

**INTERNATIONAL ENVIRONMENTAL JUSTICE  
ON HOLD:  
REVISITING THE BASEL BAN FROM A PHILIPPINE  
PERSPECTIVE**

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ABSTRACT

*Nineteen years after the Basel Ban was adopted it still has not garnered the necessary ratifications to enter into force. This article aims to revisit the Basel Ban and understand it from the perspective of a developing country, particularly the Philippines, and draw out possible obstacles it faces in ratifying this instrument of international environmental justice. In addition the article will review the major issues raised by those opposed to the Basel Ban and verify if these concerns raised nineteen years ago still hold true today.*

*This article has four main sections. The first section of this article briefly looks at the roots of international environmental justice in domestic environmental justice. The second section reviews the rise of toxic waste trade in the 1980s and the eventual rise of the Basel Convention and the Basel Ban. The article delves into the framework of the Basel Convention and the Basel Ban, their weaknesses and the elements of environmental justice found in both instruments.*

*The third part of the article examines the current landscape of the Basel Ban from the perspective of a developing country, the Philippines. The Philippines is similar to many developing countries, with its high incidence of poverty and its own experience with illegal toxic waste trade. The Philippine perspective is important because it was a party to the Basel Convention when the Basel Ban was adopted. Thus, it is one of the qualifying countries whose ratification is needed for the Basel Ban to enter into force. Moreover, the Philippines is often cited as a case where the Basel Ban could cause adverse impacts on the local recycling industry and in turn affect national development.*

*In examining the Philippine context, the article focuses on the trade in*

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*used lead acid batteries (ULABs) and electronic waste (e-waste) and where the country derives these wastes for its recycling industry. The article will also examine the “anti-trade” arguments leveled against the Basel Ban and the agreements that the Philippines has entered into to see the precedents the government is following, if any.*

*The last section of this article is the conclusion. What is critical at this point in the ongoing saga of the Basel Ban is for countries to re-examine the issues surrounding the Basel Ban, and see if the arguments of the past still hold true. Undoubtedly, the Basel Ban has firmly left its mark in international law. Whether it remains a paper tiger will depend on the perseverance of developing countries to fight for this principle at the international level and ratify the instrument, and its observance and implementation nationally at the domestic level.*

## INTRODUCTION

The Basel Ban Amendment [the Basel Ban] has been hailed as a triumph of international environmental justice by some sectors and criticized by others as counterproductive to environmentally sound management of hazardous wastes. Its role in international law, particularly in the Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal [Basel Convention] has been both polarizing and empowering.

The Basel Ban has polarized developed countries such as the US and Japan from developing countries in their steadfast opposition to it. However, the Basel Ban has also greatly empowered developing countries in asserting their sovereignty against toxic waste dumping and has forced developed countries to re-evaluate their policies on toxic waste trade.

This section briefly looks into the principles that helped define the Basel Ban.

### *Toxic Waste Dumping and Environmental Justice*

The 1970s and 1980s were a period that saw heightened public concern about hazardous waste in the United States (US) and in the world.<sup>1</sup> The heightened awareness resulted in increasing public resistance to the

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1. See Alan Andrews, *Beyond the Ban – Can the Basel Convention adequately Safeguard the Interests of the World’s Poor in the International Trade of Hazardous Waste?*, 5/2 L. ENV’T & DEV. J. 167, 169–70 (2009), available at <http://www.lead-journal.org/content/09167.pdf> (“During the 1970s and 1980s, an increasing awareness of the negative impacts of hazardous waste on human health and the environment led to a proliferation of legislation relating to waste disposal in the domestic legal regimes of developed countries.”).

location of disposal sites for unwanted wastes, particularly those classified as hazardous, and the appreciable increase in disposal costs for these types of wastes.<sup>2</sup> The advent of global trade combined with these two factors helped push waste traders to seek cheap dumping sites around the world.

Toxic waste dumping from developed to poorer countries became a major concern, due in part to highly publicized dumping cases. The case of the *Khian Sea*, a barge transporting 14,000 tons of incinerator ash from Pennsylvania that was refused entry to New Jersey, was one of the leading cases in the 1980s.<sup>3</sup>

Another highly publicized case was the *Koko Beach* incident in 1987 wherein an Italian businessman, illegally exported 4,000 tonnes of chemical waste (including 150 tons of polychlorinated biphenyl) from Italy to Nigeria over an 18-month period resulting in the loss of lives and environmental damage in the area.<sup>4</sup>

The logic of the waste export paradigm that defined the period was given a voice by then World Bank Chief Economist Larry Summers, when he issued an internal memo to his colleagues, stating that “the economic logic behind dumping a load of toxic waste in the lowest-wage country is impeccable. . . .”<sup>5</sup> Mr. Summers defended his logic in the following manner:

1) The measurement of the costs of health impairing pollution depends on the foregone earnings from increased morbidity and mortality. From this point of view a given amount of health impairing pollution should be done in the country with lowest cost, which will be the country with the lowest wages. . . .

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2. *History of the Negotiations of the Basel Convention*, BASEL CONVENTION, <http://www.basel.int/TheConvention/Overview/History/Overview/tabid/3405/Default.aspx> (last visited Feb. 17, 2014) [hereinafter *History of Basel Convention*].

3. When New Jersey authorities learned that the waste contained arsenic, cadmium, lead, mercury, dioxin, and other toxins and was classified as hazardous waste, the *Khian Sea's* entry was refused. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), TRADE MEASURES IN THE BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL 5 (May 27, 1998), available at <http://www.oecd.org/trade/envtrade/36789048.pdf>. The vessel attempted to dock and unload its toxic cargo in six other countries and was refused. *Id.* The barge then sailed to sea from 1984 to 1986, stopping at various Caribbean ports failing to offload its cargo, before finally leaving some of its wastes cargo in Haiti, with the rest assumed to have been dumped at sea. *Id.*; Peter Montague, *Philadelphia Dumps on the Poor*, ENVTL. RES. FOUND., [http://ban.org/ban\\_news/philly\\_dumps.html](http://ban.org/ban_news/philly_dumps.html).

4. See Edna Eguh, *Regulations of Transboundary Movement of Hazardous Wastes: Lessons from Koko*, 9 AFR. J. INT'L & COMP. L. 130, 130–32 (1997) (describing Koko incident and its consequences).

5. Internal Memorandum from Larry Summers at World Bank (Dec. 12, 1991), available at <http://www.econ.boun.edu.tr/content/document/ec47401/6865.pdf>.

2) The costs of pollution are likely to be non-linear as the initial increments of pollution probably have very low cost. I've always thought that underpopulated countries in Africa are vastly under-polluted, their air quality is probably vastly inefficiently low compared to Los Angeles or Mexico City. . . .

3) The demand for a clean environment for aesthetic and health reasons is likely to have a very high-income elasticity.<sup>6</sup>

The undercurrent of Summers' logic is the recognition of inequalities in the world and to take full advantage of them. In the realm of toxic waste trade, there was and continues a clear divide between developed and poorer countries from environmental and labor standards to technical capacity and other social elements.

In the 1970's and the decades following, only a handful of industrialized or developed countries produce 95% of the world's toxic wastes.<sup>7</sup> Much of the toxic waste trade occurs among developed countries, where the waste originated. However, significant portion of the trade have found their way to developing countries.<sup>8</sup> Thus, the *Khian Sea*, *Koko Beach*, and similar toxic waste dumping cases echoed the inequalities faced by poorer countries and the growing threat of toxic waste in the global environment.

The experience of poorer countries with respect to toxic waste dumping was happening in conjunction with the experience of poor communities and people of color in the US. It was during this period that the environmental justice movement emerged in the US, which was "started by individuals, primarily people of color, who sought to address the inequity of environmental protection in their communities."<sup>9</sup>

The environmental justice movement in the US can be seen as an important milestone in the development of international environmental justice as the movement and the principle shared common themes and struggles.<sup>10</sup> And as Lawrence Summers' remarks defined the economic logic of toxic waste dumping, the environmental justice movement in the US helped contribute in defining the environmental justice principle at the

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6. *Id.*

7. JENNIFER CLAPP, TOXIC EXPORTS: THE TRANSFER OF HAZARDOUS WASTES FROM RICH TO POOR COUNTRIES 22 (2001).

8. *Id.* at 2.

9. *Basic information on Environmental Justice*, EPA, <http://www.epa.gov/environmental-justice/basics/ejbackground.html> (last visited Feb. 18, 2014).

10. *Cf.* RUCHI ANAND, INTERNATIONAL ENVIRONMENTAL JUSTICE: A NORTH-SOUTH DIMENSION 15 (2004) (analogizing the United States and international environmental justice movements).

international level.

In 1994, the principle of environmental justice was institutionalized in the US when President Bill Clinton issued Executive Order 12898 (EO).<sup>11</sup> According to the US Environmental Protection Agency (EPA), environmental justice is “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>12</sup>

The EPA’s definition encompasses two sets of action: fair treatment and meaningful involvement.

“Fair treatment means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies. Meaningful involvement means that: (1) people have an opportunity to participate in decisions about activities that may affect their environment and/or health; (2) the public’s [sic] contribution can influence the regulatory agency’s decision; (3) their concerns will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.”<sup>13</sup>

Other authors describe these two elements as: distributive justice and procedural justice.<sup>14</sup> Distributive justice deals with “inequitable distribution of social, economic, and political burdens on people/communities with different levels of development.”<sup>15</sup> Procedural justice highlights the “inequitable bargaining powers of people/communities with different levels of economic development,” regarding environmental benefits and burdens, and recognizes that racial minorities and the poor are often not included or are ignored in such conversations.<sup>16</sup>

In spite of the difference in terminologies, these very principles have found their way at the global level, particularly in international multilateral agreements, such as the Basel Convention.<sup>17</sup>

11. Exec. Order. No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

12. EPA, *supra* note 9.

13. *Id.* (emphasis removed).

14. Lisa Widawsky, *In My Backyard: How Enabling Hazardous Waste Trade To Developing Nations Can Improve the Basel Convention’s Ability to Achieve Environmental Justice*, 38 ENVTL. L. 577, 583 (2008).

15. ANAND, *supra* note 10, at 10.

16. *Id.*

17. See Widawsky, *supra* note 14, at 585 (“Examples of procedural and distributive injustice pervade the discourse among industrialized and developing nations, and political solutions in the form of multilateral environmental agreements (MEAs) echoing the themes of environmental justice and

## I. THE BASEL CONVENTION AND THE BASEL BAN

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal<sup>18</sup> (Basel Convention) was initiated in response to the numerous international scandals regarding hazardous waste trafficking in the 1980s.<sup>19</sup>

The Basel Convention negotiations were “politicized, arduous and emotionally charged.”<sup>20</sup> In the tense negotiations the undercurrent of environmental justice was present as two competing ideologies vied for control of the direction of the Convention: the pro-trade camp and those calling for a total ban on toxic waste exports. Developed countries, Japan, US, Canada, Australia, and New Zealand, known as the JUSCANZ, with their developing country allies, led the pro-trade side. On the other, the Group of 77 developing countries led by China, and supported by the European Union bloc of countries fought for an outright ban.

The negotiations started in 1987 and concluded on March 22, 1989 with 35 states signing the Convention in Basel, Switzerland.<sup>21</sup> To date, 181 countries have ratified the treaty.<sup>22</sup>

### A. Basel Convention

1. *The Convention's Framework.* The Basel Convention seeks to minimize the generation<sup>23</sup> and exportation of hazardous wastes,<sup>24</sup> and to promote national self-sufficiency in hazardous waste management by placing responsibility on toxic waste generators to dispose of the wastes as close to area of generation as possible.<sup>25</sup> In its efforts at minimizing waste exports, the Basel Convention also restricts traffic in toxic wastes by

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attempting to rectify these injustices have been forged.”).

18. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57 [hereinafter Basel Convention], available at [https://treaties.un.org/doc/Treaties/1992/05/19920505%2012-51%20PM/Ch\\_XXVII\\_03p.pdf](https://treaties.un.org/doc/Treaties/1992/05/19920505%2012-51%20PM/Ch_XXVII_03p.pdf).

19. *History of Basel Convention*, *supra* note 2.

20. Katharina Kummer, *The Basel Convention: Ten Years On*, 7 REV. EUR. CMTY. & INT'L ENVL. L. 227, 227 (1998).

21. For a full list of signatories, see *Parties to the Basel Convention*, BASEL CONVENTION, <http://www.basel.int/Countries/StatusofRatifications/Parties/tabid/1290/Default.aspx> (last visited Feb. 17, 2014) [hereinafter Signatories to Basel Convention].

22. *Id.*

23. Basel Convention, *supra* note 18, art. 4(2)(a).

24. Basel Convention, *supra* note 18, art. 4(2)(d).

25. Basel Convention, *supra* note 18, arts. 4(2)(b) and 4(10).

applying the “Prior Informed Consent” or PIC procedure,<sup>26</sup> and prohibiting waste trade with countries not parties to the Basel Convention.<sup>27</sup> Shipments made without the proper notification and consent of the importing Party or when the shipment does not conform in a material way with the shipping documents, are deemed illegal.<sup>28</sup> Illegal traffic under the Basel Convention is a criminal act.<sup>29</sup>

It is important to note that the Basel Convention framework only applies to toxic and other wastes.<sup>30</sup> Waste is defined by the Convention as “any substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law.”<sup>31</sup> The Basel Convention is unique because it defines wastes without considering economic value or use of the substance and places emphasis on the fact of disposal or intent to dispose of the substance. Disposal is defined in Annex IV of the Convention and includes recycling, reclamation, and other processes.<sup>32</sup>

Elements of distributive justice and procedural justice are present in the Basel Convention. The PIC procedure on the importation of waste is an important element of procedural justice, as it allows countries, regardless of economic stature, to be notified and consent to or reject any toxic waste importation or exportation. Other procedural justice elements that are found in Basel are:

- Information sharing provisions<sup>33</sup> and a mandate for cooperation<sup>34</sup> – countries are mandated to cooperate in monitoring the management of hazardous wastes<sup>35</sup> and in developing technical guidelines and codes of practice for environmentally sound management of wastes,<sup>36</sup> send

26. See Basel Convention, *supra* note 18, art. 6 (establishing prior informed consent requirement).

27. Basel Convention, *supra* note 18, art. 4(5).

28. Basel Convention, *supra* note 18, art. 9(1).

29. Basel Convention, *supra* note 18, art. 4(3).

30. Basel Convention, *supra* note 18, art. 1.

31. Basel Convention, *supra* note 18, art. 2(1).

32. Wastes are considered toxic under Basel if it is included in a category of waste under Annex I of the Convention, e.g. clinical wastes. Basel Convention, *supra* note 18, art. 1(1)(a). If the suspected waste, however, is found in Annex I, but does not exhibit a specific characteristic that the Parties to the Convention deemed hazardous, as listed in Annex III, e.g. poisonous, flammable solids, then that waste is not considered hazardous. *Id.* art. 1(1)(b).

33. Basel Convention, *supra* note 18, art. 13.

34. Basel Convention, *supra* note 18, art. 10.

35. Basel Convention, *supra* note 18, art. 10(b).

36. Basel Convention, *supra* note 18, art. 10(e).

information on their national definitions of wastes<sup>37</sup>, decisions to ban or limit entry of hazardous wastes<sup>38</sup>, among other information.

- Participation at Conference of Parties (COP) and allowing observers.<sup>39</sup> Developing countries are able participate in COP adding their voice in strengthening and developing the Convention. To accomplish this the Convention has created a provision where financial support is given to developing countries to attend and participate.<sup>40</sup> Notably, the Convention also makes room for non-parties and non-state parties, such as non-governmental organizations (NGOs), industry, and other stakeholders to participate as observers under specific rules.<sup>41</sup>
- The right to vote<sup>42</sup> – regardless of economic status, countries party to the Convention has 1 vote and decisions by the Convention pass by consensus.<sup>43</sup>

On distributive justice, the obligation to manage a country's own toxic waste within its own border,<sup>44</sup> the explicit recognition of disparity between developed and developing countries<sup>45</sup> are some of the indicators of the Convention's consciousness of the plight of developing countries. To further minimize the disproportionate impact of waste dumping on developing countries, the Basel Convention further installed measures such as the criminalization of illegal trade in hazardous wastes,<sup>46</sup> and provisions of transfer of technology to developing countries through centers called Basel Convention Regional Centers.<sup>47</sup>

2. *Weaknesses of the Basel Convention.* For NGOs and the developing countries that fought for a trade ban, the resulting treaty was a failure. Instead of establishing an outright toxic waste ban, the Basel Convention was seen as a means of legalizing toxic waste trade.<sup>48</sup> “Thus the original

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37. Basel Convention, *supra* note 18, art. 13(2)(b).

38. Basel Convention, *supra* note 18, art. 13(2)(d).

39. Basel Convention, *supra* note 18, art. 15.

40. Basel Convention, *supra* note 18, art. 15 (3).

41. Basel Convention, *supra* note 18, art. 15(6).

42. Basel Convention, *supra* note 18, art. 24.

43. Basel Convention, *supra* note 18, art. 24(1).

44. Basel Convention, *supra* note 18, art. 4(2)(b).

45. Basel Convention, *supra* note 18, pmb. ¶ 20.

46. Basel Convention, *supra* note 18, arts. 4(3), 9(1).

47. Basel Convention, *supra* note 18, art. 14(1).

48. BASEL ACTION NETWORK, BRIEFING PAPER NO. 1: THE BASEL BAN A TRIUMPH FOR GLOBAL

Convention became primarily an instrument to monitor the transboundary movements of hazardous waste rather than prevent it. With the exception of a ban on exports to Antarctica, the Convention established only a weak control regime based on the principle of PIC.”<sup>49</sup>

i. *Gaps in the PIC procedure.* As the core measure of control under the Basel Convention, the PIC procedure has three critical weaknesses that have raised concerns over Basel’s effectiveness in minimizing toxic waste dumping. First, the PIC procedure fundamentally fails to ensure that the exporting country verifies that the facility accepting the waste in the importing country can manage the waste in an environmentally sound manner.<sup>50</sup> Under the Convention each party has the obligation to ensure the availability of adequate disposal facilities in the importing state.<sup>51</sup> However, the obligation does not prescribe a process nor designate an entity that will conduct the verification. The Convention thus relies on self-verification by countries and without any standard process or independent entity to conduct the verification, the adequacy of sufficiently determining if a facility is environmentally sound is difficult to achieve.

Compounding the lack of a prescribed process is the fact that the technical guidelines generated under the Convention are not mandatory at the local or national levels. The guidelines are merely prescriptive of environmentally sound management (ESM) technologies and processes, and Basel parties have the discretion to adopt these ESM guidelines. Thus, in the absence of a standard process for verification, a country attempting to self-verify a facility cannot assume that the destination country is observing the Basel ESM guidelines for a specific waste.

Another weakness in the PIC procedure is its omission to account for the susceptibility of country consents to be obtained from corrupt local officials.<sup>52</sup> It also ignores the economic motivation of poor countries to accept these types of wastes for either the value or money that the waste can contribute to the local economy.<sup>53</sup>

ii. *Recycling Loophole.* The “Recycling Loophole” is based on Article

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ENVIRONMENTAL JUSTICE (2012), available at <http://ban.org/library/briefing1.html> [hereinafter BAN No. 1].

49. Jim Puckett, *The Basel Ban: A Triumph Over Business-As-Usual*, BASEL ACTION NETWORK (last updated Oct. 1, 1997), available at [http://ban.org/about\\_basel\\_ban/jims\\_article.html](http://ban.org/about_basel_ban/jims_article.html).

50. See Widawsky, *supra* note 14, at 582 (“[T]he loophole in the PIC process currently enabling misrepresentation by Parties regarding [environmentally sound management] practices could be closed by predicating use of a facility in a developing nation upon prior inspection and authorization by an implementation body.”).

51. Basel Convention, *supra* note 18, art. 4(2)(b).

52. Andrews, *supra* note 1, at 173.

53. *Id.* at 173–74.

4(9)(b) of the Basel Convention which allows transboundary movement of wastes if these are required as a raw material for recycling or recovery industries in the importing state. There was a concern among NGOs and developing countries that waste trade will follow the recycling loophole under the Convention. The international environmental group, Greenpeace, reported that by early 1990s after the Convention entered into force, 90% of waste destined for final disposal shifted instead and headed to recycling or further use.<sup>54</sup> The Organization for Economic Cooperation and Development (OECD) also cited an increase in their member countries waste export for recycling, from 50.2% in 1992 to 58.4% in 1993.<sup>55</sup>

The Basel Action Network, a Basel Convention NGO watchdog, classifies the waste trade recycling practices either as: sham – “where wastes are not really recycled at all, but simply burned or dumped,” or dirty – “which involves polluting operations that jeopardize the health of the importing country’s populace and environment.”<sup>56</sup> In 2002, the group publicized its investigation on the sham or dirty recycling of electronic waste or e-waste from the US to China.<sup>57</sup> Other civil society groups have also documented egregious recycling practices over the years, including the disposal of ships that are have reached the end of their useful life or have been mandated by law to be decommissioned, or end-of-life vessels.<sup>58</sup>

iii. *Environmentally Sound Management.* Environmentally sound management is a critical principle in the Basel Convention framework, as it functions as both a goal and obligation by parties to the Convention. The Basel Convention defines environmentally sound management as “taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.”<sup>59</sup>

This definition has been criticized as vague and open to subjective interpretations and has been seen as one of the reasons for the difficulty of enforcing the obligation of parties that wastes can be exported only if

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54. CLAPP, *supra* note 7, at 58 (footnotes omitted).

55. *Id.* (footnotes omitted).

56. BASEL ACTION NETWORK, HAZARDOUS WASTE RECYCLING: NO JUSTIFICATION FOR TOXIC TRADE 1 (2011), *available at* [http://www.ban.org/wp-content/uploads/2011/10/BP7\\_Oct\\_2011\\_Final\\_Letter.pdf](http://www.ban.org/wp-content/uploads/2011/10/BP7_Oct_2011_Final_Letter.pdf).

57. BASEL ACTION NETWORK & SILICON VALLEY TOXICS COALITION, EXPORTING HARM: THE HIGH-TECH TRASHING OF ASIA (2002), *available at* <http://www.ban.org/E-waste/techartrashfinalcomp.pdf>.

58. *Problems and Solutions*, NGO SHIPBREAKING PLATFORM, <http://www.shipbreakingplatform.org/problems-and-solutions/> (last visited Feb. 28, 2014).

59. Basel Convention, *supra* note 18, art. 2(8).

disposed of in an “environmentally sound manner”.<sup>60</sup>

The subjectivity of the ESM definition is also seen as a means of stripping the Basel Convention of its environmental justice roots.<sup>61</sup> Some sectors are defining ESM “only in terms of technical capacity and only at the facility level, and does not embody the fundamental Basel policies, such as the fact that waste generation should be minimized and that it is not ESM to externalize costs of pollution via export to poorer countries rather than deal with them at source through national self-sufficiency.”<sup>62</sup>

iv. *Liability Protocol in Limbo.* Another weakness that has been attributed to the Basel Convention is its lack of provision for liability and compensation for toxic waste contamination.<sup>63</sup> The closest response by the Basel Parties was to develop the Protocol on Liability and Compensation (Protocol),<sup>64</sup> which was adopted in December of 1999. Fifteen years after its adoption it is not yet in force, and has garnered only 11 of 20 needed ratifications.

The Protocol covers damages arising from incidents occurring “during a transboundary movement of hazardous wastes and other wastes and their disposal, including illegal traffic, from the point where the wastes are loaded on the means of transport in an area under the national jurisdiction of a State of export.”<sup>65</sup> Damages under the Protocol include: loss of life or personal injury, loss of or damage to property, loss of income, costs of reinstatement and preventive measures.<sup>66</sup>

The main strengths of the Protocol are the strict liability and fault-based liability provisions it has set up for waste shipments. Under the strict liability provisions liability for damages is generally assigned to the state of export or exporter, and to the state of import in specific cases, arising from the transboundary movement of hazardous wastes until the disposer has taken possession of the waste, at which point the disposer will be held liable.<sup>67</sup> The fault-based liability element of the Protocol applies to any person who causes or contributes to an accident by ignoring Basel

60. CLAPP, *supra* note 7, at 57.

61. BASEL ACTION NETWORK, RUNNING FROM BASEL: HOW THE CONVENTION IS DELIBERATELY UNDERMINED 1 (2012), available at [http://www.ban.org/wpcontent/uploads/2012/09/BP8\\_Sept2012\\_Final\\_A4.pdf](http://www.ban.org/wpcontent/uploads/2012/09/BP8_Sept2012_Final_A4.pdf).

62. *Id.* at 2.

63. CLAPP, *supra* note 7, at 57.

64. Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, Dec. 10, 1999, UNEP/CHW.1/WG/1/9/2, available at <http://archive.basel.int/meetings/cop/cop5/docs/prot-e.pdf>.

65. *Id.* art. 3(1).

66. *Id.* art. 2(2)(c).

67. *Id.* art. 4(1),(2).

Convention requirements or through wrongful intentional, reckless, or negligent acts will be held liable for damages.<sup>68</sup>

Developed and developing countries, including NGOs, have been lukewarm in accepting the Protocol. A reason for this is that the liability for the shipment will not cover so-called “after-care incidences” such as leaks or seepage at waste storage sites.<sup>69</sup> Major costs of clean-up and remediation are borne by the State of import. For developing countries who are often at the receiving end of toxic waste exports this is an unwanted economic and technical burden. Depending on the hazards involved, the technical capacity of cleaning up and remediating the hazards might not be available in the country. In these cases, developing countries often seek out developed country assistance.

Another downside of the Protocol is the exclusion of waste generators from the strict liability provisions. The exclusion is seen as an incentive for waste exporters to hand over their waste to export brokers or other “notifiers” who would assume liability for the shipments who could easily escape or minimize liability.<sup>70</sup> For instance, the “notifier” assuming the liability of the waste export may be under capitalized which will immediately limit its exposure to pay out any claims for damage arising from any incident.

Developed nations, particularly the US, were uncomfortable with the Protocol primarily on the provisions for minimum liability thresholds imposing a high limit, which could impact trade in nondangerous recyclable wastes.<sup>71</sup>

### *B. The Basel Ban Amendment (the Basel Ban)*

The increase in toxic waste exports after the adoption of the Basel Convention, and the emergence of the loopholes in the Convention, pressed both developing countries and environmental NGOs to call for a trade ban on hazardous wastes outside of the Convention.<sup>72</sup> As a result, several regional agreements were born at the wake of the Convention: Lomé IV Convention in 1989,<sup>73</sup> Bamako Convention in 1991,<sup>74</sup> Agreement on the

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68. *Id.* art. 5.

69. *Saving the Basel Liability Protocol*, BASEL ACTION NETWORK, at II, <http://ban.org/subsidiary/liability10.html>.

70. *Id.* at I.

71. Daniel Pruzin, *Hazardous Waste agreement on Liability Protocol Reached at Basel Conference of Parties*, 22 INT'L ENVTL. REP. (BNA) 973 (Dec. 8, 1999), available at [www.ban.org/ban\\_news/hazardous3.html](http://www.ban.org/ban_news/hazardous3.html).

72. CLAPP, *supra* note 7, at 67.

73. Forth ACP-EEC Convention, Dec. 15, 1989, 29 I.L.M. 385, available at <http://unctad.org/Sections/dite/iia/docs/compendium/en/44%20volume%202.pdf>.

Transboundary Movement of Hazardous Wastes in the Central American Region 1992,<sup>75</sup> Waigani Convention in 1995,<sup>76</sup> and Izmir Protocol in 1996.<sup>77</sup>

Within the Basel Convention, efforts to push for trade bans continued as well. At the first Conference of Parties in Piriapolis, Uruguay on December 1992, Decision I/22 was adopted requesting developing countries to prohibit the import of hazardous wastes from industrialized countries.<sup>78</sup>

In March 1994, at COP2, a tense and political contest between JUSCANZ and the G-77 with the EU countries resulted in Decision II/12.<sup>79</sup> This decision explicitly prohibited export of all hazardous wastes from OECD to non-OECD countries including exports for recycling ore recovery operations as of January 1, 1998.<sup>80</sup> Decision II/12 attempted to address a major loophole under Basel and was a major assertion of both procedural and distributive justice by developing countries at the global stage.

Decision II/12, however, gave rise to further questions, particularly involving its legal status and enforceability paving the way for another showdown between JUSCANZ and the G-77 and EU in COP3.

In September 1995, COP3 of the Basel Convention was held in Geneva, Switzerland. The contest between JUSCANZ and G-77 and the EU was coming to a head. Both sides understood the level of importance of what was to be decided at COP3 that in order for Decision II/12, which

74. Bamako Convention on the Ban of the Import to Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Jan. 31, 1991, 2101 U.N.T.S. 177, available at <http://www.cetim.ch/en/documents/conv-bamako-ang.pdf>.

75. Regional Agreement on the Transboundary Movement of Hazardous Wastes, Dec. 11, 1992, available at <http://www.ecolex.org/ecolex/ledge/view/RecordDetails?id=TRE-001167&index=treaties>.

76. Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region, Sept. 16, 1995, 2161 U.N.T.S. 91, available at <http://www.forumsec.org/resources/uploads/attachments/documents/Waigani%20Convention%20Text.pdf>.

77. Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal, Jan. 10, 1996, available at <http://www.unep.ch/regionalseas/main/med/medhaz.html>.

78. First Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Piriapolis, Uru., Dec. 3–4, 1992, Decision I/22, 37-38, U.N. Doc. UNEP/CHW.1/24, available at <http://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>.

79. Second Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Geneva, Switz., Mar. 21–25, 1994, Decision II/12, 19-20, U.N. Doc. UNEP/CHW.2/30, available at <http://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>.

80. *Id.* §§ 1–2.

has been restated in Decision III/1,<sup>81</sup> to be implemented it had to become integral to the Convention. Thus, amending the Basel Convention was necessary.

At the end of the highly contentious meeting, the political tight rope was crossed. The G-77 nations prevailed and Decision III/1 or what has come to be known as the Basel Ban was adopted by consensus.<sup>82</sup>

1. *The Basel Ban's Framework.* Decision III/1 or the Basel Ban prohibits Annex VII countries (nations that are part of the OECD, European Community, and the special mention of Liechtenstein) from exporting hazardous wastes to non-Annex VII countries for final disposal and for wastes intended for recycling or recovery.<sup>83</sup>

In addition to the prevention of waste dumping on poorer countries, the Basel Ban is also designed to bolster the Basel Convention's goal of minimizing toxic waste generation.<sup>84</sup> The Basel Ban attempts to accomplish this by preventing the movement of waste, forcing waste generating countries to increase their self-sufficiency in managing their waste, which includes minimizing toxic inputs in production and processes.<sup>85</sup>

The Basel Ban has several key features in relation to international environmental justice.

First the Basel Ban attempted to further embed within the treaty the principle of distributive justice by adding a new preambular paragraph to the Basel Convention, confirming the inequality between rich and poorer nations on the issue of hazardous waste management. The proposed amendment states:

“Recognizing that transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous wastes as required by this Convention;”

Second, considering the fact that in that period at least 95% of the

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81. Third Meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Geneva, Switz., Sept. 18–22, 1995, *Decision III/1*, U.N. Doc. UNEP/CHW.3/35, available at <http://www.basel.int/Implementation/LegalMatters/BanAmendment/tabid/1484/Default.aspx> [hereinafter Basel Ban].

82. Note at the meeting India, Brazil, South Korea, and Russia sided with the JUSCANZ. See CLAPP, *supra* note 7, at 76 (“[F]or the first time, some non-OECD governments, including those of Brazil, India, Russia, and South Korea, also expressed opposition to the adoption of a ban amendment.”).

83. Basel Ban, *supra* note 81, § 3.

84. BAN No.1, *supra* note 48.

85. See *id.*

waste trade generators were from rich nations, the developing country proponents and their NGO allies tried to further concretize the differentiation of roles between richer and poorer nations by creating the category of Annex VII and non-Annex VII countries.

Third, the fact that Decision III/1 was even possible and passed through the Basel proceedings, in spite of strong resistance from several developed nations such as the US and Japan, affirmed that the procedural justice component of the Basel Convention is functioning.

2. *Major Weaknesses of the Basel Ban.* The Basel Ban has received its fair share of criticisms. These can be grouped into three categories: trade, development, and implementation.

The trade argument against the Basel Ban rests on two planks: a) that it is inconsistent with the General Agreement on Tariffs and Trade (GATT) / World Trade Organization (WTO) rules; and b) legitimate trade on recyclable materials will be controlled as hazardous waste potentially stifling the trade.<sup>86</sup>

Another major argument against the Basel Ban is that it impinges on a country's national development by restricting needed supply of raw materials and source of income, especially for developing countries. By denying access to raw materials or from foreign sources, developing country facilities could eventually close down and the valuable materials in the hazardous wastes would end up in final disposal.<sup>87</sup> Put another way, this argument posits that a ban on recycling hazardous wastes will discourage recycling and result in more use of virgin materials thus creating more environmental damage. Corollary to the national development argument is the loss of jobs and earnings from the affected recycling sector.

The lack of support from developed countries, particularly the non-European developed nations: US, Japan, Australia, New Zealand, and South Korea is cited as a critical weakness of the Basel Ban. "Any measure that does not bind such an important group of countries is of limited value."<sup>88</sup>

3. *The Country Led Initiative (CLI).* The competing interests over the Basel Ban Amendment defined the agenda of work of the Basel

86. CLAPP, *supra* note 7, at 83; *see also* Widawsky, *supra* note 14, at 614.

87. *See* Widawsky, *supra* note 14, at 614 (noting that "reclamation not only provides income for these countries but also puts materials into use that would otherwise be sitting at a disposal site").

88. Andrews, *supra* note 1, at 180.

Convention and it often ended up in a political and legal deadlock. A procedural hump that further complicated the Basel Ban issue was the vagueness of the Basel Convention on how it should be amended.<sup>89</sup> Article 17(5) of the Convention on amendments was not clear, particularly the numerical basis of the three-fourth's voting requirement. The interpretation of Article 17(5) has a direct bearing on the number of votes needed before an amendment could come into force.<sup>90</sup> Thus, in addition to overcoming the challenge of getting the needed ratification, the parties to the Convention had to agree on the process of resolving the issue and what the correct interpretation of the Article 17(5) provision should be while navigating the political minefield that has permeated the Basel Ban debates.

In 2008, at Bali, Indonesia, the President of the ninth meeting of the Conference of the Parties to the Basel Convention, called for a process to explore means to break the impasse to finally move the Basel Ban objectives forward.<sup>91</sup>

In response to the call, Indonesia and Switzerland organized the effort called "Country-Led Initiative" (CLI), where they invited key countries, to discuss in an informal, dynamic and non-dogmatic manner those issues related to the transboundary movements of hazardous wastes, especially to developing countries, contrary to the overarching objective of the Basel Ban.<sup>92</sup>

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89. See Basel Convention, *supra* note 18, art. 17(5).

90. See *Basel Convention Amendments – History*, Basel Convention, <http://www.basel.int/Default.aspx?tabid=2760#section2> (last visited Feb. 21, 2014) (noting that ambiguity arises in determining the particular percentage of votes needed to ratify or amend and that "it is necessary to be aware of the total number of States concerned from which the required percentage will be calculated"). There were two competing interpretations on Art. 17(5). The first interpretation was called the "fixed time" approach. *Id.* This interpretation considers the number of parties present and voting in 1995 when the Basel Ban Amendment was adopted. *Id.* The main disagreement in this interpretation was whether the actual number of parties present at the time of the adoption or the total number of parties to the Basel Convention in 1995 would be the basis. See *id.* ("It is only when a treaty specifies that the percentage should be calculated based upon the number of parties at the time of adoption of an amendment that the depositary, in compliance with the treaty itself, can adopt the 'fixed time approach.' . . . [However,] [i]n the present case, article 17(5) of the Convention does not specify that the percentages should be calculated at the time of adoption . . ."). The other line of interpretation was from the UN Office of Legal Affairs, which utilized the "current time" approach. *Id.* This approach stipulates that the number of ratifications required for entry into force will be calculated on the basis of the percentage of the Parties at the time each ratification is deposited. *Id.*

91. See Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal on its Ninth Meeting, Bali, Indon., June 23–27, 2008, 51–52 U.N. DOC. UNEP/CHW.9/39, available at <http://www.basel.int/Portals/4/Basel%20Convention/docs/meetings/cop/cop9/docs/39e-rep.pdf#ix26> (reproducing the "President's statement on the possible way forward on the Ban Amendment").

92. *Basel Convention Implementation – The Country-Led Initiative*, BASEL CONVENTION,

A key output from the CLI was a draft omnibus decision that became the basis for Decision 10/3,<sup>93</sup> which was adopted as a decision at the tenth meeting of the Conference of the Parties in 2011.<sup>94</sup>

Decision 10/3 interpreted Article 17(5) stating that:

[A]cceptance of three-fourths of those parties that were parties at the time of the adoption of the amendment is required for the entry into force of such amendment, noting that such an interpretation of paragraph 5 of Article 17 does not compel any party to ratify the Ban Amendment.<sup>95</sup>

With the Basel parties resolving the roadblock to ratification, the CLI effort led to 7 country ratifications 3 years since its passage.<sup>96</sup> The adoption of the “fixed time” approach at COP 10 means that 66 countries are needed to ratify the Basel Ban for it to enter into force, and as of this writing, it is 16 ratifications away.<sup>97</sup>

## II. THE BASEL BAN IN 2014: FROM A PHILIPPINE PERSPECTIVE

As the Basel Ban moves closer to its entry into force, it is critical to

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[http://www.basel.int/Implementation/LegalMatters/CountryLedInitiative/tabid/1339/Default.aspx#LiveContent\[decision10-3\]](http://www.basel.int/Implementation/LegalMatters/CountryLedInitiative/tabid/1339/Default.aspx#LiveContent[decision10-3]) (last visited Feb. 21, 2014).

93. *Id.*

94. *Id.*

95. Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal on its Tenth Meeting, Cartagena, Colom., Oct. 17–21, 2011, 31, U.N. DOC. UNEP/CHW.10/28 (Nov. 1, 2011), available at <http://archive.basel.int/meetings/cop/cop10/documents/28e.pdf> (emphasis added).

96. See *Basel Convention - Ban Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal Geneva, 22 September 1995*, BASEL CONVENTION, [http://www.basel.int/Countries/StatusofRatifications/Ban Amendment/tabid/1344/Default.aspx](http://www.basel.int/Countries/StatusofRatifications/Ban%20Amendment/tabid/1344/Default.aspx) (last visited April 19, 2014). The following countries submitted their instruments of accession, acceptance or ratification after Nov. 1, 2011: Benin, Côte d’Ivoire, Guatemala, Lesotho, Malta, Monaco, and Saudi Arabia.

97. There were 87 parties to the Basel Convention in 1995 when the Basel Ban was adopted. Following the fixed-time approach, three-fourths of those 87 parties, 66, would need to ratify the Basel Ban in order for it to enter into force. See at: [file:///Users/Rich/Downloads/UNEP-CHW-BAN-OLA-DepositaryLetter19032013.Engl ish.pdf](file:///Users/Rich/Downloads/UNEP-CHW-BAN-OLA-DepositaryLetter19032013.Engl%20ish.pdf) (last visited April 19, 2014). The following are the prospective countries that have not yet ratified the Basel Ban Amendment, and whose ratification counts toward the Amendment entering into force: Antigua and Barbuda, Australia, Bahamas, Bangladesh, Brazil, Canada, Comoros, Costa Rica, Croatia, Cuba, Dem. Rep. of Congo, El Salvador, Estonia, Guinea, India, Iran, Israel, Japan, Lebanon, Malawi, Maldives, Mexico, Namibia, New Zealand, Pakistan, Peru, Philippines, Republic of Korea, Russian Federation, Senegal, Seychelles, St. Kitt and Nevis, South Africa, United Arab Emirates, and Vietnam. See *id.* This list is based on the comparison of the UN Office of Legal Affairs 1995 list of countries and the current ratification lists under the Basel Convention. (highlighting those countries who have yet to ratify the Basel Ban).

revisit the Basel Ban in the reality that faces developing countries to understand the arguments raised against it that could dissuade the Philippines and other countries from ratifying an international instrument whose main purpose is to prevent toxic waste dumping on poorer nations.

#### A. *The Philippines*

The Philippines is a representative country for developing nations on the issue of the Basel Ban. It shares similarities with other developing countries, for instance, with a population surpassing 105 million, 26.5% of its population is under the poverty line, it ranks 54<sup>th</sup> among highly indebted nations, and 51.5% of its GDP goes into servicing its foreign debt.<sup>98</sup> The Philippine public sector is highly perceived as corrupt. In 2013, the Philippines ranked 94th with a score of 36, from a corruption ranking issued by the international NGO, Transparency International, which scores countries from 0 (highly corrupt) to 100 (no corruption).<sup>99</sup>

On the issue of toxic waste, the Philippines became a party to the Convention on March 10, 1993. It has not ratified the Basel Ban. The country has also experienced illegal toxic waste shipments and toxic exports. In 1994, a Japanese shipbuilding company developed an industrial zone in Southern Philippines to dismantle end-of-life vessels contaminated with toxins, with no effective measures to prevent pollution.<sup>100</sup> In 1999, Philippine authorities in the Port of Manila intercepted 124 seagoing containers of medical waste, in the guise of recycled paper, from Japan.<sup>101</sup>

The Philippines also has a special connection with the Basel Ban. First, it is one of the countries that belong to the 1995 list of parties to the Basel Convention whose ratification is crucial in bringing the Basel Ban into force. Second, Philippine lawmakers were outraged over the growing toxic waste trade, which they called a “diabolical practice” that they responded unilaterally by passing a law banning the import, storage, or transport of nuclear or toxic wastes in or through the Philippines.<sup>102</sup> And

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98. *The World Factbook – Philippines*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/rp.html> (last updated Feb. 11, 2014).

99. *Corruption by Country/Territory*, TRANSPARENCY INTERNATIONAL, <http://www.transparency.org/country#PHL> (last visited Feb. 21, 2014). Compared to its Southeast Asian neighbors, the Philippines would be in middle of the pack with Singapore being the least corrupt with a rank of 5th followed by Brunei (38th) and Malaysia (53th) but it is ahead of Thailand (102nd), Indonesia (114th), Vietnam (116th), Laos (140th) Myanmar (157th), and Cambodia (160th).

100. BASEL ACTION NETWORK, JPEPA AS A STEP IN JAPAN’S GREATER PLAN TO LIBERALIZE HAZARDOUS WASTE TRADE IN ASIA 9 (2007), available at [http://ban.org/library/JPEPA\\_Report\\_BAN\\_FINAL\\_29\\_Aug\\_071.pdf](http://ban.org/library/JPEPA_Report_BAN_FINAL_29_Aug_071.pdf).

101. *Id.*

102. THE INTERNATIONAL TRADE IN WASTES: A GREENPEACE INVENTORY, 1990; see also An Act to Control Toxic Substances and Hazardous and Nuclear Wastes, Providing Penalties for Violations

third, the country's importation from Australia of used lead acid batteries as raw materials for its facility has oft been cited as an example of why the Basel Ban can adversely impact local recycling industries in developing countries.

In the succeeding section, we will look at the Philippine situation and examine whether the weaknesses or faults attributed to the Basel Ban has and continues to impact the prospects of the country ratifying the Basel Ban.

### *B. Obstacles to Ratifying the Basel Ban*

1. *Anti-Trade Measure.* The “anti-trade” measure argument against the Basel Ban must be seen in light of the WTO principles and agreements. A fundamental principle that the WTO members follow is that countries must facilitate free trade by removing both tariff and non-tariff barriers to trade.<sup>103</sup>

Specifically, GATT Article XI(1) requires its members not to employ prohibitions or restrictions other than duties, taxes, or other charges on the importation of any product from another member country or on the exportation or sale for export of any product destined for the territory of another member. This is a clear proscription against the practice of export and import bans on industrial goods. The Philippines became part of the WTO in January 1, 1995.

Considering GATT Article XI(1), the Basel Ban is indeed a measure to restrict or control trade, particularly for hazardous wastes.

The fact that a measure can indeed be characterized as or contain provisions that could be construed as “anti-trade” did not dissuade the Philippine government from ratifying multilateral environmental agreements (MEAs) with such elements.

On July 17, 1991, four years before the Basel Ban, the Philippines ratified the Montreal Protocol on Substances That Deplete the Ozone Layer (Montreal Protocol).<sup>104</sup> The Montreal Protocol is a landmark international

Thereof, and for Other Purposes, Rep. Act No. 6969, § 13, (Oct. 26, 1990) (Phil.), available at <http://www.pctc.gov.ph/initiatv/RepAct6969.htm>.

103. See *Understanding the WTO: Basics – Principles of the Trading System*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm) (last visited Feb. 21, 2014) (“Lowering trade barriers is one of the most obvious means of encouraging trade.”).

104. See generally Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 29, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201522/volume-1522-I-26369-English.pdf> [hereinafter Montreal Protocol]; *Status of Ratification for the Montreal Protocol and the Vienna Convention*, U.N. ENV'T PROGRAMME, (Nov. 12, 2013), [http://ozone.unep.org/new\\_site/en/treaty\\_ratification\\_status.php](http://ozone.unep.org/new_site/en/treaty_ratification_status.php). Note that The Vienna Convention on Protection of Ozone Layer (1985) established the framework for the creation of the Montreal Protocol.

agreement designed to protect the stratospheric ozone layer. The Protocol requires each party to ratchet-down its respective production and consumption of Ozone Depleting Substances (ODS) following the time frame stated in the Protocol, with the ultimate goal of global elimination of ODS.<sup>105</sup> The Protocol also requires all Parties to ban exports and imports of controlled substances from and to non-Parties.<sup>106</sup>

On February 27, 2004, 9 years after the Basel Ban, the Philippines ratified the Stockholm Convention on Persistent Organic Pollutants (POPs Convention).<sup>107</sup> The POPs Convention was designed to end the production and use of persistent organic pollutants (POPs).

The Convention has specific “anti-trade” provisions as it restricts export and import of POPs and POPs’ wastes.<sup>108</sup> The Convention also defines how the international community must manage POPs wastes, particularly the need to take appropriate measures so that these wastes are, disposed of in such a way that the POPs pollutant content is “destroyed or irreversibly transformed” so that it no longer possesses the characteristics of a POP.

At the WTO level there is room for even the “anti-trade” measures under the Montreal Protocol and POPs Convention. The WTO recognizes that the principle of free trade is not absolute and is limited by a country’s need to protect human health and the environment. This is embodied in the chapeau of Article XX and in subparagraph (b) of GATT 1994, which provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

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*The Montreal Protocol*, U.N. ENV’T PROGRAMME, [http://ozone.unep.org/new\\_site/en/montreal\\_protocol.php](http://ozone.unep.org/new_site/en/montreal_protocol.php). The Protocol has been modified five times since its adoption in 1987 by subsequent agreements in London (1990), Copenhagen (1992), Vienna (1995), Montreal (1997), and Beijing (1999). *Id.* The Philippines has ratified all the modifications. *Id.*

105. See Montreal Protocol, *supra* note 104, art. 2.

106. Montreal Protocol, *supra* note 104, art. 4.

107. Secretariat of the Stockholm Convention, *Stockholm Convention – Status of Ratifications*, STOCKHOLM CONVENTION, <http://chm.pops.int/Countries/StatusofRatifications/tabid/252/Default.aspx> (last visited Feb. 21, 2014).

108. Stockholm Convention on Persistent Organic Pollutants art. 3, May 22, 2001, 2256 U.N.T.S. 119, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%202256/v2256.pdf> [hereinafter POPs Convention].

x x x

(b) necessary to protect human, animal or plant life or health;

x x x

Considering that the Philippines ratified MEAs with “anti-trade” elements, and the WTO’s own recognition and allowance of trade bans under specific circumstances,<sup>109</sup> it appears that the argument against the Basel Ban as an “anti-trade” measure is not a major factor for the Philippines government.

2. *Economic Development / Supply of Raw Material.* The economic development argument posits that recycling industries need raw materials for their facilities, and if the supply of raw materials is interrupted or stopped, this could adversely affect the industry and could result in dislocation of laborers, lowered income, further environmental degradation and flight of investments. Thus, the Basel Ban, as an “anti-trade” measure is an impediment to hazardous raw materials, particularly those coming from Annex VII (developed countries).

The focus of this article is not to prove or disprove the economic value of the Philippine hazardous waste recycling industry, but to focus on a specific element key to the economic argument, and that is supply of raw materials.

In 1994, the Philippine Department of Environment and Natural Resources (DENR) released Administrative Order No. 28 on the Interim Guidelines for the Importation of Recyclable Materials Containing Hazardous Substances (AO 28).<sup>110</sup> AO 28 affirms the country’s commitment to the Basel Convention, but upon approval of the DENR, will allow into the country the following wastes for “recovery, recycling and reprocessing:”

- i. scrap metals (including used lead-acid batteries and metal bearing sludge)
- ii. solid plastic materials
- iii. electronic assemblies and scraps<sup>111</sup>

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109. For a discussion of the WTO Article XX (b) and (g) rules please see: *WTO Rules and Environmental Policies: GATT Exceptions*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/envir\\_e/envt\\_rules\\_exceptions\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm) (last visited April 19, 2014).

110. D.E.N.R. Admin. Ord. No. 28 (1994) (Phil.), available at <http://www.emb.gov.ph/laws/toxic%20substances%20and%20hazardous%20wastes/dao94-28.pdf> (last visited Feb. 21, 2014) [hereinafter AO28].

111. *Id.* at Annex A.

The exemption given to these classes of wastes raises a presumption that Executive Department deemed it important for the country to allow entry of these wastes in a controlled manner. We focus our attention on the supply of ULABs and electronic assemblies and scraps (e-waste). Note that these are both hazardous wastes under the Basel Convention, and are within the ambit of the Basel Ban.<sup>112</sup>

i. *Supply of ULABs.* The Philippine Association of Battery Manufacturer's Inc. (PABMA) produces over 5 million standard battery units (SBUs) and provides employment to nearly 15,000.<sup>113</sup>

PABMA is also one of the staunchest opponents of the Basel Ban because of the threat of a possible disruption in the supply of lead to its members. Its membership needs 6,436 metric tons of ULABs every month to maintain the 5 million car batteries per month it can produce. There is an estimated domestic supply of about 3,300 metric tons of ULABs in the Philippines per month. With the domestic supply insufficient to cover the production needs, a shortfall of 3,136 metric tons per month or an annual shortfall of almost 38,000 metric tons needs to be met.<sup>114</sup> Further, since the Philippines does not have any primary source of lead, PABMA members are dependent on foreign sources of lead.

The United Nations Comtrade data base<sup>115</sup> contains a listing of the legal trade of commodities traded around the globe, including ULABs. Looking at the Philippine imports of ULABs for the past 13 years a picture emerges, see table below.

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112. Basel Convention, *supra* note 18, Annex VIII, available at <http://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf#page=73>. The Basel Convention identifies ULABs as hazardous waste under Annex VIII, List A, A1160 Waste lead-acid batteries, whole or scrap. *Id.* E-waste is identified also in the same annex as A1180 waste electrical and electronic assemblies or scrap containing, components such as accumulators and other batteries included on list A, mercury-switches, activated glass cullets from cathode-ray tubes and other activated glass and PCB-capacitors, or contaminated with Schedule 2 constituents (e.g. cadmium, mercury, lead, polychlorinated biphenyl) to an extent that they exhibit hazard characteristics indicated in part C of this Schedule (refer B1110). *Id.*

113. Ateneo School of Government, *Demystifying the Impacts of a Basel Ban Amendment Ratification by the Philippines* (2014), draft and unpublished, at 34 [hereinafter ASOG Study].

114. *Id.*

115. The United Nations Commodity Trade Statistics Database (UN Comtrade) contains detailed imports and exports statistics reported by statistical authorities of close to 200 countries or areas. *United Nations Statistics Division—Commodity Trade Statistics Database (COMTRADE)*, UN COMTRADE, <http://comtrade.un.org/db/default.aspx> (last visited Feb. 28, 2014). It concerns annual trade data from 1962 to the most recent year. *Read Me First*, UN COMTRADE, <http://comtrade.un.org/db/help/uiReadMeFirst.aspx> (last visited Feb. 28, 2014). Note the table was generated by using the following parameters: click “imports” under the “SHOW” box; typing in the HS Code 854810 only, as legal trade of ULABs should fall under this code; indicating the applicable years for the search “in the year” box; indicating “Philippines” in the “TO” box; specifying an exporting country in the “FROM” box, e.g. Thailand; and selecting “any” in the classification box.

Year	Import (kg)	Exporting Country
2000	12,356	Malaysia
	336	Thailand
	<b>Total 12,692</b>	
2001	26,273	Thailand
	<b>Total 26,273</b>	
2002	207,000	Bulgaria
	10,500	Thailand
	<b>Total 217,500</b>	
2004	689,360	Bulgaria
	292,518	Malaysia
	19,380	Thailand
	<b>Total 1,001,258</b>	
2005	160,740	Papua New Guinea
	<b>Total 160,740</b>	
2006	119,704	Papua New Guinea
	<b>Total 119,704</b>	
2007	3,385,877	Sri Lanka
	<b>Total 3,385,877</b>	
2008	150,000	China
	6,210,905	New Zealand
	111,136	Papua New Guinea
	1,272,770	Singapore
	758,134	Sri Lanka
	<b>Total 8,502,945</b>	
2009	1,700,440	New Zealand
	9	Singapore
	6,512	United States of America
	<b>Total 1,706,961</b>	
2010	106,730	Australia
	35,640	China, Hong Kong SAR
	438,015	New Zealand
	2,220,515	Singapore

	447,050	United Arab Emirates
	401,725	Viet Nam
	<b>Total 3,649,675</b>	
2011	62,858	China
	7,079	Indonesia
	395,630	New Zealand
	4,441,725	Singapore
	8,339,402	United Arab Emirates
	<b>Total 13,246,694</b>	
2012	3,000	China
	43,000	Indonesia
	109,520	New Zealand
	18,332	Republic of Korea
	7,231,111	Singapore
	97,920	United Arab Emirates
	68	United States of America
	<b>Total 7,502,951</b>	

The data suggests that in the past 13 years the Philippines imported 39,533,270 kgs of ULABs from various nations, developed and developing. Developing country exports to the Philippines totalled 30,547,118 kgs, comprising 77% of total ULAB imports into the country. Compared to 8,986,152 kgs, 23% of total imports, coming from developed nations (majority of the ULABs came from New Zealand).

The above data confirms a changing trend in both hazardous waste generation and trade. In the 1990s when the Basel Ban was born a majority of developed nations generated hazardous wastes. At least the above ULAB trade data shows developing nations are increasing their generation and trade as well.

The Basel Convention released a report in 2010 confirming the change in the overall hazardous waste generation and trade. For instance their data shows that trade between Annex VII to Non-Annex VII states from 2004 to 2006 decreased by 73%. The Basel Convention report also explains the decrease in relation to the Basel Ban:

[T]he data as reported does suggest that exports that would come under the Ban Amendment are limited in number, amount and seem to be

decreasing. . . .

Lead and lead compounds are also moved in relatively large amounts between non-Annex VII countries. Most likely these are lead-acid batteries that are generated in a large number of non-Annex VII countries that do not have recycling facilities for the lead and that are recycled in a limited number of non-Annex VII countries. In particular, the Philippines recycles lead acid batteries from a number of Asian non-Annex VII countries . . . .<sup>116</sup>

ii. *E-waste Supply*. Unlike ULABs, there are no e-waste associations in the Philippines who can share production data and raw materials requirements. To approximate raw material demand a study conducted by the Ateneo School of Government looked at the official e-waste importation permitted by the Department of Environment from 2001 to 2005 and found that Japan and China were the top source of e-wastes imported into the Philippines.<sup>117</sup> Presumably the e-waste demand is to recover precious metals found in e-waste such as gold, copper, etc. to supply the needs of local the local electronics assembly industry or for further export as there are no smelters in the country that would need further supply of metals.

The study extrapolated the e-waste raw material's need of recycling industries in the country based on the quantity of imports for the period. According to the study the Philippine e-waste recycling industry demand could run in the range of 11,000 to 28,000 kgs, based on the available data. Thus, to maintain the facilities the industry would need to be ensured of a steady supply of e-waste in the above amount.

To look at possible supply sources, the study turned its attention to domestic e-waste where an estimate was made that by 2015 there would be approximately 4 million tons of e-waste generated in the Philippines. The study further concludes that the estimated local e-waste would be more than enough to cover the shortfall from a possible import prohibition from Annex VII countries like Japan.

Given the ULAB and e-waste scenarios above, from a strict supply perspective, the threat of supply disruption in the face of the Basel Ban appears to be minimal. Thus, the economic argument against the Basel Ban appears to be out of date in light of the historical trade data shown and the changing trend in hazardous waste generation and trade as confirmed by the Basel Convention.

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116. Kees Wielenga, SECRETARIAT OF THE BASEL CONVENTION, WASTE WITHOUT FRONTIERS 16 (2010), available at <http://archive.basel.int/pub/ww-frontiers31Jan2010.pdf>.

117. ASOG Study, *supra* note 113, at 39.

3. *Difficulty of Implementing the Basel Ban.* The argument that the Basel Ban will be difficult to implement has two components: a) because major developing countries such as the US are not supporting it, and b) the requirement of financial, technical and human resources to implement the ban.

i. *Not supported by US and other hazardous waste generating countries.* At the start a distinction needs to be made between parties and non-parties to the Basel Convention. The US is in a special category all of its own as it is the only developed nation that is not party to the Basel Convention.<sup>118</sup> As a non-party, the Basel Convention prohibits waste trade between parties and non-parties, thus, the US as a general rule will not be allowed to trade with a country that is party to Basel, regardless whether that party has ratified the Basel Ban or not.

For the US to legally trade hazardous wastes to Basel parties, it will need to enter an agreement that is fully compliant with Article 11 of Basel.<sup>119</sup> These agreements must not derogate from the environmentally sound management of hazardous wastes as required by the Convention, or stipulate provisions, which are less stringent than those under Basel.<sup>120</sup> Therefore, the US in order to legally trade with a Basel party will need to comply with the importing country's laws as it relates to the Basel Convention.

In a situation where it ratifies the Basel Ban, as a developing country the Philippines will modify its hazardous waste law in line with the principle of *pacta sunt servanda*.<sup>121</sup> The main element that it will need to transpose in its national law is an explicit prohibition against hazardous waste imports similar to the Basel Ban. After it modifies its local law, the government must report and notify the Basel Secretariat of these changes, which then puts all Basel parties on notice that the Philippines has effected a Basel Ban import prohibition, which will thereafter influence hazardous waste exports particularly from developed countries.<sup>122</sup> For instance, AO 28 on exemptions to e-waste and ULABs will need to be revisited and realigned with the Basel Ban obligations.

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118. See Signatories to Basel Convention, *supra* note 21 (noting that the United States has signed, but not yet ratified, the Convention, unlike many other developed countries that have, including France, Germany, etc.).

119. See Basel Convention, *supra* note 18, art. 11(1) (explaining when parties to the Convention may make agreements with other parties and non-parties regarding the movement of wastes).

120. *Id.*

121. Vienna Convention on the Law of Treaties arts. 26–27, May 23, 1969, 1155 U.N.T.S. 331, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/v1155.pdf>.

122. Basel Convention, *supra* note 18, art. 13(2).

Thus, even though the US is not a party to the Basel Ban,<sup>123</sup> if it were to attempt to trade with a country that has ratified the Basel Ban, the importing country under Article 11 of Basel and under the principle of *pacta sunt servanda* must ensure that agreements it makes with the US comply with its Basel Convention and Basel Ban obligations.

The same process will apply to other developed nations party to Basel that may wish to trade with other Parties that have ratified the Basel Ban. In the case of the Philippines, for instance, if New Zealand exports ULABs to the Philippines, and the latter has ratified the Basel Ban and eliminates the ULAB exemption under AO 28, New Zealand is obligated under the Basel Convention to respect Philippine regulations that implement the latter's Basel Ban obligations.

In the above scenario, even if the developed nations opposed to the Basel Ban do not support it, the domestic law implementation of the Basel Ban in the importing states could prevent or make it difficult for these nations to trade their hazardous wastes. In spite their opposition to the Basel Ban.

ii. *Financial, Manpower and Technical Costs.* Developing countries are often concerned about the costs of implementing treaty obligations. The Basel Ban is not immune to these concerns.

The critical difference with the Basel Ban, however, is that Annex VII exporting countries will bear the additional costs of implementation and not necessarily the developing countries.<sup>124</sup> Note that the obligation to "prohibit" falls with the Annex VII countries. The act of prohibiting necessarily entails a policy shift within the Annex VII state, and the corresponding enforcement of the policy.

This is also in line with the recognition that developed nations are better equipped to monitor and enforce hazardous waste controls.<sup>125</sup>

## CONCLUSION

International environmental justice continues to be an ideal that is elusive and one that developing countries are still struggling for. Nineteen years after its adoption, the Basel Ban, an instrument that strengthens

123. Signatories to Basel Convention, *supra* note 21.

124. *See* Basel Ban, *supra* note 81, at ¶ 1 (noting that at previous Conference, a "request was made for the prohibition of hazardous waste shipments from industrialized countries to developing countries").

125. *See* Basel Ban, *supra* note 80, § 3 (noting that "transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous waste as required by this Convention").

environmental justice at the global level, is still a paper tiger.

The Philippine situation, however, has shown that a lot of the perceived weaknesses surrounding the Basel Ban no longer holds true. As an anti-trade measure, not only have countries, such as the Philippines, acceded to other MEAs that have “anti-trade” measures such as the Basel Ban, but the WTO itself recognizes certain limits to trade through its GATT XX(b) provision.

The argument that the Basel Ban will be a hindrance to formal recycling because of the obstacle it places on “raw materials” supply appears to no longer hold water as well. The concern over the lack of support by the US, Japan and other members of JUSCANZ will not necessarily make the Basel Ban difficult to implement. Almost all the nations in the world are parties to the Basel Convention now. Thus, countries that ratify the Basel Ban can affect Basel Convention parties when the former realign their domestic laws to comply with the Basel Ban.

The Basel Ban has and always been a developing country-driven and motivated instrument. The Basel Ban will not come about by happenstance. Each ratification that the Basel Ban garners in the coming years must be a clear demand from developing countries for international environmental justice. Rhetoric has no place in this endeavor. To achieve this, developing countries must re-examine their position vis-à-vis the Basel Ban, and go beyond the myths that have straddled the issue for so long.

Countries, both developed and developing, must also begin a critical examination of how they apply environmental justice within their borders. The strength of a country’s international policy on any given issue, such as environmental justice, is derived from the strength of its own domestic policy. And perhaps, this is the only obstacle left unexamined for those countries waiting to ratify the Basel Ban.