

## European Union Illegally Scuttles Basel Convention for End-of-Life Ships

The migration 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 - "on the cheap" - is precisely the type of scandalous exploitation that the Basel Convention and its subsequent Basel Ban Amendment were designed to arrest.

After all, the tragedy of ship scrapping is not primarily a maritime issue at all; it is a tragedy of exploitation of impoverished communities and disastrous waste management all justified purely on economic terms – the result of externalizing the costs of an industry on unsuspecting and desperate communities in developing countries.

The European Union, until last year was a recognized champion of the Basel Convention and the Basel Ban Amendment since their inception. Yet, in what is clearly the most egregious act of non-compliance in the history of the Basel Convention, the European Union on 20 November 2013 adopted a new ship recycling regulation that unilaterally withdraws end-of-life ships from EU Basel implementation legislation, and attempts to aligns toxic ships under the IMO's Hong Kong Convention which is not in force and may never be. In effect the EU seeks to pretend that the Basel Convention removed toxic ships from its scope which it has not done, and pretends that the Hong Kong Convention has force which it does not.

Three independent legal assessments find this act to be a serious breach of the Commission and Member State's legal obligations to uphold international law. Even the European Council's own legal Service highlighted several legal issues, particularly in regard to undermining the Basel Ban Amendment, stating: "Legal Service considers that there is a serious risk that the simple exclusion of ships from Regulation 1013/2006 in the manner being proposed could amount to a breach of the obligation not to defeat the object and purpose of a treaty prior to its entry into force."

EU legal expert, Prof. Dr. Ludwig Krämer, the former head of the EU Commission's Waste Management Unit, concluded in his legal review of the Commission's proposal: "The Commission Proposal constitutes a unilateral departure from the provisions of the Basel Convention that is not allowed by the Convention. The adoption of the Commission Proposal by the European Parliament and the Council would thus constitute a breach of the EU's obligations under the Basel Convention and would therefore be illegal."

The Center for International Environmental Law (CIEL) was also in agreement, concluding in their analysis that "the EU's Proposed Legislation attempting to unilaterally exempt a certain category of hazardous waste covered by the Basel Convention, namely end-of-life ships, from the control mechanisms of the Convention is illegal under international law and EU law."

Not only does the European Union as a political integration organization have a legal dilemma, now each EU Member State, which are also independent Basel Parties, will have to reconcile the illegality of unilaterally acting in non-compliance with the Basel Convention.

### Double Standard Now in Affect in Europe

Because the European Ship Recycling Regulation only applies to European flagged ships we now have the situation that non-European flagged ships sailing for shipbreaking destinations that does not abide by the Basel Convention or Basel Ban Amendment will be prosecuted for illegal traffic under the Basel Convention, while a European flagged ship can sail for breaking yards without such concerns.

Likewise any military ships or ships under 500 gross tons will be under the Basel Convention rules while commercial and larger ships will not be.

### Hong Kong Convention Fails to Uphold Basel Principles and Obligations

In 2004, at its 7th Conference of Parties, the Basel Convention Parties passed decision VII/26 that clearly noted that the Basel Convention does apply to end-of-life ships and further, 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..."

<b>Basel and Hong Kong Equivalency</b>	
<b>Basel Convention</b>	<b>Hong Kong Convention</b>
Scope includes all ships.	<b>NO.</b> Government / small ships not covered.
Establishes global definition of waste and hazardous waste.	<b>NO.</b> Refuses to recognize existent (Basel) definitions of hazardous wastes or wastes. Presence of hazardousness triggers no special trade control.
Illegal traffic is considered criminal.	<b>NO.</b> Violations not necessarily criminal.
Enforcement/inspection possibility by port states not limited.	<b>NO.</b> Port state control severely limited to asking for on-board inventory but cannot check the validity of inventory.

States allowed to prohibit import of any waste including ships.	<b>NO.</b> No such provisions.
Obligation to minimize transboundary movement of hazardous waste, in particular to developing countries.	<b>NO.</b> No such provision / no notion of pre-cleaning prior to final voyage to avoid developing countries getting disproportionate burden of toxic waste.
Obligation to provide national capacity for waste management of all wastes (e.g. ships).	<b>NO.</b> Not even on a regional basis are countries expected to achieve any kind of self-sufficiency.
Obligation to ensure that exports do not take place unless exporting state is convinced of ESM in ship recycling state.	<b>NO.</b> No right exists for any state to impede the export/final voyage of a ship and entry if it has reason to believe ESM is not assured.
Requires state-to-state notification and consent of exporting, importing and transit countries prior to export.	<b>NO.</b> State-to-State communication (notification and consent) between port states, flag states and ship recycling states is not required.
Defines Environmentally Sound Management.	<b>NO.</b> Fails to define ESM and fails to prescribe mandatory criteria for achieving ESM for ship recycling.

For many of the reasons described in the Table above, Parties at COP10 in Cartagena, Colombia, could not agree that the Hong Kong Convention provided an equivalent level of control to that of the Basel Convention, as described in Decision 10/17: *“While some parties believe that the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships provides an equivalent level of control and enforcement to that established under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, some parties do not believe this to be the case.”*

Despite this lack of agreement regarding equivalency amongst Basel Parties, the European Commission soon thereafter proposed their own way forward, claiming that Hong Kong was at least as equivalent, and could therefore be considered an Article 11 agreement. However the legal experts cited earlier provide ample rationale as to why Article 11 cannot be used.

### The Hong Kong Convention Not in Force

Even if Hong Kong were to be considered equivalent, which it is not, it is vital to remember that the Hong Kong Convention is not in force and there exists no clear timeline as to when it may come into force. What is known is that the Hong Kong Convention will not cover those vessels nearing end-of-life now and over the next decade.

Vessels reaching end-of-life in 2020 (the earliest point Hong Kong could come into force) will have likely been built in or around 1990, which is 5-10 years after many of the most concerning hazardous waste materials were banned from use in shipbuilding in many respective shipbuilding states. Thus by the time the Hong Kong Convention enters into force the most severe hazardous waste transboundary movement issues will be over and moot. The next 5-10 years is therefore perhaps the most critical time for the global ship recycling industry due to the foreseeable obsolete ship inventory and the volume of hazardous wastes found in this vintage vessel. It is vital then, that Basel maintains its competency now and its application and enforcement is improved at once.

### Hong Kong and Basel Should Co-exist

While the Hong Kong Convention is devoid of the environmental justice principles imbedded in the Basel regime, the Hong Kong Convention *does* provide a distinct advantage of applying to flag states, where Basel only applies to exporting (port) states. Combining the strengths of the two Conventions provides the best of both worlds and the beginnings of a real solution.

The chart below provides guidance on how the two Conventions can coexist without compromising the obligations of both Conventions.

<b>Basel and Hong Kong Coexistence</b>	
<b>Hong Kong Convention Application</b>	<b>Basel Convention Application</b>
1. Ships not covered by Basel (see column to the right) flying a HK Party State flag located anywhere in the world*	1. Ships containing hazardous materials flying BC Party State flag less than 500 GWT
*To respect the Ban Amendment, ships covered under HK only, should only be allowed to sail for recycling to Annex VII countries unless they have been pre-cleaned of hazardous wastes.	2. Government Ships containing hazardous materials
	3. Ships containing hazardous materials of any flag or size in a port or territorial waters of BC Party State when intent to be disposed is known

**The Hong Kong Convention is not equipped to correct and hold accountable the shipping industry that created it. By design it fails to provide an “equivalent level of control” to the Basel Convention by any fair analysis. However, once in force it does serve to apply to flag ships.**

**BAN calls for legislation that incorporates the strengths of both regimes. Such legislation that includes a mandatory fund on ship owners to internalize costs and prevent reflagging, and finally a ban on the beaching method, are the keys to solving the shipbreaking crisis.**

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