

# CONTROLLING TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTE: THE EVOLUTION OF A GLOBAL CONVENTION

SUSANNE RUBLACK

*The disposal and management of hazardous waste is one of the world's most problematic issues. Shipment of hazardous waste between OECD countries is extensive and has been going on for years. Until recently, however, little has been known about hazardous waste shipments from the industrialized North to the less developed South. Some Third World leaders point to the lack of binding international law, calling the issue "toxic terrorism" and "garbage imperialism." In this article Ms. Susanne Rublack summarizes international regulatory efforts to control such movements and traces the evolution of an upcoming UN-sponsored international convention on transfrontier shipment of hazardous waste.*

## INTRODUCTION

Almost all areas of environmental protection legislation have an international dimension. Since the 1962 Stockholm United Nations Conference on the Human Environment, the scope of international environmental cooperation has been expanding. At the end of the 1970s, the issue of hazardous waste management was taken up in international fora, and one of the main themes was its transboundary movements. Hazardous waste traffic from North to South was widely publicized in 1988, calling attention to the lack of legally binding global instruments to control that traffic. Such publicized traffic from North to South has sparked momentum in the negotiations for a global convention which are taking place under the auspices of the United Nations Environment Program (UNEP).

This article gives some background on the phenomenon of hazardous waste exports and summarizes the primary national and international regulatory efforts. The evolving elements of the UNEP Global Convention on the Control of Transboundary Movements of Hazardous Waste will then be identified and discussed.

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Susanne Rublack recently earned a law degree from the University of Hamburg and is pursuing a doctorate degree there. In 1988 she worked as a law clerk in the Environmental Law and Machinery Unit of the United Nations Environment Program.

## HAZARDOUS WASTE EXPORTS: DIMENSIONS AND PROBLEMS

Transboundary traffic in hazardous waste between industrialized countries is extensive. In 1983, the Organization for Economic Cooperation and Development (OECD) estimated that about 10 percent of all hazardous waste generated in OECD member states was transported across frontiers.<sup>1</sup> For example, the forty-one barrels of dioxin from the 1976 Seveso industrial accident were moved out of Italy in 1982 and, after months of intensive searching in several European countries, finally found in France. Significant amounts of hazardous waste are being sent from the Federal Republic of Germany, the Netherlands, Belgium, and Denmark to the German Democratic Republic.<sup>2</sup> The United Kingdom is consolidating its role as major importer of hazardous waste from Western European countries — total imports have risen from 24,500 metric tons during the year ending in March 1985 to 160,000 tons during the year ending March 1987.<sup>3</sup>

Until recently, little was known about shipment of hazardous waste from industrialized to developing countries. In 1980, the President of Sierra Leone rejected a \$25 million offer from a Colorado company to ship chemical wastes for processing and disposal. The proposal became public and stirred protest not only from Sierra Leone but also from neighboring African countries including Ghana, Liberia, and Nigeria.<sup>4</sup> In 1988, several incidents of hazardous waste shipments from the United States and Western Europe, mostly to African countries, alarmed the public and caused a wave of scathing protests from journalists, statesmen, and international organizations.

Reports about the dumping of American incinerator fly ash in Haiti and Guinea, Italian toxic wastes in Nigeria and Lebanon, and about contractual agreements between European firms and the governments of Guinea-Bissau, Benin, Equatorial Guinea, and Congo concerning waste exports led African politicians and pressmen to speak of "toxic terrorism," "garbage imperialism," "neo-colonialism," and "affront to the dignity of Africa."<sup>5</sup>

In May 1988, the Council of Ministers of the Organization of African Unity (OAU) adopted a resolution in which it declared the dumping of industrial waste in Africa a crime against Africa and its people and called upon African countries not to take part in transactions involving such wastes. In its reso-

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1 United Nations Environment Program/WG.95/2, *Transfrontier Movements of Hazardous Wastes with Regard to Developing Countries*, 6.

2 H. Smets, "Transfrontier Movements of Hazardous Wastes," *Environmental Policy and Law* 14 (1985): 16-17.

3 *International Environment Reporter* (BNA) 10 (1987): 536.

4 J. Sherr, Proceedings of the 74th Annual Meeting, Washington, D.C., 1980. *American Society of International Law*, 238.

5 See the following reports: "Who Gets the Garbage?" *Time*, 4 July 1988, 36; "Africa: the Industrial World's Dumping Ground?" *African Business*, July 1988, 10; "From US with Malice," *African Concord*, 24 May 1988, 8; "Outcry Grows in Africa over West's Waste Dumping," *Washington Post*, 22 June 1988; and the following articles from the *Daily Nation*, Nairobi: "How to Thwart the Poison Merchants," 9 June 1988; "Turning Africa into a Dump for Rich Nations," 17 June 1988; "Toxic Imports: The Price Africa May End Up Paying," 23 June 1988; "Dumping: Cash in a Poison Bag," 25 July 1988; "This is Garbage Imperialism," 6 September 1988. See also reports in *International Environment Reporter*, 3 (1988): 189; 5 (1988): 287; 6 (1988) 325.

lution on exports of toxic waste to the Third World, passed in May 1988, the European Parliament condemned all high volume exports of dangerous wastes to developing countries and called for all existing contracts to be cancelled.

There are several reasons for the increasing transfrontier flow of hazardous waste. Limited capacities and rising legal and technical standards for the disposal, incineration, and processing of such wastes in industrialized countries provide incentive to look for less costly alternatives of hazardous waste management. Most developing countries have neither enacted legislation dealing specifically with the environmental risks of toxic waste treatment and disposal, nor do they possess adequate administrative structures to control such risks.<sup>6</sup> The deliberate exploitation of differences between environmental standards in industrialized and developing countries results in an exchange of long-term environmental loss for foreign exchange earnings. It poses similar questions to policy makers as the international trade in dangerous products and chemicals<sup>7</sup> and the relocation of pollution-intensive industries to developing countries.<sup>8</sup>

Waste movements between industrialized countries are motivated by factors other than differing levels of environmental controls and waste management costs. For example, for a hazardous waste generator situated near a country border, an approved domestic disposal site or treatment facility may be more remote than a site in a neighboring state; facilities for waste disposal may service generators from several countries.<sup>9</sup> Exporting waste may also be a temporary solution to inadequate waste management facilities in the exporting country.<sup>10</sup> Although these reasons previously have been acceptable in international fora,<sup>11</sup> recent developments are evidence of an evolving principle obligating countries to minimize their waste exports.<sup>12</sup>

### US REGULATIONS OF HAZARDOUS WASTE EXPORTS

According to the United States Environmental Protection Agency (EPA), hazardous waste exports from the United States have increased in recent years, primarily to Mexico and Canada.<sup>13</sup> The United States concluded bilateral agreements with both countries shortly after the EPA had promulgated reg-

6 UNEP/WG.95/2, 13.

7 See Carolyn Greenwood, "Restrictions on the Exportation of Hazardous Products to the Third World: Regulatory Imperialism of Ethical Responsibility?" *Boston College Third World Law Journal*, 2 (June 1985): 129.

8 See "Environmental Aspects of the Activities of Transnational Corporations: A Survey," document ST/CTC/55, *United Nations Center of Transnational Corporations*, New York, (1985): 34-47.

9 UNEP/WG.95/4: "Draft Guidelines for the Environmentally Sound Management of Hazardous Wastes," 19.

10 "Management of Hazardous Waste," *World Health Organization Regional Publications*. European Series 14, Copenhagen (1983): 71; J. Butlin and P. Lieben, "Economic and Policy Aspects of Hazardous Waste Management in Industry and Environment," *UNEP Special Issue*. 4 (1983): 12.

11 *Ibid*, WHO, 71; UNEP/WG.95/4, 3.

12 *International Environment Reporter*, 5 (1988): 274.

13 *Ibid*.

ulations on exports of hazardous waste, setting up procedures and requirements for transfrontier movements. The EPA regulation prohibits hazardous waste exports without prior written consent of the receiving country and notification to the EPA administrator. Section 3008 of the Resource Conservation and Recovery Act (RCRA) as amended in 1984 mandates criminal penalties for knowingly exporting hazardous waste without the consent of the receiving country government or in violation of an existing international agreement between the United States and the receiving country.

#### BILATERAL INTERNATIONAL AGREEMENTS

Exports to countries which have entered into an international agreement with the United States must conform to the terms of that agreement in lieu of those of the EPA regulation (Section 3017 (a) RCRA). The United States signed its first bilateral agreement on the transboundary movement of hazardous waste with Canada in October 1986.<sup>14</sup> Deviating from the notification consent procedure as required by the EPA rule, Article 3(c) of the treaty states that if the importing country does not respond within thirty days after receipt of the notification, it shall be considered as having no objection to the export as described in the notice.

In November 1986, the United States and Mexico signed an agreement on cooperation concerning shipment of hazardous waste and hazardous substances.<sup>15</sup> This treaty requires a forty-five day notice to the country of import which in turn, must respond within forty-five days of receipt of notification. Contrary to the rule established in the United States-Canada agreement, the shipment may only take place with the explicit consent of the receiving country. Only recyclable waste can legally be exported to Mexico, since a special presidential decree prohibits importing hazardous waste for disposal.<sup>16</sup>

#### INTERNATIONAL EFFORTS

##### *The Framework of International Environmental Law*

The emergence of a whole body of international environmental law over the last decades has been one of the most dynamic developments in public international law.<sup>17</sup> In addition to numerous bi- and multilateral treaties dealing with aspects of environmental protection<sup>18</sup>, some norms of customary international environmental law have evolved which confer rights and responsibilities onto states. These include equitable utilization of common resources and the duty not to use a country's own territory in a way that causes significant environmental harm to another state's territory. The context in which these

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14 *Environmental Policy and Law*, 1 (1987): 38.

15 *International Environment Report*, 274.

16 See M. Bothe, ed., *Trends in Environmental Policy and Law*. (Gland: 1980); L. Gundling, "Environment, International Protection," in *Encyclopedia of Public International Law*, ed. R. Bernhardt, vol. 9, 1986, 119.

17 See B. Ruster, B. Simma, and M. Bock, eds., *International Protection of the Environment, Treaties and Related Documents*, vol 1-30 (1975-1982).

18 UNEP, "Environmental Law Guidelines and Principle No. 1 of Stockholm Declaration," (1972).

norms solidified as customary law, and in which they have been used since, indicates that they presuppose situations between neighboring countries — a premise which is questionable in many of today's international environmental concerns. Because of this inherent limitation, international customary law seems to contain no norms of direct relevance to the transfer of environmental risks to non-neighboring states. There are no existing rules of public international law which prevent a sovereign state from consenting to receive hazardous waste. With the receiving country's consent, the export does not constitute a breach of international customary law.

It is a peculiarity of public international law that legally non-binding norms and principles governing the interaction between states may contribute to the formation of binding rules. Such principles may determine the behavior of states even before merging into "hard law." International cooperation on the environment generates an abundance of declarations, guidelines, and principles which reflect states' intent to subject their activities to jointly agreed upon norms.

Principle 21 of the Declaration of the Human Environment<sup>19</sup>, adopted by the 1972 Stockholm Conference, states that "States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities in their jurisdiction or control do not cause damage to the environment of other States . . . ." The principle is relevant to hazardous waste exports and does not only refer to a constellation of neighboring states. The phrasing might also suggest that such responsibility exists independent (or in spite) of another state's decision to pollute its environment by importing hazardous material that it cannot handle adequately.

## THE ROLE OF INTERNATIONAL ORGANIZATIONS

### *United Nations Environment Program*

Since its inception by United Nations General Assembly Resolution 2997 (XXVII) of 15 December 1962, UNEP has been entrusted with the tasks of catalyzing, coordinating, and stimulating environmental action within the UN system<sup>20</sup> and has actively concerned itself with the promotion and development of environmental law.<sup>21</sup> The UNEP-sponsored ad hoc meeting of senior government experts in environmental law which convened in Montevideo, Uruguay in November 1981 provided the framework for the emerging structures of international environmental policy and law. Its conclusions were adopted by the governing council of the UNEP and are a mandate for the organization's activities in the field of environmental law.<sup>22</sup>

<sup>19</sup> UNEP, "Annual Report, Part One." (1986): 15.

<sup>20</sup> UNEP, "Environmental Law in the United Nations Environment Program." Nairobi, (1985).

<sup>21</sup> L. Caldwell, *International Environmental Policy, Emergence and Dimensions*. (Durham: 1984), 104.

<sup>22</sup> UNEP/WG.122/2. "Survey of Programs and Activities of International Bodies and Organizations Relevant to the Environmentally Sound Management of Hazardous Wastes," 2.

The Montevideo Program, among other things, calls for global regulation of toxic and dangerous waste. Prior to the adoption of the Montevideo Program, the UNEP was involved in hazardous waste management through its Industry and Environment Office, in collaboration with the UNEP International Register for Potentially Toxic Chemicals.<sup>23</sup> Pursuant to governing council decision 8/8 of 1980 on the export and disposal of hazardous chemicals, UNEP and the World Health Organization (WHO) published policy guidelines and a code of practice on the management of hazardous waste.<sup>24</sup> The document outlines several options designed to control hazardous waste from the point of generation to the place of disposal and proposes a series of strategies which countries should use when developing schemes for the trans-frontier conveyance of hazardous waste. According to those principles, notifications with detailed information on the waste to be exported should be provided to the authorities of all countries involved and the import of waste should be subject to the formal approval of the receiving country.<sup>25</sup>

In 1984 the UNEP convened an ad hoc working group of experts on the environmentally sound management of hazardous waste to consider guidelines or principles which ensure the safe handling of toxic and dangerous waste.<sup>26</sup> The group decided that it did not intend to prepare an international legislative instrument, but rather to formulate recommendations and generally applicable principles relating to hazardous waste management which could serve as model rules for national legislation and future agreements.<sup>27</sup> The working group focused on the special legislative and administrative capacities of developing countries to ensure environmentally sound management of hazardous waste, on their needs for technical training and assistance and on the dangers of possible hazardous waste dumping from industrialized countries in the Third World. Mostafa Tolba, executive director of UNEP, addressed the working group after it had adopted the final Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes. He spoke of a possible most-favored-nation clause, toward which the Cairo guidelines might contribute. He believed this would prevent international discrimination in the field of the environment.<sup>28</sup>

The Cairo guidelines were adopted on 17 June 1987.<sup>29</sup> They belong to the growing body of international "soft law," aimed at global standardization of environmental management and preparing the way for the development of a legally binding international instrument. Guidelines 26 and 27 introduce a joint responsibility for exporting and importing countries to ensure the protection of the environment. According to Guideline 26 (f) it is the exporting

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23 WHO, 71.

24 Ibid., 72-73; see also B. Boche, "UNEP's Environmental Law Activity on International Transport and Disposal of Toxic and Dangerous Wastes, in: Industry and Environment," *UNEP Special Issue 4*, (1983): 3.

25 UNEP Governing Council Decision 10/24.

26 UNEP/WG.95/5. "Report of the Ad Hoc Working Group of Experts on the Environmentally Sound Management of Hazardous Wastes," First Session, 5.

27 "Report on the Meeting," *Environmental Policy and Law*. 1 (1986): 6.

28 "UNEP Environmental Law Guidelines and Principles No. 8." Nairobi (1987).

29 Decision 14/30 of the Governing Council of UNEP, 17 June 1987.

state's responsibility to permit a movement of waste only if it is satisfied that it "can be managed in an environmentally sound manner, at an approved site or facility, and with the consent of the State of import." Furthermore, Guideline 27 puts an obligation on the exporting state to readmit wastes into its territory if a movement has not been carried out as proposed. In addition to establishing requirements of notification and consent of importing and transit countries, the guidelines clearly call for the exporting country to assume some kind of responsibility that reaches beyond the limits of its national territory. As will be shown, the developments since the adoption of the Cairo guidelines have further strengthened their responsibilities.

When it adopted the Cairo guidelines, the governing council of UNEP convened a working group of legal and technical experts to prepare a global convention specifically on transboundary movements of hazardous waste.<sup>30</sup> The adoption and signature of the convention is scheduled for early 1989. Although the Draft Convention on the Control of Transboundary Movements of Hazardous Wastes clarifies most of the main features of the evolving global regulatory system, the policy directions of the Draft Convention might change after the recent alarming occurrences of hazardous waste traffic. The governmental experts want "to establish a mechanism which would ensure adequate control and full availability of information on transboundary movements of hazardous wastes and to prevent imports or exports that did not meet basic environmental standards."<sup>31</sup> Critics have pointed out that the working group's approach would further enable a transboundary flow of hazardous waste — especially to developing countries — if movements happen in a controlled manner and comply with the procedural and substantive environmental requirements of the convention. The final rounds of negotiations may yet introduce elements of prohibition rather than the mere regulation of hazardous waste exports.

#### *Organization for Economic Cooperation and Development*

The OECD has been involved in waste management questions since 1974, when it established a special Waste Management Policy Group. In 1976, the organization declared its three main objectives to be reduction (at source) of waste generated, maximum material reclamation and energy recovery, and safe transport and disposal of hazardous waste.<sup>32</sup> After some years of activities in the areas of household waste management and abandoned waste sites, the OECD shifted its emphasis to the development of regulations for transboundary waste movements. In 1984, the OECD adopted the Decision and Recommendation on Transfrontier Movements of Hazardous Waste. This decision requires member states to notify the relevant authorities in case of hazardous waste transfers across borders. It also recommends that transport of hazardous

30 UNEP/WG.182/3, 2.

31 OECD Council Recommendation C (76) 155 on a Comprehensive Waste Management Policy, 28 September 1976.

32 All OECD member countries with the exception of Australia and Greece adopted the decision.

waste intended for export should require authorization and the generator of the waste should assume responsibility for their proper management in case arrangements for safe disposal of the waste cannot be completed. This decision was the first legally binding international regulation of transboundary movements of hazardous waste.<sup>33</sup> It rests on the premise that "efficient and environmentally sound management of hazardous waste may justify some transfrontier movement of such waste . . ." (Preamble) and stresses the need to protect the environment, "whatever the place of disposal," rather than prohibiting waste exports.<sup>34</sup>

In June 1985, the OECD Council followed the recommendations of an OECD Conference on International Cooperation Concerning Transfrontier Movements of Hazardous Waste and decided that before the end of 1987 an OECD international convention concerning such movements should be drafted.<sup>35</sup> The expert group that convened to prepare the draft convention was confronted with a number of difficult issues to negotiate, and the draft has yet to be finalized. The first construct on which the experts agreed was a procedure for hazardous waste exports to non-OECD member countries. The OECD seeks to control systematically waste movements among its member countries and to ensure that this does not lead to an increase in environmentally unsound waste disposal elsewhere.<sup>36</sup> To this end, they propose that exporters must demonstrate to their governments that a planned disposal operation in a non-OECD country is both legal and environmentally sound.<sup>37</sup> However, there is concern that this provision might transgress the limits both of the receiving country's national sovereignty and of the exporting country's resources, as the latter would have to evaluate the proposed disposal facilities.<sup>38</sup> The consensus as formulated in the OECD Council Decision-Recommendation C (86) 64 (Final) on Exports of Hazardous Waste from the OECD area, adopted in June 1986, requires the exporting member country to "prohibit movements of hazardous waste to a non-member country unless the waste is directed to an adequate disposal facility in that country." The group apparently valued the flexibility provided to exporting countries for their judgment to authorize a movement.<sup>39</sup> The decision also requires that any movement to non-member countries must have the written consent of the receiving country. Any transit countries must be notified in advance. No formal decision has been made concerning notification and consent procedures within the OECD area, but a provision introducing less strict requirements seems probable.<sup>40</sup>

The biggest challenge to negotiations for a draft convention was to reach consensus on which waste should be defined as hazardous. The US government

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33 H. Smets, 17.

34 OECD Council Resolution C (85) 100 on International Cooperation Concerning Transfrontier Movements of Hazardous Wastes, 20 June 1985.

35 OECD official Torrens as cited in *International Environmental Reporter*, 7 (1986): 238.

36 *Ibid.*, 2 (1986): 32.

37 *Ibid.*, 4 (1986): 111.

38 *Ibid.*

39 *Ibid.*, 2 (1987): 57; 4 (1988): 220.

40 *Ibid.*, 5 (1987): 199; 7 (1987): 314; 11 (1987): 580; 4 (1988): 220.

feared that the evolving OECD system would cover a much broader range of hazardous waste materials than the existing US regulations, and claimed it would be unable to enforce such far reaching obligations under US law. Delegations from several European countries criticized the US position, arguing that the objective of an international agreement was to upgrade national legislation toward a jointly defined standard.<sup>41</sup> The definition of hazardous waste as finally agreed on refers to a core list of waste to be controlled when subject to transfrontier movements — waste that stems from certain industrial processes or waste having certain constituents.<sup>42</sup> In addition, the convention will cover hazardous waste in the exporting or in the importing member country. The present UNEP Draft Convention on the Control of Transboundary Movement of Hazardous Wastes fully incorporates the OECD core list<sup>43</sup>, thus contributing to the compatibility of the evolving regulatory systems.

#### *European Economic Community*

In December 1984, the Council of the European Economic Community (EEC) adopted a directive supervising transfrontier shipments of hazardous waste within its member countries. This directive was complemented in 1986 by regulations covering the shipment of hazardous waste.<sup>44</sup> Within the EEC, the directive requires an exporter to notify the recipient country of the shipment and demonstrate that there is a contract with the importer, who must have adequate technical capacity to dispose of the waste without endangering human health or the environment. No action may be initiated until the notified authority has acknowledged receipt of the information. The importing country may object to the waste export only on the basis of the shipment's incompatibility with domestic environmental or health legislation. This legislation will, in turn, conform to EEC directives or obligations that the member state in question has assumed under other international conventions. In cases of hazardous waste exports from the EEC to third countries, stricter procedures apply. The importing country must accept the consignment and demonstrate its capacity to adequately dispose of it. This provision intends to protect developing countries from "becoming the dustbin of the industrialized world."<sup>45</sup>

#### *Elements of an Evolving Global Legal Instrument*

The regulatory systems that have been developed on the national level and in international organizations form a complex background to the present UNEP efforts to negotiate a global legal instrument on transboundary movements of hazardous waste. A closer analysis of some elements of the Draft

41 OECD Council Decision C (88) 90 (Final).

42 UNEP/WG.186/3. Annex A, Annex 1, 1.

43 *International Environment Reporter*, 3 (1986): 67; 5 (1988): 275.

44 Clinton Davis in *ibid.*, 3 (1986): 67.

45 The executive director of UNEP voiced concerns about such a constellation in his note to the second session of the ad hoc working group, UNEP/WG.186/2, 2.

Global Convention on the Control of Transboundary Movements of Hazardous Wastes illustrates whether it follows an approach which is distinct from the regulatory concepts on which the OECD convention will be based.

### *Scope of the Draft Convention*

As in the negotiations for the OECD Convention, the question of how the Draft Global Convention should define hazardous waste and thus determine the scope of its applicability, was difficult to resolve. To refer to domestic legislative definitions would be most compatible with the exporting country's regulations of hazardous waste. In a majority of cases, waste is exported to countries which have a less comprehensive control system and less inclusive definitions of "hazardous," so that the exporter's legal order would determine whether the convention covers a particular waste movement. However, exporting industrialized countries' intricate systems of waste and special hazardous waste control (such as the US Resource Recovery and Conservation Act) may exclude materials from its definitions of hazardous waste and subject them to simple waste rules which are not necessarily valid under the conditions of an importing developing country.<sup>46</sup> The third revised draft, therefore, supplements the definition of hazardous waste as based on domestic legislation with a core list (as developed by the OECD) of substances which the convention autonomously defines as hazardous.<sup>47</sup> The OECD Draft Convention, however, does not include transit countries' legislation in its hazardous waste definition, so the scope of the Global Convention might be considerably broader in cases where shipments cross the boundaries of several states.

### *Notification and Consent*

The notification requirement is commonly included in national legislation and international guidelines on the export of hazardous substances.<sup>48</sup> Its premise is that the government of an importing country will, if furnished with sufficient information on this risk, be able to make its own policy decision according to its own cost-benefit analysis. It would be paternalistic for the exporting country to make this decision unilaterally by banning a transfer of risk. It is, however, difficult to delineate between paternalistic restrictions on hazardous exports and a state's legitimate power to control its exports for reasons such as its foreign relations.<sup>49</sup> In addition, the administrative capacities required to make informed decisions upon notification are limited in most developing countries; this may call for technical assistance rather than question the notification approach as such. Also, export control

46 "Third Revised Draft Convention," Article I 2, UNEP/WG.186/3, Annex A, 3.

47 See No. 6-12 of the London Guidelines for the Exchange of Information on Chemicals in International Trade, adopted by decision 14/27 of the Governing Council of UNEP, 17 June 1987; Article 9 of the International Code of Conduct on the Distribution and Use of Pesticides, adopted by decision 10/5 of the Food and Agricultural Organization (FAO).

48 As allow the US Export Administration Act.

49 UNEP/WG.186/3, 8.

models which presuppose an importing country's policy decision diminish the pressure on developing countries to build a legislative and administrative foundation for environmental protection.

Under Article IV of the Third Revised Draft Convention, the exporter of waste — or, in its place, the government of the exporting country — must notify in writing all countries involved in the proposed movement. The movement may only be authorized by the country of export if the receiving country gives its written consent and if "the country of export has received satisfactory information on the existence of a contractual agreement with the disposer of the waste, who should possess adequate technical capacity for the disposal of the waste in question." To prevent delay, the country of import is obligated to respond promptly to the notifier. The export may not take place without its explicit consent.

Agreement is yet to be reached on whether the failure to receive explicit consent from transit countries should prevent the exporter's government from allowing a transboundary movement. A procedure whereby the tacit consent of a transit country is sufficient will probably be adopted. At the last round of negotiations in June 1988, however, the Group of 77 at the UN requested that the interests of transit countries be addressed on the same level as the interests of importing countries.<sup>50</sup>

At this stage, the notification and consent requirements under UNEP negotiations correspond to those in the OECD Draft Convention for exports from the OECD area to non-member countries.<sup>51</sup> Articles VIII and IX of the Draft Global Convention provide for international cooperation, technology transfer, and general information on the environmentally sound management of hazardous waste, so that developing countries may gradually adapt to premises of the notification model.

#### *Division of Responsibility for the Exported Waste*

Remarkably, the states cooperating on the control of transboundary movements of hazardous waste have always, in principle, accepted the responsibility of the waste exporting country for the related environmental aspects beyond the border of their national jurisdiction. This goes much further than the responsibilities acknowledged for the export of chemicals.<sup>52</sup> The UNEP Cairo Guidelines, the OECD Convention and the Draft Global Convention all recognize a division of responsibility for the environmentally sound disposal of exported waste. These conventions allocate obligations beyond mere duties to provide information to the receiving country.

Article II of the UNEP Draft Convention outlines the general obligation of a contracting party to "not permit the export of hazardous waste from its territory if it has reason to believe that the waste in question will not be

<sup>50</sup> There are, however, differences in procedure.

<sup>51</sup> E. Rehbinder, "Environmental Protection and the Law of International Trade," *Academie de Droit International, Colloque 1984*. (1985): 368.

<sup>52</sup> First revised draft, UNEP/WG.182/2, 11.

managed in an environmentally sound manner." Originally, the draft had taken the wording from Cairo guideline 26 (f), which requires the state of export to be "satisfied with" the environmental soundness of the ultimate disposal.<sup>53</sup> There are still questions over the extent to which the exporting country is obliged to assess the disposal facilities and technical capacities in the receiving country. This raises questions of national sovereignty.<sup>54</sup> The changed version is more flexible, but allows for a restrictive interpretation under which the exporting country may make its judgment solely on the basis of information provided by the exporter or the country of import.

When a transboundary movement of hazardous waste has been initiated, but is not completed as planned, the question arises if and in which way the country of export should reassume responsibility for the materials which have left its territory. The Cairo Guidelines require the state of export to "not object to reimport of the wastes," and the UNEP Draft Convention — like the OECD Draft Convention<sup>55</sup> — originally supplemented this obligation with the duty of contracting parties to cooperate in finding alternative arrangements for environmentally safe disposal.<sup>56</sup>

Article V of the Third Revised Draft Global Convention contains a stronger obligation for the exporting country: the latter shall, "if alternative arrangements are not found within a reasonable period of time, ensure that the exporter or the generator . . . will take those wastes back into the country of export."<sup>57</sup> However, reservations to this article made by several industrialized countries, and a newly introduced clause restricting the scope of the article to waste exports "to which the consent of the countries concerned have been given," practically exclude cases of illegal transboundary movements from the duty to reimport. Responsibility for illegally exported waste has been the central issue in recent scandals involving Italian toxic waste which was dumped illegally in Venezuela and Nigeria, and proposals have been made to insert a separate provision into the draft convention which clarifies the obligations of the exporting state.<sup>58</sup>

The importing country's share of responsibility to ensure safe management of transboundary movements of hazardous waste consists of some general obligations, such as the duty to introduce a licensing requirement for all related activities and to ensure that pollution is prevented (Article II 2. (c) and 3). Developing countries will be assisted in these responsibilities through information exchange, technical assistance and training, and technology transfer.<sup>59</sup> OECD and UNEP negotiations have, at an early stage, left questions of liability for separate international fora.<sup>60</sup>

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53 Comment by the executive director of UNEP, *UNEP/WG.186/2*, 2-3.

54 *UNEP/WG.182/2*, 21.

55 "Second Revised Draft Convention," *UNEP/WG.182/3*, 17.

56 *UNEP/WG.186/3*, Annex A, 12.

57 *Ibid.*; *UNEP/WG.186/2*, 3.

58 "UNEP Draft Convention," Articles VIII, XI, and XIV.

59 *UNEP/WG.180/3*, 13; *UNEP/WG.182*, 29;

60 Recommendation No. VII of the OECD Conference on International Cooperation Concerning Transfrontier Movements of Hazardous Wastes (Basel 1985), Annex of OECD Council Resolution C (85) 100, 5.

## MINIMIZATION OF TRANSBOUNDARY MOVEMENTS

One of the most interesting developments in the control of hazardous waste exports is the evolution of a principle to minimize their transboundary movement. Such a principle, if more clearly shaped and acknowledged as "soft international law," could pave the way for limitations on the transfer of environmental risks.

The OECD makes only slight reference to reducing hazardous waste exports by establishing disposal facilities at the national level.<sup>61</sup> At the global level, however, the first draft of the UNEP Cairo Guidelines proposes that exports be "kept to the absolute minimum compatible with a rational and efficient management of such wastes."<sup>62</sup> This principle was later inserted into the UNEP Draft Convention<sup>63</sup>, and reinforced in a clause of the preamble stating that "hazardous waste should be disposed of as close as possible to the source of its generation." The EEC has already announced that its member states would minimize their waste exports.

## CONCLUSIONS

The final rounds of negotiations for the Global Convention on the Control of Transboundary Movements of Hazardous Wastes coincide with reports of an increasing "spill-over" of toxic and dangerous waste from the industrialized to the developing world. There is growing evidence that developing countries' governments, fearing the pressure of public outrage and seeing their national dignity at stake, are taking initiatives to protect the health and environment of their citizens from imported risks. At the international level, the creation of a regulatory instrument with universal adherence is an important step towards abolishing "pollution havens" for the North. The challenge remains for the governmental experts to finalize a convention with instruments to distinguish between intolerable transboundary movements and safer movements which systematically account for the inherent dangers of waste movement. In both cases, international law can only supplement the control of environmental risks by national legislation.

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61 *UNEP/WG.95/4*, 37.

62 *UNEP/WG.180/3*, 11-12; *UNEP/WG.182/3*, 12, Article II 2. (c) Draft Convention.

63 *UNEP/WG.186/3*, 5.

