

# **BIMCO webinar on the need to tackle the conflicting requirements of the Basel and the Hong Kong Conventions**

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24<sup>th</sup> April 2025

In this presentation I will focus on the conflicting requirements of the Basel Convention (BC) and the Hong Kong Convention (HKC) on end-of-life ships. To manage with the limited available time, I will not touch on the European Ship Recycling Regulation, unless the discussion takes us there.

The BC was adopted in 1989 and entered into force in 1992. It currently has 191 Parties. It focuses on: (a) the reduction of hazardous waste generation and the promotion of environmentally sound management of hazardous wastes; (b) the restriction of transboundary movements (TBM) of hazardous wastes except where it is perceived to be in accordance with the principles of environmentally sound management; and (c) a regulatory system applying to cases where transboundary movements are permissible (the concept of the Prior Informed Consent – or PIC).

In 1994, the 2<sup>nd</sup> Conference of the Parties (COP 2) of the BC adopted the “*Ban Amendment*”, banning outright the export of hazardous wastes from OECD to non-OECD countries. The amendment entered into force in December 2019, and it currently has 104 Parties.

In the late 90s ship recycling entered the agenda of the COPs of BC. In 1999, COP 5, with its decision V/28, instructed its technical working group to develop guidelines, in collaboration with IMO, for the environmentally sound management of the dismantling of ships. Thereafter, COP 6 in 2002 adopted the BC's voluntary "*Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships*".

While the BC may have been successful in fighting illegal exports of hazardous wastes to countries that are unable to deal with them, on the other hand the Convention was never drafted with the intention to define standards for regulating ships or their recycling and has in fact proven to be unsuitable to regulate this industry.

A key problem is that the BC is not cognisant of the concept of the flag State that is central to UNCLOS and to all maritime Conventions. Instead, the mechanism for achieving the BC's "Prior Informed Consent" relies on establishing communications between the *exporting, transit and importing* countries. This is highly impractical and inefficient, with undesirable consequences to ships as has been discussed at length in the Alliance's "non-paper" to COP 17.

The early experiences of implementing the BC's PIC procedure to ships on their final voyage were counterproductive. These failures led BC's COP 7 to reach in 2004 its decision VII/26 when addressing the question on whether BC can regulate the movement of end-of-life ships.

Quoting from the decision:

*“Noting that a ship may become waste as defined in article 2 of the Basel Convention and at the same time it may be defined as a ship under other international rules” . . . . .*

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

Responding to this call, the IMO worked from 2006 to 2009 and developed a new international Convention specific for the recycling of ships. This was adopted by a Diplomatic Conference in Hong Kong, China in 2009.

Amongst its many technical requirements, the HKC replicates the BC's requirements for the Prior Informed Consent (but with the consent being between the ship's flag State and the recycling State). Unlike the BC, HKC's requirements do not only address the environmentally sound management of wastes but also address worker safety. Additionally, HKC acknowledges the continuing applicability of relevant requirements of the BC (on the environmentally sound management of wastes) and of ILO Conventions (on occupational safety and health matters of workers).

This coming June, it will have taken just over 15 years from the date HKC was adopted to its entry into force. In that period, the mindset of ship recyclers slowly but surely changed. Recyclers, with some encouragement from the shipping industry, and having to make considerable investments, transformed many yards through improvements in infrastructure and in working procedures. Presently, a substantial portion of the ship recycling industry is ready for HKC's entry into force.

While the ship recycling industry and the administrations of the four main ship recycling States (all of which have ratified HKC) are getting ready for the entry into force of the new international regime, the same is not true of the Basel Convention's Conference of the Parties (i.e. the governing body of the BC).

Having requested IMO to develop a dedicated Convention for the recycling of ships, COP 10 of the BC considered in 2011 whether HKC could be deemed equivalent to the BC. Under organised lobbying by the NGOs who have fought from 2006 against IMO's involvement and in favour of maintaining BC as the Convention that regulates the recycling of ships, two countries with no shipping or ship recycling interests supported the NGO positions and refused to accept the equivalency. COP 10 had its focus on how to get the Ban Amendment to enter into force and therefore concluded that the peripheral question of HKC's equivalency could not be agreed at that time!

Since then, no further development has taken place at a BC COP and consequently, as the entry into force of HKC is now approaching fast, in two months' time we shall have two international Conventions in force with some crucial conflicting requirements.

It is relevant to recall that in 2024 at MEPC 81, the three South Asian ship recycling countries together with Norway, ICS and BIMCO raised in document MEPC 81/15/5 the potential legal issues concerning the interplay between the two Conventions and the risk that end-of-life ships, that will be in full compliance with HKC after 26/06/2025 could be detained in ports for violating the BC and could be asked to fulfil BC's PIC.

The submission (MEPC 81/15/5) was supported by the Committee who recalled that IMO had initiated its work on the development of HKC due to the challenges of applying BC to ships; therefore, a ship flying the flag of a State that was a Party to the HKC should no longer fall under the provisions of the Basel Convention while on its way to its final recycling destination.

The Committee agreed that legal clarity and certainty were needed to ensure that compliance with the HKC did not result in sanctions under the Basel Convention. It also agreed that the scenarios detailed in MEPC 81/15/5 illustrated the practical and legal challenges that shipowners and recycling facilities might face, potentially hindering the uniform and effective implementation of HKC.

Finally, the Secretariat was requested to develop draft guidance on the interplay between HKC and the BC.

In response, the IMO Secretariat submitted to MEPC 82 a draft guidance containing *“an option that Parties to the two Conventions may wish to consider in their efforts to provide clarity with respect to the transboundary movement of ships intended for recycling”*.

The idea behind the proposed guidance being that a State that is Party only to HKC would apply HKC to ship recycling; a State that is Party only to the BC would apply the BC; and a State that is Party to both Conventions, *“in accordance to BC’s Article 11 should consider notifying the BC Secretariat that it will apply HKC’s requirements in respect of transboundary movements of ships intended to be recycled at a ship recycling facility that has been authorized in accordance with the HKC and is situated under the jurisdiction of a Party to HKC”*.

So, what does Article 11 of the BC say?

## ARTICLE 11

### Bilateral, Multilateral and Regional Agreements

1. Notwithstanding the provisions of Article 4 paragraph 5, **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 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.

2. **Parties shall notify the Secretariat of any bilateral, multilateral or regional agreements or arrangements referred to in paragraph 1** and those which they have entered into prior to the entry into force of this Convention for them, for the purpose of controlling transboundary movements of hazardous wastes and other wastes which take place entirely among the Parties to such agreements. **The provisions of this Convention shall not affect transboundary movements which take place pursuant to such agreements provided that such agreements are compatible with the environmentally sound management of hazardous wastes and other wastes as required by this Convention.**

BIMCO in its submission MEPC 82/16/6, while welcoming the submission by the IMO Secretariat, suggested that the proposed Provisional Guidance “*does not appear to encourage a clear and robust implementation of the HKC, nor does it seem to provide more legal certainty*”.

BIMCO also said in its submission: “*[This] will create a patchwork of different national and/or regional regimes, impossible for the shipping and ship recycling industry to comply with. To avoid being sanctioned, a shipowner would need to consult every competent authority involved in all the TBMs to ascertain whether each respective authority would apply BC or HKC requirements.*”

I would go a step further and say that the proposed solution cannot work: The proposed unilateral declaration of a flag State is not a “Bilateral, Multilateral or Regional Arrangement” as envisaged by Article 11. Also, without a COP of the BC having agreed on the equivalency between HKC and BC it is very difficult to see how the declaration of a flag State under Article 11 could be accepted by the BC Secretariat. Furthermore, the “exporting State” and any “Transit States” cannot be obliged to respect the declaration of a flag State. The outcome of this proposed solution is that each Party to the BC will be free to make its own determination! So, where is the benefit of having an international Convention to regulate ship recycling?

COP 17 will be held from 28/4/25 to 9/5/25. In its agenda under its generic item “International Cooperation and Co-ordination”, among other matters the COP will also consider, in the afternoon of Wednesday 30<sup>th</sup> April, IMO’s *Provisional Guidance on the implementation of HKC and BC with respect to the transboundary movement of ships*.

The draft decision of COP 17 presently states the following:

*20. Takes note of the information provided by the secretariat of the International Maritime Organization .....*

*21. Invites Parties and observers to submit to the Secretariat, by 31 July 2025, comments on the provisional guidance referred to in paragraph 20 above;*

*22. Requests the Secretariat, subject to the availability of resources, to reflect the comments received on the provisional guidance referred in paragraph 20 above and to submit the updates to the provisional guidance for consideration by the Open-ended Working Group of the Basel Convention at its fifteenth meeting;*

The BC OEWG will be held in 2026 and will report to COP 18 to be held in 2027. Unless the terms of reference of the OEWG are widened, for it, not only to consider comments on the Provisional Guidance, but also to seek a pragmatic solution that acknowledges the relevance of HKC, I believe we will have wasted the next two years.

So, other than the Article 11 route, that would not result in HKC taking its rightful place as the global set of regulations for the recycling of ships, what solutions are there?

(1) BC to evaluate HKC and conclude on its equivalency to the BC.

(2) BC to agree that the PIC should not apply and the provisions of HKC's IRRC would apply for ships that fulfil the requirements of HKC and are to be recycled in an HKC Party.

(3) BC to confirm that it recognises the provisions of the Vienna Convention on the Law of Treaties which allow States to give preference to the requirements of the most recent convention and the convention governing a specific subject matter (*lex specialis* and *lex posterior* principles).

(4) BC to revisit and annul its decision VII/26 of COP 7 (quoted in my 3<sup>rd</sup> slide), which states that “*Noting that a ship may become waste as defined in article 2 of the Basel Convention and at the same time it may be defined as a ship under other international rules*”. As mentioned in the Alliance's “non-paper”, according to that decision, the moment a shipowner decides to recycle his ship, this is deemed to be hazardous waste. Why are there no known precedents in aviation where a fully operational airplane is deemed waste, even if the owner plans to dispose of it in the near future?

Most participants to the BC COPs are representatives of Ministries of Environment of the BC's Parties and while they have the necessary expertise in important and critical fields, they cannot be expected to understand the governance and the way international shipping operates. The danger therefore is that, unless the BC COP can be made to understand the significant advancements made under the HKC and its guidelines, the COP may most likely default to offering no solution for ship recycling.

A ray of hope, however, may be found in a submission by the European Union to IMO (MEPC 83/16/3) proposing: *“the establishment of a collaboration process with the BC in order to provide further clarity and certainty regarding the implementation of the BC and HKC with respect to the transboundary movement of ships intended for recycling”*.

In closing, I wish to invite you to consider the effects of BC being unwilling or unable to provide a solution to its conflict with HKC on the TBM of end-of-life ships.

- What might happen to individual end-of-life ships caught in a port of a State that does not consider that BC and HKC are equivalent?
- What would happen to HKC itself, two or three years after its entry into force, if it has failed to become the global regulatory instrument for the recycling of ships?
- Would shipowners be keen to fly the flag of an HKC Party to their end-of-life ships?
- Would flag States that have not yet ratified HKC be motivated to ratify it?

Thank you for your attention