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Grant L. Kratz

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Implementing The Basel Convention into U.S. Law: Will it Help or Hinder Recycling Efforts?

I. INTRODUCTION

Trade in hazardous waste is gaining national attention as domestic landfills reach their capacity and the United States as a whole becomes more environmentally conscious. The hazardous waste trade, like many others, has progressed from the domestic to the international arena. The law, unfortunately, has not kept pace with this transition. In an effort to bring international law up to par with the needs of the international waste trade, the Basel Convention was held.

This paper discusses the Convention itself, including what the convention does and does not do. It also discusses the Basel Convention's potential impact on U.S. law, and the steps that the U.S. must now take to ratify the Convention and ensure participation in discussions concerning the future implementation of the Convention. Attention is then given to the relative merits of the three bills currently proposed to implement the Basel Convention into U.S. law. Particular emphasis is given to the role of recycling and the impact that the Convention and the implementation of U.S. legislation will have on recycling efforts within the United States and abroad.

II. BACKGROUND

A. *Trade in Hazardous Waste*

In 1990, the United States legally exported 139,000 tons of hazardous waste.¹ This amount is substantial, even though it represents only 1% of the approximately 271 million tons of hazardous waste generated in the United States. Of these exports, 68% was sent to Canada and 28% to Mexico.² Since 1986, the United States and European countries have sent

1. *Hearings on the Basel Convention before the Subcomm. on Environmental Protection of the Comm. on Environment and Public Works*, 102d Cong., 1st Sess. (1991) (Statement of William K. Reilly, Administrator, U.S. Environmental Protection Agency) (forthcoming 1992).

2. *Hearings*, *supra* note 1 (statement of William K. Reilly).

waste to at least 11 developing nations.³

This trade between developed and developing nations can be extremely profitable in the short term for both parties. Exporters can save a great deal in waste management costs by simply shipping the waste to developing countries and paying what seems to the importing country to be tremendous amounts of money. In reality, these payments are only a fraction of what the disposal costs would be in the United States.⁴

To the economist this seems ideal. The exporter gets rid of its waste in a cheaper way, while the importer profits. Both parties gain and nobody loses. But tremendous losses are possible. Information in this scenario is not perfect, and oftentimes the importer has no idea of the level of danger involved with the shipment and disposal of these materials. The risk to the environment and to the citizens of importing nations is tremendous. These developing countries have not dealt domestically with the industries that are now exporting waste and therefore have no regulatory structure to control the flow of these materials.⁵ At the same time, the growth of environmental awareness in the U.S. and the increase in domestic disposal regulation make it even more attractive for U.S. companies producing these materials to export them to the money-starved developing nations which may or may not be equipped to handle the possible consequences of their disposal.⁶

One example of a near tragic experience occurred when Lindaco, a U.S. company, tried to export toxic waste to the country of Guinea Bissau. The revenue which Guinea Bissau would have received from the project was \$120 million per year, an amount close to its national product, and yet it was still significantly less than Lindaco would have paid to dispose of the materials in the United States. Guinea Bissau apparently learned of the potential environmental and health threats of the shipment, however, and the deal never went through.⁷

3. Michelle M. Vilcheck, *The Controls of the Transfrontier Movement of Hazardous Waste from Developed to Developing Nations: The Goal of a "Level Playing Field"*, 11 NW. J. INT'L L. & BUS. 643, 644 (1991).

4. *Id.*

5. Jeffery D. Williams, *Trashing Developing Nations: The Global Hazardous Waste Trade*, 39 BUFF. L. REV. 275, 289.

6. *Id.*

7. *Id.*

B. *The Basel Convention*

The international community acknowledged the risks involved with the continued international trade in hazardous waste and in an attempt to regulate these exports, and under the auspices of the United Nations Environment Program (UNEP), the Basel Convention was held in Basel, Switzerland. An agreement was reached in March 1989.⁸ As of December 5, 1991, fourteen countries had deposited their ratification of the Convention with the Secretariat.⁹ The Convention enters into force 90 days after the ratification by the 20th party¹⁰ and looks to be "the most binding international provision regulating the transfrontier movement of hazardous waste[.]" as well as the most restrictive.¹¹

1. *What the Convention does not do*

Before discussing what the Convention does, it is important to mention what it does not do. It is generally not a ban on the export and import of hazardous waste. Environmental activist groups such as Greenpeace, however, argue that the only way to protect the environment and encourage reduction of waste production and recycling of waste is to completely ban its export. These proponents argue further that developing countries simply lack the infrastructure to deal with these wastes and that a ban would save the regulatory and implementation costs involved with implementation of the Convention.¹² A ban is the only alternative which these groups find

8. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, U.N.E.P. Doc. I.G.80/3 (March 22, 1989) reprinted in 28 I.L.M. 657 (1989) [hereinafter *Basel Convention* or *Convention*].

9. Telephone interview with Ms. Evelyn Kiss of the Secretariat's Office of the United Nations. (December 5, 1991). The countries who have ratified include: Hungary, Jordan, Norway, Saudi Arabia, Switzerland, France, Mexico, Panama, Rumania, Nigeria, Argentina, Czechoslovakia, Sweden, and Finland. The Convention itself does not contain a lapse provision providing that the Convention would lapse if not ratified by the required number of countries by a certain date, but one could assume that it could constructively lapse after a certain period of time. Apparently that further ratifications may require the imposition of international pressure by the U.S., and considering the importance of the convention, this may be a very good idea—especially for any President interested in truly being 'the environmental' President.

10. *Hearings, supra* note 1 (Statement of Dr. Harvey Alter, U.S. Chamber of Commerce).

11. Vilcheck, *supra* note 3, at ???.

12. *Hearings, supra* note 1 (Statement of Jim Vallette, coordinator, Greenpeace

acceptable.

However, such a complete ban takes power away from the importing countries, invades their sovereignty through external application of U.S. law, and prevents them from receiving badly needed cash from legitimate transactions. Some countries may even be interested in improving their economic position by building a waste disposal industry.¹³ A ban also prevents the specialization of both disposal and recycling industries in places such as Canada.¹⁴ What is a producer to do when, as is often the case, the nearest disposal site is within another country (such as Canada) or when the best equipped facility is abroad?¹⁵ A ban also poses problems when a country's landfills reach their capacity and there is no place to put the waste. This is not the distant prospect that some would have us think; since the U.S. Environmental Protection Agency (EPA) says that within the next ten years, more than half of the states in the U.S. will be unable to accept hazardous waste due to a lack of landfill capacity.¹⁶

In addition, those who argue that informed consent on the part of the receiving country is impossible, considering the importer's economic status and infrastructure, ignore the simple fact these countries are, by definition, developing and thus will need to deal with the problem of hazardous waste at some time. Permitting them to import under the structure and regulations provided by the Convention allows them to start with guidance and, therefore, make more appropriate decisions for their developing economies.¹⁷ Placing them in an artificially created haven, away from the evils of trade in hazardous waste, fosters isolationism and inhibits their growth.

Finally, as in other bans, a ban of shipment of hazardous waste will only lead to more illegal dumping and the terrible

International Hazardous Exports-Imports Prevention Project); Vilcheck, *supra* note 3 at 73?.

13. Vilcheck, *supra* note 3, at 715?.

14. *Hearings, supra* note 1 (Statement of Swep Davis, Pres. and CEO, Concord Resources Group Inc.).

15. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, TRANSFRONTIER MOVEMENTS OF HAZARDOUS WASTES 8 (1985).

16. Andrew Porterfield & David Weir, *The Export of U.S. Toxic Wastes*, THE NATION, Oct. 3, 1987, at 341.

17. See F. James Handley, Hazardous Waste Exports: A Leak in the System of International Legal Controls, 19 ENVTL. L. REP. (Envl. L. Inst.) 10171, 10182 (1989).

consequences thereof.¹⁸ A ban is a radical and unnecessary step in regulation of international hazardous waste shipments.

2. *What the Convention does*

A principal goal of the Basel Convention is a major reduction in the generation of hazardous wastes.¹⁹ The Convention requires parties to ensure "that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes"²⁰ It also requires that each of the parties not allow the export of hazardous waste "if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner"²¹ Apparently the drafters intend to make trade in hazardous waste so expensive that it will be more cost effective for an entity to reduce its output rather than find new places to ship it.

The Convention requires notification of the proposed shipment in writing from the state of export, the generator, or the exporter, to the appropriate authority in the receiving country as well as to the export country and to any transit countries.²² The state of import (and the transit states) may then "respond to the notifier in writing, consenting to the movement with or without conditions, within 60 days, denying permission for the movement, or requesting additional information."²³ The state of export may not allow the shipment until receipt of permission from the importing state and confirmation by the exporting state of the existence of a contract between exporter and importer, which must include environmentally sound management of the shipment.²⁴

The states of transit must also respond within 60 days, unless they have previously decided not to require prior written

18. Vilcheck, *supra* note 3, at ?16?.

19. Preamble language includes "the most effective way of protecting human health and the environment from the dangers posed by such wastes is the reduction of their generation to a minimum in terms of quantity and/or hazard potential" and continues, "enhanced control of transboundary movement of hazardous wastes and other wastes will act as an incentive for their environmentally sound management and for the reduction of the volume of such transboundary movement." Basel Convention, *supra* note 8, Preamble.

20. Basel Convention, *supra* note 8, art.4(2)(d).

21. Basel Convention, *supra* note 8, art.4(2)(e).

22. Basel Convention, *supra* note 8, art. 6(1).

23. Basel Convention, *supra* note 8, art. 6(4).

24. Basel Convention, *supra* note 8, art. 6(3)(a-b).

consent to shipment, in which case the export country may allow the shipment after the 60 day period without specific authorization. If prior written consent is required, then the exporting country cannot permit the shipment until specific authorization is made by the states of transit.²⁵

The Convention also includes various requirements for record-keeping and reporting as well as a requirement for the notification from the exporter to the exporting country concerning compliance with applicable insurance requirements.²⁶ Other, more specific requirements of the Convention will be discussed later in this paper.

III. UNITED STATES RATIFICATION

A. *Steps for U.S. Ratification*

The Deputy General of the United Nations plans to hold the first meeting of ratifying parties 90 days after the ratification by the 20th party. This meeting will deal with the actual implementation of the Convention and will define ambiguous terms found in the Convention. It will also deal with any problems not dealt with at the time of the original Convention. This meeting will be key to implementation of the Convention; therefore it is imperative that the United States be among the parties at this meeting if it is to participate in the shaping of the Convention.²⁷ Under the terms of the Convention, unless the U.S. ratifies, it would be unable to export waste to or import waste from any country that is a party to the Convention unless a separate agreement were negotiated.²⁸ Perhaps more importantly, the United States would be unable to participate in definition of terms found in the Convention.

In order to ratify the Basel Convention, the U.S. Senate must first give the President its consent. Then, the EPA must be given additional statutory authority to control the shipment of waste in accordance with the Convention. This additional authority is necessary to meet three requirements of the Convention.

First, the EPA must be given authority to regulate all

25. Basel Convention, *supra* note 8, art. 6(4).

26. *Id.*

27. *Id.*

28. Basel Convention, *supra* note 8, art. 4(5), art. 11; *Hearings, supra* note 1 (statement of Jim Vallette).

waste subject to the Convention, whereas now the EPA is only able to regulate hazardous waste as defined by U.S. law.²⁹ Second, the EPA needs authority to stop exports which may be in violation of the Convention, even if the importing country has consented to the shipment. Third, the EPA needs to be able to require U.S. exporters to return waste that is mismanaged abroad to the United States.³⁰ Each of the three proposals currently before Congress aims to solve these implementation problems. Significant problems, however, exist with two of these proposals.

B. Proposed Legislative Solutions to the Implementation Problem

House Resolution 2358, the Waste Export Control Act, put forth by Congressman Synar of Oklahoma, involves a "no less strict" standard which, as will be seen, proves troublesome to other nations in that it promotes extraterritorial application of American laws and environmental standards.³¹ Another proposal, H.R. 2580, the Waste Export and Import Prohibition Act, primarily sponsored by environmental groups, proposes a complete ban on international trade of hazardous waste. This approach throws the baby out with the bathwater and seems not to be in accord with the spirit nor the letter of the Convention. The third, and most feasible alternative, is S. 1082, proposed by the President. S. 1082 involves reasonable regulation of the hazardous waste trade and provides much needed exceptions for recyclables. This paper will discuss these proposals individually.

1. HR 2358, The Waste Export Control Act

Among the provisions of H.R. 2358 are a requirement of an international agreement between the United States and the importing country and a provision for a guarantee from the EPA that the waste (both hazardous and non-hazardous) is managed safely and in a manner "no less strict" than U.S. waste management standards. This second provision has objectors up in arms.

The Canadian response to this provision is indicative of

29. *Hearings, supra* note 1 (statement of William K. Reilly).

30. *Id.*

31. *See infra* notes 32-33 and accompanying text.

other foreign responses to H.R. 2358. Canada asserts that any U.S. legislation implementing the Basel Convention "should take into account the fact that other countries may have standards different from those of the United States, but which nevertheless ensure that waste is dealt with safely and in an environmentally sound manner."³² The position statement continues:

[The American legislation] should ensure that the sovereignty of receiving countries is not inadvertently infringed upon, for example, through calls for inspection of disposal facilities in these countries by officials of the United States. Such a provision would have the effect of extending the application of US law and standards into other countries, and would not take into account the responsibility of the receiving country to ensure that its own standards, enforced by its own officials, are respected.³³

Environmentalists, on the other hand, are worried that without a "no less strict" standard, exporters will not adhere to safety standards which would protect the interests of people and the environment in less developed nations which are lured into accepting waste by the tremendous financial incentives offered by U.S. exporters.³⁴ The environmentalists argue that without a "no less strict" standard, shippers of waste will simply look for the country with the lowest waste disposal standards and the greatest need for money and ship their waste there. They also argue that this bill does not regulate the import of waste to the U.S. and that U.S. standards are irrelevant in foreign countries which lack the hospitals and technology to respond to emergencies.³⁵

2. H.R. 2580, *The Waste Export and Import Prohibition Act*

House Resolution 2580, *The Waste Export and Import Prohibition Act*, introduced June 6, 1991, on the other hand, pleases the environmentalists while outraging others. It bans the export and import of all potentially hazardous materials.

32. *Trade in Hazardous Waste-The Canadian Position, U.S. Waste Exports, Hearing Before the Subcommittee on Human Rights and International Organizations and the Subcommittee on International Economic Policy and Trade of the Committee on Foreign Affairs*, 101st Cong., 1st Sess. 24 (1989).

33. *The Canadian Position*, *supra* note 32, at 24.

34. *Hearings*, *supra* note 1 (statement of Jim Vallette).

35. *Id.*

According to Greenpeace, this is the only proposed legislation that fully implements the Convention.³⁶

While this proposal attempts to solve the problem, it eliminates the potential benefits of trade in waste, including possible specialization and development of significant recycling programs. Most non-environmentalist groups find this an extreme and unwise option.³⁷ Since this alternative eliminates the problem and the benefit at the same time, instead of dealing directly and rationally with the issue of hazardous waste, H.R. 2580 should not be taken too seriously.³⁸ It makes the mistake of throwing the baby out with the bathwater.

3. S. 1082, *The Administration's Proposal*

President Bush has introduced his solution to the Basel implementation problem in the form of S. 1082. This legislation includes a statutory prohibition on export and import of waste without a bilateral or regional agreement between the countries involved. The agreement should provide for management of the waste in an environmentally sound manner. This proposal excludes trade of scrap metal, waste paper, and other items separated from the solid waste stream for recycling purposes. It also excludes nuclear material, which is regulated under other international agreements.³⁹

a. "Environmentally sound" disposal: a common problem. A key question in determining the value of this bill is the possible interpretations of disposal in an "environmentally sound manner." However, this language and, therefore, this question is not unique to the administration's bill since the language is found in the Basel Convention itself. Most interested parties agree that if S.1082 were to be passed, other legislation would also be required to implement this phrase into U.S. law. Some argue that the possibility of differing interpretations of this language is a significant reason for the U.S. to ratify the Convention and thereby be able to participate in the discussions interpreting the ambiguities in the Convention itself.⁴⁰

36. *Id.*

37. *Hearings, supra* note 1 (statement of Swep Davis); *Hearings, supra* note 1 (statement of William K. Reilley); *Hearings, supra* note 1 (statement of Dr. Harvey Alter); *Hearings, supra* note 1 (statement of Robert J. Redhead, Director of Government Relations, Laidlaw Inc.).

38. *Hearings, supra* note 1 (statement of Swep Davis).

39. *Hearings, supra* note 1 (statement of William K. Reilley).

40. *Hearings, supra* note 1 (statement of Dr. Harvey Alter).

The Convention defines "[e]nvironmentally sound management of hazardous or other wastes" as "taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes"⁴¹ This definition, however, provides little practical help in applying the terms of the Convention to the real world.

(1) *How to evaluate an "environmentally sound" system.* Although there may be dispute as to the specific requirements of an environmentally sound management system, there seems to be agreement concerning the essential factors in the evaluation of such a system. These include the following considerations: the waste management program in place in the importing country to control and manage waste; the technical design of the treatment and disposal facilities in the importing country; the day-to-day operation of those facilities; and the compliance history of the facilities.⁴²

(2) *The components of such an environmentally sound waste management system.* The EPA and private sector also seem to agree on components of an environmentally sound system. These include a clear definition of waste that is to be regulated,⁴³ procedures for controlling toxicity of waste and for making it generally more difficult for contaminants to migrate from waste into the environment, a system for final disposition of residuals in a manner that isolates them from the environment, and procedures to monitor the performance of all of these measures to make sure that they are working.⁴⁴ Environmentalists would probably want even higher standards put in place, and it would appear, in fact, that such groups would be less than happy with anything short of a complete ban.

One key to be remembered is that whatever standard is

41. Basel Convention, *supra* note 8, art. 2 (8).

42. *Hearings, supra* note 1 (statement of William K. Reilly).

43. The Convention itself defines the categories of waste controlled by the Convention. The types of waste are listed in Annex I and are governed by the convention unless they display none of the hazardous characteristics found in Annex III. Annex I contains 45 types of waste, categorized by waste stream and wastes having specific constituents. The waste stream categories range from hospital waste to industrial waste. Article III lists 13 characteristics of waste that make it hazardous and Article II labels household waste and residues from the incineration of household waste as "wastes requiring special consideration" and the convention covers these as "other wastes." Basel Convention, *supra* note 8, art.2.

44. *Hearings, supra* note 1 (statement of Swep Davis).

decided upon by the U.S. for environmentally sound management of waste, the extra-territorial application of U.S. law is not appealing to our neighbors, as illustrated by the Canadian position paper. This simply re-emphasizes the importance of U.S. participation in the post-ratification talks which will, undoubtedly, need to come to some workable definition of environmentally sound management. With U.S. participation, the U.N. definition of such management can be reconciled with the U.S. definition and such extra-territoriality problems will be eliminated.

b. Procedural Requirements of S. 1082. The Administration's bill also includes procedural requirements consistent with the Basel Convention. These procedural requirements include written notice to and consent from the importing country and any transit countries prior to commencement of the export; a written contract between the exporter and the importer; documentation of waste minimization efforts made by U.S. hazardous waste exporters; acceptance of legal and financial responsibility for any waste not managed according to Convention standards, American regulation, or the contract; and financial responsibility requirements.⁴⁵ Those who trade in waste would be required to pay fees to cover the costs of implementation and administration of the program.⁴⁶

One key point which the promoters of S. 1082 are quick to mention is that since the EPA retains responsibility for improperly managed waste, there is a strong disincentive against looking the other way if the exporter is not ensuring disposal in an environmentally sound manner.⁴⁷

c. Objections to S. 1082. There are, however, several objections to the administration's proposed legislation. These objections will now be outlined and discussed.

(1) What S. 1082 covers. S. 1082 covers hazardous and "additional" wastes. It does not cover "solid waste produced by industry, mining, and agriculture unless its composition meets the RCRA definition of a hazardous waste."⁴⁸ Some of these materials may be far beyond trash in their potential damage to the environment and still not reach the hazardous waste lev-

45. *Hearings, supra* note 1 (statement of William K. Reilly).

46. *Id.*

47. *Hearings, supra* note 1 (statement of Swep Davis).

48. *Hearings, supra* note 1 (statement of Dr. William Y. Brown, Director of Environmental Affairs, Waste Management Inc.).

el.⁴⁹ The trade in these materials should be regulated.

(2) *Definitional Problems.* Unless the U.S. accepts the Convention definitions of "hazardous wastes" and "other wastes", the bill will not cover all of the waste that the Convention does. This is true because the Convention's definitions of waste are very broad and inclusive, while the administration's bill proposes several exceptions which, depending on the interpretation of the Convention, may or may not fall under the Convention. If no definitional changes are made, either in the Convention itself or in American law, we would have only partial implementation of the Convention, which would make the environmental lobbyists less than happy.

According to the terms of the Convention itself, the U.S. legislation implementing the Convention would need to address the Convention's definitions and then either add to or take from these definitions. The Convention provides that:

[E]ach Party shall, within six months of becoming a Party to this Convention, inform the Secretariat of the Convention of the wastes, other than those listed in Annexes I and II,⁵⁰ considered or defined as hazardous under its national legislation and of any requirements concerning transboundary movement procedures applicable to such wastes.⁵¹

Since Annex II of the Convention clearly includes "[w]astes collected from households"⁵² and since one very positive point in the Administration's bill is the fact that it exempts recyclables from the Convention, some definitional compromises will be absolutely necessary. The U.S. will need to use its influence at these discussions to assure that shipment of household waste intended for recycling be permitted. U.S. participation in the post-ratification discussions will ensure that the important recycling industry is not fatally wounded by the Convention.

49. Used batteries, for example, are simple household waste with potentially hazardous effects for the environment.

50. Annexes I and II of the Convention simply enumerate several types of waste which are generally included under the Convention. This provision merely allows each nation to add materials to this list.

51. Basel Convention, *supra* note 8, art. 3(1).

52. Basel Convention, *supra* note 8, Annex II.

C. *Impact on Current International Trade in Waste*

S. 1082 would likely leave substantially unaffected U.S. waste trade with Canada and Mexico⁵³, with whom the U.S. has bilateral agreements.⁵⁴ However, such legislation would significantly impact trade with other entities with whom there are no such bi-lateral agreements. These countries include many third world countries which lack the technology and the incentive to dispose of waste in accordance with international environmental standards. Indeed, these should be the countries whose trade in waste should be most affected by the Convention. The U.S. should therefore take any appropriate step to encourage these countries, along with the other more significant traders in waste, to ratify the Convention.

D. *The Best Proposal*

S. 1082, the President's proposal seems to meet the requirements of the Basel Convention without taking the extreme stance of forbidding shipment of hazardous waste. This approach is not without its problems, but some sort of movement is necessary before the Basel Convention is ratified by the required number of countries or the U.S. will be unable to participate in the discussions necessary to interpret the ambiguous language found in the Convention.

IV. RECYCLING

The scope of recycling in this country is significant. Almost ninety two million tons of waste from sources in the United States other than municipal solid waste is recycled each year.⁵⁵ Of this amount, about nineteen million tons or more are exported.⁵⁶ Exports of ferrous and non-ferrous recyclable metals are at levels of \$5.1 billion annually and imports are about \$1 billion, creating an annual trade surplus of \$4 billion.⁵⁷

Tables 1, 2, and 3, reprinted from a statement by Dr.

53. The fact that Mexico has already ratified the convention may affect our present trade status with that country, however.

54. *Hearings, supra* note 1 (statement of Robert J. Redhead).

55. *Hearings, supra* note 1 (statement of Dr. Harvey Alter).

56. *Id.*

57. *Hearings, supra* note 1 (statement of Dr. Herschel Cutler, Executive Director, Institute of Scrap Recycling Industries Inc.).

Harvey Alter of the U.S. Chamber of Commerce, further indicate the extent of the secondary market in the United States.

TABLE 1
INDUSTRIAL MATERIALS RECYCLING
1989

MATERIAL	RECYCLED, U.S. TONS	EXPORTED TONS
ALUMINUM	2,396,411	726,094
COPPER	1,386,873	405,048
IRON & STEEL	45,934,000	11,398,000
LEAD	891,000	57,209
NICKEL & ALLOYS	659,000	291,607
ZINC	227,152	107,560
PAPER	21,398,000	5,980,655
TOTALS	72,892,436	18,966,173

Source: Statement by Dr. Harvey Alter of the U.S. Chamber of Commerce

TABLE 2
U.S. IMPORTS/EXPORT-WASTE PAPER (ALL GRADES)

YEAR	VALUE, THOUSAND \$	U.S. TONS	VALUE, THOUSAND \$	U.S. TONS
1988	688,258,000	5,640,559	27,400,000	160,970
1989	765,022,000	6,308,390	33,200,000	171,996
1990	779,687,000	6,506,227	26,300,000	121,279
TOTALS	2,232,967,000	18,455,176	86,900,000	454,245

Source: Statement by Dr. Harvey Alter of the U.S. Chamber of Commerce

TABLE 3
U.S. IMPORT/EXPORT-METAL WASTE AND SCRAP-1989

METAL WASTE AND SCRAP	VALUE, \$	U.S. TONS	VALUE, \$	U.S. TONS
PRECIOUS METALS	844,000,000	0.915	244,000,000	0.147
IRON & STEEL	1,440,000,000	9,503,859	141,000,000	1,014,333
ALUMINUM	685,000,000	565,601	313,000,000	228,225
COPPER	559,000,000	199,559	239,000,000	122,381
NICKEL & ALLOYS	46,000,000	57,332	79,000,000	11,025
LEAD	22,000,000	57,332	-	-
ZINC	72,000,000	108,049	9,000,000	9,923
TIN	12,000,000	18,743	3,000,000	4,410
MAGNESIUM	-	-	4,000,000	4,410
TOTALS	3,680,000,000	10,469,681	1,032,000,000	1,391,400

Source: Statement by Dr. Harvey Alter of the U.S. Chamber of Commerce

These charts show the extent of U.S. trade in recyclables, but they do not show the importance of such trade. One example of the usefulness of waste exports for recycling will help illustrate the point. When Turkey, India, and other developing nations built their steel industries, they chose electric arc furnaces and avoided the more expensive coke batteries and blast furnaces. These arc furnaces "almost universally melt scrap exclusively."⁵⁸ These nations, however, do not generate enough scrap metal to supply these furnaces. The environmental benefits of these furnaces is substantial. They reduce energy consumption in the steelmaking process by 72%, cut down on toxic emissions and other airborne pollutants by 86%, reduce waste generation (a goal of the Convention itself) by 97%, and de-

crease water use by 40%.⁵⁹ If these nations are prohibited from importing scrap metal, the effects could be disastrous, both for the developing countries' economies and for the environment.

Another key point comes into play once the tremendous increase in environmental awareness in the United States is considered. Along with this awareness has come an increase in efforts to recycle materials. However, one of the problems in implementing recycling programs is finding markets for the recyclables.⁶⁰ Because domestic markets are so limited, nearly 30% of the U.S.'s scrap paper collected is exported for reuse.⁶¹ If the recycling movement is to be fostered, exports of these recyclables need to be increased and new markets found, not restricted.

This significant trade in recyclable or secondary materials is affected by the Basel Convention, inasmuch as the Convention governs all of the materials included in its very broad definition of waste, unless specifically exempted by national law.⁶² The Basel Convention, however, specifically mentions the need for international programs involving recycling and reclamation.⁶³ Under terms of the Convention, if the importing country is willing to claim that the materials are required for recycling or reclamation within that country, and thus exempt from the Convention, the export can be made, even if the proposed export does not otherwise meet the Convention requirements.⁶⁴

59. *Id.*

60. *Id.*

61. *Id.*

62. Article 2 of the Convention defines "waste" as "substances or objects which are disposed of or are intended to be disposed of . . ." The same article defines "disposal" as "any operation specified in Annex IV to this Convention." Annex IV is then divided into two parts. Part A is entitled "Operations which do not lead to the possibility of resource recovery, recycling, reclamation, direct re-use or alternative uses" and delineates 15 specific disposal operations. Part B is entitled "Operations which may lead to resource recovery, recycling, reclamation, direct re-use or alternative uses" and encompasses "all such operations with respect to materials legally defined as or considered to be hazardous wastes and which otherwise would have been destined for operations included in Section A." It would thus seem that recycling operations are included under the restrictions of the Convention. Any recycling would therefore have to fall into the "other criteria" exception, to be discussed later.

63. Again, Preamble language of the convention provides that the drafters were "[a]ware of the need to continue the development and implementation of . . . recycling options . . ." Basel Convention, *supra* note 8, preamble.

64. *Hearings, supra* note 1 (statement of Dr. Harvey Alter).

The Convention also provides that the export can go forth if the shipment meets "other criteria" to be decided at some other time by the Parties to the Convention, provided these criteria do not conflict with those of the Convention.⁶⁵ This is another reason why it is extremely important for the United States to ratify the Convention and thereby be able to participate in the implementation of the Convention. Without such participation, the convention could deal with recyclables and other secondary materials in a manner unfavorable to U.S. interests.

This could happen in several ways. Such recyclables could be treated in the same manner as any other "waste", resulting in significant restrictions on trade in these secondary materials. Recyclables could also be constructively exempted from regulation under the Basel Convention, thus circumventing the intentions of the drafters of the Convention and allowing dangerous waste labeled as recyclables to flow freely from country to country. Either way, the U.S. could lose big if it is not able to participate in the shaping of the post-ratification Convention.

Whatever happens, the export of waste for recycling should still be required to meet the (admittedly ambiguous) Convention definition of environmentally sound management. Without this requirement, sham recycling, the export of hazardous waste under the facade of recycling, with the waste being disposed of later, will inevitably occur. The U.S. Chamber of Commerce has proposed some criteria which should be implemented into both U.S. law and the Basel Convention. They include the following:

- (1) Recyclers must be in the business of recycling and have the appropriate equipment, as well as the technical and environmental expertise, to process the materials they receive . . .
- (2) Recyclers must conduct transactions on the basis of contracts arranged in advance of shipment of material to them . . . Nonconforming and incompatible shipments are, therefore, substantially less likely to occur.
- (3) There must be a governmental infrastructure with the

65. The Basel Convention states that "Parties shall take the appropriate measures to ensure that the transboundary movement of hazardous wastes and other wastes only be allowed if: (c) The transboundary movement in question is in accordance with other criteria to be decided by the Parties, provided those criteria do not differ from the objectives of this Convention." Basel Convention, *supra* note 8, art. 4(9)(c).

authority and capability to regulate the recycling activity and to enforce the regulations.⁶⁶

(4) Recyclers must register with their Competent Authorities and maintain a status of compliance with their national environmental laws.

(5) Under the oversight of its Competent Authority, and in accordance with its laws, a recycler must comply, at a minimum consistent with environmentally sound management, with national requirements for storage, process wastewater releases, and process air emissions.⁶⁷

(6) A recycler must properly manage process residues

(7) A recycler must create and maintain accurate and timely records

(8) At least one product of the process must be returned to commercial use, wither as an ultimate product or as a feed material for an industrial process, in a use that does not solely involve application to the land. At least one product must meet commercial specifications for use in commerce as a product or process feed material.⁶⁸

As the United States becomes more ecologically aware and interested in the recycling of household products, it would seem important to maintain and indeed to improve technology, both domestic and international, which will allow recycling of heretofore unrecyclable waste. U.S. markets in recycled materials are extremely soft, and in order to utilize its recyclables, the United States has become a significant net exporter of recycled materials. If this specialization occurs overseas and the export of the waste is so restricted that the U.S. is unable to ship it to the recycler, the U.S. efforts will obviously be hampered, and an industry that would be serving the needs and wants of environmental groups will be extremely limited in its capacity to recycle.

At the same time, sham recycling must not be permitted. These proposed requirements for an export waiver under a recycling exemption would go far to prevent this problem. Components also exist within the recycling industry itself which promote self-regulation. These components include the estab-

66. This requirement is one with which I disagree, since it seems to imply that if a country does not have a bureaucracy as large and as diverse as the United States, it is incapable of handling the recycling of waste. It also leaves open the question of who determines this "capability".

67. Note the familiar 'environmentally sound management' language.

68. *Hearings, supra* note 1 (statement of Dr. Harvey Alter).

lishment of a specific control regime for recycling by the Organization for Economic Cooperation and Development,⁶⁹ similar regimes established in other nations with whom we trade recyclables,⁷⁰ uniform classification of recyclable U.S. exports under the Harmonized Tariff System, and the fact that these materials are not simply dumped anywhere—they are sold to the overseas buyer for reuse.

The need for control of these exports is obvious, but so is the need to continue allowing the recycling industry to grow internationally.

V. CONCLUSION

The Basel Convention took an important and necessary step in the international effort to control the international trade in waste. Its provisions, however, are vague and further negotiation is necessary to interpret the ambiguities. U.S. participation in these negotiations cannot be overemphasized. Without such participation, U.S. recycling interests could be endangered and since the U.S. is such an important player in the international waste trade game, the entire process will be hindered.

The U.S. therefore must ratify the convention before U.N. discussions on its implementation are held. Ratification requires Senate approval and implementing legislation. Of the three proposals currently under consideration, only the administration's proposal fully implements the convention without crippling the domestic and international recycling trend.

The increasing domestic and international environmental consciousness and the resulting importance of recycling, should play a significant role in any legislation implementing the Basel Convention. The most efficient way to allow domestic

69. The U.S. regime would include a "Green List" indicating materials for which normal commercial practices are environmentally sound, an "Amber List" of materials which could pose a problem if mishandled and for which an expedited form of advance notice and consent would be needed before shipment within the OECD, and a "Red List" of materials including hazardous recyclables which would be treated the same as waste for final disposal. *Hearings, supra* note 1 (statement of Dr. Herschel Cutler).

70. The Canadian government has announced their intent to establish a three-tiered Green-Amber-Red regime for recycling, while the European Community is considering a three-tiered White-Grey-Black regime similar to U.S. and Canadian regulations. *Id.* at 9.

recycling programs to continue to have markets in which to sell their recyclables is to exempt them from normal treatment under the Convention. The administration's proposal accomplishes this goal and should be passed expeditiously so that the interpretation and implementation of the Basel Convention can proceed.

Grant L. Kratz