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NOTES

THE UNITED STATES, CHINA & THE BASEL CONVENTION ON THE TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL

Mark Bradford*

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal¹ ("Basel Convention" or the "Convention") is the first *global* regulatory regime imposed upon the international trade, both legal and illegal, in hazardous solid and chemical wastes.² The Convention concluded on March 22, 1989 at the end of a three-day United Nations Environment Programme ("UNEP") conference attended by representatives of 116 states and observers from 34 non-governmental organizations.³ The Convention entered into force on May 5, 1992.⁴ The United States became one of the

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1. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, U.N. Doc. UNEP/WG.190/4, 28 I.L.M. 649 [hereinafter *Basel Convention* or *Convention*]

2. See *United Nations Officials See Basel Treaty As 'Limping' Into Effect with Limited Support*, Int'l Env't Daily (BNA) (May 22, 1992) [hereinafter *Treaty Limping Into Effect*] (quoting UNEP Executive Director Mostafa Tolba on the objectives and innovations of the Convention).

3. See United Nations Environment Programme Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes: Final Act and Text of Basel Convention, Mar. 22, 1989, UNEP/WG.190/4, 28 I.L.M. 649, 652-53 (1989) (listing participants).

4. By its terms, the Basel Convention entered into force ninety days after twenty nations had ratified it. See *Basel Convention*, *supra* note 1, art. 25, § 1. The first twenty nations to ratify the Conventions were (in chronological order): Jordan, Switzerland, Saudi Arabia, Hun-

Convention's first signatories on March 22, 1990.⁵

In the seven years since then, however, the U.S. Congress has failed to enact the legislation necessary to ratify the Convention.⁶ In no way does the long delay in U.S. ratification moot the enhancement of the Convention that would likely result if the United States became a full participant. The United States generates more hazardous waste than any other nation in the world. Despite its capacity for disposing much of this hazardous waste domestically, the U.S. is a primary exporter of such waste as well.⁷ It is on account of the United States' extensive involvement in the trade - and not despite it - that ratification would be directly beneficial to U.S. interests.

The prospective benefits of ratification are most clearly exemplified by the United States' relationship with the People's Republic of China. The United States and China are the most powerful nations in the industrialized and developing worlds, respectively. The division between industrialized and developing nations is the controlling dynamic within the process of formulating global regulation of hazardous waste traffic. The process is

gary, Norway, France, Panama, Mexico, Romania, Nigeria, Argentina, Czechoslovakia, Sweden, Finland, El Salvador, China (on Dec. 17, 1991), Uruguay, Syria, Liechtenstein, Australia. Accordingly, the Convention entered into force on May 5, 1992, ninety days after Australia's ratification on Feb. 5, 1992. *See* Status of Signatures and Ratifications for Basel Convention: There are 108 ratifications as of January 13, 1997 (visited Mar. 16, 1997) <<http://www.unep.ch/sbc/ratif.html>> [hereinafter Basel Status].

5. *See* Basel Status, *supra* note 4.

6. The Basel Convention is a "non-self-executing" treaty, meaning that the United States may not become a full party to the Convention, nor may the Convention bind the U.S. legally, until Congress has enacted the requisite implementing legislation, bringing U.S. law into conformity with the terms of the Convention. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987). *See infra* text accompanying notes 91-96. Apart from the U.S., the only signatories that are not party-states to the Convention are Afghanistan, Haiti and Thailand. *See* Basel Status, *supra* note 4.

7. *See Hazardous Waste: Mishandled Exports Would Be Returned To U.S. Under Administration's New Policy*, Daily Env't Rep. (BNA), at d10 (March 2, 1994). "Based on U.S. Customs Service reports, the [U.S. Chamber of Commerce] estimated that the United States each year exports between 16 million and 20 million tons of waste that is covered under the Basel Convention." *Id.*

characterized by the need for the community of nations to collectively prevent hazardous wastes from being transported to those nations that not only lack the means to dispose of them safely, but also may lack the means to effectively prevent their illicit importation.

China has become a major economic power following less than two decades of massive industrial development.⁸ While China generates an accordingly large amount of waste of its own,⁹ it is also currently one of the world's largest *importers* of such wastes from exporting countries, such as the United States.¹⁰ Although China and the United States signed the Basel Convention on the same day,¹¹ the United States has yet to ratify the treaty. In contrast, China ratified in 1991.¹² This division has contributed to

8. Following Deng Xiao-Ping's assumption of the Premiership in the late 1970s, China's documented gross domestic product rose from approximately \$302 billion in 1981 to \$817 billion in 1996. See Nicholas D. Kristof, *The Communist Dynasty Had Its Run. Now What?*, N.Y. TIMES, Feb. 23, 1997, § 4, at 1. For the past fifteen years, China's economy has grown at an average rate of 9% annually and is today one of the tenth largest in the world. See *Deng's China: The Last Emperor*, ECONOMIST, Feb. 22, 1997, at 21.

9. See *China: Government to Step Up Inspections in Bid to Curb Transports of Toxic Waste*, 19 Int'l Env't Rep. (BNA) 229, (Mar. 20, 1996) [hereinafter *Government to Step Up Inspections*].

10. Greenpeace estimates that between 1990 and 1993, toxic waste moving from the United States to China totaled 220,665 metric tons (twenty times the combined total for Australia, Canada, Germany and the U.K.), although during that period far more toxic waste of U.S. provenance went to India and South Korea. *Greenpeace Report Says Asian Countries Being Used as Dumping Ground for Waste*, 17 Int'l Env't Rep. (BNA) 113, 114 (Feb. 9, 1994) [hereinafter *Greenpeace Report*].

11. See *Basel Status*, *supra* note 4.

12. See *id.* As of January 13, 1997, the following 88 entities have ratified the Basel Convention since Australia's ratification on Feb. 5, 1992 allowed the Convention to enter into force: Antigua, Austria, Bahamas, Bahrain, Bangladesh, Barbados, Belgium, Bolivia, Brazil, Bulgaria, Burundi, Canada, Chile, Colombia, Comoros, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Denmark, Ecuador, Egypt, Estonia, European Economic Community, Germany, Greece, Guatemala, Guinea, Honduras, Iceland, India, Indonesia, Islamic Republic of Iran, Ireland, Israel, Italy, Japan, Republic of Korea, Kuwait, Kyrgyzstan, Latvia, Lebanon, Luxembourg, Malawi, Malaysia, Maldives, Mauritania, Mauritius, Micronesia, Monaco, Morocco, Namibia, Nepal, Netherlands, New Zea-

one of the most intriguing, albeit least-publicized, of the recent disputes between the two governments.

In May 1996, the Chinese government announced that it had filed a formal protest to the Secretariat of the Basel Convention over alleged illegal transfers of hazardous waste from the U.S. to China.¹³ If both China and the United States had been party-states to the Basel Convention, the two governments would be authorized to seek a resolution of the dispute through negotiation, adjudication by the International Court of Justice, or through the formal arbitration process outlined in the Convention.¹⁴ However, the United States was not - and is not - a party-state and the Convention is not legally binding upon it. Thus, today, a formal complaint under the Convention¹⁵ would have little legal significance.

As a political gesture, China's announcement was compromised somewhat by its timing: essentially lost amidst the acrimonious Sino-U.S. negotiations over China's observance of American intellectual property rights.¹⁶ Even if China's threatened protest over hazardous waste was merely rhetorical, however, the rhetoric illuminates the hazardous waste issue on two levels at once. First, beneath the high politics, China's actions point up

land, Oman, Pakistan, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Seychelles, Singapore, Slovenia, South Africa, Spain, Sri Lanka, Tanzania, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, United Arab Emirates, United Kingdom, Uzbekistan, Vietnam, Yemen, Zaire and Zambia. *See id.*

13. *See China Accuses U.S. of Dumping Illegal Waste: Formal Protest Alleges Violation of Treaty*, S.F. CHRON., June 1, 1996, at C1, available in LEXIS, News Library, Sfchrn File.

14. *See* Basel Convention, *supra* note 1, art. 20 & Annex VI.

15. It is not at all clear that the Chinese government has actually filed any formal protest with the Basel Convention. In response to a query from this author via electronic mail message, Susan Bragdon of the UNEP Press Office in Geneva indicated that as of December 5, 1996, she could locate no information pertaining to any such complaint. *See* Electronic message from Susan Bragdon, Legal Officer, UNEP Press Office, to Mark Bradford (Dec. 5, 1996) (copy on file with the *Fordham Environmental Law Journal*).

16. *See* Seth Faison, *China Convicts American as Trash Smuggler*, N.Y. TIMES, Jan. 14, 1997, at A3.

the unambiguous threat posed to the international community by China's woeful environmental condition after years of unregulated importation and improper disposal of hazardous waste. Second, however, on the level of rhetoric per se, the Chinese government's ambiguous protests serve to indicate the true significance of the Basel Convention as it stands and what its potential might be if the U.S. became a party.

As this Note indicates, China has no avenues of direct legal redress against the United States under the Basel Convention.¹⁷ Yet, China's apparent lack of options reveals a far more notable lack of options for the United States. Due to its current non-party status, the U.S. lacks any avenues through which it may effectively influence international policy on hazardous waste transport and disposal. In addition, the U.S. cannot even negotiate export agreements with other individual states outside the Convention's seemingly limited regulatory regime. Thus, China's protest to the Basel Convention demonstrates irrefutably that the Basel Convention works - even indirectly. It also clearly indicates that ratification of the Convention by the United States is not only vital to its own interests, but also to the furtherance of the Convention as a genuinely effective instrument of international environmental policy.

This Note advocates the immediate ratification of the Basel Convention by the United States. Part I of this Note examines the practical and legal difficulties inherent in regulating the transboundary movement of hazardous wastes and appraises the ways in which these difficulties have been addressed in the Basel Convention and in subsequent agreements.¹⁸ Part II surveys the respective policies of the United States and China in relation to the Basel Convention and the transboundary trade in hazardous wastes. Part III assesses the putative options for the Chinese government in seeking legal redress from the United States within the context of the Convention and the principles of international law. This Note concludes with an appraisal of the positive

17. See *infra* text accompanying notes 180-81.

18. This Note will address only the trade in hazardous chemical and solid wastes intended for territorial disposal. It will address neither nuclear wastes, which are not regulated by the Basel Convention, nor the dumping of wastes at sea, which would be affected by the Basel Convention only insofar as the dumping occurs within territorial waters. See Basel Convention, *supra* note 1, art. 1, § 3 & art. 2, § 9.

effects of the Basel Convention, even where it does not directly apply, and of the significantly greater effect the Convention would likely have if the United States ratified it.

I. THE BASEL CONVENTION ON THE TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL

A. *Hazardous Waste and the Principles of Environmental Law*

It is formally appropriate that the necessarily rapid growth of international environmental regulation should have outstripped the concurrent development and convergence of underlying "customary" law.¹⁹ While customary law may in fact be catching up,²⁰ the disjunction has perennially complicated both the formulation and application of international environmental regulatory schemes. Nowhere is this problem better exemplified than in multilateral efforts to control the transboundary movements of hazardous wastes.

Arguably the most venerable of customary environmental law principles, arising from the *Corfu Channel*²¹ and *Trail Smelter Arbitration*²² cases, is the corollary that every sovereign state is obliged to ensure that activities within its jurisdiction do not damage, or compromise the rights of, any other state.²³ This rule was for-

19. See KATHARINA KUMMER, INTERNATIONAL MANAGEMENT OF HAZARDOUS WASTES: THE BASEL CONVENTION AND RELATED LEGAL RULES 25 (1995).

20. See ALEXANDRE KISS AND DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 55 (Supp. 1994) ("The number of treaties and other international instruments reproducing the same legal norms concerning the environment continues to grow The work of the International Law Commission shows that the repetition of the same norms in numerous international instruments can be considered as giving birth to new customary rules.").

21. (U.K. v. Alb.) 1949 I.C.J. Rep 4.

22. (U.S. v. Can.) 3 U.N. Rep. Int'l Arb. Awards 1905 (1941).

23. See 1949 I.C.J. Rep 4, 44; 3 U.N. Rep. Int'l Arb. Awards 1905, 1965. "[U]nder the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another." 3 U.N. Rep. Int'l Arb. Awards 1905, 1965. See also Valentina O. Okaru, Article, *The Basel Convention: Controlling the Movement of Hazardous Wastes to Develop-*

mally adopted as a guiding legal principle for international environmental law in Principle 21 of the Stockholm Declaration, issued by the first U.N. Conference on the Human Environment in 1972.²⁴

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.²⁵

In the negotiation of international environmental agreements since then, the application of this principle has been reasonably straightforward. Nations have collectively sought to limit polluting activities that have transboundary effects, such as sulfur dioxide emissions that cause acid rain²⁶ or potentially unsafe nuclear facilities.²⁷ Since the issuing of the Stockholm Declaration and the founding of the United Nations Environmental Programme ("UNEP") the following year,²⁸ the immediate tactical objectives have been twofold. First, nations have attempted to formulate an acceptable set of standards that will at least limit the *acceleration* of global environmental damage. Second, they have concurrently sought to ameliorate the relative expense to developing nations of complying with such standards, both in terms of direct enforcement costs and in slowed economic development.²⁹

ing Countries, 4 FORDHAM ENVTL. L. REP. 137, 156 (1993).

24. Report of the United Nations Conference on the Human Environment, June 16, 1972, U.N. Doc. A/CONF.48/14 & Corr. 1 [hereinafter Stockholm Declaration].

25. *Id.* at 7.

26. See Convention on Long-range Transboundary Air Pollution, Geneva, Nov. 13, 1979, T.I.A.S. No. 10541, 18 I.L.M. 1442.

27. See Convention on Nuclear Safety, Sept. 20, 1994, S. TREATY DOC. NO. 104-6 (1995), IAEA Doc. INFCIRC/449.

28. *Institutional and Financial Arrangements for International Environmental Co-operation*, G.A. Res. 2997, U.N. GAOR, 27th Sess., 2112th plen. mtg. at 43, U.N. Doc. A/8730 (1972).

29. See Stockholm Declaration, *supra* note 24, at 5 (Principles 9, 11, 13, & 14); see also William K. Stevens, *Ideas & Trends: Ecological Threats, Rich-Poor Tensions*, N.Y. TIMES, March 26, 1989, § 4, at 18; Sylvia F. Liu, Note, *The Koko Incident: Developing International Norms for the Transboundary Movement of Hazardous Waste*, 8 J. NAT. RESOURCES & ENVTL. L.

The regulation of the transboundary movement of hazardous wastes, however, presents at least one very significant conceptual difference from other forms of international environmental regulation. International environmental regulatory regimes have generally been designed to discourage states from externalizing the costs of their domestic polluting activity and, in theory, hold such states liable for doing so.³⁰ The regulation of the transboundary trade in hazardous waste, in contrast, seeks to discourage the *transfer* of a state's polluting activity from one national jurisdiction to another. This "pollution source transfer" problem entails a specifically legal dilemma as well. Any liability mechanism imposed along with a regulatory scheme must address - within a single transaction - a number of wrongful acts occurring within the jurisdictions of at least two sovereign states: (1) improper export of waste from the sending state, (2) improper handling in a transit state (if any), and (3) improper import and disposal of the waste in the receiving state.³¹

Consequently, "pollution source transfer" entails a fundamental complication of the "polluter pays" cost-allocation principle, formulated by the Organisation for Economic Cooperation and Development ("OECD") in the early 1970s, by which a source country is held liable for transboundary pollution.³² Unmodified "polluter pays" means that the export of wastes would simply be the most cost-effective option for waste-producing nations. Prior to the efforts of the international community to regulate the trade, this was irrefutably so.

Ironically, the enactment of increasingly strict domestic environmental standards by many industrialized states³³ has made it

121, 150-51 (1992-93).

30. See Stockholm Declaration, *supra* note 24, at 7 (Principle 22). "States shall co-operate to develop further the international law regarding liability and compensation for the victims of . . . environmental damage caused by activities within the jurisdiction or control of such States to areas *beyond their jurisdiction*." *Id.* (emphasis added).

31. See KUMMER, *supra* note 19, at 15-16.

32. See OECD Council Recommendation on Guiding Principles Concerning International Economic Aspects of Environmental Policies, adopted May 26, 1972, O.E.C.D. DOC. C(72)128, Annex A(a), in ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD & THE ENVIRONMENT 24 (1986).

33. See Alexandre Kiss, *The International Control of Transboundary Movement of Hazardous Waste*, 26 TEX. INT'L L.J. 521, 529 (1991).

imperative for hazardous waste producers in those countries to export their waste. Legal domestic disposal is difficult, if not impossible, for waste producers in a number of developed nations.³⁴ In many cases, export of hazardous waste may be the only practical disposal option in environmental as well as economic terms.³⁵

Generally, however, the export of wastes by producers in industrialized countries has been primarily a matter of limiting disposal costs for waste producers by transferring the source of the pollution, in effect the polluting activity itself, along with its attendant costs. The "pollution source transfer" concept points up the fact that *all* of the nations that are party to an improper waste transaction are, in essence, polluters. Yet, the state ultimately receiving the waste is most likely to be burdened with all of the attendant responsibilities and costs. Consequently, exports of hazardous waste to developing countries had become relatively common practice by the mid-1980s.

Waste disposal law in most developing countries tends to be significantly less onerous than that in industrialized countries, and moreover, the authorities in developing countries generally lack the means to effectively monitor compliance with any standards they impose.³⁶ The transboundary trade in hazardous waste has therefore presented developing nations with an untenable choice: (1) accept the potentially damaging environmental impact of legally importing hazardous waste in exchange for badly needed capital, or (2) attempt to prevent the illegal importation as well as the developing nation's limited means allow.

34. See F. James Handley, *Hazardous Waste Exports: A Leak in the System of International Legal Controls*, 19 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,171-72 (Apr. 1989). Demographic and geological factors have prevented some industrialized countries from building adequate disposal facilities and, as a result, their desire to export to developing countries has increased. For example, Denmark, Greece and Luxembourg cannot afford to build complex waste disposal sites due to their small size. The volume of hazardous wastes are so considerable that such complex facilities are economically inefficient. Moreover, the Netherlands bans landfills because of its geological and hydrological conditions, which include a high water table.

Id.

35. See KUMMER, *supra* note 19, at 43. This is also a position adopted by UNEP at the Basel Conference. *See id.*

36. See ALEXANDRE KISS AND DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* 320-21 (1991).

The movement to alleviate this situation was sparked by a number of widely-publicized incidents in the late 1980s involving disastrous waste shipments to developing countries.³⁷ Subsequently, many of the latter began seeking a *total* ban on all exports of hazardous waste to their countries. In May 1988, the Council of Ministers of the Organization of African Unity ("OAU") adopted a resolution condemning the transfer of hazardous and radioactive wastes to Africa as "a crime against Africa and the African people."³⁸ Yet neither a total nor even a partial ban can do more than oblige a governmental party to such an agreement to withhold its *consent* to the importation of waste. Even if the government of a developing nation officially halts such shipments to its territory, it is often unable to enforce its own injunction. For example, exporters and carriers can easily mislabel shipments and bribe customs officers.³⁹ Despite the in-

37. The most notable of these was the "Koko Incident" in 1988. An Italian waste trader illegally arranged to dump 3,800 tons of toxic wastes in a vacant lot in Koko, Nigeria. The Italian government was obliged to recover the waste at its own expense due to the press attention and international opprobrium that arose from the incident. *See generally* Liu, *supra* note 29. Another notable event was the equally-publicized "Khian Sea" incident in 1986-87, in which a U.S. ship carrying toxic ash was refused entry at numerous ports around the world, changed its registry twice and eventually dumped the waste at sea. *See* Liu, *supra* note 29, at 129-30; Okaru, *supra* note 23, at 157-58.

38. Organization of African Unity: Council of Ministers Resolution on Dumping of Nuclear and Industrial Waste in Africa, *adopted* May 23, 1988, 28 I.L.M. 567, 568 (1989).

39. *See* Liu, *supra* note 29, at 126. In addition, some multinational corporations present comparable difficulties:

[F]oreign companies operating in developing countries usually insist on maintaining the secrecy of their production processes, sometimes making it impossible for the developing country to know how much and what kinds of solid wastes have already been deposited on their territory. It is hard to imagine how developing countries can effectively regulate pollution from solid wastes under such conditions.

Chen Lihu, *On the Legal Regulation of Solid Wastes*, reprinted in LESTER ROSS AND MITCHELL A. SILK, *ENVIRONMENTAL LAW AND POLICY IN THE PEOPLE'S REPUBLIC OF CHINA* 153 (1987). One legitimate reason for such secrecy stated by industry representatives is reluctance to disclose too much privileged information about their companies' processes that might be obtained by competitors. *See Law Controls Trade in Toxic Chemi-*

creased regulation of transboundary hazardous waste shipments, the illicit trade is still so large that official statistics are generally viewed as low approximations.⁴⁰ The demand for foreign disposal of hazardous waste from industrialized nations is so great that it is likely that an outright ban of the trade would simply increase the use of these illicit channels.⁴¹ For developing nations, therefore, fully implementing any kind of regulatory oversight upon hazardous waste imports requires financial and technical assistance from the industrialized world.

B. *The Basel Convention*

The Basel Convention is the first attempt at devising a global mechanism to regulate the hazardous waste trade. Predictably, the necessary compromises in the document's provisions have made it controversial. In the opinion of many developing nations and environmental groups,⁴² the Convention's primary failing is that it does not even propose to *halt* the transboundary trade in hazardous waste; it simply attempts to *regulate* it. Moreover, although UNEP officially describes the Basel Convention as "establish[ing] legally binding rules of law to control the transboundary movements of hazardous wastes,"⁴³ the essential thrust of the Convention is not to restrict the trade. The Convention entails a set of flexibly-defined norms and a legal protocol, with

*cal*s, CHINA CHEMICAL REP., April 25, 1995, available in 1995 WL 13909056.

40. See Maureen T. Walsh, Comment, *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, 108-09 (1992).

41. See Liu, *supra* note 29, at 151; Okaru, *supra* note 23, at 152.

42. See, e.g., *Five More Countries Sign Basel Convention Just Before Deadline, Bringing Total to 54*, 13 Int'l Env't Rep. (BNA) 147 (Apr. 1990) [hereinafter *Five More Countries*] "Environmentalists, Greenpeace in particular, have denounced the convention, saying it will do more to institutionalize waste trade than to prevent it. It 'merely legalizes illegal traffic of waste and its implementation would create the illusion that international waste trade is under control,' Greenpeace said." *Id.* at 148.

43. UNEP, *Ministers Debate Amending Basel Convention to Ban Hazardous Waste Exports to Non-OECD Countries* (visited Nov. 24, 1996) <gopher://gopher.undp.org:70/00/ungophers/unep/news_releases /1995/nr_95-55>.

a view toward *eventually* bringing a liability mechanism to bear on those states that breach the protocol.⁴⁴ Pending the creation of such a liability mechanism, the Convention serves less as a way of preempting negotiations through the global imposition of legal standards than as an *inducement* to more particularized negotiations between states.

This is indicated first of all by the flexibility of the Convention's definitions. The definition of "hazardous waste" is a notable example. Substances considered potentially hazardous under the Convention are contained in an annex listing specific chemicals, such as cadmium and "[i]norganic cyanides,"⁴⁵ and waste stream categories, such as "[w]astes from the production, formulation and use of biocides and phytopharmaceuticals."⁴⁶ In order for a substance in this annex to be considered "hazardous" under the Convention, the concentration must be sufficiently great for the waste stream to possess any of a number of characteristics, such as "Explosive" and "Corrosive," listed in a second annex.⁴⁷ The document, however, does not specifically quantify the concentrations required to meet these threshold levels.⁴⁸ A further illustration of the Convention's definitional flexibility is

44. See Basel Convention, *supra* note 1, art. 12. "The Parties shall co-operate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes." *Id.*

45. *Id.* at Annex I ("Categories of Wastes to Be Controlled: Wastes having as constituents:")

46. *Id.* at Annex I ("Categories of Wastes to Be Controlled: Waste Streams").

47. See *id.* at art. 1, § 1(a) & Annex III ("List of Hazardous Characteristics").

48. One near exception may be found in the definition for "Flammable liquids" under Annex III, which describes a "closed-cup" and "open-cup test" for determining flammability, based on whether the substance emits a flammable vapor at certain set temperatures. This relative precision is qualified in a parenthesis at the end, however: "Since the results of open-cup tests and of closed-cup tests are not strictly comparable and even individual results by the same test are often variable, regulations varying from the above figures to make allowance for such differences would be within the spirit of this definition." *Id.* at Annex III (emphasis added).

that waste not covered under the specific categories in the document, but classified as hazardous by the domestic legislation of any party-state directly involved in a particular transboundary shipment of that waste, may also be considered hazardous under the Convention.⁴⁹

Even more broadly defined than "hazardous waste" is what constitutes "environmentally sound" management of waste and the "proper disposal" of hazardous waste by a receiving state. Aside from the Convention's pronounced objective to "protect human health and the environment,"⁵⁰ the task of determining specific technical guidelines was deferred to subsequent meetings.⁵¹ Although the Convention does not attempt to impose specific waste disposal standards any more precisely than it defines standards of "hazardousness," the Convention does invite party-states to impose additional requirements through domestic legislation.⁵²

The Convention also contains a provision, albeit loosely defined, to ensure that wastes are managed in an "environmentally sound manner." In light of the aforementioned "pollution source transfer" issue that characterizes regulation of the hazardous waste trade, it is significant that the Convention unequivocally prohibits any party-state from abdicating its own obligation

49. *See id.* at art. 1, § 1(b) & Annex III ("Tests") "The potential hazards posed by certain types of wastes are not yet fully documented . . . Many countries have developed national tests which can be applied to materials listed in Annex I, in order to decide if these materials exhibit any of the characteristics listed in this Annex." *Id.*; *see also* Okaru, *supra* note 23, at 147 (suggesting that a uniform environmental standard might not be practical due to the differences in cost for industrialized and developing countries, but that effective environmental standards applied on a case-by-case basis could be based on a global "threshold" established by the Convention).

50. *See* Basel Convention, *supra* note 1, art. 4, § 11.

51. *See id.* at art. 4, § 8; *but see* 138 CONG. REC. S12,292-93 (1992) (Remarks by Sen. Claiborne Pell)[hereinafter Pell remarks] (indicating that the "understanding" of the U.S. government vis-à-vis Article 4(9)(a), allowing export only if State of export lacks its own "suitable disposal sites," would include *relative* cost of disposal in either State as part of the calculation of "suitability").

52. *See* Basel Convention, *supra* note 1, art. 4, § 11.

by simply transferring the pollution source to another state.⁵³ In short, if liability had been specifically imposed by the Convention, the mere acceptance of hazardous waste by a transit or receiving state would not render a sending state immune from liability if environmental damage were to result from the improper management of the waste by a transit state or improper management and disposal by the receiving state. Receiving states, in effect, would not be viewed as having assumed the risk in accepting a shipment of waste that the sending state knew or had reason to know that the receiving state could not properly handle.

Thus, the limited duties imposed on party-states by the Convention are formally appropriate, despite the absence of a specific liability protocol. As such, the central functional aspect of the Convention is its "notice and consent" procedure. This procedure was supported by industrialized nations, particularly the United States, as a practical alternative to a *total* ban on transboundary shipments of hazardous waste.⁵⁴ States from which waste generators intend to export must provide the governments of the destination state and any transit states with a written "Notice Statement" indicating the type, quantity and packaging of the waste, the nature of its generation, and the planned method of its disposal.⁵⁵ The notice statement must also indicate the relevant private parties (generator and exporter in sending state, carriers, disposer in receiving state), and relevant government authorities in each state.⁵⁶ In addition, the provision contains a curiously-worded requirement that the notice statement include:

[i]nformation transmitted . . . to the exporter or generator from the disposer of the waste upon which the latter has based his assessment that there was no reason to believe that the wastes will not be managed in an environmentally sound manner in accordance with the laws and regulations of the country

53. *See id.* at art. 4, § 10. "The obligation under this Convention of States in which hazardous wastes and other wastes are generated to require that those wastes are managed in an environmentally sound manner may not under any circumstances be transferred to the States of import or transit." *Id.*

54. *See id.* at art. 6; *see also* Okaru, *supra* note 23, at 154.

55. *See* Basel Convention, *supra* note 1, Annex V A.

56. *See id.*

of import.⁵⁷

Despite its equivocal wording, this provision is most relevant to the putative liability of a sending state for environmental damage. The provision establishes, at the very least, a rudimentary standard for governments in monitoring the hazardous waste trade and making disclosures to other concerned governments.⁵⁸

One aspect of the "notice and consent" mechanism that has occasioned some criticism is the "consent" requirement. A nation importing a shipment of waste, as well as all "transit" nations through which the waste is to pass, must provide written consent to the shipment before the state of export may allow the waste to be exported.⁵⁹ If the shipment cannot be completed under the authorized terms or within the provisions of the Convention, however, the state of export must *re-import* the shipment unless an alternative arrangement for proper disposal can be made within ninety days of notification by the state of import.⁶⁰ Thus even in a situation where a state of import has *legally* consented to receive a shipment, by the terms of the Convention, the state of export remains responsible for the waste up until its disposal, and may be entirely liable for costs if fulfillment of the contract becomes impossible.⁶¹ This re-importation obligation imposed on exporting states is the only substantive remedy pre-

57. *Id.* at Annex V A, § 20.

58. That the Convention does not do a great deal more than this occasions much of the criticism from environmental groups. See *Five More Countries*, *supra* note 42, at 148. "Environmentalists . . . argue that 'mere notification systems are an ineffective means of controlling the international waste trade.' A notification system merely sets up a tracking system for the wastes, [stated] Ann Leonard of Greenpeace." *Id.*

59. See Basel Convention, *supra* note 1, art. 6, §§ 2-4. Under section 4, a state of transit may waive prior written consent. Thus if it does not object to a shipment within 60 days of receiving notice, the state of export may allow the shipment to proceed through the state of transit. See *id.*

60. See *id.* at art. 8.

61. See Hao-Nhien Q. Vu, *The Law of Treaties and the Export of Hazardous Waste*, 12 UCLA J. ENVTL. L. & POL'Y 389, 420 (1994); but see Okaru, *supra* note 23, at 157 (arguing that strict liability for exporting states, even in this limited sense, would be the most practical liability scheme because it would oblige states of export to "police their shores more carefully").

scribed by the Convention.⁶²

By far the most controversial aspect of the Basel Convention is the apparent contradiction between two particular provisions of the document. Article 4, which details the General Obligations of Party States, includes the unequivocal stipulation that party states "shall not" allow any import or export of hazardous waste from or to any non-party state.⁶³ This provision, referred to generally as the "limited ban," was intended not only to discourage parties from trading with states that were not willing or able to meet the basic standards of the Convention, but also to oblige non-party states to become parties.⁶⁴ This provision was the product of compromise between OECD nations and developing nations, as many of the latter strongly favored a total ban on the transboundary hazardous waste trade.⁶⁵

This compromise was complicated, and perhaps undone, by the inclusion of another provision authorizing party-states to enter into bilateral and multilateral agreements with party and non-party states alike, provided that the stipulations in such agreements would not be "less environmentally sound" than the standards set forth in the Convention.⁶⁶ This measure was strongly urged by many OECD nations wishing to offset the strictures of the Convention's waste classification system.⁶⁷ Its ostensible advantage of this is its implicit "ratcheting" effect: nudging collective environmental standards upward through piecemeal bi- and multi-lateral agreements.

The inclusion of this provision, and its seeming derogation from the "limited ban" on trade between party and non-party-

62. See Basel Convention, *supra* note 1, art. 9, § 1 (defining illegal traffic as a transboundary movement of hazardous waste occurring without notification and/or consent or through fraudulently obtained consent) & art. 9, § 2 (obligating the state of export to ensure that illegal shipments are either re-imported by the exporter or the state of export, or, if re-importation is impractical, are properly disposed).

63. See *id.* at art. 4, § 5. "A Party shall not permit hazardous waste or other wastes to be exported to a non-Party or to be imported from a non-Party." *Id.*

64. See KUMMER, *supra* note 19, at 61-62.

65. See *id.* at 43. This position was also strongly supported by observing representatives of non-governmental organizations, notably Greenpeace. See *id.* at n.17.

66. See Basel Convention, *supra* note 1, art. 11, § 1.

67. See KUMMER, *supra* note 19, at 43.

states, caused every member of the OAU except Nigeria, to initially refuse to sign the final Convention document.⁶⁸ In contrast, a number of key industrial states, like Germany, the United States, the United Kingdom and Japan, briefly deferred their signatures because they found the final document's provisions overly strict, despite the numerous compromises in place.⁶⁹

C. *Subsequent Agreements*

Despite its apparent limitations, the Basel Convention specifically affirms the right of any state to prohibit the import of hazardous wastes into its territory.⁷⁰ Appropriately, one initial consequence of the Convention was the subsequent negotiation of separate regional agreements banning all imports of hazardous wastes to developing nations in specific regions. Most notable among these are the Fourth ACP-EEC Convention of Lomé ("Lomé IV"),⁷¹ the Central American Regional Agreement on the Transboundary Movement of Hazardous Wastes ("Panama City"),⁷² and the Bamako Convention on the Ban of the Import

68. See *Treaty Limping Into Effect*, *supra* note 2. Nigeria's reticence in joining with the OAU members is ironic in light of the fact that it reacted to the Koko incident by making the import of hazardous waste a capital offense. See Liu, *supra* note 29, at 132; Vu, *supra* note 61, at 390. The OAU members refrained from signing only until the organization could formulate a collective position. See Liu, *supra* note 29, at 144. A number of African states reconsidered the Basel Convention and ratified it after the negotiation of the Bamako Convention. As of Jan. 13, 1997, the following OAU members were parties to the Basel Convention: Burundi, Comoros, Cote d'Ivoire, Egypt, Guinea, Malawi, Maldives, Mauritania, Mauritius, Namibia, Nigeria, Senegal, Seychelles, South Africa, Tanzania, Tunisia, Zaire and Zambia. See Basel Status, *supra* note 4; Organisation of African Unity (OAU): Membership (visited Mar. 16, 1997) <<http://www.rapide-pana.com/demo/oua/APOUA01.HTM#MEMBERSHIP>>.

69. See KUMMER, *supra* note 19, at 45. Germany, Japan and the United Kingdom have all since ratified the Convention, however. See Basel Status, *supra* note 4.

70. See Basel Convention, *supra* note 1, art. 4, § 1.

71. Fourth Convention of Lomé (Lomé IV), Dec. 15, 1989, ACP-EEC, 1992 Gr. Brit. T.S. No. 47, 29 I.L.M. 783 [hereinafter Lomé IV].

72. Acuerdo Regional Sobre Movimiento Transfronterizo de

Into Africa and the Control of Transboundary Movement of Hazardous Wastes Within Africa ("Bamako Convention").⁷³ Article 39 of Lomé IV, to which the nations of the EU and nations of the ACP (Africa, Caribbean and Pacific) are parties, prohibits export of both hazardous and radioactive wastes from EU countries to any of the ACP countries.⁷⁴

The Bamako Convention, which followed in the wake of Lomé IV, is a prime example of the way in which the Basel Convention may serve as an incentive for particularized substantive regulation, rather than merely as a compromised attempt to impose it globally.⁷⁵ The Bamako Convention was negotiated by the members of the OAU and enacted in January, 1991, shortly before the Basel Convention went into effect.⁷⁶ The Bamako Convention mirrors the Basel Convention in numerous particulars, but it contains one very prominent difference: a ban on *all* exports of hazardous waste to all signatory African countries, even if a fellow OAU state is the exporter.⁷⁷ The Bamako Convention was conceived as a means of rectifying certain perceived weaknesses of the Basel Convention. Specifically, the Basel Convention's loopholes seemed to compromise the ability of developing nations to restrict imports of hazardous waste. Interestingly, the Bamako Convention cites the Basel Convention's provision allowing for separate agreements⁷⁸ as justification for establishing a

Desechos Peligrosos [Central American Regional Agreement on the Transboundary Movement of Hazardous Wastes], Dec. 9-11, 1992, U.N. Doc. UNEP/CHW/C.1/INF.2 (Oct. 1993), *available in* 3 Y.B. INT'L ENVTL. L., 1992, Doc. No. 10 (Appended Disk, Gunther Handl et al. eds., 1992) [hereinafter Panama City Agreement] (banning all export of hazardous waste to Central American states).

73. Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Jan. 29, 1991, 30 I.L.M. 773 (1991) [hereinafter Bamako Convention].

74. See Lomé IV, *supra* note 71.

75. See KUMMER, *supra* note 19, at 104-05.

76. See Bamako Convention, *supra* note 73.

77. See *id.*

78. See Basel Convention, *supra* note 1, art. 11, § 1. "Parties may enter into bilateral, multilateral, or regional agreements . . . provided that . . . [t]hese agreements or arrangements shall stipulate provisions

regional agreement "equal to or stronger than" the Basel Convention's provisions.⁷⁹ In light of the suddenly evident utility of the Basel Convention's reciprocity provision as a baseline for more stringent subsequent agreements such as the Bamako Convention, a number of African states that initially refused to sign the Basel Convention have now done so.⁸⁰

Subsequent revisions of the Basel Convention itself, however, have been extremely divisive. At the Second Meeting of the Conference of the Parties to the Basel Convention (Second Conference) on March 25, 1994, party states resolved to impose an immediate ban on *all* transfers of hazardous waste between OECD countries and non-OECD countries.⁸¹ The party-states also decided to phase out transfers of waste for recycling by December 31, 1997,⁸² and this decision was later amended to the Convention at the Third Meeting of the Conference of Parties to the Basel Convention in 1995 (Third Conference).⁸³ However, the ban's practical effect is still contingent on the further revision of the Convention's definitions of hazardous waste.⁸⁴

Reactions from most OECD nations were predictably hostile.⁸⁵

which are not less environmentally sound than those provided for by this Convention." *Id.*

79. See Bamako Convention, *supra* note 73, Preamble & § 11.

80. See KUMMER, *supra* note 19, at 105. Ironically, more African states have now ratified the Basel Convention than the Bamako Convention, although neither number is large. *See id.*

81. See Decisions Adopted by the Second Meeting of the Conference of the Parties in Geneva, Switzerland on 25 March 1994 (visited Mar. 16, 1997) <<http://www.unep.ch/sbc/cop-2.html>> [hereinafter Second Conference] (Decision II/12).

82. *See id.*

83. See Decisions Adopted by the Third Meeting of the Conference of the Parties to the Basel Convention in Geneva, 18-22 September 1995 (visited Mar. 16, 1997) <<http://www.unep.ch/sbc/cop3-b.html>> (Decisions III/1 [amending the Convention] & III/12 [instructing the Technical Working Group to "continue work on criteria for hazardous characteristics]).

84. *See id.*

85. The Nordic countries (Denmark, Finland, Norway and Sweden) forwarded the proposal and are thus, obviously, exceptions. *See Basel Convention Ban on OECD Exports Hinges on Definition of Recycled Waste*, Int'l Envtl. Daily (BNA), at d3 (Sept. 20, 1995) [hereinafter *Ban*

The United States, notably, has failed to complete its long-promised ratification of the Convention and has cited the OECD ban adopted at the Second Conference as a primary obstacle to U.S. ratification.⁸⁶ Furthermore, the government of Australia has claimed that it does not acknowledge any specific legal obligation arising from the Convention. It only acknowledges the *moral* obligation incumbent on all nations to bring the transboundary trade in hazardous waste "under control."⁸⁷

II. THE UNITED STATES AND CHINA

A. *The United States and the Basel Convention*

Although the United States representatives initially hesitated to sign the Basel Convention at the time of its completion, the U.S. was nevertheless one of the first nations to sign the document.⁸⁸ The U.S. government has certainly never opposed the Convention's fundamental objectives. A number of legislators and government officials have long pointed out that it would be advantageous for the U.S., from an overall foreign policy standpoint, to be on the right side of the "moral" issue of industrialized na-

on OECD Exports].

86. See *infra* text accompanying notes 111-114.

87. See Kalinga Seneviratne, *Australia-Environment: An Export Nobody Wants*, Inter Press Serv., Oct. 21, 1994, available in LEXIS, News Library, Inpres File.

Chris Lamb, legal adviser to the Australian Department of Foreign Affairs and Trade, argues that while the Basel Convention carries a lot of political and moral weight, it does not create any particular legal obligation for Australia.

"What the countries decided they wanted to do at the Basel conference was to create an atmosphere in which all countries in the world agreed that the vulnerable needed to be protected, and the vulnerable were described, for the purpose of that decision, as being the non-member states of the OECD," he says.

He adds: "What needs to happen now is that countries in the period between now and the end of 1997 have to work out exactly how they propose to implement it."

Id.

88. See Basel Status, *supra* note 4.

tions exporting waste to developing ones.⁸⁹ In fact, Congressional efforts to implement the Convention began even before the initial document was finalized.⁹⁰

The Basel Convention, however, is not a self-executing treaty. In order for the United States to become a full participant, Congress must enact implementing legislation which brings domestic hazardous waste law into line with the standards of the Convention. United States law governing hazardous waste disposal is contained in the Resource Conservation and Recovery Act ("RCRA").⁹¹ Originally enacted in 1976, RCRA established federal authority over hazardous waste traffic and standards for disposal within the U.S. There was no RCRA provision pertaining to the export of hazardous waste until 1984, when Congress enacted the Hazardous and Solid Wastes Amendments ("HSWA").⁹² These amendments established a "prior informed consent" procedure for exports of waste which requires (1) notification of both EPA and the state of import and (2) consent from the state of import.⁹³ There is, however, no re-importation requirement

89. See Thomas R. Munteer, *Codifying Basel Convention Obligations into U.S. Law: The Waste Export Control Act*, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10085, n.57 (Feb. 1991) (quoting *International Export of U.S. Waste: Hearings Before the Subcomm. on Environment, Energy, and Natural Resources of the House Comm. on Government Operations*, 100th Cong., 2d Sess. (1988), at 257-58). Assistant Secretary of State Bernthal testified that:

[m]any countries, particularly developing countries, do not make the sometimes arcane distinction made under RCRA between hazardous and nonhazardous waste. Second, many countries will hold the U.S. Government responsible for problems caused by private U.S. firms. Thirdly, the United States will be held morally responsible for any damage caused by waste, whether it is hazardous or not, generated by U.S. companies and disposed of in an underdeveloped country, regardless of whether or not the government of the country consented to receiving the waste.

Id.

90. See Munteer, *supra* note 89 (text accompanying n.5).

91. 42 U.S.C. §§ 6901-87 (1994).

92. 42 U.S.C. § 6938; RCRA § 3017 (1994).

93. See Rebecca A. Kirby, *The Basel Convention and the Need for United States Implementation*, 24 *GA. J. INT'L & COMP. L.* 281, 294 (1994).

for shipments refused by a state of import.⁹⁴

RCRA also does not accord EPA sufficient authority to halt a waste export shipment consented to, even when the agency has reason to believe that the waste will not be managed in an environmentally sound manner.⁹⁵ In order for EPA to function properly under the Convention, implementing legislation would be required not only to delegate the necessary authority to EPA, but also to set the requisite standards for "environmentally sound" disposal by a foreign waste importer.⁹⁶ Additionally, as EPA would theoretically be accorded authority both to halt unlawful acts and to appraise disposal facilities outside of the jurisdiction of the U.S., the extraterritorial reach of RCRA would also have to be precisely delineated.

Disagreements over what specific standards should be imposed under RCRA have caused a great deal of delay in implementing the Convention.⁹⁷ Legislation has been proposed in numerous permutations and varying degrees of strictness, but none has as yet been enacted.⁹⁸ Unfortunately, this delay has placed U.S. ratification of the Convention in jeopardy and, currently, the process is at a standstill.⁹⁹ Paradoxically, the obstacles to implementa-

94. See *Hazardous Waste: Mishandled Exports Would Be Returned to U.S. Under Administration's New Policy*, Daily Envtl. Rep. (BNA), at d10 (Mar. 2, 1994) [hereinafter *Mishandled Exports*].

95. See Mounteer, *supra* note 89 (text accompanying nn.66-69).

96. See *id.*

97. See *Treaty Limping Into Effect*, *supra* note 2.

98. See Kirby, *supra* note 93, at 304 n.96 (listing eleven bills introduced in the House and Senate between 1989 and 1994, either fully implementing the Basel Convention or bringing federal environmental law significantly into line with the Convention's requirements). All of these bills have languished in committee and have never been put to a vote. See Liu, *supra* note 29, at 140.

99. The U.S. officially supports the Convention, but has voiced strong reservations over the inclusion of waste for recycling within the definition of hazardous waste in the amendment to the Convention drawn up at the Second Conference. The U.S. government has stated that this definition must be re-negotiated before the U.S. can ratify the Convention. See Paige Bowers, *Definition of Waste Remains Stumbling Block; Amendment Targeted by U.S. Groups*, WASHINGTON TIMES, Dec. 9, 1996, at A14, available in LEXIS, News Library, Wtimes File.

tion now arise from what had previously been the government's primary rationales *for* ratification.

At the time of the Senate vote consenting to ratification on August 11, 1992,¹⁰⁰ the Bush administration posited two pragmatic rationales for implementing the Convention as rapidly as possible. First, lack of party status for the U.S. would mean the automatic disruption of existing export arrangements with states that were parties to the Convention, but with whom the U.S. did not currently have a separate bilateral agreement governing waste exports.¹⁰¹ The only treaties of this nature, existing then and now, are those with the United States' immediate neighbors, Canada¹⁰² and Mexico,¹⁰³ and another with the OECD countries which covers only the export of waste for recycling purposes.¹⁰⁴ A number of key terms in the Canadian and Mexican bilateral treaties are actually more stringent than their counterparts in U.S. environmental law and in the Basel Convention itself.¹⁰⁵ Second,

100. See 138 CONG. REC. S12,292 (1992). The Senate's consent to ratification constituted that body's assent to the signature. Full ratification would still require enacting legislation. See *id.*

101. See *id.* at S12,293 (Letter from Janet Mullins, Assistant Secretary of State for Legislative Affairs, to Hon. Claiborne Pell, Chairman, Committee on Foreign Relations, U.S. Senate (July 24, 1992) [hereinafter Mullins Letter] (citing, as a prime example, an agreement with Finland allowing for the disposal of dioxins from the U.S. in a special incinerator. As export of this waste was not for recycling purposes, there was no recourse to the OECD treaty).

102. Agreement Between the Government of the United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Waste, Oct. 28, 1986, T.I.A.S. No. 11099 [hereinafter U.S.-Canada Agreement].

103. Agreement of Co-operation Between the United States of America and the United Mexican States Regarding the Transboundary Shipments of Hazardous Wastes and Hazardous Substances, Nov. 12, 1986, T.I.A.S. No. 11269 [hereinafter U.S.-Mexico Agreement].

104. OECD Council Decision Concerning the Control of Trans-frontier Movements of Wastes Destined for Recovery Operations, *done* Mar. 30, 1992, T.I.A.S. No. 11880, OECD Doc. No. C(92)39/final.

105. See U.S.-Canada Agreement, *supra* note 102, art. 4 (requiring notification of designated authorities in transit countries, a requirement lacking in the export provisions of RCRA § 6938); U.S.-Mexico Agreement, *supra* note 103, art. XIV, § 2 (requiring not only reimportation of hazardous waste by the state of export, but also direct compen-

party status for the U.S. would enable it to participate fully at the subsequent conferences, mandated by the Convention, since the terms of the Convention are likely to be extensively revised.¹⁰⁶ Political wrangling between the Bush administration and Democratic members of Congress, who sought to force the administration to support reauthorization of domestic environmental law in its entirety rather than piecemeal, precluded implementation during the Bush administration.¹⁰⁷

In his first term, President Clinton proposed speedy implementation of the Basel Convention as a component of a scaled-down RCRA reauthorization bill.¹⁰⁸ In March of 1994, the Clinton administration announced new legislation that would impose a re-import obligation on domestic waste exporters corresponding with the analogous provision in the Convention.¹⁰⁹ Unfortunately, the administration's announcement was untimely. It coincided with the Second Conference of the Basel Convention, at which the party-states resolved to enact a ban on *all* waste shipments between OECD and non-OECD states.¹¹⁰

The U.S. Department of Commerce responded to the Second Conference by publicly withdrawing its support for implementation of the Basel Convention.¹¹¹ The Department also voiced objections to the party-states' pledge in the same resolution to ban all transboundary waste exports, including those for recycling purposes, by the end of 1997.¹¹² It suggested that the only viable

sation for "damages caused to persons, property or the environment").

106. See Mullins Letter, *supra* note 101. This was also the position of the United States Council on International Business. See *Treaty Limping Into Effect*, *supra* note 2.

107. See *Treaty Limping Into Effect*, *supra* note 2.

108. See EPA: Agency Official Discusses Cabinet Bill, Other Upcoming Legislative Agenda Items, Daily Env't. Rep. (BNA), at d3 (Oct. 8, 1993).

109. See *Mishandled Exports*, *supra* note 94; Louis Freedberg, U.S. Plans Ban on Export of Toxic Waste, S.F. CHRON., Feb. 26, 1994, at A4, available in LEXIS, News Library, Sfchrn File; see also Basel Convention, *supra* note 1, art. 8.

110. See Second Conference, *supra* note 81.

111. See *Hazardous Waste: U.S. Chamber of Commerce Halts Support of Basel Treaty Citing Ban on Waste Trade*, Daily Env't. Rep. (BNA), at d16 (May 19, 1994) [hereinafter *Commerce Halts Support*].

112. See Second Conference, *supra* note 81.

diplomatic option for the U.S. government was for the State Department to place those states with whom the U.S. had informal waste export agreements on notice that these agreements would become inoperative if the latest Convention revisions were enacted, and then to begin negotiating new bilateral treaties from scratch.¹¹³

The State Department currently maintains that, in practice, the U.S. adheres to the Basel Convention in its entirety. Meanwhile, it has simultaneously sought to persuade the party-states to modify the broad definition of hazardous waste in the amendment.¹¹⁴ As it stands now, the United States' non-party status places it in a very difficult position. Without ratification, the negotiation of separate agreements with party-states is essential. The viability of the existing treaties with Canada and Mexico is at risk, as well.¹¹⁵ The Convention, however, prohibits party-states from entering into any separate agreements that are "less environmentally sound" than the provisions of the Basel Convention.¹¹⁶ Thus in order for the U.S. to negotiate any agreement with a party-state, the U.S. is still obliged to implement the same domestic legislation required for ratification of the Convention itself.

It is ironic that while many developing countries initially considered the standards of the Basel Convention overly lax, those same standards have been sufficient to curtail the options of the world's largest industrial power. Even if the U.S. does not implement the Basel Convention, it must still enact domestic measures equivalent to implementation in order to provide for the legal disposal of its wastes abroad. Increased exports of waste through

113. See *Commerce Halts Support*, *supra* note 111.

114. See *Ban on OECD Exports*, *supra* note 85; Bowers, *supra* note 99.

115. See Munteer, *supra* note 89 (text accompanying nn.171-72). Ironically, the non-party status of the U.S. does not prevent it from negotiating bilateral agreements with party-states for the export of hazardous wastes to the U.S. for disposal in this country, and the government has already done so with Malaysia. See *Agreement Between the Government of the United States of America and the Government of Malaysia Concerning the Transboundary Movement of Hazardous Wastes from Malaysia to the United States*, Mar. 10, 1995, Temp. State Dept. No. 95-79.

116. See Mullins Letter, *supra* note 101.

illicit channels would simply expose the U.S. to more of the same moral opprobrium that implementation might have dampened. Most significantly, however, the United States' failure to implement the Convention deprives it of both influence on the course that international waste policy may take in the future and, also, influence on hazardous waste policies pursued by other nations, such as China.

B. *China and Environmental Law*

China is, in terms of living standards and per capita income, the world's largest developing nation.¹¹⁷ Not coincidentally, it is one of the only developing nations in a position to negotiate at reasonable parity with industrialized nations, including the United States. As such, the exceptional case of China might appear to overwhelm those mechanisms within the Convention designed to ameliorate the differences between industrialized and developing nations.

China, however, is subject to the same pressures as other developing nations in resisting ostensibly unwanted imports of hazardous waste. The problem has become increasingly acute in recent years, throughout Asia. China, in particular, has become a primary destination for transboundary hazardous waste¹¹⁸ in the wake of import bans imposed by the OAU¹¹⁹ and Latin American countries.¹²⁰ Moreover, China's vulnerability to imports of hazard-

117. See generally *Environmental Protection in China*, Xinhua News Agency, June 4, 1996, Item No: 0604038, available in LEXIS, News Library, Xinhua File; see also comments by Deputy Division Chief, International Liaison Dept., China Law Society, P.R.C., Huanhui Xue, *Sustainable Development: Accommodating Environmental and Economic Needs*, in ENVIRONMENTAL REGULATION IN PACIFIC RIM NATIONS 117-18 (Randall Abate and Elissa C. Lichtenstein, eds., 1993).

118. See *Greenpeace Report*, *supra* note 10, at 113. "[Greenpeace hazardous waste campaigner Simon Divecha] added that over 103 countries had banned the import of hazardous waste, but only one of those was in Asia — the Philippines. Even with the ban, waste is still being shipped to the Philippines, he said."

Id.

119. See Bamako Convention, *supra* note 73; see also Lomé IV, *supra* note 71, art. 39.

120. See Panama City Agreement, *supra* note 72.

ous waste has been compounded by years of relatively unbridled industrial development and lax enforcement of industrial emission standards.¹²¹ Consequently, China's domestic environmental situation is, by many accounts, extremely serious.¹²² Despite the government's strict control of all kinds of information, Chinese environmental conditions have already occasioned grim reports of such phenomena as an entire city disappearing from satellite photographs under its own smog,¹²³ thousands of miles of lifeless waterways,¹²⁴ and a soaring rate of death from pollution-related causes.¹²⁵

The chronology of China's statutory enactments regarding the environment coincide with China's drive to develop its economy.¹²⁶ China's National Environmental Protection Agency ("PRC-NEPA") was established by the enactment of the Environ-

121. See Craig S. Smith, *China Becomes Dump Site For the World's Garbage*, ASIAN WALL ST. J., Oct. 4, 1995, available in LEXIS, News library, Aws File.

122. See Ichiro Kato, *Introduction: Environmental Laws in Southeast Asia and China: An Overview*, in ENVIRONMENTAL LAW AND POLICY IN THE PACIFIC BASIN AREA 4-5 (Ichiro Kato, Nobuo Kumamoto and William H. Matthews, eds., 1981).

123. The city was Benxi, in the heavily industrialized northern region. See *China: Strategy for Sustainable Development to Trigger New Governmental Policies*, 15 Int'l Env't Rep. (BNA) 650, 651 (Oct. 7, 1992) [hereinafter *China Strategy*].

124. *China: Environment Protection Not Keeping Pace with Economic Growth, Government Reports*, 16 Int'l Env't Rep. (BNA) 449 (June 16, 1993) [hereinafter *Protection Not Keeping Pace*].

[China's NEPA reported that] 80 percent of river sections running through cities are now polluted, with nearly 86 percent exceeding prescribed standards in at least one measure. Fish were "basically extinct" in 2,800 kilometers (1,736 miles) of the river sections surveyed, and 25,000 kilometers (15,500 miles) of river sections failed to meet fishery standards, the report said.

Id.

125. See *China: Public Health Ministry Says Pollution Leading Cause of Illness, Death in China*, 19 Int'l Env't Rep. (BNA) 331 (Apr. 17, 1996); see also Agnes Cheung, *China: Environment Fear 'May Spark Mass Exodus'*, S. CHINA MORNING POST, Mar. 1, 1995, available in LEXIS, News Library, Schina File.

126. See *Environmental Protection in China*, *supra* note 117.

mental Protection Act in 1979.¹²⁷ Although the statute was more a statement of principles than substantive environmental regulation, PRC-NEPA was authorized to set domestic environmental standards and draft appropriate regulations.¹²⁸ Additionally, the various municipal, provincial and autonomous regional governments would have their own environmental protection bureaus under the general supervision of PRC-NEPA.¹²⁹ These environmental agencies were given nominal enforcement powers under the 1979 Act,¹³⁰ but their powers were more clearly defined, and thus extended, in the major subsequent enactments of the 1980s, most notably the Water Pollution Control Act (1984)¹³¹ and the Air Pollution Control Act (1988).¹³² The monitoring and enforcement capability of the environmental agencies was more thoroughly codified in the Environmental Protection Law of 1989,

127. Environmental Protection Law of the People's Republic of China (Adopted in Principle at the 11th Meeting of the Standing Committee of the Fifth National People's Congress on Sept. 13, 1979), Law 790913 [hereinafter PRC Environmental Law of 1979], in I STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA [hereinafter PRC STATUTES] (1987).

128. *See id.* at ch. 4, art. 26.

129. *See id.* at ch. 4, art. 27; *see also* Michael Roberts, *Environment: Industry Faces Registration Law (Foreign Chemical Companies are Starting to Deal with China's New Environmental Regulations)*, 157 CHEMICAL WK., No. 8 (Sept. 6, 1995), available in LEXIS, Envirn Library, Chemwk File.

130. *See* PRC Environmental Protection Law of 1979, *supra* note 127, ch. 6, art. 32. The environmental protection agencies at the national and provincial levels are given nominal power to "criticize," warn, fine, enjoin or assess damages from "[u]nits which have violated this law and other environmental protection regulations . . . subject to the approval of the people's government of the corresponding level" (emphasis added). *Id.*

131. Law of the PRC on the Prevention of Water Pollution and Treatment of Polluted Water (Adopted by the Standing Committee of the Sixth National People's Congress at its Fifth Session on 11 May 1984 and Promulgated on the same day), Law 840511 in II PRC STATUTES (1987).

132. Law of the PRC on Atmospheric Pollution Control (Adopted by the Standing Committee of the Sixth National People's Congress on 5 Sept. 1987), Law 870905.1, ch. 5, arts. 31-34 in IV PRC STATUTES (1989) (as in Water Pollution Control Act, giving agencies explicit authority to determine penalties).

which introduced a polluter-registration and licensing system.¹³³ A pledge to protect the environment was also formally included in China's 1989 Constitution.¹³⁴

Toxic waste regulation was one of the last major environmental issues to be addressed by the Chinese government, partially due to intra-governmental friction between PRC-NEPA, the People's Congress, and the Ministry of Chemical Industries.¹³⁵ Officially, the government had two major concerns: (1) the desirability of obtaining substantial foreign financial and technical assistance in improving China's disposal and recycling capabilities, and (2) the need to avoid disrupting China's economic development.¹³⁶ The Chinese government has given mixed signals on the issue of foreign environmental aid. The indications are strong that the Chinese environmental situation is beyond that country's means to rectify without considerable outside assistance, yet officials have also indicated that the government's willingness to address it may be predicated to some degree on the promise of such assistance.¹³⁷

133. Law of the PRC on Environmental Protection (Adopted at the 11th Session of the Standing Committee of the Seventh National People's Congress on 26 Dec., 1989), Law 891226.2, ch. IV, arts. 27-29 in VI PRC STATUTES (1990).

134. See Constitution of the People's Republic of China, Adopted by the 5th Session of the 5th National People's Congress, Dec. 4, 1989, Law No. 821204, art. 26, in 1 PRC STATUTES, *supra* note 127 (1987) "The State is to protect and improve the living and ecological environment and to control pollution and other public hazards". *Id.*

135. See generally Roberts, *supra* note 129.

136. See *China: New Laws to be Developed to Curb Solid Waste, Control River Pollution*, 14 Int'l Env't Rep. (BNA) 360 (1991). In 1994, however, the Chinese government officially took notice of the significant losses to the economy due to pollution, totaling 100 billion yuan (U.S. \$11.5 billion), "due to health problems, resource wastage, and destruction of ecological systems." See *China: Economy Suffers \$11.5 Billion Loss Annually Due to Environmental Pollution*, 17 Int'l Env't Rep. (BNA) 265 (1994); see also Huanhui comments, *supra* note 117, at 118.

137. See *China to Push for Economic Aid for Pollution Control at Rio Meeting*, 15 Int'l Env't Rep. (BNA) 306 (1992). "When asked if China would agree to curbs on pollutant emissions in exchange for aid from the developed world at Rio, [Man Fuliang, vice director of the Environmental Protection Agency for China's Heilongjiang Province] said

China ratified the Basel Convention on December 17, 1991, and became a full party-state on May 5, 1992.¹³⁸ Having already enacted a provisional ban on imports of non-recyclable hazardous waste in 1991,¹³⁹ China was a leading proponent of the total ban on the movement of all hazardous waste between OECD and developing countries introduced at the Second Conference of the Basel Convention in March, 1994.¹⁴⁰ Shortly thereafter, the government adopted the first comprehensive waste statute, specifically addressing toxic chemicals: Regulations on Environmental Management Registration of the First Import of Chemicals and Import and Export of Toxic Chemicals.¹⁴¹ A detailed regulatory scheme and the establishment of a supervisory State Committee for Evaluation of Toxic Chemicals followed in February, 1995.¹⁴²

The regulations have two basic components: (1) an official classification of toxic substances, and (2) requirements that both foreign generators intending to export waste to China as well as those Chinese entities wishing to import it, apply for registration

China would take an "active attitude" toward any funds it receives." *Id.*

138. See Basel Status, *supra* note 4; see also Basel Convention, *supra* note 1, art. 25, para. 2. Convention enters into force for a state ninety days after ratification. See *id.*

139. See *Government to Step Up Inspections*, *supra* note 9.

140. See Frank McDonald, *Ban on Toxic Waste Going to Poorest Countries is Welcomed*, IRISH TIMES, Mar. 26, 1994, at 7, available in LEXIS, News Library, Itimes File. "Greenpeace International, which staged a sustained lobbying campaign for the ban credited Denmark, China and the Group of 77, led by Sri Lanka, with forcing the issue to a conclusion this week." *Id.* See also *supra* note 81.

141. See Administration of the Environment in Connection with the Import of Chemicals for the First Time and for the Import and Export of Toxic Chemicals Provisions, May 1, 1994, Law No. 940501, summarized in 5 CHINA LAW REFERENCE SERVICE (1996); see also *Chinese Regulation Faces Criticism: Chemical Import & Export Registration Criticized by Western Firms as Costly & Confusing*, EUROPEAN CHEMICAL NEWS, July 3, 1995.

142. See *Will Chinese Chemical Import Control Constitute Trade Barrier?*, JAPAN CHEMICAL WK., Apr. 13, 1995, available in 1995 WL 10281991; *Law Controls Trade in Toxic Chemicals*, CHINA CHEMICAL REP., Apr. 25, 1995, available in 1995 WL 13909056.

with NEPA and pay the appropriate registration fees.¹⁴³ NEPA has stated publicly that the new regulations would be enforced initially against multinational corporations importing chemicals into China, and would be subsequently brought to bear against Chinese companies in conjunction with prospective enactments.¹⁴⁴ The first to apply for registration under the new enactments was a U.S. corporation.¹⁴⁵

The toxic chemical import regulations were closely modeled after a 1982 enactment imposing fees on domestic entities discharging certain particularly hazardous pollutants.¹⁴⁶ For toxic residues that were not directly discharged into the air, such as those containing arsenic, cadmium, chromium, lead, mercury or cyanide, the fee was adjusted to reflect the means of the waste's "disposal." Only two forms of solid waste disposal are specified in the fee schedule: (1) piling-up residue containing any of these substances in the open air (without waterproofing), and (2) discharging it into a water body.¹⁴⁷

It is difficult to ascertain the effectiveness of this fee schedule because statistics pertaining to the generation and disposal of waste are notoriously unreliable due to corruption, government secrecy, and the undocumentable illicit trade. However, a 1995 study commissioned by the U.S. and Foreign Commercial Service in Beijing estimated that China domestically produces about 600 million tons of hazardous solid waste each year and that it has likely accumulated a total of 5.97 billion tons of industrial solid waste.¹⁴⁸ In 1993, China's PRC-NEPA announced that in 1992 China had domestically produced 620 million tons of solid industrial wastes (without distinctions as to the relative degrees of haz-

143. See JAPAN CHEMICAL WK., *supra* note 142.

144. See Roberts, *supra* note 129.

145. The corporation was 3M. See CHINA CHEMICAL REP., *supra* note 142.

146. Interim Procedures [from the State Council on Imposing Fees for Discharging Wastes] (Promulgated by the State Council), Feb. 5, 1982, Law No. 820205, in 1 PRC STATUTES, *supra* note 127.

147. See *id.* tbl. 3 ("The Schedule of Waste Discharge Fees"). The fee for water discharge was 18 times the rate for piling toxic residuum. See *id.*

148. See *Government to Step Up Inspections*, *supra* note 9.

ardousness) and that the portion not discharged into waterways (and thus subject to far higher permit fees¹⁴⁹) was deposited in above-ground piles which as of that year cumulatively covered 134,671 acres.¹⁵⁰

Some observers have expressed doubts that regulation and additional enforcement will be sufficient to significantly affect even the problem of domestically-generated wastes.¹⁵¹ In terms of establishing a statutory regime, Chinese environmental law and regulation are now reasonably complete. The enforcement agencies, however, have had the double burden of being chronically understaffed and, even more problematically, directly answerable to government bodies which often have direct financial interests in local industries.¹⁵² Moreover, the difficulty of enforcing the regulations against all shipments of waste from abroad may be insurmountable. This is simply due to the difficulties posed by the sheer volume of traffic moving through Chinese ports, and the ease with which illegal shipments of waste may slip through because of deliberately mislabelled containers or bribed officials.¹⁵³ Government officials have also acknowledged that numerous Chinese concerns profit from the illegal importation of hazardous waste and, it is more than likely that a number of government officials profit from the trade as well.¹⁵⁴

149. See PRC STATUTES, *supra* note 146, tbl. 3.

150. See *Protection Not Keeping Pace*, *supra* note 124.

151. See *China: Enforcement of New Waste Disposal Laws Depends on Foreign Expertise, Report Says*, Int'l Env't Daily (BNA), at d6 (Sept. 30, 1996) (quoting a report by Jay Sennett, program associate at the International Institute of George Mason University, at a conference organized by Hong Kong's Center for Environmental Technology on his study of municipal solid waste management in Jiangsu, China's fourth most populated province).

152. Environmental protection bureaus are authorized to assess fines, but closing down a polluting operation requires the direct approval of the government corresponding to the administrative level of the agency (national or provincial). See *China Strategy*, *supra* note 123. It is estimated, for example, that the People's Liberation Army owns approximately 20,000 Chinese companies outright. See *Deng's China: The Last Emperor*, *supra* note 8, at 25.

153. See Smith, *supra* note 121.

154. See *Government to Step Up Inspections*, *supra* note 9.

These difficulties, however, in no way preclude China's compliance with the Basel Convention. "Disposal" of wastes through above-ground piling or discharge into water bodies would not be considered environmentally unsound under any provision of the Convention. One potential conflict could exist between the Convention's emphasis on the free exchange of information between states, and China's strict policies on state secrecy.¹⁵⁵ Information on China's domestic environmental conditions is strictly controlled if not totally suppressed.¹⁵⁶ There are no avenues for a non-governmental international agency, like Greenpeace, to operate within China. Unsurprisingly, Chinese leadership views such agencies as a threat, however trivial, to its monopoly on power and the dissemination of information.¹⁵⁷ Under the Convention's notice-and-consent procedure, therefore, China could grant or withhold its consent to a shipment of waste from abroad, but an exporting state would have no reasonable assurance as to the waste's environmentally-sound disposal.¹⁵⁸

Another complication arises from the often conflicting objectives of factions within the Chinese government. China's recent tightening of its environmental regulations is no doubt justified by domestic conditions, not the least of which is the govern-

155. See Yojana Sharma, *China: Secrecy Hindering Economic Reform*, INTER PRESS SERV., Apr. 25, 1995, available in LEXIS, New Library, Inpres File.

"The definition of state secret is so vague that it is almost impossible to know whether information obtained in China is classified or not," said a Hong Kong businessman. "The upshot is, few people (in China) are willing to tell you anything at all of value even if tying up a deal is of major benefit to them" "Anything not publicized through official channels could be termed a state secret," notes Hong Kong-based China watcher Wu Zhong.

Id.

156. See Criminal Law of the People's Republic of China (Adopted by the 2nd Session of the 5th National People's Congress on July 1, 1979), Law No. 790706, ch. 8, art. 186, in 1 PRC STATUTES, *supra* note 127 ("Those government staff members who violate the regulation on security, revealing *important national secrets*, shall be sentenced to up to 7 years in prison.") (emphasis added).

157. See Cheung, *supra* note 125.

158. See Basel Convention, *supra* note 1, art. 4, § 9.

ment's increasing awareness that the shift from a centrally-controlled economy to a market-driven one requires environmental regulation of an order significantly different than that contemplated at the time of the Environmental Protection Law of 1979.¹⁵⁹ On the other hand, the utility of these new laws as a political instrument should not be discounted. Commentators have cited two possible rationales. Internally, Communist hardliners in the government may be using the stringent environmental regulations as a way of partially reining in the capitalism unleashed by Deng Xiao-Ping's economic policies.¹⁶⁰ Externally, likely use of the regulations as a tool in China's foreign relations is possibly evidenced by the initial targeting of foreign waste generators.¹⁶¹ Even more pointedly, China adopted an increasingly strident tone on the subject of hazardous waste in its targeting of the United States¹⁶² at the same time that American trade negotiators were threatening trade sanctions over China's failure to come to terms over the pirating of intellectual property.¹⁶³

On October 30, 1995, the Standing Committee adopted the Law on Solid Waste Pollution Prevention and Control, which introduced an outright ban on the import of numerous varieties of

159. See *China: Changing Economy Driving Force in Revising Environment Law*, *Official Says*, 18 Int'l Env't Rep. (BNA) 546 (July 12, 1995).

160. See Yojana Sharma, *China-Environment: Politics Aside, Activists Laud New Waste Law*, INTER PRESS SERV., June 5, 1996, available in LEXIS, News Library, Inpres File.

161. See Roberts, *supra* note 129.

162. See Sharma, *supra* note 155.

Environmentalists in Hong Kong are well aware of but unconcerned by the anti-U.S. rhetoric that has come with the legislation, saying the new law may yet provide a way to eliminate the ecological and health problems posed by huge stockpiles of hazardous waste imported into China — much of it illegally.

The main worry of green groups here, noted one activist, was that "when it suits Beijing's purpose to no longer lambaste the West, they will ignore the problem and allow it to get out of hand again.

"Political campaigns are an unreliable way to ensure long term environmental improvements," he added.

Id.

163. See Faison, *supra* note 16.

waste and established stiff fines for violations.¹⁶⁴ Shortly thereafter, PRC-NEPA announced that an amendment to China's Criminal Code would make certain environmental crimes punishable by death, at least officially.¹⁶⁵ In the same announcement, China criticized foreign governments, particularly the U.S., for alleged illegal exports of waste to China. The Chinese government further indicated that, under the new regulations, foreigners convicted of unlawfully shipping solid waste to China could be fined up to one million Chinese yuan (U.S. \$125,000).¹⁶⁶

One month after the stringent new regulations went into effect, PRC-NEPA announced that it had blocked the entry of "tons of household, medical, and toxic waste illegally shipped from the United States and Canada."¹⁶⁷ PRC-NEPA also claimed it discovered numerous other illegal foreign shipments, mostly of household garbage, (which is *not* covered by the Basel Convention¹⁶⁸), said to have occurred at least over the previous two years.¹⁶⁹ PRC-NEPA cited one shipment discovered in Qingdao, totaling 640 metric tons, mislabeled "waste paper" but actually containing medical waste¹⁷⁰ (which *is* covered by the Convention¹⁷¹). Curiously, when U.S. government agencies offered to as-

164. See *New Chinese Law to Bar Solid Waste Imports Useless as Raw Materials, Limit Usable Waste*, Int'l Env't Daily (BNA), Nov. 9, 1995, at d4 (Nov. 9, 1995).

165. See *China: Imperiling Environment Capital Offense Under Law to be Enacted in April 1996*, 18 Int'l Env't Rep. (BNA) 913 (Nov. 29, 1995).

166. See *id.*

167. See *China: Authorities Investigate Alleged Import of Toxic, Other Wastes from Outside Country*, 19 Int'l Env't Rep. (BNA) 459 (May 29, 1996) [hereinafter *Authorities Investigate*].

168. See Basel Convention, *supra* note 1, art. 1, § 2 & Annex II.

169. The Chinese authorities arrested an American businessman, William Ping Chen, in June of 1996 for allegedly shipping two hundred thirty-eight tons of household garbage from California to Shanghai. On Jan. 13, 1997, he was convicted, fined \$60,000 and expelled from the country. See Faison, *supra* note 16.

170. See *Authorities Investigate*, *supra* note 167; *Garbage Case Probe Must Go Deeper*, CHINA DAILY, May 18, 1996, available in LEXIS, News Library, Chidly File; *Officials in China Find Another Large Shipment of U.S. Trash*, Associated Press, May 20, 1996, available in 1996 WL 4424177.

171. See Basel Convention, *supra* note 1, art. 1, § 1(a), Annex I, § YI & Annex III.

sist in an investigation of the illegal shipments, the Chinese authorities did not respond. U.S. authorities were able to corroborate that one of the shipments contained household waste, but could not verify PRC-NEPA's claim that this same shipment also contained hazardous waste.¹⁷²

Nevertheless, on May 24, 1996, the *People's Daily* accused the United States of committing a "malicious act in disregard of international morality and justice,"¹⁷³ and stated that the Chinese government had filed a formal complaint to the Basel Convention against the U.S.¹⁷⁴ In June, the Chinese government took advantage of World Environmental Day to further attack the U.S.:

Ironically, it is the United States that has always been claiming it is concerned about human rights and environmental protection If the US government is at all concerned about human rights, it should do something to stop the dirty business. That is the basic demand of respecting human rights, of international convention and human morality.¹⁷⁵

Intriguingly, a U.S. State Department spokesman characterized the Chinese government's threat to send the Qingdao waste back to the U.S.¹⁷⁶ as a "propaganda effort," and more curiously, as a matter that had nothing to do with the U.S. government.¹⁷⁷

III. CHINA VS. THE UNITED STATES OF AMERICA

China has already demonstrated a willingness to seek formal legal redress for the illegal import of hazardous waste against foreign persons or entities within its jurisdiction.¹⁷⁸ Without question, there are no barriers to the Chinese government's prosecution of wholly domestic entities for similar violations, although the same could be said of any other developing nation with a

172. See *China: Officials Reject U.S. Aid in Investigation of Alleged Shipments of Toxic, Other Wastes*, 19 Int'l Env't Rep. (BNA) 500 (1996).

173. See *id.*

174. See *supra* note 15.

175. *China Attacks US Over Export of Waste*, Agence France-Presse, June 5, 1996, available in 1996 WL 3865529.

176. This would, of course, be the remedy available under the Basel Convention, *supra* note 1, arts. 8 & 9, § 2.

177. See Vivien Pik-Kwan Chan, *US Medical Waste to be Sent Back*, S. CHINA MORNING POST, May 11, 1996, available in 1996 WL 3757646.

178. See Faison, *supra* note 16.

statutory regime in place. What differentiates China in this regard is the delicacy and complexity of its relationship with the ostensible defendant: the United States. Although China's objective may be *political* redress, assessment of China's *legal* options produces the most enlightening analysis.

In seeking a legal remedy against the United States for improper export of hazardous waste to China, China would have three theoretical avenues within the norms of international law: (1) international dispute resolution, (2) litigation, and (3) negotiation. This section examines each avenue in turn.

A. *International Dispute Resolution*

China might attempt to seek a resolution of the dispute through international mechanisms. China might actually file a complaint with the Secretariat of the Basel Convention, which it claimed to have done in May, 1996.¹⁷⁹ China might also seek adjudication in the International Court of Justice or arbitration under international law.

A complaint by China against the U.S. within the formal structures of the Basel Convention is, quite obviously, not truly an option. As a non-party state, the U.S. is not subject to the Convention's arbitration procedures, which are designed to resolve disputes "between Parties,"¹⁸⁰ and it is against the Convention's explicit precepts to make a non-party state so subject without obliging it either to ratify the Convention first or to negotiate a separate bilateral treaty with the party-state involved in the dispute.¹⁸¹

The Convention's dispute-settlement procedures are, however, strikingly generic in terms of the norms of international law. Parties are advised initially to settle any dispute as to the Convention's terms through negotiation or "any other peaceful means."¹⁸² Failing that, Parties have the option of submitting the dispute either to the International Court of Justice ("ICJ"), or to arbitration under the procedures set forth in an annex to the

179. *See supra* note 13.

180. *See* Basel Convention, *supra* note 1, art. 20, § 1.

181. *See* Basel Convention, *supra* note 1, art. 4, § 5 & art. 11, § 1.

182. *See id.* at art. 20, § 1.

Convention.¹⁸³

The question arises as to whether China could seek adjudication in the ICJ¹⁸⁴ or arbitration outside of the Convention, simply by applying the substantive aspects of international environmental regulation as if they constituted customary law. Thus, it would be necessary under the terms of the Vienna Convention on Treaties ("Vienna Convention")¹⁸⁵ to determine what would constitute a "peremptory norm" - in effect, a universally recognized legal principle. The immediate difficulty is that the nearest that the applicable international environmental law has to a "peremptory norm" is Principle 21 of the Stockholm Declaration.¹⁸⁶ Without the adaptations of Principle 21 embodied in the Basel Convention, the accepted corollary of Principle 21 is of very little use in the case of a pollution source transfer, including the apparent illegal shipment from the U.S. to China. The terms of the Basel Convention remain the base threshold for extending Principle 21 in such a way that both export and import states may be answerable for damages resulting from improper transboundary shipments of hazardous waste.

The United States, moreover, has made the terms of its ratification exceedingly clear, in that implementing legislation is a necessary prerequisite. This precludes the use of the Convention as a source of international law in adjudicating or arbitrating a dispute between the China and the United States. Without recourse to the Convention, there is insufficient law to apply here. The barriers posed by the singularities of the hazardous waste transfer issue only indicate once again why the Basel Convention was necessary in the first place.

183. *See id.* at art. 20, § 2 & annex VI.

184. Although the issue is mooted by the subsequent discussion, it should be noted that neither China nor the U.S. is currently subject to compulsory jurisdiction in the ICJ.

185. Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27, 1980 Gr. Brit. T.S. No. 58 (Cmnd. 7964), art. 53. "[A] peremptory norm . . . is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.*

186. *See supra* text accompanying notes 21-25.

B. *Litigation*

In addition to prosecuting violators of its laws in Chinese courts, China or a Chinese entity might consider bringing suit against an American entity in a U.S. court. An analysis of China's prospects in this regard speaks as much to the ability of the United States to extend its influence abroad under existing law as it does to China's ability to do so.

As in the context of international dispute resolution, the provisions of the Basel Convention could not be applied as customary international law in an action in a U.S. court, as Congress has made it manifestly clear that the Convention will have no legal effect on the U.S. prior to full implementation.¹⁸⁷ Despite the inapplicability of the Convention itself as a source of substantive law, a hypothetical action by China in a U.S. court applying *domestic* environmental law raises some interesting issues.

One case, *Amlon Metals, Inc. v. FMC Corp.*,¹⁸⁸ decided subsequent to the U.S. signing of the Basel Convention, is very much on point. In *Amlon*, a U.K. importer of metal wastes for recycling brought an action against its U.S. supplier for the alleged mislabelling and illegal shipment of unusable solid wastes to the plaintiff's plant.¹⁸⁹ The U.K. plaintiff initially brought suit in a British court, which dismissed the complaint on the grounds that all of the relevant actions by the defendant occurred in the U.S. and that U.S. law should apply.¹⁹⁰ A year and a half later, the plaintiff sued in U.S. federal court.¹⁹¹ *Amlon* arises from the defendant's motion to dismiss the plaintiff's two key claims: one under RCRA and the other under the Alien Tort Statute.¹⁹² In finding for the defendant on both issues, the court's reasoning was rooted in the fact that the U.S. had not implemented the Basel Convention. In effect, *Amlon* clearly demonstrates that the United States' non-party status precludes even the use of its *do-*

187. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 111(3), (4)(b).

188. 775 F. Supp. 668 (S.D.N.Y. 1991).

189. See *id.* at 669-70.

190. *Id.* at 670

191. *Id.*

192. *Id.* at 669.

mestic environmental laws in addressing illegal exports of hazardous wastes.

The plaintiff's attempt to reach the defendant's actions by way of the Alien Tort Statute¹⁹³ was also forestalled by the United States' non-party status. By the language of the Alien Tort Statute, the threshold requirement is that the tort be a "violation of the law of nations or a treaty of the United States."¹⁹⁴ Obviously, the plaintiff did not claim any treaty violation, as the only applicable treaty would have been the Basel Convention. Instead, the plaintiff claimed that the defendant's actions constituted a violation of the "law of nations." The only international law upon which the plaintiff could rely, however, was - once again - Principle 21 of the Stockholm Declaration¹⁹⁵ and a variation of the same principle set forth in the Restatement of Foreign Relations Law.¹⁹⁶ Under the guidelines for this threshold requirement set by the Second Circuit, a wrong is a violation of "the law of nations" sufficient to trigger the statute only when nations have formally asserted by way of "express international accord," that the wrong is of "mutual" concern.¹⁹⁷ The only such "express international accord" would be the Basel Convention. Significantly, the court did not consider Principle 21 or the Restatement section to be expressive of substantive law, but rather considered them as expressions of an admonitory principle as to the "responsibility of nations."¹⁹⁸

193. 28 U.S.C. § 1350. "Alien's action for tort: The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.*

194. *See id.*

195. *See supra* note 24.

196. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 602(2). "[W]here pollution originating in a state has caused significant injury to persons outside that state . . . the state of origin is obligated to accord to the person injured . . . access to the same . . . remedies as are available . . . to persons within the state." *Id.*

197. *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980) (cited in 775 F. Supp. at 671).

198. 775 F. Supp. at 671. *Compare* Seneviratne, *supra* note 87 (remarks of Australian official).

The more significant issue in *Amlon* was whether RCRA could be applied extraterritorially and no other court has addressed it since.¹⁹⁹ The court cited a great deal of legislative history indicating that Congress had in no way intended the "citizen suit" provision to apply extraterritorially.²⁰⁰ While this alone would have been dispositive, the court broadened its holding to preclude extraterritorial application of *any* provisions of RCRA, lacking evidence that Congress clearly intended RCRA to have extraterritorial effect.²⁰¹ Most persuasive to the court was that one of the numerous Basel Convention implementation bills was at that time pending in Congress.²⁰² The court considered the pending bill, at the very least, "probative of the fact members of Congress considered that RCRA in its present form does not reach waste located in another country."²⁰³

The court's broad finding that RCRA could have no extraterritorial application moots and subsumes one issue raised by the plaintiff: whether the significant acts of the defendant *within the U.S.* in gathering and exporting the waste could trigger extraterritorial application of RCRA under the terms established by the Second Circuit in *Leasco Data Processing Equip. Corp. v. Maxwell*.²⁰⁴ The *Leasco* criteria are ambiguous, however. In that case, the Second Circuit suggested that while a statute is not necessarily precluded from extraterritorial application absent clear congressional intent to that effect, it would be "equally erroneous" to assume, without full interpretive analysis, that Congress intends the fullest possible application of the statute.²⁰⁵ In *Amlon*, the District Court simply found sufficient evidence that Congress did not intend RCRA to have extraterritorial effect and thus declined

199. See 775 F. Supp. at 670.

200. See *id.* at 675-76.

201. See *id.*

202. See *id.* at 674 n.8 ("One of the proposed findings of the bill was that 'existing Federal laws do not provide for any review by the United States of the effects of its exported wastes on the environment of the countries to which the waste is sent.'") (quoting Waste Export Control Act, S. 2598, 100th Cong., 2d Sess. § 2(a)(4) in 138 CONG. REC. S8,809-10) (daily ed. June 29, 1988)).

203. 775 F. Supp. at 674 n.8.

204. 468 F.2d 1326 (2d Cir. 1972).

205. See *id.* at 1334.

to address the issue of the defendant's domestic actions.²⁰⁶

As the court's holding is based largely on an inference from the Basel Convention implementation process, however, it is entirely conceivable that the court could have alternatively found no *express* congressional intent to *preclude* extraterritorial effect and proceeded to reach the defendant's actions under the *Leasco* criteria. Moreover, there is nothing in the language of the RCRA "citizen suit" provision that would preclude an interpretation based on the "pollution source transfer" principle.²⁰⁷ The current limbo of the implementation process, however, has effectively made this impossible. Under *Amlon*, therefore, a foreign importer of hazardous waste has no legal redress against a U.S. exporter under U.S. law: not only for unlawful acts abroad, but also for the exporter's acts *in the U.S.* Theoretically, a foreign party might have had better prospects under U.S. law *before* the Basel Convention existed.

C. *Negotiation*

China and the U.S. might negotiate a separate agreement specifically addressing their bilateral trade in hazardous waste, such that a formal mechanism would be in place to discourage recurrence of such improper shipments. If the United States were already a party to the Convention, this would be the most practical option and would be as logical an extension of the Convention's purposes as the Bamako Convention.²⁰⁸

Today, such a bilateral treaty with the U.S. governing hazardous waste transfers to China would also be precluded by China's

206. See 775 F. Supp. at 673 n.5.

207. See 42 U.S.C. § 6972(a)(1)(B) (1994).

[A]ny person may commence a civil action on his own behalf . . . against any person . . . including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

Id.

208. See *supra* text accompanying notes 77-80.

party-status and the necessity for the U.S. to amend RCRA, at the very least, to ensure that the governing standards were not less environmentally sound than those of the Convention.²⁰⁹ Certainly, as has been previously indicated, China and the U.S. could quite easily execute a bilateral treaty for the export of China's hazardous waste *to the U.S.* for disposal.²¹⁰

All three of China's theoretical options are directly precluded by the Basel Convention and each nation's status, as party and non-party respectively. The complementary impact on the United States' options is equally evident. Without ratifying the Basel Convention, the U.S. cannot negotiate export agreements with party-states, which include most of the likely importing states. Since the U.S. did not complete the Basel Convention implementation process, the U.S. cannot even use its own laws to curtail harmful activity by exporters within its jurisdiction. If foreign waste importers accept shipments of waste from the U.S., they do so at the risk of having no legal redress for improprieties by U.S. exporters.

The primary effect of China's public protest is to highlight the negative moral example that the U.S. has set by failing to implement the Convention.²¹¹ China stands to benefit just as much from this in the potentially greater willingness on the part of the U.S. to provide China with increased technical and economic support, as much as it would from the specific remedy of a reimportation of a load of medical waste from Qingdao, under the Basel Convention.²¹²

Neither government truly benefits from the status quo, however. China's complaint both obscures and accentuates that nation's genuinely grave environmental situation: one that will almost certainly require the resources of the United States, and perhaps other states, to rectify. The United States' non-party status makes the gesture possible, but the status and the gesture serve only to make direct action even more remote unless the

209. See Basel Convention, *supra* note 1, art. 11, § 1.

210. See *supra* note 115.

211. See *supra* note 89.

212. See Basel Convention, *supra* note 1, art. 8.

United States puts aside its cavils over the Second Conference's amendment and speedily ratifies the Convention.

CONCLUSION

To a considerable extent, the relationship between the United States and China may be too singular for the nations' dispute over hazardous waste shipments to be truly emblematic of the problem that the Basel Convention was intended to remedy. Yet the singularity makes a number of principles evident.

It is not simply that the bargaining position of the United States, at least on a "moral" level, would be enhanced by implementation. Regardless of the attempts by party-states to impose a moratorium on all transboundary waste trade, it is vital that the U.S. be a part of the ongoing development of transboundary hazardous waste regulation, if only to facilitate the continuance of those exports of waste from U.S. generators that cannot be efficiently disposed of domestically or, better, eliminated altogether. It is also vital to the protection of its own interests that the United States have the means to affect this form of polluting activity abroad. Reciprocally, the Convention can ultimately be viable only with the full participation of the world's largest industrialized nation. As it stands, the Convention is largely a statement of mere principles, however valuable a foundation for the further development of waste regulation those principles may be.

From the viewpoint of China, however, the United States' failure to implement the Convention simply means that China's formal complaint to the Convention is essentially a rhetorical gesture. Yet, China's readiness to utilize the Convention's mechanism, even rhetorically, may well evidence its genuine resolve to aggressively address its own environmental situation without abjuring the use of international instruments (and thus not using its often-bruited sovereignty as a barrier). It may also indicate that these largely untested international instruments are viewed by China - and perhaps, by extension, other developing nations - as genuinely effective, even if the development of these effects and the body of customary law governing the transboundary trade in hazardous waste is almost wholly prospective in nature. If for no other reason, this alone should impel the

United States to cease hesitation and ratify the Convention immediately.

