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The Disproportionate Burden on Vulnerable Communities in the Trade of Plastic Waste: How Environmental Justice Should be Integrated into the United Nations Treaty on Plastic Pollution

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The Disproportionate Burden on Vulnerable Communities in the Trade of Plastic Waste: How Environmental Justice Should be Integrated into the United Nations Treaty on Plastic Pollution

*Jackson Moffett**

Abstract

The United Nations Environment Assembly passed a resolution to end plastic pollution with a legally binding treaty in response to growing international concern over the destruction of the environment and human health from plastic pollution. Plastic waste disposal is currently regulated under the Plastic Waste Amendments of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), which subjects it to prior informed consent (PIC) and the environmentally sound management of waste (ESM). Unfortunately, the increasing amount of plastic production and limited number of recycling facilities around the world have rendered the Basel Convention ineffective in limiting the environmental harms caused by plastic pollution. Environmental justice communities suffer disproportionate burdens caused by the improper disposal of plastic waste.

In 2018, China closed its borders to receiving plastic waste, which used to account for more than half the world's plastic waste disposal. This action led to an influx of plastic waste into Global South countries which lack the technical and financial resources to accept such waste. As a result, more than 70 percent of plastic waste ends up in landfills or open-burning pits, which are often located in the communities of the poor and people of color. The United Nations' proposed binding treaty is premised on the need to address the full life-cycle of plastic and a call to curb the overall production of plastic. It also reinforces some of the key principles of the Basel Convention. However, environmental justice is not mentioned explicitly in the resolution, nor are any recommendations to provide remediation measures to communities in damage. This Article first provides a background on the disproportionate burden of plastic waste disposal on environmental justice communities, principles of environmental justice, and how they are reflected in international law. Then, it provides an overview of how the Basel Convention regulates plastic waste and analyzes how it fails environmental justice communities. Finally, this Article recommends how the United Nations' new binding treaty must integrate environmental justice by including binding targets on plastic production, mitigation and enforcement measures for illegal waste disposal, and effective capacity building for developing economies. These

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changes can help environmental justice communities by both addressing current harms being suffered, and by offering a roadmap for protecting them in the future.

TABLE OF CONTENTS

I. INTRODUCTION.....	179
II. ENVIRONMENTAL JUSTICE ISSUES IN THE TRADE OF PLASTIC WASTE	181
A. Global South Countries Receive a Disproportionate Amount of Plastic Waste	182
B. Environmental Justice Communities Suffer from the Illegal Waste Trade	183
III. HISTORY OF ENVIRONMENTAL JUSTICE IN INTERNATIONAL LAW ..	184
A. Principles of Environmental Justice.....	185
IV. REGULATION OF PLASTICS AND TOXIC WASTE IN INTERNATIONAL LAW	186
A. The Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal.....	186
B. Relevant Provisions in the Basel Convention	187
1. Environmentally Sound Management of Waste.....	187
2. Prior-Informed Consent.....	187
C. Plastic Waste Amendments Under the Basel Convention ...	188
D. Limitations of the Regulating Plastic Waste Under the Basel Convention	189
V. THE UNITED NATIONS RESOLUTION TO PASS A BINDING TREATY TO REGULATE PLASTIC WASTE	190
VI. INTEGRATING ENVIRONMENTAL JUSTICE INTO THE NEW PLASTICS TREATY.....	190
A. Phasing out Single-Use Plastics with Capacity Building and Binding Targets.....	191
B. Ensuring Adequate Treatment of Plastic Waste.....	192
C. Specific Funding Provisions for Environmental Justice Communities	194
VII. CONCLUSION	195

I. Introduction

Plastic waste is everywhere—it chokes our aquatic ecosystems,¹ infiltrates the food we eat,² and plagues the shores of our cities.³ A massive gyre of waste known as the “Great Pacific Garbage Patch,” located in the North Pacific Ocean, is more than twice the size of Texas and is growing each day.⁴ More than 800 marine and coastal species are adversely affected by ingestion, entanglement, and other dangers associated with plastic pollution.⁵ “An estimated six billion tons of plastic waste have been generated since 1950, of which less than 10% will be recycled and nearly 80% either discarded or landfilled.”⁶ The United Nations Environment Programme (UNEP) estimates that the annual flow of plastic into the ocean is estimated to nearly triple by 2040 without action.⁷ Plastic also exacerbates climate change. In 2019 alone, carbon emissions from the incineration and production of plastic added more than 850 million metric tons of greenhouse gases to the atmosphere—making the plastic industry, if it were its own country, the fifth largest carbon-dioxide emitter in the world.⁸

Part of the failure to recycle plastics is the trade of plastic waste. Plastic waste trading often occurs in the form of “Global North” countries paying “Global South” countries, with inadequate facilities and weak environmental laws, to dispose of their plastics.⁹ Because of this, vulnerable communities in these disposal destinations bear the brunt of the environmental and economic burdens.¹⁰ In particular, the harms suffered by EJ communities in Southeast Asia have worsened since China closed its borders to plastic waste in 2018.¹¹

Harms to EJ communities are both directly and indirectly tied to the trade and disposal of plastics: microplastics infiltrate food systems, toxic fumes from

1. See generally Thomas Efferth & Norbert W. Paul, *Threats to Human Health by Great Ocean Garbage Patches*, 1 LANCET PLANETARY HEALTH 301 (2017) (describing the different global impacts of marine pollution).

2. *Id.*

3. *Id.*

4. Mary Schoell, *Garbage Island: The Great Pacific Garbage Patch*, YALE ENV'T REV. (June 11, 2019), <https://perma.cc/Y4J7-G93D>.

5. *Nations Sign Up to End Global Scourge of Plastic Pollution*, U.N. NEWS (Mar. 2, 2022), <https://perma.cc/DF6L-4XXD>.

6. *Our Planet is Choking on Plastic*, UNEP, <https://perma.cc/374L-5HLC>.

7. JULIANO CALIL ET AL., *NEGLECTED: ENVIRONMENTAL JUSTICE IMPACTS OF MARINE LITTER AND PLASTIC POLLUTION* 17 (2021).

8. See generally Elisa A. Hamilton et al., *Plastic & Climate, The Hidden Costs of a Plastic Planet*, CIEL 1 (2019), <https://perma.cc/W4KL-RVWJ>.

9. Aidan Charron, *Babies in the Global South are Being Poisoned by Plastic from the North. Yet They are Missing from the Data*, THE GUARDIAN (Nov. 30, 2023), <https://perma.cc/U4KL-H2LP>; Megan Quinn, *Global Treaty Aims to Tackle Plastic Pollution Through its Full Life Cycle, Including Waste and Recycling*, WASTE DIVE (Mar. 3, 2022), <https://perma.cc/66YM-E3AP>.

10. *Environmental Justice*, ENV'T PROT. AGENCY, <https://perma.cc/TL8C-TQYL> (Environmental justice (EJ) 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.”).

11. Iman Ghosh, *Mapping the Flow of the World's Plastic Waste*, VISUAL CAPITALIST (July 3, 2019), <https://perma.cc/3VGJ-D72U>.

unregulated incineration releases harmful chemicals into the air and groundwater, and farms and coastlines become the world's dumping grounds.¹² Open-waste burning leads to contaminated water supplies, crop death, respiratory illnesses from exposure to toxic fumes, and a rise in organized crime associated with illegal waste management.¹³ Women are particularly vulnerable to plastic-related toxicity: “[d]ifferences in biology, social roles, and political power in regulating plastic use and health standards place women at high risk of miscarriages and cancer” due to the toxins released when plastic is burned, “which further exacerbates existing gender-related disparities.”¹⁴

Current international binding and non-binding instruments that apply to plastics fall short of addressing EJ communities. Plastic waste is regulated under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) along with other hazardous wastes through a Prior-Informed Consent regime.¹⁵ Signatories to the Basel Convention have recently taken steps to mitigate further the plastic pollution crisis with new amendments to address plastic separately from other wastes.¹⁶ They established a Plastic Waste Partnership to improve and promote the environmentally sound management (ESM) of plastic waste as well as to prevent and minimize its generation.¹⁷ However, land-based pollution, which accounts for an estimated 80% of the plastics that end up in the ocean,¹⁸ is not regulated under the Basel Convention.¹⁹ The United Nations Convention on the Law of the Sea (UNCLOS) is written broadly enough to apply to land-based pollution, but it does not regulate it specifically.²⁰ In short, there is no binding international framework that explicitly regulates land-based pollution, vessel-based pollution, the entire lifecycle of plastics, or environmental justice on these specific grounds. As a result, EJ communities suffer from the lack of a transparent and well-funded global framework.

12. Hamilton et al., *supra* note 9.

13. GLOBAL ALLIANCE FOR INCINERATOR ALTERNATIVES, DISCARDED: COMMUNITIES ON THE FRONTLINES OF THE GLOBAL PLASTIC WASTE CRISIS 5 (2019), <https://perma.cc/GND7-EFQN>.

14. CALIL ET AL., *supra* note 8, at 11.

15. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, art. 6, *opened for signature* Mar. 22, 1989, UNEP/IG.80/3, 28 I.L.M. 657 (*entered into force* May 5, 1992) [hereinafter Basel Convention].

16. Basel Convention Plastic Waste Amendments, <https://perma.cc/ZCV2-UN8D>.

17. *Plastic Waste Partnership: Overview*, U.N., <https://perma.cc/7PMS-PF9E> [hereinafter *Plastic Waste Partnership: Overview*].

18. *Global Agreement on Marine Pollution from Land-Based Sources Yields Lessons: Policy Brief*, INT’L INST. FOR SUSTAINABLE DEV. (Jan. 20, 2021), <https://perma.cc/T2SE-PGDC>.

19. Basel Convention, *supra* note 16, *passim*.

20. Giulia Carlini & Konstantin Kleine, *Advancing the International Regulation of Plastic Pollution Beyond the United Nations Environment Assembly Resolution on Marine Litter and Microplastics*, 27 REV. EUR. COMP. & INT’L ENV’T L. 234, 236 (2018). Article 194 of UNCLOS obliges States to take measures to regulate general pollution to the marine environment but does not include measures for most types of plastic waste. Article 207 requires States to take measures to control pollution at large from land-based sources but is limited by the reference to internationally agreed rules.

To fill this gap, the United Nations Environment Assembly (UNEA), the world's highest-level decision-making body on the environment with a membership composed of all 193 United Nations (UN) member states, established an Intergovernmental Negotiating Committee to draft, by the end of 2024, the first legally-binding agreement to regulate plastics comprehensively.²¹ The overall goal of the Committee is to address the full life cycle of plastics, from production to disposal,²² as well as to establish a global fund providing budgetary resources, action curbing production, resilient and sustainable infrastructure, and the sound management of chemicals and waste.²³

However, the resolution does not explicitly mention the challenges EJ communities face. Through a review of the UNEA's goals and existing frameworks, this Article recommends that a new binding treaty integrate environmental justice into its provisions to protect these vulnerable communities. This could be achieved by ensuring adequate waste facilities for importing countries, funding enforcement actions against illegal waste management, instituting mitigation action plans where plastics have previously harmed communities, and prohibiting open-source burning. Where the duties of developed countries are concerned, this Article recommends that exporting countries be bound with specific targets to domestically process their own plastic waste and slow down production. Similarly, local, regional, and global governments are advised to work with non-government entities and corporations to achieve these ends.

Part II of the Article explains the scale of the problem and why certain communities are disproportionately affected. Part III discusses the history of EJ in international law. Part IV discusses how current international frameworks regulate environmental justice and the plastics trade. Part V discusses the UN's proposed agreement and where it can address environmental justice concerns through mitigation strategies, greater responsibility on developed nations to process their own plastic domestically, and effective capacity-building in developing countries. This Article concludes, in Part VI, with a more thorough look at the aforementioned recommendations for how the international community could better serve those affected by the plastics trade with a new binding agreement.

II. Environmental Justice Issues in the Trade of Plastic Waste

The onslaught of production and disposal of plastic waste leads to vulnerable communities bearing the burden of unwanted externalities.²⁴ Developed countries produce an exorbitant amount of plastic waste, which, because they lack adequate infrastructure to recycle or dispose of it properly, they then pay to ship to developing countries.²⁵ Alongside that market, the illegal waste trade, in which organizations dispose of their waste at a discounted price to unregulated facilities,

21. Environment Assembly Draft Res. UNEP/EA.5/L.23/Rev.1, *End Plastic Pollution: Towards an International Legally Binding Instrument* (Mar. 2, 2022) [hereinafter *End Plastic Pollution*].

22. *Id.*

23. *Id.*

24. Quinn, *supra* note 10.

25. *Id.*

flourishes because companies don't want to pay for the costs associated with proper treatment, technology, and compliance with regulations.²⁶ EJ communities absorb negative externalities from unregulated facilities in the form of polluted air, poisoned water sources, and dead wildlife. A binding treaty, giving EJ communities support and a basis for legal action, can help remedy these harms.

A. Global South Countries Receive a Disproportionate Amount of Plastic Waste

“[E]xporting hazardous wastes for disposal in developing countries has been described as environmental injustice or environmental racism on a global scale.”²⁷ Throughout the last quarter century, China handled nearly half of the world's recycling of plastics and other waste.²⁸ Nearly all of the European Union's, and more than half of the United States', plastics for recycling were sold and shipped to Chinese processors to be repurposed into newly manufactured products. This was a convenient system for China; after Chinese ships delivered manufactured goods to ports across the seas, it made economic sense to fill those ships with raw materials which were used for new goods.²⁹ A combination of low shipping rates, cheap labor, and high demand for recycled materials made it profitable to China.³⁰ However, this waste management industry became unsustainable from both an economic and environmental standpoint. The improper disposal of leftover waste not used for manufactured goods wreaked havoc on China's natural environment, fouling rivers and clouding the skies, motivating a policy shift.³¹

In 2017, China enacted its “National Sword” policy,³² which effectively imposed a halt on China acting as the world's dumping ground for plastic waste. Shutting off the world's largest plastic waste facility lifted the veil on the severity of the environmental and economic costs of discarding plastic waste, and how the trade of plastic waste has impacted environmental justice communities. Notably, the impact in the United States was immediate. For example, in Oregon, curbside collection programs for plastic recyclables screeched to a halt in most counties outside of the Portland metro area.³³ Nationwide, plastic waste in landfills has risen by more than 23% since 2017.³⁴ After China closed its borders, large exporting nations, such as the United States and countries in Europe, have diverted their

26. HOWARD HUSOCK, *THE DECLINING CASE FOR MUNICIPAL RECYCLING* 5 (2020), <https://perma.cc/G7P3-SC5Z>.

27. ZADA LIPMAN, *TRADE IN HAZARDOUS WASTE: ENVIRONMENTAL JUSTICE VERSUS ECONOMIC GROWTH: ENVIRONMENTAL JUSTICE AND LEGAL PROCESS* 1 (1993), <https://perma.cc/7VBY-MLCV>.

28. *Id.*

29. *Id.*

30. Cheryl Katz, *Piling Up: How China's Ban on Importing Waste Has Stalled Global Recycling*, *YALE ENVIRONMENT* 360 (Mar. 7, 2019), <https://perma.cc/M8ET-J35Y>.

31. *Id.*

32. Ana Yong, *The Plastic Waste Dilemma and China's National Sword Policy*, *UNSUSTAINABLE* (Jan. 31, 2023), <https://perma.cc/6R5Y-HWZJ>.

33. OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, *2020 RECOVERY RATES FOR PLASTIC WASTE AND FOOD WASTE* 7 (Sept. 2022).

34. Yong, *supra* note 33.

plastics primarily to Southeast Asian countries including Thailand, Malaysia, Vietnam, Taiwan, and Indonesia.³⁵

B. Environmental Justice Communities Suffer from the Illegal Waste Trade

Improper disposal of plastic waste harms vulnerable communities because it adversely impacts human health, the environment, and food sources through open-burning and landfills.³⁶ As much as one billion tons of waste burns in open and uncontrolled fires around the world each year, according to the National Center for Atmospheric Research,³⁷ which is more than 40% of all the municipal solid waste generated on Earth.³⁸ Across low- and middle-income countries, an estimated two billion people do not have their solid waste collected at all, often resulting in unregulated open burning.³⁹ Open-waste burning releases dioxin, which, if inhaled by humans, leads to adverse reproductive development, suppression of the immune system, disruption of hormonal systems, asthma attacks, and cancer.⁴⁰ Additionally, open burns release toxins into the soil and water, where they are ingested by domesticated animals directly or by way of their feed.⁴¹ Such pollutants can later be passed on to humans when they consume these animals.⁴²

Heavy costs associated with proper plastic waste disposal include building and maintaining proper treatment facilities, development of adequate technology, and labor.⁴³ In Europe, more than one-third of plastic waste is exported by companies because it is cheaper to send that waste away on a ship than to recycle it at home.⁴⁴ Once plastic waste is put on a ship, illegal activities can develop during the “collection, transportation, segregation, disposal, recycling, and monitoring of the waste.”⁴⁵ The sheer size of the global plastics trade, estimated at around \$1.2 trillion,⁴⁶ fuels incentives for bad agents to illegally acquire plastic waste and produce recyclables where laws are weak and the labor is cheap.⁴⁷

In Southeast Asian countries, such as Malaysia, Thailand, and Indonesia, economic insecurity stimulates the market for illegal plastic recycling factories,

35. *Id.*

36. Efferth & Paul, *supra* note 2.

37. *Trash Burning Worldwide Significantly Worsens Air Pollution*, PHYS ORG (Aug. 26, 2014), <https://perma.cc/P53K-TGZK>.

38. Costas Velis & Ed Cook, *Health Crisis: Up to a Billion Tonnes of Waste Potentially Burned in the Open Every Year*, THE CONVERSATION (Jan. 7, 2021, 10:09 AM), <https://perma.cc/5SAB-L54A>.

39. *Id.*

40. Iida T. Hershey & Nicole L. Wolf, *The Dangers of Backyard Trash Burning*, OSU EXTENSION (Feb. 2017), <https://perma.cc/L4KE-B3HC>.

41. *Id.*

42. *Id.*

43. ELISA A. HAMILTON ET AL., *PLASTIC & CLIMATE, THE HIDDEN COSTS OF A PLASTIC PLANET 1* (2019), <https://perma.cc/W4KL-RVWJ>.

44. Int’l Crim. Police Org. [INTERPOL], *Strategic Analysis Report: Emerging Criminal Trends in the Global Plastic Waste Market Since January 2018*, at 11 (Aug. 2020).

45. *Global Plastics Trade Hits Record \$1.2 Trillion*, UNCTAD (Nov. 10, 2022), <https://perma.cc/PM77-LDAZ>.

46. INTERPOL, *supra* note 45.

47. *Id.* at 11.

most of which are Chinese companies that moved to Southeast Asia after China stopped accepting foreign waste.⁴⁸ Middlemen and brokers for illegal recycling facilities prey on vulnerable community members, such as farmers, construction workers, and other low-wage workers.⁴⁹ In Indonesia, for example, plastic waste arrives commingled with paper and cardboard recycling.⁵⁰ The piles of waste are dumped into villages, and then the plastic waste is sorted from the paper by hand.⁵¹ The only compensation plastic-waste pickers receive is whatever they find in the trash.⁵² What's more, the communities living with the waste are usually economically vulnerable and, thus only accept the work begrudgingly.⁵³ Ultimately, massive piles of burning plastic blacken the skies, contaminate the air with harmful particles, and create environmental hazards for those communities.⁵⁴ For example, one woman living in South Sumengko, Indonesia, was hospitalized because of itchy rashes, heart problems, and trouble breathing.⁵⁵

In Malaysia, outside the ports of Kuala Langat and Telok Gong, open-burning piles of plastic waste operated by illegal waste companies are harming the environment and destroying the livelihoods of nearby farmers and fisher folk.⁵⁶ In the vicinity of illegal processing facilities, previously abundant wildlife, such as crocodiles, are disappearing from the rivers, and fresh fruits are rotting before they ripen.⁵⁷ In Thailand, plastic-waste workers melt plastic without respirators and toxic liquids are poured onto farmlands.⁵⁸ The toxic chemicals seep into the groundwater, and are related to increases in miscarriages, infertility, and premature deliveries.⁵⁹ Without adequate legal protections and a robust enforcement mechanism created in a binding treaty, these harms will continue.

III. History of Environmental Justice in International Law

Environmental justice has a relatively short history. The concept emerged in the United States when the civil rights movement began to take hold. On a global level, the Stockholm Declaration of 1972, and its corresponding recommendations included in the Stockholm Action Plan, recognized EJ during the first world conference that adopted principles for the sound management of the environment.⁶⁰ In the United States, EJ first became a stated federal priority in 1994 after President Clinton issued Executive Order No. 12898;⁶¹ federal agencies

48. GLOBAL ALLIANCE FOR INCINERATOR ALTERNATIVES, *supra* note 14, at 32.

49. *Id.* at 27.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 29.

55. *Id.* at 30.

56. *Id.* at 18.

57. *Id.*

58. *Id.* at 24.

59. *Id.*

60. Stockholm Declaration and Action Plan for the Human Environment, *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 (June 15, 1972).

61. Exec. Order No. 12898, 59 Fed. Reg. 7629, 1-102(b)(1) (Feb. 11, 1994).

were thenceforth required to provide participatory opportunities for minority and low-income populations.⁶²

A. Principles of Environmental Justice

The EJ movement in the United States catapulted into the national consciousness in 1982 when poor, African-American farmers in Warren County, North Carolina, protested the designation of a toxic waste site in their community.⁶³ Police arrested more than 500 protesters who denounced the toxic waste site that contaminated over 40,000 cubic yards of soil with cancer-causing chemicals.⁶⁴ National coverage of the protests lit the spark that grew into the EJ movement in the United States,⁶⁵ and led to protests the following decade that ultimately forced the Environmental Protection Agency to analyze connections between race and hazardous waste siting decisions.⁶⁶ In 1987, the United Church of Christ concluded that, not only was race the most significant factor in determining where to place hazardous waste facilities, but that “three out of every five African-Americans and Hispanics” lived in a community near toxic waste sites.⁶⁷

In 1972, EJ was introduced into international law at The Stockholm Declaration and was formally institutionalized at the Rio Declaration of 1992, along with twenty-seven universal principles and the concept of “sustainable development,” or development that meets the needs of the present without compromising the ability of future generations to meet their own needs.⁶⁸ These principles included: the Common but Different Responsibilities Principle (“CBDR”);⁶⁹ the Precautionary Principle;⁷⁰ and the Polluter-Pays Principle.⁷¹

The principles adopted at the Rio Declaration serve as a baseline in regards to how an environmental treaty that serves EJ communities can be framed. Principle 14 advises States to cooperate to discourage “the relocation and transfer to other States of any activities and substances that [cause] severe environmental degradation or are found to be harmful to human health.”⁷² Principle 14 may be

62. *Environmental Justice and Environmental Policy Act*, EPA (Jan. 29, 2024), <https://perma.cc/4ZUU-7BFQ>.

63. *History of Environmental Justice Education and Research at SEAS*, MICH. SCH. FOR ENV'T & SUSTAINABILITY (2024), <https://perma.cc/C29C-6FE5>.

64. *Environmental Justice History*, OFF. LEGACY MGMT., <https://perma.cc/WJ4V-69J7>.

65. *Id.*

66. GEN. ACCT. OFF., ENV'T PROT. AGENCY, GAO/RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 3 (June 1, 1963).

67. OFF. LEGACY MGMT., *supra* note 65.

68. *Fast Facts – What is Sustainable Development?*, UN (Aug. 8, 2023), <https://perma.cc/2ZWH-GANS>.

69. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26, at 2 (Aug. 12, 1992) [hereinafter *Rio Declaration*].

70. *Id.* at 3.

71. *Id.*

72. *Id.*

used as a guidepost to write an entire treaty, as long as it aims to adequately protect CBDR and “acknowledges the different capabilities and responsibilities of individual countries in addressing environmental degradation.”⁷³ The CBDR language provides a recourse for EJ communities by acknowledging the responsibility of countries that have contributed more harm to the environment to provide more financial resources. For example, these countries could provide resources to help EJ communities and their respective developing countries meet treaty goals.

The Precautionary Principle states that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”⁷⁴ The Polluter-Pays Principle calls for States “to ensure that the environment is in an acceptable state,” that polluters should bear expenses related to cleaning the environment, and that those costs should be reflected in the cost of goods and services sold in polluting States.⁷⁵ These two principles protect EJ communities by ensuring that efforts to protect them will not be hindered by a lack of scientific certainty, and that States that cause harm are called to pay for the damage.

IV. Regulation of Plastics and Toxic Waste in International Law

A. The Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal

The Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal (The Basel Convention) is the most robust, legally-binding instrument that regulates the trade of hazardous waste and other wastes. It contains elements such as environmentally sound management (ESM) and prior-informed consent (PIC), both of which embody EJ principles.⁷⁶ The scope of The Basel Convention extends to hazardous wastes⁷⁷ and “other wastes,”⁷⁸ including household waste and incinerator ash.⁷⁹ The treaty also requires Parties to minimize production and reduce the overall amount of toxic waste transported.⁸⁰ In January 2021, The Basel Convention adopted amendments to regulate the trade of plastic waste.⁸¹

73. *Id.* at 2.

74. *Id.* at 3.

75. *Id.* at 2.

76. Basel Convention, *supra* note 16.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

B. Relevant Provisions in the Basel Convention

1. Environmentally Sound Management of Waste

Environmentally sound management (ESM) means “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.”⁸² The Basel Convention’s “ESM Toolkit” contains a checklist, including, but not limited to, implementing a national waste management plan, raising awareness, enforcing labor safety, providing transport, promulgating proper regulation, and establishing a permit system for operating facilities.⁸³ Parties are mandated to share best practices, technologies, guidelines, and to “employ [any] appropriate means in order to assist developing countries” in the implementation of ESM.⁸⁴ The Secretariat helps organize and facilitate these best practices by compiling all information related to technical assistance and training, scientific know-how, and expertise concerning authorized national sites and facilities.⁸⁵ Through this cooperative system, the Secretariat then uses this information to either assist parties or provide consultants to aid ESM.⁸⁶

The Basel Convention helps improve ESM with Regional and Coordinating Centers delivering capacity training and technology transfers relevant to ESM and the minimization of waste.⁸⁷ The Basel Convention and The Stockholm Convention on Persistent Organic Pollutants are the only global environmental agreements that establish regional centers, playing an important role in the multilateral approach to managing waste disposal, as that problem grows increasingly complex.⁸⁸

2. Prior-Informed Consent

Under the Basel Convention’s Prior-Informed Consent (PIC) regime, the exporting State is required to notify the receiving State through official government channels of any proposed transboundary movement of wastes.⁸⁹ The receiving State must then give its consent in writing to the movement with an option to add conditions or request additional information.⁹⁰ The exporting Party cannot allow the shipment of the waste until it has received written consent from the receiving State, and until a contract exists between the exporter and the recovery facility that confirms the waste will be disposed of in an environmentally sound manner.⁹¹ The notification form includes information such as the identification of all concerned

82. *Id.* at 16.

83. UNEP, *Checklist for Self-Assessment of National Environmentally Sound Management Capacity*, at 1.

84. Basel Convention, *supra* note 16, at 32.

85. *Id.* at 40.

86. *Id.*

87. *Id.*

88. Henrik Selin, *Environmental Governance and Regional Centers*, 12 GLOB. ENV’T POL. 18, 20 (2012).

89. Basel Convention, *supra* note 16, at 26.

90. *Id.*

91. *Id.*

Parties, the classification and quantity of the waste, and the registration number of the disposal or recovery facility.⁹² Even if the receiving State's consent is given, but the waste cannot be disposed of in accordance with the terms of the contract, the exporting State has a duty to remove and re-import the waste according to the contract terms.⁹³

When a transboundary shipment of waste does not comply with the PIC structure, it is illegal traffic.⁹⁴ If the illegal traffic is attributable to the conduct of the exporting Party, that Party has a duty to re-import and dispose of the waste in an ESM.⁹⁵ If the conduct is attributed to the importing Party, the receiving Party must ensure that the waste is disposed of in accordance with ESM within thirty days of becoming aware of any illegal shipment.⁹⁶

The Environmental Network for Optimizing Regulatory Compliance on Illegal Traffic (ENFORCE) promotes compliance and battles illegal traffic by aiding better implementation of national laws.⁹⁷ Through capacity building, information sharing, and exchanging best practices, ENFORCE uses non-punitive cooperative measures to battle illegal traffic.⁹⁸ ENFORCE has an open membership available to Parties, UN representatives, international organizations such as International Criminal Police Organization (INTERPOL), and nongovernmental organizations (NGOs).⁹⁹

C. Plastic Waste Amendments Under the Basel Convention

Ever since The Basel Convention's adoption in 1989, plastic waste has been regulated under the category of "other wastes."¹⁰⁰ However, as the disposal and recovery of plastic waste has grown into a global crisis with more than 300 million tons of plastic produced annually,¹⁰¹ the Conference of Parties adopted amendments to Annexes VIII, II, and IV in January 2021 to re-categorize how plastic waste is regulated under the Convention.¹⁰² These three categories include pre-sorted and uncontaminated plastic waste destined for recycling, plastic waste that contains a hazardous constituent, and non-hazardous plastic waste that is not

92. Basel Convention, *Revised Notification and Movement Documents for the Control of Transboundary Movement of Hazardous Wastes and Instructions for Completing These Documents* (Dec. 2006), <https://perma.cc/9XHF-52D5>.

93. Basel Convention, *supra* note 16, at 29.

94. *Id.*

95. *Id.*

96. *Id.*

97. Basel Convention, *Terms of Reference for Cooperative Arrangements on Preventing and Combating Illegal Traffic: The Env't Network for Optimizing Regulatory Compliance on Illegal Traffic (ENFORCE)*, <https://perma.cc/UAC6-KUN5> [hereinafter *Terms of Reference*].

98. *Id.*

99. *Id.*

100. UNEP, *Basel Convention & Basel Protocol on Liab. and Comp.: Texts and Annexes* (2019), 7, 37, <https://perma.cc/VT6D-4EQV> [hereinafter *Basel Protocol*].

101. Emily Benson & Sarah Mortensen, *The Basel Convention: From Hazardous Waste to Plastic Pollution*, CTR. FOR STRATEGIC & INT'L STUD. (Oct. 7, 2021), <https://perma.cc/9HD5-LN8R>.

102. *Basel Protocol*, *supra* note 101.

pre-sorted and headed to a recycling center.¹⁰³ Plastic wastes that are destined for recycling in an environmentally sound manner are not subject to the PIC regime.¹⁰⁴ However, both plastic wastes that contain a hazardous constituent and non-hazardous plastic wastes that are not cleared for recycling are each subject to the Prior Informed Consent requirement.¹⁰⁵

The Basel Convention assists the Parties' task of implementing these new amendments into national law with technical guidelines, the ESM toolkit, and the Plastic Waste Partnership, a working group consisting of different Party members along with various stakeholders and the business community.¹⁰⁶ The goal of the Plastic Waste Partnership is "to improve and promote the ESM of plastic waste at the global, regional, and national levels[,] and prevent and minimize [plastic] generation so as to . . . significantly reduce and in the long-term eliminate the discharge of plastic waste and microplastics in the environment."¹⁰⁷ Four project groups work beneath this umbrella: 1) prevention and minimization; 2) plastic waste collection, recycling and other recovery including financing and related markets; 3) transboundary movements; and 4) outreach, education, and awareness raising.¹⁰⁸ The Plastic Waste Partnership has a robust membership of 210 representatives from all of the UN geographic regions with a wide spectrum of stakeholders from grassroots, non-government organizations, and local government leaders to industry and national government leaders.¹⁰⁹ The quality and diversity of the Plastic Waste Partnership should allow it to serve as a launching pad to help implement amendments to The Basel Convention through collaborative information and guidance sharing.¹¹⁰

D. Limitations of the Regulating Plastic Waste Under the Basel Convention

The Basel Convention does not effectively protect EJ communities through regulating the trade of plastic waste because the enforcement mechanism lacks teeth. It contains no targets for phasing out the production of harmful plastics, and EJ is not integrated into the structure of the Convention. Illegal treatment of plastic waste thrives because enforcers working under The Basel Convention do not have the capability to tackle this complex industry.¹¹¹ In one month alone, an INTERPOL law enforcement operation detected more than 600 violations of The Basel Convention with 483 individuals and 264 companies involved.¹¹² A majority of violations came in the form of "rerouting," which refers to the use of transit

103. *New International Requirements for the Export and Import of Plastic Recyclables and Waste*, EPA (Feb. 25, 2024), <https://perma.cc/Y6NV-CBT4>.

104. *Id.*

105. *Id.*

106. MICHAEL S. BANK, *MICROPLASTIC IN THE ENV'T: PATTERN AND PROCESS*, 327-29 (1st ed. 2022).

107. *Terms of Reference*, *supra* note 98.

108. *Plastic Waste Partnership: Overview*, *supra* note 18.

109. BANK, *supra* note 107 at 329.

110. *Id.*

111. INTERPOL, *supra* note 45, at 13.

112. *Id.*

countries to disguise the identity of the original, waste-producing country.¹¹³ The total value of illegal waste was estimated to be worth more than \$30 million.¹¹⁴

EJ communities bear the worst impacts of this industry because the air they breathe is clouded and the soil that produces their food is poisoned with seeping toxins.¹¹⁵ Lack of traceability, growing presence of illegal facilities in Southeast Asia, and ineffective national laws demonstrate that a well-financed enforcement structure with binding sanctions is necessary to protect EJ communities.¹¹⁶

Due to the complexity of monitoring the trade of plastic waste, The Basel Convention will not be strong enough without binding targets. EJ communities in Global South countries will continue to suffer as long as shipments of waste continue, and these communities are not recognized as a critical component of the Convention.

V. The United Nations Resolution to Pass a Binding Treaty to Regulate Plastic Waste

UNEA Resolution 5.2, “End Plastic Pollution: Towards an International Legally Binding Instrument” (the Resolution), is an agreement to address the full life cycle of plastics through enhancing a circular economy approach, building sustainable and resilient infrastructure, encouraging sound management of chemicals and waste, creating a global fund to provide budgetary resources, and curbing production.¹¹⁷ The Resolution recognizes principles of the Rio Declaration and acknowledges the threat that rapidly increasing levels of plastic pollution present to the environment, as well as their adverse impact on “environmental, social and economic dimensions of sustainable development.”¹¹⁸ The Resolution also acknowledges the magnitude of the capacity building and technical and financial assistance required to assist transitioning economies for a new treaty to be effective.¹¹⁹ Lastly, the Resolution urges global coordination from both governments and the private sectors to work towards the long-term elimination of plastic pollution.¹²⁰

VI. Integrating Environmental Justice into the New Plastics Treaty

The new binding treaty can help EJ communities by phasing out the production of single-use plastics, ensuring adequate treatment of plastic waste, and creating specific EJ financing through a trust fund. The Intergovernmental Negotiating Committee (INC) has the steep task of grappling with a complex industry but can follow examples from other international frameworks to

113. *Id.* at 5.

114. *Id.* at 13.

115. KATZ, *supra* note 31.

116. *Id.* at 18.

117. *End Plastic Pollution supra* note 22.

118. *Id.* at 2.

119. *Id.* at 4.

120. *Id.* at 2.

incorporate EJ principles. While these recommendations do not guarantee justice for EJ communities, they may serve as a starting point for the INC.

A. Phasing out Single-Use Plastics with Capacity Building and Binding Targets

Phasing out single-use plastics benefits environmental justice communities by minimizing pollution, reducing carbon emissions from the production of these plastics, and aiding in the transition to a circular economy.¹²¹ A circular economy keeps materials in circulation as long as possible, minimizing “throw-away culture” by capturing waste and manufacturing it into new materials and products.¹²²

The Philippines, in particular, exemplifies the severity of single-use plastics and their infiltration into EJ communities.¹²³ The Philippines is known for its “sachet economy”—an economy run on single-use sachets, which are small plastic sealed packages for one-time use containing a variety of items including snacks, toiletries, coffee, drinks, cleaning products, and more.¹²⁴ The harm to the environment is staggering: more than 160 million sachets are thrown away each day,¹²⁵ and up to 74% of plastic garbage generated and collected in the Philippines still ends up in the ocean.¹²⁶ In short, EJ communities in the Philippines are severely handicapped by the lack or insufficiency of waste management systems.¹²⁷ Without adequate waste management systems, EJ communities bear the brunt of harmful plastic waste disposal, leading to open burning, burying trash, and dumping waste into rivers.¹²⁸

However, even within the Philippines, there are examples of successful management practices with more than 300 local government units passing ordinances regulating the use of single use plastics.¹²⁹ For example, the island of Siquijor, located in the Visayas region of the Philippines, demonstrates how consideration of EJ can lead to effective change.¹³⁰ The provincial government partnered with a local NGO to implement a zero-waste ordinance by lobbying local business support, constructing a recycling recovery center, and investing in extensive community organizing through an effective “Information, Education, Campaign.”¹³¹ Community organizing was vital, as the government spent more than a year informing people how to segregate their waste.¹³² Siquijor is a small

121. *What is a Circular Economy?*, EPA (Dec. 14, 2023), <https://perma.cc/52N9-J3SW>.

122. *Id.*

123. CATHERINE LIAMZON ET AL., *SACHET ECONOMY: BIG PROBLEMS IN SMALL PACKETS* 6 (2020).

124. *Id.*

125. *Id.* at 10.

126. *Id.* at 13.

127. GLOBAL ALLIANCE FOR INCINERATOR ALTERNATIVES, *supra* note 14, at 35.

128. *Id.*

129. CATHERINE LIAMZON ET AL., *supra* note 124, at 19.

130. Geela Garcia, *How a Plastics Ban Turned Siquijor into a Zero-Waste Island in the Philippines*, EVERAND (July 23, 2022), <https://perma.cc/6KUR-TLT4>.

131. *Id.*

132. *Id.*

island, but the Plastics Treaty can follow examples of local zero-waste initiatives and replicate them by providing funding for extensive capacity building with an emphasis on community outreach and education.

A framework for how a binding treaty can facilitate phasing out single-use plastics is exemplified in the Stockholm Convention on the Persistent Organic Pollutants (POPs).¹³³ The Stockholm Convention on Organic Pollutants protects human health and the environment from specific chemicals known as POPs.¹³⁴ These chemicals remain in the environment for long periods, become widely distributed geographically, accumulate in the tissue of humans and wildlife, and have harmful impacts on human health and the environment.¹³⁵ The treaty lists different types of POPs in different annexes, two of which call for explicit elimination or reduction. For POPs listed under Annex A, each Party must prohibit the production, import, and export thereof. Annex B calls for the restriction of certain POPs, and both Annexes require registration for specific exemptions. Implementation inadequacies have handicapped the effectiveness of the Stockholm Convention, but a 2017 report (issued thirteen years after the Convention came into force) concluded that concentrations for most of the initial twelve POPs listed in 2004 have declined “and continue to decline or remain at low levels.”¹³⁶

The Stockholm Convention’s success demonstrates that scheduled targets for elimination can be effective. A new binding treaty could use a similar framework to phase out the production of plastics while simultaneously giving the private industry time to adjust their supply chains. For example, most plastic water bottles and soft drinks are made from polyethylene terephthalate (PET), a type of plastic that becomes highly toxic when burned and exposed to high temperatures.¹³⁷ A targeted phase-out of the use of PET serves environmental justice communities because it prevents the burning of toxic plastics for those that do not have their solid waste collected or live near larger open-burning pits.¹³⁸

B. Ensuring Adequate Treatment of Plastic Waste

The Basel Convention’s framework of ESM, PIC, along with toolkits and guidelines, should be seen as a starting point for a new binding treaty. A new treaty can help ensure adequate treatment of plastic waste with the principles of ESM and PIC, expanded enforcement responsibilities for the Secretariat, and a robust compliance mechanism. Adequate treatment helps prevent EJ harms through limiting harmful burying and burning of plastic waste.

The Plastics Treaty can build off the foregoing provisions by strengthening the facilitating actors, such as working groups and the Secretariat, to bring more

133. Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 2256 U.N.T.S. 119 [hereinafter Stockholm Convention].

134. *Id.*

135. UNECE, *Entry into Force of More Stringent Regul. on Persistent Organic Pollutants in the UENCE Region Milestone in Air Quality and Chem. Mgmt.* (Jan. 20, 2022), <https://perma.cc/4BPJ-Y5A2>.

136. Stockholm Convention, *supra* note 134.

137. Shane Cucow, *The Most Dangerous Plastic Products Polluting Our Oceans*, AUSTL. MARINE CONSERVATION SOC’Y (Apr. 21, 2020), <https://perma.cc/HX7H-C627>.

138. *Id.*

transparency to tracking waste treatment. Secretariats are impartial actors serving as “executive support systems . . . created by the treaty parties to aid management and implementation of the treaty.”¹³⁹ However, the role of the Secretariat in the monitoring of compliance varies between different multilateral environmental agreements.¹⁴⁰ The Secretariat of the United Nations Framework Convention on Climate Change transmits reports of compliance prepared by Expert Review Teams to all Parties of the Convention on International Trade in Endangered Species (CITES).¹⁴¹ While these reports may contain non-compliance from Parties, the Secretariat does not initiate any implementation procedures¹⁴² By contrast, the Secretariat of the Montreal Protocol and CITES can trigger a non-compliance procedure, delegating more power to initiate compliance and enforcement action from a designated Implementation Committee.¹⁴³ An expanded role of the Secretariat leads to better enforcement, as exemplified by CITES¹⁴⁴ and the Montreal Protocol.¹⁴⁵ Better enforcement and quicker action begins with a more empowered Secretariat.

The Montreal Protocol aims to ban the global production of ozone-causing chemicals and is acknowledged as a successful display of international law.¹⁴⁶ One of the reasons for the treaty’s success is because of its Implementation Committee, which encourages self-reporting by the Parties.¹⁴⁷ The Committee reviews submissions of non-compliance, and decides upon and calls for steps on how to assist that Party towards compliance.¹⁴⁸

A non-punitive compliance mechanism may serve as the most realistic option to aiding Parties in their disposal and recycling of plastics. For example, open burning is a critical issue in Malaysia.¹⁴⁹ With the combination of a powerful Secretariat to direct resources and Parties being offered an opportunity to come into compliance, those open-burning sites can be shut down one at a time. Officials should work with Parties that need help rather than compelling them to hide their violations or face punishment. To help impacted communities, countries need an

139. Pallavi Kishore, *A Compar. Analysis of Secretariats Created Under Select Treaty Regimes*, 45 INT’L. LAW. 1051 (2011).

140. *Id.*

141. *Id.* at 1060.

142. *Id.*

143. *Id.* at 1062.

144. Convention on the Int’l Trade in Endangered Species of Wild Fauna and Flora, opened for signature Mar. 3, 1973, CITES, Art. XII (entered into force July 1, 1975), <https://perma.cc/QMM6-XUFN>.

145. UNEP, *Montreal Protocol on Substances that Deplete the Ozone Layer* (Sep. 16, 1987), <https://perma.cc/WML7-VEWN>.; UNEP, *Amend. To the Montreal Protocol on Substances that Deplete the Ozone Layer* (Jun. 29, 1990), <https://perma.cc/B26W-MD6N>.

146. Ian Rae, *Saving the Ozone Layer: Why the Montreal Protocol Worked*, THE CONVERSATION (Sept. 9, 2012, 4:23 PM), <https://perma.cc/HV8U-ETZT>.

147. Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, *Rep. on the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, Dec. II/5, UNEP/OzL.Pro.2/3 (June 29, 1990), <https://perma.cc/T7A9-SQB7>.

148. *Id.* at Annex III.

149. INTERPOL, *supra* note 45.

outlet to discuss frankly the prevalence of open-burning and illegal-waste disposal sites, and their dangers.

The compliance committee in the Plastics Treaty should mirror the Implementation Committee of the Montreal Protocol, while also incorporating components of the Environmental Network for Optimizing Regulatory Compliance on Illegal Traffic under The Basel Convention. Additionally, as seen in Siquijor, help from private industry and local NGOs is imperative to the effective implementation of EJ goals. A compliance committee under the Plastics Treaty should emphasize the participation of NGOs and the private-sector to bring about more transparency.

C. Specific Funding Provisions for Environmental Justice Communities

Due to the incessant harms that EJ communities face from the trade of plastic waste, a fund financed by the Parties can help address these issues. A plastics trust fund can help protect EJ communities by providing a robust enforcement structure, supplying a relief fund for medical claims in communities currently suffering from open-burning, and aiding in the development of adequate facilities. For example, the Montreal Protocol's Multilateral Fund illustrates the principle that countries have common but different responsibilities to protect and manage the global environment.¹⁵⁰ Developed countries at the height of ozone depletion were producing a majority of ozone-harming chemicals, and were thus committed to creating a fund to assist other Parties with developing economies.¹⁵¹ The fund provides financing for instrumental aspects of the treaty, such as technical assistance, training and capacity building, and the closure of existing plants that are producing banned substances.

A Plastics Fund could mirror the structure of the Multilateral Fund and embody both the CBDR and Polluter-Pays principles. Exporting countries can be called on to commit resources to the fund to ensure the waste that is being sent overseas is handled in an environmentally sound manner. Under the Polluter-Pays Principle, oil producers, plastic manufacturers, consumer goods companies, and other actors that benefit from plastics are taxed for the harm their products cause to EJ communities. For example, companies in the Netherlands that use more than 50,000 kilograms of single-use packaging are required to pay a fee that finances collection and recycling.¹⁵² Under the Plastics Treaty, companies that ship their waste internationally could be required to pay a fee to finance the sound management of waste at a disposal facility where the waste is treated. This would aid EJ communities by limiting open burning of waste before it happens and preventing people from living near toxic sites.

To manage the Plastics Fund, an EJ finance committee should be established in order to oversee a portion of the funds, directing them appropriately to

150. Rae, *supra* note 147.

151. *Id.*

152. *Polluter Pays Principle*, PLASTIC SOUP FOUNDATION, <https://perma.cc/Q4CU-C8QG>.

enforcement, capacity building, and support for communities currently suffering from negative externalities such as open-burning.

VII. Conclusion

While The Basel Convention has taken significant strides to regulate the trade of plastic waste, and the UN has a proposed binding resolution to alleviate plastic pollution, EJ communities will continue to suffer without an integrated binding treaty with explicit provisions to prevent harm. This Article serves as a recommendation for the Intergovernmental Negotiating Committee to frame a treaty protecting EJ communities as an integral component of the treaty itself, rather than as an ancillary benefit of scattered treaty provisions. The illegal plastics trade demonstrates the difficulty in regulating the industry and protecting vulnerable communities. Thus, ample resources must be committed to technology, enforcement, and capacity building in order to prevent further harm.
