

Trade Implications of the Basel Convention Amendment Banning North-South Trade in Hazardous Wastes

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■ Introduction

Decision III/1, adopted at the third meeting of the Conference of the Parties to the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the Basel Convention),¹ has occasioned a great deal of debate. In that decision, the Conference of the Parties adopted an amendment (the Ban Amendment) to the Basel Convention that would prohibit exportation from industrialized countries of hazardous wastes intended for disposal and that would phase out exportation from those same countries of hazardous wastes intended for recycling or reuse in countries of import. Because the Basel Convention directly addresses and regulates international trade in wastes, a significant portion of the controversy over Decision III/1 and the Ban Amendment relates to the trade implications of the new Amendment contained in that decision. An important sub-category of this discussion concerns the impact of the rules of the World Trade Organization (WTO) on the new Ban Amendment.

The principal purpose of this article is to examine the effect of Decision III/1 and the Ban Amendment in the context of the ongoing policy dialogue concerning the interaction between trade and the environment, with an emphasis on the relationship between the new Ban Amendment and the rules of the GATT/WTO regime. Accordingly, the article summarizes the basic provisions of the Basel Convention relevant to an analysis by reference to GATT/WTO rules; describes pertinent developments at the international level related to Decision III/1 and the Ban Amendment; examines the relationship between the Basel Convention and GATT/WTO rules; and analyzes the effect of GATT/WTO rules on the Ban Amendment contained in Decision III/1. The article concludes that, entirely apart from the appropriateness

from a policy point of view of the new Ban Amendment, that action will have little if any effect on GATT/WTO rights beyond those already affected by the 1989 parent agreement.

■ The Basel Convention, the Ban Amendment, and North-South Trade in Wastes

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. For example, Article 104 of the North American Free Trade Agreement (NAFTA)² expressly addresses the relationship between it and the Basel Convention. The interaction between the rights and obligations contained in the Basel Convention and GATT/WTO rights and obligations has not been similarly resolved and continues to be a subject of ongoing discussion.

Structure of the Basel Convention

The Basel Convention arises from a strain of debate in international environmental policy and law that emphasizes both notification to, and the consent of, the government of the country of import as at least a partial response to the environmental and public health hazards associated with transboundary shipments of toxic substances. This approach, often known as 'prior informed consent' or PIC, has been accepted under certain circumstances on the international level not only with respect to exports of wastes, but also for hazardous pesticides and industrial chemicals.³

Among Parties to the agreement, the core regulatory approach of the Basel Convention is the establishment of a PIC regime. Accordingly, every Party to the Convention may choose to ban the importation of hazardous or other wastes. With respect to other Parties 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. Based on the written consent of relevant states of import, states of export may allow exporters to use a 'general' notification procedure for up to one year for multiple shipments of the same types of wastes.

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.

With respect to non-party states, the Basel Convention establishes a 'limited ban'. Specifically, the 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.

Article 11 of 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, 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.⁴

The Ban Amendment

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.⁵ The Convention itself specifies that the Conference of the Parties (COP):

shall undertake three years after the entry into force of this Convention, and at least every six years thereafter, an evaluation of its effectiveness and, if deemed necessary, to consider the adoption of a complete or partial ban of transboundary movement of hazardous wastes and other wastes in light of the latest scientific, environmental, technical and economic information.⁶

The first meeting of the Conference of the Parties (COP-1) took place in Uruguay at the end of 1992. After a 'heated debate ... around the proposal of a total export ban to non-OECD states',⁷ COP-1 adopted Decision I/22.⁸ 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 pro-

hibit the import of hazardous wastes from industrialized countries'. Decision I/22 also noted that, pending further work on the issue, transboundary movements of wastes intended for recycling and recovery should take place in accordance with the Convention's rules.

In further elaboration of these policy themes, the second meeting of the Conference of the Parties to the Basel Convention (COP-2), held in Geneva in March 1994, adopted Decision II/12.⁹ Building on Decision I/22 from COP-1, Decision II/12 directs the Parties to the Basel Convention to:

- ban shipments of hazardous wastes from OECD to non-OECD states; and
- phase out by the end of 1997 shipments of hazardous wastes from OECD states destined for recycling or recovery operations in non-OECD states.

The export ban 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'.¹⁰

Decision II/12 is generally regarded as reflecting a political as opposed to a legal commitment,¹¹ and to that extent can be viewed as a precursor to the first amendment to the Convention adopted the following year. COP-2 was followed by further work on the characterization of wastes under the auspices of a Technical Working Group.

The third Conference of the Parties to the Basel Convention (COP-3), held in Geneva in September 1995, adopted Decision III/1.¹² 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:

- requires member states of the OECD, the European Union (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 waste intended for disposal; and
- by the end of 1997, phase out shipments of hazardous wastes from the same group of countries intended for recovery or recycling to other states outside this group.

At COP-3, 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-2 with respect to Decision II/12.

The amendment contained in Decision III/1 has become a major flash point in the debate over export bans. On

a policy level, questions and concerns raised about the Decision and the Ban Amendment contained in it include the following:

- **Circumstances of adoption.** The Ban Amendment 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.¹³ A particular concern is that the lack of widespread support for the Ban Amendment may result in a low number of ratifications and/or a delay in the Amendment's entry into force,¹⁴ a prediction which has since been demonstrated to be largely correct.¹⁵
- **Applicability to recycling.** Business and industry do not appear to be inclined to object to the ban on waste intended for disposal, but the portion of the Ban Amendment addressed to exports for recycling and recovery has been quite controversial.
- **Definitional issues.** Because the Ban Amendment, unlike the parent Convention, applies only to hazardous wastes, the characterization of a waste as 'hazardous' takes on considerable significance. 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 an environmentally counterproductive deficiency in the Ban Amendment.
- **Scope.** The Ban Amendment applies only to exports originating from industrialized countries and has been criticized for failing to address South-South trade in wastes.
- **Availability of Article 11 agreements.** The text of the Ban Amendment does not explicitly address the continued availability of regional or bilateral agreements under the parent Convention as a means for particular Parties to waive the ban on shipments for disposal and/or recycling strictly among themselves. There is some disagreement over the legality of the use of Article 11 agreements for this purpose.¹⁶
- **Obligations of potential countries of import.** The Ban Amendment clearly specifies that certain enumerated states, set out in a new Annex VII to the Convention, have an obligation under the Amendment to prohibit exports to non-Annex VII states. However, somewhat asymmetrically and in contrast to Decision I/22, the text of the Ban Amendment does not specifically articulate a role for non-Annex VII states in controlling shipments from those states from which exportation is prohibited by the Amendment. One question that arises is whether a non-Annex VII state that is party to the Ban Amendment may import hazardous wastes from an Annex VII state that is not party to the Amendment and therefore has no obligation to prohibit exports under the Amendment.

The fourth meeting of the Conference of the Parties (COP-4) held in Kuching, Malaysia, in February 1998 considered but took no action on requests from Monaco, Israel, and Slovenia to be added to the list of countries identified in Annex VII of the Ban Amendment.¹⁷ The apparent motivation for these requests was to permit those countries to receive shipments from Annex VII countries – mostly OECD states – which, under the Ban Amendment, would otherwise be prohibited,¹⁸ a devel-

opment that is very revealing as to the policy dynamics underlying the Ban Amendment. As of this writing, the Ban Amendment has not received a sufficiently large number of ratifications to enter into force.¹⁹

■ The Basel Convention and GATT/WTO Rules

The Basel Convention is one of the principal multilateral environmental agreements thought to raise questions about consistency with GATT/WTO rules. Against that background, the relationship between the new Ban Amendment and the GATT/WTO regime has been discussed in general fashion and the 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 GATT/WTO regime of rules on the new Amendment.

Basic GATT/WTO Obligations as Applied to Environmental Measures

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 General Agreement on Tariffs and Trade (GATT).²⁰ Fundamental GATT/WTO obligations that apply in these areas, as in others, include the following:

- the most-favoured-nation (MFN) principle, contained in Article I of the GATT and specifying non-discrimination among imported products on the basis of their national origin;
- national treatment, contained in Article III of the GATT and requiring non-discrimination between foreign and domestic products; and
- a prohibition on quantitative restrictions for imports or exports contained in Article XI of the GATT.

Article XX of the GATT 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 in paragraph (b) for measures 'necessary to protect human, animal or plant life or health'; and another in paragraph (g) for measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'.²¹

Unless they were considered exempt under Article XX, national measures undertaken to implement the Basel Convention would be subject to the basic GATT/WTO obligations relating to MFN status, national treatment, and quantitative restrictions. Concern about the application of those requirements, as well as the availability of the Article XX exemptions, has been substantially heightened by a series of dispute settlement panel reports issued under the auspices of the GATT and, subsequently, the WTO.

In one proceeding, Mexico challenged a ban imposed by the United States on the importation of yellowfin tuna

caught with 'purse seine' nets resulting in the incidental kill or incidental serious injury of ocean mammals in excess of US standards. The Panel's report²² noted that discrimination by importing states based on the methods by which foreign goods are produced, as opposed to characteristics of the foreign goods themselves, is not permitted by Article III of the GATT, which articulates the national treatment standard. Consequently, concluded the Panel, the import ban on yellowfin tuna was a quantitative restriction prohibited by Article XI.

Moreover, according to the Panel, the exemptions provided in Article XX were unavailable in this case. In light of the need for a narrow construction of the exemptions to the GATT, the drafting history of the 1947 General Agreement, and the broader implications for international trade, the Panel concluded that trade measures to protect resources outside the jurisdiction of a contracting party are not within the scope of the exceptions contained in Article XX, paragraphs (b) and (g) of the GATT. Further, according to the Panel, the United States had failed to demonstrate that the import restriction was primarily aimed at conservation or that measures consistent with the General Agreement, such as an internationally-agreed joint dolphin conservation programme, were unavailable. For these reasons, the Panel found both the primary embargo on Mexican tuna and a secondary ban on imports of tuna from intermediary nations to be inconsistent with US obligations under the General Agreement.

Mexico did not seek the adoption of this report at the time of its release, and the GATT Council rejected a request by the EU to adopt the report. The EU and the Netherlands subsequently initiated their own challenge to the secondary import ban, which is designed to discourage 'tuna laundering' by intermediary nations which purchase yellowfin tuna abroad and export it to the United States. This Panel report,²³ like the first, found that the secondary import prohibition is inconsistent with the United States' obligations pursuant to the GATT. The reasoning of the second Panel was somewhat different from the first. Instead of emphasizing the extra-jurisdictional character of the resources affected by the challenged trade measures, the second Panel concluded 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 exceptions for human, animal, or plant life or health in paragraph (b) or for the conservation of exhaustible natural resources in paragraph (g).

Although influential in the larger trade and environment debates, neither of the so-called 'tuna/dolphin' reports was adopted by the GATT Council, which ceased to exist as of the end of 1995. Hence, these two reports do not represent authoritative interpretations of GATT/WTO obligations by the Contracting Parties to GATT 1947.²⁴

A subsequent GATT Panel found that a facially nondiscriminatory US regulatory scheme requiring manufacturers and importers to meet minimum average fuel

efficiency standards for all automobiles is intended to promote energy conservation and therefore is primarily aimed at conservation.²⁵ This is the only GATT or WTO dispute settlement proceeding to date involving the environment, public health, or natural resources whose outcome turned on the availability of the Article XX exceptions in which those exemptions were held to apply.

The first dispute settlement proceeding in the WTO, also initiated against the United States, addressed related questions. Rules promulgated by the US Environmental Protection Agency (EPA) establish standards for 'reformulated' gasoline, which reduce ground-level ozone in highly polluted areas, by specifying the composition of reformulated gasoline and requiring reductions in the emissions of certain pollutants. The regulations direct domestic refiners to establish an individual baseline for determining compliance with the regulatory requirements, reflecting that refiner's actual historical performance, by choosing one of three specified methods of calculation. Other entities, including foreign refiners, are assigned a baseline specified in the governing statute.

Venezuela and Brazil protested that the EPA rules discriminate against imported gasoline in contravention of the GATT/WTO regime of rules. Both the Dispute Settlement Panel²⁶ and the Appellate Body established within the WTO by the Uruguay Round²⁷ ruled against the US. The Appellate Body concluded that the measure in question was 'relat[ed] to the conservation of exhaustible natural resources' as required by Article XX(g), but nonetheless found that the regulations violated the prohibition in the 'chapeau' or opening clause of Article XX. The measure, ruled the Appellate Body, constituted an 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade', because the United States had not adequately considered alternative, less trade restrictive approaches that would have accomplished similar ends.

Another recent panel decision, initiated by India, Pakistan, Thailand, and Malaysia, followed the reasoning of the two GATT tuna/dolphin Panels and the WTO reformulated gasoline Appellate Body report.²⁸ At issue was a prohibition, similar to those in the tuna/dolphin disputes, on the importation of shrimp into the United States caught without the use of 'turtle excluder devices' (TEDs) intended to reduce the incidental take of sea turtles, all species of which are recognized as threatened with extinction under the Convention on International Trade in Endangered Species (CITES). As in the reformulated gasoline case, the Panel held that the import embargo was 'unjustified' and therefore did not qualify under the chapeau of Article XX. This decision has been appealed, but as of this writing the Appellate Body has yet to release its ruling.

Potential Conflicts Between the Basel Convention and GATT/WTO Obligations

Beginning with the first tuna Panel report, there has been 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. In contrast to the case-by-case approach of GATT/WTO Panels, the relationship between multilateral environmental agreements, such as the Basel Convention, on the one hand and the GATT/WTO regime of rules on the other, might be addressed as a generic problem by means of a 'legislative' solution adopted in a multilateral forum.

To date, however, such efforts within the GATT, the WTO, and elsewhere have generally not been successful. A GATT Working Group on Environmental Measures in International Trade was established in 1971 but was convened only 20 years later. A GATT Working Group on The Export of Domestically Prohibited Goods and Other Hazardous Substances, established in 1989, prepared but failed to adopt a draft decision on products banned or severely restricted in the domestic market.²⁹ These efforts were overtaken by the establishment of a new WTO Committee on Trade and Environment (CTE) in the Uruguay Round of Multilateral Trade Negotiations,³⁰ which also established the WTO itself. The CTE's 1996 report,³¹ like similar previous attempts, was inconclusive on this question.

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. In the continuing absence of a 'legislative' solution to the generic problem, any analysis of such a situation is therefore of necessity 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 and the GATT/WTO regime both originate in international treaty, sometimes called 'conventional', law. Reconciling any divergences between the two instruments requires an analytical framework that meshes those agreements in a principled manner. As discussed in greater detail below, a particularly salient result of such an analysis is the considerably greater likelihood of a conflict between the GATT/WTO regime and the Basel Convention in the case of a non-party to the Basel Convention. The likelihood of such an inconsistency as between two Parties to the Convention is appreciably lower.

Effect of the Basel Convention on Non-Party WTO Members

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. The principal obligations are enumerated in the basic GATT/WTO requirements, such as those addressing MFN status, national treatment, and quantitative restrictions; the rights implicit in the agreement consist

primarily of market access. By subsequent agreement, WTO members, like Parties to the Basel Convention, can modify the commitments among themselves. But 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.

In other words, the Parties to the Basel Convention cannot compromise the GATT/WTO rights of those states not party to the Convention. Consequently, 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 complaints under the GATT/WTO regime.

Chief among the provisions of the Basel Convention which are likely to give rise to difficulties with WTO member states not party to the Convention is the prohibition in Article 4 (5) on exports and imports of hazardous and other wastes by Parties to the Convention to and from non-party states – the 'limited ban'.³² As a legal matter, refraining from trade with non-party third states is an obligation owed by one Party to the Basel Convention to another. But the implementation of this provision by Parties to the Basel Convention might constitute an MFN violation under Article I of the GATT or contravene Article XI's prohibition on quantitative restrictions or both.³³ If identical waste were generated and managed domestically but imports of that waste were prohibited, there might also be a violation by a state of import of the national treatment standard set out in GATT Article III. To the extent that this provision in the Basel Convention affects a resource outside the jurisdiction of the Party to the Basel Convention, or is intended to leverage policy change in the non-party state, the reasoning of the tuna/dolphin line of GATT/WTO dispute settlement panel reports might preclude an exemption under Article XX. At the same time, the multilateral nature of the Convention's requirements might reduce the likelihood that such measures are 'arbitrary' or 'unjustifiable' in contravention of the chapeau of Article XX.

Article 11 of the Basel Convention is something of an 'escape hatch' in dealing with such a situation. To the extent that a WTO member not party to the Basel Convention were to allege a violation of GATT/WTO rules against another WTO member that is party to the Convention, the two states could negotiate an agreement mutually acceptable to both in which they waive the Basel Convention's requirements that would otherwise apply. As discussed above, newly negotiated agreements under Article 11 must be 'not less environmentally sound' than the Convention itself. In such a situation, an Article 11 agreement could serve as a mechanism for the Party to the Basel Convention to reconcile its obligations to protect public health and environment under the Convention with its international trade obligations as a WTO member. But because such agreements require the consent of the states concerned to be bound, the Article 11

route is not an automatic solution to the potential conflict between the Convention and GATT/WTO rules. Moreover, it should be reemphasized that, as of this writing, no GATT Contracting Party or WTO member has initiated a dispute settlement proceeding that addresses trade provisions in a multilateral environmental agreement, including the Basel Convention. As a result, the need for a 'safety valve' under Article 11 is still indeterminate.

Implications of GATT/WTO Rules Among Basel Parties

The potential problem in the case of a WTO member not party to the Basel Convention arises because the obligations owed by one Party to the Basel Convention to other Parties – e.g., to refrain from exporting wastes to non-party third states – may conflict with other international obligations – e.g., MFN treatment. The situation is very different when considering trade relations among Basel Convention 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, which is generally viewed as restating and codifying customary international law in this area.³⁴ With respect to successive agreements among the same Parties, later agreements on a particular subject matter will prevail over earlier, except to the extent that the earlier is 'compatible' with the later.³⁵ By means of a particularized agreement among them, states may also modify multilateral treaties *inter se*.³⁶

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 whenever 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. Article 4(1)(b) of the Basel Convention bans shipments of hazardous and other wastes to Parties that have prohibited imports. Such a unilateral requirement in domestic legislation or as applied to non-parties, as discussed above, might be considered a violation of MFN treatment or a prohibited quantitative restriction. Article 4(2)(e) of 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 the state of import's rights to most-favoured-nation status and could amount to a quantitative restriction.

In contrast to a unilateral situation, Parties to the Basel Convention are not only authorized, but mandated, to

adopt those measures as obligations owed by the Parties to each other. For instance, the requirement to prohibit exports of waste 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 Convention Party state of export owes to the Basel Convention Party state of import. This and other measures authorized by the Convention are a consensual waiver by Parties to the agreement of their GATT/WTO rights that might otherwise apply. In other words, among Parties to that instrument, the Basel Convention is best viewed as a limited derogation by mutual agreement of GATT/WTO rights, and in particular as a consensual departure from GATT/WTO rights by states of import and export *vis-à-vis* each other. The responding party in a WTO dispute settlement proceeding would have a defense that the Basel Convention Party WTO member challenging those measures had waived its GATT/WTO rights in becoming a party to the Basel Convention.

This interpretation is not only consistent with, but required fully to give life to, the Vienna Convention's 'compatible' standard. The entire purpose of the Basel Convention is to control and regulate trade in a precisely circumscribed class of substances, namely wastes, that present unusual problems from a trade policy point of view. The Convention establishes a detailed regulatory structure to accomplish this aim. The Basel Convention consequently is a straightforward application of the rule that the specific controls the general, codified in the Vienna Convention's 'compatible' test, in a manner that assures the continuing vitality of the rights and obligations contained in both the Basel Convention and the GATT/WTO regime.

The alternative result is considerably less satisfactory as a relatively elementary matter of treaty interpretation. If, as between Parties, GATT/WTO rights were to 'trump' the Basel Convention, major portions of the latter instrument could be rendered ineffective, which cannot have been the intention of those Parties to the Convention that are also GATT contracting parties and/or WTO member states. In sum, as between Parties to the Basel Convention, there can be no nullification or impairment of GATT/WTO rights, at least to the extent those rights have been superseded by the Basel Convention.³⁷

Thanks to some unusual features of the relationship between the Basel Convention and the GATT/WTO regime, some further analysis is necessary. First, the relationship between the Basel Convention, whose text was adopted in 1989 and which entered into force in 1992, might be seen as an application of a simple later-in-time rule. To that extent, the reaffirmation of the basic principles contained in GATT 1947, as codified in the Uruguay Round agreements adopted in 1994, might present complicating difficulties. Even so, the temporal ordering of these agreements does not affect the analysis. The relationship between the two instruments is not one of mere sequencing in time. Instead, harmonizing the two instruments reflects a more deeply-rooted, fundamental principle in which the Basel Convention obligations are a narrow, specialized set of obligations con-

trolling a limited, clearly defined sector of trade by comparison with the GATT/WTO regime, which addresses trade relations more generally, not to mention many more commodities. The Basel Convention is not inconsistent with, but a species of *lex specialis* 'compatible' with, the GATT/WTO regime, notwithstanding that the Convention preceded the Uruguay Round/WTO agreements in time.

Second, even if the operation of the Basel Convention among Parties to it were to be viewed as circumscribed by GATT/WTO rights, the PIC scheme would still amount to a case-by-case, *ad hoc* consensual waiver by states of import of GATT/WTO rights that they might otherwise assert. Accordingly, the core of the agreement specifying the consent of the government of the state of import would survive even if GATT/WTO rights were to supersede the Convention's provisions. Under this theory, however, those provisions that rely on the exercise of discretion by the state of export without the consent of the state of import might be subject to a GATT/WTO challenge. These could include the requirement 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, or if there is a scientific dispute as to the toxicity of the waste and therefore the rationality of the country of export's decision to prohibit a shipment.³⁸

Third, there might be some residual question about the consistency between the choice of national measures to implement the Basel Convention and GATT/WTO rules. The Basel Convention is evidence of a consensual departure from GATT/WTO rights as among the Parties to the Convention. Consistent with that approach, if the Convention does not authorize certain national measures to implement that agreement, a Party's GATT/WTO rights would not have been waived and a challenge under that regime might be appropriate. For example, to the extent that a Party can successfully demonstrate that the Basel Convention does not authorize particular national measures adopted by another Party, those measures might be subject to challenge under the GATT or the new Uruguay Round/WTO regime.

■ The Ban 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.³⁹ The Basel Convention embodies the same rule.⁴⁰ 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 Ban Amendment and that there-

fore 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 Ban Amendment.⁴¹ Significantly – at least from the point of view of the Amendment's treatment in the GATT/WTO regime – the Ban Amendment does not distinguish among states of export or import that are Parties to the 'parent' Convention alone, Parties to both the parent agreement and the new Ban Amendment, and non-parties to either. Judging by the wording of the Ban Amendment, it is intended to apply to all exports from industrialized Annex VII states, including to non-parties to the parent Basel Convention, and to the Basel Convention Parties that have not adhered to the Amendment.

Between Parties to the Ban Amendment and Non-parties to the Basel Convention

The Ban Amendment contained in Decision III/1 adopted at COP-3 instructs 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 discussed above, in the case of the parent Basel Convention, questions might be raised about whether these bans are consistent with the GATT/WTO regime's most-favoured-nation principle and the prohibition on quantitative restrictions. But as between Parties and non-parties, Article 4(5) of the parent agreement, as noted earlier, **already** prohibits **all** imports and exports. Accordingly, with respect to the sub-category of transboundary shipments originating in one of the enumerated Annex VII industrialized states that are Basel Convention Parties and destined for developing countries that are not parties to the Basel Convention, the Ban Amendment is redundant.⁴² Consequently, as between Parties to the new Ban 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.

Among Parties to the Ban Amendment

As among WTO member states that are also Parties to the Basel Convention and the new Ban Amendment, the analysis above on the implications of the GATT/WTO rules among Basel Convention Parties would apply. That is, subject to the qualifications set out earlier, the Ban Amendment, like the Basel Convention itself, would operate as a consensual abrogation of GATT/WTO rights. In other words, as between Parties to the Ban 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 industrialized Annex VII Basel Convention Parties to developing, non-Annex VII countries that are also party to the Convention and the Ban Amendment.⁴³ Therefore there can be no nullification or impairment of GATT/WTO rights as between Parties to the Ban Amendment, at least to the extent the national measures employed to implement the Amendment are consistent with that instrument.

Among Basel Parties Not All Party to the Ban Amendment

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 Convention, but only one of which is a party to the new Ban Amendment. Within this class of relationships, there are two sub-categories: (1) the proposed state of import is a party to the Ban Amendment, but the anticipated state of export is not; and (2) the potential state of export is a party to the Ban Amendment, but the contemplated state of import is not.

State of Export Not Party to the Ban Amendment

In the former case, as already analyzed above, the state of export is under no obligation to prohibit all exportation to non-Annex VII Basel Convention Party states; those relationships, from the point of view of the state of export would continue to be governed by the PIC notification-and-consent scheme established by the parent Convention. Thanks to the apparent gap or ambiguity in the Ban Amendment discussed above, at least under one interpretation of the new Amendment the state of import would seem to have no obligation to refuse imports from Annex VII states. 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 Ban 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. Precisely because of the possibility of such an inconsistency, the better interpretation of the new Ban Amendment may well be that it imposes no such obligations on non-Annex VII states of import. Assuming that is so, the regime set out in the parent Convention would apply as between members of this sub-category of Basel Convention Parties.

The one potentially significant modification would be a situation in which a Basel Party state that had not accepted the Ban Amendment nonetheless unilaterally were to prohibit exports to non-Annex VII states. Such a situation might arise, for instance, if an Annex VII state were to implement the Ban Amendment on a *de facto* or voluntary basis pending the adoption of domestic implementing measures, prior to formal acceptance of the Amendment. Although in such a case there may be no obligation to refuse imports from Annex VII, the state of import, in adhering to the Ban Amendment, can no longer credibly claim a right under GATT/WTO rules to those imports. A non-Annex VII state party to the Ban Amendment – one of the beneficiaries of the Amendment that has consensually relinquished any 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 an Annex VII state enumerated in the Ban Amendment to permit exportation.

State of Import Not Party to the Ban Amendment

The latter case – that of an industrialized state party to the Ban Amendment that refuses to allow exportation to a non-party state not party to the Amendment – is somewhat more complicated. Under these circumstances, the state of import, a putative beneficiary of the Ban 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 Ban 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.

Under the Basel regime, plausibly to claim such an expectation, a non-Annex VII state that is not party to the Ban Amendment must demonstrate that all the following conditions provided under the parent Convention have been satisfied:

- the potential state of import must not have prohibited all imports of hazardous or other wastes (Article 4 (2)(e));
- the proposed state of import must not have prohibited all importation of the waste in question (Article 4 (1)(b));
- the anticipated state of import must have indicated its intent in writing to receive the specific import (Article 4(1)(c));
- the government of the state of export must determine that the state of export does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the wastes in question in an environmentally sound and efficient manner (Article 4 (9)(a)); and
- the government of the state of export must be convinced that the wastes in question will be managed in an environmentally sound manner in the state of import (Article 4, (2)(e), 2(g), and 8).

If any of these requirements are not satisfied, then the exportation would not occur under the parent agreement even if the state of export, an Annex VII state, were not a party to the new Ban Amendment. Therefore, if any of these conditions are not met, the prohibition on exportation does not give rise to nullification or impairment of GATT/WTO rights because the state of import waived those rights in ratifying or acceding to the parent Basel Convention.

Even if all these conditions were to be satisfied, it is highly questionable whether the Basel Convention itself can be read to imply an expectation, much less a right, by developing states to receive waste exports from OECD states. Some criticisms of the Convention to the contrary, the goals and purposes of the instrument are clearly to minimize transboundary movements of wastes to the extent possible. The notification-and-consent procedure in particular is designed to facilitate the state of import's right to **reject** shipments of wastes and to be free of the environmental and public health consequences of the trade in wastes, at least to the extent that state does not give its written consent. Nowhere does

the Convention speak of a right to importation, and the overall intent of the instrument can hardly be said to give rise to such an expectation. In other words, there is nothing in the Convention that suggests that a potential state of import, having given its consent, has either a right or an expectation under the agreement to receive the shipments consented to.

In principle, there might nonetheless be some residual possibility for nullification or impairment of GATT/WTO rights as between Parties and non-parties to the Ban Amendment, all of which are Parties to the parent Basel Convention. In practice, that potential would appear to be small. To the extent that the Ban Amendment obtains less than widespread support among the existing Parties to the Basel Convention, the 'holdouts' are likely to be OECD or other industrialized states on whom the principal – or, depending on the interpretation of the Amendment, sole – obligations fall.⁴⁴ In this scenario, the states that benefit from the Amendment are also those most likely to find their GATT/WTO rights nullified or impaired. But given the history of the export ban, these same states – developing countries of import – even if they are not parties to the Ban Amendment are much more likely to object to the **failure** of industrialized states to implement the Amendment. Thanks to the structure of the Amendment, in which developing countries are the intended beneficiaries of the instrument, it is unlikely indeed that any of those beneficiaries would assert GATT/WTO rights in an attempt to defeat the implementation of the Amendment.

Even then, Article 11 agreements in derogation of the Basel Convention's obligations could serve as a vehicle for curing the inconsistency with GATT/WTO rights, as discussed in greater detail above. As earlier noted, however, the applicability to the new Ban Amendment of Article 11 of the parent agreement has not yet been clarified and is the subject of some disagreement. As discussed above, the Ban Amendment does not specifically address whether bilateral and regional agreements continue to be available to modify the requirements of the Amendment, as opposed to the parent agreement. Further sub-categories of such agreements could be identified – e.g., between Parties to the Amendment and non-parties to the Basel regime, between Parties to the Amendment and non-parties to the amendment that are party to the parent agreement, and so on.

These ancillary agreements may well be useful as fail-safes or 'relief valves' to address those unlikely instances of potential difficulties with GATT/WTO rules – a situation which may suggest that the better interpretation is that such agreements may modify the obligations in the Ban Amendment.⁴⁵ In any event, as between Parties to the Ban Amendment there would be no legal need for Article 11 agreements as a vehicle for assuring the integrity of GATT/WTO rights; if at all, those agreements would be legally necessary for this purpose only as between Parties and non-parties to the Amendment. And, as discussed earlier, the probability in practice that a genuine dispute would arise between states thus situated would likely be very small.

■ Conclusion

As a matter of sound policy for trade in hazardous wastes, the Ban Amendment 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, the lack of attention to South-South trade, uncertainty as to the continued availability of Article 11 agreements, and the nature, if any, of obligations undertaken by potential developing country states of import. But with respect to the GATT/WTO regime of rules, the implications of the Ban Amendment 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'.

■ Notes

1. 22 March 1989, reprinted in *EPL*, 19 (1989) 68; *Int'l Env Rep (BNA)*, 21:3101; (1989) 28 ILM 657; Katharina Kummer, *International Management of Hazardous Wastes: The Basel Convention and Related Legal Rules*, (Oxford, Clarendon Press, 1995), 288 [hereinafter Kummer, *International Management of Hazardous Wastes*]; Barbara Kwiatkowska and Alfred H.A. Soons (eds), *Transboundary Movements and Disposal of Hazardous Wastes in International Law: Basic Documents*, (Martinus Nijhoff/Graham & Trotman, 1993) 40 [hereinafter Kwiatkowska & Soons].
2. North American Free Trade Agreement, 8, 11, 14 & 17 December, 1992, US-Can-Mex.; (1993) 32 ILM 296, 612.
3. E.g. London Guidelines for the Exchange of Information on Chemicals in International Trade, UN Doc. UNEP/WG.155/L.1 Annex I (1987), adopted G. C. Dec. 14/27, 42 UN GAOR Supp. (No. 25) at 79, UN Doc. A/42/25 (1987), amended, UN Doc. UNEP/PIC/WG.2/4 app. (1989), adopted as amended G. C. Dec. 15/30, 44 UN GAOR Supp. (No. 25) at 156, UN Doc. A/44/25 (1989), reprinted in *EPL*, 19 (1989) 125; FAO International Code of Conduct on the Distribution and Use of Pesticides (as amended), FAO Sales No. M/U0610E/I/9.90/10.000, art. 9 (1986) (information exchange and prior informed consent). Both these instruments were amended in the late 1980s to expand notification requirements to include PIC. See also Draft Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, UN Doc. UNEP/FAO/PIC/INC.5/3 Annex I (17 March 1998) (not in force).
4. For a more extensive treatment of the negotiating history of the Basel Convention, its structure, and subsequent developments, see Kummer, *International Management of Hazardous Wastes*, n. 1 above.
5. For example, African States expressed concern that the Basel Convention is inadequate in that it does not ban transboundary movements of hazardous and other wastes. No sub-Saharan African country signed the Convention at the time of its adoption, and those countries have been poorly represented in subsequent accessions. Considerations such as these led to the adoption of the Bamako Convention, a regional agreement negotiated under the auspices of the Organization of African Unity that would 'prohibit the import of all hazardous wastes, for any reason, into Africa from non-Contracting Parties' while adopting a PIC approach for transboundary movements within Africa; Bamako Convention on the Ban of the Import Into Africa and the Control of Transboundary Movements of Hazardous Wastes Within Africa, 29 January 1991; in force 22 April 1998; reprinted in (1991) 30 ILM 773; *Y Int'l Env L*, 2 (1991) 632; Kummer, *International Management of Hazardous Waste*, n. 1 above, at 317; Kwiatkowska & Soons, n. 1 above, at 912.

6. Basel Convention, n. 1 above, Article 15(7) (establishing a Conference of the Parties).
7. Katharina Kummer, 'Transboundary Movements of Hazardous Wastes', *Y Int'l Env L*, 3 (1992) 288, 290.
8. UN Doc. UNEP/CHW.1/24 (5 December 1992) (<http://www.unep.ch/basel/index.html>), reprinted (in data format only) in *Y Int'l Env L*, 3 (1992).
9. In the operative portion of Decision II/12, the Conference of the Parties
 1. *Decides* to prohibit immediately all transboundary movements of hazardous wastes which are destined for final disposal from OECD to non-OECD States;
 2. *Decides also* to phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes which are destined for recycling or recovery operations from OECD to non-OECD states;
 3. *Decides further* that any non-OECD State, not possessing a national hazardous wastes import ban and which allows the import from OECD States of hazardous wastes for recycling or recovery operation until 31 December 1997, should inform the Secretariat of the Basel Convention that it would allow the import from an OECD State of hazardous wastes which are acceptable for import; the quantities to be imported; the specific recycling/recovery process to be used; and the final destination/disposal of the residues which are derived from recycling/recovery operations;
 4. *Requests* the Parties to report regularly to the Secretariat on the implementation of this decision, including details of the transboundary movements of hazardous wastes allowed under paragraph 3 above. Further requests the Secretariat to prepare a summary and to compile these reports for consideration by the Open-ended Ad Hoc Committee. After considering these reports, the Open-ended Ad Hoc Committee will submit a report based on the input provided by the Secretariat to the Conference of the Parties of the Convention;
 5. *Requests* further the Parties to cooperate and work actively to ensure the effective implementation of this decision. UN Doc. UNEP/CHW.2/30 (25 March 1994) (<http://www.unep.ch/basel/index.html>), reprinted in Kummer, *International Management of Hazardous Wastes*, n. 1 above, at 316.
10. Iwona Rummel-Bulska, 'Transboundary Movement of Hazardous Waste', *Y Int'l Env L*, 4 (1994) 218, 219. See generally Consolidated Report on the Implementation of Decision II/12 of the Second Meeting of the Conference of the Parties to the Basel Convention, UN Doc. UNEP/CHW.4/Inf.7 (1997) (<http://www.unep.ch/basel/index.html>) (summary of status of implementation of Decision II/12 prepared for COP-4).
11. But see Kevin Stairs, 'The Basel Convention Parties' Decision to Ban All Hazardous Waste Exports from OECD to Non-OECD Countries (Decision II/12): Legal Analysis' (unpublished report) (arguing that Decision II/12 is legally binding).
12. Decision III/1 provides in full as follows:

AMENDMENT TO THE BASEL CONVENTION

The Conference,

Recalling that at the first meeting of the Conference of the Parties to the Basel Convention, a request was made for the prohibition of hazardous waste shipments from industrialized countries to developing countries;

Recalling decision II/12 of the Conference,

Noting that:

- the technical Working Group is instructed by this Conference to continue its work on hazard characterization of wastes subject to the Basel Convention (decision III/12);
- the Technical Working Group has already commenced its work on the development of lists of wastes which are hazardous and wastes which are not subject to the Convention;
- those lists (document UNEP/CHW.3/Inf.4) already offer useful guidance but are not yet complete or fully accepted;
- the Technical Working Group will develop technical guidelines to assist any Party or State that has sovereign right wishing to conclude agreements or arrangements including those under Article 11 concerning the transboundary movement of hazardous wastes.

1. *Instructs* the Technical Working Group to give full priority to completing the work on hazard characterization and the development of lists and technical guidelines in order to submit

them for approval to the fourth meeting of the Conference of the Parties.

2. *Decides* that the Conference of the Parties shall make a decision on a list(s) at its fourth meeting.

3. *Decides* to adopt the following amendment to the Convention:

Insert new preambular paragraph 7 bis:

Recognizing that transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous wastes as required by this Convention.

Insert new Article 4A:

1. Each Party listed in Annex VII shall prohibit all transboundary movements of hazardous wastes which are destined for operations according to Annex IVA, to States not listed in Annex VII.

2. Each Party listed in Annex VII shall phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes under Article 1(i)(a) of the convention which are destined for operations according to Annex IVB to States not listed in Annex VII. Such transboundary movement shall not be prohibited unless the wastes in question are characterised as hazardous under the Convention.

[Insert new] ANNEX VII

Parties and other States which are members of the OECD, EC and Liechtenstein.

UN Doc. UNEP/CHW.3/35 (28 November 1995) (<http://www.unep.ch/basel/index.html>).

13. See e.g., 'Ban on Waste Exports Outside OECD Pushed Through Basel Treaty Meeting', *Int'l Env Rep.* (BNA), 18 (1995) 753. Cf. Basel Convention, n. 1 above, Article 17(3) ('The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting ...').
14. Article 17(5) of the Basel Convention, n. 1 above, provides that '[a]mendments ... shall enter into force between Parties having accepted them on the ninetieth day after the receipt by the Depositary of their instrument of ratification, approval, formal confirmation or acceptance by at least three-fourths of the Parties who accepted the amendments ...'.
15. See Katharina Kummer, 'The Basel Convention: Ten Years On', in this issue of *RECIEL*.
16. See e.g., Louise de La Fayette, 'Legal and Practical Implications of the Ban Amendment to the Basel Convention', *Y Int'l Env L*, 6 (1995) 703, 711-15 (arguing that Article 11 agreements may not modify the legal effect of the Ban Amendment). See generally Decisions IV/1 and IV/2, UN Doc. UNEP/CHW.4/35, Annex (decisions of COP-4 regarding bilateral, multilateral and regional agreements and arrangements).
17. See Decision IV/8, UN Doc. UNEP/CHW.4/35 Annex at 28 (decision of COP-4 regarding Annex VII 'decid[ing] to leave Annex VII unchanged until the amendment contained in decision III/1 enters into force'). See generally Katharina Kummer's article in this issue of *RECIEL*.
18. The OECD has adopted a regime governing transboundary movements of wastes among its membership, which is roughly equivalent to the Annex VII list. Decision Concerning the Control of Transfrontier Movements of Wastes Destined for Recovery Operations, OECD Doc. C(92)39, reprinted (in data format only) in *Y Int'l Env L*, 3 (1992), Kummer, *International Management of Hazardous Wastes*, n.1 above, at 400, Kwiatkowska & Soons, n. 1 above, at 592. That decision, which applies only to the transport of wastes among OECD countries and not to trade with third states, is not limited to wastes defined as hazardous. The decision establishes a three-tiered approach, depending on the level of risk presented by the wastes in question. Hazardous wastes on a 'red list' are subject to the full PIC procedure set out in the Basel Convention and prior OECD instruments. For 'amber list' wastes, less rigorous requirements of prior notification and tacit consent of the state of import apply. Those comparatively low-risk wastes appearing on a 'green list' are treated as ordinary commercial transactions, subject to no spe-

- cial controls by virtue of their character as wastes. The decision has been notified to the Secretariat of the Basel Convention as a regional agreement that meets the criteria of Article 11 of the Convention. In Regulation 259/93, which was adopted in 1993 and took effect in 1994, the European Union implemented both the Basel Convention and the 1992 OECD decision. Regulation on the Supervision and Control of Shipments of Waste Within, Into and Out of the European Community, OJ 1993 L 30, 1, reprinted in *Y Int'l Env L*, 4 (1993) 713; Kummer, *International Management of Hazardous Wastes*, n. 1 above, at 360.
19. See e.g., Decision on the Approval, on Behalf of the Community, of the Amendment to the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), as Laid Down in Decision III/1 of the Conference of the Parties, OJ 1997 L 272, 45 (Council Decision 97/640 approving the Ban Amendment on behalf of European Union); Regulation Amending Regulation (EC) No 259/93 on the Supervision and control of Shipments of Waste Within, Into, and Out of the European Community, OJ 1997 L 22, 14 (Regulation 120/97 implementing Ban Amendment in European Union).
 20. General Agreement on Tariffs and Trade, 30 October 1947, as amended, *Basic Instruments and Selected Documents*, vol. IV, 55 UNTS 188 [hereinafter GATT 1947]. The Uruguay Round of Multilateral Trade Negotiations, in creating the World Trade Organization (WTO), codified and reaffirmed the text of the General Agreement, as amended up to that time. See Agreement Establishing the World Trade Organization, Article XVI, para. 1, (1994) 33 ILM 15.
 21. The relevant passage provides in full as follows:

Article XX
General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(b) necessary to protect human, animal or plant life or health; [or]

...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.
 22. United States – Restrictions on Imports of Tuna, reprinted in (1991) 30 ILM 1594.
 23. United States – Restrictions on Imports of Tuna, reprinted in (1994) 33 ILM 842.
 24. See, e.g., William J. Davey, 'Dispute Settlement in GATT', *Fordham Int'l L J*, 11 (1987) 51, 94.
 25. United States – Taxes on Automobiles, reprinted in (1994) 33 ILM 1399.
 26. United States – Standards for Reformulated and Conventional Gasoline, reprinted in (1996) 35 ILM 276; and (<http://www.wto.org/dispute/distab.htm>) (Panel report).
 27. United States – Standards for Reformulated and Conventional Gasoline, reprinted in (1996) 35 ILM 605 and (<http://www.wto.org/wto/dispute/distab.htm>) (report of WTO Appellate Body). See Steve Charnovitz, 'New WTO Adjudication and Its Implications for the Environment', *Int'l Env Rep (BNA)*, 19 (1996) 851.
 28. United States – Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/R (15 May 1998) (<http://www.wto.org/wto/dispute/distab.htm>).
 29. See Report by the Chairman of the Working Group and Draft Decision on Products Banned or Severely Restricted in the Domestic Market of 22 May 1991, GATT Doc. L/6872 (2 July 1991), reprinted in Kwiatkowska & Soons, n. 1 above, at 527.
 30. Ministerial Declaration on Trade and Environment, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 April 1994, (1994) 33 ILM 1140, 1267.
 31. Report (1996) of the WTO Committee on Trade and Environment, WTO Doc. WT/CTE/W/40 (7 November 1996).
 32. Because wastes governed by the Basel Convention generally – although not necessarily always – are discarded materials with a negative value – 'bads' as opposed to goods, products, or services – there is an outstanding, as yet unresolved question whether the GATT/WTO regime of rules applies to such materials as articles in commerce. See e.g., Robert Housman, Donald Goldberg, Brennan Van Dyke & Durwood Zaelke (eds.), 'The Use of Trade Measures in Select Multilateral Environmental Agreements' (UNEP Environment and Trade Series No. 10, 1995), 153 [hereinafter Housman *et al.*]. At least two significant national and supranational schemes that contain trade rules analogous to the GATT/WTO regime have considered this question and concluded that wastes are governed by trade-based tests. See e.g., *EC Commission v. Belgium (Case C-2/90)*, CMLR, 1 (1993) 365, 396 ('waste, whether recyclable or not, should be regarded as a product the movement of which must not in principle ... be impeded'); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353, 359 (1992) ('Solid waste, even if it has no value, is an article of commerce'.) One line of reasoning asserts that, because wastes are by-products of the manufacture of goods and products, restrictions on trade in wastes will also inevitably burden trade in products. See also Housman *et al.*, at 268 (noting that shipping, treatment, storage, disposal or recovery of wastes are likely 'services' governed by General Agreement on Trade in Services (GATS)). This analysis assumes strictly for the sake of argument that the GATT/WTO regime of rules applies to wastes governed by the Basel Convention.
 33. Other WTO disciplines that might apply to this situation include those set out in the Uruguay Round Agreement on Technical Barriers to Trade, Uruguay Round Final Act, at II-A1A-6. See Housman *et al.*, n. 32 above, at 153.
 34. Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331, reprinted in *AJIL*, 63 (1969) 875; (1869) 8 ILM 679 [hereinafter Vienna Convention]. For example, this instrument, although not in force for the United States, has been accepted there as a codification of customary international law regarding international agreements. See S. Exec. Doc. L, 92d Cong., 1st Sess. 1 (1971); Restatement (Third) of the Foreign Relations Law of the United States, pt. III, introductory note (1987).
 35. Article 30 of the Vienna Convention, n. 34 above, provides in full as follows:

Article 30
Application of successive treaties relating to the same subject-matter

 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended ..., the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
 4. When the parties to the later treaty do not include all the parties to the earlier one:
 - (a) as between States parties to both treaties the same rule applies as in paragraph 3;
 - (b) as between a State party to both treaties and a States party to only one the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
 36. Article 41 of the Vienna Convention, n. 34 above, provides as follows:

Article 41
Agreements to modify multilateral treaties between certain of the parties only

 1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
 - (a) the possibility of such a modification is provided for by the treaty; or
 - (b) the modification in question is not prohibited by the treaty and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

- (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.
37. There is the potential that, even if WTO members were to waive GATT/WTO rights among themselves, that action could nonetheless adversely affect third party WTO members. See e.g., GATT 1947, Article XIII, para. 1 ('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'.) This provision appears to have been invoked rarely, and there is relatively little jurisprudence with respect to it. *General Agreement on Tariffs and Trade (GATT), Analytical Index: Guide to GATT Law and Practice*, 366 (1994). Cf. Vienna Convention, Article 41(1)(b)(i), n. 36 above (effect on rights of third parties of side agreements in derogation of multilateral treaties).
38. Cf. United States – Measures Concerning Meat and Meat Products (Hormones), WTO Doc. WT/DS26/AB/R & WT/DS48/AB/R (16 January 1998) (<http://www.wto.org/wto/dispute/distab.htm>) (WTO Appellate Body report approving reexamination of scientific basis for national regulatory measure).
39. Articles 39 and 40 of the Vienna Convention on the Law of Treaties provide in relevant part as follows:
- Article 39*
General rule regarding the amendment of treaties
A treaty may be amended by agreement between the parties ...
- Article 40*
Amendment of multilateral treaties
...
4. The amending agreement does not bind any States already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), [reproduced in n. 35 above] applies in relation to such a State.
5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:
- (a) be considered as a party to the treaty as amended; and
- (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.
40. Article 17, Basel Convention, n. 1 above.
41. According to Article 40(5), of the Vienna Convention on the Law of Treaties, reproduced in n. 39 above, Parties adhering to the parent agreement shall be presumed to be a party to amendments that have previously entered into force unless the adhering state specifies otherwise. The Basel Convention itself does not address this issue directly, suggesting that the Vienna Convention rule applies.
42. At least as between non-Basel party states of export and developing country parties to the Convention and the Ban Amendment, the apparent gap in the Amendment relating to the obligations of states of import, discussed above, would seem to be of no consequence. In such a situation, the state of import is already obligated by the parent Basel Convention to prohibit imports from non-parties to the Convention.
43. As a corollary to this conclusion, as between Parties to the Ban Amendment the apparent gap in the Amendment relating to the obligations of states of import, discussed above, would seem to have no significance from the point of view of the GATT/WTO regime. In such a situation the potential state of import arguably has no obligation to prohibit importation. Cf. n. 42 above (parent Convention prohibits importation by Parties to Ban Amendment from non-Basel Party states). Nonetheless, the obligation articulated in the Ban Amendment on behalf of Annex VII states of export – in this situation, presumed to have been accepted by the potential states of export – would almost certainly be a credible defense in a WTO dispute settlement proceeding initiated by a potential state of export. Cf. see below where the same applies, except the state of export is not party to the Ban Amendment).
44. In this regard, it is interesting to note that the bulk of the small number of ratifications of the Ban Amendment lodged to date are from Annex VII states. See the article by Katharina Kummer in this issue of *RECIEL*.
45. Cf. James Crawford & Philippe Sands, 'The Availability of Article 11 Agreements in the Context of the Basel Convention's Export Ban on Recyclables' (International Council on Metals and the Environment (August 1997)) ('the recognition that Article 11 agreements remain available in appropriate cases would ... leav[e] the Ban Amendment less vulnerable to a GATT challenge from a third state whose trade would otherwise be prohibited'). But see de La Fayette, n. 16 above.

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