

AUSTRALIA'S OPPOSITION TO THE BASEL BAN AMENDMENT ON THE EXPORT OF HAZARDOUS WASTES: WHEN WILL AUSTRALIA STOP STALLING AND RATIFY THE AMENDMENT?

I. INTRODUCTION

Krishnaswamy, a thirteen-year-old Indian boy, innocently stirs a hot pan of molten lead left over from a used car battery imported from the west.¹ Like most workers engaged in the hazardous waste recycling industries in many developing Asian countries, he is economically dependent upon the potentially deadly practice.² While industrial world leaders influence powerful industrialized nations like Australia, Canada,³ and the United States⁴ to continue dumping their waste cheaply in India and other developing nations, the ratification of the Basel Ban⁵ remains uncertain.⁶ Australia, although a ratifying member of the Basel Convention,⁷ has refused to ratify the recent Ban Amendment to the Convention on the Transboundary Movement of Hazardous Waste⁸ and attempts to continue its waste trade with

1. See Subhadra Menon & Smruti Koppikar, *The Poisoning of India. Hazardous Wastes: Toxic Terror*, INDIA TODAY, July 14, 1997, at 76, available in 1997 WL 9848337.

2. See *id.* In the nearby town of Majiwada, 600 citizens displayed symptoms of lead poisoning in 1996. See *id.* The air over the suburb has lead concentrations 11 times above regional standards. See *id.*

3. Canada stands together with Australia in stalling its ratification of the Basel Ban. See Statement Made by Canada Following the Adoption of the Amendment Decision by Consensus, Sept. 22, 1995, in SECRETARIAT BASEL CONVENTION, DECISIONS AND REPORT ADOPTED BY THE THIRD MEETING OF THE CONFERENCE TO THE PARTIES, at 99-100, SBC No. 95/003 (1995).

4. The United States has not ratified the Basel Convention, an international treaty regulating the transboundary movement and disposal of hazardous waste, let alone the Ban Amendment forbidding movement from industrialized countries to developing countries. See Martin Khor, *Environment: U.S. Accused of Trying to Reverse Toxic Waste Ban*, INTER PRESS SERV., Apr. 10, 1995, available in 1995 WL 2260324.

5. See Decision III/1, Amendment to the Basel Convention, in SECRETARIAT BASEL CONVENTION, DECISIONS AND REPORT ADOPTED BY THE THIRD MEETING OF THE CONFERENCE TO THE PARTIES, at 1-2, SBC No. 95/003 (1995) [hereinafter Decision III/1, Amendment to the Basel Convention].

6. A spokesman for Greenpeace stated that OECD nations were attempting to stall ban implementation in order to "keep the option of dumping on the non-OECD countries open." *Ignore OECD Members' Call to Dump in Developing Countries, Says NGOs*, BERNAMA, MALAYSIAN NEWS AGENCY, Feb. 27, 1998, available in 1998 WL 6594534.

7. See *infra* Part II.A for further background on the Basel Convention.

8. The Ban Amendment became effective at the beginning of January of 1998. See Jim Puckett & Cathy Fogel, *A Victory for Environment and Justice: The Basel Ban and How it Happened* (visited Sept. 8, 1998) <<http://www.greenpeace.org/~comms/97/toxic/basban.html>>.

developing nations.⁹

The Basel Convention controls and regulates the international movement of hazardous waste, aiming to minimize trade and encourage domestic disposal.¹⁰ In recognizing that developing nations remain acutely vulnerable to hazardous waste exports, the Ban Amendment instituted a no-exceptions ban on the export of hazardous waste from industrialized members of the Organization for Economic Cooperation and Development (OECD)¹¹ to developing nations beginning January 1, 1998.¹² In opposition

9. See *Greenpeace Accuses 'Waste-Trade Zealots' of Undermining Global Ban*, AGENCE FRANCE-PRESSE, Feb. 22, 1998, available in 1998 WL 2227972 [hereinafter *Waste-Trade Zealots*]. These other nations include the United States, New Zealand, Canada, the Netherlands, Germany, and South Korea. See *id.* See also *India-Environment: India Denies Waste Import Deal with Australia*, INTER PRESS SERV., Oct. 20, 1994, available in 1994 WL 2722979 (describing the Indian government's refutation of the notion that Australia is pressuring it to accept Australia's toxic waste); *Ignore OECD Members' Call to Dump in Developing Countries*, *supra* note 6 (discussing the negative implications of Australia's attempts to "delay and dilute the ratification and implementation of the Basel ban."); Pratap Chatterjee, *Environment: Australia to Discuss Waste Dumping in Asia*, INTER PRESS SERV., Sept. 22, 1994, available in 1994 WL 2707666 (noting that Australia and the 12 countries of the European Union actively attempt to avoid the ban); Greenpeace Australia, *Australia Attempts to Break Waste Trade Ban* (visited Sept. 21, 1998) <<http://www.greenpeace.org/au/Releases/93.html>>.

10. See Dr. I. Rummel-Bulska, *Introduction to The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, in SECRETARIAT BASEL CONVENTION, BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL, 1989 AND DECISIONS ADOPTED BY THE FIRST (1992) AND THE SECOND (1994) MEETINGS OF THE CONFERENCE OF THE PARTIES, at 1-2, S.B.C. No. 94/008 (1994). See generally *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, Mar. 22, 1989 (entered into force May 5, 1992) [hereinafter *Basel Convention 1989*], in SECRETARIAT BASEL CONVENTION, BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL, 1989 AND DECISIONS ADOPTED BY THE FIRST (1992) AND THE SECOND (1994) MEETINGS OF THE CONFERENCE OF THE PARTIES, at 3, S.B.C. No. 94/008 (1994).

11. The OECD is made up of primarily industrialized nations, including Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. See Jason L. Gudofsky, *Transboundary Shipments of Hazardous Waste for Recycling and Recovery Operations*, 34 STAN. J. INT'L L. 219, 237 n.86 (1998).

12. Decision III/1, Amendment to the Basel Convention.

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((1))(a) of the Convention which are destined for operations according to Annex IV B to States not listed in Annex VII. Such

to the ban, Australia attempts to invoke article 11 of the Convention, which permits the use of multilateral, bilateral, and regional waste trade agreements to export hazardous waste between OECD and non-OECD nations.¹³ Australia and others opposed to the ban currently assert that article 11 agreements, made either before or after the ban took effect, continue to allow the export of hazardous wastes from OECD nations to non-OECD nations.¹⁴ The Conference of the Parties has not yet decided what will be the fate of the agreements between OECD and non-OECD nations once the ban is ratified.¹⁵

Australia has also encouraged the expansion of Annex VII¹⁶ status required by non-parties in order to accept waste from other OECD nations at lower costs, sometimes regardless of adequate domestic treatment and reclamation facilities.¹⁷ Arguably, these efforts to circumvent the effect of

transboundary movement shall not be prohibited unless the wastes in question are characterised as hazardous under the Convention.

Id.

Included within Annex VII are "Parties and other States which are members of OECD, EC [European Community], [and] Liechtenstein." *Id.* Annex IV(A) governs "disposal operations" which "do not lead to the possibility of resource recovery, recycling, reclamation, direct re-use or alternative uses." Basel Convention 1989, Annex IV(A). Annex IV(B) are "operations which may lead to resource recovery, recycling reclamation, direct re-use or alternative uses." *Id.* Annex IV(B). Article 1(1)(a) defines hazardous waste as those materials designated in Annex I (a list of categories of wastes to be controlled). See Basel Convention 1989, art. 1(1)(a).

13. See Basel Convention 1989, art. 11. This article contains the restriction that "[s]uch agreements or arrangements . . . [must not] derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention . . . in particular taking into account the interests of developing countries." *Id.*

14. See Statement Made by Canada Following the Adoption of the Amendment Decision by Consensus, *supra* note 3, at 99; Statement Made by Australia Following the Adoption of the Amendment Decision by Consensus, Sept. 22, 1995, in SECRETARIAT BASEL CONVENTION, DECISIONS AND REPORT ADOPTED BY THE THIRD MEETING OF THE CONFERENCE TO THE PARTIES, at 100-01, SBC No. 95/003 (1995).

15. See JAMES CRAWFORD & PHILIPPE SANDS, THE AVAILABILITY OF ARTICLE 11 AGREEMENTS IN THE CONTEXT OF THE BASEL CONVENTION'S EXPORT BAN ON RECYCLABLES: A DISCUSSION PAPER 20 (1997). Decision III/1, the ban decision, did not specifically discuss the availability of article 11 agreements after the ratification of the Ban Amendment. See *id.* Thus, the use of article 11 agreements by parties to circumvent the ban was also left unaddressed. See *id.*

16. Annex VII to the Basel Convention specifies those countries prohibited from sending Basel-designated hazardous wastes to nations not listed in the annex. See Cheryl Hogue, *Basel Convention Parties to Discuss Possible Exceptions to Waste Trade Ban*, Int'l Env't Daily (BNA) (Jan. 22, 1998). Annex VII is currently composed of OECD member nations, members of the European Union and Liechtenstein. See *id.* See also Decision III/1, Amendment to the Basel Convention.

17. See Esther Tan, *Loopholes in Basel Treaty Remain*, NEW STRAITS TIMES (MALAYSIA), Mar. 22, 1998, at 9. Environmentalists characterized the push of developed countries to expand Annex VII nations as a "ploy to delay implementation of the ban." *Id.*

the Ban Amendment undermine the spirit of the Basel Convention. Greenpeace International¹⁸ alleges continued hazardous waste exportation in contravention of the ban.¹⁹ Australia, among the worst offenders and most vocal opponents of the ban decision, demonstrates why the Ban Amendment is a necessary and integral part of the Basel Convention and why an international convention that purports to control hazardous waste transportation, disposal, and reclamation without the ban would fail to accomplish its original goals.

Part II of this note outlines the Basel Convention of 1989, highlighting its key provisions to explain how each works toward the Convention's overall purpose. Part II also discusses the Basel Ban Amendment in the context of the Convention and explains its inception, necessity, and relevance given hazardous waste trade realities. Part III chronicles Australia's efforts and the efforts of other OECD nations to use article 11 and the expansion of Annex VII to circumvent the Ban Amendment restrictions on free trade in hazardous waste. Part III also raises and counters industry arguments criticizing the ban as a violation of international free trade provisions, emphasizing Australia's particular responsibilities as a Convention member in view of the vulnerabilities of developing countries. Part IV describes the enforcement and liability scheme and adjudication process under the Convention, comparing it to the Australian liability scheme and suggesting solutions to the inherent difficulties of policing an international ban on the movement of hazardous wastes. This note concludes that the Ban Amendment is a necessary addition to the Basel Convention, deserving of enforcement, and neither amenable to circumvention through the use of article 11 agreements nor subject to compelling criticism from a free trade perspective.

II. BACKGROUND OF THE BASEL CONVENTION

A. 1989 Basel Convention

The Basel Convention was first conceived in 1989 and entered into force in 1992 to regulate the transboundary movement of hazardous wastes

18. Greenpeace was "vital in assisting the Group of 77 states (G-77) [i.e., states favoring the Ban Amendment] in writing proposals to be included in the ban decision amendment." Patricia M. Wolff, *Uncovering Determinants of International Environmental Cooperation: The Disjuncture Between Treaty Signing and Treaty Ratification* 38 (1996) (unpublished M.A. Thesis, University of Oregon) (on file with the University of Oregon Library). Greenpeace also assisted in developing Basel Convention negotiation strategy and in providing information regarding the extent of the hazardous waste trade problem. *See id.*

19. *See generally Waste-Trade Zealots*, *supra* note 9.

from and between the now 121²⁰ member nations.²¹ The Convention responded to the effect of tightening industrial waste laws that prompted industrialized nations to engage in the international hazardous waste trade.²² Prior to the Basel Convention's development, the OECD played a significant role in developing legal requirements governing the hazardous waste trade.²³ The Basel Convention now defines which materials constitute hazardous waste and establishes rules for transporting and recycling those materials.²⁴ The Convention also seeks to establish each specific nation's responsibility for its own import and export of hazardous materials by restricting the transnational flow of hazardous material and by creating incentives to control the creation of hazardous waste.²⁵

20. Those countries that have either ratified, acceded, accepted or approved the Basel Convention include Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Bahrain, Bangladesh, Barbados, Belgium, Belize, Benin, Bolivia, Botswana, Brazil, Bulgaria, Burundi, Cameroon, Canada, Chile, China, Colombia, Comoros, Costa Rica, Cote D'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Dominica, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gambia, Germany, Greece, Guatemala, Guinea, Honduras, Hungary, Iceland, India, Indonesia, Islamic Republic of Iran, Ireland, Israel, Italy, Japan, Jordan, Kuwait, Kyrgyzstan, Latvia, Lebanon, Liechtenstein, Luxembourg, Malawi, Malaysia, Maldives, Mauritania, Maritius, Mexico, Micronesia, Monaco, Mongolia, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Seychelles, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, The Former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, United Arab Emirates, United Kingdom, United Republic of Tanzania, Uruguay, Uzbekistan, Venezuela, Vietnam, Republic of Yemen, Zaire, and Zambia. See Basel Action Network, *Country Status — Waste Trade Ban Agreements* (visited Sept. 17, 1998) <http://www.ban.org/country_status/country_status.html> [hereinafter Basel Action Network]; *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (visited Nov. 18, 1998) <<http://www.unep.ch/basel/sbc/ratif.html>>. As of June 17, 1998, there are 121 parties to the Basel Convention. See United Nations Environment Program, *Ratifications* (visited Nov. 18, 1998) <<http://www.unep.ch/basel/sbc/ratif.html>>.

21. See Rummel-Bulksa, *supra* note 10, at 1-2.

22. See Khor, *supra* note 4.

23. See D. KOFI ASANTE-DUAH & IMRE V. NAGY, INTERNATIONAL TRADE IN HAZARDOUS WASTE 94-95 (1998). Australia became a member of the OECD in June of 1971. See *id.* at 21. Even before the entry into force of the Basel Convention, the OECD, seeing the necessity for such regulations, developed specific, legally-binding obligations that applied to the export of hazardous wastes from OECD nations to developing nations. See *id.* at 95.

24. See generally Basel Convention 1989. Article 1 of the Basel Convention defines what is considered hazardous waste under the Convention. See *id.* art. 1(1)(a)-(b).

25. See ELLI LOUKA, OVERCOMING NATIONAL BARRIERS TO INTERNATIONAL WASTE TRADE: A NEW PERSPECTIVE ON THE TRANSNATIONAL MOVEMENTS OF HAZARDOUS AND RADIOACTIVE WASTES 46, 49 (International Env'tl. Law & Policy Series No. 22, 1994). "The

The Convention accomplishes its goals through two key provisions. Article 4 outlines Convention members' obligations in general. Article 4 requires an exporting state to notify a prospective importing state of any transboundary movement of hazardous waste.²⁶ The information must be "sufficiently detailed" to allow the importing state to make a proper risk assessment.²⁷ Because the Convention allows parties to pass national legislation banning all hazardous waste imports, parties to the Convention may not export their hazardous waste to nations choosing to institute such bans.²⁸ Parties must also forbid export to an importing nation if it has reason to believe that the importer will not manage the waste "in an environmentally sound manner."²⁹ In addition, article 4 insulates parties from receiving hazardous waste from non-parties and prevents parties from exporting to non-parties.³⁰ Other general obligations include requiring: (1) the exporting nation to ensure that it minimizes its hazardous and other waste generation;³¹ (2) the importing nation to possess "environmentally sound" disposal or recycling facilities and to exercise the same such management practices;³² and (3) the cooperation and sharing of information regarding "the transboundary movement of hazardous wastes . . . in order to improve the environmentally sound management of such wastes and to achieve the prevention of illegal traffic."³³ Article 4(10) further prevents the exporting

purpose of the Basel Convention is to establish state responsibility for hazardous waste transfers." *Id.* at 49. "The Convention attempts to regulate waste movements by imposing restrictions because, as emphasized in the preamble, restrictions reduce transfrontier movements, and provide incentives for sound waste management." *Id.* at 46. Iwona Rummell-Bulcka, acting Basel Secretariat, characterized the goals of the Basel Convention as being: "to prevent to the extent possible and minimize the generation of hazardous wastes; treat and dispose of such wastes in such a way that they do not cause harm to health and the environment; and eliminate or reduce transboundary movements of hazardous wastes to a minimum." Wolff, *supra* note 18, at 30.

26. See Basel Convention 1989, art. 4(2)(f).

27. See KATHARINA KUMMER, INTERNATIONAL MANAGEMENT OF HAZARDOUS WASTES: THE BASEL CONVENTION AND RELATED LEGAL RULES 66 (1995). Annex VA to the Convention specifies what information is required. See *id.* Some examples include "the reason for the export; [the identity of] the exporter and the generator; the site and process of generation; the nature of the wastes and their packaging; the intended itinerary; [and] the site of disposal and the disposer." *Id.* Note that under article 6(6)-(8), the exporting state may obtain approval from the importing state to specify a general notification for wastes of the same nature for up to 12 months. See *id.* See also Basel Convention 1989, art. 6.

28. See Basel Convention 1989, art. 4(2)(e).

29. *Id.*

30. See *id.* art. 4(5). However, Parties may allow their waste to pass *through* the non-Party states as long as the procedures of article 6(2), governing prior informed consent, are adhered to pursuant to article 7. See *id.* art. 7.

31. See *id.* art. 4(2)(a).

32. *Id.* art. 4(2)(b).

33. *Id.* art. 4(2)(h).

state from shirking its obligations under other provisions of the Convention by improperly imposing its obligations upon the importing state.³⁴

Article 6 of the Basel Convention governs the movement of hazardous waste between parties. Its prior informed consent provision requires the exporting state to notify the importing state in writing of the hazardous qualities of the materials to be shipped.³⁵ A contract between the two must be formed "specifying environmentally sound management" of the hazardous wastes.³⁶ If any of the Basel Convention's notification and consent provisions are not followed, if the documents provided to the importing state misrepresent actual waste contents, or if the disposal is conducted by either the exporting or importing nation, or both, in violation of the Convention or other international law, such activities are deemed "illegal traffic" and are subject to criminal penalties developed nationally by each ratifying party.³⁷

Australia signed the Basel Convention in 1989 and passed enabling legislation entitled the Hazardous Waste (Regulation of Exports and Imports) Act soon thereafter.³⁸ Australia later ratified the Convention in 1992.³⁹ Because of the government's belief that the Hazardous Waste Act proved deficient when compared with the "mainstream of international opinion,"⁴⁰ the Act was amended in 1996 to widen its scope to regulate hazardous waste intended for recycling or recovery and to impose greater penalties upon individuals and corporations engaging in illegal hazardous waste trade.⁴¹

The Act's objectives appear to be in accord with the Basel

34. *See id.* art. 4(10).

35. *See id.* art. 6(1).

36. *Id.* art. 6(3)(b).

37. *See id.* art. 9(1)(a)-(e). In addition, the state of export is responsible for taking the waste back or, if that is impracticable, to ensure proper disposal in compliance with the Convention. *See id.* art. 9(2)(a)-(b). The liability and dispute resolution provisions of articles 12 and 19 will be discussed in greater depth in Part IV of this note.

38. *See Australia and the Basel Convention, Hazardous Waste Act* (visited Oct. 1, 1998) <<http://www.environment.gov.au/epg/hwa/basel.html>>. *See also* The Honorable Ian Campbell, *Keynote Address to the Third National Hazardous and Solid Waste Convention*, May 27, 1996 (visited Oct. 5, 1998) <<http://environment.gov.au>> [hereinafter Campbell Remarks] (discussing Australia's enabling legislation).

39. *See* Campbell Remarks, *supra* note 38.

40. *Id.*

41. *See Hazardous Waste (Regulation of Exports and Imports) Act 1989* (visited Mar. 4, 1999) <http://www.austlii.edu.au/cgi-bin/download.cgi/download/au/legis/cth/consol_act/hwoeai1989548.txt> [hereinafter Hazardous Waste Act 1989]. *See also* Matt Brown, *Hazardous Waste Controls Come into Force* (last modified Feb. 14, 1997) <<http://www.environment.gov.au/portfolio/minister/env/96/mrl3dec.html>>. The Senate Minister for the Environment, the Honorable Robert Hill, stated that "[p]rior to these amendments, Australia's legislation did not fully implement our obligation under the Basel Convention. . . . These amendments ensure that Australia is now fully meeting its international obligations." *Id.*

Convention⁴² but lend greater emphasis to the continued existence of article 11 agreements. The amended Act attempts "to give effect to the Basel Convention . . . and . . . to give effect to agreements and arrangements of the kind mentioned in Article 11 of the Convention."⁴³ The Australian law also codifies the Basel Convention's prior informed consent provision.⁴⁴ Australia's Environment Minister generally acts as gatekeeper to the granting of export or import permits to individuals or corporations.⁴⁵ For example, the Minister may consider an applicant's financial viability, his previous environmental record, and "any other relevant matters."⁴⁶ The Minister must also be satisfied that the proposal is "consistent with the environmentally sound management of the hazardous waste,"⁴⁷ that prior informed consent was given,⁴⁸ and that the applicant has adequate insurance.⁴⁹ However, even if the above conditions are satisfied, the Minister may still refuse to grant the permit if doing so would be "in the public interest,"⁵⁰ or if there is another way of handling the waste that does not "pose a significant risk of injury or damage to human beings or the environment"⁵¹ and doing so domestically would be safe, efficient and "consistent with the environmentally sound management of the waste."⁵² The Act discourages exports intended for final disposal by requiring that permits for these exports only be granted in "exceptional circumstances."⁵³

42. Section 3(1) of the Amendment states:

The object of this Act is to regulate the export, import and transit of hazardous waste to ensure that exported, imported or transited waste is managed in an environmentally sound manner so that human beings and the environment, both within and outside Australia, are protected from the harmful effects of the waste.

Hazardous Waste Act 1989, § 3(1).

43. *Id.* § 3(2)(a)-(b).

44. *See id.* § 17(1)(b)(i)-(iii). *See also* Basel Convention 1989, art. 6.

45. *See id.* § 13. A Basel Export Permit must include, but is not limited to, the following information: (1) the kind and quantity of the hazardous waste to be exported; (2) the method, time and place of transport; (3) the method of dealing with the waste to be used after export; and (4) the facility used in disposal and process after export. *See* Hazardous Waste Act 1989, § 21(1)(a)-(g).

46. *Id.* § 17(1)(c)(iii).

47. *Id.* § 17(1)(a).

48. *See id.* § 17(1)(b)(i).

49. *See id.* § 17(1)(d).

50. *Id.* § 17(3).

51. *Id.* § 17(4)(a)-(b).

52. *Id.* § 17(5)(a)-(aa).

53. *Id.* § 18A(2)(b). A determination of exceptional circumstances requires that the Minister consider "whether there will be a significant risk of injury or damage to human beings or the environment if the Minister decides not to grant the permit; [and] . . . whether the waste is needed for research into improving the management of hazardous waste." *Id.* § 18A(4)(a)-(b).

Thus, the Australian Hazardous Waste Act appears to codify and strengthen the purposes of the Basel Convention *prior* to the Ban Amendment. However, nowhere does the Act state that Australia must manage its hazardous waste with an eye toward minimizing or prohibiting movement to developing countries because of the risks that such activities pose to developing countries. The Ban Amendment, if ratified, would require Australia and every other Convention member to implement this prohibition into national legislation.⁵⁴

B. *The Ban Amendment*

The need for the ban on waste exported from OECD to non-OECD nations grew evident because developing nations with nonexistent or less stringent hazardous waste laws were being inundated with waste from OECD member nations.⁵⁵ Accordingly, the Third Conference of the Parties, in its decision and amendment, "[r]ecogniz[ed] 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."⁵⁶ The Ban Amendment to the Basel Convention was first agreed to by Convention consensus on March 25, 1994.⁵⁷ Effective January 1, 1998, the amendment imposed a further ban on hazardous waste exports from OECD to non-OECD nations, making it more difficult for industrialized nations to ignore their obligations to dispose of or recycle their waste responsibly.⁵⁸

A coalition of developing countries first proposed the ban at the First Conference of the Parties.⁵⁹ The coalition pushed for a consensus to institute the ban at the Second Conference, and Denmark joined the developing countries in moving to implement the ban decision into the Convention by

54. See Decision III/1, Amendment to the Basel Convention.

55. See ASANTE-DUAH & NAGY, *supra* note 23, at 88. Most developing nations wanted an "absolute ban . . . [because] all such trade is exploitative." *Id.* at 99. According to the United Nations Environment Program (UNEP), 98% of the 400 million tons of waste produced annually comes from OECD countries, of which more than 10% is dumped in developing countries. See Khor, *supra* note 4.

56. Decision III/1, Amendment to the Basel Convention, § 3.

57. See Puckett & Fogel, *supra* note 8. An OECD nation disposes of its waste responsibly by first attempting to do so domestically by either minimizing its production at the source or developing proper recycling and disposal technology. See Basel Convention 1989, art. 4(2)(a)-(c). If it proves impossible to manage the waste domestically, an OECD nation may export its wastes to another OECD nation that engages in environmentally sound management practices. See *id.*

58. See *id.*

59. See *id.* at 76; Puckett & Fogel, *supra* note 8.

amendment at the Third Conference.⁶⁰ The Head of the Indian Delegation to the Basel Convention, A. Bhattacharja, best expressed the prevailing feelings of developing nations at the First Conference of the Parties: "You industrialized countries have been asking us to do many things for the global good [such as] stop cutting down our forests, stop using your CFCs. Now we are asking you to do something for the global good: keep your own waste."⁶¹

Economically, the ban decision shifts the burden of enforcement from developing countries (which previously were able to initiate unilateral bans on waste imports under the Convention) to wealthy OECD nations where the waste originates.⁶² The ban further closes "the recycling loophole" through which ninety percent of the hazardous waste trade schemes fell by encompassing not only goods destined for final disposal, but also goods labeled for recycling or reclamation.⁶³

By the end of 1994, one hundred three developing countries had instituted prohibitions upon hazardous waste imports whether destined for "recycling" or "final disposal."⁶⁴ However, Asian countries lagged behind, becoming even more desirable targets for OECD nations' disposal and recycling business.⁶⁵ In response to the growing concern for the uniquely

60. See KUMMER, *supra* note 27, at 46-47; Puckett & Fogel, *supra* note 8. By refusing to "bow down to a morally bankrupt European Union," Denmark convinced the remaining Nordic nations and, eventually, the EU nations to support the ban decision at the Third Conference of the Parties. Puckett & Fogel, *supra* note 8. Denmark supported the G-77 developing nations in calling for a total ban. *See id.*

61. Greenpeace Australia, *Toxic Trade Reports: Heavy Burden. A Case Study on the Lead Waste Imports Into India — March 1997* (visited Sept. 21, 1998) <<http://www.greenpeace.org.au/Toxics/49.137.html>>.

62. See *The Basel Ban — The Pride of the Basel Convention: An Update on Implementation and Amendment — September 1995* (visited Sept. 8, 1998) <<http://www.greenpeace.org/~comms/97/toxic/bbp.html>> [hereinafter *Pride*].

63. *See id.* The Second Meeting of the Conference of the Parties in Geneva, Decision II/12 (2) declared: "Decides also to phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes which are destined for recycling or recovery operations from OECD to non-OECD States" Decision II/12, Mar. 25, 1994, in SECRETARIAT BASEL CONVENTION, BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL, 1989 AND DECISIONS ADOPTED BY THE FIRST (1992) AND THE SECOND (1994) MEETINGS OF THE CONFERENCE OF THE PARTIES, at 77, S.B.C. No. 94/008 (1994).

64. Praful Bidwai, *India-Environment: India Turning Into a Toxic Dump*, INTER PRESS SERV., Nov. 3, 1994, available in 1994 WL 2750201. However, India, Bangladesh, Nepal and other south asian countries had not yet imposed similar bans. *See id.* As a result, India imported more than five million kilograms of metal processing waste and 2.85 million kilograms of scrap metal from Australia between January and June of 1994. *See id.* The Supreme Court of India later instituted a ban against hazardous waste imports in May of 1997. *See Menon & Koppikar, supra* note 1.

65. *See* Greenpeace Australia, *supra* note 61.

vulnerable Asian economies and ecosystems, a group of seventy-seven Asian and non-Asian developing nations stood in strong support and solidarity for the ban on exports, even if such exports were destined for recycling.⁶⁶ The developing nations believed that such activities "exploit[] their inability to assess or process much of the toxic material destined for recycling."⁶⁷ The group, dubbed "G-77," decided by consensus that they desired a non-negotiable, "no-exceptions" ban and threatened to call for a vote on the matter if the OECD nations failed to join their position.⁶⁸ Because each country has an equal vote under the Convention,⁶⁹ "the Sinister Seven"⁷⁰ OECD nations in opposition were clearly outnumbered.⁷¹ As a result, all parties present agreed by consensus at the Third Meeting of the Parties to adopt the Ban Amendment.⁷² In support of the consensus decision, Advisor to the Malaysian Environmental Protection Society, Gurmit Singh, commented that "[i]t is not worth [it] to risk the environment and health of millions of people at the cost of promoting a few dirty industries."⁷³

Ratification by sixty-two (three-fourths) of the parties present and voting for the amendment is now required to create enforceable law.⁷⁴ However, despite its adoption⁷⁵ by all eighty-two of the parties present and

66. See Pratap Chatterjee, *Environment: Wealthy Nations Feel Pressure to Ban Toxic Shipments*, INTER PRESS SERV. GLOBAL INFO. NETWORK, Mar. 24, 1994, available in 1994 WL 2583836. Australia, Canada and the United States tried to "water down" their position in private meetings. See *id.*

67. *Id.*

68. See Puckett & Fogel, *supra* note 8.

69. See Basel Convention 1989, art. 24.

70. The "Sinister Seven" consists of Australia, Canada, Germany, Japan, the Netherlands, the United Kingdom and the United States. See Puckett & Fogel, *supra* note 8.

71. See *id.*

72. See ASANTE-DUAH & NAGY, *supra* note 23, at 107.

73. Eileen Ng, *Toxic Waste Ban a Blow to Asia's Ailing Economies*, AGENCE FRANCE-PRESSE, Feb. 27, 1998, available in 1998 WL 2231559. At the Fourth Conference of the Parties, Singh also stated, "[T]he most important step now is for countries, including Malaysia, to ratify the amendments so that the ban could come into force. There is no excuse for developing countries not to do so." Esther Tan, *Representatives Unanimously Close Annex VII Membership*, NEW STRAITS TIMES, Feb. 28, 1998, at 7, available in 1998 WL 3970612.

74. See Basel Convention 1989, art. 17(3). See also *How to Identify the Attempts to Undermine the Ban — A Quick Guide* (visited Sept. 9, 1998) <<http://www.greenpeace.org>>.

75. Ratification entails depositing formal instruments indicating acceptance of the provisions with the Depository. See Basel Convention 1989, art. 22(3). Australia adopted the Ban Amendment subject to the contingency that it would not ratify it until the definition of hazardous waste under the Convention was clarified. See Statement Made by Australia Following the Adoption of the Amendment Decision by Consensus, Sept. 22, 1995, in SECRETARIAT BASEL CONVENTION, DECISIONS AND REPORT ADOPTED BY THE THIRD MEETING OF THE CONFERENCE TO THE PARTIES, at 100, SBC No. 95/003 (1995) [hereinafter Statement Made by Australia].

voting at the Third Conference,⁷⁶ only seventeen countries⁷⁷ had ratified the ban as of February 1998.⁷⁸ Part of this failure to ratify may be attributed to confusion sparked by Australian and Canadian demands for clarification of the types of hazardous waste included in the Convention and, therefore, excluded from export by the ban.⁷⁹ In response, at the Fourth Conference of the Parties, the Technical Working Group adopted two separate lists of wastes in order to clarify what wastes were considered hazardous under the Basel Convention for the purposes of the ban.⁸⁰ Australia responded to the concerns of Greenpeace at a national Policy Reference Group meeting by stating that regardless of the clarification of what materials would be considered hazardous wastes, Australia had merely promised to "consider" whether or not to ratify the amendment once the hazardous waste issue was resolved.⁸¹ Moreover, Australian officials further stalled ratification by

76. See Basel Action Network, *supra* note 20.

77. The seventeen countries that ratified and implemented the ban into national or European Union legislation are Austria, Belgium, Denmark, Ecuador, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom. See *id.* See also United Nations Environment Program, *List of Ratification of the Amendment to the Basel Convention* (visited Nov. 18, 1998) <<http://www.unep.ch/basel/sbc/ratif-am.html>>. Note, however, that only fifteen of these seventeen countries are members of the European Union. Ecuador and Norway are not members of the European Union. See *US to Exclude Basel Ban From Treaty Ratification?*, HAZNEWS, June 1, 1998, available in 1998 WL 9399342.

78. See *How to Identify Attempts to Undermine the Ban — A Quick Guide*, *supra* note 74.

79. See Statement Made by Australia, *supra* note 75, at 100. In a statement by Australia following the adoption of the Ban Amendment, the Australian delegate stated that, "Australia . . . will only consider ratifying the amendment when the work on the definition of hazardous characteristics is completed to our satisfaction." *Id.*

80. See *Trade Measures in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, Joint Session of Trade and Environment Experts, OECD Working Papers, at 19-20 (1998). The materials on list A are hazardous wastes covered by article 1(1)(a) of the Basel Convention, and materials on list B are wastes not considered hazardous for the purposes of the Convention with limited exceptions. See Decision IV/6, Outcome of the Work of the Technical Working Group on Lists of Wastes and the Applicable Procedure for Their Review or Adjustment, Mar. 18, 1998, UNEP/CHW.4/35, in *Trade Measures in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, Joint Session of Trade and Environment Experts, OECD Working Papers (1998). Annex VIII to the Fourth Conference lists A wastes, and Annex IX lists B wastes. See *id.* at 48-62. Many of the scrap metals were included on list B. See *id.* at 54-62.

81. See *Hazardous Waste Act Policy Reference Group, Nineteenth Meeting, February 4, 1998*, ¶ 23 (visited Oct. 27, 1998) <<http://www.environment.gov.au/epg/hwa/prg19.pdf>>. The Hazardous Waste Act Policy Reference Group is a "consultative forum for major stakeholders including up to thirty representatives of industry, trade unions, environment groups and overseas development groups." *Hazardous Waste Policy Reference Group* (visited Apr. 15, 1999) <<http://www.environment.gov.au/epg/hwa/prg.html>>.

citing the need to perform an economic assessment of the ban decision with regard to the new hazardous waste classification system.⁸² Another explanation for some countries' failure to ratify the ban may reside in the United States' lack of support as evidenced by its failure to either sign or ratify the Convention.⁸³

In addition, because of many economic and social incentives to maintain a hazardous waste export relationship between OECD and non-OECD members, and because of pressure from the International Chamber of Commerce,⁸⁴ compliance with the terms of the Convention ban is, and will continue to become, a major international policing issue. Specifically, the scrap metal industry opposes the ban and continues to lobby non-OECD nations to break from the non-OECD alliance that supports the ban.⁸⁵ Further, ban opponents⁸⁶ continue to assert pressure upon G-77 developing nations to withdraw their support of the ban, pressure other countries to withdraw, or to enter into bilateral hazardous waste trade agreements, or all

82. See *Hazardous Waste Act Policy Reference Group, Nineteenth Meeting, February 4, 1998*, *supra* note 81, ¶ 27.

83. See generally *Pride*, *supra* note 62; Kenneth D. Hirschi, Note, *Possibilities for a Unified International Convention on the Transboundary Shipments of Hazardous Wastes*, 10 GEO. INT'L ENVTL. L. REV. 169, 189-191 (1997). Greenpeace sees the United States's continued failure to ratify the Ban Amendment as a "blackmail" attempt. See *Pride*, *supra* note 62. In failing to ratify the Convention, industrial nations like the United States also fail to contribute economically to the Basel Convention's efforts. See William Schneider, Note, *The Basel Convention Ban on Hazardous Waste Exports: Paradigm of Efficacy or Exercise in Futility?*, 20 SUFFOLK TRANSNAT'L L. REV. 247, 280 (1996).

84. See *27,000 Tons of Toxic Waste Dumped in India: Greenpeace*, DEUTSCHE PRESSE-AGENTUR, Apr. 17, 1997, at 08:01:00.

85. See Martyn Chase, *Harvey Alter: Basel Flawed, But Goals are Worthy*, AM. METAL MARKET, May 26, 1997, available in 1997 WL 8676213.

86. These ban opponents include Australia, the United States, Canada, New Zealand, South Korea, Japan, the International Chamber of Commerce (ICC), and the Bureau of International Recycling. See Greenpeace Australia, *Australia's Attempts to Break Waste Trade Ban* (visited Sept. 21, 1998) <<http://www.greenpeace.org.au/Releases/93.html>>; *Environment: Green Light for Export Ban on all Hazardous Waste*, EUR. INFO. SERV., Oct. 7, 1995 (showing South Korea argued for an amendment retaining the right to recycle with developing nations); Pratap Chatterjee, *Environment: Ban on Toxic Exports to Poor Countries Challenged*, INTER PRESS SERV., Mar. 14, 1995, available in 1995 WL 2259654 (citing Australia, Canada, France, the United States and the ICC); Khor, *supra* note 4 (citing a United States State Department statement to the European Union governments that "the U.S. opposes the OECD to non-OECD ban and would not support this amendment"); Alan Samson, *Waste Stance Could Leave NZ on Outer*, DOMINION, Mar. 2, 1998, available in 1998 WL 7977908 (citing New Zealand); *Pride*, *supra* note 62 (citing Australia, the United States, the ICC, and the Bureau of International Recycling). Greenpeace identified the "sinister seven" key opponents of the Basel Ban as Australia, Canada, Germany, Japan, the Netherlands, the United Kingdom, and the United States. See Puckett & Fogel, *supra* note 8.

three.⁸⁷ In order to accomplish their objectives, nations opposed to the Ban Amendment employ a variety of tactics.

III. EFFORTS TO UNDERMINE THE BAN AMENDMENT

A. *Australian Resistance*

Industrialized nations such as the United States, Australia, and Canada are pushing vigorously to undermine the ban.⁸⁸ Many waste schemes involving developing countries existed before the ban came into effect and may not magically dissipate without fear of reprisal. Australia, in particular, continues exporting hazardous waste to developing countries who are more than willing to accept the waste at costs far lower than Australia's domestic disposal or recycling operations cost.⁸⁹ Australia's actions illustrate that industrial nations who are opposed to the ban can continue to find ways to export waste to Third World countries through legal loopholes in the Convention. To further complicate matters, a few non-OECD nations want to either accept the waste or be included in Annex VII despite their lack of adequate treatment facilities.⁹⁰ Seeking to take advantage of political and economic vulnerability, Australia and other ban opponents organized a meeting with developing countries in March of 1995, in Dakar, Senegal.⁹¹ Greenpeace characterized the meeting as a "disguised attempt by some rich countries to destroy the ban [amendment]."⁹²

Evidence that Australia may not be taking the ban seriously is illustrated by a statement in October of 1994 made by Chris Lamb, legal advisor to the Australian Department of Foreign Affairs and Trade. He argued that, although the Convention possesses moral and political significance, it does not create a binding legal obligation upon Australia.⁹³

87. See Chatterjee, *supra* note 86; Chatterjee, *supra* note 9. A "confidential report" from the Australian delegation indicated its purpose in meeting with South Africa was to gain South African support to "weaken" the ban. Eddie Koch, *South Africa — Environment: Scandal Over Toxic Waste Ban*, INTER PRESS SERV., Aug. 29, 1995, available in 1995 WL 10133936. See also Chatterjee, *supra* note 86 (citing future trips to India and the Philippines by the Australian government for the purpose of getting these countries to accept waste imports).

88. See generally sources cited *supra* note 9 (citing various news sources providing evidence of ban resistance).

89. See *infra* notes 99-102 and accompanying text.

90. See Tan, *supra* note 17.

91. See Chatterjee, *supra* note 86. The meeting was organized by Australia, Canada, France, the United States, and the International Chamber of Commerce. See *id.*

92. *Id.*

93. See Kalinga Seneviratne, *Australia-Environment: An Export Nobody Wants*, INTER PRESS SERV., Oct. 21, 1994, available in 1994 WL 2722935. However, upon a three-fourths vote of the Parties present and voting at the Conference adopting the Ban Amendment, it is

Following the ban's adoption, Australia instituted an international campaign to convince developing nations to sign waste trade agreements in order to rally and defeat ratification of the ban. In October of 1994, five months after the ban decision was originally made,⁹⁴ Australian government officials held meetings with the Indian, Malaysian, and Indonesian governments to ask that they accept toxic waste from Australian companies.⁹⁵ Australian officials also approached the South African government in 1995,⁹⁶ before the Basel Ban came into effect, to encourage it to reconsider its support for the proposed ban.⁹⁷

Along with these attempts to thwart Ban Amendment ratification, Australian industrial hazardous waste exporters have continued dumping hazardous waste in the world's poorer nations under the guise of "recycling," a practice previously permitted under the Convention. Although the ban on exportation came into effect in January of 1998, reports from Greenpeace allege that Australia, Canada, the United States, and other OECD countries continue exporting their waste to non-OECD nations in order to save money. Greenpeace specifically cited waste "schemes" involving the United States, Canada, Australia, the Netherlands, and Germany and the export of hazardous waste to India, Brazil, Bangladesh, the Philippines, and China.⁹⁸

Presently, Greenpeace accuses Australia of hazardous waste trading with various developing countries not equipped to handle the waste without endangering the health and environment of their citizens.⁹⁹ These allegations include: (1) twenty tons of zinc ash and residues shipped without a permit to

submitted to the Depositary and to the parties for ratification. See Basel Convention 1989, art. 17(5). As to the overall force of the Basel Convention, article 25 specifies that "[f]or each state . . . which ratifies, accepts, approves or formally confirms this Convention . . . it shall enter into force." Basel Convention 1989, art. 25(2).

94. The decision to ban export of hazardous wastes from OECD to non-OECD states was originally adopted pending implementation by Decision II/12 of the Second Meeting of the Conference of the Parties in Geneva, Switzerland, on March 25, 1994. See Decision II/12, Mar. 25, 1994, in SECRETARIAT BASEL CONVENTION, BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL, 1989 AND DECISIONS ADOPTED BY THE FIRST (1992) AND THE SECOND (1994) MEETINGS OF THE CONFERENCE OF THE PARTIES, at 77, S.B.C. No. 94/008 (1994).

95. See Chatterjee, *supra* note 9.

96. South Africa was the only member of the African continent refusing to ratify the Bamako Convention prohibiting hazardous waste imports to Africa. See Hirschi, *supra* note 83, at 175.

97. See Koch, *supra* note 87.

98. See *Waste-Trade Zealots*, *supra* note 9.

99. See *Waste Dumpers Named*, NEW STRAIT TIMES, Mar. 22, 1998 (visited Feb. 2, 1999) <http://www.ban.org/ban_news/dumpers_named.html>. See also LOUKA, *supra* note 25, at 99-102 (discussing waste management in developing nations).

Bombay in January of 1997;¹⁰⁰ (2) a hazardous mixture of lead, cadmium and mercury sent to Hong Kong was ordered to be returned to Australia in October of 1997;¹⁰¹ (3) exportation of at least 8569 tons of hazardous waste to non-OECD countries in 1996; and (4) between January of 1994 and June of 1996, Australia shipped 11,328 tons of battery scrap to the Philippines.¹⁰² Regardless of whether hazardous waste trading between Australia and some poorer Asian countries continues, Australia employs stalling tactics and legal maneuvers to ignore its obligation to respect the ban. One legal maneuver is claiming the continued validity of article 11 agreements under the Convention following the Ban Amendment.

B. Article 11 Agreements

Prior to the Ban Amendment, article 11 of the Basel Convention clearly allowed bilateral and multilateral export agreements between OECD and non-OECD nations as long as the importing country observed "environmentally sound" management practices.¹⁰³ However, Greenpeace urges that the hazardous waste ban should not be circumvented using article 11 agreements.¹⁰⁴ Many OECD countries, including the United States¹⁰⁵ and

100. See *Waste Dumpers Named*, *supra* note 99.

101. See *id.*

102. See *id.* Australia has been classified as one of the top three scrap lead battery exporters to the Philippines. See *id.* See generally Greenpeace Australia, *Australian Waste Trader Convicted in Hong Kong*, March 25, 1998 (visited Sept. 21, 1998) <<http://www.greenpeace.org.au/Releases/103.html>>; *Australia: Greens Stop Used Battery Export*, INTER PRESS SERV. GLOBAL INFO. NETWORK, Mar. 14, 1994, available in 1994 WL 2584169. Because Australia can only domestically recycle one-fourth of the 15 million car batteries it discards annually, most of the residual is exported for recycling and disposal in developing Asian countries. See *id.* Last year, "India . . . received more than 40 ton[s] of battery scrap and lead ash." *Call for Nations to Ignore New OECD Hazardous Waste Bid*, ASIA PULSE, Feb. 27, 1998, available in 1998 WL 2950761; *Ignore OECD Members' Call to Dump in Developing Countries, Says NGOs*, MALAYSIAN NAT'L NEWS AGENCY (BERNAMA), Feb. 27, 1998, available in 1998 WL 6594534. In addition, at least 27,000 tons of toxic waste were dumped in India during a ten-month period from April 1996 to January 1997." *27,000 Tons of Toxic Waste Dumped in India: Greenpeace*, *supra* note 84.

103. See Basel Convention 1989, art. 11.

104. See U.S. Chamber *Reconsidering Opposition to Basel Pact in Wake of Recent Changes*, [Mar.] Int'l Env't Daily (BNA) (Mar. 10, 1998), available in LEXIS, BNA Library, BNAIED File.

105. The United States also has bilateral hazardous waste trade agreements with Canada, Mexico (both formed in 1986) and, most recently, Malaysia. See Agreement Between the Government of Canada and the United States of America Concerning the Transboundary Movement of Hazardous Wastes, Oct. 28, 1996, in SECRETARIAT BASEL CONVENTION, TEXTS ON THE BILATERAL, MULTILATERAL AND REGIONAL AGREEMENTS OR ARRANGEMENTS REGARDING TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND OTHER WASTES, at 123, SBC No. 94/009 (1994); Annex III to the Agreement Between the United States of

Australia,¹⁰⁶ rushed to enter into article 11 agreements before the ban on exportation went into effect, thereby nullifying the intent of the ban to prevent recycling and reclamation operations in nations ill-equipped to handle hazardous material.¹⁰⁷

Additional efforts to avoid the ban are seen in Germany's¹⁰⁸ and Australia's assertions that any bilateral agreement entered into before January of 1998 remains effective after that date.¹⁰⁹ A Convention delegate

America and the United Mexican States on Cooperation for the Protection and Imprisonment of the Environment in the Border Area, Nov. 12, 1986, in SECRETARIAT BASEL CONVENTION, TEXTS ON THE BILATERAL, MULTILATERAL AND REGIONAL AGREEMENTS OR ARRANGEMENTS REGARDING TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND OTHER WASTES, at 157, SBC No. 94/009 (1994); Hogue, *supra* note 16.

106. See generally *India-Environment: India Denies Waste Import Deal with Australia*, INTER PRESS SERV., Oct. 20, 1994, available in 1994 WL 2722979. While denying that it made a deal with Australia to import hazardous waste, the Indian government confirmed that Australia sought such agreements in the wake of the Ban Amendment. See *id.* See also *The Waigani Convention* (last modified Aug. 31, 1998) <<http://www.environment.gov.au/epg/hwa/waigani.html>> (describing the Waigani Convention and Australia's responsibilities under it). The Waigani Convention is a multilateral agreement pursuant to article 11 of the Basel Convention which bans the transboundary movement of hazardous and radioactive wastes to the South Pacific Forum Island Countries but allows Australia to receive such shipments. See *id.* Australia signed the Waigani Convention on September 16, 1996, and ratified it on August 17, 1998. See *id.* However, in order to enter into force the Convention must be ratified by two-thirds of the South Pacific Forum countries, which is expected to be completed in the year 2000. See *id.* Australian industry representatives at the Eighteenth Hazardous Waste Act Policy Reference Group Meeting were unconcerned about the Waigani ban because Australia does not engage in hazardous waste export with South Pacific island countries. See *Hazardous Waste Act Policy Reference Group Eighteenth Meeting Minutes*, Sept. 8, 1997 (last modified Aug. 30, 1998) <<http://www.environment.gov.au/epg/hwa/prg18.pdf>>.

107. See Dean M. Poulakidas, *Waste Trade and Disposal in the Americas: The Need for and Benefits of a Regional Response*, 21 VT. L. REV. 873, 900-01 (1997).

108. But see *infra* notes 109 and 111 (regarding Germany's current position as a member of the European Union).

109. See Poulakidas, *supra* note 107, at 901. Note, however, that Germany is bound by the European Union's decision to ban the continued use or formation of such agreements as of January 1, 1998. See discussion *infra* note 111. However, Basel Convention parties must not only refrain from entering into any post-Basel Convention agreements incompatible with the aims of the Convention, but the Basel Convention also prevails over incompatible agreements between Convention parties concluded pre-Basel. See KUMMER, *supra* note 27, at 97. This conclusion is based upon the principle, found in article 30(3) of the Vienna Convention, that current laws supersede old laws. See *id.* By extension, and based upon the same principles governing treaties, article 11 agreements concluded before the Ban Amendment between two parties to the Convention are subject to the ban limitations that bind them. See *id.* However, agreements between parties and non-parties (even those incompatible with the Convention) concluded pre-Basel take precedence over the Convention based upon the rule *pacta tertiis nec nocent nec prosunt* "agreements neither harm nor benefit third parties." *Id.* Conversely, agreements between parties or between parties and non-parties to the Convention are rendered in violation of their international obligations imposed by the

from Australia made the following statement following adoption of the Ban Amendment: "Australia considers Article 11 to be an important provision of this Convention. . . . We do not consider that the text we have just adopted removes th[e] right [to form bilateral and multilateral agreements with non-OECD countries]." ¹¹⁰ However, the Directorate-General for the European Commission on the Environment, Ludwig Kramer, stated that article 11 no longer applies to the new article 4A (Ban Amendment) and that any multilateral, bilateral, or regional agreement (past or present) would violate "the spirit and provisions of the Convention." ¹¹¹ Mr. Kramer reaffirmed his position in a statement to the Bureau of National Affairs that, "If you are going to have a ban, you cannot have bilateral agreements." ¹¹²

It is important to emphasize the situations in which article 11 agreements to trade in hazardous waste still apply following the adoption of the Ban Amendment. First, between states that have not ratified the Ban Amendment, or between those states and non-parties to the Convention, an article 11 agreement still operates. ¹¹³ Second, imports to Annex VII states from non-Annex VII states or non-parties are also covered by article 11 agreements. ¹¹⁴ Third, Annex VII states may freely trade hazardous wastes

Convention if found to be "incompatible with the Convention" and made post-Convention. *Id.* at 97-98.

110. Statement Made by Australia, *supra* note 75, at 101. In addition, the Australian Hazardous Waste Act specifies one of its "aims" as giving "effect to agreements and arrangements of the kind mentioned in Article 11 of [the Basel Convention]." Hazardous Waste Act 1989, § 3(2)(b).

111. Letter from Ludwig Kramer, Head of the Waste Management Policy Unit in the Environment, Nuclear Safety and Civil Protection Division of the European Commission, to Dr. I. Rummel-Bulska, Executive Secretary, United Nations Environment Policy/Programme/Protection, Secretariat of the Basel Convention, *Bulska Letter* (visited Sept. 21, 1998) <http://www.ban.org/issues_for_cop4/bulska_letter.html>.

[I]t is clear that bilateral, multilateral, or regional agreements or arrangements between Parties listed in Annex VII and Parties or other States not listed in Annex VII, when allowing for hazardous waste to be exported from the first to the latter, would circumvent the legal requirement of Article 4A in a way which is not foreseen by the Convention and are therefore not acceptable from a legal point of view.

Id.

In addition, the European Union adopted European Council Regulation No. 120/97 (an amendment to No. 259/93) to fully implement the Ban Amendment. *See* Basel Action Network, *supra* note 20. The regulation specified that article 11 agreements would only remain valid until January 1, 1998. *See id.* The fifteen members of the European Union are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom. *See id.*

112. Joe Kirwin, *European Commission, Recycling Industry Still Up in Arms Over Expanding Basel List*, [Mar.] Int'l Env't Daily (BNA) (Mar. 10, 1998), available in LEXIS, BNA Library, BNAIED File.

113. *See* CRAWFORD & SANDS, *supra* note 15, at 18-19.

114. *See id.* at 19.

with other Annex VII states without the use of article 11.¹¹⁵ Similarly, non-Annex VII states may also trade hazardous wastes with other non-Annex VII states without article 11.¹¹⁶

However, trade from an Annex VII state that adopted the Ban Amendment to a non-Annex VII state that adopted the amendment is clearly prohibited because both have agreed, by the terms of the Basel Convention as amended, that trade between them would “not derogate from the environmentally sound management of hazardous wastes”¹¹⁷ in violation of article 11 of the Basel Convention. Australia is an Annex VII state that has not ratified the Ban Amendment and wishes to engage in hazardous waste trade with developing countries that have or may ratify the Ban Amendment. In this scenario, although Australia is not officially bound by the Ban Amendment, it is constrained by other language in the Basel Convention,¹¹⁸ and non-Annex VII states that ratify the Ban Amendment would be placed in the awkward position of enforcing the intent of the Basel Convention in any negotiation with Australia.¹¹⁹ This is because the law of treaties would impose the obligations of the unamended Basel Convention upon both of the parties, and because the Basel Convention imposes the responsibility to prohibit Annex VII to non-Annex VII trade squarely upon Annex VII states rather than sharing it with non-Annex VII receiving states.¹²⁰ Thus, by failing to ratify the Ban Amendment, and given the weak economic and political position of non-Annex VII countries, Australia will likely experience little resistance in continuing its hazardous waste trade with developing countries while it awaits the results of its economic studies.

Even assuming article 11 still applied, the original Convention specifies that agreements between OECD and non-OECD countries “shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests

115. *See id.* at 20.

116. *See id.* at 19.

117. Basel Convention 1989, art. 11. Crawford and Sands believe that article 58 of the Vienna Convention allows these countries to “suspend” the Basel Convention in special cases where there is environmentally sound management of hazardous waste for a specified period. *See CRAWFORD & SANDS, supra* note 15, at 23.

118. Regarding the Basel Convention’s language, particularly constraining is the requirement to exercise environmentally sound management practices. *See Hazardous Waste Act 1989*, § 3(1).

119. *See CRAWFORD & SANDS, supra* note 15, at 23-24.

120. *See id.* at 19-20; Basel Convention 1989, art. 4(5). Article 30(4) of the Vienna Convention “gives priority to the treaty to which both states are parties.” *CRAWFORD & SANDS, supra* note 15, at 18. Crawford and Sands conclude that article 11 agreements would not be available in practice between Annex VII states ratifying the Ban Amendment and developing non-Parties to the Basel Convention and would be severely scrutinized as between Annex VII states ratifying the Ban and developing states not ratifying the Ban. *See id.* at 25-26.

of developing countries.”¹²¹ In addition, the agreements must receive the Basel Convention Secretariat's approval as being “compatible with the environmentally sound management of hazardous wastes and other wastes as required by th[e] Convention.”¹²² To control the apparent looseness of an “environmentally sound” standard, article 11 should be subject to the same standards governing the Convention as a whole.¹²³ This would ensure that the agreement is not “incompatible with the spirit of the Basel Convention.”¹²⁴

121. Basel Convention 1989, art. 11(1). “Environmentally sound management” is defined 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.” *Id.* art. 2(8). The Australian Hazardous Waste Act allows the Environment Minister to issue a written certificate specifying what conduct as applied to what hazardous waste is, or is not, environmentally sound management after consultation with the Hazardous Waste Technical Group. See Hazardous Waste Act 1989, § 58 C(1)-(2).

122. Basel Convention 1989, art. 11(2). To further that end, the Ad Hoc Committee on Implementation drew up a list of questions to be posited to parties to a potential article 11 agreement:

- (1) Does the agreement address the control of the transboundary movement of hazardous wastes and other wastes subject to the Basel Convention?
- (2) Taking all practicable steps, will the management of hazardous wastes under the agreement or arrangement be such that it will protect human health and the environment against adverse effects?
- (3) How does the agreement or arrangement take into account the interests of developing countries?
- (4) Does the agreement or arrangement require prior notification?
- (5) Does the agreement or arrangement require prior consent?
- (6) Does the agreement or arrangement provide for the tracking of the wastes?
- (7) Does the agreement or arrangement provide for alternative measures for wastes which cannot be managed as planned?
- (8) Does the agreement or arrangement provide for the identification of authorities responsible for the implementation of such agreement?
- (9) Are the obligations of the Article 11 agreement or arrangement consistent with the control measures related to transboundary movements of hazardous wastes as provided for by the Basel Convention?
- (10) Are the wastes covered by the Article 11 agreement or arrangement consistent with the scope of the Basel Convention?

Decisions Adopted by the Second Meeting of the Conference of the Parties in Geneva, Switzerland on 25 March 1994, Decision II/10, Annex, in SECRETARIAT BASEL CONVENTION, BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL, 1989 AND DECISIONS ADOPTED BY THE FIRST (1992) AND THE SECOND (1994) MEETINGS OF THE CONFERENCE OF THE PARTIES, at 63, S.B.C. No. 94/008 (1994).

123. See KUMMER, *supra* note 27, at 90-91.

124. *Id.* at 91. In other words, article 11 agreements are subject to the same scrutiny implied by the institution of the Basel Ban on hazardous waste exports from OECD to non-OECD nations. If the ban, directed at prohibiting such activity, is interpreted in accordance

The "large gap" that exists in environmental technology for disposal and recycling operations between industrialized and developing nations precludes effective regulation of hazardous waste export to the latter from the former.¹²⁵ Developing nations lack the technology to adequately control or monitor hazardous waste imports.¹²⁶ Many of the same arguments and statistics advanced above in support of the Ban Amendment may also justify the invalidation of article 11 agreements, which ignore the dangers attendant with trade between rich and poor countries. Therefore, in light of waste trade realities, any agreement between an OECD and non-OECD country allowing hazardous waste exports to the latter may constitute too great a risk to the developing nation even when subject to article 11 guidelines. However, the continued use of article 11 agreements between OECD and non-OECD nations allowing hazardous waste export to the latter is not the only argument forwarded by OECD nations eager to continue their profitable trade relationships.

C. Annex VII Expansion¹²⁷

Another effort to circumvent the ban includes statements that a non-OECD country, in order to accept hazardous waste from an OECD member, need only declare that it has "environmentally sound recycling facilities."¹²⁸ However, this criterion not only applies to the accepting nation's treatment of an exporting nation's waste, but it also imposes a "general obligation" on all parties to the Convention to dispose of waste using "environmentally sound management."¹²⁹ Basel Action Network (BAN), a United States-based non-governmental organization that attended the Convention, stated that, "if non-OECD countries were allowed to join Annex VII, the ban would no

with the "spirit" of the Convention as a whole, then article 11 agreements permitting the same activity would undermine the spirit of the Convention. *See id.*

125. *See* Pawel Kazmierczyk, *International Trade in Hazardous Waste: Overview of Approaches to Creating an Effective Legal Order*, at 19 (1995) (unpublished M.A. Thesis, University of South Carolina) (on file with the Thomas Cooper Library, University of South Carolina).

126. *See id.*

127. Annex VII is the list of OECD nations, the European Union, and Liechtenstein that are prohibited from exporting their waste to developing countries by the Ban Amendment. *See* discussion *supra* note 12.

128. *See supra* note 121 (defining "environmentally sound").

129. *See* Basel Convention 1989, art. 4(8). Note that this obligation "may not under any circumstances be transferred to the States of import or transit." *Id.* art. 4(10). *See also* KUMMER, *supra* note 27, at 56-57 (discussing "[e]nvironmentally sound management of hazardous wastes and the principle of non-discrimination").

longer be a ban, but an open ended, largely voluntary agreement.”¹³⁰ Environmentalists characterized the push by developed countries to expand “Annex VII as a ploy to delay implementation of the ban.”¹³¹ Australia is one of the nations “strongly in favour of opening Annex VII in order to leave the ban more ‘flexible.’”¹³² Environmentalists counter these arguments by asserting that countries should be subject to the OECD membership process before addition to Annex VII.¹³³

On February 23, 1998, Convention delegates met in Kuching, Malaysia, to discuss conferring Annex VII status upon requesting non-OECD countries.¹³⁴ Application for OECD status is conditioned upon criteria such as the applying country’s economic situation and not upon its capacity to properly treat hazardous waste because economically disadvantaged countries that claim proper capacity may nonetheless be operating under economic pressure exerted by richer OECD nations.¹³⁵ Two countries, Israel and Monaco, requested admission to Annex VII at the Fourth Conference of the Parties in February of 1998.¹³⁶ Ban opponents like Australia and the United States have interpreted these requests as opportunities to encourage the development of criteria for evaluating Annex VII membership in order to expand it.¹³⁷ According to BAN, any criteria would prove just as inadequate at promoting the goals of the Convention as prior informed consent¹³⁸

130. Basel Action Network, *Basel Ban Victory at COP4: A Report on the Negotiations and Results of the Fourth Conference of Parties to the Basel Convention Held in Kuching, Malaysia 23-27 February 1998* (visited Sept. 17, 1998) <http://www.ban.org/issues_for_cop4/what_happened.html>. Australia joined the United States, and Canada, among others, in pushing for the development of criteria to decide which countries could be placed on Annex VII. *See id.* However, that effort proved unsuccessful at the Fourth Conference of the Parties, and the parties deferred the Annex VII criteria development to the Fifth Conference of the Parties. *See id.*

131. Tan, *supra* note 17.

132. Basel Action Network, *supra* note 130. The United States also insists that allowing countries to voluntarily join Annex VII would best avoid conflicts with GATT. *See* Hogue, *supra* note 16.

133. *See Annex VII “Criteria” — Last Attempt to Undermine the Ban?*, 1 BASEL ACTION NEWS (visited Sept. 21, 1998) <http://www.ban.org/ban_news/last_effort.html> [hereinafter *Last Attempt*].

134. *See* Hogue, *supra* note 16.

135. *See Last Attempt*, *supra* note 133. The OECD/non-OECD distinction remains important because OECD countries are a “legally bound, closed set of nations” which undergo a “rigorous process” to acquire membership based on economic, and not just technological, capacity criteria (the latter of which proponents of Annex VII expansion argue justifies admission to the Annex). *Id.*

136. *See* Hogue, *supra* note 16; *Last Attempt*, *supra* note 133.

137. *See Last Attempt*, *supra* note 133.

138. *See id.* Prior informed consent requires a Basel Convention member to obtain the express informed consent of all potentially affected states and to supply detailed information to those states before the exporting member can ship hazardous wastes. *See* Basel Convention

because of the possibility of economic pressure to accept hazardous waste pushed by OECD nations upon developing nations.¹³⁹ BAN further argues that, because the development of such criteria would inspire much disagreement and enforcement difficulties, the activity would only serve to stall implementation and ratification of the ban.¹⁴⁰ However, this issue, along with the effect of article 11 following the Ban Amendment, remains open for debate at the Fifth Conference of the Parties in 2000.¹⁴¹ Beyond article 11 and Annex VII expansion arguments is the contention of many industries, and the countries they support, that the Ban Amendment violates international free trade provisions.

D. *Criticism of the Ban from a Free Trade Perspective*

Many industrial leaders and interest groups assert that the Basel Convention itself may violate the General Agreement on Tariffs and Trade (GATT).¹⁴² Industry groups especially emphasize the need to exclude hazardous waste destined for recycling or recovery operations. However, the Basel Secretariat, Dr. Rummel-Bulska, stresses that the Basel Convention "was negotiated not to impose trade sanctions, but to minimize the generation and movement of hazardous waste."¹⁴³ However in 1995, a confidential report issued by the Australian delegation stated that there was no understanding that in signing the Convention Australia agreed to waive its free trade rights.¹⁴⁴

The issues are GATT's most-favored-nation (MFN) rule in article I¹⁴⁵

1989, art. 6(1). KUMMER, *supra* note 27, at 24. The information required to obtain consent includes the nature of the waste, the names of involved states and waste generators, and all other information specified in Annex VA to the Basel Convention. See Basel Convention 1989, Annex VA.

139. See *Last Attempt*, *supra* note 133.

140. See *id.*

141. See Decision IV/8, Decision Regarding Annex VII, in *Trade Measures in the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, Joint Session of Trade and Environment Experts, OECD Working Papers, at 46 (1998).

142. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

143. Hirschi, *supra* note 83, at 187 (footnote omitted).

144. See Koch, *supra* note 87.

145. Article I of GATT 1947 provides that "a nation extending a trade advantage to another nation must immediately and unconditionally extend that advantage to all other member nations." Lakshman Guruswamy, *The Promise of the United Nations Convention on the Law of the Sea (UNCLOS): Justice in Trade and Environment Disputes*, 25 ECOLOGY L.Q. 189, 217 (1998). "There is no reason to assume, a priori, that the most favoured nation rule is part of the solution [to the international waste trade issue]." Steve Charnovitz, *Living in an Ecolonomy: Environmental Cooperation and the GATT* (visited Oct. 5, 1998) <<http://www>

and GATT's article XI.¹⁴⁶ Whether the Basel Ban, in particular, violates these provisions requires further inquiry. First, if viewed as a usable good for recovery and reuse, hazardous waste and a ban on its trade would constitute a non-tariff barrier imposed by OECD nations to bar the access of "emerging economies" to a new commodity — waste.¹⁴⁷ Second, a requirement that hazardous wastes be imported exclusively to other OECD nations may violate GATT's article I MFN obligation by discriminating against non-OECD convention members.¹⁴⁸ It is argued that the Ban Amendment arbitrarily and unjustifiably discriminates between OECD/Annex VII and non-OECD/non-Annex VII countries where the same conditions may exist and where a less trade-restrictive solution¹⁴⁹ can be substituted.¹⁵⁰

Obvious inconsistencies exist between free trade interests and placing limits on international hazardous waste trading. Both GATT and the North American Free Trade Agreement (NAFTA) contain provisions that, in theory, resolve such inconsistencies with deference to international environmental obligations.¹⁵¹ Article 20 of GATT provides an exception for "national measures that are, inter alia, necessary to protect human, animal, or plant life and health."¹⁵² However, there is no clear test under article 20 specifying the kinds of health or environmental measures that justify yielding free trade interests for environmental concerns.¹⁵³ GATT arbitration panels

.ap.harvard.edu/papers/T&E/Charnovitz/Charnovitz.html>.

146. See Charnovitz, *supra* note 145. Article XI of GATT forbids "prohibitions or restrictions" on the trade of "any product" as an import or export to a GATT member. CRAWFORD & SANDS, *supra* note 15, at 29, 31.

147. See ASANTE-DUAH & NAGY, *supra* note 23, at 103. In fact, both exporting and importing countries in this scenario would violate article XI of GATT if they prohibit waste trade just "because the importing country cannot manage the waste in an environmentally sound manner." *Id.*

148. See *id.*

149. An example of a less trade-restrictive solution is establishing criteria for Annex VII admission based on technical capacity rather than on OECD membership. See CRAWFORD & SANDS, *supra* note 15, at 38.

150. See *id.* at 37-38. Crawford and Sands note that the Ban Amendment is less likely to be arbitrary if ratification is gained by three-fourths of the Convention parties. See *id.* at 17.

151. See Hirschi, *supra* note 83, at 187. "[B]oth GATT and NAFTA have provisions stating that when there is such inconsistency, the international environmental obligations will pre-empt the trade obligations." *Id.* (footnote omitted).

152. Mike Meier, Note, *GATT, WTO, and the Environment: To What Extent Do GATT/WTO Rules Permit Member Nations to Protect the Environment When Doing So Adversely Affects Trade?*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 241, 242 (1997).

153. See *id.* at 243. Article 20 provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised

have relaxed their position on whether the exemptions apply, suggesting that cooperative multilateral environmental agreements will more likely qualify for those exemptions.¹⁵⁴ The World Trade Organization (WTO) Panel further clarified "necessary" to mean "if there were no alternative measures consistent with . . . [GATT], which [the party] could reasonably be expected to employ to achieve its . . . objectives."¹⁵⁵

Industrial groups accuse the European Commission (EC) of "economic imperialism" for the EC's clear support and ratification of the Basel Ban.¹⁵⁶ However, unlike the Basel Amendment, the EC has extended the ban to additional materials not characterized as hazardous under the Convention.¹⁵⁷ The Australian industrial lobby asserted pressure on its government to invest in exploring ways to weaken or revoke the Ban Amendment.¹⁵⁸ Australian scrap metals processor Peter Netchaef similarly characterized the Basel Convention as "eco-imperialism" because he believes it creates a scarcity of raw materials in developing countries while simultaneously creating an excess in developed nations, resulting in inflated prices for developing nations that "runs counter to what we are trying to do with the WTO and limits markets."¹⁵⁹

restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animal or plant life or health

....

General Agreement on Tariffs and Trade, art. 20, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. GATT arbitration panels have applied the following test to decide if article 20(b) can be used to allow the environmental measure to restrict trade:

- (1) whether the national measure serves to protect human, animal, or plant life or health;
- (2) whether the measure for which the exception is invoked is necessary to protect human, animal, or plant life or health;
- (3) whether the measure is applied consistently with the requirements in the introductory clause to Article 20 (namely, that the measure not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or that would constitute a disguised restriction on international trade); and
- (4) whether alternative GATT-consistent measures are reasonably available to further the same policy objectives.

Meier, *supra* note 152, at 280.

154. See CRAWFORD & SANDS, *supra* note 15, at 33.

155. *Id.*

156. See Kirwin, *supra* note 112.

157. See *id.*

158. See *Pride*, *supra* note 62. United States industry has asserted similar pressure upon the United States Department of State to oppose the Ban Amendment. *Id.* See also *supra* Part III(A).

159. Christiaan Virant, *Global Business Group Opposes UN Waste Ban*, J. COM., Apr. 11, 1997, at 11B.

Globally, industry, with the aid of the International Chamber of Commerce (ICC), is trying to "kill the Basel Ban" by arguing that anything "recyclable" should not be regulated under the Convention.¹⁶⁰ Exporting industries support this argument by contending that a rejection of certain recycling practices will cause manufacturing processes, now dependent upon receiving raw materials from abroad, to resort to increased use and exploitation of virgin resources.¹⁶¹ Admittedly, other bilateral or multilateral treaties governing the international movement of hazardous wastes exclude materials intended for recycling or recovery from the definition of a hazardous waste even though they have different definitions of what constitutes a hazardous waste and different allowances for movement intended for recycling.¹⁶² However, this argument and the others advanced in support of allowing continued hazardous waste trade recycling agreements between OECD and non-OECD nations ignore the reality that the act of recycling hazardous wastes itself poses grave health risks.¹⁶³ Further, if the recycling loophole remained, industries could justify exportation by fabricating a future use for any waste regardless of its volatility.¹⁶⁴

From a world trade perspective, the ICC stated that "the Basel Convention . . . contravenes the spirit of the World Trade Organization . . . [because] "it will lead to significant economic losses for many developing Asian nations."¹⁶⁵ The ICC cites the inability of developing nations like China to import secondary raw materials for copper extraction and the harmful effect of zinc ash limits on Indian wheat output, which is dependent

160. See *Pride*, *supra* note 62.

161. See Armando Roggio, *Environmental Watchdogs Putting Bite on Recyclers (International Metals Recycling: Import Bans Stacking Odds Against Scrap)*, AM. METAL MARKET, May 26, 1997, available in 1997 WL 8676209. In particular, the scrap metal industry wants ferrous scrap recognized as a product rather than a waste (hazardous or otherwise) to alleviate anticipated worldwide shortages of iron ore and steel. See Hirschi, *supra* note 83, at 190.

162. See Hirschi, *supra* note 83, at 188. One insider characterized the U.S. position on restrictions placed upon movement of hazardous waste intended for recycling by stating that, "legitimate trade in recyclable materials must be properly considered and protected before [the United States] will ratify the treaty." *Id.* at 189 (quoting *Conference Participants Debate Trade Aspects of Basel Convention*, Int'l Env't L. Rep. (BNA) No. 50 (Jan. 24, 1996)). It is further recognized that, without U.S. support for the Basel Convention or the Ban Amendment, the ban will not likely gain the support necessary for ratification. See *id.* at 191. However, if all other parties to the Convention refuse to trade with the United States, the United States will be forced to abide by international rules instead of economically and politically pressuring other Parties to abide by the status quo they currently support.

163. See *Pride*, *supra* note 62.

164. See *id.*

165. Virant, *supra* note 159. The United States Chamber of Commerce contends that the Basel Ban will severely stifle the \$2.2 billion in U.S. earnings from the recycling trade. See Khor, *supra* note 4.

upon zinc-enriched fertilizers.¹⁶⁶ Although the Philippines, Malaysia, India, South Korea, and Brazil eventually voiced support for the ban, most of these countries expressed fears that the Ban Amendment would threaten their sources of revenue and raw materials.¹⁶⁷ Ban opponents also pointed out that most of the Convention delegates primarily have environmental or political backgrounds and lack the technical knowledge of metals or recycling necessary to properly evaluate the ramifications of their decisions regarding the ban.¹⁶⁸ However, industrial proponents appear to ignore the negative realities that continue to exist in developing nations vulnerable to OECD hazardous waste exports.

E. *Need for the Ban Amendment*

The most startling example of the dangers of continued tolerance for hazardous waste trade between OECD and non-OECD nations, premised on ban opponents' arguments for the need to recover raw materials, exists in India.¹⁶⁹ Although Bharat Zinc's executive director lauds the environmentally sound hazardous waste recycling and disposal processes of Bharat Zinc,¹⁷⁰

166. See Virant, *supra* note 159. There is currently an emerging black market in copper in China. See *id.* Also, because of the Basel Ban, many secondary smelter operations throughout the Philippines, deprived of their supply sources, were forced to shut down operations. See Roggio, *supra* note 161. Battery recycling operations have come to a standstill, resulting in a dangerous pile-up of discarded battery waste. See *id.* This forced manufacturers to look for virgin materials, increasing costs for consumers. See *id.*

167. See *Environment: Green Light for Export Ban on all Hazardous Waste*, *supra* note 86. Initially, South Korea won a compromise that shipments between OECD and non-OECD nations destined for recycling would be allowed provided that the materials were "watertight" and "not for re-export." *Id.*

168. See Chase, *supra* note 85.

169. Shristi, an India-based environmental group, reported that between 1994 and 1996, India imported over 66 cubic tons of zinc and lead from 49 countries with about half originating from Australia, Canada and the United States. See Robin Ajello Arjuna Ranawana, *The West's Toxic Trade with Asia (India's Recycling of Toxic Metal Waste from Western Countries)*, WORLD PRESS REV., Dec. 1, 1996, at 31. The Indian Supreme Court banned hazardous wastes imports to India in May of 1997. See R. Dev Raj, *Environment-India: Green Groups to Resist Toxic Dumping*, INTER PRESS SERV., Jan. 22, 1998, available in 1998 WL 5985444. However, "unscrupulous Indian businessmen" continue to import zinc ash and lead battery scrap from the United States and Germany. See *id.*

170. See Ranawana, *supra* note 169. Bharat Zinc, based in Bhopal, India, imports zinc ash from industrialized countries and extracts the metal. See *id.* According to Basel Action Network Secretariat, Jim Puckett, "Bharat Zinc is an example of exactly why the Basel Waste Trade Ban must not be overturned." Ann Leonard & Jan Rispens, *Exposing the Recycling Hoax: Bharat Zinc and the Politics of the International Waste Trade*, MULTINATIONAL MONITOR, Jan. 1, 1996, at 30. Jan Rispens, of Greenpeace Germany, characterized Bharat Zinc as an "environmental disaster" that would have never been allowed in Germany or Holland. See Mahesh Uniyal, *Environment-India: India Breaks Ranks on Basel Ban*, INTER

observations made by witnesses in July and September of 1995 indicate otherwise.¹⁷¹ First, witnesses noticed that in every room of the factory, workers handled the lead-containing hazardous waste without gloves or protective masks.¹⁷² Second, despite the executive director's claims that the lead content of the zinc being recycled is too small to warrant concern, shipping documents from the origin state (Germany) indicated that the actual lead concentrations are one hundred times higher than the executive's claims.¹⁷³ Third, a factory worker specifically acknowledged the failure of management to warn any of the workers of possible health hazards.¹⁷⁴ Finally, local activists report that city officials tested the nearby Betwa River, a drinking source for 200,000 people and found that it was contaminated with lead and cadmium.¹⁷⁵

Although Australia has instituted fervent efforts to stall ban ratification based in part upon its industrial trade concerns, the effects upon Australia's overall export trade remain negligible. Australia's self-reported trade statistics indicate that only .00038 percent of the country's total annual export trade is affected by the export ban.¹⁷⁶ Thus, arguments against the Ban Amendment in the name of free trade lack the same urgency advanced by environmentalists and developing nations in support of the ban. Given the inherent dangers to non-OECD nations from either disposing of hazardous wastes or recycling hazardous wastes and given the environmental benefits of encouraging domestic waste disposal, hazardous waste minimization, and

PRESS SERV., Sept. 8, 1995, available in 1995 WL 10134161.

171. See Leonard & Rispens, *supra* note 170.

172. See *id.* This is despite the fact that the plant manager and the visitors were all provided with protective masks, indicating an awareness of the danger of inhaling waste dust. See *id.* In addition, workers outside the plant carried residual waste in baskets through open dumping areas without protective clothing, and, in some cases, wearing only shorts and a t-shirt. See *id.* About 450 tons of lead are dumped there annually according to European shipping documents and laboratory tests of samples from the plant conducted by Greenpeace. See Uniyal, *supra* note 170.

173. See Leonard & Rispens, *supra* note 170. The residual waste was found to contain two percent lead which, as a material not recycled, either contaminates the water in run-off or enters the lungs of workers. See *id.*

174. See *id.* The worker stated: "They don't say anything. They just give us a cloth for our mouths and a hat, but they tell us nothing." *Id.*

175. See Ranawana, *supra* note 169.

176. See *Pride*, *supra* note 62. This figure was calculated accepting that Australia currently exports approximately 22 million Australian dollars worth of hazardous wastes to non-OECD nations annually, compared to the 56.58 billion Australian dollars (1994) in total export trade it made in 1994. See *id.* Even more striking are Germany's costs to export trade as the result of the ban — .000062 percent of its total annual export trade. See *id.* See also Peter Christoff, *Letter to the Editor*, AUSTL. FIN. REV., May 13, 1996, at 18, available in 1996 WL 16880352 (stating that the Convention does not harm Australia's hazardous waste trade interests because "trade affected by potential prohibitions under the revised act constitutes some 0.2 per cent of total annual trade by value").

recycling, the Basel ban survives both economic and environmental scrutiny.

F. Moral and Political Responsibility of Australia as a Convention Member

In Australia's statement following the adoption of the Ban Amendment at the Third Conference of the Parties, Australia specifically conveyed its desire to strengthen the purposes of the Convention, especially with regard to safeguarding countries "vulnerable" to unwanted hazardous waste (presumably, developing nations).¹⁷⁷ The Australian representative concluded her statement by commanding those who supported the adoption of the ban decision to "contribute to the realization of its true objectives," declaring that Australia would certainly not "shirk that responsibility" in that regard.¹⁷⁸ Although the representative's sentiment appeared well-meaning, Australia's continued failure to affirm its commitment to protect vulnerable developing countries by ratifying the Ban Amendment is more significant.¹⁷⁹

Signing an international treaty or convention like the Basel Convention "displays a willingness to cooperate at a very low price."¹⁸⁰ Ratification of a treaty or convention, on the other hand, requires enacting national legislation that "constrain[s] the activities of certain industries in the economy."¹⁸¹ In addition, some countries take advantage of the time between signing and ratification to continue undesirable behavior and to attempt to forestall cooperative efforts.¹⁸² As such, Australia may currently be taking advantage of the time period between agreeing to the consensus decision to the Ban Amendment and ratifying that amendment. Australia has signed and ratified the Basel Convention, but it is now stalling the consensus decision to ratify the Ban Amendment despite the amendment's furtherance of previously agreed upon Convention goals.¹⁸³ Specifically, Australia has requested

177. See Statement Made by Australia, *supra* note 75, at 100. "Australia's essential position ever since negotiation began on . . . [the ban decision] has been to strengthen the Convention and its processes to provide greater protection to those countries vulnerable to unwanted hazardous wastes." *Id.*

178. *Id.* at 101.

179. An example of Australia's stalling tactics is found at *supra* note 75 and accompanying text (referring to hazardous waste list clarification request).

180. Wolff, *supra* note 18, at 103.

181. *Id.*

182. See *id.* at 110.

183. It is important to note that the preamble to the Basel Convention specifically acknowledges an "increasing desire for the prohibition of transboundary movements of hazardous wastes and their disposal in other states, especially developing countries." KUMMER, *supra* note 27, at 63. In addition, article 15(7) of the Convention specifies the need for the Conference of the Parties to examine the Convention's effectiveness "periodically" with an eye toward adopting "a complete or partial ban on transboundary movements of hazardous wastes and other wastes in light of the latest scientific, environmental, technical and

specification of what constitutes hazardous waste,¹⁸⁴ insisted that article 11 agreements between OECD and non-OECD nations remain valid, and attempted to establish criteria beyond OECD status that would allow additions to Annex VII.

When a state ratifies a treaty or convention, that state becomes bound by its obligations to other parties to the agreement which restrict its ability to ignore future amendments consistent with the agreement's goals. When a state ratifies a treaty, it restrains its international behavior in order to similarly restrict another state's international behavior.¹⁸⁵ If a state chooses to forego the burdens while receiving the benefits of such an arrangement (adherence by other states), then that state is considered a "free-rider."¹⁸⁶ Because Australia has already ratified the Convention, certain international obligations already bind and restrict its ability to ignore future amendments to the Convention. Specifically, Australia receives the benefits of regulations forbidding the export of hazardous wastes without its consent while refusing to accept the burdens of foregoing trade in exports with developing nations.

In addition to the "free rider" problem, "a state that agrees to a treaty must execute it in good faith."¹⁸⁷ In order to execute a treaty in good faith, a ratifying state must affirmatively work to advance the spirit of the treaty.¹⁸⁸ By stalling ratification of the Ban Amendment, a necessary and integral part of the Basel Convention, Australia is violating its duty of good faith by failing to join in the effort to advance the Convention's purpose of restricting hazardous waste trade to countries unable to safely treat or dispose of it.

Article 9 of the Basel Convention, which classifies conduct amounting to illegal traffic under the Convention, may contain a legal argument defeating the continued practice of OECD to non-OECD hazardous waste trafficking. Article 9 defines the illegal traffic of hazardous waste as "any transboundary movement of hazardous wastes or other wastes: . . . (e) that

economic information." Basel Convention 1989, art. 15(7).

184. According to Greenpeace, any moves to stall or confuse the amendment process by arguing definitional weaknesses would "undermine the very basis of the Convention itself." *Pride*, *supra* note 62. In other words, countries had to know what was included in the definition of hazardous waste in order to implement the Convention into their national law in the first place. *See id.*

185. *See* Hao-Nhien Q. Vu, *The Law of Treaties and the Export of Hazardous Waste*, 12 UCLA J. ENVTL. L. & POL'Y 389 (1994). The principle of *pacta sunt servanda* binds a ratifying state to the treaty obligations. *See id.*

186. *See id.*

187. *See id.* (footnote omitted). "[G]ood faith requires that the parties refrain from fraud, adhere to the purpose of the treaty, and affirmatively work to advance its spirit." *Id.* (footnote omitted). Article 26 of the Vienna Convention "obliges states to fulfil[] international obligations in good faith." *Id.* This approach espouses the rule of *pacta sunt servanda* that "agreements must be adhered to." KUMMER, *supra* note 27, at 98.

188. *See* Vu, *supra* note 185.

results in deliberate disposal (e.g.,] dumping) of hazardous wastes or other wastes in contravention of this Convention and of general principles of international law."¹⁸⁹ Because the export of hazardous wastes from OECD to non-OECD countries is now prohibited by article 4A (the Ban Amendment), such movements, whether based on article 11 agreements or not, could be characterized as illegal traffic, punishable by the domestic legislation of either the exporting or importing country.¹⁹⁰ However, as discussed below, enforcement and policing of this solution may pose additional problems.¹⁹¹

IV. ENFORCEMENT AND LIABILITY SCHEME LIMITATIONS

A. *Enforcement and Development of Liability Protocol*

Unfortunately, no matter how worthy the goals of a total ban on hazardous waste exports to developing nations, enforcement remains difficult. Often, as is the case with India, corrupt government and local officials exploit industrialized countries' pre-existing economic incentives in order to ignore waste trade restrictions.¹⁹² The twin temptation exists for developing countries to earn a quick and much-needed buck, providing immediate benefits without comprehending the long-term health and environmental risks.¹⁹³

The original Convention recognized these warring motives and incentives and responded by requiring each Party to develop domestic measures "to prevent and punish conduct in contravention of the Convention."¹⁹⁴ Like most treaties of its kind, the Basel Convention relies primarily upon "self-policing" and political pressures to discourage

189. Basel Convention 1989, art. 9(1)(e).

190. Article 9(5) of the Basel Convention specifies that "[e]ach Party shall introduce appropriate national/domestic legislation to prevent and punish illegal traffic. The Parties shall co-operate with a view to achieving the objects of this Article." *Id.* art. 9(5). Note that because of economic and political pressures, lack of resources, etc., in developing nations, upon whom responsibility to police international activity will inevitably reside, the strict enforcement of an export ban upon those nations choosing to engage in such profitable illegal traffic in hazardous wastes will not likely result. See ASANTE-DUAH & NAGY, *supra* note 23, at 109-110.

191. It is contended that in order to successfully enforce the Ban Amendment, there must be sufficient and effective "infrastructure" in place to prevent unauthorized shipments; otherwise, greedy nations will resort to illegal trade in hazardous waste. See KUMMER, *supra* note 27, at 81. However, this may not be a weakness of the Convention itself, but a fact of life reflecting that "persons who stand to make millions of dollars through illegal traffic will not be easily deterred." *Id.* at 82 (footnote omitted).

192. See ASANTE-DUAH & NAGY, *supra* note 23, at 110.

193. See *id.*

194. Basel Convention 1989, art. 4(4).

breaches.¹⁹⁵ It also left open the stratifying concept of liability by allowing the Protocol Working Group (PWG) to specify the "appropriate rules and procedures"¹⁹⁶ with a view to adopting "as soon as practicable."¹⁹⁷ The PWG met several times to discuss the appropriate scope of liability, and the form and mode of compensation under the Convention.¹⁹⁸ At the first meeting of the ad hoc group, it set out four broad goals for liability protocol development:

[(1)] The victim should be protected; [(2)] The person who created the risk should, in all fairness, be held liable for the consequences of that risk; [(3)] A good liability regime should in general provide an incentive to prevent waste generation; and Last, but not least, [(4)] such a regime would enable industry to know where it stood.¹⁹⁹

Katharina Kummer criticizes the current Basel Convention liability scheme as failing to capture the concept of environmental reparation.²⁰⁰ She outlines three aspects for ensuring compliance with international hazardous waste trade measures: (1) International guidelines, with an eye towards prevention, must "facilitate and support compliance" by providing a means of monitoring and verifying state and individual conduct;²⁰¹ (2) the guidelines should seek reparation of damage — *i.e.*, restoration of the environment and compensation to victims;²⁰² and (3) costs should be borne by the person or

195. See Vu, *supra* note 185.

196. Basel Convention 1989, art. 12.

197. *Id.* See also Muthu S. Sundram, *Basel Convention on Transboundary Movement of Hazardous Wastes: Total Ban Amendment*, 9 PACE INT'L L. REV. 1 (1997) (discussing the development of liability protocol).

198. See generally SECRETARIAT BASEL CONVENTION, DOCUMENTATION AND REPORTS ON THE DEVELOPMENT OF PROTOCOL ON LIABILITY AND COMPENSATION FOR DAMAGE RESULTING FROM THE TRANSBOUNDARY MOVEMENT AND DISPOSAL OF HAZARDOUS WASTES, SBC No. 97-003 (1997).

199. *Final Report of Ad Hoc Working Group of Legal and Technical Experts*, July 6, 1990, UNEP/CHW/WG.1/3, in DOCUMENTATION AND REPORTS ON THE DEVELOPMENT OF THE PROTOCOL ON LIABILITY AND COMPENSATION FOR DAMAGE RESULTING FROM THE TRANSBOUNDARY MOVEMENT AND DISPOSAL OF HAZARDOUS WASTES, SBC No. 97/003 (1997).

200. See KUMMER, *supra* note 27, at 222. The draft liability protocol imposes strict liability for environmental damage, holding all those participating in the trade export transaction jointly and severally liable. See *id.* at 244-45. The Basel Convention further imposes the duty to re-import hazardous wastes that cannot be disposed of properly and safely under the Convention upon the exporting state. See Basel Convention 1989, art. 8.

201. See KUMMER, *supra* note 27, at 212.

202. *Id.* at 212-13.

state controlling and benefitting economically from the hazardous wastes.²⁰³

Efforts to stop illegal toxic waste trade in Australia are currently stifled by enforcement and monitoring difficulties contained within Australian law.²⁰⁴ In addition, Helen Blain of Australia's Environment Protection Group identified problems within the Australian Customs Service and international customs codes that create a discrepancy between Basel Convention waste descriptions and the codes.²⁰⁵

Despite these difficulties, the Hazardous Waste Act subjects a person or a corporate body to punishment if they "knowingly, recklessly or negligently" export or import hazardous wastes without the relevant permit or in breach of permit conditions.²⁰⁶ This offense is punishable by a fine of up to one million dollars against a corporate body or by imprisonment of up to five years for an individual.²⁰⁷ If a person knowingly or recklessly makes a false or misleading statement in relation to prior informed consent or an article 11 agreement and its terms, he incurs a penalty of six thousand dollars.²⁰⁸ For continued noncompliance, the Minister can apply to the court for an injunction.²⁰⁹

Article 16 of the Basel Convention creates and specifies the functions of the Basel Convention Secretariat. Many of these functions are merely supervisory rather than regulatory in nature.²¹⁰ For example, she assists the parties to the Convention in identifying illegal traffic and circulates information among the parties that may result in the assertion of moral and political pressure upon them to discontinue and punish such activities.²¹¹ In addition, because the Secretariat already possesses expertise as the monitor of global waste movements, she should also be empowered to adjudicate disputes between member nations under the Convention and to adapt the

203. *Id.* at 213. Note, this may also justify imposing the responsibility to prohibit OECD to non-OECD trade in hazardous wastes solely upon OECD nations.

204. See Ilana Eldridge, *Environment: Toxic Waste Shipment a Test Case for Australia*, INTER PRESS SERV., Nov. 20, 1997, available in 1997 WL 13257735.

205. See *Hazardous Waste Act Policy Reference Group Nineteenth Meeting, February 4, 1998*, *supra* note 81, at 5.

206. Hazardous Waste Act 1989, § 40(3).

207. See Brown, *supra* note 41.

208. See Hazardous Waste Act 1989, § 55(1).

209. See *id.* § 41.

210. See Basel Convention 1989, art. 16(1)(a)-(j). For example, some of her functions include preparing and disseminating progress reports provided by each member state, coordinating with other international authorities, gathering together information regarding available disposal and reclamation sites, conveying technical assistance to requesting parties, identifying and circulating information of illegal traffic, and aiding in an emergency. See *id.* art. 16(b)-(j). Additional functions may be added by the Conference of the Parties pursuant to article 16(1)(k).

211. See KUMMER, *supra* note 27, at 71.

Convention to technological changes.²¹² She should assert the same type of pressure upon Parties refusing to ratify the Convention or the Ban Amendment.

Non-governmental organizations (NGOs) should also aid in enforcing Convention provisions or in encouraging ratification. Certainly, NGOs such as the Basel Action Network, Greenpeace and the ICC have significantly contributed to the dialogue during the Convention's evolution. However, without a corresponding increase in their legal capacity in the international judicial system, their enforcement power will remain limited.²¹³ Thus, because the nature of international environmental agreements requires a unique system of enforcement and liability, preventative national legislation providing environmental reparation and just compensation from the perpetrator should be specified through the work of the Ad Hoc Group of Legal and Technical Experts to the Basel Convention. Parties to the Convention need guidance in developing liability and compensation systems, which are not only specific to their needs, but also conscious of an effective international environmental enforcement scheme. However, before the fine is levied or the individual imprisoned, an impartial third party must evaluate the charges.

B. Adjudication and Settlement of Disputes

Once an allegation of illegal trafficking in hazardous waste is made or when a Convention breach occurs and is not immediately corrected, the complaining Party has a variety of options with which to seek settlement of the dispute. When one Party to the Convention has reason to believe that another Party has breached any of the Convention provisions, the complaining Party may so inform the Secretariat, and, if the Secretariat is informed, the complaining party "shall simultaneously and immediately inform" the accused Party of the allegations.²¹⁴ The wronged Party then has the option under article 20 of negotiation, or, failing that, either arbitration or submission to the International Court of Justice (ICJ), subject to agreement by both parties.²¹⁵

The possibility of an offending Party's refusal to submit to ICJ jurisdiction, coupled with the ICJ's inexperience adjudicating environmental disputes, creates further difficulties in cases where peaceful negotiation

212. See Vu, *supra* note 185.

213. See Schneider, *supra* note 83, at 281.

214. See Basel Convention 1989, art. 19.

215. See *id.* art. 20(1)-(2). See also Vu, *supra* note 185 (describing ICJ jurisdiction and authority in these disputes).

proves insufficient.²¹⁶ It is unjust for a court that has never adjudicated a conflict between environmental and trade regulations, and that is only familiar with the latter, to handle conflicts with trade and environmental laws because these laws are aimed at different and contradictory purposes.²¹⁷ To further complicate matters, in order to assert standing to bring suit before the ICJ, the dispute must involve a "legally protected interest."²¹⁸ As a result, some nations may be unable to bring offenders of the ban before the court because they are unable to prove that the right to be free from unwanted hazardous waste trade constitutes a legally protected interest.²¹⁹ Instead, the Basel Convention must impose an "affirmative obligation" upon the Parties to submit to ICJ jurisdiction and an increase in ICJ jurisdictional authority.²²⁰ Without these safeguards, together with enforcement efforts, those that enjoy the benefits and protections of the Basel Convention may impose unfair burdens upon other Convention members through their perpetuation of the illegal hazardous waste trade for profit.

V. CONCLUSION & PROPOSAL

Australia should ratify the Ban Amendment immediately, implement internal legislation that complies with the article 4A Ban Amendment and refrain from forming or attempting to enforce conflicting bilateral or multilateral treaties allowing hazardous waste export to non-OECD countries. Australia cannot legitimately claim to support and uphold the principles of the Convention while refusing to ratify the Ban Amendment. In addition, to prevent resistance to ratification and promote ban enforcement, whether through the use of article 11 agreements between OECD and non-OECD nations or through other trade practices in derogation of Convention purposes, the power of the Secretariat should be increased where financially feasible. Also, the possibility of ICJ jurisdiction should be added to the Convention as an affirmative command. Further, NGOs such as Greenpeace, Basel Action Network, and even foes of the Ban Amendment such as the International Chamber of Commerce, should enjoy increased international legal discretion and influence. They can aid in enforcing and policing the ban by ensuring the proper scope of hazardous material coverage. Wealthy

216. See Schneider, *supra* note 83, at 282. See also *id.* at 273 (discussing the Basel Convention's inability to hold violators financially accountable).

217. See Guruswamy, *supra* note 145, at 226. Free trade regulations principally ignore environmental impacts and emphasize economic maximization, while environmental regulations prostrate economic concerns for the health of living things. See generally *id.* at 190-94.

218. See Schneider, *supra* note 83, at 282.

219. See *id.*

220. See *id.*

industrialized nations like Australia and Canada should not be permitted to enjoy the benefits of Convention membership while avoiding the costs of disposing of or recycling wastes responsibly.

Accordingly, the Fifth Conference should reinforce Convention objectives by refusing to tolerate Australia's and other Convention delegates' attempts to stall ban ratification, especially given the recent clarification of hazardous materials covered at the Fourth Conference. The Fifth Conference should also require that any existing multilateral or bilateral treaty between an OECD and non-OECD nation, once valid under article 11, be revoked immediately as a violation of the Basel Ban. The added benefit of having the United States lend its support to the Basel Convention and ban decision by ratifying the Convention would certainly prove valuable, but more importantly, current Convention members should not allow the United States' continued abstention to influence their resolve to limit irresponsible transboundary movement of hazardous wastes. Members of the original consensus decision which instituted the ban should work together to remedy alleged confusions and differences, and they should ratify the ban to derive the three-fourths vote necessary to create enforceable international law. This will not only provide the majority required, but it will also prevent opportunistic waste trade zealots like Australia from taking advantage of the international confusion over the Ban Amendment.

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