

ANNEX V

ILL-SUITED BASEL CONVENTION

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Annex V

Ill-suited Basel Convention

I. History and current overview

I.1. History:

Signed in Basel on 29 March 1989 under the aegis of the United Nations Environment Programme (UNEP) and in force since 5 May 1992, the Convention on the control of transboundary movements of hazardous wastes and their disposal has set itself the general goal “to protect, by strict control, human health and the environment against the adverse effects which may result from the generation and management of hazardous wastes and other wastes”. To achieve this objective it determines several priorities:

- to reduce the generation of hazardous wastes, and to develop treatment infrastructures in waste generating areas;
- to reduce and control authorized movements, in particular through the introduction of prior notification procedures for transit and destination States and through the use of movement documents, the criterion for movement authorization being “ensured environmentally sound management”;
- to prevent illegal traffic of hazardous waste, in particular towards developing countries by initially affirming a State’s right to refuse the importing of waste into its territory.

169 States are Parties to this Convention (only Afghanistan, Haiti and the United States of America have signed the Convention but have not ratified it).

During the third Conference¹ of the Parties, organised in Geneva on 22 September 1995, the Parties passed an amendment (Decision III/I) to the Convention called the “Ban Amendment”, under the terms of which transboundary movements of hazardous wastes “are only authorised between the Parties and other States which are members of OECD, EC, Liechtenstein”.

To date, 63 Parties have ratified this amendment (ratified by France in 2003). The amendment has not yet come into force, but is applied by the Member States of the European Union via the Community Regulation for application of the Convention.

Although the toxic waste crisis in Abidjan offered a platform for those in favour of rapid entry into force of the Ban Amendment, at the last Conference of the Parties in 2006, it was not followed by any announced additional signature or ratification and the debate focused on a technical level (quorum for its entry into force). On the other hand, some countries (Japan in particular) clearly expressed their opposition to the entry into force of this amendment.

Following after the Fifth Conference held in Basel in December 1999, the latest development of the Convention is the Protocol on Liability and Compensation originally provided by Article 12 of the Convention, and which sets up rules and procedures for comprehensive third party liability, based on the risk related to a particular activity, the damage victim only being bound to provide evidence not of fault but of cause and effect.

¹ Meetings are held approximately every 2 years (December 92, March 94, September 95, February 98, December 99, December 02, October 04). The last meeting was held in November 06.

The person having liability is the person giving notification of export, or the exporter if the notifier is a State.

The Protocol applies to “damage resulting from the transboundary movement of hazardous wastes or other wastes and their disposal including illegal traffic in those wastes” if it is suffered by a Party State to the Protocol, at every step of the movement of the hazardous waste. It does not apply to damage suffered during movements authorized under special agreements.

This Protocol has not yet come into force (ratification by 20 Parties is required, to date only 7 ratifications have been made [it has not been ratified by France]).

I.2. Sound environmental management:

The foundation principle of the Convention is the principle of “environmentally sound management”. This principle, which is not strictly defined but means “all practical steps to ensure that all hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes”, is an innovation by the Basel Convention. It is on this criterion that movements of wastes are examined.

The Convention defines a control system based on prior, informed consent, which uses a notification system.

Regarding imports:

- “any State has the sovereign right to ban the entry or disposal of foreign hazardous wastes and other wastes in its territory”;
- “the import of hazardous wastes from a non-Party State is prohibited”, unless it is the subject of an agreement or arrangement which “shall stipulate provisions which are not less environmentally sound than those provided for by this Convention”;
- the States must take steps to prevent imports if the criterion of “environmentally sound management” cannot be met.

Regarding exports:

- “Parties shall prohibit or shall not permit the export of hazardous wastes and other wastes to the Parties which have prohibited the import of such wastes” when such prohibition is notified;
- “Each Party shall require that hazardous wastes to be exported are managed in an environmentally sound manner in the State of import or elsewhere”.

I.3. The issue of recyclable wastes:

While the prohibited exporting of hazardous wastes represents an undeniably positive step for less developed countries, the lack of any distinction between recyclable waste and disposed waste has been contended on the grounds of the commercial value of recyclable wastes.

This measure may be liable to deprive some transition countries of secondary raw materials used by their industries under cost conditions that are beneficial for their economic growth. By prohibiting the export of recyclable hazardous wastes, the Basel Convention is decreeing commercial standards since these wastes are goods and a source of profit.

Report N° 343 issued by the French Senate specifies that “possible pernicious effects on the environment, in particular through the redirecting of flows of recyclable wastes, could lead to the

search for substitution primary raw materials, whose extraction and manufacture use energy under less satisfactory conditions from an environmental viewpoint than the recycling of certain ores". This point must be taken into consideration with respect to the dismantling of ships.

The decision on the environmentally sound management of ship dismantling taken at the Seventh meeting of the Conference of the Parties to the Basel Convention (25-29 October 2004) marks a true turning point in the UN approach to the issue of ship dismantling.

For the first time, it is mentioned that a ship may become a waste in the meaning of Article 2 of the Basel Convention while remaining a ship pursuant to other international regulations.

To become waste, there must be clear intention to dispose of the ship. While this intention may be easy to ascertain for government-owned ships and for merchant ships which are abandoned or have become unseaworthy subsequent to an accident at sea, this is not the case for most ships.

It is a rare event for a ship to be sold expressly for demolition. This is substantiated by the very few number of "Demolishcon" contracts used worldwide, i.e. the standard international contract drawn up by BIMCO for the sale of vessels destined for recycling or demolition. Ships are frequently sold to "cash buyer intermediaries". In this case, it is only after they have arrived and been moored close to dismantling yards in the territorial waters of the State having jurisdiction over these dismantling units that a contract for demolition is entered into with a breaking yard.

Finally, it is to be pointed out that for as long as a ship remains a ship and only a ship, all its transit movements at sea are covered by liability and compensation systems arising from various conventions. It would be desirable to provide greater legal provisions for this risk coverage when the ship becomes waste.

It must also be mentioned that the situation of ships within the Basel Convention is also governed by other articles which have not been repealed and which give overriding status to other international conventions over the Basel Convention:

"4.12. Nothing in this Convention shall affect in any way the sovereignty of States over their territorial sea established in accordance with international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law, and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments » regarding the right of innocent passage (foreign ships, whether merchant vessels or warships, have a right of innocent passage in territorial waters).

In October 2004, subsequent to the Seventh Conference of the Parties, the open-ended Work Group was requested to examine the practical, legal and technical aspects of ship dismantling for the purpose of arriving at a practical approach to the issue of ship dismantling, to submit a report on developments and to present proposals if possible on a legally binding solution to the Conference of the Parties at its Eighth meeting, giving consideration to the work conducted by the International Maritime Organisation and the joint work group.

The Eighth Conference of the Parties held in Nairobi from 27 November through December 1st 2006 did not bring any significant progress on this matter:

Around 80 countries were represented in addition to observer countries (United States) and several NGOs and international organisations.

From the studies carried out by the work group on the dismantling of ships, 3 points particularly stand out:

- Some countries vigorously defended the non-interference of the Basel Convention (and of the future IMO Convention) on dismantling facilities (permits, international standards, inspections).
- Evident lack of knowledge of the draft IMO convention by some of the Parties translates a total lack of ministerial coordination leading to the difficult conducting of coherent negotiations.
- At the other extreme, the European Union which had prepared draft decisions in Brussels, (Conference Room Paper) on the matter of ship dismantling might have given the impression that it was imposing its viewpoint on the other Parties without any prior consultation, and its proposal was given a very poor reception.

The next Conference of the Parties to the Basel Convention is to be held in Indonesia, in September 2008, under French Presidency.

II. From the Basel Convention to an IMO instrument.

Pursuant to the conclusions of the Environment Council on 24 June 2005, the draft legally binding instrument negotiated within the framework of the IMO should guarantee an equivalent level of environmental protection to the Basel Convention, while solving the problems raised concerning the application to ships of the Basel Convention and of the Regulation on transboundary shipments of wastes.

It is to be stressed that this level of protection is equivalent and not identical.

This implies a minimum baseline of requirements regarding the two following aspects:

- **a notification system:** The French position being to make flag States aware of their responsibilities, there should be exchange of information at State level. The Norwegian draft convention does not at the present time make provision for exchange of information between the competent authorities of the flag State and of the recycling State. The recycling State should have a sufficient time period (the proposed 14-day period appears too short) to notify any opposition against the shipment of an obsolete vessel before it arrives at the recycling facility.
- **environmentally sound management of the treatment of time-expired vessels:**
 - * The standards to be applied to recycling facilities need to be defined: they must be international, at least reproducing the main guidelines given by the IMO, ILO and Basel Convention. Careful attention must be given to the notion of an inventory of hazardous substances. Guidelines must also be drawn up on the matter of prior pollutant removal.
 - * This issue of international standards is related to the financial measures which need to be taken to upgrade the facilities concerned;
 - * A suitable definition of environmentally sound management for time-expired ships must be given in the new instrument. Support should be given to the definition proposed by the British authorities (*“The combination of practical standards, procedures and management controls applied to shoreline, dock and other ship recycling activities,*

ensuring the protection of human health and the environment from the potential impacts of all the operations carried out that may give rise to release of potentially harmful substances, including wastes, to air, water or land.”).

III. European Union: Implementation of the amendment via the Community².

Community Regulation n° 259/93 by the Council dated February 1st 1993, regarding the monitoring and control of waste shipments into and out of the European Community was adapted by a Regulation dated 20 January 1997 to give application to Decision III/1 of the Third Conference of the Parties.

New Article 16 specifies that exports towards countries to which the OECD control system does not apply, these exports being made pursuant to bilateral, multilateral or regional agreements or arrangements, shall be prohibited as from January 1st 1998.

The European Community proceeded with ratifying the Amendment to the Basel Convention on 30 September 1997. Pursuant to the provisions of the Community Regulation, it has been directly applicable in France since end January 1997.

A new Community Regulation (n°1013/2006) on the shipment of wastes was adopted on 14 June 2006 and published in the Official Journal of the European Union on 12 July 2006. It is intended to replace current regulation 259/93/CE and will be applicable effective from 12 July 2007.

This new legislation is part of the European strategy in the matter of waste prevention and recycling, which sets out to reduce the quantity of waste and the impact of generated waste flows on the environment.

Like Regulation 259/93, the new text lays down the procedures and control systems which apply to shipments of wastes in relation to their origin, destination, shipment itinerary and type of waste to be shipped. It concerns shipments between Member States, imports of waste from third countries and exports towards these same countries as well as all waste transits in the territory of the European Union.

III.1. General Objectives of the new Regulation:

The re-writing of Regulation 259/93 was essentially intended to codify European regulations on shipments of waste and to incorporate therein several changes that have occurred at Community³ and international⁴ level. In particular, by transposing in full the Basel Convention and the OECD Decision into Community law, Regulation 1013/2006 sets out to harmonise the rules applicable to international movements of wastes.

The new text does not fundamentally modify European legislation on shipments of wastes. Such shipments continue to be the subject of a specific control procedure which is dependent upon the type of wastes – whether hazardous or not – and the type of treatment they are to be given at the place of destination (recovery or disposal). It concerns all shippable wastes with the exception of radioactive wastes and wastes governed by special rules (e.g. wastes produced on board ships and aircraft).

² Memorandum by French ministry of defence (Administration, Judicial affairs) October 06 (Community application of the amendment)

³ The Commission had specified the terms of application of Regulation 259/93 in two decisions, one relating to the uniform movement document (Decision 94/774/CE of 24 November 1994), the other relating to the questionnaire to be completed by Member States under the reporting obligation (Decision 1999/412/CE of 3 June 1999).

⁴ Decision C(2001)107/Final of the OECD Council amending Decision C(92)39/Final by this same Council on the control of transboundary waste movements destined for recovery operations, with a view to harmonising the list of wastes drawn up by the OECD with the list set out in the Basel Convention.

Also, the new Regulation henceforth explicitly lays obligations on the generator of a waste, on the notifier and on the relevant shipping authority, to achieve environmentally sound management of waste. The Regulation defines the notion of “environmentally sound management”⁵ and, for guidance purposes proposes giving consideration to the various non-binding guidelines already existing at international level in this area.

III.2. Main additions brought by the new Regulation:

- Prohibited exports:

The principle of prohibition remains whereby exports from the Community of wastes destined for disposal are prohibited. As in Regulation 259/93, this prohibition does not apply to exports destined for EFTA Member countries which are also Parties to the Basel Convention⁶.

Article 36.4 of the New Regulation gives an important specification with respect to the previous text: the list of hazardous wastes – those whose exporting outside the Community is prohibited – is not strictly limiting. In some exceptional cases it is possible to qualify as hazardous a waste that is not given in the initial list (Annex V of the Regulation) if it displays any of the indexed properties⁷ and is present in a quantity higher than certain limit values⁸.

- Simplification of procedures:

To simplify the system in force, the new Regulation reduces the number of procedures. Henceforth the following subsist:

- a notification requirement and prior written consent firstly for any waste destined for disposal and secondly for the shipment of hazardous and semi-hazardous wastes (such as residues containing metals) intended for recovery operations;
- a general reporting requirement for the shipment of non-hazardous wastes (such as glass or paper) intended for recovery, which compels the person organizing the shipment to hold certain supporting documents⁹.

- Reinforcement of controls:

Particular attention is given to application of the legislation. The Regulation provides that controls of waste movements may be conducted at any place within the borders of the Community. Controls are to be made on shipment-related documents, identity of the parties and on the wastes themselves.

Aside from the classification in the green list of time-expired ships, properly emptied of hazardous wastes (GC030)¹⁰, the new Regulation does not deal with the dismantling of ships that have reached the end of their useful lives. Nonetheless, in its preambles, it recalls the need to ensure that the dismantlement of obsolete ships is managed safely and in environmentally sound manner¹¹. In this

⁵ Article 2 paragraph 8.

⁶ This concerns the following countries: Iceland, Liechtenstein Norway and Switzerland.

⁷ These properties are listed in Annex III of Directive 91/689/CEE dated 12 December 1991 which specifically governs hazardous wastes.

⁸ These limit values are fixed by the Commission (Decision 2000/532/CE).

⁹ Article 18.

¹⁰ CGO30 (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. »

¹¹ Preamble 35.

respect the Regulation refers to the specific (non-binding) guidelines adopted under the Basel Convention, and by the IMO and the ILO¹².

III.3. Role of the European Union within international instances¹³:

“All issues arising from the Basel Convention have been fully integrated by the Community. Pursuant to Article 300 of the Treaty establishing the European Community: “Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organisations, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it”. Authorisation to negotiate is therefore conferred by the Council on the European Commission which negotiates officially for and on behalf of the Community ...”.

“Within the Council, it is the “international environment group” which is responsible for examining the planned vesting of powers of negotiation proposed by the Commission; the final vesting of powers is then approved by the “environment” group, then by the Committee of Permanent Representatives and the “Environment” Council.

Nonetheless, during meetings of the Basel Convention, in particular at the Conferences of the Parties, the position may need to be adapted as and when negotiations progress; Community coordination meetings are therefore organised daily to update the position of the Community which will then be defended by the Commission in working groups or at plenary sessions.

In the matter in hand, an agreement was entered into between the Commission and the Presidency of the European Union: it is the Presidency which expresses the position of the Community and its Member States.

IV. The Basel Convention is supplemented by a series of regional agreements.

The Convention of Bamako, which was adopted under the aegis of the African Unity Organisation and came into force on 20 March 1996, prohibits the importing into Africa of hazardous and radioactive wastes by non-contracting members. It subjects all waste movements within the African continent to a system that is close to the procedures laid down by the Basel Convention.

Article 39 of the Lomé IV Convention entered into in 1989 between the European Union and 69 African, Caribbean and Pacific States (ACP) provides for the prohibition of exports of hazardous wastes by European Member States to ACP States. It also requires ACP States to prohibit such imports from the European Union or any other country, with the exception of returned treated wastes.

The Central American regional agreement on transboundary movements of hazardous wastes signed in Panama in 1992 obliges the Parties to prohibit the importing of hazardous wastes into the Central American region from countries who are not parties to the agreement.

¹² Annex VIII of the Regulation.

¹³ SGAE memorandum October 06 (French General Secretariat for European Affairs)

Documentary sources:

Site www.basel.int

French Senate: Report N°343 M. Robert DEL PICCHIA (*Annex to the minutes of the session held on 3 July 2002*).

MEDD memorandum (French ministry of ecology and sustainable development) of 10 July 06

The South Pacific Forum States entered into the Treaty of Waigani in April 1995 for the control of movements of hazardous wastes produced by member States, and prohibits imports into the territory of Island member States of wastes produced in other countries.

Signed in October 1996 at Izmir, the Protocol on the prevention of pollution in the Mediterranean Sea due to transboundary movements of hazardous wastes integrates a control system in the Barcelona Convention for the Protection of the Mediterranean Sea against Pollution that was adopted on 16 February 1996.

In April 1996, an agreement was signed in Moscow on this matter covering the geographical areas of the States within the Commonwealth of Independent States.

The Basel Convention triggered a series of agreements with regional coverage whose scope of application is at times broader, extending in particular to radioactive waste, and which form an important meshwork of rules regarding wastes.

The issue of wastes has also become a global problem; chapter 20 of the Action 21 Programme adopted in Rio in 1992 is devoted to the management of hazardous wastes.