Chapter Six

The Basel Convention: Why National Sovereignty is Important

Ray Evans

The Basel Convention is an international treaty which requires the governments and citizens of signatory nations (Convention Parties) to do certain things, or to refrain from doing things, with respect to the export and import of commodities and materials which are listed in the Convention as "hazardous wastes". 1

In summary, the Convention will bring about the end of a well established sector of international trade, and do so solely upon the geo-political alignment of the countries in which the private trading partners are domiciled. This prohibition will include, amongst other things, the movement of virtually all secondary and recyclable materials (eg lead scrap) from OECD countries to non-OECD countries. Australian exporters of computer scrap to the Philippines, for example, will no longer be able to carry on their business and the Philippines workers who have been sorting this scrap for re-export will lose their livelihood. Trade in listed materials between OECD members will be burdened by onerous transaction costs of regulation and supervision.

(Greenpeace's success, earlier this year, in stopping the shipment of computer scrap from Brisbane to the Philippines, brings to mind a comment by Finn Lynge, a Greenlander who has written a book entitled Arctic Wars. Lynge notes that when the Greenpeace campaign to ban sealing on the St Laurence Gulf proved successful, the income of the Canadian Inuit hunters fell from US $2,000 pa to US$400 pa. At the same time, contrariwise, the incomes of top Greenpeace executives were raised to more than US$100,000 pa.)

The federal Government, as part of the Basel process, but well before signing the Convention, persuaded the federal Parliament to pass the Hazardous Waste (Regulation of Exports and Imports) Bill 1989. The Coalition, represented by Senator Chris Puplick in the Upper House and Mr Warwick Smith in the Lower House was, I regret to say, fulsome in its support for the measure.

It is now entertaining to observe that the federal Government's 1989 idea of "hazardous waste", as defined in its 1989 Act, differs significantly from the Basel Convention. Our government naively assumed that scrap material (eg old batteries) used as feedstock for industrial processes would not be regarded as "hazardous waste". Such Australian innocence is rather charming, but it indicates that our national interests are in the hands of people who are exceedingly naive.

The Basel Convention is a ludicrous piece of nonsense, but there can be no doubt that it is extremely hazardous nonsense. It illustrates with great clarity the forces at work which are combining to destroy the political institution we know as the nation-state, and create a world governed by a class of international, tax- exempt, officious (in the derogatory sense of that word), do-gooding bureaucrats, who are politically driven by antinomian zealots from Non-Government Organisations (NGOs).

In the first part of my paper I will briefly describe the history of Basel and its consequences. In the second I will argue that it is now very important to defend, very vigorously, the nation-state, against its contemporary opponents, particularly when these opponents bear titles such as Prime Minister, Minister for Foreign Affairs, Minister for Industrial Relations, etc, and especially when such luminaries sanctimoniously intone the words "international obligations".

The Aetiology of the Basel Convention

At first sight the creation of an international treaty which defines "hazardous waste", and then prohibits or regulates the trade in the materials so defined, seems to be as curious an ambition in life as could be imagined. But it is instructive to look at the origins of the Convention, since this story tells us much about the politics of green imperialism, and about the competition for market share between green organisations in North America and Western Europe.

The Basel Convention, like the 1986 international treaty which banned commercial whaling was, from the first, a Greenpeace initiative. Greenpeace, like every environmentalist group, needs donations from the public, and at least the appearance of mass support, to finance its activities and uphold its claims to legitimacy. Saving the whales was one of Greenpeace's most effective public campaigns. But just as an exploration geologist, having found a substantial and profitable orebody, has to set out immediately in search of the next one, Greenpeace strategists, having "saved the whales" in 1986, had to find new issues as funding vehicles, and keep on finding them, if the organisation was to sustain its income and prestige.

In Europe the word "toxic" and the word "waste" have acquired almost demonic powers, for reasons which probably only anthropologists can explain, and when these words are combined, we are faced with very potent magic indeed. Greenpeace saw an opportunity, therefore, when illegal dumping of hazardous waste materials took place in developing countries. According to Peter Lawrence, a member of the Environment Law and Aid Unit of the Department of Foreign Affairs and Trade (DFAT):

"Arguably the worst (case of illegal dumping) was the dumping of 3,800 tons of hazardous waste in Nigeria. An Italian businessman resident in Nigeria had forged documents and permits to import drums of waste PCBs and radioactive materials. The drums were stored at a site at Koko and the owner did not know the contents of the drums but had rented his land to the importer for over five years. Many drums were damaged and leaking. Labourers packing the drums into containers for movement back to Italy suffered very bad chemical burns. Some were hospitalised and one man was paralysed. While the waste was eventually removed there were grave concerns about surface and groundwater contamination.

"Incidents such as this led to the negotiation of the Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal, 1989. Australia was active in the negotiation of this agreement, which is the first multilateral treaty imposing legal obligations on states in relation to the transboundary movement of hazardous wastes." 2

Africa has many problems, the complete breakdown of civil society (as Hobbes described it) and the nightly appearance on TV of the four horsemen of the apocalypse, being the most heart-rending. One does not, of course, wish to appear indifferent to the plight of people who suffered burns or worse as a result of the criminally negligent behaviour described by Lawrence. Nevertheless, the time and money spent on putting together the Basel Convention, let alone the economic damage which will result from that Convention, seem far removed from the particular damage and injury which have inspired this diplomatic activity.

But there can be no argument that Greenpeace struck a rich orebody with its campaign against international trade in hazardous wastes. The high point of Greenpeace success was the Pope's October, 1993 address to a Workshop on Chemical Hazards in Developing Countries, organised by the Pontifical Academy of Sciences in conjunction with the Royal Swedish Academy of Sciences with the support of the Swedish Wenner-Grun Foundation.

In the course of his remarks the Pope said:

"It is a serious abuse and an offence against human solidarity when industrial enterprises in the richer countries profit from the economic and legislative weaknesses of poorer countries to

locate production plants or accumulate waste which will have a degrading effect on the environment and on people's health . . .

"It would be difficult to overstate the weight of the moral duty incumbent upon developed countries to assist the developing countries in their efforts to solve their chemical pollution and health hazard problems." 3

Greenpeace seized on this statement and subsequently placed an advertisement in the London Spectator (16 March, 1994) which depicted a self-satisfied, dark-suited businessman, in the confessional, seeking absolution from the Pope for dumping hazardous waste, at great profit, in a developing country.

As it stands the Pope's statement, however reluctant one is to take issue with one of our truly great contemporaries, is not beyond criticism. (For example, I would argue that it is only individuals, not "developed countries" who can discharge "moral duties"). But in the context of the run-up to the 21-25 March, 1994 Conference of the Parties to the Basel Convention, Greenpeace's advertisement was brilliantly timed. Published months after the Pope's speech but a few days before the Basel meeting, it is a good example of Greenpeace flair. I do hope that some of the Vatican bureaucrats took note.

The purpose of the 1994 Basel Conference of Parties was to turn Convention proposals into cast-iron obligations. Greenpeace was a very active player at the Conference, with speakers, displays, and a helicopter landing outside the venue carrying one tonne of alleged plastic toxic waste, supposedly flown in from Indonesia. Greenpeace kept a public scoreboard of "good" and "bad" countries. Australia ended up in a minority of three "baddies" against 63 "goodies", Japan and Canada, in spite of explicit Greenpeace threats, sticking with Australia to the end. However Australia then accepted the legitimacy of a majority vote.

Appendix I comprises a report from a US environmental counsel, John Bullock of Handy & Harman, who was briefed by the ICC, BIAC and USCIB to observe the proceedings and report back. I quote directly his final paragraph:

"Finally, it might be noted that the chief Greenpeace representative stated at a press conference on the final day that, having achieved the trade ban, he looked forward to the primary purpose of the Basel Convention the control of industrial production within parties to the Convention, so as to eliminate the generation of waste. He asked the President of the Convention if that would in fact be the next major activity. The response was carefully evasive. Nevertheless, it was a fair warning."

The Australian Government is now in a difficult position. It has helped, enthusiastically, to create a monster which is now understood to be capable of causing very serious economic damage to Australia. It also contains within it the seeds of such loss of sovereignty that Australia could no longer pretend to be a self-governing nation. The unconsidered but deeply condescending internationalism, which has so far guided government thinking and behaviour in this matter of treaties, is now looking, at least intellectually, pretty threadbare.

The Nation-State and its Virtues

What is the nation-state? At one level it is that political institution which issues passports and visas, and which requires the international traveller to fill out customs declaration forms. A very important aspect of sovereignty is the capacity to successfully determine who cannot enter into the nation's territory and who can and, having entered, on what terms they may stay.

A nation-state possesses two essential attributes. First, it must successfully claim territorial jurisdiction, and have that claim recognised internationally; and second, it must impose and enforce its legal system, be it just or unjust, racially discriminatory or racially blind, over that territory.

These two attributes, territory, law and the exercise of police authority to uphold the law, are crucial in this discussion.

The nation-state shares with the family this characteristic, that we become (at least in the first instance) members of the institution in an involuntary way. We are born into our families with no say in the matter and, similarly, we are born, willy nilly, Australians or New Zealanders or whatever.

Despite the involuntary nature of the situation, both of these institutions entail a sense of allegiance or obligation upon individuals. The role of brother, son, father, husband; sister, daughter, mother, wife; always entails obligations. Likewise the role of citizen brings with it the duties of political allegiance which, especially in time of war, can require great sacrifice.

The nation-state is today under heavy attack, from the libertarian right as well as from the old left. These attacks are mounted for very different reasons.

One of the most eminent critics from the libertarian right is Norman Macrae, former deputy editor of The Economist, and successful forecaster of the demise of the Soviet Union. In a paper which Mr Macrae gave to a North American Trade Conference in Mexico City (May 20, 1992) he develops an argument which contains the following elements: 4

First, that increasing progress in computers and telecommunications will enable very many people not only to work from their homes, but also from a home located anywhere in the world.

Second, that increasing competition between owners or sovereigns of desirable locations for domestic residency, will enable buyers of residency status a great deal of choice in the matter of where they live. Once such a market develops, the choice of domicile will be based on issues such as law and order, sovereign risk, educational, recreational and cultural facilities, climate and so on. Proximity to markets or population centres will not be an issue.

Third, that this increase in quasi-statelessness for a rapidly growing number of relatively well paid people will lead to the contraction, if not the demise, of the nation-state with which we have grown up.

Macrae, in setting out his prognosis for a C21 world, is appealing to the disenchantment which many people of a liberal-conservative disposition now have for the nation-state. This disenchantment, he argues (I believe correctly), is closely related to the very high levels of taxation to which they have been subjected during the last thirty years or more.

Macrae summarises his argument with the claim that:

"Countries that choose to have too high taxes or fussy regulations will be residually inhabited mainly by dummies."

(He was not referring to those objects seen in shop windows with clothes on them.)

The issue of taxation is one which has dominated the relationship between the sovereign and the subject, or the state and the citizen, from time immemorial. Today it is commonplace for citizens who are in the top 40 per cent of income earners to find that they are paying substantially more than half of their real income to the state in taxation of one form or another. This degree of taxation is necessary when the state, in all its manifestations, consumes approximately 40 per cent of the national output. Such levels of taxation are entirely without precedent.

Machiavelli in The Prince advises the putative sovereign:

"Above all things, abstain from taking people's property, for men will sooner forget the death of their fathers than the loss of their patrimony,"

and it is not surprising that, in many instances, the natural affection which people have for the country of their birth has been undermined by this relentless expropriation of their earnings and assets. We should not forget that Mrs Bronwyn Bishop first achieved national political prominence by criticising the then Commissioner of Taxation, Mr Trevor Boucher. Mr Boucher symbolised, for very many Australians, the nation-state as expropriator.

Norman Macrae's vision of a world made up of very many small principalities, some of them run by insurance companies, is a very attractive one. It is reminiscent of C18 Germany, the world of Johann Sebastian Bach, which was a society characterised by many competing princes and independent cities which, whilst sharing the same language and culture, often differed in religion. Many of the rulers in these principalities spent at least part of their revenues in striving to obtain better orchestras and composers than their rivals, a form of sovereign competition which seems to me highly laudable.

There are, of course, a number of such small principalities extant today. Monaco, Luxembourg, the Bahamas, Andorra, and closer to home, Singapore and Hong Kong are useful examples. Hong Kong will lose its independence in 1997 but, following the Soviet collapse, Estonia, Lithuania and Latvia have recently regained their sovereignty.

There can be no doubt that the transaction costs involved in organising the political life of a small city state like Singapore are, in proportionate terms, much, much lower than the transaction costs taken up in the political life of a very large nation such as the USA, for example.

Transaction costs here include not just the cost of running a democratic state with elections, professional politicians, law-making assemblies, government bureaucracies, judges, professors, courts, lawyers, etc; but also the costs of political and judicial mistakes. Major mistakes are much more likely to occur in very large states than in small ones, because of the distance (both geographic and emotional) between what is actually happening and where decisions are made.

Norman Macrae's arguments about the future of the nation-state have become more significant after the fall of the Soviet Empire. When the Western World, under US leadership, was locked in a do-or-die struggle with the "evil empire", the economic power and military might of the US was the sine qua non of long term victory over Marxism-Leninism and the militarily powerful State which had adopted that body of doctrine as its state religion.

Small states enjoyed continuing peace and sovereignty during the Cold War period only because the United States, a very large and wealthy nation, was able to successfully organise and lead an alliance of non- Communist states for forty years. Now that the Soviet Empire is no more, it becomes easier to assume that long-term peace will ensue, at least in most parts of the world.

In his paper Macrae specifically predicts a very substantial decline in defence spending, from 5 per cent of gross world product in 1984 to 0.01 per cent in 2024. He envisages that "the nearest thing left to an army or navy or airforce anywhere is an anti-emergency force paid on performance contract by some very much reformed United Nations."

Despite Macrae's optimism, it remains true that small states are much more vulnerable than large ones to invasion or occupation by hostile powers. And the problem, therefore, of Norman Macrae's world of a multiplicity of small principalities is the assumption that out of such a world, no powerful leader, with the resources of a rich, large, politically cohesive nation to command, will arise to create a new menace to world- wide peace and quietude.

So much, then, for the attack on the nation-state from the Libertarian Right.

Far more ominous and significant is the attack on the nation-state from the Old Left. This attack has been mounted under the rubric of international citizenship and international obligation, and the mechanism by which sovereignty has been, and is increasingly being, subverted is the international treaty, convention, or declaration. The Basel Convention is a useful example of such treaty-making because it is so obviously nonsensical, and Australia's interests, both immediate and long-term, are so clearly endangered by it.

Some of the arguments against national sovereignty employed by the Old Left are, briefly, as follows:5

National sovereignty is outmoded, outdated, anachronistic.

Nation-states are incapable of keeping out influences coming in from outside.

Nation-states, of themselves, are a cause of war.

These ideas, usually never explicit, are widely diffused through the chattering classes of the English- speaking world. Taken as a whole they comprise a belief structure which Kenneth Minogue has called "internationalism". Let me quote him directly:

"Internationalism is the belief that problems can no longer be solved and the world no longer governed by sovereign states, and that increasing power must be given to international bodies. In part, internationalism is a moral doctrine, holding that the decisions of nation states tend to be selfish, while those of international organisations are consonant with the interests of humanity. Internationalism is thus a project for the transfer of power from one set of people to another." 6

The power of internationalism as a political force is clearly evident when we see, all too frequently, our own Ministers of State implicitly denigrating the capacity of Australia, as a nation-state, to govern itself.

The defence which Government ministers, notably Senator Evans, have mounted in response to criticisms of Australia's signing of Basel now becomes extremely important. These Ministers have now admitted that the Basel Treaty is something less than perfect; that Australia's position on key issues was over-ruled by a large majority; but that, nonetheless, Australia was obliged to accept being over-ruled despite the fact that Australian interests, both in a direct commercial sense, and more generally in internationally accepted and endorsed restraints on trade, will be adversely affected.

The defence of this decision was made explicit by Senator McMullan in the Senate Estimates Committee on June 21 last. In response to questions from Senator Rod Kemp he said:

"Let me make it clear that the outcome at this stage with regard to Basel is not Australia's preferred outcome, but when you negotiate with a large number of countries nobody gets everything. Although we think the outcome from GATT (the Uruguay Round) was a very good result for Australia, we did not get everything we wanted, and we never will. We have not concluded our attempts to make agreements such as that more in accordance with what we think to be Australia's interests and our obligation to try to make it in the best interests of the international economy and the environment as well."

The reference to GATT is an important sign that the Minister is in trouble. The implicit logic in his argument is this. The GATT has been very beneficial in its consequences. The GATT is an international treaty. Basel is also an international treaty. Therefore we have to sign it, under duress of majority vote, regardless of the economic consequences because, being an international treaty, it must be beneficial in its consequences.

More important than such muddled thinking is the unquestioned assumption by the Minister that the same processes which operate in the ALP Caucus room the wheeling and dealing and the negotiating of compromises which all the factions can wear are to be carried out in international forums such as the Basel negotiations. This is the most dangerous delusion of all.

These arguments make it clear that we now urgently need some criteria which enable us to decide whether Australia, as a sovereign nation-state, should give up sovereignty by committing to a particular treaty or not. (I exclude defence agreements from this survey. A defence treaty such as ANZUS is clearly the action of a sovereign power seeking to secure its future independence through military alliances which will only last for a finite period.)

The present government position appears to be that if an international treaty can be found, anywhere, then Australia will sign it, particularly if such signing results in a transfer of power from the States to the Commonwealth.

The defence of the nation-state as a successful and beneficial political institution can be made in several ways. In this paper I wish to offer a utilitarian defence. The nation-state, through its legal system, defines property rights over the territory which it controls. Sometimes it defines those

property rights effectively, as in England and Scotland; sometimes so badly that chronic impoverishment ensues, as in the late and unlamented Soviet Union. Nevertheless, when property rights are badly defined or not defined at all, the option still remains for the sovereign to remedy the problem. This process is now taking place with extraordinary speed and spectacular success in Peru.

It is the institution of property and its ownership which provides for, and encourages, not only economic progress, a greater abundance of life for the people, but also for effective environmental stewardship. John Hewson got into trouble a while ago when he referred to the fact that it is the rented house, not the owner-occupied house, with the unmown lawn. But the disposition of men and women to take much greater care of what belongs to them than what belongs to others, seems to be a universal phenomenon. Property owners are great friends of environmental amenities and values, particularly when they are prosperous.

As a general rule we can argue, convincingly, that environmental problems will almost always be solved without government intrusion, provided property rights are allocated and upheld according to a rule of law which encompasses our common law notions of tort and contract. Where environmental problems become intractable is in situations where property rights either are not, or cannot be, defined and enforced.

There is now a substantial literature on what is called "the tragedy of the commons". The village commons of mediaeval times was over-grazed, and over-exploited. Since no-one owned the commons, everyone who had access to it sought to maximise their short term returns from it, and in this way the commons was ruined, everywhere.

International treaties therefore become legitimate instruments of sovereign power when they solve the problems of the commons in other words, when they act to define and uphold property rights in situations where the sovereign state, acting on its own initiative, cannot do so.

Thus a good example of a legitimate international treaty was the treaty to regulate (1946) and ultimately (in 1986) to ban whale hunting. (One can disagree with banning as opposed to quotas but the principle is the same). Whales are an excellent example of the commons. No-one owns them and nobody had any incentive other than to maximise their short-run returns from hunting them. If however some technique for allocating and enforcing property rights to whales could be devised, then the argument for an international treaty would vanish. Whale farming would then ensure the multiplication of the species.

The treaty which is often used, particularly by ministers in difficulties as the justification for all international treaties, is the GATT.

The GATT is a curious treaty. It has, without question, been one of the foundation stones of post-war economic growth around the world and is regarded very highly in consequence.

But the fact remains that the GATT is a treaty in which the signatories undertake to stop inflicting serious wounds to themselves, provided other countries do likewise. I'll stop mutilating my left arm but only if you will stop stabbing yourself in the right leg. This is the logic of the GATT.

The architects of the GATT were the Americans Dean Acheson, George Marshall and their colleagues, who were well aware of the damage which Smoot Hawley had done not only to the US and to the world economy after 1931, but also to trading relations and therefore international relations generally. They therefore deliberately sought to construct a mechanism which would enable US politicians particularly, but politicians generally, to say to importunate rent-seekers:

"I would love to help you with this tariff or that import restriction, but the GATT means that my hands are tied."

The GATT was seen by its architects as a fortress in which politicians could safely shelter from the political pressures of rent-seekers. There is no doubt that in signing the GATT, nations

surrendered sovereignty over the matter of tariffs and other forms of protection. Likewise Prime Minister Margaret Thatcher agreed to the 1986 Single European Act, and gave up sovereignty in its most crucial form (the acceptance of a majority vote), in the mistaken belief that it would merely guarantee free trade within the European Community. I suspect that decision is the one she now most keenly regrets.

In the same way, NAFTA was seen by the present Mexican Government as an instrument which will constrain future administrations and maintain the processes of economic reform. And the prospect of losing that particular fortress, in Mexico, was sufficiently serious to turn the Clinton Administration from a group of NAFTA sceptics into energetic, indeed spendthrift, NAFTA champions.

NAFTA was strenuously opposed by some free-trade groups within the US 7 on the grounds that the Treaty gave international standing and jurisdictional authority to NAFTA panels whose members would be nominated by environmentalist NGOs within the US. This came about because the Clinton Administration sought to mollify some environmentalist groups, who were generally strongly opposed to NAFTA.

In recent weeks appointments have been made which suggest that these fears may prove to have been well founded. But there can be no doubt that hard-core environmentalists see the GATT as a major impediment to their imperialist ambitions and that the Greening of GATT is very high on the environmentalist agenda. It would be a terrible tragedy if the GATT, having played such an important role, for nearly 50 years, in the development of a more prosperous and a more free world, should end up as an instrument of green imperialism.

Let us come back to the fundamental question of propriety in international treaties. I have argued that where a treaty is necessary to establish property rights or quasi-property rights in international commons, then treaties are justified. The treaties concerning whales are, therefore, quite legitimate. But what about green-house gases (GHGs)? The atmosphere is indubitably a commons. If the emission of anthropogenic GHGs were really a problem, then an international treaty to tackle it would meet the criterion I have set down.

But we now come to the intermeshing of science and politics. It now seems completely clear, as a consequence of satellite temperature observations for nearly fifteen years, that there is no observable global temperature increase. Further, the more we study the temperature records of the past, the more difficult it is to believe that the increase in atmospheric CO2, which has indubitably taken place since the Industrial Revolution, has had any observable impact on world climate.

Despite this growing body of evidence, the investment that has taken place in promoting greenhouse gas catastrophe is so great, and so many political and, alas, scientific reputations are now caught up in the certainty of catastrophe, that it is difficult for political leaders who have signed on to CO2 reduction commitments to back away from those commitments.

Very similar remarks apply to the Toronto agreement on CFCs.

None of the other environmental treaties which the Australian government has signed contributes to the solution of a problem involving a global commons. A future Australian government should devise a procedure for withdrawing from all of them, and it should do so as a considered assertion, carried out after wide ranging public debate, of national sovereignty.

It is now very clear, as a consequence of the debates which Senator Rod Kemp has initiated on Australia's treaty making proclivities, that we no longer understand the benefits which sovereignty brings. We have lost pride in the ideal of self-government, and we have been prepared to abandon our sovereignty on the whim of a few political leaders, meeting as the Executive Council, behind closed doors, in Canberra.

The Basel Convention, because it is so manifestly ridiculous; because it has been so blatantly driven by an organisation, Greenpeace, which cannot retain credibility under any careful scrutiny, does provide us with an important opportunity to go on the counter-offensive.
The ideal of self-government, then, and of its historical forebear national sovereignty, has to be refurbished. This Society is well placed to undertake the task.

Appendix 1

COPY
Handy & Harman
John C Bullock, Environmental Counsel
US Mail PO Box 120 Waterbury CT 06720
TO: Denise O'Brien, ICC
Marc Patten, BIAC
Norine Kennedy, USCIB
c.c. Walter Blum, Preussag AG
Date: March 27, 1994
RE: Basel Convention
Conference of the Parties, Second Meeting, 21-25 March, 1994, Geneva
Dear Colleagues:
The Basel Convention has decided to ban a segment of international trade, solely upon the geopolitical alignment of the countries in which the private trading partners are located. The ban, on its face, will prohibit the movement of virtually all secondary and recyclable materials from countries which are members of the Organisation for Economic Cooperation and Development (OECD) to countries which are not. The operative sections of the decision are:
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 movement of hazardous wastes which are destined for recycling or recovery operations from OECD to non- OECD States.
The first paragraph was unopposed. Efforts by the European Union and a number of industrialized countries to add to the second paragraph an evaluation of trade for its actual environmental impact were repeatedly and adamantly rebuffed by proponents of the trade ban. The only criteria permitted, in absolute and no uncertain terms, are the geopolitical alignments of the countries of import and export.
This extraordinary action, taken by consensus on the last day of the meeting, poses an immediate threat to the large international trade in secondary and recyclable materials, notwithstanding the phase-in until the end of 1997, for reasons discussed below. It also places other international development in question, insofar as such development involves the generation and management of waste or recyclable materials. The decision establishes a precedent in which both trade and environmental interests are determined without specific reference to either, but instead are conclusively determined in accordance with political alignments. And the decision has left significant dissatisfaction with the Basel Convention.
Rationale for the Decision
Proponents of the trade ban asserted that a movement of any material defined as hazardous waste from an OECD country to a non-OECD country does "not constitute environmentally sound

management", without regard to the actual circumstances. This language was ultimately modified to state that such a movement presents "a high risk of not constituting an environmentally sound management", and that conclusory assertion was adopted as the basis for the trade ban. Movements of hazardous waste from non- OECD countries, or to OECD countries, are not pre-determined with regard to their environmental soundness, and have not been included within the trade ban.

The actual basis for concern was difficult to ascertain. Greenpeace compiled and distributed an inventory of hazardous waste exports from OECD to non-OECD countries from 1989 to March, 1994, but the data it provides is limited and no environmental evaluation is included. Some international transactions of which Greenpeace complains have been fully approved by the competent environmental authorities of the concerned countries. There are reports of some actual dumping, in the normal sense in which we would use that term, but they are limited. There are some reported transactions involving recycling activities of little or no value in developing countries, but it is not easy to tell the underlying environmental specifics and determine if dumping was the motive. Some recycling is done in developing countries because the cost of necessary manual labour is lower, although this too is considered by proponents of the trade ban to be exploitation. The much more common problem appears to be low national environmental standards or enforcement in developing countries, and there are some descriptions of recycling activities in developing countries which receive some of their feedstock materials from OECD countries, and which are clearly harmful to human health and the environment.

It is also clear that the proponents of the ban are concerned with more than actual movement of hazardous waste imported from industrialized countries. The delegate from El Salvador made a very logical point that his country was not equipped to evaluate complex waste management proposals received from companies in developed countries, and that the full resources of his agency were needed to develop a waste management strategy applicable to national problems. Greenpeace lists such proposed transactions as a major part of its inventory of the toxic waste trade, even if the proposals were open to the concerned governments and were rejected, and asserts that such proposals are inherently coercive. Some delegates have said that their countries have had no actual imports of hazardous waste, but that they are concerned for other countries, particularly that they may succumb to financial inducements.

It is apparent through the extensive discussion that some countries are not capable of processing recyclable and secondary materials, because they do not have facilities, or sufficient infrastructures and competent authorities, or both. A ban applicable to such countries seems to be logical and well founded on environmental grounds. However the Basel Convention provides that a country which wishes to prohibit the import of hazardous waste may do so, and requires other countries to support that decision (Article 4). It was not explained why that authority, which is more extensive in scope than the trade ban because it applies to imports from all countries, and which remains in the control of the importing country if conditions change, was considered insufficient.

Political Basis for the Decision

While the underlying reasons for the trade ban are not certain, the process of decision-making was clear. The trade ban was the result of a very well-organized political campaign by some of the G77 countries and by Greenpeace. G77 was led by Sri Lanka, with considerable support on this issue from Senegal, which had sought a ban in 1992 in Uruguay, and from Malaysia.

International trade in hazardous waste was consistently described as a tool of the rich to oppress and victimize the poor, and it was clear that a part of the emotion expressed on this issue was from a resentment that developing countries were receiving only scraps from the tables of the rich, as much as resentment of environmental consequences. Greenpeace has also convinced

many G77 delegations that there will soon be technology capable of industrial production without waste, and the G77 countries openly expressed a desire that such technology be provided to them, instead of hazardous waste.

The internal political power of G77 was sufficient to hold to a consensus position a number of emerging countries in Asia and eastern Europe with clearly contrary interests in a trade ban. Several of these countries, knowing the importance of recyclable materials to their national economies, were opposed to the trade ban, and were not reluctant to say so in private. Nevertheless they would not express this position in the Convention in the face of a G77 floor position seeking a total ban. G77 does not vote, and asserts all positions to be the result of consensus. A suggestion of a vote on one issue was met with outcry from the floor, and one delegate stated emphatically that G77 never voted on anything. It is therefore impossible to know the level of actual support for its position on a trade ban.

It was in any case sufficient to prevail over the opposition to the trade ban. The position of most of the developed OECD countries was that each country should have the right to decide for itself whether it wished to receive secondary and recyclable materials under the conditions of the Basel Convention. It was based upon the knowledge that many developing countries require secondary materials, and that their economies will be adversely affected by the trade ban. This position, proposed in two variations by the European Union and Canada, was attacked by Greenpeace as a front for industrial interests intent upon dumping. It was weakened by the support for a trade ban by Denmark, Finland, Iceland, Norway and Sweden. Over the course of the week, after having been openly threatened by Greenpeace with a call for a vote, the industrialized countries conceded and permitted the G77 position to be adopted by consensus.

Impact of the Ban, and the Definition of Basel Hazardous Waste

The trade ban was decided in a state of open confusion regarding how it would actually affect existing trade. The impact of a ban upon trade in "hazardous waste intended for recovery operations" depends upon what is hazardous waste, and no one knows. This state of confusion was a strong undercurrent, because it was well understood that some non-OECD countries rely heavily upon import of secondary and recyclable materials from OECD countries, particularly for ferrous and nonferrous metal industries, and there was debate over their fate.

The definition of waste under the Basel Convention is very broad. It encompasses materials intended for resource recovery, recycling, reclamation, direct re-use or alternative uses (Annex IV,B). A waste is then classified as hazardous if it meets any of a number of equally broad standards. A waste is hazardous if it is the result of a listed industrial operation (e.g. surface treatment of metals and plastics (Annex Y17)), or contains any listed constituents (e.g. zinc compounds (Annex I, Y23)), or exhibits a listed hazardous characteristic (e.g. ecotoxic, Annex III, H12)). How this classification system will be interpreted and applied is unknown, but a literal application is promoted by some parties, and this would encompass an extremely broad spectrum of secondary and recyclable materials.

This is because there are no minimum concentrations or thresholds set forth in the Basel Convention's classification system for hazardous waste. In the United States, the absence of thresholds or concentrations has been interpreted in superfund enforcement and collection actions to mean that no thresholds or concentrations are intended, and that the presence of a single molecule of a listed hazardous substance is sufficient to make the law applicable to any material. This has been the consistent position of the United States Environmental Protection Agency (USEPA) and Department of Justice, and it has been upheld by United States courts.

Some countries have asserted that the Basel Convention will not be applied literally, and that the ban will not affect the majority of trade in secondary and recyclable materials. Greenpeace strongly supported this belief, pointing, for example, to the absence of iron and copper as

hazardous constituents (Annex I), and asserting that the very large global trade in scrap steel and scrap copper would therefore not be affected. Reference to the fact that neither scrap steel nor scrap copper is ever "pure", and contain such listed hazardous constituents as lead or zinc compounds, was dismissed by Greenpeace as a scare tactic. Greenpeace asserted that "common sense" would prevail, and that trade would continue because countries would simply define any materials they wanted to be outside of the scope of the Basel definition of hazardous waste.

It is difficult for the business community to derive comfort from such assurances, even from national delegations, much less from Greenpeace. The United States position that its national definition of hazardous waste prevails over the Basel definition is not supported by the language of the Convention, and is contrary to the opinion of people involved in the implementation of the Convention. And while Greenpeace asserted prior to the decision that countries could merely define themselves out of the trade ban, Greenpeace also asserted that the United States' national exemption of scrap metal from regulation as hazardous waste would not be acceptable for Basel compliance. Thus the prospect of a "common sense" Basel Convention in the near future is not likely.

More importantly, the risk for business of being wrong is significant. A movement of material thought to be outside of the ban and later determined to be covered by it would be deemed to be illegal traffic. The Basel Convention defines such traffic to be criminal (Article 4), and countries are advised and directed to incorporate criminal penalties into their national law to punish such traffic (Article 4 and Model National Legislation). Financial liability for the environmental consequences of illegal traffic is proposed to be unlimited in amount and time (Proposed Liability and Compensation Protocol). Such issues may be determined in the courts of the country where the claimants reside. The prospect of conducting business under such conditions is not attractive.

Even before the ban takes effect, there will be increasing pressure upon transactions involving secondary and recyclable materials. The decision provides that during the phase-out period:

"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 operations until 31 December, 1997, should inform the Secretariat of the Basel Convention that it would allow the import from the OECD State of hazardous wastes for recycling or recovery operations by specifying the categories 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." (Paragraph 3)

Compliance with this requirement may itself preclude the completion of transactions in accordance with prevailing market terms and conditions. In addition, the requirement invites interference and delay. At a news conference immediately following adoption of the decision, Elizabeth Dowdswell, Executive Director of UNEP, stated that this requirement would make any transaction "highly visible" and draw it to the attention of the public. Public involvement in environmental issues, whatever benefit it may be from a political or policy perspective, is incompatible with the timely execution of commercial transactions normally considered necessary in, for example, secondary metal markets.

Whatever the ultimate resolution of definitional issues, it is probable that the international markets in secondary and recyclable materials will be affected immediately, and certainly by the end of 1997. Even the leadership of G77 agreed that some industries in non-OECD countries would be damaged. If the trade ban operates as intended by its proponents, industries in non-OECD countries will be unable to purchase at least some secondary and recyclable materials. They will presumably resort to primary resources, if the resources are available and can be economically and efficiently used. The removal of market demand in non-OECD countries

should depress prices, to the detriment of suppliers of such materials within OECD countries, and to the benefit of purchasers. In general, it seems reasonable to predict that the curtailment of international trade will be a negative effect upon the global economy, particularly in non-OECD countries.

Legality of the Decision

The decision is of questionable legality, an issue raised by several parties concerned with such issues. It is a significant departure from the original intent and wording of the Basel Convention, which has heretofore required a very particular evaluation of every proposed international transaction in hazardous waste. The new trade ban states that such evaluation is not relevant if the country of export is within the OECD. A number of parties expressed the concern and objection that a change of such magnitude requires an amendment to the Convention, rather than a decision. The procedures for amendment of the Convention (Article 17) were not followed, and there was no attempt to incorporate the trade ban in an amendment.

The trade ban, by deeming the actual environmental circumstances of a proposed transaction to be irrelevant, infringes upon the GATT requirement that trade barriers be actually related to protection of the environment, and not unnecessarily restrictive. In addition, by discriminating against identical transactions based only upon their point of origin, the trade ban does not fall within any GATT exception to a ban upon national discrimination. A proposal by the European Union to make the trade ban applicable to all countries, without national discrimination, was expressly rejected. Thus the trade ban should be considered in violation of GATT as well.

Of course, the availability of a challenge within the Basel Convention, which might be taken up at the Third Meeting of the Conference of the Parties in 199x, or of a GATT challenge, is hardly a desirable outcome.

Final Observation and Conclusions

From a business point of view, the Basel Convention is not working in the interests of sustainable development. The parties continue to be represented by environmental ministries with little or no knowledge, and often less interest, in how business works. They thus make decisions which make no sense.

Basel has become a convention of the blind, led by those who will not see. The decision-making process at this meeting was dominated by Greenpeace, leading G77, overwhelming developed countries. The dissatisfaction among several developed countries was palpable. These is no apparent reason to believe that the circumstances will change. It is conceivable that businesses directly affected by the trade ban, particularly in non-OECD countries but also in developed countries, will now seek to persuade their governments that sustainable development includes "resource recovery, recycling, reclamation, direct re-use or alternative uses", and that these activities need to be promoted rather than suppressed. The phase-in period was subtly intended to permit re-evaluation, before the window closes at the end of 1997, and it is possible that some countries will change their positions before that time. However the Basel Convention does not appear likely to accept an about-face. Greenpeace will continue to preach the demonology of hazardous waste and the heavenly reward of clean production, notwithstanding the needs of many countries for intermediate measures. The diplomatic concern for consensus, and the consequent need for compromise of every contested issue, however unsatisfactory, will obstruct progress even among willing participants. What was once an economically and environmentally significant international trade in secondary and recyclable materials will, at best, become so managed that it will sink under the weight.

Finally, it might be noted that the chief Greenpeace representative stated at a press conference on the final day that, having achieved the trade ban, he looked forward to the primary purpose of the Basel Convention – the control of industrial production within parties to the Convention, so as to

eliminate the generation of waste. He asked the President of the Convention if that would in fact be the next major activity. The response was carefully evasive. Nevertheless, it was a fair warning.

As always, please call if you have any questions.

Very truly yours,

(Sgn) JC Bullock

John C Bullock

Endnotes:

1. N R Evans, The Basel Convention, IPA Backgrounder, 12 April, 1994.
2. Peter Lawrence, DFAT Backgrounder, Vol.3 No.6, 10 April, 1992.
3. L'Osservatore Romano, 3 November, 1993.
4. Cato Policy Report, July/August, 1992, Cato Institute, Washington DC.
5. These observations are due to Kenneth Minogue. I am greatly indebted to him for on-going discussions on this issue.
6. Kenneth Minogue, Internationalism as an Emerging Ideology, Unpublished MS, October, 1992.
7. Notably the Competitive Enterprise Institute, based in Washington, DC.