Introduction

The Basel Action Network takes this opportunity to provide just a few general comments regarding the paper prepared by the Basel Secretariat on the subject of Environmentally Sound Management of ships. We note that the Secretariat has pointed out the glaring lack of equivalency in the reporting mechanism for end-of-life ships as currently proposed by the IMO. But we fear that the Secretariat’s note failed to address the bigger picture that the issue of Basel equivalency is far greater than a reporting mechanism and should have proactively addressed what we as Parties to the Convention must do according to our mandate from Decision VII/26 to address the legal shortcomings of the Basel Convention and to provide guidance to Parties on how to implement it with respect to ships-as-waste.

BAN warns that from all appearances and reading of the motivations currently expressed, the IMO regime does not look like it will be nearly as effective as the Basel Convention in dealing with the issue at hand. This issue is not “how to ensure that hazardous waste continues to be transported to weaker economies while trying to protect the workers and environment in these developing countries.” The issue at hand is how to minimize the transboundary movement of hazardous waste to developing countries, while providing for the recycling of steel from ships. Below we elaborate on these concerns.

Mandate for Basel to Conduct its Own Work

The mandate of the Parties which should provide guidance to the Secretariat with respect to the OEWG is found in COP7 Decision VII/26 as follows:

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.
Rather than accomplishing original work as has been requested, “to consider the practical, legal and technical aspects of the dismantling of ships...to report on developments and to present any proposals...." the Secretariat and to too large degree, the Parties have instead spent their time looking exclusively at what the IMO is doing. The analysis provided in this paper is very important, and they have done a good job at identifying the glaring fact that even for the small subset of Basel obligations regarding “reporting”, the IMO effort falls short of any form of "equivalent level of control". However, a clear reading of Decision VII/26 makes it apparent that the Parties have agreed to a dual track approach, on the one hand carrying on with implementing and improving the Basel Convention with respect to addressing ships as waste, while inviting the IMO to do the same. But where is the Basel Convention’s work on this issue going? Where is the paper from the Secretariat laying out options and solutions?

It is absolutely not a fait accompli that the IMO is going to be able to take over full or partial legally binding competence on the matter of ships as waste, and if they try to do this, that it is likely to be acceptable as providing an “equivalent level of control.” Meanwhile the Basel Convention does have competence over this subject and yet for some reason the Secretariat continues to avoid accomplishing actual work to resolve the known difficulties regarding ships as waste. The Parties must send a strong signal to the Secretariat to move forward on developing ideas for closing Basel Convention loopholes. We know such mechanisms to improve the Basel regime exist and have produced papers in the past highlighting various options.

It is quite a normal situation for bodies of law to be updated given new, unforeseen situations arising in real world circumstances. This does not mean that an entirely new law needs to be drafted. Rather it is far better to work with what one has, especially when the attempts at rewriting laws are far less comprehensive.

Given the considerable political pressure brought to bear on this subject by powerful shipping industry interests to have the Basel Convention simply evaporate in legal thin air, the Secretariat must resist yielding to such pressures, but work within its own mandate to find solutions to the new world problems that have come to light regarding one particular waste stream – ships at end-of-life. To yield to pressure would spell disaster for the Convention, as it would mean that any powerful industry, can in future simply apply pressure and escape the principles of the Basel Convention, turning back the clock to a time when it was acceptable to disproportionately burden developing countries with toxic pollution should they wish. The Convention will then be seen as little more than a paper tiger – its integrity stripped by one industry.

**Reporting as Equivalency?**

Decision VII/26 invites 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 ships dismantling, which might include pre-decontamination within its scope”. A plain reading of this decision is that the equivalency rests with regulations, and that such regulations include a reporting system. The regulation is not to be a reporting system alone.

Thus it is a serious mistake to only compare equivalency on the reporting regime in isolation to the overarching obligations of the Basel Convention which include among other things, the obligation to minimize transboundary movement of hazardous waste. A reporting system in isolation of its context and integral obligations is not appropriate. The single focus of this paper on a "reporting system" that is being proposed by
the IMO seems to infer that a reporting system alone is sufficient to achieve equivalency to the Basel Convention. Nothing could be further from the truth.

Apart from the fact of whether or not the reporting system proposed by the IMO will ever be legally binding, or the functional equivalent of the Basel's prior informed consent regime, it must be strongly maintained that the a reporting system alone is not going to halt or minimize the flow of hazardous waste as required by the Convention and that the Basel Convention is far more than merely Article 6. It would be a very big mistake to only establish “equivalent level of control” on the reporting regime in isolation to the overarching obligations of the Basel Convention which includes as a central obligation – the minimization of transboundary movement of hazardous waste.

The frantic efforts of the IMO to try and create a reporting mechanism as if that is going to be sufficient to convey competency on this issue to the IMO rather than the Basel Convention is a sadly misplaced effort. The IMO should be looking closely at the entire Basel regime, its raison d’etre, its preamble, its entire text as well as its decisions.

BAN and Greenpeace have prepared a longer paper discussing the question of functional equivalency in greater detail. The paper concludes that the Basel Parties that are also Parties of the IMO Conventions, must seek an equivalent level of control in any instrument that IMO develops regarding transboundary movement of hazardous waste. This is not only because of Decision VII/26, but also due to the rigorous definition of Environmentally Sound Management found in the Convention as well as the requirements of Article 11. This paper can be accessed on the BAN website at: www.ban.org/library/BAN_ships_obligandopp.

**Fundamental Aim/s of Basel Convention**

In Section D, the Secretariat paper makes a claim that the fundamental aim of the Basel Convention is to protect human health and the environment. The paper then very selectively cites preambular language supporting this view. It must be stated at the outset that neither the preamble nor the treaty text of the Basel Convention establishes a fundamental aim.

Rather we would claim that the “goal of protecting human health and the environment” really goes without saying. Any agreement can make a claim of seeking this goal. Rather it is the manner in which the Basel Convention chooses to accomplish this goal that makes its essence.

It must not be forgotten that the Basel Convention preamble very pointedly speaks of:

- Recognizing also the increasing desire for the prohibition of transboundary movements of hazardous wastes and their disposal in other States, especially developing countries; and
- Convinced that hazardous wastes and other wastes should, as far as is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated.

The obligations of the Basel Convention, derived in part from the above, that are fundamental include:

- Obligation to minimize the generation of hazardous wastes.
- Obligation to minimize the transboundary movement of hazardous wastes.
- Obligation to create national capacity for managing hazardous wastes.
• Consensual Agreement of all states concerned for any waste trade (PIC).

These are the fundaments of the Basel Convention upon which “equivalent level of control” at the IMO or any other venue must be based.

**Reporting System Equivalency**

Just taking the isolated matter of the last point above however, as the Basel Secretariat paper has done in its analysis, clearly reveals that the essence of the Basel Prior Informed Consent (PIC) system is almost completely lost in the IMO reporting system.

The Basel PIC system is distilled as consisting of the following principles or functions:

1. Full transparency of all relevant information available with all competent authorities of States concerned as well as accompanying the shipment (e.g. trading entities, competent authorities, nature of wastes, environmentally sound technology to be employed)
2. State to State responsibility (private parties are involved but ultimate decisions made by governments)
3. Consensual Agreement by ALL relevant States Concerned required before export. (export, import, transit, flag) etc. Relevancy can be determined by the possibility of states being able to impact the generation of waste, or states potentially impacted by the waste itself.
4. Notifications must be sent and consent must be received, prior to export
5. If it is not correctly applied, or information is incorrect then traffic is considered illegal and criminal
6. Report back after disposal to exporting states and possibly importing state to confirm ESM
7. State of export responsibility continues through the entire disposal process

Following the analysis as produced by the Secretariat we can conclude that the above fundamental functions of the Basel system have NOT achieved “equivalent levels of control”.

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<tr>
<th>Fundaments of “Reporting” in Basel (Prior Informed Consent)</th>
<th>Does IMO provide an equivalent level of control?</th>
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<tbody>
<tr>
<td>1. Full transparency</td>
<td>No. State with jurisdiction over owner, and transit states are not informed.</td>
</tr>
<tr>
<td>2. State to State Responsibility</td>
<td>No. States serve merely as conduits of information. We see no obligations placed upon them in this regime. In any event, States with jurisdiction over the waste generator (owner) are not involved. Flag states have minimal jurisdiction over owners and cannot be seen as functional equivalent of “state of export” in most circumstances.</td>
</tr>
<tr>
<td>3. Trade cannot take place without Consent of all States Concerned</td>
<td>No. Current diagrams and descriptions indicate that no consent is required.</td>
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<tr>
<td>4. Information and Consent Prior to Export</td>
<td>No. No consent is required prior to export, but information does come prior to export</td>
</tr>
<tr>
<td>5. Non-compliance is illegal and</td>
<td>No. We see no evidence of indications of illegal</td>
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criminal traffic or criminal liability.

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<tr>
<th>6. Report to Exporting State upon Completion of ESM Disposal</th>
<th>No. We see that the state with jurisdiction over the owner is not informed, and possibly even the flag state is not informed.</th>
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<tbody>
<tr>
<td>7. State of Export Responsibility after export, and during disposal</td>
<td>No. Once the waste is delivered, the “exporting state” relinquishes all responsibility.</td>
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Conclusion

Some stakeholders and IMO delegates have claimed that the Basel Convention is not able to control the transboundary movement of ships because its regime is too easy to circumvent, that it is thus not effective for ships, and therefore a new one should be created at the IMO. Indeed it is well known that it is possible to exploit loopholes in the Basel regime due to the mobility of ships.

Thus, if one were to believe the claim of those supporting the possible transfer of competency for this issue to the IMO, one would expect from these same proponents, a proposal for a regime that is as rigorous as Basel but takes the extra step of closing the loopholes. The above “report card” however reveals that those involved in the negotiation of an alternate instrument, not only do not believe in closing the loopholes, but likewise do not believe in even functional equivalency.

By the above report card, it can be revealed that those seeking a move of venue and competency away from Basel to the IMO for end-of-life ships are doing this, not because they believe that the Basel Convention regime is not effective, but that it is far too effective for their special interests. The proponents of a new regime want to turn back the clock to a time (pre-Basel) when the international community had not condemned the disproportionate dumping of hazardous wastes on communities and peoples simply because they are poor, a time when exploitation of cheap labor forces to do their dirty work was simply a result of a “free” market, with no environmental or moral considerations whatsoever.

The Basel Convention cannot accept such an undermining of its very principles by the shipping industry without the risk of loosing its collective soul and raison d’être. Despite the strength of the wealthy shipping industry, their influence on certain governments, and their brutish tactics, as witnessed at the first joint meeting of the Basel Convention, IMO and ILO this year, the Basel Parties must remain resolute that its basic principles including the

- Obligation to minimize the generation of hazardous wastes.
- Obligation to minimize the transboundary movement of hazardous wastes.
- Obligation to create national capacity for managing hazardous wastes.
- Consensual Agreement of all states concerned for any waste trade (PIC).

be upheld always, and not sold away to the highest bidder.

END