

**EXTERNALIZING THE COSTS OF HAZARDOUS WASTE  
FROM THE UNITED STATES**

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## INTRODUCTION

The history of hazardous waste pollution in the United States is marked by cost externalization and by significant impacts on the international community, despite the fact that most nations have adopted a United Nations treaty to restrict “trade” in hazardous wastes. This treaty is called the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (“Basel Convention”).<sup>1</sup> The United States is the *only* developed nation in the world that is *not* a Party to the Basel Convention.<sup>2</sup>

Part I of this article will first explore the accumulation of hazardous waste in the United States and reactive federal legislation during the last four decades of the Twentieth century. It then provides a brief history of international events that led to the creation of the Basel Convention and its Ban Amendment.<sup>3</sup> Part II of the article discusses the first two decades of the Basel Convention and the Ban Amendment, creating a lens to analyze the United States’ non-Party status to the Basel Convention. Part III discusses the current status of the Basel Convention, including ratifications, and a separate treaty that the United States has ratified, explaining the legal and other implications of the United States not ratifying Basel. Finally, Part IV of this article recommends actions for the United States to take in order to emerge from its current status into a responsible global citizen relative to its hazardous waste management.

## I. HISTORY OF HAZARDOUS WASTE DISPOSAL IN THE UNITED STATES

The 1960s and subsequent decades saw the United States pass various federal laws to mitigate environmental damage caused by pollution after years of industrialization.<sup>4</sup> The United States Environmental Protection

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1. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 126, 126 [hereinafter *Basel Convention*], available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201673/v1673.pdf> [http://perma.cc/6HHD-DTZZ].

2. See *Parties to the Basel Convention*, BASEL CONVENTION, <http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories> [http://perma.cc/U6BC-6PCJ] (last visited Mar. 31, 2015) (showing how the United States is one of the few nations that has not ratified the Basel Convention).

3. See *The Basel Convention Ban Amendment*, BASEL CONVENTION, <http://www.basel.int/Implementation/LegalMatters/BanAmendment/Overview/tabid/1484/Default.aspx> [http://perma.cc/7CJY-EJNG] (last visited Mar. 31, 2015).

4. See ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE 3 (James P. Lester ed., 2d ed. 1995). These laws include the following major federal environmental legislation: the Solid Waste Disposal Act and the Water Quality Act (1965); the Clean Water Restoration Act and the National Environmental Policy Act (1966); the Federal Water Pollution Control Act and the Coastal

Agency (“EPA”) has defined hazardous waste as “waste that is dangerous or potentially harmful to our health or the environment.”<sup>5</sup> The period between 1960 and 1976 revealed a growing accumulation of hazardous waste and an urgent need for disposal plans.<sup>6</sup> A Congressional effort to monetize decades of hazardous waste dumping created two kinds of costs: (1) front-end costs to comply with new regulations and (2) back-end costs of potential fines for non-compliance.<sup>7</sup> This led to a large number of abandoned hazardous waste sites, concern over how these sites would be cleaned, and questions of liability.<sup>8</sup>

National concern over hazardous waste disposal led to the passage of two Congressional acts addressing the issue. In 1976, Congress passed the Solid Waste Disposal Act, later changed to the Resource Conservation and Recovery Act (“RCRA”).<sup>9</sup> The goals of RCRA, as outlined by the EPA, are:

- To protect human health and the environment from the hazards posed by waste disposal;
- To conserve energy and natural resources through waste recycling and recovery;
- To reduce or eliminate, as expeditiously as possible, the amount of waste generated, including hazardous waste; and

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Zone Management Act (1972); the Safe Drinking Water Act (1974); the Toxic Substances Control Act and the Resource Conservation and Control Act (1976); the Amended Solid Waste Disposal Act and the Clean Water Act Amendments (1977); the Comprehensive Environmental Response, Compensation, and Liability Act Superfund (1980); the Hazardous and Solid Waste Amendments (1984); the Safe Drinking Water Act Amendments and the Superfund Amendments and Reauthorization Act (1986); the Clean Water Act Reauthorization (1987); the North American Wetlands Conservation Act (1989); and the Pollution Prevention Act (1990).

5. U.S. ENVTL. PROTECTION AGENCY, *Waste – Hazardous Waste*, <http://www.epa.gov/osw/hazard/> [<http://perma.cc/NQ8Q-RT7C>] (last visited Mar. 18, 2015).

6. For example, incidents at Love Canal, NY and Times Beach, MO show the devastating effects of this period when hazardous waste sites were abandoned. The Federal Government, through the Federal Emergency Management Association, poured millions of dollars into relocating citizens and cleaning these sites. It became apparent that policy changes were needed to protect United States citizens from irresponsibly disposed waste created by communities and private owners. Eckardt C. Beck, *The Love Canal Tragedy*, U.S. ENVTL. PROTECTION AGENCY (Jan. 1979), <http://www2.epa.gov/aboutepa/love-canal-tragedy> [<http://perma.cc/ES4F-AQLD>]; *Joint Federal/State Action Taken to Relocate Times Beach Residents*, U.S. ENVTL. PROTECTION AGENCY (Feb. 22, 1983), <http://www2.epa.gov/aboutepa/joint-federalstate-action-taken-relocate-times-beach-residents> [<http://perma.cc/V7EB-7L9N>].

7. See Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6922–6924, 6928 (2012) (requiring standards for generators and transporters, and requiring fines for non-compliance).

8. Beck, *supra* note 6; *Times Beach Residents*, *supra* note 6. Both the Love Canal and Times Beach cases created a need for federal intervention in the cleanup of those facilities to restore community health.

9. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901–6992k (2012)).

- To ensure that wastes are managed in a manner that is protective of human health and the environment.<sup>10</sup>

In 1980, Congress reacted to the vast number of hazardous waste sites through the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”).<sup>11</sup> Today, RCRA and CERCLA remain the major federal acts that govern the United States’ domestic hazardous waste management. While RCRA and CERCLA did address the domestic hazardous waste problem, the issue of *where* the hazardous waste would end up remained. It became common practice for hazardous waste to be gathered and stored in containers.<sup>12</sup> These containers were either buried within the United States, or increasingly shipped to another country, and typically a developing country where costs were significantly lower.<sup>13</sup>

The rest of the developed world also began to appreciate the health and environmental impacts of hazardous waste and to experience multiple costs for properly managing hazardous waste during the 1960s and 1970s.<sup>14</sup> Industrialized nations producing large amounts of toxic waste began to devise ways to reduce the costs of hazardous waste management and at the same time protect the health of their own citizens and environments.<sup>15</sup> Accordingly, the profit-minded and protectionist practice of exporting hazardous waste from developed to developing countries became customary.<sup>16</sup> The shipment of hazardous waste from developed to developing nations has been referred to as “toxic colonialism.”<sup>17</sup>

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10. RCRA Summary, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/Region2/waste/summary.htm> [<http://perma.cc/TH2H-29HL>] (last visited Feb. 20, 2015).

11. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675 (2012)).

12. *Toxic Waste: Man’s Poisonous Byproducts*, NAT’L GEOGRAPHIC, <http://environment.nationalgeographic.com/environment/global-warming/toxic-waste-overview/> [<http://perma.cc/L6L2-X844>] (last visited Mar. 23, 2015).

13. *Id.*; see Laura A. W. Pratt, *Decreasing Dirty Dumping? A Reevaluation of Toxic Waste Colonialism and the Global Management of Transboundary Hazardous Waste*, 35 WM. & MARY. ENVTL. L. & POLICY REV. 581, 584 (2011) (describing how disposal costs are lower when exporting to a developing country).

14. See Pratt, *supra* note 13, at 592 (discussing the beginning of toxic waste regulations).

15. See *id.* at 590 (explaining how exporting hazardous waste can be “cost-effective” for hazardous waste producers in developed countries).

16. See *id.* (discussing the role money plays in toxic colonialism).

17. Lassana Koné, *The Illicit Trade of Toxic Waste in Africa: The Human Rights Implications of the New Toxic Colonialism*, ACADEMIA.EDU, [http://www.academia.edu/5340851/The\\_illicit\\_trade\\_of\\_toxic\\_waste\\_in\\_Africa\\_The\\_human\\_rights\\_implications\\_of\\_the\\_new\\_toxic\\_colonialism](http://www.academia.edu/5340851/The_illicit_trade_of_toxic_waste_in_Africa_The_human_rights_implications_of_the_new_toxic_colonialism) [<http://perma.cc/WCZ2-S6QZ>] (last visited Mar. 21, 2015).

### A. *International Concern over Hazardous Waste Injustices*

The 1980s revealed major international scandals associated with the hazardous waste trade. In 1988, five ships transported 8,000 barrels of hazardous waste, including toxic PCBs and solvents, from Italy to the small town of Koko, Nigeria. Italy exchanged the hazardous waste for the equivalent of \$100 monthly rent paid to a Nigerian landowner to use his farmland for outdoor storage of the hazardous waste.<sup>18</sup> The Nigerian landowner died, reportedly due to “cancer of the throat,” within a year of the arrangement.<sup>19</sup>

The *Khian Sea* barge incident is another example of a major toxic waste injustice that galvanized nations around the world to take action. In the 1980s, a barge carrying 14,000 tons of toxic incinerator ash from Philadelphia was towed to Haiti, where the workers dumped a portion of the toxic ash before the Haitian government stopped them and sent the barge on its way.<sup>20</sup> It sailed for the next 27 months, changing its name, owner, and flag state several times.<sup>21</sup> Unable to unload the infamous cargo in any port, the crew was believed to have dumped much of it into the Indian Ocean.<sup>22</sup> This incident was one of many scandals that triggered international outrage at the emerging global hazardous waste crisis.

## II. CREATION OF THE BASEL CONVENTION: INITIAL GOALS & PARTIES TO THE CONVENTION

The hazardous waste incidents of the 1980s proved to be the last straw for many nations. They came together to create a legal trade barrier under the umbrella of the United Nations Environment Programme (“UNEP”).<sup>23</sup> The relationship between waste and trade is proportional; UNEP recognized

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18. *Id.*

19. ANDREAS BERNSTORFF & KEVIN STAIRS, POPS IN AFRICA: HAZARDOUS WASTE TRADE (1980-2000) 80, 82 (2001).

20. THE ENCYCLOPEDIA OF CONSUMPTION AND WASTE: THE SOCIAL SCIENCE OF GARBAGE, VOLUME 1, 64 (Carl A. Zimring, William L. Rathje, eds., 2012); *see also* Alex Santoso, *World's Most Unwanted Garbage: Cargo of the Khian Sea*, NEATORAMA (Aug. 15, 2007), <http://www.neatorama.com/2007/08/15/worlds-most-unwanted-garbage-cargo-of-the-khian-sea/> [<http://perma.cc/3FTQ-LYY4>] (describing where the ash ultimately ended up and that the United States EPA declared the ash not hazardous).

21. Santoso, *supra* note 20.

22. *Id.* The ash waste in this incident was eventually disposed of in Pennsylvania at the Mountain View Reclamation landfill.

23. KATHARINA KUMMER PEIRY, BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY HAZARDOUS WASTES AND THEIR DISPOSAL 1 (2010), *available at* [http://legal.un.org/avl/pdf/ha/bcctmhwd/bcctmhwd\\_e.pdf](http://legal.un.org/avl/pdf/ha/bcctmhwd/bcctmhwd_e.pdf) [<http://perma.cc/KS45-YZCJ>] (last visited Apr. 2, 2015).

that the increase in hazardous waste would increase the hazardous waste trade.<sup>24</sup> In 1987, UNEP adopted the Cairo Guidelines and Principles for Environmentally Sound Management of Hazardous Wastes (“Cairo Guidelines”), which put the onus on the exporter by requiring “notification to receiving and transit nations of any export and consent by those nations prior to export.”<sup>25</sup>

The international community recognized the Cairo Guidelines, but with virtually no international laws pertaining to trade in hazardous waste there was no framework for enforcement at the country level.<sup>26</sup> In this milieu, nations came together to create a legally binding treaty with criminal penalties to protect developing countries from receiving the toxic spoils of rich countries.<sup>27</sup> Unfortunately, the hazardous waste trade is still going on today.

Using the Cairo Guidelines as a working draft, the original 82 signatory nations of the Basel Convention attempted to completely ban hazardous waste movement from developed to developing countries.<sup>28</sup> This was the original purpose of the Basel Convention, based on the principle of environmental justice—that no group of people deserves a disproportionate burden of toxics simply because of their social, racial, or socio-economic status.<sup>29</sup> The Parties hoped to create this Convention as a complete hazardous waste wall between developed and developing nations—effectively ending toxic colonialism.<sup>30</sup> Unfortunately, in 1989 the 82 original signatories completed and adopted the Basel Convention without this outright ban.<sup>31</sup> The Basel Convention allowed Parties a few years to

24. See *Basel Agreement on Waste Trade*, TED CASE STUDIES, <http://www1.american.edu/ted/basel.htm> [<http://perma.cc/4TR2-BLV7>] (last visited Apr. 2, 2015) (describing the growth of hazardous waste generation in the last half of the Twentieth century and the resulting increase in hazard waste being shipped to developing countries).

25. *Id.*

26. See *id.* (describing how “UNEP wanted to enlarge the scope of their international regulation of hazardous waste” after the adoption of the Cairo Guidelines).

27. Dr. Zada Lipman, *Trade in Hazardous Environmental Justice Versus Economic Growth: Environmental Justice and Legal Process*, <http://ban.org/library/lipman.html> [<http://perma.cc/4GA7-5Q99>] (last visited Mar. 25, 2015).

28. Rebecca A. Kirby, *The Basel Convention and the Need for United States Implementation*, 24 GA. J. INT’L & COMP. L. 281, 290 (1994).

29. The EPA defines environmental justice as “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.” OFFICE OF ENVTL. JUSTICE, U.S. ENVTL. PROT. AGENCY, TOOLKIT FOR ASSESSING POTENTIAL ALLEGATIONS OF ENVIRONMENTAL INJUSTICE 9 (2004), available at <http://www.epa.gov/environmentaljustice/resources/policy/ej-toolkit.pdf> [<http://perma.cc/5KEW-QTE7>].

30. See Pratt, *supra* note 13, at 600–01 (noting that a “total ban” has been a part of the negotiations from the beginning).

31. Basel Convention, *supra* note 1, at 126–48.

transpose the Convention's requirements into their own domestic laws, and the full Convention went into legal force in 1992.<sup>32</sup> The United States was not among the Parties, and to this day, has signed but not ratified the Convention.<sup>33</sup>

A. *Undermining Original Party-Goals: Requirements of the Basel Convention to this Day*

The United States played an integral role in shaping the Basel Convention. Just before Basel was adopted in 1989, the United States led an effort that succeeded in removing the complete ban on exporting hazardous waste from developed to developing countries.<sup>34</sup> Instead of a ban from rich to poor, countries agreed to a procedure called "Prior Informed Consent," requiring government-to-government notification and consent before shipping hazardous waste between any Basel Parties.<sup>35</sup> However, six years later in 1995, the Parties passed a consensus decision to amend the Convention, to later achieve this original goal.<sup>36</sup>

Today, 181 countries—out of the total 193 United Nations member states—have ratified the Basel Convention.<sup>37</sup> The United States is the only developed country in the world that has not ratified this treaty to restrict the trade of hazardous waste.<sup>38</sup> A few developing countries have also not ratified; however, some of these are fairly new countries, like South Sudan, that are struggling with fundamental issues of governance.<sup>39</sup>

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32. See *Parties to the Basel Convention*, *supra* note 2 (showing the delay before legal enforcement to allow time for domestic enactments and the ratification of the Basel Convention by more countries).

33. See *id.* (showing how the United States is one of the few nations that has not ratified the Basel Convention).

34. See Pratt, *supra* note 13 (explaining that as ratified, the Basel Convention does not ban the export of hazardous waste as intended).

35. Eur. Chems. Agency, PRIOR INFORMED CONSENT REG., <http://echa.europa.eu/regulations/prior-informed-consent-regulation> [<http://perma.cc/S6AF-NCES>] (last visited Mar. 21, 2015). This is similar to the situation of the Kyoto Protocol, where the United States substantially participated in negotiations but then refused to sign the treaty at the last minute. "'U.S. withdrawal from the Kyoto Protocol in [sic] an extreme disappointment. U.S. action to reduce greenhouse gas emissions is essential to international efforts to prevent dangerous global warming. Nevertheless, the treaty will be beneficial and start the world moving in the right direction,' said Kert Davies, Director of Greenpeace's U.S. Global Warming Campaign." *U.S. Withdraws from Kyoto Protocol*, GREENPEACE (Apr. 5, 2001), <http://www.greenpeace.org/usa/en/news-and-blogs/news/u-s-withdraws-from-kyoto-prot/> [<http://perma.cc/57WB-65ZB>].

36. *The Basel Convention Ban Amendment*, *supra* note 3; see *infra* Part II.B (explaining the Ban Amendment proposal).

37. *Parties to the Basel Convention*, *supra* note 2.

38. *Id.*

39. See *id.* (showing how not all of the United Nations member states have ratified the Convention).

What does Basel call for in those countries that have ratified it? The Basel Convention contains both “soft law”—non-legally binding principles (e.g. efforts aimed at prevention)—as well as “hard law,” which specifies legally binding actions to be taken by Parties and criminalizes illegal traffic in hazardous wastes.<sup>40</sup> Basel regulates hazardous waste destined for both disposal and recycling because nations drafting the Convention understood the perils of allowing an exporting country to simply label hazardous waste as destined for “recycling” and fall out from under Basel regulation.<sup>41</sup> Such relabeling would likely become the new norm, if allowed.

First, the Convention calls for countries to minimize the generation of hazardous waste.<sup>42</sup> Second, if hazardous waste is created, Basel calls on Parties to use environmentally sound management of hazardous waste within their own countries, to the extent possible.<sup>43</sup> This self-sufficiency principle is, of course, intended to provide incentives for Parties to create less hazardous waste. Third, Basel calls on nations to minimize waste exports, recognizing the risks inherent in transporting hazardous materials (increasing possibilities of accidents and exposures), particularly to other countries that may or may not have the broad legal, technical, democratic, and social framework necessary for properly managing hazardous waste long term.<sup>44</sup>

In addition, Basel provides a set of definitions for hazardous waste, which each Party interprets relative to the contents and destinations of their waste shipments.<sup>45</sup> Specifically, Parties must examine and characterize each shipment according to its hazardous characteristics (such as leachability, toxicity, flammability, corrosiveness, etc.) and determine if it is destined for a recycling or disposal destination.<sup>46</sup> Furthermore, a clause in the Basel Convention prevents Parties to the Convention from trading in hazardous materials with non-Parties (including the United States) unless those non-Parties are members of other bi- or multilateral agreements controlling hazardous waste.<sup>47</sup> The United States has only ratified one other multilateral treaty on the transboundary movement of hazardous waste.<sup>48</sup>

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40. Basel Convention, *supra* note 1, at 132.

41. *Id.* at 155–56.

42. *Id.* at 131.

43. *Id.*

44. *Id.* at 132.

45. *Id.* at 129.

46. *See id.* at 132–33 (requiring proper labeling of hazardous waste shipments).

47. *Id.* at 132.

48. *Members and Partners*, ORGANIZATION FOR ECONOMIC COOPERATION & DEVELOPMENT (OECD), <http://www.oecd.org/about/membersandpartners/> [<http://perma.cc/P3HL-22FT>] (last visited Mar. 23, 2015).

But the original goal of the Basel Convention was not achieved; it failed to stop developed countries from trading in hazardous waste with developing countries.<sup>49</sup> Instead, it set up the Prior Informed Consent protocol whereby any Basel Parties are allowed to ship to any other Party (developed or developing) as long as the exporting government first contacts the importing and transit governments using a written notification procedure and receives written consent from them to accept the shipment.<sup>50</sup> The importing country have a facility capable of environmentally sound management of that particular type of hazardous waste.<sup>51</sup>

Even though the Convention failed to achieve its outright ban from developed to developing countries, it did achieve a limited outright ban of hazardous waste. To this day, it bans Parties' hazardous waste only to Antarctica.<sup>52</sup>

### *B. Reclaiming Original Purpose: The Basel Ban Amendment*

In 1989, after the Basel Convention failed to put up a complete legal barrier against transboundary movement of hazardous waste from developed to developing countries, African countries walked out in protest and developed their own regional treaty called the Bamako Convention.<sup>53</sup>

Developing countries eventually returned to the Basel Conference of the Parties, and in 1995, Parties passed a consensus decision (the United States having no vote as a non-Party) to amend the Basel Convention to achieve the outright ban on hazardous waste going from developed to developing countries for any reason.<sup>54</sup> The Basel Ban Amendment was adopted as a legally binding instrument (not yet in full legal force), with criminal penalties for violators.<sup>55</sup> It is important to note that this blatant trade barrier was adopted in an era otherwise characterized by a

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49. See Pratt, *supra* note 13, at 601 (explaining how the failure of the Basel Convention to stop developed countries from exporting hazardous waste to developing countries sparked the passage of the Ban Amendment).

50. Basel Convention, *supra* note 1, at 134.

51. *Id.*

51. *Id.* at 132.

53. *First Conference of the Parties to the Bamako Convention*, UNITED NATIONS ENV'T PROGRAMME, <http://www.unep.org/delc/BamakoConvention> [<http://perma.cc/36KJ-EJ36>] (last visited Mar. 18, 2015).

54. *The Basel Convention Ban Amendment-Overview*, BASEL CONVENTION <http://www.basel.int/Implementation/LegalMatters/BanAmendment/Overview/tabid/1484/Default.aspx> [<http://perma.cc/2PVV-6ED7>] (last visited Mar. 19, 2015).

55. Basel Action Network, *The Basel Ban: A Triumph for Global Environmental Justice*, (Sept. 2014) available at <http://ban.org/library/briefing1.html> [<http://perma.cc/7UW8-2UVD>].

proliferation of global free trade agreements (WTO, NAFTA, FTAA, etc.).<sup>56</sup>

This Amendment is a critical landmark. Once it goes into full legal force, it will finally disallow the transboundary movement of hazardous waste from developed to developing nations for applicable Parties.<sup>57</sup> Globally, the Ban Amendment will act to prevent the externalizing of costs to developing nations. The Ban Amendment will function as a separate legal instrument until it has been ratified by a minimum number of Parties.<sup>58</sup> Currently, 80 Basel Parties have separately ratified the Ban Amendment, putting it on track to become part of the Basel Convention itself in upcoming years.<sup>59</sup> In the meantime, some countries have already put it into legal force domestically; the European Union countries, for example, have not only ratified the Basel Ban Amendment,<sup>60</sup> but have fully implemented it in national laws, such as their Waste Shipment Regulations.<sup>61</sup> This means European Union countries are barred by law, unlike the United States, from shipping hazardous waste to developing countries.

### C. Electronic Waste: A Growing Concern for the International Community

Electronic waste (“e-waste”) is a massive hazardous waste stream with 20 to 50 million tons of waste generated globally per year.<sup>62</sup> There is significant toxicity in the e-waste stream.<sup>63</sup> Heavy metals including lead, cadmium, mercury, beryllium, and arsenic are present in electronic waste.<sup>64</sup> E-waste also contains halogenated materials (such as fluorine, chlorine,

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56. *Id.*

57. *The Basel Convention Ban Amendment*, BASEL CONVENTION, <http://www.basel.int/Implementation/LegalMatters/BanAmendment/Overview/tabid/1484/Default.aspx> [<http://perma.cc/LF5U-KQNC>] (last visited Mar. 31, 2015).

58. *Questions and Answers (Q&A) Related the Ratification of the Ban Amendment*, BASEL CONVENTION, <http://www.basel.int/Implementation/LegalMatters/BanAmendment/QuestionsandAnswers/tabid/3596/Default.aspx> [<http://perma.cc/SZ9A-7S87>] (last visited Mar. 22, 2015).

59. *Ban Amendment to the Basel Convention: Geneva, 22 September 1995*, BASEL CONVENTION, <http://www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/> [[HTTP://PERMA.CC/95PQ-MBAQ](http://perma.cc/95PQ-MBAQ)] (last visited Mar. 22, 2015).

60. *See id.* (noting the European Union countries that have ratified the Ban Amendment).

61. *Waste Shipments*, EUR. COMMISSION, <http://ec.europa.eu/environment/waste/shipments/legis.htm> [<http://perma.cc/66PM-GRBG>] (last visited Mar. 18, 2015).

62. *E-Waste Facts*, CAUSES INT’L, <https://www.causesinternational.com/ewaste/what-is-ewaste> [<http://perma.cc/AR6M-UX7A>] (last visited Mar. 20, 2015).

63. *Id.*

64. *Id.*

etc., that can create dioxins and furans when openly burned), and rare earth metals.<sup>65</sup>

Unlike many other countries that have passed national laws to deal with e-waste, the United States government has not addressed the large-scale hazardous waste problem nationally.<sup>66</sup> Because of this, 25 states have passed separate electronic waste laws to collect and recycle e-waste, but only the federal government has jurisdiction over exports.<sup>67</sup> This means state governments cannot legally prevent e-waste from going to China, India, or any other nation.<sup>68</sup> In a country that has not ratified the Basel Convention, much less the Ban Amendment, and does not monitor and control its exports of hazardous e-waste, there are only estimates of the volumes going off-shore. According to anecdotes from the recycling industry, an estimated 80% of what is being collected for recycling is being exported.<sup>69</sup>

In 2002, Basel Action Network (“BAN”), a non-profit environmental group dedicated to protecting the global environment based on the Basel Convention, released a documentary film called *Exporting Harm*, with the first images of what happens to our e-waste in Guiyu, China, one of a number of Chinese destinations for United States e-waste.<sup>70</sup> There, primitive riverside acid baths were used to recover gold from a mix of heavy metals, dumping the rest of the metals and spent acids directly into rivers.<sup>71</sup> The documentary also documented families living and working in villages that burn computer wires in open fires in order to liberate the copper, while likely creating invisible, odorless, and highly toxic halogenated dioxins and furans in the process.<sup>72</sup>

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65. *Id.*

66. *Id.*

67. *See Map of States with Legislation*, ELECTRONICS RECYCLING COORDINATION CLEARINGHOUSE, <http://www.ecycleclearinghouse.org/Content.aspx?pageid=10> [<http://perma.cc/GPN6-BNJ4>] (last visited Apr. 2, 2015); Jeffrey M. Gaba, *Exporting Waste: Regulations of the Export of Hazardous Wastes from the United States*, 36 WM. & MARY ENVTL. L. & POL'Y REV. 405, 408 (2012) (discussing the federal laws and regulations that govern the export of hazardous waste).

68. *See Decision of the Council Concerning the Control of Transboundary Movements of Wastes Destined for Recovery Operations*, ORGANIZATION FOR ECONOMIC COOPERATION & DEVELOPMENT (OECD), <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=221&InstrumentPID=217&Lang=en&Book=False> (last visited Mar. 23, 2015) (providing that each country only needs to enforce its own laws on export and import).

69. The Basel Action Network et al., *Exporting Harm: The High-Tech Trashing of Asia*, 4 (Feb. 25, 2002), <http://www.ban.org/E-waste/technotrashfinalcomp.pdf> [<http://perma.cc/AJM8-8E8X>].

70. The Basel Action Network, *Exporting: The High-Tech Trashing of Asia*, YOUTUBE (May 16, 2013), <https://www.youtube.com/watch?v=yDSWGV3jGek> [<http://perma.cc/H95R-T35Y>].

71. *Id.*

72. *Id.*

In 2005, Basel Action Network went to Nigeria to document in a short film what some claimed was an alternative to sending e-waste to China for “recycling.”<sup>73</sup> Instead, the rationale for exporting United States hazardous waste to Nigeria became “bridge the digital divide”, i.e. send non-working electronics for repair and reuse.<sup>74</sup> Although Lagos, Nigeria was found to have many skilled workers trained to repair electronics, much of it ended up in both formal and informal waste dumps.<sup>75</sup> Frequently, much of the e-waste accumulated around residential areas.<sup>76</sup> When the piles grew too high, they were burned, one of the most environmentally and occupationally damaging methods of managing this waste stream.<sup>77</sup>

In 2006, Basel Action Network went to Ghana and found children burning fields of e-waste and breaking unwanted CRT televisions and monitors, each containing an average of five to eight pounds of lead.<sup>78</sup> In 2008, the investigative television program called *60 Minutes* aired an award-winning story featuring BAN.<sup>79</sup> In the *60 Minutes* report, it was revealed that, even though BAN had been to Guiyu, China six years earlier, “recyclers” had moved their visible, open air burning operations indoors where the occupational hazards were even higher.<sup>80</sup> The toxic by-products, which were still being released into the air, were now accumulating indoors and exposing workers to even higher concentrations.<sup>81</sup>

In sum, exporting hazardous electronic waste to developing countries externalizes costs and impacts, and damages human health and the global

73. The Basel Action Network, *The Digital Dump: Exporting Re-use and Abuse to Africa*, YOUTUBE (May 16, 2013), <https://www.youtube.com/watch?v=8tVdTBnBXw0> [http://perma.cc/8XLJ-68PQ].

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. The Basal Action Network et al., *supra* note 68, at 9.

79. *60 Minutes*, CBS NEWS (Aug. 27, 2009), available at <http://www.cbsnews.com/news/following-the-trail-of-toxic-e-waste/> [http://perma.cc/ELB7-658L].

80. The Basal Action Network, *eStewardship: Taking Responsibility in the Information Age (Part I)*, YOUTUBE (May 16, 2013), <https://www.youtube.com/watch?v=JFBj6LbyK3U> [https://perma.cc/E5WN-9BQ7].

81. See Adaramodu, A.A. et al., *Heavy Metal Concentration of Surface Dust Present in E-Waste Components: The Westminster Electronic Market, Lagos Case Study*, 2 RESOURCES & MGMT. 11, 12 (2012) (finding support for the inference that higher concentrations of toxic metals are present indoors compared to outside because of the presence of surface dust); see Anna Leung et al., *Environmental Contamination from Electronic Waste Recycling at Guiyu Southeast China*, 8 J. MATERIAL CYCLES AND WASTE MGMT. 21, 22 (2006) (“However, the recycling industries in these countries, which include China, India, Pakistan, Vietnam, and the Philippines, are often crude and do not have the appropriate facilities to safeguard environmental and human health. The stripping of metals in openpit acid baths, the removal of electronic components from printed circuit boards by heating over a grill, chipping and melting plastics without proper ventilation, and recovering metals by burning cables and parts are common practices. Unsalvageable materials are disposed of either by dumping in fields and rivers or by open burning.”).

ecosystem in ways that are long term and profound. There are deep social and environmental injustices that underlie externalization of toxic e-waste to those least able to deal with it, and these injustices are in violation of their laws. When the Convention was drafted in 1989, e-waste was not a big topic.<sup>82</sup> Today, in the Basel Convention's Conference of the Parties, hazardous e-waste is one of the most ubiquitous and compelling issues that nations are trying to address within this legal framework.<sup>83</sup> Complicated technical guidelines are now being negotiated under Basel, seeking global clarity around complex issues such as exports of used electronics for repair and reuse.<sup>84</sup>

### III. CURRENT STATUS OF THE BASEL CONVENTION

According to BAN in one of its briefing papers:

Treaties are living and growing instruments. Since its adoption in 1989, the Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal has evolved significantly from its original minimalist approach to controlling trade in wastes. The Basel Convention has now adopted hundreds of decisions, a protocol, an amendment, and has amended its annexes.<sup>85</sup>

#### A. Ratifications of the Basel Convention

In the 26 years since the Basel Convention first went into legal force with 20 country ratifications, most nations in the world have now ratified this global treaty achieving a legal framework to restrict trade in hazardous waste.<sup>86</sup> As of mid-February 2015, 181 out of 193 United Nation member nations have ratified the Basel Convention, including almost all South

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82. *The Basel Convention Overview*, BASEL CONVENTION, <http://www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx> [<http://perma.cc/K8PE-EVKH>] (last visited Mar. 21, 2015).

83. *Basel Convention Conference of the Parties, Overview and Mandates*, BASEL CONVENTION, <http://www.basel.int/TheConvention/ConferenceoftheParties/OverviewandMandate/tabid/1316/Default.aspx> [<http://perma.cc/72CD-6WQ2>] (last visited Mar. 22, 2015).

84. Basel Convention, *Press Advisory* (Aug. 31, 2007), available at <http://www.basel.int/Portals/4/Basel%20Convention/docs/press/archive/presadv310807.doc> [<http://perma.cc/BKV3-Z4J4>].

85. The Basel Action Network, *Why the US Must Ratify the Basel Convention Together with the BAN Amendment (or not at all)* (Sept. 2014), available at <http://ban.org/library/briefing2.html> [<http://perma.cc/EXW6-HDCY>].

86. *Parties to the Basel Convention*, *supra* note 33.

American, African, and Asian countries.<sup>87</sup> Only a handful of countries in the world have not ratified this legal trade barrier for hazardous waste; some of these non-ratifying countries include Haiti, South Sudan, and the United States.<sup>88</sup>

### B. United States: Reasons for Not Ratifying Basel

Although the United States may have prepared legislation to ratify Basel, there has not been the political will since the Convention's adoption in 1989,<sup>89</sup> despite the fact that the United States signed the Convention, indicating intent to ratify. Since the Clean Air Act and Clean Water Act were enacted, there has been a persistent backlash within the business community against any legal restrictions perceived to limit United States business interests, despite evidence to the contrary.<sup>90</sup> The United States scrap industry, for example, represented by the Institute of Scrap Recycling Industries, has chosen for years not to incorporate Basel definitions of hazardous waste and restrictions in its trade specifications for scrap materials.<sup>91</sup> Under the label of "commodities," the United States exports hazardous waste; meanwhile, 181 other nations have ratified a legally binding treaty to stop free trade in toxic wastes.

Without Basel restrictions on United States exports, simple economic principles drive its hazardous waste to the highest bidders globally, with devastating long term impacts on the global commons. Businesses in one of the richest countries in the world can generate revenue by exporting their hazardous waste rather than paying to have it responsibly managed in the United States or the Global North. This practice leaves little motivation to ratify a United Nations treaty and its amendment, which erect a legal barrier to trade. In fact, between 1989 and 1992 (a time when motivation was high to ratify the Basel Convention), there were at least 11 bills introduced in the House that would have either pushed the United States to ratify the Basel

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87. *Parties to the Basel Convention*, BASEL CONVENTION, <http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/1290/Default.aspx#a-note-1> [<http://perma.cc/A6C7-6JBE>] (last visited Mar. 18, 2015).

88. *See id.* (excluding Haiti, South Sudan, and the United States as countries that ratified the Basel Convention).

89. *International Waste Agreements: Basel Convention*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/osw/hazard/international/basel.htm> [<http://perma.cc/KLG5-RJHN>] (last updated July 24, 2012).

90. *See* RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW 94-95* (2004) (noting resistance up to the 1970s and beyond).

91. *See generally Scrap Specifications Circular 2014*, INST. FOR SCRAP RECYCLING INDUS., <http://www.isri.org/docs/default-source/commodities/specsupdatejuly2014.pdf> [<http://perma.cc/896T-LMLM>] (last visited Mar. 22, 2015) (providing the institutes own guidelines on different hazardous waste materials).

Convention or at least forced federal law to comply with the Convention.<sup>92</sup> None of these bills came to fruition.<sup>93</sup>

In addition to the attraction of generating revenue from hazardous waste exports, United States businesses can also avoid Superfund liabilities by sending their hazardous waste offshore because CERCLA cannot be enforced extraterritorially.<sup>94</sup> Ratifying the Basel Convention would add a layer of legal restrictions currently not present, requiring United States exporters to seek government to government “notification and consent” for transboundary movement of Basel hazardous wastes, regardless of CERCLA limitations. These legal restrictions, of course, are not happening.

Furthermore, if the United States were to ratify Basel, it would be obliged to transpose the Basel definitions of hazardous waste into United States domestic laws.<sup>95</sup> Changing the definition would trigger a revision of the RCRA, for example.<sup>96</sup> Also the United States would be legally obligated to enforce the treaty, including controlling and monitoring its exports and imports of the newly defined hazardous wastes. Further, customs agencies, EPA, and other government agencies would need to learn these new definitions.

The old notion that protecting the environment will harm productivity and the economy has been repeatedly questioned and increasingly debunked in the past decade.<sup>97</sup> In fact, in the United States, responsible recyclers have created a coalition to lobby for a bill that calls for keeping hazardous e-waste in the country precisely for economic reasons such as, to create jobs and to supply the recycling infrastructure.<sup>98</sup> Because it appears

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92. Kirby, *supra* note 28, at 304 (“From 1989 to 1994, several bills meant to implement the Basel Convention have come before the U.S. Congress.”).

93. Mark Bradford, Note, *The United States, China & The Basel Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal*, 8 FORDHAM ENVTL. L.J. 305, 326 n.98 (1997).

94. *ARC Ecology v. U.S. Dep’t of Air Force*, 411 F.3d 1092, 1100 (9th Cir. 2005) (dismissing plaintiffs’ argument that CERCLA provides relief for contamination outside the territorial boundaries of the United States).

95. See Bradford, *supra* note 92, at 306 (noting that the Basel Convention is a self-executing treaty; thus, if the United States becomes a party, Congress would need to amend existing law in order to conform to the provisions of the Basel Convention).

96. See *Resource Conservation and Recovery Act*, U.S. ENV’L PROT. AGENCY, <http://www.epa.gov/agriculture/lrca.html> [<http://perma.cc/R54T-8QTR>] (last updated Oct. 30, 2013) (RCRA currently defines hazardous waste as ignitable, corrosive, or reactive waste, or waste with toxic chemicals).

97. Matt Wade, *OECD Says Green Tape is Not Damaging the Economy*, SYDNEY MORNING HERALD (Jan. 31, 2015), <http://www.smh.com.au/comment/oced-says-green-tape-is-not-damaging-the-economy-20150131-132a98.html> [<http://perma.cc/NZ3D-2G55>].

98. Coalition for American Electronics Recycling, *Combating Counterfeits, Protecting National Security*, <http://www.americanerecycling.org/> [<http://perma.cc/WU44-P668>] (last visited Mar. 18, 2015).

unlikely that the United States will ratify Basel any time soon, a bill supported by both Democrats and Republicans, the Responsible Electronics Recycling Act, would make it illegal to export hazardous e-waste from the United States to developing countries.<sup>99</sup> Although this large coalition of United States recyclers and refurbishers has actively lobbied for the bill, it has languished for over two years without being heard in a powerful Republican-led committee, perpetuating uncontrolled United States exports of hazardous waste to developing countries.<sup>100</sup>

### 1. Legal and Practical Implications of Basel Ban on Trade Between Parties & Non-Parties

Because of a ban on hazardous waste trade between Parties and non-Parties in the Convention,<sup>101</sup> it is illegal for more than 140 developing countries that are party to Basel but not members of the Organization for Economic Cooperation and Development (“OECD”) to trade hazardous wastes with the United States. And yet, from the perspective of domestic laws, United States businesses are allowed to sell their hazardous waste to buyers in almost any country, even though it is illegal for developing countries that are also Basel Parties to trade with the United States.<sup>102</sup> In other words, the United States failure to control its exports of Basel-regulated wastes results in illegal trafficking to most developing countries.

So why is there a regular flow of containers of hazardous waste leaving the United States to Hong Kong, China, and other developing nations?<sup>103</sup> Because it has not ratified the Basel Convention, the United States has no legal obligation to follow it. Moreover, it has not put controls in place to respect laws in importing Basel-member countries as is required under the

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99. Responsible Electronics Recycling Act, H.R. 2791, 113th Cong. (2013), available at <https://www.congress.gov/bill/113th-congress/house-bill/2791> [<http://perma.cc/PQ42-3YKD>]. This bill was introduced by Rep. Green (D-TX) and was referred to the Subcommittee on Environment. Unfortunately, even with 22 co-sponsors, the bill has had no further action since Sept. 24, 2013.

100. *Id.*

101. Basel Convention, *supra* note 1, at 132.

102. See ALIBABA.COM, <http://www.alibaba.com/> [<http://perma.cc/SWT5-SQLH>] (last visited Mar. 22, 2015) (providing international goods for global trade from a number nations); TBN ONLINE, <http://www.tbnonline.com/> [<http://perma.cc/FA2R-XMYM>] (last visited Mar. 22, 2015) (offering global trade for electronic equipment); EXPORTERS.SG, <http://www.exporters.sg/productdir.asp> [<http://perma.cc/Q7CF-Z9P5>] (last visited Mar. 22, 2015) (providing products from different trade networks).

103. *Indonesia Turns Back Illegal Shipment of E-waste from USA “Recycler”*, THE BASEL ACTION NETWORK, [http://ban.org/ban\\_news/2010/100301\\_indonesia\\_turns\\_back.html](http://ban.org/ban_news/2010/100301_indonesia_turns_back.html) [<http://perma.cc/38PA-9GQ7>] (Mar. 1, 2010) (“It is estimated by Hong Kong authorities that 50–100 containers of e-waste enter the port of Hong Kong alone each day. Almost all of this comes from the United States according to BAN.”).

Convention. Thus, the United States allows its exporters to freely arrange business-to-business transactions without engaging importing and transit governments to determine the legality of any particular waste trade as called for in the Basel “Prior Informed Consent” procedures.

The fact remains, however, that once United States shipments move outside of United States territory—usually the 200 mile off-shore limit known as the Exclusive Economic Zone (“EEZ”)—those shipments fall under international law and are usually illegal for the more than 140 developing countries to import from a non-Party. But it is well understood that trying to control illegal trafficking at importing borders is very challenging.<sup>104</sup> As the United States discovered after the September 11th tragedy, it is very difficult for importing countries to adequately protect their borders from potential risks hidden in incoming containers.<sup>105</sup> Negative impacts on commerce, inadequate legislation, and lack of capacity at the borders limit most countries (particularly developing countries) from adequately controlling imports.<sup>106</sup>

For importing countries, the challenge of controlling illegal imports of Basel wastes from the United States is further complicated by the fact that many exporters simply mislabel their shipments as some sort of benign materials. For example some exporters use labels like “used equipment for reuse” to avoid the attention of customs officials.<sup>107</sup> In fact, exports of electronic waste “for repair” can result in the transboundary movement of hazardous components, such as bad batteries, mercury lamps, circuit boards, and leaded CRT glass for disposal in the importing country; import of these hazardous parts clearly violates the intent of the Basel Convention.<sup>108</sup> The effects of these hazardous wastes can be seen in developed nations where there are burning fields of e-waste.<sup>109</sup> Local citizens, whether scavenging a few materials of value or simply living near

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104. Katelyn J. Wendell, *Improving Enforcement of Hazardous Waste Laws: A Regional Look at E-waste Shipment Control in Asia*, in NINTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT 628 (2011), available at [http://inece.org/conference/9/proceedings/58\\_Wendell.pdf](http://inece.org/conference/9/proceedings/58_Wendell.pdf) [<http://perma.cc/R3GR-KAYH>].

105. Joann Peterson & Alan Treat, *The Post-9/11 Global Framework for Cargo Security*, J. INT’L COM. & ECON. at 17–19 (Mar. 2008), available at [http://www.usitc.gov/publications/332/journals/cargo\\_security.pdf](http://www.usitc.gov/publications/332/journals/cargo_security.pdf) [<http://perma.cc/SYP8-QYZJ>].

106. Wendell, *supra* note 103, at 628–29.

107. *Electronic Waste Recycling Sparks a Toxic Trade*, L.A. TIMES, Nov. 19, 2007, <http://articles.latimes.com/2007/nov/19/business/fi-ewaste19> [<http://perma.cc/3PFJ-8H2G>].

108. Basel Convention, *supra* note 1, at 127.

109. *Poisoning the Poor: Electronic Waste in Ghana*, GREENPEACE INT’L (Aug. 5, 2008), <http://www.greenpeace.org/international/en/news/features/poisoning-the-poor-electroni/> [<http://perma.cc/6MYW-RBXP>].

the smoldering e-waste dumps, suffer the ill-effects through pollution of air, water, and soil and direct exposures.<sup>110</sup>

## 2. The OECD Treaty: Only Applicable to Developed Countries

Although the United States has not ratified the global United Nations treaty restricting hazardous waste trade, it has ratified a multi-lateral environmental agreement (“MEA”) pertaining to the trade in hazardous waste between the 34 OECD countries.<sup>111</sup> It is important to understand that the OECD trade agreements apply only to the developed OECD countries.<sup>112</sup> Because multilateral and bilateral agreements are allowed under Basel, it is legal for the United States to trade hazardous waste only with the other 33 developed Basel countries that have also ratified the OECD agreements, including Canada, Japan, Australia, and much of Europe.<sup>113</sup> Consequently, the United States controls hazardous waste exports to other developed OECD countries, but fails to control exports of its hazardous waste to developing countries, where risks and impacts are the greatest.

However, according to BAN:

This legally binding OECD decision (C(86)64(Final)), which requires Prior Informed Consent (“PIC”) for all hazardous wastes and prohibits exports if there is reason to believe that the wastes will not be handled in an environmentally sound manner, has never been properly implemented into U.S. national law. Thus, current U.S. law allows highly dangerous and unscrupulous exports of asbestos and lead acid batteries, lead/cadmium contaminated sludges, electronic wastes, etc. to developing countries – with few controls if any.”<sup>114</sup>

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110. See Alexander Göbel, *Home for Some, E-waste Dump for the World*, DEUTSCHE WELLE (July 1, 2014), <http://www.dw.de/home-for-some-e-waste-dump-for-the-world/a-17313876> [<http://perma.cc/NKE2-54TN>] (describing the conditions faced by children who collect e-waste for money in Ghana and the health effects—including liver damage and toxic smoke inhalation).

111. *Decision of the Council Concerning the Control of Transboundary Movements of Wastes Destined for Recovery Operations*, *supra* note 68; *Decision-Recommendation of the Council on Exports of Hazardous Wastes from the OECD Area*, ORGANIZATION FOR ECON. COOPERATION & DEVELOPMENT (OECD), <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=54&Lang=en&Book=False> [<http://perma.cc/EUN5-4UZF>] (last visited Mar. 23, 2015).

112. See *Members and Partners*, *supra* note 49 (describing OECD members as the “world’s most advanced countries”).

113. See *id.* (showing that the OECD countries are largely developed and include a number of European nations).

114. *Why the US Must Ratify*, *supra* note 84, at 2.

Aside from the fact that it is illegal for the more than 140 developing countries that are Basel Parties to accept hazardous waste from the United States, there are also moral and diplomatic issues to consider. The laws of physics dictate that heavy metals such as lead, mercury, and cadmium are immortal, i.e. they never disappear, although they may change form. When any country exports its hazardous wastes to countries that can least capable to manage them, illegality aside, these heavy metals along with persistent bio-accumulative chemicals are released into air, water, and soil leaving entire regions with widely dispersed immortal elements and persistent chemicals. Where primitive recycling techniques have been used to reclaim a few valuable materials from a hazardous waste stream without adequate occupational and environmental controls, the resulting toxics released into the environment can have profound long term effects, and not only for the local region. Many of these persistent chemicals bio-transport, carrying toxics around the globe into the far reaches of oceans, air, and land, into the food chain and many forms of life—virtually impossible to “clean up.”

*C. Ethical and Diplomatic Implications of United States Non-Ratification of Basel & Its Ban Amendment*

Politically and ethically, how can one of the world’s richest countries, and most wasteful, continue its unrestricted transfer of hazardous wastes to developing countries? What are the diplomatic implications of such ongoing activities, as most nations have agreed to restrict trade in hazardous wastes, while others have implemented the Basel Ban Amendment, completely banning trade in hazardous waste between developed and developing countries?

In 1991, an internal memo from the World Bank was leaked to the world press—a memo written by then World Bank Chief Economist (and United States citizen), Lawrence Summers.<sup>115</sup> It articulated his influential point of view of the “impeccable” economic logic of toxic trade.<sup>116</sup> According to the memo, he stated: “I think the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to the fact that . . . under-populated countries in Africa are vastly under-polluted.”<sup>117</sup>

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115. *Furor on Memo at World Bank*, N.Y. TIMES (Feb. 7, 1992), <http://www.nytimes.com/1992/02/07/business/furor-on-memo-at-world-bank.html> [<http://perma.cc/G53G-3BU9>].

116. *Id.*

117. *The Basel Ban: A Triumph for Global Environmental Justice*, BASEL ACTION NETWORK (Sept. 2014), [http://www.ban.org/wp-content/uploads/2014/09/BP1\\_September2014Final.pdf](http://www.ban.org/wp-content/uploads/2014/09/BP1_September2014Final.pdf) [<http://perma.cc/34GP-DT48>].

According to BAN, Summers's words:

. . . resulted in a global outcry. Then Environment Minister of Brazil, Jose Lutzenberger, found words for the collective outrage in his written rebuke to the Bank and Mr. Summers. "Your reasoning is perfectly logical but totally insane . . . your thoughts [provide] a concrete example of the unbelievable alienation, reductionist thinking, social ruthlessness and the arrogant ignorance of many conventional 'economists' concerning the nature of the world we live in."<sup>118</sup>

Today, the United States is ever present at Basel meetings as a non-voting "observer," seeking to influence Parties and usually to weaken the implementation of the Basel Ban Amendment. According to Jim Puckett, executive director of the Basel Action Network, who has attended every Basel Conference of the Parties:

The United States has consistently taken an insupportable and embarrassing stance with respect to the Basel Convention. We are the country that creates the most waste per capita on earth, including hazardous waste. We are the country that is currently exporting electronic waste with impunity and without control. We are the country that has for years purported to care about the poor and less fortunate and have made this part of our foreign relations ethic—e.g. the Peace Corps, CARE, U.S. AID, etc. We are the country that invented the important term and principle of 'environmental justice'. And yet our role at Basel—the world's only waste treaty and arguably one of the few global instruments of environmental justice, has been a tragedy of conscience. We are the only developed country in the world that refuses to ratify the Convention, and stand with Haiti as the only two countries in the world that signed the Convention in 1989 but never ratified it, even some 25 years later. And despite not being a Party to the Convention, we actively work to undermine its most significant achievement—the ban on exporting hazardous wastes from developed to developing countries. Meanwhile, we turn a blind eye to thousands of illegal shipments of hazardous waste each year that leave our shores and are exported to countries that have forbidden

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118. *Id.*

their importation. We are perpetrators of environmental crime on an unfathomable scale.<sup>119</sup>

But this does not prevent the United States from going to the Basel meetings, even as a non-Party, and arguing for weaker global policies, while failing to contribute needed funds to the United Nations program.<sup>120</sup> The Basel Convention provides a legal framework designed to protect all communities around the world from hazardous waste; the United States should be playing a key role in supporting, strengthening, and enforcing this critical United Nations treaty.

#### IV. RECOMMENDATIONS FOR THE UNITED STATES

The United States' failure to ratify the Kyoto Protocol,<sup>121</sup> the United Nations Convention on the Rights of the Child,<sup>122</sup> and the Basel Convention with its Ban Amendment<sup>123</sup> has rightly resulted in a growing perception that the United States is out-of-step with the global community on many critical issues. Many perceive the United States as a nation that externalizes the real costs of doing business, *particularly* to countries with low labor costs, weak environmental and occupational laws and enforcement, lack of tort law for redress of wrongs, and little capacity to manage toxic metals and chemicals in both the short and long term.<sup>124</sup>

When it comes to hazardous waste trade, the United States is not controlling its exports beyond the 33 other developed countries, raising diplomatic and ethical questions as developing countries receive uncontrolled United States-generated hazardous wastes. These questions have become particularly visible as developing countries better transpose

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119. E-mail from Jim Puckett, Exec. Director, Basel Action Network, to author Sarah Westervelt (Apr. 16, 2015, 18:22 EDT) (on file with author).

120. Peeyush Gaurav Soni, *Managing the E-Waste Menace; a Developing Country's Perspective*, WORLD TRADE R. (March 1–15, 2007), <http://worldtradereview.com/news.asp?pType=N&iType=A&iID=151&siD=14&nID=32263> [<http://perma.cc/PF3S-GTK7>].

121. *U.S. Withdraws from Kyoto Protocol*, GREENPEACE (April 5, 2001), <http://www.greenpeace.org/usa/en/news-and-blogs/news/u-s-withdraws-from-kyoto-prot/> [<http://perma.cc/5WWT-Q585>].

122. *UN Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, art. 11 (Nov. 20 1989), available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=e](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=e) [<http://perma.cc/NCM6-YUJ4>] (last visited Mar. 22, 2015).

123. *Parties to the Basel Convention*, *supra* note 33.

124. *FAQs on Global E-Waste Dumping*, ELECTRONICS TAKEBACK COALITION (Sept. 28, 2010), [http://www.electronicstakeback.com/wp-content/uploads/Q\\_and\\_A\\_on\\_Exporting\\_Issues](http://www.electronicstakeback.com/wp-content/uploads/Q_and_A_on_Exporting_Issues) [<http://perma.cc/SAV4-7TT5>].

Basel obligations into their domestic laws and enforce the ban on hazardous waste trade (for recycling and disposal) between Parties and non-Parties. In the international Basel meetings, developing countries voice significant concerns regarding hazardous waste from the developed countries. This hazardous waste results in high levels of immortal heavy metals, persistent bio-accumulative toxins, and other hazards in the importing countries, which are causing increasingly visible impacts on human health and the ecosystem.<sup>125</sup> These impacts are not only local and regional, but inevitably global impacts, as wind and water carry the elements far and wide. Given the current United States status as the only developed country in the world that has not ratified the Basel Convention, what are the best ways forward?

A. *Either the United States Should Simultaneously Ratify the Basel Convention and its Ban Amendment or Neither*

In order to understand the following recommendation, it may be useful to first summarize the current legal realities for the United States. Because the United States is a non-Party to the Basel Convention, exports of hazardous electronic waste from the United States to most developing countries are illegal once they leave United States territory. Under the Convention, no Basel Party can trade in hazardous waste with a non-Party without a special Article 11 agreement.<sup>126</sup> The United States has not ratified any multilateral hazardous waste agreements with countries outside of the OECD member countries.<sup>127</sup> Therefore, most of the e-waste traffic currently going to Basel developing countries from the United States is illegal for those importing countries.

If the United States were to ratify the Convention alone, this trade would become *legal* between the United States and any consenting Basel developing countries, utilizing Basel's "Prior Informed Consent" regime. But legally shipping United States hazardous waste to developing countries would conflict with the notions of environmental justice, best management practices for hazardous waste, United States global citizenship, and the

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125. *Our Sustainable Future: The Role of the Basel Convention*, BASEL CONVENTION, available at <http://www.basel.int/Portals/4/Basel%20Convention/docs/pub/broch090508.pdf> [<http://perma.cc/K7N3-MDUG>] (last visited Mar. 20, 2015).

126. Basel Convention, *supra* note 1, at 138. Article 11 of the Basel Convention allows bilateral, multilateral, and regional agreements between Parties and non-Parties with some stipulations.

127. See *International Waste Agreements*, U.S. ENV'T'L PROTECTION AGENCY, <http://www.epa.gov/epawaste/hazard/international/agree.htm> [<http://perma.cc/Z4TV-T77P>] (last visited Mar. 24, 2015) (listing the international agreements on waste, with the OECD as the only multilateral agreement).

consensus decision by Basel Parties in 1995 to completely ban hazardous waste going from developed countries to developing countries.

Therefore, the United States should only ratify both the Basel Convention and its separate Ban Amendment *simultaneously*, or neither. Given the history of United States and the Basel Convention, it is highly unlikely that the United States will ratify the Ban Amendment any time soon. Therefore, it is far preferable that a legal barrier remains between the United States and developing countries. For this reason, the United States should not ratify the Basel Convention without the Amendment.

### *B. Improve Global Enforcement*

Many nations are cooperating with international efforts to stop illegal trafficking of hazardous waste. Especially because the United States has not ratified Basel, it should be investing significantly in these efforts to prevent illegal trafficking from its shores to the more than 140 developing countries. The International Network for Environmental Compliance and Enforcement (“INECE”) represents one such global effort.<sup>128</sup> Another is INTERPOL’s Project Eden,<sup>129</sup> which has developed a multinational strategy and database, but needs funding. While the United States has no legal obligations under Basel, it could be aggressively contributing to INTERPOL’s and INECE’s efforts, both financially<sup>130</sup> and programmatically, as they rely on the support and cooperation of member countries to share information about illegal shipments and to crackdown on the illegal trafficking.

### *C. Pass a Federal Export Ban*

In lieu of ratifying both the Convention and the Ban Amendment, Congress could pass a federal bill to ban exports of hazardous e-waste from the United States to developing countries. Such a law would result in the following:

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128. See *Who We Are*, INT’L NETWORK FOR ENV’T’L COMPLIANCE & ENFORCEMENT, <http://inece.org/about/who-we-are/> [<http://perma.cc/2NFL-8VW6>] (last visited Mar. 19, 2015) (“The International Network for Environmental Compliance and Enforcement (INECE) is a partnership of government and non-government enforcement and compliance practitioners from more than 150 countries. INECE’s goals are: raising awareness to compliance and enforcement; developing networks for enforcement cooperation; and strengthening capacity to implement and enforce environmental requirements.”).

129. *Project Eden*, INTERPOL, <http://www.interpol.int/Crime-areas/Environmental-crime/Projects/Project-Eden> [<http://perma.cc/8HX7-CGT7>] (last visited Mar. 23, 2015).

130. United States funding to INTERPOL could be earmarked for Project Eden.

- a) Create jobs in the United States. If the United States were to responsibly manage its hazardous waste in country instead of exporting it to the highest bidder globally, the large volumes of used electronics could supply the hungry United States recycling and refurbishing facilities struggling to compete with exporters. Keeping e-waste in the United States would also improve data security and hazardous waste management for corporate, government, and organizational customers when they need to get rid of used electronic equipment;
- b) Provide an incentive to reduce United States generation of hazardous waste in the first place, solving the hazardous waste problem upstream, where the real leverage lies;
- c) Contribute to better United States diplomacy as a global citizen;
- d) Result in far more responsible management of toxic, leaching, corrosive, explosive, and otherwise hazardous substances and mixed wastes, using United States state-of-the-art technologies; and
- e) Prevent harm to the global commons and particularly to the developing countries of the world, actively pursuing environmental justice for all people.

#### *D. Use Certified E-Stewards Recyclers*

There is now an accredited, independently audited certification program to help customers around the world identify globally responsible recyclers and refurbishers that operate in conformity with the Basel Convention and the Ban Amendment.<sup>131</sup> The program, [www.e-stewards.org](http://www.e-stewards.org), provides recyclers and their customers with a rigorous standard and “conformity assurance” program. This auditing program defines responsible management of electronic waste relative to international trade, occupational health and safety, data security, reuse, downstream accountability, final disposition of toxic materials, site closure, and much more.<sup>132</sup> It is invaluable to have a rigorous voluntary certification program, helping to bring a high bar and transparency to a relatively new recycling industry that

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131. *Basel Convention: Meetings and Workshops*, BASEL CONVENTION, <http://www.basel.int/Implementation/CountryLedInitiative/Meetings/tabid/3624/Default.aspx> [<http://perma.cc/LYE2-HPAF>] (last visited Mar. 28, 2015).

132. *Review Version: e-Stewards Standard for Responsible Recycling and Reuse of Electronic Equipment*, E-STEWARDS, iii (Nov. 1, 2013), [http://e-stewards.org/wp-content/uploads/2014/09/eStewards\\_Standard\\_Review\\_Version.pdf](http://e-stewards.org/wp-content/uploads/2014/09/eStewards_Standard_Review_Version.pdf) [<http://perma.cc/MQ2W-XKVY>].

exists in a dearth of occupational protections, hazardous waste laws, and hazardous waste disposal infrastructure in many countries.

*E. Adopt Laws for Production of Non-Toxic Products*

At the same time we work to prevent cost externalization via the export of pollution to poorer economies or the global commons, we also need to create incentives for solving the toxic waste problem upstream, in the design and production phase of the life cycle of products. It is there that is the most effective place to solve hazardous waste problems. Manufacturers redesign toxic products and processes to phase out toxic inputs, and create products that are designed to last, designed for recycling, and designed for the environment. Europe has passed a law restricting the use of some toxic metals and chemicals in new products.<sup>133</sup> The United States could also require by law that manufacturers phase out the most hazardous substances from their products, creating a “level playing field” in which manufacturers compete to produce cleaner products for all.

Regardless of whether the United States ratifies the Basel Ban Amendment and the Convention, or adopts laws requiring the phase out of hazardous substances from products and processes, it is critical that individuals, companies, organizations, and governments push for reducing hazardous waste at its source through waste prevention. As a society, we can help shift the paradigm by purchasing the cleanest new electronic products,<sup>134</sup> and communicate directly with manufacturers the importance of non-toxic products. Manufacturers repeatedly state that they are not highly motivated to redesign products for the environment because they do not hear from consumers asking for this.<sup>135</sup> It is worth noting, however, that some manufacturers are developing innovative solutions.<sup>136</sup> Dell, for example, is working on mushroom packaging, Asus has a pilot for bamboo

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133. Council Directive 2011/65, Art. 114, 2011 O.J. (L 174) 88 (EU), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0065&from=EN> [<http://perma.cc/8UJC-TGDJ>].

134. See Green Electronics Council, *Who Participates in EPEAT?*, EPEAT, <http://www.epeat.net/> [<http://perma.cc/7S34-4S26>] (last visited Mar. 23, 2015) (providing a user-friendly tool to consumers for identifying high-performance and environmentally preferable products).

135. See MICHAEL HOWES, *POLITICS AND THE ENVIRONMENT RISK AND THE ROLE OF GOVERNMENT AND INDUSTRY* 161, 172 (2005) (“Up to the end of the 1970s most firms adopted neo-liberal rejection that denied or played down the significance of environmental risks.”).

136. See *id.* at 162, 172 (citing the company 3M as an example of a company that redeveloped its program line in order to reduce their pollution per tonne of product).

casing surrounding a laptop, and there are prototypes for cardboard computer towers and printers, as well.<sup>137</sup>

As a nation, we should ensure that toxics (e.g. mercury and brominated flame retardants) are removed from our products and the hazardous waste stream. Furthermore, these toxics should be retired and properly managed, by placing them in long-term monitored hazardous waste storage, and not put back into new products.

#### CONCLUSION

As a member of the global community of nations, the United States is the only developed country unwilling to ratify the United Nations treaty adopted by most nations to reduce and legally restrain hazardous waste trade. Just as nations have decided not to allow free trade in slaves, endangered species, nuclear weapons, and other “bads,” most countries have also agreed not to consider hazardous waste as “goods,” despite any economic value they may have on the black market. But the United States continues to “go it alone,” transferring its moral and financial responsibilities and the real impacts of hazardous wastes to other countries.

Global society has tried to resist this kind of externalization for decades, particularly externalization to developing countries, in the form of the Basel Convention and its Ban Amendment. While enforcement of any law can be challenging, it is another matter altogether for the most powerful country in the world to refuse to adopt the global legal restrictions that 181 other countries have voluntarily adopted. The future of the planet is dependent upon the choices made by citizens/consumers, organizations, manufacturers, and governments, to reject toxic products, and the trade in the resulting hazardous waste. But as long as toxic products are manufactured, recycled, and disposed, the United States must become a far better global citizen, and not externalize the real costs and impacts of its hazardous wastes.

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137. *Green Packaging and Shipping*, DELL, <http://www.dell.com/learn/us/en/uscorp1/corp-comm/mushroom-packaging> [<http://perma.cc/YHK4-V9ZB>] (last visited Mar. 20, 2015); *Bamboo Series – Inspired by Nature, Designed for Style*, ASUS, [http://www.asus.com/Notebooks\\_Ultrabooks/U6V\\_Bamboo/](http://www.asus.com/Notebooks_Ultrabooks/U6V_Bamboo/) [<http://perma.cc/D65C-XBWN>] (last visited Mar. 20, 2015); *Understanding Sustainability and Product Life Cycle*, RECOMPUTE, <http://recompute.com/index.php/about/about-philosophy> [<http://perma.cc/NT88-BY64>] (last visited Mar. 20, 2015).