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Jerrold A. Long
University of Idaho, jlong@uidaho.edu

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Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements of Hazardous Wastes and Their Disposal

INTRODUCTION

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)¹ was adopted in 1989² and entered into force on May 5, 1992.³ Despite the Basel Convention's intention to reduce the overall number of transboundary shipments of hazardous wastes, no system was created to establish liability should an accident occur.⁴ In December 1999, at the Fifth Conference of the Parties to the Convention, a liability protocol was finalized,⁵ and the Basel Convention came closer to protecting member na-

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1. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, S. TREATY DOC. NO. 5 (1991), 28 I.L.M. 657 [hereinafter *Basel Convention*]. For an in-depth background on the Basel Convention, see Miles L. Buckingham, *The Basel Convention*, COLO. J. INT'L ENVTL. L. & POL'Y 1998 Y.B. 291 (1999).
 2. See *Basic Description of the Basel Convention* (visited Feb. 16, 2000) <<http://www.basel.int/about.html>>.
 3. See *id.*
 4. See Buckingham, *supra* note 1.
 5. *BAN Report and Analysis of the Fifth Conference of the Parties to the Basel Convention* (visited Jan. 24, 2000) <<http://www.ban.org/COP5/cop5rep.html>> [hereinafter *BAN Report*]. The Liability Protocol first opened for signature on March 6 to 17 at Switzerland's Federal Department of Foreign Affairs. The Protocol will again open for signature from April 1 to December 10, 2000 at the United Nations Headquarters in New York. The Protocol will enter into force after it has been ratified by twenty nations. See UNEP, *Liability Regime for Hazardous Wastes Accidents Opens for Signature in Bern* (press release Mar. 6, 2000) <<http://www.unep.org/unep/per/ipa/pressrel/r03-0600.001>>.

tions from accidents due to the transboundary shipments of hazardous wastes.

I. HISTORY OF PROTOCOL

The Basel Convention mandates that “[t]he 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 transboundary movement and disposal of hazardous wastes and other wastes.”⁶ Despite this mandate, work on the Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal⁷ (Liability Protocol or Protocol) unearthed significant problems over the last seven years. The discussions initially began in 1993, when the first draft protocol was issued by the Ad Hoc Working Group of Legal and Technical Experts.⁸ At the Second Conference of the Parties in March 1994,⁹ the Parties voted to advance the Protocol in hopes that it would be finalized by the Third Conference in September 1995.¹⁰ However, this did not occur.

Even in the final months before the Fifth Conference, the Liability Protocol faced significant opposition. The largest conflicts concerned the potential establishment of an international “Superfund” to pay for future accidents,¹¹ and the possibility that exporters would have to pay for accidents that occur after the hazardous material had arrived at the disposal site.¹² US exporters were particularly concerned about the second issue.¹³ They succeeded in having the draft protocol changed to limit their liabil-

6. Basel Convention, *supra* note 1, art. 12.

7. Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal (visited Mar. 17, 2000) <<http://www.unep.ch/basel/COP5/docs/prot-e.pdf>>[hereinafter Liability Protocol].

8. See *Basel Liability Protocol Drafted*, ENVTL. LIABILITY REP., Oct. 29, 1993, at 11, available in 1993 WL 10912079.

9. See *id.*

10. See *Basel Plenary Approves Protocol Work*, ENVTL. LIABILITY REP., Apr. 25, 1994, at 6, available in 1994 WL 10096886.

11. See *Countries Push for Superfund-Like System at Latest Basel Meeting*, SOLID WASTE REP., Feb. 4, 1999, available in 1999 WL 10390719.

12. See Jack Lucentini, *Exporters Won't Be Hit with Cleanup Costs Under Revised Liability Proposal*, J. COM., Mar. 26, 1999, at A3, available in 1999 WL 6374608.

13. According to one estimate, the “proposed agreement [could] affect an estimated \$14 billion to \$18 billion in materials exported by U.S. producers.” *Id.*

ity to accidents occurring only while the material is in transit.¹⁴ In September, developed countries, including Germany, Australia, and Canada, finally rejected attempts to establish a compensation fund.¹⁵

II. THE LIABILITY PROTOCOL

The objective of the Protocol is to provide for a comprehensive regime for liability and for adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other wastes and their disposal including illegal traffic in those wastes.¹⁶

A. Liability

The Protocol's guidelines for liability are quite simple, and Article 3 outlines the situations in which the Protocol's provisions will apply.¹⁷ Generally, when the importing state and exporting state are both Contracting Parties,¹⁸ the Protocol will apply until the completion of disposal.¹⁹ In this case, the notifier²⁰ will be strictly liable until the disposer takes possession of the wastes, at which time the disposer would be liable for any damage.²¹ Where only one party is a Contracting Party, the Protocol will only apply to damage that occurs while the hazardous wastes are in the possession of the Contracting Party.²² If a waste is not specifically included in the Basel Convention, but is considered hazardous by the domestic legislation of a Party, the Protocol will only apply when the wastes have been notified in accordance with Article 3 of the Basel Convention.²³

14. *See id.*

15. *See* Esther Tan, *Payment for Waste Disposal: Talks Fail*, NEW STRAITS TIMES, Sept. 20, 1999, at 15, available in 1999 WL 21743614.

16. Liability Protocol, *supra* note 7, art. 1.

17. *See id.* art. 3.

18. "Contracting Party" is defined in Article 2, paragraph 2(f) of the Liability Protocol as "a Party to the Protocol." *Id.* art. 2, ¶ 2(f).

19. *See id.* art. 3, ¶ 2.

20. The "notifier" can be either the importing or the exporting state. *See* Liability Protocol, *supra* note 7, art. 3, ¶ 2. Moreover, the "notifier" may also be the actual "generator or exporter" of the materials. *See* Basel Convention, *supra* note 1, art. 6, ¶ 1.

21. *See* Liability Protocol, *supra* note 7, art. 4, ¶ 1.

22. *See id.* art. 3, ¶ 3(b).

23. *See id.* art. 3, ¶ 6(b). Either the State of Import or Export, or both, may notify a waste. *See id.*

In addition to the strict liability regime outlined in Article 4, the Liability Protocol assigns liability to any person "for damage caused or contributed to by his lack of compliance with the provisions implementing the Convention or by his wrongful intentional, reckless or negligent acts or omissions."²⁴

However, even when both parties are Contracting Parties, Article 3, Paragraph 6 provides that the Protocol may not apply where both parties are part of a liability agreement entered into prior to the Protocol's entry into force.²⁵ This provision primarily impacts developed countries that are parties to the Organization for Economic Cooperation and Development (OECD).²⁶ The Protocol also excuses from liability any accidents if the Party responsible for the waste can show that the accident was:

- (a) The result of an act of armed conflict, hostilities, civil war or insurrection;
- (b) The result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character;
- (c) Wholly the result of compliance with a compulsory measure of a public authority of the State where the damage occurred; or
- (d) Wholly the result of the wrongful intentional conduct of a third party, including the person who suffered the damage.²⁷

B. Payments

The Protocol requires that any person liable under Article 4 "maintain during the period of the time limit of liability, insurance, bonds or other financial guarantees covering their liability."²⁸ These guarantees must satisfy the minimum limits established in Annex B to the Protocol.²⁹ Contracting Parties may bring a claim for damages in the court of a Contracting Party where: "(a) The damage was suffered; or (b) The incident occurred; or (c) The defendant has his habitual residence, or has his principal place of business."³⁰ Any person liable under the Protocol shall be allowed to seek contribution from any other person liable under the

24. *Id.* art. 5.

25. *See* Liability Protocol, *supra* note 7, art. 3, ¶ 6(a).

26. *See* Daniel Pruzin, *Hazardous Waste: Agreement on Liability Protocol Reached at Basel Conference of Parties*, Daily Env't Rep. (BNA), Dec. 13, 1999, at AA-1.

27. Liability Protocol, *supra* note 7, art. 4, ¶ 5.

28. *Id.* art. 14, ¶ 1. Article 13 establishes the time limit for liability. *See id.* art. 13.

29. *See id.* art. 14, ¶ 1. Note that there is no limit for Article 5 fault-based liability.

30. *Id.* art. 17, ¶ 1.

Protocol,³¹ or from any person with whom the liable party has an express contractual agreement.³² Liability may also be reduced or disallowed if the injured party caused or contributed to the damage.³³

III. CRITICISMS

Only time will tell us whether the protocol will remain as weak and dangerous as it is currently drafted or whether it will in time be amended to assure real victim protection and provide incentives for industry to reduce transboundary movements and the generation of hazardous wastes.³⁴

Initial reactions to the Liability Protocol varied. Klaus Töpfer, Executive Director of the United Nations Environment Programme, called the adoption of the Basel Treaty “an historic event that represents a major shift toward cleaner production, capacity building in developing nations and a desire to move away from the throw-away philosophy that is all too common.”³⁵ However, not all commentators shared such praise for the Protocol. Tom Wolfe, an attorney with the Washington, D.C.-based Capital Environmental, called the Liability Protocol “all politics, really not legal [work] or negotiating,” which was advanced merely because it “looks good for the U.N. program.”³⁶ Kevin Stairs, a political advisor with Greenpeace International, further derided the Protocol as “the sad result of 10 years of effort by the industrial lobby to reduce the original intention to a text with as many holes and exclusions as Swiss cheese.”³⁷

A. *No Generator Liability*

The Protocol, by placing exclusive responsibility on the “person in operational control” to mitigate damages caused by hazardous wastes, can exempt the generators of the waste from any liability.³⁸ Arguably,

31. *See id.* art. 8, ¶ 1(a).

32. *See id.* art. 8, ¶ 1(b).

33. *See id.* art. 9.

34. *BAN Report*, *supra* note 5.

35. *Basel Convention Approves Final Pact, but Some Question Fate of Agreement, ASBESTOS & LEAD ABATEMENT REP.*, Dec. 1, 1999, available in 1999 WL 10391434.

36. *Id.* (alteration in original).

37. Pruzin, *supra* note 26.

38. *See Liability Protocol*, *supra* note 7, art. 6, ¶ 1 (“[s]ubject to any requirement of do-

this creates an incentive for generators to export their waste, contrary to the original purpose of the Basel Convention.³⁹ By passing waste on to a "notifier" or exporter, a generator can escape all liability. Critics argue that these notifiers may lack sufficient financial resources to effectively deal with potential accidents.⁴⁰

In addition, the ability to escape generator liability through the Basel Convention may tempt US corporations to export their waste, avoiding liability under the US "Superfund" legislation.⁴¹ Roger Kluck, a legal advisor to the Basel Action Network (BAN), specifically criticizes this part of the Protocol:

[u]nder superfund provisions, a waste generator in the United States who disposes his waste in a landfill which is not run properly is jointly liable for any damage. So a generator is always on the hook, which encourages a firm to ensure that the waste is being handled correctly. All this is being undercut by the option to terminate liability under the protocol, which acts as a significant and real incentive to export.⁴²

Again, this potentially undermines the original purposes of the Basel Convention.

B. No Superfund

Of particular concern to many developing countries, the Liability Protocol failed to establish any sort of "Superfund" to aid clean-up in economically disadvantaged locales.⁴³ Developed countries prevailed in

mestic law any person in operational control of hazardous wastes and other wastes at the time of an incident shall take all reasonable measures to mitigate damage arising therefrom").

39. See *BAN Report*, *supra* note 5. The preamble to the original Basel Convention recognized the issue: "[n]oting that States should ensure that the *generator* should carry out duties with regards to the transport and disposal of hazardous wastes and other wastes in a manner that is consistent with the protection of the environment, whatever the place of disposal. . . . Aware also of the growing international concern about the need for stringent control of transboundary movement of hazardous wastes and other wastes, and of the need as far as possible *to reduce such movement to a minimum.*" Basel Convention, *supra* note 1 (emphasis added).
40. See *BAN Report*, *supra* note 5; Pruzin, *supra* note 26. The Protocol does provide for liability to be placed on any party who contributes to the accident. See *supra* text accompanying note 24.
41. See Pruzin, *supra* note 26. The Comprehensive Environmental Response, Compensation and Liability Act ("Superfund") can be found at 42 U.S.C. §§ 9601-9675.
42. See Pruzin, *supra* note 26.
43. See *id.*

including only a very weak and effectively non-existent financial mechanism, which was finalized in Article 15 of the Protocol: “[w]here compensation under the Protocol does not cover the costs of damage, additional and supplementary measures aimed at ensuring adequate and prompt compensation may be taken using existing mechanisms.”⁴⁴ The Protocol’s drafters attempted to placate developing countries’ concerns by making an ambiguous and unenforceable promise: “[t]he Meeting of the Parties shall keep under review the need for and possibility of improving existing mechanisms or establishing a new mechanism.”⁴⁵ This was an arguably inadequate response to concerns raised by UNEP prior to the December meeting, namely that the lack of funds for managing wastes in developing countries whose “capabilities and capacities. . . in disposal, monitoring and enforcement are quite weak” was in fact a serious problem.⁴⁶

C. “Other” Agreement Exemptions

Perhaps the most significant criticism of the Protocol involves the exemptions allowed under Article 3, Paragraph 7. That provision provides, in part: “[t]he Protocol shall not apply to damage due to an incident occurring during a transboundary movement of hazardous wastes and other wastes and their disposal pursuant to a bilateral, multilateral or regional agreement or arrangement concluded and notified in accordance with Article 11 of the Convention.”⁴⁷ This provision is crucial as most developed countries already have agreements for the transfer of hazardous wastes (*i.e.*, the OECD’s “red-amber-green” waste shipment accord).⁴⁸ Roger Kluck of BAN also harshly criticizes this provision. “The vast majority of hazardous waste shipments now taking place occur

44. Liability Protocol, *supra* note 7, art. 15, ¶ 1. This provision is made even weaker when considered in conjunction with Article 3, Paragraph 7, which allows parties to “opt out” of the Protocol through outside agreements. *See id.* art. 3, ¶ 7.

45. *Id.* art. 15, ¶ 2.

46. Gustavo Capdevila, *Environment: Rich Nations Block Hazardous Waste Disposal Fund*, Inter Press Serv., Sept. 7, 1999, available in 1999 WL 5950416.

47. Liability Protocol, *supra* note 7, art. 3, ¶ 7. For the exemption to apply to an Article 11 agreement, the following four conditions must be met: 1) the damage occurred in an area under the jurisdiction of a party to the agreement; 2) the agreement contains a liability and compensation regime which meets the objectives of the Protocol; 3) the parties to the agreement notified the Depository of the non-application of the Protocol; and 4) the parties have not declared that the Protocol shall be applicable. Article 11 provides that the Protocol will not replace other agreements that were opened for signature at the time the Protocol was opened for signature, even if such agreement is later amended. *See id.* art. 11.

48. *See* Pruzin, *supra* note 26.

within the OECD, so most waste shipments won't be covered under the protocol Developing countries don't want this [exemption]; they want the protocol to act as a minimum global norm."⁴⁹

Of course, not all commentators agree with Kluck's assessment. Philippe Roch, president of the Basel Meeting of the Parties,⁵⁰ argues that the Protocol is not designed to deal with developed countries. "It is clear that OECD countries do not need this protocol because they already have their own system."⁵¹ However, it is believed that OECD countries account for approximately ninety-eight percent of the world's hazardous waste, much of which ends up in developing countries.⁵²

D. Minimum Penalties

Annex B of the Liability Protocol provides for minimum penalties in Annex B to the Protocol.⁵³ However, these minimum penalties are criticized by environmental groups as insufficient to cover potential damages caused by hazardous wastes.⁵⁴ Once again, observers disagreed on this issue. Daniel Fantozzi, the US State Department's Office of Environmental Policy Director, expressed concern that the minimum penalties would have significant impacts on the trade of non-dangerous recyclable wastes.⁵⁵ Fantozzi noted that recyclable wastes "can be in bulk shipments with very low hazardous components, but because of those components they would be caught by the agreement."⁵⁶ Absent some change in the liability provisions to account for his concern, Fantozzi declared, "it would be a very serious question whether we would ratify."⁵⁷

CONCLUSION

As currently written, the Liability Protocol contains significant loopholes that might reduce its effectiveness. Whether hazardous waste producers take advantage of straw "notifiers" and exporters to shield

49. *Id.* (alteration in original).

50. Roch is also the head of the Swiss Federal Office for the Environment, Forests, and Landscape. *See id.*

51. *Id.*

52. *See Tan, supra* note 15.

53. *See Liability Protocol, supra* note 7, Annex B.

54. *See BAN Report, supra* note 5.

55. *See Pruzin, supra* note 26.

56. *Id.*

57. *Id.*

them from liability, and whether any substantial compensation fund will be created, remains to be seen. Hopefully, the Protocol will serve its purpose and seven years of work and compromises will not be wasted.

Jerrold A. Long