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TRADE IMPLICATIONS OF THE BASEL CONVENTION AMENDMENT BANNING NORTH-SOUTH TRADE IN HAZARDOUS WASTES

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Decision III/1, adopted at the third meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) in September 1995, has occasioned a great deal of controversy. In that decision, the Conference of the Parties amended the Basel Convention to prohibit exportation from industrialized countries of hazardous wastes intended for disposal and to phase out shipments from those same countries of hazardous wastes intended for recycling or reuse in countries of import (INER Reference File 1, 21:3701). The purpose of this article is to examine the new Basel amendment in the context of the ongoing public policy dialogue over the interaction between trade and the environment, with an emphasis on the legal relationship between the new amendment and international trade rules.

Because the Basel Convention directly addresses and regulates international trade in wastes, the interaction between that agreement and basic principles of international trade law has been subjected to close analysis for some time. Nonetheless, the relationship between the rights and obligations contained in the Basel Convention and the requirements of international trade law still has not been fully resolved. Similarly, the new amendment has been criticized as needlessly and perhaps illegally disruptive of trade. An important element of the ongoing international public policy debate over trade in wastes consequently concerns the impact of the rules of the World Trade Organization (WTO) on the new amendment.

North-South Trade In Wastes And The Basel Convention

Although multilateral efforts had been under way for some time in such international organizations as the Organization for Economic Cooperation and Development (OECD) and the United Nations Environment Program (UNEP), in the late 1980s a number of highly-publicized cases added significantly to the sense of urgency over controlling international trade in toxic wastes. The Basel Convention, whose negotiations under UNEP’s auspices concluded in 1989, is the principal policy response to this upsurge of global concern and the first potentially universal, binding instrument addressing international trade in wastes, including both hazardous wastes and municipal trash.

The overall strategy of the convention is to limit transboundary shipments of wastes. The core provisions of the convention attempt to accomplish this aim by requiring notification to, and the consent of, the government of the country of import. This approach, often known as “prior informed consent” or “PIC,” applies among parties to the agreement.

Accordingly, every state party to the convention may choose to ban the importation of hazardous or other wastes. With respect to other states party to the convention that have not prohibited waste imports, the government of the country of export must assure prior notification of the governments of the receiving state and any transit states in advance of a waste shipment. The shipment may not commence until the government of the proposed state of import has given its consent in writing.

Notwithstanding the consent of the proposed state of import, the convention requires that states of export prohibit shipments of hazardous and other wastes if there is reason to believe that the wastes will not be managed in an environmentally sound manner in the country of import. The convention also articulates an obligation for states of export to ensure that international shipments of wastes are accepted for re-import if those shipments do not conform to the terms of export.

The Basel Convention specifies that the requirements of the convention will not apply to transboundary movements that are governed by bilateral or regional arrangements that meet certain standards. In particular, such ancillary agreements concluded after the entry into force of the Basel Convention must contain provisions that are “not less environmentally sound” than those in the convention.
With respect to states not party to that instrument, the convention establishes a “limited ban.” Specifically, the Basel Convention prohibits exportation from parties to non-parties and limits transboundary movements of wastes, both imports and exports, only to those states that are parties to the convention.

The Basel Convention entered into force on May 5, 1992. As of this writing, there are 103 parties to the convention, including the European Union (EU) but not the United States. Former U.S. President George Bush authorized signature of the convention on behalf of the United States in March 1990, and the Senate gave its advice and consent to ratification in August 1992. The necessary implementing legislation, however, has not been enacted, and the United States consequently has participated as an observer in the three meetings of the Conference of the Parties held to date.

Even before the Basel Convention was adopted, there were pressures to strengthen the rigor and intensity with which that instrument controls international trade in wastes. African states expressed concern over the Basel Convention’s failure fully to ban transboundary movements of hazardous and other wastes, and no sub-Saharan African country signed the convention at the time of its adoption. Those countries, having adopted a stronger regional agreement known as the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (21:4201), have been poorly represented in subsequent accessions.

Meanwhile, in the 1989 Lome IV Convention, the EU agreed to ban all waste exports to 68 former colonies in Africa, the Caribbean, and the Pacific. EU Regulation 259/93 on the Supervision and Control of Shipments of Waste Within, Into, and Out of the European Community (Reference File 4, 181:0221), adopted in 1993, empowers member states to “prohibit generally or partially or to object systematically to shipments of waste,” even those originating within the EU, and further tightens the regime for exports from the EU.

**Conferences Of The Basel Parties**

Similar policy dynamics, reflecting international pressure toward more stringent restrictions on international trade in wastes, have played out in the Conference of the Parties (COP) to the Basel Convention. The first meeting of the Conference of the Parties took place in Uruguay at the end of 1992. After what has been described as a “heated debate . . . around the proposal of a total export ban to non-OECD states,” COP-I adopted Decision I/22. That decision “requests the industrialized countries to prohibit transboundary movements of hazardous wastes and other wastes for disposal to developing countries” and “further requests developing countries to prohibit the import of hazardous wastes from industrialized countries.” Decision I/22 also noted that, pending further work on the issue, wastes intended for recycling and recovery should take place in accordance with the convention's rules.

In further elaboration of these policy strains, the second meeting of the Conference the Parties to the Basel Convention (COP-II), held in Geneva in March 1994, adopted Decision II/12. Building on Decision I/22 from COP-I, Decision II/12 directs Basel parties to ban shipments of hazardous wastes from OECD to non-OECD states and to phase out shipments of hazardous wastes from OECD states destined for recycling or recovery operations in non-OECD states by the end of 1997. The export ban, according to one commentator, was intended to “provide a strong incentive to efforts by countries to reduce transboundary movements of hazardous wastes. In addition, it should consolidate policies aimed at treating and disposing of those wastes as close as possible to their source of generation, and it should act as an incentive to promote the introduction of cleaner production methods in industrial processes, thus minimizing the generation of hazardous wastes.” Decision II/12 is generally regarded as reflecting a political as opposed to a legal commitment and to that extent can be viewed as a precursor to the first amendment to the convention adopted the following year.

The most recent Conference of the Parties to the Basel Convention (COP-III), held in Geneva in September 1995, adopted Decision III/1. The apparent purpose of this instrument is to give binding legal content to the political commitments contained in the earlier Decision II/12. The new decision contains an amendment to the Basel Convention that would require member states of the OECD, the EU, and Liechtenstein to prohibit hazardous wastes intended for disposal to states other than members of the OECD, the EU, and Liechtenstein. Roughly speaking, this provision would result in a ban on North-South shipments of hazardous wastes intended for disposal. Further, the amendment would phase out shipments of hazardous wastes from the same group of countries intended for recovery or recycling to other states outside this group by the end of 1997. At COP-III, the universe of countries from which exportation would be prohibited was consciously expanded from the OECD/non-OECD distinction employed in Decision II/12. Additionally, developing countries were reported to be less united in support of Decision III/1 than they had been at COP-II with respect to Decision II/12.

The amendment contained in Decision III/1 has become a major flash point in the debate over international policy for addressing hazardous wastes. The decision has been criticized as failing to reflect a genuine consensus, particularly on the part of certain developing countries whose imports, especially for recycling, would be expected to be affected by the ban. A specific concern is that the lack of widespread support for the amendment may result in a low number of ratifications, a delay in the amendment’s entry into force, or both.

Business and industry by and large do not appear to object to the ban on wastes intended for disposal. However, the portion of Decision III/1 addressed to exports for recycling and recovery has been quite controversial. In
particular, the potential that certain scrap metals intended as raw materials for recycling or extraction might be covered by the export ban has been identified as a disincentive for recycling and therefore environmentally counterproductive.

Decision III/1 applies only to exports originating from industrialized countries and has consequently been criticized for failing to address South-South trade in wastes. Moreover, the decision does not address the continued availability of regional or bilateral agreements under the parent Basel Convention as a means for particular parties to waive the ban on shipments for disposal and/or recycling strictly among themselves.

The Basel Convention And GATT/WTO Rules

The principal thrust of the Basel Convention, as its full name suggests, is the regulation of international trade in wastes. The Basel Convention has consequently been the focus of considerable attention in the trade-and-environment debate as one of the principal multilateral environmental agreements thought to raise questions about consistency with international trade rules. For these reasons, the impact of those rules on the new amendment is an issue of particular interest.

As a general matter, national measures directed at preservation of the environment and protection of public health are subject to the generic requirements of the 1947 General Agreement on Tariffs and Trade (GATT), as reaffirmed in the fundamental instruments comprising the World Trade Organization (WTO). Basic GATT/WTO obligations that apply in these areas, as in others, include the following: (1) the most-favored-nation (MFN) principle, specifying non-discrimination among imported and exported products on the basis of their national origin; (2) national treatment, requiring non-discrimination between foreign and domestic products; and (3) a prohibition on quantitative restrictions for imports or exports. Article XX of GATT 1947 contains a number of exemptions from the General Agreement for specific categories of national measures. Of particular importance in the fields of environment and public health are two of these express exceptions: one for measures "necessary to protect human, animal, or plant life or health" and another for those "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

Concern about the application of the fundamental GATT/WTO requirements, as well as the availability of the article XX exemptions, was substantially heightened by the so-called tuna dolphin controversy, which to date has resulted in two GATT dispute settlement panel reports, one in 1991 and the other in 1994. In brief, the first panel concluded that trade measures to protect resources outside the jurisdiction of a contracting party are not within the scope of the article XX exceptions. Employing a somewhat different theory, the second panel reasoned that measures taken so as to force other countries to change their policies, and that are effective only if such changes occur, do not satisfy the GATT exceptions. The first tuna panel report caused considerable concern over potential conflicts between multilateral environmental agreements that contain trade measures--of which the Basel Convention is one, but not the only--and GATT/WTO rules.

No trade agreement dispute settlement panel has addressed the legality of national measures to implement a multilateral environmental agreement, such as the Basel Convention, that specifies trade-related obligations. Any analysis of such a situation of necessity is therefore somewhat conjectural. Even so, basic principles of international law provide helpful guideposts and insights in reconciling any potential divergences between the two regimes.

The rights and obligations articulated in the Basel Convention on the one hand and the GATT/WTO regime on the other both originate in international treaty, sometimes called "conventional" law. International agreements are analogues of contracts among states and create rights and obligations among the parties to those agreements. Both the GATT/WTO regime and the Basel Convention articulate a flow of rights and obligations among parties, which in the case of the international trade regime are the WTO member states. By subsequent agreement, WTO members, like Basel parties, can modify the commitments among themselves.

As between two states, both of which are parties to the GATT/WTO regime and only one of which is a party to the Basel Convention, GATT/WTO rights and obligations remain intact. One very important consequence is that disputes alleging nullification or impairment of GATT/WTO rights are most likely to arise between states that are parties to the Basel Convention and those that are not, because the latter have not acquiesced in any modification to their rights arising from the GATT/WTO regime. Similarly, the convention’s provisions dealing with relations with non-parties are those most likely to give rise to objections by reference to GATT/WTO rules.

Chief among the Basel provisions likely to cause difficulties with non-Basel party WTO member states is the prohibition on exports and imports of hazardous and other wastes by parties to the convention to and from non-party states--the "limited ban." As a legal matter, refraining from trade with non-party third states is an obligation owed by one Basel party state to another. But the implementation of this provision by Basel party states might constitute an MFN violation or contravene the prohibition on quantitative restrictions or both. If identical wastes were generated and managed domestically but imports of those wastes were prohibited, there could also be a violation by a state of import of the national treatment standard. To the extent that this provision in the Basel Convention affects a resource outside the jurisdiction of the Basel party state or is intended to
leverage policy change in the non-party state, the reasoning of either or both of the tuna panel reports might preclude an exemption under article XX. Regional or bilateral agreements, as specified in the Basel Convention, can provide something of a "relief valve" for Basel parties to resolve potential inconsistencies of this sort on a consensual basis with non-Basel party WTO members.

The situation is very different when considering trade relations among Basel parties, because the obligations undertaken by all those states are not disparate, but identical. Customary international law addresses the relationship among successive treaties on similar subject matter, as does a major multilateral agreement, the Vienna Convention on the Law of Treaties. With respect to successive agreements among the same parties, later agreements on a particular subject matter will prevail over earlier ones, except to the extent that the earlier is "compatible" with the later one. Moreover, by means of a particularized agreement among them, states may modify multilateral treaties among themselves. In other words, the obligations in international agreements ought to be harmonized where possible to give effect to all commitments simultaneously, an approach that counsels reconciling agreements with each other where possible. 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.

The Basel Convention specifies some measures as between parties that arguably would conflict with GATT/WTO rules if undertaken unilaterally. The Basel Convention bans shipments of hazardous and other wastes to parties that have prohibited imports, which might be considered a violation of MFN treatment or a prohibited quantitative restriction if undertaken unilaterally. Moreover, the convention requires that states of export prohibit shipments of hazardous and other wastes if there is reason to believe that the wastes will not be managed in an environmentally sound manner in the country of import. Unilateral decisions of this kind might similarly adversely affect a state of import's rights to most-favored-nation status and could amount to a quantitative restriction.

But in contrast to a unilateral situation, states party to the Basel Convention are not only authorized, but required, to adopt those measures as obligations owed by the parties to each other. For instance, the requirement to prohibit exports of wastes that the government of the state of export believes will not be appropriately managed in the state of import is not a unilateral measure, but a binding obligation that the Basel party state of export owes to the Basel party state of import. This and other measures authorized by the convention (but only those authorized by the convention) consequently are a consensual derogation by parties to the Basel agreement of their GATT/WTO rights that might otherwise apply. The responding party in a WTO dispute settlement proceeding would have a defense that the Basel party WTO member challenging those measures had consensually relinquished its GATT/WTO rights by mutual agreement with the challenging party in becoming a party to the Basel Convention. The two treaty regimes are compatible with one another because the Basel obligations control a limited, clearly defined sector of trade by comparison with the GATT/WTO regime, which addresses trade relations more generally. In sum, as between parties to the Basel Convention, there can be no nullification or impairment of GATT/WTO rights to the extent those rights have been superseded by the Basel Convention.

The New Amendment And GATT/WTO Rules

Customary international law specifies that an amendment to a multilateral treaty is binding only on those states that indicate their affirmative intent to accept those new obligations, ordinarily through ratification or acceptance of the amendment. The Basel Convention embodies the same principle. In effect, an amendment is a new agreement under international law. A consequence of this rule is the potential for the creation of classes of parties with different obligations. In the case of the Basel Convention, one such class of parties would be those that had adhered to both the "parent" agreement and the amendment and that therefore have agreed to be bound by the newly-adopted export ban. A second would be those that have ratified or accepted the Basel Convention as adopted in 1989 but not the new amendment. The situation is further complicated because both the state of export and the state of import can fall into either of these two categories or may not be a party to the Basel regime at all—a situation that results in a three-by-three matrix of nine distinct cases.

The amendment contained in Decision III/1 adopted at COP-III instructs the OECD, EU, and other industrialized states, enumerated by name, to prohibit exports of hazardous wastes destined for disposal or recycling in non-party states. As in the case of the parent Basel Convention, questions might be raised as to whether this export ban is consistent with the GATT/WTO regime's most-favored-nation principle and the prohibition on quantitative restrictions. But as between parties and non-parties, the parent agreement, as noted earlier, already prohibits all imports and exports. Accordingly, with respect to transboundary shipments originating in one of the enumerated industrialized states that are Basel parties and destined for developing countries that are not parties to the Basel Convention, the amendment is redundant. Consequently, as between parties to the new amendment and non-parties to the Basel regime, the amendment would not appear to exacerbate the nullification or impairment of GATT/WTO rights of non-parties to an extent greater than the parent Basel Convention.

As among WTO member states that are also parties to the Basel Convention and the new amendment, the same analysis set out earlier would apply. That is, the amendment, like the Basel Convention itself, would operate as a
consensual abrogation of GATT/WTO rights. In other words, as between parties to the amendment, the prohibition on North-South exports of hazardous wastes originating in the enumerated industrialized states is not an infringement of the rights of potential states of import; rather, it is an obligation owed by the enumerated industrialized Basel party states to developing countries that are also party to the convention and the amendment. Therefore there can be no nullification or impairment of GATT/WTO rights between parties to the amendment, at least to the extent the national measures employed to implement the amendment are consistent with that instrument.

The most difficult analytical case is consequently that of two states, both of which are WTO members, both of which are parties to the parent Basel agreement, but only one of which is a party to the new amendment. Within this class of relationships, there are two subcategories: (1) the proposed state of import is a party to the amendment, but the anticipated state of export is not; and (2) the potential state of export is a party to the amendment, but the contemplated state of import is not.

In the former case, the state of export is under no obligation to prohibit all exportation to developing country Basel party states. Those relationships would continue to be governed by the PIC notification-and-consent scheme established by the parent convention. The latter case, that of an industrialized state party to the amendment that refuses to allow exportation to a Basel party state not party to the amendment, is somewhat more complicated. Under these circumstances the state of import, a putative beneficiary of the amendment, might nonetheless claim to have an expectation of a right to import pursuant to--or at least notwithstanding--the parent Basel Convention that is frustrated by the amendment, thereby raising questions as to the consistency with GATT/WTO rules with respect to MFN and quantitative restrictions, for example.

While this situation may be interesting from a theoretical point of view, it seems unlikely to arise in practice, in particular because the parent Basel Convention provides any number of alternative bases that might impede waste shipments.

Conclusion

As a matter of sound policy for trade in hazardous wastes, Decision III/1 raises a number of issues, such as the potential lack of broad-based support for the instrument, the scope of the ban on scrap material intended for recycling, and the lack of attention to South-South trade. With respect to the GATT/WTO regime of rules, however, the implications of Decision III/1 are few, if any, beyond those encountered with the parent Basel Convention. In particular, there is only a very small likelihood in practice that the amendment would give rise to conflicts with GATT/WTO rules to a greater extent than the ban on exports to and imports from non-Basel parties already contained in the convention. As Gertrude Stein might have said of criticisms of the amendment from a trade rules point of view, “there is not much there there.”

1 In contrast to Decision I/22, the text of the amendment does not specifically articulate an obligation for potential developing country states of import to refuse shipments from those states from which exportation is prohibited by the amendment. In the case of a state of export not party to the parent convention, this uncertainty is irrelevant because the parent convention already requires the potential state of import to prohibit such shipments. If, however, the amendment were to be interpreted to impose such an obligation on states of import, the state of export could argue that certain of its GATT/WTO rights survive the amendment and therefore could be nullified or impaired. This may be a good reason not to adopt an interpretation of the amendment that would impose obligations on developing country states of import.

2 A developing country party to the amendment--one of the beneficiaries of the amendment that has consensually relinquished its GATT/WTO rights to importation from any of the states enumerated in the amendment--would be in no position to protest even a unilateral refusal on the part of a state enumerated in the amendment to permit exportation.