

MARINE ENVIRONMENT PROTECTION
COMMITTEE
82nd session
Agenda item 16

MEPC 82/16/7
9 August 2024
Original: ENGLISH
Pre-session public release:

ANY OTHER BUSINESS

Comments on document MEPC 82/16 providing draft guidance on the implementation of the Hong Kong and Basel Conventions regarding the transboundary movement of ships intended for recycling

Submitted by CSC

SUMMARY

Executive summary: This document comments on document MEPC 82/16 (Secretariat) and invites the Committee to consider proposals for ensuring an efficient and streamlined simultaneous enforcement of both the Basel and Hong Kong Conventions. The document outlines why, in accordance with the Vienna Convention on the Law of Treaties and the text of the Basel Convention itself, it is impossible to consider the Hong Kong Convention a valid Article 11 agreement under the Basel Convention.

Strategic direction, if applicable: 7 and 8

Output: 7.1 and 8.1

Action to be taken: Paragraph 21

Related document: MEPC 82/16

Introduction

1 This document is submitted in accordance with the provisions of paragraph 6.12.5 of the *Organization and method of work of the Maritime Safety Committee and the Marine Environment Protection Committee and their subsidiary bodies* (MSC-MEPC.1/Circ.5/Rev.5). It comments on document MEPC 82/16 (Secretariat) providing draft guidance on the implementation of the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009 (HKC) and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (BC) regarding the transboundary movement of ships intended for recycling.

Background

2 BC Parties adopted Decision VII/26 at the seventh Conference of the Parties (COP-7). This decision established that ships can be a waste under the BC. Indeed, ships are very likely to be hazardous wastes as they most often contain or consist of BC Annex I

constituents that present BC Annex III characteristics. Decision VII/27 furthermore encouraged the International Maritime Organization (IMO) to make sure any new legislation on ship recycling to be developed, be done in a manner that would provide an "equivalent level of control" to the controls provided by the BC. This was an abbreviated way of referring to the requirements of Article 11 of the BC, as outlined in document MEPC 82/16, which necessitate that any bilateral, multilateral or regional agreements intended to replace the BC on the control of the transboundary movement of hazardous wastes include "provisions which are not less environmentally sound than those of the Convention in particular taking into account the interests of developing countries."

3 The issue of whether the HKC provides an equivalent level of control as that of the BC was debated following the adoption of the HKC. Many BC Parties weighed in at the time, as did international legal experts, including the [Center for International Environmental Law \(CIEL\)](#), the [UN Special Rapporteur on Toxics and Human Rights](#) and the [NGO Shipbreaking Platform](#).

4 The issue was raised in 2011 at the BC's tenth meeting of the Conference of the Parties (COP-10). As noted in Decision 10/17 of that meeting, the Parties could not agree that there was equivalence, and so acknowledged that the "*Basel Convention should continue to assist countries to apply the Basel Convention as it relates to ships.*"

5 The [Center for International Environmental Law \(CIEL\)](#) and [Dr. Ludwig Kramer](#) issued similar analyses of equivalence to the European Commission upon adoption of the European Union's (EU) Ship Recycling Regulation 1257/2013 (EU SRR), explaining in detail why the EU SRR, based on the HKC, but including additional requirements and control mechanisms related to downstream waste management and independent certification, and the EU Waste Shipment Regulation 2024/1157 (EU WSR), which incorporates the BC at the EU level, are far from equivalent.

Interpretation of treaties under the Vienna Convention

6 Document MEPC 82/16 incorrectly asserts that "the interpretation of treaties is the sole prerogative of the States Parties thereto." Rather the Vienna Convention on the Law of Treaties (VCLT), asserts in Article 31 that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The VCLT further asserts that unless a subsequent agreement is made by all Parties collectively, the ordinary meaning remains binding. On the subject of "Application of successive treaties relating to the same subject matter" (Article 30), the VCLT reasserts the principle that unless all of the Parties agree to an interpretation that the competency of one treaty can be replaced by another, the original treaty stands. Seen in this light by the treaty governing treaties, it is therefore not correct that ignoring key articles and principles and requirements of the BC is "an option that Parties to the Hong Kong Convention and the Basel Convention may wish to consider."

HKC cannot be considered a valid BC Article 11 agreement

7 The ordinary meaning, purpose, and context of the BC, including its Article 11, is very clear. An Article 11 agreement formed subsequent to the entry into force of the BC must ensure that it includes "provisions which are not less environmentally sound than those of the Convention in particular taking into account the interests of developing countries." The aforementioned critical analyses of the two treaties make it clear that there are numerous instances where the HKC is less environmentally sound, less rigorous, less restrictive, than the BC.

8 The Prior Informed Consent (PIC) procedure under the BC provides countries with the right to refuse or consent to import and export of hazardous waste, aiming to ensure environmentally sound management of such waste all the way downstream, including disposal. Decisively, an equivalent PIC procedure is absent in the HKC. It has also become apparent that the HKC lacks equivalence in terms of ensuring the safe and environmentally sound management of end-of-life ships within the premises of the ship recycling facilities (e.g. lack of impermeable floors and drainage systems) to prevent hazardous materials from leaking into the marine environment.

9 However, most decisively, with the entry into force in December 2019 of the BC Ban Amendment, embodied within the BC as Article 4a and in the eighth recital of the preamble, which states: "Recognizing that transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous wastes as required by this Convention", the list of reasons why the HKC is not equivalent of the BC has now become longer and irrefutable.

10 As a result of the entry into force of the BC Ban Amendment, the newly recast EU WSR, which entered into force on 20 May 2024, cited the BC Ban Amendment and reversed the previous exemption of ships sailing under an EU flag as being wastes subject to BC control. The export of all end-of-life ships from the EU, regardless of flag, is thus, again, only allowed to countries listed in the BC's Annex VII. Indeed, the authorization scheme for ship recycling facilities under the EU SRR was not deemed equivalent to a no-exceptions ban on the export of hazardous waste to countries not listed in the BC's Annex VII.

11 It should also be noted that several shipowners have already been held [accountable for violating the BC](#) after ships were illegally exported from European ports to shipbreaking beaches in India, Pakistan and Bangladesh. With more than one third of the end-of-life tonnage owned by European shipping companies, enforcement officers across Europe have become increasingly aware of how the shipping sector seeks to circumvent obligations under the BC.

12 It is thus indisputable that end-of-life ships are hazardous waste, as BC decisions and recent legal precedents for criminal liability showcase. In accordance with Article 1 of the BC, and in the absence of proof to the contrary, end-of-life ships must be assumed to be hazardous as long as they contain substances or materials listed in BC Annex I and that present BC Annex III characteristics.

The way forward: dual competency

13 The idea that one must be compliant with multiple laws at the same time should not be controversial.

14 The BC and the HKC do different things, with different purposes and requirements. As such, they are not redundant, and further, fulfilling one Convention's requirements does not contradict or violate fulfilling the other's. The notion that it is either one or the other is not supported by a reading of each. In fact, both can coexist, and together could provide the best level of international coherence and environmentally sound management of ships at end of life. Because each Convention adds its own layer of protection to the issue of a ship's life cycle management, dual competency is in fact the best way forward.

15 Indeed, when looking at the life cycle of a ship, the HKC could be amended to more effectively cover green ship design and build, as well as the operational life of a ship. The BC is then best suited to manage ships from the moment they are intended to be discarded, including the implementation of the Ban Amendment (BC Article 4a) and the PIC procedure (BC Article 6), giving Parties their right to refuse to consent to import, and exporting countries

the right to not allow an export if they fear there is no guarantee of environmentally sound management (ESM) all the way downstream, including the final disposal of hazardous materials such as asbestos, lead, mercury and NORM (naturally occurring radioactive materials) as well as with regard to the methods for re-processing contaminated scrap steel.

16 The actual operations of the recycling facility can be best done in accordance with the most rigorous aspects of each Convention's respective guidance documents, while the BC must maintain its full competency over ESM at the facility, the offsite downstream management of residual waste (where the HKC has no obligations), and the procedure for allowing, or not, the export of hazardous waste, including end-of-life ships, accordingly.

17 In that regard, it is worth noting the report of the Special Rapporteur: <https://documents.un.org/doc/undoc/gen/g23/120/88/pdf/g2312088.pdf> on their visit to IMO, submitted to the UN Human Rights Council's fifty-fourth session. Paragraph 88 of the report states when referring to the HKC: "Most prominently, the Convention does not prohibit beaching. Furthermore, it does not include provisions on the duty to re-import illegally transferred waste or the duty to minimize the transboundary movement of waste." The report goes on to conclude and recommend that IMO: "Commit to examining and evaluating the human rights impact of shipbreaking, including the implications of beaching, with a view to amending the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships;" and "Analyse shipbreaking activities closely by paying special attention to potential human rights violations and abuses, especially in the context of beaching".

18 Finally, it is well known that ships can too easily be ordered to make legally convenient transboundary movements before they might be declared as waste as a way of circumventing the BC's obligations to obtain consent for export and import. Likewise, flag States have little say in a shipping company's choice of register, and it is widely [documented](#) that flag-hopping to MoU grey- and black-listed registries at end-of-life is currently common practice.

19 These shortcomings of both Conventions in terms of scope, which are unique to the subject of ships, should be rectified and placed on the global agenda. Decisions to scrap ships are not made by flag States or port States in most cases. They are taken in offices in the world's shipping hubs. It is thus logical for both BC and HKC to consider placing export status and responsibility on the state where the beneficial owner of the ship is headquartered. That would allow for more efficient and streamlined simultaneous enforcement of both Conventions.

20 Meanwhile, consideration should be given to creating guidance between the two Conventions as to how cooperation and shared competencies can be best accomplished nationally and internationally.

Action requested by the Committee

21 The Committee is invited to consider the information and proposals in this document and take action as appropriate.
