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Konu : Gemi Geri Dönüşüm Sözleşmeleri Arasındaki Denklik Hk.

Sirküler No: 93

Sayın Üyemiz,

Uluslararası Deniz Ticaret Odası (International Chamber of Shipping-ICS) tarafından gönderilen, 11 Ocak 2021 tarihli Ekte sunulan yazıda;

Avrupa Komisyonu ve Üye Devletlerin, Avrupa Birliği Gemi Geri Dönüşüm Yönetmeliği (European Union Ship Recycling Regulations–EUSRR), Hong Kong Sözleşmesi (Hong Kong Convention-HKC) ile Basel Sözleşmesi ve Yasağına Ait Değişiklik arasındaki denklik konusunda Avrupa Konseyi hukuk biriminden görüş talep edildiği bildirilmektedir.

Avrupa Komisyonu tarafından Basel Sözleşmesi'ne ait yasakların yürürlüğe girmesiyle, ilgili devletlerle ikili bir anlaşma yapılmadığı sürece Ekonomik Kalkınma ve İşbirliği Örgütü (Organisation for Economic Co-operation and Development– OECD) dışındaki ülkelerde bulunan geri dönüşüm tesislerinin Avrupa Gemi Geri Dönüşüm tesisleri listesinde yer almasının sınırlanabileceği görüşünün iletilmesi üzerine hukuk biriminden görüş alma ihtiyacı oluştuğu belirtilmektedir.

Ayrıca söz konusu yazının Ekinde yer alan yazıda EUSRR ve HKC'nin sadece Basel Sözleşmesi ve Yasağına eşdeğer olmadığını, aynı zamanda daha sıkı kontroller sağladığını gösteren yasal dayanakların bir özeti ve hukuk biriminin olumsuz karar vermesi sonrasında oluşabilecek sonuçlar yer almaktadır. Yazının ekleri (Ek-2) özetle doğrudan ilişkili olup sözleşmeler arasındaki denklik hakkında ayrıntılı hukuki görüşleri sağlamaktadır.

Bahse konu yazıda Avrupa Konseyi hukuk biriminin, sözleşmelerin eşdeğer olduğu dışında bir sonuca varması durumunda EUSRR'nin etkinliğinde önemli engellere neden olabileceği ve ayrıca Hong Kong Sözleşmesi'nin yürürlüğe girmesinde ve nihai uygulamasında sorun teşkil edebileceği değerlendirilmektedir.

Gemi geri dönüşüm sözleşmeleri arasındaki denklik hakkındaki görüşler yazımız ekinde yer almakta olup, konu hakkında detaylı bilgi hususunda john.stawpert@ics-shipping.org ile iletişime geçilebileceği belirtilmektedir.

Bilgilerinize arz/rica ederim.

Saygılarımla,

İsmet SALİHOĞLU
Genel Sekreter

Bu belge, 5070 sayılı Elektronik İmza Kanuna göre Güvenli Elektronik İmza ile İmzalanmıştır.

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Ek:
1- ICS'in Yazısı (2 sayfa)
2- Geri Dönüşüm Sözleşmeleri Hakkındaki Görüş Yazısı ve Ekleri (23 sayfa)

Dağıtım:
Gereği:
- Tüm Üyeler (WEB Sayfası)
- Türk Armatörler Birliği
- GİSBİR (Türkiye Gemi İnşa Sanayicileri Birliği Derneği)
- KOSDER (Koster Armatörleri ve İşletmecileri Derneği)
- Gemi Geri Dönüşüm Sanayicileri Derneği
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- İMEAK DTO Şube YK Başkanları
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- İMEAK DTO Meslek Komite Başkanları

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11 January 2021

ENV(20)01

TO: ENVIRONMENT SUBCOMMITTEE

EQUIVALENCE BETWEEN SHIP RECYCLING INSTRUMENTS

Action Required: ***Members are requested to consider the documents and, where possible, to provide them to their relevant national authorities to ensure that the fact of equivalence between the ship recycling instruments is widely broadcast and, in particular, that the legal service to the European Council is made fully aware of these arguments.***

Members are advised that the European Commission and Member States have requested an opinion from the legal service to the European Council on the equivalence between the European Ship Recycling Regulation (EUSRR) and Hong Kong Convention (HKC), and the Basel Convention and Ban Amendment. This is due to the view taken by the Commission that the entry into force of the Basel Ban may limit its ability to allow recycling facilities in non-OECD States onto the European List of Ship Recycling facilities, unless a bilateral agreement is reached with those respective States. The legal service is expected to provide its view in late January.

Annex 1 provides a summary of the legal arguments demonstrating that the EUSRR and HKC are not only equivalent to the Basel Convention and Ban but in fact provide more stringent controls, as well as the possible consequences of the legal service reaching a negative conclusion. Annexes A and B are directly associated with that summary and provide detailed legal opinions on the equivalence between the instruments.

A failure by the legal service of the Council to reach any conclusion other than that the instruments are at least equivalent is likely to cause significant obstacles to the

effectiveness of the EUSRR, and could also present problems in the entry into force of the Hong Kong Convention, and its eventual application. It is therefore imperative that the legal service is made aware of the arguments provided in the annexes, and that Member State authorities responsible for ship recycling are similarly advised of the importance of this issue and the fact that the instruments are equivalent.

Members are requested to consider the annexed documents and to provide them to the relevant authorities for ship recycling in their States as well as their representatives in Brussels as appropriate. This will help ensure that the fact of equivalence between the ship recycling instruments is widely acknowledged and, in particular, that the legal service to the council is made fully aware of these arguments. Any further questions should be provided to the undersigned (john.stawpert@ics-shipping.org).

John Stawpert
Manager (Environment and Trade)

Assessment of Equivalence Between Ship Recycling Instruments and the Basel Convention, and Possible Impacts of Legal Interpretations

1) Background

The European Commission is of the view that the entry into force of the Basel Ban Amendment (the Basel Ban) does not allow the entry of non-OECD yards onto the European List of Ship Recycling Facilities, and thus believes that a bilateral agreement with a non-OECD state would be required before allowing its facilities onto the European List of Ship Recycling Facilities. The Commission and the Member States have therefore requested a legal opinion on the equivalence between the Basel Ban and the Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships (Hong Kong) from the legal service of the European Council. This opinion is expected by mid-January and could have impacts on the European Ship Recycling Regulation (EUSRR), in particular the European List of Recycling Facilities, and Hong Kong which is likely to enter into force in the next three years.

The key question with respect to equivalence between the various instruments and its effect on bilateral agreements centres on the provisions of Article 11 of the Basel Convention Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel), which covers bilateral agreements regarding the transboundary movement of hazardous wastes.

If a conclusion is reached that equivalence does not exist between the instruments, then it is likely that the Commission would not seek the bilateral agreements which it deems necessary to allow facilities in non-OECD countries onto the European List of Ship Recycling Facilities. A negative conclusion could also unnecessarily complicate the application of Hong Kong.

This document summarises why Hong Kong is not only equivalent to but offers greater controls than Basel and the Basel Ban for the ship recycling process. Furthermore, it establishes that the EUSRR also provides at least a similar level of equivalence to Basel and the Basel Ban. It also provides context, and an assessment of the likely impacts of the legal service reaching an interpretation of equivalence which differs from that of the consulted experts and the decisions of international bodies. Furthermore, it expands on the potential impacts of failing to understand this in the context of the EUSRR, and the consequences for that instrument, the European shipping sector, and the ship recycling industry globally.

Annexes A and B provide legal opinions which demonstrate that at the very least Hong Kong and Basel are equivalent, and that of the two instruments, Hong Kong offers stronger controls for ship recycling. Furthermore, they provide opinions demonstrating that the EUSRR and Hong Kong are more specific and strict than Basel and the Basel Ban.

2) Equivalence Between the Hong Kong Convention and the Basel Convention.

It should be recalled that at the 10th Conference to the parties of the Basel Convention (COP 10) the majority of Parties agreed that Hong Kong provides an equivalent level of control and enforcement to that established under Basel. A small minority of the Parties disagreed with this position.

In summary it can be concluded that on entry into force Hong Kong will take priority over Basel in case of any conflict between states that <u>are</u> parties to both legislations. This is due to a legal basis found within international law, e.g. the *lex specialis* and *lex posterior* principles and treaty interpretation according to Vienna Convention on the Law of Treaties. In essence, because the Hong Kong Convention

is specialized to ship recycling, it would take precedent over the more generic Basel Convention. Therefore, Hong Kong represents, like the EUSRR, a regulation that offers at least the same level of environmental protection as Basel thereby meeting the criteria of Basel art. 11.

It is also observed that where it is applied in ship recycling, circumvention of Basel and the Basel Ban can arise if ships change jurisdiction from a party State to a non-party which has no bilateral agreements. In this context it is notable that Hong Kong reduces the risk of such circumvention through a no more favourable treatment clause which is absent from Basel , and since Hong Kong offers a solution which is tailored for the operations and recycling of vessels it enhances the possibility that Hong Kong will actually be observed – and not circumvented.

3) Equivalence between the Basel Convention and the EUSRR

In the context of Basel and the EUSRR, it is concluded that Basel does not necessarily prevail over the EUSRR since the latter provides a level of environmental protection at least equivalent to that of Basel, thus fulfilling the requirement of BC art. 11, that allows States to enter into regulations and/or bilateral agreements relating to matters otherwise covered by Basel , such as ship recycling.

It is likewise concluded that that the EUSRR will, as EU legislation (an EU Regulation), always take precedence over international conventions such as Basel in matters between a State and the citizens (both persons and companies) in all EU Member States. Likewise, the basic principles of treaty interpretation relating to Hong Kong application, highlighted above, would have the same implications in the context of a possible conflict between Basel and the EUSSR. Furthermore, significantly, Basel and the Basel Ban are not binding on shipowners and non-State entities, since they apply only to State entities. By contrast the EUSRR is binding on businesses and individuals, and thus offers a greater level of control.

Finally, whilst it could be argued that the EU's declaration to Basel on retaining its legislative competence in all matters covered by Basel if the EU so chooses) can be seen/interpreted as a legally binding reservation, the practical relevance of this is unclear given that arguments on EU law will always take precedence over international law for the member States, and that the EUSRR provides a stricter level of protection than Basel.

4) Possible impacts of an alternative legal interpretation

It is difficult to see how the legal service could reach a conclusion other than that both Hong Kong and EUSRR are equivalent to Basel. Nevertheless, it may be the case that a contrary decision could be reached and, if this were the case, it would very likely have negative impacts on the stated objectives of the EUSRR, and the European Shipping Sector. Whilst these would not necessarily influence any legal interpretation, it is important that member States and policy makers are aware of them.

a) Context of EUSRR and EU Policy

Fundamentally, a negative interpretation would work against the objectives of the EUSRR as stated in Article 5, which commits the instrument to the early ratification of the Hong Kong Convention, and would thus essentially bring the regulation into conflict with itself. The interpretation would also work against the objectives of article 7 which states that the instrument intends "to reduce disparities between operators in the Union, in OECD countries and in relevant third countries in terms of health

and safety at the workplace and environmental standards and to direct ships flying the flag of a Member State to ship recycling facilities that practice safe and environmentally sound methods of dismantling". Finally, it would also work against the objectives of the EU's Development Policy to foster sustainable development and stability in developing countries, by potentially undercutting their markets or undermining ongoing capacity building activities in the ship recycling sector.

b) Commercial impact

Any decision which does not recognise the equivalence between the instruments, which consequently prevented compliant facilities in third party States from entering the European List would have a severely detrimental impact on the viability of the list and the regulation as a whole and would negatively impact the European Shipping Sector. Shipping is global and EU shipowners need recycling facilities spread globally. The demand for scrap steel and other equipment is mainly in Asia and Europe is a net exporter of scrap steel. As a recent BIMCO report has demonstrated, the European List is still insufficient to meet the needs of the European fleet and is likely to remain so without the inclusion of further non-European facilities. The prospect of the list making up this shortfall through the development of domestic recycling capacity fails several fundamental economic tests, since the market for scrap steel and shipboard equipment and fittings does not exist in Europe by comparison with the States in which the ship recycling industry is largely established.

Such an exclusion of non-OECD yards from the list, many of which are certified as being compliant with the Hong Kong Convention, would ultimately put European shipping at a disadvantage in the recycling market due to the limited options available for end of life ships in an uncompetitive sector of the market. This distortion would most likely see the removal of ships from the European sector in order to take advantage of the commercial opportunities elsewhere in compliance with other internationally recognised standards. It could also potentially see the relocation of businesses in their entirety. The consequential effect of such a contraction would be the further removal of the industry from the environmental controls that the EU wished to apply in other areas.

5) Conclusion

It is clear that both the EUSRR and the Hong Kong Convention are more specific and strict than the controls of the Basel Convention and further interpretation or amendment is therefore unnecessary in order for them to be effective. Any interpretation that derogates from this is likely to work against declared goals of European policy and have significant negative outcomes for the EUSRR, the European list, the European Shipping Sector and, the practical reach of Europe in enforcing its environmental standards. It is therefore imperative that the need for an accurate assessment of equivalence is fully understood by member States and policy makers, and that this is conveyed to the legal service of the Council through the appropriate channels.

To: Danish Shipping

From: Ole Spiermann, Bruun & Hjejle Advokatpartnerselskab

Date: 19 November 2020

Re: Ship recycling – the relationship between the Basel Convention and the Hong Kong Convention and also EU Regulation 1257/2013

1. This note presents our initial observations in relation to the ongoing discussion on the prohibition against transboundary movement of hazardous waste from OECD countries to non-OECD countries in the Basel Convention, including the so-called Ban Amendment, and EU flagged ships destined for recycling. This concerns not least the relationship between, on the one hand, the Basel Convention on the control of Transboundary Movement of Hazardous Wastes and their Disposal and, on the other hand, EU Regulation 1257/2013 on ship recycling amending Regulation EC No 1013/2006 and Directive 2009/16/EC and also the Hong-Kong Convention for the safe and environmentally sound recycling of ships (not yet in force).

2. The Basel Convention has 188 parties, including the EU, and out of which 99 parties, including the EU, have also agreed to the Ban Amendment generally prohibiting the transboundary movement of hazardous waste from OECD countries to non-OECD countries (effective from 5 December 2019). The Hong Kong Convention sponsored by the International Maritime Organization, and also EU Regulation 1257/2013, provides for environmental safeguards for ship recycling, including procedures for certifying ships and an obligation to use authorised ship-recycling facilities that meet environmental standards.

3. Parties to the Basel Convention disagree whether the Hong Kong Convention is compatible with the Basel Convention, including the Ban Amendment, and there is no mandatory mechanism for dispute resolution under the Basel Convention (although the International Maritime Organization, among others, is entitled to request an advisory opinion from the International Court of Justice, as the International Maritime Organization has done already once).

4. We do not find there to be a clear conflict between the Basel Convention and the Hong Kong Convention, and also EU Regulation 1257/2013, and principles of treaty interpretation suggest that common ground is found, also bearing in mind that the Basel Convention is sponsored by the United Nations Environment Programme while the Hong Kong Convention is sponsored by the International Maritime Organization, two United Nations entities. Both the Hong

Kong Convention and EU Regulation 1257/2013 make reference to the Basel Convention.

5. The question whether the Hong Kong Convention, and also EU Regulation 1257/2013, is compatible with the Basel Convention mainly turns on Article 11(1) of the Basel Convention, which 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."

6. As already noted, parties to the Basel Convention take different views whether Article 11(1) is broad enough to accommodate the Hong Kong Convention and also EU Regulation 1257/2013 (bearing in mind that Article 11(1) refers not only to "agreements" but also to "arrangements").

7. There is a likely presumption in favour of the Hong Kong Convention being compatible with the Basel Convention and also the Ban Amendment. The latter instruments came first in time, and it would be somewhat surprising if subsequently the International Maritime Organization should have sponsored the Hong Kong Convention if incompatible with the Basel Convention and the Ban Amendment.

8. In considering the conditions laid down in Article 11(1) of the Basel Convention concerning "the environmentally sound management" and "provisions ... not less environmentally sound", one has to bear in mind that Article 11(1) allows for derogations from provisions in the Basel Convention (as distinct from its object and purpose). Provisions such as those in the Ban Amendment may be absolute and without exceptions and yet this does not in themselves justify the conclusion that Article 11(1) cannot apply.

9. It would seem useful to explore previous use of Article 11(1) of the Basel Convention, and the same may go for other legal arguments.

10. Currently, a number of more specific arguments support that the Hong Kong Convention and also EU Regulation 1257/2013 comply with the conditions in Article 11(1) of the Basel Convention:

- The Hong Kong Convention covers the whole life cycle of a ship and might ensure better overall environmental protection than the Basel Convention.

- The Basel Convention, including the Ban Amendment, can be easily circumvented by shipowners due the mobility of ships. The environmental standards required by the Hong Kong Convention are more difficult to circumvent.

11. The position could be further enhanced through new agreements or arrangements with developing countries that could improve some of the alleged shortcomings of the protections in the Hong Kong Convention and also Regulation 1257/2013, e.g. EU could make arrangements that require improved downstream management of waste beyond the ship-recycling facilities. We note that a final assessment whether Regulation 1257/2013 complies with Article 11(1) of the Basel Convention would have to take into account also the specific environmental safeguards in the relevant bilateral agreement required under Article 15 of the Regulation.

12. Importantly, shipowners and non-state actors in general are not bound by the Basel Convention and the Ban Amendment (which apply to states and international organisations only). In the EU, Regulation 1257/2013 is binding upon businesses and individuals, just as national law. For Danish shipowners, and in respect of ships flying the Danish flag, the position taken by the EU and possibly also the Danish Government is critical.

23 November 2020

The International Legal Regime for Ship Recycling

Legal assessment of the relationship between the Basel Convention, the Hong Kong Convention and the EU Ship Recycling Regulation in an international law perspective

Gorrissen Federspiel

Table of contents

1 Introduction to the memorandum

1.1 We have been requested by APMM to provide an assessment of the potential conflict between the main international conventions and regulations on ship recycling from an international law perspective. This mainly being the relationship between the 1989 Basel Convention ("**BC**")[1] on the one side and the 2009 Hong Kong Convention ("**HKC**")[2] and the EU Ship Recycling Regulation ("**SSR**")[3] on the other.

1.2 We will, in particular, assess whether the contracting states to the HKC (which are also contracting states to the BC) may be deemed to violate their obligations under the BC (towards other BC states),[4] and whether the EU and its member states may be deemed to violate their obligations under the BC by enacting and enforcing the SSR.

1.3 This assessment will be based on an analysis of the relevant international conventions and made with the application of general rules and principles on the construction of treaty obligations under international law. We will highlight certain factual and technical matters pertaining to the analysis, for instance, the methods of ship recycling. We note, however, that this should be deemed a legal and not a technical assessment.

1.4 This memorandum will not make an assessment of the practical application of any of the aforementioned conventions under any particular national legal system.

2 Summary findings

2.1 First, it is necessary to determine the instances where there may be any conflict (and thereby, a potential violation of the BC by the HKC states and/or EU).

2.2 Importantly, the HKC and the SRR do only apply to vessels flying the flags of the HKC states or EU Member States. Neither the EU, nor any HKC state (to our knowledge), has suggested that the BC should not apply to non-HKC/EU-flagged vessels.

2.3 Consequently, we have made our assessment of the potential conflict and/or compatibility of the BC with the HKC/SRR on this premise. This entails, for instance, that the point on the risk of re-flagging is a moot point in respect of the alleged conflict.

2.4 In respect of the potential conflicts, it is important to distinguish between (i) conflicts between states that are both BC/HKC states and (ii) conflicts between BC/HKC state and BC/non-HKC state. As to the first situation, it follows, in our assessment, clearly from the Vienna Convention, Art. 30, and the internationally accepted principles of *lex specialis derogate generali* and *lex posterior derogate prioiri* that the HKC shall take precedence over the BC as the HKC has a more specific scope (i.e. the recycling of vessels and not all forms of waste) and has been adopted more recently.

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[1] The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal of 22 March 1989 (as amended).
[2] Hong Kong International Convention for the safe and environmentally sound recycling of ships of 2009.
[3] The Regulation (EU) No. 1257 of 20 November 2013 on ship recycling and amending Regulation (EC) No. 1013/2006 and Directive 2009/EC/EC, as amended.
[4] As alleged, e.g., in the Centre for International Environmental Law, "Shipbreaking and the Basel Convention: Analysis of the Level of Control Established under the Honk Kong Convention", April 2011. Conversely, the EU has stated the opposite in its "Submission of the EU and its Member States presenting the table and preliminary assessment pursuant to decision OEWG-VII/12 (environmentally sounds dismantling of ships)", 2009.

2.5 These principles can, however, not be applied in respect of any alleged violation of the BC committed by a HKC/BC-state towards a BC/non-HKC state.

2.6 In our best assessment, there is thus no firm basis under international law for asserting that the HKC states and/or the EU may vacate their obligations (towards non HKC/EU-states) under the BC unless the HKC is deemed to be compatible with the BC, Art. 11 (requiring a comparative levels of protection to the environment).

2.7 We do, however, based on a legal assessment of the purpose, scope and application of the HKC and the BC, respectively, find that there is a sound basis for asserting that the HKC offers at least an equivalent level of protection as noted in BC, Art. 11. This is in particular clear when the conventions are analysed in a holistic perspective considering all the elements of the conventions and their actual application (or lack thereof) in practice. This comparative analysis can be found in section 5 below.

2.8 We thus conclude that the HKC should prevail in any international law conflict between the HKC and the BC and that the contracting states to the HKC cannot be deemed to violate their BC obligations even against BC/non-HKC states.

2.9 In respect of the conflict between the SRR and the EU, there is no potential conflict as a matter of EU law. It follows explicitly from the WSR (that implements the BC) that the SRR takes precedence over the BC within the scope of the SRR.

2.10 In respect of the comparative level of protection, ref. Art. 11 of the BC, it is even clearer that the SRR ensures a comparative level of protection (as the BC) due to the even stricter requirements under the SRR in terms of recycling operations.

2.11 For this, and certain additional reasons outlined below, it is our firm assessment that the HKC and the SRR should, from an international law perspective, prevail in any conflict with the BC regardless of the relevant state parties involved.

3 The waste management and ship recycling legal regimes

3.1 Overview

3.1.1 The expansion of international law in the last half a century has led to wide discussions around the challenge of fragmentation when it comes to the unity and coherence of the international legal order. The transposition of functional differences in governance from the national to the international plane has resulted "in the creation of more or less complete regulatory regimes which may at times compete with each other".[5]

3.1.2 The international legal regime governing ship recycling has not escaped this fragmentation. When taking the decision to recycle a ship, a vessel owner must take into account at least two major systems of regulation whose application and provisions have, ostensibly, the potential to conflict with one another: (1) The broadly-scoped waste management rules formed by or based on the BC - which may apply to virtually any form of transboundary movement of waste - and (2) the ship-specific rules formed by the HKC and the SRR whose application mainly rely on the flag of the vessel.

[5] Simma, B (2009) "Universality of International Law from the Perspective of a Practitioner", 20 EJIL 265.

3.1.3 These two major legal regimes will be introduced in the following sections.

3.2 The BC and the other waste-shipment rules

3.2.1 The BC is, in brief, a convention that sets out rules and procedures for the international shipment of virtually any form of waste. The BC may also apply to the recycling of vessel as the vessel may be deemed to constitute "*waste*" if, for instance, the owners or other controlling stakeholders in the vessel elects to recycle the vessel.

3.2.2 The purpose of the BC is to control the transboundary movement of waste and to ensure that any disposal or recycling is handled in an "*environmentally sound manner*" in accordance with national laws, regulations and practices. Depending on the states involved and the (potentially hazardous) character of the '*waste*', a transboundary '*movement*' of a vessel for recycling may either be prohibited (in any form), subject to pre-approval (prior to any export/import) and/or notification requirements.

3.2.3 The BC applies almost worldwide. As of November 2020, 188 states, including the main ship-breaking nations, have ratified the convention.[6] The USA is a notable exception. As the BC restricts the import of waste (including vessels) from non-party states, the import and export of vessels to and from the USA depend on US domestic law and the bilateral agreements between the USA and the relevant states.

3.2.4 An amendment to the BC known as the 1995 Basel Ban Amendment (the "**BBA**") entered into force on December 5 2019.[7] The BBA prohibits the shipments of hazardous wastes, including vessels, from Annex VII-listed states (OECD, EC (i.e. the EU) and Liechtenstein) to other ('non-listed') states. As of November 2020, 99 states have ratified the BBA, including China, but excluding for instance Bangladesh and India (see the full list in Appendix VII). The BBA thus stipulate restrictions on the export of the vessels for the purpose of recycling from OECD states to, for instance, India.

3.2.5 In general, each nation may, within the BC framework, enforce unilateral import/export restrictions and/or enter into bilateral or multilateral agreements/treaties.[8]

3.2.6 The BC has been implemented by the 2002 OECD Decision (the "**OD**")[9] and the EU Waste Shipment Regulation (the "**WSR**")[10] (collectively the "**Waste Shipment Rules**").

3.2.7 The OD is agreed among certain members of the OECD and based on the BC system. It lays out certain restrictions and procedures for movement of waste from one OECD state to another (such as Turkey). The OD does not, in itself, implement the BBA (even though the BBA relates to the export from OECD-states to non-OECD states).

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[6] Basel Convention website, (http://www.basel.int/?tabid=4499), last accessed 17/11/2020 at 09:11.
[7] The Basel Ban Amendment (3.a. Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Geneva, 22 September 1995) The BBA was not adopted simultaneously with the BC, but reached its threshold requirement for ratification and entered into force on December 5 2019.
[8] See BC
[9] Decision C (2001)107/Final of the OECD Council concerning the revision of Decision C (92)39/Final on control of transboundary movements of wastes destined for recovery operations.
[10] The Regulation (EC) No. 1013/2006 of 14 June 2006 on shipments of waste, as amended.

3.2.8 The WSR implements the BC and OD in the EU and puts certain additional requirements in place for the transboundary movement of waste. The WSR also implements the BBA in respect of shipments from the EU to non-OECD states. The WSR is supplemented – as for 'green listed waste' exported to BC states – by the Green Waste Regulation (the "**GWR**").[11] The green list includes a definition of vessels (GG030).

3.2.9 As noted, the scope of Waste Shipment Rules is very broad and may also apply also to vessels destined for recycling (i.e. not for further use and therefore 'waste'). It is, however, often very difficult to assess whether and at which time that a vessel shall be deemed to constitute waste; unlike most other items and substances, vessels can be fully operational even though a decision may have been taken to recycle the vessel.

3.2.10 The Waste Shipment Rules are only concerned with the waste shipments and the subsequent recycling operation. The rules do not place any continuous obligations on the ship-owners to actually ensure that the vessel is built and operated in a manner that may, subsequently, ensure an environmentally sound recycling of the vessel.

3.2.11 As a general point, while the Waste Shipment Rules were not drafted with vessels in mind which is evident from the practical difficulties application of the rules. These issues were, in fact, the reasons for the adoption of the HKC and the SRR.

3.2.12 It follows from an amendment to the WSR (included as part of the SRR), that the WSR (and thereby the BC) will no longer apply as a matter of EU law to EU flagged vessels (destined for recycling).[12] The WSR will still apply to any exports/imports from/to the EU of vessels (destined for recycling) that are not flagged in the EU.

3.3 Introduction to the HKC and the SSR as flag based rules

3.3.1 The HKC and the SRR (collectively the "**Flag-based Rules**") are distinct from the Waste Shipment Rules in that the Flag-based Rules only regulate the recycling of vessels and not the recycling of waste in general. Furthermore, the Flag-based Rules do not concern the movement of waste as such (unlike the Waste Shipment Rules which focus on "*transboundary movement*"), but the specific recycling operations. The Flag-based Rules will thus mainly apply depending on the flag of the vessel.

3.3.2 The SRR entered into force as of 31 December 2018. The regulation replaces the WSR in relation to EU flagged vessels (see above). There is no such rule in the HKC.

3.3.3 Importantly, the HKC and the SRR create certain 'ongoing' obligations relating to the installation and registration of hazardous wastes onboard the vessel which shipowners are required to observe while the vessel is in operational use. These obligations are in place in order to prepare the vessel for the recycling operation at end-of-life.

3.3.4 The obligations of the ship owner in connection with the recycling operation include;

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[11] Regulation (EC) No. 1013/2006 of 29 November 2007 concerning the export for recovery of certain waste listed in Annex III or IIIA to Regulation (EC) No 1013/2006 of the European Parliament and of the Council to certain countries to which the OECD Decision on the control of transboundary movements of wastes does not apply.
[12] WSR, art. 1 (3) (i).

- Provide the recycling facility with all ship-relevant information (Reg. 9 (1), Art. 6(1)) in order for the facility to draft a Ship Recycling Plan (SRP) (Reg. 9, Art. 7)
- Notify the authorities in the flag state and the recycling facility state of the intention to recycle the vessel (together with IHM) (Art. 6(2))
- Conduct operations in the period prior to the entering the ship recycling facility in a way which minimises cargo residues, remaining fuel oil etc. (Art. 6(3)(b))
- Update and complete the IHM (Reg. 5, Art. 5 (7))
- Obtain a ready-for-recycling certificate (Reg. 8 (6), Art. 6 (2)(c))
- Provide a copy of the ready-for-recycling certificate to the ship recycling facility (Art. 6 (4))
- Subject to final survey for the purpose of verifying the content of the IHM, the SRP and that the facility is authorised to recycle the vessel (Reg. 10 (1) (4), Art. 8(8)).

3.3.5 Both the SRR and the HKC require that the recycling facility used by the vessel owner must be of a specified standard which is capable of recycling the vessel in an environmentally sound manner. Under the HKC the facility must be certified while the SRR requires it to be approved by the EU Commission. When approved, the facility will be placed on the so-called European List (the "**European List**").[13]

3.3.6 As of November 2020, the European List consists of 34 facilities.[14] Nine of these are located outside of the EU; five in Norway, three in Turkey and one in USA.[15]

3.3.7 The HKC is not yet in force. The HKC will enter into force 24 months after the (i) ratification by 15 states (ii) which represent at least 40 % of world merchant shipping by GT and (iii) which has a combined maximum annual ship recycling volume not less than 3 % of their combined tonnage. As of November 2020, the HKC has been ratified by 15 states representing 29.42 % of the world tonnage. Based on recent ratification trends, the HKC may reach the above ratification thresholds within a few years.

3.3.8 Depending on the national implementations of the HKC and the nations involved in the recycling, the waste shipment rules and flag state rules may apply in parallel.

4 Treaty obligations and conflicts under international law

4.1 Introduction to conflicts under international law

4.1.1 As noted by the International Law Commission, there is neither a well-developed and authoritative hierarchy of values in international law nor an institutional system to adequately resolve treaty conflicts and other issues under international law.

4.1.2 Therefore while an assessment of international law (and treaty obligations) may touch upon general principles of international law, codified principles of treaty creation and interpretation and the jurisprudence of the international court of justice. These sources

[13] European List as of 17 June 2019 EU 2019/995.
[14] Ibid.
[15] Ibid.

must be understood and applied in a holistic manner, which accounts for the inherent uncertainty incumbent of a system without defined hierarchy of values.

4.2 The Vienna Convention

4.2.1 The Vienna Convention on the Law of Treaties[16] (the "**VCLT**") entered into force on January 27 1980 aimed to codify the law of treaties and sets out the process for determining the scope of, creating, and interpreting treaties. The VCLT has been ratified by 116 states,[17] notably non-ratifying states include the USA. The VCLT considered to reflect customary international law to a wide extent.[18] We will therefore apply the articles of the VCLT (stated in this memo) to the conflict between the BC/HKC. [19]

4.2.2 According to Article 31 (1) of the VCLT, treaties should be interpreted i) in good faith in accordance with the ii) ordinary meaning to be given to the terms of the treaty iii) in their context and iv) in the light of its object and purpose.

4.2.3 Article 30 of the VCLT codifies the principles to be applied when determining the application of successive treaties relating to the same subject matter.

4.2.4 The general rule under Article 30 is that if the first treaty is not terminated or suspended in operation then it shall only apply to the extent that its provisions are compatible with those of the later treaty. This reflects the general principle of *lex specialis derogate legi generalis* which is outlined in more detail below.

4.3 General principles on treaty conflicts

4.3.1 General principles of international law may resolve some conflicts between international regulation but difficult issues remain of determining international priorities among areas of regulation that have developed separately of each other. Furthermore the application of such principles are limited in scope to resolving conflicts which have arisen between states which are both parties to the relevant regulations.

4.3.2 As a general norm of international law, when there exists more than one rule or system of rules that is prime facie applicable to a given situation, the choice between them can be made by the application of one of two principles of international law: *lex specialis derogate generali* and *lex posterior derogate prioiri.*

4.3.3 The principle of *lex specialis derogate generali* means that a special rule will override a general rule. The principle of *lex posterior derogate priori* means that a later rule will override an earlier rule. Both principles are recognised principles of international law. [20] However, neither principle can be used to create additional obligations on states which have not ratified both of the rules in question. For example, state A which is party to both the BC and the HKC cannot rely on the principle of *lex posterior derogate priori* in reference to its obligations towards state B who has only ratified BC to argue that such state should be obliged to accept state A's acceptable conduct under

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[16]3 Vienna Convention on the Law of Treaties, United Nations, 1155 UNTS 331, 1969.
[17] United Nations Treaty Collection, (https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en), last accessed 18/11/2020 at 10:21.
[18] Malcolm D Evans, "International Law", 3rd edition, Oxford University Press p174.
[19] On the definition of treaties, see Art. 2(a)(1)(i) of the VCLT.
[20] Ibid, p140.

the HKC (which is in breaching of the BC) on the basis that the HKC will have come into effect at a later point in time.

4.3.4 The principle of *lex specialis derogate legi generalis* is generally straightforward to apply in the context of treaties, as the assumption is that legislators normally enact new law in order to replace or modify older law.

5 Analysis of the comparative level of protection under the BC and the HKC

5.1 Permission for coexistence under the BC

5.1.1 The BC and the BBA were adopted in 1989 and 1995, respectively whereas the HKC has not yet entered into force. Therefore an assessment of the text of the BC is a reasonable starting place for considering the subsequent regulations on ship recycling.

5.1.2 Article 11 of the BC stipulates that:

> *"(...) 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."*

5.1.3 In this regard, it is reasonable to argue that there is no *prime facie* conflict between the BC and the HKC in terms of the legal validity of subscribing to both, provided that the provisions of the HKC are no less environmentally sound than those provided for by the BC, or in other words that they offer at least an equivalent level of protection.

5.2 The comparative levels of protection provided by the BC and the HKC

5.2.1 Given the significance of the issue, is it unsurprising that the question of whether the BC and the HKC provide equivalent levels of protection is hotly contested.

5.2.2 A final determination on the question of the equivalency of protection according to Article 11 of the BC is ultimately a matter for the International Court or Justice (or any other court or tribunal elected by the contracting parties) and no firm assessment can be made with any clear authority. However some of the factors that would likely be relevant in making such a determination are discussed further below.

5.2.3 Importantly, the BC and the HKC (as any treaty provision), should be interpreted in good faith, in its context and in the light of the object and purpose as set out in the VCLT, Art. 30 (see above). Consequently, the analysis under Art. 11 (the comparison between the BC and the HKC) cannot, in our view, be made as a narrow analysis of the comparative control procedures of each convention (e.g. an out-right export ban under the BC compared to a recycling procedure set out in the HKC) without reference to the actual application and protections offered by these convention in practice. It is thus a question of whether the conventions actually fulfil the stipulated purposes.

5.2.4 In general, based on the construction of treaties in general, see above, it is necessary to carry out a holistic assessment of all relevant factors. The HKC may be deemed to have a comparative level of protection even though it may not, on all factors and in any potential scenario, ensure the same level of protection as the BC (and vice versa).

5.2.5 In the next sections, we will highlight some of the relevant issues in each case.

5.3 Purpose and scope of the respective rules

5.3.1 The purpose of the BC is to control the transboundary movement of waste and to ensure that any disposal or recycling is handled in an "*environmentally sound manner*" in accordance with national laws, regulations and practices. The purpose of the HKC is, in terms of vessels broader, as it addresses additional around ship recycling.

5.3.2 The HKC applies to commercial ships entitled to fly the flag of a party to the convention, or operating under its authority and ship recycling facilities operating under the jurisdiction of a party.[21] The HKC applies to all recycling operations of commercial vessels flying a HKC flag as the HKC applies to such vessels destined to be recycled.

5.3.3 Waste in the sense of the BC are, according to Article 2(1), substances or objects which are disposed of, or are intended, or are required to be disposed of by the provisions of national law. All ships that can be considered to be or contain hazardous wastes are covered by the convention irrespective of size or type[22]. The BC will, however, not apply to non-transboundary movements of vessels destined for recycling, see section 5.6 below) whereas the HKC will apply to any recycling operation for such vessels.

5.3.4 In any event, it is no argument against the HKC providing an equivalent level of protection that the HKC will not apply to non-HKC flagged vessels as the BC may still apply residually to such vessels. There is thus no conflict in such case.

5.4 Ongoing obligations of the ship-owners

5.4.1 An arguably major shortcoming of the BC in respect of ship recycling is the lack of obligations on the treaty states to ensure that the vessels are constructed and operated in a manner which prepares the vessel for the (unavoidable) end-of-life recycling.

5.4.2 The HKC contains, conversely, several obligations on the part of the ship owner during the construction and operational life of the vessel, i.e. "*a comprehensive system of control and enforcement from "cradle to grave*", as noted by the EU Commission.

5.4.3 For example, under Regulation 5 of the HKC, ship owners are required to develop and update an inventory of hazardous materials during the operating life of the ship. In this regard the HKC can be seen to offer a higher level of protection than the BC.

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[21] Op.cit,2, Article 3 (1). The HKC does not apply to i) any military vessels or vessels owned only for governmental (non-commercial) services ii) vessels of less than 50 GT or iii) vessels that spend their lifespan only operating in waters subject to the jurisdiction of the state of the flag of the vessel.[21]

[22] The BC does not exempt military vessels or vessels owned only for governmental services or vessels under a certain size or restricted to a certain geographical area from its scope.

5.5 The control procedures and notice requirements at time of recycling

5.5.1 The BC and the HKC offers substantially procedures for the movement and recycling of end-of-life vessels. In brief, the BC provides for control procedures that limits the export/import of vessels, in particular for exports to non OECD-states. The HKC, in the offer hand, has no limitations on the transboundary movements of vessels. The HKC, instead, puts in place more ship-specific recycling procedures that applies irrespective of the location of the vessels prior to the vessels being recycling.

5.5.2 The main provisions regarding control systems under the BC for legitimate movements of hazardous waste (such as vessels) are laid out in Art 6. All exporters (and 'generators' or 'producers') of hazardous waste who wish to export (i.e. make a transboundary movement) of said waste, are required to provide notification of the proposed transboundary movement of the waste in writing, through the channel of the competent authority of the state of export, to the competent authority in the state of import.

5.5.3 As a general rule, under the BC the State of export shall not allow transboundary movement to commence until it has received the explicit written consent of the State of import and confirmation of the existence of a contract between the exporter and the disposer. This can cause significant expense and delay in practice, and the vessel is confined to the export state until the relevant permissions have been granted.

5.5.4 Under the HKC, regulations 24 and 25 of the Annex to the Convention provide the reporting requirements that relate to the notification of and information concerning the recycling of individual vessels. The ship owner is obliged to notify its flag state administration in writing of the intention to recycle the vessel. Regulation 8(1)6 requires that before any recycling take place, the vessel be certified as ready for recycling by the flag state administration. Furthermore a ship recycling plan must be developed by the recycling facility which must be approved by the competent authority authorizing the ship recycling facility. The approval is typically done by classification societies.

5.5.5 On this basis, on its face value, it could be argued that the control requirements and the notice procedure under the HK are not as stringent as the requirements under the BC. However, it may also be argued the substantial practical burden and restrictions associated with complying with the control requirements and notice procedure under the BC disincentives ship owners from actually following the intended path, instead preferring to take advantage of one of the exceptions discussed below.

5.6 The application to non-transboundary movement

5.6.1 The application of the BC is contingent on there being a transboundary movement (i.e. a movement from the jurisdiction of one state to the jurisdiction of another). The BC can thus only apply if there is at least an exporting state and an important state.

5.6.2 This entails a very problematic issue which is virtually unique to vessels. This limitation means that the BC will not apply to a recycle operation of a vessel if the decision to recycle the vessel is (in fact) taken while the vessel is on the high seas (and not subject to any subsequent transboundary movement between two states), see below.

5.6.3 Hence, when there is no state of export, the BC will not apply and it will not ensure any protection of the environmental sound recycling of the vessels in question. This is a major loophole which is, in our understanding widely use in the industry.

5.6.4 This high sea-limitation (which appears to be recognised Basel Secretariat[23]) thus substantially limits the actual application of the Waste-based Rules to vessels.

5.6.5 Conversely, the HKC does not suffer from the same limitation. It will thus apply to all HKC-flagged vessels irrespective of whether they carry out a transboundary movement or not prior to the recycling operation. Provided all flag states ratified the HKC, the HKC would thus offer ensure that it applied to all recycling operations.

5.7 The application to non-HKC flagged vessels

5.7.1 It has been argued that the HKC suffers from a limitation in that the convention can be circumvented by a ship owner prior to any recycling operation by reflagging the vessel to a non-HKC-state (as with the SRR for EU-flagged vessels). The owner may therefore circumvent the requirement to use a HKC approved facility.

5.7.2 While the circumvention is indeed possible (until the time that the HKC is ratified by all flag states), the point is in fact moot as long as the BC will apply residually. In such case, the owners will (if the BC applies) thus be subject to the requirements of the BC and the HKC and SRR may, by definition, be in conflict with the BC.

5.8 The determination of the application of the rules

5.8.1 Although the BC is readily applied to ship recycling, it was not drafted with vessels in mind. As such there are significant issues concerning its practical application.

5.8.2 Only ships that constitute waste will be covered by the provisions of the BC. It can be difficult to determine the point at which a vessel becomes waste through the lens of the BC, as it is highly dependent on the individual factual circumstances. For example, if it becomes clear that before its last cargo-carrying voyage the vessel owner had already entered into a scrapping contract, the vessel should be treated as waste before the voyage began.[24] It is, however, a very difficult assessment to make in practice.

5.8.3 It is generally accepted that the courts need to determine the 'true intention' of the ship-owners, i.e. when the ship-owner has in fact made the decision to recycle. This will need to be determined under consideration of all relevant circumstances.[25]

5.8.4 The HKC has, in theory, a similar difficulty in determining whether the vessels are "destined" for recycling. However, under the HKC, the determination is irrelevant as the HKC does not restrict the movements of the vessels based on whether not the vessels are destined for recycling or not. It will apply to the recycling operations, in any event. The HKC thereby avoids the risks of circumvention (and unnecessary limitation to the movements of operational vessels) that the BC unfortunately does.

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[23]
[24] Ibid.
[25] See e.g. the Seatrade case, judgment dated 15 March 2018 (case no. ECLI: NL: RBROT:2018:2018).

5.8.5 Put simply, the HKC offers a solution which is tailored for the operations and recycling of vessels which the BC is not. It thereby also enhances the possibility that the HKC will actually be observed – and not circumvented - by the ship owners.

5.9 Enforcement

5.9.1 The enforcement of the conventions can be seen to be broadly comparable from legal standpoint. It is more, unclear, whether the effects are similar in practice.

5.9.2 The BC establishes that illegal traffic in hazardous wastes is criminal and requires each party to take appropriate legal, administrative and other measures to implement and enforce the provisions of the BC.[26] The HKC obliges parties to prohibit violations and establish sanctions through domestic legislation.[27] Sanctions shall be adequate in severity in order to discourage violations.[28]

5.9.3 As the enforcement provisions themselves are relatively comparable, "gaps" in the application of the rules are arguably equally as important in terms of enforcement as the enforcement provisions themselves. In particular due to problems relating to the application of the rules and the high-seas limitation, enforcement is considerably easier under the HKC than the BC. Furthermore, the authorities in the state of the recycling operation will always be competent to enforce the HKC rules whereas the same authorities may not enforce the BC in such cases where the BC does not apply.

5.10 The interests of the developing countries

5.10.1 Under the BC, vessels intended to be recycled can be imported to developing countries provided that they are also party to the BC. Many developing countries that have typically participated in ship recycling, such as Bangladesh, are parties to the BC.

5.10.2 The BC sets out requirements for the recycling of vessels which entail that vessels may not be recycled if such cannot be carried out in an environmentally sound manner. In principle, the BC thus arguably ensures a great protection of the developing countries in terms of environmental protection. In practice, however, the BC has to a large extent failed to avoid the large-scale beaching of vessels in, for instance, India and Bangladesh, both BC states, due to the significant problems relating to the practical application and enforcement of the rules, incl. the high seas rule, set out above.

5.10.3 Under the HKC vessels may only be recycled at "*approved recycling facilities*". As the HKC is not yet in force and since certain facilities have only been approved by classification societies for a few years, it cannot be conclusively determined whether the standards set by the HKC sufficiently protects the local environment and the social and economic interest of the developing countries in the ship recycling industry.

5.10.4 It is, however, to be noted that a substantial amount of facilities have already been approved by several international classification societies. In order to attract international ship owners (that observe the HKC), these facilities thus need to observe the requirements set out by the HKC.

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[26] Op. cit at 1, Art. 4
[27] Op. cit at 2, Art 10.
[28] Ibid.

5.10.5 Arguably, this also means that the HKC provides a level of protection for workers in developing countries that has, in practical terms, not been offered by the BC.

5.11 Summary conclusion

5.11.1 In our view, based on all factors considered above, we find that the HKC at least a comparative level of environmental protection than the BC also considering that the BC may apply residually (in case the HKC does not apply). Generally, the practical shortcomings of the BC and the ship-specific nature of the HKC provides a more comprehensive and environmentally sound framework for the recycling of vessels.

5.11.2 The HKC is therefore not violating the obligations under Art. 11 of the BC.

6 Conflict between states that are both parties to the BC and the HKC?

6.1 It is relevant to distinguish between the conflicts between states that are both parties to the BC and the HKC and conflicts in which only one party has ratified the BC. The first situation will be examined in this section, the second in section 7 below.

6.2 The BC applies to the recycling of waste generally, whereas the HKC applies specifically to the recycling of ships, therefore it follows that in the context of the recycling of ships that the HKC is more specific, and should prevail over the BC.

6.3 In relation to states that are both parties to the BC and the HKC, applying the principle of *lex posterior derogate prioiri* to the conflict between the BC and the HKC, would suggest that the HKC should prevail as it will have entered into force subsequently.

6.4 However it should be noted that the application of either principle does not guarantee a final resolution of the matter or a binary outcome (i.e. one treaty prevailing whilst the other is set aside). In the Southern Bluefin Tuna case [29] the International Tribunal on the Law of the Sea considered the principles of *lex posterior derogate priori* and *lex specialis derogate legi generalis* to a dispute between New Zealand and Australia on one side and Japan on the other over Japan's role in the management of southern bluefin tuna stock. Faced with the argument that two existing conventions were in conflict with one another, the tribunal identified which would prevail under each of the two doctrines but nonetheless declined to make its decision on that basis.

6.5 In relation to the question of subject matter, two treaties will generally be considered to address the same subject matter if the same factual situation/action would involve the application of the two treaties.[30] Even though the general scope of the BC is significantly broader than that of the HKC, the BC and the HKC would likely still be considered to address the same subject matter in relation to ship recycling.

6.6 The question of incompatibility is harder. The degree of incompatibility that is required is unspecified, however it seems unlikely to require a level which creates de facto inoperability, as such are covered by the VCLT, Art. 59.

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[29] Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan), International Tribunal on the Law of the Sea, 4 August 2000, Volume XXIII pp. 1-57

[30] A Ramanujan, "*Conflicts over conflict*: Preventing fragmentation of international law", 1 (1) Trade L. & Dec 171 (2009), p 178.

6.7 In determining whether incompatibility exists, the principles of the VCLT relating to the interpretation of treaties will likely be relevant.

6.8 It is hard to substantiate a conclusion that there is not sufficient incompatibility between the BC and the HKC. In the context, genuine practical difficulties arise for vessel owners who are obliged to follow both. The existence of both conventions does seem to frustrate the object and purpose of both conventions of ensuring that vessels are recycled in an environmentally sound manner, as their dual existence creates additional obstacles to be navigated by the vessel owner. Whether or not the level of incompatibility is significant enough to trigger the provisions of Art. 30 and which of the provisions may be salvaged as compatible will ultimately be a matter for the ICJ.

6.9 Art. 30(4) further clarifies the situation where not all of the parties to the first treaty re parties to the second treaty (as is the case in the matter at hand). In such circumstances, where both the relevant state parties are parties to both treaties (e.g. HKC and BC), the conflict is to be solved based on the rule of compatibility stated above.

6.10 In our view, due to the similar purpose of the HKC and the BC, it seem fair to assert that the HKC shall take priority over the BC in case of any conflict between the HKC and the BC between states that are both parties to the HKC and the BC.

6.11 In principle, this conclusion will thus already follow from the stated principles of international law (and the VCLT) without reference to the articles of the BC.

6.12 Secondly, in any event, as noted above in section 5, it is our assessment that the HKC is also fulfilling the requirements of an at least comparable environmental protection. The HKC should also, on this basis, prevail over the BC in the said conflicts.

7 Conflict between BC/non-HKC states and BC/HKC states?

7.1.1 The general principles of *lex posterior derogate priori* and *lex specialis derogate legi generalis* will not be applicable to conflicts between states that have ratified both the BC and the HKC and states that have only ratified the BC, see section 4.3.3.

7.1.2 Nonetheless, as the HKC ensures at least a comparable level of environmental protection than the BC, see the analysis in section 5 above on the BC, Art. 11, the HKC shall thus prevail in any actual conflict with the BC. This is, however, only relevant to the recycling operations for which the HKC applies (i.e. for HKC-flagged vessels), as the BC may still apply to the recycling of non-HKC-flagged vessels.

8 Conflict between the BC and the SRR?

8.1 Overall position of the SSR in relation to the HKC

8.1.1 As the SSR is based to a large extent on the HKC, much of the analysis in earlier sections applies equally as to the conflict between the BC and the SSR.

8.1.2 It should be noted that the SSR will as a matter of EU law always take precedence over international conventions such as the BC, in matters between the state and the citizens (both real and legal) in all EU member states.

8.2 EU declaration under articles 26 and 22 of the BC

8.2.1 Art 26(1) of the BC provides that signatories are not permitted to make reservations or exceptions to the BC. Art 26(2) offers a qualification of the absolute restriction envisaged by 26(1) during the process of signing or ratifying the BC, and provides that states may:

> *"Paragraph 1 of this Article does not preclude a State or political and/or economic integration organization, when signing, ratifying, accepting, approving, formally confirming or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State."*

8.2.2 It is unclear from the wording of art. 26(2) exactly what the purported effect of such a declaration or statement may be. It seems clear that the intention is not to allow states to exclude or modify the legal effect of the BC, which would likely constitute a prohibited exception or restriction under 26(1).

8.2.3 The BC may be ratified by organizations, such as the EU, Art 22 (3) require organizations which ratify the BC to:

> *"In their instruments of formal confirmation or approval, the organizations referred to in paragraph 1 above shall declare the extent of their competence with respect to the matters governed by the Convention (...)."*

8.2.4 As required, the EU made such a declaration under Article 22(3) during its accession to the BC which stated:

> *"As provided for in the EEC Treaty and in the light of existing Community legislation in the field covered by the Basel Convention, more particularly Council Regulation (EEC) No. 259/93 and Council Directive 84/631/EEC on the supervision and control within the European Community of the transfrontier shipment of hazardous waste (as amended), the Community possesses competence at an international level in this field. The Member States of the European Economic Community also have competence at international level, including on certain matters which are covered by the Basel Convention."*[31]

8.2.5 It may therefore be argued that the acceptance of this declaration indicates a tacit acceptance of the EU and its member states ability to possess continuing competence to regulate matters covered by the BC. Conversely, it may be argued that this mandatory declaration requirement is merely a procedural formality for organisations which exists to ensure that organisations have the required authority to adequately bind their constituent member states.

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[31] EU declaration in accordance with article 22(3), accessible via https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-3&chapter=27&clang=_en#EndDec , last accessed 23/11/2020 16:34

8.2.6 Given that i) EU law will always take precedence over international treaties for members of the EU and ii) the fact that all parties to the BC are permitted to legislate on the same subject-matter of the BC, provided that such legislation, contains an equivalent level of protection to the BC, it is unclear how practically significant this declaration is the context of the conflict between the BC and the SSR.

8.3 The comparative levels of protection offered by the BC and the SSR

8.3.1 The comparative levels of protection question is still relevant in this context, and the SSR stipulates some additional requirements in relation to the recycling of vessels in comparison with the HKC.

8.3.2 For example under the SSR, recycling must be carried out at an EU-approved facility, whereas under the HKC the facility must just be certified. The EU SSR also requires that the recycling facilities must operate from "built structures",[32] which is likely to indirectly hinder the use of the highly controversial and environmentally damaging "beaching" method of ship recycling.

8.3.3 These additional specifications would strengthen the arguments in favour of the SSR providing at least an equivalent level of protection to the BC.

8.4 General principles of international law

8.4.1 The above discussion of the application of general principles of international law in section 6 would have the same implications in the context of conflict between the BC the SSR.

8.5 Principles of treaty interpretation

8.5.1 The above discussion of the principles of treaty interpretation in section would have the same implications in the context of the conflict between the BC and the SSR.

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[32] Op.cit. at 3, Article 13, 1(c).