

# Toward a Working Solution to Global Pollution: Importing CERCLA to Regulate the Export of Hazardous Waste

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## I. INTRODUCTION

Industrialized countries are exporting significant amounts of hazardous waste<sup>1</sup> for disposal in foreign nations. This practice leads to the export of environmental and public health problems associated with the disposal of hazardous substances, and it poisons diplomatic relations between importing and exporting nations.<sup>2</sup> These problems are exacerbated, moreover, when the importing nation lacks the resources or technical infrastructure to ensure the safe disposal of waste exports. The failure of the international community to formulate an effective and comprehensive response to hazardous waste exports necessitates a search for alternative solutions to this kind of global pollution. One such alternative is the extraterritorial application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>3</sup> a domestic environmental liability law, to United States waste export activity.

The volume and toxicity of waste exports from the United States are increasing.<sup>4</sup> Changes in the domestic waste disposal markets of industrialized

1. The term "hazardous waste" or "hazardous substance" generally refers to any substance "designated pursuant to section 1321(b)(2)(A) of Title 33" or any other substance that meets the definition of "hazardous" as contained in the Comprehensive Environmental Response, Compensation and Liability Act unless otherwise noted. 42 U.S.C. § 9601(14) (1988). See J. VALLETTE, A. BERNSTOFF & A. LEONARD, *THE INTERNATIONAL TRADE IN WASTES: A GREENPEACE INVENTORY* (4th ed. 1989) [hereinafter *GREENPEACE WASTE INVENTORY*] ("More than 3,176,000 tons of wastes were shipped from industrialized countries to less developed countries between 1986 and 1988. This figure probably should be interpreted as a minimal total — the 'tip of the iceberg.' The actual figure is probably much higher"); other sources estimate that "[m]ore than 2.2 million tons of toxic garbage cross borders each year." B. MOYERS & CENTER FOR INVESTIGATIVE REPORTING, *GLOBAL DUMPING GROUND: THE INTERNATIONAL TRAFFIC IN HAZARDOUS WASTE 2* (1990) [hereinafter B. MOYERS].

2. See, e.g., *Italy Bans Waste Exports to Third World*, Reuters, Sept. 7, 1988 ("Italy on Wednesday banned hazardous waste-exports to Third World states except in extraordinary cases, amid an international row over such shipments, dubbed by Kenya 'garbage imperialism'"); see generally *Hearings Before the Subcomm. on Environment, Energy, and Natural Resources*, 100th Cong., 1st Sess. 2 (1988) [hereinafter *Hearings*] (testimony of Dr. Frederick M. Bernthal, Assistant Secretary of State for Oceans, International Environmental and Scientific Affairs); see also Millman, *Exporting Hazardous Waste*, *TECH. REV.*, Apr. 1989, at 6.

3. 42 U.S.C. §§ 9601-9675(c) (1988).

4. Documenting the volume of hazardous wastes exported from the United States for disposal is problematic. The United States Environmental Protection Agency (EPA) has reliable figures for exports only from 1987-89. The reason for the limited information, according to the EPA, is that the program monitoring waste export volumes went into effect in 1986. The EPA, moreover, has never officially published any actual numbers on the volume of waste exported for disposal. It furnished the following figures for 1987, 1988, and 1989 via a telephone conversation:

	1987	1988	1989
Notifications received of waste to be exported:	0.500	4.000	5.000
Actual volume of waste exported:	0.100	0.140	0.141
	(in millions of tons)		

The EPA also claims that the total volume of waste exported for disposal will decrease in 1990, although final figures for that year are not available. Telephone interview with Jim Vincent, Coordinator for Waste Export Enforcement, EPA (Dec. 12, 1990) [hereinafter *Vincent Interview*]. However, these figures are not indicative of the total problem in that they do not include any substances or waste streams "not regulated" by the EPA's waste export program, such as exports of fly ash from waste incinerators or products such as batteries that may contain hazardous materials. *Id.* SEE B. MOYERS, *supra* note 1, at 11

nations, including increased waste generation, reduced disposal capacity, tighter regulation of the environment, increased disposal costs, and greater public concern over the disposal of hazardous wastes, have stimulated the export of hazardous waste for disposal.<sup>5</sup> The prominence of the international waste export trade has encouraged the industrial nations to take a "not in my back yard" (NIMBY)<sup>6</sup> approach to their domestic pollution problems by shipping their wastes abroad, often at the expense of the poorer, developing countries.

On the whole, the international community's response to the global proliferation of waste export has produced more debate than unity on effective waste disposal regulation. An analysis of existing multilateral, bilateral, and unilateral proposals to regulate international waste exports reveals two major deficiencies in the proposals: (1) they contain no substantive provisions governing liability for cleanup and damages caused by these exports; and (2) they fail to create any enforcement mechanism to regulate and reduce the volume and toxicity of export shipments.

The extraterritorial application of CERCLA would provide a novel means for improving the regulation of hazardous waste exports from the United States. Extending CERCLA's strict, joint and several, polluter-pays liability scheme to waste disposal beyond the borders of the United States would create broad liability for environmental cleanup of hazardous waste exported from the United States to a foreign nation.<sup>7</sup> Such liability would provide injured

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("No one can say how much hazardous waste has been dumped on land or at sea or across borders, since this lucrative trade has yet to be fully inventoried, much less controlled. By all accounts, however, it is growing"); see also *infra* notes 13-22 and accompanying text for a discussion of problems with existing legal mechanisms that inventory waste exports.

5. See B. MOYERS, *supra* note 1, at 6-8 (changes in domestic disposal market in United States have stimulated interest in waste exports); see also Porterfield & Weir, *The Export of U.S. Toxic Wastes*, THE NATION 341 (Oct. 3, 1987) (severe limitations on land disposal in Europe have produced greater awareness of need for long term waste reduction strategies and generation of lower volume of waste than in United States). Estimates for waste generation in the United States range from a low of 250 million metric tons per year (Vincent Interview, *supra* note 4) to estimates as high as 500 to 600 million metric tons (B. MOYERS, *supra* note 1, at 6; Porterfield & Weir, *supra*, at 341). Estimates for Europe range from 30 to 40 million metric tons of annual waste generation. *Id.* at 341.

6. The phrase "not in my back yard" (NIMBY) refers to the phenomenon of community efforts in the United States to prevent the siting of waste disposal facilities or other facilities involving activity that is perceived by members of these communities to pose health or safety risks to the local area. NIMBY has been criticized by state and federal officials for preventing or attempting to prevent the siting of structures deemed necessary to address environmental and public health issues that affect a state or the nation as a whole. See *Government Suppliers Consolidating Serv. v. Bayh*, 734 F. Supp. 853, 856, 865 (S.D. Ind. 1990) (discussing NIMBY attitude involving litigation over siting of waste disposal facility); *Greenberg v. Veteran*, 710 F. Supp. 962, 964 (S.D.N.Y. 1989) ("This case, at its core, is unmistakably a product of the 'NIMBY Syndrome'"); see also Glaberson, *Coping in the Age of NIMBY*, N.Y. Times, June 19, 1988, § 3, at 1, col. 2; B. MOYERS, *supra* note 1, at 7.

7. Despite the absence of an express statutory provision imposing joint and several liability, the courts have interpreted CERCLA's liability scheme to imply a congressional intent to employ the common law concept of joint and several liability. Instead of a statutory mandate of the imposition of this type of

parties with a legal remedy to recover cleanup and response costs arising from improper disposal of waste exports while forcing polluters to bear those costs.<sup>8</sup> The internalization of these hidden but significant costs associated with waste export disposal would create a powerful financial incentive for United States waste generators to reduce the volume and toxicity of their waste exports and to seek environmentally sound forms of disposal.

This article examines the legal viability and regulatory role of CERCLA's extraterritorial application to environmental problems associated with the international export of hazardous wastes from the United States. Part I reviews the source and scope of the problem of international hazardous waste exports. Part II discusses the emerging national, regional, and international proposals that address waste exports and examines why those efforts are ineffective. Part III sets forth the legal basis for CERCLA's extraterritorial jurisdiction over hazardous substance releases from United States generators occurring outside the territory of the United States. Part IV discusses the policy benefits and improvements in existing domestic and international waste export regulations that would be created by CERCLA's extraterritorial application to waste export disposal activity.

## II. THE PROBLEMS OF EXPORTING HAZARDOUS WASTES

The industrialized nations are confronting a waste disposal crisis. Stricter environmental laws, phaseouts of traditional land-based disposal sources, and public opposition to the location and construction of new waste disposal facilities have contributed to a scarcity of domestic waste disposal capacity. At the same time, the volume of waste generated has increased significantly over the last decade. In response to this crisis, the industrialized nations have begun to search for new forms of hazardous waste disposal.<sup>9</sup>

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liability, the common law approach allows a court to impose joint and several liability on a case by case basis where such liability will enhance the statute's purpose of getting available responsible parties to pay for the entire cleanup. Therefore, CERCLA's use of a common-law approach to joint and several liability allows the courts to decline the application of joint and several liability in specific situations such as those involving *de minimis* generators of hazardous substances where such a broad scheme of liability is unwarranted and disproportionate. *See generally* United States v. Chem-Dyne Corp., 572 F. Supp. 802, 807-08 (S.D. Ohio 1983). Polluter-pays liability imposes on the polluter total liability for all environmental and public health costs associated with a hazardous substance. The term "polluter" includes any party who has a financial stake in the substance.

8. The statute provides for both a private cause of action and a government administered program to clean up hazardous waste problems and enforce its broad liability provisions. In addition, the recently reauthorized version of CERCLA establishes a mechanism to monitor health effects associated with hazardous waste disposal, as well as a citizen's "Right To Know" provision requiring parties manufacturing or using hazardous materials to release publicly information about the hazards associated with a particular substance. *See generally* 42 U.S.C. §§ 9607, 9611, 11001-11050 (1988).

9. *See* Porterfield & Weir, *supra* note 5, at 341; B. MOYERS, *supra* note 1, at 6-8.

## CERCLA Regulation of Hazardous Wastes

An increasingly common form of waste disposal is the export of hazardous waste to a foreign nation. The industrialized nations shipped approximately three million tons of wastes to less developed nations between 1986 and 1988.<sup>10</sup> The United States exports a relatively small percentage of its total hazardous waste generation -- approximately 150,000 tons, or less than one half of one percent of its total hazardous waste volume generated in 1988. Eighty-five percent of its total waste exports go to landfills in Canada.<sup>11</sup> European nations export "at least" ten percent of their waste.<sup>12</sup>

While these figures suggest that the exportation of hazardous waste from the United States is a relatively minor problem, they do not tell the whole story. First, the figures do not include wastes recently or not yet officially classified as "hazardous" by the EPA.<sup>13</sup> For example, one waste not classified as "hazardous" is the fly ash from solid waste incinerators, ash that contains toxic compounds.<sup>14</sup>

Second, the agency is quick to point out that its waste export figures reflect only waste streams that fall within its regulatory authority.<sup>15</sup> For example, used batteries, exported for recycling and containing hazardous substances, are not regulated by the EPA as long as the batteries remain intact when they leave the United States.<sup>16</sup>

Third, hazardous waste exports regulated by the EPA often escape detection. EPA officials acknowledge that "[m]any exporters don't bother to give

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10. GREENPEACE WASTE INVENTORY, *supra* note 1, at 11.

11. Volume (tons) of waste exported from the United States:

	1987	1988	1989
Canada	85,000	115,000	105,000
Mexico	11,000	16,000	28,000
Other	n/a	10,000	n/a
Total	100,000	140,000	141,000

(figures are approximate)

Vincent Interview, *supra* note 4; *see also* Hearings, *supra* note 2, at 375 (testimony of Bonnie Ram, Bernard Schwartz Fellow in Energy and Environment, Federation of American Scientists).

12. Hearings, *supra* note 2, at 379.

13. *See* Porterfield & Weir, *supra* note 5, at 341.

14. The volume of fly ash exported appears to be very large. Recently, 13,476 tons of Philadelphia incinerator fly ash created an international uproar when it was loaded onto the *Khian Sea*, a renegade waste export vessel. The ship then proceeded to circumnavigate the globe seeking a less developed nation that would accept the ash for land disposal. *See* GREENPEACE WASTE INVENTORY, *supra* note 1, at 11-14; *see also* B. MOYERS, *supra* note 1, at 9-30.

15. Vincent Interview, *supra* note 4.

16. *Id.* *See also* Porterfield & Weir, *supra* note 5, at 341 (pointing out problem of overlapping departmental jurisdictions within EPA where "[e]xport of certain chemicals, like polychlorinated biphenyls (PCBs), is forbidden by the Toxic Substances Control Act and is regulated by the EPA's toxic substances division, which does not handle wastes."); *see also* B. MOYERS, *supra* note 1, at 66, 75-78 (noting similar loopholes in United States environmental laws governing export of batteries and scrap metal for recycling). For an explanation of how CERCLA can remedy this loophole regarding substances contained in used products that evade coverage under the existing regulatory system for waste exports, *see infra* notes 222-23 and accompanying text.

notice to the agency because there isn't any enforcement" of the requirement that an exporter notify the EPA prior to and after completion of an export shipment.<sup>17</sup> From February to December 1987, for example, the EPA received 274 manifests of hazardous waste exports, 143 of which did not show a port of exit.<sup>18</sup> The United States General Accounting Office (GAO) concluded that, "EPA does not know whether it is controlling 90 percent of the existing waste or 10 percent . . . It does not know if it is controlling the wastes that are most hazardous."<sup>19</sup>

Irrespective of the disagreement over the actual volume of United States waste exports, it is clear that waste export shipments are increasing. Since 1985, the Resource Conservation Recovery Act (RCRA)<sup>20</sup> has required exporters of hazardous wastes to notify the EPA of an intent to export a shipment of hazardous waste.<sup>21</sup> In 1980 there were only twelve notifications of such exports. In 1988, the number of export notifications under RCRA grew to 522, and the volume of wastes exported has increased forty percent from 1987 to 1989.<sup>22</sup> There is concern that the significant volume of waste exports to foreign nations will continue over the next decade.<sup>23</sup>

The reasons for concern are well founded. Environmental and public health concerns in the United States regarding hazardous waste disposal have resulted in the creation of tougher regulations and liability for land-based disposal. This, in turn, has dramatically reduced disposal options for domestic hazardous waste. Moreover, as the 1980s approached, outright bans and phaseouts of land-filling hazardous wastes have become the established domestic environmental policy.<sup>24</sup> The proposed siting of alternative disposal options, such as incineration and treatment facilities, has met strong grass-roots political opposition.<sup>25</sup> As the waste disposal market adapted to these developments, domestic disposal costs skyrocketed from less than ten dollars per ton in 1976

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17. Porterfield & Weir, *supra* note 5, at 341.

18. *Hearings, supra* note 2, at 22 (testimony of John C. Martin, Inspector General, EPA).

19. Porterfield & Weir, *supra* note 5, at 341.

20. 42 U.S.C. §§ 6901-6991(i) (1988) (amended and renamed the Solid Waste Disposal Act of 1984).

21. *See* 42 U.S.C. § 6938(c) (1988).

22. B. MOYERS, *supra* note 1, at 11.

23. *Hearings, supra* note 2, at 266 (testimony of Frederick M. Bernthal, Assistant Secretary of State for Oceans, International Environmental and Scientific Affairs); Vincent Interview, *supra* note 4; *see also* B. MOYERS, *supra* note 1, at 10-11.

24. *See, e.g.*, 42 U.S.C. § 5924(d)-(m) (1988) (establishing federal prohibitions on many types of land-based disposal of hazardous wastes). Over-capacity of landfills and state and local restrictions on land-based disposal have also contributed to the phaseout of this traditional approach to hazardous waste disposal. *See, e.g.*, National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management, 910 F.2d 713, 722-24 (11th Cir. 1990) (discussing constitutionality of Alabama's prohibition on land disposal of hazardous wastes); *see also* B. MOYERS, *supra* note 1, at 7 (noting that number of operating hazardous waste landfills has shrunk from 1500 in 1984, to 325 in 1988, and discussing effect of 1984 Solid Waste Disposal Act on domestic disposal costs).

25. *See supra* note 6 and accompanying text.

to more than two hundred dollars per ton for certain waste streams in 1987.<sup>26</sup> These conditions encourage the export of waste as a cheaper disposal alternative.

Developing nations, at first, may view waste imports as a financial bonanza. Starved for hard currency, poor nations view the imports as a quick means for pumping much-needed foreign exchange into their economies.<sup>27</sup> One recently canceled waste import-export agreement, for example, would have earned the small African nation of Guinea-Bissau more than four times its entire gross national product and twice its foreign debt.<sup>28</sup>

Despite the appearance of a mutually beneficial transfer of hazardous wastes from developed to developing nations, however, the international trade in waste poses long term costs that far outweigh any short term benefits. First, environmental and public health problems may negate the immediate financial gains realized by the importing state. Poorer nations will suffer in particular due to their limited regulatory and technological capabilities. Limited financial, regulatory, and technological resources make hazardous waste cleanup costly and inefficient. As an example of the costs of hazardous waste cleanup, the United States (with the world's largest regulatory and technological resources) estimates that its domestic cleanup bill could increase to \$300 billion.<sup>29</sup> The costs for minimal cleanup efforts in developing countries could be prohibitive.<sup>30</sup>

Second, the export of hazardous substances to less developed nations raises the prospect of a transnational environmental catastrophe. In December of 1984, for example, thousands of pounds of lethal methyl isocyanate gas leaked from a Union Carbide pesticide manufacturing facility in Bhopal, India. The gas leak killed between 2,000 and 10,000 people, and injured more than

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26. As recently as the late 1970s:

U.S. manufacturers could simply bury wastes in landfills at little cost. In 1978, for example, auto makers could bury a ton of paint sludge for \$2.50. Burning the stuff cost more: \$50 a ton. By 1987, eleven years after the passage of the Resource Conservation and Recovery Act, the price of burial began at \$200 — if a landfill could be found in which to bury it — and burning the sludge could cost as much as \$2,000 a ton.

B. MOYERS, *supra* note 1, at 7; *see also* Porterfield & Weir, *supra* note 5, at 341 (placing average cost of waste disposal at \$10 per ton in 1976 and \$140 per ton in 1987).

27. *See* Millman, *supra* note 2, at 6.

28. *Id.*

29. *Toxic Waste Mess: Superfund, Superflop*, U.S. NEWS AND WORLD REPORT, Feb. 6, 1989, at 47-48.

30. The nation of Haiti paid dearly for such a venture. After sailing for more than one year with Philadelphia's incinerator fly ash, the *Khian Sea* persuaded the Haitian Department of Commerce to accept some of its fly ash waste. International environmental groups subsequently warned Haiti of the toxic contents of the ash. Haiti immediately rescinded the agreement and banned any further dumping of the ash. By then, however, more than 3,000 tons of fly ash containing significant levels of cadmium, mercury, arsenic, and dioxins were spread across this developing nation's beaches. *See* Millman, *supra* note 2, at 7; *see also* GREENPEACE WASTE INVENTORY, *supra* note 1, at 11-12.

200,000.<sup>31</sup> In 1986, a fire at a nuclear reactor in Chernobyl, Soviet Union, resulted in massive emissions of radioactive materials. The radioactive material spread to other European nations, contaminating food chains. Scientists are still uncertain about the long term health effects of the Chernobyl disaster.<sup>32</sup> Although these incidents did not involve hazardous waste exports, they serve to remind us that "[i]t only takes one nation and a few thousand tons of waste in the 'wrong' place to create an international disaster."<sup>33</sup>

Third, the international export of hazardous waste damages relations between nations. Several recent international incidents, including those between Guinea and Norway, and between Italy and Nigeria, illustrate the extent to which waste exports can create ill will between nations.<sup>34</sup> Thus, mishandled waste export shipments can easily become international incidents capable of creating a full-scale diplomatic crisis between importing and exporting nations.

Members of Congress fear the export of waste for disposal signifies a concerted effort by United States waste generators to circumvent domestic environmental laws at the expense of United States diplomatic relations with developing nations. Former Representative James Florio, author of CERCLA and Chairperson of the *House Subcommittee Hearings on Waste Exports*, warned that "[l]ike water running downhill, hazardous wastes invariably will be disposed of along the path of least resistance and least expense. Conditions are ripe for finding 'safe havens' for hazardous wastes around the globe."<sup>35</sup> Increasingly, developing nations perceive the export of hazardous wastes from

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31. See *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 197 (2d Cir. 1987); D. DEMBO, C. DIAS, A. KADWANI & W. MOREHOUSE, *NOTHING TO LOSE BUT OUR LIVES* 13-17 (1988) [hereinafter W. MOREHOUSE].

32. W. MOREHOUSE, *supra* note 31, at 53-64.

33. *Hearings*, *supra* note 2, at 375 (testimony of Bonnie Ram, Bernard Schwartz Fellow in Energy and Environment, Federation of American Scientists).

34. In June of 1988, Guinea arrested the Norwegian Consul General for his role in the dumping of 15,000 metric tons of waste from the United States by a Norwegian firm. The firm transported its cargo to Kassa Island off the coast of Guinea. The Guinean government determined that the permits to dump the ash were illegally obtained, promptly arrested the ranking Norwegian diplomat, and filed a protest with the Norwegian government. Norway's Consul General was released only after the polluting Norwegian firm removed the waste and cleaned up Kassa Island. The incident has severely strained relations between Norway and Guinea. See Millman, *supra* note 2, at 7; GREENPEACE WASTE INVENTORY, *supra* note 1, at 26-27. Another international incident involving waste exports upset diplomatic relations between Italy and Nigeria. Nigeria discovered that 4,000 tons of Italy's industrial and nuclear hazardous wastes were dumped on a Nigerian farm adjacent to a school. Although the Italian government was not directly involved in the incident, Nigeria filed a series of diplomatic protests against the Italian government accusing it of perpetrating an act of terrorism. Nigeria proceeded to arrest 15 alleged dumpers, threatened to execute them if the wastes were not cleaned up, and seized two Italian ships. The Italian government, under diplomatic pressure from Nigeria and the Organization of African Unity (OAU), formally apologized to the Nigerians and arranged to have the waste cleaned up and shipped back to Italy. Nigeria subsequently passed a formal decree stating that anyone associated with the importing of hazardous waste for profit within its borders will face arrest and execution. GREENPEACE WASTE INVENTORY, *supra* note 1, at 34-36; see also *Nations Sign Treaty, Limit Waste Shipments*, Chicago Trib., Mar. 23, 1989, at 5, col. 1.

35. Porterfield & Weir, *supra* note 5, at 344; see also *Hearings*, *supra* note 2, at 9 (testimony of Representative John Conyers) (calling export of waste abroad "export of irresponsibility" and "a recipe for a foreign policy disaster").

industrialized nations as a form of "toxic terrorism" or "environmental imperialism."<sup>36</sup>

United States foreign relations analysts view with growing alarm the increasing waste exports from the United States, which create diplomatic tensions between importing and exporting nations. Dr. Frederick M. Bernthal, Assistant Secretary of State for Oceans, International Environmental and Scientific Affairs, recently warned that:

[M]any countries will hold the United States Government responsible for problems created by private U.S. firms . . . The U.S. will be held morally responsible for any damage caused by waste (whether it is hazardous or not) generated by U.S. companies and disposed of in an underdeveloped country, regardless of whether or not the government of the country consented to receiving the waste.<sup>37</sup>

International efforts aimed at regulating the transnational export of hazardous wastes demonstrate the extent to which relations between importing and exporting nations have deteriorated on this issue. In Geneva, for example, the 1988 United Nations Environmental Programme (UNEP) conference to consider a draft convention on waste exports produced discord instead of agreement. Wendy Greider, a member of the EPA's Office of International Activities, remarked after attending the Geneva conference that the waste export issue "has already become a racism issue, a North-South issue."<sup>38</sup> Some foreign policy experts conclude that the ugly American dumping garbage on other nations "can be considered more of a foreign policy concern than an environmental problem."<sup>39</sup>

Lastly, the export of hazardous wastes to foreign nations affects the environment and public health of the United States. The belief that shipping hazardous wastes outside our borders avoids the health problems associated with such wastes is illusory. In reality, waste exports have a boomerang effect on our environment. The United States imports more than two billion dollars worth of food.<sup>40</sup> Over the last decade, evidence suggests that we have imported agricultural products with high levels of toxicity from pesticide residues and other forms of pollution. Many of these imported products came from developing nations that might receive waste export shipments in the future. Testimony

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36. Millman, *supra* note 2, at 6 ("The Organization of African Unity, one of several international bodies working to curb [waste] shipments, calls the practice 'toxic terrorism' and has condemned it on African territory"); see also *Hearings, supra* note 2, at 264-66 (testimony of Dr. Frederick M. Bernthal, Assistant Secretary of State for Oceans, International Environmental and Scientific Affairs).

37. *Hearings, supra* note 2, at 265-66 (testimony of Dr. Frederick M. Bernthal, Assistant Secretary of State for Oceans, International Environmental and Scientific Affairs).

38. Millman, *supra* note 2, at 7.

39. *Hearings, supra* note 2, at 374 (testimony of Bonnie Ram, Bernard Schwartz Fellow in Energy and Environment, Federation of American Scientists) ("One could argue that one or two cases has already tarnished our diplomatic image, strained relations with our neighbors and allies, and presented difficult moral and ethical questions").

40. *Id.*

at a recent congressional hearing on waste exports expressed the fear that a link between waste exports, the international economy, and the health of United States citizens "creates a 'circle of poison' [that] could end up on their dining room tables as well as ours."<sup>41</sup>

Despite the short term profits and expediency realized by hazardous waste exporters, long term problems exist for exporting as well as importing nations. As a participant in this lethal trade, the United States is not immune from these problems. The United States government's inability to police polluters beyond our borders injures our standing with the international community and contributes to the decay of the global environment. The absence of any systematic and effective means of regulating hazardous waste exports and deterring the unabashed dumping of poisons on developing nations only encourages "garbage imperialism" and increases its threat to public health and the global environment.

### III. AN OVERVIEW OF THE DOMESTIC AND INTERNATIONAL REGULATION OF HAZARDOUS WASTE EXPORTS

Existing domestic and international regulatory proposals have failed to curb the rapid increase in waste exports and to reduce the harms caused by waste export activity. The failure of these regulatory efforts stems from a reluctance to establish a liability scheme that effectively deters the environmentally unsound conduct associated with the extraterritorial disposal of hazardous waste. Moreover, the failure of regulatory efforts to address the issue of liability reflects an inability of various interest groups to reach a compromise between two extreme positions. The first, representative of most of the developing nations, seeks to ban hazardous waste exports altogether. The other, articulated by the industrialized nations, seeks to keep exports as a financially viable disposal option.<sup>42</sup>

In applying a domestic statute, CERCLA, to address an international problem, it is important to examine briefly the current sources of law that regulate international waste export activity at the domestic, bilateral, and multilateral level.<sup>43</sup>

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41. *Id.*

42. As one author states:

[r]eaching consensus has not been easy within the United States, either. Several bills languished in Congress last year. Conyers's proposal would have banned all waste exports, including those now unregulated, such as common garbage and sewage ... [A] bill by Sen. Robert Kasten (R-Wis.) called for a lengthy process permitting exports that met minimum EPA guidelines for waste disposal in this country.

Millman, *supra* note 2, at 7; see also *infra* note 100.

43. A new awareness of the problems created by the hazardous waste export trade has focused public attention on the availability of solutions at the national and international level. A variety of recently published articles from environmental and legal scholars examines domestic and international sources of

*A. Domestic Statutory and Common Law Governing Hazardous Waste Exports*

*1. Domestic Statutory Laws*

*a. The Resource Conservation and Recovery Act*

The most direct federal statutory regulation of waste exports exists in the provisions of the RCRA, which Congress passed in 1976 to regulate and track hazardous wastes from "cradle to grave."<sup>44</sup> In 1980, the EPA promulgated regulations under section 3017, requiring waste exporters to notify the EPA of the estimated volume and content of an export four weeks prior to the initial shipment. RCRA also requires the exporting person or entity to file an "annual report" containing the actual content and volume of the waste exports made during the previous calendar year.<sup>45</sup>

These RCRA regulations were ineffective, however, because the importing nation was not required to give the EPA a written acceptance of the shipment. Thus, the EPA was powerless to prevent shipments of hazardous waste to an importing country regardless of whether the country wanted the shipment.

In 1984, Congress amended RCRA to allow the EPA to develop regulations that could correct this defect.<sup>46</sup> In 1986, the EPA promulgated regulations requiring prior written consent of the importing country through intergovernmental notification. In conjunction with these regulations, the EPA will also furnish limited technical information on storage and handling requirements in the United States if requested by the importing state.<sup>47</sup>

Despite these amendments, there are several major problems with the current RCRA program. First, RCRA gives the EPA only limited power to regulate waste export activity. The EPA has no statutory authority to prohibit

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law in an effort to determine their regulatory impact on the waste export trade. *See, e.g., Note, Issues and Policy Considerations Regarding Hazardous Waste Exports*, 11 HOUS. J. INT'L L. 373 (1989); Brennan & Lucas, *A Legal Strategy for Controlling the Export of Hazardous Industries to Developing Countries: The Case of Asbestos*, 9 YALE J. WORLD PUB. ORD. 275 (1982); Lutz, *The Export of Danger: A View From the Developed World*, 20 INT'L L. & POL. 629 (1988).

44. *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 910 F.2d 713, 722 (11th Cir. 1990) ("While CERCLA is designed to cleanup unsafe hazardous waste sites, the federal [RCRA] ... provides a 'cradle to grave' regulatory program"); *see also American Petroleum Inst. v. EPA*, 906 F.2d 729, 732-33 (D.C. Cir. 1990); *United Technologies Corp. v. EPA*, 821 F.2d 714, 716 (D.C. Cir. 1987). RCRA achieves this "cradle to grave" regulation through the implementation of a system whereby waste generators are required to fill out Hazardous Waste Manifests. The Manifests are forms "used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during transportation from the point of origin to the point of disposal, treatment, or storage." 42 U.S.C. § 6903(12) (1988).

45. *See* 42 U.S.C. § 6938 (1988), *as amended by* Act of Nov. 8, 1984, Pub. L. No. 98-616, 98 Stat. 3262 (1984).

46. *Id.*

47. 40 C.F.R. §§ 262.50-8 (1989).

a United States export shipment to a foreign country once that country has given formal consent to the export. Thus, the EPA is powerless to stop some waste export ventures that can potentially cause catastrophic environmental damage. Furthermore, the EPA is not required to warn the importing nation of the potential risks and hazards of a particular hazardous waste export. Members of Congress acknowledge that this gap in the RCRA program "[leaves] the door open for some waste brokers to take advantage of the cash needs of underdeveloped and developing nations to promote proposals that can pose threats to public health and the environment."<sup>48</sup> In short, once waste exporters comply with the minimal notification requirements of RCRA, the EPA is powerless to regulate that export activity, no matter how dangerous or ill-advised.

The limited ability of the EPA to enforce RCRA's waste export provisions is also a result of the agency's failure to use the enforcement authority granted it by Congress. In part, this failure is inherent in the segmentation of the federal government departments, and the failure of these different departments to coordinate their efforts.<sup>49</sup> A recent investigation of the RCRA waste exports program, however, found that the major reason for its ineffectiveness was rampant noncompliance with the statutory notification requirements. Despite the EPA's authority to seek criminal as well as civil penalties against violators who knowingly fail to comply with the notification regulations, the EPA report found that "hundreds of tons of hazardous waste were exported without notifications of intent to export filed with EPA."<sup>50</sup> In addition, the report found that "enormous volumes" of hazardous wastes were exported without the exporter filing the required annual report.<sup>51</sup>

The second major problem with the RCRA export requirements is that their application is limited to wastes defined as "hazardous" under the applicable provisions of the statute. The distinction between nonhazardous and hazardous waste contained in RCRA is in many instances an artificial one. Many waste streams pose serious threats to public health and the environment despite the EPA's failure to classify those wastes as hazardous pursuant to RCRA.<sup>52</sup>

Third, RCRA's emphasis on notification of waste exports, instead of waste reduction and limited bans on extremely hazardous exports, serves to legalize and institutionalize this disposal practice. Evidence suggests that the notification process actually encourages exports of hazardous waste.<sup>53</sup> Since notifica-

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48. *Hearings, supra* note 2, at 2 (testimony of Representative Michael Synar).

49. *Cf. supra* notes 15-16 and accompanying text.

50. *Hearings, supra* note 2, at 19-20 (testimony of John C. Martin, Inspector General, EPA).

51. *Id.* at 21.

52. *See supra* text accompanying notes 13-14.

53. Consider the increase in waste exports since the new RCRA regulations went into effect. *See generally* GREENPEACE WASTE INVENTORY, *supra* note 1, at 110 (criticizing existing and proposed export notification regulations in United States).

tion is the only exporter conduct regulated by RCRA, and the statute contains no liability provisions for improper disposal of wastes outside the borders of the United States, waste exports are less regulated than current domestic disposal practices. Once an exporter complies with RCRA notification requirements and the waste shipment leaves the United States, exporter conduct is no longer subject to the constraints of RCRA.

b. *Pending Congressional Legislation: The Waste Export Control Act (WECA)*

In addition to the existing provisions in RCRA, Congress is presently considering legislation that would create new waste export regulations. In recent sessions, several members of Congress have introduced legislation to impose stricter regulations of waste exports. These legislative efforts have ranged from increasing the existing notification requirements in RCRA to creating an outright ban on waste exports to less developed countries.<sup>54</sup> In the fall of 1989, Congress introduced a compromise bill on waste exports. Sponsors of the bill have dubbed it the Waste Export Control Act (WECA)<sup>55</sup> and have introduced it in the form of legislative amendments to the Solid Waste Disposal Act (SWDA).

WECA seeks to deter United States exports of hazardous wastes to foreign nations unless "all reasonable efforts to minimize the generation of solid waste have taken place."<sup>56</sup> It aims to ensure that waste exports comply with an international agreement and strict domestic regulation requiring that the exported waste is "managed in a manner which is protective of human health and the environment and which is no less strict than that which would be required [by this Act] if the waste were managed in the United States."<sup>57</sup>

WECA would employ two mechanisms to achieve its regulatory goals. First, it would prohibit the export of any waste from the United States to any foreign nation unless "an international agreement is in effect to which the United States and any country receiving the solid waste are parties."<sup>58</sup> In addition, such an international agreement must include provisions requiring: (1) the notification and consent of the importing country; (2) the exchange of information between the United States and the importing nation regarding the management and disposal of the exported waste; (3) cooperation between nations in the enforcement and compliance with the agreement; and (4) the

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54. See *supra* note 42.

55. H.R. 3736, 101st Cong., 1st Sess., 135 CONG. REC. H9042 (1989) [hereinafter Waste Export Control Act].

56. *Id.* at § 2(a)(3).

57. *Id.* at § 2(b).

58. *Id.* at § 12002(a)(1).

unilateral right of party nations to review, revise, and suspend the agreement.<sup>59</sup> Second, WECA would require the exporter to obtain an export permit for all designated waste shipments.<sup>60</sup> The application for the permit requires the exporter to provide information regarding volume and contents, source of generation, ports of exit and entry, foreign disposal and treatment facilities, and proof that the manner of disposal is "protective of human health and the environment and . . . no less strict than that which would be required . . . in the United States."<sup>61</sup>

In its present form WECA is silent on the issue of liability for cleanup costs and damages associated with hazardous substance exports from the United States. Liability language that would have extended CERCLA's polluter-pays scheme to hazardous substances exported for disposal outside the United States was deleted by sponsors of the bill who reintroduced the legislation during the fall 1989 session.<sup>62</sup> The deleted provision expressly created a private cause of action under section 107 of CERCLA (42 U.S.C. § 9607) whereby foreign governments were entitled to recover response costs or natural resource damages incurred "with respect to any hazardous substance . . . exported from the United States."<sup>63</sup> If this provision had remained in the bill, WECA would have allowed the government of the foreign country where such costs or damages were incurred to "bring an action under section 107 of [CERCLA] in the same manner as if such costs or damages were incurred in the United States."<sup>64</sup>

The failure of Congress to create a liability mechanism in WECA reduces the impact the legislation will have on the problems associated with United States hazardous waste exports. At best, WECA's current provisions will tighten loopholes in the present waste export notification requirements under RCRA, give the federal government a more proactive role in regulating waste exports, and allow Congress to voice rhetorically its concern over the dumping of hazardous substances on developing nations. Stripping WECA of any language governing liability detracts significantly from the bill's ability to improve the regulation of waste exports. In its present form, WECA does little to discourage generators from circumventing tougher domestic disposal laws and avoiding liability for wastes altogether by shipping those wastes abroad.<sup>65</sup>

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59. *Id.* at § 12002(b)(1).

60. *Id.* at § 12003(a).

61. *Id.* at § 12003(b).

62. *Cf.* H.R. 2525, 101st Cong., 1st Sess. § 12005, 135 CONG. REC. H2250 (1989).

63. *Id.*

64. *Id.*

65. It may be argued that the "no less strict than . . . in the United States" requirement in § 12003(b)(8) of H.R. 3739 for disposal of such exports makes WECA a viable and effective form of regulation. The language, however, is of little practical value. First, domestic disposal standards in the United States have produced approximately 23,000 potentially dangerous hazardous waste sites that will cost an estimated \$300 billion to clean up. *See supra* note 29 and accompanying text. Second, in light of the difficulties the EPA

Moreover, critics of current national waste export policy may view WECA as congressional approval of exporting United States pollution problems to less developed nations.<sup>66</sup>

The absence of the express provision in WECA extending CERCLA liability to waste export activity, however, preserves the legal basis for interpreting CERCLA as governing extraterritorial hazardous substance releases in its present form. The deletion of the CERCLA liability provision from WECA eliminates the possibility of a congressional vote on the issue of the extraterritorial scope of CERCLA liability. If either the specific liability provision or the entire WECA package were defeated in Congress, it would be interpreted as clear congressional disapproval of the extraterritorial application of CERCLA. By deleting WECA's creation of a private cause of action for foreign governments under CERCLA, bill sponsors have eliminated evidence potentially fatal to the assertion of extraterritorial jurisdiction under CERCLA. Avoiding a vote on WECA's CERCLA liability provision scheme ensures that the present version of the bill cannot be read as indicative of congressional intent against CERCLA's extraterritorial jurisdiction over hazardous waste disposal. The present construction of WECA protects the claim that CERCLA liability extends to waste dumping beyond the territorial limits of the United States and leaves the ultimate resolution of the scope of CERCLA's jurisdiction to the courts.

### *2. Domestic Common Law Remedies: Extraterritorial Toxic Torts*

In addition to statutory regulations, traditional common law remedies exist for individuals injured by hazardous substances. Although this area of the law, known as toxic torts, has yet to provide an effective legal remedy to parties injured outside the territory of the United States, its concepts are instructive for a discussion of the weakness of liability provisions governing hazardous waste disposal.

Parties affected by environmental and health problems associated with hazardous waste disposal in the United States frequently turn to toxic tort litigation as a means of legal relief. Two distinct causes of action emerge in such litigation. The first involves parties bringing suit for damages resulting from injuries, often physical in nature, due to improper disposal of hazardous

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has had enforcing regulations for both domestic and export disposal of wastes within its own borders, it is difficult for the United States effectively to enforce the "no less strict than" standard extraterritorially.

66. One strong critic of the legislation is the environmental group Greenpeace, which argues precisely this point. See B. MOYERS, *supra* note 1, at 104-05.

substances.<sup>67</sup> In an effort to respond to the often latent nature of such injuries, the law has expanded the concept of a compensable injury in toxic tort cases. In particular, several jurisdictions within the United States have recognized risk of harm from hazardous substances as a compensable injury.<sup>68</sup> In these cases, the court awards monetary damages to address, abate, or remove the risk of harm caused by the hazardous substance.

The second type of common law action is usually rooted in common law nuisance doctrine and seeks injunctive relief. Parties seek to enjoin an activity involving hazardous substance use, such as the disposal of hazardous waste, on the grounds that such activity constitutes a nuisance. If a plaintiff prevails on a nuisance claim, the court may either prohibit or limit the activity.<sup>69</sup> When a plaintiff prevails on such a claim, moreover, courts will often reject the position that the defendant's compliance with existing regulatory standards provides a complete defense to the nuisance action.<sup>70</sup>

Common law toxic tort suits have met with mixed success in addressing the environmental and public health problems associated with hazardous waste disposal in the United States. Critics of the toxic tort approach argue that the burdens of proof and causation tend to favor defendants and lead to inconsistent outcomes.<sup>71</sup> The traditional concept of injury recognized by the common law, despite recent improvements, fails to address adequately many types of injuries incurred from hazardous waste disposal. Accordingly, victims of improper hazardous waste disposal often find it expensive and difficult to take advantage of this legal remedy.<sup>72</sup>

Two particular problems with the common law's ability to address activity associated with the export of hazardous wastes stem from the extraterritorial nature of a legal claim for injury caused by hazardous waste disposal in a

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67. See, e.g., *Ayers v. Jackson Township*, 525 A.2d 287 (N.J. 1987) (class action lawsuit for damages caused by hazardous waste brought by residents living near municipal landfill); *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219 (D. Mass. 1986) (action for wrongful death and damages brought by residents of Woburn, Massachusetts, who alleged trichloroethylene leaked from defendant's storage tanks into drinking water and caused childhood leukemia).

68. See, e.g., *Chicago Bd. of Educ. v. AC & S, Inc.*, 525 N.E.2d 950 (Ill. Ct. App. 1988); *School Dist. of Independence v. U.S. Gypsum Co.*, 750 S.W.2d 442 (Mo. Ct. App. 1988); *Manchester v. National Gypsum Co.*, 637 F. Supp. 646 (D.R.I. 1986) (line of cases permitting municipal school districts to recover damages in tort for removal of asbestos to abate risk of harm from that substance to persons at schools).

69. See, e.g., *Village of Wilsonville v. SCA Services, Inc.*, 426 N.E.2d 824 (Ill. 1981) (hazardous waste landfill proposal constitutes both concurrent and prospective nuisance from which plaintiffs are entitled to injunctive relief).

70. See, e.g., *Michie v. Great Lakes Steel Division*, 495 F.2d 213 (6th Cir. 1974) (compliance with regulatory emission standards held to be no defense to nuisance action for air pollution problems caused by area factories).

71. See Note, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence*, 96 YALE L. J. 376 (1982); Trauberman, *Statutory Reform of "Toxic Torts": Relieving Legal, Scientific, and Economic Burdens on the Chemical Victim*, 7 HARV. ENVTL. L. REV. 177 (1983); Elliott, *The Future of Toxic Torts: Of Chemophobia, Risk as a Compensable Injury and Hybrid Compensation Systems*, 25 HOUS. L. REV. 781 (1988).

72. See Trauberman, *supra* note 71, at 184.

foreign nation. First, defendants have successfully invoked the common law doctrine of *forum non conveniens* to prevent extraterritorial toxic tort claims from being tried in the United States.<sup>73</sup> Under this doctrine, a defendant can remove an extraterritorial toxic tort suit from a United States court and try the case in a legal forum located in the country where the injury or hazardous waste release took place.<sup>74</sup> Since the particular law of the foreign nation may differ from that of the United States, a United States defendant can then raise due process of law claims challenging the legal basis of a foreign court's judgment and, in so doing, prevent the enforcement of that judgment in the United States.<sup>75</sup>

Second, choice of law issues emerge from extraterritorial common law claims. Traditionally, the law of the forum where the plaintiff was injured governs.<sup>76</sup> Therefore, the relevant law under this approach would not be United States tort law, but that of the foreign nation where the release of the hazardous substance occurred. Recently, many United States courts have abandoned this approach to choice of law issues in favor of more flexible doctrines. These new doctrines include the contacts test, the better law approach, and the government interest analysis.<sup>77</sup> Nonetheless, the distinctions between the traditional and more flexible doctrines are vague and unpredict-

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73. See *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 843 (S.D.N.Y. 1986), *modified in part*, 809 F.2d 195 (2d Cir. 1987) (class action tort claim by Indian victims of toxic gas leak must be dismissed to Indian forum under doctrine of *forum non conveniens*).

74. To guide trial court discretion in evaluating a motion to dismiss a case for *forum non conveniens*, the United States Supreme Court provided a list of "private interest factors" affecting the convenience of the litigants and a list of "public interest factors" affecting the convenience of the forum. The factors pertaining to the private interests of litigants include: (1) relative ease of access to sources of evidence and proof; (2) cost of obtaining the attendance at trial of both compulsory and noncompulsory witnesses; (3) the possibility of getting a physical inspection of premises in issue if necessary to the adjudication; and (4) all other practical problems that make trial of the case easy, expeditious, and inexpensive. Public interest factors include: (1) administrative difficulties flowing from a particular forum, including court congestion and docketing problems; (2) local interest in having the controversy decided in the local forum; (3) the interest in having the trial in a forum situated within the jurisdiction of the governing substantive law; (4) the avoidance of conflict of law problems; and (5) the unfairness of burdening citizens with jury duty in an unrelated forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981). The possibility, moreover, that a change in forum would result in a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry. *Id.* at 247; see also *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947); *In re Union Carbide*, 809 F.2d at 205.

75. See *In re Union Carbide*, 809 F.2d at 205 ("Any denial by the Indian courts of due process can be raised by [defendant] as a defense to the plaintiffs' later attempt to enforce a resulting judgment against [defendant] in this country").

76. In the words of Professor Lea Brilmayer:

[t]he key to application of the Restatement approach was the so-called last act doctrine. Under this doctrine, the rights vested at the place where the last act occurred that was necessary to complete the cause of action ... [f]or a torts case, the last act was the injury because mere 'negligence in the air' by itself created no cause of action until it gave rise to a particular injury.

L. BRILMAYER, *CONFLICTS OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 20-21 (1991).

77. For a detailed discussion of the methodology and application of these different approaches, see generally *id.* at 43-111.

able.<sup>78</sup> In short, causation issues, *forum non conveniens* doctrine, and the choice of law problem make common law approaches unpredictable and inconsistent. They consequently provide minimal deterrence to the problems associated with waste exports.

### B. *International Law Regulating the Export of Hazardous Wastes*

Three types of international agreements currently regulate the export of hazardous wastes, namely: bilateral treaties governing the transnational movement of hazardous wastes; regional, multilateral conventions on transnational pollution; and the recent UNEP effort to draft an international convention on waste exports. While they are not the only sources of international law relevant to waste exports, these three types of agreements are the most important sources of the international regulation of hazardous waste exports that exist to date.

#### 1. *Bilateral Treaties*

Bilateral treaties are one type of international legal instrument regulating waste exports from the United States to a foreign nation.<sup>79</sup> The most substantial of these agreements governing the extraterritorial export of hazardous wastes is the accord between the United States and Mexico. This agreement responded to increases in United States waste exports to Mexico and the problems associated with those transboundary shipments over the last decade.

The United States-Mexico agreement contains strict notification provisions (similar to those found in RCRA), requiring notification of, and consent by, a designated authority of the country of import. Consent from the importing state's designated authority must be received within forty-five days of the initial notice of the intent to ship in order for the export to proceed.<sup>80</sup>

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78. See Boehringer, *Exporting or Importing Justice?*, TRIAL, Mar. 1987, at 65, 67.

79. The only two bilateral treaties to which the United States is a party specifically governing the transboundary movement of hazardous waste are the cooperation agreements with Canada and Mexico. Since 90% of the United States waste exports currently go to one of these two nations, the agreements govern a significant percentage of our waste exports. See *supra* note 11. The accord between the United States and Canada, lacking provisions governing liability, is far weaker than the treaty concerning transboundary waste shipments to Mexico. Accordingly, this analysis focuses on the Mexican agreement. Annexes to Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, July 18, 1985 to Jan. 29, 1987, United States-Mexico, \_\_ U.S.T. \_\_, T.I.A.S. No. \_\_, reprinted in 26 I.L.M. 15 [hereinafter United States-Mexico Annex]; Agreement Between the Government of the United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Waste, Oct. 28, 1986, United States-Canada (unpublished) (copies available from U.S. State Department). For an inventory of all bilateral treaties in force governing pollution and the environment to which the United States is a party, see *infra* note 86.

80. See United States-Mexico Annex, *supra* note 79, at Annex III, art. III.

As with the RCRA export notification regulations, the exporting nation cannot unilaterally prevent a private export that it views as inadequate or unsafe, if the importing nation gives its consent. In addition, a party to the treaty has an obligation to notify the other party of a regulatory action that restricts or bans a specific substance.<sup>81</sup>

Unlike RCRA, however, this agreement contains a readmission clause. The country of export is obligated to "readmit any shipment of hazardous waste that may be returned for any reason by the country of import."<sup>82</sup> Moreover, the country of export has a duty to readmit any shipment of "hazardous substances" that was exported into the importing country in violation of the treaty.<sup>83</sup>

The agreement provides for the exchange of information and technical assistance to help each party in its effort to enforce laws and regulations concerning the transboundary shipments of hazardous wastes. The accord also calls for the creation of a confidential information restriction on this exchange.<sup>84</sup>

A unique aspect of this bilateral agreement is the damages provision, a provision that is notably absent from other domestic and international agreements that concern hazardous waste exports. This damage provision provides the importing state with several remedies for damages associated with hazardous waste disposal. First, the importing nation may require insurance or a bond as a condition of entry for the waste. Second, if a waste export violates any national law of the parties to the treaty or harms public health, property, or the environment of the importing state, the country of export shall initiate all pertinent legal actions to the extent permitted by its national laws or regulations. Thus, if the United States is the exporting nation, CERCLA would be available to "repair, through compensation, the damages caused to persons, property or the environment."<sup>85</sup>

The major problem with this treaty is its bilateral nature; the provisions of the agreement only apply to waste export activity between the United States and Mexico, about five percent of the total volume of waste exports from the United States. The lack of similar bilateral agreements on waste export liability with other waste importing nations means that this approach is limited to a relatively small percentage of global waste export activity.<sup>86</sup> Waste exporters

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81. *Id.* at art. V.

82. *Id.* at art. IV.

83. *Id.* at art. IX.

84. *Id.* at art. XII.

85. *Id.* at art. XIV.

86. A survey of bilateral treaties in force reveals that the United States is party to agreements that govern environmental and pollution issues with a number of other nations including: France, West Germany, Italy, Japan, Netherlands, Nigeria, Panama, USSR, United Kingdom, Canada, and U.K./Bermuda. See generally 2 I. KAVASS & A. SPRUDZS, A GUIDE TO THE UNITED STATES TREATIES IN FORCE

can avoid liability provisions in these treaties by simply exporting their waste to areas of the world not covered by these geographically limited agreements. To regulate waste exports effectively, agreements must extend the scope of liability to waste disposal sites anywhere in the world.

## 2. Regional International Efforts

Few regional international efforts directly address the regulation of transnational exports of hazardous waste. However, a number of developing countries have issued resolutions of regional cooperation calling for the restriction and regulation of waste exports in response to the increase in exports to their regions.

The greatest expression of regional concern over waste exports has come from intergovernmental organizations in Africa. The Economic Community of West African States (ECOWAS) adopted a resolution at a recent summit meeting condemning waste exports to that region and calling on member states to enact national legislation against waste dumping within their borders.<sup>87</sup> The Organization of African Unity (OAU) unanimously adopted a resolution calling on all of its members to "refrain from entering into agreements with any industrialized countries on the dumping of nuclear or hazardous industrial waste on African territories."<sup>88</sup>

A number of similar resolutions recently emerged from intergovernmental organizations in the Caribbean region. The States of the Zone of Peace and Cooperation of the South Atlantic, a coalition of African coastal nations and Caribbean countries, adopted a resolution condemning the export of hazardous waste to member countries and calling on the parties "to join in a cooperative effort to seek, identify and blacklist states which willfully dump wastes in less developed countries."<sup>89</sup> The Caribbean Community (CARICOM), the Cartagena Convention members, and the Organization of Eastern Caribbean States have also passed regional resolutions condemning the export of hazardous wastes to the less industrialized regions of the world.<sup>90</sup>

It remains to be seen, however, whether these resolutions can effectively regulate waste exports on a regional level. To date, none of the resolutions articulates a substantive policy with specific legal standards and mechanisms

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(1989). None of these treaties except the United States-Canada and United States-Mexico agreements governs hazardous substance exports and disposal. Most of these treaties are extremely general in nature. The treaties to which the developing nations of Nigeria and Panama are parties, moreover, merely cover protocol for environmental information sharing, technology exchange, and general cooperation.

87. See GREENPEACE WASTE INVENTORY, *supra* note 1, at 15.

88. *Id.* (citing Resolution on Dumping of Nuclear and Industrial Wastes in Africa, Council of Ministers of the Organization of African Unity, CM/Res. 1153 (XLVIII), May 25, 1988).

89. *Id.* at 15-16 (citing Nigerian ambassador P.D. Cole).

90. *Id.* at 50 (citing *Danger: Toxic Waste in Caribbean*, CARIBBEAN CONTACT (Mar. 1988)).

that allow for coordinated multilateral implementation of a regional waste export policy. Until these efforts develop beyond general resolutions that simply condemn the export of hazardous waste to particular regions, the nations in those regions will be unable to mount a coherent and effective campaign against environmental problems associated with waste export shipments.

The Convention for the Protection of the Natural Resources and the Environment of the South Pacific Region<sup>91</sup> is the only regional intergovernmental agreement in treaty form dealing with the regulation of waste exports. Although the Convention addresses the entire spectrum of environmental issues confronting the Pacific Region nations, language in the document specifically speaks to problems associated with waste exports.<sup>92</sup>

This document, signed in 1986 by many South Pacific nations, regulates, with several limited provisions, the storage and disposal of hazardous waste. First, it calls on the signatories to "take all appropriate measures to prevent, reduce and control pollution in the Convention Area caused by dumping from vessels, aircraft, or man-made structures at sea."<sup>93</sup> Second, it bans the storage of radioactive waste in the Convention area.<sup>94</sup> Third, it contains several technical assistance and emergency cleanup cooperation agreements.<sup>95</sup> Fourth, parties are required to file environmental impact statements for "major projects which might affect the marine environment."<sup>96</sup>

Like other waste export proposals, however, this agreement skirts the issue of liability for pollution damage. Its liability provision reads: "[t]he Parties shall co-operate in the formulation and adoption of appropriate rules and procedures in conformity with international law in respect of liability and compensation for damage resulting from pollution of the Convention Area."<sup>97</sup>

Unfortunately, the failure of this agreement to provide for imposition of liability again turns a potentially viable waste export convention into an ineffective document which merely pays lip service to the regulation of waste exports. The Convention's lack of a mechanism to hold waste exporters financially accountable for the public health, property, and environmental damage resulting from waste export disposal activity in the South Pacific region makes it ineffective in deterring waste exports. Thus, the importing

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91. Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Nov. 25, 1986, \_\_ U.S.T. \_\_, \_\_ U.N.T.S. \_\_, T.I.A.S. No. \_\_, *reprinted in* 26 I.L.M. 38 (1987) [hereinafter South Pacific Regional Agreement].

92. *Id.* at arts. 10-11.

93. *Id.* at art. 10.

94. *Id.* at art. 11.

95. *Id.* at arts. 17-18.

96. *Id.* at art. 16.

97. *Id.* at art. 20.

state will bear all the hidden costs of waste export disposal, with the single exception of nuclear waste exports, which are banned altogether.

The failure to create a liability scheme is not unique to the South Pacific Regional Agreement. Liability provisions have been absent from all recent multilateral efforts to regulate waste exports.<sup>98</sup> This failure underscores the utility of applying CERCLA to the export of hazardous wastes from the United States to developing regions of the world.

### 3. *Multilateral Treaties: The Basel Convention*

The most important source of evolving international law regulating the export of hazardous wastes is the Global Convention on the Control of Transboundary Movements of Hazardous Wastes ("Basel Convention").<sup>99</sup> The Convention, adopted on March 22, 1989, represents the culmination of nearly ten years of effort by the international community to reach a multilateral, global treaty on the movement of hazardous wastes. The drafting of the Convention was spearheaded by UNEP.

The Basel Convention was the product of an often contentious political struggle between industrialized and less developed nations. The less developed nations, led by UNEP, were seeking significant restrictions on the export of hazardous wastes. The industrialized countries, although supportive of increased regulation of exports, pushed for a treaty that would keep open the option of waste exports as a form of hazardous waste disposal.<sup>100</sup> The result of this political tension was a compromise treaty that is long on rhetoric and short on substance and effectiveness. Moreover, many nations from both the industrialized and developing parts of the world are unhappy with the compromise product and have not yet signed the treaty.

Despite its problems, the Basel Convention is the most significant and broadly based multilateral, international agreement on hazardous waste exports in existence today. It contains a variety of provisions that will affect the transboundary movement of hazardous wastes.

The preamble to the Convention repeatedly states that the agreement seeks a reduction in the generation and export of hazardous wastes.<sup>101</sup> The Convention states that the "enhanced control of transboundary movement of hazardous wastes and other wastes will act as an incentive . . . for the reduction of the

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98. See, e.g., The Global Convention on the Control of Transboundary Movements of Hazardous Wastes, Mar. 22, 1989, art. 12, \_\_ U.S.T. \_\_, \_\_ U.N.T.S. \_\_, reprinted in 28 I.L.M. 649, 668 (1989) [hereinafter *Basel Convention*].

99. *Id.*

100. Millman, *supra* note 2, at 7 ("[A] 1988 UNEP meeting in Geneva produced confrontation as well as cooperation ... UNEP wants to reduce hazardous-waste shipments, but developed nations want exports to remain an option").

101. See *Basel Convention*, *supra* note 98, at Preamble.

volume of such transboundary movement."<sup>102</sup> Moreover, the Convention stresses "the need to continue the development and implementation of environmentally sound low-waste technologies . . . with a view to reducing to a minimum the generation of hazardous wastes and other wastes."<sup>103</sup>

The Convention defines hazardous wastes in several ways. First, it lists specific waste streams and chemical characteristics that the Convention covers.<sup>104</sup> Second, wastes not defined as hazardous under this first definition are covered under the Convention if they are defined as, or considered, hazardous wastes "by the domestic legislation of the Party of export, import or transit."<sup>105</sup> Radioactive wastes "subject to other international control systems, including international instruments" are excluded from regulation under the Convention.<sup>106</sup>

The Basel Convention obligates its parties to prohibit waste exports in several situations. First, importing states may prohibit specific waste streams from crossing their borders. Exporting states shall prohibit the export of that waste to any country prohibiting the import of such wastes.<sup>107</sup> Second, parties shall prohibit the export of any hazardous waste not categorically prohibited from import by the importing state, if the importing state does not give formal written consent to import the specific waste shipment.<sup>108</sup> Third, parties have a duty to prohibit waste exports to any country that the exporting nation has reason to believe cannot dispose of such waste in an environmentally sound manner.<sup>109</sup> Fourth, parties shall not allow the export of hazardous wastes to any area south of sixty degree latitude south, thereby preventing the possibility of dumping in the Antarctica region.<sup>110</sup> Finally and most importantly, a party "shall not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party."<sup>111</sup>

The import/export ban on waste movements to nations that are not party to the Convention has serious implications for waste exports from the United States. The United States recently signed but has not yet ratified the Basel

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102. *Id.*

103. *Id.*

104. *Id.* at art. 1, para. 1(a).

105. *Id.* at art. 1, para. 1(b).

106. *Id.* at art. 1(3).

107. *Id.* at art. 4(1)(a)-(b).

108. *Id.* at art. 4(1)(c).

109. *Id.* at art. 4(2)(b).

110. *Id.* at art. 4(6).

111. *Id.* at art. 4(5).

Convention.<sup>112</sup> Failure by the United States to ratify would result in prohibitions on its waste exports to any country that is a party to the Convention.<sup>113</sup>

The member nations of the OAU have refused to sign the treaty because they feel that the industrialized nations weakened the language on liability and prohibitions.<sup>114</sup> Thus, the OAU in effect created a total ban on the waste exports of Convention signatories to OAU member nations, since parties to the Basel Convention will be prohibited from exporting wastes to all non-parties. Other developing nations sympathetic to the OAU are threatening to follow the OAU.<sup>115</sup> As a result, the United States may be banned from exporting wastes to certain regions of the world. If the United States ratifies the Basel Convention it will be banned from exporting waste to any nation that is not a party to the convention, pursuant to the Convention's ban of waste exports to nonparty nations. On the other hand, if the United States does not ratify the Convention and Congress passes the WECA amendments, the United States will be prohibited from exporting its waste to any nation that is not party to an international waste export agreement with the United States.<sup>116</sup>

Violations of any of the restrictions governing the movement of hazardous wastes trigger the exporting state's duty to re-import the waste. The duty attaches initially to the generator or exporter of the waste shipment. The exporting state, however, ultimately "ensures" that the wastes are taken back to its territory, "or, if impracticable, are otherwise disposed of in accordance with the provisions of this Convention."<sup>117</sup>

A major area of contention in the drafting of the Basel Convention was the liability provision. As with other international efforts to regulate waste exports, the drafters of the Basel Convention were unable to overcome the differences between developing nations and the industrialized countries on the liability issue. The Convention fails to provide any mechanism for liability and compensation for damages resulting from the transboundary movement of wastes. The liability provision reads:

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112. See *United States Signs Convention to Prohibit Certain Waste Exports*, 161 DAILY EXEC. REP. (BNA) A-20 (Mar. 22, 1989).

113. Theoretically, the Basel Convention's prohibition on waste export activity with nonparty nations would ban United States waste exports to Canada and Mexico. These importers of American waste, who are also parties to the treaty, would be prohibited from accepting United States waste under the treaty's prohibition against importing waste from nonparty nations if the United States fails to ratify the Basel Convention. EPA officials expect the Convention to be ratified in the next two years. Vincent Interview, *supra* note 4.

114. See Greenhouse, *U.N. Conference Supports Curbs on Exporting of Hazardous Waste*, N.Y. Times, Mar. 23, 1989, at A1, col. 1.

115. See *infra* notes 122-23 and accompanying text.

116. See Waste Export Control Act, *supra* note 55; but cf. Basel Convention, *supra* note 98, at art. 7 (permitting transboundary movement of hazardous waste through territory of nonparty state or states; consent for such movement must be obtained from nonparty state in writing pursuant to general obligations of Convention concerning consent and notification of waste shipments in general).

117. Basel Convention, *supra* note 98, at arts. 8, 9(3).

## CERCLA Regulation of Hazardous Wastes

The Parties shall co-operate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes.<sup>118</sup>

The failure to reach agreement on liability in the Basel Convention has created a number of diplomatic and enforcement problems for the international effort to regulate waste exports. First, the Convention suffers from the fatal defect inherent in other international accords on waste exports: it lacks a mechanism to hold financially accountable those responsible for problems associated with waste exports. Accordingly, the Convention does not strongly deter present waste export activity, and a reduction in the volume of waste exports is unlikely.<sup>119</sup> Second, the developing nations and international environmental organizations view the lack of a liability provision as a sign that the industrialized nations do not have any real commitment to curbing waste exports. One group argues, for example, that the Convention does more to legitimate waste exports to the developing nations than it does to control and reduce them.<sup>120</sup> As a result of this perception, many developing nations have refused to sign the treaty until the Convention is strengthened in this area.<sup>121</sup>

Third, the final text of the Basel Convention has arguably produced more international contention than cooperation on the waste export issue. Many developing nations are threatening total bans on waste movements within their boundaries and have accused the industrialized nations of "racism" and "toxic terrorism."<sup>122</sup> Some nations are threatening to jail and execute anyone associated with waste exports to their territories.<sup>123</sup> Moreover, the Basel Convention has done little to improve the image of the United States with the developing countries as the ugly American garbage dumper.

### IV. THE LEGAL VIABILITY OF CERCLA'S EXTRATERRITORIAL APPLICATION

The viability of CERCLA as a means of regulating the international export of hazardous wastes from the United States depends largely on the legality of its application to activities outside the borders of the United States. Assuming

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118. *Id.* at art. 12.

119. See Greenhouse, *supra* note 114 ("[t]his treaty puts an international stamp of approval on a horrible business" said James Puckett, a toxic-waste expert with Greenpeace"); see also *id.* (comments of Ahmed Mohammed Taylor-Kamara, Minister of the Environment of Sierra Leone) ("treaty has been watered down").

120. See Greenhouse, *supra* note 114; *cf. supra* note 109 and accompanying text. Thus, if the United States were to ratify the Basel Convention, the EPA would have the authority to prohibit waste export shipments which it determines cannot be handled by the importing nation in an "environmentally sound manner."

121. Greenhouse, *supra* note 114.

122. See *supra* notes 2, 34-39 and accompanying text; see also B. MOYERS, *supra* note 1, at 2.

123. See *supra* note 34.

for the moment that CERCLA liability would produce major improvements in existing efforts to regulate international waste exports (as this article will argue in Part IV), this Part takes up the legal argument for CERCLA's application to waste exports from the United States. Section A looks at the various causes of action that can be utilized to impose liability on polluters for damages that result from waste export activity. Section B examines the legality of CERCLA's jurisdiction for activity that occurs beyond the territory of the United States.

### *A. Imposing Liability for Damages from Hazardous Substance Releases Under CERCLA*

CERCLA contains two statutory provisions that create liability for damages associated with the disposal of hazardous waste. First, section 107 of CERCLA provides a private cause of action in United States district courts for parties seeking response costs and natural resource damages incurred from the release of a hazardous substance into the environment.<sup>124</sup> A section 107 action provides parties with the primary and most flexible legal mechanism for creating extraterritorial liability for waste exports under the statute. Second, section 111 of CERCLA provides parties with an opportunity to obtain compensation for cleanup of a hazardous substance release from a nine billion dollar revolving fund known as the "Superfund."<sup>125</sup> Although more problematic in its application to extraterritorial acts such as waste exports, section 111 compensation is available to a foreign party in limited situations.

#### *1. CERCLA's Private Cause of Action*

A foreign party seeking compensation from a hazardous substance release caused by the transportation or disposal of hazardous wastes exported from the United States would most likely bring a CERCLA action under section 107 of the statute. Section 107 creates a private cause of action for persons who incur response costs or damages to natural resources that result from a release or threatened release of a hazardous substance from a facility or disposal site.<sup>126</sup> Section 107(a) imposes liability for such costs or damages on several categories of responsible parties: the owner or operator of a vessel or facility; any person who at the time of disposal of a hazardous substance owned or operated the facility at which the released substance was disposed; any person who generates a hazardous substance that is released from a facility owned or operated by another party or entity; and any person who accepts a hazardous

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124. 42 U.S.C. § 9607 (1988).

125. 42 U.S.C. § 9611(a)(1) (1988).

126. 42 U.S.C. § 9607(a)(4)(B),(C) (1988).

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substance for transport to a disposal or treatment facility that is later released from the facility.<sup>127</sup>

Section 107 separates the scope of response costs and natural resource damages into four basic areas of liability: (1) "all costs of removal or remedial action incurred by the United States government, a State or an Indian Tribe;" (2) any other necessary response costs "incurred by any other person;" (3) "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release;" and (4) the costs of health assessments and epidemiological studies authorized under section 104(i) of CERCLA.<sup>128</sup>

Several key definitions of terms employed in section 107 of CERCLA more fully illuminate the breadth of this statutory private cause of action. The statute defines person as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States government, State, municipality, Commission, political subdivision of a State, or any interstate body."<sup>129</sup> Disposal of wastes means:

[T]he discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.<sup>130</sup>

The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. It applies to the "abandonment or discarding of barrels, containers, and other closed receptacles" containing a hazardous substance or pollutant.<sup>131</sup> The statute defines a hazardous substance as any substance whose release exceeds the reportable quantity designated for that particular substance by the Administrator of the EPA.<sup>132</sup>

The use of a section 107 private cause of action to recover the "necessary cost of response incurred" as a result of hazardous substance release limits a party to a recovery of those response costs that are "consistent with the national contingency plan" (NCP), the federal government's general guidelines for appropriate actions and remedies for hazardous substance releases.<sup>133</sup> The

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127. 42 U.S.C. § 9607(a)(1)-(4) (1988).

128. 42 U.S.C. § 9607(a)(4)(A)-(D) (1988).

129. 42 U.S.C. § 9601(21) (1988).

130. 42 U.S.C. § 9601(29) (1988) (adopting definition of "disposal" in 42 U.S.C. § 6903(3) (1988)).

131. 42 U.S.C. § 9601(22) (1988).

132. 42 U.S.C. § 9601(14) (1988); *see also* 40 C.F.R. § 302.4 app. A (1989) (containing "hazardous" release thresholds for chemical substances).

133. 42 U.S.C. § 9607(a)(2)(B) (1988). The NCP was created to "provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances." 33 U.S.C. § 1321(c)(2) (1988). The NCP was initially created in the Chapter 26, Water Pollution Prevention and Control ("Clean Water Act") as part of the cleanup provision for oil and hazardous substance discharges into navigable waters. With the

NCP limits recovery of costs incurred by a party to costs responding to "[r]eleases or substantial threats of releases of hazardous substances into the environment, and releases of pollutants or contaminants which may present imminent and substantial danger to public health or welfare."<sup>134</sup>

Section 107 does not require that a party seeking response costs obtain the approval or permission of the federal government to recover particular costs before bringing an action. The landmark decision in *New York v. Shore Realty Corp.*<sup>135</sup> expressly stated that neither EPA approval nor supervision was "a requisite for an action under section 107(a)(4)(B)."<sup>136</sup> The requirement that the response costs sought by a party be consistent with the federal government's NCP means only that a party seek the costs of response actions that a governmental agency could take under the NCP.<sup>137</sup>

Compensable response costs include an extremely broad range of costs associated with a party's response to a hazardous substance release. These costs include, among other things, costs for alternate water supplies; monitoring to protect public health and the environment from further harm; relocation of endangered individuals; site cleanup; and action consistent with a permanent remedy in response to a release, or threat of release, to prevent mitigation of hazardous wastes and substantial danger to the future or present health of members of the public or environment. Therefore, actual cleanup costs are but one subset of the costs a party may seek to recover under section 107 of CERCLA.<sup>138</sup>

In addition to incurred response costs, CERCLA creates liability "for injury to, destruction of, or loss of natural resources."<sup>139</sup> CERCLA defines natural resources as: "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources . . . controlled by the United States . . . any State or local government, any foreign government, [or] any Indian tribe."<sup>140</sup> Natural resource damages can be recovered only by the United States government or the authorized representative of a State, acting on behalf

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creation of a separate law, CERCLA, to address hazardous substance cleanup, the NCP provision was added to CERCLA, providing legal parameters for CERCLA based cleanup activity.

134. 40 C.F.R. § 300.3(2) (1989).

135. 759 F.2d 1032 (2d Cir. 1985)

136. 759 F.2d at 1048, citing *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 289-90 (N.D. Cal. 1984) ("[S]upervision by EPA is not a requisite for an action under section 9607(a)(4)(B)").

137. EPA National Oil and Hazardous Substance Pollution Contingency Plan, 40 C.F.R. § 300.71(D)-(3) (1989) ("For the purpose of consistency with §§ 300.65 and 300.68 of this Plan . . . any action to be taken by the 'lead agency' in §§ 300.65 or 300.68 may be taken by the person carrying out the response").

138. 42 U.S.C. § 9601(23)-(25) (1988).

139. 42 U.S.C. § 9607(a)(4)(C) (1988).

140. 42 U.S.C. § 9601(16) (1988).

of an injured party, pursuant to an action under section 107.<sup>141</sup> The language in the statute appears to prohibit private parties from bringing a suit for damages to natural resources; accordingly, the United States government would have to bring any action for damages to the natural resources of a foreign nation.

Defenses to a section 107 action for response costs to a hazardous substance release are few and limited. The statute provides for only three affirmative defenses to liability: (1) an act of God; (2) an act of war; and (3) an act or omission by a third party who neither is an agent of, nor maintains a direct or indirect relationship with, the defendant. Moreover, the defendant can escape liability for the act of an independent third party only if the defendant establishes that it exercised due care in handling the hazardous substance released and that it used appropriate precautions against all of the third party's foreseeable acts and consequences.<sup>142</sup>

CERCLA contains venue and jurisdiction requirements that assure any plaintiff a legal forum in a United States district court. The statute states that the venue of all actions under section 107 "shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office."<sup>143</sup> CERCLA provides that "United States district courts shall have exclusive jurisdiction over all controversies arising under this chapter, without regard to citizenship of the parties or the amount in controversy."<sup>144</sup>

Therefore, the components of CERCLA's private cause of action under section 107 make it an attractive legal remedy for foreign parties, private or governmental, who are injured by waste exports from the United States. Section 107 lawsuits provide the plaintiff with potential for significant monetary recovery for costs associated with a response to a hazardous substance release caused by wastes exported from the United States. The strict and joint and several liability of Section 107 make it difficult to raise defenses to response cost liability. Most importantly for foreign parties, CERCLA's congressionally mandated venue and jurisdiction requirements guarantee the plaintiff a legal forum in a United States district court.

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141. Section 107 provides that:

[i]n case of an injury to, destruction of, or loss of natural resources ... [t]he President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover such damages. Sums recovered by the United States Government as trustee under this Subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such resources.

42 U.S.C. § 9607(f)(1) (1988).

142. 42 U.S.C. § 9607(b) (1988).

143. 42 U.S.C. § 9613(b) (1988).

144. *Id.*

## 2. *Administrative Claims for Compensation from the Superfund*

Section 111 of CERCLA creates a fund of not more than \$8.5 billion for the cleanup of hazardous waste sites that threaten public health, property and the environment.<sup>145</sup> Known as the "Superfund," this huge revolving trust fund is financed primarily by a per gallon tax on the production of raw chemical products or "feed stocks." This tax is supplemented by smaller revenues from general revenues of the United States government and a tax on generators of hazardous waste or "waste-end" products. The fund provides the government or qualified private parties with cash resources for quick and effective hazardous waste cleanups at facilities that are financially insolvent, or where payment of cleanup costs by solvent responsible parties is subject to indefinite delay due to litigation.

Section 111 authorizes payment from the Superfund for any claim of necessary response costs incurred as a result of carrying out the NCP. Unlike the NCP consistency requirement in a section 107 claim, a claim for response costs from the Superfund under section 111 requires the federal government to approve and certify the response costs.<sup>146</sup> Accordingly, section 111 claims must proceed through the lengthy and bureaucratic Superfund process that mandates site evaluations, studies, cost-benefit analysis, public comment, and contract bidding.<sup>147</sup>

In addition to the government certification requirement, private party claims by a foreign claimant against the Superfund are subject to certain restrictions.<sup>148</sup> The two most significant restrictions affecting a foreign claimant are: (1) that the hazardous substance must be released from a facility "located adjacent to or within" the navigable waters of the United States, and (2) that the recovery is authorized by a bilateral treaty or with the certification of the United States Attorney General.

The foreign claimant and government certification requirements for private party claims under section 111 of CERCLA make this remedy for foreign parties injured by waste exports from the United States far more difficult to obtain and more limited in scope than section 107. Residents of Mexico and Canada, two nations that have entered into bilateral treaties with the United

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145. See 42 U.S.C. § 9611(a) (1988).

146. 42 U.S.C. § 9611(a)(2) (1988).

147. The process of section 111 funding prior to commencement of actual cleanup work involves: (1) a preliminary assessment; (2) an on-site investigation; (3) if the site presents a serious enough threat, placing and ranking of the site on the National Priority List of hazardous waste sites upon which EPA will take action; (4) a feasibility study, setting forth alternative cleanup options, the benefits and costs of each option, and a recommended option; (5) a public comment period on preferred options; (6) EPA's response to comments and selection of cleanup remedy. See G. COHEN & J. O'CONNOR, *FIGHTING TOXICS: A MANUAL FOR PROTECTING YOUR FAMILY, COMMUNITY, AND WORKPLACE* 173-74 (1990).

148. Subsection (1) of section 111 states that a "foreign claimant may assert a claim to the same extent that a United States claimant may" under certain restrictions. 42 U.S.C. § 9611(l) (1988).

States on the transboundary movement of hazardous wastes and which are geographically adjacent to the navigable waters and territory of the United States, are the only potential foreign claimants that can take advantage of section 111 in CERCLA. Since more than ninety percent of all current United States waste exports go to one of these two countries,<sup>149</sup> section 111 claims can play a role in regulating and deterring waste export shipments to those countries. Nevertheless, section 111 cannot provide comprehensive and effective global liability because it involves an extensive federal government administrative process and express extraterritorial limitations.

### B. *CERCLA's Extraterritorial Application*

CERCLA's application to hazardous substance disposal that occurs outside the territory of the United States raises a profound and, as yet, unresolved legal issue. United States courts have not ruled on the extraterritorial application of CERCLA. Although the statute contains both express and implied provisions governing the rights of a foreign party to legal relief, no precedent exists in which a foreign party invoked such a provision to recover damages incurred from a hazardous substance release abroad. Accordingly, whether these provisions impose extraterritorial liability on parties responsible for United States hazardous waste exports remains an open question, the resolution of which will profoundly affect the international export of such wastes as well as domestic disposal activity within the United States.

This Part attempts to answer that question by arguing for the legal viability of CERCLA's extraterritorial application to waste disposal activity outside the United States. A three-part analysis supports this contention. First, statutory language confers an unrestricted, implied right of action on foreign parties seeking to recover costs incurred for the cleanup of extraterritorial hazardous substance releases. Second, this unrestricted, implied right of action is consistent with the legislative history and the intent of CERCLA's authors. Third, the extraterritorial imposition of CERCLA liability for the disposal of American hazardous waste exports is consistent with precedent and the doctrine of extraterritorial jurisdiction.

#### 1. *Statutory Language*

The language of section 107 of CERCLA confers an unqualified cause of action on foreign parties. Two legal constraints on CERCLA's statutory construction govern an analysis of the statute's extraterritoriality. First, judicial

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149. *See supra* note 11.

interpretations of CERCLA's provisions consistently point out an obligation "to construe its provisions liberally to avoid frustration of the beneficial legislative purposes."<sup>150</sup> Second, the National Environmental Policy Act (NEPA) states:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall . . . (F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment.<sup>151</sup>

Statutory language regarding CERCLA's application to activity outside the territory of the United States must be interpreted in light of these general principles.

The fundamental issue underlying the statutory language concerning the right of a foreign party to seek legal relief under CERCLA is the extent to which the express limitations on a foreign claimant under section 111 apply to a foreign party seeking relief under the private cause of action of section 107. If section 107 implies that a foreign party may bring suit to recover response costs independent of the restrictions on foreign claimants in section 111, CERCLA liability effectively extends globally to all hazardous waste exports from the United States.

Section 111 of CERCLA affirms a clear congressional intent to give CERCLA limited application outside the territory of the United States. Section 111(l) is subtitled "Foreign Claimants." It expressly states that "[t]o the extent that the provisions of this chapter [Act]<sup>152</sup> permit, a foreign claimant may assert a claim"<sup>153</sup> if the following four conditions are met:

- (1) the release of a hazardous substance occurred (A) in the navigable waters [of the United States]<sup>154</sup> or (B) in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident;
- (2) the claimant is not otherwise compensated for his loss;
- (3) the hazardous substance was released from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with

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150. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986).

151. 42 U.S.C. § 4332(F) (1988).

152. Statutes at Large uses the word "Act" where U.S.C. uses the word "chapter." Since Title 42 of U.S.C. has not been recodified, Statutes at Large is considered the technically correct language of the statute, and the word "Act" should be read instead of the word "chapter." This discrepancy would have major implications for the argument of this article if the phrase "[t]o the extent the provisions of this chapter permit" was construed to include only provisions in section 111 of the statute. Since "chapter" generally refers to be chapter 98, which includes all of CERCLA, the use of either term makes no substantive difference, because the provision applies to all "claims" under the entire Act and not just under section 111.

153. 42 U.S.C. § 9611(l) (1988).

154. 42 U.S.C. § 9601(15) (1988) ("The term 'navigable waters' ... means the waters of the United States, including the territorial sea").

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activities conducted under the Outer Continental Shelf Lands Act, as amended (43 U.S.C. 1331 et seq.) or the Deepwater Port Act of 1974, as amended (33 U.S.C. 1501 et seq.); and

(4) recovery is authorized by a treaty or an executive agreement between the United States and foreign country involved, or if the Secretary of State, in consultation with the Attorney General and other appropriate officials, certifies that such country provides a comparable remedy for United States claimants.<sup>155</sup>

Congress, therefore, expressly sanctioned all extraterritorial claims under CERCLA involving limited situations that met these four conditions.

In contrast, language in section 107 suggests that foreign claimants may bring suit to recover response costs incurred from a release of a hazardous substance generated in the United States irrespective of the restrictions on foreign claims set forth in section 111. Section 107 states:

*Notwithstanding any other provision or rule of law*, and subject only to the defenses set forth in subsection (b) of this section . . . any person . . . [who generated, stored, transported, or disposed of a hazardous substance at any facility] . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for . . . (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.<sup>156</sup>

Congress expressly made section 107 relief available to any person "(n)otwithstanding any other provision or rule of law."<sup>157</sup> The statute's definition of "person" includes any "individual, firm, corporation, association, partnership, consortium, joint venture . . . or interstate body."<sup>158</sup> This definition does not require that a person be a person of the United States.

Under this construction of the statutory language, section 107 implies a right of action to any foreign party who meets the definition of a person, notwithstanding the conditional limitations of the foreign claimant provision in section 111. Section 107's right of action, therefore, extends unconditional CERCLA liability to extraterritorial hazardous substance releases from United States waste exports in the same manner that such liability attaches to domestic disposal activity.

At first glance, this interpretation of CERCLA's extraterritorial jurisdiction begs the threshold issue of which contradictory provision governs the extraterritorial application of the statute to waste exports from the United States. On the one hand, section 111 restricts all claims under CERCLA by a foreign party to situations that meet the four conditions of the foreign claimant provision. In contrast, section 107 gives a foreign party an unqualified right of action to recover response costs from a responsible party. A further examination of CERCLA's statutory construction, however, reveals that these two

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155. 42 U.S.C. § 9611(l) (1988).

156. 42 U.S.C. § 9607(a) (1988) (emphasis added).

157. *Id.*

158. *Id.*

provisions can be harmonized into a coherent statutory compensation and liability scheme.

CERCLA's statutory scheme suggests a fundamental distinction between claims for compensation and the legal right to pursue liability for hazardous substance releases. The statute makes compensation for response actions to hazardous substance releases available through a section 111 government administered claims process referred to earlier: the Superfund.<sup>159</sup> Critical to understanding the distinction between section 107 and section 111 in the statutory scheme is Congress' intent to design the Superfund process as a means of facilitating the cleanup of a hazardous substance release without subjecting that cleanup to the delay of lengthy liability litigation.<sup>160</sup> In short, the Superfund acts as an insurance claims fund for the cost of cleanup independent of the availability of solvent, legally responsible parties.

Liability principles for cleanup costs are established under section 107. The federal government invokes section 107 liability to pursue the responsible parties for cleanups funded under section 111. CERCLA entitles the federal government to seek treble damages from responsible parties to replace money drained from the Superfund by a section 111 cleanup in this subsequent litigation under section 107.<sup>161</sup> CERCLA supplements section 107 with an implied private right of action to create an incentive for parties other than the federal government to participate in private cleanup actions of any hazardous substance release, thereby reducing the strain on the limited resources of the Superfund process and ensuring accountability and relief for any problem created by a hazardous substance release.<sup>162</sup> A distinction emerges, therefore, between claims or applications for administrative compensation from the Superfund under section 111, and the legal right of an injured party under section 107 to hold a responsible party liable for costs incurred in response to a hazardous substance release.

Statutory language in section 112, CERCLA's claims procedure provision, reinforces this distinction between the administrative nature of "claims" under section 111 and a legal action under section 107.<sup>163</sup> The statute defines the term "claim" as "a demand in writing for a sum certain."<sup>164</sup> The word "claimant" means "any person who presents a claim for compensation."<sup>165</sup> Section 112, which governs CERCLA claims, refers exclusively to claims

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159. See generally 42 U.S.C. § 9611 (1988).

160. See generally H.R. REP. NO. 172, 96th Cong., 2d Sess. 15, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6160 [hereinafter H.R. REP. NO. 172]; H.R. REP. NO. 1016, 96th Cong., 2d Sess. 17, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6119-20 [hereinafter H.R. REP. NO. 1016].

161. 42 U.S.C. § 9607(c)(3) (1988).

162. H.R. REP. NO. 1016, *supra* note 160, at 40.

163. 42 U.S.C. § 9612 (1988).

164. 42 U.S.C. § 9601(4) (1988).

165. 42 U.S.C. § 9601(5) (1988).

within CERCLA's administrative compensation process. Subsection (a) governs "[c]laims against [the] Fund for response costs."<sup>166</sup> Subsection (b) sets forth the forms and procedures applicable to the administrative compensation process including the provision that "[a]ll administrative decisions hereunder shall be in writing . . . and shall be rendered within 90 days of submission of a claim to an administrative law judge."<sup>167</sup> Subsection (c) further suggests the administrative nature of the term "claims" under CERCLA. Its provisions govern the subrogation of "all rights, claims, and causes of action for such damages and costs of removal that the claimant has under this chapter or any other law" should the claimant receive compensation "pursuant to this chapter."<sup>168</sup>

Case law interpreting CERCLA's application also suggests that claims under sections 111 and 112 are entirely separate from legal actions under section 107.<sup>169</sup> The courts have held that section 107 and sections 111 and 112 provide causes of action that are distinct and independent.<sup>170</sup> They have rejected the argument that section 107 merely establishes liability for purposes of sections 111 and 112, which govern the use of the Superfund.<sup>171</sup> In addition, recent CERCLA cases consistently support the contention that the various restrictions and requirements contained in sections 111 and 112 do not apply to a party's right of action under section 107.<sup>172</sup> These cases interpret the purpose of restrictions on the claims process set forth in sections 111 and 112 as a means of protecting the limited resources of the Superfund and allowing the federal government to target limited administrative funds to the areas of greatest need.<sup>173</sup>

The CERCLA case law recognizes that liability of a responsible party for response costs under section 107 is not governed by a concern for limited administrative resources and thus that liability under section 107 is not subject

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166. 42 U.S.C. § 9612(a) (1988).

167. 42 U.S.C. § 9612(b)(4) (1988).

168. 42 U.S.C. § 9612(c) (1988).

169. *Pinole Point Properties v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 289 (N.D. Cal. 1984); *Wehner v. Syntex Corp.*, 622 F. Supp. 302, 304 (E.D. Mo. 1983).

170. *Pinole Point Properties*, 596 F. Supp. at 289 (section 107 provides private cause of action on basis of liability "that is separate and distinct from liability and compensation created in [s]ections 111 and 112").

171. 596 F. Supp. at 288.

172. 596 F. Supp. at 288-89; *see also Wehner*, 622 F. Supp. at 304 (liability for response costs under section 107 is not governed by requirements of section 111).

173. In *Pinole Point Properties*, the court held that:

[s]ection 112 requires a person claiming against the Superfund first obtain federal approval of its response costs under the National Contingency Plan. This requirement makes perfect sense in light of the limited availability of federal funds. The requirement does not, however, make sense when applied to causes of action that do not involve the government.

596 F. Supp. at 288.

to the requirements of section 111 for recovery of response costs from Superfund.<sup>174</sup>

The case law and statutory construction of CERCLA support the theory that distinguishes claims for compensation from a right of action to establish legal liability under the statute. The application of this distinction, therefore, becomes essential in interpreting the meaning of CERCLA's statutory language.

Applying this distinction to the language of section 111's foreign claimant provision suggests that the extraterritorial restrictions contained in the foreign claimants provision governs only a claim for administrative compensation under sections 111 and 112 of CERCLA and not the legal right of action under section 107. The words "foreign claimant" and "claim" refer only to a foreign party pursuing a claim under section 111 for administrative relief against the Superfund and not to the legal right of a foreign "person" to recover from a responsible party the necessary costs of response incurred from a hazardous substance release. The foreign claimant provision in section 111(l), therefore, is inapplicable to a party seeking legal relief under the federal cause of action provided by section 107.

By construing the statute in this manner, the unqualified right of action under section 107 for a foreign party and the severe restrictions imposed by section 111 on foreign claimants are perfectly consistent. Foreign parties are limited to legal relief under section 107 unless they meet the conditions of section 111(l), in which case they may present a claim for administrative compensation from the Superfund.

Accordingly, the statutory language of CERCLA implies that liability for releases of hazardous substances generated in the United States extends beyond our borders. The language suggests that CERCLA creates global, cradle to grave accountability of hazardous waste exports from the United States, and that foreign parties may pursue that accountability with an unrestricted, statutory right of action in United States federal district courts.

## 2. Legislative History

CERCLA's legislative history provides strong evidence that Congress intended to apply the statute extraterritorially and to impose strict liability on hazardous substance releases. The evidence exists in House Bill H.R. 85,<sup>175</sup>

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174. In *Wehner* the court held that:

[i]n assessing liability for response costs against those liable under 42 U.S.C. § 9607, CERCLA clearly indicates that liability under § 9607 is not subject to any other provision or rule of law. Thus, liability under 42 U.S.C. § 9607 cannot possibly be governed by the requirements of 42 U.S.C. § 9611 for recovery of response costs under the fund.

622 F. Supp. at 304.

175. H.R. 85 96th Cong., 2d Sess., 126 CONG. REC. 26369, 26378 (1980) [hereinafter H.R. 85].

one of three "spill bill" proposals Congress ultimately merged into CERCLA. This bill contains the statutory language that became CERCLA's "foreign claimant" provision in section 111(l) of the statute. The committee report, moreover, provides the only official congressional documentation of CERCLA's legislative history that discusses hazardous substance releases that either threaten or occur in territory outside the United States. The text of and history behind incorporation of H.R. 85 into the final CERCLA package, therefore, provide an important source of information about Congress' intent concerning CERCLA's extraterritorial application.

The House of Representatives initially introduced H.R. 85 as a separate "spill bill" designed to address compensation for oil and hazardous substance pollution from vessels and offshore facilities.<sup>176</sup> The legislation, entitled "Comprehensive Oil and Hazardous Substances Pollution Liability and Compensation Act," provided a supplementary cleanup and compensation mechanism to other congressional proposals that focused on cleaning up inactive hazardous waste dump sites within the United States.<sup>177</sup> Although H.R. 85 covered a wide range of hazardous substances, its central concern was oil pollution. It provided Congress with a means for responding to pollution incidents not covered by the dump site proposals, such as oil and chemical spills from vessels on the high seas.<sup>178</sup>

Not surprisingly, the particular subject area of H.R. 85 necessitated that the bill address issues involving responses to, and compensation for, extraterritorial pollution incidents. To meet this need, H.R. 85 proposed a compensation and liability mechanism for parties injured by releases outside the territorial jurisdiction of the United States.<sup>179</sup> According to the House Committee that reported the final version of the legislation, the underlying purpose for the liability and compensation language was to create "a clear-cut mechanization for compensation, [and to] provide important incentives for compliance with other laws in the pollution area, and for voluntary actions to reduce and respond to pollution incidents."<sup>180</sup>

To achieve these objectives, H.R. 85 contained language allowing damage claims for economic loss "arising out of or directly resulting from oil pollution" to be asserted for: (1) removal costs; (2) injury or destruction of real or personal property; (3) injury or destruction of natural resources; and (4) loss of profits or impairment of earning capacity.<sup>181</sup> The text of H.R. 85 restricted recovery for damages in categories (2) to (4) for foreign claimants by

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176. H.R. REP. NO. 172, *supra* note 160, at 30-32.

177. *See generally id.*

178. *Id.*

179. H.R. 85, *supra* note 175, at 26370, 26371.

180. H.R. REP. NO. 172, *supra* note 160, at 32.

181. H.R. 85, *supra* note 175, at 26370.

employing the exact language that eventually emerged as the "foreign claimant" provision in section 111 of CERCLA.<sup>182</sup> H.R. 85, however, expressly authorized the unrestricted assertion of claims "under item 1 [removal costs], by any claimant."<sup>183</sup> The section by section analysis of the committee report attached to H.R. 85 when it was passed by the House of Representatives described the language governing removal costs as creating an exception to the foreign claimant restrictions for recovery of such costs incurred from extraterritorial releases. The report states:

'Removal costs' is a recoverable economic loss, as provided under subsection (a)(1). Subsection (b)(1) provides that any claimant may recover removal costs. To create an incentive for maximum participation in cleaning up, foreign claimants are permitted to recover these costs, even if the conditions imposed by subsection (b)(6) [foreign claimant restriction provision] are not met.<sup>184</sup>

H.R. 85, therefore, expresses a clear congressional intent that the statute apply to extraterritorial claims for damages incurred in the removal of hazardous substance releases involving oil pollution.

In a subsequent Senate-House conference committee, Congress merged H.R. 85 with other spill bill legislation to create CERCLA. The Senate members of that committee refused to accept H.R. 85's compensation and liability language unless the statute exempted oil pollution, although that was the primary objective of H.R. 85. The "take it or leave it" Senate compromise incorporated H.R. 85's compensation and liability mechanism for other chemical releases into CERCLA but created an exemption for oil.<sup>185</sup> Congress ultimately accepted this compromise and passed the final spill bill package as CERCLA in late December of 1980.

The legislative history of the statute's foreign claimant provision suggests that members of Congress perceived the final version of CERCLA as incorporating the liability and compensation scheme of H.R. 85 for damages incurred from extraterritorial hazardous substance releases. Included in this scheme was the unrestricted right conferred by H.R. 85 on any party to assert a claim for removal costs for an extraterritorial release. By incorporating H.R. 85 into the final version of CERCLA for hazardous substance releases other than oil, Congress implicitly created extraterritorial liability for removal costs of hazardous substance releases associated with United States hazardous waste exports.

CERCLA vests this extraterritorial liability for removal costs in the private right of action for response costs under section 107. Congress incorporated the liability and compensation scheme of H.R. 85 in section 107 by providing foreign claimants with an unrestricted cause of action for response costs. In

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182. Cf. 42 U.S.C. § 9611(f); H.R. 85, *supra* note 175, at 26370.

183. H.R. 85, *supra* note 175, at 26370.

184. H.R. REP. NO. 172, *supra* note 160, at 39-40.

185. See 36 CONG. Q. ALMANAC 593 (1980).

other words, Congress transferred the extraterritorial liability for removal costs of H.R. 85 to the section of CERCLA that governs liability and retained the foreign claimant restrictions of H.R. 85 for foreign parties seeking administrative compensation from the Superfund. This explains, moreover, why the enacted language of section 111 of CERCLA, unlike that of H.R. 85, does not contain an express exemption from the restrictions on and prerequisites for extraterritorial assertions of claims for removal costs. Under this interpretation of the statute, CERCLA complies with the mandate of the statute's legislative history to create "an incentive for maximum participation in cleaning up" by exempting foreign parties from the prerequisites of CERCLA's administrative claims process.<sup>186</sup> CERCLA achieves this by conferring an independent and unrestricted right on any party to bring a legal action for response costs incurred by a hazardous substance release occurring outside the territory of the United States.

### 3. *The Jurisprudence of Extraterritoriality*

The extraterritorial application of domestic law is emerging as a major issue in multinational legal disputes. While the issue of extraterritorial jurisdiction is not new to United States courts,<sup>187</sup> it has become increasingly contentious. In recent years, United States courts have ruled on the extraterritorial application of a number of domestic statutes including antitrust, securities, Title VII, criminal, and environmental laws.<sup>188</sup> These cases establish

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186. See *supra* notes 182-84 and accompanying text.

187. Many of the legal issues created by the extraterritorial application of a nation's domestic laws were confronted by the Supreme Court in *Hilton v. Guyot*:

[I]nternational law, in its widest and most comprehensive sense – includ[es] ... questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation ... The most certain guide, no doubt, for the decision of such questions is a treaty or statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests with the judicial tribunal of ascertaining and declaring what the law is.

159 U.S. 113, 163 (1895).

188. See, e.g., *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) (upholding limited extraterritoriality of Sherman Act); *Consolidated Gold Fields PLC v. Minorco*, 871 F.2d 252 (2d Cir. 1989) (upholding extraterritoriality of antitrust and securities regulation laws to extraterritorial activity deemed to have substantial effect upon United States); *Boureslan v. ARAMCO*, 857 F.2d 1014 (5th Cir. 1988) *aff'd on rehearing*, 892 F.2d 1271 (5th Cir. 1990) (en banc), *cert. granted* 59 U.S.L.W. 3212 (U.S. Oct. 1, 1990) (No. 89-1845) (neither statutory language nor history of Title VII is strong enough to overcome presumption against extending protection of Title VII to American citizens living abroad); *FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980) (rejecting extraterritorial enforcement of subpoena served upon French corporation); *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978) (upholding NEPA Environmental Impact Statement (EIS) requirement for United States-funded highway project in Panama); *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345 (D.C. Cir. 1981) (NEPA EIS requirement does not apply to licensing of United States military nuclear reactor in Philippines, although extraterritoriality of NEPA is open question).

important precedents that clarify the basic principles of extraterritoriality. Unlike legal claims involving CERCLA, these cases confront situations where the statutory language and legislative history are silent on the statute's extraterritorial applicability. Nonetheless, they provide additional guidance for evaluating the extraterritorial applicability of CERCLA.

The case law draws a fundamental distinction between three types of jurisdiction in the extraterritorial application of domestic law. The first, jurisdiction to prescribe, involves the right of a sovereign state to make and apply laws that "[govern] the conduct, relations, status or interests of persons or things."<sup>189</sup> The second, jurisdiction to enforce, refers to "a state's authority to compel compliance or impose sanctions for noncompliance with its administrative or judicial orders."<sup>190</sup> The third, adjudicatory or personal jurisdiction, goes to the power to reach an individual. This power to reach an individual is subject to a constitutional due process requirement that the defendant has sufficient minimum contacts with the forum adjudicating any claim against the individual.<sup>191</sup>

Significantly, these types of jurisdiction are not geographically co-extensive in extraterritorial situations. The Restatement (Second) of Foreign Relations Law states: "[a] state having jurisdiction to prescribe a rule of law does not necessarily have jurisdiction to enforce it in all cases."<sup>192</sup> United States courts interpret this distinction as "by and large" limiting a state's enforcement jurisdiction of domestic law to within the territorial boundaries of the state.<sup>193</sup> Jurisdiction to prescribe, however, "is not strictly limited by territorial boundaries."<sup>194</sup> Accordingly, where a federal statute fails to contain language on extraterritoriality, precedent confines that statute's extraterritorial application to situations involving the power to prescribe conduct.<sup>195</sup>

The extraterritorial application of CERCLA is prescriptive. A party may assert the statute's extraterritoriality by bringing a legal action for response costs under section 107. While liability under section 107 covers violative conduct occurring outside United States territory, enforcement of statutory liability takes place exclusively in the federal courts of the United States.<sup>196</sup> The extraterritorial application of CERCLA liability and its subsequent territorial enforcement under section 107, therefore, conform with the judicial

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189. *Compagnie de Saint-Gobain*, 636 F.2d at 1315.

190. *Id.*

191. *Id.* at 1319.

192. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 7(1) (1965). The Restatement (Second), although prior to the Restatement (Third), is a far better treatise on the extraterritorial application of domestic law than its sequel. See also *Compagnie de Saint-Gobain*, 636 F.2d at 1316.

193. *Compagnie de Saint-Gobain*, 636 F.2d at 1316.

194. *Id.* at 1316.

195. See, e.g., cases cited *supra* note 188.

196. See *supra* notes 143-44 and accompanying text.

predisposition to limit a statute's extraterritoriality to cases involving jurisdiction to prescribe.

The limitation of a statute's extraterritorial application to the prescription of conduct, moreover, may help explain CERCLA's restrictions on foreign claimants under section 111. Administrative claims for compensation under CERCLA's Superfund process require active participation in and approval of the federal government in the cleanup process. The National Contingency Plan requirement of section 111 directs the federal government to control all on-site monitoring, remedial evaluation, and cleanup activities involving Superfund financing in accord with specific agency regulations. A claim against the Superfund under section 111 by a foreign party for damages incurred from an extraterritorial hazardous substance release would require active enforcement of the statute by the federal government on the soil of another nation. Therefore, CERCLA's statutory mandate of an active, on-site government role for section 111 claims requires an assertion of jurisdiction to enforce compliance with the statute's provisions. Congress' imposition of severe statutory restrictions on the application of section 111 to extraterritorial situations comports with the case law's predisposition against the extraterritorial assertion of enforcement jurisdiction.

The limitations on a court's adjudicatory or personal jurisdiction over a party whose extraterritorial conduct violates a domestic statute suggest that liability for extraterritorial releases under CERCLA attaches only to responsible parties who have minimum contacts with the United States. The application of the minimum contacts test to potentially liable parties under CERCLA limits the applicability of the statute to either liability creating conduct attributable to a national of the United States or liability creating conduct of a foreign party, some portion of which occurs within the territory of the United States.

Moreover, since CERCLA's extraterritorial liability applies only to a responsible party who has minimum contacts with the United States, the statute does not govern all hazardous substance releases in the world. Therefore, CERCLA's extraterritorial application would not represent a global assertion of United States environmental policy over all international waste disposal activity. CERCLA covers only the disposal activity of substances that originate within the United States.

In addition to distinguishing between different kinds of jurisdiction, United States courts recognize two basic grounds for an assertion of jurisdiction to prescribe in extraterritorial situations: the nationality principle and the substantial effects principle.<sup>197</sup> The nationality principle provides that a state has

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197. See generally, M. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 244-48 (1988); see also *Compagnie de Saint-Gobain*, 636 F.2d at 1316.

jurisdiction to prescribe conduct with respect to "the activities, interests, status or relations of its nationals outside as well as within its territory."<sup>198</sup> United States courts recognize the nationality principle as an accepted basis of extraterritorial jurisdiction. In 1952, the Supreme Court held that "Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States."<sup>199</sup>

CERCLA's extraterritorial application is based, in part, on the principle of nationality. The statute regulates the disposal of hazardous substances generated from within its territory. To the extent that liability attaches to all United States nationals who generate substances in need of disposal, CERCLA conforms to the principle of prescribing standards of environmentally sound conduct to all American citizens within and beyond United States borders.

The substantial effects test, the second principle by which United States courts evaluate the validity of a statute's extraterritorial jurisdiction, is grounded in a nation's right to assert jurisdiction over activities within its territory. United States courts apply the substantial effects test by evaluating extraterritorial activities in light of their impact on United States territory. In short, the substantial effects test extends a nation's territorial sovereignty over activity occurring beyond that nation's borders that, nevertheless, substantially affects persons or activities within its sovereign territory.<sup>200</sup>

The Restatement (Third) of the Foreign Relations Law of the United States asserts the substantial effects test for situations involving extraterritorial assertions of jurisdiction to prescribe conduct. The test describes the right of a nation to prescribe law governing "conduct outside its territory that has or is intended to have substantial effect within its territory."<sup>201</sup>

Waste exports satisfy the substantial effects test in several ways. First, waste exports threaten the health and safety of American citizens. As discussed earlier, exporting waste to developing nations that lack the technical and regulatory capabilities to provide for environmentally sound disposal of hazardous waste creates a boomerang effect that "threatens our coasts, oceans, and groundwater."<sup>202</sup> In addition, waste exports threaten to contaminate food products imported from developing nations. Since the United States imports agricultural products from many developing nations, improper waste disposal in those nations poses an increased risk of contamination to United States consumers.<sup>203</sup>

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198. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1986) [hereinafter RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW].

199. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282 (1952).

200. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 198, at § 402(1)(c) (1986).

201. *Id.*

202. Waste Export Control Act, *supra* note 55, at § 2(a)(5).

203. *See supra* text accompanying notes 40-41.

Second, the severity and scope of environmental disasters increases commensurate with the increase in the volume and toxicity of wastes exported to developing nations. Recent catastrophic hazardous substance releases like those at Chernobyl or the Rhine River in Germany have demonstrated the potential transnational damages caused by the improper disposal of toxic substances.<sup>204</sup> The risk of a hazardous substance release outside the United States that directly damages public health, property, and the environment within United States territory increases with the uninhibited export of hazardous wastes to developing countries.

Third, waste exports present significant problems for United States foreign policy objectives. Foreign policy relationships with developing nations are particularly threatened by waste exports. The United States Department of State has characterized waste exports from the United States as more of a foreign policy risk than an environmental one. Congressional efforts to regulate waste exports, moreover, underscore the effect of these shipments in "creating foreign policy liabilities for the United States."<sup>205</sup> The image of the ugly American dumping garbage on poorer nations continues to plague the diplomatic image of the United States in bilateral and multilateral foreign relations efforts.<sup>206</sup>

Fourth, in certain cases, generators export their waste in an effort to avoid the higher domestic disposal costs in the United States. The waste exports also contribute to the trade deficit of the United States.<sup>207</sup>

CERCLA's ability to deter waste exports and provide foreign parties injured by American waste exports with compensation for cleanup costs reduces the harmful effects of those waste exports upon the United States. Reducing the volume of waste exports through the deterrent threat of strict and joint and several liability reduces the risk to the health and environment of the United States. The application of domestic liability provisions for waste disposal to American generated waste disposed of outside our borders demonstrates the political good will of the United States to deter the volume and toxicity of waste exports to poorer nations and to assist these countries in environmental and public health protection while reducing our own trade deficit.

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204. See generally W. MOREHOUSE, *supra* note 31, at 13-72.

205. Waste Export Control Act, *supra* note 55, at § 2(a)(1).

206. *Id.* ("Exports of solid waste from the United States to foreign countries are increasing. In several reported instances, exported wastes have been disposed of in a manner that would not be permitted in the United States and are creating foreign policy liabilities for the United States"). See *supra* text accompanying notes 36-39.

207. See Waste Export Control Act, *supra* note 55, at § 2(a)(2) ("In some cases, exports of solid waste are being undertaken to avoid higher treatment and disposal expenses in the United States ... and contribute to the trade deficit of the United States").

For these reasons, waste exports create substantial negative domestic effects, and jurisdiction over them is appropriate. Hazardous waste releases impact upon American territory regardless of the geographic situs of the release and, therefore, provide a clear justification for establishing CERCLA liability irrespective of territoriality.

Extraterritorial application of a nation's domestic law raises the possibility of conflicts between national legal systems. In an effort to avoid conflicts of law between nations, United States courts show great deference to the laws of other nations when ruling on the extraterritorial application of United States law.<sup>208</sup> This deference is known as the principle of comity.<sup>209</sup> An important element in evaluating CERCLA's extraterritorial scope, therefore, is the extent to which the statute would not be applied for reasons of comity due to conflicts with the jurisdiction of another nation's legal norms or laws.

CERCLA's extraterritorial application differs from the cases involving the extraterritoriality of other federal statutes regarding antitrust, securities regulation, Title VII, or environmental control and command regulations. In such cases, United States courts evaluated American theories of liability and regulation that directly conflicted with the laws, regulatory norms, and culture of the nation where the conduct at issue took place. CERCLA's private party approach to hazardous substance liability, however, greatly reduces the potential for these kinds of conflicts.

Two elements of CERCLA's liability scheme reduce the chance of conflict with the laws and regulations of a foreign nation governing waste disposal activity. First, CERCLA employs civil liability for damages as its fundamental regulatory mechanism rather than command and control regulations. Since this mechanism functions in a private enforcement scheme, CERCLA liability would not affect another nation's regulatory efforts to sanction or prohibit particular waste disposal conduct within a foreign nation's borders. Second, the liability-creating conduct, the disposal of United States generated substances, originates within the territory and regulatory system of the United States. CERCLA does not reach waste streams that flow exclusively abroad.

A private cause of action, moreover, initiated by a foreign party for response costs under section 107 of CERCLA creates little potential for such conflicts. Although a determination of conflicts is always done on a case by case basis, conflicts with CERCLA would arise only when the law of a foreign

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208. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895); see also *supra* note 188.

209. A classic statement of the comity principle appears in *Hilton*:

[comity] in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

159 U.S. at 163-64 (1895).

nation prohibits an individual, the government or another entity of that nation from seeking legal relief in United States courts for damages from United States hazardous substance exports. Particularly when the plaintiff is the government of a foreign nation, it is unlikely to commence a CERCLA action if that action creates conflicts with its own legal system.

This is not to say, however, that conflicts will never emerge in the extraterritorial application of CERCLA. Problems would arise in foreign nations which have liberal investment codes or development agreements with United States based multinational corporations. A development agreement or investment code that prohibits liability for environmental problems could conflict with a claim under CERCLA for costs incurred from conduct covered by the contract or code. In such a case, choice of law and express restrictions on CERCLA liability might categorically prohibit the application of CERCLA to a hazardous substance release. The governing legal provision, however, would have to prevent an assertion of a CERCLA claim, since section 107 applies "[n]otwithstanding any other provision or rule of law."<sup>210</sup>

Foreign claims for monetary recovery from the Superfund under section 111 create a greater potential for conflict with the laws of a foreign nation. Since section 111 compensation involves significant "on-site" administrative action, technical analysis, and approval by United States regulatory agencies, these claims run the risk of the EPA attempting CERCLA enforcement within the jurisdiction of another nation's regulatory structure.<sup>211</sup> However, the requirement of section 111 that a bilateral treaty on hazardous substance liability be in force before a foreign claim for liability can be asserted greatly increases the chances that the conflict will be resolved before such a claim becomes ripe.

A final consideration in evaluating the extraterritorial scope of domestic law is the consistency of the statute with international legal norms.<sup>212</sup> Although the regulation of the international environment is a relatively new and undeveloped area, available sources of international environmental law suggest that CERCLA's extraterritorial application is consistent with emerging norms.

In 1972, many members of the international community reached consensus on a series of fundamental principles on the world environment.<sup>213</sup> These

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210. 42 U.S.C. § 9607(a) (1988).

211. See 42 U.S.C. § 9611(a)(2),(3) (1988); see also *supra* note 147.

212. See, e.g., *Boureslan v. ARAMCO*, 857 F.2d 1014, 1025-26, *aff'd on rehearing*, 892 F.2d 1271 (5th Cir. 1990) (en banc), *cert. granted* 59 U.S.L.W. 3212 (U.S. Oct. 1, 1990) (No. 89-1845), citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 198, at § 403(2)(f) ("Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including ... (f) the extent to which the regulation is consistent with the traditions of the international system").

213. Declaration of the United Nations Conference on the Human Environment (adopted June 16, 1972), \_\_ U.N.T.S. \_\_, *reprinted in* 11 I.L.M. 1416 (1972).

principles, known as the "Stockholm Principles," articulate a responsibility on the part of signatory nations "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."<sup>214</sup> CERCLA's imposition of strict and joint and several liability on all parties who generate hazardous wastes within its territorial and jurisdictional control is consistent with this principle. Through the imposition of broad liability upon domestic polluters for damages associated with the foreign disposal of their hazardous wastes, the United States can remedy the environmental harm that its generation of hazardous waste causes other nations.

To the extent that CERCLA also represents an effort to establish a law regarding liability and compensation for foreign victims of pollution damage caused by activities within its control, CERCLA is a significant component of a developing international norm concerning pollution liability.<sup>215</sup> CERCLA's extraterritorial application comports with the general intent of the liability provision of the Basel Convention calling on nations to cooperate "as soon as practicable" in adopting appropriate rules and procedures "in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes."<sup>216</sup> CERCLA's application to United States waste export activity may be understood as a cooperative effort on the part of the United States to adopt an appropriate rule of liability and compensation for damage from the export of its hazardous wastes in the absence of a formal international liability agreement.

Although the absence of a substantive liability provision in the Basel Convention demonstrates the international community's inability to codify a specific global liability scheme in treaty form, the Basel Convention does not constitute an international rejection of the polluter-pays liability principle embodied in CERCLA. Significantly, the most recent multilateral expression of international support for polluter-pays liability comes from the Organization for Economic Cooperation and Development (OECD). In issuing guiding principles relating to accidental pollution, the OECD proclaimed that the "principle to be used for allocating the costs of pollution prevention and control is the so-called 'Polluter-Pays Principle.'<sup>217</sup> The application of CERCLA liability to United States waste exports on a global scale is consistent, therefore, with existing international liability norms despite the inability of the world community to codify those norms in a treaty.

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214. *Id.* at Principle 21.

215. *See, e.g., id.* at Principle 22; Basel Convention, *supra* note 98, at art. 12.

216. Basel Convention, *supra* note 98, at art. 12.

217. *Organisation for Economic Cooperation and Development: Council Recommendation on the Application of the Polluter-Pays Principle to Accidental Pollution*, 28 I.L.M. 1320, 1322 (1989).

Finally, CERCLA's liability scheme is consistent with the general objectives and substantive provisions of the Basel Convention. The participants at Basel sought to create an instrument to address the problems associated with the international export of hazardous substances for disposal. CERCLA was created to combat the problems associated with hazardous waste disposal in the United States. The Basel Convention, therefore, is a global response to the problems that led to the enactment of CERCLA in the United States. The drafters of the Basel Convention sought to establish, as did the drafters of CERCLA, a regulatory scheme that contains a revolving fund mechanism to provide an emergency response for transboundary waste movement accidents, strong liability provisions to reduce waste exports and deter unsound disposal, and notification and information requirements for existing waste export proposals.<sup>218</sup> The extraterritorial application of CERCLA bolsters the intent of the Convention to reduce waste exports and control unsound environmental practices related to those exports.

### V. STRENGTHENING DOMESTIC AND INTERNATIONAL EFFORTS TO REGULATE HAZARDOUS WASTE EXPORTS

The extraterritorial application of CERCLA would constitute a significant improvement over current waste export regulations. Although limited to exports from the United States, the addition of CERCLA's polluter-pays liability scheme strengthens the ability of both domestic and international laws to cope with the problems posed by this global form of hazardous substance disposal. Accordingly, this part of the article examines the impact of CERCLA's extraterritorial application on domestic and international exports of hazardous waste for disposal.

#### A. *Improving Domestic Regulation*

CERCLA's extraterritorial application complements and improves existing federal efforts to regulate waste disposal in an environmentally sound manner. The extension of CERCLA's jurisdiction to cover waste exports from the United States cures several prominent defects in the current RCRA program and the proposed WECA amendments. Broadening CERCLA's liability scheme to encompass waste exports from the United States also eliminates the loophole in CERCLA's domestic liability scheme whereby polluters can avoid CERCLA

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218. See Basel Convention, *supra* note 98, at art. 14 ("The Parties shall consider the establishment of a revolving fund to assist on an interim basis in case of emergency situations to minimize damage from accidents arising from transboundary movements of hazardous wastes and other wastes or during disposal of those wastes").

liability altogether by simply exporting their waste for disposal outside the territory of the United States. The elimination of this loophole also helps to bring about a fundamental objective of United States environmental policy: the reduction of hazardous waste streams at the source of their generation, and the investment by industry in environmentally advanced disposal technologies.

CERCLA's extraterritorial application fits neatly into the current waste export program governed by RCRA while strengthening the program's ability to regulate and deter potentially dangerous shipments. The two laws have historically played complementary roles in the regulation of domestic waste disposal. RCRA's "cradle to grave" waste tracking regulations provide the means by which the individual parties liable for waste disposal problems are identified under CERCLA.<sup>219</sup> Conversely, CERCLA provides RCRA with the legal mechanism for penalizing environmentally unsound disposal activity: strict, joint and several, "cradle to grave" liability.

This imposition of liability on waste export activity produces several notable improvements in the current waste export program. First, the ability of the importing nation to invoke CERCLA to recover the costs associated with the cleanup of improperly handled hazardous substances exported from the United States would enhance the EPA's efforts to deter unsafe waste export proposals under RCRA. Although the EPA would still be powerless to ban an export shipment outright, exporters would be legally accountable for the costs of problems associated with all hazardous waste exports.<sup>220</sup> Exporters, therefore, would have to consider the potential costs of strict and joint and several liability in assessing the risks and merits of a particular export proposal.<sup>221</sup>

Second, CERCLA would govern disposal problems associated with substances not regulated by RCRA's waste export provisions. For example, raw chemical substances such as PCBs found in used products like electrical transformers, scrap metal, or batteries exported for recycling are exempted under RCRA's export provisions.<sup>222</sup> Actions could also be maintained under

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219. See *supra* notes 44-48 and accompanying text.

220. The EPA believes that enabling legislation attached to the Basel Convention ratification process will give the agency express power to prohibit waste export shipments to both nonparty and party nations. Vincent Interview, *supra* note 4. The Basel Convention will give the United States the power to prohibit any shipment the EPA believes cannot be handled by the importing nation in an environmentally sound manner. The Basel Convention also bans all shipments to nonparty nations. See *supra* notes 107-11 and accompanying text.

221. Although compliance with RCRA regulations is not a defense to CERCLA's imposition of strict liability, compliance with the RCRA requirements of notification and consent of the importing nation could be important to a defendant asserting an "act of state" doctrine defense to a CERCLA action by a foreign party. Thus, it is not unreasonable to suppose that the extraterritorial applications of CERCLA would also improve compliance rates with RCRA notification requirements.

222. 40 C.F.R. § 302.1 (1989) (listing threshold levels for releases of many chemicals such as PCBs that may not be regulated under RCRA in export context but will, nonetheless, trigger CERCLA action should release of substance exceed listed level); see also B. MOYERS, *supra* note 1, at 65-85 (discussion of loopholes in RCRA's regulation of hazardous waste exports).

CERCLA for response costs to pollution problems associated with waste, such as fly ash, classified as nonhazardous under RCRA. An action could recover response costs associated with the various toxic components of the fly ash like dioxins, cadmium, mercury, and arsenic.<sup>223</sup>

The application of CERCLA to waste exports also strengthens the viability of the Waste Export Control Act amendments to RCRA. Extending CERCLA's jurisdiction extraterritorially allows a foreign government to invoke the private cause of action under section 107 for cleanup costs associated with a waste export shipment. The unrestricted availability of section 107 to foreign governments thus restores the liability provision previously deleted from the pending legislation.

Furthermore, CERCLA's extraterritorial application fosters waste reduction and environmentally safe disposal technologies, two cornerstones of current environmental policy in the United States. Ironically, CERCLA's effectiveness in forcing industry to internalize the costs of waste disposal in the United States creates an incentive for polluters to externalize those costs by disposing of waste outside the country and thus evade the statute's imposition of liability. The extraterritorial extension of CERCLA liability to disposal activity involving waste exported from the United States cures this defect. Polluters, therefore, would bear the same costs for extraterritorial hazardous substance releases as those imposed for domestic disposal. Forcing polluters to internalize the costs of cleaning up hazardous waste releases irrespective of geography promotes waste reduction and long term investment in sound disposal technologies.

### *B. Improving the Availability of Compensation for Victims*

Even more important than improving the effectiveness of waste export regulations, CERCLA's extraterritorial application enhances the ability of the victims of hazardous waste export activity to recover for injury. Extending CERCLA's jurisdiction extraterritorially provides a more predictable and consistent means of compensating injured parties for costs incurred in response to a release of exported waste than is presently available under tort law doctrines in the United States. Furthermore, the imposition of CERCLA liability to waste export activity strengthens an injured party's ability to bring traditional tort law claims for damages caused by injuries not covered under CERCLA.

The imposition of strict and joint and several liability upon all responsible parties greatly reduces the burden of proof problems confronting victims and

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223. See 40 C.F.R. § 302.1 (1989).

foreign governments seeking compensation for response costs associated with the cleanup of hazardous waste exported from the United States. A plaintiff in a section 107 action under CERCLA for response costs need only prove that the defendant generated the hazardous substance released and that the plaintiff incurred costs in response to that release.<sup>224</sup> Moreover, the plaintiff need not demonstrate the extent to which a responsible party's substance caused particular damage, nor the extent to which that party was at fault for the release. As a result of this broad liability, the plaintiff can avoid many of the difficult causation issues associated with traditional toxic tort litigation and maintain an action at far less cost.

A major advantage of extending CERCLA's jurisdiction extraterritorially for foreign plaintiffs is the statute's ability to prevent defendants from forum shopping during litigation. The statute requires that United States district courts have exclusive and original jurisdiction over any CERCLA action and that the action must be tried in the federal district court in the district where the defendant resides or has its principal place of business.<sup>225</sup> These requirements bar a defendant from removing any action brought under section 107 of CERCLA from a United States district court. Unlike extraterritorial toxic tort litigation, which is subject to dismissal from a federal district court under the doctrine of *forum non conveniens*,<sup>226</sup> CERCLA guarantees a plaintiff a forum in a United States court.

Furthermore, CERCLA's extraterritorial application would allow a foreign plaintiff to overcome the forum shopping and choice of law problems in extraterritorial toxic tort actions. A foreign plaintiff could join any damage claim stemming from injuries exclusively governed by tort law doctrines to a CERCLA action for response costs. This would allow the federal district court, pursuant to pendent jurisdiction, to try the toxic tort claims not governed by CERCLA along with the CERCLA action. Any attempt to remove the pendent tort claims, by invoking *forum non conveniens*, would conflict sharply with the efficiency and convenience rationales that underlie that doctrine; removal would require a separate adjudication in the foreign country where the release and injuries occurred. Thus, CERCLA's venue and exclusive jurisdiction requirements strengthen a foreign plaintiff's answer to a defendant's motion to dismiss toxic tort claims for *forum non conveniens* and diminish the ability of the defendant to shop for fora.

Thus, CERCLA's extraterritorial application provides a clear legal mechanism for compensating the victims of extraterritorial hazardous substance releases. Predictable and consistent outcomes in litigation will aid the victims

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224. See *supra* notes 126-44 and accompanying text.

225. 42 U.S.C. § 9613(b) (1988).

226. See *supra* notes 73-75 and accompanying text.

of these environmental tragedies and establish a dependable means for deterring unsound environmental conduct through the imposition of liability on polluters.

*C. Strengthening the Basel Convention*

The application of CERCLA's liability scheme to international waste exports from the United States will improve the global effort to regulate waste exports in a number of ways. First, it creates an effective and immediately available liability scheme that can deter the international export of hazardous waste from the United States, the world's largest generator of hazardous waste.<sup>227</sup> CERCLA gives the Basel Convention and other multilateral proposals a means of imposing polluter-pays liability on a significant volume of waste exports.

Second, in addition to the imposition of liability on responsible parties for damages associated with United States exports, CERCLA's extraterritorial application provides a means of international legal relief for parties injured by hazardous waste exports from the United States. CERCLA thereby fills a significant gap in current international efforts to regulate waste exports by providing effective and consistent legal relief from environmental damage caused by United States waste exports.

Third, although liability and corresponding legal relief would be limited to situations involving United States waste exports, CERCLA's extraterritorial application provides the international community with a model for developing a workable multilateral liability rule applicable to waste exports from any nation. CERCLA could provide an important departure point for resolving the current international stalemate over the issue of waste export liability and act as a catalyst for creating consensus on a comprehensive global policy governing waste exports.

Fourth, CERCLA's application may lessen the possibility that certain importing nations will ban waste exports. These unilateral bans<sup>228</sup> are undesirable because they result in a patchwork approach to waste export regulation that encourages exporters to ship their waste to neighboring countries that have no such restrictions, thereby increasing the concentration of wastes in particu-

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227. See *supra* note 5 and accompanying text.

228. See Greenpeace Waste Trade Update, Dec. 1989, at 2 ("The Basel Convention waste trade notification system stands in stark contrast to efforts in the European Parliament, the Organization of African Unity, the Lome Convention, and elsewhere to prohibit all waste exports from the United States and Europe to less industrialized countries"). The diplomatic volatility of the waste export issue and the international community's inability to agree on a liability provision for waste exports have strengthened the view that a global moratorium on waste export shipments may be the only viable short term solution. *Id.*; see also *supra* notes 87-89 and accompanying text.

lar nations instead of deterring the volume and toxicity of exports worldwide.<sup>229</sup> To the extent that these unilateral bans are a response to the failure of the international community to agree on a liability scheme, CERCLA may be viewed as a significant effort by an important export nation, the United States, to establish a global liability scheme for its own exports. CERCLA, therefore, could provide a means of persuading countries not to enact unilateral blockades of waste exports.<sup>230</sup>

## VI. CONCLUSION

The extraterritorial application of CERCLA provides the United States with an effective means to address the increasing environmental and diplomatic problems associated with the international export of hazardous waste. This approach to waste exports is legally viable, economically efficient, and environmentally sound.

Empirical evidence suggests that in the coming years the United States and other industrialized nations will increase their exports of hazardous wastes for disposal. As disposal costs continue to rise and domestic regulations reduce the availability of the end-of-the-pipe forms of waste disposal, the industrialized world will increasingly view developing nations as cheap and available

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229. This article's criticism of unilateral bans should not be construed to imply any opposition to a global ban on waste exports. A global ban may be the most effective long term approach to the problem.

230. A possible objection to extending CERCLA's extraterritorial jurisdiction is the belief that the extraterritorial extension of liability would put American industry at a competitive disadvantage with the rest of the world. Ironically, this policy argument challenges neither the legality of the statute's extraterritorial jurisdiction nor the effectiveness of its ability to deter and regulate the international export of hazardous wastes from the United States. Rather, this criticism stems from the fear that CERCLA might work too well in preventing the internalization of pollution costs and create stringent polluter-pays liability for American industry while the rest of the industrialized world pollutes liability free.

The view that CERCLA's extraterritorial application places American industry at a competitive disadvantage is misguided when examined in light of the characteristics of the waste export trade. First, CERCLA's application will help responsible American industries to continue to export their waste at a time when many importing nations are erecting outright bans on waste exports and when proposals for a global moratorium are gaining broader international support. CERCLA represents an attractive counterproposal to the idea of erecting a total blockade of waste export shipments. CERCLA's application is particularly helpful to United States industry since European and other developed nations can offer no comparable form of insurance to importing nations.

Second, environmental experts all over the world agree that end-of-the-pipe waste disposal must be phased out over the long term if the planet is to avoid ecological suicide. See generally *Office of Technology Assessment, Serious Reduction of Hazardous Waste: For Pollution Prevention and Industrial Efficiency*, OTA-ITE-317, 87-91 (1986). CERCLA's extraterritorial application forces American industry to adjust gradually to that inevitability. By preventing industry from externalizing its costs onto the rest of the world, CERCLA creates a financial incentive for American business to invest in alternative disposal and source reduction strategies. The adjustment to alternative waste disposal strategies, moreover, is essential if American business is going to compete in the long run with industries from other developed nations, many of which have already begun to reduce waste generation greatly and to develop alternative waste technologies. Third, CERCLA's deterrence of waste exports has the additional benefit of keeping waste disposal dollars in the United States, thereby reducing the trade deficit. Waste Export Control Act, *supra* note 55, at § 2(a)(2).

dump sites. The evidence suggests, however, that the hidden costs -- environmental damage, public health problems, and foreign relations crises -- associated with this quick-fix solution to industrial pollution will be extremely high.

The notable absence of provisions imposing liability for the export of hazardous wastes renders recent domestic and international efforts aimed at the problems associated with the waste export trade inherently ineffective. Moreover, friction between exporting and importing nations makes an agreement on an effective global liability scheme unlikely. Without such a scheme, deterrence of unsound disposal practices, remediation of environmental and public health problems, and internalization of the hidden costs associated with hazardous waste exports will be virtually impossible.

The extension of CERCLA's strict and joint and several liability scheme to the export of American hazardous wastes provides the United States with an effective solution to the waste export dilemma. CERCLA's extraterritorial application, while novel, is consistent with the language, intent, and history of the statute. CERCLA's statutory scheme provides two distinct remedies for addressing problems associated with the release of hazardous wastes into the environment. Section 107 of the statute creates an unrestricted private cause of action for response costs incurred as the result of a hazardous substance release. CERCLA's statutory language allows foreign parties to invoke section 107 for any extraterritorial release of a hazardous substance in a foreign nation. Section 111 provides a foreign party with a more limited remedy; it establishes a multibillion dollar Superfund to provide administrative financial assistance for the cleanup of abandoned hazardous waste sites located either within or directly adjacent to the territory of the United States. The extraterritorial application of CERCLA complements the existing framework of domestic waste export regulation and provides the international community with a viable model for structuring a global liability scheme. Most importantly, extending CERCLA to regulate the export of hazardous waste from the United States provides a realistic departure point for internationalizing the slogan -- Not in anyone's back yard!

