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# Is Foreign Hazardous Waste Really the Same as Domestic Hazardous Waste When Imported into the U.S.

## **Cover Page Footnote**

International Law; Commercial Law; Law

# Is Foreign Hazardous Waste Really the Same as Domestic Hazardous Waste When Imported into the U.S.?

## I. Introduction

A great deal has been written on the exportation of domestic hazardous waste,<sup>1</sup> including case law on the interstate shipment of domestically produced hazardous waste.<sup>2</sup> However, the importation of foreign generated hazardous waste and the laws governing this waste in interstate commerce within the United States is a relatively uncharted area. A recent federal district court decision precisely addressed this area.<sup>3</sup>

Federal law does not preclude approved state hazardous waste programs from "adopting or enforcing requirements which are more stringent or more extensive than those required" by federal regulation.<sup>4</sup> However, in *Chemical Waste Management, Inc. v. Templet*, a federal district court held that Louisiana's attempt to ban the importation of any hazardous waste generated in a foreign country was unconstitutional because it violated the Commerce Clause.<sup>5</sup> In arriving at this conclusion, the district court relied on the same principles and reasoning as those used in examining the interstate shipment of domestically generated hazardous waste.<sup>6</sup>

This Note will examine both the logic and the implications of

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<sup>1</sup> See, e.g., Peter Obstler, *Toward a Working Solution to Global Pollution: Importing CERCLA to Regulate the Export of Hazardous Waste*, 16 YALE J. INT'L L. 73 (1991); Peter D.P. Vint, *The International Export of Hazardous Waste: European Economic Community, United States, and International Law*, 129 MIL. L. REV. 107 (1990); Mary Critharis, Note, *Third World Nations Are Down in the Dumps: The Exportation of Hazardous Waste*, 16 BROOK. J. INT'L L. 311 (1990).

<sup>2</sup> National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management, 910 F.2d 713, 719 (11th Cir. 1990) ("dangers associated with hazardous waste movement do not outweigh the value of moving hazardous waste across state lines"), modified, 924 F.2d 1001 (11th Cir.), cert. denied, 111 S.Ct. 2800 (1991); see also *Hardage v. Atkins*, 582 F.2d 1264 (10th Cir. 1978) ("controlled industrial waste" defined in Oklahoma statute as refuse products that are toxic to human, animal, or plant life, is within purview of the Interstate Commerce Clause).

<sup>3</sup> *Chemical Waste Management, Inc. v. Templet*, 770 F. Supp. 1142 (M.D. La. 1991).

<sup>4</sup> 40 C.F.R. § 271.1(i)(1) (1991).

<sup>5</sup> *Templet*, 770 F. Supp. at 1153. The commerce clause may be found at U.S. CONST. art. I, § 8, cl. 3. The Constitution states that Congress shall have power "[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

<sup>6</sup> *Templet*, 770 F. Supp. at 1149.

considering foreign generated hazardous waste, once inside the United States, as analogous to domestically generated hazardous waste. In particular, this Note will look at the implications of *Templet's* rationale which indicate that states may be able to inhibit or ban certain types of foreign hazardous waste from treatment, storage, or disposal within the state, and may be able to inhibit or ban certain types of foreign hazardous wastes from interstate shipment into the state.

The rationale used in *Templet* may create an incentive for states to ban specific types of domestically produced hazardous waste to avoid becoming a dumping ground for foreign hazardous waste. Such bans could encourage some industries to move out-of-state or even out of the United States. However, even if these industries move to Mexico, the hazardous wastes generated by these industries may well end up back in the United States. The court's decision and rationale could also upset Congress's attempts to allocate equitably domestically generated hazardous waste among the states. If the courts do not reject the logic of the *Templet* holding or Congress does not intervene, there may be both economic and environmental misallocation, and the law regarding the interstate Commerce Clause itself may have to be redefined.

## II. Statement of the Case

### A. State Statute Declared Unconstitutional

In *Templet*, Chemical Waste Management, Inc. ("ChemWaste") filed an action seeking declaratory relief against Paul H. Templet, Ph.D., Secretary of the Louisiana Department of Environmental Quality (LDEQ).<sup>7</sup> ChemWaste challenged the constitutionality of two Louisiana statutes<sup>8</sup> governing the importation, storage, and disposal of hazardous waste generated in a foreign country and brought into Louisiana.<sup>9</sup> One of the statutes states in part:

(2) The laws of foreign nations are inadequate to insure that hazardous wastes sought to be exported to the United States do not contain unknown or unauthorized pollutants and that such wastes are not released into the environment due to inadequate containment, labeling, or handling during transport.

(3) The only practical method for insuring that the environment and the health of the citizens of this state are not endangered by the importation of hazardous wastes generated in foreign nations is to prohibit the introduction or receipt of such wastes into this state for the purpose of treatment, storage, or disposal.<sup>10</sup>

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<sup>7</sup> *Id.* at 1144.

<sup>8</sup> LA. REV. STAT. ANN. §§ 30:2190-2191 (West 1989).

<sup>9</sup> *Templet*, 770 F. Supp. at 1144.

<sup>10</sup> LA. REV. STAT. ANN. §§ 30:2190(A)(2)-(3) (West 1989).

The facts in *Templet* were not seriously disputed by the parties.<sup>11</sup> ChemWaste owned and operated an LDEQ authorized hazardous waste treatment, storage, and disposal facility in Louisiana.<sup>12</sup> In September of 1989, ChemWaste informed the Regional Administrator of the United States Environmental Protection Agency (EPA) in Texas of its intent to receive at its Louisiana facility foreign hazardous waste generated from Inland System Business Unit of Inland/Matamores, Mexico and Trico Technologies of Matamores, Mexico, two *maquiladora*<sup>13</sup> companies.<sup>14</sup> The EPA advised ChemWaste that since the State of Louisiana was an "authorized"<sup>15</sup> state under the federal Resource Conservation and Recovery Act of 1976 (RCRA),<sup>16</sup> Louisiana, and not the EPA, was the proper party to be notified regarding the receipt of hazardous waste from Mexico.<sup>17</sup> After notification, the LDEQ relied on Louisiana's Revised Statutes sections 30:2190 and 30:2191<sup>18</sup> to object to the importation, storage, and disposal of the Mexican foreign hazardous waste in Louisiana and refused to grant ChemWaste a permit.<sup>19</sup> ChemWaste sued in a United States district court for declaratory relief, and the court held that "[sections] 2190 and 2191 are unconstitutional under the Commerce Clause of the United States Constitution."<sup>20</sup>

*B. Hazardous Waste as an Object of Commerce*

The *Templet* court, relying on the Supreme Court decision of *City*

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It shall be unlawful for any person to transport or cause or allow to be transported into this state, for the purpose of treatment, storage, or disposal, any hazardous waste generated outside the United States and its territories.

It shall be unlawful for any person to receive for treatment, storage, or disposal in this state any hazardous waste generated outside the United States or its territories.

*Id.* §§ 30:2190(B),(C). The second statute states in part: "The commission or the assistant secretary shall deny hazardous waste transporter licenses and hazardous waste treatment, storage, and disposal facility permits to all persons who propose to transport into and dispose of in Louisiana hazardous waste generated in a country other than the United States." *Id.* § 30:2191(A).

<sup>11</sup> *Templet*, 770 F. Supp. at 1144.

<sup>12</sup> *Id.*

<sup>13</sup> The district court stated that "'Maquiladoras' are companies incorporated under Mexican corporate law which may be 100% foreign owned and/or managed. The corporation is allowed to import its raw materials and other items into Mexico without paying Mexican import taxes." *Id.* at 1144 n.3.

<sup>14</sup> *Id.* at 1145.

<sup>15</sup> The relevant federal statute provides a procedure for the authorization of a state to administer and enforce a hazardous waste program if the state program meets the specified conditions. 42 U.S.C. § 6926(b) (1988). "Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste . . . ." *Id.*

<sup>16</sup> 42 U.S.C. §§ 6901-6992k (1988 & Supp. 1991); 40 C.F.R. §§ 271.1-138.

<sup>17</sup> *Templet*, 770 F. Supp. at 1145.

<sup>18</sup> See *supra* notes 10-11 and accompanying text.

<sup>19</sup> *Templet*, 770 F. Supp. at 1145.

<sup>20</sup> *Id.* at 1147.

of *Philadelphia v. New Jersey*,<sup>21</sup> stated that "[a]ll objects of interstate trade merit . . . protection; none is excluded by definition at the outset."<sup>22</sup> The *Templet* court, quoting the language of *City of Philadelphia*, acknowledged that "[a] state may prohibit transportation of an object across state lines when 'the article's worth in interstate commerce [is] far outweighed by the dangers inhering in their very movement.'"<sup>23</sup> The *Templet* court further stated: "[c]ertain objects 'are not legitimate subjects of trade and commerce.' Such objects are those objects which in their existing condition at the time of transport could not be safely brought into the state without the risk of 'spread [of] disease, pestilence, and death.'"<sup>24</sup>

The *Templet* court relied heavily on the analysis of *City of Philadelphia* in which the Supreme Court held that a New Jersey law prohibiting the importation of most solid or liquid waste which originated outside of New Jersey violated the Commerce Clause of the Constitution.<sup>25</sup> The Supreme Court stated that "[j]ust as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement."<sup>26</sup>

The *Templet* court next cited *National Solid Wastes Management Ass'n v. Alabama Department of Environmental Management*<sup>27</sup> which "held that hazardous waste is an object of commerce and subject to the Commerce Clause."<sup>28</sup> In *National Solid Wastes*, the Eleventh Circuit Court of Appeals held that "[t]o the extent these rules<sup>29</sup> can and do provide for the safe transportation of hazardous waste, the dangers associated with hazardous waste movement do not outweigh the value of moving hazardous waste across state lines."<sup>30</sup> The court in

<sup>21</sup> 437 U.S. 617 (1978).

<sup>22</sup> *Templet*, 770 F. Supp. at 1148 (quoting *City of Philadelphia*, 437 U.S. at 622).

<sup>23</sup> *Id.* (quoting *City of Philadelphia*, 437 U.S. at 622).

<sup>24</sup> *Id.*

<sup>25</sup> *City of Philadelphia*, 437 U.S. at 629.

<sup>26</sup> *Id.* at 622-23.

<sup>27</sup> 910 F.2d 713 (11th Cir. 1990), *modified*, 924 F.2d 1001 (11th Cir. 1991).

<sup>28</sup> *Templet*, 770 F. Supp. at 1148.

<sup>29</sup> The Court of Appeals previously stated in this decision that:

The legislative and executive branches of the federal government together with the separate states have developed a comprehensive scheme for regulating the management of hazardous waste. Waste generators, transporters, and managers must comply with highly technical and rigid rules designed to ensure that the movement of hazardous waste is accomplished with a minimum of danger to the public and to the environment.

*National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 910 F.2d 713, 719 (11th Cir. 1990), *modified*, 924 F.2d 1001, *cert. denied*, 111 S. Ct. 2800 (1991), 910 F.2d at 719. This quotation supports the notion that the states are not prohibited from regulating in the area concerning movement of hazardous waste.

<sup>30</sup> *National Solid Wastes*, 910 F.2d at 719. The court's use of "these rules" appears to be referring to a comprehensive scheme formed from the combination of both state and federal regulations. See *supra* note 29. This quotation implies that the combination of both state and federal rules are necessary to provide for safe transportation of hazardous waste

*National Solid Wastes* thus concluded that hazardous waste was an object of commerce.<sup>31</sup>

C. *Domestic and Foreign Generated Hazardous Wastes Are Analogous*

Once the *Templet* court laid this foundation, it stated that “[w]hile the waste considered in the above case was generated within the United States, the Court believes that the same principles and reasoning apply to the foreign generated hazardous waste involved in this case.”<sup>32</sup> In response to LDEQ’s argument that the statutes do not ban waste because of its origin,<sup>33</sup> but because of the lack of adequate controls by foreign nations,<sup>34</sup> the court stated that “[t]he problem with LDEQ’s argument is that Louisiana’s ban is based on the origin of the hazardous waste, rather than on the specific type of hazardous waste.”<sup>35</sup> In holding that Louisiana’s statutes violated the Interstate Commerce Clause, the court stated “that [sections] 2190 and 2191 are discriminatory on their face, or *per se* discriminatory. Furthermore, the Court finds as a matter of fact and law that the ‘quarantine power’<sup>36</sup> exception does not apply under the facts of this case.”<sup>37</sup>

D. *The Foreign Component of the Commerce Clause*

Although the Constitution grants Congress power to “regulate

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so that the dangers associated with movement do not outweigh the value of moving hazardous waste across state lines.

<sup>31</sup> *National Solid Wastes*, 910 F.2d at 719. The court stated that:

In concluding that hazardous waste is an object of commerce, we follow precedent of this circuit. See *State of Alabama v. United States EPA*, 871 F.2d 1548, 1555 n.3 (11th Cir. 1989) (“To the extent plaintiffs also seem to assert injury based on the out-of-state nature of these wastes [PCBs and other toxic wastes], the Supreme Court bars such a distinction.” (citing *City of Philadelphia*), cert. denied sub nom. *Alabama ex rel Siegelman v. United States EPA*, 110 S.Ct. 538, 107 L.Ed.2d 535 (1989). Accord *Hardage v. Atkins*, 582 F.2d 1264, 1266 (10th Cir. 1978) (“controlled industrial waste,” defined in Oklahoma statute as refuse products that are toxic to human, animal, aquatic, or plant life, is within purview of commerce clause).

*Id.*

<sup>32</sup> *Templet*, 770 F. Supp. at 1149.

<sup>33</sup> For the significance of attempting to ban importation of articles because of their origin, see *infra* notes 47-54 and accompanying text.

<sup>34</sup> *Templet*, 770 F. Supp. at 1152.

<sup>35</sup> *Id.*

<sup>36</sup> The quarantine clause of the Constitution reads:

No State shall, without the consent of the Congress, lay any imposts or duties on Imports or Exports, except what may be absolutely necessary for executing its inspections Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

U.S. CONST. art. I, § 10, cl. 2. For a discussion on the application of the quarantine power to interstate commerce, see *infra* notes 52-54 and accompanying text.

<sup>37</sup> *Templet*, 770 F. Supp. at 1152.

commerce with foreign nations, and among the several States"<sup>38</sup> in the same clause, "there is evidence that the Founders intended the scope of the foreign commerce power to be the greater."<sup>39</sup> The *Templet* court did a short analysis of the effect of the foreign component of the Commerce Clause under the facts of the case. The court held that "the restrictions placed on the importation of foreign generated hazardous waste, based solely on the origin of an object of commerce, violates the foreign Commerce Clause of the United States Constitution."<sup>40</sup> The court noted that "[t]he Congress has expressly authorized in the RCRA regulations the importation of foreign hazardous waste."<sup>41</sup> The *Templet* court also stated that "[t]he Supreme Court has noted that a higher level of scrutiny is required when foreign commerce is restrained, because, unlike interstate commerce, the United States must speak with a single voice for effective relations and trade with foreign nations."<sup>42</sup> In addition, "[a]lthough the Congress's regulatory power over interstate commerce may be limited by federalism and state sovereignty, the Supreme Court has not held that such limitations apply to the Congress's power to regulate foreign commerce."<sup>43</sup>

ChemWaste also contended that the Louisiana statutes were in conflict with agreements between the United States and Mexico<sup>44</sup> and were therefore unconstitutional under the Supremacy Clause.<sup>45</sup> Because the court in *Templet* found the statutes unconstitutional under the Commerce Clause, it did not feel that it was necessary to discuss or resolve this issue.<sup>46</sup>

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<sup>38</sup> U.S. CONST. art. I, § 8, cl. 3. The entire text of the Commerce Clause is as follows: "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

<sup>39</sup> *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979). For further discussion see *infra* notes 84-87 and accompanying text.

<sup>40</sup> *Templet*, 770 F. Supp. at 1153.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1152 (citing *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 96 (1984); *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n.9 (1980)).

<sup>43</sup> *Id.* at 1152-53 (citing *Japan Line, Ltd.*, 441 U.S. at 448 n.13).

<sup>44</sup> Agreement of Cooperation Between the United States of America and the United Mexican States Regarding the Transboundary Shipments of Hazardous Wastes and Hazardous Substances, Nov. 12, 1986, U.S.-Mex., 26 I.L.M. 25 (1987) [hereinafter Annex III]; Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, U.S.-Mex., T.I.A.S. No. 10827 [hereinafter 1983 Agreement].

<sup>45</sup> U.S. CONST. art. VI, cl. 2. The Supremacy Clause states that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*

<sup>46</sup> *Templet*, 770 F. Supp. at 1153 n.55.



### III. Background

#### A. Interstate Commerce of Waste

Both *Templet* and *National Solid Wastes* referenced the Supreme Court decision of *City of Philadelphia*. In *City of Philadelphia*, the U.S. Supreme Court examined New Jersey statutes which prohibited the importation of most solid or liquid waste which originated or was collected outside of New Jersey.<sup>47</sup> As stated by the U.S. Supreme Court, the New Jersey Supreme Court found that the statute "was designed to protect, not the State's economy, but its environment, and that its substantial benefits outweigh its 'slight' burden on interstate commerce."<sup>48</sup> The United States Supreme Court reversed the New Jersey Supreme Court and stated that "the evil of protectionism can reside in legislative means as well as legislative ends."<sup>49</sup> Thus, according to the Supreme Court, "whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."<sup>50</sup> The Supreme Court in *City of Philadelphia* stated that "[w]hat is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."<sup>51</sup>

The Supreme Court in *City of Philadelphia* also discussed the validity of quarantine laws:

It is true that certain quarantine laws have not been considered forbidden protectionist measures, even though they were directed against out-of-state commerce. But those quarantine laws banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.<sup>52</sup>

The Supreme Court then stated that "[t]he New Jersey statute is not such a quarantine law."<sup>53</sup> The Court's rationale equated the post-disposal harms of out-of-state waste and load waste to reach this conclusion.<sup>54</sup>

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<sup>47</sup> *City of Philadelphia v. New Jersey*, 437 U.S. 617, 618 (1978).

<sup>48</sup> *Id.* at 625.

<sup>49</sup> *Id.* at 626.

<sup>50</sup> *Id.* at 626-27.

<sup>51</sup> *Id.* at 628.

<sup>52</sup> *Id.* at 628-29 (citations omitted).

<sup>53</sup> *Id.* at 629.

<sup>54</sup> *Id.* In his dissent, Justice Rehnquist stated:

The fact that New Jersey has left its landfill sites open for domestic waste does not, of course, mean that solid waste is not innately harmful. . . . New Jersey must out of sheer necessity treat and dispose of its solid waste in some fashion, just as it must treat New Jersey cattle suffering from hoof-and-mouth disease. It does not follow that New Jersey must, under the Commerce

As early as 1978, the 1977 holding in *City of Philadelphia* was applied by a circuit court<sup>55</sup> to "controlled industrial waste," which was defined as "toxic to human, animal, aquatic or plant life."<sup>56</sup> The Tenth Circuit Court of Appeals in *Hardage v. Atkins* held that such "controlled industrial waste" was within the purview of the Interstate Commerce Clause.<sup>57</sup>

In *National Solid Wastes* the Eleventh Circuit Court of Appeals stated that:

The legislative and executive branches of the federal government together with the separated states have developed a comprehensive scheme for regulating the management of hazardous waste. . . . To the extent these rules can and do provide for the safe transportation of hazardous waste, the dangers associated with hazardous waste movement do not outweigh the value of moving hazardous waste across state lines.<sup>58</sup>

The court in *National Solid Wastes* said that this conclusion comported with the fact that Alabama had banned the importation into Alabama of hazardous wastes only from certain states, not from all states.<sup>59</sup>

The *National Solid Wastes* decision was based on the Superfund Amendments and Reauthorization Act of 1986<sup>60</sup> (SARA) to the 1980 Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).<sup>61</sup> The court in *National Solid Wastes* stated that the SARA provision at issue<sup>62</sup> "requires that each state present a proposal to EPA showing that the state will have adequate capacity available to dispose of the hazardous wastes generated within the state for the next twenty years."<sup>63</sup>

### B. *The Foreign Connection*

The *Templet* case concerns not domestically produced hazardous waste, but hazardous waste generated in Mexico by *maquiladoras*<sup>64</sup> and imported into the United States.<sup>65</sup> Most of the *maquiladoras* are U.S.-owned companies that have located factories in the Mexican

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Clause, accept solid waste or diseased cattle from outside its borders and thereby exacerbate its problems.

*Id.* at 633 (Rehnquist, J., dissenting).

<sup>55</sup> *Hardage v. Atkins*, 582 F.2d 1264 (10th Cir. 1978).

<sup>56</sup> *Id.* at 1265 (quoting OKLA. STAT. tit. 63, § 2752 (1972)).

<sup>57</sup> *Id.*

<sup>58</sup> *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 910 F.2d 713, 719 (11th Cir. 1990). For a further discussion of this quotation see *supra* notes 29-30 and accompanying text.

<sup>59</sup> *National Solid Wastes*, 910 F.2d at 719.

<sup>60</sup> Pub. L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of 10, 26 & 42 U.S.C.); see also *National Solid Wastes*, 910 F.2d at 716.

<sup>61</sup> 42 U.S.C. §§ 9601-9675 (1988).

<sup>62</sup> 42 U.S.C. § 9604(c)(9) (1988).

<sup>63</sup> *National Solid Wastes*, 910 F.2d at 716.

<sup>64</sup> For a definition of *maquiladoras*, see *supra* note 13.

<sup>65</sup> *Templet*, 770 F. Supp. at 1144.

border region.<sup>66</sup> The companies "take advantage of Mexico's foreign investment law, which allows the creation of Mexican companies that may import their components and raw material into Mexico duty-free, assemble them with cheap Mexican labor, and export the finished products to U.S. and other markets."<sup>67</sup> In 1989 Mexican *maquila* workers earned an average of \$1.63 per hour versus \$14.32 for U.S. workers.<sup>68</sup> In addition, "Mexico's proximity to U.S. markets is also an obvious advantage."<sup>69</sup>

The *maquiladora* program was established in 1965 in response to problems of economic underdevelopment in northern Mexico that originated when thousands of Mexicans left the interior's farmlands for more lucrative industrial jobs in the border communities.<sup>70</sup> In 1965 the President of Mexico announced the first border industrialization program. In 1971, the Mexican government codified the program's provisions and procedures in the Mexican Customs Code, "and on August 15, 1983, the Presidential Decree for the Promotion and Operation of the *Maquiladora* Export Industry was issued and published in the Official Gazette of Mexico."<sup>71</sup> The program is currently regulated by the 1989 Presidential Decree for the promotion and operation of the In-Bond export industry.<sup>72</sup> In 1989, United States—Mexico trade reached \$52 billion<sup>73</sup> and in 1990, close to 500,000 people were employed by the *maquiladoras*.<sup>74</sup>

While the differences in the stages of economic development between the United States and Mexico necessarily create alternative national priorities, Mexico has begun to show more concern for environmental protection.<sup>75</sup> In 1987 the Mexican Government amended article 27 of its constitution, which now reads "The Nation shall at all times have the right to impose on private ownership measures required by the public interest . . . to preserve and restore ecological balance."<sup>76</sup>

As a result of bilateral negotiations, in 1983 the Presidents of the United States and Mexico signed the Agreement on Cooperation for the Protection and Improvement of the Environment in the Bor-

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<sup>66</sup> Elizabeth C. Rose, Note, *Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras*, 23 INT'L LAW. 223, 223 (1989).

<sup>67</sup> *Id.* (footnotes omitted).

<sup>68</sup> Stephen Baker et. al., *Mexico: A New Economic Era*, BUS. WK., Nov. 12, 1990, 102, 105 (diagram).

<sup>69</sup> Rose, *supra* note 66, at 229.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* (footnotes omitted).

<sup>72</sup> Daniel I. Basurto Gonzalez & Elaine Flud Rodriguez, *Environmental Aspects of Maquiladora Operations: A Note of Caution for U.S. Parent Corporations*, 22 ST. MARY'S L.J. 659, 660 (1991)(footnote omitted).

<sup>73</sup> Baker, *supra* note 68, at 103 (diagram).

<sup>74</sup> *Id.* at 105 (diagram).

<sup>75</sup> Rose, *supra* note 66, at 239-42.

<sup>76</sup> *Id.* at 237.

der Area<sup>77</sup> (1983 Agreement). In an attempt to combat the problem of exportation of hazardous waste, the 1983 Agreement has been supplemented with Annex III to the 1983 Agreement.<sup>78</sup>

Annex III covers the transfrontier shipment of hazardous waste.<sup>79</sup> Article I of Annex III defines the EPA as the designated authority in the case of the United States and the Secretariat of Urban Development and Ecology (SUDE) as the designated authority in the case of Mexico.<sup>80</sup> Article I then defines hazardous waste as "any waste, as designated or defined by the applicable designated authority . . ."<sup>81</sup> Mexico has requirements for the disposal, reclamation, recycling, or use in Mexico of hazardous waste generated by raw material imported from the United States; however, if these hazardous wastes are not disposed of, reclaimed, recycled, or used according to Mexican requirements, the hazardous wastes must be shipped back to the United States.<sup>82</sup> Annex III, in turn, requires that hazardous waste generated from raw materials imported from the United States and used by the *maquiladoras* shall continue to be readmitted to the United States.<sup>83</sup>

#### IV. Significance of the Case

##### A. Rationale Underlying Templet

While the Commerce Clause may give Congress the power to let

<sup>77</sup> 1983 Agreement, *supra* note 44. It should be noted that this is an executive agreement and not a formal treaty. The ability of the President to make such agreements, and the effect of such agreements, is itself a very involved subject. One author has stated:

Considerable controversy exists over the President's constitutional power to use executive agreements in resolving international disputes. The U.S. Constitution does not specifically provide for the use of executive agreements to direct foreign policy. Nor does federal law stipulate when an executive agreement may be used instead of a treaty. Nevertheless, the use of executive agreements to resolve international disputes is becoming more common, and such agreements surpass treaties in number.

Mark A. Sinclair, Note, *The Environmental Cooperation Agreement Between Mexico and the United States: A Response to the Pollution Problems of the Borderlands*, 19 CORNELL INT'L L.J. 87, 123 n.202 (1986)(footnotes omitted). Sinclair further stated that "[a]n executive agreement lacks the enforceability of a treaty; its success depends on continued political goodwill between national governments." *Id.* at 123 (footnote omitted).

<sup>78</sup> Annex III, *supra* note 44.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* art. I, par. 1.

<sup>81</sup> *Id.* art. I, par. 2.

<sup>82</sup> Gonzalez & Rodriguez, *supra* note 72, at 674 n.69.

<sup>83</sup> Annex III, *supra* note 44, at art. XI. Article XI is titled "Hazardous Waste Generated From Raw Materials Admitted In-Bond" and reads as follows: "Hazardous waste generated in the processes of economic production, manufacturing, processing or repair, for which raw materials were utilized and temporarily admitted, shall continue to be readmitted by the country of origin of the raw materials in accordance with applicable national policies, laws and regulations." *Id.*

foreign hazardous waste be imported into the United States,<sup>84</sup> it does not answer the question of what becomes of the hazardous waste once it is inside the United States. The court in *Templet* stated that “[a]lthough the Congress’s regulatory power over interstate commerce may be limited by federalism and state sovereignty, the Supreme Court has not held that such limitations apply to the Congress’s power to regulate foreign commerce.”<sup>85</sup> The Supreme Court stated that “[f]oreign commerce is preeminently a matter of national concern,”<sup>86</sup> and further stated that there is evidence that the Founders intended the foreign commerce power to be greater than interstate commerce power.<sup>87</sup>

The logic used in *Templet* implies that states could use the concepts of federalism and state sovereignty to limit the treatment, storage, or disposal of certain specific types of hazardous waste even though they would be powerless to ban their importation. The court in *Templet* stated that “[t]he problem with LDEQ’s argument is that Louisiana’s ban is based on the origin of the hazardous waste, rather than on the specific type of hazardous waste.”<sup>88</sup> According to the *Templet* court:

Although the hazardous waste which the plaintiff seeks to dispose of in Louisiana is generated in Mexico, the Carlyss [Louisiana] facility is already receiving the same type of hazardous waste from plants located within the United States. The only difference between the Mexican and United States waste is that Mexican water is used in Mexico while American water is used in the United States.<sup>89</sup>

The court in *Templet* clearly carried over the original analysis that the Supreme Court used regarding domestically produced waste in *City of Philadelphia*. In *City of Philadelphia*, the Supreme Court stated:

The harms caused by waste are said to arise after its disposal in landfill sites, and at that point, as New Jersey concedes, there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other. Yet New Jersey has banned the

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<sup>84</sup> *Templet*, 770 F. Supp. at 1152-53; see, e.g., *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 448-49 n.13 (1978).

The court in *Templet* states that “[t]he Congress’s plenary power to regulate foreign commerce is well established.” *Templet*, 770 F. Supp. at 1152. The *Templet* court failed to discuss the fact that the hazardous waste involved in this case was imported under an executive agreement and not under the authority of Congress. See *supra* notes 77-83 and accompanying text.

<sup>85</sup> *Templet*, 770 F. Supp. at 1152-53.

<sup>86</sup> *Japan Line, Ltd.*, 441 U.S. at 448.

<sup>87</sup> *Id.* The Court stated:

Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce “with foreign Nations” and “among the several States” in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater. Cases of this Court, stressing the need for uniformity in treating with other nations, echo this distinction.

*Id.*

<sup>88</sup> *Templet*, 770 F. Supp. at 1152-53.

<sup>89</sup> *Id.* at 1149.

former while leaving its landfill sites open to the latter.<sup>90</sup>

The Supreme Court was more concerned with whether out-of-state waste was being discriminated against than with New Jersey's motives and indicated that it would be permissible for New Jersey to restrict certain wastes from landfills so long as it did not discriminate on the basis of origin:

[W]e assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected.<sup>91</sup>

It would appear that a state may inhibit shipment into the state of certain classes of hazardous waste and ban treatment, storage, or disposal of them if the state has banned all such treatment, storage, or disposal for the protection of its citizens.

### B. *Implications of the Templet Logic*

Louisiana's statutes were declared unconstitutional because they were "based solely on the origin of an object of commerce."<sup>92</sup> It is useful to speculate on what the results would be if only specific types of hazardous waste already banned in the state were covered by the statutes. It would appear that some of the wording of the statutes could be modified so as to prevent them from violating the Commerce Clause under either its foreign or interstate components. One of the sections of the relevant statutes reads: "It shall be unlawful for any person to receive for treatment, storage, or disposal in this state any hazardous waste generated outside the United States or its territories."<sup>93</sup> The court in *Templet*, relying on the rationale used in *City of Philadelphia*, found the violation in the word "any." In *City of Philadelphia* the Supreme court noted the two prongs of the Interstate Commerce Clause analysis, the *per se* rule of invalidity in cases of economic protectionism,<sup>94</sup> such as that used by *Templet*,<sup>95</sup> and a balancing test where discrimination is not patent and where legitimate state interests are advanced, as in *Pike v. Bruce Church, Inc.*<sup>96</sup> The Court in *Bruce Church* held that a state law requiring all cantaloupes grown domestically be packaged within the state before being shipped out-of-state violated the Interstate Commerce Clause.<sup>97</sup> The rule used in

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<sup>90</sup> *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978).

<sup>91</sup> *Id.* at 626 (emphasis in original).

<sup>92</sup> *Templet*, 770 F. Supp. at 1153.

<sup>93</sup> LA. REV. STAT. ANN. § 30:2190(C) (West 1989).

<sup>94</sup> *City of Philadelphia*, 437 U.S. at 624; *see, e.g.*, *H.P. Hood & Sons, Inc., v. DuMond*, 336 U.S. 525, 537-38 (1949); *Toomer v. Witsell*, 334 U.S. 385, 403-06 (1948); *Buck v. Kuykendall*, 267 U.S. 307, 315-16 (1925).

<sup>95</sup> *Templet*, 770 F. Supp. at 1153.

<sup>96</sup> 397 U.S. 137, 142 (1970).

<sup>97</sup> *Bruce Church*, 397 U.S. at 145-46.

*Bruce Church* was stated as follows:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.<sup>98</sup>

Relying on this second prong balancing test and the *Templet* court's prohibition of the concept of "any," if the statute was limited to certain classes of hazardous waste to protect bona fide state interests, instead of banning "any" foreign hazardous waste, it might not violate the Interstate Commerce Clause. In addition, it would appear not to violate the Foreign Commerce Clause because importation itself of these certain classes of hazardous wastes would not be banned, but only treatment, storage, or disposal within the state.

It has also been suggested by one writer that an individual state could inhibit the flow of domestic hazardous waste into that state by instituting and enforcing strict recycling and waste minimization legislation.<sup>99</sup> This would be done under the theory that states may ban waste from other states that do not have their own programs which meet or exceed the standards of recycling and waste minimization of the destination state.<sup>100</sup> This method may pass the balancing test of *Bruce Church* as it promotes bona fide state interests and applies even handedly to both in-state and out-of-state generated hazardous wastes. The Supreme Court indicated in *Sporhase v. Nebraska*<sup>101</sup> that a reciprocity requirement governing the use of natural resources in interstate commerce may be permissible if the state can demonstrate a close fit between the reciprocity requirement and the state's asserted local purpose. If the foreign country did not meet the destination state's minimum standards in this area, under the above analysis, and under *Templet*, it would seem that the foreign country's hazardous waste could also be banned from the destination state for treatment, storage, or disposal in the same manner as domestically produced hazardous waste.

### C. *Tensions Between Applying the Foreign and Interstate Components of the Commerce Clause*

If states have the power to inhibit or ban certain types of domes-

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<sup>98</sup> *Bruce Church*, 397 U.S. at 142 (citation omitted); see Susan Adams Brietzke, Note, *Hazardous Waste in Interstate Commerce: Minimizing the Problem After City of Philadelphia v. New Jersey*, 24 VAL. U. L. REV. 77, 92-93 (1989).

<sup>99</sup> Brietzke, *supra* note 98, at 104.

<sup>100</sup> *Id.*

<sup>101</sup> *Sporhase v. Nebraska*, 458 U.S. 941, 957 (1982).

tic hazardous waste, what becomes of the foreign waste once it is imported into a state and becomes the equivalent of domestically generated hazardous waste? It follows that if a state can inhibit or ban the treatment, storage, or disposal of certain types of domestically produced hazardous waste, then a state could apply the same restrictions to the same types of foreign hazardous waste. Courts could require that shipment of these certain types of hazardous waste be allowed under the Commerce Clause without destroying the analogy of foreign hazardous wastes to domestically generated hazardous waste. If shipment is allowed, but treatment, storage, or disposal is not allowed, the hazardous waste will end up being shipped to another state. But there would be nothing to prevent other states from also banning the treatment, storage, or disposal of these certain types of hazardous waste. In other words, the foreign component of the Commerce Clause can be interpreted to mean that foreign hazardous waste must be allowed into the United States over any objections by a state. But the interstate component of the Commerce Clause under the balancing test as stated in *Bruce Church*<sup>102</sup> should allow states to ban the treatment, storage, or disposal of certain types of foreign hazardous wastes if the statute regulates even handedly to effectuate a legitimate local public interest.

It may be that in applying the balancing test used in *City of Philadelphia*, the courts will hold that any attempt to ban certain types of hazardous wastes from treatment, storage, or disposal violates the test's limiting language of "with effects upon interstate commerce that are only incidental."<sup>103</sup> This holding would indicate that state laws which promote a bona fide state interest and even-handedly apply to both in-state and out-of-state generated hazardous wastes would be considered to have more than an incidental effect on interstate commerce. The courts could also disallow any quarantine exception to the Interstate Commerce Clause even though there is a ban on in-state generated hazardous wastes of these certain types. These holdings would have many ramifications on state programs and Congress's attempts to allocate equitably domestically generated hazardous waste. The total effect such holdings would have in the area of hazardous waste shipments and on other areas of law that involve the Commerce Clause is not clear.

A final possibility may be that courts would allow a state to ban certain types of in-state produced hazardous waste from treatment, storage, or disposal within the state, yet hold that under the Commerce Clause, the state could not apply such a ban to foreign or out-of-state generated hazardous wastes. The courts could do this by holding that such a ban would impose a burden on such commerce

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<sup>102</sup> See *supra* notes 96-98 and accompanying text.

<sup>103</sup> *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).



that is "clearly excessive in relation to the putative local benefits."<sup>104</sup> It would seem anomalous, however, that a state could ban the in-state generation of certain types of hazardous waste, yet be powerless to keep out these same types of hazardous wastes solely because they were generated in foreign countries or other states. It must be remembered that the court in *Templet* said that "[i]t is also clear that the Congress did not intend to preempt all state environmental laws when it enacted RCRA."<sup>105</sup> The court in *Templet* further stated that "[s]tates are not precluded from 'adopting or enforcing requirements which are more stringent or extensive' or 'operating a program with greater scope of coverage' than required by the minimum federal standards."<sup>106</sup>

#### D. Possible Ramifications of the *Templet* Rationale

As states seek to minimize damages to their environmental quality, certain specific types of hazardous waste seem likely to be banned from states that have little or no generation of such types of wastes within that state. Currently, many types of industrial processing are already moving to foreign countries. In 1987 alone, the number of *maquiladoras* increased thirty percent.<sup>107</sup> It is also recognized that "[u]nquestionably, one of the most serious potential pollution problems faced by Mexico is that, until recently, virtually no legal provisions or physical facilities existed for the proper disposal of hazardous and toxic materials."<sup>108</sup>

Currently "[m]any developing countries consider imports of hazardous wastes from industrialized countries a form of neo-colonialist exploitation, to be avoided regardless of any possible financial benefit to the country."<sup>109</sup> The step from considering importation of hazardous wastes, itself, as neo-colonialist exploitation, to considering the importation of industrial processing plants that generate such hazardous wastes, as neo-colonialist exploitation is a small one. Indeed, "[c]ritics of the *maquiladora* program assert the *maquilas* represent the worst aspects of United States industry — exploiting poor Mexicans and turning Mexico into a United States chemical waste dump."<sup>110</sup> Requirements similar to Mexico's requirement that certain hazardous wastes be readmitted to the country that brought in the raw materials responsible for these wastes<sup>111</sup> may be one of the

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<sup>104</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>105</sup> *Templet*, 770 F. Supp. at 1146-47.

<sup>106</sup> *Id.* at 1147 (quoting 40 C.F.R. § 123.1(i)(1991)).

<sup>107</sup> *Rose*, *supra* note 66, at 224.

<sup>108</sup> *Id.* at 226.

<sup>109</sup> David J. Abrams, Note, *Regulating the International Hazardous Waste Trade: A Proposed Global Solution*, 28 COLUM. J. TRANSNAT'L L. 801, 810-11 (1990).

<sup>110</sup> *Gonzalez & Rodriguez*, *supra* note 72, at 662 (footnote omitted).

<sup>111</sup> Annex III, *supra* note 44, art. XI.

more viable means of insuring environmental quality in some developing countries.

The court in *National Solid Wastes* quoted an EPA document that stated "Congress was concerned that certain states, because of political pressures and public opposition, were not able to create and to permit sufficient facilities within their borders to treat and securely dispose of (or manage) the amounts of wastes produced in those states."<sup>112</sup> The court in *National Solid Wastes* noted that "[t]he provision of SARA at issue in this case, section 104(c)(9), 42 U.S.C. § 9604(c)(9), requires that each state present a proposal to EPA showing that the state will have adequate capacity available to dispose of the hazardous wastes generated within the state for the next twenty years."<sup>113</sup> These measures will protect certain states from becoming overburdened by hazardous wastes generated in other states, even though the states are unable to stop interstate shipment into their state. This legislation may also encourage the minimization of hazardous waste generation.<sup>114</sup>

There is no such mechanism to prevent the increasing amount of foreign generated hazardous waste, once it is inside the United States, from being "dumped" into selected states under the holding of *Templet*. There also appears to be little incentive for either Mexico or the hazardous waste generating companies to minimize the amount of hazardous waste generated. As states discourage certain hazardous waste producing industry, it can be expected that this may become an encouragement to export this waste generating industry. However, the hazardous wastes may well end up coming back to the United States.

It is possible that if some states ban all of a certain specific type of hazardous waste, whether domestic or foreign, the remaining states who do not ban such waste will have more and more foreign hazardous waste funneled into them. States wishing to avoid being the resting place for such foreign generated hazardous waste may in turn ban both domestically and foreign generated waste of that class in their state, or require that source states and countries have reciprocal strict recycling and minimization laws, further increasing the pressures on the remaining states.

On the petition for rehearing of *National Solid Wastes*<sup>115</sup> the Eleventh Circuit Court of Appeals faced a similar issue regarding Alabama's strict pre-approval standard for hazardous wastes, which

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<sup>112</sup> *National Solid Wastes Management Ass'n v. Alabama Dep't of Env'tl. Management*, 910 F.2d 713, 716 (11th Cir. 1990)(quoting OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. EPA, ASSURANCE OF HAZARDOUS WASTE CAPACITY: GUIDANCE TO STATE OFFICIALS, 2 (Dec. 1988)).

<sup>113</sup> *Id.*

<sup>114</sup> See Brietzke, *supra* note 98, at 90.

<sup>115</sup> 924 F.2d 1001 (11th Cir. 1990).

applied to both in-state and out-of-state waste generators. The Court of Appeals held that a balancing test was appropriate<sup>116</sup> and that the case must be remanded to district court for further proceedings on "the extent of the burden imposed by the pre-approval regulations on interstate commerce and the constitutionality of those regulations."<sup>117</sup> However, in the part of the original circuit court opinion in *National Solid Wastes* that was withdrawn by the later opinion concerning the petition for rehearing,<sup>118</sup> the court stated that "[b]ecause the regulations impose substantial economic burdens on both intrastate and interstate commerce, the local benefits must be great for these regulations to be valid."<sup>119</sup>

## V. Conclusion

*Templet* relied on two major premises: (1) that Congress's power is greater under the foreign component of the Commerce Clause than under the interstate component of the Commerce Clause and (2) that foreign produced hazardous waste, once imported into the United States, is analogous to domestically produced hazardous waste. By basing its decision on these premises the court failed to address the problem of how such foreign hazardous waste will be allocated among the states. The rationale used may give some states an incentive to ban or inhibit specific types of hazardous wastes. This could be detrimental to the same types of domestic hazardous waste generating industries, to states that will lose these industries, and also to the states who will end up receiving the foreign hazardous waste.

The delicate balance achieved in allocating hazardous waste among the states and the incentives for recycling and waste generation minimization may have been upset. The court should not rely on the Interstate Commerce Clause to deal with foreign hazardous waste; by doing so the stage may now be set for certain states to become dumping grounds for specific types of hazardous wastes. The courts should recognize that foreign hazardous waste is still uniquely foreign even after its importation into the United States. Barring this recognition, a whole new framework may have to be developed to equitably allocate hazardous waste among the states. It may be that Congress will pass legislation that will clarify this situation, although there is no indication this will happen. Hopefully the need for such changes in policy or rationale will be recognized and

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<sup>116</sup> *Id.* at 1004.

<sup>117</sup> *Id.*

<sup>118</sup> Part II-C of the original opinion was withdrawn. *See id.*

<sup>119</sup> *National Solid Wastes*, 910 F.2d at 725.

action taken before the situation escalates and causes both economic and environmental misallocation.

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