CHAPTER 12

Trade and Environment in the Region of the Caucasus and Central Asia: The Case of Hazardous Waste

Andreas R. Ziegler

1 Introduction

Despite temporary setbacks and a very uneven integration of various regions into the globalized economy, we speak today of global supply (or value) chains for the production of goods (and increasingly services).[1] They are based on the general concept that specialization leads to the possibility of producing larger quantities and thereby achieving economies of scale.[2] This specialization is thus considered to lead to a more efficient production and the possibility of achieving growth and increased welfare. This principle can be applied locally and within States (internal market) but also across political borders, which requires trans-border economic activities and leads to increased international trade flows, be it within a specific region or globally.[3]

Based on these very basic principles, States have tried to eliminate obstacles to international trade. The fight against protectionism is one aspect of this liberalization of international trade flows but other policy goals may also lead to the hindrance of international trade flows. Traditionally many States relied on the income from customs duties to finance government activities (and many developing states still do) and the elimination of such customs duties is a typical objective of trade negotiations. While the financing of government activities as such is not questioned, the use of customs duties shall be eliminated to reduce the negative effects on trade that they have. As a result,

1 See, for example, John Humphrey, 'Governance in global value chains' (2001) *IDS Bulletin 32.3*, 19–29.

2 See, for example, Peter K. Schott, 'Across-product versus Within-product Specialization in International Trade' (2004) 119.2 The Quarterly Journal of Economics 647–678.

3 See, for example, Geoffrey Garrett, 'International Cooperation and Institutional Choice: The European Community's Internal Market' (1992) International Organization 533–560.

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States must usually find other ways to finance their activities, e.g. internal non-discriminatory taxation.[4]

The same consequences may result from border and domestic measures that States use to regulate certain policy areas. Governments have always been aware of the fact that, while it is absolutely indispensable for the authorities to take measures to protect the population from certain risks (e.g. sanitary and phytosanitary risk or fraud), the measures chosen may also impact trade flows. As a consequence, States typically try to reduce the trade effects of such regulatory measures in trade negotiations by promoting those measures that are least trade-restrictive or outlawing certain measures that are particularly distortive.[5] Of course this process can be difficult as there are fears that it may lead to the elimination of important regulatory measures that safeguard important policy goals for the sake of increased trade (race to the bottom).[6] On the other side, there is often a fear that a specific non-trade issue is invoked to take measures that in reality are intended to protect domestic industry (hidden or disguised protectionism).[7]

In particular, in the area of environment protection, this general tension has led to an extensive discussion – normally under the title "Trade and Environment".[8] Environmental policy, strictly speaking, has become a much more important part of most Governments' activities since the late 1960s and at the international level has become an area of international negotiations only since the 1970s. In the framework of multilateral negotiations, it is mostly since the 1980s that the potential risk of "green protectionism"[9] on one side and the dangers stemming from the negotiated elimination of certain environmental measures because of their trade effects on the other side, has crystallized in an

4 See, for example, David Greenaway and Chris Milner, 'Fiscal Dependence on Trade Taxes and Trade Policy Reform' (1991) 27.3 The Journal of Development Studies 95–132.

5 See, for example, Paul Krugman, 'What Should Trade Negotiators Negotiate about?' (1997) 35.1 Journal of Economic Literature 113–120.

6 See, for example, Gareth Porter, 'Trade Competition and Pollution Standards: "Race to the Bottom" or "Stuck at the Bottom"' (1999) 8.2 The Journal of Environment & Development 133–151.

7 See, for example, Thilo Glebe, *EU Agri-Environmental Payments: Appropriate Policy or Protectionism in Disguise?* (2005) available at <https://escholarship.org/uc/item/0719f4st> accessed 22 November 2021.

8 See Andreas R. Ziegler, *Trade and Environmental Law in the European Community*. (Clarendon Press 1996).

9 See, for example, Hugh R. Campbell and Brad L. Coombes, 'Green Protectionism and Organic Food Exporting from New Zealand: Crisis Experiments in the Breakdown of Fordist Trade and Agricultural Policies' (1999) 64.2 Rural Sociology 302–319.

intensive debate[10] and a number of known cases before international tribunals and dispute settlement bodies.[11]

This is mostly due to the increased awareness for environmental problems (locally and globally), e.g. in the case of hazardous waste that will be analysed in this Chapter, on one side and more ambitious trade liberalization measures once a substantive elimination of tariffs is achieved on the other side. A similar development has taken place in the area of investment negotiations where more recently the debate on "Investment and the Environment"[12] is also intensifying and cases before international arbitral tribunals highlight the potential tension between the "Right to regulate"[13] – as it is often referred to in the specific investment agreements – and environmental concerns of contracting parties to international agreements.

2 The Peculiarities of Waste and the General Principles Underlying the Trade Liberalization in the Area of Goods

The treatment of waste in general and of hazardous waste in particular, is a typical example where the protection of consumers, the environment and the public in general usually require government action. The associated risks generally lead, in developed States, to an extensive control of the handling, recycling and, in particular disposal of waste.[14] It is generally admitted that in this

10 See eg Rolf Weder and Andreas R. Ziegler, 'Economic Integration and the Choice of National Environmental Policies' (2002) 13:3 European Journal of Law and Economics 239–256; or Gene M. Grossman and Alan B. Krueger, 'Environmental Impacts of a North American Free Trade Agreement', No. w3914 (National Bureau of Economic Research, 1991).

11 See Andreas R Ziegler, 'The Environmental Provisions of the World Trade Organization (WTO)' in Friedl Weiss (ed), *International Economic Law with a Human Face*, (Kluwer 1998) 203–222; and more recently Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (CUP 2012) 175ff; and James Watson, *The WTO and the Environment: Development of Competence beyond Trade* (Routledge, 2012).

12 See Ene Sebastian George, 'The Foreign Direct Investment-Investment Environment Relationship' (2012) 12.1 Ovidius University Annals, Economic Sciences Series 1414–1418 and Saverio Di Benedetto, *International Investment Law and the Environment* (Edward Elgar Publishing 2013).

13 See, for example, Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration' (2012) 15.1 Journal of International Economic Law 223–255.

14 See for example, R. G. P. Hawkins and H. S. Shaw, *The Practical Guide to Waste Management Law: With a List of Abbreviations and Acronyms, Useful Websites and Relevant Legislation* (Thomas Telford 2004).

area specific regulation is needed. Most often this is done through prohibitions of certain activities and the delivery of permits to approved agents. While such a regulation on the territory of a State (domestic regulation) may impact trade flows, it is usually not problematic if it is undertaken in a non-discriminatory and transparent way. This also corresponds to the regulations normally found in international, regional and bilateral trade agreements, when it comes to permits and the regulation of processes; in particular the most-favoured-nation (MFN) principle and the requirement of national treatment found in most agreements are usually interpreted as leaving enough policy discretion to justify non-discriminatory measures in this respect.[15] In recent years more and more agreements include stringent obligations to publish all information regarding such (environmental and other) regulations in a way that is easily accessible for importers and exporters worldwide.[16] This may constitute a certain bureaucratic burden.[17]

When it comes to specific import and export restrictions regarding goods, including environmentally sensitive ones like (hazardous) waste, most international trade agreements are much more specific. While the progressive elimination and non-discriminatory application of customs duties is normally not at stake, in particular the elimination of typical non-tariff obstacles like quotas can be seen as a stumbling block at first sight. Article XI GATT as well as Article 34 of the Treaty on the Functioning of the European Union (TFEU) are typical examples of provisions in international trade agreements, which have the general objective to totally eliminate quantitative restrictions (including total bans and quotas). Nevertheless, the outright prohibitions must be read in conjunction with the (general) exceptions normally provided for in these agreements, which leave room to maintain or even (re)introduce (new) trade restrictions in specific cases, such as to protect the health and life of human beings or the

15 Such as, for example, in the case of Articles I and III of the General Agreement on Tariffs and Trade (GATT). Other provisions in this Agreement and other multilateral trade agreements of the WTO contain these principles for more specific measures.

16 See for example the transparency obligations of the Agreement on Sanitary and Phytosanitary Measures (SPS-Agreement) of the WTO contained in art 5.8, art 7 and Annex B. In addition, the WTO's SPS Committee has elaborated recommended procedures for implementing the transparency obligations of the SPS Agreement (G/SPS/7/Rev.2). See also art X GATT which requires WTO Members to promptly publish laws, regulations, judicial decisions and administrative rulings of general application, including those pertaining to requirements on imports or exports and to administer them in a uniform, impartial and reasonable manner.

17 See Terry Collins-Williams and Robert Wolfe, 'Transparency as a Trade Policy Tool: The WTO's Cloudy Windows' (2010) 9.4 World Trade Review 551–581.

environment. Some observers regret the fact that only the application of an exception provision allows for the implementation of such measures, but that is basically due to the main rationale of these trade agreements and must not necessarily lead to an unsatisfactory balance between trade liberalization and environmental policy concerns. What must be noted, however, is that these expectations normally require an objective assessment of the risk at stake and a reasonable link between the risks and the quantitative measure taken.[18] In addition many modern trade agreements (including the WTO) include very specific conditions regarding all measures that have trade effects and whose rationale is the protection of human, animal and plant life and health (sanitary and phytosanitary [SPS] measures).[19] Even import permits (import licensing), which may be quasi-automatic or dependent on the fulfilment of specific conditions, are normally, these days, subject to specific disciplines in international trade agreements, and in particular within the WTO. For example, the WTO Agreement on Import Licensing Procedures says import licensing should be simple, transparent and predictable so as not to become an obstacle to trade.

3 The Use of Special Regimes Regarding Certain Goods: E.g. the Basel Convention

When it comes to the handling and trade of waste, one can trace the development of a special regime for hazardous waste back to the 1980s. During this time, a number of incidents led to concerns that certain regions might be used to dump waste from other regions in an inappropriate way and that thus the market-based specialisation referred to earlier in this chapter was not an adequate approach or at least needed some additional disciplines to avoid undesirable results and outcomes.

The famous Seveso disaster took off in 1976 in Italy when a fire broke out in a small chemical manufacturing plant north of Milan in the Lombardy region in Italy. Apart from the exposure of the local population to toxic substances, the waste from the clean-up of the plant was a mixture of protective clothing and chemical residues from the plant. Instead of being legally disposed of, as agreed among the companies involved, in 1983 the barrels containing the

18 See the abundant literature on art XX GATT.

19 See, for example, Lukasz Gruszczynski, *Regulating Health and Environmental Risks Under WTO Law: A Critical Analysis of the SPS Agreement* (OUP 2010).

waste disappeared for a while in Northern France before being incinerated in Switzerland.[20]

A second incident that started in 1986 is normally referred to as the Khian Sea Waste Disposal Incident 1986. The cargo ship Khian Sea, registered in Liberia, was loaded with more than 14,000 tons of non-toxic ash from waste incinerators in the United States and the company handling the waste struggled to find a place for disposal. After many States had refused to allow the landing of the waste, in January 1988, the crew finally dumped 4,000 tons of the waste in Haiti as "topsoil fertilizer".[21]

These and other incidents led to negotiations for an international treaty to better control transboundary movements of hazardous wastes and their disposal, resulting in the adoption of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989/1992) on 22 March 1989 by the Conference of Plenipotentiaries in Basel (Switzerland).[22] The main goals of this Convention were to reduce the movements of hazardous waste between Parties, and specifically to prevent the transfer of hazardous waste from developed to less developed countries (LDCs).[23] Contrary to the normal situation where specialization and the resulting trade are seen positively, the risk of shipping hazardous waste and disposing of it in an inappropriate way (especially in developing countries) were seen as justifying such an approach.

As of November 2020, 187 states and the European Union are parties to the Convention. The United States has signed the Convention but not ratified it. Also, most States in the Caucasus region and Central Asia have acceded to the treaty, e.g. Azerbaijan: 1st of June 2001 (Accession); Armenia: 1st of October 1999 (Accession), Georgia: 20 May 1999 (Accession); Kazakhstan: 3 June 2003 (Accession), and The Russian Federation: 31 January 1995 (Accession).

Technically the original Convention invited Member States to apply stringent requirements for notice, consent and tracking of the movement of wastes across national boundaries. Parties shall prohibit or shall not permit the export of hazardous wastes and other wastes to the Parties that have prohibited the

20 See Ivan Vince, *Major Accidents to the Environment: A Practical Guide to the Seveso II-Directive and COMAH Regulations* (Butterworth-Heinemann 2011).

21 See Marguerite M. Cusack, 'International Law and the Transboundary Shipment of Hazardous Waste to the Third World: Will the Basel Convention Make a Difference' (1989) 5 Am U J Intl L & Poly 393ff.

22 <www.basel.int/portals/4/basel%20convention/docs/text/baselconventiontext-e.pdf> accessed on 22 November 2021. See Katharina Kummer, *International Management of Hazardous Wastes* (Clarendon Press 1995).

23 It does not, however, address the movement of radioactive waste.

import of such wastes (Article 4 Paragraph 1 Letter b). Parties shall also prevent the import of hazardous wastes and other wastes if they have reason to believe that the wastes in question will not be managed in an environmentally sound manner (Article 4 Paragraph 2 Letter g).

In addition, the Convention places a general prohibition on the exportation or importation of wastes between Parties and non-Parties (Article 4 Paragraph 5). The exception to this rule is where the waste is subject to another treaty that does not take away from the Basel Convention. The United States is a notable non-Party to the Convention and has a number of such agreements (in particular with all OECD countries) for allowing the shipping of hazardous wastes to Basel Party countries.

These and other provisions of the Convention require States to adopt import and export licensing procedures that usually fall under the respective disciplines of trade agreements that a Party may have concluded, including the WTO. Normally, it should be possible to apply them in a non-discriminatory and transparent manner, as typically required, to reduce unnecessary obstacles to trade. Apart from the explicit reference to the possibility that Members introduce import restrictions, the outright prohibition to allow trade with non-parties to the Basel Convention (export restrictions) may be more problematic. The European Union fully implemented the Basel Ban in its Waste Shipment Regulation (EWSR),[24] making it legally binding in all EU member states.

Generally, the efficiency of the Basel Convention has not been too heavily criticized. Nevertheless, isolated incidents have come to the forefront. A particularly famous incident constituted the so-called 2006 Ivory Coast Toxic Waste Dump Incident. The unauthorized disposal of toxic hazardous waste led to a health crisis in Côte d'Ivoire. A ship registered in Panama, the *Probo Koala*, chartered by the Dutch-based oil and commodity shipping company Trafigura Beheer BV had offloaded the waste before the waste was then dumped by a local contractor at as many as 12 sites in and around the city of Abidjan in August 2006. In subsequent criminal and administrative proceedings Trafigura agreed on 13 February 2007 to pay the Ivorian government £100 million (USD 198m) for the clean-up of the waste. On 23 July 2010 Trafigura were fined €1 million by the Dutch authorities for the transit of the waste through Amsterdam before being taken to the Côte d'Ivoire to be dumped, plus later settlement. Trafigura's chairman, Claude Dauphin, accepted in 2012 a €67,000 fine. Furthermore, the settlement obliged Trafigura to pay an additional €300,000 – the money it

24 Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste. Norway and Switzerland have similarly fully implemented the Basel Ban in their legislation.

saved by dumping the toxic waste in Abidjan rather than having it properly disposed of in the Netherlands.[25]

4 Potential Conflicts

This problem of export restrictions to, and import restrictions from, certain States without their consent has been exacerbated by the negotiations of additional rules prohibiting exports to certain regions. The original Convention did not prohibit waste exports to any location other than Antarctica (Article 4 Paragraph 6: The Parties agree not to allow the export of hazardous wastes or other wastes for disposal within the area south of 60 South latitude, whether or not such wastes are subject to transboundary movement), except if States were non-parties to the Basel Convention or had themselves banned the imports. In 1995, however, the so-called (Basel) Ban Amendment (to the Basel Convention) was adopted. The amendment has been accepted by 73 countries and the European Union, but it has not entered into force (as this requires ratification by 3/4 of the member states to the Convention).[26] The Amendment prohibits the export of hazardous waste from a list of developed (mostly OECD) countries to developing countries. It should be noted that the Member States of what is now the Organisation of African Union (OAU; formerly Organisation of African States [OAS]), has itself adopted the so-called Bamako-Convention of 1991[27] which equally prohibits the import of certain types of hazardous waste.

The tensions that may exist between specific obligations not to import/export certain goods from/to specific States, due to their legal or economic status (non-party, LDC etc.), have been recognized for a considerable time within the WTO. As a consequence, the WTO was, and still is, mandated under paragraph 31(i) of the WTO 2001 Doha Ministerial Declaration to consider the

25 See Liesbeth Enneking, 'The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation' (2008) 16(2) European Review of Private Law 283–312; Laura AW Pratt, 'Decreasing Dirty Dumping – A Re-evaluation of Toxic Waste Colonialism and the Global Management of Transboundary Hazardous Waste' (2010) 35 Wm & Mary Envtl L & Poly Rev 581; Amnesty International, *The Toxic Truth* (London 2012).

26 A controversy exists regarding whether the calculation of ¾ of all members must be based on the number of parties at the time of the adoption of the amendment or the current number of parties.

27 Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, adopted on 30 January 1991. It also prohibits the import of radioactive waste and entered into force on 22 April 1998.

relationship between WTO rules and "specific trade obligations" set out in Multilateral Environmental Agreements (MEAs), such as the Basel Convention. The WTO Secretariat and various Secretariats of MEAs have undertaken activities to strengthen the information exchange and common reflection, but no conclusive analysis has been undertaken regarding the compatibility of the Basel Convention trade regime with the WTO.[28] In another situation, WTO Members have adopted a specific waiver to avoid any incompatibilities stemming from a system involving import/export permits and trade restrictions regarding non-parties. This is, for example, the case for the so-called Kimberley Process Certification Scheme (KPCS) to prevent the trade in "conflict or blood diamonds" to be used for the financing of civil wars and atrocities in Africa. The WTO waiver decision would exempt – from 1 January 2003 until 31 December 2006 – trade measures taken under the Kimberley Process by these 11 members and other members that would subsequently join from GATT provisions on most-favoured-nation treatment (Article I:1), elimination of quantitative restrictions (Article XI:1) and non-discriminatory administration of quantitative restrictions (Article XIII:1).[29] The waiver was extended in 2006, 2012 and then in 2018 (until 2024).[30]

Under paragraph 31(iii) of the 2001 WTO Doha Ministerial Declaration, the WTO is also mandated to negotiate "the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services". A considerable debate has arisen as to which goods can be considered environmental goods. This is particularly interesting with regard to (hazardous waste) in light of the parallel debate on the controversial concept of "Green Economy".[31] This concept underlines that the recycling of (hazardous) waste

28 For a summary of the activities involving the WTO and the Basel Convention see the respective web page of the Basel Convention at: <http://archive.basel.int/trade/> accessed 22 November 2021; These questions are analysed in detail in Mirina Grosz, *Sustainable Waste Trade under WTO Law: Chances and Risks of the Legal Frameworks' Regulation of Transboundary Movements of Waste* (Nijhoff 2010).

29 WTO Council for Trade in Goods, *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, Communication from Canada, Japan and Sierra Leone,* G/C/W/431 (12 November 2002).

30 WTO, *Extension of Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, Waiver Decision of 26 July 2018*, WT/L/1039 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1039.pdf&Open=True> accessed 11 February 2021.

31 See Lakshmi Raghupathy and Ashish Chaturvedi 'Secondary Resources and Recycling in Developing Economies' (2013) Science of the Total Environment 830–834; Sean Connelly, Sean Markey and Mark Roseland, 'We Know Enough: Achieving Action Through the Convergence of Sustainable Community Development and the Social Economy' in Richard Simpson and Monika Zimmermann (eds) *The Economy of Green Cities: A World Compendium on the Green Urban Economy* (Springer 2013) 191–203.

can be a very ecological and economically attractive activity at the same time. Some authors argue, therefore, that the recycling of, and associated trade in waste should be revisited and that bans may not always be justified or may lead to sub-optimal results.[32]

5 Conclusions

The international trading regime is highly fragmented. This is not only due to the increasing number of bilateral and regional agreements and the perceived weaknesses of the WTO, but also due to the specific regimes that exist for various goods. Environmental concerns justify the existence of specific rules for (hazardous) waste, but the coordination with the multilateral rules is sub-optimal and leads to many controversies and uncertainties which, especially for developing countries, can become stumbling blocks in their internal reform projects and with regard to the optimal planning of their economic strategies. The fragmentation and the resulting uncertainties regarding the compatibility of various regimes may be less acute when the memberships in these instruments is large and more or less identical (as is the case with the WTO and the original Basel Convention), but it becomes highly problematic when important actors (like in this case the United States) are not involved in all regimes concerned or if new developments lead to further fragmentation (like the Ban Amendment).

32 European Environment Agency, EEA Report No 8/2011, *Earnings, Jobs and Innovation: The Role of Recycling in a Green Economy* (2011); Kummer, Katharina and Andreas R. Ziegler (eds), *Waste Management and the Green Economy: Law and Policy* (Edward Elgar 2016).