

INTERNATIONAL LAW AND SHIP RECYCLING



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1. Introduction

The current approach in the maritime industry when dealing with end-of-life ships has been to sell these vessels for scrapping on the international market. The majority of the ship breaking is done in non-OECD countries, countries including Bangladesh, China, India and Pakistan. However, the practice of selling outdated vessels for dismantling is present in both developed and developing countries. This often occurs in many developing countries without due regard to accepted environmental, health and safety standards. Ships are often dismantled in Southeast Asia under substandard conditions, which put workers' health and safety and the environment at risk. This demolition market or more precisely the so-called ship breaking industry, where vessels are sold and purchased to be scrapped has had a generally poor occupational health and safety and environmental protection record. The information that we get from International Labour Organization (ILO), and environmental and human rights non-governmental organizations (NGOs), show us that too many workers are killed or injured by accidents or are exposed to toxic substances.¹ Every year hundreds of workers in the yards of Southeast Asia, among others, suffer injuries and tragic death at work. Workers are frequently not properly equipped and trained, including when they are expected to handle materials such as asbestos, oil sludge and PCBs. The environment in the coastal and marine areas does also suffer due to non-existence of adequate equipment to deal with hazardous wastes contained in old ship and due the act of beaching, where ships are drag up on the beaches of Southeast Asia after their final voyage. This clearly shows that dismantling of ships is a pressing environmental and socio-economic global issue that needs to be addressed.

¹ <http://www.shipbreakingplatform.org/>

The Basel Convention on the Control Of Transboundary Movement of Hazardous wastes and Their Disposal, 1989 (hereinafter The Basel Convention)² is the current mechanism in place to deal with this acute issue, but this convention was not originally designed primarily for the maritime industry and especially the recycling ship, but for transboundary movement of hazardous waste in general. The Convention contains and define many concepts, such the concept of “Waste”, “State of Export” and “Transboundary Movement” as well as it implements many of the International Environmental Law principles, such as the Polluter Pays principle, Source principle and Waste Prevention principle. The Basel Convention is not absolute and it lacks accuracy in some key elements. In the light of this international problem, Parties to the Basel Convention decided to address the issue of ship recycling as a matter of priority, taking into account that many materials carried on board ships or contained in their structure would be classified as hazardous wastes at the time of disposal. The ship breaking being an issue of major concern of Governments, the industry, international organizations and NGOs, lead to that these international players and the international community as a whole came to the realization that this problem cannot continue to be unregulated. In the space of a few years the IMO³-sponsored new ship recycling convention the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships was developed and agreed on 15 May

² Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, 22 March 1989, 1672 U.N.T.S. 126, 28 I.L.M. 657 (entered into force 5 May 1992) (hereinafter The Basel Convention).

³ The International Maritime Organization (IMO), formerly known as the Inter-Governmental Maritime Consultative Organization (IMCO), was established in Geneva in 1948. The IMO's primary purpose is to develop and maintain a comprehensive regulatory framework for shipping and its remit today includes safety, environmental concerns, legal matters, technical co-operation, maritime security and the efficiency of shipping. IMO is governed by an Assembly of members and is financially administered by a Council of members elected from the Assembly. The work of IMO is conducted through five committees and these are supported by technical subcommittees. Member organizations of the UN organizational family may observe the proceedings of the IMO. Observer status is granted to qualified non-governmental organizations.

2009 (hereinafter the Hong Kong Convention or SRC).⁴

The two conventions now in place deal with the same part of the shipping industry. However, the two conventions have a somewhat different angle of approach to this market, but they still have a lot in common and touch upon some of the same issues. The Basel Convention comes from the perspective of international hazardous waste management and movement standards, while the new Hong Kong Convention come from the perspective of ship recycling.

There was a wish from NGOs and the Recycling States that the new Hong Kong Convention would deal with some of the same issues as the Basel Convention and that the former would further define some of the weaker points in the latter and in particular carry on the same principles and standards set out by the Basel Convention. The new Convention went in a somewhat different direction and left some of the important points out all together. The new convention was meant to supplant or fill the gaps in the existing Basel Convention's competence over controls on the transboundary movement of waste due to the shortcomings of its regime in covering the specific nature of ships when they become waste in particular ship breaking operations and their processing and the legal requirements. This has not been the case since the new Hong Kong Convention only seeks to co-exist with the Basel Convention, rather than supplant it. It would have been welcome if the new Convention had provided more specified regulations of ships and especially ships treated as waste.⁵

⁴ The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, May 19, 2009, SR/CONF/45 (hereinafter the Hong Kong Convention or SRC) (Yet to come into force). It shall come into force when ratified by at least 15 States with a combined tonnage of not less than 40% of world fleet and a combined ship recycling capacity of not less than 3% of the gross tonnage of their combined merchant fleet.

⁵ The Basel Action Network on behalf of the Global NGO Platform on Shipbreaking, Critique of Draft IMO "International Convention for Safe and Environmentally Sound Recycling of Ships", 2006.

Several States and international agencies have welcomed the adoption of the new Hong Kong Convention and they believe that it will strike the “right balance between the responsibilities and obligations of shipowners, ship recycling facilities, flag and Recycling States.” They further believe that the new Convention will provide for “a platform and an avenue for better regulation” of ship-recycling.⁶ However, many environmental NGOs are of a different opinion, they all agree that the new Convention overlooks basic principles of international environmental law and hazardous waste trade law in particular the Basel Convention.⁷

Under Art. 11 of the Basel Convention, any new treaty seeking to supplant existing controls over transboundary movement of wastes, which includes decaying ships intended for ship breaking, will have to establish an “equivalent level of control”. In bringing about this principle of equivalency, the new treaty must stipulate conditions that are no less environmentally sound than those provided for by the Basel Convention, taking into account the interests of the developing countries.⁸ Therefore, it is expected that this new Hong Kong Convention will incorporate the obligations and controls set out in the Basel Convention, as well as filling in the gaps and loopholes created when the more general provisions of the Basel Convention are applied to regulate the specific waste stream of end-of-life ships.⁹ It is therefore useful to consider whether the new Hong Kong Convention establishes a comparable set of controls to the existing regime, or whether it merely is an attempt by certain shipping interests to gain control over matters involving ships as waste which currently are governed by the strict Basel Convention.¹⁰

⁶ *New international convention adopted to ensure safe and environmentally sound ship recycling*, International Conference on the Safe and Environmentally Sound Recycling of Ships, Hong Kong, May 11-15, 2009.

⁷ *Statement of Concern on the New IMO Convention on Shipbreaking*, (Joint Statement by 107 NGOs from across the World), April 27, 2009.

⁸ The Basel Convention, Art. 11(1).

⁹ France, Interdepartmental Committee on the Dismantling of Civilian and Military End-of-Life Ships, *Le rapport de la Mission Interministerielle portant sur le Demantelement des Navires civils et militaires en fin de vie*, at 16, 27 March 2007.

¹⁰ The Basel Action Network on behalf of the Global NGO Platform on Shipbreaking, Critique of Draft IMO

With this study I will attempt to look at the provisions of the new Hong Kong Convention and by comparing them with the basic elements of the Basel Convention see what legal problems there are and if they have been solved by the introduction of the new Convention and whether it establishes an equivalent level of control.

After a look at the background of the new Convention, a brief review of the basic provisions will follow, before analysing some of the basic central elements that has to do with ship breaking in the Basel Convention. The next point of this study will be to look at the equivalence level of the new Convention and point out some of the flaws, but also some of the qualities of the new Convention. Finally, the author will see what generally can be done in order to strengthen the international legal regime dealing with ship recycling.

As will be seen the Basel Convention fits well within the regime of transboundary movement of hazardous waste when it comes to ship, but as said above the Convention is not absolute. Some major gaps have be observed first after application of the Convention to the maritime industry.¹¹ As a matter of fact this is one of the reasons for the creation of the new Hong Kong Convention.

2. Background Hong Kong – Convention

The development of the new Hong Kong convention derives from MEPC 42 (November 1998) when the Marine Environmental Protection Committee (MEPC)

“International Convention for Safe and Environmentally Sound Recycling of Ships”, 2006.

¹¹ Saurabh Bhattacharjee, *From Basel to HongKong: International Environmental Regulation of Ship-Recycling Takes One Step Forward and TwoSteps Back*1(2) TRADE L. & DEV. 193 (2009).

first brought the issue of ship recycling to the attention of the International Maritime Organization (IMO), which later led IMO Assembly 24 (December 2005) to adopt resolution A.981(24) instructing the MEPC to develop a “new legally binding instrument on ship recycling”. The resolution stated that the new document should regulate:

- the design, construction, operation and preparation of ships so as to facilitate safe and environmentally sound recycling, without compromising the safety and operational efficiency of ships;
- the operation of ship recycling facilities in a safe and environmentally sound manner; and
- the establishment of an appropriate enforcement mechanism for ship recycling (certification/reporting requirements);¹²

2.1 Interagency co-operation

The International Labour Organisation (ILO) which is the specialized agency mandated to set standards on occupational safety and health (OSH) for all workers. Prior to MEPC 42 the ILO had adopted various recommendations and guidelines in relation to ship recycling e.g. the ILO Guideline on Safety and Health in Shipbreaking.¹³

The Basel Convention on the Control Of Transboundary Movement of Hazardous wastes and Their Disposal, 1989, the Convention has competence and expertise on the environmentally sound management of hazardous and other wastes and

¹² Resolution A.981(24), Adopted on 1 December 2005 (Agenda item 11), New Legally Binding Instrument on Ship Recycling).

¹³ Safety and Health in Shipbreaking: Guidelines for Asian countries and Turkey, approved by the 289th session of the International Labour Organization’s Governing Body in March 2004. (www.ilo.org/public/english/protection/safework/sectors/shipbrk/index.htm).

their disposal as listed in Annexes I and II of that Convention. The Basel Convention has experience relevant to the design and operation of ship recycling facilities and The Basel Convention Working Group has also developed its' own set of guidelines, Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships, adopted by the Sixth Meeting of the Conference of Parties to the Basel Convention.¹⁴

ILO, IMO and the Secretariat to the Basel Convention co-operates on issues relating to ship recycling, but the goal with this co-operation was not to jointly develop the new Convention on Ship Recycling rather it was to avoid duplication of work and overlapping of roles, responsibilities and competencies between the three Organizations. All three of the Organizations, ILO/IMO/Basel Convention Working Group developed their own guidelines on ship recycling within their fields. For that reason they are collaborating in technical activities and activities that could promote implementation of all of the three guidelines in their particular field.¹⁵

The new ship recycling convention the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, agreed on 15 May 2009 (hereinafter the Hong Kong Convention or SRC) intends to address all the issues around ship recycling, including the fact that ships sold for scrapping may contain environmentally hazardous substances such as asbestos, heavy metals, hydrocarbons, ozone-depleting substances and others. As mentioned earlier most of the ship breaking done today is done in non-OECD countries in ways that are hazardous and harmful to workers' short- and long-term health as well as it leads to contamination of the environment in these counties due to operations not being

¹⁴ Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships adopted by the Sixth Meeting of the Conference of Parties to the Basel Convention on 13 December 2002 (see <http://www.basel.int/ships/techguid.html>).

¹⁵ Nikos Mikelis, Development of the International Convention for the Safe and Environmentally Sound Recycling of Ships, 2008.

done in an environmentally sound manners.¹⁶ Ship breaking yards in developing states offer much better prices than the equivalent operations in developed states, for a number of reasons, the lack of environmental regulation being only one of these.

The newly adopted Hong Kong Convention accepts that ship recycling is the best option for decommissioned ships. This is certainly correct as the alternative options of scuttling or abandonment of ships means the uncontrolled release of hazardous materials in the environment with unknown risks involved. The preamble to the SRC also considers ship recycling as a contribution to sustainable development, adopts a precautionary approach and declares the need to substitute hazardous materials in the future.¹⁷

2.2 Hong Kong Convention, a closer look.¹⁸

This section will look at some of the central articles of the new Hong Kong Convention.

2.2.1 The Objective

The new Convention was intended to address all the issues around ship recycling, including the fact that ships sold for scrapping may contain environmentally hazardous substances such as asbestos, heavy metals, hydrocarbons, ozone-

¹⁶ <http://www.shipbreakingplatform.org/>.

¹⁷ The Hong Kong Convention on the recycling of ships, Shipping & Trade Law, Professor Mikis Tsimplis University of Southampton, 2009.

¹⁸ Saurabh Bhattacharjee, *From Basel to HongKong: International Environmental Regulation of Ship-Recycling Takes One Step Forward and Two Steps Back*1(2) TRADE L. & DEV. 193 (2009).

depleting substances and others. It has raised concerns about the working and environmental conditions at many of the world's ship recycling locations.¹⁹

2.2.2 Control over Design, Construction, Operation and Maintenance

The provisions of this Convention are intended cover the whole spectrum of ship recycling “cradle-to-grave” across every aspect of the entire life-cycle of a ship. It contains regulations for the “design, construction, operation and preparation for ships so as to facilitate safe and environmentally sound recycling but without compromising their safety and operational efficiency”.²⁰ It requires Parties (both Flag States as well as Port States) to “prohibit and/or restrict the installation and use of hazardous materials listed in Appendix 1 to the Convention” on ships flying their flags or “whilst in their ports, shipyards, ship repair yards or offshore terminals” respectively.²¹

2.2.3 Inventory of Hazardous Materials, Survey and Certification

An important new element is the obligation that every ship shall carry necessary “Inventory of Hazardous Materials”²² lasting throughout of the vessels operational life.²³ The inventory is handed in by the shipowner and is subject to verification by the Flag State. Every ship has to comply with the survey and certification requirements prescribed by the Flag State. Existing ships however have a grace-period of five years within which they need to develop the inventory. Such inventory is mandatory for new ships right from commencement of their operations.

¹⁹ <http://www.imo.org>.

²⁰ Nikos Mikelis, *Developments and Issues on Recycling of Ships*, Paper presented at the East Asian Seas Congress, (2006), http://www.imo.org/includes/blastDataOnly.asp/data_id%3D17980/Developments.pdf.

²¹ The Hong Kong, Regulation 4.

²² The Hong Kong Convention, Regulation 5.

²³ *Ibid*, Regulation 5.3.

There are certain surveys²⁴ a vessel must undergo including an initial survey before the ship is put in service and before the issue of the International Certificate on Inventory of Hazardous Materials,²⁵ a renewal survey at a maximum interval of every five years,²⁶ a survey after any change, replacement or significant repair of the structure,²⁷ and a final survey prior to the ship is taken out of service²⁸ for recycling after which an International Ready for Recycling Certificate shall be issued.²⁹

2.2.4 Authorization for Recycling Facilities

Art. 6 of the Hong Kong Convention requires each Party to ensure that ship-recycling facilities operating under its jurisdiction are authorized in accordance with the regulations contained in the Annex i.e. Regulation 25 – Initial notification and reporting requirements. Art. 4.2 also imposes a general obligation on the Parties to ensure that the ship recycling facilities comply with the requirements of the Convention, and shall take effective measures to do so.

2.2.5 Notification and Reporting Obligations

Before a shipowner can commence the process of recycling a ship, notification must be given to the authorities in the Flag State of the Ship with the same notice also being provided to the [the State] where the recycling of the ship will be undertaken, by the ship recycling facilities.³⁰ This makes possible for the Flag State administration to prepare for the survey and issue of the International Ready

²⁴ *Ibid*, Regulation 10, 11.

²⁵ *Ibid*, Regulation 10.1.1.

²⁶ *Ibid*, Regulation 10.1.2.

²⁷ *Ibid*, Regulation 10.1.3.

²⁸ *Ibid*, Regulation 10.1.4.

²⁹ *Ibid*, Regulation 11.11.

³⁰ Hong Kong Convention, at Regulation 24.1.

for Recycling Certificate found in the new Hong Kong Convention.³¹ After partial or complete recycling a “statement of completion” is to be issued by the recycling facility in accordance with the Convention.³²

2.2.6 Communication of Information with the IMO

Each party to the Hong Kong Convention are required to submit to the IMO a list of authorized recycling facilities, annual lists of ships that are recycled or deregistered to be recycled, and information on violations of the Convention and actions taken towards ships and recycling facilities.³³ The submission and spreading of this information will hopefully assist and streamline enforcement, monitoring and implementation of the Convention.³⁴

2.2.7 Inspection of Ships by Port States

Art. 8 of the Hong Kong Convention provides for inspection of ships by Port States. Duly authorised officers can inspect ships in ports and offshore terminals. The new Convention can be somewhat criticised of that similar inspections are however normally limited to only verifying that there is on board a valid International Certificate on Inventory of Hazardous Materials.³⁵

³¹ *Ibid.*

³² Hong Kong Convention, at Regulation 25.

³³ *Ibid.*, Art. 12.

³⁴ Nikos Mikelis, *Developments and Issues on Recycling of Ships*, Paper presented at the East Asian Seas Congress, (2006), http://www.imo.org/includes/blastDataOnly.asp/data_id%3D17980/Developments.pdf.

³⁵ Hong Kong Convention, Art. 8.1.

2.2.7 Enforcement and Detection of Violations

According to the Convention's enforcement mechanism Parties are expected to cooperate with each other in the detection of violations.³⁶ Investigations are to be undertaken at ports of Parties and the Convention further authorizes Parties to warn, detain, dismiss or exclude a ship from their ports as a result of the findings of violation.³⁷ If any Party has sufficient evidence indicating that a ship is operating, has operated or is about to operate in violation of the Convention, it shall request an investigation of the vessel when it enters the port or offshore terminals under the jurisdiction of another Party and the new control state shall make an inspection and report its findings.³⁸ Art. 10 is a very significant provision in the context of enforcement as it obliges Parties to prohibit violations and establish sanctions through their domestic legislations.

3. The Basel Convention

3.1 The Basel Convention, a closer look

However, as already mentioned above there is already a current mechanism in place dealing with somewhat the same problem of environmentally sound management of ship dismantling (the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989). The

³⁶ *Ibid.* Art. 9.1.

³⁷ *Ibid.* Art. 9.3.

³⁸ *Ibid.* Art. 9.2.

Basel Convention provides the general framework for the minimisation of international movement and the environmentally safe management of hazardous wastes. This Convention is based upon three foundational objectives:

- (a) minimization of the amount and hazard level of generated wastes,³⁹
- (b) promotion of disposal of wastes as close as possible to the source of generation, and
- (c) “environmentally sound management” and disposal of hazardous waste.⁴⁰

3.1.1 The Objective

The primary rationale and objectives of the Convention are to ensure Parties take responsibility for their hazardous waste, minimise generation and transboundary movements of hazardous wastes, and ensure that their hazardous wastes do not damage human health or the environment in another State. Hence, the Contracting Parties to the Basel Convention have a responsibility to ensure that the potential legal loopholes are not available to any ships and/or unscrupulous persons attempting to avoid the provisions of the Convention. Parties to the Basel Convention undertake obligations to take appropriate measures to reduce the generation of hazardous wastes to a minimum⁴¹ and to ensure that there are adequate disposal facilities within the generating state.⁴² The theory behind these requirements is that minimal production of hazardous wastes, coupled with

³⁹ Every generator/exporter is required to develop waste minimization policies. All states are therefore required to develop technologies and policies that decrease the amount of waste generated. Art. 4 establishes a responsibility on the part of a party to properly minimize the production and manage the movement of hazardous wastes.

⁴⁰ The Basel Convention, para.4 of the Preamble.

⁴¹ *Ibid.* Art. 4.2(a): “taking into account social, technological and economic aspects”.

⁴² *Ibid.* Art. 4.2(b).

adequate disposal facilities within the generating state, should lead to a reduction in the transboundary transport of such wastes.

3.1.2 Prior Informed Consent (PIC)

The Basel Convention requires state-to-state notification and consent of exporting, importing and transit countries prior to export, Prior Informed Consent notification (PIC).⁴³ Exporting State parties are also obliged under Art. 4.2(e) to ban an export the State believes that the wastes will not be managed in an environmentally friendly manner.⁴⁴ Whether the State parties, especially developing countries, have the ability to comply with the complex rules of the Convention is an important factor in its effective implementation. For example, in regards to the Prior Informed Consent (PIC) system and the consent procedure, the problems that the States of Export⁴⁵, the States of Import and the Transit State face are:

- (a) It is unknown whether the harmful wastes will be passed on or imported into their countries;
- (b) There is insufficient time, professional knowledge or technology available to evaluate whether each individual transboundary movement of harmful wastes is acceptable;
- (c) States do not have the management capabilities to inform or assent; and
- (d) There is not sufficient information to help States carry out professional evaluation of the transferred harmful wastes that are in progress.

⁴³ The Basel Convention, Art. 4.1(c) and 6.

⁴⁴ *Ibid*, Art. 4.2(e). “Each Party shall take the appropriate measures to:... not allow the export of hazardous wastes or other wastes to a State... if it has reason to believe that the wastes in question will not be managed in an environmentally sound manner”.

⁴⁵ See below, 3.2.3

Therefore, the successful adoption of PIC system relies on advanced national management facilities and provisions.⁴⁶ No transboundary shipment of waste should take place without all states, which are involved, have been informed and consenting to it.

3.1.3 Illegal traffic

The Basel Convention obligates States to introduce appropriate legislation to criminalize and punish illegal traffic.⁴⁷ The Convention defines such illegal traffic as “traffic in hazardous wastes or other wastes” and makes it a criminal act. The Convention leaves it up to States themselves to regulate in this field. Finally, the State of Export⁴⁸ is required to take back or adequately dispose of hazardous waste that was illegally exported as a result of conduct on the part of the exporter or generator.⁴⁹

3.1.4 The Basel Ban Amendment

The Basel Amendment 1995, the Conference of the Parties to the Convention (COP) through Decision II/12, the so called Basel Ban Amendment, completely bans exports of hazardous wastes for final disposal, phasing out and recycling or recovery operations from OECD countries to non-OECD countries. Such wastes are hazardous if they fall within the Convention’s definition⁵⁰ or if they are deemed

⁴⁶ Xiaodong Tou, *The Transboundary Movement of Harmful Wastes and the Transformation of Transnational State Responsibility*, 5 *Macquarie J. Int'l & Comp. Env'tl. L.* 97, 2008

⁴⁷ *Ibid*, Art. 4.3-4.

⁴⁸ See below, 3.2.3

⁴⁹ *Ibid*, Art. 4.3-4.

⁵⁰ *Ibid*, Art 1.1.(a), hazardous wastes are any that are listed in Annex I of the Convention, unless they are devoid of the characteristics that are contained in Annex III.

hazardous under the domestic legislation of a party to the Convention that is involved in the transport of the waste. Radioactive wastes⁵¹ and wastes which are derived from the normal operations of a ship⁵² are excluded from the Basel Convention all together, provided they are subject to an international regulatory system. The Convention also does not apply to transport of wastes, which are not transboundary.

The Basel Convention Amendment 1995, the legality of this decision might be discussed, especially to what extent the COP had the authoritative power to make this decision binding.⁵³

*“The legal value of such a decision is not clearly defined. In the strictest sense, it is not legally binding on the parties to the Convention. On the other hand, it is clearly intended to be more than a mere non-binding recommendation.”*⁵⁴

However, Art. 39 of Vienna Convention on the Law of Treaties 1969, the provides for amendment of treaties by parties⁵⁵ whereas Art. 41.1(b) allows *inter partes* modification of multilateral treaties.⁵⁶ Thus, COP Decisions are binding on all the State-parties, thought somewhat arguably as seen above.

⁵¹ Basel Convention, Art. 1.3.

⁵² *Ibid.*, Art. 1.4.

⁵³ Geir Ulfstein, *Legal Aspects of Scrapping of Vessels: A Study for the Norwegian Ministry of Environment*, (1999), <http://www.ban.org/Library/dismant.PDF>.

⁵⁴ Katharina Kummer, *International Management of Hazardous Wastes. The Basel Convention and Related Legal Rules*, Clarendon Press, Oxford, 1995 p. 64.

⁵⁵ “A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.’ *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155, U.N.T.S. 331.

⁵⁶ “Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if ... (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.” *Ibid.*

3.2 The central elements of the Basel Convention in regard to ship recycling

The Basel Convention has gradually earned its place in the international end-of-life ship market, questions have emerged as to the actual utility norms in the Convention in light of certain peculiar features of the ship breaking. While the control of waste movements through the procedure of Prior Informed Consent (“PIC”) functions relatively well for most hazardous wastes, the Basel Convention is applied to relatively few end-of-life ships.⁵⁷ The Basel Convention is not perfect, there are some limitations to its ability to effectively deal with the transfer of transboundary harmful waste. There are specific limitations to the Basel Convention such as the concept of "hazardous wastes and other wastes" and this needs to be further defined. The convention based its definition of "hazardous wastes" on the process of producing wastes and the harm it brings to the environment, it contains 45 kinds of wastes,⁵⁸ that are listed as harmful according to their ingredients and danger grading.⁵⁹ The domestic legislation of Parties to the Basel Convention can also define other wastes to be hazardous wastes. Nevertheless, a unified, clear and concrete definition is not given in the Convention. Further there is a need to identify which country is to be regarded as the “State of export” under the Basel Convention⁶⁰ and finally address the question of what “transboundary movement” actually means in this sense.

⁵⁷ Geir Ulfstein, *Legal Aspects of Scrapping of Vessels: A Study for the Norwegian Ministry of Environment*, (1999), <http://www.ban.org/Library/dismant.PDF>.

⁵⁸ The Basel Convention, Annex I and II, Wastes enumerated in this Annexes include pharmaceutical products, biocides, organic solvents, cyanide, polychlorinated biphenyls (PCBs), photographic chemicals and chemicals substances arising from research and development activities whose impact on the environment and the society are unknown.

⁵⁹ The Basel Convention, annex 3, Art. 4.2 and 4.10.

⁶⁰ *Ibid.*

3.2.1 Definition of “waste”

According to the Basel Convention the Parties shall prohibit or shall not permit export of hazardous wastes and other wastes to other states without prior approval of the importing state, i.e. the previously mentioned (PIC). The Parties shall further prohibit or shall not permit such export if the State of import does not consent in writing to the specific import.⁶¹ Very few vessels comply with PIC and the notification requirements of the Basel Convention, though most of them contain substantial amount of hazardous materials on board⁶² and many within the industry consider a ship not to be classified as waste and therefore not subject to transboundary waste legislation. Further, ships often carry cargo even in their last voyage for dismantling, where they discharge in one of the local ports. This makes it harder for various officials and watchdogs to identify the precise point where a ship becomes waste.⁶³

The Convention defines “wastes” as: “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.”⁶⁴ A vessel clearly falls within this category. Radioactive wastes and garbage which derives from the normal operations of a ship⁶⁵ are excluded from the scope of the Basel Convention.

The Convention further defines “hazardous wastes” under Art. 1.1. Wastes that belong to any category contained in Annex I and II, unless they do not possess any

⁶¹ *Ibid*, Arts. 4.1 and 6.

⁶² United Kingdom, *Comment on Legal Aspects of Full and Partial Dismantling of Ships: Report on the Implementation of the Decisions Adopted by the Conference of the Parties at its Sixth Meeting*, www.basel.int/meetings/cop/cop7/docs/i10a1e.doc.

⁶³ H. Edwin Anderson, *The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives*, 21 TUL. MAR. L. J. 139, 163 (1996).

⁶⁴ *Ibid*, art. 2.1.

⁶⁵ Basel Convention, Art. 1.4.

of the characteristics contained in Annex III⁶⁶. Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit.⁶⁷ The wide definition was to prevent misunderstanding and contribute to a better control and monitoring system. The Convention was intended to be flexible and to encourage political and scientific evolution of the definition of hazardous waste. Hence under this definition, any substance, unless already defined as hazardous wastes by national legislation of one of the concerned States, must satisfy the definition of “wastes” under the Convention and possess one of the characteristics specified in Annex III.

In light of this, it is submitted that ships destined for ship breaking operations clearly fall within the definition of “hazardous wastes” as defined by the Basel Convention. This discussion shows that an end-of-life ship containing hazardous materials in its structure and meant for export would indeed be considered as “hazardous wastes” under the Basel Convention.

The term “disposal” is further defined in Art. 2, paragraph 4 to mean, “any operation specified in Annex IV to this Convention”.⁶⁸ Annex IV includes final disposal operations and operations which “lead to recovery, recycling, reclamation, direct re-use or alternative uses”. Under Annex IV, paragraph B., ships destined for ship breaking are included within the entry: “R4 Recycling/reclamation of metals and metal compounds”.⁶⁹

⁶⁶ Basel Convention, Art. 1.1(a).

⁶⁷ *Ibid.*, Art. 1.1(b).

⁶⁸ *Ibid.*, art. 2.4.

⁶⁹ *Ibid.*, R4, para B, Annex IV.

3.2.2 When should a vessel be considered “intended” to be disposed?

Together with the reluctance of shipowners to classify ships as wastes there is another complication and an important definition that needs to be made is when, the specific point, a vessel is to be “intended” for disposal. The Convention does not specifically address this issue. An assumption can be made that the decision whether or not to put up a vessel for disposal can be made by the owner, meaning the intent of the person, company or the state owning the vessel that is of importance. The Convention defines five different persons in it Art. 2⁷⁰, but none of this persons defined in the Convention will automatically be correspond with the status of an owner. The owner may also be different from who is designated the management company for the vessel. Such a decision may, however, be difficult to discover and to prove for relevant national authorities.

What the owner intents can also be established by the actions takes, whether these actions are legal and/or physical. One of the actions can be the vessel being taken out of traffic in waiting for final arrangements for scrapping and preparatory steps might be taken in order to prepare the vessel for scrapping. Another action might be deleting the vessel from the national ship registry, not renewing the necessary certificates or classifications of the vessel or the fact that the vessel has reached 25 years of age after the date of its delivery and has to be phased-out according to the phase-out scheme for single hull tankers.⁷¹ These actions may be indications of the intention of the owner to dispose of the vessel, and thus mean that the vessel should be considered “waste”.⁷²

⁷⁰ Basel Convention 1989, art. 2.15-19.

⁷¹ Revised regulation 13G of Annex I of MARPOL adopted by Marine Environment Protection Committee (MEPC) - 50th session, 2003.

⁷² Geir Ulfstein, *Legal Aspects of Scrapping of Vessels: A Study for the Norwegian Ministry of Environment*, (1999), <http://www.ban.org/Library/dismant.PDF>.

Such intention may also be established by a contract entered into by the owner. It may be asked whether preparatory steps before a binding contract is entered into, such as contacting a broker for a possible sale for scrapping, should be considered as establishing the necessary intention of the owner. While this may be taken as an indication that the owner has such intention, it would not suffice in itself, since the final intention of the owner may depend on the terms of a possible contract. But this private contract part of the ship scrapping industry will not be examined in this thesis.

It is further not easy to decide the timeline this "intention". From what point in time shall one count this intention. As mentioned above all single hull tankers have their final phasing-out date 2015, so as a shipowner one must have considered the scrapping of such a vessel before the actual date. Another question that is of relevance is what would happen if after the intention to scrap an owner changes his or her plans? For example, if a vessel is considered to be a constructive total loss by the owner after a collision and is intended for scrapping by the owner. Except, on a later stage the repairs are covered by the insurers and the vessel is able to carry on its operations. Unfortunately neither of the conventions gives us any help to solve this due to the done existing definition of the intention in the Basel Convention and the fact that intention is not even mentioned in the new Hong Kong Convention.

It may be economically favourable and less time consuming for an owner to try to avoid international and national regulations by not taking the action mentioned above or enter into a contract when the vessel has reached the high seas and by doing this steer clear of any national regulations or taking actions in the waters of the State where scrapping is to take place to avoid "transboundary movement". One might wish for a mechanism in place that would establish the intention of the

owner at an earlier stage other than the fact of the owner entering into an actual contact with the purpose to scrap the vessel.⁷³

Often a vessel intended for scrapping will sail to location under her own power and with the seller's crew and any preparatory practical steps could be taken in the ports of the scrapping state. A lot times it will also be possible to use the vessel in traffic in a non-OECD country before scrapping which means that the owner has plenty opportunity to circumvent a prohibition against export of "hazardous waste" from an OECD country to a non-OECD country.

There seems to be few steps of a physical nature the owner would need to undertake prior to the vessel's reaching the destination for scrapping.⁷⁴ The Hong Kong Convention somewhat changes that by introduction of the International Ready for Recycling Certificate.⁷⁵

3.2.3 Vessel or waste?

As seen it is relatively clear that a ship may become waste as defined in Art. 2 and, at the same time, it may be defined as a ship under other international rules, there is considerable uncertainty over practical identification of the point at which a ship becomes "waste".⁷⁶ The Basel Convention makes no distinction between cases where the waste can still be considered a vessel under international law, and cases where that state no longer exists. Nor is there any difference between the

⁷³ Geir Ulfstein, *Legal Aspects of Scrapping of Vessels: A Study for the Norwegian Ministry of Environment*, (1999), <http://www.ban.org/Library/dismant.PDF>.

⁷⁴ Veritas Technical Report No 99-3065, Rev. 3, 3 Februar 1999.

⁷⁵ The Hong Kong Convention, Art. 8.

⁷⁶ United Kingdom, *Comment on Legal Aspects of Full and Partial Dismantling of Ships: Report on the Implementation of the Decisions Adopted by the Conference of the Parties at its Sixth Meeting*, www.basel.int/meetings/cop/cop7/docs/i10a1e.doc.

cases where the waste is still used for other purposes, such as transport of cargo by ship, and if waste is sent directly to disposal.

Decision VII/26 taken at the Seventh Conference of the Parties in October 2004 supports this and notes “that a ship may become waste as defined in Art. 2 of the Basel Convention and that at the same time it may be defined as a ship under other international rules.”⁷⁷ The Decision further recognised “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.”⁷⁸

As mentioned above, it is relevant to note in this context that the decisions of the Conference of Parties (COP) command highest legal level of importance as authoritative interpretation of the text of the Convention. It has been argued that decisions of COP could be “regarded as an agreement *inter partes* modifying or supplementing the MEA within the meaning of Art. 39 or Art. 41.1(b) of the Vienna Convention on the Law of Treaties”.⁷⁹ Art. 39 provides for amendment of treaties by parties⁸⁰ whereas Art. 41.1(b) allows *inter partes* modification of multilateral treaties.⁸¹ Thus, COP Decisions are inarguably binding on all the State-parties. This means that a ship should be regarded as waste if it is still considered a vessel, or is it still used to transport goods, so long as the decision to scrap the

⁷⁷ Decision VII/26, Seventh Conference of Parties of the Basel Convention (2004) UNEP/CHW.7/33, <http://www.basel.int/meetings/cop/cop7/docs/33eRep.pdf>

⁷⁸ *Ibid.*

⁷⁹ Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little Noticed Phenomenon in International Law*, 94 AM. J. INT’L L. 628, 641 (2000).

⁸⁰ “A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.’ *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155, U.N.T.S. 331.

⁸¹ *Ibid.* “Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if ... (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.”

vessel. This means that a ship should be regarded as waste even though it rings in different ports of loading, before it reaches the site of scrapping. But the decision has been taken to a scrap in the distant future, and in the meantime will be used as a ship, the ship is not considered as waste from the time of the decision. It can be difficult to establish how closely related should the actual scrapping be to the decision to scrap, considering that the ship has become a waste.⁸²

As stated above, the ship becomes a "hazardous waste" at the moment it is disposed of, intended to be disposed of or required to be disposed of by law. Hence, an owner could sell the ship through a broker or directly, as a "sale of a ship", and after it enters the country of destination for breaking, it is declared to go to a breaking operation. In this way, there would be the potential to avoid the "waste" definition until after the transboundary movement.

Once the ship is declared as "waste", i.e., destined for breaking in the country of import, there is a "transboundary movement" aspect. If such a declaration is not clear the Basel Convention could possibly be circumvented. However, since the crew and others usually are well aware of the fate of a ship destined for breaking, any cases fitting this potential circumvention scenario could be uncovered but would need to be scrutinised by the authorities to do so. If uncovered to be a circumvention of the Convention, it would be illegal and subject to criminal prosecution.⁸³

⁸² Geir Ulfstein, *Legal Aspects of Scrapping of Vessels: A Study for the Norwegian Ministry of Environment*, (1999), <http://www.ban.org/Library/dismant.PDF>.

⁸³ Shipbreaking and The Basel Convention - An Analysis, Prepared for the Technical Working Group of the Basel Convention by GREENPEACE INTERNATIONAL / BASEL ACTION NETWORK, http://www.ban.org/subsidiary/shipbreaking_and.html.

3.2.3 Definition of “State of export”

Which state is responsible for ensuring that the necessary Prior Informed Consent (PIC) notification of the importing state for scrapping has been obtained: is it the flag state, the state in which the owner is registered, or the port state from which the vessel departs for scrapping, the so called State of Export or some other state?

One of the characteristics of the Basel Convention is the party of export must always bear responsibility over hazardous waste and properly notify of such movement to the State of Import (PIC)⁸⁴, the principle of state responsibility. The Convention reflects a general consensus of nations that the State of Export should bear the responsibility of the transboundary movements until its final completion in an environmentally sound manner.⁸⁵ Art. 9.4 of the Convention says that, in the cases where the responsibility for the illegal traffic cannot be assigned either to the exporter or the generator or to the importer or disposer, the parties concerned, or other parties as appropriate, shall ensure through co-operation that the wastes in question are disposed of as soon as possible in an environmentally sound manner either in the Exporting State or the Importing State or elsewhere as appropriate. In view of this open-ended article, it is reasonable to think that it might constitute a major loophole for minor cases of illegal traffic where responsibility cannot be easily attributed⁸⁶ as the case well maybe and currently is in the ship scrapping industry.

⁸⁴ The Basel Convention, Art. 4.1 and 6.

⁸⁵ *Ibid.* Art. 4.10. provides that: ”the obligation under this Convention of States in which hazardous wastes and other wastes are generated ti require that those wastes are managed in an environmentally sound manner may not under any circumstances be transfered to the States of import or transit.”.

⁸⁶ Cubel, Pablo, *Transboanday Movements Of Hazardous Wastes in International Law: The special Case of the Mediterranean Area*, (12 Int'l J. Marine & Coastal L. 447) 1997.

The Basel Convention defines “State of Export” in Art. 2.10 as a Party from which a transboundary movement of hazardous waste or other wastes is planned to be initiated or is initiated. A closer look at Art. 2.10 lead us to conclude that the State of Export is the state from which the transboundary movement started. The first part of the of the provision deals with the state in which the movement is planned to be initiated, without mentioning anything about from where the actual movement is to physically start. This alternative must have been meant to indicate the State of Export already at the planning of the transboundary movement, since this state shall ensure that the State of Import has consented before the movement actually takes place. However such states of planning may including a Flag State which have little incentive to investigate from which state the movement of waste, actually commenced. The planning could also be made on the high seas or in a non-Party State, leaving us with no State of Export at all and that the waste would fall completely of the grid and can be “illegally” moved.

The second part of the provision is clearer and shows us that in order to decide the State of Export you need to know from which state the transboundary movement physically started. The State where the planning or the decision to move has been taken becomes irrelevant.⁸⁷ A Port State or a Transit State may according to this provision become the State of Export. A Non-Party State could also become the State of Export or the vessel could physically start the transboundary movement of hazardous wastes on the high seas leaving us once again without a State of Export. Additional, question might arise regarding the thought behind this second part of the provision. I find it odd that a Port State with no relation to the ship beside that the ship arrived there should have to acquire the necessary PIC notifications and have jurisdiction over the ship in relation to the scrapping of the vessel. But this clearly shows that the Basel Convention was not originally

⁸⁷ Geir Ulfstein, *Legal Aspects of Scrapping of Vessels: A Study for the Norwegian Ministry of Environment*, (1999), <http://www.ban.org/Library/dismant.PDF>.

intended for shipping, where a vessel can be flagged in one state, the Flag State, but become waste accordingly in another state, the Port State.

This further arises the question to what extent the Port State has jurisdiction over a foreign vessel to require that it obtain necessary permissions from the State of Import. There is no doubt that jurisdiction over ships in port exist due to the territorial sovereignty of the port state. However, if one takes a look at Art. 4.12 of the Convention⁸⁸ one will see that although the Port State is the State of Export under the Basel Convention, it has no jurisdiction to control foreign-owned vessels as long as they continue to be considered as vessel and not waste under international law and there is nothing within the Convention provides the Port states with enough incentive to exert such control.

Further, the Port State has no jurisdiction over the vessel after it has left its ports, or to establish requirements related to prior consent from other states before it is allowed to depart.⁸⁹ Also, it is hard the Port State do obtain the necessary information in order exercise the need control. Information such as the plans of the owners of foreign ships and the contracts entered into about the vessels' destiny.

A state is considered the State of Export even if the company exporting the goods is foreign-owned or the decision has been taken in a different state, meaning that the state where the vessel becomes waste would be the State of Export irrespective of the Flag State of the vessel, which would make the Port State a State of Export in relation to the Basel Convention and this is also the way State of Export is commonly interpreted outside the Convention. The Basel Convention does not mention the Flag State, but the fact that also the Flag state exercises

⁸⁸ Basel Convention 1989, Art. 4.12: "Nothing in this Convention shall affect in any way the sovereignty of States over their territorial sea established in accordance with international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law, and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments."

⁸⁹ R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 2nd ed., Manchester University Press, 1988.

“administrative and regulatory” responsibility over its ships with respect to human health and environmental matters may raise some doubt about the proper interpretation and questions as to why the Basel Convention did not extend the definition of State of Export to include the Flag State clearly.⁹⁰ A Flag State may become a State of Export, but is not always the case as we see above.

As a conclusion, a ship can be declared a waste in any coastal State or upon the high seas, it will be necessary to explore various options regarding which country must be considered the "State of Export" where most of the responsibilities and obligations must be borne according to the Basel Convention. In cases where it is not clear under the Convention, the most reliable approach is to make the owner the responsible person, the “Exporter”⁹¹. In this case, the state with jurisdiction over that owner would be the "State of Export". Looking at the Convention it does not have such provisions in regard to vessels. The key point seems to be whether a “transboundary movement” of hazardous waste is undertaken i.e. when a vessel, which is considered hazardous waste, leaves a state, that state should be considered the State of Export. Accordingly, the Port State should be responsible for ensuring that the requirements for export are fulfilled. The Flag State as such has no obligation under the Convention to ensure the existence of consent from the importing state.

However, in my view the Basel Convention fails to clearly define “State of Export”. If one just analyses the convention text more that often one would come to the conclusion if applying the text to a practical example that a Port State or a Transit State might become the State of Export. Even worst what if the movement is planned outside the grasp of the Convention for example on the high seas or in a non-Party State. There is already a growing awareness amongst shipowners about “responsible ship scrapping”, so why not make an attempt to make the Flag State

⁹⁰ Geir Ulfstein, *Legal Aspects of Scrapping of Vessels: A Study for the Norwegian Ministry of Environment*, (1999), <http://www.ban.org/Library/dismant.PDF>.

⁹¹ *Ibid.* Art 2(15).

the main state of responsibility and create an incentive for the Flag State to follow the principle of state responsibility.

3.2.4 “Transboundary movement”

One major issue is that many consider a ship not to be classified as waste and therefore not subject to transboundary waste legislation. A vessel may become waste when sailing in different kinds of maritime zones in different countries, and it must be assessed what is a “transboundary movement” of such waste. As the European Union noted in its report:

“Some stakeholders and Recycling States, in so far as they give reasons, define a ship that arrives under its own power as not being waste, even though it is intended for metal recycling (a recovery operation, R4, in Annex IVB of the Basel Convention) and the decision to sell it for this purpose was taken by the owner often weeks or months before.”⁹²

The Basel Convention defines “transboundary movements”⁹³ and establishes obligations in relation to this movement, but this definition is not particularly clear. According to United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS) a state has the right to implement both administrative and regulatory responsibility over amongst other things human health and the environment in its ports and internal waters. Other states are able to innocent

⁹² European Community, *Comparison of the Level of Control and Enforcement Established by the Basel Convention with the Expected Level of Control and Enforcement to be provided by the Draft Ship Recycling Convention in its Entirety – An Assessment by the EU and its Member States*, (2008) www.basel.int/ships/commentsOEWG6/EU.doc.

⁹³ The Basel Convention, Art. 2.3: “Transboundary movement” means any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement.

passage,⁹⁴ the coastal State may however, adopt laws and regulations, in conformity with the provisions in UNCLOS and other rules of international law, relating to innocent passage through the territorial sea and regulations relating to environmental protection and the prevention of sanitary legislation.⁹⁵ UNCLOS also provides for state jurisdiction in the contiguous zone and EEZ.⁹⁶ “Area under the national jurisdiction of a State”⁹⁷ in the Basel Convention could thus be interpreted to cover all maritime zones of a state.

However, if a vessel is to be seen as waste when it departs from the port or internal waters of one state en route to another state for ship breaking it is obvious that the vessels movement should be considered as “transboundary movement”. But what happened when a ship becomes waste on the high sea or in the marine territory of the state where the vessel is to be scrapped, here is there where the Convention loses its grip of the movement, since no actual “transboundary movement” has occurred. There are consequently several legal questions without clear answers in neither of the two conventions dealt with in this thesis.

3.2.5 "Environmentally Sound Management"

Further, there is another concept that needs to be further developed, the concept "environmentally sound management" of hazardous wastes or other wastes. The Basel Convention simply stipulates that "environmentally sound management" means taking all practicable steps to ensure that hazardous wastes and other wastes are managed in a manner that will protect human health and the

⁹⁴ UNCLOS, Art. 17.

⁹⁵ UNCLOS, Art. 21.

⁹⁶ *Ibid.* Art. 33, 56 and Part XII.

⁹⁷ The Basel Convention, Art. 2.9: “Area under the national jurisdiction of a State” means any land, marine area or airspace within which a State exercises administrative and regulatory responsibility in accordance with international law in regard to the protection of human health or the environment.

environment.

*“Ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes, and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement;”*⁹⁸

Competent authorities must not authorize a shipment unless all competent authorities of the States Concerned (import, export and transit states) are convinced that the wastes will be managed in an environmentally sound manner.⁹⁹ The obligation, however, seems smooth-tongued at best and does not provide clear steps and procedures that can be respected. But at least a general obligation does exist in the Basel Convention. Pre-cleaning in developed countries during the lifespan of a ship is a very practical way in which transboundary movements of hazardous waste ships can be minimized.

4. Equivalent Level of Control, principle of equivalency.

Comparative study of the Basel Convention system and the new Hong Kong Convention must be done to see if the new Hong Kong Convention has observed its original objective of renewing and strengthening the current system and removing the weaknesses in the former. Studying Art. 11 of the Basel Convention¹⁰⁰ which

⁹⁸ The Basel Convention, Art. 4.2(d).

⁹⁹ *Ibid.* Art. 4.2(e and g) and 4.8.

¹⁰⁰ The Basel Convention, Art. 11: "... Parties may 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

requires that any bilateral or multilateral agreement regarding transboundary movement of hazardous wastes must not stipulate provisions, which are less environmentally sound than those, provided for by this Convention. This means that if a state is a party to the Basel Convention it may not enter into international agreements that do not provide an equivalent level of control as the Basel Convention. It is consequently essential for the new Hong Kong Convention to establish an equivalent level of control to satisfy this criteria.¹⁰¹ The notion of equivalency of other instruments, which might fall within the scope of the Basel Convention's mandate, which the new Hong Kong Convention does, has a legal basis in the Convention itself. It is indeed a requirement of the Convention as we see embodied in Art.11 of the Convention.¹⁰²

Without such an equivalent level of control it will be impossible for Basel Parties to accept this Convention as a valid Art. 11 agreement under the Basel Convention. There are arguments made that Art. 11 give countries leverage to negotiate more stringent rules than the Convention sets out, but the critics of the article maintain that the concept "equivalent level of control" was vague and allowed States to avoid their Basel obligations.¹⁰³

The principle of "equivalent level of control" under Art. 11 must be given a liberal interpretation. The use of the term "equivalent" by the COP VIII show that the State Parties did not insist on an "identical level of control", meaning that any of the international agreements entered into, e.g. the new Hong Kong Convention, are only expected to match the "environmentally sound management of hazardous

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."

¹⁰¹ Decision VIII/11, Eighth Conference of Parties of the Basel Convention (2006) UNEP/CHW .8/16, <http://www.basel.int/meetings/cop/cop8/docs/16eREISSUED.pdf>.

¹⁰² 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, 2009, <http://www.ban.org/Library/EquivalentLevelofControl.pdf>.

¹⁰³ Karen Dowson, *Wag the Dog: Towards a Harmonization of the International Hazardous Waste Transfer Regime*, 19 No. 1 CAN. J.L. & SOC'Y 1, 16 (2004).

wastes” provided in the Basel Convention.¹⁰⁴

It must be mentioned that the Basel Convention Art. 11 only laid down the minimum mandate and that in order to fulfil its purpose, the new Hong Kong Convention does need to go beyond this requirement and try to remove all the weaknesses and identify all loopholes in the Basel Convention.¹⁰⁵

The equivalence of Art. 11 must not only extend to the basic principles of the Basel Convention, it should go beyond control mechanisms and procedures and deal with such issues as definition of hazardous wastes, the obligations to minimize the generation and transboundary movement of hazardous wastes, prior informed consent and notification mechanism, state responsibility, criminalization of illegal traffic, disclosure of full inventory of the ships, etc.¹⁰⁶ However, the Hong Kong Convention is structured so that most of the functional provisions are found in annexes while most of the articles of the convention are very general in their nature and they refer to annexes. A reason for this type of structure might be to allow the treaty to be extremely flexible in the future. The Annexes are far easier to amend than the main body of the treaty.¹⁰⁷ This could be viewed in both a positive and a negative manner. With the known the lack of transparency found in the IMO this might be seen as bias toward the scrapping industry and this flexibility seen as

¹⁰⁴ European Community, *Comparison of the Level of Control and Enforcement Established by the Basel Convention with the Expected Level of Control and Enforcement to be provided by the Draft Ship Recycling Convention in its Entirety – An Assessment by the EU and its Member States*, (2008) www.basel.int/ships/commentsOEWG6/EU.doc.

¹⁰⁵ Saurabh Bhattacharjee, *From Basel to HongKong: International Environmental Regulation of Ship-Recycling Takes One Step Forward and TwoSteps Back*1(2) TRADE L. & DEV. 193, 2009.

¹⁰⁶ European Community, *Comparison of the Level of Control and Enforcement Established by the Basel Convention with the Expected Level of Control and Enforcement to be provided by the Draft Ship Recycling Convention in its Entirety – An Assessment by the EU and its Member States*, (2008) available at: www.basel.int/ships/commentsOEWG6/EU.doc.

¹⁰⁷ The Hong Kong Convention, Art. 18.5.

disturbing.¹⁰⁸ On the other hand this might lead to an easier streamlining of the new Convention with the Basel Convention and simpler repair pitfalls in the latter.

5. The shortcoming of the new Hong Kong Convention

The intension behind the new Hong Kong Convention was to pick up where the Basel Convention left of, or more precise will the gaps of latter. However, the new Convention somewhat leaves out some of the more central issues that are already as seen above not clearly enough defined in the Basel Convention. The study will now look at the equivalence level of the new Convention and point out some of the flaws.

5.1 “State of Export”

The new Hong Kong Convention fails to supplement The Basel Convention in defining “State of Export” to include State Parties who have jurisdiction over the owners of the vessel, to the shipbuilding state, or to states who have jurisdiction over the vessel at the time the vessel was determined to be a waste.¹⁰⁹ Through dealing with the International Ready for Recycling Certificate the new Convention does not seem concerned with placing State responsibility on states other then the States of Import or the Flag States, but these are the states that have the least incentive to prosecute the principles of environmental justice found in the Basel Convention.

¹⁰⁸ The Basel Action Network on behalf of the Global NGO Platform on Shipbreaking, Critique of Draft IMO “International Convention for Safe and Environmentally Sound Recycling of Ships”, 2006.

¹⁰⁹ EC, Directorate General Environment, Ship Dismantling and Pre-cleaning of Ships: Final Report (EC 2007) at 67.

The State of Import has no incentive to prosecute the principles of environmental justice or get the Prior Informed Consent notification, due to the business the recycling industry generates for the State and the Flag State due to the fact that flags of convenience state are keen to keep their fleets. If nothing is done there will be no change in the world of ship breaking. It is necessary to close this loophole to properly apply the Basel Convention together with the Hong Kong Convention to states with jurisdiction over the owner and shipbuilders.¹¹⁰

5.2 Undermining the concept of PIC Notification

An issue not at all dealt with in the new Hong Kong Convention is the concept of Prior Informed Consent developed in the Basel Convention and addressing the State-to-State reporting. In the new Convention this could relate to notification between the Flag State and the Recycling State. Instead the shipowner reports to the Flag State as for example in the case of “Inventory of Hazardous Materials”¹¹¹, and the recycling facility reports to its competent authority as for example in the case when a recycling facility is preparing to receive a ship.¹¹² There is no express need in the new Convention for a State-to-State, which undermines the concept set out in the Basel Convention.¹¹³

The relatively limited formulation of the Recycling State’s right to object to a ship recycling may have limited practical relevance¹¹⁴. The Recycling State can use the Port-State authority under UNCLOS to refuse permit entry into its territory, provided it exercises the right through establishing it in domestic legislation. Once

¹¹⁰ The Basel Action Network on behalf of the Global NGO Platform on Shipbreaking, Critique of Draft IMO “International Convention for Safe and Environmentally Sound Recycling of Ships”, 2006.

¹¹¹ The Hong Kong Convention, Regulation 5.

¹¹² *Ibid*, Regulation 25.

¹¹³ Saurabh Bhattacharjee, *From Basel to HongKong: International Environmental Regulation of Ship-Recycling Takes One Step Forward and TwoSteps Back*1(2) TRADE L. & DEV. 193 (2009).

¹¹⁴ *Ibid*

it has been established that a vessel has violated the provisions of the Hong Kong Convention the Recycling State can also use the powers vested under Art. 9.¹¹⁵

There are concerns that states may experience difficulties in preventing the entry of a vessel without the Prior Informed Consent about the coming entry of the ship. The absence of a state-to-state prior notification requirement deprives states of time and information required to take decision on the nature of toxic materials contained in a ship. Considering that each vessel can contain various amounts of hazardous materials and wastes, and Parties, including transit states, need time and information to arrive at an informed decision about the toxics onboard the vessel, the Hong Kong Convention denies states the two crucial elements of notification and consent. Environmentalists have expressed the fear that beaching of an end-of-life ship is almost irreversible.¹¹⁶

A Party State can request relevant information from the Recycling State on the basis for the decision to authorize the facility.¹¹⁷ If the information given does not comply with the Convention, the asking state might refuse to issue the “Ready-for-Recycling” certificate. However, this refusal can easily be made ineffective by a re-flagging of the ship to another state.¹¹⁸

5.3 Exemptions in the new Convention

The Hong Kong Convention excludes domestic¹¹⁹, government-owned and naval

¹¹⁵ European Community, *Comparison of the Level of Control and Enforcement Established by the Basel Convention with the Expected Level of Control and Enforcement to be provided by the Draft Ship Recycling Convention in its Entirety – An Assessment by the EU and its Member States*, (2008)

¹¹⁶ Global NGO Platform on Shipbreaking, *Legal Shipwreck: IMO Convention Legalizes Toxic Ship Dumping*, 2009, http://www.shipbreakingplatform.com/dmdocuments/submissions/BP_May_2009.pdf

¹¹⁷ The Hong Kong Convention, Art. 7.

¹¹⁸ Global NGO Platform on Shipbreaking, *Legal Shipwreck: IMO Convention Legalizes Toxic Ship Dumping*, 2009, http://www.shipbreakingplatform.com/dmdocuments/submissions/BP_May_2009.pdf

¹¹⁹ The Hong Kong Convention, Art. 3.3.

vessels¹²⁰ from its sphere of application. It is submitted that such a distinction is bereft of any purposive basis. The objective of the convention is to regulate the environmental impact of ship recycling, particularly in the process of transfer of ship from one country to another.¹²¹ There is no connection between the earlier usage of the vessel and its environmental impact and hazard after recycling. State-owned ships and warships are no less dangerous to the environment than ordinary vessels. On the contrary, warships, because of their huge size, contain vast amount of hazardous materials like asbestos and PCBs¹²² and need to be subjected to stricter regulation. Further, if anything the incentive should be higher to properly dismantle government-owned and naval vessels, due to the exposure towards other states.¹²³

5.4 No trade between Parties and non-Parties

The Basel Convention prohibits trade between Parties and non-Parties of hazardous waste. The goal of the prohibition is to force non-Parties to become a member State to the Convention to ensure the application of a stringent global standard on hazardous waste exports.

The Hong Kong Convention does not apply transboundary movement of hazardous wastes, such an absence can create a race to the bottom, since shipowners of vessels are flying flags of convenience and can send their vessels

¹²⁰ *Ibid.* Art. 3.2.

¹²¹ Basel Convention Secretariat, *Report of the Working Group on Ship Recycling established by the Fifty-Sixth session of the Marine Environment Protection Committee of the International Maritime Organization*, 2007, UNEP/CHW/OEWG/46/INF/1042.

¹²² For example, the French aircraft carrier, *Clemenceau* that had become the subject of huge controversy due to its proposed export to India in 2006, was alleged to have contained between 190 to 250 tons of asbestos. Greenpeace International, *The Saga of the Clemenceau: Fact Sheet*, (2006), <http://www.greenpeace.org/raw/content/international/press/reports/the-clemenceau-fact-sheet.pdf>.

¹²³ Saurabh Bhattacharjee, *From Basel to HongKong: International Environmental Regulation of Ship-Recycling Takes One Step Forward and TwoSteps Back*1(2) TRADE L. & DEV. 193 (2009).

for disposal to a non-party who doesn't need to comply with the various guidelines of the Convention. This can lead to unwillingness amongst States to sign and ratify the Hong Kong Convention.

“... recycling States might be expected to support the Ship Recycling Convention if it is apparent that the majority of shipowners will send their ships only to facilities, which comply with the new rules, and if the costs of improving the recycling industry are outweighed by the economic benefits.”¹²⁴

However, the fact that shipowners can export their ships to non-parties also may suggest to Recycling States that they may be able to secure orders for dismantling even without joining the Convention.

In Art. 3(4) of the Hong Kong Convention it is specified that the Parties shall agree to apply the requirements of this Convention so that non-party States shall not be given a more favourable treatment. Though, the exact scope of this provision is somewhat unclear and vague may undermine the level of actual protection. Such trade will obviously not be subjected to the information requirements with the IMO and thus may also hinder effective regulation.¹²⁵

5.5 Illegal traffic

The Basel Convention mentions “illegal traffic” and makes it criminal, but leaves to the Parties to legislate (see above 3.1.2).¹²⁶ The new Hong Kong Convention does

¹²⁴ European Community, *Comparison of the Level of Control and Enforcement Established by the Basel Convention with the Expected Level of Control and Enforcement to be provided by the Draft Ship Recycling Convention in its Entirety – An Assessment by the EU and its Member States*, (2008), www.basel.int/ships/commentsOEWG6/EU.doc

¹²⁵ Saurabh Bhattacharjee, *From Basel to HongKong: International Environmental Regulation of Ship-Recycling Takes One Step Forward and TwoSteps Back*1(2) TRADE L. & DEV. 193 (2009).

¹²⁶ The Basel Convention, Art. 4.3.

not address the issue of illegality, maintaining this level of punitive measure by states is very important. The new Convention leaves it to the Parties to determine the sanctions for any violation by national legislation.¹²⁷ This loophole creates yet another race to the bottom scenario, as it creates an incentive for wrongdoers to continue their violations in a jurisdiction that has the lightest of sanctions undermining jurisdictions that have stronger sanctions.

5.6 Waste in the new Hong Kong convention

While the IMO seeks to establish lists of hazardous materials, it refuses to recognize such materials at end-of- life of a ship as waste in new the Hong Kong Convention. This can cause very serious problems in integrating the body of existing law (the Basel Convention, the Bamako Convention¹²⁸, EU Waste Shipment Regulation etc.), with the IMO regime. It is clear that ships fall under established definitions of waste and must be referred to as such. If this avoidance is allowed for ships, many waste streams can be characterized as non-wastes to avoid the Basel Convention and the body of waste law making the Basel Convention ineffectual. Further, in the new Hong Kong Convention, despite the definitions being in place for hazardous materials, the presence of hazardous substances does not trigger any special controls regarding ship trade (such as pre-cleaning) or notification/consent.

¹²⁷ The Hong Kong Convention, Art. 10.

¹²⁸ Bamako Convention on the ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, it is a treaty of Africa nations prohibiting the import of any hazardous, including radioactive waste. The Convention was negotiated by twelve nations of the Organization of African Unity at Bamako, Mali in January, 1991, and came into force in 1998. The motivation behind the Bamako Convention arose from the failure of the Basel Convention to prohibit trade of hazardous waste to Less developed countries (LDCs), and from the realization that many developed nations were exporting toxic wastes to Africa. The Bamako Convention uses a format and language similar to that of the Basel Convention, but is much stronger in prohibiting all imports of hazardous waste. Additionally, it does not make exceptions on certain hazardous wastes (like those for radioactive materials) made by the Basel Convention.

Therefore it was anticipated that the Hong Kong Convention might provide some new approaches to close this gap in the PIC-system. The Hong Kong Convention does not have such a requirement of a state-to-state communication that notification takes place and consent be obtained between port states, flag states and ship recycling states prior to any export. The Hong Kong Convention disrupts prior and informed consent, first by not requiring consent prior to the export of the vessels, second, only the flag state and ship recycling state are notified, but are not placed in communication with each other.¹²⁹

5.7 "Environmentally Sound Management"

Remarkably the new Hong Kong Convention makes no effort to minimize transboundary movement, the fundamental goal of the Basel Convention by incorporating "Environmentally Sound Management" into the wording of the Convention. As mentioned above the new Hong Kong Convention does not directly apply to transboundary movement of hazardous waste. However it does mandate or otherwise encourage pre-cleaning in OECD/EU countries and facilities during the life of a ship and prior to its final voyage. Incentives and mandates need to be put in place to require the removal of TBT paints, mercury, asbestos, PCB impregnated materials, etc. during the life of all ships. Without this, the global community takes a giant step backwards from the Basel Convention and Basel Ban Amendment's principles that clearly seek to prevent dumping of hazardous wastes on developing countries and promote environmental justice.

This obligation could specially apply to ship breaking yards, the Basel Convention requires adequate "environmentally sound management" in disposal, which means taking all practicable steps to ensure protection of human health and the

¹²⁹ Global NGO Platform on Shipbreaking, *Legal Shipwreck: IMO Convention Legalizes Toxic Ship Dumping*, 2009, http://www.shipbreakingplatform.com/dmdocuments/submissions/BP_May_2009.pdf

environment.¹³⁰ The new Hong Kong Convention calls on all Parties to follow the criteria set out in the Annex, but the annex merely states that:

“Parties shall establish management systems, procedures and techniques which will reduce, minimize and ultimately eliminate adverse effects on the marine environment and human health caused by ship recycling taking into account the guidelines developed by the Organization.”¹³¹

It is noteworthy that the only effort that the new Convention makes is to reduce adverse effects to satisfy this requirement and further that only the marine environment is being addressed. A reduction could be claimed for even the most minimal improvement in the yards.¹³²

6. The Hong Kong Convention and International Environmental Principles

Looking at the Hong Kong Convention one can clearly see that some well established principles of international policy have been ignored.

6.1 Polluter Pays Principle / Producer Responsibility Principles

The “polluter pays” principle is well established principle of international

¹³⁰ The Basel Convention, Art. 4.2(b) and 4.8.

¹³¹ The Hong Kong Convention, Regulation 17

¹³² The Basel Action Network on behalf of the Global NGO Platform on Shipbreaking, Critique of Draft IMO “International Convention for Safe and Environmentally Sound Recycling of Ships”, 2006.

environmental law.¹³³ This principle is enacted to make the party responsible for producing pollution responsible the removal of that pollution and for paying for the damage done to the natural environment. The costs for properly managing end-of-life ships, loaded as they are with toxic waste, are significant. The burden to remove the hazardous materials from a ship must thus fall on the owner of the ship and not on the country operating the dismantling ship yards.¹³⁴

In the Hong Kong Convention this principle is ignored, a fundamental weakness in the Convention meant to address an issue of global pollution without seeking to fully internalize costs and introduce producer responsibility based on the Polluter Pays Principle. For example, the costs for the removal of that pollution and the damage done to the environment are avoided by the Flag State or shipowners neither or are given any responsibility for the clean-up. Polluter-pays principle would mandate that a vessel must be stripped of all its hazardous materials in the Flag State by the shipowner prior to export as the primary responsibility of clean-up should rest on the latter as a “polluter”. An expansive definition of polluter would include the ship as well, as he has been the primary user of the ship, the object containing hazardous substances.¹³⁵ The Convention draws the wrongful and unfortunate conclusion that as long as a recycling facility has required authorization by the Recycling State, it should be allowed to conduct the entire dismantling process including removal of the hazardous wastes.¹³⁶

This fundamental weakness in the draft Convention lies in the fact that the Convention has sought to address an issue of global pollution without seeking to fully internalize costs and install producer responsibility based on the Polluter Pays

¹³³ *Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, June 13, 1992, U.N. Doc. A/Conf.151/5/Rev.1, reprinted in 31 I.L.M. 874, principle 16.

¹³⁴ Saurabh Bhattacharjee, *From Basel to HongKong: International Environmental Regulation of Ship-Recycling Takes One Step Forward and TwoSteps Back*1(2) TRADE L. & DEV. 193 (2009).

¹³⁵ *Ibid.*

¹³⁶ Nikos Mikelis, *Development of the International Convention for the Safe and Environmentally Sound Recycling of Ships*, 2008.

Principle.

6.2 Source Principle

The source principle implies that any form of pollution should be treated as close as possible to the source.¹³⁷ Lack of recognition of this principle in the Hong Kong Convention leads to lack of incentives to the Flag State or shipowners to clean-up and pre-decontaminate the vessels and leads to continuous treatment and disposal of the hazardous materials in distant Recycling States where complete removal of hazardous wastes may not be possible due the substandard technique of beaching ships in used in the majority of the recycling yards, a method of operations that “manages” hazardous wastes without containment in the sensitive intertidal zone and on shifting sands where it is impossible to rescue workers with emergency equipment or provide ship side cranes to lift heavy pieces of the cut ship.

6.3 Waste Prevention Principle / Substitution Principle

Waste Prevention Principle sais that once produced, wastes and in particular hazardous wastes can never be managed completely without risk of harm. Prevention is always better than later management or mitigation. The best solution to hazardous waste and pollution is not creating it (both the quantity and the harm) in the first place. Substitution Principle continues on the same line, but look at what happens when decisions regarding the use of hazardous materials already been taken. One should be informed by a constant review of safer alternatives and a responsibility to replace more hazardous substances with less hazardous ones.

¹³⁷ Ernst-Ulrich Petersmann, International and European Trade and Environmental Law, 15 (1995)

One should strive for elimination of the use of toxic substances and technologies in products and process designs.¹³⁸ While waste management is not part of the core competency of the IMO and the Hong Kong Convention, shipbuilding rightfully is and thus the challenge to ensure that future ships do not contain hazardous substances is but another miss in the Convention. The Hong Kong Convention fails to ban or phase-out any more hazardous substances than what was already banned elsewhere (see above). Even as the Convention cites the Substitution Principle in the preamble, it is not implemented in the convention text itself by a regular review process to examine hazardous ship materials and to always prefer safer alternatives to them.

6.4 Principle of Environmentally Sound Management

Environmentally Sound Management systems and related technologies and processes are not complete solutions to hazardous wastes. The existence of even best-practice Environmentally Sound Management facilities does not justify moving hazardous waste processing to developing countries from developed countries and creating a race to the bottom. While Hong Kong Convention means to support Environmentally Sound Management it does not to define it, nor to set mandatory criteria for what constitutes safe and sound ship recycling. Rather, they aim to produce a guideline and leave it to ship recycling states to decide what to do. None of the ship recycling states has managed to implement the existing IMO, ILO and Basel Guidelines. Without mandatory criteria there's no motive for this states to change. Once again the Convention even to condemn the substandard technique of beaching ships.

¹³⁸ http://www.ban.org/about_BAN/policy_principles.html

6.5 Environmental Justice

The Basel Convention developed a hazardous waste control norm, an affirmation of the principle of environmental justice. A believe that no one should bear a disproportionate burden of environmental harm because to gross economic differences in the world and simply due to racial, ethnic, or socio-economic status.¹³⁹

The Hong Kong Convention is premised on formal equality between developed and developing States and does not discuss The North-South division, the socio-division and political that exists between the wealthy developed countries. The Convention places no special requirements on the developed States in terms of prior decontamination.

7. The new Hong Kong Convention: not all bad

As seen the Hong Kong Convention does not really manage to improve on the loopholes existing in the Basel Convention and thus increase the effectiveness of the regulation dealing with transfer of end-of-life ships for recycling.

7.1 Cradle-to-Grave: Green Designs and Hazardous Material Inventory

The cradle-to-grave approach of the Hong Kong Convention, wherein it regulates design, construction, operation and maintenance of ships and also requires

¹³⁹ http://www.ban.org/about_BAN/policy_principles.html

maintenance of inventory of hazardous materials during the entire lifetime of a ship, is a radical progress from the Basel framework. The Convention addresses the important issue of “green shipbuilding and design”,¹⁴⁰ that neither the Basel Convention nor any other international body currently addresses directly. This is one matter where the Hong Kong Convention manages to be in consistency with the Basel Convention and it’s obligation to minimize the generation of hazardous waste.

Another positive aspect of the Hong Kong Convention is that it also requires an on going inventory of hazardous substances on board ships and establishes the concept of a ready-for-recycling certificate. However, while these are already implicit in the Basel Convention obligations, this will only add to an environmentally safe ship recycling and perhaps altogether remove the hazards involved in ship breaking..¹⁴¹

As noted by the Global NGO Platform on Shipbreaking:

“the establishment of a framework for eliminating or restricting the use of hazardous materials in ship construction is clearly necessary to ensure that end-of-life ships will no longer be source of contamination and occupational disease.”¹⁴²

7.2. Uniform Technical Standards

The Hong Kong Convention sets out regulation in its Annex I that address the technical standards for ship recycling facilities and procedures. The Hong Kong

¹⁴⁰ The Hong Kong Convention, Regulation 4.

¹⁴¹ The Basel Action Network on behalf of the Global NGO Platform on Shipbreaking, Critique of Draft IMO“International Convention for Safe and Environmentally Sound Recycling of Ships”, 2006.

¹⁴² Global NGO Platform on Shipbreaking, *Legal Shipwreck: IMO Convention Legalizes Toxic Ship Dumping*, 2009, http://www.shipbreakingplatform.com/dmdocuments/submissions/BP_May_2009.pdf

Convention opens up a door for standardization of the ship breaking process across jurisdictions and this will hopefully lead to a stop of the current race to the bottom amongst ship breaking nations.¹⁴³

7.3. Communication with IMO

Another positive improvement in the Hong Kong Convention is the duty of State Parties to communicate information on the details of authorized ship-recycling facilities, ships recycled and instances of violation with the IMO.¹⁴⁴ This initiative to inform will make it easier for States to monitor of export of end-of-life ships and comply with the Convention in a more convenient way.¹⁴⁵

8. What can be done?

8.1 Extending Strict Liability

State responsibility has traditionally been based on the theory of fault liability by Hugo Grotius. This means that that action and inaction in violation of a states international obligation must be either intentional or neglectful. Whether a States action is legal or not and if that State is responsible cannot be established if there is neither intention nor negligence.¹⁴⁶ However it is explicitly pointed out "Oppenheim's International Law":

¹⁴³ Nikos Mikelis, *Developments and Issues on Recycling of Ships*, Paper presented at the East Asian Seas Congress, (2006), http://www.imo.org/includes/blastDataOnly.asp/data_id%3D17980/Developments.pdf.

¹⁴⁴ Hong Kong Convention, Art. 12.

¹⁴⁵ Nikos Mikelis, *Developments and Issues on Recycling of Ships*, Paper presented at the East Asian Seas Congress, (2006).

¹⁴⁶ Xiaodong Tou, *The Transboundary Movement of Harmful Wastes and the Transformation of Transnational State Responsibility*, 5 Macquarie J. Int'l & Comp. Envtl. L. 97, 2008

*When concerning private behavior, State responsibility is fault-based. ... The state has not give enough attention to the prevention of damages or to the punishment of offenders. However, responsibility may occur without fault in some areas. For some particularly dangerous activities, the treaties have absolute or strict liabilities.*¹⁴⁷

With the high risk of damages occurring from movement of transboundary wastes and especially the act of beaching and breaking ships the requirement the fault-responsibility principle should be reviewed. It should be replaced with the principle of no-fault or strict liability where States are responsible for their actions regardless of whether they are at fault. If one looks at the activity of illegal transboundary movements of harmful waste, this becomes even clearer. The consequence must in this case be that if a State, as a State of Export, breaches an international legal obligation, that State should bare the international responsibilities. But, if the States of Import allows a legal transboundary movements of harmful wastes and this movement does not cause damages, the States of Export should not be liable, but if damages does occur at a later stage the exporting countries subsequently become liable. Exporting countries are responsible for damages they cause whether they have obtained the consent from importing countries or not. However, in order to prevent the unpredictably high risks of transboundary damages from harmful wastes and the emergence of irresponsible transfers of waste, stricter measures must be taken.¹⁴⁸

Further one could prefer an introduction a type of Ship Recycling Fund and such a fund could be pre-financed through loans by States. Producer responsibility is well known policy with respect to waste management. The governments involved could make beneficial owners responsible, through the creation of this kind of a fund that

¹⁴⁷ Lassa Francis Lawrence Oppenheim, *Oppenheim's International Law*, (Vol. 1)1995, 406-7.

¹⁴⁸ Lassa Francis Lawrence Oppenheim, *Oppenheim's International Law*, (Vol. 1)1995, 406-7.

could be utilized to provide a full range of “technology, governance, legal and social resources and infrastructure to ensure pre-cleaning during the life of a ship” and also include environmentally sound management of hazardous wastes.¹⁴⁹

8.2 International Co-operation: The principle of “Common but differentiated responsibilities”

The Rio Declaration principle 7 states:

“States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”¹⁵⁰

What this means is that in order to protect the environment in the best way possible States need to co-operate in all ways possible. The transboundary movement of hazardous wastes and ship breaking can be more efficiently addressed if there it is a co-operation in the outlining of the rights and responsibilities of victims and breaching States. It is important to correctly define the subjects of the damage from transboundary movements of harmful wastes as well as the wrongdoers.

¹⁴⁹ International Conference on the Safe and Environmentally Sound Recycling of Ships, Agenda item 6, Consideration of the Draft International Convention for the Safe and Environmentally Sound Recycling of Ships, *Ensuring sustainable green and safe ship dismantling – concerning beaching and the establishment of a mandatory fund*, SR/CONF/14 9 February 2009

¹⁵⁰ *Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, June 13, 1992, U.N. Doc. A/Conf.151/5/Rev.1, reprinted in 31 I.L.M. 874, principle 7.

In the light of the principle of common but differentiated responsibilities developed and developing countries should not bear the same burden in the responsibility for international environmental protection. As the principle indicates this burden should be common, but differentiated due to northern countries influence on the world seen thru the eyes of history.

X. Conclusion

It will be several years before the new Hong Kong Convention will receive the required number of ratifications to bring the instrument into force. The hope is that the main source of the ship breaking States will become parties. It is possible to criticise the Convention for what it has not been able to achieve, or address effectively. However, one must not look away from the fact that it is an important achievement and addition to the international regulation of the industry.

As we have seen the Basel Convention does not provide for a bulletproof regulatory coverage of the ship recycling industry. The current definition of waste under the Basel Convention makes it easy for a ship owner to decide when he or she wants to make their vessel a waste. The lack of jurisdiction of a Port State over a vessel meant for scrapping and the vague definition of State of Export are other problems under the Basel Convention. The new Hong Kong Convention does contain certain breakthroughs for example new the cradle-to-grave approach, a more holistic view on ship recycling. This holistic view together with uniform minimum technical standards for the recycling process hopefully will change the ship breaking industry towards the better. However, it does not manage to further define or meet the equivalent level of control on some of the key elements in ship recycling and the regulatory gaps evident in the Basel Convention regime,

amongst other issues the no trade between Parties and non-Parties or the Prior Informed Consent system. Finally, it is regrettably concluded that the new Convention is also noticeably inadequate in its devotion to the basic principles of international environmental law and that it may seriously undermine its potential as an effective source of regulation. The Hong Kong Convention is not the final solution to this pressing international problem, but a baby step on the way.

It is true that the global environmental protection is the common interest of mankind. Each State is responsible for preventing environmental degradation. However, responsibilities should not be evenly distributed in an absolute sense between developed and developing countries without considering historic factors. This should be viewed on the basis of the principle of common but differentiated responsibilities relating to global environmental protection. In particular, developed countries should avoid transferring pollution originating from harmful wastes to other countries. At the same time they should help developing nations to improve their own environmental awareness. Further, the developed countries should assist developing countries to participate in negotiation and creation of international environmental conventions and get more involved in global environment and most important provide the developing countries with financial assistance and help to promote technology transfers to improve the actual environmental protection. International environmental law could be used to establish a practical and feasible mechanism to ensure that developing countries are able to receive sufficient financial assistance.¹⁵¹

¹⁵¹ Xiaodong Tou, *The Transboundary Movement of Harmful Wastes and the Transformation of Transnational State Responsibility*, 5 *Macquarie J. Int'l & Comp. Env'tl. L.* 97, 2008

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