



The Hon Audrey Eu Yuet-mee, SC, JP
The Chairman,
Bills Committee on the Waste Disposal (Amendment) Bill 2005,
Legislative Council Building,
8 Jackson Road,
Central, Hong Kong

Dear Hon. Audrey Eu Yuet-mee, SC, JP:

What follows are Greenpeace/BAN's counter response to the Administration's comments on our submission of December 6th, 2005. The comments are inserted in an annotated way into the Administration text.

Sincerely yours,

Jim Puckett (Basel Action Network)
Chan Yue Fai, Edward (Greenpeace)

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The Hon Audrey Eu Yuet-mee, SC, JP
The Chairman,
Bills Committee on the Waste Disposal (Amendment) Bill 2005,
Legislative Council Building,
8 Jackson Road,
Central, Hong Kong

Dear Chairman,

Bills Committee on the Waste Disposal (Amendment) Bill 2005

**Administration's Response to Greenpeace's Submission on
"Harmonizing Hong Kong's Waste Disposal Ordinance
and China's Basel Convention Obligation"**

As discussed at the 10th meeting of the captioned Bills Committee, I would like to submit our written response to the submission made by Greenpeace on 16 December 2005.

Hong Kong as a free port

2. Hong Kong is a leading international trading and services hub. It is widely recognized as one of the freest economies in the world. Our firm commitment to free trade is one of the key elements to our continuing economic success. Hong Kong has maintained no tariffs and no regulatory measures impinging on international trade.

Greenpeace/BAN: If the last statement is indeed the case it is rather surprising. There are numerous international accords which seek to regulate trade for example in illicit drugs, prostitution, nuclear armaments, endangered species, slavery, etc. The Basel Convention and the Basel Ban Amendment are but two international accords where the global community felt it was very important to establish regulatory measures applying some trade rules as hazardous wastes were not seen as strictly a “good” but rather also as a “bad” that needed to be controlled to avoid environmental harm and human rights exploitation. China was a leader in this effort. It would be surprising indeed if Hong Kong did not restrict any trade whatsoever and in any way. We know of no country that truly employs “free trade”.

3. As the leading port in the region, we have a well-established system to enable maximum convenience in movement of goods and at the same time effectively discharge our international obligations and protect public health and the environment.

Greenpeace/BAN: We reiterate that the Basel Convention and the Basel Ban Amendment do not seek to control commodities or goods, but rather install control on a narrow area - hazardous wastes which are globally acknowledged threats to human health and the environment.

4. In this respect, we have been implementing “The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal” (the Convention) as concluded at Basel in Switzerland on 22 March 1989, with a view to sharing our global responsibility to reduce the adverse impact to the environment due to the improper management of hazardous waste.

Implementation of the Convention in Hong Kong

5. Hong Kong implements the Convention through amendments to the Waste Disposal Ordinance (WDO) in 1995, and the provisions are set out in Part IVA (Sections 20A to 20I) of the WDO. The Convention is designed to regulate the transboundary movement of hazardous wastes, and we control those hazardous wastes listed in the 7th Schedule of the WDO and any other waste contaminated

by a substance to an extent which renders the waste hazardous, or not suitable for reuse or for reprocessing, recycling or recovery.

Greenpeace/BAN: Unfortunately, the definitions of waste, and hazardous waste as outlined in the 7th Schedule does not correspond to the Basel Convention definitions. In fact it no longer even corresponds with the OECD definitions, upon which they were originally based. And, while Parties to the Basel Convention can enact lists that are stronger than the Basel Convention under Article 1.1.b, they cannot pick and choose among the wastes globally listed in Article 1.1.a of the Convention. Yet in effect this is what HKSAR has done and this needs to be corrected at this opportunity for revision.

Under Part IVA, the import or export of hazardous waste requires a permit from the Director of Environmental Protection (DEP).

Greenpeace/BAN: This indicates that the HKSAR has not chosen to implement the Basel Ban Amendment, which all Parties of the Convention have been urged to ratify and implement at the earliest possible date, in decisions adopted at each and every Conference of the Parties since 1995. Under the Basel Ban Amendment the importation of Basel listed hazardous wastes are forbidden – not subject to permitting. It is hard to understand how Hong Kong can conceive to violate the Ban, which has been concluded on a consensus basis and which China has already ratified.

For non-hazardous wastes which are listed in the 6th Schedule of the WDO, a permit is also required unless they are uncontaminated and imported for the purpose of reuse or a reprocessing, recycling or recovery operation.

Greenpeace/BAN: This is worrying, as non-hazardous wastes that are contaminated with hazardous wastes must be considered hazardous waste under the Basel Convention. Further, the consideration of whether or not a material is destined for recycling is irrelevant in the Basel Convention context. Because of the serious environmental risks posed by the recycling of hazardous wastes such as electronic wastes, the Basel Convention rightly makes no distinction legally between operations destined for final disposal or for recycling. If the HKSAR were to truly implement the Basel Convention as they say they wish to do, they would

make no such distinction between wastes destined for recycling or final disposal and likewise would not make a distinction between contaminated non-hazardous waste and hazardous waste.

Both the 6th and 7th Schedules of the WDO were drawn up by reference to the green, amber and red waste lists adopted by the Organization for Economic Co-operation and Development (OECD) in 1994, well before similar listing was adopted as Annexes VIII and IX to the Convention in 1998. The OECD lists have been and are still being adopted by the Member States of the European Community (EC) under the Council Regulation (EEC) No. 259/93, which controls the import and export of waste. The 6th and 7th Schedules resemble the OECD lists in order to ensure the local waste classification system is compatible with that adopted by our trading partners in Europe and other OECD countries.

Greenpeace/BAN: This is a very serious legal mistake. Neither China nor HKSAR are member states of the Organization for Economic Cooperation and Development. These special OECD lists were never meant to be adopted by all countries of the world, but only by the 30 member states of the OECD. And in fact, in C(2001)107/FINAL, the OECD has repealed these lists that HKSAR still wants to employ and has substituted new definitions which for the most part align with the Basel Convention's Annex VIII. And, where differences remain, these deviations from the Basel Convention can *only* apply to the OECD group of states. The Basel Parties meanwhile are obliged to honor the hazardous waste definitions of the Basel Convention including full application of Annexes I, III and VIII. As the lists used by HKSAR are no longer in legal effect among OECD member states, so the claimed desire to assume international compatibility cannot be a valid concern.

The EU has ratified the Basel Ban Amendment and is thus EU member states are forbidden from exporting hazardous wastes that appear on the Basel Convention lists or the OECD restricted lists (amber and red) to non-OECD countries like China/HKSAR. Thus the statement above about ensuring compatible trade is highly misleading. The EU has just finished negotiations on a revision of the waste shipment regulation and they have likewise updated the new OECD lists in accordance with C(2001)107/FINAL for trade with OECD countries but maintains the Basel lists for non-OECD countries. Further, to maintain that other OECD countries can engage in free trade with non-OECD countries is in

contradiction to the Basel Ban Amendment which all Parties have adopted and have agreed to implement. The Basel Ban should be respected even if it is not yet in strict legal force. It is therefore incorrect for HKSAR to pretend that it can trade freely in hazardous wastes with OECD countries under the terms of the Basel Convention. This position taken here, particularly when China was the sponsor of the Basel Ban Amendment, is not easily understood.

Implementation of the Basel Ban in Hong Kong

6. In 1995, the parties to the Convention agreed to ban the export of hazardous waste (commonly referred to as the Basel Ban) from Member States of the OECD, EC and Liechtenstein to other states. The objective of the Basel Ban is to reduce the environmental impact caused by the movement of hazardous waste from the developed countries to the developing countries.

Greenpeace/BAN: That is but one objective. Another very important objective is to prevent the export of hazardous wastes for economic reasons. That is, allowing hazardous wastes to follow an economic path of least resistance, seeking out weaker economies and lower wage communities, rather than requiring rich, developed countries to take responsibility to create adequate capacity for hazardous waste prevention and management domestically as is required under the Convention (Article 4,2.b). Domestic management of hazardous waste is a requirement of *all* Parties but it was seen that the OECD/EU group could accomplish this goal first while preventing the environmental injustice of disproportionately burdening weaker economies and low wage communities and their environments with the global toxic waste burden.

While Hong Kong has no obligation to implement the Basel Ban since China is not a Member State of the OECD, we have been implementing the Basel Ban since 1998 by not issuing permits for the importation of hazardous waste from Member States of the OECD, EC and Liechtenstein.

Greenpeace/BAN: Certainly while it is true that the obligations for Parties under the Basel Ban Amendment rest with the OECD/EU/Liechtenstein group (new Annex VII), HKSAR should do

nothing that would be contradictory to the ban (e.g. allowing legal importation of what other Parties must forbid). In short, it cannot be seen that HKSAR has fully implemented the Ban if the importation of Basel listed hazardous wastes is allowed under any circumstances into Hong Kong or China – with a permit or without a permit. The insistence on maintaining a permit system in the past was not correct. Further maintaining an incorrect listing of wastes when this could easily be rectified still seems to demonstrate intent to circumvent the Basel Convention and the Basel Ban Amendment.

We have also proposed in the Bill to give effect to the Basel Ban through amendment to the WDO so as to send a strong signal to the international community regarding Hong Kong's commitment to enforcing the Basel Ban.

Greenpeace/BAN: And as we have noted in our extensive comments this is laudable except for the fact that the lists used for hazardous waste are not the appropriate Basel lists.

Collaboration with overseas jurisdictions and the mainland authority

7. The Environmental Protection Department (EPD), as the local competent authority of the Convention, has been in close liaison with the competent authorities in overseas countries to tackle illegal transboundary movement of hazardous wastes. We have joined the Cluster on Transfrontier Shipments of Waste of the IMPEL Network¹ (IMPEL-TFS) since 2001 and participated in their enforcement projects to stop illegal waste shipments. Since 2004, we also joined the Asian Network for Prevention of Illegal Transboundary Movement of Hazardous Wastes, and share our intelligence and enforcement experience with other Asian countries.
8. EPD has also signed a Memorandum of Understanding with the State Environmental Protection Administration (SEPA) of the mainland in 2000 to formalize the arrangement for controlling waste shipment between Hong Kong and the mainland. Since June

¹ The European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) is an informal Network of the environmental authorities of the Member States, acceding and candidate countries of the European Union and Norway. The network is commonly known as the IMPEL Network.

2003, the EPD and the Hong Kong Customs and Excise Department (C&ED) have joined force with the SEPA and the customs authorities of the mainland to combat the smuggling of hazardous electronic wastes. Regular meetings with the mainland authorities are held to discuss issues of mutual concern and share enforcement experience and intelligence.

Enhanced efforts in controlling hazardous electronic waste (e-waste)

9. In light of the global concerns on the export of hazardous e-waste to developing countries which are ill-equipped to manage or recycle/reprocess the waste properly, we have stepped up our enforcement efforts. Through close liaison and co-operation with the mainland and overseas enforcement authorities, EPD intercepted 164 shipments of hazardous e-waste and successfully made 70 prosecutions upon waste importers or exporters of hazardous e-wastes between 2004 and 2005, and two offenders were each convicted and sentenced with an imprisonment term of 2 months but suspended for two years. Most of the shipments intercepted by EPD have been returned to the countries of origin in accordance with the Convention.

10. Illegal cases on the transboundary movement of e-waste are usually related to false customs declaration, smuggling and import or export under the disguise of recyclable wastes. Apart from stepping up enforcement patrols, we have also promulgated a set of guidelines to the waste importers and exporters to advise them of the need to obtain a permit before importing or exporting hazardous e-waste.

Greenpeace/BAN: While we sincerely applaud Hong Kong's efforts at diligent enforcement outlined above, the last sentence in the paragraph above is of concern. We hope this can only mean that the hazardous waste imports possible in Hong Kong are those that are coming from developing countries.

EPD also collaborates with our Japanese counterpart to develop a guideline on the control of transboundary movement of used electronics in the Asian region.

11. While we have been successful in curbing the transboundary movement of hazardous e-waste through enhanced efforts and collaboration with both local enforcement agencies and our counterparts and competent authorities in the mainland and overseas countries, we have also proposed to amend the existing 7th Schedule to the WDO to specifically set out the categories of e-waste which are considered hazardous and subject to the import/export permit control. It should however be noted that used electrical and electronic equipment that can be transferred to the ultimate users for direct reuse without repair is not regarded as waste and hence not subject to control under the Convention and the WDO. This is in line with the international practice to encourage the reuse of such used equipment.

Greenpeace/Ban: We concur with exempting wastes that are destined for re-use without repair. However this can only be properly enforce with proper testing and labeling applied in the exporting state *prior* to import. It must not fall on the importers or importing state to be responsible for testing the equipment to determine whether the material is really a waste or not. In this regard it is very useful to look at the testing requirements promulgated by the Australian government and require exporters to adhere to such. Due to the rapid obsolescence of computers and computer equipment, it would also be wise for HKSAR to also place an age limit on the equipment so that regardless of its functionality, it is really useful and resalable. It is far too easy for traders to claim that wastes are re-usable/repairable when in fact they are not useful due to age and lack of computing power or in fact are junk and not functioning at all.

Proposed amendments to the WDO to follow the spirit of the Convention

12. As mentioned above, the existing lists of wastes as set out in the 6th and 7th Schedules of the WDO were modeled along the OECD lists which are still adopted by the Members States of the EC, and hence our local classification is compatible with that of our trading partners.

Greenpeace/BAN: Again we strongly object to the above statement. It is simply misleading to state this when in fact it is illegal for the EU to export wastes to Hong Kong based on the old OECD lists (See Article 16

of the European Waste Shipment Regulation (EEC/259/93). Further those lists have been repealed by the OECD and the EU is no longer intending to use them in the Waste Shipment Regulation. The OECD has been under a lot of criticism for having adopted its own waste lists separate from the Basel Convention and that is why they have taken the effort to conform their lists to those of the Convention. They changed their lists as noted above and repealed the ones now used by HKSAR and proposed for continued use!

Nevertheless there are still glaring differences, most notably for equipment containing hazardous circuit boards. This is highly significant for the environment and human health as printed circuit boards as found in use today contain more readily leachable lead than do cathode ray tubes which HKSAR has agreed to prohibit. Thus, it begs the question as to why HKSAR is intent on maintaining the loophole and continues to list circuit boards on its Schedule VI of so-called “green” listed waste as follows?

“GC020 Electronic scrap (e.g. printed circuit boards, electronic components, wire, etc.) and reclaimed electronic components suitable for base and precious metal recovery”

The Basel Convention does not agree to exempt these circuit board wastes and that is why this type of listing above cannot be found in Basel Convention Annex IX (non-hazardous wastes). Could it be that this position is due to the fact that there is an effort to maintain trade in circuit boards containing hazardous wastes, particularly those coming from the United States – a country which has failed to ratify the Basel Convention and has failed to properly implement the OECD rules and does not consider any electronic waste should be subject to export controls unless it contains PCBs? It is difficult to imagine another rationale for this position, as all other Basel Parties already consider electronic circuit boards to be hazardous waste.

To ensure our waste lists are aligned with international practice, we have proposed to amend the two schedules as set out in Clauses 23 and 24 of the Bill. Under Clause 24 of the Bill, we have inserted 13 new items into the 7th Schedule so that its coverage is more comprehensive and reflects better the hazardous waste list in Annex VIII of the Convention. The new entry AD220 (i.e. chemical waste not elsewhere specified)

makes reference to the chemical waste control regime, which encompasses consideration of the form, quantity or concentration of the hazardous components. This new entry complements the list of specific waste streams in the 7th Schedule and is a catch-all description to ensure that any hazardous waste not specifically listed will still be subject to control.

Greenpeace/BAN: While a catch-all listing might be useful if authorities are willing to apply it diligently, we are concerned as to how in practice this will be implemented. Loose legislation is just as likely to serve as a vehicle to provide authorities with regulatory discretion when in fact such discretion might not be legally appropriate with respect to international commitments. Under the current WDO “chemical waste” is defined as:

"chemical waste" means any substance, matter or thing defined as chemical waste by regulations made under section 33;

However we cannot find a list of “chemical wastes which have been defined as such by section 33. In fact, as everything on earth is a chemical, it is thus unlikely that it will be applied strictly or taken so seriously as to include all wastes. Actually, a common reading of “chemical waste” would exclude in the minds of most people such materials as printed circuit boards. Such a term is more suited to liquid or dry residue, still in the physical form of a highly complex product – that is, process wastes rather than to post-consumer wastes. Thus it could be highly misleading to use this term without a full definition of it. As it is, the term “chemical waste” is a very loose term for which authorities make a case by case determination. This type of approach is not legally correct for wastes that are very clearly on the Basel lists such as printed circuit boards.

It is far better to simply reflect the Basel Convention and its lists – a Convention to which China is a Party, and not lists derived from the OECD, to which neither China nor Hong Kong is a Party. To do otherwise, and to continue maintaining this legally inappropriate regime, reveals intent to import hazardous electronic equipment containing circuit boards. Again, we implore the LEGCO to look at the rules promulgated by Australia, an OECD member nation, – a country that has thoroughly explored their responsibility as a Basel and OECD party, and the

ramifications of the Basel lists with respect to electronic waste.

13. Regarding hazardous e-waste listed as item A1180 of the Convention, we have already covered the individual items under the 7th Schedule e.g. AA180 for batteries, AB040 for glass waste from cathode-ray tubes, RA010 for PCB-containing capacitors. In order to further improve the clarity of the 7th Schedule, we propose a Committee Stage amendment (CSA) such that a new item will be inserted under the 7th Schedule as follow :

“A1180 Waste electrical and electronic assemblies or scrap contaminated with constituents to an extent which renders the waste as chemical waste.”

Greenpeace/BAN: The unwillingness of the authors to reflect the Basel listings speak volumes. And the utilization of the very same listing number as Basel without the correct language is very inappropriate. This new language appears to insert subjectivity and discretion where it is not appropriate.

It is clear that Hong Kong wishes to maintain a free trade in circuit board containing material. They are not intending to consider hazardous printed circuit boards as “chemical wastes”. That is why they continue to maintain the listing on Schedule VI:

“GC020 Electronic scrap (e.g. printed circuit boards, electronic components, wire, etc.) and reclaimed electronic components suitable for base and precious metal recovery”

The Basel Convention on the other hand does not consider circuit boards as a “green” or non-hazardous waste and in fact the correct A1180, Annex VIII listing reads as follows:

“A1180: Waste electrical and electronic assemblies or scrap containing components such as accumulators and other batteries included on List A, mercury switches, glass from cathode-ray tubes and other activated glass and PCB-capacitors, or contaminated with Annex I constituents (e.g. cadmium, mercury, lead, polychlorinated biphenyl) to an extent that they possess any of the characteristics contained in Annex III (note the related entry on B B1110).”

Those uninitiated in the nuances of waste definitions might not see the difference above. But in practice the lead-tin solder content of a circuit board clearly is delineated by reference to Annex I and III of the Basel Convention such that any country diligently following the Convention will (as Australia has done) include circuit boards, shredded or otherwise, separate or as part of equipment, as falling under the Basel Convention listing.

There very much appears to be an effort here to create a legally inappropriate loophole for companies that are actively engaged in what should be an illegal trade in importing equipment containing hazardous lead-tin soldered circuit boards. We strongly recommend that Annex VIII replace the Seventh Schedule and the appropriate references to Annex I and III of Basel be included. We strongly recommend likewise that Annex IX replace Schedule 6. Without these changes, HKSAR will be out of compliance with the Basel Convention. Again, it must be stressed that the existing lists, contrary to the claims made of intent at compatibility, do not exist anywhere in international law any longer and even if they did, the OECD lists are not appropriate for use by non-OECD countries.

Scope for further amendments to the WDO

14. We have examined the scope for adopting Annex III of the Convention in enhancing our control regime. We observe that it is premature to adopt the Annex since the text of the Convention has rightly pointed out that the potential hazards posed by certain types of wastes are not fully documented and the tests do not exist to define quantitatively these hazards. However, we remain open-minded and will closely monitor the development of such tests and consider their applications in the longer term.

Greenpeace/BAN: This statement is really quite surprising. The exercise that took place prior to 1997 which led to the adoption of Annex VIII of the Convention at COP4, which the authors refuse to recognize or mention, was in fact a scientific investigation into waste streams with a view to identifying which waste streams in practice fall under the Basel Convention (containing Annex I constituents unless they do not possess a hazardous characteristic). Thus Annex III was fully taken into account in

the adoption of Annex VIII (waste streams presumed to be hazardous). Further, to ignore Annex III is legally unacceptable as it is one of the fundamentals of the definition of what falls under the control of the Basel Convention. Of course there is some room for national interpretation of Annex III where it might be vague, but to refuse to adopt it is absolutely incorrect for a Basel Party, as HKSAR purports to be. Further, it must be noted that the Basel Convention, in establishing the relationship between Annex I and III has created a rebuttable presumption that any material containing Annex I constituents (e.g. circuit boards) *is* in fact a Basel hazardous waste, *unless it does not exhibit a hazardous characteristic listed in Annex III*. Thus, if HKSAR does not know if such wastes exhibit hazardous characteristics and does not want to rely on the data of Australia and many other countries, they still must consider it as falling under the Basel Convention *unless* they can demonstrate that it does not possess a hazardous characteristic. Can they really claim they can do this for circuit boards because the data speaks very strongly to the contrary?

Further in addition to Annex VIII, technical guidelines have been and continue to be developed for each of the Annex III characteristics. Thus the implication that Basel's Annex III is ineffectual and therefore it can be ignored is simply not the case.

15. We have also re-considered the proposal to prohibit the import of hazardous waste and to extend the permit control to recyclable non-hazardous waste, similar to the approach adopted by the mainland in banning the import of a list of controlled waste that has covered some non-hazardous waste. As pointed out earlier, Hong Kong is an international port with container cargoes coming from all over the world and their destination may be many places other than the mainland.

Greenpeace/BAN: This argument which implies a need to be consistent with international law is without merit. The Basel Ban Amendment is for the most part, despite not being yet in strict legal force, already implemented by a vast majority of the Annex VII (OECD/EU/Liechtenstein) countries it applies to. There are currently 37 Annex VII countries. Of these 30 have already implemented the Basel Ban into their national law (see table below)

<u>Implementing (30)</u>		<u>Respecting (2)</u>
Austria	Norway	Australia
Belgium	Poland	Mexico
Cyprus	Portugal	
Czech Republic	Slovak Republic	
Denmark	Slovenia	
Estonia	Spain	
Finland	Sweden	
France	Switzerland	
Germany	Turkey	
Greece	United Kingdom	
Hungary		
Iceland		
Ireland		
Italy		
Latvia		<u>Ignoring (5)</u>
Liechtenstein		Canada
Lithuania		Japan
Luxembourg		New Zealand
Malta		South Korea
Netherlands		United States

Thus if compatibility with the rest of the world is truly the goal then it would be far more appropriate to implement the Basel Ban Amendment fully.

It is important for Hong Kong to follow the international practice on the import and export control to facilitate the trading of goods, and it is neither necessary nor practicable to follow the restriction imposed by the mainland since it will have a negative and detrimental impact on the movement of recyclable materials between Hong Kong and other countries.

Greenpeace/BAN: Further, it is misleading to assume that port activities or most waste shipments would be disrupted. The Basel Ban is a ban on transboundary movements *from* Annex VII *to* (not through) non-Annex VII countries. Thus only those shipments exported by an Annex VII country that will eventually be imported by a non-Annex VII country are subject to the Basel Ban. It does not forbid Parties lacking adequate recycling infrastructure from shipping to those that have it. Rather it prohibits the opposite. Implying that it does this and forbids all waste trade is very misleading. China and the HKSAR, based on the Basel Convention have a duty to cooperate to ensure that illegal exports of this kind would be subject to the Basel Ban Amendment and its enforcement.

The notion that the word “recycling” can be used as a justification to ignore the Basel Ban is absolutely inappropriate. The Basel Ban pointedly included recycling destinations as being forbidden for the reason that virtually all of the economically expedient, but environmentally disastrous exports of hazardous waste taking place today and in the last two decades have been destined for recycling operations. Recycling of hazardous waste entails significant risk and it is inappropriate for countries fully capable of providing their own domestic recycling capacity to exploit developing countries for this service. It is unacceptable that HKSAR seems willing to play a role in perpetuating what the global community has deemed an environmental injustice with respect to electronic wastes (e.g. the large volume of these that should be controlled due to the hazardous circuit boards).

Moreover, despite the slightly different control regime between Hong Kong and the mainland, we have close working relationship to share intelligence and enforcement practices with our mainland counterparts as

enshrined under the Memorandum of Understanding signed between SEPA and EPD in 2000.

Greenpeace/BAN: The MOU primarily establishes a reporting mechanism between the Mainland and Hong Kong, and cannot be used as a justification to escape upholding the Basel Ban. The problem in Hong Kong's New Territories is illustrative of the point we are raising. In a report released by Greenpeace last year, it was revealed that Hong Kong's New Territories has become a staging point for e-wastes to enter into the Mainland. E-waste is taken to the Mainland by waste traders using inland roads making inspection by authorities and subsequent reporting difficult. Clearly, prohibiting hazardous waste from even entering the territory would immediately address this problem, more than a reporting system.

16. As explained above, we do not consider it appropriate or timely to introduce some of the changes suggested in Greenpeace's submission. We have summarized our detailed response to the specific recommendations of Greenpeace in the Annex, and we are pleased to further explain our rationale and enforcement practices to Members of the Bills Committee.

Greenpeace/BAN: What is being suggested is not just the wishes of Greenpeace/BAN but is what is required by a correct reading of established international law.

Yours sincerely,

(Raymond Fan)
for Director of Environmental Protection

cc Mr Edward Chan, Greenpeace

Response to the specific recommendations made by Greenpeace

Our detailed response to the specific recommendations made by Greenpeace is set out below.

1. Definition of “waste” (Pages 6 - 8 of the Submission)

Definition of waste in Basel is based on the ultimate fate of wastes – that is whether the material is defined for an Annex IV destination. As most waste has an “owner” as it is trafficked for profit, the notion of “abandonment” is not appropriate.

Recommendation: *We therefore strongly suggest the following change in the WDO amendments: Section 2(1), suggested new definition of "waste": “means any substance or article which is disposed of or is intended to be disposed and includes animal waste, chemical waste, household waste, livestock waste, street waste, trade waste”. Section 2(2), replace the term “discarded” with “disposed”.*

Under the WDO, “waste” is defined as “any substance or article which is abandoned and includes animal waste, chemical waste, household waste, livestock waste, street waste and trade waste”. The term “abandoned” has a special meaning when applied to the waste import and export control. It is incorrect to consider “abandonment” being equivalent to the “absence of ownership” as suggested in the submission. In fact, this interpretation has been rejected by the magistrates in a series of local court cases in 2005. In essence, the courts ruled that “waste” should be given a broad meaning and any used article is considered to be waste once the original overseas owner has given up its ownership for exporting to Hong Kong and it is dealt with as waste during its transport. The magistrates also observed that in applying the broad meaning of “waste”, whether the article was workable or had a value in the market was irrelevant. This broad interpretation has effectively fulfilled the policy intention of the Convention. Therefore, there is no need to make changes to the definition of “waste” in light of our successful prosecution track record and the wider application of our definition of “waste” to other waste types which are subject to control under the WDO.

Greenpeace/BAN: Clearly, the current controversy over the varied definition of wastes as used by Hong Kong and the global community needs to be resolved. Many waste brokers and operators are going to read the WDO and will not understand the unstated nuance elaborated above. If Hong Kong truly sees itself as an international port, it should adopt the globally accepted definition of wastes under Basel. Further, we question why a definition of waste should be different for a domestic generator than an exporter. Such discriminatory definitions could be challenged under the WTO and are yet another way of asking for trouble. What can be the rationale for continuing definitions that are not globally compatible and are clearly stated in the Basel Convention to which HKSAR/China is a Party.

Recommendation: “Disposed” or “Disposal” must be defined in all sections of the WDO as: “Disposed” or “Disposal” means any operation specified in Annex “XX” of this Convention. Annex IV of Basel needs to be replicated and placed into the WDO as Annex “XX”.

“Disposal” is defined in Section 20I of the WDO to mean, in relation to waste, any transfer operation, storage, reprocessing, recycling, material recovery, deposit, destruction, discharge (whether into water or into a sewer or drain or otherwise) or burial (whether underground or otherwise). Hence, the current definition has already adequately encompassed the specific processes listed in Annex IV of the Convention. There is no need to amend the definition of “disposal” and to replicate Annex IV of the Convention.

Greenpeace/BAN: The problem that is likely to arise is that the definition of disposal in the WDO can only be applied with a clear understanding of what a waste is. Rather in the Basel Convention the definition of waste is determined by waste management destinations. Thus in the WDO, if a material is not deemed to be “abandoned” by the unusual definition of waste applied in the WDO, (e.g. its ownership has never been given over to another), then it will not fall under the WDO regardless of how comprehensive the definition of disposal might be. Rather if the HKSAR wishes to maintain the current definition of “disposed” or “disposal”, then the definition of waste must be identical to that of the Basel Convention:

“Wastes” are 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.

Further we still find it inappropriate to have different waste and disposal definitions for import and export as those for domestically generated and managed wastes. We cannot understand the insistence of HKSAR to create their own incompatible definitions on subjects dealing with trade where international norms are necessary for smooth trade regulations.

2. Definition of Hazardous waste (Pages 9 & 10 of the Submission)

The WDO does not properly define hazardous waste as those wastes subject to the Basel Convention, making true implementation of the Basel Convention impossible under the WDO.

Recommendation: *We suggest that Basel's hazardous waste definition (Article 1(1)a) be properly transposed into the WDO and the former definition of contaminated be replaced such that it makes reference to Annex III hazardous characteristics.*

The 7th Schedule of the WDO provides a list of those waste streams which are considered hazardous. We have proposed some amendments to the Schedule in the Bill so as to improve its coverage, and to reflect better the hazardous waste list in Annex VIII of the Convention.

Greenpeace/BAN: It is not appropriate to merely “reflect better the hazardous waste list in Annex VIII of the Convention”. This is a very surprising statement. Rather the annexes are to be followed as a matter of proper implementation of international law. This annex and all annexes are to be applied by all Parties. The Basel Convention does not allow for reservations or exceptions (Article 26,1). All of the annexes of the Convention “form an integral part” of the Convention (Article 18,1).

The word “contaminated” has already been defined in Section 20I(2) of the WDO as follows –

“waste is contaminated if it is contaminated by a substance to an extent which significantly increases the risk to human health, property or the environment associated with the waste, or prevents the reprocessing, recycling, recovery or

reuse of the waste in an environmentally sound manner.”

The existing definition provides adequate control such that all hazardous wastes listed in the 7th Schedule of the WDO and any other waste contaminated by a substance to an extent which renders the waste hazardous, or not suitable for reuse or for reprocessing, recycling or recovery, are subject to the permit control for import or export. A permit is not necessary for the import or export of waste only if it is listed in the 6th Schedule and is uncontaminated and intended for the purpose of reuse, reprocessing, recycling or recovery.

Greenpeace/BAN: The problem arises when the word being defined is found in the definition itself. In this case, “waste is contaminated if it is contaminated...” This leads to great confusion. Does contamination imply an “unintended addition”? Or does it mean “containing”? This is a very important distinction. For example does a load of circuit boards that contain lead-tin solders (a Basel Annex I substance with a Basel III characteristic) mean that it is contaminated?

We strongly maintain that what HKSAR is intending to mean is not the latter but the former. Otherwise the word “containing” would have been used to make things far more clear. From a scientific standpoint, the risk is existent whether the hazardous constituent is intended to be present or not. We therefore strongly disagree that the existing definition provides adequate and consistent control with that required by the Basel Convention.

Annex III of the Basel Convention sets out the hazardous characteristics for defining waste which may be subject to control. The 7th Schedule of the WDO has already included specific hazardous waste streams, and we have also proposed a new entry AD220 (chemical waste not elsewhere specified) in the Schedule, which complements the list of specific waste streams. This allows us to make reference to the chemical waste control regime, which encompasses consideration of the form, quantity or concentration of the hazardous components.

Greenpeace/BAN: With all due respect, the above paragraph makes little sense. The Basel Convention’s Annex III is not referenced in the WDO and it is far from clear that the reference to “chemical waste” invokes application of the Basel Convention and its definitions.

It is fundamental that any Basel Party use its waste legislation to implement the Basel Convention and the Basel Ban Amendment as well as other domestic priorities. However the domestic priorities cannot deny or confuse application of the Basel Convention rather they can augment these. The above paragraph is a very poor substitute or explanation for why the WDO goes out of its way to confuse or negate application of the Basel Convention to which China is a Party and which the HKSAR has agreed to implement.

Recommendation: *Schedule 7 must be replaced to include, as a minimum, Annex VIII of the Basel Convention. Schedule 6 must be replaced with Basel Convention Annex IX. Annexes I and III of Basel must be included and properly referenced with their new numbers.*

There is no requirement in the Convention to copy the waste lists of the Convention verbatim as long as the wastes stated in the lists are subject to proper control under local legislation.

Greenpeace/BAN: The above statement is incorrect because they are not subject to the control envisaged by the Basel Convention. What is true is that there is no requirement in the Convention to copy the waste lists of the Convention verbatim *as long as the wastes stated in the lists are subjected to the controls as required under the Convention.* To state that the Convention can be ignored as long as HKSAR apply a subjective “proper control” is absolutely unacceptable. The Basel Convention is law, not a guideline!

The 7th Schedule of the WDO has a comprehensive waste list, and we have proposed amendments to further improve its coverage.

Greenpeace/BAN: Claims of “comprehensive” can be made but in fact the list is not complete. It does not include all of the wastes named in the Basel Convention. There may be others that surface with extensive analysis that are not covered that should be by virtue of using inappropriate waste lists, but the leaving out of electronic waste that is hazardous by virtue of lead-tinned soldered circuit boards is glaring and very significant.

Annex III of the Convention has spelt out clearly that “*The potential*

hazards posed by certain types of wastes are not fully documented; tests to define quantitatively these hazards do not exist...” This implies that there are still many technical areas in the Basel waste lists which need to be addressed by individual Member States through their local legislation, having taken into account the enforcement aspects. Nevertheless, we will continue to monitor the development of such tests and consider their application.

Greenpeace/BAN: As noted above, this statement is very misleading and denies the development of Annex VIII to remedy this concern as well as the development of many technical guidelines on the hazardous characteristics. Further, the absence of tests is meant to call for a stricter interpretation of the interplay between Annex I and III based on the rebuttable presumption that if one cannot prove a hazard and yet the material exists on Annex I, then they must be considered as hazardous and apply the maximum rigor. The absence of tests was never meant to serve as a rationale for less rigorous application of environmental protections.

3. Basel Ban decisions (Pages 12 & 13 of the Submission)

Recommendation:

(a) Prohibit the import of any waste of a kind specified in the 6th Schedule, unless the waste is uncontaminated and is imported for the purpose of a reprocessing, recycling or recovery operation or the reuse of the waste.

(b) Prohibit the import of any hazardous waste and apply Basel Annex VIII as the new Schedule 7.

(c) Prohibit the import of any waste not found in the 6th and 7th Schedules.

(d) A new permit system is required for the import of any uncontaminated waste of a kind specified in the 6th Schedule, and is imported for the purpose of a reprocessing, recycling or recovery operation or the reuse of the waste.

While Hong Kong has no obligation to implement the Basel Ban since China is not a Member State of the OECD, we have been implementing the Basel Ban since 1998 by not issuing permits for the importation of hazardous waste from Member States of the OECD, EC and Liechtenstein.

Greenpeace/BAN: This is not the case as certain hazardous electronic wastes have not been forbidden from entry into the HKSAR.

We have also proposed to give effect to the Basel Ban through amendment to the WDO as reflected in Clause 8 of the Bill so as to send a strong signal to the international community regarding Hong Kong's commitment to enforcing the Basel Ban.

We do not agree to adopt the approach of blanket prohibition since the existing permit control provides the flexibility to regulate the import or export of waste, and Hong Kong has to share global responsibility to assist other neighbouring countries to manage the waste in an environmentally sound manner.

Greenpeace/BAN: Implementation of international law does not allow for much flexibility on certain subjects. Waste definitions are one such subject in the Basel Convention that must be replicated in effect if not by the letter. Again we would like to hear which waste imports/exports HKSAR believes are appropriate to continue which would be prohibited by the Basel Ban Amendment. It is difficult to imagine for example circuit board imports that would "assist neighboring" Annex VII countries (e.g. Japan, South Korea) to manage their wastes in an environmentally sound manner. WE use this example because the Basel Ban Amendment only forbids exports from Annex VII countries to non-Annex VII countries. The lack of examples here is not helpful in making the government's case.

Lastly, it is important to note that helping countries manage waste in an environmentally sound manner does not mean promoting the movement of hazardous waste from one nation to another. Environmentally Sound Management under the Basel Convention includes prohibiting the transboundary movement of these wastes, as well as minimizing and preventing the generation of such wastes. It is erroneous for the government of Hong Kong to equate ESM in such a one-dimensional perspective, and as we see, in a way that runs contrary to what the Basel Convention and the Basel Ban Amendment intends.

As explained above, the 7th Schedule of the WDO provides a list of waste streams which are considered hazardous. We have proposed some

amendments to the Schedule in the Bill so as to improve its coverage, and to reflect better the hazardous waste list in Annex VIII of the Basel Convention. There is no need to adopt Basel Annex VIII to replace the existing 7th Schedule.

Greenpeace/BAN: As stated above, this explanation is not acceptable.

For non-hazardous waste which is not contaminated and is imported for the purpose of reuse, or for a reprocessing, recycling or recovery operation, a permit is not required from EPD since this practice is in line with the international trend to encourage the movement of non-hazardous waste for beneficial reuse and recycling. Hence, there is no need to introduce a permit system which will impose unnecessary red tapes.

Greenpeace/BAN: While what we are proposing is not necessarily a reflection of the Basel Convention, we must remind the LEGCO that first the definitions of non-hazardous waste must be compatible with those of the Basel Convention (which they are not) and further it might be prudent for the sake of enforcement to monitor, via a permit system, the waste which enters the country *alleging* to be non-hazardous and recyclable. This might save considerable administrative costs in dealing with illegal shipments in the longer term.

Finally, the notion of an “international trend to encourage the movement of non-hazardous waste for re-use and recycling” is not a consensus view by any means and can hardly be considered a policy trend despite its promotion by the Japanese and US governments of late. This notion is not compatible with the obligations of the Basel Convention which calls for minimization of transboundary movements of hazardous *and other* wastes as one of its prime objectives.

4. China’s Import prohibitions (Page 14 of the Submission)

Recommendation: The WDO must, in accordance with China’s Basel Convention obligations, be harmonized with mainland China’s hazardous waste definitions and prohibitions.

The mainland has adopted a list of controlled waste, and the list has included some non-hazardous waste which is banned from import into the mainland.

The existing WDO provides adequate control such that a permit is required for the import or export of any waste which contains hazardous constituents. Since the Convention encourages the recycling of waste, Hong Kong follows the spirit of the Convention and the existing control does not require a permit for the import of recyclable waste that is uncontaminated, non-hazardous and imported for the purpose of reuse or recycling.

Greenpeace/BAN: The statement that the Convention encourages the recycling of waste, while true within the context of minimizing the transboundary movement and generation of wastes, is far from being an overriding obligation of the Convention. Indeed such an alleged “encouragement” is not found as one of the primary obligations of the Convention.

While in normal circumstances, the Basel Convention does not require controls for non-hazardous wastes if these wastes are not collected from households or are residues of incineration of household wastes (other wastes as defined in Annex II of the Convention), in the case of Parties that have announced by virtue of Article 1.1.b that their national definitions are stricter and more inclusive than the Basel lists (Article 1.1.a), HKSAR is incorrect.

It is *not* acceptable for HKSAR, which is an integral part of China, to apply different definitions from those that have been declared by China by its own restrictive lists. China’s (mainland’s) definitions are legally valid under the Basel Convention’s Article 1.1.b which allows for stricter national definitions. However, as China has asserted these as a Party, HKSAR must do so likewise as a territory of that Party.

Moreover, waste coming to Hong Kong may be destined for areas other than the mainland for recycling; and imposing a ban on them will deprive the opportunity in using our port for transshipment in the Asia Pacific Region.

Greenpeace/BAN: One cannot have it both ways. Either HK wants to fully implement the Basel Ban or it does not. We would hope that HK would do as the Parties have requested in numerous decisions and help implement the Basel Ban Amendment by banning the traffic in wastes which are forbidden from export by Annex VII countries. What

“opportunities” that are consistent with the Basel Ban is the government considering here?

Furthermore, the mainland’s ban lists cover some second-hand or used products (e.g. used electronic appliances and equipment), which are beyond the scope of the WDO’s control. Adopting mainland’s ban lists will also mean that local consumers cannot procure second-hand or used goods from overseas, such as used cars or machinery with electronic equipment or parts. We therefore consider it not appropriate to adopt the mainland’s ban lists.

Greenpeace/BAN: We likewise are only considering banning waste imports in accordance with the Chinese mainland, not non-wastes. However it is imperative that Hong Kong be certain that the material claimed for re-use truly is re-usable by requiring testing and labeling showing functionality. I don’t believe this is currently required and is not required by the WDO revision proposal.

Recognizing the differences in the legal systems and control philosophy of the mainland and Hong Kong, the SEPA and EPD signed a Memorandum of Understanding to strengthen the communication and co-operation on transboundary movement of hazardous wastes in 2000. Since then, it has been our practice to alert the mainland authority of waste shipments from Hong Kong that may be subject to their import control.

Greenpeace/BAN: Legally under international law, HKSAR and mainland China must both adhere to the Basel Convention at a minimum including definitions reported by Mainland under Article 1.1.b.

Final Comments by Greenpeace/BAN:

It is a contradiction that the government claims that it wishes on the one hand to implement the Basel Convention and the Basel Ban Amendment, and at the same time goes out of its way to make sure that such implementation is only partial and in fact out of step with those international control regimes.

Further, despite, the desire for the HKSAR to maintain separate domestic control procedures, it is not acceptable under the terms of international law for subsidiary bodies of governments to apply less rigorous controls than

those agreed to on an international basis in treaties or Conventions between governments. And likewise it is not appropriate for HKSAR to not accept mainland's list of restricted wastes as these find their basis in Article 1.1. b of the Convention and a Party must implement the Convention as one and not have some regions implementing it less rigorously than others. HKSAR seems to believe it can pick and choose which of its international commitments to adhere to. Yet the Basel Convention allows no such reservations or exemptions and no one region of a Party can decide to exempt itself from requirements ratified by the whole.

Specifically we believe that the areas not directly addressed need to be so addressed. These include the following:

1. We have yet to receive an explanation as to why the government has not commented on why they insist on maintaining definitions for waste disposal and hazardous waste that are inconsistent and incompatible with those required under the Basel Convention. Why does it resist harmonization with the Basel Convention when to do so will only create difficulty in waste trade relations with Basel Parties and create a situation where China is out of compliance with the Convention. Indeed the OECD lists that Hong Kong insists on maintaining are not even used by the OECD any longer and yet we have not heard why Hong Kong insists on such outdated lists.

2. We have yet to receive an explanation as to why the government feels it is necessary to maintain an exemption for electronic wastes that contain hazardous printed circuit boards. The silence on this would lend one to think that it is currently condoning imports of these Basel wastes from Annex VII countries and wishes to continue to do so.

3. We would like to see an explanation of the types of hazardous waste traffic which Hong Kong wishes to allow to or through its port that are not already deemed legal, and outside of the controls imposed by the Basel Convention or the Basel Ban Amendment.

Thank you for your thoughtful consideration of our comments.

END