

THE WASTE TRADE PUZZLE AND GATT CONFLICT

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Abstract

Waste Trading was viewed as an easy activity to dump excessive waste from one side of the world to the other. Free trade policies supported the environmentally harmful activity and advocated for a free movement, until the World NGOs came forward and developed the "Ban Conventions" for the activity. The area of waste trading has been not left from the effect of International policies and difference in municipal laws for the waste management. The paper analyses the activity of Waste Trading from the perspective of GATT Principles, supporting the view that the ban is not justified even under the GATT exceptions and therefore the need is for a balance between a The Complete Ban and Control Strategy adopted. The idea is to present that the diverging municipal laws of waste management creates more difficulty and the need is to find a solution to this in International Law.

Introduction

Waste Trading is not a new activity. It has existed since 1970s, with the OECD estimating that in 1984 on an average, a consignment of hazardous wastes crossed an OECD frontier every five minutes, 24 hours per day and 365 days per year.¹ From then as the globalization widened its panorama, environmentalists blame capitalism and free trade as reasons for local and global ecosystem pressures.² In recent times, waste trade has become one of the issues under criticism although the conflict between trade developers and environmentalists has existed ever since the technological advancements started affecting the sensitive cycles of environmental balance.

The GATT articles of WTO emerged in the international scenario as a guardian to the ideology of Free Trade and Globalization. However the non- tariff trade barriers were accepted as an exception to the GATT rules, when conflicting interests were witnessed. One of these exceptions included the environmental issue which developed from the concept of "sustainable development" forming a happy union between trade, economy, growth, development and environment.

Although trade has been criticized for being bent in favour of the developed countries, the emergence of New International Economic Order has shifted the focus to developing countries, realizing the economic benefits and growth it gifts. As has always been the situation, developing countries have emerged as the dumping grounds for manufactured goods by developed countries. The situation is no different in waste trading.

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¹ Kate O'Neill, *Waste Trading among Rich Nations: Building a new theory of Environmental Regulation*, ix (MIT Press Cambridge Massachusetts, 2000 ed.)

² *Ibid.*

As we go back to the time of Basel Convention, we realize that the developing countries were used as a dumping ground for the world's toxic waste and therefore emerged the phenomenon of 'toxic colonialism'³. The decrease in the availability of disposal sites and increase in disposal costs led to the practice of exporting hazardous waste to countries in the developing world. The developing countries happily accepted waste management even though their own waste was unable to find an environmental friendly method of dumping.

Some of the many risks due to the improper handling have been the affect to human health through leakage of toxins into ground water, the soil, or the atmosphere, and the local habits and ecosystems may be damaged or even destroyed as a result of waste disposal.⁴ The US- Mexico Border Waste trade case displays the issue. The problem of offsite disposal has also been pointed out by environmentalists. The involvement of third parties - waste disposal companies or brokers to whom waste- generating firms sell their waste, exacerbate pollution externalities and other market failures associated with many forms of industrial production. Externalities are the "unintended" side affects of production or consumption that pose a social cost on actors outside the firm. They are not reflected in profits generated by the firm or, therefore, in decisions about output.⁵

But the government response has been to look for an exit route to the heaps of waste. In most countries, hazardous waste management is in a state of internal flux and public strife. International Controls are crippled by problems and divergences in national approaches.⁶

A number of disasters led to a public outcry by the international community and NGOs to ban the international trade in hazardous waste. Numerous incidents of improper waste dumping in Africa and Eastern Europe led to the issue been taken up at the international forum of UNEP. In March 1989, the United Nations Environment Programme's attempt led to the signing of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. UNEP blamed improper waste disposal on trade as: "A growing army of immoral, unscrupulous waste broker's are benefiting from global commerce in poison."⁷The existence of this treaty is a direct challenge to the notion of a free and open global market.

³ Alan Andrews, 'Beyond the ban – Can the Basel convention adequately safeguard the interests of the world's poor in the international trade of hazardous waste?', 5/2 LEAD Journal, 169, 169 (2009), <<http://www.lead-journal.org/content/09167.pdf>> last seen on 13/07/15

⁴*Supra* 2

⁵*Ibid.*

⁶*Ibid.*

⁷ James M. Sheehan, 'Trashing Free Trade: The Basel Convention's Impact on International Commerce' (September 9, 1996 Comparative Enterprise Institute) <<https://cei.org/op-eds-and-articles/trashing-free-trade-basel-conventions-impact-international-commerce>> last seen on 13/07/15

This paper analyses the "total ban" or "control strategy" on waste trade as implemented by international agreement and its contradiction with GATT principles. It suggests alternative strategy to deal with waste trade crisis.

Part 1 of the paper deals with Legislations implementing Waste Trade Bans - the Basel Convention, The Bamako convention etc. Part 2 discusses failures of these restriction strategies adopted at the international level. Part 3 deals with Article XX of the GATT about exceptions to free trade and justification of "environmental interests" as non-tariff barriers to trade. Then follows the discussion to analyse if Waste trade ban can be justified under Article XX of GATT. Part 4 discusses if Trade Restriction is the only solution to waste trade. Part 5 lays down the final conclusion of paper and hypothesis of a new model of 'Waste Good' and 'Waste Trade Environment Organization' as the solution to waste trade problem.

1. Conflicting Strategies Adopted At International Level

The debate over how best to prevent the harms presented by the international waste trade has manifested itself in two types of actions: control mechanisms and bans.

Control Mechanism has been the way to "reconcile" the debate of "ban or no ban" generally supported by major industrialized powers and is based on the "Prior Informed Consent (PIC)"⁸ formula. It is remarked that, "The bans however, are more generally supported by less-industrialized countries- the potential victims of waste trade. The relevant U.S. and European Community legislation as well as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes, all rely on various forms of the PIC as the basis for its "control system". However NGOs like Greenpeace firmly believe that instruments which rely on PIC cannot possibly combat waste trade or mitigate the political, ecological, moral or social ills created by it. They believe that PIC cannot pretend to be a just system when we live in a world of such disproportional economic and political levels; in a world where the wastes of the rich can be offered as short term remedies for the poverty of the poor. PIC cannot pretend to redress the disincentive for both waste minimization and the implementation of clean production methodology that is served when industrial interests, with minimum paperwork can cheaply export their waste problems rather than take responsibility for them at home."⁹

Thus, rather than accepting "control systems" based on some form of "prior informed consent", Greenpeace and much of the less-industrialized world insist on complete import or export bans as

⁸ Greenpeace International, 'The Transboundary Movement of Hazardous and Nuclear Wastes in the Wider Caribbean Region - A Call for a Legal Instrument within the Cartagena Convention'(1991)

<<http://www.cep.unep.org/information-services/cep-technical-reports/plonearticlemultipage.2005-12-14.5340445167/plonearticle.2005-12-14.1260836771>> last seen 13/07/15

⁹ *Ibid.*

the only means to adequately remedy the problems associated with the international trade in hazardous wastes.¹⁰

1.1 The Control Mechanism: Basel: The Key Convention

The primary multilateral agreement governing the international waste trade is the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) which was negotiated under the auspices of the United Nations Environment Programme. Over 170 countries are parties to the Basel Convention.¹¹

Alan Andrews explains that, "From the outset, the Convention was an attempt to reconcile the opposing views of those nations which favoured a complete ban on trade in hazardous waste and those which opposed such a ban. Most developing countries, along with the EU and a coalition of Environmental NGOs argued that this was the only means by which to ensure that the industrial north dealt with its own waste rather than using the developing world as a dumping ground. Opposing a ban on trade were the majority of non-European industrialised countries, along with a small number of significant developing countries such as India and Pakistan, who were of the view that a total ban was not in the best interests of either the environment or economic development. The Convention achieved a compromise between these two positions by regulating rather than prohibiting trade in hazardous waste."¹²

The Convention places a complete prohibition on trade in hazardous waste between parties to the Convention and non-parties and it expressly gives right of any Party to prohibit the import of hazardous waste. However it has allowed such movement only where the state of export does not have the technical capacity and suitable disposal sites, or where the wastes are required by the importing state as raw materials for recycling or recovery industries. However such trade is only permitted when it complies with the Prior Informed Consent (PIC) procedure and the principles of ESM. The PIC procedure requires that either the generator of the waste or the state of origin of the waste must give notification, in writing, to the competent authority within the state of import informing them of the nature of the waste being transported. The notification must contain 20 separate pieces of information including a full description of the waste being transported and full details of all the parties involved in the transboundary movement. The importing state must then respond to the notification in writing, either giving consent to the transboundary movement (with or without conditions), refusing consent to the transboundary movement, or requesting further information. The exporting state must not allow the transboundary movement to take place until this information has been received.

¹⁰ *Ibid.*

¹¹ List of parties and the status of ratifications, <<http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/1290/Default.aspx>> last seen 13/07/15

¹² *Supra* 3

The Convention places an obligation on both the importing and exporting country Parties to ensure that hazardous wastes that are exported are managed in accordance with ESM. The Convention also establishes a procedure to deal with instances of illegal traffic of hazardous waste. Illegal traffic is defined fairly widely to include movements that take place without prior notification and consent or where consent is obtained through fraud or misrepresentation or where the waste does not conform in a material way with the documents.¹³

1.2 The Ban Strategy:

1.2.1. *The 'Ban' Amendment of Basel Convention and its failure to be adopted:*

The underlying tensions at the heart of the Convention came to a head at the second Conference of the Parties (COP) in March 1994. At the instigation of a coalition of environmental NGOs and developing countries, the Parties adopted a decision to immediately ban trade in hazardous waste destined for final disposal between developed countries and developing countries and to phase out trade in hazardous waste destined for reuse or recovery between these two groups by 31 December 2007.

However, because this Decision was not incorporated in the text of the Convention itself, there was a dispute as to whether it was legally binding on the Parties. Therefore, at COP-3 in 1995, following a proposal by the EU, the Parties adopted by consensus an amendment to the Convention which became known as 'the Ban Amendment', or 'the Ban'.¹⁴ "The Ban replicated the provisions of the 1994 decision, but defined developed countries by reference to a new Annex VII to the Convention, which was comprised of the countries of the Organisation for Economic cooperation and Development (the 'OECD'), the EU and Lichtenstein."¹⁵

However, fourteen years later, the Ban has yet to come into force, as it has not been ratified by the requisite three quarters of the Parties to the Convention.¹⁶ As of 20 August 2009, only 65 out of the 172 Parties to the Convention had ratified the Ban.¹⁷ The list of Parties which have not ratified the Ban includes major producers of hazardous waste such as the US and Japan as well as developing countries such as India and Pakistan who are major importers of hazardous waste. Andrew remarks that, "The issue of the non-ratification of the Ban has become 'emotional and over politicised' to the extent that it is doubtful that it will ever be

¹³ See Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal Articles (hereafter 'Basel Convention')

¹⁴ *Supra* 3

¹⁵ *Ibid.*

¹⁶ *Supra* 13, Article 17(5)

¹⁷ Full list of ratifications, <<http://www.basel.int/ratif/ban-alpha.htm>> last seen 13/07/15

resolved."¹⁸ "The political deadlock is exacerbated by a legal dispute over the correct interpretation of the provisions of the Convention regulating the number of ratifications required for an amendment to enter into force."¹⁹

1.2.2. *The Bamako Convention*

The Bamako Convention was a treaty negotiated by members of the Organisation of African Unity (OAU) in 1991, placing a complete prohibition on the trade in hazardous waste. Member states of the OAU had from the outset been concerned by the Convention's failure to impose an outright ban on trade in hazardous waste. African leaders feared that the Convention would serve to legitimise the dumping of hazardous waste in Africa, and had delayed signing it as a result. In order to address these concerns, the Bamako Convention placed a complete prohibition on imports of hazardous waste into signatory nations.²⁰

1.2.3. *The Country Led Initiative*

In an attempt to move beyond the political and legal deadlock over the ratification of the Ban, the Parties adopted Decision IX/26 at the ninth Conference of the Parties in June 2008.²¹ The statement made by the president in this decision called upon the Parties "to launch a process which would reaffirm the Ban's objectives and to explore means by which these objectives could be achieved. In particular, the statement called on the Parties to: 'Create enabling conditions, through, among other measures, country-led initiatives conducive to attainment of the objectives of the Amendment'."²²

In response to this Decision, Switzerland and Indonesia launched the Country Led Initiative ('CLI'). The CLI established a process of informal consultations amongst key actors in the hazardous waste trade.

By establishing a detailed procedure to regulate the transboundary movements of hazardous waste, the Convention aimed to allay the concerns of the developing world that they would bear a disproportionate burden from the trade in hazardous waste. However, the adoption of the Ban demonstrated that countries within both the developing and developed world remained unconvinced of the adequacy of the protection offered by the Convention. Part 3 will therefore attempt to explain this position by highlighting how the Convention has failed

¹⁸ *Supra* 3

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Annex to Decision IX/26, in Organization of the seventh session of the Open-ended Working Group and proposals by the Secretariat for the organization of work on the President's statement on the possible way forward on the Ban Amendment, UN Doc. UNEP/SBC/BUREAU/9/1/ 6 (2009), < www.basel.int/meetings/bureau/bureau%201%20cop%209/docs/06e.doc > last seen 13/07/15

²² *Ibid.*

to safeguard the interests of the global south in the international trade in waste as a result of key weaknesses in its procedures and institutions.²³

1.2.4. *The Lomé IV Convention*

Many of the Caribbean countries in the Cartagena Convention area have succeeded in helping establish a waste trade ban within the Lomé IV Convention. Fifteen countries in the region are now protected from foreign dumping of hazardous and nuclear waste under a trade and aid agreement between the African, Caribbean and Pacific (ACP) group of States and the European Economic Community (EEC) signed on 15 December 1989.

Article 39, of the Lomé IV treaty represents the world's most comprehensive hazardous waste trade ban. When this 10-year pact enters into force, the EC will not be allowed to ship any hazardous (including nuclear) wastes to the 69 ACP countries. Also, under this agreement, the ACP countries agreed to prohibit hazardous, including radioactive waste imports from any country. Caribbean nations protected under the Lomé IV treaty are Antigua & Barbuda, The Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, Suriname and Trinidad & Tobago.²⁴

2. Failure Of Restriction Strategies Of Waste Trade

The Basel Convention has been unable to solve the problems of Waste Trading harms. It allows waste imports from member countries following certain conditions and compliances laid down in the convention. However certain reasons have been identified as to why the convention fails:

1. The Prior Informed Consent (PIC) Procedure and the Problem of Self-verification: A crucial weakness of the Convention is that the PIC procedure fails to ensure that the exporting country properly verifies that adequate waste management facilities are available in the importing country.²⁵ Although the Convention places an obligation on both the importer and exporter to ensure the availability of adequate facilities in the country of disposal, it does not prescribe a particular process by which this information is to be ascertained.²⁶ The Parties are therefore reliant on the Convention's exchange of information provisions, which in effect

²³ *Supra* 3

²⁴ *Supra* 8

²⁵ L. Widawsky, 'In My Backyard: How Enabling Hazardous Waste Trade To Developing Nations Can Improve the Basel Convention's Ability to Achieve Environmental Justice', 38/ 2 Environmental Law 577, 604 (2008)

²⁶ *Supra* 15, Article 4(b)

means that the exporter is relying on representations made by the authorities in the importing country.²⁷

2. Compliance Committee: In common with similar compliance mechanisms under other international environmental agreements, the Committee does not have a mandate to enforce the Convention or to impose punitive measures against non-compliant Parties.²⁸ The Committee's objectives are to provide assistance to Parties to comply with their obligations under the Convention and to facilitate, promote, monitor and aim to secure the implementation of and compliance with the Convention²⁹
3. Failure to establish liability mechanism: Article 12 of the Convention required the Parties to cooperate with a view to adopting, as soon as practicable, a protocol establishing a framework for liability and compensation for damage resulting from transboundary movements of hazardous waste. The Basel Protocol on Liability and Compensation³⁰ was eventually adopted after six years of negotiation, at the Fifth Conference of Parties (COP-5) on 10 December 1999. However, nearly ten years later it is still not in force as only nine of the minimum of 20 Parties have ratified it.³¹ The Protocol has yet to be ratified as it is a compromise that suits neither the developed nor the developing world. From the perspective of the developing world, it contains a number of loopholes, which would allow developed countries to escape liability for damage caused by exporting waste to developed countries. This prompted one NGO commentator to describe the Protocol as 'a text with as many holes and exclusions as Swiss cheese'³²
4. Lack of funding for technology transfer: The Convention obliged the Parties to establish regional centers for training and technology transfers.³³ These have become known as the Basel Convention's Regional Training Centers for the Transfer of Technology (BCRCs). This financial model fails to provide the BCRCs with the resources they require to build capacity in developing countries.³⁴

²⁷ *Supra* 3

²⁸ *Ibid.*

²⁹ Terms of Reference of the Implementation and Compliance Committee, annexed to Decision VI/1 2, UN Doc.UNEP/ CHW/OEWG/1/3 (2003)

³⁰ Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 10 December 1999 (hereafter 'Liability Protocol'),

³¹ *Ibid.*

³² D. Pruzin, 'Hazardous Waste Agreement on Liability Protocol Reached at Basel Conference of Parties', (Press release, Basel Action Network', 10 December 1999) <http://www.ban.org/ban_news/hazardous3.html last seen>13/07/15

³³ *Supra* 15, Article 14

³⁴ *Supra* 3

5. The Recycling Loophole: A critical weakness of the Convention is that the definition of waste is limited to 'substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law'.³⁵The Basel Action Network, a vociferous critic of what it describes as the 'recycling loophole', argues that most waste trade to developing countries that is claimed to be destined for reuse or recycling is either 'sham' recycling, where it is not really for recycling at all, but will be dumped or burned by the importer, or 'dirty' recycling, where the recycling process itself will involve pollution of the environment and risk to the health of workers.

The Convention is currently failing to prevent the developing world from being used as a dumping ground for the industrialized nation's hazardous waste. However, a complete prohibition on hazardous waste trade between north and south is misguided and, from a practical point of view, futile.³⁶

3. GATT Versus Environment: GATT Exceptions

The tussle and conflict of interest between Trade and Environment opens the floor for a full new analysis of the arguments of the two factions. Environmentalists and Trade developers have different motives. But it must be well appreciated that some of the ways in which trade could harm the environment has been taken good care in GATT articles and caution has been taken to not use these measures as a disguise to otherwise intentions of restricting trade. However, one major problem faced is that each International Environmental Agreement has different subject area and it becomes necessary to analyse if that particular IEA will fit into "environment" principles of GATT.

WTO, the guardian of world trade also knows full well the other considerations for which trade might create a problem. The World Trade Organization ("WTO") has a commitment to "an open, non-discriminatory and equitable multilateral trading system on the one hand," and to "protection of the environment, and the promotion of sustainable development on the other."³⁷ The dual commitment expresses the conviction of the world's trade ministers that, "there should not be, nor need be, any policy contradiction"³⁸ between these two policy goals, a belief first officially enunciated at the United Nations Conference on Environment and Development.³⁹

³⁵ *Supra* 15

³⁶ *Supra* 3

³⁷ Preamble of the (Marrakesh) Ministerial Decision on Trade and Environment, April 15, 1994, GATT/MTN.TNC/MIN(94)/1/Rev.1

³⁸ *Ibid*.pg 739

The Trade- Environment Debate is the main policy peril for Article XX of WTO. The jurisprudence has developed from cases of Shrimp-Turtle and Tuna-Dolphin. Stanford Gaines remarks:

*"A 1991 dispute settlement panel report thrust trade law abruptly into the realm of environmental protection policy, and put environmental issues squarely on the agenda of international trade policy development. The mutual shock produced cries of alarm from environmentalists and trade mavens alike."*⁴⁰

Trade advocates conjured their own specter that countries would adopt multiple trade restrictions in the name of the environment and that such "green" protectionism would put the liberalized international trade regime on a "slippery slope" toward the "chaotic trade conditions ... that plagued the 1930s."⁴¹ Ardent environmentalists portrayed the world trade system as "GATrzilla," a monster at the service of unbridled multinational corporations stomping on national environmental laws and bent on ever-expanding production and consumption that would destroy the environment.⁴² Basel Convention on Waste has been cited for long as being unfit to GATT principles, and it will be interesting to analyse the misfit.

3.1 GATT Principles

The aim of the GATT/WTO is trade liberalization, based on three core principles:

- a) most-favored nation – Article I states that any privilege granted to one member state must be granted to other member states;
- b) national treatment – Article III requires that foreign goods imported into a member state be treated in the same manner as goods produced domestically in that state; and
- c) prohibition of import/export restrictions – Article XI prohibits quantitative restrictions on imports or exports, such as a ban on imports from a particular country or a measure that has the effect of preventing or limiting such imports (e.g., quotas, import licenses).⁴³

MEAs potentially infringe the core principles of the GATT/WTO by using restrictive trade measures for a range of purposes, for example, to:

- a) control trade that causes environmental harm, e.g., trade in endangered species;
- b) protect states from environmentally harmful substances, e.g., hazardous wastes; or
- c) support agreements to protect the global commons, e.g., agreements to decrease the use of ozone-depleting substances.⁴⁴

³⁹ *Ibid.*

⁴⁰ Sanford Gaines, 'The WTO's reading of the GATT article XX chapeau: A disguised restriction on environmental measures' 22:4, U. Pa. 1. Int'l Econ. L., 752

⁴¹ GATT Secretariat, 'Trade And The Environment' 6 (1992)

⁴² *Supra* 41, 752

⁴³ General Agreement on Trade and Tariffs

3.2 Article XX

Article XX of the GATT gives some relief to the trade related environment measures without using the term "environment". Article XX provides exceptions to it if it is:

- necessary to protect human, animal or plant life or health (Art XX(b)); or
- relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption (Art XX(g)),

However these two measures are to also fulfill the following two conditions laid down in the "chapeau" to article XX.

Chapeau states that the measures should not be applied in a manner that would constitute:

- i. a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or
- ii. a disguised restriction on international trade.

It has been opined that, "On its face, Article XX seems to provide comfort to environmentalists and recognition of the effects that trade may have on the environment. However, it raises several problems, largely because its broad terms can be subject to widely differing interpretations."⁴⁵

Cadwell remarks that: "*The International Environmental Agreements (IEAs) like Basel Convention are generally justified under GATT Article XX for environmental protection. Nevertheless, recent dispute resolution panel decisions have cast considerable doubt on the effectiveness of the Article XX exceptions in defense of environmental objectives.*"⁴⁶

The *Tuna/Dolphin*⁴⁷ Panel's interpretation of the applicability of Article XX(b) and (g) to the protection of resources outside of a contracting party's jurisdiction may represent the most direct impact on the relationship between the GATT and the IEAs.⁴⁸ In that decision, the Tuna/Dolphin

⁴⁴ James Cameron & Jonathan Robinson, 'The Use Of Trade Provisions In International Environmental Agreements And Their Compatibility With The GATT', (1991) 2 Y.B. INT'L ENVTL. L. 4-6

⁴⁵ Tania Voon, 'Sizing Up The WTO: Trade-Environment Conflict And The Kyoto Protocol', 10, J. Transnational Law & Policy 1, 80

⁴⁶ Douglas J. Caldwell, 'International Environmental Agreements and the GATT: an Analysis of the Potential Conflict and the Role of a GATT "Waiver" Resolution', 18 Md. J. Int'l L. 173 (1994) <<http://digitalcommons.law.umaryland.edu/mjil/vol18/iss2/3>> last seen 13/07/15

⁴⁷ United States - Restrictions on Imports of Tuna, GATT Doc. DS21/R (Sept. 3, 1991) (not adopted by the GATT Council), 30 I.L.M. 1594, 1606-07 (1991)

⁴⁸ *Supra* note 24

Panel stated that Article XX(b) and (g) should be limited to protecting resources within the jurisdiction of the importing country.⁴⁹ The panel thisd explained in the following words:

"This interpretation raises serious concerns about the ability of the IEAs' parties to effectively implement measures to protect the global commons. Most of the nations that are signatories to the IEAs have become parties to the agreements because they recognize a national interest and international responsibility in acting collectively to discourage further global environmental degradation. Ultimately, the citizens of the parties to CITES, the Basel Convention, and the Montreal Protocol will arguably receive direct benefits from the actions taken in pursuance of these agreements. However, the GATT, specifically Article XX(b) and (g), currently fail to acknowledge the legitimacy of nations acting in concert, not only to benefit their own citizens, but also to protect citizens and resources outside their jurisdictions."⁵⁰

3.3 Analysis of International Environmental Agreements relating to Waste Trade

Basel Convention and other International efforts are a measure to save environment and protect human health but is the measure a necessary one?

In a case decided in 1989 regarding "Section 337 of the Tariff Act of 1930,"⁵¹the panel established the following test: A measure would not be considered necessary under Article XX(d) if an "alternative measure" were "available" which was not inconsistent with other GATT provisions and which a contracting party "could reasonably be expected to employ." Furthermore, if no GATT consistent measure were reasonably available, the contracting party would have to use the measure that "entails the least degree of inconsistency with other GATT provisions." The panel did concede, however, that "this does not mean that a contracting party could be asked to change its substantive patent law or its desired level of enforcement . . ." But the panel did not spell out the type of modifications that a contracting party could reasonably be asked to make.⁵²

In case of Waste Trade the serious question that arises is that whether restriction of Waste Trade the only alternative to save the environment? This question has been answered in negative in the next part and the main change required for Waste Trade solution has been suggested. Therefore Ban and restrictions are definitely not the way to solve Waste Trade harms. The Chapeau of the GATT also seems to be violated by International Environmental Agreements⁵³ since GATT requires that measures should not be arbitrary and without discrimination. Under the Basel Convention, parties must prohibit imports of hazardous waste from non-parties,⁵⁴ even though equally hazardous waste may be imported from parties to that convention. This trade restriction could be seen as

⁴⁹Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. World Trade 37, 52 (1991).

⁵⁰ *Supra* 24

⁵¹ Report by the Panel, United States - Section 337 Of The Tariff Act Of 1930, adopted on 7 November 1989 (L/6439 - 36S/345) < https://www.wto.org/english/tratop_e/dispu_e/87tar337.pdf > last seen 13/07/15

⁵² *Ibid.*

⁵³ Hereinafter referred to as 'IEAs'

⁵⁴ *Supra* 47, pg 81

"arbitrary."⁵⁵ It has been opined that, "however, a party to the Basel Convention could argue that the restriction is justifiable because it is necessary to encourage participation in the convention and thus to protect the environment through preventing spillage and unsafe waste disposal. The justification for imposing the trade restriction is the need to protect the environment. When framed this way, it becomes apparent that the chapeau simply brings the two concerns of trade and environment head to head, and does little to solve the conflict between them."⁵⁶

Therefore the analysis boils down to the fact that Restrictions on Waste Trading continue to violate GATT principles also being unable to solve the Waste Trade Problem.

3.4 International Law on Conflicting Multilateral Treaties

Several commentators have suggested that, "the traditional international law of treaties may establish priority of the IEAs over the GATT sufficient to enable the IEAs to withstand a challenge based on the obligations of the GATT."⁵⁷

Article 30 of the Vienna Convention on Law of Treaties provides that when the provisions of two treaties concerning the same subject matter conflict as between parties to both treaties, the later-in-time prevails, unless one treaty explicitly notes otherwise.⁵⁸ Alan Andrew explains that, "The major difficulty associated with relying on the hierarchical treaty argument is that the GATT is constantly evolving through practice and further negotiation. The current round of GATT negotiations, the Uruguay Round, will expand the GATT in several areas such as intellectual property and services, and dramatically alter its dispute resolution processes. The Uruguay Round also proposes to establish a Multilateral Trade Organization (MTO) that will provide "legal personality" for the GATT." If the Uruguay Round is eventually adopted, an argument could be presented that the later-in-time treaty is the GATT, not the IEAs. As per VCLT, treaties worded specifically take precedence over treaties worded more generally. A factor that may benefit the IEAs is that none of the IEAs have explicitly indicated deference to the GATT in their texts. However, regardless of whether or not deference to the GATT can be established in the current IEAs, the significance of resisting all references to the GATT in future IEAs should not be overlooked.⁵⁹ IEA negotiators should carefully analyze, potential long-term implications of language implying deference to the GATT.⁶⁰

4. Is Restricting Waste Trade The Only Solution?

⁵⁵ *Supra* 46

⁵⁶ *Supra* 26 pg. 82

⁵⁷ *Supra* 46

⁵⁸ Article 30, Vienna Convention on the Law of Treaties (hereinafter referred to as "VCLT") (May 22, 1969, U.N. Doc. A/CONF.39/27, 8 I.L.M. 679)

⁵⁹ *Supra* 27 pg.189

⁶⁰ *Supra* 48

The GATT - Environment battle has long existed ever since "restrictions to trade" was found as a measure to save the environment. Is restriction the only way to save environment from harms associated with waste trade? Will it really solve the problem of environmental affects of Waste Trade?

Obviously, the GATT's main objective has been shattered and the exceptions to GATT also provide no rescue. The "Basel and Bans" have also proved futile on practical application. GATT does not stand for an unfettered trade harming everything, it rather takes care of all environmental concerns, but the environmentalists blatantly blame free trading as the only cause. Waste Trading definitely is posing problems. But the point to note is that it is so only when the importer does the disposing off carelessly. The need to realize the problems in national policies of countries.

Kate O'Neill, in her book on "Waste Trading among Rich Nations Building A New theory of Environmental Regulation" states that the national environmental policy and regulation framework in each country is responsible for a country's control, to import or export. She analyses Procedural & Institutional Framework of country regulatory structure and regulatory styles. If regulatory structure is diffused, then there is more scope for control at different levels and hence there can be a transparent check to the process of policy decisions and there can be scope of corruption. However if the regulatory structure is closed, the policy decision is limited to a group of people who can decide it as per their own choices without any environmental consideration. The regulatory style can be dependent upon access and implementation of the policies. If the Access policy is open then a democratic system of environmental regulation exists and anyone can know the actual motives, however if it is closed policy decisions can again be taken at the own fancy of policy regulators without public knowing the real scenario. If the most practicable solution approach is to be followed, generally environment is compromised and economic considerations are seen.⁶¹

This theory definitely gives a full solution to the real waste trade regulation. It is agreed that waste trade involves environmental problems, but only when the waste trade management is not done proper globally. Therefore if any International Environmental Agreement addressing waste issue is to be made, the agreement should be to follow a waste trade "management" policy rather than waste trade "restriction" policy. Waste Trade if properly implemented can lead to a lot of economic growth.

5. Conclusion: The 'Waste Good' And The 'Waste Trade Environment Organization'

Can we regard 'waste' as a 'good' for International trade? Why can't we trade it like a good keeping its "sensitive environment problem creation nature in mind"? If this theory is relied on, a new model for waste trade issue would evolve. A new international organization just like GATT and WIPO

⁶¹ *Supra* 1

could be formed which keeps a check on waste trade "management" and should be for all countries involved in waste trade. These could be the methods:

1. Green Scientific Inventions for Waste disposal: The concern should be to find greener, cheaper and sustainable ways to dispose waste. New methods should be discovered to dispose of waste without requiring much area and with minimum investment, so that even developing countries can afford the methods.
2. New International Organization: In order to assure that waste is being disposed off properly by the importing country a global system to guard the proper disposal, maybe an international body, called as 'Waste Trade Environment Organization' can be formed. Such new body rather than creating a multilateral agreement among many countries, should set out certain principles to be followed by two countries before they enter into a bilateral agreement of waste trade.

Such body could have following principles:

- a. System of Checks: Every exporting country should assure that the importing country possess all the new greener machinery for waste disposal and if it doesn't then the exporting country should provide such importing countries with such machineries. Specific conditions like non- payment of money if waste is disposed off without proper methods or delay in delivering the waste on non availability of appropriate machinery can be imposed.
- b. System of Lending: If a developing or poor country wants to import waste and does not possess waste then the international organization should provide facility of lending such green machinery to these countries along withtheir surveillance using such machinery.
- c. Dispute Settlement Body: Forming a dispute settlement body addressing waste trade issues and non-compliance of principles of International body.

The only solution to the waste puzzle is that a new system of managing it should be formed. Restricting Waste Trade has neither provided any solution nor it is in compliance with the trading principles of GATT. The need is realizing the root of the issue. A ban to the waste trade seems like completely shunning the idea of waste trade, which could otherwise be a good way of economic growth and waste disposal. If such a body is developed, then rather than waste trade being an environmental issue, it will turn to be a revenue generator.

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