

Basel Action Network / Greenpeace Legal Review of Industry Working Party on Ship Recycling Position Paper

15 February 2005

Introduction

What follows are annotations on the legal paper released by the Industry Working Party on Ship Recycling in October 2004. While we find that few, if any, of the Parties of the Basel Convention believe the industry's assertion that ships cannot be wastes under international rules, we find it necessary to refute this repeated false assertion and analysis due to the fact that it continues to be repeated in the trade and other press. Such misleading statements are used to attempt to render the Basel Convention impotent and irrelevant and as such are not helpful in terms of resolving the human rights and environmental abuses posed by global shipbreaking as practiced today. The export of hazardous ships to developing countries for cheap and dirty scrapping is precisely the type of trade that the Basel Convention was designed to prevent. It is crucial that to address this problem that the global community make use of the treaties we have and seek compliance with them, rather than try to run from their obligations. Legal obligations cannot be ignored simply because compliance will entail producers internalizing costs rather than externalizing these environmental and social costs to vulnerable populations and communities.



INDUSTRY WORKING PARTY ON SHIP RECYCLING¹

¹ The Industry Working Party on Ship Recycling was established in February 1999 in response to growing concerns expressed by governments, environmental groups and the industry itself.

The Industry Working Party comprises representatives from:

BIMCO
International Association of Dry Cargo Shipowners (INTERCARGO)
International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)
International Tanker Owners Pollution Federation (ITOPF)
International Transport Workers' Federation (ITF)
Oil Companies' International Marine Forum (OCIMF)

with active participation, as observers, also from

POSITION PAPER

The Application of the Basel Convention to Ships Destined for Recycling

1. It is clear from the wording of the “Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal” that the issue of ships on their way to recycling yards was not considered during the formulation of the Convention. However, the day-to-day operation of ships is specifically addressed by Article 1.4 which states:

“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.”

→ This Basel text above simply states that wastes that are covered by MARPOL (normal operations of a ship e.g. bilge water, fuel, sewage etc.) should be dealt with by MARPOL and not by the Basel Convention. It is a recognition of competence of another pre-existing treaty and draws a line between MARPOL wastes and other types of waste subject to the Basel Convention. There are only two such exemptions in the Basel Convention (MARPOL wastes and nuclear wastes). All other materials are considered wastes under the Basel Convention when they are intended for disposal.

2 The “normal operations of a ship” are covered by a set of international instruments, notably, in this context, the International Maritime Organization’s “International Convention for the Prevention of Pollution from Ships (MARPOL 73/78)”, in which a “ship” is defined (Article 2.4) as “a vessel of any type whatsoever operating in the marine environment ...”. This convention (and other international instruments) applies to ships while they are operational and is equally applicable whether ships are on their first voyage or on their last, under their own power, to a recycling yard. Both flag state and port state authorities monitor ships’ conformance and compliance with all applicable international instruments. It therefore follows that for as long as MARPOL is applicable to a ship, the discharge of wastes which derive from the normal operation of a ship are not within the scope of Basel.

→ The conclusion drawn here that if a ship is operational that it can only fall within the rules of one treaty alone is unfounded. Indeed, the IMO itself has various treaties that function simultaneously on various aspects of shipping. If what the industry is saying here were true, then the Basel Convention’s competency over ship cargo waste (probably the majority of traded wastes) would never exist simply because MARPOL exists at the same time. Of course such a conclusion is legally incorrect. Further, the argument blurs the line between wastes generated during the operation of the vessel, waste cargoes, and the vessel as a waste itself. The elimination of these clear distinctions can lead, as apparent in this instance, to absurd conclusions.

3. However, from recent meetings of the Parties to the Basel Convention it is apparent that some delegations and observer organisations are of the view that the Basel Convention is applicable to ships on their way to recycling yards.

→ Yes in fact, in the Basel meetings to date, we are aware of not one single Party that holds the industry position that a ship cannot be considered a waste when it is on its way to recycling yards. At the Seventh Conference of the Parties, this legal

clarification was asserted in Decision VII/26 adopted by consensus of all 160+ Parties present:

“Recognizing that many ships and other floating structures are known to contain hazardous materials and that such hazardous materials may become hazardous wastes as listed in the annexes to the Basel Convention.”

While the above statement alone only points to the fact that the materials in question may be hazardous waste and does not clarify when such materials become waste, the next relevant statement in decision VII/26, makes it abundantly clear that a ship can be a waste and a ship at the same time:

“Noting that a ship may become a waste as defined in Article 2 of the Basel Convention and that at the same time it may be defined as a ship under other international rules.”

The two statements together point to the conclusion reached by the Parties that end-of-life ships are, when intended to be disposed (article 2), *hazardous wastes* falling under the Basel Convention.

4. The shipping industry has consistently maintained the view that the Basel Convention does not apply to ships on their way, under their own power, to a recycling yard and that any “hazardous waste” which results from the recycling operation is created at the recycling facility. The rationale for this view is summarised in the following paragraphs.

5. In respect of its applicability, the Basel Convention states:

“Article 1

1. The following wastes that are subject to transboundary movement shall be “hazardous wastes” for the purposes of this Convention:

- (a) Wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex III; and*
- (b) Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit.*

2. Wastes that belong to any category contained in Annex II that are subject to transboundary movement shall be “other wastes” for the purposes of this Convention.

3. Wastes which, as a result of being radioactive, are subject to other international control systems, including international instruments, applying specifically to radioactive materials, are excluded from the scope of this Convention.

4. 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.”

6. If Article 1 were to apply to ships they would have to be deemed to be either

- a) “hazardous wastes” as defined in Article 1.1(a) above; or
- b) “hazardous wastes” as defined in Article 1.1(b) above; or
- c) “other wastes” as defined in Article 1.2 above.

a) **Article 1.1(a)**

7. The definition of “hazardous wastes” in Article 1.1 (a) embraces all wastes belonging to any category in Annex I to the Basel Convention **unless they do not possess any of the characteristics in Annex III**. The Annex III characteristics are therefore paramount in this connection and are quoted in full in the appendix to this paper. The characteristics define:

- Explosive
- Flammable liquids
- Flammable solids
- Substances or wastes liable to spontaneous combustion
- Substances or wastes which, in contact with water emit flammable gases
- Oxidizing
- Organic Peroxides
- Poisonous (Acute)
- Infectious substances
- Corrosives
- Liberation of toxic gases in contact with air or water
- Toxic (Delayed or chronic)
- Ecotoxic

A “ship”, defined in MARPOL 78 (Article 2.4) as “a vessel of any type whatsoever operating in the marine environment ...”, does not possess any of these Basel Convention characteristics.

8. It might be held that certain components of a ship, or materials used within those components to maintain the operation of the ship, possess one or more of the Basel characteristics. However, **the ship as a unit** does not possess any of the characteristics of “hazardous waste” and cannot, therefore, be held to be “hazardous waste”.

→ Such a statement is without merit as the Basel Convention is concerned with characteristics the waste presents not only during transport but from cradle to grave. Certainly a very toxic waste placed in a barrel does not become exempt from the Basel Convention simply because the barrelled waste “**as a unit**” does not possess any of the characteristics of hazardous waste, due to its containment, or due to the fact that a barrel still functions as a barrel.

It is well known that the Convention covers wastes that is packaged or contained that may not present the hazards and risk until it is recycled or disposed or is otherwise becomes bioavailable. The same situation applies to much of the hazardous materials on board a vessel. Indeed the “containment” provided by a ship and its structure, is even less secure than the barrel analogy. The point remains that Basel is not a Convention designed primarily to ensure secure transport, and thus is not a Convention that defines hazardous wastes by the manner of their containment.

It is obvious that asbestos, PCBs, heavy metals and hydrocarbons on vessels, whether they are integral to the vessel’s structure or shipbuilding materials or are residual materials -- paints, fuels, etc. are all Basel listed wastes that possess the characteristics of hazards including: flammable, toxic, ecotoxic, etc. (See in particular the Annex I categories of: Y21, Y26, Y31, Y29, Y36, Y45 and Annex III categories of H1, H3, H4.1, H6.1, H11, H12, H13). The Annex VIII list of specific hazardous wastes that might be onboard ships is even more lengthy. Such a listing can be found in the Basel Convention Technical Guidelines for the Environmentally Sound

Management of the Full or Partial Dismantling of ships on pages 89-91. See: <http://www.basel.int/ships/techguid.html>

9. There is a further category of characteristics covered by Annex III of Basel, "Other", defined as

"Capable, by any means, after disposal, of yielding another material, e.g., leachate, which possesses any of the characteristics listed above."

"Disposal" is defined in Basel Article 2.4 as "any operation specified in Annex IV" of the Convention.

10. Annex IV to the Basel Convention contains a list of disposal and recycling methods. It seems quite clear that, in the case of a ship sold to recycling yards, with delivery to take place on arrival at, and under the control of, the recycling facility, "disposal", as defined in Basel, is the full responsibility of the recycling yard purchasing the vessel. It is only when a ship ceases to be a "ship" as defined in MARPOL, that certain components of or materials within the ship, when isolated, might fall within the definition of "**Other**", or possess other Annex III characteristics.

→ Clearly, Ship-Recycling yards are Annex IV destinations. R4 (Recycling, Reclamation of metals and metal compounds) is the primary destination which defines the form of "disposal" involved in ship-scraping.

The premise herein boils down to the faith that a ship cannot be a ship and a waste at the same time. MARPOL defines what a "ship" is, but it does not define what a waste is nor does it claim that a functional ship cannot be a waste at the same time. Of course it can be. A ship becomes a waste under Basel, when it is disposed of, or when it is intended to be disposed of, or when it is required to be disposed of by national law regardless of whether it can move under its own power. Thus, when the shipowner intended to dispose of its vessel, the vessel became by operation of law, waste. The shipowner is responsible for this waste. Unfortunately, this is a conclusion the ICS wants to avoid, thus its insistence on disingenuous legal arguments.

11. Article 1.1(a), therefore, cannot apply to ships on their final voyage to a recycling yard.

→ This statement is incorrect for the reasons cited above. Already there is substantial case-law, primarily in the European Union and in India which points to consistency in interpreting the law by a wide variety of courts to conclude assuredly that Basel applies to ships as waste. Some of that case law can be found at: <http://www.basel.int/ships/relevcaselaw.html>

b) Article 1.1(b)

12. Article 1.1(b) defines hazardous wastes for the purposes of Basel as wastes not covered under paragraph (a), but defined as or considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit. There have been legal decisions in some countries which have determined specific abandoned ships to be "wastes", and to which the Basel Convention requirements and obligations have been applied. However, we are not aware of any domestic legislation which defines either ships in general, or specific ships, while they are operational in terms of MARPOL and other international Conventions, as "hazardous waste".

→ Domestic legislation does not, in most cases specifically mention ships, just as the legislation does not specifically mention computers, cars, etc. or all other forms of possible post consumer wastes. The domestic legislation relies on the clear application of Article 1.1(a) which includes ships for the reasons cited above, and therefore it is not necessary to specifically design domestic legislation for every form of post consumer wastes possible.

The OECD group of 30 countries, does in fact, place an entry in their green list of wastes which makes it manifest that unless an end-of-life vessel is cleaned of hazardous materials it is indeed a waste subject to control (amber). That entry is listed as follows:

“**GC030** ex 890800 Vessels and other floating structures for breaking up, properly emptied of any cargo and other materials arising from the operation of the vessel which may have been classified as a dangerous substance or waste.”

Further based on the Basel Convention, India has called for decontamination of ships for breaking and certification that it contains no hazardous wastes before entry into Indian ports and all ships should be thoroughly pre-cleaned prior to import. This case law can be found at: <http://www.basel.int/ships/relevcaselaw.htm>

13. Article 1.1(b), therefore, cannot apply to ships on their final voyage to a recycling yard.

→ This is a misleading statement. Even if we were to ignore the designation listed by the OECD above, Article 1.1 (b) is generally considered as applying only when Article 1.1 (a) does not apply. Since Article 1.1 (a) clearly does apply because a ship is considered by the Parties to be a waste, and it contains, as clarified by the Parties hazardous substances listed in Basel, and it is destined for an Annex IV destination (e.g. metals recycling), there is no need for recourse to Article 1.1 (b).

c) Article 1.2 – “Other Wastes”

14. For Article 1.2 to apply, a ship would have to fall under “a category contained in Annex II”. Annex II contains only two categories

Y46 *Wastes collected from households*

Y47 *Residues arising from the incineration of household wastes”*

It is therefore clear that ships cannot be defined as “other wastes” in terms of the applicability of the Basel Convention, and that Article 1.2 cannot apply to ships on their final voyage to a recycling yard.

15. While the shipping industry is confident in its belief that the Basel Convention cannot, and was never intended to, apply to ships on their final voyage to a recycling facility, the shipping industry has recognised that there are significant safety and environmental issues associated with ship recycling in respect of some recycling yards. The shipping industry has sought to address such problems in a constructive and practical manner, as evidenced by its publication of the “Industry Code of Practice on Ship Recycling”, its support for the “IMO Guidelines on Ship Recycling” and participation in the development of measures to encourage their adoption.

16. Ship recycling is an economic activity involving many stakeholders including shipowners, shipbuilders, ship recycling yards, flag states, port states and recycling states.

The issues arising from the activity are complex and cannot be resolved merely by controlling “the transboundary movement “ of ships to be recycled. In this respect, the Industry Working Party strongly believes that co-ordinated encouragement to implement the ILO Guidelines on Safety and Health in Shipbuilding, the Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships, adopted by the 6th meeting of the Conference of Parties to the Basel Convention and, in the context of operational ships, the IMO Guidelines on Ship Recycling, which together give guidance to all stakeholders involved in the life cycle of ships from construction to recycling, is the most appropriate and effective way to tackle the problems related to ship recycling.

→ The Basel Convention is designed not only to minimize the transboundary movement of hazardous waste but also to prevent economically motivated export of such wastes to developing countries. The fact that over 90% of global ship scrapping now takes place in developing countries and among some of the lowest wage, impoverished workforces on earth, is precisely the type of trade and waste management scenario that the Basel Convention was designed to prevent. It is clear that rather than face this exploitation issue, the shipping industry wants to place a green gloss on the status quo and continue to use Asia as its dumping ground, in effect externalizing, or passing on, real and heavy environmental and social costs to those least able to deal with such costs. They hope these false legal assertions contained in this document will allow an entire industry with a massive quantity of hazardous waste, to circumvent the Basel Convention.

17. The shipping industry remains ready and willing to work with others to ensure the safe and environmentally friendly recycling of ships wherever this activity takes place and looks forward to contributing to the deliberations of the joint IMO/ILO/Basel Working Group and participating in any consequential developments.