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Hazardous Wastes and Their Disposal
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**Matters related to the implementation of the Convention:
legal, compliance and governance matters:
international cooperation and coordination**

Legal analysis of the application of the Basel Convention to hazardous wastes and other wastes generated on board ships

Note by the Secretariat

1. The Open-ended Working Group, at its seventh session and in decision OEWG VII/13, requested the Secretariat of the Basel Convention to provide a legal analysis of the application of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, to hazardous wastes and other wastes generated on board ships. In accordance with that decision, a legal analysis was prepared by the Secretariat with the assistance of two consultants, which was published on the website of the Basel Convention on 4 April 2011. Several parties, in response to that decision, submitted their comments on the legal analysis within the agreed timeframe set out in that decision.¹
2. The revised legal analysis, contained in the annex to this note, has been prepared by the Secretariat in order to present a further analysis of the relevant legal issues examining the application of the Basel Convention to hazardous wastes and other wastes generated on board ships. The revised legal analysis supersedes the legal analysis dated 4 April 2011 and its appendix entitled “Wastes generated on board ships: technical paper on blending”.² The Secretariat consulted the Secretariat of the International Maritime Organization during the preparation of both legal analyses. Those legal analyses are presented in annexes I and II to the present note.
3. The question of the applicability of the Basel Convention to hazardous wastes and other wastes generated on board ships needs to be examined taking into account the relationship between its scope and the scope of the relevant international instruments governing such wastes, in particular those adopted under the auspices of the International Maritime Organization, such as the International Convention for the Prevention of Pollution from Ships of 1973 as modified by its Protocol of 1978. Therefore, this matter should be considered within the general context of cooperation between the

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** UNEP/CHW.10/1.

¹ UNEP/CHW.10/INF/17.

² The previous legal analysis and its annex will be found on the Basel Convention website (<http://www.basel.int/legalmatters/coop-IMO/index.html>).

Basel Convention and the International Maritime Organization, as discussed at the eighth and ninth meetings of the Conference of the Parties and reflected respectively in decisions VIII/9 and IX/12. Such inter-relationships are taken into account in the preparation of the revised legal analysis.

4. The legal analyses as contained in the annexes to the present note have not been formally edited.

Annex I

Revised legal analysis on the application of the Basel Convention to hazardous wastes and other wastes generated on board a ship

I. Background

1. The objective of this legal analysis is to examine the application of the provisions of the Basel Convention to hazardous wastes and other wastes generated on board a ship, in response to a request by the Open-ended Working Group to provide such a legal analysis as contained in its decision OEWG-VII/13.

II. Applicability of the Basel Convention to hazardous wastes and other wastes generated on board a ship

2. In Article 1 governing its scope, the Basel Convention defines “hazardous wastes” as wastes that are subject to transboundary movement and that belong to any category listed in Annex I to the Convention, as further elaborated in Annex VIII, unless they do not possess the hazardous characteristics contained in Annex III of the Convention. Also, they include wastes that are subject to transboundary movement and are not covered by the above definition but are defined as, or considered to be hazardous wastes by the domestic legislation of the Party of export, import or transit. Furthermore, wastes that belong to any category contained in Annex II that are subject to transboundary movement are “other wastes” covered by the scope of the Convention.

3. The Convention does not specify any process as to how and where hazardous wastes and other wastes are generated, except for the exclusion from the scope of the Convention “wastes which derive from the normal operation of a ship, the discharge of which is covered by another international instrument”, as set out in paragraph 4 of Article 1. Also, 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 the Convention pursuant to paragraph 3 of Article 1.

4. Subject to the above exemptions, hazardous wastes and other wastes generated on board a ship which conform to the definition of hazardous wastes and other wastes set out in Article 1 are considered within the scope of the Basel Convention.

5. Each State that is party to the Basel Convention is required to undertake its obligations with respect to hazardous wastes and other wastes generated on board a ship, subject to the above exemptions from the scope of the Convention, in its capacity as a flag State of the ship, a port State, or a State exercising its sovereignty over its territorial sea or exclusive economic zones under its national jurisdiction. Also, the Parties to the Basel Convention have collective obligations to handle such wastes, subject to the scope of the Convention, in accordance with the relevant provisions of the Convention.

6. The Party or Parties concerned, in their undertaking of the obligations concerning such wastes, should bear in mind the objective of the Basel Convention that is to protect, by strict control, human health and the environment from the adverse effects which might result from hazardous and other wastes, in particular the control of transboundary movements of hazardous and other wastes.

7. With regard to “wastes which derive from the normal operation of a ship, the discharge of which is covered by another international instrument”, issues associated with handling of such wastes under “another international instrument” and its relationship with the provision of the Basel Convention is addressed in section VI below.

III. General obligations with respect to hazardous wastes and other wastes generated on board a ship

8. Regarding the generation of hazardous wastes and other wastes on board a ship, a State party to the Basel Convention that is also the flag State of the ship or a port State or a coastal State is required to ensure that the provisions of the Basel Convention are applied to such wastes, subject to the scope of the Convention.

9. In its Article 4, the Convention sets out a number of the provisions governing the general obligations of each Party as well as collective obligations of Parties. In addition to the requirements to a Party or Parties concerning the measures to control transboundary movements of hazardous wastes and other wastes, Article 4 sets out also the requirements for each Party to ensure that the generation of hazardous wastes and other wastes within it is reduced to a minimum, as contained in subparagraph (a) of paragraph 2, which is applicable

to the flag State that is party to the Basel Convention with respect to the generation of hazardous wastes and other wastes on board a ship. In accordance subparagraph (c) of paragraph 2, the flag State that is party to the Basel Convention is required to ensure that persons on board a ship, such as the master, officers or crew involved in the management of hazardous wastes or other wastes generated on board the ship, take such steps as are necessary to prevent pollution due to hazardous wastes and other wastes arising from such management and, if such pollution occurs, to minimize the consequences thereof for human health and the environment.

IV. Transboundary movements of hazardous wastes and other wastes generated on board a ship

10. The Basel Convention provides for the obligations of a Party or Parties to undertake strict control of transboundary movements of hazardous wastes and other wastes and sets out the provisions governing the procedures for that purpose. Within the scope of the Basel Convention as defined in Article 1, its provisions governing transboundary movements of hazardous wastes and other wastes apply to hazardous wastes and other wastes generated on board a ship, except for “wastes which derive from the normal operation of a ship, the discharge of which is covered by another international instrument”.

11. The Basel Convention, in paragraph 3 of Article 2 states that “[t]ransboundary movement” means any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement.” Under paragraph 9 of that article, “[a]rea under the national jurisdiction of a State” means any land, marine area or airspace within which a State exercises administrative and regulatory responsibility in accordance with international law in regard to the protection of human health or the environment. In accordance with this definition, hazardous wastes and other wastes generated on board a ship at a port or in marine area under the national jurisdiction of a State and remain on board the ship for movement to or through an area under the national jurisdiction of another State, or to or through an area not under the national jurisdiction of any State, involving no less than two States, would constitute such transboundary movement.

12. For transboundary movements of such wastes, under subparagraphs (b) and (c) of paragraph 1 of Article 4, Parties must prohibit or not permit the export of hazardous wastes and other wastes to the Parties which have prohibited the import of such wastes, and it must prohibit or not permit the export of hazardous wastes and other wastes if the State of import does not consent in writing to the specific import, in the case where that State of import has not prohibited the import of such wastes.

13. Pursuant to subparagraphs (d), (e) and (f) of paragraph 2 of Article 4, each Party is required to ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes, and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement; it is required not to allow the export of hazardous wastes or other wastes to a State or group of States belonging to an economic and/or political integration organization that are Parties, particularly developing countries, which have prohibited by their legislation all imports, or if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner, according to criteria to be decided on by the Conference of the Parties at its first meeting; and it must require that information about a proposed transboundary movement of hazardous wastes and other wastes be provided to the States concerned, according to Annex V A, to state clearly the effects of the proposed movement on human health and the environment. The Parties concerned are required to undertake the above in respect of transboundary movements of hazardous wastes and other wastes generated on board a ship.

14. In accordance with paragraph 1 of Article 6, the State of export must notify, or must require the generator or exporter to notify, in writing, through the channel of the competent authority of the State of export, the competent authority of the States concerned of any proposed transboundary movement of hazardous wastes or other wastes. In accordance with paragraph of the same article, the State of import must respond to the notifier in writing, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information, and in accordance with its paragraph 3, the State of export must not allow the generator or exporter to commence the transboundary movement until it has received written confirmation that the notifier has received the written consent of the State of import, and the notifier has received from the State of import confirmation of the existence of a contract between the exporter and the disposer specifying environmentally sound management of the wastes in question.

15. Irrespective of the circumstances in which hazardous wastes and other wastes are generated, including the generation of such wastes on board a ship, as far as transboundary movement of such wastes that are within the scope of the Basel Convention is planned to be initiated or initiated, the Party that is the State of export is required to commence and undertake the above prior informed consent procedure through its competent authority set out in Article 6.

16. It should be noted that the flag State that is party to the Basel Convention could be different from a State of export exercising the national jurisdiction over an area (e.g. port, marine area) in which hazardous wastes and other wastes are generated on board a ship and from which transboundary movement of hazardous wastes or other wastes is planned to be initiated or is initiated. In case they are different, it might be necessary for the flag State and the State of export to ensure that, through their respective national legislation or administrative measures, the generator of hazardous wastes and other wastes on board a ship comply with the requirements under the Basel Convention thereby enabling the State of export to comply with the provisions of the Basel Convention.

17. However, there seem to be certain practical difficulties in such undertakings. While a State has jurisdiction over the ships flying its flag, a ship is not an extension of the geography of the State whose flag it flies, and therefore it appears difficult to argue that the ship is “an area under national jurisdiction”. In other words, it appears difficult to see how a ship can fall within the criteria used in defining “exporting State”, and consequently the same difficulty arises in seeing how obligations under the Basel Convention to exporting Party States could be seen to be obligations to ships flying the flag of Party States. Notwithstanding the above, further clarification might be needed as to whether there are shared responsibilities of a Party State exercising the jurisdiction over a geographical area in which hazardous wastes are generated on board a ship and the flag State of that ship which is Party to the Convention.

18. If, for some reasons (e.g. the requirement to obtain consent of the State of import within the time period specified in Article 6), the State of export cannot comply with the requirement of these procedures, it would constitute a violation of the provisions of the Convention, and such transboundary movement would be deemed illegal and the Party in question is required not to proceed with such transboundary movement. The State of export should not allow the hazardous wastes and other wastes generated on board the ship to proceed to the State of import or transit. Under paragraph 4 of Article 4, each Party is required take appropriate legal, administrative and other measures to implement and enforce the provisions of the Basel Convention, including measures to prevent and punish conduct in contravention of the Convention.

V. Hazardous wastes and other wastes generated on board a ship outside of national jurisdiction of any State, in particular the High Seas

19. Transboundary movements, as defined in Article 2, need to commence from an area under the national jurisdiction of a State (State of export). As such, if hazardous wastes and other wastes are generated on board a ship outside of the national jurisdiction of any State, such as in the high seas, there will be no “State of export” and the movement of such wastes on board a ship, which could pass through or arrive in an area of the national jurisdiction of a State, may not be recognized as transboundary movements under the Basel Convention. Consequently, the procedural requirements for the State of export, transit and import required for transboundary movements of hazardous wastes and other wastes under the Basel Convention, in particular the prior informed consent procedure, may not be triggered. This could be considered as a potential gap in the procedures for such transboundary movements under the Basel Convention. In order to address this gap, the role of a State with respect to ships flying its flag (flag State) might be further examined.

20. Under Article 94 of part VII on the high seas of the United Nations Convention on the Law of the Sea (UNCLOS), governing the duties of the flag States, every State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag (paragraph 1), and 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 (paragraph 2 (b)). In Article 217, the UNCLOS requires States to ensure compliance by vessels flying their flags or of their registration with applicable international, rules and standards, established through the competent international organization or general diplomatic conference, and with their laws and regulations adopted in accordance with the UNCLOS for the prevention, reduction and control of pollution of the marine environment from vessels and must accordingly adopt laws and regulation to take other measures necessary for their implementation. Flag States must provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs (paragraph 1).

21. In the case of generation of hazardous wastes and other wastes on board ships in the high seas, given the exclusive jurisdiction of a flag State over a ship flying its flag while it is in the high seas, consideration might be given to the following:

(a) Whether the flag State that is Party to the Basel Convention, by its internal law, should require the ship and its master, officers and crew to comply with the relevant requirements of the Basel Convention upon generation of hazardous wastes and other wastes on board a ship;

(b) Whether the flag State that is Party to the Basel Convention, in the absence of a State of export as defined in the Convention, should be requested to take appropriate measures to ensure the application of the relevant provisions, such as those listed in paragraph 2 of Article 4, acting as if it were a State of export, and to trigger the procedures normally required for transboundary movements of hazardous wastes and other wastes under the Convention;

(c) Whether the flag State that is Party to the Basel Convention, acting as if it were a State of export, might be requested to apply the provisions in Article 8 concerning the duty to re-import or and those under Article 9 concerning illegal traffic.

22. It could be argued that the case of wastes generated from non-normal operations of ships in High seas is rather theoretical. Practical difficulties in such undertakings as pointed out in paragraph 17 would be also relevant in this context. Furthermore, it should be noted that the international implementation of the measures identified in sub-paragraphs (a) to (c) above appear to require a new international instrument or the amendment of an existing one. Therefore further thought is needed in addressing these issues.

VI. Relationship between the Basel Convention and an international instrument governing the discharge of wastes derived from the normal operation of a ship

23. The Basel Convention excludes from its scope “wastes which derive from the normal operation of a ship, the discharge of which is covered by another international instrument” in accordance with paragraph 4 of Article 1. It should be noted, however, that hazardous wastes and other wastes, as defined in paragraphs 1 and 2 of Article 1 of the Basel Convention, could be generated on board a ship from the normal operation of a ship, in addition to the other activities and operations which might generate such wastes on board a ship. The Basel Convention neither defines the term “wastes which derive from the normal operation of a ship” nor identifies “another international instrument” that covers the discharge of such wastes. In order to clarify the scope of the application of the Basel Convention to hazardous wastes and other wastes generated on board a ship, it seems necessary to define “wastes which derive from the normal operation of a ship, the discharge of which is covered by another international instrument”.

24. The UNCLOS provides a general legal framework to govern matters of the law of the sea, including the protection of the marine environment, and its provisions governing the protection of the marine environment from pollution from ships call for a competent international organization or general diplomatic conference to set the applicable international standards and rules. In this context, the International Maritime Organization (IMO) and the international instruments developed under its auspices are of direct relevance to setting such international standards and rules on the prevention of pollution from ships for the protection of the environment.

25. Among such international instruments, the International Convention for the Prevention of Pollution from Ships of 1973 as modified by its Protocol of 1978 (MARPOL 73/78) appears to be the most relevant international instrument governing the discharge of wastes which derive from the normal operation of ships. MARPOL 73/78 applies, in accordance with paragraph 1 of Article 3 of the Convention, to ships entitled to fly the flag of a Party to the Convention and to ships not entitled to fly the flag of a Party but which operate under the authority of a Party. Pursuant to paragraph 1 of Article 1, the Parties to the Convention undertake to give effect to the provisions of the Convention and its annexes in order to prevent the pollution of the marine environment by the discharge of harmful substances or effluents containing such substances in contravention of the Convention. Detailed regulations for the prevention of pollution are set out in the annexes to the Convention which covers such areas as the prevention of pollution by oil (Annex I), the control of pollution by noxious liquid in bulk (Annex II), the prevention of pollution by harmful substances carried by sea in packaged forms on the freight containers, portable tanks or road and rail tank wagons (Annex III), the prevention of pollution by sewage from ships (Annex IV), and the prevention of pollution by garbage from ships (Annex V).

26. Regarding the “normal operation of ships”, while MARPOL does not define this term in the main text of the Convention, in regulation 1 of Annex V of MARPOL, the term “garbage” is defined to mean “all kinds of victual, domestic and operational wastes [...], generated during the normal operation of the ship and liable to be disposed of continuously and periodically except those substances which are defined or listed in other Annexes to the present Convention.” The Protocol of 1997 to amend MARPOL, in paragraph (8) of regulation 2 of its Annex VI, defines the term “shipboard incineration” to mean that “the incineration of wastes or other matter on board a ship, if such wastes or other matter were generated during the normal operation of that ship.” In paragraph 5 of regulation 16 of the same annex, it is stated that “[s]hipboard incineration of sewage sludge and sludge oil generated during the normal operation of a ship may also take place in the main or auxiliary power plant or boilers, but in those cases, shall not take place inside ports, harbours and estuaries”.

27. Also, the UNCLOS, in paragraph 5 of Article 1 on the definition of the term “dumping”, in particular its subparagraph (b)(i), states that “dumping” does not include [...] the disposal of wastes or other matter incidental to, or derived from the normal operations of vessels, [...] other than wastes or other matter transported by or to vessels, [...] operating for the purpose of disposal of such matter or derived from the treatment of such wastes or other matter on such vessels, [...]”, which is identical to the definition of the same term contained in paragraph 1 of Article III of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.

28. Thus, the term “normal operation of ships” appears to be used in the existing international instruments relating to the protection of the marine environment from pollution from ships, without defining its meaning. It seems to indicate that the term is considered to be commonly understood in the normal meaning of those words, and used in conjunction with the assertion that incidental discharge of wastes generated from such “normal operation of ships” may be permissible. In this context, specific industrial processes or activities on board a ship (such as refining oil products through certain processes conducted in addition to the mere transportation of such goods on board a ship) might be considered distinct from the “normal operation of ships”, and if so considered, wastes generated from such industrial processes or activities outside of or additional to the “normal operation of ships” could fall within the scope of the Basel Convention.

29. Bearing this in mind, it should be noted that certain ships and ship types are designed and certificated to carry out industrial processes on board, as is the case, for example, with FPSOs (Floating Production and Storage and Offloading tankers).

30. Alternatively, normal operations could be defined in terms of those operations that are in conformity with Chapter IX of the SOLAS Convention (Management of safe operation of ships) which mandates that ships shall comply with the requirements of the International Safety Management (ISM) Code, requiring *inter alia* the auditing and certification by the flag State of a ship and of its managing company, and the implementation and maintenance of a safety management system establishing procedures, plans and instructions, including checklists as appropriate, for key shipboard operations concerning the safety of the personnel, ship and the environment. Although this suggestion may have natural merit in providing a viable definition of “normal operations”, it nevertheless has to be stressed that only the Parties to those instruments would have the authority to define terms

31. However, the boundaries between the “normal operation of ships” and the other activities or operations of ships may not be entirely clear and require further clarification. Such clarification could be given through defining the meaning of the “normal operation of ships” for the purpose of the relevant international instruments, or to identify those industrial activities or other processes operations other than the “normal operation of ships” possibly for regulating such activities or processes on board ships.

32. With regard to the scope of the exemption set out in paragraph 4 of Article 1, while the discharge of hazardous wastes and other wastes generated on board a ship from the normal operation of ships might be governed by the relevant provisions of MARPOL (or any other relevant instrument), the flag State (or a State under which authority the ship operates without the entitlement to fly its flag) that is party to the Basel Convention should act in conformity with, or at least not to violate, the relevant obligations under the Basel Convention regarding hazardous wastes and other wastes as defined in its Article 1 (such as those concerning environmentally sound management of hazardous wastes and other wastes), while applying the provisions of MARPOL (or any other relevant instrument) to such wastes. Also, if such wastes are subject to further movement, handling or disposal beyond the scope of the activities covered by MARPOL (or any other relevant instrument), such as disposal of wastes on land outside of reception facilities at port, the provisions of the Basel Convention would be applicable to those wastes.

Annex II

THE APPLICATION OF THE BASEL CONVENTION TO HAZARDOUS WASTES AND OTHER WASTES GENERATED ON BOARD SHIPS

(Secretariat of the Basel Convention, 4 April 2011)

Executive Summary

The present report is a legal analysis of the application of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (hereafter, the “Basel Convention”) to hazardous wastes and other wastes generated on board ships.

Article 1, paragraph 4 of the Basel Convention limits the material application of this treaty by providing that “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 the Convention. The International Convention for the Prevention of Pollution from Ships (hereafter, “MARPOL”) regulates the discharge of such wastes.

In the aftermath of the *Probo Koala* August 2006 incident, Parties to the Basel Convention have sought to clarify the meaning and scope of article 1, paragraph 4 of the Basel Convention, including the legal framework applicable to hazardous and other wastes generated on board ships as a result of certain practices. This incident also prompted some member States of the International Maritime Organization, through its Marine Environment Protection Committee (MEPC), to try to get a clearer understanding of such practices

Articles 31 and 32 of the Vienna Convention on the Law of Treaties on treaty interpretation help further clarify the terms of Article 1 paragraph 4 of the Basel Convention and provide a roadmap to guide Parties towards an agreed interpretation of this provision and, as a consequence, of the Basel Convention rules applicable to wastes generated on board ships. The present legal analysis offers a practical way forward by suggesting that Parties to the Basel Convention adopt an interpretative decision whereby they agree that:

1. “Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument ...” means wastes falling within the scope of MARPOL, whatever the process by which such wastes are generated.
2. “... are excluded from the scope of this Convention” means that:
 - a. the Basel Convention provisions related to environmentally sound management (ESM) do not apply in as far as MARPOL provisions are supportive of the objective of the Basel Convention: the ESM requirement does not apply as long as the MARPOL wastes are on board the ship, and the Basel Convention ESM provisions apply as soon as the MARPOL wastes are unloaded from the ship; and
 - b. the Basel Convention provisions related to transboundary movements do not apply until the wastes are unloaded from the ship and a transboundary movement subsequently takes place.

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Part III: Conclusions and Recommendations

Introduction

This report was prepared by the Secretariat with the assistance of consultants following the request to the Secretariat from the seventh session of the Open-ended Working Group (hereafter “OEWG”) contained in its decision OEWG VII/13 to provide a “legal analysis of the application of the Basel Convention to hazardous and other wastes generated on board ships.”

From a methodological standpoint, this report is divided into three parts. The first part presents the main legal provisions of the Basel Convention that apply to the control of transboundary movements of hazardous wastes and other wastes and their disposal.

The second part of this report consists of the legal analysis of the relevant provisions of the Basel Convention applicable to hazardous wastes and other wastes generated on board ships. In particular, it will identify the possible legal unclarity that Parties may face with respect to the application of the Basel Convention to wastes generated on board ships, the discharge of which is covered by another international instrument. The application of the general norms of treaty interpretation as contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties assists in shedding some light as to the meaning and scope of the mentioned relevant norms.

Finally, the last part of this document presents some conclusions and recommendations for future application. The purpose of such recommendations is to assist Parties to the Basel Convention reach an agreement on the application of its provisions to hazardous wastes and other wastes generated on board ships.

Annexed to this report, and for information purposes, is a technical paper on blending operations aimed at providing background information on some processes conducted on board ships that may result in the generation of wastes covered by the Basel Convention.

Part I: The Basel Convention provisions: an overview

The objective of the Basel Convention³ is to protect, by strict control, human health and the environment against the adverse effects which may result from the generation and management of hazardous and other wastes. The Convention applies a life cycle approach to relevant wastes: from their generation to their disposal. The Convention defines the terms “wastes”, “hazardous wastes”, “other wastes”. Basically, is a “waste” any substance or object that is intended to, is required to or is being disposed of (article 2). “Hazardous wastes” are those wastes that belong to any category listed in Annex I to the Convention, as further elaborated in Annex VIII of the Convention, unless they do not possess the hazardous characteristics contained in Annex III of the Convention. Parties may also define wastes as “hazardous” under their national legislation. “Other wastes” are those specified in Annex II to the Convention. It is thus the **nature** of the wastes involved - not the process by which they were generated, where they were generated or who generated them - that is the departing point to define the scope of the Basel Convention.

The Basel Convention provides essentially for two tracks to achieve its objective. The first track relates to the generation of hazardous and other wastes and requires that Parties ensure to reduce such generation to a minimum (article 4.2.a). The second track relates to the management of hazardous and other wastes and requires that such wastes be managed in an environmentally sound manner (hereafter “ESM”). The ESM requirement applies to the collection, transport and disposal of relevant wastes. Specific rules apply to transboundary movements (hereafter “TBM”) of hazardous and other wastes. It is also worth emphasizing that the ESM provisions of the Convention apply regardless as to whether a TBM occurred.

In the present legal analysis, it is less the provisions of the Convention related to the minimization of the generation of wastes than those related to ESM and TBM that will be the focus of attention. This being said, efforts aimed at regulating upstream activities and at ensuring that the use of hazardous substances in the production of goods is minimized or that production processes do not, as far as possible, lead to the release of hazardous substances are of direct relevance to the Basel Convention requirement of minimizing the generation of hazardous wastes.

1. The control procedure for transboundary movements of hazardous and other wastes

Article 4 of the Basel Convention lays down the main obligations of all States of import, States of export and States of transit, which are parties to this agreement. Article 6 more specifically addresses the specific procedures to be followed for transboundary movements of covered wastes to take place.

For the purposes of the Convention, ‘transboundary movement’ means:

“any movement of hazardous wastes and other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement”⁴.

Hence, the Basel Convention applies to those cases where the following three conditions are fulfilled:

1. the movement is **from** an area under the national jurisdiction of a State, and
2. the movement is **to** or **through** an area under the national jurisdiction of another States or **to** or **through** an area not under the national jurisdiction of any State, and
3. at least **two States** are involved in the movement.

An area under the national jurisdiction of one State includes land, marine areas or airspace where a State exercises, in accordance with international law, its administrative and regulatory competencies in regard to the protection of human health and the environment. Consequently, the norms of the Basel Convention are applicable to any movement of hazardous wastes and other wastes generated on the land, national airspace, territorial sea, exclusive economic zone and continental shelf of one State. For these norms to be applicable, this movement must also take place to or through these same areas of another State or to or through the high seas, the international seabed or the outer space, as long as a minimum of two States are involved in such activity.

It is important to note that this definition of “transboundary movement” affects the application of the Convention to wastes which are outside an area under the jurisdiction of a State, such as the high seas. The movement of hazardous wastes from the high seas or other areas outside the national jurisdiction of a State

³ *United Nations Treaty Series*, Vol. 1673, p. 57 *et seq.* The Basel Convention was concluded on 22 March 1989 and entered into force on 5 May 1992.

⁴ Article 2, paragraph 3 of the Basel Convention.

does not fall within the scope of the notion of transboundary movement of hazardous waste as defined by the Basel Convention. This is an important element to be kept in mind when elaborating a meaningful interpretation of article 1 paragraph 4 of the Basel Convention as unlike wastes generated on land, wastes generated on board ships can, in practice, be generated either within or outside an area under the national jurisdiction of a State.

Transboundary movements of hazardous wastes that fall within the scope of the Basel Convention must take place in accordance with the general requirements of the Convention contained in its article 4 and also in line with the Convention's provisions on the control procedure of TBM. Article 6 is the main provision of the Basel Convention governing this procedure – also known as the Prior Informed Consent (PIC) procedure –. In a nutshell, each Party appoints a competent authority responsible for administering this procedure at a national level. The State of export must notify in writing the States concerned about its intention to move hazardous wastes across their boundaries. This notification shall include detailed information on the nature and risks of the waste involved, the site of generation, the process by which it was generated, the method of disposal and the parties involved in the transboundary movement⁵. The written consent of the State of import and/or transit as well as a contract between the exporter and the disposer specifying ESM of the wastes in question are required prior to any movement of hazardous waste. If only one of the States concerned consider the waste to be moved as hazardous waste according to its national legislation, the duty to notify is still applicable⁶.

Any transboundary movement that takes place without the pertinent notifications to all the States concerned or the consent pursuant to the Convention, or when such consent is obtained through falsification, misrepresentation or fraud, it is considered illegal traffic under the Basel Convention⁷. Illegal traffic also occurs when the transboundary movement does not conform in a material way with the documents or when it results in the dumping of hazardous wastes or other wastes in violation of the Convention and of general principles of international law. The fact that Parties consider that illegal traffic is a crime says a lot about how serious the international community is to ensure that the TBM and ESM requirements of the Convention are respected.

2. The requirement of environmentally sound management of hazardous and other wastes

Equally fundamental to the aforementioned obligations is the duty to take all appropriate measures to ensure the environmentally sound management of hazardous wastes⁸. The notion of 'environmentally sound management' is defined in paragraph 8, Article 2 of the Convention. ESM entails:

“taking all practicable steps to ensure that hazardous waste 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”.

State Parties to the Basel Convention shall prevent the transboundary movement of hazardous waste if they have reasons to believe that such waste will not be managed in an environmentally sound manner⁹. Hence, by virtue of the principle of non-discrimination, transboundary movement of hazardous wastes is subject to the same rules and standards as those disposed of domestically within the generating State¹⁰.

The Basel Convention defines the notion of environmentally sound management in rather general terms¹¹, which calls for further clarification when applied in practice. Since the Convention does not foresee a specific standard to be followed in this regard, each State relies on its own understanding of what is environmentally sound¹². Nonetheless, the concept of environmentally sound management has been further developed by Technical Guidelines adopted by the Conference of the Parties. These guidelines assist Parties in the implementation of the Convention providing them with guidance with regard to operations involving the management of diverse types of hazardous waste. The technical guidelines provide recommendations on

⁵ Article 6 and Annex V A of the Convention. Article 7 prescribes that the obligation to notify foreseen in Article 6.1 is also applicable to the transboundary movement of hazardous waste involving one or more States of transit which are not Parties to the Basel Convention.

⁶ Article 6, paragraph 5 of the Convention.

⁷ Article 9 of the Convention.

⁸ Article 4.2, b), c), e), f), g) and h) of the Basel Convention. See also paragraph 8 of the same article.

⁹ Article 4, paragraph 2, e) and g), and paragraph 8. See also Article 6, paragraph 3, b) and Annex V A).

¹⁰ KUMMER, Katharina, *International Management of Hazardous Wastes. The Basel Convention and Related Legal Rules*, Oxford, Oxford University Press, 1995, p. 56.

¹¹ ABRAMS, David, “Regulating the International Hazardous Waste Trade: A Proposed Global Solution”, in: *Columbia Journal of Transnational Law*, Vol. 28, 1990, p. 828.

¹² GROSZ, Mirina & PORTAS, Pierre, “Environmentally Sound Management: Towards a Coherent Framework Bridging the Basel, the Rotterdam and the Stockholm Conventions”, in: *EcoLomic Policy and Law, Journal of Trade and Environment Studies*, Vol. 5/6, Special Edition 2008-2010, p. 48.

treatment and disposal methods form different waste streams and waste substances such as those consisting of or containing persistent organic pollutants (POPs), Polychlorinated Biphenyls (PCBs), Polychlorinated Terphenyls (PCTs) and Polybrominated Biphenyls (PBBs), 1,1,1 trichloro 2,2 bis (4 chlorophenyl)ethane (DDT), unintentionally produced polychlorinated dibenzo-p-dioxins (PCDDs), polychlorinated dibenzofurans (PCDFs), hexachlorobenzene (HCB), and certain pesticides. There are also specific technical guidelines for the environmentally sound management of plastic wastes and their disposal, partial or full dismantling of ships, used oil re-refining or other re-uses of previously used oil (R9), physico-chemical (D9)/ biological (D8) waste, and waste oils from petroleum origins and sources (Y8), among others¹³.

The aforementioned guidelines present some principles, which have been developed by different national regulations. These principles do not replace the norms agreed to in the Basel Convention. They merit consideration in assisting State Parties in developing their waste and hazardous waste strategies. They are: the source reduction principle, the integrated life-cycle principle, the precautionary principle, the integrated pollution control principle, the standardization principle, the self-sufficiency principle, the proximity principle, the least transboundary movement principle, the polluter pays principle, the principle of sovereignty and the principle of public participation¹⁴.

It must be noted that the requirement for Parties to undertake ESM of hazardous and other wastes exists independently of any TBM taking place. If a TBM does take place, the ESM requirement presumably applies as soon as the wastes are within the jurisdiction of the State Party to the Basel Convention, unless otherwise provided by the Convention.

¹³ The Guidance Documents establishes the criteria to assess environmentally sound management, which include the following: (a) There exists a regulatory infrastructure and enforcement that ensures compliance with applicable regulations; (b) Sites or facilities are authorised and of an adequate standard of technology and pollution control to deal with the hazardous wastes in the way proposed, in particular taking into account the level of technology and pollution control in the exporting country; (c) Operators of sites or facilities at which hazardous wastes are managed are required, as appropriate, to monitor the effects of those activities; (d) Appropriate action is taken in cases where monitoring gives indication that the management of hazardous wastes have resulted in unacceptable emissions; (e) Persons involved in the management of hazardous wastes are capable and adequately trained in their capacity.

Countries also have obligations to avoid or minimize waste generation and to ensure the availability of adequate facilities for their waste, so as to protect human health and the environment. In this context, countries should, *inter alia*: (a) Take steps to identify and quantify the types of waste being produced nationally; (b) Use best practice to avoid or minimize the generation of hazardous waste, such as the use of clean methods; (c) Provide sites or facilities authorised as environmentally sound to manage its wastes, in particular hazardous wastes". In addition, enforcement and monitoring could be enhanced through international cooperation.

¹⁴ See paragraph 10 of the Guidance Document.

Part II: The Application of the Rules on Treaty Interpretation to Article 1, paragraph 4 of the Basel Convention

1. Background

The Basel Convention contains provisions that limit its scope of application with regards to two specific types of wastes: article 1 paragraph 3 refers to radioactive wastes, while article 1 paragraph 4 refers to wastes generated on board ships. Article 1, paragraph 4 of the Basel Convention provides that:

“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”.

The discharge of wastes deriving from the normal operations of ships is regulated by the International Convention for the Prevention of Pollution from Ships (1973), as modified by the Protocol of 1978 and the Protocol of 1997 (MARPOL)¹⁵. MARPOL aims at preventing pollution of the marine environment by discharges into the sea of harmful substances, or effluents containing such substances from ships, whether from operational or accidental causes. MARPOL addresses pollution from ships in six annexes that foresee: oil (Annex I), noxious liquid substances (Annex II), harmful substances carried in packages (Annex III), sewage (Annex IV), garbage (Annex V), and air pollution (Annex VI)¹⁶. MARPOL, also contains requirement in relation to port reception facilities which must be “adequate” to meet the needs of the ships using them¹⁷. “Guidelines for ensuring the adequacy of port reception facilities” intended, inter alia, to “encourage States to develop environmentally appropriate methods of disposing of ships’ wastes ashore”, elaborate on the location and capacity requirements for the reception facilities¹⁸.

The need for legal clarity with regards to the application of the Basel Convention and of MARPOL to wastes generated on board ships was prompted by the August 2006 *Probo Koala* incident. Until then, Parties apparently had felt no need to clarify the respective scope and application of these two treaties. The *Probo Koala* incident raised in particular the following two questions:

1. Whether the substances transported by the *Probo Koala* and dumped in Cote d’Ivoire were “wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument”,

2. If so, to what extent, if at all, the Basel Convention provisions – both in relation to TBM and more generally ESM - applied to those wastes.

It is not the purpose of the present legal analysis to answer these questions in relation to this specific incident. This incident however illustrates some of the legal uncertainties pertaining to the application of the Basel Convention to wastes generated on board ships. These issues were especially discussed by States in the context of two international instances: the Conference of the Parties to the Basel Convention, in particular its eighth meeting (COP-8) and the International Maritime Organization’s Marine Environment Protection Committee, in particular its 56th session (IMO-MEPC).

(a) IMO MEPC

During the 56th session of IMO-MEPC, in July 2007, the Netherlands expressed concern about the lack of information and regulation on industrial production processes on board ships whilst at sea¹⁹. This country expressed uncertainty with regard to the practice of making alterations to oil cargo through ‘industrial processing’ or on-board chemical processes. In particular, it drew attention to the dumping of hazardous waste by the OBO carrier *Probo Koala* in the agglomeration of Abidjan, Côte d’Ivoire, in August 2006, which resulted in human suffering. Before proposing a new work programme on this issue, the Netherlands sought to receive from delegations any information on industrial processes on board ships from members States and non governmental organizations.

¹⁵ *United Nations Treaty Series*, Vol. 1340, pp. 61 et seq. and 184 et seq. MARPOL entered into force on 2 October 1983. It replaced the 1954 Convention for the Prevention of Pollution of the Sea by Oil.

¹⁶ Annex I of MARPOL entered into force on 2 October 1983, Annex II did so on 6 April 1987, Annex III on 1 July 1992, Annex IV on 27 September 2003, Annex V on 29 December 1988, and Annex VI on 19 May 2005. Whilst every State Party to MARPOL must accept Annexes I and II, consent to the rest of them is voluntary.

¹⁷ See for example regulation 38 of Annex I and regulation 18 of Annex II of MARPOL.

¹⁸ Resolution MEPC.83(44) of 13 March 2000

¹⁹ IMO, MEPC 56/22/2, of 13 April 2007.

The issue was again discussed at the 59th session of IMO-MEPC, held on 13-17 July 2009. The Committee recalled the Netherlands' request for information to submit details of any relevant industrial production processes on board ships. It acknowledged that no feedback had been given to that date²⁰. However MEPC 59 and Maritime Safety Committee (MSC) 86 agreed that blending on board during a sea voyage should be prohibited and thus instructed the Bulk Liquid Gas (BLG) Sub-Committee to develop mandatory regulation, and also as an interim measure issued MSC-MEPC.2/Circ.8 – Prohibition of blending MARPOL cargoes on board during the sea voyage. Subsequently, the BLG Sub-Committee has proposed for MSC 89 (to be held in May 2011) new SOLAS regulations to forbid blending during a sea voyage. In the meantime the Netherlands are additionally proposing to MSC 89 to also forbid any production (chemical) processes on board ships while on sea voyage.

It is worth mentioning here a European Maritime Safety Agency (EMSA) 2007 Report on the handling of cargo residues that confirms the absence of information on the precise nature and extent of the practices on board ships and in ports/terminals in relation to the handling of cargo residues²¹. A similar conclusion stems from the appendix to this legal analysis: the understanding of the type of waste generated by blending operations, of the processes used and of the magnitude of the practices remains inadequate²².

(b) The Basel Convention

Following the *Probo Koala* incident, Côte d'Ivoire sent a request for technical assistance to the Secretariat of the Basel Convention. The mission mandated by the Secretariat in response to this request established that “based on available information, the *Probo Koala* wastes exhibit the hazard characteristics of the Basel Convention”²³.

The incident of the *Probo Koala* was also the subject of thorough consideration during COP 8, which was held in Nairobi in 2006. During the Conference, noting that the *Probo Koala* vessel had entered the port of Amsterdam during its journey, the Netherlands stressed the importance of ruling out any future ambiguity on the applicability of international instruments. This Party also highlighted concern about future waste streams, which might end up in the marine environment if processing at sea became a normal practice²⁴. Most States called for the need to identify loopholes and grey areas in the Basel Convention and other international and national legal instruments related to waste and shipping, which might be exploited by unscrupulous business operators. The implementation of the polluter pays principle was also put forward. In addition, a number of preventive measures was suggested such as strengthened training and awareness-raising on hazardous wastes through the Basel Convention regional and coordinating centers; capacity building in ports to ensure adequate monitoring and control of shipments; information exchange between maritime, environmental and port authorities; capacity-building to strengthen regional cooperation in the management and disposal of hazardous wastes, including enhanced information sharing, rapid assessment centers at regional centers or selected hotspot areas; and increased political will to deal with hazardous waste issues. In addition, many States stressed the need to ensure the urgent entry into force of the “Ban Amendment”, as adopted by decision III/1 of the Conference of the Parties²⁵.

In light of the aforementioned incident and the issues it raised concerning the applicable legal framework, COP 8 adopted decision VIII/9 on co-operation between the Basel Convention and the International Maritime Organization. By virtue of this decision, the Conference of the Parties requested Parties and the Secretariat of the International Maritime Organization to provide information and views on:

- the respective competencies of the Basel Convention and MARPOL in respect to hazardous wastes and other wastes;
- any gaps between those instruments;
- any option for addressing those gaps.

²⁰ IMO, MEPC 59/24, p. 110, paragraph 23.4

²¹ European Maritime Safety Agency, Workshop Report, *EMSA Workshop on the handling of cargo residues*, Lisbon, 7 December 2007.

http://www.emsa.europa.eu/Docs/workshops/wsreport_20071207.pdf

²² WASTE ENVIRONMENT COOPERATION CENTRE, *Waste generated on board ships – A note on blending*, p. 2 annexed to this report.

²³ UNEP/CHW/OEWG/6/2, annex, paragraph 3, c).

²⁴ UNEP/CHW.8/16, p. 8, paragraph 38.

²⁵ At present, 69 State Parties have ratified the “Ban Amendment”. This amendment bans hazardous wastes exports for final disposal and recycling from what are known as Annex VII countries (Basel Convention Parties that are members of the EU, OECD, Liechtenstein) to non-Annex VII countries (all other Parties to the Convention).

Norway, Colombia and the Secretariat of the International Maritime Organization provided their views as a result.

(c) Views on the issue

In its response to the invitation contained in decision VIII/9, Norway stated that more information is needed on what kind of 'industrial processes' are carried out or are likely to be carried out on board ships, what kind of waste is generated from such processes and the options available for its management²⁶. It noted that wastes deriving from such processes on board ships are not covered by MARPOL. "For waste generated on board a ship, but presently not covered by MARPOL 73/78, the "export" provisions of the Basel Convention may be applicable if there is a case of "transboundary transport" of the waste in question"²⁷. Furthermore, Norway declared that if a waste covered by MARPOL is discharged to a port reception facility and the same waste is subsequently reloaded for shipment to another country, the shipment may be considered a case of "transboundary transport" under the Basel Convention. This State explained that a similar approach may be used with regard to offloading/reloading of waste generated on board a ship but not covered by MARPOL, since there may be situations where the offloading itself could already be considered a case of "transboundary transport" under the Basel Convention. It also stated that the norms of the Basel Convention on transit may be relevant when a ship containing such waste enters an area under the national jurisdiction of another State.

Colombia also provided a response in which it stated that MARPOL and the Basel Convention differ. The goal of MARPOL is to prevent pollution resulting from the discharge of harmful substances from ships, more specifically due to operational or accidental discharges of a ship. The establishment in its 6 annexes of rules on the construction, design and equipment of ships to avoid pollution resulting from harmful substances, regardless of whether these substances are merchandise or discharge, reveals its preventive character. What matters is that they are not discharged at sea, neither accidentally nor intentionally. According to this State, MARPOL becomes a tool of the Basel Convention with reference to the transboundary movement of hazardous wastes. If that movement is undertaken by ship, the norms applicable to that means of transportation shall be respected. Nonetheless, the main goal of the Basel Convention is the elimination of hazardous wastes, matter on which MARPOL has no interference. MARPOL establishes the need for State Parties to provide port facilities for the reception of ship discharge, as complementary to the prohibition to discharge at sea and to avoid operational problems derived from keeping those discharges on board. But this must not be interpreted as a means of eliminating waste regulated by the Basel Convention²⁸.

The response of the International Maritime Organization's Secretariat stated that one of the purposes of the MARPOL Convention is to "prevent the pollution of the marine environment by discharges into the sea of harmful substances, or effluents containing such substances from ships". The term "harmful substance" according to Article 2 refers to "any substance, which if introduced into the sea, is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea, and includes any substance subject to control by the present Convention"²⁹. It also noted that in the context of the *Probo Koala* incident, gasoline is a MARPOL Annex I cargo, while caustic soda solution would fall under MARPOL Annex II³⁰.

The invitation contained in decision VIII/9 was reiterated in decision IX/12 adopted by the ninth meeting of the Conference of the Parties and one more time in decision VII/13 adopted by the OEWG which invited the IMO to provide further comments, views or information on the elements contained in decision VIII/9. In response, the Secretariat of the IMO sent a letter dated 5 July 2010 to the Secretariat of the Basel Convention in which it explained that the **requirements of MARPOL for Parties to provide adequate reception facilities for oily residues did not extend to the environmentally sound management of the landed wastes/residues**. As a consequence, the Secretariat of the IMO expressed the view that advice and guidance from the Parties to the Basel Convention on the environmentally sound management of waste oil residues of ships would be a welcome development³¹.

(d) Conclusion

It has been stated that incidents like that of the *Probo Koala* are rare, although one should note that a similar incident took place in Norway on 24 May 2007, involving OBO carrier *Probo Emu*, sister ship of the *Probo*

²⁶ UNEP/CHW.9/INF/22, Annex B.

²⁷ *Ibid.*, p. 2. This State added that the London Convention and the London Protocol are also relevant instruments in relation to wastes generated on board ships.

²⁸ UNEP/CHW.9/INF/22, Annex A.

²⁹ UNEP/CHW.9/INF/22, p. 10

³⁰ *Ibid.*, p. 12.

³¹ IMO, T5/1.01, p. 2.

Koala, which resulted in an explosion at a terminal in Sløvåg, Gulen, and spread of toxic wastes to its inhabitants³². No matter how rare they may be, the management of hazardous wastes generated on board ships need to be internationally regulated since it may pose severe danger to human health and the environment.

In this regard, it is crucial to clarify the application of the Basel Convention and of MARPOL to hazardous wastes and other wastes generated on board ships. This was certainly the intention of those who drafted and agreed to article 1 paragraph 4 of the Basel Convention. By introducing this provision, negotiators made use of article 30 of the Vienna Convention on the Law of Treaties that foresees the application of successive treaties relating to the same subject matter and defers to the will of Parties as expressed in the treaty through the adoption of a “conflict clause”³³. Such a clause, as embedded in article 1 paragraph 4 of the Basel Convention, usually helps to determine the scope of apparently or possibly colliding treaties. Nevertheless, these clauses do not always succeed in clearly distinguishing the respective scope of application of these agreements. The terms in which those treaties are couched may be ambiguous and they may not be able to cover all the possible situations that could or will arise. In such cases, it becomes necessary to apply the general rules on treaty interpretation as contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties³⁴. Hence, the application of the general rules on treaty interpretation to article 1, paragraph 4 of the Basel Convention will help shed some legal clarity on the application of the Basel Convention or/and another legal instrument, in this case MARPOL, to those wastes generated on board ships.

2. Introduction to the Vienna Convention on the Law of Treaties

Articles 31 and 32 of the Vienna Convention on the Law of Treaties³⁵ contain the international general norms on treaty interpretation³⁶.

When interpreting a particular legal norm, the interpreter seeks to determine its meaning and scope³⁷. The International Court of Justice has stressed in its advisory opinion on the *Competence of the General Assembly*

³² http://www.dsb.no/Global/Farlige%20stoffer/Dokumenter/Report_accident_vest_tank.pdf

³³ Article 30 of the Vienna Convention states: 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States Parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

³⁴ Wolfrum, Rüdiger & MATZ, Nele, *Conflicts in International Environmental Law*, Berlin, Springer, 2003, p. 122.

³⁵ Article 31 of the 1969 Vienna Convention prescribes: “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”.

Article 32 runs as follows: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable”. *United Nations Treaty Series*, Vol. 1155, p. 331.

³⁶ Cf. *Territorial Dispute* (Lybian Arab Jamahiriya v. Chad), judgment of 3 February 1994, ICJ Reports 1994, p. 6, at p. 21 para. 41; *Oil Platforms* (Islamic Republic of Iran v. United States of America), preliminary objection, judgment of 12 December 1996, ICJ Reports 1996, p. 803, at p. 812, para. 23 and *Kasikili/Sedudu Island* (Botswana v. Namibia), judgment of 13 December 1999, ICJ Reports 1999, p. 1045, at p. 1059, para. 18.

on the Admission of a State to the United Nations that there is no sense in interpreting a clear text³⁸. However, legal norms are often ambiguous. The fact that the Parties to the Basel Convention have adopted two decisions seeking Parties' views on the respective scope of the Basel Convention and MARPOL as well as one decision requesting the Secretariat to elaborate a legal analysis of the application of the Basel Convention to hazardous and other wastes generated on board ships is clear evidence that article 1 paragraph 4 is not "a clear text". Thus, it becomes necessary to establish more accurately the meaning and scope of this legal norm³⁹.

In accordance with article 31 of the Vienna Convention, 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**. 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. 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. Finally, a special meaning shall be given to a term if it is established that the parties so intended. Article 32 authorizes the recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Articles 31 and 32 do not establish a legal hierarchy of norms with regard to treaty interpretation. The International Law Commission states with reference to article 31 that,

"Once it is established ... that the starting point of interpretation is the meaning of the text, logic indicates that 'the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' should be the first element to be mentioned. Similarly, logic suggests that the elements comprised in the 'context' should be the next to be mentioned since they form part of or are intimately related to the text. Again, it is only logic which suggests that the elements in paragraph 3 – a subsequent agreement regarding the interpretation, subsequent practice establishing the understanding of the parties regarding the interpretation and relevant rules of international law applicable in the relations between the parties – should follow and not precede the elements in the previous paragraphs. The logical consideration which suggests this is that these elements are extrinsic to the text"⁴⁰.

In order to properly interpret article 1, paragraph 4 of the Basel Convention, it is necessary to take into consideration all of its terms. This norm states that "[w]astes 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". The analysis of this norm will be broken into two segments. The meaning of "wastes which derive from the normal operations of a ship the discharge of which is covered by another international instrument" will be analysed on the one hand, and that of "are excluded from the scope of this Convention" on the other hand.

³⁷ Cf. *Request for Interpretation of the Judgment of November 20th 1950, in the Asylum Case* (Colombia v Peru), judgment of 27 November 1950, ICJ Reports 1950, p. 395, at p. 402.

³⁸ The Court declared: "If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter". *Competence of the General Assembly on the Admission of a State to the United Nations*, advisory opinion of 3 March 1950, ICJ Reports 1950, p. 4, at p. 8. See also *Fisheries Jurisdiction case*, (Spain v. Canada) jurisdiction of the Court, judgment of 4 December 1998, ICJ Reports 1998, p. 432, at p. 464, para. 76.

³⁹ Cf. SADAT-AKHAVI, Seyed Ali, *Methods of Resolving Conflicts Between Treaties*, Leiden, Martinus Nijhoff, 2003, p. 25.

⁴⁰ *Yearbook of the International Law Commission*, Vol. II, 1966, p. 220.

3. Interpretation of ‘Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument ...’

The first part of the norm under analysis needs to be interpreted as a whole in order to fully understand its meaning and scope. It refers to wastes which derive from the normal operations of a ship the discharge of which is covered by another international instrument.

Article 2 of the Basel Convention defines ‘wastes’ as “substances or objects, which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law”. “Disposal” is defined in Annex IV of the Convention and includes both operations that may lead to resource recovery, recycling, reclamation, direct re-use or alternative uses, and operations that may not lead to such possibilities.

The terms “normal operations” contained in article 1 paragraph 4 are not defined by the Basel Convention. As previously indicated, the process or operation by which a waste is generated is irrelevant under the Basel Convention. It is the fact that there is “waste”, more specifically “hazardous wastes” - as defined in article 1, paragraph 1 of the Convention - or “other wastes” – as defined in Annex II - that is the key concern. It is not pertinent for the Basel Convention whether such wastes are the result of a “normal” or an “abnormal” generating process, whatever these terms may mean.

An interpretation of Article 1, paragraph 4 cannot contradict the language of the treaty as a whole. The *travaux préparatoires* of article 31 of the Vienna Convention support this interpretation. In its draft articles on the law of treaties, the International Law Commission recalls the *dictum* of the Permanent Court of International Justice in the advisory opinion of the *Competence of the ILO to Regulate Agricultural Labour*⁴¹. The Court stressed that,

“In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense”⁴².

The phrase under consideration makes reference to wastes covered by another specific international legal instrument: MARPOL. As will be shown down below when analysing the *travaux préparatoires* of the Basel Convention, article 1, paragraph 4 was drafted to safeguard the MARPOL competence⁴³.

The analysis of the context of this phrase confirms this view. The context of a conventional legal norm comprises both the preamble and annexes of the treaty under analysis. The preamble provides the object and purpose in the light of which article 1, paragraph 4 should be addressed. The State Parties to the Convention are “determined 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”. In addition, they are “convinced also that the transboundary movement of hazardous wastes and other wastes should be permitted only when the transport and ultimate disposal of such wastes is environmentally sound”. In this respect, the State Parties express their concern about the existing illegal transboundary traffic in hazardous wastes as defined in Article 9 of the Convention. Their goal is to reduce the generation and transboundary movements of hazardous wastes to a minimum and that hazardous wastes are treated and disposed of as close as possible to their source of generation⁴⁴.

Taking into consideration the process by which wastes are generated would be at odds with the approach of the Basel Convention which has for primary objective to prevent the negative impact or “adverse effects” of such wastes on human health and the environment. Hence, there is apparently no justification under the Basel legal regime to treat differently the wastes stemming from “normal” or “abnormal” operations, whether on board or off board ships. In light of the object and purpose of the Basel Convention, the origin of the waste in question is not relevant as long as its discharge is covered by MARPOL. If indeed the use of the terms “normal operations” cannot be interpreted in isolation of the rest of the first part of the article, of the context of the Convention and without taking into account its object and purpose, it would appear that a better explanation for the use of the word “normal operations” in article 1 paragraph 4 is that this word was intended to serve as a marker to identify, without specifically mentioning it, MARPOL, as opposed to the Convention

⁴¹ *Yearbook of the International Law Commission*, Vol. II, 1966, p. 121.

⁴² *Competence of the ILO to Regulate Agricultural Labour*, advisory opinion of 12 August 1922, PCIJ, Series B, Nos. 2 and 3, p. 23.

⁴³ See *infra*, p. 16.

⁴⁴ Cf. RUMMEL-BULSKA, Iwona, “The Basel Convention and the UN Convention on the Law of the Sea”, in: RINGBOM, Henrik, *Competing Norms in the Law of Marine Environmental Protection*, London, Kluwer Law International, 1997, p. 84.

on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972, London Convention)⁴⁵. Such an understanding is also supported by the fact that MARPOL appears to follow the same approach as that of the Basel Convention: it is the listing in the Annexes that determines whether a specific substance is covered by MARPOL, not the process through which such substances are generated.

Whilst the only “authentic” interpretation of a treaty is said to be that provided by the Parties to the agreement in question⁴⁶, resort to subsequent agreements and subsequent practices in interpreting a treaty is based on the understanding that a treaty is by nature evolving and that current Parties should have a say in what it means to them. The International Court of Justice has so confirmed in its judgment on the *Costa Rica v. Nicaragua* case⁴⁷. For this reason, in accordance with Article 31, there shall also be taken into account any subsequent agreement and subsequent practice in the application of the Basel Convention that establishes the agreement of parties regarding its interpretation⁴⁸. Subsequent agreements between Parties (whether the Protocol on Liability and Compensation or COP decisions) do not shed light of Parties’ understanding of article 1 paragraph 4. Moreover, few conclusions can be drawn from Parties’ subsequent practice as to the meaning of article 1, paragraph 4. In addition, the information received so far coincides in concluding that, from the lack of additional data received, production processes on board a ship as that of the *Probo Koala* are rare.

A preliminary conclusion derived from the application of article 31 of the Vienna Convention is that the first part of article 1 paragraph 4 of the Basel Convention means “MARPOL wastes”.

Article 32 of the Vienna Convention authorizes the recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31.

The text of article 1, paragraph 4 was drafted by a representative of the IMO Secretariat and submitted at a late stage of the negotiations of the Basel Convention⁴⁹. It follows the same approach as paragraph 3 of the same article that excludes radioactive waste from the scope of the Basel Convention. There is no indication in the available travaux préparatoires as to the rationale for the choice - at the time - of the terminology “normal operations”. There is no indication, for instance, that negotiators intended to make a distinction as to the process by which the wastes were generated on board ships. One can actually question whether, at the time, industrial processes did take place on board ships and resulted in the generation of wastes. One can also question why it was proposed that such wastes should be treated differently, depending on whether they were generated as a result of “normal” or “abnormal” operations. As a consequence, the use of the terminology “normal operations” was most probably with reference to article III.1b of the London Convention on the Prevention of Dumping of Wastes and Other Matter, which contains a similar exclusion provision. Whereas a specific reference to MARPOL was not included in article 1, paragraph 4 of the Basel Convention, resorting to the term “normal” was a way to clarify that it is the wastes falling within the scope of MARPOL that were

⁴⁵ Article III of the London Convention specifies that “dumping” does not include “the disposal at sea of wastes or other matter incidental to, or derived from the normal operations of vessels ...”

⁴⁶ Applying the Latin adagio *eius est interpretari cuius est condere*, the Permanent Court of International Justice declared in its advisory opinion on the *Jaworzina case*: “it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it”. *Question of Jaworzina (Polish-Czechoslovak Frontier)*, advisory opinion of 6 December 1923, PCIJ, Series B, No. 8, p. 6, at p. 37.

⁴⁷ The Court stated: “It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties’ common intention, which is, by definition, contemporaneous with the treaty’s conclusion... This does not however signify that, where a term’s meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it.

On the one hand, the subsequent practice of the parties, within the meaning of Article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties’ common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied”. *Dispute over Navigational and Related Rights (Costa Rica v. Nicaragua)*, judgment of 13 July 2009, p. 1, at p.29, para.63-64.

⁴⁸ Caflisch defines practice as “*le comportement des acteurs de la scène internationale sur les plans interne (législation, actes administratifs) ou externe (pratique diplomatique), de même que la jurisprudence nationale et internationale*”. CAFLISCH, Lucius, “La pratique dans le raisonnement du juge international”, Société française pour le droit international, *La pratique et le droit international*, Colloque de Genève, Paris, Pedone, 2004, p. 126.

⁴⁹ UNEP/IG.80/4, p. 10, paragraph 15.

targeted by the exclusion provision⁵⁰. Hence, it is wastes whose discharge is covered by MARPOL that are excluded from the scope of the Basel Convention.

In conclusion, this legal analysis suggests that ‘Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument ...’ means wastes falling within the scope of MARPOL, whatever the process of their generation.

In the event Parties to the Basel Convention intended to make a distinction between the “normal” and “abnormal” operations by which MARPOL wastes are generated, it is worth noting that issues of industrial processes are considered within the International Maritime Organization as a safety issue⁵¹. As such, they are discussed at the IMO’s Maritime Safety Committee within the framework of the International Convention for the Safety of Life at Sea (SOLAS)⁵² - a convention whose scope does not extend to the “discharge” of wastes - and not within the context of MARPOL. Obviously, the work of the IMO MSC is not irrelevant to the Basel Convention in that the regulation of activities on board ships may serve the purpose of minimizing the generation of hazardous wastes, in particular if the amendment currently under discussion to prohibit industrial processes from taking place at sea is adopted. However, whereas MARPOL regulates “discharges”, as expressly specified in article 1 paragraph 4 of the Basel Convention, while SOLAS does not. It is not, therefore, a treaty falling under the scope of article 1 paragraph 4. Thus, any effort to define “normal operations” within SOLAS would not be directly relevant to clarifying the meaning of Article 1, paragraph 4 of the Basel Convention.

4. Interpretation of “... are excluded from the scope of this Convention”

The last part of article 1, paragraph 4 needs also to be interpreted in the light of articles 31 and 32 of the Vienna Convention of the Law of Treaties. Accordingly, an interpretation of “...are excluded from the scope of this Convention” cannot be made in isolation and needs to take into account the **terms** of the treaty in their **context** and in the light of its **object and purpose**.

Given the objective and purpose of the Basel Convention, it does not seem possible to assert in one block that the phrase “excluded from the scope of this Convention” means that no Basel Convention provision would ever apply to wastes falling within the scope of MARPOL. Such an interpretation would certainly be incompatible with the terms of the Basel Convention in their context and in light of its object and purpose, especially given the different scope of application of the Basel Convention and of MARPOL: MARPOL applies from the generation of wastes on board ships to their offloading in port reception facilities, while Basel Convention applies a life cycle approach - from the generation of wastes to their disposal, including their transboundary movement.

The generation of wastes on board ships is, by its very nature, an ongoing activity: it takes place in areas within and outside the national jurisdiction of states. The generation of such wastes can also be, by its very nature, a transboundary process. Moreover, once generated, the wastes on board ships move across borders and within and outside areas under national jurisdiction. For this reason, MARPOL does not operate a distinction as to where, geographically and legally, the waste is generated. Equally logical is the lack of regulation within MARPOL of the movements of such wastes generated on board ships. MARPOL’s basic principle is that wastes that cannot be discharged into the sea in accordance with relevant requirements must be delivered to port reception facilities, and port states must provide adequate port reception facilities to receive MARPOL wastes.

MARPOL defines the term “discharge” of harmful substances or effluents containing such substances in its article 2, paragraph 3, a) and b) as “any release howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying”⁵³. This article does not contain any

⁵⁰ This article states: “For the purposes of this Convention, b. "Dumping" does not include: (i) the disposal at sea of wastes or other matter incidental to, or derived from the normal operations of vessels, aircraft, platforms or other man-made structures at sea and their equipment, other than wastes or other matter transported by or to vessels, aircraft, platforms or other man-made structures at sea, operating for the purpose of disposal of such matter or derived from the treatment of such wastes or other matter on such vessels, aircraft, platforms or structures”. This convention entered into force on 30 August 1975. *United Nations Treaty Series*, Vol. 1046, p. 140.

⁵¹ There is a proposal to incorporate an amendment to Chapter VI, regulation 5 of SOLAS at the next Maritime Safety Committee 89th session to be held in May 2011, prescribing the prohibition of physical or chemical blending processes during sea voyage. The proposal refers to production processes as “any deliberate chemical process whereby a chemical reaction between the ship’s cargoes or cargo and any other substance results in a cargo with a new product designation”.

⁵² *United Nations Treaty Series*, Vol. 1184, p. 277 *et seq.* SOLAS Convention entered into force on 25 May 1980.

⁵³ It does not include: (i) dumping within the meaning of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, done at London on 13 November 1972; or (ii) release of harmful

environmentally sound management requirement once the waste is offloaded. In addition, all of MARPOL annexes contain provisions for the environmentally sound management of wastes generated on board ships only whilst at sea, but not on land once the waste is offloaded.

Neither do its specific obligations concerning reception facilities, as contained in regulation 38 of Annex I foresee the environmentally sound management requirement. The “Guidelines for ensuring the adequacy of port reception facilities” to which regulation 38 makes reference state that “the facilities provided by the port must allow for the ultimate disposal of ships’ wastes to take place in an environmentally appropriate way” (paragraph 3.3., 2). However, these guidelines do not contain specific provisions on the environmentally sound management of such wastes ashore⁵⁴.

In light of the object and purpose of the Basel Convention, the terms “excluded from the scope of the Convention” need to be interpreted as meaning that the norms of Basel Convention apply in as far as MARPOL no longer applies. However, in light of the object and purpose of the Basel Convention, it would seem that the exclusion of the application of the Basel Convention to MARPOL wastes can only take place in as far as the MARPOL requirements are supportive of the object and purpose of the Basel Convention. In addition, the interpretation of article 1 paragraph 4 should not lead to “a result which is manifestly absurd or unreasonable” (article 32 of the Vienna Convention). In other terms, the exclusion of MARPOL wastes (wastes which derive from the normal operations of a ship the discharge of which is covered by another international instrument) from the scope of the Basel Convention in article 1, paragraph 4, presupposes the environmentally sound management of such wastes and their strict control by MARPOL (in this case, the other legal instrument that covers such discharge), unless such an interpretation leads to imposing requirements that are “manifestly unreasonable”.

The process of interpretation will need to determine on one hand whether and how far the TBM requirements of the Basel Convention apply to MARPOL wastes and on the other hand whether the Basel Convention ESM requirements apply to such wastes.

As far as the Basel Convention TBM control procedure is concerned, MARPOL does not provide for a PIC procedure in instances where there is a transboundary movement of wastes generated on board ships. Such a requirement is not in line with the object and purpose of MARPOL and the way this treaty addresses issues of marine pollution. In addition, such a requirement would have, it seems, impossible practical implications. Basically, if the waste was generated within the area under the national jurisdiction of a State (e.g. its territorial waters) and then moved with the ship to or through another area under the national jurisdiction of another State, then the PIC procedure would be applicable; notification and consent would be required. If the same type of waste was generated in international waters and then “moved” with the ship to territorial waters, then the Basel Convention PIC procedure would not apply. Such an interpretation of article 1 paragraph 4, whereby the TBM control procedure applies to wastes generated on board ships, appears to lead to a result that it “manifestly unreasonable”. Notwithstanding the practical difficulties of determining whether wastes are generated within our outside areas under the national jurisdiction of a State and the lack of rationale for applying different legal regimes to such wastes depending on where they are generated, such an interpretation of article 1 paragraph 4 of the Convention would actually be an incentive for ships to generate such wastes in the high seas if they do not want the Basel Convention to apply. An interpretation of article 1 paragraph 4 that would not exclude the application of the Basel Convention TBM requirements to wastes generated on board ships appears manifestly unreasonable and should not be sustained.

What about the overall ESM requirements provided for under the Basel Convention, is their application to wastes generated on board ships excluded as well? As previously indicated, MARPOL regulates the management of such wastes until they are unloaded: its requirements pertaining to port reception facilities, although encouraging ESM, does not extend to ESM. In other words, MARPOL does not regulate the ESM of wastes generated on board ships once they have been unloaded. Given the context of the Basel Convention as well as its object and purpose, it is safe to conclude that “excluded from the scope of this Convention” cannot be interpreted as meaning that the Basel Convention ESM requirement does not apply to unloaded wastes. In conclusion, article 1 paragraph 4 should be interpreted in the way that the ESM requirement of the Basel Convention does not apply to wastes generated on board ships until they are unloaded. Once such wastes are unloaded from a ship, and provided they are “hazardous” or “other” wastes, the requirement that they be managed in an environmentally sound way in accordance with the provisions of the Basel Convention is fully applicable. In order to properly articulate the application of both Conventions, the Conference of the Parties could assess how far the current technical guidelines on environmentally sound management cover MARPOL wastes.

substances directly arising from the exploration, exploitation and associated off-shore processing of sea-bed mineral resources; or (iii) release of harmful substances for purposes of legitimate scientific research into pollution abatement or control.

⁵⁴ See IMO, MEPC.83/44 of 13 March 2000.

Part III: Conclusions and Recommendations

In light of the above legal analysis, it is possible to draw some conclusions and present some recommendations on a possible way forward.

This legal analysis was based on the assumption that State Parties to the Basel Convention need to reach an agreement on the application of this convention to hazardous wastes and other wastes generated on board ships. To do so, it is necessary to agree on the meaning and scope of article 1, paragraph 4 of the Basel Convention. In accordance with articles 31 and 32 of the Vienna Convention, this norm requires to be interpreted in two segments: a) “wastes which derive from the normal operations of a ship, the discharge of which is not covered by another international instrument”, on the one hand; and b) “are excluded from the scope of this convention”, on the other.

The term “normal operations” cannot be interpreted in isolation of the rest of the first part of the article. The process or operation by which a waste is generated is irrelevant under the Basel Convention as long as there is “waste” and “hazardous waste”, in the terms of article 1, paragraph 1. Article 1, paragraph 4 was drafted to safeguard MARPOL competence and thus refers to those wastes whose discharge is covered by MARPOL.

In light of the object and purpose of the Basel Convention, the terms “excluded from the scope of the Convention”, need to be interpreted as meaning that the norms of Basel Convention apply in as far as MARPOL no longer applies. However, in light of the object and purpose of the Basel Convention, it would seem that the exclusion of the application of the Basel Convention to MARPOL wastes can only take place in as far as the MARPOL requirements are supportive of the object and purpose of the Basel Convention. In addition, the interpretation of article 1 paragraph 4 should not lead to “a result which is manifestly absurd or unreasonable” (article 32 of the Vienna Convention). Whereas MARPOL contains provisions on environmentally sound management whilst at sea that are supportive of the objective and purpose of the Basel Convention, it does not have similar requirements for landed wastes. Hence, the Basel Convention requirements on environmentally sound management are applicable to port reception facilities’ operations, once the waste is offloaded. On the other hand, the non-exclusion of the Basel Convention requirements for the control of TBM of wastes generated on board ships leads to a result that appears to be manifestly unreasonable.

Inasmuch as both conventions aim to protect human health and the environment, it is important to ensure the articulation of the Basel and MARPOL Conventions. Their respective legal norms need to be harmonized to prevent the existence of gaps in the system. In particular, there is a need to improve the sea-land interface in order to achieve the environmentally sound management of hazardous waste generated on board ships. Cooperation between the IMO and the Basel Convention, through their secretariats, should be encouraged so as to ensure, on one hand, that the generation of hazardous wastes is minimized and, on the other hand, that hazardous wastes, once offloaded from ships, are treated in an environmentally sound manner (capacity building, assessment of how far the current technical guidelines on environmentally sound management cover MARPOL waste). Cooperation at the national level between the shipping industry, port authorities and environmental authorities is equally important in order to achieve the ESM of the wastes generated on board ships.