

Ship recycling regulation under international and EU law

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1. Introduction

This article examines the international and EU regulation of ship recycling. The demand for recycling of the European fleet exceeds by far the supply available in European ship recycling markets. Therefore, most European-owned commercial vessels are sent to the recycling facilities of third countries, the majority of which are located in South East Asia.² The economic feasibility of using the services of ship scrapping yards located in third countries is also an important consideration for ship-owners.

The levels of health, safety and environmental standards on many of these sites are, however, unacceptably low.³ Ships may contain hazardous, toxic and explosive cargo residues and dangerous built-in substances, such as asbestos and sometimes even radioactive materials. The so-called “beaching” of ships is an extremely dangerous and environmentally harmful shipbreaking, conducted directly onto beaches, where the ship is washed up with the tidal waters. Beaching is practiced in countries such as Pakistan, Bangladesh and India.⁴ At the same time, European-flagged or European-owned ships are estimated to represent a major share of the customers at these sites.⁵

² See generally Frank Stuer-Lauridsen, Nikolai Kristensen and Jesper Skaarup, *Ship-breaking in OECD*, Working Report No. 18, 2003 (Arbejdsrapport fra Miljøstyrelsen), available at: <<https://www2.mst.dk/udgiv/Publications/2003/87-7972-588-0/pdf/87-7972-589-9.pdf>> (last accessed 13 April 2020).

³ See Report by the Parliament of Norway on environmental crime (in Norwegian): Meld.St. 19 (2019–2020) Miljøkriminalitet [Environmental Crime], p118–119, available at: <<https://www.regjeringen.no/no/dokumenter/meld.-st.-19-20192020/id2698506/>> (last visited 26 April 2020). See also reports by IndustriALL Global Union on unsafe accidents in the Bangladesh shipbreaking industry (29.05.2019), *Safety crisis in Bangladesh shipbreaking yards continues*. Available at: <<http://www.industriall-union.org/safety-crisis-in-bangladesh-shipbreaking-yards-continues-0>> (last accessed 13 April 2020).

⁴ See ILO, *Ship-breaking: a hazardous work*, 23 March 2015: https://www.ilo.org/safework/areasofwork/hazardous-work/WCMS_356543/lang-en/index.htm.

⁵ European owned ships are reported to amount to one third of end-of-life ships scrapped in South East Asia: see, e.g., Opinion of the European Economic and Social Committee on ‘Shipbreaking and the recycling society’ (own-initiative opinion) (2017/C 034/06)

Recently, the problem of beaching and other unsafe shipbreaking practices have come into focus due to both the initiatives by NGOs and media attention.⁶ To begin with, the competence to adopt and enforce environmental, social and labour conditions at the ship scrapping facilities lies with the State, in whose territory the yard is located. This State – and private owners of the yard – may or may not respect the applicable minimal international standards. In addition, as explained later, there are no sufficiently rigorous international requirements in force which would regulate the ship recycling industry. The concept of sustainable, safe and environmentally sound ship recycling is vague and leaves a significant margin of discretion to States involved in the shipbreaking business.

Shipowners are also required to choose the recycling facilities for their end-of-life ships according to certain rules and procedures. In some countries, proceedings have been initiated against shipowners, as well as so-called ‘cash buyers’ of end-of-life ships, which buy up such ships and deliver them to scrapping yards, as well as against other actors involved, such as insurance companies.⁷ These cases highlight the legal and practical difficulties faced by the authorities in trying to combat what they view as illegal shipbreaking. These cases also highlight legal uncertainty issues for shipowners, which may – unexpectedly perhaps – end up with a violation of environmental law.

Furthermore, the ability of flag States to address the problem of beaching and other unsound ship scrapping is limited. By imposing certain requirements on the owners or operators of ships (for example, by requiring them only to use sufficiently responsible ship yards and imposing sanctions for non-compliance with such requirements), flag States may prompt shipowners to re-flag the ship to a State with less strict regulations. Indeed, studies report significant discrepancies between flag

and the information published by NGO Shipbreaking Platform at <<https://www.shipbreakingplatform.org/>> (last accessed 13 April 2020).

⁶ See, e.g., NGO Shipbreaking Platform (above), www.danwatch.dk and IndustriALL Global Union (n. 3 above).

⁷ See text accompanying n. 68 below.

States, citing the discrepancy between the 25 largest flag states and the 25 largest flag states for end-of-life ships.⁸ In all cases, flag States will probably be unwilling to take more stringent unilateral measures in the absence of global rules.

In practice, once the ship has sailed away from the State where it is registered or where the shipowner has its place of residence, it may be difficult for the authorities of the home State to trace what happens to that ship at a later stage, and prove a possible infringement of applicable rules. In practice, ships are often sold to the yards through middlemen (so-called ‘cash buyers’), and ownership of a ship may be transferred to other entities a number of times before the actual scrapping occurs. These operations – even if environmentally and socially ignorant – might be viewed as lawful under applicable national rules.

The further discussion will focus on the international regulation and corresponding EU regulation of ship recycling. At both the international and the EU level, regulatory attempts have been made to tackle the problem of unsafe and environmentally unsound scrapping of ships. Section 2 gives an overview of international instruments. Section 3 examines EU law provisions giving effect to and strengthening the international obligations with regard to safe and sound ship recycling. Section 4 contains some final remarks.

⁸ COWI (for European Commission), Support to the impact assessment of a new legislative proposal on ship dismantling, Final report, December 2009, available at: <https://ec.europa.eu/environment/waste/ships/pdf/final_report080310.pdf> (last accessed 13 April 2020) and Urs Daniels Engels, *European Ship Recycling Regulation: Entry-Into-Force Implications of the Hong Kong Convention*, Springer, Heidelberg, New York Dordrecht London (2013), p. 174.

2. International conventions governing ship recycling

2.1 Overview

No specific internationally binding standards currently in force govern ship recycling as such. However, this sector does not operate in an entirely lawless environment. Firstly, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (hereinafter – Basel Convention) lays down a regime for the transporting of waste from State to State, subject to certain environmental and safety standards. Secondly, the IMO Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (not yet in force) sets out provisions on the safe and environmentally sound ship recycling. International non-binding instruments, such as the IMO guidelines,⁹ as well as general international environmental law also provide for criteria and standards for the ship recycling industry.

2.2 Basel Convention

2.2.1 The scope of the Convention

Today, the Basel convention is the central international (global) instrument for combatting environmentally unsound ship scrapping.¹⁰ This Convention generally seeks to minimise the generation and transboundary movement of hazardous and other wastes and aims to ensure the environmentally sound management of such wastes.¹¹ From the outset, the Basel Convention does not entirely outlaw the export of waste but

⁹ See n. 32 below.

¹⁰ Adopted on 22nd March 1989. Its ratification status by far exceeds the ratification status of the Hong Kong Convention.

¹¹ Article 4. On Basel Convention in the ship recycling context see Engels (n. 8 above), p. 124 et seq.

instead requires that export and import states meet a number of obligations with respect to hazardous and other wastes.

Does the Basel Convention apply (and if so, on what conditions) to ships which are to be recycled? The conditions for the application of Basel regime are (1) that ships are covered by the ‘waste’ definition of the Basel Convention; (2) that they are subject to transboundary movement; and (3) that both the State of export and the State of import are parties to the Basel Convention.¹²

Objections have been raised by some States and industry stakeholders against application of the Basel Convention to ship breaking. It may indeed be questioned whether ships taken out of service to be sent to scrapping are included at all in the definition of «waste». The Basel Convention makes an express exception for wastes which “derive from the normal operations of a ship, the discharge of which is covered by another international instrument.”¹³ Ships as such and their parts are not excluded from the Basel Convention.

Article 2 of the Basel Convention defines “wastes” as “substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law.”¹⁴ Obviously, the Convention was not designed to deal with ship decommissioning as such, and a ship as a unit is not mentioned in the Basel Convention and its Annex III (List of hazardous characteristics). However, a ship contains materials which are regulated by the Convention in its hull, equipment, cargo and fuel. The operations at ship scrapping yards are included in the examples of operations defined as ‘disposal’ by the Convention.

In addition, it has also been argued that a ship continues its existence as such until the dismantling operations commence at a yard.¹⁵ In such a case, the element of transboundary movement on which the application of the Convention is contingent, is arguably not present.

¹² Article 4.5 and Engels (n. 8 above), pp 124–125.

¹³ Article 1(4).

¹⁴ Article 2.1. Disposal operations are defined in Annex IV.

¹⁵ See Engels (n. 8 above), p. 127, summarizing the debate.

In this author's view, the real problem of the Basel regime is rather of evidentiary character than of substantive legal character: how to prove that there was 'intention to dispose' of the ship before it has left the waters under jurisdiction of the export State.

Although the disagreement as to the application of the Basel regime to ship scrapping persists, national practice and scholarly opinion seem to support the view that the ships may generally be considered as 'waste' within the meaning of the Basel Convention.¹⁶

2.2.2 Obligations with regard to prevention of export of ships as hazardous waste

It is outside the scope of this article to give a detailed presentation of general obligations envisaged for States parties under the Basel Convention. For the purposes of this article, it is relevant to mention that the Basel Convention requires the export States to prohibit export of hazardous waste in cases where the import State does not provide a written consent to the specific import ("prior informed consent") or has prohibited import of such wastes.¹⁷

Furthermore, the export State is required to prohibit all persons "under its national jurisdiction from transporting or disposing of hazardous wastes or other wastes unless such persons are authorized or allowed to perform such types of operations".¹⁸ The Convention also does not allow the generator or exporter of wastes to commence the transboundary movement in the absence of a proper written confirmation that requirements concerning the consent of the import State have been fulfilled and a contract exists with the disposer (scrapping yard) on environmentally sound management of waste in question.¹⁹ These obligations prevent (at least in law, if not in fact) owners of ships from moving the

¹⁶ See, e.g., Engels (n. 8 above).

¹⁷ Article 4(1).

¹⁸ Article 4(7)(a).

¹⁹ Article 6.

ship destined for scrapping to another State without the notification and proper authorization by the authorities of the export State.

In 1995, a so-called “Basel Ban Amendment” was adopted (in force as of 5 December 2019). This instrument introduced a *total ban* on all exports of hazardous wastes from OECD-countries to non-OECD countries. In the context of ship recycling, this means (if the ban were in force) that only one existing non-Western shipbreaking market – Turkey – can import ships for recycling.

The Basel Convention defines all transboundary movement of wastes without notification and consent or in contravention of the documentation, as well as movement resulting in dumping of hazardous wastes, as being *illegal traffic*.²⁰ In addition to the requirement to criminalize the illegal traffic of hazardous wastes,²¹ the Basel Convention requires that the export States ensure the taking back of the wastes in question or provide for the proper (i.e. environmentally sound) disposal of the wastes.²² Thus, the ship sent illegally for breaking in another State must, as a general rule, be returned to the export State. This obligation lies primarily with the exporter or generator of the waste.²³

The Basel Convention requires States to adopt adequate legal, administrative or other measures to implement and enforce the Convention’s provisions, including measures to prevent and punish conduct amounting to violation of the Convention’s obligations.²⁴

2.2.3 Is the Basel Convention adequate to address environmentally unsound ship breaking?

As noted above, the Basel Convention does not contain provisions setting out requirements addressed specifically to owners and operators of ships and shipbreaking yards or recycling facilities. The waste export

²⁰ Article 9.1.

²¹ Article 4.3.

²² Article 9.2. Article 8 contains a corresponding requirement to re-import waste where the consent has been given but the contract may not be completed.

²³ Article 9.2. (i.e. owner of the ship, cash buyer or another agent).

²⁴ Article 4.4.

rules are not tailored to address unsound ship scrapping as such. The Basel regime is also weakened by more or less lawful ways of circumventing its requirements, as well as by evidentiary issues and enforcement difficulties faced by the national authorities.

However, the broad scope of the Basel Convention, and the general formulation of the obligations it imposes on export and import States, has also certain advantages. The broad definition of ‘exporter’, ‘carrier’ and ‘generator’²⁵ is capable of including a broad range of natural and legal persons involved in initiating, organising, facilitating or performing activities aimed at shipping the vessel to scrapping yards abroad. The notion of a ‘shipowner’ or a ‘shipping company’ under the Hong Kong Convention discussed further below is arguably more limited.

However, as the State of export is defined as a State party “from which a transboundary movement of hazardous wastes or other wastes is planned to be initiated or is initiated”,²⁶ it is unlikely that this definition applies to the flag State in cases where the ship is not located in its territory at the given time. In such a case, the flag State’s responsibilities vis-à-vis the sending of its ship to scrapping are unclear. This uncertainty accordingly applies to exporters of waste who are defined as “any person under the jurisdiction of the State of export who arranges for the export of hazardous wastes or other wastes.”²⁷

The Basel Convention requires both categories of States – export and import – to ensure that the disposal of end-of-life ships is conducted in an environmentally acceptable manner. This general obligation is given effect in a number of specific contexts. For example, the export of waste may not be permitted if the export State has reason to believe that the waste will not be managed in an environmentally sound manner.²⁸ The “environmentally sound management of hazardous wastes or other wastes” requires actors to take “all practicable steps to ensure that hazardous or other wastes are managed in a manner that will protect human health and

²⁵ Article 2(15), 2(17) and 2(18).

²⁶ Article 2(10).

²⁷ Article 2(15).

²⁸ Article 4(2)(e).

the environment against the adverse effects which may result from such wastes.”²⁹ In this author’s view, many reported ship scrapping practices in third States, especially those involving “beaching”, are obviously not compatible with this criterion.

Importantly, the Basel Convention also precludes States within which wastes are generated from transferring their obligation to manage these wastes in an environmentally sound manner to import States.³⁰ The responsibilities thus clearly and unavoidably rest not only on the recycling State but also remain with the State from where the ship is exported.

Although the Basel Convention is far from offering perfect solutions to tackle irresponsible practices in the shipbreaking industry, it has established an important cooperation framework for further developing the international regulation of ship recycling conditions. For example, *Technical Guidelines for decommissioning of ships* (2013) aims to provide some guidance for ship scrapping sites on the “sound treatment of waste”. The Guidelines do not rule out the use of beaches if this is combined with measures to prevent discharges. The Guidelines should obviously be understood as encouraging beaching sites to become more environmentally friendly and to only use beaches where absolutely unavoidable, and not as a general acceptance of beaching.

2.3 Hong Kong Convention

2.3.1 Generally

At the IMO diplomatic conference in 2009 held in Hong Kong, IMO member States adopted the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (hereinafter ‘Hong Kong Convention’).³¹ Norway has been a driving force for the

²⁹ Article 2(8).

³⁰ Article 4(10).

³¹ The Convention is commonly known as «Hong Kong Convention» or «Ship Recycling Convention».

elaboration and adoption of the Hong Kong Convention, and the first State to ratify it (in June 2013).

The adoption of the Convention was preceded by work under the framework of the Basel Convention and under the auspices of the IMO. In particular, the IMO Resolution on Guidelines on Ship Recycling was adopted in 2003.³² The International Labour Organisation (ILO) has been involved in work to protect the occupational safety and health of workers in the ship recycling industry.³³ The mentioned IMO Guidelines place the ultimate responsibility for ship scrapping conditions on the State where the yard or facility is located, while the shipowners are required, “as far as practicable”, to reduce potential problems caused by ship scrapping.

The overarching objective of the Hong Kong Convention is to “effectively address, in a legally-binding instrument, the environmental, occupational health and safety risks related to ship recycling, taking into account the particular characteristics of maritime transport and the need to secure the smooth withdrawal of ships that have reached the end of their operating lives.”³⁴ The Convention is designed to cover a ship’s life cycle “from cradle to grave”. Importantly for this article, the Hong Kong Convention poses a number of requirements for end-of-life ships.

The main text of the Hong Kong Convention contains 21 Articles with relatively generally substantive and procedural obligations for States parties and the Annex “Regulations for Safe and Environmentally Sound Recycling of Ships” which sets out the detailed provisions of the Convention.

Ship recycling is defined as “the activity of complete or partial dismantling of a ship at a Ship Recycling Facility in order to recover components and materials for reprocessing and re-use, whilst taking care of hazardous

³² Resolution A.962(23). See also <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_117943.pdf> (last accessed 13 April 2020); Secretariat of the Basel Convention, Guidance for compliant ship recycling facilities in consideration of the requirements of the Basel and Hong Kong Conventions (RWECLTD 4/7/2013).

³³ 2003 tripartite meeting: Safety and health in shipbreaking: Guidelines for Asian countries and Turkey Bangkok, 7–14 October 2003, at: <<https://www.ilo.org/public/english/standards/relm/gb/docs/gb289/pdf/meshs-1.pdf>> (last accessed 13 April 2020).

³⁴ The Preamble.

and other materials, and includes associated operations such as storage and treatment of components and materials on site, but not their further processing or disposal in separate facilities.”³⁵

“Ship Recycling Facility” means a defined area that is a site, yard or facility used for the recycling of ships.³⁶ Obviously, these definitions are broad enough to include all methods of ship recycling and shipbreaking, including the most unsustainable ones such as beaching.

The Hong Kong Convention applies to all ships sailing under flag of a State party, with the usual exception for warships, naval auxiliary, or other ships owned by or operated only on government non-commercial service, as well as ships under 500 GT and ships operating only in waters under national jurisdiction of a State party.³⁷ Ships are broadly defined as a “vessel of any type whatsoever operating or having operated in the marine environment and includes submersibles, floating craft, floating platforms, self-elevating platforms, Floating Storage Units (FSUs), and Floating Production Storage and Offloading Units (FPSOs), including a vessel stripped of equipment or being towed.”³⁸ Thus decommissioned oil rigs are also included in the Convention.

2.3.2 Hong Kong Convention obligations for ships (flag States) and Recycling States

The Convention contains provisions setting out obligations relevant for two categories of ‘actors’: firstly, for ships and shipowners (flag States) and, secondly, for ship recycling facilities (States under whose jurisdiction these facilities operate). In addition, port States, which are parties to the Convention, undertake to conduct inspections of ships flying the flag of a State party when in their ports.³⁹ The Hong Kong Convention

³⁵ Article 2(10).

³⁶ Article 2(11).

³⁷ Article 3.

³⁸ Article 2(7).

³⁹ Article 8. In addition, No More Favourable Treatment clause in Article 3(4) with respect to ships flying the flag of a non-Party State.

contains minimum requirements for States, which may adopt stricter provisions than those laid down in the Convention.⁴⁰

Requirements applicable to *ships* include restrictions on the use of certain hazardous materials and an obligation for each new ship to have on board an inventory of such materials.⁴¹ Existing ships are required to comply with this requirement “as far as practicable” and within 5 years or earlier if going to recycling before that deadline. In addition to the requirement to have an updated inventory of hazardous materials on board ships, some other provisions ensure further the safety of the ship’s recycling processes.

Further, the Hong Kong Convention contains requirements applicable to ships taken out of service (“destined to be recycled”) in preparation for recycling. Such ships may only be recycled at an authorized recycling facility subject to a specifically adopted Recycling Plan.⁴² Ships are subject to surveys throughout their life time which, among other checks, verify compliance with the provisions on the inventory of hazardous materials. For ships which are to be taken out of service, they must undergo a final survey before being sent for recycling.⁴³ The inspection shall, among other things, verify that the ship is to be sent to a ship recycling facility that has valid approval.

The Convention also sets out requirements for the *Recycling States* parties to the Convention related to the standards of the recycling facilities, authorization of such facilities as well as inspections, monitoring and enforcement with regard to the facilities.

Importantly, States must ensure that the recycling yards under their jurisdiction accepting ships to which this Convention applies, are authorized in accordance with the regulations in the Annex.⁴⁴ Such authorization must be conducted in light of IMO guidelines⁴⁵ and must

⁴⁰ Article 8.

⁴¹ Annex Chapter 2 contains Requirements for Ships.

⁴² Reg. 9 of Annex of the Convention.

⁴³ The Annex also specifies requirements for the International Certificate on Inventory of Hazardous Materials to be issued to ships.

⁴⁴ Article 6 of the Convention and Regulation 16 of the Annex.

⁴⁵ See n. 32 above.

include certain elements and criteria applicable to the facilities deserving to be authorized. Such authorization may logically be granted only to the facilities which meet some minimum safety and environmental standards.

Recycling States must adopt national laws and regulations ensuring that the facilities under their jurisdiction are designed, constructed, and operated in a safe and environmentally sound manner in accordance with the regulations of the Hong Kong Convention. The relevant standards must, among other things, include workers' safety and emergency response, environmental rules and internal allocation of responsibilities.⁴⁶

The Annex also requires that the competent national authorities of the recycling State monitor the facility as required by the Hong Kong Convention and investigate infringements and breaches of the recycling rules. If it turns out that the facility no longer meets the requirements for approval, competent national authorities may require the facility to take corrective action, or decide to suspend or withdraw the permit for the facility.

Corresponding obligations apply to flag States with regard to their ships. Flag States and Recycling States shall require that the requirements of the Hong Kong Convention are complied with, and take effective measures to ensure such compliance.⁴⁷ Such measures include detection and investigation of violations, as well as adoption of national sanctions for violations. The Convention also requires States parties to impose sufficient sanctions for violations of the Convention's provisions.

2.3.3 What is the future of the Convention?

As noted earlier, ship recycling facilities regulated by the Hong Kong Convention must meet certain requirements for sound environmental and health standards. The standards are quite general and are set out in the Annex to the Convention. The IMO guidelines for the Convention somewhat detail out the requirements of the Convention. However, all in all, neither the Hong Kong Convention nor other international

⁴⁶ Chapter 3 of the Annex.

⁴⁷ Article 4.

instruments impose either sufficiently explicit environmental requirements or else an outright ban on certain unacceptable ship scrapping approaches (e.g. beaching). In this respect, the national authorities of Recycling States have a wide margin of discretion when granting authorization to the facilities under their jurisdiction.

At the same time, the Hong Kong Convention does not penalize shipowners for using facilities which may be authorized by the national authorities of the recycling State but which are, in practice, incompatible with the Convention's requirements for safe and sound ship recycling.⁴⁸ Further, by contrast to the Basel Convention imposing a duty to take the illegally shipped waste back to the export State,⁴⁹ there is no obligation to take back the ship sent to a third State for recycling in violation of the provisions of the Hong Kong Convention. The Hong Kong Convention also does not require criminalization of particularly illicit infringements.⁵⁰

The Hong Kong Convention has been criticized by environmental organizations, who argue that, among other limitations/defects, this Convention does not combat but rather tolerates beaching and other unsafe scrapping of ships in developing countries.⁵¹ The Convention arguably permits the export of end-of-life ships without first cleansing them of toxic materials, thereby failing to uphold Basel principles. Per today, only a handful of States have become parties to the Hong Kong Convention; States with the largest ship-breaking markets have not ratified it. A recent ratification by one of the largest shipbreaking States, India (2019), may be a significant step forward in the Convention's entering

⁴⁸ However, one source reports that several ship recycling yards in China, India and Turkey have developed appropriate infrastructure and obtained Statement of Compliance Certificates from IACS- member societies: Kanu Priys Jain, *Ship Recycling: The Relevance of the Basel Convention*, *The Maritime Executive*, 20th February 2018. Accessible at: <<https://www.maritime-executive.com/editorials/ship-recycling-the-relevance-of-the-basel-convention>> (last accessed on 13 April 2020).

⁴⁹ See text accompanying n. 22 above.

⁵⁰ Article 10.

⁵¹ New "Ship Recycling" Convention Legalizes Scrapping Toxic Ships on Beaches of Poor Countries – "A major step backwards", *Toxic Trade News*, 15 May 2009, available at: <[://www.fidh.org/en/issues/globalisation-human-rights/economic-social-and-cultural-rights/New-ship-recycling-convention](http://www.fidh.org/en/issues/globalisation-human-rights/economic-social-and-cultural-rights/New-ship-recycling-convention)> (last accessed on 13 April 2020).

into force.⁵² However, the sufficient acceptance rate is yet to be achieved for the Convention to enter into force.⁵³ It is not certain when or whether its entry into force will take place in the near future.

3. Ship recycling in the European Union law

3.1 Overview

The European Union is an important actor in the global environmental sector, and has been party to the Basel Convention since 1993.⁵⁴ By its competence to adopt secondary legislative measures binding for Member States, the EU not only harmonizes the international law provisions on environmentally sound ship recycling in the EU but may also contribute to the development and enforcement of more stringent standards than States may manage to achieve through international agreements. In addition, the conduct of shipowners and other private actors in the shipbreaking business may be directly regulated by Regulations. Importantly, by adopting high standards for EU actors, the EU is also capable of influencing to a certain extent the safety and environmental standards at the scrapping yards located in *third* (non-EU) States.

The framework based on the Basel Convention is implemented in the Waste Shipment Regulation and is examined further below. This regime has been more recently supplemented by the Ship Recycling Regulation based on the Hong Kong Convention. The latter Regulation applies to

⁵² Belgium, Congo, Denmark, Estonia, Norway, Netherlands, France, Germany, Ghana, Malta, Serbia, Turkey, Panama, India and Japan (as of 14 April 2020).

⁵³ Entry into force provisions are laid down in Article 17, which lays down a number of cumulative conditions to be met. It is required that no less than 15 States have acceded to the Convention, of which the combined merchant fleet is no less than 40% of the world merchant shipping gross tonnage and the combined maximum annual ship recycling volume during the preceding 10 years is at least 3 % of the gross tonnage of the combined merchant shipping of the same States.

⁵⁴ Council Decision of 1 February 1993 on the conclusion, on behalf of the Community, of the Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel Convention) (93/98/EEC).

ships flying the flag of an EU/EEA State and excludes such ships from the scope of the Waste Shipment Regulation.

As shipowners may always choose a flag for their ships, they may accordingly choose which Regulation will govern their situation. One of the factors relates to estimated costs associated with complying with the requirements of one or the other Regulation. Arguably, the Ship Recycling Regulation may lead to increased costs for shipowners, because it introduces new documentation and inspection requirements and the duty to scrap end-of-life ships only at the yards approved according to the procedure laid down by that Regulation.

The Waste Shipment Regulation has, in any case, not lost its significance because a significant number of European-owned ships fly the flag of a third State. This Regulation is also incorporated into the EEA Agreement and is thus relevant for shipment of waste to or from the EFTA States Norway, Iceland and Liechtenstein. The following section examines the application of the Waste Shipment Regulation to ships to be sent to recycling.

3.2 Waste Shipment Regulation

The Regulation 1013/2006 on shipments of waste is based on the Basel Convention provisions. The EU fully transposes and implements not only the Convention, but also the ‘Basel Ban Amendment’ in this Regulation.⁵⁵ Thus, the Regulation bans shipments of waste falling within its scope to non-OECD States. Ships are expressly included in the Regulation, which states that it is “necessary to ensure the safe and environmentally sound management of ship dismantling in order to protect human health and the environment. Furthermore, it should be noted that a ship may become waste as defined in Article 2 of the Basel Con-

⁵⁵ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ L 190/1 2006. The predecessor is Regulation 259/93. The EU has also incorporated the OECD Decision of the Council C(2001)107/Final Concerning the Control of Transboundary Movements of Wastes Destined for Recovery Operations (as amended by (2004)20).

vention and that at the same time it may be defined as a ship under other international rules”⁵⁶

Apart from the clarification in the recital that ships may be considered as ‘waste’, the EU law definition of ‘waste’ generally follows the Basel provisions, and is spelled out in the provisions of the EU Directive on waste.⁵⁷ The concept of waste includes substances or objects, which are disposed of or are being recovered; or are *intended to be disposed of* or recovered.⁵⁸

The Regulation applies to shipment of waste within the EU/EEA Area, to the import of waste to the EU from the third States, and to shipments of waste from the EU to third countries (including non-OECD countries).⁵⁹ The latter situation is governed by Title IV of the Regulation, and is the most relevant for this article.

Firstly, all export of waste from the EU to third States destined for *disposal* is prohibited.⁶⁰ The operations amounting to disposal are, among other, deposit into or on to land, and land treatment such as sludgy discards in soils or release into seas or oceans.⁶¹ This clearly applies to practices such as beaching of end-of-life ships.

Secondly, the export of waste destined for *recovery* in non-OECD States⁶² is prohibited if it involves wastes listed in Article 36(1) of the Regulation, as specified in the related Annexes (which include hazardous wastes). At the same time, shipment of waste on the Green list (Annex II)

⁵⁶ Recital 35. The Waste Shipment Regulation preserves the exceptions of the Basel Convention, including the exception for waste generated by the normal operation of the ship within the meaning of MARPOL 73/78 or other relevant instruments. The EU law definition of ‘waste’ also follows generally the Basel regime and is laid down in the two Directives on, respectively, waste and hazardous waste.

⁵⁷ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312, 2008, p. 3.

⁵⁸ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312, 2008, p. 3, Annex I.

⁵⁹ Article 1(1).

⁶⁰ Article 34.1. EFTA States are subject to further provisions but are not a significant destination for end-of-life ships.

⁶¹ Annex II A of Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste, OJ L 114/9, 2006.

⁶² www.oecd.org.

for recovery is generally excluded from the regulatory requirements.⁶³ This list also includes “vessels and other floating structures” to be shipped for breaking, if they are properly *emptied* of dangerous substances. However, older ships are in all cases unlikely to benefit from the Green list because they normally contain built-in hazardous materials. If an end-of-life ship contains a sufficient amount of such materials in its hull, it will not classify as ‘green waste’ which may be sent to a third State for recovery.⁶⁴

The Waste Shipment Regulation contains provisions envisaging certain legal *implications* of the infringements of its requirements. Importantly, and in line with the Basel Convention, the Regulation contains *take-back* obligations applicable in cases where a shipment of waste cannot be completed as intended or if it was illegal.⁶⁵

Article 50(1) of the Waste Shipment Regulation requires Member States to adopt provisions on effective, proportionate and dissuasive penalties for infringement of the provisions of the Regulation and to take all measures necessary to ensure that they are implemented. Furthermore, the Environmental Crime Directive⁶⁶ requires Member States to criminalize seriously negligent or intentional illegal shipment of waste.⁶⁷ In the Netherlands, the shipowners and other involved entities were prosecuted for environmental violations after they sent their ships to beaching in India.⁶⁸

Of course, it is possible for shipowners to escape the application of the Waste Shipment Regulation. It may be difficult to prove the intention

⁶³ Article 1(3)(a). See also Engels (n. 8 above), p 44.

⁶⁴ See Tony George Puthucherril, *From Shipbreaking to Sustainable Ship Recycling*, Martinus Nijhoff (Leiden/Boston), 2010, p. 84 for discussion of French case Sandrein where this was one of the issues raised.

⁶⁵ Arts 22–24 and 34(4).

⁶⁶ Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (The Environmental Crime Directive), OJ L 328, 2008, p. 28.

⁶⁷ Article 3(1)(c).

⁶⁸ The cases are reported here: <<https://www.reuters.com/article/us-netherlands-shipping-court/dutch-shippers-sentenced-for-having-ships-demolished-on-indian-beach-idUSKCN1GR2NC>> (SeaTrade) and here: <<https://www.maritime-executive.com/article/another-dutch-shipowner-fined-for-beaching-a-vessel>> (*HMS Laurence*) (last accessed 13 April 2020).

to dispose of a ship – a subjective matter – before that ship is re-flagged and sent abroad with other purposes, such as continued operations or repair. The question is whether it is possible to deduce the intention to scrap the ship from some objective factors, including the age of the ship, the route it takes, the manner in which the transfer is organized (e.g., to cash buyers and similar actors known to be involved with purchasing vessels for shipbreaking etc). In EU case law, the concept of ‘waste’ is interpreted broadly, so as to ensure the effectiveness of the EU environmental law and the Directives.⁶⁹ Even if the substance – or a ship – still has commercial value, it may be considered as ‘waste’,⁷⁰ if the holder has an actual intention to discard it at the time of shipment (for example, because it is only perceived as a burden).⁷¹

In addition, the ship sold to ship scrapping may leave undetected from a port in an EU/EEA State, thereby escaping the reach of the EU waste shipment rules. In *Tide Carrier/Harrier* case (Norway), the ship did not manage to leave the Norwegian waters because it suffered engine stoppage a short time after having departed from the port. As the national authorities had suspicions that the ship was in reality destined for scrapping at the infamous Alang beach (India), they had the chance to start the investigation against the shipowner, the cash buyer and the insurance company.⁷²

⁶⁹ C-263/05 *Commission v. Italy*, para. 33.

⁷⁰ C-263/05 *Commission v. Italy*, para. 36.

⁷¹ Joined Cases C-241/12 and C-242/12 *Shell*.

⁷² For a description of the case, see: <<https://www.shipbreakingplatform.org/spotlight-harrier-case/>> (last accessed on 13 April 2020). At the time of writing, the cash buyer Wirana accepted a settlement of 7 million Norwegian krone for charges of several environmental violations in relation to Harrier-case.

3.3 EU Ship Recycling Regulation

3.3.1 Overview

Ship Recycling Regulation 1257/2013 was adopted by the European Parliament and Council in 2013⁷³ with a view of improving the ship recycling conditions and speeding up ratification of the Hong Kong Convention. The Regulation is based on the provisions of the Hong Kong Convention and follows broadly the same logic as this Convention. The overall allocation of the responsibilities between the flag State and the Recycling State is, therefore, preserved by the Regulation. However, the Regulation has also introduced some elements which strengthen the latter's provisions.

The Ship Recycling Regulation applies to ships flying the flag of an EU Member State or the flag of an EFTA State party to the EEA Agreement (i.e. Norway, Iceland and Liechtenstein). Following the Regulation's entry in force, the EU- or EEA-flagged ships are no longer subject to the EU law on export of waste.⁷⁴ The Waste Shipment Regulation continues to govern recycling ships under the flag of a third State, even if the ship has European owners. However, the Waste Shipment Regulation still keeps some relevance for ships covered by the Ship Recycling Regulation: e.g. definition of "waste" in the Ship Recycling Regulation is connected to the definitions in the Waste Shipment Regulation.⁷⁵

⁷³ Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC, OJ L 330/1, 2013.

⁷⁴ The Regulation was incorporated in the EEA Agreement by the decision of the joint EEA committee nr. 257/2018 of 5 December 2018. In Norway, the Regulation is implemented by a corresponding Regulation nr 1813 (2018), in force as of 6 December 2018.

⁷⁵ Article 3(2).

3.3.2 Allocation of responsibilities for ship recycling under the Regulation

The Ship Recycling Regulation provides for a number of rules and restrictions concerning materials used for building and equipping the vessels covered by the Regulation. For the purposes of this article, the focus is on the final stage of a ship's life: recycling.⁷⁶

Shipowners' obligations and responsibilities during the final stage of the ship's life are determined in Article 6 of the Regulation. "Ship owner" is broadly defined as "the natural or legal person registered as the owner of the ship, including the natural or legal person owning the ship for a limited period pending its sale or handover to a ship recycling facility, or, in the absence of registration, the natural or legal person owning the ship or any other organisation or person, such as the manager or bareboat charterer, who has assumed the responsibility for operation of the ship from the owner of the ship, and the legal person operating a state-owned ship".⁷⁷ The definition includes cash buyers and similar intermediaries which take over ownership of the vessel in order to organise or facilitate its moving to a ship recycling yard.

Article 6 requires that the operator of the ship recycling facility is provided by the shipowner with all ship-relevant information which is necessary for the development of the ship Recycling Plan. The intention to recycle the ship in a specified ship recycling facility must also be notified to the flag State administration.

The Regulation also requires that ship operations prior to entering the ship recycling facility are conducted in such a way as to minimise the amount of cargo residues, remaining fuel oil, and ship generated waste remaining on board. Ship owners must ensure that tankers arrive at the ship recycling facility with cargo tanks and pump rooms in a condition ready for certification as safe-for-hot work.⁷⁸ It is unclear whether these

⁷⁶ For a more detailed discussion of the Regulation, see Puthucherril (n. 64 above) or Engels (n. 8 above).

⁷⁷ Article 3(1)(14).

⁷⁸ Article 6(3).

provisions are clear enough to ensure that the ship is delivered to the yard entirely free of (toxic and explosive) cargo residues.

3.3.3 EU approval system for ship recycling facilities

A central requirement for shipowners introduced by the Regulation is to send their end-of-life ships to yards which are approved according to the procedure established in the Regulation.⁷⁹ In line with the Hong Kong Convention, the recycling yard must be authorized by the national authorities of the State where the yard is located. In addition, the Regulation requires that the yard is approved by the EU Commission, whether the yard is located in an EU Member State or in a third country. The Regulation requires all eligible yards to be registered on the so-called European list made by the EU Commission according to the requirements laid down in the Regulation.⁸⁰

The Regulation sets out more detailed requirements to be met by the recycling yards which qualify for the European list.⁸¹ The Regulation requires, among others, that a ship recycling facility “operates from built structures” and controls all leakages, “in particular in intertidal zones” (not mentioned in the Hong Kong Convention).⁸² Furthermore, with regard to ship recycling facilities located in third countries, waste management, human health and environmental protection standards must be “broadly equivalent to relevant international and Union standards”.⁸³ In this author’s view, the Regulation clearly outlaws typical beaching and similar unsound and hazardous ship scrapping practices.

The additional requirements for the European approval of the ship recycling facilities located in third States are laid down in Article 15. This provision sets out requirements for the applicant facility regarding the documentation of compliance with the standards of the Regula-

⁷⁹ Article 6(2).

⁸⁰ Articles 13 and 15.

⁸¹ Article 15.

⁸² Article 13(1)(c) and (f).

⁸³ Article 13(5).

tion. Furthermore, Article 15 stipulates that the yard located in a third country must be inspected by an independent verifier with appropriate qualifications (a classification society). In addition, by applying for the European list, the yard accepts the possibility of a site inspection by the representatives of the Commission, both prior to and after its inclusion on the list. Thus, in practice, the Commission has the final word on the question of what acceptable ship recycling standards are for EU-flagged ships within and outside the EU.

At present, the EU Commission has put into effect the Regulation's approval mechanism by adopting the European list for ship recycling yards in the EU Member States and Turkey.⁸⁴

3.3.4 Consequences of non-compliance with the Ship Recycling Regulation

Like the Hong Kong Convention, the Ship Recycling Regulation requires Member States to adopt effective, proportionate and dissuasive penalties for infringements of the Regulation and to take all the necessary measures to ensure that they are applied.⁸⁵ Member States are also required to cooperate in order to facilitate the prevention and detection of potential circumvention and breach of this Regulation.⁸⁶

By contrast to the sanctions regime applicable to ships covered by the Waste Shipment Regulation, infringements of the Ship Recycling Regulation are not covered by the Environmental Crime Directive.⁸⁷ It means that individual Member States may determine whether or not

⁸⁴ Commission Implementing Decision (EU) 2020/95 of 22 January 2020 amending Implementing Decision (EU) 2016/2323 establishing the European List of ship recycling facilities pursuant to Regulation (EU) No 1257/2013 of the European Parliament and of the Council (Text with EEA relevance), C/2020/200, OJ L 18, 2020, p. 6. Applications from facilities located in third countries (non-OECD) are reportedly under review: <<https://ec.europa.eu/environment/waste/ships/list.htm>> (last accessed 12 April 2020).

⁸⁵ Article 22(1).

⁸⁶ Article 22(2).

⁸⁷ The Environmental Crime Directive (n. 66 above). Article 30 of the Ship Recycling Regulation envisages a procedure to follow when deciding whether infringements of the Regulation should be covered by the Environmental Crime Directive.

administrative and similar non-criminal law penalties are sufficient and adequate for the purposes of the Regulation.⁸⁸

The Regulation envisages the possibility of taking measures against approved recycling yards in EU Member States, which no longer comply with the applicable requirements: the Member State where that yard is located shall suspend or withdraw the authorisation given to it or require corrective actions by the yard, as well as immediately inform the Commission.⁸⁹ The Regulation does not provide for equivalent consequences of non-compliance for recycling yards located in third States, but the yard must keep the Commission updated on changes in the information provided previously on the meeting of standards.⁹⁰

A significant difference from the Basel regime and the corresponding EU Waste Shipment Regulation, is the absence of a take-back obligation for shipowners in the Ship Recycling Regulation. The latter envisages a similar, but not equivalent provision: a *right* for the recycling facility to decline to accept the ship for recycling if the conditions of the ship do not correspond substantially with the particulars of the inventory certificate.⁹¹ In such a case, the shipowner retains the responsibility for the ship and is obliged to inform the flag State administration accordingly.⁹²

4. Final remarks

To achieve sustainable, safe and environmentally sound ship recycling, it is necessary to clarify and detail the international law requirements governing this sector. International law has so far not been quite successful

⁸⁸ Article 30 of the Ship Recycling Regulation envisages a procedure to follow when deciding whether infringements of the Regulation should be covered by the Environmental Crime Directive (n. 66 above).

⁸⁹ Article 14(4)

⁹⁰ Article 15(6). In addition, Article 23 provides environmental organisations with the right to request action, which might start a withdrawal process for the approval of a yard which does not comply with the requirements of the Ship Recycling Regulation.

⁹¹ Article 6(5).

⁹² Above.

in the accomplishment of this objective. The Basel regime is complex and not designed to regulate ship recycling, which is a factor compromising its national implementation and its legal certainty for the actors involved, including owners and operators of the end-of-life ships and ship recycling facilities. The Hong Kong Convention is yet to enter into force and has not been tested in practice. In all cases, these conventions obviously contain very broad 'grey areas' of acceptable shipbreaking methods, even if they do not tolerate "beaching" and similarly dangerous and environmentally catastrophic shipbreaking practices.

The legislative steps undertaken by the EU may have strengthened the implementation and enforcement of the Basel and Hong Kong frameworks respectively. Of course, it is not satisfactory that two different regimes apply to end-of-life ships depending on what flag they fly. In this author's view, the Ship Recycling Regulation provides for more legal certainty for shipowners, has a clearer allocation of obligations between shipowners and recycling facilities and is also less extreme than the Waste Shipment Regulation with regard to penalties for infringements. Due to the European approval system, it may also contribute to the improvement of the conditions of yards in the third States. The Ship Recycling Regulation has, however, been criticized by the shipping industry because it increases costs for EU-flagged ships and may thereby affect the competitiveness of the EU fleet.

The Hong Kong Convention and the corresponding EU Regulation is based on the flag State jurisdiction. A commonly known weakness of this approach is the opportunity to avoid these rules by re-flagging vessels under a flag of convenience prior to scrapping. However, rules on waste shipment also have loopholes which raise legal and practical enforcement difficulties for the national authorities. Developments in the national practice show that the authorities in EU and third States may be increasingly willing to combat environmentally unsound shipbreaking.