

# **BAN Comments and Proposals for Resolving Basel Convention Shipbreaking Issues**

For Consideration by the Intercessional Working Group on the Legal Aspects of Ships for Scrap and the Open-Ended Working Group of the Basel Convention

Submitted by the Basel Action Network (BAN)  
6 January 2004

## ***Introduction***

**The goal of the exercise before the Parties is to find a pragmatic and timely way to preserve the intent and spirit of the Basel Convention and its decisions with respect to ships when those ships are considered hazardous wastes under the Convention.**

Before discussing how to achieve that goal it is important for us all to be reminded of what exactly was the intent and spirit of the Convention. Contrary to what some have said recently about the goals and objectives of the Basel Convention, the treaty is very clearly not *just* an instrument to promote environmentally sound management (ESM) alone without regard to the obvious need to prevent the injustice that arises from a free trade in toxic waste that became obvious in the 1980s and to this day still takes place.

Rather the Convention from the outset was born to counter the human rights abuses and environmental injustice engendered when toxic wastes are freely traded without restraint in the global market place. A guiding principle of environmental justice is that no peoples should be disproportionately burdened by environmental risk and hazard simply because of their racial, social, geographic, or economic status. This concern over justice and human rights, was the driving force behind the creation of the Convention itself and the passage of the Basel Ban which has been reaffirmed in repeated decisions ever since the first COP (I/22, II/12, III/1, IV/7, V/III, VI/33). Denial of this fact now, leaves the Parties open to the possibility that the Basel Convention might become a tool of environmental injustice rather than the first global treaty to address it head on.

Further, there is a constant need still to remind ourselves that the Convention's primary goals and obligations include reducing transboundary movement of wastes to a minimum and that all States are obliged to accomplish this through waste minimization methods and by assuring environmentally sound management capacity (waste management self-sufficiency to the extent possible) within their national borders. Clearly, the current state of affairs with respect to just a handful of developing countries managing over 90% of the world's toxic waste ships, is the antithesis of what the Convention stands for. Clearly

then, if we are to move resolutely toward the intent and spirit of the Convention with respect to ships as waste, something has to change dramatically. We would suggest that what needs to change is that we move to ensure that:

- a) more toxic ship breaking capacity and ship decontamination technology is developed in OECD countries;
- b) ship recycling capacity for *cleaned* (decontaminated) ships is maintained and further developed and improved in developing countries.
- c) that dramatic steps are taken to ensure that developing countries do not receive a disproportionate share of the world's toxic waste from ships; and
- d) that proactive steps are taken now to ensure that all new ships are made with an absolute minimum of toxics on board.

Our work then is to determine how best to use the Convention to fulfill these end objectives in a pragmatic and timely way.

### ***An Illustrative Recent Example***

The shipbreaking issue has shared the global center stage for the past several months. One of the cases that made international news was the export of four dilapidated and seriously contaminated United States naval vessels – part of the “Ghost Fleet”, that were sent to the United Kingdom for shipbreaking. Subsequently, it has come to light that the United Kingdom themselves, are guilty of exporting their own ghost fleets to the shipbreaking yards of India where human health and environmental protection is far from assured and that country receives large amounts of hazardous materials simply because they are relatively poor. Both of these toxic waste ship export schemes have been denounced in the press in Britain and throughout the world.

The “Ghost Fleet” case is illustrative. First, the case functions as a reminder that there are in fact two very real issues regarding the public's aversion to waste trade and both are firmly rooted in the Basel Convention's intent and purpose. Not only is there a moral revulsion to exploiting weaker economies (such as the workers in India) by passing a disproportionate burden of the world's pollution (e.g. asbestos and PCB exposure), to a country and community simply because of its weaker economic stature, but also, there is considerable public concern that those responsible for the generation of a toxic waste should be the ones responsible for managing that waste, as in the case of the US ships moving to the UK where questions of exploitation of weaker economies were not at issue. Politicians and the UK public alike voiced strong concern as to why the US did not manage their own waste ships when they clearly have the capability of doing so. This question was not simply a selfish not-in-my-back-yard sentiment, as the transport itself of these vessels did, in fact entail considerable environmental risk which needlessly taken.

Both of these concerns -- national self-sufficiency, and environmental justice as articulated by the Basel Ban, are front and center in the *raison d'être* of the Basel Convention and are not allayed by explaining away the export with the use of the word “recycling”, as long as real transfer of risk and pollution are clearly involved.

The issue then of *responsibility* for a waste is central to the Basel Convention, as it makes it very clear that the *importing state or facility* does not bear the primary responsibility for its environmentally sound management, but rather the *exporter and exporting state* does. Unfortunately, the opposite burden of responsibility is what has been asserted repeatedly in the recent draft of the International Maritime Organization's (IMO) ship recycling guidelines despite the pre-existence of the Basel Convention. The IMO guideline is almost combative in its anti-Basel stance and its deflection of responsibility from those at the front-end of a waste life-cycle to those at the back-end.

Further, the case of the "Ghost Fleet" ships has served to highlight the fact that in order to establish who is primarily responsible for controlling transboundary toxic ship exports, the responsibility of the *flag State and/or the State having control over the "generator" or "exporter" of the vessel* is of paramount importance in determining equivalence of "State of Export". This was seen as obvious in the "ghost fleet" case and is in fact a crucial determination in all cases of transboundary movements of ships as wastes, due to the fact that ships can uniquely freely move in and out of jurisdictions at will, first as a product and then can become a waste at any point on the globe. In this regard, with respect to ships, it is clear that flag states, as well as the states having jurisdiction over the owner of the vessels are where the prime responsibility must lie and must be considered equivalent to "State of Export".

While the Basel Convention does not appear to define "owner" of waste, it does designate and define the two entities - exporter and generator - that are in fact likely to be owners and, in any case, bear the very first responsibility. Under the Convention, the entire PIC regime central to the Convention is triggered in the first instance by the "generator" or "exporter" which in turn triggers the competent authority of the state with jurisdiction over the same to act. Thus it is clear that the state with authority over the operations of an "exporter" or "generator" is clearly the "State of Export". In the case of a ship the "exporter" or "generator" of a waste vessel is most often the *owner* of said vessel as the entity that made the decision to discard said vessel.

*Note: Thus, for the purposes of this paper, we will lump the two definitions of "exporter" and "generator" used in Basel under the one term "owner", however, it must be noted that in fact "generator" implies, with respect to a post-consumer waste, the entity that used the product and then decided to discard that product (consumer or user).*

In the case of the "Ghost Fleet" ships, both the flag State and the State of Export (by virtue of holding jurisdiction over the owner which was a private company following sale of ships) was the United States and there was no ambiguity about that fact. Thus, when the affected communities in the US and UK tried to halt the irresponsible export/import of these vessels, there was recourse available both in US and UK courts (some of the court cases are still pending). Much of this recourse involves alleged violations of the OECD (Article 11) agreement under which the export took place and its implementation in the Waste Shipment Regulation of the EU and the Resource Conservation and Recovery Act of the US. Had the US been a Basel Party, there would likely have been

even more legal recourse under implementation language for the Basel Convention. For example, the Basel Convention asserts that the only possible justification for export is when a country needs the waste as a raw material or when they themselves lack adequate capacity. Neither applied in this case, which would have raised further legal questions about the export. Further, Basel requires notification and consent from transit states, and this did not in fact occur.

It must also be acknowledged that in addition to clarity regarding the “State of Export” the legal questions were made more transparent also because the question of when and whether the ships became waste was not an issue in the “Ghost Fleet” case. The US clearly designated the ships as an OECD “amber” listed waste in their export arrangements. Thus, despite the fact that the US is not a Basel Party, the “Ghost Fleet” case is illustrative of the fact that when certain ambiguities or questions as to “export state” and “when a ship becomes a waste” are erased, the Basel Convention, its spirit and obligations have very clear application to waste vessels that contain Basel listed hazardous wastes.

The logistical challenge then, with respect to finding a practical way to implement the Basel Convention’s intent and spirit with respect to ships is to assist in clearing up these two identified possible ambiguities that may exist in the real world of a product (ship) that can become a waste at any moment in time, and do so in numerous possible jurisdictions on earth. Those primary possible ambiguities are:

- a) Determination of when a ship becomes a waste, or how can “intent to dispose” be made more transparent; and
- b) Determination of equivalence of “State of Export” when the ship may be declared waste at any point in time and any point on the globe.

This conundrum must be resolved pragmatically and yet done with our hands firmly on the tiller of the *raison d’etre* of the Basel Convention, which is that those most responsible for a waste should be responsible for managing its disposal and do so in a way that prevents exploitation of weaker economies.

### ***Creative, Pragmatic Solutions***

In the following Sections, particularly I and II, we attempt to answer the questions posed to the Parties regarding the application of the Basel Convention to ships. In so doing we raise several ideas for pragmatic resolution for erasing the above noted ambiguities or potential loopholes in the Convention. These ideas are indicated in the text at points bearing this ►► symbol. For example, as we delved into the question of establishing intent to dispose, it became clear that in order to halt any efforts in hiding or disguising such evidence, it is advisable to take a serious look into the establishment of “*automatic triggers*”, as were proposed earlier by the European Commission. Such automatic triggers would create a legal presumption that ships are a hazardous waste or are about to become a hazardous waste far in advance of their actual arrival at the breaking yards thereby thwarting unscrupulous traders wishing to avoid the Basel regime.

In Sections IV and V, we address the posed questions of conflicts and gaps as well as between cargo and operational wastes. We note that among international instruments that deal with the shipbreaking issue any conflicts or gaps appear to be more apparent than real. At the heart of any seeming conflicts lies a conflict in culture within international organizations, such as that between the IMO and the Basel Convention, and not in fact a conflict between the legally binding international instruments such organizations are trying to enforce.

Finally in Section VI, we summarize the previously proposed possible solutions to the shipbreaking conundrum, and present a package of ideas (mechanisms) that are needed to working tandem to help clear the fog of obscurity in establishing intent to dispose and State of Export.



### **I. When does a ship become waste? When does a ship cease to be a ship?**

The Basel Convention defines waste as substances or objects which are disposed of, or are intended to be disposed of, or are required to be disposed of, by provisions of national law.<sup>1</sup> Disposal is defined as operations in Annex IV. A ship like any other substance or object, would thus become a waste once intent, or requirement to dispose, is indicated and the substance or object is destined for an Annex IV operation.

Note that the Convention does not include in its definition that a substance or object becomes a waste once it stops becoming operational or functional, or even when it ceases to operate under its own power. The Convention does not also exempt a waste based on its possible subsequent economic reutilization. Interpretations that attempt to include these non-existent criteria are without foundation in the letter and spirit of the Convention.

The second part of the question, “when does a ship cease to be a ship”, could possibly be misleading in this context because some might presume that a ship cannot be a ship and a waste at the same time. The fact that a ship can assume both the status of a waste and a vessel simultaneously is already certain considering that various international instruments and bodies, such as the Basel and London Convention and the International Maritime Organization (IMO) instruments etc. have simultaneous jurisdictions over ships in the course of their operating life.

### **II. What criteria or indicators should be used for determining the point at which a ship becomes waste and, in particular, the intention to dispose of the ship?**

---

<sup>1</sup> Art. 2 (1), Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal [hereinafter Basel].

Various approaches can be utilized in determining intent to dispose, and one straightforward approach involves specific known facts or evidence of intent to dispose. Evidence of such intent can take many forms, such as, but not limited to the following:

- (A) Contract for scrapping between the shipowner and the shipbreaking company;
- (B) Advance notice to crew of their need to vacate ship and assignment;
- (C) Sale to a broker of waste vessels;
- (D) Permanent removal of the vessel from traffic or failure to maintain the vessel;
- (E) Preparatory actions such as cancellation or modification of the vessel's insurance;
- (F) Deletion from ship registries or failure to renew relevant certificates or to be re-registered;
- (G) Communications, such as facsimile, telex, or electronic mail indicating a plan to scrap the vessel;
- (H) Notice to port authorities of the intent to dispose, or notices given to the crew of the fact of "final voyage".

These measures, however, need to be supplemented because of the ease by which unscrupulous operators might cloak or disguise the intent to dispose of a ship. The ease by which this can be done is compounded by the mobility of the vessel, as it proceeds from one port to another, passing through one or several state jurisdictions in its voyage. Also the lax regulatory structure that might provide governmental scrutiny of ship sales and transfer of vessel ownership can further frustrate efforts to pin down evidence of intent to dispose.

#### ►► Automatic Waste Trigger

What is likely needed to reinforce the evidence of intent is an automatic trigger that defines the ship as a presumptive waste until proven otherwise.

One form of automatic trigger, for example, can be based on the operational life of a vessel or date of legislated decommissioning (e.g. single hulled tankers). Once a vessel passes its optimum operating life, which can be determined using existing commercial knowledge or based on marine insurance data, or international legislation requiring decommissioning, then an automatic trigger that the vessel is a waste is activated. In this context a legal presumption that the vessel is a waste can be established through a code of practice that could be drawn up under the auspices of the Basel Convention and the IMO.

By creating a legal presumption that a vessel having an operating life of 25 years for example, is a waste, places upon the shipowner, flag State, other "States of Export", and all other relevant entities the responsibility to comply with existing international regulations on waste, including that of the Basel Convention. It may be possible under such a scheme for ships to obtain an exemption to this presumption if they wish to continue to operate after that period, but the exemption must require the owners to report

to the Basel Secretariat (or an established independent body) as well as all “States of Concern” (including the state where they are incorporated or exist), at least 90 days prior to arrival (for example) at the shipbreaking destination country, with a disposal plan that assures that the decisions and the obligations of the Basel Convention will not be violated.

Another form of an automatic trigger mechanism can be a Termination Passport (TP) requirement prior to the last voyage of the vessel for shipbreaking. This requirement can be adopted by a decision of the Basel Parties. Under this scheme, shipowners must apply for a TP from the IMO or Basel Convention (or an established independent body) at least 6 months before their vessels can be sent to ship recycling yards. The appropriate international body will then establish a Registry of Vessels destined for Disposal for those vessels that have filed a TP.

The TP must contain the following information and guarantees that are fully consistent with existent Basel or IMO guidelines, obligations and decisions:

- (A) Who the owner of the vessel is and who is, or will be considered to be the “generator” and/or “exporter” of the ship
- (B) The precise arrival date, location of disposal and identity of disposer;
- (C) An IMO Green Passport document (full inventory of all onboard hazardous materials)
- (D) A guarantee that every effort has been made to remove and safely dispose of all hazardous materials on board prior to arrival at the shipbreaking yards and a report on the extent and limit of such removal. (This is consistent with existing Basel Shipbreaking Guidelines).
- (E) A guarantee that the ship will not be eventually disposed of in a non-OECD country unless all on-board hazardous waste has been removed in an OECD country to the extent feasible prior to export. A schedule for such removal should be attached. (This is consistent with Decision I/22, II/12 and III/1 of the Basel Convention as well as with the Basel Shipbreaking Guidelines);
- (F) Assurance that if any hazardous waste *is* generated in the shipbreaking process in a non-OECD country, then the “generator” and/or “exporter” will bear responsibility for having the waste safely and legally transported back to the exporting state, or to another suitable OECD country for environmentally sound management.
- (G) A guarantee that the ship and its on-board hazardous wastes will be disposed of in an environmentally sound manner, in accordance with all national and international law including meeting Basel requirements as well as adhere to the IMO, Basel and ILO guidelines.

The Termination Passport requirement should be adopted in a decision of the Parties and need not be required as an amendment to the Convention. Decisions of the Convention are to be adhered to regardless of whether they are strictly legally binding. For example the work plans, rules of procedure, guidelines etc. of the Convention are all adopted by Decision. Likewise the TP should be integrated into the Basel and IMO guidelines for

end-of-life ships.

►► Fail-Safe Requirement that Criteria Are Met Prior to Shipbreaking

In both the decisions and the guidelines, it can be stated clearly that unless a ship obtains a TP 6 months prior to disposal there is a presumption that the ship disposal cannot constitute environmentally sound management as required under the Convention,<sup>2</sup> and thus it will be incumbent on all Basel Parties that are “States of Concern” to deny consent for its export/import/transit/disposal as relevant. One state that is certain to have control in this regard is the importing state and thus, as a Basel Party acting in good faith, such state will deny consent to import or disposal. It will then be considered illegal traffic<sup>3</sup> if the vessel arrives in the shipbreaking country without consent, unless of course, it has been cleaned to the extent where it no longer qualifies as a Basel waste.

The beauty of the TP scheme, is that it does not require a new instrument or amendment of any kind, and it can work even when the “State of Export” is difficult to determine. Indeed it can even work to avoid sale of ship to a broker in a shipbreaking state prior to declaring the vessel as a waste. That is, by deciding in a Basel decision and/or Guideline, that there is a presumption that any ship or vessel transiting to, arriving in an importing state, or slated to be disposed of, without a pre-filed TP is presumed to not constitute environmentally sound management under the Convention. Therefore, any such ship arriving at a shipbreaking yard regardless of source, without a TP will be prohibited from being disposed of, by the Basel Party shipbreaking state. Thus, the onus is on the shipowner (“exporter/generator”) to ensure that a TP is filed with the relevant competent authority of the “State of Export” that in turn will send that information as notification to the competent authority of the State of Import or shipbreaking state. If not, then the State of Import/Disposal will deny consent to import or dispose.

►► Global Ship Ownership Registry

With either idea above, or others, there is also a need to track, in a manifestly transparent manner the ownership of vessels throughout their entire life. Ideally, the IMO would synthesize and build a publicly accessible global shipping registry that will track down ship ownership of all vessels navigating in the world. One of the key points that can frustrate ship disposal control is the present failure of international shipping registry. This is why it is difficult at times to determine who is responsible for scuttling and abandoning ships in coastal states in Africa for example. An accurate and publicly accessible global shipping registry must be established, hopefully by the IMO in order to keep full track of vessel ownership, where they are flagged and all subsequent transfers and name changes.

These are but a few suggestions on the idea of a practical automatic trigger, as well as a ship ownership registry, which the Parties might seriously consider.

---

<sup>2</sup> Article 4, 2 (e), Basel

<sup>3</sup> Article 9, 1 (b), Basel

**III. Which State or States (e.g. flag State, owner State, port State) have the responsibility or obligation to ensure compliance with the appropriate conventions or provisions under the following scenarios:**

*Note: The question as posed above seems to be looking at obligations of “State of Export” with most of the indicated scenarios indicate different situations of how the “State of Export” might be defined. However, it is important to note that States of Import and Transit, also have obligations under each of these scenarios. Due to the similarity of the obligations of these states (transit and importing states) in each of the scenarios, we will mention these most substantially only under the first scenario (A) below and not repeat them under each instance.*

**(A) If the ship is government-owned;**

If the vessel is owned by a state, it is very likely that the flag of the vessel is also of the state that owns the vessel. In either scenario (flag state or as “state of ownership”) such state is clearly the “State of Export” under the Convention.

**The following are the main obligations under Basel of the “State of Export”** assuming the vessel is known to contain Basel Convention hazardous wastes in hazardous amounts:

- ▶ Prohibiting the export of scrap vessels if the “State of Import” has prohibited such import<sup>4</sup> or does not consent in writing to the specific import<sup>5</sup>, or which results in deliberate disposal of wastes in contravention of the Convention<sup>6</sup>, or where the State of Export has reason to believe that the wastes will not be subject to ESM<sup>7</sup>.
- ▶ Ensuring that the transboundary movement of hazardous wastes is reduced to a minimum and conducted in a manner that will protect against the adverse effects which may result from such movement<sup>8</sup>.
- ▶ Requiring that information about a proposed transboundary movement of scrap vessels is provided to the ship-breaking state and any transit state.<sup>9</sup>
- ▶ Implementing the above obligations, including taking legal, administrative, and other measures, including measures to prevent and punish illegal conduct.<sup>10</sup>

---

<sup>4</sup> Art. 4(1)(b), Basel.

<sup>5</sup> Art. 4(1)(c), Basel.

<sup>6</sup> Art. 9(5), Basel.

<sup>7</sup> Art. 4(2)(e), Basel.

<sup>8</sup> Art. 4(2)(d), Basel.

<sup>9</sup> Arts.4(2)(f) and (h), Basel.

<sup>10</sup> Article 4(4), Basel.

- ▶ Further, in order to adhere to Basel decisions I/22, II/12 and III/1 Parties must not allow the export of ships to non-OECD countries from OECD countries.

**The following are some of the prime obligations of the “State of Import”:**

- ▶ Prohibiting the import and denying consent to import of scrap vessels if such import has been prohibited<sup>11</sup> or has not been properly notified in writing to the specific import<sup>12</sup>, or which results in deliberate disposal of wastes in contravention of the Convention<sup>13</sup>, or where the “State of Import” has reason to believe that the wastes will not be subject to ESM.<sup>14</sup>
- ▶ Ensuring that the transboundary movement of hazardous wastes is reduced to a minimum and conducted in a manner that will protect against the adverse effects which may result from such movement.<sup>15</sup>
- ▶ Requiring that information about a proposed transboundary movement of scrap vessels is provided to the ship-breaking state and any transit state.<sup>16</sup>
- ▶ Implementing the above obligations, including taking legal, administrative, and other measures, including measures to prevent and punish illegal conduct.<sup>17</sup>
- ▶ Further, in order to adhere to Basel decisions I/22, II/12 and III/1 Parties must not allow the export of ships to non-OECD countries from OECD countries.
- ▶ *And, if the Parties were to adopt a requirement for a Termination Passport as suggested above, a Party would not allow the recycling of any vessel that did not possess a Termination Passport.*

**Transit states likewise have similar obligations to ensure that the above-mentioned obligations are fulfilled.** Any doubt about their jurisdiction is erased once one looks at the specific right to deny consent to a transboundary movement provided transit states,<sup>18</sup> and especially when one sees that *any Party* that can exercise jurisdiction to stop illegal traffic or contravention of the Convention is required to take appropriate legal, administrative and other measures to implement and enforce the provisions of the Convention.<sup>19</sup> Clearly a transit state is in a position to exercise such control.

---

<sup>11</sup> Art. 4(1)(a), Basel.

<sup>12</sup> Art. 9(1)(a), Basel.

<sup>13</sup> Art. 9(1)(e), Basel.

<sup>14</sup> Art. 4(2)(g), Basel.

<sup>15</sup> Art. 4(2)(d), Basel.

<sup>16</sup> Arts.4(2)(f) and (h), Basel.

<sup>17</sup> Article 4(4), Basel.

<sup>18</sup> Art. 6(4), Basel

<sup>19</sup> Art. 4(4), Basel

**(B) If a ship becomes waste in an area under the jurisdiction of a Party and then proceeds to the ship-breaking State;**

- ▶ The State where the ship becomes a waste, is the Party from which the movement is planned to be initiated or is initiated, and thus, the “State of Export” by definition. The ”State of Export” must comply with the above indicated obligations (listed under government owned scenario).
- ▶ However, the fact that there appears to be a ”State of Export” does not diminish the flag State’s responsibility in this scenario. Article 94(1) of United Nations Convention on the Law of the Sea (UNCLOS) requires that every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. Article 94(2)(b) of the UNCLOS also requires that States shall assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship. Thus, the flag State’s responsibility to fulfill its Basel obligations in this scenario continues simultaneous to that of the state where the ship becomes a waste.
- ▶ In this scenario the owner of the vessel is assumed to be a private entity.

▶▶ State of Export = State of Ownership

- ▶ Considering that shipowners are those responsible for transformation of a ship from a non-waste to a waste via intent to dispose, and thus are in fact the “generators” of said waste, it is only logical and consistent with the principles of responsibility established in the Basel Convention that the State Party that has jurisdiction over ship owners is the one that must assume responsibilities designated as “State of Export” under the Convention and fulfill such Basel obligations that hold shipowners accountable under the Basel regime. For it is clear that a ship owner will be either be the “exporter” or the “generator” under the terms of the Basel Convention and as is indicated<sup>20</sup> in the Convention those are the persons that must cause the “State of Export” to take action as official notifier. It stands to reason therefore that the “State of Export” must be the State where the generator (user) or exporter (owner) is established.

**(C) If a ship becomes waste on the high seas and proceeds to the ship-breaking State;**

- ▶ Flag state Parties, and Parties with jurisdiction over the ship owner have continuing obligations under Basel to act and prevent the export/import of ships in contravention of the Convention even under this scenario.
- ▶ Finally, very clearly the importing state has clearly defined obligations as noted in (A) above.

---

<sup>20</sup> Art. 6(3), Basel

**(D) If a ship becomes waste on the high seas and sails to a transit Party State and finally proceeds to the ship-breaking State;**

- ▶ The transit State has a right to be informed or be notified of shipments of Basel wastes through their territory and likewise have the right to consent to such shipments or not.<sup>21</sup> Such shipments that appear without such notification and consent, can be deemed illegal traffic<sup>22</sup> and can be acted upon to prevent such illegal behaviour.<sup>23</sup>
- ▶ The role of the Flag state Parties, and the Party with the jurisdiction over the shipowner still applies under this scenario based on their Basel responsibilities as discussed in Sub-section (A).

**(E) If the ship becomes waste in an area under the jurisdiction of the ship-breaking State;**

Clearly this is the most difficult loophole to close in a pragmatic way while retaining the spirit of the Basel Convention which should be the goal of this exercise. However, creative solutions can be employed. In the Termination Passport scenario above, a COP decision declaring that shipbreaking without a TP is not deemed to be Environmentally Sound Management would make it unacceptable for a shipbreaking state to process *any* ship without a TP approved 6 months in advance. And as one of the stipulations of a TP being that all hazardous materials must first be removed if the ship is disposed of in a non-OECD country, it is unlikely that circumvention of the intent and spirit of the Basel Convention and Basel Ban can occur while maintaining a viable cleaned ship steel recycling operation in developing countries.

**(F) If a ship becomes or is found abandoned or scuttled on land or at sea?**

The role of the Flag state Parties, and the Party with the jurisdiction over the shipowner over the scuttled ship should apply, if ever, more stringently in this case, as this is clearly a case of illegal dumping both under the London Convention, in cases of dumping at sea, and under Basel in cases where the dumping occurs on land or in near shore waters. Practical enforcement will be greatly enhanced by the Global Ship Ownership Registry indicated above.

**Party Obligation under the Basel Ban Amendment (Decision III/1)**

Note that in all of the above circumstances, all relevant state Parties must observe the obligation under the Basel Ban Amendment. The Basel Ban obligation states that *all*

---

<sup>21</sup> Art. 6(4), Basel

<sup>22</sup> Art. 9(1), Basel

<sup>23</sup> Art. 4(4), Basel

Annex VII Parties have a special obligation to: “*prohibit all transboundary movements of hazardous wastes which are destined for operations according to Annex IV A to States not listed in Annex VII.*” Note that the obligation is not solely that of the Annex VII State of Export, (including Owner States as State of Export) but would also include Annex VII port states, flag states, and transit states, as having an obligation to uphold the prohibition. Thus, Annex VII port states must prohibit the departure of any ships within its territory destined for shipbreaking in non-Annex VII States, and Annex VII flag states must do all they can to legally prohibit the transboundary movement of such ships. If any intention to dispose has been formed prior to departure from any Annex VII port state, the departure should be banned, and the moment any intention has been formed, Annex VII flag states must likewise prohibit the movement of the ship. Finally, those Annex VII states that have jurisdiction over, persons, including corporations, owners, charterers, brokers, shipping agents, captains and crew, to prevent/prohibit the export to non-Annex VII states also must take action to prohibit the ship-as-hazardous-waste from moving to a non-Annex VII country.

**IV. Potential or identified overlaps, gaps, or conflicts between the international treaties including the 1972 London Convention, the United Nations Convention on the Law of the Sea, the Basel Convention and the International Maritime Organization treaties, as well as the identification of situation where the domestic laws implementing the Basel Convention are difficult to enforce in accordance with the various obligations under the Convention, including environmentally sound management;**

*Potential Gaps or Conflicts*

Current notions regarding overlaps, gaps, or conflicts among the international instruments that touches upon the shipbreaking issue are more apparent than real. Rather, there has been great care in determining that the legally binding instruments are not in conflict with one another. The international instruments, e.g. London Convention, UNCLOS, etc. were not created by capricious whims of state parties. In the Basel context, subparagraphs 3 and 4 of Article 1 exemplify the thought that went through in avoiding conflicts with other instruments.

What has been evident, however, is that the culture within the organizations, particularly the IMO, are where the central conflict exists and not in the instruments themselves. This conflict has been translated very unfortunately into some conflicting non-binding guidelines – most notably the recent guideline of the IMO which is in direct conflict with the Basel Convention.

The IMO Shiprecycling Guidelines (“IMO Guidelines”), which was adopted this December 2003, is ripe with passages that illustrate the conflict within the present culture in the IMO towards Basel. The following are some examples:

- ▶ Instead of following the Basel definition of waste, the IMO proceeded to define “the operating life” of the ship bypassing Basel, and further obscuring within the IMO the issue of ship as wastes.
- ▶ In page 6 of the IMO Guidelines it is stated “these Guidelines accept that the obligation for environmental and worker protection in ship recycling facilities must rest with the recycling facility itself and with the regulatory authorities of the country in which the recycling facility operates. Nevertheless, it is acknowledged that shipowners and other stakeholders have a responsibility to address the issues involved.”

This is perhaps the most egregious error of the IMO Guidelines. It is a breach of responsibility and the height of hypocrisy to export vessels to the lowest wage communities and nations on earth and then state that the responsibility for doing the job right rests with these poor communities. Had these shipbreakers in fact done the job right, and had the infrastructure, legal, governmental, medical and otherwise really adequately existed in such countries, then the export would not have likely taken place. It is hypocrisy to first take advantage of a market made weak by cost externalities and then complain that it is the fault or responsibility of that market for not internalizing pollution costs. The polluter in this instance is the industry that has created the hazardous waste product, and those that seek to avoid the “Polluter Pays Principle” through exploiting weaker economies must be made fully responsible.

The shipbreaking problem is a global environmental problem. By squarely placing responsibility of this environmental problem over the shoulders of the importing or shipbreaking state, the IMO Guidelines effectively shields the generators of the waste, the shipowners and flag states, from any responsibility over this problem.

Polluter pays principle and product stewardship principle, assert a primary responsibility for end-of-life management of wastes with those producing and who have profited from the product in the first instance. This has now been accepted in the electronics and automobile and other industries. The growing trend worldwide is for producers of products to take full life-cycle responsibility.

Further, the Basel Convention often requires more from Parties, considering that State Parties to the Convention may at times be ship owners, or may assume jurisdiction over other entities such as waste brokers or ship management companies.

- ▶ In paragraph 6.1.8 the IMO Guidelines state, “Substances prohibited or restricted by international Conventions such as the Stockholm Convention on Persistent Organic Pollutants (POPs), the Montreal Protocol on Substances that Deplete the Ozone Layer, and the International Convention

on the Control of Harmful Anti-Fouling Systems on Ships, should not be used in the construction, refit and repair of ships.”

Whereas IMO wishes not to recognize obligations of the Basel Convention, they have no problem recognizing obligations of Stockholm Convention or the Montreal Protocol.

- ▶ In Section 8.1 the IMO conveniently omits that any transboundary movement of a ship containing hazardous wastes or deemed a hazardous waste under the Basel Convention must comply with all provisions of the Basel Convention and its Decisions and in any case should comply with the spirit of that Convention and its principles. The Basel Convention’s Decisions I/22, II/12 and III/1 preclude the export of hazardous wastes from member states of the OECD to non-OECD states.

Also since end-of-life vessels are hazardous wastes, the notification requirements of Articles 6 and 7 of the Basel Convention should have been incorporated in the IMO Guideline, and complied with prior to the selection of the recycling facility.

The above points illustrate the prevailing symptom of the culture of conflict within the IMO towards Basel. In order to ease the conflict the existing cooperation between the two international bodies must continue, and there is a critical need for the IMO to re-examine itself with regard this issue seeing that the Basel Convention preceded the existence of the IMO work on ships as waste. Basel parties who are also parties to the IMO need to coordinate their Basel focal points with their IMO or maritime authority to thresh out and address the shipbreaking issue with the Basel application. Unless there is an internal harmony within the domestic arena of IMO/Basel parties, the culture of conflict at the international level will persist.

### *Domestic Law Enforcement*

One of the prevailing domestic law difficulties with regard to shipbreaking apart from what has been addressed above in regard to establishing mechanisms for determining State of Export and establishing when a ship becomes a waste, is that most domestic shipping laws do not rightfully reflect their country’s Basel obligations. At this point it is not a direct matter of enforcement, but prior to that Basel parties must harmonize their domestic shipping laws and add the appropriate provisions for ships as waste in accordance with their Basel obligations. Once the Basel Convention decides on pragmatic steps to be taken to better enforce the Basel Convention with respect to ships, it will be necessary to train port authorities around the world to be aware of the need to manage ships that are moving as wastes.

### **V. What rules, if any, apply to waste, both cargo and operationally generated, on a ship destined for breaking?**

Article 1 (4), of the Basel Convention provides a clarification of the extent Basel's competence of operational waste discharge from ships:

“Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument, are excluded from the scope of this Convention.”

Basel therefore has no jurisdiction over operational discharges from ships as this is already covered under MARPOL.

With regard to waste cargoes, however, Basel has clear competence over the matter, as it is a waste. Likewise as is usually the case, a ship itself is contaminated in its structure with hazardous materials to the extent that it qualifies the ship structure itself as hazardous waste.

**VI. What range of possible solutions might address the issues identified in subparagraphs 1 to 5 and how could they be addressed and to what extent should this be done by the Secretariat of the Basel Convention or the International Maritime Organization or in cooperation between the International Maritime Organization, the International Labour Organization and the Secretariat of the Basel Convention?**

There is no single magical answer to resolve the questions of proper implementation of the Basel Convention with respect to ships. However, it is clear that creative solutions that are pragmatic, workable and consistent with the aims and spirit of the Convention are available for the Parties to adopt. Clearly the time to do so is upon us. Inaction is an endorsement of the status quo situation that currently places the primary burden for this global problem squarely on the shoulders of some of the world's poorest countries and communities. This status quo approach which has unfortunately been endorsed by the IMO is unacceptable. In the summary below we highlight the type and package of solutions already proposed above which will move us a very long way toward moving toward a pragmatic and correct implementation of the Basel Convention with respect to ships as waste.



***Summary***

While maintaining a viable steel recycling capacity worldwide, the continuing disproportionate and deadly management of end-of-life ships that are contaminated with hazardous materials must be halted as soon as possible. Currently, the intent and obligations of the Basel Convention, designed in fact to address this type of global environmental injustice, is not being implemented with respect to ships.

At the core of the intent and obligations of the Basel Convention is the clear establishment of obligations to minimize all transboundary movement of hazardous wastes through the establishment of national waste management self-sufficiency in all states and through the implementation of waste minimization techniques. Additionally, at the heart of the Basel Convention lies the need to eliminate the social injustice of allowing a free trade in toxic waste determine that economically weak regions of the world bear a disproportionate burden of the world's pollution and hazardous wastes.

While acting urgently, pragmatism in implementing the Basel Convention for ships is especially important, as it is well recognized that the unique nature of ships makes it easy to circumvent the intent and spirit of the letter of the Convention unless interpretive guidelines, decisions and mechanisms are agreed. Pragmatism is especially important also to maintain a viable steel recycling capacity in developing countries while ending the abuse of allowing toxic waste along for the ride in contradiction of the principles of environmental justice.

At the heart of the challenge with respect to ships lies the need to provide guidance to provide a transparent way to determine a) when a ship becomes a waste, and b) which states bear responsibility for controlling the transboundary movement of ships as Basel wastes. In particular, it is necessary to provide guidance on how to determine equivalence to "State of Export" under the Convention for cases involving ships.

To this end, we have suggested that non-binding interpretive solutions will work with the existing binding obligations under the Convention. We propose the use of COP decisions and guidelines to elaborate and operationalize the following interpretive mechanisms:

- a) **An automatic ship-as-waste trigger.**
- b) **A fail-safe requirement that importing states will not allow the processing of a ship on their territory unless certain clear Basel, IMO and ILO consistent criteria are met.**
- c) **An interpretation that the State with jurisdiction over the "exporter" and/or "generator" is de facto, the State of Export.**
- d) **The establishment of a Publicly Accessible Ship Ownership Registry**

By enacting such mechanisms we will proceed to rectify the current sad state of affairs in the global shipbreaking industry, which is manifestly in violation of the intent and purpose of the Basel Convention and move proactively toward achieving the realization of the following goals:

- a) more toxic ship breaking capacity and ship decontamination technology is developed in OECD countries;
- b) non-toxic (decontaminated) ship recycling capacity maintained, further developed and improved in developing countries;
- c) that steps are taken to ensure that developing countries do not receive a disproportionate share of the world's toxic waste from ships; and,

- d) that proactive steps are taken to ensure that all new ships are made with an absolute minimum of toxics on board.

*Lets work together to preserve the integrity of the Basel Convention, and use it as the tool it was designed as to promote environmentally sound management and environmental justice.*

**-- End --**

**Basel Action Network**

C/O Asia Pacific Environmental Exchange  
1305 4<sup>th</sup> Ave, Suite 606  
Seattle, Washington 98101  
Phone: 1.206.652.5555, Fax: 1.206.652.5750  
E-mail: [info@ban.org](mailto:info@ban.org)  
**Website: [www.ban.org](http://www.ban.org)**