FOIA Number: 2012-0769-F

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Council on Environmental Quality

Series/Staff Member: Kathleen (Katie) McGinty

Subseries:

OA/ID Number: 2614

FolderID:

Folder Title:
NAFTA [North American Free Trade Agreement] [Folder 1] [4]

Stack:	Row:	Section:	Shelf:	Position:
S	61	5	6	3

102D CONGRESS
1st Session

SENATE

TREATY DOC.
102-5

BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

THE BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL, WITH ANNEXES, DONE AT BASEL ON MARCH 22, 1989

MAY 20, 1991.—Convention was read the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate.

U.S. GOVERNMENT PRINTING OFFICE

49-118 WASHINGTON : 1991

nounce that it intends to accept the jurisdiction of the International Court of Justice or binding arbitration. States are not required to make such an election, however.

Before the United States can deposit its instrument of ratification, changes in domestic law will be necessary. The primary changes include creating authority to prohibit shipments when the United States has reason to believe that the wastes will not be handled in an environmentally sound manner, as well as the authority to take charge of wastes found to be illegally transported when the responsible private parties do not arrange for the environmentally sound disposal of the wastes. Furthermore, current domestic law regulates only transboundary movements of hazardous wastes. The Convention, however, also governs movements of household wastes, ash from the incineration of those wastes, and wastes that are regarded as hazardous under the Convention but not under current U.S. law. All necessary changes are contained in the Administration's proposal for legislation to implement the Convention.

Nine nations have ratified the Convention, and one has acceded. The Convention will enter into force ninety days after the deposit of the twentieth instrument of ratification, acceptance, formal confirmation, approval, or accession. More nations, including most European nations, are expected to become parties by the end of 1991.

Expeditious ratification is in the interest of the United States. Once the Convention enters into force, the United States, if not yet a party, will be barred from exporting wastes to or importing wastes from parties, unless it has a bilateral or regional agreement meeting the standards of Article 11 with a party. Delays in ratification could therefore disrupt U.S. trade in the materials covered by the Convention, a possibility of special concern to processors and consumers of recyclable materials. In addition, ratification is the only way to ensure that the United States may participate fully in the conference of the parties, which will decide issues of importance to the United States, such as financial obligations, state responsibility and liability, and the definition of environmentally sound management.

Environmental documentation will be forwarded separately to the Senate for its information.

I recommend that the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, with Annexes, be transmitted to the Senate as soon as possible for its advice and consent to ratification.

Respectfully submitted,

LAURENCE EAGLEBURGER.

BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL

UNITED NATIONS
1989

PREAMBLE

The Parties to this Convention,

Aware of the risk of damage to human health and the environment caused by hazardous wastes and other wastes and the transboundary movement thereof,

Mindful of the growing threat to human health and the environment posed by the increased generation and complexity, and transboundary movement of hazardous wastes and other wastes,

Mindful also that the most effective way of protecting human health and the environment from the dangers posed by such wastes is the reduction of their generation to a minimum in terms of quantity and/or hazard potential,

Convinced that States should take necessary measures to ensure that the management of hazardous wastes and other wastes including their transboundary movement and disposal is consistent with the protection of human health and the environment whatever the place of their disposal,

Noting that States should ensure that the generator should carry out duties with regard 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,

Fully recognizing that any State has the sovereign right to ban the entry or disposal of foreign hazardous wastes and other wastes in its territory,

Recognizing also the increasing desire for the prohibition of transboundary movements of hazardous wastes and their disposal in other States, especially developing countries,

Convinced that hazardous wastes and other wastes should, as far as is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated,

Aware also that transboundary movements of such wastes from the State of their generation to any other State should be permitted only when conducted under conditions which do not endanger human health and the environment, and under conditions in conformity with the provisions of this Convention,

Considering that enhanced control of transboundary movement of hazardous wastes and other wastes will act as an incentive for their environmentally sound management and for the reduction of the volume of such transboundary movement,

Convinced that States should take measures for the proper exchange of information on and control of the transboundary movement of hazardous wastes and other wastes from and to those States,

Noting that a number of international and regional agreements have addressed the issue of protection and preservation of the environment with regard to the transit of dangerous goods,

Taking into account the Declaration of the United Nations Conference on the Human Environment (Stockholm, 1972), the Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes adopted by the Governing Council of the United Nations Environment Programme (UNEP) by decision 14/30 of 17 June 1987, the Recommendations of the United Nations Committee of Experts on the Transport of Dangerous Goods (formulated in 1957 and updated biennially), relevant recommendations, declarations, instruments and regulations adopted within the United Nations system and the work and studies done within other international and regional organizations,

Mindful of the spirit, principles, aims and functions of the World Charter for Nature adopted by the General Assembly of the United Nations at its thirty-seventh session (1982) as the rule of ethics in respect of the protection of the human environment and the conservation of natural resources,

Affirming that States are responsible for the fulfilment of their international obligations concerning the protection of human health and protection and preservation of the environment, and are liable in accordance with international law,

Recognizing that in the case of a material breach of the provisions of this Convention or any protocol thereto the relevant international law of treaties shall apply, *Aware* of the need to continue the development and implementation of environmentally sound low-waste technologies, recycling options, good house-keeping and management systems with a view to reducing to a minimum the generation of hazardous wastes and other wastes,

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,

Concerned about the problem of illegal transboundary traffic in hazardous wastes and other wastes,

Taking into account also the limited capabilities of the developing countries to manage hazardous wastes and other wastes,

Recognizing the need to promote the transfer of technology for the sound management of hazardous wastes and other wastes produced locally, particularly to the developing countries in accordance with the spirit of the Cairo Guidelines and decision 14/16 of the Governing Council of UNEP on Promotion of the transfer of environmental protection technology,

Recognizing also that hazardous wastes and other wastes should be transported in accordance with relevant international conventions and recommendations,

Convinced also that the transboundary movement of hazardous wastes and other wastes should be permitted only when the transport and the ultimate disposal of such wastes is environmentally sound, and

Determined to protect, by strict control, human health and the environment against the adverse effects which may result from the generation and management of hazardous wastes and other wastes,

HAVE AGREED AS FOLLOWS:

Article 1

Scope of the Convention

1. The following wastes that are subject to transboundary movement shall be "hazardous wastes" for the purposes of this Convention:

(a) Wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex III; and

(b) Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit.

2. Wastes that belong to any category contained in Annex II that are subject to transboundary movement shall be "other wastes" for the purposes of this Convention.

3. Wastes which, as a result of being radioactive, are subject to other international control systems, including international instruments, applying specifically to radioactive materials, are excluded from the scope of this Convention.

4. Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument, are excluded from the scope of this Convention.

Article 2

Definitions

For the purposes of this Convention:

1. "Wastes" are substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law;

2. "Management" means the collection, transport and disposal of hazardous wastes or other wastes, including after-care of disposal sites;

3. "Transboundary movement" means any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement;

4. "Disposal" means any operation specified in Annex IV to this Convention;

5. "Approved site or facility" means a site or facility for the disposal of hazardous wastes or other wastes which is authorized or permitted to operate for this purpose by a relevant authority of the State where the site or facility is located;

6. "Competent authority" means one governmental authority designated by a Party to be responsible, within such geographical areas as the Party may think fit, for receiving the notification of a transboundary movement of hazardous wastes or other wastes, and any information related to it, and for responding to such a notification, as provided in Article 6;

7. "Focal point" means the entity of a Party referred to in Article 5 responsible for receiving and submitting information as provided for in Articles 13 and 16;

8. "Environmentally sound management of hazardous wastes or other wastes" means taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes;

9. "Area under the national jurisdiction of a State" means any land, marine area or airspace within which a State exercises administrative and regulatory responsibility in accordance with international law in regard to the protection of human health or the environment;

10. "State of export" means a Party from which a transboundary movement of hazardous wastes or other wastes is planned to be initiated or is initiated;

11. "State of import" means a Party to which a transboundary movement of hazardous wastes or other wastes is planned or takes place for the purpose of disposal therein or for the purpose of loading prior to disposal in an area not under the national jurisdiction of any State;

12. "State of transit" means any State, other than the State of export or import, through which a movement of hazardous wastes or other wastes is planned or takes place;

13. "States concerned" means Parties which are States of export or import, or transit States, whether or not Parties;

14. "Person" means any natural or legal person;

15. "Exporter" means any person under the jurisdiction of the State of export who arranges for hazardous wastes or other wastes to be exported;

16. "Importer" means any person under the jurisdiction of the State of import who arranges for hazardous wastes or other wastes to be imported;

17. "Carrier" means any person who carries out the transport of hazardous wastes or other wastes;

18. "Generator" means any person whose activity produces hazardous wastes or other wastes or, if that person is not known, the person who is in possession and/or control of those wastes;

19. "Disposer" means any person to whom hazardous wastes or other wastes are shipped and who carries out the disposal of such wastes;

20. "Political and/or economic integration organization" means an organization constituted by sovereign States to which its member States transferred competence in respect of matters governed by this Convention and which has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve, formally confirm or accede to it;

21. "Illegal traffic" means any transboundary movement of hazardous wastes or other wastes as specified in Article 9.

Article 3

National Definitions of Hazardous Wastes

1. Each Party shall, within six months of becoming a Party to this Convention, inform the Secretariat of the Convention of the wastes, other than those listed in Annexes I and II, considered or defined as hazardous under its national legislation and of any requirements concerning transboundary movement procedures applicable to such wastes.

2. Each Party shall subsequently inform the Secretariat of any significant changes to the information it has provided pursuant to paragraph 1.

3. The Secretariat shall forthwith inform all Parties of the information it has received pursuant to paragraphs 1 and 2.

4. Parties shall be responsible for making the information transmitted to them by the Secretariat under paragraph 3 available to their exporters.

Article 4

General Obligations

1. (a) Parties exercising their right to prohibit the import of hazardous wastes or other wastes for disposal shall inform the other Parties of their decision pursuant to Article 13.

(b) Parties shall prohibit or shall not permit the export of hazardous wastes and other wastes to the Parties which have prohibited the import of such wastes, when notified pursuant to subparagraph (a) above.

(c) Parties shall prohibit or shall not permit the export of hazardous wastes and other wastes if the State of import does not consent in writing to the specific import, in the case where that State of import has not prohibited the import of such wastes.

2. Each Party shall take the appropriate measures to:

(a) Ensure that the generation of hazardous wastes and other wastes within it is reduced to a minimum, taking into account social, technological and economic aspects;

(b) Ensure the availability of adequate disposal facilities, for the environmentally sound management of hazardous wastes and other wastes, that shall be located, to the extent possible, within it, whatever the place of their disposal;

(c) Ensure that persons involved in the management of hazardous wastes or other wastes within it take such steps as are necessary to pr[illegible] pollution due to hazardous wastes and other wastes arising from such management and, if such pollution occurs, to minimize the consequences thereof for human health and the environment;

(d) Ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes, and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement;

(e) Not allow the export of hazardous wastes or other wastes to a State or group of States belonging to an economic and/or political integration organization that are Parties, particularly developing countries, which have prohibited by their legislation all imports, or if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner, according to criteria to be decided on by the Parties at their first meeting.

(f) Require that information about a proposed transboundary movement of hazardous wastes and other wastes be provided to the States concerned, according to Annex V A, to state clearly the effects of the proposed movement on human health and the environment;

(g) Prevent the import of hazardous wastes and other wastes if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner;

(h) Co-operate in activities with other Parties and interested organizations, directly and through the Secretariat, including the dissemination of information on the transboundary movement of hazardous wastes and other wastes, in order to improve the environmentally sound management of such wastes and to achieve the prevention of illegal traffic;

3. The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal.

4. Each Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention.

5. 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.

6. The Parties agree not to allow the export of hazardous wastes or other wastes for disposal within the area south of 60° South latitude, whether or not such wastes are subject to transboundary movement.

7. Furthermore, each Party shall:

(a) Prohibit all persons under its national jurisdiction from transporting or disposing of hazardous wastes or other wastes unless such persons are authorized or allowed to perform such types of operations;

(b) Require that hazardous wastes and other wastes that are to be the subject of a transboundary movement be packaged, labelled, and transported in conformity with generally accepted and recognized international rules and standards in the field of packaging, labelling, and transport, and that due account is taken of relevant internationally recognized practices;

(c) Require that hazardous wastes and other wastes be accompanied by a movement document from the point at which a transboundary movement commences to the point of disposal.

8. Each Party shall require that hazardous wastes or other wastes, to be exported, are managed in an environmentally sound manner in the State of import or elsewhere. Technical guidelines for the environmentally sound management of wastes subject to this Convention shall be decided by the Parties at their first meeting.

9. Parties shall take the appropriate measures to ensure that the transboundary movement of hazardous wastes and other wastes only be allowed if:

(a) The State of export does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the wastes in question in an environmentally sound and efficient manner; or

(b) The wastes in question are required as a raw material for recycling or recovery industries in the State of import; or

(c) The transboundary movement in question is in accordance with other criteria to be decided by the Parties, provided those criteria do not differ from the objectives of this Convention.

10. The obligation under this Convention of States in which hazar wastes and other wastes are generated to require that those wastes are managed in an environmentally sound manner may not under any circumstances be transferred to the States of import or transit.

11. Nothing in this Convention shall prevent a Party from imposing additional requirements that are consistent with the provisions of this Convention, and are in accordance with the rules of international law, in order better to protect human health and the environment.

12. Nothing in this Convention shall affect in any way the sovereignty of States over their territorial sea established in accordance with international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law, and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments.

13. Parties shall undertake to review periodically the possibilities for the reduction of the amount and/or the pollution potential of hazardous wastes and other wastes which are exported to other States, in particular to developing countries.

Article 5

Designation of Competent Authorities and Focal Point

To facilitate the implementation of this Convention, the Parties shall:

1. Designate or establish one or more competent authorities and one focal point. One competent authority shall be designated to receive the notification in case of a State of transit.

2. Inform the Secretariat, within three months of the date of the entry into force of this Convention for them, which agencies they have designated as their focal point and their competent authorities.

3. Inform the Secretariat, within one month of the date of decision, of any changes regarding the designation made by them under paragraph 2 above.

Article 6

Transboundary Movement between Parties

1. The State of export shall notify, or shall require the generator or exporter to notify, in writing, through the channel of the competent authority of the State of export, the competent authority of the States concerned of any proposed transboundary movement of hazardous wastes or other wastes. Such notification shall contain the declarations and information specified in
Annex V A, written in a language acceptable to the State of import. Only one notification needs to be sent to each State concerned.

2. The State of import shall respond to the notifier in writing, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information. A copy of the final response of the State of import shall be sent to the competent authorities of the States concerned which are Parties.

3. The State of export shall not allow the generator or exporter to commence the transboundary movement until it has received written confirmation
that:

(a) The notifier has received the written consent of the State of import; and

(b) The notifier has received from the State of import confirmation of the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question.

4. Each State of transit which is a Party shall promptly acknowledge to the notifier receipt of the notification. It may subsequently respond to the notifier in writing, within 60 days, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information. The State of export shall not allow the transboundary movement to commence until it has received the written consent of the State of transit. However, if at any time a Party decides not to require prior written consent, either generally or under specific conditions, for transit transboundary movements of hazardous wastes or other wastes, or modifies its requirements in this respect, it shall forthwith inform the other Parties of its decision pursuant to Article 13. In this latter case, if no response is received by the State of export within 60 days of the receipt of a given notification by the State of transit, the State of export may allow the export to proceed through the State of transit.

5. In the case of a transboundary movement of wastes where the wastes are legally defined as or considered to be hazardous wastes only:

(a) By the State of export, the requirements of paragraph 9 of this Article that apply to the importer or disposer and the State of import shall apply _mutatis mutandis_ to the exporter and State of export, respectively;

(b) By the State of import, or by the States of import and transit which are Parties, the requirements of paragraphs 1, 3, 4 and 6 of this Article that apply to the exporter and State of export shall apply _mutatis mutandis_ to the importer or disposer and State of import, respectively; or

(c) By any State of transit which is a Party, the provisions of paragraph 4 shall apply to such State.

6. The State of export may, subject to the written consent of the States concerned, allow the generator or the exporter to use a general notification where hazardous wastes or other wastes having the same physical and chemical characteristics are shipped regularly to the same disposer via the same customs office of exit of the State of export via the same customs office of entry of the State of import, and, in the case of transit, via the same customs office of entry and exit of the State or States of transit.

7. The States concerned may make their written consent to the use of the general notification referred to in paragraph 6 subject to the supply of certain information, such as the exact quantities or periodical lists of hazardous wastes or other wastes to be shipped.

8. The general notification and written consent referred to in paragraphs 6 and 7 may cover multiple shipments of hazardous wastes or other wastes during a maximum period of 12 months.

9. The Parties shall require that each person who takes charge of a transboundary movement of hazardous wastes or other wastes sign the movement document either upon delivery or receipt of the wastes in question. They shall also require that the disposer inform both the exporter and the competent authority of the State of export of receipt by the disposer of the wastes in question and, in due course, of the completion of disposal as specified in the notification. If no such information is received within the State of export, the competent authority of the State of export or the exporter shall so notify the State of import.

10. The notification and response required by this Article shall be transmitted to the competent authority of the Parties concerned or to such governmental authority as may be appropriate in the case of non-Parties.

11. Any transboundary movement of hazardous wastes or other wastes shall be covered by insurance, bond or other guarantee as may be required by the State of import or any State of transit which is a Party.

Article 7

Transboundary Movement from a Party through States which are not Parties

Paragraph 2 of Article 6 of the Convention shall apply _mutatis mutandis_ to transboundary movement of hazardous wastes or other wastes from a Party through a State or States which are not Parties.

Article 8

Duty to Re-import

When a transboundary movement of hazardous wastes or other wastes to which the consent of the States concerned has been given, subject to the provisions of this Convention, cannot be completed in accordance with the terms of the contract, the State of export shall ensure that the wastes in question are taken back into the State of export, by the exporter, if alternative arrangements cannot be made for their disposal in an environmentally sound manner, within 90 days from the time that the importing State informed the State of export and the Secretariat, or such other period of time as the States concerned agree. To this end, the State of export and any Party of transit shall not oppose, hinder or prevent the return of those wastes to the State of export.

Article 9

Illegal Traffic

1. For the purpose of this Convention, any transboundary movement of hazardous wastes or other wastes:

(a) without notification pursuant to the provisions of this Convention to all States concerned; or

(b) without the consent pursuant to the provisions of this Convention of a State concerned; or

(c) with consent obtained from States concerned through falsification, misrepresentation or fraud; or

(d) that does not conform in a material way with the documents; or

(e) that results in deliberate disposal (e.g. dumping) of hazardous wastes or other wastes in contravention of this Convention and of general principles of international law,

shall be deemed to be illegal traffic.

2. In case of a transboundary movement of hazardous wastes or other wastes deemed to be illegal traffic as the result of conduct on the part of the exporter or generator, the State of export shall ensure that the wastes in question are:

(a) taken back by the exporter or the generator or, if necessary, by itself into the State of export, or, if impracticable,

(b) are otherwise disposed of in accordance with the provisions of this Convention,

within 30 days from the time the State of export has been informed about the illegal traffic or such other period of time as States concerned may agree. To this end the Parties concerned shall not oppose, hinder or prevent the return of those wastes to the State of export.

3. In the case of a transboundary movement of hazardous wastes or other wastes deemed to be illegal traffic as the result of conduct on the part of the importer or disposer, the State of import shall ensure that the wastes in question are disposed of in an environmentally sound manner by the importer or disposer or, if necessary, by itself within 30 days from the time the illegal traffic has come to the attention of the State of import or such other period of time as the States concerned may agree. To this end, the Parties concerned shall co-operate, as necessary, in the disposal of the wastes in an environmentally sound manner.

4. In cases where the responsibility for the illegal traffic cannot be assigned either to the exporter or generator or to the importer or disposer, the Parties concerned or other Parties, as appropriate, shall ensure, through co-operation, that the wastes in question are disposed of as soon as possible in an environmentally sound manner either in the State of export or the State of import or elsewhere as appropriate.

5. Each Party shall introduce appropriate national/domestic legislation to prevent and punish illegal traffic. The Parties shall co-operate with a view to achieving the objects of this Article.

Article 10

International Co-operation

1. The Parties shall co-operate with each other in order to improve and achieve environmentally sound management of hazardous wastes and other wastes.

2. To this end, the Parties shall:

(a) Upon request, make available information, whether on a bilateral or multilateral basis, with a view to promoting the environmentally sound management of hazardous wastes and other wastes, including harmonization of technical standards and practices for the adequate management of hazardous wastes and other wastes;

(b) Co-operate in monitoring the effects of the management of hazardous wastes on human health and the environment;

(c) Co-operate, subject to their national laws, regulations and policies, in the development and implementation of new environmentally sound low-waste technologies and the improvement of existing technologies with a view to eliminating, as far as practicable, the generation of hazardous wastes and other wastes and achieving more effective and efficient methods of ensuring their management in an environmentally sound manner, including the study of the economic, social and environmental effects of the adoption of such new or improved technologies;

(d) Co-operate actively, subject to their national laws, regulations and policies, in the transfer of technology and management systems related to the environmentally sound management or hazardous wastes and other wastes. They shall also co-operate in developing the technical capacity among Parties, especially those which may need and request technical assistance in this field;

(e) Co-operate in developing appropriate technical guidelines and/or codes of practice.

3. The Parties shall employ appropriate means to co-operate in order to assist developing countries in the implementation of subparagraphs a, b, c and d of paragraph 2 of Article 4.

4. Taking into account the needs of developing countries, co-operation between Parties and the competent international organizations is encouraged to promote, *inter alia*, public awareness, the development of sound management of hazardous wastes and other wastes and the adoption of new low-waste technologies.

Article 11

Bilateral, Multilateral and Regional Agreements

1. Notwithstanding the provisions of Article 4 paragraph 5, Parties may enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with Parties or non-Parties provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention. These agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries.

2. Parties shall notify the Secretariat of any bilateral, multilateral or regional agreements or arrangements referred to in paragraph 1 and those which they have entered into prior to the entry into force of this Convention for them, for the purpose of controlling transboundary movements of hazardous wastes and other wastes which take place entirely among the Parties to such agreements. The provisions of this Convention shall not affect transboundary movements which take place pursuant to such agreements provided that such agreements are compatible with the environmentally sound management of hazardous wastes and other wastes as required by this Convention.

Article 12

Consultations on Liability

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.

Article 13

Transmission of Information

1. The Parties shall, whenever it comes to their knowledge, ensure that, in the case of an accident occurring during the transboundary movement of hazardous wastes or other wastes or their disposal, which are likely to present risks to human health and the environment in other States, those states are immediately informed.

2. The Parties shall inform each other, through the Secretariat, of:

(a) Changes regarding the designation of competent authorities and/or focal points, pursuant to Article 5;

(b) Changes in their national definition of hazardous wastes, pursuant to Article 3;

and, as soon as possible,

(c) Decisions made by them not to consent totally or partially to the import of hazardous wastes or other wastes for disposal within the area under their national jurisdiction;

(d) Decisions taken by them to limit or ban the export of hazardous wastes or other wastes;

(e) Any other information required pursuant to paragraph 4 of this Article.

3. The Parties, consistent with national laws and regulations, shall transmit, through the Secretariat, to the Conference of the Parties established under Article 15, before the end of each calendar year, a report on the previous calendar year, containing the following information:

(a) Competent authorities and focal points that have been designated by them pursuant to Article 5;

(b) Information regarding transboundary movements of hazardous wastes or other wastes in which they have been involved, including:

(i) The amount of hazardous wastes and other wastes exported, their category, characteristics, destination, any transit country and disposal method as stated on the response to notification;

(ii) The amount of hazardous wastes and other wastes imported, their category, characteristics, origin, and disposal methods;

(iii) Disposals which did not proceed as intended;

(iv) Efforts to achieve a reduction of the amount of hazardous wastes or other wastes subject to transboundary movement;

(c) Information on the measures adopted by them in implementation of this Convention;

(d) Information on available qualified statistics which have been compiled by them on the effects on human health and the environment of the generation, transportation and disposal of hazardous wastes or other wastes;

(e) Information concerning bilateral, multilateral and regional agreements and arrangements entered into pursuant to Article 11 of this Convention;

(f) Information on accidents occurring during the transboundary movement and disposal of hazardous wastes and other wastes and on the measures undertaken to deal with them;

(g) Information on disposal options operated within the area of their national jurisdiction;

(h) Information on measures undertaken for development of technologies for the reduction and/or elimination of production of hazardous wastes and other wastes; and

(i) Such other matters as the Conference of the Parties shall deem relevant.

4. The Parties, consistent with national laws and regulations, shall ensure that copies of each notification concerning any given transboundary movement of hazardous wastes or other wastes, and the response to it, are sent to the Secretariat when a Party considers that its environment may be affected by that transboundary movement has requested that this should be done.

Article 14

Financial Aspects

1. The Parties agree that, according to the specific needs of different regions and subregions, regional or sub-regional centres for training and technology transfers regarding the management of hazardous wastes and other wastes and the minimization of their generation should be established. The Parties shall decide on the establishment of appropriate funding mechanisms of a voluntary nature.

2. 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 the disposal of those wastes.

Article 15

Conference of the Parties

1. A Conference of the Parties is hereby established. The first meeting of the Conference of the Parties shall be convened by the Executive Director of UNEP not later than one year after the entry into force of this Convention. Thereafter, ordinary meetings of the Conference of the Parties shall be held at regular intervals to be determined by the Conference at its first meeting.

2. Extraordinary meetings of the Conference of the Parties shall be held at such other times as may be deemed necessary by the Conference, or at the written request of any Party, provided that, within six months of the request being communicated to them by the Secretariat, it is supported by at least one third of the Parties.

3. The Conference of the Parties shall by consensus agree upon and adopt rules of procedure for itself and for any subsidiary body it may establish, as well as financial rules to determine in particular the financial participation of the Parties under this Convention.

4. The Parties at their first meeting shall consider any additional measures needed to assist them in fulfilling their responsibilities with respect to the protection and the preservation of the marine environment in the context of this Convention.

5. The Conference of the Parties shall keep under continuous review and evaluation the effective implementation of this Convention, and, in addition, shall:

(a) Promote the harmonization of appropriate policies, strategies and measures for minimizing harm to human health and the environment by hazardous wastes and other wastes;

(b) Consider and adopt, as required, amendments to this Convention its annexes, taking into consideration, _inter alia_, available scientific, technical, economic and environmental information;

(c) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention in the light of experience gained in its operation and in the operation of the agreements and arrangements envisaged in Article 11;

(d) Consider and adopt protocols as required; and

(e) Establish such subsidiary bodies as are deemed necessary for the implementation of this Convention.

6. The United Nations, its specialized agencies, as well as any State not party to this Convention, may be represented as observers at meetings of the Conference of the Parties. Any other body or agency, whether national or international, governmental or non-governmental, qualified in fields relating to hazardous wastes or other wastes which has informed the Secretariat of its wish to be represented as an observer at a meeting of the Conference of the Parties, may be admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties.

7. The Conference of the Parties shall undertake three years after the entry into force of this Convention, and at least every six years thereafter, an evaluation of its effectiveness and, if deemed necessary, to consider the adoption of a complete or partial ban of transboundary movements of hazardous wastes and other wastes in light of the latest scientific, environmental, technical and economic information.

Article 16

Secretariat

1. The functions of the Secretariat shall be:

(a) To arrange for and service meetings provided for in Article 15 and 17;

(b) To prepare and transmit reports based upon information received in accordance with Articles 3, 4, 6, 11 and 13 as well as upon information derived from meetings of subsidiary bodies established under Article 15 as well as upon, as appropriate, information provided by relevant intergovernmental and non-governmental entities;

(c) To prepare reports on its activities carried out in implementation of its functions under this Convention and present them to the Conference of the Parties;

(d) To ensure the necessary coordination with relevant international bodies, and in particular to enter into such administrative and contractual arrangements as may be required for the effective discharge of its functions;

(e) To communicate with focal points and competent authorities established by the Parties in accordance with Article 5 of this Convention;

(f) To compile information concerning authorized national sites facilities of Parties available for the disposal of their hazardous wastes and other wastes and to circulate this information among Parties;

(g) To receive and convey information from and to Parties on;

- sources of technical assistance and training;
- available technical and scientific know-how;
- sources of advice and expertise; and
- availability of resources

with a view to assisting them, upon request, in such areas as:

- the handling of the notification system of this Convention;
- the management of hazardous wastes and other wastes;
- environmentally sound technologies relating to hazardous wastes and other wastes, such as low- and non-waste technology;
- the assessment of disposal capabilities and sites;
- the monitoring of hazardous wastes and other wastes; and
- emergency responses;

(h) To provide Parties, upon request, with information on consultants or consulting firms having the necessary technical competence in the field, which can assist them to examine a notification for a transboundary movement, the concurrence of a shipment of hazardous wastes or other wastes with the relevant notification, and/or the fact that the proposed disposal facilities for hazardous wastes or other wastes are environmentally sound, when they have reason to believe that the wastes in question will not be managed in an environmentally sound manner. Any such examination would not be at the expense of the Secretariat;

(i) To assist Parties upon request in their identification of cases of illegal traffic and to circulate immediately to the Parties concerned any information it has received regarding illegal traffic;

(j) To co-operate with Parties and with relevant and competent international organizations and agencies in the provision of experts and equipment for the purpose of rapid assistance to States in the event of an emergency situation; and

(k) To perform such other functions relevant to the purposes of this Convention as may be determined by the Conference of the Parties.

2. The secretariat functions will be carried out on an interim basis by UNEP until the completion of the first meeting of the Conference of the Parties held pursuant to Article 15.

3. At its first meeting, the Conference of the Parties shall designate the Secretariat from among those existing competent intergovernmental organizations which have signified their willingness to carry out the secretariat functions under this Convention. At this meeting, the Conference of the Parties shall also evaluate the implementation by the interim Secretariat of the functions assigned to it, in particular under paragraph 1 above, and decide upon the structures appropriate for those functions.

Article 17

Amendment of the Convention

1. Any Party may propose amendments to this Convention and any Party to a protocol may propose amendments to that protocol. Such amendments shall take due account, *inter alia*, of relevant scientific and technical considerations.

2. Amendments to this Convention shall be adopted at a meeting of the Conference of the Parties. Amendments to any protocol shall be adopted at a meeting of the Parties to the protocol in question. The text of any proposed amendment to this Convention or to any protocol, except as may otherwise be provided in such protocol, shall be communicated to the Parties by the Secretariat at least six months before the meeting at which it is proposed for adoption. The Secretariat shall also communicate proposed amendments to the Signatories to this Convention for information.

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

4. The procedure mentioned in paragraph 3 above shall apply to amendments to any protocol, except that a two-thirds majority of the Parties to that protocol present and voting at the meeting shall suffice for their adoption.

5. Instruments of ratification, approval, formal confirmation or acceptance of amendments shall be deposited with the Depositary. Amendments adopted in accordance with paragraphs 3 or 4 above sha'l enter into force between Parties having accepted them on the ninetieth day after the receipt by the Depositary of their instrument of ratification, approval, fc[illegible] confirmation or acceptance by at least three-fourths of the Parties who accepted the amendments to the protocol concerned, except as may otherwise be provided in such protocol. The amendments shall enter into force for any other Party on the ninetieth day after that Party deposits its inst[illegible] of ratification, approval, formal confirmation or acceptance of the amendments.

6. For the purpose of this Article, "Parties present and voting" means Parties present and casting an affirmative or negative vote.

Article 18

Adoption and Amendment of Annexes

1. The annexes to this Convention or to any protocol shall form an integral part of this Convention or of such protocol, as the case may be and, unless expressly provided otherwise, a reference to this Convention or its protocols constitutes at the same time a reference to any annexes thereto. Such annexes shall be restricted to scientific, technical and administrative matters.

2. Except as may be otherwise provided in any protocol with respect to its annexes, the following procedure shall apply to the proposal, adoption and entry into force of additional annexes to this Convention or of annexes to a protocol:

(a) Annexes to this Convention and its protocols shall be proposed and adopted according to the procedure laid down in Article 17, paragraphs 2, 3 and 4;

(b) Any Party that is unable to accept an additional annex to this Convention or an annex to any protocol to which it is party shall so notify the Depositary, in writing, within six months from the date of the communication of the adoption by the Depositary. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time substitute an acceptance for a previous declaration of objection and the annexes shall thereupon enter into force for that Party;

(c) On the expiry of six months from the date of the circulation of the communication by the Depositary, the annex shall become effective for all Parties to this Convention or to any protocol concerned, which have not submitted a notification in accordance with the provision of subparagraph (b) above.

3. The proposal, adoption and entry into force of amendments to annexes to this Convention or to any protocol shall be subject to the same procedure as for the proposal, adoption and entry into force of annexes to the Convention or annexes to a protocol. Annexes and amendments thereto shall take due account, inter alia, of relevant scientific and technical considerations.

4. If an additional annex or an amendment to an annex involves an amendment to this Convention or to any protocol, the additional annex or amended annex shall not enter into force until such time as the amendment to this Convention or to the protocol enters into force.

Article 19

Verification

Any Party which has reason to believe that another Party is acting or has acted in breach of its obligations under this Convention may inform the Secretariat thereof, and in such an event, shall simultaneously and immediately inform, directly or through the Secretariat, the Party against whom the allegations are made. All relevant information should be submitted by the Secretariat to the Parties.

Article 20

Settlement of Disputes

1. In case of a dispute between Parties as to the interpretation or application of, or compliance with, this Convention or any protocol thereto, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.

2. If the Parties concerned cannot settle their dispute through the means mentioned in the preceding paragraph the dispute, if the parties to the dispute agree, shall be submitted to the International Court of Justice or to arbitration under the conditions set out in Annex VI on Arbitration. However, failure to reach common agreement on submission of the dispute to the International Court of Justice or to arbitration shall not absolve the Parties from the responsibility of continuing to seek to resolve it by the means referred to in paragraph 1.

3. When ratifying, accepting, approving, formally confirming or acceding to this Convention, or at any time thereafter, a State or political and/or economic integration organization may declare that it recognizes as compulsory ipso facto and without special agreement, in relation to any Party accepting the same obligation:

(a) submission of the dispute to the International Court of Justice; and/or

(b) arbitration in accordance with the procedures set out in Annex VI.

Such declaration shall be notified in writing to the Secretariat which shall communicate it to the Parties.

Article 21

Signature

This Convention shall be open for signature by States, by Namibia, represented by the United Nations Council for Namibia, and by political and/or economic integration organizations, in Basel on 22 March 1989, at the Federal Department of Foreign Affairs of Switzerland in Berne from 23 March 1989 to 30 June 1989, and at United Nations Headquarters in New York from 1 July 1989 to 22 March 1990.

Article 22

Ratification, Acceptance, Formal Confirmation or Approval

1. This Convention shall be subject to ratification, acceptance or approval by States and by Namibia, represented by the United Nations Council for Namibia, and to formal confirmation or approval by political and/or economic integration organizations. Instruments of ratification, acceptance, formal confirmation, or approval shall be deposited with the Depositary.

2. Any organization referred to in paragraph 1 above which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under the Convention. In the case of such organizations, one or more of whose member States is a Party to the Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under the Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under the Convention concurrently.

3. In their instruments of formal confirmation or approval, the organizations referred to in paragraph 1 above shall declare the extent of their competence with respect to the matters governed by the Convention. These organizations shall also inform the Depositary, who will inform the Parties of any substantial modification in the extent of their competence.

Article 23

Accession

1. This Convention shall be open for accession by States, by Namibia, represented by the United Nations Council for Namibia, and by political and/or economic integration organizations from the day after the date on which the Convention is closed for signature. The instruments of accession shall be deposited with the Depositary.

2. In their instruments of accession, the organizations referred to in paragraph 1 above shall declare the extent of their competence with respect to the matters governed by the Convention. These organizations shall also inform the Depositary of any substantial modification in the extent of their competence.

3. The provisions of Article 22 paragraph 2, shall apply to political and/or economic integration organizations which accede to this Convention.

Article 24

Right to Vote

1. Except as provided for in paragraph 2 below, each Contracting Party to this Convention shall have one vote.

2. Political and/or economic integration organizations, in matters within their competence, in accordance with Article 22, paragraph 3, and Article 23, paragraph 2, shall exercise their right to vote with a number of votes equal to the number of their member States which are Parties to the Convention or the relevant protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

Article 25

Entry into Force

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the twentieth instrument of ratification, acceptance, formal confirmation, approval or accession.

2. For each State or political and/or economic integration organization which ratifies, accepts, approves or formally confirms this Convention or accedes thereto after the date of the deposit of the twentieth instrument of ratification, acceptance, approval, formal confirmation or accession, it shall enter into force on the ninetieth day after the date of deposit by such State or political and/or economic integration organization of its instrument of ratification, acceptance, approval, formal confirmation or accession.

3. For the purposes of paragraphs 1 and 2 above, any instrument deposited by a political and/or economic integration organization shall not be counted as additional to those deposited by member States of such organization.

Article 26

Reservations and Declarations

1. No reservation or exception may be made to this Convention.

2. Paragraph 1 of this Article does not preclude a State or political and/or economic integration organization, when signing, ratifying, accepting, approving, formally confirming or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State.

Article 27

Withdrawal

1. At any time after three years from the date on which this Convention has entered into force for a Party, that Party may withdraw from the Convention by giving written notification to the Depositary.

2. Withdrawal shall be effective one year from receipt of notification by the Depositary, or on such later date as may be specified in the notification.

Article 28

Depository

The Secretary-General of the United Nations shall be the Depository of this Convention and of any protocol thereto.

Article 29

Authentic texts

The original Arabic, Chinese, English, French, Russian and Spanish texts of this Convention are equally authentic.

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Convention.

Done at ...Basel........ on the 22nd day of March...... 1989

Annex I

CATEGORIES OF WASTES TO BE CONTROLLED

Waste Streams

Y1 Clinical wastes from medical care in hospitals, medical centers and clinics
Y2 Wastes from the production and preparation of pharmaceutical products
Y3 Waste pharmaceuticals, drugs and medicines
Y4 Wastes from the production, formulation and use of biocides and phytopharmaceuticals
Y5 Wastes from the manufacture, formulation and use of wood preserving chemicals
Y6 Wastes from the production, formulation and use of organic solvents
Y7 Wastes from heat treatment and tempering operations containing cyanides
Y8 Waste mineral oils unfit for their originally intended use
Y9 Waste oils/water, hydrocarbons/water mixtures, emulsions
Y10 Waste substances and articles containing or contaminated with polychlorinated biphenyls (PCBs) and/or polychlorinated terphenyls (PCTs) and/or polybrominated biphenyls (PBBs)
Y11 Waste tarry residues arising from refining, distillation and any pyrolytic treatment
Y12 Wastes from production, formulation and use of inks, dyes, pigments, paints, lacquers, varnish
Y13 Wastes from production, formulation and use of resins, latex, plasticizers, glues/adhesives

Y14 Waste chemical substances arising from research and development or teaching activities which are not identified and/or are new and whose effects on man and/or the environment are not known
Y15 Wastes of an explosive nature not subject to other legislation
Y16 Wastes from production, formulation and use of photographic chemicals and processing materials
Y17 Wastes resulting from surface treatment of metals and plastics
Y18 Residues arising from industrial waste disposal operations

Wastes having as constituents:

Y19 Metal carbonyls
Y20 Beryllium; beryllium compounds
Y21 Hexavalent chromium compounds
Y22 Copper compounds
Y23 Zinc compounds
Y24 Arsenic; arsenic compounds
Y25 Selenium; selenium compounds
Y26 Cadmium; cadmium compounds
Y27 Antimony; antimony compounds
Y28 Tellurium; tellurium compounds
Y29 Mercury; mercury compounds
Y30 Thallium; thallium compounds
Y31 Lead; lead compounds
Y32 Inorganic fluorine compounds excluding calcium fluoride
Y33 Inorganic cyanides
Y34 Acidic solutions or acids in solid form
Y35 Basic solutions or bases in solid form
Y36 Asbestos (dust and fibres)
Y37 Organic phosphorous compounds
Y38 Organic cyanides
Y39 Phenols; phenol compounds including chlorophenols
Y40 Ethers
Y41 Halogenated organic solvents
Y42 Organic solvents excluding halogenated solvents
Y43 Any congenor of polychlorinated dibenzo-furan
Y44 Any congenor of polychlorinated dibenzo-p-dioxin
Y45 Organohalogen compounds other than substances referred to in this Annex (eg. Y39, Y41, Y42, Y43, Y44).

Annex II

CATEGORIES OF WASTES REQUIRING SPECIAL CONSIDERATION

Y46 Wastes collected from households
Y47 Residues arising from the incineration of household wastes

Annex III

LIST OF HAZARDOUS CHARACTERISTICS

UN Class*	Code	Characteristics
1	H1	**Explosive** An explosive substance or waste is a solid or liquid substance or waste (or mixture of substances or wastes) which is in itself capable by chemical reaction of producing gas at such a temperature and pressure and at such a speed as to cause damage to the surroundings.
3	H3	**Flammable liquids** The word "flammable" has the same meaning as "inflammable". Flammable liquids are liquids, or mixtures of liquids, or liquids containing solids in solution or suspension (for example, paints, varnishes, lacquers, etc., but not including substances or wastes otherwise classified on account of their dangerous characteristics) which give off a flammable vapour at temperatures of not more than 60.5°C, closed-cup test, or not more than 65.6°C, open-cup test. (Since the results of open-cup tests and of closed-cup tests are not strictly comparable and even individual results by the same test are often variable, regulations varying from the above figures to make allowance for such differences would be within the spirit of this definition.)
4.1	H4.1	**Flammable solids** Solids, or waste solids, other than those classed as explosives, which under conditions encountered in transport are readily combustible, or may cause or contribute to fire through friction.
4.2	H4.2	**Substances or wastes liable to spontaneous combustion** Substances or wastes which are liable to spontaneous heating under normal conditions encountered in transport, or to heating up on contact with air, and being then liable to catch fire.
4.3	H4.3	**Substances or wastes which, in contact with water emit flammable gases** Substances or wastes which, by interaction with water, are liable to become spontaneously flammable or to give off flammable gases in dangerous quantities.

* Corresponds to the hazard classification system included in the United Nations Recommendations on the Transport of Dangerous Goods (ST/SG/AC.10/1/Rev.5, United Nations, New York, 1988).

UN Class*	Code	Characteristics
5.1	H5.1	**Oxidizing** Substances or wastes which, while in themselves not necessarily combustible, may, generally by yielding oxygen cause, or contribute to, the combustion of other materials.
5.2	H5.2	**Organic Peroxides** Organic substances or wastes which contain the bivalent-O-O-structure are thermally unstable substances which may undergo exothermic self-accelerating decomposition.
6.1	H6.1	**Poisonous (Acute)** Substances or wastes liable either to cause death or serious injury or to harm human health if swallowed or inhaled or by skin contact.
6.2	H6.2	**Infectious substances** Substances or wastes containing viable micro organisms or their toxins which are known or suspected to cause disease in animals or humans.
8	H8	**Corrosives** Substances or wastes which, by chemical action, will cause severe damage when in contact with living tissue, or, in the case of leakage, will materially damage, or even destroy, other goods or the means of transport; they may also cause other hazards.
9	H10	**Liberation of toxic gases in contact with air or water** Substances or wastes which, by interaction with air or water, are liable to give off toxic gases in dangerous quantities.
9	H11	**Toxic (Delayed or chronic)** Substances or wastes which, if they are inhaled or ingested or if they penetrate the skin, may involve delayed or chronic effects, including carcinogenicity.
9	H12	**Ecotoxic** Substances or wastes which if released present or may present immediate or delayed adverse impacts to the environment by means of bioaccumulation and/or toxic effects upon biotic systems.
9	H13	Capable, by any means, after disposal, of yielding another material, e.g., leachate, which possesses any of the characteristics listed above.

Tests

The potential hazards posed by certain types of wastes are not yet fully documented; tests to define quantitatively these hazards do not exist. Further research is necessary in order to develop means to characterise potential hazards posed to man and/or the environment by these wastes. Standardized tests have been derived with respect to pure substances and materials. Many countries have developed national tests which can be applied to materials listed in Annex I, in order to decide if these materials exhibit any of the characteristics listed in this Annex.

Annex IV

DISPOSAL OPERATIONS

A. OPERATIONS WHICH DO NOT LEAD TO THE POSSIBILITY OF RESOURCE RECOVERY, RECYCLING, RECLAMATION, DIRECT RE-USE OR ALTERNATIVE USES

Section A encompasses all such disposal operations which occur in practice.

D1 Deposit into or onto land, (e.g., landfill, etc.)
D2 Land treatment, (e.g., biodegradation of liquid or sludgy discards in soils, etc.)
D3 Deep injection, (e.g., injection of pumpable discards into wells, salt domes or naturally occurring repositories, etc.)
D4 Surface impoundment, (e.g., placement of liquid or sludge discards into pits, ponds or lagoons, etc.)
D5 Specially engineered landfill, (e.g., placement into lined discrete cells which are capped and isolated from one another and the environment, etc.)
D6 Release into a water body except seas/oceans
D7 Release into seas/oceans including sea-bed insertion
D8 Biological treatment not specified elsewhere in this Annex which results in final compounds or mixtures which are discarded by means of any of the operations in Section A
D9 Physico chemical treatment not specified elsewhere in this Annex which results in final compounds or mixtures which are discarded by means of any of the operations in Section A, (e.g., evaporation, drying, calcination, neutralisation, precipitation, etc.)
D10 Inc neration on land
D11 Incineration at sea
D12 Permanent storage (e.g., emplacement of containers in a mine, etc.)
D13 Blending or mixing prior to submission to any of the operations in Section A
D14 Repackaging prior to submission to any of the operations in Section A
D15 Storage pending any of the operations in Section A

B. OPERATIONS WHICH MAY LEAD TO RESOURCE RECOVERY, RECYCLING, RECLAMATION, DIRECT RE-USE OR ALTERNATIVE USES

Section B encompasses all such operations with respect to materials legally defined as or considered to be hazardous wastes and which otherwise would have been destined for operations included in Section A

R1 Use as a fuel (other than in direct incineration) or other means to generate energy
R2 Solvent reclamation/regeneration
R3 Recycling/reclamation of organic substances which are not used as solvents
R4 Recycling/reclamation of metals and metal compounds
R5 Recycling/reclamation of other inorganic materials
R6 Regeneration of acids or bases
R7 Recovery of components used for pollution abatement
R8 Recovery of components from catalysts
R9 Used oil re-refining or other reuses of previously used oil
R10 Land treatment resulting in benefit to agriculture or ecological improvement
R11 Uses of residual materials obtained from any of the operations numbered R1-R10
R12 Exchange of wastes for submission to any of the operations numbered R1-R11
R13 Accumulation of material intended for any operation in Section B

Annex V A

INFORMATION TO BE PROVIDED ON NOTIFICATION

1. Reason for waste export

2. Exporter of the waste 1/

3. Generator(s) of the waste and site of generation 1/

4. Disposer of the waste and actual site of disposal 1/

5. Intended carrier(s) of the waste or their agents, if known 1/

6. Country of export of the waste
Competent authority 2/

7. Expected countries of transit
Competent authority 2/

8. Country of import of the waste
Competent authority 2/

9. General or single notification

10. Projected date(s) of shipment(s) and period of time over which waste is to be exported and proposed itinerary (including point of entry and exit) 3/

11. Means of transport envisaged (road, rail, sea, air, inland waters)

12. Information relating to insurance 4/

13. Designation and physical description of the waste including Y number and UN number and its composition 5/ and information on any special handling requirements including emergency provisions in case of accidents

14. Type of packaging envisaged (eg. bulk, drummed, tanker)

15. Estimated quantity in weight/volume 6/

16. Process by which the waste is generated 7/

17. For wastes listed in Annex I, classifications from Annex III: hazardous characteristic, H number, and UN class.

18. Method of disposal as per Annex IV

19. Declaration by the generator and exporter that the information is correct

20. Information transmitted (including technical description of the plant) to the exporter or generator from the disposer of the waste upon which the latter has based his assessment that there was no reason to believe that the wastes will not be managed in an environmentally sound manner in accordance with the laws and regulations of the country of import.

21. Information concerning the contract between the exporter and disposer.

20. Information transmitted (including technical description of the plant) to the exporter or generator from the disposer of the waste upon which the latter has based his assessment that there was no reason to believe that the wastes will not be managed in an environmentally sound manner in accordance with the laws and regulations of the country of import.

21. Information concerning the contract between the exporter and disposer.

Notes

1/ Full name and address, telephone, telex or telefax number and the name, address, telephone, telex or telefax number of the person to be contacted.

2/ Full name and address, telephone, telex or telefax number.

3/ In the case of a general notification covering several shipments, either the expected dates of each shipment or, if this is not known, the expected frequency of the shipments will be required.

4/ Information to be provided on relevant insurance requirements and how they are met by exporter, carrier and disposer.

5/ The nature and the concentration of the most hazardous components, in terms of toxicity and other dangers presented by the waste both in handling and in relation to the proposed disposal method.

6/ In the case of a general notification covering several shipments, both the estimated total quantity and the estimated quantities for each individual shipment will be required.

7/ Insofar as this is necessary to assess the hazard and determine the appropriateness of the proposed disposal operation.

Annex V B

INFORMATION TO BE PROVIDED ON THE MOVEMENT DOCUMENT

1. Exporter of the waste 1/
2. Generator(s) of the waste and site of generation 1/
3. Disposer of the waste and actual site of disposal 1/
4. Carrier(s) of the waste 1/ or his agent(s)
5. Subject of general or single notification
6. The date the transboundary movement started and date(s) and signature on receipt by each person who takes charge of the waste
7. Means of transport (road, rail, inland waterway, sea, air) including countries of export, transit and import, also point of entry and exit where these have been designated
8. General description of the waste (physical state, proper UN shipping name and class, UN number, Y number and H number as applicable)
9. Information on special handling requirements including emergency provision in case of accidents
10. Type and number of packages
11. Quantity in weight/volume
12. Declaration by the generator or exporter that the information is correct
13. Declaration by the generator or exporter indicating no objection from the competent authorities of all States concerned which are Parties.
14. Certification by disposer of receipt at designated disposal facility and indication of method of disposal and of the approximate date of disposal.

Notes

The information required on the movement document shall where possible be integrated in one document with that required under transport rules. Where this is not possible the information should complement rather than duplicate that required under the transport rules. The movement document shall carry instructions as to who is to provide information and fill-out any form.

1/ Full name and address, telephone, telex or telefax number and the name, address, telephone, telex or telefax number of the person to be contacted in case of emergency.

Annex VI

ARBITRATION

Article 1

Unless the agreement referred to in Article 20 of the Convention provides otherwise, the arbitration procedure shall be conducted in accordance with Articles 2 to 10 below.

Article 2

The claimant party shall notify the Secretariat that the parties have agreed to submit the dispute to arbitration pursuant to paragraph 2 or paragraph 3 of Article 20 and include, in particular, the Articles of the Convention the interpretation or application of which are at issue. The Secretariat shall forward the information thus received to all Parties to the Convention.

Article 3

The arbitral tribunal shall consist of three members. Each of the Parties to the dispute shall appoint an arbitrator, and the two arbitrators so appointed shall designate by common agreement the third arbitrator, who shall be the chairman of the tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

Article 4

1. If the chairman of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Secretary-General of the United Nations shall, at the request of either party, designate him within a further two months period.

2. If one of the parties to the dispute does not appoint an arbitrator within two months of the receipt of the request, the other party may inform the Secretary-General of the United Nations who shall designate the chairman of the arbitral tribunal within a further two months' period. Upon designation, the chairman of the arbitral tribunal shall request the party which has not appointed an arbitrator to do so within two months. After such period, he shall inform the Secretary-General of the United Nations, who shall make this appointment within a further two months' period.

Article 5

1. The arbitral tribunal shall render its decision in accordance with international law and in accordance with the provisions of this Convention.

2. Any arbitral tribunal constituted under the provisions of this Annex shall draw up its own rules of procedure.

Article 6

1. The decisions of the arbitral tribunal both on procedure and on substance, shall be taken by majority vote of its members.

2. The tribunal may take all appropriate measures in order to establish the facts. It may, at the request of one of the parties, recommend essential interim measures of protection.

3. The parties to the dispute shall provide all facilities necessary for the effective conduct of the proceedings.

4. The absence or default of a party in the dispute shall not constitute an impediment to the proceedings.

Article 7

The tribunal may hear and determine counter-claims arising directly out of the subject-matter of the dispute.

Article 8

Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.

Article 9

Any Party that has an interest of a legal nature in the subject-matter of the dispute which may be affected by the decision in the case, may intervene in the proceedings with the consent of the tribunal.

Article 10

1. The tribunal shall render its award within five months of the date on which it is established unless it finds it necessary to extend the time-limit for a period which should not exceed five months.

2. The award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon the parties to the dispute.

3. Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made the award or, if the latter cannot be seized thereof, to another tribunal constituted for this purpose in the same manner as the first.

I hereby certify that the foregoing text is a true copy of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, concluded at Basel on 22 March 1989, the original of which is deposited with the Secretary-General of the United Nations, as the said Convention was opened for signature.

For the Secretary-General,
The Legal Counsel:

Je certifie que le texte qui précède est une copie conforme de la Convention de Bâle sur le contrôle des mouvements transfrontières de déchets dangereux et de leur élimination, conclue à Bâle le 22 mars 1989, dont l'original se trouve déposé auprès du Secrétaire général de l'Organisation des Nations Unies telle que ladite Convention a été ouverte à la signature.

Pour le Secrétaire général,
Le Conseiller juridique :

Carl-August Fleischhauer

United Nations, New York
7 juillet 1989

Organisation des Nations Unies
New York, le 7 juillet 1989

Re:

International environmental law

RESTATEMENT OF THE LAW THIRD

THE AMERICAN LAW INSTITUTE

RESTATEMENT OF THE LAW THE FOREIGN RELATIONS LAW OF THE UNITED STATES

Volume 2

§§ 501–End

TABLES and INDEX

As Adopted and Promulgated

BY

THE AMERICAN LAW INSTITUTE

AT WASHINGTON, D.C.

May 14, 1986

ST. PAUL, MINN.

AMERICAN LAW INSTITUTE PUBLISHERS

1987

France, Japan, and the Soviet Union for a portion of their claims, and arranging for those states to relinquish other parts of the contested area for the benefit of other potential pioneer investors (four consortia composed of companies incorporated in the United States, the United Kingdom, Belgium, Canada, the Federal Republic of Germany, Italy, Japan, and the Netherlands), provided they submit their applications before the entry into force of the LOS Convention. U.N. Doc. LOS/PCN/L.41/Rev.1, at 9–13 (1986); U.N. Press Release SEA/777 (1986).

Part VI

THE LAW OF THE ENVIRONMENT

Introductory Note:

Since the Second World War, the growth of population, the spread of industrialization, and the increase in automobile, air, and maritime traffic have led to a great increase in pollution of land, air, and water. It soon became obvious that unilateral action by states to control pollution was not sufficient, and that international co-operation and regulation to protect the environment were necessary. Strong impetus to the development of international environmental law was given by the Conference on the Human Environment, held in Stockholm in 1972. That Conference adopted the Stockholm Declaration on the Human Environment and an Action Plan. It also made proposals that led the General Assembly of the United Nations to establish a United Nations Environment Program. See § 601, Reporters' Note 1 and § 602, Reporters' Note 1.

This Part addresses primarily transfrontier and marine pollution. Transfrontier pollution occurs when activities in one state cause significant injury in another (usually neighboring) state, by deleterious effect on that state's ecosystem, its air, land, or water, on the health of its inhabitants, or on its living resources. Marine pollution is the introduction into the marine environment of substances that have or are likely to have deleterious effect on the coasts and coastal waters of states or on marine areas beyond the jurisdiction of any state. International environmental law addresses also pollution of the "global commons," *i.e.*, areas over which no state has jurisdiction or control but which are of common interest to all states—outer space, Antarctica, ice floes, and unoccupied islands.

Environmental harm may be caused by activities other than pollution: a dam may cause erosion, or irrigation may increase the salinity of a river. Other environmental problems of international concern include the need to improve habitat and human settlements; to protect archaeologic treasures, cultural monuments, nature sanctuaries, endangered fauna and flora, and migratory birds; to lessen the consequences of deforestation, overfishing, and weather modification. Where activities in one state cause environmental injuries in another state, the principles of this Part generally apply.

Sources of environmental law. The principles discussed in this Part are rooted in customary international law. They originated in rules relating to the responsibility of a state for injuries caused to another state or to its property, or to persons within another state's territory or their property. The International Court of Justice has noted that one of the "general and well-recognized principles" of international law is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." [1] The United Nations Survey of International Law concluded that "[t]here has been general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interests of other States in a manner contrary to international law." [2]

Judge Lauterpacht has said that "[a] State is bound to prevent such use of its territory as, having regard to the circumstances, is unduly injurious to the inhabitants of the neighboring State." [3] He added that the maxim *sic utere tuo ut alienum non laedas* (use your own property so as not to injure the property of another) is applicable to relations of states not less than those of individuals; it is one of those general principles of law applicable under Article 38(1)(c) of the Statute of the International Court of Justice.[4]

This general principle has been applied, in particular, to international rivers. As early as 1911, the Institute of International Law expressed the opinion that where a river forms the boundary of two states, neither state may, "on its own territory, utilize or allow the utilization of the water in such a way as seriously to interfere with its utilization by the other State or by individuals, corporations, etc., thereof." [5] The United States stated similarly that "no State might claim to use the waters of an international

[1] Corfu Channel Case (Merits) (United Kingdom/Albania), [1949] I.C.J. Rep. 4, 22.

[2] U.N. Doc.A/CN.4/1/Rev.1 (U.N. Pub. 1948. V.1(1)), at 34 (1949).

[3] 1 Oppenheim, International Law 291 (8th ed. by H. Lauterpacht, 1955).

[4] *Id.*, at 346–47.

[5] J.B. Scott, Resolutions of the Institute of International Law Dealing with the Law of Nations 169 (1916). Judge Lauterpacht also pointed out that a state is forbidden to make such use of a river that causes danger to a neighboring state or prevents it from making proper use of the flow of the river. *Supra*, n. 3, at 475.

river in such a way as to cause material injury to the interests of other States." [6]

In a decision applying the general principle to transfrontier air pollution, which has been frequently quoted by other courts and tribunals, a United States-Canadian tribunal, in the *Trail Smelter Arbitration*, concluded that, "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." [7]

In recent years many international agreements have dealt with regional transfrontier pollution. Important guidelines on several aspects of such problems have been adopted, by consensus, by the Organization for Economic Co-operation and Development (OECD).[8]

Marine pollution, International law has established a special regime for marine pollution because of the interdependent character of ocean waters (and air) and the cumulative effect of acts of pollution. Any significant pollution of the marine environment, therefore, is of concern to all states. Any state may complain to the offending state or to an appropriate international agency against violation of generally accepted international rules and standards for the protection of the marine environment by another state or its nationals or ships. Remedies are available to a particular state when the pollution of the marine environment has caused injury to that state or to its nationals. See §§ 604 and 902.

[6] 17 U.N. GAOR C. 6 (764th mtg.) at 158 (1962). See also United States notes to Canada and Mexico, [1978] Digest of U.S. Practice in Int'l L. 1116–17, 1121–22.

[7] Trail Smelter Case, 1941, 3 R. Int'l Arb. Awards 1905, 1965 (1949); 35 Am.J. Int'l L. 684, 716 (1941). See also § 601, Reporters' Note 1.

[8] See, *e.g.*, OECD, Non-Discrimination in Relation to Transfrontier Pollution: Leading OECD Documents 8, 32, 49 (1978). See also the Canada-United States joint statement on transboundary air quality. [1979] Digest of U.S. Practice in Int'l L. 1612–15; the Canada-United States Memorandum of Intent Concerning Transboundary Air Pollution, 1980, 32 U.S.T. 2521, T.I.A.S. No. 9856 (expressing "common determination to combat transboundary air pollution in keeping with their existing international rights, obligations, commitments and co-operative practices, including those set forth in the 1909 Boundary Waters Treaty, the 1972 Stockholm Declaration on Human Environment," and in other agreements); and the Mexico-United States Agreement to Co-operate in the Solution of Environmental Problems in the Border Area, 1983, 22 Int'l Leg.Mat. 1025 (1983) (undertaking, "to the fullest extent practical, to adopt the appropriate measures to prevent, reduce and eliminate sources of pollution in their respective territory which affect the border area of the other," the border area being defined for this purpose as "the area situated 100 kilometers on either side of the inland and maritime boundaries" between the parties).

With the rapid growth of maritime traffic after the Second World War, pollution from ships and harm to the marine environment from maritime accidents, particularly those involving large oil tankers, reached alarming proportions. Waste dumped into the sea by ever-growing coastal cities, release of toxic substances including radioactive materials, and spills from oil wells on the continental shelf added greatly to marine pollution.

The 1958 Convention on the High Seas requires states to "draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil" (Article 24). Every state was also obligated to "take measures to prevent pollution of the seas by the dumping of radioactive waste," and to co-operate with the competent international organizations in preventing pollution of the seas and air space above by "any activities with radioactive materials or other harmful agents" (Article 25).[9]

The 1982 Convention on the Law of the Sea (discussed in Part V) includes provisions for the protection of the marine environment against pollution not only by ships or other activities in the sea, but also from land-based sources or from or through the atmosphere. LOS Convention, Part XII, Articles 192–237. Disputes relating to these provisions are made subject to a compulsory dispute settlement procedure. See, in particular, Article 297(1)(c). The Convention also increases the powers of coastal states, particularly port states, to enforce pollution rules and standards against vessels of foreign states. See § 604. Most of the provisions of the Convention concerning the protection of the marine environment reflect customary international law. See Introductory Note to Part V. The dispute settlement provisions, however, are not customary law and will not bind the United States nor will the United States be able to invoke them unless it becomes a party to the Convention.

In addition to the provisions in the Law of the Sea Convention, there are numerous international conventions on the protection of the marine environment, both global and regional (see § 603, Reporters' Notes 2–5, and § 604, Reporters' Note 1), and several bilateral agreements (see § 604, Reporters' Note 1).

United States law. International aspects of environmental problems, especially of marine pollution, have been the subject of United States legislation. See, *e.g.*, the Acts relating, respectively, to National Environmental Policy, Clean Air, Federal Water Pollution Control, Toxic Substances Control, Oil Pollution, Ocean Dumping, Deepwater Ports, Rivers and Harbors, Coastal Zone Manage-

[9] 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82. (As of 1987, this convention was in force for 57 states, including the United States.)

ment, Outer Continental Shelf Lands, Submerged Lands, Fishery Conservation and Management, Deep Seabed Hard Mineral Resources, Resources Conservation and Recovery, Marine Mammals, Endangered Species, and Marine Sanctuaries. See § 601, Reporters' Note 8, and § 603, Reporters' Note 7.

REPORTERS' NOTES

1. *Bibliography.*

K. Hakapää, Marine Pollution in International Law (1981).

B. Johnson, International Environmental Law (1976).

D. M. Johnson, ed., The Environmental Law of the Sea (1981).

J. Schneider, World Public Order and the Environment (1979).

2. *Previous Restatement.* The previous Restatement dealt incidentally with transfrontier pollution in sections relating to liability of a state for injuries caused in the territory of another state (§ 18, Reporters' Note 3), and to marine pollution resulting from the exploration and exploitation of the seabed (§ 23, Reporters' Note 3).

§ 601. State Obligations with Respect to Environment of Other States and the Common Environment

(1) A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control

(a) conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and

(b) are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.

(2) A state is responsible to all other states

(a) for any violation of its obligations under Subsection (1)(a), and

(b) for any significant injury, resulting from such violation, to the environment of areas beyond the limits of national jurisdiction.

(3) A state is responsible for any significant injury, resulting from a violation of its obligations under Subsection (1), to the environment of another state or to its property, or to persons or property within that state's territory or under its jurisdiction or control.

Comment:

a. Application of general principles of state responsibility. This Part applies to environmental questions the general principles of international law relating to the responsibility of states for injury to another state or its property or to persons within its territory or their property, or for injury to interests common to all states. A state is responsible under Subsections (2) and (3) for breach of any of its obligations under Subsection (1). It is responsible under Subsection (2) to all states, and any state may request that it abate a threat of pollution and make arrangements to prevent future violations. Under Subsection (3), it is responsible to an injured state for any significant injury and is required to make reparation for the injury. The conditions of responsibility and the remedies available may differ with the circumstances and with the interests affected. See Comment *d* and § 602; see also the general principles in § 711 and §§ 901–902.

b. "Generally accepted international rules and standards." This phrase is adopted from the law of the sea; see § 502, Comment *c.* The obligation under Subsection (1)(a) refers to both general rules of customary international law (see, *e.g.*, the *Trail Smelter* case, Reporters' Note 1) and those derived from international conventions, and from standards adopted by international organizations pursuant to such conventions, that deal with a specific subject, such as oil pollution or radioactive wastes. See Reporters' Notes 3–7 and § 603, Reporters' Notes 4 and 5; see also § 102, Comments *f* and *g*, and § 103, Comment *c.* A state is also obligated to comply with an environmental rule or standard that has been accepted by both it and an injured state, even if that rule or standard has not been generally accepted.

Where an international rule or standard has been violated, any state can object to the violation; where a state has been injured in consequence of such violation, it is entitled to damages or other appropriate relief from the responsible state; where there is a threat of injury, the threatened state, or any state acting on behalf of threatened common interests, is entitled to have the dangerous activity terminated. See § 602.

c. "Activities within its jurisdiction" and "significant injury." An activity is considered to be within a state's jurisdiction under this section if the state may exercise jurisdiction to prescribe law with respect to that activity under §§ 402–403. The phrase "activities within its jurisdiction or control" includes activities in a state's territory, on the coastal waters that are under its jurisdiction, Part V, as well as activities on ships flying its flag or on installations on the high seas operating under its authority. See

§ 502(1)(b) and Comment *c* thereto, § 514, Comment *i* and § 521, Comment *c.* International law does not address internal pollution, but a state is responsible under this section if pollution within its jurisdiction causes significant injuries beyond its borders. "Significant injury" is not defined but references to "significant" impact on the environment are common in both international law and United States law. The word "significant" excludes minor incidents causing minimal damage. In special circumstances, the significance of injury to another state is balanced against the importance of the activity to the state causing the injury. See Reporters' Note 3.

d. Conditions of responsibility. A state is responsible under Subsections (2) and (3) for both its own activities and those of individuals or private or public corporations under its jurisdiction. The state may be responsible, for instance, for not enacting necessary legislation, for not enforcing its laws against persons acting in its territory or against its vessels, or for not preventing or terminating an illegal activity, or for not punishing the person responsible for it. In the case of ships flying its flags, a state is responsible for injury due to the state's own defaults under Subsection (1) but is not responsible for injury due to fault of the operators of the ship. In both cases, a state is responsible only if it has not taken "such measures as may be necessary" to comply with applicable international standards and to avoid causing injury outside its territory, as required by Subsection (1). In general, the applicable international rules and standards do not hold a state responsible when it has taken the necessary and practicable measures; some international agreements provide also for responsibility regardless of fault in case of a discharge of highly dangerous (radioactive, toxic, etc.) substances, or an abnormally dangerous activity (*e.g.*, launching of space satellites). See also the principles applicable to weather modification, Comment *f.* In all cases, however, some defenses may be available to the state; *e.g.*, that it had acted pursuant to a binding decision of the Security Council of the United Nations, or that injury was due to the failure of the injured state to exercise reasonable care to avoid the threatened harm. Compare Restatement, Second, Torts §§ 519, 520, and 524. A state is not responsible for injury due to a natural disaster such as an eruption of a volcano, unless such disaster was triggered or aggravated by a human act, such as nuclear explosion in a volcano's vicinity. But a state is responsible if after a natural disaster has occurred it does not take necessary and practicable steps to prevent or reduce injury to other states.

Under Subsections (2)(b) and (3), responsibility of a state for a significant injury entails payment of appropriate damages if the complaining state proves the existence of a causal link between an activity within the jurisdiction of the responsible state and the injury to the complaining state. Determination of responsibility raises special difficulties in cases of long-range pollution where the link between multiple activities in some distant states and the pollution in the injured state might be difficult to prove. Where more than one state contributes to the pollution causing significant injury, the liability will be apportioned among the states, taking into account, where appropriate, the contribution to the injury of the injured state itself.

A state is responsible under this section for environmental harm proximately caused by activity under its own jurisdiction, not for activity by another state. For instance, a state is not responsible under this section merely because it encourages activities in another state, such as plant eradication programs, that inflict environmental injury in that state or in a third state. Similarly, if a group of states imposes economic sanctions on state *A* depriving it of oil supplies and requiring state *A* to use coal, which results in an increase in air pollution in state *B*, the boycotting states are not responsible under principles of international environmental law for injury resulting to state *B*.

Although there has been no authoritative consideration of the issue, international environmental law has apparently not extended responsibility beyond the state directly responsible for the activities causing injury, under principles analogous to "product liability" which apply in some national legal systems. Thus, under this section, state *A* is responsible for a radioactive emission from a nuclear reactor operated in its territory that causes injury to state *B*, but there is no recognized responsibility to *B* by state *C* in which the defective reactor was manufactured or from which it was sold to state *A*. There may, however, be such responsibility pursuant to an international agreement between state *A* and state *C*, and in special circumstances under general principles of state responsibility. See, *e.g.*, §§ 207, 711, and 901. Also, there may be liability by the manufacturer or seller of the defective reactor, whether it is a state or a private person, under principles of national law applicable to the transaction. Compare, for example, Restatement, Second, Torts §§ 388–408.

Under this section, a state is obligated to take all necessary precautionary measures where an activity is contemplated that poses a substantial risk of a significant transfrontier environmental injury; if the activity has already taken place, the state is obligated to take all necessary measures to prevent or reduce pollution beyond its borders. Similarly, where a violation of international

environmental rules and standards has already occurred, the violating state is obligated to take promptly all necessary preventive or remedial measures, even if no injury has yet taken place.

For the remedies for breach of obligations under this section, see § 602.

e. Obligation to notify and consult. Under Subsection 1(a), a state has an obligation to warn another state promptly of any situation that may cause significant pollution damage in that state. A state has also an obligation to consult with another state if a proposed activity within its jurisdiction or control poses a substantial risk of significant injury to the environment of the other state, but it need not permit such consultations to delay the proposed activity unduly.

f. Weather modification. Weather modification programs are normally used either to prevent injuries to the environment (*e.g.*, by a storm) or to obtain some benefit (*e.g.*, by causing rain during a drought). A state's weather modification programs have sometimes caused injury to another state, *e.g.*, by bringing it excessive rain or by depriving it of rain, or, by changing the direction of a storm, causing injury to that state's ships at sea, to its shore, or to the marine environment. Under international law, a state engaged in weather modification activities is responsible for any significant injuries if causation can be proved, even if the injury was neither intended nor due to negligence, and even if the state took all necessary measures to prevent or reduce injury. Compare the rule as to abnormally dangerous activities, Comment *d.*

REPORTERS' NOTES

1. *General principles of state responsibility for environmental injury.* Principle 21 of the 1972 Stockholm Declaration on the Human Environment provides that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility 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." Report of the United Nations Conference on the Human Environment, U.N.Doc. A/CONF. 48/14/Rev.1 (U.N.Pub.E.73.II.A.14), at 3, 5 (1973). According to Principle 22 of the Stockholm Declaration, "States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction." *Id.* In 1973, the Council of the European Communities issued a statement of principles and objectives of Community environmental policy including

the following: "In accordance with the Declaration of the United Nations Conference on Human Environment adopted in Stockholm, care should be taken to ensure that activities carried out in one state do not cause any degradation of the environment in another state." Johnson, The Pollution Control Policy of the European Communities 4 (para. vi) (1979).

In Article 19(3)(d) of the Draft Articles on State Responsibility, adopted provisionally in 1976, the International Law Commission listed among international crimes "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas." Report of the International Law Commission, [1976] 2(2) Y.B.Int'l L.Comm. 96, 31 U.N. GAOR, Supp. No. 10, at 226 (1976).

The 1963 Treaty banning certain nuclear weapon tests, Reporters' Note 6, prohibits underground explosions that cause "radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted." The Soviet Union complained when nuclear explosions in Nevada vented and resulted in radioactive debris over Canada, Mexico, and the Eastern Pacific. Similarly, the United States complained when explosions in the Soviet Union resulted in radioactive debris in the air over Japan and the Western Pacific. See U.S. Department of State, "Soviet Noncompliance with Arms Control Agreements," Special Report No. 136, at 8 (1985); Voas, "The Arms-Control Compliance Debate," 28 Survival 8, 13 (1986).

The Convention on Long-Range Transboundary Air Pollution was adopted in Geneva on November 13, 1979, by which more than 30 European states, as well as Canada and the United States, agreed to "endeavour to limit and, as far as possible, gradually reduce and prevent air pollution including long-range transboundary air pollution." Such pollution was defined as air pollution that originates "within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources." The main emphasis of the Convention is on research and exchange of information. T.I.A.S. No. 10541; 18 Int'l Leg.Mat. 1442 (1979). As of 1987, this convention was in force for 31 states including the United States. For a 1984 protocol to the Convention, providing more adequate financing for the program, see 24 Int'l Leg.Mat. 484 (1985). As to the implementation by the United States of the Convention, see Benedick, "Transboundary Air Pollution," U.S. Dep't of State, Current Policy No. 723 (1985). Another 1984 protocol to the 1979 Convention, obligating the parties to reduce annual sulphur emission by at least 30 percent by 1993, was not in force as of 1986 and had not been signed by the United States. U.N. Press Release L/T/3808 (1986).

Two cases involving the United States and Canada illustrate the difficulties that have arisen in dealing with transfrontier injuries to the en-

vironment and the development of international law rules on this subject: the *Trail Smelter* case and the *Gut Dam* case.

The *Trail Smelter* case resulted from injuries caused in the State of Washington by large amounts of sulphur dioxide emitted since 1925 by a smelter plant at Trail, British Columbia. Claims for the injury could not be brought in the courts of British Columbia under a doctrine of nuisance since under the law of that province such claims were "local" and could be brought only in the jurisdiction where the injured property was located. See § 602, Reporters' Note 3. The State of Washington, on the other hand, had no jurisdiction over the polluter, a Canadian company, as it was not engaged in any business in that State. (At that time long-arm jurisdiction was not yet available; see § 421(2)(j).) In 1928, the matter was referred to the International Joint Commission established under the Boundary Waters Treaty of 1909, 36 Stat. 2448, T.S. No. 548, 12 Bevans 319, but the Commission's report was rejected by the United States. Further negotiations led to a Convention in 1935 submitting to arbitration two questions: reparation for past injuries and arrangements for the future. 49 Stat. 3245, T.S. No. 893, 6 Bevans 60.

In its final decision, of March 11, 1941, the tribunal recognized a general principle of international law that "[a] State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction." Not finding any international precedents, the tribunal relied on decisions of the Supreme Court of the United States in controversies between States of the United States. From cases such as Missouri v. Illinois, 200 U.S. 496, 520, 526, 26 S.Ct. 268, 269, 272, 50 L.Ed. 572, 578, 581 (1906), New York v. New Jersey, 256 U.S. 296, 309, 41 S.Ct. 492, 496, 65 L.Ed. 937, 943 (1921), and Georgia v. Tennessee Copper Co., 206 U.S. 230, 237–39, 27 S.Ct. 618, 619–620, 51 L.Ed. 1038, 1044–45 (1907), the tribunal deduced the following as a principle not only of United States law but also of international law:

> [N]o state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

The tribunal held that Canada was responsible in international law for the conduct of the Trail Smelter, and that its Government had "the duty . . . to see to it that this conduct should be in conformity with the obligation of the Dominion under international law." In particular, "the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington"; should any injuries occur, an indemnity should be fixed by agreement of the two Governments, injury being defined for this purpose as any injury which "would be recoverable under the decisions of the courts of the United States in suits between private individuals." 3 R.Int'l Arb.Awards 1911, 1963–66. See Rubin, "Pollution by Analogy: The Trail Smelter Arbitration," 50 Ore.L.Rev. 259, 266–74 (1971).

To prevent future injuries as far as possible, the tribunal established a regime of control over the emission of sulphur dioxide fumes from the smelter, at a capital cost of 20 million dollars (at 1941 prices). See Read, "The Trail Smelter Dispute," 1 Can.Y.B.Int'l L. 213, 221 (1963). However, in case the regime should prove insufficient to abate the nuisance, provision was made for amendment or suspension of the regime through binding decisions by an *ad hoc* commission of three scientists. 3 R.Int'l Arb.Awards 1911, 1978. As the system has apparently functioned well, no need for appointing a commission has arisen.

In 1972, Canada invoked the *Trail Smelter* principle against the United States when an oil spill at Cherry Point, Washington, resulted in a contamination of beaches in British Columbia, 11 Can.Y.B. Int'l L. 333–34 (1973). For a recent application of the *Trail Smelter* principle by a Dutch court, see Lammers, Pollution of International Watercourses 198 (1984).

The Gut Dam, which was built by Canada across the international boundary on the St. Lawrence River with the consent of the United States (Act of June 18, 1902; 32 Stat. 392), raised the water levels of Lake Ontario between 1947 and 1952 and caused injury by erosion and inundation to property owners on the United States shore of the lake. Their attempts to sue Canada in United States courts, and to sue the United States Government, proved unsuccessful. See 3 Whiteman, Digest of International Law 768–71, 860–64 (1964). A United States statute authorized the investigation of the Gut Dam claims by the Foreign Claims Settlement Commission (76 Stat. 387 (1962)), but, before any decisions were rendered, the United States and Canada agreed to establish an international arbitral tribunal to dispose finally of the claims of United States citizens. 17 U.S.T. 1566, T.I.A.S. No. 6114. See Re, "'The Foreign Claims Settlement Commission and the Lake Ontario Claims Program," 4 Int'l Leg.Mat. 473 (1965), and the supplementary materials, *id.* at 468–72.

After the tribunal rendered several preliminary decisions in favor of the United States, Canada agreed to pay to the United States $350,000 in full settlement of all claims. The tribunal recorded the settlement and terminated the proceedings. See 8 Int'l Leg.Mat. 118, 133–42 (1969); 7 Can.Y.B.Int'l L. 316–18 (1969).

2. *"Environment" and "pollution" defined.* In the United States, the Council on Environmental Quality has interpreted "human environment" comprehensively as including "the natural and physical environment and the relationship of people with that environment." At the same time, as regards the requirement of an environmental impact statement, Reporters' Note 3, the Council stated that "economic or social effects are not intended by themselves to require preparation" of such a statement, but they must be taken into account in an environmental impact statement when "economic or social and natural or physical environmental effects are interrelated." 40 C.F.R. § 1508.14. See also the Council's Second Annual Report 189–207 (1971), quoted with approval in Crosby v. Young, 512 F.Supp. 1363, 1388 (E.D.Mich. 1981) (such factors as inadequate housing, high crime rates, unsanitary conditions, or inadequate education may not be environmental when looked at individually, but when their net effect is to lower the quality of life their combined environmental impact must be considered); Hanly v. Mitchell, 460 F.2d 640 (2d Cir.), *certiorari denied,* 409 U.S. 990, 93 S.Ct. 313, 34 L.Ed.2d 256 (1972) (environmental impact statements must take into consideration not only water and air pollution, but also such factors as noise, overburdened mass transportation systems, crime, and congestion). The Council's regulations define adverse "effects" to be avoided or minimized as including not only ecological ones, but also "aesthetic, historic, cultural, economic, social or health, whether direct, indirect or cumulative." 40 C.F.R. § 1500.2(f) and § 1508.8. (Whether this broad definition of environmental effect applies in international transboundary cases has not been decided.) The Executive Order on Environmental Effects Abroad of Major Federal Actions applies to "the natural and physical environment," excluding "social, economic and other environments." U.S. Exec. Order No. 12114, Jan. 4, 1979, Section 3–4, 44 Fed.Reg. 1957 (1979). See also National Environmental Policy Act of 1969, Section 101, 42 U.S.C. § 4331.

Pollution has been defined as "any introduction by man, directly or indirectly, of substance or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems, impair amenities or interfere with other legitimate uses of the environment." See Organization for Economic Co-operation and Development (OECD), Recommendation of the Council for the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution, May 17, 1977, OECD Doc. C (77) 28 (Final), Annex, Introduction, subpara. (a) (1977); OECD, OECD and the Environment 115, 116 (1979); 16 Int'l Leg.Mat. 977–78 (1977). The International Bank for Reconstruction and Development (World Bank) and its related institutions have made environmental concerns a major part of their economic assistance programs. They interpret those concerns broadly, "as those pertaining to the natural and social conditions surrounding all organisms, particularly mankind, and including future generations." According to the Bank, actions affecting the environment include not only pollution of air, water, and land, but also waste of resources and "despoiling of mankind's aesthetic and cultural heritage." World Bank, Environmental Policies and Procedures 1–2 (1984). For a definition of pollution in the context of the law of the sea, see § 603, Reporters' Note 1.

3. *"Significant" impact or injury.* Both international law and United States law stress "significant" impact or injury, as a requirement for remedial action (see § 602), or for other purposes, such as an impact statement. For instance, according to the 1969 National Environmental Policy Act, an environmental impact statement is required for any major Federal actions "significantly affecting the quality of the human environment." Section 102(2)(C); 42 U.S.C. § 4332(C). In determining the significance of an impact, both its "context" (*e.g.,* the affected region, locality and interests) and "intensity" (*e.g.,* severity of impact, controversial character,

danger of unique or unknown risks) are to be considered. See the 1978 regulations of the Council on Environmental Quality (CEQ), 40 C.F.R. § 1508.27. For an interpretation of the statutory provisions, see Hanly v. Kleindienst, 471 F.2d 823, 830–31 (2d Cir. 1972), *certiorari denied*, 412 U.S. 908, 93 S.Ct. 2290, 36 L.Ed. 2d 974 (1973). The Clean Air Act requires the Administrator, in cases of international air pollution, to take steps leading to a revision of the pollutant State's plan for implementing the national "ambient air quality standards," but only when the Administrator "has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country" (42 U.S.C. § 7415(a)); in inter-State cases the Act requires that a State prohibit any stationary source within the State from emitting any air pollutant in amounts that will prevent any other State from attaining or maintaining a national "ambient air quality standard" (42 U.S.C. § 4710(a)(2)(E)(i)(I)). It has been held that this standard is less demanding than one requiring prohibition of emissions having "substantial impact on pollution" in the affected State, though other sections of the Act impose that higher standard for other purposes. State of Conn. v. E.P.A., 696 F.2d 147, 156 (2d Cir.1982). The Executive Order on Environmental Effect Abroad of Major Federal Actions, Reporter's Note 2, states that "an action significantly affects the environment if it does significant harm to the environment even though on balance the agency believes the action to be beneficial to the environment." Section 3–4.

The requirement that injury be "significant", "substantial" or "serious" appears also in several international instruments and arbitral awards. See, *e.g.*, 1980 Memorandum of Intent Concerning Transboundary Air Pollution between the United States and Canada, Reporters' Note 4; 1983 Mexico-United States Agreement to Cooperate in the Solution of Environmental Problems in the Border Area, Art. 7, 22 Int'l Leg.Mat. 1025 (1983). G.A. Res. 2995 (XXVII) concerning co-operation between states in the field of the environment, §§ 1 and 2, 27 U.N. GAOR, Supp. No. 30, at 42 (1973); Recommendation of the Council of the Organization for Economic Co-operation and Development on Principles Concerning Transfrontier Pollution, 1974, § 6, OECD, Non-Discrimination in Relations to Transfrontier Pollution: Leading OECD Documents 30, 35 (1978); the draft convention on industrial and agricultural use of international rivers and lakes, prepared by the Inter-American Juridical Committee in 1965, Art. 5, Organization of American States, Rios y Lagos Internacionales 132 (4th ed., 1971); the Helsinki Rules on the Uses of the Waters of International Rivers, Art. 10, International Law Association, Report of the 52d Conference (Helsinki, 1966), 484, 496 (1967); draft on the law of the non-navigational uses of international watercourses, presented to the International Law Commission in 1981, Art. 8(2), U.N. Doc. A/CN.4/348, at 105 (1981). The *Trail Smelter* tribunal imposed liability only in cases "of serious consequence." 3 R.Int'l Arb.Awards 1911, 1965. In the *Lake Lanoux*

Case, the arbitral tribunal noted that the principle prohibiting the upstream state to alter the flow of water applies only where the downstream state has been seriously ("gravement") injured. Award of Nov. 16, 1957, 12 R.Int'l Arb. Awards 281, 308.

In a few cases, the significance of an impact on the environment is balanced against the economic importance of the activity causing the impact. For instance, the 1971 Agreement Concerning Frontier Rivers between Finland and Sweden contains the following provision in Chapter 3, Art. 3(2) (825 U.N.T.S. 191, 282):

> Where the construction would result in a substantial deterioration in the living conditions of the population or cause a permanent change in natural conditions such as might entail substantially diminished comfort for people living in the vicinity or a significant nature conservancy loss or where significant public interests would be otherwise prejudiced, the construction shall be permitted only if it is of particular importance for the economy or for the locality or from some other public standpoint.

There is no need to prove a significant impact or injury when pollution is caused by substances which are highly dangerous to human life and health. Several international agreements contain "black lists" of such substances. See, *e.g.*, 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Annex I, 26 U.S.T. 2403, T.I.A.S. No. 8165. (As of 1987, this convention was in force for 64 states, including the United States.) See also 1978 Agreement between the United States and Canada on Great Lakes Water Quality, Annex, 30 U.S.T. 1383, T.I.A.S. No. 9257. The launching of space objects is considered an abnormally dangerous activity and the launching state is "absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight." 1972 Convention on International Liability for Damage Caused by Space Objects, Art. 2, 24 U.S.T. 2389, T.I.A.S. No. 7762, 961 U.N.T.S. 187. (As of 1987, this convention was in force for 80 states, including the United States, as well as for the European Space Agency.) See also the resolution of the International Law Institute on the pollution of rivers and lakes, Art. III(2) (requiring the taking of strict measures in the case of abnormally dangerous activities), 58(2) Institut de Droit International, Annuaire 196 (1979). As to liability for nuclear accidents, see the conventions cited in § 602, Reporters' Note 2.

When two or more states contribute to pollution causing significant injury, liability is apportioned among the responsible states. If the injured state itself contributed to the pollution, that state, too, is included as one of the responsible states in apportioning liability. Compare the principles recognized in respect of damage caused by space objects, 1972 Convention on International Liability for Damage Caused by Space Objects, Arts. 4(2), 5, and 6, *supra*. Compare also, as to the responsibility of private vessels, 1969 International Convention on Civil Liability for Oil Pollution Damage, Art. 3(3), 973 U.N.T.S. 3, 9 Int'l Leg. Mat. 45 (1970). *Cf.* Restatement, Second, Torts §§ 433A, 433B, 875, 881; Michie v. Great Lakes Steel Division, 495 F.2d 213 (6th Cir.), *certiorari denied*, 419 U.S. 997, 95 S.Ct. 310, 42 L.Ed.2d 270 (1974).

Under Subsections (1)(a) and (2)(a), any state that might be affected by a violation of an applicable pollution control standard is entitled to request compliance with that standard even if no significant injury has been caused or is imminent. Pollution control standards usually allow a margin of safety, but a state that might be affected by their violation need not await the erosion of that margin before requesting compliance.

4. *Obligation to notify and consult.* Under some international agreements, there is an obligation to consult or to provide another state with relevant information in case of activities which are likely to cause significant injuries in that state.

The 1974 Recommendation of the Council of the OECD on Principles Concerning Transfrontier Pollution, which has been accepted by almost all members of the organization including the United States and Canada, contains the following principles:

> . . . Prior to the initiation in a country of works or undertakings which might create a significant risk of transfrontier pollution, this country should provide early information to other countries which are or may be affected. It should provide these countries with relevant information and data, the transmission of which is not prohibited by legislative provisions or prescriptions or applicable international conventions, and should invite their comments.
>
> . . . Countries should enter into consultation on an existing or foreseeable transfrontier pollution problem at the request of a country which is or may be directly affected and should diligently pursue such consultations on this particular problem over a reasonable period of time.
>
> . . . Countries should refrain from carrying out projects or activities which might create a significant risk of transfrontier pollution without first informing the countries which are or may be affected and, except in cases of extreme urgency, providing a reasonable amount of time in the light of circumstances for diligent consultations. Such consultations held in the best spirit of co-operation and good neighbourliness should not enable a country to unreasonably delay or to impede the activities or projects on which consultations are taking place.

OECD, Non-Discrimination in Relation to Transfrontier Pollution: Leading OECD Documents 35 (1978); 14 Int'l Leg.Mat. 242, 246 (1975). See United Nations Convention on Long-Range Transboundary Air Pollution, Geneva, 1979, Arts. 5 and 8(b), T.I.A.S. No. 10541; 18 Int'l Leg.Mat. 1442 (1979). (As of 1987, this convention was in force for 31 states, including the United States.) See also Scandinavian Convention on the Protection of the Environment, 1974, Art. 11, 13 Int'l Leg. Mat. 591, 595 (1974).

While the Stockholm Conference on the Human Environment was unable to achieve consensus on the scope of the obligation to notify and consult, such an obligation is generally accepted, as long as it does not cause inordinate delays in development projects. See G.A. Res. 2995, 27 U.N. GAOR, Supp. No. 30, at 42; National Environmental Policy Act, § 102, Reporters' Note 2. See also Sohn, "The Stockholm Declaration on the Human Environment," 14 Harv.Int'l L.J. 423, 496, 502 (1973).

In the 1980 Memorandum of Intent Concerning Transboundary Air Pollution, 32 U.S.T. 2521, T.I.A.S. No. 9856, Canada and the United States agreed to continue and expand

> their long-standing practice of advance notification and consultation on proposed actions involving a significant risk or potential risk of causing or increasing transboundary air pollution, including:
>
> (a) proposed major industrial development or other actions which may cause significant increases in transboundary air pollution: and
>
> (b) proposed changes of policy, regulations or practices which may significantly affect transboundary air pollution.

As noted in Comment *e* (and in § 603, Comment *e*), when a state becomes aware that an activity or incident within its territory may cause significant pollution injury in another state, it has a duty to notify that state of the danger. See Report of J. Barboza to the International Law Commission, U.N.Doc. A/CN.4/402, para. 14 (1986); United Nations, Survey of State Practice Relevant to International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law 180–82, U.N.Doc. A/CN.4/384 (1984); Magraw, "Transboundary Harm: The International Law Commission's Study of 'International Liability,'" 80 Am.J.Int'l L. 305, 312, 327–29 (1986).

In 1986, when an accident at the nuclear reactor in Chernobyl, in the Soviet Union, resulted in radioactive clouds spreading to several European countries, these countries protested that the Soviet Union had not immediately notified them of the impending danger. As a result of this incident, the International Atomic Energy Agency prepared two conventions: one, the Convention on Early Notification of a Nuclear Accident, would strengthen the obligation of a state to provide its neighbors with early notification and information about a nuclear accident that may have a transboundary effect; the other convention, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, would commit states parties to provide assistance in case of nuclear accident. IAEA Doc. GC/SPL.I/2 (1986); 25 Int'l Leg.Mat. 1370, 1377 (1986). By October 1986, the conventions were signed by 57 states, including the United States. The Notification Convention entered into force on October 27, 1986, but the United States had not yet ratified it. 1 IAEA Newsbriefs, No. 1, at 1 (1986); 2 *id.* at 2. Many states announced their willingness to apply the two conventions even before they became bound by them. In October 1986 the Soviet Union immediately notified the IAEA of an accident involving a nuclear submarine. See 25 Int'l Leg.Mat. 1369, 1394 (1986).

A 1978 agreement between France and the Soviet Union on the prevention of accidental or unauthorized use of nuclear weapons requires each party immediately to notify the other party "of any accidental occurrence or any other unexplained incident that could lead to the explosion of one of their nuclear weapons which may have harmful effect on the other party." 1036 U.N.T.S. 299.

5. *Antarctica.* Concerning the prohibition of disposal of radioactive waste in Antarctica, see Antarctic Treaty, 1959, Art. 5, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71. (As of 1987, this treaty was in force for 33 states, including the United States.) The parties to the Antarctic Treaty have adopted various measures for the preservation and conservation of the living resources of the Antarctic and the protection of the Antarctic environment. See, *e.g.*, the recommendations in 13 U.S.T. 1349, T.I.A.S. No. 5094 (1961); 14 U.S.T. 99, T.I.A.S. No. 5274 (1962); 17 U.S.T. 991, T.I.A.S. No. 6058 (1964); 20 U.S.T. 614, T.I.A.S. No. 6668 (1966); 24 U.S.T. 1793, T.I.A.S. No. 7692 (1968); 25 U.S.T. 266, T.I.A.S. No. 7796 (1970); 28 U.S.T. 1138, T.I.A.S. No. 8500 (1972). See also Convention for the Conservation of Antarctic Seals, London, 1972, 29 U.S.T. 441, T.I.A.S. No. 8826 (as of 1987, this convention was in force for 11 states, including the United States); and Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 1980, T.I.A.S. No. 10240 (as of 1987, this convention was in force for 20 states, including the United States, and for the European Economic Community).

6. *Outer Space.* In conducting exploration of outer space, including the moon and other celestial bodies, states parties to the 1967 Treaty on Outer Space have agreed "to avoid their harmful contamination" and to prevent the introduction into the earth's environment of extraterrestrial matter which may cause adverse changes in that environment. Art. 9, 18 U.S.T. 2410, T.I.A.S. No. 6347. (As of 1987, this treaty was in force for 96 states, including the United States.) This treaty also makes a state launching an object into outer space liable for injuries caused by such object to another state or to natural or juridical persons, whether on earth, in the air, or in outer space. Art. 7. This provision has been supplemented by the 1972 Convention on the International Liability for Damage Caused by Space Objects. 24 U.S.T. 2389, T.I.A.S. No. 7762. (As of 1987, this convention was in force for 80 states, including the United States, and for the European Space Agency.) Concerning the payment of compensation for injuries caused by Soviet satellite Cosmos 954, which contained a nuclear reactor and which caused injuries in Canada in 1978, see 18 Int'l Leg.Mat. 899 (1979); Cohen, "Cosmos 954 and the International Law of Satellite Accidents," 10 Yale J. Int'l L. 78 (1984).

A 1963 treaty banned nuclear weapon tests in the atmosphere, in outer space and under water, including both territorial waters and high seas. Testing underground was also prohibited if it caused nuclear emissions outside the testing state's territory. 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43. As of 1987, this treaty was in force for 114 states, including the United States. But some nonparty states continued to conduct nuclear tests in the atmosphere despite protests by other states. *Cf.* the Nuclear Test Cases (Australia and New Zealand v. France), [1974] I.C.J. Rep. 253, 457.

See Goldie, "Concepts of Strict and Absolute Liability in Terms of Relative Exposure to Risk," 16 Netherlands Y.B. Int'l L. 175, 219–31 (1985).

7. *Weather modification.* The principles of international law relating to weather modification are based on general principles of law common to major legal systems of the world (§ 102(1)(c)), which have evolved in recent years out of a number of domestic cases. While these legal principles are widely accepted, scientists have found it difficult to agree whether an incident was caused by a weather modification activity, and it may be difficult to prove causation in a particular case.

The 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques prohibited the "military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects" as a means of inflicting an injury on another state. Such techniques were defined as "any technique for changing—through the deliberate manipulation of natural processes—the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space." Arts. 1–2, 31 U.S.T. 333, T.I.A.S. No. 9614. As of 1987, this convention was in force for 57 states, including the United States.

See also the Draft Principles prepared by the World Meteorological Organization's and United Nations Environmental Program's (WMO/UNEP) Informal Meeting on Legal Aspects of Weather Modification, April 1978, [1978] Digest of U.S. Practice in Int'l L. 1204–1205 (including, *inter alia*, the principle that "[s]tates shall take all reasonable steps to ensure that weather modification activities under their jurisdiction or control do not cause adverse environmental effects in areas outside their national jurisdiction"); and the 1975 United States-Canada Agreement relating to the Exchange of Information on Weather Modification Activities, 26 U.S.T. 540, T.I.A.S. No. 8056; Weiss, "International Liability for Weather Modification," 1 Climatic Change 267 (1978).

International law has not yet developed rules relating to large-scale climate modification, such as the depletion of the stratospheric ozone layer protecting earth from solar radiation, or the melting of Arctic ice causing inundation of coastal areas all over the world. See, *e.g.*, Staff Report of Senate Comm. on Aeronautical and Space Sciences, 94th Cong., 1st sess., The International Legal and Institutional Aspects of the Stratosphere Ozone Problem 61–78 (Comm. Print 1975); Ozone Layer: Hearings Before the Subcomm. on Toxic Substances and Environmental Oversight of the Senate Comm. on Environment and Public Works, 97th Cong., 1st sess. (1981). See also Agreement Regarding Monitoring of the Stratosphere, Paris, 1976, 27 U.S.T. 1437, T.I.A.S. No. 8255 (establishing strengthened global stratospheric ozone monitoring capability) (in force for France, United Kingdom, and United States); and Convention for the Protection of the Ozone Layer, Vienna, 1985 (cooperation in monitoring, research, and exchange of information, accompanied by recommendation to control chlorofluorocarbon emissions "to the maximum extent practicable"). See

U.S. Dep't of State, "International Cooperation to Protect the Ozone Layer," Current Policy No. 808 (1986); 8 Envt'l L.Rep. 126 (1985).

8. *United States legislation relating to transfrontier pollution.* The two principal United States acts concerned with the prevention and control of pollution are the Clean Water Act and the Clean Air Act, both of which have international implications. The Clean Water Act started as the Federal Water Pollution Control Act of 1948, was amended several times, especially in 1972 and 1977, and is codified at 33 U.S.C. §§ 1251–1376. The Clean Air Act of 1955 was also frequently amended, especially in 1970 and 1977, and was recodified in 1977 at 42 U.S.C. §§ 7401–7642.

The Clean Water Act, designed to control pollution of navigable waters, applies to transfrontier pollution on condition of reciprocity. When the Administrator of the Environmental Protection Agency has reason to believe that pollution is occurring that endangers the health or welfare of persons in a foreign state, and the Secretary of State requests him to abate such pollution, he is obligated to hold a hearing promptly, provided two conditions are fulfilled: that such pollution is occurring in sufficient quantity to warrant such action; and that the foreign country in question has given the United States essentially the same rights with respect to the prevention and control of pollution occurring in that country as are given to that country by this Act. The foreign country that may be adversely affected by the pollution is to be invited to attend and participate in the hearing. 33 U.S.C. § 1320(a). The Administrator is required to implement promptly the recommendations of the hearing board for abating the pollution. § 1320(c). Civil enforcement actions under the Act can be brought by "citizens," defined as "a person or persons having an interest which is or may be adversely affected." § 1365(a) and (g). It has not been determined whether an alien meeting the definition can sue. In a parallel situation, access to United States courts was allowed to noncitizens under the National Environmental Policy Act (Reporters' Note 3). See People of Enewetak v. Laird, 353 F.Supp. 811, 820, n. 14 (D.Hawaii 1973); Wilderness Society v. Morton, 463 F.2d 1261, 1262 (D.C.Cir.1972). (The Act contains also provisions relating to marine pollution. See § 603, Reporters' Note 7.)

For the complex relationship between the Federal Water Pollution Control Act, as amended, and remedies available under State laws, see the various actions against the cities of Milwaukee and Hammond decided jointly, after two Supreme Court decisions, in People of the State of Illinois v. Milwaukee, 731 F.2d 403, 409–14 (7th Cir.1984), *certiorari denied,* 469 U.S. 1196, 105 S.Ct. 980, 83 L.Ed.2d 981 (1985) (federal act precludes application of one State's common or statutory law to determine liability and afford a remedy for discharge within another State). A similar problem has arisen in Canada. See Interprovincial Co-operatives Ltd. v. The Queen in Right of Manitoba, 53 D.L.R.3d 321 (1975).

The Clean Air Act has similar provisions for allowing foreign state participation in hearings designed to revise a State implementation plan

in order to prevent or eliminate danger to public health or welfare in the foreign state; such hearings and foreign participation are also conditioned on reciprocity. 42 U.S.C. § 7415(c). In implementation of this Act, Congress in 1978 expressed its sense that "the President should make every effort to negotiate a cooperative agreement with the Government of Canada aimed at preserving the mutual airshed of the United States and Canada so as to protect and enhance air resources and insure the attainment and maintenance of air quality protective of public health and welfare." Congress also expressed its sense that the President "should take whatever diplomatic actions appear necessary to reduce or eliminate any undesirable impact upon the United States and Canada resulting from air pollution from any source." 92 Stat. 962, at 990; 42 U.S.C. § 7415, note. This resolution led in turn to the 1980 Memorandum of Intent of the Two Governments Concerning Transboundary Air Pollution, which established a United States/Canada Coordinating Committee charged with negotiating a cooperative agreement on transboundary air pollution. 32 U.S.T. 2521, T.I.A.S. No. 9856. The Committee established a Legal, Institutional and Drafting Working Group charged, *inter alia,* with developing "the legal elements of an agreement[,] such as notification and consultation, equal access, nondiscrimination, liability and compensation." Dep't of State, Press Release No. 209A (August 6, 1980), at 14. In 1980, Canada revised its Clean Air Act of 1971, in order to provide the reciprocity required by 42 U.S.C. § 7415(c). Can. Stat., ch. 45, § 21.1(1) (1980–81).

The Acid Precipitation Act of 1980 sets out guidelines for a 10-year study of the impact of acid rain, and seeks to promote international cooperation in acid precipitation research. 42 U.S.C. §§ 8901–05, 8011–12. See also the New York-Quebec Agreement on Acid Precipitation, July 26, 1982. 21 Int'l Leg.Mat. 721 (1982) (to conduct joint studies and exchange information).

Special problems relating to injuries to the environment caused by hazardous wastes have led to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, also known as the Superfund Act), 42 U.S.C. § 9601. A foreign claimant may assert a claim under this Act to the same extent as a United States claimant if there is a treaty or executive agreement with the foreign country involved, or if the Secretary of State certifies that such country provides a comparable remedy for United States claimants. *Id.* § 9611(l). See also Senate Committee on Environment and Public Works, Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies: A Report . . . by the "Superfund Section 301(e) Study Group", Doc. No. 97–12, 97th Cong., 2d sess. (1982).

9. *Impact abroad or upon the "global commons."* In the United States, the National Environmental Policy Act (NEPA) of 1969 provides for the preparation by federal agencies of environmental impact statements for all major federal actions significantly affecting the quality of the human environment. See Reporters' Note 3. While that act is principally directed toward assuring

a healthful environment for the people of the United States, it recognizes "the worldwide and long-range character of environmental problems" and supports the initiation of "programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment." 42 U.S.C. §§ 4321, 4332(2)(F). Whether this policy declaration indicates that the legal obligation to prepare an environmental impact statement extends to impacts outside the United States is not clear. *Compare* Sierra Club v. Coleman, 405 F.Supp. 53, 421 F.Supp. 63 (D.D.C.1975, 1976) (building highway through Panama and Colombia, requirement of inclusion of environmental impact in foreign country assumed), *vacated*, 578 F.2d 389, 391–92 n. 14 (D.C.Cir. 1978) (finding it unnecessary to decide issue in view of impact in the United States), and National Organization for the Reform of Marijuana Laws (NORML) v. United States Department of State, 452 F.Supp. 1226 (D.C.C.1978) (applicability of NEPA to spraying in Mexico to destroy marijuana plants assumed without being decided), *with* Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission (NRC), 647 F.2d 1345 (D.C.Cir.1981) (impact statement not required with respect to issuance of nuclear export license for shipment to the Philippines). The Executive Order on Environmental Effects Abroad of Major Federal Actions (Reporters' Note 2) requires federal agencies to take into consideration environmental impact statements and relevant international environmental studies when approving "major Federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (*e.g.*, the oceans or Antarctica)." Section 2–3(a). See also Pincus, "The 'NEPA-Abroad' Controversy: Unresolved by an Executive Order," 30 Buffalo L.Rev. 611 (1981). The Nuclear Regulatory Commission, in connection with investigating the environmental impact of exports of nuclear reactors, has decided to evaluate the effect of a foreign nuclear power project on the "global commons," which it defined as including "areas such as the high seas, Antarctica, and the portions of the atmosphere that are not within the territorial jurisdiction of a single nation state." Cited in Natural Resource Defense Council, Inc. v. Nuclear Regulatory Commission, *supra*, at 1348, n. 8, 1377, n. 68 (1981).

§ 602. Remedies for Violation of Environmental Obligations

(1) A state responsible to another state for violation of § 601 is subject to general interstate remedies (§ 902) to prevent, reduce, or terminate the activity threatening or causing the violation, and to pay reparation for injury caused.

(2) Where pollution originating in a state has caused significant injury to persons outside that state, or has created a significant risk of such injury, the state of origin is obligated to accord to the person injured or

[§ 902: attached]

exposed to such risk access to the same judicial or administrative remedies as are available in similar circumstances to persons within the state.

Comment:

a. International law remedies. The remedies referred to in Subsection (1) usually begin with a protest against the violation, accompanied by a demand that the offending state terminate the violation, desist from further violations, and make reparation for past violations. If the matter is not resolved by diplomatic negotiations, the aggrieved state may resort to agreed third-party procedures, such as conciliation, mediation, arbitration, or adjudication. Some neighboring states have established international joint commissions to deal with transboundary problems, including pollution, but usually such commissions can only make recommendations. Strictly limited and reasonable measures of "self help" may be permitted in special circumstances. See § 905. Remedies under international law are to the injured state; whether that state is obligated to pay any reparation received over to any injured person in its territory is a matter of its domestic law. See § 902, Comments *i* and *l*.

Remedies under this section are available for injury to a state's environmental interests within its territory as well as to interests beyond its territory, such as injury to its fishing interests on the high seas; it may pursue remedies, not only for injury to state interests but also to those of its political subdivisions or of its inhabitants or nationals. A state may also pursue appropriate remedies for injury to the common interest in the global commons, such as the high seas.

Even where reparations for past injuries are not appropriate or feasible, a state may demand that violations be discontinued.

b. Local remedies. A state responsible for transfrontier pollution can fulfill its obligation to inhabitants of other states who suffered injuries by giving them access to its tribunals for adjudication of their claims. If such local remedies are available, the person who suffered injuries must exhaust these remedies before the state of which he is a national can bring an international claim on his behalf under Subsection (1). See § 703, Comment *d*; § 713, Comments *b* and *f*; § 902, Comment *k*. The two states, however, may agree at any time to settle the claim or include it in a lump-sum settlement. See § 902, Comment *i*.

Subsection (2) applies the principle of non-discrimination against foreign nationals (§ 711, Comment *f*). This principle requires that a state in which pollution originates avoid discrimination in the enforcement of applicable international rules and standards, as well as give to foreign victims the benefit of its own rules and standards for the protection of the environment, even if they are stricter than the international rules or standards. Subsection (2) applies the principle of nondiscrimination also to remedies. A state must provide the same procedures, and apply the same substantive law and the same measures of compensation, to persons outside its territory as are available to persons injured within its territory. Thus, a state applying the "polluter-pays" principle should apply it to all pollution originating within the state, whether it causes injury at home or abroad. If a state applies the principle of strict liability, a victim of transfrontier pollution will be entitled to the benefit of that principle. On the other hand, if the state makes liability conditional on fault or negligence, the foreign victim can be required to meet that condition even if in the place of injury fault or negligence is not a necessary element for liability. Similarly, if a state's law imposes an obligation to reduce pollution to the lowest level that is attainable by the application of the most advanced technology that is economically feasible, this requirement applies equally to pollution at home and abroad.

When environmental injury in one state results from private activity in another state, a remedy may sometimes be available in the courts of the victim state, or even of a third state, and if the victim has received satisfaction by such a remedy the interstate remedy would abate.

c. Availability of private remedies under state law. Under the law of many states, pollution damage is considered a local tort; suit for damages lies only in the state where the injury occurred, not in the state where the pollution originated. If personal jurisdiction over the person responsible for the pollution can be obtained in the state where the injury occurred, a suit for compensation or for an injunction would lie, but such suit might not be possible if the alleged polluter has no business or property in that state. Even if a suit there is brought under a long-arm statute and results in a default judgment, the judgment might not be enforceable in the polluter's home state. See § 421(2)(j) and § 481, Reporters' Note 4.

REPORTERS' NOTES

1. *International law remedies.* A state can present a claim for injury to its environment independently of any claim for injury to its nationals or their property. As was noted by the United States Supreme Court in an analogous context, a State of the United States, as quasi-sovereign, "has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." It was "a fair and

reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, . . . whatever domestic destruction they have suffered, should not be further destroyed or threatened by the acts of persons beyond its control.". The Court said that an injunction would issue should the fumes continue. Georgia v. Tennessee Copper Co., 206 U.S. 230, 237–38, 27 S.Ct. 618, 619, 51 L.Ed. 1038, 1045 (1907). In a later decree against one of the defendants, the Supreme Court set limits on the amount of sulphur which Tennessee may permit to escape and appointed an inspector to supervise compliance. 237 U.S. 474, 35 S.Ct. 631, 59 L.Ed. 1054 (1915).

In this case the Supreme Court applied principles of "federal common law" that resemble and sometimes draw on principles of international law. In respect of water pollution, however, the Supreme Court has held that the growth of comprehensive federal control legislation preempted the "federal common law" of nuisance previously applicable. City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981), on remand, 731 F.2d 403 (7th Cir.1984), *certiorari denied,* 469 U.S. 1196, 105 S.Ct. 979, 83 L.Ed.2d 981 (1985); Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981).

A few international agreements provide expressly for liability for pollution injuries. See, *e.g.,* the 1960 General Treaty for the Settlement of Frontier Questions between the Netherlands and the Federal Republic of Germany, 508 U.N.T.S. 14, 194, which provides that the party causing pollution injuries within the territory of the other party in violation of obligations under the Treaty "shall be liable for damages." A state is liable under the treaty, however, only if the injured state had objected to the polluting activity, and only for injuries sustained after the objection. Art. 63.

The Boundary Waters Treaty between Canada and the United States, 1909, T.S. No. 548, 36 Stat. 2448, 12 Bevans 319, provides in Article 4 that "boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other." For pollution situations considered by the International Joint Commission established by the Treaty, see *e.g.,* 3 Whiteman Digest of International Law 828, 853, 869 (1964). More than 20 international bipartite and regional commissions have been established to monitor transfrontier pollution and to propose preventive or remedial measures. See OECD, Transfrontier Pollution and the Role of States, 133, 138 (1981).

Upon recommendation of the 1972 Stockholm Conference on the Human Environment (Introductory Note to this Part), the General Assembly of the United Nations adopted several institutional and financial arrangements for international environmental cooperation. In particular, the General Assembly established (a) the United Nations Environment Program (UNEP), under the direction of an intergovernmental Governing Council, which was mandated to "keep under review the world environmental situation in order to ensure that emerging environmental problems of wide international significance receive appropriate and adequate consideration by Governments"; and (b) an Environment Fund, to be financed by voluntary contributions and to be used to finance programs of general interest, such as "regional and global monitoring, assessment and data-collecting systems," and "the improvement of environmental quality management." G.A. Res. 2994-97, 27 U.N. GAOR Supp. No. 30, at 42–45. In fulfillment of this mandate, various global and regional programs were instituted by the UNEP, and several environmental conventions were concluded. For an assessment of the first 10 years of UNEP's work, see the special report of the Governing Council, 37 U.N. GAOR Supp. No. 25, part I (1982); for UNEP's program for the development and periodic review of environmental law, see U.N. Doc. UNEP/GC.10/5/Add.2 and Corrs. 1 and 2 (1982).

2. *Pollution from multiple sources.* Difficulties have arisen in determining liability for pollution originating in several states, sometimes including the state where damage occurred. Some domestic and regional systems oblige each polluting enterprise to pay a tax, or a compensation, which is proportioned to its share of the total pollution, and often specify maximum liability, but there is as yet no general international agreement on such a system. There are, however, agreements with respect to particular sources of pollution, such as nuclear accidents. See, *e.g.*, Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, Arts. 5(b) and 7, 55 Am.J.Int'l L. 1082 (1961) (as of 1986, this convention was in force for 14 states, but not for the United States); Convention on Civil Liability for Nuclear Damage, 1963, Arts. 2(3), 4 and 5, 2 Int'l Leg.Mat. 727 (1963) (as of 1986, this convention was in force for 10 states, but not for the United States). For the 1982 Protocols which increased the compensation amounts, see OECD, Nuclear Energy Agency (NEA), 14th Report: Activities in 1985, at 31–32 (1986). See also Subcommittee on Legislation of the Joint Committee on Atomic Energy, Selected Materials on Atomic Energy Indemnity Legislation, 89th Cong., 1st sess. 50, 63, 256, 312 (1965); International Atomic Energy Agency, International Conventions on Civil Liability for Nuclear Damage 7, 22, 43 (Legal Series No. 4, rev. ed. 1976).

3. *Availability of private remedies under state law.* The right to sue for compensation and other relief in transfrontier pollution cases is governed by the law of the state where the suit is brought. Special rules govern environmental injuries to immovable property. Some states permit suits for such injuries only where the property is located; in particular, suits based on trespass theory are considered local. Some states allow suits relating to transboundary pollution in either the place where the pollution originated or the place where the injury occurred. Other states achieve the same result by narrowing the definition of trespass, or by changing the rule and considering suits for compensation (or even requests for an injunction) in environmental cases transitory, *i.e.*, they can be brought outside the jurisdiction in which the property is located.

In British South Africa Company v. Companhia de Moçcambique, the House of Lords decided that only the courts of a jurisdiction where immovable property is situated can adjudicate its title; it held that an English court has no jurisdiction with respect to a claim for compensation relating to a trespass to land situated abroad. [1893] A.C. 602 (H.L.). Various Commonwealth courts have extended this rule to bar suits in the state where pollution originated for injury to property in another state. See, *e.g.*, Albert v. Fraser Companies Ltd., [1937] 1 D.L.R. 39, 45, 11 Mar.Prov. 209, 216 (N.B.C.A.); and see 15 Can. B.Rev. 112–15 (1937). When drilling for oil started in the Beaufort Sea on the Canadian side of the United States-Canadian boundary, the United States expressed concern about the possibility of a spill and inquired as to the availability to United States claimants of remedies provided for in the Canadian Arctic Waters Pollution Act. In view of legal doubts on the subject because of the "local action rule," special arrangements were made requiring the Canadian corporation involved in this oil exploration to post a $20,000,000 bond to secure compensation to potential United States pollution victims, and committing the Canadian Government to accept subsidiary liability in the event this bonding arrangement should prove inadequate. See 16 Can.Y.B. Int'l L. 392–94 (1978) (statements in the Canadian House of Commons); Handl, "State Liability for Accidental Transnational Environmental Damage by Private Persons," 74 Am.J.Int'l L. 525, 547–48 (1980); Bankes, "Canada and the Natural Resources of the Polar Regions," Queen's L.J., International Law: Critical Choices for Canada: 1985–2000, at 292, 306–307 (1986).

The common law rule applies also in the United States in States that still follow the "local action rule" established in Livingston v. Jefferson, 15 F. Cas. 660 (No. 8411) (C.C.D.Va.1811). See, *e.g.*, Ellenwood v. Marietta Chair Co., 158 U.S. 105, 107, 15 S.Ct. 771, 39 L.Ed. 913 (1895). See also Taylor v. Sommers Bros. Match Co., 35 Idaho 30, 204 P. 472 (1922); People of the State of Illinois v. Milwaukee, 731 F.2d 403, 411 n. 3 (7th Cir.1984), *certiorari denied*, 469 U.S. 1196, 105 S.Ct. 980, 83 L.Ed.2d 981 (1985) (actions for damages to real property are local and therefore maintainable only in the State wherein the damaged land is).

In the United States, two exceptions to this principle have developed. In some States, an action *in personam*, for example an action for damages, is transitory even if real property in another State is involved. Huntington v. Attrill, 146 U.S. 657, 669, 13 S.Ct. 224, 228, 36 L.Ed. 1123, 1128 (1892). See also Stone v. United States, 167 U.S. 178, 17 S.Ct. 778, 42 L.Ed. 127 (1897); French v. Clinchfield Coal Co., 407 F.Supp. 13 (D.Del. 1976); Mueller v. Brunn, 105 Wis.2d 171, 313 N.W.2d 790 (1982). See also Michie v. Great Lakes Steel Division, National Steel Corp., 495 F.2d 213 (6th Cir.1974), *certiorari denied*, 419 U.S. 997, 95 S.Ct. 310, 42 L.Ed.2d 270 (1974) (Canadian residents sued three United States corporations for damages; no issue of jurisdiction raised); Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1529, 1563 (D.C.Cir. 1984) (en banc) (according to a majority of six, where "the court adjudicating the controversy has personal jurisdiction over the defendants, the extraterritorial nature of the property involved in the litigation is no bar to equitable relief," but three judges dissented on the ground, *inter alia*, that "even those few courts which have abandoned the local action rule vis-à-vis other states still recognize its validity where land *in a foreign country* is concerned" (emphasis in the original)). This judgment was vacated by the Supreme Court and the case was remanded because of new developments. 471 U.S. 1113, 105 S.Ct. 2353, 86 L.Ed.2d 255 (1985), on remand, 788 F.2d 762 (D.C.Cir.1986).

If the injury in one State was caused by an act in another State, the wrongful act is considered to have been committed in both States and either of them has jurisdiction. Smith v. Southern Railway Co., 136 Ky. 162, 165, 123 S.W. 678, 678 (1909). See, generally, the annotations in 42 A.L.R. 196 (1926) and 30 A.L.R.2d 1219 (1953); Note, "Local Actions in the Federal Courts," 70 Harv.L.Rev. 708 (1957). See also McCaffrey, "Transboundary Pollution Injuries: Jurisdictional Considerations in Private Litigation between Canada and the United States," 3 Cal.W.Int'l L.J. 191 (1973).

In a few States, even actions for trespass to land situated in another State are considered transitory. Little v. Chicago, St.P.M. & O. Ry. Co., 65 Minn. 48, 67 N.W. 846 (1896); Ingram v. Great Lakes Pipe Line Co., 153 S.W.2d 547 (Mo.App. 1941); N.Y. Real Property Law, § 536, McKinney's Real Property Actions and Proceedings Law, § 121. However, a State might distinguish between actions relating to land in another State and those relating to land in a foreign country. One court expressed the view that in international controversies the local-action rule should continue to apply, "especially if the other jurisdiction would provide no redress if the situation were reversed." Reasor-Hill Corp. v. Harrison, 220 Ark. 521, 525, 249 S.W.2d 994 (1952). Relying on this case, the Restatement, Second, of Conflict of Laws § 87 provides more broadly that "[a] State may entertain an action that seeks to recover compensation for a trespass upon or harm done to land in another State." This principle would seem to apply to both inter-State and international cases, although in the latter cases reciprocity—which is implied in domestic cases—might be required.

The Boundary Waters Treaty between the United States and Canada, Reporters' Note 1, provides in Article 2 that "any interference with or diversion from their natural channel of [waters flowing across the boundary or into boundary waters] on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs." 36 Stat. 2448, T.S. No. 548, 12 Bevans 319. Article 4(2) relating to pollution contains no similar provision. As of 1986, the United States had no other such agreement on remedies for pollution.

4. *Equal access to remedies.* In 1977, the Council of the Organization for Economic Co-operation and Development (OECD) adopted unanimously a recommendation for the implementation of a regime of equal

right of access and nondiscrimination in relation to transfrontier pollution. See § 601, Reporters' Note 2. The Council recommended, in particular (in para. 4), that:

> (a) Countries of origin should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant risk of transfrontier pollution, shall at least receive equivalent treatment to that afforded in the Country of origin in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition or status.
>
> (b) From a procedural standpoint, this treatment includes the right to take part in, or have resort to, all administrative and judicial procedures existing within the Country of origin, in order to prevent domestic pollution, to have it abated and/or to obtain compensation for the damage caused.

This recommendation has been generally accepted. It led, *inter alia*, to a proposal by the American and Canadian Bar Associations for a bilateral convention on the subject. See American Bar Association and Canadian Bar Association, Settlement of International Disputes Between Canada and the United States, pp. xiii, 40–56 (1979). This proposal in turn led to the preparation by a Joint Working Group of the Uniform Law Conference of Canada and of the United States National Conference of Commissioners on Uniform State Laws of a Draft Transfrontier Pollution Reciprocal Access Act, which was approved by the two organizations in August 1982. (As of 1987, the Act was adopted by Colorado (Colo.Rev.Stat. § 13–1.5.101) (1984), Montana (Mont.Code Ann. § 75–16–101) (1987), New Jersey (N.J.Stat.Ann. 2A:58A–1) (West 1984), Wisconsin (Wis.Stat.Ann. § 144.995) (West Supp.1987), Manitoba (Man.Stat. 1985, ch. 11), and Ontario (Ont. Stat. 35 Eliz. II, c. 10) (1986).)

Several European agreements recognize the right of equal access in transfrontier pollution cases. See, *e.g.*, the 1974 Scandinavian Convention on the Environment, Art. 3 (§ 601, Reporters' Note 4). In 1976, the European Court of Justice held that within the European Community the victim of transfrontier pollution may sue either before a tribunal of the victim's country or before the tribunal of the polluter's country, and that a decision by either tribunal can be executed in any Community country. Bier v. Mines de Potasse d'Alsace, 1976 Eur.Comm.Ct.J.Rep. 1735. For other recent European decisions dealing with jurisdiction in transfrontier pollution, see OECD, Transfrontier Pollution, 1975–1978, at 26 (1979).

Whether, in the United States, the right of equal access includes a right for nonresident foreign persons, claiming environmental injury resulting from activities by persons in the United States, to bring a class action, in circumstances where such an action would lie for domestic plaintiffs, has not been authoritatively determined. Compare Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.1975), *certiorari denied*, 423 U.S. 1018, 96 S.Ct. 453, 46 L.Ed.2d 389 (1975) (excluding foreign purchasers of defendant's securities from class action for fraud), discussed in § 416, Reporters' Note 2.

bear"; and "the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it." *Ibid.* A few years later, however, in Central Rhodope Forests Case (Greece v. Bulgaria), 1933, the arbitrator (Undén, Sweden) rejected a request for restitution on the ground that it was hardly likely that the forests were in the same condition in 1933 as when they were seized by Bulgaria in 1918. 2 Whiteman, Damages in International Law 1460, 1483–84 (1937); 3 R.Int'l Arb.Awards 1405, 1432. In the *Temple of Preah Vihear* case, Reporters' Note 1, [1962] I.C.J. Rep. at 36–37, the International Court of Justice ordered Thailand to "restore to Cambodia any objects . . . removed from the Temple or the Temple area by the Thai authorities."

In an arbitration between a state and a private company, Texas Overseas Petroleum Co. v. Libyan Arab Republic (1977), 53 Int'l L.Rep. 389, 507–09, 511 (1979), the arbitrator (Dupuy, France) held that restitution is, "under the principles of international law, the normal sanction for non-performance of contractual obligations and that it is inapplicable only to the extent that restoration of the *status quo ante* is impossible"; called upon Libya "to perform specifically its own obligations"; decided that Libya "is legally bound to perform these contracts and to give them full effect"; and reserved for further proceedings the question what should be done if the award were not implemented. But in the parallel case of B.P. (British Petroleum) v. Libya, the arbitrator (Lagergren, Sweden) rejected the claim that the company be restored to the full enjoyment of its rights, and awarded damages instead (1973), 53 Int'l L.Rep. 297, 356–57. Accord, Libyan American Oil Co. v. Libya (by Mahmassani, Lebanon, 1977), 20 Int'l Leg.Mat. 1, 122–25 (1981) (restitution is inconsistent with "respect due for the sovereignty of the nationalizing state"). See Fatouros, "International Law and the Internationalized Contract," 74 Am.J.Int'l L. 134 (1980); see also § 713, Reporters' Note 8.

4. *Principle and measure of compensation.* The rules relating to compensation for a violation are unclear in a number of respects, such as the calculation of direct and indirect damages, prospective profits, rate of exchange, interest, incidental expenses, and costs connected with the preparation and presentation of the claim. For many decisions dealing with these topics, see 3 Whiteman, Damages in International Law 1765–2031 (1943); for a table summarizing the amounts claimed and awarded in 101 international arbitrations, and by 36 domestic claims commissions, see *id.* at 2068a. For later cases, see 8 Whiteman, Digest of International Law 1143–1216 (1967).

5. *Punitive or exemplary damages.* If a violation is not merely a delict but an international crime, see Reporters' Note 1, punitive damages may be awarded. In fixing the amount of an award, some international tribunals have taken into consideration the seriousness of the offense and included an element of punishment in the award. Borchard, The Diplomatic Protection of Citizens Abroad 419 (1915); see the case of The I'm Alone, 1935, 3 R.Int'l Arb.Awards 1616, 1618 (1949) ("as a material amend in respect of the wrong, the United States should pay the sum of

$25,000" to Canada). For a contrary view, see Judge Parker's opinion in Lusitania Cases (United States v. Germany), 1923, 7 R.Int'l Arb. Awards 32, 38–44 ("counsel has failed to point us to any money award by an international arbitral tribunal where exemplary, punitive, or vindictive damages have been assessed against one sovereign nation in favor of another presenting a claim in behalf of its nationals"). In the United States, the Foreign Sovereign Immunities Act excludes punitive damages against a foreign state, but allows them against an agency or instrumentality of the foreign state. 28 U.S.C. § 1606.

§ 902. Interstate Claims and Remedies

(1) A state may bring a claim against another state for a violation of an international obligation owed to the claimant state or to states generally, either through diplomatic channels or through any procedure to which the two states have agreed.

(2) Under Subsection (1), a state may bring claims, *inter alia*, for violations of international obligations resulting in injury to its nationals or to other persons on whose behalf it is entitled to make a claim under international law.

Comment:

a. Standing to make claims. Ordinarily, claims for violation of an international obligation may be made only by the state to whom the obligation was owed. See § 901, Comment *b* and Reporters' Note 1. When a state has violated an obligation owed to the international community as a whole, any state may bring a claim in accordance with this section without showing that it suffered any particular injury. Thus, any state may call on the violating state to terminate a significant injury to the general environment, § 602, Comment *a*, or pursue a remedy for a denial of human rights in violation of customary international law, § 703(2). Some multilateral international agreements, such as regional human rights agreements, may also give standing to any state party to raise a claim of violation of the agreement without having to show injury to its particular interest.

For the forms of reparation and the principle and measure of monetary compensation, see § 901, Comments *d* and *e* and Reporters' Notes 3–5.

b. Ripeness. Ordinarily, a state may bring a formal claim against another state or resort to available third-party procedures only after a violation has actually occurred, but it can make an informal protest in advance of a violation that it reasonably believes is impending. A claim may be made for a violation even if an injury has not yet been suffered.

c. Lapse of time. No general rule of international law limits the time within which a claim can be made. However, international tribunals have barred claims because of a delay in presentation to the respondent state if the delay was due to the negligence or laches of the claimant state.

d. Means for settling international disputes. Most international disputes are resolved by direct negotiations between the parties. If the parties to the dispute do not maintain diplomatic relations, negotiations may be facilitated by a third state or a high international official (*e.g.*, the Secretary-General of the United Nations). Parties that are members of an international organization may resort to its procedures for settling a dispute. Parties may also agree, *ad hoc* or in advance, to resort to third parties for help in resolving a dispute. See Comment *e.* Third parties may volunteer their assistance in resolving a dispute, and such an offer may not be considered an unfriendly act. A state to which a claim is presented is required to negotiate in good faith to resolve it and to submit the dispute to a claim settlement procedure where it has agreed to do so.

e. Third-party settlement. Dispute settlement by third parties depends on consent of the parties. Such consent may be given expressly by international agreement, *ad hoc* or in advance, or may be implied from submission of pleadings or arguments to an international tribunal without challenging its jurisdiction. Some international agreements require a specified sequence of proceedings; for instance, many agreements providing for conciliation prohibit submission of a dispute to an international tribunal before the conciliation proceeding is completed, unless the parties agree otherwise.

In accepting third-party jurisdiction, the parties to the dispute may authorize the third party to try to settle the claim through good offices, mediation, inquiry, or conciliation; to render an advisory opinion; or to render a decision binding on the parties. The third party may be a state or a group of states, an individual or a group of individuals, a domestic institution, an international court, or an arbitral tribunal.

f. Negotiation as condition to third-party settlement. An international agreement providing for the settlement of a dispute by specified means, such as conciliation, arbitration, or by decision of an international tribunal, often makes resort to such procedures conditional on previous attempt to resolve the matter by negotia-

tion. A failure of a state to respond in good faith to a request for negotiation may itself constitute a breach of an international obligation. If the respondent rejects the claim or refuses to negotiate, or if negotiations have continued for a substantial time without progress, resort to agreed procedures is appropriate.

g. Withdrawal or settlement of claim. A claim may be terminated by withdrawal of the claim, by settlement, or by judgment or award with which the parties have complied. A settlement reached by the parties after the commencement of third-party proceedings usually terminates such proceedings, but a proceeding before an international court cannot be terminated by the parties without leave of the court. See, *e.g.*, International Court of Justice Rules of Court, Articles 88–89; European Court of Human Rights Rules of the Court, Rule 47.

h. Ex gratia *relief.* A state charged with a violation of an international obligation may offer an *ex gratia* (voluntary) payment or other relief, without acknowledgment of liability. If the claimant state accepts the offer without reservation, the dispute is resolved; if the claimant state declines to accept the offer in full settlement, or accepts it only on conditions not acceptable to the state that made the offer, the offer of *ex gratia* relief is not to be taken as an admission of liability.

i. State claims deriving from injury to private persons. Like other claims for violation of an international obligation, a state's claim for a violation that caused injury to rights or interests of private persons is a claim of the state and is under the state's control. The state may determine what international remedies to pursue, may abandon the claim, or settle it. The state may merge the claim with other claims with a view to an *en bloc* settlement. The claimant state may set these claims off against claims against it by the respondent state. Any reparation is, in principle, for the violation of the obligation to the state, and any payment made is to the state.

State claims deriving from private injury differ from other interstate claims in some respects. The injured person may disable the state from making the claim by failing to exhaust local remedies, § 713, Comment *b.* The person may waive or settle the claim. (But see § 713, Comment *f*). The person is often consulted or otherwise involved in the claims process. Money damages paid are generally measured, in fact, by the injury to the individual (rather than by the offense to the state), and the state ordinarily pays over to the person the compensation it receives. Some international agreements to resolve claims may give the private person direct access to an international tribunal, *e.g.*, the United States–Iran Claims Tribunal. See § 487, Reporters' Note 6.

A state that makes a claim for a violation of an obligation *erga omnes* can abandon or settle its own claim, but not those of other states or of the community at large. As regards waiver or settlement of a claim by a state for a violation of the human rights of an individual, see § 703, Reporters' Note 2.

j. Nationals and other private persons represented. For the most part, state claims under Subsection (2) are for injury due to violations of the rights of nationals under §§ 711, 712. See § 713. In some circumstances, a state may present a claim on behalf of persons who are not its nationals, such as permanent residents, aliens injured aboard a ship or an airplane of the claimant state, or a foreign corporation or vessel substantially owned by nationals of the claimant state. Under some international agreements and the customary international law of human rights, a state may bring a claim on behalf of any person whose human rights were violated by another state, including a national of the respondent state. See § 703 and Comment *b* and Reporters' Note 4 thereto.

k. Exhaustion of local remedies. Under international law, before a state can make a formal claim on behalf of a private person, Comment *i*, that person must ordinarily exhaust domestic remedies available in the responding state. See § 703, Comment *d*; § 713, Comments *b* and *f*. Local remedies need not be exhausted for violations of international law not involving private persons; a state is not required to seek a remedy for violations of its rights in the courts of the responsible state, even where the state suffered injury to its own interests as a result of a violation of international law that also caused injury to its nationals.

l. International claims under United States law. In the United States, the presentation of claims against foreign governments, including those on behalf of private persons, is the responsibility of the President and the Executive Branch. The President may refuse to present a claim, settle it by negotiation, abandon it, or join it with other claims for *en bloc* resolution; he may also agree to submit the claim for international dispute settlement, whether or not the United States is obligated to do so by international agreement. While some claims settlements have been made by treaty, a majority of them have been by executive agreement, and the authority of the President to make such agreements has been upheld by the Supreme Court. The money received from a foreign government as a result of an international award, or in settlement, belongs to the United States and is placed in the

Miscellaneous Receipts account of the Treasury, but Congress has usually provided for payment to private claimants, especially to those whose claims are settled in accordance with decisions of a special United States claims commission dividing a lump-sum settlement. See § 713, Reporters' Note 9.

REPORTERS' NOTES

1. *Standing to claim.* In South West Africa Cases (Second Phase) (Ethiopia and Liberia v. South Africa), the International Court of Justice rejected the contention that international law recognizes "the equivalent of an *'actio popularis,'* or right resident in any member of a community to take legal action in vindication of a public interest." [1966] I.C.J. Rep. 6, 47. A few years later, however, the Court declared that

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes.*
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law [Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), [1951] I.C.J. Rep. 15, 23]; others are conferred by international instruments of a universal or quasi-universal character.

Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain), [1970] I.C.J. Rep. 3, 32. Some universal and some regional human rights conventions allow any party to the convention to bring before an international commission or court any breach of the convention by another party, provided both parties have accepted an optional clause on the subject. See, *e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, Arts. 11, 22, 20 U.N. GAOR Supp. No. 14, at 47 (1965), 660 U.N.T.S. 195; European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Arts. 24 and 48(c), 213 U.N.T.S. 221, 45 Am.J.Int'l L.Supp. 24 (1951).

2. *Lapse of time.* In the George W. Cook case, 1927, the General Claims Commission between United States and Mexico stated that there is "no rule of international law putting a limitation of time on diplomatic action or upon the presentation of an international claim to an international tribunal." 4 R.Int'l Arb.Awards 213, 214. On the other hand, in the Walter H. Faulkner case (1926) before the same Commission, it was noted that interna-

tional "tribunals have in some instances declared that one government should not call upon another government to respond in damages when such action, after a long lapse of time, clearly puts the respondent government in an unfair position in making its defense, particularly in the matter of collecting evidence." Separate opinion of American Commissioner (Nielsen), *id.* 67, at 74. See also Ralston, The Law and Procedure of International Tribunals 375–83 (1926), and Supp. 185–87 (1936).

In the *Ambatielos* case, 1956, the arbitral tribunal did not accept the British contention that the Greek claim ought to be rejected because of undue delay in its presentation. The tribunal endorsed the principle stated by the Institute of International Law in 1925 that it is "left to the unfettered discretion of the international tribunal" to determine the existence of an "undue delay." 12 R.Int'l Arb.Awards 81, 103–104; see 32 Institut de Droit International, Annuaire 558–60 (1925). In Lighthouses Case (France/Greece), 1956, Greece invoked a delay of more than 40 years as barring the French claims, but the tribunal rejected the defense in the circumstances, especially in view of the troubled conditions caused by successive wars between 1912 and 1923. 12 R.Int'l Arb.Awards 161, 186.

3. *Consent to third-party settlement.* "It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement." Eastern Carelia, P.C.I.J., ser. B, No. 5, at 27 (1923) (Advisory Opinion). International claims "cannot, in the present state of the law as to international jurisdiction, be submitted to a tribunal, except with the consent of the States concerned." Reparation for Injuries, [1949] I.C.J.Rep. 174, 177–78 (Advisory Opinion).

The Permanent Court of International Justice held that "the consent of a State to the submission of a dispute to the Court may not only result from an express declaration, but may also be inferred from acts conclusively establishing it," such as "the submission of arguments on the merits, without making reservations in regard to the question of jurisdiction." Rights of Minorities in Upper Silesia (Minority Schools) Case (Germany v. Poland), P.C.I.J., ser. A, No. 15, at 24 (1928). See also the Haya de la Torre Case (Colombia v. Peru), [1951] I.C.J. Rep. 71, 78.

4. *Forms of third-party settlement.* The most common means for the settlement of international disputes are good offices, mediation, commissions of inquiry, and conciliation commissions. See United Nations Charter, Art. 33. While some international agreements draw clear distinctions among these procedures, in practice they are often combined. International organizations also use these procedures, but their mandates to commissions, committees, or individuals often confuse the various functions, especially good offices and mediation.

If relations between parties are severed or strained, they may ask for, or accept, the *good offices* of a third party. The third party may bring them to the negotiating table, induce them to resort to arbitration,

or help them to reach a solution on the merits.

A *mediator* tries to reconcile the views and claims of the parties and in appropriate cases makes confidential suggestions for this purpose. Such suggestions have no binding force.

An offer of good offices or mediation "can never be regarded by either of the parties in dispute as an unfriendly act." Convention on the Pacific Settlement of International Disputes, The Hague, 1907, Art. 3(3), T.S. 536, 1 Bevans 577, 586.

The main function of a *commission of inquiry* is to elucidate the facts by means of an impartial and conscientious investigation, which may involve hearing witnesses or a visit to the area where the breach of international obligation is said to have occurred. Such a commission often includes representatives of both parties and sometimes consists solely of such representatives.

A *conciliation commission* examines the claims of the parties and the evidence submitted by them, and makes proposals to them for an amicable settlement. If an agreement is not reached, the commission prepares a report stating its conclusions on all questions of fact or law relevant to the matter in dispute, together with such recommendations as the commission may deem appropriate for an amicable settlement. Neither its conclusions nor its recommendations are binding upon the parties.

5. *Dispute settlement in or by international organization.* An agreement establishing an international organization may empower the organization to deal with disputes between its members and sometimes also with those involving non-members. The United Nations, its specialized agencies, regional organizations such as the Organization of American States, the Organization of African Unity, and the Council of Europe, and organizations such as the General Agreement on Tariff and Trade (GATT) and the organizations established by various commodity agreements, frequently deal with international disputes by arranging for good offices, mediation, or commissions of inquiry or conciliation. The European Commission of Human Rights considers disputes between states involving human rights violations within the framework of the European Human Rights Convention, and presents reports on them, which are then considered by the Committee of Ministers of the Council of Europe. For a discussion of an interstate proceeding, see *e.g.*, Becket, "The Greek Case Before the European Human Rights Commission," 1 Human Rights 91 (1970).

Under some agreements, the parties are obligated to refer some categories of disputes to a bilateral commission, such as the joint boundary waters commissions between the United States and Canada and between the United States and Mexico.

The Charter of the United Nations authorizes any member state to bring any dispute (even one to which the member state is not a party), or any situation which is likely to endanger the maintenance of international peace and security, to the attention of the Security Council or of the General Assembly. Even a non-member state may bring to the attention of these organs any dispute to which it is a party. United Nations Charter, Art. 35(1) and

(2). The Security Council may recommend appropriate procedures or methods of adjustment, or may recommend such terms of settlement as it considers appropriate. *Id.*, Arts. 36(1) and 37(2). The General Assembly "may recommend measures for the peaceful adjustment of any situation, regardless of origin which it deems likely to impair the general welfare or friendly relations among nations." *Id.*, Art. 14. Many disputes have been submitted to the Security Council and the General Assembly under these provisions, and a solution acceptable to the parties was found in a number of them. For a comprehensive list of measures taken by the Security Council in the 41 disputes submitted to it between January 1970 and December 1978, see Repertory of Practice of United Nations Organs, Supp. No. 5, Vol. II, at 20–33 (U.N. Pub. Sales No. E.85.V.8) (1986).

Under some regional agreements, there is an obligation to resort to regional bodies or procedures prior to bringing the matter before the United Nations. For instance, the Charter of the Organization of American States provides that "[a]ll international disputes that may arise between American States shall be submitted to the peaceful procedures set forth in the Charter, before being referred to the Security Council of the United Nations." Original 1948 text, Art. 20, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N. T.S. 3; revised 1967 text, Art. 23, 21 U.S.T. 607, T.I.A.S. No. 6847. (As of 1986, this Charter was in force for 32 states, including the United States.) Members of the United Nations that are parties to regional arrangements are obligated to make every effort to achieve pacific settlement of local disputes through such regional arrangements before referring them to the Security Council, but any dispute likely to endanger the maintenance of peace and security may be referred directly to the United Nations. United Nations Charter, Art. 52(2) and (4).

Some international agreements empower an organization to render binding decisions, *e.g.*, United Nations Charter, Arts. 25, 39, 41, 42 (Security Council decisions may not, however, impose a settlement of a dispute). See also Articles of Agreement of the International Monetary Fund, Second Amendment, 1976, Art. 29, 29 U.S.T. 2203, T.I.A.S. No. 8937, entered into force for the United States in 1978; Articles of Agreement of the International Bank for Reconstruction and Development (World Bank), 1945, Art. 9, T.I.A.S. No. 1502, 3 Bevans 1390, 2 U.N.T.S. 134; Convention on International Civil Aviation, 1944, Art. 84, 3 Bevans 944. Other agreements provide for non-binding reports by special committees or working parties (*e.g.*, the General Agreement on Tariff and Trade, Arts. 22 and 23), or for arbitration (*e.g.*, the Convention of the World Meteorological Organization, 1947, Art. 29, 1 U.S.T. 281, T.I.A.S. No. 2052, 77 U.N.T.S. 143; as of 1987, the United States and 159 other states were parties). See Hudec, "GATT Dispute Settlement After the Tokyo Round: An Unfinished Business," 13 Cornell Int'l L.J. 145 (1980); Sohn, "Settlement of Disputes Relating to the Interpretation and Application of Treaties," Hague Academy, 150 Recueil des Cours 195, at 264–66 (1976).

6. *Negotiation as condition to third-party settlement.* According to the Permanent Court of Interna-

tional Justice, the obligation to negotiate is "not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements," although it is not necessarily an obligation to reach an agreement. Railway Traffic between Lithuania and Poland, P.C.I.J., ser. A/B, No. 42, at 108, 116 (1931) (Advisory Opinion). The International Court of Justice also pointed out that "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement . . . ; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it." North Sea Continental Shelf Cases (Fed. Rep. of Germany/Denmark and the Netherlands), [1969] I.C.J. Rep. 3, at 47.

Many international agreements require negotiation or consultation prior to resort to more institutionalized procedures for the settlement of disputes. In particular, many international agreements relating to the pacific settlement of disputes provide that other means of settlement can be resorted to only with respect to disputes "which it has not been possible to settle by diplomacy." See, *e.g.*, the Geneva General Act for the Pacific Settlement of International Disputes, 1928, Art. 1, 93 L.N.T.S. 345, which provides for conciliation, arbitration, and judicial settlement of all disputes (as of 1986, it had been acceded to by 22 states, but some of these had denounced it; the United States was not a party); and the Revised General Act for the Pacific Settlement of International Disputes, 1949, Art. 1, 71 U.N.T.S. 101, which adapted the 1928 Act to the United Nations system (as of 1986 it had been acceded to by seven states, but the United States was not a party). For a list of other such treaties containing this requirement, see United Nations, Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928–1948, at 13–23 (1949); for a list of 20 pre-World War II United States conciliation treaties, resort to which is conditional on failure of "ordinary diplomatic proceedings," see *id.* at 21–22.

Whether a negotiation has become futile or whether all means have been exhausted is not easy to determine. The Permanent Court of International Justice said that "the question of the importance and chances of diplomatic negotiations is essentially a relative one." Negotiations "do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion has been commenced, and . . . a deadlock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way." Mavrommatis Palestine Concessions Case (Greece v. U.K.), P.C.I.J., ser. A, No. 2, at 13 (1924); quoted with approval in South West Africa Cases (Preliminary Objections) (Ethiopia and Liberia v. South Africa), [1962] I.C.J. Rep. 319, 345.

7. *Dispute as prerequisite to resort to settlement procedures.* Before resorting to some settlement procedures, the claimant state must prove the existence of an "international dispute," but ordinarily such proof is not difficult. The Permanent Court of International Justice defined a dispute broadly as "a disa-

greement on a point of law or fact, a conflict of legal views or of interests between two persons" or states. Mavrommatis Palestine Concessions, Reporters' Note 6, at 11–12. See also German Interests in Polish Upper Silesia (Jurisdiction) (Germany v. Poland), P.C.I.J., ser. A, No. 6, at 14 (1925). See § 903, Reporters' Note 5.

8. *International claims practice of the United States.* The United States has a long tradition of settling international claims by negotiation or international arbitration. Some claims implicated national interests directly, such as boundary disputes; some claims by the United States were for injury to private interests of its nationals. See Comment *i* and § 713. Sometimes a single dispute was settled or arbitrated, sometimes several disputes were combined; sometimes a dispute involved large numbers of claims, usually private claims. Thus, in 1794, the United States and Great Britain referred to a mixed commission more than 500 claims relating to maritime seizures. 1 Moore, History and Digest of International Arbitrations 299–349 (1898). The United States-Mexican Commission established in 1868 disposed of some 2,000 claims. 2 *id.* at 1287–1359. Two United States-Mexico claims commissions were established in 1923 to deal with more than 6,000 claims, mostly by the United States against Mexico, and a few by Mexico against the United States. See Feller, The Mexican Claims Commissions, 1923–34 (1935). Under the Algiers Declaration of 1981, 20 Int'l Leg.Mat. 230 (1981), more than 3,000 claims were submitted to an Iran-United States Claims Tribunal, most of them by United States nationals against Iran, some by Iranians against the United States, and some claims were between the two governments. See § 487, Reporters' Note 6. See generally, Lillich, ed., The Iran-United States Claims Tribunal (1984).

Matters affecting the national interest directly are generally resolved or submitted to international arbitration by treaty made with the consent of the United States Senate; most agreements settling claims of nationals have been made by executive agreement. The validity of such executive agreements was upheld in United States v. Belmont, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937), and United States v. Pink, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942). See also Ozanic v. United States, 188 F.2d 228, 231 (2d Cir.1951); Shanghai Power Co. v. United States, 4 Ct.Cl. 237, 244, 247 (1983). Presidential action in the case of Iran was sustained in Dames and Moore v. Regan, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981), § 721, Reporters' Note 8. As the Supreme Court noted in *Dames and Moore*, Congress has generally acquiesced in this exercise of presidential power. In 1974, however, Congress found a proposed agreement with Czechoslovakia unacceptable and adopted the Gravel Amendment to the Trade Act of 1974 (88 Stat. 1978, § 408), requesting that the agreement be renegotiated and submitted to Congress as part of any agreement entered under that Act; gold belonging to Czechoslovakia was not to be released to that country. For difficulties which arose as a result of that legislation, see [1974] Digest of U.S. Practice in Int'l L. 422–25; [1976] *id.* 439–41; [1977] *id.* 695–98; [1978] *id.* 1220–26.

The Department of State is authorized to pay any small (less than $15,000) "meritorious claim" against the United States presented by a foreign government. 22 U.S.C. § 2669(b). See also 22 U.S.C. § 2669(f), 28 U.S.C. § 2672 and 31 U.S.C. § 3725.

For United States practice in respect of claims for injury to United States nationals, see § 713, Reporters' Note 8.

9. *Previous Restatement.* The previous Restatement dealt with remedies in the special context of responsibility of states for injuries to aliens, §§ 164–214. Compare this Restatement, § 713.

§ 903. International Court of Justice

(1) A state party to a dispute with another state may submit that dispute to the International Court of Justice for adjudication, and the Court has jurisdiction over that dispute, if the parties:

(a) have, by a special agreement (*compromis*) or otherwise, agreed to bring that dispute before the Court; or

(b) are bound by an agreement providing for the submission to the Court of a category of disputes that includes the dispute in question; or

(c) have made declarations under Article 36(2) of the Statute of the Court accepting the jurisdiction of the Court generally or in respect of a category of legal disputes that includes the dispute in question.

(2) The Court may render an advisory opinion at the request of:

(a) the General Assembly or the Security Council on any legal question; or

(b) other organs and specialized agencies of the United Nations, authorized by the General Assembly to request such an opinion, on legal questions arising within the scope of their activities.

(3) The Court has authority to determine whether it has jurisdiction to decide a dispute submitted to it, or whether to issue an advisory opinion requested of it.

Comment:

a. Jurisdiction of International Court of Justice. The Court has two kinds of jurisdiction: to decide contentious cases published with the regulation in the Federal Register in accordance with 21 CFR 25.40(c).

Dated: June 7, 1989

Fred R. Shank,

Acting Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 89-14343 Filed 6-15-89; 8:45 am]

BILLING CODE 4160-01-M

[FDA 225-89-2001]

Memorandum of Understanding Between the Food and Drug Administration, Department of Health and Human Services and the Ministry of Economy Development and Reconstruction, Subsecretariat of Fisheries, Republic of Chile

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is providing notice of a memorandum of understanding (MOU) between FDA, Department of Health and Human Services, and the Ministry of Economy, Development, and Reconstruction, Subsecretariat of Fisheries, Republic of Chile. This MOU affirms the parties' intention to assure that fresh and frozen oysters, clams and mussels exported from Chile to the United States are safe and have been processed and labeled in accordance with the Federal Food, Drug, and Cosmetic Act, the Fair Packaging and Labeling Act, the Public Health Service Act, and other relevant statutes.

DATE: The agreement became effective May 18, 1989.

FOR FURTHER INFORMATION CONTACT: Walter J. Kustka, Intergovernmental and Industry Affairs Staff (HFC-50), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-1583.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 20.108(c), which states that all written agreements and memoranda of understanding between FDA and others shall be published in the Federal Register, the agency is publishing notice of this memorandum of understanding.

Dated: June 12, 1989.

Alan L. Hoeting,

Acting Associate Commissioner for Regulatory Affairs.

Memorandum of Understanding Regarding Cooperation in Ensuring the Safety and Wholesomeness of Fresh and Frozen Oysters, Clams, and Mussels Exported to the United States of America From the Republic of Chile

I. Purpose

The Food and Drug Administration (FDA) of the Department of Health and Human Services, of the United States of America, and the Ministry of Economy, Development, and Reconstruction, Subsecretariat of Fisheries, National Service for Fisheries (SERNAP), Republic of Chile, affirm by this document their intention to cooperate to assure that fresh and frozen oysters, clams, and mussels exported from Chile to the United States are safe and wholesome, and that they have been harvested, shucked, transported, and labeled in accordance with the Federal Food, Drug, and Cosmetic Act, the Fair Packaging and Labeling Act, the Public Health Service Act, and other relevant statutes of the United States, the National Shellfish Sanitation Program (NSSP) of the United States, and the Sanitation Program for Molluscan Bivalves of Chile.

A convention (an agreement) noted as Exempt Resolution No. 302 was signed between the Chilean Ministry of Health and the Ministry of Economy, Development, and Reconstruction on March 29, 1988, and describes the responsibilities of these two Chilean agencies and their functions regarding the implementation of the Sanitation Program for Molluscan Bivalves of Chile.

II. Background

The development of the Sanitation Program for Molluscan Bivalves of Chile originated in 1977, with the Government of Chile requesting that the Food and Drug Administration visit Chile to evaluate its program for compliance with the requirements of the National Shellfish Sanitation Program.

The Government of Chile, in collaboration with its fisheries industry, has endeavored since 1977 to meet all administrative and technical requirements of the National Shellfish Sanitation Program, the Federal Food, Drug, and Cosmetic Act, the Fair Packaging and Labeling Act, the Public Health Service Act, and other related U.S. statutes that concern the export of shellfish to the United States.

Significant accomplishments made by the Government of Chile include: training of Chilean shellfish sanitation personnel both in the United States and Chile, development of legislation for the certification of shellfish for export, and the signature of a convention between the Chilean Ministry of Health and the Ministry of Economy, Development, and Reconstruction that describes the responsibilities of each Ministry in the implementation of the Sanitation Program for Molluscan Bivalves of Chile.

III. Substance of Agreement

A. Definitions

For the purpose of this Memorandum of Understanding, both parties agree to the following definitions:

1. Central file—The location where the shellfish sanitation authority stores and maintains program information, data, and reports.

2. Enforcement Agency—The National Service for Fisheries within the Chilean Ministry of Economy, Development, and Reconstruction is the agency having regulatory authority over the classification, production, harvesting, processing, transport, and export of certified shellfish to the United States under the terms of this memorandum.

3. Lot—A collection of shellfish of no more than one day's harvest, from a single defined growing area, produced under conditions as nearly uniform as possible, placed in primary containers or units of the same size, type, and style, and identified by a common container code or marking.

4. Marine Biotoxins—Natural toxins produced by marine dinoflagellates, such as Gonyaulax catenella, G. tamarensis, and Ptychodiscus brevis (formerly Gymnodinium breve), and concentrated by shellfish during the feeding process.

5. Shellfish—All edible species of molluscan bivalves except scallop, from the Pectinidae family. Only shellfish that are to be offered for import into the United States as fresh or frozen products are covered under this Memorandum of Understanding.

B. Shared Responsibilities

Both parties will: 1. Provide current and relevant information on the following:

a. Methods and procedures for sampling;

b. Methods of analysis;

c. Methods of confirmation;

d. Reference standards and norms;

e. Administrative guidelines and specification standards;

c. Tolerances and nomenclature on sanitary aspects and inspectional procedures;

2. Inform each other on a timely basis of the following:

a. Proposed modification of existing U.S. or Chilean Federal and state regulations;

b. Proposed new U.S. or Chilean Federal regulations

3. Name a liaison officer who will coordinate all of the activities of the program in relation to this Memorandum of Understanding. The liaison officers will be responsible for facilitating exchanges of information and for expeditiously notifying the other party of all matters requiring prompt attention. Each party agrees to notify the other if a new liaison officer is appointed.

4. Use English as the language for the technical documents and information exchanged under this Memorandum of Understanding.

C. Responsibilities of the Government of Chile

1. The Ministry of Economy, Development, and Reconstruction, Subsecretariat of Fisheries, National Service for Fisheries shall have overall responsibility for the coordination and implementation of the Sanitation Program for Molluscan Bivalves of Chile and develop and maintain interagency agreements and protocols with other government enforcement agencies to implement the NSSP controls as necessary. The National Service for Fisheries will be the liaison with the Food and Drug Administration and maintain compliance with the administrative/operational and technical aspects of the NSSP and Sanitation Program for Molluscan Bivalves of Chile.

2. The National Service for Fisheries, as the enforcement agency, shall:

a. Maintain NSSP required legal, administrative, and sanitary controls over shellfish exported by certified Chilean dealers by ensuring that the Chilean Program for Molluscan Bivalves can:

- Classify Molluscan bivalve growing areas based on comprehensive sanitation surveys;
- Prepare sanitation survey reports and maintain survey data in a control file;
- Update survey data annually and periodically review the classification status of each harvest area;
- Approve and supervise harvesting and relaying operations and provide proper labeling and identification of source of shellstock;
- Restrict harvesting of shellstock from unapproved areas and take appropriate enforcement action against violations; and
- Oversee certification laboratories approved to participate in the shellfish sanitation control program.

b. Inspect firms processing fresh or frozen shellfish for export to ensure compliance with NSSP controls.

c. On an annual basis, (1) Certify dealers exporting fresh or frozen shellfish to the U.S., (2) certify that such dealers comply with NSSP requirements, and (3) notify FDA of the name, location, and certification number of those firms on Form FD–3038B, "Shellfish Certification."

d. Cancel the certification of any firm operating out of compliance with the requirements of the NSSP, utilizing shellfish from nonapproved areas, or shipping shellfish that do not conform to the requirements of the Federal Food, Drug, and Cosmetic Act and the Public Health Service Act.

e. Ensure that all containers of each lot of fresh or frozen shellfish certified for export are identified with the shipper's address, certification number, and lot number or code, together with all other information required by the Federal Food, Drug and Cosmetic Act, the Public Health Service Act, and the Fair Packaging and Labeling Act.

f. Ensure that all shipping containers of live and fresh-shucked shellfish exported to the U.S. bear the following instructions on the use and disposal of such shellfish in the form of a "NOTICE TO RECIPIENTS," including:

—Live shellfish shall not be relayed into U.S. waters for any purpose.

—Live shellfish shall not be held in wet holding and storage systems where water could transport undesirable organisms into the environment.

—In order to minimize risk of introducing undesirable or exotic organisms into the environment, waste shell material shall not be discarded into U.S. waters.

—Dead or unacceptable shellfish and shellfish products shall not be discarded into waste treatment or disposal systems whereby improperly treated water or waste could contaminate the marine environment.

g. Provide results of research investigations conducted on live shellfish (tissue and shell material) taken from approved growing areas designated for shellfish harvest for export to the U.S.

h. Upon request from the U.S., provide samples of live shellfish (sample is fifty (50) shellfish) over a 2-year period (quarterly—spring, summer, fall, and winter) for inspection and analysis from each growing area designated for shellfish harvest for export to the U.S.

i. Maintain a central file of program records including but not necessarily limited to sanitation survey reports, inspection reports, labortory evaluation reports, and enforcement actions. These records are to be made available to FDA for review upon request.

j. Provide inspection results, as appropriate, and other program information, including FDA evaluation reports, interpretations, and laboratory quality assurance program information, to Regional Chilean National Service for Fisheries offices and other government agencies that have responsibilities in the Chilean Program for Molluscan Bivalves.

k. Review periodically, but at least annually, the level of conformity to NSSP requirements that is being enforced by National Service for Fisheries and the Institute of Public Health and provide a report of the review to FDA as necessary, or at least annually.

l. Provide FDA with information about current or potential public health problems affecting shellfish intended for export to the United States.

m. Make travel arrangements in Chile for, and conduct joint inspections with, FDA evaluation officers at FDA's request. Meet transportation expenses in Chile of FDA officials making inspections in accordance with this memorandum.

3. The Chilean Ministry of Health, through its Health Services and the Institute of Public Health, is directly responsible for the prohibition of the harvesting of shellfish from areas in response to contamination emergencies and for reopening such prohibited areas after water quality data demonstrates the area meets approved criteria.

4. The Institute of Public Health shall serve as the official laboratory of reference for the certification of all other Chilean laboratories wishing to participate in the shellfish sanitation program and will:

a. Certify that all laboratories participating in the Molluscan Bivalve Program of Chile maintain appropriate infrastructure, technical materials, equipment, and trained personnel to carry out required NSSP sampling and analytical procedures.

b. Periodically evaluate certified laboratories to verify compliance with all NSSP requirements and the maintenance of laboratory quality assurance procedures.

c. Develop and maintain a monitoring program for paralytic shellfish poison in those areas where shellfish are harvested for export to the United States.

directly to the appropriate OMB Desk Officer designated above at the following address:

OMB Reports Management Branch, New Executive Office Building, Room 3208, Washington, DC 20503

ATTN: (name of OMB Desk Officer)

Dated: October 4, 1986.

Wallace O. Keene,

Acting Deputy Assistant Secretary for Management Analysis and Systems.

[FR Doc. 86-25247 Filed 11-6-86; 8:45 am]

BILLING CODE 4150-04-M

Food and Drug Administration

[FDA 225-86-2001]

Memorandum of Understanding Between the Export Inspection Service, Australia, and the Food and Drug Administration

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is providing notice of a memorandum of understanding (MOU) between the Export Inspection Service, Australia Department of Primary Industry (DPI), and FDA, U.S. Department of Health and Human Services. This MOU describes the cooperative methods that FDA and DPI will employ to assure that fresh frozen molluscan shellfish exported from Australia and offered for import into the United States are safe and wholesome and have been harvested, processed, transported, and labeled in accordance with the provisions of the National Shellfish Sanitation Program and the requirements of law.

DATE: The agreement became effective September 12, 1986.

FOR FURTHER INFORMATION CONTACT: Walter J. Kustka, Intergovernmental and Industry Affairs Staff (HFC-50), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-1583.

SUPPLEMENTARY INFORMATION: In accordance with § 20.108(c) (21 CFR 20.108(c)), which states that all agreements and memoranda of understanding between FDA and others shall be published in the Federal Register, the agency is publishing this memorandum of understanding.

Dated: October 31, 1986.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

Memorandum of Understanding Between the Food and Drug Administration, Department of Health and Human Services, United States of America and the Export Inspection Service, Department of Primary Industry, Australia, Concerning the Sanitary Control of Fresh Frozen Molluscan Shellfish Destined for Exportation From Australia to the United States

I. Purpose

The Food and Drug Administration (FDA) and the Department of Primary Industry (DPI) affirm by this memorandum their intention to cooperate in seeking to assure that fresh frozen molluscan shellfish exported from Australia and offered for import into the United States of America (U.S.) are safe and wholesome and have been harvested, processed, transported, and labeled in accordance with the provisions of the National Shellfish Sanitation Program (NSSP) and the requirements of the U.S. Federal Food, Drug, and Cosmetic Act, the U.S. Public Health Service Act, the U.S. Fair Packaging and Labeling Act, and the Australian Export Control Act. This memorandum defines the sanitation practices and administrative controls and describes the responsibilities of FDA and DPI in implementing these practices and controls. By this document, under the NSSP, FDA officially recognizes DPI as the authority for certifying shellfish shippers intending to export fresh frozen shellfish from Australia to the United States.

II. Background

The sanitary control of shellfish in interstate commerce in the United States is administered by FDA in cooperation with the American States under the NSSP. The NSSP provides the States and industry with a mechanism by which shellfish dealers can be "certified" as shipping shellfish that have been harvested, handled, and processed in conformity with the sanitation and administrative guidelines of the NSSP. In most instances, food control authorities rely on the integrity of the NSSP certification controls to determine the acceptability of the shellfish product.

FDA, the States, and many foreign control authorities recognize the substantial benefit that can result from the use of a similar procedure for imported shellfish. Therefore, it is FDA's policy to enter into memoranda of understanding with foreign control authorities willing to apply the sanitation and administrative controls of the NSSP to exported lots of shellfish that are to be offered for import to the United States. These agreements permit the foreign control authorities to certify foreign processors and shippers of fresh frozen shellfish and to have these dealers listed on FDA's "Interstate Certified Shellfish Shippers List" (ICSSL). FDA and American State authorities, in turn, will recognize these shipments as being certified under the NSSP.

Certification of foreign shellfish dealers exporting to the United States is normally limited to those dealers shipping fresh frozen products. This limitation is based on fishery conservation concerns over the possible introduction of exotic infectious organisms into U.S. fishery stocks from foreign fishery stocks. The processing and freezing of shellfish substantially reduce the possibility that such introductions will occur.

The sanitary control of shellfish in Australia is administered by DPI in cooperation with Australian State control agencies. DPI has authority under the Australian Export Control Act of 1982 to inspect shellfish processors preparing products for export, to set quality standards, and to certify compliance of export lots with these standards. Australian State public health and fishery authorities have jurisdiction under various Australian Federal and State public health and fishery regulations to survey and classify shellfish growing areas and to control harvesting and shipping operations. Laboratory support is provided by private laboratories under agreements with Australian Federal and State authorities.

III. Substance of Agreement

A. Definitions

1. *Advisory agencies.* Advisory agencies are the Australian Government Analytical Laboratories or other laboratories accredited by the Australian National Association of Testing Authorities that provide analytical support to shellfish control authorities associated with this memorandum.

2. *Central file.* Central file is the location where each shellfish sanitation authority stores and maintains program information, data, and reports.

3. *Enforcement agencies.* Enforcement agencies are the Department of Primary Industry (DPI) and the Australian State enforcement agencies having regulatory authority over the production, harvesting, processing, transport, classification, and export of certified shellfish to the United States under the terms of this memorandum.

4. *Lot.* A lot is a collection of primary containers or units of the same size, type, and style, produced under conditions as nearly uniform as possible, designated by a common container code or marking, and in any event, containing no more than a day's production.

5. *Shellfish.* Shellfish are edible species of oysters; clams, including cockles; and mussels.

6. *State enforcement agencies.* State enforcement agencies are the Australian State departments that have regulatory authority over the production, harvesting, transport, and processing of shellfish and the classification, monitoring, and control of harvest areas, and that have entered into an agreement with DPI for the purposes of this memorandum.

B. DPI Responsibilities

DPI will: 1. Develop and maintain interagency agreements and protocols with Australian State enforcement agencies to coordinate Australian Federal and State implementation of NSSP controls, as necessary.

2. Maintain NSSP required legal, administrative, and sanitation controls over shellfish exported by certified Australian

dealers by ensuring that Australian State enforcement agencies:

(a) Classify shellfish harvesting areas based upon comprehensive sanitation surveys;

(b) Prepare sanitation survey reports and maintain survey data in a central file;

(c) Update survey data annually and periodically review the classification status of each harvest area;

(d) License and supervise harvesting and relaying operations and provide proper source labeling for shellstock;

(e) Restrict harvesting of shellfish from unapproved areas and take appropriate enforcement action against violators; and

(f) Evaluate laboratory practices at least annually and encourage participation in FDA's voluntary quality assurance programs.

3. Inspect firms processing fresh frozen shellfish for export to ensure compliance with NSSP controls.

4. Certify dealers exporting fresh frozen shellfish that comply with NSSP requirements on an annual basis and notify FDA of the name, location, and certification number of those firms on Form FD-3038B, "Shellfish Certification."

5. Cancel the certificate of any firm operating out of compliance with the requirements of the NSSP, utilizing shellfish from nonapproved areas, or shipping shellfish that do not conform to the requirements of the U.S. Federal Food, Drug, and Cosmetic Act and the U.S. Public Health Service Act.

6. Ensure that all containers of each lot of fresh frozen shellfish certified for export are identified with the shipper's address, certification number, and lot number or code, together with all other information required by the U.S. Federal Food, Drug and Cosmetic Act, the U.S. Public Health Service Act, and the U.S. Fair Packaging and Labeling Act.

7. Maintain a central file of program records including but not necessarily limited to sanitation survey reports, inspection reports, laboratory evaluation reports, and enforcement actions. These records are made available to FDA for review upon request.

8. Provide inspection results, as appropriate, and other program information, including FDA evaluation reports, interpretations, and laboratory quality assurance program information, to Australian State enforcement and advisory agencies.

9. Review periodically, but at least annually before recertification, the level of conformity to NSSP requirements that is being enforced by DPI and the Australian State enforcement and advisory agencies and provide a report of the review to FDA as necessary, or at least annually.

10. Provide FDA with information about current or potential new public health problems affecting shellfish intended for export to the United States.

11. Make travel arrangements in Australia for, and conduct joint inspections with, FDA evaluation officers at FDA's request. Meet transportation expenses in Australia of FDA officials making inspections in accordance with this memorandum.

C. FDA Responsibilities

FDA will: 1. Recognize Australia as a participant in the NSSP with full rights to participate in national workshops, cooperative research programs, seminars, training courses, and other NSSP activities; to make recommendations for changes or improvements in the procedures, methods, standards, and guidelines of the NSSP; and to have DPI certify Australian dealers for inclusion in FDA's ICSSL.

2. Publish the names, locations, and certification numbers of Australian shellfish shippers certified by DPI in the monthly publication of the ICSSL upon receipt of Form FD-3038B.

3. Provide limited training and technical assistance to enforcement agency personnel in shellfish sanitation program administration, laboratory procedures, and growing area classification procedures upon request of DPI and subject to availability of funds for such purposes.

4. Inform DPI of the reasons for any FDA detentions of certified frozen shellfish shipments from Australia. Additional information that FDA will provide shall include, but not necessarily be limited to:

(a) Commodity identification;

(b) Commodity code, lot, and certification number;

(c) Name and address of the shipper;

(d) Sampling procedure;

(e) Methods of analysis and confirmation; and

(f) Administrative guidelines.

5. Advise DPI of any questions that FDA has received from U.S. food control officials concerning the safety or wholesomeness of frozen shellfish imported into the United States from Australia. Upon receiving such questions, FDA will seek to determine the reason for the problems and will inform DPI of any action taken under American State and local laws or regulations with regard to such frozen shellfish imports.

6. Participate with DPI in joint evaluations of the Australian shellfish sanitation program as it pertains to certifying dealers. Joint evaluations normally will be conducted at 2-year intervals to ascertain Australia's level of conformity with the requirements of the NSSP and the responsibilities specified in this memorandum. FDA will pay round trip transportation expenses between the United States and Australia and the per diem of the members of the FDA evaluation team while in Australia.

7. Facilitate the exchange of information between DPI and U.S. Federal and State agencies concerned with the introduction and proliferation of exotic infectious organisms that might be carried by Australian shellfish.

D. Shared Responsibilities

DPI and FDA will: 1. Exchange information through nominated liaison officers concerning significant proposed and final changes in program operations and procedures including:

(a) Methods and procedures for sampling;

(b) Methods of analysis;

(c) Methods of confirmation;

(d) Administrative guidelines, tolerances, specification standards, and nomenclature;

(e) Reference standards; and

(f) Inspection procedures.

Final changes will be considered incorporated into the appropriate provisions of this memorandum 90 days after receipt unless written objection is provided to the other party.

2. Provide written notification to the other party of any changes in liaison officers. Changing liaison officers will not otherwise constitute a change in the provisions of this memorandum.

E. References

1. U.S. Department of Health and Human Services (formerly U.S. Department of Health, Education, and Welfare), PHS, National Shellfish Sanitation Program, Manual of Operations: Part I *Sanitation of Shellfish Growing Areas*, 1965 Revision; Part II *Sanitation of the Harvesting and Processing of Shellfish*, 1965 Revision; Part III *Public Health Service Appraisal of State Shellfish Sanitation Programs*, 1965 Revision, PHS Publication No. 33.

2. Association of Official Analytical Chemists, Official Methods of Analysis, 14th Ed., Association of Official Analytical Chemists, Inc., 1111 North 19th St., Suite 210, Arlington, VA 22209, U.S.A., 1984.

3. Food and Drug Administration, "Interstate Certified Shellfish Shippers List," published monthly and distributed to food control officials and other interested persons by FDA, Center for Food Safety and Applied Nutrition, Shellfish Sanitation Branch (HFF-344), 200 C St. SW., Washington, DC 20204.

4. Federal Food, Drug, and Cosmetic Act, 1938, as amended, U.S. Code, Title 21.

5. Public Health Service Act, as amended, U.S. Code, Title 42.

6. Fair Packaging and Labeling Act, Pub. L. 89-755, approved November 3, 1966.

7. American Public Health Association, Recommended Procedures for the Examination of Seawater and Shellfish, 4th Ed., 1970, APHA, Inc., 1015 15th St. NW., Washington, DC 20036.

8. Food and Drug Administration, "Current Good Manufacturing Practice in Manufacturing, Processing, Packing, or Holding Human Food," regulations, 21 CFR Part 110.

9. Food and Drug Administration, "Definitions and Standards for Food," "Fish and Shellfish" regulations, 21 CFR Part 161.

10. Food and Drug Administration, "Specific Administrative Decisions Regarding Interstate Shipments," "Shellfish," 21 CFR 1240.60.

11. Food and Drug Administration, "Food Service Sanitation on Land and Air Conveyances, and Vessels," "Special Food Requirements," 21 CFR 1250.26.

12. Export Control Act, 1982.

13. Prescribed Goods (Orders) Regulations.

14. Prescribed Goods (General) Orders.

15. Fish Orders.

IV. Participating Parties

A. Export Inspection Service, Department of Primary Industry, Edmund Barton Bldg., Canberra ACT 2600, Australia.

B. Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, U.S.A.

V. Liaison Officers

A. For Department of Primary Industry: Director (Fish Export Standards), (currently David Walter), Export Inspection Service, Department of Primary Industry, Canberra

For Meat Inspection Act

§ 620. Imports

(a) Adulteration or misbranding prohibition; compliance with inspection, building construction standards, and other provisions; humane methods of slaughter; treatment as domestic articles subject to this chapter and food, drug, and cosmetic provisions; marking and labeling; personal consumption exemption

No carcasses, parts of carcasses, meat or meat food products of cattle, sheep, swine, goats, horses, mules, or other equines which are capable of use as human food, shall be imported into the United States if such articles are adulterated or misbranded and unless they comply with all the inspection, building construction standards, and all other provisions of this chapter and regulations issued thereunder applicable to such articles in commerce within the United States. No such carcasses, parts of carcasses, meat or meat food products shall be imported into the United States unless the livestock from which they were produced was slaughtered and handled in connection with slaughter in accordance with the Act of August 27, 1958 (72 Stat. 862; 7 U.S.C. 1901–1906). All such imported articles shall, upon entry into the United States, be deemed and treated as domestic articles subject to the other provisions of this chapter and the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.]: *Provided*, That they shall be marked and labeled as required by such regulations for imported articles: *Provided further*, That nothing in this section shall apply to any individual who purchases meat or meat products outside the United States for his own consumption except that the total amount of such meat or meat products shall not exceed fifty pounds.

[See main volume for text of (b) to (d)]

(e) Reports to Congress

Not later than March 1 of each year the Secretary shall submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture and Forestry of the Senate a comprehensive and detailed written report with respect to the administration of this section during the immediately preceding calendar year. Such report shall include, but shall not be limited to—

[See main volume for text of (1) to (3)]

(4) the number of inspectors licensed by each country from which any imports subject to the provisions of this section were imported who were assigned, during the calendar year concerned, to inspect such imports and the facilities in which such imports were handled and the frequency and effectiveness of such inspections;

(5) the total volume of carcasses or meat or meat products referred to in subsection (a) of this section which was imported into the United States during the calendar year concerned from each country, including a separate itemization of the volume of each major category of such imports from each country during such year, and a detailed report of rejections of plants and products because of failure to meet appropriate standards prescribed by this chapter; and

(6) the name of each foreign country that applies standards for the importation of meat articles from the United States that are described in subsection (h)(2) of this section.

(f) Inspection and other standards; applicability, enforcement, etc.; certifications

Notwithstanding any other provision of law, all carcasses, parts of carcasses, meat, and meat food products of cattle, sheep, swine, goats, horses, mules, or other equines, capable of use as human food, offered for importation into the United States shall be subject to the inspection, sanitary, quality, species verification, and residue standards applied to products produced in the United States. Any such imported meat articles that do not meet such standards shall not be permitted entry into the United States. The Secretary shall enforce this provision through (1) the imposition of random inspections for such species verification and for residues, and (2) random sampling and testing of internal organs and fat of the carcasses for residues at the point of slaughter by the exporting country in accordance with methods approved by the Secretary. Each foreign country from which such meat articles are offered for importation into the United States shall obtain a certification issued by the Secretary stating that the country maintains a program using reliable analytical methods to ensure compliance with the United States standards for residues in such meat articles. No such meat article shall be permitted entry into the United States from a country for which the Secretary has not issued such certification. The Secretary shall periodically review such certifications and shall revoke any certification if the Secretary determines that the country involved is not maintaining a program that uses reliable analytical methods to ensure compliance with United States standards for residues in such meat articles. The consideration of any application for a certification under this subsection and the review of any such certification, by the Secretary, shall include the inspection of individual establishments to ensure that the inspection program of the foreign country involved is meeting such United States standards.

(g) Administration of animal drugs or antibiotics; terms and conditions; entry order violations

The Secretary may prescribe terms and conditions under which cattle, sheep, swine, goats, horses, mules, and other equines that have been administered an animal drug or antibiotic banned for use in the United States may be imported for slaughter and human consumption. No person shall enter cattle, sheep, swine, goats, horses, mules, and other equines into the United States in violation of any order issued under this subsection by the Secretary.

(h) Reciprocal meat inspection requirement

(1) As used in this subsection:

(A) The term "meat articles" means carcasses, meat and meat food products of cattle, sheep, swine, goats, horses, mules, or other equines, that are capable of use as human food.

(B) The term "standards" means inspection, building construction, sanitary, quality, species verification, residue, and other standards that are applicable to meat articles.

(2) On request of the Committee on Agriculture or the Committee on Ways and Means of the House of Representatives or the Committee on Agriculture, Nutrition, and Forestry or the Committee on Finance of the Senate, or at the initiative of the Secretary, the Secretary shall, as soon as practicable, determine whether a particular foreign country applies standards for the importation of meat articles from the United States that are not related to public health concerns about end-product quality that can be substantiated by reliable analytical methods.

(3) If the Secretary determines that a foreign country applies standards described in paragraph (2)—

(A) the Secretary shall consult with the United States Trade Representative; and

(B) within 30 days after the determination of the Secretary under paragraph (2), the Secretary and the United States Trade Representative shall recommend to the President whether action should be taken under paragraph (4).

(4) Within 30 days after receiving a recommendation for action under paragraph (3), the President shall, if and for such time as the President considers appropriate, prohibit imports into the United States of any meat articles produced in such foreign country unless it is determined that the meat articles produced in that country meet the standards applicable to meat articles in commerce within the United States.

(5) The action authorized under paragraph (4) may be used instead of, or in addition to, any other action taken under any other law.

(As amended Oct. 10, 1978, Pub.L. 95–445, § 4, 92 Stat. 1069; Dec. 22, 1981, Pub.L. 97–98, Title XI, § 1122, 95 Stat. 1273; Dec. 23, 1985, Pub.L. 99–198, Title XVII, § 1702, 99 Stat. 1634; Aug. 23, 1988, Pub.L. 100–418, Title IV, § 4604, 102 Stat. 1408.)

Historical and Statutory Notes

References in Text. The Act of August 27, 1958 (72 Stat. 862; 7 U.S.C. 1901 to 1906), referred to in subsec. (a), is Pub.L. 85–765, Aug. 27, 1958, 72 Stat. 862, as amended, which is classified generally to chapter 48 (section 1901 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see Tables.

Sections 1903 and 1905 of Title 7, included within reference to act August 27, 1958, were repealed by Pub.L. 95–445, § 5(b), Oct. 10, 1978, 92 Stat. 1069, effective as set forth in section 7 of

FISH SAFETY ACT OF 1990, S. 2924 (INTROD. BY SEN. MITCHELL)

any container in use or proposed for use with respect to any article subject to this title is false or misleading in any particular, the Secretary may require that such use be withheld unless the marking, labeling, or container is modified in such manner as the Secretary may prescribe so that it will not be false or misleading.

"(2) REQUEST FOR HEARING.—If a person using or proposing to use markings, labeling, or a container that is subject to a withholding requirement udner paragraph (1) does not accept such requirement, such person may request a hearing, and the use of such marking, labeling, or container shall, if the Secretary so requires, be withheld pending such hearing and final determination by the Secretary.

"(3) APPEALS.—Any determination by the Secretary under paragraph (2) shall be conclusive unless, not later than 30 days after the person receives notice of such final determination, such person appeals such determination to the United States Court of Appeals for the circuit in which such person has its principal place of business or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 204 of the Packers and Stockyards Act, 1921 (7 U.S.C. 194) shall be applicable to appeals brought under this section.

"SEC. 1909. RECORDS, REPORTS AND DISCLOSURE.

"(a) IN GENERAL.—Establishments shall maintain accurate records as determined to be appropriate by the Secretary. Any requirements imposed under this section may include information concerning—

"(1) the receipt, delivery, sale, movement, or disposition of fish or fish products;

"(2) matters reasonably related to whether fish products may be adulterated or misbranded, including the growing or harvesting area from which such fish was harvested;

"(3) the effective enforcement of this title to ensure against the sale or distribution of adulterated or misbranded fish products to consumers; and

"(4) other activities and matters relevant to food safety and sanitation.

"(b) TIME PERIODS.—The persons described in subsection (c) shall, for such period of time as the Secretary may by regulation prescribe (not to exceed 2 years unless otherwise directed by the Secretary for good cause shown) keep and maintain such records as determined by the Secretary to be appropriate under subsection (a).

"(c) PERSONS AFFECTED.—The recordkeeping and other requirements of this section shall apply to any person, not exempted under section 1902—

"(1) that engages in the business of processing any fish product for interstate commerce; and

"(2) that engages in the business of buying or selling (such as acting as products brokers or wholesalers), or transporting, in interstate commerce, or storing in or for interstate commerce or importing any fish products.

"(d) ACCESS TO RECORDS.—The Secretary and the Secretary of Commerce shall, on request at reasonable times, have access to and make copies of records maintained under this section.

"SEC. 1910. IMPORTS.

"(a) REQUIREMENT.—

"(1) IN GENERAL.—No fish product shall be entered, or withdrawn from warehouses, for consumption in the United States, unless such fish product—

"(A) is not adulterated or misbranded;

"(B) complies with all requirements applicable to fish products in commerce in the United States under this title;

"(C) is marked and labeled as required by regulations for imported articles; and

"(D) complies with the requirements of this title and regulations promulgated under this title.

"(2) TREATMENT.—On entry into the United States, any fish product that satisfies the requirements of paragraph (1) shall be considered and treated as domestic fish products under this title, except that all labeling of such fish products shall identify the country of origin.

"(b) INSPECTION OF IMPORTS.—The Secretary shall enforce the requirements of this section through inspections and other procedures, and the sampling and inspection of fish products that are offered for importation or entered, or withdrawn from warehouses, for consumption in the United States, and through any other procedures that the Secretary determines necessary to ensure compliance with this title.

"(c) CORRECTIVE ACTIONS.—All fish products that are refused entry into commerce in the United States under subsection (a) or that are entered, or withdrawn from warehouses, for consumption in the United States in violation of this section, shall pursuant to regulations promulgated by the Secretary, be destroyed unless—

"(1) such fish products are exported within a time fixed for such exportation by the Secretary; or

"(2) the Secretary determines that such fish product can be brought into compliance with this title through relabeling or other action.

If the Secretary makes a positive determination under paragraph (2), the destruction of such fish product may be deferred pending the filing of a written application by the owner or consignee and the execution by the applicant of a bond within a time period specified by the Secretary. On such filing and execution of a bond, the Secretary may authorize the applicant to perform such relabeling or other actions required by the Secretary. If after such action is performed, the Secretary determines that such fish product has been brought into compliance with this title, the Secretary shall permit its entry into commerce.

"(d) COSTS.—Storage, cartage, labor, and other costs resulting from the denial of entry, or withdrawal from warehouse, of any fish product under this section shall be paid by the owner or consignee of such product. The nonpayment of such costs shall constitute a lien against such product and any other fish product thereafter entered, or withdrawn from warehouse, for consumption in the United States by such owner or consignee.

"(e) FOREIGN SEAFOOD INSPECTION PROGRAM.—

"(1) REVIEW.—On request of a country desiring to export fish products to the United States, the Secretary shall review the inspection program, including the sanitary, wholesomeness, quality, species verification, residue and other requirements and tolerances, with respect to fish products to be offered for importation into the United States, to determine whether such requirements and tolerances for such products are at least equal to those established under this title.

"(2) CERTIFICATION.—If the Secretary determines that a country desiring to export fish products to the United States meets the standards and procedures set forth in paragraph (1), with respect to fish products to be offered for importation into the United States, and that such country will permit the enforcement measures that the Secretary determines necessary pursuant to paragraph (5), the Secretary shall issue a certificate to such country stating that the country meets such requirements.

"(3) EFFECT OF NONCERTIFICATION.—All fish products imported from a country that is not certified by the Secretary under this section shall be inspected by the Secretary at the port of entry to ensure compliance with the provisions of this section.

"(4) REVIEW.—

"(A) IN GENERAL.—The Secretary shall periodically review certificates issued under this subsection and shall revoke any such certificate if the Secretary determines that such action is necessary.

"(B) INSPECTION.—The consideration of any application for a certification under this subsection and the review of any such certification, by the Secretary, shall include the inspection of individual establishments that produce fish products to be offered for export to the United States to ensure that such products, and the procedures and standards used in handling and processing such products, meet the inspection, sanitary, quality, species verification, residue and other standards and tolerances required by this title.

"(5) ENFORCEMENT.—The Secretary shall enforce the requirements of this section through inspections, sampling, testing, or such other actions at such stages in the handling or processing of fish products, whether in the foreign country, during importation, or otherwise as the Secretary determines necessary to ensure compliance with this title.

"(f) REPORTS TO CONGRESS.—Not later than March 1 of each year, the Secretary shall submit, to the Committee on Agriculture of the House of Representatives and the Committe on Agriculture, Nutrition and Forestry of the Senate, a comprehensive and detailed written report with respect to the administration of this section during the immediately preceding calendar year. Such report shall include—

"(1) a certification by the Secretary that foreign entities exporting fish products under this section have complied with requirements at least equal to all the inspection, building construction standards, and all other provisions of this title and regulations issued thereunder;

"(2) the names and locations of establishments authorized or permitted to have imported fish products into the United States;

"(3) the number of inspectors employed by the Department of Agriculture in the calendar year for which the report is being prepared that were assigned to inspect the establishments referred to in paragraph (2) and the frequency with which each such establishment was inspected by such inspectors;

"(4) the number of inspectors licensed by each country from which any imports subject to the provisions of this section were imported who were assigned, during the calendar year concerned, to inspect such imports and the facilities in which such imports were handled and the frequency and effectiveness of such inspections;

"(5) the total volume of fish products that were imported into the United States during the year for which such report was prepared from each country, including a separate itemization of the volume of each major category of such imports form each country during such year, and a detailed report of rejections of entities for certification and products because of the failure of such entities or products to meet appropriate standards prescribed under this section; and

"(6) the name of each foreign country that applies requirements for the importation of fish products from the United States.

IS USDA IMPORT MEAT INSPECTION SERVICE ADEQUATE?

HEARING

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

FIRST SESSION

APRIL 2, 1987

Printed for the use of the Committee on Government Operations

U.S. GOVERNMENT PRINTING OFFICE

72-691 WASHINGTON : 1987

For sale by the Superintendent of Documents, Congressional Sales Office

Mr. ENGLISH. Our next witness is Mr. Donald Houston who is the Administrator of the Food Safety and Inspection Service for the Department of Agriculture.

Mr. Houston, we want to welcome you here today, and we are looking forward to answers to some of the questions that have arisen.

STATEMENT OF DONALD L. HOUSTON, ADMINISTRATOR, FOOD SAFETY AND INSPECTION SERVICE, U.S. DEPARTMENT OF AGRICULTURE, ACCOMPANIED BY PATRICIA STOLFA AND MARK MANIS

Mr. HOUSTON. I need just 1 minute.

Mr. ENGLISH. Sure. Go right ahead.

I might say in the meantime for all of our witnesses—Mr. Snead, you are still here—we may have some written questions that we want to submit to you as well, and we would appreciate a timely response to any written questions to both you and Mr. Houston.

Thank you.

Mr. HOUSTON. Thank you very much, Mr. Chairman.

Sitting to my right is Ms. Pat Stolfa, who is the Deputy Administrator for International Programs in the Food Safety and Inspection Service, and has principal responsibility for import inspection and export certification.

Mr. ENGLISH. Good. I might say to you, Mr. Houston, if you would care to summarize your testimony, we would be happy, without objection, to make your full written testimony a part of the record.

Mr. HOUSTON. Mr. Chairman, I will be glad to do that, but based on the dialog that preceded me, it is apparent there is a great deal of misunderstanding about the import inspection program and the details of how it operates, both here in the United States and in foreign countries, and I would like to go over significant parts of the testimony. I think it will be helpful to the members of the committee to understand the system and how it operates.

Mr. ENGLISH. Fine, Mr. Houston. We'd be happy to have you do that.

Mr. HOUSTON. OK. I appreciate the opportunity to appear before you to discuss the imported meat and poultry inspection program that is conducted by the Food Safety and Inspection Service of the U.S. Department of Agriculture.

I will present an overview of the import program, including the legal authority on which the program is based; how the program has developed; how it is carried out; changes that have been made over the last few years to strengthen the program; and steps that will be taken to further improve the program.

In the course of my remarks, I will address current issues affecting import inspection, including the control of residues in imported products; the importation of live animals, and other issues raised in the audit of the inspection program by the USDA's Office of Inspector General.

I will also have something to say about the agency's implementation of provisions of the 1981 and 1985 farm bills. I believe we can demonstrate that the import inspection program is sound, and that meat and poultry products in the United States are wholesome, safe and accurately labeled.

The import program is based on the statutory provisions of the Federal Meat Inspection Act [FMIA] and the Poultry Products Inspection Act. Under these laws, in order to be able to export meat or poultry products to the United States, countries must have inspection programs that have been judged to impose requirements at least equal to those under the acts applicable to domestic meat and poultry products inspection.

Countries that want to export meat and poultry products to the United States must make a formal request through diplomatic channels. To determine eligiblity, the agency conducts a complete evaluation of the country's inspection system. The evaluation consists of two major parts: A review of foreign systems documents, and an onsite review of the country's inspection system operations.

A ~~country's laws~~ and regulations are evaluated to ensure that they provide for inspection and certification of the wholesomeness of product intended for export into the United States; that there are adequate controls over an ineligible product to prevent its export; and that the country has adequate controls to prevent a person convicted of wrongdoing from being connected with a firm exporting product to the United States.

The country's laws and regulations are also reviewed to ensure that it has the legal authority to impose requirements at least equal to those of the United States in one ante-mortem inspection of meat and poultry for slaughter, and post mortem inspection for meat and poultry carcasses at the time of slaughter; official controls by the government over construction facilities and equipment of the establishments; direct and continuous supervision of slaughter activities and product preparation by the assignment of inspectors to establishments to assure that adulterated or misbranded meat and poultry products are not processed for export to the United States, maintenance of a single standard of inspection and sanitation throughout all certified establishments and complete separation of certified and noncertified establishments, requirements for sanitation at certified establishments and for sanitary handling of product and official controls over condemned product and other matters for which requirements are contained in the acts of the implementing regulations.

If the document review is satisfactory, a multidisciplinary team conducts an onsite review to evaluate all aspects of the country's program. At present, 41 countries are eligible to export meat and/or poultry products to the United States. Thirty-three of the countries were active in 1986.

Once a meat or poultry inspection system of a foreign country has been certified by the agency as eligible to export products to the United States, the individual plants operating within that country that want to export products to the United States must apply to their national inspection authorities for certification.

The chief inspection official of the foreign country must in turn certify to FSIS that each establishment authorized to export to the United States meets all of the applicable standards.

This certification is valid only as long as standards are maintained, or for a period of 1 year. At the beginning of each year, a responsible official of the foreign country must certify each plant. The daily operation of a certified foreign plant is similar to the operation of the United States, in which a routine daily inspection is conducted by Government inspectors. Agency personnel conduct periodic onsite reviews of foreign inspection systems. The reviews provide continued assurance that the foreign country is maintaining an inspection system that is at least equal to the inspection system of the United States.

During 1986, foreign program officers made 1,658 reviews of certified plants, and 174 reviews of official laboratories and other facilities of interest in assessing equal-to status. Nearly 6 percent of the foreign plants certified to export to the United States were decertified during 1986. Almost 25 percent of the decertification was the result of FSIS reviews that found operations that were not in compliance with U.S. standards.

On arrival in the United States, FSIS checks certification documents on all shipments to verify that foreign inspection controls have been applied to each lot.

We also reinspect product on a sample basis to further assure the continued equal-to operation of the foreign inspection system.

Reinspection of product is directed by computerized automated import information system which stores daily reinspection results from all ports of entry, inspection locations, residue and species laboratory sampling histories for each exporting country and product compliance histories for each exporting plant.

The automated system uses this information to determine the intensity and types of reinspection procedures to be applied to a particular shipment. Port of entry reinspection can include testing or examination for any of the following: Species verification; residue levels; condition of product; appropriate labeling; and compliance with USDA standards of composition.

Any shipment of product found unacceptable is refused entry and the product must be reexported within a prescribed time period, or destroyed or rendered unfit for human food purposes.

Port of entry reinspection activities occur at 31 major ports around the country. In 1986, nearly 2.5 billion pounds of meat and poultry products were offered for inspection in the United States. About 80 percent of the total was fresh frozen meat; two-thirds of this was manufacturing meat for further processing in U.S. plants. Canned pork accounted for slightly more than 10 percent of the total, while cooked canned beef and other products each amount to about 5 percent.

Strengthening our inspection of imported products is a priority commitment at FSIS. The 1981 farm bill stimulated certain improvements. A 1983 General Accounting Office review suggested others. We believe that systematic changes made over the past several years have significantly improved our program. The 1981 farm bill amended the FMIA to clarify that all carcasses, parts of carcasses, and meat food products capable of use as human food that are offered for importation to be subject to the same inspection, sanitation, quality, species verification, and residue standards applied to products produced in the United States.

Any product failing to meet these standards will be refused entry.

The bill highlighted two specific concerns: Species verification and residue testing. It placed certain requirements on exporting countries to assure their systems are adequate to prevent meat contamination.

The 1981 farm bill did not require and specifically avoided requiring that the use patterns for drugs and agricultural compounds be the same in foreign countries as they are in the United States. To carry out the requirements of the legislation, FSIS published a final rule on February 10, 1983, amending the Federal meat inspection regulations to require foreign inspection programs to randomly sample the internal organs and fat of carcasses at the point of slaughter, and to test the samples for resides using sampling and analytical techniques approved by the agency.

The regulation means that in order for a country to establish or maintain eligiblity to export to the United States, it must have a residue testing program with certain features. Among these is the requirement that animals intended to be slaughtered for the export market must be subjected to residue sampling at slaughter. The animals may be randomly selected. This requirement means that a country program must sample animals at the time of slaughter, and all plants exporting must be included in the program.

The design of the testing program is determined by each country. A country may elect to use a nonrandom sampling approach, provided that it is more intense than our program and that it prevents the export of violative products.

The program must include testing of organ tissue and fat of carcasses. This means the country must test the tissue that is appropriate for the compound in question, even though that tissue may not be exported. In some cases the tissue is a fat; in others it is organ tissue such as liver or kidney. Testing will be considered unacceptable if the correct tissue is not being tested.

The foreign residue program must use methods approved by the agency. We will accept AOAC methods and other methods recognized by the scientific community as satisfactory. If other methods are used, a task review by U.S. scientists may be necessary.

The foreign residue program must test for compounds it or USDA identifies as potential contaminants of exported meat. USDA requires all exporting countries to test for organo-chlorides, organo-phosphates, antibiotics, hormones, trace elements, and polychlorinated biphenyls each year.

If a country can produce test data from previous years that show no problem exists for any of the above classes, intermittent testing will be permitted for some compounds, as is done in the U.S. domestic residue program.

The regulations promulgated by USDA to implement the amendment to the Federal Meat Inspection Act contained in the 1981 farm bill also stipulated that in order to establish or maintain eligibility, the foreign inspection system must have a program for species verification that is at least equal to that of the USDA system.

USDA interprets this to mean that the country must have either a series of controls judged adequate to prevent substitution or introduction of illegal or otherwise uninspected meat, or have implemented a species testing program to verify the correct identification of exported product.

In 1984, FSIS reviewed and evaluated the residue testing programs of each eligible country to ensure that its methodologies were in accordance with agency-approved sampling analytical techniques. The reviews disclosed that six countries were not in compliance with the residue testing regulations.

As a result, each of the countries was removed from the list of countries eligible to export to the United States. Four of those countries later established satisfactory residue programs, then applied for and were granted renewed eligibility to export to this country. All eligible exporting countries are now in compliance with the residue testing requirements in the act and in the Federal meat inspection regulations.

I would say parenthetically that the two countries which did not come back on were Haiti and Mexico.

Besides carrying out the specific mandates of the 1981 farm bill, the agency has taken other steps to improve import inspection. In 1985, FSIS consolidated all of its import inspection activities into one international programs unit. The import inspection function was removed from the diverse domestic inspection system and placed in the same organization that was responsible for foreign system reviews.

Since that time, a number of changes have been made to formulate a comprehensive and integrated import program. One change was the permanent marking of U.S.-refused entry product; not only to keep rejected product out of our own marketing channels, but to notify other foreign countries that the lot was rejected at U.S. ports.

We have put an end to the practice of permitting imported product to be reinspected at unofficial locations where facilities, equipment, or other controls are substandard.

Another change has been the elimination of destination inspection, which occurred when imported product was not inspected at the port of entry, but instead was shipped to an interior location where inspection was performed by an inspector of domestic product, rather than by an import specialist. However, Canadian product has been granted an extension until 1989 because of lack of facilities on the border.

During 1986, we developed a plan to enhance the national residue program. As a result, on January 1 of this year, international programs assumed responsibility for directing the residue sampling of imported meat and poultry products. The samples are collected in accordance with the agency's annual residue sampling plan for imported products. International programs has modified the automated import information system to provide for the routine random collection of approximately 12,000 residue samples required by the annual plan.

International programs has also developed programs and procedure for monitoring and reporting the results of residue sampling tests. As of March 1, 2,604 residue samples have been collected by import field office personnel and sent to agency laboratories for residue analysis.

At this point, Mr. Chairman, with your permission, I would like to submit for the record the Compound Evaluation and Analytical

Capability, National Residue Program Plan for 1987, which incorporates the import inspection sampling scheme.

Mr. ENGLISH. Without objection.

[The publication is retained in subcommittee files.]

Mr. HOUSTON. Mr. Chairman, with your permission, I would like to submit for the record the FSIS Residue Program on Import Product Monitoring for 1986, which shows the total number of samples analyzed at 15,517, and the total number of violations to be 39

Mr. ENGLISH. Without objection, so ordered.

[The information follows:]

SOURCE: JUERGENSMEYER & WADLEY, AGRICULTURAL LAW (1982)

plant varieties are given protection,[6] monitors certain industry sponsored research and promotion programs authorized by federal law, and provides farmers with a means of financing and operating various research activities on the farm for such commodities as cotton, potatoes, eggs, wool, lamb, and mohair. For example, under AMS authority, financial grants may be made to states for marketing improvement projects or for promotional assistance for foods that are temporarily burdensome on the market.

§7.5.2. Animal and Plant Health Inspection Service. The Animal and Plant Health Inspection Service (APHIS) was established by the Secretary of Agriculture on March 14, 1977, pursuant to authority contained in 5 U.S.C. §301 and Organization Plan No. 2 of 1953. This agency was established to conduct regulatory and control programs that protect and improve plant and animal health. Its programs are carried out in cooperation with state government and other federal programs and involve service administration of federal laws and regulations pertaining to humane treatment of animals, quarantine of plants and animals and of plant and animal products, and control and eradication of pests and diseases. Agricultural quarantine inspection officials administer a number of programs that are designed to control or eradicate plant pests and diseases and to prevent their entry into noninfested areas; these are carried out in cooperation with Canada and Mexico as well as with state governments. Inspection services are maintained at all major ocean, air, border, and interior ports of entry in the continental United States and in Hawaii, Alaska, Puerto Rico, the American Virgin Islands, the Bahamas, Bermuda, and some 500 outlying ports and military installations. Inspectors also work in several foreign countries to insure that plant or plant products imported into the United States are disease-free. For example, inspectors work in The Netherlands, Belgium, Germany, Italy, France, and Japan, where they supervise the certification of flower bulbs before shipment to this

[6] Id. §§2321-2583.

country. In Mexico, plant protection and quarantine personnel supervise fumigation of fruit before it is moved across the border into the United States.

APHIS also administers a number of veterinary service programs that are designed to determine the existence and extent of outbreaks of communicable diseases and pests affecting livestock and poultry. The service organizes and conducts control and eradication operations in cooperation with state officials and cooperates with plant and animal health officials in other countries to prevent the entry of diseased animals into the United States. It also administers federal laws dealing with the humane handling of livestock and poultry in interstate commerce and is concerned with such matters as the transportation, sale, and handling of dogs, cats, circus and zoo animals, and other animals intended for laboratory research or exhibition. It oversees the interstate transportation and shipment of all biological products used in the diagnosis, prevention, or treatment of animal diseases to insure that these products are pure, safe, potent, and effective. Agency programs also regulate biologics manufacturers, license those manufacturing establishments and their products, and inspect their facilities and production methods.

§7.5.3. Federal Grain Inspection Service. The Federal Grain Inspection Service (FGIS) was established by the U.S. Department of Agriculture in 1976 to carry out the provisions of the U.S. Grain Standards Act as amended.[7] FGIS is responsible for establishing official U.S. standards for grain, administers a nationwide system of official inspection, regulates the weighing of all grain coming into or going out of any export facility in the United States, and registers substantial exporters of U.S. grain. A number of specific programs administered by this agency involve the inspection and weighing of grain and the development of official U.S. standards for corn, wheat, rye, oats, barley, flaxseed, sorghum, soybeans, triticale, and mixed grains. Proposed standards must be published in the Federal

[7] 7 U.S.C. §§71-87h (1976 & Supp. III 1979).

Dunkel Draft

L. TEXT ON AGRICULTURE

PART A: URUGUAY ROUND AGREEMENT ON AGRICULTURE

PART B: AGREEMENT ON MODALITIES FOR THE ESTABLISHMENT OF SPECIFIC BINDING COMMITMENTS UNDER THE REFORM PROGRAMME

PART C: DECISION BY CONTRACTING PARTIES ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

PART D: DECLARATION ON MEASURES CONCERNING THE POSSIBLE NEGATIVE EFFECTS OF THE REFORM PROGRAMME ON NET FOOD-IMPORTING DEVELOPING COUNTRIES

PART C

In respect of the following Decision on Sanitary and Phytosanitary Measures, it had been proposed that consumer concerns with relation to health, as well as animal welfare, should be fully addressed by this Decision. Most participants, however, were of the view that only some aspects of consumer concerns related to health were within the scope of the Decision, and insisted that other consumer concerns, along with animal welfare, could most appropriately be dealt with through other instruments.

DECISION BY CONTRACTING PARTIES ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

The CONTRACTING PARTIES,

Reaffirming that no contracting party should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade;

Desiring to improve the human health, animal health and phytosanitary situation in all contracting parties;

Noting that sanitary and phytosanitary measures are often applied on the basis of bilateral agreements or protocols;

Desiring the establishment of a multilateral framework of rules and disciplines to guide the adoption, development and the enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade;

Recognizing the important contribution that international standards, guidelines and recommendations can make in this regard;

Desiring to further the use of harmonized sanitary and phytosanitary measures between contracting parties, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention;

Recognizing that developing contracting parties may encounter special difficulties in complying with the sanitary or phytosanitary measures of importing contracting parties, and as a consequence, in access to markets, and also in the formulation and application of sanitary or phytosanitary measures in their own territories, and desiring to assist them in their endeavours in this regard;

Desiring therefore to elaborate rules for the application of the provisions of the General Agreement which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)*;

Decide as follows:

1. This decision applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this decision.

2. For the purposes of this decision, the definitions provided in Annex A shall apply.

3. The annexes are an integral part of this decision.

4. Nothing in this decision shall affect the rights of parties to the Agreement on Technical Barriers to Trade with respect to measures not within the scope of this decision.

Basic Rights and Obligations

5. Contracting parties have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this decision.

6. Contracting parties shall ensure that sanitary and phytosanitary measures are applied only to the extent necessary to protect human, animal or plant life or health, are based on scientific principles and are not maintained against available scientific evidence.

7. Contracting parties shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between contracting parties where identical or similar conditions prevail, including between their own territory and other contracting parties. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

8. Sanitary or phytosanitary measures which conform to the relevant provisions of this decision shall be presumed to be in accordance with the obligations of the contracting parties under the provisions of the General Agreement which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).

---

* In this decision, reference to Article XX(b) includes also the chapeau of that Article.

Harmonization

9. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, contracting parties shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this decision.

10. Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this decision and of the General Agreement.

11. Contracting parties may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of protection a contracting party determines to be appropriate in accordance with the relevant provisions of paragraphs 16 through 23. Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this decision.

12. Contracting parties shall play a full part within the limits of their resources in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and in the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures.

13. The Committee on Sanitary and Phytosanitary Measures, as provided for in paragraphs 38 and 41, shall develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations.

Equivalence

14. Contracting parties shall accept the sanitary or phytosanitary measures of other contracting parties as equivalent, even if these measures differ from their own or from those used by other contracting parties trading in the same product, if the exporting contracting party objectively demonstrates to the importing contracting party that its measures achieve the importing contracting party's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing contracting party for inspection, testing and other relevant procedures.

15. Contracting parties shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures.

Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection

16. Contracting parties shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

17. In the assessment of risks, contracting parties shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest-or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

18. In assessing the risk and determining the appropriate level of sanitary or phytosanitary protection, contracting parties shall take into account as relevant economic factors the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease, the costs of control or eradication in the importing contracting party, and the relative cost effectiveness of alternative approaches to limiting risks.

19. Contracting parties should, when determining the appropriate level of sanitary and phytosanitary protection, take into account the objective of minimizing negative trade effects.

20. With the objective of achieving consistency in the application of the concept of appropriate level of sanitary and phytosanitary protection against risks to human life or health, or to animal and plant life or health, each contracting party shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Contracting parties shall co-operate in the Committee on Sanitary and Phytosanitary Measures in accordance with paragraphs 38, 39 and 40 of this decision, to develop guidelines to further the practical implementation of this provision. In developing the guidelines the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.

21. Without prejudice to paragraph 10, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, contracting parties shall ensure that such measures are the least restrictive to trade, taking into account technical and economic feasibility.

22. In cases where relevant scientific evidence is insufficient, a contracting party may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other contracting parties. In such circumstances, contracting parties shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

23. When a contracting party has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another contracting party is constraining or has the potential to constrain its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the contracting party maintaining the measure.

Adaptation to Regional Conditions, including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence

24. Contracting parties shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area - whether a country, part of a country, or areas of several countries - from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, contracting parties shall take into account, inter alia, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.

25. Contracting parties shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.

26. Exporting contracting parties claiming that areas within their territories are pest- or disease-free or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing contracting party that such areas are, and are likely to remain, pest- or disease-free or areas of low pest or disease prevalence, respectively. For this purpose, reasonable access shall be given, upon request, to the importing contracting party for inspection, testing and other relevant procedures.

Transparency

27. Contracting parties shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.

Control, Inspection and Approval Procedures

28. Contracting parties shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this decision.

Technical Assistance

29. Contracting parties agree to facilitate the provision of technical assistance to other contracting parties, especially developing contracting parties, either bilaterally or through the appropriate international organizations. Such assistance may be, inter alia, in the areas of processing technologies, research and infrastructure, including in the

establishment of national regulatory bodies, and may take the form of advice, credits donations and grants, including for the purpose of seeking technical expertise, training and equipment to allow such countries to adjust to, and comply with, sanitary or phytosanitary measures necessary to achieve the appropriate level of sanitary or phytosanitary protection in their export markets.

30. Where substantial investments are required in order for an exporting developing contracting party to fulfil the sanitary or phytosanitary requirements of an importing contracting party, the latter shall consider providing such technical assistance as will permit the developing contracting party to maintain and expand its market access opportunities for the product involved.

Special and Differential Treatment

31. In the preparation and application of sanitary or phytosanitary measures, contracting parties shall take account of the special needs of developing contracting parties, and in particular of the least-developed ones.

32. Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing contracting parties so as to maintain opportunities for their exports.

33. With a view to ensuring that developing contracting parties are able to comply with the provisions of this decision, the Committee on Sanitary and Phytosanitary Measures is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this decision, taking into account their financial, trade and development needs.

34. Contracting parties should encourage and facilitate the active participation of developing countries in the relevant international organizations.

Consultations and Dispute Settlement

35. The provisions of Articles XXII and XXIII of the General Agreement, and the Understanding on Rules and Procedures Governing the Settlement of Disputes under Articles XXII and XXIII of the General Agreement on Tariffs and Trade as adopted by the CONTRACTING PARTIES shall apply to consultations and the settlement of disputes under this decision, except as otherwise specifically provided herein.

36. In a dispute under this decision involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative.

37. Nothing in this decision shall impair the rights of contracting parties under other international agreements, including the rights to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement.

Administration

38. A Committee on Sanitary and Phytosanitary Measures shall be established to provide a regular forum for consultations. It shall carry out the functions necessary to implement the provisions of this decision and the furtherance of its objectives, in particular with respect to harmonization. The Committee shall reach its decisions by consensus.

39. The Committee shall encourage and facilitate ad hoc consultations or negotiations among its members on specific sanitary or phytosanitary issues. The Committee shall encourage the use of international standards, guidelines or recommendations by all contracting parties and, in this regard, shall sponsor technical consultation and study with the objective of increasing coordination and integration between international and national systems and approaches for approving the use of food additives or for establishing tolerances for contaminants in foods, beverages and feedstuffs.

40. The Committee shall maintain close contact with the relevant international organizations in the field of sanitary and phytosanitary protection, especially with the Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention, with the objective of securing the best available scientific and technical advice for the administration of this decision and in order to ensure that unnecessary duplication of effort is avoided.

41. The Committee shall develop a procedure to monitor the process of international harmonization and the use of international standards, guidelines or recommendations. For this purpose, the Committee should, in conjunction with the relevant international organizations, establish a list of international standards, guidelines or recommendations relating to sanitary or phytosanitary measures which the Committee determines to have a major trade impact. The list should include an indication by contracting parties of those international standards, guidelines or recommendations which they apply as conditions for import or on the basis of which imported products conforming to these standards can enjoy access to their markets. For those cases in which a contracting party does not apply an international standard, guideline or recommendation as a condition for import, the contracting party should provide an indication of the reason thereof, and, in particular, if it considers that the standard is not stringent enough to provide the appropriate level of sanitary or phytosanitary protection. If a contracting party revises its position, following its indication of the use of a standard, guideline or

recommendation as a condition for import, it should provide an explanation for its change and so inform the GATT as well as the relevant international organizations, unless such notification and explanation is given according to the procedures of Annex B.

42. In order to avoid unnecessary duplication, the Committee may decide, as appropriate, to use the information generated by the existing procedures, particularly for notification, which are in operation in the relevant international organizations.

43. The Committee may, on the basis of an initiative from one of the contracting parties, through appropriate channels invite the relevant international organizations or their subsidiary bodies to examine specific matters with respect to a particular standard, guideline or recommendation, including the basis of explanations for non-use given according to paragraph 41 above.

44. The Committee shall review the operation and implementation of this decision three years after its entry into force, and thereafter as the need arises, and, where appropriate, propose modifications to the text of this decision having regard, inter alia, to the experience gained in its implementation.

Implementation

45. Contracting parties are fully responsible under this decision for the observance of all obligations set forth herein. Contracting parties shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this decision by other than central government bodies. Contracting parties shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this decision. In addition, contracting parties shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this decision. Contracting parties shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this decision.

Final Provisions

46. The least developed contracting parties may delay application of the provisions of this decision for a period of 2 years following the date of entry into force of this decision with respect to their sanitary or phytosanitary measures affecting importation or imported products. Other developing contracting parties may delay application of the provisions of this decision, other than paragraphs 23 and 27, for 2 years following the

date of entry into force of this decision with respect to their existing sanitary or phytosanitary measures affecting importation or imported products where such application is prevented by a lack of technical expertise, technical infrastructure or resources.

ANNEX A

Definitions*

For the purposes of this decision, the following definitions shall apply:

1. Sanitary or phytosanitary measure - Any measure applied:

- to protect animal or plant life or health within the territory of the contracting party from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;

- to protect human or animal life or health within the territory of the contracting party from risks arising from additives, contaminants, toxins or disease-causing organisms, in foods, beverages or feedstuffs;

- to protect human life or health within the territory of the contracting party from risks arising from diseases carried by animals, plants or products thereof or from the entry, establishment or spread of pests; or

- to prevent or limit other damage within the territory of the contracting party from the entry, establishment or spread of pests.

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processing and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

2. Harmonization - The establishment, recognition and application of common sanitary and phytosanitary measures by different contracting parties.

---

* For the purpose of these definitions "animal" includes fish and wild fauna; "plant" includes forests and wild flora; "pests" include weeds; and "contaminants" include pesticide and veterinary drug residues and extraneous matter.

3. International standards, guidelines and recommendations

- for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice;

- for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics;

- for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in co-operation with regional organizations operating within the framework of the International Plant Protection Convention;

- and, for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all contracting parties, as identified by the Committee on Sanitary and Phytosanitary Measures.

4. Risk assessment - The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing contracting party according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, feedstuffs and beverages.

5. Appropriate Level of Sanitary or Phytosanitary Protection - The level of protection deemed appropriate by the contracting party establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory. (Note: Many parties otherwise refer to this concept as the "acceptable level of risk".)

6. Pest-or Disease-Free Area - An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease does not occur.

NOTE: A pest- or disease-free area may surround, be surrounded by, or be adjacent to an area - whether within part of a country or in a geographic region which includes parts of or all of several countries - in which a specific pest or disease is known to occur but is subject to regional control measures such as the establishment of protection, surveillance and buffer zones which will confine or eradicate the pest or disease in question.

7.. <u>Area of low pest or disease prevalence</u> - An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease occurs at low levels and which are subject to effective surveillance, control or eradication measures.

ANNEX B

Transparency of Sanitary and Phytosanitary Regulations

1. Publication of regulations

1.1 Contracting parties shall ensure that all sanitary and phytosanitary regulations* which have been adopted are published promptly in such a manner as to enable interested contracting parties to become acquainted with them.

1.2 Except in urgent circumstances, contracting parties shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting countries, and particularly in developing countries, to adapt their products and methods of production to the requirements of the importing country.

2. Enquiry points

2.1 Each contracting party shall ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested contracting parties as well as for the provision of relevant documents regarding:

(a) any sanitary or phytosanitary regulations adopted or proposed within its territory;

(b) any control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures, which are operated within its territory;

(c) risk assessment procedures, factors taken into consideration, as well as the determination of the appropriate level of sanitary and phytosanitary protection;

(d) the membership and participation of the contracting party, or of relevant bodies within its territory, in international and regional sanitary and phytosanitary organizations and systems, as well as in bilateral and multilateral agreements and arrangements within the scope of this decision, and copies of the texts of such agreements and arrangements.

2.2 Contracting parties shall ensure that where copies of documents are requested by interested contracting parties, they are supplied at the same price (if any), apart from the real cost of delivery, as to the nationals of the contracting party concerned.

---

* Sanitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally.

3. <u>Notification procedures</u>

3.1 Whenever an international standard, recommendation or guideline does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, recommendation or guideline, and if the regulation may have a significant effect on trade of other contracting parties, contracting parties shall:

(a) publish a notice at an early stage, in such a manner as to enable interested contracting parties to become acquainted with the proposal to introduce a particular regulation;

(b) notify other contracting parties, through the GATT Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;

(c) provide upon request to other contracting parties copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, recommendations or guidelines;

(d) without discrimination, allow reasonable time for other contracting parties to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.

3.2 However, where urgent problems of health protection arise or threaten to arise for a contracting party, that contracting party may omit such of the steps enumerated in paragraph 3.1 of this Annex as it finds necessary, provided that the contracting party:

(a) immediately notify other contracting parties, through the GATT Secretariat, of the particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s);

(b) provide upon request to other contracting parties copies of the regulation;

(c) allow other contracting parties to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.

3.3 Notifications to the GATT Secretariat shall be either in English, French or Spanish.

3.4 Developed contracting parties shall, if requested by other contracting parties, provide copies of the documents or, in case of voluminous documents, summaries of the documents covered by a specific notification in either English, French or Spanish.

3.5 The GATT Secretariat shall promptly circulate copies of the notifications to all contracting parties and interested international organizations and draw the attention of developing contracting parties to any notifications relating to products of particular interest to them.

3.6 Contracting parties shall designate one single central government authority as responsible for the implementation, on the national level, of the provisions concerning notification procedures according to paragraphs 3.1, 3.2, 3.3 and 3.4 of this Annex.

4. General reservations

4.1 Nothing in this decision shall be construed as requiring:

(a) the provision of particulars or copies of drafts or the publication of texts other than in the language of the contracting party except as stated in paragraph 3.4 of this Annex; or

(b) contracting parties to disclose confidential information which would impede enforcement of sanitary or phytosanitary legislation or which would prejudice the legitimate commercial interests of particular enterprises.

ANNEX C

Control, Inspection and Approval Procedures*

1. Contracting parties shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:

(a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;

(b) the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body as soon as possible transmits the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

(c) information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances;

(d) the confidentiality of information about imported products arising from or supplied in connection with control, inspection and approval is respected in a way no less favourable than for domestic products and in such a manner that legitimate commercial interests are protected;

(e) any requirements for control, inspection and approval of individual specimens of a product are limited to what is reasonable and necessary;

(f) any fees imposed for the procedures on imported products are equitable in relation to any fees charged on like domestic products or products originating in any other country and should be no higher than the actual cost of the service;

---

* Control, inspection and approval procedures include, inter alia, procedures for sampling, testing and certification.

(g) the same criteria should be used in the siting of facilities used in the procedures and the selection of samples of imported products as for domestic products so as to minimize the inconvenience to applicants, importers, exporters or their agents;

(h) whenever specifications of a product are changed subsequent to its control and inspection in light of the applicable regulations, the procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the regulations concerned;

(i) a procedure exists to review complaints concerning the operation of such procedures and to take corrective action when a complaint is justified.

Where an importing contracting party operates a system for the approval of the use of food additives or for the establishment of tolerances for contaminants in food, feedstuffs or beverages which prohibits or restricts access to its domestic markets for products based on the absence of an approval, the importing contracting party shall consider the use of a relevant international standard as the basis for access until a final determination is made.

2. Where a sanitary or phytosanitary measure specifies control at the level of production, the contracting party in whose territory the production takes place shall provide the necessary assistance to facilitate such control and the work of the controlling authorities.

3. Nothing in this decision shall prevent contracting parties from carrying out reasonable inspection within their own territories.

NAFTA, Chapter Seven : Agriculture

Subchapter B - Sanitary and Phytosanitary Measures

Article 751: Scope

In order to establish a framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures, this Subchapter applies to any such measure of a Party that may, directly or indirectly, affect trade between the Parties.

Article 752: Relation to Other Chapters

Articles 301 (National Treatment), 309 (Import and Export Restrictions) and 310 (Non-Discriminatory Administration of Restrictions), and the provisions of Article XX(b) of the GATT as incorporated into Article 2101(1), do not apply to any sanitary or phytosanitary measure.

Article 753: Reliance on Non-Governmental Entities

Each Party shall ensure that any non-governmental entity on which it relies in applying a sanitary or phytosanitary measure acts in a manner consistent with this Subchapter.

Article 754: Basic Rights and Obligations

Right to Take Sanitary and Phytosanitary Measures

1. Each Party may, in accordance with this Subchapter, adopt, maintain or apply any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory, including a measure more stringent than an international standard, guideline or recommendation.

Right to Establish Level of Protection

2. Notwithstanding any other provision of this Subchapter, each Party may, in protecting human, animal or plant life or health, establish its appropriate level of protection in accordance with Article 757.

Scientific Principles

3. Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is:

(a) based on scientific principles, taking into account relevant factors including, where appropriate, different geographic conditions;

(b) not maintained where there is no longer a scientific basis for it; and

(c) based on a risk assessment, as appropriate to the circumstances.

Non-Discriminatory Treatment

4. Each Party shall ensure that a sanitary or phytosanitary measure that it adopts, maintains or applies does not arbitrarily or unjustifiably discriminate between its goods and like goods of another Party, or between goods of another Party and like goods of any other country, where identical or similar conditions prevail.

Unnecessary Obstacles

5. Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is applied only to the extent necessary to achieve its appropriate level of protection, taking into account technical and economic feasibility.

Disguised Restrictions

6. No Party may adopt, maintain or apply any sanitary or phytosanitary measure with a view to, or with the effect of, creating a disguised restriction to trade between the Parties.

Article 755: International Standards and Standardizing Organizations

1. Without reducing the level of protection of human, animal, or plant life or health, each Party shall use, as a basis for its sanitary and phytosanitary measures, relevant international standards, guidelines or recommendations with the objective, among others, of making its sanitary and phytosanitary measures equivalent or, where appropriate, identical to those of the other Parties.

2. A Party's sanitary or phytosanitary measure that conforms to a relevant international standard, guideline or recommendation shall be presumed to be consistent with Article 754. A measure that results in a level of sanitary or phytosanitary protection different from that which would be achieved by a measure based on a relevant international standard, guideline or recommendation shall not for that reason alone be presumed to be inconsistent with this Subchapter.

3. Notwithstanding paragraph 1 and in accordance with the other provisions of this Subchapter, a Party may adopt, maintain or apply a sanitary or phytosanitary measure that is more stringent than the relevant international standard, guideline or recommendation.

4. Where a Party has reason to believe that a sanitary or phytosanitary measure of another Party is adversely affecting or may adversely affect its exports and the measure is not based on a relevant international standard, guideline or recommendation, it may request, and the other Party shall provide in writing, the reasons for such measure.

5. Each Party shall, to the greatest extent practicable, participate in relevant international and North American standardizing organizations, including the *Codex Alimentarius Commission*, the *International Office of Epizootics*, the *International Plant Protection Convention*, and the *North American Plant Protection Organization*, with a view to promoting the development and periodic review of international standards, guidelines and recommendations.

Article 756: Equivalence

1. Without reducing the level of protection of human, animal, or plant life or health, the Parties shall, to the greatest extent practicable and in accordance with this Subchapter, pursue equivalence of their respective sanitary or phytosanitary measures.

2. Each importing Party:

   (a) shall treat a sanitary or phytosanitary measure adopted or maintained by an exporting Party as equivalent to its own where the exporting Party, in cooperation with the importing Party, provides to the importing Party scientific evidence or other information, in accordance with risk assessment methodologies agreed upon by those Parties, to demonstrate objectively, subject to subparagraph (b), that the exporting Party's measure achieves the importing Party's appropriate level of protection;

(b) may, where it has a scientific basis, determine that the exporting Party's measure does not achieve the importing Party's appropriate level of protection; and

(c) shall, upon the request of the exporting Party, provide its reasons in writing for a determination under subparagraph (b).

3. For purposes of establishing equivalency, each exporting Party shall, upon the request of an importing Party, take such reasonable measures as may be available to it to facilitate access in its territory for inspection, testing, and other relevant procedures.

4. Each Party should, in the development of a sanitary or phytosanitary measure, consider relevant actual or proposed sanitary or phytosanitary measures of the other Parties.

Article 757: Risk Assessment and Appropriate Level of Protection

1. In conducting a risk assessment, each Party shall take into account:

(a) relevant risk assessment techniques and methodologies developed by international or North American standardizing organizations;

(b) relevant scientific evidence;

(c) relevant processes and production methods;

(d) relevant inspection, sampling, and testing methods;

(e) the prevalence of relevant diseases or pests, including the existence of pest-free or disease-free areas or areas of low pest or disease prevalence;

(f) relevant ecological and other environmental conditions; and

(g) relevant treatments, such as quarantines.

2. Further to paragraph 1, each Party shall, in establishing its appropriate level of protection regarding the risk associated with the introduction, establishment or spread of an animal or plant pest or disease, and in assessing such risk, also take into account the following economic factors, where relevant:

(a) loss of production or sales that may result from such pest or disease;

(b) costs of control or eradication of the pest or disease in its territory; and

(c) the relative cost-effectiveness of alternative approaches to limiting risks.

3. Each Party, in establishing its appropriate level of protection:

(a) should take into account the objective of minimizing negative trade effects; and

(b) shall, with the objective of achieving consistency in such levels, avoid arbitrary or unjustifiable distinctions in such levels in different circumstances, where such distinctions result in arbitrary or unjustifiable discrimination against a good of another Party or constitute a disguised restriction on trade between the Parties.

4. Notwithstanding paragraphs (1) through (3) and Article 754(3)(c), where a Party conducting a risk assessment determines that available relevant scientific evidence or other information is insufficient to complete the assessment, it may adopt a provisional sanitary or phytosanitary measure on the basis of available relevant information, including from international or North American standardizing organizations and from sanitary or phytosanitary measures of other Parties. Such Party shall, within a reasonable period after information sufficient to complete the assessment is presented to it, complete its assessment, review and where appropriate revise the provisional measure in light of such assessment.

5. Where a Party is able to achieve its appropriate level of protection through the phased application of a sanitary or phytosanitary measure, it may, upon the request of another Party and in accordance with this Subchapter, allow for such a phased application, or grant specified exceptions for limited periods from such measure, taking into account the requesting Party's export interests.

Article 758: Adaptation to Regional Conditions

1. Each Party shall adapt any of its sanitary or phytosanitary measures relating to the introduction, establishment, or spread of an animal or plant pest or disease, to the sanitary or phytosanitary characteristics of the area where a good subject to such measure is produced and the area in its territory to which such good is destined, taking into account any relevant conditions, including those relating to transportation and handling, between such areas. In assessing such characteristics of an area, including whether an area is, and is likely to

remain, a pest-free or disease-free area or an area of low pest or disease prevalence, each Party shall take into account, among other factors:

(a) the prevalence of relevant pests or diseases in that area;

(b) the existence of eradication or control programs in that area; and

(c) any relevant international standard, guideline or recommendation.

2. Further to paragraph 1, each Party shall, in determining whether an area is a pest-free or disease-free area or an area of low pest or disease prevalence, base such determination on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls in that area.

3. Each importing Party shall recognize that an area in the territory of the exporting Party is, and is likely to remain, a pest-free or disease-free area or an area of low pest or disease prevalence, where the exporting Party provides to the importing Party scientific evidence or other information sufficient to so demonstrate to the satisfaction of the importing Party. For this purpose, each exporting Party shall provide reasonable access in its territory to the importing Party for inspection, testing and other relevant procedures.

4. Each Party may, in accordance with this Subchapter:

(a) adopt, maintain or apply a different risk assessment procedure for a pest-free or disease-free area than for an area of low pest or disease prevalence; or

(b) make a different final determination for the disposition of a good produced in a pest-free or disease-free area than for a good produced in an area of low pest or disease prevalence,

taking into account any relevant conditions, including those relating to transportation and handling.

5. Each Party shall, in adopting, maintaining or applying a sanitary or phytosanitary measure relating to the introduction, establishment, or spread of an animal or plant pest or disease, accord a good produced in a pest-free or disease-free area in the territory of another Party no less favorable treatment than it accords a good produced in a pest-free or disease-free area, in another country, that poses the same level of risk. Such Party shall use

equivalent risk assessment techniques to evaluate relevant conditions and controls in the pest-free or disease-free area and in the area surrounding that area and take into account any relevant conditions, including those relating to transportation and handling.

6. Each importing Party shall pursue an agreement with an exporting Party, upon request, on specific requirements the fulfillment of which allows a good produced in an area of low pest or disease prevalence in the territory of an exporting Party to be imported into the territory of the importing Party and achieves the importing Party's appropriate level of protection.

Article 759: Control, Inspection and Approval Procedures

1. Each Party, with respect to any control or inspection procedure that it conducts:

   (a) shall initiate and complete such procedure as expeditiously as possible and in no less favorable manner for a good of another Party than for a good of such Party or a like good of any other country;

   (b) shall publish the normal processing period for each such procedure or communicate the anticipated processing period to the applicant upon request;

   (c) shall ensure that the competent body

      (i) upon receipt of an application, promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of any deficiency,

      (ii) transmits to the applicant as soon as possible the results of the procedure in a form that is precise and complete so that such applicant may take any necessary corrective action,

      (iii) where the application is deficient, proceeds as far as practicable with such procedure if the applicant so requests, and

      (iv) informs the applicant, upon request, of the status of the application and the reasons for any delay;

   (d) shall limit the information the applicant is required to supply to that necessary for conducting such procedure;

(e) shall accord confidential or proprietary information arising from, or supplied in connection with, such procedure conducted for a good of another Party

(i) treatment no less favorable than for a good of such Party, and

(ii) in any event, treatment that protects the applicant's legitimate commercial interests, to the extent provided under the Party's law;

(f) shall limit any requirement regarding individual specimens or samples of a good to that which is reasonable and necessary;

(g) should not impose a fee for conducting such procedure that is higher for a good of another Party than is equitable in relation to any such fee it imposes for its like goods or for like goods of any other country, taking into account communication, transportation and other related costs;

(h) should use criteria for selecting the location of facilities at which a procedure is conducted that do not cause unnecessary inconvenience to an applicant or its agent;

(i) shall provide a mechanism to review complaints concerning the operation of such procedure and to take corrective action when a complaint is justified;

(j) should use criteria for selecting samples of goods that do not cause unnecessary inconvenience to an applicant or its agent; and

(k) shall limit such procedure, for a good modified subsequent to a determination that such good fulfills the requirements of the applicable sanitary or phytosanitary measure, to that necessary to determine that such good continues to fulfill the requirements of such measure.

2. Each Party shall apply, with such modifications as may be necessary, paragraphs 1(a) through (i) to its approval procedures.

3. Where an importing Party's sanitary or phytosanitary measure requires the conduct of a control or inspection procedure at the level of production, an exporting Party shall, upon the request of the importing Party, take such reasonable measures as may be available to it to facilitate access in its territory and to provide assistance necessary to facilitate the conduct of the importing Party's control or inspection procedure.

4. A Party maintaining an approval procedure may require its approval for the use of an additive, or its establishment of a tolerance for a contaminant, in a food, beverage or feedstuff, under such procedure, prior to granting access to its domestic market for a food, beverage or feedstuff containing such additive or contaminant. Where such Party so requires, it shall consider using a relevant international standard, guideline or recommendation as the basis for granting access until it completes such procedure.

Article 760: Notification, Publication and Provision of Information

1. Further to Articles 1802 and 1803, each Party proposing to adopt or modify a sanitary or phytosanitary measure of general application at the federal level shall:

(a) at least 60 days prior to the adoption or modification of such measure, other than a law, publish a notice and notify in writing the other Parties of the proposed measure and provide to the other Parties and publish the full text of the proposed measure, in such a manner as to enable interested persons to become acquainted with the proposed measure;

(b) identify in such notice and notification the good to which the proposed measure would apply, and provide a brief description of the objective and reasons for such measure;

(c) provide a copy of such proposed measure to any Party or interested person that so requests and, wherever possible, identify any provision that deviates in substance from relevant international standards, guidelines or recommendations; and

(d) without discrimination, allow other Parties and interested persons to make comments in writing and shall, upon request, discuss such comments and take the comments and the results of such discussions into account.

2. Each Party shall seek, through appropriate measures, to ensure, with respect to a sanitary or phytosanitary measure of a state or provincial government:

(a) that, at an early appropriate stage, a notice and notification of the type referred to in paragraphs 1(a) and (b) are made prior to their adoption; and

(b) observance of paragraphs 1(c) and (d).

(b) such Party's risk assessment procedures and factors it considers in conducting such assessment and in establishing its appropriate levels of protection;

(c) the membership and participation of such Party, or its relevant federal, provincial or state government authorities in international and regional sanitary and phytosanitary organizations and systems, and in bilateral and multilateral arrangements within the scope of this Subchapter, and the provisions of such systems and arrangements; and

(d) the location of notices published pursuant to this Subchapter or where such information can be obtained.

2. Each Party shall ensure that where copies of documents are requested by another Party or by interested persons in accordance with this Subchapter, they are supplied at the same price, apart from the actual cost of delivery, as the price for domestic purchase.

Article 762: Technical Cooperation

1. Each Party shall, upon the request of another Party, facilitate the provision of technical advice, information and assistance, on mutually agreed terms and conditions, to enhance that Party's sanitary and phytosanitary measures and related activities, including research, processing technologies, infrastructure and the establishment of national regulatory bodies. Such assistance may include credits, donations and grants, for the purpose of acquiring technical expertise, training and equipment to allow the Party to adjust to and comply with a Party's sanitary or phytosanitary measure.

2. Each Party shall, on the request of another Party:

(a) provide to that Party information on its technical cooperation programs regarding sanitary or phytosanitary measures relating to specific areas of interest; and

(b) consult with the other Party during the development of, or prior to the adoption or change in the application of, any sanitary or phytosanitary measure.

3. Where a Party considers it necessary to address an urgent problem relating to sanitary and phytosanitary protection, it may omit any step set out in paragraph 1 or 2, provided that, upon adoption of a sanitary or phytosanitary measure, it shall:

(a) immediately provide to the other Parties a notification of the type referred to in paragraph 1(b), including a brief description of the urgent problem;

(b) provide a copy of such measure to any Party or interested person that so requests; and

(c) without discrimination, allow other Parties and interested persons to make comments in writing and shall, upon request, discuss such comments and take such comments and the results of such discussions into account.

4. Except where necessary to address an urgent problem referred to in paragraph 3, each Party shall allow a reasonable period between the publication of a sanitary or phytosanitary measure of general application and the date that it becomes effective to allow time for interested persons to adapt to such measure.

5. Each Party shall designate a government authority responsible for the implementation at the federal level of the notification provisions of this Article, and shall notify the other Parties thereof. Where a Party designates two or more government authorities for such purpose, it shall provide to the other Parties complete and unambiguous information on the scope of responsibility of each such authority.

6. Where an importing Party denies entry into its territory of a good of another Party because it does not comply with a sanitary or phytosanitary measure, the importing Party shall provide a written explanation to the exporting Party, upon request, that identifies the applicable measure and the reasons that the good is not in compliance.

Article 761: Inquiry Points

1. Each Party shall ensure that there is one inquiry point that is able to answer all reasonable enquiries from other Parties and interested persons, and to provide relevant documents, regarding:

(a) any sanitary or phytosanitary measure of general application, including any control or inspection procedure or approval procedure, proposed, adopted or maintained in its territory at the federal, provincial, or state government level;

Article 763: Limitations on the Provision of Information

Nothing in this Subchapter shall be construed as requiring a Party to:

(a) communicate, publish texts or provide particulars or copies of documents other than in an official language of such Party; or

(b) furnish any information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.

Article 764: Committee on Sanitary and Phytosanitary Measures

1. The Parties hereby establish a Committee on Sanitary and Phytosanitary Measures, comprising representatives of each Party who have responsibility for sanitary and phytosanitary matters.

2. The Committee should facilitate:

(a) the enhancement of food safety and improvement of sanitary and phytosanitary conditions in the territories of the Parties;

(b) activities of the Parties pursuant to Articles 755 and 756;

(c) technical cooperation between the Parties, including cooperation in the development, application and enforcement of sanitary or phytosanitary measures; and

(d) consultations on specific matters relating to sanitary or phytosanitary measures.

3. The Committee:

(a) shall, to the extent possible, in carrying out its functions, seek the assistance of relevant international and North American standardizing organizations to obtain available scientific and technical advice and minimize duplication of effort;

(b) may draw upon such experts and expert bodies as it considers appropriate;

(c) shall report annually to the Commission on the implementation of this Subchapter;

(d) shall meet upon the request of any Party and, unless the Parties otherwise agree, at least once each year; and

(e) may, as it considers appropriate, establish and determine the scope and mandate of working groups.

Article 765: Technical Consultations

1. A Party may request consultations with another Party on any matter covered by this Subchapter.

2. Each Party should use the good offices of relevant international and North American standardizing organizations, including those referred to in Article 755(5), for advice and assistance on sanitary and phytosanitary matters within their respective mandates.

3. Where a Party requests consultations regarding the application of this Subchapter to a Party's sanitary or phytosanitary measure, and so notifies the Committee, the Committee may facilitate such consultations, if it does not consider the matter itself, by referring the matter for non-binding technical advice or recommendations to a working group, including an ad hoc working group, or to another forum.

4. The Committee should consider any matter referred to it under paragraph 3 as expeditiously as possible, particularly regarding perishable goods, and promptly forward to the Parties any technical advice or recommendations that it develops or receives concerning the matter. The Parties involved shall provide a written response to the Committee concerning the technical advice or recommendations within such time as the Committee may request.

5. Where the involved Parties have had recourse to consultations facilitated by the Committee under paragraph 3, such consultations shall, upon the agreement of the Parties involved, constitute consultations conducted for purposes of Article 2006 (Consultations).

6. The Parties confirm that a Party asserting that a sanitary or phytosanitary measure of another Party is inconsistent with the provisions of this Subchapter shall have the burden of establishing such inconsistency.

Article 766: Definitions

For purposes of this Subchapter:

animal includes fish and wild fauna;

appropriate level of protection means the level of protection of human, animal or plant life or health in the territory of a Party that the Party considers appropriate;

approval procedure means any registration, notification or other mandatory administrative procedure for:

(a) approving the use of an additive for a stated purpose or under stated conditions; or

(b) establishing a tolerance for a stated purpose or under stated conditions for a contaminant,

in a food, beverage or feedstuff prior to permitting the use of such additive or the marketing of a food, beverage or feedstuff containing such additive or contaminant;

area means a country, part of a country or all or parts of several countries;

area of low pest or disease prevalence means an area in which a specific pest or disease occurs at low levels;

contaminant includes pesticide and veterinary drug residues and extraneous matter;

control or inspection procedure means any procedure used, directly or indirectly, to determine that a sanitary or phytosanitary measure is fulfilled, including sampling, testing, inspection, evaluation, verification, monitoring, auditing, assurance of conformity, accreditation, registration, certification, or other procedure involving the physical examination of a good, of the packaging of a good, or of the equipment or facilities directly related to production, marketing or use of a good, but does not mean an approval procedure;

international standard, guideline or recommendation means a standard, guideline or recommendation:

(a) regarding food safety, adopted by the *Codex Alimentarius Commission*, including one regarding decomposition elaborated by the *Codex Committee on Fish and Fishery Products*, food additives, contaminants, hygienic practice, and methods of analysis and sampling;

(b) regarding animal health and zoonoses, developed under the auspices of the *International Office of Epizootics*;

(c) regarding plant health, developed under the auspices of the *Secretariat of the International Plant Protection Convention* in co—operation with the *North American Plant Protection Organization*; or

(d) established by or developed under any other international organization agreed upon by the Parties;

pest includes a weed;

pest-free or disease-free area means an area in which a specific pest or disease does not occur;

plant includes wild flora;

risk assessment means an evaluation of:

(a) the potential for the introduction, establishment or spread of a pest or disease and associated biological and economic consequences; or

(b) the potential for adverse effects on human or animal life or health arising from the presence of an additive, contaminant, toxin or disease-causing organism in a food, beverage or feedstuff;

sanitary or phytosanitary measure means a measure that a Party adopts, maintains or applies to:

(a) protect animal or plant life or health in its territory from risks arising from the introduction, establishment or spread of a pest or disease,

(b) protect human or animal life or health in its territory from risks arising from the presence of an additive, contaminant, toxin or disease-causing organism in a food, beverage or feedstuff,

(c) to protect human life or health in its territory from risks arising from a disease-causing organism or pest carried by an animal or plant, or a product thereof,

(d) prevent or limit other damage in its territory arising from the introduction, establishment or spread of a pest,

including end product criteria; a product-related processing or production method; a testing, inspection, certification or approval procedure; a relevant statistical method; a sampling procedure; a method of risk assessment; a packaging and labelling requirement directly related to food safety; and a quarantine treatment, such as a relevant requirement associated with the transportation of animals or plants or with material necessary for their survival during transportation; and

scientific basis means a reason based on data or information derived using scientific methods.

Re:
Enforcement of judgments

RESTATEMENT OF THE LAW THIRD

THE AMERICAN LAW INSTITUTE

RESTATEMENT OF THE LAW
THE
FOREIGN RELATIONS LAW
OF THE
UNITED STATES

Volume 1
§§ 1–488

As Adopted and Promulgated
BY
THE AMERICAN LAW INSTITUTE
AT WASHINGTON, D.C.
May 14, 1986

A·L·I·

ST. PAUL, MINN.
AMERICAN LAW INSTITUTE PUBLISHERS
1987

apply between States of the United States; the arrest warrant is issued by the governor of the requested State, not by a magistrate; and, in general, judicial scrutiny of the extradition request is narrower than in international extradition. See Biddinger v. Commissioner of Police, 245 U.S. 128 (1917).

Extradition between States of the United States proceeds pursuant to Article IV, Section 2, clause 2 of the Constitution, a provision designed to complement in the criminal area the full faith and credit clause in Article IV, Section 1. Implementation of the extradition clause proceeds both through federal legislation, 18 U.S.C. § 3182, and through State law, which for nearly all States is the Uniform Criminal Extradition Act, 11 U.L.A. 51. Whether the courts of the requested State may look behind the assertion of the requesting State that there is probable cause to believe that the person sought has committed the crime charged was long debated, see 90 A.L.R.3d 1085 (1979 and Supp.). It is now clear that they may not do so. Michigan v. Doran, 439 U.S. 282, 99 S.Ct. 530, 58 L.Ed.2d 521 (1978); California v. Superior Court, ___ U.S. ___, 107 S.Ct. 2433, 96 L.Ed.2d 332 (1987). It seems also that the courts of the requested State may not inquire into the fairness of the proceedings in the demanding State. Sweeney v. Woodall, 344 U.S. 86, 73 S.Ct. 139, 97 L.Ed. 114 (1952), or into the adequacy of its facilities for incarceration, Pacileo v. Walker, 449 U.S. 86, 101 S.Ct. 308, 66 L.Ed.2d 304 (1980).

The governor of the requested State may investigate whether the demand comes within the extradition law. If he decides that it does, he appears to have no discretion comparable to that of the Secretary of State in international cases to refuse extradition. Drew v. Thaw, 235 U.S. 432, 35 S.Ct. 137, 59 L.Ed. 302 (1914). In 1987, overruling Kentucky v. Dennison, 65 U.S. (24 How.) 66, 16 L.Ed. 717 (1860), the Supreme Court held that the federal courts could order the governor of a State to carry out the duty to extradite. Puerto Rico v. Branstad, ___ U.S. ___, 107 S.Ct. 2802, 97 L.Ed.2d 187 (1987). See generally Murphy, "Revising Domestic Extradition Law," 131 U.Pa.L.Rev. 1063 (1983).

Chapter Eight

FOREIGN JUDGMENTS AND AWARDS

Introductory Note:

In contrast to the principles governing jurisdiction to adjudicate (§§ 421–23), which, with minor variations, reflect international consensus, there are no agreed principles governing recognition and enforcement of foreign judgments, except that no state recognizes or enforces the judgment of another state rendered without jurisdiction over the judgment debtor.

Recognition of a foreign judgment is a requirement for its enforcement, but judgments sometimes are recognized for purposes other than enforcement. See § 481, Comments *b* and *g*.

State practice varies widely. Some states require a treaty or proof of reciprocity (*e.g.*, the Federal Republic of Germany), some have no such requirement (*e.g.* France), and some do not enforce foreign judgments at all in the absence of a treaty (*e.g.*, The Netherlands). Some states (*e.g.*, the United States) treat default judgments and contested judgments substantially alike for purposes of enforcement; others (*e.g.*, Great Britain) enforce default judgments in limited circumstances only. Some states distinguish sharply between civil judgments ordering the payment of money and other judgments, such as those determining status of persons; others treat different types of judgments substantially alike. Some states recognize foreign judgments directly, others require "validation" by local courts (*e.g.*, Italy). Some states (*e.g.*, France) permit intermediate provisional measures, such as attachment of the judgment debtor's assets, prior to decision on enforcement. All states decline to recognize some judgments on the basis of conflict with their public policy or *ordre public*, but these terms have different meaning from state to state. Courts of some states (*e.g.*, France) recognize a foreign judgment only if they would have applied the same law to the controversy as that chosen by the rendering court, or if the choice of law did not affect the result. Some states (*e.g.*, Belgium) reserve the right to review the merits of a foreign judgment, though they do not always do so. It appears that the country most receptive to recognition of foreign judgments is the United States, in which the principles and practices engendered by the Full Faith and Credit clause in the United States Constitution in respect of sister-State judgments have to a large extent been carried over to recognition and enforcement of judgments of foreign states.

Numerous bilateral and multilateral treaties, especially among the European states, mitigate the diversity suggested above and tend to promote the recognition and enforcement of foreign judgments. Since 1968, the member states of the European Community have been parties to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil Matters, § 481, Reporters' Note 7, which, where it applies, functions much like the Full Faith and Credit clause of the United States Constitution. As of 1987, the United States was not a party to any treaty concerning recognition or enforcement of foreign judgments, and no negotiations looking to such a treaty were in progress.[1]

In view of the diversity in the law and practice of states, Subchapter A of this Chapter focuses on the law and practice of the United States, referring to the law and practice of other states in Comment and Reporters' Notes. State/federal issues concerning recognition and enforcement of foreign judgments in the United States are addressed in § 481, Comments *a* and *c*.

Much of the development of the United States law of enforcement of foreign judgments has come through decisions of State courts or of federal courts applying State law. In 1962, the

[1] In the mid-1970's, the United States and Great Britain held negotiations on a proposed Convention Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, but agreement could not be reached and the negotiations were terminated.

National Conference of Commissioners on Uniform State Laws and the American Bar Association adopted the Uniform Foreign Money Judgments Recognition Act, codifying State rules that had long been applied by the majority of courts in the United States. See 13 Uniform Laws Annotated 261 (1986). As of 1986, 16 States, including California, Illinois, Massachusetts, New York, and Texas, had adopted the Uniform Act, and the courts of most other States have applied its principles without benefit of statute. See § 481, Reporters' Note 1. Sections 481 and 482 of this Restatement in general follow the Uniform Act, but they are not limited, as is the Uniform Act, to judgments granting or denying recovery of a sum of money. See § 481, Reporters' Note 2.

Unlike the Uniform Act, which expressly excludes family law judgments, this Chapter addresses divorce, custody, and support judgments, which have raised increasingly important problems of international recognition. The principles of fairness set forth in §§ 481 and 482 are applicable to family law judgments as well. However, because some of the bases for jurisdiction to adjudicate in family law matters are different from those applicable to judicial jurisdiction generally, § 421, and because special rules have grown up with respect to *ex parte* actions, modification, and recognition of obligations to make future payments, §§ 484–86 set forth particular rules concerning recognition of foreign divorce, custody, and support judgments. Other types of family law judgments, such as adoption and filiation, are not addressed in this Restatement, but such judgments, fairly arrived at, may also be entitled to recognition in states other than the rendering state.

In contrast to the principles governing recognition and enforcement of foreign judgments, recognition of foreign arbitral awards is governed by an international convention, signed in 1958 and as of 1986, adhered to by nearly half of the world's states, including almost all the major trading states and all the principal centers of international arbitration. Except as otherwise noted, Subchapter B of this Chapter, §§ 487–88, covering recognition and enforcement of agreements to arbitrate and arbitral awards, is based on that convention, and thus states not merely the law of the United States. However, the Convention is not declaratory of customary international law, and those provisions apply only among the parties to the convention.

Relation to other Restatements. The Restatement, Second, of Judgments does not deal with judgments of foreign countries, but the rules there stated for giving effect to, or relief from, judgments within a given jurisdiction in the United States may be applicable to foreign judgments as well. The Restatement, Second, of Conflict of Laws and its 1986 Revisions address the topic in § 98, as well as in comments in several other sections, and are generally consistent with this Chapter.

REPORTERS' NOTES

1. *Bibliography.*

G. Delaume, Transnational Contracts, Parts IX, X, and XIII (1985–86 rev.).

A. Van den Berg, The New York Arbitration Convention of 1958 (1981).

2. *Previous Restatement.* The previous Restatement of Foreign Relations Law (1965) did not deal with the topic, except to state, in § 9, Comment *a*, that refusal by one state to give effect to judgments of another state because of lack of reciprocity does not violate international law.

SUBCHAPTER A. FOREIGN JUDGMENTS: LAW OF THE UNITED STATES

§ 481. Recognition and Enforcement of Foreign Judgments

(1) Except as provided in § 482, a final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States.

(2) A judgment entitled to recognition under Subsection (1) may be enforced by any party or its successors or assigns against any other party, its successors or assigns, in accordance with the procedure for enforcement of judgments applicable where enforcement is sought.

Comment:

a. Recognition and enforcement of judgments as State law. This section sets forth the prevailing common and statutory law of States of the United States, not rules of federal or international law. Since Erie v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), it has been accepted that in the absence of a federal statute or treaty or some other basis for federal jurisdiction, such as admiralty, recognition and enforcement of foreign country judgments is a matter of State law, and an action to enforce a foreign

country judgment is not an action arising under the laws of the United States. Thus, State courts, and federal courts applying State law, recognize and enforce foreign country judgments without reference to federal rules. Ordinarily, a decision of a State court granting or denying recognition to a foreign judgment is not subject to review by the United States Supreme Court, unless the decision raises questions under the United States Constitution, for example, intrusion into the foreign affairs of the United States, see § 1, Reporters' Note 5, or denial of due process of law.

b. Recognition and enforcement distinguished. The judgment of a foreign state may not be enforced unless it is entitled to recognition. Whether a foreign judgment should be recognized, may be in issue, however, not only in enforcement (see § 482), but in other contexts, for example where the defendant seeks to rely on a prior adjudication of a controversy (*res judicata*), or where either side in a litigation seeks to rely on prior determination of an issue of fact or law. A proceeding to enforce a foreign judgment normally takes the form of an action by the judgment creditor to collect a sum due from the judgment debtor under a judgment rendered in another state. See Comment *g*. Recognition of a foreign judgment may also be at issue in proceedings before bodies other than courts, for example in administrative proceedings.

Judgments granting injunctions, declaring rights or determining status, and judgments arising from attachments of property, are not generally entitled to enforcement, but may be entitled to recognition under this and the following sections.

c. Effect of foreign judgment. A foreign judgment is generally entitled to recognition by courts in the United States to the same extent as a judgment of a court of one State in the courts of another State. As in the case of a sister-State judgment, a judgment of a foreign country ordinarily has no greater effect in the United States than in the country where the judgment was rendered. See Restatement, Second, Judgments §§ 18–20; Restatement, Second, Conflict of Laws § 98, Comment *f*, 1986 Revisions, Comment *g*. However, no rule prevents a court in the United States from giving greater preclusive effect to a judgment of a foreign state than would be given in the courts of that state. For instance, if an action growing out of an airline disaster is brought in foreign state *A*, and in that action the airline has been determined to have been negligent, a plaintiff in an action in the United States might be able to rely on that determination, even if the law of state *A* would require full identity of parties before giving preclusive effect to the determination in the first action. See Reporters' Note 3.

For the effect of a judgment not given recognition in accordance with this section, see § 482, Comment *i.*

d. Reciprocity in enforcement of foreign judgments. A judgment otherwise entitled to recognition will not be denied recognition or enforcement because courts in the rendering state might not enforce a judgment of a court in the United States if the circumstances were reversed. Hilton v. Guyot, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895), declared a limited reciprocity requirement applicable when the judgment creditor is a national of the state in which the judgment was rendered and the judgment debtor is a national of the United States. Though that holding has not been formally overruled, it is no longer followed in the great majority of State and federal courts in the United States. See Reporters' Note 1.

e. Final judgment. A final judgment is one that is not subject to additional proceedings in the rendering court other than execution. That a judgment is subject to appeal or to modification in light of changed circumstances does not deprive it of its character as a final judgment. See § 485 and Comment *a* thereto. A final judgment may be the basis for an action for its enforcement and for attachment of property of the judgment debtor even while an appeal is pending, but courts in which enforcement is sought in these circumstances often stay their proceedings until the appeal has run its course.

f. Judgment of court. The rule stated in this section relates to judgments of courts, and in particular to judgments of courts of record. The rule is less clear with regard to decisions of administrative tribunals, industrial compensation boards, and similar bodies, but in the United States such administrative bodies are generally assimilated to courts for purposes of the rules of preclusion (*res judicata*), if they use procedures similar to those of courts. See Restatement, Second, Judgments § 83. Moreover, routine administrative determinations, such as that a person is entitled to a passport, a marriage license, or a birth certificate, are generally given recognition. The distinction between a court and an administrative tribunal varies in different states, and no rule either requires or prevents recognition and enforcement of decisions of foreign tribunals that do not possess all the characteristics of courts. A number of United States decisions have in fact recognized and enforced decisions of such tribunals, in circumstances where the essential fairness and reliability of the proceeding was established. See Reporters' Note 5. For enforcement of foreign arbitral awards, see §§ 487–88.

g. Proceedings to enforce foreign judgments in the Unit States. No procedures exist in the United States for registration foreign country judgments, or for their validation by *exequat* (*i.e.*, an endorsement by order of a court authorizing executio Therefore, enforcement of a debt arising out of a foreign judgme must be initiated by civil action, and the judgment creditor mu establish a basis for the exercise of jurisdiction by the enforci court over the judgment debtor or his property. See, Comment In many States, including those that have adopted the Unifor Foreign Money Judgments Recognition Act, see Introductory No to this Chapter, an action to enforce a foreign money judgment m be initiated through expedited procedures, such as a motion f summary judgment in lieu of a complaint. Enforcement of foreign judgment may also be pursued by counterclaim, cross-clai or affirmative defense.

h. Jurisdiction in action to enforce foreign judgment. T rules of jurisdiction to adjudicate in respect of civil actions gener ly, § 421, are applicable to actions or proceedings to enforce foreig judgments. However, whereas under § 421(k) (and under preva ing United States law) a state has jurisdiction to adjudicate a clai on the basis of presence of property in the forum only where th property is reasonably connected with the claim, an action t enforce a judgment may usually be brought wherever property c the defendant is found, without any necessary connection betwee the underlying action and the property, or between the defendar and the forum. The rationale behind wider jurisdiction in enforc ment of judgments is that once a judgment has been rendered in forum having jurisdiction, the prevailing party is entitled to have i satisfied out of the judgment debtor's assets wherever they may b located. The owner of property against which enforcement pr ceedings are initiated is, of course, entitled to raise all defenses t recognition available under § 482; raising such defenses in a enforcement proceeding would not expose him to liability greate than the value of the property out of which enforcement of th judgment was sought.

i. Default judgments. Unlike courts in many foreign states courts in the United States generally give the same direct effect t default judgments as to judgments following proceedings in whic all parties participated. Neither the Uniform Foreign Money Judgments Recognition Act nor this Restatement distinguishes betwee contested and default judgments. However, since a judgment rendered by a court not having jurisdiction over the judgment debtor is not entitled to recognition, see § 482(1)(b), a court in the recognizing state will scrutinize the jurisdiction of the rendering to foreign country judgments without inquiring whether the state of the rendering court would apply these concepts in the same ways. See Peterson, "Foreign Country Judgments and the Second Restatement of Conflict of Laws," 72 Colum.L.Rev. 220, 259–64 (1972). Before applying the concepts of issue preclusion (collateral estoppel) to judgments rendered in states where such concepts may not be known, a court in the United States must satisfy itself that the party to be bound had both fair opportunity and incentive to litigate the issue sought to be precluded from relitigation in the second forum. See Casad, "Issue Preclusion and Foreign Country Judgments: Whose Law?", 70 Iowa L.Rev. 53, (1984). If jurisdictional facts—*e.g.*, whether the defendant was doing business in the forum state, or whether a person in that state through whom a contract was made was the defendant's agent—have not been litigated in the rendering state, for example in the case of a default judgment, the court asked to recognize the judgment should reexamine those facts. If the jurisdictional facts have been litigated or an opportunity to litigate them was not taken, Reporters' Note 4, most courts in the United States will regard the determination of jurisdiction as *res judicata*. See, *e.g.*, Somportex Ltd. v. Philadelphia Chewing Gum Corp., Reporters' Note 1; Sprague and Rhodes Commodity Corp. v. Instituto Mexicano del Cafe, 566 F.2d 861 (2d Cir.1977). Some courts, however, have independently reexamined the bases of jurisdiction of the foreign court. See Hunt v. BP Exploration Co. (Libya) Ltd., 492 F.Supp. 885 (N.D. Tex.1980). Some courts also decline to permit relitigation of determinations implicit in the judgment of a foreign court, *e.g.*, the conclusion that a contract was validly entered into is implied in a judgment awarding damages for its breach. See Fairchild, Arabatzis and Smith, Inc. v. Prometco (Produce & Metals) Co., Ltd., 470 F.Supp. 610 (S.D.N.Y. 1979).

4. *Default judgments.* The effectiveness of an exercise of jurisdiction to adjudicate with respect to nonresidents on the basis of their activity in the forum state, § 421, depends in significant part on the ability to enforce a judgment in a second state even if the defendant did not appear in the original proceeding. Judgments rendered in one State of the United States are guaranteed enforcement in all other States of the United States by the Full Faith and Credit clause of the United States Constitution, Article IV, Section 1. The rationale underlying the Full Faith and Credit clause has led courts in the United States, in general, to enforce default judgments rendered in foreign states, although the constitutional command does not apply, provided basic jurisdictional requirements have been met. See, *e.g.*, Ritchie v. McMullen, 159 U.S. 235, 16 S.Ct. 171, 40 L.Ed. 133 (1895). If jurisdiction of the foreign court over a resident of the United States was based on concepts similar to those of long-arm jurisdiction in the United States, see International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), for instance under most provisions of Order 11 of the United Kingdom Rules of the Supreme Court, a default judgment so rendered will be recognized in the United States—provided defendant received adequate notice, the

statutory procedures at the place of rendition were followed, and the asserted basis of jurisdiction is not unreasonable. See, *e.g.*, John Sanderson & Co. (Wool) Pty. Ltd. v. Ludlow Jute Co., Ltd., 569 F.2d 696 (1st Cir.1978); Bank of Montreal v. Kough, 612 F.2d 467 (9th Cir.1980); Tahan v. Hodgson, 662 F.2d 862 (D.C.Cir.1981); Porisini v. Petricca, 90 A.D.2d 949, 456 N.Y.S.2d 888 (4th Dep't 1982). If, however, the exercise of jurisdiction by the state of origin was unreasonable, see § 421, the judgment will be denied recognition. See, *e.g.*, Koster v. Automark Industries, Inc., 640 F.2d 77 (7th Cir.1981). In general, recognition of default judgments is effective only between the parties, and no collateral estoppel or other preclusive effect is accorded to a default judgment. See Restatement, Second, Judgments §§ 27 and 28.

5. *Nonjudicial awards.* Some courts in the United States have been willing to enforce awards of bodies other than courts provided the awards were rendered in circumstances assuring fairness and independent decision. In Regierungspraesident Land Nordrhein-Westfalen v. Rosenthal, 17 A.D.2d 145, 232 N.Y.S.2d 963 (1st Dep't 1962), the decision of a West German administrative agency revoking an award of restitution to victims of Nazism on grounds of misrepresentation was recognized in New York, and the agency was permitted to recover funds previously awarded. A *"transaction," i.e.*, compromise settlement of a law suit which was entitled to *res judicata* effect in Quebec, was given the same effect in New York, though no judge had reviewed the settlement in Quebec. Cardy v. Cardy, 23 A.D.2d 117, 258 N.Y.S.2d 955 (1st Dep't 1965). See also In re Estate of O'Dea, 29 Cal. App.3d 759, 105 Cal.Rptr. 756 (1973).

6. *Foreign country practice.* There is no uniformity of practice among foreign states in regard to recognition of judgments of other states. However, recognition of foreign judgments has long been a subject of international concern, and there is a wide network of bilateral and multilateral agreements concerning reciprocal enforcement of civil judgments. See, *e.g.*, Delaume, Transnational Contracts, §§ 10.01–10.12 (April 1986 Supp.) and sources there cited.

(a) *Great Britain.* Foreign civil judgments, from countries other than Commonwealth countries or parties to the EEC Convention, Reporters' Note 7, are enforced either at common law (*i.e.*, by action on the foreign judgment, as in the United States) or by registration under the Foreign Judgments (Reciprocal Enforcement) Act of 1933, 23–24 Geo. 5, c. 13, if reciprocity is established through a bilateral convention. Judgments covered under the 1933 Act are entitled to registration, but may be set aside on initiative of the judgment debtor. Defenses to recognition of bilateral judgments are essentially the same as in the United States, § 482. However, default judgments are recognized only if the defendant (i) was, according to British law, present in the foreign state at the time of initiation of the proceedings, or (ii) had submitted to the jurisdiction of the foreign court by contract or by appearance. Thus, in respect of foreign default judgments, Great court when that issue has not been adjudicated or waived in the rendering forum. If the judgment debtor appeared in the rendering court for the purpose of challenging its jurisdiction and that jurisdiction was upheld, he is generally precluded from renewing the challenge in the state where recognition is sought, unless the proceeding in the foreign court was manifestly unfair or the asserted basis for jurisdiction clearly untenable. See § 482, Comment *c.* For this purpose, a motion in the rendering court for a stay pending arbitration, or for dismissal or transfer on grounds of *forum non conveniens,* is generally regarded in the United States not as a challenge to the court's jurisdiction but as a concession of jurisdiction.

REPORTERS' NOTES

1. *Reciprocity generally not required.* In Hilton v. Guyot, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895), the United States Supreme Court treated the enforceability of foreign country judgments as a matter of the "comity of nations," and concluded that comity called for enforcement of judgments rendered in a foreign state in favor of a citizen of that state against a non-citizen only on the basis of reciprocity. Accordingly, the Court declined to enforce the judgment of a French court in favor of a French citizen against two United States citizens, on the ground that French courts, if the facts were reversed, would not enforce the judgment of a court in the United States. Notwithstanding that decision, the great majority of courts in the United States have rejected the requirement of reciprocity, both in construing the Uniform Foreign Money Judgments Recognition Act, Introductory Note to this Chapter, and apart from the Act. See *e.g.,* Bank of Montreal v. Kough, 612 F.2d 467 (9th Cir.1980); Nicol v. Tanner, 310 Minn. 68, 256 N.W.2d 796 (1976); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir.1971), *certiorari denied,* 405 U.S. 1017, 92 S.Ct. 1294, 31 L.Ed.2d 479 (1972); Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926). See also Reese, "The Status in This Country of Judgments Rendered Abroad," 50 Colum.L.Rev. 783, 793 (1950): "[T]he creditor is not to blame for the fact that the state of rendition does not accord conclusive effect to American judgments. . . ." Some courts have asserted that they enforce judgments of foreign states only on condition of reciprocity, but in nearly all such cases reciprocity was found to have been established. Ritchie v. McMullen, 159 U.S. 235, 16 S.Ct. 171, 40 L.Ed. 133 (1895); Atlantic Ship Supply, Inc. v. M/V Lucy, 392 F.Supp. 179 (D.Fla. 1975), *affirmed,* 553 F.2d 1009 (5th Cir.1977). In a few cases, the reciprocity requirement was applied to the extent of permitting the judgment debtor to introduce evidence controverting the creditor's claim, but the judgment itself was held sufficient to prove the creditor's case without any need for him to prove the underlying facts. See, *e.g.,* Medical Arts Building Ltd. v. Eralp, 290 N.W.2d 241 (N.D.1980);

Svenska Handelsbanken v. Carlson, 258 F.Supp. 448 (D.Mass.1966). In those few recent cases in which reciprocity was held to be required but not established, there was some other ground for denying recognition as well. See, *e.g.,* Ogden v. Ogden, 159 Fla. 604, 33 So.2d 870 (1947). In some instances the existence of reciprocity has been relied on to grant recognition where it might not have been granted otherwise. See Peterson, "Foreign Country Judgments and the Second Restatement of Conflict of Laws," 72 Colum.L.Rev. 220, 234 (1972). See also § 486, Reporters' Note 6. The Texas version of the Uniform Act contains a discretionary reciprocity provision. Tex.Rev.Civ.Stat. Art. 2328b–6 § 5(7) (Supp.1985); the Massachusetts version of the Uniform Act contains a mandatory reciprocity provision, Mass.Gen.L. Ch. 235 § 23A, as adopted by St.1966, c. 638.

2. *Judgments entitled to recognition.* Although the Uniform Foreign Money Judgments Recognition Act is limited to money judgments, nothing in the Act or in the practice of courts in the United States prevents recognition of other kinds of judgments. In addition to judgments of divorce, custody, adoption, and other incidents of family status, courts in the United States recognize a great variety of other judgments, provided the basic requirements of fairness, § 482, have been complied with. Among these are judgments concerning succession to property of a decedent, *e.g.,* Watts v. Swiss Bank Corporation, 27 N.Y. 2d 270, 317 N.Y.S.2d 315, 265 N.E.2d 739 (1970); alleged breach of copyright, Leo Feist, Inc. v. Debmar Publishing Co., 232 F.Supp. 623 (E.D.Pa.1964); rights of a foreign trustee in bankruptcy to records in the United States, Clarkson Co. Ltd. v. Shaheen, 544 F.2d 624 (2d Cir.1976); claims recognized or denied by foreign bankruptcy court, Pioneer-Cafeteria Feeds, Ltd. v. Mack, 340 F.2d 719 (6th Cir.1965); In re Aktiebolaget Kreuger & Toll, 20 F.Supp. 964 (S.D.N.Y.1937), *affirmed,* 96 F.2d 768 (2d Cir.1938); and a decree approving a distribution of assets in a nationalized company, Kohn v. American Metal Climax, Inc., 458 F.2d 255 (3d Cir. 1971), *certiorari denied,* 409 U.S. 874, 93 S.Ct. 120, 34 L.Ed.2d 126 (1972). See also Matter of Colorado Corp., 531 F.2d 463 (10th Cir.1976). For judgments of a public law character, see § 483; for judgments concerning family matters, see §§ 484–86.

3. *Scope of recognition.* One important aspect of recognition of a foreign judgment is that as to the matters actually litigated and determined between the parties, the judgment precludes relitigation (claim preclusion). See, *e.g.,* Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926). Under prevailing law in the United States, there are other rules of preclusion, such as those relating to collateral estoppel (issue preclusion), effect of the judgment on third parties, splitting causes of action, privity among parties, and compulsory counterclaims. Whether these rules apply not only in the state where the judgment was rendered but also in the state of recognition is subject to some doubt. It is generally stated that a judgment will not be given greater effect in other states than it has in the state of origin, Comment *c.* However, some American courts have applied their own concepts of *res judicata*

to foreign country judgments without inquiring whether the state of the rendering court would apply these concepts in the same ways. See Peterson, "Foreign Country Judgments and the Second Restatement of Conflict of Laws," 72 Colum.L.Rev. 220, 259–64 (1972). Before applying the concepts of issue preclusion (collateral estoppel) to judgments rendered in states where such concepts may not be known, a court in the United States must satisfy itself that the party to be bound had both fair opportunity and incentive to litigate the issue sought to be precluded from relitigation in the second forum. See Casad, "Issue Preclusion and Foreign Country Judgments: Whose Law?", 70 Iowa L.Rev. 53, (1984). If jurisdictional facts—*e.g.*, whether the defendant was doing business in the forum state, or whether a person in that state through whom a contract was made was the defendant's agent—have not been litigated in the rendering state, for example in the case of a default judgment, the court asked to recognize the judgment should reexamine those facts. If the jurisdictional facts have been litigated or an opportunity to litigate them was not taken, Reporters' Note 4, most courts in the United States will regard the determination of jurisdiction as *res judicata*. See, *e.g.*, Somportex Ltd. v. Philadelphia Chewing Gum Corp., Reporters' Note 1; Sprague and Rhodes Commodity Corp. v. Instituto Mexicano del Cafe, 566 F.2d 861 (2d Cir.1977). Some courts, however, have independently reexamined the bases of jurisdiction of the foreign court. See Hunt v. BP Exploration Co. (Libya) Ltd., 492 F.Supp. 885 (N.D. Tex.1980). Some courts also decline to permit relitigation of determinations implicit in the judgment of a foreign court, *e.g.*, the conclusion that a contract was validly entered into is implied in a judgment awarding damages for its breach. See Fairchild, Arabatzis and Smith, Inc. v. Prometco (Produce & Metals) Co., Ltd., 470 F.Supp. 610 (S.D.N.Y. 1979).

4. *Default judgments.* The effectiveness of an exercise of jurisdiction to adjudicate with respect to nonresidents on the basis of their activity in the forum state, § 421, depends in significant part on the ability to enforce a judgment in a second state even if the defendant did not appear in the original proceeding. Judgments rendered in one State of the United States are guaranteed enforcement in all other States of the United States by the Full Faith and Credit clause of the United States Constitution, Article IV, Section 1. The rationale underlying the Full Faith and Credit clause has led courts in the United States, in general, to enforce default judgments rendered in foreign states, although the constitutional command does not apply, provided basic jurisdictional requirements have been met. See, *e.g.*, Ritchie v. McMullen, 159 U.S. 235, 16 S.Ct. 171, 40 L.Ed. 133 (1895). If jurisdiction of the foreign court over a resident of the United States was based on concepts similar to those of long-arm jurisdiction in the United States, see International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), for instance under most provisions of Order 11 of the United Kingdom Rules of the Supreme Court, a default judgment so rendered will be recognized in the United States—provided defendant received adequate notice, the

statutory procedures at the place of rendition were followed, and the asserted basis of jurisdiction is not unreasonable. See, *e.g.*, John Sanderson & Co. (Wool) Pty. Ltd. v. Ludlow Jute Co., Ltd., 569 F.2d 696 (1st Cir.1978); Bank of Montreal v. Kough, 612 F.2d 467 (9th Cir.1980); Tahan v. Hodgson, 662 F.2d 862 (D.C.Cir.1981); Porisini v. Petricca, 90 A.D.2d 949, 456 N.Y.S.2d 888 (4th Dep't 1982). If, however, the exercise of jurisdiction by the state of origin was unreasonable, see § 421, the judgment will be denied recognition. See, *e.g.*, Koster v. Automark Industries, Inc., 640 F.2d 77 (7th Cir.1981). In general, recognition of default judgments is effective only between the parties, and no collateral estoppel or other preclusive effect is accorded to a default judgment. See Restatement, Second, Judgments §§ 27 and 28.

5. *Nonjudicial awards.* Some courts in the United States have been willing to enforce awards of bodies other than courts provided the awards were rendered in circumstances assuring fairness and independent decision. In Regierungspraesident Land Nordrhein-Westfalen v. Rosenthal, 17 A.D.2d 145, 232 N.Y.S.2d 963 (1st Dep't 1962), the decision of a West German administrative agency revoking an award of restitution to victims of Nazism on grounds of misrepresentation was recognized in New York, and the agency was permitted to recover funds previously awarded. A *"transaction," i.e.*, compromise settlement of a law suit which was entitled to *res judicata* effect in Quebec, was given the same effect in New York, though no judge had reviewed the settlement in Quebec. Cardy v. Cardy, 23 A.D.2d 117, 258 N.Y.S.2d 955 (1st Dep't 1965). See also In re Estate of O'Dea, 29 Cal. App.3d 759, 105 Cal.Rptr. 756 (1973).

6. *Foreign country practice.* There is no uniformity of practice among foreign states in regard to recognition of judgments of other states. However, recognition of foreign judgments has long been a subject of international concern, and there is a wide network of bilateral and multilateral agreements concerning reciprocal enforcement of civil judgments. See, *e.g.*, Delaume, Transnational Contracts, §§ 10.01–10.12 (April 1986 Supp.) and sources there cited.

(a) *Great Britain.* Foreign civil judgments, from countries other than Commonwealth countries or parties to the EEC Convention, Reporters' Note 7, are enforced either at common law (*i.e.*, by action on the foreign judgment, as in the United States) or by registration under the Foreign Judgments (Reciprocal Enforcement) Act of 1933, 23–24 Geo. 5, c. 13, if reciprocity is established through a bilateral convention. Judgments covered under the 1933 Act are entitled to registration, but may be set aside on initiative of the judgment debtor. Defenses to recognition of bilateral judgments are essentially the same as in the United States, § 482. However, default judgments are recognized only if the defendant (i) was, according to British law, present in the foreign state at the time of initiation of the proceedings, or (ii) had submitted to the jurisdiction of the foreign court by contract or by appearance. Thus, in respect of foreign default judgments, Great

Britain does not recognize many of the bases on which its courts would exercise jurisdiction over absent defendants. See Soc. Cooperative Sidmetal v. Titan International, Ltd., [1966] 1 Q.B. 828. Pursuant to Section 33 of the Civil Jurisdiction and Judgment Act 1982, c. 27, reversing the result in Henry v. Geoprosco International Ltd., [1976] Q.B. 726, an appearance to contest the jurisdiction of the court, to seek a stay or dismissal pending arbitration or adjudication in another forum, or to protect property seized or threatened with seizure, will not be regarded as an appearance for purposes of recognition of a foreign judgment. See generally Cheshire and North, Private International Law, ch. XIX (10th ed. 1979); 2 Dicey and Morris, The Conflict of Laws, ch. 33 (10th ed. 1980).

(b) *Canada.* Enforcement of foreign judgments is a matter of provincial rather than federal law, but appeal may be taken to the Supreme Court of Canada. Except in Quebec, the law on recognition and enforcement of judgments generally follows British law. See Castel, Canadian Conflict of Laws, ch. 14 (1975).

(c) *France.* Until 1964, foreign judgments were subject to *"revision au fond," i.e.*, they would be examined on the merits as a condition of enforcement. This rule was the basis for denying enforcement to a French judgment against an American partnership in Hilton v. Guyot, Reporters' Note 1. In Munzer v. Munzer-Jacoby, Cass. Jan. 7, 1964, [1964] Semaine Juridique II, 13590, the Cour de Cassation reversed that rule. Since *Munzer*, foreign judgments are entitled to recognition or enforcement in France provided they meet five conditions: (i) the rendering court had jurisdiction, and French courts did not, by French standards, have exclusive jurisdiction; (ii) the procedure was regular; (iii) the foreign court applied the law that would have been applicable under French conflict of laws rules, or reached a substantially equivalent result; (iv) the foreign judgment does not offend French public policy; and (v) there was no evasion of mandatory rules of law (*e.g.*, exchange controls). Apart from these conditions, a public policy defense, compare § 482, Comment *f*, is sometimes used to raise defects in notice or opportunity to be heard that would raise issues of due process in United States practice.

(d) *Federal Republic of Germany.* Assuming jurisdiction of the rendering court, foreign judgments will be recognized, but only on the basis of reciprocity. Code of Civil Procedure [ZPO] § 328(5). In recent years, however, German courts have analyzed enforcement practice in the rendering state in detail to determine whether there was reciprocity. Adoption by a State in the United States of the Uniform Foreign Country Money Judgments Act, or of the rules set forth in this Restatement, would presumably demonstrate the existence of reciprocity, entitling money judgments from that State to recognition and enforcement in Germany. See generally Drobnig, American-German Private International Law 350–63 (2d ed. 1972); Brenscheidt, "The Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany," 11 Int'l Law. 261 (1977).

(e) *Latin America.* For the practice in Latin America, including discussion of the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979, see Casad, Civil Judgment Recognition and the Integration of Multiple State Association (1981).

7. *EEC Jurisdiction and Judgments Convention.* In 1968, the six original member states of the European Economic Community adopted a Convention on Jurisdiction and the Enforcement of Judgments in Civil Matters. The Convention, in implementation of the Treaty of Rome establishing the European Economic Community, is designed to establish a uniform system of reciprocal enforcement of judgments of member states, and to harmonize the acceptable bases of jurisdiction to adjudicate. See § 421, Reporters' Notes 1 and 5. Under a Protocol adopted in 1971, implementation of the Convention is subject to supervision by the Court of Justice of the European Communities. The Convention was amended in 1978 to take account of the accession of Denmark, Great Britain, and Ireland. See 21 O.J. Eur. Comm. (No. L 304) 1 (1978), [1978] Gr. Brit.T.S. (Cmnd. 7395), CCH Common Mkt. Rep. ¶ 6003. While there are differences of detail, as a whole the rules for recognition of judgments under the Convention are similar to the provisions of §§ 481 and 482 of this Restatement. The European Court of Justice has held that in order for a judgment to be enforceable under the Convention, the defendant must be afforded the right to join substantive to jurisdictional defenses, without thereby waiving his objection to the jurisdiction of the rendering court. Case 150/80 Elefanten Schuh G.m.b.H. v. Jacqmain, [1981] ECR 1671 [1982] 3 C.M.L.R. 1; Case 27/81 Etablissements Rohr S.A. v. Ossberger, [1981] ECR 2431, [1982] 3 C.M.L.R. 29.

8. *Judgments in foreign currency.* If an action is brought in a court in the United States to enforce a foreign judgment denominated in a currency other than United States dollars, the court will generally convert the judgment into United States currency as of the date of the judgment granting enforcement. See Island Territory of Curaçao v. Solitron Devices, Inc., 356 F.Supp. 1, 14 (S.D.N.Y.1973), *affirmed on other grounds*, 489 F.2d 1313 (2d Cir.1973), *certiorari denied*, 416 U.S. 986, 94 S.Ct. 2389, 40 L.Ed.2d 763 (1974); Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co., Ltd., 470 F.Supp. 610, 618 (S.D.N.Y.1979); Medical Arts Building Ltd. v. Eralp, 290 N.W.2d 241 (N.D.1980); Competex, S.A. v. LaBow, 783 F.2d 333 (2d Cir.1986). The same rule applies in respect of enforcement of an arbitral award in accordance with § 487. See Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Company, 484 F.Supp. 1063, 1070 (N.D.Ga.1980). In Canada, where a statute requires that all judgments be given in Canadian dollars, the rule for conversion is the same. Batavia Times Publishing Co. v. Davis, 88 D.L.R.3d 144, 154, 20 O.R.2d 437, 447 (1978). Since 1976, British courts have been authorized to give judgment in a foreign currency when the underlying obligation is denominated in that

currency. Miliangos v. George Frank (Textiles) Ltd., [1976] A.C. 443 (H.L. (E.)); see § 823, Reporters' Note 6. Presumably that rule extends to judgments in actions to enforce foreign judgments. See 2 Dicey and Morris, The Conflict of Laws 1018 (10th ed. 1980). For the rule on converting causes of action denominated in foreign currency, see § 823.

§ 482. Grounds for Nonrecognition of Foreign Judgments

(1) A court in the United States may not recognize a judgment of the court of a foreign state if:

(a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or

(b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421.

(2) A court in the United States need not recognize a judgment of the court of a foreign state if:

(a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;

(b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;

(c) the judgment was obtained by fraud;

(d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;

(e) the judgment conflicts with another final judgment that is entitled to recognition; or

(f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

Comment:

a. Mandatory or discretionary denial of recognition. If one of the defenses listed in Subsection (1) is established, the court where recognition is sought is required to deny recognition. If one of the defenses listed in Subsection (2) is established, the court is

not required to deny recognition, but may do so in the interests of justice. The distinction between mandatory and discretionary denial of recognition follows § 4 of the Uniform Act. Lack of subject matter jurisdiction appears in Subsection (2), as in the New York version of the Uniform Act, because jurisdiction of the rendering court over the subject matter is normally presumed, and an inquiry into possible lack of competence is initiated only on the basis of a credible challenge by the judgment debtor or by another person resisting recognition or enforcement. See Comment *d.* Lack of adequate notice appears in Subsection (2) for the same reason. If it were established that the defendant did not have notice of the pendency of the action that resulted in the judgment in question, and that no attempt had been made to give notice by means reasonably calculated to do so, the judgment would not ordinarily qualify for recognition, except in special circumstances, such as an action for divorce where the defendant had deserted the plaintiff and his whereabouts were unknown when the action was brought. For the somewhat different rules applicable to judgments in family matters generally, see §§ 484–86.

b. Lack of fair procedures. A court asked to recognize or enforce the judgment of a foreign court must satisfy itself of the essential fairness of the judicial system under which the judgment was rendered. The recognizing court may make this determination without formal proof or argument, on the basis of general knowledge and judicial notice. A court may make an explicit finding that the judicial system meets the essential requirements of fairness, but such a finding may be inferred from a decision to recognize or enforce the foreign judgment, or to deny recognition on some other specific ground.

The United States Supreme Court identified the essential elements of fair procedure as follows:

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect.

Hilton v. Guyot, 159 U.S. 113, 202, 16 S.Ct. 139, 158, 40 L.Ed. at 95 (1895).

standards of fairness. For instance, jurisdiction on the basis of the citizenship of the defendant may give rise to a judgment entitled to recognition. Similarly, a judgment may be entitled to recognition when the rendering court's jurisdiction was based on a determination that a contract was governed by the law of the forum. See U.K. Rules of Supreme Court Order 11, r.1(d)(iii). See, generally, Bank of Montreal v. Kough, 430 F.Supp. 1243 (N.D.Cal. 1977), *affirmed*, 612 F.2d 467 (9th Cir.1980).

3. Res judicata *and jurisdictional findings in rendering court.* As stated in § 481, Comment *i* and Reporters' Note 4, courts in the United States generally enforce default judgments of foreign courts, provided they are satisfied that the rendering court had jurisdiction to adjudicate and the defendant had adequate notice and opportunity to be heard. By analogy to practice between States in the United States, if jurisdiction of the foreign court was not contested or waived, the judgment debtor may challenge the jurisdiction of the rendering court in resisting enforcement in the United States. Compare, *e.g.*, Covington Industries, Inc. v. Resintex A.G., 629 F.2d 730 (2d Cir.1980) (default judgment rendered in Georgia federal court against Swiss firm set aside in federal court in New York on grounds that the rendering court did not have jurisdiction over the defendant). If the defendant challenged the jurisdiction of the rendering court in the first action and the challenge was unsuccessful or was not carried to conclusion, or if he defended on the merits without challenging the court's jurisdiction, a renewed challenge to jurisdiction of the rendering court is generally precluded. *Compare* Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244 (1931) (challenge to jurisdiction of sister-State court precluded by *res judicata*), *with* Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir.1971), *certiorari denied*, 405 U.S. 1017, 92 S.Ct. 1294, 31 L.Ed.2d 479 (1972) (British court's finding that appearance was unconditional given effect as *res judicata* in United States court). See also § 481, Reporters' Note 3 and cases there cited.

4. *Full faith and credit to denial of recognition of foreign judgment.* If an attempt to secure enforcement of a foreign judgment in the courts of one State of the United States is unsuccessful for one of the reasons stated in this section, the judgment of nonrecognition is entitled to full faith and credit in all other States. U.S. Constitution, Article IV, Section 1. If, however, the attempt fails because the court where enforcement is sought lacks jurisdiction over the judgment debtor, or because that court declines to enforce the judgment for lack of reciprocity or for some other reason not specified in this Subchapter, an attempt to secure enforcement of the foreign judgment in another State is not precluded. In Ackerman v. Ackerman, 517 F.Supp. 614, 623–26 (S.D.N.Y.1981), *affirmed*, 676 F.2d 898 (2d Cir.1982), the lower court indicated that a later foreign judgment would be enforced even if it conflicted with a prior sister-State judgment entitled to full faith and credit.

5. *Forum selection agreements favored.* Subsection (2)(f) supports the modern trend to give effect to

forum selection agreements. The United States Supreme Court has enforced (i) an agreement that disputes under a contract shall be adjudicated in the courts of a foreign state, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), and (ii) an agreement to submit any dispute under a contract to international arbitration, Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974). In both cases the effect was to oust courts that would have had jurisdiction to adjudicate the controversy but for the forum selection agreement. These decisions are consistent with recent decisions in most developed states, at least in respect of international commercial transactions between persons with comparable bargaining strength. See § 421, Comment *h* and Reporters' Note 6. The *Zapata* rule is generally followed in State courts in the United States. See, *e.g.*, Smith, Valentino & Smith, Inc. v. Superior Court of Los Angeles County, 17 Cal.3d 491, 131 Cal.Rptr. 374, 551 P.2d 1206 (1976).

§ 483. Recognition and Enforcement of Tax and Penal Judgments

Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states.

Comment:

a. Nonrecognition not required but permitted. This section states a principle that has long been accepted both in international and in United States practice. However, the rationale for the rule has been questioned, particularly with respect to tax judgments, see Reporters' Note 2. No rule of United States law or of international law would be violated if a court in the United States enforced a judgment of a foreign court for payment of taxes or comparable assessments that was otherwise consistent with the standards of §§ 481 and 482.

b. Penal judgments defined. A penal judgment, for purposes of this section, is a judgment in favor of a foreign state or one of its subdivisions, and primarily punitive rather than compensatory in character. A judgment for a fine or penalty is within this section; a judgment in favor of a foreign state arising out of a contract, a tort, a loan guaranty, or similar civil controversy is not penal for purposes of this section. Nor is a judgment for damages rendered in an action combining claims of civil and criminal responsibility, as is possible in some states, for example in respect of vehicle accidents or nonsupport of dependents. Actions may be penal in character, however, and therefore governed by this section, even if they do not result from judicial process, for example when a government agency is authorized to impose fines or penalties for violation of its regulations.

Some states consider judgments penal for purposes of nonrecognition if multiple, punitive, or exemplary damages are awarded, even when no governmental agency is a party. See Reporters' Note 4. In the United States, such judgments are not considered penal for this purpose.

c. Tax judgment defined. For purposes of this section, a tax judgment is a judgment in favor of a foreign state or one of its subdivisions based on a claim for an assessment of a tax, whether imposed in respect of income, property, transfer of wealth, or transactions in the taxing state. Judgments arising out of failure to pay license fees or for violation of exchange controls or similar laws are not tax judgments, but they may be treated similarly. See Comment *d.*

d. Other fiscal judgments. A foreign judgment may involve a revenue or fiscal claim even though it is neither a penal nor a tax judgment. Whether a judgment in favor of a foreign state or state instrumentality is a civil judgment entitled to recognition, or a judgment for a fine not entitled to recognition, depends on the purpose of the claim and on the law on which it is based. For instance, a judgment in an action by a central bank of a state for restitution of foreign currency unlawfully exported from that state would probably be enforced, but a fine for violation of exchange controls would not be.

e. Recognition and enforcement of public law judgments distinguished. Judgments not entitled to enforcement under this section may nevertheless be recognized for certain purposes. For instance, a foreign conviction of a crime may be recognized for purposes of denying the convicted person a visa or naturalization; a conviction for extortion or blackmail may be recognized as a defense to an action by the convicted person on the debt in question; a conviction in a foreign bastardy or paternity proceeding may be recognized in an action for child support. See § 486.

REPORTERS' NOTES

1. *Origin of "revenue rule."* In 1775, a seller of tea in France sued his English buyer in England for the purchase price. The buyer defended on the ground that the contract was illegal, because it was intended to smuggle the tea into England without paying English duties. The court, in a famous opinion by Lord Mansfield, held for the French plaintiff, on the ground that he had committed no immoral act, for revenue laws are only positive and not moral law; and he could not have committed a criminal act, for he had acted only in France, and

"no country ever takes notice of the revenue laws of another." Holman v. Johnson, 1 Cowp. 341, 98 Eng. Rep. 1120 (K.B.1775). The quoted words were applied in later cases in actions brought by governmental authorities to enforce tax claims, or to enforce foreign judgments based on tax claims. See, *e.g.,* Government of India v. Taylor, [1955] A.C. 491 (H.L. (E).); United States v. Harden, 1963 S.C.R. 366, 41 D.L.R.2d 721 (Sup.Ct. Canada 1963), noted in 77 Harv.L.Rev. 1327 (1964). The rule of nonrecognition of tax judgments prevailed in the United States with regard to sister-State judgments until 1935, when the Supreme Court held that whatever the rule on enforcing sister-State claims for taxes, if such claims had been reduced to final judgment, the Full Faith and Credit clause of the Constitution required that the judgment be enforced. Milwaukee County v. M.E. White Co., 296 U.S. 268, 56 S.Ct. 229, 80 L.Ed. 220 (1935). In Her Majesty the Queen in Right of the Province of British-Columbia v. Gilbertson, 597 F.2d 1161 (9th Cir. 1979), a Canadian province sought to collect a judgment, rendered after contest, for a logging tax assessed against United States citizens who had engaged in lumber operations in the province. The court, though not persuaded of the soundness of the "revenue rule," found it to be "firmly embedded in the law," and declined enforcement. For cases concerning foreign exchange contracts, see § 822, Reporters' Notes 2 and 3.

2. *Rationale for the rule.* The rule with respect to judgments stated in this section appears to be related to the rule of conflict of laws that one state will not enforce a claim based on the penal or revenue laws of another state. See *e.g.,* Restatement, Second, Conflict of Laws § 89. The normal rule that once an obligation has been reduced to judgment a second court does not look behind the judgment, see, *e.g.,* Restatement, Second, Judgments §§ 18–19, has not been applied to revenue, penal, or fiscal judgments. The rule appears to reflect a reluctance of courts to subject foreign public law to judicial scrutiny (compare the rationale for the act of state doctrine, § 443, Comment *a*), [attached] combined with reluctance to enforce law that may conflict with the public policy of the forum state. As applied to judgments of criminal courts, the rule appears also to reflect distrust of foreign criminal procedures. Even where those procedures have by implication been recognized to be adequate, *e.g.,* where a state has signed an extradition treaty with another state (see Introductory Note to Chapter 7, Subchapter B), there has been no disposition to enforce penal judgments of the other state.

Although the rule as commonly stated treats tax and penal judgments alike, the considerations concerning foreign tax judgments are different from those for penal judgments. In an age when virtually all states impose and collect taxes and when instantaneous transfer of assets can be easily arranged, the rationale for not recognizing or enforcing tax judgments is largely obsolete. The British House of Lords stated in 1955 that it upheld the rule primarily because it had been in effect for nearly two centuries. Government of India v. Taylor, Reporters' Note 1. Compare In re Norway's Application, [1986] 3 W.L.R. 452, permitting cooperation with adjudication of tax claim in foreign country. For an argument that nonrecognition of foreign tax judgments encourages tax evasion, see Note, "The Nonrecognition of Foreign Tax Judgments: International Tax Evasion," 1981 U.Ill.L. Rev. 241. For criticism of the exclusion of "public law" claims from application of the rules of conflict of laws, see Annuaire de L'Institut de Droit International, Vol. 56, at 157–278, 375–410, and Resolution, *id.* 550–53 (1975).

3. *Enforcement or recognition of foreign penal judgments.* Unless required to do so by treaty, no state enforces the penal judgments of other states. The United States has entered into treaties with several states, including Mexico and Canada, that provide for the repatriation of prisoners to complete their sentences in their home state. See § 721, Reporters' Note 11. Also, under the auspices of the Council of Europe, a number of states have entered into the European Convention on the International Validity of Criminal Judgments, 1970 Eur.T.S. No. 70, designed to assimilate criminal judgments of member states into the legal systems of other member states for purposes of both enforcement and recognition. As of 1986, six states (Austria, Cyprus, Denmark, Norway, Sweden, and Turkey) were parties to the Convention; eight other states had signed but not yet ratified it.

States often recognize foreign penal judgments for purposes other than enforcement. For instance, foreign penal judgments are recognized for purposes of habitual criminal statutes or multiple offender sentencing laws. See Pye, "The Effect of Foreign Criminal Judgments within the United States," in Mueller and Wise, eds., International Criminal Law 478, 492–96 (1965). The statutes of many States of the United States provide that trial in another State or foreign country for an act bars prosecution for the same act. *Id.* at 485–88 and sources there cited. However, the prohibition against double jeopardy under the United States Constitution has been held not to bar trial in the United States for a crime of which the accused has been convicted or acquitted in another state. See People v. Papaccio, 140 Misc. 696, 251 N.Y.Supp. 717 (N.Y.County 1931). Compare the rule concerning prosecution by both State and federal authorities for the same act. Abbate v. United States, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959); Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959); see also Petite v. United States, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960); Heath v. Alabama, 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985), sustaining conviction in Alabama of a crime for which petitioner had already been convicted in Georgia.

For the double jeopardy rule in connection with requests for extradition, see § 476(1)(b) and Comment *c* thereto. Section 212(a)(9) and (10) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1182(A)(9) and (10), denies admission to the United States to aliens who have been convicted of a crime involving moral turpitude, or of two or more offenses (other than purely political offenses) regardless of moral turpitude, for which sentences to confinement aggregating five years or more were imposed. Recognition of judgments of conviction for these purposes is permitted only if the conviction in the first

state was achieved through fundamentally fair procedures. Fair procedures require, at least, that the accused was informed, in advance of trial, of the charges against him; that he was given an opportunity to be heard; that he had a right to counsel; that he was granted process for the attendance of witnesses; and that he had the right to confront his accusers. The fact that guarantees of cross-examination, trial by jury, or suppression of unlawfully seized evidence were not provided in the foreign state do not preclude recognition of a foreign penal judgment. Compare § 482, Comment *b*.

4. *Penal character of civil judgments.* The United States Supreme Court and the British Privy Council, ruling on different aspects of the same controversy, both held enforceable the judgment of a New York court imposing liability on the director of a corporation to the corporation's creditors; both courts concluded that the New York law on which the judgment was based was not "penal" in the international sense. Huntington v. Attrill, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123 (1892); Huntington v. Attrill, [1893] A.C. 150 (P.C.). British courts have enforced the civil portion of judgments based on an action of adhesion, a practice common in civil law countries whereby if a single act—*e.g.*, reckless driving—gives rise to both criminal and civil liability, the injured private party can join the action brought by the state. Raulin v. Fischer, [1911] 2 K.B. 93. If suit on such a judgment were brought in a court in the United States, the result would presumably be the same. Courts in the United States do not distinguish, for purposes of enforcement, between judgments awarding compensatory judgments only and judgments awarding multiple or punitive (exemplary) damages, such as treble damages for violation of the antitrust laws. The British Court of Appeal has held that there is "nothing contrary to English public policy in enforcing a claim for exemplary damages." S.A. Consortium General Textiles v. Sun & Sand Agencies, [1978] Q.B. 279, 299–300. However, Great Britain has changed this rule by statute, Reporters' Note 5. Some states appear to follow the rule that only the compensatory portion of a judgment for multiple damages (if otherwise enforceable) will be enforced. Thus, if a United States court in an antitrust action determined that the plaintiff had been damaged to the extent of $100,000 and entered judgment for $300,000 in accordance with 15 U.S.C. § 15, a foreign court might enforce only $100,000 of the judgment. Some foreign courts might regard the entire judgment as penal and decline enforcement, both because the judgment is much larger than required for reparation, and because the plaintiff had acted as a "private attorney general," *i.e.*, had sued to enforce a public law.

5. *British Protection of Trading Interests Act.* This statute was adopted in 1980 in response to litigation and discovery practices then in progress in the United States in connection with the uranium cartel and international shipping conferences. See § 442, Reporters' Note 4. The Act contains two provisions directed at foreign judgments considered contrary to British public policy. Section 5 of the Act provides (a) that no part of any foreign judgment for multiple damages may be enforced in Great Britain, and (b) that judgments, even if not for mul-

tiple damages, may not be enforced in Great Britain if they are based on any law of the foreign state designated by the Secretary of State as concerned with regulation of competition. Section 6, known as the "claw-back" section, provides that if a court of another state has given a judgment for multiple damages against a British citizen or company, or other person carrying on business in Great Britain and not principally established in the state of the judgment, the amount paid under that judgment in excess of actual compensation may be recovered in an action in Great Britain, even if the judgment creditor is not within the jurisdiction of the British court. It seems clear that if a "claw-back" judgment cannot be fully satisfied in Great Britain, it would not be recognized or enforced in the United States under § 482(2)(d) or (e), and possibly under § 482(1)(b).

6. Security for foreign public judgments. In Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir.1986), *certiorari denied sub nom.* New York Land Co. v. Republic of the Philippines, ___ U.S. ___, 107 S.Ct. 2178, 95 L.Ed.2d 835 (1987), the Court sustained an application by the Republic of the Philippines to attach property of its former president in the United States, pending adjudication in the Philippines of the government's claim that the property was unlawfully acquired with public funds.

§ 484. Recognition of Foreign Divorce Decrees

(1) Courts in the United States will recognize a divorce granted in the state in which both parties to the marriage had their domicile or their habitual residence at the time of divorce, and valid and effective under the law of that state.

(2) Courts in the United States may, but need not, recognize a divorce, valid and effective under the law of the state where it was granted,

(a) if that state was, at the time of divorce, the state of domicile or habitual residence of one party to the marriage; or

(b) if the divorce was granted by a court having jurisdiction over both parties, and if at least one party appeared in person and the other party had notice of and opportunity to participate in the proceeding.

(3) A court that would not recognize a divorce that is within Subsection 2(a) or 2(b) may nevertheless recognize such a divorce if it would be recognized by the state where the parties were domiciled or had their habitual residence at the time of the divorce.

Comment:

a. "Migratory" and other divorces. Subsection (1) is addressed to recognition in the United States of divorces obtained in a state where both parties to the marriage were domiciled or had their habitual residence. Subsections (2) and (3) are addressed primarily to "migratory divorces" of residents of the United States, particularly divorces obtained from courts in "easy divorce" states such as Haiti and the Dominican Republic.

Subsection (2) distinguishes between bilateral and *ex parte* migratory divorces. Under Subsection (2)(a), a divorce may be entitled to recognition even though granted *ex parte*, if it was granted in the state of domicile or habitual residence of one party to the marriage. Subsection (2)(b) permits, but does not require, recognition of a divorce granted in a foreign state even without proof of domicile or residence, provided the rendering court had jurisdiction to adjudicate with respect to both parties under the rules set forth in § 421, and at least one of the parties appeared in person. Subsection (3) recognizes that an *ex parte* divorce granted without a finding of domicile or habitual residence of either party is not entitled to recognition, but may be recognized if it would be recognized by the state having the greatest interest in the question, ordinarily the state of domicile or residence of the parties at the time of the divorce. See Reporters' Note 4.

b. Division of views as to recognition. Subsection (2)(a) reflects the attitude of the majority of courts in the United States to migratory or transitory divorce, that domicile or habitual residence of at least one party is required for a foreign divorce to be entitled to recognition. Subsection (2)(b) reflects the rule in New York and some other States that when both parties have participated in a foreign divorce proceeding, at least one of them in person, neither party can thereafter challenge the divorce. See Reporters' Note 3. Under Subsection (2)(a), if the rendering court made a finding of domicile as a jurisdictional fact, that finding is subject to scrutiny by a court asked to grant recognition. See § 481, Reporters' Note 3; § 482, Reporters' Note 3. Under Subsection (2)(b), jurisdiction over the defendant party must be consistent with the rule stated in § 421, in particular with the bases of *in personam* jurisdiction set forth in Subsection (2)(b), (c), or (g) or Subsection (3).

c. Consequences of recognition or nonrecognition. If a foreign divorce is recognized in the United States, both parties may remarry. Unless there has been a decree denying recognition to a foreign divorce prior to a remarriage, the party who remarries is not subject to prosecution for bigamy and the children of the second marriage are not subject to a finding of illegitimacy. The second

Bank A.G. (Landgericht, Kiel 6/30/82), 22 Int'l Leg. Mat. 740 (1983), a West German court ordered a German bank not to comply with a United States grand jury subpoena concerning investigation of its client, following unsuccessful challenge to the subpoena in the United States. In re Grand Jury 81–2, 550 F. Supp. 24 (W.D.Mich.1982). Whether compliance with the injunction of the foreign court would provide an excuse to a bank in the United States was not pursued in the *X* case; the Krupp case was settled. But compliance with the order of a Cayman court was held not to provide an excuse under Fed. R.Crim.Pro.Rule 17(g), at least where the United States court had doubts about the good faith of the bank. United States v. Bank of Nova Scotia II, Reporters' Note 8. See also Vanguard International Manufacturing, Inc. v. United States, 588 F.Supp. 1229 (S.D.N.Y.1984); United States v. Chase Manhattan Bank, N.A., 590 F.Supp. 1160 (S.D.N.Y. 1984).

11. *Discovery concerning jurisdiction.* Normally, discovery requests and orders follow a determination that the court has jurisdiction. However, challenges to that jurisdiction may depend on questions of fact, such as whether the defendant has engaged in sufficient activity in the forum state to come within the criteria of § 421. In such circumstances, some United States courts have sustained discovery requests related to these questions before a determination of jurisdiction, provided the plaintiff has made an initial showing giving reason to believe that the bases for jurisdiction are present. In one action against a foreign insurance company, where the plaintiff made an initial showing and the defendant refused to comply with a discovery order, a district court found that it had jurisdiction and was upheld by the United States Supreme Court. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). In an analogous criminal case, the court postponed determination of its jurisdiction until defendant foreign corporation complied with the subpoena of a grand jury, and meanwhile upheld a finding of contempt against the company for noncompliance. See Matter of Marc Rich & Co., A.G., 707 F.2d 663 (2d Cir.), *certiorari denied,* 463 U.S. 1215, 103 S.Ct. 3555, 77 L.Ed.2d 1400 (1983).

SUBCHAPTER B. THE ACT OF STATE DOCTRINE

§ 443. Act of State Doctrine: Law of the United States

(1) In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there.

(2) The doctrine set forth in Subsection (1) is subject to modification by act of Congress. See § 444.

Comment:

a. Origins and rationale of act of state doctrine. The act of state doctrine as set forth in this section is derived from two statements by the Supreme Court of the United States. In Underhill v. Hernandez, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456, 457 (1897), the Supreme Court said:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

In 1964, in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428, 84 S.Ct. 923, 940, 11 L.Ed.2d 804, 823–24 (1964), the Supreme Court, building on *Underhill* and intervening cases, held that "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government [subject to certain possible limitations]."

The act of state doctrine derived from these cases has been a subject of controversy and uncertainty, and some limitations and exceptions have been developed. It has been urged that the doctrine should be limited to cases, such as *Sabbatino,* involving expropriation by a foreign state of property located in its territory, but *Underhill* applied the doctrine to a suit for damages for assault and detention by a foreign military commander, and that precedent as well as the rationale of the doctrine have led lower courts to apply it in some cases not involving property. See Comment *c* and Reporters' Notes 3 and 7. Even as to expropriation cases, *Sabbatino* itself suggested possible limitations on the act of state doctrine, and some Justices of the Supreme Court have sought to limit it further. See Comment *b.* For the statutory limitation on application of the doctrine, see § 444.

The rationale for the doctrine has been variously described. The doctrine was developed by the Court on its own authority, as a principle of judicial restraint, essentially to avoid disrespect for foreign states. "To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'" Oetjen v. Central Leather Co., 246 U.S. 297, 304, 38 S.Ct. 309, 311, 62 L.Ed. 726 (1918). Thus, the doctrine is related in spirit to the rules of international law that accord to foreign sovereigns large immunity from adjudication in domestic courts. See Reporters' Note 11; see also §§ 451–60. In *Sabbatino*, the Court said that the act of state doctrine is compelled neither by international law nor by the Constitution, but that it has "'constitutional' underpinnings," 376 U.S. at 423, 84 S.Ct. at 937. The Court referred to the doctrine as "concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community." 376 U.S. at 425, 84 S.Ct. at 938. The Court's statement in *Underhill* implies that disputes arising out of foreign acts of state should be resolved between governments. The act of state doctrine therefore also reflects deference to the Executive Branch, akin to the political question doctrine. See § 1, Reporters' Note 4. Where the act of a foreign state is challenged under international law, as in *Sabbatino*, the lack of consensus on the relevant content of that law has contributed to the Court's reluctance to entertain such a challenge. See § 712, Reporters' Note 1. Courts and commentators have stressed one or another of these bases for the doctrine, and the weight given to the different bases may determine possible limitations or exceptions. See Comments *b*, *c*, and *h*. For comparable policies in other countries, see Reporters' Note 12.

The act of state doctrine does not apply to challenges in courts in the United States to the validity or legality of acts of the United States Government.

b. Scope of act of state doctrine and exceptions. In the principal contemporary formulation of the doctrine, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), Justice Harlan wrote:

> [R]ather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

376 U.S. at 428, 84 S.Ct. at 940, 11 L.Ed.2d at 823–24.

The *Sabbatino* case involved property taken by the government of a recognized state within its own territory, and the legal challenge

to the taking was founded on a principle of customary international law as to which there was substantial controversy, not on a treaty or other unambiguous agreement. The Court said "we decide only . . ." the kind of case before it, and it is not clear whether it intended to limit application of the act of state doctrine to situations in which all of the conditions listed are present. The applicability of the doctrine where one or more of those conditions is not present should be determined in the light of the reasons for the doctrine. See Comment *a*.

As of 1987, the Supreme Court had not passed on the applicability of the doctrine to an act of a foreign government in respect of property outside that state's territory, to an act of a government not recognized by the United States, to an act alleged to violate a provision of a treaty or other unambiguous agreement, or a principle of customary law not in dispute. Since *Sabbatino*, the Supreme Court has not had occasion to apply the doctrine to a case not involving the taking of property, as it had done in *Underhill*.

Lower courts have been unanimous in holding that the act of state doctrine does not apply to a taking by a foreign state of property outside of its territory at the time of taking, but have been divided as to how the territorial limitations should be applied to intangible property. See Reporters' Note 4. The doctrine has been held inapplicable in the context of a challenge to a taking by a foreign state alleged to be in violation of a treaty between the United States and that state. See Reporters' Note 5. In *Sabbatino*, the Court stressed that the principles of international law on which the challenge to the foreign state's act was based were in sharp dispute, 376 U.S. at 428–30, 84 S.Ct. at 940–941, 11 L.Ed.2d at 824–25, see § 712, Reporters' Note 1; it has been argued that the doctrine was not intended to preclude review of an act of a foreign state challenged under principles of international law not in dispute, but as of 1986 no such case had been decided. No post-*Sabbatino* case has considered application of the doctrine to acts by an unrecognized state or government. A divided Supreme Court has held that the doctrine would not preclude a counterclaim against the foreign state in certain circumstances. See Reporters' Notes 2 and 9.

c. Applicability of act of state doctrine to cases not involving expropriation. The *Sabbatino* case involved a taking of private property, and the act of state doctrine has been applied predominantly to such acts, whether challenged by claims to title to the property taken or claims for compensation for the taking. Challenges in United States courts to other types of acts by foreign states may also bring the doctrine into play. Compare *Underhill*, Comment *a*, and