Legal Analysis of Letter from Mr. Raja to Ms. Hedegaard regarding the legal application of the Basel Convention to the Kong Frederik IX (aka Riky)

Prepared by the Basel Action Network
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Introduction

The Basel Action Network, NGO watchdog of the Basel Convention, can find no legal basis for India’s assertion that the "Riky" is not a waste as defined in the Basel Convention. For this reason, BAN has already published a Basel Non-Compliance Notification on the Indian action in this case and forwarded this report, to the United Nations Human Rights Commission’s Special Rapporteur on toxic waste dumping, as well as to the Secretariat of the Basel Convention, and United Nations Environment Program’s Executive Director.

Below we wish to examine more closely the claim made by Mr. Raja, Environment Minister of India as forwarded to Danish Environment Minister Hedegaard in the attached letter to illustrate that India has no legal basis for their position, and instead appear to be making this claim to protect the global shipping industry’s commercial interests in preventing the controls stipulated by international law.

Ships as waste

Indian Ministry of Environment, Mr. Raja, wrote:

“We have determined that the ship cannot be classified as “Wastes” within the scope of Act 2.1 of the Basel Convention.”

“I would like to assure you that India has adequate capacity to ensure environmentally sound disposal of the said ship.”

It must be first noted that the above two quotes are in direct contradiction to each other. Article 2.1 of the Basel Convention defines waste 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;”

Mr. Raja has inadvertently stated the obvious, that the ship in question is to be disposed. Thus, it is a waste as defined in the Convention. This is further underlined by a decision already made by the Parties to the Basel Convention. Last October, at the Seventh Conference of the Parties, the Parties clarified any remaining ambiguity in Decision II/26 as follows:

“Noting that a ship may become waste as defined in article 2 of the Basel Convention and that at the same time it may be defined as a ship under other international rules,

It is noted that India is not disputing the fact that asbestos is a hazardous material listed clearly on Basel Annex I and possessing Annex III hazardous characteristics. The presence of asbestos qualifies the waste ships as hazardous waste under the Convention.
Indeed Decision VII/26 also reminds the Parties of this fact:

“Recognizing that many ships and other floating structures are known to contain hazardous materials and that such hazardous materials may become hazardous wastes as listed in the annexes to the Basel Convention,”

Decisions of the Parties are at the highest legal level, next to the text of the treaty itself. It is not acceptable that India simply ignores this decision simply because it disagrees.

**Hazardous Waste by Article 1.1.b**

However even if India wished to defy Decision VII/26 and fail to read the clear statement that a ship destined with hazardous materials destined for disposal is in fact a hazardous waste, they are still in the wrong in their failing to treat the “Riky” as a Basel waste. This is due to the fact that the Basel Convention defines hazardous waste in two ways. First by virtue of the Annexes found in the Convention and secondly by virtue of the fact that if any Party involved in a transboundary movement (exporter, transit state or importer) considers the shipment to be a hazardous waste by their own national law, then this also must be considered as hazardous wastes for the states concerned (export, import or transit).

Article 1.1.b states this definition as follows:

1. The following wastes that are subject to transboundary movement shall be "hazardous wastes" for the purposes 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.

As we can see above, due to the fact that Denmark considers the Riky to be a waste and a hazardous waste is sufficient legal basis for India to be obliged to consider it as such as well. They do not have any legal justification for ignoring another Basel party’s law, Denmark’s, in this regard.

If this were not the case, then any country could suddenly make a claim that they do not consider a waste to be a waste, leaving the other states concerned exposed and vulnerable to trade. Imagine for the sake of illustration, if Denmark were to declare for example that it did not consider dioxin in barrels to be a waste and chose to simply export such waste to India without controls whatsoever even if India declared it as such. This unilateralism is clearly what the authors of 1.1.b sought to prevent – that is, the Basel Convention is precautionary to avoid this type of victimization. Rather the Basel Convention is based on the principle of denying waste trade without mutual consent.

This is clearly the intent of Article 1.1.b. It is not possible for one country to consider wastes as non-wastes or hazardous wastes as non-hazardous wastes if one of the States Concerned (exporting, transit or importing state) considers it as a hazardous waste under their own law.

As such the shipment of the Riky from Denmark to India is clearly illegal traffic as defined in Article 9 of the Convention because among other things, it left Denmark without the proper notification. Article 9, states in part:
For the purpose of this Convention, any transboundary movement of hazardous wastes or other wastes:

(a) without notification pursuant to the provisions of this Convention to all States concerned; or

shall be deemed to be illegal traffic.

Denmark is thus correct in labelling the shipment to India illegal. The final paragraph of the article on illegal traffic states:

5. Each Party shall introduce appropriate national/domestic legislation to prevent and punish illegal traffic. The Parties shall co-operate with a view to achieving the objects of this Article.

It is therefore absolutely clear that India must cooperate with Denmark, as a Party to the Basel Convention and prosecute this shipment as illegal traffic regardless of their political views regarding ships as waste and the shipping industry.

Environmentally Sound Management

Finally, we must comment on the closing statement made in the attached letter regarding India’s abilities to dispose of the ship in an environmentally sound manner.

It is widely recognised that the beaches at Alang where the Riky now sits, beached, do NOT represent Environmentally Sound Management (ESM) of wastes as defined in the Convention. This is precisely why the Basel Convention produced Guidelines for the ESM for the full and partial dismantling of ships which specified steps which the existing yards found in India and in other developing countries are to undertake in order to fulfil the objective of environmentally sound management. Indeed throughout the negotiations of these technical guidelines delegates from India, Pakistan or Bangladesh never made the claim that the South Asian beaches are considered environmentally sound management as defined in the Convention.

For Mr. Raja to make this statement now is very difficult to understand from a legal or technical standpoint. While it may not be politically correct to state it, it is a well known fact that the beach shipbreaking yards of South Asia cannot be considered ESM under the Convention. The Convention defines ESM broadly as:

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

By any environmental and occupational health accounting, it cannot be seen that the yards in Alang are taking all practical steps to ensure protection of human health and the environment.

Conclusion:
India has no legal basis to assert that the “Riky” does not fall under the Basel Convention even if India does not consider ships to be a waste. They must still respect the definitions of the exporting country in this regard. As such they must treat the arrival of the Riky into the territory of India as illegal traffic.

QUOTE:

D.O. No.11 3/96 HSMO-VOL-IX (PT.III)

Excellency,

This has reference to your letter No. J-3034-0036 dated 15th April, 2005 expressing concern regarding vessel – ‘Kong Frederik IX’ that left Denmark for the Western Indian Coast to be dismantled.

As you are aware India is a party to the Basel Convention since 1992 and has strengthened the national legislation Hazardous Wastes management notified in 1989 to ensure compliance of our obligations under the Convention. We have determined that the ship cannot be classified as “Wastes” within the scope of Act 2.1 of the Basel Convention.

As you have also mentioned, the Supreme Court of India under a Public Interest Litigation has also given directions, strict compliance of which is being monitored.

According to the Gujarat Maritime Board, Gujarat Pollution Control Board, and the Central Pollution Control Board who have inspected the Vessel, there is no objectionable hazardous material on the ship. Accordingly the said ship now called ‘Ricky’ has been beached on 23rd of April 2005 at Alang Gujarat. There are only in built insulation material which are part of the structure of all ships. As per Indian Laws and our position under the Basel Convention and the IMO, the ship has the requisite permission for beaching. I would like to assure you that India has adequate capacity to ensure environmentally sound disposal of the said ship.

Assuring you, as always of our highest consideration.

With kind regards,

Yours sincerely,

(A RAJA)

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UNQUOTE