



# delegate alert

## **Illegal: European Commission Cannot Unilaterally Remove Ships from Basel Convention Obligations**

*Independent Legal Experts and European Council's own Legal Counsel Warns of Illegality and Defeating the Intent and Purpose of the Basel Ban Amendment*

Written by the Basel Action Network in preparation for the Conference of Parties to the Basel Convention

### **The EU Flops on Basel Convention**

The European Union, has until now been a recognized champion of the Basel Convention and the Basel Ban Amendment since their inception. Yet, in what is clearly the most massive and egregious act of non-compliance in the history of the Basel Convention, the European Commission on 23 March 2012, forcefully turned its back on the Basel Convention and Basel Ban by proposing a new Ship Recycling Regulation which unilaterally withdraws end-of-life ships from EU Basel implementation legislation.

It is vital to remind the Parties that:

1. Never have the Basel Parties ever declared that ships are not a waste subject to the Basel Convention.
2. On the contrary, the Parties in Decision VII/26, declared ships as waste subject to the Convention when waste is hazardous.
3. At the last COP (10) the Parties agreed that not all Parties agreed that the Hong Kong Convention provided an equivalent level of control as that of the Basel Convention and that the Parties acknowledged that the Basel Convention should continue to assist countries to apply the Basel Convention as it relates to ships.
4. The Basel Convention does not allow unilateral actions to de-list certain hazardous wastes (only to add new hazardous wastes).
5. The Basel Convention's Article 26 allows no reservations or exceptions be made to the Convention (no unilateral exceptions).

The Commission's move to ignore the Basel Convention obligations for end-of-life ships was rubber stamped by a negligent European Parliament in an 18 April 2013 vote. Negligent is the proper word because there is clear and compelling expert legal opinion demonstrating that the Commission's ploy is illegal.

EU legal expert, Prof. Dr. Ludwig Krämer, the former head of the EU Commission's Waste Management Unit, concluded in his legal review of the question as follows:

*"The Commission Proposal constitutes a unilateral departure from the provisions of the Basel Convention that is not allowed by the Convention. The adoption of the Commission Proposal by the European*

*Parliament and the Council would thus constitute a breach of the EU's obligations under the Basel Convention and would therefore be illegal.”[1]*

The Center for International Environmental Law (CIEL) was also in agreement, concluding in their analysis that:

*“the EU’s Proposed Legislation attempting to unilaterally exempt a certain category of hazardous waste covered by the Basel Convention, namely end-of-life ships, from the control mechanisms of the Convention is illegal under international law and EU law.” [2]*

### **Leaked European Council Legal Opinion Warns of Illegality**

The widely respected newspaper in the UK, the Guardian, in fact received a legal analysis by the European Council’s Legal Services that warned European legislators against defeating the *intent and purpose* of the Basel Ban Amendment. In the interests of transparency BAN has posted this document. [3]

The Council Legal Services highlighted several legal problems with regard to the European Commission’s proposed regulation, the most concerning issues raised were with regards to the Basel Ban Amendment and the EU’s breach of its obligation to the Ban. The opinion states:

*“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...” 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.”*

### **Not a Legal Article 11 Agreement**

The legal analyses conducted by, Prof. Dr. Ludwig Krämer, CIEL and the Council Legal Services, all examined whether Article 11 can be utilized to exclude end-of-life ships from Basel Convention application. Article 11 of the Basel Convention allows for Parties to enter into bilateral or multilateral agreements, but such agreements *“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.”*

If one were to attempt to utilize the Hong Kong Convention as an Article 11 Agreement, major problems arise. First, the Hong Kong Convention is not in force and there is no guarantee that all EU countries or ship trading partners will ratify it. Second, the Basel Parties at COP10 could not agree that the Hong Kong Convention provided an equivalent level of control (e.g. stipulate provisions, which are not less environmentally sound). Third, as the Council Legal Services points out, while some in Europe have argued that Hong Kong, while different provides an form of equivalent level of control to the Basel Convention, it is simply not possible to stretch that equivalent level of control argument when also including the Ban Amendment in that assessment.

In fact, the Council Legal Services stated that:

*“...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”.*

Legal Services went on to say: “

*...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.”*

We must recall also that Article 11 requires, “in particular taking into account the interests of developing countries.” Yet it was primarily the developing countries at COP10 that could not agree that the Hong Kong Convention provided adequate protections which led to the conclusion in Decision 10/17:

*“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.”*

Indeed many legal scholars point out that there is no equivalency. For example, the Hong Kong Convention does not regulate downstream management of ship wastes or residues past the initial receiving facility. Further, the Hong Kong Convention does not allow for countries to refuse entry of vessels into their territories, does not look after the interests of developing countries, has no obligation to minimize transboundary movements of hazardous and other wastes, etc.

Finally, if one attempts to describe the new EU Ship Recycling Regulation as an Article 11 agreement that can only be correctly accomplished if all ship importers and transit countries are Parties to it. And likewise, the EU Ship Recycling Regulation does not cover primary aspects of the Basel Convention and thus is not a valid Article 11 Agreement. Further if it does not include the Ban Amendment, it is far removed from any notion of equivalency.

### **27 Member States all Now in Legal Hot Water**

Not only does the European Union as a political integration organization have a legal dilemma, now each Member State, which are also independent Basel Parties will have to reconcile the illegality of unilaterally acting in non-compliance with the Basel Convention. 28 Separate Parties will be in direct non-compliance, indicating 28 potential lawsuits, and 28 potential findings of non-compliance. Is this necessary? No, but worse than that, it is a turning back of the clock, on long established principles hitherto upheld by Europe simply to accommodate continued profits of one powerful industry at the expense of the health of the earth and impoverished and vulnerable laborers.

### **The Hong Kong Convention is not/will not be in Force at the Critical Time**

It is vital to remember that the Hong Kong Convention is not in force and there exists no clear timeline as to when it might be in force. What is known is that vessels nearing end-of-life now and over the next decade, will not be covered by the Hong Kong Convention.

Vessels reaching end-of-life in 2020 will have likely been built in or around 1990, which is 5-10 years after many of the most concerning hazardous waste materials were banned from use in shipbuilding in many respective shipbuilding states. Thus by the time the Hong Kong Convention enters into force the most severe hazardous waste transboundary movement issues will be over and moot. The next 5-10 years is therefore perhaps the most critical time for the global ship recycling industry due to the foreseeable obsolete ship inventory and the volume of hazardous wastes found in this vintage vessel. It is vital then, that Basel maintains its competency now and its application and enforcement is improved at once.

### **Hong Kong and Basel Should Co-exist to Solve the Ship Breaking Crisis**

One very clear means to improve the status quo is to immediately combine the best of both Conventions within national legislation. This is what it is hoped the EU will do.

The best of both Conventions can be melded into a seamless and effective co-existence. We have long listened to the arguments at the IMO and more recently among EU politicians and bureaucrats claiming that the Basel Convention simply does not work for ships. And it is well known that due to the ease at which ships move across borders, there are exceptional challenges when attempting to enforce Basel on ships, and in particular when ship owners ultimately make end-of-life decisions in route, outside port control.

BAN fully appreciates the unique nature of ships as waste; indeed this is an old argument, which could easily have been resolved by action taken at Basel level. But the shipping industry did not want the Basel principles to prevail and that was the real reason that there was a strong effort to wrest competency for ships from Basel and place it in the shipping industry clubhouse – the International Maritime Organization

(IMO). Rather than the Basel Parties working to clarify how the Basel principles and obligations could be applied to ships, the IMO demanded that they take over this issue despite it largely being an issue about waste management and not about ships. However abandoning Basel principles because of difficulties with implementation, which could easily be resolved, is an act of intentionally “throwing the baby out with the bathwater.”

While the Hong Kong Convention is devoid of the environmental justice principles imbedded in the Basel regime, the Hong Kong Convention *does* provide a distinct advantage of applying to flag states, where Basel only applies to exporting (port) states. Combining the strengths of the two Conventions provides the best of both worlds and the beginnings of a real solution.

The chart below provides guidance on how the two Conventions can easily coexist and protect the obligations of both Conventions. The legal regimes are not duplicative, but are instead complimentary. They need not, and should not apply to the same ship at the same time. The Hong Kong Convention provides exemptions to certain classes and sizes of ships, making it clear that Basel must always be in place for these exceptions and it needs to also apply whenever a ship is in a port and known to be a waste. The table below describes when each convention would apply in coexistence.

Hong Kong Convention Application	Basel Convention Application
1. Ships not covered by Basel (see column to the right) flying a HK Party State flag located anywhere in the world*	1. Ships containing hazardous materials flying BC Party State flag less than 500 GWT
*To respect the Ban Amendment, ships covered under HK only, should only be allowed to sail for recycling to Annex VII countries unless they have been pre-cleaned of hazardous wastes.	2. Government Ships containing hazardous materials
	3. Ships containing hazardous materials of any flag or size in a port or territorial waters of BC Party State when intent to be disposed is known

The above approach combined with a ship-recycling fund to level-the-playing field for all ship-owners, provides a true solution. See NGO Shipbreaking Platform Policy Document.[4]

## Conclusion

The Basel Convention is the only active international legal instrument currently applying to the transboundary movement and disposal of end-of-life ships. Already it has shown its effectiveness in preventing toxic ships like the *Clemenceau* from being dumped in Asia. And it has prevented numerous toxic ships from landing on the beaches of Bangladesh and India as the courts in those countries are implementing the Basel Convention for ships now and requiring them to be pre-cleaned prior to entry into their territories.

The EU move to undermine Basel rather than improve its application, is not only illegal, but a cynical slap in the face to all such efforts past and present. More work is clearly needed to better implement the Basel Convention. It is hoped that the EU will take the lead on this matter as a prime objective. With respect to EU legislation, there is a clear and rational way forward for creating practical and principled legislation that allows Hong Kong and the Basel Convention to rightly coexist, maintaining the integrity of both Conventions.

**We urge the European nations to halt at once the illegal and misguided notion of unilaterally removing ships from their Basel Convention application and instead work proactively to meld the best of the two regimes.**

**END**

[1] Dr. Ludwig Krämer’s [Legal Report](#)

[2] The Center for International Environmental Law [Legal Report](#)

[3] Council Legal Services [Opinion](#)

[4] [Shipbreaking Platform Plan for EU Regulation](#)