

# Comments on “Document B” on the Study on Annex VII, Part II

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of the Legal Working Group of the Basel Convention

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## 1 Summary

BAN first expresses strong concern over the choice of author of this particular study which is mandated to be a transparent and objective one. Ms. Kummer is well known to possess strong personal and partial views with respect to the subject of the Basel Ban Amendment. Indeed the paper presented by Ms. Kummer is revealed in these comments to be biased in many respects against the Basel Ban Amendment. Nevertheless the finding of Ms. Kummer that the question of institutional and legal capacities for implementing Decision III/1 are identical to the capacity to implement the Convention itself, is largely an accurate one with respect to the Annex VII countries to which Decision III/1 applies. As the mandate for the study is restricted to Decision III/1 itself, and not the entire Convention, this early conclusion obviates the need for most of the remainder of the paper. Indeed this is particularly the case with respect to the examination of conditions in non-Annex VII countries which, contrary to what is stated in the paper, are not obligated in any way by the Basel Ban Amendment. Thus, the exploration of limitations for these countries to implement the Basel Convention are not at all relevant to the scope of this study. Rather the paper fails to point out that the implementation of the ban will in fact ease the burden of non-Annex VII countries to implement the Convention by eliminating much paperwork and managing potential or actual waste transactions from Annex VII countries.

What is especially onerous in the lengthy and unnecessary text that makes up the bulk of the paper, and one which lends itself to prejudiced conclusions, is the arbitrary designation of new “Country Categories.” Such “Country Categories” are based on no criteria at all, fail to list the countries that are so categorized, and appear to be designed as a vehicle to question, in a less than subtle manner, the agreed categorization of Annex VII itself. Finally, BAN highlights repeated, one-sided assumptions about the Basel Ban found throughout the text.

## 2 Conflict of Interest

BAN believes that there is a conflict of interest in the choice of Ms. Katharina Kummer, of Kummer EcoConsult, as author of a very sensitive document on what is known to be an equally sensitive subject. The terms of reference for this study call for a “transparent and objective” exploration of issues. Yet the choice of Ms. Kummer has undermined norms of objectivity.

It is well documented that Ms. Kummer holds strong views about the Basel Ban Amendment and the many Parties and NGOs that continue to support it without reservation. Late last year Ms. Kummer published a paper in the International Environment Reporter, entitled “*Hazardous Waste: Accepted and Hidden Realities of the Basel Ban on Hazardous Waste Exports,*” in which among other views, she makes a case that: developing countries do not really support the Ban Amendment; that it is therefore slow to achieve ratifications; and that the way forward involves consideration of changing the ban’s Annex VII prior to its entry into force (contrary to decisions of the Conference of Parties). Further, she disparages the very terms of reference of the Annex VII study on which she was later hired to work, as being too limited. Finally, in the same article, Ms. Kummer sarcastically calls those that wish to keep the ban text as is, as “*self-proclaimed ‘keepers of ethics.’*”

While it is perfectly acceptable for Ms. Kummer to hold these strong personal views and have them published, it is not acceptable, and indeed now remarkable and unfortunate, that Ms. Kummer would then be selected to author a section of a study which must, according to the terms of reference, “*explore, in a transparent, objective and comprehensive manner.....issues related to Annex VII.*”

It can hardly be seen to be objective that Ms. Kummer author what is known to be a very sensitive study on the most controversial issue of the entire Convention’s history when she in fact has clearly sided strongly with one particular viewpoint of the issue. While criteria for preventing conflicts of this kind may or may not be stipulated in United Nations guidelines, all countries possess a healthy sense of “fair play” which must surely be offended by this imbalanced choice. Indeed, such choices which lead to real or perceived bias only create an ugly diplomatic climate and ultimately defeat the purpose of the exercise in which we are engaged.

Indeed as we shall examine later in these comments, BAN finds the paper to be biased in its approach, assumptions, and frequent value judgements and editorializations.

**In addressing this mistake, we would ask that the final preparation of the text of Document B be transferred to the Secretariat and that all delegations be allowed to provide comments and suggestions in order to remove all biased assumptions, personal views, and imbalanced statements, that exist in the text. In future, consultancies must be screened for real or perceived conflicts of interests and viewpoints.**

What follows are BAN’s general comments on the presented Document B (hereafter called “the paper”). Later we will, as necessary, provide more specific suggestions.

### **3 Implementing Ban is no more difficult than implementing Convention**

Ms. Kummer’s paper addresses point (b) of the terms of reference elaborated earlier by the Technical Working Group for Phase II of the study of Annex VII mandated by Decision IV/8 of the Conference of Parties. Point (b) calls for an evaluation of the “institutional and legal

framework for the implementation of decision III/1" (The Basel Ban Amendment). Perhaps the most important contribution and statement provided by the paper, is the following conclusion:

*“The legal and institutional requirements for the implementation of Decision III/1 do not differ from the requirements for the implementation for other import/export prohibitions. In other words, if a country has the infrastructure to implement the Convention as it stands, it will also be able to implement Decision III/1.”*

BAN fundamentally agrees with this statement. However, once this truth is noted and demonstrated, it begs the question as to whether the rest of the paper is relevant and necessary. For if we accept this statement, then the terms of reference moves beyond the implementation of Decision III/1 to a far greater concern over implementation of the Convention itself – a subject which is *not* part of the terms of reference of this study and indeed would involve an even more comprehensive look at the realities in various countries.

**We would submit therefore that this paper should be cut in size significantly to discuss only issues related uniquely to “the institutional and legal framework for the implementation of decision III/1.”**

#### **4 Many countries lack the resources/infrastructure to Implement Convention**

The second primary finding of Ms. Kummer is that many countries lack the infrastructure, resources and capacities to diligently implement the Convention and therefore the ban. This is hardly an unexpected or new finding. Perhaps the most serious issue facing all international treaties today are the challenges presented by the uneven economic playing field present in the world.

However, what is *not* recognized adequately in Ms. Kummer’s paper, is that the Basel Ban Amendment is designed in part to address that inequity. It does this in many ways. One way it addresses this is that it does not likewise provide equal onus on both Annex VII and non-Annex VII countries.

#### **5 Ban Amendment Obligates Annex VII Countries Only**

The Basel Ban Amendment prescribes that Annex VII countries prohibit exports and does not likewise require non-Annex VII countries to prohibit imports. While the Convention itself provides the *right* of any country to ban the imports of hazardous wastes, this right was established long before, and separate from, the Basel Ban Amendment. The paper is therefore incorrect in examining with equal scrutiny the abilities/capacities of non-Annex VII countries to implement the ban. The Ban Amendment will have great impact (in fact, it already has been very influential in dictating international hazardous waste trade) when implemented by those countries that it obligates, irrespective of what non-Annex VII countries are able to do. Indeed in one

passage in the paper it is admitted that a non-Annex VII country will not even know if an Annex VII country halts an export due to the ban.

There is a logical and historical reason for this that is not raised in the paper as it should be. Following numerous grievous dumping scandals in the late 1980s and early 1990s, many developing countries proceeded to ban, on a national basis, the imports of hazardous waste. However such bans often had little practical efficacy when there was no onus on the likely exporting countries to similarly ban their exports to developing countries. Placing the onus on recipient developing countries with few resources to monitor the trade and minimal or no legal jurisdiction over the perpetrators of it, was often futile. Thus such bans were often only meaningful as a political message.

Further and perhaps most importantly, a ban which applied to only some developing countries, would continue to allow the highly industrialized, developed countries to continue, via economically motivated dumping, to avoid taking responsibility for minimizing hazardous waste generation, transboundary movements and proceeding with efforts to become self-sufficient in waste management as required by the Convention.

What the vast majority of countries knew to be needed was an *export* ban that placed the legal obligation more rightfully on and within those countries that produced the most waste, exported the most waste and possessed the financial and infra-structural advantage for minimizing hazardous waste traffic and generation and becoming self-sufficient in hazardous waste management as required by the Convention.

Thus, by design there is no obligation placed on non-Annex VII countries stipulated in the Ban Amendment. This is not to say that non-Annex VII countries should not be vigilant with respect to illegal trade and also fulfill their many obligations of the original Basel Convention. There are of course many essential requirements placed on Annex VII countries found in the Convention. However these obligations are without real relevance to the implementation of the amendment that will become Article 4a. Thus all discussion of obligations of non-Annex VII countries in the context of the terms of reference of this paper are inappropriate.

For this same reason, the elaboration of various country “categories” that examine non-Annex VII implementation of Decision III/1 are off-the-mark and inappropriate in this examination.

**For the above reasons, all discussion of obligations of non-Annex VII countries should be removed.**

## **6 The Basel Ban Eases Institutional and Legal Burden for non-Annex VII Countries**

Actually, contrary to adding obligations, the Basel Ban eases the institutional and legal burden of non-Annex VII countries and this paper fails to make this point. As a large segment of previous proposed or actual trade involved export from Annex VII to non-Annex VII and this type of trade should no longer become a concern for non-Annex VII countries, the ban significantly *lessens* the

financial/resource burden of non-Annex VII countries for dealing with and processing paperwork (PIC), assessing environmental impacts, potential legal issues, alerting customs and transport authorities etc. This is also by design and a very important consideration with respect to the “institutional and legal framework for implementing decision III/1”. This significant point is not raised in the paper. Rather, the paper illogically insists that the ban imposes an equal obligation and burden on all countries.

**It is essential to point out that the Basel Ban Amendment can predictably ease the institutional and legal burden of Convention compliance for non-Annex VII countries.**

## **7 Assessment by Country Categories**

As mentioned above, as Decision III/1 only obligates Annex VII countries, examinations of the situations in non-Annex VII countries are outside of the scope of the mandate. Further, as also noted in the paper, as the question of Annex VII implementation is really a question of implementation of the Convention itself, the further assessment on a country by country or categorical basis is also outside of the scope of the mandate. The lengthy assessment on a “Country Categories” basis would be a relatively benign exercise, however off the mandate, except that the assessment is used to elaborate various biased assumptions and editorializations that seem to be designed to question the validity of Annex VII and the ban itself.

These subjective assumptions that recur in the text will be addressed generally below:

### **7.1 Designation of new, arbitrary “Country Categories” Inappropriate**

Even if there was relevance in examining various countries as we have argued is doubtful, the subsequent conclusion that these countries represent relevant *categories* is a huge and arbitrary leap past the mandate of what is called for in this study. The Parties never asked for *new, arbitrary categories* of countries to be designated for any purpose in this study or elsewhere. Indeed it is well known that if such new “categories” of countries were elaborated it would be extremely contentious due to the fact that Annex VII and non-Annex VII *are* the agreed categories and elaborations of new categorizations implies for some that the current categories are not adequate or appropriate. Further, there is no rationale or criteria given for presenting for these so-called categories, and there is no listing of countries which fit within them.

**Formulations of new “categories” of countries in the context of the terms of reference must be removed.**

### **7.2 Statement that Basel Ban “restricts freedom of countries” misleading**

The notion appearing baldly in Section 3.1 of the paper that the ban “restricts the freedom of countries” must be removed. In one sense *all* new law, (as did the Basel Convention itself), “restricts the freedom of countries” and that is why countries must agree to be bound by it through negotiation and then ratification. In another sense it could be strongly argued that being

constantly under threat of receiving pressure to accept hazardous wastes for recycling from other countries and having to develop additional capacity and infra-structure to deal with the additional threats from imported pollution and liability also “restricts the freedom of countries”. Yet in fact this latter threat is largely avoided by the Basel Ban. The statement in the text simply demonstrates the bias of the author.

**Absent a thorough analysis of what is meant by this statement and a balanced review, the statement that the Basel Ban “restricts the freedom of countries” should be removed.**

### **7.3 Statements that Countries Lack Capacity to Implement the Ban are Misleading**

In the Observations and Conclusions of Country “Category 2,” which appear to utilize Mexico as an example of a broad category (when in fact Mexico is anomalous in most ways with respect to Annex VII), the author complains that the country will be required, presumably unfairly, to assume the obligations of an Annex VII country which “at present it accomplishes only in an incomplete way.” Again, the only obligation required of Mexico as an Annex VII country vis a vis the ban is to prohibit the export of hazardous wastes to non-Annex VII countries. As the author has noted, this is no extra obligation beyond existing obligations under the Basel Convention. Either the Basel Convention infrastructure is in place or it is not, and as has been stated before, the subject of implementation of the Convention itself is not the subject of this study.

**All commentary that Annex VII countries lack the capability to implement the ban are issues of lack of capability to implement the Convention, and are thus not a part of this study and should be removed.**

### **7.4 Statements of “Needs” or “Requirements” of hazardous wastes are subjective, debatable judgements**

There is repeated and biased reference to alleged “requirements” and “needs” of certain countries for hazardous wastes for “secondary raw materials”. The fact that markets and trade exists can not be accurately characterised as “requirements” or “needs”. Would we likewise agree that all commerce that takes place is appropriate for sustainable commerce? We would argue strongly that this is not the case. One needs only to look at the trade in “drugs” and “prostitution” for two obvious examples. For less obvious examples such as the case of recyclable hazardous wastes, without full cost accountings for all of the externalized negative costs involved in hazardous waste importation and recycling, and likewise without a full examination of clean production alternatives, the terms “needs” and “requirements” are purely subjective serving only to perpetuate the status quo, however unsustainable.

**The words “requirements” and “needs” of “secondary raw materials” should be replaced with words that indicate that there is currently trade in hazardous wastes of which a part, is recycled which in turn has its own potential positive or negative environmental impacts.**

## **7.5 Statements that importation of hazardous waste by developing countries is appropriate are in contravention of decisions taken by the Parties**

The paper, in its Observations and Conclusions section of Country Category 3 deems, in examining the country of what appears to be Malaysia, that the allowance of imports of hazardous wastes for recycling from Annex VII countries is “appropriate” as they include the obligation to assure environmentally sound management. This statement is remarkable as it contravenes Decisions taken by the Parties to date (I/22, II/12, III/1). Even in the absence of entry into force of decision III/1, decision II/12 for example, still is an agreement by the Parties.

## **7.6 Statements limiting “ESM” to downstream waste importing countries and ignore prime objective of ESM -- upstream waste minimization in waste generating countries**

Further, such argumentation ignores and belies a true understanding of what is meant by Environmentally Sound Management (ESM) and underlying motivation of the Basel Ban which is the requirement for “upstream” (ESM) as being of paramount importance to downstream ESM. Yet that principle is embodied in the Convention – to minimize the generation of hazardous wastes and to minimize its export. The recent “Next Decade” Declaration on Environmentally Sound Management likewise calls for an emphasis on waste minimization and clean production. By definition, waste minimization must take place at source – that is upstream, in the country of export.

Thus, regardless of the ESM found downstream (and due to historical and prevailing lack of attention to externalized costs, such claims are highly suspect), it is far better to prevent hazardous waste than to recycle it and allow it to re-enter the commercial cycle and expose more people and environments to hazard. This prime ESM goal, is accomplished via the Basel Convention by requiring the most wasteful countries first (Annex VII) to cap their exports and generation of hazardous wastes. They will never have incentive to do this as long as cheap markets for their hazardous wastes are allowed to persist in poorer economies.

The paper’s misguided and regressive conclusion that recyclable waste importation by non-Annex VII countries from Annex VII countries is appropriate, is repeated in the unfortunate Paragraph 4 of the final conclusion. “*Only if the corresponding institutional framework exists can pertinent exceptions be implemented without danger to the environment.*” Here the paper again suddenly seems to find that exceptions to the ban are acceptable when in fact the Parties agreed that no such exceptions are permissible.

Even if these statements were not in direct contravention of decisions taken by the Parties, it is not appropriate to deem hazardous waste imports acceptable solely by looking at the downstream destination. This is particularly the case now that we have moved into the era of “the next decade” which will emphasize waste minimization at source and require comprehensive analysis of entire waste life-cycles.

**Remove all references to imports of hazardous waste to non-Annex VII countries from Annex VII countries as “appropriate” exceptions in any case.**

**7.7 Statements that Imply that Annex VII Countries do not need to Implement the Ban are inappropriate**

In the Observations and Conclusions Section of “Country Category 7” which appears to be based on Australia’s situation, the paper argues that although the country “*does not explicitly prohibit hazardous waste exports to non-OECD countries,*” this is “*compensated by an elaborate permit system, which is effectively applied by the competent authority.*” The author implies that the Basel Ban is not needed in Australia. This once again flies in the face of decision already taken by the Parties and in fact disregards the real-life situation which found Australia last year as the first OECD country to have knowingly disregarded Decision II/12 and III/1 by exporting hazardous wastes to non-Annex VII country -- South Africa. Australia had previously stated on the floor of the Conference of the Parties and to the press that although they did not agree with the decision (II/12) they would respect it. When asked about this statement following the export of hazardous wastes to South Africa, an Australian representative replied by saying that “respecting a decision does not mean we feel we have to abide by it.” We do not believe that this type of verbal accolade for a country that deliberately violates a decision of the Convention and the spirit of a ban not yet in force is appropriate for this study.

Later in the overall conclusion, the paper likewise editorializes that Country Category, which appears to be Luxembourg, and Country Category 7, which appears to be Australia, “*show that export prohibitions are in general effectively enforced in the respective countries, even though there is no explicit prohibition of export to non-OECD countries.*” Apart from the fact that if this is in fact Luxembourg, then they are indeed bound by a very specific export ban to non-OECD via the EU regulation, this statement which seems to justify not actually ratifying and implementing the ban, is not acceptable. The very terms of reference of the study upon of which the paper is but a part is to “*assist Parties to ratify the ban amendment*”. Finally, such statements again fail to take into account the responsibility of exporting Annex VII countries like Australia to minimize their hazardous waste as noted above.

**Remove the editorial bias and self-defeating statements that imply that OECD countries don’t really need to implement Decision III/1.**

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