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## REVIEW

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Do investor-to-state dispute settlement mechanisms fit  
in the EU legal system?

*Andrea Carta*

Regulatory coherence in the transatlantic trade and in-  
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Quality and speed of administrative decision-making  
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Recent Developments

## Editorial

The negotiations of the Transatlantic Trade and Investment Partnership (TTIP) began in 2013 and have been the source of heated debate since then. In addition to various concerns regarding a feared reduction of statutory health and environmental standards, the main discussion has centered around the introduction of the so-called Investor-to-State Dispute Settlements (ISDS).

Against this background the current elni issue focuses on issues relevant to TTIP with the following contributions.

*Andrea Carta* addresses the question of whether the Investor-to-State Dispute Settlement (ISDS) fits in the EU legal system. His article describes the framework underlying the inclusion of ISDS in EU international investment agreements (IIAs) and discusses the concerns raised, particularly by NGOs, regarding the potential impact of ISDS on EU and Member States' regulatory powers.

The regulatory coherence in the TTIP Agreement in the context of chemicals is discussed by *Vito Buonsante*. He outlines the conflict between seeking regulatory coherence and at the same time maintaining the right to choose different levels of protection in regard to health, safety, consumer, labour and the environment.

In the recent developments section *Julian Schenten* reports on activities to strengthen REACH provisions concerning (imported) articles which also touch a sensitive point in the relationship between the EU and the USA.

A second series of contributions to this issue of the elni Review covers a variety of other topical legal issues.

In an article by *Viktoria Raczyńska* the main provisions of Ukrainian legislation regulating hazardous waste management are analysed in terms of its compliance with the Basel Convention and the Directive 2008/98/EC.

Furthermore, the contribution of *Gerhard Roller* deals with the ambiguous relationship between speed and quality in decision-making in Germany by analyzing the measures taken to expedite procedures.

Finally, the issue concludes with recent developments – described by *Nicola Below* – with regard to participatory rights in the environmental decision-making process and the implementation of the Aarhus Convention.

We hope you enjoy reading the journal.

Contributions for the next issue of elni Review are very welcome. Please send contributions to the editors by mid-March 2015.

*Claudia Schreider (née Fricke) / Martin Führ*  
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## The Ukrainian regulation on hazardous waste in comparison with Basel Convention and the Directive 2008/98/EC

Viktoria Raczyńska

### 1 Ukrainian legislation on waste treatment

The physical, chemical and biological characteristics of waste in general and of hazardous waste in particular make them a danger to human health and the environment. As it is impossible to avoid waste generation absolutely, the adequate legal mechanisms should be used to control their treatment. Ukraine ratified the Basel Convention on the control of transboundary movements of hazardous waste and their disposal<sup>1</sup> (hereinafter - the Basel Convention) as well the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management<sup>2</sup>. However, national legislation is more declarative than specific; it tends to copy basic general provisions of international documents in this field than creates concrete effective mechanisms for their implementation<sup>3</sup>. The duplication and inconsistency of the provisions of Ukrainian legal acts in the field of hazardous waste management has attracted the attention of scholars<sup>4</sup>. The disadvantages of Ukrainian legislation on waste management have revealed themselves in a number of problems in practice<sup>5</sup>. Nevertheless, Ukraine is in the process of adapting its legislation (including the waste management issues) to the European Union law<sup>6</sup>. The main act in this field in

Ukraine is Ukrainian Act On Waste<sup>7</sup>. In the European Union it is the Directive 2008/98/EC of the European Parliament and of the Council on waste and repealing certain Directives of 19.11.2008<sup>8</sup> (hereinafter - the Directive 2008/98/EC).

This article analyses the main provisions of Ukrainian legislation regulating hazardous waste management in terms of its compliance with the Basel Convention and the Directive 2008/98/EC.

### 2 The definition of "waste"

Waste is always what concrete society considers it to be waste. The purpose of such a definition is a special mode of conduct with waste, based on their main criterion - uselessness in terms of previous ways of exploitation. Therefore, waste treatment - if legal - should lead to waste prevention and reasonable ways of using the produced waste. At the same time, there is a lack of objective criteria for waste<sup>9</sup>. According to the Basel Convention "wastes" are substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law.

The Directive 2008/98/EC contains quite a similar definition, in which the term "disposing of" is replaced by the term "discarding" and the concept of "waste holder" is added. According to the Directive, "waste" means any substance or object which the holder discards or intends or is required to discard. Therefore, the basis of the definition of waste is a criterion of the existence of will, intention or obligation to dispose of these substances or object<sup>10</sup>. In fact, *disposing of* is another interpretation of the criterion of *uselessness*<sup>11</sup>.

Undoubtedly, the existence of the will or intention to dispose of substance or object (as distinct from the obligation to dispose of them) is a rather subjective criterion. Therefore, it is hard to agree with the

<sup>1</sup> Adopted on 22.03.1989 and entered into force on 05.05.1992. Ukraine acceded to the Basel Convention by Law of Ukraine № 803-XIV of July, 1, 1999. An interesting and significant fact is the absence, at least on the official website of the Ukrainian parliament, the text of this Convention in Ukrainian language. Russian text is available via a link [http://zakon2.rada.gov.ua/laws/show/995\\_022](http://zakon2.rada.gov.ua/laws/show/995_022). The imperfection of the translation presented at the official website is shown at least by the following example. When determining the scope of the Convention (Art. 1) and defining the definition of "hazardous waste" a rather significant mistake was made. The English phrase "unless they do not possess" was translated as "if they do not possess". Obviously, the meaning is opposite to the original text of the Convention. However, it should also be noted that the analyzed below Ukrainian subordinate legal act, which is the main document implementing the Basel Convention, rather corresponds to the Convention.

<sup>2</sup> Carried out at Vienna on September, 5, 1997. Ratified by the Law of Ukraine of April, 20, 2000, № 1688-III. It is available via the following link: [zakon2.rada.gov.ua/laws/show/995\\_335](http://zakon2.rada.gov.ua/laws/show/995_335).

<sup>3</sup> Baluk G.I. The state of Ukrainian legislation on waste and the problems of its improvement. Bulletin of Kyiv National Taras Shevchenko University. Juridical series, 2001, № 44, p. 28.

<sup>4</sup> Maksimentseva N.O. Legal regulation of the hazardous waste treatment. PhD thesis. 12.00.06, Kyiv, 2006, p. 11.

<sup>5</sup> Korniyakova N.O. Legal regulation of waste management under the laws of Ukraine. Bulletin of Kyiv National Taras Shevchenko University. Juridical series, 2004, № 56/59, p. 171.

<sup>6</sup> As provided inter alia in the National Programme for Adaptation of Ukrainian legislation to the European Union legislation, approved by the Law of Ukraine of March, 18, 2004, № 1629-IV. The list of Ukrainian legislative acts and of the *acquis* in the priority areas of adaptation includes paragraph titled "Waste" of the section dedicated to environmental protection.

<sup>7</sup> Ukrainian Act on Waste of March, 5, 1998 № 187/98. Official Bulletin of Ukraine of 16.04.1998, № 13, p. 23, the code of the act 5121/1998.

<sup>8</sup> OJ L 312, 22.11.2008, pp. 3-30.

<sup>9</sup> Jan Jerzmański, Postępowanie z odpadami. [w:] Instytucje prawa ochrony środowiska, Geneza-Rozwój- Perspektywy (W. Radecki, red.), Warszawa 2010. Wyd. Difin, pp. 69-70.

<sup>10</sup> Art. 3 para. 1 point 6 of Polish Act on Waste of December, 14, 2012. OJ 2013 item. 21. The above definition has been transposed into Polish law in a literal way.

<sup>11</sup> The latter criterion was used in the Polish Environmental Protection and Management Act of 1980. Jan Jerzmański, Postępowanie z odpadami, p. 72.

opinion that the EU definition on waste “has an objective element in the sense that a material becomes waste by virtue of a circumstances which is outside the control of the owner or holder of the material”. As an example of such an opinion a situation of abandoning the material is used<sup>12</sup>. Obviously, the owner or holder of the material decides to abandon it and by doing they ascribe the status of waste to the material. Thus, it is rather subjective. The latter is even more reasonable in case of intending to dispose of some materials.

Subjectivity in determining the intention to dispose of substance or object can be illustrated by the following example. According to the judgment of the Court of Justice of the European Union (hereinafter - ECJ) a consignment of diesel (accidentally mixed with another substance and therefore rejected by the intended buyer) is not waste, provided that the holder of that consignment *does actually plan* to re-introduce it on the market<sup>13</sup>.

However, these two rather subjective criteria seem to be an important element of waste definition. Therefore, the proposal to exclude them from this definition is rather controversial<sup>14</sup>. Ukrainian legislation more broadly defines the term “waste”. It is “any substances, materials and objects that were created during the production or consumption, as well as goods (products) that fully or partially lost their consumer properties and cannot be further used in the place of their creation or revelation and which the owner discards, intends or is required to discard by recycling or removal”<sup>15</sup>. The “Ukrainian” definition contains the basic elements of the definition from the Directive 2008/98/EC, but slightly modifies it. For example, the Ukrainian concept of “waste” does not include substances, materials and objects, which *did not* fully or partially lost their consumer properties and *can still be used*, but which the holder *discards or intends or is required to discard*. Among other disadvantages of this definition, the following is mentioned by the scholars. The fact that such substances, materials and objects “cannot be further used in the place of their creation or revelation” means that their recycling at these sites is impossible. Therefore, the above definition does not include the possibility of further stimulation of the recycling process, which is a significant obstacle to the further development of environmentally sound waste

management<sup>16</sup>. Therefore, it is recommended to adjust this definition to the EU law.

Other Ukrainian legal acts include other definitions of “waste” that highlight economic<sup>17</sup> and environmental sense of the term<sup>18</sup>. In the literature it is justly noted that a couple of different definitions of the same concept creates difficulties in its practical application and that there is a clear need for a single definition<sup>19</sup>. Certainly, the concept of waste cannot be limitless. Therefore, the Basel Convention defines its scope. It does not include radioactive waste, nor waste derived from the normal operations of a ship, covered by other international agreements. The Basel Convention does not mention “by-products” and “substances or objects that ceased to be waste”. The Directive 2008/98/EC also defines the limitations of its scope (Art. 2 of the Directive). It outlines substances and objects that are not waste, namely: by-products and substances and objects that ceased to be waste (Art. 5-6 of the Directive). Such substances or objects have to fulfill certain conditions. For example, they shall not lead to overall adverse environmental or human health impacts<sup>20</sup>. It is widely known that some products may lead to such adverse impacts. In these terms, it might be said that criteria for by-products and substances or objects that ceased to be waste are higher than for other products without objective reason. This means that the former are treated less favorably, then products in general, and therefore they seem to be discriminated. However, by-products and substances or objects that ceased to be waste are still specific products, may be more dangerous than products in general and therefore should be subject to specific regulation<sup>21</sup>.

Ukrainian legislation lacks the notions of by-products and end-of-waste status as well as the criteria of by-products and of the substance or object that ceased to be waste.

Thus, it seems to be important to adapt the Ukrainian definition of waste to the EU law and to complement Ukrainian law with the definitions of by-products and end-of-waste status and with the relevant regulations.

<sup>12</sup> EU Environmental Policy Handbook. A critical analysis of EU Environmental Legislation. Edit.: S. Scheuer, European Environmental Bureau, Brussels, Belgium, p. 88.

<sup>13</sup> Judgment of the Court (First Chamber) of December, 12, 2013 (case C-241/12). OJ C 243, 11.8.2012.

<sup>14</sup> Korniyakova N.O. Legal regulation of waste management under the laws of Ukraine, p. 152.

<sup>15</sup> Art. 1 of Ukrainian Act On Waste.

<sup>16</sup> Korniyakova N.O. Legal regulation of waste management under the laws of Ukraine, p. 150.

<sup>17</sup> Art 1, para 1, sub-paragraph 2 of the Law of Ukraine On Alternative Fuels of January, 14, 2000, № 1391-XIV; para. 1.9.5. of the Methodology of Examination and Certification of Hydraulic Facilities of the Systems of Hydraulic Removal and Storage of Industrial Wastes, approved by the Order of the State Committee of Urbanistics and Architecture of December, 19, 1995, № 252.

<sup>18</sup> State Classifier of Wastes of Ukraine DK 005-96, approved and put into force by the order of State Committee of Ukraine for Standardization, Metrology and Certification of February, 29, 1996, № 89.

<sup>19</sup> Korniyakova N.O. Legal regulation of waste management under the laws of Ukraine, p. 151-152.

<sup>20</sup> Incidentally, the ECJ stated this condition of substances or objects that ceased to be hazardous waste. Judgment of the Court (Fourth Chamber) of October, 3, 2013 (case C-113/12). OJ C 151, 26.5.2012.

<sup>21</sup> See: EU Environmental Policy Handbook., p. 88.

### 3 The definition of "hazardous waste"

As noted above, the status of waste is ascribed to substances or objects in order to set special methods of their treatment because of their special characteristics. Similarly, different types of waste also require different methods of treatment. Therefore, these different types of waste should also be differentiated and their characteristics should be specified<sup>22</sup>. One of the groups of waste that are the most important in the context of their special treatment is hazardous waste. The Basel Convention contains the definition of "hazardous waste":

"Hazardous wastes" are the following wastes that are subject to transboundary movement:

- wastes that belong to any category contained in Annex I to the Basel Convention, unless they do not possess any of the characteristics contained in Annex III to the Basel Convention;
- wastes that are not covered under the previous paragraph but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit.

The Basel Convention also regulates the handling of "other wastes", which are wastes that belong to any category contained in Annex II of the Basel Convention that are subject to transboundary movement<sup>23</sup>.

In the light of the Directive 2008/98/EC, hazardous waste means waste which displays one or more of the hazardous properties listed in Annex III of the Directive (for example, hazardous waste is explosive, highly flammable, harmful, etc.)<sup>24</sup>. The EU list of hazardous waste sets out an exhaustive list of such waste<sup>25</sup>. According to the Ukrainian Regulation *on the Control of Transboundary Movements of Hazardous Wastes and their Disposal/ Removal*<sup>26</sup> hazardous wastes are:

- the wastes that are included in the section "A" of the Yellow Waste List<sup>27</sup>, and possess one or more of the hazardous properties listed in the List of Hazardous Properties<sup>28</sup>, as well as

- the wastes that are included in the Green Waste List<sup>29</sup> and contain the materials listed in Annex 2 to the Regulation *on the Control of Transboundary Movements...* in such quantities that can detect hazardous properties listed in the above List of Hazardous Properties<sup>30</sup>.

The main points of the Regulation *on the Control of Transboundary Movements...* are not limited to transboundary movements of hazardous wastes outlined above, but also wastes:

- listed in the section "B" of the Yellow Waste List;
- listed in the Green Waste List if their transboundary movement is regulated in the states concerned<sup>31</sup>.

This conclusion whether the Regulation *on the Control of Transboundary Movements...* is applied during the export or import of wastes listed in Green Waste List is given by the Ministry of Ecology and Natural Resources of Ukraine. It appears very problematic to define hazardous waste under the second category of the definition inserted in the Regulation *on the Control of Transboundary Movements* ("the wastes that are included in the Green Waste List and contain the materials listed in Annex 2 to the Regulation *on the Control of Transboundary*

<sup>22</sup> These types are radioactive, toxic waste, etc. As noted by Ukrainian authors national legislation lacks clear non-reference definitions of waste belonging to each of these special groups (see Kornyakova N.O. *Legal regulation of waste management under the laws of Ukraine...*, p. 171).

<sup>23</sup> Art. 1 of the Basel Convention.

<sup>24</sup> The definition of hazardous waste and the list of hazardous properties are directly transposed to Art. 3 para. 4 and to Annex 3 to the Polish Act *On Waste*.

<sup>25</sup> The list can be found in the Decision of the Commission of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC on waste and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste (2000/532/EC). OJ L 226/3, 6.9.2000.

<sup>26</sup> Approved by the Regulation of the Cabinet of Ministers of Ukraine of July, 13, 2000, № 1120.

<sup>27</sup> The Yellow Waste List is approved by the above Regulation of the Cabinet of Ministers of Ukraine. The list consists of two sections - Section "A" and Section "B". Section "A" of the Yellow Waste List corresponds to Annex I to the Basel Convention and expands it. Section "B" of the Yellow Waste List of wastes consists of four items, among them, for example, household waste and corresponds to Annex II to the Basel Convention, adding two points to it. EU, Polish and Ukrainian law state that only wastes listed in the list of hazardous waste are hazardous. According to EU law, list of wastes containing hazardous waste shall take into account the origin and composition of the waste and, where necessary, the limit values of concentration of hazardous substances (Art. 7 para. 1 of the Directive 2008/98/EC). "The EU list" and the corresponding Polish list (Rozporządzenie Ministra środowiska z dnia 27.09.2001 w sprawie katalogu odpadów (Dz.U. Nr 112, poz. 1206) contain information about the origin and composition of hazardous and other wastes that meets the above basic requirements for such lists. Instead Ukrainian Yellow and Green Waste Lists define only the composition, and not the origin of waste.

<sup>28</sup> The List of Hazardous Properties and Instructions on the Control of Transboundary Movements of Hazardous Wastes and their Disposal/ Removal is approved by the Decree of the Ministry of Ecology and Natural Resources of Ukraine of October, 16, 2000, № 165. Dangerous properties listed in Ukrainian List of Hazardous Properties are fully consistent with Annex III to the Basel Convention. Compared to the list of hazardous properties specified in Annex III to the Directive 2008/98/EC, the "Ukrainian" list does not include such properties as: irritant, harmful, toxic for reproduction, mutagenic, sensitizing.

<sup>29</sup> The Green Waste List is approved by the Regulation of the Cabinet of Ministers of Ukraine № 1120 of July, 13, 2000.

<sup>30</sup> Art. 3 para. 2 of the Regulation *on the Control of Transboundary Movements*.

<sup>31</sup> Art. 4 of the Regulation *on the Control of Transboundary Movements*.

*Movements* in such quantities that can detect hazardous properties”).

The difficulty is the term “quantities that can detect hazardous properties”, which is non-concrete and subject to validation. As appears from the Regulation *on the Control of Transboundary Movements*, future exporters, carriers, importers or disposers of hazardous waste shall apply to the Ministry of Ecology and Natural Resources of Ukraine for consent for transboundary movement of waste<sup>32</sup>. That is, in the first stage, it is these individuals who determine whether these substances or materials constitutes hazardous waste or not. Although it is under the control of the corresponding ministry, such a determination may be problematic.

In addition to this, the definition contained in the Regulation *on the Control of Transboundary Movements* is generally quite specific and tends to meet the requirements of the Basel Convention. However, the definition is not placed in the highest but in the subordinate legal act. Undoubtedly, the definition of the object of legal regulation is important in defining the legal status of this object. For this reason, it seems more relevant to define “hazardous waste” on the highest, not on subordinate level. Ukrainian Act *On Waste* contains a less specific definition of “hazardous waste”. According to it, hazardous wastes are the wastes that have the physical, chemical, biological or other hazardous properties that (properties) create or may create a significant danger to the environment and human health and therefore these wastes require special methods for handling. This definition covers various types of waste, and includes concepts subject to evaluation (e.g. “significant danger to the environment and human health”). Therefore, it is proposed that this legal definition is brought into line with the Basel Convention. Thus, the main features of hazardous waste under international law, as well as under EU and Ukrainian law, are the following. They belong to the group included in the specific list of hazardous wastes and they have certain hazardous properties. These lists and properties specified in these three legal systems are quite similar and consistent.

## 4 Hazardous Waste Management

### 4.1 Material Aspects

Among the special methods of handling hazardous wastes, the following can be mentioned.

The Basel Convention (Art. 4 para. 2 point “a”) expresses the need to minimize the generation of hazardous wastes and other wastes by the Parties to the Convention. Priority in waste management in EU legislation is their prevention (Art. 4 para. 1 of the Directive 2008/98/EC). In Ukrainian law one of the general objectives of the national policy is to minimize the generation of wastes and to reduce their level of hazard. The law also defines the duty of entrepreneurs to prevent the generation and reduce the amount of waste. To this end, among other things, the Cabinet of Ministers of Ukraine, ministries, other central and local executive authorities can develop, implement and periodically review the standards of waste generation per unit of production (raw materials and energy), performance of works, provision of services. These standards should define quantitative and qualitative composition of waste, taking into account the advanced technological achievements<sup>33</sup>. Such standards have not been developed<sup>34</sup>. The Basel Convention provides that its Parties should ensure that persons involved in the management of hazardous wastes or other wastes prevent pollution<sup>35</sup>. This provision as a duty of entrepreneurs is copied to Art. 34 para. 3 of the Ukrainian Act *On Waste*. The abovementioned provision of the Basel Convention is implemented, *inter alia*, in the provisions of the Regulation *on the Control of Transboundary Movements*. The Regulation specifies the list of documents to be submitted to the Ministry of Ecology and Natural Resources of Ukraine for consideration of consent to import hazardous waste (such as the description of methods of waste disposal/removal)<sup>36</sup>. Undoubtedly, this measure aims to prevent environmental pollution. Another measure that is implemented with the same purpose is that the container of hazardous waste transiting through Ukrainian territory can be sealed at the entrance of its territory and verified at the exit from it. These and even many other measures provided in Ukrainian legislation are undoubtedly insufficient to ensure the prevention of environmental pollution by waste. It is necessary to develop a more systematic approach that

<sup>32</sup> The Basel Convention (Art. 5) requires establishment of one or more competent authorities, whose aim is to facilitate the implementation of the Convention. In Ukraine, such an authority is the Ministry of Ecology and Natural Resources. The Ministry controls the movement of hazardous wastes and their disposal/ removal in Ukraine, as well as gives consent to their import into or transit through the territory of Ukraine (according to Art. 16, 24 of the Regulation *on the Control of Transboundary Movements* written consent is required). The Ministry also gives consent to the export of hazardous waste (according to Art 12 para. “r” of the Regulation *on the Control of Transboundary Movements* acquiescence is allowed).

<sup>33</sup> Art. 5 para. 1 point “6”, Art. 17, Art. 31 of the Ukrainian Act *On Waste*.

<sup>34</sup> Interestingly enough, the Polish Act *On Environmental Protection* of April, 27, 2001 (ustawa z dnia 27 kwietnia 2001 r. *Prawo ochrony środowiska* (Dz.U. Nr 62, poz. 627 ze zm.)) includes the same provision. According to it, the Minister of the Environment together with the Minister of Economy can define standards of waste generation. Such standards in Poland have not yet been set.

<sup>35</sup> Art. 4 para. 2 point “c” of the Basel Convention.

<sup>36</sup> Art. 29 of the Regulation *on the Control of Transboundary Movements*.

would cover all levels of waste management. In order to improve Ukrainian legislation in the area of prevention of waste contamination on the basis of European experience, the following issues should be considered.

1. Introduction of extended producer responsibility in accordance with the polluter pays principle<sup>37</sup>. This will encourage production of products in such a way that the negative impact on the environment caused by waste created from these products is reduced.
2. Creation of real organizational, legal and economic mechanisms for separate collection of wastes<sup>38</sup>.
3. The obligation of the original waste producer or other holder to carry out waste treatment himself or to ensure that this treatment is carried out by other persons<sup>39</sup>. Ukrainian law lacks specific definition of this duty as well as the subjects responsible for waste management.

Another requirement of the Basel Convention on hazardous waste management is that its Parties shall not permit export or import of hazardous wastes or other wastes to or from a non-Party, except when the relevant agreements exist (Art. 4 para. 5, Art. 11 of the Convention). These rules are included into the Ukrainian Regulation *on the Control of Transboundary Movements*.

The Convention also requires special packaging, labeling and accompaniment by an appropriate movement document of hazardous and other wastes subject to transboundary movement. Such a movement shall be in accordance with generally accepted and recognized international rules and standards (Art. 4 para. 7 item "b", "c" of the Convention).

As for the first three requirements, Art. 19 of the Directive 2008/98/EC requires proper packaging and labeling of hazardous waste during their collection, transport and temporary storage; transfer of hazardous waste within the territory of the EU Member States is possible with an identification document.

According to Ukrainian legislation, the transfer of hazardous waste is subject to the general rules on waste management and the rules on the handling of

dangerous goods. Detailed provisions on hazardous waste as defined in the License Conditions for Economic Activity in the Sphere of Hazardous Waste Management<sup>40</sup>. License conditions specify requirements for the packaging during hazardous waste collection and storage.

All waste produced in Ukraine are subject to mandatory certification<sup>41</sup>; dangerous goods shall be accompanied by appropriate shipping documents<sup>42</sup>. According to other acts of Ukrainian legislation, hazardous waste shall be accompanied by a passport and an appropriate permit (license)<sup>43</sup> during their transportation. They may be transported only in a specially equipped vehicle, with the appropriate labels that characterize the nature of their use<sup>44</sup>.

With regard to generally accepted international rules and standards to be met during transboundary movement of waste, Art. 18 of the Directive 2008/98/EC generally prohibits the mixing of hazardous waste, but also outlines some specific conditions under which such mixing can take place. The Ukrainian Act *On Waste* prohibits the mixing of any waste (except when justified by technology)<sup>45</sup>.

#### 4.2 Procedural Aspects

According to Art. 6-7 of the Basel Convention, transboundary movement of hazardous and other wastes (hereinafter - transboundary movement) shall include the following mandatory elements that were almost literally transferred to the Ukrainian Regulation *on the Control of Transboundary Movements*.

1. State of export, waste generator or waste exporter (hereinafter - the notifier) notifies of any proposed transboundary movement of hazardous wastes or other wastes (through the competent authority of the State

<sup>37</sup> As provided for in Art. 9 of the Directive 2008/98/EC.

<sup>38</sup> For example, according to Art. 11 para. 1 of the Directive 2008/98/EC, by 2015 separate collection should be organized at least for paper, metal, plastic and glass. Ukrainian legislation in this respect is limited to general formulations (Art. 5 para. 1 item "i" of Ukrainian Act *On Waste*, Methodology of Separate Waste Collection, approved by the Order of the Ministry of Regional Development, Construction, Housing and Communal Services of Ukraine of August, 1, 2011 № 133).

<sup>39</sup> Art. 15 of the Directive 2008/98/EC.

<sup>40</sup> Approved by the Order of the Ministry of Ecology and Natural Resources of Ukraine of November, 4, 2011, № 433.

<sup>41</sup> Art. 26 of Ukrainian Act *On Waste*.

<sup>42</sup> Art. 20 of Ukrainian Act *On the Transport of Dangerous Goods* of April, 06, 2000, № 1644-III. Vidomosti Verhovnoi Rady Ukrainy, 2000, № 28, art. 222.

<sup>43</sup> Requirements of License conditions and of Art. 34 para. 6 of the Ukrainian Act *On Waste*. Passport is a document stating the name and code of the waste (in accordance with the national waste classifier), their quantitative and qualitative composition, origin and characteristics of sites or objects of their removal and storage, as well as information about methods of control and safe operation of these sites or objects (Art. 33 para. 2 of Ukrainian Act *On Waste*). Rules of state registration and certification of waste are established by the Procedure of State Registration and Certification of Waste, approved by the Regulation of the Cabinet of Ministers of Ukraine of November, 1, 1999, № 2034.

<sup>44</sup> Art. 2.2.1 of the State Sanitary Rules and Regulations "Hygienic requirements for industrial waste management and determination of their class of hazard for human health" DSanPIN 2.2.7.029-99, approved by the Decree of Chief Medical Officer of Ukraine of July, 1, 1999, № 29.

<sup>45</sup> Art. 17 para. 1 point "ж" of the Ukrainian Act *On Waste*.

of export) the competent authorities of the States concerned that are Parties to the Basel Convention<sup>46</sup>.

The language of the message should be acceptable for the State of import<sup>47</sup>. Notice shall include information from Annex VA to the Basel Convention<sup>48</sup>.

In case of planned regular transboundary movement for a period not exceeding 12 months provided written consent of the States concerned, instead of a single notification of each shipment one general notification can be used. This notification shall include the exact quantities or periodical lists of hazardous wastes or other wastes to be shipped.

## 2. State of import:

- informs the notifier in writing on:
  - consent on transboundary movement and the confirmation of the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question or
  - consent on transboundary movement on certain conditions and the above confirmation, or
  - denial on transboundary movement, or
  - the need for more information;
- sends the final response to the competent authorities of the States concerned which are Parties<sup>49</sup>

## 3. State of transit which is a Party to the Basel Convention:

- promptly<sup>50</sup> acknowledges the receipt of the notification;
- within 60 days informs the notifier in writing on:
  - consent on transboundary movement or

- consent on transboundary movement on certain conditions and the above confirmation, or
- denial on transboundary movement<sup>51</sup>, or
- the need for more information;
- (as appropriate) informs the competent authorities of the States concerned on the consent on transboundary movement.

## 4. State of export allows transboundary movement if it is:

- notified in writing that the notifier received from the State of import:
  - consent on transboundary movement,
  - confirmation of the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question;
- receives the written consent for transboundary transport of the State of transit or receives no such agreement within 60 days of receiving notice by the State of transit if the State of export has decided not to require such a consent and informed the other Parties in accordance with Art. 13 of the Basel Convention.

## 5. A person who takes charge of a transboundary movement shall sign the movement document either upon delivery or receipt of the wastes in question.

The disposer shall inform the exporter and the competent authority of the State of export about the receipt of the wastes in question and, in due course, of the completion of disposal<sup>52</sup>.

At the request of the State of import or the State of transit that are Parties to the Basel Convention, transboundary movement shall be covered by insurance, bond or other guarantee<sup>53</sup>.

The Basel Convention provides special conditions for the application of its provisions if not all States concerned recognize waste planned for transboundary movement to be hazardous.

If the transboundary movement of hazardous or other wastes cannot be completed, the State of export shall take the wastes in question back (Art. 8 of the Basel Convention);

The next article of the Basel Convention outlines concept of illegal traffic of hazardous wastes and other wastes and assumes liability for it.

<sup>46</sup> According to the Basel Convention, the States concerned means Parties of the Convention which are States of export import, or transit, whether or not Parties. If the State is not a Party to the Convention, cooperation on the issues of transboundary movement of waste is carried out with its relevant authorities.

<sup>47</sup> For some unknown reason the Regulation *on the Control of Transboundary Movements* defines only the language of the notification acceptable in case of Ukraine being a State of transit. It is in the Ukrainian or Russian language. The language of the notification in the case of Ukraine being a State of import is not mentioned.

<sup>48</sup> Annex 3 to the Regulation *on the Control of Transboundary Movements* provides a sample notification. This sample includes general information outlined in Appendix VA to the Basel Convention. However, the Ukrainian sample lacks such items as the reason for waste export and the information relating to insurance. In accordance with the Basel Convention, information relating to insurance should include relevant insurance requirements and how they are met by the exporter, carrier and disposer. Instead of this, the Ukrainian sample contains application of exporter/manufacturer about the existence of the documents on relevant insurance or other financial guarantees. In our opinion, it is not in line with the Basel Convention.

<sup>49</sup> According to the Regulation *on the Control of Transboundary Movements* the decision is made within 70 days. Interestingly, the requirement for the consent to import hazardous wastes under Ukrainian law is that the importer or other agent acting on his behalf shall be resident or have branches in Ukraine.

<sup>50</sup> For Ukraine it is three working days.

<sup>51</sup> According to Ukrainian legislation, such a denial should be substantiated.

<sup>52</sup> According to Ukrainian legislation, such a person shall inform the named entities and the Ministry of Ecology and Natural Resources of Ukraine about receiving the waste within 3 business days after their receipt and about the completion of their disposal/ removal - within 180 days after their receipt. Sample "document of transportation", which in this case is sent can be found in the Annex 4 to the Regulation *on the Control of Transboundary Movements*.

<sup>53</sup> Regulation *on the Control of Transboundary Movement* determines that such insurance is required.



The above analysis suggests that the Basel Convention was implemented to Ukrainian legislation. However, its provisions should be concretized in national legislation in order to be effective. The grounds for such implementation could be found in the regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 *on shipments of waste*<sup>54</sup> that not only is in line with the Basel Convention but also specifies its provisions, which is important in terms of its realization in practice.

## 5 Conclusion

According to Ukrainian legislation “waste” means any substances, materials and objects that were created during the production or consumption, as well as goods (products) that fully or partially lost their consumer properties and cannot be further used in the place of their creation or revelation and which the owner discards, intends or is required to discard by recycling or removal.

Consideration of excluding from this definition all the elements that are not used in the European definition of waste is recommended. Ukrainian legislation should be supplemented with the notions of by-products and end-of-waste status as well as with the criteria of by-products and of the substance or object that ceased to be waste.

Ukrainian definition of “hazardous wastes” is in line with the definition from the Basel Convention and the EU definition. The main features of hazardous waste under international, EU and Ukrainian law are quite similar and consistent. However, the Ukrainian definition of “hazardous wastes” should be easier in practical usage and it should be placed in the highest, not in subordinate legal act.

Ukrainian legislation includes the general requirements that can be found in the Basel Convention and in the Directive 2008/98/EC on the minimization of wastes generation and on pollution prevention. However, the concrete effective provisions implementing these requirements are lacking.

The Convention and the Directive 2008/98/EC also require that wastes subject to transboundary movement shall be specially packed, labeled and accompanied by an appropriate movement document. Such a movement shall conform to generally accepted and recognized international rules and standards.

The procedure preceding transboundary movement of wastes outlined in the Basel Convention was transferred almost verbatim to Ukrainian law.

Therefore, international, European and Ukrainian regulation on transboundary movement of wastes is quite similar. It is suggested that more precise mechanisms for realizing the international requirements in this area in Ukraine are developed.

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<sup>54</sup> OJ L 190, 12.7.2006, pp. 1-98.

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

#### The Environmental Law Division of the Öko-Institut:

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

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- Undertaking projects in developing countries
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- **Companies and environment**
  - Environmental management
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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of homo oeconomicus institutionalis, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

- Product policy/REACH
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conservation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

sofia is working on behalf of the

- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Nature Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

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## elni

*In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.*

*Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.*

*elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.*

### Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

### elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focusing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

### elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

### Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

### elni Website: elni.org

The elni website [www.elni.org](http://www.elni.org) contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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