

IN MY BACKYARD: HOW *ENABLING* HAZARDOUS WASTE
TRADE TO DEVELOPING NATIONS CAN IMPROVE THE
BASEL CONVENTION'S ABILITY TO ACHIEVE
ENVIRONMENTAL JUSTICE

BY

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The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) was adopted in 1989 in part to respond to growing international concern over the disproportionate environmental burdens borne by developing nations from trade in hazardous wastes. Espousing a system in which transboundary movements of hazardous wastes would be both minimized and regulated by requiring prior informed consent and emphasizing environmentally sound management (ESM) of wastes, the Basel Convention arose as an international embodiment of the principles of environmental justice.

However, the recent tragedy in Côte d'Ivoire, in which over 100,000 people were killed or injured after 500 tons of toxic sludge originating in industrialized nations were disposed of improperly, makes clear that the Basel Convention has not fulfilled its promise of shielding developing nations from environmental catastrophes. The forward-thinking Basel Ban Amendment, proposed in 1995, would have banned all importation of hazardous wastes to countries not listed in Annex VII to the Basel Convention, and may have prevented the Côte d'Ivoire and other disasters. However, now thirteen years later, the ban has still failed to garner the support necessary to be entered into force. This Comment first provides a background on the principles behind environmental justice. Then, it provides a background on the Basel Convention and analyzes the key obstacles that have prevented the Basel Convention from achieving an environmentally just system for hazardous waste control. Ultimately, although the permanent total ban

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proposed by the Ban Amendment would better protect developing nations than the Basel Convention as it currently functions, it would not encourage developing nations to advance economically. Consequently, this Comment proposes implementing a few pivotal changes to address the Basel Convention's key weaknesses and encourage developing nations to develop the tools to properly handle hazardous wastes. These changes would achieve environmental justice not only by better protecting these nations from environmental calamities, but also by empowering them with the technological and economic prowess to have more bargaining power at international decision-making tables.

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I. INTRODUCTION

Just after midnight on August 19, 2006, a small company in Côte d'Ivoire accepted over five hundred tons of toxic sludge that had been refused for disposal in Europe, pumped it into trucks, and dumped it in at least eighteen public locations throughout the city of Abidjan, poisoning ten people to death and provoking more than 100,000 others to seek medical treatment.¹ The lethal waste arrived on the African coast in a ship owned by a Greek shipping company,² flying a Panamanian flag, and leased by the London branch of a Swiss corporation fiscally headquartered in the Netherlands.³ Relying on the corporation's assertions that it required disposal of only 250 tons of "regular slops," Amsterdam Port Services, a waste processing company, had originally agreed to accept the waste for \$15,000.⁴ However, after finding that the volume of wastes had been grossly underreported, noting that the waste looked different from any waste that it had seen before, and watching as many of its workers were falling ill from the "seeping fumes," Amsterdam Port Services tested and confirmed that the waste was hazardous and re-estimated that \$300,000 would be required for safe disposal.⁵ Refusing to remit this amount, the multi-billion dollar carrier corporation withdrew from the European continent and searched until it found an entity willing to accept a cheaper price for disposal.⁶ It eventually sold its wastes to the local Côte d'Ivoire company for not just a cheaper price but for the *original* price of only \$15,000.⁷

Unfortunately, the Côte d'Ivoire incident is only one of many instances in which industrialized nations have exported their wastes to developing nations. In 1998 alone, *reported* instances of transboundary movements of wastes from industrialized to developing nations exceeded 800,000 metric

¹ Todd Pitman, *Hazardous Waste Flows to Poor Nations*, SEATTLE TIMES, Oct. 19, 2006, at A10; see also Lydia Polgreen & Marlise Simons, *Global Sludge Ends in Tragedy for Ivory Coast*, N.Y. TIMES, Oct. 2, 2006, at A1.

² See Greenpeace, *Toxic Waste in Abidjan: Greenpeace Evaluation*, <http://www.greenpeace.org/international/news/ivory-coast-toxic-dumping/toxic-waste-in-abidjan-green> (last visited Apr. 13, 2008).

³ Polgreen & Simons, *supra* note 1.

⁴ See *id.*

⁵ See *id.*

⁶ See Pitman, *supra* note 1.

⁷ See *id.*

tons.⁸ The propensity of wealthy, industrialized nations to export their wastes to poorer, developing nations is a classic and pervading example of international environmental injustice. Although the concept of environmental justice originated in the United States to recognize that communities and regions with higher levels of poverty and higher percentages of minorities bear a disproportionately large number of environmental burdens,⁹ environmental justice has become “increasingly relevant in the international setting”¹⁰ as globalization has enabled nations with poor and minority populations to bear the brunt of the world’s environmental refuse.

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention or Convention)¹¹ arose in 1989 as an international response to the disproportionate burden developing nations bear specifically in regard to hazardous waste disposal.¹² It regulates trade of hazardous wastes to ensure the safe disposal and reduce the transboundary movement of wastes,¹³ and has been touted as one of the international agreements at the forefront of integrating environmental justice principles into global international trade.¹⁴ However, the Basel Convention has received more criticism than praise, being described as “a

⁸ See U.N. Env’t Program [UNEP], *Global Trends in Generation and Transboundary Movement of Hazardous Wastes and Other Wastes*, at 27, Basel Convention series/SBC No. 02/14 (Nov. 2002) (prepared by Kees Wielenga), available at <http://basel.int/natreporting/trends2.pdf> (noting that this number reflects only the movements reported to the Secretariat of the Basel Convention pursuant to its national reporting obligation and that illegal movements were not included in this calculation unless discovered); see also Press Release, Basel Action Network, Draft IMO Treaty on Ship Scrapping Immoral (Oct. 13, 2006), available at http://www.ban.org/ban_news/2006/061013_ship_scrapping_immoral.html (stating that “about 95% of the world’s asbestos and PCB laden ships are scrapped by the world’s poorest, most unprotected, and desperate workforce,” that this practice “is immoral, and an affront to both human rights and the environment,” and that such practices “perpetuate this disproportionate transfer of harm to the poor” (emphasis omitted)).

⁹ Michael Kidd, *The Pursuit of Environmental Justice in South Africa*, in ENVIRONMENTAL JUSTICE AND MARKET MECHANISMS: KEY CHALLENGES FOR ENVIRONMENTAL LAW AND POLICY 324, 327–28 (Klaus Bosselmann & Benjamin J. Richardson eds., 1999); Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1384 (1994).

¹⁰ Marie Wynter, *The Use of Market Mechanisms in the Shrimp-Turtle Dispute: The WTO’s Response*, in ENVIRONMENTAL JUSTICE AND MARKET MECHANISMS: KEY CHALLENGES FOR ENVIRONMENTAL LAW AND POLICY 169, 183 (Klaus Bosselmann & Benjamin J. Richardson eds., 1999).

¹¹ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 22, 1989, UNEP/IG.80/3, 28 I.L.M. 657 (*entered into force* May 5, 1992) [hereinafter Basel Convention].

¹² Rozelia S. Park, *An Examination of International Environmental Racism through the Lens of Transboundary Movement of Hazardous Wastes*, 5 IND. J. GLOBAL LEGAL STUD. 659, 688 (1998) (stating that the Convention was “seen by many primarily as an opportunity to put a stop to illegal international waste traffic from North to South”).

¹³ Andrew Webster-Main, *Keeping Africa Out of the Global Backyard: A Comparative Study of the Basel and Bamako Conventions*, 26 ENVIRONS ENVTL. L. & POL’Y J. 65, 70–71 (2002).

¹⁴ Viola Blayre Campbell, *Ghost Ships and Recycling Pollution: Sending America’s Trash to Europe*, 12 TULSA J. COMP. & INT’L L. 189, 212–15 (2004).

compromise treaty that is long on rhetoric and short on substance and effectiveness.”¹⁵ The disaster in Abidjan is a testament to the reality that implementation of the Basel Convention falls woefully short of achieving environmental justice.¹⁶

To increase protection for developing nations, the parties proposed an amendment to the Basel Convention in 1994 that would ban all exports of hazardous wastes from Annex VII nations (members of the Organization for Economic Co-operation and Development (OECD), the European Community (EC), and Lichtenstein) to non-Annex VII nations by December 31, 1997.¹⁷ However, the Basel Ban has not been ratified by the requisite three-fourths of the nations that adopted it for it to take effect.¹⁸ While it may not be surprising that many of the states that have failed to agree to or ratify the Basel Ban are OECD nations, there are also a large number of non-OECD, developing nations that have failed to ratify the amendment.¹⁹ The Basel Ban fails to account for the developing nations that, hoping to grow their economies and presumably not aiming to compromise human or environmental safety, are averse to a system in which they are universally deemed ineligible for importing wastes, especially those “wastes” from which valuable scrap metals are often recovered. Although elements of the Basel Convention seem to provide a promising route toward achieving environmental justice, environmental justice can not be realized without understanding that the unique pressures of developing nations require the harmonization of a precautionary attitude with tools for economic growth.

There are several impediments to the success of the Basel Convention, as currently in force, which can be improved upon to better enable the Convention to achieve environmental justice without mandating a permanent total ban on transboundary movement of wastes. The Convention’s main barriers to achieving environmental justice are: 1) insufficient funding of the Basel Trust Funds, especially the Technical Trust Fund established specifically to aid developing nations with technology transfers, 2) the failure of the prior informed consent (PIC) procedure to verify environmentally sound management (ESM) facilities, 3) inefficacy of the Basel Convention regional centers (BCRCs) to transfer training or technologies to developing nations, and 4) the Parties’ lack of support for the Convention’s Compliance Committee or Protocol on Liability.

¹⁵ Peter Obstler, *Toward a Working Solution to Global Pollution: Importing CERCLA to Regulate the Export of Hazardous Waste*, 16 YALE J. INT’L L. 73, 94 (1991).

¹⁶ All of the nations involved in the export, transit, and import of the wastes resulting in the disaster in Abidjan, namely Greece, Panama, the United Kingdom, Switzerland, the Netherlands, Estonia, and, notably, the Ivory Coast, are signatories to the Basel Convention. Secretariat of the Basel Convention, Parties to the Basel Convention, <http://basel.int/ratif/convention.htm> (last visited Apr. 13, 2008).

¹⁷ Secretariat of the Basel Convention, Basel Convention Ban Amendment, <http://www.basel.int/pub/baselban.html> (last visited Apr. 13, 2008).

¹⁸ Secretariat of the Basel Convention, Ratifications of the Basel Convention Ban Amendment, <http://www.basel.int/ratif/ban-alpha.htm> (last visited Apr. 13, 2008).

¹⁹ *Id.* Côte d’Ivoire is one of the nations that has not ratified the Basel Ban, and in fact, only ten African nations have ratified it to date. *See id.*

To better achieve environmental justice, changes can be made to the Convention's weaker provisions to protect developing nations from bearing the brunt of environmental harms without necessitating a total ban that is undesirable to many nations. For one, the loophole in the PIC process currently enabling misrepresentation by Parties regarding ESM practices could be closed by predicated use of a facility in a developing nation upon prior inspection and authorization by an implementation body. The International Atomic Energy Agency's (IAEA) inspection process, combined with the Clean Water Act's pollution permitting system, provides guidance on how such a precautionary procedure could operate. Next, the Parties need to propel the currently ineffectual yet promising Protocol on Liability into force, because it would both deter illegal waste movements and secure vital funding to respond to current and future accidents. Finally, funding sources must be established to support the BCRCs so that developing nations could build facilities to deal with wastes. This funding system should implement a cooperative model that imposes strict penalties against violators, as in the Kyoto Protocol's Compliance Committee²⁰ or the Convention on the International Trade in Endangered Species (CITES),²¹ and maximizes international contributions, as in the Montreal Protocol's Multilateral Fund.²²

Accordingly, the Basel Ban on all exports to non-Annex VII nations should be modified to only apply until a developing nation can establish a facility able to pass inspection and receive a permit certifying ESM practices. In this way, the "burden" developing nations might have incurred when previously accepting wastes would be diminished by the curtailment of potential negative environmental consequences and by the economic benefit and accordant bargaining power developing countries would gain in the global arena. This approach has the potential to both achieve economic progress in developing nations and ensure a safe, legal means for controlling hazardous wastes that will discourage the health concerns and environmental injustice associated with illegal hazardous wastes trades.

Part II of this Comment discusses the driving principles behind environmental justice. Part III analyzes the component parts of the Basel Convention and its pervasive use of environmental justice language. Part IV scrutinizes the shortcomings of the Basel Convention that prevent it from realizing its potential to better promote environmental justice. Part V looks at the Basel Ban as a proposed remedy for the shortcomings in the Basel

²⁰ U.N. Framework Convention on Climate Change, Oct. 29–Nov. 10, 2001, *Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, in Report of the Conference of the Parties on its Seventh Session*, Addendum, Part Two, Vol. III, at 75–76, U.N. Doc. FCCC/CP/2001/13/Add.3 (Jan. 21, 2002).

²¹ Convention on the International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (*entered into force* July 1, 1975) [hereinafter CITES].

²² Montreal Protocol on Substances that Deplete the Ozone Layer, *opened for signature* Sept. 16, 1987, 26 I.L.M. 1550 (*entered into force* Jan. 1, 1989); Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, *opened for signature* June 29, 1990, 30 I.L.M. 539, 550 (*entered into force* Jan. 1, 1992).

Convention and analyzes obstacles to its success. Part VI suggests alternative changes to the Basel Convention short of an outright ban of transboundary movement of wastes. It draws upon foundations in international and domestic environmental sources to support fundamental changes required by the Basel Convention to enable developing countries to move closer to their goal of economic growth without imposing significant environmental threats upon their constituents. Part VII concludes that for the impressive environmental justice principles of the Basel Convention to actually take effect in the international arena, the Convention must be implemented in a way that prioritizes the unique development needs of developing countries along with the need to safely manage wastes. Ironically, allowing developing countries to profit economically from importing some wastes and recyclables—and thereby encouraging the shipment of wastes to these nations, however contrary to the principles of environmental justice this may seem—would allow all of the needs of developing nations to have a place “at the table,” and consequently increase the bargaining power of these traditionally underserved nations, which is the best way to ensure that environmental justice is achieved.

II. ENVIRONMENTAL JUSTICE—CENTRAL PRINCIPLES

A. Domestic Origins of Environmental Justice

The environmental justice movement emerged in the United States in the 1980s “guided by an overriding inclination for community involvement and social justice issues”²³ and in response to growing recognition that “low-income persons and communities of color have to bear disproportionate environmental burdens.”²⁴ The concept slowly gained political recognition, and, after Congress tried and failed to pass the Environmental Justice Act of 1993, President Clinton undertook to institutionalize environmental justice by issuing Executive Order 12898.²⁵ Clinton described the basic premise of environmental injustice as “disproportionately high and adverse human health or environmental effects on minority populations and low-income populations,”²⁶ although it is still commonly discussed in terms of benefits and burdens.²⁷

1. Categories of Domestic Environmental Justice

The two main categories of environmental justice are distributive justice and procedural justice. Distributive justice targets the “inequitable

²³ RUCHI ANAND, INTERNATIONAL ENVIRONMENTAL JUSTICE: A NORTH-SOUTH DIMENSION 9 (2004); *see also* CHRISTOPHER H. FOREMAN, THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE 61 (1998).

²⁴ ANAND, *supra* note 23.

²⁵ BENJAMIN DAVY, ESSENTIAL INJUSTICE 21 (1997).

²⁶ Exec. Order No. 12898, 59 Fed. Reg. 7629, § 1-102(b)(1) (Feb. 11, 1994).

²⁷ Kidd, *supra* note 9; Been, *supra* note 9.

distribution of social, economic, and political burdens on people/communities with different levels of development.”²⁸ It recognizes that increased industrialization has created the need for an increasing number of “Locally Undesirable Land Uses” (LULUs), which has spawned what has become known as the “Not In My Back Yard” (NIMBY) syndrome.²⁹ The NIMBY syndrome’s ubiquitous nature has resulted in LULUs getting situated most often in lower-income and minority neighborhoods, where there are often fewer economic resources to fight LULU placement decisions.³⁰

Procedural, or representative, justice highlights the inequitable bargaining powers different people and communities have in making decisions regarding environmental benefits and burdens, recognizing that racial minorities and the poor are often not included or ignored in such conversations.³¹ The greater ability of white, rich communities to access and influence environmental decisions has resulted in more LULUs ending up in the backyards of minority and poor neighborhoods, where those seeking to dump environmental hazards have been met with less political and economic resistance. Therefore, representative justice aims to ensure that a diversity of interests is represented when setting environmental agendas. Benefits arising from a “greater inclusion of communities” include the ability to “lower risks, reduce burdens, and raise opportunities, thus producing something closer to a just society.”³²

2. Two Central Methods for Achieving Environmental Justice

Among the tools domestic environmental justice advocates have embraced to advance their cause are the precautionary principle and the polluter pays principle.³³ The precautionary principle stresses that if an activity is likely to pose a threat to human health or the environment, even in the absence of conclusive scientific data, cost-effective measures should be taken to avert those threats.³⁴ The polluter pays principle states that the polluter should have to bear the costs of the environmental harm it will cause by internalizing these costs rather than passing them on to those immediately affected or later generations.³⁵ While these tools have primarily played only ideological roles in national discourse rather than customarily

²⁸ ANAND, *supra* note 23, at 10.

²⁹ DAVY, *supra* note 25, at 15–17.

³⁰ *Id.*

³¹ ANAND, *supra* note 23, at 10.

³² FOREMAN, *supra* note 23, at 8; *see also* ANAND, *supra* note 23, at 9.

³³ JOHN C. DERNBACH, ENVTL. LAW INST., STUMBLING TOWARDS SUSTAINABILITY 132 (2002).

³⁴ Clifford Rechtschaffen, *Advancing Environmental Justice Norms*, 37 U.C. DAVIS L. REV. 95, 112, 115 (2003); Stephen G. Wood, Stephen Q. Wood & Rachel A. Wood, *Whither the Precautionary Principle? An American Assessment from an Administrative Law Perspective*, 54 AM. J. COMP. L. 581, 581 (2006).

³⁵ Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1548 (2006); Paul G. Harris, *The European Union and Environmental Change: Sharing the Burdens of Global Warming*, 17 COLO. J. INT’L ENVTL. L. & POL’Y 309, 337 (2006).

relied-upon tenets of policy-making decisions, they are increasingly gaining traction in certain areas of the nation and have played a more concrete and pervasive role in international agreements.³⁶

B. International Environmental Justice

Although it is not often coined as such, many of the interplays between industrialized and developing nations parallel the struggles and themes of environmental justice at the international scale.³⁷ Examples of procedural and distributive injustice pervade the discourse among industrialized and developing nations, and political solutions in the form of multilateral environmental agreements (MEAs) echoing the themes of environmental justice and attempting to rectify these injustices have been forged.³⁸ The Rio Declaration on Environment and Development (Rio Declaration),³⁹ although it favors the term “sustainable development” and is a non-binding resolution, recognizes that the least developed countries are “most environmentally vulnerable”⁴⁰ and has been credited with introducing environmental justice to the global arena.⁴¹ In Principle 14, it denounces the international NIMBY syndrome by calling on states to discourage transfers of activities or substances that result in peril to the environment or human health.⁴² Also, Principle 15 of the Rio Declaration incorporates the precautionary principle into the lexicon of international agreements.⁴³ It declares, “[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental

³⁶ See generally CITY OF SAN FRANCISCO, DEP'T OF THE ENV'T, THE PRECAUTIONARY PRINCIPLE AND THE CITY AND COUNTY OF SAN FRANCISCO (2003), available at <http://www.sehn.org/precaution.html> (follow “White Paper” hyperlink) (discussing the appearance of the precautionary principle in international and national instruments and the City of San Francisco's recent reliance on the principle in several contexts); DERNBACH, *supra* note 33, at 132 (stating that the United States follows the polluter pays principle in both its environmental policy and trade decisions although it rarely identifies the principle by name).

³⁷ ANAND, *supra* note 23, at 15.

³⁸ *Id.*

³⁹ U.N. Conference on Env't and Dev., Rio de Janeiro, June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992) [hereinafter *Rio Declaration*].

⁴⁰ *Id.* princ. 6.

⁴¹ See, e.g., Gwynne Wiatrowski Guzzeeu, *Indoor Air Pollution: Energy Problems in China's Residential Sector*, 11 GEO. INT'L ENVTL. L. REV. 439, 455 (1999); G.F. Maggio, *Inter/Intra-Generational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources*, 4 BUFF. ENVTL. L.J. 161, 221 (1997); Randon H. Draper, *Resuscitating the Victims of Ship Pollution: The Right of Coastal Inhabitants to a Healthy Environment*, 15 COLO. J. INT'L ENVTL. L. & POL'Y 181, 205 (2004).

⁴² *Rio Declaration*, *supra* note 39, princ. 14.

⁴³ See PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 268 (2d ed. 2003) (crediting Principle 15 with embodying “the core of the principle”).

degradation.”⁴⁴ More recently, the Cartagena Protocol⁴⁵ on trade in living genetically modified organisms has been credited with “propelling the Precautionary Principle to the forefront of international environmental law.”⁴⁶

Along with the precautionary principle, the polluter pays principle has also become a principle of “customary international law,”⁴⁷ and international environmental law in particular, since its first appearance in a global instrument in the International Convention on Oil Pollution Preparedness, Response and Co-operation by the International Maritime Organization in 1990.⁴⁸ The Rio Declaration, in fact, discussed the polluter pays principal as a normative ethical principle to be considered by nations, stating, “National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”⁴⁹ The Basel Convention is another MEA that has incorporated many of the central themes of environmental justice; however, incidents like the recent dumping of hazardous wastes in Abidjan make clear that to achieve both prongs of environmental justice, namely procedural and distributive justice, several of the tools underlying the Basel Convention need to be reevaluated.

III. BASEL CONVENTION—HISTORY, COMPONENT PARTS, AND ENVIRONMENTAL JUSTICE

The Conference of Plenipotentiaries that convened in March of 1989 and ultimately generated the Final Act of the Basel Convention was

⁴⁴ *Rio Declaration*, *supra* note 39, princ. 15.

⁴⁵ Cartagena Protocol on Biosafety to the Convention on Biological Diversity, *opened for signature* May 15, 2000, 39 I.L.M. 1027 (*entered into force* Sept. 11, 2003), *available at* <http://www.cbd.int/doc/legal/Cartagena-protocol-en.pdf>.

⁴⁶ David J. Schnier, *Genetically Modified Organisms and the Cartagena Protocol*, 12 FORDHAM ENVTL. L. REV. 377, 412 (2001). Other international environmental instruments that have employed a precautionary approach have been: Conference on Env't and Dev., June 3–4, 1992, Rio de Janeiro, Brazil, *Report*, ¶ 17.22, U.N. Doc A/CONF.151/26 (1992), *available at* <http://www.un.org/esa/documents/ga/conf151/aconf15126-2.htm> (calling for “preventive, precautionary and anticipatory approaches”); Stockholm Convention on Persistent Organic Pollutants, May 23, 2001, pmbl., arts. 1, 8(9), *available at* http://www.pops.int/documents/convtext/convtext_en.pdf (discussing “precaution,” and moving in a “precautionary manner”); and U.N. Conference on Env't and Dev.: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849, 854 (*entered into force* Mar. 21, 1994), *available at* <http://unfccc.int/resource/docs/convkp/conveng.pdf> (providing for “precautionary measures”).

⁴⁷ Carl Bruch, *Is International Environmental Law Really “Law”? An Analysis of Application in Domestic Courts*, 23 PACE ENVTL. L. REV. 423, 439 (2006); ELLI LOUKA, INTERNATIONAL ENVIRONMENTAL LAW: FAIRNESS, EFFECTIVENESS, AND WORLD ORDER 50–51 (2006).

⁴⁸ Org. for Econ. Co-operation & Dev. [OECD], *The Polluter-Pays Principle as it Relates to International Trade*, at 10 & n.7, COM/ENV/TD(2001)/FINAL (Dec. 23, 2002), *available at* [http://www.ois.oecd.org/olis/2001doc.nsf/43bb6130e5e86e5fc12569fa005d004c/988d25625e791068c1256c98003a2fcb/\\$FILE/JT00137174.PDF](http://www.ois.oecd.org/olis/2001doc.nsf/43bb6130e5e86e5fc12569fa005d004c/988d25625e791068c1256c98003a2fcb/$FILE/JT00137174.PDF).

⁴⁹ *Rio Declaration*, *supra* note 39, princ. 16.

organized in recognition of the need to sculpt an international framework for regulating the growing practice of shipping industrial wastes across national boundaries.⁵⁰ An increasing trend in the 1980s toward stricter domestic regulations of waste disposal in industrialized nations spawned a correlating surge in the shipment of such wastes to cheaper, international markets.⁵¹ Developing nations seeking to grow their fragile economies were suddenly tempted with large sums of money from industrialized nations in exchange for their acceptance of hazardous wastes.⁵²

However, developing nations were often unequipped to handle these wastes, which were often toxic and shipped in large volumes. Consequently, these transboundary shipments generated “many scandalous stories” of the environmental tragedies that befell developing nations grappling with richer nations’ toxic wastes.⁵³ One instance that received global press and condemnation in 1988 was the shipment from Italy of 18,000 drums of waste including polychlorinated biphenyls (PCBs), asbestos, and possibly dioxin to an “unscrupulous businessman” in Koko, Nigeria, which resulted in hospitalizations and premature births to such a degree that Nigeria subsequently banned the importation of hazardous wastes upon penalty of death.⁵⁴ Stories such as this sparked international intolerance for the transboundary shipment of hazardous wastes to ill-equipped developing nations, in response to which the Basel Convention, sponsored by the United Nations Environment Program (UNEP), was opened for signatures on March 22, 1989.⁵⁵

The Basel Convention provides an international scheme for controlling the transboundary movement of wastes that resonates the themes of environmental justice, prioritizing human health, environmental safety, open dialogue among nations, and a sensitivity to the limitations of developing nations in a manner that has been agreeable to both industrialized and developing nations.⁵⁶ Its passage in 1989 embodied the

⁵⁰ Secretariat of the Basel Convention, Origins of the Convention, <http://basel.int/convention/basics.html> (last visited Apr. 13, 2008); SANDS, *supra* note 43, at 692.

⁵¹ Secretariat of the Basel Convention, Introduction, <http://basel.int/convention/basics.html> (last visited Apr. 13, 2008). As an example of increasing regulation of hazardous waste disposal in industrialized countries, the cost of landfilling one ton of hazardous waste in the United States rose from \$15 per ton in 1980 to \$250 per ton in 1989. Jim Puckett, *The Base Ban: A Triumph over Business-As-Usual*, BASEL ACTION NETWORK, http://www.ban.org/about_basel_ban/jims_article.html#6 (last visited Apr. 13, 2008).

⁵² The year before the Basel Convention was adopted, private companies from the United States and Europe offered Guinea-Bissau \$600 million, which was about five times that nation’s gross national product at the time, to accept their toxic wastes. JOSEPH F. C. DiMENTO, *THE GLOBAL ENVIRONMENT AND INTERNATIONAL LAW* 112 (2003).

⁵³ *Id.* at 111.

⁵⁴ *Id.*

⁵⁵ Basel Convention, *supra* note 11, at 2–5. The Basel Convention entered into force on May 5, 1992. Secretariat of the Basel Convention, Basel Convention’s Ratifications, <http://basel.int/ratif/convention.htm> (last visited Apr 13, 2008) [hereinafter Basel Ratifications]; DiMENTO, *supra* note 52, at 112; Theodore Waugh, *Where Do We Go From Here: Legal Controls and Future Strategies for Addressing the Transportation of Hazardous Wastes Across International Borders*, 11 FORDHAM ENVTL. L. REV., 477, 503 n.93 (2000).

⁵⁶ At the time this was written, 169 countries were Parties, defined as “States consenting to

compromise reached by developing nations, which originally sought a total ban on hazardous waste transfers from industrialized to developing nations, and industrialized nations, which favored notification and consent.⁵⁷ The Basel Convention as adopted in 1989, prior to the proposal of the Basel Ban Amendment, “establishe[d] rules designed to regulate trade in . . . wastes rather than prohibit it.”⁵⁸ Although it rejected the total ban sought by many developing nations, its provisions express a preference for disposal of wastes in the generating nation⁵⁹ and provide many additional safeguards for developing nations that aim to implement environmental justice.

A. The Basic Mechanics of the Basel Convention

The model established by the Basel Convention to regulate international trade of wastes places specific and differentiated rights and duties upon States of export, import, and transit in an attempt to permit *only* transboundary movement and disposal of wastes that is “environmentally sound.”⁶⁰ The basic framework created by the Basel Convention emphasizes minimizing transboundary movement of wastes,⁶¹ ensuring environmentally sound management of hazardous wastes,⁶² and discouraging illegal movements of hazardous wastes.⁶³ In order to achieve these goals, the General Obligations set forth in Article 4 impose positive duties on each Party to cooperate to ensure that these goals are being advanced.⁶⁴ In addition to these General Obligations, Parties have specific rights and obligations tailored to the achievement of each of these three basic elements.

1. Minimizing Transboundary Movements Under the Convention

In order to minimize transboundary movement of hazardous and other wastes, the Basel Convention advocates both non-trade-based and trade-based measures. In terms of non-trade measures, the Basel Convention stresses reduction in the generation of hazardous and other wastes⁶⁵ and disposal of such wastes in the country of generation.⁶⁶

be bound by the Basel Convention.” Secretariat of the Basel Convention, Basel Convention’s Ratifications, <http://basel.int/ratify/convention.htm> (last visited Apr. 13, 2007). At the time this went to print, 170 countries were Parties. Basel Ratifications, *supra* note 55 (Republic of the Congo became a Party on April 20, 2007).

⁵⁷ DiMENTO, *supra* note 52, at 112.

⁵⁸ SANDS, *supra* note 43, at 692.

⁵⁹ Basel Convention, *supra* note 11, pmbl. ¶ 3.

⁶⁰ *Id.* pmbl. ¶ 24.

⁶¹ *Id.* pmbl. ¶¶ 8–11, 18, arts. 4, 6, 7, 9.

⁶² *Id.* pmbl., art. 2, ¶ 8, arts. 4, 6, 8–11, 13, 16.

⁶³ *Id.* pmbl. ¶ 19, arts. 4, 7, 9.

⁶⁴ *Id.* art. 4, ¶ 2.

⁶⁵ *Id.* pmbl. ¶¶ 3, 17, art. 4, ¶ 2(a), art. 10, ¶ 2(c), art. 14, ¶ 1.

⁶⁶ *Id.* pmbl. ¶ 8.

In terms of trade-based measures for minimizing waste movements, Article 4 gives each Party a right to prohibit the importation of any waste into its borders and impose upon each Party a corresponding obligation to not permit the export of wastes to any State of import that has not specifically consented to the specific import.⁶⁷ The Basel Convention advances the tool of prior informed consent (PIC), which obligates each exporting Party to inform states of import of intended waste movements and receive written consent for each transfer from the state of import, in order to keep transboundary movements to a minimum.⁶⁸ A State of import has a “sovereign right” to refuse importation of any hazardous or other waste for any reason.⁶⁹ Each State of export has an obligation to prohibit generators or exporters from commencing movements of wastes unless the State of export has received written consent and confirmation of a contract between the exporter and the disposer certifying environmentally sound management techniques from the State of import.⁷⁰ Each State of export also has a duty to prohibit exportation, find an alternate facility, or re-import wastes if there is reason to believe the wastes will not be handled in an “environmentally sound manner” in the intended State of import.⁷¹

Article 11 of the Convention does permit the Parties to enter into bilateral, multilateral, or regional agreements regarding movements of wastes with other Parties, or even with non-Parties, but such movements are restricted by requirements that the Secretariat must be notified and that such agreements must be at least as environmentally sound as the Convention requires.⁷² Trade with non-Parties not undertaken pursuant to Article 11 is therefore prohibited.⁷³ Also, notably, Article 11 empowers developing nations *desiring* a total ban to create regional agreements to ban all waste importation to the region.⁷⁴ The Basel Convention obligates each Party to prohibit the export of wastes to States, “particularly developing countries,” that have entered into such an agreement to ban all imports,⁷⁵ which enables the shipments of regulated wastes into these areas to be reduced to virtually zero even without the proposed Basel Ban Amendment, discussed *infra* Part V, in place.

⁶⁷ *Id.* art. 4, ¶ 1.

⁶⁸ *Id.* art. 6.

⁶⁹ *Id.* pmb. ¶ 6. None of the provisions of the Basel Convention requires a Party to provide justification for banning wastes from importation.

⁷⁰ *Id.* art. 11, ¶ 3.

⁷¹ *Id.* art. 4, ¶ 2(e), art. 8.

⁷² *Id.* art. 11.

⁷³ *Id.* art. 9, ¶ 1(a).

⁷⁴ *Id.* art. 11. And, in fact, many developing nations did adopt policies instituting a total ban on importation of hazardous wastes within their borders, including a ban on all importation of hazardous wastes to the African continent, agreed to by the Organization of African Unity in the Bamako Convention. Organization of African Unity, 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. *See also* Webster-Main, *supra* note 13, at 83.

⁷⁵ Basel Convention, *supra* note 11, art. 4, ¶ 2(e).

2. *Environmentally Sound Management of Hazardous and Other Wastes*

The Convention posits the rights and obligations it imposes upon parties around achievement of “[e]nvironmentally sound management of hazardous wastes or other wastes,” which it defines as “taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.”⁷⁶ The Convention differentiates between “hazardous wastes,” and “other wastes,” and asserts jurisdiction over certain wastes from both categories specified in the annexes to the Convention.⁷⁷ Hazardous wastes covered by the Convention are those that are “toxic, poisonous, explosive, corrosive, flammable, ecotoxic, and infectious.”⁷⁸

The Secretariat has specified that “environmentally sound management” (ESM) involves “strictly controlling [the] storage, transport, treatment, reuse, recycling, recovery and final disposal” of wastes.⁷⁹ The Parties have generated many technical guidelines to define what constitutes ESM for several types of wastes regulated under the Convention.⁸⁰ Specifically, the general guidance document for the generation of these technical guidelines directs that the soundness of an ESM scheme should be based upon several criteria, namely that:

- (a) There exists a regulatory infrastructure and enforcement that ensures compliance with applicable regulations;
- (b) Sites or facilities are authorised and of an adequate standard of technology and pollution control to deal with the hazardous wastes in the way proposed, in particular taking into account the level of technology and pollution control in the exporting country;
- (c) Operators of sites or facilities at which hazardous wastes are managed are required, as appropriate, to monitor the effects of those activities;
- (d) Appropriate action is taken in cases where monitoring gives indication that the management of hazardous wastes have resulted in unacceptable emissions;

⁷⁶ *Id.* art. 2, ¶ 8.

⁷⁷ *Id.* art. 1, annexes I–III, VIII. The Basel Convention does not assert jurisdiction over radioactive wastes subject to other control systems, *id.* art. 1, ¶ 3, or those wastes listed in annex IX. *Id.* annex IX.

⁷⁸ Secretariat of the Basel Convention, *Origins of the Convention*, <http://basel.int/convention/basics.html> (last visited Apr. 13, 2008).

⁷⁹ *Id.*

⁸⁰ Secretariat of the Basel Convention, *Technical Matters*, <http://basel.int/techmatters/index.html> (last visited Apr. 13, 2008). The wastes and processes for which the Parties have drafted technical guidelines include persistent organic pollutants (POPs), polychlorinated biphenyls (PCBs), polychlorinated terphenyls (PCTs), polybrominated biphenyls (PBBs), dichlorodiphenyltrichloroethane (DDT), hexachlorobenzene (HCB), dioxins and furans, pesticides wastes, surface treatments of metals and plastics, and recycling and reclamation of metals and metal compounds, and guidelines have also been created based on hazard characteristics. *Id.* See also Secretariat of the Basel Convention, *Publications: Technical Guidelines*, <http://www.basel.int/meetings/sbc/workdoc/techdocs.html> (last visited Apr. 13, 2008).

- (e) Persons involved in the management of hazardous wastes are capable and adequately trained in their capacity.⁸¹

The guidance document also reminds the Parties of the critical role individual nations play in assuring ESM, stating that “[c]ountries also have obligations to avoid or minimize waste generation and to ensure the availability of adequate facilities for their waste, so as to protect human health and the environment.”⁸² In order to meet those obligations, the guidance document directs nations to:

- (a) Take steps to identify and quantify the types of waste being produced nationally;
- (b) Use best practice to avoid or minimize the generation of hazardous waste, such as the use of clean methods;
- (c) Provide sites or facilities authorised as environmentally sound to manage its wastes, in particular hazardous wastes.⁸³

Finally, the guidance document recognizes the role international cooperation could play in providing adequate enforcement and monitoring of Parties’ obligations.⁸⁴ Beyond these guidelines and the specific rules set forth in the technical guidelines for the identification, handling, disposal, and treatment of various types of wastes, the Secretariat is authorized to provide additional guidance to Parties on what facilities or processes constitute environmentally sound technologies in order to achieve ESM.⁸⁵ Additionally, pursuant to Article 14,⁸⁶ the Parties have established Basel Convention Regional Centers (BCRCs) for training and the transfer of technology regarding the management of hazardous and other wastes and the minimization of their generation.⁸⁷

⁸¹ BASEL CONVENTION TECHNICAL WORKING GROUP, GUIDANCE DOCUMENT ON THE PREPARATION OF TECHNICAL GUIDELINES FOR THE ENVIRONMENTALLY SOUND MANAGEMENT OF WASTES SUBJECT TO THE BASEL CONVENTION 3, *available at* <http://www.basel.int/meetings/sbc/workdoc/framework.doc> (this document was adopted by the Conference of the Parties to the Basel Convention).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Basel Convention, *supra* note 11, art. 16, ¶ 1(g).

⁸⁶ Article 14 states, “[t]he Parties agree that, according to the specific needs of different regions and subregions, regional or sub-regional centers for training and technology transfers regarding the management of hazardous wastes and other wastes and the minimization of their generation should be established.” Basel Convention, *supra* note 11, art. 14, ¶ 1. There are currently 15 regional centers in operation, located in Argentina, Egypt, Indonesia, the Islamic Republic of Iran, Nigeria, Senegal, the South Pacific (Samoa), Trinidad and Tobago, Uruguay, China, the Russian Federation, the Slovak Republic, South Africa, and El Salvador. SECRETARIAT OF THE BASEL CONVENTION, THE BASEL CONVENTION REGIONAL AND COORDINATING CENTERS AT A GLANCE . . . , *available at* <http://www.basel.int/centers/description/BCRCataGlance.pdf>; Press Release, Secretariat of the Basel Convention, Official Launch of the Basel Convention Regional Centre For Training and Technology Transfer for the Central American Sub-region Including Mexico (Feb. 9, 2007) (on file with author).

⁸⁷ Secretariat of the Basel Convention, Regional Centers, <http://basel.int/centers/>

3. *Confronting Illegal Movements of Hazardous and Other Wastes*

The Basel Convention condemns and establishes a response mechanism to deal with illegal traffic. Illegal traffic includes any transboundary movement of hazardous wastes or other wastes undertaken without compliance with the notification or consent requirements of the Convention by all States concerned, with consent obtained fraudulently, in a way that does not conform to the documents accompanying such movement, or in a way that results in “deliberate disposal (e.g. dumping) of hazardous wastes or other wastes in contravention of this Convention.”⁸⁸ The State of export has a duty to re-import wastes exported illegally.⁸⁹

The Convention states that the Parties consider illegal traffic in hazardous wastes or other wastes criminal and requires each Party to take appropriate legal, administrative, and other measures to prevent and punish such conduct.⁹⁰ Each Party is required to introduce national legislation consistent with the objectives of Article 9,⁹¹ and to provide the Secretariat with information including an annual national report detailing each movement of wastes pursuant to Basel, disposal methods, accidents, Article 11 agreements, and information pertaining to the breach of the Convention by any Party.⁹²

In addition to national legislation, the Basel Convention has attempted to establish bodies within the Convention to deal with prevention of, as well as punishment and compensation for, illegal trades in hazardous and other wastes. The Basel Convention’s Mechanism for Promoting the Implementation and Compliance of the Basel Convention (Compliance Committee), which first convened in 2003, was established as a “non-confrontational,” “non-binding,” “preventive in nature” body to review collected information to monitor compliance and to assist Parties with achieving compliance.⁹³ In addition to a preventive mechanism, the Basel Convention also adopted the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Wastes and Their Disposal (the Protocol or Protocol on Liability)⁹⁴ at the fifth Conference of the Parties (COP-5) in 1999 to help Parties, especially developing nations, address violations of the Convention once they occur.⁹⁵ However, the Protocol has not yet entered into force.⁹⁶

centers.html (last visited Apr. 13, 2008); SECRETARIAT OF THE BASEL CONVENTION, REGIONAL AND COORDINATING CENTERS BROCHURE 4, *available at* <http://basel.int/pub/BCRC-brochure.pdf>.

⁸⁸ Basel Convention, *supra* note 11, art. 9, ¶ 1.

⁸⁹ *Id.* art. 9, ¶ 2.

⁹⁰ *Id.* art. 4, ¶¶ 3, 4.

⁹¹ *Id.* art. 9, ¶ 5.

⁹² *Id.* arts. 11, 13, 16, 19.

⁹³ Secretariat of the Basel Convention, Compliance Committee, Terms of Reference, <http://basel.int/legalmatters/compcommittee/index.html> (last visited Apr. 13, 2008).

⁹⁴ The Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Wastes and Their Disposal, Dec. 10, 1999, *available at* <http://basel.int/meetings/cop/cop5/docs/prot-e.pdf> [hereinafter Protocol].

⁹⁵ Secretariat of the Basel Convention, Protocol on Liability and Compensation, <http://www.basel.int/pub/protocol.html> (last visited Apr. 13, 2008).

⁹⁶ Secretariat of the Basel Convention, Basel Ban, Ratifications, <http://basel.int/ratiff/ban->

Article 14 conveys the Parties' recognition of a need to finance the mechanisms it would use to curb and respond to illegal trades. To aid in prevention of illegal trades, Article 14, paragraph 1 states that the Parties should decide on a "voluntary" funding mechanism to support BCRCs' training and technology transfer efforts.⁹⁷ To respond to emergency situations involving accidents arising from transboundary movements of wastes, Article 14, paragraph 2 directs the Parties to consider establishing a "revolving fund" to assist affected Parties on an interim basis,⁹⁸ and the Parties have established two Trust Funds pursuant to this provision.⁹⁹

B. How the Major Components of the Basel Convention Emphasize Environmental Justice

The main components of the Basel Convention exhibit a drive to implement the principles of environmental justice on an international scale. With an acute sensitivity toward the disproportionately high risks to human health and the environment that the transportation of hazardous and other wastes poses to developing nations, and concrete steps intended to relieve developing nations of these higher risks, the Basel Convention appears to promote the goals of environmental justice in a more direct manner than any law in the United States, where the concept originated.¹⁰⁰ The Convention's major components, prioritizing human health and the environment, differential treatment, prior informed consent, regional centers, and financing, compliance, and liability schemes, all evince a central preoccupation with incorporating environmental justice into the transboundary movement of wastes.

1. Prioritizing Protection of Human Health and the Environment

The compromise process that engendered the Basel Convention was an example of procedural justice—the inclusion of underrepresented groups at

alpha.htm (last visited Apr. 13, 2008).

⁹⁷ Basel Convention, *supra* note 11, art. 14, ¶ 1.

⁹⁸ *Id.* art. 14, ¶ 2.

⁹⁹ The two trust funds established by the Convention are the Trust Fund for the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and the Trust Fund to Assist Developing Countries and Other Countries in Need of Technical Assistance in the implementation of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Technical Trust Fund). Secretariat of the Basel Convention, Contributions, <http://basel.int/convention/contributions/index.html> (last visited Apr. 13, 2008); *see infra* Part III(B)(5).

¹⁰⁰ Environmental justice in the United States remains largely regarded as a grassroots social and academic movement, even despite the passage of Executive Order 12898, due to the failure of the legislature to pass a law giving the concept any "teeth" by which it can be enforced. *See* David Monsma, *Equal Rights, Governance, and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility*, 33 *ECOLOGICAL L.Q.* 443, 445–46 (2006) (discussing that there is "scholarly consensus that environmental justice claims in court rarely work," that the environmental justice movement is important as a tool for grassroots political organizing, and that much of the scholarly literature attempts to analyze "the 'gap' between environmental laws and equal justice under law").

the decision-making table—forged in recognition of the inability of existing international policies to equitably protect the fundamental interest at the heart of environmental justice—protection of human health and the environment. The Preamble to the Basel Convention, which pronounces the goals and concerns underlying the Parties' desire to formulate the Convention, explicitly references human health, the environment, or both in fifteen of its twenty-four clauses.¹⁰¹ Its final clause transitions into the Convention's text with a forceful plan of action, stating that the Parties are "[d]etermined to protect, by strict control, human health and the environment against the adverse effects which may result from the generation and management of hazardous wastes and other wastes."¹⁰²

In order to pursue this plan, the body of the Convention itself mandates that Parties cooperate with one another in order to "improve and achieve" ESM of hazardous wastes and other wastes.¹⁰³ By defining ESM as "taking all practicable steps" to manage wastes in a manner consistent with protecting human health and the environment,¹⁰⁴ the Convention endorses a policy that anything more that can be done to protect human health and the environment should be done. By enumerating the categories of wastes to be controlled, the operations of disposal to be controlled, and the properties for and specific names of those wastes to be considered "hazardous,"¹⁰⁵ the Convention regulates the gamut of sources of threats to human health and the environment rather than just the threats posed by the waste materials themselves. It additionally requires each State to submit to the Secretariat of the Convention a list of any additional wastes it deems hazardous and any procedures it imposes to minimize risks of those hazardous wastes.¹⁰⁶ This catchall provision stresses procedural justice by ensuring that the definitions imposed by the Convention are a floor, not a ceiling, allowing individual countries to impose more stringent restrictions on waste transfers depending on their preferences and capabilities.¹⁰⁷ The Basel Convention's prioritization of human health and the environment embodies both procedural justice, by empowering developing nations to dictate which wastes are environmentally unsound, and distributive justice, by halting the barrage of waste materials into developing nations and prompting more wastes to be disposed of in industrialized nations in order to comply with ESM.

¹⁰¹ Basel Convention, *supra* note 11, pmb1.

¹⁰² *Id.* (emphasis added).

¹⁰³ *Id.* art. 10, ¶ 1.

¹⁰⁴ *Id.* art. 2, ¶ 8.

¹⁰⁵ *Id.* annexes 1–5, 8, 9.

¹⁰⁶ *Id.* art. 3, ¶¶ 1–2.

¹⁰⁷ And, in fact, the Convention expressly states the ability of a Party to adopt more stringent requirements, stating, "[n]othing in this Convention shall prevent a Party from imposing additional requirements that are consistent with the provisions of this Convention, and are in accordance with the rules of international law, in order better to protect human health and the environment." *Id.* art. 4, ¶ 11.

2. Differential Treatment of Industrialized and Developing Nations

Another key element of the Convention that emphasizes environmental justice is its differential treatment of exporting nations, which are often industrialized, and importing nations, which are often developing nations. Differential treatment is a tool used in many MEAs to apply different norms to different categories of states.¹⁰⁸ In the Basel Convention, differential treatment is applied as a protective measure, giving importing nations the right to restrict importation of hazardous wastes into their borders for any reason and obligating exporting nations to prohibit waste movements in the absence of express consent by an importing nation.¹⁰⁹ By giving an absolute right of refusal to developing nations, the Convention sought to alleviate some of the pressure developing nations felt to accept waste even if they lacked the infrastructure to manage those wastes in an environmentally sound manner. Differential treatment in the Basel Convention codifies procedural justice by empowering developing nations to have the final say in hazardous waste movements, thereby reducing the risk of environmental burdens being born by nations less technologically and monetarily equipped to handle them.

Even before the Basel Convention initially convened, the international community became aware of the dissonant goals of industrialized and developing nations in regard to international environmental cooperation. At the United Nations Conference on the Human Environment in Stockholm in 1972 (Stockholm Conference), which was deemed the “cocoon from which the chrysalis of international environmental law emerged,”¹¹⁰ although industrialized nations discussed the need for a “global environmental ethic,” developing nations stressed their need for economic development as the inroad for global environmental amelioration.¹¹¹ This same trend was evident twenty years later at the United Nations Conference on the Human Environment in Rio de Janeiro (Rio Convention), at which industrialized nations “sought progress on climate change, biodiversity, forest loss, and fishery issues,” in contrast to the developing nations, who “pushed for market access, trade, technology transfer, development assistance, and capacity building.”¹¹² The Rio Declaration was based upon a concept that appealed to both developing and industrialized nations: sustainable development.¹¹³ It stressed principles grounded in environmental justice, such as the precautionary principle, which appealed to industrialized nations, and the right to development and recognition of differentiated responsibilities, which appealed to developing nations, and sought to harmonize these oft-competing goals.¹¹⁴

¹⁰⁸ LAVANYA RAJAMANI, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW 1 (2006).

¹⁰⁹ Basel Convention, *supra* note 11, art. 6.

¹¹⁰ Lakshman Guruswamy, *International Environmental Law: Boundaries, Landmarks, and Realities*, 10 NAT. RESOURCES & ENV'T 43, 44 (1995).

¹¹¹ RAJAMANI, *supra* note 108, at 55.

¹¹² *Id.* at 58.

¹¹³ *Id.* at 59.

¹¹⁴ *Id.*

The Basel Convention's imposition of differing rights and obligations for States of export and import affords developing nations increased protections, reflecting a goal similar to that of other MEAs of integrating competing goals by acknowledging and accounting for specialized needs in a single regulatory scheme. The prime example of these increased protections is the right of the importing nation to refuse any wastes for any reason. Developing nations are also offered heightened protection by the onus placed on the State of export to prevent the generator or exporter from commencing a transboundary movement without PIC¹¹⁵ and to ensure ESM in an alternate location if the intended importation facility is insufficient.¹¹⁶ And, because the Convention acknowledges the shortcomings of developing nations in the realm of ESM technologies, it has established BCRCs specifically in developing regions to transfer to developing nations the training and technology enjoyed in industrialized nations.¹¹⁷

Furthermore, differential treatment is prominent in the Basel Convention's preference that wastes should be disposed of in the generating nation, which candidly encourages more wastes to be disposed of in industrialized nations. Article 4, paragraph 9 states that transboundary movements of hazardous and other wastes should occur *only* if the State of export cannot adequately handle disposal of the wastes or if the wastes would serve a beneficial purpose in the State of import, such as providing raw materials for recycling or recovery.¹¹⁸ This policy unabashedly favors the interests of developing nations in order to achieve a more just distribution of environmental benefits and burdens.

3. Prior Informed Consent: Engaging Exporting and Importing Nations in a Safety Dialogue

The Basel Convention relies upon the precautionary principle of environmental justice through its prior informed consent (PIC) procedure, which requires nations of import to receive full disclosure regarding potential waste transports and send approval for such transports before a nation of export may permit the exporter to commence with shipment.¹¹⁹ Although the Convention expresses that "hazardous wastes and other wastes should, as far as is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated,"¹²⁰ it permits those transboundary movements of wastes that are undertaken adherent to its strict PIC provisions.

¹¹⁵ Basel Convention, *supra* note 11, art. 6, ¶ 3.

¹¹⁶ *Id.* art. 8.

¹¹⁷ *Id.* art. 14, ¶ 1, art. 10, ¶ 4; *see infra* Part III(B)(4).

¹¹⁸ Basel Convention, *supra* note 11, art. 6, ¶ 9 (emphasis added). A third "catchall" reason is also included in Article 6, paragraph 9, allowing for other movements of hazardous or other wastes to proceed if they are "in accordance with other criteria to be decided by the Parties," that do not contravene the objectives of the Convention. *Id.*

¹¹⁹ *Id.* art. 6.

¹²⁰ *Id.* pmb1.

“Prior informed consent” has been defined in international trade as the principle that “international shipment of a chemical that is banned or severely restricted in order to protect human health or the environment should not proceed without the agreement . . . or contrary to the decision, of the designated national authority in the importing country.”¹²¹ The Basel Convention mandates that Parties “shall prohibit or shall not permit the export of hazardous wastes and other wastes if the State of import does not consent in writing to the specific import.”¹²² The State of export is required to notify, or to require the generator or exporter to notify, the proposed States of import and States of transit of the proposed movement of wastes and the characteristics the wastes and the shipment will possess pursuant to a requisite list of questions.¹²³ Upon receiving notice, the State of import must consent to or refuse the movement in writing, may impose restrictions, and may base its restrictions or refusal upon any grounds.¹²⁴ Without consent of both the State of import and any States of transit and acknowledgment of a contract between exporter and disposer detailing environmentally sound management of the wastes, the State of export may not proceed.¹²⁵ This framework places in the hands of *developing* nations, not just industrialized nations, the decision of whether or not to accept hazardous wastes within its borders. PIC in the Basel Convention appears to be an exemplary model of the precautionary principle, encouraging an open dialogue regarding transboundary waste movements among nations in a manner that is procedurally just and, by forcing exporting nations to dispose of wastes in industrialized nations when developing nations do not approve of such wastes, encourages distributive justice as well.

4. Regional Training Centers for Transfers of Technology

The Basel Convention’s novel establishment of BCRCs embodies environmental justice by recognizing the inherent technological limitations of developing nations and providing a framework to equip those nations with the tools to safely manage hazardous and other wastes on their own. The Convention sought to “[take] into account . . . the limited capabilities of the developing countries to manage hazardous wastes and other wastes,” and to promote transfers of “environmental protection technology” to these countries¹²⁶ through the establishment of BCRCs to give developing nations tools to both manage wastes and minimize their generation.¹²⁷

¹²¹ UNEP, Governing Council Decision 15/30 (May 25, 1989); *see also* SANDS, *supra* note 43, at 630.

¹²² Basel Convention, *supra* note 11, art. 4, ¶ 1(c).

¹²³ *Id.* art. 6, ¶ 1. For the list of information that must be offered by the State of export, see *id.* annex V(A).

¹²⁴ *Id.* art. 6, ¶ 2; *see also* CHRIS WOLD, SANFORD GAINES & GREG BLOCK, *TRADE AND THE ENVIRONMENT: LAW AND POLICY* 639 (2005).

¹²⁵ Basel Convention, *supra* note 11, art. 6, ¶¶ 3, 4.

¹²⁶ *Id.* pmb1.

¹²⁷ *Id.* art. 14, ¶ 1.

The regional centers are intended to help those regions with less technological prowess implement the Basel Convention by “providing guidance” on technological and enforcement aspects of the Convention, and by encouraging the introduction of cleaner production technologies and the use of environmentally sound waste management practices.¹²⁸ By implementing a framework aimed at providing technological assistance to developing nations, the Basel Convention proposes to forge environmental justice by alleviating environmental burdens in developing regions by training those regions to handle hazardous and other wastes so they can prevent environmental disasters from occurring. In addition, by promoting technological transfers to developing nations, the Convention has the promise to generate jobs and stimulate the economies in the nations of these regions. With stronger economies, these regions would have greater spending capacity in the global arena, meaning the Convention would also be creating the foundation for increased representative justice for these nations, giving their preferences a greater voice in future negotiations, even outside the environmental realm.

5. Finances, Compliance, and Liability

The Basel Convention’s provisions regarding finances, compliance, and liability appear to lay the groundwork for an environmentally just mechanism for violations of the convention that emphasizes transparency in trading and making polluters pay for costs they would otherwise have externalized—harm to human health and the environment—both before and after violations occurred. The few references to finances in the Basel Convention include that funding for regional training centers shall be decided by the Parties and shall be “of a voluntary nature,” that Parties should consider establishing a revolving fund to respond to accidents that arise from transboundary movements of wastes, and that any transboundary movement of waste should be covered by “insurance, bond or other guarantee as may be required by the State of import or any State of transit which is a Party.”¹²⁹

Since adoption of the Convention, voluntary contributions from individual nations have been the lifeblood of the BCRCs. For example, the BCRC for the Arab States, BCRC-Egypt, was able to assist eight member countries with pilot projects on the ESM of hazardous waste in 2006 and 2007 (with assistance to additional countries planned for 2008) based exclusively on a voluntary donation of over \$1 million made by the Government of Finland for the 2006 to 2008 period, which was the only financial donation to the Centre during 2006 or 2007.¹³⁰ Similarly, three voluntary contributions by

¹²⁸ See Secretariat of the Basel Convention, Regional Centres, <http://basel.int/centers/centers.html> (last visited Apr. 13, 2008).

¹²⁹ Basel Convention, *supra* note 11, art. 14, art. 6, ¶ 11.

¹³⁰ SECRETARIAT OF THE BASEL CONVENTION, DRAFT REPORT ON THE OPERATION OF THE BASEL CONVENTION REGIONAL AND COORDINATING CENTRES 2–3 (2007), *available at* <http://www.basel.int/centers/draft-report-bcrs.pdf> [hereinafter 2007 BCRC DRAFT REPORT]. The actual amount of the donation from Finland was 1 million euros, *id.*, which was equal to approximately \$1.184 million on January 1, 2006, the year in which the contribution was initially made, based on calculations

the Japanese government to the BCRC for South-East Asia, BCRC-SEA, enabled BCRC-SEA to develop and maintain a web site through 2010, as well as organize both a workshop and a project on electronic wastes.¹³¹

Furthermore, the Parties have established two funds to assist member nations in carrying out their activities under the Convention: a Trust Fund for the Basel Convention (Trust Fund), as well as a specific Trust Fund to Assist Developing Countries and Other Countries in Need of Technical Assistance in the Implementation of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Technical Trust Fund).¹³² The general Trust Fund is intended to fund “operational and programmatic activities” of the Secretariat,¹³³ and had received (as of August 31, 2006) \$3,211,447 to be used for the year 2006 and beyond, with an additional \$1,117,417 pledged by the parties but not fulfilled.¹³⁴ The Technical Trust Fund is a voluntary fund to assist countries in achieving technical compliance with the Convention, and the COP-5 Decision V/32 “extended its application, in particular, to developing countries and economies in transition.”¹³⁵ As of August 31, 2006, the Technical Trust Fund had received \$411,424 for the year 2006, and did not have any unpaid monetary pledges,¹³⁶ likely due to its voluntary nature.

at Oanda.com, Currency Converter for 164 Currencies, <http://www.oanda.com/convert/classic>. In-kind donations were also made to the Centre in 2006 by Bahrain, Jordan, Syria, and Yemen. 2007 BCRC DRAFT REPORT, *supra*, at 4.

¹³¹ 2007 BCRC DRAFT REPORT, *supra* note 130, at 16.

¹³² Secretariat of the Basel Convention, Financial Matters, <http://www.basel.int/convention/contributions/index.html> (last visited Apr. 13, 2008).

¹³³ The Secretariat, *Note by the Secretariat: Implementation of the Decisions Adopted by the Conference of the Parties at its Seventh Meeting: Resource Mobilization and Sustainable Financing*, at 5, delivered to the Conference of the Parties to the Basel Convention, Eighth Meeting, UNEP/CHW.8/10 (Aug. 3, 2006).

¹³⁴ SECRETARIAT OF THE BASEL CONVENTION, TRUST FUND FOR THE BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES & THEIR DISPOSAL (BC): STATUS OF CONTRIBUTIONS AS AT [sic] AUGUST 31, 2006, available at <http://basel.int/convention/contributions/bc0806.pdf>. The first calculation was arrived at by adding the total “Collections during 2005 for 2006” and the total “Collections during 2006 for 2006 and future years.” *Id.*

¹³⁵ RAJAMANI, *supra* note 108, at 110; Fifth Meeting of the Conference of the Parties to the Basel Convention, Dec. 6–10, 1999, *Report*, at 57–58, UNEP/CHW.5/29 (Dec. 10, 1999), available at <http://www.basel.int/meetings/cop/cop5/cop5reportfinal.pdf> [hereinafter Decision V/32]. For other decisions relating to the Technical Trust Fund, see First Meeting of the Conference of the Parties to the Basel Convention, Dec. 3–4, 1992, *Report*, at 19–20, 31, UNEP/CHW.1/24 (Dec. 5, 1992), available at <http://www.basel.int/meetings/cop/cop1-4/cop1repE.pdf> [hereinafter Decisions I/7, I/14]; Second Meeting of the Conference of the Parties to the Basel Convention, Mar. 21–25, 1994, *Report*, at 12–13, UNEP/CHW.2/30 (Mar. 25, 1994), available at <http://www.basel.int/meetings/cop/cop1-4/cop2repE.pdf> [hereinafter Decision II/2]; Third Meeting of the Conference of the Parties to the Basel Convention, Sept. 18–22, 1995, *Decisions Adopted*, at 3, UNEP/CHW.3/35 (Nov. 28, 1995), available at http://www.basel.int/meetings/cop/cop1-4/cop3decisions_e.pdf [hereinafter Decision III/3]; Fourth Meeting of the Conference of the Parties to the Basel Convention, Feb. 23–27, 1998, *Report*, at 36–37, UNEP/CHW.4/35 (Mar. 18, 1998), available at <http://www.basel.int/meetings/cop/cop1-4/cop4repe.pdf> [hereinafter Decisions IV/20, IV/22].

¹³⁶ SECRETARIAT OF THE BASEL CONVENTION, TRUST FUND TO ASSIST DEVELOPING COUNTRIES AND OTHER COUNTRIES IN NEED OF TECHNICAL ASSISTANCE (BD): STATUS OF CONTRIBUTIONS AS AT [sic] AUGUST 31, 2006, available at <http://basel.int/convention/contributions/bd0806.pdf>.

The Parties' creation of a separate Technical Trust Fund consisting of voluntary contributions from industrialized nations¹³⁷ and earmarked to help developing nations technologically advance represents a steadfast attempt to achieve distributive justice through helping developing nations prevent and address the environmental burdens to which they would otherwise be privy. For an example of the types of assistance the Technical Trust Fund resources have provided to developing regions, some of the projects at BCRCs that have been funded by the Technical Trust Fund include: Capacity Building for the Implementation of the Basel Convention at BCRC-Egypt in 2006 to 2008; Strategy on the Management of the Biomedical (Healthcare) Waste at BCRC-Slovak Republic; Workshop on the Safe and Effective Detection, Investigation, and Prosecution of Illegal Traffic of Hazardous and Others Wastes at BCRC-Slovak Republic; Preparation of National Inventories and National Plans for the Environmentally Sound Management of PCBs and PCB-Containing Equipment in Central America at BCRC-El Salvador; and Inventory of Electronic Wastes in the South American Region at BCRC-Argentina.¹³⁸

The Basel Convention's Mechanism for Promoting Implementation and Compliance (Compliance Committee) was established by the sixth Conference of the Parties (COP-6) in Decision VI/12¹³⁹ to promote implementation and compliance with the Convention and further the goals of environmental justice by paying "particular attention to the special needs of developing countries and countries with economies in transition."¹⁴⁰ The Compliance Committee was intended to be a mechanism "non-confrontational, transparent, cost-effective and preventive in nature, simple, flexible, non-binding and oriented in the direction of helping parties to implement the provisions" of the Convention.¹⁴¹ It seems to promote procedural justice by allowing any Party, or the Secretariat based on national reporting data, to submit to the Compliance Committee notice that itself or another Party may be in noncompliance, and promotes distributive justice by offering all nations, but particularly developing nations, advice "on how to access financial and technical support, including technology transfer

¹³⁷ The nations that contributed to the Technical Trust Fund in 2006 were Canada, Denmark, EC, Germany, Ireland, Italy, Liechtenstein, Spain, Sweden, and the United Kingdom. *Id.*

¹³⁸ 2007 BCRC DRAFT REPORT, *supra* note 130, at 88–89 (annex IV-B); Secretariat of the Basel Convention, Projects undertaken by the Basel Convention Regional Centres and Parties under the Technical Cooperation Trust Funds, http://www.basel.int/centers/proj_activ/tctf_projects.html (last visited Apr. 13, 2008).

¹³⁹ Sixth Meeting of the Conference of the Parties to the Basel Convention, Geneva, Switz., Dec. 9–13, 2002, *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, at 46–51, UNEP/CHW.6/40 (Feb. 10, 2003), available at <http://www.basel.int/meetings/cop/cop6/english/Report40e.doc> [hereinafter COP-6 Report]. The Compliance Committee was established as a subsidiary body of the Conference of the Parties pursuant to Article XV of the Convention. Basel Convention, *supra* note 11, art. 15, ¶ 5(e).

¹⁴⁰ Secretariat of the Basel Convention, Compliance Committee, <http://www.basel.int/legalmatters/compcommite/termsref.doc> (follow "Terms of Reference" hyperlink) (last visited Apr. 13, 2008).

¹⁴¹ COP-6 Report, *supra* note 139, at 46.

and capacity-building.”¹⁴² Notably, one of the duties of General Review given to the Compliance Committee is to review to “[e]nsur[e] the environmentally sound management and disposal of hazardous wastes and other wastes.”¹⁴³ Observations and suggestions to improve compliance must be submitted by the Compliance Committee to the next Conference of the Parties, but all recommendations are non-binding.¹⁴⁴

The Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal (Protocol on Liability or Protocol) was adopted after COP-5 as an attempt to respond to concerns over a lack of funds to cope with illegal dumping or accidental spills.¹⁴⁵ It emerged as the first mechanism in international environmental law promising to assign liability and provide for adequate and prompt compensation for damages resulting from hazardous waste trade.¹⁴⁶ The Protocol requires ratification by twenty Parties to enter into force, yet it currently has only been ratified by seven Parties.¹⁴⁷

If adopted, the Protocol would impose both strict liability and fault liability. Strict liability would be imposed upon the person who notified pursuant to the PIC procedure until the moment the disposer took possession of the wastes, and upon the disposer at any point thereafter.¹⁴⁸ If the PIC procedure was not adhered to, the State of export would assume strict liability for damages that occurred prior to the disposer taking possession of the wastes.¹⁴⁹ Fault liability would also be imposed upon any person who caused or contributed to damage by a lack of compliance with the provisions implementing the Convention or by wrongful intentional, reckless, or negligent acts of omissions.¹⁵⁰ The Protocol would require anyone potentially liable under the Protocol to secure insurance.¹⁵¹ The courts with jurisdiction to hear claims for compensation under the Protocol would be courts of the state in which the damage was suffered, the incident occurred, or where the defendant maintained a residence or place of

¹⁴² *Id.* at 48.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 49.

¹⁴⁵ Secretariat of the Basel Convention. Protocol on Liability and Compensation, <http://www.basel.int/pub/protocol.html> (last visited Apr. 13, 2008).

¹⁴⁶ Sejal Choski, Note, *The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal: 1999 Protocol on Liability and Compensation*, 28 *ECOLOGY L.Q.* 509, 509 (2001).

¹⁴⁷ Secretariat of the Basel Convention, Protocol on Liability and Compensation, Ratifications, <http://basel.int/ratif/protocol.htm> (last visited Apr. 13, 2008). The Parties that have ratified the Convention are Botswana, Democratic Republic of the Congo, Ethiopia, Ghana, Liberia, Syrian Arab Republic, and Togo. *Id.* An additional 13 Parties are signatories to the Protocol but have yet to ratify it, namely Chile, Colombia, Costa Rica, Denmark, Finland, France, Hungary, Luxembourg, Monaco, Sweden, Switzerland, the Former Yugoslav Republic of Macedonia, and the United Kingdom of Great Britain and Northern Ireland. *Id.*

¹⁴⁸ Protocol, *supra* note 94, art. 4.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* art. 5.

¹⁵¹ *Id.* art. 14.

business.¹⁵² This stringent liability scheme, upon entering into force, would present a forceful insertion of the polluter pays principle into the Basel Convention, enabling the Convention to unburden developing nations from environmental disasters by forcing polluting nations to assume the costs of their environmental blunders.

The main financial, compliance, and liability mechanisms of the Basel Convention embody environmental justice by advocating the redistribution of funding from industrialized to developing nations to attempt to unburden the latter of environmental disasters. By establishing trust funds so that wealthier nations could bear greater financial burdens to prevent and respond to waste problems in poorer nations, a compliance program to foster an open dialogue among nations and track potential violations before they occur, and a liability scheme that would make violators subject to strict liability for violations, the Convention's compensation provisions appear to posit the Convention as a beacon of hope for achieving environmental justice.

The Basel Convention consequently appears to advance impressive environmental justice provisions. It incorporates environmental justice's foundational element of procedural justice from its inception by giving developing nations access to the decision-making process and instituting safeguards to account for their specific vulnerabilities through differential treatment. Its goal of minimizing hazardous waste transport aims directly at the attainment of distributive justice by pushing for more LULUs to remain in industrialized nations. It has been lauded for implementing the precautionary principle through its notice and consent requirement that exporting nations receive prior informed consent before transporting wastes to importing countries¹⁵³ and its recognition of the right of importing nations to prohibit any or all imports without needing justification.¹⁵⁴ Furthermore, its establishment of regional centers in developing regions and its push to place the economic and legal implementation burdens on the international community, rather than on the individual nations coping with environmental disasters, thrust the polluter pays principle into the realm of trades of hazardous wastes.

IV. IMPEDIMENTS TO ENVIRONMENTALLY JUST WASTE DISPOSAL: KEY WEAKNESSES OF THE BASEL CONVENTION

Despite its progressive intentions, the recent disaster in Abidjan makes clear that the Basel Convention has fallen far short of either achieving environmental justice or ensuring the safety of third world nations in the realm of international hazardous waste disposal. Although no formal violations of the Basel Convention have been admitted by any of the nations

¹⁵² *Id.* art. 17.

¹⁵³ *Id.* art. 4, ¶ 1; see Webster-Main, *supra* note 13, at 69–73; Hugh J. Marbury, Note, *Hazardous Waste Exportation: The Global Manifestation of Environmental Racism*, 28 VAND. J. TRANSNAT'L L. 251, 264–65 (1995).

¹⁵⁴ Basel Convention, *supra* note 11, art. 4, ¶ 1(a).

or companies involved, the dumping of wastes in Abidjan in apparent contravention of the requirements of the Basel Convention had grave human health effects, including ten deaths, sixty-nine hospitalizations, over one hundred thousand medical consultations, and the need for special health centers to be erected and thirty psychologists hired to address mental trauma.¹⁵⁵ Environmental repercussions included air pollution, contamination of water sources, closure of the city's household waste treatment center for two months, and contamination of the food chain.¹⁵⁶ The disaster further generated economic and social consequences, such as the closure of many businesses due to contamination and a mass layoff of workers, halting of fishing activities and vegetable and livestock farming, displacement of people, closure of schools, and "outbreaks of anger and protest among the population."¹⁵⁷ The disaster could stand as a textbook case study of environmental injustice—a classic NIMBY refusal by several wealthy nations and companies capable of affording proper waste disposal to accept the waste, and the eventual dumping of the LULU in a poor, African nation lacking the resources to cope with the disaster. The Côte d'Ivoire disaster helps reveal the key weaknesses that have caused the Convention to fail to live up to its environmental justice sensibilities: insufficiency of the Trust Funds to meet the Convention's needs; inability of the PIC procedure to accurately verify ESM facilities; inefficacy of BCRCs to transfer adequate training or technology to developing nations to dispose of hazardous or other wastes or respond to disasters; inability of the Compliance Committee to properly monitor compliance; and a liability scheme that is not being utilized.

A. Insufficiency of the Trust Funds to Enable the Convention to Achieve Environmental Justice

Not only does the Côte d'Ivoire tragedy clearly demonstrate the Basel Convention's failure to protect human well being and the environment from environmental injustice, but it also brings to light the most critical weakness in the Convention—the gross inadequacies of the Convention's compensation scheme. At the beginning of 2006, the overall Trust Fund for the Basel Convention had only garnered \$771,419, and there was another \$6,938,177 that countries had pledged to the Fund over the years that had never been paid.¹⁵⁸ As last reported in August 2006, the Trust Fund had only

¹⁵⁵ Eighth Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Nairobi, Kenya, Nov. 27–Dec. 1, 2006, *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on its Eighth Meeting*, at 7, UNEP/CHW.8/16 (Jan. 5, 2007), available at <http://www.basel.int/meetings/cop/cop8/docs/16e.pdf> [hereinafter COP-8 Report].

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ SECRETARIAT OF THE BASEL CONVENTION, TRUST FUND FOR THE BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL (BC), STATUS OF CONTRIBUTIONS FOR THE YEAR 2006, at 8, available at <http://basel.int/convention/>

received \$3,211,447 to be used for the year 2006 and beyond, and an additional \$1,117,417 had been pledged by the parties but not fulfilled.¹⁵⁹ This even included a \$50,000 donation to the fund by the United States, which is not a Party to the Convention.¹⁶⁰ More appalling is that the Technical Trust Fund, which is intended to aid developing nations by providing money for technical assistance, only garnered \$411,424.¹⁶¹ Even if all the money pledged had actually been donated, and even if all the operating funds were rerouted to aid in cleanup efforts, the available funds would still have fallen embarrassingly short of being able to fund the clean up of even this one spill event in Côte d'Ivoire, which has already cost Côte d'Ivoire over \$28.9 million and for which cleaning of the soil pollution alone is additionally estimated to cost over \$39.4 million.¹⁶²

B. Inability of the PIC Procedure to Accurately Verify ESD Facilities

The Côte d'Ivoire incident also reveals the sheer insufficiency of the Basel Convention's PIC procedure to ensure environmental justice in transboundary movements among Parties to the Convention. The exporting company was fiscally based in the Netherlands, a Party to the Basel Convention by accession, which had a duty to ensure that the company had secured ESM of this waste movement. The exporter had a duty to disclose "[d]esignation and physical description of the waste including . . . its composition . . . and any information on any special handling requirements including emergency provisions in case of accidents,"¹⁶³ yet the company nonetheless flagrantly misrepresented the nature of the wastes by characterizing them as "regular slops."¹⁶⁴ Once Amsterdam Port Services refused the wastes, the Netherlands, as the State of export (although the wastes had been generated in several Mediterranean nations, and, in large part, Estonia),¹⁶⁵ had a duty to ensure the waste could be disposed of in an environmentally sound manner or an alternate "duty to re-import" the waste

contributions/bc2005%20february%202005.pdf.

¹⁵⁹ SECRETARIAT OF THE BASEL CONVENTION, TRUST FUND FOR THE BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL (BC), STATUS OF CONTRIBUTIONS AS AT [sic] AUGUST 31, 2006, at 3, *available at* <http://basel.int/convention/contributions/bc0806.pdf>. The first calculation was arrived at by adding the total "Collections during 2005 for 2006" and the total "Collections during 2006 for 2006 and future years." *Id.*

¹⁶⁰ *Id.*

¹⁶¹ SECRETARIAT OF THE BASEL CONVENTION, TRUST FUND TO ASSIST DEVELOPING COUNTRIES AND OTHER COUNTRIES IN NEED OF TECHNICAL ASSISTANCE (BD), STATUS OF CONTRIBUTIONS AS AT [sic] AUGUST 31, 2006, *available at* <http://basel.int/convention/contributions/bd0806.pdf>.

¹⁶² COP-8 Report, *supra* note 155, at 7. The numbers provided in the COP-8 Report were 22 million euro and 30 million euro, respectively, and they were converted according to the conversion rate on the date the COP-8 Report was released, January 5, 2007 at Oanda.com, <http://www.oanda.com/convert/classic>.

¹⁶³ Basel Convention, *supra* note 11, at annex V(A), § 13.

¹⁶⁴ Polgreen & Simons, *supra* note 1.

¹⁶⁵ Trafigura, Probo Koala Updates, http://web.archive.org/web/20070110064319/http://www.trafigura.com/trafigura_news/probo_koala_updates.aspx (last visited Apr. 13, 2008).

consistent with ESM pursuant to Article 8 of the Convention.¹⁶⁶ Yet, the waste nonetheless ended up in ill-equipped Abidjan.

Although the PIC procedure encourages pre-trade dialogue and consent among exporters and importers, its reliance upon the exporters and importers to verify that their facilities comply with ESM, without inspection of the facilities to substantiate this claim, is inadequate protection against untrained, conniving, careless, or poor nations or companies looking to profit from waste trading. The Convention's PIC procedure has been criticized for "creat[ing] opportunity for the improper disposal of hazardous wastes."¹⁶⁷ The approach has been open to criticism because, with no actual inspection of facilities by an enforcement body, exporters looking to trade in wastes might have an incentive to misrepresent the nature of the wastes, misleading importing nations into making the unsafe choice to consent.¹⁶⁸ Conversely, importing companies or nations would also have an incentive to misrepresent their facilities' capabilities in order to make a profit.¹⁶⁹ The Côte d'Ivoire disaster makes clear that the PIC procedure allows for the adequacy of facilities to be misrepresented because the shipping company involved asserts that the wastes were originally intended for Nigeria and, upon doubting Nigeria's ability to handle the wastes, the company relocated the wastes to Côte d'Ivoire because it believed that nation had "one of the largest and best equipped refinery ports in West Africa which has facilities for their safe disposal."¹⁷⁰

Whether the adequacy of the facilities to be used for this trade was actually misrepresented to the exporter or not, the fact remains that the method of disposal of the wastes was woefully inadequate. The PIC process does not require inspection of waste facilities but relies upon Parties to determine whether their facilities are inadequate, yet Parties may be wont to lie, misrepresent, or simply err in judgment from lack of knowledge on ESM when consenting to waste transfers. The PIC process has clearly been ineffective if the exporters and importers have been responsible for securing consent and verifying ESM facilities yet tragedies due to inadequate ESM procedures are still occurring.

Furthermore, PIC does not easily set forth who the exporting nation would be when multinational corporations, who do not necessarily fall within the jurisdiction of a single nation, are involved. Was it clear that the Netherlands, the fiscal headquarters of the exporting corporation, was the State of export with the duty of notification and the burden of ensuring ESM, and not Switzerland (the operational headquarters), England (the branch of the corporation that leased this boat), Greece (where the company that

¹⁶⁶ Basel Convention, *supra* note 11, art. 8.

¹⁶⁷ Waugh, *supra* note 55, at 524; *see also* Webster-Main, *supra* note 13, at 71 (describing the standard as "beset with ambiguities").

¹⁶⁸ Waugh, *supra* note 55, at 524–25.

¹⁶⁹ Nancy S. Zahedi, Note, *Implementing the Rotterdam Convention: The Challenges of Transforming Aspirational Goals into Effective Controls on Hazardous Pesticide Exports to Developing Countries*, 11 GEO. INT'L ENVTL. L. REV. 707, 736–37 (1999).

¹⁷⁰ Trafigura, *supra* note 165.

owned the boat was from), Panama (where the flag the boat was flying represented), or Estonia (the primary nation from which the wastes came)? Requiring the "State of export" to ensure that the exporter or generator has received PIC appears to be a more nebulous requirement than it appears when the exporters are multinational corporations. It is no surprise that initial critics of the Basel Convention thought that PIC provided insufficient protection for developing nations, arguing that the Convention "in effect invited industrialized nations to export hazardous waste to less developed nations, *because it only required prior informed consent*."¹⁷¹ Without an external mechanism to verify ESM facilities, PIC, a procedure which should enable the Basel Convention to achieve environmental justice, is doomed to continued failure.

C. Inefficacy of BCRCs to Transfer Adequate Training or Technology to Developing Nations

The incident in Côte d'Ivoire further emphasizes that the Basel Convention's regional training centers for the transfer of technology (BCRCs), while a forward-thinking concept, have failed to equip developing nations with the ability to establish environmentally sound waste facilities, prevent accidents, or respond to resulting environmental disasters. This is largely because no mechanism has been established to ensure funding for these facilities, which have been incapable of enabling developing nations to develop sound methods for disposing of hazardous wastes and reliably meet clean up needs for environmental spills.¹⁷² There are four regional training centers in the African continent,¹⁷³ yet none of them sufficiently educated or trained the region to prevent the harms caused by the Côte d'Ivoire incident. Additionally, despite the BCRCs' "core function" of "[c]ooperating in mobilization of human, financial and material means in order to meet the urgent needs at the request of the Party(ies) of the region faced with incidents or accidents which cannot be solved with the means of the individual Party(ies) concerned,"¹⁷⁴ the only international aid Côte d'Ivoire has acknowledged receipt of following the disaster has been a monetary contribution from Japan.¹⁷⁵ Undoubtedly, the creation of BCRCs remains a

¹⁷¹ John S. Applegate, *The Taming of the Precautionary Principle*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 13, 40 (2002) (emphasis added).

¹⁷² Paula Barrios, *The Rotterdam Convention on Hazardous Chemicals: A Meaningful Step Toward Environmental Protection?*, 16 GEO. INT'L ENVTL. L. REV. 679, 747-48 (2004). In the Secretariat's draft report on the operation of the BCRCs, all the assessments made by the Secretariat and all the self-assessments reported by the centers themselves identified lack of funding as a primary obstacle to success of the centers. 2007 BCRC DRAFT REPORT, *supra* note 130, at 2-38.

¹⁷³ See SECRETARIAT OF THE BASEL CONVENTION, BASEL CONVENTION REGIONAL AND COORDINATING CENTRES 7, 25, available at <http://www.basel.int/pub/BCRC-brochure.pdf>.

¹⁷⁴ *Id.*

¹⁷⁵ COP-8 Report, *supra* note 155, at 7. This assertion refers to aid by other nations, and does not include a recently proposed settlement offer by the shipping company. Wachira Kigotho, *Dutch Firm to Compensate Ivory Coast for Dumping Incident; Civil Case Planned*, 30 INT'L ENV'T

powerful step in the achievement of environmental justice, but the regional centers are hindered primarily by inadequate funding. This insufficiency prevents them from providing the training and technological transfers developing regions need to equitably protect human health and the environment.

D. Inefficacy of the Compliance Committee to Monitor Compliance

The Côte d'Ivoire incident also highlights the Basel Convention's Compliance Committee's inaction to date to protect developing nations from environmentally unsound transportation of wastes. The Committee has not succeeded in thwarting even the most clearly environmentally unsound transboundary disposal of wastes from proceeding. The transfer of toxic wastes to Abidjan clearly contravened the most elemental requirement of the Basel Convention—ensuring that the importing nation's disposal or recovery methods were environmentally sound. The exporting corporation was linked not only to the Netherlands, but also Greece, the United Kingdom, Switzerland, and Panama, all Parties to the Convention by ratification, who each had a duty under Article 19 to disclose to the Secretary any evidence of improper waste disposal practices. Although it is unclear if these nations had prior knowledge of this unsafe transboundary movement of wastes, they each nonetheless had a duty to submit potential noncompliance issues to the Compliance Committee so that the Compliance Committee could assist¹⁷⁶ them in averting crises such as the Côte d'Ivoire incident.

However, the Compliance Committee has had no opportunities to deter non-compliance to date because neither the Secretariat nor the Parties have made a single submission to the Compliance Committee.¹⁷⁷ In fact, the last meeting of the Compliance Committee prior to COP-8 noted that its ability to accurately assess compliance was seriously frustrated by the failure of Parties to submit national reports to the Secretariat.¹⁷⁸ The Compliance Committee noted that fifteen percent of all Parties have either not reported regularly or have never reported despite being told of their obligation to do

REP. (BNA) 168 (Feb. 21, 2007).

¹⁷⁶ COP-6 Report, *supra* note 139, at 47–48.

¹⁷⁷ Eighth Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Nairobi, Kenya, Nov. 27–Dec. 1, 2006, *Compliance Committee, Item 8 of the Provisional Agenda*, at 3, UNEP/CHW.8/12 (June 21, 2006), *available at* http://www.unon.org/confss/doc/unep/chw/chw_08/chw_8_12/K0651786.pdf [hereinafter *Compliance Committee Item 8*]; Am. Law Inst., Am. Bar Ass'n Continuing Legal Educ., *MEA Enforcement and Compliance Meeting Bulletin: A Summary Report of the High-Level Meeting on Compliance With and Enforcement Of Multilateral Environmental Agreements*, SL098 ALI-ABA 461, 472 (2006) [hereinafter *MEA Enforcement*].

¹⁷⁸ UNEP, Committee for Administering the Mechanism for Promoting the Implementation and Compliance of the Basel Convention, Geneva, Switz., Apr. 8–9, 2006, *Report of the Fourth Session of the Basel Convention Implementation and Compliance Committee*, at 3, UNEP/CHW/CC/4/6 (Apr. 11, 2006), *available at* www.basel.int/legalmatters/compcommittee/reports/cc4_06.doc [hereinafter *Fourth Compliance Committee Report*].

so.¹⁷⁹ In addition, the percentage of Parties reporting data on generation of hazardous wastes has steadily declined over time, with sixty-four percent of Parties reporting in 1993 and only twenty-seven percent in 2000.¹⁸⁰ From the results of a questionnaire distributed to the Parties, the Compliance Committee recognized that the main barrier to consistent national reporting was a lack of capacity of some parties to do so, because of lack of inventory, limited personnel and training to collect data, lack of training on how to complete reports even if there is data collected, and financial constraints.¹⁸¹ Also, the Committee noted that efforts to encourage reporting were often futile because reporting was not really obligatory, but merely voluntary.¹⁸² It is also possible that Parties failed to self-submit potential compliance issues in order to preserve their reputation or failed to report potential noncompliance by other Parties to avoid the stigma associated with being a whistleblower, although neither the Parties nor the Committee acknowledged these as obstacles to submission.

The obvious inadequacies of the Compliance Committee were noted in the Secretary's agenda for COP-8, which included adoption of a decision that "Calls upon all Parties that are in a position to do so to make financial or in-kind contributions to assist the Committee to carry out its work programme," and, generally, "Calls upon Parties to make use of the Mechanism for Promoting Implementation and Compliance."¹⁸³ Without Parties cooperating to provide national reporting data and to inform the Compliance Committee of potential problems with compliance, the Compliance Committee has yet to be relied upon for investigation of potential compliance problems,¹⁸⁴ and has therefore been stunted in its abilities to ensure compliance.

E. Protocol on Liability's Failure to Garner Support

The Côte d'Ivoire incident also emphasizes the inefficacy of the Convention's liability system to provide for restitution, deterrence, or compensation after accidents have occurred, which is largely a result of the failure of the Parties to adopt the Protocol on Liability. The Basel Convention's Protocol on Liability has been characterized as one of the MEA liability instruments that has "yet to function in a satisfactory manner."¹⁸⁵ The Protocol has only been ratified by seven Parties, far short of the mere twenty required for its entry into force.¹⁸⁶ The impetus behind the

¹⁷⁹ *Id.*

¹⁸⁰ UNEP, *Global Trends in Generation and Transboundary Movement of Hazardous Wastes and Other Wastes*, No. 14, at 12, SBC No. 02/14 (Nov. 2002) (prepared by Kees Wielenga), available at <http://basel.int/natreporting/trends2.pdf>.

¹⁸¹ *Fourth Compliance Committee Report*, *supra* note 178, at 3.

¹⁸² *Id.*

¹⁸³ *Compliance Committee Item 8*, *supra* note 177, at 48.

¹⁸⁴ *MEA Enforcement*, *supra* note 177, at 472.

¹⁸⁵ LOUKA, *supra* note 47, at 450.

¹⁸⁶ Secretariat of the Basel Convention, Protocol on Liability and Compensation, Ratifications, <http://basel.int/ratif/protocol.htm> (last visited Apr. 13, 2008).

negotiations in 1993 that eventually led to the Protocol was the concern expressed by developing nations that they did not possess the funds or technologies to respond to illegal dumping or accidental spills;¹⁸⁷ yet, few developing nations have ratified the Protocol.

The compromises that were made to enlist support of the industrialized and developing nations for the Protocol have now served to undermine its passage. The biggest sources of conflict prior to drafting of the Protocol were the establishment of the equivalent of a "Superfund" to deal with future accidents and the potential for generators to have to pay for disasters that occurred once the wastes had arrived in the State of import.¹⁸⁸ Both measures were abandoned prior to establishment of the Protocol in 1999.¹⁸⁹ Although all seven of the Parties that have ratified the resulting Protocol are developing nations, the Protocol has failed to garner the ratification of any industrialized nations or the majority of developing nations. Industrialized, OECD nations have largely failed to support the Protocol because of the strict liability provisions placed upon the notifying Party, arguing that the OECD liability to which they would already be subject for a hazardous incident is punishment enough.¹⁹⁰

One reason developing nations may have been reluctant to ratify the Protocol is that, contrary to their original need for assistance to cope with hazardous incidents, the Protocol as negotiated actually created significant loopholes in liability that would undermine developing nations' abilities to deal with wastes. For example, the Protocol would not be used to hold the generator and exporter liable for damage occurring after the importer received "operational control" of the waste.¹⁹¹ This loophole would give industrialized nations little incentive to ensure that environmentally sound facilities exist in the importing nation, and would potentially leave to States of import the costs of enforcement and "aftercare," or future unanticipated consequences of waste disposal such as groundwater contamination.¹⁹² It also could potentially create an incentive for generating nations to export their wastes because hiring an exporting company to notify and export the waste would relieve generators both of domestic disposal costs *and* of liability for international disposal,¹⁹³ which would undermine a primary goal of the convention to dispose of wastes in the generating nation unless technologically unfeasible. Another qualm of developing nations is Article 3,

¹⁸⁷ Webster-Main, *supra* note 13, at 74.

¹⁸⁸ Jerrold A. Long, *Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wastes and Their Disposal*, 1999 COLO. J. INT'L ENVTL. L. & POL'Y 253, 254-55 (1999).

¹⁸⁹ *Id.*

¹⁹⁰ See Daniel Pruzin, *Hazardous Waste: Agreement on Liability Protocol Reached at Basel Conference of Parties*, Daily Env't Rep. (BNA) No. 238, at AA-1 (Dec. 13, 1999). Note that the generator and exporter could still be liable for damage and violations that occurred prior to importation, however, national laws would still be used regarding improper hazardous waste disposal within the country of import's borders.

¹⁹¹ Protocol, *supra* note 94, art. 4.

¹⁹² Long, *supra* note 188, at 257-58.

¹⁹³ *Id.*

paragraph 7(a) of the Protocol, which would exempt from liability and compensation Parties that have made bilateral or multilateral agreements that “fully meet or exceed” the Protocol provisions.¹⁹⁴ This would leave many waste transporters unsusceptible to the Protocol, which would be a particularly unappealing aspect of developing nations confronting the possibility of these wastes entering their borders.¹⁹⁵ Unfortunately, although the Protocol may have imperfections, the inability of the Protocol to enlist the support of either industrialized or most developing nations has resulted in there being *no* enforceable liability scheme in place under the Basel Convention and, correspondingly, no security at all that developing nations will have a source of funding if a hazardous incident were to occur.

V. THE BASEL BAN AMENDMENT: WHY IT AROSE AND OBSTACLES TO RATIFICATION

From over a decade before the incident in Abidjan, many of the Parties have advocated an amendment to the Convention to ban shipments from industrialized to developing nations in an attempt to improve the Convention’s efficacy in light of pervasive environmental justice problems evident by the Convention’s failure to adequately protect health and the environment in developing nations. In 1994, the second Conference of the Parties (COP-2) attempted to address the inadequacies of the Basel Convention, which had already become apparent, by proposing to ban the export from OECD to Annex VII countries (nations other than OECD nations, EC nations, or Lichtenstein) of hazardous wastes intended for final disposal and of wastes intended for recycling or recovery.¹⁹⁶ At the third Conference of the Parties (COP-3), in 1995, the parties adopted the Ban Amendment, as well as Annex VII, by Decision III/1.¹⁹⁷ The goal of the Ban

¹⁹⁴ Protocol, *supra* note 94, art. 3, ¶ 7(a).

¹⁹⁵ Long, *supra* note 188, at 259–60; *see also* Webster-Main, *supra* note 13, at 89–92.

¹⁹⁶ UNEP, Second Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, Geneva, Switz., Mar. 21–25, 1994, *Report of the Second Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal*, at 19–20, U.N. Doc. UNEP/CHW.2/30 (Mar. 25, 1994) (COP-2 Report, Decision II/12), available at <http://www.basel.int/meetings/cop/cop1-4/cop2repE.pdf>; *see also* The Basel Convention, Basel Ban, <http://basel.int/pub/baselban.html> (last visited Apr. 13, 2008).

¹⁹⁷ Secretariat of the Basel Convention, Ratifications of the Ban Amendment, <http://www.basel.int/ratif/ban-alpha.htm> (last visited Apr. 13, 2008). The Basel Ban Amendment, Decision III/1, as drafted at COP-3, states:

The Conference,

Recalling that at the first meeting of the Conference of the Parties to the Basel Convention, a request was made for the prohibition of hazardous waste shipments from industrialized countries to developing countries;

Recalling decision II/12 of the Conference;

Noting that:

- the Technical Working Group is instructed by this Conference to continue its work on hazard characterization of wastes subject to the Basel Convention (decision III/12);
- the Technical Working Group has already commenced its work on the development of

was to force industrialized nations to retain wastes produced within their own borders.¹⁹⁸ In order to make this “Basel Ban” legally enforceable, however, it has to be formally adopted into the Basel Convention by ratification by three-fourths of the Parties who accepted it.¹⁹⁹ Thirteen years later, the Ban Amendment has still not entered into force.²⁰⁰

lists of wastes which are hazardous and wastes which are not subject to the Convention;

- those lists (document UNEP/CHW.3/Inf.4) already offer useful guidance but are not yet complete or fully accepted;
- the Technical Working Group will develop technical guidelines to assist any Party or State that has sovereign right to conclude agreements or arrangements including those under Article 11 concerning the transboundary movement of hazardous wastes.

1. Instructs the Technical Working Group to give full priority to completing the work on hazard characterization and the development of lists and technical guidelines in order to submit them for approval to the fourth meeting of the Conference of the Parties;

2. Decides that the Conference of the Parties shall make a decision on a list(s) at its fourth meeting;

3. Decides to adopt the following amendment to the Convention:

Insert new preambular paragraph 7 bis:

Recognizing that transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous wastes as required by this Convention;

Insert new Article 4A:

1. Each Party listed in Annex VII shall prohibit all transboundary movements of hazardous wastes which are destined for operations according to Annex IV A, to States not listed in Annex VII.

2. Each Party listed in Annex VII shall phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes under Article 1(i)(a) of the Convention which are destined for operations according to Annex IV B to States not listed in Annex VII. Such transboundary movement shall not be prohibited unless the wastes in question are characterised as hazardous under the Convention.

Annex VII

Parties and other States which are members of OECD, EC, Liechtenstein.

Third Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Geneva, Switz., Sept. 18–22, 1995, *Decisions Adopted by the Third Meeting of the Conference of the Parties to the Basel Convention*, at 1–2, U.N. Doc. UNEP/CHW.3/35 (Nov. 28, 1995), available at http://www.basel.int/meetings/cop/cop1-4/cop3decisions_e.pdf.

Subsequent to the adoption of the Ban Amendment and Annex VII, the Parties to the Convention adopted Annexes VIII and IX at COP-4 in order to clarify beyond what was already provided in Annexes I and III which wastes would be subject to the Ban (Annex VIII wastes) and which wastes would not (Annex IX wastes). International Institute for Sustainable Development, IISD Linkages—Chemical Management, http://www.iisd.ca/process/chemical_management-baselintr.htm (last visited Apr. 13, 2008).

¹⁹⁸ Waugh, *supra* note 55, at 507.

¹⁹⁹ Secretariat of the Basel Convention, Ban Amendment, <http://basel.int/pub/baselban.html> (last visited Apr. 13, 2008).

²⁰⁰ *Id.* Controversy has arisen as to whether the Ban, which has been ratified by sixty-three Parties, should be in force. Secretariat of the Basel Convention, Ratifications of the Ban Amendment, <http://basel.int/ratif/ban-alpha.htm> (last visited Apr. 13, 2008). Article 17, paragraph five of the Basel Convention states that Amendments to the Convention will enter into force between Parties having accepting them after acceptance “by at least three-fourths of the Parties

Although admirable in its intentions, the Basel Ban represents a fundamental shifting of the delicate balance between industrialized and developing nations' interests that enabled the initial passage of the Basel Convention, which may account for its inability to gain ratification. The Basel Convention prior to the introduction of the Basel Ban represented an agreement amenable to the interests of both developing and industrialized nations, in which trade in wastes was permitted but was subject to regulation, and any nation had not only the ability but the "*right* to prohibit the import of hazardous wastes or other wastes" for any reason.²⁰¹ The Basel Ban, however, would prohibit exportation of wastes to all nations that are not Annex VII member nations, of which there are only thirty-nine.²⁰²

The Ban Amendment has been lauded as the best way to force a reduction in overall waste production because generators will know they will not be able to export their wastes to the developing world²⁰³ and as a way to reduce the distances wastes would have to travel by forcing the wastes produced in Annex VII countries to stay in only those nations.²⁰⁴ When it was first proposed, it was even hailed as "a striking victory for global environmental justice."²⁰⁵ But, the Basel Ban, although commendably seeking to implement the initial goal sought by many developing nations in joining the Basel Convention, gives little incentive for industrialized nations, who still aim for environmental protection in a framework that enables safe waste trading, to acquiesce.

who accepted the amendments to the protocol concerned." Basel Convention, *supra* note 11, art. 17, ¶ 5. This had historically been interpreted by some parties and environmental groups to mean three-fourths "of the Parties at the time of adoption of the amendment," and since there were eighty-two Parties at the time of adoption of the Ban Amendment, that would mean sixty-two ratifications would suffice for passage of the Amendment, although initial controversy surrounds whether those sixty-two need be Parties that were present at the time of adoption or not. BASEL ACTION NETWORK, A CALL FOR AN INTERPRETATION OF ARTICLE 17 BY THE PARTIES FOR RAPID ENTRY INTO FORCE OF THE BASEL BAN AMENDMENT 1 (2006), *available at* http://ban.org/Library/ban_entry_into_force_06.pdf. An additional controversy has arisen following an interpretation by the U.N. Office of Legal Affairs (OLA) advocating a "current time approach," allowing entrance into force to be calculated on the basis of the percentage of the Parties at the time each ratification is deposited, which could require as many as 126 or more ratifications. *Id.* Although sixty-three Parties have ratified the Ban, the OLA order will be controlling unless the Parties resolve to adopt the historical approach advocated by the Basel Action Network, and, since the Parties have failed to act to allow sixty-two ratifications to suffice, the Ban Amendment has not entered into force. *Id.* at 2.

²⁰¹ Basel Convention, *supra* note 11, art. 4, ¶ 1 (emphasis added). The Bamako Convention was founded upon this very notion in order to prevent importation of hazardous wastes into Africa. *See supra* note 74 and accompanying text.

²⁰² *See* Organization for Economic Co-operation and Development, Members and Partners, http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html (last visited Apr. 13, 2008) (listing the 30 OECD nations); European Union, Member States, <http://userpage.chemie.fu-berlin.de/adressen/eu.html> (last visited Apr. 13, 2008). These 38 plus Lichtenstein equal 39.

²⁰³ Waugh, *supra* note 55, at 521.

²⁰⁴ Basel Action Network, *Annex VII Expansion?—An Ignoble Attempt to Undo the Basel Ban*, <http://www.ban.org/Library/briefing3.html> (last visited Apr. 13, 2008).

²⁰⁵ *OECD Hazwaste Export Ban by 1998*, HAZNEWS, May 1994, at 74.

Not surprisingly, the Basel Ban has been met with resistance from many industrialized nations.²⁰⁶ Most notable among those is the United States, which became a signatory to the Basel Convention as early as March 22, 1990.²⁰⁷ To become a party to the Basel Convention, each party's national legislation must comport with the Basel requirements.²⁰⁸ The United States Senate actually voted to ratify the Basel Convention on August 11, 1992, after which President Clinton in his very first term pressed for the necessary modifications to be made to the United States' waste disposal and recovery law, the Resource Conservation and Recovery Act (RCRA)²⁰⁹ in order to facilitate quick implementation of the Basel Convention.²¹⁰ But, the Clinton administration announced the new legislation that would enact the changes to RCRA required to comply with the Basel provisions mandating a duty of re-importation upon exporting nations in 1994, the same year the Basel Ban Amendment was proposed at COP-2.²¹¹ The very proposal of the Basel Ban Amendment led the United States Department of Commerce to publicly oppose the entire Basel Convention,²¹² and the United States has still failed to ratify the Basel Convention.²¹³ Among the reasons the United States has

²⁰⁶ When the Ban was proposed, Greenpeace named the "sinister seven" key opponents of the Basel Ban as Australia, Canada, Germany, Japan, the Netherlands, the United Kingdom, and the United States. Jim Puckett & Cathy Fogel, Greenpeace International, *A Victory for Environment and Justice: The Basel Ban and How it Happened* (1994), http://www.ban.org/about_basel_ban/a_victory.html (last visited Apr. 13, 2008).

²⁰⁷ Basel Ratifications, *supra* note 55.

²⁰⁸ Basel Convention, *supra* note 11, art. 4, ¶ 4.

²⁰⁹ Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k (2000) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992).

²¹⁰ See 138 CONG. REC. S12,291-01 (daily ed. Aug. 11, 1992) (record of the Senate's vote to ratify the Basel Convention); *EPA: Agency Official Discusses Cabinet Bill, Other Upcoming Legislative Agenda Items*, Daily Env't Rep. (BNA), at D3 (Oct. 8, 1993) [hereinafter *Legislative Agenda*] (stating that an EPA official said "[t]he Clinton administration wants to move on ratification of the Basel [C]onvention as part of a scaled-down Resource Conservation and Recovery Act reauthorization bill"); see also Mark Bradford, Note, *The United States, China & The Basel Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal*, 8 FORDHAM ENVTL. L.J. 305, 328 (1997) (summarizing these developments). The Resource Conservation and Recovery Act lacked a provision imposing a duty to re-import upon an exporter when the intended importer is found incapable of receiving wastes, and, more critically, lacked a provision restricting transports if the exporter or the United States knew the disposal facility in the State of import would be inadequate, which were elements of the Basel Convention with which each nation's legislation needed to comport in order to become a Party to the Convention. See *Hazardous Waste: Mishandled Exports Would Be Returned to U.S. Under Administration's New Policy*, Daily Env't Rep. (BNA), at D10 (Mar. 2, 1994) [hereinafter *Mishandled Exports*] (discussing that the new proposed legislation would require re-importation of illegally imported wastes and noting that the current United States law only required notice and consent so that the standard was that if an "importer grants permission, the waste may be shipped even if the exporter or the U.S. government know the material will not be handled properly at its destination").

²¹¹ *Mishandled Exports*, *supra* note 210; The Basel Convention, Basel Ban, *supra* note 196.

²¹² *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); *"Wait-and-See" May Become U.S. Policy on Recent Export Ban Under Basel Treaty*, Daily Env't Rep. (BNA), at D8 (June 20, 1994).

²¹³ Basel Ratifications, *supra* note 55.

opposed the Basel Ban are that it would restrict free trade and limit freedom of contract,²¹⁴ that a ban would only cause the number of illicit trades to rise,²¹⁵ that a ban would not be profitable,²¹⁶ and that, suddenly, its domestic regulations were adequate to ensure the “proper control” of transboundary waste movements.²¹⁷

Although resistance by industrialized nations to a total ban on exportation of wastes to non-Annex VII nations might have been anticipated considering their general opposition to such a ban from before the Basel Convention was ratified, the Ban has also met with resistance from some developing nations, who generally tended to support this notion in the original Basel Convention negotiations.²¹⁸ A central reason developing nations have opposed the ban is because many of them rely on the recovery of materials from imported international “waste” as a valuable source of income.²¹⁹ For example, India and the Philippines have extracted lead from lead-acid batteries imported from industrialized nations.²²⁰ This reclamation not only provides income for these countries but also puts materials into use that would otherwise be sitting at a disposal site. In fact, India, Brazil, South Korea, the Philippines, and Malaysia all initially expressed opposition to the ban because it would threaten their sources of revenue and raw materials; South Korea even argued for an amendment retaining the right for industrialized nations to recycle with developing nations.²²¹ In addition, after the Ban Amendment was adopted—without the support of the United States—at COP-3, several additional non-Annex VII nations—nations that would not have been able to continue to receive hazardous wastes after the Ban was ratified, namely Monaco, Israel, and Slovenia—petitioned for Annex VII status in order to be able to continue to receive hazardous wastes despite the Ban, although this attempt was unsuccessful.²²²

²¹⁴ INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY 176 (Anthony D’Amato & Kirsten Engel eds., 1996); *see also* Webster-Main, *supra* note 13, at 82.

²¹⁵ Bradford, *supra* note 210, at 315; *see also* Sylvia F. Liu, Note, *The Koko Incident: Developing International Norms for the Transboundary Movement of Hazardous Waste*, 8 J. NAT. RESOURCES & ENVTL. L. 121, 151 (1992) (noting that regulation is difficult to enforce, and often results in bribes).

²¹⁶ INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY, *supra* note 214; Webster-Main, *supra* note 13, at 82.

²¹⁷ KATE O’NEILL, WASTE TRADING AMONG RICH NATIONS: BUILDING A NEW THEORY OF ENVIRONMENTAL REGULATION 42 (2000). Other nations, such as the Netherlands, opposed the Ban on the ground that domestic conditions made safe waste disposal impossible. *See* Sean D. Murphy, *Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes*, 88 AM. J. INT’L L. 24, 44 (1994) (discussing the Netherlands’ unique hydro-geological conditions).

²¹⁸ Webster-Main, *supra* note 13, at 82.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Environment: Green Light for Export Ban on all Hazardous Waste*, EUR. INFO. SERV., Sept. 27, 1995; *see also* Dean M. Poulakidas, *Waste Trade and Disposal in the Americas: The Need for and Benefits of a Regional Response*, 21 VT. L. REV. 873, 896–98 (1997) (discussing opposition by Brazil, India, and South Korea). Today, the only one of the nations mentioned that has ratified the Basel Ban is Malaysia. Secretariat of the Basel Convention, *Ratifications of the Ban Amendment*, <http://basel.int/ratif/ban-alpha.htm> (last visited Apr. 13, 2008).

²²² Basel Action Network, *Basel Ban Victory at COP4*, http://www.ban.org/issues_for_cop4/

Furthermore, a prohibition on hazardous wastes entering non-OECD nations would likely stunt any initiative to build safe, environmentally-sound disposal facilities in developing areas, as industrialized nations would have no incentive to transfer funds or technologies to nations that cannot accept their wastes anyway.²²³ This would inhibit the growth of a potentially lucrative source of income for developing nations, and also invite environmental disasters, for then developing nations would have no infrastructure to safely clean up any illegal dumping of hazardous wastes that might occur in these areas. Although the Basel Ban was proposed as a mechanism to impose a strict rule in order to protect the health and safety of developing nations, it may be cutting off a source of income and bargaining power critical for these nations to achieve environmental justice. Although a ban on importation of hazardous wastes to most developing nations is critical to reducing the global production of hazardous wastes, the Basel Ban, as proposed, is not the only way to improve the efficacy of the Basel Convention in achieving its environmental justice goals, nor may its severe tactic be the best way.

VI. ALTERNATIVES TO THE BASEL BAN FOR BOLSTERING THE ACHIEVEMENT OF ENVIRONMENTAL JUSTICE IN THE BASEL CONVENTION

The lack of a total ban on importation of hazardous wastes by developing nations was not the only weakness accounting for the failure of the Basel Convention to achieve environmental justice in the realm of international waste trading, nor is the imposition of the Basel Ban, alone, the best route for achieving environmental justice. Despite the support it has received, the Basel Ban is still opposed by both industrialized and developing nations who agreed with the objectives of environmental justice intrinsically laden in the Basel Convention but want at least the *option* of trading certain wastes where environmentally practicable.²²⁴ Such an option can be preserved if the Convention addresses some of its lingering loopholes that have enabled incidents like that in Côte d'Ivoire not only to take place but to continue to cripple developing nations struggling to cope with the consequences.

As discussed in Part V, some of the key problems thwarting the Basel Convention's propensity to achieve environmental justice are a lack of a monitoring body to ensure ESM within the PIC scheme, the failure of the Compliance Committee to be used by the parties to ensure compliance, the failure of the Protocol on Liability to be utilized by the Parties to condemn violators, and the nonexistence of a stable source of funding to be used to strengthen regional training centers or respond to environmental disasters. By retaining the Basel Convention's initial system by which any nation could, but did not have to, ban all hazardous or other wastes from its

what_happened.html (last visited Apr. 13, 2008).

²²³ See generally Poulakidas, *supra* note 221.

²²⁴ See Maria Isolda P. Guevara, The Basel Convention Export Ban Amendment: Arguments Against Ratification, <http://www.ban.org/Library/icme.html> (last visited Apr. 13, 2008).

borders, but closing some of the other loopholes left open by the Basel Convention before trades occur and after accidents occur, the Basel Convention could give a broader range of nations incentives to become Parties, enabling more interests to be represented at the international table, and affording more nations with economic opportunities to ensure more equitable opportunities for the future.²²⁵

A. Pre-Trade Safeguard: An Inspection and Authorization Requirement

Although the PIC process represents one model for achieving procedural justice by engaging both importing and exporting parties in a safety dialogue, its use in the Basel Convention leaves transboundary waste movements vulnerable to environmental injustices by relying on the good faith of the importer and exporter to verify ESM. Many sources credit the Basel Convention with being one of the few international environmental treaties to apply the precautionary principle, relying on its PIC provision as a manifestation of this progressive idea.²²⁶ However, although it is commendable in its goals and has been credited with breaking the mold for the precautionary principle to come to the forefront of hazardous waste disposal negotiations, in actuality, the principle of PIC falls short of being truly precautionary in the current international trading context.

PIC simply requires that the exporting, importing, and transit nations receive prior informed consent and assert that the waste disposal or recovery facilities will “protect human health and the environment against the adverse effects which may result from such wastes.”²²⁷ Under this model, a multinational corporation, dishonest nation, honest but inexperienced nation, or even one dishonest trader could go through the PIC process and certify that human health and the environment will be safe, but, with no oversight of their assertions, could be carelessly or intentionally enabling trades to proceed at the peril of the importing nation. Although the PIC process in the Convention did make headway for the entrance of the precautionary principle into international discourse, it is clear that additional safeguards are required to ensure that safety is prioritized over money and that developing nations do not get taken advantage of.

In order to best ensure that the health and safety interests of people in industrialized and developing nations are protected in the stages before a waste trade proceeds, a reviewing body could be created to inspect facilities

²²⁵ This includes not only developing nations, but also industrialized nations involved in hazardous waste trading, whose ratification of the Basel Convention would likely have a strong correlation to the curbing of trades condemned by the Basel Convention as dangerous or insensitive to the needs of developing nations. Many authors have already noted that the ratification of the Basel Convention by the United States, for example, is imperative for the success of the Basel Convention in reducing the risks of transboundary trade of hazardous wastes. See Bradford, *supra* note 210, at 325–28; Choski, *supra* note 146, at 509.

²²⁶ See, e.g., Zahedi, *supra* note 169, at 735. For a review of the precautionary principle, see *supra* Part II.A.2.

²²⁷ Basel Convention, *supra* note 11, art. 2, ¶ 8.

to ensure their compliance with ESM standards set forth by the Parties.²²⁸ Then, this body could grant or deny authorization permits for facilities on the basis of these inspections. The Secretariat of the Basel Convention currently has the task of receiving and conveying information regarding waste disposal sites and technologies,²²⁹ which may be helpful to nations actively seeking assistance but will not provide any oversight over potentially dangerous trade agreements. Additionally, the Compliance Committee, created in order to receive and respond in a strictly non-confrontational manner to instances of noncompliance, has also failed to monitor ESM because the Parties have failed to report any such instances either directly to the Committee or in their voluntary national reporting.²³⁰

By predicated the ability of a Party to import hazardous or other wastes on prior examination and verification of their facilities, rather than simply on the Parties' good faith, wastes transfers could continue to proceed, but only to those facilities truly utilizing ESM practices. This would encourage the growth of technology in developing nations looking to profit from proper disposal or recycling practices and simultaneously protect human health and the environment in these nations by imposing a temporary ban on imports until a permit verifying ESM is authorized. Requiring an inspecting body to review and grant authorization for each facility, although it would slow trade negotiations at first, would nonetheless enable trades to proceed in the future, but only once they are deemed objectively safe. Such a procedure would be implementing the precautionary principle and preventing developing nations from being taken advantage of without the trade-crippling effects of the Basel Ban.

Although this exact two-pronged (inspection and then authorization) pre-trade technique has not been utilized by any MEA, the International Atomic Energy Agency's (IAEA) inspection system²³¹ and the United States' National Pollutant Discharge Elimination System (NPDES)²³² permitting system of the Clean Water Act²³³ could be relied upon concomitantly to create a loose framework. Regarding the inspection of facilities under international agreements, "on-site inspections by an international body to verify matters of compliance" are "rare."²³⁴ However, the IAEA inspection system is one example of a system that ensures compliance by allowing an

²²⁸ See *supra* note 81 and accompanying text.

²²⁹ Basel Convention, *supra* note 11, arts. 12, 16.

²³⁰ See *Compliance Committee Item 8*, *supra* note 177, at 3 (stating "the Committee had not received any submissions from Parties or the secretariat. Accordingly, there are no items for the Committee to report on under paragraphs 19 and 20 of the terms of reference for the compliance mechanism").

²³¹ The IAEA's inspection system was established by the Treaty on the Non-Proliferation of Nuclear Weapons. Treaty on the Non-Proliferation of Nuclear Weapons, art. III, *opened for signature* July 1, 1968, 21 UST 483, 487-88, 729 U.N.T.S. 161, 171-72 (*entered into force* Mar. 5, 1970).

²³² Federal Water Pollution Control Act, 33 U.S.C. § 1342 (2000).

²³³ *Id.* §§ 1251-1387 (2000).

²³⁴ LOUKA, *supra* note 47, at 126.

international body to inspect facilities for safety purposes.²³⁵ The IAEA is authorized to monitor compliance by conducting “safeguards inspections” of facilities used in bilateral or multilateral agreements or at the request of any Parties in order to ensure that nuclear materials are not being used “to further any military purpose.”²³⁶ Although the IAEA does not predicate entrance into bilateral or multilateral agreements upon these inspections, the Clean Water Act provides an example of a system in which an actor may not proceed without a permit. The Clean Water Act requires an NPDES permit before the “addition” of any “pollutant” from a “point source” into “waters of the United States” may occur.²³⁷ Along with an inspection of a hazardous waste facility, a similar permit could be required to specify the particular types of hazardous wastes a facility is permitted to accept based on its unique capabilities.

Drawing upon tools from both the IAEA inspection process and the Clean Water Act’s permitting system, the Basel Convention could further its environmental justice objectives by requiring each facility in developing nations (and industrialized nations, too) to pass an inspection and receive a permit before it could accept hazardous or other wastes. Rather than relying upon the importer and exporter to verify ESM, each facility would be inspected to ensure compliance with the most current ESM standards endorsed by the Parties’ Technical Guidelines in order to ensure safe disposal practices. The membership and monetary resources of the Compliance Committee, which is currently underutilized, could be reorganized to perform both the inspection and permitting roles prior to waste trades between industrialized and developing nations.

This inspection and authorization system would better serve the interests of environmental justice in the long haul than the proposed Basel Ban by encouraging developing nations to become self-sufficient and to economically advance. The proposed Basel Ban Amendment would prohibit all trades to non-Annex VII nations indefinitely, presumably until each nation became admitted to the OECD or the EC and so became an Annex VII nation. This would provide little incentive for developing nations to develop sound waste disposal facilities and would also leave these nations devoid of the technology to cope with illegal transfers. Alternately, a pre-trade inspection and authorization requirement would put a temporary ban on importation into developing regions that lack ESM facilities but would offer those nations that wish to profit from waste disposal or recycling an incentive to develop ESM facilities. This would potentially also spur greater cooperation among industrialized and developing nations. Industrialized nations would have an incentive to assist developing nations with the development of ESM practices because, as soon as such facilities exist and permits are issued, they could engage in waste trading there.

²³⁵ IAEA, *The Agency’s Safeguards System*, ¶ 2, IAEA Doc. INFCIRC/66/Rev.2 (Sept. 16, 1968), <http://www.iaea.org/Publications/Documents/Infcircs/Others/inf66r2.shtml> (last visited Apr. 13, 2008).

²³⁶ *Id.*

²³⁷ 33 U.S.C. § 1311(a) (2000).

Clearly, such a system of preliminary approval could be criticized for adding a cumbersome bureaucratic component to international trades in hazardous wastes. However, this inconvenience would clearly facilitate more trades to developing nations than the zero-trade allowance contemplated by the Basel Ban. A system mandating that all trade of hazardous wastes to developing nations be subject to inspection to verify ESM practices of disposal facilities would achieve the same result intended by the Basel Ban—insulation of developing nations from environmental woes due to improper handling of hazardous wastes—without stunting economic development. In this manner, the essence of the precautionary principle—precaution—can be accomplished while the prospect of being able to profit by importation of international wastes can simultaneously provide an incentive for developing nations to bring their waste disposal facilities up to the standards of industrialized nations. This will also ensure that developing nations are properly able to manage their own domestic wastes, as well, and the freedom afforded industrialized nations in conducting their trades would also be curtailed but nonetheless preserved. The inspection and authorization model would enhance the Basel Convention's ability to achieve environmental justice by 1) closing the information gap in the PIC procedure, 2) ensuring a higher level of environmental security by only authorizing waste trades that are proven to achieve a certain caliber of safety, and 3) giving both developing and industrialized nations the impetus to work together to bring developing nations up to higher waste disposal standards.

B. Post-Trade Safeguards: Implementation of the Protocol on Liability and A Stable Fund to Nourish Regional Centers and Respond to Environmental Disasters

The most fundamental element needed to close many of the loopholes in the Basel Convention currently in force, or to implement a version of the Convention that would incorporate an inspection and authorization procedure necessary to achieving environmental justice, is a reliable monetary fund. The poor cleanup response to the Côte d'Ivoire dumping of toxic wastes makes glaringly apparent the inability of the BCRCs or the Basel Convention's Trust Funds to provide necessary support to developing regions in the event of breaches of the Convention. For the Basel Convention to achieve its environmental justice goals, it must be financially prepared to respond to the emergency situations involving mishandling of wastes that would likely occur whether the Basel Ban were implemented or not, yet this critical component of the Basel Convention has not been nurtured. Although a Trust Fund and a Technical Trust Fund for the Basel Convention exist, they have yet to garner enough money to achieve not only the environmental justice aims of the Basel Convention but even its most basic aim—ensuring that member nations, especially developing nations, will have safety from environmental and human health disasters.²³⁸

²³⁸ See generally Press Release, Liability for Côte d'Ivoire Hazardous Waste Clean-up (Nov.

Conceptually, the Basel Convention's concept of regional centers is an innovation grounded in environmental justice: institutionalizing the transfer of technology to developing nations to spur their economic development. The regional centers would promote cooperation between industrialized and developing nations, and fortify the abilities of developing nations both economically, so they could gain respect in the global market, and environmentally, so they could properly safeguard their citizens from toxic contamination. However, the fundamental problems impeding the implementation of these regional centers are a dearth of countries that have them, and, more foundationally, the lack of funding to create new centers or adequately support those in existence. The procurement of more funding to support regional centers would mollify both of these central impediments to their success, and entry into force of the Convention's already-proposed yet inoperable Protocol on Liability along with replenishment of the Trust Funds through aggressive solicitations, provide two promising routes already contemplated by the Convention for achieving this vital funding.

1. Generating Funding Through Implementation of the Protocol on Liability

Ironically, the key to a stable source of funding may lie in correcting one of the other weaknesses of the Basel Convention—the Protocol on Liability. Although the Protocol has yet to enter into force, it contemplates the imposition of binding monetary sanctions against parties that do not comply with Basel's requirements,²³⁹ which could present a novel means of securing funding in the realm of MEAs. The monetary sanctions that would be imposed by the strict liability and fault liability provisions of the Protocol have the potential to both achieve retribution and generate money to be placed into the Basel Trust Funds, especially the Technical Trust Fund established to aid in the transfer of technology to BCRCs in developing regions. The money collected from violators in damages and additional penalties for violating the Convention pursuant to the Protocol's liability scheme could be used in part to pay for cleaning up environmentally hazardous sites, which would further the polluter pays principle of environmental justice, and in part to fund the Technical Trust Fund to enable developing nations to advance technologically and acquire the skills to cope with future environmental disasters that result from illegal or accidental transboundary waste movements.

Although MEAs have not generally used a monetary sanctions model in order to secure revenue to promote economic development in developing nations, the Kyoto Protocol Compliance Committee and the Convention on the International Trade in Endangered Species (CITES) are both MEAs that have enforcement provisions that penalize violating nations for noncompliance using methods that carry severe economic consequences.²⁴⁰

24, 2006), available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=485&ArticleID=5430&l=en>.

²³⁹ Protocol, *supra* note 94, arts. 4, 5.

²⁴⁰ RAJAMANI, *supra* note 108, at 104–05.

The Kyoto Protocol Compliance Committee, for one, authorizes penalization of noncompliant nations by cutting their emissions allowances for the next term.²⁴¹ Its binding compliance mechanism has gained the Kyoto Protocol credit for breaking from the traditional non-binding, non-adversarial MEA enforcement model,²⁴² with one author stating that the Kyoto Protocol “may be the only” MEA whose compliance mechanism goes beyond merely “facilitating compliance” to “sanctioning non-compliance.”²⁴³ The Kyoto Protocol Compliance Committee contains an enforcement branch. If a Party’s emissions exceed the allowable amount of emissions in a given commitment period, the enforcement branch is empowered to penalize the defaulting Party by subtracting from the defaulting Party’s allowable emission limits in the *next* commitment.²⁴⁴

In addition, the CITES compliance scheme allows its Standing Committee to recommend to the Parties the imposition of trade bans against certain noncompliant nations for particular species.²⁴⁵ Although these are not direct monetary sanctions, they have direct monetary implications in the emissions trading schemes for the following term and the wildlife trade capabilities at the present time of sanctioned nations, respectively. Although the Kyoto Protocol’s Compliance Committee has yet to impose such monetary consequences on a Party, CITES has been increasingly relying upon its trade sanction capabilities in recent years.²⁴⁶ In fact, at the time this Comment was going to print, forty countries were currently subject to at least one trade suspension.²⁴⁷

The success of the CITES compliance mechanism in sanctioning treaty violators and the promise that the Kyoto Protocol Compliance Committee measures holds for an additional avenue for sanctioning noncompliant members provide a break from the normal operation of MEAs and offer clear support that *two* of the main obstacles to the achievement of environmental justice in the Basel Convention—inadequate funding and failure of the Parties to ratify the Protocol on Liability—can be removed by simply solving the latter problem and forcing the Protocol on Liability into entry. The attempt by the Parties to the Basel Convention to move beyond

²⁴¹ *Id.*

²⁴² See LOUKA, *supra* note 47, at 126–28 (discussing the many international environmental instruments that are incorporating nonadversarial compliance procedures).

²⁴³ RAJAMANI, *supra* note 108, at 104–05.

²⁴⁴ U.N. Framework Convention on Climate Change, Seventh Session of the Conference of the Parties, Marrakesh, Morocco, Oct. 29–Nov. 10, 2001, *Report to the Conference of the Parties on its Seventh Session, Addendum*, pt. two, vol. III, ¶ XV(5), U.N. Doc. FCCC/CP/2001/13/Add.3, (Jan. 21, 2002); see also RAJAMANI, *supra* note 108, at 105 n.96.

²⁴⁵ CITES, *supra* note 21, art. VIII; see also Eighth Meeting of the Conference of the Parties to the Convention on Biological Diversity Serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety, Curitiba, Brazil, Mar. 13–17, 2006, *Measures in Cases of Repeated Non-Compliance*, ¶ IIA, U.N. Doc. UNEP/CBD/BS/COP-MOP/3/2/Add.1 (Jan. 10, 2006), available at <http://www.cbd.int/doc/meetings/bs/mop-03/official/mop-03-02-add1-en.pdf>.

²⁴⁶ CITES, Notifications to the Parties, <http://www.cites.org/eng/notif/index.shtml> (last visited Apr. 13, 2008).

²⁴⁷ CITES, Countries Currently Subject to a Recommendation to Suspend Trade, <http://www.cites.org/eng/resources/ref/suspend.shtml> (last visited Apr. 13, 2008).

their traditional non-binding, non-adversarial Compliance Committee model and draft a liability protocol with binding monetary sanctions to be imposed upon violators of the Convention represents a means of deterring noncompliance that, if adopted, would be as effective as the CITES compliance scheme and even stronger than the Kyoto Protocol's Compliance Committee. However, it is precisely this high level of deterrence that is likely preventing the Parties from ratifying the Protocol. Unfortunately, there is no other global treaty on civil liability for transboundary pollution or damage²⁴⁸ from which methods to impel ratification can be extrapolated. However, this emphasizes *a fortiori* the sweeping impact the Protocol on Liability may have in the realm of international environmental justice if it does enter into force.

2. Generating Funding Through Public and Private Sector Donations

As an alternate, or additional (and likely more feasible), route for replenishing the Basel Convention's Technical Trust Fund in order to support technological development in developing nations, the Basel Convention could solicit donations from the private and public sectors rather than relying as heavily on voluntary contributions from the Parties. The Montreal Protocol²⁴⁹ Multilateral Fund, which solicits and receives hefty public and private donations, has been credited with being "[t]he most successful fund to date"²⁵⁰ in the realm of MEAs, and it provides a powerful example of how a reliable source of funding can promote environmental justice.

The Montreal Protocol Multilateral Fund requires the establishment of a mechanism "to provide financial and technical co-operation, including the transfer of technologies" to developing countries, that would "meet all incremental costs" of developing countries required to enable their compliance with the Montreal Protocol.²⁵¹ Klaus Toepfer, Executive Director of the United Nations Environment Program (UNEP), has lauded the Multilateral Fund, stating that it provided the Montreal Protocol with "teeth."²⁵² By "involving public and private sector stakeholders—as diverse as SMEs [small and medium enterprises], smallholder farmers and fire-fighting authorities" the Montreal Protocol's Multilateral Fund "has disbursed US \$1.984 billion in support of over 5,200 projects and activities in 139 developing countries."²⁵³ Using the Montreal Protocol Multilateral Fund

²⁴⁸ A.E. Boyle, *Globalising Environmental Liability: The Interplay of National and International Law*, 17 J. ENVTL. L. (U.K.) 3, 4 (2005) (stating "there remains no global treaty on civil liability for transboundary pollution or damage").

²⁴⁹ Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 10, 1522 U.N.T.S. 29 [hereinafter Montreal Protocol].

²⁵⁰ RAJAMANI, *supra* note 108, at 110.

²⁵¹ Montreal Protocol, *supra* note 249, art. X.1.

²⁵² U.N. News Ctr., *Compliance Body Set Up For Kyoto Protocol on Reducing Greenhouse Gases*, <http://www.un.org/apps/news/story.asp?NewsID=17697&Cr=climate&Cr1=change#> (last visited Apr. 13, 2008).

²⁵³ U.N. Dev. Program, Energy & Env't., New Delhi: 18th Meeting of the Parties to the

as a framework, the Basel Convention could strengthen its financial resources not only by leveling penalties on violators through its Liability Protocol, but also by enlisting donations from a broader range of sources rather than the Parties alone.²⁵⁴

Whether the funding critically needed to promote environmental justice in the realm of hazardous waste trading comes through entry into force of the Protocol on Liability or active solicitation for more funds to be donated to the Technical Trust Fund for developing nations, the venues for achieving a stable monetary fund appear to already lie within the strong environmental justice provisions of the Basel Convention. The Parties' meager support for the Protocol on Liability and correspondingly meager contributions to the Trust Funds have stunted the Basel Convention's ability to garner the funding necessary for the Convention to achieve its environmental justice potential. However, with the infrastructure of a highly deterrent liability scheme and a Technical Trust fund specifically aimed at assisting developing nations in place, new, aggressive campaigns to reinvigorate global support for these provisions could be all that is needed for the Basel Convention to realize its potential to achieve international environmental justice.

Securing critical additional funding for the Convention's Technical Trust Fund could ensure the availability of funding either to help BCRCs flourish with new training and technology or to provide aid in times of emergency. Nations experiencing environmental crises like the Côte d'Ivoire incident would be ensured immediate access to monetary aid. Additionally, this funding would support the education of developing nations in safe disposal and recovery practices so that they could prevent these disasters from occurring in the first place and advance economically. This increased economic fortitude could provide developing nations with the opportunity to orchestrate, rather than acquiesce to, trade negotiations, allowing for more procedurally just negotiations to infiltrate international environmental dialogues. By bringing more parties to the table in setting the parameters for and evaluating acceptable trading practices, the Basel Convention would be thwarting a fundamental obstacle to environmental justice—unequal bargaining power.

VII. CONCLUSION

Although the Basel Ban has been advanced as a solution to the Basel Convention's inability to achieve environmental justice or protect developing nations from the perils of transboundary trade in hazardous

Montreal Protocol – India and the Montreal Protocol, <http://www.undp.org/chemicals/news2.htm> (last visited Apr. 13, 2008).

²⁵⁴ The Basel Convention appears to currently derive the money for its Trust Funds solely by voluntary contributions from nations and the interest earned on those contributions. *See, e.g.*, SECRETARIAT OF THE BASEL CONVENTION, TRUST FUND TO ASSIST DEVELOPING COUNTRIES AND OTHER COUNTRIES IN NEED OF TECHNICAL ASSISTANCE IN THE IMPLEMENTATION OF THE BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL, *available at* <http://basel.int/convention/contributions/fsBD2004.pdf>.

wastes, such a ban does nothing to empower developing nations in terms of their international bargaining power or their ability to respond to the repercussions of any illicit waste trading activities. A total ban might be the best way to protect developing nations from the perils of transboundary movement of hazardous wastes if the rest of the Basel Convention's provisions actually worked to fully safeguard those country's interests, and a total ban could potentially encourage a decrease in the amount of such wastes being generated due to a shortage of disposal sites—both lofty and important goals necessary to safeguard human health and the environment from dangerous waste materials. However, the implementation of a total ban at the present time without additional safeguards would leave many nations vulnerable to the harms of illegal waste shipments, and would not create any incentive for other enterprising developing nations to work to establish safe disposal facilities. Fortifying some of the Convention's weaker pre-trade and post-trade apparatuses, in conjunction with a conditional ban on transporting wastes to developing nations, could adequately ensure health and safety without foreclosing the possibility of trade to certain qualified developing nations in the future.

Introducing an inspection and authorization body to the PIC scheme to inspect and authorize disposal facilities would encourage representative justice and prioritize precaution by safeguarding civilians from dishonest or careless waste traders. In addition, implementation of the Protocol on Liability to impose monetary sanctions on violating entities could protect developing nations both by discouraging illegal trades in hazardous waste and by replenishing the Technical Trust Fund that enables ESM practices to be transferred to developing nations through BCRCs.

Solicitation of additional funding from the public and private sectors could further equip developing nations with the tools to avoid environmental disasters stemming from the transboundary movements of hazardous waste. Using these monetary additions to respond to disasters and also to fund regional transfer centers would equip developing nations with the resources to improve their economies and thereby increase their ability to compete and negotiate in a global market. Strengthening the abilities of those developing nations that do not see wastes as a LULU but as an opportunity to advance technologically and politically to safely manage hazardous and other wastes would enable safe disposal or recovery of these wastes. This would benefit not only these nations but, additionally, other nearby developing nations who could rely on local assistance in the event of a breach of the Convention.

The irresponsible, covert dumping of toxic wastes in Abidjan, Côte d'Ivoire, brings to light that even the imposition of a total ban on transboundary movement of wastes to non-OECD nations may not curb the risky practice of unsafe waste trading or produce the desired reduction in the generation of such wastes that the Parties to the Convention have long advocated. Leaving open the possibility that the transfer of non-hazardous, and, where safe, even hazardous wastes, to developing nations could occur in nations that have proven themselves technologically and environmentally

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capable of safely dealing with wastes would bring the Basel Convention closer to achieving its environmental justice goals. Educating and equipping developing nations with the tools to manage and respond to environmental concerns and bringing more nations, industrialized and developing, under the jurisdiction of the Basel Convention, would result in an open framework of international cooperation critical to the achievement of international environmental justice.