

Does the Hong Kong Convention Provide an Equivalent Level of Control and Enforcement as Established Under the Basel Convention?



NGO platform
on shipbreaking

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1. Background

1. At the Seventh Conference of the Parties to the Basel Convention, the Parties adopted Decision VII/26 entitled “Environmentally sound management of ship dismantling” (attached). This decision makes the first definitive statements regarding the applicability of the Convention to end-of-life or waste ships.
2. In that decision the Parties concluded that end-of-life vessels or ships are wastes. Therefore when a ship contains listed hazardous materials, that is, materials listed on Annex I possessing listed hazardous characteristics in Annex III, the ships would be designated as hazardous waste, subject to control under the Convention.
3. Decision VII/26 noted:

“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,”

and therefore, Decision VII/26 called upon Parties to:

“...fulfill their obligations under the Basel Convention where applicable, in particular their obligations with respect to prior informed consent, minimization of transboundary movements of hazardous wastes and the principles of environmentally sound management.”

4. The Basel Convention defines environmentally sound management 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.”

5. At the same time, Decision VII/26 recognized the work undertaken at the IMO at that time. The Parties noted in the final recital of the decision that “... *duplication of regulatory instruments that have the same objective should be avoided.*” But the Parties also made it clear that they expected that the new Convention (hereafter referred to as the Hong Kong Convention) under consideration would not represent a step backwards in international law with respect to controls on the international trade in hazardous wastes in the case of ships.

6. The Parties thus 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.” (underlining added).

7. This was the first use of the terms “equivalent level of control”. However, it is vital to note that the concept of “equivalent level of control” is a) rooted in a desire that a backwards step be avoided and b) has a legal basis in the Convention itself – indeed it is a requirement of the Convention as embodied in Article 11 of the Convention that recognizes the applicability of multilateral and bilateral agreements between states that deal with transboundary movements of wastes.

8. At the Ninth Conference of the Parties to the Basel Convention in June 2008, by decision IX/30, the Open-ended Working Group was requested:

“To carry out a preliminary assessment on whether the ship recycling convention, as adopted, establishes an equivalent level of control and enforcement as that established under the Basel Convention, in their entirety, after having developed the criteria necessary for such assessment, and, in doing so, to take into account:

(i) The special characteristics of ships and international shipping;

(ii) The principles of the Basel Convention and the relevant decisions of the Conference of the Parties; and,

(iii) The comments submitted by Parties and other relevant stakeholders, as appropriate;”

9. It is vital to recall that the exercise in question is to see if the Hong Kong Convention establishes an equivalent level of control to that established under the Basel Convention. Thus we are comparing the Hong Kong Convention to what exists in Basel and not the other way around. If the

Hong Kong Convention possesses controls that are apart from those within Basel, such extra controls, unless they have a similar purpose to those under Basel, are irrelevant to the exercise at hand.

10. At the Seventh Open Ended Working Group meeting, following the final adoption of the Hong Kong Convention in May of 2009, the sub-group was unable to make progress on a preliminary assessment and could only begin to work on the development of a matrix of some criteria that were agreed upon for use in making such a determination (attached). It is the view of the Platform however that the criteria are not exhaustive and limited but are a basis for beginning the work. For example, while delegates are told in the chapeau of the matrix and in Decision IX/30 to consider the Basel Convention Principles, these very important principles are not within the matrix criteria and are thus unable to be considered in their own right.
11. Earlier, the NGO Platform on Ship Recycling had created another set of more comprehensive criteria based on the mandates by Parties (e.g. VII/26 and IX/30), in its paper entitled: *“Determining ‘Equivalent Level of Control’ as Established under the Basel Convention: Elements for Consideration of the Draft IMO Convention on the Safe and Environmentally Sound Recycling of Ships.”* <http://www.ban.org/Library/EquivalentLevelofControl.pdf>.
12. In that paper “Fundamental Elements” that would need to be replicated in order to achieve an equivalent level of control were identified. These fundamental elements included: The Scope and Rights of Basel, Basel Principles, Basel Obligations, and Basel Key Objectives and were drawn from:
 - Decision VII/26, where that terminology was first utilized;
 - Decision IX/30 which mandated the current assessment exercise; and
 - The language of Article 11, which provides a legal basis for this determination.
13. In that earlier paper the Platform created the matrix for making the determination but left the last column providing the comparison blank. In this paper we fill in that section and that matrix in addition to that put forth by the Seventh OEWG.
14. We maintain that both are necessary as the criteria in the OEWG is *not* exhaustive and moreover leaves out the possibility of including the “principles of the Basel Convention” and key obligations, even though the mandate requires that they be so considered.

2. Comparison of Elements of the Hong Kong Convention to the Basel Convention

NGO Platform Matrix

Comparative Table of Key Elements Needed to Determine “Equivalent Level of Control”

Fundamental Elements of Basel Convention	Hong Kong Convention (Replication Needed)
Scope and Rights	
The instrument text is legally binding in all aspects for all United Nations states without reservations. -- (Art. 26)	YES
Has a comprehensive definition of hazardous waste/materials which includes all contaminated ships without limitation such as size or ownership etc. -- (Articles 1 and 2, Annexes I, III, IV, VIII and IX)	NO. Refuses to recognize existent (Basel) definitions of hazardous wastes or wastes. Presence of hazardousness triggers no special trade control. Further the HK Convention does not cover all ships. Government owned vessels and ships of a certain size are also not covered.
Obligation to establish and regulate waste management capacity nationally, including within its scope all downstream waste management, beyond initial shipbreaking facility -- Basel establishes a clear obligation that each state develop its own capacity for waste management throughout the entire waste management chain (Article 4.2.b, 4.2.c, 4.7.a, Article 6.9 (describes completion of Basel regime as completion of disposal))	NO – Only ship recycling states are required to have national waste management capacity for ships and then only at the first tier ship recycling facility. However in fact there is an entire waste disposition chain that needs to exist and be managed in an environmentally sound manner. Such capacity beyond the ship recycling first tier facility is not guaranteed in ship recycling states.
Allows states to impose more rigorous requirements -- Basel allows States to impose additional requirements as long as they are consistent with the Convention and the rules of international law. (Article 4.11)	YES – (Article 1.2)
Recognizes sovereign right of states to prohibit import. No export to those banning import -- Parties are prohibited from exporting to Parties who have prohibited the import of such wastes. (Article 4.1.b)	NO – Importing State can prevent a ship from being recycled but cannot prevent a ship from being imported.
Principles	
Source Reduction Principle -- by which the generation of waste should be minimized in terms of its quantity and its potential to cause pollution. This may be achieved by using appropriate plant and process designs. (Preamble: recitals 3, 10, 17, Art. 4.2.a., Art. 4.13)	NO – Because ships as waste are a post consumer waste, it is most appropriate to look at this issue from the standpoint of design for longevity and hazardous material use reduction. In the Hong Kong Convention, there is no obligation to ensure that ships have a long life, nor is there any obligation to minimize or substitute the use of hazardous materials within the Convention. Rather the Convention simply calls for banning materials banned elsewhere and provides a mechanism where hazardous use reductions can be proposed by Parties.

<p>National Self-Sufficiency/Minimizing Transboundary Movement of Hazardous Waste Principle -- States should ensure that the disposal of the waste generated within their territory is undertaken there by means which are compatible with environmentally sound management, recognizing that economically sound management of some wastes outside of national territories may also be environmentally sound. (Preamble recitals 1,2,7,8. 9,18, Art. 4.2.b, 4.2.d, Art. 4.9, Art. 15.7)</p>	<p>NO – Despite pre-cleaning and Basel principles being repeatedly signaled as being important by the Basel Parties, the Hong Kong Convention does nothing to minimize TBM. In fact it instills the status quo where ships move at great distances primarily to one part of the world (South Asia) and does not call for all countries to become self-sufficient at waste management. Not even on a regional basis (e.g. North America, or Europe) are developed countries expected to achieve any kind of self-sufficiency.</p>
<p>Polluter Pays Principle/Producer Responsibility/Cost internalization -- by which the potential polluter must act to prevent pollution and those who cause pollution pay for remedying the consequences of that pollution. (Preamble: Recital 5, Art. 4.2.c, Art. 7.a)</p>	<p>NO – There is nothing in the HK Convention that serves to internalize costs with the generators of the waste – ship owners. Ship owners are only responsible for documenting the problem – not remediating it. This despite the fact that every other major sector that produces post-consumer hazardous waste has adopted producer responsibility principles, (e.g. electronics, aviation, automotive) the shipping industry does not recognize their responsibility. The HK Convention institutionalizes cost externalization.</p>
<p>Environmentally Sound Management Principle – For those wastes that cannot be or could not be prevented from being generated, 'taking of 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'. No transboundary movement of wastes can take place unless all Parties are convinced of environmentally sound management. (Preamble: Recitals 4, 5, 9, 17, 23, 24, Art. 4.2.b, 4.2.c, 4.2.e, 4.2.g, 4.8, 4.10, Art. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 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Environmentally Sound Management does exist (Article 1.1.) in the HK Convention. However the definition of the HK Convention flies in the face of its condoning the <i>beaching method</i> of shipbreaking. Beaching ships can never equate to “<i>to the extent practicable, eliminate accidents, injuries and other adverse effects on human health and the environment caused by Ship Recycling.</i>” The Basel Convention on the other hand, in its ship recycling guidelines did not accept beaching as environmentally sound.</p>
<p>No transboundary movement of wastes can take place unless all Parties are convinced of environmentally sound management. (Recitals 4.2.e, 4.2.g., 4.8, 4.10)</p>	<p>NO – The HK Convention allows export and import of all ships for recycling regardless of whether ESM is assured. No state can prevent an import or an export under the Convention based on lack of ESM.</p>
<p>Environmental Justice Principle – Recognizing the special needs and vulnerabilities of developing countries and seeking to avoid disproportionately burdening any peoples with burdens of environmental harm. The Basel Convention and its Basel Ban Amendment recognizes very clearly differing economic levels in the world today. Free markets and globalization opens up numerous opportunities for all, but also opens up opportunities for exploitation of lower-wage communities and countries with hazardous waste and was the driving force behind the development of the Basel Convention. (Preamble: Recitals 7, 20, Art. 4.13, Decisions II(19), III(4))</p>	<p>NO – The HK Convention has zero provisions that recognize that the world is not an even playing field with respect to vulnerabilities of weaker economies to become victim to cost externalization by stronger economies. Indeed the term “human rights” has not been allowed to be used at IMO. The HK Convention institutionalizes that certain poorer areas of the world will receive a disproportionate burden of hazardous waste ships.</p>

<p>Principle of common but differentiated responsibilities – Recognizing that although a common global problem is shared (hazardous waste), nations and stakeholders have different responsibilities based on their relative wealth and role. (Preamble: Recitals 21, Art.10.2.d, Art.10.3, Art.10.4)</p>	<p>NO – The HK Convention does not provide special obligations for wealthy countries, owner states, ship owners, or flag states to take responsibility commensurate with their relative wealth or role.</p>
<p>Principle of prior informed consent – States have the right to be informed and to consent prior to any export of hazardous or other waste to their territories. No export without prior informed consent can take place. (Art. 4.1.c, Art. 6)</p>	<p>NO – There is no obligation for importing states to receive advance notification prior to importation into their territory of hazardous waste ships, nor is there a possibility for importing states to consent or not to the importation of waste ships.</p>
<p>National sovereignty principle – States have the right to ban, imports and exports of hazardous waste. (Preamble: Recitals 6, Art. 4.1, 4.2.e, Art.4.10, Art. 4.11)</p>	<p>NOT EXPLICIT -- As mentioned earlier Parties can make more stringent requirements on their own but there is no recognized sovereign right to ban imports or exports of hazardous waste ships.</p>
<p>Key Objectives</p>	
<p>To reduce the generation of hazardous wastes -- (Article 4.2.a)</p>	<p>NO – Because ships as waste are a post consumer waste, it is most appropriate to look at this issue from the standpoint of design for longevity and hazardous material use reduction. In the HK Convention, there is no obligation to ensure that ships have a long life, nor is there any obligation to minimize or substitute the use of hazardous materials within the Convention. Rather the Convention simply calls for banning materials banned elsewhere and provides a mechanism where hazardous use reductions can be proposed by Parties.</p>
<p>To reduce transboundary movement of hazardous waste to a minimum -- This is seen as a vital obligation and one of the prime objectives of the Basel Convention. It goes hand in hand with the national self-sufficiency obligation mentioned next. (Article 4.2.b and d)</p>	<p>NO – Despite pre-cleaning and Basel principles being repeatedly signaled as being important by the Basel Parties, the Hong Kong Convention does nothing to minimize TBM. In fact it instills the status quo where ships move at great distances primarily to one part of the world (South Asia) and does not call for all countries to become self-sufficient at waste management. Not even on a regional basis (e.g. North America, or Europe) are developed countries expected to achieve any kind of self-sufficiency.</p>
<p>Obligation to establish waste management capacity nationally -- Here is a clear mandate that each state should develop its own capacity for waste management as an alternative to export. Certainly while it is understood that not every state can do this, certainly wealthy nations of the OECD or collectively, the EU can do this. This is also part of the criteria that has to be weighed by a competent authority exercising a level of control under Basel. For example, if a country has the capacity to manage ships at home it should do so. (Article 4.2.b)</p>	<p>NO – Only ship recycling states are seen as having waste management capacity. Not even on a regional basis are countries expected to achieve any kind of self-sufficiency in ship waste management. Rather a disproportionate burden of ship waste is found in just a few, developing countries.</p>

<p>To establish environmentally sound management (ESM) of hazardous wastes wherever their disposal and prevent trade of wastes if there is reason to believe they will not be managed with ESM -- (see Article 4.2.b,c,d,e,g,h, 4.8, 4.10)</p>	<p>NO – Not all countries are required to manage ships with ESM and the HK Convention allows export and import of all ships for recycling regardless of whether ESM is assured. No state can prevent an import or an export under the Convention based on lack of ESM.</p>
<p>To take into account the special needs and vulnerability of developing countries -- (Preamble: recitals 7,20,21, and Article 4.2.e, 4.13, 10.3, 10.4, 11.1)</p>	<p>NO – The HK Convention has zero provisions that recognize that the world is not an even playing field with respect to vulnerabilities of weaker economies to become victim to cost externalization by stronger economies. Indeed the term “human rights” has not been allowed to be used at IMO. The HK Convention institutionalizes that certain poorer areas of the world will receive a disproportionate burden of hazardous waste ships.</p>
<p>Establishment of capacity building or technology transfer mechanisms such as regional training centers and a revolving fund to assist in emergencies (e.g. abandoned ships) -- Basel clearly establishes these financial and training commitments to assist developing countries (Article 14)</p>	<p>PARTIAL – While Article 13 of the HK Convention specified that Parties should assist with technology transfer and training those countries that ask for it, there is no fund, voluntary or otherwise established, nor are there any regional centers envisaged.</p>
<p>No trade or transfer of ships between Parties and non-Parties absent a special Agreement as stipulated under Article 11 -- Basel recognizes the pernicious effects of the trade of toxic wastes and has seen fit to prohibit trade between Parties and non-Parties. The goal of the prohibition is to persuade non-Parties to become part of Basel or to otherwise adopt equivalent measures to ensure the application of a stringent global standard on toxic waste exports. (Article 1.5)</p>	<p>NO -- Article 3.4 of the HK Convention does not prohibit dealings with non-Parties but asks that those non-Parties not be afforded any more favorable treatment than Parties.</p>
<p>Key Obligations – Basel Ban Decisions</p>	
<p>No export of waste ships that contain hazardous materials to developing countries. If ships are sent to non-Annex VII countries they will need to be pre-cleaned of hazardous materials prior to delivery -- The decision IX/30 asks parties to take into account “relevant decisions” of the Convention in making the determination of “equivalent level of control.” No decision can be more relevant than Decision III/1. Indeed it was the “control” that has stopped numerous ships from being exported from Europe to date including the Clemenceau. (Decision III/1)</p>	<p>NO – The HK Convention has no equivalent to the Basel Ban Amendment and never has agreed to treat developing countries differently than developed countries to prevent cost externalization to them or exploitation of them with respect to hazardous wastes or global burdens. Despite Decision VII/26 citing the need for looking at the issue of “pre-cleaning” of hazardous wastes prior to export to developing countries, which would be a form of instituting the Ban Amendment in principle, the HK Convention did not endeavor to consider this.</p>
<p>No import of ships from OECD countries by non OECD countries -- (Decisions I/22, II/12)</p>	<p>NO – The HK Convention has no requirement of developing countries that they not receive hazardous wastes from OECD countries.</p>

OEWG 6 MATRIX (filled in by NGO Platform)

Annex to decision OEWG-VII/12*

Overarching considerations to be taken into account:

- Special characteristics of ships and international shipping
- Principles of the Basel Convention, including environmentally sound management, and the relevant decisions of the Conference of the Parties

* The columns entitled “Basel Convention” and “Hong Kong Convention” list potentially relevant articles, regulations and decisions which are not exhaustive and subject to further verification.

Criteria		Basel Convention	Hong Kong Convention	Comments to facilitate a preliminary assessment of equivalent level of control and enforcement
Scope and Applicability				
What?	Coverage of ships / wastes	Wastes: Articles 2.1, 1.1, 2.3, 11, 18 Ships: Article 2.1, Article 4.12 Decision VII/26	Ships: Article 2.7, Article 3, Article 2.9 Regulation 4, Appendix 1 and 2 Regulations 5, 6, 7, 8.2, 20 (20.3 and 20.4) Appendix 1 of Inventory Guidelines	<p>NO -- HK Convention does not recognize existent (Basel) definitions of wastes or hazardous wastes.</p> <p>NO -- Presence of hazardousness triggers no special trade control as it does in Basel.</p> <p>NO -- The HK Convention does not cover all ships covered by Basel. Government owned vessels and ships of a certain size are also not covered.</p>
	Coverage and identification of hazardous materials	Article 1 Annexes I, III, VIII, IX	Article 2.9 Regulation 4, 5, 6, 7, 8, 9, 10 Regulations 20.2 and 20.3 Appendix 1, 2, 5 Appendix 1 of Inventory Guidelines	<p>NO -- HK Convention does not recognize existent (Basel) definitions of hazardous wastes and does not cover all hazardous wastes covered by Basel. For example, HK Convention has but 16 different hazardous constituents (Annex 5, 2.2). The Basel Convention has in Annex I, 63 different hazardous constituents.</p>

When?	Management of life cycle of ship	Article 1.4, Article 2.1 Decision VII/26 Article 4.2 (a), Article 4.2 (b), 4.2 (c), Article 4.8	Articles 4.1, 4.2 Article 2.10 Regulation 4, 5, 6, 7, 8, 9, 10, 11, 20, Appendix 1, 5, 6, 7	NO -- HK Convention has no obligation to minimize the generation (e.g. toxics use reductions) of hazardous waste at front end of life cycle as does Basel. NO – HK Convention allows the beaching of ships on tidal beaches as being environmentally sound. Such a platform can never be seen as “taking all practicable steps to prevent harm to human health and the environment.” NO – HK Convention has no provisions on the minimisation of transboundary movements / national self sufficiency at point of disposal. NO -- HK Convention ceases to have competency over wastes and residues after initial recycling facility
Who?	Relationship between Party and non-Party	Article 4, Article 11	Article 3, Reg.8	NO – Basel does not allow trade between Parties and non-Parties unless a special Article 11 agreement is in place that establishes a form of equivalency. HK Convention opens up for non-party trade with only a vague notion of not allowing “more favorable treatment”
Where?	Jurisdiction	Article 1, 2, 4, 11, 26	Article 2, 3,8	NO – Basel does not allow the territory of Antarctica to be used for disposal/recycling. NO – Basel has a Party to non-Party prohibition. HK Convention does not. NO -- Basel Ban Amendment places a prohibition on exports to non-Annex VII countries from Annex VII countries. HK Convention does not. NO – Basel Convention prohibits exports to countries lacking FSM
Control				
	Authorisations and certifications	Article 2, 4	Article 5, 6 Reg. 8, 15-23	NO -- HK Convention does not call for every country to provide waste management facilities (e.g. for ships) and to authorize them as does Basel Convention. NO -- HK only regulates the first dismantling- and recycling site, but not any interim facilities or installations for subsequent processing and disposal of waste, Basel requires all such sites to be permitted. NO – HK Convention does not require all transporters of wastes to be authorized to do so.

	Surveying, auditing and inspection	Article 4, Annex 5.b	Article 8 Reg. 10, 15, 16	YES – Both Conventions require that an inventory of hazardous materials be made of ships as
	Designation of competent authorities/ focal points	Article 5	Article 2, Reg.15	NO – The Hong Kong Convention Competent Authorities only apply to ship recycling states. In the Basel Convention, every Party must have a Competent Authority.
	Standards (mandatory or voluntary)	Article 2, 4 Technical guidelines	Reg.3, 19-22	YES – Both Basel and HK Conventions only have voluntary guidelines serving as performance standards.
	Ability to prohibit import/export	Article 3, 4	Reg.9	NO -- HK Convention only allow for rejection of dismantling, thus no prohibition of import even if ESM is not possible contrary to Basel. NO – Likewise HK Convention cannot prohibit export even when ESM is not possible contrary to Basel. NO – Basel Convention establishes a sovereign right of countries to ban the importation of hazardous wastes (e.g. ships) and all other countries must recognize that and honor it. This is not the case in the
	Traceability and transparency of hazardous materials until final treatment / disposal	Article 4, 6	Reg. 5, 9, 11, 24 and 25	NO -- HK Convention does not regulate nor have any obligations to track any hazardous materials after the initial recycling facility as does Basel. NO – Not all Basel hazardous materials are covered under the HK Convention and thus no traceability.
	Prior notification and prior consent	Article 4, 6	Article 16, Reg.9, 24	NO – HK Convention does not provide notification nor consent nor allow denial prior to entry into territory of country. This is a fundamental requirement of Basel. NO – Transit States, Importing States and Exporting States are not involved in having any say in a transboundary movement of ship
	Certification of disposal / statement of completion of ship	Article 6	Reg.25	YES – Both require a notification or certificate of completion of disposal/ recycling.

	Other control mechanisms Minimization of Transboundary Movements through National Self-sufficiency	Article 4.2.b. Article 4.6		NO – Probably the most important control mechanism of the Basel Convention is the obligation to minimize the transboundary movements of wastes (e.g. waste ships). NO – Exports to Antarctica allowed in HK Convention and are prohibited in Basel.
Enforcement				
	Illegal shipments, violations and sanctioning, including criminalization, of illegal traffic	Article 4, 9	Article 9, 10	NO -- HK Convention fails to Criminalize illegal traffic as does Basel. does not criminalise illegal traffic
	Dispute Settlement	Article 20	Article 14	YES – Both the HK and Basel Conventions have similar dispute settlement language.
	Duty to re-import	Article 8, 9	None	NO -- HK does not include a duty of the exporting state to re-import hazardous waste should illegal export be detected (e.g. abandoned ships)
Exchange of Information by Parties / cooperation and				
	Access to and dissemination of information, e.g. administrative, enforcement, emergency matters	Article 4.2.h, Article 4.13, Article 6, Article 10, Article 13	Article 7, Article 12	YES – Both Conventions seem to allow for adequate exchange of information on enforcement and administrative matters.
	Reporting obligations	Article 6, Article 4.2.f	Reg. 24, 25.	NO – HK Convention fails to provide adequate prior informed consent notification (e.g. notifications prior to TBM)
	Transmission of information regarding import / export restrictions	Article 3, Article 4.1.a	None	NO – HK Convention has no mechanism for states to report on any import or export restrictions they may possess. This is however laid out very carefully in Basel including import and export prohibitions as well as differing definitions of hazardous waste

	Among Parties to advance ESM, through information exchange and technical assistance and capacity building on best practices, technical guidelines,	Article 4,2,13. , Article 10	Article 13	YES – Both Conventions have adequate requirements to assist and provide information on ESM.
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3. Summary of Key Points

1. Basel’s Article 11 and the Hong Kong Convention

- 1.1. The export of obsolete ocean going vessels laden with asbestos, PCBs, toxic paints, biocides, fuel residues and other hazardous substances, from wealthy shipping companies and nations to some of the poorest communities on earth for extremely hazardous scrapping is precisely the type of scandalous exploitation that the United Nations Basel Convention was designed to halt.
- 1.2. The notion of equivalency of other instruments which might fall within the scope of the Basel Convention’s mandate, has a legal basis in the Convention itself – indeed it is a requirement of the Convention as embodied in Article 11.
- 1.3. Article 11 states that Parties may only enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with Parties or non-Parties *“provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention. These agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries.”*
- 1.4. When noting that the equivalency must be considered *“in particular taking into account the interests of developing countries”*, we are handed an even more explicit reminder of the importance of adhering to the Basel Convention’s provisions for protecting the environment and human health in the case of export of ships for scrapping, as the vast majority of such exports currently send hazardous ships to developing countries.

2. HK fails to reflect Basel’s Core Obligation -- Minimisation of Transboundary Movements of Hazardous Waste

- 2.1. The Basel Convention, with its many references to the particular interests of developing countries, was drafted with the aim of protecting developing countries from the impacts of economically motivated dumping of hazardous wastes via disposal or recycling. This

environmental justice principle, regarding the special concerns and “*interests of developing countries*” due to their vulnerability to exploitation, is precisely the concern today with respect to the suffering of shipbreaking workers and the environment of poorer communities in developing countries currently involved in shipbreaking.

- 2.2. The Basel Convention recognized that exports of hazardous wastes to developing countries were a means of cost externalization and exploitation. They also recognized that the alternative to exporting your problem waste to lower-wage countries would result in a more sustainable outcome -- the minimization of transboundary movement would serve as a driver to the ultimate goal – waste minimization.
- 2.3. Thus it is that probably the most fundamental objective of the Basel Convention is the minimization of transboundary movements of hazardous wastes through national self sufficiency. And the directly related objective of minimization of the generation of hazardous wastes. It was from this core obligation that the Basel Ban Amendment was extrapolated as one of the first major achievements of the Parties after the Convention entered into force. The Basel Ban Amendment (Decision III/1) is now implemented by 33 of the 41 developed countries to which it applies even while still not having entered global force.
- 2.4. Yet because the Hong Kong Convention places blinders on the global realities of global inequity, and therefore the special needs and vulnerabilities of developing countries that Basel saw so clearly and thus integral to its design, the Hong Kong Convention utterly failed to reflect Basel’s core -- minimizing transboundary movement of hazardous wastes, in particular to developing countries. The Hong Kong Convention drafters have done this for ships, despite having been given some strong suggestions in Decision VII/26 on how to do this via pre-cleaning during the life-cycle of a ship.
- 2.5. The absence of any attempt by the Hong Kong Convention to minimize the transboundary movement of hazardous waste ships – the fundamental control of Basel, means that there has been no possibility for there to be an equivalent level of control.

3. HK Fails to Cover the Same Scope, Creating Massive Loopholes

- 3.1. Additionally, it must be clearly noted that the Basel Convention does not limit its scope of application to certain sizes of materials or objects, nor does it limit them by who owns them. But the Hong Kong Convention fails to consider all ships.
- 3.2. Further, the Basel Convention defines hazardous wastes subject to control very thoroughly through its annexes. The Hong Kong Convention covers only 16 constituents. Basel’s Annex I lists 63 constituents.

- 3.3. Finally and vitally, while the Basel Convention covers the recycling and disposal to final disposition, the Hong Kong Convention stops at the gate of the ship recycling yard, meaning that the most hazardous substances such as PCBs and asbestos, once removed from the ship and shipped off, will NOT be covered by the Hong Kong Convention. Should the Basel Convention cede its competency to the Hong Kong Convention, they would not be covered by Basel either. This is because Basel cannot be invoked without there first being transboundary movement which if not first covered by Basel cannot be later invoked at the disposal phase.
- 3.4. Thus it is that some of the most harmful materials from a ship, will enter a developing country via a recycling yard, and once passing through the yard can be simply mismanaged and dumped in the receiving territory – a complete circumvention of the Basel Convention leaving a toxic legacy for generations to come.

4. Breaking Ships on Tidal Beaches as “Environmentally Sound Management”

- 4.1. Probably a most telling comparison between the two Conventions lies in the fact that the Hong Kong Convention, has failed to condemn the beaching method of managing hazardous waste ships. This method is known to have fatal shortcomings and such that it can never be considered environmentally sound management. These flaws include inability to contain hazardous residues and waste from the very sensitive marine environment ecosystem of the intertidal zone. It is also fatally flawed in that shifting sands make it impossible to provide adequate emergency equipment access and egress, as well as the impossibility of providing a stable platform to bring lifting cranes alongside the vessels.
- 4.2. The Basel Convention’s technical guidelines have clearly indicated that the beaching method is to be phased out in favor of methods ensuring containment from the environment. The IMO’s continued “neutrality” with respect to beaching ships, and the failure of the Hong Kong Convention to phase this method out of existence, is sadly telling of the commitment to ESM under the Hong Kong Convention.

5. Fundamental Principle of “Prior Informed Consent” Missing

- 5.1. Beyond the obligation to minimize the transboundary movement of hazardous waste, the next most fundamental control mechanism defines how the Basel Convention deals with waste trade that cannot as yet be minimized. The answer involves the principled mechanism of “prior informed consent” (PIC). In short this entails a regime by which no country will be forced to receive hazardous waste without their consent, granted only after adequate information is supplied in advance. And of course the converse of consent applies as well – every state has the right to object to an importation of hazardous waste and have that

objection honored.

- 5.2. However, remarkably, even this fundamental control mechanism is ignored in the Hong Kong Convention. In the Hong Kong Convention, hazardous waste is viewed strictly as a pure commodity for which no trade controls apply. This turns Basel on its head which saw fit to regulate hazardous waste as a “bad” and not a “good”. While reporting takes place in the Hong Kong Convention, it is only *after* the hazardous waste ship arrives in the importing country’s territory that a competent authority has the right to object and the objection allowed is not to the importation but to the ship recycling plan or ship recycling facility permit. In this way developing and other countries are forced to receive toxic waste in the form of ships which can become abandoned and for which their importation cannot be remedied by any right of return.

4. Conclusion

- 4.1. It is without any doubt that the Hong Kong Convention does not provide an equivalent level of control to that of the Basel Convention. It is an instrument that is not even remotely close to the Basel Convention in its fundamental objectives, principles, obligations and scope. Those that would claim that it is can only be doing so for political reasons, and while there may be valid political reasons in the views of some countries, that is not the current exercise.
- 4.2. The current exercise is to determine whether or not there is an equivalent level of control such that the Basel Convention should cede its competency if it proved to be redundant. However it is clear that it is *not* redundant but provides a unique set of protections to developing countries that exist nowhere else. It does this while driving green design and waste minimization upstream in the life cycle of ships for all countries. Basel has provided very significant advancements in the body of multilateral environmental agreements and it would be a very mistaken – a regressive turning back of the clock were Basel to cede its competency over ships that are defined as hazardous waste.
- 4.3. Rather it makes real sense for the Basel Convention Parties to agree not only to maintain competency over ships, allowing dual regimes to be in play, but to move rapidly also to improve the ability of Basel to act with respect to managing the transboundary movement of ships taking into account their special characteristics. This was the exercise that Basel was embarking upon when the IMO began to take an interest in the issue. It is to this area of work which the Basel Convention will need to return.

Annex 1: Basel Convention Decision VII/26. Environmentally sound management of Ship Dismantling

The Conference of the Parties,

Aware of the risk of damage to human health and the environment caused by hazardous wastes and other wastes and the transboundary movement thereof,

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,

Concerned that ships and other floating structures may pose a threat to the environment and human health if they are not, when pre-decontaminated or dismantled, managed in an environmentally sound manner,

*Noting the need to improve the standards of ship dismantling worldwide and the importance of international cooperation in achieving this goal,
Recognizing the importance of the environmentally sound management of dismantling of ships,*

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,

Recognizing the important role that concerned States, ship owners, recycling facility operators and other stakeholders have to play in developing mechanisms to ensure the environmentally sound management of ship dismantling,

Further recognizing the need to ensure effective enforcement of such mechanisms, including a reporting system, for ships destined for dismantling,

Recalling decision V/28 on the dismantling of ships, which mandated the Technical Working Group to collaborate with the International Maritime Organization on the subject of the full and partial dismantling of ships and, together with the Legal Working Group, to discuss the legal aspects of the subject under the Basel Convention,

Further recalling decision VI/24 on technical guidelines for the environmentally sound management of the full and partial dismantling of ships,

Noting that the Governing Body of the International Labour Office has adopted guidelines on safety and health in ship breaking, that the International Maritime Organization has adopted guidelines on ship recycling and that the Basel Convention has adopted technical guidelines for the environmentally sound management of the full and partial dismantling of ships,

Noting the importance of promoting the implementation of the above-mentioned guidelines,

Further noting that the International Maritime Organization and the International Labour Organization, together with the Conference of the Parties to the Basel Convention, have agreed to establish a joint working group on ship scrapping and have agreed to terms of reference and working arrangements governing its activities,

Affirming that elements of prior informed consent as elaborated in the Basel Convention enable the minimization of the impact to human health and the environment associated with dismantling of ships, recognizing the particular issues that arise in the unique context of ships,

Noting the progress made at the fifty-second session of the International

Maritime Organization's Marine Environment Protection Committee toward the possible development of a mandatory scheme for ship recycling, including a reporting system for ships destined for recycling,

Realizing that States have distinct obligations as Parties to the United Nations Convention on the Law of the Sea and relevant International Maritime Organization conventions, including obligations of States in their capacities as flag States and as Parties to the Basel Convention and including obligations in their capacities as States of Export, and that States should be able to meet these obligations in a consistent manner,

Noting that duplication of regulatory instruments that have the same objective should be avoided,

1. *Reminds* the Parties to fulfil their obligations under the Basel Convention where applicable, in particular their obligations with respect to prior informed consent, minimization of transboundary movements of hazardous wastes and the principles of environmentally sound management;
2. *Invites* Parties, other States, ship owners and other stakeholders to assist in the improvement of the environmentally sound management of ship dismantling worldwide;
3. *Invites* Parties, especially developed States, to encourage the establishment of domestic ship recycling facilities;
4. *Encourages* Parties to ensure their full and effective participation in the deliberations of the joint working group of the International Maritime Organization, the International Labour Organization and the Basel Convention, either through their representatives or as observers;
5. *Invites* the International Maritime Organization 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;
6. *Requests* the Open-ended Working Group to consider the practical, legal and technical aspects of the dismantling of ships in the context of achieving a practical approach to the issue of ship dismantling, to report on developments and to present any proposals, as appropriate, to the Conference of the Parties at its eighth meeting on a legally binding solution, taking into consideration the work of the International Maritime Organization and the work of the joint working group.

Annex II: Basel Convention Decision IX/30: Dismantling of ships

The Conference of the Parties,

Recalling its decision VIII/11 on environmentally sound ship dismantling,

Recalling also its invitation at its eighth meeting to the International Maritime Organization to ensure that the international convention on safe and environmentally sound recycling of ships to be adopted by it establishes an equivalent level of control as that established under the Basel Convention, noting that the duplication of regulatory instruments that have the same objective should be avoided,

Further recalling the principles of the Basel Convention, in particular to minimize the generation and transboundary movement of hazardous wastes, to ensure the environmentally sound management of such wastes and to prevent the export of hazardous wastes to countries without their prior informed consent,

Recalling also the encouragement to the International Maritime Organization to promote the substitution of harmful materials in the construction and maintenance of ships by less harmful or, preferably, harmless materials, without compromising the ships' safety and operational efficiency,

Further recalling the encouragement to Parties to coordinate at the national level between their International Maritime Organization and Basel Convention representatives and to participate actively in the consideration of the draft ship recycling convention,

Acknowledging work carried out to develop programmes for sustainable ship recycling in collaboration with the International Maritime Organization and the International Labour Organization,

I. Draft international convention on the safe and environmentally sound recycling of ships

1. *Welcomes* the progress made in the development of an international convention on the safe and environmentally sound recycling of ships ("the ship recycling convention") by the International Maritime Organization;

2. *Invites* the International Maritime Organization to continue to have due regard to the role, competence and expertise of the Basel Convention in matters related to ship dismantling and in particular with regard to the environmentally sound management and disposal of hazardous and other wastes;

3. *Also invites* the International Maritime Organization to continue to incorporate clear responsibilities of all stakeholders in ship recycling, including ship owners, ship recycling facilities, flag States and ship recycling States, with a view to achieving the safe and environmentally sound management of ship recycling, also taking into account the current capacity and the common but differentiated responsibilities and sovereign rights of the Parties;

4. *Requests* the Open-ended Working Group:

(a) To carry out a preliminary assessment on whether the ship recycling convention, as adopted, establishes an equivalent level of control and enforcement as that established under the Basel Convention, in their entirety, after having developed the criteria necessary for such assessment, and, in doing so, to take into account:

(i) The special characteristics of ships and international shipping;

(ii) The principles of the Basel Convention and the relevant decisions of the Conference of the Parties;

(iii) The comments submitted by Parties and other relevant stakeholders, as appropriate;

(b) To transmit the results of the assessment to the Conference of the Parties at its tenth meeting for consideration and action, as appropriate;

5. *Invites* Parties to that end, to provide comments on appropriate criteria to be used to the Secretariat, by 31 January 2009;

6. *Requests* the Secretariat to continue to follow the development of the ship recycling convention and to report thereon to the Open-ended Working Group at its seventh session and to the Conference of the Parties at its tenth meeting;

7. *Also requests* the Secretariat to transmit this decision for submission to the International Maritime Organization for consideration by the Marine Environment Protection Committee at its fiftyeighth session;

II. International cooperation and technical assistance activities on the environmentally sound management of ship dismantling

8. *Invites* Parties and others to continue to transmit to the Secretariat relevant information that may assist stakeholders in developing measures to address, in the short and medium term, the potentially harmful consequences of ship dismantling on human health and the environment and requests the Secretariat to continue to make any such information received available on the Basel Convention website;

9. *Underlines* the importance of continued inter-agency cooperation between the International Labour Organization, the International Maritime Organization and the Basel Convention on issues related to ship dismantling, as appropriate;

10. *Welcomes* the development of implementation programmes relating to sustainable ship recycling and requests the Secretariat, subject to the availability of funding, to continue its work and to develop further the programmes for sustainable ship recycling in conjunction with other bodies, in particular the International Maritime Organization and the International Labour Organization, and to report thereon to the Open-ended Working Group at its seventh session for its consideration and for the Openended Working Group to report thereon to the Conference of the Parties at its tenth meeting;

11. *Calls upon* all Parties and other stakeholders in a position to do so to make financial or inkind contributions to the implementation of activities under the relevant programmes;

12. *Requests* the Secretariat to report to the Open-ended Working Group and the Conference of the Parties on the outcome of the third session of the Joint Working Group of the International Labour Organization, the International Maritime Organization and the Basel Convention on Ship Scrapping.

END

Annex III: OEWG-VII/12: Environmentally sound dismantling of ships

The Open-ended Working Group,

Recalling decision IX/30 of the Conference of the Parties to the Basel Convention,

Recalling also decision VIII/11 of the Conference of the Parties, by which the Conference of the Parties “invites the International Maritime Organization to ensure that the draft ship recycling convention to be adopted by it establishes an equivalent level of control as that established under the Basel Convention, noting that the duplication of regulatory instruments that have the same objective should be avoided”;

Recalling further the request by the Conference of the Parties at its ninth meeting to the Openended Working Group at its seventh session to carry out a preliminary assessment of whether the ship recycling convention, as adopted, establishes an equivalent level of control and enforcement as that established under the Basel Convention, in their entirety,¹ after having developed the criteria necessary for such assessment, and, in doing so, to take into account:

- (a) The special characteristics of ships and international shipping;
- (b) The principles of the Basel Convention and the relevant decisions of the Conference of the Parties;
- (c) The comments submitted by Parties and other relevant stakeholders, as appropriate,

Acknowledging that, in its decision IX/30, the Conference of the Parties requested that the results of the assessment should be transmitted to it at its tenth meeting for consideration and action, as appropriate,

Stressing the importance of implementation programmes relating to sustainable ship recycling in the light of the forecasts of tonnage to be dismantled in the near future, which indicate a need for appropriate action from the international community,

¹ *Editors' note:* This wording, as it appears here and elsewhere in the present draft decision, is taken verbatim from the text of decision IX/30 and has not been edited.

I

Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships

1. *Welcomes* the adoption of the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships;
2. *Invites* the International Maritime Organization to continue to have due regard to the role, competence and expertise of the Basel Convention in matters related to ship dismantling and in particular with regard to the environmentally sound management and disposal of hazardous and other wastes;
3. *Considers* the criteria contained in the annex to the present decision to be an appropriate basis for further work, including discussion, to implement decision IX/30;
4. *Invites* Parties and other relevant stakeholders, based on these criteria:
 - (a) To review and complete the table set out in the annex to the present decision;
 - (b) On the basis of the table, to provide a preliminary assessment of whether the Hong Kong Convention establishes an equivalent level of control and enforcement as that established under the Basel Convention, in their entirety, and in doing so, to take into account:
 - (i) The special characteristics of ships and international shipping;
 - (ii) The principles of the Basel Convention and the relevant decisions of the Conference of the Parties;
 - (iii) The comments previously submitted by Parties and other relevant stakeholders, as appropriate;
5. *Also invites* Parties and other relevant stakeholders to submit their tables and preliminary assessments pursuant to paragraph 4 above to the Secretariat by 15 April 2011 and requests the Secretariat to publish these on the website of the Basel Convention;
6. *Requests* the Secretariat to compile and synthesize the completed tables and to publish these and the preliminary assessments by 15 June 2011 on the website of the Basel Convention;
7. *Also requests* the Secretariat to transmit the compilation and synthesis of the completed tables and the preliminary assessments referred to in paragraph 6 above to the Conference of the Parties at its tenth meeting for consideration and action, as appropriate;
8. *Further requests* the Secretariat to continue to follow developments in relation to the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, in particular the development of the guidelines in that regard, and to report thereon to the Conference of the Parties at its tenth meeting;
9. *Requests* the Secretariat to transmit the present decision to the International Maritime Organization for consideration by the Marine Environment Protection Committee at its sixty-first session;

II

International cooperation on the environmentally sound dismantling of ships

1. *Underlines* the importance of continued inter-agency cooperation between the International Labour Organization, the International Maritime Organization and the Basel Convention on issues related to ship dismantling, as appropriate;
2. *Welcomes* the development of implementation programmes relating to sustainable ship recycling and requests the Secretariat, subject to the availability of funding, to continue its work and to develop further the programmes for sustainable ship recycling in conjunction with other bodies, in particular the International Maritime Organization and the International Labour Organization, and to report thereon to the Conference of the Parties at its tenth meeting;

3. *Calls upon* all Parties and other stakeholders in a position to do so to make financial or in kind contributions to the implementation of activities under the relevant programmes relating to sustainable ship recycling;

4. *Requests* the Secretariat to report to the Conference of the Parties at its tenth meeting on the outcome of the third session of the Joint Working Group on Ship Scrapping of the International Labour Organization, the International Maritime Organization and the Basel Convention, and to provide further information, if available, on the scheduling of further sessions of the Joint Working Group;

5. *Encourages* Parties to be mindful of the recommendations, in particular those on interim measures, of the third session of the Joint Working Group on Ship Scrapping of the International Labour Organization.

NGO Platform on Shipbreaking

Rue de la Linière 11

BE - 1060 Brussels

Tel: +32 (0)2 6094 419

Mob: +32 (0) 485 190 920

www.shipbreakingplatform.org