Comments on the Review and Revision of the European Union Waste Shipment Regulation

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and
European Environmental Bureau (EEB)

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Introduction

BAN and EEB activists have been involved in the waste shipment regulation since 1989 and remain concerned that the original intent and rigor of the legislation is maintained in the new revision while practical implementation is enhanced. To this end we have submitted the following comments. We have only commented on primary areas of concern utilizing the very same heading numbers as are used in the Commission's Background Paper of 25 June 2001 (adjusted 11 October).

1.1 Waste lists and control

Adapting to the OECD Decision or Not

At the outset, BAN and EEB wish to go on record as stating that the OECD decision to further revise their decision was an exercise in going from a bad decision to a worse one. The explanation of this latest revision, that this was a form of harmonization with the Basel Convention makes little real sense while it strives to derogate from the Basel lists.

Historically the entire exercise of establishing the OECD (red, amber and green) Council Decision was originally a thinly disguised effort to depart from the Basel Convention and to do so in ways that almost invariably were less rigorous from an environmental standpoint than the Basel Convention. This latest revision is simply more of the same. In this latest version, the OECD refuses to accept the Basel Annexes VIII and IX even after all OECD members negotiating fully in their development. The OECD now proposes new listings in the Green list that raise serious questions as to whether the green list is based on science or is simply economically motivated. Further the OECD ill advisedly removes the world's most dangerous wastes (former red list) requirements for prior informed consent control procedures. Rather than accepting false claims as to harmonization with Basel, it is important (as it was in the past) to simply look at the real effect of the changes.

The two most significant weaknesses with respect to environmental protection, found in the recent OECD revision are the elimination of the "red" list and the addition of potentially hazardous wastes into the "green" list. Both of these represent a serious step backwards for the environment. We therefore would urge that the EU not march in lock-step with these proposals.

Resurrecting the "Red" List

One of the striking changes found in the OECD revision is its decision to move the "red" listed waste into the "amber" list. This was ill-advised not only because it moved even more wastes away from the strict prior informed consent requirements but also because the red list was useful in that it

isolated wastes which must never be recycled. The wastes of the former "red" list, including asbestos, PCBs, dioxins etc. should under no circumstances ever be recycled at all, let alone recycled under a streamlined procedure. This was never the real intent of the "red" list (to signal a prohibition on recycling) but it did provide an extra warning level which should now be defined in precisely that way – a "never-to-be-recycled" list.

It is our position therefore, that the EU should maintain the "red" list, perhaps under a different name, and utilize it as list of substances that should never under any circumstances be recycled. The recent adoption of the Stockholm Convention and its imminent ratification by the EU will add a new legal impetus to such a list which should be reflected now in the Waste Shipment Revision Process.

This is due to the fact that the Stockholm Convention's list of 12 Persistent Organic Pollutants (POPs) are, under the rules of the Stockholm Convention, never to be recycled. While it is true that the Basel Convention does not make a distinction between wastes that should be recycled or not, this is a shortcoming that the Stockholm Convention and the OECD's old red list clearly indicate should be remedied.

The OECD regime, which is only about recycling, fails to make a distinction between wastes that are inappropriate to recycle and other wastes. Indeed on the amber list one can find dioxins, PCBs, chloroflourocarbons, asbestos, and other substances which should never be recycled. The EU should not make the same mistake and it should anticipate the legal obligation of prohibiting recycling of the 12 POPs. This new "red" list or list of wastes never to be recycled, should also be subject to the most rigorous of transboundary movement controls available under the waste shipment regulation.

Down-listing Hazardous Wastes to the Green List

Another disturbing aspect of the OECD revision, is the fact that they have moved some known hazardous wastes into the Green list. These include:
GB040 Slags from precious metals and copper processing for further refining

- B1100 of Basel Annex IX that deals with copper slags, has been deliberately replaced by GB040 to exclude the caveat "not containing arsenic, lead or cadmium to an extent that they exhibit Annex III hazardous characteristics" (See Part I, (c) of Appendix 3). **This change opens up a gaping loophole to begin to consider all slag waste from copper processing as being non-hazardous as these are precisely the contaminants of concern with copper slags.**

GC020 Electronic scrap (e.g. printed circuit boards, electronic components, wire, etc. and reclaimed electronic components suitable for base and precious metal recovery.

- Similarly, B1110 of the Basel Annex IX has been replaced by language found in GC020, leaving out a very large caveat that the electronic scrap in question must not contain mercury switches, PCBs, cadmium etc. and are not contaminated with Annex I constituents that create hazard. **This change is dramatic as now electronic scrap, under the OECD decision will no longer have to have mercury switches, batteries, PCB capacitors etc. removed to render the waste non-hazardous.**

GH013 Polymers of vinyl chloride

- While the Basel Convention is known to be deliberating over the subject of whether PVC waste and scrap is hazardous or not, in light of the latest science on PVC and its additives, the OECD has deliberately (GH103) circumvented this debate, and included PVC as being non-hazardous. **The effect of this is to ignore the serious toxicity concerns inherent in heavy metal and phthalate contamination from PVC as well as breakdown products and by-products of thermal treatment and combustion. The inclusion here also is a deliberate short-circuiting of the Basel deliberation process.**

GG040 Coal fired power plants fly ash

- Basel Annex VIII (hazardous) included a listing A2060 for coal-fired power plant fly ash when the material was contaminated with Annex I substances to the extent that they exhibited Annex III characteristics. In the new OECD regime this listing is gone and is replaced with a "green" listing GG040 with all such concerns erased. **This change is meant to assure that scrutiny over contamination of this waste does not take place and that it is simply considered non-hazardous and remains on the "green" list.**

We do not believe the EU should accept these wastes nor the other revisions of the so-called Green list as it represents a step backward from environmental protection.

Indeed, if harmonization and simplicity and high environmental standards is really the aim, and we feel they should be, then we would recommend that the EU simply adopt the globally accepted lists of Basel's Annexes VIII and IX, as the primary lists, augmented by the EU's own comprehensive hazardous waste list and dispense entirely with the OECD "amber" and "green" listings. This will assure that all trade in wastes with third countries meet the same qualifications, and not create a double-standard for OECD countries.

This OECD Council Decision has cost an inordinate amount of governmental time and resources and has done very little to benefit the environment. Now that the Basel lists are fairly comprehensive and the process for adjusting them is working well, the need for the EU to further complicate matters by employing the OECD's down listings is not advisable.

Unlisted Waste

It is our view that in the best of worlds, unlisted wastes should be subject to no control procedure unless a country concerned registers their objection to their uncontrolled import, and prescribes a ban or control procedure. Unfortunately, the mechanisms by which countries, and in particular developing or non-OECD countries can register and then ensure dissemination of such information are at present poor.

According to Article 1, 1, b of the Basel Convention, unlisted wastes considered to be hazardous by any of the Parties can be controlled as such. Article 4, 1, a of the Convention asserts the right of countries to ban imports and requires countries wishing to exercise that right to notify the other Parties pursuant to Article 13 (through the Basel secretariat). Further Article 4, 11 allows any Party to impose additional requirements (e.g. control procedures). Thus it is clear that the right to impose national control procedures and bans exists.

However to date it is known that many countries have not notified via Article 13, their concerns, control procedures, and bans and thus exporting countries have little knowledge of these via the Basel Secretariat. Also to date, many countries were unsure if they could advocate a control procedure (short of a ban) for non-hazardous wastes.

Recently in the Technical Working Group of the Basel Convention, these concerns have been expressed strongly by developing countries. That is, they were unhappy with seeing wastes placed on Annex IX as that would imply that no control procedure was necessary when in fact many wastes, even though non-hazardous, may be undesirable to receive as imports. One remedy to this problem might be to advocate placing such wastes onto Basel's Annex II (a universal approach which will require Prior Informed Consent), or to exercise Article 4, para 11 of Basel (a unilateral approach) noted above. However to date these remedies have not taken place and the necessary exchange of information on unlisted waste concerns has rarely occurred.

Therefore it is our view that until such time as there is an adequate and functioning mechanism, the precautionary approach of "when-in-doubt-ask" should be employed. Thus at this juncture in history, we would agree with the Commission's proposed approach of utilizing the "red" procedure for all unlisted wastes.

Basel's Annex II Waste

Finally, it must be noted also that the EU regulation does not currently legally deal with Basel's Annex II (other wastes). Nor does the OECD Council decision. Thus, the EU has not legally transcribed the obligations regarding these wastes. This mistake must be remedied. This list should be a special list which requires Prior-Informed-Consent for all countries, as per the Basel Convention but not be subject to the Basel Ban.

1.2 Declassification of wastes to the Green Procedure

We concur with the Commission's view that unilateral action is inappropriate and undermines the harmonization envisaged by the regulation.

1.3 Mixtures of Wastes – classification and procedures

Waste mixtures are not to be encouraged by legislation. Indeed waste mixtures produce unexpected outcomes and almost assuredly make recycling more difficult. Mixing wastes must be discouraged. The revision of the regulation is an opportunity to require that all waste mixtures receive the new "red" procedure – that is, they shall be banned for export to non-OECD and requiring prior informed consent within OECD.

In summary, regarding lists, BAN and EEB would like therefore to call for another option than those already discussed that would amend the Annexes and lists as indicated in the following Table:

REVISED EU LISTING	EXPLANATION	CONTROL PROCEDURE
New Annex I	*Basel Annex IX:* Globally accepted list of wastes that are non-hazardous. Not meant to be exhaustive. Logically, must contain a Basel Annex I constituent.	*New "Green" Procedure:* That is, no control procedure unless a third country demands such after being queried by survey, or it is listed on EU Annex III, or it is found to be sufficiently contaminated to exhibit hazardous characteristics.

New Annex II	*Basel Annex VIII:* Globally accepted hazardous waste list.	*New "Red" Procedure:* That is, banned to non-OECD and full prior informed consent procedure within the OECD.
New Annex III	*EU Hazardous Waste List:* Includes additional wastes that the EU believes are hazardous. This "national" approach is fully compatible with Basel Convention's Article (1,1,b)	*New "Red" Procedure:* See explanation above.
New Annex IV	*Not-to-be-Recycled Waste List:* This will include all wastes subject to the Montreal Protocol, the Stockholm Convention and the former OECD "red" list.	*New "No Recycle" Procedure:* Banned for export to non-OECD countries. And banned for export for recycling operations in any country. Full control procedure of prior-informed consent for all other destinations.
New Annex V	*Basel Annex II, (Other Wastes):* These are currently listed as wastes collected from households and wastes from the treatment of wastes collected from households.	*New "Red" Procedure except that exports can be allowed to non-OECD*. Basel requires all countries to receive prior-informed consent, including OECD countries.
Unlisted Wastes	Not placed on a list.	*New "Red" Procedure* – unless a third country has duly registered via the Basel Secretariat, that it wishes to further control or ban such import.
Mixed wastes	A mixture of two or more listed wastes	*New "Red" Procedure*

1.4 Transfer Stations

We concur with the Commission that storage and accumulation destinations can not represent final dispensation of wastes and therefore the WSR should be amended to clarify that the financial guarantee can only be released upon proof of final recovery/disposal.

2.1 Illegal Shipments

Establishment of a hierarchy of responsibility with the producer being the primary responsible entity is consistent not only with the "polluter pays" principle but will reinforce the primary obligation of waste management policy -- waste prevention and reduction at source. The more responsibility and liability that is placed upon producers, the more there is an incentive to reduce waste. We therefore strongly concur with the favored option of the Commission.

2.2 Request for Action and Take-back by country of transit

According to Article 9 of the Basel Convention, any Basel Party concerned, including transit Parties, can be involved in deeming the traffic illegal and in such cases, the exporting country bears full responsibility in ensuring it is taken back or otherwise disposed in accordance with the Convention. That is, the concept of illegal traffic is independent of which Party concerned identifies it as such. Once it is deemed illegal it must be taken back. This principle is a sound one and should be transcribed properly into the Regulation. Therefore we concur with the Commission's favored option.

2.3 Interim storage costs for illegal shipments

We concur with the Commission's favored option.

2.4 Annex II/green waste shipped in contravention of the WSR – Article 1(3)(e)

We concur with the Commission that illegal traffic should always meet with penalty without exceptions.

3.1 Article 7(4)(a) WSR: Further objections to waste movements for recovery

It is absolutely essential that a MS can protect their interests from liability and can exercise precaution and responsibility with respect to the global environment. This will be necessary if indeed the standards in the importing state are deemed to be not sufficient to expect "environmentally sound management" (ESM) of hazardous wastes.

ESM is defined rigorously in the Basel Convention as "taking all practicable steps to ensure that hazardous 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."

If a MS believes this is in doubt they have more than a right to forbid the shipment. They have an *obligation* to do so. This obligation is indicated in the Basel Convention in Article 4, (2) (c) and (e). Moreover, Article 4 (2) (b) and (d) indicates that another *obligation* for forbidding export should be whenever there is adequate technical capacity for handling the waste without export.

Finally, Article 4 (11) states that nothing shall prevent a Party from imposing additional requirements that are consistent with the provisions of the Basel Convention, in order to better protect human health and the environment.

The European Court of Justice in the famous Wallonia case has ruled that waste is not subject to free trade but rather is a special kind of "tradeable". Indeed the Basel Convention and the EU Waste Shipment Regulation itself is testament to that fact. The Basel Convention calls first and foremost for a minimization of all transboundary movements in favor of dealing with wastes domestically in an environmentally sound manner. Trade "discrimination" issues in this case therefore are clearly secondary to environmental protection under the body of existent international law. Certainly this is the essence of the Basel Convention.

With respect to a country making a determination that the waste hierarchy is relevant and should favor materials recycling over incineration), we find that concept also to be consistent with Article 4 (11) mentioned above as well as the obligation for a minimization of the generation of hazardous wastes found in Article 4, (2) (a). Incineration can never be considered as "minimization of the generation of hazardous and other wastes" as required in the Basel Convention, whereas other waste management options would be.

In sum, the legal and environmental basis for a MS objecting to a transboundary movement of waste is very strong and broad under the relevant international law. Indeed, far beyond a right, it is an obligation in many instances to do so.

3.3 Shipbreaking

The discussion of this issue in the Background Document is somewhat unclear in certain aspects but in other ways has proposed some very practical solutions to a sticky problem. Finally its proposal

don't go quite far enough in delineating when a MS has jurisdiction over such ship scrapping movements.

First, the discussion fails to note that most legal experts that have reviewed the issue do indeed claim that there is little question that ships destined for scrap yards are indeed "wastes" and become wastes as soon as "intent to dispose" is ascertained. The definitions of waste, have nothing to do with whether or not the ships can sail or not or still function as ships. The utility of a waste is never part of the waste definitions. For example if a company wishes to dispose of some acid waste, the fact that the material can still function as an acid (e.g. stripping agent) is immaterial.

Clearly, then, industry's wishes aside, when ships as waste, contain hazardous constituents at hazardous levels, they are hazardous wastes. As such they must be dealt with according to the strictest control procedures including the EU implementation of the Basel Ban with respect to non-OECD countries.

The first (i) paragraph of the favored option needs then to make note of the fact that most ships are indeed hazardous waste and therefore would be prohibited from export to non-OECD countries regardless of ESM.

The second (ii) paragraph of the favored option however is an excellent idea which we support in fully in principle especially if is confined to large commercial bulk carriers, container vessels and tankers that are the primary concern. It helps solve the riddle of proving "intent to dispose" which is going to often be difficult to prove otherwise and perhaps involve excessive and expensive and unnecessary litigation as in the case of the Sandrien in the Netherlands.

Finally however, it is important to note that there are legal arguments that support other states other than the exporting port state (territorial jurisdiction) as having a legal obligation for the transboundary movement of the ship in question. It is possible that flag states, transit states, as well as states with jurisdiction over contractors, owners, buyers etc., can bear responsibility as long as these states are Parties to the Basel Convention.

The responsibility of these states over their businesses and citizens that in turn have ownership or decision making authority over the transboundary movement in question is clear, as the state must treat illegal traffic as criminal, under its general obligation under the Basel Convention. This criminal- state relationship implies exercise of jurisdiction over the actions (e.g. intent to dispose) of its citizens and corporations.

In another example, the Basel Ban Amendment is worded in such a way that requires Parties that are listed in Annex VII to prohibit the transboundary movement that results in the waste going to non-Annex VII destinations. It does not state that such Parties that exercise the prohibition must be exporting states. Rather an Annex VII Party that can prohibit an owner from exporting or an Annex VII transit state that can block the ship's movement can also be required to implement the ban.

The legal questions involved are complex and need to be further discussed. However in the short term and in the exercise of precaution we would very strongly recommend that the WSR be amended to ensure that:

i) when it is revealed through inspection or by other means that a ship is intended to be disposed of, it is a "waste" under the regulation. If it contains hazardous constituents in hazardous amounts it is to be considered a "hazardous waste".

ii) also a ship which is 20 years of age will be deemed to be "waste". If it contains hazardous constituents in hazardous amounts it is to be considered a "hazardous waste".

iii) As a hazardous waste, inter alia, its transboundary movement to non-OECD countries must be prohibited by a MS if they have the jurisdictional ability to prohibit that movement and its initiation (that is they are either the state of export, a transit state, or the state of ownership).

3.3 Annex V - waste subject to Article 16 (Basel export ban)

It is imperative that Annex V is not changed in any way. As Annex V is drafted in such a way as to ignore the existing Annex II "green" list and first look at the Basel lists, the ill-conceived down listings of the OECD will not be invoked and this is desirable to prevent actual hazardous wastes from being exported to non-OECD countries.

4.1 Disagreement over the classification of waste

Clearly if any one state believes a waste to be hazardous then it is for all states concerned. The legal basis for this is found in Basel Convention Article 1 (1) (b) and it cannot be ignored.

4.2 Geographical Situation – Regional Agreements and Enclaves

As underlined by the Commission, with regard to notification, Art. 28 provides a good framework to deal with both these situations. Other derogations (in particular from financial guarantee/insurance) could be very dangerous.

4.3 Article 17 (1) WSR Export for recovery of non-hazardous waste to non-OECD countries

It is our view that "green" listed wastes should be, in the best of worlds, subject to no control procedure unless a country concerned registers their objection to their uncontrolled import, and prescribes a ban or control procedure. Unfortunately, the mechanisms by which countries, and in particular developing or non-OECD countries can register and then ensure dissemination of such information are at present poor.

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However to date it is known that many countries have not notified via Article 13, their concerns, control procedures, and bans and thus exporting countries have little knowledge of these via the Basel Secretariat. Also to date, many countries were unsure if they could advocate a control procedure (short of a ban) for non-hazardous wastes.

Recently in the Technical Working Group of the Basel Convention, these concerns have been expressed strongly by developing countries. That is, they were unhappy with seeing wastes placed on Annex IX as that would imply that no control procedure was necessary when in fact many wastes, even though non-hazardous, may be undesirable to receive as imports. One remedy to this problem might be to advocate placing such wastes onto Basel's Annex II (a universal approach which will require Prior Informed Consent), or to exercise Article 4, para 11 of Basel (a unilateral approach)

noted above. However to date these remedies have not taken place and the necessary exchange of information on unlisted waste concerns has rarely occurred.

Therefore it is our view that until such time as there is an adequate and functioning mechanism, the precautionary approach of "when-in-doubt-ask" should be employed for green listed wastes destined to non-OECD countries. Thus at this juncture in history, we would agree with the Commission's past approach of surveying all countries views on the issue. In the absence of a survey response, the prior informed consent control procedure should be required.

4.4 Bilateral Agreements

There should be no debate about this. The necessity of a bilateral agreement for trade between Parties and non-Parties is an absolute requirement of the Basel Convention.

4.14 Shipment of Small Quantities for Analysis

We agree with allowing this exclusion for the following reasons. Those involved in waste analysis include a variety of academics, NGOs, consultancies etc. that are not involved at all in hazardous waste generation nor are they involved in disposal motivation, rather the motivations involved has to deal with more accurate information that can be used to protect the environment. These persons are not familiar at all with the Waste Shipment Regulation and understand little about it. Further there are many hundreds of such shipments every day. To require notification and consent seems to be regulatory overkill in this instance and will do little to improve the overarching goals of the Waste Shipment Regulation – to prevent economically motivated waste exports, ensure ESM and promote waste prevention.

4.15 Time Limit for Completion of recovery/disposal operations

We believe the current time limit of 180 days should be retained.

4.17 Scope – exemption regarding OSPAR and military waste

We disagree with the proposal to exempt military waste and wastes covered under the OSPAR Convention. There is no logical reason for not covering the offshore platforms or military waste under the regulation. Waste on military bases is under the jurisdiction of the state to which the base belongs regardless of location. Military waste that is not under any jurisdiction should be considered under the jurisdiction of the state where the collection entity is incorporated or is resident.

The MARPOL example is a very poor one. It exists clearly because the waste in question emanates from operating ships themselves and can hardly be considered an export or import in the normal sense that might be subject to economically motivated dumping. This is not the case for offshore platforms. They are either under the jurisdiction of a state by virtue of territorial location or otherwise by virtue of location of owner of the platform.

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