COUNCIL OF THE EUROPEAN UNION

Brussels, 28 November 2012

16995/12

LIMITE

JUR	**606**
ENV	**906**
MAR	**139**
TRANS	**433**
COMAR	**19**
CODEC	**2856**

OPINION OF THE LEGAL SERVICE (*)

Subject: Proposal for a Regulation of the European Parliament and of the Council on ship recycling[1] - relationship between Regulation 1013/2006 on waste shipments, the Basel Convention, and the Hong Kong Convention

Introduction

1. During the course of its examination of the above-mentioned proposal, the Environment Working Party requested the opinion of the Council Legal Service with regard to the possible consequences of the proposal, in terms of the existing and future legal obligations of the Union and of the Member States under the Basel Convention. This opinion responds to that request.

2. The proposal is aimed at remedying the serious environmental issues associated with ship recycling[2], which generally takes place in poor conditions in less-developed countries, particularly in Asia. The legal framework in which the request for the present opinion has been made is somewhat complex, and the Legal Service will therefore first set out that framework, in as simple a form as possible, before dealing with the issues raised in the Working Party.

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1 COD 2012/0055.

2 In the literature, ""ship recycling" and "ship dismantling" appear to be used to refer to the same thing.

Legal framework

The Basel Convention

3. The Basel Convention on the control of transboundary movements of hazardous wastes and their disposal ("the Basel Convention") was first implemented in the Community by Council Regulation 259/93. The Basel Convention, to which the EU and all the Member States are parties, is currently implemented in EU law by Parliament and Council Regulation 1013/2006 on shipments of waste.

4. In addition to the provisions of the Basel Convention which are currently in force, it will also be necessary to consider, for the purposes of the present opinion, Decision COP III/1[3], generally known as the Ban Amendment, which is not yet in force. The operative part of this amendment is in the form of a new Article 4A, and its effect was summarised by the Basel Convention Secretariat as *"... providing for the prohibition of exports of all hazardous wastes covered by the Convention that are intended for final disposal, reuse, recycling and recovery from countries listed in annex VII to the Convention (Parties and other States which are members of the OECD, EC, Liechtenstein) to all other countries."*[4]

5. The substantive provision in Article 4A is supported by a new preambular paragraph 7bis, which reads as follows:
"Recognizing that transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous wastes as required by this Convention;"

[3] Throughout the present opinion, reference will be made to decisions of the Conference of the Parties to the Basel Convention. The abbreviation "COP III/1" therefore refers to decision number 1 of the third Conference of the Parties.

[4] In this context it should be noted that, according to the Commission, currently *"95 % of ship dismantling takes place in five countries (Bangladesh, China, India, Pakistan and Turkey)"* - see page 10 of the Impact Assessment, SWD(2012) 47 final.

6. In accordance with Article 17(5) of the Basel Convention, *"... Amendments adopted in accordance with paragraphs 3 or 4 above shall enter into force between Parties having accepted them on the ninetieth day after the receipt by the Depositary of their instrument of ratification, approval, formal confirmation or acceptance by at least three-fourths of the Parties who accepted them ..."*. The considerable debate that surrounded the interpretation of this provision was only finally resolved by Decision COP X/3 in October 2011, when it was decided that the number of ratifications required for the purpose of determining the majority needed for amendments to the Convention is to be determined in relation to the number of parties to the Convention at the time the amendment in question was agreed. Agreement on this issue has considerably improved the prospects of the entry into force of the Ban Amendment. According to the Basel Convention Secretariat, the Ban Amendment has been ratified by 73 States and although it is not yet in force, it is understood that, as a result of Decision COP X/3 only 17 more ratifications are required in order for the Ban Amendment to enter into force[5].

7. The Ban Amendment was approved on behalf of the Community by Council Decision 97/640 and has also been ratified by all the Member States. It has already been implemented in Union law by Regulation 1013/2006[6]. However, the prohibition on exporting hazardous waste in the form of end-of-life ships from the EU to developing countries is said to have proved difficult to enforce. It is understood that in practice it is sufficient for a shipowner not to declare his intention to discard until the ship is on the high seas and beyond the jurisdiction of any Member State.

[5] http://archive.basel.int/pub/baselban.html It is possible that this figure is out of date and that the number is in fact lower. Both China, a potentially significant recycling State, and Egypt, an obvious transit State in view of its sovereignty over the Suez Canal, have ratified the Ban Amendment.

[6] See Articles 34 and 36, together with recital 4.

8. It is also understood that in practice ships being sent for recycling will generally contain hazardous waste within the meaning of the Convention[7]. Moreover, COP VII/26 noted that *"... a ship may become 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 latter situation - also referred to in recital 35 of Regulation 1013/2006 - arises due to the fact that the concept of waste in Article 2 of the Basel Convention includes not only substances or objects which are disposed of but also those which are *"intended to be disposed of."* In the present context it is also worth noting that COP VII/26 invited *"... Parties, especially developed States, to encourage the establishment of domestic ship recycling facilities;"*[8]

9. Two other provisions of the Basel Convention which need to be mentioned here are Articles 11 and 26. Article 11(1) provides, in so far as material for present purposes:
"... Parties may enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with Parties or non-Parties provided that such agreements or arrangements[9] *do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention. These agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries. [...]"*
Article 26(1) provides that *"No reservation or exception may be made to this Convention."*

[7] See Articles 1 and 2 of the Basel Convention and Annexes I and III thereto.

[8] In this connection, see for example: http://archive.defra.gov.uk/environment/waste/strategy/documents/shiprecycle-strategy.pdf, which refers to *"...the development of UK capacity for recycling of end-of-life vessels in an environmentally sound manner"* as a strategy objective in that Member State.

[9] The Legal Service observes that the wording used here is relatively broad and is not limited to formal treaties. It could therefore extend to the authorisation mechanism envisaged by the proposal for including recycling facilities of third countries on a Union list.

The Hong Kong Convention

10. The Hong Kong Convention for the safe and environmentally sound recycling of ships ("the Hong Kong Convention") was adopted in 2009 under the auspices of the International Maritime Organization. It is not yet in force, and in view of the conditions for its entry into force laid down in Article 17, it is not expected to enter into force for some considerable time[10]. Unlike the Basel Convention, the focus of the Hong Kong Convention is not to restrict transboundary movements of waste - although as already noted, a ship may be "waste" for the purposes of the Basel Convention whilst at the same time being merely a "ship" for the purposes of other rules[11].

11. Instead, the Hong Kong Convention seeks to establish a system of approved recycling facilities in countries where ship recycling takes place. This system would be supported by, for example, requirements relating to surveys, inspections, ship recycling plans and inventories of hazardous materials. The Hong Kong Convention also differs fundamentally from the Basel Convention in that its material scope is essentially defined by means of the "flag State control" principle. A ship flying the flag of a Member State would therefore be caught by the Hong Kong Convention regardless of the port from which it sailed on its final voyage. In the case of the Basel Convention, it would be necessary for the ship to be within the jurisdiction of a Member State.

12. Crucially, therefore, the means by which a shipowner could escape control under the Basel Convention, by not declaring his intention to discard the ship until it was on the high seas, is irrelevant for the purposes of the Hong Kong Convention. Conversely, a shipowner wishing to evade the mechanisms of the Hong Kong Convention could always re-flag his ship, in accordance with Article 91 of the United Nations Convention on the Law of the Sea. The ship's flag is irrelevant for the purposes of the Basel Convention.

[10] See page 6 of the Commission's Impact Assessment, SWD(2012) 47 final, where it is stated: *"This is not expected to happen before 2020 at the earliest"*. The Legal Service is not aware of any information that would call that assessment into doubt, which may indeed be optimistic.

[11] The Hong Kong Convention excludes certain categories of vessels from its scope, for example, those weighing less than 500 gross tonnes, warships and naval auxiliary vessels.

13. For present purposes it is also important to note that Article 15(2) of the Hong Kong Convention provides:
"Nothing in this Convention shall prejudice the rights and obligations of Parties under other relevant and applicable international agreements."

The Commission proposal

14. The Commission proposal seeks to implement the Hong Kong Convention[12]. However, Article 29 of the proposal also seeks to remove ships that are within the scope of the Hong Kong Convention[13] from Regulation 1013/2006, by adding a further sub-paragraph to the existing list of exclusions in Article 1(3) of that Regulation. The effect of the proposal, if adopted, would therefore be that most "end-of life" ships leaving a port of a Member State to be recycled would no longer be covered by Regulation 1013/2006 and the procedures there laid down, notwithstanding the probable status of such ships as hazardous waste for the purposes of the Basel Convention.

15. This raises the following specific legal issues:
- would such an exclusion from Regulation 1013/2006 be in conformity with the Basel Convention?
- how would Member States (and the Union) go about continuing to implement the Basel Convention with regard to third countries which are not also parties to the Hong Kong Convention or which do not host an EU-authorised recycling facility?
- would such an exclusion from Regulation 1013/2006 raise any legal problems with regard to the Ban Amendment?

[12] The proposal is also accompanied by a proposal for a Council Decision requiring Member States to ratify the Hong Kong Convention (2012/0056 NLE). Recital 6 of that proposal for a Council Decision (examination of which has not yet started in the Working Party) reads:
" However, so far none of the Member States has ratified the Convention or acceded to it and only three Member States have signed it. Ratification of the Convention or accession to it by Member States would carry weight in the international arena and would speed up the entry into force of the Convention."

[13] For present purposes it should be noted that the proposal is essentially concerned with ships of over 500 gross tonnes, and references in this opinion to the material scope of the proposal are to be understood accordingly.

Legal analysis

A - Conformity with the Basel Convention

16. As indicated above, Article 11 of the Basel Convention permits Parties thereto to enter into other agreements regarding transboundary movement of hazardous wastes or other wastes with Parties or non-Parties *"... provided that such agreements ... do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention."* Moreover, such agreements must stipulate provisions which are *"... not less environmentally sound..."* than those provided for by the Basel Convention in particular taking into account the interests of developing countries.

17. Although it might be objected that the Hong Kong Convention is not an agreement regarding transboundary movement of waste, the Legal Service considers that such an objection would be unfounded. Whilst it is correct to say that the Hong Kong Convention does not use the concept of transboundary movement of waste, as already explained at paragraphs 8 and 10, above, a ship may be waste for the purposes of the Basel convention whilst at the same time being just a ship for the purposes of other rules. Article 11 of the Basel Convention is, in the opinion of the Legal Service, to be understood within its own terms of reference, and having regard to the relevant COP Decisions of the Basel Convention. The fact that other rules do not consider a ship to be waste is therefore irrelevant, if the ship in fact constitutes waste in accordance with the Basel Convention.

18. The authorisation contained in Article 11 essentially rests on the concept of equivalence. Without embarking on an exhaustive analytical comparison of the different approaches of the Basel and Hong Kong Conventions, it is clear that both instruments present different advantages and disadvantages from the point of view of environmental protection. Purely by way of illustration, the Basel Convention provides for a detailed prior informed consent procedure in respect of waste shipments, whereas the Hong Kong Convention provides for authorisation of a ship recycling facility by the receiving State. Under the Basel Convention, a State would be able to object to a particular waste shipment, which would not be the case with the Hong Kong Convention. It may also be relevant to consider the relative ease with which the Basel Convention is currently circumvented, which could arguably support the view that the Hong Kong Convention would be more effective in ensuring that ships are not recycled in an environmentally unsound manner, at least to the extent that re-flagging to avoid EU jurisdiction does not occur. In addition, with regard to EU-flagged ships sent for recycling from a third country to another third country, these are not presently covered by the Basel Convention, but would be caught by the Hong Kong Convention.

19. In this context, the Legal Service recalls that the EU and its Member States made a submission in 2011 to the Basel Convention's Open Ended Working Group-VII/12 on the environmentally sound dismantling of ships, which concluded as follows:
"As a preliminary assessment and taking a life cycle perspective, it can therefore be concluded that the Hong Kong Convention appears to provide a level of control and enforcement at least equivalent to the one provided by the Basel Convention for ships which are waste under the Basel Convention and for ships to which the Hong Kong Convention applies and to ships treated similarly pursuant to Article 3(4) of the latter Convention."

20. Although the EU position has been stated, at least on a preliminary basis, it remains nevertheless the case that this position is not the view of the Basel Convention Conference of the Parties as a whole, as reflected in COP X/17 which reads:

" 1. Notes that, while some parties believe that the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships provides an equivalent level of control and enforcement to that established under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, some parties do not believe this to be the case;

2. Encourages parties to ratify the Hong Kong Convention to enable its early entry into force;

3. Acknowledges that the Basel Convention should continue to assist countries to apply the Basel Convention as it relates to ships;"

21. Whilst the absence of an unequivocal view from the COP means the issue of equivalence is not entirely resolved, the Legal Service nevertheless considers the fact that the COP encouraged the Parties to ratify the Hong Kong Convention as reasonable justification for taking the view that the *"preliminary assessment"* of the EU and its Member States amounts to a good faith interpretation of the Basel Convention[14]. That view is, moreover, supported by the assessment carried out by the EU and its Member States in the submission made to OEWG VII/12, referred to above. It is important to stress, however, that that assessment related to the Basel Convention in its current form. The question of equivalence in relation to the Ban Amendment will be examined below.

14 See Article 31 of the Vienna Convention on the Law of Treaties:
"General rule of interpretation
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended."

22. For these reasons the Legal Service therefore concludes that the Hong Kong Convention, and EU legislation giving effect thereto, would be likely to satisfy the requirements of Article 11 of the Basel Convention in its current form, as regards States which are Parties to the Hong Kong Convention, or which (pending the entry into force of the latter Convention) host recycling facilities authorised in accordance with the proposed regulation. Obviously, the same cannot be said in relation to States which are not parties to the Hong Kong Convention, or which do not host facilities authorised in accordance with the proposed regulation. The Legal Service will now examine the situation with regard to such States, including transit States.

B - Application of the Basel Convention to States which are not Parties to the Hong Kong Convention, or which do not host recycling facilities authorised by the EU

23. As regards States in this category, the Member States' and the EU's obligations under the Basel Convention would continue to apply. The conditions laid down in Article 11 would not be fulfilled, since there would be no agreement or arrangement with such States. The same is true of transit States within the meaning of the Basel Convention. Consequently, since the Member States and the EU have obligations pursuant to the Basel Convention, which are currently implemented through Regulation 1013/2006, the simple exclusion of ships from that legislation, as the Commission has proposed in Article 29 of the proposal, would not be compatible with the Basel Convention.

24. Instead, what is required is a differentiated approach, in order to ensure that a ship which is being sent for recycling from a Member State will be dealt with in accordance with the Member States' and the EU's obligations under the Basel Convention, in circumstances where the State of destination or transit is not a Hong Kong Convention Party or does not host an EU-authorised recycling facility. In view of the obvious international regulatory context of Regulation 1013/2006 and the references there made to the Basel Convention, the Legal Service considers that the Court would be likely to accept judicial review of EU legislation in the light of the Basel Convention[15]. This means that there is an appreciable risk that the version of Article 29 as proposed by the Commission would be declared invalid by the Court, in so far as it has the effect of excluding certain ships from Regulation 1013/2006 regardless of the State of destination or transit.

15 For recent examples of this type of judicial review in the environmental field, see Cases T-338/08 *Stichting Natuur en Milieu v Commission* and T-396/09 *Stichting Natuur en Milieu Vereniging Milieudefensie v Commission,* judgments of 14.6.2012 (currently under appeal).

C - Legal problems with regard to the Ban Amendment

25. In this scenario, it would be necessary to assert that the regime to be put in place by the proposed regulation would also satisfy the conditions of Article 11 of the Basel Convention referred to at paragraph 9, above, even after the entry into force of the Ban Amendment. In this regard, the argumentation would be superficially similar to the justification given in relation to the current form of the Basel Convention, without the Ban Amendment.

26. The most obvious difficulty with this, however, is that it amounts to arguing that the proposed regulation's provisions concerning the recycling of ships in, for example, China or India, *"... are not less environmentally sound..."* than the outright ban required by the Ban Amendment in respect of those two States[16]. Conceptually, a prohibition appears on the face of it to be more protective of the environment than a regime of managed exports of hazardous waste. Moreover, this appears to be precisely the concern recognised by the new preambular paragraph 7bis, referred to at paragraph 5, above.

27. In addition, the Commission has stated in its Impact Assessment[17] that not only is there currently insufficient recycling capacity within the EU for all EU-flagged vessels which are currently recycled, but even the capacity that exists is under-used:
"It is noteworthy that even the limited existing European recycling capacity is not entirely used and that a number of investment projects for green ship recycling in Europe did not materialise. A majority of ship owners indeed prefers to have ships dismantled where the revenue from selling the ships is higher, thus making the establishment of a business case in the EU extremely difficult." (Emphasis added).
It goes without saying that considerations of an essentially economic nature do not meet the requirements of Article 11 of the Basel Convention.

16 Neither China nor India is included in Annex VII to the Basel Convention as it would result from the Ban Amendment.

17 SWD(2012) 47 final, at p. 6.

28. In the light of these difficulties, the Legal Service considers that considerable importance would have to be attached to the presumed advantages of the regime being envisaged by the proposed regulation in terms of enforceability, as compared with the difficulty of enforcing an outright prohibition. Since the current prohibition as laid down in Regulation 1013/2006 is apparently easily circumvented by shipowners, it could perhaps be argued that the special nature of ships justifies taking a different approach from the approach followed in respect of other hazardous waste. Greater legal certainty in this regard could only really come from an appropriate COP Decision, however[18].

29. Some final remarks in this section are called for in relation to the period pending the entry into force of the Ban Amendment. Although the Ban Amendment is not yet in force, and is therefore not formally binding, the Legal Service recalls that the principle of good faith is a rule of customary international law, which has been codified by Article 18 of the Vienna Convention on the Law of Treaties[19] thus:

"Obligation not to defeat the object and purpose of a treaty prior to its entry into force
A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

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

30. Given the circumstances of the Ban Amendment and the situations it is designed to deal with as referred to in the new preambular paragraph 7bis, the Legal Service considers that there is a serious risk that the simple exclusion of ships from Regulation 1013/2006 in the manner being proposed could amount to a breach of the obligation not to defeat the object and purpose of a treaty prior to its entry into force. As the Court has consistently held, *"The European Union must respect international law in the exercise of its powers..."*[20], and the Legal Service is therefore of the opinion that it would be prudent, at the very least, to seek a form of words that would not prejudice the application of the Ban Amendment as regards ships. The Legal Service is of course at the disposal of the Working Party to assist in this regard.

18 See Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties, at footnote 13, above. This would not preclude other possible action within the framework of the Basel Convention, such as an amendment to Annex VII.

19 See, as regards the application of this principle in the Union's legal order, Case T-115/94 *Opel Austria v Council* [1997] ECR II-39.

20 Case C-366/10 *Air Transport Association of America and others*, judgment of 21.12.2011, at paragraph 123.

Conclusions

In the light of the foregoing analysis, the Legal Service therefore reaches the following conclusions:

1) the Hong Kong Convention, and EU legislation giving effect thereto, would be likely to satisfy the requirements of Article 11 of the Basel Convention in its current form, as regards Parties to the Hong Kong Convention and States which host recycling facilities authorised by the EU;
2) to that extent, it would be lawful to exclude certain ships from the scope of Regulation 1013/2006;
3) Article 11 of the Basel Convention could not be relied upon as regards States which are not Parties to the Hong Kong Convention, or which do not host recycling facilities authorised by the EU;
4) it would be difficult for the Member States and the EU to rely on Article 11 of the Basel Convention, as regards the Ban Amendment, once that amendment enters into force, particularly in the absence of any appropriate interpretative Decision of the Basel Convention COP;
5) even prior to the entry into force of the Ban Amendment legal concerns exist with regard to compliance with the obligation in international law not to defeat the purpose and object of a Treaty.