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CONTRADICTION IN TERMS: EUROPEAN UNION MUST ALIGN ITS WASTE SHIP EXPORTS WITH INTERNATIONAL LAW AND GREEN DEAL

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ABOUT THIS REPORT

In house analysis by Basel Action Network, European Environmental Bureau, Greenpeace and NGO Shipbreaking Platform.



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For more information, contact:

Jim Puckett
Executive Director
Basel Action Network
jpuckett@ban.org
Tel: +1 206 652 5555

Ingvild Jenssen
Executive Director and Founder
NGO Shipbreaking Platform
ingvild@shipbreakingplatform.org
Tel: +32 (0)2 6094 42

INTRODUCTION

The Basel Ban Amendment and the EU

The Basel Ban Amendment was adopted in 1995 at the Third Conference of Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal with strong support from the European Community. Now, 24 years later, it has entered into force -- officially on 5 December 2019.

The Ban Amendment creates a new preambular paragraph, a new Article 4a, and a new Annex (Annex VII).¹ The Amendment, for all 99 Parties that have currently ratified it², effectively bans all exports of hazardous wastes from Annex VII countries to non-Annex VII countries for any reason. Annex VII is made up of a list of countries which includes all member states of the Organisation of Economic Cooperation and Development (OECD), the European Union (EU) and Liechtenstein. The substantive provision in Article 4a and the Annex VII is supported also by a new preambular paragraph 7bis, which reads as follows:

"Recognising 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;"

The Basel Ban Amendment was implemented into the EU Waste Shipment Regulation (Regulation (EC) No 1013/2006) in Article 36 many years prior to its entry into global force on 5 December 2019. The EU Member States and the Commission have not only all ratified the Ban Amendment, but have championed it at the outset. Most recently, they have also affirmed its intent and spirit in the European Green Deal and its new Circular Economy Action Plan.

The EU Unilaterally Declares EU flagged ships to not be a Hazardous Waste

Yet, in 2013, the EU unilaterally, apart from all other Basel Parties, and serving the interests of their powerful shipping industry, removed EU flagged ships from the scope of the EU's Basel Convention implementation legislation -- the Waste Shipment Regulation. This was done even though end-of-life ships were declared a type of waste by the Basel Convention in 2004.³

Below we explore the stated rationale for the decision to remove EU flagged vessels from the scope of the Waste Shipment Regulation, and outline why now, with the entry into force of the Ban Amendment, those arguments, which were leaky before, can no longer hold water. We will also explore how that decision does not match the EU's promises in its Green Deal and Circular Economy Action Plan. Indeed, the EU now stands in full legal conflict and political contradiction,

¹ Decision III/1 found [here](#).

² The list of countries ratifying the Amendment is found [here](#).

³ See [decision VII/26](#) adopted in 2004

and in urgent need of a remedy consistent with international law and its new Circular Economy mandate.

THE LEGAL CONFLICT

Ships as Hazardous Waste Subject to the Ban Amendment

End-of-life ships are, according to the Basel Convention, a form of waste and are likely to be a controlled hazardous waste due to their constituents (e.g. flammable oily wastes and fuels, heavy metal-based paints, PCBs and asbestos).⁴

It is clear that by ratifying the Ban Amendment the EU and its Member States have a strict legal mandate not to allow the export of hazardous end-of-life ships to non-Annex VII countries regardless of their size, ownership or flag. Already there have been several legal concluded and ongoing prosecutions of ship owners for violating the Waste Shipment Regulation within the EU. In March 2018, proceedings in the Netherlands resulted in criminal charges against the company *Seatrade* when it exported from the port of Rotterdam two (Liberian and Dutch-flagged) vessels for breaking on the beaches of Bangladesh and India.⁵

However, with the adoption of the EU Ship Recycling Regulation (Regulation (EU) No 1257/2013), in 2013, the EU unilaterally and extra-legally declared that ships sailing under an EU flag are no longer wastes to be controlled by the Basel Convention rules, and yet ships flying any other flag are. This legal double standard is due to pressure from the shipping industry which insisted on an alternative approach to the legally binding Basel Convention; an approach called for by a new treaty which is not yet in force -- the Hong Kong Convention.

The Hong Kong Convention and the EU Ship Recycling Regulation

The shipping industry's response to the Basel Convention decisions to consider ships as waste, and thus subject to the Basel Convention and the Ban Amendment, was to run fast to the International Maritime Organisation (IMO), another UN venue, to press for another, less restrictive legislative remedy to what the world was increasingly understanding to be an environmental and human rights disaster taking place on three beaches in South Asia. The mainstream media's discovery of the horrors of modern-day shipbreaking that sacrifices many of the world's poorest labourers in one of the world's most dangerous jobs in India, Pakistan and Bangladesh became a source of increasing shame. Indeed, it was EU law that at great expense had the French Aircraft carrier *Clemenceau* towed back to Europe after it was en route

⁴ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989. Decision VIII/26 of October 2004 at the 8th Conference of the Parties affirmed, that "a ship may become waste as defined in Article 2 of the Basel Convention and ... at the same time it may be defined as a ship under other international rules."

The Basel Convention therefore applies to end-of-life ships when they are considered as hazardous.

⁵ Openbaar Ministerie's [Press Release](#)

to the Indian beaches in Alang, Gujarat. The French courts ruled that the export was illegal under the Basel Convention and Waste Shipment Regulation.⁶

It was a fact that if ships could not be run up on the beaches of South Asia any longer, the shipping industry stood to lose billions of dollars in steel revenue from the highly polluting and dangerous "ship recycling yards". At the IMO, the industry found far greater sympathy. The result was the IMO's Hong Kong Convention which was adopted in 2009. As opposed to the Basel Convention, the Hong Kong Convention ignores the issues of human rights, the special needs of developing countries to protect their workers and environment, as well as the need to minimize transboundary movements of waste. The Hong Kong Convention does not require countries to be notified and thus able to consent or deny the ships from coming to their shores. It does not include within its scope hazardous waste management downstream of the immediate facility. It does not criminalise violations, and most certainly, it does not include a full prohibition on exporting hazardous wastes to developing countries from developed countries as the Basel Convention now does. In any event, the Hong Kong Convention has yet to enter into force.

The move to the IMO, while primarily motivated by the need to continue to exploit economic externalities made possible by operating in developing countries, was further justified by the claim that the Basel Convention control procedure was not designed for ships. Unlike land-based cargo, a ship is unique as it is a waste that can move on its own anywhere around the world, and decisions can even be made about it becoming a waste when it is on the high seas, avoiding the exporting port state obligations of Basel. This oversight created a means to circumvent responsibility and the intent and purpose of the Basel Convention. However, rather than taking the necessary steps to fix the Basel control procedure to be able to cover ships effectively and, for example, include flag state or beneficial owner responsibility via an amendment of the Basel Convention, the shipping industry sought an entirely different approach with an entirely new law, which was far from equivalent and in fact is in glaring contradiction to the intent and purpose of the Basel Convention and its Ban Amendment. The shipping industry used the known loophole in the Basel control procedure with respect to application for ships to justify the creation of a far weaker regime.

The shipping industry also made claims, later accepted and echoed by the European Commission⁷, that falsely asserted there was not enough ship recycling capacity within the OECD group of countries and therefore any policies or laws that maintained the Ban Amendment obligations for ships was simply not feasible. In fact, they failed to count the capacity of the United States, Canada, and Mexico which is significant and moreover can be easily scaled upwards to meet expected capacity needs.⁸ The industry claim is further belied by the fact that yards in Europe operate grossly under capacity due to the unfair competition of

⁶ BBC, [Chirac orders "toxic ship" home](#). 16 February 2006.

⁷ In the Explanatory Note provided by the EU commission in the first [Proposal for the Ship Recycling Regulation \(COM\(2012\)118final\)](#) this falsehood is repeated on more than one occasion.

⁸ [Industrial Capabilities of North America, BAN, November 2012](#)

beaching yards where the breaking of ships can be done far more cheaply as costs to protect workers and the environment are not internalised.

Finally, another false claim was made that the two approaches, Basel and Hong Kong, could not mutually exist, but rather one had to be thrown out -- and of course the one that ship owners lobby to be ignored is the Basel Convention.⁹

With these seemingly rational justifications, found in the Explanatory Memorandum in the foreword of the EU's Ship Recycling Regulation, the EU Member States and Parliament fell in line to support the Hong Kong approach -- the approach most obviously in the best economic interests of the shipping industry. While the EU knew they needed to make some improvements to the Hong Kong Convention, and did so (a tacit admission of a lack of equivalency), they still did not instate the basic transboundary movement obligations of the Basel Convention binding on them.

Instead, the new Ship Recycling Regulation mandated that the Waste Shipment Regulation, which implements the Basel Convention in the EU, be changed to *exclude* EU flagged ships. In this way, the EU unilaterally, apart from the rest of the Basel Parties, created an exemption from the Basel Convention for a single waste stream; ships over 500 gross tonnes in size sailing under an EU flag. All other ships are still considered as wastes subject to the Basel Convention. While this move seemingly supported the Hong Kong Convention (a treaty not in force) for EU-flagged ships, it was done with great prejudice to the Basel Convention which is existing international law, created in support of developing countries, and ratified by the EU.

The EU legally justified the movement of competency for EU flagged waste ships from the Waste Shipment Regulation (Basel based) to the Ship Recycling Regulation (Hong Kong based) by a highly controversial assertion that the Hong Kong Convention, once entered into force, could qualify as a valid Article 11 Agreement under the Basel Convention. This assertion was never corroborated by the Basel Convention itself.¹⁰ We will explore why this leap, while very controversial before, has now become a legal impossibility due to the recent entry into force of the 1995 Ban Amendment. We will also explore how creating a bilateral agreement between the EU and a non-Annex VII country to seek a means to circumvent obligations under the Basel Ban Amendment equally constitutes an unacceptable use of article 11.

⁹ Ironically, we have heard recent calls from pro-Hong Kong interests to recognize that Basel can have a co-existing role but only on the matter of downstream from facility waste management. This is very self-serving and ignores the fact that Basel's primary obligations have everything to do with transboundary movement of wastes prior to them being allowed to arrive on the receiving territory.

¹⁰ At the 10th Conference of the Parties, Decision 10/17 there was in impasse: *1. Notes that, 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 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;*

Article 11 Cannot be used to Evade Basel Obligations including the Ban Amendment

Article 11 of the Basel Convention was introduced into the Convention during negotiations to provide an opportunity for those countries which for whatever reason did not wish to be, or were unable, or were not yet Parties to the Convention to be able to trade with Parties should they wish to do so, but only in accordance with the requirements of the Convention. It was created to safeguard against allowing Parties to the Convention from derogating from or weakening the obligations of the Convention via other instruments forged with other countries. But it also served to recognise existing or future regional or bilateral arrangements between Basel parties, or between Basel Parties and non-parties, which held requirements more rigorous than that of the Convention.

Article 11, Paragraph 1 allows separate bilateral or multilateral agreements concluded after entry into force of the Convention,

"...provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous 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."

Already the debate over whether the Hong Kong Convention could be regarded as a valid Article 11 Agreement raged in the lead up to the final adoption of the Hong Kong Convention in 2009. While the Basel Convention Parties could do little to prevent the IMO from proceeding with their own convention on ship recycling, or from doing it in their own way, they were insistent at the outset of the process that the IMO do it in a manner which provided an *"equivalent level of control."*¹¹ This new phrase being an abbreviated way of referring to the requirements of Article 11 quoted above.

In 2010, the EU concluded, in a somewhat tortured rationale¹² and strongly argued against by legal experts,¹³ that the Hong Kong Convention provided an *"equivalent level of control"* to the Basel regime even though the Hong Kong Convention does not govern trade; does not cover the entire management chain of waste before and beyond the recycling facility; nor allows

¹¹ In Active paragraph 5. of Decision VII/26 at the Seventh Conference of the Parties: "5. Invites the International Maritime Organisation to continue to consider the establishment in its regulations of mandatory requirements, including a reporting system for ships destined for dismantling, that ensure an equivalent level of control as established under the Basel Convention and to continue work aimed at the establishment of mandatory requirements to ensure the environmentally sound management of ship dismantling, which might include pre-decontamination within its scope;"

¹² The EU and its Member States made a [submission to the Basel Convention's Open-Ended Working Group](#) meeting on the environmentally sound dismantling of ships, which concluded as follows: "As a preliminary assessment and taking a life cycle perspective, it can therefore be concluded that the Hong Kong Convention appears to provide a level of control and enforcement at least equivalent to the one provided by the Basel Convention for ships..." Note: A life-cycle approach is irrelevant with respect to legal trade control procedures, and is not a criteria or term of art established anywhere in the Basel Convention or its Article 11.

¹³ Several legal critiques asserted the obvious, opposite conclusion that in fact the Hong Kong Convention could not be considered as providing an "equivalent level" of control to that of the Basel Convention. See [Analysis by Dr. Ludwig Krämer](#), Analysis by the [Center for International Environmental Law](#).

countries the right to deny trade of hazardous waste contained in ships. However faulty that assertion was, it should further be noted that it was made prior to the Basel Ban becoming a legally binding part of the Basel Convention. Below we examine more closely why also neither the Ship Recycling Regulation, nor any future bilateral agreements based on that Regulation, can be deemed as an equivalent level of control and thus valid Article 11 agreements.

Not Equivalent by Scope

There is nothing in the language of Article 11 which can allow a deviation from the scope of what is defined as "hazardous or other wastes". These are defined terms which set out the scope of the Convention and of any Article 11 agreement where they are specifically referred to. Any waste covered under those terms needs to be covered by Parties in an equivalent way. That is, if an Article 11 agreement fails to include certain of the wastes defined by the Basel Convention as being under its control procedure, then a Party to the Convention will need to handle those exclusions elsewhere in other legislation in a manner that does not derogate from the provisions of the Convention.

This is consistent with the fact that the Basel Convention allows for no reservations.¹⁴ Thus, it would be inconceivable that a simple agreement via Article 11 would be tolerated that allowed Parties to collude with each other or other countries to, in effect, exempt themselves from having to control certain Basel waste streams with the Basel control procedure that they simply did not wish to control in the same manner prescribed by Basel.

Yet, this is what the EU has done with EU flagged ships by removing these from the Waste Shipment Regulation and replacing the Basel prior informed consent control procedure of its Article 6 with the Hong Kong approach, a procedure which is clearly less environmentally protective as it does not allow exporting, importing or transit states the right to deny movement of wastes to and from their territories prior to the movement taking place, even if there is reason to believe that the wastes will not be managed in an environmentally sound manner.

Blanket removal of EU flagged ships from Basel application by the EU by virtue of their coverage under the Ship Recycling Regulation is not a valid application of the requirements of Article 11 and stands as wilful non-compliance by the EU to binding international law. Further, the non-application of the waste definition for EU flagged ships within the Waste Shipment Regulation is also not a legally valid approach as these wastes have clearly been defined as controllable wastes under the Basel Convention.

Not Equivalent by Provisions

With the 5 December 2019 entry into force of the Ban Amendment, it is simply not legally possible to assert that the Hong Kong Convention provides an "*equivalent level of control*" or,

¹⁴ Article 26.

more legally precise, as possessing *"provisions which are not less environmentally sound than those provided for by this Convention [Basel] in particular taking into account the interests of developing countries"*. The Basel Convention now prohibits exports from Annex VII to non-Annex VII countries due to the very fact that such trade *"to developing countries has a high risk of not constituting an environmentally sound management of hazardous wastes as required by this Convention"*.

Even if the EU Ship Recycling Regulation sets higher standards for both environmentally sound management and the control procedures than the Hong Kong Convention -- and by that tacitly admits a lack of equivalency -- any bilateral agreement modelled on the new EU Ship Recycling Regulation cannot be deemed equivalent to the Basel Convention unless it also incorporates the Ban Amendment. Thus, any bilateral agreement concluded by the EU, or its Member States, with India, Bangladesh, Pakistan, or any other non-Annex VII country, that would allow exports from the EU to those countries, cannot be seen as a valid Article 11 agreement. For more details on such proposed bilateral agreements, we attach in Annex I a new analysis by the Center for International Environmental Law (CIEL), revealing any such new version of an old mistake as similarly illegal.

Indeed, a prohibition of the possibility of being impacted by shipborne hazardous wastes cannot ever be as protective to developing countries as a regime that simply requires a permitting process and an on-board hazardous waste inventory. This was in fact recognised by the Legal Service of the European Council in their opinion of 28 November 2012¹⁵, just prior to the adoption of the Ship Recycling Regulation:

26. " The most obvious difficulty with this, however, is that it amounts to arguing that the proposed regulation's provisions concerning the recycling of ships in, for example, China or India, "... are not less environmentally sound..." than the outright ban required by the Ban Amendment in respect of those two States. Conceptually, a prohibition appears on the face of it to be more protective of the environment than a regime of managed exports of hazardous waste. Moreover, this appears to be precisely the concern recognised by the new preambular paragraph 7bis, referred to at paragraph 5, above."

In their conclusion they further stated:

4) it would be difficult for the Member States and the EU to rely on Article 11 of the Basel Convention, as regards the Ban Amendment, once that amendment enters into force, particularly in the absence of any appropriate interpretative Decision of the Basel Convention COP;

¹⁵ Council of the European Union, Legal Services, 28 November 2012, 16995/12. Proposal for a Regulation of the European Parliament and of the Council on ship recycling - relationship between Regulation 1013/2006 on waste shipments, the Basel Convention, and the Hong Kong Convention, can be found [here](#).

The EU also examined the issue of utilisation of Article 11 to circumvent the Ban Amendment at the end of 1995. At that time, its analysis concluded that Article 11 cannot be used to undermine the Ban Amendment.¹⁶ This position was adopted by the Council of Ministers of 6 October 1995 and submitted to the Basel Convention in a letter attached here as Annex IV which stated:

"it is clear that bilateral, multilateral, or regional agreements or arrangements between Parties listed in Annex VII and Parties or other States not listed in Annex VII, when allowing for hazardous waste to be exported from the first to the latter, would circumvent the legal requirement of Article 4A in a way which is not foreseen by the Convention and are therefore not acceptable from a legal point of view."

Clearly, the EU Ship Recycling Regulation does not provide for preventing hazardous waste ships from being exported from Annex VII countries to non-Annex VII countries as does the Basel Convention's new article 4a. And clearly, any future effort by the EU or their Member States to create a bilateral agreement with a non-Annex VII country to circumvent the Ban Amendment would therefore likewise not live up to the criteria of equivalency required in Article 11.

THE POLITICAL CONTRADICTION

Using the Developing world as a place to Externalize Costs Runs Counter to a Circular Economy and European Green Deal

Waste, including hazardous waste, in a circular economy needs, in the first preference, to be minimized both in terms of quantity and hazardousness.¹⁷ For that waste which has not been minimized, it must be managed in a manner which can return value to the supply chain efficiently and does not exploit workers, human and environmental health or the long-term economic interests of any peoples anywhere in the world.¹⁸ Sadly, for the most part hazardous wastes are moved across borders not to internalize costs and take care of the potential harm they can cause, but rather to externalize such costs and harm. Such cost externalities are in contradiction to a truly circular economy.

¹⁶ Submission by letter addressed to Dr. Rummel-Bulska, Executive Secretary of the Basel Convention by Director, and signed by Ludwig Krämer on behalf of the European Commission. The transcript of this letter is found [here](#).

¹⁷ This is highlighted in the EU Waste Framework Directive in Article 3, 1,a: "Member States shall take appropriate measures to encourage:

(a) first, the prevention or reduction of waste production and its harmfulness..."

¹⁸ For numerous examples of how the EU has hitherto contributed to negligence in this regard, see chapter on waste in: [Who is Paying the Bill?](#)

Nowadays, there are numerous toxic hotspots, strategically located in the most vulnerable parts of the world, where the Global North dumps its own waste at the expenses of vulnerable communities and the environment. The e-waste dumps in Asia and Africa and the shipbreaking beaches of South Asia are sad examples of this form of exploitation of weaker economies by richer ones, perpetrated by economic interests standing to benefit from externalizing real costs and profiting from the savings made to them by not paying for proper management of hazardous wastes. Indeed, many industry sectors still currently rely on this unfortunate circle of exploitation -- a subversion of a responsible and true circular economy.

To address these concerns, the newly appointed European Commission has adopted a new Circular Economy Action Plan - one of the main building blocks of the European Green Deal, Europe's new agenda for sustainable growth. The new Action Plan announces initiatives along the entire life cycle of products, introducing legislative and non-legislative measures and aiming to lead these efforts at the global level.

The Commission is of the view that:

A sustainable product policy also has the potential to reduce waste significantly. Where waste cannot be avoided, its economic value must be recovered and its impact on the environment and on climate change avoided or minimised. [...] EU companies should benefit from a robust and integrated single market for secondary raw materials and by-products. [...] The Commission is of the view that the EU should stop exporting its waste outside of the EU and will therefore revisit the rules on waste shipments and illegal exports.¹⁹

It furthermore stresses that:

The global market for waste is undergoing considerable changes. In the past decade, millions of tonnes of European waste has been exported to non-EU countries, often without sufficient consideration of proper waste treatment. In many cases, waste exports result both in negative environmental and health impacts in the countries of destination, and in loss of resources and economic opportunities for the recycling industry in the EU. Recent import restrictions introduced by some third countries have exposed the overdependence of the EU on foreign waste treatment, but they have also mobilised the recycling industry to increase its capacity and add value to waste in the EU. In the light of these developments, and considering that illegal shipments of waste remain a source of concern, the Commission will take action with the aim to ensure that the EU does not export its waste challenges to third countries.

Facilitating preparing for re-use and recycling of waste in the EU will be enhanced by a thorough review of EU rules on waste shipments. The review will also aim at restricting

¹⁹ [Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal](#)

exports of waste that have harmful environmental and health impacts in third countries or can be treated domestically within the EU by focusing on countries of destination, problematic waste streams, types of waste operations that are source of concern, and enforcement to counteract illegal shipments. The Commission will also support measures at multilateral, regional and bilateral levels to combat environmental crime notably in the areas of illegal exports and illicit trafficking, strengthen controls of shipments of waste, and improve the sustainable management of waste in these countries.²⁰

It is now clear that the EU has finally and conclusively decided to close the door on using the developing world as a convenient place to externalize costs. This is the correct policy for a true and responsible circular economy and we applaud it. However, no sooner is this new policy announced than we learn that the Commission has informed Member States that it may be intent on trying to invoke Article 11 to facilitate the export of hazardous wastes on board and as part of the construction of ships to developing countries. Such an intent is illegal and contrary to stated EU policy. Policies must live in actions, not just in words.

REMEDIES

Both the Ship Recycling Regulation and the Waste Shipment Regulation are currently in breach of compliance with the obligations of the Basel Convention and with the spirit of the European Green Deal. This was the case with the former legislation prior to the entry into force of the Basel Ban Amendment, due to the EU deviation in the control procedures for EU flagged waste ships, but it is an even more blatant and obvious breach today, now that the Ban Amendment is in force. The Waste Shipment Regulation must restore coverage of all end-of-life ships within wastes under its control. Further, with respect to the Ship Recycling Regulation, it would violate the Ban Amendment were the Commission ever to allow the placement of a non-Annex VII country-based facility on the EU List of Approved Ship Recycling Facilities²¹ as is currently envisaged by the Regulation.²² This possibility must be removed.

Finally, there are institutional and financial remedies beyond the legal ones to ensure that the aims of the European Green Deal are met with regards to the recycling of vessels. Indeed, the recently published Foresight 2020 report calls for greater resilience in providing more green

²⁰ [Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - A new Circular Economy Action Plan For a cleaner and more competitive Europe](#)

²¹ See <https://ec.europa.eu/environment/waste/ships/list.htm>.

²² In the Explanatory Note provided by the EU commission in the first [Proposal for the Ship Recycling Regulation \(COM\(2012\)118final\)](#) under the heading "Improving compliance with the Union legislation" it is stated: "By allowing ships to be recycled in facilities located outside of the OECD group of countries as long as they comply with the requirements and are included in the European list, this Regulation will also address the current problem of the lack of recycling capacity legally accessible to shipowners." The European Commission has already sent missions to India with a view to eventual approval of yards located in Alang, Gujarat.

jobs in the EU. The Material Economics' report "Industrial Transformation 2050"²³ further calls for net-zero emission steel production, achieved in greater part from more use of recycled steel. We will recommend measures to enhance sustainable ship recycling in line with these policies herein.

1. Amend the Waste Shipment Regulation

The Waste Shipment Regulation is currently under review for being recast with an expected adoption by the Commission in the first quarter of 2021.²⁴ It is being reviewed in particular with a view toward better implementation of the aforementioned Circular Economy Action Plan. Reform of the Regulation is therefore at the top of the EU environmental agenda, providing a timely opportunity to remedy the current legal and policy contradiction.

With the entry into force of the Ban Amendment where the Basel Convention has defined "developing countries" as opposed to developed countries with a new Annex VII - something which does not exist in the Hong Kong Convention, nor in the EU's enhanced version of it - there is clearly no equivalency in provisions. Further, by removing certain Basel defined hazardous wastes, there is no equivalency in the scope of the agreements.

Put simply, a procedure which permits and actually institutionalises the export of hazardous wastes to developing countries for the purposes of their disposal/recycling can never be seen as being as environmentally protective, particularly with respect to developing countries, as a full prohibition of such trade for such disposal/recycling. Such an exemption is a massive derogation from the new Basel Article 4a which the EU has ratified and historically championed.

Remedy: First, paragraph (Title I, Article 1(2)(i)) -- the exemption mandated by the passage of the Ship Recycling Regulation must be removed.

But, at the same time, under the principle of utilising the most environmentally protective provisions of both Basel and Hong Kong approaches, the controlling of ships flying an EU flag should be retained. The Waste Shipment Regulation must be amended so that EU flagged vessels are applicable to being considered as wastes under the scope of the legislation as follows:

In Article 1 (2) add a new letter (e) as follows:

(e) movements of ships flying the flag of the EU en route to ship disposal or recovery destinations as listed in Article 1(1)(e) or (f) of Directive 2006/12/EC.

²³ See <https://materialeconomics.com/latest-updates/industrial-transformation-2050>

²⁴ For a timeline see: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/7567584-Waste-shipments-revision-of-EU-rules->

Also, in light of the review of the Waste Shipment Regulation, procedures for allowing exports of vessels to Basel Annex VII countries should be facilitated with the aim of easing access to pre-consented facilities (i.e. EU List under the Ship Recycling Regulation) and to avoid unnecessary delays in the notification procedure that may incentivise circumvention of the rules by the shipping industry.

2. Amend the Ship Recycling Regulation

The Ship Recycling Regulation was indeed the enabling legislation that created the non-compliance with the Basel Convention, but it need not be annulled in its entirety. On the contrary, the Basel regime is in fact mutually compatible to the Hong Kong approach. There is no conflict in providing for anything Hong Kong requires, in addition to the Basel obligations, despite what has been written about the need to prevent duplicative regimes. They are in fact so different in their obligations that both can be applied at the same time to enhanced benefit for the environment and human health.

Furthermore, the Ship Recycling Regulation envisaged a review when, in Article 30, paragraph 3, it stated:

The Commission shall keep this Regulation under review and, if appropriate, make timely proposals to address developments relating to international Conventions, including the Basel Convention, should it prove necessary.

Entry into force of the Basel Ban Amendment is clearly a new international development of note which requires a careful legal analysis beyond a "knee jerk" assumption that past analyses regarding the Basel Convention and use of Article 11 are relevant to assert equivalency. We call on the Commission to undertake this analysis and to moreover seek the following remedy:

Remedy: The first remedy to set things right would be the removal of Article 27 of the Ship Recycling Regulation, which established the exemption described above in the Waste Shipment Regulation.

Next, consistent with the Ban Amendment, the EU List of approved ship recycling facilities simply needs to be confined to facilities located in Basel Annex VII countries as follows:

Article 15
Ship recycling facilities located in a third country

1. A ship recycling company owning a ship recycling facility located in a ~~third country~~ non-EU Basel Annex VII country and intending to recycle ships flying the flag of a Member State shall submit an application to the Commission for inclusion of that ship recycling facility in the European List.

[...]

4. In order to be included in the European List, compliance by ship recycling facilities located in ~~third non-EU~~ Basel Annex VII countries with the requirements set out in Article 13 shall be certified following a site inspection by an independent verifier with appropriate qualifications. The certification shall be submitted to the Commission by the ship recycling company when applying for inclusion in the European List and, every five years thereafter, upon renewal of the inclusion in the European List. The initial inclusion on the list and the renewal thereof shall be supplemented by a mid-term review to confirm compliance with the requirements set out in Article 13.

[...]

Article 16
Establishment and updating of the European List

1. The Commission shall adopt implementing acts to establish a European List of ship recycling facilities which:

(a) are located in the Union and have been notified by the Member States in accordance with Article 14(3);

(b) are located in a ~~third~~ Basel Annex VII country outside of the Union and whose inclusion is based on an assessment of the information and supporting evidence provided or gathered in accordance with Article 15.

[...]

Article 28
Amendment to Directive 2009/16/EC

In Annex IV, the following point is added:

49. A certificate on the inventory of hazardous materials or a statement of compliance as applicable pursuant to Regulation (EU) No 1257/2013 of the European Parliament and of the Council (*).

50. A declaration signed by a representative of the ship owner and by the Captain of the ship, that to their knowledge there are, or are not, any plans to have the ship recycled in the next year, pursuant to implementation of Regulation (EC) No 1013/2006, determining intent to dispose.

(*) Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC (OJ L 330, 10.12.2013, p. 1).’

The change above in Article 28 on Port State Controls (Directive 2009/16/EC) will allow for

better enforcement of the Waste Shipment Regulation with respect to determining when non-EU flagged ships become a waste.

3. Introducing Positive Financial/Institutional Incentives

A circular economy is part of a broader agenda to achieve a lower carbon footprint and reduce the need for exploiting natural resources. Scrap steel is a valuable resource that can be used in smelting to reduce iron ore carbon and other footprints. In light of also “zero emissions steel” initiatives²⁵, the EU should aim to increase the supply of ships to recycling facilities operating in the EU and under high environmental and safety standards. This will require significant investment in new ship recycling capacities, as well as the optimal utilisation of existing yards. Indeed, existing capacity in the EU for sustainable ship recycling is grossly under-utilised due to unfair competition from yards that have not internalised environmental and labour costs²⁶.

To boost the recycling sector in the EU and encourage investments in high quality recycling in the EU, the Commission should explore positive financial incentives such as the use of green bonds for the recycling sector and requirements to use sustainably recycled scrap steel originating from ships in public procurement.

A return scheme for ships trading in EU waters, such as the “Ship Recycling Licence” model developed by Ecorys/DNV-GL / the University of Rotterdam for the Commission²⁷, should further be added to the Ship Recycling Regulation as an effective means to internalise environmental costs with the shipping industry during the life cycle of the vessel and incentivise the use of EU approved ship recycling facilities at end-of-life. It would further close the gap on the current profits made by the shipping industry when selling end-of-life ships to South Asian beaching yards for cheap and hazardous disposal, and provide a means to effectively counter the easy circumvention of existing laws based on only flag state or port state jurisdiction by ship owners.²⁸

Lastly, as recommended by the OECD, a revision of the advantageous tonnage tax regime to include environmental performance parameters, including end-of-life management, would prompt a shift towards more sustainable practices.²⁹

In line with the EU’s recently published Foresight 2020 report, financial and institutional incentives should seek to create a level playing field that renders it competitive to recycle sustainably in the EU. This would even be an opportunity for Europe to offer proper recovery

²⁵ See for example <https://materialeconomics.com/latest-updates/industrial-transformation-2050>

²⁶ See report entitled “EU-listed yards can handle the recycling demand of EU flagged ships” published by NGO Shipbreaking Platform and Transport & Environment in September 2018 for more details

²⁷ See report [Financial instrument to facilitate safe and sound ship recycling](#)

²⁸ For more details see report [What a difference a flag makes: Why ship owners' responsibility to ensure sustainable ship recycling needs to go beyond flag state jurisdiction](#) (NGO Shipbreaking Platform, 2015)

²⁹ See OECD report *Maritime Subsidies – do they provide value for money?* (2019) <https://www.itf-oecd.org/sites/default/files/docs/maritime-subsidies-value-for-money.pdf>

solutions for ships originated also from non-EU countries, especially from parts of the world with no appropriate waste treatment infrastructures.

CONCLUSION

The EU can't have it both ways. They cannot project that they promote a new way of thinking with the European Green Deal and prevent exports of hazardous wastes to developing countries, while seeking to bend their existing legal obligations to enable the shipping industry to do just that. They cannot do it for any industry, no matter how powerful.

It has been eleven years since the adoption of the Hong Kong Convention and seven years since the adoption of the EU's implementation legislation, the Ship Recycling Regulation. It is telling that the world has seen very little improvement with respect to the scandalous management of most end-of-life ships.³⁰ Meanwhile, the Basel Convention is in force as is its Ban Amendment -- two instruments which can do much to stem the tide of ships hitting the unsafe and non-environmentally sound beaching operations found in South Asia.³¹ They are both in force for EU flagged ships, but the EU is pretending that they are not.

The irony is that the Basel Convention and the Hong Kong Convention were never in conflict with one another in the first place. Removing EU flagged ships from the Waste Shipment Regulation was not at all necessary from a legal and policy perspective. The two approaches are not duplicative but rather additive. By working within both, there will need to be some guidance to create better communication between various national authorities as well as harmonised control procedures for exports to pre-consented facilities (i.e. EU List) within Annex VII EU/OECD countries. But from a legal standpoint, there is no conflict, if the obligations are added and implemented at the same time.

The EU Ship Recycling Regulation provides for more specificity with respect to the Basel requirement to characterise hazardous wastes during the operational life of a vessel (the Inventory of Hazardous Materials). It provides more clarity and independent third-party auditing with respect to ensuring a recycling plan is conducted and implemented. On the other hand, the Basel Convention ensures the sovereign right of Parties to deny movement of waste ships to and from their countries and its Ban Amendment protects developing countries from being disproportionately burdened by hazardous wastes originating from the developed world. The Basel Convention and EU Ship Recycling Regulation require assurances of Environmentally Sound Management (ESM) also after the waste and its residues pass through the recycling

³⁰ [Conditions of Shipbreaking Workers in India Remains Appalling \(Dec. 2019\)](#); [BBC exposes dirty and dangerous scrapping of oil and gas units in India \(March 2020\)](#); [Most shipping companies continue to opt for the highest price at the worst scrapping yards. \(Feb 2020\)](#)

³¹ Indeed, following the ground-breaking judgement in the *Seatrade* case, we have seen more successful criminal investigations into the illegal export of end-of-life vessels using the Basel Convention approach still found in the Waste Shipment Regulation for non-EU flagged vessels.

facility – the former requires that "all practicable steps are taken" to ensure that harm to human health or the environment does not take place anywhere along the chain of disposal. The EU Ship Recycling Regulation adds flag state control while the Basel Convention effectively provides at the same time for port state controls, including the ability to hold companies liable for illegal movements, thus creating better, more comprehensive controls and enforcement with both. If a movement to a recycling state is legal under Basel then the flag state controls of the EU Ship Recycling Regulation become applicable as well. If it is not legal under Basel then it must remain illegal regardless of the EU Ship Recycling Regulation's new obligations. To do otherwise is a derogation from Basel requirements which cannot be overcome by use of Basel's Article 11.

The Ban Amendment must be upheld for toxic ships. In no way should the EU list of approved ship recycling facilities include operations in developing countries as that would be a direct violation of the letter and spirit of the Ban Amendment, as well as from the spirit and aims of the European Green Deal. With the entry into force of the Ban Amendment, it is now simply impossible to pretend that the EU is acting legally by removing EU flagged ships from Basel control. The previously identified EU legal conflict has become more glaring than ever. The remedies identified above will correctly allow the controls of international and EU waste legislation to be manifest. Such an opportunity was perhaps foreseen in the Ship Recycling Regulation when in Article 30 it is stated:

3. The Commission shall keep this Regulation under review and, if appropriate, make timely proposals to address developments relating to international Conventions, including the Basel Convention, should it prove necessary.

It is time for the Commission to step up and make such a timely proposal now.

It is also time for the EU to support the development of a truly circular economy for ships in line with the European Green Deal. Financial and institutional incentives to boost safe and clean ship recycling, as well as the design and building of toxic-free vessels and 'zero-emissions steel' initiatives, are needed to effectively ensure the implementation of the environmental justice principles that the EU championed when supporting the Ban Amendment and now has put at the heart of its new Green Deal.

Annexures:

- I. CIEL updated Legal Opinion
- II. CIEL former Legal Opinion
- III. Krämer former Opinion
- IV. EU position on Ban Amendment and Article 11

ANNEX I

(press link)



Legality of EU Proposals on Ship Recycling

*Updated Legal Opinion of the Center for International
Environmental Law (CIEL)*



Center for International Environmental Law (CIEL)
1101 15th Street NW, 11th Floor, Washington DC, 20005
15 Rue des Savoises, 1205, Geneva, Switzerland

This legal opinion has been prepared by CIEL Attorney David Azoulay and CIEL Law Fellow Nathaniel Eisen. Please send comments or questions to dazoulay@ciel.org and neisen@ciel.org to be sure of a reply.

ANNEX II

(press link)

LEGALITY OF THE EU COMMISSION PROPOSAL ON SHIP RECYCLING

December 2012



**The Center for International
Environmental Law**

1350 Connecticut Ave. NW, Suite 1100, Washington, DC 20036. • 15 Rue des Savoises, 1205 Geneva, Switzerland.

This legal opinion has been prepared by CIEL Attorneys Marcos A Orellana and David Azoulay and CIEL Law Fellow Katja Bratschovsky. Comments or questions are welcome at morellana@ciel.org and dazoulay@ciel.org.

ANNEX III

(press link)

Ludwig Krämer - Patrijzenlaan 5 - 3080 Tervuren - Belgium - kramer.ludwig@skynet.be

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

A legal analysis by Dr. Ludwig Krämer

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ANNEX IV

European Commission Directorate-General Environment, Nuclear Safety and Civil Protection XI.E.3
Waste Management Policy

Dr. I. Rummel-Bulska Executive Secretary, UNEP/SBC 15, Chemin des Anémones CH - 1211,
Geneva 10

Dear Dr. Rummel-Bulska,

Thank you for your letter of 19 December 1995 by which you request input to the work of the Technical Working Group regarding technical guidelines for the conclusion of agreements or arrangements concerning the transboundary movements of hazardous waste. In reaction, I would like to make the following observations.

1. By means of Decision III/1, the Third Conference of the Parties adopted an amendment to the Basel Convention in the form of a new Article 4A. In accordance with this new Article 4A, Parties listed in Annex VII shall prohibit all transboundary movements of hazardous wastes to States not listed in Annex VII, with immediate effect when destined for disposal and as of 1998 when destined for recovery. For example, a Member State of the European Community, as a Party to the Convention, will be obliged to prohibit exports of hazardous wastes to all the States in the world which are not listed in Annex VII. It must be noted that there is neither an explicit reference to the possibility to conclude bilateral, multilateral, or regional agreements or arrangements, nor to Article 11, in this new Article 4A.

2. The new Article 4A will be inserted into the Convention after Article 4, and in view of this place in the legislative body of the Convention can be considered to install an obligation for Parties in addition to the general obligation for Parties in addition to the general obligations laid down in Article 4, among which the obligation to prohibit exports to non-Parties (Article 4.5). Thus, taking Article 4 and 4A together, a Party to the Basel Convention and having ratified Article 4A takes it upon itself to prohibit exports of hazardous waste to non-Parties and, in addition to that, to all Parties which are not listed in Annex VII.

3. Article 11 provides for an exception to the general obligation laid down in Article 4.5; ie.. If a Party enters into a bilateral, multilateral, or regional agreement or arrangement with a non-Party, it can be allowed to export to that country as an exception to the export prohibition of Article 4.5, on the one condition that environmentally sound management of the exported waste as required by the Convention is guaranteed. Article 11, however does not relate in any way to the new Article 4A and does therefore not provide an exception to the obligation for Parties listed in Annex VII to prohibit exports of hazardous wastes to all countries not listed in that Annex.

4. On the basis of these elements, it is clear that bilateral, multilateral, or regional agreements or arrangements between Parties listed in Annex VII and Parties or other States not listed in Annex VII, when allowing for hazardous waste to be exported from the first to the latter, would circumvent the legal requirement of Article 4A in a way which is not foreseen by the Convention and are therefore not acceptable from a legal point of view.

This leads to the conclusion that the only possibilities to conclude agreements or arrangements in accordance with the provisions (Article 4.5, 4A and 11) of the Convention would be:

1. between a Party listed in Annex VII and another State listed in Annex VII;
2. between a Party not listed in Annex VII and a State which is also not listed in Annex VII;

3. between a Party listed in Annex VII and a State not listed in Annex VII as far as exports from the latter to the first are concerned only.

For the reasons afore-mentioned, and without entering into the details of public international law regarding the notions of *lex specialis* and *lex posterior* which would also apply in this case, I am of the opinion that any derogation from the general obligation of Article 4A by way of a bilateral, multilateral or regional agreement or arrangement would be a violation of the spirit and the provisions of the Convention.

In addition, I would like to inform you that the European Community discussed this matter and agreed upon the position as indicated above at the meeting of Council of Ministers of the Environment of 6 October 1995. Moreover, the EC is currently in the process of transposing the requirement of the new Article 4A into Community law in accordance with this position. Procedures for the ratification for the amendment will be started as soon as possible.

In view of the above, I am unable to provide you with any input with regard to technical guidelines for assistance concerning agreements or arrangements under Article 11 which would be in contravention of Article 4A. However, as regards the remaining possibilities for concluding agreements or arrangements (eg. under 4), I enclose for your information a draft model agreement elaborated by the Directorate General for External Economic Relations (DG I) which may serve as a guideline for the Commission services in the negotiation of possible agreements with third countries in conformity with the mandate from the Council to the Commission in this respect of October 1994.

Yours sincerely,

L. Kramer

Head of Unit
