

Emerging Issues: Global Agreements

Analysis of Emerging Market Development Options Report #5

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NOTE: Legislation (SB 63, Strickland, Chapter 21, Statutes of 2009) signed into law by Gov. Arnold Schwarzenegger eliminated the California Integrated Waste Management Board (CIWMB) and its six-member governing board effective Dec. 31, 2009.

CIWMB programs and oversight responsibilities were retained and reorganized effective Jan. 1, 2010, and merged with the beverage container recycling program previously managed by the California Department of Conservation.

The new entity is known as the Department of Resources Recycling and Recovery (CalRecycle).

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Forward

Emerging Issues: Global Agreements is one of five reports prepared in connection with the Board's Analysis of Emerging Market Development Options. As outlined in **Meeting the Challenge: A Market Development Plan for California**, the analysis was undertaken to better understand several policy options and issues concerning recycling market development in California.

Four additional Board reports were prepared as part of this project:

Report #1: *Summary Report on Emerging Market Development Options*, prepared by Board Staff, summarizes the key findings of the entire project.

Report #2 *Manufacturer Responsibility Options to Support Integrated Waste Management*, prepared by Board Staff, with contractual assistance by Resource Integration Systems, Ltd., and California Futures, Inc.

Report #3 *Fee System Options to Support Integrated Waste Management*, prepared by Booz-Allen & Hamilton, Inc.

Report #4 *Tradeable Credit Applications to Integrated Waste Management*, prepared by Board Staff.

The reports are available by contacting the Board at (916) 255-2296.

EMERGING ISSUES: GLOBAL AGREEMENTS

Chapter III of the California Integrated Waste Management Board's Market Development Plan noted that more research would be needed before the Board could pursue all the market development options listed in the Plan. The Board is concerned that international trade agreements and federal law may constrain the State of California in its ability to enforce market development legislation which the Board might recommend. The Plan suggests that the General Agreement on Tariffs and Trade (GATT), the North American Free Trade Agreement (NAFTA), and the Basel Convention might call into question whether California can effectively pursue minimum content legislation. The federal Sherman Anti-Trust Act similarly might pose problems for aggressive market development initiatives by the State. Questions about conflict with First Amendment rights to free speech have even been raised regarding environmental labeling laws. The issue papers that follow examine so-called "global agreements" for their potential to limit California's choice of market development options.

Because the impetus for this work came out of the Board's Market Development Plan, this paper explores in detail only the effects of global agreements on market development options. Questions regarding the relevance of global agreements on other aspects of integrated waste management, such as disposal and incineration, are mentioned as appropriate but not discussed to any degree.

The focus of this analysis is legislative. The Board can use the objective information in the issue paper to respond to legislative proposals. The analysis also provide information the Board would need as it develops its own legislative proposals.

What follows is a separate issue paper for each of the global agreements. Each issue paper is based on a literature review. Each provides summary background information, an analysis of the relevance of the agreement to the market development work of the Board, and an identification of any key issues requiring additional research.

The General Agreement on Tariffs and Trade & Minimum Content Laws

Issue: Do California's minimum content laws constrain international trade and therefore violate GATT?

California's minimum content requirements for glass bottles may be seen as a significant trade barrier to *European Community* members, according to a Los Angeles Times article. This concern reflects a departure from the usual ones raised regarding the relationship between international trade and environmental laws. Generally, there are misgivings that stringent US environmental laws would make US companies less competitive than those in countries with less restrictive environmental regulation. Only now are questions being asked about whether US environmental laws put foreign companies at a disadvantage in selling to America. The matter is by no means resolved, but it appears that minimum content laws can be devised which promote recycled content product manufacturing without causing violation of GATT or other free trade agreements.

Background:

GATT, the General Agreement on Tariffs and Trade is a series of agreements to reduce interference with international trade. The first GATT was established in the late 1940s, following the global economic disruptions caused by World War II. It was to be a temporary solution until an International Trade Organization could be formed within the United Nations. That never happened. However, today GATT operates essentially as an independent body within the United Nations.

The United States became a contracting party to GATT by executive order¹ and presidential proclamation.² The Senate has never yet given its consent nor has the Congress formally approved or implemented the Agreement. American trade law does, however, recognize participation of the United States in GATT.

Under GATT, contracting parties³ have a number of basic obligations:

1. To apply unconditional "most-favored-nation" status to all other contracting parties; i.e., to treat all contracting parties' goods equally, without discrimination regarding the place of origin. Article I, Paragraph 1, contains this provision.
2. To maintain tariffs at or below negotiated levels (Article II). The specification of each party's tariff concessions is called "bindings."
3. To apply a national standard to the regulation and taxes affecting like goods from other contracting parties. That is domestic and foreign goods are treated the same with respect to internal regulations and taxes. Article III sets forth the national treatment obligation. Any law or regulation that applies equally to imported and domestic goods and which is, by implication, nondiscriminatory, would likely be found consistent with GATT.
4. Article III, Paragraph 5, prohibits domestic content requirements and quantitative regulations that act to protect domestic production:

"No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1."

¹ Protocol of Provisional Application, October 30, 1947, 61 Stat. pt. 6, at A2052.

² Presidential Proclamation No. 2761A, 12 Fed. Reg. 8863 (1947).

³ GATT defines "contracting parties" as (1) the collective member nations acting in their individual capacities and (2) the members acting jointly. In the latter case, according to Article XXV, Paragraph 1, GATT spells the term in capital letters: CONTRACTING PARTIES.

5. To refrain from imposing import quotas (Article XI).
6. Article XI, Paragraph 1 and 2, recognizes the right of governments to use domestic subsidies to help achieve social and economic goals. However, GATT and the GATT Subsidies Code negotiated during the Tokyo Round also allow imposition of countervailing duties to offset economic harm to other contracting parties caused by the subsidies.⁴ If a government provides a subsidy that serves to increase its exports or reduce imports, then the government has an obligation to give notice and consult with other parties.
7. Article XX provides exceptions to be made for security reasons. That is, a contracting party may restrain trade:
 - ▶ if necessary to "protect human, animal or plant life and health" (Article XX:(b)) or
 - ▶ if the measures are "related to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." (Article XX:(g))

The Tokyo Round negotiated the rules clarifying Article XX exceptions now found in the GATT Standards Code.

The current trade talks aimed at improving the GATT could alter the ability of countries to affect trade through environmentally motivated domestic regulations, such as those relating to labeling and packaging. Called the "Uruguay Round" because they are occurring at the resort of Punta del Este in Uruguay, this eighth round of GATT negotiations is officially "the Uruguay Round of Multilateral Trade Negotiations." Begun in 1986 and scheduled for completion in 1990, the Uruguay Round has been extended through 1993. Its primary focus has been on reducing non-tariff barriers to trade. If the Uruguay Round succeeds, there will be new rules governing movement of capital, the rights of foreign investors, intellectual property rights, technological development, and trade in and production of services (e.g., banking).

GATT's norm is liberal trade (i.e., as free as possible). GATT's purpose is to prevent nations from erecting trade barriers which cause other nations to be at a competitive disadvantage. To this end, GATT requires international trade to be carried out according to "free trade" principles. The

⁴ Levying countervailing duties to compensate with the "subsidy" caused by lower standards in other countries poses problems. First, they are cumbersome to administer. Furthermore, GATT would also likely find them to be a violation if challenged. Finally, such duties are of doubtful effectiveness in undoing any competitive disadvantage from different environmental standards.

contracting parties (98 member countries) accede to the GATT even though there is no formal treaty relationship among them all. They have as a common objective the substantial reduction of tariffs and other trade barriers.

GATT reduces trade barriers in negotiating rounds, such as the current Uruguay Round. Participating countries negotiate reciprocal reduction in barriers (e.g., elimination of quotas, lowering of tariffs). For example, in return for concessions, each country agrees to fix tariffs for certain products to a specified tariff rate for a given time period. If one country receives a concession regarding a trade barrier, all member countries must be given the concession.

GATT Codes are supplementary agreements which are in effect only between the member countries (as few as two) who sign them. The United States and its major trading partners have entered into a number of such arrangements, relating to subsidies, dumping, and government procurement (all in the more general, not just solid waste, sense).

Analysis of Issue:

In enacting minimum content laws California is probably safe from charges of violating GATT. Two reasons lead to this conclusion:

- (1) Minimum content laws can be drafted which do not create distinctions that put foreign products at a disadvantage.
- (2) There are some who maintain that GATT does not obligate states as it does nations.

The "National Treatment Principle" is one of GATT's most important principles. This principle holds that no member country's internal taxes and regulations should discriminate against any goods or services on the basis of whether they are imported or not. Through this provision, imports may not be explicitly discriminated against. Thus, any minimum content law that does not discriminate on the basis of origin country should comply with GATT.

Domestic laws and regulations can have the effect of constraining international trade to the extent to which domestic products can more readily comply with the laws and regulations. For example, a Danish law requires beer and soft drink containers be returned for reuse. Only Danish companies are

likely to be able to comply. Thus, foreign beer and soda pop companies will be closed out of trade in Denmark. Unilateral distinctions that apply domestic law internationally through trade sanctions (e.g., the US ban on tuna imports from countries whose fishing practices cause excessive dolphin kill) have been found to violate GATT.⁵ Minimum content bills should pass muster regarding GATT if they are drafted to be neutral regarding the place of product origin.

In any case, violation of GATT may be a non-issue as far as California law and programs go.⁶ GATT Article XXIV, Paragraph 12, requires the parties to GATT to try to persuade states and local governments from taking actions that might interfere with free trade. GATT does not oblige nations to force their political subdivisions to abide by GATT principles:

"Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory."⁷

If a contracting party to GATT (i.e., a signatory nation) imposes a restriction that interferes with open trade, this would be a violation of GATT. Whether the same restriction imposed by one of its political subdivisions would violate GATT is a matter of some disagreement.

Some maintain that the "reasonable measures" provision does not free political subdivisions of GATT obligations but merely recognizes that in federal government some matters are beyond the control of the central government. A United States delegate very early in the GATT negotiations indicated:

"...Although he could not speak decisively, he thought that the United States would be able to control the actions of states in this matter."⁸

⁵ "...it is not possible under GATT's rules to make access to one's own market dependent on the domestic environmental policies or practices of the exporting country." (Pg. 7, T & E, Note 17)

⁶ The issue of whether GATT obliges political subdivisions was recently raised during the controversy over the California Environmental Protection Act of 1990 ("Big Green") ballot initiative. The United States International Trade Commission was investigating the issue until the Initiative's defeat.

⁷ Article 3, Paragraph 1, contains similar language.

⁸ Quoted in Jackson, 1969, p. 113, regarding a conversation that occurred in 1946.

On the other hand, historical records from the time seem to show that the intention was to enable governments that constitutionally could not impose their will on their subdivisions to be able to put GATT into provisional effect as soon as the Geneva Conference ended.

Those that feel that subdivisions are not obligated say that Article XXIV, Paragraph 12, was written to recognize that there may be instances in which subdivisions can act contrary to GATT provisions. In those cases, the federal government would be obligated to try to change the situation with "reasonable measures." This was a State Department contention in testimony before the Senate in 1949, less than two years after GATT was signed.⁹ In fact, a United States delegate to the drafting of GATT is quoted as saying during the GATT negotiations:

"(it) is necessary to distinguish between central or Federal governments, which undertake these obligations in a firm way, and local authorities, which are not strictly bound, so to speak, by the provisions of the Agreement, depending on the constitutional procedure of the country concerned."¹⁰

In the Baldwin-Lima-Hamilton Corp. v Superior Court case, the US Department of State opposed the application of GATT to states and territories. The courts took the position in Baldwin-Lima-Hamilton Corp. v Superior Court and in Bethlehem Steel Corp. v. Board of Commissioners that GATT applies to state and territorial law. The question in the United States thus seems to hinge on whether federal executive regulation is superior to local law.

⁹ However, Jackson, 1969, p. 114, suggests that testimony that the federal government lacked the power to compel action by local governments may have derived from a desire to downplay the reach of GATT. Opposition to GATT was growing, and several senators were hostile.

¹⁰ Quoted in Jackson, 1969, p. 112.

Options:

(1) The State of California could take the chance that GATT does not obligate subdivisions of contracting parties and draft minimum content laws without concern for their effect on international trade. The penalty for "guessing wrong" would seem slight given that GATT isn't enforced.

From the standpoint of the United States, GATT is just an agreement, not a treaty. When GATT was established in the late 1940s, it was ratified by the President under previously delegated Congressional authority.¹¹ The Agreement has no general assembly or organization of its own. It merely has "contracting parties" which agree to act in concert to promote free trade. GATT has procedures for resolving trade disputes, but any country can veto any ruling against it. The GATT is in effect only to the extent that participating countries voluntarily comply.

Disputes are settled by consultation under GATT Article XXII or by referring the matter to the contracting parties as a whole under GATT Article XXIII. There has been some dissatisfaction with the system because it lacks deadlines and no one has the capability of enforcing a settlement. For example, when one nation takes an action which another feels interferes with free trade, the second nation can contest the action to GATT. A GATT dispute resolution panel reviews the case and makes a finding whether the first country's action has violated GATT's rules of international trade. Before the finding is made final, the panel's report must be adopted by the GATT Council as an official GATT decision.

Under current GATT practice, the United States can take steps to prevent being forced to change its actions.

- ▶ The US can block the GATT Council's adoption of the panel's report.
- ▶ The US can refuse to change the laws or regulations that caused it to take the contested action in the event that the Council adopts an adverse ruling.

¹¹ The Congress refused to ratify a treaty, the Havana Charter, which would have created an International Trade Organization.

Currently, ignoring a ruling is not penalized to any great degree. Other countries, however, may exert peer pressure to dissuade the US from resisting the exercise of GATT against US action.¹² Furthermore, the Uruguay Round of trade talks is considering strengthening the penalties against any country that refuses to abide by GATT Council rulings.

(2) California could draft its minimum content laws to take into account GATT's free trade principles. This is the recommended option.

Recommendation:

As much as possible California should draft its minimum content laws to avoid putting foreign producers at a competitive disadvantage:

- (1) Minimum content laws should conform to the non-discrimination provision of GATT Article I, Paragraph 1.
- (2) Minimum content laws should be framed so as to allow foreign producers to comply without undue hardship in accordance with Article III.
- (3) The laws should not be protective of domestic production to the detriment of foreign production (Article III, Paragraph 5).¹³
- (4) Minimum content laws should be clearly relate to "conservation of exhaustible natural resources...in conjunction with restrictions on domestic production or consumption." (Article XX:(g))

¹² Retaliation is also a possibility. For example, if one country is found to have prevented or limited access to its markets of a good produced by another country, then the producing country can retaliate by closing its markets to goods from the violating country. Furthermore, the type of goods involved in the retaliation need not be the same as those in the violation. The violated country can take "cross-retaliation actions" against the offending country. For example, recently the US cross-retaliated against French white wine sales into the US in response to a GATT violation of free trade related to French oil seed, among other things.

¹³ Tradable credits would seem to resolve any issue that a minimum content law is in violation of GATT's national treatment clause.

The General Agreement on Tariffs and Trade & "Buy-Recycled Laws"

Issue: Will expanded "buy-recycled" efforts violate GATT?

Currently, GATT appears to allow liberal preferences in government procurement. However, suggested amendments to GATT could require more careful crafting of future buy-recycled laws to be sure that they do not exclude foreign producers of recycled-products.

Background:

Governments may prefer to buy domestic products to protect domestic jobs and promote social goals. For example, there are Buy-American¹⁴ policies and purchase preferences for products from small businesses and minority- and women-owned enterprises. However, overtly Buy-American preferences, whose stated intent is to exclude purchases of foreign-made products, have been found to be unconstitutional.¹⁵

Countries other than the US frequently use government procurement as a means of developing domestic technologies. For example, the Japanese government buys Japanese supercomputers rather than faster American-made ones because of a desire to help the Japanese supercomputer industry develop. The purpose is to enhance the competitiveness of Japanese industries.

¹⁴ This preference is not a recent phenomenon. The Buy American Act of 1933 was passed to protect American jobs during the Depression.

¹⁵ A California, Buy-American law was made inoperative by a 1968 appellate court decision that such law is unconstitutional. (Bethlehem Steel Corp. v. Board of Commissioners of the Los Angeles Department of Water and Power, 276 Cal App. 2d 211, 224, 80 Cal. Rptr. 800, 802 (1969)).

The GATT Procurement Code (and the Trade Agreements Act of 1979 which implemented it in US law) eliminated some Buy-American preferences. Signatory countries are required to treat foreign-made goods the same as domestic ones. Not all government procurement is covered, however. In the EC and the US, national agencies responsible for telecommunications, water, energy, and transportation are not covered. The US has also exempted purchases reserved for small and minority businesses.

Federal Buy-American preferences are specific to certain industries, including the paper industry. With the preference, government agencies can pay 6 percent (or sometimes 12 percent) more than the lowest foreign product bidder in order to buy American.

Analysis of Issue:

One European Community (EC) priority in the Uruguay Round relates to government procurement. The EC wants the GATT Government Procurement Code expanded to cover all non-defense public procurement. Through this code, all signatory countries would be required to treat equally, regardless of origin, all products which their public agencies procure. This change may seem advantageous to the US in that it would counter a trend for American companies to manufacture overseas in order to sell their products "domestically" in those overseas countries.

Options:

Not applicable.

Recommendation

Draft "buy-recycled" laws in a way which does not exclude foreign producers. For example, the laws should not specify that California secondary materials be used in any given proportion.

The North American Free Trade Agreement & California Market Development Efforts

Issue: Will the North American Free Trade Agreement impede market development activities initiated by California?

The North American Free Trade agreement (NAFTA) between the United States, Mexico, and Canada contains an equal enforcement clause to prevent the use of environmental standards to keep out foreign products. That is, any environmental standard must be applied equally to domestic and foreign North American products or packages. Furthermore, the treaty would not limit the severity of any standard if there is some scientific basis to the standard. This should mean, for example, that California minimum content laws would not be in violation of NAFTA provided they are applied irrespective of the product's or package's place of origin¹⁶. Thus NAFTA likely will not act as a constraint to State of California market development activities.

Background:

The North American Free Trade agreement is designed to enhance trade in North America. NAFTA embodies two main principles: No tariffs and equal enforcement of standards. NAFTA's goal is elimination of all trade barriers among the three North American countries over a 15 year period.

Analysis of Issue:

There are two aspects to consider regarding NAFTA's effect on California's market development efforts: Whether California can enforce product and packaging standards and whether California recycling industries will be helped or hurt if NAFTA is signed.

¹⁶ Demetrakekes.

- (1) NAFTA might actually make environmental protection laws more effectively enforced. The agreement provides that a signatory can restrict imports that are found to interfere with local environmental protection efforts. For example, Canadian law allows packagers to decide how to meet the goal of cutting in half the amount of waste being landfilled by 2000. Canadian packagers are generally responding through source reduction. If the provinces determine that meeting the goal is being jeopardized by importation of over-packaged American products, then NAFTA would allow Canada to restrict American imports. A similar situation could occur with respect to California market development efforts.
- (2) NAFTA might actually help certain US recycling manufacturers. According to an earlier Board study of NAFTA¹⁷ representatives of the Glass Packaging Institute believe that NAFTA will increase the competitiveness of domestic glass container manufacturers compared to Mexican glass and perhaps slow the decline of the California glass industry. Neither the scrap metal nor the secondary paper industries seem to see NAFTA as a threat.

If there is any effect of NAFTA on trade between the United States and its nearest neighbors, Mexico and Canada, it ought not to be too dramatic. The United States already has bilateral agreements with Mexico and Canada concerning movement of waste across our mutual borders. These date from 1986.¹⁸ Furthermore, a decree by the President of Mexico allows waste imported for the purpose of recycling while prohibiting waste imported for disposal.

Options:

- (1) Wait and see. There have been questions raised in the press that Congress might not ratify NAFTA anytime in the foreseeable future¹⁹. In any case, NAFTA is unlikely to take effect before early 1994. Mexico, Canada, and the US initialled the Agreement in October 1992, but it needs legislative ratification by the three countries.

¹⁷ Boisson, p. 7.

¹⁸ Agreement Concerning the Transboundary Movements of Hazardous Waste, October 28, 1986, between the United States and Canada and Agreement of Cooperation Between the United States and United Mexican States Regarding Transboundary Shipments of Hazardous Wastes and Hazardous Substances, November 12, 1986.

¹⁹ It should be noted, however, that a similar agreement has already been signed between the United States and Canada.

(2) There is a concern that strengthening environmental laws in the US will give countries with weaker standards a competitive advantage. To the extent that this concern is valid, there are options to reduce the threat. One solution is seen in negotiating to persuade the other country to raise standards.²⁰ However, there may be little basis for concern.

Research²¹ shows that environmental regulation in the US has seldom caused manufacturers to relocate overseas, nor has it damaged US trade in manufactured goods. Rather, market access and lower labor costs have been primary motivation to relocate. Only in the case of Mexico border areas has US environmental regulation actually been a factor in relocation of companies. Even there, the deciding factors have been proximity to US markets, low labor costs, and the existence of duty-free export processing zones south of the border.

Although environmental regulations affect the competitiveness of companies relatively little in general, some sectors may be particularly hard hit. This is, those industries with high compliance costs are most likely to be disadvantaged by US environmental regulations. On the other hand, some "leading edge" US firms have turned environmental regulations to their advantage.

Recommended Actions:

Not applicable.

²⁰ "Harmonization" is the term used to describe this process. Harmonization is brought about by making the laws and regulations in trading partner countries similar. The limitation is that different countries have differing needs, so they are unlikely to be able to pass entirely similar laws and regulations.

²¹ See Demetrakakes, Boisson, and Office of Technology Assessment.

The Basel Convention & Foreign Markets for Secondary Materials

Issue: How does the Basel Convention affect the ability of California to market secondary materials overseas?

It would appear that the Basel Convention applies very little to the trade of scrap materials between nations. The Convention addresses the inequity between rich and poor nations that causes poor ones to be receptive to the import of waste for disposal in exchange for a fee paid by exporting nations. The Convention regulates the use of poor countries as dumping grounds for rich countries' wastes. In the case of trade in scrap, the situation is reversed: the importing country (whether rich or poor) pays exporters for the scrap they import. Thus, there should be less concern over inequity when the trade involves a valued commodity.

Background:

The Basel²² Convention²³ establishes protocols for hazardous waste²⁴ management and transport.²⁵ The Convention became effective in May 1992. Federal legislation is required for the US to become a party to the Convention.

²² Alternatively spelled "Basel" and "Basle."

²³ The full title is "Basel Convention on Transboundary Movements of Hazardous Waste and Their Disposal."

²⁴ Annex II of the Basel Convention lists two categories of waste which the Convention mentions for special consideration: wastes collected from households and residues arising from the incineration of household wastes. These "other wastes" are subject to the same restrictions as Article 4 of the Convention (General Obligations) applies to movements of hazardous wastes.

²⁵ The United Nations Environmental Programs drafted the Convention to address transfrontier solid waste trade. The Environmental Committee of the Organization for Economic Cooperation and Development (OECD) contributed to the Convention's development. The Convention was signed by 116 countries and the European Community in March 1989, in Basel, Switzerland.

The Basel Convention recognizes six principles regarding the management of hazardous wastes²⁶:

1. The amount of hazardous waste should be reduced.
2. Countries should share information on hazardous waste disposal methods.
3. Countries should promote environmentally sound waste management.
4. Wastes should be exported only in those exceptional cases when the country of origin cannot adequately manage the wastes because of physical or technical limitations.
5. All transfrontier (also called "transboundary") waste movements should be strictly controlled.
6. There should be more international cooperation in the management of hazardous wastes.

Under the Basel Convention, governments of contracting countries must abide by the six principles. No party to the Convention can ship waste to a non-party unless a separate agreement exists between the two²⁷.

Led by representatives of Third World organizations, such as the Organization of African Unity, drafters of the Convention stressed the sovereign right of nations to ban the import of hazardous wastes. Contracting parties are obligated to ensure that no such wastes are shipped to a country that bans hazardous waste imports. Illegal shipments are subject to criminal sanctions.

Analysis of Issue:

Adherence to the Basel Convention might ultimately help domestic efforts to encourage waste minimization and recycling, according to a director of the OECD²⁸. He notes that waste export

²⁶ Hazardous wastes are wastes of detrimental nature (toxic, corrosive, explosive, combustible) which could cause harm if improperly managed.

²⁷ The United States is not yet a party to the Convention: Mexico and Canada are. The US has the necessary agreements with Canada and Mexico.

²⁸ William L. Long, Director of the Environmental Directorate of the OECD, Paris.

deprives domestic industry of feedstock. If implemented as intended, the Basel Convention should decrease transboundary trade in hazardous waste and thus improve supplies for domestic industries.

That is not to say that the Basel Convention is completely satisfied by free international trade in scrap commodities. The 1972 Stockholm Report of the United States Conference on the Human Environment, which set the stage for the Basel Convention, makes an important point:

"States have...the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction."

It might not be acceptable under the Basel Convention to export scrap to another country for processing that causes environmental damage in the importing country. The export of scrap containing hazardous constituents, such as heavy metals and toxic materials, to be processed in a country with lax environmental regulations would seem to contravene the Basel Convention.

Provisions of the Resources Conservation and Recovery Act provide many of the same protections against international dumping as the Basel Convention. The law (42 USC Section 6938(a)) requires informed consent by the country receiving hazardous waste exported from the United States. RCRA's criminal penalties for violation of this law include fines of up to \$50,000 per day of violation. Another section of RCRA (42 USC Section 6928(d)(6)) provides the same penalties for violation of an international agreement between the United States and the receiving country.

Options:

(1) As necessary, the State of California could develop procedures to assure that secondary material exports from California comply with the provisions of the Basel Convention. In particular, there could be a process to assure that the importing countries agree to the shipment of materials. There needs to be further investigation to determine the State's role relative to that of the federal government in this matter.

(2) The State of California may wish to consider the ramifications of large-scale imports of secondary materials into California. Especially as the German system is implemented there may be large quantities of materials in the market searching for a home. How should California respond? Who

is the competent authority²⁹ who must respond to notifications by would-be exporters of waste to California? These are questions that need further study.

Recommendation:

Not applicable.

²⁹ Article 2 of the Convention defines "competent authority" as "the one governmental authority designated by a Party to be responsible, within such geographic areas as the Party may think fit, for receiving the notification of a transboundary movement of hazardous wastes or other wastes, and any information related to it, and for responding to such a notification, as provided in Article 6."

The Sherman Anti-Trust Act
&
Joint Marketing of Secondary Materials

Issue: Does the Sherman Anti-Trust Act present a hinderance to communities jointly marketing recovered materials?

Provision can be made in State law to protect local governments from risk of anti-trust violation if they jointly market recovered materials. The key here is the nature of the state authorization. The authority can be broad and general as long as it is fairly explicit.³⁰

Background:

The federal Sherman Anti-Trust Act prohibits anti-competitive agreements regarding supplies and prices. That is, it is illegal to conspire to fix prices or to create supply monopolies. In a sense, cities and counties jointly marketing the materials reclaimed from the waste stream could be considered to be anti-competitive in that one purpose is to assure better prices. Joint marketing could also have the effect of giving local governments control over a large portion of the supply of materials, to the point that the government partners could dictate prices and undercut private competitors. In the classic cartel, horizontal competitors acting to harmonize supplies commit a felony. It is important, however, to distinguish between price fixing and similar anti-competitive behavior and joint ventures. The latter can operate without violating anti-trust law.

³⁰ This analysis is based on a conversation with Thomas Greene, Esq., attorney in the Anti-Trust Division of the California Attorney General's Office.

Analysis of Issue:

Anti-trust case law contains special exemptions for state government to act uncompetitively. Through the so-called "State Action Doctrine" (*Parker v. Brown*³¹), the government legally can act as a "cartel" if the state, acting as the state, wants to supplant competition. In this case, the state means any state agency which has statutory authority to act on behalf of the whole state. In general, the state is only the governor and the legislature, but not any executive department or agency. Case law³² makes clear that local municipal governments are not the state as far as the State Action Doctrine goes. This is even true for charter cities.

Local governments can engage in uncompetitive activity if the State authorizes it. They need not meet the state supervision criterion that applies to private parties unless private players are involved. In the *City of Lafayette Case*,³³ a municipal utility district was prohibited from certain anti-competitive actions because the court found the district was not authorized by the state to carry out such actions. On the other hand, in the *Town of Hallie Case*³⁴, the court allowed the town to monopolize access to its water treatment plant because there was sufficient state authority for this anti-competitive action.

There is a significant difference in the way anti-trust Law treats violations by private players and by local governments. Private players found in violation of the Sherman Anti-trust Act are subject to payment of triple damages. Local governments are not.

Anti-trust law applies most particularly to agreements between private parties. Private players must pass two tests to avoid running afoul of the law: (1) Has the State authorized the anti-competitive activity? (2) Does the State supervise this activity?³⁵ It is apparently unnecessary for the otherwise

³¹ *Parker v. Brown*, 317 US 341 (1943).

³² See the Boulder Case: *Community Communic. Co. v. City of Boulder*, 455 US 40 (1982).

³³ See the Lafayette Case: *City of Lafayette v. Louisiana Power & Light Co.*, 435 US 389 (1978).

³⁴ *Town of Hallie v. City of Eau Claire*, 471 US 34 (1985).

³⁵ See the Midcal case: *California Retail Liquor Dealers Association v. Midcal Aluminum (Midcal)*, 445 US 97 (1980) and the Southern Motor Case: *Southern Motor Carriers Rate Conf. v. United States*, 471 US 48 (1985). In the latter case, the Court found an immunity because the two tests of the Midcal case were satisfied: the state had been clear in expressing its policy to allow truckers to jointly propose rates and the state adequately supervised the prices charged.

uncompetitive private activity to be compelled³⁶ by the state for there to be *Parker* immunity. The anti-trust private defendant does, however, bear the burden of proving that both tests are met in order to be able to claim the *Parker* immunity defense.

Options:

- (1) Do nothing to change the status quo.
- (2) Take an assertive role in making it easier for cooperative marketing to occur.

Recommendation:

Seek an amendment to the Public Resources Code to authorize local governments to jointly market the materials they or their agents recover from the waste stream as part of efforts to achieve the diversion requirements of AB 939. The amendment might be made even more specific by authorizing, in particular, joint marketing arrangements planned for in the local governments' approved source reduction and recycling elements. The amendment should be very clear in announcing as State policy the intention to displace anti-trust laws³⁷ and must provide for active State supervision of the results of this policy.

³⁶ Nor does compulsion confer immunity automatically.

³⁷ The policy might be framed as a reasonable attempt to correct market failure.

Free Speech & Environmental Labeling³⁸

Issue: Is California's environmental labeling law constitutional?

Judge Marilyn Hall Patel, US District Court in San Francisco, upheld a 1990 California law that regulates the terms "recycled" and "recyclable." The decision came in a case in which ten manufacturing and trade associations filed suit to have the law declared unconstitutional on the basis of infringement of free speech. The decision did, however, strike down the law's definition of "recyclable" as being too vague. The law was found to lack guidance regarding the criterion that there must be "convenient recycling" opportunities before a package could be labeled "recyclable."

Background:

A number of advertising and industry associations challenged the constitutionality of Business and Professions Code section 17508.5, the Environmental Advertising Claims Act, enacted in September 1990, also referred to as AB 3994 (Sher), on the grounds that the Act violated their First Amendment rights and that it was vague.

Analysis of Issue:

The United States District Court for the Northern District of California found the statute to be constitutional in all respects except that subsection (d), the definition for "recyclable" was determined to be invalid because it is unconstitutionally vague. The court stated: "Due to the potential for criminal sanctions, including incarceration, the absence of any standard for 'conveniently recycled' wrecks this

³⁸ The material for this issue paper was provided by attorney for the Board, Maureen Carr Morrison.

portion of section 17508.5 on the shoals of vagueness....in this instance the constitutional requirement of definiteness has not been met."

The plaintiffs in the case, the Association of National Advertisers, Inc., Grocery Manufacturers of America, Inc., the Soap and Detergent Association, National Food Processors Association, the American Paper Institute, Inc., the American Advertising Federation, the American Association of Advertising Agencies, the California Chamber of Commerce and the Chamber of Commerce of the United States filed a motion for summary judgment on constitutional grounds against defendant Daniel Lungren, in his official capacity as Attorney General of the State of California. The Attorney General is responsible for enforcing the challenged code section. The plaintiffs alleged that the statute violated their First Amendment rights related to freedom of speech and that the statute was unconstitutionally vague on its face.

The court stated that the sole issue before it was "whether the California legislature, in its effort to regulate the green marketing phenomenon, had run afoul of the Constitution." In this context, it examined First Amendment and "vagueness" aspects.

(1) THE FIRST AMENDMENT

In its analysis, the court first determined that the character of speech at issue was commercial speech, not noncommercial speech, and thus the level of scrutiny to be used by the court in reviewing the statute was a relaxed standard and not the strict scrutiny standard.

The court then applied the four part Central Hudson³⁹ test to analyze the lawfulness of the restrictions on commercial speech: 1) whether the expression was protected by the First Amendment, i.e. the speech must concern lawful activity and not be misleading; 2) whether the asserted governmental interest was substantial; 3) whether the regulation directly advanced the governmental interest asserted; and 4) whether the restriction on commercial speech was more extensive than necessary to further the state's interest. The court concluded that the California legislature acted reasonably, and that it would leave it to governmental decision-makers to judge what manner of regulation is best employed in this regard. The court felt it should not query whether any less restrictive measures exist to accomplish the asserted goals. It found that the legislature stayed within constitutional parameters in restricting this commercial expression.

³⁹ Central Hudson Gas v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980)

(2) VAGUENESS

The court next analyzed the statutory provisions to determine whether the legislature drafted an "unconstitutionally vague" statute. It once again established the standard for review, i.e. a relaxed vagueness test, finding economic regulation to be subject to a less strict test for vagueness. However, the court emphasized that when reviewing commercial speech prohibitions for facial vagueness when criminal sanctions are imposed, as in this case, the question should center around whether the law affords fair notice to a businessperson of ordinary intelligence about what conduct is illegal.

The court first analyzed the definition for "ozone friendly," especially the phrase "or any like term," and found it not to be ambiguous. The court felt confident that manufacturers and distributors of ordinary intelligence could understand this definition.

The court next analyzed the statute's definition of "recyclable," and found that there was no guidance in the statute as to what recycling programs satisfy the "conveniently recycled" requirement. This section is more "uncertain," the court opined. "It is not sufficiently clear to a manufacturer or distributor of ordinary intelligence what exactly the statute prohibits. Due to the potential for criminal sanctions, including incarceration," the court stated, "the absence of any standard for 'conveniently recycled' wrecks this portion of section 17508.5 on the shoals of vagueness....in this instance the constitutional requirement of definiteness has not been met." The court then held that subsection (d) of section 17508.5 was invalid, but left the remainder of section 17508.5 intact.

Conclusion:

The court concluded that section 17508.5 permissibly restricts commercial speech, and that, except for subsection (d), the definition of "recyclable," the statute is not unconstitutionally vague on its face. The court granted partial summary judgment for the plaintiff solely with respect to subsection (d), striking that section as unconstitutionally vague.

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