

# A Critical Assessment of the Regulation on Ship Recycling

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# Abstract

With the recycling of Ships becoming an ever-growing commercial activity, concerns within the shipping industry have been centred around the legal issues that arise when Ship owners sell their Ships with the intention to recycle them. This dissertation will start by setting out the problems surrounding the Ship Recycling industry which will then lead to a critical analysis of the present international and European Union legal framework regulating Ship recycling. The study will then proceed to assess the impact of the EU Ship Recycling Regulation with the aim of determining the manner in which it works in tandem with other EU and international regulatory controls. The ultimate scope of the research will be to establish the implications of the EU Ship Recycling Regulation and its effect on Member States and industry stakeholders.

**KEYWORDS:** MARITIME LAW - ENVIRONMENTAL LAW – SHIP RECYCLING – SHIP RECYCLING FACILITY– WASTE – HAZARDOUS MATERIAL – SHIPMENT OF WASTE – TRANSBOUNDARY MOVEMENT – ENVIRONMENTAL PROTECTION

*To my beloved parents, my sister Elaine and my friends.*

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# Table of Conventions

1989	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, March 1989
1999	Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal Basel, December 1999
2009	Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, May 2009

# Table of Statutes

1992	United Nation's Rio Declaration on Environment and Development
1992	1992 OECD Decision C(92)39/Final on the Control of Transboundary Movements on Wastes Destined for Recovery Operations, April 61992.
1995	Basel Ban Amendment Decision III/1 of the Third Conference of the Parties to the Basel Convention (COP3), 22 September 1995, Geneva, Switzerland.
2006	Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste
2008	Directive 2008/98/EC of the European Parliament and of the Council on waste and repealing certain directives
2013	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 Text with EEA relevance
2019	The Commission Implementing Decision (EU) 2019/995 of 17 June 2019 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, [2019] OJ L 160/28.

# Table of Acronyms

BAN	Basel Action Network
BIMCO	Baltic and Marine Council
EC	European Commission
ECSA	European Community Shipowners' Association
EFTA	European Free Trade Association
EMSA	European Maritime Safety Agency
EU	European Union
GT	Gross Tonnage
HKC	Hong Kong Convention
IMO	International Maritime Organisation
MEPC	Marine Environment Protection Committee
OECD	Organisation for Economic Co-operation & Development
SRFP	Ship Recycling Facility Plan
SRR	Ship Recycling Regulation
SRP	Ship Recycling Plan
WSR	Waste Shipment Regulation



# Table of Definitions

<b>Administration</b>	A governmental authority designated by a Member State as being responsible for duties related to ships flying its flag or to ships operating under its authority.
<b>Competent Authority</b>	A governmental authority or authorities designated by a Member State or a third country as responsible for ship recycling facilities, within a specified geographical area or an area of expertise, relating to all operations within the jurisdiction of that state.
<b>Competent Person</b>	A person with suitable qualifications, training, and sufficient knowledge, experience and skill, for the performance of the specific work.
<b>Consignee</b>	A person or undertaking under the jurisdiction of the country of destination to whom or to which the waste is shipped for recovery or disposal.
<b>Environmentally Sound Management</b>	The taking all practicable steps to ensure that waste is managed in a manner that will protect human health and the environment against adverse effects which may result from such waste.
<b>Flag/Flagging In</b>	The process of adding a ship to the national registry of a country.
<b>Flagging Out</b>	The process of removing a ship from the national registry of a country.
<b>Flag State</b>	The country whose flag a ship is entitled to fly. It is responsible for the enforcement of the relevant regulatory requirements, such as issuing the statutory certificates that ships need to trade.
<b>Hazardous Material</b>	Any material or substance which is liable to create hazards to human health and/or the environment.

<b>New Ship</b>	<p>A ship for which either:</p> <p>(a) the building contract is placed on or after the date of application of this Regulation;</p> <p>(b) in the absence of a building contract, the keel is laid or the ship is at a similar stage of construction six months after the date of application of this Regulation or thereafter; or</p> <p>(c) the delivery takes place thirty months after the date of application of this Regulation or thereafter.</p>
<b>OECD Decision</b>	<p>Decision C(2001)107/Final of the OECD Council concerning the revision of Decision C(92)39/Final on control of transboundary movements of wastes destined for recovery operations.</p>
<b>Port State Control</b>	<p>The inspection of foreign ships in national ports to verify that the condition of the ship and its equipment comply with the requirements of international regulations and that the ship is manned and operated in compliance with these rules.</p>
<b>Ship</b>	<p>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), as well as a vessel stripped of equipment or being towed.</p>
<b>Ship Owner</b>	<p>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 the 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.</p>
<b>Ship Recycling</b>	<p>The activity of complete or partial dismantling of a ship at a ship recycling facility in order to recover components and materials for reprocessing, for preparation for re-use or for re-use, whilst ensuring the</p>

	management of hazardous 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.
<b>Ship Recycling Facility</b>	A defined area that is a yard or facility located in a Member State or in a third country and used for the recycling of ships.
<b>Ship Recycling Facility Plan</b>	A plan prepared by the operator of the ship recycling facility and adopted by the board or the appropriate governing body of the ship recycling company that describes the operational processes and procedures involved in ship recycling at the ship recycling facility and that covers in particular workers' safety and training, protection of human health and the environment, roles and responsibilities of personnel, emergency preparedness and response, and systems for monitoring, reporting and record-keeping, taking into account the relevant IMO guidelines and resolutions.
<b>Ship Recycling Plan</b>	A plan developed by the operator of the ship recycling facility for each specific ship to be recycled under its responsibility taking into account the relevant IMO guidelines and resolutions.
<b>Statement of Completion</b>	A confirmatory statement issued by the operator of the ship recycling facility that the ship recycling has been completed in accordance with this Regulation.
<b>State Party</b>	A country that has ratified or acceded to a particular Convention, and is therefore legally bound by the provisions in the instrument.
<b>Transboundary Movement</b>	Any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement.

# CHAPTER 1

## 1. INTRODUCTION TO THE RECYCLING OF SHIPS

The improper management of waste is one of the main global crises countries must tackle and regulate. These concerns prominently involve the shipping industry given that it is an industry which generates tonnes of waste each day.<sup>1</sup> Apart from the waste generated from the day-to-day operations of a Ship, an integral part of the discussion regarding the management of waste involves Ship Recycling. Normally Ship owners decide to break Ships when the operation thereof becomes no longer profitable or when a Ship reaches its end of operating life.<sup>2</sup>

### 1.1 THESIS OBJECTIVES

The objective of this dissertation is to critically analyse the current legal framework regulating Ship Recycling. The research will start by setting out the problem caused by Ship Recycling and introducing the international and European Union (EU) legal frameworks for its regulation. It will then carry out an examination of the international legal framework applicable to Ship Recycling, through the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (the 'Basel Convention'). The legal assessment will then move on to examine the International

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<sup>1</sup> Shamseer Mambra, 'What is Green Ship Recycling?' (*Marine Insight*, 8 August 2019)

<<https://www.marineinsight.com/environment/what-is-green-ship-recycling>> accessed 10 August 2019.

<sup>2</sup> R. Scott Frey, 'Breaking Ships in The World-System: An Analysis of Two Ship Breaking Capitals, Alang-Sosiya, India And Chittagong, Bangladesh' (2015) 21 *Journal of World-Systems Research*, 27.

Maritime Organisation's Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009 (the 'Hong Kong Convention' or 'HKC'), which, although not yet in force, is of fundamental importance in this context.

The study will then legally assess the existent parallel legal framework within the EU, which comprises mainly of two regulations: Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on Shipments of Waste (the 'Waste Shipment Regulation' or 'WSR') and Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on Ship Recycling and amendment Regulation (EC) No 1013/2006 and Directive 2009/16/EC (the 'Ship Recycling Regulation' or 'SRR'). The research will then proceed to critically assess the impact of the recently introduced SRR with the aim of determining the manner in which it works in tandem with the international legal regime and the WSR.

## **1.2 THE IMPACT OF SHIP RECYCLING ON DEVELOPING COUNTRIES**

The main concerns surrounding Ship Recycling relate to occupational health and safety, community health and safety exposure, as well as the protection of the marine environment.<sup>3</sup> Apart from the process of recycling steel and other resources extracted from a Ship, Ship Recycling would also involve the delicate process of disposing of Hazardous Materials which are found on Ships.

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<sup>3</sup> 'About Ship Recycling' (SRTI, 2019) <<https://www.shiprecyclingtransparency.org/about-ship-recycling/>> accessed 20 July 2019.

Within developed countries, health and safety regulation and environmental regulation is much stricter and labour costs are considerably higher when compared to developing countries.<sup>4</sup> As a result, Ship Recycling within developed countries is deemed unpopular and costly. The Ship Recycling industry is concentrated in developing countries such as Bangladesh, India, Pakistan as well as countries such as China and Turkey.<sup>5</sup> The manner in which Ships are recycling in developing states has for years raised serious concerns.

Tsimplis explains that in the context of Ship Recycling developed states use developing states as dumping sites with little or no regard to the safety of the personnel involved in the operations or the protection of the marine environment.<sup>6</sup> Ship breaking and recycling in such countries is dangerous because there is little or no regulation in the manner in which such undertakings are carried out. As a result, unsafe, cheap and perilous practices are normally followed, unsafe facilities are used, workers are not properly trained, and inadequate and hazardous equipment is used.<sup>7</sup>

### **1.3 THE NEED FOR EFFECTIVE REGULATORY CONTROLS OVER SHIP RECYCLING**

The need for regulation of Ship Recycling is reflected in the main principles of international environmental law. The United Nation's 1992 Rio Declaration on Environment and Development, (the 'Rio Declaration'), provides guidelines on the manner in which States should seek to attain future sustainable development. One of the main principles set out by

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<sup>4</sup> 'Why Ships Are Toxic - NGO Shipbreaking Platform' (*NGO Shipbreaking Platform*, 2019) <<https://www.shipbreakingplatform.org/issues-of-interest/why-ships-are-toxic>> accessed 3 July 2019.

<sup>5</sup> *ibid.*

<sup>6</sup> Michael N Tsimplis, 'The Hong Kong Convention on Recycling of Ships' [2010] L.M.C.L.Q. 305.

<sup>7</sup> *ibid.*

the Rio Declaration is for States to seek to ensure ‘that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction’.<sup>8</sup> Additionally, States are also guided to develop international and national law regarding liability and compensation for victims of pollution and other environmental damage.<sup>9</sup>

Another important notion, in the context of Transboundary Movement, recycling and disposal of waste is the precautionary approach. The precautionary approach encourages States to seek to control any activity that may cause environmental damage with the aim of preventing harmful consequences that may arise. The Rio Declaration encourages States to apply the precautionary approach with the aim of protecting the environment further stating that ‘[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’.<sup>10</sup> Hand in hand with the precautionary approach is the Principle guiding States to cooperate to ‘discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health’.<sup>11</sup>

The Rio Declaration also sets out principles aimed at addressing instances where environmental damage occurs. The main principle with respect to environmental harm that may occur during the transport or recycling of waste is the polluter pays principle. The Rio

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<sup>8</sup> Rio Declaration, Principle 2.

<sup>9</sup> Rio Declaration, Principle 13.

<sup>10</sup> Rio Declaration, Principle 15.

<sup>11</sup> Rio Declaration, Principle 14.

Declaration encourages states to ensure that polluters bear the cost of pollution with the aim of internalising environmental costs and the use of economic instruments.<sup>12</sup>

These principles set out in the Rio Declaration have informed the content of the international legal instruments concerned with Ship Recycling. The regulation of Ship Recycling seeks to: protect the marine environment with the aim of avoiding the treatment of the oceans as unregulated disposal sites; protect the health and safety of workers involved in the undertaking; and to promote sustainable modes of management, recycling, re-use and disposal of waste and other materials from Ships.<sup>13</sup>

### 1.3.1 Introduction to the International Legal Regime

Internationally Ship Recycling is mainly regulated by the Basel Convention which was adopted in 1989 and entered into force in 1992<sup>14</sup>. To date, the Basel Convention has been ratified by 186 countries.<sup>15</sup> The Basel Convention is aimed at regulating the Transboundary Movement of hazardous waste and the disposal thereof and protecting the environment and human health during the said operations. Given that Ship Recycling is an undertaking which involves hazardous waste and materials, the applicability of the Basel Convention is central. Under the said framework there exists also the Ban (Basel Action Network (Amendment to the Basel Convention on the Transboundary Movements

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<sup>12</sup> Rio Declaration. Principle 16.

<sup>13</sup>--, 'Recycling Ships' (*Blueoceanenviro.com*, 2019) <<http://blueoceanenviro.com/ship-recycling/>> accessed 20 July 2019.

<sup>14</sup> Richard B. Bilder, Philippe Sands and Katharina Kummer, 'International Management of Hazardous Wastes: The Basel Convention and Related Legal Rules.' (1997) 91 *The American Journal of International Law*, 96.

<sup>15</sup> 'Seatrade: A New Approach to Violations of Regulations on Ship Recycling in The European Union? | Global Law Firm | Norton Rose Fulbright' (*Nortonrosefulbright.com*, 2019) <<http://www.nortonrosefulbright.com/knowledge/publications/167300/seatrade-a-new-approach-to-violations-of-regulations-on-ship-recycling-in-the-european-union>> accessed 10 June 2019.



of Hazardous Wastes and their Disposal), (the 'Basel Ban'), which is aimed at prohibiting the export of hazardous waste for disposal and recycling from OECD countries to non-OECD countries.<sup>16</sup> However the Basel Ban is not yet in force.

Another important international legal instrument in this context is the Hong Kong Convention which is aimed at regulating the safe and environmentally sound recycling of Ships. However, the HKC has not yet entered into force and its provisions were only given effect within the EU through the recent introduction of the Ship Recycling Regulation.

### 1.3.2 Introduction to the EU Legal Regime

At regional level within the EU, the Basel Convention has been given effect through the introduction of the Waste Shipment Regulation. The WSR implements the OECD Decision and gives effect to the Basel Ban, prohibiting exports of hazardous wastes to non-OECD countries and exports of waste for disposal outside the EU/EFTA area.<sup>17</sup> In addition to the WSR, the EU has recently given force to the SRR. Although the HKC was a good step forward, given that it was not enforced it was not instrumental. It is only with the coming into force of the SRR that progress may be possible in this field. The SRR is aimed at preventing, reducing, minimising and to the extent possible, eliminating accidents, injuries and other adverse effects on human health and the environment caused by Ship Recycling and to enhance safety, and protect human health and the marine environment.<sup>18</sup>

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<sup>16</sup> Tsimplis (n 6) 3.

<sup>17</sup> WSR, preamble 5.

<sup>18</sup> SRR, article 1.

# CHAPTER 2

## 2. THE INTERNATIONAL LEGAL FRAMEWORK REGULATING SHIP RECYCLING

### 2.1 INTRODUCTION

As explained in Chapter 1 the international legal regime regulating Ship Recycling is mainly two-fold. Primarily the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal deals with Ship Recycling through the regulation of Transboundary Movement of hazardous waste and the disposal thereof. The precautionary approach and the avoidance of transboundary damage to the environment are fundamental concepts integrated in the Basel Convention.<sup>19</sup> The main obligation of the Basel Convention is the minimisation of Transboundary Movement of waste and generation thereof and the management of such waste in an environmentally sound manner.<sup>20</sup> As explained by Grosz, having waste minimization as an objective emulates the ultimate goal of environmental law principles, that is, sustainable development.<sup>21</sup>

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<sup>19</sup> Anatole Boute, 'The Rio Declaration on Environment and Development: A Commentary' (2016) 75 The Cambridge Law Journal, 166.

<sup>20</sup> Basel Convention, article 4.

<sup>21</sup> Marina Grosz, *Sustainable Waste Trade Under WTO Law* (Nijhoff 2011) 142.

In addition to the Basel Convention, the International legal community developed the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009, with the aim of specifically targeting Ship Recycling. The HKC incorporates the precautionary approach set out in the Rio Declaration, such that it requires State Parties to ‘prevent, reduce, minimise and, to the extent practicable, eliminate accidents, injuries and other adverse effects on human health and the environment caused by Ship Recycling’.<sup>22</sup>

## **2.2 THE BASEL CONVENTION**

### **2.2.1 Purpose behind the Basel Convention**

As already outlined in the previous chapter, the Convention seeks to address concerns on the disproportionate burden put on the marine environment of developing states.<sup>23</sup> The Basel Convention gives fundamental importance to the prevention and minimization of waste. Article 4(2) further elaborates on this purpose by requiring State Parties to take all measures necessary to minimise the generation of hazardous wastes, whilst also ensuring the proper disposal of any hazardous waste generated, in adequate facilities.<sup>24</sup> However article 4(2) also takes into account social, technological and economic aspects which lead to the inevitable generation of waste. Thus, the Basel Convention further regulates the environmentally sound Transboundary Movement of waste generated and the management and disposal thereof.<sup>25</sup>

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<sup>22</sup> Tiffany Bergin and Emanuela Orlando, *Forging A Socio-Legal Approach to Environmental Harms* (1st edn, Routledge 2017).

<sup>23</sup> Lisa Widawsky, ‘In My Backyard: How Enabling Hazardous Waste Trade to Developing Nations Can Improve the Basel Convention’s Ability to Achieve Environmental Justice’, (2008) 38/ 2 *Environmental Law* 577, 604.

<sup>24</sup> Basel Convention, article 4(2).

<sup>25</sup> *ibid.*

### 2.2.2 Legal Scope

Initially the Basel Convention was not developed with the recycling of Ships in mind. The legal scope of the Basel Convention covers the Transboundary Movement of hazardous and other wastes and the Environmentally Sound Management and disposal thereafter.<sup>26</sup> The term 'Wastes' is defined 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'.<sup>27</sup> In determining which waste would be deemed hazardous and thus falling under the remit of the Basel Convention, reference would have to be made to the list of 'hazardous wastes' within the Convention under Annex I.<sup>28</sup>

Towards the end of the 1990s, a decision was taken by UNEP that the Convention would also regulate the recycling of Ships.<sup>29</sup> The Basel Convention regime is applicable to the recycling of Ships, given that, Ships destined for breaking, scrapping and recycling in designated facilities would fall under the definition of 'Wastes'. As explained by Tsimplis, 'Ships' would fall under the term 'objects' in article 2(1) of the Basel Convention and the process of recovery or recycling of Ships would fall under the definition of 'Disposal' in article 2(4) read in conjunction with Annex IV to the Convention.<sup>30</sup> Additionally, a number of hazardous substances and materials are found on board Ships, which substances and materials are found in the list of 'hazardous wastes' under Annex I.<sup>31</sup>

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<sup>26</sup> Basel Convention, article 1.

<sup>27</sup> Basel Convention, article 2(1).

<sup>28</sup> Tsimplis (n 6) 4.

<sup>29</sup> Norton Rose Fulbright (n 15).

<sup>30</sup> Tsimplis (n 6) 7.

<sup>31</sup> Ibid.

### 2.2.3 The Basel Ban

In 1995, the Basel Convention was amended through the Basel Ban which is aimed at completely banning the export of hazardous wastes destined for recycling and final disposal from OECD countries to non-OECD countries.<sup>32</sup> The Basel Ban is not yet in force, however it has been given the force of law within the EU under the WSR.

### 2.2.4 Transboundary Movement of Waste

Whilst the main aim of State Parties should be to minimise the generation of waste, the Basel Convention goes on to make provision on the manner in which Transboundary Movement of waste that is inevitably generated, should be conducted.

The Transboundary Movement of waste from one State to another is only permitted under the Basel Convention when conducted in such a manner that it does not endanger the environment and human health.<sup>33</sup> Primarily, the Basel Convention prohibits State Parties from permitting hazardous wastes or other wastes being exported or imported to or from countries which are not party to the Basel Convention.<sup>34</sup> Additionally, article 4(8) of the Basel Convention importantly obliges any exporting state to refuse to import or re-import any hazardous wastes or other waste if it is discovered that it cannot be disposed of in an environmentally sound manner in the importing state or elsewhere.<sup>35</sup>

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<sup>32</sup> Norton Rose Fulbright (n 15).

<sup>33</sup> Basel Convention, preamble .

<sup>34</sup> Basel Convention, article 4(5).

<sup>35</sup> Kathleen Howard, 'The Basel Convention: Control of Transboundary Movements of Hazardous Wastes and Their Disposal' (1991) Vol. 14, no 1; *Hastings International & Comparative Law Review*, 231.

#### 2.2.4.1 Notification of a Transboundary Movement of Waste

Transboundary movement of waste between State Parties requires the exporter to open a channel of communication with and notify in writing, the country of import, and any other transit country, through their Competent Authorities of any proposed Transboundary Movement.

The process of notifying and responding to such proposed Transboundary Movements of waste is done through the Competent Authorities of each State Party. Competent Authorities must act as focal points with the aim of facilitating the implementation of the provisions of the Basel Convention.<sup>36</sup> Annex V of the Basel Convention contains a number of documents, declarations and information which are required to be included in such notification.<sup>37</sup> Upon receipt of the notification the importing state would need to respond in writing to the notifying state, consenting with or without conditions or denying permission to the movement proposed.<sup>38</sup>

A State Party may refuse to consent to the import of hazardous waste from another State Party, in which case the exporting state would not be able to allow the exporter to proceed with any such export. For a State to allow a Transboundary Movement of hazardous waste or other waste, it must not have the technical capacity and facilities suitable for the disposal of waste in an environmentally sound manner.<sup>39</sup> However, an exception to this rule arises where

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<sup>36</sup> Basel Convention, article 5.

<sup>37</sup> Basel Convention, article 6 (1).

<sup>38</sup> Basel Convention, article 6(2).

<sup>39</sup> Basel Convention, article 4(9)(a).

the Transboundary Movement of waste is necessary given that the waste to be transported is a raw material required in the State of import.<sup>40</sup>

### 2.2.5 Taking of an Insurance, Bond or other Guarantee

A main requirement for such Transboundary Movement of wastes or other wastes to be allowed is the taking of an insurance, bond or other guarantee covering the whole undertaking.<sup>41</sup> The reason behind requiring such guarantee stems from the fact that Transboundary Movement of waste and the management or disposal thereafter are dangerous activities and there should therefore be in place financial means to ensure compensation to victims and environmental restoration.<sup>42</sup> This requirement reflects the polluter pays principle, such that damage to the environment and to third parties that may arise during such activities would be covered by the amounts covered with the guarantee. As explained by Kummer, such requirement incentivises Notifiers to ensure compliance with the international regulatory requirements established by the Basel Convention.<sup>43</sup>

### 2.2.6 Completion of the Transboundary Movement of Waste

The Transboundary Movement is not deemed to be completed upon arrival of the waste at the designated facility. The undertaking is deemed to be concluded when the importing state notifies the exporting state that the waste has been received and disposed of.<sup>44</sup> Only upon completion of disposal would the exporting state proceed to release the guarantee, or allow the removal of the insurance cover or other bond covering the undertaking.

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<sup>40</sup> Basel Convention, article 4(9)(b).

<sup>41</sup> Basel Convention article 6(11).

<sup>42</sup> Bilder, (n 14) 284.

<sup>43</sup> *ibid* 242.

<sup>44</sup> Basel Convention, article 6(9).

Although an importing State may have given consent to the Transboundary Movement of hazardous wastes or other wastes, the obligations and responsibilities on the part of the exporting state remain alive. Should the situation arise that such movement cannot be completed in accordance with the conditions laid down in the notification and movement documents, the exporting State may be required to take back the said wastes for their disposal in an environmentally sound manner.<sup>45</sup>

### 2.2.7 Illegal traffic

Should any exporter fail to comply with the provisions of the Basel Convention, article 9 establishes that any such transport would be deemed 'illegal traffic' which is a criminal offence.<sup>46</sup> In the event of illegal traffic, the State Parties involved, together with the exporter and generator of the waste, would still be required to ensure that the waste is managed and disposed of in an environmentally sound manner.<sup>47</sup> The Basel Convention requires State Parties to make provision into their national or domestic legislation for the purposes of punishing such illegal traffic.<sup>48</sup> In circumstances where an illegality is detected the exporting state would be obliged to either take back the waste or the importing state to ensure the environmentally sound disposal of the waste, depending on the circumstances of each case.<sup>49</sup>

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<sup>45</sup> Basel Convention, article 8.

<sup>46</sup> Basel Convention, article 9.

<sup>47</sup> *ibid.*

<sup>48</sup> *ibid.*

<sup>49</sup> *ibid.*



## 2.2.8 Liability and Compensation

Given that the main function of the Basel Convention is to monitor the manner in which Transboundary Movement of hazardous wastes and other wastes takes place and the limitation thereof, the need was felt to cater for situations where damage is caused during such transport of waste. As a result, in 1999 the Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal (the 'Basel Protocol') was adopted providing for a regime for strict liability and adequate and prompt compensation for any incident that may occur during such Transboundary Movement causing damage or creating a grave and imminent threat of causing damage.<sup>50</sup>

Strict liability for any damage that arises is imposed on the Notifier at the commencement stage up until the waste is delivered to the disposal facility, at which stage, strict liability is shifted onto the disposer until the waste is disposed of.<sup>51</sup> The Basel Protocol regime imposes fault-based unlimited liability, provides for compulsory insurance or guarantees and provides for the possibility of special funds to provide further compensation when the Basel Protocol Fund is not enough to cover a claim.<sup>52</sup> The Basel Protocol addresses the issues that had been raised regarding the lack of funds and technology available to developing countries for the purposes of controlling illegal dumping and accidental spills. However, despite the international efforts to bring the Liability Protocol into force, it has yet to be ratified by at

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<sup>50</sup> Basel Protocol, articles 1 and 2.

<sup>51</sup> Basel Protocol, article 4.

<sup>52</sup> Tsimplis (n 6) 34.

least twenty countries.<sup>53</sup> This naturally weakens the effectiveness of the Basel Convention regime.

### 2.2.9 Critiquing the Basel Convention

Although the Basel Convention in theory provided a working and robust system for the proper control of Transboundary Movement of waste between one State Party and another, in practice and in the context of Ship Recycling, it left much to be desired.

Regulatory control and proper implementation of the Basel Convention provisions rests with the individual states, and this proved ineffective.<sup>54</sup> As Kummer, rightfully argues, the Convention grants State Parties a high level of discretion in terms of determining what would amount to 'hazardous waste' and what would be deemed 'environmentally sound' management of waste, thereby leading to lack of uniformity in terms of application and enforcement.<sup>55</sup> Although the Basel Convention successfully establishes imposition of criminal sanctions where illegal trafficking of hazardous waste takes place, the Convention fails to provide a proper enforcement mechanism.<sup>56</sup>

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<sup>53</sup> 'Basel Convention > The Convention > Overview > Liability Protocol' (*Basel.int*, 2019) <<http://www.basel.int/TheConvention/Overview/LiabilityProtocol/tabid/2399/Default.aspx>> accessed 7 June 2019.

<sup>54</sup> 'Basel Convention: Entry into Force of The Ban on Trade in Hazardous Waste Between Developed and Developing States Accelerated | Volterra Fietta' (*Volterrafietta.com*, 2019) <<https://www.volterrafietta.com/basel-convention-entry-into-force-of-the-ban-on-trade-in-hazardous-waste-between-developed-and-developing-states-accelerated/>> accessed 8 June 2019.

<sup>55</sup> Katharina Kummer, 'The International Regulation of Transboundary Traffic in Hazardous Wastes: The 1989 Basel Convention' (1992) 41 *International and Comparative Law Quarterly*, 561.

<sup>56</sup> Kenneth I. Ajibo, 'Transboundary Hazardous Waste and Environmental Justice: Implications for Economically Developing Countries' (2016) 8 *Environmental Law Review*, 271.

Whilst the Basel Convention requires State Parties to reduce and minimise the generation of hazardous waste, in reality no further obligations in this regard are placed on States to ensure such reduction. For this reason, the Basel Convention has been criticised for being too lenient in its approach given that States have no specific obligations imposed upon them to ensure reduction in the generation of waste prior to agreeing to a Transboundary Movement of waste.<sup>57</sup>

Another issue with the Basel Convention is the existing loophole surrounding the prior informed consent or the notification process. Whilst the notification process would in theory work, in practice, an exporting state may accept that an importing state has sufficient waste treatment facilities, even if this may not be the case, and this may go unnoticed. The reason why importing States may make such mis-representations regarding the state of their waste treatment facilities may simply be to attract more business, and this is likely to happen in developing states.<sup>58</sup> In this respect, the Basel Convention fails to ensure that no Transboundary Movement of waste is conducted when it is not possible for such waste to be treated in an environmentally sound manner. For the system to work independent inspections should be conducted on waste treatment facilities of State Parties in order to ensure that they are in compliance with the obligations imposed by the Basel Convention.<sup>59</sup>

Whilst the provisions of the Basel Convention have to an extent been helpful in the regulation of Ship Recycling, given that it regulates waste, rather than Ship Recycling, it is not deemed sufficient and elaborate enough to regulate the recycling process in detail. The International

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<sup>57</sup> Ibid 6.

<sup>58</sup> Ibid 8.

<sup>59</sup> Ajibo (n 56) 274.

community recognised that the Basel Convention alone could not sufficiently regulate Ship Recycling and it is for this reason that we later on, saw the introduction of the HKC.

## **2.3 THE HONG KONG CONVENTION**

### **2.3.1 Purpose behind the Hong Kong Convention**

The Hong Kong Convention is directly focused on regulating the recycling of Ships, and this on the basis that recycling is deemed the best option for Ships having reached the end of their operating life.<sup>60</sup> The HKC seeks to ensure that Ship recycling is conducted without any unnecessary risks to human health and safety, and the environment.<sup>61</sup>

One of the positive elements of the HKC is that it seeks to promote sustainable recycling of Ships since it addresses the sound management of recycling of Ships from the start and not only at the point in time when the Ship reaches the end of its operational life. The ultimate aim of the HKC is to promote the eventual substitution of Hazardous Materials in the construction and maintenance of Ships, with other materials, preferably non-hazardous or at least less hazardous.<sup>62</sup> Therefore, unlike the Basel Convention,<sup>62</sup> which is aimed at controlling the Transboundary Movement of hazardous waste, the approach taken by the HKC is the gradual removal of Hazardous Materials on board Ships so that in the future the recycling of Ships becomes less dangerous and increasingly environmentally sound. The HKC therefore applies the precautionary approach in a more effective way such that there is an ultimate goal

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<sup>60</sup> HKC, preamble .

<sup>61</sup> 'Ship Recycling' (*Imo.org*, 2019) <<http://www.imo.org/en/OurWork/Environment/ShipRecycling/Pages/Default.aspx>> accessed 9 July 2019.

<sup>62</sup> HKC, preamble .

of complete removal or minimisation to the highest extent possible of hazardous waste on board Ships.

### 2.3.2 Legal Scope

The HKC applies to Ships entitled to fly the Flag of a State Party or operating under its authority and also to Ship Recycling Facilities operating under the jurisdiction of a State Party.<sup>63</sup> To fall within the scope of the HKC a Ship must be operating within the marine environment. Article 1 of the HKC imposes additional restrictions stating that Ships of less than 500 GT, warships, naval auxiliary, and non-commercial governmental Ships, or Ships operated only in waters subject to the sovereignty or jurisdiction of the State whose Flag the Ship is entitled to fly, are not subject to the Convention.<sup>64</sup>

### 2.3.3 Ship Recycling Regulation under the Hong Kong Convention

State Parties must ensure that Ships under their authority and Ship Recycling Facilities within their jurisdiction adhere to the provisions of the HKC.<sup>65</sup> Parties must also ensure that all the necessary survey and certification requirements established under the Convention are conducted and obtained by Ships operating under their authority or within their jurisdiction.<sup>66</sup> Moreover the HKC requires that Ship Recycling Facilities are properly authorised to operate as such.<sup>67</sup> Unless a Ship Recycling Facility abides by the Convention provisions, Ships subject to the provisions of the said Convention would not be able to recycle their Ships in the said facilities.

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<sup>63</sup> HKC, article 1(1).

<sup>64</sup> HKC, article 1.

<sup>65</sup> HKC, article 4.

<sup>66</sup> HKC, article 5.

<sup>67</sup> HKC, article 6.

Whilst the Basel Convention regime completely bans the export of Hazardous Materials to non-OECD countries, the HKC takes, a more favourable approach. Rather than banning exports to developing countries, the HKC provides opportunities to such States to abide by the Convention provisions and to seek to ensure compliance so that their facilities ensure the health and safety of the workforce involved and the environmentally sound recycling of Ships. State Parties to the HKC would therefore be required to establish legislation, regulation and standards ensuring that Ship Recycling Facilities are designed, constructed and operated safely and in an environmentally sound manner.<sup>68</sup> The Convention then moves on to enlist the Hazardous Materials which are prohibited or restricted from being installed or used in shipyards and Ships under its scope.<sup>69</sup> The Convention also requires the establishment of an authorisation mechanism and provisions regulating inspection, monitoring and enforcement of its Provisions within each contracting State.<sup>70</sup> An authorised Ship Recycling Facility can only accept to recycle Ships which are authorised to do so under the Convention.

### 2.3.4 The Inventory of Hazardous Materials

An important requirement established by the HKC is that Ships destined for recycling must procure an Inventory of Hazardous Materials (IHM).<sup>71</sup> The requirements surrounding an IHM are three-fold. An initial survey would have to be conducted over the Ship for the purposes of establishing and preparing an inventory of all the Hazardous Materials which are found in the structure and equipment of the Ship. During the operation of the Ship additional surveys would have to be conducted for the purposes of monitoring and controlling the presence of

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<sup>68</sup> HKC, regulation 15.1.

<sup>69</sup> HKC, Appendix 1.

<sup>70</sup> HKC, regulation 15.2 and 15.3.

<sup>71</sup> Resolution MEPC.269(68) establishes Guidelines for the Development of the Inventory of the Hazardous Materials, aimed at assisting states in the enforcement of the Convention's technical standards in this regard.

Hazardous Materials on board. At the point in time when the Ship reaches its end of its operational life a final survey would need to be conducted which would need to be complemented with a Ship Recycling Plan (SRP). The SRP would determine the manner in which a Ship-owner intends to recycle the Ship taking into account the Ship's individual particulars and its inventory.<sup>72</sup> Ships subject to the application of the HKC, must keep the IHM certificate on board at all times.<sup>73</sup>

### 2.3.5 Information Sharing

The Convention establishes a compulsory information sharing system, requiring State Parties to provide any relevant information in connection with the authorisation of Ship Recycling Facilities within their jurisdiction.<sup>74</sup>

Article 12 further regulates the manner in which information between State Parties should be shared. Primarily each party must disseminate a list of Ship Recycling Facilities authorised to operate within its jurisdiction, as well as a list of recognised organisations and nominated surveyors authorised to act on behalf of that Party.<sup>75</sup> Additionally the HKC also requires State Parties to provide, amongst other information, an annual list of Ships falling under their jurisdiction to which an International Ready for Recycling Certificate has been issued. Similar to the Basel Convention the HKC relies on the operation of Competent Authorities as contact points within each State Party.<sup>76</sup>

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<sup>72</sup> Resolution MEPC.196(62) establishes a number of Guidelines for the Development of the Ship Recycling Plan, to assist states in the implementation of the Convention's technical standards in this regard.

<sup>73</sup> HKC, Chapter 2, regulation 5.

<sup>74</sup> HKC, article 7.

<sup>75</sup> HKC, article 12.

<sup>76</sup> HKC, article 12.

### 2.3.6 Authorisations of Ship Recycling Facilities

The HKC goes on to establish detailed provisions on the manner in which authorisation of Ship Recycling Facilities can be obtained and on the manner in which the Ship Recycling operation should be conducted. Notably, the HKC does not create distinctions between developing and developed states, in deciding to recycle a Ship, as long as a Ship Recycling Facility is duly authorised under the Convention the shipowner can proceed with recycling their Ship. This system thus enables the possibility of uniform application of Ship Recycling standards across the shipping industry, worldwide.

### 2.3.7 The Notification procedure for Ship Recycling

The process for a recycling operation to be conducted in accordance with the Convention involves the communication between the Competent Authority of the Ship Recycling Facility and the Administration of the Ship involved, and the exchange of information and documentation, including written notification regarding the Ship Recycling.

Under the HKC the shipowner must issue prior notification to the Flag state in writing of his intention to recycle the Ship in order to enable the Flag State Administration to prepare for the necessary survey and certification.<sup>77</sup> Once the said survey and certification is duly completed the Administration would issue the Ship with an International Ready for Recycling Certificate. In tandem, the relative Ship Recycling Facility must notify its Competent Authority of its intention to receive a Ship for recycling, which notification must include as a minimum, the details of the Ship intended for recycling, the particulars of the shipowner, the details of

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<sup>77</sup> HKC, regulation 24 (1).



the relevant classification society, a copy of the IHM and a draft SRP.<sup>78</sup> Once a Ship receives its International Ready for Recycling Certificate, the Ship Recycling Facility would need to report accordingly to its Competent Authority when recycling is to commence.<sup>79</sup>

Upon completion or partial completion of the Ship Recycling process, the Ship Recycling Facility must issue and submit to its Competent Authority a Statement of Completion.<sup>80</sup> The Competent Authority must communicate the said Statement of Completion to the Ship's Administration.<sup>81</sup> The said Statement of Completion would need to detail any incidents or accidents damaging human health and/or the environment.<sup>82</sup>

### 2.3.8 Port State Control

Importantly the HKC also establishes a system of Port State Control, allowing State Parties to inspect Ships which are themselves subject to the Convention.<sup>83</sup> However such right of inspection is limited to the verification as to whether the International Certificate on IHM or the International Ready for Recycling Certificate are on board and valid.<sup>84</sup> Detailed inspections would only be allowed in cases where the said certificates are not found on board, or are found to be invalid or if the condition of the Ship or its equipment do not correspond with the particulars of the said certificates or the IHM.<sup>85</sup>

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<sup>78</sup> HKC, regulation 24(2).

<sup>79</sup> HKC, regulation 24(3).

<sup>80</sup> HKC, regulation 25.

<sup>81</sup> HKC, regulation 25.

<sup>82</sup> HKC, regulation 25.

<sup>83</sup> HKC, article 8(1).

<sup>84</sup> *ibid.*

<sup>85</sup> HKC, article 8(2).

### 2.3.9 Critiquing the Hong Kong Convention

As we have seen in the previous section the Basel Convention makes provision regarding situations where movements of waste cannot be completed in accordance with the conditions laid down in the notification and movement documents.<sup>86</sup> Under the Basel Convention the exporting State may be required to take back the said wastes for their disposal in an environmentally sound manner.<sup>87</sup> Unlike the Basel Convention, the HKC fails to make provision as to what would happen should completion of the recycling process be unsuccessful such that the Statement of Completion cannot be issued. Additionally, after a shipowner declares his intention to recycle his Ship, should the Flag State Administration refuse to issue the International Ready for Recycling Certificate, the HKC makes no clear provision as to what the shipowners' rights and obligations would be.

The HKC was developed through the combined efforts of the IMO Member States, the International Labour Organisation, the Basel Convention State Parties and other key non-governmental organisations in the industry.<sup>88</sup> Considering the fact that all key players were involved in the adoption of the HKC, it may come as a surprise to know that it never came into force since it was not ratified by enough parties. Notably, as will be examined further in Chapter 4, at EU level a lot of progress has been made for the facilitation of the adoption of the HKC through the Introduction of the Ship Recycling Regulation.

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<sup>86</sup> Basel Convention, article 8.

<sup>87</sup> Basel Convention, article 8.

<sup>88</sup> 'Ship Recycling' (*Imo.org*, 2019) <<http://www.imo.org/en/OurWork/Environment/ShipRecycling/Pages/Default.aspx>> accessed 9 July 2019.

# CHAPTER 3

## 3. THE EUROPEAN UNION LEGAL FRAMEWORK REGULATING SHIP RECYCLING

### 3.1 INTRODUCTION

The EU's legal framework regulating Ship Recycling transitioned from the regulation of Transboundary Movement of waste to a regime specifically regulating Ship Recycling with Flag state jurisdiction being given centre-stage.<sup>89</sup> The WSR mirrors the Basel Convention, but reaches further by implementing the Basel Ban. With the recent introduction of the SRR, the EU has also implemented the provisions of the HKC.

The SRR highlighted the EU's move towards considering Ship Recycling as the preferred mechanism for disposal as opposed to other methods such as; dumping at sea or permanent storage.<sup>90</sup> The SRR and the WSR work in tandem. EU Flagged Ships are no longer regulated by the WSR, instead all EU Flagged Ships fall now solely within the scope of the SRR. The WSR however remains applicable to all non-EU Flagged Ships destined for recycling which depart from any port within the EU.

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<sup>89</sup> Gabriela Argüello Moncayo, 'International Law on Ship Recycling and Its Interface with EU Law' (2016) 109 *Marine Pollution Bulletin*, 301.

<sup>90</sup> *ibid.*

## 3.2 THE WASTE SHIPMENT REGULATION

The WSR is aimed at regulating the manner in which transboundary shipment of waste is controlled taking into account the origin, destination and route of the shipment of waste and also the type of waste involved and treatment thereof.<sup>91</sup> Notably the WSR should be read in conjunction with Directive 2008/98/EC of the European Parliament and of the Council on waste and repealing certain directives OJ L 312/3 (the 'Waste Framework Directive'), for the purposes of determining whether material can be classified as waste and if it shall be transhipped for recovery or disposal.<sup>92</sup> The Waste Framework Directive sets out the basic principles on which the WSR is based mainly that Waste should be managed without causing nuisance and endangering human health and harming the environment.<sup>93</sup>

### 3.2.1 The Purpose behind the Waste Shipment Regulation

In determining the manner in which transboundary shipments of waste should be regulated, the WSR gives prominence to the preservation, protection and improvement of the quality of the environment and human health.<sup>94</sup> One of the main purposes behind the WSR is to facilitate the reduction of shipments of hazardous waste for the purposes of ensuring environmentally sound and efficient management of the said waste.<sup>95</sup> The WSR seeks to provide further effective solutions to the problems posed by Ship Recycling by promoting international cooperation, information exchange, and shared

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<sup>91</sup> WSR, article 1(1).

<sup>92</sup> Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives [2008] OJ L 312/3 (Waste Framework Directive).

<sup>93</sup> 'Directive 2008/98/EC On Waste (Waste Framework Directive) - Environment - European Commission' (*Ec.europa.eu*, 2019) <<https://ec.europa.eu/environment/waste/framework/>> accessed 10 May 2019.

<sup>94</sup> WSR, preamble 7.

<sup>95</sup> WSR, preamble 8.

responsibilities between Member States and third countries.<sup>96</sup> The workings of the WSR are governed by the principle of subsidiarity and the principle of proportionality set out in article 5 of the European Union Treaty, thus enabling the EU to take action and adopt measures to fulfil the objectives set out under the Regulation without going beyond that which is necessary.<sup>97</sup>

### 3.2.2 Legal Scope

The WSR is directly applicable and enforceable in all EU Member States. The WSR specifically excludes from its scope any Ships flying the Flag of Member States which would fall under the scope of the SRR.<sup>98</sup> The WSR covers hazardous and non-hazardous waste through the amalgamation of provisions of the Basel Convention and the OECD Decision. The WSR therefore amalgamates the provisions of the Basel Convention which seeks to discourage and restrict waste with the OECD Decision which promotes the management of waste in an environmentally sound manner.<sup>99</sup> The Regulation includes the provisions of the Basel Ban, meaning that, no hazardous wastes and thus no Ship, can be exported from an EU port unless it is destined for recycling to an OECD country export.<sup>100</sup>

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<sup>96</sup> WSR, preamble 35 and 36.

<sup>97</sup> WSR, preamble 42.

<sup>98</sup> WSR, article 2(3)(i).

<sup>99</sup> Argüello Moncayo (n 89) 302.

<sup>100</sup> 'Waste Shipments - Environment - European Commission' (*Ec.europa.eu*, 2019) <<http://ec.europa.eu/environment/waste/shipments/index.htm>> accessed 13 June 2019.

### 3.2.3 Prior Written Notification and Consent

The Waste Framework Directive defines Waste as ‘any substance or object which the holder discards or intends or is required to discard’.<sup>101</sup> Waste would be deemed hazardous if it comprises one or more of the properties mentioned in Annex II of the Waste Framework Directive.<sup>102</sup>

The OECD Decision makes provision for simplified recycling of ‘green-listed waste’ on the basis that such waste poses less risks. Under the WSR, the shipment of green-listed non-hazardous wastes for recovery within the EU and OECD countries would not require a shipowner to obtain written consent from the relative Competent Authorities, but rather establishes general information requirements. Contrastingly, when it comes to hazardous waste or rather ‘amber-listed wastes’ for recovery, the WSR establishes a detailed notification and consent procedure. Additionally, any shipment of waste, irrespective of whether it is green-listed or amber-listed, destined solely for disposal operations would need to be subjected to the procedure of prior written notification and consent.<sup>103</sup> Therefore the WSR distinguishes between recovery operations and disposal operations.

In the case of recycling of Ships, on a prima facie basis Ships would fall under the definition of green-listed waste. Annex III of the WSR deems green-listed wastes to include those listed in Annex IX of the Basel Convention and this including metal, and

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<sup>101</sup> Waste Framework Directive, article 3(1).

<sup>102</sup> Waste Framework Directive, article 3(2).

<sup>103</sup> WSR, article 2(1).

metal-bearing wastes containing, for example, iron or steel scrap.<sup>104</sup> However, the introduction to Annex III of the WSR further states that regardless of whether a particular 'Waste' is deemed to be a 'green-listed waste' it would not be subject to the general information requirements if contaminated by other materials to an extent which increases the risks associated with the wastes or prevents their recovery in an environmentally sound manner.<sup>105</sup> Therefore, when Ships cannot be recovered in an environmentally sound manner or when they have onboard or contain within their structure materials with hazardous characteristics, they must be subject to the procedure of prior written notification and consent.<sup>106</sup> Having said that, as rightly pointed out by Argüello Moncayo, recycling of Ships would involve disposal followed by recovery operations such that prior written notification and consent would be mandatory under the Regulation.<sup>107</sup>

The said prior written notification and consent procedure would first require a Notifier, to submit a written documentation to and through the Competent Authority of dispatch.<sup>108</sup> The Notifier would be the natural or legal person intending to carry out a shipment of waste or have a shipment of waste carried out.<sup>109</sup> Similar to the Basel Convention, the WSR makes provision for the establishment of Competent Authorities and any documentation or information to be submitted would need to be communicated between the Competent Authorities. Under the WSR, the Competent Authority of

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<sup>104</sup> WSR, Annex III.

<sup>105</sup> WSR, Annex III.

<sup>106</sup> WSR, article 2(1).

<sup>107</sup> Argüello Moncayo (n 89) 307.

<sup>108</sup> WSR, article 4.

<sup>109</sup> WSR, article 2(15).

dispatch would be ‘the competent authority for the area from which the shipment is planned to be initiated or is initiated’.<sup>110</sup>

For the purposes of fulfilling the said notification requirement, the Notifier would need to submit, *inter alia*, the notification and movement documents.<sup>111</sup> Annex II Part 2 of the WSR establishes which information and documentation needs to be supplied with the notification and movement documents.<sup>112</sup> Whilst the WSR establishes which documentation and information needs to be annexed to the notification and movement documents, it grants Competent Authorities of Member States the power to request any additional information or documentation detailed in Annex II, Part 3, as they may require.<sup>113</sup>

It is only when the Competent Authority is satisfied with the said information and documentation that the notification process is deemed completed.<sup>114</sup> The notification and the relative documentation would need to cover the whole process of the undertaking starting from the shipment of the waste from the place of dispatch, and including the interim or non-interim recovery or disposal.<sup>115</sup>

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<sup>110</sup> WSR, article 2(19).

<sup>111</sup> WSR, article 4(1).

<sup>112</sup> WSR, article 4(2).

<sup>113</sup> WSR, article 4(2).

<sup>114</sup> WSR, article 4(3).

<sup>115</sup> WSR, article 4(6).



### 3.2.4 Contractual arrangements between the Notifier and the Consignee

The next important document required for submission to the Competent Authorities for the purposes of ensuring that a shipment of waste for disposal or recovery complies with the WSR would be the contract concluded between the Notifier and the Consignee for the recovery or disposal of the notified waste.<sup>116</sup> In the case of Ship Recycling, the Ship Recycling Facility would be the Consignee for such purposes.

### 3.2.5 Financial Guarantee

As with the Basel Convention, the WSR also requires the establishment and submission of a financial guarantee or equivalent insurance covering the whole undertaking.<sup>117</sup> The financial guarantee must be such that it covers the costs of transport, recovery or disposal, storage for 90 days, any costs incurred should the shipment, recovery or disposal not be completed as intended and any costs incurred in the case of an illegal shipment, recovery or disposal.<sup>118</sup>

Whilst it is the Competent Authority of dispatch which needs to approve or otherwise the financial guarantee or equivalent, in situations where the import is into the EU, the WSR allows the Competent Authority of destination to review the amount of cover and possibly approve an additional financial guarantee or insurance.<sup>119</sup>

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<sup>116</sup> WSR, article 4(4).

<sup>117</sup> WSR, article 4(5).

<sup>118</sup> WSR, article 6.

<sup>119</sup> WSR, article 6(4).

### 3.2.6 Transmission of the notification by the Competent Authority of Dispatch

All the said documentation would need to be transmitted by the Competent Authority of dispatch to the Competent Authority of the importing state and of any transit countries for their review.<sup>120</sup> The said Competent Authorities may additionally require further information and documentation, which the Notifier would need to submit.<sup>121</sup> The Competent Authorities of destination, dispatch and transit would then need to take a decision regarding the notified shipment and may either consent in writing without imposing any conditions, or consent in writing with the imposition of conditions or otherwise object giving reasons for such objections on the grounds established in articles 11 and 12 of the WSR.<sup>122</sup>

One of the main obligations imposed on the producer, the Notifier and other undertakings involved in the shipment, recovery and/or disposal of waste is that any such operation is conducted, in its totality during movement and treatment, without endangering human health and in an environmentally sound manner.<sup>123</sup> Notably, this obligation would fall not only on the Notifier but on all undertakings involved in the operation, including therefore the recycling facilities where the waste is processed.

### 3.2.7 Non-Completion of a Shipment

Similar to the Basel Convention, the WSR makes provision for instances where the shipment cannot be completed as intended. An obligation is imposed on the country of

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<sup>120</sup> WSR, article 7.

<sup>121</sup> WSR, article 8.

<sup>122</sup> WSR, article 9.

<sup>123</sup> WSR, article 49.

dispatch to take back the waste unless it can be alternatively disposed of or recovered in the country of destination or elsewhere.<sup>124</sup>

### 3.2.8 Critiquing the Waste Shipment Regulation

The provisions of the WSR are in theory sound and workable, in the context of Ship Recycling. However, in practice the EU has experienced significant problems with the number of illegal shipments of waste. In a study conducted by the European Commission (EC) in 2009, it was found that at least ninety-one percent (91%) of Ships that should have fallen within the scope of the WSR had avoided its provisions.<sup>125</sup>

Shipowners intending to recycle their Ships were managing to go around the WSR by refraining from declaring at the time of departure from an EU port that their Ships were destined to be scrapped, recycled, recovered or disposed of.<sup>126</sup> Failure to make such declaration would mean that the Ship, although destined for recycling, when leaving an EU-port would not be deemed waste and thus would not fall under the regulatory control of the WSR.

The WSR is also impractical given that it only allows recycling of Ships within Ship Recycling Facilities located in OECD countries. This coupled with the fact that most Ships are found outside OECD countries renders the WSR unworkable.<sup>127</sup> Faced with such situation, shipowners find it more feasible, practicable and cost friendly, to avoid declaring that their

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<sup>124</sup> WSR, article 22.

<sup>125</sup> 'Seatrade: Another Way to Deal with Infringement of Directives on Ship Recycling in The European Union?' (*Infoworld-uae.blogspot.com*, 2019) <<http://infoworld-uae.blogspot.com/2018/10/seatrade-another-way-to-deal-with.html>> accessed 11 June 2019.

<sup>126</sup> *ibid.*

<sup>127</sup> *Ibid.*

Ships are destined for recycling at points in time when they are in EU ports, take their Ships to ports outside the EU, and eventually be able to tranship their Ships without having to abide by the WSR provisions.

The concerns surrounding the WSR were highlighted following the recent case decided by the District Court of Rotterdam in the Netherlands on 15 March 2018, and currently subject to appeal, in the names Prosecutor v X (*The Seatrade*) wherein the shipowners were found criminally liable for having breached the WSR.<sup>128</sup> The Court found Seatrade guilty of having indirectly sold Ships to scrapyards within non-OECD countries in breach of the prior written notification and consent procedures established by the WSR.<sup>129</sup> It was found that in 2012, Seatrade had sent four Ships from EU ports for disposal in Turkey, India and Bangladesh and this in breach of the WSR prohibition for exporting hazardous waste to non-OECD countries.<sup>130</sup> The court came to the conclusion that prior to their departure from EU-ports the shipowners had already taken the decision to have the Ships disposed of in non-OECD countries, at which point in time the WSR was already operating.<sup>131</sup> The Court concluded that Seatrade had taken decisions to dispose of Ships simply for economic reasons with little regard to the potential environmental, health and safety repercussions. The Court imposed a one-year suspension in lieu of a jail sentence for one of Seatrade's executives and imposed a fine of Euro 750,000.<sup>132</sup> This was the first criminal prosecution of its kind to take place within

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<sup>128</sup> Dr Nikos Mikelis, 'Shipbuilding News | Hellenic Shipping News Worldwide a European Road Map of Ship Recycling' (*Hellenicshippingnews.com*, 2018) <<https://www.hellenicshippingnews.com/category/shipping-news/shipbuilding-news/>> accessed 20 June 2019.

<sup>129</sup> Norton Rose Fulbright (n 15).

<sup>130</sup> 'Seatrade: Another Way to Deal with Infringement of Directions on Ship Reusing in The European Union?' (*Infoworld-uae.blogspot.com*, 2019) <<http://infoworld-uae.blogspot.com/2018/10/seatrade-another-way-to-deal-with.html>> accessed 11 June 2019.

<sup>131</sup> *ibid.*

<sup>132</sup> *ibid.*

the EU, and reflected the increased awareness and need to properly regulate the recycling and scrapping of Ships worldwide.

### **3.3 THE SHIP RECYCLING REGULATION**

In light of the failure of the WSR, the EU developed the SRR which was adopted in 2013 and became fully applicable on the 31<sup>st</sup> of December 2018.<sup>133</sup> Unlike the WSR, which regulates waste in general, the SRR specifically addresses and regulates the recycling of Ships.

#### **3.3.1 The Purpose behind the Ship Recycling Regulation**

The SRR is primarily aimed at facilitating the ratification of the HKC within the EU and also within third countries through the proportionate application of controls over Ships and Ship Recycling Facilities situated therein.<sup>134</sup>

The SRR sets within its purpose the prevention, reduction and minimisation and, to the extent practicable, the elimination of accidents, injuries and other adverse effects on human health and the environment caused by the recycling, operation and maintenance of EU Flagged Ships.<sup>135</sup> The said regulation aims to enhance safety, protect human health and marine environment throughout a Ship's life-cycle, particularly to ensure the Environmentally Sound Management of any hazardous waste from Ship Recycling.<sup>136</sup>

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<sup>133</sup> *ibid.*

<sup>134</sup> SRR, preamble 5.

<sup>135</sup> SRR, article 1.

<sup>136</sup> SRR, preamble 7.

The Regulation acknowledges that the said aims cannot be achieved by Member States in a vacuum and are better achieved at Union level given the international character of the shipping industry.<sup>137</sup> In view of this, the Regulation sets as its two main governing principles the principle of subsidiarity and the proportionality principle, emphasising the Union's power to take actions and adopt measures to fulfil the regulations' objective without going beyond what is necessary in order to achieve that objective.<sup>138</sup>

One of the main legal concerns surrounding the introduction of the SRR, was that under the WSR regime, restricting Ship Recycling of EU Flagged Ships solely to OECD countries proved unworkable.<sup>139</sup> The SRR recognises that there are Ship Recycling Facilities within non-OECD countries that could treat EU Flagged Ships in line with the standards established by the HKC.<sup>140</sup> For this reason the SRR takes a completely different approach in regulating Ship Recycling and rather than restricting compliance with the said regulation to OECD countries, it opens up the door to facilities situated outside OECD countries. This mechanism helps reduce the existing disparities between the manner in which Ships are recycled in OECD countries and in third countries.<sup>141</sup>

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<sup>137</sup> SRR, preamble 22

<sup>138</sup> SRR, preamble 22.

<sup>139</sup> SRR, preamble 3.

<sup>140</sup> SRR, preamble 3.

<sup>141</sup> SRR, preamble 7.

### 3.3.2 The Legal Scope

The Regulation applies to all Ships flying the Flag of an EU Member State, which are destined for recycling.<sup>142</sup> This however, with the exception of article 12, which is made applicable to all Ships flying the Flag of a Member State or a third country calling at a port or anchorage of a Member State.<sup>143</sup> Further restrictions on its application are established by article 1(2), which places outside its scope any:

- (a) any warships, naval auxiliary, or other Ships owned or operated by a state and used, for the time being, only on government non-commercial service;
- (b) Ships of less than 500 gross tonnage (GT);
- (c) Ships operating throughout their life only in waters subject to the sovereignty or jurisdiction of the Member State whose flag the Ship is flying.<sup>144</sup>

As with the WSR, for a Ship to fall within the scope of the SRR it must have operated in the marine environment. Notably, the SRR establishes that Ships falling under its ambit are excluded from the scope of application of the WSR and the Waste Shipment Directive.<sup>145</sup> In contrast, the SRR applies in parallel with other international conventions aimed at ensuring the safe operation of Ships during their operational part of their life-cycle.<sup>146</sup>

### 3.3.3 Controlling Hazardous Materials

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<sup>142</sup> SRR, article 2(1).

<sup>143</sup> SRR, article 2(1).

<sup>144</sup> SRR, article 2(2).

<sup>145</sup> SRR, preamble 10.

<sup>146</sup> SRR, preamble 11.

The HKC makes provision for the keeping on board of an IHM throughout the operational life of a Ship and requires Ships destined for recycling to minimise the amounts of operationally generated waste prior to entering a Ship Recycling Facility.<sup>147</sup> This rationale is reflected in the SRR which lays down rules on the proper management of Hazardous Materials which may be found both onboard EU-Flagged Ships and onboard Ships calling at a port or anchorage of a Member State.<sup>148</sup> Importantly the Regulation prohibits and restricts the installation and/or use of Hazardous Materials referred to in Annex I on Ships.<sup>149</sup>

### 3.3.4 The Inventory of Hazardous Materials

In addition to the prohibitions or restrictions placed on certain Hazardous Materials, the SRR also requires each new Ship, to have onboard an IHM identifying, as a minimum, the Hazardous Materials referred to in Annex II found in the structure or equipment of the Ship detailing their location and approximate quantities.<sup>150</sup> As for existing Ships the Regulation requires that by 31 December 2020 they comply as far as practicable with the requirements laid down for New Ships.<sup>151</sup> However, as regards Ships destined for recycling they must comply with the said requirements as from the date of publication of the European List of Ship Recycling Facilities (the 'European List').

The SRR does not restrict the requirement to have an IHM onboard to EU Flagged Ships but requires additionally that all Ships calling at a port or anchorage of a Member State, flying the

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<sup>147</sup> SRR, article 8(2), HKC and SRR, preamble 15.

<sup>148</sup> SRR, article 1.

<sup>149</sup> SRR, article 4.

<sup>150</sup> SRR, article 5(1).

<sup>151</sup> SRR, article 5(2).



Flag of a third country to have an IHM onboard.<sup>152</sup> The IHM report would need to be verified by the Administration.<sup>153</sup>

The IHM must be issued respectively for each Ship and must provide evidence of compliance with article 4 of the SRR regarding prohibited or restricted installation or use of Hazardous Materials, referred to above.<sup>154</sup> As for existing Ships the Regulation requires them to include in the IHM a description of the visual or sampling check by which the IHM is developed.<sup>155</sup>

All IHM reports would need to consist of three parts. Part 1, must include ‘a list of hazardous materials referred to in Annexes I and II...and contained in the structure or equipment of the Ship, with an indication of their location and approximate quantities (Part I)’.<sup>156</sup> This Part must be maintained and updated throughout the operational life of the Ship reflecting any new installations containing Hazardous Materials, or changes in the structure or equipment of the Ship.<sup>157</sup> Prior to recycling the IHM shall also include and incorporate Part II which should include ‘a list of the operationally generated waste present on board the Ship’ and Part III which should include ‘a list of the stores present on board the Ship (Part III)’.<sup>158</sup> Notably, the Regulation sets higher standards in relation to the substances that need to be declared in the IHM when compared to those required under the HKC.<sup>159</sup>

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<sup>152</sup> SRR, article 12.

<sup>153</sup> SRR, article 3(9).

<sup>154</sup> SRR, article 5(3).

<sup>155</sup> SRR, article 5(4).

<sup>156</sup> SRR, article 5(5).

<sup>157</sup> SRR, article 5(6).

<sup>158</sup> SRR, article 5(5).

<sup>159</sup> Argüello Moncayo (n 89) 307.

### 3.3.5 Preparing Ships for Recycling

The SRR establishes a notification procedure requiring Ship owners preparing to send a Ship for recycling to notify in writing the relevant Administration of their intention to recycle a Ship indicating the specific Ship Recycling Facility chosen for such purpose.<sup>160</sup> The said notification must include as a minimum the IHM and all Ship-relevant information necessary for the development of a SRP.<sup>161</sup> Prior to recycling their Ships, Ship owners must hold a SRP and additionally obtain a Ready for Recycling Certificate issued by the relevant Administration.<sup>162</sup>

Responsibility for the Ship rests with the shipowner during the initial stages of the preparations for Ship Recycling and only shifts onto the Ship Recycling Facility once the latter accepts responsibility for it.<sup>163</sup> We therefore see a movement away from the polluter pays principle with a shift of responsibility onto the operators of Ship Recycling Facilities.<sup>164</sup> The Ship Recycling Facility retains the right to reject a Ship for recycling if it is found that the Ship's condition does not correspond with the inventory certificate or when the IHM is not properly maintained.<sup>165</sup> In such case responsibility falls onto the shipowner who must without delay inform the Administration of such rejection.<sup>166</sup>

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<sup>160</sup> SRR, article 6(1).

<sup>161</sup> SRR, article 6(2).

<sup>162</sup> SRR, article 6(2)(c).

<sup>163</sup> SRR, article 6(5).

<sup>164</sup> Argüello Moncayo (n 89) 307.

<sup>165</sup> SRR, article 6(5).

<sup>166</sup> *ibid.*

For Ship Recycling Facilities to accept a Ship for recycling, a Ship owner would need to provide the facility with a Ready for Recycling Certificate issued by the relevant Administration in accordance with article 9 of the SRR.<sup>167</sup>

As with the HKC, once the total or partial recycling of a Ship is completed, the Ship Recycling Facility is required to send a Statement of Completion to the Ship's Administration which statement must include a report on any incidents or accidents damaging human health and or the environment, if any.<sup>168</sup>

### 3.3.6 The Ship Recycling Plan

In deciding to recycle their Ships, shipowners are required to provide the Ship Recycling Facility with all the relevant information for the purposes of developing a specific SRP prior to the commencement of the recycling operation.<sup>169</sup> The SRP must include any Ship-specific considerations which may have not been covered in the Ship Recycling Facility Plan (SRFP). The SRFP is a separate plan the facility prepares describing the operational processes and procedures involved in Ship Recycling at that particular facility.<sup>170</sup>

The SRP must *inter alia* include information relating to the arrival and safe placement of the specific Ship to be recycled at the particular facility.<sup>171</sup> It must also identify the Hazardous Materials and waste to be generated during the recycling of that specific Ship and must provide information regarding the establishment, maintenance and monitoring of the safety

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<sup>167</sup> SRR, article 6 (4).

<sup>168</sup> SRR, article 13(2).

<sup>169</sup> SRR, article 6(1).

<sup>170</sup> SRR, article 3(17).

<sup>171</sup> SRR, article 7(3).

aspects of the undertaking.<sup>172</sup> The SRP must be approved by the Competent Authority regulating the Ship Recycling Facility where the Ship is to be recycled.<sup>173</sup>

### 3.3.7 Surveys and Certification

Another important requirement established by the SRR is the need for Ships falling within its scope to undergo a number of surveys throughout their operational life and prior to the recycling operation. The Regulation requires Ships to undergo four surveys. The first survey being the 'Initial Survey' requires New Ships to undergo a survey verifying that Part I of the IHM complies with the Regulations' requirements.<sup>174</sup> As for existing Ships, these are required to conduct the said Initial Survey by 31 December 2020.<sup>175</sup> The second survey is the 'Renewal Survey' which must be conducted at intervals not exceeding five years to regularly verify Part I of the IHM.<sup>176</sup> Following the completion of the said two surveys, the Administration would issue the Ship with an Inventory Certificate with a maximum validity period of five years.<sup>177</sup> The 'Additional Survey' is to be conducted if requested by a shipowner after a change, replacement or significant repair in the Ship is conducted having an impact on the IHM.<sup>178</sup>

The 'Final Survey' must be conducted prior to the Ship being taken out of service and before the commencement of the recycling process.<sup>179</sup> The Final survey is aimed at confirming that the Ship is in compliance with the Regulations' requirements regarding

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<sup>172</sup> *ibid.*

<sup>173</sup> *ibid.*

<sup>174</sup> SRR, article 8(4).

<sup>175</sup> SRR, article 8(3) and (4).

<sup>176</sup> SRR, article 8(5).

<sup>177</sup> SRR, articles 9(1) and 10(1).

<sup>178</sup> SRR, article 8(6).

<sup>179</sup> SRR, article 8(7).

the IHM and the SRP.<sup>180</sup> Additionally, the final survey would be necessary to confirm that the Ship Recycling Facility where the Ship is to be recycled is included within the European List.<sup>181</sup> Notably, for existing Ships which are destined for recycling, the initial and final survey can be conducted simultaneously.<sup>182</sup> Once the final survey is completed the Administration would issue a Ready for Recycling Certificate with a maximum period of validity of 3 months unless extended by the Administration.<sup>183</sup> In cases where the initial and final survey are conducted simultaneously, no Inventory Certificate is issued; the Administration would solely issue the Ready for Recycling Certificate.<sup>184</sup>

The SRR grants Member States power to develop Port State Control provisions for the purposes of conducting inspections over Ships entering their jurisdiction.<sup>185</sup> Whilst Ports are allowed to verify whether entering Ships are in compliance with the SRR, such inspections are limited to checking that Ships are carrying onboard valid Inventory Certificates and Ready for Recycling Certificates.<sup>186</sup> Only if Ships are in breach of the provisions relating to the said certificates would Port State Control be allowed to carry out further detailed inspections and possibly detain, dismiss or exclude Ships from their jurisdiction.<sup>187</sup>

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<sup>180</sup> *ibid.*

<sup>181</sup> *ibid.*

<sup>182</sup> SRR, article 8(8).

<sup>183</sup> SRR, articles 9(9) and 10(3).

<sup>184</sup> SRR, article 9(1).

<sup>185</sup> SRR, article 11(1).

<sup>186</sup> Juan Ignacio Alcaide, Emilio Rodríguez-Díaz and Francisco Piniella, 'European Policies on Ship Recycling: A Stakeholder Survey' (2017) 81 *Marine Policy*, 268.

<sup>187</sup> SRR, article 11(2) and (3).

### 3.3.8 The European List of Authorised Ship Recycling Facilities

One of the main requirements imposed by the Regulation is that all EU Flagged Ships are required to be recycled at yards which have been included in the European List.<sup>188</sup> In June 2019, the EC published its fifth European List, totalling the number of authorised Ship Recycling Facilities to thirty-four. The European List includes thirty facilities situated within the EU, three situated in Turkey and one situated in the USA.<sup>189</sup> The EC seeks to update the European List often with the aim of adding new yards for Ship owners of EU Flagged Ships to have a wider choice of recycling facilities and also to remove any yards which no longer remain compliant.<sup>190</sup> Following the publication of the fifth European List, the Commission declared that it has with it 28 pending applications from yards situated outside the EU, which, following proper assessment, if found to be compliant with the health, safety and environmental rules laid down for inclusion, would eventually be added to the list.<sup>191</sup> Admittedly very few yards outside the EU have been approved, however, the EU must be commended for creating a system of approval not dependant on the geographical location of Ship Recycling Facility, but rather dependant on a number of conditions which must be met. This system thus ensures the application of uniform standards in yards situated in the EU as well as third countries.<sup>192</sup>

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<sup>188</sup> Andrew Stephens and Nicole Rencoret, 'Creating A New Norm for Responsible Ship Recycling -Maritime Risk International' (*Maritime-risk-intl.com*, 2019) <<https://www.maritime-risk-intl.com/environment/creating-a-new-norm-for-responsible-ship-recycling-133624.htm?origin=internalSearch>> accessed 21 April 2019.

<sup>189</sup> The Commission Implementing Decision (EU) 2019/995 of 17 June 2019 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, [2019] OJ L 160/28.

<sup>190</sup> Stephens et. al. (n 188).

<sup>191</sup> 'Shipbreaking: Updated List of European Ship Recycling Facilities to Include Eight New Yards' (*European Commission - European Commission*, 2019) <[https://ec.europa.eu/info/news/shipbreakingupdated-list-european-ship-recycling-facilities-include-eight-new-yards-2019-jun-18\\_en](https://ec.europa.eu/info/news/shipbreakingupdated-list-european-ship-recycling-facilities-include-eight-new-yards-2019-jun-18_en)> accessed 20 June 2019.

<sup>192</sup> Alcaide (n 186) 263.

For a Ship Recycling Facility situated in a Member State to be included in the European List it must obtain authorisation from the relevant Competent Authority.<sup>193</sup> Each authorisation given to a Ship Recycling Facility would be valid for a maximum of five years and would thereafter need to be renewed.<sup>194</sup> It must necessarily fulfil the conditions imposed by the SRR. Although the regulation does not specifically preclude beaching as a method for dismantling and scrapping Ships, it does so by implication by requiring Ship Recycling Facilities included in the European List to operate from built structures.<sup>195</sup> Additionally Ship Recycling Facilities must be safe and environmentally sound and must be managed in such a way as to reduce health risks and any adverse effects on the environment.<sup>196</sup> The SRR requires Ship Recycling Facilities to ensure the sound management of hazardous waste and to maintain an emergency preparedness response plan coupled with accessible emergency equipment.<sup>197</sup> The Ship Recycling Facility must also provide for worker safety and training and must maintain a proper record of and report any incidents, accidents or other occupational diseases or chronic effects causing risks to workers' safety, human health and the environment.<sup>198</sup>

As for authorisations of Ship Recycling Facilities situated in third countries, it is the Commission which would need to approve the application submitted by the Ship Recycling Facility.<sup>199</sup> For the Commission to accept such an application, the facility would need to prove that all the requirements set out in articles 13 and 15 are adhered to.<sup>200</sup> The SRR emphasises the importance of the application of the principle of equality when establishing and updating

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<sup>193</sup> Mikelis (n 128).

<sup>194</sup> SRR, article 14(1).

<sup>195</sup> Argüello Moncayo (n 89) 307.

<sup>196</sup> SRR, article 13(1).

<sup>197</sup> SRR, article 13(1).

<sup>198</sup> SRR, article 13(1).

<sup>199</sup> SRR, article 15(1).

<sup>200</sup> SRR, article 15(2).

the European List in respect of all Ship Recycling Facilities without distinction between those situated in Member States and those in third countries.<sup>201</sup>

### 3.3.9 Enforcement, Financial Mechanisms and Information Sharing

As regards compliance with the SRR, Member States are required to develop national law for the purposes of imposing penalties for any infringement of any of its provisions.<sup>202</sup> The Regulation fails to make any further provision regarding the manner in which such penalties should be imposed for the purposes of ensuring proper enforcement of the regulation, thus granting Member States wide discretionary powers in this area.

Member States are however required to report, every 3 years, to the Commission all information possible relating to all Ships which have received an Inventory Certificate or a Ready for Recycling Certificate and any information regarding the relative Ship Recycling Facility.<sup>203</sup> Member States must also provide the Commission with a list of Ships flying their Flag for which a Statement of Completion has been received.<sup>204</sup> Moreover, any information regarding illegal Ship Recycling and actions taken in connection therewith should also be reported to the Commission.<sup>205</sup> Ultimately Member States are required to prevent any possible circumvention of Ship Recycling rules and should aim to enhance transparency in the Ship Recycling field.<sup>206</sup>

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<sup>201</sup> SRR, preamble 8.

<sup>202</sup> SRR, article 22.

<sup>203</sup> SRR, preamble 16 and article 21(1)(a).

<sup>204</sup> SRR, article 21(1)(b).

<sup>205</sup> SRR, article 21(1)(c).

<sup>206</sup> SRR, preamble 16.



The SRR also requires that the Commission assess the possibility of establishing a financial mechanism based on the polluter pays principle.<sup>207</sup> The said financial mechanism would apply to all Ships calling at a port or anchorage of a Member State, irrespective of their Flag, with the aim of generating resources to avoid re-Flagging for circumvention of the rules laid down in the Regulation and facilitate the environmentally sound recycling and treatment of Ships.<sup>208</sup>

In its latest 2017 report on the feasibility of a financial instrument that would facilitate safe and sound Ship Recycling, the EC proposed the introduction of a Ship Recycling Licence aimed at cancelling out 'the profit gap between dismantling in substandard yards and dismantling in yards listed on the European List'.<sup>209</sup> The Ship Recycling Licence would require shipowners to pay to a contribution charge which would ultimately lead to the full capital amount being paid to them on condition that they recycle their Ships in a European List Ship Recycling Facility.<sup>210</sup> As yet however no concrete steps in developing the said financial mechanism have been made such that these proposals remain limited to the said report and subject to further studies.

### 3.3.10 Critiquing the Ship Recycling Regulation

The introduction of the SRR is commendable given that after years it has managed to effectively facilitate the entry into force of the provisions of the HKC. With the HKC not yet in

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<sup>207</sup> SRR, preamble 19.

<sup>208</sup> SRR, preamble 19 and article 29.

<sup>209</sup> European Commission, 'Report from the Commission to the European Parliament and the Council on the Feasibility of a Financial Instrument that Would Facilitate Safe and Sound Ship Recycling', COM (2017) 420, of 8 August 2017.

<sup>210</sup> *ibid.*

force, the SRR is the only legal document which specifically seeks to address the negative impact of Ship Recycling.<sup>211</sup> In contrast with the WSR, at least in theory, the SRR has also positively sought to reduce the existing disparities between Ship Recycling Facilities within the EU and OECD countries and other third countries in the context of environmental protection and health and safety at the workplace. Another key element of the SRR is the requirements laid down in relation to the IHM requiring standardised rules to be applied to both EU Flagged Ships and non-EU Flagged Ships calling at a port or anchorage of an EU Member State.<sup>212</sup> However, whilst these features of the SRR undoubtedly facilitate improvement of the health and safety and environmental standards surrounding Ship Recycling, it is not but without flaws. The next chapter will provide a deeper critical assessment of the SRR.

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<sup>211</sup> Alcaide (n 186) 270.

<sup>212</sup> *ibid* 268.

# CHAPTER 4

## **4. A CRITICAL ASSESSMENT OF THE SHIP RECYCLING REGULATION**

The Ship Recycling Regulation is now the only legally binding instrument providing for clear and specific rules on Ship Recycling and promoting sustainable treatment of end-of-life Ships with a solid backdrop of Environmentally Sound Management and health and safety rules. However, the SRR has not been met without criticism. Whilst the long-term implications of its application cannot yet be determined given its recent entry into force, much can be said on its immediate implications.

### **4.1 THE RELATIONSHIP BETWEEN THE HONG KONG CONVENTION AND THE SHIP RECYCLING REGULATION**

With the HKC taking a back seat for several years due to reluctance on the part of States to ratify it, the EU took a unilateral approach adopting the provisions of the HKC in a Regulation applicable uniformly across all Member States.

The adoption of the SRR was not intended to replace the workings of the HKC, but rather, as emphasised in its preamble, the Regulation is aimed at facilitating the ratification of the HKC by encouraging Member States as well as third countries to apply proportionate controls to

Ships and Ship Recycling Facilities in line with the provisions of the HKC.<sup>213</sup> However, for the SRR to effectively facilitate the ratification of the HKC it must necessarily be interpreted in line with the provisions of the HKC and this to ensure the uniform application of regional and international legislation.<sup>214</sup>

The risk of having dual legal regimes regulating Ship Recycling one at regional level and one at global level cannot be overlooked. Concerns have been raised at EU level regarding the possibility of the SRR having a counter-productive effect towards the HKC. Some fear that due to the progress made at regional level, the entry into force of the HKC may be stalled.<sup>215</sup> During the Ship Recycling Experts' meeting held in April 2018, the EC raised these concerns and encouraged all Member States to proceed with the ratification of the HKC.<sup>216</sup> Notably, a number of Member States confirmed that ratification procedures had reached advanced stages and in fact the HKC saw recent ratification by Malta, The Netherlands and Denmark.<sup>217</sup> Additionally, ratification of the Convention by Italy, Estonia, Poland, Finland, and the United Kingdom is expected.<sup>218</sup> As at the 9<sup>th</sup> of July the HKC has now 12 contracting states representing 28.82% of the world tonnage.<sup>219</sup>

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<sup>213</sup> SRR, preamble 5

<sup>214</sup>Alcaide (n 186) 266.

<sup>215</sup> ibid 271.

<sup>216</sup> European Commission, 'Ship Recycling Experts' Meeting Summary Record of The Meeting Held On 18 April 2018' (2018) Circular Economy & Green Growth, 4.

<sup>217</sup> European Commission, 'Minutes of the 7<sup>th</sup> Meeting of the Experts Group on Ship Recycling of 3 October 2018' (2018) Circular Economy & Green Growth, 3.

<sup>218</sup> European Commission, 'Minutes of the 8<sup>th</sup> Meeting of the Experts Group on Ship Recycling of 1 February 2019' (2019) Circular economy & Green Growth, 5.

<sup>219</sup> At the time of writing, the States which ratified the HKC included: Belgium, Congo, Denmark, Estonia, France, Japan, Malta, The Netherlands, Norway, Panama, Serbia, Turkey.

The EC has also expressed its concerns regarding the lack of uniformity between the authorisations given under the SRR and the HKC certification (the 'HKC Certificate') process. The Commission argued that a number of deficiencies had been identified following evaluations conducted over yards which currently possess a HKC Certificate.<sup>220</sup> This can be quite alarming given that such disparities may present difficulties for the HKC and the SRR to work in tandem.<sup>221</sup> One of the main reasons behind these concerns is the lack of regular independent inspections being carried out in yards holding HKC Certificates such that continuing compliance is not being properly enforced.<sup>222</sup> Naturally this issue is also rooted in the fact that third countries lack proper implementation and enforcement mechanisms.

The EC is seeking to resolve such issues through discussions with the IMO with the aim of improving the manner in which certification and inspections are carried out under the HKC so as to bring them in line with the approach taken by the EU.<sup>223</sup> It remains unknown whether yards possessing a HKC Certificate would be included in the European List of authorised yards, however, what is certain is that such inclusion will not be automatic upon the entry into force of the HKC. In agreement with members of the European Community Shipowners' Association, a global effort should be made for the ratification of the HKC, because given the international dynamic of Ship Recycling, through a legally binding international convention standards of implementation will rise and State responsibility under International law could

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<sup>220</sup> European Commission (n 216) 4.

<sup>221</sup> *ibid.*

<sup>222</sup> European Commission (n 218) 4.

<sup>223</sup> European Commission (n 216) 5.

possibly be invoked.<sup>224</sup> This will in turn lead to uniformity in the regulation of Ship Recycling and the sustainable development of Ship Recycling Facilities can be achieved.<sup>225</sup>

## **4.2 THE RELATIONSHIP BETWEEN THE SHIP RECYCLING REGULATION, THE WASTE SHIPMENT REGULATION AND THE BASEL CONVENTION**

Whilst the developments made with the HKC and the SRR are commendable, shipowners, Ship recyclers and other industry key players are faced with lack of uniformity in the applicable Ship Recycling rules when taking into account the Basel Convention and the WSR. The resultant implication is that shipowners are facing uneven playing fields, with some being regulated by the Basel Convention or the WSR and others being regulated by the SRR.<sup>226</sup>

In an EU context, confusion arises regarding the decision to recycle a Ship which falls outside the scope of the SRR but caught under the WSR. As explained in Section 3.1 et seq, technically the provisions of the WSR require recycling to take place in OECD countries and in an environmentally sound manner. Otherwise, the WSR does not require strict compliance with the SRR.<sup>227</sup> Essentially, given that the WSR incorporates the Basel Ban, Ships falling within its scope are prohibited from recycling their Ships within non-OECD countries.<sup>228</sup> Thus, even if a Ship Recycling Facility situated in a non-OECD country has been included in the European List,

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<sup>224</sup> 'A Sustainable Global Ship-Recycling Industry Requires the Efforts of Both the EU and the European Shipping Sector | ECSA' (*Ecsa.eu*, 2019) <<https://www.ecsa.eu/press-releases/sustainable-global-ship-recycling-industry-requires-efforts-both-eu-and-european>> accessed 5 June 2019.

<sup>225</sup> *ibid.*

<sup>226</sup> Stephens et. al. (n 188).

<sup>227</sup> WSR, article 49(2).

<sup>228</sup> WSR, article 36.

a Ship falling within the scope of the WSR cannot be recycled in such a facility. Conversely, Ships falling within the scope of the WSR may recycle their Ships in any Ship Recycling Facility situated in an OECD country, whether the said Ship Recycling Facility forms part of the European List or otherwise. This state of play creates an unequal level playing field for Ship-owners.

The Basel Convention provides under article 26(1) that '[n]o reservation or exception may be made to this Convention'.<sup>229</sup> Therefore the EU being a party to the Convention cannot unilaterally depart from its provisions. Notably however, the Basel Convention, allows State Parties to enter into separate bilateral, multilateral or regional arrangements or agreements regulating Transboundary Movement of waste, as long as they don't derogate from the conditions laid down in the Basel Convention on the Environmentally Sound Management of hazardous waste.<sup>230</sup> However, as Krämer points out, the SRR is a unilateral deviation from the Basel Convention and not a bilateral, multilateral or regional arrangement or agreement, arguably postulating a conflicting legal regime.<sup>231</sup> Essentially the SRR unilaterally excludes a category of waste, that is Ships, from the operation of the Basel Convention and the WSR.<sup>232</sup>

Argüello Moncayo argues that the SRR has failed to properly incorporate within its legal scope the minimisation of Transboundary Movement of waste and proper management of waste at

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<sup>229</sup> Basel Convention, article 26(1).

<sup>230</sup> Basel Convention, article 11.

<sup>231</sup> Ludwig Krämer, 'The Commission Proposal for a Regulation on Ship Recycling, the Basel Convention and the Protection of the Environment' (2012) Legal Analysis [https://www.shipbreakingplatform.org/wp-content/uploads/2018/11/Legal-Analysis-of-EC-proposal\\_Ludwig-Kramer\\_FINAL-1.pdf](https://www.shipbreakingplatform.org/wp-content/uploads/2018/11/Legal-Analysis-of-EC-proposal_Ludwig-Kramer_FINAL-1.pdf) accessed 20 June 2019.

<sup>232</sup> The Centre for International Environmental Law, 'Legality of the EU Commission Proposal on Ship Recycling', (2012) 7 <<https://www.shipbreakingplatform.org/wp-content/uploads/2018/11/CIEL-legal-opinion-on-EU-Ships-Proposed-Regulation-12-Dec-2012.pdf>> accessed 21 June 2019.

the source of generation.<sup>233</sup> Another potential weakness of the SRR is that, unlike the Basel Convention and the WSR it does not impose an obligation on the part of the exporting state to re-import any waste which has been illegally transported.<sup>234</sup>

Another major conflict surrounding the SRR is its inconsistency with the Basel Ban which prohibits the export of waste from OECD countries to non-OECD countries.<sup>235</sup> The Basel Ban has the force of law within the EU through the WSR, however the SRR has circumvented these rules by excluding from the scope of application of the WSR Ships falling within the legal scope of the SRR. The SRR does not distinguish between OECD and non-OECD countries, but rather allows Ship Recycling Facilities in non-OECD countries to apply for an authorisation to be included in the European List. In this regard the manner in which the SRR operates is a more workable mechanism when taken in the global context given that it seeks to decrease the existing disparities between Ship Recycling Facilities situated in the EU and third countries. Despite this however there is a clear conflict with the Basel Ban provisions, and once the Basel Ban comes into force the two legal regimes will become unworkable.

### **4.3 THE CAPACITY OF THE EUROPEAN LIST**

Doubts have been raised as to whether the current capacity of the European List facilities could take the volume of EU Flagged Ships dismantled each year. However, having conducted a study on the capacity of the European List, the NGO Shipbreaking Platform, concluded that the industry's' concerns were unfounded given that to date the European List Ship Recycling

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<sup>233</sup> Argüello Moncayo (n 89) 308.

<sup>234</sup> The Centre for International Environmental Law (n 232) 9.

<sup>235</sup> *ibid* 10.



Facilities have managed to recycle all EU Flagged Ships which went for recycling between 2015 and 2018.<sup>236</sup> This study was conducted before the recent inclusion of yards from Turkey and the USA. Thus, even more so today, it can be convincingly argued that the European List has sufficient capacity to deal with the recycling of all EU Flagged Ships. Additionally the Turkish Association of Ship Recyclers has indicated that additional Turkish Ship Recycling Facilities should be expected to be included within the European List in the near future.<sup>237</sup> Similar conclusions were reached by EMSA, which reiterated in September 2018, that the maximum capacity of the European List facilities was sufficient to cover the overall historic maximum capacity of EU Flagged Ships recycled.<sup>238</sup>

However, the European Community Shipowners' Association (ECSA), has criticised these studies stating that primarily they failed to take into consideration the busiest recycling years, that is, 2012 and 2013, such that the figures do not portray a realistic picture of the EU-Ship Recycling volume.<sup>239</sup> ECSA therefore proposed that such studies be conducted over a period of ten years rather than five years so that better statistical data could be achieved.<sup>240</sup> However, the Commission rejected any such proposals claiming that a study covering a five-year period was sufficient given that it covers the period since the entry into force of the SRR.<sup>241</sup> ECSA further claimed that increased and adequate facilities are required to cater for

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<sup>236</sup> NGO Shipbreaking Platform, 'EU-Listed yards can handle the recycling demand of EU-flagged ships: Implementation of the EU Ship Recycling Regulation No 1257/2013 (EU SRR)' (2018) Transport & Environment 2018 <[https://www.transportenvironment.org/sites/te/files/publications/2018\\_09\\_Shipbreaking\\_report\\_final.pdf](https://www.transportenvironment.org/sites/te/files/publications/2018_09_Shipbreaking_report_final.pdf)> accessed 15 June 2019.

<sup>237</sup> European Commission (n 218) 4.

<sup>238</sup> European Commission, 'Explanatory note on the analysis by the European Maritime Safety Agency of vessels dismantled during the period 2013-2017' (2018) Circular economy & Green Growth, 1-2.

<sup>239</sup> 'ECSA Asks for More Capacity on the EU Ship Recycling List | ECSA' (*Ecsa.eu*, 2019) <<https://www.ecsa.eu/press-releases/ecsa-asks-more-capacity-eu-ship-recycling-list>> accessed 13 January 2019.

<sup>240</sup> *ibid.*

<sup>241</sup> European Commission (n 217) 3.

the recycling of large Ships.<sup>242</sup> In this respect the Commission has insisted that both yards within the EU as well as the newly included yards, such as those situated in Turkey, adequately cater for the recycling of large Ships.<sup>243</sup>

ECSA also pointed out how important it is for the European List to include Ship Recycling yards from all over the world so as to have a good geographical spread ensuring that Ships operating outside EU ports would not need to incur extra expenses to sail into Europe for the purposes of recycling.<sup>244</sup> Therefore ECSA, representing Ship owners worldwide, has restated its calls for the EC to increase and ensure a global geographical spread of the facilities included in the European List.<sup>245</sup> Having an increased number of yards around the globe will encourage Ship-owners to avoid re-Flagging their Ships so as to avoid the regulatory controls of the SRR. Having said that, the inclusion of increased yards within the European List is an ongoing task. With the introduction of the SRR, yards worldwide are being encouraged to improve their standards with the aim of being included in the European List.

The EC has confirmed that as at 1 February 2019 it had 13 applications from Indian Ship Recycling Facilities.<sup>246</sup> However, to date no Indian yard has been approved even though applications have been with the Commission for over a year.<sup>247</sup> Faced with criticism in this regard, the EC stressed that a number of shortcomings had been identified thus the

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<sup>242</sup> 'ECSA Asks for More Capacity on the EU Ship Recycling List | ECSA' (*Ecsa.eu*, 2019) <<https://www.ecsa.eu/press-releases/ecsa-asks-more-capacity-eu-ship-recycling-list>> accessed 13 January 2019.

<sup>243</sup> European Commission (n 217) 3.

<sup>244</sup> 'ECSA Asks for More Capacity on the EU Ship Recycling List | ECSA' (*Ecsa.eu*, 2019) <<https://www.ecsa.eu/press-releases/ecsa-asks-more-capacity-eu-ship-recycling-list>> accessed 13 January 2019.

<sup>245</sup> *ibid.*

<sup>246</sup> European Commission (n 216) 3.

<sup>247</sup> European Commission (n 218) 5.

applications, though not rejected, could not as yet be accepted, not until the proposed improvements are implemented.<sup>248</sup>

ECSA has urged the EC to establish uniform criteria for assessment of third country facilities and European facilities.<sup>249</sup> As matters stand today third country yards undergo very thorough inspections when compared to the manner in which EU facilities are included in the European List.<sup>250</sup> This emulates principle 6 of the Rio Declaration which encourages States to give special priority to the needs of developing countries.<sup>251</sup> The EC should be minded that 'environmental issues are best handled with the participation of all citizens concerned'.<sup>252</sup> Moreover, the standards applied by the EU should not be of an 'economic or social cost to other countries, in particular developing states'.<sup>253</sup>

In a report commissioned by BIMCO on the European List of Ship Recycling Facilities, similar concerns were pointed out.<sup>254</sup> BIMCO commented on the fact that whilst EU-facilities were included in the list automatically following the filing of an application with the Commission, yards located outside the EU had to abide by a number of requirements and procedures and had to undergo site-inspections.<sup>255</sup> For the purposes of including Ship Recycling Facilities

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<sup>248</sup> *ibid* 7.

<sup>249</sup> *ibid* 5.

<sup>250</sup> *ibid*.

<sup>251</sup> Rio Declaration, Principle 6.

<sup>252</sup> Rio Declaration, Principle 10.

<sup>253</sup> Rio Declaration, Principle 11.

<sup>254</sup> 'EU Ship Recycling Rules Look Like Protectionism | Hellenic Shipping News Worldwide' (*Hellenicshippingnews.com*, 2019) <<https://www.hellenicshippingnews.com/eu-ship-recycling-rules-look-like-protectionism/>> accessed 27 June 2019.

<sup>255</sup> MARPROF Environmental Limited, 'Report on the European List of Ship Recycling Facilities' (2019) 5 <<https://www.bimco.org/-/media/bimco/ships-ports-and-voyage-planning/environment-protection/recycling/report-on-the-european-list-of-ship-recycling-facilities-final-v1-5----20190220.ashx>> accessed 10 July 2019.

within the European List, the EC should therefore ensure that uniform criteria are applied for all facilities whether situated within the EU or otherwise. Moreover, it is desirable that the EC conducts site-inspections of recycling facilities situated within the EU in the same manner as it does in facilities within third countries, and this, to ensure that the standards desired by the SRR are also adhered to in EU countries. The said site-inspections would preferably be conducted both prior and following approval and inclusion in the European List.

#### **4.4 CIRCUMVENTION OF THE SHIP RECYCLING REGULATION**

One of the main criticisms levelled against the WSR is that it makes it easy for shipowners to circumvent the rules and disclose their intentions to recycling their Ships once outside EU ports. The way in which the SRR works makes it difficult for shipowners to avoid its regulatory controls in this manner. Shipowners of EU Flagged Ships are compulsorily regulated by the SRR whether their Ship destined to be recycled departs an EU port or otherwise. Having said that, bypassing the SRR is not impossible. Whilst it would cost shipowners some money and it may require some additional paper work, it is easy for shipowners of EU Flagged Ships to out-flag their Ships and completely avoid the regulatory controls imposed by the SRR.

The Seatrade case should be one of the main deterrents for shipowners to refrain from circumventing not only the WSR but also the SRR.<sup>256</sup> However, unlike with the WSR, under the SRR, it is not possible for States to institute criminal proceedings against shipowners for changing the registry of their Ship and then recycling it under conditions not compliant with the SRR. The main reason why this is not possible is because the SRR does not make re-

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<sup>256</sup> Max Tingyao Lin, 'Scrap values of EU-flagged ships could plummet 50%' (2018) Tradewinds, [http://www.gmsinc.net/gms\\_new/assets/pdf/2019-01-18VQa\\_org.pdf](http://www.gmsinc.net/gms_new/assets/pdf/2019-01-18VQa_org.pdf) accessed 20 July 2019.

Flagging to avoid its provisions an offence given that linking any such re-Flagging with low standard Ship Recycling is difficult if not impossible.<sup>257</sup> The SRR failed to introduced any mechanism to de-incentivise Flagging-out.<sup>258</sup>

Once again, the Ship Recycling industry, being a global industry, must have uniform rules applicable worldwide such that circumvention of the rules becomes impossible. Mindful of Principle 11 of the Rio Declaration States need to enact effective legislation. The main reasons behind shipowners choosing to re-Flag their Ships for them to be recycled in third countries is that they manage to avoid strict environmental rules and increase their profitability rates.<sup>259</sup> Only if standards are improved in third countries would Ship Recycling Facilities around the world be able to compete on a level playing field. It is stressed that it is desirable the EC uses the SRR as a tool to encourage Member States as well as third countries to adopt the HKC with the aim of eventually having globally applicable uniform rules specifically regulating Ship Recycling operations.

One of the main solutions proposed by the NGO Shipbreaking Platform is the proper application of article 29 of the Regulation, that is, the introduction of a financial incentive for shipowners to find abiding by the SRR attractive and financially sensible.<sup>260</sup> Whilst Ship Recycling Facilities backed this form of financial incentive, the Ship-owning industry criticised it given that it would potentially discourage the adoption of global solutions for the Ship

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<sup>257</sup> Allen L. Springer, *Cases of Conflict: Transboundary Disputes and The Development of International Environmental Law* (University of Toronto Press 2016).

<sup>258</sup> Argüello Moncayo (n 89) 305.

<sup>259</sup> Cathy Buyck and Marion Solletty, 'EU Tackles Dirty Business of Recycling Ships' (*POLITICO*, 2019) 5 <<https://www.politico.eu/article/eu-efforts-still-needed-to-tackle-the-dirty-business-of-ships-recycling/>> accessed 19 June 2019.

<sup>260</sup> European Commission (n 218) 2.

Recycling industry.<sup>261</sup> At this stage no further progress has been made in this regard and the adoption of any such financial incentive remains uncertain. Whilst taking into account the criticism levelled against the adoption of the Ship Recycling Licence financial incentive, its adoption should not be further delayed so as to ensure the proper implementation of the SRR.

#### **4.5 STRENGTHENING PORT STATE CONTROL**

The SRR makes important provision for Port State Control which is one of the main mechanisms used to promote and ensure its proper implementation and enforcement. Through Port State Control, the European Union can regulate foreign Ships entering its ports, which Ships may not otherwise fall within its jurisdiction. However, the SRR fails to provide anything beyond allowing Port State Control. Industry stakeholders have therefore called for the provision of training for Port State Control officials in the manner in which inspections of the IHM should be conducted.<sup>262</sup> An IHM report is a lengthy report involving detailed information which needs to be properly understood for inspections to be satisfactorily conducted.

It is commendable that in this regard the EC is supporting EMSA in its current work on the development of the THETIS-EU module for Ship Recycling aimed at supporting Port State Control inspections for the purposes of enforcing the SRR.<sup>263</sup> In tandem with the said module, EMSA is also seeking to publish a Guidance document for Port State Control officers on the

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<sup>261</sup> Buyck (n 259) 6.

<sup>262</sup> Alcaide (n 186) 268.

<sup>263</sup> European Commission, 'Summary record of the Ship Recycling Regulation Committee meeting of 18 June 2018' (2018) Circular economy & Green Growth, 3.

manner in which inspections should be conducted for the purposes of ensuring compliance with the SRR.<sup>264</sup> The aim of the said module is to allow officers and other users to record and exchange data, information and knowledge regarding inspections carried out over Ships.<sup>265</sup> The use of the said mechanism would be on a voluntary basis.<sup>266</sup> Developing such a model will prove essential in order to ensure uniformity in the applicable standards and in the manner in which inspections are conducted within the states subject to the control mechanisms of the SRR. Mirroring the principles set out in the Rio Declaration States should aim to ensure the transfer of information, technology and training to developing countries so that they can also sustainably develop their Ship Recycling industries.<sup>267</sup>

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<sup>264</sup> European Commission (n 218) 4.

<sup>265</sup> 'THETIS EU - EMSA - European Maritime Safety Agency' (*Emsa.europa.eu*, 2019)  
<<http://www.emsa.europa.eu/ship-inspection-support/thetis-eu.html>> accessed 30 July 2019.

<sup>266</sup> European Commission (n 218) 4.

<sup>267</sup> Rio Declaration, Principle 9.

# CHAPTER 5

## **5. CONCLUSION: THE FUTURE OF SHIP RECYCLING**

As it currently stands, at an international level, proper regulation of Ship Recycling is lacking. The Basel Convention is the only means of regulating Ship Recycling and this is done incidentally through the control of Transboundary Movement of hazardous waste and the environmentally sound treatment and disposal thereafter. The international community requires specific regulatory controls over Ship Recycling and the operation of Ship Recycling Facilities.

Indeed, attempts were made to address these concerns through the introduction of the HKC. Importantly, the HKC lays down the ground work for proper authorisation of Ship Recycling Facilities, requires survey and certification of Ships, imposes obligations vis-à-vis IHM reports and ensures compliance through Port State Control. However, to date the HKC is not yet in force and the international community must continue pushing for further ratification so that improvements can be made with respect to Ship Recycling at a global level. States must therefore commit towards improving their Ship Recycling standards and bringing them in line with the obligations imposed by the HKC.

At regional level, the Ship Recycling Regulation has indeed had a good impact on Ship Recycling given that it has been the only instrumental piece of legislation vis-à-vis the improvement of standards within Ship Recycling Facilities within such a short period of



time. The SRR makes provision for the avoidance of accidents and adverse effects on the environment and human health. The SRR has also been important in regulating the proper management of Hazardous Materials onboard Ships and in improving the standards and conditions within Ship Recycling Facilities globally. Notably the SRR makes no distinction between OECD and non-OECD countries with the aim of bringing at par the standards within Ship Recycling Facilities situated in the EU and in third countries.

In truth however, assessing the success or otherwise of the SRR may be too early. It will take a number of years to determine how the regulation will work in practice. The SRR has initiated the process towards effectively having sustainable Ship recycling not only within developed states but also within third countries. Third country Ship Recycling Facilities must now strive to adopt the standards imposed by the SRR to be able to ensure that they can recycle EU Flagged Ships. But the EU and the International community must not stop here, one of the vital concerns that needs to be addressed is ensuring the application of Ship Recycling rules in a uniform fashion globally. The first step is to facilitate the entry into of the HKC regulating Ship Recycling at an international level. At the same time however, the EU must ensure that existing disparities with the HKC are addressed to avoid having dual regimes working in conflict with one another.

As explained above the SRR must work seamlessly not only with the HKC but also with the Basel Convention and with the Basel Ban in particular. As it currently stands, should the Basel Ban come into force, any Ship recycled within a European List facility which is situated in a non-OECD country would be in direct conflict of the Basel Ban provisions. Uniformity in regulation is also lacking at a regional level, given that the SRR and the WSR

are currently working in tandem with one another regulating the manner in which Ships are recycling in a completely different manner. This has lead shipowners of Ships falling under the scope of the SRR being regulated in a completely different manner than Ships falling within the ambit of the WSR. These concerns surrounding the SRR would need to be addressed before the Ship Recycling industry can convincingly move towards sustainable development.

The EC must continue pressuring States to ensure strict compliance with the SRR provisions. Moreover, concerns surrounding the European List should be addressed by the EC by helping third countries improve their conditions to obtain authorisation and by ensuring that the European List has the requisite capacity to recycle all Ships falling within the scope of the SRR.

The SRR has given the concept of sustainable Ship recycling further traction, but more needs to be done to ensure that circumvention of Ship Recycling rules becomes unattractive and difficult. There remains the need for the EU to introduce mechanisms aimed at encouraging compliance either in the form of a financial mechanism or in the form of penalties. The Ship Recycling industry must strive to ensure that Ship Recycling is viewed in a more positive light such that shipowners and other key players in the industry would have no incentive to adopt sub-standard Ship Recycling practices; where profitability would not trump environmentally sound Ship Recycling.

Transparency in the manner in which the SRR is being applied will be a key factor in ensuring that industry players have the necessary information and knowledge regarding

the manner in which others are applying Ship Recycling rules. With increased transparency, the Ship Recycling industry will be encouraged to adopt sustainable Ship Recycling practices with the aim of improving the quality of the surrounding labour and environmental standards.

An important initiative developed through the Sustainable Shipping Initiative is the Ship Recycling Transparency Initiative (SRTI) which promotes shipowners' transparency and information sharing in the context of Ship Recycling.<sup>268</sup> The aim is to establish a platform where information regarding the Ship Recycling policies and practices adopted by shipowners is shared. This initiative will help promote Ship Recycling Facilities which adopt responsible Ship Recycling practices and at the same time ensure scrutiny over practices adopted by shipowners themselves.<sup>269</sup> This platform would therefore also allow shipowners seeking to recycle their Ships to educate themselves on the practices and policies adopted within the Ship Recycling industry, thus making informed decisions on where to recycle their Ships. Additionally, this model helps promote the adoption of standard practices by shipowners globally.<sup>270</sup> This tool will also encourage Ship Recycling Facilities to adopt up-to-standard procedures with the aim of gaining a good reputation and receiving positive feedback. Unfortunately, however, this initiative is a voluntary one such that shipowners who wish to circumvent the applicable Ship Recycling rules can do so without any hindrance and without any obligation to divulge the practices they adopt such that they would not be held accountable. Having said that, the success of this initiative seems promising as it continues gaining support from industry leaders including

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<sup>268</sup> Stephens et. al. (n 188) .

<sup>269</sup> *ibid.*

<sup>270</sup> *ibid.*

Lloyd's Register and Wallenius Wilhelmsen.<sup>271</sup> Such initiatives will help promote responsible Ship Recycling and improve the overall trust surrounding the Ship Recycling industry.<sup>272</sup>

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<sup>271</sup> *ibid.*

<sup>272</sup> 'About Ship Recycling' (*SRTI*, 2019) <<https://www.shiprecyclingtransparency.org/about-ship-recycling/>> accessed 30 July 2019.

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