Less than Equivalent

*Hong Kong Ship Recycling Convention Fails to Uphold Basel Principles and Obligations*

Written by the Basel Action Network in preparation for the 10th Conference of Parties to the Basel Convention

Parties at COP10 have before them the question of whether or not the Hong Kong Convention offers an “equivalent level of control” for the transboundary movement and disposal of ships as compared to the Basel Convention. It is expected that there will be a working group on this subject and Parties concerned about the original intent of the Basel Convention are encouraged to attend and speak out in plenary. The question is of the utmost importance not only to the Convention, but also to international governance and the lives of the many who labor every day in the most dangerous profession on earth on the beaches of South Asia. The real question underlying “equivalent level of control” is whether or not a powerful industry can avoid being regulated by existing international laws simply by creating a far less rigorous and protective international law in an alternate venue, while applying pressure for countries to accept the new weaker rules and forsake existing stronger ones.

The history of this matter is rather unseemly. When the Basel Convention began to take up the matter of ships as waste in the past decade, the shipping industry and Maritime Ministries began coming to the Basel meetings arguing vociferously that ships are not waste. They argued this not with any valid legal or technical argument but simply because they did not want to be told by the Basel Convention that the common practice of dumping of toxic waste ships on South Asian beaches was illegal. When it was clear that the Basel Parties all believed that ships could be
wastes, the shipping industry then ran to the IMO and began to create a new legal instrument.

In response, at COP7, the Basel Parties, in a landmark decision (VII/26) asserted that a ship could be a waste when intended to be recycled or disposed of, and was covered under the Basel Convention. The Parties also invited the IMO to:

“continue to consider the establishment in its regulations of mandatory requirements, including a reporting system for ships destined for dismantling, that ensure an equivalent level of control as established under the Basel Convention and to continue work aimed at the establishment of mandatory requirements to ensure the environmentally sound management of ship dismantling, which might include pre-decontamination within its scope.”

The intent of this decision and its first use of the term “Equivalent Level of Control” was clear – to ensure that any legally binding instrument the IMO concluded on their own would not turn back the clock on environmental progress, not circumvent the Basel Convention, and not victimize developing countries, their environments, their workers and communities. Sadly, the IMO completely ignored the Basel Convention Parties’ wishes. During the negotiations of the Hong Kong Convention, the issue of an “equivalent level of control” to Basel was never even considered. The shipping industry, the IMO and their enabling countries never ever intended equivalence but rather a regime that would allow business-as-usual. The Hong Kong Convention was developed for and by industry in an attempt to outrun Basel rules and present a far weaker regime. This is very quickly demonstrated by the following facts:

- The Hong Kong Convention condones the fatally flawed beaching method of shipbreaking, whereas the Basel Convention Ship Dismantling Guidelines clearly signaled that ship recycling should be done on an impermeable surface and in a setting where heavy lifting cranes and emergency equipment could be brought alongside a ship. Such beach recycling of hazardous waste would never be considered Environmentally Sound Management by definition under Basel and would be disallowed.
- The Hong Kong Convention does not allow any state (importing, exporting or transit) to deny a transboundary movement of ships. Regardless of how disreputable the ship owner, how poor the condition of the ship, or how inadequate the proposed ship recycling plan or facilities might be, a ship can move out of the territory of one state and into the territory of another state, without Basel’s requirement for notification or consent, making abandonment very likely.
- The Hong Kong Convention does not consider toxic paints, asbestos, PCBs, etc. removed from ships and then sent out of the ship recycling facility to be covered under its legal regime. Basel requires environmentally sound management (ESM) of the toxic residues through final disposition.
- The Hong Kong Convention does not cover all ships. It does not cover ships under a certain size, or military or state owned ships. Basel covers all hazardous wastes, regardless of size or ownership and was ultimately why the French warship Clemenceau had to be returned from India to France.
The Hong Kong Convention does not take into consideration the human rights aspects of transboundary movements, and does not make any special consideration with respect to the special interests of developing countries. The Basel Convention has a clear obligation to minimize of course was written with especial concern for impacts on developing countries.

The Hong Kong Convention promotes rather than minimizes the transport of waste vessels to those developing countries that have shipbreaking “capacity”, most notably to the existing shipbreaking states of India, Pakistan and Bangladesh, where 90% of today’s end-of-life ships are dismantled disastrously on tidal beaches. Basel calls for minimizing all transboundary movements of hazardous wastes, in particular to developing countries.

The simple fact is that the Hong Kong Convention ignores or contradicts these fundamental principles of Basel.

And it is not just the environmental community that makes this assertion. Expert analysis by the Center for International Environmental Law (CIEL), the UN Special Commission on Human Rights Special Rapporteur on Toxic Waste, and the International Ship Recycling Association (ISRA) have all reached the same conclusion and made submissions to the COP asserting that the Hong Kong Convention does not provide an equivalent level of control and enforcement as that established under the Basel Convention.

In contrast to these independent legal analyses is the appallingly shameful position of the European Union. Despite the fact that the EU has been a steadfast supporter of the Basel Convention, the Basel Ban Amendment, and the concerns of developing countries since 1994 they turn a blind eye to toxic waste if it appears on a ship. The EU’s submission to COP10 claims that the Hong Kong Convention applies an equivalent level of control as that of Basel. The position is simply wrong and a very sad example of money trumping legal and moral certitude.

While it is well known that the Basel Convention needed to close some loopholes that are made possible due to the mobility of ships, such work to close those loopholes was quite feasible had that truly been the real concern and indeed needs to be concluded as soon as possible. Rather, the shipping industry and the EU used those implementation concerns as an excuse to run to the IMO, and create options for shipowners that are far less principled and protective and indeed would be illegal for all other owners of hazardous waste. These interests used the excuse of Basel being “weak” in order to make an even weaker instrument that serves to externalize costs and harm to the shipbreaking beaches and laborers of the Indian subcontinent.

To better understand the EU’s motivation for supporting the Hong Kong Convention over the Basel regime, one only need turn to the Euro influence of the four largest shipping companies in the world, A.P. Moeller Maersk, CMA CGM, Hapag-Lloyd, and MSC. These four shipping lines alone represent more than 40% of the global shipping capacity, which means they also hold 40% of the ship recycling needs in future years. Never before has a single industry been able to so effectively shutter
the environmental and moral rudder of all of Europe, and certainly Japan, the US, and Canada as well.

While unacceptable, it is certainly clear why the EU, Japan, and U.S. seek refuge for their shipping industry in a less than equivalent Hong Kong Convention, it is more difficult to imagine why any developing or emerging nation, and particularly those shipbreaking states of the Indian subcontinent, would support a Convention that removes responsibility from the shipping industry and the export country and instead places most all of the burden on the recycling states. The most serious obligation placed upon ship owners is merely that they complete an inventory of hazardous materials onboard a ship. This hardly serves to internalize costs or make polluters pay. It is an abdication of responsibility. It is small wonder that not one country to date, certainly no ship-recycling country has as yet ratified the Hong Kong Convention.

The Hong Kong Convention may never enter into force. If it does enter into force, it will not likely do so for some time (2015 at the earliest). And yet it is the next 5-10 years that are the most critical time for the global ship recycling industry due to high levels of PCBs and asbestos expected to be found in vessels being scrapped in this time frame. Action to properly implement Basel for ships is needed immediately. The IMO negotiation which forestalled Basel action has already cost untold lives.

But it is clear that due to the weakness of the Hong Kong Convention, even if it were to enter into force tomorrow, we will still need a dual competency of both the Basel and Hong Kong regimes. Anything less than that would be precisely what the Basel Parties sought to avoid with Decision VII/26. Anything less would be a turning back of the clock on principle and obligations simply because a powerful industry wishes to continue to profit from a horrific and unsustainable business model – exploiting developing countries. Only a continued and rigorous application of the Basel Convention, with the Hong Kong Convention once it comes into force, will serve to protect the world’s poorest communities from exploitation. Efforts must begin at once to return to the work Basel began prior to IMO interest, to create guidelines for Basel Parties for better implementation for ships – to determine when a ship becomes a waste, and better define “exporting state”. The Basel Parties must have the moral courage to insist upon this.

The Hong Kong Convention does not provide an equivalent level of control. COP10 is the opportunity for Parties to make it very clear that the Basel Convention will not allow a powerful industry to prevent it from playing its vital role in ending the scourge of unsustainable and immoral shipbreaking.

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