

Trashing Free Trade: The Basel Convention's Impact on International Commerce

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With the establishment of the World Trade Organization (WTO) in 1995, free trade *should* be on the rise. A new, more powerful version of the General Agreement on Tariffs and Trade (GATT), which had existed as a non-binding treaty since 1948, the WTO has been heralded as the mechanism for a new era in global trade liberalization.

As the WTO came into being, however, new trade restrictions in the form of non-tariff trade barriers were gaining increased acceptance around the world. Many of these regulations and restrictions are justified as measures to protect the environment. Unlike previous generations of trade barriers, environmental restrictions are enshrined in international law as measures to achieve "sustainable development." Several international environmental treaties already employ trade sanctions as enforcement measures. The most significant multilateral agreement, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal seeks to impose regulations and outright trade bans on items in global commerce. The existence of this treaty is a direct challenge to the notion of a free and open global market.

The WTO Ministerial Conference meeting in December 1996 will help determine the critical relationship between global trade and environmental policies. The WTO Committee on Trade and the Environment is attempting to determine when trade restrictions and other trade policy measures can be used for purposes of environmental protection. The Basel Convention, due to its onerous limits on the international trade in secondary materials, is in the center of this debate.

DEVELOPMENT OF THE BASEL CONVENTION

The growth of the international waste trade first prompted negotiations under the United Nations Environment Programme (UNEP). Calls for regulation peaked in 1988 when the news media highlighted numerous incidents of improper waste dumping in Africa and Eastern Europe. One horror story focused on the illegal dumping of 2,100 tons of toxic waste in Nigeria by an Italian firm. Such sensationalized abuses provided ammunition for the environmental group Greenpeace, which has long blamed environmental problems in the Third World on industrial capitalism. Greenpeace cast its anti-trade ideology as the cure for what ails the world's poor. UNEP followed suit, blaming improper waste disposal on trade: "A growing army of immoral, unscrupulous 'waste brokers' are benefiting from global commerce in poison."¹

Basic Treaty Requirements

Signed in 1989, the Basel Convention creates a global regulatory regime to control trade in hazardous wastes. It also obligates governments to manage waste transportation and disposal. The agreement is seen as the answer to the waste dumping incidents which occurred in the 1980s. It came into force in 1992 when it was ratified by a sufficient number of signatories, mostly developing countries and the European Community. Importantly, the U.S. remains a non-Party to the Convention.²

According to Iwona Rummel-Bulksa, executive secretary of the Basel Convention secretariat, “this instrument represents the intention of the international community to solve this global environmental problem in a collective manner.”³ The underlying philosophy of the treaty is that the global environment is best safeguarded by reducing the generation of wastes by industry. The agreement has three primary objectives:⁴

- Transboundary movements of hazardous wastes should be reduced to a minimum consistent with their environmentally sound management;
- Hazardous wastes should be treated and disposed of as close as possible to their source of generation;
- Hazardous waste generation should be reduced and minimized at source.

The treaty classifies a large number of materials as hazardous waste. The expansive definition of “hazardous” can be very problematic. Solvents, chemical residues, and pharmaceutical byproducts, for example, are each listed in the agreement as hazardous by definition. Given Basel’s regulatory regime, the power to declare a material hazardous can have enormous implications for world trade. The criteria are so broad that trade in the byproducts of nearly all agricultural and industrial processes are potentially affected.

Basel’s restrictions on the global economy resemble those imposed by the Resource Conservation and Recovery Act in the U.S., and can be equally cumbersome and bureaucratic. All wastes must be accompanied by a “movement document” at every stage of transit.⁵ Customs officers “are to make sure that the material being inspected corresponds to both the transport manifest and the Movement Document that accompany the wastes.”⁶ Transboundary shipment is prohibited unless government authorities in the state of export, the state of import, and all states in transit are provided written notification concerning 21 categories of information.⁷

To transport listed materials within a signatory country, a shipper must have prior informed consent, permission from that country’s government to transport or dispose of wastes somewhere in that country’s territory. A Party may export hazardous materials for disposal only if it cannot dispose of the waste domestically, raising the possibility that U.S. exports could be forbidden if there is adequate capacity for disposal within U.S. borders.⁸

Trade in hazardous materials is permitted only between Parties to the Convention. “Transboundary movements of hazardous wastes carried out in contravention are to be considered illegal traffic and a criminal act. . . every Party shall introduce national legislation to prevent and punish illegal traffic in hazardous wastes,” says Rummel-Bulksa.⁹ To this end, the Basel Secretariat works closely with Interpol and the World Customs Organization.¹⁰

A Party to the convention may not export listed materials to a non-Party, or import them from a non-Party, unless such trade is regulated by a separate agreement no less stringent than the Basel Convention.¹¹ This last provision, found in Article 11 of the treaty, could effectively enforce the Convention on the entire world, even on countries which oppose it, particularly if the U.S. chooses to implement the Convention. The executive secretary says, “Parties and non-Parties will have to respect standards recognized as essential by the international community for the protection of the environment.”¹²

Greenpeace Orchestrates a Trade Ban

The Basel Convention was negotiated with the aid of non-governmental organizations (NGOs), most notably Greenpeace. Negotiators were encouraged to utilize the convention-protocol model of international law. The convention is the first step in the process, which establishes a framework of general commitments and broad goals governing international behavior. This “soft” law instrument is designed to evolve over time, with “hard” law instruments to be negotiated and approved later through Conferences of the Parties. Subsequent protocols are used to implement more detailed policies within a binding regulatory regime.¹³ This model is exemplified by the Montreal Protocol on protection of the ozone layer, which began as the non-binding Vienna Convention and eventually phased out the production of chloroflourocarbons.

The precursor to the Basel Convention was the Cairo Guidelines on management and disposal of hazardous wastes developed in 1984-85. The guidelines established the principle of prior informed consent in which importing states would communicate their approval of waste shipments. Basel entered into force in 1992 without being ratified by several major industrialized nations, including major waste exporting states the U.S., Germany, the Netherlands, and Belgium.¹⁴

The basic provisions of the Convention were progressively strengthened in periodic meetings of the Conference of the Parties (COP) beginning in 1992. The first COP in December 1992 decided to prohibit exports of hazardous wastes from industrialized nations for final disposal in developing countries. The second COP in March 1994 decided to ban, by 1998, all exports of hazardous materials for recycling purposes from members of the Organization for Economic Cooperation and Development (OECD) to non-OECD developing countries. By the third COP in September 1995, the Parties moved to amend the Convention to make the export ban wastes formally binding on all Parties to the amendment.¹⁵

Under the proposed trade ban, Parties listed in Annex VII, comprised of members of the OECD, European Union, and Liechtenstein, may trade recyclable hazardous wastes among themselves subject to ordinary Basel requirements, but may not trade these items with any country not listed in the Annex. The Convention defines as “hazardous” all those materials which have characteristics listed in the United Nations Recommendations on the Transport of Dangerous Goods. This covers materials that are flammable, oxidizing, poisonous, or corrosive. The broad listing includes the vague category “ecotoxic,” meaning a substance which “may present immediate or delayed adverse impacts to the environment.”¹⁶

Greenpeace did much to transform Basel from a weak, relatively non-binding instrument to a vehicle for banning trade. Dedicated to putting teeth into Basel’s provisions, Greenpeace almost single-handedly convinced Third World regimes that the rich capitalists were conspiring to dump toxic waste in order to harm the poorest regions of the world. Greenpeace analyzed hazardous waste trade statistics and published reports highlighting what it claimed were illegal and exploitative toxic shipments.¹⁷ Agitated by this propaganda, countries in Organization for African Unity and the Non-Aligned Movement began clamoring for a trade ban.¹⁸ Nigeria and Cameroon vowed to execute individuals caught importing hazardous waste.¹⁹

With the decision on the trade ban secured at the COP meeting mentioned earlier, Greenpeace savored its victory: “For the first time in international law the Basel parties took a clear decision that hazardous waste is not a ‘good’ suitable for free trade, but something to be avoided, prevented and cured, like a disease or a dangerous plague.”²⁰ The sweeping rationale for the export ban on recyclables is, as the *Economist* explains, that “Few recycling plants in poor countries comply with rich-world standards – so any such exports may end up damaging the environment.”²¹ Though environmentalists usually promote recycling, they seemingly do not approve of it for development in poorer countries.

Greenpeace actions also played a role in the Clinton administration’s reversal of U.S. policy on hazardous waste exports. The administration originally opposed trade restrictions. However, in 1994 it decided to support a ban on waste exports to developing countries, and asked Congress to bring U.S. law into conformity with Basel. The administration position would permit trade in Basel wastes only with Canada and Mexico, exempting some recyclables but prohibiting exports of used car batteries.²² “The current policy puts people in other countries at risk of dangerous exposures to toxic materials,” said EPA Administrator Carol Browner, “that has to stop.”²³

A Global Superfund?

In keeping with the gradual strengthening of international regulations, the treaty directs the parties to cooperate in the development of a protocol setting out appropriate rules and procedures on liability and compensation for damage resulting from transboundary movement and disposal of hazardous wastes.²⁴

If the international liability protocol operates anything like its U.S. variant, Superfund, it will be an international disaster. Under Superfund, liability for the costs of cleanup is strict, retroactive, and joint-and-several. Even those with a tangential relationship to a toxic waste site can be held liable for cleanup costs. Waste-hauling firms and prior owners of materials in a waste site have been held liable for multimillion dollar cleanup bills. Rather than promoting sound environmental management, Superfund has caused industrial sites to be abandoned.²⁵

A Working Group of Legal and Technical Experts has convened several times to draft a liability protocol. The Working group has proposed strict, joint-and-several liability standards.²⁶ The liability protocol proposal, along with an international fund for emergency clean up and compensation activities, may be considered by the Parties as early as 1997. Generators, exporters, and individuals involved in the transit of waste materials would be held liable for damages connected with transboundary movement, and would be required to purchase insurance or other financial guarantees. The extreme financial liability provisions under consideration are directed at punishing those who engage in trade, though the mere transit of wastes is not what causes harm.²⁷

THE IMPACT ON INTERNATIONAL COMMERCE

A large majority of the materials Basel defines as “hazardous wastes” are in fact valuable materials destined for recycling, recovery, and re-use.²⁸ The decision to ban exports of many recycling materials from rich to poor nations would needlessly terminate a lucrative and mutually beneficial trading relationship. Recycled scrap provides several countries with supplies of aluminum, lead, and zinc.²⁹ The United States exports 9 to 10 million tons of scrap iron and steel per year, which many countries use as a feedstock to make steel.³⁰ If trade in secondary materials is banned, many countries will lose access to global markets for secondary raw materials, scrap metals, and textiles.

The value of international trade in items affected by the Basel Convention is approximately \$50 billion per year.³¹ U.S. net waste exports affected by the trade ban, excluding iron, amount to \$2.5 billion annually. Roughly 95 percent of the trade in hazardous wastes between OECD and non-OECD countries is in recyclable products.³² The OECD nations provide the rest of the world with much of its available aluminum, lead, zinc, copper, paper and plastics. International markets are a vital industrial source of secondary raw materials and energy for developing countries such as South Korea, Indonesia, China, Malaysia, Thailand, and India. For this reason, several of these countries have tempered their earlier enthusiasm for the Basel Convention.

The Basel Convention is dangerously vague in making distinctions between “hazardous waste” and recyclables. For example, it defines as hazardous “operations which may lead to resource recovery, recycling, reclamation, direct re-use or alternative uses,” including any material which can be used as a fuel, a solvent, a metal or metal compound, an organic substance, or “other inorganic materials.”³³ If a transported material contains

any quantity of copper compounds, zinc or lead, for example, it is automatically defined as hazardous, even though such materials may be important feedstocks for industrial production.³⁴ International shipments of metals, used car batteries, used computers, and second-hand clothing could be affected by this definition. While the Convention defines certain hazardous characteristics, such as flammability, toxicity, and corrosiveness, it establishes no thresholds of concentration and exposure levels which are essential for determining the impact on human health.³⁵

Government officials are not required to respond to importers' requests for consent within a certain time period or even to respond at all.³⁶ John C. Bullock, environmental counsel for Handy and Harman concludes that:

Businesses accustomed to contracting for delivery of recyclable materials from a broad market, over telephone and fax, within one day, at a fixed price, will simply not be able to conduct business through government agencies. In practical effect the procedural complexity alone, and consequent expense, should result in a minimum of applications for transactions beyond national boundaries.³⁷

Businesses have complained that entire shipments could possibly be classified as hazardous simply because they contain tiny quantities of listed materials. And while Greenpeace has characterized this as a concern only of commercial interests in rich countries, it is also a very real problem for businessmen in developing countries as well.³⁸ Many developing countries can only obtain recyclable materials from international markets. However, these businesses are engaged in just the kinds of activities Greenpeace intends to stop. Greenpeace campaigner Jim Puckett admits that the trade ban will damage industries in poorer parts of the world. However, he told the *Economist* that "the small harm done will be more than outweighed by the environmental and health benefits of a strict ban."³⁹

To address the concerns of recycling and recovery operations, the Convention has only offered more bureaucracy. Technical Working Groups have painstakingly developed detailed lists of hazardous substances and definitions. "Basel-crats" are preparing numerous manuals, guidance documents, technical guidelines and procedures for implementing Convention rules.⁴⁰ The third COP also created new Model National Legislation in order to promote internationally harmonized definitions.

Trade Regulation Actually Reduces Environmental Protection

The drive to regulate international trade stems from a mistrust of the free market. Private individuals cannot be trusted to safeguard the environment, according to this rationale, so government regulation and control is necessary. However, this argument ignores the fact that most environmental problems are the result of excessive government control and a lack of free market institutions.

International trade itself is not a cause of environmental degradation. Illegal dumping of waste is more often a problem in countries where there is little private property, and unresponsive or corrupt government bureaucracies. Improper handling or disposal of hazardous wastes is the norm in countries where interventionist economic policies systematically undermine market institutions, private property rights, and the rule of law.

Global hazardous waste regulation does nothing to change the root cause of environmental degradation. International trade controls cut off developing countries from international markets for important materials supplies. The loss of economic growth opportunities has profound implications for environmental quality. Economic growth is essential for the creation of wealth, which provides the resources necessary for environmental protection.⁴¹

Proponents of global environmental regulation routinely fail to take into account the anti-environmental effects of continued poverty and underdevelopment. Impoverished populations and stagnating economies are much less likely to be able to afford cleaner energy sources, and have less money to spend on improving environmental amenities. Interior Department analyst Indur Goklany writes that “anything that unduly retards economic growth in developing countries – including inefficient policies, no matter how well-intentioned – will ultimately retard net environmental progress and imperil human lives.”⁴² The late Aaron Wildavsky demonstrated forcefully that wealthier societies are also healthier and safer societies.⁴³

Restrictions on trade can result in harm to environmental quality in other ways as well. Trade restrictions prevent countries from competing with each other on the basis of comparative advantage. The maintenance of trade barriers thwarts efficiency gains which free trade generally brings to the economy. With economic growth, market economies as a whole tend to become more resource-efficient (less resource-intensive) over time. Countries which rely on statist controls tend to be much less efficient, and therefore, much more resource intensive.⁴⁴ Moreover, countries which compete in international markets are better able to integrate technological innovations to reduce waste. Trade regulation interferes with this vital process, doing greater damage to environmental quality in the end.

As developing countries are coming to discover, Greenpeace is not really a champion of the poor. Instead, the environmental group is promoting a world view in which the affairs of poorer countries must be managed by richer nations. Some developing countries resent this kind of treatment as a form of ecological imperialism. Further restrictions on the freedom of economic exchange will certainly not improve the environment, but will serve as a bad policy example for developing countries. Global regulatory intervention will simply encourage statist economies to maintain government controls.

The Implications for World Trade Organization Rules

The relationship between the Basel Convention and international trade rules is controversial and has not yet been settled. Concerns about the effect of trade treaties on environmental agreements prompted trade negotiators to incorporate into the North American Free Trade Agreement an explicit reference to the Basel Convention. It stipulates that Basel trade restrictions will prevail over any conflicting NAFTA provisions.⁴⁵ No such explicit recognition of Basel appears in the GATT/WTO.

The trade rules of the WTO are based on the principle of non-discrimination. The basic requirements of this principle are:

- Government trade policies may not discriminate among imports on the basis of origin (most-favored-nation); trade privileges are not to be granted to one country over another.⁴⁶
- Parties must treat imports no less favorably than domestic like products (national treatment).⁴⁷ Imports are to receive equivalent treatment regarding internal taxes and regulations.
- Parties may not impose trade prohibitions or quantitative restrictions on imports or exports other than duties or taxes, subject to certain exceptions.⁴⁸ Tariffs are the only acceptable means of protectionism, and restrictions may not be placed on products destined for another Party.

A major exception to general trade principles is Article XX of GATT, which allows trade restrictions “necessary to protect human, animal or plant life or health” or “relating to the conservation of exhaustible natural resources if such measures are made in conjunction with restrictions on domestic production or consumption.”⁴⁹ These provisions allow countries to deviate from general GATT principles under certain circumstances (see box).

Most of the key international environmental treaties utilize some sort of trade enforcement measure or restrict trade in some fashion. Besides the Basel Convention, the most significant trade-restrictive treaties now in effect are the Convention on International Trade in Endangered Species (CITES, 1973) and the Montreal Protocol (1987). Though some GATT jurisprudence suggests that the trade discrimination in these treaties could be struck down by the WTO, no country has ever brought the matter to a trade panel to be resolved.⁵⁰

CITES regulates trade in wildlife and wildlife products for the purposes of conservation. Species are divided into three annexes, each with differing levels of trade restriction depending on endangered or threatened status. Trade in the products of a non-domestic species can be banned, meaning that a convention Party may apply green trade barriers for the purposes of conserving resources outside its own legal jurisdiction.⁵¹ Trade in elephant ivory, for example, has been banned under CITES. The treaty attempts to achieve its objectives not just by coordinating national environmental policies, but by restricting trade with nations electing to implement different policies.

Like CITES, the Montreal Protocol imposes trade restrictions against countries which do not sign and ratify its provisions. This treaty phased out the use of chloroflourocarbons (CFCs), chemical refrigerants suspected of thinning the stratospheric ozone layer. It also adds a new wrinkle, banning trade in products which contain or use CFCs in their production processes. CFCs are used in the electronics industry, for example, to clean circuit boards. Trade in such electronic components is banned under the Protocol, employing a process standard to violate ordinary GATT obligations with regard to like products.

Similar concerns exist for treaties such as the Global Climate Convention, covering emissions of alleged greenhouse gases, which could potentially interfere with trade through the imposition of carbon taxes at the border. The Biodiversity Convention, not yet ratified by the U.S., promotes regulation and control of access to genetic resources. It could potentially result in biotechnology restrictions which conflict with the intellectual property provisions of the WTO.

The relationship between GATT/WTO and environmental trade measures was defined in large part by GATT rulings on the Tuna-Dolphin dispute between the U.S. and Mexico. Under the Marine Mammal Protection Act, the U.S. banned Mexican imports of tuna caught using purse-seine nets, and enacted a secondary embargo on imports from intermediary countries. While a GATT panel upheld the U.S. "dolphin-safe" eco-label, it ruled that the trade ban discriminated based on the way goods are produced, rather than based on the characteristics of the goods themselves, thus violating the national treatment standard. The U.S. was not able to claim an exemption under Article XX because the natural resources in question are located outside the jurisdiction of the U.S. and because other measures, such as a multilateral dolphin conservation agreement, were available to the U.S. In dealing with the secondary embargo, GATT ruled that the U.S. could not use unilateral trade bans to force other nations to adopt specific regulatory policies.⁵²

The GATT Tuna-Dolphin rulings inspired much controversy and environmentalist opposition. However, they were never adopted procedurally by the full GATT, which expired in 1995. Consequently, these rulings are not considered authoritative interpretations of GATT, and though they may contain valuable legal reasoning, they have no legal effect under the new WTO. Thus the status of environmental trade measures and multilateral environmental agreements in world trade rules remains in doubt.⁵³

Basel Conflicts with GATT Provisions

Article 4.5 of the Basel Convention prohibits all trade in wastes with countries that are non-Parties to the Convention. On its face, this provision violates GATT Article XI, unless recourse is made to Article XX. Article XI reads:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall

be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.⁵⁴

Article XI makes clear that export bans are generally not permitted under GATT. The proposed amendment to Basel, taken at the last COP, would prohibit exports from members of the OECD and EU from exporting to non-members of those categories. Parties are required to prohibit waste exports if they have “reason to believe that the wastes in question will not be managed in an environmentally sound manner.”⁵⁵ The export ban may also run afoul of GATT Article XIII in that it provides for trade discrimination against countries not listed as approved trade destinations under the Convention. Article XIII stipulates that any trade ban must apply equally to all countries:

No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

The Basel Convention, by its very nature, appears to be in conflict with the letter and spirit of existing trade law.

Reconciling Basel and GATT/WTO

An adverse WTO ruling against a multilateral environmental treaty would be devastating for the environmental groups which have championed international trade controls. Consequently, they are lobbying to have such treaties legitimized in international law.

When two treaties relate to the same subject matter, international law stipulates that the earlier treaty applies only to the extent that its provisions are compatible with the later treaty. Compatibility is a rather subjective term, however. It is possible that two seemingly incompatible sets of treaty obligations can be maintained. Some argue that such treaty obligations should be interpreted in a way which reconciles them wherever possible. David Wirth, law professor at Washington and Lee University, writes that “the obligations stemming from multiple agreements among the same parties ought to be interpreted against the background of a presumption that gives life to them all, except to the extent that, in the words of the Vienna Convention, those obligations are not ‘compatible’ with each other.”⁵⁶

Insofar as the Basel Convention is a more specific and specialized regulatory structure governing trade and management of hazardous wastes, it can be seen as a consensual departure among Parties from the WTO’s non-discrimination principles.⁵⁷ In fact, this is how the Basel Convention and GATT have coexisted since 1992. The fact that most of

the world community has participated in and accepted the Basel Convention means that no WTO challenge is likely to be forthcoming.⁵⁸ This may also explain why multilateral environmental treaties such as CITES and the Montreal Protocol have never been challenged under world trade rules either.

Between two Parties to the Basel Convention, trade bans may not violate GATT/WTO obligations. By virtue of the fact that they are both signatories to the Basel Convention and/or its trade ban on recyclables, the two countries effectively waive their GATT/WTO rights to the extent of a conflict between the two. Should Basel Parties enact the trade ban decision on recyclables as an amendment to the treaty in 1997, the ban most likely prevails over 1995 WTO obligations for Parties that ratify the Basel amendment, under the later-in-time rule.⁵⁹

However, in situations where nations do not consent to Basel restrictions, the treaty cannot be easily reconciled with GATT/WTO. When both countries are Parties to GATT/WTO, but only one is a Party to the Basel Convention, the GATT/WTO would likely prevail in the event of a dispute. Likewise, non-Parties to Basel's trade ban amendment would still retain their GATT/WTO rights vis-a-vis states which prohibit import and export of recyclables or other wastes. A WTO panel would almost certainly strike down the proposed Basel recyclables amendment because it imposes a trade ban on countries that did not consent to such an arrangement, unless the WTO were to decide that an Article XX exception is warranted on the grounds that coercive trade measures conserve the environment by forcing non-parties to comply with a multilateral environmental agreement.

Another option in the above scenario is Article 11 of the Basel Convention, which allows Parties to negotiate bilateral waste trade agreements with non-Parties. A bilateral agreement would be a vehicle for non-Parties to waive their GATT/WTO rights, minimizing conflict between the two treaties. However, non-Parties would be forced to accept terms no less stringent than Basel restrictions for Parties, meaning that the bilateral agreement is no solution for countries that desire free trade relations with Parties. In addition, a bilateral agreement would not be legal for exporting countries subject to the recyclables ban amendment, unless the importing country is both a) a non-Party and b) another developed country listed in Annex VII (OECD, EU, or Liechtenstein).⁶⁰

In the final analysis, trade rules will probably not invalidate international environmental treaties. If a major industrialized nation imposes WTO-illegal trade restrictions under an international environmental agreement, the worst that can happen is that the WTO authorizes trade retaliation by the offended Party. Since the offended Party is likely to be a developing country, trade sanctions under the WTO are unlikely to influence the policies of the more powerful trading partner.

GREENING THE WTO?

Just as the Basel Convention has been evolving, so too has the WTO. From 1991 to 1993, the GATT convened a Working Group on Environmental Measures in International Trade to consider the relationship between international environmental agreements and GATT provisions. This Working Group was also asked to focus its attention on the trade chapter of Agenda 21, the environmental policy blueprint agreed to at the 1992 U.N. Conference on Environment and Development. The group concluded that the environmental policy goals contained in Agenda 21 are compatible with a system of multilateral trade rules.⁶¹

GATT's most recent rulings suggests a much broader interpretation of environmental exceptions than in the past. In the 1994 Tuna-Dolphin case, for example, GATT indicated that extra-territorial trade restrictions are acceptable, particularly if part of a multilateral agreement.⁶² In a case involving U.S. Corporate Average Fuel Economy (CAFE) standards, trade discrimination was upheld as a fuel conservation measure, the historic first use of GATT's Article XX exemption from general trade obligations.⁶³

When the GATT was transformed into the WTO, it established a new working group, the Committee on Trade and the Environment (CTE), to consider the relationship between multilateral fair trade rules and environmental restrictions. In addition to eco-labeling rules, intellectual property rights and biodiversity standards, and environmental taxes, the CTE was convened to review the use of trade measures in environmental agreements.⁶⁴ The Committee will present its findings to the December 1996 Ministerial Conference in Singapore, where members will consider how to accommodate the trade controls of multilateral environmental agreements such as the Basel Convention. WTO director-general Renato Ruggiero has indicated that this issue will top the agenda at the summit. Some countries have proposed amending or interpreting Article XX in such a way as to allow multilateral environmental agreements to override basic WTO obligations.

NGOs Lobbying for Changes

The World Business Council for Sustainable Development (WBCSD), a coalition of 120 international companies committed to sustainable development, has joined environmental groups to support major changes to the WTO. Though the group purports to represent a business perspective on trade issues, the WBCSD positions reflect a bias against the market and in favor of international government negotiations. Its report on trade and the environment declares that "Business is responsible for undertaking the trade called for in chapter 2 of Agenda 21."⁶⁵ The UN treaty assumes that "a sound environment . . . provides the ecological and other resources needed to sustain growth and underpin a continuing expansion of trade."

The WBCSD outlines a plan for a "bridging mechanism" between trade law and environmental law regimes, anticipating a "likely increase" in the number of environmental agreements. The bridging mechanism would review periodically the costs and benefits of environmental trade measures, ensuring that they are the least-trade restrictive means used to achieve the goal, and establish dispute resolution procedures.

The WBCSD also endorsed a variety of environmental management techniques such as life-cycle assessment, environmental management standards, eco-labeling and recycling laws. The same environmental criteria would be applied internationally through the International Standards Organization, encompassing management, eco-efficiency, and clean production standards. The result of the WBCSD recommendations would be the establishment of either a single international standard, harmonization of different national standards, or mutual recognition of national regulatory systems. The presumption is that international differences in regulatory standards constitute unfair trade barriers and should be reduced as much as possible through the WTO.

The drive toward harmonization of international regulatory standards prevents nations from setting independent and competitive policies. Nations cannot experiment and compete amongst themselves in order to find the best policy. Deregulatory competition is an important function of free trade.

Pressures to harmonize regulation undercut this competition between nations. Developing countries, in particular, are encouraged to adopt environmental and other regulatory policies of the wealthier industrialized nations, something many nations fear might encroach on their national sovereignty and inhibit economic development. The adoption of international standards by developing countries can restrict economic competition in their home markets, acting as a brake on economic growth. In addition, if First-World regulations are set too high, they can close markets to Third World exports. A policy of harmonization would give trade protection to many of the large businesses represented in the WBCSD.

It is widely acknowledged that environmental trade sanctions are unfair if imposed unilaterally by industrialized nations on developing countries. The probability that such sanctions reflect purely environmental considerations is low. Rather, “green” protectionism” or protection for local economic special interests is more likely the rationale. Multilateralism is put forward as a solution to this problem: if international environmental policies are set multilaterally, then it is more likely that economic restrictions will be developed cautiously and really protect the environment. However, the very same trade measures considered inconsistent with the GATT when imposed unilaterally are being discussed as acceptable options in a multilateral context. Virtually no one claims that trade measures of CITES, the Montreal Protocol, or Basel Convention would be WTO-legal if imposed unilaterally.

What this argument ignores, however, is the fact that industrialized countries and trading blocs can just as easily impose harmful economic restrictions on developing countries, and they have protectionist economic reasons for doing so. An environmental treaty is an agreement to enforce similar regulations within each country’s respective jurisdiction. However, the environmental priorities of each country may not be uniform. In some cases, these treaties could force developing countries to divert resources to environmental problems which are less important in a Third World nation. The attachment of trade

restrictive measures against non-Parties only reinforces the coercive nature of such treaties.

A North-South Divide

A potential obstacle to full legitimization of the Basel Convention into WTO rules is developing country opposition to the green agenda: A global environmental regime governing economic activities such as mining, agriculture, and timber industries. The European Union is strongly supportive of the trade measures in environmental treaties.⁶⁶ The U.S. has joined the EU in combining the greening of trade issue with labor standards, anti-corruption rules, antitrust laws, investment protections and global minimum wage standards.⁶⁷ Their argument is that the cheap labor gives developing countries an unfair advantage. The result would be to make the enactment of acceptable policies in these areas a condition for reciprocal trade access.

Many developing countries perceive that the intent of these proposals is to erode their comparative advantages in international trade. Members of the Association of Southeast Asian Nations (ASEAN), in particular, have lashed out at industrialized nations for stacking the WTO summit agenda with these unwelcome topics. Amnuay Virivan, Foreign Minister of Thailand, criticized these trade linkages and regulation as “disguised protectionism.”⁶⁸ According to this official, “I am sure that this is the ASEAN perception and this is a perception shared by a great majority of nations in the world, especially developing nations.”⁶⁹

At a recent meeting of the ASEAN nations, trade ministers sent warnings to the industrialized countries that they would remain united against the inclusion of non-tariff issues in trade talks, and would not allow them to be negotiated in the WTO. In a speech to ASEAN foreign ministers about the inaugural WTO Ministerial meeting, Indonesian President Suharto remarked: “We must express our concern over the efforts of some developed countries to sidetrack the deliberations.” He warned that diverting the agenda toward the non-tariff issues will “not only denigrate the developing countries, it will also ultimately debilitate the WTO itself.”⁷⁰

The trade-environment issue bitterly divides industrialized and developing countries. While most developing countries generally supported the Basel Convention, they are having second thoughts, and do not approve of granting sweeping approval to trade barriers in the WTO. Developing countries are coming to the realization that the environmental demands of the industrialized nations are new forms of protectionism designed to close markets. As a result, there may be little progress on this issue at the Singapore summit, with developing countries uneasy about the implications of green trade proposals emanating from their wealthier neighbors.

CONCLUSION

The U.S. is the most important country in terms of hazardous waste disposal and recycling. To date it has not become a Party to the Basel Convention by implementing its provisions into national law. The Convention's rapid evolution to date has amply demonstrated that it is susceptible to manipulation by radical extremists motivated by a total ideological opposition to trade in secondary materials and commodities. Under these circumstances it is difficult to foresee the U.S. implementing the Basel Convention in the near future.

In the interest of the freedom of trade across international borders, it would be wise for the U.S. to refrain from further active participation in this Convention. Though efforts to incorporate multilateral agreements into the WTO are stalled at the moment, neither does the WTO appear anxious to strike down a Convention whose core principles are antithetical to the philosophy of free trade and non-discrimination. The most decisive action would be for the U.S. Senate to withdraw its advice and consent to the treaty instrument signed by president Bush in 1989, thereby rejecting even the possibility of global trade regulation and an export ban. This action would better serve the national interest, and return trade to its proper role – a voluntary exchange arrangement for mutual benefit. In addition, it would allow the U.S. and individual trading partners to work out between themselves terms acceptable to both countries on a bilateral and competitive basis.

The top priority should be the removal of the hazardous waste issue from the politicized Basel Convention forum, where anti-trade ideologues have the capacity to stage-manage international negotiations for nefarious purposes. What Greenpeace and like-minded NGOs have in mind is international acceptance for a regime of global environmental standards for trade. This entails a blending of two incompatible concepts, free trade and government controls. Countries which desire competitive international trade, particularly developing countries, must stand firm against the green trade restrictions embodied in the Basel Convention.

¹ Environmental Law and Institutions Unit, UNEP Environmental Law Library No. 2, The Basel Convention on the Control of Hazardous Wastes and Their Disposal 3-4, 6-7, 1990, as cited in David A. Wirth, "International Trade in Wastes: Trade Implications of the Recent Amendment to the Basel Convention Banning North-South Trade in Hazardous Wastes," New York: Global Environment and Trade Study, January 19, 1996.

² Gareth Porter and Janet Welsh Brown, Global Environmental Politics, 2d ed., Westview Press, 1996, pp. 86-87.

³ I. Rummel-Bulska, "The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and Trade and Environment Issue," *Trade and the Environment: Challenges for 1996*, Global Environment and Trade Study and New York University Law School, January 19, 1996, pp. 2-3.

⁴ Rummel-Bulska, p.1.

⁵ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Article 4.7(c).

⁶ Rummel-Bulska, p.7.

⁷ Basel Convention, Annex V, 1-12, including seven footnotes.

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- ⁸ Janet McDonald, "Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order," *Environmental Law*, Vol. 23, 1993, p. 453.
- ⁹ Rummel-Bulska, p.3.
- ¹⁰ Maria Isolda P. Guevara and Michael Hart, "Trade Policy Implications of the Basel Convention Export Ban on Recyclables from Developed to Developing Countries," Center for Trade Policy and Law and International Council on Metals and the Environment, May 1996, p.30; Rummel-Bulska, p.6.
- ¹¹ Article 11, Basel Convention. "Parties may enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with Parties or non- Parties provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention. These agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries."
- ¹² Rummel-Bulska, p.15.
- ¹³ Porter and Brown, pp. 16-17.
- ¹⁴ Porter and Brown, pp. 84-85.
- ¹⁵ Guevara and Hart, p.10. The amendment must be ratified by three fourths of the Parties in order to be legally binding.
- ¹⁶ Basel Convention, Annex III; (ST/SG/ AC.10/1/Rev.5, United Nations, New York, 1988).
- ¹⁷ Jim Puckett and Cathy Fogel, "A Victory for Environment and Justice: The Basel Ban and How it Happened," Greenpeace International, Washington, DC, September 1994.
- ¹⁸ Porter and Brown, pp. 85-88.
- ¹⁹ Charles P. Wallace, "Asia Tires of Being the Toxic Waste Dumping Ground for Rest of World; Environment: A Global Conference in Geneva Could End many Recycling Programs in Developing Nations," *Los Angeles Times*, March 23, 1994.
- ²⁰ Jim Puckett and Cathy Fogel, "A Victory for Environment and Justice: The Basel Ban and How it Happened," Greenpeace International, Washington, DC, September 1994.
- ²¹ "Muck and Morals," *The Economist*, September 2, 1995, p. 61.
- ²² John H. Cushman Jr., "Clinton Seeks Ban on Export of Most Hazardous Waste," *New York Times*, March 1, 1994.
- ²³ Wallace, p. 16.
- ²⁴ Basel Convention, Article 12.
- ²⁵ Competitive Enterprise Institute, Environmental Briefing Book 1996, Washington, DC.
- ²⁶ Paul Hagen, "International and United States Controls on Transboundary Shipments of Hazardous and Other Wastes," Washington, DC: Beveridge and Diamond, April 10, 1996.
- ²⁷ Guevara and Hart, p. 31; John C. Bullock, Environmental Counsel, Handy and Harman, "The Basel Convention and Trade," Global Environment and Trade Study, 1996.
- ²⁸ Bullock, pp. 8-9.
- ²⁹ "Muck and Morals," *The Economist*, September 2, 1995, p. 61.
- ³⁰ "The Waste Trade," *Journal of Commerce*, October 6, 1995.
- ³¹ Guevara and Hart, p. 2.

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- ³² Ibid.
- ³³ Basel Convention, Article IVB.
- ³⁴ Bullock, p.3.
- ³⁵ Guevara and Hart, p.28.
- ³⁶ Bullock, p.6.
- ³⁷ Bullock, pp. 5-6.
- ³⁸ “Muck and Morals,” p. 61.
- ³⁹ “Muck and Morals,” p. 61.
- ⁴⁰ Guevara and Hart, pp. 28-9.
- ⁴¹ Princeton University economists Gene Grossman and Alan Krueger have found that growth starts to alleviate pollution when per capita income reaches \$4000-\$5000 per year. “Environmental Impacts of a North American Free Trade Agreement,” Princeton University, November 1991.
- ⁴² Indur Goklany, “Richer is Cleaner,” *The True State of the Planet*, pp.353-370.
- ⁴³ Aaron Wildavsky, Searching for Safety, New Brunswick: Transaction Books, 1988.
- ⁴⁴ Mikhail S. Bernstam, “The Wealth of Nations and the Environment,” London: Institute of Economic Affairs, 1991.
- ⁴⁵ North American Free Trade Agreement, Article 104.
- ⁴⁶ Article I of GATT 1947; John H. Jackson, “World Trade Rules and Environmental Policies: Congruence or Conflict?” *Washington and Lee Law Review*, 1992, Vol. 49, pp. 1260-1266. Numerous exceptions are allowed, such as for the creation of preferential trading blocs.
- ⁴⁷ Article III of GATT 1947.
- ⁴⁸ Exceptions are made for balance of payments difficulties and other circumstances. Guevara and Hart, p.23.
- ⁴⁹ Article XX (b) and (g), as cited in Jackson, p. 1239.
- ⁵⁰ A dispute settlement under GATT would not have been definitive in any event. The true purpose of dispute settlement in the non-binding GATT was to enable the parties to reach settlement, not to bring Contracting Parties into compliance with international law. Thus, the binding nature of the new WTO changes the function of dispute settlement, making it more definitive than under GATT. See Guy De Lacherriere, *The Settlement of Disputes Between Contracting Parties to the General Agreement*, in Trade Policies for a Better Future, 119, 120 (1987), as cited in Janet McDonald, “Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order,” *Environmental Law*, p. 406, note 37.
- ⁵¹ Environmental purposes are not well served by CITES; trade bans prevent conservation through commerce, the only way to bestow economic value on an endangered species.
- ⁵² Esty, pp. 30-31.
- ⁵³ Wirth, pp. 16-17.
- ⁵⁴ Article XI of GATT 1947.
- ⁵⁵ Basel Convention, Article 4.2(e).
- ⁵⁶ Wirth, pp. 20-21.
- ⁵⁷ Robert Housman, Donald Goldberg, Brennan van Dyke, and Durwood Zaelke, “The Use of Trade Measures in Select Multilateral Environmental Agreements,” UNEP

Environment and Trade Series No. 10, Geneva: UNEP, 1995, as cited in Guevara and Hart, p. 50.

⁵⁸ Katharina Kummer, *Transboundary Movements of Hazardous Wastes at the Interface of Environment and Trade*, UNEP Environment and Trade Series No. 7, Geneva, United Nations Environment Programme, 1994, as cited in Guevara and Hart, p. 50.

⁵⁹ Wirth p. 26.

⁶⁰ The Annex VII state could reach a legal bilateral agreement with a non-Party developing country only if the wastes in question are not characterized as hazardous under the Convention, and are not destined for disposal, (that is, the wastes are destined for recycling or recovery operations only).

⁶¹ *The GATT Uruguay Round Agreements: Report on Environmental Issues*, Office of the U.S. Trade Representative, August 1994, p. 30.

⁶² "United States - Restrictions on Imports of Tuna," Report of the Panel, DS29/R, General Agreement on Tariffs and Trade, June 1994

⁶³ "United States — Taxes on Automobiles," Report of the Panel, DS31/R, General Agreement on Tariffs and Trade, September 29, 1994.

⁶⁴ John Zarocostas, "WTO Group Presses for Review of Trade, Environmental Measures," *Journal of Commerce*, October 27, 1995.

⁶⁵ World Business Council for Sustainable Development, "Trade and Environment: A Business Perspective," A Report from the Working Group on trade and Environment, Summary Report, Chairmen: Keith Erlam, RTZ Corp., Ludolf Plas, Lurgi, AG, November 1995.

⁶⁶ Bruce Barnard, "EU Urges Multilateral Tack in Settling 'Green' Disputes," *Journal of Commerce*, March 1, 1996.

⁶⁷ John Zarocostas, "Clashes Expected as Trade Officials Hammer Out Agenda for Singapore," *Journal of Commerce*, July 23, 1996; "Richard Lawrence, "Policy Divisions Loom as December WTO Talks," *Journal of Commerce*, June 25, 1996.

⁶⁸ Ron Corben, "Thai Official Slams Moves by West to Link Trade with Social Issues," *Journal of Commerce*, July 10, 1996.

⁶⁹ "ASEAN Says No to Trade-Labour Linkage," Agence-France Presse, July 20, 1996.

⁷⁰ Ibid.