Basel Non-Compliance Notification Report
prepared by the Basel Action Network

March 12, 2007

Country Violation: JAPAN

Urgent Action Required

Introduction: Due to recent alarming instances of certain states acting in violation of their obligations under the Basel Convention, and due to the weak response by the international community and the Basel Convention Secretariat to take actions to address such violations, BAN has initiated an NGO driven non-compliance reporting mechanism for the Basel Convention. This NGO non-compliance mechanism is made all the more necessary due to the fact that the Basel Convention’s formal non-compliance mechanism officially adopted by the Conference of the Parties (COP6), does not allow any triggering mechanism for civil society, and likewise lacks any accountability or enforcement provisions.

It is our belief that these notifications will foster a climate of better accountability and respect for multilateral environmental agreements in general, and for the legal obligations under the Basel Convention, in particular. We also hope to place pressure on those states that are in non-compliance or are abetting non-compliance to cease at once.

The BAN notifications are published as Basel Non-Compliance Notification Reports whenever we have gathered compelling evidence of either -- a) a Party acting out of compliance with the Basel Convention’s obligations; or b) a state otherwise encouraging, aiding or abetting non-compliance of the Basel Convention. This report is the sole property and statement of the Basel Action Network (BAN). Each such notification will be posted on the BAN website library section http://www.ban.org/main/library.html, and at the same time copies will be forwarded to:

1. The Foreign Affairs and Environmental Ministries of the States Concerned;
2. The UNEP Executive Director;
3. The Basel Convention Secretariat;
5. The United Nations Human Rights Special Rapporteur on Illegal Traffic of Hazardous Waste;
6. Basel Action Network’s Mailing List; and
7. Relevant News and Trade Media.
BASEL NON-COMPLIANCE NOTIFICATION

Case Title: Japanese Bilateral Economic Partnership Agreements  
Case Number: 2007-1  
Violating State: Japan  
Treaty Sections Violated: Articles 4.2.b; 4.2.d; 4.2.e; 4.4; 4.10; 11.  
Date: March 2007  
Documentation:


Case Description: Japan Promoting Toxic Waste Exports to Neighboring Developing Countries through the Use of Bilateral Trade Agreements

For the past several years, Japan, Asia’s foremost economic power, has been steadily laying the groundwork for a plan to skirt the Basel Convention and liberalize and promote toxic waste trade among their global neighbors in Asia. One of the key components of this plan includes utilization of bilateral trade agreements. The manner in which these trade agreements are being used we believe constitutes non-compliance with the Basel Convention.


The implications of these two seemingly innocuous agreements only became apparent a month after September 9, 2006, when Japan and the Philippines signed their bilateral trade agreement known as the Japan-Philippine Economic Agreement (JPEPA) at Helsinki, Finland.

For two years, Philippine civil society groups attempted to obtain copies of the draft agreement and negotiation documents to understand the nature of the trade pact between the two countries. It was only after a case was filed before the Philippine Supreme Court demanding the disclosure of the documents and after all negotiations were finished that the text of the JPEPA was shown to civil society groups in October of 2006.

In the JPEPA agreement, BAN and Philippine civil society groups were alarmed to find listed in the “commodities” targeted for tariff elimination, various hazardous wastes that are strictly controlled under the Basel Convention.

While the Basel Convention’s requires a minimization of transboundary movement of hazardous wastes, and decision ii/12 and III/1 of the Basel Convention call for a full prohibition on the exports of hazardous wastes from the OECD group (of which Japan is a part), to developing countries such as the Philippines, the JPEPA has clearly, in a new legally binding instrument, contradicted the Convention by tacitly promoting trade in such wastes. The Basel Convention does not distinguish between hazardous wastes destined for disposal or recycling – they are each controllable wastes and not commodities, but even if Japan wanted to make such a distinction, it is to be noted that...

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many of the listed waste (e.g. pharmaceutical wastes and waste oils containing PCBs, PBTs, and PBBs) can not and should never be recycled but rather destroyed.

The JPEPA further calls for both Japan and the Philippines to review all of their domestic laws and regulations that pertain to or may impede with the implementation of the bilateral pact, and repeal or amend such laws if the raison d’etre for such laws has ceased or if it can be addressed in less restrictive means. The domestic laws implementing Basel’s control procedure and obligations on exporting countries are at the crosshairs of this provision, and Philippine civil society groups are greatly concerned over the possible elimination or further watering down of protections afforded by these local laws.

Then there is also a prohibition against the imposition of non-tariff measures under JPEPA that adds further fuel to the controversy over the trade pact. Under the treaty, Japan or the Philippines are not to introduce or maintain non-tariff measures in the importation or sale of goods destined to the other Party, which are inconsistent with their WTO obligations. At the root of this provision is the attempt by the JPEPA to curtail a country’s sovereignty in banning unwanted “commodities” based on environmental and public health reasons. The Basel Convention and the Basel Ban Amendment as well as all laws implementing these landmark accords are non-tariff trade measures that impede trade and would no doubt be the first under attack.

Proponents of the JPEPA point to the Article XX provisions of the GATT affording countries “exceptions”, such as acts “necessary to protect human, animal, or plant life and health”, in an attempt to allay concerns. However, these same proponents fail to mention that GATT panel decisions interpreting the same Article XX provisions and the Articles ambiguous textual construction have already proven that these GATT or WTO safeguards are of little use in defending environmental laws.

Noting the implications of the trade in goods provisions under JPEPA, BAN compared the trade provisions of JSEPA and JMEPA with the JPEPA. BAN’s research revealed that all three Japan inspired trade agreements were similar: all three bilaterals included the same toxic wastes and conferred the same preferential tariff reductions. The agreements also shared similar provisions prohibiting the imposition of non-tariff measures on these toxic wastes. BAN has prepared a report and critique on JPEPA and its toxic trade implication and has included the listings of hazardous wastes listed in the agreement. Please see: http://www.ban.org/Library/JPEPA_Report.pdf.

BAN together with a coalition of Philippine civil society groups, began to publicize the issue in the Philippines. In recent weeks following the national debate about the case, the Philippine government revealed that Japan insisted that the JPEPA was an all-or-nothing deal, preventing any possibility of deleting the “toxic” provisions from the agreement.

Because of Japan’s position, Philippine civil society groups have begun to call for the rejection of its present draft by the Philippine Senate and a re-examination of the agreement. However it is known that the economic promises made in the agreement to the Philippines, such as access to its labor markets for health care workers, Japan exercises considerable negotiating clout that may well trump concerns over violations of international law. It was in much the same manner of throwing economic weight among developing nations, that Japan has been able to dominate the International Whaling Convention (IWC) to similarly counter the global consensus to eliminate the commercial whaling industry. Japan appears to be using similar tactics to undermine the Basel Convention consensus to eliminate hazardous waste trafficking from developed to developing countries.

JPEPA is just the latest of a series of bilaterals that Japan is negotiating or pushing throughout the Pacific Rim countries, and the pace to ratify these agreements has been quick. On Japan’s side, ignoring calls by both Philippine and Japanese civil society groups, Japan ratified the JPEPA in December 2006, leaving its “toxic” provisions untouched – a mere three months after it was signed. On the Philippine side, due to the 2007 mid-term elections, the Philippine senate has not acted on the JPEPA ratification. The Philippine president has been clear, however, that the JPEPA is a priority treaty, which the Philippine senate should ratify as soon as it resumes work in June of 2007.

4 Art. XX (b), GATT.
In the first quarter of 2007, Japan finished negotiations with Thailand on the Japan-Thailand Economic Partnership Agreement (JTEPA). The calls of Philippine civil society groups against the JPEPA and its toxic waste trade reverberated throughout the Asian region, prompting their Thai counterparts to demand disclosure of the draft treaty. The Thai foreign ministry confirmed the presence of toxic wastes in JTEPA. Unfortunately, the full text has not yet been revealed to the public, nor have the toxic waste provisions been removed from the JTEPA.

Japan is now in negotiations with Indonesia and India for their respective bilaterals. If Japan's agreement with Singapore, Malaysia, the Philippines, and Thailand are a barometer of the probable content of the agreements with Indonesia and India, it is highly likely that toxic wastes could again be included in the bilateral trade pact. Civil society groups in both India and Indonesia are taking steps to get information from their respective governments.

To date, Japan has not responded to civil society demands for the elimination of its toxic provisions in the bilateral agreements it is negotiating with the Philippines and Thailand and relent in its intent to create toxic waste colonies around Asia. This continued refusal speaks volume of its true intent and of Japan's disrespect for the Convention and the Basel Ban.

Recently BAN was made aware of a solicitation made by the Japanese government in August 2006 that sought a consultancy to prepare an assessment on the use of bilateral agreements "for bidirectional movement of toxic wastes between Japan and Asia."

The solicitation of August 2006 was not just a one-off endeavor. Japan has also funded at least one other policy think-tank -- the Institute for Global Environmental Strategies who developed a policy paper decrying the Basel Convention as a "cumbersome procedure" that has “become a barrier to international trade of recyclables”. The IGES proposed expansion of cross-border transfer of recyclable toxic wastes through the use of the 3R Initiative and through bilateral Free Trade Agreements, such as JPEPA, JMEPA, JSEPA, and JTEPA.

Further, at the most recent Conference of the Parties in Nairobi, Kenya, the Japanese government was asked in a side event whether or not they supported export of hazardous electronic wastes to developing countries from Japan. They replied in the affirmative. Further, Japan was the only Party taking the floor during the meeting to denounce the Basel Ban Amendment as being unacceptable to Japan.

According to international law experts there is a legitimate concern that the bilateral agreements, being more recent and more specific, could be ruled in a trade settlement dispute as trumping the older Basel Convention. It is now clear that Japan has crossed the line to being a Basel Convention skeptic country, to becoming openly at war with the Convention including open non-compliance through the development of contradictory bilateral agreements. And they are willing to use powerful economic “persuaders” to “twist the arms” of its global neighbors to accede to their waste colonialist ambitions and aid and abet in the non-compliance.

Basel Violations:

1. Arts. 4.2 b, d, and e – By insisting that toxic wastes be traded from Japan to the Philippines and other Asian countries, Japan is violating its obligation to seek national self-sufficiency in hazardous waste management. It also ensures that the transboundary movement of toxic wastes from Japan to other developing countries in Asia increases, thus, violating the obligation to minimize TBM of hazardous wastes.

Further, as the Basel Ban Amendment passed by a consensus of Parties, recognized that transboundary movement of hazardous wastes to developing countries possesses a high risk of not constituting an environmentally sound management of toxic wastes, Japan’s actions then also fly in the face of the Basel obligation to ensure environmentally sound management of its toxic wastes.

2. Art. 4.4 – Japan is obligated to “take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention.” The Japanese solicitation of August 2006 that sought to contravene the Basel Convention, by

inviting an assessment in the use of bilateral agreements “for bidirectional movement of toxic wastes between Japan and Asia”, not only failed at punishing conduct that contravenes the Convention, but Japan itself became the culprit and the one encouraging acts that would lead to the contravention of the Convention.

3. **Art. 4.10** – By promoting the transfer of its toxic wastes to its Asian neighbors through the opening of trade routes and creating the market environment for toxic waste trade, Japan is passing on the responsibility to manage the toxic waste it generated to its bilateral Party. Under Art. 4.10, Japan cannot pass on this responsibility to the importing or transit country.

4. **Art. 11** - The Convention allows Parties to enter into bilateral, multilateral or regional agreements or arrangements provided that such agreement or arrangement do not derogate from the environmentally sound management of hazardous wastes as required by this Convention, and for these agreements or arrangements to stipulate provisions which are not less environmentally sound than those provided for by this Convention. By redefining “wastes” as “goods” in its bilateral agreements, Japan instantly undermined the controls established under Basel which hinge upon objects or materials that are considered “wastes” subject to global controls distinct from free trade considerations. Further, the Parties have expressed strong opinions that bilateral agreements cannot be used, now or in the future, to undermine the Basel Ban Amendment. However this appears to be precisely what Japan intends.

The Japanese bilaterals themselves if allowed to contain regulated hazardous wastes as commodities for liberalization, may well legally trump the Basel Convention should a dispute need to be settled. As discussed previously, under the JPEPA, Parties are called to repeal or amend domestic laws or regulation that will interfere with trade under JPEPA or if the raison d’être for these laws have ceased to exist or if there are less trade restrictive means available to meet its objectives. With provisions such as these, it is not difficult to envision a situation where the bilateral agreements which are more recent and more specific than the Basel Convention can be seen as overriding the laws implementing the 1992 (entry into force date) Basel Convention.

5. **Basel Ban Amendment** - It is no secret that Japan together with the United States have been strident foes of the Basel Ban Amendment. Its present action with the various Free Trade Agreements it has been pushing is only consistent with its history of animosity towards the Basel Ban Amendment and environmental justice. While this prohibition is not yet in legal force it has been passed on more than one occasion by consensus and all Parties have been urged to ratify it at the earliest possible date. Already 63 countries have done so, and at the most recent Conference of the Parties there was strong sentiment to see it enter into force at the earliest possible date. **Regardless of entry into force, the linkage of this decision which determined that any waste trade moving from developed to developing countries possesses a high risk of not being environmentally sound management, with the requirements to ensure environmentally sound management and to minimize all transboundary movement, is compelling legal argumentation for compliance with the ban even prior to entry into force.**

NOTE: The Japanese bilaterals not only court conflict with Basel, but also raises very serious conflict issues as well with other Multilateral Environmental Agreements, such as the Stockholm Convention, Montreal Protocol and CITES. All the Japanese bilaterals, in addition to facilitating trade in toxic wastes, also seek to facilitate trade in other internationally banned or controlled substances such as CFCs, DDT, ivory, tortoise shell, etc. See BAN Report for more information at: [http://www.ban.org/Library/JPEPA_Report.pdf](http://www.ban.org/Library/JPEPA_Report.pdf).

**Recommended Actions:**

1. The Philippines, Thailand and other Asian governments must refuse the ratification of or negotiate on the Japanese Economic Partnership Agreements until all listings of toxic technology and internationally controlled or banned wastes, substances or species are expunged from tariff reduction provisions and other exploitative provisions are removed.

2. Those agreements already ratified, must be amended at once to ensure that all such liberalization of hazardous wastes and other internationally controlled substances are removed.
3. Japan, the Philippines, Thailand and other Asian nations that have not done so, must ratify the Basel Convention’s Ban Amendment at the earliest possible date and all Basel Parties must press for the most rapid entry into force of the Ban Amendment.

4. A full and impartial multi-stakeholder inquiry in both Japan and the Philippines must be made to determine the intent and manner of how the waste trade liberalization provisions were included in the Japan-Philippine Economic Partnership Agreements, and to hold these officials accountable.

5. Asian governments should embark on a serious program to prevent hazardous and other wastes at source via toxics use reductions, stopping planned obsolescence, and holding manufacturers accountable for the hazardous products and by-products they produce, rather than seeking hiding places for them.

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