

Obligations and Opportunities for a Mandatory Alternate or Additional Instrument to the Basel Convention for End-of-Life Ships

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1. Introduction

- 1.1. This paper is designed primarily to serve those countries that are Basel Parties in their deliberations regarding the transboundary movement and waste management of end-of-life vessels in other venues such as the International Maritime Organization (IMO). At the outset this paper reminds the Basel Parties that end-of-life ships containing hazardous materials with hazardous characteristics fall under the scope of the Basel Convention. Shipping industry objections to this fact notwithstanding, this is the case now and for the foreseeable future. What remains to be seen is whether efforts in other for a, such as the IMO, will fulfill the requirements of the Basel Convention and the decisions of its Parties.
- 1.2. To this end, the paper discusses the obligations of countries that are Parties to the Basel Convention established by decisions taken by the Conference of Parties, and in particular by Decision VII/26 (Annex 1), by the definition of Environmentally Sound Management found in the Convention, by Article 11 of the Convention, and by the overarching principle of environmental justice which was the basis for the Basel Convention and the original rationale for its creation including its mandated trade restrictions for hazardous wastes
- 1.3. A review of these Basel obligations indicates that there is no escaping that any regime proposed in a venue other than the Basel Convention must achieve an “*equivalent level of control*” and must not “turn back the clock” on well established principles that served as a basis for Basel that were designed to ensure that developing countries were not unduly or disproportionately burdened by hazards and risks. Further, as equivalency is to *at least* be assured, it stands to reason that the only justification for any new regime in any venue must be on the basis of improving upon the existing regime while retaining its core provisions, obligations and spirit.
- 1.4. What is needed then is very clearly not a step backwards from existing levels of control but a strengthening of the Basel regime and its principles with respect to its shortcomings. This is justified by making the Basel Convention become more workable and proactive for the special requirements of ships while not abandoning what has already been agreed to by the global community. This

paper not only identifies the areas where improvements can and should be realized in any venue, but likewise identifies the essential obligations of the Basel Convention which must be mirrored, at least in function, to achieve an equivalent level of control.

2. Basel Convention Obligations for End-of-Life Vessels

- 2.1. The Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and their Disposal deals with all matter of hazardous wastes and their transboundary movement. Wastes under the Convention are defined 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.*” “Disposal” is defined by destinations listed in Annex IV of the Convention which includes both final disposal and recycling destinations. It is clear that ships are “substances or objects” and that facilities involved in the recycling of ships are disposal destinations under the Basel Convention.
- 2.2. To date, the Parties of the Basel Convention have solicited views on whether or not end-of-life vessels are to be considered wastes under the Convention and international law. They first asked international maritime law expert, Prof. Geir Ulfstein¹, who while recognizing the now well known loopholes by which shipowners might circumvent the Basel Convention, concluded that beyond doubt, end-of-life ships are “wastes” under the Convention. He wrote:

“No distinction is made between cases where the waste can still be considered a ship under international law, and cases where such status no longer exists. Neither is there any distinction between cases where the waste is still used for other purposes, such as transport of cargo by vessels, and where waste is sent directly to disposal. Consequently, a vessel is to be regarded as waste whether or not it still is to be considered a ship, or it is still used for transport of cargo, as long as the decision has been taken to scrap the vessel.”

- 2.3. Likewise the Basel Convention solicited views on this matter from the Parties and from other intergovernmental bodies.
- 2.4. As a result of this process, the Parties (with the noted exception of India which spoke out in opposition to this view at the Seventh Conference of the Parties), have concluded that end-of-life vessels or ships which contain hazardous materials possessing hazardous characteristics, are indeed to be considered hazardous wastes falling within the scope of the Convention. Notwithstanding the repeated view of the International Chamber of Shipping to the contrary,² the Parties to the Basel Convention, passed Decision VII/26 at the Seventh Conference of Parties.

¹ To be found at: <http://www.ban.org/Library/dismant.PDF>

² For a critique of the International Chamber of Shipping position on this subject, see: <http://www.ban.org/Library/Legal%20application.pdf>

- 2.5. This decision noted that: *“a ship may become waste as defined in article 2 of the Basel Convention and that at the same time it may be defined as a ship under other international rules,”* and moreover Parties in Decision VII/26, entitled “Environmentally sound management of ship dismantling” called upon Parties to: *“fulfill their obligations under the Basel Convention where applicable, in particular their obligations with respect to prior informed consent, minimization of transboundary movements of hazardous wastes and the principles of environmentally sound management.”*
- 2.6. It is to be noted that the Basel Convention defines environmentally sound management as, *“taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.”*
- 2.7. Decision VII/26 then, clearly tasks the Basel Parties with applying their Basel obligations with respect to ships as wastes. At the same time the Decision VII/26 recognised the work undertaken at the IMO to and invited the IMO to *“continue to consider the establishment in its regulations of mandatory requirements, including a reporting system for ships destined for dismantling, that ensure an equivalent level of control as established under the Basel Convention and to continue work aimed at the establishment of mandatory requirements to ensure the environmentally sound management of ship dismantling, which might include pre-decontamination within its scope.”*
- 2.8. Finally, the Parties in Decision VII/26 requested the Basel Convention’s Open Ended Working Group to, *“consider the practical, legal and technical aspects of the dismantling of ships in the context of achieving a practical approach to the issue of ship dismantling, to report on developments and to present any proposals, as appropriate, to the Conference of the Parties at its eighth meeting on a legally binding solution, taking into consideration the work of the International Maritime Organization and the work of the joint working group.”*
- 2.9. In sum, what the Basel Convention has therefore concluded that currently the Basel Convention applies to ships and that Parties are to exercise their obligations with respect to ships as waste. Further, these obligations include minimizing transboundary movement, ensuring prior informed consent, and their environmentally sound management. At the same time the Basel Convention recognized the work undertaken at the IMO and asked that such work be mandatory in nature and ensure an equivalent level of control as the Basel Convention and also that mandatory requirements ensure environmentally sound management. They also signaled that the IMO should consider pre-decontamination as a way that this might be achieved. At the same time, the Parties agreed to continue to solve some of the legal difficulties within the Basel Convention’s working groups.

3. What Can be Promoted within the IMO by Basel Parties?

3.1. The actions noted above based on their consensus decision begin to provide a basis for understanding what should appropriately be promoted by Basel Parties in any venue. The decision has likewise indicated and helped to define a possible and appropriate role for the IMO in helping to solve the shipbreaking crisis. Of key significance in this regard is the question of what constitutes “*equivalent level of control*” and “*environmentally sound management*.” Additionally, as any IMO instrument will likely need to be considered an *Article 11 agreement* under the Basel Convention, the criteria for such Article 11 agreements allowed under the Basel Convention also need to be examined very carefully. Finally, it is essential to take a measure of the intent and spirit of the Basel Convention and its design around the overarching environmental justice principle. These will be examined, each in turn and in appropriate detail.

“Equivalent Level of Control”

3.2. As there can be no point in replicating a control regime “equivalently” if it already exists in the Basel Convention, which as a matter of fact, includes the vast majority of nations in the world as Parties, it is clear that what is expected is that the IMO will create a regime that is “at least the equivalent” level of control as that found in the Basel Convention. But at the same time will, in fact be augmented by elements that serve to close identified loopholes and gaps found in the Basel Convention when the specific waste stream of end-of-life vessels is involved and perhaps expand the existing scope of action such as creating provisions that impact the design and operational part of a ship’s life cycle. In short, the IMO is expected to cover the obligations of the Basel Convention and at the same time, provide additional provisions which serve to better fulfill those obligations and objectives in the specific case of ships.

3.3. What would not be acceptable to the Parties of the Basel Convention is if the IMO used the exercise of legislating on the transboundary movement and disposal of ships, to create a regime that is far less rigorous in terms of the controls and obligations required.

3.4. It is thus important to examine the most important elements that make up the “level of control” that Basel requires. At the outset it is important to note that the “equivalent level of control” of the Basel Convention cannot be confined alone to strictly the mechanics of the prior informed consent mechanism as laid out in Articles 5, 6 and 8 of the Convention. Level of control does not translate to “control mechanism” but is far broader than that. For example, the controls of the “control mechanism” found in Article 6 have very much to do with decisions made by competent authorities that cannot be made outside of the context of the general obligations and goals found in the Convention. The decision for consent

made by competent authorities must draw upon the general intent and obligations found in the Basel Convention. Likewise, the Basel Convention goes far beyond merely prescribing requirements for Environmentally Sound Management.

- 3.5. Below we list some of the key provisions that create the Basel level of control, as well as discuss their control significance and any special considerations for ships. These must be seen as Basel at a minimum, by any body wishing to achieve equivalent levels of control.
 - 3.5.1. **The Instrument or Regime must be Legally Binding.** Equivalency obviously requires that any instrument must be legally binding on Parties to it as is the Basel Convention for all of the essential provisions outlined below.
 - 3.5.2. **Definition of Waste and Hazardous Waste (Articles 1 and 2, Annexes I, III, IV, VIII and IX)** The control regime of Basel certainly, at the outset, begins with the definition of what is to be controlled. Wastes are defined in terms of any materials destined for an Annex IV destination. Hazardous wastes are defined both by annexes (1.1.b) and by national definitions. To be equivalent to Basel, these definitions need to be maintained.
 - 3.5.3. **Obligation to minimize the generation of hazardous wastes. (Article 4.2.a)** This is an area where considerable progress can be made by the IMO with respect to ships. They alone are in a good position to mandate green ship design and the phase-out of use of toxic substances.
 - 3.5.4. **Obligation to minimize transboundary movement of hazardous waste. (Article 4.2.d)** This provides the context for the statement regarding pre-decontamination in decision VII/26 quoted above. Pre-decontamination is a very practical way in which transboundary movements of hazardous waste ships can be minimized. This obligation is also a major consideration for each competent authority in their decision as to whether to grant consent to export a vessel. It must always be looked at through the lens of whether or not the transboundary movement is necessary for environmental reasons. Thus this obligation is very much a part of the “control” of the Basel Convention.
 - 3.5.5. **Obligation to establish waste management capacity nationally. (Article 4.2.b)** Here is a clear mandate that each state should develop its own capacity for waste management as an alternative to export. Certainly while it is understood that not every state can do this, certainly wealthy nations of the OECD or collectively, the EU can do this. This is also part of the criteria that has to be weighed by a competent authority exercising a level of control under Basel. For example, if a country has the capacity to manage ships at home it should do so.

- 3.5.6. **Obligation to ensure environmentally sound management. (Article 4.2.e and g)** 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. It is absolutely vital that the exporting state as well as the importing state have the right to forbid the transboundary movement unless they are convinced that “all practicable steps” have been taken to ensure the protection of human health and the environment in the course of movement and disposal/recycling of the waste.
- 3.5.7. **Establishment of State responsibility for Import, Export and Transit States. (Article 2 and throughout the Convention)** Much of the effectiveness of the Basel Convention stems from the fact that all decisions for approving an export, import or transit of hazardous wastes must be scrutinized and consented to prior to initiation by national governments, not private sector actors. This state responsibility implies state liability, thus there is special liability placed upon the initiating entity – the exporting state – or state with jurisdiction over the exporter. This supplies an incentive to further reduce the generation of hazardous wastes – in the case of ships for producing ships without toxic substances. The flag state can not be considered to have the kind of responsibility over the owners, comparable to “export state” under Basel and thus it is clear that an “equivalent level of control” must consider more states as responsible for a transboundary movement initiation, than simply the flag state. This should likely include port states and states with jurisdiction over owners.
- 3.5.8. **Requirement that Prior Notification take place and Consent be obtained prior to any export. (Articles 4.1.c and 6)** No shipment of waste should take place without all States Concerned being informed and consenting to it. It is well known that this requirement can be circumvented by unscrupulous waste ship traders because they can declare a ship to be a waste only after it is in international waters or already at the shipbreaking state. This loophole and the difficulty that the Basel regime sometimes has for determining “intent to dispose” and the “State of Export” are the justifications given for a new regime of “equivalent control”. Closing these loopholes is the task of the IMO or Basel.
- 3.5.9. **Illegal Traffic is considered criminal (Article 4.3)** The Basel Convention defines “illegal traffic” and makes it a criminal act. Maintaining this level of punitive measure by states is very important.
- 3.5.10. **Full description of the owner, holder, hazardous materials, and waste must accompany the shipment as a movement document, and must be provided in advance to all States Concerned. (Articles 4.2.f, 4.7.c, and Annex V)** The Basel Convention requires transparency on matters related to ownership of waste, types of waste involved, and types of transport and

management that will be involved. Finally, the paperwork must indicate full consent by competent authorities.

3.5.11. Other provisions/functions that must be mirrored in new regimes include:

- 3.5.11.1. No export to Antarctica.
- 3.5.11.2. No trade between Parties and non-Parties.
- 3.5.11.3. Duty to re-import when things are not in accordance with contract.
- 3.5.11.4. Existence of valid contract.
- 3.5.11.5. No export to those banning import.
- 3.5.11.6. Designation of Competent Authorities/Focal Points in each State.

Environmentally Sound Management

3.6. It is very important to understand clearly that “Environmentally Sound Management” under the Convention is defined broadly as:

“Taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes;”

We will see that even without reference to VII/26, any regime purporting to promote environmentally sound management, will need to provide an equivalent level of control to that of the Basel Convention. That is because “taking all practicable steps” includes, but goes far beyond merely technical guidelines for downstream waste management. “Taking all practicable steps” includes following all of the obligations of international law found in the Basel Convention as well as taking national measures such as providing monitoring, enforcement, worker protections, training, medical and emergency response infrastructure, liability and compensation protections, rights of access to information regarding risk, downstream waste management infrastructure, occupational safety and health infrastructure etc. Very often these “practical steps” which can be far more important than technological levels or standards in terms of protecting human health and the environment, are lacking in developing countries due to a lack of resources.

3.7. Additionally, it must be understood that “management” of wastes includes upstream endeavors to prevent and reduce wastes at source and not just management of wastes once produced. Transboundary movement must be seen in this light. The transboundary movement of hazardous wastes to developing countries that takes place for economic reasons represents an externalizing of operating costs of the shipping industry and thus serves as a disincentive for upstream hazard and waste reduction. Thus any regime looking to ensure environmentally sound management of waste ships will need to reflect the Basel obligations to minimize trade and generation of hazardous waste ships, and

moreover, will require all practical safeguards put into place by the national and local authorities.

Article 11 Agreement Requirements

- 3.8. For those countries that are Parties to the Basel Convention, any regime that governs the transboundary movement of hazardous wastes outside of the Convention will need to adhere to Article 11 of the Convention.
- 3.9. It must be noted that recourse to Article 1.4 to exclude ships themselves from the Basel Convention is not applicable. Article 1.4, reads:

“Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument, are excluded from the scope of this Convention.”

Clearly, this was meant to apply to waste ballast waters, sewage, engine oils etc. covered under MARPOL at the time the Basel Convention was adopted. Ships themselves cannot be considered to be “wastes derived from the normal operations of a ship.” Shipbreaking is not a “normal operation” of a ship, and a ship cannot be “derived” from its operation.

- 3.10. Thus, short of amending the Convention, Article 11 must be seen as the avenue by which another regime governing transboundary movement of waste can be in accordance with the Convention. Article 11 reads as follows:

“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.” [emphasis added]

- 3.11. The language “do not derogate from” and “provisions that are not less environmentally sound” likewise echoes Decision VII/26 and its call for “equivalent level of control”. When we read further that this must be considered “in particular taking into account the interests of developing countries”, we are handed an even more explicit reminder of the importance of adhering to the Basel Convention’s provisions outlined above in the case of export of ships for scrapping – the vast majority of which takes place currently in developing countries.

- 3.12. When the paragraph was written, and indeed the Basel Convention itself with its many references to the particular interests of developing countries, was drafted with the protection of developing countries from the impacts of economically motivated dumping of hazardous wastes via disposal or recycling firmly in mind. This is what the Basel reference to “interests of developing countries” refers to, and is precisely the same concern applicable today to the phenomenon which is well known to victimize workers in developing countries involved in shipbreaking. While these workers need employment, they do not need the toxic wastes that accompany end-of-life ships that have not been pre-decontaminated prior to their export. The “interests of developing countries” today with respect to ships is known to be access to the resource of steel *without* the simultaneous importation of hazardous waste.
- 3.13. Thus it can be concluded that Article 11 forbids any derogation which facilitates rather than prevents the transfer of hazardous wastes or hazards found in end-of-life ships to developing countries by any another bilateral, multilateral, or regional agreement or arrangement which might take place under the IMO or elsewhere.

3.14. Fundamental Underlying Principle in Basel – Environmental Justice

- 3.14.1. The Basel Convention and its Basel Ban Amendment recognizes very clearly that there are markedly differing economic levels prevalent in the world today. Free markets and globalization opens up numerous opportunities for all, but also opens up opportunities for exploitation of lower-wage communities and countries. This was recognized as an abhorrent phenomenon by the global community in the late 1980s and was the driving force behind the development of the Basel Convention.
- 3.14.2. The Basel Convention was born out of an outrage that recognized that it was not appropriate to utilize low-wage countries and communities, that while desperate to alleviate their impoverished conditions, would be ill served by having to bear a disproportionate burden of environmental and health risks, simply because they are poor.
- 3.14.3. And it must be realized that this principle which later became articulated as the principle of environmental justice, cannot be resolved entirely by improving conditions and technologies in developing countries. This is due to two reasons. First, because there is far more to environmental protections than simply technological advances. Without the political, financial, legal, and medical infrastructure to support a dangerous technology, workers in developing countries cannot be adequately protected. These aspects are almost always lacking in developing countries and it is impossible to simply export them. And, second, because handling hazardous wastes even in state-of-art conditions is still hazardous and fraught with risk. There is an

increased likelihood of occupational disease and adverse environmental impacts which should not be disproportionately born simply because of one's economic status.

- 3.14.4. Further exporting hazards for economic reasons to weaker economies, was seen as a means for those responsible for the economic activity that created the waste, of externalizing the real environmental costs associated with it, creating exploitive economic inefficiencies that moreover served as a disincentive to eliminating hazards and wastes upstream through preventative measures. Put simply, as long as cheap (and dirty) avenues for waste disposal existed, there would be little incentive to design products and processes that reduced wastes and hazards at source.
- 3.14.5. The Basel Convention also recognized that recycling, despite it being most often preferable to dumping, can very often be little more than that in terms of environmental and occupational health impacts. The Basel Convention recognized that recycling hazardous wastes has serious environmental and health implications and for this reason the Convention required equivalent controls for recycling and final disposal.
- 3.14.6. It was for all of the above reasons that the Basel Convention did not just call for Prior Informed Consent and ESM. Rather it called very clearly for a **minimization of transboundary movement, particularly to developing countries and a national self-sufficiency in waste management driven by clean production** – the obligation to minimize the generation of hazardous and other wastes.
- 3.14.7. These principles were further strengthened and endorsed by the consensus decisions taken in 1994 and 1995 banning all export of hazardous wastes for recycling and final disposal from OECD/EU/Liechtenstein (Annex VII) countries to all other countries (non-Annex VII) countries. It must be noted that this ban was supported by India, China and all the G-77 group of developing countries.
- 3.14.8. Any equivalency control regime for toxic end-of-life ships must reflect these Basel Convention and Basel Ban Amendment principles if the world is not going to take a giant step backwards from the stand it took on behalf of developing countries in 1989 and further strengthened in 1995 with the passage of the Basel Ban Amendment.

4. What is needed beyond what now exists in Basel

- 4.1. Above we have identified what is already in place in the body of international law both in terms of specific provisions as well as the underlying principles, regarding waste ships and their trafficking. These provisions would need to be replicated for any new regime to be considered in accordance with Article 11 of

the Basel Convention, in accordance with the requirements of Decision VII/26, and the definition of Environmentally Sound Management and the overarching principle of environmental justice.

- 4.2. Now it is time to acknowledge the special provisions that might be needed to truly improve and build upon what currently exists in the Basel regime with respect to end-of-life ships. Clearly the only justification for creating a new regime is to improve upon the older one, by strengthening it to ensure that principles established in the Basel Convention by the global community in 1989 are upheld and made applicable to ships.
- 4.3. It is well known that the Basel Convention cannot easily, as it now stands, deal with unscrupulous traders who might wish to circumvent it. It is well known that additional provisions are needed to close the identified loopholes. These loopholes have been distilled to: a) determining intent to dispose and thus the moment in which a ship becomes a waste, and b) determining the appropriate equivalent to “state of export” with respect to ships as waste which can be anywhere on earth at any given time. BAN and Greenpeace have earlier submitted to the IMO and to the Basel Convention a paper³ outlining some concrete ideas of how these Basel loopholes can be closed. By this exercise we know that the problem is far from legally insurmountable if the will exists to do the job. We believe that the debate is far from conclusive which venue, IMO or Basel, is best to accomplish that.
- 4.4. On the other hand, we have also recognized that the IMO is in a far better position than Basel do deal with issues surrounding activities that take place during the life of a ship prior to it becoming a waste. Combining all of these ideas, we have identified the following additional provisions that can improve on the Basel regime with respect to end-of-life, or waste ships wherever they eventually find their home in the body of international law:
 - 4.4.1. **Full transparency needed regarding “intent to dispose”** with relevant authorities (Port States, states with jurisdiction over the owner, and Flag states) prior to arrival at a shipbreaking country. (The ease by which intent to dispose can be disguised until all transboundary movements are over, is a glaring loophole in Basel that needs to be closed)
 - 4.4.2. **Establishment of equivalent of Basel “Exporting State” for ships** which might be the state with jurisdiction over the owners, or shipbuilding state. (This is another glaring problem in Basel. An equivalent to exporting state needs to be found which holds responsibility for the waste being generated in the first place)
 - 4.4.3. **Need to mandate green shipbuilding**, including methodologies to ease recycling and to minimize the use of hazardous materials. (This is already

³ Find at: http://www.ban.org/Library/BAN_Submission_shipbreaking_jan04.pdf

an obligation under Basel, but specific mandates are needed)

- 4.4.4. **Need to mandate or encourage pre-cleaning of ships during their working life in OECD/EU countries.** Incentives need to be explored to remove TBT paints, mercury, asbestos and PCB impregnated materials during the life of all ships. (This is consistent with the Basel obligation to minimized transboundary movement as well as the Basel Ban but is not being practiced for ships)
 - 4.4.5. **Need to create incentives or mandates for ship decontamination facilities and ship recycling capacity in developed countries.** (This is already an obligation under Basel, but is not being practiced for ships)
 - 4.4.6. **Need to provide absolute transparency regarding the identity of shipowners** at all times, available to all. (This is already mandated under Basel after a ship becomes a waste, but must be practiced for ships during operational life as well as after a ship becomes a waste)
 - 4.4.7. **Need to provide full transparency at any given time for all hazardous substances on board ships** to all relevant authorities and including documentation onboard a ship at any given time. (This already is required under Basel once a ship becomes a waste, but is not being practiced for ships. Further it needs to be done throughout operational life as well)
 - 4.4.8. **Need to provide for all ships destined for shipbreaking yards in developing countries (non-OECD/EU) to be decontaminated in OECD/EU** prior to delivery to the fullest extent possible.
 - 4.4.9. **Non-OECD/EU shipbreaking countries agree to not accept any vessels that have not been pre-cleaned in OECD/EU countries.** (This is fully consistent with obligation to minimize transboundary movement, as well as the Basel Ban Amendment)
- 4.5. Just as Section 3 above serves as a checklist for provisions or functions that need to be retained in any new regime, the above list serves as a checklist of what still needs work, either at the IMO or Basel or elsewhere. If the above are not being developed then the exercise to create a new regime becomes very dubious.

5. Conclusion

- 5.1. This paper serves to clarify the obligations placed on Basel Parties (which most IMO treaty Parties are) in the creation of any future regime to deal more specifically with end-of-life (waste) ships destined for recycling. These obligations include those outlined in Decision VII/26, the definition of Environmentally Sound Management, Article 11 of the Convention, all of which need to be informed by the overarching principles of environmental justice.

- 5.2. It is clear that any future regime, whether in Basel or the IMO or elsewhere, must be one that provides more specificity and rigor to what currently exists in the Basel Convention and retains respect for the fundamental principles under which that Convention was created. The Basel Convention can in this light be seen as being rather comprehensive but lacking in aspects having to do with the special nature of ships and their mobility as well as lacking in an ability to create obligations on shipowners prior to a ship becoming a waste. These include the need to clean ships during their operational life and to build them in a more sustainable, environmentally friendly manner.
- 5.3. To date, the stated justification for the IMO taking action on ships apart from the Basel Convention is because Basel is perceived as not being able to provide an adequate working mechanism within its existing provisions for properly dealing with the special problems presented by mobile waste that ships can become. The implication is that Basel is not workable for ships, and thus something more can be provided by the IMO to make Basel more workable.
- 5.4. However, contrary to this assertion, what has been observed to date by the statements of those pressing hardest for moving competency from Basel to the IMO, as well as an examination of the existing work plan established so far within the MEPC is the desire for a regime that is far less rigorous than what now exists in Basel, and at the same time do very little to establish the provisions necessary to improve upon the workability that Basel is said to lack.
- 5.5. In this regard, we have often heard the mantra that any regime must be “practical”. It is not well understood what is meant by “practical” in these discussions. If creating something more “practical” means that the Basel Convention itself is not practical at its core, in trying to limit abuses of impoverished communities and workers from the impacts of hazardous wastes, then this would signal an indictment of the entire Convention. Certainly many that stand to profit from indiscriminate waste dumping have never felt the Convention was “practical” in terms of maximizing their profits. Using the word “practical” in this sense is simply indefensible.
- 5.6. So what really is meant by the repeated assertion that there is a need to be practical? Maybe the question really is “practical” for whom? It must be understood that laws exist for very pragmatic reasons as waste anarchy is as impractical for its victims as can be imagined. However, if the desire to be more “practical” is used in the sense of making Basel, its core principles and obligations more applicable and workable for ships, this would be truly practical *and* principled and indeed is the only sustainable and just way forward.
- 5.7. It very much appears though, that to many, the problem for them is that far from being unworkable and impractical, it is that the Basel Convention “works” all too well. It has already created a level of control that they refuse to accept.

These actors would prefer to turn back the clock to a free-trade in waste - an abrogation of responsibility by developed countries to proportionately deal with the global waste burden generated from ships. They want to dramatically reduce the issue to reporting mechanisms and some kind of assurances of improved conditions at shipbreaking yards because that will not deter the fundamental abuse of using developing countries as dumping grounds for environmental liabilities. This green-glossing will do nothing to minimize the transboundary movement and will still equate to massive tonnage of hazardous materials and serious risk being exported in exploitation of impoverished communities, arriving on their shores simply because they are poor and desperate.

- 5.8. It is well recognized that while these workers need jobs, and the developing countries need steel, they do not need the poisons along for the ride. The proper application of Basel with respect to this issue then is to fully recognize the economic disparities in the world and ensure that all ships are pre-cleaned at OECD/EU certified facilities prior to final delivery to shipbreaking states. Nothing short of that can be considered an equivalent level of control as established and required under the Basel Convention and the Basel Ban Amendment.
- 5.9. New mechanisms which will perpetuate the status quo whereby developing countries still receive a disproportionate burden of hazardous wastes from the global shipping industry, is precisely the kind of abuse which necessitated creation of the Basel Convention and the Basel Ban Amendment. It is both unconscionable, and as demonstrated above, illegal (for Basel Parties) to allow this to happen, and to use this as the purpose in shifting venues to the IMO or any other international forum.
- 5.10. The Basel Parties must be very certain that the IMO mandate is clear, if they are asked to assume competency for waste ships, their movements and management. They must require an equivalent level of control as that found in the Basel Convention, while closing the identified loopholes made possible by the special nature of ships and while taking proactive measures to build green ships and clean them during their operational life. This is the only outcome that can be seen as legitimate and worthy.
- 5.11. We in the NGO environmental community will fully support such an effort either at the IMO, at the Basel Convention or elsewhere, but stand ready to condemn in the strongest terms anything less.

END

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

The Conference of the Parties,

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

Recognizing that many ships and other floating structures are known to contain hazardous materials and that such hazardous materials may become hazardous wastes as listed in the annexes to the Basel Convention,

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

Noting the need to improve the standards of ship dismantling worldwide and the importance of international cooperation in achieving this goal,

Recognizing the importance of the environmentally sound management of dismantling of ships,

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

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

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

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

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

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

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

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

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

Noting the progress made at the fifty-second session of the International Maritime Organization's Marine Environment Protection Committee toward the

possible development of a mandatory scheme for ship recycling, including a reporting system for ships destined for recycling,

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

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

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