

No2/2010

ENVIRONMENTAL
LAW NETWORK
INTERNATIONAL

RÉSEAU
INTERNATIONAL
DE DROIT DE
L'ENVIRONNEMENT

INTERNATIONALES
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elni

REVIEW

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and their Possible Contribution to Toxic Trade

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as a Means for Promoting Environmental Protection

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Editorial

Environmental issues are international issues. Many would agree with this statement when thinking of climate change, biodiversity loss and globalised markets. Environmental impacts in particular do not cease at country borders. For this reason the current issue of *elni Review* (2/2010) focuses on the environmental law of countries outside the EU – especially those considered to be developing or emerging countries. Questions of law arising in those legal spheres are likely to be different in nature, because developments in social and environmental law generally occur more slowly than developments in economic law do.

This issue of *elni Review* (2/2010) contains valuable insights on this subject, based on the following contributions:

First off, *Richard Gutierrez* tackles ‘new age’ trade agreements and their possible contribution to toxic trade in his article, examining the legal provisions under the Japanese economic partnership agreements that gave rise to the concerns over toxic waste trade and dumping. He also discusses the corresponding implications, particularly on the implementation of the Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal by the Southeast Asian countries.

In an article entitled ‘WTO Compatibility of Border Tax Adjustments as a Means for Promoting Environmental Protection’, *Rike U. Krämer* analyses the rationale behind Border Tax Adjustments, its contribution to a level-playing field, and its legality under WTO law.

‘Intellectual Property Rights, Genetical Resources and Traditional Knowledge: An Approach from the Perspective of Megadiverse Countries’ by *Aírton Guilherme Berger Filho* discusses biodiversity as well as biopiracy issues against the background of intellectual property rights and the rights of the native populations and the local communities regarding their territory, their cultural and environmental goods.

Jimena Murillo Chávarro and *Frank Maes* provide details on the Andean Community, its legal instruments and a corresponding decision in their article ‘The Legal Nature of the Biodiversity Provisions adopted by the Andean Community’.

In ‘Convergence with the Water Framework Directive in the Context of the European Neighbourhood Policy’, *Claire Dupont* and *Gretta Goldenman* look at the differences between approximation and convergence processes in the light of EU water legislation, drawing on interesting practical experiences gathered in Moldova and Georgia.

Alongside articles covering environmental law issues of developing and emerging countries, this issue of *elni Review* also deals with three additional issues:

From a broader perspective *Stefan Scheuer* provides a critical analysis of the repercussions of the EU Water

Framework Directive in ‘The Phase-Out of Hazardous Substances in Troubled Waters’.

Furthermore, *Hanna D. Tolsma* looks at the legal instrument of integrated environmental permitting, discussing in the process the integrated approach under the IPPC Directive and recent developments on integrated permitting in the Netherlands.

Finally, we cover recent developments in the law on island protection in China and provide a brief summary of the ELNI-VMR-VVOR congress 2010. The latter addressed the environmental effects of industrial installations the European Directive on Industrial Emissions (IED/current IPPC Directive) and took place in Ghent on 17 September 2010.

Contributions for the next issue of the *elni Review* are very welcome. Please send contributions to the editors by mid-February 2011.

Nicola Below/Martin Führ
October 2010

European Environmental Law Forum Kick-off Symposium:

19th and 20th May 2011
in Leipzig, Germany

“Key Challenges and Developments of European Environmental Law”

The German Helmholtz Centre for Environmental Research (UFZ) is organising a European expert symposium to promote exchange in the field of European environmental jurisprudence.

The symposium is divided into two parts. In the first part the key challenges and developments of environmental law will be discussed. There will be presentations on central topics of European environmental law, followed by open debate. In the second part, the situation with regard to the exchange of ideas and information on environmental law amongst experts of this field will be addressed with a view to establishing a European Environmental Law Forum. This forum is to be a common open network and shall encompass regular European conferences.

**Please note that this symposium
is only open to invited experts.**

For more information on the Helmholtz Centre for Environmental Research (UFZ), please visit <http://www.ufz.de/>

'New Age' Trade Agreements and their Possible Contribution to Toxic Trade

Richard Gutierrez

1 Introduction

Over the past seven years, a spate of bilateral "new age" economic partnership accords have been struck between Japan and the Association of Southeast Asian Nations (ASEAN) and several of its members namely: Brunei¹, Indonesia², Malaysia,³ Philippines,⁴ Singapore,⁵ Thailand⁶ and Vietnam⁷.

These agreements were seen as Japan's response to the growing Chinese economic power and influence in the region. The seeds to these agreements were planted in 2002 when Japan began a parallel approach towards building closer economic relations between Japan and the ASEAN community.

Japan utilised the moniker "economic partnership agreements" (JEPAs) to call the agreements, which are essentially trade agreements that complement the basic WTO agreements on goods and services, and incorporate areas presently not covered under the WTO called the "Singapore issues" (i.e., investment, government procurement, competition policy, and trade facilitation). These JEPAs have invariably been called "WTO-Plus" agreements and "Mega-Treaties" to evoke their scope and magnitude.

To bind these JEPAs together, Japan forged a multi-lateral pact with ASEAN, the ASEAN-Japan Comprehensive Economic Partnership Agreement (AJCEP)⁸ that functions as an overarching framework document with country-specific details fleshed out in individual JEPAs with ASEAN members and Japan.

Civil society groups voiced concerns over the JEPAs questioning their constitutionality to the impact of the trade related provisions on the local economy.⁹ Amidst the din of protests the JEPAs received in Southeast Asia the issue of toxic waste trade resonated with most prominence. The issue of Japan's intent to make Southeast Asia its toxic waste bin and the ensuing environmental and public health blight that could occur as a result of the tsunami of Japanese toxic wastes caught the public and the government of Japan's attention.¹⁰

This article examines the legal provisions under the JEPAs that gave rise to the concerns over toxic waste trade and dumping, and the implications these have on the implementation of multilateral environmental agreements, particularly that of the Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal by the Southeast Asian countries who are parties to the JEPAs.

2 Toxic waste trade and dumping: A continuing global concern

The issue of toxic wastes, particularly dumping, has long been recognised as a global concern. The 1987 case of toxic waste dumping by an Italian waste trader in Koko Beach, Nigeria to the 2006 case of the Probo Koala, a cargo vessel that departed from the Netherlands, which dumped toxic chemical waste in the Ivory Coast, shows that the issue of toxic waste dumping continues.

According to a United Nations study, only a handful of industrialised or developed countries produce 95% of the world's toxic wastes.¹¹ Much of the toxic waste trade occurs among developed countries, where the waste originated.¹² However, significant portion of the trade have found their way to developing countries. And with increasing costs of disposal at the country of generation due to labor and environmental standards, waste traders often look at country destinations that have high poverty and lax or non-existent labour and

1 Japan-Brunei Economic Partnership Agreement, 5 June 2007, available at: <http://www.mofa.go.jp/region/asia-paci/brunei/epa0706/index.html> [hereafter, JBEPA]

2 Japan-Indonesia Economic Partnership Agreement, 10 August 2007, available at: <http://www.mofa.go.jp/policy/economy/fta/indonesia.html> [hereafter, JIEPA].

3 Japan-Malaysia Economic Partnership Agreement, 13 December 2005, available at: <http://www.mofa.go.jp/policy/economy/fta/malaysia.html> [hereafter, JMEPA].

4 Japan-Philippines Economic Partnership Agreement, 9 September 2006, available at: <http://www.mofa.go.jp/policy/economy/fta/philippines.html> [hereafter, JPEPA].

5 Agreement between Japan and the Republic of Singapore for a New Age Economic Partnership, 13 January 2002, available at: <http://www.mofa.go.jp/policy/economy/fta/singapore.html> [hereafter, JSEPA].

6 Japan-Thailand Economic Partnership Agreement, Japan-Thailand, 2 October 2007, available at: <http://www.mofa.go.jp/policy/economy/fta/thailand.html> [hereafter, JTEPA].

7 Japan-Vietnam Economic Partnership Agreement, 1 October 2009, available at: <http://www.mofa.go.jp/policy/economy/fta/vietnam.html> [hereafter, JVEPA].

8 The ASEAN-Japan Comprehensive Economic Partnership Agreement (AJCEP) entered into force, 1 December 2008, between Japan, Singapore, Laos, Vietnam, and Myanmar. The AJCEP will become effective in relation to other ASEAN member states after each respective state completes its legal procedure for the entry into force of the Agreement. As of Sept. 2010, the following states have ratified the AJCEPA: Brunei (Dec. 2008); Malaysia (Jan. 2009); Thailand (May 2009); and Cambodia (Nov. 2009).

9 Akbayan v. Aquino, Petition for Mandamus and Prohibition, 9 n.30 (S.C. 9 Dec. 2005). (Phil), available at <http://pcij.org/blog/wp-docs/Akbayan-petition-re-JPEPA.pdf>; The JTEPA was strongly opposed by social movements both in Thailand and Japan, available at: <http://www.bilaterals.org/spip.php?rubrique115>

10 "Japan Accused of Breaching Toxic Waste Trade Treaty", Environmental News Service, 14 March 2007 available at: <http://www.ens-newswire.com/ens/mar2007/2007-03-14-02.html>.

11 Clapp, Jennifer. "Toxic Exports: The Transfer of Hazardous Wastes from Rich to Poor Countries", p. 22, citing "Basel Convention – More Action?" Environmental Policy and Law 23, No. 1 (1993).

12 see Clapp, supra note 11. at p. 2.

environmental standards to bring their toxic wastes to.¹³

It is hard to arrive at an accurate figure of the amount of toxic waste that is traded due to the paucity of data. However, specific toxic waste streams reveal the magnitude of the problem. Waste electronic and electrical equipment (WEEE), or commonly known as e-waste, is a prime example.

The United Nations University estimates that current global e-waste generation to be around 40 million tons per year.¹⁴ The magnitude of e-waste exports could be gleaned from an August 2010 BBC News story on Europe's burgeoning problem of stopping illegal e-waste exports to Africa or Asia in spite of an EU ban on toxic waste exports; in the article a member of the European parliament acknowledged the extraordinary amount of illegal e-waste export occurring at EU ports.¹⁵ The EU however, is not alone in facing the migration of e-waste beyond its borders. Other developed countries (e.g. the United States) face similar problems with its e-waste and have been criticised for its failure to amply address its ongoing toxic waste exports.¹⁶

In Asia, Japan has struggled with similar toxic waste trade problems as well as other ones. Environmental NGOs such as the Basel Action Network (BAN) and Greenpeace have documented Japanese hazardous wastes flowing illegally into the Chinese port of Taizhou¹⁷ south of Shanghai and in the infamous electronic waste processing areas of Guiyu in Guangdong Province.¹⁸ BAN also found Japanese e-wastes in Nigeria which had been exported for alleged re-use.¹⁹ Other Japanese toxic waste has invariably found its way to other Southeast Asian countries, e.g. in 1999 toxic waste dumped in the Philippines helped reignite concern over the possibility of toxic waste exports from Japan.²⁰

The discovery of the shipment caused an international scandal for Japan, which, according to critics, has exposed itself as a nation that is willing to “*dump harmful waste on a poorer neighbour, the Philippines.*”²¹ The Japanese government paid for and repatriated the toxic waste the following year.

The continued toxic waste trade globally, and the rise of new forms of toxic wastes such as e-waste that are exported in the guise of recycling, refurbishment and second-hand goods only served to heighten the suspicion and concern by the general public over the JEPAs. The situation was exacerbated when the JEPAs began getting substantial support from the respective governments in the absence of what civil society groups feel to be transparent and democratic processes in the JEPAs negotiations.

In the following section we look into the JEPAs provisions that fueled the flames of suspicion of a worried public.

3 Japan EPAs – A new age agreement for toxic trade?

3.1 Wastes are “Goods”

The JEPAs makes it clear that waste is indeed part of the bilateral trade agreement with Japan. The JEPAs defines “originating goods” as including the following:

“(i) articles collected in the Party which can no longer perform their original purpose in the Party nor are capable of being restored or repaired and which are fit only for disposal or for the recovery of parts or raw materials;

(j) scrap and waste derived from manufacturing or processing operations or from consumption in the Party and fit only for disposal or for the recovery of raw materials;

(k) parts or raw materials recovered in the Party from articles which can no longer perform their original purpose nor are capable of being restored or repaired;

[and]

“(l) goods obtained or produced in the Party exclusively from the goods referred to in subparagraphs (a) through (k) above.”²²

13 Basel Action Network, *The Basel Ban: A Triumph for Global Environmental Justice*, May 2010, p. 2 available at: http://www.ban.org/Library/BP1_10_05.pdf.

14 Recycling from E-waste to Resources, United Nations Environment Programme, July 2009, p. 1, citing Huisman J. et al. 2008 Review of Directive 2002/96 on Waste Electrical and Electronic Equipment (WEEE). Bonn: United Nations University, 2007.

15 “Europe Breaking Electronic Waste Export Ban”, BBC News Online, 4 August 2010 at: <http://www.bbc.co.uk/news/world-europe-10846395> (last accessed on 31 August 2010).

16 Electronic Wastes: Considerations for Promoting Environmentally Sound Reuse and Recycling, United States Government Accountability Office, July 2010, available at: <http://www.gao.gov/new.items/d10626.pdf>

17 http://www.ban.org/Library/Taizhou_E-waste_Research_Report.pdf

18 see, “Exporting Harm: The High-Tech Trashing of Asia” available at: <http://www.ban.org/E-waste/technotrashfinalcomp.pdf>

19 see, “Digital Dump: Exporting Re-use and Abuse to Africa” available at: <http://www.ban.org/Library/TheDigitalDump.pdf>

20 In July 1999, 122 sea-going container vans were discovered at the Port of Manila falsely labelled as recyclable paper. Philippine official found the vans to contain toxic clinical wastes from Japan, as well as used electronic equipment, PVC plastic materials mixed with industrial and household wastes, styrofoam packaging materials, sacks, plastic sheets, PVC pipes, plastic packaging materials, paper, and plastic food packaging materials. Please see, “Environmentalists’ Fears of Japan-RP Treaty Not Unfounded”,

Inside PCIJ: The Philippine Center for Investigative Journalism’s Institutional Weblog, 30 October 2006, available at:

<http://www.pcij.org/blog/?p=1272#more-1272>; and “Harsh Light Shines On Japan’s Dirty Habit”, Asia Times Online, 18 January 2000, available at: <http://www.atimes.com/japan-econ/BA18Dh01.html>.

21 Suvendrini Kakuchi. Harsh Light Shines On Japan’s Dirty Habit, Asia Times Online, 18 January 2000:

<http://www.atimes.com/japan-econ/BA18Dh01.html>.

22 Art. 29(2), JPEPA, *supra* note 4; Art. 24(2), JBEPAs, *supra* note 1; Art. 29(2), JIEPA, *supra* note 2; Art. 28(2), JMEPA, *supra* note 3; Art. 23(1), JSEPA, *supra* note 5; Art. 28(2), JTEPA, *supra* note 6; Art. 25, JVEPA, *supra* note 7.

3.2 Promote trade – reduce tariffs

The Japanese EPAs also mandate reduction of tariffs on Japanese goods, in accordance with the specific country schedules.²³ Reducing tariff rates is a policy tool designed to encourage trade which included controlled toxic wastes, particularly:

Waste targeted for tariff reductions under JEPAs	Basel Convention Code
Ash and residues (other than from the manufacture of iron or steel), containing arsenic, mercury, thallium or their mixtures, of a kind used for the extraction of arsenic or those metals or for the manufacture of their chemical compounds	A1030
Ash and residues from the incineration of municipal waste	Annex II (Y47)
Lead, Cadmium, Antimony, Beryllium Waste and Scrap	A1020
Lead-acid scrap storage batteries, drained or undrained	A1160
Waste pharmaceuticals	A4010
Municipal waste	Annex II (Y46)
Sewage sludge	Y46 or Annex (Y18) ²⁴
Clinical waste - adhesive dressings and other articles having adhesive layer; wadding gauze bandages, surgical gloves	A4020
Other clinical waste	A4020
Waste oils; waste oils containing PCBs, PBBs, PCTs	A3180
Waste organic solvents - halogenated, and other	A3140, A3150
Wastes of metal pickling liquors, hydraulic fluids, brake fluids and anti-freeze fluids	A1060, A4060

In addition to toxic wastes, the Japanese EPAs likewise applies to other controlled or banned substances, such as persistent organic pollutants (POPs), ozone depleting substances (ODS), and nuclear wastes.²⁵

23 Art. 18(1) and (3), JPEPA, *supra* note 4; Art. 16(1); JBEPAs, *supra* note 1; Art. 20(1) and (3), JIEPA, *supra* note 2; Art. 19(1), JMEPA, *supra* note 3; Art. 18(1) and (4), JSEPA, *supra* note 5; Art. 18(1), JTEPA, *supra* note 6; Art. 16(1) JVEPA, *supra* note 7.

24 If collected from households the waste can be considered as (Y46). If industrial sludge, it can be considered under Annex I (Y18). Depending on the constituents it may be considered hazardous waste under the Basel Convention.

25 Basel Action Network, JPEPA as a Step in Japan's Greater Plan to Liberalize Hazardous Waste Trade in Asia, July 2007, Annex 2; see at: http://www.ban.org/Library/JPEPA_Report_BAN_FINAL_29_Aug_071.pdf

3.3 Prohibit non-tariff barriers

The JEPAs also prohibit parties from imposing or maintaining non-tariff measures on imports and exports, which are inconsistent with their obligations under the WTO Agreement.²⁶

3.4 Trade facilitation through simplified customs procedure

To complement tariff reduction efforts the JEPAs also mandate the parties to facilitate trade through the simplification and harmonization of customs procedures. To achieve this objective parties to the JEPAs need to make use of information and communications technology,²⁷ harmonise their customs procedures with international standards,²⁸ reduce and simplify import and export documentation requirements,²⁹ and use paperless trading³⁰

3.5 Possibility of amending and repealing laws

Of the various JEPAs, only the JEPAs with the Philippines contains a unique clause, which raised serious concerns over the possible outcome in the case of a conflict with the implementation of the JEPAs and provisions of Multilateral Environmental Agreements (MEAs), of which the Philippines and Japan are parties. Under Art. 4 of the Philippine-JEPA it is stipulated that:

“Each Party shall examine the possibility of amending or repealing laws and regulations that pertain to or affect the implementation and operation of this Agreement, if the circumstances or objectives giving rise to their adoption no longer exist or if such circumstances or objectives can be addressed in a less trade-restrictive manner.”

Taken individually, the above provisions were seen by the negotiators as necessary for trade facilitation and to achieving the objectives of the JEPAs. Collectively and in the context of waste trade, civil society groups saw the implementation of these JEPAs provisions as running against existing obligations under MEAs, such as the Basel and Stockholm Conventions.

26 Art. 21, JPEPA, *supra* note 4; Art. 20, JBEPAs, *supra* note 1; Art. 23, JIEPA, *supra* note 2; Art. 22 JMEPA, *supra* note 3; Art. 17, JSEPA, *supra* note 5; Art. 21, JTEPA, *supra* note 7; and Art. 19, JVEPA, *supra* note 7 [hereafter collectively JEPAs].

27 Art. 53(2)(a), JPEPA, *supra* note 4; Art. 51(2)(a), JBEPAs, *supra* note 1; Art. 54(2)(a), JIEPA, *supra* note 2; Art. 54(2)(a) JMEPA, *supra* note 3; Art. 36(a), JSEPA, *supra* note 5; Art. 53(2)(a), JTEPA, *supra* note 6; Art. 41(c), JVEPA, *supra* note 7.

28 Art. 53(2)(c), JPEPA, *supra* note 4; Art. 51(2)(c), JBEPAs, *supra* note 1; Art. 54(2)(c), JIEPA, *supra* note 2; Art. 54(2)(c), JMEPA, *supra* note 3; Art. 36(c), JSEPA, *supra* note 5; Art. 53(2)(c), JTEPA, *supra* note 6; Art. 41(c), JVEPA, *supra* note 7.

29 Art. 53(2)(b) JPEPA, *id.* Identical provisions are contained in the JEPAs.

30 Chapter 5, JPEPA. Identical provisions are contained in the JEPAs.

4 Pushing back the tide of toxic trade

4.1 *The Basel Convention*

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal³¹ (Basel Convention) was initiated in response to numerous international scandals regarding hazardous waste trafficking in the 1980s.³²

4.1.1 *Distinguishing “Goods” from “Bads”*

To stem the waste dumping especially on poorer countries the international community began to draw the line between goods that are acceptable within the commerce of man and substances, in these case, wastes or “bads” that should be controlled if not outrightly prohibited from global commerce. The Basel Convention was created to provide a legal structure for “bads” – toxic and other wastes.

The Basel Convention begins by defining what are considered “wastes”, which are “any substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law.”³³ The Basel Convention definition does not consider value or use of a substance when it considers it a waste. The definition places emphasis on the fact of disposal³⁴ or intent to dispose of a substance. The toxicity of the waste is then determined through a listing of what wastes are considered hazardous and characteristics that make it hazardous.³⁵

After establishing the scope of its jurisdiction, the Basel Convention then prescribes obligations and rules on the conduct of dealing with hazardous wastes.

4.1.2 *Minimising generation and self-sufficiency in waste disposal*

A key tenet to the Basel Convention is acknowledgement of the need to control the generation of hazardous wastes. Thus, Parties to the Basel Convention are mandated to ensure that the generation of hazardous wastes and other wastes is reduced to a minimum³⁶

and that adequate disposal facilities are present in the country where the toxic waste is generated, to the extent possible.³⁷

4.1.3 *Restraint of trade*

The Basel Convention requires Parties to minimize the transboundary movement of hazardous wastes³⁸ and acknowledges the sovereign rights of Parties to prohibit the entry of hazardous wastes into its territory and restrain trade in hazardous wastes under specific conditions.³⁹

The most far-reaching trade restrictive measure under the Convention was effectuated in 1995, when Parties passed Decision III/1, commonly known as the Basel Ban Amendment which affirmed the call for a ban on toxic waste exports, from Annex VII countries, i.e. European Union, member countries of the Organization for Economic Cooperation and Development, and Liechtenstein to any non-Annex VII countries (developing countries) for recycling or disposal.⁴⁰

4.1.4 *Trade discrimination*

With the Basel Ban Amendment, the Basel Convention has allowed trade discrimination between developed and developing countries. The Convention also reflects this discriminatory stance against non-Parties, where Parties are prohibited from exporting and accepting imports from countries that are not parties to the Convention.⁴¹

4.2 *Other MEAs - The Stockholm Convention and Montreal Protocol*

As mentioned previously, JEPAs also includes persistent organic pollutants (POPs) and Ozone Depleting Substances (ODS) in its list of privileged “goods”. POPs are a group of chemicals governed under the jurisdiction of the Stockholm Convention on Persistent Organic Pollutants (POPs Convention),⁴² while ODS are governed under the Montreal Protocol on Substances That Deplete the Ozone Layer (Montreal Protocol).⁴³

31 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22 March 1989 [hereafter Basel Convention]. As of Sept. 2010, 174 countries are parties to the Basel Convention.

32 The following JEPAs countries are parties to the Basel Convention: (2002), Indonesia (1993), Japan (1989), Malaysia (1993), Philippines (1993), Singapore (1996), Thailand (1997), and Vietnam (1995)

33 Art. 2(1), Basel Convention, *supra* note 31.

34 Annex IV, Basel Convention. Disposal is defined in Annex IV, and includes recycling, reclamation, and other processes.

35 Annexes I, III, VIII, and IX, Basel Convention. Wastes are considered toxic under the Basel Convention if it is included in a category of wastes under Annex 1, e.g. clinical wastes. If the waste, however, is not found in Annex 1 of Basel, but nonetheless exhibits specific characteristics, which the Parties to the Convention deemed hazardous, e.g. poisonous, flammable solids, etc. then that waste is still considered hazardous. These hazardous characteristics are found in Annex III of Basel. To further give guidance to Parties, the Basel Convention later developed two new annexes to provide a detailed listing of what considered toxic wastes (Annex VIII) and wastes that are not (Annex IX).

36 Art. 4(2)(a), Basel Convention, *supra* note 31.

37 Art. 4(2)(b), Basel Convention, *supra* note 31.

38 Art. 4(2)(d), Basel Convention, *supra* note 31.

39 Art. 4(1)(b), (2)(g), and 9, Basel Convention, *supra* note 31.

40 Decision III/1, Basel Convention, available at: <http://www.basel.int/pub/baselban.html>. [hereafter Basel Ban Amendment]. While this prohibition is not yet in legal force it has been endorsed by all Parties. As of Sept. 2010, 69 countries have ratified or are implementing the Basel Ban Amendment, including most member states of the European Union.

41 Art. 5, Basel Convention, *supra* note 31.

42 Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, [hereafter Stockholm Convention]. The Stockholm Convention is designed to end the production and use of POPs, some of the world's most poisonous chemicals. The Stockholm Convention was adopted in 2001 and came into force on 17 May 2004. As of 1 September 2010, 172 countries are parties to the Stockholm Convention. The following JEPAs countries are parties to the Stockholm Convention: Japan (1988), Indonesia (1992), Malaysia (1989), Philippines (1991), Singapore (1989), Thailand (1989) and Viet Nam (1994).

43 Montreal Protocol on Substances That Deplete the Ozone Layer, 16 September 1987, [hereafter Montreal Protocol]. Note that The Vienna Convention on Protection of Ozone Layer (1985) established the framework

It is also important to note that under both MEAs, much like the Basel Convention, the international community has drawn the line against POPs and ODS, and imposed bans and restrictions on production, use, trade, and disposal of these substances.

The Stockholm Convention severely restricts export and import of POPs and POPs wastes⁴⁴, examples of which are polychlorinated biphenyls (PCBs), Dioxins, and DDT. The Convention also defines how the international community must manage POPs waste, particularly the need to take appropriate measures so that these wastes are, disposed of in such a way that the POPs pollutant content is “destroyed or irreversibly transformed” so that it no longer possesses the characteristics of a POP.⁴⁵

The Montreal Protocol, on the other hand, requires each Party to ratchet down its respective production and consumption of Ozone Depleting Substances (ODS) following the time frame stated in the Protocol, with the ultimate goal of global elimination of ODS. The Protocol also requires all Parties to ban exports and imports of controlled substances from and to non-Parties.⁴⁶

The Montreal Protocol identifies these ODS as chlorofluorocarbons (CFCs), halons, carbon tetrachloride, methyl chloroform, hydrochlorofluorocarbons (HCFCs), hydrobromofluorocarbons (HBFCs), and methyl bromide.⁴⁷

5 Blurring distinctions

The three MEAs discussed above all contain inherent provisions that are at odds with trade regimes, as the MEAs seek to restrain trade of substances that have been deemed harmful to public health and the environment. The collision course between the JEPAs and in the implementation of MEAs are evident, and we now discuss the areas where there are apparent conflicts.

- **Re-defining wastes as “goods”.** The inclusion of wastes under the term “originating goods” could possibly erode the existing international law definition of “wastes” under the Basel Convention. The JEPAs re-definition has created a grey area

that was not in existence prior to the JEPAs. Waste traders from Japan or any other JEPAs party could exploit this opening.

- **Promotion of toxic trade through tariff elimination or reduction.** The elimination of tariffs under the JEPAs contradicts the Basel Convention obligations of minimisation of trade and self-sufficiency in waste management by tacitly promoting cross-boundary trade in such wastes through the incentive of tariff reduction. The tariff reductions send a strong signal for waste traders and investors to engage in the trade of toxic wastes particularly for recycling and recovery purposes. These facilities can easily be set up in JEPAs parties, complemented by the investment and other provisions of JEPAs and legally claim toxic wastes from Japan as raw materials or goods for processing in the local facilities outside of Japan. Moreover, Parties to the Basel Convention are bound to ensure environmentally sound management (ESM) of its toxic wastes. Decision III/1 of the Basel Convention recognises that the transboundary movement of hazardous wastes to developing countries is at high risk of not constituting an environmentally sound management of toxic wastes.⁴⁸ Provisions in the JEPAs that directly or indirectly foster trade of toxic waste from Japan to its Southeast Asian partners serves to undermine Japan’s ESM obligation under the Basel Convention.
- **Prohibition of imposing non-tariff measures.** JEPAs can limit a country’s ability to implement its prohibition of certain substances as required by the respective MEAs. Parties to the JEPAs are obligated to refrain from introducing or maintaining non-tariff measures in the importation or sale of goods destined to another Party, which are inconsistent with their WTO obligations. This also raises the question of the obligation of Japan and the JEPAs Parties under the Basel Convention that prohibits them from entering into agreements on the trade of toxic and other wastes, which derogates from the environmentally sound management requirement of the Basel Convention.⁴⁹ Since restrictions and controls over toxic waste trade are inherent under the Basel Convention, JEPAs cannot impose non-tariff restrictions over toxic wastes without derogating from the Basel Convention requirements.
- **Review of laws and regulations that may impede with the implementation of JEPAs, and repeal or amend such laws if the reason for such laws has ceased or if it can be addressed in less restrictive means.** The avenue for the

for the creation of the Montreal Protocol. The Protocol has been modified five times since its adoption in 1987 by subsequent agreements in London (1990), Copenhagen (1992), Vienna (1995), Montreal (1997), and Beijing (1999). As of 1 September 2010, 196 countries are parties to the Montreal Protocol. The following JEPAs countries are parties to the Montreal Protocol: Japan (1988), Indonesia (1992), Malaysia (1989), Philippines (1991), Singapore (1989), Thailand (1989) and Viet Nam (1994).

44 Art. 3, Stockholm Convention, *supra* note 42.

45 Art. 6(1)(d)(2) Stockholm Convention, *supra* note 42.

46 The Montreal Protocol, and its amendments, required that CFC from developed countries be phased out by 1 January 1996, halons to be totally phased out by 1 January 1994, and carbon tetrachloride and methyl chloroform by 1 January 1996. Developing countries were allowed to continue to produce and purchase CFCs and carbon tetrachloride for use until 2010 and methyl chloroform until 2015.

47 Art. 4, Montreal Protocol, *supra* note 43.

48 Preamble, Basel Ban Amendment, *supra* note 40.

49 Art. 11, Basel Convention, *supra* note 31.

possible elimination or dilution of protections afforded by local laws that implement treaty obligations is made possible under Art. 4 of the Japan-Philippines EPA (JPEPA). At risk of being opened up for review and amendment are municipal laws that implement the Basel and Stockholm Conventions and the Montreal Protocol particularly trade restrictive provisions as it affects “goods” originating from Japan.

Proponents of the JEPAs dismiss these possible points of legal conflict on the following grounds:

- The provisions on “toxic waste-trade provision in the agreement [JPEPA], under which Japan is allowed to export toxic and hazardous waste to the Philippines is nothing more than an innocuous, meaningless surplusage because, in the first place, neither Japan nor the Philippines intends to trade in waste.”⁵⁰
- The JEPAs uphold the implementation of MEAs and do not supersede country obligations under the MEAs.⁵¹
- There are provisions contained in JEPAs that specifically mention the need to uphold the environmental regulations of countries parties to the JEPAs, particularly:
*“Each Party recognizes that it is inappropriate to encourage investments by investors of the other Party by relaxing its environmental measures. To this effect each Party should not waive or otherwise derogate from such environmental measures as an encouragement for establishment, acquisition or expansion in its Area of investments by investors of the other Party.”*⁵²
- The JEPAs have incorporated 1994 GATT Art. XX(b),⁵³ which states that:
“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect human, animal or plant life or health.”

50 “Toxic waste dumping not new to RP”, Philippine Daily Inquirer Online, 28 December 2006, available at:

http://opinion.inquirer.net/inquireropinion/letterstotheeditor/view/20061228-40487/Toxic_waste_dumping_not_new_to_RP (quoting Philippine Trade and Industry Secretary, Mr. Peter Favila) (last accessed 1 September 2010).

51 “Two main issues against RP-Japan Deal”, Manila Standard Online, August 2007, available at:
<http://www.manilastandardtoday.com/2007/aug/18/felMaragay.htm>
 (last accessed 1 September 2010).

52 Art. 102, JPEPA, *supra* note 4.

53 Art. XX and XXI of the GATT 1994 shall form part of the Agreement “mutatis mutandis.” See Art. 8, JBEPAs, *supra* note 1; Art. 11.1, JIEPA, *supra* note 2; Art. 10.1, JMEPA, *supra* note 3; Art. 23, JPEPA, *supra* note 4; Art. 10.1, JTEPA, *supra* note 6; Art. 8, JVEPA, *supra* note 7.

Treaties like the JEPAs are no ordinary pieces of paper. Once signed and entered into these documents represent legally binding obligations on states. The fundamental maxim under international law, agreement must be kept (*pacta sunt servanda*) is instructive of the force and power of treaties.⁵⁴ It must also be borne in mind that the Parties would not include provisions in a treaty had there been no intention to be bound by such provisions. Thus, all provisions found in the JEPAs must be given effect and considered legally binding.

The argument that there is no intent on the part of Japan or any JEPAs party to engage in toxic trade needs to be seen in the context of the treaty. The intention of the parties must be gleaned from the text of their agreement giving the text the ordinary meaning of the words, and in light of the object and purpose of the treaty. The context of the treaty, for purposes of interpretation, must also include its preamble and annexes.⁵⁵ A reading of all provisions of the JEPAs and its annexes does not show a clear intention to follow the Basel Convention.⁵⁶

If the Parties to the JEPAs wanted to strongly convey an intent to respect their Basel obligations they could have made it plainer and clearer through a strong reservation or a reference to the Basel Convention in the respective JEPAs. Firstly, it can be argued that the doctrine *lex posterior derogat priori* - more recent law prevails over an inconsistent earlier law can be applied to negate the Basel Convention regulation in light of the general exception. Secondly, Art. 102 of the JPEPA for instance, can be seen as a specific exception on investments and not necessarily one that is applicable to environmental regulations in the trade of goods, since the JEPAs are divided into chapters and each exception is given a specific chapter. Thus, the argument that certain provisions in the JEPAs uphold the environmental regulations of Parties is weak in the absence of specific reservation or reference to the MEAs that it claims to uphold given the context of JEPAs.

Finally, the argument that the 1994 GATT Art. XX b) provision amply addresses the conflict issues begs the question of why a WTO challenge is invited in the first place, if indeed there was never any intention to engage in toxic trade from the very start. To date seven JEPAs have been negotiated and entered into and all JEPAs replicated the same toxic trade provisions. Is this by design? Or is there more simply a stubborn denial that an error has been made?

The earlier fears that the WTO Dispute Settlement Body (DSB) would not be sympathetic to environ-

54 Art. 26, Vienna Convention on the Law of Treaties [hereafter, Vienna Treaty].

55 Art. 31(1)(2), Vienna Treaty, *supra* note 54.

56 The arguments set forth can also apply to the Stockholm Convention and Montreal Protocol.

mental concerns seem to have faded. “*The most recent rulings of the DSB on GATT Art. XX indicate a progressive ‘greening’ of WTO jurisprudence,*”⁵⁷ with cases such as the WTO Shrimp-Turtles (1998) to the recent case of the Brazil-Retreaded Tyres (2007). The progressive ‘greening’ of WTO jurisprudence is welcome, but should not be relied upon with a certainty of upholding MEAs by the JEPAs Parties, after all this is still an adversarial procedure that necessitates establishing the criteria needed to operationalise GATT Art. XX(b).

Moreover, although competent on the issue of trade, the DSB may not necessarily have the same level of competence on environmental or public health issues. After all the DSB functions within the WTO regime, and a trade bias cannot be avoided.

For developing country parties to the JEPAs it is not practical to rely on the DSB to uphold their environmental cases. These proceedings entail costs and the possibility of failure and the accompanying fines, penalties, and damages that the losing party will bear is an ever-present specter.

Lastly, the DSB will not be making decisions out of thin air. The cases will start from a review of the text contained in the four corners of the pages that constitute the JEPAs. In this process the DSB is beholden to the maxim of *pacta sunt servanda*; it cannot be expected to make a favourable interpretation to save a JEPAs Party from a badly worded or negotiated agreement.

6 Conclusion

The provisions under the JEPAs that could give rise to conflict with MEAs such as the Basel Convention are too glaring to be dismissed as surplusage or meaningless. In fact, left as it is, the toxic trade liberalisation provisions of the JEPAs have the latent ability to alter the national and global legal landscape on waste and banned controlled substances, particularly on the ability of countries to implement the Basel Convention and its amendments and related MEAs.

The present barrage of bilateral free trade agreements among countries is indicative of the failure of the WTO system. It is therefore crucial that the mistakes made in the JEPAs not be copied and, at worse magnified, by replicating it in other regions and countries.

For existing JEPAs the preferred remedy is to amend the “originating goods” definition by removing the waste definitions, and remove the listing of toxic wastes and banned and controlled substances under the respective annexes of the JEPAs.

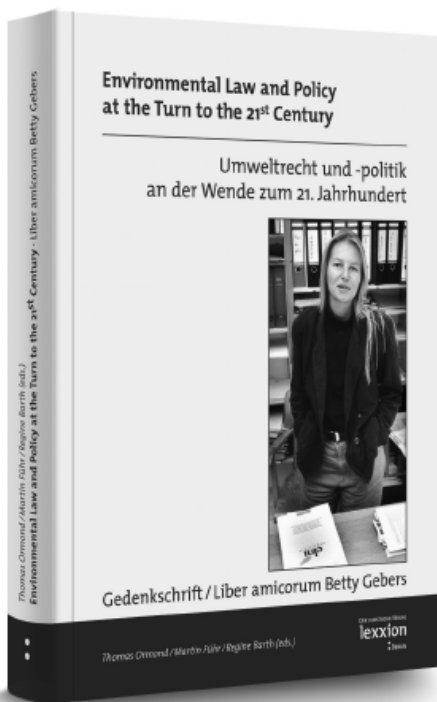
The solutions to avoiding a conflict between the trade-oriented JEPAs and trade-restrictive MEAs clearly lies

in separating the “goods” from the “bads” at the very beginning. This can be done only if governments approach the negotiating table with a consciousness of the magnitude of the agreement into which they are entering and respect for the various crosscutting issues that affect trade, such as but not limited to environment and health. Only when governments begin dealing with trade in this manner can we rightly call such agreements “new age”.

⁵⁷ T. Lat, Testing the Limits of GATT Art. XX(b): Toxic Waste Trade, Japan's Economic Partnership Agreements, and the WTO, 22 Georgetown International Environmental Law Review (GIELR) 2 (2009), at 391.

Environmental Law and Policy at the Turn to the 21st Century

Umweltrecht und -politik an der Wende zum 21. Jahrhundert



Gedenkschrift / Liber amicorum Betty Gebers

*Thomas Ormond/Martin Führ/
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THE LEGAL PUBLISHER
lexxion
BERLIN

Imprint

Editors: Hendrik Acker, Regine Barth, Nicola Below, Martin Führ, Gerhard Roller

Editors in charge of the current issue:

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The Editors would like to thank **Vanessa Cook** (Öko-Institut) for proofreading the *elni Review*.

We invite authors to submit manuscripts to the Editors as files by email using an IBM-compatible word processing system.

The *elni Review* is the double-blind peer reviewed journal of the Environmental Law Network International. It is distributed twice a year at the following prices: commercial users (consultants, law firms, government administrations): €52; private users, students, libraries: €30. Non-members can order single issues at a fee of €20 incl. packaging. The Environmental Law Network International also welcomes an exchange of articles as a way of payment.

The *elni Review* is published with financial and organisational support from Öko-Institut e.V., and the Universities of Applied Sciences in Darmstadt and Bingen.

The views expressed in the articles are those of the authors and do not necessarily reflect those of elni.

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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

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elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

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