COMMENTS ON THE ANALYSIS OF THE BASEL CONVENTION'S SECRETARIAT REGARDING HAZARDOUS AND OTHER WASTES GENERATED ON BOARD SHIPS

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TABLE OF CONTENTS

I. INTRODUCTION

The *Revised legal analysis of the application of the Basel Convention to hazardous and other wastes generated on board ships* (*Revised Legal Analysis*)[1] prepared by the Secretariat of the Basel Convention (Basel or the Convention) offers insight on the question of hazardous wastes generated on board vessels,[2] which is an issue of significant importance to the attainment of the objectives of the Convention. The critical importance of this issue can be clearly discerned after the 2006 incidents involving the *Probo Koala's* illegal transboundary movement (TBM) of hazardous waste from The Netherlands to the Ivory Coast, and the deleterious impacts of the dumping therein on the environmental rights of more than 100,000 people.

However, while the request for the interpretation of the Convention meant to clarify its provisions with a view to addressing Basel's shortcomings apparent in the *Probo Koala* incident, certain conclusions of the *Revised Legal Analysis* open loopholes in the Convention that diminish Basel's level of protection and effectiveness. The conclusions of the *Revised Legal Analysis* must be strengthened, so that the Basel Convention is capable of effectively controlling hazardous wastes generated on board ships that are not covered by Marpol[3].

These comments address the interpretative conclusions of the *Revised Legal Analysis*prepared by the Convention's Secretariat. The comments also put forward alternative interpretations that better comport with the principles of treaty interpretation established in customary law and codified in the Vienna Convention on the Law of Treaties (VCLT).

The comments are structured as follows. First we comment on the interpretative approach of the *Revised Legal Analysis*, noting that it ignores certain principles of interpretation, such as systemic integration and*effet utile*. Second, our comments address the conclusions of the *Revised Legal Analysis* pertaining to TBM of hazardous waste, and specifically the conclusion that wastes generated on ships in the territorial sea and the exclusive economic zone are not covered by the Convention. Third, the comments address the interpretation of Basel's Article 4.2(a)(b) pertaining to generation and environmentally sound management (ESM) of waste, and the conclusion of the *Revised Legal Analysis* that the relevant terms "within it" only refer to the territory of a State. Fourth, we endorse the conclusions on Basel's Article 1(4) that limits the Convention's scope of application and analyze certain of their implications. The comments then offer concluding remarks.

II. COMMENTS ON THE INTERPRETATIVE APPROACH OF THE *REVISED LEGAL ANALYSIS*

The *Revised Legal Analysis* generally refers to the principles of treaty interpretation codified in the Vienna Convention on the Law of Treaties (VCLT). However, the *Revised Legal Analysis*

[1] UNEP/CHW/OEWG.8/INF/18.

[2] This paper uses the terms hazardous wastes and wastes interchangeably, by virtue of the legal effect of Articles 1 and 2 of the Convention.

[3] International Convention for the Prevention of Pollution from Ships (1973), as modified by the Protocol of 1978 and the Protocol of 1997

is inconsistent in its application of these tools. For example, the discussion of TBM obligations neither accounts for the text nor for the special definitions of the terms "marine area" and "under national jurisdiction". Similarly, the *Revised Legal Analysis* ignores the principles of interpretation of systemic integration and*effet utile*. The application of these principles is critical to the proper interpretation of the Convention, particularly in relation to the respective roles of flag-State and coastal-State jurisdiction.

In addition, the interpretation of Basel should afford greater weight to its object and purpose, which is to protect, by strict control, human health and the environment against the adverse effects which may result from the generation and management of hazardous wastes and other wastes. An interpretation of the Basel Convention guided by its object and purpose enables greater effectiveness, particularly with respect to situations that were unforeseen at the time of negotiations. An example of such a situation is the production of hazardous waste from industrial processes carried out on board vessels, such as was the case of the *Probo Koala*. As a living instrument, the Basel Convention must address present realities and thus cannot ignore developments in technology. Basel Parties must adopt interpretations that do not open loopholes that can be exploited by unscrupulous operators and criminal gangs.

The following comments present the principles of systemic integration and*effet utile*. The next sections include comments on how these principles contribute to the proper interpretation of Basel.

II.i. Systemic Integration

One of the weaknesses of the *Revised Legal Analysis* is that it fails to consider the principle of systemic integration codified in the VCLT.[4] According to VCLT Article 31(3)(c), "there shall be taken into account, together with the context: any relevant rules of international law applicable in the relations between the parties."[5]

The principle of systemic integration has been conceptualized by the UN International Law Commission (ILC) as the process whereby international obligations are interpreted by reference to their normative environment.[6] It has been described as the "master key" to the house of international law, since it *requires* the interpretation process to take into account any relevant rules of international law applicable in the relations between the parties.[7] The International Court of Justice in the *Case Concerning Oil Platforms* confirmed the relevance of this principle of interpretation, as the ICJ utilized the rules of international law on the use of force in its interpretation of the bilateral Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran.[8] Further, as observed by the ILC, "without the principle of "systemic integration" it would be impossible to give expression and to keep alive, any sense of the common good of humankind, not reducible to the good of any particular institution or "regime"".[9]

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[4] Vienna Convention on the Law of Treaties, art. 31.3.c, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).

[5] *Id*. Art. 31(3)(c).

[6] Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶ 413, A/CN.4/L.682 (Apr. 13, 2006), available at http://untreaty.un.org/ilc/guide/1_9.htm.

[7] *Id*. at ¶ 420.

[8] Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 41 (Nov. 6).

[9] *Id*. at ¶ 480.

The result of the application of the principle of systemic integration is greater coherence among international treaties, especially if they concern overlapping subject-matter, such as is the case of Marpol and Basel with respect to wastes generated on board ships.

II.ii. *Effet Utile*

Another weaknesses of the *Revised Legal Analysis* is that it fails to consider the *effet utile* principle, which requires that a treaty must be interpreted in a way that renders it meaningful rather than meaningless. This interpretative principle is key to enhancing the efficacy of the Convention, especially given the complexification of industrial practices as a result of technological developments. It is also critical to avoiding gaps and loopholes that can be exploited by unscrupulous operators and criminal gangs. The principle of effectiveness is particularly relevant to Basel, since the Convention presents interpretative challenges,[10] including with respect of situations that were not foreseen at the time of negotiations, such as the generation on board vessels of wastes not covered by Marpol, *i.e.*, non-Marpol wastes. The Probo Koala incident provides a stark example of the changes in technology and industrial practices, as well as of the need for the principle of *effet utile* to guide the interpretation of the Convention in order to ensure the attainment of its objectives.

In respect of certain interpretative complexities of Basel, the *Revised Legal Analysis* already utilizes the principle of effectiveness, albeit implicitly. For example, the *Revised Legal Analysis* concludes that Basel obligations pertaining to generation and ESM are applicable to Basel Parties, despite the absence of a transboundary movement.[11] This conclusion cannot be supported by a literal reading alone, but necessitates support from the effectiveness principle. Article 1(1) (entitled "Scope of the Convention") refers to hazardous wastes that are subject to transboundary movement. Accordingly, a narrow literal reading of Article 1(1) would exclude the application of Basel obligations to hazardous wastes not subject to transboundary movement. However, an interpretation of Article 4 entitled "General Obligations" guided by the *effet utile* principle allows for its application even in the absence of a transboundary movement. Accordingly, the principle of *effet utile* should be used consistently throughout the interpretation process.

The result of the application of the *effet utile* principle is an enhanced ability of the Convention to attain its object and purpose. This interpretative principle is thus particularly useful in closing gaps and loopholes that would otherwise allow for situations like the Probo Koala to remain in impunity.

III. INTERPRETATION OF TBM OBLIGATIONS WITH RESPECT TO NON-MARPOL WASTES GENERATED ON BOARD A SHIP

The *Revised Legal Analysis* ultimately concludes that the prior informed consent procedure pertaining to TBM of hazardous waste does not apply to wastes generated on board ships.In other words, the *Revised Legal Analysis* concludes that Basel's TBM provisions can never apply to wastes generated on board ships.

This conclusion is disallowed by customary canons of treaty interpretation because it fails to

[10] Basel's shortcomings and interpretative challenges may be the result of the short time allowed for complex negotiations that addressed deeply controversial issues.

[11] *Revised Legal Analysis*, para. 44.

examine and give meaning to the words used in Article 2 of Basel. An interpretation that ignores the literal meaning of terms is disallowed in international law. For example, the ICJ in the recent *Pulp Mills* case displayed great care in elucidating the meaning of the words employed in the treaty in question.[12] The terms of a treaty cannot be disregarded and must be read in good faith, in their context, in light of the object and purpose of the agreement, and taking into account the relevant rules of international law applicable in the relations between the Parties.

More specifically, the interpretation of the *Revised Legal Analysis* does not properly account for the definition of the phrase "area under national jurisdiction". In this connection, the conclusion of the *Revised Legal Analysis* overreaches because it excludes non-Marpol waste generated in the internal waters, the territorial sea, or the EEZ of a coastal State from the application of Basel's TBM obligations, as if these marine areas where not under the national jurisdiction of the coastal State.

Moreover, the interpretation of the *Revised Legal Analysis* is disallowed by the VCLT because it defeats the Convention's object and purpose and because it ignores the principles of effectiveness and systemic integration. The principle of effectiveness favors an interpretation that enhances the ability of Basel to address TBM of hazardous waste. The principle of systemic integration contemplates a role for the law of the sea in the interpretation of Basel terms, including norms concerning coastal and flag State jurisdiction. Further, Basel's *travaux*confirms the inadequacy of the interpretation of the *Revised Legal Analysis*, since the terms of the special definition of "area under national jurisdiction" were drafted, *inter alia*, to establish a degree of harmony between Basel and the LOSC.

Accordingly, the conclusion of the *Revised Legal Analysis* on TBM obligations must be abandoned and replaced by a proper reading of the terms "marine area" and "area under national jurisdiction." There are two possible interpretations of these terms. First, a *geographically* focused interpretation of "marine area" will apply TBM obligations to non-Marpol wastes generated in areas where the coastal State exercises jurisdiction over environmental issues, namely its internal waters, territorial sea, and exclusive economic zone (EEZ). Second, a *jurisdictionally* focused interpretation of "marine area" will regard a ship as a marine area subject to flag-State jurisdiction and apply TBM obligations to non-Marpol wastes generated on board vessels, particularly to wastes generated on vessels on the high seas. These two readings are not mutually incompatible and instead can fully coexist. They are examined in further detail immediately below.

III.i. A *geographically* focused interpretation: internal waters, the territorial sea and the EEZ are a "marine area" and "an area under national jurisdiction"

A *geographically* focused interpretation of the terms "an area under national jurisdiction", in connection with TBM obligations, accounts for the definition of these terms in Article 2(9), as "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." In accordance with this definition, the interpreter must ask whether internal waters, territorial sea, or EEZ qualify as a "marine area". If they do, then non-Marpol wastes generated in them fall under the scope of Basel's TBM obligations.

[12] Pulp Mills on the River Uruguay (Argentina v. Uruguay), 2010 I.C.J. (April 20), para 65.

It is well settled in international law that the territorial sea is an element of the territory of the State. The State exercises sovereignty over its territorial sea, including with respect to the exercise of jurisdiction for the protection of human health or the environment. Therefore, it is incorrect to conclude that non-Marpol wastes generated on a ship in the territorial sea are generated outside an area under national jurisdiction because the coastal State holds administrative and regulatory responsibility in regard to the protection of human health or the environment in its territorial sea. Stated differently, non-Marpol wastes generated in the territorial sea, whether they are generated on a ship or otherwise, cannot fall outside Basel's TBM obligations because the territorial sea is unquestionably a marine area subject to the sovereignty and jurisdiction of the coastal State. The proper reading of the Convention, in light of its specific definition of the applicable terms, is that non-Marpol wastes generated in the territorial sea of a State are subject to Basel's TBM obligations.

It is also well settled in international law that the right of innocent passage in the territorial sea by vessels flying the flag of third States is a general limitation on the coastal State's sovereignty. Innocent passage, however, ceases to be innocent if the ship is no longer passing but engages in industrial activities that generate non-Marpol waste. There is here a parallel between innocent passage and the normal operations of ships that generate wastes subject to Marpol. Marpol wastes generated in the course of innocent passage do not fall under the scope of the Basel Convention by virtue of Article 1(4), commented on further below.

With respect to the EEZ, the *Revised Legal Analysis* ignores the fact that the EEZ is a marine area where the coastal State exercises jurisdiction over environmental issues. The EEZ is a functional marine area that crystallized as customary law of the sea during the second half of the XXth Century and was codified by the LOSC. Under the terms of Article 56 of the LOSC, the State exercises jurisdiction with regard to the protection and preservation of the marine environment.

Basel's *travauxpreparatoires*confirm the interpretation that non-Marpol wastes generated in the territorial sea and the EEZ are subject to Basel's TBM obligations. During the course of negotiations leading to the Basel Convention, the formulation of Article 2(9) in First Revised Draft Convention employed the term "territory".[13] This formulation was subsequently changed in the Third Revised Draft Convention to "area under the national jurisdiction",[14] which is a broader formulation that encompasses the EEZ as a functional marine area where the coastal State exercises jurisdiction with regard to environmental protection. This change in Article 2(9) also demonstrates the intent of the drafters to align the Basel Convention to the relevant categories of the LOSC, including with respect to geographical marine areas and jurisdictional competences.

Instead of giving meaning to the text of Article 2 of the Convention, the *Revised Legal Analysis* conclusion notes that, "a ship is not an extension of the geography of the State." This conclusion misses the point because the proper question is not whether a ship is or not an extension of the State's geography. Rather, the relevant interpretative question with respect to the application of TBM obligations to non-Marpol wastes concerns the meaning of the terms "marine area" and "area under national jurisdiction." If a ship finds itself in a marine area under the national jurisdiction of a State, then non-Marpol waste generated on it will be

[13] First Revised Draft Convention on the Control of Transboundary Movement of Hazardous Wastes, Geneva, UNEP/WG.182/2.

[14] Third Revised Draft Convention on the Control of Transboundary Movement of Hazardous Wastes, Caracas, UNEP/WG.186.3, Annex A.

subject to the scope of Basel's TBM obligations. It must be underscored here once again that the territorial sea and the EEZ are unquestionably marine areas under the national jurisdiction of the coastal State.

It is worth identifying certain implications of this *geographically* focused interpretation of the terms "marine area" and "area under national jurisdiction" employed in Article 2 of the Convention, in connection with Basel's TBM obligations.

First, a ship that generates non-Marpol wastes in internal waters, territorial sea or EEZ of a coastal State, and then subsequently exits its jurisdiction, incurs in illegal TBM if it fails to comply with Basel TBM obligations, including the PIC procedure. Accordingly, criminal responsibility attaches to persons and legal entities responsible for the illegal TBM of hazardous waste. This implication is particularly relevant in the case of the *Probo Koala*, since certain industrial operations on board the vessel resulting in non-Marpol waste took place in the territorial sea of Spain, prior to the vessel reaching the port of Amsterdam in The Netherlands.[15]

Second, under this *geographically* focused interpretation the generation of non-Marpol wastes in the high seas would not fall under the scope of Basel's TBM obligations because the high seas is not a marine area under the national jurisdiction of a State. This resulting gap in Convention coverage of non-Marpol waste generated in the high seas can be addressed by a *jurisdictionally* focused interpretation that regards a ship as a marine area under the jurisdiction of the flag State. This *jurisdictionally* focused interpretation is examined next.

III.ii. A *jurisdictionally* focused interpretation: the terms "marine area" and "under national jurisdiction" can be interpreted to encompass a ship under flag-State jurisdiction

A *jurisdictionally* focused interpretation of the terms "marine area" will regard a ship as a marine area and apply TBM obligations to non-Marpol wastes generated on board vessels. This interpretation is not incompatible and can thus co-exist with a *geographically* focused interpretation of marine area.

The starting point of the interpretative task is of course the text and the special definitions of Basel. The terms "marine," "area," "under," and "national jurisdiction" are broad and open-textured, and they can all be satisfied by ocean-going vessels. A ship in the seas is obviously involved in "marine" activities, and a ship literally includes an "area". Thus, a ship can be regarded as a "marine area", which are the functional terms used in the definition of Article 2(9). Further, a ship is "under" the "national jurisdiction" of the flag-State. Accordingly, a literal interpretation does not exclude the applicability of these terms to a vessel.

However, a literal interpretation alone is insufficient to properly interpret the terms of the Convention. An interpretation guided by the principles of effectiveness and systemic integration of the relevant terms of Article 2, *i.e.*, "marine," "area," "under," and "national jurisdiction," strongly favors the understanding that the flag-State of a ship, if also Basel Party, must apply the Convention's TBM control mechanisms to hazardous waste generated on that vessel. This interpretation avoids loopholes in Basel's coverage, as favored by the principle of effectiveness, because it subjects the generation of non-Marpol wastes on board of a ship in the high seas to the jurisdiction of the flag-State. This interpretation recognizes

[15] Amnesty International & Greenpeace, *The Toxic Truth* (2012), pg. 31.

the role of the flag-State in the customary law of the sea, which is the result favored by the principle of systemic integration.

Admittedly, an interpretation that reads a ship as a "marine area" in the context of Basel's TBM obligations will be opposed by a reader that considers the terms "marine area" to refer solely to a geographical space. A *geographically* focused interpretation finds support in Basel's *travaux*, which speaks to the desire of the drafters to encompass the new maritime zones established in the LOSC and modern customary law of the sea, particularly in respect of the EEZ where the State exercises, *inter alia*, functional jurisdiction over environmental issues.[16]

In addition, regarding the ship as a "marine area" in the TBM context raises concurrent jurisdiction issues with respect to wastes generated on board a ship in a geographically defined marine area other than the high seas. While in law there would be no difficulty in establishing a mechanism to coordinate the exercise of concurrent jurisdiction, the use of flags of convenience for much of the worlds shipping tonnage raise further practical considerations.

Still and all, interpreting "marine area" to encompass a ship would ensure that waste generated on board a vessel in the high seas is subject to Basel controls. As noted, a jurisdictional approach to the interpretation "marine area" that encompasses a ship is not incompatible with a literal reading in light of the object and purpose of the Convention. In addition, the value of systemic integration and effectiveness, in connection with the role of flag-State jurisdiction, are particularly relevant in relation to TBM obligations because they constitute one of the cornerstones of the Basel regulatory regime.

III.iii. The conclusion of the *Revised Legal Analysis* with respect to flag State jurisdiction in the TBM context

The *Revised Legal Analysis* addresses the question of the exercise of flag-State jurisdiction by a Basel Party over vessels authorized to fly its flag. More specifically, it poses the question whether a flag State that is a Party to the Basel Convention would be bound by its obligations with regard to the prior informed consent (PIC) procedure. After examining relevant provisions of the LOSC regarding flag-State jurisdiction, the *Revised Legal Analysis* simply concludes that there "seem to be practical difficulties in arguing that the flag State that is a Party to the Basel Convention would be bound by its obligations with regard to the transboundary movement."[17]

The interpretative approach of the *Revised Legal Analysis* to the question of flag-State jurisdiction disregards international legal principles of treaty interpretation. It is one thing to identify implementation challenges associated with a treaty provision, in order to address them with a view to enhancing the treaty's effectiveness. It is altogether different to point to challenges of implementation to read away a certain treaty obligation. There is no rule in international law that allows a Party to a treaty to ignore an international obligation on the basis of practical difficulties in securing compliance. On this issue, the *Revised Legal Analysis* thus finds itself at odds with the international legal principles applicable to the interpretation of Basel obligations.

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[16] LOSC, Part V.

[17] Revised Legal Analysis, para 55.

The practical difficulties identified in *Revised Legal Analysis* include, first, a situation where the flag State could be different from the State of Export exercising national jurisdiction over an area. As noted, a ship can fall under both the jurisdiction of the flag State and the coastal State if it finds itself in the territorial sea or the EEZ. In such a situation, there would be a need for a mechanism to allocate responsibility given the potential exercise of concurrent jurisdiction.[18] The solution to that problem is quite simple, however, since the coastal State can be regarded the State of Export with respect to non-Marpol wastes generated on a ship in its internal waters, territorial sea or EEZ, and the flag State can be regarded the State of export with respect to non-Marpol wastes generated in the high seas on a ship flying its flag.

Another practical difficulty identified in the *Revised Legal Analysis* is that it could take considerable time to receive the replies from the relevant States called upon for their consent and by then, the waste receptacles could be overflowing. This "practical difficulty" is precisely the reason to avoid industrial operations that generate hazardous waste on board ships in the first place. This risk underlies the approach taken by Maritime Safety Committee of the IMO with respect to amending the International Convention for the Safety of Life at Sea (SOLAS) to prohibit any production process on board a ship during sea voyage.[19] In addition, the risk of overflowing hazardous waste receptacles should be addressed in the environmental impact assessment (EIA) conducted prior to the authorization of any activity on board a vessel that threatens the marine environment with such serious environmental risks. And under the law of the sea, it is incumbent upon the flag-State to ensure compliance with EIA requirements.[20] Accordingly, Basel's ESM obligation pertaining to hazardous waste must inform every stage of activities on board vessels, particularly the planning of risky operations. Clearly, this "practical difficulty" cannot justify non-compliance with Basel obligations; certainly this "difficulty" cannot be considered an interpretative tool of the Convention.

The last practical difficulty identified in the *Revised Legal Analysis* goes as follows: if the intended port of disposal or transit State refused consent, the wastes could be dumped into the sea. The dumping of such wastes would of course be illegal under the London Dumping Convention, as amended, and a criminal act under the Basel Convention. Consideration of the risk of dumping is not a "practical difficulty"; rather, this risk highlights the need to avoid the generation of non-Marpol hazardous waste on ships at sea. This risk also points to the need to strengthen the implementation of Basel with respect to ships. The *Revised Legal Analysis*, however, takes the opposite approach: in the face of the risk of non-compliance, it concludes that the obligation does not apply.

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[18] Mechanisms of coordination are not unknown in the law of the sea, which provides means for addressing issues of concurrent jurisdiction.

[19] Int'l Maritime Org., SUB-COMMITTEE ON BULK LIQUIDS AND GASES (BLG): 16TH SESSION, 30 JANUARY TO 3 FEBRUARY 2012 (Feb. 3, 2012), at http://www.imo.org/MediaCentre/MeetingSummaries/BLG/Pages/BLG-16th-session.aspx ("A draft SOLAS regulation to prohibit production processes on board ships was agreed by the Sub-Committee on Bulk Liquids and Gases (BLG) when it met for its 16th session. The proposed draft new regulation VI/5-3 would prohibit any production process on board a ship during the sea voyage. Production processes refer to any deliberate operation whereby a chemical reaction between a ship's cargo and any other substance or cargo takes place. The proposed draft regulation will be submitted to the Maritime Safety Committee (MSC 90) with a view to adoption, together with the new draft SOLAS regulation VI/5-2, to make mandatory the prohibition of blending of bulk liquid cargoes during the sea voyage, which was previously approved by MSC 89.").

[20] *See* LOSC, Art. 197-201; Art. 194, 204-06.

In the end, the interpretation of the Revised Legal Analysis with respect to flag State jurisdiction does not strengthen the Convention; instead, it does exactly the opposite by opening a serious loophole in its regulatory scheme. The approach of the *Revised Legal Analysis* thus undermines Basel's efficacy.

III.iv. Conclusion on the scope of Basel's TBM obligations

The interpretation of the *Revised Legal Analysis* reveals an implicit policy preference of excluding non-Marpol hazardous waste generated on board vessels from Basel's TBM procedures. However, an interpretation that ignores the text and special definitions, and that defeats the object and purpose of a treaty, is disallowed by the customary principles of interpretation in international law and also by the VCLT. Accordingly, by excluding non-Marpol wastes generated on board vessels in internal waters, the territorial sea or the EEZ from the scope of Basel obligations, the *Revised Legal Analysis* misapplies the applicable law on the interpretation of treaties and opens a serious loophole in Basel's scope.

The better interpretation of the scope of Basel's TBM obligations rests on geographical and jurisdictional grounds. Under a *geographically* focused interpretation, the terms "marine area" and "area under national jurisdiction" include the coastal State's internal waters, territorial sea, and EEZ; accordingly, non-Marpol wastes generated therein fall under the scope of Basel's TBM obligations. Under a *jurisdictionally* focused interpretation, the same relevant terms can also encompass a ship; accordingly, non-Marpol wastes generated on a ship are subject to the jurisdiction of the flag State and fall under the scope of Basel's TBM obligations.

IV. INTERPRETATION OF BASEL'S OBLIGATION TO MINIMIZE THE GENERATION OF HAZARDOUS WASTES AND OTHER WASTES AND BASEL'S OBLIGATION TO MANAGE WASTES IN AN ENVIRONMENTALLY SOUND MANNER.

This section includes comments on the *Revised Legal Analysis* treatment of the scope of Basel's obligation to minimize the generation of hazardous wastes and Basel's obligation to manage wastes in an environmentally sound manner.

The introduction of part IV of the *Revised Legal Analysis*, which frames the issues involved in the application of the Basel Convention to hazardous wastes generated on board ships,suggests that, "the generation of wastes on board ships is, by its very nature, an ongoing activity: it takes place in areas within and outside the national jurisdiction of States". This framing ignores a central tenet of the law of the sea, which is that ocean-going vessels are subject to the jurisdiction of their flag-State. Therefore, with the sole exception of stateless vessels, the generation of wastes on board a ship can never take place outside the national jurisdiction of a State. In this regard, the proper elucidation of the role of flag-State jurisdiction helps address potential gaps or loopholes in the application of Basel to wastes generated on board vessels.

The key interpretative question that arises with respect to applicability of Basel's obligation to minimize the generation of hazardous wastes and other wastes, as well as Basel's obligation to manage wastes in an environmentally sound manner (ESM), rests on the meaning of the terms “within it” and "Party" in Basel Articles 4(2)(a)(b) and (c). Since the terms "within it" utilized in the Articles 4(2)(a)(b) and (c) refer to the chapeau of Article 4

that utilizes the term "Party", the question rests on the meaning of "Party". This focus on the term "Party" thus implicates the notion of the State in international law.

The *Revised Legal Analysis* does not address this question first. Instead, it asks two questions:

1. What are the implications, if any, for a Party to the Basel Convention that is also a flag State under UN Convention on the Law of the Sea (LOSC)?

2. Can "within it" be interpreted as including "within a ship" that is located in a marine area under the national jurisdiction of a State?

These questions, however, confuse the *implications* of the interpretation with the *meaning* of the relevant terms. We turn now to offer comments on the conclusions reached by the *Revised Legal Analysis* on these two questions.

IV.i. The conclusion of the *Revised Legal Analysis* on the responsibility of the flag State in connection with Basel's generation and ESM obligations

The *Revised Legal Analysis* concludes that the notion of the flag-State under LOSC is not relevant because Basel does not foresee this possibility or refer to LOSC.[21]

The argument that Basel does not refer to the LOSC is unpersuasive for the following reasons. First of all, because the Basel Convention is *lexspecialis* in relation to customary law of the sea, in order for Basel to effectively exclude the application of a norm of such central importance as flag-State jurisdiction, the treaty would have to do so explicitly. However, Basel does not contain any such explicit provision excluding flag-State jurisdiction. On the contrary, Article 4(12) of the Convention clearly states that Basel does not affect "the navigational rights and freedoms as provided for in international law". It is well settled in international law that the State's right to sail ships flying its flag correlates with the State's duty to effectively exercise jurisdiction and control over those ships.

Furthermore, the interpretation of "within it" and "Party" must account for the principle of systemic integration, particularly in respect of the relevant norms of the customary law of the sea, such as flag-State jurisdiction. The principle of systemic integration is fully applicable because it is beyond question that flag-State jurisdiction is a relevant rule of international law applicable in the relations between Basel Parties.

Flag-State jurisdiction is a key tool for the allocation of responsibility for the governance of activities of marine vessels under the law of the sea. LOSC, negotiated prior to the adoption of the Basel Convention, attempts to strengthen this central role of flag-State jurisdiction. Therefore, the interpretation of Basel under the light of the principle of systemic integration could not discard the role of flag State jurisdiction in respect of non-Marpol waste generated on a ship unless the text of the treaty specifically and expressly excluded it, which is not the case.

[21] *Revised Legal Analysis,* para 36.

IV.ii. The conclusion of the *Revised Legal Analysis* on the meaning of "within it" in Article 4.2 (a)(b) and (c)

The *Revised Legal Analysis* concludes that "within it" is a "reference to the territory of that State, and a ship at sea [...] would not fall within that spatial sphere". There are two problems with this conclusion. First, while this conclusion equates "State" with "territory", it excludes the application of Basel obligations in the territorial sea. As noted above, it is well settled in international law that the territorial sea is an integral element of the territory of the State. Second, the *territorial* focus of this interpretation fails to regard the proper notion of the State's nature and *jurisdictional* competences in contemporary international law.

The *Revised Legal Analysis* adopts a conception of the State prevalent in the XIXth and early XXth centuries that identified *territory* as an integral element of the State. This territorial notion is codified, for example, in the Montevideo Convention on the Rights and Duties of States from 1933. While the notion of territory certainly remains important in modern international law, the State is no longer viewed simply as a geographically-defined territorial mass. Instead, the State is recognized as a legal actor, a subject of international law proper, that holds rights and responsibilities. In this regard, the legal notion of *jurisdiction* has replaced the narrower notion of territory in the articulation of the rights and responsibilities of the State under international law.

IV.iii. A *geographically* focused interpretation of the term "Party"

A *geographically* focused interpretation of the term Party places emphasis on the territory and marine area under national jurisdiction. This geographically focused interpretation can hold two variants.

The first variant is to equate the term Party with the territory of the State. The implication of this first variant is that Basel generation and ESM obligations apply to non-Marpol wastes generated on a ship in the territorial sea.

The second variant admitted by this interpretation is to equate the term Party with the geographical areas over which it exercises national jurisdictional, namely internal waters, the territorial sea and the exclusive economic zone. The implication of this second variant is that Basel generation and ESM obligations apply to non-Marpol wastes generated on a ship in these marine areas.

However, the geographically focused interpretation of the term "Party" takes us back to the notion of the State defined and understood solely as a *physical* entity. The better approach is to recognize how international law has impacted on and transformed the notion of the State, and how the notion of jurisdiction as a *legal* construct has played a critical role in this transformation. A jurisdictionally focused interpretation of the term "Party" is examined next.

IV.iv. A *jurisdictionally* focused interpretation of the term "Party"

Seen under a jurisdictional light, the State is no longer simply a mass of land and territorial sea, but it begins to encompass rights and responsibilities that can and must be exercised beyond its geographical borders. The notion of flag-State jurisdiction in relation to navigational rights and freedoms is a prime example of the exercise of State authority

beyond the confines of territory. So is the obligation to prevent transboundary harm in international environmental law, which the ICJ recognized as customary law in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.[22] In accordance with this obligation, States must ensure that activities within their *jurisdiction* and control respect the environment of other States and of areas beyond national control. These examples clearly demonstrate how contemporary international law has expanded from narrow territorial notions and resorted to functional notions of jurisdiction and control in relation to a State's international obligations.

The emergence of the EEZ, where the coastal State holds certain rights, jurisdiction and duties over a functional marine area located beyond its territory, also speaks to the key notion of jurisdiction in modern international law.

A jurisdictionally focused interpretation of the term Party finds further support in the jurisprudence of the European Court of Justice (ECJ). Indeed the ECJ has interpreted *Council Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora* (Habitats Directive), to the effect that its geographical scope of application extends beyond the State's territory to the adjacent EEZ.[23] The ECJ's ruling is noteworthy, since the Habitats Directive specifically uses the term *territory* in articulating its aims.[24] Despite the specific use of the term territory in the Habitats Directive, in *Commission v. United Kingdom* the ECJ considered that the State exercises sovereign powers in the EEZ and held that the directive applies beyond territorial waters and must be implemented in the EEZ.[25]*A fortiori*, there is no difficulty in concluding that Basel applies where the State exercises sovereign powers, such as in the exercise of jurisdiction over ships flying its flag.

The principle of *effet utile*, in relation to the object and purpose of the Basel Convention, confirms the strength of the *jurisdictionally* focused interpretation of the term "Party" submitted in these comments. In accordance with the principle of effectiveness, the jurisdictional approach to the interpretation of the terms "Party" and "within it" is preferable, since that approach avoids creating gaps in Basel's scope of application. By the same token, the narrow territorial approach is discouraged by the *effet utile* principle because it results in loopholes that undermine the objectives of the Convention.

In the end, this discussion reveals that contemporary notions of the State in international law should illuminate the interpretation of the terms "Party" and "within it". Under that light a Basel Party that is also the flag-State of a marine vessel has, with respect to non-Marpol waste generated on board the ship, the obligation to minimize the generation of hazardous wastes and other wastes as well as the obligation to manage wastes in an environmentally sound manner.

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[22] Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8).

[23] Council Directive 92/43, Conservation of Natural habitats and of Wild Fauna and Flora, 1992 O.J. (L 206) 7 (EEC), as amended.

[24] Id. art. 2, para. 1, ("The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies) (emphasis added).

[25] Case C-6/04, Comm'n v. United Kingdom, 2005 E.C.R. I-9017.

V. BASEL'S ARTICLE 1(4) LIMITING ITS SCOPE OF APPLICATION

One of the key issues concerning Basel's treatment of wastes produced on board a ship relates to the interpretation of the Article 1(4). This provision excludes from the scope of application of Basel those "wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument."

The *Revised Legal Analysis* concludes that wastes falling within the scope of Marpol are excluded from the scope of the Basel Convention by virtue of Basel's Article 1(4). This conclusion is based in the proper application of Articles 31 and 32 of the VCLT. Particular weight is given to Basel's *travauxpreparatoires*, which show that Article 1(4) was based on a drafting proposal of a representative of the International Maritime Organization (IMO), which administers Marpol.

It is worth identifying some of the implications of this conclusion.

First of all, wastes generated on board vessels that are not covered by Marpol, *i.e*, non-Marpol wastes, can fall under the scope of the Basel Convention. Marpol does not have an unlimited scope. It generally addresses wastes that derive from the normal operations of a ship, and it operationalizes this general criterion through various annexes that refer to particular types of wastes. In this regard, the assertion in the *Revised Legal Analysis* that Marpol does not distinguish between "normal" and "abnormal" wastes misses a key point of Marpol's*travaux*, which show that its scope was intended to address, *inter alia*, the *normal* operations of a ship. The *Revised Legal Analysis* does not examine Marpol's*travaux* and, perhaps for this reason, it questions whether at the time industrial processes took place on board ships and resulted in the generation of wastes. On this point, Marpol's*travaux*shows that Marpol Parties did not consider industrial operations on board vessels to be included in the normal operation of a ship.[26] Accordingly, wastes generated on vessels as a result of industrial processes fall outside Marpol's scope and thus can be covered by Basel.

A second implication of the interpretation of Article 1(4) offered by the *Revised Legal Analysis* is that it places the onus on Marpol Parties to further clarify and operationalize the scope of Marpol. In this regard, Basel's Article 1(4) contains two elements that operate in concert and cannot be dissociated, namely: (i) wastes derived from the normal operations of a ship and (ii) the discharge of which is covered by another international instrument. The *Revised Legal Analysis* (correctly) reads these two elements together to conclude that the whole provision refers to Marpol wastes. Accordingly, a waste could not be said to derive from the normal operations of a ship, yet not be subject to Marpol's regulatory framework. Stated differently, the meaning of the phrase "normal operations of a ship" is not independent from Marpol's regulatory framework; both elements operate in tandem. Therefore, if the discharge of the waste were not covered by Marpol, Basel Article 1(4) limiting its scope of application would not apply.

A third implication is the enhanced normative dialogue enabled by the conclusion reached in the *Revised Legal Analysis*. This point may be more general and abstract than the operational scope of Marpol discussed above, but is no less important in an increasingly fragmented international legal order. By implication, Basel's Article 1(4) means that Basel defers to the specialized agency and relevant instrument, namely the IMO and Marpol, to define their scope of application, instead of calling on Basel Parties to autonomously examine the

[26] See CIEL Issue Brief, Normal Operations of a Ship in Marpol: A Review of Marpol's Travaux, June 2012, available at http://www.ciel.org/Publications/Marpol_26Jun2012.pdf

meaning of the phrase "normal operations of a ship". This approach fosters a coherent understanding between the two treaties, avoids duplication of resources, and minimizes potential tensions between legal regimes. At the same time, this approach highlights the need for adequate arrangements for collaboration between Basel and Marpol. These arrangements for normative dialogue are key to ensuring a smooth functioning of the regimes, including with respect to two key issues: (i) the progressive development of Marpol, particularly in clarifying its scope and enhancing its effectiveness, and (ii) the implementation of Basel with respect to wastes not covered by Marpol.

A fourth and final implication of the conclusion of the *Revised Legal Analysis* is that, when Marpol ceases to cover a certain waste, then Article 1(4) limiting Basel's scope of application ceases to operate. Wastes are only Marpol wastes as long as they remain subject to Marpol's regulatory framework, and not *ad infinitum*. For example, when Marpol waste is offloaded to a port reception facility, it arguably ceases to be covered by Marpol, at which time the Basel Convention acquires full force with respect to such offloaded wastes.

These four implications should be incorporated to the version of the Legal Analysis that the Secretariat will prepare in advance of COP11.

VI. CONCLUSIONS

The *Revised Legal Analysis* conclusions regarding the applicability of Basel obligations to non-Marpol waste generated on board ships are deficient because they are not based on a rigorous application of the principles of treaty interpretation established in customary international law and the Vienna Convention on the Law of Treaties. This critique is particularly relevant to the interpretation of the scope of Basel obligations pertaining to the generation, ESM and TBM of non-Marpol hazardous waste.

1. With respect to Basel's TBM obligations, the *Revised Legal Analysis* disregards the definitions and literal text of Basel's Article 2(9). Although internal waters, the territorial sea and the EEZ are unquestionably a "marine area" and an “area under national jurisdiction,” and accordingly wastes produced therein fall under Basel’s TBM provisions, the *Revised Legal Analysis* concludes that Basel's TBM mechanism never applies to hazardous waste generated on a ship, regardless of where it is generated. Thus, the *Revised Legal Analysis* overreaches.

2. With respect to Basel's generation and ESM obligations, the *Revised Legal Analysis* disregards the object and purpose of the Convention as well as the principles of effectiveness and systemic integration. The *Revised Legal Analysis*'s interpretation of the term "Party" in Article 4 of the Convention is based on a narrow territorial construct that unduly narrows the scope of protections contemplated in the Basel Convention and that ignores contemporary notions of the State's sovereign rights and jurisdiction in international law. Moreover, the *Revised Legal Analysis* fails to adequately contemplate the role of the flag-State in the discharge of Basel obligations.

This said, the *Revised Legal Analysis* does contribute to elucidating the relationship between Basel and Marpol. The *Revised Legal Analysis* shows that Marpol waste generated on board a ship is excluded from the scope of Basel by virtue of Article 1(4) of the Convention. One of the implications of this conclusion is that since Marpol does not cover industrial wastes generated on board vessels, but generally only wastes resulting from the normal operations

of a ship, then hazardous wastes generated by industrial processes on board ships can fall under Basel's scope of application. In addition, once Marpol wastes cease to be covered by Marpol, such as when offloaded in port, Basel requirements fully apply to the hazardous wastes from that moment on.

In effect, there seems to be a policy preference advanced in the *Revised Legal Analysis* to exclude Basel from wastes generated on board ships. While this policy preference finds support in Article 1(4) regarding Basel's scope of application with respect to Marpol waste, its extension beyond Marpol wastes opens a serious loophole in the control mechanisms of Basel that can be used by unscrupulous operators and criminal gangs to defeat the objectives of the Convention regarding the protection of the environment and public health.

In the end, with respect to non-Marpol hazardous waste generated on a ship, the better interpretations of the Basel Convention are the following:

> 1. With respect to Basel's TBM obligations, the terms in Article 2 "marine area" and "area under national jurisdiction" encompass the coastal State's internal waters, territorial sea and EEZ. By implication, non-Marpol wastes generated on a ship in any of these marine areas is subject to Basel's TBM obligations.
>
> 2. With respect to Basel's TBM obligations, the terms in Article 2 "marine area" and "area under national jurisdiction" encompass a ship subject to the jurisdiction of the State that has authorized it to fly its flag. By implication, non-Marpol wastes generated on a ship in the high seas is subject to Basel's TBM obligations.
>
> 3. With respect to Basel's generation and ESM obligations, the terms of Article 4 "within it" and "Party" involve the State not only as a territorial mass of land and appertaining territorial sea, but also as a subject of international law entitled to sovereign rights and jurisdiction. By implication, the flag-State that is also a Party to Basel is called upon to discharge its Basel obligations.

These three conclusions are supported by the customary canons of treaty interpretation, including the literal and teleological approaches as well as the principles of effectiveness and systemic integration. In addition, this interpretative solution better comports with contemporary readings of the nature and competences of the State in international law, as confirmed by the European Court of Justice, which regards the State not only as a territorial mass, but also as a subject of international law entitled to exercise sovereign rights and jurisdiction.
