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**Hong Kong Convention and EU Ship Recycling Regulation:  
Can they change bad industrial practices soon?<sup>1</sup>**

by

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*In May 2009, 63 countries adopted the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships. The agreement was meant to end the anarchy of highly dangerous and extremely polluting ship dismantling practices which are still prevalent on the scrapyards of Southern Asia. However, none of the conference participants has so far ratified the Convention and it looks far from entering into force. In March 2012, the European Commission thus presented a proposal for an EU Ship Recycling Regulation in order to speed up the ratification process as well as to introduce additional measures for European ships. The following article looks at the two legal instruments and their chances of success.*

## **1 Background**

According to statistics published by the International Maritime Organization (IMO)<sup>2</sup>, the world merchant fleet has grown over the last decade from 575 million gross tons (GT) in 2001 to 958 million GT in 2010. During this time old ships amounting to between 3.7 and 25 million gross tons per year were decommissioned and dismantled worldwide. About 97 % of this activity, which is most commonly called “shipbreaking” or more recently “ship recycling”, was and is concentrated in just five countries: India, Bangladesh, China (the Big Three), Pakistan and Turkey.

Whereas ship recycling is carried out in China on harbour piers and in Turkey on rocky or concreted slipways, the shipbreakers on the Indian subcontinent use “beaching” as their standard method. It takes place on locations with particularly big tidal ranges and expansive mudflats - Alang in India, Chittagong in Bangladesh, Gadani in Pakistan – and means ships are being driven as far up the beach as possible, dismantled with cut-torches into large blocks, pulled higher with winches and progressively cut up into ever smaller pieces which are then sorted and taken away by lorries. The whole process involves the use of a large workforce instead of heavy machinery and the conditions on a tidal beach make it virtually impossible to employ cranes or scaffolding or to contain oil spills.

Ship dismantling is highly efficient in terms of material recycling, as more than 95 % of a ship’s weight – in particular steel and other metals – are being recovered for use especially in the construction industry. However, the current practices of the industry in Southern Asia pollute the local and marine environment and come at a heavy cost to life and human health. Safety precautions are scarce, accident rates high and deaths frequent, whether by falling, explosions, toxic fumes, snapping cables or other causes. To this must be added the long-term effects of exposure to hazardous materials, such as asbestos, which are contained in the structure of many old ships. As a rule, South Asian shipbreaking yards still have no or only rudimentary facilities to deal with the incoming hazardous wastes, in line with the generally poor infrastructure for waste management in the region.<sup>3</sup>

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<sup>2</sup> See e.g. information document MEPC 62/INF.13 of 19 April 2011, Annex, p. 3 (MEPC = Marine Environment Protection Committee of the IMO).

<sup>3</sup> For a good summary see: Lloyd’s Register, Ship recycling. Practice and regulation today, June 2011; for more background information: T.G. Puthucherril, From Shipbreaking to Sustainable Ship Recycling. Evolution of a Legal Regime, 2010.

## 2 The lack of a functioning legal regime

Although each of the Asian recycling states has some legislation in place regarding pollution prevention and workers' safety and health, only China and Turkey have passed specific regulations for ship dismantling at national level (in India there is a Ship Recycling Regulation in the State of Gujarat).<sup>4</sup> Moreover, as Puthucherril's study shows for India, the existing rules provide only a minimal legal framework for ensuring safe working conditions and environmentally sound ship recycling, they address only some of the contentious issues raised by the industry's operations, and even these rather perfunctorily.<sup>5</sup>

At international level, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989 applies also to ships which go for demolition from one country to another and can be classified as hazardous waste. Under the standard formula on which the Parties to the Basel Convention agreed in 2004, a ship may become waste as defined in Article 2 of the Basel Convention and at the same time it may be defined as a ship under other international rules.<sup>6</sup> Potentially this is relevant for many end-of-life ships which have hazardous materials on board (asbestos, PCB, TBT, heavy metals in paints, oils and oil sludge in tanks and engine rooms, etc.) and reach the recycling states from other countries. Not least it may concern ships that have a link to Europe and which constitute a sizeable fraction of the world fleet: According to data from late 2011, 17 % of the international merchant fleet tonnage is flying flags of EU Member States and about 37 % of the tonnage belongs to owners resident in the EU.<sup>7</sup>

In practice, however, the Basel Convention and its transposing law in the EU, Regulation (EC) No. 1013/2006 on shipments of waste, have been applied only rarely with regard to "waste ships". Most notable are the cases of the French aircraft carrier "Clemenceau" and the tankers "Sandrien" and "Otapan" which gave rise to court decisions by the French and Dutch Councils of State.<sup>8</sup> In recent years, other end-of-life ships like "Blue Lady" (ex-"France"), "Onyx" and "Northern Vitality" have gained public attention as they were identified by NGOs in European ports before their envisaged departure to Asian recycling yards.<sup>9</sup> Even in those cases it was difficult for EU waste shipment authorities to prove the dismantling purpose of their voyage, so that eventually the ships had to be released from custody. In many more instances, European end-of-life ships stay outside the territorial

<sup>4</sup> Cf. Puthucherril, op.cit., pp. 26 et seq., 54 et seq.

<sup>5</sup> Op.cit. at p. 65.

<sup>6</sup> Decision VII/26 (Environmentally sound management of ship dismantling), recital 6 of the preamble. Cf. T. Ormond, Enforcing EU environmental law outside Europe? The case of ship dismantling, in: *elni Review* vol 1/2009, at p. 17 et seq., against R. Lagoni / J. Albers, *Schiffe als Abfall?*, in: *Natur und Recht* (2008) 30, pp. 220-227, and the legal discussion among Basel Convention Parties and others recorded in document UNEP/CHW/OEWG/3/INF/5 of 24 February 2004, <http://archive.basel.int/meetings/oewg/oewg3/i05e.pdf>.

<sup>7</sup> Commission Staff Working Document SWD(2012) 47 final, 23.3.2012 (= Impact Assessment for the EU Ship Recycling Regulation), at p. 10.

<sup>8</sup> Conseil d'Etat, decision of 15.2.2006 („Clemenceau“), published at: [http://www.conseil-etat.fr/ce/jurispd/index\\_ac\\_ld0607.shtml](http://www.conseil-etat.fr/ce/jurispd/index_ac_ld0607.shtml); Raad van State, decisions of 19.6.2002 („Sandrien“) and 21.2.2007 („Otapan“), English translations at: <http://www.basel.int/ships/relevcaselaw.html>.

<sup>9</sup> Cf. the examples on the website of the NGO Shipbreaking Platform, <http://www.shipbreakingplatform.org/>, most recently: "Media alert – NGOs call on Germany: Stop toxic ship before it reaches Alang graveyard", 7.9.2012.

reach of the EU Waste Shipment Regulation, in ports like Singapore, Dubai or Mumbai, when their owners' decision to send them for scrapping becomes evident.

Even though this should not prevent the notification rules of the Basel Convention from being applied by India, Bangladesh or China as import states of hazardous waste, those countries (unlike Turkey) have repeatedly declared their unwillingness to do so in relation to ships. Because of this refusal the Basel Convention has remained largely ineffective in the field of shipbreaking.

### 3 The Hong Kong Convention

The objective gaps of the Basel Convention (what is the “country of dispatch” or export state if the shipowner decides on the High Seas to send a vessel for dismantling?), its lack of acceptance in maritime circles and the pressure of public opinion in the first decade of the 21<sup>st</sup> century led to the drafting of a new and more specific legal instrument, the International Convention for the Safe and Environmentally Sound Recycling of Ships, under the auspices of the IMO. This Ship Recycling Convention (SRC) was adopted at a diplomatic conference in Hong Kong in May 2009 which was attended by 63 states (with voting rights) and various other entities and organizations.<sup>10</sup> 59 states signed the Final Act of the conference but afterwards the support of the international community for the new instrument remained rather lukewarm. During the year when the SRC was open for signature at the IMO headquarters (until 31 August 2010) only five states - France, Italy, the Netherlands, Saint Kitts and Nevis, Turkey - took this step.<sup>11</sup> Two years later, no further states have acceded to the Convention and none have so far ratified it.<sup>12</sup>

The “Hong Kong Convention” (HKC), as it is now commonly called, contains altogether 21 articles setting out the general legal provisions and working mechanisms and an Annex with the actual technical requirements for the design, construction and operation of ships, for the operation of ship recycling facilities, and for reporting and enforcement mechanisms. The Convention in fact addresses not only the final stage of a ship's dismantling but is meant to provide a comprehensive regime of environmental and health protection “from cradle to grave”. The overarching approach is that certified ships should be recycled only at duly authorized facilities. Key elements are restrictions to the use of hazardous materials on board ships, the requirement for ships to carry an Inventory of Hazardous Materials (IHM) which should be certified and regularly updated, and a “Ready-for-Recycling Certificate” on the basis of a survey prior to its final voyage, as well as the requirement for ship recycling facilities to be authorized in accordance with the Convention, to work along a general “ship recycling facility plan” and to develop an individual “ship recycling plan” before the dismantling of a given ship. Particularly

<sup>10</sup> For full text see <http://ec.europa.eu/environment/waste/ships/pdf/Convention.pdf> and also Puthucherril, op.cit., at pp. 209 et seq.

<sup>11</sup> S. Alam, International Convention for the Safe and Environmentally Sound Recycling of Ships, in: The Law and Politics of Sustainability. Berkshire Encyclopedia of Sustainability, vol. 3, 2011, pp. 74-77.

<sup>12</sup> See IMO, Status of multilateral conventions and instruments ..., as at 31 August 2012, <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202012.pdf>.

important in substance, apart from various regulations on occupational safety and health, is Regulation 20 in the Annex which lays down the obligation to ensure the safe and environmentally sound management of hazardous materials contained in a ship.

The HKC, according to its Article 3, only applies to ships which are entitled to fly the flag of a Party to the Convention, and to ship recycling facilities operating under the jurisdiction of a Party. Excluded from its scope – as is common for IMO conventions - are warships, other vessels on government non-commercial service, ships below 500 gross tons and those employed only in domestic transport. However, Parties are obliged to ensure that such ships act in a manner consistent with the Convention, “so far as is reasonable and practicable”. The HKC also contains a “no-more-favourable-treatment” clause for non-Party ships (Article 3.4).

The Hong Kong Convention is supplemented by a set of six guidelines of which four – concerning the development of the Inventory of Hazardous Materials and of the Ship Recycling Plan, Safe and Environmentally Sound Ship Recycling, as well as the Authorization of Ship Recycling Facilities - were adopted in 2011 and early 2012 by the Marine Environment Protection Committee of the IMO.<sup>13</sup>

As may be expected, the HKC attracted considerable criticism from environmental NGOs and others who pointed to various deficiencies and expressed doubts as to whether the new Convention could ensure an equivalent level of control and enforcement in comparison with the Basel Convention.<sup>14</sup> The study by Puthucherril, for instance, lists about a dozen drawbacks and inherent contradictions, such as the lack of clear rules on pre-cleaning of ships before arrival at the recycling yard, the non-decision on the issue of beaching – which is mentioned as a recycling method in the Guidelines although it is practically incompatible with the Convention requirements on health protection and pollution prevention – and the rudimentary reporting system which falls far behind the Basel Convention’s principle of prior informed consent by all parties concerned.<sup>15</sup>

Beyond those weaknesses – which may be seen as typical for a new legal regime that tries to balance opposing interests – the most critical element of the Ship Recycling Convention seems to be its entry-into-force provision in Article 17. The HKC differs here from all other IMO conventions in so far as it introduces, in addition to the usual quorum of an absolute number of signatories (15 states) with a minimum tonnage (40 % of the world merchant fleet), a further requirement, namely that the combined maximum annual ship recycling volume of the signatory states during the preceding 10 years should constitute not less than 3 per cent of the gross tonnage of the combined merchant shipping of the same states. After intensive discussion within the IMO, an MEPC information paper of

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<sup>13</sup> <http://www.imo.org/ourwork/environment/shiprecycling/pages/Default.aspx>

<sup>14</sup> Cf. however the submission of the EU and its Member States to the Basel Convention of April 2010 which regarded the level of control and enforcement provided by the Hong Kong Convention as “at least equivalent to that one provided by the Basel Convention for ships which are waste under the Basel Convention...”, <http://archive.basel.int/ships/owwg-vii12-comments/comments/eu.doc>.

<sup>15</sup> Puthucherril, op.cit., pp. 173 et seq.

2011 has interpreted this in the sense that the merchant fleet of the 15 minimum signatories should constitute not less than 383 million gross tons and their maximum annual ship recycling volumes should amount to not less than 11.5 million GT.<sup>16</sup> It is still unclear whether these conditions can be met within the foreseeable future. Experts from Japan – the country who proposed the peculiar entry-into-force provision – calculate that, apart from the major shipping states with flags of convenience (Panama, Liberia, Marshall Islands etc.), ratifications by at least two of the three main recycling countries (India, Bangladesh, China) will be needed for the Convention to become effective.<sup>17</sup>

#### 4 The draft EU Ship Recycling Regulation

The European Union, which for years had only observed developments and commissioned some studies in the field of shipbreaking, began to act more forcefully in the wake of the public uproar caused in 2005-6 by the envisaged dismantling of the French aircraft carrier “Clemenceau” in India. After a Green Paper published in 2007, the European Commission presented a Communication on “an EU strategy for better ship dismantling” in November 2008.<sup>18</sup> The strategy paper proposed in the first place to improve enforcement of current waste shipment rules, transpose key elements of the Ship Recycling Convention and fill some of its gaps, as well as encourage voluntary industry action. In the longer term it recommended an EU certification and audit scheme for ship recycling facilities and the creation of a “ship dismantling fund” by which clean recycling operations in and outside of Europe could be financed through port fees or similar taxes on shipping activities.

Following some more research work and public consultations on the options for legislation, the Commission finally came up with a proposal for a Regulation on ship recycling in March 2012, accompanied by an extensive impact assessment and a draft Council Decision requiring Member States to ratify or to accede to the Hong Kong Convention.<sup>19</sup> The draft Regulation (in the following text also abbreviated “SRR”) is meant to establish a system of survey, certification and authorization for large commercial seagoing vessels that fly the flag of an EU Member State, based essentially on the Hong Kong Convention. As the Commission estimates that the Convention will not enter into force before the year 2020, at the earliest, the proposal aims not to wait till then but to implement the treaty as quickly as possible with a directly effective Regulation and a

<sup>16</sup> MEPC 62/INF.13 of 19 April 2011, <http://www.imo.org/OurWork/Environment/ShipRecycling/Documents/INF-13.pdf>.

<sup>17</sup> Japanese Shipowners’ Association, presentation “Current Situation on Ship Recycling” at the ASF Ship Recycling Committee session in Taiwan, 23.3.2012, <http://eng.csoa.cn/ASF/201203/P020120328427019861909.pdf>.

<sup>18</sup> Communication of 19.11.2008, COM(2008) 767 final, with accompanying Impact Assessment, SEC(2008) 2846. Cf. the preceding Green Paper on better ship dismantling of 22.5.2007, COM(2007) 269 final. All documents published on the Commission website at [http://ec.europa.eu/environment/waste/ships/eu\\_policy.htm](http://ec.europa.eu/environment/waste/ships/eu_policy.htm). For more background cf. Ormond, in: elni Review 2009, at p. 20 et seq.

<sup>19</sup> Commission documents COM(2012) 118 final (draft Regulation), SWD(2012) 47 final (impact assessment), SWD(2012) 45 final (executive summary of the impact assessment) and COM(2012) 120 (proposal for a Council Decision), all of 23.3.2012 and published at <http://ec.europa.eu/environment/waste/ships/index.htm>.

Council Decision which obliges Member States to deposit their instruments of ratification or accession within three years after its entry into force.

The scope of the draft Regulation follows closely the Convention in that it excludes warships and other vessels on government service, ships of less than 500 GT and those operating throughout their life only in waters of EU flag states. Likewise, the ship-specific rules on the inventory of hazardous materials, on surveys, certificates and the ship recycling plan, as well as the notification and reporting requirements (only for shipowners vis-à-vis their flag state administration), are essentially copied from the Convention.

In three areas, however, the Commission's proposal goes considerably beyond the international legal instrument:

- 1) As regards the restrictions on the use of hazardous materials, Article 4 SRR prohibits the new installation not only of materials which contain asbestos, PCB or controlled substances as defined in Regulation (EC) No 1005/2009 but also those containing perfluorooctane sulfonic acid (PFOS) and its derivatives, in line with recent EU chemicals legislation (Regulation [EC] No 757/2010).
- 2) According to Article 12 SRR, ships may only be recycled in ship recycling facilities which have been included in a "European List", as established by an implementing act of the Commission (cf. Art. 16 SRR). Such ship recycling facilities, which may be located in a Member State or outside the EU, must comply with a set of 14 requirements enumerated in Article 12 and provide evidence for this in accordance with Article 13 SRR.
- 3) Under Article 9 SRR, the shipowner and the ship recycling facility have to enter into a contract which must include specific obligations and becomes effective at the latest from the time of the request for the final survey that provides the basis for the "Ready for Recycling" certificate. Even though some sort of demolition contract is quite common in practice, it is not mentioned as a prerequisite in the Hong Kong Convention; an omission that has been heavily criticised for obscuring transactions between parties and hampering the resolution of disputes.<sup>20</sup>

Some variations show also in the field of enforcement and inter-institutional communication. Whereas the Hong Kong Convention does not normally use the term "enforcement" but contains several articles on the inspection of ships (Art. 8) and the detection and sanctioning of "violations" (Art. 9 and 10 HKC), the draft Regulation speaks of "enforcement in the Member States" (Art. 23 SRR) but only in the sense of penalties which should be effective, proportionate and dissuasive. The duty of Member State authorities to inspect ships and ship recycling facilities is not at all mentioned in the draft Regulation. On the other hand, the Commission's proposal envisages penalties for ship recycling in an un-listed facility to be imposed not only on the last owner, but also on the penultimate one (within six months before departure to the recycling yard), thus recognizing the common practice that ships are sold some months before their end of life to a specialized "cashbuyer" who then deals with the recycling facility. Besides, the draft

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<sup>20</sup> Cf. Puthucherril, *op.cit.*, at p. 181.

Regulation tries to improve the enforcement regime by granting environmental NGOs and other persons with sufficient interest a right to request action from a Member State in case of a breach of the Regulation, and to claim access to justice against decisions or failure to act (Articles 24 and 25 SRR). Conversely, as regards reporting by governments, the list of items that should be reported by EU Member States to the Commission seems far more limited than the information that should be communicated by Convention Parties to the IMO (cf. Art. 23 SRR and Art. 12 HKC).

## **5 Strong and weak points and chances of success**

Like the Hong Kong Convention, the draft Ship Recycling Regulation offers a mixed picture of ambitious and reluctant – if not over-cautious – legislation. The “cradle-to-grave” approach of both is certainly to be welcomed, and the restriction of hazardous materials on board as well as the requirement for ships to carry an inventory of such materials are important steps forward in the direction of cleaner shipping and ship dismantling. It is in this field that stricter legislation is today generally accepted also by the shipping industry, and even the additional substance bans based on EU chemicals regulations should not be overly controversial. However, the first weakness of the Commission’s proposal that may be identified already at this point and which may prove critical also in other respects is its rigid “flag state” perspective. To require, for instance, an Inventory of Hazardous Materials not only from EU-flagged ships but also from other vessels that enter an EU port would greatly increase the effectiveness of the new rules and could well be justified with the port state and coastal state interest to know about those materials in case of fire and other accidents.

The decision to copy the IMO’s list of exemptions from the scope of legislation is, in the case of government vessels, essentially a disappointing symbol which shows to commercial shipowners and the public that even EU governments do not want to be bound by the rules that they force others to observe. The practical effect may, however, be limited since warships – which constitute the bulk of those vessels - are normally disarmed and decommissioned before being sent for dismantling, so that they fall at this point again under the regime of the Hong Kong Convention and the draft Regulation. The exemption for ships below 500 gross tons and for domestic shipping can be explained by the fact that the respective vessels do not form part of the “problem group” of ships sent to Asian beaches. The total waiver with regard to the rules on hazardous materials, however, may have to be revisited in the long term, in view of the fact that vessels below 500 GT represent 36 % of the world fleet.<sup>21</sup>

A crucial but quite controversial part of the Commission’s proposal is the “European List” of ship recycling facilities. Here the resistance of maritime lobby groups is probably strongest, using the argument that this “unilateral” action by the EU creates unnecessary bureaucracy and will drive shipowners to a re-flagging in favour of non-European flags of

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<sup>21</sup> Lloyd’s List, 13.9.2012: „A third of ships are exempt from safety and pollution rules“.

convenience. Although the requirements for EU-listed ship recycling facilities are not new in substance – they can all be derived from the Hong Kong Convention -, it is the envisaged power of the Commission to examine and acknowledge acceptable facilities that is likely to disturb existing business practices. While the continuity of sub-standard shipbreaking and of the underlying governance problems in Southern Asia, notably in Bangladesh, makes it necessary to institute such an additional level of control, the risk of an increased re-flagging of EU ships – beyond what is already common practice now - is real. That risk might, however, be reduced if the “European List” were linked with financial incentives for good ship recycling. In this context, and in order to give the necessary impetus to the desired reformation of the industry, the idea of a “ship dismantling fund” mentioned in the strategy paper of 2008 should be reconsidered.

Although the international community and the EU have made good progress in creating a proper legislative framework for ship recycling, and impressive technical expertise has been invested in the supplementing IMO guidelines and parallel ISO standards<sup>22</sup>, the impact of these efforts on the reality of ship dismantling remains so far limited. While there are some hopeful signs that the share of environmentally sound recycling facilities worldwide may be growing<sup>23</sup>, the casualties, health hazards and pollution by the market leaders, particularly in Bangladesh, appear to continue unabated.<sup>24</sup> To achieve a real change on the ground will require a quick entry into force of binding legislation, financial incentives for responsible industry, a step-up of sanctions against violations<sup>25</sup> and the continuing pressure from NGOs and the public.

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<sup>22</sup> Cf. [http://www.iso.org/iso/home/store/catalogue\\_ics/catalogue\\_detail\\_ics.htm?csnumber=51244](http://www.iso.org/iso/home/store/catalogue_ics/catalogue_detail_ics.htm?csnumber=51244) and the other ISO standards of the 30000 series.

<sup>23</sup> See e.g. Lloyd’s List of 19.7.2012, “Shipbreakers cash in prime location” (on Turkey), and of 9.8.2012, “North Europe’s small recycling yards ride growth in demand for scrap” (on Danish and other yards in the EU).

<sup>24</sup> Cf. the reports and lists of casualties published by the Bangladeshi NGO YPSA at <http://www.shipbreakingbd.info/>

<sup>25</sup> Cf. Lloyd’s List of 22.6.2012, „Sanctions suggested to quickly enforce ship recycling improvements”.