



Best practices of repatriation of illegal waste shipments from Asia to Europe

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1. INTRODUCTION

The “Deterring and disrupting illegal trade and management of Waste by developing Tools for Enforcement, Forensics and Capacity Building” (WasteForce) project, is an initiative funded by the European Union’s Internal Security Fund Police (ISFP/2017/AG/ENV/821345), with a duration of two years, ending in November 2020.

Work package 4 of the WasteForce project is aimed at supporting international operational networking between the European Union (EU) and the Asia Pacific region and will result in four deliverables. Deliverable 4.1 provides an inventory of needs and possibilities related to the information exchange mechanisms, while deliverable 4.2 delves into the different mechanisms and a guideline on how to use them. Deliverable 4.3 provides guidance on prosecuting waste crime. Finally, the current deliverable 4.4 is a collection of good practices to support the EU-Asia collaboration, especially on the repatriation of illegal waste shipments.

In 2019, the United Nations Environment Programme (UNEP) carried out a survey under the WasteForce project amongst various officers from different organisations dealing with illegal waste shipments. The survey investigates the experiences from customs, police and environmental officers as well international organisations in sharing information; using information exchange mechanisms related to verification of destinations, detection of illegal waste shipments and their repatriation. One of the outcomes of the survey shows that collaboration between authorities related to illegal shipments of waste seems to be very challenging. The repatriation of illegal waste shipments is considered a difficult and time-consuming process. However, there are several good examples from daily practice where information of verifications of destinations in Asia was shared. Those verifications were mainly carried out via email and through bilateral contacts between officers from the country of origin and that of destination. The report will focus on examples where illegal waste shipments detected in Asia have been successfully repatriated to the country of origin in Europe.

A few successful examples are described in this document and recommendations are drawn to promote a good and successful collaboration in dealing with such cases in the future. More best practices in dealing with illegal waste shipments can be found in the DOTCOM Waste library. This is a collection of information on good practices and lessons learned in supporting the detection, investigation and prosecution of the illicit management and illegal trade of waste.¹

¹ The DOTCOM Waste Library is available online at: <https://dotcomproject.eu/resources/dotcomlibrary/> ; moreover, under the Waste Force project, the DOTCOM Waste Library is being further developed and updated, the Waste Force library is online available at: <https://www.wasteorceproject.eu/resources/library/>

2. THE BASEL CONVENTION AND THE EUROPEAN WASTE SHIPMENT REGULATION²

Transboundary movements of hazardous and other wastes are regulated under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention).³ This means that those shipments only can be shipped under a Prior Informed Consent (PIC) procedure. Parties of the Convention need to implement the provisions of the Convention through their national legislation. On 5 December 2019 the BAN amendment⁴ of this Convention entered into force. It means that it is prohibited to export hazardous waste to developing countries. Many countries which are Parties to the Basel Convention have used the opportunity offered by the Convention, to consider certain types of non-hazardous waste as hazardous,⁵ which entails that such types of waste only can be shipped under the PIC procedure. The Convention also gives the possibility to countries to restrict or prohibit the import of certain types of waste.

In the EU, the Basel Convention, including the BAN amendment and other related international instruments such as Decision (2001)107/ final of the Organisation for Economic Co-operation and Development (OECD)⁶ have been transposed into the EU level through the EU Waste Shipment Regulation (WSR).⁷ It is worth remembering that any EU regulation is directly applicable in every member state and needs no further transposition.

The WSR, in addition to the requirements of the Basel Convention, also regulates non-hazardous wastes shipped for recycling to countries which are not member of the OECD. Based on this WSR, the EU has asked non-OECD countries whether they agree to receive non-hazardous wastes originating from the EU and, in case they agree, to specify whether the waste need to be sent under a PIC procedure or under a simplified procedure. The non-OECD countries can also decide that the import of non-hazardous waste from the EU is prohibited. More details on this can be found in Commission Regulation (EC) 1418/2007.⁸

² The Basel Convention defines in Article 2 paragraph 3 the 'Transboundary Movement' of waste under the Convention. The EU WSR defines the 'shipment' of waste in Article 2 paragraph 34. When there is mentioned in this document 'Movement', 'Shipment' or 'Transport' it always means transportation of waste from one country to another country.

³ For more information see:

<http://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx>

⁴ For more information see: <http://www.basel.int/Default.aspx?tabid=8120>

⁵ <http://www.basel.int/Countries/NationalDefinitions/NationalDefinitionsofHazardousWastes/tabid/1480/Default.aspx>

⁶ See [https://one.oecd.org/document/C\(2001\)107/FINAL/en/pdf](https://one.oecd.org/document/C(2001)107/FINAL/en/pdf)

⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1454069470717&uri=CELEX:02006R1013-20180101>

⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R1418&from=NL>

3. ILLEGAL TRAFFIC AND REPATRIATION OF WASTE

The Basel Convention (Article 9) considers transboundary shipments of waste as illegal under the following conditions:

- without notification pursuant to the provisions of the Convention to all States concerned;
- without the consent of a State concerned;
- through consent obtained by falsification, misrepresentation or fraud;
- a shipment that does not conform in a material way with the documents; or
- that results in deliberate disposal (e.g. dumping) of hazardous wastes in contravention of the Convention and of general principles of international law.

It also considers illegal traffic as a criminal act. The EU WSR (Article 2.35) considers the points above as an illegal shipment and among others as well:

- waste exported outside the EU for disposal;
- waste exported to countries which have prohibited the import of such waste;
- hazardous waste exported to non-OECD countries or waste which is considered as hazardous by the non- OECD country.⁹

Under the Basel Convention (Article 9), if shipments are being considered illegal as the result of conduct by the exporter or generator, the State of Export shall ensure that the waste in question are:

- taken back by the exporter or the generator or, if necessary, by itself in the State of export; or, if impracticable,
- are otherwise disposed of in accordance with the provisions of the Convention.¹⁰

The EU WSR (Article 24) has similar obligations for the exporter and the State of Export but provides more details about alternative options in cases where the repatriation is impracticable. These options are that the waste will be:

- alternatively recovered or disposed of in the country of destination or dispatch by the competent authority of dispatch or by a natural or legal person on its behalf; or, if impracticable
- alternatively recovered or disposed of in another country by the competent authority of dispatch or by a natural or legal person on its behalf if all the competent authorities concerned agree.

⁹ Based on Article 35, 36 and 37 of the European Waste Shipment Regulation (WSR 1013/2006).

¹⁰<http://www.brsmeas.org/Decisionmaking/COPsandExCOPs/2017COPs/2017COPs/MeetingDocuments/tabid/5385/ctl/Download/mid/16177/language/en-US/Default.aspx?id=553&ObjID=17210>



Figure 1 illegal plastic found in Cambodia (photo credit Ministry of Environment, Cambodia)

"We need to send a message to the international community about ASEAN's stance on this toxic waste issue," said Indonesian Foreign Minister Retno Marsudi. "We don't want the Southeast Asian region to become a trash can of other countries."

In the past two months, some Southeast Asian countries, including Cambodia, Indonesia, Malaysia and the Philippines decided to send back hundreds of containers carrying illegal plastic waste to Australia, Canada, France, Germany, Hong Kong and the United States. Hundreds more containers were being checked for possible repatriation. ASEAN groups Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam¹¹.

¹¹ The full article is available online at: <https://english.kyodonews.net/news/2019/08/fa486d2a0f15-southeast-asia-wont-be-developed-countries-trash-can-asean.html>

Essential is when the illegal waste shipment is the responsibility of the exporter or the generator the waste has to be repatriated to the State of export.

In case the importer or the consignee is responsible for the illegal shipment, the State of Import needs to make sure that the waste is being recovered or disposed in an environmentally sound manner by the importer, consignee or when impracticable directly by itself.

In cases where the responsibility for the illegal shipment cannot be assigned either to the exporter or generator or the importer or disposer, the countries involved or other countries, as appropriate, shall ensure through co-operation that the wastes in question are treated as soon as possible in an environmentally sound manner either in the country of export, the country of import or elsewhere as appropriate.¹²

One of the key elements for governmental bodies dealing with illegal waste shipments is to determine who is responsible for the illegal shipment.

The answer to this determination is required for determining the options on how to deal with the waste. The options include: repatriation to the exporting country or recovery/ disposal in the importing country.

¹² Based on Article 9 paragraph 4 of the Basel Convention and/ or Article 24 paragraph 5 of the EU WSR

4. DETECTION OF ILLEGAL SHIPMENTS OF WASTE

Before the question concerning the responsibility for an illegal waste shipment can be answered, there are several other elements which need to be defined.¹³

1. To determine if the shipped items qualify as waste.¹⁴ The Basel Convention¹⁵ as well as the EU WSR¹⁶ have both a definition of waste.

To determine which procedure is applicable for a particular shipment, the steps to be followed are listed below.

2. Under the Basel Convention hazardous waste and other waste shipped for disposal need a PIC. Under EU WSR, waste shipped for disposal requires a PIC. In case of treatment for disposal outside the EU, the export is prohibited.

In addition to what is mentioned under point 2, based on the EU WSR and Regulation (EC) 1418/2007, certain exports of waste out of the EU to non-OECD countries are prohibited, including the following:

- hazardous waste;
- wastes that the country of destination has notified to be hazardous under Article 3 of the Basel Convention;
- wastes the import of which has been prohibited by the country of destination; or
- wastes which the Competent Authority of dispatch has reason to believe will not be managed in an environmentally sound manner in the country of destination concerned, e.g. when waste is sent to a non-licensed facility.

Additional requirement to Basel Convention: transboundary movements of waste are allowed only if:

- the State of export does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the wastes in question in an “environmentally sound manner”; or
- the wastes in question are required as raw material for recycling or recovery industries in the State of import; or
- the TBM in question is in accordance with other criteria decided by the Parties.

¹³ This refers to a situation according to the EU Regulations.

¹⁴ Article 2 of the Basel Convention: “Wastes” are substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law.

¹⁵ Glossary of terms can be downloaded at:

<http://www.basel.int/Implementation/LegalMatters/LegalClarity/Glossaryofterms/SmallIntersessionalWorkingGroup/tabid/3622/Default.aspx>

¹⁶ Article 2 of the EU WSR refers to Article 1 of the EU Waste Framework Directive 2008/98/EC: ‘waste’ means any substance or object which the holder discards or intends or is required to discard.

3. Under the EU WSR shipments wastes which are not classified in Annex III, IIIB, IV or IVA under one single entry need a PIC.
4. Mixtures of non-hazardous wastes need also a PIC under the EU WSR when they are not classified under one single entry of Annex III, IIIB, IV or IV unless listed in IIIA.
5. Under the EU WSR regardless of whether wastes are classified as non-hazardous and shipped for recovery they need PIC if they are contaminated by other materials to an extent which increases the risks associated with the wastes sufficiently taken into the hazardous characteristics mentioned in the EU Waste Framework Directive or it prevents the recovery of the wastes in an environmentally sound manner.

The mentioned points are of great importance to determine if waste shipments are legal or illegal. In case of an illegal shipment, it is related to whom is held responsible for the shipment to decide if the shipment needs to be repatriated to the country of export.

Case study 1: shipment of contaminated waste paper from Netherlands to China

A waste recycling company in the Netherlands collects on its premises waste paper from various sources and from various countries in Europe. The waste is sent for further recovery to countries in Asia and mainly to China. According to different sources/newspapers,¹⁷ the company exported 450,000 containers to China, in two decades. In 2011 the company was investigated by Dutch Law Enforcement Agencies as the company was suspected of sending contaminated waste from the Netherlands to China. The company imported household waste from the United Kingdom into the Netherlands for further treatment and sorting out plastics and other wastes. Instead of doing this, the company hid the bales with contaminated materials behind clean bales with waste paper in containers and exported those containers to China. The company and its directors were sentenced in the Netherlands in 2016.¹⁸



Figure 2 China Customs officers inspecting the waste

As part of the investigation, the Dutch public prosecutor sent a request for legal assistance to his

¹⁷ <https://www.bredavandaag.nl/nieuws/economie/226696/china-stuurt-vervuild-papier-van-puijfelik-breda>

¹⁸ <https://www.ad.nl/breda/celstraf-voor-directeuren-van-puijfelik-breda-ordinaire-milieucriminelen~a0331e50/>

Chinese counterpart regarding 30 containers which were suspected to contain contaminated household waste, or at least a mixture of waste exceeding the Chinese thresholds for paper waste. China Customs in cooperation with other Chinese authorities investigated this shipment and confirmed that the waste was not allowed for import in China. Thanks to a close cooperation between the Chinese and Dutch authorities, including the cooperation of the Shipping Line, the waste was repatriated to the Netherlands.¹⁹

Main conclusions on this case and the repatriation of the waste:

- The waste inside the container was contaminated, exceeding the thresholds in Chinese Law and considered as household waste.
- Household wastes are waste requiring special consideration under the Basel Convention (PIC procedure).
- Household wastes are prohibited to export from OECD (EU) to non- OECD (China), as part of the Ban Amendment, implemented in the EU WSR.
- The exporter was held responsible for the illegal export as he was aware that the contaminated waste was shipped in the containers.
- Authorities in China and Netherlands worked together via formal ways including the involvement of their embassies.
- Chinese authorities started further investigations in China to other imports of such materials.
- The Dutch suspects were sentenced by the court.

The waste was recovered in an environmentally sound manner in the Netherlands.

¹⁹ http://www.chinadaily.com.cn/china/2012-06/02/content_15454275.htm

5. EVIDENCE GATHERING

During the handling of a waste shipment, the involved officers need to gather information from different sources. Guidance documents on the various aspects on how to deal with illegal shipments of waste and their return are provided by several organisations or networks such as the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL).²⁰

The information which can be gathered as evidence in case of an illegal waste shipment includes:

Documents

- Transport documents/ Freight letter
- Notification and movement documents, as required by the Basel Convention
- EU WSR Annex VII document
- Contracts
- Invoices
- Weighing slips
- Bill of lading.

Such information can be available at:

- the exporter
- the importer
- the shipping or forwarding agent
- the shipping line
- port authorities
- customs
- the environmental authorities.

Visual inspection and sampling

The waste involved should be ideally visually inspected, its composition and characteristics should be described and photos of the wastes should be attached.

In certain cases, sampling is necessary to determine the exact characteristics of the waste involved. Sampling needs to be undertaken by qualified persons, following precise standards and with respect to safety measures.

Statements/ interviews

In addition to documents, photos, samples and description of the waste, it can be very important to interview involved persons to determine who is responsible for the illegal shipment, as sometimes instructions are given by phone, by email and there an explanation is

²⁰ https://www.env.go.jp/en/recycle/asian_net/Annual_Workshops/2010_II_PDF/Additional_Paper/IMPEL-TFS-Manual-return-of-illegal-waste-shipments-Dec-2008.pdf

necessary for instance on certain information found documents, on the transport route followed, etc.

Chain of evidence

It is extremely important that the situation encountered is documented in detail. If there are signs of violation, the inspectors should ensure that evidence is collected in a manner consistent with general criminal investigations and evidence must be collected and prepared in a way such that it can be admissible evidence in a court of law.

This means that every step made in the selection, inspection, determination, information gathering, etc. should be documented in every aspect. This includes the documentation of every seal which is removed or replaced; if waste has been discharged and re-loaded, that exactly the same waste is being re-loaded in the same transport mean then from which it was discharged.

A minor gap in the chain of evidence can be the reason why the responsible person cannot be determined, or held responsible and therefore the involved waste cannot be repatriated or the involved persons cannot be prosecuted.

Case study 2: Contaminated metal scrap successfully repatriated from Indonesia to the UK

In 2011, a shipment of 89 containers containing 1,800 tons of metal scrap were inspected in by Customs officials in the port of Jakarta, Indonesia. According to the Indonesian authorities the metal scrap was contaminated with asphalt, plastic and liquid.²¹



Figure 3 The inspection of the containers metal scrap in port of Jakarta, Indonesia (photo credit Jakarta Globe)

The abovementioned shipment of 89 containers were in 2012 successfully repatriated, due to cooperation between the authorities in Indonesia and the UK.

This repatriation was successful also because the Indonesian authorities gathered and exchanged evidence and convinced the authorities in the UK that the suspicious shipment could be indeed an illegal shipment of waste, and the exporter could possibly be hold responsible for this particular shipment.

The team investigating the containers returned from Indonesia – the inquiry is appropriately named “Operation Anvil” – searched through their contents to try and find evidence that the waste metal, claimed by its exporters to have been legitimately-exportable scrap metal, was mixed with hazardous contaminants allegedly found by the Indonesian authorities.

According to photographs taken by customs officials in Jakarta and sent back to Britain, suspect hazardous substances were found in some of the containers. This means that Operation Anvil will have to conduct further tests to assess which, if any, of Britain's strict waste export regulations have been broken.

Jeff Warburton, a senior environmental crime officer, said: "The legislation is quite clear – there should not be any contaminants in this material. It is the very early stages of this investigation, but we do take these things extremely seriously."²²

²¹ <https://www.ibtimes.co.uk/scrap-illegal-exported-returned-safety-315195>

²² <https://www.independent.co.uk/news/uk/home-news/britains-waste-now-its-coming-back-to-haunt-us-7789292.html>

6. COOPERATION

The Basel Convention and the EU WSR often highlight the importance of inter-state cooperation to ensure that the waste in question is disposed or recovered in an environmentally sound manner. Such cooperation is also relevant for repatriations of illegal waste shipments.

It is well known that international cooperation is challenging. However, a successful repatriation of an illegal waste shipment heavily depends on cooperation and communication.

Several organizations and networks such as the World Customs Organisation (WCO), Interpol and IMPEL have developed their own communication channels or information exchange mechanisms. Information may be sent using informal channels (such as through personal emails) or more formal avenues, through national embassies, international organizations such as the Basel Convention Secretariat or the World Trade Organization (WTO). Irrespective of the way the communication takes place, it is critical that it happens with full respect of each country's legislation and authority over the shipment to facilitate the successful repatriation of illegal waste shipments when necessary.

Case study 3: Repatriation of plastic waste from Malaysia to UK

The UK has agreed to repatriate 42 containers comprising illegal shipment of plastic waste from Malaysia, in accordance with the Basel Convention. Authorities and shipping agents are currently working together in the repatriation process. The containers, which had arrived at Penang Port between March 2018 and March 2019, were deemed illegal as they failed to comply with the necessary import papers.



Figure 4 Photo credit Breakfreefromplastic.org

The announcement came following a recent visit by the UK's Environment Agency (EA) organised by the British High Commission in response to news of the illegal shipment of plastic waste from the UK.

The EA held a series of meetings with the Ministry of Energy, Science, Technology, Environment and Climate Change (MESTECC), Department of Environment, Royal Malaysian Customs Department, relevant port authorities and agencies in Malaysia. These meetings have resulted in a greater mutual understanding of the regulatory framework and policies related to trade in plastic waste, as well as an exchange of knowledge in sharing intelligence, inspection procedures, identification and repatriation of plastic waste.

Y.B. Yeo Bee Yin, Minister of Energy, Science, Technology, Environment and Climate Change said, "The British High Commission's proactive action of working closely with MESTECC in repatriating 42 plastic import containers in Penang Port is highly commendable. This co-operation signifies a recognition that plastic pollution is a global issue which requires commitment from various countries to address the problem. "We hope the co-operation and understanding between Malaysia and United Kingdom will set an example for other countries with companies exporting contaminated plastic waste to other developing nations," she said.²³

²³ <https://www.breakfreefromplastic.org/2019/12/02/uk-to-take-back-42-containers-of-plastic-waste-from-malaysia/>

7. RECOMMENDATIONS

Based on experiences of successful repatriations, the following recommendations to all organisations involved in such shipments can be drawn:

1. To investigate who is responsible for the illegal shipment, so as to conclude if a repatriation is possible and who is responsible for the costs.
2. To cooperate at the national level to determine who is responsible for the shipment. National agencies should be aware of their role and responsibilities and should set-up collaboration mechanisms at the national level.
3. Since the responsibility for the illegal shipment lies often on the exporter, to ensure cooperation between environmental authorities in the country of import and the country of export.
4. To ensure that the responsible officers, while gathering the necessary evidence, keep a closed chain of evidence and document everything which will in turn assist in the identification of the violators and assist in the prosecution of an eventual crime. For instance, no 'gaps' should be allowed in the evidence collected, from the moment the shipment was loaded onto e.g. the container until the moment the waste was detected in the same container. Everything needs to be very well documented, to succeed in finding the responsible persons and the eventual successful prosecution.
5. To communicate at an early stage with the authorities in the country of export for successful cooperation and repatriation.
6. To engage with the competent environmental authorities for the return of illegal shipments.