



turn back the toxic tide

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Washington & Santiago, 27th of December, 2016

Mr. Pablo Badenier
Minister of the Environment, Chile

Mr. Heraldo Muñoz
Minister of Foreign Affairs, Chile

Mrs. Carmen Castillo
Health Minister, Chile

Mr. Marcelo Mena
Vice-Minister of the Environment
Basel National Competent Authority, Chile

Re: The proposed “Reglamento que regula el movimiento transfronterizo de residuos” is in breach of Chile's International Legal Obligations

Dear Honorable Ministers:

The international organization Basel Action Network (BAN), writes today to provide our comments and concerns regarding the proposed new regulation concerning waste and waste management. These concerns are shared by two Chilean organizations: Fundación TERRAM and FIMA which indicate their endorsement by co-signing this letter.

BAN was founded in 1997 and is the world's foremost expert NGO on all matters having to do with the Basel Convention and the international trade in waste. Its principals have been active on the Basel Convention since 1989 and have attended every Conference of Parties since its inception.

Fundación TERRAM was founded in 1997 too, inspired by the idea that environmental problems, starting point for reflection on sustainability, are, above all, public problems whose solution will not be possible without a democratic basis, expressed in a broad and participatory debate. Terram has a special focus in environmental public politics, environmental justice, promotion of democracy and justice, and sustainability.

FIMA, born in 1998 is a not-for-profit, nongovernmental organization, known as the first and most influential public interest, environmental law firm in Chile. While FIMA's mission is to actively promote the right to live in a healthy environment and to ensure the protection of the environmental heritage of Chile, FIMA has contributed significantly to the development of environmental law policy and legislation, as well as to ensure access to environmental justice in Chile.

We hereby express our concern that with the passage of this new decree, Chile is poised to violate their international legal obligations established by their ratifications of the Basel Convention, the Basel Ban Amendment and the Vienna Convention on the Law of Treaties. Such derogation from standing legal obligations would set a dangerous precedent that could undermine more than 20 years of global efforts under the Basel Convention to ensure environmental justice -- an effort in which Chile has played a vital role to date.

The "***Reglamento que regula el movimiento transfronterizo de residuos***" (hereafter ***Reglamento***) is currently under public review and we humbly request that our concerns as stated in this letter be part of the public record.

We refer specifically to the **Draft *Reglamento's*** Articles 4 (related to Article 8 of Ley 20.920), 36 and 52.

- Article 8 of Ley 20.920 states, on the one hand, that the Basel Convention's obligations shall govern the actions of importers and exporters of wastes, but then goes on to describes a policy that in conjunction with Article 4 of the Draft Reglamento, violates, in part, those same Convention obligations by establishing less rigorous controls for wastes destined for recycling than those required for final disposal.
 - **This action would weaken the definitions and controls established by the Basel Convention and would thus constitute a violation of the Basel Convention.**
- Draft Reglamento's Article 36 describes that export of hazardous waste can take place from Chile under any one of the following three circumstances: a) If they are destined to other OECD countries, b) to countries with which Chile has a bilateral agreement, and c) any facility which has been audited to a standard by an agent certified by the Ministry of Environment.
 - **(b) and (c) above would constitute a violation of the Basel Ban Amendment which Chile has ratified. The ban cannot be derogated from by Article 11 agreements nor by another means such as certifying companies.**
 - **While the Basel Ban Amendment is not yet in legal force, the Vienna Convention requires Parties (including Chile) not to conduct themselves in a way that would defeat object and purpose of the instrument in question.**

- Draft Reglamento's Article 52 repeals Decree Number 2 of 2010 of Ministerio de Salud which limited the export of lead-acid batteries as long as treatment capacity existed in Chile.
 - **Article 52 also would violate the Ban Amendment as it implies that exports of Basel listed hazardous wastes from Chile (OECD member) can be approved to countries outside of the OECD, EU, Liechtenstein group (Annex VII).**

What follows is a more detailed explanation of these potential violations of Chile's international legal obligations should this bill pass in its current form.

Article 8 of Law 20.920 related to Draft Reglamento Article 4

Chile ratified the Basel Convention in August of 1992 and thus is obliged to adhere to its obligations and implement them within its domestic law. However, these obligations are jeopardized by Article 8.

While at the outset of Article 8 the Basel Convention obligations are said to prevail, it then proceeds to prescribe less rigorous legal obligations for exports for *recycling* than for *final disposal*¹.

Yet, the Basel Convention makes no distinction in its obligations between wastes destined for recycling and those destined for final disposal. Both of these categories of waste destinations are part of Annex IV which in the Convention is fundamental in defining waste. When such wastes are hazardous regardless of whether they are destined for recycling or final disposal, they would fall within the scope of the Convention and are treated equally -- invoking all of the obligations including the prior-informed-consent notification scheme, applicability of the Ban Amendment export prohibition etc.

The possibility of Parties unilaterally lowering the basic "floor" of Basel Convention definitions and obligations is not foreseen in the convention. Indeed, the Convention allows no reservations (Article 26); thus, while Parties are allowed to make additional provisions to the Basel Convention (Article 4, para. 11) *to add rigor*, they cannot impose less rigor than that prescribed by the Convention.

In other words, applying more relaxed obligations and procedures (e.g. no export prohibitions for wastes in transboundary movement for recycling) as strongly implied by Article 4 of Reglamento applying Article 8 of the Law, contradicts the Basel Convention that is, in Chile, a supra legal norm.

Draft Reglamento Articles 36 and 52

¹ New Law # 20.920 defines "eliminación" as synonym of final disposal, but Basel Convention defines "disposal", that is translated for Basel purposes as "eliminación", as a generic term that includes both final disposal and operations that may lead to resource recovery and others.

Further, Chile ratified the Basel Ban Amendment (1995) in August of 2009² during President Bachelet mandate. The Basel Ban Amendment created by Decision III/1 does not allow any export of hazardous wastes from an Annex VII country (comprised of member states of the OECD, the EU, and Liechtenstein) to a non-Annex VII country for any reason.

Chile is now an OECD country and additionally, under the President Piñera government, was one of the states that worked diligently in the diplomatic effort known as the Swiss-Indonesian Country-Led Initiative (CLI) that led in COP 10, in 2011, to the consensus agreement to foster its early entry into force. In doing so, **Chile demonstrated their full and continued support to the Amendment they had previously ratified**, as well as gained an understanding of the sensitivity of the issue and what a derogation or breach of it by an OECD country would mean.

Thus, having observed Chilean international policies in this regard, it is very surprising to see that Article 36 directly contradicts the Ban Amendment that Chile has ratified.

First, it is not possible to use Article 11 (which recognises bilateral and multilateral agreements in some cases) to derogate from the Ban Amendment once it enters into force. While this notion is legally dubious from the start given the diplomatic record of the ban's creation, the issue was in fact debated in 1995-1996 and the prevailing view, including that of the European Union, was that using Article 11 to circumvent the Ban Amendment was not possible under the terms of Article 11 and Decision III/1 (Ban Amendment decision).

Second, no amount of auditing or determination of Environmentally Sound Management (ESM) criteria can create a derogation from the Ban Amendment based on the text of that Amendment which is included below (from Decision III/1 (1995)). At the time of the negotiation and adoption of the ban, 1992-1995, some Parties argued for a set of criteria to qualify for the ban or not but these ideas were all rejected.

“The Conference

Recalling that at the first meeting of the Conference of the Parties to the Basel Convention, a request was made for the prohibition of hazardous waste shipments from industrialized countries to developing countries;

(...)

3. Decides to adopt the following amendment to the Convention:

Insert new preambular paragraph 7 bis:

Recognizing that transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous wastes as required by this Convention;

Insert new Article 4A:

² https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-3-a&chapter=27&clang=en

1. *Each Party listed in Annex VII shall prohibit all transboundary movements of hazardous wastes which are destined for operations according to Annex IV A, to States not listed in Annex VII.*

2. *Each Party listed in Annex VII shall phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes under Article 1, paragraph 1 (a) of the Convention which are destined for operations according to Annex IV B to States not listed in Annex VII. Such transboundary movements shall not be prohibited unless the wastes in question are characterized as hazardous under the Convention.*

Annex VII

Parties and other States which are members of OECD, EC, Liechtenstein.”

Article 52 of the draft **Reglamento**

This is also of serious concern as it provides for a lifting of a prohibition on the export of one type of Basel listed hazardous waste (used lead acid batteries). This seems to have also been written without regard to the Basel Ban Amendment which supersedes any national desires to export hazardous wastes to a neighboring non-Annex VII country. Any such lifting of a prohibition must instate that such would not include the prohibition in effect on Chile for exports of hazardous wastes to non-Annex VII countries. Chile cannot derogate from the strict ban which they have ratified.

While it is well understood that the Basel Ban Amendment is not yet in force, Chile is a Party to the Vienna Convention on the Law of Treaties (ratification in 1981)³.

That Convention in its Article 18 states:

“Obligation not to defeat the object and purpose of a treaty prior to its entry into force.

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”

As the very object and purpose of the BAN amendment is to prohibit the export of hazardous wastes from developed to developing countries, the act of engaging in such exports, clearly is an act that defeats the object and purpose of the Amendment. Thus, it would be a violation of Chile's obligations under the Vienna Convention to undertake such an act while the Ban Amendment they have ratified awaits entry into force. Further, it is worth noting that even if

³ [Decree # 381/1981 from Ministerio de Relaciones Exteriores.](https://en.wikipedia.org/wiki/List_of_parties_to_the_Vienna_Convention_on_the_Law_of_Treaties)
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one believed they could ignore the Vienna Convention obligation on Chile until entry into force, the Ban Amendment is likely to be in force within a few short years, as it currently lacks but 7 ratifications among Parties (present in 1995) to bring it into force.

Policy Considerations and General Obligations Violation

The Organization for Economic Cooperation and Development (OECD) has long supported the Basel Convention and its efforts at promoting international environmental justice and environmentally sound management. The OECD being named as part of Annex VII connotes a great deal of importance to OECD governance and consistency.

The idea that one OECD country might derogate from an international agreement based in part on OECD membership would be a matter of great concern to the OECD. Further, the breaches identified above on the part of Chile would be of grave concern to all Basel Parties and signatories that have agreed to respect the fundamental obligations of the Convention and Ban Amendment prior to and after entry into force.

Further, the Basel Convention recently went through the very careful and sensitive negotiations of the Country-Led Initiative (CLI) within which Chile played an important role, to arrive at the decisive conclusion at the Basel Conference of Parties at COP 10 held in Latin America, in Cartagena de Indias, to proceed with the Ban Amendment as it stands, unamended, and to bring it into force at the earliest possible date of the various options considered.

The identified problems found in the aforementioned articles also run afoul of the Basel Convention's general obligations, particularly those found in Article 4.2. This section of the Basel Convention states inter-alia that hazardous wastes should, as far as is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated; that parties shall take the appropriate measures to ensure the availability of adequate disposal facilities in their countries; that parties shall take the appropriate measures to ensure that the transboundary movement of hazardous wastes; and, other wastes only be allowed if the State of export does not have the technical capacity and the necessary facilities, in order to dispose of the wastes in an environmentally sound and efficient manner.

The Ban Amendment follows directly from the obligation for Parties to become nationally self-sufficient in hazardous waste management (Article 4, 2, b), in effect, asking developed countries (Annex VII) to fulfill the Basel obligation of national self-sufficiency before all other countries with respect to exports to developing countries and countries with economies in transition.

When Chile joined the OECD and ratified the Ban Amendment, they placed themselves in a special status of deciding to manage their hazardous wastes domestically or within the OECD group. Indeed, as is well known, the OECD has promulgated their own streamlined rules for trading in wastes for recycling purposes among themselves.

Finally, it is our understanding that much of the impetus of the proposed law including Articles 8, 36 and 52 comes from the interest of some importers of one of the products prioritized in Law # 20.920, that later becomes a hazardous waste, to enable hazardous wastes such to be sent to Peru and other neighbor countries, for less costly recycling.

However, it is to be noted that there are several neighbor countries that are non-Annex VII countries, but have also ratified the BAN Amendment. It would be impossible for Peru and other regional countries, therefore, to receive hazardous wastes such as lead-acid batteries from Chile (an Annex VII country) without likewise violating the Vienna Convention (Those countries are also Vienna Party) prior to entry into force or for that matter to violate the Ban Amendment after it enters into force. For this reason, these comments will be copied to Peru and other Basel Competent authorities. Peru ratified the amendment in 2015 and is most likely to be affected by the measure.

Again, the notion of wishing to export hazardous waste to any neighboring countries to save costs runs afoul of the Basel Convention's basic obligation found in Article 4.2.b for national self-sufficiency in hazardous waste management.

In sum

Article 8 of the law and article 4 of Draft Reglamento is contradictory within itself as written and implies derogating from the Basel Convention with respect to exports to developing countries for recycling. Further, unless Chile is planning to withdraw its ratification of the Ban Amendment, Articles 36 and 52 of Draft Reglamento would be in violation of Chile's international legal obligations under the Vienna Convention immediately and under the Basel Convention in a few years' time.

In either case, a new domestic law contradicting Chile's treaty obligations, or Chile's withdrawal of ratification of the Ban Amendment, would be a very disturbing precedent.

Thank you

BAN and the Chilean co-signators organizations, TERRAM y FIMA, hope that this letter will be carefully considered with respect to the proposed **Reglamento** and in particular its Articles 8, 36 and 52. We hope that changes can be made to bring Chilean domestic legislation in alignment with their treaty obligations. To do otherwise would set an alarming precedent and threaten international environmental governance. We stand ready to assist in efforts to amend the proposed Reglamento to ensure international legal coherence.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Jim Puckett", with a stylized flourish at the end.

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