LEGAL ASPECTS OF SCRAPPING OF VESSELS

A Study for the Norwegian Ministry of Environment

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Cambridge, 9 March 1999
Revised Oslo, 26 November 2001

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1. Summary (English and Norwegian)

1.1. English Summary

This study focuses on the legal framework for scrapping of vessels, especially in relation to the ban on export of waste from OECD to non-OECD countries. The 1989 Convention on Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), the 1993 Council Regulation (EEC) No 259/93 on the Supervision and Control of Shipments of Waste within, into and out of the European Community (Shipment Regulation), and the Norwegian Regulation of 30 December 1994 ("Forskrift om grensekryssende transport av avfall") are discussed. Contract practice on transfer of vessels for scrapping is also examined. The emphasis is on when a vessel should be considered "waste", what is the "state of export" of vessels, and what is a "transboundary movement"/"transfrontier shipment" of vessels.

"Waste" is in the Basel Convention defined as substances and 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. In relation to scrapping of vessels, it may be difficult to establish when a vessel is "intended" to be disposed of. Such intention may be established by a decision of the owner or by a contract on scrapping. The owner will, however, have several possibilities to cover his intention, and objective criteria for establishing his intention are not easily defined. The EC Shipment Regulation and the Norwegian Regulations raise similar problems.

"State of Export" is in the Basel Convention defined as the state from which a transboundary movement of waste is planned to be initiated or is initiated. This means that the state of export is the state from which the transboundary movement physically is begun or is planned to begin. The state where the decision about the transboundary movement is taken or the nationality of the waste or its owner is of no relevance. Since there are no special rules about vessels as waste, this means that it is the state in which a vessel has become waste which is the state of export and which must ensure the presence of the necessary consent from the importing state. The flag state or the state where the owner is registered has no responsibility to obtain such consent. A problem is, however, that the port state has no jurisdiction to require that such consent exists before a foreign vessel departs. This means in practice that OECD states have no responsibility under the Convention for their vessels leaving as waste from foreign ports to non-OECD countries, and that the port state has no jurisdiction over such vessels. Similar problems arise under the EC Shipment Regulation and the Norwegian Regulation. Although the flag state has no responsibility to control export of vessels for scrapping, there is, however, nothing to prevent it from taking action if it so desires. This may, however, require amendment of national legislation and the law of the European Community.

"Transboundary movement" means under the Basel Convention a movement from an area under 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. It is, however, difficult to determine which maritime zones should be considered to be under the national jurisdiction of a state, and thus what is a transboundary movement. Anyway, the owner of a vessel will also have ample opportunity to ensure that movement of a vessel for scrapping is not considered transboundary movement. The EC Shipment Regulation does not refer to

transboundary movement and, although the Norwegian Regulation makes such reference, it does not establish specific obligations relating to such movements.

It is concluded that the Basel Convention may be improved by the parties, especially by establishing more objective criteria for when a vessel should be considered waste. It is, however, difficult to establish effective objective criteria. It should thus be considered to develop the necessary legal framework for scrapping of vessels through the International Maritime Organisation (IMO), establishing that the flag state not only has the right to exercise jurisdiction over its ships "from cradle to grave", but should have an obligation to do so.

1.2. Norwegian Summary

Denne studien diskuterer det rettslige rammeverket for opphugging av skip, spesielt i forhold til forbudet mot å eksportere avfall fra OECD-land til ikke-OECD land. Basel-konvensjonen om kontroll av grensekryssende transport av farlig avfall (1989), EFs Rådsforordning nr. 259/93 og den norske forskrift om grensekryssende transport av avfall av 30. desember 1984 er behandlet. I tillegg er kontraktspraksis om opphugging av skip undersøkt. Fokus er særlig rettet mot hva som skal anses som "waste", hva som er "state of export", og hva som er en "transboundary movement"/"transfrontier shipment" av fartøyer.

"Waste" er i Basel-konvensjonen stoffer og gjenstander som en kvitter seg med, som en har bestemt seg for å kvitte seg med, eller som en etter nasjonal lovgivning har plikt til å kvitte seg med. I forhold til skip, kan det være vanskelig å bestemme når en eier har bestemt seg for å kvitte seg med det. Slik intensjon kan fastslås gjennom en beslutning fra eieren eller ved at han inngår en opphuggingskontrakt. Eieren har imidlertid rike muligheter for å skjule sin intensjon, og det er ikke lett å fastsette objektive kriterier for å bestemme en slik intensjon. EFs Rådsforordning og den norske avfallsforskriften reiser tilsvarende problemer.

"State of Export" er i Basel-konvensjonen definert som den staten hvor en grensekryssende transport settes i verk eller planlegges satt i verk. Dette bør forstås som den staten hvor den fysiske forflytningen skjer fra, eller planlegges å skje fra. Dette innebærer at den staten hvor beslutningen om den grensekryssende transporten tas eller nasjonaliteten til avfallet eller dets eier ikke har betydning. Siden Basel-konvensjonen ikke har spesielle regler om skip som avfall, vil eksportstaten for skip være den staten hvor skipet er blitt til avfall, og denne staten må sikre at importstaten har gitt nødvendig tillatelse til transporten. Flaggstaten eller den staten hvor eieren er registrert har ikke noe ansvar for å sikre tillatelse til utførsel til importstaten. Et problem er imidlertid at havnestaten ikke har jurisdiksjon til å kreve at slik tillatelse skal foreligge før et utenlansk registrert skip forlater dens havn. Dette betyr i praksis at OECD-stater ikke har noe ansvar etter Konvensjonen for deres skip som forlater utenlandske havner som avfall for å gå til til ikke-OECD stater, og havnestaten har ingen jurisdiksjon over slike skip. Tilsvarende problemer oppstår i forhold til EFs Rådsforordning og den norske avfallsforskriften. Selv om flaggstaten ikke har en plikt til å regulere eksport av skip for opphugging, er det imidlertid ingenting i veien for at denne staten fastsetter slike reguleringer dersom den ønsker dette. Dette kan imidlertid kreve endringer i nasjonal lovgivning og EF-retten.

"Transboundary movement" betyr i Basel-konvensjonen en transport fra et område under nasjonal jurisdiksjon i en stat til eller gjennom et område under nasjonal jurisdiksjon i en annen stat, eller til eller gjennom et område som ikke ligger under nasjonal jurisdiksjon i noen stat. Det

er imidlertid vanskelig å fastslå hvilke maritime soner som skal anses å høre under nasjonal jurisdiksjon til en stat, og dermed hva som skal anses som en grensekryssende transport. Uansett vil skipets eier ha store muligheter til å sikre at et skip sendt til opphugging ikke foretar en grensekryssende transport. EFs Rådsforordning bruker ikke uttrykket grensekryssende transport, og selv om den norske avfallsforskriften bruker dette uttrykket fastsetter den ingen spesielle plikter i forhold til slik transport.

Det konkluderes med at Basel-konvensjonen kan forbedres, spesielt gjennom å fastsette mer objektive kriterier for når et skip skal anses som avfall. Det er imidlertid vanskelig å fastsette effektive objektive kriterier. Det bør derfor vurderes å utvikle det nødvendige regelverket om opphugging av skip under Den internasjonale sjøfartsorganisasjonen (IMO), slik at flaggstaten ikke bare har en rett til å utøve jurisdiksjon over sine skip fra "vugge til grav", men får en plikt til å gjøre dette.

2. Introduction

Exports of hazardous waste are regulated at the international and the national level, aiming at the reduction of such exports. This study focuses on the legal framework for scrapping of vessels, especially the export of vessels for scrapping from OECD to non-OECD countries. The emphasis is on when a vessel should be considered "waste", what is the "state of export" of vessels, and what is a "transboundary movement"/"transfrontier shipment" of vessels.

These questions will be discussed in relation to the 1989 Convention on Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), the 1993 Council Regulation (EEC) No 259/93 on the Supervision and Control of Shipments of Waste within, into and out of the European Community, as well as the Norwegian Regulation of 30 December 1994 ("Forskrift om grensekryssende transport av avfall"). But also other international instruments will be addressed, such as the 1972 London Dumping Convention with its 1996 Protocol. The discussion will refer to contract practice on the transfer of vessels for scrapping. While the number of available contracts is limited to three, these contracts are assumed to be typical for such transfers. BIMCO Salescrap 87, which is a standard scrapping contract said to be used relatively often (Falkanger and Bull 1999 p. 96), has also been examined.

3. Definition of "waste"

3.1. The Basel Convention

The Basel Convention prohibits the export of hazardous wastes and other wastes to other states without the prior approval of the importing state. The exporting state shall not permit such export to states which have prohibited the import of such wastes or without a consent obtained by the importing state (arts. 4 (1) and 6).

The Conference of the Parties to the Convention (COP) prohibited by Decision II/12 transboundary movements from OECD States to non-OECD States of wastes destined for final disposal, and a phasing out of wastes destined for recycling or recovery operations. It may be discussed to what extent the COP had powers to adopt a binding decision on this issue, and,

accordingly, whether this decision in spite of its mandatory wording should be considered a recommendation:

> "The legal value of such a decision is not clearly defined. In the strictest sense, it is not legally binding on the parties to the Convention. On the other hand, it is clearly intended to be more than a mere non-binding recommendation." (Kummer 1995 p. 64)

The COP has, however, also included the prohibition of the transboundary movement from OECD States to non-OECD States by Decision III/1 as an amendment to the Convention. A new art. 4 A has been inserted:

1. Each Party listed in Annex VII shall prohibit all transboundary movements of hazardous wastes which are destined for operations according to Annex IV A, to States not listed in Annex VII.
2. Each Party listed in Annex VII shall phase out by 31 December 1997, and prohibit as of that date, all transboundary movements of hazardous wastes under Article 1 (i) (a) of the Convention which are destined for operations according to Annex IV B to States not listed in Annex VII. Such transboundary movement shall not be prohibited unless the wastes in question are characterised as hazardous under the Convention.

The phase-out period expired on 31 December 1997, and both art. 4 A (1) and (2) contain accordingly as of today prohibitions against transboundary movements. The COP added also a new Annex VII to determine to which countries the export ban applies:

> Parties and other States which are members of OECD, EC, Liechtenstein.

In order to enter into force, this amendment must be ratified by three-fourths of the Parties accepting it at the time of its adoption (art. 17), i.e. by 63 countries. As of 20 May 1998 it had been ratified by eight States (Denmark, Finland, Luxembourg, Norway, Spain, Sweden, the UK and Ecuador) and the European Community (Kummer 1998 p. 229). This means that there is as yet no legally binding prohibition against such export from OECD States, unless Decision II/12 is considered a binding prohibition. In the following, the basis for the discussion is the legal situation when the amendment under Decision III/1 enters into force.

Art. 4 A refers to "hazardous waste". This term is defined in art. 1:

> 1. The following wastes that are subject to transboundary movement shall be "hazardous wastes" for the purpose of this Convention:
>
> (a) Wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex III; and
>
> (b) Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit.
>
> 2. …….
>
> 3. …….
>
> 4. …….

It should be noted that art. 4 A (2) only refers to art. 1 (1) (a), and not to (1) (b).

Annex I lists a number of substances, including waste oils/water, hydrocarbons/water mixtures and surface treatment of metals. Annex III lists hazardous characteristics, including explosive substances, flammable liquids and solids, and poisonous and infectious substances. The COP has in accordance with art. 19 of the Convention by Decision IV/9 added two Annexes, Annex VIII and Annex IX, containing, respectively, wastes characterised as hazardous and not hazardous

under art. 1 (1) (a). Veritas Report 1999 Tables 1-1 and 1-3 provides an overview over hazardous wastes likely to be generated during the scrapping of vessels. The focus of this study is, however, not which substances should be considered hazardous waste and it will in the following be assumed without further discussion that if vessels are scrapped, not only individual substances as part of or on board vessels, but the vessels as such should be considered "hazardous waste" under art. 1 (1).

At what point does a vessel become waste? "Wastes" are defined in art. 2 (1):

> "Wastes" are 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;

Vessels are clearly "objects", but what is "disposal"? Art. 2 (4) defines "disposal":

> "Disposal" means any operation specified in Annex IV to this Convention;

Annex IV refers both to (A) operations which do not lead to the possibility of resource recovery and recycling, such as deposit into or onto land, and (B) operations which may lead to recovery and recycling. Art. 4 A refers in (1) to Annex IV A and in (2) to Annex IV B, meaning that the export ban, when in force, would apply both to final disposal and to disposal for recovery.

Scrapping of vessels will generally be undertaken to recover relevant material, especially scrap steel for steel mills, but also to recover fuel oils and machinery components (Veritas Report 1999 pp. 8 and 52, see also Falkanger and Bull 1999 p. 96). Annex IV B refers, *inter alia*, to recycling/reclamation of metals and metal components. Parts of the vessel may presumably also be left without recovery or recycling, see Annex IV A. It may thus be concluded that vessels should be considered waste under Annex IV A or B, or both, when they are actually scrapped, or when they are required to be scrapped under national law.

Abandonment should also be considered a form of disposal under Annex IV A since the owner has given up the vessel. Although abandonment in a port or outside a beach does not fit well with the wording of Annex IV A (D 1 "Deposit into or onto land (e.g., landfill, etc.)" or D 7 "Release into seas/oceans including sea-bed insertion"), it is stated that "Section A encompasses all such disposal operations which occur in practice". Accordingly, also such a form of disposal should be covered by Section A.

If the whole vessel is abandoned while only parts of it is dismantled, the whole vessel should still be considered disposed of and thus be regarded as "waste". But if parts of the vessel are dismantled and the rest of the vessel is intended for continued sailing, only the dismantled parts should be seen as "objects which are disposed of or are intended to be disposed of", and thus be considered "waste".

But at what time should a vessel be considered "intended" to be disposed of?

No distinction is made between cases where the waste can still be considered a ship under international law, and cases where such status no longer exists. Neither is there any distinction between cases where the waste is still used for other purposes, such as transport of cargo by vessels, and where waste is sent directly to disposal. Consequently, a vessel is to be regarded as waste whether or not it still is to be considered a ship, or it is still used for transport of cargo, as long as the decision has been taken to scrap the vessel. This means that a vessel should be

considered waste even if it will call at different ports with cargo, before it reaches the location for scrapping. But if the decision has been taken to scrap the vessel in some distant future, and it meanwhile will be used as a ship, the vessel should not be regarded as waste already from the time of the decision. It may be difficult to establish how close connection should be required between the decision and the actual scrapping, to consider the vessel to have become waste.

"Intention" is a subjective quality, and it may be asked whose intention should be examined. The Convention does not expressly address this question. It must be assumed that only the owner of the vessel is entitled to decide whether or not it shall be disposed of, and, accordingly, that it is the intention of the person, company or state owning the vessel that is decisive. The "exporter", the "carrier", and the "generator" of the waste are defined in art. 2 (15), (17) and (18), but the status of owner will not necessarily coincide with these three categories. The owner may also be different from who is designated the management company for the vessel.

The intention to scrap a vessel may be established by a decision by the relevant organ of the company owning the vessel. Such a decision may, however, be difficult to discover and to prove for relevant national authorities.

The intention of the owner may also be established by legal and/or physical actions taken in respect of the vessel. First, the vessel may be taken out of traffic on a permanent basis awaiting arrangements for scrapping. The vessel may not be maintained for transport of cargo or passengers, and preparatory steps may be taken on board for scrapping (see below). Second, the owner may delete the vessel from the national ship registry, or not renew relevant certificates or classifications of the vessel. All these actions may be indications of the intention of the owner to dispose of the vessel, and thus mean that the vessel should be considered "waste".

Such intention may also be established by a contract entered into by the owner. All the three contracts on scrapping examined, as well as Salescrap 87, establish explicitly that the vessel is sold for the purpose of scrapping/demolition only. These cases create no problems: the vessel has become waste when the contract is binding on the owner.

It may be asked whether preparatory steps before a binding contract is entered into, such as contacting a broker for a possible sale for scrapping, should be considered as establishing the necessary intention of the owner. While this may be taken as an indication that the owner has such intention, it would not suffice in itself, since the final intention of the owner may depend on the terms of a possible contract.

The owner of a vessel may, however, wish to circumvent international and national regulations on export by not stating the purpose of a transfer of ownership or by waiting with entering into a contract until the vessel is on the high seas or in the waters of the State where scrapping is to take place. The question will then arise to what extent the intention of the owner may be established at an earlier stage by some objective criteria other than entering into a contract expressly stating that its purpose is scrapping.

There seems to be few steps of a physical nature the owner would need to undertake prior to the vessel's reaching the destination for scrapping (Veritas 1999 pp. 44-45). Two of the contracts require that the vessel shall be delivered under her own power and safely afloat and substantially intact at the scrapping location. The owner's crew is even required to assist in sailing the vessel ashore on the beach for scrapping. One of these contracts requires the seller to certify that the vessel has not been engaged in carriage of toxic chemicals or industrial/nuclear waste, and to

provide a gas free certificate, except for bunkers and slop tanks. Also Salescrap 87 requires that a certificate establishing that tank vessels are gas free and substantially free of residues, slops and sludge is provided. This means that in principle no preparatory steps must be undertaken before beaching unless the buyer or governmental authorities require such steps. In the absence of such requirements, it is accordingly difficult to determine the scrapping intention of the owner until he enters into a contract on scrapping.

The third contract is of a different character in the sense that the vessel shall be delivered safely afloat accessible to the buyer's ocean going tug. The owner shall also provide for the deletion of the vessel from the Registry of Vessels. The vessel shall be delivered with everything belonging to her, but free of cargo with sludge removed and with class as storage barge. She shall have a valid gas free certificate. In this case steps have been taken to convert the vessel to a storage barge, which is an indication that scrapping is intended. But even a status as a storage barge would not necessarily mean that the vessel is intended for scrapping, and thus has become waste. Salescrap 87 establishes that the vessel shall be delivered either under her own power or under tow.

It may be concluded that the scrapping intention of the owner can be established by a decision of the ship-owning company; by legal and practical steps, such as permanently taking the vessel out of traffic and deleting it from the national registry; or by entering into a contract expressly for scrapping. Usually, the vessel will, however, sail to the scrapping location under her own power and with the seller's crew, and any preparatory practical steps could be taken in the ports of the scrapping state. It would probably in many cases also be possible to use the vessel in traffic in non-OECD countries before scrapping. This means that the owner has ample opportunity to circumvent a prohibition, when it enters into force, against export of waste from OECD countries to non-OECD countries.

3.2. Council Regulation (EEC) No. 259/93 on Shipments of Waste

Council Regulation (EEC) No. 259/93 on Shipments of Waste (Shipment Regulation) distinguishes between shipments between Member State (Title II), within Member States (Title III), exports of waste from the Community (Title IV), imports of waste into the Community (Title V), and transit of waste from outside and through the Community (Title VI). A distinction is also made between waste destined for disposal and for recovery.

As regards exports of waste for disposal, it is established that all such exports are prohibited, except for exports to EFTA countries which are also parties to the Basel Convention (art. 14 (1)). Consequently, all exports for disposal are prohibited from the Community to non-OECD countries (and even to several OECD countries). "Disposal" is defined in the Framework Directive art. 1 (e) as any of the operations provided for in Annex II, A, which, *inter alia*, covers deposit into or onto land.

As for exports of waste for recovery, the Shipment Regulation has been amended by Council Regulation (EC) No. 120/97. The new regulation art. 1 (1) establishes:

1. All exports for recovery of waste listed in Annex V for recovery shall be prohibited except those to:
   (a) countries to which the OECD Decision applies.

The OECD Decision means the decision of the OECD Council of 30 March 1992 concerning the Control of Transfrontier Movements of Wastes destined for Recovery Operations. This decision, which is legally binding, establishes a regulatory system for shipment of wastes for recovery, but limited to shipments between OECD States. This decision will accordingly not apply to shipments from the Community to non-OECD States.

Council Regulation No. 120/97 provides furthermore in art. 1 (1) (b):

> (b) other countries:
> - … Any such exports shall however be prohibited from 1 January 1998 onwards.
> - with which individual Member States have concluded bilateral agreements and arrangements prior to the date of application of this Regulation …

This means that exports of wastes listed in Annex V for recovery to non-OECD States are prohibited from 1 January 1998 (bilateral agreements covered by the second indent will not be further discussed). Annex V has been replaced by Commission Regulation (EC) No 2408/98 following the adoption of the new Annexes VIII and IX under the Basel Convention. "Recovery" is defined in art. 1 (f) as meaning any of the operations in Annex II, B, which, *inter alia*, covers recycling/reclamation of metals and metal compounds (see Commission Decision 96/350/EC).

In relation to ACP States exports of all waste are prohibited, whether they are destined for disposal or recovery, also wastes which are not listed in Annex V (art. 18).

The prohibition against exports refers, however, only to what is considered "waste". The Shipment Regulation art. 2 (a) states that "waste" shall be defined as in art. 1 (a) of Directive 75/442/EEC (Framework Directive). The Framework Directive, as amended by Council

Directive 91/156/EEC, defines in art. 1 (a) "waste" as follows:

> (a) "waste" shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.

Annex I lists different categories of wastes but does also contain a catch-all phrase:

> Q 16 Any materials, substances or products which are not contained in the above categories.

Vessels would accordingly be among the "objects" covered by art. 1 (a).

A key-word in art. 1 (a) is "discard", which is not used in the Basel Convention. This term is not further defined, and has given rise to "considerable conjecture" (Ermacora 1998 p. 277). Discard is in dictionaries defined as "to get rid of as useless or undesirable", "cast aside" or "give up". It may thus be discussed whether the expression only covers final disposal, or also objects destined for recovery or recycling. But since the Shipment Regulation applies "waste" both in connection with final disposal and with recovery, objects and substances should be regarded as "discarded" if they are destined for either of these purposes.

The definition of "waste" has also been addressed by the European Court of Justice (ECJ) in several cases. The Court dealt with this question for the first time in the joined cases C-206/88 and C-207/88 (*Vessoso and Zanetti*), and stated that waste "is not to be understood as excluding substances and objects which are capable of economic reutilization" (para. 9). This opinion was

also referred to in joined cases C-304/94, C-330/94, C-342/94 and C-224/95 (*Euro Tombesi and Adino Tombesi et al*) (paras. 47 and 54) and case C-129/96 (*Inter-Environnement Wallonie ASBL*) (para. 31).

It may be concluded that vessels are "discarded" and thus become "waste" at the point when they are actually scrapped, either for final disposal or for recovery operations, or when they are required to be scrapped. Already the intention to scrap means that a vessel becomes "waste". But in determining when such intention occurs, similar problems arise as in the Basel Convention, and they should be assessed along the same lines.

3.3. Norwegian Regulation 30 December 1994 on Shipment of Waste

Council Regulation (EEC) No. 259/93 on Shipments of Waste (Shipment Regulation) has been implemented in Norwegian law by Norwegian Regulation 30 December 1994 on Shipment of Waste, pursuant to the EEA Agreement, Annex XX, para. 32 C. This means that the same regulations apply to export of waste from Norway as export of waste from the Member States of the European Union, unless the Norwegian Regulation provides otherwise.

As regards export of waste for disposal, the Shipment Regulation establishes that all such export is prohibited from Member States of the European Union, except for export to EFTA countries which are also parties to the Basel Convention (art. 14 (1)). It should be assumed that in relation to export from EFTA countries, they must be allowed to export also to Member States of the European Union. But all exports for disposal are prohibited from Norway to non-OECD countries (and OECD countries not members of the EEA).

As for exports of hazardous waste for recovery, the Norwegian Regulation itself provides that export of such waste will not be allowed from Norway to non-OECD countries. Hazardous waste is understood as wastes included in Annex III (Amber List) and Annex IV (Red List) to the Norwegian Regulation.

The Norwegian Regulation contains no separate definition of "waste" and the Community definition of "waste" in the Shipment Regulation will accordingly apply. No Norwegian case law is known on this point and it should be assumed that "waste" will be given an interpretation similar to European Community law, and will raise the same questions in respect to its application for scrapping of vessels.

4. Definition of "state of export"

4.1. The Basel Convention

Which state is responsible for ensuring that the necessary consent of the importing state for scrapping has been obtained: is it the flag state, the state in which the owner is registered, or the port state from which the vessel departs for scrapping?

The Basel Convention establishes in arts. 4 and 6 that this obligation is placed upon the "State of Export", which is thus defined in art. 2 (10):

10. “State of export” means a Party from which a transboundary movement of hazardous wastes or other wastes is planned to be initiated or is initiated;

This definition establishes two alternatives: the state of export is the state from which the transboundary movement is planned to be initiated, or from which it is initiated.

“Initiate” means to begin, originate or set going. According to the second alternative the decisive fact is thus from which state the transboundary movement of the waste is begun, i.e. from where the physical action of moving the waste has commenced. This alternative makes no mention of where the decision has been taken to move the waste, the nationality of the waste, or of its owner. If, for example, a waste is located in state A and sent to state B, state A will be the state of export whether or not the decision is taken in state C, or the factory generating the waste is owned by a national of state D, or the waste itself is owned by a national from state E.

The first alternative refers to the state in which the transboundary movement is planned to be initiated. No reference is, however, made to where the movement was planned, but only to where it was planned to be initiated, i.e. where it was planned to physically start. The reason for adding this alternative must have been to designate the exporting state already at the planning of the transboundary movement, since this state shall ensure that the importing state has consented before the movement actually takes place. Consequently, the state where the planning of the movement or the decision to move has been taken is irrelevant also under this alternative.

This means that the state of export is the state from which the transboundary movement, i.e. the physical action of moving the waste, starts or is planned to start. Such an interpretation conforms with other provisions of the Convention, such as art. 8, providing that the exporting state must ensure that the wastes are “taken back” if a transboundary movement cannot be completed in accordance with the terms of the contract. This means obviously, that the waste must be taken back to where it physically came from.

This interpretation conforms also with the object and purpose of the Basel Convention, which is to restrict transboundary movement of hazardous waste and to encourage that such waste is taken care of in the state in which it is physically located. In the absence of a consent from the importing state, the exporting state must take care of the waste itself. In order to prevent a transboundary movement, the exporting state should accordingly be the state where the waste actually is situated.

Furthermore, such an interpretation is in accordance with the practice under the Convention. The place where a decision about transboundary movement has been taken or planned, or the nationality of the waste or its owner is irrelevant. The decisive fact in establishing the export state is from where the waste is sent or planned to be sent.

And, finally, this interpretation is consonant with what is commonly understood as an exporting state outside the Convention. A state of export is generally understood to be the state from where the goods come, irrespective of whether the company exporting the goods is foreign-owned or the decision has been taken in a different state.

This would in relation to vessels mean that the state in which the vessel becomes waste is the exporting state, whether or not the vessel flies the flag of that state. It may be argued that it is not natural to say that a port state exports a vessel departing for another state, even if it is for scrapping. The Basel Convention does, however, not establish a special system for vessels. The

decisive facts are whether a “transboundary movement” of “waste” is undertaken. When a vessel has become waste, it is the state from which it departs which, in conformity with other waste, must be considered the exporting state. Accordingly, in the absence of any express provision, the flag state as such has no obligation under the Convention to ensure the existence of a consent from the importing state.

The relationship between port states and flag states must, however, be discussed in relation to jurisdictional issues.

When a vessel is in a port of its flag state and the owner wants to send it to another country party to the Convention for scrapping, the flag state as export state must ensure that the export is allowed under the Convention, and follow its requirements for export of waste. The flag state has the necessary jurisdiction over its vessels in its own ports to impose such requirements.

But what about the situation where the vessel is in a foreign port? It has been concluded that the state where the waste is to be found is the state of export, and not the flag state. Accordingly, the port state should be responsible for ensuring that the requirements for export are fulfilled. But this raises the question to what extent the port state has jurisdiction over a foreign vessel to require that it obtains necessary permissions from the importing state.

It may be the case that a vessel has ceased to be a ship under international law, by reason of not longer being able to sail or because it has been put to other use. In such case, the port state will have the same jurisdiction over this object as over any other waste in its territory. But, as has been stated above, vessels will usually be able to sail to the scrapping location, and such vessels would undoubtedly be considered ships under international law.

The port state has generally jurisdiction over foreign vessels in its ports. Article 2 of the 1982 United Nations Law of the Sea Convention states that the sovereignty of the coastal state applies both in its internal waters and the territorial sea. Article 211 establishes rights and obligations of states relating to pollution from vessels. This includes co-operation on marine pollution (paragraph 1), flag state responsibilities (paragraph 2), coastal state authority in ports (port state authority) and internal waters (paragraph 3), and coastal state authority in the territorial sea (paragraph 4).

Paragraph 3 provides that states establishing particular requirements for the prevention of marine pollution as a condition for entry into its ports, internal waters of off-shore terminals shall give due publicity and shall communicate such requirements to the competent international organization. If such requirements are applied by two or more states, the flag state shall require the master of the vessel navigating in the territorial waters of one such state, upon request, to furnish information on whether it is proceeding to another state participating in such an arrangement, and whether it complies with the port entry requirements. The right to establish conditions for access of vessels is thus recognized. But only in so far as they relate to the prevention of marine pollution.

One could ask whether a port state may establish regulations or conditions for access, requiring the vessel to obtain prior consent from an importing state in the case of scrapping. The difficulty is, however, that the port state will have no jurisdiction over the use of the vessel after its departure. While a prohibition against such a requirement is not explicitly stated in the 1982 Law of the Sea Convention, it would probably follow from the general restrictions on the port state’s jurisdiction (see Churchill & Lowe pp. 68-9 about the restrictions on the port state’s jurisdiction

based on the “temporary presence of foreign ships in ports”). Furthermore, the port state will usually have no information about the plans of the owners of foreign ships and the contracts entered into about the vessels’ destiny, and will have little incentive to obtain such information and exert control.

It could be argued that the flag states parties to the Basel Convention have, through the Convention, agreed to such interference with their vessels by the port states, and thus that the port state would have the necessary jurisdiction. Art. 4 (12) of the Convention establishes, however, that it shall not affect the navigational rights and freedoms of states:

> 12. Nothing in this Convention shall affect in any way the sovereignty of States over their territorial sea established in accordance with international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law, and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments.

This means that, although the port state is the exporting state under the Basel Convention, it has no jurisdiction - and little incentive - to control foreign-owned vessels as long as they retain their status as ships under international law.

The following four situations may thus exist in relation to jurisdictional issues:

		Status of Ship	
		Ship	Non-Ship
Location	Flag State	Jurisdiction	Jurisdiction
	Foreign State	No Jurisdiction	Jurisdiction

It may be concluded that in relation to vessels sent to non-OECD countries for scrapping, OECD countries should only be regarded as exporting states for vessels in the ports of these countries when they become waste, i.e. when they are in the location of the flag state. They will, however, have no responsibility under the Basel Convention as flag states or home country for owners to vessels sent to scrapping from foreign ports. Neither will these foreign states have jurisdiction over the vessels, unless such vessels can no longer be considered ships under international law. If the vessels become waste when sailing on the high seas by the fact that the owner enters into a contract on scrapping, there will be no exporting state at all. Consequently, the vessel owner may circumvent the requirements of the Basel Convention by arranging for the vessel to become waste when situated in a foreign port or when sailing on the high seas.

The above conclusions relate to the responsibilities under the Basel Convention and the jurisdiction of the port state over foreign ships for scrapping. Although it has been concluded that the flag state as such does not have responsibilities under the Convention, it would have jurisdiction over its ships even in foreign ports for the purpose of establishing prohibitions or

requirements for scrapping if it so desires. Such prohibitions or requirements may, however, require amendments to national legislation and the law of the European Community.

4.2. Council Regulation (EEC) No. 259/93 on Shipments of Waste

Council Regulation (EEC) No. 259/93 on Shipments of Waste (Shipment Regulation) does not use the term "state of export", but "state of dispatch" which is defined as (art. 2 (l)):

> (l) *State of dispatch* means any State from which a shipment of waste is planned or made;

It is assumed that this expression has the same meaning as "state of export" in the Basel Convention.

4.3. Norwegian Regulation 30 December 1994 on Shipment of Waste

Norwegian Regulation 30 December 1994 on Shipment of Waste has no separate definition of state of export, and the definition must therefore be assumed to have the same content as the EC Shipment Regulation. This means, consonantly with the above conclusion for the Basel Convention, that Norway has no responsibility to notify importing states about Norwegian registered or - owned vessels leaving foreign ports for scrapping.

5. Definition of "transboundary movement"/"transfrontier shipping"

5.1. The Basel Convention

The Basel Convention establishes obligations in relation to "transboundary movements", which are defined in art. 2 (3):

> 3. "Transboundary movement" means any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement;

"Area under the national jurisdiction of a State" is defined in art. 2 (9):

> 9. "Area under the national jurisdiction of a State" means any land, marine area or airspace within which a State exercises administrative and regulatory responsibility in accordance with international law in regard to the protection of human health or the environment;

The territorial application of the Basel Convention was disputed at the time of its negotiation:

> "During the negotiations, there was considerable disagreement concerning the territorial areas to which the provisions of the Basel Convention should apply. This was particularly important for the position of transit states in the context of the Convention's regulatory system […]. States which did not want to see that system applied to transit of hazardous wastes through the airspace or territorial sea of third states objected to the use of the term 'territory', since they feared that it might be interpreted to include those areas. The resulting compromise language is not very clear." (Kummer 1995 p. 52).

The most pertinent question in relation to scrapping of vessels is, however, that a vessel may become waste when sailing in different kinds of maritime zones in different countries, and it must be assessed what is a "transboundary movement" of such waste.

A state exercises obviously "administrative and regulatory responsibility" over both "human health" and the "environment" in its ports and internal waters. Furthermore, a state exercises sovereignty over its territorial sea (1982 Law of the Sea Convention, art. 2), and while other states have the right to innocent passage (art. 17), the coastal state may adopt laws and regulations relating to environmental protection and the prevention of sanitary legislation (art. 21). It has also a certain jurisdiction in sanitary matters in the contiguous zone (art. 33). And, finally, it has a carefully drafted environmental jurisdiction in the 200-mile exclusive economic zone (art. 56 and Part XII of the Law of the Sea Convention). "Area under the national jurisdiction of a State" could thus be interpreted to cover all maritime zones of a state. But the fact that also the flag state exercises "administrative and regulatory" responsibility over its ships with respect to human health and environmental matters may raise some doubt about the proper interpretation.

This means that there is obviously a "transboundary movement" if a vessel considered as waste sails from the ports or the internal waters of one state to a beach for scrapping in another state. This would probably also be the case if a ship becomes waste in one state's territorial waters and then enters the internal waters in another state. There may be more doubt if a vessel becomes scrap in the contiguous zone or the 200-mile exclusive economic zone of one state and then enters the internal waters of another state. But it should not be considered a transboundary movement if the vessel becomes waste on the high seas or in one of the maritime zones of the state where it is scrapped.

There are consequently several legal questions without clear answers. In relation to scrapping of vessel, it is, however, of more importance that the ship-owner may wait with the decision to scrap the vessel until it arrives in the waters of the state where it is to be scrapped, and thus avoid a "transboundary movement" under the Basel Convention. It should also be added that although a state may be considered a "state of export" in relation to transboundary movements from its internal waters, the territorial sea, the contiguous zone or the 200-mile exclusive economic zone, it would have no jurisdiction to require from vessels under foreign flag that consent to scrapping has been obtained from an importing state (see subsection 4.1. above on the restricted jurisdiction of the port state).

5.2. Council Regulation (EEC) No. 259/93 on Shipments of Waste

Council Regulation (EEC) No. 259/93 on Shipments of Waste (Shipment Regulation) has no reference to "transboundary movement" or a similar wording. The decisive factor will be what should be considered export, and the maritime areas are not mentioned.

5.3. Norwegian Regulation 30 December 1994 on Shipment of Waste

The Norwegian Regulation 30 December 1994 on Shipment of Waste refers to "transboundary movement" ("grensekryssende transport") in its title, in the title of section 1, and in the reference to Council Regulation (EEC) No. 259/93 on Shipments of Waste (Shipment Regulation) in

section 1. The Norwegian Regulation has, however, no separate provision on “transboundary movements”, and should be interpreted in the same way as the EC Shipment Regulation.

6. Conclusions

It has been demonstrated that the existing definition of waste makes it easy for ship-owners to manipulate when their vessels are to become “waste”. One possibility would be to introduce more objective criteria for when a vessel becomes waste. This would probably require an amendment of the definition of “waste” in the Basel Convention. But since few or no preparations have to be undertaken with vessels before their arrival at the destination for scrapping, it is difficult to establish such objective criteria. The ship-owner may engage the vessel in traffic between non-OECD countries for a long time before scrapping and thus avoid the prohibition, when it enters into force, against export of waste from OECD to non-OECD countries.

Another point which has been highlighted is that the port state, although being the state of export under the Basel Convention, has no jurisdiction over foreign vessels in regard to scrapping in other states. This could be remedied by another amendment of the Convention allowing port states such jurisdiction in relation to parties to the Convention. But as has been pointed out, the port state has little information about foreign vessels’ affairs and has little incentive to regulate their activities. Such jurisdiction could also be considered to be negative by flag states, fearing the danger of abuse of the port state’s rights and responsibilities.

Generally, the flag states are in international law responsible for the activities of their vessels, and it could be argued that this should be the case also in relation to scrapping of vessels. Under the London Dumping Convention and the OSPAR Convention the flag states are responsible for the safe dumping of vessels. Similar obligations could be established for scrapping of vessels, which would mean that the flag state not only would have the right to exercise jurisdiction over its ships “from cradle to grave”, but would have an obligation to do so, and it would make it unnecessary to determine when a vessel becomes “waste”, what is the “state of export”, and what is “transboundary movement”. This could also mean that scrapping of vessels came under control of the international organisation responsible for maritime activities, i.e. the International Maritime Organisation (IMO). But international regulations on scrapping of vessels on land would probably require an amendment of the London Convention, or a new legal instrument.

REFERENCES

R.R. Churchill and A.V. Lowe, The Law of the Sea, 3rd ed., Juris Publishing, Manchester University Press, 1999

Thor Falkanger and Hans Jacob Bull, Innføring i Sjørett, 5th ed., Forsikringsakademiet, Oslo, 1999

Katharina Kummer, International Management of Hazardous Wastes. The Basel Convention and Related Legal Rules, Clarendon Press, Oxford, 1995

Katharina Kummer, The Basel Convention: Ten Years On, Review of European Community and International Environmental Law (RECIEL), No. 3/1998, pp. 227-237

Florian Ermacora, Community Legislation and Jurisprudence in the Area of Waste Management: Recent Developments, Review of European Community and International Environmental Law (RECIEL), No. 3/1998, pp. 274-283

Veritas Technical Report No 99-3065, Rev. 3, 3 February 1999

INTERNATIONAL AND NORWEGIAN LEGAL INSTRUMENTS

1972 London Dumping Convention with its 1996 Protocol

1982 United Nations Convention on the Law of the Sea

1989 Convention on Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention)

1992 OECD Decision concerning the Control of Transfrontier Movements of Wastes destined for Recovery Operations

1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR)

1975 Council Directive 75/442/EEC on Waste

1991 Council Directive 91/156/EEC amending Directive 75/442-EEC on Waste

1993 Council Regulation 259/93/EEC on the Supervision and Control of Shipments of Waste within, into and out of the European Community

1994 Commission Decision 94/721/EC adapting Annex II, III and IV to Council Regulation 259/93/EEC

1996 Commission Decision 96/350 EC adapting Annexes IIA and IIB to Council Directive 75/442/EEC on Waste

1996 Commission Decision 96/660/EC adapting Annex II to Council Regulation 259/93/EEC

1997 Council Regulation 120/97/EC amending Council Regulation 259/93/EC

1998 Commission Regulation 2408/98 amending Annex V to Council Regulation 259/93/EEC

1998 Commission Decision 98/368/EC adapting Annexes II and III to Council Regulation 259/93/EEC

Norwegian regulation of 30 December 1994 (“Forskrift om grensekryssende transport av avfall”)