France’s Export of Decommissioned Aircraft Carrier Clemenceau in Violation of International, and National Law

Prepared by Basel Action Network
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1. Introduction – Hazardous Wastes in Ship

On December 31, the decommissioned aircraft-carrier, Clemenceau was allowed by a French court to be towed toward the breaking yards of Alang, in Gujarat state, India for breaking and disposal. Despite an injunction on the export sought by environmentalists, the court accepted an unusual argument proffered by the French government that because the Clemenceau was a “material of war”, it was not to be considered a waste under the law and therefore fell outside of the scope of the Basel Convention and the European Waste Shipment Regulation. The European Waste Shipment Regulation implements the international Basel Convention on the Control of the Transboundary Movement of Hazardous Waste and Their Disposal in the European Union. The regulation forbids all exports of hazardous wastes from leaving the European Union for recycling that are not members of the Organization of Economic Cooperation and Development or the European Union.

The ship is bound for the ship-breaking yards at Alang in Gujarat. The steel from the ship is estimated to be valued at eight million euros. But also onboard the vessel is a significant, albeit disputed amount of asbestos and other hazardous materials.

The French Government has been extremely negligent in first not conducting a full inventory of hazardous wastes on board the vessel. For this reason it is not possible to have a complete picture of how much or what types of asbestos, PCBs and heavy metals contaminated materials remain on board and in the structure of the vessel. A precautionary approach in such a circumstance would indicate that competent authorities should assume the worst.

The French Government is claiming that altogether the ship contained no more than 160 tonnes of asbestos of which 115 tonnes have been removed. However in an interview with The Hindu newspaper in India, Jean-Claude Gianino, the head of Technopure, the company whose services were retained to carry out the decontamination of the ship, decided to break the confidentiality clause in his contract on moral grounds. He stated,

“The first detailed note I received from SDIC (Societe Ship Decommissioning Industry Corp., the company contracted to manage the decommissioning of the Clemenceau) on the state of the Clemenceau indicated there was at least 200 tonnes of asbestos on board. My company has
removed 70 tons of material from the ship for which we have proof from the landfill. A lot more than 115 tonnes could have been removed without damaging the structure or the seaworthiness of the ship. For instance, the funnel, lateral catapults and other areas of the ship could have been cleaned out or dismantled as could the decks — 30,000 square feet — without jeopardising the ship’s structure. The estimation of my engineers is that there is far, far more asbestos on board than anyone could imagine. I can say with certainty that the ship contains over 500 tonnes of asbestos. And once dismantling begins that could go up to 1,000 tonnes.”

While asbestos is the hazardous material on board the vessel likely to create the greatest threat to human health, the ship also likely contains significant amounts of PCBs (polychlorinated biphenyls) in the paints, gaskets, insulation and wiring of the vessel. Likewise numerous heavy metals such as lead are expected to be present in the materials onboard the ship.

The experience with US ex-naval vessels in the US has lead us to believe that the Clemenceau does in fact contain significant amounts of asbestos and PCBs. The Clemenceau was built in 1957 and has a weight of 27,307 Lightweight tons. Below is a comparative table of US vessels Launched or commissioned from the years 1945 to 1965.

### Comparative Table of Vessels with their Asbestos and Materials Containing non-liquid PCBs Load

<table>
<thead>
<tr>
<th>Name of US Vessel</th>
<th>Vessel Type</th>
<th>Year Launched/Commissioned</th>
<th>Lightweight (Tonnes)</th>
<th>Asbestos (Tonnes)</th>
<th>Materials Containing PCBs (Tonnes)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oriskany</td>
<td>Aircraft Carrier</td>
<td>1950</td>
<td>25,129</td>
<td>500-600*</td>
<td>794.65**</td>
</tr>
<tr>
<td>Calooshatchee</td>
<td>Oiler</td>
<td>1945</td>
<td>15,184</td>
<td>61</td>
<td>34.1</td>
</tr>
<tr>
<td>Canisteo</td>
<td>Oiler</td>
<td>1945</td>
<td>14,705</td>
<td>61</td>
<td>34.1</td>
</tr>
<tr>
<td>Donner</td>
<td>Landing Ship Dock</td>
<td>1945</td>
<td>5,910</td>
<td>75</td>
<td>13.7</td>
</tr>
<tr>
<td>Protector</td>
<td>Radar Station Ship</td>
<td>1957</td>
<td>6,194</td>
<td>85</td>
<td>23.8</td>
</tr>
<tr>
<td>Compass Island</td>
<td>Auxiliary Ship</td>
<td>1953</td>
<td>15,057</td>
<td>252</td>
<td>47.3</td>
</tr>
<tr>
<td>Canopus</td>
<td>Submarine Tender</td>
<td>1965</td>
<td>12,618</td>
<td>252</td>
<td>286</td>
</tr>
</tbody>
</table>

Sources: Marine Environmental Risk Assessment, Sept. 2003, Det Norske Veritas.
* Based on the estimates from US Ship recyclers

Trade in product and/or waste PCBs are controlled under the Rotterdam Convention and the Stockholm Convention and are considered to be persistent organic pollutants (POPs).

Exports of wastes and unwanted hazardous products are often exported from rich developed countries to poorer developing countries to avoid the high costs of properly disposing or recycling of such high-risk materials in developed countries.

The trade in hazardous materials either as products or as wastes is controlled under international law as well as national law. Most of these controls are designed to protect the peoples and environments of
developing countries from being disproportionately, or inappropriately placed at risk simply due to the economic status of such countries.

In this summary report we examine how the French export of the Clemenceau is in likely violation of the following:

- The Basel Convention
- The European Union Legislation and Positions
- The Rotterdam Convention
- The Stockholm Convention
- The National Law of Egypt (Suez Canal Passage)
- The Supreme Court of India Order

Below we examine these surprising violations perpetrated by France in turn.

2. The Basel Convention

France, India, and Egypt are all Parties to the Basel Convention on the Control of the Transboundary Movement of Hazardous Wastes and Their Disposal.

2.1. Definitions of waste are without a military exemption

The claim made by the Government of France that the decommissioned naval aircraft carrier Clemenceau is a “Material of War” and therefore exempt from the Basel Convention, and the European Waste Shipment Regulation that implements it, is without merit.

First, we will dispense with the alleged exemption for “material of war”. A ship that is no longer in military service and is in fact intended rather for disposal or recycling can no longer be considered a “material of war” despite its military origins. Almost assuredly, any aspect entailing strategic importance with respect to the ship has been removed prior to export to the breaking yards in India. In short the vessel no longer has military function or significance and thus cannot be a “material of war”. For this reason, when this issue has been raised in the past such as in the deliberations of the London Convention (on dumping wastes at sea) it was concluded that a claim of sovereign immunity from international law for military vessels was not acceptable.

Second, even if it was deemed a “material of war” by some entity, neither the Basel Convention nor the Waste Shipment Regulation (EEC) No 259/93 of 1 February 1993 currently in force in the European Union and in France and which implements the Convention for European Union countries, has an exemption for military waste material with respect to their respective rules on transboundary movements of wastes or in the definitions of waste. Likewise, neither the European Union's Waste Framework Directive (75/442/EEC) which defines waste generally, nor the Hazardous Waste Directive (91/689/EEC) which defines hazardous wastes management requirements, nor the Directive establishing the EU waste lists (2000/532/EC), possesses any form of exemption for military waste.

Indeed these types of exemptions were never deemed necessary in the Basel Convention, as wastes are not seen as strategic elements of war or “materials of war”. Consequently the Basel Convention nor its complementary laws applicable in the European Union has never considered such a military waste exemption as having merit and thus such exemptions do not exist.
The only exemptions from the scope of the Basel Convention are listed in its Article 1, paragraphs 3 (radioactive wastes) and 4 (wastes derived from the normal operations of a ship). Apart from these exemptions, any listed hazardous material (found in Basel Convention’s Annex I and III) that is “intended to be disposed” or “is required to be disposed by national law” (Definition of Waste in Basel, Article 2, paragraph 1), is a waste covered under the Basel Convention, and therefore the European Waste Shipment Regulation now in full force in France.

2.2. Ships Can be Wastes Under Basel Convention

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;”

“Disposal” in the Basel Convention is defined by having a recycling or final disposal destination listed in its Annex IV. One of these destinations includes R4 — “recycling/reclamation of metals and metal compounds”. As this is the primary intention and destination for exporting the Clemenceau to India, it is clear that the vessel qualifies as “intended to be disposed” and thus a waste.

In past years, some shipping industry interests (joined by India and the United States) wished to claim that a ship can not be a ship and a waste at the same time. However the Basel Convention’s Parties and legal experts resolved this debate conclusively in October 2004, at the Seventh Conference of the Parties, when in Decision VII/26 they stated 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,

France joined in this decision. And in fact in a response to a questionnaire going out to all Parties prior to this decision, France responded to the question of how to determine when a ship has become a waste in this way:

Three situations may be encountered:

- Where a contract stipulating the sale of a ship for the purpose of dismantling exists, it would be possible to define the ship objectively as waste, with all the attendant consequences.
- Where a ship has been abandoned, there is, a priori, no criterion which would permit the ship to be defined as waste. Nevertheless, it may be considered that it is possible for the port state to consider the ship to be waste when it no longer has a class or where the cost of repairs required by the regulatory authorities of the port state exceeds the ship’s value as scrap.
- And lastly, where the ship is sold to an intermediary, but where dismantling is not clearly defined as the intention, the ship may be defined as waste on sound grounds only where it has been purchased by the ship-breaking yard, or at such time as it is physically located there.

Source: http://www.basel.int/meetings/oewg/followup/france-ii-4eE.doc

Even if an entity wished to maintain that the Basel Parties were wrong, the working definition of a ship under the IMO and one in which is being proposed for use in a newly proposed IMO Convention on ship recycling is as follows:
“Ship” means a vessel of any type whatsoever operating in the aquatic environment and includes submersibles, floating craft, floating platforms, FSUs, and FPSOs.

The key word “operating” would indicate that a vessel under tow without crew or engine or purpose, can hardly be considered to be “operating”. However the shipping industry has in the past sought to argue that even a ship under tow, if carrying a certificate issued by the flag state is still a “ship”.

This debate is moot however, because the global community in Decision VII/26 has determined that the definition of “ship” and “waste” are not mutually exclusive. The Basel Convention has no exemption for ships, operating or otherwise from its scope. Many post-consumer products become waste at end-of-life whether they be packaging, old computers, end-of-life vehicles etc. and the fact that they are a recognizable consumer item, does not mean that they are not at the same time a waste at end-of-life.

2.3. Waste Ships Are Hazardous Wastes if they Contain Hazardous Materials

It is likewise well known that obsolete vessels and in particular military vessels over 20 years old, contain numerous hazardous materials which are listed in Annex I of the Basel Convention. Under the Convention, any material containing constituents listed in Annex I such as asbestos (Y36) or PCBs (Y39) is a hazardous waste “unless they do not possess any of the hazardous characteristics listed in Annex III.”

The vessel Clemenceau is known to contain asbestos. Further, based on the data available on US warships of similar age and composition, it is expected that the vessel also contains a significant quantity of PCBs (polychlorinated biphenyls) in solid matrix form which the French and Indian governments have failed to quantify or recognize as yet. While the French government has reportedly removed the readily accessible liquid PCB material, the vast majority of PCBs on board such vessels are bound in a solid matrix such as in paints, gasket material, wiring, insulation etc.

Likewise there are likely to be other constituents that make up part of the Clemenceau such as lead and tin based paints which are also Basel listed hazardous constituents.

It is also important to note that the Basel Convention has in only one instance established a threshold concentration level with respect to the hazardous characteristics. They set a level of 50 parts per million for PCBs below which they are presumed to be non-hazardous. Asbestos and all other Annex I listed materials however are presumed to be hazardous unless it can be demonstrated that they do not possess a hazardous characteristic.

In 1997 the Basel Convention adopted Annex VIII containing the “A” list of waste streams that are presumed to be hazardous (i.e. possessing a hazardous characteristic. On this list are included for example the following listings:

A2050 Waste asbestos (dusts and fibres)

A3180 Wastes, substances and articles containing, consisting of or contaminated with polychlorinated biphenyl (PCB), polychlorinated terphenyl (PCT), polychlorinated naphthalene (PCN) or polybrominated biphenyl (PBB), or any other polybrominated analogues of these compounds, at a concentration level of 50 mg/kg or more.

Indeed the Parties to the Basel Convention in their landmark Decision VII/26 also corroborated the hazardous waste character of obsolete ships as follows:
“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,”

2.4. Wastes are Basel Hazardous Wastes if considered as Such by States Concerned

It is important to note that the Basel Convention also defines hazardous wastes in Article 1 below (1.1.b) as being defined also by the domestic legislation of the Party of export, import or transit in a transboundary movement:

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.

Thus in the case of the transit of the Clemenceau from France to India via Egypt (for example) even if France maintains that the ship is not a hazardous waste under 1.1.b of the Convention to which they are a Party, however wrong that statement or conclusion may be, the designation of France is nullified if any of the States Concerned (export, import or transit) define the material as a hazardous waste. It is very likely that Egypt or other transit state will not have an unusual determination that the Clemenceau is not a hazardous waste under the Convention and will deem it as a hazardous waste (see Egypt’s statements below). In such case, the Convention requires that all States Concerned then consider the material as hazardous waste. Thus France will have to take that determination seriously and consider the export as a transboundary movement under the Convention.

Indeed, 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 toxic trade. Imagine for the sake of illustration, if Germany were to declare 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 Article 1.1.b sought to prevent – that is, the Basel Convention is designed to be precautionary, transparent and inclusive to avoid this type of victimization. Rather the Basel Convention is based on the principle of denying waste trade in the absence of mutual consent among the States Concerned.

In the case of the export of the Clemenceau, France’s dubious claim that the ship is not a hazardous waste becomes irrelevant if any other Party involved in the transit of the ship (e.g. Egypt, through its territorial waters) or import of the ship – India, declares that according to its national legislation the ship is a hazardous waste.

Indeed it is highly likely based on published declarations made by Egypt (see below) that the Egyptian Government (which is in possession of the Suez Canal through which the Clemenceau must pass) will declare the Clemenceau to be a hazardous waste under its domestic law and subject to the Basel Convention rules.

If this is the case, then the vessel will have arrived in Egypt in breach of the Basel Convention requirements such as:
• Prior notification and consent
• Assurances of destination for environmentally sound management
• Without accompanying movement documents

As such the shipment would be considered as illegal traffic under the Convention.

2.5. Basel Convention Definition of Illegal Traffic – A Criminal Offence

Article 9 of the Convention defines illegal traffic and 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;
(b) without the consent pursuant to the provisions of this Convention of a State Concerned; or

shall be deemed to be illegal traffic.

Thus, if Egypt or India considers the ship to be a hazardous waste then the shipment will be considered illegal traffic.

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 France, Egypt and India must cooperate as Parties to the Basel Convention and prosecute this shipment as illegal traffic.

Finally, Article 4, paragraph 3 of the Convention states:

The Parties consider that illegal traffic in hazardous waste or other wastes is criminal.

As a criminal offence Parties can arrest, detain, fine and otherwise punish individuals involved.

2.6. Environmentally Sound Management is a Requirement of the Convention

It must be noted that the Basel Convention also requires that no transboundary movement can occur without assurances that the destination facility is engaged in environmentally sound management as defined in the Convention. These requirements are laid out in Article 4; paragraph 2 (e) and (g). In this regard it is noteworthy to understand the internationally recognized fact that the shipbreaking yards in Alang do not constitute environmentally sound management as required under 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 by which the existing yards found in India and in other developing countries are to undertake in order to fulfill 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. And the steps to date as delineated in that guideline have not been accomplished in full. While it may not be politically correct to state it so bluntly, 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.

2.7. Basel Ban Amendment

Finally, it must be noted with some dismay and disbelief that France has ratified the Basel Ban Amendment which forbids all export of Basel listed hazardous wastes from France to any country not listed in Annex VII (OECD, EU, and Liechtenstein). Egypt has also ratified this amendment. India has not. The Basel Ban Amendment places obligations on the exporting state to prohibit such export. It is shocking to see how France as a state that has been in the forefront of forbidding such exports has found it expedient to ignore its international commitments in the case of the Clemenceau.

3. European Union Legislation and Positions

3.1. EU Council Supports Decision VII/26 of Basel Convention

Before going into depth on the EU legislation, it is worthy to note that the European Union member states including France showed full support for the Basel Convention Decision VII/26 which asserted that a ship can be a waste and that Basel Parties must fulfill their obligations for ships as waste. They did this during the adoption of the decision at COP/VII.

Subsequent to that they also passed a resolution during the Luxembourg Presidency on June 24, 2005 which stated at the outset the following:

The Council adopted the following conclusions:

“The Council,

• Underlining the need to ensure the safe and environmentally sound management of ships dismantling in order to protect human health and the environment,

• Recalling Decision VII/26 of the Basel Convention which recognises the importance of the environmentally sound management of dismantling of ships and notes 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,

France was party to these decisions.

In the European Union, the Basel Convention has been implemented in the following legislation: The Waste Framework Directive (75/442/EEC) which defines waste generally; the Hazardous Waste

3.2. EU Hazardous Waste List

It is important to note that the waste lists found in (2000/532/EC) can be seen to encompass ships in the following listings:

- 16 02 10* discarded equipment containing or contaminated by PCBs other than those mentioned in 16 02 09
- 16 02 12* discarded equipment containing free asbestos
- 16 02 13* discarded equipment containing hazardous components (2) other than those mentioned in 16 02 09 to 16 02 12
- 17 06 01* insulation materials containing asbestos
- 17 06 03* other insulation materials consisting of or containing dangerous substances
- 17 06 05* construction materials containing asbestos (7)
- 17 09 02* construction and demolition wastes containing PCB (for example PCB-containing sealants, PCB-containing resin-based floorings, PCB-containing sealed glazing units, PCB-containing capacitors)

Listings with an asterisk (*) are considered as hazardous waste.

3.3. EU Hazardous Waste Export Ban

But the most important information with respect to the case of the Clemenceau is that Article 16 of the Waste Shipment Regulation forbids hazardous waste from being exported from the European Union to countries that are not member states of the European Union or the Organization for Economic Cooperation and Development (OECD) for any reason.

Article 16 is based on Annex V which contains reference to a hierarchy of hazardous waste lists. If the material in question does not fall on the first list, then the subsequent lists need to be looked at. If the material appears on any of the lists then it is forbidden from export from the EU to a non-OECD country.

This Annex V first and foremost references the A list of the Basel Convention (Annex VIII). And indeed, Basel clearly has waste asbestos and wastes containing PCBs on this list as noted above.

It is important to note that even if one were to try and use an argument that the asbestos, being contained in the construct of the ship, is not hazardous until recycled, the Basel Convention has foreseen and answered this potential question by creating hazardous characteristic H13:

"Capable by any means, after disposal, of yielding another material, e.g. leachate, which possesses any of the characteristics listed above."

Most hazardous waste experts would make no distinction of containment or dispersability with regard to asbestos however. They would not, for example, argue that asbestos, simply because it is placed in a steel barrel or drum and therefore is not accessible to lungs at least in the short term, is somehow no longer considered toxic. Such a reading would make the Basel Convention and the EU waste shipment regulation ridiculous as any waste trader could simply avoid the scope of regulation by simply placing all wastes into barrels. Indeed most wastes are shipped in some form of containment rendering them temporarily non-available to organisms which might be adversely impacted. Thus the idea of
containment within the vessel of a ship is completely irrelevant to whether or not the material is a waste or a hazardous waste.

The Waste Shipment Regulation then goes on to utilize other lists starting with the EU hazardous waste list which can apply if the waste in question does not appear in the Basel listings (which it clearly does). It appears directly on the EU hazardous waste list as: 15 01 11, 16 02 12, 17 06 01, 17 06 05. While the EU hazardous waste list 94/904/EC can refer to percentages found in other directives, these are made moot by the fact that the Basel lists do not make reference to percentages. Indeed the Article 16 ban was created precisely to implement the Basel Ban Decision II/12 and thus cannot create a regime weaker then that ban which refers to Basel Hazardous Wastes by definition which contain no reference to percentages except in regard to PCBs.

Even if the waste were to fall through both the Basel and EU hazardous waste lists, however, the next list in the hierarchy refers to Annex III and IV of the waste shipment regulation, derived from the OECD Council Decision. This list includes asbestos in Annex IV and does so in a very explicit way regarding the term "containing" and furthermore reiterates the concern that the wastes be present in hazardous amounts as follows:

Chapeau: "Containing" or "contained with", when used in this list, means that the substance referred to is present to an extent which (a) renders the waste hazardous, or (b) renders it not suitable for submission to a recovery operation.

RB 010 Asbestos (dusts and fibres)"

Indeed the so-called "Green" list of the OECD makes the listing even more explicit as it contains the listing:

GC 030 ex 8908 00 Vessels and other floating structures for breaking up, properly emptied of any cargo and other materials arising from the operation of the vessel which may have been classified as a dangerous substance or waste

The clear implication being that a vessel not properly emptied of materials classified as a dangerous substance or waste, would not be considered to be on the Green list but rather on the red or amber lists (Annexes III or IV). Indeed the chapeau over the Green list states clearly that a "green" listed waste contaminated by something other than a green listed waste will not be considered to be "green":

"Regardless of whether or not wastes are included on this list, they may not be moved as green wastes if they are contaminated by other materials to an extent which (a) increases the risks associated with the waste sufficiently to render it appropriate for inclusion in the amber or red lists, or (b) prevents the recovery of the waste in an environmentally sound manner."

Under the Waste Shipment Regulation which is binding on all EU member states, there can be no doubt that a ship for scrap containing hazardous Basel wastes, or OECD listed or EU listed hazardous wastes must be considered as a hazardous waste banned from export from a member state of the EU to any non-OECD, non-EU member state. Thus the export to India from France of the Clemenceau is illegal.

4. **Rotterdam Convention**

France and India have ratified the Rotterdam Convention.
It must be noted that even if France were to insist on maintaining the false premise that the ship is not a waste, the asbestos and PCBs present on the vessel are certainly a “chemical” and therefore fall under the scope of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. As such prior informed consent is required before export of chemicals listed in Annex III of that Convention.

“Chemical” is defined in the Rotterdam Convention as:

(a) ‘Chemical’ means a substance whether by itself or in a mixture or preparation and whether manufactured or obtained from nature, but does not include any living organism. It consists of the following categories: pesticide (including severely hazardous pesticide formulations) and industrial;

Annex III of the Rotterdam Convention lists the chemicals which prior informed consent must be obtained prior to export. The following are listings of Annex III:

**Asbestos:** Actinolite, Anthophyllite, Amosite, Crocidolite, Tremolite

*Polybrominated biphenyls (PBB) (hexa-), (octa-), (deca-)*

*Polychlorinated biphenyls (PCB)*

*Polychlorinated terphenyls (PCT)*

While it is well known that most of the asbestos on board is likely to be Chrysolite which is not as yet listed in the Rotterdam Convention, experts we have contacted insist that the other forms of asbestos listed on Annex III are likely to be present in the vessel as well.

It is very unfortunate and unacceptable that France has failed to conduct a full inventory of the types of asbestos, the amount of PCBs, as well as other hazardous materials on board.

However, it is highly likely that even when France insists on claiming a ship as a non-waste, it nevertheless contains chemicals that require adherence to the Rotterdam Convention. And yet France has not invoked the prior informed consent regime and the other obligations outlined in the Rotterdam Convention to which they are a Party.

5. **Stockholm Convention**

France has ratified the Stockholm Convention on Persistent Organic Pollutants.

As has been mentioned previously, the experience in other countries, primarily the United States, demonstrates that warships of the vintage of the *Clemenceau* have notoriously contained very significant quantities of PCBs or polychlorinated biphenyls. Most of these PCBs are in solid matrix form and found in paints, gaskets, insulation materials, wiring etc. PCBs are targeted for global phase-out and strict trade and destruction criteria under the Stockholm Convention.

Regardless of whether or not the PCBs that are expected to be on the *Clemenceau* are part of wastes or products by definition, their management and trade is strictly controlled. Article 3 of the Stockholm Convention severely restricts export and import of Persistent Organic Pollutants (POPs).
Each Party shall:

(a) Prohibit and/or take the legal and administrative measures necessary to eliminate: […]

(ii) Its import and export of the chemicals listed in Annex A in accordance with the provisions of paragraph 2; and

Paragraph 2 of Article 3 states:

(b) That a chemical listed in Annex A for which any production or use specific exemption is in effect or a chemical listed in Annex B for which any production or use specific exemption or acceptable purpose is in effect, taking into account any relevant provisions in existing international prior informed consent instruments, is exported only:

(i) For the purpose of environmentally sound disposal as set forth in paragraph 1 (d) of Article 6;

(ii) To a Party which is permitted to use that chemical under Annex A or Annex B; or

(iii) To a State not Party to this Convention which has provided an annual certification to the exporting Party. Such certification shall specify the intended use of the chemical and include a statement that, with respect to that chemical, the importing State is committed to:

PCBs are listed in Annex A of the Stockholm Convention. Clearly as India is not intending to “use” the PCBs, it is clear that only (i) above can apply. Below we therefore examine Article 6 provisions:

(d) Take appropriate measures so that such wastes, including products and articles upon becoming wastes, are:

(i) Handled, collected, transported and stored in an environmentally sound manner;

(ii) Disposed of in such a way that the persistent organic pollutant content is destroyed or irreversibly transformed so that they do not exhibit the characteristics of persistent organic pollutants or otherwise disposed of in an environmentally sound manner when destruction or irreversible transformation does not represent the environmentally preferable option or the persistent organic pollutant content is low, taking into account international rules, standards, and guidelines, including those that may be developed pursuant to paragraph 2, and relevant global and regional regimes governing the management of hazardous wastes;

(iii) Not permitted to be subjected to disposal operations that may lead to recovery, recycling, reclamation, direct reuse or alternative uses of persistent organic pollutants; and

(iv) Not transported across international boundaries without taking into account relevant international rules, standards and guidelines;
It must be noted that the shipbreaking yards of Alang do not possess the technological means to dispose of PCBs in "such a way that the persistent organic pollutant content is destroyed or irreversibly transformed so that they do not exhibit the characteristics of persistent organic pollutants".

It is clear from just the above summary analysis that if the Clemenceau contains PCBs as we fully expect, then France is in violation of its Stockholm obligations. These violations include:

- Exporting PCBs for purposes other than destruction.
- Exporting PCBs to a non-Party that has not provided an annual certification to the exporting Party.
- Allowing PCBs to be subjected to recovery, recycling, operations.
- Transporting PCBs without taking into account relevant international rules


In the case of the export of the Clemenceau from France to India, Egypt is a “transit state” by virtue of their possession of the Suez Canal. As such Egypt has clear national rights, some of which have been highlighted under the Basel Convention. Indeed Egypt has recently made it very clear to all Basel Parties that they consider that all passage of hazardous wastes through the Suez Canal must adhere to the Basel Convention. They have further stated that such obligations extend to obsolete vessels moving for dismantling or recycling.

On February 27th the following statement was transmitted to the Parties via the Secretariat of the Basel Convention:

EGYPT - REQUIREMENTS THAT ARE APPLICABLE TO WASTES LISTED IN ANNEX I, II, VIII OF THE BASEL CONVENTION WHEN SUBJECT TO TRANSBOUNDARY MOVEMENT THROUGH THE SUEZ CANAL

"The requirements below are applied if the wastes listed in Annex I, II, VIII are subject to transboundary movement through the Suez Canal:

- All shipments should comply with the terms of Basel Convention for the passage of hazardous waste.
- All shipments should comply with the Suez Canal requirements concerning the passage of hazardous waste.
- Approval of the Suez Canal authorities.
- Transit documents should be sent to both the Egyptian Environmental Affairs Agency and Suez Canal authority for prior approval.
- Previous notification of the name of the vessel & maritime agent and the date of shipping should be sent to the Suez Canal authority.
- The vessel/s should leave the Egyptian territorial waters as soon as it crosses the Suez Canal.
- The vessel will not be allowed to load and/or unload any of its cargo during its passage through the Egyptian waterways and the exclusive economic zone.
- The vessel should have a competent maritime agent and a P&I certificate."
Subsequent to the publishing of this notice, Egypt announced at the close of the Fourth Open Ended Working Group of the Basel Convention on July 8th 2005 that they would be applying the above requirements to vessels destined for disposal or recycling operations. This statement appeared in the report as follows:

Egypt

1. In the context of the efforts being exerted by both the Secretariat and the Parties to the Convention with a view to rendering effective the measures to control the illegal traffic in hazardous waste, in its anxiety to comply with the Basel Convention and also other environmental conventions which regulate such control operations and prohibit illegal transits through the Suez Canal and stressing the importance of which you are all aware of the Suez Canal as an international navigation route falling under Egyptian sovereignty, the Egyptian delegation would like to bring to the attention of all Parties, relevant bodies and organizations the requirements that were laid down by Egypt to control any illegal traffic of hazardous wastes through the Suez Canal, and which were posted on the internet in March 2005.

2. These requirements apply to ships destined for dismantling or recycling (whether hazards were removed from them or not).

3. Accordingly, prior notification procedures should be implemented when such ships transit through the Suez Canal. Failing compliance with those requirements, Egypt as a Party to the Convention shall consider such crossing an illegal one in line with the Basel Convention provisions.

Source: http://www.basel.int/meetings/oewg/oewg4/documents/18e.pdf (see end of report)

Clearly based on the above statement, in particular points 2 and 3 of the statement made at the OEWG, Egypt will consider the passage of the Clemenceau through the Suez Canal as illegal traffic.

7. Supreme Court of India

In its “Directions of the Supreme Court on Ship Breaking No. 657/95 the Supreme court delineated the following relevant provisions that must be followed in India.

1. Before a ship arrives at port, it should have proper consent from the concerned authority or the State Maritime Board, stating that it does not contain any hazardous waste or radioactive substances. AERB should be consulted in the matter in appropriate cases.

2. The ship should be properly decontaminated by the ship owner prior to the breaking. This should be ensured by the SPCBs.

[...]

13. A complete inventory of hazardous waste on board of ship should be made mandatory for the ship owner. And not breaking permission should be granted without such an inventory. The inventory
should also be submitted by the GMB to concerned SPCBs to ensure safe disposal of hazardous and toxics waste.

[...]

16. At the international level, India should participate in international meetings on ship breaking at the level of the International Maritime Organization and the Basel Convention’s Technical Working Group with a clear mandate for the decontamination of ships of their hazardous substances such as asbestos, waste oil, gas and PCBs prior to exports to India for breaking. Participation should include from Central and State level.

On 25 February 2005 the Gujarat Pollution Control Board issued an order NO: GPCB/HAZ/Gen-66(12)/5826 referring to the above with three points:

1) No Permission shall be granted for beaching “Clemenceau” till direction given by Supreme Court in WP 657 of 1995 in its judgment dated 14th October 2003 are complied with regard to Hazardous waste including Asbestos and Radioactive substances, and in terms of other relevant direction there too.

2) Further no beaching permission shall be granted without prior approval of this Board.

3) In the event the ship making its way to Alang after decontamination, if any Asbestos is generated during the breaking of the ship the same shall be re-exported and shall not be allowed to be disposed of in any TSDF in the state of Gujarat or anywhere else in Indian.

It is clear that the Clemenceau exporters have failed to adhere to point 1 above as the export scheme has failed to:

- Achieve consent based on a claim that there is no hazardous waste on board
- Properly decontaminate the vessel prior to export
- Provide a complete inventory of hazardous waste on board.

Unfortunately, we have seen in the past where India is willing to play fast and loose not only with the Basel Convention but with its own Supreme Court rules. In the case of the import of a former Danish ferry, later known as Riky in 2005, India claimed that the ship was not a waste under the Basel Convention despite Denmark’s assertion that as exporting state they believed it was a waste. Thus India flouted Denmark’s right to determine whether a material was a waste under Basel Article 1.1.b. Further, and most unbelievably, in order to skirt the Supreme Court of India they made the outlandish claim that “waste on board” only means cargo and not the structural material waste that is clearly the issue of concern for all with respect to ship scrapping. BAN’s comments on the Riky violations by India are available at:  http://www.ban.org/Library/BAN_analysis_Ricky.pdf

India appears to be at odds with itself, with the Supreme Court able to provide a correct reading of India’s Basel Convention obligations on the one hand, and the Ministry of Environment and Forests on the other hand, seemingly blinded by the power of the shipbreaking industry and all too willing to pretend its Basel Convention obligations do not exist.
8. Conclusion

It is a legal certainty that France is acting completely outside of the bounds of international and national law in their export of the *Clemenceau* from France to India via Egypt. The ship is clearly a waste under international law and France until now has agreed with those determinations. As such, it is clear that France has failed to fulfill its most fundamental Basel obligations and is in direct violation of its own EU Waste Shipment Regulation. The export of the *Clemenceau* by France is therefore illegal traffic under the Basel Convention as delineated in Basel's Article 9. Under the Basel Convention, illegal traffic is a criminal act.

We have likewise demonstrated that even a spurious claim were made that deemed the Clemenceau not to be a waste by a sudden new expedient interpretation by France, there are numerous grounds under the Basel, Rotterdam, and Stockholm Convention that will require strict export rules to be applied in accordance with those regimes which are currently being ignored.

Further, the export is a clear violation of the national laws of Egypt, and the Indian Supreme Court order. For these reasons, it is incumbent on all authorities in a position to do so, to apprehend this shipment and take their legal responsibility to diligently enforce established international and national law.

END

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