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Features

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THE EMERGING OF INTERNATIONAL ENVIRONMENTAL LAW

The growth of an increasingly global marketplace and a nearly universal concern for environmental protection has resulted in a complex maze of regulations facing manufacturers, importers and exporters. Companies whose activities impact foreign markets must monitor with increasing scrutiny the impact that international agreements and treaties will have on their business.

Similarly, importers and companies retaining services in foreign countries must be mindful of an ever increasing web of foreign and international laws. This article provides an overview of the international environmental laws currently affecting the conduct of business in the global market and offers some practical knowledge on what companies will need to do to comply with them. In light of the number of articles already published on International Organization for Standardization (ISO), on ISO standards 9000 (covering consultant technical services), and 14000 (addressing manufacturing practices), these topics are not addressed. [1]

Laws regulating the environmental aspects of international trade derive from several sources: international and bilateral environmental treaties; trade agreements; individual country municipal laws; customary international laws; and "soft law" instruments. In a somewhat uncoordinated fashion, these laws target environmental problems such as the transportation of hazardous waste, air pollution, toxic-waste dumping, and the depletion of the ozone layer.

International Environmental Treaties

There are five primary treaties regulating environmental matters: the Basel Convention, the Vienna Convention, the Montreal Protocol, the Kyoto Protocol, and the Convention on the Impact of Environmental Assessment.

The Basel Convention

The Basel Convention regulates the international shipment of hazardous waste. [2] It seeks "to directly stop international trade in waste destined for disposal in countries which do not have regulatory infrastructure, and which cannot ensure environmental sound management of such disposal."

The Basel Convention requires an exporting nation to inform an importing nation of the amount and content of the hazardous waste and to obtain written consent from the importing nation that it will accept such a shipment. [3]

To prevent circumvention of this system, a country which is not a party to the agreement may not export or import hazardous wastes to or from parties unless it does so pursuant to a separate multilateral or bilateral agreement. [4] Furthermore, each party to the agreement must prohibit persons within its jurisdiction from transporting hazardous waste unless they are authorized, and then, only when in compliance with the specific rules.

Forty nations have ratified this treaty, including all of the world's industrialized nations, except the United States and New Zealand. [5]

*26 *The Vienna Convention and Montreal Protocol*

The Vienna Convention obligates countries to take measures to "protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer. [6] It provides a list of chemical substances which have the potential to modify and deplete the properties of the ozone layer." [7]

In addition, the Vienna Convention requires participating countries to adopt legislative measures to control and limit the behavior of individuals within a state's jurisdiction to prevent them from conducting activities which are shown to cause further depletion of the ozone layer. [8] The participants also agreed to cooperate in the research effort to determine which human activities effect the depletion of the ozone layer, [9] although individual participating countries have the latitude to exploit their own resources in accordance with their own environmental policies. [10]

In 1987 the Montreal Protocol [11] amended the Vienna Convention by specifically providing for the parties' gradual reduction in the production and consumption of chlorofluoro-carbons (CFCs) and other chemical substances. [12] The Montreal Protocol also set controls on the trade of such chemicals with non-parties. [13]

In 1990 the London Amendment strengthened these control procedures by requiring the parties to the Montreal Protocol to phase out the production of CFCs by the year 2000, and to gradually phase out other controlled substances by 2005. [14]

Climate Change Treaty and Kyoto Protocol

The Climate Change Treaty [15] seeks to stabilize greenhouse gas concentrations to prevent them from reaching levels which could endanger the climate system. [16] The developed countries who are parties to the agreement obligate themselves to take the lead in dealing with this climate control problem by promising to implement national policies and to take the corresponding measures to help assist in the reduction of greenhouse gas emissions. [17]

Despite the obligations imposed by the Climate Change Treaty, it placed no legally binding requirements on the parties. [18] The Kyoto Protocol of 1995, however, amended the Climate Change Treaty by imposing the specific legal requirements that the initial agreement lacked. [19] In particular, the Kyoto Protocol requires 39 specific industrialized and developed countries to reduce the emissions of greenhouse gases to five percent below 1990 levels between the years 2008 and 2012, [20] although it specifically declines to extend the reduction of emissions requirement to developing countries. [21]

The Convention on Environmental Impact Assessment

The Convention on Environmental Impact Assessment [22] addresses environmental problems that arise when one country's activity impacts the environment of a neighboring country. [23] The treaty lists 17 activities [24] believed to have the potential to affect the environment outside the borders of the country where the activity originates.

Parties to the treaty must take appropriate measures to prevent and control the environmental impact from those activities identified in the treaty as having this potential for transboundary environmental effects. The parties must notify any party that could be affected by the environmentally unsafe activity, and must implement an impact assessment procedure which permits public participation and preparation of the necessary documentation.

Although the parties signed this treaty in 1991, it will not enter into force until at least 16 of the signatories ratify the treaty. [25]

When doing business in or with a country that is a party to one of these environmental treaties, it is important to have a full understanding of the import of a particular treaty to a company's proposed activity. For instance, the Basel Convention places

requirements on the transboundary shipping of hazardous wastes, so in order to effectuate compliance with the treaty, a party must know what substances are considered wastes and whether those wastes are hazardous.

In the case of the Basel Convention, this task is not a simple one because the treaty broadly defines "wastes" to arguably cover not only items for disposal, but also materials intended for recycling purposes.[26] Thus, when recyclable material partially consists of elements considered to be hazardous, the Basel Convention regulates the trade of such recyclable material.[27]

Furthermore, when a company operates in a country which is a party to a particular treaty, it should take compliance measures to avoid the threat of liability. For example, in March of 1998, the Japanese government had to investigate and confirm reports that Japanese trading companies were exporting worn-out automobile tires to North Korea in violation of the Basel Convention.[28]

Bilateral Environmental Treaties

In addition to the international treaties involving many nations, environmental regulation is prominent in bilateral treaties, where neighboring states enter into treaties between one another. These bilateral agreements very often deal with environmental issues which arise at the border, where one country's activities affect the environment of the common border and the neighboring state.

For example, the United States and Canada are bound by the Great Lakes Water Quality Agreement, which limits the amount of copper discharged ***27** into the Great Lakes.[29] Last year, Ontario's largest public power company, Ontario Hydro, admitted to dumping 1,110 tons of toxic copper and zinc into Lake Ontario and Lake Erie over the past 25 years.[30] Although the company's liability under the Great Lakes Water Quality Agreement remains unresolved, its daily discharge of copper was twice the amount of the limit set by the treaty.[31]

International Trade Agreements — GATT and NAFTA

In the spirit of protecting trading practices, a few international laws actually limit the extent to which a country, state, or municipality can implement or apply laws that protect the environment.

The General Agreement on Trade and Tariffs (GATT)[32] requires a country to implement its environmental policy with the "least trade restrictive methods."[33] Thus, when one country implements a municipal law pursuant to an environmental treaty which imposes stricter standards than other countries, GATT has the authority to strike down the law as being discriminatory toward other nations with respect to trade.[34]

For example, in 1991 GATT struck down the United States' Marine Mammal Protection Act (MMPA) as being discriminatory against foreign exporters.[35] Although the United States could hold members of its own jurisdiction to environmental standards, it could not ban an acceptable product merely because it was not produced by means acceptable to United States' standards.[36] Presently, the World Trade Organization (WTO)[37] has jurisdiction to consider challenges to environ-mental rulings such as the one involving the MMPA, but there is an ongoing movement to prevent the WTO rules from thwarting multilateral environmental agreements.[38]

The North American Free Trade Agreement (NAFTA),[39] on the other hand, takes a different approach to the conflict between trade and environmental interests by addressing environmental concerns in conjunction with the trade goals.[40] Although NAFTA creates a free trade zone among Canada, the United States, and Mexico,[41] it also focuses upon the promotion, development, and enforcement of environmental policies. In its preamble, two of NAFTA's 15 resolutions address the environment.[42] An environmental side agreement to NAFTA, the North American Agreement on Environmental Cooperation (NAAEC), which went into force immediately after NAFTA became effective, also addresses these environmental issues.[43]

In general, NAFTA does not impose greater environmental requirements on the parties, but rather gives each country the power to preserve and maintain their environmental regulations in light of the free trade established, so long as the requirements are not discriminatory and have a reasonable scientific basis. [44]

More specifically, NAFTA preserves each country's right to choose an appropriate level of environmental protection; provides each country with the right to use standards more stringent than those imposed internationally to maintain that protection; and prohibits each country from lowering environmental standards for the purpose of attracting new investment. [45] Although NAFTA does not require the parties to have similar environmental standards, the ultimate goal is to reach a harmonization of requirements. [46]

Municipal Laws

A knowledge of the various environmental treaties and their parties is also helpful in determining whether a specific country might have certain environmental laws. For example, the United States ratified the MARPOL Protocol [47] and subsequently passed legislation [48] which made it a crime to violate this international treaty. [49]

In 1995, the Federal District Court in Florida fined Regency Cruises, Inc., a Tampa-based cruise ship company, $250,000 for deliberately dumping plastic garbage into the Gulf of Mexico, violating MARPOL and U.S. municipal law.

Reliance upon treaties alone to determine whether a particular nation regulates a certain environmental concern may be insufficient, however, because some nations may choose to follow the provisions of a treaty, regardless of whether it is a party to that treaty. For instance, although the United States has not ratified the Basel Convention, it imposes standards for the shipment of hazardous wastes similar to those imposed by the treaty. [50]

In 1994, the Environmental Protection Agency (EPA) filed a multimillion dollar lawsuit against a Louisiana company, Borden Chemicals and Plastics, claiming, in part, that it illegally shipped 150 tons of hazardous waste to South Africa in violation of U.S. law. [51]

Other Sources of International Law

Formal treaties are not the only source of international environmental law. Customary international law and soft law also play an integral role in international law-making. Understanding the significance of these laws and how they differ from one another ***28** and from treaty law is critical because each source of international law may call for compliance with a specific provision of environmental law.

Custom becomes a binding authority in international law when "states in and by their international practice ... implicitly consent to the creation and application of international legal rules." [52] Customary international law is often regional in nature because it evolves from the implied practices or norms of several states. [53] Whether certain states are bound may be entirely dependent upon whether they expressly dissented from the international law when it was being formulated. [54]

When dealing with international environmental law issues, the difficult part of a lawyer's job is determining whether a specific country is bound by a customary international law that requires compliance by a company which conducts an activity which may impact the environment.

Soft law is a legal phenomena in international law which refers to the non-binding international agreements or norms which have altered the process by which international law has developed over the past decade. [55] Although soft law is non-binding, it is not completely void of legal significance. [56] The concept of soft law has developed from the notion that resolutions and recommendations of international organizations "gradually acquire some legal value." [57]

The basic role of soft law is to raise expectations of conformity with legal norms, and to create uniformity in the creation of these norms. Once there is compliance with a uniform legal norm, the formation of binding hard law is a relatively simple task. [58]

Reliance on treaties to develop international law is often difficult because the formation and creation of them is time-consuming in nature. Soft law permits international parties to reach an agreement on issues more rapidly, and therefore respond more quickly to scientific and technological changes. [59] Over time, soft law could evolve into customary international law and thus become binding. [60] For example, a resolution by the General Assembly of the United Nations may indicate the attitudes of several states on a particular matter, and thus may be able to influence the creation of a customary international law. [61]

Additionally, soft law principles, such as United Nations resolutions and recommendations, need to be respected because blatant disregard of them, even if by mistake, could expose a company to a significant liability threat. An example of this is the "mistake" made by the Swiss firm, Ciba Geigy, when it accidentally delivered 117,000 gallons of a deadly insecticide containing DDT to a Tanzania cotton marketing board. [62] The company's action violated a United Nations code of conduct, and thus presented Ciba Geigy with a threat of liability. [63]

The importance of understanding soft laws does not rest in the notion that certain soft laws dictate current international environmental laws that require compliance, but rather that they indicate current trends in international law which may be turned into binding law in the future. This is especially true in the environmental law context because a plethora of nongovernmental organizations exist which attempt to influence the creation of new regulations by petitioning soft law instruments. In addition, the policies of international entities, such as the World Bank, sometimes adopt soft law principles. [64] For example, when the World Bank places environmental requirements derived from soft law into their lending policies and conditions, international actors have additional reason to comply because of the financial incentives. [65]

One specific soft law instrument making its presence known in international environmental law is the ISO 14000. [66] It intends to provide all industries with a structure for an environmental management system that will ensure all operational processes are consistent and effective and will achieve the stated environmental objectives of a given organization. [67]

ISO 14001 details the basic requirements a company must meet to have an efficient management system (EMS). [68] Once a company develops an EMS, it can apply for ISO 14001 certification. [69] Although there are costs and potential problems associated with applying for certification, merely doing so provides companies with some benefits as well. [70] Furthermore, once a company becomes ISO 14001 certified, it puts itself in a better position within the global market because, as more larger multinational companies become certified, they likely will require their suppliers to be certified as well. [71]

Thus, even though ISO 14001 certification is not a binding environmental provision, it could affect the ability of a company to do business in the global market in the near future.

Conclusion

International environmental law is a growing field of law derived from a variety of sources of authority. Manufacturers, importers, and exporters participating in the global market must perform proper due diligence whenever they deal with activities which may effect the environment. Due diligence is especially important in this field because the law is constantly changing and expanding. Practitioners representing clients in the global market must make the effort to stay abreast of these environmental laws, while recognizing that clarity or great consistency will not come quickly.

Footnotes

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1 In addition to international laws, there are also international standards such as those promulgated by the International Organization for Standardization (ISO). Two of the ISO standards (ISO 9000 and ISO 14000) play a significant role in compelling international companies to reach an acceptable standard of care in their operations. In particular, ISO 9000 addresses the development and implementation of management systems in technical services (*i.e.*, environmental consultants). ISO 14000 addresses environmental management systems, environmental audi-ing, environmental performance, environmental labeling, and life cycle analyzes.

2 The Basel Convention defines hazardous waste based upon the provisions in the national laws of the individual signatories, thus creating a definition which is not universal, but rather country. See John C. Bullock, The Basel Convention and Trade (January19, 1996) <gopher:// gopher.igc.apc.org/00/orgs/gets/gets.library/27>.

3 *See* TED Case Studies (visited October 20, 1998) <http:// gurukul.ucc.american.edu/ted/BASEL.htm>.

4 *See id.*

5 Mitchell Zuckoff, US sues over La. firms toxic-waste shipping, The Boston Globe, October 28, 1994, available in 1994 WL 6007039.

6 The Ozone Secretariat (visited October 26, 1998) <http:// www.unep.ch/ozone/vc-text.htm>. This web site contents the complete text of the Vienna Convention.

7 *See id.* at 102. The chemical substance list in Annex I to the Vienna Convention includes: carbon substances; nitrogen substances; chlorine substances; bromine substances; and hydrogen substances. *See id.*

8 *See* Nelson, *supra* note 1 at 101.

9 *See id.*

10 *See id.*

11 The Montreal Protocol is an amendment to the Vienna Convention. The official name is the Montreal Protocol on Substances that Deplete the Ozone Layer (hereinafter, the "Montreal Protocol.

12 *See* Nelson, *supra* note 1 at 102.

13 *See id.* The controlled substances were organized into various annexes. *See id.* The parties immediately banned the import of substances listed in Annex A from non-parties and called for the further ban on importing substances in Annex B within one year of the enforcement of this protocol. *See id.*

14 *See* Policy Instruments Database (ENTRI) - UNEP Summary File (visited October 26, 1998) <http://Sedac.ciesin.org/pidb/register/reg133.rrr.html> (containing a summary of the London Amendment). The London Amendment also provided for tighter provisions on the trade of controlled substances between parties and non-parties.

15 The official name is the 1992 United Nations Framework Convention on Climate Change (hereinafter, the "Climate Change Treaty").

16 Nelson, *supra* note 1 at 99-100.

17 *See id.* at 100. The developed countries also obligated themselves to provide financial help to developing countries to assist them in implementing the necessary measures for reducing their emissions of greenhouse gases. *See id.*

18 *See id.*

19 *See id.* at 101.

20 *See id.* For example, the United States must reduce emissions by seven percent and Japan by eight percent. *See id.*

21 *See id.* The controversial aspect of the Kyoto Protocol in general is the fact that the emissions regulation does not apply to developing countries. *See id.*

22 The official name is The Convention on Environmental Impact Assessment in a Transboundary Context (hereinafter, the "Convention on Environmental Impact Assessment).

23 *See* Convention on Environ-mental Impact in a Transboundary Context (1991) (visited October 26, 1998) <http://www.tufts.edu/departments/fletcher/multi/texts/BH986.txt> (providing the full text of the Convention on Environmental Impact Assessment).

24 Some of the activities listed include: nuclear power plants and storage facilities; major installations for the initial smelting of cast-iron and steel and for the production of non-ferrous metals; installations for the extraction of asbestos and for the transformation of asbestos and products containing asbestos; integrated chemical installations; large-diameter oil and gas pipelines; waste disposal installations for the incineration, chemical treatment, or landfill of toxic and dangerous wastes; and major storage facilities for petroleum, petrochemical, and chemical byproducts. *Id.* at Appendix I.

25 *Id.* at Article 18(1). The United States is a signatory but has yet to ratify the treaty. *See* Pace Environmental Law Library (visited October 26, 1998) <http://www.law.pace.edu/env/impact.html>.

26 *See* Bullock, *supra* note 3.

27 *See id.*

28 Japan Asked to Provide Details of Waste Shipments, The Korea Herald, March 18, 1998 available in 1998 WL 7565210.

29 *See* Barry Brown, Ontario Hydro Admits Massive Dumping in Lakes, Buffalo News, May 25 1997, available in 1997 WL 6437965.

30 *See id.*

31 *See id.*

32 GATT stands for the General Agreement on Trade and Tariffs. The Uruguay Round amended GATT in 1994 to include the "least trade restrictive methods" language. In general, GATT prohibits countries from making laws which

discriminate against the import of certain products because of their state of origin. *See* Nelson *supra* note 1 at 10-11. Although initially created after World War II to combat the problems associated with world tariff barriers, GATT's reach has extended to dealing with non-tariff barriers. *See id.* An individual country's environmental laws have produced a new form of "barrier" and GATT has turned its attention to eliminating these barriers. *See id.*

33 Nelson, *supra* note 1 at 11.

34 *See id.*

35 *See id.* The MMPA banned the import of Mexican tuna because it caught the fish using outdated technology which unnecessarily killed many dolphins. *See id.*

36 *See* Ernest E. Smith, Environmental Issues for the 90s: Golden-Cheeked Warblers and Yellowfin Tuna, 47 Me. L. Rev. 345, 361 (1995).

37 The World Trade Organization (WTO) was established in 1993 by the Marrakesh Agreement to act as an umbrella administration for GATT.

38 International Trade: WTO Rules Must Not Thwart International Agreements, June 10, 1998.

39 NAFTA is formally known as the North American Free Trade Agreement.

40 *See* Nelson, *supra* note 1 at 12.

41 *See id.*

42 *See id.*

43 *See* Pace Environmental Law Library (visited October 26, 1998) < www.law.pace.edu/env/general-intagr.html#NAAEC>. NAFTA also established the Commission for Environmental Cooperation (CEC) to monitor the impact of NAFTA on the environment by tracking the progress of the three countries in adopting and enforcing environmental laws. *See* Nelson, *supra* note 1 at 13. The CEC is also charged with the duty of promoting and establishing a long-term enforcement process. *See id.*

44 *See* Paul, Hastings, Janofsky, & Walker, North American Free Trade Agreement: Summary and Analysis 109 (1993).

45 *See* Nelson, *supra* note 1 at 13 (citing Martha M. Ezzard, "NAFTA and U.S./Mexico Relations," presented at the Center for Teaching International Relations Graduate School for International Studies, University of Denver, Denver, Colorado (June 29, 1993)). NAFTA pronounced eight commitments of the agreement regarding environmental policy:

1. The trade obligations of the NAFTA countries under specified international environmental agreements regarding endangered species, ozone depletion substances (Montreal Convention), and hazardous wastes (Basel Convention) will take precedence over NAFTA provisions, subject to a requirement to minimize inconsistencies with NAFTA.

2. The right of each country to choose the level of protection of human, animal, or plant life or health or of environmental protection that it considers appropriate is preserved.

3. Each country may maintain and adopt standards and sanitary and phytosanitary measures, including standards more stringent than international standards, to secure its chosen level of protection.

4. The NAFTA countries will work jointly to enhance the protection of human, animal, plant, health, and the environment.

5. No NAFTA country shall lower its health, safety, or environmental standards for the purpose of attracting investment.

6. When a dispute regarding a country's standards raises factual issues concerning the environment, that country may choose to have the dispute submitted to NAFTA dispute-settlement procedures rather than to procedures of other trade agreements.

7. NAFTA dispute-settlement panels may call on scientific experts, including environmental experts, to provide advice on factual questions related to the environment and other scientific matters.

8. In dispute settlement, the complaining country bears the burden of proving that another NAFTA country's environmental or health measure in\ >s inconsistent with NAFTA.

Id.

46 *See* Paul, *supra* note 55 at 109. Although Mexican standards are lower than that of the United States and Canada, the hope is that in the long run, the goal of harmonization will tighten the standards on Mexico to bring them more in line with the other countries. *See id.*

47 The MARPOL Protocol was entered into force in 1983 and amended and incorporated the MARPOL Convention, a treaty on the same topic which was never entered into force. *See* <www.law.pace.edu/env/seafish.html>. The official name of the MARPOL Convention is the International Convention for the Prevention of Pollution from Ships. *See id.* The MARPOL Protocol was designed to prevent ships from discharging certain substances harmful to marine and human life into the seas. *See id.*

48 The United States passed the Act to Prevent Pollution from Ships (APPS). *See* 1995 WL 299808 (D.O.J.), March 8, 1995.

49 *See id.*

50 *See* Zuckoff, *supra* note 7.

51 *See id.*

52 Janis, *supra* note 1 at 36.

53 *See id.* at 37.

54 *See id.*

55 *See* Layla A. Hughes, Structure of International Law, 10 Geo. Int'l Envtl. L. Rev. 243, 246 (1998).

56 *See* Janis, *supra* note 1 at 44.

57 Nelson, *supra* note 1 at 55.

58 Hughes, *supra* note 66 at 246.

59 *See id.*

60 *See* Janis, *supra* note 1 at 44.

61 *See id.*

62 *See* Associated Press, Swiss Chemical Firm Says it Sold DDT to Tanzania by Mistake, The Associated Press, Wednesday, May 8, 1991, available in 1991 WL 6185199.

63 *See id.*

64 *See* Hughes, *supra* note 66 at 247.

65 *See id.*

66 ISO 14000 is "a series of voluntary international standards covering environmental management tools and systems developed by the International Organization for Standardization (ISO). Suzan] Jackson, ISO 14000: What you need to know 59:10 Occupational Hazards 127, (October 1 1997).

67 *See id.*

68 Carey A. Mathews, The ISO 14001 Environmental Management Standard: An Innovative Approach to Environmental Protection, 2 ENVTL. LAW. 817, 822 (June, 1996). These requirements are: "to create a defined policy to which the organization is committed; to devise a plan to meet the policy's objectives; to implement the plan; to continually monitor environmental performance and to take any appropriate corrective action; and to scrutinize the EMS through management review." *Id.*

69 *See* International Standards Companies Face Both Risks, Boons in Applying for ISO 14001 Certification, Hazardous Waste News, July 6, 1998, available in 1998 WL 10239862.

70 *See id.* For instance, companies may benefit from lower insurance premiums and broader coverage because they allowed themselves to be environmentally audited, thus posing lower environmental risk. *See id.*

71 *See* Mathews, *supra* note 79 at 827.

195-FEB NJLAW 25

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