

TRAVELING TOXIC TRASH: AN ANALYSIS OF THE 1989 BASEL CONVENTION

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INTRODUCTION

The Stockholm Declaration of the United Nations Conference on the Human Environment (1972) proclaims that every human has a fundamental right to "an environment of quality that permits a life of dignity and well-being, and . . . bears a solemn responsibility to protect and improve the environment for present and future generations."¹ Despite the adoption of this declaration eighteen years ago, it is difficult to argue that the human environment has improved. Deforestation, the depletion of the ozone layer, global warming and pollution from hazardous wastes continue unabated. By most assessments, these "Four Horsemen of the Environmental Apocalypse" have been gaining ground.² Despite the diversity of international agreements that constitute the legacy of the Stockholm Declaration, the actions of national governments have not matched their promises.

The international control of hazardous wastes will serve as a case in point. Several regional and bilateral agreements have been negotiated to control the transboundary movements of hazardous wastes, with the purpose of limiting the pollution that often accompanies such movements. Thus there has not been complete regulatory anarchy in the international system with regard to the hazardous waste trade. On the other hand, pollution resulting from the waste trade has not decreased in recent years, despite the tightening of certain legislative loopholes. As in many other cases of international environmental law, addressing the issue is not the same as solving the problem. Implementation of existing laws has been hampered by weak incentives to protect the environment, unreliable surveillance and verification and toothless enforcement mechanisms.

A recent convention signed in Basel, Switzerland, is the first attempt to control the international trade in wastes on a global scale. Under the auspices of the United Nations Environment Programme (UNEP), representatives of more than 100 nations approved the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.³ The stated aim of the Convention is "to protect, by strict control, human health and the

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1. Principle 1 of the "Stockholm Declaration of the United Nations Conference on the Human Environment" (1972), UN Document A/CONF.48/14, reprinted in 11 *International Legal Materials Current Documents (ILM)* (1972), 1,416ff.
2. Dr. Edward O. Wilson, "The International Biodiversity Crisis: Challenge and Opportunity," an address given at The Fletcher School of Law and Diplomacy as a part of a conference entitled, "Development, Deforestation and Biodiversity: A Question of Balance?" on 22 February 1989.
3. UN Document UNEP/IG.80/3, dated 22 March 1989. Reprinted in 28(3) *ILM* 657-686.

environment against the adverse effects which may result from the generation and management of hazardous wastes and other wastes." To what extent this global Convention—with its particular set of incentives, verification procedures and enforcement mechanisms—will be effective remains to be seen.

THE WASTE TRADE PROBLEM

Due in part to the increased domestic regulation of hazardous waste disposal in the industrialized countries, the costs of waste disposal have skyrocketed. Producers of hazardous wastes pay from \$75 to \$1,500 per ton to dispose of these wastes domestically in the most environmentally sound manner available.⁴ The high price of waste treatment and disposal leads waste generators to seek cheap alternatives. UNEP explains the problem in simple economic terms: "Wastes have been considered to be worthless, and so there has been no economic incentive to recover them, and a positive encouragement to getting rid of them as cheaply as possible."⁵

Until recently, the cheapest option was to ship wastes to cash-starved developing countries. There the price of disposal ranges from \$40 to as low as \$2.50 per ton.⁶ The French news magazine *L'Express* reports that the transport of chemical wastes today represents the most important transfer of resources from North to South, amounting to more than all government aid from the West to developing countries.⁷ While this may be an exaggeration, it is true that for cash-starved and resource-poor countries, the financial incentive to import waste is often too enticing to pass up. The government of Guinea-Bissau for example, recently negotiated (and subsequently aborted) a deal with European waste traders to import more than 3 million tons of wastes per year. The British and Swiss waste exporters had promised to pay the government of Guinea-Bissau \$800 million, a sum five times the nation's GNP, or twice that country's total foreign debt.⁸

Besides these enormous direct financial incentives, the waste trade is sometimes tied to development aid, job creation and technology transfer. In Panama, a US firm promised to create 600 jobs and to pump \$12 million into the economy of Colón, one of the most economically depressed regions of Panama, by building an incinerator large enough to burn one third of New York City's garbage. The plan was called off when the Panamanian Minister of Health threatened to resign if the deal went through.⁹

Two recent, well-publicized incidents illustrate the problem. Between August 1987 and May 1988, nearly 4,000 tons of toxic wastes that included

4. Anne Maesschalk and Gérard de Selys, "Le Cri d'Alarme des Pays-Poubelles," *Le Monde Diplomatique* August 1988, 2-3 and James Brooke, "African Nations Barring Foreign Toxic Waste," *The New York Times*, 25 September 1988, 18.

5. United Nations Environment Programme, "State of the Environment 1983: Special Topics," (Nairobi: UNEP Publications), 5.

6. Anne Maesschalk and Gérard de Selys, 2-3.

7. Yves Cuan, "Les Poubelles de l'Occident," *L'Express*, 1 July 1988.

8. Anne Maesschalk and Gérard de Selys, 2-3. Also *L'Express*, 1 July 1988.

9. Timothy Aepfel, "Curbing Abuses in Export of Wastes," *The Christian Science Monitor*, 24 March 1989, 4.

highly poisonous polychlorinated biphenyls (PCBs) were shipped from Italy to the tiny port of Koko, Nigeria, where a Nigerian citizen agreed to rent his backyard for approximately \$100 a month to store the 8,000 drums of wastes. When the fraudulently labeled and poorly sealed drums were discovered, the Nigerian government recalled its ambassador to Italy and seized an Italian freighter in order to pressure the Italian government to take back the wastes. After the wastes had been stored in Koko for over ten months, affecting the health of the local population, the wastes were finally reloaded onto the ship *Karin B* and transported back to Italy.

Perhaps the most notorious and widely reported case of illicit disposal of hazardous wastes was the odyssey of the ship *Khian Sea*, which left Philadelphia in August of 1986 loaded with nearly 14,000 tons of toxic incinerator ash. After an unsuccessful attempt to dump its cargo in the Bahamas, the *Khian Sea* floated around the Caribbean searching for a place to unload. Over a year later, after the governments of Costa Rica, Chile, the Dominican Republic and Honduras all rejected requests to unload the ash, the Haitian government issued an import permit to the *Khian Sea* to unload its cargo of "fertilizer." The ship then began unloading its toxic contents on a beach near Gonaïves in January of 1988. Alerted of the true nature of the *Khian Sea's* cargo, the Haitian government ordered the ship to reload the ash. Six days later, in the middle of the night, the *Khian Sea* departed Haiti, leaving an estimated 2,000 to 4,500 tons of Philadelphia's incinerator ash. Two years and three coup d'etats later, the ash remains on the beach in Gonaïves, posing health risks to the local population.

Implementation of existing laws has been hampered by weak incentives to protect the environment, unreliable surveillance and verification and toothless enforcement mechanisms.

Ignoring the orders of the US Coast Guard, the *Khian Sea* then traversed the Atlantic Ocean, requesting permission to unload its cargo in the Cape Verde Islands, Guinea, Guinea-Bissau and Senegal. Finally in November 1988, the ship appeared off the coast of Singapore, its holds empty. Although the captain of the ship denies dumping the ash at sea, most assume that the cargo was dumped illegally somewhere in the Indian Ocean.

The Third World is not the only dumping ground for First World wastes. Eastern Europe and some developed countries accept waste imports. East Germany has imported hazardous wastes from its West European neighbors. In this case the chickens have come home to roost: East Germany's largest waste dump is just across the border from Lubeck, West Germany, and

townspeople there have complained that their drinking water risks contamination from the irresponsible dumping of toxins by their poorer cousins.¹⁰

The overwhelming majority of wastes are traded between industrialized countries. Britain has made a big business of importing, treating and disposing of toxic wastes that other countries choose not to treat domestically. Revenues for the British waste trade totaled \$1.2 billion in 1987, making the UK the world's largest importer of waste.¹¹ On the other hand, popular opposition to waste imports may reduce Britain's market share in the future.¹² For example, despite the strength of the British waste business, Britain refused permission to the *Karin B* to unload the wastes that it had earlier dumped in Koko, Nigeria. Popular sentiment and adverse publicity had a hand in the government's decision.¹³

Not all waste trading is for profit. Some argue that transboundary shipments of hazardous wastes are motivated more by environmental protection concerns than by economic self-interest. As Dr. Jan Huismans, UNEP's scientific expert at the Basel negotiations explains:

There is nothing wrong with this (transboundary movement of hazardous waste) if the movement and disposal of the waste are for the benefit of the environment. As developing countries develop, there will be transport of hazardous waste from these countries to industrialized societies for incineration.¹⁴

Also, if a multinational corporation processes wastes generated by its geographically diverse subsidiaries in one centralized location, transboundary shipments might be necessary.¹⁵ It may also be more convenient to ship wastes across borders if a waste generator and waste disposal facility are geographically proximate, but internationally divided. Such is the case in the United States and Canada—a large portion of industrial wastes generated in New England are shipped to Canada.

Convenience and environmental concerns notwithstanding, economics is the bottom line. The incentive for both the producer and the receiver of hazardous wastes remains the locomotive of the waste trade. Huge profits combined with the lack of real export controls have promoted the expansion of the waste trade. And while it is true that only a small fraction of the hazardous wastes in the industrialized countries are shipped across national boundaries, and that an even smaller fraction finds its way to the Third World, this small fraction represents a potential for damaging the environment that belies its seeming unimportance.¹⁶

10. Timothy Aepfel, "West Pays Price for Dumping on East," *The Christian Science Monitor*, 10 February 1989, 4.

11. *The Economist*, 3 September 1988.

12. "Tendency of U.S. Trash to Travel Irks Britons," *The New York Times*, 27 June 1988.

13. *The Economist*, 3 September 1988.

14. *Environmental Policy and Law* (18 June 1988), 195.

15. J. W. MacNeill, "Policy Issues Concerning Transfrontier Movements of Hazardous Wastes," in *Transfrontier Movements of Hazardous Wastes: Legal and Institutional Aspects*, OECD, 1983, 9.

16. According to the US Environmental Protection Agency, less than 1 percent of hazardous wastes generated in the United States was exported in 1988. Eighty-five percent of this went to Canada, 8 percent went to

There is little disagreement that the international waste trade presents global environmental problems. It is not difficult to understand the motivation behind the drafting of an international convention. The question remains, however, whether "The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal" will be effective. Is this Convention an effective instrument for promoting international cooperation in the management of the environment?

In order to adequately answer this question, it is important to understand the four issues posed by the waste trade. The first issue concerns the burden of environmental damage resulting from the inadequate control of hazardous waste movements. While developing countries receive only a small percentage of wastes moving across boundaries, these countries bear a disproportionately large burden of the pollution damage resulting from the insufficient management of waste shipments. Many developing countries have neither the technical nor the administrative wherewithal to manage toxics. Some may not have even broad environmental legislation, much less specific guidelines for the safe treatment and disposal of hazardous substances. Reckless waste traders have been able to take advantage of weak bureaucracies, which in some cases has led to deadly consequences.

The political dynamic of North-South relations thus enters the stage. The waste trade problem is one in which the developing countries have been able to set the agenda, not because they have the raw numbers on their side, but because they are the victims of their own economic comparative advantage in waste disposal. As one writer has suggested, the North-South debate is changing from the exploitation of raw materials to the exploitation of the political and economic weaknesses for the North's advantage.¹⁷ A letter written to the Nigerian newspaper, *African Concord* characterizes the waste trade as

a new imperialist warfare against Africa and its people . . . In the past we were being bought as slaves and used as chattels. They looted our riches, colonized and partitioned our land. Presently, we are still being neocolonized, balkanized, plundered, exploited, and poisoned by the same forces.¹⁸

While high on rhetoric, this accurately reflects developing countries' indignation over hazardous waste dumping in the Third World.

The second issue surrounding the waste trade is the dual nature of costs. The waste trade does not resemble trade in traditional goods such as cloth and wine. Exporters pay importers to take the product off their hands. By shipping wastes to the Third World, waste generators are able to reduce their overall costs of production. The economic incentive is clear. This incentive also exists for the importers. The high fees paid to importing countries are

Mexico, and the remainder went to Western Europe, Japan and Brazil (Wendy Grieder, Office of International Activities, Environmental Protection Agency, 15 November 1989).

17. Erwan Fouéré, "Emerging Trends in International Environmental Agreements," in John E. Carroll, ed., *International Environmental Diplomacy*, (Cambridge: Cambridge University Press, 1988), 39.

18. Judy Christrup, "Clamping Down on the International Waste Trade," *Greenpeace* Vol. 13, No. 6, (November/December 1988), 10.

attractive to cash-poor governments in the early stages of national development. At least in terms of short-run economic gain, it seems that both producing and depositary countries benefit.

But long-term costs are another kettle of fish. By exporting hazardous wastes, producers are able to eliminate long-term costs of waste management and regulation. This might be acceptable if the receiving countries had the technological, political and financial wherewithal to bear these costs. As it stands, however, they do not. Nor is there reason to believe that they will be better able to bear these costs in the future, as other development needs take precedence. The result is increasing environmental damage, which over the long term threatens the public health of the population of the Third World.

The question, then, is who will bear the costs of environmental damage in the Third World. Clearly both sides of the trade equation must be balanced. Exporting and importing countries should share the costs of environmental regulations. Effective international control of the waste trade should raise export costs, and at the same time reduce the incentives to import.

The third issue relates to the familiar conundrums of international law. First, in the absence of an international police force, any convention must be self-enforcing. The conflict between sovereignty and supranationality must be factored into the equation. Second, the sheer logistics of trying to control global movements of wastes must be considered. Effective legislation should increase the transparency of the waste trade so that it is open to surveillance by the international community.

The fourth issue of the waste trade is intertwined with the negotiation process itself. Any international convention relating to the waste trade has to be acceptable to all parties at all levels. The negotiation of a waste trade convention is a "two-level game."¹⁹ At the system level, Third World nations must be convinced that the convention will protect them from pollution. Industrialized countries, on the other hand, must believe that a convention serves their interests.

At the domestic level, waste-producing industries, rival bureaucracies, environmental lobbies, public interest groups and the public at large must all be satisfied—at least in the aggregate—that such a convention is efficient, equitable, and feasible.²⁰ As of this writing, the Basel Convention is under review by the 105 countries that approved it. Only thirty-seven countries signed the final document, and so far only Jordan has ratified it formally. The Convention must be "sold" to nineteen more countries for it to enter into force.

BASEL THROUGH THE LENS OF REGIME ANALYSIS

To facilitate a review of the Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and Their Disposal, it is

19. Robert D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games," *International Organization*, Vol. 42, No. 3 (Spring 1987).

20. Oran R. Young, *Resource Regimes: Natural Resources and Social Institutions* (Berkeley: University of California Press, 1982), 117-137.

helpful to look through the lens of regime analysis. Stephen D. Krasner defines an international regime as "principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue area."²¹ Although some have expressed reservations about the usefulness of Krasner's analytical hierarchy, by his definition, an international waste trade regime has been established by the Basel Convention.²²

Few of the provisions of the Basel Convention are particularly revolutionary. Many portions of the document are, in fact, direct transcriptions from an OECD Agreement regulating the international trade in hazardous wastes.²³ The new dimension derives from this Convention's attempt to "internationalize" the scope of the regime to include all nations, and to cohere actor expectations with regard to hazardous waste transport by creating a formal constitution.

The "issue area" of the Basel Convention coincides with a determination of what makes wastes hazardous. Substances that fall under the purview of the Convention are classified in regard to their origin (medical wastes, manufacturing byproducts), their chemical components (heavy metals, dioxins, asbestos) or their possession of certain dangerous characteristics, such as a tendency to explode, combust, corrode, infect, poison or undergo chemical conversions. The Convention does not regulate radioactive wastes or "wastes which derive from the normal operations of a ship." Both of these are covered under other international instruments.

Principles

The principles of the Basel Convention are predicated on the general principles set forth in the Stockholm Convention of 1972. For example, Principle 20 of the earlier agreement encourages the dissemination of scientific knowledge, the free flow of information and the transfer of technology "to facilitate solution of environmental problems." As will be illustrated, many of the provisions of the Basel Convention address the "proper exchange of information" and the "need to promote the transfer of technology for the sound management of hazardous wastes."

The Basel Convention also refers to other global agreements regulating the transportation of dangerous goods²⁴ as well as to principles of international law, insofar as a breach of this Convention would amount to a breach of "relevant international law of treaties." The Convention also includes principles that are more specific to the hazardous waste problem. It asserts that human health is endangered by hazardous wastes, and that

21. Stephen D. Krasner, *International Regimes* (Ithaca: Cornell University Press, 1983), 1.

22. For criticism of Krasner's analytical hierarchy, see Stephen Haggard and Beth A. Simmons, "Theories of International Regimes," *International Organization* (Summer 1987): 493.

23. Decision of the OECD Council on Transfrontier Movements of Hazardous Wastes, OECD C(88) 90 (Final), reprinted in 28(1) *ILM* 259-276 (1989).

24. Specifically, the Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes (UNEP, Decision 14/30 of the Governing Council, 17 June 1987).

States should take necessary measures to ensure that the management of hazardous wastes and other wastes including their transboundary movement and disposal is consistent with the protection of human health and the environment whatever the place of their disposal.

Another diffuse principle of the Convention is that "enhanced control of transboundary movement of hazardous wastes and other wastes will act as an incentive for their environmentally sound management and for the reduction of the volume of such transboundary movement." This logic is sound: if the world community makes it difficult to transport wastes, then political and economic incentives will develop to find other solutions to the hazardous waste problem—solutions designed to reduce wastes at their source. In principle, then, the Convention does address the fundamental problem connected with the international trade in waste.

Norms

One of the "rights" formulated under this Convention (in the Preamble) is a state's prerogative to "ban the entry or disposal of foreign hazardous wastes and other wastes in its territory." This right goes back to Principle 21 of the Stockholm Convention which declares that "[s]tates have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies."

The definition of what is considered "environmentally sound" is the most problematic aspect of the norms of the Convention . . .

On the surface this right seems innocuous enough. However, sovereignty is one of the major sticking points of international environmental legislation. Environmental problems know no national boundaries. The effects of pollution follow the boundaries of ecosystems or other natural systems, rather than legal jurisdictional boundaries. In a world of nation-states, then, there is a fundamental contradiction between the responsibility of states not to cause damage to the environment, and the right of states to exploit their own natural resources and to pursue their own environmental policies. This contradiction often acts as a barrier to collective action on environmental problems. The Basel Convention emphasizes the responsibility, but does not eliminate the right.

Other responsibilities include the injunction that hazardous wastes should, "as far as is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated;" that transboundary movements of wastes "should be permitted only when conducted under conditions which do not endanger human health and the environment;" that States "should take measures for the proper exchange of information on and control of the transboundary movement of wastes;" and that "the ultimate disposal of such wastes" should be "environmentally sound."

The definition of what is considered "environmentally sound" is the most problematic aspect of the norms of the Convention:

'Environmentally sound management of hazardous wastes or other wastes' means 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.

No international standards are instituted. While negotiators sheltered themselves in this vague language, they have left us with a gaping loophole.

There are other definitional problems. While "wastes" are defined as "substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law, the term "hazardous" is never clearly defined. The Convention does list a large number of chemicals and other substances that the drafters of the Convention consider dangerous. It also provides a list of characteristics for classifying substances on the list as "hazardous." While these lists are extensive, they may not be inclusive. There is still a considerable amount of scientific debate about which chemical compounds and waste substances pose dangers to human health.

However, the Convention does make it possible to amend these lists. Future advances in scientific understanding and technological innovations in hazardous waste management may bring about changes in the definition of what constitutes environmentally sound treatment and disposal. In other words, the scope of the Convention may change over time. In addition, the language of the Convention is ambiguous enough to allow individual States to create their own definitions of what is hazardous, but it is understood that the Convention's definitions constitute the minimum requirements. A state can choose to label more substances as hazardous, but the ones on the list are generally agreed upon by all.

Rules

The rules of the Basel Convention outline certain procedures that states must follow in order to be consistent with the spirit and the letter of the Convention. Some of the rules are perfunctory and relate to such issues as accession of the Convention, its ratification, its entry into force, and who has the right to vote on future amendments.

There are three rules that constitute the meat of the Convention. First, it mandates that states formulate national policies and designate "competent" national authorities for waste management decisions. Second, it institutes a "trip ticket" system under the general principle of prior informed consent. Third, it directs exporting countries to accept the re-import of wastes that are illegally (and unsafely) dumped outside its borders. We will examine each of these rules in turn.

The first rule stems from the need for developing countries to formulate their own waste import policies and to build up their administrative capacity to deal with the technical and legal issues of hazardous waste management. Countries are required to codify these policies and to communicate them to all other nations via a centralized waste trade Secretariat. In this same vein, states also are required to "designate or establish one or more competent authorities and one focal point." A "competent authority" is a person or entity chosen by a national government who is responsible "for receiving the notification of a transboundary shipment of waste." As we shall see, this "competent authority" is key to the effectiveness of the trip ticket system. A "focal point" is "responsible for receiving and submitting information" from and to the Secretariat.

In laymen's terms, the difference between the focal point and the competent authority is slight. They may even be the same agency or group of government officials. The motivation behind the establishment of a competent authority and a focal point is to centralize hazardous waste policy in each country. The importance of doing so is illustrated in a waste scheme to send European wastes to Angola. In this case, an "authorized" signature was secured by the exporters, but when the Angolan government was alerted to the kind of wastes being imported, it claimed that the name on the document was falsified.²⁵ The appointment of a competent authority would make it more difficult to falsify document or to take advantage of a weaker state.

The second rule of the Convention sets up a system of prior informed consent (PIC). This is based on a developing norm in the transport of hazardous materials calling for international notification of hazardous substance transfers of all types, including wastes. PIC remains the subject of debate in many international environmental fora because "opinion differs as to the degree to which exporting states should be actively involved in the notification process."²⁶

The rule of prior informed consent formulated in the Basel Convention states that

the State of export shall notify, or shall require the generator or exporter to notify, in writing, through the channel of the competent authority of the State of export, the competent authority of the

25. Jean-Baptiste Placca, "Déchets Toxiques: L'Afrique réagit," *Jeune Afrique*, 11 January 1989, 31.

26. Günther Handl, "Environmental Protection in Third World Countries: Common Destiny—Common Responsibility," *New York Journal of International Law and Policy* Vol. 20, No. 3 (Spring 1988), 616.

States concerned of any proposed transboundary movement of hazardous wastes or other wastes.

The Convention details what information should be included on the consent document in order to ensure proper notification. Once a country's competent authority has received a request to import hazardous wastes, he or she has sixty days in which to respond. If the competent authority does not respond, the Convention considers the shipments to be approved tacitly. Under this general umbrella of prior informed consent, the Convention also sets up a trip ticket system by which "each person who takes charge of a transboundary movement of hazardous wastes or other wastes" signs a document "either upon delivery or receipt of the wastes in question." The information that should be provided on the movement document also is spelled out in the Convention. Waste disposers are also required "to inform both the exporter and the competent authority of the State of export" when disposal of the wastes has been completed. Thus the Convention creates a "paper trail" that could facilitate multilateral surveillance of the waste trade.

One major rule left out of the Convention pertains to liability and compensation for damage . . .

The third major rule of this Convention requires that even when consent has been given by the competent authority of an importing state, if the wastes imported cannot be disposed of in an "environmentally sound manner," the exporting state has a duty to re-import the wastes. This rule creates some hitches that relate to a government's role in the free market. For example, if American wastes are dumped illegally in another country, and if the generator or exporter could not be located, the costs of transporting and disposing of those wastes would fall on taxpayers. Irresponsible waste brokers would thus have an insurance policy: even if their waste schemes are discovered, the government would have to bear the burden.

Omissions

One major rule left out of the Convention—although there are allusions to it—pertains to "liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes." Article 12 of the Convention urges the Parties to adopt a protocol on liability "as soon as practicable." The political impracticability of this issue is underscored when one notes that it has been seventeen years since the Stockholm Convention mandated in Principle 22 that

States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

The Basel Convention also ignores the issue of developing emergency measures in case of accident.²⁷ One recent incident off the coast of Japan brings the issue into focus. A chemical tanker loaded with 25,700 tons of toxic chemicals (not wastes) exploded, killing the crew. Rescue and clean-up were delayed because of the intensity of the blaze.²⁸ Nothing in the Basel Convention indicates whether the responsibility of such an accident will be borne by the exporting country, the receiving country or by the international community as a whole.

Explanations for the omission of these two issues are difficult to uncover. The realities of negotiation make it impossible to put every issue linked to hazardous waste movements in this treaty. This is the first attempt to find universal agreement on how transboundary shipments should be controlled. If it enters into force, it is likely to be a springboard for future negotiations on international waste management.

Decision-Making Procedures

The decision-making procedures outlined in this Convention are two-fold. First there is to be a "Conference of the Parties." Representatives of the states bound to the treaty shall meet regularly to "keep under continuous review and evaluation the effective implementation of this Convention." Specifically, the Conference of the Parties shall "promote the harmonization of appropriate policies, strategies, and measures for minimizing harm to human health and the environment by hazardous wastes and other wastes."

The Conference of the Parties can make amendments or annexes to the Convention or formulate protocols based on new scientific, technical, economic and environmental information or on experience gained in the implementation of the Convention itself.

The second fundamental decision-making body established by the Convention is a Secretariat that would coordinate the gathering and dissemination of information (of a political, legal or technical nature). The Secretariat would also ensure coordination with relevant international organizations and prepare reports for the Conference of the Parties. The Secretariat would also act as a "watchdog," assisting states in identifying incidents of illegal traffic.

The Convention provides for dispute resolution if there are disagreements "as to the interpretation or application of or compliance with, this Convention or any protocol thereto." First the parties are to submit to negotiation. If this

27. J. P. Hannequart, "The Responsibilities of Competent Authorities in Regard to Transfrontier Movements of Hazardous Wastes," *Transfrontier Movements of Toxic Wastes: Legal and Institutional Aspects*, (Paris: OECD, 1985), 17.

28. "23 Feared Lost in Fire," *Boston Globe*, 15 March 1989, 12.

proves fruitless, the dispute will be referred to the International Court of Justice at The Hague or to a three-member arbitral tribunal.

These decision-making procedures, combined with the principles, norms and rules of the Basel Convention, constitute an international waste trade regime, at least in theory. It is a formalization of relationships regarding the transboundary movements of toxic wastes. Of course the Convention is untested. Whether it will be ratified by enough countries to be put into force at all remains to be seen.

CONCLUSION

The Basel Convention is far from being a perfect solution to the hazardous waste trade problem. However, it does address the major issues of the waste trade. It includes incentives for exporting states to police their frontiers for illegal waste movements. It induces developing countries to tighten their environmental policies and waste management regulations. It makes the waste trade more transparent by creating a paper trail that will help the international community verify compliance. The costs of compliance are distributed between exporters and importers in such a way that transboundary movements of hazardous wastes may be reduced, thereby decreasing the pollution that often accompanies such movements.

If the Convention enters into force—and this writer hopes that it will—it must have the support of a majority of both the major waste-producing countries, as well as the poorer countries that are the primary victims of hazardous waste trade schemes. Without support from both ends of the waste trade, the chances of reducing pollution are nil.

Not everyone is happy about the Convention. Many other issues still remain unresolved. There may still be cases of illegal dumping that slip through the enforcement net. Potential problems with transshipment of wastes through third countries remain unaddressed by the Basel Convention. The liability issue looms large, and there is still no political or scientific agreement on what constitutes “environmentally sound” disposal of hazardous wastes.

The industrialized countries are especially worried about the provisions requiring that wastes be reimported if it is determined that the wastes have been disposed of unsafely or illegally. It is unclear when the wastes leave the jurisdiction of the exporting state and become the responsibility of the importing country. No “statute of limitations” clearly stipulates that once the importing country signs the consent forms to import, the importing country takes full responsibility for the wastes. As it stands, it is conceivable that an importing country might demand that an exporting state take back its waste many years after the original transfer took place.

One reply to this legitimate concern would be that the exporting country should take measures to ensure that wastes not leave its borders unless the competent authority can verify that the wastes will be handled responsibly. States could require that waste exports be covered by adequate private insurance that would cover the costs of reimport if a problem should arise down

the road. Alternatively, waste-producing countries could move to ban hazardous waste exports altogether, a process underway already in some countries, including the United States. The Senate, the House of Representatives and the EPA have all drafted legislation that effectively would outlaw all exports of hazardous wastes in the absence of a bilateral waste shipment treaty.²⁹ The primary goal of an export ban is to encourage waste minimization and recycling.

For their part, developing countries that have been the victims of waste trade schemes are also hesitant to support the Basel Convention because they believe it does not go far enough to protect them from becoming the dumping ground of the industrial North. The African states in particular have been advocating a total ban of all transboundary movements of hazardous wastes. Forty countries, many of them African, have already instituted such a ban.³⁰ None of the African countries have signed the Basel Convention and the meeting of member foreign ministers of the Organization of African Unity will be discussing the Convention at the meeting in Bamako, Mali, in July of 1990. OAU support for the Convention will be crucial to the success of the Basel agreement.

One must remain realistic, however, about the success of any international environmental legislation. Effective implementation of the Basel Convention depends on conscientious enforcement of its provisions by each state that is party to it. The waste trade problem is fundamentally one of international cooperation. To say that there are problems and loopholes, however, is not to say that states necessarily will take advantage of them. If states continue to perceive an overriding self-interest in abrogating the treaty, they probably will. But the structure of the waste trade game is changing. States are beginning to perceive their own self-interest in cooperating. Despite the rhetoric and political posturing, states are realizing the economic and environmental costs of unregulated international trade in hazardous wastes, and in some cases are acting unilaterally to ban waste movements across their borders. Other regional and bilateral arrangements may diminish the waste trade further. Clearly there is more work to be done, but the Basel Convention is the important first step in internationalizing the control of transboundary shipments of hazardous wastes.

29. Senate Bill 1113 ("The Waste Minimization and Control Act of 1989") and House of Representatives Bill 2525 ("The Waste Export Control Act"). EPA lawyers are drafting their own version as part of their internal review of the Basel Convention. Source: Wendy Grieder, Office of International Activities, US EPA, 15 November 1989.

30. "Greenpeace Waste Trade Update," Vol. 2, Issue 2 (March 1989), 2.