

**Comments from the United States on the proposal prepared by
Indonesia and Switzerland on the country-led initiative to improve
the effectiveness of the Basel Convention**

The United States appreciates the opportunity to comment on the proposal and draft omnibus decision prepared by Indonesia and Switzerland as an outcome of the country-led initiative. In general, we welcome the initiative and proposal and its focus on identifying and addressing the needs of countries that continue to face obstacles to prohibiting the illegitimate and unsound import of hazardous wastes. We offer the following comments, organized according to the subsections of the proposed omnibus decision, for consideration.

1. Addressing the entry into force of the Ban Amendment

The proper interpretation of Article 17(5) of the Convention has been the subject of extensive discussion over the past decade. The United States, along with many Parties, other stakeholders, and the UN Office of Legal Affairs have all expressed views on the question. We do not intend to restate our views here.

We do, however, take particular note of the conclusion of the CLI participants that the entry into force of the Ban Amendment would have “no practical implications.” In light of that conclusion, we would encourage Parties to consider whether it is necessary or appropriate to take steps, such as adopting interpretations of the Convention’s text motivated by a desire to reach a particular outcome, which might have far-reaching and/or unintended consequences.

If the Parties were to proceed along the lines proposed in the omnibus decision, in our view it would be important that such a decision be explicitly limited to the particular situation of Article 17(5) of the Basel Convention. In this regard, we believe the caveat in the proposed decision that suggests it is to be “without prejudice to any other multilateral environmental agreement” is a good step, but is insufficient. It would be clearer to indicate that the resolution is “unique to the circumstances of the Basel Convention and is not intended to address the meaning of the words used in the Convention or any similar textual formulation in any other international instrument.”

Finally, we note that there is an error in the explanatory note to the omnibus decision. That note suggests that a country joining the Convention after entry into force of the Ban Amendment, should it enter into force, would automatically be bound by the Amendment. As made clear by Article 40, paragraph 5 of the Vienna Convention on the Law of Treaties, a State joining a multilateral treaty that has been amended shall be considered a party to the treaty as amended “failing an expression of a different intention by that State.” In other words, a State in such circumstances may choose whether to be bound by the amendment; application of the amendment may be the default assumption, but it is not automatic.

2. Developing standards and guidelines for environmentally sound management (ESM)

We support the continued development of guidelines for the environmentally sound management of hazardous wastes and other wastes and the proposal by the CLI to create an expert technical group to further develop these guidelines into an overarching framework. We would be interested in participating in, and sharing information for, such an effort, and suggest that the group draw from signatories as well as Parties to the Convention.

With respect to timing, we believe it would be important to first conduct a thorough needs assessment, such as proposed in other elements of the draft omnibus decision, to identify specific gaps among countries in terms of implementing the Convention. Such an assessment would ensure that resources are used where they will be most useful and would not duplicate the extensive work that has already been done.

We do suggest that the intended output from the group be further clarified. A framework of “requirements” could be interpreted as something intended to be legally binding, which may not be the intention of the Parties.

3. Providing further legal clarity

In the abstract, the United States supports the goal of legal clarity. We also welcome developments under the Basel Convention that recognize the resource value of end-of-life products, and the challenges and issues posed by newer, non-traditional materials, products, and waste streams, such as used and end-of-life electronics. It is not clear, however, that adopting definitions and interpretations is a useful approach to address those challenges and issues. Issues of terminology might be best addressed in the context of substantive initiatives such as the Partnership for Action on Computing Equipment (mentioned by the CLI) and the effort to develop technical guidelines on the transboundary movement of used electrical and electronic equipment.

In particular, it is not clear what is contemplated in the draft omnibus decision with respect to the definition of waste and hazardous waste, terms that are explicitly defined in Articles 1 and 2 of the Convention. Furthermore, we question whether it is appropriate for a Convention body to seek to define terms such as “second hand goods” and “used goods” that do not appear anywhere in the Convention. We have similar questions regarding whether it is appropriate for a Convention body to consider requirements for categories of goods and imports that are not “hazardous wastes” or “other wastes” within the scope of the Convention, as is suggested, for example, in paragraph 2 of this section of the draft omnibus decision with respect to “specific arrangements that can be applied to used and end of life goods.”

Finally, and perhaps most importantly, we do not believe that the Committee for Administering the Mechanism for Promoting Implementation and Compliance is the correct forum to develop definitions and interpretations of Convention terms. The terms of reference of the Committee state that its purpose is to “assist Parties to comply with their obligations under the Convention and to facilitate, promote, monitor and aim to secure the implementation of and compliance with

the obligations under the Convention.” In addition to addressing specific cases, the Committee may, as directed by the Conference of Parties, address general issues of compliance and implementation, but definition of terms is not an issue of compliance or implementation.

4. Further strengthening the Basel Convention Regional and Coordinating Centers (BCRCs)

The United States fully agrees that BCRCs, as the draft decision suggests, “play an important role in training, technical assistance, and awareness raising,” and should be strengthened. We believe it could be counter-productive to their continued success in this role, as well as a drain on badly-needed resources, to assign to the BCRCs a more political set of tasks. Therefore, we suggest that the first (“Convening regional meetings to encourage and assist Parties in their ratification of the Ban Amendment or national measures to prohibit imports”) and fifth (“Taking action to secure political and public engagement with the work of the Convention”) bullet points related to activities of the BCRCs in the 2012-2021 framework be deleted.

5. Combating illegal traffic more effectively

The United States supports the continuing efforts of the Basel Convention to combat illegal traffic in wastes. Many of the recommendations provided in the CLI proposal by Indonesia and Switzerland are ongoing; therefore, we suggest that the Basel Secretariat conduct an assessment of needs to better focus funding in terms of the various recommendations.

6. Assisting vulnerable countries to prohibit the import of hazardous wastes

The United States overall supports the activities recommended in this section. Work on such issues as identifying real needs of developing countries and countries with economies in transition; updating national lists of prohibited materials and transmitting them to the SBC; enhancing reporting; developing national legislation; and promoting a better understanding between trade and environment as relating to the transboundary movement of hazardous waste, is critical in terms of how the other recommendations within the CLI proposal are implemented.

The United States suggests that the term "vulnerable" used to describe certain countries is not well defined, but in any event may not be necessary; in each place in which that term is used in the draft omnibus decision, it could easily be deleted or replaced with the word "certain" with no change in meaning.