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**Conference of the Parties to the Basel Convention
on the Control of Transboundary Movements of
Hazardous Wastes and Their Disposal
Tenth meeting**

Cartagena, Colombia, 17–21 October 2011

Item 3 (c) (vi) of the provisional agenda**

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

**Comments received from parties on the legal analysis of the
application of the Basel Convention to hazardous wastes and
other wastes generated on board ships**

Note by the Secretariat

The annex to this document contains the comments received from parties on the legal analysis prepared by the Secretariat of the application of the Basel Convention to hazardous wastes and other wastes generated on board ships, pursuant to decision OEWG-VII/13. They have not been formally edited by the Secretariat and are presented as received.

* Reissued for technical reasons on 13 October 2011.

** UNEP/CHW.10/1.

Annex

Comments received from parties

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1. Argentina

"2011 - Año del Trabajo Decente, la Salud y Seguridad de los Trabajadores"



Misión Permanente
de la República Argentina

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La Misión Permanente de la República Argentina ante los Organismos Internacionales en Ginebra presenta sus atentos saludos a la Secretaría del Convenio de Basilea y en relación con el proyecto de decisión interpretativa contenido en el documento "Aplicación de la Convención de Basilea a los Desechos Peligrosos y otros desechos generados a bordo de buques", elaborado por la Secretaría del Convenio de Basilea sobre el control de los movimientos transfronterizos de los desechos peligrosos y su eliminación, tiene el honor de comunicar los siguientes comentarios:

El documento bajo análisis fue preparado en cumplimiento de la Decisión OEWG VII/13 de la Séptima Reunión del Grupo de Trabajo de Composición Abierta de las Partes del Convenio de Basilea (Ginebra, 10 al 14 de mayo de 2010). En efecto, mediante dicha Decisión se solicitó a la Secretaría que proveyera un análisis legal sobre la aplicación del mencionado Convenio a los residuos peligrosos y otros residuos generados a bordo de buques.

En particular, está en juego la interpretación del Artículo 1, párrafo 4 del Convenio de Basilea: "Los desechos derivados de las operaciones normales de los buques, cuya descarga está regulada por otro instrumento internacional, quedarán excluidos del ámbito del presente Convenio".

Sobre este punto, la Secretaría del Convenio formula la siguiente interpretación:

"Los artículos 31 y 32 de la Convención de Viena sobre el Derecho de los Tratados ayudan a clarificar los términos del apartado 1 del artículo 4 de la Convención de Basilea y ofrecen una orientación para guiar a las Partes a un acuerdo en la interpretación de esta disposición y, en consecuencia, de las disposiciones del Convenio de Basilea aplicables a los residuos generados a bordo de buques.

El análisis jurídico actual ofrece una forma práctica de avanzar por lo que se sugiere que las Partes del Convenio de Basilea adopten una decisión interpretativa por la cual están de acuerdo en que:

1. 'Los desechos derivados de las operaciones normales de los buques, cuya descarga esté regulada por otro instrumento internacional...' se refiere a los residuos que entran en el ámbito de aplicación del Convenio MARPOL, sea cual fuere el proceso por el cual esos desechos se produzcan.

2. '...quedarán excluidos del ámbito del presente Convenio' significa que:

a. las disposiciones del Convenio de Basilea relacionadas con el manejo ambientalmente racional (MAR) no se aplican en la medida en que las disposiciones del Convenio MARPOL apoyan el objetivo del Convenio de Basilea: el requisito de MAR no se aplica siempre y cuando los residuos MARPOL están a bordo del buque, y las disposiciones de MAR del Convenio de Basilea se aplican tan pronto como los residuos MARPOL se descargan de la nave, y

b. las disposiciones del Convenio de Basilea no se aplican hasta que los desechos se descargan del buque y el movimiento transfronterizo posteriormente se lleve a cabo."

Al respecto, la Argentina no encuentra objeciones que formular en relación con la propuesta de decisión interpretativa *sub examine*.

En efecto, la interpretación legal propuesta por el documento analizado es la que de hecho se viene aplicando a nivel nacional en la República Argentina, conforme se desprende de la Resolución SADS 315/2005 y del trabajo conjunto llevado adelante entre la Secretaría de Ambiente y Desarrollo Sustentable de la Nación y la Prefectura Naval Argentina.

La Secretaría de Ambiente y Desarrollo Sustentable firmó con la Prefectura Naval Argentina un Protocolo Particular Adicional al Convenio de Cooperación Mutua entre ambos organismos, que fuera publicado por resolución SADS 315/2005. El objetivo de la norma fue el de acordar un mecanismo de control y fiscalización de la gestión de los residuos peligrosos regulados por la Ley 24.051 de Residuos Peligrosos, en los ámbitos donde la Prefectura Naval Argentina ejerce su jurisdicción conforme la Ley 18.398 (Ley General de la Prefectura Naval Argentina, artículo 5° inciso a) sub-inciso 23).

Así, mientras los residuos se encuentren a bordo de buques, la autoridad competente en el ciclo de vida del desecho es la Prefectura Naval Argentina, que aplica el Convenio Internacional para Prevenir la Contaminación por los buques (MARPOL), aprobado por la Ley 24.089, y la ley 22.190 sobre "Régimen de Prevención y Vigilancia de la Contaminación de las Aguas u otros elementos del Medio Ambiente por Agentes Contaminantes provenientes de Buques y Artefactos Navales".

Cuando los residuos son descargados a tierra, o a otro buque que colecta y transporta los desechos a instalaciones de recepción en zona portuaria o extra portuaria, la autoridad competente en el ciclo de vida del residuo es la Secretaría de Ambiente y Desarrollo Sustentable, que aplica el Convenio de Basilea, aprobado por la Ley 23.922, y la Ley 24.051 de Residuos Peligrosos.

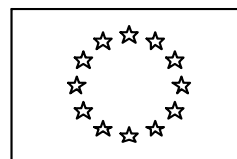
La Misión Permanente de la República Argentina ante los Organismos Internacionales en Ginebra reitera a la Secretaría del Convenio de Basilea las seguridades de su consideración más distinguida.

Ginebra, 7 de marzo de 2011.



SECRETARÍA PARA EL CONVENIO DE BASILEA
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Suiza

2. European Union



Brussels, 2011.06.30

Submission of the EU and its 27 Member States on the legal analysis regarding application of the Basel Convention to hazardous wastes and other wastes generated on board ships.

The EU and its Member States would like to thank the Secretariat of the Basel Convention for the useful legal analysis of the application of the Basel Convention to hazardous wastes and other wastes generated on board ships as well as for the opportunity to provide comments.

General comments

1. We consider that this legal analysis is really helpful in the process considering, with the hope of clarifying the application of the Basel Convention to hazardous wastes generated on board ships.
2. The EU and its Member States would welcome further explanation of the intended status of the document: a legal assessment for purely informative purpose, or is there an intention that Parties would adopt an interpretative decision at COP10? If the latter, then the EU and its Member States would request the opportunity to consider and submit further detailed textual amendments.
3. Pending further explanation of the intended status of the document, in particular the proposed draft decision, we would like to suggest preliminary detailed comments as indicated below in the text.
4. The EU and its Member States would have been interested in identifying gaps that may exist between the Basel and MARPOL Conventions and would appreciate if some concrete examples could be added to the analysis.
5. The EU and its Member States have some doubts about the approach that the paper takes in recommending a particular course of action. The paper seems to present the preferred interpretation as the only possible outcome. Although the conclusions of the interpretation appear sensible in the light of the objectives of the Basel Convention, the EU and its Member States believe that it would be valuable if the analysis would more clearly indicate that other interpretations of the Convention are possible.

Specific comments

Some detailed comments referring to particular conclusions are indicated below in text.

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. as long as the waste is on board the ship and until it has entered the reception facility the MARPOL provisions apply. The Basel Convention provisions on environmentally sound management apply as soon as the MARPOL waste are unloaded from the ship.
 - b. the Basel Convention provisions related to environmentally sound management (ESM) do not apply in as far as where MARPOL provisions apply and are supportive of the objectives 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
 - c. 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,
 - d. Waste not covered by MARPOL – meaning e.g. waste produced on board the ship but not derived from the normal operation of the ship – is covered by the scope of the Basel Convention.

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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 Convention¹ 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” is 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 the subject of managed in an environmentally sound management 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”².

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 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.

¹ *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.

² Article 2, paragraph 3 of the Basel Convention.

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 movement³. 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 applicable⁴.

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 Convention⁵. 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 wastes⁶. 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 manner⁷. 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 State⁸.

The Basel Convention defines the notion of environmentally sound management in rather general terms⁹, 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 sound¹⁰. 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 treatment and disposal methods for 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

³ 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.

⁴ Article 6, paragraph 5 of the Convention.

⁵ Article 9 of the Convention.

⁶ Article 4.2, b), c), e), f), g) and h) of the Basel Convention. See also paragraph 8 of the same article.

⁷ Article 4, paragraph 2, e) and g), and paragraph 8. See also Article 6, paragraph 3, b) and Annex V A).

⁸ KUMMER, Katharina, *International Management of Hazardous Wastes. The Basel Convention and Related Legal Rules*, Oxford, Oxford University Press, 1995, p. 56.

⁹ ABRAMS, David, “Regulating the International Hazardous Waste Trade: A Proposed Global Solution”, in: *Columbia Journal of Transnational Law*, Vol. 28, 1990, p. 828.

¹⁰ 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.

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 others¹¹.

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 participation¹².

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.

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)¹³. 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)¹⁴. MARPOL, also contains requirements in relation to port reception facilities which must be “adequate” to meet the needs of the ships using them¹⁵. “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 facilities¹⁶.

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

¹¹ 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.

¹² See paragraph 10 of the Guidance Document.

¹³ *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.

¹⁴ 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.

¹⁵ See for example regulation 38 of Annex I and regulation 18 of Annex II of MARPOL

¹⁶ Resolution MEPC.83(44) of 13 March 2000

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 sea¹⁷. 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.

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 date¹⁸. 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 Liquids ~~Gaz~~ and Gases (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 residues¹⁹. A similar conclusion stems from the annex 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 inadequate²⁰.

(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”²¹.

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 practice²². 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

¹⁷ IMO, MEPC 56/22/2, of 13 April 2007.

¹⁸ IMO, MEPC 59/24, p. 110, paragraph 23.4

¹⁹ 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

²⁰ WASTE ENVIRONMENT COOPERATION CENTRE, *Waste generated on board ships – A note on blending*, p. 2 annexed to this report.

²¹ UNEP/CHW/OEWG/6/2, annex, paragraph 3, c).

²² UNEP/CHW.8/16, p. 8, paragraph 38.

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 Parties²³.

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.

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 management²⁴. 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”²⁵. 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 Convention²⁶.

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

²³ 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).

²⁴ UNEP/CHW.9/INF/22, Annex B.

²⁵ *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.

²⁶ UNEP/CHW.9/INF/22, Annex A.

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 Convention²⁷. 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 II²⁸.

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 development²⁹.

(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 Koala*, which resulted in an explosion at a terminal in Sløvåg, Gulen, and spread of toxic wastes to its inhabitants³⁰. 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”³¹. 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 Treaties³². 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 Treaties³³ contain the international general norms on treaty interpretation³⁴.

²⁷ UNEP/CHW.9/INF/22, p. 10

²⁸ *Ibid*, p. 12.

²⁹ IMO, T5/1.01, p. 2.

³⁰ http://www.dsb.no/Global/Farlige%20stoffer/Dokumenter/Report_accident_vest_tank.pdf

³¹ 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.

³² Wolfum, Rüdiger & MATZ, Nele, *Conflicts in International Environmental Law*, Berlin, Springer, 2003, p. 122.

³³ Article 31 of the 1969 Vienna Convention prescribes: “1. A treaty shall be interpreted in good faith in

When interpreting a particular legal norm, the interpreter seeks to determine its meaning and scope³⁵. The International Court of Justice has stressed in its advisory opinion on the *Competence of the General Assembly on the Admission of a State to the United Nations* that there is no sense in interpreting a clear text³⁶. 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 norm³⁷.

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

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.

³⁴ 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.

³⁵ 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.

³⁶ 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.

³⁷ Cf. SADAT-AKHAVI, Seyed Ali, *Methods of Resolving Conflicts Between Treaties*, Leiden, Martinus Nijhoff, 2003, p. 25.

previous paragraphs. The logical consideration which suggests this is that these elements are extrinsic to the text³⁸.

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.

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*³⁹. 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 sense⁴⁰”.

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 competence⁴¹.

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 generation⁴².

Taking into consideration the process by which wastes are generated would be at odds with the approach of the Basel Convention which has ~~for a~~ 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

³⁸ *Yearbook of the International Law Commission*, Vol. II, 1966, p. 220.

³⁹ *Yearbook of the International Law Commission*, Vol. II, 1966, p. 121.

⁴⁰ *Competence of the ILO to Regulate Agricultural Labour*, advisory opinion of 12 August 1922, PCIJ, Series B, Nos. 2 and 3, p. 23.

⁴¹ See *infra*, p. 22.

⁴² 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.

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 on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972, London Convention)⁴³. 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 question⁴⁴, 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* case⁴⁵. 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 interpretation⁴⁶. 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 [should be taken to](#) 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 Convention⁴⁷. 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

⁴³ 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 ...”

⁴⁴ 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.

⁴⁵ 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.

⁴⁶ 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.

⁴⁷ UNEP/IG.80/4, p. 10, paragraph 15.

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 targeted by the exclusion provision⁴⁸. 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 issue⁴⁹. 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)⁵⁰ - 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, while not being irrelevant, 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 materials (including 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”⁵¹. This article does not contain any environmentally sound

⁴⁸ 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.

⁴⁹ 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”.

⁵⁰ *United Nations Treaty Series*, Vol. 1184, p. 277 *et seq.* SOLAS Convention entered into force on 25 May 1980.

⁵¹ 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

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 ashore⁵².

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? Are wastes generated on board ships also excluded from the overall ESM requirements of the Basel Convention? 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.

⁵² 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~~ should not 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 in general terms usually 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 should be therefore taken to~~ refers to those wastes whose discharge is covered by MARPOL. (whether generated by a ‘normal operation’ or not).

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.

Annex - Waste generated on board ships: A technical paper on blending

I. Waste generated on board ships

Over 90% of world trade is carried by the international shipping industry. The world fleet is composed of more than 80 000 vessels of which around 50,000 merchant ships trade internationally. The fleet of oil tankers and dry bulk carriers make up more 70% of the total world fleet. Every ship generates waste, residues or garbage during its operation or when transporting cargoes.

The principal categories of waste generated on board ships include: sludge, oily tank washings or slops, garbage from the crew and cargo residues. Depending on its size, a ship can generate a few hundreds tons of oily residues (slops) during its voyage after settling and getting rid of the water through the oil discharge monitoring equipment. The oily effluents originate from the use of fuel (heavy oil bunkers or marine diesel fuel), lubrication for the ship's engine and machinery and the transport of cargo. Oil-water mixtures must be kept on board ships and should be discharged to a port reception facility. Port States are required to provide these facilities. Unlike oil, noxious chemical compounds are not generated in the daily operation of a ship. MARPOL Annex II (cargo residues) discharge requirements are differentiated according to the toxicity of the chemicals involved. The washing of tanks containing hazardous substances shall take place in port and the wash water discharged at a reception facility.

The management of residues generated on board ships is a complex undertaking. It requires a workable sea-land interface. Many stakeholders are involved (eg: Port State, port authority, port operators, port and terminal reception facilities, port waste management, ship waste handlers and collectors, shipping agents, Flag States, charterers, shipowners, enforcement authorities, environmental authorities, waste processors).

II. The issue

Physical or chemical blending operations carried out on board ships or during the sea voyage bring additional uncertainties to the recurrent difficulties encountered in ensuring the discharge and adequate collection of ship generated waste and its safe and sound treatment and disposal on land. Certain types of blending operations that generate hazardous waste seem to fall outside existing legislation. The understanding of the type of waste generated, of the processes used and of the magnitude of the practices remains inadequate. For instance, it is difficult to obtain accurate, reliable and accessible data to quantify the trade in low quality gasoline subject to blending operations (physical and chemical).

III. IMO/ MARPOL Annexes I and II

The global rules and procedures applying to oily residues and cargo residues generated on board ships, are well defined in the International Convention for the Prevention of Pollution from Ships 1973, as modified by its 1978 Protocol (MARPOL). Annex I of MARPOL deals with the prevention of pollution from oily residues (slops) from engine rooms of all ship types and from cargo residues of oil tankers. Similarly, Annex II of MARPOL deals with the prevention of pollution from cargo residues from noxious liquid substances carried in bulk. MARPOL Annexes I and II requirements call for the discharge of certain categories of oily residues and cargo residues and their delivery into adequate port or terminal reception facilities. MARPOL places a legal obligation upon State parties to provide such adequate port or terminal reception facilities. Ships have a right to discharge or deliver their residues and there is a legal obligation on the ports or terminals to provide the facilities. Once the waste is discharged (taken off the ship) into a port reception facility, MARPOL no longer applies. Blending activities are common for MARPOL Annex I product cargoes.

The main challenge for oily residues is to ensure adequate port or terminal reception facilities. Although, there could be questions about what rules or procedures apply to some cargo residues, for many, the system with regard to Annex II works well. The categorisation of cargo residues is based on a global system, the Globally Harmonised System for the classification and labelling of chemicals, and on the scientific knowledge of the day. One of the difficulties with Annex I materials lies in the occasional inability or unwillingness of port or terminal facilities to accept cargo residues.

IV. Analysis of practices regarding blending activities on board ships

At the onset it is important to mention that information is limited regarding ship board blending practices involving a catalyst. Only a very small percentage of the world commercial fleet are involved in such practice. It concerns, for instance, the Probo class of ships like the Probo Koala (category OBO – Ore/Bulk/Oil Carriers).

A. *The nature of the processes of on board blending operations*

International trade in petroleum products has expanded over the past two decades, making the market for gasoline and other petroleum products increasingly global in nature. For the past 25 years, there has been excess refining capacity globally, but this excess has shrunk considerably in recent years as demand has increased faster than capacity growth. Today's highly competitive trading environment demands a flexible approach to meet the contractual and physical limitations of oil commodities and leads to a search for anticipating and responding efficiently to an increased demand for a variety of gasoline specifications on the world market. Blending capacity becomes critical in order to make the best use of the available stocks on the market to meet a variety of product demand and specifications in a profitable way. What does blending achieve: it changes the quality of a product so as to meet a specification, it dilutes a contamination to insignificance or it makes a new product. Most blending is performed in shore tanks as the greatest degree of accuracy can be achieved when entire shipments are pre-mixed in shore tanks prior to being loaded on ships. However, on board blending is practiced as a mean by which a cargo may be prepared to specification in the vessel tanks. On board blending offers compelling advantages to suppliers to do business at less cost. For instance, on board blending will save shore tanks investments or leases, require no blending installation, give freedom to choose suppliers over a wide geographical area, provide a « just-in-time » preparation of cargo and limit inventory exercise. The leading global oil traders prepare different gasoline specifications to suit the needs of different markets around the world.

On board blending of gasoline (for achieving low sulphur content for instance), in a context of volatile crude oil prices, can maximise the value of cargoes. Equally important is the fact that the storage capacity at shore remains limited and storage of petroleum product on board ships could compensate for land-based supply shortages. Some blending operations may be carried out in international waters. When blending is carried out in ship's tanks, knowledge of ship loading systems, petroleum chemistry and terminal tankage, pumps or lines is important. This is an operation that requires highly skilled technicians and chemists, in particular because ship tanks are not as accurately calibrated as shore tanks and the tanks themselves are subject to trim and list. Such blending operations need to be performed by specialists. A number of specifically designed ships are used as floating storage structures for oil products. Such vessels may over time get different cargoes of petroleum products that are transferred at sea and may be engaged in chemical blending operations.

Basically, any mixing or blending has the potential to create uncertainties about the nature of the waste discharged or delivered at shore and its subsequent management on land. Information is often lacking or lagging behind regarding the extent to which mixing and blending is occurring and the problems associated with such practices. In some cases, ports may refuse to accept these wastes because of such uncertainties or may simply not be capable of handling contaminated slops.

Many companies offer services for blending operations on ships. They propose years of experience in blending petroleum products to meet client specifications, thereby adding significant value to their business. Gasoline and fuel oil blending require specialists with an intimate knowledge of petroleum chemistry, ship loading systems, terminal tankage, pumps and pipelines. A variety of blending components are normally hand blended in private laboratories in different ratios in order to determine the amount, and nature of the various components required to meet the finished blend quality required. When blending is carried out in ships' tanks, specialists' knowledge of ship loading systems facilitates a variety of components being blended in a controlled and planned manner. This operation requires highly skilled operatives, given the complexity of shipboard systems and the fact that most vessels are not built to perform such blending operations on a regular basis. Staff inspectors with specialized blending knowledge can assist the vessel officers and crew in performing such operations in a timely and cost-effective manner. Some of these companies carry out blending operations on behalf of the world's major oil companies and independent traders on a daily basis around the world. Companies' inspectors are backed up by global networks of state of the art petroleum laboratories, operating to international standards, state of the art equipment, and subject to internal and external audits. (Adapted from a company's advertisement).

One of the most widespread process used to reduce sulphur content in gasoline is the MEROX process. It is used for the oxidation of mercaptan to disulfide (sulphur extraction) in the presence of a catalyst. MEROX is licensed by UOP (a Honeywell company) which is the world's largest supplier of sweetening and sulfur extraction products and processes to enable refiners to meet increasingly complex and robust sulfur regulations at the national and international level. The MEROX catalyst is a blue heterogenous powder and a mix of cobalt sulfonite, phthalocyanine derivatives with sodium and calcium salts. The MEROX process with MEROX catalyst are used on board ships.

A number of things can happen on board certain ships. A mixing of products during loading followed by a blending operation during the voyage. Mixing aided by natural motion of the vessel can be carried out during its voyage. In many cases, blending operations on board concern the mixing of two or more types of petroleum products. As an example, more than 200 physical or chemical parameters could be modified in a cargo of gasoline depending on demand. It should be mentioned that chemical blending is done to respond to the lack of uniform standards worldwide for petroleum products (contrary to metal-bearing commodities for instance) resulting in the existence of a wide

variety of specifications for these products. Traceability of the product is sometimes difficult. Indeed, it not uncommon for vessels to transfer fuel to other ships.

B. Relationship with the Basel Convention

When drafting and adopting the Basel Convention (1987-1989), Governments had in mind what conformed with prescribed rules and procedures or constituted an accepted standard or pattern regarding operation of ships at that time. Since the adoption of the Convention in 1989 and its entry into force in 1992, Parties had not felt a need for clarifying what was meant in article 1 paragraph 4 of the Basel Convention until the Probo Koala incident which shed light on maritime practices that seem to fall outside existing law.

Waste that derives from both chemical blending operations or the treatment of coker gasoline⁵³ can be identified in Annex VIII List A to the Basel Convention under the entries:

- A3010 Waste from the production or processing of petroleum coke and bitumen
- A4060 Waste oils/water, hydrocarbon/water mixtures, emulsions
- A4090 Waste acidic or basic solutions, other than those specified in the corresponding entry on B List (B2120).

This raises two comments:

- Is coker gasoline a waste (hazardous waste ?) as this material is usually difficult to use ? If coker gasoline is considered a waste then it may imply that waste categorised in the Basel Convention could be or has been used to produce low quality gasoline.
- Some blending processes on board of ships can generate waste that would be categorised as hazardous under the Basel Convention because of their intrinsic properties and potential hazards that meet the criteria of Annexes I and II together.

C. Evolving international regulations

Already, the European Union chemical policy REACH (Registration, Evaluation and Authorization of Chemicals) requires the blender to have evaluated the blending components and the final blended product for its properties, safety assessment and risk management.

The International Maritime Organisation (IMO) is considering the prohibition of blending MARPOL cargoes on board during the sea voyage due to concerns expressed for the safety of the ship and the protection of the environment. IMO refers to physical blending whereby the ship's cargo pumps and pipelines are used to internally circulate two or more different cargoes within the ship with the intent to achieve a cargo with a different product designation (IMO/MSC-MEPC.2/Circ.8 of 3 August 2009) and to chemical processes.

The circular raises issues about a prohibition on physical blending. One issue is whether you prohibit onboard in-tank blending while ships are at sea or during its sea voyage. The maritime industry is favorable to a prohibition during the ship's voyage. This means that the long established practice of blending whilst the ship is moored within port limits or alongside a stationary receiving vessel will be allowed to continue. The main concern of shipowners is for chemical tankers where charterers might request blending of cargoes in situations and for products which is not in the interest of the ship. The same attitude does not prevail for chemical carriers or oil tankers that can continue to be involved in blending operations causing no concern. Another early concern was how such a prohibition would apply to offshore industry but this aspect has already been identified as an area for exemption.

Cargo residue can also by itself represent a problem. Current scientific knowledge will help in the majority of cases, however, there could be cases where uncertainties would prevail regarding characterisation of the residue which may impact on its disposal on land. Some difficulties or uncertainties may remain regarding the categorization and control of some operations that entail a process of mixing of substances to produce a new product (blending) such as transforming bio-fuels to bio-fuels blends. IMO is considering the issue of the carriage of bio-fuels and bio-fuels

⁵³ The Probo Koala incident and the Vest Tank accident in Norway in 2007 brought light to a trade in low grade petroleum products to West Africa. The driving factor for gasoline is the fact that, for instance, in Europe the maximum approved level of sulphur in gasoline is 50 ppm while in West Africa it can be as high as 5000 ppm or more. As an illustration, some oil terminal on land could treat and purify coker gasoline, residual waste from refinery process of crude oil that is unusable, to reduce the content of sulphur containing components, especially mercaptans. Coker gasoline can be pumped from a tanker ship to onshore tanks and simultaneously mixed with sodium hydroxide. This operation generates a precipitated sludge (waste) that settles in the bottom of the tank and that should be disposed of on land while the top layer of treated coker gasoline is pumped back into the tanker for sale in countries accepting such types of product. The waste resulting from the shore operation can exhibit flammable, malodorous and alkaline characteristics. As such this waste could be identified in the Basel Convention list of waste. It should be pointed out, however, that the activities carried out by Vest Tank (treatment of coker gasoline) might be exceptional.

blends, however, and this includes appropriate cargo categorization and appropriate regulations that would have to be applied to a specific blend along with related safety matters.

3. Guatemala



Misión Permanente de Guatemala
 ante la Organización de las Naciones Unidas
 y otros Organismos Internacionales
 Ginebra, Suiza

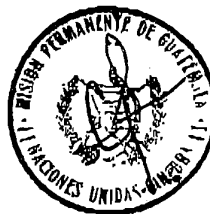
Date

No. 552/AMB/M-11/11

The Permanent Mission of Guatemala to the United Nations Office and other International Organizations in Geneva presents its compliments to the Secretariat of the Basel Convention to make reference of the Decision OEWG-VII/13 concerning cooperation between the International Maritime Organization and the Basel Convention, and in which it was decided to provide a legal analysis of the application of the Basel Convention to hazardous wastes and other wastes generated on board ships and to publish such analysis on the website of the Basel Convention and invites Parties to submit comments.

In that sense, the Government of Guatemala is pleased to inform that the Ministry of Environment made an analysis of the document presented by the Secretariat of the Basel Convention indicating that they support the conclusions and recommendations made in the above mentioned document. A copy of the respective comments is attached.

The Permanent Mission of Guatemala to the United Nations Office and other International Organizations in Geneva avails itself to this opportunity to renew to the Basel Secretariat the assurances of its highest consideration.



Geneva, 20 July 2011

**SECRETARIAT OF THE BASEL CONVENTION
 GENEVA**

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 Fax +41 22 733 1429 E-mail : mission.guatemala@ries.itu.int

MRA

VICEMINISTERIO DE RECURSOS NATURALES: Guatemala, trece de mayo de dos mil once.



ASUNTO: Solicitud de la Secretaría del Convenio de Basilea, relacionada con la Decisión OEWG-VII/13, en el sentido de que los Estados Signatarios presenten un análisis legal relativo a la aplicación del Convenio de Basilea a los desechos peligrosos y otros desechos generados a bordo de los buques.

Pase atentamente el presente expediente a la Coordinadora de Asesoría Jurídica del Ministerio de Ambiente y Recursos Naturales, haciendo de su conocimiento lo siguiente:

ANTECEDENTES:

En la Decisión OEWG-VII/13 adoptada durante la reunión del Grupo de Trabajo de Composición Abierta del Convenio de Basilea sobre el Control de los Movimientos Transfronterizos de los Desechos Peligrosos y su Eliminación, el citado grupo de trabajo solicitó a la Secretaría que presentara un análisis jurídico de la aplicación del Convenio de Basilea en relación con los desechos peligrosos y otros desechos generados a bordo de buques y que lo publicara en el sitio web del Convenio de Basilea a más tardar el 31 de marzo de 2011, e invitó a las Partes a formular observaciones al respecto antes del 30 de junio de 2011.

El análisis legal en cuestión fue realizado, por lo que la Secretaría del Convenio de Basilea lo puso en conocimiento de los Estados Parte y los invitó a presentar su análisis legal antes del 30 de junio de 2011.

Por medio del Oficio número 39000006211 de fecha 11 de abril de 2011, el Director General de Relaciones Internacionales Multilaterales y Económicas solicitó al señor Ministro de Ambiente y Recursos Naturales el pronunciamiento de este Ministerio. Dicha documentación fue remitida a la Asesoría Jurídica por el Asesor de la Unidad de Coordinación para el Manejo Ambientalmente Racional de Productos Químicos y Desechos Peligrosos.


CONSIDERACIONES LEGALES:

En el artículo 1, párrafo 4 del Convenio de Basilea se establece que "Los desechos derivados de las operaciones normales de los buques, cuya descarga esté regulada por otro instrumento internacional, quedarán excluidos del ámbito del presente Convenio." En tal virtud, ha surgido la duda acerca de si el Convenio de

Basilea podría ser aplicable en algunos casos a desechos generados a bordo de los buques, porque ésa en principio es materia que corresponde al Convenio Internacional para Prevenir la Contaminación por los Buques, conocido como MARPOL.

En ese orden de ideas, la Secretaría del Convenio de Basilea ha presentado un análisis jurídico en el que, luego de profundas consideraciones, se sugiere que las Partes del Convenio de Basilea adopten una decisión interpretativa en la que acuerden que:

1. "Los desechos derivados de las operaciones normales de los buques, cuya descarga esté regulada por otro instrumento internacional..." significa desechos que entren en el ámbito de aplicación de MARPOL, sin importar el proceso a través del cual tales desechos son generados.
2. "...quedarán excluidos del ámbito del presente Convenio." significa que:
 - a. Las disposiciones del Convenio de Basilea relacionadas con el manejo respetuoso con el ambiente (ESM) no aplican en tanto las disposiciones de MARPOL apoyen el objetivo del Convenio de Basilea: los requerimientos de ESM no aplican en tanto los desechos MARPOL se encuentren a bordo del buque, y las disposiciones ESM del Convenio de Basilea aplican tan pronto como los desechos MARPOL son descargados del buque.
 - b. Las disposiciones del Convenio de Basilea relacionadas con movimientos transfronterizos no aplican hasta que los desechos son descargados del buque y subsecuentemente tiene lugar un movimiento transfronterizo.

 Para arribar a la sugerencia de esa decisión interpretativa, el análisis legal hace una serie de consideraciones, dentro de las que debe resaltarse lo siguiente:

- a) Lo que determinará la aplicación del Convenio de Basilea es la naturaleza de los desechos involucrados y no el proceso por el cual se generaron, dónde se generaron o quién los generó.
- b) El Convenio de Basilea establece dos caminos para lograr su objetivo: el primero, relacionado con la generación de desechos peligrosos y otros desechos, y requiere a las Partes asegurar la reducción de tales desechos al mínimo; el segundo, se relaciona con el manejo de los desechos peligrosos y otros desechos en una forma respetuosa con el ambiente.
- c) Para que el Convenio de Basilea sea aplicable, deben cumplirse tres condiciones: 1. El movimiento es desde un área bajo la jurisdicción nacional de un Estado; 2. El movimiento es hacia o a través de un área bajo la jurisdicción nacional de otro Estado, o hacia o a través de un área que no esté bajo la jurisdicción nacional de ningún estado; y 3. Al menos dos Estados están involucrados en el movimiento.
- d) Los desechos generados a bordo de los buques pueden, en la práctica, ser

generados ya sea dentro o fuera de un área bajo la jurisdicción nacional de un Estado.

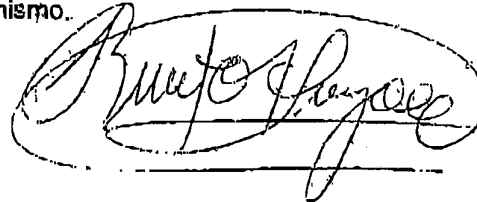
- e) El requerimiento de que las Partes del Convenio de Basilea lleven a cabo un manejo respetuoso con el ambiente de los desechos peligrosos y otros desechos existe independientemente de que cualquier movimiento transfronterizo tenga lugar.
- f) Los desechos generados a bordo de buques como consecuencia de procesos industriales no se encuentran cubiertos por MARPOL. En tales casos las disposiciones del Convenio de Basilea podrían ser aplicables si se configura un caso de movimiento transfronterizo de esos desechos.
- g) El objetivo principal del Convenio de Basilea es la eliminación de los desechos peligrosos, asunto en el que MARPOL no tiene interferencia, porque éste se centra en evitar que tales desechos sean arrojados al mar.
- h) La Organización Marítima Internacional envió una carta de fecha 5 de julio de 2010 a la Secretaría del Convenio de Basilea, en la que explica que los requerimientos de MARPOL de que las partes provean una adecuada recepción de los desechos aceitosos de los buques no se extienden al manejo ambientalmente respetuoso de los desechos o residuos una vez que están en tierra. Como consecuencia, la Secretaría de la Organización Marítima Internacional expresó la opinión de que el consejo y guía de las partes del Convenio de Basilea en cuanto al manejo ambientalmente respetuoso de los desechos de residuos de aceite de los buques sería un desarrollo bienvenido.
- i) El proceso a través del cual se genera un desecho es irrelevante bajo el Convenio de Basilea. No interesa a este convenio si dichos desechos son generados como el resultado de un proceso "normal" o "anormal", sin importar lo que tales términos signifiquen.
- j) El artículo 1 párrafo 4 del Convenio de Basilea fue redactado para salvaguardar la competencia de MARPOL. Por lo tanto, puede afirmarse que la primera parte de tal norma significa "desechos MARPOL". Son los desechos cuya descarga se encuentra cubierta por MARPOL los que están excluidos del ámbito de aplicación del Convenio de Basilea.
- k) No parece posible afirmar que la frase "excluidos del ámbito del presente Convenio" significa que ninguna provisión del Convenio de Basilea será alguna vez aplicada a desechos que caigan en el ámbito de aplicación de MARPOL.
- l) MARPOL aplica desde la generación de desechos a bordo de los buques hasta su descarga en las instalaciones de los puertos de recepción, mientras que el Convenio de Basilea aplica desde la generación de los desechos hasta su disposición, incluyendo su movimiento transfronterizo.

- m) Los anexos de MARPOL contienen provisiones para el manejo ambientalmente respetuoso de los desechos generados a bordo de los buques únicamente mientras están en el mar, pero no en tierra una vez que los desechos son descargados.
- n) La expresión "excluidos del ámbito del presente Convenio" no puede ser interpretada en el sentido de que los requerimientos de manejo ambientalmente respetuoso del Convenio de Basilea no apliquen a los desechos descargados. El artículo 1 párrafo 4 del Convenio de Basilea debe ser interpretado en el sentido de que los requerimientos de manejo ambientalmente respetuoso del Convenio de Basilea no aplican a desechos generados a bordo de buques hasta que son descargados. Una vez tales desechos son descargados de un buque y siempre que sean "desechos peligrosos" u "otros desechos", los requerimientos de que sean manejados en una forma ambientalmente respetuosa de conformidad con las disposiciones del Convenio de Basilea son totalmente aplicables.
- o) Dado que ambas convenciones se dirigen a proteger la salud humana y el ambiente, es importante asegurar la articulación de las disposiciones del Convenio de Basilea y de MARPOL. Sus respectivas normas legales deben ser armonizadas para prevenir la existencia de lagunas en el sistema.

Luego de hacer un estudio sobre el análisis legal presentado por la Secretaría del Convenio de Basilea, el suscrito encuentra que tal análisis es consistente con las disposiciones tanto del Convenio de Basilea como de MARPOL y especialmente con el espíritu de ambos convenios. Debe concluirse necesariamente, por lo tanto, que el análisis en cuestión es adecuado, y apoyarse las conclusiones y recomendaciones del mismo.

CONCLUSIÓN:

Desde el punto de vista jurídico y desde el ámbito de competencia del Ministerio de Ambiente y Recursos Naturales, el análisis legal presentado por la Secretaría del Convenio de Basilea es consistente con las disposiciones tanto del Convenio de Basilea como de MARPOL y especialmente con el espíritu de ambos convenios, por lo que el análisis en cuestión es adecuado, y el pronunciamiento que debe presentarse a la Secretaría del Convenio de Basilea debe ser en el sentido de apoyar las conclusiones y recomendaciones del mismo.



Roberto Acosta Blang del Cid
Ministro de Ambiente

4. Mexico

MISIÓN PERMANENTE DE MÉXICO

OGE02515

La Misión Permanente de México ante la Oficina de las Naciones Unidas y otros Organismos Internacionales con sede en Ginebra saluda muy atentamente a la Secretaría del Convenio de Basilea sobre el control de los movimientos transfronterizos de los desechos peligrosos y su eliminación, y tiene el honor de referirse a la solicitud de la Secretaría para presentar observaciones al documento "análisis legal para la aplicación del Convenio de Basilea para los residuos peligrosos y otros residuos generados a bordo de los buques", de conformidad con la Decisión VII/13 del Grupo de Trabajo de Composición Abierta del Convenio sobre la cooperación con la Organización Marítima Internacional (OMI).

Al respecto, la Misión Permanente presenta la opinión de la Unidad Coordinadora de Asuntos Jurídicos de la Secretaría de Medio Ambiente y Recursos Naturales de México sobre el documento de referencia.

La Misión Permanente de México ante la Oficina de las Naciones Unidas y otros Organismos Internacionales con sede en Ginebra aprovecha la oportunidad para reiterar a la Secretaría del Convenio de Basilea sobre movimientos transfronterizos de desechos peligrosos y su eliminación las seguridades de su más atenta y distinguida consideración.



Ginebra, a 28 de junio de 2011

DELEGACIÓN
PERMANENTE DE MÉXICO
ANTE LOS ORGANISMOS
INTERNACIONALES CON
SEDE EN GINEBRA

**Secretaría del Convenio de Basilea sobre
movimientos transfronterizos de desechos peligrosos y
su eliminación
G i n e b r a.**

**COMENTARIOS DE LA UNIDAD COORDINADORA DE ASUNTOS JURIDICOS DE
LA SECRETARÍA DE MEDIO AMBIENTE Y RECURSOS NATURALES AL
DOCUMENTO:
“ANÁLISIS LEGAL PARA LA APLICACIÓN DEL CONVENIO DE BASILEA PARA
LOS RESIDUOS PELIGROSOS Y OTROS RESIDUOS GENERADOS A BORDO DE LOS
BUQUES”.**

Sobre el particular, se hace de su conocimiento que la Unidad Coordinadora de Asuntos Jurídicos de la SEMARNAT, comparte las conclusiones vertidas por el Secretario del Convenio de Basilea en el Análisis legal del documento titulado: “Análisis legal para la aplicación del Convenio de Basilea para los residuos peligrosos y otros residuos generados a bordo de los buques” respecto del artículo 1, párrafo 4 del Convenio de Basilea, apoyando en consecuencia las siguientes interpretaciones:

1. La expresión “desechos derivados de las operaciones normales de los buques, cuya descarga esté regulada por otro instrumento internacional”, se refiere a los residuos incluidos en el ámbito del Convenio Internacional para Prevenir la Contaminación por los Buques (en adelante Convenio MARPL), independiente del proceso por el cual se hayan producido dichos desechos.
2. La expresión “quedarán excluidos del ámbito del presente Convenio”, implica que:
 - Las disposiciones del Convenio de Basilea relacionadas con el manejo ambientalmente racional de los desechos (ESM por sus siglas en inglés), no resultan aplicables al Convenio MARPOL siempre y cuando los desechos se encuentren a bordo de los buques; por lo tanto, las disposiciones del ESM del Convenio de Basilea, resultan aplicables tan pronto como se descargan de los buques los desechos regulados por el Convenio MARPOL.
 - Las disposiciones del Convenio de Basilea sobre movimientos transfronterizos no se aplican hasta que los desechos hayan sido descargados de los buques, seguido de un movimiento transfronterizo.

5. Qatar

The Permanent Mission of the State of Qatar to the United Nations Office and other International Organizations in Geneva, presents its compliments to the Secretariat of the Basel Convention in Geneva, and wishes to refer to its communication dated 4 April 2011 requesting Parties to submit comments on the legal analysis of the application of the Basel convention to hazardous wastes and other wastes generated on board ships.

The Permanent Mission of the State of Qatar has the honor to inform that the State of Qatar has no comments regarding the above-mentioned subject.

The Permanent Mission of the State of Qatar to the United Nations Office and other international Organization in Geneva avails itself of this opportunity to renew to the Secretariat of the Basel Convention in Geneva, the assurances of its highest consideration.

6. Trinidad and Tobago



**MINISTRY OF HOUSING AND THE ENVIRONMENT
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May 17, 2011

Katherina Kumer Peiry
Executive Secretary
Secretariat of the Basel Convention
15, chemin des Anémones,
1219 Châtelaine, Geneva
Switzerland

Dear Ms. Peiry,

Re: Legal Analysis of the Application of the Basel Convention to Hazardous Wastes and other Wastes generated on Board Ships

Reference is made to your correspondence dated April 4, 2011 on the subject at caption.

The Ministry of Housing and the Environment, as the National Focal Point for Trinidad and Tobago, would like to submit the enclosed comments based on our review of the draft legal analysis entitled 'The Application of the Basel Convention to Hazardous Wastes and other Wastes Generated on Board Ships specifically:

1. The respective competencies of the Basel Convention and the 1978 Protocol to the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL) in respect of hazardous wastes and other wastes and harmful substances;
2. Any gaps between those instruments;
3. Any options for addressing those gaps, if any such as may exist under other legal instruments of the International Maritime Organization; and
4. Any other relevant information.

Sincerely,


/s/ Permanent Secretary

COMMENTS BY THE REPUBLIC OF TRINIDAD AND TOBAGO

Legal Analysis: Application of the Basel Convention to Hazardous Wastes and other Wastes Generated on Board Ships

Article 1 paragraph 4 of the Basel Convention states:

“Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument, are excluded from the scope of this Convention”

Article 1 paragraph 4 has been the basis for the Legal Analysis put forward by the Secretariat. Comments are as follows:

Mutually exclusive nature of the Basel Convention and MARPOL

For the outset, it is important to appreciate that the Basel Convention and MARPOL are two mutually exclusive international treaties in that the Basel Convention covers waste which is *generated on land* and is transported as cargo whereas MARPOL covers waste which is *generated on board ships at sea*.

Reference to the London Convention

It is agreed that Article 1 paragraph 4 of the Basel Convention related *only* to MARPOL, since the exclusion clause was proposed by the International Maritime Organization. It is noteworthy that the definition of “discharge” under Article 2 (3) (b) of MARPOL excludes, *inter alia*, “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” (“the London Convention”). It may be useful to point out that the London Convention covers the disposal of hazardous wastes *generated on land* and taken on board a ship to be dumped at sea; therefore the London Convention is distinguished from MARPOL in this regard. This point may be used to strengthen the argument that the term “normal operations” was used in Article 1 paragraph 4 to distinguish MARPOL from the London Convention when interpreted in its context.

It is agreed that the terms “excluded from the scope of the Convention” means that the norms of the Basel Convention apply as far as MARPOL no longer applies, more so since both treaties are mutually exclusive.

TBM and ESM requirements

The analysis mentions that the process of interpretation needs to determine whether and how far transboundary movement (“TBM”) requirements of the Basel Convention apply to MARPOL wastes and whether the Basel Convention’s environmentally sound management (“ESM”) requirements apply to such wastes. Wastes generated on board ships cannot practically be managed and disposed of under TBM requirements since both treaties address two distinct scenarios. TBM requirements may not be applicable to ships since wastes on board ships cannot be entirely avoided and must be kept until a suitable point of discharge becomes available.

In relations to ESM requirements, MARPOL itself ensures that ESM of wastes until they are accepted into a port reception facility in its various Annexes, such as the requirements for slop tanks and environmental equipment. The application of the Basel Convention's ESM requirements would not be suitable so long as those wastes continue to be stored on board a ship.

Moreover, the operator of a ship may not be capable of ensuring in advance that the wastes would be disposed of in accordance with ESM requirements, especially when one considers that unlike wastes on board ships, transboundary movement of wastes under the Basel Convention is only permitted when the wastes cannot be treated in an environmentally sound manner.

There, the Basel Convention TBM and ESM requirements would become operation only after the ship has discharged its wastes into a port reception facility and not while MARPOL is operational. The interpretive decision put forward in this regard is therefore agreed.

Prior Informed Consent (PIC) Procedure

It is agreed that the PIC procedure is not in line with the object and purpose of MARPOL and that such a procedure would have seemingly impossible practical implications. It is noteworthy that notification and consent requirements may take several weeks or months to obtain and this may result in overflowing of slop tanks; worse may be the case where consent is refused, since ships would then be constrained to change destinations, thereby repeating the PIC process and resulting in further implications.

Movement of wastes from the high seas

The interpretive decision put forward in the Legal Analysis recognizes that the Basel Convention provisions become operation when wastes are unloaded from the ship and a transboundary movement subsequently occurs. Therefore, the movement of hazardous wastes from the high seas or other areas outside national jurisdiction does not fall within the scope of TBM under the Basel Convention (nor does It fall under MARPOL).

While it is appreciated that an interpretation of the Basel Convention Article 1 paragraph 4 to include the PIC procedure would create a loophole for would-be polluters to generate wastes in the high seas, the fact that movement of hazardous wastes from the high seas does not fall within the Basel Convention of MARPOL is an issue that needs to be addressed by the Parties.
