

## BRIEFING PAPER

No. 2 - December 1999

### Why the US Must Ratify the Entire Basel Convention (or not at all)

#### The Basel Convention of 1989 -- Now an Anachronism

Treaties are living and growing instruments and institutions. Since its adoption in 1989, the Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal, has moved a long way from its original minimalist text. The Basel Convention has now adopted 103 decisions since coming into force. Of these, the decisions that culminated in the adoption of a global ban on the export of hazardous wastes from developed (defined as member states of the Organization of Economic Cooperation and Development) to developing (non-OECD) countries has dramatically altered the treaty. By far, this Basel Ban which has now been adopted as an amendment to the treaty, has been the subject which has most dominated the work of the Convention since coming into force in 1992.

Whereas the original text of the Convention was condemned by environmentalists and many developing countries as legitimizing international toxic waste dumping rather than criminalizing it, as soon as the treaty entered into force, the Parties progressively moved at each of the Conference of Parties (COPs) to rectify that shortcoming by the following *consensus* agreements:

- **COP1 (December 1992):** Decision I/22 Requested developing countries to prohibit the import of hazardous wastes from industrialized countries.
- **COP2 (March 1994):** Decision II/12 banned export of all hazardous wastes from OECD to non-OECD countries including for recycling as of 1 January 1998.
- **COP3 (September 1995):** Decision III/1 adopted the OECD (and Liechtenstein) export ban as an amendment to the Convention.
- **COP4 (February 1998):** Decision IV/8 agrees to leave Ban Amendment unchanged until it enters into force; Decision IV/7 appealed to all Parties to ratify the Ban Amendment as soon as possible.

The Basel Ban now readied as a treaty amendment, has been hailed as a landmark precedent for global environmental justice. It has,

without question, transformed the Basel Convention from a control regime, to a no-exceptions, environmentally justified trade barrier to hazardous waste trade. Countries like the United States now entering the treaty cannot pretend that they can turn back the clock and ignore these highly significant decisions made on more than one occasion by a consensus of the Parties -- decisions which dramatically altered the treaty during the period they chose not to be Parties to it.

#### Motivations for Selective Ratification are Revealed as Bad Faith

Since the beginning of the Basel negotiations, the United States has adopted the viewpoint of its industry lobby and not of its public as it strongly opposes the concept of a no-exceptions waste trade ban. The US, even as a non-Party, fought hard against passage of all of the above noted decisions. To date, the United States, in both Republican and Democrat administrations continues to oppose the Basel Ban which aims to end the practice of dumping hazardous wastes on poorer countries in avoidance of paying the high costs of more appropriate waste management or prevention within wealthier industrialized nations. As the Basel Ban has been the dominant goal and activity of the treaty since 1989 and since the US still opposes it vociferously, US desires to now accede to the original treaty and ignore the Basel Ban amendment to it, must be viewed as *bad faith*.

*Regardless of the legality of doing so, such an action is tantamount to a new 51st state joining the United States by ratifying the original 1787 US Constitution without accepting the subsequent bill of rights or the amendment banning slavery. It is simply not acceptable.*

Indeed a closer look at the stated US reasons for selectively ratifying the Basel Convention reveals that the strongest motivation is likely to be an unstated one -- an enhanced ability for the United States to work within the Convention to weaken the obligations imposed by the Basel Ban. We examine the alleged US motivations for "selective" ratification below:

- **"The US Needs legal authority to better control hazardous wastes"** Internal State Department Documents have previously rationalized non-ratification of the Basel Convention by stating that this could not be done until implementing legislation was passed. Now we are hearing that such legislation cannot be adopted until the treaty is ratified and this weakens the US ability to control their hazardous wastes. The fact remains that the United States can pass legislation of any kind it wants at any time. If the United States wants

better authority over waste exports than they can amend their laws accordingly. But the claim is seen as odd given the fact that the Basel Convention *with* the Ban Amendment supplies more control over environmentally destructive shipments of hazardous waste than the discredited original treaty alone.

Indeed, the US claim becomes even more dubious once it is realized that the United States already had the internationally imposed legal authority and obligation to apply most of the obligations of the original 1989 Basel Convention by virtue of a legally binding OECD decision passed in 1986. But they have failed to do so! This legally binding OECD decision [C(86)64(Final)], which requires Prior Informed Consent (PIC) for all hazardous wastes, and prohibits exports if there is reason to believe that the wastes will not be handled in an environmentally sound manner has *never* been properly implemented into US national laws such as RCRA and TSCA. For this reason current US law allows the highly dangerous and unscrupulous export of asbestos wastes on board ships, lead acid batteries, lead and cadmium contaminated sludge etc. to developing countries ill equipped to deal with such wastes.

If the United States really had the will to better control hazardous waste exports and be a responsible Party to international treaties, why did they not implement the 1986 OECD agreement?. Their failure to do so, together with the fact that the Basel Convention *with* the Ban provides the greatest degree of control, reveals the State Department claim for wanting greater control to be disingenuous.

■ **“In the Current Political Climate the Ban will not Pass, so Ratifying just the 1989 Text is Better than Nothing.”** The State Department has also claimed that as they have already received Senate “advice and consent” on the original treaty they must go with that as it would be politically impossible to achieve “advice and consent” on the Basel Ban Amendment in the current Congress. They submit that ratifying the Convention is better than nothing. In light of the fact that the original treaty was denounced by environmentalists and developing countries alike and dramatic moves were made immediately to reform the original treaty, the question is begged, *better for whom?*

*While many politicians and the Administration have embraced the environmental justice movement domestically, which aims to prevent hazards from disproportionately burdening the poor, this principle seems to find less rhetorical mileage on the global stage.*

Both political parties are guilty in this regard and both have adamantly opposed the Basel Ban. Thus blaming selective ratification of the Basel Convention on the Republican Party Senate leadership is seen as an attempt at misdirecting blame.

### **The Real Reason**

To date, as non-Parties, the United States has been forced to argue their extreme minority view in the Basel Convention from an increasingly weak position. There is no doubt that *if* the world's last superpower were allowed to join the Convention without accepting the decisions made by it, their ability to project their current policy to weaken the Basel Ban on behalf of domestic industry would be vastly

improved. Rights and obligations of Parties include ability to block consensus, call special votes, propose amendments etc. Additionally, the relatively large amount of money the US as a party would be required to contribute to the trust fund of the Convention would allow it considerable more clout than other Parties.

As long as the US remains a non-party, it is likely they will become increasingly ineffectual at dismantling the Basel Ban. Meanwhile more and more countries will in the next months move to ratify it making its implementation and entry into force a *fait accompli*. It is this eventuality which the US now seeks to avoid at all costs. To date their numerous attempts to sabotage the Ban have failed. By selectively ratifying the treaty, they can get their foot in the door, however unwelcome it might be, and be that much better positioned to punch loopholes in the Basel Ban.

### **Would US Ratification of the Basel Convention *without* the Basel Ban Amendment be a step in the right direction for the global environment?**

*Given* that the original 1989 text of the Basel Convention has been denounced by environmentalists and developing countries alike as legitimizing hazardous waste trade instead of criminalizing it;

*Given* that the Basel Ban Amendment was passed by a consensus of the Basel Parties to rectify this shortcoming;

*Given* that the United States is still intent on weakening or destroying the Basel Ban -- the most significant achievement of the Convention;

*Given* that the original 1989 Convention is largely a replica of a 1986 OECD decision which the United States has never bothered to implement;

*Given* that the US ability to weaken or eliminate the Basel Ban will be vastly enhanced *if* the US becomes a Party;

☛ **No.** It is our conclusion that US ratification of the original 1989 treaty without simultaneous ratification of its Ban Amendment will equate to a net loss for the global environment and the protection of developing countries. Until the United States changes its position within the Basel Convention and decides to join the rest of the global community in prohibiting the unscrupulous and environmentally damaging export of hazardous wastes to developing countries, it would be much better for the earth and its inhabitants to keep the US out of the Basel Convention entirely.

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