

THE BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY
MOVEMENTS OF HAZARDOUS WASTE AND THEIR DISPOSAL:
SHOULD THE UNITED STATES RATIFY THE ACCORD?

I. INTRODUCTION

The infamous vessel, the *Khian Sea*, sailed the seas for years searching for a nation that would accept its cargo.¹ Its voyage began on August 31, 1986, when the freighter departed from Philadelphia with 13,000 tons of incinerator ash and headed for the Bahamas.² After the Bahamian Government barred its entry, the *Khian Sea* searched for two years before finally unloading three thousand tons of noxious cargo on the Haitian shore.³ After the Haitian government demanded that the ship leave port, the *Khian Sea* changed its name to the *Pelicano* and continued searching through the Middle and Far East for a disposal site.⁴ Thereafter, reports surfaced that the freighter emptied the rest of its cargo on the ocean floor.⁵ This is just one blatant example of the environmental exploitation of poor countries by rich industrialized nations during the 1970's and 1980's.⁶ The *Pelicano's* illegal hazardous waste dumping demonstrates the most irresponsible and reckless way a country can rid itself of its unwanted toxic refuse.⁷

However, the tragic events of the 1970's and 1980's brought widespread attention to the enormous global dilemma of indiscriminate hazardous waste dumping. The public outcry sent a red flag waving over the world that focused attention on the nations which were illegally dumping their waste.⁸ In response to the negative attention produced by the media and environmental groups, the

1. John Langone, *Waste A Stinking Mess the Problem: Throwaway Societies Befoul their Land and Seas*, TIME, Jan. 2, 1989, at 44.

2. Robert M. Rosenthal, *Ratification of the Basel Convention: Why the United States Should Adopt the No Less Environmentally Sound Standard*, 11 TEMP. ENVTL. L. & TECH. J. 61, 62-63 (1992).

3. *Id.*

4. *Id.*

5. Langone, *supra* note 1, at 44.

6. *Id.* Another example occurred in the Nigerian port of Koko. In Nigeria, an Italian company dumped 8,000 leaking drums of toxic waste in an open air builder's yard. *Toxic Materials*, ECONOMIST, Feb. 18, 1989, available in LEXIS, World Library, ALLWLD File. Also, in Brussels, a West German company admitted illegally dumping more than 25,000 tons of hazardous waste in a quarry. Sean D. Murphy, *The Prospective Liability Regimes for the Transboundary Movement of Hazardous Waste*, 88 AM. U. J. INT'L L. & POL'Y 24, 31 (1994).

7. *Id.*

8. *Where Danger Roams*, UNESCO COURIER, Nov. 1992, at 30. Concern for the environment reached a new peak in the 1980's. In 1988, devastating droughts, mega-forest fires, and record high temperatures convinced most that humanity was courting ecological disaster. Thomas A. Sanction, *The Fight to Save the Planet as Concern for the Environment Grows, and Some Promising International Initiatives Take Shape, the U.S. Must Do its Share*, TIME, Dec. 18, 1989, at 60.

industrialized nations acted by sending the waste to agreeing developing countries.⁹ However, many problems surfaced due to the inability of the third world countries to safely dispose of the hazardous waste.¹⁰ Thus, responding to the problems associated with crossboundary waste trade, the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal was formed.

II. BACKGROUND LEADING UP TO THE BASEL CONVENTION

The world produces about 2.1 billion tons of industrial waste per year; 338 million tons of such waste is hazardous.¹¹ Industrial countries produce a disproportionate amount of waste compared to developing countries. For example, the United States produces about 275 million tons of hazardous waste per year while Thailand, a developing country, only produces 22,000 tons per year.¹² The Organization for Economic Co-Operation and Development (OECD) and the United Nations Environment Programme (UNEP)¹³ estimate that ten percent to twenty percent of global industrial waste, which accounts for twenty to thirty million tons per year, is exported.¹⁴ In 1990, the United States legally exported 139 tons of hazardous waste.¹⁵ Although this represents only one percent of the hazardous waste generated in the United States, it is substantial.¹⁶ Of this one percent, approximately eighty-five percent is exported to Canada,¹⁷

9. *Id.*

10. *See infra* text accompanying note 33 (discussing the problems associated with hazardous waste trade).

11. *Where Danger Roams, supra* note 8. The exact amount of hazardous waste crossing international borders every year is unknown due to illegal traffic in hazardous waste and nations disagreement as to what defines hazardous waste. Maureen T. Walsh, *The Global Trade in Hazardous Wastes: Domestic and International Attempts to Cope with a Growing Crisis in Waste Management*, 42 CATH. U. L. REV. 103, 108 (1992).

12. Joseph LaDou, *The Export of Environmental Responsibility*, 49 ARCHIVES OF ENVTL. HEALTH, Jan. 1994, at 6.

13. *See infra* note 113 and accompanying text. In 1972, delegates of the United Nations Conference on the Human Environment created the United Nations Environment Programme. Rosenthal, *supra* note 2, at 71.

14. LaDou, *supra* note 12, at 6.

15. Grant L. Kratz, *Implementing the Basel Convention into U.S. Law: Will it Help or Hinder Recycling Efforts?*, 6 B.Y.U. J. PUB. L. 323 (1992).

16. *Id.*

17. Robert E. Cattanach & Peter O'Connor, *Environmental Concerns Raised by the Canada-United States Free Trade Agreement*, 18 WM. MITCHELL L. REV. 461, 479-80 (1992). Most of the hazardous waste exported to Canada comes from the Northeastern United States and along the common border. *Id.* *See generally infra* text accompanying note 183 (trading under the North American Free Trade Agreement).

and twelve percent is sent to Mexico.¹⁸

The major problems associated with crossboundary waste trade derive from the exportation of hazardous waste from rich nations to developing countries. The industrialized nations face the dilemma of where to put the insurmountable volume of refuse because they produce about ninety percent of all hazardous waste.¹⁹ Although it is estimated that more than 600,000 tons of toxic waste is exported annually from the industrialized countries, that number is actually double.²⁰

Faced with soaring costs of hazardous waste disposal, the industrialized nations have turned to developing countries to rid themselves of this waste. The cost of hazardous waste disposal has increased 100% in the past twenty years due to developed countries' new and stringent environmental laws and enforcement.²¹ Increased regulatory constraints have affected traditional low-cost disposal methods,²² thereby causing a reduction in waste disposal capacity.²³ Due to increased operating costs over the past decade, many facilities capable of disposing of hazardous waste have been forced to close.²⁴ In the United States alone, nearly half of 4,600 facilities that treated or disposed of hazardous wastes during the 1980s closed because of increased regulation.²⁵ Due to the increasing cost of waste disposal, particularly hazardous waste, industry has gone beyond its own borders for disposal.²⁶ Developing nations, severely burdened by huge foreign debt, provide attractive disposal sites due to their lack of environmental controls and their need for capital.²⁷ This debt places enormous pressure on developing countries to exploit their resources to acquire substantial

18. Maureen T. Walsh, *The Global Trade in Hazardous Wastes: Domestic and International Attempts to Cope With a Growing Crisis in Waste Management*, 42 CATH. U. L. REV. 103, 136 (1992).

19. C. Russell H. Shearer, *Comparative Analysis Of The Basel and Bamako Conventions on Hazardous Waste*, 23 ENVTL. L. 141, 144 (1993). The UNEP estimates that every five minutes 23 tons of waste crosses the border of an OECD Member country. *Where Danger Roams*, *supra* note 8.

20. *Toxic Materials*, ECONOMIST, Feb. 18, 1989, available in LEXIS, World Library, ALLWLD File.

21. LaDou, *supra* note 12. The United States has enacted The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Resource Conservation & Recovery Act (RCRA) to regulate waste disposal. See generally *infra* note 145 and accompanying text (discussion of RCRA).

22. Sean D. Murphy, *The Prospective Liability Regimes for the Transboundary Movement of Hazardous Waste*, 88 AM. U. J. INT'L L. & POL'Y 24, 30 (1994). Low cost disposal methods include landfill, storage in surface impoundments, and deep well injection. *Id.*

23. *Id.*

24. *Id.* at 31.

25. *Id.*

26. Rosenthal, *supra* note 2, at 61.

27. Shearer, *supra* note 19, at 144.

sources of income.²⁸ By accepting hazardous waste, developing nations have faced several problems in managing the waste. First, uncontrollable forces pose an insurmountable barrier to environmentally sound management.²⁹ Second, homes of the poorest people are usually located near or even in landfills.³⁰ Third, developing nations often do not have adequate resources to provide competent administrative agencies or administrators to regulate waste disposal.³¹ Because they lack environmentally sound waste management, developing nations have become a low cost disposal site for industrialized nations.³²

The hazardous waste trade creates deplorable conditions in many developing countries. The recipient country and bordering nations experience soil contamination, ground water pollution, air pollution, and threats to natural resources and biodiversity.³³ In addition, others may suffer the ramifications of hazardous waste trade. The importation of hazardous wastes in agricultural exporting countries affects human health in other countries through the exportation of contaminated food product.³⁴ The snowball effect of mismanaged waste can indirectly affect the entire world.

III. THE BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTE AND THEIR DISPOSAL

Responding to a lack of uniform crossboundary hazardous waste trade guidelines³⁵ and concern for developing countries' inability to adequately handle

28. Rosenthal, *supra* note 2, at 62.

29. Shearer, *supra* note 19, at 146. In the tropics' heavy rains, wastes soak into the soil under the landfills, causing the contamination of water supplies. *Id.*

30. *Id.* The poorest neighborhoods may be located in waste disposal sites. As a result of the proximity of the disposal sites and the neighborhoods, groundwater is often contaminated, and residents frequently bathe, drink, grow food, and cook with the tainted water. In addition, children play with hazardous wastes, and adults view them as raw materials for projects or as objects of good luck. *Id.*

31. *Id.*

32. *Id.*

33. Murphy, *supra* note 22, at 32.

34. *Id.* During the 1950's and 1960's the residents of Minamata and Niigata, Japan suffered neurological diseases caused by the consumption of fish which had been contaminated by the discharge of mercury into the ocean. Shearer, *supra* note 19 at 147.

35. Murphy, *supra* note 22, at 34. In response to the concern for control of transboundary movements of hazardous wastes, many different national and international regulations were enacted. For example, the International Maritime Organization developed a technical annex to the Marpol Convention to govern the transport of hazardous waste by sea. The annex contains detailed requirements on packing, marking, documentation, stowage, quantity limitations, and other matters. Another example of rules promulgated to govern hazardous waste that are not internationally unified are the bilateral agreements between the United States, Canada, and Mexico. These agreements govern the import of hazardous waste with Canada and Mexico, the two largest importers of United States hazardous waste. See *supra* text accompanying notes 17 and 18. In another attempt at addressing the hazardous waste problem, in 1984, the OECD

hazardous waste imports, the UNEP pursued a global solution.³⁶ In 1987, in an effort toward a global approach, the UNEP developed the Cairo Guidelines which set forth principles to assist developing countries in the implementation of environmentally sound management of hazardous wastes.³⁷ The organization of the Cairo Guidelines³⁸ set the foundation for the first unified global convention on the transboundary movement of hazardous waste.³⁹

Thereafter, the UNEP wanted to surpass the scope of the Cairo Guidelines.⁴⁰ In 1989, a negotiating conference⁴¹ in Basel, Switzerland drafted the first international convention on the control of transboundary movements of hazardous waste.⁴² The resulting product of the Conference set forth guidelines and principles for control of the international movement of hazardous wastes.⁴³ The final document, known as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) signed by thirty-five⁴⁴ of the 116 countries that participated in the negotiations.⁴⁵ In response to growing concerns raised by the scandals of the 1970s and 1980s,⁴⁶ the Basel Convention went into force in 1992.⁴⁷ Currently,

showed its concern through adoption of a Decision/Recommendation that requires countries to ensure that hazardous waste situated within their borders is managed responsibly in order to protect both human health and the environment. Although this was one of the first steps taken by an international organization toward managing the problem of toxic wastes, it was not a unified international solution. Murphy, *supra* note 22, at 33.

36. *Id.*

37. *Id.*

38. In sponsoring the Cairo Guidelines, the UNEP was attempting to assist developing countries in implementing safe hazardous waste management. Diana L. Godwin, Comment, *The Basel Convention on Transboundary Movements of Hazardous Wastes: An Opportunity for Industrialized Nations to Clean Up Their Acts?*, 22 DENV. J. INT'L L. & POL'Y 193, 198 (1993).

39. Rosenthal, *supra* note 2, at 72.

40. Godwin, *supra* note 38, at 198.

41. The negotiating conference consisted of working technical and legal experts. *Id.*

42. Murphy, *supra* note 22, at 34.

43. Walsh, *supra* note 18, at 107.

44. Signatories to the Convention include Afghanistan, Bahrain, Belgium, Bolivia, Canada, Colombia, Cyprus, Denmark, Ecuador, Finland, France, Greece, Guatemala, Haiti, Hungary, Israel, Italy, Jordan, Kuwait, Lebanon, Liechtenstein, Luxembourg, Mexico, Netherlands, Norway, Panama, Philippines, Saudi Arabia, Spain, Sweden, Switzerland, Turkey, United States, United Arab Emirates, Uruguay, and Venezuela. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal [hereinafter Basel Convention], adopted and opened for signature Mar. 22, 1989, 28 I.L.M. 649, 653 (1989).

45. Godwin, *supra* note 38, at 199.

46. See Langone, *supra* note 1, at 44. See also Murphy, *supra* note 6 and accompanying text.

47. Narelle Hooper, *Industry Outfoxed on Waste Trade*, BUS. REV. WKLY., May 9, 1994, at 30. The Convention became effective only upon ratification by twenty countries. Godwin, *supra* note 38, at 199. The number of countries required to ratify the agreement was purposely kept low so that the Convention would quickly become law. Rosenthal, *supra* note 2, at 72.

sixty-four countries⁴⁸ have implemented domestic legislation, thereby making them full Parties to the Basel Convention.⁴⁹ Although some countries, such as the United States, are signatories to the Basel Convention, they will not be full treaty partners until they implement internal legislation to ratify the Basel Convention.⁵⁰ Thus, in order for the United States to ratify the Basel Convention, Congress must pass legislation to establish export and import controls set forth by the Basel Convention.⁵¹

The former Executive Director of the UNEP, Dr. Mostafa Tolba, stated that the aim of the Basel Convention is a "major reduction in the generation of hazardous wastes."⁵² The Basel Convention itself provides that "the most effective way of protecting human health and the environment from the dangers posed by such wastes is the reduction of their generation to a minimum"⁵³ Although the overall aim of the Convention is to reduce the production of hazardous wastes, the primary objective is "to protect countries against the uncontrolled dumping of toxic wastes."⁵⁴ The guidelines of the Convention are the means to controlling the irresponsible dumping of hazardous waste, and the ends should be the reduction of the creation of those wastes at their source.

The main provision of the Convention, Article 4, requires that the State of export must guarantee environmentally sound management of the waste⁵⁵ and may export waste to a Party State only in situations where it does not have the technical capacity and facilities to dispose of the waste in an environmentally sound manner.⁵⁶ The Basel Convention defines "environmentally sound

48. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban on Waste Trade*, Daily Env'tl. Rep. (BNA) No. 1167, at D-16 (May 19, 1994).

49. Godwin, *supra* note 38, at 201.

50. *'Wait-and-See' May Become U.S. Policy on Recent Export Ban under Basel Treaty*, Daily Env'tl. Rep. (BNA) No. 1167, at D-8 (June 20, 1994).

51. *Id.* Many obstacles stand in the way of implementation of international environmental agreements. First, sovereign nations are often unwilling to cede their sovereign authority to an international agreement. The second hindrance to implementing an international environmental agreement involves convincing the nations that their country is in need of the agreement. Third, it is difficult to convince nations that the subject matter of the agreement is relevant and important to their state. Finally, another obstacle to implementing international environmental agreements is the developing countries' concern that the international agreement will place the industrialized nations' interests over those of the developing countries. Walsh, *supra* note 18, at 114-15.

52. Godwin, *supra* note 38, at 199.

53. Basel Convention, *supra* note 44, at 657.

54. Godwin, *supra* note 38, at 199.

55. Basel Convention, *supra* note 44, art. 4. The relevant language of the Basel convention provides that "[e]ach party shall require that hazardous wastes or other wastes, to be exported, are managed in an environmentally sound manner in the State of import or elsewhere." *Id.*

56. *Id.* The Convention provides:

[p]arties shall take the appropriate measures to ensure . . . movement of hazardous wastes and other wastes only be allowed if . . . the State of export does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites

management" as "taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes."⁵⁷

Article 6 of the Convention governs the guidelines of the exchange of waste among parties. The guidelines set forth that "[t]he state of export shall not allow a transboundary movement of hazardous wastes to commence until it has received the written consent, based on prior detailed information, of the State of import, as well as of any State of transit."⁵⁸ In addition, every State possesses the sovereign right to prohibit the import of hazardous wastes.⁵⁹ Therefore, the Basel Convention requires the exporting country to adhere to a developing country's legislation prohibiting the import of hazardous wastes.

Article 8 provides that when transboundary movement of hazardous waste which is carried out in accordance with the Basel Convention cannot be completed in accordance with the contracting Parties, the State of export must ensure that the wastes are re-imported.⁶⁰ The Basel Convention defines this as "taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes."⁶¹ Alternatively, it also creates an affirmative duty on the State of import to reject the hazardous waste if it has reason to believe the waste will not be managed in an environmentally sound manner.⁶²

Article 9 of the Basel Convention provides that the transboundary movements of hazardous wastes which do not conform to the provisions of the Basel Convention or general principles of international law shall be deemed to be illegal traffic.⁶³ The Basel Convention provides that "illegal traffic in hazardous wastes is criminal."⁶⁴ In determining responsibility for illegal transboundary movement of hazardous waste, the State responsible for the movement of the waste is the criminal party.⁶⁵ Therefore, it is the criminal party that has the obligation to ensure the environmentally sound disposal of the hazardous waste

in order to dispose of the wastes in question in an environmentally sound and efficient manner

Id.

57. *Id.* art. 2.

58. Gonzalo Biggs, *Latin America and the Basel Convention on Hazardous Wastes*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 333, 338 (1994).

59. *Id.*

60. Basel Convention, *supra* note 44, art. 8.

61. 138 CONG. REC. S12291-01 (1992).

62. Basel Convention, *supra* note 44, art. 4. The Convention provides that "[e]ach party shall . . . [p]revent the import of hazardous wastes . . . if it has reason to believe that the wastes . . . will not be managed in an environmentally sound manner." *Id.*

63. Biggs, *supra* note 58, at 338.

64. Basel Convention, *supra* note 44, at art. 4.

65. Biggs, *supra* note 58, at 338.

by re-importing the wastes or otherwise.⁶⁶ However, Article 9 does not extend the obligations of re-importation to cleanup of the hazardous waste in the importing country.⁶⁷ The guidelines governing the criminal party's action shall be introduced by each party's national legislation to prevent and punish illegal traffic in hazardous wastes.⁶⁸

A party shall not permit hazardous waste exports to a non-party nor permit imports from a non-party,⁶⁹ unless the parties enter into bilateral, multilateral, or regional agreements or arrangements.⁷⁰ Article 11 of the Convention provides that Parties may enter into bilateral, multilateral, or regional agreements or arrangements with non-parties, provided that such agreements do not derogate from environmentally sound management of hazardous wastes as required by the Basel Convention.⁷¹ For example, preexisting agreements, such as the United States' bilateral agreements with Canada and Mexico, must be "compatible with the environmentally sound management of hazardous wastes and other wastes as required by the Convention."⁷² To ensure that the agreements with non-parties are consistent with the Basel Convention, they must contain provisions guaranteeing that "agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention . . ."⁷³

On May 5, 1992, over three years after its creation, the Basel Convention finally went into effect.⁷⁴ During the negotiations of the Basel Convention, the parties delayed implementation of important decisions involving liability and compensation for damages until the parties had an opportunity to ratify the treaty,⁷⁵ thereby providing key countries such as the United States, Japan, and the European Community time to implement the Convention.⁷⁶ In October 1994, in Geneva, Switzerland, a meeting was held to discuss liability and compensation under the Basel Convention.⁷⁷ The member nations' legal and technical experts were unable to agree on a draft protocol on liability and compensation for

66. *Id.*

67. 138 CONG. REC. S7352-03 (1992).

68. Basel Convention, *supra* note 44, art. 9.

69. *Id.* art. 4.

70. Biggs, *supra* note 58, at 338.

71. Godwin, *supra* note 38, at 200. *See infra* text accompanying note 83.

72. 138 CONG. REC. S12291-01 (daily ed. Aug. 11, 1992)(statement of Sen. Pell).

73. Basel Convention, *supra* note 44, art 11(1).

74. *Id.* As of December 28, 1992, the following countries had ratified the Basel Convention: Australia, Argentina, Bahamas, Bahrain, Brazil, Canada, Chile, China, Cyprus, Czechoslovakia, El Salvador, Estonia, Finland, France, Hungary, India, Jordan, Latvia, Liechtenstein, Maldives, Mexico, Monaco, Nigeria, Norway, Panama, Poland, Romania, and Saudi Arabia. *Id.*

75. Godwin, *supra* note 38, at 203.

76. *Id.*

77. *Experts from Basel Treaty Nations Wrangle on Liability in Draft Protocol*, 198 Daily Env'tl. Rep. (BNA) at D-11 (Oct. 17, 1994).

attachment to the Convention.⁷⁸ The UNEP proposed several liability options where the transmission of hazardous wastes across boundaries results in legal actions.⁷⁹ The proposals included "putting responsibility for liability on the generator of the wastes, the exporter, any person who at the time of the incident in question has control over the wastes, brokers, any person with operational control of the wastes, or any permutation of these alternatives."⁸⁰ In addition, representatives of the insurance industry requested that the Parties define the scope of liability reserved for insurance companies and the government.⁸¹ Therefore, the Parties will continue to work toward drafting a liability and compensation mechanism for implementation under the Basel Convention.⁸²

IV. CONCERNS GIVING RISE TO THE DECISION TO BAN CROSSBOUNDARY WASTE TRADE BETWEEN OECD AND NON-OECD COUNTRIES

A. *Total Ban Desired*

The Basel Convention has been highly criticized for continuing to allow industrialized nations to export waste to countries that have inadequate resources to safely manage the waste. Under the Basel Convention, crossboundary waste is permitted between Member States, provided that trade is preceded by an exchange of detailed information on the intended export and written consent is acquired from the importing country.⁸³ However, crossboundary waste will even be authorized between Member and non-Member States so long as bilateral, multilateral, or regional agreements are environmentally sound.⁸⁴ Although the Convention provides positive steps toward the management of hazardous wastes, it is criticized by Greenpeace as not having a single clause prohibiting the transfer of waste, even if the country has inadequate environmental regulations.⁸⁵

Because the Basel Convention did not adopt a total or partial ban of crossboundary waste trade, an environmental coalition urged for a total ban of hazardous waste trade from the rich to poor countries. In support of developing countries, environmental groups, including the Natural Resources Defense Council, International Organization of Consumers Unions, Greenpeace, and the African Network of Environmental NGO's, called for an outright worldwide ban

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. Basel Convention, *supra* note 44, art. 11(1). *See also supra* text accompanying note 58.

84. Basel Convention, *supra* note 44, at art. 11(1). *See supra* text accompanying note 70.

85. *Where Danger Roams*, *supra* note 8, at 30.

on the transboundary toxic trade.⁸⁶ Environmental activist groups are convinced that the only way to protect the environment and human health and encourage reduction of waste production and recycling of waste is a complete ban on the export of hazardous waste from industrialized nations to developing countries.⁸⁷ These proponents insist that developing countries lack the internal structure to implement the guidelines prescribed by the Basel Convention.⁸⁸ Therefore, even though several developing countries generate their own waste, they have neither the experience nor the equipment for dealing with imported waste.⁸⁹ Thus, the ban on toxic trade between countries of differing industrialization is the single alternative which the environmental groups deem acceptable.⁹⁰

B. *Recycling Exception*

Proponents of the plan to prohibit toxic trade exports to developing countries assert that the recycling exception is a dangerous loophole of the Convention.⁹¹ The preamble to the Convention expresses the importance of recycling and states that the Parties to the Convention are "aware of the need to continue the development and implementation of environmentally sound low-waste . . . recycling options . . ."⁹² The Convention provides that hazardous waste trade will be permitted if "the wastes in question are required as a raw material for recycling or recovery industries in the State of import . . ."⁹³ Even though the Convention's broad definition of hazardous waste includes recyclable waste, the import of recyclable materials is only permitted if the importing country is willing to claim that the materials are required for recycling or reclamation within that country.⁹⁴ Thus, under the recycling exception, waste that would normally be banned as hazardous under the Convention may be transported and disposed of in countries under the guise of recycling.⁹⁵ In addition, the Convention provides that the export of recyclable materials can go forth if the shipment meets "other criteria" to be decided at some other time by the Parties to the Convention, provided they do not conflict with those of the Convention.⁹⁶ This is one reason for favoring ratification by the United States,

86. Valentina O. Okaru, *The Basel Convention: Controlling the Movement of Hazardous Wastes to Developing Countries*, 4 FORDHAM ENVTL. L. REP. 137, 151 (1993).

87. Kratz, *supra* note 15, at 325.

88. *Id.* See *supra* text accompanying note 29.

89. *Toxic Materials*, *supra* note 20.

90. Kratz, *supra* note 15, at 325.

91. Godwin, *supra* note 38, at 202.

92. Basel Convention, *supra* note 44, at 658.

93. *Id.* at art. 4(7)(b).

94. Kratz, *supra* note 15, at 338.

95. Godwin, *supra* note 38, at 202.

96. Kratz, *supra* note 15, at 339.

thereby permitting it to participate in implementation guidelines of the Convention.⁹⁷

Most of the global trade in recyclable materials is between countries with advanced mechanisms prescribing the environmentally sound management of the wastes.⁹⁸ However, problems emerge when a significant portion of recycled trade is exported from countries with highly developed regulatory regimes to countries with nonexistent regulations or poorly developed ones.⁹⁹ Kevin Stairs, Greenpeace's adviser on treaties and conventions, claims that most hazardous waste trade is traded under the guise of the recycling exception.¹⁰⁰ In some cases the disguise is transparently thin, and it is questionable whether recycling activities are much more than dangerous waste disposal.¹⁰¹

Greenpeace asserts that wealthy countries often dump hazardous waste in the Third World under the guise of recycling.¹⁰² Jim Vallette, co-coordinator for Greenpeace's campaign to ban waste trade, has claimed that the United States exports a large quantity of lead acid batteries to Asian countries.¹⁰³ In these Asian countries, Greenpeace inspected numerous facilities where the recycling of these batteries occurred and found that the workers suffered from lead poisoning.¹⁰⁴

In response to the fervor against the recycling exception of the Convention, the United States Chamber of Commerce has proposed criteria to counteract the ambiguity in the Convention guidelines. They include the following:

- (1) Recyclers must be in the business of recycling and have the appropriate equipment, as well as the technical and environmental expertise, to process the materials they receive...
- (2) Recyclers must conduct transactions on the basis of contracts arranged in advance of shipment of material to them.

97. *Id.*

98. Murphy, *supra* note 22, at 30.

99. *Id.*

100. Godwin, *supra* note 38, at 202 n.68. The German government was held responsible for recovery of more than 400 tons of toxic German pesticides. Greenpeace claims that Germany told Romanian farmers that the pesticides could be recycled. However, when Greenpeace investigated, they found the damaged and rusting barrels full of pesticides that were leaking into the environment. In 1992 Britain exported 280 tons of lead waste to Indonesia and 165 tons to the Philippines for recycling. When Greenpeace visited the lead recovery plants in Indonesia, they found workers stirring molten lead by hand with no protection from the highly toxic lead fumes. *Id.*

101. Hannah Pearce, *Dump and Run*, NEW STATESMAN & SOCIETY, Feb. 5, 1993, at v6.

102. *Industry Slams Parliaments Call for Waste Trade Ban*, Reuter Newswire, Feb. 14, 1992, available in LEXIS, World Library, ALLWLD File.

103. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban on Waste Trade*, *supra* note 48 at D-16.

104. *Id.*

Nonconforming and incompatible shipments are, therefore, substantially less likely to occur.

(3) There must be a governmental infrastructure with the authority and capability to regulate the recycling activity and to enforce the regulations.

(4) Recyclers must register with their Competent Authorities and maintain a status of compliance with their national environmental laws.

(5) Under the oversight of its Competent Authority, and in accordance with its laws, a recycler must comply, at a minimum consistent with environmentally sound management, with national requirements for storage, process wastewater releases, and process air emissions.

(6) A recycler must properly manage process residues

(7) A recycler must create and maintain accurate and timely records

(8) At least one product of the process must be returned to commercial use, whether as an ultimate product or as a feed material for an industrial process, in a use that does not solely involve application to the land. At least one product must meet commercial specifications for use in commerce as a product or process feed material.¹⁰⁵

Thus, in response to efforts of the environmental coalition urging for a ban of crossboundary waste trade, industry attempted to impose its own criteria to further define trade in recyclables.

C. *Limited Provisions*

The Basel Convention has been criticized as having "no teeth because it lacks executive authority; therefore it will not be able to coerce states into compliance with the Convention."¹⁰⁶ The Organization of African Unity was primarily concerned that any controls provided by the Convention could be circumvented because of the lack of competent administrators and administrative agencies.¹⁰⁷ Therefore, much of the force of the Basel Convention will depend upon who participates in the agreement and how they implement its values into their national legislation.¹⁰⁸ One suggestion is that the solution lies in an

105. Kratz, *supra* note 15, at 339-40.

106. Godwin, *supra* note 38, at 201. The Secretariat to the Convention facilitates information rather than enforcing compliance with the Convention. *Id.*

107. *Id.* at 206.

108. *Id.*

international environmental agency within the United Nations that would be responsible for forcing compliance by Member nations.¹⁰⁹ A total ban of hazardous waste export to third world countries would abolish the need for implementation and execution of regulatory guidelines for developing countries that lack the infrastructure to implement the Convention.

V. BASEL RESOLUTION

On March 25, 1994, the Conference of the Parties to the Convention met in Geneva, Switzerland and agreed to ban shipments of hazardous waste between industrialized nations and developing countries.¹¹⁰ The relevant language of the decision states:

The Conference,

Recognizing that transboundary movements of hazardous wastes from OECD to non-OECD States have a high risk of not constituting an environmentally sound management of hazardous wastes as required by the Basel Convention;

1. Decides to prohibit immediately all transboundary movements of hazardous wastes which are destined for final disposal from OECD to non-OECD States;
2. Decides also to phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes which are destined for recycling or recovery operations from OECD to non-OECD States¹¹¹

The resolution calls for an immediate ban on waste trade between OECD and non-OECD countries and calls for a complete prohibition of the movement of hazardous wastes for recycling by December 31, 1997.¹¹² The OECD is composed of twenty-five of the world's largest industrialized powers.¹¹³ When

109. *Id.*

110. 'Wait-And-See' May Become U.S. Policy on Recent Export Ban Under Basel Treaty, *supra* note 50.

111. Enclosure from LiAnn Parker, Assistant Director, Business Recycling Coalition (decision to ban crossboundary waste trade from OECD countries to non-OECD countries) (Mar. 25, 1994).

112. *Pressure on Waste Agreements*, Australian Financial Review, May 20, 1994, available in LEXIS, World Library, ALLWLD File. See generally *supra* note 20 (discusses the amount of hazardous waste exported from OECD countries).

113. 'Wait-And-See' May Become U.S. Policy on Recent Export Ban Under Basel Treaty, *supra* note 50, at D-8. Mexico became the 25th member of the organization May 18, 1994. *Id.* Other members are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. *Id.*

it came down to the vote, only three countries voted against the decision, while sixty-three voted in favor of the ban.¹¹⁴ However, in the two months prior to the Geneva meeting, Greenpeace used its strength in the media and vigorously lobbied ministers of Member countries.¹¹⁵ Thus, through its efforts, it was evident that Greenpeace "was determined to close the recycling loophole."¹¹⁶

The decision to ban hazardous waste export to non-OECD countries immediately and to ban recycling by 1997 does not otherwise change the Convention from its original form.¹¹⁷ Moreover, since the resolution is not a formal one, it is not legally binding on the treaty partners.¹¹⁸ However, international political pressure is expected to induce compliance.¹¹⁹

The resolution does provide for the transboundary movements of hazardous wastes from OECD countries to non-OECD countries in exceptional circumstances.¹²⁰ However, hazardous wastes from OECD to non-OECD states for the purposes of recovery are generally prohibited.¹²¹

VI. CONCERNS RAISED IN RESPONSE TO THE BAN

A. *Industry and Recycling*

Industrialized nations have expressed concern over the plan to prohibit crossboundary hazardous waste trade. Industry claims that the ban on trading recycled wastes between OECD and developing countries could cost the United States industry \$2.2 billion a year in commodities trade.¹²² Although the resolution is not yet legally binding since it is not yet a formal amendment, industry groups are concerned that the resolution will inhibit legitimate trade in recyclable waste.¹²³

114. Hooper, *supra* note 47, at 30.

115. *Id.* Greenpeace ran a public campaign to maximize opposition and reinforce the need for a ban. Greenpeace gave graphic details of the contamination and pollution caused by plants in Asia that processed lead-acid batteries for recycling. In addition, Greenpeace sailed the Rainbow Warrior II from Singapore to Indonesia and the Philippines arranging with local environmental groups to publicize the pollution before and during its visits. *Id.*

116. *Id.* See *supra* text accompanying note 100.

117. 'Wait-and-See' May Become U.S. Policy on Recent Export Ban Under Basel Treaty, *supra* note 50, at D-16.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Chamber of Commerce Withdraws Support for Treaty on Waste Movement, Disposal, 25 *Env'tl. Rep.* 165 (BNA) (May 27, 1994). See *infra* text accompanying note 132.

123. *Pressure on Waste Agreement, supra* note 112.

The United States Chamber of Commerce listed options the United States government and industry should consider in light of the ban:

- 1) The administration should inform Congress and the Basel Secretariat the United States will not implement the treaty because of the ban;
- 2) U.S. companies exporting Basel wastes to non-OECD countries that have ratified the treaty should inform their customers that the shipments may stop Dec. 31, 1997, unless a bilateral agreement is reached;
- 3) The United States should begin negotiating bilateral agreements with non-OECD Basel parties with whom it trades Basel wastes;
- 4) Non-OECD countries should develop a mechanism to decide what is a Basel waste;
- 5) The U.S. government should organize training programs in sound environmental management and hazardous waste identification for non-OECD countries with which it trades; and
- 6) Trade in recyclable commodities should be clarified to include issues not addressed in the convention such as the status of materials shipped as part of a stewardship program.¹²⁴

A major opponent of the decision to ban waste trade is the scrap metal industry. A major representative of the scrap metal industry is the Business Recycling Coalition (BRC).¹²⁵ Prior to the ban, the BRC strongly supported implementation of the Convention, because it "believed it could be implemented in a way that would promote environmentally sound management of hazardous waste while allowing all Parties to realize the benefits of trade in recyclables."¹²⁶ However, since the March ban, the BRC claims that the United States should not ratify the Convention until the March decision has been reversed.¹²⁷

Advances in technology allow the scrap metal industry to recover valuable materials, such as chromium, copper, mercury, and other metals.¹²⁸ Recovery of these materials has fueled an extensive recycling trade in hazardous waste among

124. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban On Waste Trade*, *supra* note 48, at D-16.

125. The Business Recycling Coalition represents 50 companies and associations that are working toward legislative and regulatory frameworks that will encourage recyclable waste trade and the recovery of energy from industrial byproducts and secondary materials. Letter from Dr. Harvey Alter, manager of the Resource Pol'y Dept., U.S. Chamber of Commerce, to Ms. McGinty, Director, Office on Env'tl. Pol'y (May 18, 1994).

126. *Id.*

127. *Id.*

128. Murphy, *supra* note 22, at 30.

industrialized nations.¹²⁹ For example, recycling in the United States has become quite successful.¹³⁰ The United States recycles almost ninety-two million tons of waste other than municipal solid waste each year and exports about nineteen million tons.¹³¹ The exports of recyclable metals produce \$5.1 billion annually and imports \$1 billion, creating an annual surplus of \$4 billion.¹³²

Although recycling provides revenue to developing countries and is advantageous to the scrap metal industry, inadequate recycling processes are treacherous. Greenpeace discounts the industry's claim that \$2.2 billion in commodities trade would be affected as "grossly inflated, and probably includes all scrap metal, not just that with toxic components."¹³³

The recycling process in developing countries can be extremely dangerous. The shipments of scrap metal to third world countries for recycling include everything from asbestos to transformers containing PCB-contaminated oil.¹³⁴ When the scrap dealers burn the scrap to retrieve the copper inside, dangerous dioxins are released from burning the plastic wire coverings.¹³⁵ Often during the treatment process, the scrap industry employees are not provided with needed masks or equipment to protect them against asbestos, PCBs, and metal dust.¹³⁶ Thus, in many situations, although some commercially useful elements are recovered from the waste and used, the consequences often prove more problematic than the original waste.¹³⁷

B. *Recyclable Waste under the Basel Convention and Current United States Legislation*

Dr. Harvey Alter, manager of the Resource Policy Department at the United States Chamber of Commerce, stated that the decision to ban Basel waste changes the Convention from its original form since Basel waste includes both hazardous and non-hazardous material.¹³⁸ Most of the controversy centers on the notion that much of the defined waste under the Basel Convention is not

129. *Id.*

130. Kratz, *supra* note 15, at 335.

131. *Id.*

132. *Id.*

133. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban on Waste Trade*, *supra* note 48, at D-16.

134. Rosenthal, *supra* note 2, at 64.

135. *Id.*

136. *Id.*

137. Pearce, *supra* note 101, at v6.

138. *Chamber of Commerce Withdraws Support for Treaty on Waste Movement, Disposal*, *supra* note 122, at 165.

hazardous.¹³⁹ Dr. Alter claims that Basel waste includes, "many secondary materials that are traded as ordinary commodities worldwide."¹⁴⁰

In Article 1 of the Convention, waste is identified as hazardous if it is specifically listed in Annex 1 of the Convention.¹⁴¹ In addition to specifically defined hazardous wastes, they "are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import, or transit."¹⁴² Thus, the term "hazardous waste" pursuant to the Basel Convention includes characteristics defined by the Convention and set forth by each nation's implementing legislation.

Under terms of the Convention, the United States exported about 20 million tons of Basel waste in 1992.¹⁴³ Yet, industry claims that according to the Environmental Protection Agency (EPA), only about 150,000 tons of the 20 million tons of Basel waste exported is considered hazardous under the Resource Conservation and Recovery Act (RCRA).¹⁴⁴

In 1976, Congress enacted RCRA¹⁴⁵ which, along with agency regulations, currently governs hazardous waste generated within the United States.¹⁴⁶ Waste is considered hazardous under RCRA if it is specifically listed as hazardous or

139. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban on Waste Trade*, *supra* note 48, at D-16.

140. Letter from Dr. Harvey Alter, *supra* note 125.

141. Basel Convention, *supra* note 44, art. 1.

142. *Id.*

143. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban on Waste Trade*, *supra* note 48, at D-16.

144. *Id.* There is a discrepancy in hazardous waste figures formulated under the Convention and RCRA because no single accepted definition of hazardous waste exists. Prior to classifying waste as hazardous, the EPA first determines if the substance is a "solid waste." "Solid waste" is defined in RCRA as:

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

42 U.S.C. § 6903(27). RCRA defines "hazardous waste" as:

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

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

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

Id. § 6903(5).

145. Walsh, *supra* note 18, at 124. The RCRA provided the EPA with the power to regulate domestic hazardous waste from generation through disposal. *Id.*

146. *Id.* at 123.

exhibits one of the characteristics defined by the EPA.¹⁴⁷ The characteristics include: ignitability, corrosivity, reactivity, toxicity, or the ability to cause a substantial endangerment to human health or the environment.¹⁴⁸ Industry fears that its trade in metal recyclables might disappear because of laws which fail to distinguish between waste and reusable materials.¹⁴⁹

However, Greenpeace counters that industry's reliance on RCRA "is so full of loopholes that it renders meaningless the amount of waste the chamber cites as being hazardous."¹⁵⁰ This is because some hazardous waste is not regulated under RCRA.¹⁵¹ Many recycled materials that contain hazardous substances or have the potential to cause hazardous releases during reprocessing are not considered hazardous waste under RCRA.¹⁵² Thus, some recyclable waste that could be potentially hazardous is not subject to the regulations of RCRA.

C. *Effect on Developing Countries*

Industry asserts several reasons why the ban may actually cause harm to developing countries.¹⁵³ Third world industry that relies on Basel waste as a means of fueling its own manufacturing sector will suffer economically.¹⁵⁴ For example, when some developing countries built their steel industries, they chose to use electric arc furnaces.¹⁵⁵ The furnaces almost exclusively recycle scrap; however, the developing nations do not generate enough scrap metal to supply these furnaces.¹⁵⁶ The environmental benefits of these furnaces are substantial.¹⁵⁷ Therefore, if these nations are prohibited from importing scrap metal, the effects could seriously harm the developing countries' economies and the environment.¹⁵⁸

In addition, trading with OECD countries provides the income necessary to develop sound management practices and provides a greater opportunity for

147. Walsh, *supra* note 18, at 140.

148. 40 C.F.R. § 261.20-24 (1992).

149. *Scrap Metal Industry Warns Against New Waste Laws*, Reuter Newswire, Oct. 30, 1990, available in LEXIS, World Library, ALLWLD File.

150. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban on Waste Trade*, *supra* note 48, at D-16.

151. Rosenthal, *supra* note 2, at 73-74.

152. *Id.*

153. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban on Waste Trade*, *supra* note 48, at D-16.

154. *Id.*

155. Kratz, *supra* note 15, at 337-38.

156. *Id.*

157. They reduce energy consumption in the steelmaking process by 72%, cut down on toxic emissions and other airborne pollutants by 86%, reduce waste generation by 97%, and decrease water use by 40%. *Id.*

158. *Id.*

technology transfer and self-policing of environmental practices.¹⁵⁹ Industry claims that continued trade is the "only way for the U.S., with its relatively higher technological development, to influence the growth of environmentally sound management of hazardous materials in developing nations."¹⁶⁰

D. *Migration of Industry to Developing Countries*

Another concern raised by stricter environmental regulations, is the migration of corporations in industrialized nations to developing countries. The environmental impact of crossboundary waste trade is small compared to the dangers associated with the migration of hazardous industries to developing countries.¹⁶¹ One reason that developing countries provide attractive economic incentives for outside interests and investments is that environmental costs are significantly less than exporters would have to pay in their own country.¹⁶² As a result, third world cities are overcome with migrating industry experience, severe air pollution, inadequate sewage treatment and water purification, and rampant dumping of toxic wastes.¹⁶³ Thus, wholesale migration of industry could be disastrous and have a detrimental effect that even exceeds that of crossboundary waste trade.

E. *Stricter Standards Giving Rise to Increased Illegal Waste Trade*

Economically, a total ban on the toxic trade may make the wastes more attractive in the international market and consequently result in hazardous waste smuggling.¹⁶⁴ Where the international community, the exporting country, or the importing country has imposed regulations or prohibited the crossboundary movement of hazardous wastes, the large profits to be made from their disposal encourage illegal trafficking.¹⁶⁵ Unfortunately because of the secretive nature of

159. *U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban on Waste Trade*, *supra* note 48, at D-16.

160. Letter from Dr. Harvey Alter, *supra* note 125.

161. LaDou, *supra* note 12, at 6.

162. *Id.*

163. *Id.* Due to migration of industry, most of the rivers in the Eastern European countries do not provide safe drinking water and some are so acidic that the water cannot even be used for industry. *Id.*

164. Okaru, *supra* note 86, at 152. After the Nigerian Government introduced a ban on the importation of rice and other goods in hopes of improving the agricultural sector, there was an increase in smuggling from neighboring countries like Ghana. *Id.*

165. Murphy, *supra* note 22, at 31. Even though treatment of polychlorinated benzenes can cost as much as \$3000 per ton in the United States, it can cost as low as \$2.50 per ton in developing countries which makes illegal shipment highly profitable even after paying for freight. *Id.*

illegal trafficking, detailed information about it is minimal.¹⁶⁶ Nevertheless, the United Nations Secretary-General asserted "that the foremost characteristic of illegal traffic in toxic and dangerous products and wastes is the dominant movement of these substances from the industrial to the developing world."¹⁶⁷

VII. UNITED STATES LEGISLATION

Although the United States has signed the Basel Convention, it will not be a full treaty partner until Congress implements the appropriate legislation. In order for the United States to ratify the Basel Convention, Congress must pass legislation to "establish export and import controls on material covered by the treaty."¹⁶⁸

In the 102nd Congress, the Senate voted to give its advice and consent for ratification of the Basel Convention.¹⁶⁹ However, the United States Congress failed in both the 102nd and 103rd sessions of Congress to accept legislation that would implement the Basel Convention.¹⁷⁰

A. *The Waste Export and Import Control Act of 1994*

The latest attempt to establish legislation that would ratify the Basel Convention was the proposed bill entitled, *The Waste Export and Import Control Act of 1994 (Waste Export Act)*.¹⁷¹ On March 7, 1994, Representative Al Swift of Washington and Representative Mike Synar of Oklahoma introduced the *Waste Export Act* to implement the Basel Convention.¹⁷² The *Waste Export Act* provided "the Environmental Protection Agency with the needed authority to implement the Basel Convention."¹⁷³

Although current legislation requires the EPA to obtain the prior informed consent of the nation receiving the waste, the EPA does not have the authority to refuse waste shipments where the agency knew or suspected that the waste would not be handled properly.¹⁷⁴ In response to the lack of authority of the EPA in recalling such waste, the bill also authorized the EPA to halt shipments to or

166. *Id.*

167. *Id.*

168. *'Wait-And-See' May Become U.S. Policy on Recent Export Ban Under Basel Treaty*, *supra* note 50, at D-8.

169. 140 CONG. REC. H1053-01 (daily ed. Mar. 3, 1994) (statement of Representative Swift).

170. Godwin, *supra* note 38, at 198.

171. H.R. 3965, 103rd Cong., 2d Sess. (1994).

172. *Id.*

173. 140 CONG. REC. H1053-01 (daily ed. Mar. 3, 1994) (statement of Representative Swift).

174. *Id.*

recall shipments from facilities that the EPA believed would handle the United States waste improperly.¹⁷⁵

Because current legislation under the RCRA applies only to hazardous waste, other waste with hazardous characteristics is left entirely unregulated.¹⁷⁶ The Waste Act covered materials considered hazardous or that exhibited a hazardous characteristic under RCRA, as well as municipal solid waste and municipal incinerator ash.¹⁷⁷ The Waste Act would have been a positive step toward implementing more effective legislation governing crossboundary waste trade.

Prior to the March 25th meeting implementing the total ban, the United States Chamber of Commerce supported The Waste Export Act legislation to implement the Basel Convention.¹⁷⁸ However, on May 18, 1994, the United States Chamber of Commerce withdrew its support for the Waste Export Act, which reduced the chance that the United States would join the international accord in ratifying the Convention.¹⁷⁹ The Chamber of Commerce withdrew its support because of the resolution to the Basel Convention that bans crossboundary waste trade between OECD and non-OECD countries.¹⁸⁰

B. *Trading with Mexico and Canada*

The text of the North American Free Trade Agreement (NAFTA) was released in September of 1992.¹⁸¹ NAFTA itself does not prescribe hazardous waste regulations governing the relationship between the United States, Canada, and Mexico.¹⁸² However, NAFTA will be subject to the terms of the Convention, and to the extent it is inconsistent with it, the latter will prevail.¹⁸³

VIII. Conclusion

During the past ten years, environmental awareness has soared to new heights. The UNEP realized that protection of the environment could only be achieved through a joint effort. This notion derives from the ability of industrialized nations to seriously affect the lives of those in poorer countries.

175. *Id.*

176. *Id.*

177. *Chamber of Commerce Withdraws Support for Treaty on Waste Movement, Disposal*, *supra* note 122. Failure to regulate hazardous municipal solid waste and incinerator ash has led to embarrassing international incidents where U.S. barges filled with municipal garbage incinerator ash traveled from port to port in search of a dumping ground.

178. *Id.*

179. *Id.*

180. *Id.*

181. Godwin, *supra* note 38, at 198.

182. *Id.*

183. *Id.*

The Basel Convention has been a positive step toward a relationship of responsible waste trade among nations.

The United States, as an international leader, should take responsibility and play a leading role in the management of international waste trade. This nation must recognize that the developing countries do not have the adequate resources necessary to properly handle hazardous waste disposal or treatment. The United States must take responsibility for the contamination of soil, water, and food due to the hazardous waste it exports to developing countries.

Congress should take a positive step and ratify the Basel Convention. Although the prescription of a total ban under the resolution to the Basel Convention may result in negative consequences and seem harsh to the recycling metal industry, it is necessary to combat current domestic legislation that does not provide the necessary protection for developing countries. Even though the waste itself may be adequate for recycling, the developing countries lack the infrastructure to adequately handle recyclable waste.

Congress should ratify the Convention so that it may participate in implementing the ban.¹⁸⁴ Further meetings of the Parties will specifically define the meaning and the scope of the ban. At that time, the United States could use its strength to influence the implementation of a recycling exception in situations where environmentally sound trade could be achieved. This solution would require strict legislation and a tight infrastructure in attempt to abolish mismanaged recyclable waste trade.

If the United States does not adopt legislation to implement the Basel Convention, changes must be made to current United States legislation if the United States wants to evolve as an environmental leader.

*Donna Valin**

184. Telephone Interview with LiAnn Parker, Director, *Business Recycling Coalition* (Jan. 13, 1995).

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