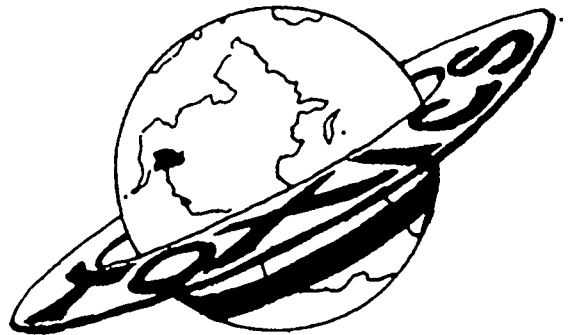
With regards to policy considerations, Parties to the Convention agree that technology transfer is needed for developing countries to enable them to meet the requirements of the Convention. The Parties agree that training and technology transfer centers for hazardous waste management should be established. Additionally, the Convention claims as its underlying objective the goals of waste minimization, recycling, and source-country disposal, rather than transfer. To these ends, annual reports on such efforts by each Party are required to be submitted to the Basel Secretariat.

The Enforcement Problem

The Basel Convention has been criticized by some environmentalists as an institutionalization of the waste trade, a move which they fear may lead to an increase in the export trade. Greenpeace and many members of the Organization of African Unity (OAU) have called for an outright ban on transboundary shipments of hazardous wastes, but attempting to impose a total ban is not realistic, particularly in the European states where international boundaries are regularly traversed.

A more crucial criticism of the Basel Convention is that it has no teeth; that participation and adherence to its standards is voluntary. Unless a country enacts implementing legislation domestically, the convention is effectively unenforceable. Some further international action is needed to add teeth and to enable enforcement of the provisions of the Convention.

A recent example of an enforcement problem between participants of the Basel Convention occurred in September, 1992, when authorities in both France and England prevented a shipment of Australian toxic wastes from being unloaded in their ports. The ship bearing the wastes, the *Maria Laura*, was originally destined for disposal in Le Havre, France, but was denied access there by Greenpeace activists. The 18 tons of PCBs were then shipped to England, where protesters again stopped the delivery. Australian authorities then stated that the next destination for the wastes was Cape Town, South Africa.²⁰ Some observers believe this will be a test case for the Basel Convention, as all involved are signatories to the Convention. Even if it does not become a test case for violation of the convention, it does point to a need for enhanced enforcement. Unless shippers of hazardous waste know that they may be held liable in some way for any injury to the environment that may occur, they have no incentive, either economic or moral, to abide by the Convention.



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Liability Protocol

There are inherent difficulties in international law when trying to impose state liability for transboundary environmental impacts.²¹ However, a mechanism for imposing individual liability would help to ensure that nations adhere to the provisions of the Basel Convention. The

Basel Convention itself requires parties to the convention to adopt a protocol addressing liability and compensation "as soon as practicable". However, no action has been taken yet beyond a preparatory meeting to discuss the protocol.

The EC's proposed Directive imposing civil liability for damage caused by waste²², which is a similarly structured document, provides a basis for analyzing possible approaches to the proposed civil liability protocol to the Basel Convention. The EC Directive provides civil liability for any producer, transporter, or processor of hazardous wastes if damage is caused to the environment before the waste is deposited with an authorized disposal or treatment facility. Article 5 of the Directive proposes that strict liability would attach in full to each "producer" as defined by the Directive, even where the waste of another producer is a contributing cause of the harm. In rejecting any fault-based liability in favor of this strict liability scheme, the Commission noted that the concept of strict liability for environmental risks is becoming commonly accepted, because of the otherwise difficult task of proving exact causation and attributing the harm.²³

In an important and controversial provision, the Directive gives standing to "public authorities" and "common interest groups" to bring suit to remedy actual or imminent injury to the environment. Currently, only certain members of the EC allow "citizen suits" to protect the environment, whereas some allow the suits when attached to a criminal proceeding in certain

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circumstances,²⁴ and still others do not allow "citizen suits" at all. The question of standing for interest groups is one which has great potential for ensuring that entities comply with the Basel Convention. Greenpeace has called for specific regulations governing the allowance of common interest group suits, thus overriding any national law to the

contrary.²⁵ However, this provision could be controversial because of the Member States' differing laws on the subject, and might hinder acceptance by Members. The member states whose laws do not comport with the Directive may oppose its implementation for this reason.

The proposed protocol to the Basel Convention should follow the same form as the EC proposed Directive, especially in the provision for strict liability for all involved parties to the shipment. The questions of who can claim standing by asserting a harm, what are damages under the provision, and whether or not insurance should be allowed to cover the risk, are all contentious questions that must be tackled in the protocol.

The protocol, in order to be politically feasible, must take into account the existing different laws of the nations involved, and must somehow integrate the balancing needs of the disposal of waste with those of protecting our fragile ecosystem.

Conclusion

With the recognition that every action of an individual, multinational corporation, or States can have dire consequences on the global environment, the world community is slowly coming to terms with the need for supranational regulation of environmental matters. The difficult task of convincing different States to forgo their sovereignty in exercising their own laws must be accomplished in the face of the greater need for the safety of the environment. To this end, much progress has been made in the past decade. However, in order to control the overwhelming problem of hazardous wastes, there must be an effective deterrent to potential violators of the Basel Convention.

The proposed liability protocol discussed above would further this goal, by attaching civil liability to those whose negligence in producing, transporting, or storing hazardous wastes causes harm to the environment. The international community must therefore act to propose, discuss, amend, and ratify such a protocol now, before we encounter another disaster such as the *Khian Sea* or Koko episodes.

NOTES

1. *Waste Export Control: Hearing on H.R. 2525 Before the Sucomm. on Transportation and Hazardous Materials of the House Comm. on Energy & Commerce*, 101st Cong., 1st Sess. 23 (1989) (Statement of Rep. John Conyers, Jr.)
2. Ibrahim J. Wani, *Poverty, Governance, Rule of Law, and International Environmentalism: A Critique of The Basel Convention*, 1 Kan. J. Law & Pub. Pol. 37, 38 (1991)
3. F. James Handley, *Hazardous Waste Exports: A Leak in the System of International Legal Controls*, 19 Env't'l. L. Rep. 10171 (1989)
4. David J. Abrams, Comment, *Regulating International Hazardous Waste Trade: A Proposed Global Solution*, 28 Col. J. Trans. L. 801 (1990) (citing UNEP Indus. and Env't, Special Issue No. 4, 1983, at 22). While the EPA estimates that only 1% of US hazardous wastes are exported, this amounts to a larger total tonnage than any other country, and the percentages of export are higher for European nations.
5. *The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, London, Dec. 29, 1972, 26 U.S.T. 2403, reprinted in 18 I.L.M. 510 (1979), prohibits the dumping of certain wastes, while requiring permits for other types of wastes, based on the degree of dangerousness. *Id.* at Art. IV.
6. James Vallette, *The International Trade in Wastes: A Greenpeace Inventory*, 11-14 (4th ed. 1989)
7. *10,000 Tons of Toxic Ash Disappear in the Indian Ocean*, Greenpeace Waste Trade Update, Jan. 15, 1989, at 1.
8. *Italy Moves to Resolve Problem With Nigeria on Dumping of Toxic Waste*, 11 Int'l Env't Rep. (BNA) No. 7, at 379 (July 13, 1988). The wastes also included arsenic and phosgene, a chemical weapons component, both of which are considered hazardous.
9. See Handley, *supra* note 3, at footnote 148 and accompanying text (discussing the Guinea-Bissau incident); see also 11 Int'l Env't Rep. (BNA) at 325 (June 1988).
10. Brooke, *African Nations Barring Foreign Toxic Waste*, N.Y. Times, Sept. 25, 1988, at A18, col. 1.
11. EPA, *Hazardous Waste Management System; Notification Concerning the Basel Convention's Potential Implication for Hazardous Waste Exports and Imports*, 57 Fed. Reg. 20602, (May 13, 1992) [hereafter EPA Announcement]
12. *OECD Council Resolution*, C(89)1(final), reprinted in 12 Int'l Env't Rep. (BNA) No. 3, at 147 (Mar. 8, 1989)
13. David J. Abrams, Comment, *Regulating International Hazardous Waste Trade*, 28 Col. J. Trans. L. 801 (1990).
14. *OECD Decision Concerning the Control of Transfrontier Movements of Wastes Destined for Recovery Operations*, C(92)39/FINAL, adopted by the Council March 30, 1992. [hereafter OECD Decision]
15. See Linda M. Sheehan, *The EEC's Proposed Directive on Civil Liability for Damage Caused by Waste: Taking Over When Prevention Fails*, 18 Ecol. L. Quarterly 405 (1991).
16. *Directive on the Supervision and Control Within the European Community of the Transfrontier Shipment of Hazardous Waste*, 27 O.J. Eur. Comm. (No. L 326) 31 (1984)
17. EPA Announcement, *supra* note 11.
18. UNEP, *Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes*, Annex II, U.N. Doc. EP/GC.14/17 (1987).
19. U.N. Doc. EP/IG.80/L.12 (1989)
20. *United Kingdom Refuses Entry to Shipment of PCBs from Australia*, Int'l Env't Daily (BNA) Sept. 9, 1992
21. State liability has been imposed, but in limited circumstances. See *The Trail Smelter arbitration*, 3 R. Int'l Arb. Awards 1905 (1941) (explaining the obligations of a State not to cause environmental harm to a neighboring state.) While this arbitration involved state responsibility for a private action, it also provides a basis for the extraterritorial application of civil liability for private action. See also *U.K. v. Albania*, 1949 I.C.J. 4 (Apr. 9, 1949) (known as the *Corfu Channel Case*, in which the International Court of Justice (ICJ) details State's obligation "not to knowingly allow its territory to be used for acts contrary to the rights of other States." *Id.* at 22.)
22. *Proposal for a Council Directive on Civil Liability for Damage Caused by Waste*, 1989 O.J. (C 251) 3; amended in 1991, *Amended Commission Proposal for a Council Directive on Civil Liability for Damage Caused by Waste*, 1991 O.J. (C 192) 6.
23. Michael Scott Feeler, and Peter M. Gilhuly, Reginald K.S. Ammons, *W(h)ither Goes the EC Proposed Directive on Civil Liability for Waste*, 15 B.C. Int'l & Comp. L. Rev. 241, 261 (1992) (citing *Explanatory Memorandum to the Commission Proposal for a Council Directive on Civil Liability for Damage Caused by Waste*, Select Committee on the European Communities, Twenty-fifth report, 1990, CMND, at 22.)
24. For example, the laws of the Netherlands and Luxembourg allow suits by groups of citizens alleging an interest in the protection of the environment. France and Italy allow suits by private citizens who are injured, if a criminal proceeding is also being prosecuted against the polluter.
25. Feeler, *supra* note 23, at 272 (citing Phillippe Sands, *In the Matter of the Proposed Council Directive on Liability for Damage Caused by Waste: general Comments on the Proposed Directive 4* (Sept. 4, 1989) (prepared for Greenpeace International))