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THE TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTE A COMPARATIVE ANALYSIS

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by

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TABLE OF CONTENTS

	page
Introduction	1
Chapter I. The background of the Basel Convention	**2**
A. Western realities...	2
B. ...developing countries' tragedies	5
C. The shaping of the Basel Convention	8
Chapter II. Analysis and Criticism of the Basel Convention	**10**
A. Goals of the Basel Convention	10
B. Important concepts and definitions	11
C. The adoption of a complete ban	18
D. Criticism of the Basel Convention	22
E. U.S. versus Basel	26
F Testing the Basel Convention	32
Chapter III. Actual regulatory scheme in the EU, related to the Transboundary Movement of Waste	**36**
A. General background	36
B. Examination of the Regulation	38
C. How the Right to Ban in the Regulation came to be	46
Chapter IV. The internal approach by the United States	**56**
A. A basic undertone	56
B. The judicial limits related to the interstate and intrastate movement of waste	58
Chapter V. Conclusion	**75**
Bibliography	77

Introduction

An analysis of the transboundary movement of hazardous waste requires a comparative examination of three main regulatory entities.

First, the international Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and Their Disposal will be covered. More particularly, an inquiry of its raison d'etre, will be followed by a critical examination of its goals and mechanisms. The relationship the United States has with the Convention and its national approach towards the export of hazardous waste will be covered next. A brief investigation of the real situation impacts of the Basel Convention will finalize this chapter.

The second part will explore the actual regulatory scheme in the European Union concerning the Supervision and Control of Shipments of Waste, Within, Into and Out of the European Community, which is reflected in the Regulation 259/93, applicable since May 1994. After studying its main features, some greater attention will be given to its striking 'right to ban' clause. Especially, the precursory influences of this particular provision, as can be found in the Belgian Waste Case, rendered by the European Court of Justice, will be touched upon.

The last part will analyze the approach by the United States Supreme Court towards the issue of interstate and intrastate movement of (hazardous) wastes rendered in its main decisions. The cases will be discussed extensively, and wherever possible a comparison will be made with the judgments by the European Court of Justice.

Chapter I.

The background of the Basel Convention :

A.Western realities ...

The global annual generation of hazardous waste has increased from roughly 5 million metric tons in 1947[1] to over 400 million tons in 1998.[2] About 98% of all toxic wastes and hazardous substances are produced by the 25 members of the Organization for Economic Cooperation and Development(OECD),[3] of which the biggest share (275 million tons a year) can be attributed to the United States.[4] Of the worldwide generation of hazardous waste, at least 10% enters into international trade.[5] And even though the vast majority of the hazardous waste export and import movements are transacted

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[1] David P. Hackett, *An assessment of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, 5 AM. U. J. IT. L. & POL'Y 291, 294 (1990).

[2] *Press Release : Ministers to Specify the Hazardous Wastes That Are Subject to Export Ban , Malaysia, 23 February 1998*, (visited Nov.3, 1998) <http://www.unhip.ch/basil/sbc/pry.htm> (hereinafter *Press Release: Ministers in Malaysia).*

[3] Kenneth D. Hirsch, *Possibilities for a Unified International Convention on the Transboundary Shipments of Hazardous Wastes*, 10 GEO. INT'L ENVTL. L. REV. 191 (1997). Current OECD members are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, and Mexico.

[4] Donna Valin, *The Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal: Should the United States Ratify the Accord ?*, 6 IND. INT'L & COMP. L. REV. 268 (1995). See Jeffrey D. Williams, *Trashing Developing Nations: the Global Hazardous Waste Trade*, 39 BUFF. L. REV. 276 (1991) (Mentioning how the Congressional Office of Technology Assessment asserts that the figure is actually twice as high, nearly 575 million tons).

[5] *Press Release : Ministers in Malaysia*, supra note 2.

between OECD-members,[6] developing countries, as well as Eastern and Central European States are becoming increasingly targeted and vulnerable destinations for the export of hazardous waste.[7]

There are several reasons underlaying the increase of the export of hazardous wastes from developed countries to the developing countries since the 1980s. First, the growth of stringent administrative and legal regulations, and therefore the increased cost of the economic activity related to the disposal and management of hazardous wastes in industrialized countries.[8] For example, in both Europe and the United States disposal costs which, prior to the enactment of environmental legislation averaged between $2.50 and $ 50 per ton rose up to $2,500 per ton,[9] whereas in many developing countries prices remained between $ 3 and $20 per ton.[10] Therefore, big industrial companies are able to offer a payment to developing countries equal to a manifold of their gross national product, in exchange for the acceptance of the import of hazardous waste, and still pay significantly less than if they would comply with their own more stringent national

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[6] Hao-Nhien Q. Vu, *The Law of Treaties and the Export of Hazardous Waste*, 12 UCLA J. ENVTL. L. & POL'Y 389, 404 (1994) (holding that at least 80% of the toxic waste export from OECD-countries is destined for another OECD member); Valin, supra note 4 (e.g. approximately 85% of the United States export of hazardous waste goes to Canada and 12 % is sent to Mexico); See Peter D. P. Vint, *The International Export of Hazardous Waste: European Economic Community, United States and International Law*, 129 MIL. L. REV. 126, 130 (1990) (extensive analysis of the existing bilateral treaties between the United States and Canada, and the United States and Mexico).

[7] *Press Release: Progress on Legal Issues Related to the Basel Convention* (visited on Nov. 3, 1998) <http://www.unhip.ch/basil/sbc/pr6-97.htm> (hereinafter *Press Release: Progress*); Valentina O. Okaru, *The Basel Convention: Controlling the Movement of Hazardous Wastes to Developing Countries*, 4 FORDHAM ENVTL. L. REP 137, 139 (1993).

[8] Sean D. Murphy, *Prospective Liability Regimes for the Transboundary Movement of Hazardous Wastes*, 88 A.J.I.L. 24, 30-31 (1994) (giving an of the United States, where "nearly half of of some 4,600 facilities that treat,store, or dispose of hazardous wastes decided to close during the 1980's because of increased regulation").

[9] Okaru, supra note 7, at 141.

[10] Sylvia F. Liu, *The Koko Incident: Developing International Norms for the Transboundary Movement of Hazardous Waste*, 8 J. NAT. RESOURCES & ENVTL. L.,125 (1992-1993).

environmental laws.[11] Second,the shrinking geographical space for the installation of waste facilities in many industrialized countries.[12] Third, the rise of public awareness in the industrialized countries,[13] culminating in a citizens hostility towards the acceptance of waste in their own community (so-called 'not in my backyard' or 'NIMBY' syndrome).[14] This awareness was strengthened by what scientists and later media have described as the "boomerang effect" or "circle of poison", which can occur when an agricultural country that has previously imported hazardous wastes, exports food products, thereby endangering human health elsewhere.[15] And, *fourth*, the controversial theory of international environmental racism, which holds that developing countries are being used as a dumping ground "not because of cost or convenience but because of race and poverty", should be mentioned.[16]

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[11] Williams, supra note 4, at 278 (explaining in more detail the often quoted example of Guinea Bissau : a plan by Detroit industrialists to export 4 million of U.S. auto-industry hazardous waste was discovered in time, i.e. before Lindaco Inc. of Delaware could ship the waste to Guinea Bissau, for the payment $ 300 million spread over 5 years, an amount twice the country's gross national product); Grant L. Kratz, *Implementing the Basel Convention Into U.S. Law: Will it Help or Hinder Recycling Efforts?*, 6 BYU J. PUB L. 324 (1992) (mentioning the same case in a different version: $120 million per year,an amount close to the country's national product); Liu, supra note 10, at 142 (adding that the payment would have totaled a tripplefold of the country's foreign debt).

[12] Murphy, supra note 8, at 30; Okaru, supra note 7, at 140.

[13] Murphy, supra note 8, at 30.

[14] John Ansbro, *The EU Regulation on Waste Shipment: in Conflict With the Free Market and Contrary to Environmental Comparative Advantage*, 3 CARDOZO J. INT'L & COMP. L. 410 (1995); Muthu S. Sundram, *Basel Convention on Transboundary Movement of Hazardous Waste: Total Ban Amendment*, 9 PACE INT'L L. REV. 1, 5 (1997) (the author further mentions that as the NIMBY syndrome took roots, "elected officials responded in kind - with a NIMTO (not in my term of office) syndrome").

[15] Murphy, supra note 8, at 32; See also Okaru, supra note 7, at 145 ("Statistics prepared by the Food and Drug Administration (FDA) confirm that about 10% of commodities imported into the United States from developing countries contain illegal (banned and unregistered chemicals) residues of pesticides").

[16] See Rozelia S. Park, *An Examination of International Environmental Racism Through the Lens of Transboundary Movement of Hazardous Wastes*, 5 IND. J. GLOBAL LEGAL STUD. 659, 660 (1998).

B....developing countries' tragedies

It took many sad and well-publicized incidents to provoke a global reaction against the unregulated transboundary movement of hazardous wastes on an international level.[17] Some of the more shocking examples will be given, not out of sensationalism, but merely because they do not deserve to be buried in a footnote.

In 1988 Nigerian students living in Italy alerted the Nigerian government to a scheme through which an Italian waste trader had arranged for 3,800 tons of hazardous wastes, originating from the United States, to be stored in Nigeria on a dirt lot near the home of one of its poorest citizens in exchange for $100 a month.[18] The Nigerian President Ibrahim Babangida reacted promptly by recalling the Nigerian ambassador from Italy. The Minister of External Affairs asked the United Nations to intervene and to send a clear message to international corporations to stop dumping wastes in Africa.[19] Not only did the Minister of Justice threaten to take legal action against Italy by bringing the matter to the International Court of Justice (ICJ), but president Babangida warned that anyone found guilty of importing radioactive waste would be shot.[20] Only one week after the scandal broke out, a special tribunal was set up to try fifteen people allegedly involved in the scheme, including an Italian partner, and to order Italy to retrieve the wastes at stake.[21] In the weeks following the discovery Nigerian health officials reported

[17] See Mark E. Allen, *Slowing Europe's Hazardous Waste Trade: Implementing the Basel Convention Into European Union Law*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 165 (1995) ("International attention began to focus on the toxic waste trade as early as 1981, when a group of experts met in Montevideo, Uruguay, to examine issues relating to toxic waste handling, storage and transport"); Murphy, supra note 8, at 34 (Probably one of the earliest efforts to regulate certain aspects of the transboundary movement of hazardous waste can be found in the United Nations 'Recommendations on the Transport of Dangerous Goods' of 1957).

[18] Liu, supra note 10, at 131 and at 126 (adding that the Italian businessman involved would have gained $4.3 million in profit).

[19] Id., at 131.

[20] Id., at 132.

[21] Ibid.

that some dock workers suffered severe chemical burns and others even became paralyzed after having moved the wastes from the ship into the harbor.[22] Ultimately Italy agreed to remove the waste and the Italian Cabinet adopted a decree that banned waste exports to developing countries.[23] Italy accepted the waste on its own territory but only after the refusal by many other European countries to do so, and despite a strike of 1,400 Italian port workers who discovered that toxins were leaking from the ship.[24]

Another notorious example is 'the world tour' of the Khian Sea vessel. The ship left in 1986 from Philadelphia with more than 14,000 tons of municipal waste and arrived two years later in Singapore with a totally empty load, despite the fact that none of the countries on any of the continents had accepted it.[25] It was suspected that the cargo was dumped illegally in the Indian Ocean, even though the captain denied to have done so (but he also refused to say where he had unloaded the cargo).[26] A response by the international community to the complex problem of the movement of hazardous wastes can be found in the Basel Convention of 1989.[27]

It should be stressed that other international agreements concerning certain aspects of the transboundary movement of hazardous waste prior to the creation of the Basel Convention existed, albeit with a more restricted scope and number of participating members.[28] In 1984 Members of the OECD had adopted a "Movement Decision" related

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[22] Id., at 132.

[23] Id., at 133.

[24] Id., at 134.

[25] Julienne I. Adler, *United States' Waste Export Control Program: Burying Our Neighbors in Garbage*, 40 AM U. L. REV. 885, 886-887 (1991); Okaru, supra note 7, at 157.

[26] Okaru, supra note 7, at 158.

[27] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, reprinted in 28 I.L.M. 649 (1989); or at <http://www.unhip.ch/basil/baselcon.htm> (open for signature March 22, 1989) (hereinafter Basel Convention).

[28] The regional European response will be analyzed more extensively below, at pages 37-56.

to the shipments of hazardous wastes among themselves[29] and expanded it in 1986 to non-members in their "Export Decision".[30] Yet, both OECD Decisions have been criticized for their vague terms and 'liberal' regulation.[31] Also, many conventions related to the dumping of wastes at sea prevailed previously.[32] But, the Basel Convention became the first Convention to favor a "transsectoral approach" by focusing on the pollutants rather than on particular environmental segments (as marine environment, continental waters, atmosphere...).[33] Some go as far as to declare that the Basel Convention is "the most binding, restrictive international provision regulating the transfontier movement of hazardous waste".[34] To comprehend that statement, a careful examination of the Basel Convention is required.

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[29] OECD Council Decision and Recommendation on Transfontier Movements of Hazardous Waste, Feb.1, 1984, OECD C(83)180 (Final), reprinted in 23 I.L.M. 214 (1984), Annex, par. 1. (Australia and Greece abstained).

[30] OECD Council Decision and Recommendation on Exports of Hazardous Wastes from the OECD Area, June 5, 1986, OECD C(86) 64 (Final), reprinted in 25 I.L.M. 1010 (1986) (Australia abstained).

[31] See Vu, supra note 6, at 404-406 (analysis of both OECD Decisions); See Kate Sinding, *The Transboundary Movement of Waste: a Critical Comparison of U.S. Interstate Policy and the Emerging International Regime*, 5 N.Y.U. ENVTL. L. J. 796, 804-805 (1996) (analysis of the OECD Decisions; finding one binding term: "that member countries control the transfontier movements of hazardous waste and inform other members of such movements").

[32] See Murphy, supra note 8, at 33 (reference made to the adoption of a technical annex to the MARPOL Convention by the International Maritime Organization in order to address pollution from the carriage of hazardous wastes by sea); See Alexandre Kiss, *Transboundary Movement of Waste,* 26 TEXAS INT'L LAW JOURNAL 522- 528 (1991) (thorough analysis of the Oslo Convention of 1972, the Helsinki Convention of 1974, the Barcelona Convention of 1976, the London Dumping Convention of 1979 and the U.N. Law of the Sea Convention of 1982*).*

[33] Kiss, supra note 32, at 528.

[34] William N. Doyle, *United States Implementation of the Basel Convention: Time Keeps Ticking, Ticking Away...*, 9 TEMP. INT'L & COMP. L.J. 141, 143 (1995).

C. The shaping of the Basel Convention

The two examples mentioned previously and many more "toxic cargoes" incidents[35] led to a public and political awareness demanding a comprehensive and binding international approach. In 1987, the Governing Council of the United Nations Environmental Program (UNEP)[36] adopted the "Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes",[37] through which it sought to assist developing countries in installing a 'cradle-to-grave'[38] disposal system of hazardous wastes.[39]

The key principles of the Cairo Guidelines are:[40]

1.) States should minimize transboundary movements of hazardous wastes.

2.) States should ensure that exported wastes are not subjected to less stringent standards than the wastes retained in its borders.

3.) States should seek and offer international cooperation in the development and promotion of control technologies for environmentally sound management of hazardous wastes.

4.) States should pursue pollution minimization techniques through appropriate treatment methods.

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[35] See Hackett, supra note 1, at 296-297 (summary and reference to many other hazardous and toxic waste cases).

[36] Robert M. Rosenthal, *Ratification of the Basel Convention: Why the United States Should Adopt the No Less Environmentally Sound Standard*, 11 TEMP. ENVTL. L. & TECH. J. 61, 71 (1992) (In 1972, at the United Nations Conference on the Human Environment, delegates created the UNEP).

[37] U.N. Env. Progr., Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes, 1987, U.N. Doc. UNEP/GC, 14/33 (hereinafter Cairo Guidelines).

[38] Sundram, supra note 14, at 9.

[39] Jason L. Gudofsky, *Transboundary Shipments of Hazardous Waste for Recycling and Recovery Operations*, 34 STAN. J. INT'L L. 219, 224 (1998) (this was the result of a working group set up under the auspices of UNEP in 1982).

[40] Sundram, supra note 14, at 10.

The Cairo Guidelines opened the international debate on regulatory schemes between States even further, and made the chances of the success of a binding[41] legal instrument more plausible.[42] After about two years of negotiations the Basel Convention[43] was *signed* on March 22, 1989, by 35 countries and the European Commission out of the 116 participating countries,[44] during the Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes, held in Basel, Switzerland.[45] On May 6, 1992,[46] the Basel Convention *entered into force* 90 days after the deposition of the twentieth ratification.[47]

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[41] Mark Bradford, *The United States, China & the Basel Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal*, 8 FORDHAM ENVTL. L. J. 305, 315 (1997).

[42] Sundram, supra note 14 at 10.

[43] See Basel Convention, supra note 27.

[44] *Press Release: Basel Meeting on Hazardous Wastes Ends on Note of Optimism*, <http://www.unhip.ch/basil/sbc/pr2-98a.htm> (visited on Nov. 3,1998) (hereinafter *Press Release: Basel Ends on Note of Optimism*); *Press Release: Progress*, supra note 7 (to this date 117 States and the European Community are Contracting Parties); For an extensive list of the status of all the signatories see <http://www.un.org/Depts/Treaty/fin...les/part_boo/xxviiboo/xxvii_3.html (hereinafter www. un.org).

[45] William Schneider, *The Basel Convention Ban on Hazardous Waste Exports: Paradigm of Efficacy or Exercise in Futility ?*, 20 SUFFOLK TRANSNAT'L L. REV. 247, n.10 (1996) (Basel, Switzerland, was a symbolic convention site after a major chemical spill of approximately 1,000 tons of chemicals and organic compounds contaminated the Rhine river causing an ecological disaster).

[46] See www.un.org, supra note 44.

[47] The Basel Convention, supra note 27, art. 25; Rosenthal, supra note 36, at 72 (quoting Dr.Tolba, Executive Director of UNEP, whom "explained that the number of ratifications required was kept deliberately low so that the treaty could quickly become international law".).

Chapter II.

Analysis and Criticism of the Basel Convention :

A. Goals of the Basel Convention :

The main objectives of the Convention are:[48]

1.) To reduce transboundary movements of hazardous wastes and other wastes to a minimum consistent with their environmentally sound management.[49]

2.) To treat and dispose of hazardous wastes and other wastes as close as possible to their source of generation in an environmentally sound manner.[50]

3.) To minimize the generation of hazardous wastes and other wastes (in terms of both quantity and potential hazard).[51]

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[48] See *Manual for the Implementation of the Basel Convention,* <http://www.unhip.ch/basil/sbc/workdoc/manual.htm> (hereinafter Manual) (The Manual aims at assisting Parties as well as non-Parties, the private sector, NGOs, and individuals to understand the obligations set forth in the Convention; it explains the provisions of the Convention in simple language and gives examples of situations covered by the Convention).

[49] See the Basel Convention, supra note 27, at par. 10, 18 and 23.

[50] Id., Preamble at par. 8.

[51] Id., Preamble at par. 3 and 17.

B.Important concepts and definitions[52]

1.) hazardous wastes and other wastes

* hazardous wastes

Wastes shall be considered as "hazardous waste" if :

a.) They belong to any *listed* category (in Annex I), *unless* they do *not* possess any of the *characteristics* contained in Annex III, such as explosive, flammable, corrosive...[53] The author Vu points out that a list of wastes to be monitored encompasses more items than a list of wastes to be banned, "both because it is easier to implement and because industry will be less likely to oppose mere monitoring".[54] Nevertheless the problem with making finite lists is that they can never be complete.[55]

b.) They are defined as, or are considered to be hazardous wastes by the *domestic legislation* of the Party of Export, Import or Transit. This flexible definition allows an environmentally conscious country to include more wastes in the hazardous category but might also weaken the enforcement of international transactions in areas where countries

[52]Some definitions will not be treated, thus transboundary movement, competent authority, state of export, state of import, state of transit, states concerned, person, exporter, generator,...are all defined in art. 2 of the Basel Convention.

[53] Annex I of the Convention provides for a list of 45 categories of wastes divided into two distinct categories: first category comprising waste streams (e.g. clinical wastes, waste mineral PCB, etc..) and a second category comprising wastes having as constituents certain enumerated substances such as copper compounds, arsenic, cadmium, lead, organic cyanides, etc... The Basel Convention, supra note 27, at Annex I; Annex III lists 14 classes of hazardous characteristics and each hazard class of the Convention also corresponds to hazard classification 1 to 9 of the United Nations Recommendations on the Transport of Hazardous Goods. The Basel Convention, supra note 27, at Annex III. See also Sundram, supra note 14, at n. 46.The concept of hazardous waste will be covered further infra, at page 22.

[54] Vu, supra note 6, at 413.

[55] Ibid.

involved in a same transboundary shipment use very different definitions, or have little or no national environmental legislation.[56]

* other wastes and wastes not covered by the Convention

Household wastes and incinerator ash from household wastes shall be considered as *other wastes*, subject to the regime of the Basel Convention.[57] By contrast, radioactive wastes and wastes which are derived from the normal operations of a ship are excluded from the scope of the Basel Convention, since they are governed by other international instruments.[58]

The Basel Convention does not specify what concentration of hazardous materials would make the waste hazardous. This will both allow a "political and scientific evolution of the definition of hazardous waste"[59] but will also render the calibration of hazardousness more difficult and therefore hinder proper implementation of the Convention to a certain extent.[60]

2.) environmentally sound management :

Mr. Sundram writes evocatively that if one "considers the heart of the Convention to be the control of the transboundary movement of hazardous wastes, then its soul is the

[56] Id., at 413-414; Yet art. 6, par. 5 (a), (b), (c) of the Basel Convention, see supra note 27, proposes some solutions if only one of the countries involved in a transboundary movement considers a substance as hazardous waste; See B. John Ovink, *Transboundary Shipments of Hazardous Wastes: the Basel and Bamako Conventions: Do Third World Countries Have A Choice?*, 13 DICK. J. INT'L L. 281, 291 (1995).

[57] The Basel Convention, supra note 27, art. 1 par. 2 and Annex II.

[58] Id., art. 1 par. 3 and par. 4.

[59] Okaru, supra note 7, at 144; Bradford, supra note 41, at 316.

[60] Vu, supra note 6, at 418, n.169 (the author describes the proverbial "cry wolf" problem when regulations become applicable as soon as a mere trace of hazardous substance is found, often rendering the control of true hazardous waste perfunctory).

disposal of hazardous wastes in an environmentally sound manner".[61] Article 2 defines environmentally sound management as "taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes".[62] The Convention further clarifies that member states need to take the appropriate measures to *reduce the generation* of hazardous wastes and other wastes to a minimum and to ensure the availability of *adequate disposal facilities*.[63] Additionally, parties are expected to require that hazardous wastes and other wastes subject to the transboundary movement be packaged , labeled and transported in conformity with generally accepted and recognized international rules and standards.[64]

This broad definition has been criticized for its vague terms.[65] Over the years though, technical working groups have developed "technical guidelines" which contain essential information to familiarize the parties to the Convention with the minimum 'Basel standards' to be taken into consideration (e.g. guidelines regarding incineration on land, specially engineered landfills, waste oils from petroleum origins and sources...).[66]

An illustration of the importance of a clear definition lies in the obligation that rests on each party to the Convention not to allow the export of hazardous wastes or other wastes if it has reason to believe that the wastes in question will not be managed in an

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[61] Sundram, supra note 14, at 13.

[62] The Basel Convention, supra note 27, art. 2 par. 8.

[63] Id., art. 4 par. 2(a)-(b).

[64] Id., art. 4 par. 7(b).

[65] Katharine Kummer, *The International Regulation of Transboundary Traffic in Hazardous Wastes: the 1989 Basel Convention*, 41 INT'L & COMP. L. Q. 530, 560-561 (1992).

[66] The Basel Convention, supra note 27, art. 4 par. 8 (requiring the Parties to adopt technical guidelines from their first meeting on). See generally *Basel Convention Technical Guidelines* (Oct. 25, 1994) <http://www.unhip.ch/sbc/guidelines.html>. See Sundram, supra note 14, at 14 (giving detailed references to all the existing technical guidelines).

environmentally sound manner.[67] Mr. Ovink therefore ascribes the absence of a comprehensive definition of 'environmentally sound management' to the obstruction by certain industrialized nations that fear having to dispose of their hazardous waste at home since they have comparatively better management schemes in their own country.[68]

3.) determining whether to allow a transboundary movement

a.) the general principle of a limited ban

Typical for the Convention's mechanism is that "*any State* has the sovereign *right to ban* the entry or disposal of foreign hazardous wastes and other wastes in its territory".[69] This includes the right of the transit country to ban the import of hazardous wastes and other wastes if it has reason to believe that the wastes in question will *not* be managed in an *environmentally sound manner*".[70] Above all, the Parties should *not permit* hazardous wastes or other wastes to be exported or imported from a *non-Party*.[71] This latter provision is also known as the '*limited ban*'. Its intention is to prohibit States trading with States that are "not willing or not able to meet the basic standards of the Convention" and also to spur the non-parties to ratify the Convention.[72] Originally, the OECD members that signed the Basel Convention were successful in avoiding a total ban on the transboundary movement of hazardous waste.[73]

[67] The Basel Convention, supra note 27, art. 4 par. 2(e); art.4 par. 10 specifies that this obligation of waste-generating States "may not under any circumstances be transferred to the States of import and transit".

[68] Ovink, supra note 56, at 292.

[69] Id., Preamble par. 6 and art. 4 par. 1, (emphasis added).

[70] Id., art. 4 par. 2(g).

[71] Id., art. 4 par. 5.

[72] Bradford, supra note 41, at 320.

[73] Ibid.

Another success for the OECD members[74] was the insertion of article 11, which allows Party-states to "enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes with Parties or *non-Parties* provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes (...), these agreements or arrangements shall stipulate provisions which are *not less environmentally sound* than those provided for by this Convention (...) in particular taking into account the interests of developing countries".[75] Despite those last soothing words, almost all members of the Organization of African Unity (OAU)[76] initially refused to sign the final Convention document, since they believed this latter provision to be a back-door to the terms of the 'limited ban'.[77]

b.) prior informed consent

The procedure of prior informed consent was strongly supported by "industrialized nations, particularly the United States, as a practical alternative to a total ban on transboundary shipments of hazardous wastes".[78] Article 6 of the Basel Convention provides that "the *State of Export shall notify*, or shall require the generator or exporter to notify, (...), the competent authority of the *States concerned* of any proposed transboundary movement of hazardous wastes or other wastes".[79] Subsequently, the

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[74] Ibid.

[75] The Basel Convention, supra note 27, art. 11 par. 1.

[76] Bradford, supra note 41, at 321 (all members of the OAU, except Nigeria originally refused to sign the final document).

[77] Liu, supra note 10, at 143 (environmentalists denounced this provision as a loophole).

[78] Bradford, supra note 41, at 318; See also Okaru, supra note 7, at 154.

[79] The Basel Convention, supra note 27, art.6 par.1 (emphasis added).

State of Import shall (while not being subjected to any deadline)[80] and each *State of Transit* which is a Party *may* (within 60 days after notification) respond to the notifier in writing[81] or without *conditions*, *deny* permission for the movement. The concerned Parties can *consent* to the movement or *request additional information.*[82] Even when the State of Import has not prohibited the import of hazardous wastes and other wastes, the Parties should *prohibit* or should *not permit* the export of such wastes *without the written consent* of the *State of Import* to the specific import. Additionally, the Exporting State shall not allow the generator or exporter to commence the transboundary movement until it has received written confirmation that the generator or exporter have received from the State of Import: i) a *written confirmation* and ii) a confirmation of the existence of a *contract* between the exporter and the disposer, specifying environmentally sound management of the wastes in question.[83]

A detailed tracking system is installed by obliging each Party to require that hazardous wastes and other wastes be accompanied by a *movement document* from the point at which the transboundary movement commences to the point of disposal.[84] The State of Export may, after the written consent of the States concerned, allow the generator or the exporter to use a general notification for shipments of the same type via the same route[85] during a maximum period of 12 months after given consent.[86]

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[80] Id., art. 6, par. 2 .

[81] Id., art 6, par. 4.

[82] Id., art. 6, par. 2 and par. 4.

[83]The Basel Convention, supra note 27, art. 6 par. 3.

[84] Id., art.4 par. 7(c), see also art. 6 par. 9 (obliging the Parties to ensure that each person who takes charge of the transboundary movement signs the document either upon delivery or receipt of the wastes in question). The necessary content of the movement document can be found in Annex V, A and B.

[85] Id., art. 6 par. 6.

[86] Id., art. 6 par. 8.

The only substantive remedy[87] of the Basel Convention is the *duty to re-import*, which rests on the Exporting State if a transboundary movement cannot be completed in accordance with the terms of the contract, and if no alternative arrangements can be made for disposal in an environmentally sound manner.[88]

c.) miscellaneous provisions :

An additional safety net is formed by the requirement that any transboundary movement of hazardous or other wastes shall be covered by an insurance, bond or other guarantee as may be required by the State of import or any State of transit which is a party.[89]

Article 9 of the Basel Convention briefly enumerates the situations where traffic shall be deemed illegal and requires each Party to introduce appropriate national/domestic legislation to prevent and punish illegal traffic.[90]

An annual report from the Parties containing information regarding transboundary movements of hazardous wastes or other wastes in which they have been involved has been made obligatory.[91]

At this stage the Dispute Settlement between Parties still relies on 'classical' means of negotiation or "any other peaceful means of their own choice".[92] In the event Parties fail to settle, the dispute *may* by common agreement be submitted to the ICJ or to

[87] Bradford, supra note 41, at 319.

[88] The Basel Convention, supra note 27, art. 9 par. 3.

[89] Id., art. 6, par. 11.

[90] Id., art. 9 par. 1-5.

[91] Id., art. 13 par. 3 (giving further details as to which information is requested).

[92] Id., art. 20 par. 1.

arbitration.[93] Not surprisingly, the Dispute Settlement clause has been criticized for not offering enough compliance and enforceability guarantees.[94] First, is the *absence* in the Convention of a *compulsory* adjudication system, unless the Parties involved have given their consent to rely on the ICJs jurisdiction.[95] Second, the ICJ only offers standing to States and not to NGOs nor individuals.[96] Some authors used to believe that even if the ICJ retains jurisdiction over a dispute, it would still lack the necessary expertise in environmental matters.[97] However, in 1993 a specialized 'ICJ Environmental Chamber' was created, but so far no case has ever been brought to it.[98]

C. The adoption of a complete ban

1.) outside the Basel Convention

The dissatisfaction of many developing countries with being treated as a dumping destination of Western waste, prior to the insertion of a complete ban in the Convention,[99]

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[93] Id., art. 20 par. 2.

[94] See Hackett, supra note 1, at 319-320.

[95] Harvard Law Review Association (HLRA), *Assent to and Enforcement of International Environmental Agreements*, 104 HARV.L.REV. 1550, 1563 (1991); Schneider, supra note 45, at 282; Vu, supra note 6, at 420.

[96] HLRA, supra note 90, at 1562. Comparatively, it should be mentioned that the European Court of Justice (ECJ) has recently decided that environmental organizations do not have legal standing, see C-321/95 P, *Stichting Greenpeace Council v. Commission* (2 April 1998). The Council has recently welcomed the proposal by the Commission to provide private individuals and environmental organizations access to justice, but the Commission has so far not submitted a related report that the Council requested. See Rod Hunter and Koen Muylle, *European Community Environmental Law: Institutions, Law Making, Enforcement, and Free Trade*, 28 ENVTL. L. REP. 10477, 10488 and n.123 (1998) (referring to Council Resolution of October 7, 1997 on the Drafting, Implementation, and Enforcement of Community Environmental Law, 1997 O.J. (C 321).

[97] Ibid.; Schneider, supra note 45, at 282.

[98] Latest information received through e-mail on 23 March 1999. See *information@icj-cij.org*.

[99] It was only after the Parties of the Basel Convention had decided to ban the hazardous waste trade from OECD to non-OECD States that many developing countries ratified it. See *The Basel Convention - What Is It All About?* (Feb., 1998) <http:www.greenbase.g13/gopher/campaigns/toxins/1998/baswhat.txt>.

led the OAU in 1991 to adopt the "Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa",[100] *banning all waste imports into Africa,*[101] and installing a prior informed consent mechanism among the African States.[102] For at the time even the Chief Economist of the World Bank, Lawrence Summers, dared to declare that "the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that (...) underpopulated countries such as Africa are vastly under-polluted".[103] The African countries are not alone in their "outcry to stop environmental terrorism".[104] Recently, six other regions have either called for or concluded regional agreements banning the import of hazardous wastes.[105] Most notable among these are the Fourth ACP-EEC Convention of Lome[106] (Lome IV) and the Central American Regional Agreement on the Transboundary Movement of Hazardous Wastes[107] ('Panama City').[108]

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[100] Bamako Convention on the Ban on the Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Jan. 30, 1991, reprinted in 30 I.L.M. 773 (1991); Ovink, supra note 56, at n.6 (However, the Bamako Convention has not entered into force because it has *not* been *ratified* by 10 countries).

[101] Id., art. 2, par. 1(d) and paras. 2-3.

[102] Id., art. 4, par. 3(i)-(u); For a more extensive analysis see: Ovink, supra note 56, at 281-295; Schneider, supra note 45, at 262-263; C. Russel H. Shearer, *Comparative Analysis of the Basel and Bamako Conventions on Hazardous Waste*, 23 ENVTL.L.141, 179 (1993) (describing how one of the major weaknesses of the Bamako Convention is that it has not entered into force so far, and that there's no provision for its interim application).

[103] Greenpeace International, *International Trade in Wastes* (June 1997) <http://www.greenbase.g13/gopher/campaigns/toxins/1997/es2basel.txt>.

[104] Ovink, supra note 56, at 282-283.

[105] Id., n.9 (including the Association of South East Asian Nations' Interparliamentary Organization, the South Pacific Forum, the South East Pacific Coastal States of Latin America, and the U.N. Economic Commission on Latin America and the Caribbean).

[106] Fourth Convention of Lome, Dec. 15, 1989, ACP-EEC, 1992 Gr. Brit. T.S. No. 47, 29 I.L.M. 783.

[107] Acuerdo Regional Sobre Movimiento Transfrontiero de Desechos Peligrosos (Central American Regional Agreement on the Transboundary Movement of Hazardous Wastes), Dec. 9-11, 1992, U.N. Doc. UNEP/CHW/C.1/INF.2 (Oct. 1993), available in 3 Y.B. INT'L ENVTL.L., 1992, Doc.No. 10.

[108] See Bradford , supra note 41, at 321-322, and n. 71 and n. 72 (extensive analysis).

2.) within the Basel Convention :

From the start the Basel Convention recognized the "increasing desire for the *prohibition* of transboundary movements of hazardous wastes and their disposal in other States, especially developing countries (...)".[109] The Conferences of the Parties (COPs), meeting at regular intervals,[110] proved to be fruitful occasions to elaborate those intentions. The signatories of the Basel Convention *adopted* a *decision*[111] during the Second COP meeting (COP-2), held in March 1994, to place a *total ban* on the transboundary movement of hazardous wastes and other wastes *from OECD-members to non OECD-members* and to *phase out* similar exports destined for *recycling* or recovery operations, before banning them completely on 31 December 1997.[112]

Some say that the resounding vote in favor of the ban was a result of a lobbying campaign of Greenpeace.[113] Almost by retaliation the International Reclamation Bureau (a global recycling business association), proposed to set up a "fighting fund" of $250,000

[109] The Basel Convention, supra note 27, Preamble, par. 7, see also: art.15, par. 7 and art. 4, par .2(e).

[110] Id., art.15, par.1 (obliging the Parties to do so). The first meeting was held in Piriapolis, Uruguay on 4 December 1992, see extensively: <http://www.unhip.ch/sbc/cop-1.html>.

[111] See Diana L. Godwin, *The Basel Convention on the Transboundary Movements of Hazardous Wastes: An Opportunity for Industrialized Nations to Clean Up their Acts?*, 22 DENV.J.INT'L L. & POL'Y 193, 204 (1993) (reporting how Denmark was the 'driving force' behind the decision, while Germany and the U.K. "vehemently opposed" it); See Bradford, supra note 41, at 334 (informing that China was a major proponent as well); Jim Puckett, *Comment on the Basel Convention*, at: <www.greenpeace.org/home/gopher/campaigns/toxios/1994 basclo txt> (In 1994 seven countries opposed the ban: Australia, Canada, Finland, Germany, Japan, U.K. and U.S., i.e. "the Sinister Seven"); Narelle Hooper, *Industry Outfoxed on Waste Trade*, BUS. REV. WKLY., May 9, 1994, at 30 ("Australia was isolated, one of only three countries voting against the decision while 63 voted in favor (...) Australia later bowed to the inevitable and supported the decision").

[112] See *Press Release: Ministers Debate Amending the Basel Convention to Ban Hazardous Waste Exports to Non-OECD Countries* (hereinafter *Ministers Debate*) <http://www.unhip.ch/basil/sbc/pr9-95.htm>; Extensively at: <http://www.unhip.dh/basil/sbc/cop-2.html>.

[113] Hooper, supra note 111.

for legal costs to challenge the Basel definition of scraps and residues as 'waste', during a meeting in Barcelona in 1994.[114]

During the Third COP meeting (COP-3), held in September 1995, the Parties *ratified the decision* of COP-2 by adopting an *amendment*[115] to the Basel Convention.[116] So far, the ban has *not entered into force yet,*[117] since the necessary amount of ratifications have not been deposited.[118] Replying to the major claim of the Parties opposing the ban, especially Canada and Australia,[119] COP-3 decided to delegate a technical working group with the duty to clarify which wastes will be subjected to the ban.[120] Greenpeace saw in this request for redefinition a maneuver from industrialized countries to de-categorize wastes for recycling as non-wastes and to de-list hazardous wastes as those meant for recycling.[121]

One of the main decisions during the Fourth meeting of the Parties (COP-4) in February 1998, involved the establishment of two hazardous wastes lists :

- A.) The Hazardous List: proposing to ban the export of wastes containing certain

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[114] Jim Puckett, *The Basel Ban: Threats and Implementation*, 7.1 Toxic Trade Update (Aug. 3, 1994) <http:www.greenbase.g13/gopher/campaigns/toxins/1994/basba3.txt>.

[115]The Basel Convention, supra note 27, art. 17, par. 3: "The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting, and shall be submitted by the Depositary to all Parties for ratification, approval, formal confirmation or acceptance".

[116] See also Sundram, supra note 14, at 19.

[117] *Press Release: Basel Ends on Note of Optimism,* supra note 44 (The amendment has so far been ratified by Denmark, the EU, Luxembourg, Norway, Spain, Sweden and the U.K.). See also www.un.org., supra note 44.

[118] The Basel Convention, supra note 27, art. 17, par. 5: "(...) Amendments adopted in accordance with paragraphs 3 or 4 above shall enter into force between Parties having accepted them on the ninetieth day after the receipt by the Depositary of their instrument of ratification, approval, formal confirmation or acceptance by at least three-fourths of the Parties who accepted the amendments to the protocol concerned (...)".

[119] Sundram, supra note 14, at 21.

[120] *Press Release: Ministers Debate*, supra note 112.

[121] See Puckett, supra note 114.

chemicals and substances such as lead, mercury, asbestos...

- B.) The Non-Hazardous List: exempting from the ban those wastes that can safely (and profitably) be recycled or reused, including scrap iron, steel or copper, paper...[122]

D. Criticism of the Basel Convention

1.) critique of the Basel Ban in particular

Probably the most prevalent fear is that many countries will not comply with the ban and that illegal trading will be common.[123] For it has to be said that, even though the secretive nature of illegal traffic obstructs the gathering of detailed information,[124] waste traders have the advantage of earning fabulous profits without the risk of drug or gun smuggling.[125] Research done by Greenpeace indeed indicates that waste trade business is proliferating in the 1990s.[126]

Some also consider the OECD/non-OECD distinction as an "imperfect equation",[127] for various reasons. First, it increases the chances that less affluent OECD-members, such as Mexico and Turkey, will become new "waste havens" unless those

[122] *Press Release: Basel Ends on Note of Optimism*, supra note 44; See Sundram , supra note 14, at 22.

[123] Bradford, supra note 41, at 314-315; Valin, supra note 4, at 285-286; Okaru, supra note 7, at 152; Liu, supra note 10, at 126; Michelle M. Vilcheck, *The Controls on the Transfontier Movement of Hazardous Wastes from Developed to Developing Nations: The Goal of a "Level Playing Field"*, 11 NW. J.INT'L L. & BUS. 643, 671 (1991).

[124] Valin, supra note 4, at 285-286; Bradford, supra note 41, at 315; *Press Release: Ministers in Malaysia,* supra note 2 (to date, there is an existing cooperation with Interpol and the World Customs Organization).

[125] Liu, supra note 10, at 126.

[126] See Puckett, supra note 111 (Since 1989, more than 500 attempts to export over 200 million tons of waste, from OECD to non-OECD countries have been cataloged); Mark A. Montgomery, *Banning Waste Exports: Much Ado About Nothing*, 1 BUFF. J. INT'L L. 197, 201-202 (1994) (mentioning that Greenpeace is the most widely cited source of information about international waste transfers, because UNEP does not yet collect waste trade data of its own, and the Basel Secretariat does not make its statistics publicly available. The author gives a list of reliable data information in n. 26).

[127] Ibid.

nations enact national law banning the import of hazardous wastes,[128] in *all* circumstances.[129] Second, newly industrialized, non-OECD members will take over the role played by the OECD countries prior to the ban.[130] Countries such as Australia and the United States (both mere signatories to the Basel Convention up to this date) have already declared that they will sign bilateral agreements with non-OECD members, even after the ban comes into effect.[131] For example, in 1994 the U.S. Chamber of Commerce published a document in which it advised the U.S. companies currently exporting commodities to non-OECD countries to inform their clients "that such a shipment *may* have to cease December 31, 1997, *unless* an appropriate bilateral agreement is concluded between the U.S. and the receiving country".[132] Jim Puckett perceives this industry strategy as a flagrant attempt to call upon non-OECD Basel Parties to violate the Basel ban decision by deliberately spreading misinformation that bilaterals are legally acceptable ways to circumvent the ban.[133] An increasing concern is whether developing nations may adopt national policies which choose to ignore or circumvent the ban with bilateral agreements entered into with OECD countries.[134]

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[128] Ibid.

[129] See for a general analysis for Mexico: Luis R. Vera-Morales, *Dumping in the International Backyard: Exportation of Hazardous Wastes to Mexico*, 7 TUL.ENV.L.J. 353, 355 (1994) (Mexican legislation prohibits any import of hazardous waste into Mexico for the purpose of storage, destruction or final disposal, but it still enters the country as intended for recycling or as a raw material); Stephen M. Learner, *The Maquiladoras and Hazardous Waste: the Effect Under NAFTA*, 6 TRANSNAT'L LAW. 255 (1993).

[130] Schneider, supra note 45, at 287.

[131] Id., at n.166.

[132] See Puckett, supra note 114 (emphasis added).

[133] Ibid.

[134] Schneider, supra note 45, at 286-287.

The major opposing forces to the ban can be found among the recycling industries.[135] Apart from the interests of the 'Western Industries',[136] some developing countries claim that the ban on imports of recyclable wastes will seriously harm their economies and in particular block the necessary income to flow to them, thereby obstructing the installation of sound management practices and technology transfer possibilities.[137]

2.) commentary on the Convention in general

As demonstrated above, the Convention is tainted by potential loopholes, vague definitions and an inadequate enforcement mechanism. But I would like to concur with Mark Montgomery's moderating tone, when writing that those criticisms, "although justifiable, are neither surprising nor unique", since inadequate enforcement mechanisms are inherent to international law.[138]

A problem that is currently being addressed is the introduction of a liability and compensation mechanism in the Basel Convention. An ad hoc working group of legal and technical experts gathered in Geneva in order to prepare a draft protocol on liability and compensation for damage resulting from the transboundary movement of hazardous wastes and their disposal. The protocol is likely to be adopted during the COP-5 to be held in December 1999.[139] It is hoped that a liability provision for the *generators* of

[135] Valin, supra note 4, 280-286; Puckett, supra note 111; Kratz, supra note 11, at 336-342.

[136] See Valin, supra note 4, at 280 (" Industry claims that the ban on trading recycled wastes between OECD and developing countries could cost the U.S. industry $2,2 billion a year in commodities trade.").

[137] Id., at 284-285; Elli Louka, *Cutting the Gordian Knot: Why International Environmental Law is Not Only About the Protection of the Environment*, 10 TEMP. INT'L & COMP. L. J. 79, 88 (1996).

[138] Montgomery, supra note 126, at 199.

[139] The COP-5 meeting was originally planned to be held December 1998. The result of the ad hoc working group held from 19-23 April 1999, is available at: <http://www.unhip.ch/basil/sbc/liab9-2.htm>. Some gray areas relating to scope, the level of compensation, and emergency funds will be discussed during a working group meeting at the end of August 1999. See: <http://www.ends.co.uk/envdaily> (April 27, 1999).

hazardous wastes will increase the implementation of the Basel Convention by the citizens of Basel parties and work as an incentive to reduce the generation of those wastes domestically.[140]

An indirect criticism on the reach of the Basel Convention can be found in a recent 'hazardous cargo' incident which arose[141] between Cambodia and Taiwan, both *non-Members* of the Basel Convention.[142] In December 1998 Cambodian authorities discovered over 3,000 tons of mercury-tainted waste illegally dumped near the popular coastal resort of Sihanoukville by the Taiwanese petrochemical giant Formosa Plastics. Its discovery caused thousands of residents to riot and flee the province and four people died in the melee.[143] Allegedly two dock workers whom handled the toxic waste[144] and several villagers living near the dump also died.[145] Formosa Plastics signed an agreement with the Cambodian government to remove the waste, but has not found a disposal site yet. Originally the waste was to be disposed in West Moreland, California, but the plan was abandoned after the U.S. Environmental Protection Agency (EPA) reviewed its original approval under public pressure and allegations that the toxicity exceeded EPA's

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[140] Greenpeace International, *COP4 The Key Issues At a Glance* (Feb. 1998) <http://www.greenpeace.g13/gopher/campaigns/toxins/1998/cop4key.txt>; Stephen Johnson, *The Basel Convention: The Shape of Things to Come for United States Waste Exports?*, 21 ENVTL.L. 299, at 316-317 (1991).

[141] Another example of a toxic cargo incident can be found at: *Indian Unions, Greenpeace: Toxic Ship Sneaked In* (March 20, 1999) <http://ens.lycos.com/ens/mar99/1999L-03-22-01.html> (At the end of May Greenpeace and trade unions of India charged an Anglo-Dutch shipping company, P&O Neddloyd, with exporting hazardous wastes, including ships-for-scrap, to India, in violation of a ruling of India's highest court); See for many more current examples <http://www.ban.org> (especially the news section of this Basel Action Network web site), and <http://greenpeace.org/toxins.html>.

[142] See www.un.org, supra note 44 (updated list of Parties to the Basel Convention).

[143] *Cambodia Investigates New Waste Dump* (Dec. 24, 1998) <http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_241000/241861.stm.

[144] *Cambodia Says Farewell to Toxic Waste* (Apr. 1, 1999) <http://www.sustainablebusiness.com/news/newsdetail.cfm?NewsID=6879.

[145] *Accord Signed to Remove Taiwanese Waste From Cambodia* (Feb. 25, 1999) <http://news.bbc.co.uk/hi/english/world/asia-pacific>.

safe-storage level.[146] In the meanwhile the Taiwanese port officials did not allow the ship that contains the removed wastes at stake to dock, and there is a growing fear that Formosa Plastics will be unable to find a country willing to take the toxic material.[147] More sadly is the Cambodian government's apparent reluctance to pursue any legal action against Formosa Plastics, which has apologized, but has refused to accept responsibility or pay compensation.[148] There are allegations that up to three million dollars in bribes may have been paid to corrupt government officials, and at this stage three of them have been charged with endangering human life, property and the environment under Cambodian law.[149]

E. U.S. versus Basel :

1. friend or....

Although the United States was one of the first nations to *sign* the Basel Convention in 1990,[150] its *ratification* process has *not* been completed yet.[151] The Senate did give its prerequisite Advise and Consent to the ratification of the Basel Convention in August 1992,[152] but the necessary implementing legislation has not been passed.[153] The

[146] *Cambodia Sends Toxic Waste Back Home* (Apr. 2, 1999) <http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_310000/310362.stm>.

[147] *Taiwan Toxic Waste Waits* (Apr. 8, 1999) <http://news.bbc.co.uk/hi/english/world/asia-pacific>.

[148] *Cambodia Sends Toxic Waste Back Home*, supra note 146.

[149] Ibid.

[150] Ibid.; See also Rebecca A. Kirby, *The Basel Convention and the Need for United States Implementation*, 24 GA. J. INT'L & COMP.L .REV. 281-282 (1994).

[151] Kirby, supra note 150, at 282; Paul E. Hagan, *International and United States Controls on Transboundary Shipments of Hazardous Wastes*, C990 ALI-ABA 57, 75 (1995).

[152] August 11, 1992, see: 138 Cong. Rec. S. 12, 291 (daily ed. Aug.11, 1992).

[153] Hagan, supra note 151, at 75; Doyle, supra note 34, 148-155 (detailed overview of U.S. legislative proposals up to 1995).

further development of implementing legislation is linked to the amendment of the Resource Conservation and Recovery Act ('RCRA').[154]

The Clinton Administration released in February 1994 a "Position Statement on Basel Legislation" which contained guidelines for Congress in its implementation work.[155] This document :

"a.) Narrowly defines 'covered wastes' and exempts certain commodity-like secondary materials such as scrap metal, paper, textiles, and glass when exported for recycling;
b.) Supports an eventual ban on all exports of covered wastes for treatment, storage, disposal, and recycling except for shipments to Canada and Mexico;
c.) Recommends that the President be given the authority to grant exemptions to the ban on exports for disposal and recycling based on case-by-case findings".[156]

It is important to add that the United States Chamber of Commerce[157] and the Business Recycling Coalition[158] withdrew their original support to different 'Waste Export Act Proposals' after the COP-2 accepted the ban on cross boundary waste trade from OECD to non-OECD members.[159] Ironically, as Mark Bradford remarks, the non-party status of the U.S does not prevent it from negotiating bilateral agreements with party-states of the Basel convention for the *import* of hazardous wastes (as it has already done so with Malaysia),[160] since the OECD Recycling Decision,[161] which has been

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[154] Resource Conservation and Recovery Act, 42 U.S.C. art. 6901-6992k; See Doyle, supra note 34, at 154; See Hagan, supra note 151, 75-78.

[155] Hagan, supra note 151, at 78.

[156] Ibid.

[157] Valin, supra note 4, at 287.

[158] Id., at 283.

[159] Id., at 287.

[160] Bradford, supra note 41, n. 115.

[161] See *OECD Recycling Decision*, infra note 213.

integrated in U.S. law,[162] qualifies as a multilateral agreement under the article 11 exceptions of the Basel Convention.[163]

2. ...foe ?

a.) the implication of the OECD Recycling Decision for recovery operations

For the sake of clarity, a synopsis will now be given of the American administrative and legislative approach towards the international movements of hazardous waste, while the transboundary waste shipments within the U.S.will be covered in Chapter IV.[164]

Pending the complete ratification of the Basel Convention by the United States, the U.S. Environmental Protection Agency (EPA) promulgated a final rule that fully embodies the OECD Recycling Decision, related to shipments of hazardous waste among OECD countries that are destined for *recovery* operations;[165] those intended for *disposal or treatment* will remain subject to RCRA regulations.[166] The OECD Recycling Decision (typified by its assignment of wastes in green, amber and red lists) permits member countries (import, export and transit) to use their national procedures to determine the

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[162] See Imports and Exports of Hazardous Waste: Implementation of OECD Council Decision, 61 Fed. Reg. 16, 290 (Apr. 12, 1996) (codified at 40 C.F.R. par. 262.80-89).

[163] See supra page 15; Joy Clairmont, *Imports and Exports of Hazardous Waste: Implementation of OECD Council Decision C(92)39 Concerning the Transfontier Movements of Recoverable Wastes*, 3 ENVTL. LAW 545, 547 (1997).

[164] See infra at pages 58-77.

[165] The United States' bilateral agreements with Canada and Mexico take precedence over the Rule, see at 61 Fed. Reg. at 16,307.

[166] Clairmont, supra note 163, at 545, 548 and n.20-21; See generally 40 C.F.R. pts. 100, 200 and in particular 40 C.F.R. 262.80(a) (1996) 'recovery operations' are defined as activities leading to resource, recovery, recycling, reclamation, direct reuse or alternative uses as listed in table 2.B of the Annex of the OECD Decision, OECD Doc. C(88) 90/Final of 27 May 1988.

level of control for a particular waste shipment.[167] This raises obvious problems. For example when only the importing country considers the waste to be hazardous, the exporting country will be free of all obligations because its national procedures classify the waste as non-hazardous.[168] A potential conflict that has been overlooked by the OECD Decision is when only the transit country would define the waste as hazardous, and not the importing and exporting countries.[169]

The concerned countries may subject a transportation to its national procedures with regard to wastes not yet assigned to the green, amber or red lists by the OECD Review Mechanism.[170] Thus, if the U.S. national procedures consider an unlisted waste to be hazardous, it shall be subjected to all the controls imposed on red-list wastes.[171]

The OECD Decision leaves it up to the various countries to decide if they want to require a financial guarantee to back up a possible failure to carry out the shipment as planned.[172] Currently the United States has not made use of this possibility.[173]

Furthermore, the principle of prior informed consent, and an accompanying tracking document to the movements of hazardous wastes are just like in the Basel Convention quintessential concepts, and are similarly developed in both systems.[174]

The EPA Rule differs from the Basel Convention provisions, by solely resting the responsibility of the failure to handle the amber- or red-list wastes by the recovery facility in the hands of the party identified in the contract, and not the exporting

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[167] See *OECD Recycling Decision*, infra note 213, at Annex I, section II par. (4) and (5).

[168] Clairmont, supra note 163, at 549.

[169] Id., at 550.

[170] See *OECD Recycling Decision*, infra note 213, at Annex I, section II par. (7).

[171] See 40 C.F.R. par. 262.82(4)(i), .89(c) (1996); 61 Fed. Reg. at 16,294.

[172] See *OECD Recycling Decision*, infra note 213, at Annex I, section IV par. (1).

[173] Clairmont, supra note 163, at 551; see 40 C.F.R. par. 262.85(e) (1996).

[174] See *OECD Recycling Decision*, infra note 213, at respectively Annex I, section IV, par. (2), and Annex I, App. 2, par. A, B; See more extensively Clairmont, supra note 163, at 553-557.

country.[175] Therefore, the OECD Decision is not characterized by a duty to re-import by the exporting country, but rather by a possibility for the responsible party to re-export the waste to a recovery facility in a different OECD country.[176]

b.) RCRA Regulations

Section 3001 of RCRA required EPA to implement means by which to identify hazardous wastes. The EPA developed two main parameters through which solid wastes can be considered as hazardous, namely by being *listed* in its regulations[177] or by exhibiting one of four hazardous *characteristics* (ignitability, corrosivity, reactivity, toxicity).[178] The EPA adopted two additional important rules related to the listed wastes, the so-called 'mixture rule' and the 'derived-from rule', to "prevent generators from evading hazardous waste regulations by diluting or otherwise changing the composition of listed waste streams".[179] The *mixture rule*[180] provides that any mixture of a listed waste with another solid waste is itself considered to be a hazardous waste.[181] The *derived-from rule*[182] states that wastes derived from the treatment, storage, or disposal of a listed waste are deemed to be hazardous wastes.[183] Characteristic wastes on the other hand will be

[175] See 40 C.F.R. 262.85(a) (1996); compare with supra note 83.

[176] Clairmont, supra note 163, at 557 (referring to 40 C.F.R. 262.82(c)(1) (1996).

[177] See 40 C.F.R. pts 261.31 (28) (F), 261.32 (101) (K), 261.33 (186) (P), 261.33(f) (435) (U).

[178] Respectively, 40 C.F.R. pts. 261.23 (I), 261.21 (C), 261.22 (R), 261.22 (R), 261.24 (T).

[179] ROBERT V. PERCIVAL, ALAN S. MILLER, CHRISTOPHER H. SCHROEDER and JAMES P. LEAPE, ENVIRONMENTAL REGULATION - LAW, SCIENCE AND POLICY 235 (Little, Brown & Company, 2d ed. 1996).

[180] See 40 C.F.R. par. 261.3(c) (1).

[181] See clearly PERCIVAL, MILLER, SCHROEDER and LEAPE, supra note 179, at 235-237.

[182] See 40 C.F.R. par. 261.3(c) (2) (i).

[183] See clearly PERCIVAL, MILLER, SCHROEDER and LEAPE, supra note 179, at 236-237.

considered hazardous wastes only until they no longer exhibit the hazardous characteristic.[184]

3. probably both

There are significant differences between the regulation of waste exports as conceived in the Basel Convention and as installed by RCRA and the EPA Rule. The most significant ones will be touched upon.

First of all, the Basel Convention and RCRA differ in the *scope* of waste exports covered.[185] The Basel Convention encompasses hazardous wastes *and* other wastes (household wastes, residues from the incineration of household wastes),[186] while RCRA only covers hazardous wastes.[187] Above all, the Basel Convention uses a broader definition of hazardous wastes than RCRA, and while RCRA limits itself to the regulation of hazardous wastes as defined in the United States, the Basel Convention will be applicable as soon as any of its parties define it as such in their domestic legislation.[188] Secondly, there is a significant *absence* under the RCRA requirements and the EPA Rule of the duty of an exporting country to ensure that the hazardous waste will be managed in an *environmentally sound manner* in the the receiving country or elsewhere, and which is a primordial prerequisite under the Basel Convention.[189] As Mr. Johnson notices, the importance of the inclusion of such a requirement lays not only in the increased responsibility of the exporting country for the management of their waste in receiving

[184] Id., at 237.

[185] Johnson, supra note 140, at 312.

[186] See supra p. 10-11.

[187] See supra p. 26-27.

[188] See supra p. 10; Johnson, supra note 140, at 312-313.

[189] Compare supra page 11.

countries, but especially ensures that waste "is not being exported from the country simply to avoid the high cost of managing the waste in an environmentally sound manner domestically".[190] Today, EPA lacks the authority to prohibit the export of waste, even if it knows that the waste will not be managed in an environmentally sound manner.[191] Thirdly, under the Basel Convention the *duty to re-import* waste if the waste shipment cannot be completed as agreed upon rests on both the exporter as the exporting country, while under RCRA only the exporter is obliged to do so.[192]

F. Testing the Basel Convention

1.) a hypothetical case

If the United States had been a Party to the Basel Convention, a true test for the Convention might have been launched by China (a full Party State), currently one of the world's largest importers of hazardous wastes.[193] China announced in November 1995, that it had blocked the entry of various shipments containing tons of household, medical and toxic waste illegally shipped from the United States and Canada. In one instance, the Chinese authorities arrested an American businessman for allegedly shipping 238 tons of household garbage from California to Shanghai in June 1996, and he was convicted, fined $60,000 and expelled from the country in 1997.[194] China's National Environmental

[190] Johnson, supra note 140, at 314-315.

[191] Id., at 315.

[192] Ibid.

[193] See www.un.org., supra note 44 (China signed the Basel Convention on 22 March 1990, ratified it 17 December 1991 and became a full Party State on May 5, 1992, when the Basel Convention entered into force); See Bradford, supra note 41, at n. 10 (referring to Greenpeace report estimating that between 1990 and 1993, toxic wastes moving from the United States to China totaled 220,665 metric tons, i.e. twenty times the combined total for Australia, Canada, Germany and the U.K.).

[194] Bradford, supra note 41, at n. 169.

Protection Agency (PRC-NEPA) particularly claimed it discovered in Qingdao, 640 metric tons of mislabeled 'waste paper' that actually contained medical waste from the United States.[195] When U.S. government agencies offered to assist in an investigation of the illegal shipments, the Chinese authorities did not respond and U.S. authorities were only able to corroborate that one of the shipments contained household waste but could not verify the hazardous waste claim.[196] Nevertheless, the Chinese government announced a formal protest to the Secretariat of the Basel Convention in May 1996 against the (alleged) illegal import of hazardous wastes, originating from the United States.[197] As Mr. Bradford infers, it was primarily a public "rhetoric gesture" by China aimed at protesting against "the negative moral example" rooted in the non-ratification by the U.S. of the Basel Convention.[198] The importance of China's complaint with the Basel Secretariat lays more in the fact that a state formally intended to use the venue offered by the Basel Convention, since no other example is available. As the author observes, the non-Party status of the United States renders the chances of legal redress within the structures of the Basel Convention impossible. The Basel dispute resolution provision does not apply to a party which has not ratified the Convention such as the U.S., unless the disputing countries have negotiated a separate bilateral treaty.[199]

2.) a lost opportunity ?-

In September 1992, amidst the civil war and famine in Somalia, an $80 million contract between the Somalian Minister of Health, a Swiss company and an Italian waste

[195] Id., at 339.

[196] Id., at 340.

[197] Id., at 308 and 338.

[198] Id., at 347-348, see also at 308 (the author reminds us that this conflict arose in a period which was tainted by the tensions over the respect of American intellectual property rights by China).

[199] Id., at 341; See Basel Convention, supra note 27, at art. 20 par. 1, art. 4 par. 5 and art. 11 par.1.

broker, to dump hazardous waste in Somalia became known to the public.[200] Somalia and Italy were not parties to the Basel Convention, but Switzerland was [201] Both Italy and Switzerland promised the Somalian government to investigate the matter further in conjunction with UNEP. Suspicions quickly arose that the Swiss company was no more than a front, and UNEP charged "the mafia" with being behind it all. Strong international reactions flared for a moment, but after a month media interest cooled. UNEP claimed that the international attention over the planned dump had forced the companies to abandon the venture.[202]

The importance of the Somalia incident, as analyzed by author Vu, lies in the particular loophole of the Basel Convention it depicts. Namely the absence of a regulatory scheme for the country of the *waste broker*. More and more waste generators are relying on waste brokers and other intermediaries, who may be in neither the exporting nor the importing country.[203] Switzerland, being the only Basel party, cannot be defined as an exporting nor transit state for the waste neither departed nor passed through its territory.[204] The author therefore proposes to amend the Basel Convention such as to monitor waste broker activities. For example, the *broker's country* could be considered as a *transit country*. This would oblige the waste exporter to obtain a prior informed consent from the broker's country. There also seems less reason to believe the broker's country would refuse its consent, since it will not actually suffer pollution by the transport and

[200] Vu, supra note 6, at 429-430 and n. 223 (the author also alludes to other hazardous waste dumping problems between Italy and Somalia and explains the involvement of Italian companies partly by the fact that Italy ruled Somalia from 1905 to 1960); For extensive references to relevant lecture, see also: <http://gurukul.ucc.american.edu/ted/Somalia.htm>.

[201] See www.un.org., supra note 44 (Italy signed the Convention 22 March 1989 and has ratified it in the meanwhile on 7 Feb. 1994; Switzerland signed 22 March 1989 and ratified it on 31 Jan. 1990).

[202] Vu, supra note 6, at 430 (the author cynically adds: "No one even seemed to wonder whether the traveling business partners had returned to their office").

[203] Id., at 432.

[204] Id., at 431.

will gain by its citizen gaining brokerage income.[205] Another alternative would be to expand the definition of waste *exporter*[206] to include waste *broker*. The latter would then be obliged to respect the same environmentally sound manner requirements as a waste exporter. Parties to the Basel Convention might be more reluctant to adopt this expanded definition because it would imply a duty to re-import hazardous waste not disposed of in an environmentally sound manner.[207]

[205] Id., at 431.

[206] The Basel Convention, supra note 27, art. 2, par. 15: "Exporter, means any person under the jurisdiction of the the State of export who arranges for hazardous wastes or other wastes to be exported"; see supra page 16 for analysis of the prior informed consent duty resting on the generator and exporter of hazardous wastes and other wastes.

[207] Vu, supra note 6, at 433.

Chapter III.

Actual regulatory scheme in the EU, related to the Transboundary Movement of Waste

A. General background

The "Saga of the Seveso Drums" i.e. the European interstate tension which originally arose due to the explosion in 1976 of a factory in Seveso, Italy, releasing a cloud of dioxin and that revived in the early 1980s when barrels of hazardous waste from the factory were discovered in France, instigated the EU countries to pass the first Directive[208] to regulate the transboundary transport of hazardous wastes in 1984. Regulation[209] 259/93 on the "Supervision and Control of Shipments of Waste, Within, Into, and Out of the European Community"[210] (Regulation) was adopted in a desire to

[208] Directive on the Supervision and Control Within the European Community of the Transfontier Shipment of Hazardous Waste, 1984 O.J.C.E. (L 326) 31 (1984), amended by Directive 84/631/EEC on the Supervision and Control Within the European Community of the Transfontier Shipment of Hazardous Waste, 1986 O.J.C.E. (L 181) 13 (1986); This paper will not cover the legal tension that exists regarding the proper legal basis for the adoption of waste Directives (art. 130(s) versus art.100 (a) 4) and its evolution, see e.g. extensively: Damien Geradin, *Free Trade and Environmental Protection in an Integrated Market: a Survey of the Case Law of the United States Supreme Court and the European Court of Justice*, 2 J. TRANSNAT'L L. & POL'Y 141, 162-177 (1993); for a synopsis: European Newsletter, *Recent Legal Developments of the European Community*, 4 DUKE J. COMP. & INT'L L. 189, 211-212 (1994).

[209] STEPHEN WEATHERILL & PAUL BEAUMONT, EU LAW - THE ESSENTIAL GUIDE TO THE LEGAL WORKINGS OF THE EUROPEAN COMMUNITY 136-137 (Penguin Books, U.K., 1995) (" A Regulation has general application, is binding in its entirety and is directly applicable in all member states. (...) A Directive does not necessarily apply to all member states and, rather than being directly applicable in those states, allows them the choice of forms and methods of implementing it in their national laws. Directives are, however, binding on the member states to which they are addressed as to 'the result to be achieved'.").

[210] Regulation 259/93 on the Supervision and Control of Shipments of Waste, Within, Into and Out of the European Community, O.J.C.E. (L 30) 36 (1993).

comply with the Basel Convention[211] and to end the lax implementation of prior Directives.[212]

The Regulation was inspired by:

1.) the third OECD-Decision ('Recycling Decision') of April 1992[213] - which divides wastes into three categories by color code, according to the wastes' increased hazardousness: green, amber, red;

2.) the Belgian Waste Case,[214] rendered by the European Court of Justice (ECJ), and

3.) the French - German 'medical waste' conflict,[215] all of which will be reviewed below.

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[211] CAROLINE LONDON & MICHAEL LLAMAS, EU LAW ON PROTECTION OF THE ENVIRONMENT AND THE FREE MOVEMENT OF GOODS 135 (Ed. Butterworths, U.K. 1995) ("The Regulation was adopted on Feb.1, 1993; published on Feb.1, 1993; entered into force on Feb. 9, 1993 and became applicable as from May 6, 1994") and at 62 ("The EU Council approved the Basel Convention on 16 February 1993, one week after the entry into force of Regulation 259/93."); Andrew Evans Skroback, *Even a Sacred Cow Must Live in a Green Pasture: the Proximity Principle, Free Movement of Goods, and Regulation 259/93 on Transfontier Waste Shipments Within the EU*, 17 BC. INT'L & COMP. L. REV. 85, at n.8 (1994).

[212] Allen, supra note 17, at 170; See Liu, supra note 10, at 125 and Vu, supra note 6, at n. 101 (in 1989 only Belgium, Denmark, Greece and Luxembourg had implemented the 1984 and 1986 Directives).

[213] Decision of the Council Concerning the Control of Transfontier Movements of Wastes Destined for Recovery Operations, OECD Council decision Doc. C(92) 39/Final; *Transboundary Movements of Toxic Wastes for Recovery Covered by New OECD Decision*, INT'L ENVTL.DAILY (BNA), Apr.22, 1992 (abbreviated as: *OECD Recycling Decision*).; Sinding, supra note 31, at 805 (The Recycling Decision of the OECD was rendered moot for the parties to the Basel Convention, following the COP-3 Decision of the Convention in Sept.'95).

[213] Case C-2/90 *Commission v. Belgium* (1992) ECR I-4431; (1993) I CMLR 365.

[214] LONDON & LLAMAS, supra note 211, at 67.

[215] See Regulation, supra note 210, art.1, par.1-3. Many authors claim that the the Regulation covers 'all' types of waste (i.e. in comparison with prior Directives), but considering the important exceptions (see infra at pages 39-40) I find it a rather confusing language.

B. Examination of the Regulation

1. scope

The scope of the Regulation encompasses hazardous, household and industrial waste, but excludes, e.g. radio-active and 'green' waste destined for recovery.[216] The 'green' waste exception reflects how the EU adopted the three-tiered classification of the OECD Recycling Decision : green for the non-hazardous wastes; amber for the more hazardous wastes; red for the most hazardous wastes.[217] The control of transboundary movement of wastes will vary in accordance to the degree of hazardousness, from a low level control (green list of wastes: Annex II of the Regulation), to an implicit consent system, in the absence of an objection by the country in question (amber list of wastes: Annex III of the Regulation) to an explicit prior written consent scheme (red list of wastes: Annex IV of the Regulation).[218] Greenpeace has reprimanded this "greenwash", which was a "last minute lobby success" for the manufacturing and recycling industries.[219] But more importantly, Greenpeace attacks the inclusion of hazardous wastes in the 'green list'; it being in violation of the Basel Convention.[220]

The Commission of the EU has responded to those claims by adapting the Regulation's Annexes II and III, as follows: "Regardless of whether or not wastes are included on this list, they may not be moved as green wastes", or respectively "amber wastes", "if they are contaminated by other materials to an extent which :
a.) increases the risks associated with the waste sufficiently to render it appropriate for

[216] See Sinding, supra note 31, at 809; Allen, supra note 17, at 171.

[218] See also LONDON & LLAMAS, supra note 211, at 142-157; Allen, supra note 17, at 171.

[219] See Puckett, supra note 111.

[220] Ibid.; LONDON & LLAMAS, supra note 211, at 95 (mentioning how the scrap industry even requested the OECD to delete scrap "products" from the green waste list); Allen, supra note 17, at 175-176 and n. 125.

inclusion in the amber or red lists" or respectively "red list", "or

b.) prevents the recovery of the waste in an environmentally sound manner".[221]

The Council of the EU amended art. 16(1) of the Regulation to provide for a total prohibition of exports of hazardous waste destined for recycling or recovery operations to non-OECD members.[222] Yet, the potential loophole caused by 'sham' recycling remains,[223] because the notification procedure for 'green waste' still does not require a signature from the importing country and allows the shipment of wastes for recovery to countries that are Parties to the Basel Convention and to which the OECD Decision applies as well.[224]

It is important to remember that the EC-Treaty does not contain any definition of "waste", neither of "goods".[225] Because one cannot distill a clear definition of "waste" from the existing primary or secondary legislation,[226] the interpretation by the ECJ is the

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[221] 98/368/EU: Commission Decision of 18 May 1998 adapting, pursuant to Article 42(3), Annexes II and III to Council Regulation (EEL) No. 259/93 on the Supervision and Control of Shipments of Waste Within, Into and Out of the European Community. O.J. No. L 165, 10 June, 1998, at 0020-0029. Also at: <http://europa.eu.int/eur-lex/eu/lif/dat/en_398D0368.html>.

[222] Council Regulation (EU) No. 120/97 of 20 Jan. 1997 amending Regulation (EU) No. 259/93 on the Supervision and Control of Shipments of Wastes Within, Into and Out of the EU , O.J. No. L.022, 24 Jan.,1997, p.0014-0015; Also available via: <http://europa.en.int/eur-lex/eu/lif/dat/en_397R0120.html>.

[223] Skroback, supra note 160, at 109; Allen, supra note 17, at 179 (refers to some Greenpeace documents reporting that in the period 1987-1995, 96 attempts by 95 firms to export 34 million metric tons of hazardous wastes, from Western Europe to Russia, were discovered under the disguise of a "recycling plan").

[224] Allen, supra note 17, at 176.

[225] LONDON & LLAMAS, supra note 211, at 87.

[226] Id., at 87-90 (for a thorough review: Regulation 259/93 art. 2a) refers to the definition in art. 1a) of Directive 75/442 (the 'Framework Directive' at O.J. L 194, July 25 1975, at 47) as amended by Directive 91/156 (O.J. L 78), that "waste shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard". Pursuant to art. 1a) of Directive 75/442 the Commission drew up a list, commonly referred to as the "European Waste Catalog", which contains a codified enumeration of wastes, subject to periodical reviews; but especially drafted to serve as a reference for the Community program on waste statistics to be prepared in accordance with the Council resolution of 7 May, 1990 on Waste Policy adopted in accordance with Directive 91/689 -replacing Directive 78/319- on toxic and dangerous waste, at O.J. L 84 March 31, 1978,43. But, the three lists of the Regulation do not correspond to the above mentioned lists in this footnote; thereby creating a source of confusion !).

main guideline.[227] It is settled case law[228] that *waste* may be considered as a good, *irrespective* of the *intention* of the owner, the positive or negative *value* which it has and whether or not it is *recyclable*.[229]

2. types of waste shipments

The Regulation classifies the types of waste shipments into five categories:

a.) *between* Member States;[230]

b.) *within* Member States;[231]

c.) *exports* to non-member countries;[232]

d.) *imports* into the Community from non-member countries;[233]

e.) *transit* of waste from outside and through the Community for disposal or recovery outside the Community.[234]

Common to all types of waste shipments is the comprehensive prior authorization and notification scheme which rests on the *notifier*[235] (and requires the

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[227] Id., at 90.

[228] See: "Zanetti cases", C-206 and C-207/88-(1990) ECR I-1461; the "Belgian Waste case", supra note 213; joined cases C-304/94 EURO Tombesi,C-330/94 Roberto Satella, C-342/94 Giovanni Muzi and others, C-224/95 Anselmo Savini, decided on June 25, 1997, not yet reported but covered in: Sara Poli, *Case Notes*, 7 R.E.C.I.E.L. 8, 1998.

[229] LONDON & LLAMAS, supra note 160, 90-95 (extensive assessment).

[230] The Regulation, supra note 210, Title II, chapter A: waste for disposal: art. 3-5; chapter B: waste for recovery: art.6-11; chapter C: waste for disposal and recovery with transit via third states : art. 12.

[231] Id., Title III, art. 13.

[232] Id., Title IV, chapter A: waste for disposal: art. 14-15; chapter B: waste for recovery: art. 16-18.

[233] Id., Title V, chapter A: waste for disposal: art. 19-20; chapter B: waste for recovery: art. 21-22.

[234] Id., Title VI, chapter A: wastes for disposal and recovery: art. 23; chapter B: waste for recovery: art. 24.

[235] Id., art. 2g): "notifier means any natural person or corporate body to whom or to which the duty to notify is assigned, that is to say the person referred to hereinafter who proposes to ship waste or have waste shipped". An interesting test is to determine if a waste broker would fall under those terms...

consent of the competent authorities[236] designated by the Member States)[237] and the main subdivisions between wastes intended for *disposal* and those meant for *recovery.*[238]

a.) Shipments of waste between Member States

i) The general right to ban wastes for disposal

1.)The principle: art. 4-3 (a) i

Though both shipments of waste destined for disposal and recovery are subjected to an analogous procedure, *greater powers* are granted to the Member States to *prohibit* the import of waste to be *disposed* of. Thus, in accordance with the principle of proximity and self-sufficiency at Community and national levels, Member States may take measures *in accordance with the Treaty,*[239] to *prohibit generally or partially*, or even to object *systematically* to shipments of waste destined for disposal.[240] The Regulation does *not* contain a similar provision for *recovery* operations.[241]

At the demand of Luxembourg[242] a "small country exception" to the right to ban was inserted, for the situations where the hazardous waste is produced in such small

[236] Id., see art. 2, par. b)-e) for definition.

[237] Ansbro, supra note 14, at 420.

[238] Allen, supra note 17, at 171-172.

[239] Skroback, supra note 211, at 107 (informs us that the words "in accordance with the Treaty" were inserted as a compromise, "which allowed the more hesitant Member States to sign the Regulation. The true dimension of this balancing sentence will have to be clarified by the jurisprudence of the ECJ).

[240] The Regulation, supra note 210, art. 4, par. 3a).

[241] LONDON & LLAMAS, supra note 211, at 68.

[242] Skroback, supra note 211, at 107; LONDON & LLAMAS, supra note 211 (to a certain extent Portugal, Ireland and Greece will benefit from this provision too).

quantities that the provision of new specialized disposal installations within that State would be uneconomic.[243]

2.)Reasonable objections: art.4-3(b)

Furthermore, the competent authorities of dispatch and destination may raise *reasoned objections* to an import:

- based on the principles of self-sufficiency and proximity;
- in order to ensure that the shipments are in accordance with waste management plans;
- to comply with national laws and regulations relating to environmental protection, public order, public safety or health protection.[244]

The *fundamental* impact of these provisions is overwhelming if we follow the line of reasoning of the authors London and Llamas: "(...) the Regulation has become a *lex specialis* for the application of the principle of the free movement of goods to waste, to the detriment of the application of articles 30-36 EU Treaty; (...)the list of conditions and objections contained in article 4(3) take the place of the list of permitted obstacles to the free movement of goods contained in article 36 EU Treaty and the mandatory requirements".[245]

[243] The Regulation, supra note 210, see art. 4) 3.a.ii).

[244] Id., see art. 4, par. 3 b)-c) (more situations enumerated). LONDON & LLAMAS, supra note, 160, at 67 (the authors have pointed out the futility and the danger for potential conflicts, between the general 'right to ban' provision and the latter, milder version of it. For why should a Member State which has the right to "object systematically to shipments of waste" bother to justify a prohibition on the basis of "reasoned objections" ?).

[245] LONDON & LLAMAS, supra note 211, at 140 (emphasis added). The full impact will be clarified below at pages 49-51.

ii.)Wastes for recovery - a different treatment

Significantly, the *bases* of the objections by Member States are considerably *narrower* in the case of waste shipments aimed for recovery than for disposal.[246] Another difference arises in the context of the assessment by the competent authorities of the notification, is that the control procedure for recovery operations is characterized by a system of *tacit approval*; nonexistent in the case of disposal operations.[247]

b.) Shipments of waste within a Member State

The Regulation leaves it up to the Member States to establish an appropriate system for the supervision and control of shipments of waste within their jurisdiction. This system should take into account the need for coherence with the Community system established by this Regulation.[248] The authors London and Llamas, once more pertinently question the possible tension that might rise with the principle of *subsidiarity,*[249] which has become quintessential to Community environmental policy since the adoption of the Single European Act in 1987.[250]

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[246] The Regulation, supra note 210, art. 7 par. 4 only mentions the bases provided in art. 3 par.c), not those in art. 3, par. b)-c); See at large: LONDON & LLAMAS, supra note 211, at 143.

[247] LONDON & LLAMAS, supra note 211, at 143.

[248] The Regulation, supra note 210, art.13, par.2.

[249] See art 3 b) EC-Treaty: "The Community shall act within limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or the effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty". See for further information *Revue des Affaires Europeenes-Law and European Affairs*, (1998) 1&2, Mys & Breesch (covering various facets of the growing subsidiarity principle).

[250] LONDON & LLAMAS, supra note 211, at 147.

Since the Regulation was based on art. 130S of the EC-Treaty, the Member States can "introduce stricter measures generally, and in particular with respect to purely national movements" than those contained in the Regulation.[251]

c.) Exports of waste from the EC to third countries

Under the Regulation, all exports of waste for disposal from an EU member to a third country are prohibited, except to the countries of the European Free Trade Association (EFTA).[252] The practical effect of this provision is limited, now that the EFTA only encompasses four countries, of which Iceland, Liechtenstein and Norway are parties to the Agreement on the European Economic Area (EEA). By virtue of the EEA the three countries will be considered as "Member States" for the application of the Regulation.[253] Consequently, the complex control procedure contained in art.15, for the export of waste for disposal, only applies to one country: Switzerland.[254]

The ban with respect to the export of waste for *recovery* is *less restrictive*. The most important exceptions to the export ban are those to OECD members, parties to the Basel Convention and those countries with which the EU, or the EU and its Member States acting jointly, have concluded bilateral, multilateral or regional agreements or arrangements in accordance with the Basel Convention.[255]

According to the Lome-IV Convention,[256] all exports of wastes to the African, Caribbean, Pacific (ACP) countries are banned, except where an ACP country has

[251] Ibid.

[252] The Regulation, supra note 210, art. 14 (1). The current members of the EFTA are Iceland, Norway, Switzerland, and Liechtenstein.

[253] LONDON & LLAMAS, supra note 211.

[254] Id., at 148.

[255] The Regulation, supra note 210, art. 16, par. a)-b).

[256] Fourth convention of Lome, see supra note 96.

exported waste for processing to a Member State, in which case the processed waste can then be returned to the ACP country of origin.[257]

d.) imports of waste into the EU

All imports into the Community of waste for *disposal* shall be *prohibited, except* those from EFTA countries, parties to the Basel Convention, or countries with which the Community, or the Community and its Member States, have concluded bilateral, multilateral agreements or arrangement , compatible with Community legislation and in accordance with the Basel Convention.[258]

e.) the transit of waste from outside and through the for disposal or recovery outside the EU

Here too, a detailed control system of prior authorization of the authorities through which the waste will pass is set up.[259] The most flexible provisions are provided for waste shipments for recovery passing through countries to which the OECD Decision applies.[260]

f.) provision common to all movements

All shipments of waste not in accordance with the system provided for in the Regulation, shall be deemed *illegal.*[261] The illegal "shipper" or the competent authority if

[257] The Regulation, supra note 210, art. 18.

[258] Id., art. 19; for further comment see LONDON & LLAMAS, supra note 211, at 154-155.

[259] The Regulation, supra note 210, art. 23.

[260] Id., art. 24; Allen, supra note 17, at 173; LONDON & LLAMAS, supra note 211, at 155-157.

[261] The Regulation, supra note 210, art. 26, par. 1a)-f).

necessary shall be responsible for *re-importing* the waste to the State of dispatch or, if this is impractical, they will have to ensure that it is disposed of or recovered in an environmentally sound manner.[262]

C. How the Right to Ban in the Regulation came to be

The right to ban by Member States, prima facie, in tension with the free movement of goods,[263] was not accepted overnight, but rather a result of different factors meeting at the same moment.

1. the French veto

A Franco-German waste crisis arose in August 1992, when custom officials discovered hazardous hospital waste amidst German domestic waste being imported in France.[264] France, the largest importer of EU waste,[265] reacted by promulgating a unilateral ban[266] against the import of waste intended for final disposal in its borders.[267] German business, which was focused on cheaper disposals in France, and Luxembourg which as a small country was reaching the limit of its disposal capacity, especially felt the ramifications of France's "retaliatory" ban.[268]

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[262] Id., art. 26, par. 2a)-b).

[263] EU Treaty, Part III, Title I, art. 9-37.

[264] Skroback, supra note 211, at 96; LONDON & LLAMAS, supra note 211, at 67.

[265] Skroback, supra note 211, at 96.

[266] Decree 92-798 of 18 August 1992.

[267] Skroback, supra note 211, at 96; LONDON & LLAMAS , supra note 211, 67.

[268] Ansbro, supra note 14, at 424-425.

The importance of this 'waste crisis' arises from the fact that the *draft version* of the Regulation *did not contain the right to ban* as set out in art. 4(3)(a)i. It was the French Environment Minister whom vetoed [269] the adoption of the proposed Regulation , unless art. 4(3)(a)i, as it stands under its current form was accepted.[270]

2. the Belgian Waste case

a.) a general introduction

A brief comment on the ECJs previous jurisdiction related to the 'free movement of goods' in general and its relationship to the 'environment' in specific is needed in order to understand why the Belgian waste case[271] was at the same time welcomed in the environmentally concerned camp and considered as controversial by those whom could not reconcile it with the previous case law of the ECJ.

In the *absence of Community legislation* it will be the role of the *ECJ* to limit the freedom of Member States to enact environmental legislation, which might hamper the

[269] At the time art. 130S, being the legal basis of the Regulation, required an unanimous vote from all the Member States. See Banny Poostchi, *Note*, 7 R.E.C.I.E.L. 1, (1998) (Only after the Treaty of Maastricht of 1992 became effective, was a qualified majority in the Council of the EC sufficient. See also *New Treaty to Boost EU Environmental Policies* (Apr. 12, 1999) <http://www.ends.co.uk/envdaily>. The Treaty of Amsterdam signed in 1997 and which entered into force May 1, 1999, has 'upgraded' the decision making process under art. 130S from a co-operation procedure with Parliament (art. 189C) to a so-called co-decision procedure (art. 189B) giving Parliament a right to veto but not to initiate legislation yet).

[270] See LONDON & LLAMAS, supra note 211, at 67.

[271] Supra note 213.

free movement of goods, i.e. limitation through *negative harmonization* through the application of articles 30-36.[272]

i.) the principle : art. 30 EC-Treaty

Art. 30 of the EC-Treaty prohibits *quantitative restrictions on imports and all measures having equivalent effect.* Yet, as Weatherill and Beaumont remind us, the ECJ has in practice rarely dealt with quantitative restrictions as such, since quotas on trade between Member States were mainly abolished under the auspices of the GATT.[273] In its leading judgment *Procureur du Roi v. Dassonville,*[274] the ECJ interpreted measures having equivalent effect as "all *trading rules* enacted by Member States which are capable of *hindering, directly or indirectly, actively or potentially, intra-Community trade".* This broad definition encompasses both discriminatory measures against foreign producers as neutral measures that in effect erect barriers to interstate trade.[275]

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[272] WEATHERILL and BEAUMONT, supra note 209, at 524. The implication for the Member States when the Community legislator has acted, i.e. through *positive harmonization*, regarding maintaining or introducing more stringent national environmental legislation varies depending on which legal ground the legislation was based - art 100a(4) free market oriented which allows less 'opting out' than art 130(t) related to the environment. The Treaty of Amsterdam of 1997 significantly amended/inserted articles 100a(3)-100a(8), clarifying some previous contentions surrounding art. 100a(4), but introducing many other interpretative problems, raising many doubts regarding its real practicality for those Member States which desire to insert higher environmental standards. See especially Poostchi, supra note 233 (the author gives a concise and clear analysis of the articles in a post-Amsterdam era); See for a general background e.g. Geradin, supra note 208, at 162-177; WEATHERILL and BEAUMONT, supra note 209, at 483-485.

[273] WEATHERILL and BEAUMONT, supra note 209, at 429.

[274] C-8/74 (1974) ECR 837, par. 5 (italics added).

[275] T. Sexton, *Enacting National Environmental Laws More Stringent Than Other States' Laws in the European Community,* 24 C.I.L. 575 (1991).

ii.) the exceptions

*) the legal exception : art. 36 EC-Treaty

Art. 36 enumerates an *exhaustive list* of derogations from art. 30 for non-economic values,[276] such as public morality, public policy or public security, the protection of human health, animals or plants. Ludwig Kramer[277] enlightens that according to the case law of the ECJ the majority of environmental measures will not be able to be subsumed under art. 36. The Court scrutinizes if the measure has a *direct effect* on the protection of humans or flaura/fauna that can be supported by scientific evidence or a genuine scientific doubt; if the measure does not pass the threshold it is an environmental measure.[278] For instance, the restriction on the use of CFC's in products aims at the protection of the ozone layer which may increase diseases of humans, such as skin cancer, will be considered an environmental measure since the health risk of humans is an indirect one.[279] The second sentence of art. 36 contains a built-in restriction, since the permitted exceptions may not "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States". Or, as Sexton puts it, " a *national measure* that genuinely aims to achieve an *art. 36* objective *may discriminate* against imports, but only if it does *not* do so *arbitrarily*".[280]

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[276] LUDWIG KRAMER, EUROPEAN ENVIRONMENTAL LAW CASEBOOK 95, n. 5 (Ed. Sweet & Maxwell, 1993).

[277] Ludwig Kramer, *Environmental Protection and Article 30 EEC Treaty,* 30 C.M.L.R. 111, 117-118 (1993).

[278] WEATHERILL and BEAUMONT, supra note 209, at 465-466.

[279] Kramer, supra note 277, at 117-118 (e.g. environmental taxes, environmental labeling, waste prevention measures, measures to assess the environmental impact and measures on environmental liability will all be considered as environmental measures).

[280] Sexton, supra note 275, at 576 (emphasis added).

Not only has the ECJ always insisted on the strict interpretation of art. 36,[281] but above all it decided that the onus of compliance rests on the Member States.[282]

**) the jurisdictional exception - mandatory requirements

The famous *Cassis de Dijon*[283] judgment expounded the exceptions from art. 30, by announcing that "*obstacles to movement in the Community* resulting from disparities between the laws relating to the marketing of the products in question *must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements* (...)."

A fundamental difference between a "mandatory requirement" and an art. 36 exception lays in the applicability of the former to *non-discriminatory measures.*[284]

Nevertheless the two distinct concepts also share an important similarity, namely its subjection to the *"proportionality test"*. A measure will in general be regarded as being proportional by the ECJ if it aims to pursue a *legitimate political objective;* if it is *appropriate* to achieve this objective; if it is *necessary* to reach the objective and if there is *no measure which is less restrictive* for the free movement of goods.[285]

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[281] See C-7161 *Commission v. Italy* (1961) ECR 317, C-72/83, *Campus Oil v. Ministry for Industry and Energy (*1984) ECR 1299, C-16/83 *Karl Prantl* (1984) ECR 2727.

[282] C-227/82, *Leendert v. Bennekom* (1983) ECR 3883 and WEATHERILL and BEAUMONT, supra note 209, at 455.

[283] C-120/78 *Rewe Zentrale v. Bundesmonopol - Verwaltung fur Branntwein* (1979) ECR 649, (1979) 3 CMLR 494, at par. 8 (emphasis added).

[284] See C-227/82 *Van Bennekom*, (1983) ECR 3883; B. Jadot, *Mesures Nationales de Police de l'Environnement, Libre Circulation des Marchandises et Proportionalite*, 26 Cahiers de Droit Europeen 408 (1990); Erin A. Walter, *The Supreme Court Goes Dormant When Desperate Times Call for Desperate Measures: Looking to the European Union for a Lesson in Environmental Protection*, 65 FORDHAM L. REV. 1161, 1184 (1996) (the author refines the distinction even further - albeit without any reference - by writing that the ECJ "has not distinguished between discriminatory and nondiscriminatory measures in article 36 cases").

[285] Sexton, supra note 275, at 576; WEATHERILL and BEAUMONT, supra note 209, at 455.

iii.) the Danish Bottles Case

*) *before the judgment*

In the Waste Oil Case,[286] rendered in the early 1980s, the ECJ acknowledged for the first time[287] the protection of the environment as one of the Community's essential objectives. As such, it could justify certain limitations on the principle of freedom of trade. By doing so, the ECJ opened the door for further reaching decisions as in the Danish Bottles Case.[288]

**) the judgment

The quintessence of the Danish Bottles Case is the ECJs recognition of the *protection of the environment as a mandatory requirement.*[289] The ECJ had to assess existing Danish legislation,[290] which installed a system where manufacturers had to market beer and soft drinks only in reusable containers which could be integrated in a deposit and return system.[291] The Danish legislation further required that the containers at stake should be *approved* of by the National Agency for the Protection of the Environment. Manufacturers could be exempted from the approval when they did not exceed a certain

[286] C-240/83 *Procureur de la Republique v. Association de Defense des Bruleurs d'Huiles Usagees (ABDHU)* (1985) ECR 531.

[287] In case 172/82, *Syndicat National des Fabricants Raffineurs d'Huiles de Graissage and Others v. Groupement d'Interet Economique*, (1983) ECR 555, the ECJ already touched upon the balance between environmental protection and free movement of goods, but avoided examining it. See further, David. A. Demiray, *The Movement of Goods in a Green Market*, 1 L.I.E.I. 82, (1994).

[288] C-302/86 *Commission v. Denmark* (1988) ECR 4607 (1989); CMLR 619.

[289] Ibid., at par. 9.

[290] See Danish Law nr. 297 (June 8, 1978) and Danish Order nr. 397 and nr. 95 (March 16, 1984).

[291] C-302/86, supra note 288, par. 2-3. It is noteworthy that the ECJ had already clarified that national measures as to the *type of packaging* of goods, were capable of affecting trade between Member States, in Case 261/81 *Walter Rau v. de Smedt* (1982) ECR 3961, par. 12.

yearly quantity or if importers test the market, and if a deposit and return system was established.[292]

First, the ECJ replied that the establishment of a *deposit-and-return* system must be considered as an *indispensable* element of a system intended to ensure the reuse of containers and regarded it as necessary to achieve the pursued aims and thus *proportionate*.[293] Secondly, the ECJ deemed the approval system as unnecessary if the manufacturers established a deposit-and-return system. Even though the ECJ admitted that approved standardized packages might maximize the protection of the environment, it conceded that non-approved containers could protect the environment too.[294]

b.) the Belgian waste case in the era before the Regulation: more confusion or a solution ?

Wallonia, the Southern Region of Belgium, had become a destination for "waste tourism" due to its lax approach towards environmental regulations.[295] The effect of this "laissez faire" approach was that about three to four hundred old sand quarries were purchased by entrepreneurs in order to fill them with waste.[296] Medical diagnoses of the people of the concerned villages found a considerable amount of exposure to toxins.[297]

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[292] C-302/86, supra note 288, paras. 2-3. The Danish legislation also flatly bans the import of metal containers, but it was an issue not dealt with by the ECJ in its 'Danish Bottles' decision. The Commission filed a case against Denmark on April 21, 1999, for this part of the unaltered legislation, as being contrary to the Packaging Directive 94/62. See more extensively <http://www.ends.co.uk/envdaily> (Apr. 21, 1999).

[293] Ibid., at par. 13.

[294] Ibid., paras. 19-21.

[295] WEATHERILL and BEAUMONT, supra note 209, at 516.

[296] Daniel W. Simcox, *The Future of Europe Lies in Waste: The Importance of the Proposed Directive on Civil Liability for Damage Caused by Waste to the European Community and its Environmental Policy*, 28 VAND. J. TRANSNAT'L L. 543, 547 (1995).

[297] Id., at 547-548.

The Wallonian Regional Government reacted by promulgating a Decree which banned the import of all waste products.[298]

The Commission qualified this Decree as contrary to art. 30, the Waste Directive of 1984[299] and the 'Framework' Directive 75/442 on Waste.[300] The Advocate-General first claimed the infringement of Directive 84/631, which established a *detailed system* for the control of transfontier shipment of *dangerous waste*. The reliance on art. 36 could, according to A.-G. Jacobs, only be accepted with regard to the categories of dangerous waste excluded from the scope of Directive 84/631.[301] The ECJ judged that in a situation of *complete harmonization*, the Member States could *not rely on art. 36.*[302] The second Directive 75/442 only contained a *framework* for the supervision of *non-dangerous* waste. Here, the Advocate-General pleaded the rejection of the reliance on a "mandatory requirement" exception when dealing with a discriminatory regional law.[303]

The ECJ, by contrast, controversially concluded that the Decree did not discriminate. The Court's rationale was based on the *distinctions between waste from different regions and art 130R (2) following which environmental damages must be rectified at the source.*[304] The unique legal reasoning leaves many scholars[305] with only one

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[298] Damien Geradin, *The Belgian Waste Case*, 19 E.L.R. 145, 146 (1993) (citing: "Art. 1 par. 1, as amended by art. 130 of a Decree of July 23, 1987, prohibits the storage, tipping or dumping of waste from a foreign country in authorized depots, stores and tips in Wallonia, except in depots annexed to an installation for the destruction, neutralization and disposal of toxic waste (...) Under art. 3, the storage, tipping or dumping of waste from other Belgian regions, namely Flanders and Brussels, is also prohibited, but exceptions may be made in accordance with agreements to be made with other regions"); See also L. Hancher and H. Sevenster, *Case Law*, 30 C.M.L.R. 351 (1991).

[299] See supra note 208.

[300] See supra note 226.

[301] *Commission v. Belgium*, supra note 213, at 21.

[302] Id., at 11-14 and 20.

[303] Id., par. 20.

[304] Id., par. 34 and 36.

[305] Geradin, supra note 298, at 160; Demiray, supra note 287, at 95; WEATHERILL and BEAUMONT, supra note 209, at 517-518.

possible interpretation, namely that the ECJ upheld *Cassis de Dijon exceptions in a facially discriminatory situation*. Probably the Court did not intend to expand its longstanding Cassis de Dijon reasoning, since it did not reappraise this rationale in other cases so far. The Court indeed tried to stress that it was the particular facts and issues involved that supported its reasoning: "So far as the environment is concerned, it should be observed that *waste has a special characteristic*. The accumulation of waste, even before it becomes a health hazard, constitutes a threat to the environment because of the limited capacity of each region or locality for receiving it".[306] The Court also referred to the Basel Convention, "to which the Community is a party" to strengthen its argument in favor of the principle that environmental damage should be rectified at the source.[307] "However, in order to determine whether the obstacle in question is discriminatory, *the particular type of waste must be taken into account*".[308] "It follows that, having regard to the *differences between waste produced in one place and that in another* and its connection with the place where it is produced, the contested measures *cannot be considered to be discriminatory*".[309]

Not surprisingly, and in despite of the later adopted Regulation 259/93 which confirmed the Court's goal, this legal construction invited much criticism.
Damien Geradin questioned the deduction based on the particular nature of waste and found it "a rather weak justification" that does not ensure legal certainty and "opens the door to potential abuse".[310] Hancher and Sevenster even went as far as writing that the reference to the Basel Convention was "irrelevant", since it covered hazardous wastes and

[306] *Commission v. Belgium*, supra note 213, at par. 30.

[307] Id., paras. 34-35.

[308] Id., par. 34.

[309] Id., par. 36.

[310] Geradin, supra note 298, at 190.

the remaining issue involved non-hazardous wastes.[311] But most profoundly, it is *questionable* if the ECJ respected its *proportionality-test* by not taking into consideration less restrictive options for the Wallonian Government.[312]

3.) summation

Thus, the imminent ratification of the Basel Convention, the ECJs landmark decision in the Belgian Waste Case and a significant French veto, accumulated in the acceptance of a 'right to ban by Member States' under the Regulation 259/93.

[311] Hancher and Sevenster, supra note 298, at 363.

[312] Geradin, supra note 298, at 190.

Chapter IV.

The internal approach by the United States:

A. A basic undertone

Of the more than fifteen million tons of garbage that cross state lines of the U.S., approximately 2.2 million tons of hazardous waste cross international borders every year, and 375,000 tons of hazardous waste move in interstate commerce each year.[313] On how the United States deals with the interstate and intrastate movement of waste will be dealt with in this chapter.[314] A certain background on federalism in the United States needs to be depicted first.

Since the U.S. Constitution does not delegate powers regarding the protection of the environment to the United States, the states are entitled to take measures in this field.[315] Of importance for the aspect of the transboundary movement of hazardous wastes is the constitutional provision that reads: "The Congress shall have Power ...To regulate Commerce...among the several States".[316] The Supreme Court of the United States has interpreted this Commerce Clause to give the Congress power to restrict or advance free trade among the states, to the detriment of the powers of the states in this

[313] Walter, supra note 284, at 1162 (quoting visually that the United States generates enough garbage in one year "to fill a convoy of garbage trucks stretching eight times around the globe.").

[314] The approach by the U.S. towards extra-territorial movements of hazardous wastes is briefly covered at pages 28-33.

[315] The Tenth Amendment to the U.S. Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[316] U.S. Const. art. I, s. 8, cl. 3.

broad field.[317] Mr. Geradin mentions that it is "generally admitted that physical transportation of pollution across states amounts to interstate commerce".[318] Thus, in 1976 Congress decided to use its Commerce Clause powers and enacted RCRA,[319] which established preventive craddle-to-grave measures such as the identification and listing of hazardous wastes, a tracking system of those listed hazardous wastes, the standardization of requirements for generators and transporters of hazardous wastes and for operators of treatment, storage, and disposal facilities , a permit system to guarantee the aforementioned requirements, etc...[320] Even though RCRA is a federal legislative product, it delegates an important part of its implementation primarily to the states, via the administration of permits.[321] Importantly, RCRA deliberately left the *management* of 'solid waste' (hazardous and non-hazardous wastes) to the states.[322]

Respecting the scope of this thesis, no further analysis will be given of the RCRA requirements, but rather an analysis of the tensions that exist between states over whose waste can be disposed of where, will be rendered. In the absence of federal regulation regarding the implications of the transboundary movement of hazardous waste, states have tried to protect their environment from the consequences posed by the accumulation of waste, caused by the flourishing business in the management and disposal of hazardous

[317] The OXFORD COMPANION TO THE SUPREME COURT 167 (Kermit L. Hall, Oxford University Press, 1992) (this phrase "generated more litigation between 1789 and 1950 than any other clause in the Constitution and eventually became the single most important source of national power"); Lisa Heinzerling, *The Commercial Constitution*, 1995 Sup. Ct. Rev. 217, 218 ("...the Commerce Clause is perhaps most famous for what it does not say...As a result it took the Court itself some time to sort out what the grant of power to Congress meant for the power of the States"); See extensively DONALD E. LIVELY, PHOEBE A. HADDON, DOROTHY E. ROBERTS and RUSSELL L. WEAVER, CONSTITUTIONAL LAW - CASES, HISTORY, AND DIALOGUES 305-409 (Anderson Publishing Company 1996).

[318] Geradin, supra note 208, at 144-145.

[319] See supra note 154.

[320] PERCIVAL. MILLER, SCHROEDER, LEAPE, supra note 179, at 209, see also at 208-279 (extremely enriching and thorough analysis).

[321] Id., at 209 and 212.

[322] 42 U.S.C. s. 6901(a)(4) (1994) ("the collection and disposal of solid wastes should continue to be primarily the function of the State, regional, and local agencies").

and non-hazardous wastes,[323] through devices to limit or prohibit the import of out of state waste.

B. The judicial limits related to the interstate and intrastate movement of waste

1. the Supreme Court guards over the Dormant Commerce Clause...

In the absence of federal legislation[324] to regulate the state's right to ban the import of waste, the so-called dormant, silent, or negative portion of the Commerce Clause[325] as interpreted by the Supreme Court places a limitation on the states' power to regulate interstate commerce.[326] The Supreme Court guards the impact of the Commerce Clause as a "final arbiter" of the competing demands of an integrated trade market and the protection of the environment by each state in the United States.[327]

The United States Supreme Court uses three different tests when determining the constitutional limits on state restrictions of free trade:[328] a.) the Pike balancing test for *non-discriminatory* measures; b.) the Dean Milk 'no adequate alternatives' test for *discriminatory* measures; c.) the Philadelphia 'virtually per se invalidity' rule for *arbitrarily discriminatory* measures.

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[323] Walter, supra note 284, at 1162-1163.

[324] The doctrine of preemption, i.e. the overriding effect that federal legislation has over state legislation in a situation of substantive conflict between both legislations, or if state statutes are contrary to the Congressional intention to preempt, will not be dealt with. See for clarifying insight: LIVELY, HADDON, ROBERTS and WEAVER, supra note 317, at 389-395; PERCIVAL, MILLER, SCHROEDER and LEAPE, supra note 179, at 115-118, 121--123; Geradin, supra note 208, at 146-151.

[325] Walter, supra note 284, at 1164 and n. 22.

[326] PERCIVAL, MILLER, SCHROEDER and LEAPE, supra note 179, at 402.

[327] Ibid.; note similar wordings in *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945) ("...where Congress has not acted, this Court, and and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests").

[328] See for an excellent synthesis Walter, supra note 284, at 1188-1200; Geradin, supra note 208, at 151-162.

a. the Pike balancing test for non-discriminatory measures

Before the Court will even apply the balancing test as set forth in *Pike v. Bruce Church, Inc.*[329] it must find that the state statute regulates evenhandedly, for the Court has always consistently made a distinction between "outright protectionism and more indirect burdens on the flow of trade".[330] Once the Court has found the state statute to be non-discriminatory the Pike balancing test strictu sensu will be applied and the statute upheld if: 1.) the statute serves a *legitimate local public interest*; 2.) its *effects* on interstate commerce are only *incidental*; 3.) *unless* the burden imposed on such a commerce is *clearly excessive* in relation to the putative local benefits.[331]

If a legitimate local interest is found, the question becomes one of *degree.* The extent of the burden that will be tolerated will depend on "the *nature of the local interests* involved, and on whether it could be promoted as well with *lesser impact on interstate activities*".[332] In general a state measure which is not discriminatory and whose primary objective is to protect the environment will be considered as pursuing a legitimate, and even compelling, state interest.[333] At times it even seems that lower courts do not apply any balancing test once they found the statute to be evenhanded and to serve a legitimate state interest.[334]

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[329] 397 U.S. 137 (1970).

[330] Geradin, supra note 208, at 152.

[331] See supra note 328, at 142 (emphasis added) (referring to *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)); compare with the ECJ balancing test, supra at page 51.

[332] Ibid. (emphasis added).

[333] Geradin, supra note 208, at 153 ; Walter, supra note 284, at 1191; LIVELY, HADDON, ROBERTS and WEAVER, supra note 317, at 368.

[334] Walter, supra note 284, at 1192; Geradin supra note 208, at 158-159 (the author even detects a new and more lenient "rational relation test" for nondiscriminatory measures where no balancing test at all has been applied after the respective courts found the measures to be evenhanded and legitimate , e.g. in *Procter and Gamble v. the City of Chicago*, 509 F.2d 69 (7th Cir.), cert. denied, 421 U.S. 978 (1975), and *American Can Co. v. Oregon Liquor Control Comm'n*, 517 P.2d 691 (1972). Yet other courts have explicitly declined to follow those decisions and applied the Pike balancing test, e.g. *Virgin Islands Port Authority v. Virgin Islands Taxi Ass'n*, 979 F. Supp. 344 (1997) and *Norfolk Southern Corp. v. Oberley*, 822 F. 2d 388 (1987) (3rd Cir.)).

A good illustration of the application of the Pike balancing test can be found in the *Minnesota v. Clover Leaf Creamery Co.*[335] case, where milk sellers challenged the constitutionality of a Minnesota statute *banning* retail sale of milk in *plastic* nonreturnable, nonrefillable containers, but *permitting* such sale in *other* nonreturnable, nonrefillable containers, such as paper board milk cartons.[336]

The Court found that the statute did not effect "simple protectionism" and that it was a non-discriminatory regulation since it prohibited *all* milk retailers from selling their products in plastic, nonreturnable milk containers, *without regard* to whether the milk, the containers or the sellers are from *outside the state*.[337] It further analyzed that the burden imposed on interstate commerce was "relatively minor", now that milk products still move freely across the Minnesota border and since most dairies package their products in more than one type of containers.[338] The Court reasoned that there was no reason to suspect that "the gainers will be Minnesota firms, or the losers out-of-state firms".[339] Even though the Court acknowledged that some (albeit exaggerated) arguments could be made to prove that the out-of-state industries might be burdened relatively more, it could never be found "clearly excessive in the light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems".[340] In other words, the Court will accept environmental regulations that may discourage out-of-state business, but that do not necessarily give local enterprises an unfair advantage over out-of-state competition.[341] Moreover, the Court

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[335] 449 U.S. 456 (1981).

[336] Id., at 449.

[337] Id., at 471-472.

[338] Id., at 472.

[339] Id., at 473.

[340] Ibid.

[341] LIVELY, HADDON, ROBERTS and WEAVER, supra note 317, at 368.

added that there was no approach with a lesser impact on interstate activities, since banning all nonreturnables would be more burdensome on interstate commerce or providing incentives to recycle would be less effective.[342]

Interestingly enough, a rather clear parallelism can be found between the Clover Leaf Creamery case rendered by the U. S. Supreme Court and the Danish Bottles case held by the ECJ, not only in the facts but also in the reasoning of both courts.[343]

b.) the Dean Milk 'no adequate alternatives' test for *discriminatory* measures

The Supreme Court treats discriminatory state statutes with more suspicion than evenhanded measures, and it applies differing tests depending on whether they are *arbitrarily* discriminatory or not.[344] In both cases discriminatory measures are conceived by the Court as presumptively invalid.[345]

The test used for discriminatory measures was developed in *Dean Milk Co. v. Madison*.[346] In Dean Milk the Court struck down an ordinance of Madison, Wisconsin, which made it unlawful to sell milk as pasteurized *unless* it had been processed and bottled at an approved pasteurization plant within a radius of 5 miles from the city.[347] Even though the statute might have seemed facially neutral since it applied to *all* milk to be sold in Madison,[348] the Court found that the ordinance plainly *discriminatory* against interstate commerce in its *practical effect* since it excluded the distribution of milk

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[342] Ibid.

[343] See supra at pages 52-53.

[344] Walter, supra note 284, at 1188.

[345] LIVELY, HADDON, ROBERTS and WEAVER, supra note 317, at 368.

[346] 340 U.S. 349 (1951).

[347] Id., at 349 (emphasis added).

[348] Geradin, supra note 208, at 155.

produced and pasteurized in a plant outside the radius of 5 miles from the city.[349] The Court added that the ordinance simply erected an economic barrier to protect a major local industry against competition from without the State.[350] Furthermore it held that "even in the exercise of the unquestioned power to protect the health and safety of its people" such a discriminatory legislation cannot be enacted if *reasonable nondiscriminatory alternatives* are available to conserve legitimate local interests.[351] The Court even explicitly referred to the possibility for the city of Madison to rely on its own officials for inspection of distant milk sources, for which it could charge the actual and reasonable cost from producers and processors.[352]

The Dean Milk test implies that a facially neutral statute but which has a discriminatory impact can be upheld only if: 1.) the statute furthers a legitimate local interest and 2.) in the absence of reasonable nondiscriminatory alternatives.[353]

Again, this line of reasoning corresponds with the Danish Bottles case where the ECJ struck down the part of the Danish legislation that installed an approval system by the Danish National Agency for the Protection of the Environment.[354]

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[349] Supra note 346, at 354 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935): "The importer ...may keep his milk or drink it, but sell it he may not").

[350] Ibid.

[351] Ibid.

[352] Id., at 354.

[353] Geradin, supra note 208, at 155 (this approach has been reaffirmed by the Supreme Court in *Hunt v. Washington State apple Advertising Comm'n*, 432 U.S. 333 (1977)).

[354] See supra, pages 52-53.

c.) the Philadelphia 'virtually per se invalidity' rule for *arbitrarily discriminatory* measures

For statutes that are facially, unambiguously or arbitrarily discriminatory the Supreme Court has developed a test with a higher validity threshold.

In *Philadelphia v. New Jersey*[355] the Supreme Court addressed for the first time the interstate movement of waste.[356] A New Jersey statute prohibited the importation of most solid and liquid waste which originated or was collected outside the territorial limits of the state.[357] Before addressing the merits of the case, the Supreme Court first had to assess if waste could be considered as an item of 'commerce' in the meaning of the Commerce Clause.[358] It differentiated the waste at stake from its old 'quarantine cases', in which it decided that some objects were not "legitimate subjects of trade and commerce" such as diseased livestock that required destruction as soon as possible because their very movement risked contagion.[359] Above all those quarantine laws did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.[360] The Court further spelled out that all objects of interstate *trade* merit Commerce Clause protection and that none is excluded by definition at the outset.[361]

[355] 437 U.S. 617 (1978).

[356] Walter, supra note 284, at 1194; The Supreme Court had already upheld *local* efforts to manage solid waste by controlling waste flow in 1905. In *California Reduction Co. v, Sanitary Reduction Works*, 199 U.S. 306, 325 (1905) (upholding San Francisco ordinance requiring all refuse generated within the city to be disposed of at specific, private facility) and in *Gardner v. Michigan*, 199 U.S. 325, 333 (1905) (upholding Detroit ordinance requiring all garbage to be collected and disposed of by a single operator).

[357] Supra note 355, at 618.

[358] Id., at 621.

[359] Id., at 628 and at 622 (quoting *Bowman v. Chicago & Northwestern R. Co*, 125 U.S. 465, 489 (1888)) (referring to articles "which on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs or yellow fever or or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise from their condition and quality, unfit for for human use or consumption.").

[360] Id, at 628.

[361] Id., at 622.

The result of the Court's reasoning leads to a similar approach as the settled case law established by the ECJ.[362]

The crucial inquiry for the Court was whether it could find the legislation at stake to be a protectionist measure, or whether it could fairly be viewed as a law directed to legitimate local concerns, effecting the interstate commerce only incidentally.[363] At the outset of its analysis the Court reminds us of the principle of economic unity among all the states in the U.S implies that "one state in its dealings with another may not place itself in a position of economic isolation".[364] Referring to its previous case law the Court reiterated that where simple economic protectionism is effected by state legislation, "a *virtually per se rule of invalidity* has been erected".[365]

The Court found the legislative purpose of the act, consisting of the protection of the environment, and the health and safety of the citizens of New Jersey from the accumulation of waste in the overburdened landfills of the state, irrelevant since "the evil of protectionism can reside in legislative means as well as legislative ends".[366] Especially, states cannot take discriminatory measures against out-of-state articles *unless there is some reason, apart from their origin*, to treat them differently.[367] The harms caused by waste arise after its disposal in landfill sites, and at that point, as New Jersey conceded there is no basis to distinguish out-of-state waste from domestic waste. The Court concluded: "if one is inherently harmful, so is the other".[368] It made it very clear that states cannot isolate itself from a problem common to many by erecting a barrier against

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[362] See supra, at page 40-41.

[363] Supra note 357, at 624.

[364] Supra note 357, at 623 (quoting *Baldwin v. Seelig*, supra note 351, at 527).

[365] Id., at 624.

[366] Id., at 626.

[367] Ibid.

[368] Id., at 629.

the movement of interstate trade.[369] The Supreme Court further advised the New Jersey legislator to pursue its valid intentions through means which would apply to *all* waste flowing into the state's remaining landfills, even though interstate commerce might *incidentally* be affected.

Here, by contrast the ECJ differed quite strikingly in its approach to very similar facts in the Belgian Waste case, allowing Wallonia to ban the import of waste from other European countries and even from the two other regions in Belgium.[370]

2. and does not become more lenient

From a practical perspective it should be stressed that the Supreme Court expressed it had "no opinion" regarding the situation where the states or local governments act as market participants rather than as regulators.[371] As a result federal and state courts have held that state, county or municipal landfills may discriminate against or even prohibit out-of-state waste without violating the dormant commerce clause.[372] Given that state and local governments own or operate approximately 80 % of the nation's

[369] Id., at 628.

[370] See supra pages 53-56.

[371] Id., at 618, n.6.

[372] See for example, *Evergreen Waste System v. Metropolitan Serv. Dist.*, 643 F.Supp. 127 (Or. 1986), aff'd on other grounds, 820 F.2d 1482 (9th Cir.1987); *County Comm'rs v. Stevens*, 299 Md. 203, 473 A.2d 12 (1984); see *Reeves v. Stake*, 447 U.S. 429 (1980) (The Reeves decision developed a more permissive view of efforts by states to ensure that state-created resources be reserved for use by their citizens.

landfills, this venue open to states is the most important exception to Philadelphia v. New Jersey, i.e. the so-called *market participant exception*.[373]

But the remaining situations have given rise to considerable confusion among the lower courts.[374] Despite Philadelphia v. New Jersey, approximately 25 states have implemented a variety of environmental policies which effectively restrict the importation of waste into their states.[375] Considering that states handle the solid waste problem through mainly incineration, recycling, source reduction and land filling,[376] and that 40% of all landfills operating in the U.S.may soon be filled to capacity, the reaction by those various states can be understood.[377] However, the Supreme Court reaffirmed, and even increased,[378] the basic tenets of Philadelphia v. New Jersey in four other 'waste decisions'.[379]

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[373] David Pomper, *Recycling Philadelphia v. New Jersey: the Dormant Commerce Clause, Postindustrial 'Natural' Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309, 1311 (1989) (the author urges the states to take this venue and analyzes lower court decisions extensively); PERCIVAL. MILLER, SCHROEDER and LEAPE, supra note 179, at 417-418; Howard G. Hopkirk, *The Future of Solid Waste Import Bans Under the Dormant Commerce Clause: Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 4 VILL. ENVTL. L. J. 395, 407 (1993) (the author mentions quarantine laws and scarce resources as other exceptions, but for the latter he does not refer to any case law) (It should be noted on the contrary that in *Oregon Waste Syst. v. Dept. of Env. Quality*, infra note 379, the Supreme Court explicitly denies the natural resource exception landfill space); Geradin, supra note 208, at n. 97.

[374] Stanley E. Cox, *Garbage In, Garbage Out: Court Confusion About the Dormant Commerce Clause*, 50 OKLA. L. REV. 155, 157 (1997) (by 1995 the lower courts produced over forty significant decisions involving waste and commerce; the author enumerates them in n.8).

[375] Hopkirk, supra note 373, at 396-397.

[376] Jonathan P. Meyers, *Confronting the Garbage Crisis: Increased Federal Involvement as a Means of Addressing Municipal Solid Waste Disposal*, 79 GEO. L. J. 567, 570 (1991); See PERCIVAL. MILLER, SCHROEDER and LEAPE, supra note 179, at 265-269 (Art. 1002 (b)(7) of RCRA describes land disposal, particularly landfill and surface impoundment, as the least favored method for managing hazardous wastes. During the amendment of RCRA in 1984, Congress also enacted provisions to prohibit land disposal gradually. The *land disposal ban* is basically applicable to *untreated* hazardous wastes, and allows EPA to require wastes to be treated by the *best demonstrated available technology*).

[377] David Wartinbee, *Swim Resource System, Inc. v. Lycoming County: Our Barriers to Solid Wastes Are Growing*, 7 COOLEY L. REV. 527, 528 (1990).

[378] Cox, supra note 374, at 156, 166, 175-188.

[379] *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992); *Oregon Waste Systems, Inc. v. Dept of Envtl. Qual.* 511 U.S. 93 (1994); *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

In *Chemical Waste Management v. Hunt*,[380] an operator of a commercial *hazardous waste* facility challenged the constitutionality of an Alabama statute imposing an *additional fee* on all hazardous waste generated outside the state.[381] In its brief decision the Court mainly reiterated the principles of Philadelphia v. New Jersey: the additional fee facially discriminates against hazardous waste generated in states other than Alabama[382] and this in despite of the fact that no State may attempt to isolate itself from a problem common to several states.[383] Quite confusingly the Court accepted the state's argument that they should be allowed to prove that the act served legitimate local purposes and that nondiscriminatory adequate alternatives were unavailable,[384] for it resembled the Dean Milk balancing test it previously applied to measures discriminatory in their practical effect.[385] The Court, like in Philadelphia v. New Jersey, found that there was "absolutely no evidence" that the waste generated outside Alabama was more dangerous than the waste generated in Alabama.[386] Again, it pointed out to less discriminatory measures to serve the valid state concerns,[387] such as levying a per-ton additional fee on *all* hazardous waste disposed of within Alabama.[388] It further

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[380] 504 U.S. 334 (1992).

[381] Id., at 337 and at 338-339 (the law imposed: a.) a 'base fee' of $25.60 per ton on all hazardous waste disposed of in the state, regardless of state of origin; b.) an 'additional fee' of $72.00 per ton on all out-of-state hazardous waste disposed of in the state and c.) placed a cap on the amount of hazardous waste that could be disposed of in any Alabama facility during a one-year period).

[382] Id., at 342.

[383] Id., at 340.

[384] Id., at 342-343.

[385] See Geradin, supra note 208, at 161-162.

[386] 504 U.S. 334, supra note 379, at 344.

[387] Id., at 343 ("1.) protection of the health and safety of the citizens of Alabama from toxic substances; 2.) conservation of the environment and the state's natural resources; 3.) provision for compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama; 4.) reduction of the overall flow of wastes traveling on the state's highways, which flow creates a great risk to the health and safety of the state's citizens").

[388] Id., at 345.

distinguished the facts of the case from *Maine v. Taylor*.[389] Maine had banned the import of out-of-state bait fish, but also succeeded in proving that they were subject to parasites foreign to in-state bait fish and that there was no less discriminatory means to protect the state's environment.[390]

If for a moment it might have seemed that the Court became more lenient towards facially discriminatory measures by at least allowing arguments to be heard which are required under the Dean Milk test, its further decisions proved differently.

The same day as Chemical Waste Management, the Court considered another 'waste case' involving the dormant Commerce Clause: *Fort Gratiot v. Michigan*.[391] In 1988 Michigan amended its comprehensive Solid Waste Management Act (SWMA) to allow *counties* to ban out-of-county solid waste, unless the counties explicitly authorized it.[392] Here again, the Court found it intolerable that Michigan did not identify any reason, apart from the origin of the out-of-county waste, why it should be treated differently.[393] The Supreme Court could not accept the argument that the Michigan law did not discriminate against interstate commerce because it treated waste from other Michigan counties no different from waste from other States. On the contrary, the Court referred to its previous case law establishing the principle that states may not avoid the strictures of the Commerce Clause through subdivisions of the state.[394] The fact that some counties have decided not to use the possibility to ban out-of-county waste only reduces the

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[389] 477 U.S. 131 (1986).

[390] Id., at 140; 504 U.S. 334, supra note 379, at 348.

[391] 504 U.S. 353, supra note 379, at 359 (it should be mentioned that the Court explicitly narrows the scope of its analysis to privately owned and operated landfills, hereby leaving the market participant exception intact, see supra pages 66-67).

[392] Id., at 356, 357.

[393] Id., at 361.

[394] Id., at 361-362 (referring to e.g. *Dean Milk v. Madison*, supra note 346, where the Madison ordinance was held to be invalid even if it also discriminated against all Wisconsin producers whose facilities fell outside the five mile radius from the center of the city).

scope of the discrimination, not the discrimination itself.[395] As it had done before, the court also suggested a nondiscriminatory measure such as limiting the amount of waste that landfill operators may accept per year in general.[396]

Though the decision evokes a standard Philadelphia analysis in its many references to it, Mr. Cox has interestingly observed that in a subtle way the Court left its seemingly more lenient balancing test in Chemical Waste Management and has shifted subtly towards an almost rudimentary test, where no weighing of benefits and burdens on the interstate commerce is applied, once the measures are found to be discriminatory.[397] The author, supporting Michigan's arguments,[398] asserts that there was an opportunity in Fort Gratiot to apply the Pike test (a statute serving a legitimate local public interest and its effects on interstate commerce only being incidental) for unlike the "charades of legitimate local purpose, which the court unmasked as economic protectionism" in cases like Dean Milk and Philadelphia, Michigan was potentially capable of showing that its legislation neither displaced neither severely harmed the interstate waste market.[399] Mr. Hopkirk by contrast doubts a different outcome if the Pike test would have been applied by the Supreme Court since Michigan still failed to identify any reason apart from origin why solid waste from outside the county should be treated differently from solid waste within the county.[400] Basically, Mr. Cox favors a less mechanical approach by the Supreme Court, which he founds to merely pigeon-hole cases as discriminatory or

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[395] Id., at 363.

[396] Id., at 367.

[397] Cox, supra note 374, at 170.

[398] 504 U.S. 353, see supra note 379, at 361.

[399] Cox, supra note 374, at 171.

[400] Hopkirk, supra note 373, at 412-413 and n. 90.

nondiscriminatory without really assessing if the actual effects of those environmentally inspired measures actually harm or benefit the out-of-state waste market.[401]

Two terms later, in 1994, the Supreme Court revisited the issue at stake in Chemical Waste Management in its judgment *Oregon Waste Systems, Inc. v. Department of Environmental Quality,* namely can a state justify a higher fee on waste originating out of state?[402] In Chemical Waste Management the Court had left open the possibility that such a differential surcharge might be valid if based on the real costs of disposing of waste from other states.[403] The Oregon Department of Environmental Quality oversees the state's regulatory scheme by developing and executing plans for the management, reduction, and recycling of solid wastes. To fund many of its activities The Department levies a wide range of fees, amongst which a certain 'surcharge' based on the costs the state of Oregon or its political subdivisions might encounter of disposing of solid nonhazardous waste generated out-of-state which are not otherwise paid for. In conjunction the legislature imposed a fee on the in-state nonhazardous disposal of waste generated within Oregon, albeit at a much lower cost.[404] The Court was quick in finding the legislation obviously discriminatory, therefore the virtually per se rule was triggered and it was up to Oregon to prove that its act advanced a legitimate local purpose that could not be served by reasonable nondiscriminatory alternatives.[405]

In this one sentence the Court almost spells out that the two different tests for discriminatory measures have grown together. It should be mentioned, perhaps as an answer to Mr. Cox that the Court verbatim refuted to take into consideration the minimal

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[401] Cox, supra note 374, at 156, 171-173.

[402] 511 U.S. 93, supra note 379.

[403] Id., at 95.

[404] Id., at 96 (the in-state fee is capped at $0.85 per ton; the out-of-state fee adds up to $2.25 per ton and $0.85, the latter with the proviso that if the surcharge survives the judicial challenge, it shall be repealed).

[405] Id., at 99.

impact of the surcharge fee on the interstate commerce; its discriminatory character is the sole factor taken into consideration.[406]

The Court remained very strict in its analysis of valid reasons as to why the out-of-state waste required to be charged almost three times more. The 'compensatory' tax doctrine, accepted by the Court to support a discriminatory tax on interstate commerce if it imposes the rough equivalent of an identifiable and 'substantially similar' tax on intrastate commerce., was dismissed in this case. Oregon, to no avail, tried to argue that it searched compensation for the general tax the Oregonians had already paid, and of which a part was dedicated to waste problems.[407] Since no more precise evidence of the exact allocation of he general tax revenues was presented, Oregon's act was judged invalid.[408]

Currently the last and factually quite different 'waste' decision by the Supreme Court is *C&A Carbone v. Town of Clarkstown.*[409] In this case the Court had to consider the constitutionality of a so-called *flow control ordinance*, which required *all*[410] nonhazardous solid waste (both generated or brought into the town) to be processed at a designated transfer station before leaving the municipality.[411] The scheme Clarkstown, New York, developed after it closed down its landfill went as follows. The town wanted to build a transfer station costing about $1.4 million and a local private contractor agreed to construct the facility and operate it for five years, after which the town would buy it for $1. During those five years, the town guaranteed a minimum waste flow of 120,000 tons in a year, for which the contractor could charge the hauler a so-called tipping fee of $81 per ton. If the station received less than 120,000 tons in a year, the town promised

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[406] Id., at 100, n. 4.

[407] Id., at 103.

[408] Id., at 108.

[409] 511 U.S. 383, see supra note 379.

[410] Unlike in Chemical Waste Management and Oregon Waste Systems.

[411] 511 U.S. 383, supra note 379, at 386.

to make up the tipping fee deficit. The object of this arrangement was to amortize the cost of the transfer station: the town would finance its new facility with the income generated by the tipping fees. A recycling company, C&A Carbone, petitioned the validity of the flow control ordinance since it obliged the company to bring the non recyclable residues to the transfer station, thereby not allowing it to ship the non recyclable waste itself, and to pay a tipping fee on trash that Carbone had already sorted.[412]

Accepting that the immediate effect of the ordinance was to direct local transport of solid waste to a designated site within the local jurisdiction, the Court nevertheless found it to have interstate economic effects since it deprives out-of-state businesses of access to a local market by entrusting the initial processing step of waste to one local contractor.[413] Not surprisingly the Philadelphia test was chosen over the Pike test, now that the court found the ordinance discriminatory.[414] One of the main counter arguments of Clarkstown to differentiate its case from Philadelphia was that its ordinance did not discriminate because it did not differentiate waste on the basis of its geographic origin: all waste must be processed at the designated transfer station before it leaves the town.[415] Yet the Court found the article of commerce in this case not so much the waste itself, but rather the service of processing and disposing it.[416] It even found the protectionist effect to be "more acute' than in Dean Milk, for it favored a single local proprietor as opposed to installing a five mile radius limit.[417] The Court was not mild in asserting that Clarkstown had simply developed a financing measure while any number of

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[412] Id., at 387-388.

[413] Id., at 389.

[414] Id., at 390.

[415] Ibid.

[416] Id., at 391.

[417] Id., at 392.

nondiscriminatory alternatives, such as installing uniform safety regulations through which competitors like Carbone could not underprice the market by "cutting corners on environmental safety".[418] Another valuable hint from the Court for Clarkstown to maintain a viable financing scheme was the subsidization of the facility through general taxes or municipal bonds.[419]

In general, regarding waste subsidization it appears that states or political subdivisions should make sure that the funds collected to subsidize not be obtained from those competitors of those in-state business or economic interests being subsidized if they want to pass the constitutional muster.[420] C&A Carbone is arguably one of the most significant dormant Commerce Clause waste decisions in the 1990s. Not only in its theoretical stringency, but especially by having struck down a flow control ordinance: a measure that had become highly popular in more than half the states of the U.S.[421]

3. Will the future compromise ?

Seen from a strict point of legal reasoning, the Supreme Court has been praised for its firm formulaic stance to the benefit of the clarity of general dormant Commerce Clause jurisprudence.[422] Others find that the Supreme Court should stop pigeon-holing all cases and start to appreciate true environmental measures by focusing more on the actual

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[418] Id., at 393.

[419] Id, at 394.

[420] Stanley E. Cox, *What May States Do About Out-of-State Waste in Light of Recent Supreme Court Decisions Applying the Dormant Commerce Clause? Kentucky as Case Study: The Waste Wars,* 83 KYLJ 551, 599 (1995).

[421] See Cox, supra note 374, at 180, n. 74 (referring to 27 state statutes).

[422] See Hopkirk, supra note 373, at 415.

interstate trade effect,[423] and like to take the ECJs Belgian Waste decision as an example.[424] To serve the environmentally inspired concerns best it seems more desired to develop a strong legal doctrine without raising too much confusion for the general jurisprudence, unlike what the ECJ did. Perhaps, the leniency will have to be found in the growing together of the Dean Milk 'no adequate alternative' test and the Philadelphia 'virtually per se test'. Yet proving the waste of out-of-state to be inherently more dangerous will never be an easy task.

Therefore state representatives have been lobbying for a Congressional action.[425] Ironically, because most states are net exporters of hazardous waste, there is far more more support in Congress for legislation authorizing restrictions on the movement of municipal solid waste than for hazardous waste.[426] Municipalities also hope that legislation will expressly authorize some existing flow control ordinances. In 1995, the Senate approved a bill that would give the states the authority to limit interstate shipment of municipal waste and to impose fees on out-of-state waste.[427] Currently the bill never received a vote in the House though.[428]

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[423] Cox, supra note 374, at 168-189; Samuel R. Bloom, *The Need For.a New Dormant Commerce Clause Test: a Time to Discard Waste Systems Corp. v. County of Martin, Minn.*, 18 HAMLINE L. REV. 80 (1994); Christine M. Fixl, *Hazardous Waste and Partial Import Bans: An Environmentally Sound Exception to he Commerce Clause*, 3 VILL. ENVTL. L. J. 149 (1992).

[424] See Walter, supra note 284, at 1201-1202.

[425] See Holly McCann, *The Civil War of Waste*, 32 DUQ. L. REV. 285, 294-295 (1994).

[426] PERCIVAL, MILLER, SCHROEDER and LEAPE, supra note 179, at 433.

[427] Ibid.

[428] ROBERT V. PERCIVAL, ALAN S. MILLER, CHRISTOPHER H. SCHROEDER and JAMES P. LEAPE, ENVIRONMENTAL REGULATION - LAW, SCIENCE AND POLICY - 1998 SUPPLEMENT 36 (Aspen Law & Business, 1998).

Chapter V.

Conclusion

The increasing generation of hazardous wastes on a global level has raised the acute question of how to control its treatment and disposal.

Differing levels of environmental regulations between countries, mirrored in varying costs of compliance, an increasing NIMBY awareness and a decrease of the lack of capacity to dispose of waste in some Western States, have all added to a flourishing and often illegal trade in transfontier waste movements. Highly publicized toxic scandals and their corollary public concern, instigated both the international and regional entities to respond to the overwhelming problems related to the unsound treatment or disposal of hazardous wastes.

Due to the inherent difficulty to enforce international law in the ICJ, the judicial control of the transboundary movement of wastes might be more successful under the umbrella of the European Union with its strong supranational institutions as the ECJ, than under the auspices of the Parties to the Basel Convention. It is hoped that the enforcement and the implementation of the Convention will increase when the Parties of the Basel Convention will adopt a Liability Protocol during the COP-5 meeting to be held in Basel, December 1999. The Basel Ban, laudable in itself, suffers from its OECD/non-OECD distinction since it will cause less affluent OECD members to become new 'waste havens'.

The U. S. Supreme Court has only indicated a heightened stringency when scrutinizing dormant Commerce Clause cases related to the interstate and intrastate movement of waste. Unlike the ECJ in its Belgian Waste case, the Supreme Court finds

the free market principle and measures to ban out-of-state waste taken by states or its political subdivisions mutually exclusive, and the latter absolutely intolerable. Granted, the Supreme Court tries to hold on to very clear formulas for the benefit of the dormant Commerce Clause case law in general. It cannot be overlooked that the Belgian Waste case created lots of confusion when set against the prior 'free market of goods' jurisprudence developed by the ECJ. The value of the Belgian Waste case as a precedent has not been tested since the European Union decided to enact a directly applicable regulation to tackle the transboundary movement of hazardous wastes, allowing the states to ban waste coming from other European Union members.

A similar legislative approach by the United States is still absent, since the House of Representatives never came to vote over a bill the Senate had adopted in 1995. A same reluctance in Parliament can be found regarding the ratification process of the Basel Convention. Although the signing of the Basel Convention does not seem feasible under Mr. Clinton's term, it might have a slight chance if his democratic counterpart wins the imminent election.

Amidst the different legal and administrative approaches taken by the international community, the European Union and the United States regarding the export of hazardous waste outside the national boundaries, it should be noticed that all of them have been influenced by the OECD Recycling Decision for recovery operation to a higher or lesser extent. Certainly, the global problem of the transboundary movement of hazardous waste asks for a hermetical and general response by all nations, but one cannot deny the growing intertwinement of the various legal systems all over the world, as they let themselves be influenced by the same sources.

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