Industrialized countries export vast amounts of hazardous wastes to less developed nations where the import, treatment, and disposal of such wastes remain largely unregulated. Third World countries are often caught between a rock and a hard place regarding the transportation of hazardous waste into their countries: on the one hand, import provides major revenue; on the other hand, it creates untold numbers of health and environmental risks.

Horror stories about the trade abound and have contributed to its notoriety. In 1988, 3,000 tons of Italian toxic wastes, labeled as construction material, were delivered to a port in Nigeria, where authorities came frighteningly close to executing the people responsible. In the same year, the “ghost ship” Pro Americana, laden with 2,000 tons of toxic wastes, was refused at ports in Brazil, Denmark, and Belgium. Numerous officials in many countries have been arrested or implicated in illegal import/export schemes, and a thriving and entirely unregulated black market continues to exist worldwide.

The combination of the exploitive nature of the trade between industrialized and less developed countries and the toxic nature of the environmental threat has made this issue a favorite with nongovernment organizations and the public. The nature of the trade, involving privately owned companies that conduct their business on the open seas, in addition to the temptations that corrupt many government authorities, have made the issue a particularly sensitive one among national governments. Thus, the regulation of the international transport of hazardous wastes has become one of the most difficult but critical issues in the field of international environmental law.

Regulation of the transportation of hazardous wastes began on a national level and has only recently become an issue of international negotiations and agreements. Yet, due in part to the North-South (exporter-importer) divisions over the issue, efforts at international regulation have remained fragmented. Within the United States, hazardous waste exports are controlled by the 1984 Hazardous Waste and Solid Waste Amendments to the 1980 Resource Conservation and Recovery Act. In the European Union, the 1984 Directive on the Transfrontier Movement of Toxic Waste, as amended in 1986, is the primary domestic regulation mechanism.

The most ambitious international agreement in this area is the 1989 Basel Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal. However, because of the many weaknesses in the Basel Convention, including the claim that it legitimizes a trade the international community should properly prohibit, many Third World countries have renounced it. As an alternative, the Organization of African Unity has created its own agreement, the 1991 Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa. The European Economic Community banned all hazardous waste exports to developing countries and toxic and radioactive exports to 68 developing countries in accordance with the 1989 African, Caribbean, and Pacific States–European Economic Community Convention (LOME IV), as amended in 1990.

The international effort with respect to the movement and dumping of hazardous wastes at sea has consisted of, most importantly, the 1972 Ocean Dumping Convention and the 1973 International Convention for the Prevention of Pollution from Ships. One last piece in the patchwork of international efforts is the attempt by the international community to control transnational
corporations (TNCs), who are often the main players in the import/export business and yet who remain unregulated under international treaties, by which only nations become bound. This problem was addressed by the U.N. Economic and Social Council in its 1988 Draft Code of Conduct on Transnational Corporations. Although still a long way from adoption, that code represents a small step forward in regulating the parties who have the most to gain from the unregulated black market in hazardous wastes.

1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal

In May 1992, a month before the Earth Summit in Rio de Janeiro, the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal came into force after receiving the requisite number of ratifications. The Basel Convention’s ratification came three years after it was signed under United Nations Environmental Programme (UNEP) sponsorship in 1989.

Under the terms of the convention, member countries seeking to export hazardous wastes must now comply with the agreement’s provisions regarding notification of such exports both to the importing country and to any countries through which the waste travels. In addition, before any waste may be transported, official consent to the shipment must be obtained in writing from all the countries involved. If the provisions of the convention are not complied with at any time during the waste shipment or disposal, the exporting country must reimport the waste and be responsible for its proper disposal.

While the Basel Convention’s stated objectives are the reduction of hazardous wastes and self-sufficiency in waste disposal (each nation treats and disposes of its own hazardous wastes), countries must do so in an “environmentally sound and efficient manner.” According to the convention, any country lacking the technical capacity or proper facilities to dispose of its waste domestically in an environmentally sound and efficient manner is permitted to export the waste abroad, also in an environmentally sound and efficient manner.

Although the term “environmentally sound and efficient manner” is pivotal to the Basel Convention’s construction and implementation, it remains vague and poorly defined. At a post-ratification conference held in Uruguay in late 1992, participating nations were unable to reach consensus on what specific treatment standards and techniques satisfy this standard. Additionally, there are problems with enforcing the convention and making violators liable.

Because of the undefined terms and the absence of enforcement and liability provisions, the Basel Convention has achieved little success. In fact, many developing nations and environmental organizations believe that the agreement has actually encouraged the export of hazardous wastes. These nations and organizations maintain that by establishing procedures that facilitate the transboundary movement of waste, UNEP is seen to be sanctioning such activities. Rather than create incentives to reduce the initial generation of waste, it could be argued that the Basel Convention legitimizes its continued production, transport, and disposal.

It is in the area of the transportation of hazardous wastes that the jurisdictional issues become most frustrating. Nations are not directly responsible for the sale, purchase, and movement of waste. Rather, large TNCs make huge profits by collecting waste and paying underdeveloped nations to dispose of it within their boundaries. As discussed in an earlier section, it is nearly impossible to impose liability or responsibility on TNCs. This has become such an overwhelming and life-threatening issue for many African nations that they countered both the ineffectiveness of the Basel Convention and the immunity of the TNCs with the 1991 Bamako Convention, a complete ban on the import of hazardous waste into convention countries. However, as yet, the convention has not been implemented, and several African nations continue to collude with European TNCs to import illegal wastes.

In an effort to address these conditions, in 1998 the parties to the Basel Convention signed, but have not yet ratified, a total ban on hazardous-waste trade between developed and developing countries.
1972 Ocean Dumping Convention

As a result of a recommendation made at the U.N. Conference on the Human Environment in Stockholm, an ocean dumping conference was held in London in October and November of 1972. The product of this conference was the Ocean Dumping Convention.

This convention remains the most comprehensive international agreement concerning marine pollution. First, it establishes a list of contraband materials as well as procedures for adding new materials to this list. In addition to the listing of materials that may not be dumped in the ocean under any circumstances, the convention also sets forth other obligations. States must (1) undertake environmental impact assessment prior to dumping, (2) promote effective controls of all resources or marine pollution, (3) keep records regarding the quality and quantity of dumping by vessels or aircraft, (4) designate a permit-authorizing body or agency, and (5) negotiate dispute settlement procedures for resolving damages caused by ocean dumping.

Although perceived as an important first step toward controlling pollution from ocean dumping, the convention has been criticized for its lack of enforcement procedures. No specific international environmental agency was designated or created to monitor and ensure compliance. Contracting states retain sole authority to prevent and punish conduct that contravenes the provisions of the convention. Many countries have chosen to ignore illegal dumping activity or to permit such dumping in territorial and coastal waters.

While the Ocean Dumping Convention enhanced global awareness of the environmental problems resulting from marine pollution, it did not provide the institutions to ensure that conditions improved.

MARPOL Convention

An additional instrument in the regulation of marine pollution is the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL), in conjunction with an additional 1978 protocol. While the 1973 MARPOL Convention had as its ambitious aim the regulation of various pollutants, including oil (Annex I), "noxious liquid substances in bulk" (Annex II), and garbage from ships (Annex V), the 1978 protocol specifically defers the application of Annex II “until certain technical problems have been satisfactorily resolved.” As garbage from ships applies only to the garbage generated by that ship, and not to the transportation of garbage, MARPOL only regulates marine oil pollution caused by ships, particularly oil tankers.

MARPOL regulates in two primary ways: first it sets out detailed requirements for the construction of ships that transport oil, and second, it establishes a permitting and inspection and a reporting scheme between coastal states, port states, and flag states. The regulations require double-hulling based on established categories according to weight and age. While double-hulling is recognized as an effective way of reducing oil spills in the event of low-velocity accidents, it is still somewhat controversial because it may increase the risks of fires and explosions. In addition, the large gaps in MARPOL assure that any ships below a certain capacity, less than 25 years old, or newly constructed before the implementation dates, are not regulated. A final problem raised by this type of regulation is the suspicion of many that it will force oil companies to use more, smaller vessels to avoid regulations and therefore increase the odds of accidents by virtue of the sheer number of ships involved in oil transport.

MARPOL also established a permitting, inspection, and reporting scheme. Flag states must issue initial certifications of international oil pollution prevention compliance. Port states inspect ships upon entry and bar substantial non-compliers from exiting without repairs. Coastal states report discharges. The primary enforcement comes from flag-state prosecution of violators, with evidence collected from inspecting port states and reporting coastal states. However, not surprisingly, the exchange of information has proved difficult. The surveillance of discharges on the high seas is nearly impossible, and flag states are often unwilling to prosecute, especially in the less developed nations.