

The Commission Proposal for a Regulation on ship recycling, the Basel Convention and the protection of the environment

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EXECUTIVE SUMMARY

Under EU legislation on the shipment of waste (Regulation 1013/2006), end-of life ships which contain hazardous materials or wastes, are hazardous wastes, the export of which for recycling, recovery or disposal purposes to developing countries (non-OECD countries) is prohibited. The definition of what constitutes a hazardous waste, which includes end-of life ships when they contain hazardous materials, is derived from the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal to which the EU has acceded. The EU export prohibition derives from the Basel Ban Amendment adopted in 1995 by the Parties to the Basel Convention. The Basel Ban Amendment has not yet entered into force, but nevertheless has been ratified and implemented by and transposed into EU legislation along with the definitions and all Basel obligations in Regulation 1013/2006.

The Commission Proposal on ship recycling (COM(2012) 118) provides for the possibility to export end-of-life ships for recycling under certain conditions to non-industrialized States. The proposal also calls for the EU to remove ships from the Waste Shipment Regulation's list of hazardous wastes. The latter action constitutes a derogation from the binding provisions of the Basel Convention which even in the absence of a ban requires strict controls on the shipments of hazardous wastes to non-industrialized countries. Further, the proposal is a violation of the Basel Ban Amendment which all Parties have been encouraged to ratify and which the EU has already ratified. The Commission Proposal constitutes a unilateral departure from the provisions of the Basel Convention that is not allowed by the Convention. The adoption of the Commission Proposal by the European Parliament and the Council would thus constitute a breach of the EU's obligations under the Basel Convention and would therefore be illegal.

The study examines the notion that Article 11 of the Basel Convention might be used to allow the EU to remove ships from the European Regulation and manage them under the Hong Kong Convention, but concludes that this is also not legally supportable.

1. Introduction: the Commission Proposal of March 2012

(1) In March 2012, the European Commission submitted to the European Parliament and to the Council a proposal for a Regulation on ship recycling¹. The purpose of this Regulation is “to prevent, reduce or eliminate adverse effects on human health and the environment caused by the recycling, operation and maintenance of ships flying the flag of a Member State”². According to Article 3, the Regulation shall not apply to any warships, naval auxiliary, or other ships owned or operated by a Member State and used, for the time being, only on government non-commercial service, to ships of less than 500 GT and to ships operating throughout their life only in waters subject to the sovereignty or jurisdiction of the State whose flag the ship is entitled to fly.

(2) The Proposal provides for measures concerning the ships, in particular the control of hazardous materials (Articles 4 and 5), the preparation for recycling of the ship (Articles 6 and 7), surveys of the ship (Articles 8, 10 and 11), and the contractual relations between the ship owner and a ship recycling facility (Article 9). Furthermore, the Proposal includes provisions on ship recycling facilities located within and outside the European Union (EU)³ (Articles 11 to 16). General administrative provisions (Articles 17 to 20), provisions on reporting and enforcement (Articles 21 to 25) and final provisions (Articles 26 to 31) are included in the text.

(3) Article 29 of the Proposal reads as follows: “In Article 1(3) of Regulation (EC) No 1013/2006, the following point is added: ‘i) Ships falling under the scope of Regulation (EU) No XX [*insert full title of this Regulation*](*) (*) OJ L[...], [...], p.[..]’”. This effectively would remove ships from the Waste Shipment Regulation, the European Union’s Basel Convention implementation legislation.

(4) The Commission also submitted to the Council the Proposal for a Decision which requires Member States to ratify or to accede to the Hong Kong Convention on ship recycling⁴, “in the interest of the European Union”.

2. Ships and EU waste legislation

(5) End-of-life ships which are recycled, otherwise recovered or disposed of, are waste under current international and EU law. The European Union recognized this in the following terms: “The Basel Convention applies to all types of ships when they are waste and the transboundary movement of ships that are waste”⁵. The EU Commission was of the same opinion: “Ships which constitute waste and which are subject to transboundary movement for recycling are regulated by the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and

¹ Commission, Proposal for a Regulation of the European Parliament and of the Council on ship recycling, COM(2012) 118 final, of 23 March 2012 (hereafter: Proposal on ship recycling).

² Commission, Proposal on ship recycling (fn.1), Article 1.

³ The term “European Union” or “EU” will be used throughout this study, also with regard to the period prior to 2009.

⁴ Commission, Proposal for a Council Decision requiring Member States to ratify or to accede to the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009, in the interest of the European Union, COM (2012) 120, of 23 March 2012.

⁵ UNEP/CHW.10/INF/18 of 18 August 2011, p.38, Submission of the EU and its Member States presenting the table and preliminary assessment pursuant to decision OEWG-VII/12 (environmentally sound dismantling of ships), paragraph 4.

their Disposal (the Basel Convention) and Regulation (EC) No 1013/2006 on the shipment of waste...”⁶.

(6) The provisions of the Basel Convention were transposed into secondary EU legislation by a Regulation of 1993⁷, which was, in 2006, replaced by the current Waste Shipment Regulation 1013/2006, “in the interest of clarity”⁸. The intention of the 1993 Regulation was to implement the provisions of the Basel Convention by the EU⁹, and the Council followed that line, by stating: “By adopting Regulation (EEC) No 259/93, the Council has established rules to curtail and to control such movements designed, *inter alia*, to make the existing Community system for the supervision and control of waste movements comply with the requirements of the Basel Convention”¹⁰. As the Basel Convention is also explicitly mentioned in a number of other provisions of the Waste Shipment Regulation¹¹ and their substantive provisions are more or less¹² fully taken over by the Waste Shipment Regulation, it can be concluded that the provisions of the Basel Convention are incorporated into EU secondary legislation through the Waste Shipment Regulation¹³.

(7) Regulation 1013/2006 deals with the shipment of waste¹⁴. According to its Article 1(2), it applies to shipments of waste between EU Member States, waste imported into the European Union from third countries and exported from the European Union to third countries. Article 1(3) contains a list of activities or waste that is excluded from the scope of Regulation 1013/2006. No exemption for ships is foreseen in this provision or in other provisions of Regulation 1013/2006. This is a proper implementation of the Basel Convention, because the Basel Convention does not exclude ships. However, the proposed new Article 29 of the EU’s Proposal on ship recycling intends to exempt all ships which come under its scope from the provisions of Regulation 1013/2006. The explanatory memorandum of the Commission clarifies that “in order to avoid confusion, overlaps and administrative burden, ships covered by this new legislation would no

⁶ Commission, Proposal on ship recycling (fn.1), Recital 1. Commission, COM(2012) 120 (fn.4), Recital 1: “Since ships contain hazardous materials, they are generally classified as hazardous waste and are therefore prohibited from being exported for recycling in facilities in countries not member of the OECD”. See also Commission, An EU strategy for better ship recycling, COM(2008) 767, section 2.2 (p.3).

⁷ Regulation (EEC) No 259/93, OJ 1993, L 30 p.1.

⁸ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ 2006, L 190 p.1 (hereafter: Waste Shipment Regulation), Recital 2.

⁹ Commission, Explanatory memorandum to the Commission proposal for the regulation, COM(90) 415, p.4.

¹⁰ Waste Shipment Regulation (fn 8), Recital 3.

¹¹ See in this regard in particular Waste Shipment Regulation (fn 8) , Recitals 4, 5,, 8 and 9, Article 2 nos. 16 and 18, Articles 31, 34, 35, 41, 42, 43, 45 and 51.

¹² An examination, whether the Waste Shipment Regulation fully complies with the requirements of the Basel Convention, goes beyond the scope of this study.

¹³ In the same way Commission, Proposal on ship recycling (fn 1), Recital 1: “Ships which constitute waste and which are subject to a transboundary movement for recycling are regulated by the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (‘the Basel Convention’) and Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on the shipment of waste. Regulation (EC) No 1013/2006 implements the Basel Convention as well as an amendment to the Convention adopted in 1995, which has not yet entered into force at international level, and which establishes a ban on exports of hazardous waste to countries that are not members of the Organization for Economic Cooperation and Development (OECD). Since ships contain hazardous materials, they are generally classified as hazardous waste and are therefore prohibited from being exported for recycling in facilities in countries not members of the OECD”.

¹⁴ Regulation (EC) No 1013/2006 (fn 8).

longer be covered by the Waste Shipment Regulation”¹⁵. This proposed action would derogate from the EU’s obligations under international law, as the Basel Convention has not been amended to exclude ships from its scope.

(8) While the operation and the maintenance of a ship is a normal activity concerning a transport means, the recycling of a ship is undoubtedly a waste treatment activity. This conclusion is confirmed by the definition of “ship recycling” in the Proposal on ship recycling¹⁶ and by the definition of “recycling” in the relevant EU legislation¹⁷. It follows from this that the Commission’s Proposal on ship recycling, insofar as it concerns the recycling of ships, deals with waste treatment activities.

(9) Waste treatment activities of EU Member States and of EU-located economic operators are treated by the EU Waste Shipment Regulation¹⁸ and, furthermore, by the Basel Convention of 22 March 1989, on the Control of Transboundary Movements of Hazardous Wastes and their Disposal¹⁹. The European Union adhered, as mentioned, to the Basel Convention in 1993²⁰.

(10) According to Article 216(2) of the Treaty on the Functioning of the European Union (TFEU), “Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States”.

(11) An international agreement which was ratified by the European Union is part of the European Union’s legal order. This also applies to international agreements which are, so-called mixed agreements, such as the Basel Convention,; in such a case, that part of the international agreement which falls into EU competence, is part of the Union’s legal order²¹. As to the relationship between such an international convention and EU secondary law, it is settled case-law of the EU Court of Justice that international agreements which are concluded by the European Union, prevail over secondary EU legislation (regulations and directives). The Court stated: “Article 300(7) EC [now Article 216(2) TFEU] provides that ‘agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on

¹⁵ Commission, Proposal on ship recycling (fn.1), section 3.1, p.8.

¹⁶ Commission, Proposal on ship recycling (fn.1), Article 2(1) no.5: „‘ship recycling’ means the activity of complete or partial dismantling of a ship at a ship recycling facility in order to recover components and materials for reprocessing and re-use, whilst taking care of hazardous and other materials, and includes associated operations such as storage and treatment of components and materials on site, but not further processing or disposal in separate facilities”.

¹⁷ See Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives, OJ 2008, L 312 p.3, Article 3 no.17 (hereafter: Waste Directive): “‘recycling’ means any recovery operation by which waste materials are processed into products, materials or substances whether for the original or other purposes”. Article 3 no. 15 defines “recovery”: “‘recovery’ means any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfill a particular function, or waste being prepared to fulfill that function in the plant or in the wider economy”. Annex II to the Waste Directive contains a non-exhaustive list of recovery operations; it lists under R 4: “Recycling/reclamation of metals and metal compounds” and under R 5: “Recycling/reclamation of other inorganic material”.

¹⁸ Waste Shipment Regulation (fn.8).

¹⁹ Hereafter: The Basel Convention.

²⁰ Decision 93/98/EC concerning the conclusion, on behalf of the Community, of the Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal, OJ 1993, L 39 p.1.

²¹ EU Court of Justice, case C-239/04 Commission v. France, ECR 2004, p.I-9325, paragraph 25; case C-12/86 Demirel, ECR 1987 p.3719; case C-13/00 Commission v. Ireland, ECR 2002 p.I-2943.

Member States'. In accordance with the Court's case law, those agreements prevail over provisions of secondary Community legislation"²².

(12) It follows from this that the provisions of the Basel Convention are binding on the EU institutions. This includes those provisions of the Basel Convention which, internationally, have not yet entered into force, such as the prohibition to export hazardous waste for recycling or recovery²³. Indeed, the European Union formally approved of this amendment and notified this ratification on 30 September 1997, to the Secretariat of the Basel Convention²⁴.

(13) Therefore, EU legislation may derogate from the provisions of the Basel Convention only, where it is permitted to do so by the Basel Convention provisions itself.

3. Possibilities to deviate from the Basel Convention

(14) There are four provisions of the Basel Convention which might allow a Contracting Party – in this case the European Union – to deviate from its provisions, Articles 26 and 27, Article 11 and Article 4(11).

3.1 Reservations and declarations

(15) Article 26 of the Basel Convention deals with reservations and declarations. It categorically states. "No reservation or exception may be made to this Convention". Article 26(2) deals with declarations or statements made by a Contracting party at the moment of adhering to the Convention. The European Union has not made any such statement with regard to ships, when it adhered to the Basel Convention²⁵. Therefore, Article 26 does not give it any right to deviate from the provisions of the Basel Convention with regard to ships.

²² EU Court of Justice, case C-344/04 International Air transport Association and European Low Fares Airlines Association, ECR 2006, p.I-403, paragraph 35; see also C-61/96, Commission v. Germany, ECR 1996 p.I-3989 paragraph 52 and case C-286/02 Bello Fratelli, ECR 2004, p.I-3465 paragraph 33.

²³ See Article 18 of the Vienna Convention on the Law of Treaties of 1969 which reads:

"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; or (b) it has expressed its consent to be bound to the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed".

See also Council, conclusions of the Environmental Ministers Meeting, Luxemburg, 23 October 2006 (Document C/06/287; 13989/06 (Presse 287), no. 5 : (the Council) Notes that the 1995 amendment to the Basel Convention which bans hazardous waste exports for final disposal and recovery from Basel Convention Parties which are European Union, OECD members and Liechtenstein to any other Parties to the Basel Convention ('the Ban Amendment') is in force for all Member States, because it has been fully implemented by the Waste Shipment regulation..." No.11(a): "While the 1995 Amendment is part of the EC legislation, and therefore binding law within the European Union, the EU regrets that the Amendment has, however, not yet come into force at international level".

²⁴ See Basel Convention, Ban Amendment, Status of Ratifications,

<http://www.basel.int/Implementation/LegalMatters/BanAmendment/tabid/1484/Default.aspx>.

²⁵ The EU made a general declaration on competence which reads as follows: "As provided for in the EEC Treaty and in the light of existing Community legislation in the field covered by the Basel Convention, more particularly Council Regulation (EEC) No 259/93 and Council Directive 84/631/EEC on the supervision and control within the European Community of the transfrontier shipment of hazardous waste (as amended), the Community possesses competence at an international level in this field. The Member States of the European

3.2 Withdrawal

(16) Article 27 of the Basel Convention allows a Contracting Party to withdraw from the Convention, by giving written notification to the Depository. However, the European Union has not notified such an intention. Article 27 is therefore not applicable.

3.3 Article 11 Basel Convention

(17) Article 11 of the Basel Convention reads: “1. Notwithstanding the provisions of Article 4(5), Parties may enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with Parties or non-Parties provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention. These agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries. 2. Parties shall notify the Secretariat of any bilateral, multilateral or regional agreements or arrangements referred to in paragraph 1 and those which they have entered into prior to the entry into force of this convention for them, for the purpose of controlling transboundary movements of hazardous wastes and other wastes which take place entirely among the Parties to such agreements. The provisions of this Convention shall not affect transboundary movements which take place pursuant to such agreements provided that such agreements are compatible with the environmentally sound management of hazardous wastes and other wastes as required by this Convention”.

(18) The proposal for an EU Regulation on ship recycling does not constitute a “bilateral, multilateral, or regional agreement or arrangement”. Rather, it is a unilateral measure by a Contracting Party – the European Union – to organize its internal legislation. As it is clear from the wording of Article 20 of the Proposal, it intends to amend the internal EU Waste Shipment Regulation. No other Party of the Basel Convention or non-Party is involved in this process.

(19) Under the perspective of public international law, it might be considered that an EU regulation constitutes a multilateral agreement between the EU Member States. However, in the context of the Basel Convention, this is not possible, because the EU is itself a Contracting Party of the Convention. This has the consequence that EU legislation on waste issues must be understood as the internal legislation of the Contracting Party EU and not as an international agreement between EU Member States. Consequently, the application of Article 11 of the Basel Convention on EU legislation, and in particular on the Proposal on ship recycling is excluded.

(20) This appears to be the general opinion among legal researchers of public international and EU law. A minority of legal opinion, however, considers EU waste shipment legislation to be an “arrangement” according to Article 11 of the Basel Convention²⁶. This opinion does not go so far, though, as to consider that EU legislation would be allowed to deviate altogether, under the conditions laid down in Article 11, from the provision of the Basel Convention. Rather, this opinion argues that with regard to international obligations – i.e. towards non-EU Member States – the Basel Convention provisions would have to apply and prevail over diverging EU law. A

Economic Community also have competence at the international level, including certain matters which are covered by the Basel Convention”, OJ 1993, L 74 p.52.

²⁶ K.Kummer, *International Management of Hazardous Wastes*, Oxford 1995 (1999), p.147ss.

deviation would only be possible in order to organize waste shipments between EU Member States.

(21) This opinion is not supported here. It does not explain why the EU, as a Contracting Party of the Basel Convention, would benefit from a privileged treatment with regard to all other Contracting Parties, by being allowed, as regards to its internal EU legislation, to partly disregard the provisions of the Basel Convention. This is all the less acceptable as all EU Member States are Contracting Parties of the Basel Convention, and are thus bound by its provisions. It makes no sense to allow them to partly disregard the provisions of the Basel Convention by adopting and applying EU legislation.

(22) The above-mentioned opinion is all the more unacceptable, according to Article 288 TFEU, as an EU regulation is directly applicable in all EU Member States and therefore prevails over the national legislation of an EU Member State. This means that an EU Member State could, in the case of a divergence between the EU Waste Shipment Regulation and the Basel Convention, rely on the EU Waste Shipment Regulation and set aside the provisions of the Basel Convention, though the Member State had itself adhered to the Basel Convention and is thus bound by its provisions.

(23) In the last instance, though, this matter need not be decided in the context of this study. Indeed, what matters in the present case, are the relations between the EU and non-EU Member States which provide for ship recycling. And in this regard, also the minority legal opinion mentioned above, agrees that the Basel Convention provisions prevail over EU legislation and may not be amended by such internal EU-legislation.

(24) It is possible, however, that the EU could seek to conclude that the Hong Kong Convention itself²⁷ is an Article 11 agreement. This would be legally very difficult to justify in EU legislation, first because the Hong Kong Convention is not yet in force and there is no guarantee that it will ever enter into force. Second, the Hong Kong Convention is so different in its approach to waste shipments and environmentally sound management of wastes, and in particular in regard to the interests of developing countries, as to be able to meet the Article 11 requirement that "(T)hese agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention, in particular taking into account the interests of developing countries". Certainly, many arguments have already been made by Parties and Observers that the Hong Kong Convention does not provide for an equivalent level of control and enforcement to that of the Basel Convention²⁸. Indeed, at the 10th Conference of the Parties to the Basel Convention, there were many Parties that did not agree that the Hong Kong Convention provided for an equivalent level of control and enforcement to that of the Basel Convention, and as a result, the Basel Convention Decision 10/17 stated: "while some parties believe that the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships provides an equivalent level of control and enforcement to that established

²⁷ International Maritime Organization, Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, Hong Kong, 15 May 2009 (hereafter: Hong Kong Convention).

²⁸ See in particular The UN Special Rapporteur on the adverse effects of the movement and dumping of toxic and hazardous products and wastes on ships on the enjoyment of human rights, Document UNEP/CHW.10/INF/1818 of 19 October 2011; The Center for International Environmental Law: Shipbreaking and the Basel Convention: analysis of the level of control established under the Hong Kong Convention. April 2011. Document UNEP/CHW.10/INF/18 of 19 October 2011.

under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, some parties do not believe this to be the case”.

(25) Using Article 11 which calls for a clear level of equivalence when the Basel Convention has not concluded that to be the case would be inappropriate, particularly when many of the EU trading partners for future ships may not likewise conclude that the Basel Convention provides an equivalent level of control, nor that ships should be removed from the Basel Convention scope. Likewise, it may be that a ship gets exported from the EU to a country that has not ratified the Hong Kong Convention. Would the EU in this scenario be considered a non-Party, simply because the export entailed a ship? Legally, that would be the case, as ships would be outside the Basel Convention scope for the EU. While the EU makes it, in this scenario, illegal for such an activity to take place, no legal instrument would be commonly in effect to ensure the obligations, rights and cooperation of and between the countries. For example, in the case of both countries being Parties to the Basel Convention, as it is likely to be the case at present, the duty to re-import an illegal shipment would be managed by both Parties to the Convention, as envisaged in Article 8 of the Basel Convention. Likewise, all of Article 10 would be ineffective, as well as Article 4(2.h), and many other aspects of the Basel Convention, which relies on cooperation and activities between Parties.

(26) A third problem with the notion that the Hong Kong Convention might be considered an Article 11 Agreement by the EU is the fact that according to Article 16 of the Hong Kong Convention, the Convention is only open to States²⁹, but not to regional economic organizations such as the European Union. The EU is aware of this fact³⁰ and has not indicated the slightest intention to try to change this state of affairs. Thus, it would be highly inappropriate to create a law that assumed that all EU Member States would ratify a third treaty (the Hong Kong Convention) which they might not choose to do; and EU law does not compel them to do so.

3.4 Unilateral Actions

(27) Article 4(11) of the Basel Convention allows Contracting Parties to impose “additional requirements that are consistent with the provisions of this Convention, and are in accordance with the rules of international law, in order better to protect human health and the environment”. The question is thus, whether the Commission Proposal on ship recycling, while ensuring a better protection of the environment and of human health, is consistent with the provisions of the Basel Convention.

(28) Likewise, Article 1(1.b) of the Basel Convention allows Parties unilaterally to add national definitions of hazardous waste to the scope of what all States concerned (export, import and transit States) must respect as being hazardous waste under the Basel Convention.

²⁹ The question, whether the EU Member States may adhere to the Hong Kong Convention, goes beyond the scope of this study and is therefore not examined here. As the EU itself cannot legally deviate from the provisions of the Basel Convention, the EU Waste Shipment Regulation 1013/2006 will remain in force. The export ban of Article 36 of that Regulation will thus continue to apply. According to Article 288 TFEU it prevails over any national legislation. In this author’s opinion, the EU Member States may thus not allow the export of hazardous end-of life ships to non-OECD countries. This would make their adherence to the Hong Kong Convention impossible.

³⁰ See Commission Proposal on ship recycling (fn.1), Explanatory Memorandum, section 3.3: “The European Union cannot become a party to the Hong Kong Convention since this is reserved to States which are members of the International Maritime Organization”.

(29) Both of these alterations entail *adding* requirements to the scope of the Convention – making it more comprehensive or rigorous, but never subtracting any materials from its field of application, making it less. Unilaterally removing hazardous waste from the scope of the Basel Convention is not allowed.

(30) One could argue that the adding of the obligation of the Hong Kong Convention for ships is consistent with Article 4(11), but one could not argue that subtracting the Basel Convention requirements could be seen as adding additional requirements. Additional requirements must mean additional requirements, not less requirements. Clearly, not demanding the obligations of prior informed consent, not ensuring downstream environmentally sound management beyond the facility, not considering illegal traffic to be criminal, etc., are all far less requirements. The objection is not therefore about adding Hong Kong requirements to the existing Basel requirements, but rather subtracting Basel and its unique set of obligations, and doing so unilaterally.

3.5 The Ban Amendment

(31) Clearly, the unspoken looming issue behind the Commission Proposal to drop ships from the Waste Shipment Regulation and Basel obligations is the question of whether the Basel Ban Amendment should apply to ships. The Basel Ban Amendment has, since 1994, been championed by the European Union and the EU was among the first to implement it. But there is now a sudden move to retreat from this important agreement. Thus, the Commission does not just propose new legislation in order to implement the Hong Kong Convention, but attempts to re-open and substantially weaken existing legislation which currently covers the issue, by dropping Basel Convention/Waste Shipment Regulation application to ships.

(32) The rationale given for doing this by the Commission is that the Basel Convention does not apply well to ships. Yet, in many ways, the Basel Convention applies far better than does the Hong Kong Convention. For example, only the Basel Convention can prevent a toxic ship from moving from an EU port to a developing country. Only the Basel Convention can allow a developing country to prevent a toxic ship from being imported into its territory. Only the Basel Convention covers all sizes and manners of ships, whether government owned or not. Only the Basel Convention can apply to facilities downstream of the existing ship recycling facility. Only the Basel Convention can consider breaking toxic ships on intertidal beaches without impermeable containment to be a failure to achieve environmentally sound management. Only the Basel Convention forbids transboundary movements of ships to such beaching operations. Only the Basel Convention considers illegal traffic in ships to be a criminal offence. These are just a few examples. The many reasons why the Hong Kong Convention approach does not apply an equivalent level of control or enforcement have been laid out in documents submitted to the Basel Convention. They are very well documented and are the reasons why the Parties to the Basel Convention could not agree that the Hong Kong Convention stipulated an equivalent level of protection.

(33) It is true that the Basel Convention can be too easily undermined due to the mobility of ships. For example, it is well known that a ship-owner could disguise the intent to dispose of a ship until it is on the high seas, and the Basel Convention, having only territorial jurisdiction, has no jurisdiction over flag States and may become powerless. This is all the more reason to apply both Conventions and indeed improve the Waste Shipment Regulation and the Basel Convention

where it applies to ships. The shortcomings of the Basel Convention are not a valid reason for abandoning obligations to the Convention, which has proved invaluable in preventing the export of harmful toxic ships to developing countries.

(34) Some have claimed that the Basel Convention is incompatible with the Hong Kong Convention, but in fact this is hardly the case. The only redundant provision appears to be the requirement for an inventory of hazardous substances on the ship (Hong Kong Convention) as well as the waste shipment declaration describing hazardous waste (Basel Convention). This redundancy can be resolved in EU legislation, by making one serve for the other in the case of ships.

(35) The Basel Ban Amendment, when in force, will create in the Basel Convention a new Article 4a which provides: "Each Party listed in Annex VII shall prohibit all transboundary movements of hazardous wastes which are destined for operations according to Annex IVa, to states not listed in Annex VII". Internationally, this provision has not yet entered into force, due to lack of sufficient ratifications of the Decision by which the provision was inserted into the Basel Convention. However, the provision has been ratified by the EU and transposed into EU law in 1997; it is, as regards EU law, incorporated in the Waste Shipment Regulation. The Basel Ban Amendment is likewise not incompatible with the Hong Kong Convention.

(36) The Commission Proposal on ship recycling provides for an obligation of ship owners to recycle ships within the European Union or in a country member of the OECD only during the time that the EU list of ship recycling facilities has not yet been published (Article 6(1)(a)). For this period, Article 6(1)(a) contains an export ban which is equivalent to the export ban under the Basel Convention. However, once this EU list of ship recycling facilities is published, the export ban of Article 36 of Regulation 1013/2006 would no longer apply. As has been previously stated, this method of withdrawing support for the Basel Ban Amendment (altering the definitions of the scope of the Basel Convention itself) is illegal. If the EU wanted to retract its ratification of the Basel Ban Amendment that could be done, but unilaterally altering the scope of the Basel Convention to exclude ships is not an appropriate or legal action.

(37) The export ban for any disposal or recovery operations, thus also for recycling operations, of hazardous waste was inserted into the Basel Convention – and subsequently into Regulation 1013/2006 – in order to address the concerns of developing countries and to prevent cost externalities and provide for incentives to internalize costs upstream through waste prevention; the Convention was of the opinion that developing countries did not have the capacity to properly manage – recover, recycle or dispose of – hazardous waste which could cause health and environmental problems³¹ and moreover the argument was made that exportation to cheaper treatment facilities provided a disincentive to manage waste at source through cleaner production. Thus, the export ban was and is intended to protect health and safety of persons and

³¹ See Basel Convention, Decision II/12: "The Conference, recalling the request of the G-77 countries..for the total ban on all exports of hazardous wastes from OECD countries to non-OECD countries; recognizing that transboundary movements of hazardous wastes from OECD to non-OECD States have a high risk of not constituting an environmentally sound management of hazardous wastes as required by the Basel Convention; 1. 1. Decides to prohibit immediately all transboundary movements of hazardous wastes which are destined for disposal from OECD to non-OECD States; 2. Decides also to phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes which are destined for recycling or recovery operations from OECD to non-OECD States;..."

the environment and to promote greater waste management efficiencies. The Commission proposal on ship recycling dramatically reduces this degree of protective action.

(38) The concern for the interests of developing countries is also the reason, why the Basel Convention wants to ensure that hazardous waste is recovered, recycled or disposed of as closely as possible to the place where it is generated – as stipulated in Article 4(2) and Recitals 8 and 9. It indirectly recognizes that the waste management structures and the treatment capacities in the developing countries are not always appropriate to allow hazardous waste to be traded and shipped as any other ordinary product. On such considerations and on any other concern for developing countries, the Commission Proposal on ship recycling does not contain any specific provision. It provides for obligations of ship recycling facilities within and outside the EU, for requirements regarding the construction, operation and recycling of ships and several other provisions. However, there is no differentiation, as in the Basel Convention, between developed and developing countries.

(39) There are other provisions which demonstrate the different approach taken by the Basel Convention with regard to the Commission Proposal; these concern the different States concerned – State of export, State of import and transit State under the Basel Convention, port State and authorizing State under the Commission Proposal –; the different reporting requirements under both legal texts; the fact that the Basel Convention considers the transboundary shipment of hazardous waste an issue which must involve and be executed under the control or supervision of the different States, while the Commission Proposal essentially considers the ship recycling activity as a private matter between the ship owner and the ship recycling facility. Overall, the system of the Commission Proposal on ship recycling is a system that aims at addressing the specific problems of the dismantling and subsequent recycling of ships. It is in some aspects more specific than the Basel Convention. However, it deviates from the Basel Convention in several points, in particular with regard to the export ban, the prior informed consent procedure, the control mechanisms and the enforcement methods. It does not provide for better protection of health and safety of persons and the environment, but provides for *another* system.

(40) This result is also based on the EU Commission's own comparison between the Hong Kong Convention, which is the basis for the Commission Proposal on ship recycling, and the Basel Convention/the EU waste shipment Regulation³².

(41) The conclusion is that the Commission proposal for the ship recycling does not intend to and does not provide for a better protection of the environment than the Basel Convention. Rather, it introduces, for end-of life ships, *another* system which in many respects is weaker and less comprehensive. Therefore, it cannot be justified by Article 4(11) of the Basel Convention.

4. Conclusion

(42) As noted above, as the use of Article 11 is not appropriate, nor are any of the legally acceptable possibilities for unilateral action found in the Basel Convention available to justify the departure of the EU from the Basel definitions of waste, its scope and obligations, the EU is not

³² See Commission, Communication: An assessment of the link between the IMO Hong Kong Convention for the safe and environmentally sound recycling of ships, the Basel Convention and the EU waste shipment regulation, COM(2010) 88, section 3.

allowed to do what it is proposing in the Commission Proposal. Should it adopt the Commission proposal, it would breach its international legal obligations which flow from the adherence to that Convention.

(43) One might consider that the Commission Proposal on ship recycling tries to transfer the EU competence for regulating ship recycling issues back to the EU Member States, notifies this to the Basel Convention authorities and hence does not regulate ship recycling any more. Article 2 TFEU allows EU competences to be re-transferred to EU Member States, be it under certain conditions. However, in the present situation, the Commission Proposal does not provide for a re-transfer of competence – the Proposal itself does not indicate at all such an intention of re-transfer of competence. Moreover, the Proposal regulates ship recycling questions in the EU in a considerable amount of detail and determines that the future EU regulation on ship recycling shall apply to Member States activities in this area. And for those ships which, under the Commission Proposal, are not submitted to the new proposed system – warships and other ships that are owned or operated by Member States – the EU provisions on ship recycling, as laid down in the Regulation 1013/2006, are intended to continue to be applied. The Proposal also provides that the Commission keeps considerable management responsibilities, such as in Articles 16, 19, 20, 23(7) and 30; in Article 26 it obtains delegate powers; and in particular in Articles 5(9), 10(3), 15(9), and 16(3) it obtains extensive implementation responsibilities.

(44) Furthermore, the Proposal provides for EU-wide prohibitions to use certain hazardous materials in the construction of new ships (Article 4); a *European* list of appropriate ship recycling facilities is to be established (Article 16); the criteria for such facilities are laid down for all EU-flagged ships in the Proposal (Article 12); the content of the contract between the ship owner and the ship recycling facility is fixed in detail (Article 9). Ship owners (Article 21) and Member States (Article 22) shall regularly report to the Commission. The forms of report on the planned start of ship recycling (Annex II), on the report concerning the completion of ship recycling (Annex III), of the inventory certificate (Annex IV), of the ‘ready for recycling’ certificate (Annex V), and on the identification of the ship recycling facility (Annex VI) are uniform for the whole EU and are laid down in the Proposal.

(45) All these elements of the Proposal demonstrate that ship recycling is intended to continue to be regulated at EU level. This is confirmed by the Explanatory Memorandum to the Proposal which stated³³, “Individual action by Member States will not be sufficient since not all Member States consider the ratification of the Hong Kong Convention to be a priority. There is a clear risk of having different legal requirements applied to large commercial EU-flagged ships depending on the different Member States concerned. This situation could result in changes of flags and unfair competition between the Member States acting as flag states. The establishment of a *European* list of ship recycling facilities fulfilling requirements will avoid duplication of work between EU Member States and facilitate their control procedures as flag states. Incorporating the Hong Kong Convention into *European* legislation would promote harmonised decision-making and speed up the ratification process amongst the Member States”.

(46) A re-transfer of competence on ship recycling to the EU Member States is thus neither intended nor achieved by the Commission Proposal on ship recycling.

³³ Commission, Proposal on ship recycling (fn.1), section 3.3 (emphasis added).

(47) It must likewise be pointed out that Member States are bound by EU law, and in particular by the Waste Shipment Regulation. They may not adopt national legislation which deviates from that Regulation. As long as the EU may not deviate from the provisions of the Basel Convention, also the Member States remain bound by EU law. Furthermore, all EU Member States on their own have likewise ratified the Basel Convention and the Basel Ban Amendment. Therefore, the Commission proposal for a decision³⁴ which requires Member States to ratify or to accede to the Hong Kong Convention, under which the export of hazardous end-of life ships would be permitted outside of the rules of the Waste Shipment regulation/Basel Convention, is based on an erroneous legal analysis and may not be adopted by the European Parliament and the Council.

(48) The Commission's risk assessment of 2008 as well as that of 2012 both contain a section on the EU's "right to act" in the area of ship recycling³⁵. However, these sections exclusively discuss the EU competence to take measures under the EU Treaties. They do not touch with one word the problem of whether the EU, as a Contracting Party to the Basel Convention, may unilaterally deviate from the provisions of that Convention.

(49) The Commission Proposal for a regulation on ship recycling, by providing that ships which come under the scope of that Regulation do not come under the provisions of Regulation 1013/2006 on the shipment of waste, establishes a unilateral exemption from the Basel Convention which is not allowed under the provisions of that Convention. Therefore, the European Parliament should reject the Commission proposal in its present form.

(50) Should the Commission Proposal on ship recycling be adopted, it would mean that the EU takes the rights to decide itself, for which waste streams it complies with the provisions of the Basel Convention and for which waste streams it fixes provisions on its own. The interest to remove specific EU requirements for certain waste streams and end-of life products is likely to exist in particular for high-value post consumer products which finished their useful life-time and became waste. Examples are cars and trucks, electrical and electronic goods, airplanes, etc. Yet, as has been noted above, while Parties can enact stronger provisions and add new hazardous wastes based on national definitions, they cannot subtract hazardous wastes and reduce the scope and rigour of the Convention without resorting to amending the Convention itself. If the EU were to attempt to do this, the consequences could be far reaching, with other industries (besides shipping) seeking exemptions for their waste streams of end-of life products, or where other Parties simply declare that they do not consider certain Basel listed hazardous wastes to be hazardous. This would lead to a breakdown of the integrity of the Convention, rendering it ineffective, and all of the resources expended by the European Union on creating and maintaining the Convention would be wasted.

Madrid, 4 September 2012

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³⁴ Commission, COM (2012) 120 (fn.4), above).

³⁵ Commission, SEC(2008) 2846, section 3.7 (p.18) ; SWD (2012) 47, section 2.7 p.27.

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