ABHANDLUNGEN / ARTICLES

Legal Rules for the International Waste Trade

The Implementation of the Basel Convention in Japan and the EU

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In principle, transboundary movements of (hazardous) wastes and the control of such movements through legal instruments are not new issues. There have been numerous international waste scandals since the 1970s.[1] Against this background, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention, BC)[2] was adopted in 1989 and entered into force in 1992. Since then, it has served as the international legal framework for issues relating to transboundary waste shipments. The Parties to the Convention fill this framework through national law – or in the case of the European Union (EU) and its Member States, predominantly through EU law. This results in a regulatory system that has been well established for more than three decades.

Nevertheless, the legal problem of transboundary waste shipments has again become the subject of increased attention in recent years. One reason for this renaissance is the linkage of the Basel Convention – and subsequently other waste shipment law regimes – with the issue of (marine) plastic pollution. Plastic wastes were traditionally not perceived as materials requiring movability restrictions. Consequently, they were not covered by the Basel Convention. However, this changed with a decision by the 14th Conference of the Parties in May 2019 – the so-called Plastic Amendment.[3]

Significant for this development was a "seismic event"[4] which caused enormous distortions in the international plastic waste market: China, formerly by far the largest importer of plastic wastes,[5] notified the World Trade Organization (WTO) in July 2017 that it would forbid the import of 24 waste categories.[6] As a result, there was a sudden ban on imports of important plastic waste types such as polystyrene (PS), polyethylene (PE), polyvinyl chloride (PVC), and polyethylene terephthalate (PET) to China

1 For notable examples, see D. P. HACKETT, An Assessment of the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal, American University Journal of International Law and Policy 5 (1990) 291, 295–297; J. KRUEGER, International Trade and the Basel Convention (1999) 10–11; C. OKEREKE, Global Justice and Neoliberal Environmental Governance: Ethics, Sustainable Development and International Co-operation (2008) 89–90.

2 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22 March 1989, 1673 U.N.T.S. 57 (entered into force 5 May 1992).

3 Decision BC-14/12, Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on the Work of its Fourteenth Meeting, UNEP/CHW.14/28 (2019) 57–58. For the classification of plastic wastes under the Basel Convention before and after the Plastic Amendment, see Section V.1. below.

4 K. O'NEILL, Waste (2019) 7.

5 A. L. BROOKS/S. WANG/J. R. JAMBECK, The Chinese Import Ban and its Impact on Global Plastic Waste Trade, Science Advances 4 (2018) eaat0131, 1.

from the beginning of 2018.[7] This had a considerable impact on the global waste trade: Already in 2018, it became clear that plastic waste exports were now flowing to other target regions instead of China.[8] Some middle-income countries in Southeast Asia, such as Thailand, Vietnam, Malaysia, and Indonesia, responded to this sudden increase and the resulting environmental problems by enacting their own import restrictions.[9]

At the level of international law, the Parties to the Basel Convention reacted in 2019 by adopting the aforementioned Plastic Amendment. They decided to consider many plastic wastes as "wastes requiring special consideration" from 2021 and therefore include them in the scope of the Convention as "other wastes" for the first time.[10] One result is that the transboundary shipment of these plastic wastes is now subject to the prior informed consent (PIC) procedure prescribed by Article 6 BC.[11]

Another significant event took place in the same year: In 2019, the so-called Ban Amendment to the Basel Convention reached the necessary number of ratifications and finally entered into force long after being adopted in 1995. It established a ban on shipments of hazardous waste from members of the OECD, the EU, and Liechtenstein to all other countries.[12]

With the Basel Convention, the international community has already agreed on common answers to the question of under which circumstances transboundary waste shipments should be permissible. Nevertheless, to a large extent the Convention relies heavily on its implementation by the Parties. In part, it contains very concrete provisions, such as specifications

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6 World Trade Organization, G/TBT/N/CHN/1211, Notification of 18 July 2017, online: *https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBTN17/CHN1211.pdf.*

7 This was subsequently supplemented by further measures. For example, China established extremely strict contamination thresholds for still permissible waste imports from March 2018, see World Trade Organization, G/TBT/N/CHN/1233, Notification of 15 November 2017, online: *https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/TBTN17/CHN1233.pdf.*

8 C. WANG/L. ZHAO/M. K. LIM/W.-Q. CHEN/J. W. SUTHERLAND, Structure of the Global Plastic Waste Trade Network and the Impact of China's Import Ban, Resources, Conservation & Recycling 153 (2020) 104591, 9–11.

9 Y. MORITA/S. HAYASHI, Proposals to Strengthen Japan's Domestic Measures and Regional Cooperation on Stable and Environmentally Sound Plastic Scrap Recycling: Response to China's Ban on Imports of Plastic Scrap, Institute for Global Environmental Strategies Policy Brief 41 (2018) 5.

10 For the contents of the Plastic Amendment, see Section V. below.

11 For details on the PIC procedure, see Section I. below.

12 Decision III/1, Decisions Adopted by the Third Meeting of the Conference of the Parties to the Basel Convention, UNEP/CHW.3/35 (1995) 1–2. For details on the Ban Amendment, see Section II.4. below.

for the PIC procedure. But even the PIC procedure is carried out without any significant involvement of international institutions. Whether and how it is enforced largely depends on the States of export, import, and, if applicable, transit.

Of special relevance is the implementation by those countries that are involved in many shipments. Looking at the prominent example of plastic wastes, two of the most important states of export are Germany and Japan. In 2021, Germany was the world's largest exporter of plastic waste by trade value. After the United States, which has signed, but not ratified the Basel Convention, Japan was the third largest state of export.[13] Among the Parties to the Basel Convention, Germany and Japan were thus the largest exporters of plastic waste. Their implementation of the Basel Convention is therefore of particular interest.

This article will compare core aspects of the implementation of the Basel Convention by the EU Member States, using the example of Germany on the one hand and Japan on the other. The article aims to provide insights on four main issues:

Firstly, what (permission) procedures govern waste exports from the EU and from Japan, and what is characteristic of the implementation of the Basel Convention in both jurisdictions? *Secondly*, how is "waste" defined in the EU and in Japan and how does this affect the respective waste shipment laws? *Thirdly*, what are the rules for the re-import of illegally exported wastes in both jurisdictions? And, *fourthly*, how do the EU and Japan implement the Plastic Amendment and how do they apply these new rules on plastic waste?

I. THE BASEL CONVENTION AS THE COMMON BASIS

Starting in the 1980s, various factors gave rise to growing public attention regarding the phenomenon of transboundary waste shipments. The amount of waste generated in industrialized countries increased. At the same time, the management (particularly of hazardous wastes) became subject to stricter regulations, and opposition to new treatment facilities grew, leading to higher costs for disposal and recovery. The result was an economic incentive to shift disposal to countries with lower wages and softer environmental standards.[14] Whereas transboundary waste shipments had mainly taken place among industrialized states until then, in the 1980s developing countries and states of the (then) Eastern Bloc increasingly took over the

13 UN Comtrade Database, Trade value of exports of HS code 3915 (waste, parings and scrap of plastics) to countries worldwide in 2021.

14 KRUEGER, *supra* note 1, 10.

role of importers of hazardous wastes.[15] As a result, there were serious cases of improper and environmentally harmful disposals in the countries of import, attracting international attention.[16]

The international regulation of waste shipments began in the 1980s with initiatives in the OECD and the then European Economic Community (EEC). Negotiations for a global treaty under the auspices of the United Nations Environment Programme (UNEP) were initiated in 1987 and finally led to the adoption of the Basel Convention on 22 March 1989 and its entry into force on 5 May 1992.[17] Through subsequent accession, approval, or ratification, Japan as well as the EU and its Member States became Parties to the Convention.[18]

As of now, the Basel Convention has been ratified by more than 180 countries and the EU. The only major industrialized country refusing ratification – despite having signed the Convention – is the United States.[19] The Convention can be considered the most important legal instrument on international waste trade.[20]

The scope of the Convention covers "hazardous wastes" (Article 1(1) BC) and "other wastes" (Article 1(2) BC) – provided that they are the subject of transboundary movement. These two central terms are defined by reference to a system of lists in the annexes of the Convention: The classification as "hazardous wastes" is essentially determined by Annex VIII BC (a list of wastes generally considered hazardous) and Annex IX BC (a list of wastes generally not considered hazardous).[21] "Other wastes" are defined

15 H. E. OTT, Umweltregime im Völkerrecht: Eine Untersuchung zu neuen Formen internationaler institutionalisierter Kooperation am Beispiel der Verträge zum Schutz der Ozonschicht und zur Kontrolle grenzüberschreitender Abfallverbringungen (1998) 72–74.

16 See the references in note 1.

17 KRUEGER, *supra* note 1, 22–31; Secretariat of the Basel Convention, History of the Negotiations of the Basel Convention, online: *http://www.basel.int/TheConvention/Overview/History/Overview/tabid/3405/Default.aspx.*

18 Japan acceded to the Convention on 17 September 1993, the then European Community approved the Convention on 7 February 1994, Germany ratified the Convention on 21 April 1995. The Convention entered into force 90 days after the deposit of the respective instrument. For a current overview of the Parties, including signature and ratification status, see Secretariat of the Basel Convention, Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, online: *http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx.*

19 For details on the failure of the United States to ratify, see J. CLAPP, Toxic Exports: The Transfer of Hazardous Wastes from Rich to Poor Countries (2001) 55.

20 J. ALBERS, Responsibilty and Liability in the Context of Transboundary Movements of Hazardous Wastes by Sea (2015) 91.

by reference to Annex II BC; until the Plastic Amendment added certain plastic wastes to this list, it consisted of only two entries, namely household wastes and residues from their incineration.[22] Despite its misleading name, the category of "other wastes" must therefore not be misinterpreted to mean *all* other wastes. Rather, it encompasses only those expressly listed in Annex II BC.

Apart from the subsequent Ban Amendment[23] and a few initial absolute movement bans, the Basel Convention originally focused on a formal control mechanism or a "prima facie prohibition allowing for exceptions",[24] rather than setting substantive standards on the permissibility of certain movements. This control mechanism is the aforementioned PIC procedure.

Article 4(1)(c) BC prohibits any export without the written consent of the state of import. The procedure leading to such consent is detailed by Article 6 BC, addressing the implementation of the PIC procedure by states of export, import, and, if applicable, transit. The procedure means that transboundary waste shipments must no longer be carried out in a mere two-party relationship between private actors, i.e., the exporter and the importer. Instead, the obligatory participation of the authorities of the states of export and import creates (at least) a four-party relationship.[25] The effectiveness of this procedural approach, which leaves the assessment of the legitimacy of a shipment to the state of import, relies on the capacities of this state.[26] The Convention restricts itself to two instruments for the enforcement of the PIC procedure. The first is the State of export's re-import

21 Originally, the classification as "hazardous wastes" required that a material belonged to one of the waste streams or waste components listed in Annex I BC, unless it did not possess any of the hazardous characteristics listed in Annex III BC. This definition was perceived as too vague and abstract for practical application; see K. KUMMER, Transboundary Movements of Hazardous Wastes at the Interface of Environment and Trade (1994) 38–39. Therefore, an amendment in 1998 added references to the new and more detailed Annexes VIII, IX BC, see Decision IV/9, Report of the Fourth Meeting of the Conference of the Parties to the Basel Convention, UNEP/CHW.4/35 (1998) 18–30.

22 Entries Y46 and Y47 Annex II BC.

23 For details on the Ban Amendment, see Section II.4. below.

24 M. BOTHE, International Regulation of Transboundary Movement of Hazardous Waste, German Yearbook of International Law 33 (1990) 422, 424.

25 *Ibid.*

26 See M. GROSZ, Sustainable Waste Trade under WTO Law: Chances and Risks of the Legal Frameworks' Regulation of Transboundary Movements of Wastes (2011) 152–153. On doubts about the suitability of the PIC procedure to protect developing countries from unwanted waste imports, see also K. POPE, Global Waste Management: Models for Tackling the International Waste Crisis (2020) 278–279.

duty in the event of violations.[27] The second instrument is the obligation of the Parties to criminalize and punish illegal traffic.[28]

The system of the Basel Convention is partially modified for shipments of waste for recovery (i.e., not for disposal) between OECD member countries by OECD Decision C(2001)107.[29] The OECD countries agreed to, inter alia, soften the PIC procedure by allowing tacit consent. Most importantly however, the Decision makes shipments between the United States and other OECD member states, such as Japan and Germany, possible by applying Article 11 BC. Technically, such shipments would be prohibited as movements between Parties and non-Parties to the Convention according to Article 4(5) BC.[30]

II. Characteristics of the Waste Shipment Laws in Japan and the EU

As described, the Basel Convention requires its Parties to enact national waste shipment legislation, including the establishment of a PIC procedure. Such legislation exists also in Japan and the EU Member States. Looking at the example of Germany, the central legislative decisions are made at EU level according to the Waste Shipment Regulation (WSR),[31] which is directly applicable. As in the other Member States, the national Waste Shipment Act (AbfVerbrG)[32] only serves a supplementary role in Germany. In Japan, on the other hand, no union comparable to the EU exists. Therefore, legisla-

27 Articles 8, 9(2) BC. For details, see Section IV.1. below.

28 Articles 4(3), 4(4), 9(5) BC. See A. Boyle/C. Redgwell, Birnie, Boyle & Redgwell's International Law and the Environment (4th ed., 2021) 492–493.

29 OECD, Decision of the Council Concerning the Revision of Decision C(92)39/FINAL on the Control of Transboundary Movements of Wasted Destined for Recovery Operations, C(2001)107/FINAL (2001).

30 On the problem of the conformity of the OECD decisions with the Basel Convention, see K. Kummer, International Management of Hazardous Wastes: The Basel Convention and Related Legal Rules (1995) 165–169.

31 Regulation (EC) No. 1013/2006 of the European Parliament and of the Council of 14 June 2006 on Shipments of Waste, OJ 2006 L 190, 1 [WSR]. The WSR is currently under revision. The European Commission issued a proposal on a new regulation in November 2021. As of August 2023, the revision process is still underway, see European Parliament, "Revision of the EU's Waste Shipment Regulation" (11 January 2023), online: *https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)729330.* This article therefore refers to the WSR currently in force, as amended by Commission Delegated Regulation (EU) 2020/2174 of 19 October 2020.

32 Abfallverbringungsgesetz vom 19. Juli 2007 [Waste Shipment Act of 19 July 2007], BGBl. 2007 I, 1462.

tive decisions are made at national level under the so-called *Bāzeru-hō* (Basel Act)[33] and the *Haiki-butsu shori-hō* (Waste Management Act, WMA).[34]

For both Germany and for Japan, the requirement under international law to establish a system for the control and authorization of certain waste shipments is essentially fulfilled. However, despite the common basis of the Basel Convention, a comparison reveals remarkable differences between the waste shipment laws of both jurisdictions.

1. The Role of the Basel Convention for Japan and the EU

Compared to the situation in Europe, transboundary waste shipments became a policy issue in Japan only later. This delay also corresponds to a different role of the Basel Convention in the development of European and Japanese waste shipment laws.

Looking at the Federal Republic of Germany, waste exports did not play a significant role in practice or in law until the 1970s. Generally, waste could be disposed of locally without any major obstacles, so there were few incentives for shipments over longer distances.[35] However, at the beginning of the 1980s the issue of transboundary waste shipments received major public attention in Europe through the Seveso disaster in Italy and the temporary disappearance of the resulting toxic waste.[36] The subsequent regulation of waste shipments in Germany was largely shaped by EEC law: The first act addressing the problem through European law was Directive 84/631/EEC.[37] It prescribed a notification procedure for shipments of hazardous waste between EEC Member States. After amendment in 1986,[38] the directive stipulated that prior consent also must be obtained for exports to third countries.[39]

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33 特定有害廃棄物等の輸出入等の規制に関する法律 *Tokutei yūgai haiki-butsu-tō no yushutsu'nyū-tō no kisei ni kansuru hōritsu* [Law for the Control of Export, Import, etc. of Specified Hazardous Wastes, etc.], Law No. 108/1992.

34 廃棄物の処理及び清掃に関する法律 *Haiki-butsu no shori oyobi seisō ni kansuru hōritsu* [Waste Management and Public Cleansing Act], Law No. 137/1970.

35 B.-A. SZELINSKI/S. SCHNEIDER, Grenzüberschreitende Abfallverbringungen (1995) 9–10.

36 On the Seveso disaster, see V. P. NANDA/B. C. BAILEY, Nature and Scope of the Problem, in: Handl/Lutz (eds.), Transferring Hazardous Technologies and Substances: The International Legal Challenge (1989) 3.

37 Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the Community of transboundary movements of hazardous waste, OJ 1984 L 326, 31.

38 Council Directive 86/279/EEC of 12 June 1986 amending Directive 84/631/EEC on the supervision and control within the Community of transboundary movements of hazardous waste, OJ 1986 L 181, 13.

39 Article 3(1) and 3(4) Directive 84/631/EEC as amended by Directive 86/279/EEC.

Together with the efforts in the OECD, European law also influenced the Basel Convention: For example, Directive 84/631/EEC served as a model for parts of the Convention.[40] The EEC reacted to the adoption of the Convention by replacing the Directive with the directly applicable[41] Regulation (EEC) No. 259/93.[42] For the first time there was now a European Waste Shipment *Regulation*. It was replaced in 2006 – again in response to amendments to the Basel Convention and OECD decisions[43] – by the Waste Shipment Regulation (WSR), which is still in force today.

In Japan, however, the historical development was different: At the time of the adoption of the Basel Convention, waste exports from Japan – at least for disposal – were not yet a significant phenomenon. KOJIMA attributes this to the fact that measures to combat illegal disposal *within* Japan were pushed forward only from 1991. Before that point, illegal waste disposal within Japan was so easy that there was hardly any incentive to export it.[44] Especially in comparison with Europe, one might add that exports from or imports to the islands of Japan were simply a less feasible option in economic and practical terms. Subsequently, however, cases became known in which waste was exported from Japan for recycling and improperly treated abroad.[45]

This initially low importance of waste shipments in Japan until the 1990s and the low public attention are also reflected in the history of Japanese waste shipment law: In contrast to the EEC, there was simply no national waste shipment law in Japan until the Basel Convention entered into force – rather, it was created only in response to it. Also, in the 1980s, the Japanese government took a passive position on the issue at the international level: When the OECD agreed on a notification procedure for the first time in 1984, Japan did support this decision.[46] However, unlike the EEC, which implemented the OECD rules by codifying Directive 84/631/EEC, Japan reacted only with a mere ministerial notification[47] and informal measures of

40 KUMMER, *supra* note 30, 83.

41 See Section II.2. below.

42 Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, OJ 1993 L 30, 1.

43 Recital 5 WSR.

44 M. KOJIMA [小島道一], バーゼル条約とバーゼル法 [Basel Convention and Basel Act], 環境と公害 Kankyō to kōgai 47 (2018) 47, 47.

45 *Ibid.*

46 Decision-Recommendation of the Council on Transfrontier Movements of Hazardous Waste C(83)180/FINAL, OECD (1984).

47 産業廃棄物に係る国際移動の適正な実施について *Sangyō haiki-butsu ni kakaru kokusai idō no tekisei na jisshi ni tsuite* [Regarding the Appropriate Execution of

行政指導 *gyōsei shidō* [administrative guidance] vis-à-vis potential importers and exporters.[48] When the OECD then agreed on detailed requirements for transfers to non-OECD countries in 1986,[49] Japan even made a reservation to this decision. The Japanese government claimed that import and export were rare and already dealt with sufficiently by administrative guidance. Therefore, Japan refused to codify a national waste shipment law. Arguably, it was simply not foreseen at this point that transboundary waste shipments would become significant for the insular state. Japan abandoned this passive attitude only years later when it joined the Basel Convention.[50]

After accession, the Basel Convention entered into force for Japan on 16 December 1993. The Japanese Basel Act also entered into force on the same day. 16 December 1993 was also the date of entry into force of an amendment to the Waste Management Act (WMA), stipulating the principle of domestic disposal.[51] Both the Basel Act and the amendment to the WMA are clearly a reaction to the adoption of the Basel Convention and were intended to serve its implementation.

While in European law the Basel Convention merely provided an impetus for a revision of rules that had already existed for nearly one decade, the implementation of the Convention was the compelling reason for Japan to codify national laws on waste shipments for the first time. European law was therefore able to influence the contents of the Convention in combination with OECD efforts. In sharp contrast, Japan's role at the international level until the adoption of the Convention was a very passive one.

2. The EU-wide Approach vs. the National Approach

Legislative decisions on waste shipments are largely made at EU level for Germany and the other Member States, so that national law only serves supplementary purposes. However, in Japan, in the absence of an EU equivalent, all these decisions are made at the national level.

The European WSR takes the form of a regulation, although directives requiring national implementation were much more common in EU envi-

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International Movements of Industrial Waste], Communication No. 16 of the Ministry of Health and Welfare, 18 March 1985.

48 H. KIKUCHI [菊池英弘], バーゼル条約締結に至る政策形成過程に関する考察 [Study on the Policymaking Process Leading to the Conclusion of the Basel Convention], 長崎大学総合環境研究 Nagasaki daigaku sōgō kankyō kenkyū 13 (2011) 1, 2.

49 Decision-Recommendation of the Council on Exports of Hazardous Wastes from the OECD Area C(86)64/FINAL, OECD (1986).

50 KIKUCHI, *supra* note 48, 2.

51 For details on the Basel Act and the export provisions of the WMA, see Section II.3. below.

ronmental and waste law. As a regulation, it is directly applicable in the Member States without the need for implementation.[52] Nevertheless, the WSR cannot be carried out in isolation from provisions of national law. It explicitly obliges the Member States to take implementing measures: For example, Article 50(1) WSR requires them to lay down rules on penalties for WSR infringements. Also, according to Article 53 WSR, the Member States must designate competent authorities. The role of Member State law is therefore essential, but at the same time it is very limited due to the extensive harmonization of EU waste shipment rules brought about by the WSR.

In Japan, on the other hand, the main legislative decisions are taken at the national level by means of the Basel Act and the WMA. The task of the Japanese legislature is less complex: No consideration had to be given to anything comparable to the EU Single Market. Whereas, for example, a shipment from Germany to France is transboundary but still intra-EU, such situations are impossible in Japan. Apart from the differentiation between OECD and non-OECD states, from the Japanese perspective every foreign state is a "third country". The WSR, on the other hand, makes a fundamental distinction between intra-EU shipments and shipments involving third countries, attaching stricter conditions to the latter. Such differentiations are unnecessary in Japan.

Additionally, Japan can necessarily only play the role of *either* state of export *or* of import. The WSR must seek a compromise between the interests of the Member States of export and import in cases of intra-EU shipments. In contrast, the Japanese legislature can, within the limits of international law, exclusively take Japanese interests into account. One example is the rules for re-imports of illegally shipped waste outlined below, which are much less complex in Japanese law than in EU law.[53]

3. The Comprehensive EU Law vs. the Japanese Double-track Law

a) The EU's Comprehensive Waste Shipment Law: The Procedures of the Waste Shipment Regulation

In EU law, the scope of the WSR in principle covers all transboundary shipments of waste involving a Member State, without any regard to the type or properties of the waste or the treatment method.[54] As a result, it is considerably broader than the scope of the Basel Convention. Unlike the

52 Treaty on the Functioning of the European Union, OJ 2012 C 326, 47 (TFEU), Article 288(2).

53 For details, see Section IV. below.

54 Article 1(2) WSR.

Convention, the WSR covers not only shipments of "hazardous" or "other wastes", but in principle shipments of *all* wastes.[55]

In addition, according to the broad, operation-based definition of waste in the WSR,[56] which covers not only valueless materials, also wastes with a positive market value fall within the scope of the WSR. This fact makes an appropriate balancing of different interests much more complicated.

In principle, any shipment within the scope of the WSR, unless prohibited, is subject either to the notification procedure of Articles 4–17 WSR ("procedure of prior written notification and consent") or only to the general information requirements of Article 18 WSR. The notification procedure makes the consent of the authorities of the states of export and import a prerequisite for the shipment. With the notification procedure, the WSR therefore establishes a PIC procedure in accordance with the requirements of the Basel Convention. In the case of shipments that are only subject to the general information requirements under Article 18 of the WSR, there is no consent requirement and generally no other administrative procedure. Still, certain obligations are imposed on the parties involved in a shipment, compliance with which can be monitored by the authorities.

b) Japan's Double-track Waste Shipment Law

Whereas in the EU, with the WSR, one single regulation covers all transboundary shipments, in Japan the export of wastes can be subject to two entirely different regimes: the Basel Act on the one hand and the Waste Management Act (WMA) one the other. One can therefore speak of a double-track approach in Japanese waste shipment law.

Both the Basel Act and the WMA make the export of (certain) wastes subject to an administrative decision. In the case of the Basel Act, this decision is called 承認 *shōnin* [approval]; in the case of the WMA, it is referred to as 確認 *kakunin* [confirmation]. The two systems are not mutually exclusive. The consequence is that several situations are possible regarding the export of a certain material: firstly, an approval requirement only under the Basel Act; secondly, a confirmation requirement only under the WMA; thirdly, a double approval and confirmation requirement under both laws; and fourthly, no requirement at all under either of the two laws, i.e., free movability under waste shipment law.

The two regimes have different scopes: The provisions of the WMA apply to 廃棄物 *haiki-butsu* [wastes], while the Basel Act applies to 特定有害廃

55 For the much narrower scope of application of the Japanese Basel Act, see Section II.3.b)aa) below.

56 The WSR's definition of waste will be discussed in detail, see Section III.2.b) below.

棄物等 *tokutei yūgai haiki-butsu-tō* [specified hazardous wastes, etc.]. The different waste concepts of the Basel Act and the WMA will be examined in detail below.[57]

aa) The Approval Procedure of the Basel Act

For "specified hazardous wastes, etc.", Article 4(1) Basel Act stipulates that their export requires an approval. However, the Basel Act does not establish an original procedure here and instead refers to Article 48(3) Foreign Exchange Act,[58] thereby applying the procedure laid down there for export approvals to be issued by the Minister of Economy, Trade and Industry (hereinafter: Minister of Economy).

The procedure is initiated through an application by the exporter to the Minister of Economy. However, the required prior informed consent (PIC) of the states of import and transit is not obtained by the Minister of Economy, but by the Minister of the Environment. While the Minister of Economy is the addressee of the application and takes the formal decision to grant the approval or not to grant the approval, intermediary communication with other states is carried out by the Minister of the Environment.

In certain constellations, the Minister of the Environment must also assess the environmental protection measures before an export approval can be granted. The subject of this environmental assessment is whether all "necessary measures to prevent environmental pollution are taken".[59] Only exports for recovery to OECD countries can be authorized without such assessment.[60]

The scope of the Basel Act is clearly designed to emulate the scope of the Basel Convention as precisely as possible. This is in accordance with the purpose of the Basel Act to "ensure accurate and smooth implementation"[61] of the Convention. However, this also means that the scope of the Basel Act does not go beyond that of the Convention. This is an important difference from the EU, where the WSR creates a set of regulations that not only implements the Convention but covers *all* transboundary waste shipments. In

57 See Section III.3. below.

58 外国為替及び外国貿易法 *Gaikoku kawase oyobi gaikoku bōeki-hō* [Foreign Exchange and Foreign Trade Act], Law No. 228/1949.

59 Article 4(3) Basel Act.

60 Article 4(2) Basel Act in conjunction with Articles 1, 2, Annex 1 of the 特定有害廃棄物等の輸出入等の規制に関する法律施行規則 *Tokutei yūgai haiki-butsu-tō no yushutsu'nyū-tō no kisei ni kansuru hōritsu shikō kisoku*, Joint Ordinance of the Prime Minister's Office, the Ministry of Health and Welfare, and the Ministry of International Trade and Industry No. 1/1993. However, shipments of lead accumulators require an environmental assessment even when exported to OECD countries.

61 Article 1 Basel Act.

contrast, Japan's Basel Act, just like its colloquial name suggests, remains a pure Basel implementation law instead of a general waste shipment law.

Like the WSR in the EU, also the Japanese Basel Act establishes a PIC procedure meeting the requirements of the Basel Convention. Both the WSR and the Basel Act refer to or incorporate the Annexes of the Basel Convention. With slight modifications, they thereby distinguish between Basel wastes ("hazardous wastes" and "other wastes") and non-Basel wastes (non-hazardous wastes). While Basel wastes are subject to the respective PIC procedures, i.e., the notification procedure of the WSR and the approval procedure of the Basel Act, non-Basel wastes are exempt from these procedures. Unlike the European WSR, however, the Basel Act in principle establishes only one single type of procedure.[62] In the WSR, freedom from the notification procedure does not result in complete procedural freedom. For non-Basel wastes, EU law provides for at least the – albeit considerably milder – general information requirements of Article 18 WSR. Within the Japanese Basel Act, when wastes are not subject to the approval procedure, no other (less stringent) obligations apply. Instead, such non-Basel wastes are entirely outside of the scope of the Basel Act.

bb) The Confirmation Procedure of the Waste Management Act

In addition to the Basel Act, which *exclusively* addresses transboundary shipments, also the general Waste Management Act (WMA) contains certain provisions on this subject. The WMA establishes the principle of domestic disposal for all 廃棄物 *haiki-butsu* [wastes].[63] Like the Basel Act as a whole, the shipment regulations of the Waste Act are intended to implement the Basel Convention. However, the principle of domestic disposal also aims to protect domestic waste management and to prevent that waste generators evade their duties due to easy disposal options abroad.[64]

To concretize the principle of domestic disposal, a novel instrument was created in the form of export confirmation procedure. In contrast to the Basel Act, the WMA does not use the existing structures of the Foreign Exchange Act. Instead, it established a completely independent procedure.

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62 Within the approval procedure of the Basel Act, however, there can be differentiations depending on the type of waste and the purpose and destination of the shipment. This is due namely to the environmental assessment described in this Section.

63 Article 2-2(1) WMA.

64 一般廃棄物又は産業廃棄物の輸出の確認に係る審査基準等 *Ippan haiki-butsu mata wa sangyō haiki-butsu no yushutsu no kakunin ni kakaru shinsa kijun-tō* [Examination Criteria, etc. for the Confirmation of Export of General Waste and Industrial Waste], Communication No. 1808202 of the Ministry of the Environment, 20 August 2018.

Article 10(1) WMA makes the export of waste subject to a 確認 *kakunin* [confirmation] by the Minister of the Environment.[65] In addition, the provision also formulates the assessment criteria and thus the material prerequisites for this export confirmation: Inter alia, it requires in principle that the waste is either "difficult to be treated properly in Japan",[66] or that it is ensured that the waste will be "recycled" [再生利用 *saisei riyō*] in the state of import.[67] It must also be ensured that the method of management in the state of import does not fall below the standards for disposal in Japan.[68]

The assessment criteria under the export confirmation procedure of the WMA are similar to those of the environmental assessment of the Basel Act approval procedure. However, the notification and prior informed consent (PIC) of the state of import are *not* required. The WMA does not provide for such a procedural step. Assuming that all wastes covered by the Basel Convention are already covered by the Japanese Basel Act, this is not problematic from an international law perspective.

The role of the WMA export confirmation procedure is diminished by its narrow scope of application.[69] The WMA does not differentiate between hazardous and non-hazardous materials, but it employs a narrow and value-based definition of "wastes", which does not include valuable materials.[70] From 2011 to 2020 almost all wastes exported under the export confirmation procedure were of the same type (almost exclusively coal ash), for the same purpose (exclusively for use in cement production), and destined for the same countries (almost exclusively South Korea, Hong Kong and Thailand).[71] This can be explained by the fact that the WMA applies only to "wastes" i.e., only to worthless materials, while the export confirmation

65 This applies directly to the subcategory of 一般廃棄物 *ippan haiki-butsu* [general wastes]. Article 15-4-7(1) WMA prescribes the application also for the subcategory of 産業廃棄物 *sangyō haiki-butsu* [industrial wastes], so that in principle exports of all "wastes" are covered. Article 10(2) WMA formulates few exceptions.

66 Article 10(1)(1) WMA.

67 Article 10(1)(2) WMA in conjunction with Article 6-25(1) of the 廃棄物の処理及び清掃に関する法律施行規則 *Haiki-butsu no shori oyobi seisō ni kansuru hōritsu shikō kisoku*, Ordinance of the Ministry of Health and Welfare Ordinance No. 35/1971.

68 Article 10(1)(3) WMA.

69 J. TSURUTA [鶴田順], 国際環境枠組条約における条約実践の動態過程 [Dynamics of Convention Practice regarding International Environmental Framework Conventions], in: Shiroyama [城山]/Yamamoto [山本] (eds.), 環境と生命 [Environment and Life] (2005) 207, 224.

70 For a detailed discussion of the concept of waste in the WMA, see Section III.3.a) below.

71 The annual statistics of the Ministry of the Environment on imports and exports under the export confirmation procedure of the WMA are online: *http://www.env.go.jp/recycle/yugai/index4.html.*

generally requires recycling in the state of import. Coal ash simply seems to be one of the few materials combining worthlessness and recyclability.

4. The Lack of Export Bans in Japanese Law

The Basel Convention – in addition to its main instrument, the PIC procedure discussed above – also provides for certain movement bans. Arguably the most important of these prohibitions is the Ban Amendment: For many, the biggest shortcoming of the initial Convention was that it did not contain a ban on shipments of hazardous waste – if not between all states, then at least from industrialized countries to developing countries.[72] In the latter version, the 3rd Conference of the Parties created such a ban in 1995 through Article 4a BC. This provision prohibits shipments of hazardous wastes from the members of the OECD, the EU, and Liechtenstein to all other states. It covers waste both for disposal and for recovery. However, it was not until December 2019 that the Ban Amendment finally entered into force, when the necessary number of ratifications was reached following Croatia's ratification in September of the same year. Pursuant to Article 17(5) BC, the amendment applies only to those Parties that have ratified the amendment.[73] The EU did so as early as 1997; Germany followed suit in 2002. However, Japan has not ratified the amendment to date and is thus not bound by the Ban Amendment.

In the EU, the Ban Amendment is implemented directly through ban provisions in the WSR. The export from the EU of wastes *for disposal* is prohibited under Article 34(1) WSR.[74] The provision serves to implement the Convention.[75] Nonetheless, it applies to any type of waste, regardless of its listing in the annexes to the WSR. This means it also covers non-hazardous wastes, i.e., non-Basel wastes.

The export from the EU of wastes *for recovery* is subject to the prohibition of Article 36(1) WSR. Geographically, this ban applies to shipments to non-OECD third countries. This ban does not cover all types of waste, but only those explicitly listed. Interestingly, this list also includes "other

72 D. LANGLET, Prior Informed Consent and Hazardous Trade: Regulating Trade in Hazardous Goods at the Intersection of Sovereignty, Free Trade and Environmental Protection (2009) 84–86.

73 On the implications for the applicability of Article 4a BC between Parties that have ratified the Ban Amendment, Parties that have not ratified the Ban Amendment, and non-Parties, see GROSZ, *supra* note 26, 168–169.

74 An exception applies to the EFTA states of Iceland, Liechtenstein, Norway, and Switzerland, Article 34(2) WSR.

75 Commission proposal of 30 June 2003 for a Regulation of the European Parliament and of the Council on shipments of waste, COM(2003) 379 final, Explanatory Memorandum 4.2.6.

wastes" as defined in the Basel Convention.[76] In this way, the WSR goes beyond the requirements of the Ban Amendment.[77] Article 4a(2) BC, only requires a ban on shipments of "hazardous wastes", but not "other wastes". As a result of this autonomous extension to "other wastes", the ban of shipments from the EU to non-OECD countries after the entry into force of the Plastic Amendment also includes many plastic wastes.[78]

In Japanese waste shipment law, the situation is completely different: neither the Basel Act nor any of the waste shipment related ordinances contain any absolute prohibitions on shipments. In particular, the Basel Act does not prohibit the shipment of hazardous wastes from Japan to non-OECD countries. The Basel Act does differentiate in some regards according to whether a country of import is an OECD member state or not. However, this is done by easing the approval procedure for exports to OECD countries[79] and not, inversely, by tightening regulations or even banning shipments to non-OECD countries.

Japan has therefore not transposed the Ban Amendment into national waste shipment law. This is understandable insofar as Japan is not bound under international law to an amendment that it has not ratified. The failure to implement an export ban thus does not constitute a violation of the Basel Convention. However, the fact that the Japanese legislature completely refrains from abstract-general shipment bans stands in sharp contrast with the situation in Europe. The EU has not only ratified and implemented the Ban Amendment, but by extending the ban of Article 34(1) WSR to *all* wastes and by extending the ban of Article 36(1) WSR to "other wastes", it goes even beyond the requirements of Article 4a BC, which only prohibit shipments of "hazardous wastes".

III. The Different Concepts of "Wastes"

1. Possible Concepts of "Wastes"

The crucial role of the definition of "wastes" has already been mentioned during the examination of the procedural tools of European and Japanese

76 Article 36(1)(b) WSR in conjunction with Part 3 of Annex V WSR.

77 F. Zotz/E. de Bruijne/S. Fraunhofer/A. Oexle, Contributions to the further development of the EC Waste Shipment Regulation, Umweltbundesamt Texte 13/2021 (2021) 71.

78 For details on the classification of many plastic wastes as "other wastes" after the Plastic Amendment, see Section V.1. below.

79 For example, the environmental assessment of Article 4(2) Basel Act is waived in principle for shipments of waste to OECD countries for recovery, see Section II.3.a)aa) above.

waste shipment laws above.[80] As is the case for waste law in general, this question is also of fundamental importance for waste *shipment* law. At a first stage, any international or national waste regime has to decide which materials it considers "wastes". Only those materials will be included in the respective scope of application and subjected to certain rules.

A definition of "wastes" can be based on different concepts. GROSZ identifies three basic approaches used in waste shipment regimes: The first possibility is an operation-based approach that asks what operations a material is subjected to and classifies the material as waste or non-waste depending on this. Secondly, one can base the classification of materials as waste on their material composition – usually their property of being either hazardous or non-hazardous. I will refer to this as the material-based approach. Thirdly, one can ask whether a material has a (positive) economic value and use this criterion to distinguish between wastes and non-wastes. This will be referred to as the value-based approach.[81]

To illustrate these three approaches, one could formulate three possible basic definitions of waste. Firstly, according to the operation-based approach: 'Waste is what is disposed of.' Secondly, following the material-based approach: 'Waste is what is hazardous.' Thirdly, according to the value-based approach: 'Waste is what is worthless.'

Whether a specific material is considered waste according to these three approaches depends largely on the exact phrasing of a definition and its interpretation. However, the example of plastic waste illustrates how they can lead to completely different results: Many used plastics can be recovered or recycled in an economically lucrative way and are therefore traded at a positive price. An operation-based approach will nevertheless consider them waste, as they are regularly subject to recovery operations before they become a product again. A value-based approach, on the other hand, will generally lead to them not being classified as waste from the outset, in view of their positive price.

2. The Operation-based Approaches of International Law and EU Law

Arguably due to the close interrelations between the drafting process of the Basel Convention and the efforts at the OECD and the EEC/EU levels,[82] all these regimes follow principally similar concepts of waste. They all determine the waste status based on the operations to which a material is, should be, or must be subjected.

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80 See Section II.3. above.

81 GROSZ, *supra* note 26, 19–20.

82 On the influence of OECD and EEC efforts on the Basel Convention, see Section II.1. above.

a) The Basel Convention and the OECD Decision

For the Basel Convention, Article 2 No. 1 BC defines "wastes" as "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". The first part of this definition focuses on a subjective concept of waste (the actual disposal or the intention to dispose), while the second part opens the door to an objective concept of waste (the duty to dispose) by referring to national legislation.[83] Overall, the waste character of a material is thus determined by reference to the (disposal) operations to which the material is or should or must be subjected. The Basel Convention thus follows an operation-based approach.

The hazardousness or other properties of a material do not (yet) play a role at the level of the waste definition of Article 2 No. 1 BC. They only become relevant when, in a possible subsequent step, it is assessed whether wastes are to be classified as "hazardous wastes" or "other wastes". Only here, beyond the definition of the term "wastes", does an additional material-based approach come into play.

The value or valuelessness of a material is *not* relevant to the waste status under the Convention.[84] In particular, it does not prevent materials from being classified as wastes even if they are sold as secondary raw materials for a positive price.

Also, the waste definition of the OECD[85] is in line with the Convention. A mere terminological difference lies in the fact that the OECD definition differentiates between "disposal" and "recovery", whereas the Convention only speaks of "disposal" in a broader sense.[86] Apart from this, the OECD definition follows the example of the Basel Convention in substance. All the regimes of international waste shipment law relevant for OECD countries like Japan and Germany thus employ an operation-based approach.

b) The EU Waste Shipment Regulation

Article 2 No. 1 WSR refers to the Waste Framework Directive (WFD)[87] for definition of the term "waste". According to Article 3 No. 1 WFD, "waste" means "any substance or object which the holder discards, intends to dis-

83 BOTHE, *supra* note 24, 426–427.

84 G. ARGÜELLO, Marine Pollution, Shipping Waste and International Law (2020) 50.

85 OECD Decision C(2001)107, Chapter II, A. Definitions, Article 1.

86 According to Article 2 No. 4 BC, "disposal" means any operation listed in Annex IV BC. In substance, Annex IV BC lists those operations that are referred to as "disposal" or "recovery" in OECD Decision C(2001)107 and the WSR. "Disposal" in the Basel Convention is thus a broader term than in the OECD and EU regimes.

87 Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ 2008 L 312, 3 [WFD].

card or is required to discard". By adopting the waste definition of general EU waste law, the WSR also inherits the difficulties and legal uncertainties associated with this concept.

The scope of the term "waste" depends on the meaning of the term "to discard".[88] However, neither the WSR nor the WFD contain a further definition of this term. The vague concept of "to discard" and its openness to interpretation have been the subject of criticism.[89] In numerous decisions, the European Court of Justice (ECJ) has formulated various criteria for the scope of the concept of waste but does not commit itself to a positive definition. Instead, the ECJ emphasizes that whether a concrete material is waste "must be determined in the light of all the circumstances, regard being had to the aim of the [WFD] and the need to ensure that its effectiveness is not undermined".[90]

This article does not aim to provide an analysis of the extensive EU case law on the concept of "waste".[91] However, one important aspect must be emphasized for the purpose of comparison with Japanese waste shipment laws: valuable materials, too, can be "waste" under EU law. This is one of the reasons why the EU waste definition – in replacing the term "to dispose of" – made a shift in 1991 to the more neutral and less negatively connoted expression "to discard".[92] The purpose of this wording is to clarify that EU waste law should cover not only wastes for disposal but also wastes for recovery. [93] The ECJ had already established before that the concept of waste "does not presume that the holder disposing of a substance or an object intends to exclude all economic reutilization of the substance or object by others".[94] The Court expressly emphasized that substances and objects that have a commercial value also fall under the waste regime.[95]

In line with the definitions of the Basel Convention and the OECD, EU waste shipment law thus employs an operation-based waste definition. It

88 ECJ, Judgment of 18 December 1997 – C-129/96 (*Wallonie*), ECLI:EU:C:1997:628, para. 26.

89 GROSZ, *supra* note 26, 34–35.

90 ECJ, Judgment of 15 June 2000 – C-418/97, C-419/97 (*ARCO Chemie*), ECLI:EU:C:2000:318, para. 88.

91 For details on the concept of "waste" in EU law, see G. VAN CALSTER, EU Waste Law (2nd ed., 2015) 5–39; GROSZ, *supra* note 26, 31–44.

92 The terminological change from "to dispose of" to "to discard" was made when the initial Directive 75/442/EEC was revised by Directive 91/156/EEC.

93 VAN CALSTER, *supra* note 91, 10.

94 ECJ, Judgment of 28 March 1990 – C-206/88, C-207/88 (*Vessoso and Zanetti*), ECLI:EU:C:1990:145, para. 13.

95 ECJ, Judgment of 25 June 1997 – C-304/94, C-330/94, C-342/94, C-224/95 (*Tombesi*), ECLI:EU:C:1997:314, para. 52.

has therefore always regulated not only the shipment of "worthless" materials but also the shipment of valuable and recyclable secondary resources.

3. The Different Waste Concepts of Japanese Law

It has been shown that in the EU, where the WSR covers all transboundary waste shipments under a single regime, there is only one (operation-based) definition of waste. By contrast, in Japan transboundary shipments can be subject to two different regimes, as described above: the Basel Act on the one hand and the Waste Management Act (WMA) on the other. It will be shown that both systems define their respective scopes of application independently and follow different waste concepts.

a) The Value-based Approach of the Waste Management Act

For the purposes of the WMA, the term "waste" is defined by Article 2(1) WMA as follows: "refuse, bulky refuse, ashes, sludge, excreta, waste oil, waste acid and alkali, carcasses and other filthy and unnecessary matter…".

The nine materials listed at the beginning of the definition merely serve as examples. The core of the definition of waste is therefore the pair of terms 汚物 *obutsu* [filthy matter] and 不要物 *fuyō-butsu* [unnecessary matter].[96] Today, however, only the interpretation of the term "unnecessary matter" is relevant, while the alternative "filthy matter" no longer has any independent meaning in practice.[97] Although the definition of Article 2(1) WMA may seem complex at first glance, it can thus be reduced to an extremely succinct formula: 'waste is unnecessary matter.' This leads to a situation similar to EU law, where the question of waste status is ultimately answered depending on the understanding of the term "to discard".[98] In a comparable way, the core question of Japanese waste law is reduced to the interpretation of the term "unnecessary matter".

It is evident already from the definition of waste in Article 2(1) WMA that Japanese waste law, even at the outset, chooses a completely different approach than international or European waste law: in contrast to the Basel Convention and the WSR, the Japanese WMA does not link waste to any (disposal or recovery) procedures, focusing instead on the unnecessariness or superfluousness of an object. Already the wording thus points towards a value-based approach instead of an operation-based one.

One fundamental ruling for the interpretation of the concept of waste is the おから決定 *Okara kettei* [Okara Decision] of the Supreme Court from

96 Y. KITAMURA [北村喜宣], 環境法 [Environmental Law] (5th ed., 2020) 449.
97 *Ibid.*, 452.
98 See Section III.2.b) above.

1999.[99] In a criminal case, the Court had to deal with the question whether *okara*, a by-product of the production of soy milk and tofu, is waste in the sense of Article 2(1) WMA. In part, although only to a negligible extent in the specific case decided by the Court, *okara* is traded as food or animal feed with a positive market value.

For the interpretation of the term "unnecessary matter" – and thus of the term "waste" – the Supreme Court used the following definition: "an object that has become unnecessary for the business[100] because they can neither use it themselves nor transfer it to someone else against payment".[101] The Court then proceeds to specify five criteria to assess whether this is the case: the characteristics of the object, the circumstances of output, the usual form of treatment, the presence or absence of a commercial value, and the intention of the business. An added "etc." shows that the Court does not deem this list exhaustive. This set of criteria was also adopted by the government when it amended its official interpretation of the term "waste" following the *Okara* Decision.[102]

Here, a clear difference from EU law becomes apparent: The Supreme Court defines wastes by asking whether they can be transferred "against payment", i.e., whether they are valuable. The five criteria concretizing this definition do contain material-related aspects (e.g., "the characteristics of the output") and operation-related aspects (e.g., the "usual form of treatment"), but here also the "presence or absence of a commercial value" stands as a decisive criterion. The waste definition of the WMA is therefore to a large extent value-based.

b) The Operation-based Approach of the Basel Act

In contrast to its international role model (the Basel Convention), its European counterpart (the WSR), and Japan's general waste law (the WMA), the Basel Act does *not* contain an explicit definition of the term "waste". Neither does the Basel Act make any reference to the definition of "waste" in Article 2(1) WMA.

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99 Supreme Court, 10 March 1999, 刑集 Keishū 53, 339.

100 The specific case concerned industrial waste, so instead of speaking more generally of the 占有者 *sen'yū-sha* [possessor], the Supreme Court used the term 事業者 *jigyō-sha* [business].

101 In substance, this definition used by the Court is in accordance with the official government interpretation of the term that had existed since 1977, see KITAMURA, *supra* note 96, 452–454.

102 野積みされた使用済みタイヤの適正処理について *Nozumi sareta shiyō-zumi taiya no tekisei shori ni tsuite* [Regarding the appropriate management of used tires stored outside], Communication No. 65 of the Ministry of Health and Welfare, 24 July 2000.

Instead, the Basel Act links the application of its provisions to the existence of 特定有害廃棄物等 *tokutei yūgai haiki-butsu-tō* [specified hazardous wastes, etc.]. Accordingly, the term 廃棄物 *haiki-butsu* [waste] appears in the Basel Act almost exclusively as part of this longer fixed term and is rarely used in isolation.

The term "specified hazardous waste, etc." is legally defined by Article 2(1) Basel Act: The first basic prerequisite is that the items in question are "materials to be exported or imported for [disposal]".[103] Additionally, these materials must fall under one of the groups listed in Article 2(1)(1) a–e Basel Act. It is true that the term "specified hazardous waste, etc." is only used as a whole and is therefore also only defined as a whole. Nevertheless, it can be split up as follows: In substance, the element 'materials for disposal' can be seen as the definition of the term "waste" for the purposes of the Basel Act. Article 2(1)(1) a–e Basel Act then determines solely whether such "waste" is also a "specified hazardous" one. Even if the Basel Act does not contain an explicit definition of "waste", a concept of waste can thus be extracted in this way.

This concept of "waste" employed by the Basel Act differs considerably from that of the WMA: There is no reference to materials being "unnecessary" or to any other value-based criteria. Instead, following the example of Article 2 No. 1 BC, the decisive criterion is 処分 *shobun* [disposal] alone. The Basel Act thus assesses materials regardless of their value, so that even items with a positive market price can be covered.[104] Within the terminology introduced above, the approach of the Basel Act can thus be classified as operation-based.

In this way, the operation-based approach of international law finds its way into Japanese waste law. It is only this definition that makes it possible to meet the requirements of the Basel Convention as it also covers materials having a positive value. Such materials are not "waste" in the sense of the WMA and therefore are not subject to the export confirmation procedure pursuant to Article 10(1) WMA. If it was not for the operation-based definition of the Basel Act, they would consequently remain unregulated in Japanese waste shipment law.

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103 Article 2(1)(1) Basel Act. The term 処分 *shobun* [disposal] is defined in this provision by reference to the disposal procedures of Annex IV BC.

104 T. SEKINE [関根孝道], 有害廃棄物の越境移動と国際環境正義 [Transboundary Movements of Hazardous Wastes and International Environmental Justice], 総合政策研究 Sōgō seisaku kenkyū 18 (2004) 99, 111, fn. 34.

4. European and Japanese Concepts of Waste in Comparison

The Basel Convention and general EU waste law both define waste according to the operations to which a material is, should be or must be subjected. They thus adopt an operation-based approach. These definitions do not prevent the classification of valuable materials as waste. The European legislature was therefore able to integrate the WSR seamlessly into the existing EU waste law and simply refer to the concept of waste of Article 3 No. 1 WFD.

In contrast, Japanese waste law has traditionally employed a value-based approach and focuses on the "unnecessariness" of an object, especially whether the possessor can transfer it against payment. Therefore, the implementation of the Basel Convention was more complex for the Japanese legislature. Merely integrating new provisions on transboundary shipments into the existing WMA while retaining the value-based waste definition would not have been sufficient. Japan would not have been able to fulfil its obligations under international law.

Thus, under the influence of the Basel Convention, there was a split in Japanese waste law. While the newly created Basel Act employs an operation-based approach in accordance with the Convention, the pre-existing WMA and its waste shipment regulations continue to follow a value-based approach.

5. The Practical Consequences of the Differing Waste Definitions

As regards exports of Basel wastes, in other words, "hazardous and other wastes",[105] the different waste concepts of Japanese and EU law do not have substantial consequences. The European WSR and the Japanese Basel Act in Japan both follow a similar (operation-based) definition, thus ensuring that Basel wastes fall under the respective scopes of these two regimes regardless of their value. In this way, their shipment is in principle subject to a PIC procedure in both jurisdictions.

However, the split concept of waste under Japanese law has an impact on non-Basel wastes, in other words, non-hazardous wastes. Here, the Basel Act is not applicable. For these scenarios, the (operation-based) waste definition of the WSR must not be compared to the (also operation-based) waste definition of the Basel Act, but to the (value-based) waste definition of the WSR.

This has implications for the control of non-Basel waste shipments: When such non-hazardous materials *do not* have a positive value, they fall under the broad, operation-based definition of the WSR, but *also* under the

105 For the scope of application of the Basel Convention, see Section I. above.

value-based definition of the WMA. In these cases, Japanese waste shipment law is stricter than its EU counterpart: This is because the export confirmation procedure of the WMA serves to subject such exports from Japan to a real permission requirement. In contrast, exports of such wastes from an EU Member State are subject only to the general information requirements of Article 18 WSR – i.e., essentially an obligation to carry certain documents – and not to a prior permission procedure.

In contrast, when such non-hazardous materials *do have* a positive value, they do not fall under the narrow, value-related definition of the WMA but under the operation-based definition of the WSR. In such a scenario, they are subject to stricter provisions when exported from EU Member States: This is because the WSR does at least prescribe the general information requirements of Article 18 WSR, albeit without a PIC procedure. When exported from Japan, on the other hand, non-hazardous materials having positive value are not subject to *any* waste shipment regulations; they are instead treated as normal goods.

IV. Re-import Duties

To ensure the enforcement of the PIC procedure, the Basel Convention relies, inter alia, on re-import duties of the state of export. By its nature, the effectiveness of this tool is highly dependent on the national laws of the Parties and on their application by national authorities, especially those of major export countries like many EU Member States and Japan.

1. The Parties' Re-import Duties under the Basel Convention

In certain cases, the Basel Convention imposes an obligation on the state of export to ensure that exported wastes are taken back.

Firstly, according to Article 8 BC, the state of export must in principle ensure that waste is taken back if a shipment cannot be completed in accordance with the contract[106] between the exporter and the disposer. As an expression of the continuing responsibility of the state of export, this obligation exists regardless of whether the shipment is legal or illegal.[107]

Secondly, Article 9(2)(a) stipulates a re-import duty in cases of illegal traffic,[108] if the illegality is the result of conduct of the waste exporter or

106 Regarding the requirement of such a contract specifying environmentally sound management, see Article 6(3)(b) BC.

107 Grosz, *supra* note 26, 155.

108 The term "illegal traffic" is defined by Article 9(1) BC and encompasses, inter alia, exports without notification or consent as well as exports in which consent was obtained through fraud, etc.

generator. In these cases, the state of export must in principle[109] ensure that the illegally exported wastes are taken back by the exporter or the generator or, if necessary, by the state of export itself. If, however, the illegality is due to the conduct of the importer or the disposer, the state of import must ensure environmentally sound disposal. In cases of unclear responsibility, the states concerned must cooperate to ensure environmentally sound disposal.[110]

2. Re-imports under the EU Waste Shipment Regulation

The WSR contains detailed provisions on the take-back of wastes in a separate chapter. Following the model of the Basel Convention, the provisions distinguish between re-imports due to incomplete shipments (Articles 22, 23 WSR) and due to illegal shipments (Articles 24, 25 WSR).[111]

In cases of take-back orders issued by German authorities, the direct legal basis for such orders is not located in EU law but in § 13 AbfVerbrG. However, this provision of national law does not stipulate any additional requirements but simply refers to the WSR.

The scenario of incomplete shipments is addressed in EU law as follows: Article 22(2) WSR establishes an obligation of the state of export to ensure the take-back of such waste. By reference to Article 2 No. 15 WSR, an explicit hierarchy of persons responsible for the re-import is prescribed. This hierarchy comprises firstly the waste producer, then the waste collector, dealer, etc., and finally the waste holder. Article 22(2) WSR also provides for a (subsidiary) take-back obligation of the state of export itself.

The scenario of illegal shipments is addressed separately: As within the system of Article 9 BC, there are take-back or recovery/disposal obligations depending on whose "responsibility" the illegal shipment is. Article 24(2) and (3) WSR stipulates different hierarchies of responsible persons, depending on whether the illegality is the fault of the notifier (i.e., the exporter) or the consignee (i.e., the importer). In cases where the notifier is responsible, the wastes must, in principle, be taken back by the notifier or by the state of export itself. If the consignee is responsible, no re-import takes place, but the wastes must in principle be recovered or disposed of by the consignee or the state of import. In cases of unclear responsibility, Article 24(5) WSR adds an obligation for the authorities to cooperate. Notably, Article 24(9) WSR extends the scope of application of Article 24 WSR also

109 If re-import is impracticable, the state of export must ensure that the wastes are otherwise disposed of appropriately, Article 9(2)(b) BC.

110 Article 9(3), 9(4) BC.

111 The provisions apply directly only to intra-Union transfers, but according to the references in Title IV WSR, they apply mutatis mutandis to exports from the EU to third countries.

to transfers that are not subject to the notification procedure, but only to the general information requirements of Article 18. Therefore, also non-hazardous or non-Basel wastes can be the subject of take-back orders in the event of an illegal shipment.

Importantly, Article 24(2) WSR does not establish additional prerequisites for a take-back order apart from the illegality of the transfer, such as the risk of environmental damage, etc. This is different in the Japanese Basel Act, as will be shown below.

3. Re-imports under Japanese Law

As shown above, the export of wastes from Japan can be subject to the Basel Act, the WMA, or both. Accordingly, re-imports are at least conceivable under both laws.

a) The General Re-import Clause of the Basel Act

The Basel Act grants powers to the authorities vis-à-vis exporters, transporters, and producers. Of particular importance is the general clause of Article 17(1) Basel Act, based on which the Minister of Economy or the Minister of the Environment can order "measures for the take-back or appropriate disposal or other necessary measures".

Article 17(1) Basel Act serves to implement the re-import duties pursuant to both Articles 8 and 9(2) BC.[112] Thus, in contrast to the European WSR, the Japanese Basel Act does not differentiate between the two separate duties under international law; instead, it transposes them jointly into national law by means of a single provision.

The provision is applicable in cases where the export or the related transport or disposal "is not carried out appropriately", e.g., due to violations of the Basel Act, etc. However, Article 17(1) Basel Act establishes an additional prerequisite, namely that "a special necessity to prevent harm to human health or the living environment" is recognized.

However, this element of "special necessity" cannot be found in the Basel Convention. The state of export's obligations under international law thus apply irrespective of a concrete possibility of harm to health or envi-

112 ENVIRONMENT AGENCY [環境庁], バーゼル新法 Q&A: 特定有害廃棄物等の輸出入等の規制に関する法律のポイント [New Basel Act Q&A: Points of the Law for the Control of Export, Import, etc. of Specified Hazardous Wastes, etc.] (1993) 104; Y. KITAMURA [北村喜宣], 有害廃棄物の輸出入規制 — バーゼル条約と国内法的対応 [Regulation of Import and Export of Hazardous Wastes: The Basel Convention and the Response by National Law], 日本国際経済法学会年報 Nihon kokusai keizai-hō gakkai nenpō 3 (1994) 25, 34.

ronment. The only requirement is that a shipment cannot be completed in accordance with the contract (Article 8 BC) or that there is illegal traffic (Article 9(2) BC). Consequently, cases are conceivable in which Japan has an obligation under international law to re-import exported waste, but the Japanese authorities cannot order such measures against the exporter due to the lack of a "special necessity".[113]

As possible addressees of an order, Article 17(1) Basel Act specifies – from among the exporter, transporter, and producer of waste – the person to which "responsibility can be attributed" for the fact that the export, transport, or disposal has not been carried out appropriately. Unlike the WSR, however, the Basel Act does not establish a hierarchy or priority of addressees. The content of an order may be "measures for the take-back or appropriate disposal or other necessary measures". In the form of a general clause, the authorities are thus granted a broad discretion to select possible measures.

It is noteworthy that, in roughly three decades since the Basel Act's entry into force, there has only been one single case in which Japanese authorities ordered the take-back of wastes based on Article 17(1) Basel Act.[114] In all other cases of re-imports, the Japanese authorities did not issue a formal order. Instead, the state of import usually requested exporters to re-import the waste, and exporters often complied without any formal action by Japanese authorities becoming necessary.[115] Even the less intensive measure of mere information requests pursuant to Article 18(1) Basel Act has not been applied since 2006.[116] These remarkable statistics illustrate the importance of 行政指導 *gyōsei shidō* [administrative guidance] as opposed to formal enforcement of the Basel Act.

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113 T. SHIMAMURA [島村健], 国際環境条約の国内実施 ― バーゼル条約の場合 [National Implementation of International Environmental Treaties: The Case of the Basel Convention] 新世代法政策学研究 Shin-sedai hō-seisaku-gaku kenkyū 9 (2010) 139, 156–159.

114 T. SHIMAMURA [島村健], バーゼル法改正 [Basel Act Reform], 環境と公害 Kankyō to kōgai 47 (2018) 52, 52 states this as of 2018. Even after that, no further orders were issued, see the statistics of the Ministry of the Environment for the years 1999 to 2021, online: *http://www.env.go.jp/recycle/yugai/index4.html.* For information on this incident involving the re-import of medical wastes from the Philippines to Japan, see J. TSURUTA, Japanese Implementation of the Basel Convention and its Problems, in: Kojima/Michida (eds.), International Trade in Recyclable and Hazardous Waste in Asia (2013) 116, 124–126.

115 Information provided to the author by the Industrial and Hazardous Waste Management Division of the Ministry of the Environment.

116 See the statistics of the Ministry of the Environment for the years 1999 to 2021, online: *http://www.env.go.jp/recycle/yugai/index4.html*.

b) The Lack of Re-import Rules in the Waste Management Act

Like the Basel Act, the WMA contains provisions for specific measures in connection with waste shipments: Articles 18(2), 19(2) authorize the Minister of the Environment to, inter alia, request information or conduct certain investigations vis-à-vis (potential) importers or exporters. However, these rules exclusively concern the determination of the facts by the authorities. There is no provision in the WMA that would enable authorities to order measures specifically in connection with waste imports or exports. The WMA lacks a provision like Article 17(1) Basel Act.

Articles 19-4, 19-5, 19-6 WMA do contain the authorization to order measures (措置命令 *sochi meirei)*. However, these provisions are general – i.e., not limited to the case of transboundary shipments – and mostly authorize action by 市町村長 *shichōson-chō* [mayors] or 都道府県知事 *todōfu-ken chiji* [governors] instead of the Ministry of the Environment or other national authorities. In terms of the content of such orders, the provisions do not mention the 回収 *kaishū* [take-back] of wastes but describe general measures to remove or prevent obstacles to the preservation of the environment. It therefore seems unclear whether re-import orders can be issued based on these provisions.[117] In any case, the competence for this would not lie with the Ministry of the Environment. And in practice, as of 2021 the Ministry had never issued a re-import order based on the WMA.[118]

The Ministry is thus limited in its possibilities to order the re-import of wastes exported under the export confirmation procedure of the WMA.[119] From the perspective of the Basel Convention, this is not problematic: Japan can fulfil its re-import duties by applying Article 17(1) Basel Act. International law does not provide for any further obligation to also re-import non-hazardous wastes or non-Basel wastes. Nevertheless, Japanese waste shipment law seems inconsistent here: On the one hand, the WMA subjects non-hazardous wastes to an export confirmation procedure, although this is not required by the Basel Convention. Yet on the other hand, the Ministry of the Environment is not, or at least not explicitly, put in a position to order the re-import of non-hazardous waste exported in violation of the WMA.

117 TSURUTA, *supra* note 69, 225, stresses that the WMA does not contain re-import rules and concludes that, in the specific case assessed there, re-import would not have been possible without applying the Basel Act.

118 Information provided to the author by the Industrial and Hazardous Waste Management Division of the Ministry of the Environment.

119 For the export confirmation procedure under the WMA, see Section II.3.b)bb) above.

4. Re-imports to EU Member States and to Japan in Comparison

Despite the common requirements stipulated by the Basel Convention, a comparison of the re-import rules under Japanese and EU law reveals remarkable differences.

First, the difference in detailedness is apparent: While the European WSR differentiates between various scenarios in several extensive articles and stipulates in detail the respective legal consequences, the Japanese Basel Act covers all constellations of re-imports in a one vague general clause.

The detailed provisions of the WSR reflect the intention to address all potential disagreements between different EU Member States as comprehensively as possible. Directly and primarily, the rules cover shipments within the EU. For exports to third countries, they only apply mutatis mutandis. They are thus initially designed for a far more complex network of norm addressees: In their original case of application, they govern the relationship between at least two Member States (the two states of export and import) and the notifier and the consignee.

In contrast, Article 17(1) Basel Act as the Japanese equivalent is designed for the purely national relationship between the Japanese authorities and the (usually) Japanese exporter. The (separate) question of whether the state of Japan has an obligation to re-import vis-à-vis the state of import must be answered by applying the Basel Convention. Article 17(1) Basel Act only serves the purpose of enabling the Japanese authorities to enforce such re-import vis-à-vis the exporter. Against this background, it is understandable that the Basel Act re-import rules seem vague in comparison to EU law.

Another difference lies in the requirements for a re-import order: Article 24(2) WSR copies the model of Article 9(2) BC and provides for re-import in every case of "illegal transfer". Article 17(1) Basel Act, however, adds the criterion of a "special necessity", which is alien to the Basel Convention. The Japanese solution ensures that proportionality is observed but risks that authorities are unable to order the re-import of wastes in cases Japan is obliged to ensure such re-import under international law.

There is also a difference regarding the take-back of non-hazardous or non-Basel wastes: Article 24(9) WSR explicitly extends the scope of application of the re-import provisions to illegally exported wastes that are *not* subject to a notification procedure. This goes beyond the requirements of the Basel Convention. Japanese law lacks such provision. A re-import order for non-hazardous wastes cannot be based on the Basel Act, as this law does not cover such wastes from the outset. The export confirmation procedure under the WMA, however, may apply to such wastes. Therefore, an

"illegal shipment" of such wastes is conceivable. Nonetheless, the WMA does not explicitly authorize the Ministry of the Environment to issue re-import orders. This can be seen as an inconsistency in Japanese waste shipment law.

V. The Implementation of the Plastic Amendment

In 2019, the Parties to the Basel Convention adopted the Plastic Amendment, significantly expanding the scope of the Convention to many types of plastic waste.[120] Like the Convention as a whole, this amendment is highly dependent on its implementation by the Parties. The reaction of important states of export such as Japan and many EU Member States is therefore of particular interest.

1. Plastics under the Basel Convention and Issues Requiring Implementation

At the level of the Basel Convention, the Plastic Amendment took the form of a revision of Annexes II, VIII and IX BC. By amending or adding list entries concerning plastic waste, assignment to the categories "hazardous wastes" and "other wastes" was changed with effect from 1 January 2021. The Plastic Amendment thus addresses the question of which plastic wastes are subject to the Convention as "hazardous wastes" and "other wastes" and which remain unregulated as non-hazardous wastes.

The Plastic Amendment confronts the Parties with two major issues requiring implementation:

The first issue is transposing into national law the new lists of plastic wastes specified in the annexes of the Convention. On the satisfaction of certain additional conditions, the Convention excludes certain types of plastics from its scope of application by listing them in Annex IX BC and by thereby considering them non-hazardous wastes.[121] Plastic waste types *not* listed in this way are "other wastes" in the sense of Annex II BC and are therefore subject to the Convention, in particular to the PIC procedure. Details regarding this first issue will not be further addressed in this article, but it is necessary to mention that both the EU and Japan in principle implement these changes through amendments to their respective laws. In deviation from the requirements of the Convention, however, both provide for certain exceptions: In the case of the EU, for example, intra-EU shipments of PVC and certain waste mixtures are exempted from the notifica-

120 See reference in note 3.

121 Examples include plastic waste types such as PE, PP, PS, or PET.

tion procedure of the WSR. In the case of Japan, PVC exports to other OECD countries do not fall under the approval procedure of the Basel Act.

The second issue raised by the Plastic Amendment will be discussed in more detail. This is the question of purity. Even those types of plastic wastes listed in Annex IX BC are considered non-hazardous only on the satisfaction of additional conditions. The Convention explicitly requires that the wastes be "almost exclusively consisting of" one of the listed plastic types. Furthermore, they must be "almost free from contamination and other types of wastes".[122] However, the Convention does not specify the extent to which waste may contain impurities and nevertheless be considered "almost free". In particular, Annex IX BC does not specify a concrete percentage or other quantitative thresholds. A footnote merely points out that "international and national specifications may offer a point of reference". The same applies to the equally vague term "almost exclusively". Which plastic wastes are excluded from the scope of the Convention is therefore determined by the purity requirements provided by these "international and national specifications".

A uniform interpretation of these terms by the OECD was demanded by the recycling industry.[123] However, the OECD member states could not reach such an agreement. The question of whether an export of plastic waste from an EU Member State or from Japan is subject to a PIC procedure or not therefore depends on the national interpretation of the terms "almost free" and "almost exclusively".

2. Quantitative Purity Requirements in EU Law

At the EU level, the question of 'purity' is not addressed in the binding form of a regulation. When the Plastic Amendment was transposed into the annexes of the WSR, also the terms "almost free" and "almost exclusively" were adopted. However, the WSR does not define them. Instead, the issue was addressed in the form of so-called correspondents' guidelines.[124] The

122 In addition to unmixed plastic waste, entry B3011 of Annex IX BC also includes "Mixtures of plastic waste, consisting of [PE, PP, and/or PET], provided they are destined for separate recycling of each material and in an environmentally sound manner, and almost free from contamination and other types of wastes". Thus, also waste mixtures are required to be free from contamination.

123 EUROPEAN RECYCLING INDUSTRIES' CONFEDERATION, EuRIC Statement: EU Position for Implementation of Basel Decisions into the OECD (2020), online: EuRIC *https://euric-aisbl.eu/images/Position-papers/euricstatementontheoecdimplementation-1.pdf.*

124 Correspondents' Guidelines No. 12, Subject: Classification of plastic waste, 12 November 2021, online: *https://environment.ec.europa.eu/system/files/2021-12/Correspondents'%20guidelines%20No%2012%20final%20Nov%202021%20corr1.pdf.*

adoption of these guidelines was preceded by lengthy negotiations between the Member States. Although the Plastic Amendment had already been in force from January 2021, the Member States were able to agree on a common position only in November 2021.

Correspondents' guidelines are not legal norms and are not binding. They do, however, reflect the common opinion of all Member States on questions of interpretation regarding the WSR and are of practical importance for the application of the WSR by Member State authorities.[125]

The correspondents of the Member States agreed to set weight percentage limits as a criterion for compliance with the purity requirements of the Plastic Amendment. Such percentage limits have the advantage that they provide a clearly predictable and verifiable standard. They thus serve legal clarity and legal certainty. Compliance with them can be clearly determined through analyses. However, a mere visual inspection is usually not sufficient to assess the percentage of impurities.[126]

When incorporating the Plastic Amendment into the annexes of the WSR, separate classification standards for intra-EU shipments of plastic waste were created. Accordingly, the correspondents' guidelines now also set different percentage limits for intra-EU shipments and shipments involving third countries. A more tolerant limit of six per cent of impurities applies to intra-EU shipments. In contrast, a stricter limit of only two per cent is set for shipments involving third countries.[127] One of the reasons given by the correspondents for this split interpretation is that recovery according to high environmental standards can be expected within the EU.[128]

3. Qualitative Purity Requirements in Japanese Law

When implementing the Plastic Amendment, Japan does not have to take into account anything like the EU Single Market and does not have to consider the option of more lenient requirements for intra-union shipments. An approach of interpreting the terms "almost free" and "almost exclusively" in a differentiated manner depending on the destination of a shipment, as is employed by the EU, is therefore pointless from a Japanese perspective.

While in the EU the authorities of all 27 Member States had to agree on common purity requirements, the decision-making process of the Japanese

125 Accordingly, the correspondents' guidelines explicitly state that they are not legally binding, and that the binding interpretation of EU law falls under the exclusive competence of the ECJ. For the role of the correspondents, see Article 54 WSR.

126 O. KROPP, Fremdstoffe in Kunststoffabfällen, AbfallR – Zeitschrift für das Recht der Kreislaufwirtschaft 20 (2021) 81, 84–85.

127 Correspondents' Guidelines No. 12, *supra* note 124, Nos. 20–22.

128 *Ibid.*, No. 18.

authorities was naturally much simpler. The Ministry of the Environment published guidelines as early as October 2020, three months *before* the Plastic Amendment entered into force.[129] Like in the EU, the concretization of purity requirements does not take place at the legislative level (i.e., in the Basel Act), but through mere guidelines issued by the authorities.

For the purity of plastic types, the guidelines specify four criteria: There must not be any dirt adhering to them, they must not contain any materials other than plastics, they must consist of a single type of plastic, and they must be processed as a recycling material.[130] These four criteria remain vague and mostly just reproduce the wording used in the Convention. They hardly provide any clarification.

In particular, the Guidelines do *not* set any percentage thresholds. Instead, they emphasize that compliance with the criteria should be verifiable by mere visual inspection. Rather than setting a general limit applicable to all types of waste, they provide clarification in the form of photographs showing, by way of example and comparison, materials that are impure and therefore "other wastes" and other materials that are pure enough to be deemed non-hazardous.

The guidelines also contain an explanatory section. Here, they stress the aim of preventing take-back requests by states of import based on their national laws or standards. The guidelines therefore explicitly refer to standards of potential states of import such as China, Vietnam, Indonesia, and Thailand.[131] The guidelines thus follow a pragmatic approach, their primary purpose being the prevention of distortions in practice. The aspect of establishing an autonomous Japanese or a – from Japan's point of view – 'correct' interpretation of the terms of the Basel Convention is arguably of secondary importance.

Furthermore, the guidelines emphasize the need to ensure simple and uniform assessments by the customs authorities.[132] One of the biggest obstacles for an effective supervision of the waste trade is the reliance on the capacities for physical inspection in the ports.[133] Verifying compliance with waste shipment law through border controls is resource intensive and poses

129 プラスチックの輸出に係るバーゼル法該非判断基準 *Purasuchikku no yushutsu ni kakaru Bāzeru-hō gaihi handan kijun* [Evaluation Criteria for Classification Under the Basel Act Concerning Exports of Plastics], Ministry of the Environment, 2020, online: *https://www.env.go.jp/recycle/yugai/law/r02basel_law02.pdf.*

130 *Ibid.*, No. 3(1).

131 *Ibid.*, Annex 1, No. 2(1).

132 *Ibid.*, Annex 1, No. 2(2).

133 S. AHMAD KHAN, Clearly Hazardous, Obscurely Regulated: Lessons from the Basel Convention on Waste Trade, American Journal of International Law (AJIL Unbound) 114 (2020) 200, 203–204.

significant capacity problems even for developed countries.[134] This explains the Japanese approach of focusing on criteria that are verifiable by mere visual inspection instead of quantitative thresholds.

4. The Approaches of the EU and Japan in Comparison

The differences between the European and the Japanese approach can be understood against the following background: For plastic wastes, Japan is mostly a state of export.[135] The Japanese guidelines therefore take an exclusive export perspective. Unlike the EU guidelines, they do not need to achieve harmonization between different Member States, which may assume the role of either state of export or state of import. Furthermore, the number of competent authorities in Japan is much smaller. In Germany alone, 30 different regional or sub-regional agencies are responsible for import and export procedures; this is in addition to the authorities of the 26 other Member States.[136] In Japan, export control is carried out by national authorities instead. Rather than aiming for harmonization between a large number of administrative bodies, Japan could therefore take a pragmatic approach and prioritize the practical feasibility of border controls.

Moreover, in an environment like Japan, where judicial review of administrative action is far less common than in many EU Member States,[137] it is also less important to establish 'court-proof' and clearly quantified assessment criteria. From the perspective of the authorities, where there is less 'danger' of judicial review, the focus can be placed on the facilitation of export controls and the avoidance of re-imports.

However, one thing is true for the EU approach as well as for the Japanese one: Whether the Plastic Amendment actually leads to less problematic plastic waste exports depends primarily on the stringency of controls 'on the ground'.

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134 K. KUMMER PEIRY, Transboundary Movement of Hazardous Waste and Chemicals, in: Nollkaemper/Plakokefalos (eds.), The Practice of Shared Responsibility in International Law (2017) 936, 937–938.

135 Between 1988 and 2021, plastic waste imports to Japan never exceeded 20,000 tons per year, UN Comtrade Database, Trade value of imports of HS code 3915 (waste, parings and scrap of plastics) to Japan from countries worldwide.

136 German Environment Agency [Umweltbundesamt], Competent Authorities in the Federal Republic of Germany for the Transboundary Movement of Waste (January 2023), online: *https://www.umweltbundesamt.de/sites/default/files/medien/10592/dokumente/competent_authorities_germany.pdf.*

137 For details on the strikingly low number of (successful) administrative lawsuits in Japan, see C. P. A. JONES/F. S. RAVITCH, The Japanese Legal System (2018) 358.

VI. Concluding Remarks

Overall, it has been shown that both Japan and the EU essentially fulfil the obligations arising for them as Parties to the Basel Convention. In a similar fashion, both Japanese law and EU law – the latter in conjunction with national laws of the Member States – establish the legal instruments prescribed by the Convention. These include a prior informed consent procedure and rules for the re-import of wastes in cases of illegal or failed shipments.

Nonetheless, significant differences could also be observed. In part, these can simply be attributed to divergent decisions by the respective legislatures and authorities. One example is Japan's non-ratification of the Ban Amendment and the corresponding absence in Japanese law of a ban prohibiting hazardous waste shipments to non-OECD countries. Another example is the different exemptions that the EU and Japan establish for plastic waste exports in deviation from the Plastic Amendment of the Basel Convention.

Other differences, however, can be explained by determining factors of the two legal systems that extend beyond waste shipment law. The most obvious example is that in European law most legislative decisions have been taken on the EU level by the Waste Shipment Regulation, whereas in Japan these are naturally located in national law in the form of the Basel Act and the Waste Management Act. Differences in the design of re-import rules are understandable when one considers, on the one hand, the important role of informal administrative guidance in Japan and, on the other, the more complex regulatory task between the EU Member States. Different approaches for the interpretation of waste purity requirements under the Plastic Amendment can be attributed to a greater need for harmonization and predictability within the EU, while Japan was able to prioritize enforceability and the prevention of re-import demands from plastic waste import countries.

Summary

This article examines the implementation of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal in Japan and the EU. It analyses how two of the largest economies and major waste exporters transpose the rules of international waste shipment law into their respective legal systems. The article shows that both Japan and the EU essentially fulfil their obligations under the Convention, in particular by establishing prior informed consent (PIC) procedures for the export of certain waste types and provisions for the re-import of illegally exported wastes. But, despite

being based on the same international standards, also notable differences can by observed. Some of these can simply be attributed to divergent decisions by the respective legislatures: One example is Japan's non-ratification of Article 4a of the Basel Convention and the corresponding absence in Japanese law of a ban prohibiting export to non-OECD countries. The article argues, however, that many other differences can be explained by characteristics of the two legal systems that extend beyond waste shipment law. Examples include the traditionally value-based concept of "waste" in Japan that has posed a challenge for the Japanese legislature, as it contradicts the operation-based waste definition of the Convention. The complex and detailed design of re-import rules in EU law is explained by the need to prevent conflicts between Member States. The fact that Japan instead relies on a vague general clause as a basis for re-imports can be attributed to the important role of informal administrative guidance in Japanese administrative law. Finally, it is shown that the EU and Japan have chosen different ways to determine which plastic wastes are subject to the 2019 Plastic Amendment of the Convention. The EU has set quantitative purity requirements to achieve harmonization and predictability for plastic waste shipments, also within the EU. By contrast, Japan has established criteria that are vague but easier to enforce in order to facilitate effective border controls and prevent ship-back demands from plastic waste import countries.

ZUSAMMENFASSUNG

Der vorliegende Artikel untersucht die Umsetzung des Basler Übereinkommens über die Kontrolle der grenzüberschreitenden Verbringung gefährlicher Abfälle und ihrer Entsorgung in Japan und der EU. Es wird analysiert, wie zwei der größten Volkswirtschaften und wichtigsten Abfallexporteure die Regeln des internationalen Abfallverbringungsrechts in ihre jeweiligen Rechtssysteme überführen. Es wird gezeigt, dass sowohl Japan als auch die EU ihren völkerrechtlichen Verpflichtungen im Wesentlichen nachkommen. Insbesondere errichten sie Verfahren der vorherigen informierten Zustimmung (PIC-Verfahren) für den Export bestimmter Abfallarten sowie Regeln zur Wiedereinfuhr illegal exportierter Abfälle. Trotz gemeinsamer völkerrechtlicher Vorgaben bestehen aber auch erhebliche Unterschiede. Einige davon lassen sich schlicht auf abweichende gesetzgeberische Entscheidungen zurückführen: So hat Japan Artikel 4a des Basler Übereinkommens nie ratifiziert und verbietet daher den Export gefährlicher Abfälle in Nicht-OECD-Staaten nicht. Andere Unterschiede können hingegen durch zugrundeliegende Charakteristika beider Rechtssysteme jenseits des Abfallverbringungsrechts erklärt werden. Ein Beispiel ist der traditionell wertbezogene Abfallbegriff des japanischen Rechts, der der verfahrensbezogenen Abfalldefinition des Übereinkommens widerspricht und deren

Umsetzung in japanisches Recht verkomplizierte. Die komplexen Wiedereinfuhrregeln des Unionsrechts dienen dazu, Konflikte zwischen den Mitgliedstaaten zu verhindern. Dass Wiedereinfuhren nach Japan stattdessen auf eine vage Generalklausel gestützt werden, kann auf die wichtige Rolle informellen Verwaltungshandelns (gyōsei shidō) im japanischen Verwaltungsrecht zurückgeführt werden. Unterschiede zeigen sich auch bei der Auslegung des Plastic Amendment von 2019 und der Frage, welche Kunststoffabfälle dem PIC-Verfahren unterworfen werden: Europäische Behörden bestimmen dies anhand fester Prozentwerte für maximal zulässige Verunreinigungen, um eine unionsweite Vergleichbarkeit, Harmonisierung und Rechtssicherheit zu gewährleisten. Die japanische Exekutive priorisiert stattdessen die effektive Kontrollierbarkeit und die Vermeidung von Rückfuhrverlangen der Importstaaten. Für Plastikabfallexporte aus Japan gelten daher qualitative Kriterien, die zwar vage, aber vollzugsfreundlicher sind.