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Lisa T. Belenky

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Cradle to Border: U.S. Hazardous Waste Export Regulations and International Law

By
Lisa T. Belenky*

I. INTRODUCTION

This paper explores current U.S. law regulating the transboundary shipment and export of hazardous waste, specifically examining both the Resource Conservation and Recovery Act (RCRA)1 as well as applicable treaties. This paper attempts to untangle the various overlapping strands of domestic law, including treaties, statutes, and common law, in the context of current international agreements. This paper also examines the legal remedies that are available in the United States to alien plaintiffs harmed by the violation of these laws.

One goal of U.S. environmental laws regarding hazardous waste is to ensure the environmentally sound treatment and disposal of domestically generated hazardous wastes.2 This paper looks at two distinct types of hazardous waste exports as defined under RCRA. First, this paper examines the class of hazardous waste that falls within the definition of hazardous waste used by the Environmental Protection Agency (EPA) to regulate exports, "RCRA-designated" waste. Second, this paper examines the much larger class of hazardous waste that is exempt from EPA hazardous waste export requirements, mainly under the recycling and recovery exemptions to RCRA, "RCRA-exempt" waste. RCRA-exempt waste is exported without any monitoring or regulatory control by the EPA. One major problem with any analysis of how well the U.S. is meeting the goal of ensuring environmentally sound disposal of U.S.-generated

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2. On March 1, 1994 President Clinton asked Congress to pass legislation curbing U.S. exports of hazardous waste. EPA Administrator Carol Browner concurred, stating that the United States "must set an example for the world by taking responsibility for our own waste. Citizens in other countries should not be asked to bear the burden of U.S. pollution." Hazardous Waste Export Curb Cited as 'Example to World,' HAZARDOUS WASTE NEWS, March 1, 1994, available in LEXIS, Nexis Library, IAC Database.
hazardous wastes is the consistent lack of data collection for RCRA-exempt waste by the EPA or any other federal agency.³

In general, as hazardous waste regulations are increased within the U.S., disposal, recycling, and recovery of hazardous wastes become more costly. As costs rise, the incentive increases for hazardous waste generators to export hazardous waste to countries where disposal, recycling and recovery are less costly. If the cost savings in other countries are due primarily to weaker environmental protections in those countries, then hazardous waste exports frustrate the articulated goal of ensuring that the U.S. takes responsibility for its own hazardous waste. These exports may be undermining protection of the global environment as a result of U.S. environmental regulations designed to protect the domestic environment. This result is contrary to the stated policy that the U.S. "set an example for the world by taking responsibility for our own waste."⁴

This paper concludes that the goal of ensuring environmentally sound disposal of U.S.-generated hazardous waste can only begin to be achieved by expanding current export regulations to both classes of hazardous waste. This expansion is within the regulatory discretion of the EPA. Further, the expansion of the current U.S. notice and consent requirements to RCRA-exempt hazardous waste will significantly increase the ability of importing countries to assume responsibility for the environmentally sound handling and disposal of imported hazardous waste within their own countries. Finally, hard data will inform the debate over the "acceptable balance between economic growth and environmental sustainability"⁵ in the waste-receiving countries and in the U.S.

This paper also examines what forms of relief may be available under U.S. law to an alien plaintiff who is harmed outside of the U.S. by the treatment or disposal of hazardous waste that was generated within the U.S. Currently, when RCRA-exempt hazardous waste is transported across the border, responsible parties in the U.S. are able to escape most liability for any harm caused by these wastes.⁶

The paper is organized as follows: Part II examines U.S. law regarding the two classes of hazardous waste identified above; Part II-E considers administrative law issues that arose when the EPA promulgated its current rules. Part III looks at the current liability of exporters under RCRA, focusing on the Amlon

³. "Given the uncertainties associated with such basic statistics, it is difficult to come up with a good estimate of how much hazardous waste is being shipped overseas." Kofi Asante-Duah et al., The Hazardous Waste Trade: Can It Be Controlled?, 26 ENVTL. SCI. & TECH. 1684, 1684 (1992).
⁴. Hazardous Waste Export Curb Cited as 'Example to World,' supra note 2.
⁵. Asante-Duah et al., supra note 3 at 1690. In contrast to Asante-Duah, I conclude that the chance of finding an "acceptable balance between economic growth and environmental sustainability for the waste-receiving countries," Id. (emphasis added), will depend on an open exchange of information and data collection between exporting-generator countries and importing countries. More extensive information in this area will determine whether it is true that “[p]olicies and actions that protect the environment can at the same time contribute to economic progress." Id.
⁶. New case law in this area shows a trend towards greater accountability. See Jota v. Texaco, Inc., 157 F.3d 153 (2nd Cir. 1998) (holding in part that a forum non conveniens dismissal is erroneous absent agreement or condition requiring Texaco to submit to jurisdiction in Ecuador).
Metals decision. Parts IV through VI examine how the current U.S. laws and regulatory definitions interface with existing international agreements on the transboundary shipment of hazardous waste. Specifically, Part IV examines bilateral treaties to which the U.S. is a party. Part V examines the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel), to which the U.S. is a signatory but not yet a party. Part VI considers other multilateral agreements to which the U.S. is bound, including: the Organization for Economic Cooperation and Development (OECD) Decision C(92)39; the North American Free Trade Agreement (NAFTA); and the World Trade Organization / General Agreement on Tariffs and Trade (WTO / GATT). Part VII revisits the issue of liability in light of the present international agreements and changing interpretations of the Alien Tort Claims Act.

II.
CURRENT UNITED STATES LAW GOVERNING THE EXPORT OF HAZARDOUS WASTE

Congress passed the RCRA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as comprehensive statutes to regulate solid waste, including hazardous waste, and to establish liability for cleanup and response costs. Subchapter III of the RCRA includes provisions for identification of hazardous wastes as well as standards for generators, transporters, and treatment, storage and disposal facilities (TSDFs). The Environmental Protection Agency (EPA) regulations implementing the RCRA

14. When first enacted, RCRA did not have any export provision; it was amended to include this provision in 1984. Pub. L. No. 98-616, 98 Stat. 3262 (codified as amended at 42 U.S.C. § 6938 (1984)). CERCLA has no export provision.
include both the definitions of hazardous wastes and exemptions from regulation for certain types of waste, including universal waste, batteries, and waste to be recycled or recovered. The regulations include two different ways to define hazardous waste: (1) by hazardous substances and (2) by characteristics that make a substance hazardous.

Congress enacted both RCRA and CERCLA under its Commerce Clause power. A series of Supreme Court decisions have held that domestic transport and disposal of solid waste are forms of commerce even if the waste itself may be valueless or of negative value. As such, waste cannot be burdened by state or local laws that discriminate against out-of-state, or out-of-locale, waste. This "free trade" paradigm for waste within the U.S. is increasingly becoming the model used in world trade agreements. The emerging presumption, and the one followed by the U.S., is that waste is freely traded as an item in commerce unless otherwise limited by binding international treaties or agreements.

A. Export of Hazardous Waste: RCRA Section 3017

The export of hazardous waste is regulated by statute as part of the Resource Conservation and Recovery Act at 42 U.S.C. § 6938 (RCRA section 3017). The statute establishes notification, consent, manifest, and re-
porting requirements for the export of hazardous waste. However, where a valid international agreement regarding hazardous waste exports exists between the United States and the receiving country, the shipments must conform with the terms of that agreement, and only the annual report requirement of RCRA section 3017 ("Section 3017") applies. In fact, 99% of all U.S. hazardous waste exports fall under one of two bilateral treaties, one between the U.S. and Mexico and the other between the U.S. and Canada. Both treaties have requirements that closely match the general regulations promulgated by EPA to enforce Section 3017.

RCRA section 3017 essentially creates a monitoring and consent program for the export of hazardous wastes. The EPA is responsible for enforcement of the procedures. Because the EPA has no direct independent authority to seize or detain shipments of hazardous waste that violate the procedures of Section 3017, the EPA has entered into a Memorandum of Understanding (MOU) with the U.S. Customs Service, which does have that direct enforcement authority. Customs officials collect manifests at the border, verify the completeness and consistency of the data on the export documents, submit them to the EPA, and watch for illegal hazardous waste exports (i.e., those without the proper documents).

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30. 42 U.S.C. § 6938(g) (1984) ("[A] report summarizing the types, quantities, frequency, and ultimate destination of all such hazardous waste exported during the previous calendar year."). See also 40 C.F.R. § 262.52(d) (1987).
31. 42 U.S.C. § 6938(f) (1984) ("Where there exists an international agreement ... establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, only the requirements of subsection (a)(2) and (g) of this section shall apply"); 42 U.S.C. § 6938(a)(2) (1994) (requiring that "shipment conforms with the terms of such agreement").
32. This refers to RCRA-designated waste only. See discussion infra p. 8.
34. Original MOU December 29, 1986, renewed March 5, 1996. Susan Bromm, The United States' Enforcement Approach to the Export and Import of Hazardous Waste, 7 (1994) (director of RCRA Enforcement Division, Office of Waste Programs Enforcement, US EPA) (unpublished manuscript, on file with the author). The new agreements include training for U.S. Customs officers in identification and monitoring of hazardous waste shipments. The EPA also has MOUs on hazardous waste matters with Department of Transportation (DOT), Federal Bureau of Investigation (FBI), Occupational Safety and Health Administration (OSHA), and the Coast Guard. The EPA works closely with the State Department and DOJ on these issues. Id. at 7.
35. GAO, Hazardous Waste Exports: Data Quality and Collection Problems Weaken EPA Enforcement Activities, GAO/PPEMD-93-24 at 26 [hereinafter ‘GAO Report’]. The EPA hopes that by improving the computer database interfaces, Customs officers will at minimum be able to identify hazardous waste export documents that are inconsistent with the information reported to EPA by the exporter. Currently, Customs officials can phone EPA if they suspect a problem and hold the shipment at the border while EPA staff researches the data problems. There are much more complex problems that would be associated with actual inspections of the trade at the border. First, chemical testing is highly technical, not widely available, and time consuming. Second, the volume of trade and individuals crossing the border makes it unwieldy for Customs officials to stop every truck to assure that the cargo is not hazardous waste (therefore Customs examines only on those that self-report as hazardous waste). Third, public policy has dictated that Customs officers’ priority (especially on the U.S.-Mexican Border) be interdiction of drug traffic and illegal entry of aliens. See also David Eaton, NAFTA and the Environment, 27 St. Mary's L.J. 715, 731-33 (discussing the border enforcement problems along the Mexican-U.S. border as a “situation ripe for illegal dumping.”).
Under the RCRA, a waste is considered hazardous for export if: (1) it meets the definition of hazardous waste in 40 C.F.R. section 261.3, and (2) it is subject to either the federal manifesting requirements at 40 C.F.R. 262, Subpart B, the universal waste management standards of 40 C.F.R. section 273, or state requirements analogous to 40 C.F.R. section 273.

In 1995, the total amount of RCRA-designated hazardous waste exported according to the regulations found in RCRA section 3017 was 226,393.2 tons, representing only 1.05% of the 214,092,505 tons of RCRA-designated hazardous waste generated in the U.S. that year. The vast majority of RCRA-designated hazardous waste exported from the U.S. in 1995 was sent to Canada and Mexico under the bilateral treaties between the U.S. and each of these countries.


38. ENVTL. PROTECTION AGENCY, 1995 NATIONAL BIENNIAL RCRA HAZARDOUS WASTE REPORT (BASED ON 1995 DATA); EXECUTIVE SUMMARY, 7 (August, 1997) <http://www.epa.gov/epaoswer/hazwaste/data/hr95/execsum.htm> [hereinafter EPA 1995 REPORT]. This data is gathered from biennial self-reporting by 20,873 large quantity generators throughout the U.S. and territories. Id. at 8. The reported figure for treatment and disposal (not including treatment for storage only) at TSDs was 208,272,032 tons managed by 1,983 TSD Facilities. Id. at 8-9. EPA notes the discrepancy and attributes it to: “off-year generation (generation that occurred at the end of a non-biennial reporting year but was shipped during a reporting year) and wastes received for management from generators in foreign countries.” Id. at 3.

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<tr>
<td>Total RCRA designated waste exported from the U.S. in short tons**</td>
<td>131,093.8 st</td>
<td>130,530.5 st</td>
<td>119,562.6 st</td>
<td>145,556 st</td>
<td>142,708.4 st</td>
<td>191,458.2 st</td>
<td>226,393.2 st</td>
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<td>Total imports to Canada from the U.S.</td>
<td>94,156.68 st</td>
<td>86,314.88 st</td>
<td>65,011.7 st</td>
<td>71,969 st</td>
<td>70,297.72 st</td>
<td>115,133.8 st</td>
<td>121,014.3 st</td>
</tr>
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<td>Exports to Canada as percent of total U.S. RCRA designated hazardous waste exports</td>
<td>72%</td>
<td>66%</td>
<td>54.4%</td>
<td>49.4%</td>
<td>49.26%</td>
<td>60.1%</td>
<td>53.5%</td>
</tr>
<tr>
<td>Exports of hazardous waste to Mexico from the U.S.</td>
<td>28,101 st</td>
<td>39,208.98 st</td>
<td>51,383.9 st</td>
<td>72,178 st</td>
<td>71,596.78 st</td>
<td>75,581.6 st</td>
<td>104,408.2 st</td>
</tr>
<tr>
<td>Exports to Mexico as percentage of total U.S. hazardous waste exports</td>
<td>21.5%</td>
<td>30%</td>
<td>43.0%</td>
<td>49.6%</td>
<td>50.17%</td>
<td>39.6%</td>
<td>46.1%</td>
</tr>
<tr>
<td>Exports of RCRA designated hazardous waste outside of North America</td>
<td>8,837.2 st</td>
<td>5,004.5 st</td>
<td>3,166.9 st</td>
<td>1,409 st</td>
<td>813.95 st</td>
<td>472.8 st</td>
<td>970.7 st</td>
</tr>
<tr>
<td>Percent of U.S. exports of RCRA designated hazardous waste outside of North America</td>
<td>6.5%</td>
<td>4%</td>
<td>2.6%</td>
<td>1.0%</td>
<td>0.57%</td>
<td>0.3%</td>
<td>0.4%</td>
</tr>
<tr>
<td>Percent of U.S. RCRA designated hazardous waste exports reported as being exported for reclamation and recycling</td>
<td>not available</td>
<td>not available</td>
<td>60.7%</td>
<td>62.7%</td>
<td>62.49%</td>
<td>54%</td>
<td>59.9%</td>
</tr>
</tbody>
</table>


C. Regulatory Framework and Requirements

The EPA promulgated regulations to establish requirements for exporters of hazardous waste. The generator and shipper must notify the EPA, in writing, of the intent to export at least 60 days before the date of the initial intended shipment. The notification must include: the estimated total quantity of waste; the frequency of export; a description of the waste with EPA hazardous waste number and ID; shipment means; destination; manner in which waste will be treated, stored, or disposed of in the receiving country; and transit country information, if any. The EPA must notify the receiving country, which must consent to accept the hazardous waste. In accepting the waste, the receiving country may place conditions on the export shipment. A copy of the EPA “Acknowledgment of Consent” form, indicating that consent has been given by the receiving country, must be attached to the manifest. If any of three enumerated problems arise or if any of the shipping details change, an “Exception Report” must be submitted to the EPA. This report describes the problems that were encountered with the shipment and corrects the original notification. These problems include: (1) return of a shipment to the U.S. for any reason; (2) the exporter’s failure to receive a copy of the manifest from the transporter; and (3) the exporter’s failure to receive confirmation of delivery from the receiving facility within the specified time frame.

For the most part, the EPA uses discrepancies in reporting to trigger enforcement inquiries. Inaccurate data that matches inaccurate annual reports will likely not trigger enforcement inquiries. The facilities of exporters of haz-

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41. One notice may have multiple kinds of waste, or waste streams; with the increase in regulations in general and greater sophistication of waste handlers, these finer classifications are being used more widely. The EPA has begun keeping a database that tracks each of the waste streams on a notification and later matches it to the annual reports. Discrepancies may trigger an investigation of the exporter. However these figures are all gathered by self-reporting; those seeking to circumvent the system may not leave gaps in their paper work. Robert Heiss, A U.S. Perspective on the Import and Export of Hazardous Waste, Presentation at the 19th Canadian Waste Management Conference (September 1997) (on file with the author).
42. The EPA is improving its databases and beginning to compile data on the facilities available in other countries and their compliance records with applicable laws. This tracking and enforcement project was set up through NAFTA and the Commission for Environmental Cooperation. There may be uniform notification and manifest forms developed and implemented in the future between the three countries. Heiss, supra note 29, at 7.
43. See 40 C.F.R. § 262.53 (1986). This is not an exhaustive list.
44. 40 C.F.R. § 262.52(h) (1986).
46. 40 C.F.R. § 262.52(c) (1986). “A copy of the EPA Acknowledgment of Consent to the shipment accompanies the hazardous waste shipment and, unless exported by rail, is attached to the manifest (or shipping paper for exports by water (bulk shipment)).”
49. See Bromm, supra note 34, at 5. See also Scott C. Fulton, EPA’s Enforcement Priorities for Fiscal Year 1993, NAT’L ASS’N OF ATT’YS GEN. ENVTL. ENFORCEMENT J., Feb. 1993, at 6. “The RCRA enforcement program will continue to use its Import/Export Data tracking system to ensure compliance with notification, reporting, and manifest requirements regarding the shipment of hazardous waste.”
ardous waste are subject to inspection by the EPA regional offices and state environmental agencies, providing an opportunity for the EPA to reconcile the data by examining the exporters' own copies of confirmations of delivery and reshipments from importers. However, because of the EPA's funding limitations, such data reconciliation is rare.

The time lag between notification to the EPA and acknowledgment of consent from the EPA has led some exporters to submit speculative notices or "protective notices." These notices allow the exporter to ship waste at some point within the following year if it negotiates a contract. While there is no regulation explicitly prohibiting protective notices, they add to the agency's burden of processing consents and may slow down the process as a whole. EPA staff time is thus consumed by a purely bureaucratic exercise, which may have no relation to any actual need of the exporter, or to any actual export of hazardous waste. These notices also add to the burden of reconciling the information contained in notices, manifests, and delivery confirmations.

In 1983, Representative Mike Synar, then Chair of the Subcommittee on Environment, Energy, and Natural Resources of the House Committee on Government Operations, requested that the General Accounting Office (GAO) evaluate the EPA's hazardous waste export data. The resulting report found systematic data quality and collection problems:

- GAO found (1) unreliable hazardous waste quantity estimates, (2) exported waste quantities that went unreported, (3) shipment frequency not reported, (4) incomplete reporting of waste codes describing the type of wastes, (5) non-hazardous waste counted as hazardous, and (6) exception reports not submitted by exporters to EPA.

Since the report was issued, the EPA has tightened oversight of compliance with the use of waste codes and consistent units of measure, and provided better reporting guidance for exporters.

The GAO report found that importers in receiving countries had not relied on the data from either the EPA or the exporters for decisions about accepting wastes, but rather relied on their own assessment of the proposed wastes and their capacities to treat or dispose of the waste. In addition, both Mexico and Canada generally give consent pro forma for additional individual shipments to

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50. One alternative is to have exporters pay a fee to EPA for the processing of all notices. Fees to process notices would both deter protective notices and place costs of monitoring export notices on generators. Apparently, Canada is currently considering a cost recovery scheme for administration of its program which would be paid for by Canadian hazardous waste generators and receiving facilities. Telephone interview with Robert Heiss, EPA Office of Enforcement and Compliance Assurance (March 1998). See also Thomas Mounteer, Codifying Basel Convention Obligations into U.S. Law: The Waste Export Control Act, 21 ENVTL. L. REP. 10085, 10088 n. 47 (stating that some Canadian facilities had only received 20% of the waste indicated on export notifications).

51. GAO Report, supra note 33, at 4. These problems may be inherent in self-reporting and call into question the accuracy of the raw data that the EPA is relying on in its upgrades of its own systems. No matter how sophisticated EPA's tracking and computer systems become, or how well integrated with other countries, if the initial data is unreliable and not independently verified then the system will nonetheless have a fatal flaw.

52. Generally, samples have already been sent to the importer for analysis by the time a consent is requested. Shipment of samples is exempt from exporting requirements under 40 C.F.R. § 261.4(e) (1998) (Treatability Study Samples).
the same importers, at the same disposal and treatment facilities, after the initial consent process and investigation.53

D. RCRA-Exempt Hazardous Wastes as Defined Under Section 3017 and Exemptions for Recycling and Recovery: Opening the Loophole

Generally, substances exempt from RCRA hazardous waste regulation for any reason are also exempt from the export controls.54 The RCRA statutory definition of hazardous waste and the accompanying regulations include many exemptions. Shipments of RCRA-exempt hazardous waste are not subject to hazardous waste export restrictions under Section 3017.55 Because many countries use different criteria for defining hazardous waste and exemptions, the use of the term "hazardous waste" internationally is quite confusing. Moreover, little effort has been made to harmonize the U.S. definition of hazardous waste for export purposes with the definition used in the country of import.56 This has generated much confusion in statistical data collection and reporting of "toxic" or "hazardous" waste exports and imports worldwide. Many hazardous substances which are exempted from RCRA hazardous waste regulations in the U.S. meet the general hazardous waste criteria but are exempt from regulations for specific reasons, e.g., to encourage recycling and recovery of industrial chemicals.

Some of the definitions used by the domestic recycling and recovery exemptions are controversial. For example, hazardous wastes that are defined as "recyclable materials"57 "used in a manner constituting disposal"58 are exempt from requirements for generators, transporters, and storage facilities.59 The phrase "used in a manner constituting disposal"60 means that the recyclable materials are applied to or placed on the land: essentially they are used as fertilizers combined with other materials to make fertilizers.61 The hazardous

54. The only exception is industrial ethyl alcohol that is exported for reclamation. Though ethyl alcohol is generally exempt from RCRA under the recycling rules, generators still must comply with notice and consent requirements of 262.53, et al. in order to export it. 40 C.F.R. § 261.6(a)(3)(i)(A) (1998).
55. 40 C.F.R. §§ 262.50-262.89 (1986).
56. In 1996, the OECD regulations were incorporated into the regulations for export 40 C.F.R. §§ 262.80-262.89 (1996). Even these regulations continue to be based on U.S. definitions of hazardous waste. They only harmonize labeling for those wastes that are "considered hazardous under U.S. national procedures and are destined for recovery operations" in OECD member countries besides Canada and Mexico. See generally F. James Handly, Hazardous Waste Exports: A Leak in the System of International Legal Controls, 19 Env’t L. Rep. 10171, 10178 (Apr. 1989).
57. 40 C.F.R. § 261.6(a)(1) (1997) ("Hazardous wastes that are recycled will be known as ‘recyclable materials.’")
59. 40 C.F.R. § 261.6(a)(1) (1997) (This includes an exemption from manifesting requirements).
60. 40 C.F.R. §§ 266.20-266.23 (1998) (Subpart C - Recyclable Materials Used in a Manner Constituting Disposal).
61. See generally Duff Wilson, Wasteland: Every Day Hazardous Waste is Made into Fertilizer and There is Not a Law in Place to Make Sure That it is Safe, 66 Amicus J. 34 (Spring 1998); Env’tl. Working Group, Toxic Wastes ‘Recycled’ as Fertilizer Threaten U.S. Farms and Food
materials that qualify as recyclable materials under this regulation include K061 waste from steel manufacturers, which is used to make zinc fertilizers. The K061 residues may contain contaminants that include: arsenic, barium, cadmium, chromium, lead, mercury and selenium. Fertilizers containing K061 that are produced for use by the general public are expressly exempt from regulation. When these same K061 wastes are recycled for metals recovery in high temperature metals recovery processes the residues from that process are not deemed hazardous if the original K061 waste met EPA standards for acceptable levels of certain contaminants. However, these same tests are not required for land disposal of K061. Ironically, K061 exports for metals recovery are regulated under Section 3017, but K061 exports are not regulated if they are destined to be used as fertilizer. In addition, if the K061 wastes are used to make fertilizer within the U.S., the export of that fertilizer is not regulated under Section 3017.

Another example of RCRA-exempt hazardous waste that is exported without notice and consent requirements is the export of used lead acid batteries. Lead acid batteries are exempted from hazardous waste criteria domestically to encourage recycling and recovery operations, and are also therefore exempt from export controls. The liquid acids and the lead contained in these batteries both independently meet the RCRA definition of hazardous waste. The do-

62. K061 is distinct from K061 slag; the latter is the end product after K061 has undergone metals recovery. K061 slag was the subject of several court cases including: American Mining Congress v. Envtl. Protection Agency, 824 F.2d 1177 (D.C. Cir. 1987) (holding that RCRA expanded EPA’s regulatory reach to include K061 slag and other end products of recycling and recovery operations, and that post-recovery slag left on the ground for six months was not in a recovery process); Steel Manufacturers Ass’n v. Envtl. Protection Agency, 27 F.3d 642 (D.C. Cir. 1994) (EPA can regulate concentrations of toxins in post-recovery slag).

63. 40 C.F.R. § 266.20(b) (1998). See also 40 C.F.R. § 268.40 (1998) (Land Disposal Regulations); Wilson, supra note 61; Toxic Wastes Recycled, supra note 61 (stating that the land disposal regulation threshold is too low, industry sent more than 270 million pounds of toxic waste to fertilizer companies from 1990-1995, and that the exemption allows millions of pounds of heavy metals, carcinogens, and dioxins to be applied to the nation’s farmlands).


65. 40 C.F.R. § 266.80 (1998) (Subpart G—Spent Lead-Acid Batteries Being Reclaimed, Applicability and Requirements). Persons who generate, transport, or collect whole spent lead-acid batteries for reclamation are not subject to the federal manifest requirements. Spent lead-acid batteries being reclaimed are exempt from federal manifest requirements, i.e. they are not considered hazardous under U.S. national procedures. See 40 C.F.R. § 266.80 (1998); 40 C.F.R. § 261.6 (a)(2)(iv) (1997). See also 61 Fed. Reg. 16290, 16305, (1996) (new regulations promulgated by the EPA to incorporate OECD Council Decision C(92)39) (“Thus, persons exporting whole spent lead-acid batteries for reclamation are not subject to today’s import/export requirements. However, they may be required to notify the importing country of their intention to export lead-acid batteries, pursuant to contracts they execute with foreign consignees, because lead-acid batteries are found on the amber list and are considered to be hazardous under the national procedures of many OECD countries.”).
Domestic policies for recycling of batteries require ongoing regulation of the process of materials recycling or recovery. At the point in the life of a hazardous product where it is exempt from control as waste, e.g. because it is in a recycling or recovery category, or because it is explicitly exempt to encourage recycling as is the case with lead acid batteries, it can be exported without any monitoring or control under RCRA section 3017. In fact, Section 3017 completely fails to distinguish these exempt but hazardous shipments from non-hazardous waste shipments.

There is evidence that batteries exported to Mexico, Brazil, and India have caused serious environmental damage. Such damage is not surprising. When an Oregon battery plant closed in 1986, it subsequently shipped the battery wastes to a plant in Saraburi, Thailand for "recycling." Although the costs of recycling are much lower in Thailand, the environmental standards are not as strict or as strictly enforced as environmental standards in the U.S. Researchers have gathered samples around the Saraburi plant that reveal high levels of lead and manganese in the ground and in the water.

67. Ongoing regulation includes: standards for battery manufacturing plant which also engage in lead reclamation, 40 C.F.R. §§ 60.370 - 60.375 (1998); emissions standards for secondary lead smelters, 40 C.F.R. § 63.542 (1998); and the universal waste rules, 40 C.F.R. § 273 (1995). In addition, EPA regulation domestically includes detection and prosecution of "sham recycling," and reissuance of regulations to close loopholes in recycling/recovery regulations. See Marine Shale Processors, Inc. v. Envt'l Protection Agency, 81 F.3d 1371 (5th Cir. 1996) (upholding denial of incinerator permit for waste recovery to processor who EPA determined was using incineration for disposal and not for recovery), Owen Electric Steel Co. v. Browner, 37 F.3d 146 (4th Cir. 1994) (upholding EPA determination that slag from steel production process left on ground to cure for six months was subject to regulation under RCRA as a TSDF). See generally Michael Sweeney, Reengineering RCRA: The Command Control Requirements of the Waste Disposal Paradigm of Subtitle C and the Act's Objective of Fostering Recycling—Rethinking the Definition of Solid Waste, Again, 6 DUKE ENVTL. L. & POL'Y FORUM 1 (1996) (through and detailed analysis with the problems in the definition of solid waste and the confusion which has ensued, especially noting a risk-based approach that departs from the current characterization of recycling as a subset of waste may be more useful); Barry Needelman, Hazardous Waste Recycling Under the Resource Conservation and Recovery Act: Problems and Potential Solutions, 24 ENVTL. L. 971 (1994) (complexity of regulations causes many of the problems as well as creating the loopholes); Phillip L. Cornell, Understanding a Sham: When is Recycling, Treatment?, 20 B.C. ENVTL. AFF. L. REV. 415 (1993) (a somewhat dated but informative look at the lack of objective criteria to distinguish recycling from treatment).

68. See Kenny Bruno, Serious Problem Which Needs Attention, Letter to the Editor, SOUTH CHINA MORNING POST, October 19, 1994, at 22 (noting that Australia, Canada, UK, Germany and U.S. shipped more than 5.4 million tons of waste to Asian countries including 50,000 tones of lead); Asante-Duah et al., supra note 3, at 1689 ("One concern is the mushrooming of recycling plants in Brazil, Taiwan, Mexico, India, China, South Korea, and South Africa."); CENTER FOR INVESTIGATIVE REPORTING & BILL MOYERS, GLOBAL DUMPING GROUND: INTERNATIONAL TRAFFIC IN HAZARDOUS WASTE, Seven Locks Press, Washington, DC (1990) (documenting lead recovery plants in Brazil, Mexico, and Taiwan where workers are exposed to high levels of lead and acid is simply drained onto the ground. The Brazil plant is owned by the same firm that owned a battery recycling plant in Pennsylvania which went bankrupt and was subsequently declared a Superfund site).

69. Edward Worder, EPA, Lead in Dilemma on Insurance, 94 AMERICAN METALS MARKET 1, (1986) (reporting that new standards for insurance would force most of the remaining 25-30 secondary lead smelters in the U.S. to close. "Lead battery recycling would be brought to a halt at all but a few smelters which are capable of self-insurance." Domestic regulations for lead smelters lead to closure of half the plants in the U.S. between 1980-1986).

70. Eliza Teoh, Effective Policing Needed as Asia Becomes Waste Dumping Ground, THE STRAITS TIMES (Singapore), June 21, 1995, at 29. See also The Poisonous effects of Lead Waste...
There is no question that lead-acid batteries contain hazardous materials, and while within the U.S. any recovery operations and eventual disposal of by-products continues to be regulated and subject to liability for environmental harm under CERCLA. However, whether batteries are exported "for recovery" or for disposal, the lack of regulation eliminates any ongoing CERCLA or RCRA liability of the generator under Section 3017. Because these operations are exempt from even the minimal notification and reporting requirements of Section 3017 and there is no domestic penalty for exporting these hazardous wastes, the EPA does not keep any export data on these wastes. Therefore, the extent of the problem is unknown.

These RCRA-exempt hazardous wastes move across the U.S. border through a large loophole in the export regulations. The EPA has tightened the regulation of recycling and recovery operations within the U.S., but this has not been translated to an expansion of RCRA section 3017. Within the U.S., ongoing hazardous waste recovery or recycling operations are subject to RCRA standards for site contamination, final waste disposal, and treatment and storage of hazardous products from the recycling or recovery operation. The recycling operations are also subject to CERCLA liability from cradle to grave. By exporting the product at the stage when it is not labeled hazardous, when it is exempt expressly to encourage responsible recycling and recovery operations, the hazardous waste generator can escape both the RCRA export restrictions that have some monitoring and tracking functions, and from RCRA and CERCLA liability. Cradle to grave liability thus becomes cradle to border liability.

Under current practice, the receiving countries are given no notice and thereby have less opportunity to refuse the import or to condition it on safe practices or insurance coverage. Once the waste enters a country without direct

Exports, Environment Business, March 23, 1994, available in LEXIS, Nexis Library, IAC Database (stating that 61,000 mg/kg of lead were found in Thailand in soils around lead recycling plants as compared with the 85 mg/kg Dutch standard, and 140 mg/kg typically found in soils near European lead smelters.).

71. See supra notes 6, 7.

72. Currently, there are no penalties under RCRA section 3017 for labeling waste as "for recycling" when it is eventually disposed of after export. Such a regulation could serve a deterrence function, and facilities found to violate the export requirements once could be closely monitored for future compliance. A search by the author found no cases with explicit penalties for noncompliance with Section 3017 on this basis.

73. Handly, supra note 56, at 10179.

74. At least for municipal incinerator ash, the Supreme Court appears to have closed the major loophole. In City of Chicago v. Envt'l Defense Fund, 511 U.S. 328 (1994), the Supreme Court held that the fact that municipal waste incinerators were exempt from regulation as hazardous waste treatment facilities under RCRA § 3001(i) did not explicitly or automatically exempt the residual ash generated from regulation as hazardous waste under RCRA. The Court reasoned that depending on the actual composition and properties of the ash, the waste may independently qualify as hazardous under RCRA. The export of such ash, when it qualifies as hazardous, is now governed by Section 3017 as well.

75. The polluter-pays principle followed by U.S. law makes the generator responsible for insuring environmentally sound disposal of hazardous waste. However, these principles are meaningless if the generator can escape that responsibility and liability simply by shipping the waste across the border. See discussion infra Section III(B).
notice to the government it is much harder to trace and monitor for enforcement purposes. Because the exemptions mean that the EPA or any other government agency does not track export of this waste, it is impossible to know the magnitude of waste that moves through this loophole.

E. Did Congress Intend This Loophole or Did the EPA Create It in Promulgating the Regulations?

The EPA promulgated the regulations for RCRA section 3017 on August 8, 1986. During the public comment period, comments were made that specifically addressed the narrow scope of the proposed rules and the fact that hazardous wastes that were then exempt from the manifest requirements would now be exempt from the export requirements. One individual specifically pointed out that the statutory language "no person shall export any hazardous waste identified or listed under this subchapter unless . . ." indicated a Congressional intent to subject all hazardous wastes to the export requirements of Section 3017. The EPA responded that:

EPA's regulatory definition of 'hazardous waste' is a broad one. It includes all solid wastes which are listed as hazardous wastes or which exhibit the characteristic of ignitability, corrosivity, reactivity or EP toxicity. Generally, hazardous wastes (whether listed or characteristic) are subject to the generally applicable regulations governing their generation, transportation, treatment, storage and disposal. However, there are some wastes which EPA, for one reason or another, has exempted from domestic regulation. It is highly unlikely that Congress would have been more concerned about wastes exported than about wastes in its own backyard.

This statement of congressional intent is not founded on any express congressional exemptions in the statute but on exemptions found only in other EPA regulations. Further, even if the export regulations of section 3017 applied to these hazardous wastes it would not be a case of these exports being more regulated than the domestic wastes: these exports would still be much less regulated for export than for domestic treatment and disposal. There is no question that those substances that are considered hazardous but are exempted from regulation

76. I am not arguing that the U.S. government should be responsible for all actions which impact the environment in other countries stemming from hazardous waste originally generated in the U.S. I am making a much narrower claim: that facilitating notice and consent of hazardous shipments is a minimal form of comity between nations that would greatly increase the likelihood that this U.S.-generated waste is dealt with responsibly and that any harms caused by that waste in the receiving country can be accurately traced to the responsible parties (whether they are the U.S. generator or transporter, or the importer or waste handler in the country of import). Expanding data collection and notice and consent requirements would be a minimal expense for the U.S. to incur, in order to help ensure effective and efficient environmental enforcement and regulation in the receiving countries. I argue that this is true both from an equitable standpoint and from a cost-benefit analysis.

77. See chart infra p. 307 and accompanying text; see also Asante-Duah supra note 3.


“for one reason or another”\textsuperscript{82} are still “regulated domestically” by the EPA as solid waste in order to protect the environment,\textsuperscript{83} even if they are no longer defined as “hazardous wastes.”

Next, the EPA contended that the regulation was not clear on its face regarding the scope of its coverage. The reasoning behind this contention was twofold. First, the EPA contended that “section 3017(a) includes language prohibiting the export of ‘any hazardous waste’ unless certain conditions are met, one of those conditions is the requirement to attach a copy of the receiving country’s consent ‘to the manifest accompanying the hazardous waste shipment.’”\textsuperscript{84} Second, the EPA noted that the statute requires that “a description of the Federal regulations which would apply to the treatment, storage, and disposal of the hazardous waste in the United States”\textsuperscript{85} be forwarded to the receiving country along with the consent request. The EPA claimed that these requirements evidence “an intent on Congress’s part to encompass something less than ‘all hazardous wastes’ since where a waste is not regulated domestically, consent could not be attached to the manifest nor would there be any regulations for EPA to describe which govern the domestic treatment, storage or disposal of such wastes.”\textsuperscript{86}

First, it is wrong that these exempt wastes are not regulated under RCRA. Waste that is “exempt” \textit{is} regulated under RCRA hazardous waste regulations; an exemption is part of the regulatory structure. Those parts of the hazardous waste regulations which specifically exempt these categories of waste could be sent to the receiving country. Second, should any of the wastes that are exempt for recycling domestically be disposed of instead, at that point they would again be subject to RCRA guidelines for the disposal of hazardous wastes.\textsuperscript{87} The EPA cannot really mean to say that once a substance is exempt for one purpose, \textit{e.g.} recycling, it can be disposed of domestically without meeting \textit{any} regulatory standards within the U.S.

The stronger claim by the EPA is that the direct reference to the manifest is a signal that Congress only meant to regulate for export hazardous wastes subject to the transportation manifest requirements.\textsuperscript{88} “In EPA’s view, the function served by the manifest domestically is similar to the function served by the noti-

\textsuperscript{82} Generally, wastes have been exempted to encourage recovery or recycling options over disposal or for very small generators. 40 C.F.R. \S 261.5 (1998) (Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators).

\textsuperscript{83} See discussion \textit{supra} at notes 74-75 and accompanying text. Under RCRA/SWDA hazardous wastes which are exempt are still regulated as solid waste.

\textsuperscript{84} 51 Fed. Reg. 28,670 (citing at 42 U.S.C. \S 6938(a)(1)(c) (1984)).


\textsuperscript{87} Because there is no monitoring of shipments of hazardous waste that are “exempt for recycling and recovery” there is no data on the overall amount of this waste exported each year and no tracking of what percent of the waste is actually recycled and not disposed of. See Asante-Duah, \textit{supra} note 3, at 1688.

\textsuperscript{88} \textit{But see} 40 C.F.R. \S 262.52(c) (1998). EPA’s own regulations allow for attachment of consent to “shipping paper” for bulk shipments by water and exempt rail shipments from the attachment requirement.
fication and consent internationally." The notification and consent form serves both as a tracking document and as an informative document about the nature of the waste transported. This information assists the receiving country in making an informed decision to accept or reject the shipment. It is unclear why the EPA believed that Congress did not intend similar information about hazardous wastes intended for recycling to perform an equally important function. The EPA's response, that it "is doubtful that Congress intended to regulate waste for export more stringently than domestically," is misleading in a context where export regulations are significantly weaker than domestic regulations. The EPA did not show that Congress intended the current result of exempting a large class of hazardous waste exports altogether. The plain text of the statute would not necessarily lead to this conclusion.

The next section will address two questions. First, is it too late to challenge the regulations? Second, could the EPA re-issue the rules with a new, broader interpretation of the scope?

1. Administrative Law Challenges to the Regulations

The regulations could have been challenged under the APA at the time that they were promulgated, but they were not. In order to challenge the regulations at this late date, a plaintiff would have to show that he or she had been harmed due to the EPA's failure to promulgate these regulations properly. It is hard to imagine a domestic plaintiff that would be able to challenge the export regulations at this stage and, as discussed below, foreign plaintiffs have a myriad of difficulties in bringing suit on these issues. However, a domestic plaintiff who suffered a direct injury-in-fact related to the scope of the domestic hazardous waste regulations could challenge those regulations and this could in turn result in an expansion of the scope of the export regulations. For instance, a party harmed domestically by a transportation accident involving waste exempted from the transport manifest requirement (because it was destined for recycling) could challenge the regulation under the APA in the context of a tort suit against the agency. Such a plaintiff would have to allege that the lack of a hazardous waste transport manifest had contributed to the harm suffered in the accident. If the recycling regulations, which currently exempt some hazardous waste for the transport manifest requirements, were changed as a result of this litigation to require a transport manifest for all recycled waste (e.g., as part of an effort to keep better data and for tracking), then that domestic manifesting requirement would automatically expand the scope of Section 3017 as well.

2. The EPA's Authority to Revise the Rules

The EPA has the authority to expand the export requirements of Section 3017 to other hazardous wastes identified under Section 261.3, thereby closing the export loophole. In Motor Vehicle Manufacturers Association v. State

the Supreme Court acknowledged that an agency could reevaluate earlier regulations in light of the ensuing practice and changed circumstances, although the reasons for doing so must be compelling and clearly stated. In this case the EPA’s original reasoning was flawed and opened a large loophole in the regulation of hazardous waste exports. The statute could reasonably be analyzed more broadly to close or narrow this loophole in a revised rulemaking. The EPA has the authority to rewrite the regulations and expand them to cover all hazardous wastes under section 261.3, rather than only those subject to manifesting requirements and 273 universal waste rules. In effect, this would bring the export requirement into line with the EPA’s general definition of hazardous waste by ending the exemption of hazardous waste for recycling or recovery from the export requirements of notification, consent, and monitoring. This would comport with the purpose of the regulations, to encourage recycling or recovery of disposal domestically. Broadening the export requirements to include notification, consent and monitoring of hazardous waste shipments intended for recycling would rationalize the export requirements under Section 3017 and bring U.S. export requirements closer to prevailing international standards.


92. "A 'settled course of behavior embodies the agency's informed judgment that, by pursuing such a course, it will carry out the policies committed to it by Congress.' ...[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance. ... [W]e fully recognize that 'regulatory agencies do not establish rules of conduct to last forever' and that an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'” Id. at 41-42 (citations omitted). Rehnquist’s dissent even more clearly stated the position that a change in executive leadership would unremarkably cause an administrative agency to change its evaluation/interpretation of some statutes. “A change in administration brought about by the people casting their votes is a perfectly rational basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulation. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.” Id. at 59.

93. This could be seen to contradict current Congressional intent evidenced by the refusal to ratify Basel, but Congressional debate has been sparse and it is not clear on what grounds the refusal is based (i.e. monitoring, expansion to other waste, liability, or sovereignty issues). See generally William Eskridge & Phillip Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy (2d. ed. 1995) (post-enactment legislative history and the rejected proposal rule).

94. These RCRA section 3017 requirements are not particularly burdensome at this time as they require only notification, consent of the receiving country and tracking, there is as yet no U.S. law which would extend liability or require reshipment in the event of a problem.

95. See Christopher Hilz, The International Toxic Waste Trade (1992) (identifying three basic kinds of hazardous waste export activities: (1) compliant waste handlers, who export waste exempted from the regulation or not considered hazardous categorically these include incinerator ash and contaminated soil; (2) sham recycling waste, exported for recycling but treated in a manner constituting disposal including incineration; and (3) criminal activities).

96. See discussion infra Section V on Basel and discussion infra Section VI on OECD.
III. LIABILITY

A. Domestic Disposal vs. Export Liability

Liability of exporters of hazardous waste is minimal under both RCRA and CERCLA, because once a material is exported RCRA and CERCLA no longer apply.\(^97\) By contrast, within the U.S., generators, transporters, and treatment, storage and disposal facilities (TSDFs) have comprehensive and extensive liability for the proper treatment, storage, transport and disposal of all hazardous wastes.\(^98\) Even wastes that are exempt from hazardous waste rules (e.g. solid wastes and wastes exempt from hazardous waste rules for recycling and recovery) are subject to safe handling and disposal regulations and liability at all stages. In addition, the EPA has revised the regulations for recycling and recovery of hazardous waste repeatedly\(^99\) in order to close loopholes that allowed for "sham recycling."\(^100\)

Once hazardous wastes cross the border any damages they cause are largely beyond the reach of RCRA and CERCLA.\(^101\) RCRA generally provides for enforcement by the EPA for violations of the requirements of the statute through both civil and criminal penalties and possible injunctive relief.\(^102\) Under these provisions the EPA has the power to prosecute illegal exports for failure to comply with Section 3017 requirements. The few cases the EPA has prosecuted under this provision\(^103\) were brought to its attention either through paperwork discrepancies\(^104\) or by the regulated community.\(^105\)

\(^{97}\) See discussion infra Section III B. (Discussion of Amlon Metals, Inc. v. FMC Corp., 775 F.Supp. 668 (S.D.N.Y. 1991), which found no congressional intent for extraterritorial application of RCRA, and presumably the same analysis will hold for CERCLA.)

\(^{98}\) CERCLA imposes liability on generators, owners, and transporters for damages, cleanup costs and damage to natural resources, 42 U.S.C. § 9607 (1998). In fact, these regulations cover liability for all waste disposal and treatment, not just hazardous waste. Responsible parties may also be liable for nuisance and trespass at common law. In addition, in some situations (emergencies and responsible party unable, unwilling or unavailable) the federal government will takeover clean-up or disposal of wastes and then litigate against responsible parties for contribution. 42 U.S.C. § 9607(a)(4) (1998) includes liability for costs of removal or remedial action incurred by government, damages to natural resources, and health assessment costs.


\(^{100}\) See Marine Shale Processors v. Envt'l Protection Agency, 81 F. 3d 1371 (5th Cir. 1996).

\(^{101}\) See discussion infra Section III B.


\(^{103}\) This does not mean that the EPA has not settled more cases that included an export component, but they are not in the public record. See, e.g., infra note 105, discussing Borden and Kodak settlements.

\(^{104}\) See Susan Bromm, supra note 34, at 5 (Most enforcement actions undertaken after detecting violations of the documentation requirements).

\(^{105}\) Id. at 14. (The EPA's reliance on the regulated community to forward illegal solicitations, and for tips on illegal activity). See United States v. Ahmad & Asran, 67 F.3d 309 (9th Cir. 1995) WL 579646 ( Pakistani authorities intercepted shipment bound for dumping in family-owned mineshift, Ahmad was found guilty of illegally transporting and exporting hazardous waste for dis-
Although RCRA's citizen suit provision provides for suits against polluters\(^\text{106}\) or against the EPA for failure to perform non-discretionary duty,\(^\text{107}\) no such suits have been successfully brought to date. This is in part because plaintiffs in federal court must still meet federal standing requirements\(^\text{108}\) to sue under the citizen suit provisions. Furthermore, any direct harm from the waste will occur in a foreign country. Domestic plaintiffs will rarely be able to allege direct injury due to illegal or mishandled hazardous waste exports and will rarely be able to sue hazardous waste exporters directly or to sue the EPA for any failure to monitor compliance with the export provisions.\(^\text{109}\)

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\(^{106}\) 42 U.S.C. § 6972(a)(1)(A), (B) (1998). \( \text{"Any person" includes organizations, government agencies, but it is not clear whether it includes aliens. In } \text{Amlon the court refers to "considerable legislative history supporting the view that Congress intended an entirely domestic focus for RCRA's citizen suit provision." } \text{Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 674 n.8. Aliens affected by transboundary pollution face similar problems. See } \text{Joel A. Gollub, } \text{Birth of the North American Transboundary Environmental Plaintiff: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy, 15 Harv. Envtl. L. Rev. 85 (1991) (exploring the possibilities and limitations of the draft treaty to provide access to courts and remedies for transboundary pollution between Canada and the U.S., including issues of jurisdiction, standing, and choice of laws).} \)

\(^{107}\) 42 U.S.C. § 6972(a)(2) (1998) (however, prosecution by the EPA or the Department of Justice is generally discretionary).

\(^{108}\) \text{See } \text{Lujan v. National Wildlife Federation, 497 U.S. 871, 882 (1990) ("plaintiff must fall within zone of interest sought to be protected by statute"). It is arguable that even if aliens could bring citizen suits they would be outside the zone of interest of RCRA and CERCLA, but not ATCA. See also } \text{Data Processing Service Orgs., Inc. v. Camp, 397 U.S. 150 (1970) (zone of interest issues).} \)

\(^{109}\) Hypothetically, if hazardous waste was exported under the guise of a new product (i.e. willfully mislabeled) to a foreign country, the receiving party (or a neighbor or worker in the other country) could not bring a citizen suit against the EPA for failure to prosecute illegal export because prosecution is discretionary. In addition, the party may not be able to bring a citizen suit at all as a non-citizen. If the injured party was a U.S. citizen then they might be able to bring a citizen suit against the exporter for illegal export even if the injury in fact was extraterritorial, because the violation of RCRA was domestic (failure to notify and gain consent). The U.S. citizen who was harmed extraterritorially might have standing if the injury in fact for standing does not have to be completely commensurate with cause of action. See } \text{Duke Power Co. v Carolina Envtl. Study Group, 438 U.S. 59, 95 (1978) (J. Stewart dissenting) ("Surely there must be some direct relationship between the plaintiff's federal claim and the injury relied on for standing"). See also } \text{Stevens'}
B. Amlon Metals, Inc. v. FMC Corp.\textsuperscript{110}

In 1988 Amlon Metals, Inc., a New York Corporation (as agent for Wath Recycling and Euromet, United Kingdom corporations) entered into a contract with FMC, a Delaware Corporation, for reclamation of copper residue produced at FMC’s pesticide plant in Baltimore, Maryland. The contract included an agreement “that the copper residue would be treated for metallic reclamation purposes, that the material would be free from harmful impurities as per sample tested earlier by Amlon, that the material was not hazardous waste, and that the material typically contained 33% copper.”\textsuperscript{111} In 1989, when the second shipment from FMC of 20 containers arrived at Leeds, England, Wath personnel noticed a strong odor. Nonetheless, thirteen of the containers were shipped to Wath and seven remained in Leeds. Those seven were eventually rejected by Wath and reshipped to FMC.\textsuperscript{112} When Wath contacted FMC they were told that the odor was probably due to xylene, a hazardous substance, in very small quantities of 0-100ppm. However, when the smell did not dissipate FMC admitted that xylene might be present in much higher concentrations. Wath eventually contacted the British government whose tests showed xylene and several other hazardous materials in the mixture. The Health and Safety Executive required Wath to store the material in steel drums for safety. Wath then brought suit in the Queen’s Bench against FMC and FMC moved to “dismiss on the grounds that all the actions claimed to be taken by FMC took place in the United States and U.S. law would apply.”\textsuperscript{113} Wath then filed suit in federal district court alleging that “FMC misrepresented the composition and characteristics of the copper residue and failed to disclose the presence and concentrations of organic chemicals in the material . . . and that the material may represent imminent and substantial danger to human health and the environment”\textsuperscript{114} under RCRA and the Alien Tort Claims Act.\textsuperscript{115} Wath further alleged “common law fraud, strict liability, breach of express and implied warranty and negligence.”\textsuperscript{116} The published case involved a 12(b)(1) motion to dismiss for lack of jurisdiction and a 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted. Ultimately, the court allowed the common law claims to go forward\textsuperscript{117}

\textsuperscript{110} Federal courts have rarely had the chance to examine these issues. The leading case is \textit{Amlon Metals, Inc. v. FMC Corp.}, 775 F. Supp 668 (S.D.N.Y. 1991).

\textsuperscript{111} \textit{Id.} at 669.

\textsuperscript{112} Reshipment assumed from facts.

\textsuperscript{113} \textit{Id.} at 670.

\textsuperscript{114} \textit{Id.}


\textsuperscript{116} \textit{See} \textit{Amlon Metals}, 775 F. Supp. at 670.

\textsuperscript{117} These were presumably settled because there are no further references to them in the court docket.
but granted the 12(b)(1) motion to dismiss for lack of jurisdiction on claims brought under the Alien Tort Claims Act, and granted the 12(b)(6) motion for failure to state a claim under RCRA.

The court’s analysis of the Alien Tort Claims Act turned on the lack of violation of a specific treaty or “the law of nations,” which is a threshold requirement under the statute. The court found that the complaint had failed to allege a particular treaty violation because it only referred to agreements that laid down general principles and not “express international accords” whose violation could form the basis for a cause of action under the Act.

The court noted jurisdiction under RCRA but declined to apply RCRA in this case. The court stated that there is a presumption against extraterritorial application of laws and that the standard for extraterritorial application of U.S. law is the intent of Congress that the law applies extraterritorially. “Having examined the relevant legislative history and structure and language of RCRA, this Court is unpersuaded by plaintiffs’ contention that Congress desired RCRA to apply extraterritorially.” The court found that the plaintiffs had failed to meet the threshold requirement of congressional intent for extraterritorial application of RCRA.

Furthermore, the court found that it did not need to reach the question of whether the conduct at issue occurred within the U.S. or outside of the U.S. Unfortunately, the court’s reasoning that enabled it to avoid the issue of where the conduct occurred is circular. FMC had moved to dismiss the case in Eng-

118. “The District Courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (1998). The standard of review for a 12(b)(1) motion establishing a treaty violation is a threshold jurisdictional requirement for claims brought under ATCA. Courts typically engage in a more searching preliminary review of the merits for ATCA than is required for most “arising under” or federal question jurisdiction. See Amlon Metals, 775 F. Supp. at 671 (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980)).


120. See Amlon Metals, 775 F. Supp at 671 (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980)).

121. See Amlon Metals, 775 F. Supp. at 670 n.1.


123. See Amlon Metals, 775 F. Supp. at 676. The analysis used by the court to deny that RCRA applies extraterritorially would be much the same under CERCLA. But see Kourtney Twenhafel, Freeport McMoran’s Midas Touch: Testing the Application of the National Environmental Policy Act to Federal Agency Action Governing Multinational Corporations, 4 TUL. J. INT’L & COMP. L. 303 (1996) (arguing that NEPA could meet standards for extraterritorial application. Attempts to apply NEPA to Indonesian mining project based on U.S. government loans to the project. Such application would ensure information about the project at a minimum and some accountability from U.S. multinational corporations. The article acknowledges that if there was a “major federal action” then extraterritoriality may not be necessary for NEPA to apply).

124. See Amlon Metals, 775 F. Supp. at 672, 673 n.5 (referring to the Leasco test “when, as here, there has been significant conduct within the territory, a statute cannot properly be held inapplicable simply on the ground that, absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations law.” Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir.1972)).
land based on the fact that the relevant conduct took place in the U.S. and therefore an U.S. court should hear the case. Moreover, if it was determined that the conduct (i.e., the illegal export of hazardous waste) took place within the U.S., then the conduct would fall under RCRA and the question of extraterritorial application of RCRA would be moot. The defendant characterized the plaintiff’s claim for imminent and substantial endangerment as turning not on conduct, but only on “the existence of the condition.” Because the condition occurred entirely overseas the defendant maintained that it was reach of RCRA.125 Here, however, the defendant contradicted its own claim for dismissal from the Queen’s Bench.

Next, the court examined whether the citizen suit provisions of RCRA would be applicable to a Section 3017 claim. The court found that Congress intended the citizen suit provision to have only a domestic focus. Therefore, citizen suit provisions did not apply to violations of Section 3017.126 Under the court’s analysis, if the shipment was found to be hazardous waste and subject to RCRA export requirements only the EPA could bring a suit for violation of Section 3017, not Amlon as an alien plaintiff, nor any other citizen who had been harmed.127

Even if citizen suits are limited to domestic issues, that limitation should not categorically bar a citizen suit action under Section 3017, because the actual violation of Section 3017 export requirements is always domestic. This is because Section 3017 only applies to waste that is generated in and shipped from the U.S.

IV. BILATERAL TREATIES

The U.S. currently has bilateral import-export agreements for the transboundary movement of hazardous wastes with both Canada and Mexico.128 This section will examine these treaties and how their provisions interface with those of the RCRA.

A. Mexico

1. La Paz

In 1983, the U.S. and Mexico signed a bilateral agreement on Environmental Cooperation in La Paz, Mexico.129 The treaty went into force in 1984 and

125. *See* Amlon Metals, 775 F. Supp. at 673.
126. *Id.* at 674 nn.7,8.
127. The EPA may have brought suit in this case but this information is neither in the record nor on line.
128. Where treaties and statutes directly conflict, the last in time will generally control. *See*, e.g., Weinberger v. Rossi, 456 U.S. 25 (1982).
was primarily focused on the border area, but its scope extends to all environmental issues of common concern. In 1987, Annex III to the agreement was signed and went into force regarding the transboundary shipments of hazardous wastes and hazardous substances. The agreement contains provisions for: written notification; readmission of exports for any reason; sharing of research data on mitigation and avoidance of adverse affects to health, property and the environment; enforcement cooperation; and the requirement that all hazardous waste shipments be governed by both the terms of the Annex and domestic laws and regulations. In 1988, Mexico banned the import of all hazardous wastes solely for disposal or storage, thereby excepting import for recovery or recycling. At the present time, the only RCRA-regulated hazardous waste exports from the U.S. to Mexico are those of bag house dust, a by product of electric arc furnaces’ emission control filters used in steel manufacturing. In 1996, the entire U.S. hazardous waste export to Mexico was 104,408.2 short tons of this emission control dust.

2. Maquiladora Program: Free Trade Zones and Hazardous Waste

As part of the La Paz Agreement Annex III, the U.S. and Mexico agreed that hazardous waste generated in maquiladora industries on the U.S.-Mexico border from raw materials allowed into these “free trade zones” without payment of customs tariffs would be returned to the U.S. for disposal. However, some estimates are that over 25% of the hazardous waste generated is unaccounted for, and “much of the hazardous waste that should be coming back to the United States for proper disposal is probably not being returned.”

130. The treaty defines border area as “the area situated 100 kilometers on either side of the inland and maritime boundaries between the Parties.” U.S.-Mexico Treaty, supra note 8, at art. 4.
132. Id. at art. III(2).
133. Id. at art. IV.
134. Id. at art. X(1).
135. Id. at art. XII.
136. Id. at art. II.
138. Annex III, supra note 131 at 28, art. XI, (Hazardous Waste Generated From Raw Materials Admitted In-Bond.) (“Hazardous waste generated in the processes of economic production, manufacturing, processing or repair, for which raw materials were utilized and temporarily admitted, shall continue to be readmitted by the country of origin of the raw materials in accordance with applicable national policies, laws and regulations.”) See also Mexico General Law, supra note 123, at art. 153 (hazardous waste produced from raw materials imported in-bond must be returned to exporting country).
139. See Eaton, supra note 35 (citing article by Alberto Bustani, entitled Environmental Needs and Infrastructure in Mexico 3 (1995) on file with the St. Mary’s Law Journal).
140. Testimony attributed to “GAO representatives” as part of findings after year-long review of maquiladoras by GAO. H.R. Rep No. 1086, 102nd Cong. 2nd Sess. (1992). For a discussion of tracking problems of waste generated in maquiladoras, see also Elizabeth Rose, Transboundary Harm: Hazardous Waste Management Problems and Mexico’s Maquiladoras, 23 Int’l L. 223, 231-32 (1989). The EPA has prosecuted at least two waste companies who re-imported maquiladora hazardous wastes without notice and consent to the EPA. In the Matter of Rollins Envtl Services, Inc., Doc. No. RCRA-VI-106-H U.S.E.P.A. (June 16, 1994) (the ALJ found that even though the
3. Border XXI Program

In 1996, the U.S. and Mexico agreed to a five-year plan of coordination and cooperation between environmental agencies in both countries on issues affecting the environment and sustainable development along the border. The agreement subdivides the border into five geographic regions and provides for public participation, decentralized management, and cooperation among national, state and local agencies in both countries. On the U.S. side, agencies that have been actively involved include: the EPA, the Department of the Interior, the Department of Agriculture, and the Department of Health and Human Services. Participation on the Mexican side includes: the Secretariat for the Environment, Natural Resources, and Fisheries (SEMERNAP), the Secretariat for Social Development (SEDESOL), and the Secretariat of Health (SSA). The heart of the agreement is nine workgroups that meet to determine policy directions in these areas of environmental concern. The workgroups are: Natural Resource, Water, Environmental Health, Air Quality, Hazardous and Solid Waste, Contingency Planning and Emergency Response, Environmental Information Resource, Pollution Prevention, and Cooperative Enforcement and Compliance. The Hazardous Waste and Solid Waste Workgroup focuses on transboundary movements of waste, transboundary effects from hazardous waste disposal, development of new disposal sites, and the maintenance or clean up of old sites. Coordination of monitoring and enforcement are primary goals of the workgroup.

B. Canada

In the early 1980s, over 85% of the hazardous waste exports from the U.S. were sent to Canada. In recent years the total amount of hazardous waste

Annex III treaty provision required re-importation of the waste, notice to the U.S. was not superfluous but rather “essential to the U.S. fulfilling its monitoring obligations under the Executive Agreement and that EPA has interpreted the Agreement as allowing temporary detention of the waste until e.g., RCRA marking and labeling requirements have been complied with and a proper destination supplied on the manifest.”; In the Matter of Chem. Reclamation Services, Doc. No. RCRA-VI-104-H U.S.E.P.A. (Nov. 30, 1995).


142. Analogous to the Department of the Interior.

143. Analogous to the EPA and in charge of enforcement.

144. Six of the Workgroups had already been established to work on these issues under the La Paz agreement.

145. Of special concern is the contamination of aquifers which straddle the border. See also International Markets: Mexico Publishes Hazwaste Policy; Would Create Confinement Zones. HAZARDOUS WASTE NEWS, October 28, 1996, Available in LEXIS, Nexis Library, IAC Database (reporting that Mexico had issued an inventory of 55 geographical zones “suitable” for hazardous waste confinement and treatment sites, the proposal for new sites would include strengthening enforcement and reporting. The report also notes that Mexican officials’ report that currently 88 percent of hazardous wastes are “improperly managed”).

sent to Canada has risen while the percent of U.S. hazardous waste it receives has fallen to approximately 50% of total U.S. exports. Waste trade with Canada is governed by the bilateral treaty signed in Ottawa on October 28, 1986. The treaty provides for notification and documentation nearly identical to that in the U.S. regulations. However, the treaty also provides for tacit consent if the importing country fails to respond within 30 days of notification. Issues raised by exports to Canada are somewhat different than those that have been raised by export to Mexico or non-OECD or developing countries. This may be based on a perception that Canada can more effectively protect itself. Canada has strict environmental laws and comprehensive enforcement at much the same "level" as the U.S. However, Canada uses a very different system, one that is risk-based, to determine hazardous waste treatment and disposal requirements. Concerns do not generally focus on whether these practices are sufficient to protect Canada, but whether they will protect U.S. interests across the border and protect the Great Lakes, our shared resource.

The difference in types of risk assessment noted between Canada and the U.S. is reflected in proposals that have been made in Congress to allow export to countries that have environmental laws "no less strict than" or an "equally effective set of preventative controls as" those in the U.S. This seemingly straightforward criterion, however, calls for complex and subjective judgments on a case-by-case basis. Many countries, whether or not they enforce their own comprehensive environmental protection regulations, use different models and assumptions to develop their regulations. This makes it difficult to make accurate comparisons between countries. For example, many countries have strong environmental laws on the books but do not enforce them rigorously.
nal behavior and fraudulent labeling make it more difficult still to ensure that strict enforcement of regulations and environmental protection goals will be met, despite monitoring, manifests, and integrated databases.

V.
THE BASEL CONVENTION: THE U.S. REMAINS A SIGNATORY BUT NOT A PARTY

A. Basel Convention

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel) currently has 121 parties. While much has been written and debated about the Basel Convention, perhaps the most salient fact is that the United States has not yet ratified it. The U.S. remains a signatory but is not a party. Therefore, the treaty lacks the force of law within the United States, the world’s largest single producer and exporter of hazardous wastes.

The Basel Convention includes agreements that: (1) the transboundary movement of hazardous waste should be reduced to a minimum consistent with environmentally sound management; (2) hazardous waste should be treated and disposed of as close to the source of generation as possible; and (3) the generation of hazardous waste should be reduced and minimized at the source. These common sense objectives are not problematic in themselves, but the more expansive definition of hazardous waste under Basel may be the crucial issue blocking U.S. participation. The main regulatory mechanisms of Basel are: notice, consent, and either reshipment to the exporter or proper on-site disposal of waste, paid for by the exporter when so requested by the country of import. Many counties that are parties to Basel are also members of other interna-


157. The U.S. is the largest hazardous waste generator both as defined by Basel and under the narrower Section 3107 definition. Basel has continued to refine its definitions of hazardous waste; at Kuching the Convention adopted new comprehensive lists of hazardous wastes presented by the parties. See infra at note 169.
158. For example, exceptions for countries without disposal capacity (e.g. Luxembourg) or geological features making environmentally sound facilities nearly impossible (e.g. Holland).
159. See infra text accompanying note 172 on attempts to ratify Basel.
160. See infra text accompanying note 172 on attempts to ratify Basel.
161. Basel has provisions for reshipment of wastes which violate the convention, placing liability for reshipment and safe disposal on the country of origin. "(2) "[T]he State of export shall ensure that the wastes in question are (a) taken back by the exporter or the generator, or, if necessary, by itself into the State of export, or, if impracticable, (b) are otherwise disposed of in accordance with the provisions of this Convention. . . ." Basel Convention, supra note 9, at art. 9 (Basel requirement of reshipment or environmentally sound disposal).
tional, multilateral, and bilateral treaties, as well as trade organizations. Therefore, it is not always clear which agreements trump on various issues.  

At the second session of the Basel convention, the Conference of the Parties adopted Basel II/12, a ban on the export of hazardous waste from OECD to non-OECD countries which included a ban on the export of hazardous waste for recycling that was to go into effect in 1998. This ban in particular has created confusion for parties to Basel, both OECD members and non-OECD members, who trade with the U.S. in hazardous waste. In addition, the U.S. regulations implementing the OECD decision are in conflict with the Basel II/12 ban.

B. Definitions in Basel

Many news reports use the terms “toxic waste” and “hazardous waste” interchangeably to describe exports that may be considered hazardous waste under either the Basel convention or other standards, but are exempt under RCRA export standards. Klaus Topfer, the executive director of the United Nations Environmental Program has estimated that 450 million tons of toxic waste are created annually. However, in 1995 the total U.S. generation of RCRA regulated hazardous waste was 214,092,505 tons, of which only 226,393 tons were exported.

162. The U.S. position seems to be that the order of preference is bilateral over multilateral when agreements conflict. A number of parties also rank these agreements as such (i.e., NAFTA over OECD). Further, under U.S. law, more specific treaties always supersede more general agreements, and specific language supersedes general language.


164. Although too few parties have actually ratified the changes adopted at the Second Conference of the Parties for the ban to go into effect, many have begun to try to implement the ban. Confusion about what would come under the ban is one impediment to its ratification. Under Basel, green list wastes are considered hazardous, but under EU and OECD standards they are not.

165. See supra text accompanying note 204.

166. Confusion is not limited to the U.S. definitions. European Union countries have had a hard time adjusting to and sorting out definitions as various bans on exports for disposal or recovery go into effect. See Legal Trouble Brews As Chaos Hits Waste Recovery, ENVT. BUS., June 15, 1994, available on LEXIS, Nexis Library, IAC Database; OECD to Conduct General Review of Product/Waste Distinction, ENVT. WATCH W. EUR., Nov. 4, 1994, available in LEXIS, Nexis Library, IAC Database (discussion the status of scrap metal as 'legitimately traded' worldwide as a feedstock for industry, and discussion of industry's preference for looking at issue as waste versus product as distinct from hazardous versus non-hazardous waste). This points to other labeling problems which make enforcement of export controls especially difficult. Mislabeling of scrap metal most likely led to the Acerinox Steel plant accident in Algeciras, Cadiz, Spain in the Summer of 1998, involving scrap metal contaminated with Cesium-137 that created a radioactive plume over France, Italy, Switzerland and Germany that was not detected in Spain due to the wind patterns. See Italian Justice Opens an Investigation on the Radioactive cloud of Algeciras, EL PAIS, June 15, 1998, <http:www.el-pais.es> (noting that environmental groups pointed out that the incident raised issues of illegal traffic in toxic waste and recyclable remainders). See also Smelter Contamination: Accidental Source Melting Reflects Insufficient Regulation of Users, NUCLEAR WASTE NEWS, May 18, 1995, available in LEXIS, Nexis Library, IAC Database (reporting that NRC report identifies Cesium-137 contamination in scrap steel which not only contaminates the steel and the plant but also the dust effluent from which zinc is recovered, tracing the problem to the accountability of radioactive sources).

167. EPA 1995 REPORT, supra note 38.
The fourth session of the Basel Convention specifically dealt with lists of wastes which could be exported and those which would be banned from export. Included in the list of hazardous waste specifically banned for export under Basel are: wastes for disposal containing arsenic, asbestos, lead, and mercury.\textsuperscript{169} Wastes which are allowable exports for recovery include: scrap iron, steel or copper, non-hazardous catalysts.\textsuperscript{170} Lead-acid batteries are just one example of a waste that is exempt from RCRA section 3017 export controls but considered hazardous waste under Basel.\textsuperscript{171}

C. Attempts to Ratify Basel in the United States

As early as 1988, the Waste Export Control Act was introduced in Congress.\textsuperscript{172} The bill would have broadened the class of wastes subject to RCRA export restrictions and imposed the condition that treatment standards of importing facilities be “no less strict than” U.S. standards for treatment of hazardous wastes. The bill would also have imposed cleanup liability on waste exporters, required insurance or bond, and guaranteed EPA access to foreign facilities for inspections.\textsuperscript{173} The bill failed to pass in 1988, but was re-introduced in 1989 and again failed to win support. In 1992, President Clinton proposed that the Senate ratify Basel and presented the treaty to the Senate for ratification along with a document describing the steps that would be necessary to change existing

\textsuperscript{168} See chart, supra page 101.
\textsuperscript{170} Scrap Metal Exempt from Basel Ban, \textit{Waste Treatment and Tech. News}, March 1998, available in LEXIS, Nexis Library, News Database. The exemption of scrap metal for recycling was crucial and controversial. Although many scrap metals fit hazardous definitions (mostly due to hazardous paints and solvents found on them) they are used as raw material in less developed countries and it is often not economical to recycle scrap metals in many OECD countries. \textit{OECD to destroy Ghana’s Scrap Industry?}, HAZNEWS, Feb. 1, 1998, available in LEXIS, Nexis Library, IAC Database (stating that in confusion over exact terms of Basel, EU countries had already rejected requests to allow import of secondary materials (not all hazardous) for reuse to Ghana. The Ghanaian scrap industry employs over 4 million people); \textit{OECD Hazwaste Export Ban by 1998}, HAZNEWS, May 1994, available in LEXIS, Nexis Library, IAC Database (lengthy negotiations on Basel ban and resistance to ban on export of “secondary materials” would result in landfill of low-value metal residues in industrialized countries). Approximately 5 million tons of scrap metal were sent to South Korea and India between 1990 and 1993. \textit{OECD Countries Dump ‘Toxic’ Wastes in Asia?}, HAZNEWS, March 1994, available in LEXIS, Nexis Library, IAC Database. There has also been confusion over the distinction between incineration for disposal and incineration for recovery of valuable metals. See, \textit{Varied Environmental Progress in ’94 says CEFIC (European Chemical Industry Council)}, HAZNEWS, Sept. 1995, available in LEXIS, Nexis Library, IAC Database.
\textsuperscript{171} Basel IV must still be ratified by parties before the new definitions go into effect. The lists are quite detailed and include “lead acid batteries whole or crushed” as well as “ash from incineration of circuit boards.” See Conference of Parties, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Annex VIII, List A. Wastes covered by the Conference of Parties (COP) 4 decisions include lead acid battery waste, <www.unep.ch/basel/index>.
\textsuperscript{172} Waste Export Control Act, S. 2598, 100\textsuperscript{th} Cong. (1988); H.R. 3736, 101\textsuperscript{st} Cong. (1988).
\textsuperscript{173} See generally Mounteer, supra note 50 (describing the features of the bill as reintroduced in 102\textsuperscript{nd} Congress).
U.S. laws to conform with the treaty. Though the Senate debated giving “advice and consent” on the Basel Convention, the ratification was not achieved. In 1994, the Waste Export and Import Control Act (Synar-Swift Bill) was introduced to the Congress, but also failed to pass into law. Again, in 1997, Rep. Towns introduced the Waste Export and Import Prohibition Act in the House of Representatives where it died in committee.

All of these bills have essentially the same contours and any of them would have served to ratify the Basel Convention into law. Clearly the issues presented by the export of hazardous wastes are not hidden from the Congress; rather, they have been introduced and debated repeatedly. Congress has chosen not to ratify Basel and has also chosen not to independently expand the current hazardous waste export provisions.

Why has Congress failed to ratify Basel or to adjust U.S. laws to meet the emerging worldwide hazardous waste consensus, and what interests and constituencies are driving these results? Industries that generate hazardous wastes are a strong constituency that clearly see export as a cheaper alternative to environmentally sound disposal and management of hazardous waste within the U.S. In addition, public liability issues are also a likely factor. However, the failure of environmental groups to mobilize around this issue is also a significant factor.

Environmentalists’ concerns about international environmental justice clash with the commonly held “not in my backyard” attitude of legislators, U.S. citizens, and even domestic environmental groups. Domestic environmental groups do not want hazardous waste disposed of where it will damage the U.S. environment or public health within communities (and the environmental justice movement has broadened the definition of the term ‘communities’). As groups with mostly grassroots constituencies, these domestic goals are the first priority of many domestic environmental groups. Internationally- or globally-focused environmentalists who address the issue of hazardous waste disposal stress that all countries must reduce the amount of hazardous waste generated, and that exporting waste to less developed nations is a form of environmental racism.

178. See supra note 161. (Basel requests that the country of origin take responsibility for the waste, not just the private party exporter).
180. Greenpeace has taken this position. “Greenpeace has always believed in the fundamental principle that we should no longer needlessly dump wastes into the environment and that we must act responsibly to reduce waste, recycle non-hazardous waste and treat or contain harmful materials.” Brent Spar Meeting Between Greenpeace and Shell <http://www.greenpeace.org/-comms/brent/sep08.html>. A first step towards the goal of reducing exports would be to expand U.S. regulations to cover the monitoring of these wastes, expansion of the scope of Section 3017 would at least accomplish this. See also Hugh J. Marbury, Hazardous Waste Exportation: The Global Mani-
Forcing the internalization of the costs of disposal by industry may be the only way to reduce the generation of hazardous waste in an essentially free market economy. Within the U.S., regulations are comprehensive and are generally enforced. If generators were forced to keep hazardous waste “at home” the current regulations would have the strongest economic effect. By taking into account the long-term global benefits of forcing generators to deal with the waste within the U.S., environmentalist may be able to mobilize support for stronger export regulations.

VI.
MULTILATERAL AGREEMENTS IN FORCE: OECD DECISION, NAFTA AND GATT

This section looks at three multilateral agreements to which the U.S. is a party: OECD, NAFTA, and GATT, and the terms of those agreements that directly affect U.S. hazardous waste exports.

A. The Role of the OECD In Framing the Issues for the International Debate on the Transfrontier Movement of Hazardous Waste

This section focuses on OECD and its ongoing efforts to utilize an economic model in dealing with environmental issues because it is a precursor to, and an essential model for, the newer global economic treaties and organizations which are now at center stage in the international debates on economics and the environment. Unlike NAFTA and WTO / GATT, environmental issues have been integrated into the OECD agreements with little fanfare or discord. This may be partly due to the relative economic homogeneity of OECD members and the focus on trade policy over detailed regulation. During 1994, when the ratification of NAFTA in the U.S. and the environmental side agreements were hard fought, Mexico joined OECD. At that time all three countries in the NAFTA environmental side agreement became subject to quite similar existing OECD agreements that also deal with transboundary pollution and waste shipments.

The OECD Council took an early interest in the transfrontier pollution issues, focusing on “the interrelationships between population, resource and festation of Environmental Racism, 28 VANDERBILT J. OF TRANSNATIONAL L. 251 (1995) (arguing that the same issues raised by environmental justice on siting of waste facilities in the U.S. are present in the export of hazardous waste to other countries where the waste disproportionately impacts poor and minority populations; in essence, that the export of hazardous waste raises environmental justice issues on a global scale).

181. OECD member countries are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden. Switzerland, Turkey, the United Kingdom, and the United States. However, this is changing as more “mid-level” economies are being admitted to the OECD. In 1995 the Czech Republic was admitted, and in 1996 Hungary, Poland and Korea were admitted.

182. For example, the Environment Committee of the OECD held a special session on April 1981 to address environmental challenges for the 1980s. OECD, ECONOMIC AND ECOLOGICAL INTERDEPENDENCE (OECD, 1982), at ii n.1.
environment issues on the one hand and sustainable economic development on the other.”

The primary mandate of the OECD is multilateral economic cooperation and development, and the OECD realized that issues including production and consumption patterns, transboundary effects of pollution, resource management, soil degradation, and loss of genetic materials would “prove resolvable or avoidable only through increased co-operation among countries.” The OECD’s focus on international movement of hazardous wastes was spurred by the discovery of abandoned waste sites throughout the world. The OECD noted that the difficulty of siting hazardous waste disposal, long term costs of proper disposal, and ongoing liabilities associated with hazardous waste sites “provide strong incentives to ‘export’ such wastes to other regions or countries for treatment or for temporary or permanent storage.”

The OECD recognizes that there are legitimate reasons to export hazardous waste, such as geographic/geological limitations, lack of treatment or disposal capacity, highly specific treatment needs where the exporting country lacks the technology to treat the wastes adequately, transportation distances, or the economic use of the waste as raw material in another industry. “[H]owever, under other conditions, the export of hazardous wastes may simply reflect a search for a jurisdiction in which environmental awareness and regulations are weak or non-existent.” OECD countries produce most of the hazardous waste worldwide; this makes the need for cooperation among OECD countries particularly strong. The need for coordination of national policies and international cooperation led to the 1992 Decision calling for uniform labeling. However, more work remains to be done in other areas. For example, uniform documentation, tracking and monitoring, uniform definitions, meaningful in-

183. Id.
184. Id. at 3.
185. Id. at 29 (noting especially Love Canal (U.S.) and Lekkerkerk (Netherlands)).
186. Id. at 29.
187. For example: the Netherlands has a very high water table and had banned land disposal of hazardous wastes within the country. However, in 1990 a chemical waste dump was opened in Rotterdam’s Maasvlakte to relieve some pressure from exports of chemical wastes from the Dutch chemical industry. The dump is fully sealed to prevent seepage and will hold less than half of the annual chemical waste output. Dutch Open Chemical Dump to Cut Back on Waste Exports, Int’l Petrochemical Rep., April 19, 1990, at 5.
188. OECD, supra note 182 at 30. This statement is a bit dated, environmental awareness at least among the educated people and within governments worldwide is now widespread. In addition, environmental regulations are often excellent on paper. Currently it is more likely that the lack of consistent enforcement of environmental regulations and the dire needs for short term economic gain are the magnets for international hazardous waste export.
189. Approximately 80% in 1982; currently, the U.S. accounts for over 50%. See Asante-Duah, supra note 3, at 1684.
190. See OECD Decision 92(39), supra note 10. Discussion of U.S. incorporation of this standard shows that there will still be little uniformity.
international notification, and insurance and liability issues all still need to be agreed upon.

The OECD Council adopted the "polluter-pays principle" as an economic guideline for members in 1972. This decision reflected the OECD's determination that "economic efficiency would be promoted and distortions of trade avoided if the pollution control policies of Member countries required polluters to internalize their external costs . . . [it] was intended to ensure that the full costs of pollution control or prevention measures should be reflected, in turn, in the costs of the goods produced and marketed." The adoption of this principle was an acknowledgment that OECD countries, as the major investors and industrial producers worldwide, have obligations not to abuse the "global commons" by externalizing the costs of pollution to other countries, whether OECD members or not. The OECD has endorsed the use of economic instruments for environmental protection because the experience of member countries has shown that economic instruments used in conjunction with domestic environmental regulation can: yield substantial cost-savings, create incentives to lower pollution below regulatory levels, increase flexibility of regulatory schemes, promote resource conservation, and may provided needed sources of financing for environmentally sound economic development.

The OECD has specifically endorsed the use of environmental taxes (both emissions charges and product charges), marketable pollution permits, and deposit refund systems. Direct subsidies to industries for environmental protection and clean up may be acceptable, but the OECD does not endorse general subsidies to industries because they lead to market distortions, which are incompatible with the polluter-pays principle. In the waste arena in particular, "user charges are aimed at the proper collection, processing and storage of waste or at restoration of old hazardous waste sites." Both use and disposal charges create incentives to minimize waste generation, discourage generation of waste-intensive products, and promote the development and use of environmentally

192. See also Martine Remond, The Carriage of Hazardous Waste and the Liability Question, id. at 210 (examining the issue raised by insurance of "goods" of zero economic value which reverses the normal incentive of transporters not to lose or damage goods in transit, in fact creating strong incentives to "lose" these "goods" at sea); Rudiger Lummert, Liability of the Generator and the Disposer of Hazardous Wastes, id. at 230 (exploring the problems associated with differing liability regimes, choice of law, and purpose or incentives created by those differing liability regimes); S. Baumgartner & P. Tobler, Contract Clauses with Respect to Transfrontier Movement of Hazardous Waste, id. at 285 (arguing that contracts clauses are suitable to cover gaps in regulations within Europe, but written before the EC existed. There are presumably fewer choice of law issues now.).

193. OECD, ECONOMIC AND ECOLOGICAL INTERDEPENDENCE (OECD 1982) 68 n.1 (discussing Guiding Principles Concerning International Economic Aspects of Environmental Policies, C(72)128 (1972)).

194. Id. at 68.

195. Id. at 70.


197. See id. at 15-18.

198. Id. at 39.
sound substitutes. Marketable permits have not yet been used in this area and likely would have little efficacy without stronger controls and monitoring worldwide. Because waste is easily shipped and hard to recognize at border control points, the move towards greater free trade and fewer border controls makes it crucial to coordinate rules for waste management and to integrate environmental and trade policies so as to include the basic notion that waste is different from normal free-tradable products.

1. OECD Declaration

On March 30, 1992, the OECD adopted Council Decision C(92)39 Concerning the Control of Transfrontier Movements of Hazardous Waste Destined for Recovery Operations. This Decision was supported by the U.S. and imposes legally binding obligations on the United States. Unlike the Basel Convention, to which the U.S. is a signatory but not a party, the OECD Council Decision C(92)39 is binding on the U.S. The OECD decision stemmed from recommendations, made during the Basel II meeting at Geneva, that exports of hazardous waste for disposal be banned between OECD and non-OECD countries, and that waste exports for recovery be limited to OECD countries and banned between OECD and non-OECD countries after January 1, 1998. The EPA promulgated regulations implementing the Decision which include uniform labeling of hazardous waste exports for recovery in other OECD countries. These EPA / OECD regulations are an attempt to facilitate shipment of waste for recycling and recovery between the U.S. and other OECD countries who are parties to the Basel Convention.

Although the U.S., Canada, and Mexico are all OECD members, the regulations do not appear to apply to hazardous waste exports from the U.S. to Canada and Mexico. The EPA has interpreted the bilateral agreements to supersede the OECD agreement. Therefore, those exports continue to be regulated under the bilateral agreements and the U.S. regulations for export already in effect.

199. Id. at 40. Charges for disposal or use should be based on toxicity, quantity, costs of disposal, direct environmental damages, and a “use” fee for residual environmental risks. See id. at 43. Deposit refund systems provide incentives to consumers to return spent products but do not directly impact the waste handling after that point, which is the focus of this paper.

200. See id. at 43.


203. See discussion of Basel, supra notes 163, 164 and accompanying text. Not enough countries have ratified this decision for it to go into force.


205. Imports and Exports of Hazardous Waste: Implementation of OECD Council Decision C(92)39 Concerning Control of Transfrontier Movements of Wastes Destined for Recovery Operations, 61 Fed. Reg. 16,290 (1996). “These requirements will apply only to U.S. exporters and importers of RCRA hazardous wastes destined for recovery in OECD countries (except for Canada and Mexico; waste shipments to and from these countries will continue to move under the current bilateral agreements and regulations).” Id. at 16290. Furthermore, these regulations fail to address any limits on exports to non-OECD countries which were enated by Basel II.
Basel explicitly states that bilateral and multilateral regional agreements with parties or non-parties override Basel requirements between the countries. Because the U.S. is not a party to Basel, and both Canada and Mexico are parties, the bilateral treaties control transactions between the three countries under Basel as well. However, as parties to Basel, Canada and Mexico may still need to find ways to reconcile contradictory requirements in the Basel Convention and the OECD treaty, such as the inconsistent labeling standards and definitions.

2. EPA Response: New Regulations

In 1996 the EPA promulgated regulations designed to “harmonize” the OECD requirements for labeling of hazardous waste exports with the U.S. requirements under Section 3017. In general, the regulations require: (1) that hazardous waste only be exported for recovery or recycling; (2) the notification and consent of the importing country; and (3) the additional labeling of the hazardous waste for export on a tracking document using the OECD system identifying “green-list”, “amber-list” and “red-list” wastes. Green-list wastes “are subject to existing controls normally applied to commercial transactions,” unless they are considered hazardous under U.S. law or are contaminated or mixed with wastes considered hazardous under U.S. law. However, if the wastes are not considered hazardous under U.S. procedures, they “may move as though they appeared on the green list.” In essence, the U.S. definitions of hazardous waste for export still control how the wastes are labeled.
These regulations were intended to facilitate transboundary movements of hazardous wastes for recovery, particularly between the U.S., which is not a party to the Basel Convention, and OECD countries (other than Canada and Mexico) that are parties to the Convention. The regulations apply to the same hazardous wastes as covered by RCRA section 3017 and do not expand or over-ride the tracking or notification procedures of that section. Rather, the regulations merely add another form of labeling. While the OECD Decision requires that hazardous waste exports only be made for recovery, the new U.S. regulations apply to a more limited class of waste. The new regulations restrict export for disposal only of waste already regulated under Section 3017, and only where a bilateral treaty does not exist that allows exports for disposal, such as that between the U.S. and Canada. The new regulations do not restrict export for disposal of waste exempt from Section 3017. Because the EPA originally interpreted Section 3017 to regulate exports of only a limited class of hazardous waste, the EPA did not expand the scope of the export regulations beyond that limit under the OECD Decision. Therefore, the EPA’s OECD regulations do not regulate wastes that are considered hazardous by other OECD members if those wastes are not defined as hazardous under RCRA. Nor do the new regulations broaden the scope of the regulations to include the export of RCRA-exempt hazardous waste. The new regulations primarily create another labeling requirement, without moving any closer to uniform definitions of hazardous waste. How the waste is labeled will still be dependent upon the definition of hazardous waste in the country of origin, where the label is attached.

B. NAFTA

The North American Free Trade Agreement (NAFTA) between the United States, Mexico and Canada specifically incorporates as controlling the bilateral agreements between the U.S. and Canada, and the U.S. and Mexico, as well as other Multilateral Environmental Agreements (MEAs) between the parties (including Basel, to which both Mexico and Canada are parties). NAFTA itself makes no specific reference to hazardous waste regulation, but includes a prohibition on lowering environmental standards to increase trade or attract investment. The Environmental Side Agreement provides for sanctions if a country fails to enforce its own environmental standards, and allows
countries to increase regulations to protect human, plant and animal health and life, but it is silent on standardizing hazardous waste definitions between the countries. Therefore, Mexico is in a position to develop more recycling capacity and legally increase its hazardous waste imports for recycling and recovery. However, Mexico presumably can not change the import ban on disposal of hazardous waste in order to attract waste trade from other countries.

The increase in cross-border traffic expected under NAFTA will make it more difficult to monitor shipments and to identify illegal shipments. In addition, NAFTA will eventually eliminate all import duties between the three countries; at that time the current in-bond system and hazardous waste return provision for maquiladoras will become ineffective. Without import duties, manufacturers will not be able to gain any reduction in duties by complying with the requirement that they repatriate the waste to the U.S.

monitor and enforce RCRA section 3017 and the border in-bond system and, if so, what the penalties would be.

221. Id. at art. 712 (1).

222. Whether the import ban for disposal actually qualifies as an environmental standard to protect local health and safety, or whether it would be considered a different kind of legislation, and what standards are used to make this determination is unclear. Mexican standards for disposal are quite comprehensive on paper but unevenly enforced, and lack of enforcement can be sanctioned under NAFTA. This web of agreements could lead to a large number of cross suits over a single illegal export for disposal, and that litigation may not adequately compensate or clean up the problem. Mexico could claim that the U.S. failed to enforce export controls and the U.S. could claim that Mexico failed to enforce the prohibition against illegal dumping. Meanwhile, the responsible private party could escape most RCRA liability applicable only in U.S., except fines for illegal export under RCRA. However, a private Mexican citizen who was harmed by the illegal disposal would have to sue the private U.S. company using the Alien Tort Claims Act with NAFTA, or a side agreement, or the bilateral agreement as the international law violated. See discussion infra Section VII.

223. Eaton, supra note 27 at 719-22 (positing Mexico as the "path of least resistance" for illegal dumping in part because of the maquiladora trade, the high cost of disposal in the U.S. and the perception of lax enforcement within Mexico on waste issues). Industrial relocation under NAFTA will also increase the amount of hazardous waste produced in Mexico without necessarily expanding the treatment, storage and disposal capacity. Id. at 723-24. However, a parallel development is taking place with increased trade in environmental technology and investment for environmental infrastructure. Estimates are that 5 to 7 million tons of hazardous waste is generated in Mexico annually. Hazardous waste management is estimated to cost $115 million per year. U.S.-based waste management companies currently operating in Mexico include Waste Management Inc., Metalclad, Inc., and WMX Technologies. Policy Proposals for Hazardous Waste in Mexico, HAZNEWS, August 1994, available in LEXIS, Nexis Library, IAC Database. U.S. environmental technology exports to Mexico were expected to grow from $1.5 Billion in 1992 to $2.6 Billion in 1995. Commerce Eyes Mexican Markets, WASTE TREATMENT TECH. NEWS, January 1995, available in LEXIS, Nexis Library, News Database; see generally U.S. Companies Should Not Fear Foreign Markets, SUPERFUND WEEK, Nov. 21, 1997, available in LEXIS, Nexis Library, News Database; Armin Rosencranz et al., Rio Plus Five: Environmental Protection and Free Trade in Latin America, 9 GEO. INT'L ENV'T'L. L. REV. 527, 535-36 (1997) (particularly noting competitive advantage of U.S companies whose products meet high international standards for equipment and efficacy, citing efforts by Cal/EPA to have International Standards Organization specifically adopt California standards).

C. GATT / WTO: Free Trade Agreements and Environmental Agreements on Hazardous Waste

The General Agreement on Tariffs and Trade\(^{225}\) and the World Trade Organization\(^{226}\) prohibit unfair trade practices between parties while accommodating the use of trade-related measures for environmental purposes in bilateral or multilateral environmental agreements (MEAs). The agreement allows for restrictions based on legitimate environmental concerns of nations. Article XX of the GATT allows WTO members to legitimately place public health and safety, and national environmental goals ahead of obligations not to raise trade restrictions.\(^{227}\) Article XX(b) explicitly allows for measures which are "neither arbitrarily applied nor unjustifiable discrimination between countries" where the same conditions prevail.\(^{228}\) However, such measures cannot be disguised as restrictions on trade, and are allowable only if they are necessary to protect human, animal or plant life or health.\(^{229}\) This exception theoretically allows for both import and export controls on hazardous waste between countries, as long as such controls are applied evenhandedly among nations similarly situated, and the controls are imposed for legitimate environmental ends.\(^{230}\) In sum, under the terms of the WTO, only MEAs between countries similarly situated in terms of trade are allowed, and only domestic environmental concerns can be valid motivations for trade barriers.

Sovereignty issues may arise when one country raises trade issues based on internal environmental conditions in another country, e.g., conditioning exports on environmental regulations in the importing country and how they are enforced. Some commentators have urged an end to all export regulations and an integrated worldwide system of regulation of hazardous waste for processing and recycling.\(^{231}\) While this suggestion is attractive in its simplicity, it does not address the sovereignty concerns of either importing or exporting nations.

The Committee on Trade and the Environment (CTE) is working within the WTO to encourage multilateral agreements and cooperation instead of unilateral solutions to transboundary environmental issues.\(^{232}\) Trade restrictions are dis-

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\(^{225}\) General Agreement on Tariffs and Trade, supra note 12.

\(^{226}\) See supra note 12.

\(^{227}\) General Agreement on Tariffs and Trade, supra note 12.

\(^{228}\) Id.


\(^{230}\) For in-depth discussion of WTO provisions and environmental agreements in general, see Schoenbaum, supra note 229 at 304-305 (arguing that "emerging international hazardous waste regimes seem reconcilable under the WTO/GATT system."); but see Shannon Hudnall, Towards a Greener International Trade System: Multilateral Environmental Agreements and the WTO, 29 COLUM. J. L. & Soc. PROBS. 175 (1996).

\(^{231}\) See O'Reilly and Cuzze, supra note 149, at 529 (arguing generally that traditional notions of free trade economics and rational systems of oversight will promote pollution prevention among industrial recyclers worldwide more effectively than current agreements or proposed international agreements like Basel).

\(^{232}\) CTE is concerned primarily with disputes arising from trade provisions in MEAs. At the 1991 meeting the issues that were discussed included the interface between trade and domestic
couraged and are suspect under this model as presumptively not the least restrictive alternative. The WTO allows for trade measures that protect the domestic environment, but discourages any measures that distort trade "too much" or in the "wrong" way. For example: "The GATT Secretariat has recommended that countries rely on 'carrots' rather than 'sticks' to induce the participation of other countries in multilateral environmental agreements." To date no cases directly dealing with the transboundary movement of hazardous wastes have been brought to WTO for resolution. Whether international trade agreements will ultimately lead to a "trading up" effect which eventually pulls all trading partners to higher regulatory standards remains to be seen.

233. Howard Chang, Carrots, Sticks and International Externalities, 17 INT’L REV. L. & ECON. 309, 309 (1997) (prompted by the Tuna-Dolphin decisions and using economic modeling, this paper explores how such a model in WTO / GATT would create perverse incentives for countries to pollute more to get more “carrots” in negotiating MEAs). However, the main concern of WTO / GATT is that any trade measures justified by reference to domestic environmental concerns could be used to disguise protectionist measures, and that the costs of the abuse of such trade measures would outweigh the benefits of environmental protection. Id. at 324. How an international trade organization would set out to measure the domestic benefits of environmental protection is far from clear and is not uncontroversial.

234. Schoenbaum, supra note 229, 304-305 (theorizing that WTO will use MEA and “safe harbor” provisions to uphold Basel or similar treaties which restrict trade between more and less developed countries, as well as an export ban to protect areas outside the territory of the trade restricting country); but see Chris Wold, Multilateral Environmental Agreements and the GATT: Conflict and Resolution?, 26 ENVTL. L. 841, 888 (1991) (arguing that GATT would be violated by Basel distinctions between parties and non-parties). See also David Wirth, Trade Implications of Basel, INT’L ENVT'L REP., Sept. 4, 1996, BNA, available in LEXIS, Nexis Library, BNA-ENV Database. DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 140 (1995) (finding Basel would violate GATT rule against nondiscrimination, especially insofar as it includes “other wastes” including scrap metal which are commercially valuable (however, 1998 Basel IV specifically exempts scrap metal from agreement)). See also id. at 264-65 (discussing greening of GATT and how integration of trade will raise standards. However, unilateral export controls (not based on an agreement between the parties) by the U.S. would clearly violate the WTO if tied to importing country’s environmental laws and enforcement).

235. See generally Vogel, supra note 234.

236. This is also called the "California" effect, in which higher regulatory standards do not lead to a "race to the bottom" by industry, but in an overall raising of regulatory standards among trading partners. See generally Vogel, supra note 234. The California effect is a model which functions best in the area of products standards, where both strong domestic and foreign markets exist for the products. Id. at 263. ("While this encompasses virtually all consumer protection regulations as well as those environmental regulations which apply to products, it excludes those environmental standards that seek to address the harms caused by how products are produced." Id.) Vogel theorizes that regulations of production standards and waste issues are left to international environmental agreements to accomplish rising regulatory standards between trading partners. Vogel’s analysis does not address issues raised by exploitative trading practices in the interim or the actual enforcement of laws and regulations put in place by LDCs. He explicitly uses NAFTA as an example where the environmental side agreement “raised” the level of Mexico’s environmental regulations on the books but says nothing about actual enforcement of those standards. The examples where developed countries push each other to both strengthen regulations domestically and increase trade opportunities are more compelling. While Vogel’s long-term sense that international trade and environmental protection can create a win-win situation that both expands trade and raises the overall level of environmental protection regionally (and eventually globally) is analytically compelling, he declines
VII.
LIABILITY: FUTURE CLAIMS

A. Possible Claims Under the Alien Tort Claims Act and Multilateral or Bilateral Environmental Agreements and Treaties

Foreign nationals who are harmed by the lack of environmentally sound disposal of hazardous waste generated in the U.S. have few remedies against the U.S. waste generator or shipper. Whether the waste was legally shipped under RCRA section 3017 or shipped as exempt from that section for recycling or recovery, a foreign plaintiff who has no direct contract with the U.S. generator or shipper will find it hard to sue the responsible parties in the U.S. courts, in part because neither RCRA nor CERCLA apply extraterritorially. In addition, foreign court judgments are notoriously hard to enforce in the U.S. As discussed above, the Amlon Metals case did not provide a remedy for the plaintiffs under ATCA or RCRA, but only provided a remedy for the common law contract claims. However, Amlon Metals may point in the direction of possible remedies under ATCA when the countries involved are both parties to environmental treaties.

Cases brought under ATCA must generally: (1) allege a violation of a treaty or law of nations, (2) allege conduct constituting a tort against the person or property, (3) be brought by an alien, and (4) meet all other jurisdictional threshold requirements for suits in federal courts, including standing. The fatal flaw in Amlon Metals was that the plaintiff could not point to a specific treaty between the U.K. and the U.S. that was violated by the defendant's acts. Courts have generally followed a strict standard for what constitutes a "law of nations" or a relevant treaty under ATCA, but there are now several U.S. treaties which specifically address hazardous waste exports.

For example, taking a similar set of facts to Amlon Metals, if a shipment of waste intended for recycling, but tainted with hazardous waste, is sent to a Mexican recycling facility and the recycler is a Mexican national, then the bilateral treaty will have specifically been violated and could provide a cause of action to the recycler as a plaintiff in a U.S. court, or for a third part who was harmed. It is unclear precisely what kind of treaty violation is necessary to create a cause of action under ATCA, but the majority of cases have found that it is not necessary to deal with essential short-term and mid-range issues of environmental degradation and intentional dumping in LDCs before this rising tide of the California effect hits those countries.


238. See, e.g., U.S.-Mexico Treaty, supra note 8; U.S.-Canada Treaty, supra note 8; and OECD Council Decision C(92)39, supra note 10.
for the treaty that is violated to provide an express cause of action so long as the alleged conduct constituted a common law tort, e.g. fraud. Alternatively, a Mexican national whose property or person was damaged or harmed by illegal disposal of hazardous waste from a U.S. generator or transporter may be able to bring suit under ATCA also using the La Paz agreement and Annex III as the treaty violated. In this hypothetical case, a suit in federal district court that met other jurisdictional requirements could survive a 12(b)(1) motion to dismiss for lack of jurisdiction under ATCA and a 12(b)(6) motion for failure to state a claim.

Of course, forum non conveniens and choice of law issues would still be key to the resolution of either hypothetical case. To survive a forum non conveniens motion in U.S. courts, a Mexican plaintiff harmed by fraudulent shipment of U.S. hazardous waste, or by illegal disposal of such hazardous waste, would have to make a strong showing that a competent forum is not available in the country of import. If the suit survives a forum non conveniens motion and Mexican law is chosen as controlling the suit, as is likely, the Mexican laws will provide the plaintiff with reasonable remedies. While the plaintiff would not have the benefit of RCRA and CERCLA causes of action and standards of proof, the court might be persuaded to use some of the procedures and remedies available under those statutes to fill in any gaps in the law of the country where the tort took place.

The availability of this kind of tort claim is especially important because it can be brought where a contract claim cannot be. Tort claims can be brought by injured third parties, for example, neighbors and workers at a recycling facility that was party to a contract. In addition, tort claims can be brought for harm resulting from illegal disposal in situations where no contract existed. At the


240. Venue, personal jurisdiction, etc.

241. The author was unable to find any cases that were brought on this basis; perhaps because these cases do state a claim they are settled before litigation. In addition, if aliens can use citizen suit provisions the case could allege violation of RCRA section 3017 requirements as well. This hypothetical should work just as well for Canadian citizens, and other OECD country citizens.

242. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (holding that an action brought against a U.S. company by a foreign plaintiff, based on harm suffered abroad, should be dismissed on forum non conveniens grounds. Specifically, the alternative forum was more appropriate for witnesses and discovery, plaintiff was not a U.S. citizen or resident, law in other forum is less favorable but not inadequate so that the plaintiff is not deprived of remedy. A determination involves weighing both private interests of plaintiff and defendant, and public interest factors at the discretion of trial court); *see also* In re Union Carbide Corp. Gas Plant Disaster at Bhopal, 809 F. 2d 195 (2d Cir. 1987) (forum non conveniens dismissal of class actions arising from disaster in Bhopal but district court could not add as condition of dismissal defendant’s submission to discovery in accordance with FRCP). *See* Aguinda v. Texaco, 945 F. Supp. 625 (S.D.N.Y. 1996) (class action suit not available in Ecuador and lack of meaningful discovery not enough to resist forum non conveniens motion by defendant).


244. Mexican environmental laws on the books are detailed and comprehensive. *See* Mexico General Law, *supra* note 137.
least, an ATCA tort claim is a non-frivolous claim which can be asserted in federal court. It might not survive a 12(b)(6) motion for other reasons, or a forum non convienens challenge on the facts of the individual case, but the claim might provide litigants with an initial forum in which to raise issues and pressure exporters of hazardous waste to change current practices or settle claims for past harms.

ATCA is a necessary tool for aliens harmed by hazardous waste generated in the U.S. for several reasons. First, in the future federal courts are likely to concur in the analysis of the lack of extraterritoriality of RCRA or CERCLA found in Amlon Metals, and there is virtually no likelihood that Congress will expressly extend RCRA and CERCLA liability extraterritorially. Second, citizen suits by aliens rest on a slim foundation. Even if allowed, such lawsuits would be limited to conduct occurring within the U.S. and perhaps violations of the RCRA export controls. Third, U.S. citizens who are allies of aliens who are harmed by hazardous waste exports may fail to meet the standing requirements to bring citizen suits on their own behalf.

B. Liability: An Issue for Future Agreements

There is another critical issue which cannot be fully explored here but should be mentioned. The Basel convention and other international treaties all lack clarity on liability issues. Basel itself requires the parties who export hazardous waste to take on ultimate financial responsibility for reshipment and proper disposal if a problem arises during or after export. But Basel has no insurance or bond requirements for the private party exporters. In effect, this requires the exporting countries themselves to develop domestic rules for insurance or bonding or to indemnify or guarantee the generators’ and shippers’ compliance with treaty obligations. The crucial insight here is that under Basel,

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245. Accord, Rankin, supra note 244 (excellent and detailed analysis of the issues as applied to Aguinda v. Texaco, Inc); Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996) (the case was eventually dismissed on forum non convienens grounds, as well as international comity and failure to join indispensable parties, therefore ATCA issues pertaining to international law that were examined in Rankin’s article were never reached).


247. But see, Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 674 (S.D.N.Y. 1991) (dicta that citizen suits cannot be brought under Section 3017.) If the case would lie it might well provide plenty of liability if the “conduct” is characterized as the intent (and / or conspiracy) to dispose of hazardous waste illegally or to violate export requirements within the U.S., but generators will likely lay blame on transporters, who will try to lay blame on either employees’ independent acts in another country or third parties who accepted the shipments and then mishandled them, again in another country. The problems of proof for intent or for the chain of causation will be just as high as under an ATCA suit. However, it is not clear that much would be gained by availability of the citizen suit to aliens in this context.

248. There may be a case for organizational standing of an organization with both U.S. and alien members, if some members had standing as citizens and others had injury in fact and the court allowed such a split.

249. See generally Gunther Handl, State Liability for Accidental Environmental Damage by Private Persons, 74 AM. J. OF INTL. L. 525, 527 (1980) (“It is a well-established principle of international law that the international liability a state may incur for acts of private persons is a function of
the country of origin (i.e. the waste generating country), would have to pay for the reshipment and proper disposal regardless of either their vigilance in enforcement, or the intentional acts of third parties.\textsuperscript{250} This creates a strict liability regime, if of limited scope, for the countries that are parties.

To some extent the liability regime in Basel disconnects liability from both of its traditional functions, compensation of victims and prevention of future harm by the responsible party. Under the Basel approach the waste is either reshipped or disposed of properly, but no compensation is made to the country that received the illegal wastes or to the importer who may have significant damages, shipping costs, opportunity costs, or direct damages from the waste. In addition, no compensation is made to other individuals whose property or health may have been harmed by the lack of proper environmental safeguards. To the extent that Basel’s provisions force the country of export to tighten enforcement of export regulations it is creating the “right” incentive on the country. But Basel creates much weaker incentives on the responsible parties themselves. Future debates on liability must include: responsible parties’ liability for damages (standards for and types of liability e.g. joint and several liability, standards of proof and knowledge); consent to jurisdiction; availability of forums for dispute resolution; enforcement of judgments; and choice of laws.\textsuperscript{251}

\section*{VIII. Conclusion}

The U.S. presently has the technology, the capital, and the capacity to treat, store, and dispose of all of its own hazardous waste. While it may be cheaper in the short run for domestic generators to export hazardous waste, the cost savings is really an externality, a cost of production foisted off onto other nations and the “global commons.” As a foreign relations issue, the failure of U.S. laws to hold U.S. generators of hazardous waste responsible for the harm caused by those hazardous wastes overseas strains U.S. credibility and political capital\textsuperscript{252} as a leader in the environmental arena. The costs of international environmental harms created by U.S.-generated hazardous wastes may eventually be paid by the U.S. as a nation through loss of prestige and influence in the environmental

\textsuperscript{250.} See supra note 9, Basel Convention, art. 9.

\textsuperscript{251.} Choice of laws raises issues of where the act occurred, where the harm occurred, substantive and procedural law dilemmas, enforcement of judgments, jurisdiction and forum shopping. See also Elin Louka, \textit{Bringing Polluters Before Transnational Courts: Why Industry Should Demand Strict and Unlimited Liability for the Transnational Movements of Hazardous and Radioactive Wastes}, 22 DenV. J. INT'L L. & POL'Y 63, 103-05 (1993) (“A Proposal For a Liability Regime.”) Author’s proposal is based on common law ultra-hazardous activity tort law including strict or absolute and unlimited joint and several liability. Discusses whether liability should remain with generator or transfer to transporters, possible defenses of independent acts by third party or acts of god, and coverage for personal injuries).

\textsuperscript{252.} Perhaps the U.S. has little credibility left on these issues in most other countries due to the history of U.S. pollution and dumping overseas. However, U.S. environmental statutes and regulations, if not our actions, have been a model for environmental protection worldwide.
arena. The U.S. is currently at the forefront of those countries calling for agreements on global issues like ozone depletion, biodiversity conservation, species habitat conservation, and global warming. We are asking other countries, especially less developed counties, to reduce emissions or forgo short-term economic benefits of timber harvesting and low-tech energy production to help conserve the biosphere for all. In that context, it is disingenuous to continue to allow U.S. companies to dispose of hazardous wastes without the notification to or consent of receiving countries and without any assurance of available environmentally sound methods of recycling, recovery or disposal in those countries.\textsuperscript{253}

In an era when the insight that the world is a single biosphere is unexceptional, exporting environmental hazards cannot be merely a question of current economic benefits to private parties. At this point in the development of an international consensus on hazardous waste exports, the U.S. is the origin of the largest share of waste shipments considered hazardous under Basel but we have refused to ratify Basel or to more closely align U.S. law with this international consensus. Congress has the power to curb private actors from continuing to export “exempt” hazardous wastes without regulation, and at minimum Congress can and should expand the data collection, notification and consent requirements to all hazardous waste export. However, all recent attempts to change the laws along these lines have fizzled, not even eliciting strong debate. It is possible that the executive, directly or through agency action, can begin to change the rules in this area. A simple and effective way to begin to change the regulations would be by expanding the reporting and consent requirements of RCRA section 3017 to include hazardous waste exported for recycling or recovery. This change would facilitate data collection and tracking, and add needed facts and figures to a debate that is now largely based on dueling anecdotes. Hard data on the extent of the problem may help mobilize environmental constituencies within the U.S. and finally persuade Congress to act in the area.

If the “free trade” global marketplace becomes the norm of international trade, the goal of environmentally sound treatment and disposal of domestically generated hazardous wastes will only be achieved by enforcing the central tenets of U.S. environmental laws, the polluter pays principle, and cradle to grave liability for generators of hazardous wastes, even when those hazardous wastes cross the border. Cradle to border is not good enough.

\textsuperscript{253} Certainly one could construct other export criteria like transfer of environmentally sound technology to the country of import, or use of “as good as” methods (Basel). However, the problem with these solutions is that they require strong enforcement and tracking to which the U.S. would have to commit more funds. This again serves to shift the financial burden from the private generators (who could probably still save money operating U.S.-style disposal in other countries due to lower wages) to the government, which oversees the statutory scheme designed to save private parties money.