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Ungovernable Ships at the End of their Lives and the Response of the Hong Kong Convention: A Critical Appraisal of the Treaty on Ship-breaking from the Perspective of South Asian Ship-breaking Nations

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**Ungovernable Ships at the
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Ship-breaking Nations**

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Abstract:

Ship-breaking on beaches is widely known to cause pollution and is among the most dangerous occupations in the world. After three decades of prevailing mobocracy, particularly in the three chief ship recycling nations of Bangladesh, India, and Pakistan, in 2009, the International Maritime Organization finally adopted the Hong Kong Convention, as a result of mounting pressure from international communities including various environmental groups, NGOs, mass media, and human right activists. However, this much awaited convention protecting the marine environment has not been enforced yet due to the lack of ratification by key ship recycling states caused by competing conflicts of interest and significant disagreements among the dominant stakeholders of this industry. Leading environmental and labor activists claim that the convention is extremely pro-business in character and has heavily favored the industry and entities with active shipping interest at the expense of labor rights and the coastal environment. On the other hand, shipping and ship-breaking industries maintain that early ratification of this convention is the only effective solution to the current problems. Through a doctrinal analysis, this article addresses the challenging question of this convention's efficacy in ensuring sustainable, safe and environmentally sound recycling of ships by breaking down its key terms and provisions. The article ends with policy recommendations for the International Maritime Organization, which adopted this convention in 2009 amidst significant protest and criticism of both labor and environmental activists.

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I. Introduction

The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (“Hong Kong Convention” or “HKC”) is a multilateral treaty on ship-breaking adopted under the auspices of the International Maritime Organization (“IMO”) in 2009. This international convention is designed to control commercial ship-breaking activities around the world. Ship-breaking, widely known as a ‘pollution haven,’ is the most dangerous occupation worldwide, particularly when it is carried out on the tidal part of the beach.¹ Nonetheless, it is an essential activity for the sustainability of the global shipping industry. The Hong Kong Convention also recognizes ship recycling as the most environmentally sound way to dispose of end of life ships from international waters.

II. Origin and Evaluation of the Hong Kong Convention.

By the end of 1990s, when commercial ship-breaking had become virtually nonexistent in the developed world,² the anarchy in the beach breaking industry across the South Asian region became a notable global concern. In March of 2000, IMO was first notified about this concern through its Marine Environment Protection Committee (MEPC) during its 44th session.³ This IMO initiative was triggered predominantly by three decades of mobocracy prevailing in the three-giant ship recycling nations: Bangladesh, India and Pakistan. Mounting pressure from various environmental groups such as Greenpeace, NGO Shipbreaking Platform and various local NGOs, human right activists, and mass media, however, caused concern for this specialized agency of the United Nations (UN), an intergovernmental organization responsible for the adoption of maritime regulations for global shipping communities, and other inter-governmental organizations.⁴ Following the 44th session of the MEPC, a correspondence group was formed to collect information about the existing ship recycling practice and to give advice on the role of the

¹ M. JAMALUDDIN AHMED & MD. NAZRUL ISLAM, *THE MOST DANGEROUS JOB ON THE PLANET — SHIPBREAKING IN BANGLADESH*, (Lambert Acad. Publishing 2016).

² Morshedul Hoque & Dr. Md Masum Emran, *Role of Ship-breaking Industries in Bangladesh and ILO Guidelines: A Critical Discussion*, 16 GLOBAL J. HUM. SOC. SCI.: E 19 (2016), [https://globaljournals.org/GJHSS_Volume16/E-Journal_GJHSS_\(E\)_Vol_16_Issue_3.pdf](https://globaljournals.org/GJHSS_Volume16/E-Journal_GJHSS_(E)_Vol_16_Issue_3.pdf).

³ International Maritime Organization (IMO), *Historic Background*, <http://www.imo.org/en/OurWork/Environment/ShipRecycling/Pages/Default.aspx>.

⁴ Dr. Nikos Mikelis, *Hong Kong Convention: The Origins of a Convention Seminar at Malmö: World Maritime University*, (Feb. 10, 2012).

IMO in ship recycling, including the development of measures required to prepare a ship for recycling.

Ship-breaking involves knowledge of the maritime industry, labor rights, and disposal of hazardous materials. Various specialized UN agencies, primarily IMO, the Secretariat of the Basel Convention, and International Labour Organization (ILO), but also public and private stakeholders, were anticipated to be involved in the preparatory discussion.⁵ The IMO accepted jurisdiction⁶ and agreed that it should develop a non-mandatory guideline using the industry code of practice for ship recycling to be adopted by the IMO assembly.⁷ In July 2003, at the 49th meeting of the MEPC, the IMO approved the draft guidelines for ship recycling.⁸ These guidelines were subsequently adopted by the IMO assembly via resolution A.962 (23).⁹ The guidelines were later amended by resolution A.980 (24) in December 2005.¹⁰

Ship-breaking activities involve interplay of multinational stakeholders ranging from the weakest to the strongest entities, members with tremendous conflict of interest between numerous state and non-state actors, including individual persons and the environment. Since its adoption in 2003, it was soon apparent that a voluntary guideline is insufficient to regulate this international industry. In MEPC's 53rd meeting in 2005, it unanimously agreed that without a binding legal instrument, it would be impossible to create harmony governing this industry.¹¹ MEPC passed Resolution A.981 (24) to direct the development of a new convention covering the entire life cycle of a ship from design and construction, to preparation for ship-breaking

⁵ Secretariat of the Basel Convention, Meeting Report: Discussions on the Global Programme for Sustainable Ship Recycling (Jan. 12-13, 2008), <http://www.basel.int/Portals/4/download.aspx?d=UNEP-CHW-SHIPS-GPSSR.1-REP.English.pdf>.

⁶ K. P. Jain, J. F. J. Pruyn, & J. J. Hopman, *Critical Analysis of the Hong Kong International Convention on Ship Recycling*, 7 INT'L J. ENVTL., CHEMICAL, ECOLOGICAL, GEOLOGICAL & GEOPHYSICAL ENG'G 686 (2013).

⁷ Marine Environment Protection Committee (MEPC), Meeting Summaries of 47th session (Mar. 4-8, 2002), http://www.imo.org/blast/mainframe.asp?topic_id=109&doc_id=1753.

⁸ MEPC, Meeting Summaries of 49th session (July 14-18, 2003), http://www.imo.org/blast/mainframe.asp?topic_id=109&doc_id=2798.

⁹ IMO, *The development of the Hong Kong Convention*, <http://www.imo.org/en/OurWork/Environment/ShipRecycling/Pages/Default.aspx>.

¹⁰ IMO, Historic Background, *supra* note 3.

¹¹ IMO, Report of the Marine Environment Protection Committee on Its Fifty-Third Session, § 3, ¶ 3.24, http://www.crs.hr/Portals/0/docs/eng/imo_iacs_eu/imo/mepc_reports/MEPC53.pdf?ver=2010-11-04-101906-000.

without compromising operational efficiency.¹² This convention was intended to govern all stakeholders involved in regulating and management of end-of-life (“EOL”) ships with various reporting requirements. MEPC’s 54th meeting convened a working group, per the instruction of IMO assembly 24, and drafted the initial version of the convention based on an earlier proposal by Norway,¹³ one of the top ten ship owning nations of the world.¹⁴ In 2009, a series of meetings took place in Hong Kong in the presence of 63 delegates from IMO member states, which finally led to the adoption of the Hong Kong Convention and six resolutions.¹⁵

Maritime conventions of IMO have all been adopted promptly as a response to one or more major casualties at sea¹⁶ affecting predominantly the interest of those in the maritime transport industry. The Hong Kong Convention is perhaps the single exception to this long-standing tradition. Almost 40 years of anarchy in the ship-breaking industry in South Asia and the outcry of environmental and labor activists have been catalysts for the development of this convention.¹⁷ However in March 2009,¹⁸ the apex court of the largest ship-breaking state, Bangladesh, ordered the instant shut-down of ship-breaking activity for an indefinite period of time.¹⁹ This raised a red flag in the global shipping community and appears to have offered the final push that brought forth the convention swiftly, just within two month of the Supreme Court Judgment delivered on 19 May 2009.

III. The Structure of the Hong Kong Convention.

The provisions of the Hong Kong Convention have been arranged in three different annexes. The first annex includes twenty-one articles that deal with the core substantive and

¹² *Id.*

¹³ Jain, Pruyun & Hopman, *supra* note 6.

¹⁴ *Infographic: Norway as a Ship owning Nation*, WORLD MARITIME NEWS (May 24, 2017), <https://worldmaritimeneeds.com/archives/220753/infographic-norway-as-a-shipowning-nation/>.

¹⁵ Mikelis, Hong Kong Convention, *supra* note 4.

¹⁶ Erik Hollnagel, Michael Baldauf, Sarah Hofmann & Aditi Kataria, *Maritime Human Factors and IMO Policy*, 40 MAR. POL’Y & MGMT. 243 (2013).

¹⁷ Mikelis, Hong Kong Convention, *supra* note 4.

¹⁸ Bangladesh Environmental Lawyers Association (BELA) v. Government of Bangladesh, Writ Petition (Civil) No. 7260, Bangladesh Supreme Court 18 (2008), <http://bdpil.org/assets/uploads/pdf/c86f3-judgement-ship-breaking-7260-of-2008.pdf>.

¹⁹ Environmentalists call this the “dumping ground” for world merchant ships. *See* Anbarasan Ethirajan, *Bangladesh ship breaking workers die after inhaling gas*, BBC NEWS (Oct. 17, 2011), <http://www.bbc.com/news/world-south-asia-15334152>.

procedural provisions. The second annex titled “Regulations for Safe and Environmentally Sound Recycling of Ships” includes twenty-five regulations arranged in four chapters. These regulations incorporate the technical details required to effectively implement the core provisions of the convention stipulated in the first annex. The third annex includes seven appendixes. Except appendix 1 and 2, all the appendixes contain standard format for various certification procedures. Appendix 1 covers the list of hazardous materials and appendix 2 includes a minimum list of items for the “inventory of hazardous materials” (IHM).

The Hong Kong Convention has been criticized for placing the provisions of the convention covering substantive rights protecting workers and the environment outside the main body of the text, making them easily amendable.²⁰ However, this criticism has been countered by an argument that the dual-tier mechanism would make the convention easily adaptable to the modern needs and circumstances.²¹ Any future technical development could therefore be incorporated easily when available.²²

Both the articles and regulations, irrespective of their placement in the convention text, carry the same importance and strength in enforcement.²³ Six sets of voluntary guidelines have also been incorporated. It is expected that these voluntary guidelines would help the convention in its early implementation. Although voluntary, their reference within the core text of the convention have given them a special status. Certain core provisions such as preparation of ship recycling plan (SRP) or ship recycling facility plan (SRFP) under the Hong Kong Convention may largely depend on how these guidelines are being interpreted by an individual state.²⁴

²⁰ Candidate no. 5006, *International Law and Ship Recycling*, 33 (Oct. 31, 2010) (Master’s Thesis) (on file with the University of Oslo).

²¹ N. Matz-Lück, *Safe and Sound Scrapping of ‘Rusty Buckets’? The 2009 Hong Kong Ship Recycling Convention*, 19 REV. EUROPEAN COMMUN. & INT’L ENVTL. L. 95, 95-103 (2010), <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-9388.2010.00667.x>.

²² *International Law and Ship Recycling*, *supra* note 20.

²³ The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, art. 1.5, May 19, 2009, IMO Doc. SR/CONF/45 [hereinafter HKC].

²⁴ MARIA SARRAF ET. AL, SHIP BREAKING AND RECYCLING INDUSTRY IN BANGLADESH AND PAKISTAN, WORLD BANK REPORT 24 (2010), <http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-1296680097256/Shipbreaking.pdf>.

IV. The Salient Features of the Hong Kong Convention.

The Hong Kong Convention imposes general obligations on each party, to give full and complete effect to its provisions in their national legislation.²⁵ Additionally, member states shall ensure compliance of the convention's obligations to prevent, reduce, minimize and to the extent practicable, eliminate accidents, injuries, and other adverse effects on human health and environment caused by ship recycling.²⁶ The standard of compliance is dependent on the methods used for ship recycling.

A. Approach to Health, Safety and the Environment.

The Hong Kong Convention has taken a typical approach to health and safety, but a nontraditional approach to environmental protection. It has not provided any universally applicable methods to minimize ship-breaking's pollution or impact on human health, except setting a standard of 'practicability.'²⁷ Practicability may widely vary within the contracting states, between recyclers within a state, or within one recycler at different times and circumstances. When judged in terms of financial or technological capability, practicability raises further ethical questions. When does it become justifiable to continue business without avoiding predictable risk of death or grievous bodily harm at a workplace because it is not "practicable" for a recycler on financial grounds? According to the standard set by the Hong Kong Convention, a foreseeable case of death or injury may still be tolerated if, for example, it jeopardizes smooth profitable production in business, because it could be argued as a relevant practical circumstance of an employer based on his lack of financial capability to invest in safety. If the word 'practicability' in the convention has a subjective meaning, each party would tend to argue it has different obligations from the same convention.

In any standard health and safety law directed upon the employers to prevent human casualty and injury at work, the use of the terms '*reasonably practicable*,' '*reasonable and*

²⁵ HKC, *supra* note 23, at art. 1.1.

²⁶ *Id.* at art. 1.

²⁷ *Id.*

practicable,’ or *‘as far as reasonably practical’* are common.²⁸ The HKC uses the words *‘practicable’* six times, while the word *‘reasonable’* has been deleted from three specific provisions related to the duty on recyclers as well as the competent authority (CA) to ensure the safety of workers and safeguard to the environment.²⁹ The two other provisions relating squarely to business, e.g. excluding jurisdiction over the ships below 500 DWT³⁰ and naval or war ships,³¹ however, are required to be *‘reasonable and practicable.’* The duty of existing ship-owners to prepare the inventory of hazardous materials (IHM) needs to be only *‘practicable’* without a *‘reasonableness’* qualifier.³² In the Hong Kong Convention, there is therefore clear evidence of heedful use of words favoring business interest of ship-owners and recyclers, omitting the concerns of labor welfare and environmental protection.

This ideology of prioritizing business over safety can be considered an artifact of barbarism. This may promote arguments regarding monetary compensation for a predictable loss of life of a human being or permanent injury. This strategy downplays the precious cost of human life which is inestimable, irrespective of social and economic status. By not clarifying the meaning of “practicability,” this provision puts the safety and life of workers on equivalent footing as production and profit in business. This compromise is a shift from IMO’s traditional

²⁸ See e.g. Sec 2(1), 2(2) , 2(2)(a) , 2(2)(b) , 2(2)(c) of the Health and Safety at Work 1974 Act (UK) applies to ship recycling that reads

Sec. 2. General duties of employers to their employees

- (1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.
- (2) Without prejudice to the generality of an employer's duty under the preceding subsection, the matters to which that duty extends include in particular—
 - (a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;
 - (b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
 - (c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employee...

See Health and Safety at Work Act 1974, c. 37, § 2 (UK).

²⁹ HKC, *supra* note 23, at Reg. 5, 17, 18 art. 1, 3.

³⁰ *Id.* at art. 3.3.

³¹ *Id.* at art. 3.2.

³² *Id.* at Reg. 5.2.

mandate to promote a ‘safety first’ culture and environmental stewardship as one of IMO’s pillars for sustainable maritime development.³³

B. Placing Unnecessary Stress on Settled Issues.

In Article 1.2, the HKC allows state parties to take more stringent measures than what is stated in the convention itself.³⁴ However, the purpose of any international law is to set a minimum benchmark acceptable to state parties to facilitate expansion, increase efficiency, and guarantee fairness in dealing in an integrated global market. State parties, therefore, have every right to impose a higher standard than the minimum demanded by the Hong Kong Convention, without needing the express incorporation of its Article 1.2 provision. Indeed, this provision is redundant and could instead be misused as a tool to foster discrimination between party ships and facilities and those of nonparties.³⁵

C. Approach of Using Technology in Ship-breaking.

The convention has urged contracting parties to encourage each other to use technologies available to them and exert continuous effort towards the development of technology which would contribute to the safe and environmentally sound recycling of ships.³⁶ This industry has no shortage of technology, however access to such technology has been a prime concern for the global communities involved in ship-breaking in the last 40 years. Advanced technology is currently available to the developed parts of the world,³⁷ where ship recycling is virtually non-existent.³⁸ Further encouragement for research and improving technology without addressing the

³³ Jesper Loldrup & Edward Kleverlaan, IMO, EGM on Oceans, Seas, and Sustainable Development: MARITIME TRANSPORT at Rio +20 (June 20-22, 2013), <https://sustainabledevelopment.un.org/content/documents/1780IMO%20presentation.pdf>.

³⁴ HKC, *supra* note 23, at art. 1.2.

³⁵ See MEPC, *Recycling of ships: Report of the Second Intersessional Meeting of the Working Group on Ship Recycling*, ¶ 15, IMO Doc. MEPC 56/3 (2007).

³⁶ HKC, *supra* note 23, at art. 1.4..

³⁷ *Industry Overview: Ship Breaking Industry*, GOOD RETURNS (May 30, 2011, 1:30PM), <https://www.goodreturns.in/news/2011/05/30/industry-overview.html>.

³⁸ John F. Sawyer, *Shipbreaking and North-South Debate, Economic Development or Environmental and Labor Catastrophe*, 20 PENN ST. INT’L L. REV. 535, 541 (2002).

core issue of how Bangladesh, India and Pakistan, holding major shares of this global industry,³⁹ would finance access to such technologies, does not make any real sense.

D. Approach to Downstream Management of Hazardous Waste.

The proponents of the HKC suggest that downstream management of hazardous waste produced from recycling of ships is purely a domestic enterprise and beyond the jurisdiction of international law.⁴⁰ This argument disregards the fact that an EOL ship is itself hazardous waste in its unbroken condition. Any further processing of the ship merely amounts to transformation from one type of hazard to another. This is a classic case of the transboundary aspect of pollution in international law.⁴¹ An absence of recognition of such a downstream venture under international governance would further promote a race to the bottom.

E. Definition of Ship in the Hong Kong Convention.

Although this ship recycling convention is intended to cover mostly EOL ships, it includes other non-ship objects operating in the marine environment.⁴² These include floating crafts, self-elevating platforms, floating storage units, floating production storages, and offloading units.⁴³ Vessels that have lost the propulsion power, have been stripped of equipment, or are being towed are also included.⁴⁴ Ships of less than 500 GT⁴⁵ or ships operating throughout their lives only in waters subject to the jurisdiction of the recycling states whose flag the ship is entitled to fly, are excluded.⁴⁶ The HKC did not however clarify if non-ship structures would fall under this tonnage exception. If not, keeping the ships below 500 GT out of jurisdiction seems

³⁹ Noting that Bangladesh, India, Pakistan, and China share 94.9% of all global ship-breaking. See *UNCTAD reveals top 5 ship-owning countries*, SAFETY4SEA (Nov. 3, 2017), https://safety4sea.com/unctad-reveals-top-5-ship-owning-countries-2utm_source=safety4seautm_medium=majors/. China mostly breaks its own ships and the international outcry for health and environment in ship-breaking does not apply to China as it uses green ship recycling methods, namely pier breaking. The practical area of application of this convention is three South Asian countries, namely Bangladesh, India, and Pakistan, based on the last 40 years of recorded of ship recycling.

⁴⁰ See GMS Leadership, *IHS*, YouTube (Sep. 6, 2018), https://www.youtube.com/watch?v=4SDUWaa8Tgc&feature=emb_logo.

⁴¹ Art. 195 of UNCLOS states “[i]n taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another.” United Nations Convention on the Law of the Sea, art. 195, Dec. 10, 1982, 1833 U.N.T.S. 397.

⁴² HKC, *supra* note 23, at art. 2.7.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Gross Tonnage.

⁴⁶ HKC, *supra* note 23, at art. 3.3.

aimless. It can be argued that many of the same provisions of the convention would still be almost impossible to apply to a small ship as little as 500 GT equally with a Very Large Crude Career (“VLCC”) or super tanker, i.e. over 400,000 GT. However, the convention does not make any sensible distinction between such a great variance of ships.

F. Definition of Ship Recycling Activity.

The HKC defines the ship recycling activity as a complete or partial dismantling of a ship at a ship recycling facility to recover its materials for reprocessing and reuse while taking care of the hazardous substances.⁴⁷ The process includes associated operations such as storage and treatment of components and materials on site, but not their further processing or disposal in separate facilities.⁴⁸ It appears that ship recycling activities are entirely restricted to whatever is happening inside the boundaries of a recycling facility. By excluding downstream processing of hazardous materials outside the areas of the facility, the convention contemplates a separate domestic regulatory regime to govern those activities. Generation and disposal of hazardous materials at a ship recycling facility is an ongoing process and an inseparable part of a ship dismantling operation. It’s difficult to discern how a domestic plant expects to run recycling activities competitively in the global market without first ensuring a suitable global regime on downstream waste management. Yet, the enforcement of the convention is not conditioned upon existence of any such indivisible global regime.

G. Uncertainty in the Range of Recycling Activity and the Prediction of the Convention.

The convention has failed to determine the precise point where the owners of an EOL ship would be subject to the convention’s jurisdiction. There are certain obligations imposed upon the owners of ships for preparatory works before the ship is delivered to the facility for recycling.⁴⁹ However, the convention is silent on the practice of ship owners reflagging their ships or transferring title to some momentary owners known in the industry as ‘cash buyers,’ sometimes even just moments before the ship is delivered to the facility. The convention does not address how the obligation contemplated above would be satisfied by so called “fly by night”

⁴⁷ *Id.* at art. 2.10.

⁴⁸ *Id.*

⁴⁹ *Id.* at Reg. 8.3.

entities or “cash buyers” within such a small fraction of time. As mentioned before, most of the changes in ownership take place at the recycling state’s anchorage site.⁵⁰ These phenomena inter alia have led the critics to diminish the significance of the convention, as it appears to impose no more than a paper obligation upon owners of EOL ships.⁵¹

The convention aims to fulfill its objectives through a ‘cradle-to-grave’ strategy which renders the jurisdiction applicable throughout the ship’s operative life.⁵² This begins from the prohibition against the usage of certain hazardous materials at the designing and construction stage of any new ship.⁵³ This is an attempt to tackle the problem from the source. However, the deliberate shirking of the convention from the downstream management,⁵⁴ might jeopardize the whole ‘cradle-to-grave’ objective, if these wastes cannot ultimately be managed in a safe and sound manner. The waste may eventually escape oversight after transportation to an unregulated domestic facility and may end up directly in the sea, which is not an unusual phenomenon in developing countries.⁵⁵

H. Delegation of the Task of Recycling to Third Party by the Ship Recycling Facility.

It appears that anyone who steps into the shoe of an authorized recycler even for a single ship recycling activity on a temporary lease, may also be considered a ‘ship recycling company’ subject to the full convention rights, duties and responsibilities.⁵⁶ It will be interesting to see how the non-compliance of convention’s provisions by a temporary delegate would impact the original owner’s convention obligation and right to operate or renew the facility at the end of its

⁵⁰ Dr. Nikos Mikelis, *The shipowner, the Cash Buyer, and the new European Regulation*, Green Recycling Conference (Nov. 18, 2013), http://www.gmsinc.net/gms/pdf/2013-11-18_GMS_Tokyo_Conf/The_shipowner_the_Cash_Buyer_and_the_new_Eu_Regulation.pdf.

⁵¹ Interview with Syeda Rizwana Hasan, winner of the 2009 Goldman Environmental Prize and CEO of Bangladesh Environmental Lawyers Association (BELA), Head Office, Dhaka, Bangladesh (Aug. 12, 2016).

⁵² HKC, *supra* note 23, at Reg. 2.

⁵³ *Id.* at Reg. 4.1.

⁵⁴ *Id.* at Reg. 2.10.

⁵⁵ It has been noted that in some developing nations, such as the Philippines, land-based disposal systems include discharging waste directly into the sea. See John R. Lethbridge, Transportation, Water and Urban Development Department, World Bank, *Infrastructure Notes: MARPOL 73/78 (International Convention for the Prevention of Pollution from Ships)* (1991), <http://siteresources.worldbank.org/INTTRANSPORT/Resources/336291-1119275973157/td-ps4.pdf>.

⁵⁶ HKC, *supra* note 23, at art. 2.12.

term. In the absence of clear safeguards provided by the convention, delegation of authority might open the door to abuse the process of law. A recycler may simply attempt to set up a shell company to purposefully shift the legal burden, allowing it to keep the full beneficial interest, but remain unharmed by the convention's obligations.

I. Sailing Under the Authority of a Flag: An Innovative Approach of the Hong Kong Convention.

The convention applies to “ships entitled to fly the flag of a party or operating under its authority” and “‘ship recycling facilities’ operating under the jurisdiction of a party.”⁵⁷ Therefore, a ship that does not carry a party flag but operates under the authority of a party is covered by the convention. It is however not fully clear what the convention means about operating under a party's authority even without being registered with a party's flag. Further clarification may be required when introducing a term unfamiliar to maritime world. For example, beaching is often carried out in a flagless status, especially when a cash buyer does not wish to reflag the ship after taking the delivery of the ship from the anchorage of a recycling state. In such a case, any dispute around the questionable beaching or processing at a substandard facility may be attributed to the recycling state only, outside of the convention's jurisdiction. In absence of any flag, arguably, the beaching maneuvering is carried out under the sole authority of recycling states. This could be an attempt of the convention to hold no one accountable for the controversial act of beaching in substandard facilities.

J. Relinquishment of Essential Jurisdiction with No Good Reason.

The HKC expressly excludes war ships, naval auxiliaries and other ships owned and operated by a party while used for government and noncommercial operations.⁵⁸ A war ship by design in its nature and character can be more threatening to human health and the environment while undergoing disposal operations. Built-in weaponry and specially designed ammunition pose greater threats than ordinary merchant ships. These warships deserve stricter regulation.⁵⁹ Making a distinction over the application of the convention based on ship's structure and use

⁵⁷ *Id.* at art. 3.1.

⁵⁸ *Id.* at art. 3.2.

⁵⁹ Saurabh Bhattacharjee, *From Basel to Hong Kong: International Environmental Regulation of Ship-Recycling Takes One Step Forward and Two Steps Back*, 1 TRADE L. DEV. 193 (2009).

may be logical on the grounds of security, sovereignty, or operational capabilities. However, it makes little sense to exclude them from the convention's jurisdiction after their operating lives are over and they become waste. Governments might use vessels of same category as other private commercial operators. When a government or Navy EOL ship is sold to a cash buyer or directly to a yard owner for scrapping, they don't appear to further sovereignty based interests anymore. There are more than 33,000 ships of less than 500 GT operating in international waters.⁶⁰ The lifetime of each of those vessels is expected to be the same as the large ocean-going vessels. Collectively they might produce a significant amount of hazardous waste when recycled after their operative lives,⁶¹ but the convention does not apply to these vessels, which are, instead, exempted.⁶²

Vessels operated throughout their lives exclusively in domestic waters, irrespective of their sizes, are also exempted by the convention.⁶³ By the words 'throughout their lives' the convention seems to target ships that have never been engaged in cross-border movement. Thus, most inland vessels are covered by this provision. Coastal vessels⁶⁴ with shallow hulls that trade between two points within a jurisdiction are also subject to this provision. There are many countries in Europe along the Mediterranean Sea or in the Indian subcontinent in Asia where coastal trading is prevalent.⁶⁵ These ships perhaps would be subjected to the convention jurisdiction simply because of the crossing of an international border, even in a coastal route. Yet, most ships of similar class do not involve such cross-border movement and thereby are exempted. Many of these vessels moving within a single jurisdiction are larger than a typical ocean-going commercial vessel but not amenable to convention jurisdiction. A significant

⁶⁰ *The world merchant fleet - statistics from Equasis*, EQUASIS (2016), <http://www.emsa.europa.eu/equasis-statistics/items.html?cid=95&id=472>.

⁶¹ Noted that these ships, when built, would have no restriction to use prohibited material such as asbestos, glass wool etc. under the convention being exempted.

⁶² HKC, *supra* note 23, at art. 3.3.

⁶³ *Id.*

⁶⁴ Coastal vessels are Coasters which are shallow-hulled vessel ships, typically ranging from 1000 DWT to 15000 DWT.

⁶⁵ 41% of the travel between EU members is carried out with coastal vessels. In Europe, short sea shipping is at the forefront of the European Union's transportation policy. Roughly 41% of all freight moved in Europe is classified as Short Sea Shipping. See Nil Güler & Osman Kamil Sağ, *The Impact of European Union's Port Policies on Maritime Transport*, ¶ 13 (2014).

number of coastal vessels, as large as 16,500 DWT,⁶⁶ are automatically exempted because of the nature of the voyage rather than relevant characteristics allied to the safety and environment.

The convention, however, has imposed responsibilities upon state parties to adopt appropriate measures so that those exempted vessels act consistently with its provisions.⁶⁷ It is not clear whether the convention would apply when a coastal vessel or inland vessel of a state is exported to a recycling state abroad. Its last voyage would entail a cross border movement and per both Basel Convention and the Hong Kong Convention, there is no exception for the end of life journey, and the last journey is invariably part of a ship's operating life.⁶⁸ Provided the movement takes place beyond the jurisdiction of a state, the convention should apply, but it is not clear how the convention would address these situations.⁶⁹ However, these ships are bound to undergo a recycling process consistent with the convention as far as practicable and reasonable⁷⁰ but under a separate domestic regime. This may again, allow an individual state to enjoy more discretion in deciding what is reasonable and practical for those types of vessels.

By not clarifying the meaning of "ships operating throughout their lives only in waters subject to the sovereignty or jurisdiction of the State whose flag the ship is entitled to fly," the convention has blurred the distinction between the cross-border movement with flying foreign flags and movement within a national jurisdiction with a foreign flag. The words "throughout a ships life only in waters" seem to modify only to the ship's travel within the territorial jurisdiction of the prevailing flag state. In this situation, a short voyage could therefore be used to

⁶⁶ DANISH ENVTL. PROT. AGENCY, WORKING REPORT NO. 18: SHIPBREAKING IN OECD, 15 (2003), <https://www2.mst.dk/udgiv/Publications/2003/87-7972-588-0/pdf/87-7972-589-9.pdf>.

⁶⁷ HKC, *supra* note 23, at art. 3.2.

⁶⁸ *Id.* Many EOL ships carry cargo even in their last voyage to the recycling state. The HKC has not addressed the issue of using the EOL ship in commercial navigation.

⁶⁹ There might be several predictable circumstances. Firstly, the ship may be exported even if the state is also a capable recycling state. Secondly, the state may export it as they may not have any option of recycling ship in their own jurisdiction. Thirdly, the ship may not have propulsion power and may be towed and delivered to the recycling facility. In the final case, it might not even be considered as an operating ship within the provision. *See* HKC, *supra* note 23, at art. 3.3.

⁷⁰ HKC, *supra* note 23, at arts. 3.2, 3.3.

overcome the domestic jurisdiction if that happens to be more rigorous than that of the Hong Kong Convention to the domestic ship owners.⁷¹

On the other hand, the less rigorous domestic jurisdiction of a state for inland vessels may be a preferable option for the foreign ship owners for recycling their ships. After the change of flag and transfer of ownership, the ship can be considered as purely operating in single jurisdiction throughout its life under new ownership and flag. It is likely that the existence of a parallel jurisdiction within a domestic territory, coupled with the prevalence of open registry, will tend to ruin fair competition among the contracting states even if the convention is ratified and universally applied by all.

K. 'No More Favorable Treatment' Provision of the Hong Kong Convention: A Redundant Provision.

The convention does not forbid transactions with nonparty ships, but party ships cannot choose a nonparty facility.⁷² State parties are entitled to receive EOL ships flying the flag of nonparties for recycling, however they are to ensure same level of compliance when dealing with nonparty ships.⁷³ The convention clearly mentions that no more favorable treatment shall be given to such ships. This is an attempt to exert pressure upon the states to join the convention and ratify it quickly. Party ships cannot be recycled at a nonparty facility, whereas the nonparty ships can still choose between both to party and nonparty facilities alike. This is favorable treatment to the nonparty ships which do not need to comply with the obligations under the convention throughout their lives until their EOL journey begins, whereas party ships are subject to the 'cradle-to-grave' jurisdiction of the convention. This might discourage certain states from ratifying the convention to avoid suffering competitive disadvantages in business. The ship recycling states would also be exposed to similar problems by losing potential supply of ships for recycling into their facilities from both party and nonparty states alike due to the use of open

⁷¹ A domestic ship owner, depending on his ships class, may decide to operate its ship in international waters under another state's flag.

⁷² HKC, *supra* note 23, at art. 3.4.

⁷³ *Id.*

registry of the party ships before recycling.⁷⁴ Hence it seems that contrary to the convention's claim, mere acceptance of ships from nonparty by a party's facility would indirectly discriminate between party and nonparty ships.

The convention provides detailed regulations in its annexes for ensuring a harmonized system of survey and certifications.⁷⁵ A state party is obliged to prohibit any installation and use of hazardous materials onboard their ships flying their flags anywhere, but nonparty ships are prohibited when these activities are carried out in few specified places such as ports, shipyards, ship repair yards, or offshore terminals.⁷⁶ It is unclear whether this jurisdiction would apply to nonparty ships when outside the four specified areas cited above, but elsewhere in the party's jurisdiction such as the territorial sea or anchorage.⁷⁷ This also makes it more difficult for a party to compete with a nonparty to the convention.⁷⁸

According to the convention, nonparty ships can be recycled in a recycling facility of a party.⁷⁹ In that case, the basis of jurisdiction of flag states in certifying the IHM and their incentives to cooperate, remains uncertain. According to the convention, in every case only the flag state administration remains responsible for verification of the IHM, including the last survey before recycling.⁸⁰ It is therefore unsettled how a survey report issued by a nonparty flag state could bind the competent authority of the recycling state who is a party to the convention.

⁷⁴ This can become more exaggerated by the FOC doctrine by which even a party ship can just easily change its flags and send the ship to the nonparty facility without intending to be governed by the convention provisions. These would naturally give it a huge competitive advantage over other rule abiding ship owners and is currently a common phenomenon in world ship recycling industries.

⁷⁵ HKC, *supra* note 23, at Reg. 5.2.

⁷⁶ *Id.* at Reg. 4.2.

⁷⁷ The convention is silent about the point, although it clearly contemplates nonparty ships in territorial sea. A coastal state has unlimited jurisdiction over all (including foreign) activities unless restrictions are otherwise imposed by law. All coastal states have the right to a territorial sea extending 12 nautical miles from the baseline. See Simon O. Williams, *Law of the Sea Mechanisms: Examining UNCLOS Maritime Zones*, THE MARITIME EXECUTIVE (Dec. 1 2014), <http://www.maritime-executive.com/article/Law-of-the-Sea-Mechanisms-Examining-UNCLOS-Maritime-Zones-2014-12-01>.

⁷⁸ However, from the perspective of the convention, this is perhaps another example of unequal treatment between party and nonparty ships contrary to art. 3.4 of HKC. To carry on installation of the prohibited material or equipment with such material, a ship does not need to birth in port or terminal but also possibly in anchorage.

⁷⁹ HKC, *supra* note 23, at art. 3.4.

⁸⁰ *Id.* at Reg. 10.4.

L. A Universal Technical Method for Diversified Technical Needs.

The HKC incorporates technical details in its regulations.⁸¹ The convention requires each party to give full and complete effect to the provisions of the convention including these technical provisions.⁸² It requires that each party and its ship recycling facilities comply with the convention as set forth.⁸³ However, parties that rely on various ship recycling methods including beach breaking, pier breaking, dry-docking, and landing, all differ technically from one another. There is a gulf of difference in the technical standards of dry-docking and beach breaking, which are technically unmatchable. Therefore, it remains to be seen how the state parties relying on sharply contrasting technical method of recycling would attempt to give uniform, full, and complete effect of its technical provisions as required by the convention.⁸⁴

M. Inconsistency in Approach with Inbuilt Hazardous Materials.

The HKC lists hazardous materials in appendixes 1 and 2. Appendix 1 lists asbestos, ozone depleting substances, PCB, and anti-fouling components and systems. Appendix 2 lists nine other toxic materials including those mentioned in appendix 1.⁸⁵ These hazardous materials usually remain part of the ship's inbuilt structure. It is an obligation upon the parties not to allow installation of materials listed in appendix 1, no matter where in the world the ship is, whether at sea or at shore.⁸⁶ Also, it prohibits vessels carrying flags of a nonparty to install such materials when the ship is at their ports, shipyards, ship repair yards, or any offshore terminals.⁸⁷ This provision does not say anything about forbidding ships to use or install materials listed in appendix 2. Arguably appendix 2 materials could be used or installed in ships by a party or

⁸¹ Bhattacharjee, *supra* note 59, at 221.

⁸² HKC, *supra* note 23, at art. 1.1.

⁸³ *Id.* at arts. 4.1, 4.2.

⁸⁴ Note that dry-docking and beaching pose radically different risks in terms of safety and environmental ecology. In beaching, 100% containment is impossible, which is unlike dry-docking, where it is 100% possible.

⁸⁵ The list of prohibited materials was reduced to 9 in Appendix 2, and 4 in Appendix 1 after serious protest by some ship owners. The draft convention initially included many other hazardous materials listed in other IMO conventions, all of which have been omitted because of serious debate and pressure from the shipping delegates except the above 13. See SAIFUL KARIM, *PREVENTION OF POLLUTION OF THE MARINE ENVIRONMENT FROM VESSELS: THE POTENTIAL LIMITS OF THE INTERNATIONAL MARITIME ORGANISATION*, 90 (Springer International Publishing 2015).

⁸⁶ HKC, *supra* note 23, at Reg. 4.

⁸⁷ *Id.* at art. 3.4.

nonparty during the ship's operating life.⁸⁸ Appendix 2 also incorporates the materials in appendix 1 reference.⁸⁹ This creates inconsistency when applying both provisions.⁹⁰

N. The Hong Kong Convention's Overdrawn Approach to the List of Hazardous Materials Onboard.

Existing ships are required to comply with the IHM certification within 5 years after the convention enters into force, or before the ship proceeds to the recycling yard if earlier.⁹¹ Considering the grave necessity to protect and preserve the coastal environment of the recycling states and health of their citizens, and prevent sub-standard recycling in the industry, the burden upon the existing ship owners appears to be crafted too flexibly. A five year timeline after the convention has entered into force seems to be a long drawn out deal given the preparation of the IHM, which, some experts suggest, is mostly paperwork.⁹² Per the convention, this could be done through visual or sampling checks only.⁹³ On the other hand, new ships are bound to implement the rule right away.⁹⁴ Again, the convention has used the phrase "as far as practical," but it did not provide any further details as to whether any impracticability would be subjectively or objectively assessed. Ship-owners may always plead their incapability, which might be difficult to disprove or deny. Such inspection is likely to be cursory and still pass the standard set by the convention.

IV. The Survey and Certifications of Ships under the Hong Kong Convention.

As noted in the convention, a ship is usually subjected to survey and certification by the flag state in four circumstances.⁹⁵ The initial survey⁹⁶ is made when a new ship is built and

⁸⁸ *Id.* at Reg. 5.3.

⁸⁹ *Id.* at Appendix 2.

⁹⁰ In any case, it is open for a party ship to install prohibited material in a nonparty state by reflagging the ship.

⁹¹ HKC, *supra* note 23, at Reg. 5.2.

⁹² Interview with Md. Golam Kibria, Chief Engineer (Marine Engineer Officer Class -1 , UK) Country Manager, Bureau Veritas (Bangladesh) Pvt. Ltd., Dhaka (Aug. 25, 2016). *See also* Interview with Captain K.M. Jashimuddin Sarker, Master Mariner (Class-1, UK) Chief Nautical Surveyor (CC), Department of Shipping, Govt of Bangladesh, Dhaka (June 30, 2016).

⁹³ HKC, *supra* note 23, at Reg. 5.2.

⁹⁴ *Id.* at Reg. 5.1.

⁹⁵ *Id.* at Reg. 10.

⁹⁶ *Id.* at Reg. 10.1.1.

begins operation, that is followed by the renewal survey after every five years.⁹⁷ An additional survey would be needed if any changes are made during the ships operational life that may affect the onboard hazardous materials in its structure.⁹⁸ A final survey is made before the ship departs for recycling.⁹⁹ The main thrust of the convention's 'cradle-to-grave' approach is to maintain an unbreakable chain throughout a ship's life cycle from its birthplace to the deathbed.¹⁰⁰

Ownership of a vessel usually changes many times in its lifetime. The convention aims to ensure that all information on shipboard materials that may be a potential cause of hazard to health and environment are communicated effectively to the last dealmakers i.e. the recyclers. This helps the recyclers to plan and manage the hazardous waste in a safe and environmentally sound manner. To continue with this goal, the convention introduces an additional survey in case any structural changes take place, or other significant changes occur for example in ship's fittings, equipments, arrangement, and materials.¹⁰¹ This additional survey is consistent with the 'cradle-to-grave' approach but the obligation to get the ship surveyed by the flag state in such circumstances seems optional, and depends on the ship owner's requests.¹⁰² This is an instance of self-governance and the discretion sits improperly with other obligations on IHM survey and certifications as set forth by the HKC. IHM survey and certifications appear to be the pivotal responsibility imposed upon ship owners under the convention, but the irregularity, as pointed out, might destroy the whole substance of those provisions.

The flag state's administration is responsible for IHM survey and certification throughout the ship's lifetime and when the ship is delivered to the facility for recycling.¹⁰³ Additionally, the flag state has the duty to confirm if the Ship Recycling Plan (SRP) is consistent with IHM

⁹⁷ *Id.* at Reg. 10.1.2.

⁹⁸ *Id.* at Reg. 10.1.3.

⁹⁹ *Id.*, at Reg. 10.1.4.

¹⁰⁰ Bhattacharjee, *supra* note 59, at 221.

¹⁰¹ HKC, *supra* note 23, at Reg. 10.1.3.

¹⁰² Shipping companies already expressed doubt about the reliability of this convention obligation. Individual ship owners will judge how impactful this will be, as ultimately many shipping companies use their own survey system to cover this ambiguity in a reliable and predictable fashion. See *Summary on the new Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships*, LLOYD'S REGISTER, 6 (2009), <https://www.cdinfo.lr.org/information/Documents/IMOMarineServices2009/EXTERNAL%20Summary%20on%20Hong%20Kong%20ship%20recycling%20convention.pdf>.

¹⁰³ HKC, *supra* note 23, at Reg. 10.1.3.

prepared by the ship owners.¹⁰⁴ This includes overseeing the plan prepared by the Ship Recycling Facility (SRF) including the “enclosed space” and “safe for entry” procedures.¹⁰⁵ The flag state also has right to inquire and verify authorization of the ship recycling facilities.¹⁰⁶ After satisfying the three matters above, the ship is issued with a ready for recycling certificate (RRC) by the flag state.¹⁰⁷ Soon after the RRC is issued under the convention, the ship is immediately cleared by the flag state for beaching. The verification of the authorization of ship recycling facility is done by the flag state in its private capacity, both on the ship’s arrival to the recycling state’s anchorage and on the eve ship-breaking works are to begin.¹⁰⁸ At this belated stage, it makes little sense to verify the authorization of a SRF, as it is almost impractical as a business matter to outlaw the contract between ship owners and recyclers for any irregularity detected in the authorization process. The survey about the authenticity of the recycling facility is therefore arranged at a stage by the flag state when there is little a party can do based on the outcome of the survey.

Furthermore, the flag state or its authorized representative has no duty to make a physical inspection of the SRF to ensure its existing capability to efficiently handle the ship’s hazardous material. There appears to be a power available to the competent authority (CA) to make a physical investigation of the facility before issuing the SRP, but the CA is not contacted by the ship owner or by the flag states before permitting the ships to proceed towards the recycling state. Under the convention, the CA of the recycling state is also not bound to make a physical inspection before approving the SRP, which can be approved after 14 days of filing the application for the SRP.¹⁰⁹ The SRP is a ship specific document. Each inspection is unique and identifies the materials that deserve a direct, prompt, and detailed consideration. There appears to be a substantial concession made from the perspective of both flag and recycling states, in the verification process of the SRP, at the cost of workers’ safety and environmental protection.

¹⁰⁴ *Id.* at Reg. 10.4.1.

¹⁰⁵ *Id.* at Reg. 10.4.2.

¹⁰⁶ *Id.* at Reg. 10.4.3.

¹⁰⁷ *Id.* at Reg. 11.11.

¹⁰⁸ *Id.* at Reg. 4.3.

¹⁰⁹ HKC, *supra* note 23, Reg. 10.4.

V. The Port State Control and the Hong Kong Convention.

Under the convention, a port state control (PSC) of a party to the convention can request the flag state to carry out Inventory of Hazardous Materials (IHM) survey.¹¹⁰ The port state jurisdiction over the survey of IHM and RRC has been substantially limited by the convention.¹¹¹ In any case, however, there is little incentive for a port state to undergo an IHM survey and certification of an EOL ship, especially when the ship is being recycled in other parts of the world. When the port state happens to be the recycling state, the situation does not change either, because for the port state to intervene it must have information in hand about any substantial discrepancy in preparing the IHM that can trigger the port state's jurisdiction for a detailed investigation.¹¹² As noted earlier, the PSC is not required to be informed by ship owners prior arrival to the recycling state. The CA itself remains unaware about the arrival of an EOL ship until the application for issuance of the SRP is forwarded by the SRF that imported the ship.¹¹³ Again, there is no set deadline to file the application, and this could be done at a later stage. Even where the PSC believes a substantial discrepancy on the IHM exists, the convention does not make it mandatory for the PSC to carry on inspection of the IHM.¹¹⁴

VI. Hot Work and Gas Free Certifications of Ships Before Recycling.

The HKC requires the flag state to issue RRC based on an SRP approved by the CA of the recycling state. It appears that internationally, RRC is the final clearance by the flag state, after that, the recycling work can begin immediately after the ship is taken into the facility. The convention did not make clear at what stage the hot work and gas free certification of ships will be issued and who is responsible to ensure that. Shockingly, if the recycling state does not forbid it, there is no restriction against a ship-owner to directly drive even a super tanker or an Ultra Large Crude Carrier ("ULCC") on the beach of the ship-breaking states in loaded and uncleaned

¹¹⁰ *Id.* at Reg. 10.3.2.

¹¹¹ *Id.* at arts. 8.1, 8.2.

¹¹² *Id.* at art. 8.2.1.

¹¹³ *Id.* at Reg. 9. Note that in current practice of beaching, e.g. in Bangladesh, importers tend to wait for the next tide to file the application for the SRP before the Competent Authority. High tide suitable for beaching comes in 3 to 4 times a month, and this natural process negatively affects the Competent Authority's schedule of inspection.

Interview with Mohammad Ali Shahin, Coordinator in Bangladesh for NGO Shipbreaking Platform, Chittagong, Bangladesh (Aug. 4, 2016).

¹¹⁴ HKC, *supra* note 23, at art. 8.1.

conditions.¹¹⁵ This provision is alarming, as it widens the risk of creating a race to the bottom with tanker recycling among the ship recycling states.

VII. Preparation for Ship Recycling, Pre-cleaning and Approval of a Dangerous Method.

In ship recycling, the degree of pollution and threat to the human health and the environment varies considerably depending on the employment of recycling methods. Unlike the green recycling methods (e.g. dry-docking), beaching does not offer the ability to fully contain pollutants such as toxic paints, heavy metals, and dirty oils. The release of these toxic substances to the ocean in large amounts is unstoppable in the beaching method.¹¹⁶ Additionally, it is impossible to bring fire-fighting equipment and ambulances to the ship in case of an emergency.¹¹⁷ Due to the soft muddy land it is also impossible to use heavy duty cranes to lift heavy cut sections of a ship and prevent these from falling suddenly and directly from height onto the marine environment.¹¹⁸ This method, by its nature, is immensely polluting and dangerous, but the convention has fully legitimized this method of recycling. Conducting a sound hazardous waste management operation in the ecologically delicate coastal zone is questionable.¹¹⁹

VIII. The Convention's Role in Preventing a Race to the Bottom in Ship Recycling Business.

No sufficient green recycling capacity currently exists in the world to address ship-breaking needs.¹²⁰ In the last three decades, ship owners have consistently used South Asian

¹¹⁵ *Id.* at Reg. 8.3.

¹¹⁶ *Off the Beach! Safe and Green Dismantling* (NGO Shipbreaking Platform, Brussels, Belgium), at 7 (2009), http://www.shipbreakingplatform.org/shipbrea_wp2011/wp-content/uploads/2011/11/off-the-beach-report.pdf.

¹¹⁷ *Id.*

¹¹⁸ Shashank Bengali, *Adult and underage workers risk their lives in Bangladesh's rising ship-breaking industry*, LOS ANGELES TIMES (Mar. 9, 2016), <http://www.latimes.com/world/asia/la-fg-bangladesh-ships-20160309-story.html>.

¹¹⁹ Jain, Pruyt & Hopman, *supra* note 6, at 690.

¹²⁰ China National Shipbreaking Association has reported recently in an IMO meeting that they have available with them over 3 million LDT green recycling capacity per year. In Turkey, it is over 1 million per year. The EU has enough structures readily available for the project. The current green Recycling capacity of USA is 200,000 LDT/year. See FRANK STUER-LAURIDSEN ET AL., EUROPEAN COMMISSION DIRECTORATE GENERAL ENVIRONMENT, FINAL REPORT: SHIP DISMANTLING AND PRE-CLEANING OF SHIPS 6-8 (COWI ed., 2007), https://ec.europa.eu/environment/waste/ships/pdf/ship_dismantling_report.pdf.

beaches to dismantle their ships.¹²¹ Abolishing beaching completely and ensuring a zero-tolerance strategy against environmental pollution and threat to the human health would not make sense to the ship owners for pragmatic reasons.¹²² As a result, an attempt has been made by the shipping community to strike a balance by incorporating both green and non-green methods under the same umbrella regulation. The parties to the convention have chosen the term ‘environmentally sound management,’ leaving it to parties to eventually decide the method they wish to apply and define the meaning of environmental soundness as they deem appropriate. This wide discretion effectively creates a competitive disadvantage to the operators of green facilities. In short, the cost of ship-breaking varies greatly between the operation of an environmentally sound dry-dock and a beaching facilities, even within South Asian countries.¹²³ Under this approach, competing for business between owners of dry-docks in a developed country with owners of beaching yards in developing countries will be a daunting task.

IX. Safety and Environmental Protection.

The HKC did not attempt to seize a zero-tolerance policy to the inevitable human casualty and environmental degradation arising from ship-breaking in the beaching method. Notably, the beaching method is the principal method of recycling of ships currently available in the world¹²⁴ and practiced, since the 1960s, only by three dominant players in global ship recycling: Bangladesh, India, and Pakistan.¹²⁵ It is apparent that the convention drafters, after realizing the impossibility of abolishing beaching methods and ensuring zero tolerance, made an

¹²¹ Aiswarya Lakshmi, *78% Ships Dismantled in South Asian Beaches*, MARINELINK (Feb. 2, 2017), <https://www.marinelink.com/news/dismantled-beaches-south421563>.

¹²² Gopal Krishna Choudhary, *An analysis of the creation of a global ship recycling fund in the framework of the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships*, 2009 WORLD MARITIME UNIVERSITY 44 (2011), https://commons.wmu.se/cgi/viewcontent.cgi?referer=https://www.bing.com/&httpsredir=1&article=1101&context=all_dissertations.

¹²³ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An EU strategy for better ship dismantling*, at 3, COM (2008) 767 final (Nov. 19, 2008), http://ec.europa.eu/environment/waste/ships/pdf/com_2008_767.pdf.

¹²⁴ Secretariat of the Basel Convention, *Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships*, SBC No. 2003/2 §2.2 (2003).

¹²⁵ Marprof Environmental, Limited, *‘Good’ Landing vs. ‘Bad’ Beaching - and where ‘Intertidal Landing’ might fit*, MARPROF.NET (Aug. 31, 2018), <https://marprof.net/marprof-environmental-ltd/blog/landing-vs-beaching-vs-intertidal-landing/>; *see also*, INTERNATIONAL LAW AND POLICY INSTITUTE, SHIPBREAKING PRACTICES IN BANGLADESH, INDIA AND PAKISTAN: AN INVESTOR PERSPECTIVE ON THE HUMAN RIGHTS AND ENVIRONMENTAL IMPACTS OF BEACHING 7-8, 35 (2016).

indirect attempt to abate coastal pollution and the adverse impacts on health and the environment by emphasizing the training of workers, supplying adequate Personal Protective Equipment (PPE), emergency preparedness and response, and a system of monitoring record and reporting.¹²⁶

It is important to note that while training, using PPE, and conducting emergency drills may help avoid unnecessary and avoidable injuries, as well as environmental contamination, there are many hazards associated with beaching practice that are unavoidable as they involve acts of nature. For example, a sudden fall of a heavy cut section of ship's hull directly in water or on workers around the vicinity cannot be prevented by any grade of PPE. The semidiurnal tidal, up to 15-meters high, washes pollutants and toxic wastes out to sea at regular intervals, which can hardly be avoided by any amount of training or equipment.¹²⁷

X. Pre-cleaning, Gas Free and Hot Work Certifications.

For pre-cleaning, the HKC requires ships destined to be recycled conduct operations in the period prior to entering the ship recycling facility in a manner to minimize the amount of cargo residue, remaining fuel oil, and wastes remaining onboard.¹²⁸ The convention did not qualify the word 'minimize' nor provide any standard to measure the amount up to which the minimization of the cargo residue is required before pre-cleaning of ships begin. This could have been made clear by using words like 'as far as practicable using the best technology available in the industry.' Hence any reduction of oil, even a very negligible amount, would easily comply with this provision of the convention. While reduction of cargo residue, fuel oil, waste onboard is required, the HKC is silent about the most objectionable material: the hazardous waste that remains as part of the ship's structure.¹²⁹ Once the ship is beached it is dead for all purposes, and the opportunity to reduce oil from tanks and other residues conveniently and effectively by using

¹²⁶ Jain, Pruyn & Hopman, *supra* note 6.

¹²⁷ Only one ship recycling yard in Bangladesh has recently started to use floating barge with a crane to receive heavy cut sections of ships separated from the ship's hull. The ship's tank top or bottom floors are used as receptacles which are removed at the end of recycling process. This method to some extent helps to avoid ships part falling directly into the sea water but it slows down the recycling process substantially and is not suitable to be used in all weather conditions at sea.

¹²⁸ HKC, *supra* note 23, at Reg. 8.1.2.

¹²⁹ Saiful Karim, *Environmental Pollution from Ship Breaking Industry: International Law and National Response*, 22 GEO. INT'L ENVTL. L. REV. 185, 211 (2010).

ship's own power and auxiliary machineries, no longer exist. Explosions of toxic gases while carrying out ship dismantling operations is one of the major causes of concern in all the ship-breaking fields in South Asia.¹³⁰ Yet, the convention does not provide any duty to ship owners to ensure that ship's enclosed spaces and fuel tanks are certified and ready for hot work or gas free before they arrive at the recycling facility for recycling.

During negotiations of the HKC, India raised the seriousness of this issue, and all delegates present agreed it should be addressed. India's proposal was to ensure that, before the ship arrives at the recycling facility, all ship owners should guarantee the fuel tanks and enclosed spaces to be certified as gas free.¹³¹ However, no such regulation was ultimately included in the convention. The working committee believed that regulation nine of the convention covers the issue. Unfortunately, regulation nine merely requires the SRF to mention in SRP how the 'safe for entry' and 'gas free for hot work' conditions would be ensured, but it does not impose any specific duty upon ship owners nor upon the recyclers to confirm it before the ship is taken to the facility. Ultimately, who is responsible for these exceedingly important tasks is not clear. Having failed to negotiate in IMO working group meetings to include the safe for entry and hot work certification for all ships, India proposed to include an alternative provision, requiring at least the owner of tankers to send their vessels after certifying the slop and cargo tank is gas free and ready for hot work condition.¹³² This proposal was vehemently opposed by the ship-owners and later diluted, instead only requiring them to send their tankers to the recycling facilities ready for certification for hot work and safe for entry condition, but not certified ready for hot work or safe entry condition.¹³³ This requirement only applies before the ship arrives at the facility, and not before it arrives at the recycling state's territory. This means an oil tanker can carry cargo even on its last trip, until it reaches the recycling facility. Furthermore, this is subject to national laws, regulations, and policies of recycling states. Hence, it eventually would remain up to the national

¹³⁰ NGO Shipbreaking Platform, *South Asia Quarterly Update* 9 BRUSSELS 3 (Apr. 27, 2016), http://www.shipbreakingplatform.org/shipbrea_wp2011/wp-content/uploads/2016/04/SOUTH-ASIA-QUARTERLY-UPDATE-9-final.pdf.

¹³¹ See MEPC, *supra* note 35 at ¶ 38.2 (2007).

¹³² IMO, *Consideration of the Draft International Convention for the Safe and Environmentally Sound Recycling of Ships*, Submitted by India, IMO Doc. SR/CONF/26 (Apr. 2, 2009).

¹³³ HKC, *supra* note 23, Reg. 8.3.

authorities to ensure whether oil tankers arrive at their territories ready for certification or not.¹³⁴ As indicated earlier, this provision will promote unfair competition among the recycling states because imposition of a cleaning requirement on the tanker owners varies under each nation's laws.¹³⁵

For ships other than tankers there is no requirement in the HKC to ensure they are ready for certification before the ship's arrival at the facility. This means there is no requirement to clean the ship's oil tank, lubricating oil tank, sludge tank, or any other compartment containing oily substance before its arrival at the facility.¹³⁶ This prioritizes the convenience of ship owners and ship recyclers, and ignores the safety of workers and the environment around the facility. There was a proposal from the European Commission for removal of hazardous materials and gas freeing of ships before their final voyage to begin the pre-cleaning.¹³⁷ However, this proposal did not receive any positive responses in working group meetings because of serious reservations from certain ship owning countries and the shipping industry.¹³⁸ The arguments were that the proposal would overlap with many other provisions of the convention.¹³⁹ In particular, it was pointed out that the hazardous materials listed in annex one are part of ships' structure and propulsion machinery. Removal of all or even some of these would cause the ships to lose their propulsion power and render the ship unseaworthy, making it difficult to take it to a recycling facility that relies exclusively on beaching method of recycling.¹⁴⁰ However, ships which have already lost propulsion power are regularly towed to the recycling yard, so there is no justification for sending ships in uncleaned. Ultimately, the convention did not set any pre-cleaning requirement even for those dead vessels. Various environmental organizations

¹³⁴ *Id.*

¹³⁵ Karim, *Environmental Pollution from Ship Breaking Industry*, *supra* note 129.

¹³⁶ Fuel tanks, diesel oil, and lubricating oil tanks that are not necessarily being used for propulsion and not connected to the ship's maneuvering to the recycling facilities are not required to be cleaned, even before the ship is taken to the facility. Before arriving at the SRF, mean taker may come in a fully loaded condition and discharge at the outer anchorage. So, the whole cleaning process might end up in the recycling territory.

¹³⁷ See MEPC, *Recycling of ships*, *supra* note 35, at ¶ 27.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Karim, *Environmental Pollution from Ship Breaking Industry*, *supra* note 129, at 214 (citing NIKOS MIKELIS, DEVELOPMENTS AND ISSUES ON RECYCLING OF SHIPS, 8 (2006)).

advocated for a pre-cleaning regime to be executed by ship owning developing nations, however, this attempt was also defeated by the shipping industry.¹⁴¹

XI. Inspection and Detection of Violations.

The Hong Kong Convention seeks the parties' cooperation in detecting violation of ships and ship recycling facilities. If any party has sufficient evidence to prove that a violation has occurred, or is taking place by any ship, it may report the matter to the concerned member state at any port or offshore terminal for further investigation. If found to be true, the port state can impose sanctions by warning, detention, dismissal, or exclusion from its territory.¹⁴² A party can also make a complaint against a SRF if it believes it to be operating in violation of the convention's obligations.¹⁴³ However, it is hard to locate any incentives for a state party to complain about a private ship or a facility functioning in other parts of the world.

Under the Hong Kong Convention, any breach by a ship or a SRF will be prohibited respectively by the national laws of the flag state or recycling state.¹⁴⁴ Instead of invoking jurisdiction over a ship that violated the convention, a port state may choose to file a complaint with ship's flag state administration, if it so desires.¹⁴⁵ Under the convention, the port state has very limited jurisdiction to undertake inspection of an EOL ship for any grounds other than verifying the validity of IHM, provided that a substantial irregularity is also brought to light.¹⁴⁶ The question arises as to how these substantial irregularities could be discovered without first getting on board for a detailed investigation, but that seems to be prohibited by the convention.¹⁴⁷ If the administration is satisfied with evidence of violation adduced by a party, it can initiate legal proceedings against the EOL ship for alleged abuse.¹⁴⁸

The flag state must respond to the complaint promptly, but if no action is taken, it must notify the complainant with a reason for non-action within one year from the receipt of the

¹⁴¹ *Id.*

¹⁴² HKC, *supra* note 23, at arts. 9.2, 9.3.

¹⁴³ *Id.* at art. 9.4.

¹⁴⁴ *Id.* at arts. 10.1.1, 10.1.2.

¹⁴⁵ *Id.* at art. 10.2.2.

¹⁴⁶ *Id.* at art. 1.8.

¹⁴⁷ *Id.* at art. 8.

¹⁴⁸ *Id.* at art. 10.

complaint, with supporting evidence.¹⁴⁹ An EOL ship after arrival at the anchorage of the recycling state is expected to be taken to the facility as quickly as possible.¹⁵⁰ Currently, in Bangladesh,¹⁵¹ it takes approximately seven to ten days after the ship's arrival at the anchorage.¹⁵² After beaching, the entire breaking process usually is completed at the facility in around three to seven months.¹⁵³ Therefore, the one year deadline set by the convention to process the complaint is very long and, likely, would serve no useful purpose. This is the only complaint permitted under the convention to be filed by a contracting state against an EOL ship. The only obligation on ship-owners connected to ship recycling is to maintain an IHM certificate on board.¹⁵⁴ After the ship is taken to the facility, any complaint derived from the IHM becomes superficial and redundant.

The HKC also prohibits undue detention and delay of EOL ships caused by PSC while performing their convention obligations.¹⁵⁵ Otherwise, PSC authority is held liable to pay damage and compensation to EOL ship-owners.¹⁵⁶ This measure aims to avoid unnecessary delays in ship recycling operations. It is noteworthy that to address an allegation against an EOL ship attended by PSC's authority significantly augments the discretion vested upon the flag state, reducing it virtually to a vanishing point.¹⁵⁷ Moreover, there exists no well established complaint mechanism and no avenue of review, even if the reasoning offered by flag state is grossly

¹⁴⁹ *Id.* at art. 10.1.1.

¹⁵⁰ Interview with Md. Mokbul Hossain, Director, Department of Environment, Ministry of Environment and Forest, Chittagong Division, Chittagong (Aug. 1, 2016).

¹⁵¹ Bangladesh is currently considered the largest ship recycling country, as it produces annually the highest amount of steel from recycling EOL ships.

¹⁵² Interview with Md. Mizanur Rahman, Manager SENSREC Project and Deputy Secretary, Ministry of Industry Bangladesh, Dhaka (Aug. 12, 2016).

¹⁵³ Interview with MA Hashem, owner ZH Enterprise (Ship Breaking & Recycling) and Director Mother Steel Limited, Chittagong, Bangladesh (Aug. 2, 2016).

¹⁵⁴ The IRRC is issued right before the beaching process is carried out, and at this stage, it is unlikely to entertain any complaint from a party state.

¹⁵⁵ HKC, *supra* note 23, at art. 11.1.

¹⁵⁶ *Id.* at art. 11.2.

¹⁵⁷ First, under the Convention, the PSC has no jurisdiction to interfere with the movement of the EOL ship except for the verification of IHM. Second, the duty to verify the IHM has been made conditional upon finding a substantial discrepancy in the IHM Information. There is no precise mechanism to find out this information by the Port State. Finally, if there is any undue delay or detention made by the Port State in performing the duty, damage or compensation must be paid by the Port State to the EOL ship owners. It also appears that there is no defense to the PSC against wrongful detention even if there is a reasonable suspicion which leads to the unlawful detention.

irrational or unfounded. A similar difficulty exists regarding the filing of a complaint against ship recycling facilities operating in a party's jurisdiction.¹⁵⁸ The presumption of the convention that formal complaint against a private recycling facility or an EOL ship operator operating abroad should be initiated directly and only from a state party is devoid of practicality and not helpful. Foreign state parties may not have enough resources, incentives, intelligence, or adequate representation to gather and manage information on the condition of private ship recycling facilities operating overseas.

According to the convention, any violation of its provisions within the jurisdiction of any party are sanctionable according to the established law of the party who can either initiate a proceeding against a ship or furnish the administrators of that ship with such information and evidence.¹⁵⁹ On the other hand, in case of a ship, the convention requires that the sanctions be established under the law of the administration where the violation occurs.¹⁶⁰ It seems that the traditional uninterrupted jurisdiction of a flag state is retained for EOL ships. In the global ship recycling industry, ousting the authority of flag states and taking the benefit of more convenient regimes of open registries in ship's last voyage is unprecedentedly high in practice when a ship approaches the South Asian beaches for recycling.¹⁶¹ In order to discourage violations, parties are required under the Hong Kong Convention to establish adequate sanctions.¹⁶² Irrespective of the nature and degree of a breach, there is no requirement to impose any criminal obligations upon EOL ships, like other international waste conventions have prescribed.¹⁶³ Parties are

¹⁵⁸ HKC, *supra* note 23, at art. 10.1.2.

¹⁵⁹ *Id.* at arts. 10.2.1, 10.2.2.

¹⁶⁰ *Id.* at art. 10.1.1.

¹⁶¹ According to the NGO Shipbreaking Platform, in 2014, out of 641 EOL vessels beached in South Asia, 202 used flags that are used hardly for ships navigation at sea. Most of them are grey and blacklisted by the Paris MOU. See PATRIZIA HEIDEGGER ET AL., NGO SHIPBREAKING PLATFORM, WHAT A DIFFERENCE A FLAG MAKES: WHY SHIP OWNERS RESPONSIBILITY TO ENSURE SUSTAINABLE SHIP RECYCLING NEEDS TO GO BEYOND FLAG STATE JURISDICTION 12 (2015), available at http://www.shipbreakingplatform.org/shipbrea_wp2011/wp-content/uploads/2015/04/FoCBriefing_NGO-Shipbreaking-Platform_-April-2015.pdf.

¹⁶² HKC, *supra* note 23, at art. 10.3.

¹⁶³ Art. 9.1 and Art. 4.3 of the Basel Convention impose criminal obligation upon state parties for illegal traffic (i.e. shipment of hazardous waste by the exporting state without prior informed consent of importing state). Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal arts. 4, 9, May 5, 1992, 1673 U.N.T.S. 28911. An EOL ship is a recognized hazardous waste, but the HKC does not impose any criminal sanctions in similar circumstances, as apparent from the convention's text itself. See HKC, *supra* note 23, generally.

entitled to impose stricter conditions than the convention itself if they wish to do so.¹⁶⁴ It can be argued that this discretion is highly likely to be abused in the current uncertain condition of the ship-breaking global market. In the present race to the bottom climate, any further clampdown by any leading ship recycling state may either force the industry to relocate to the nearest competitors or a more impoverished part of the world.¹⁶⁵

XII. Communication and Information.

The HKC has attempted to establish a clear communication and information system among all the controlling stakeholders responsible for management and operation of ship recycling activities.¹⁶⁶ Each party shall report to the organization, which shall disseminate the information as appropriate to all state parties and the relevant stakeholders.¹⁶⁷ It is the responsibility of each party to collect data on ships under their registry and ship recycling facilities operating under their jurisdictions or otherwise authorized by them.¹⁶⁸ As ship recycling is an international activity, information exchange is crucial to ensure a degree of transparency and accountability between the contracting states.

The states are required to communicate the list of ship recycling facilities that they have authorized in their jurisdiction per the convention.¹⁶⁹ The convention provides a guideline for authorization of ship recycling facilities,¹⁷⁰ but it does not include any technical provision that is necessary for the uniform application of the SRF authorization process based on different recycling methods. The technical requirement of different ship recycling methods available internationally sharply contradict each other.¹⁷¹

¹⁶⁴ HKC, *supra* note 23, at art. 1.2.

¹⁶⁵ Interview by The Ecologist, Interview with Ingvild Jenssen, Director and Founder, NGO Shipbreaking Platform (Mar. 2, 2010), available at <https://theecologist.org/2010/mar/02/shipbreaking-clampdown-asia-will-send-it-africa>.

¹⁶⁶ HKC, *supra* note 23, at art. 12.

¹⁶⁷ *Id.* at art. 12.3.

¹⁶⁸ *Id.* at art. 12.

¹⁶⁹ *Id.* at art. 12.1.

¹⁷⁰ MEPC, *Guidelines for the Authorization for the Ship Recycling Facility*, IMO Doc. MEPC 63/23 (March 2, 2012), [http://www.imo.org/en/OurWork/Environment/ShipRecycling/Documents/211\(63\).pdf](http://www.imo.org/en/OurWork/Environment/ShipRecycling/Documents/211(63).pdf).

¹⁷¹ There are currently four different recycling methods known to the world. Khandakar Akhter Hossain, *Ship Recycling Practice and Annual Reusable Material Output from Bangladesh Ship Recycling Industry*, 7 J. OF FUNDAMENTALS OF RENEWABLE ENERGY AND APPLICATIONS 5, 3-4 (2017).

XIII. The Concept of a Single Contact Point Under the Convention.

Creating a concept of a single contact point¹⁷² in each ship recycling state is a welcome approach to avoid unnecessary administrative complexities and delays. The convention puts responsibilities upon state parties to provide the IMO with a list of recognized organizations and nominated surveyors which are authorized to act on behalf of the parties in the administration of matters relating to control of ship recycling activities.¹⁷³ There is also a requirement to provide information on the specific responsibilities delegated to the recognized organization, or surveyors and conditions of the delegation of the authority.¹⁷⁴ The annual list of ships flying the flag of that party to which an RRC has been issued, including the name of recycling facilities and the annual list of ships that have been recycled in the state and their violations are to be reported to the organization as well.¹⁷⁵

It should be noted that, the convention imposes reporting responsibilities for any violation of its provision committed by ships and recycling facilities¹⁷⁶ However, there is no requirement to disseminate information about any contravention by the delegates of state authorities. These delegated private entities should be accountable to the respective state authorities as well. Information regarding their violations is material and equally important to share among the stakeholders.

XIV. The Responsibility of the Flag State.

The inefficiency of the open registry, particularly the gray and blacklisted Flag of Convenience (FOC) to govern ship recycling activities has been well documented. There is plenty of room for self-indulgence and substantive misuse by the so-called cash-strapped developing nations in order to fill their national treasuries with a steady flow of registration fees.¹⁷⁷ FOC registry has already failed to prevent labor rights violations in the maritime

¹⁷² HKC, *supra* note 23, at art. 12.2.

¹⁷³ *Id.* at art. 12.3.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at art. 12.6.

¹⁷⁶ *Id.* at art. 12.

¹⁷⁷ Valentina Rossi, *The Dismantling of End of Life Ships: The Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships*, 2011 ITALIAN Y.B. OF INT'L L. 275, 287 (2011); *see also* J. Peter Pham, *An Inconvenient Flag*, FOUNDATION FOR DEFENSE OF DEMOCRACIES (June 14, 2011), <https://www.fdd.org/analysis/2011/06/14/an-inconvenient-flag-2/>.

industry, environmental pollution, or illegal fishing.¹⁷⁸ The convention has not only imposed upon the flag states sole responsibility to govern EOL ships but also limited the jurisdiction of port states, making it difficult to exercise their usual authority. It is well recognized that the cooperative effort between flag and port states provides a well organized maritime safety and environmental protection system, which has proven useful over the years.¹⁷⁹ Moreover, this was the very reason for the development of port state jurisdiction in international maritime law in parallel to the flag state jurisdiction in the port states territories.¹⁸⁰ These objectives appear to have been frustrated by this international convention, which serve none but the ship-owners and the recyclers.

IHM and RRC certifications are the only two responsibilities the Hong Kong Convention has imposed upon the ship-owners. These provide the basis of the ‘cradle-to-grave’ jurisdiction of the convention. It is apparent that the convention has substantially relied on these two certifications for ensuring safety and sound environmental management in ship recycling. The convention has entrusted jurisdiction to flag states, which in practical terms, includes failed, fragile, and cash-strapped nations. The convention on the other hand has significantly curtailed port state jurisdiction of recycling states.¹⁸¹ As a result, the so-called ‘cradle-to-grave’ claim of the convention is unlikely to realize its intended purpose.

Ship-breaking in tidal beaches has been operating in South Asian countries for almost forty years. This long experience has allowed the industry to gain firsthand knowledge and expertise about the shipboard hazardous materials and their contents. Several experts in the field suggest that conventional transmission of knowledge of onboard hazardous material through IHM certificates or exchanging other documents is not currently the major issue. Even where

¹⁷⁸ Carlos Felipe Llinás Negret, *Pretending to be Liberian and Panamanian; Flags of Convenience and the Weakening of the Nation State on the High Seas*, 47 J. OF MAR. L. & COM. 1, 15 (2016).

¹⁷⁹ *Id.* at 18.

¹⁸⁰ HEIDEGGER ET AL., *supra* note 161.

¹⁸¹ See HKC, *supra* note 23, at art. 8 (explaining that ship inspection by Port State Authority is limited to verifying that there is onboard either an IHM or RRC, which if valid, shall be accepted, and a violation must be *clear grounds* for believing the condition of the ship or its equipment does not correspond *substantially* with the particulars of the document, or there is *no procedure* implemented onboard the ship for maintenance of items listed in the IHM.). The HKC has further constrained the power to inspect ships by indicating that when a ship is unduly detained or delayed under the convention, the ship *shall* be entitled to compensation for any loss or damage suffered. *Id.*, at art. 11.

such reports were validly provided to any specific yard, frequent casualty at worksites, health hazards, and environmental disasters could not be avoided in any significant term.¹⁸² According to several experts interviewed, it is the dangerous method of ship recycling, lack of infrastructures, workers' skills and training, inadequate use of safety equipment, and lack of mechanization that contribute significantly to these problems.¹⁸³ Substantial emphasis has been given to the execution of a single piece of paper, the IHM, prepared by ship owners and verified by the flag states.¹⁸⁴ These pieces of paper reflect the existence, amount, and location of hazardous materials in a ship at any given time. A single certified document provided by a flag state, however, does not ease the rigor of beach breaking of ships in tidal beaches, save lives of workers engaged in the most dangerous occupation in the world, or reduce environmental catastrophe according to NGOs and labor activists.¹⁸⁵

The convention is silent on the pertinent issue of capacity of ship recycling facilities to meet the challenge that arises in breaking vessels on tidal beaches of the ocean. Some fundamental problems appear to be technological incapability, financial impotency, and scientific impossibility—all are long standing issues in beach breaking of ships in all developing countries, widely known by the industry since the 1980s. Instead of addressing these issues even in a rudimentary sense, the convention placed heavy reliance on paperwork. In practice, this documentation is executed by “fly by night” entities, namely the “cash buyers,” and verified by the cash strapped flag states.¹⁸⁶ Undisputedly, both these entities have substantial and direct pecuniary interest in getting their ships recycled in substandard facilities. Ironically, the role of such entities has been legalized and firmly established by the Hong Kong Convention.

¹⁸² Interview with Mohammad Ali Shahin, Coordinator in Bangladesh for NGO Shipbreaking Platform, in Chittagong, Bangladesh (Aug. 4, 2017).

¹⁸³ Interview with Captain Mohammad Sirazul Mawla Master Mariner (UK) and Chief Operating Officer, HR Ship Management (Government Registered Safety Agency), in Chittagong (Aug. 5, 2016); *see also* Interview with Chief Engineer SM Rashed Uzzman, Class 1 Marine Engr. Marine Surveyor, Marine & Offshore Division, Bareau Veritas (Bangladesh) Private Limited, in Chittagong (Aug. 5, 2016).

¹⁸⁴ HKC, *supra* note 23, at Reg. 5.

¹⁸⁵ Interview with Rizwana Hasan, CEO BELA, *supra* note 51.

¹⁸⁶ The material by which a ship has been built can be recorded by the shipbuilder or in IMO databases against each vessel's IMO number or elsewhere in an electronic database that may be available online at all times. These can also be updated by the ship-owner as and when changes are made.

XV. Recycling State's Obligations.

Under the convention, a SRF can operate only if it is authorized by the respective CA of the local jurisdiction.¹⁸⁷ Parties must have mechanisms to authorize, as well as control and monitor, all activities happening within a SRF.¹⁸⁸ Monitoring and controlling may take the form of verification of documents and physical inspection of the facilities and site inspection.¹⁸⁹ The power to authorize, control, and monitor the SRF can be delegated to bodies recognized by the CA of the recycling states, but the primary responsibilities would remain upon the CA.¹⁹⁰ The parties are obliged to notify the organization about authorities delegated to the recognized organization.¹⁹¹ The authorization is given for five years at a time.¹⁹² The convention did not consider the likelihood of conflict of interest that might lead to an arbitrary decision¹⁹³ and generous authorization of SRFs.¹⁹⁴ There is no provision for an independent audit to evaluate the compliance of these state entities, which have apparent vested interests that might conflict with enforcing the HKC.

The convention has specifically mentioned two instances where the permission of authorization may be withdrawn or suspended by the CA.¹⁹⁵ First, approval will be suspended or revoked if any of the conditions attached to the authorization of ship recycling facility is violated. Setting the benchmark for the terms approval, suspension, cancellation, withdrawal, and renewal are all matters entirely for the state parties to decide and should not be addressed within the international convention.¹⁹⁶ This approach has invested the parties with enormous discretion and caused another opportunity for a race to the bottom between ship recycling states. Notably, the other approach available, specific to authorization of a facility, is the power vested to CA to

¹⁸⁷ HKC, *supra* note 23, at Reg. 16.1, 16.2.

¹⁸⁸ *Id.* at Reg. 15.3.

¹⁸⁹ *Id.* at Reg. 16.2.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at Reg. 16.5.

¹⁹² *Id.*

¹⁹³ Ying Fang & Maximo Q. Mejia, Jr., *Reinforcing the Legal Framework for the Environmentally Friendly Recycling of Ships: A Brief Look at the Hong Kong Convention*, 48 INT'L PROC. OF ECON. DEV. AND RES. 91, 93 (2012).

¹⁹⁴ Bhattacharjee, *supra* note 59.

¹⁹⁵ HKC, *supra* note 23, at Reg. 16.6.

¹⁹⁶ *Id.* at Reg. 16.5.

suspend or withdraw SRF permits. This right is exercisable when a CA is denied entry to a recycling facility to perform its supervisory task. This power is self-evident and the incorporation of this provision in express terms in the convention does not add any real value.

XVI. Flag States' Role in Ship Recycling.

A flag state who is a party to the HKC, or the IMO,¹⁹⁷ can request information from the recycling state about the grounds for authorizing a facility.¹⁹⁸ The recycling state must provide such information promptly.¹⁹⁹ The requesting state might refuse to issue a RRC if the information is not provided.²⁰⁰ However, a response is unlikely to come from flag states who have questionable record of implementation, and usually invoke jurisdiction purely for economic motives.²⁰¹ Moreover, any stringency on the matter may quickly be addressed by ship owners through reflagging their ships to other providers, who would be more than happy to offer a much more flexible package for recycling of ships. Under the nationality principle, it is lawful for ship owners to take the benefit of convenience that each of the open registries offers.²⁰² There is, however, no accountability of ship-owners who, in breach of good faith, voluntarily chose a blacklisted registry to execute the IHM or the IRRC, creating a high degree of foreseeable threat to human health and the environment. These two certificates are claimed to be linked directly to the safety of life and preventing pollution of the marine environment. Without a doubt, questioning an SRF's validity by a flag state at the doorstep of the facility is unlikely to have any practical consequences.

After receiving the SRP approved by the CA of the recycling state, the flag state is required to verify whether the IHM complies with the convention and if the SRP accurately reflects the IHM.²⁰³ Yet, there is no corresponding duty upon the CA of the recycling states. A SRF owner upon receiving the RRC from flag state can take the ship right away to the recycling

¹⁹⁷ "Organization" means the International Maritime Organization. See HKC, *supra* note 23, at art. 2.4.

¹⁹⁸ *Id.*, at art. 7

¹⁹⁹ *Id.*

²⁰⁰ *Id.*, at Reg. 10.1.4.3. See also International Law and Ship Recycling, *supra* note 20.

²⁰¹ Niklas Krigslund, *Maersk vessels sailed under black-listed flag for final journey*, SHIPPINGWATCH (Oct. 17, 2017), <https://shippingwatch.com/carriers/Container/article9948964.ece>.

²⁰² Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 6465, art. 6. See also Awni Behnam, *The Ocean Trade in the New Economy: A Keynote Address*, 35 OCEAN DEV. & INT'L L. 2, 118 (2004).

²⁰³ HKC, *supra* note 23, at Reg. 10.1.4.2.

facility and begin the recycling operation subject to filing a report with the CA, without waiting for an acknowledgment of receipt.²⁰⁴ It seems that the convention has made the recycling states accountable to foreign flag states to protect the interest of the recycling states' public health and environment. Ironically, the recycling states' interests are not protected by this transaction and the flag states apparently have no genuine connection to protect such interest. However, they have a notable conflict of interest in accelerating the deal. The convention has delineated the responsibilities of stakeholders in such a way where the victim has been made responsible to polluters and their associates.

XVII. Recognition of Hazardous Wastes.

The IMO seeks to maintain a list of hazardous materials in the different international instruments it has adopted, but refuses to recognize the same materials when applied to EOL ships.²⁰⁵ Instead of using the term hazardous waste, it uses the term "hazardous materials" to denote the same thing. This approach can cause severe problems in integrating the body of existing international and regional laws including the Basel Convention, the Bamako Convention, and EU Waste Shipment Regulation. This failure to clarify the position of EOL ships, without creating a recognized exception, would allow other exporters of goods with hazardous waste content in structures to put forward an apparent and legitimate claim to be exempted from the stable international transboundary waste regimes. Shipment of other recyclable objects that contain elements such as radioactive substance and asbestos as part of inbuilt structure in a waste product can no longer be stopped under the Basel Convention or other waste regimes following the jurisprudence created by the Hong Kong Convention unless a clear exception is recognized in international laws for EOL ships.

In the absence of any exception explicitly created for EOL ships, how the ship recycling regime reconciles with other waste regimes is unclear. This creates further inconsistency in international jurisprudence on the cross-border movement of hazardous waste. Even if an

²⁰⁴ *Id.* at Reg. 24.3.

²⁰⁵ Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, Dec. 29, 1972, 1046 U.N.T.S. 15749 [hereinafter London Convention 1972]; International Convention on Oil Pollution Preparedness, Response and Co-operation, Nov. 30, 1990, 1891 U.N.T.S. 32194 [hereinafter OPRC 1990], Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, Mar. 15, 2000 [hereinafter OPRC-HNS Protocol].

exception is recognized, another difficult question remains: what justifies a separate regime for EOL ships from other waste regimes? It seems that creating a hidden exception for EOL ships has made the matter impossibly complex.

XVIII. The Duties of the Ship Recycling Facilities.

The ship recycling facilities are required to prepare a Ship Recycling Facility Plan (SRFP). The plan shall include policies ensuring workers safety, protection of human health and environment,²⁰⁶ and have a system in place to provide the implementation of the plan and achievement of its goal.²⁰⁷ It shall identify the roles and responsibilities of workers and employers including: a training program for workers,²⁰⁸ scheme for emergency preparedness,²⁰⁹ monitoring and record keeping, a system of reporting the discharge of emission, incident, accident, occupational disease, and other adverse effects to worker's safety and human health.²¹⁰

Ship recycling facilities are therefore required to establish and utilize procedures to prevent explosions, fire and other unsafe conditions at work by ensuring ships are safe for hot work,²¹¹ and prevent harm from a dangerous work atmosphere by guaranteeing safe for entry.²¹² They shall establish and utilize procedures to avoid accidents and occupational disease,²¹³ as well as prevent spillage and emission to avoid harmful effects on the environment and human health.²¹⁴

However, the most massive task upon ship recyclers has been imposed by regulation 20 of the HKC. Under this regulation, SRFs are required to ensure that all listed hazardous materials are removed extensively by using well informed workers, who shall be familiar with the convention requirements relevant to their task.²¹⁵ The workers are required to actively use the information contained in the IHM and the ship recycling plan before and during the removal of

²⁰⁶ HKC, *supra* note 23, at Reg. 18.1.

²⁰⁷ *Id.* at Reg. 18.2.

²⁰⁸ *Id.* at Reg. 18.4.

²⁰⁹ *Id.* at Reg. 18.5.

²¹⁰ *Id.* at Reg. 18.9.

²¹¹ *Id.* at Reg. 19.1.

²¹² *Id.* at Reg. 19.2.

²¹³ *Id.* at Reg. 19.3.

²¹⁴ *Id.* at Reg. 19.4.

²¹⁵ *Id.* at Reg. 20.1.

hazardous materials.²¹⁶ The process includes removing of hazardous liquids, residues, sediments, substances or objects containing heavy metals, paints, and coatings that are highly flammable and can lead to the toxic release, asbestos and asbestos containing materials, CFC, halons, and other hazardous materials remaining in the ship's structure.²¹⁷ The convention emphasizes use of competent hands, knowledgeable skilled and equipped workers, and supervisors to handle all these matters, but does not prohibit manual recovery of all these high grade toxic and hazardous substances such as asbestos or other asbestos containing materials. According to all professional organizations around the world, asbestos is an extremely dangerous substance for human health, known to cause cancer, and thus gives rise to threats at all levels of production and handling. There is no minimum level of exposure that does not cause a clinical effect.²¹⁸ Studies have concluded that all levels of asbestos exposure have demonstrated a connection to an asbestos related disease.²¹⁹

The words 'equipped workers' under the HKC do not necessarily refer to using PPE that guarantees complete protection of fatalities. The standard is left for domestic authorities to determine, without setting any specific criteria for useable technology, heavy equipment, instruments, or power tools which would guarantee minimum protection for workers. The standard set by the convention regarding 'equipped workers,' can be easily satisfied with a bare minimum of PPE supplied by the SRF. Under this provision a worker's right to be protected from unnecessary health hazard and death has not been adequately addressed in this convention.

XIX. Ship Owner's Responsibility.

Ship owners are required to inform the flag state in due time to arrange the final inspection and a survey to prepare the IHM.²²⁰ The IHM is issued when a new ship is commissioned and renewed subsequently in five-year intervals, and again when the recycling process begins.²²¹ This IHM certification forms the basis of the convention's 'cradle-to-grave'

²¹⁶ *Id.*

²¹⁷ *Id.* at Reg. 20.2.

²¹⁸ Brayton Purcell, LLP, *Worker Safety Despite Limits, No Safe Level of Asbestos Exposure*, ASBESTOS NETWORK (2018), <https://www.asbestosnetwork.com/Worker-Safety/>.

²¹⁹ *Id.*

²²⁰ HKC, *supra* note 23, at Reg. 24.

²²¹ *Id.* at Reg. 10.

jurisdiction. However, after a ship is delivered at the outer anchorage of a recycling state, it can be re-delivered to the SRF within a week, a day, or as little as a few hours.²²² A ship may not be re-flagged by 'cash buyers' after the original owner withdraws the flag from the ship.²²³ Thus, the beaching is often done under a flagless status.²²⁴ Rather than strengthening a chain of responsibility, the HKC afforded the beneficial owner of ships the opportunity to disguise and swap their responsibility with dubious entities like cash-strapped flag states. These fly-by-night entities or cash buyers legally assert themselves as ship-owners but never in fact engage in shipping, and as a result the assignment of duty barely impacts them in practice. These entities act as brokers by merely taking title in a ship for a momentary period, which has the effect of liberating them entirely from the whole chain of liabilities.

The convention does not use any independent mechanism to verify how the bare minimum requirements imposed on ship owners are carried out at the end. As a result, these are carried out in a grossly autoschediastic manner.²²⁵ The scheme of open registry has traditionally been used by ship owners as a tool for oppression, enabling violation of labor rights and tax legislation across the maritime industry.²²⁶ The doctrine was initially created for the private economic interests of shipping industry in a few developed nations and was subsequently followed by the entire shipping community out of pure financial motive.²²⁷ This doctrine is recognized as a self-inflicted injury of the maritime industry.²²⁸ However, it has survived the century under the theory it promotes utility by yielding the maximum benefit for people all over the world. Using the same doctrine for the purpose of ships where no transport of goods, service or freedom of navigation are involved promotes no public interest, and does not appear to be

²²² Interview with MA Hashem, Owner of ZH Enterprise and Director of Mother Steel Limited, *supra* note 153.

²²³ Tony George Puthucherril, *Trans-Boundary Movement of Hazardous Ships for Their Last Rites: Will the Ship Recycling Convention Make a Difference?*, 24 OCEAN Y.B. 283, 327 (2010).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Pham, *supra* note 177.

²²⁷ H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives*, 21 TUL. MAR. L. J. 139, 158 (1996).

²²⁸ William R. Gregory, *Flags of Convenience: The Development of Open Registries in the Global Maritime Business and Implications for Modern Sea Farers*, GEO. UNIVERSITY, ii (Nov. 1, 2012), https://www.oceanfdn.org/sites/default/files/Gregory_georgetown.pdf.

producing any such synergy. This cannot be justified under this popular moral theory of utility. The very justification for sustaining the open registry does not harmonize with the concept of an EOL journey or the EOL ship recycling. This controversial doctrine promotes freedom of navigation, but is moot when discussing terminating navigation of a ship. It can be cited as a classic example of the law being used as a vehicle of deception. The Hong Kong Convention has offered a tacit acceptance to this controversial practice, and discloses no reasonable grounds for what is tantamount to an official tolerance of global injustice or welcoming of further self-inflicted injury to maritime nations solely for the benefit of private interests.

XX. Workers' Rights, Safety and Training.

The SRFs are required to include a policy approved by governing boards, ensuring workers' safety and the protection of the environment, when preparing the SRFP.²²⁹ The strategy aims to minimize and eliminate, to the extent practicable, the adverse effect on human health and the environment caused by ship recycling,²³⁰ with a goal of continuous improvement of procedure and standard in ship recycling operation.²³¹ The policy would also include a wide range of programs on workers safety.²³² However, all these substantive rights come only as an organizational policy which may not be directly enforceable by workers under labor law in labor courts of recycling countries. A company policy usually is not directly executable by workers unless it is consistently applied and becomes part of a contract between the worker and the company.²³³ In all South Asian SRFs this employer-employee relationship does not exist in a traditional sense.

First, almost all the workers are temporary and not directly employed by their companies, and they are generally classified as independent contractors only. Second, all the rights discussed above are expressed in broad terms, with no specifics. It is difficult to establish liability against

²²⁹ HKC, *supra* note 23, at Reg.18.

²³⁰ *Id.* at Reg. 18.1.

²³¹ *Id.* at Reg. 18.2.

²³² *Id.* at Reg. 18. These include identification of responsibilities of workers and employer, training of workers, emergency preparedness, system of monitoring and performance, record keeping, method of reporting of discharge, emission, other potential of damage to the safety health and environment, including a system of reporting occupational disease, incident, accident and injuries at work.

²³³ David Cross, *Enforcement of company policies*, LEXOLOGY (May 17, 2015), <https://www.lexology.com/library/detail.aspx?g=b99dc11d-dbf9-4039-b291-f9ac5890ec1b>.

an employer where it is challenging to confirm which specific right was violated. Third, an SRF is under a duty to ensure that workers have an approved policy document available describing all these rights expressed in broader terms. So long as these program or procedures are in place, the provisions of the convention would be satisfied. Existence of even a rudimentary policy would still fulfill the demand of the convention and the specific content of all such rights would remain in the sole discretion of any individual facility. The HKC creates no universal standards concerning the result it seeks. A facility incorporating these rights under its policies must only take into account non-mandatory guidelines published by the convention, but has no obligation to apply them.²³⁴ This approach to workers' rights under the convention poses a significant challenge to all the law abiding companies who want to ensure adequate freedom of rights for their workers, given that tremendous degrees of unfair competition already exists within the market.

In some areas, there appear some specific responsibilities imposed upon the recyclers, such as worker's training²³⁵ and safe recovery of hazardous material from the structure of EOL ships.²³⁶ However, these provisions are not without flaws. A closer read reveals that there is no duty on the recyclers to personally undertake responsibility for training. The requirement is only to cooperate in the program and provide training.²³⁷ This strategy ensures that workers without any training cannot be recruited in ship recycling work.²³⁸ However, the HKC did not make it clear whose burden it is to bear the expenses of training and who is ultimately responsible for any accident or injury resulting from inadequate training. Moreover, most of the workers in this industry supplied by contractors are migrants and work only temporarily.²³⁹ It is difficult to see how one can ensure a successful scheme of training to build a skilled and experienced workforce, without guaranteeing the regular employment of workers. The convention is silent about establishing a steady and professional workforce. It acknowledges the role of independent

²³⁴ HKC, *supra* note 23, at Reg. 17, 18.

²³⁵ *Id.* at Reg. 22.

²³⁶ *Id.* at Reg. 20.

²³⁷ *Id.* at Reg. 22.2.

²³⁸ *Id.* at Reg. 22.3.

²³⁹ SARRAF ET. AL, *supra* note 24.

contractors,²⁴⁰ but does not clarify the accountability of an SRF for any misdemeanor of the contractors. In the absence of any clarification, it appears that an SRF may easily circumvent its responsibility for the workers' death and injury at work by appointing unprofessional and unscrupulous independent contractors. The convention requires the recyclers to engage skilled workers with appropriate utilization of the IHM and SRP.²⁴¹ There is a duty to ensure that all hazardous materials in the inventory are identified, labeled, packaged, and removed by skilled persons to the maximum extent.²⁴² The convention does not, however, mandate recyclers to use the best technology available in the market, instead it allows workers to carry out these daunting tasks manually.²⁴³

There is a duty upon the SRF to hand over untreated hazardous materials to the authorized disposal facilities.²⁴⁴ However, if there is no suitable disposal facility available in any recycling state, interim measures have not been addressed by the HKC. According to the former head of ship recycling division of IMO, Dr. Nikos Mikelis, who was closely associated with the adoption of the convention, this downstream waste management is outside the maritime jurisdiction of the IMO.²⁴⁵ Ironically, the convention has been open for ratification and enforcement since 2009 to all countries around the world without ensuring this *sine qua non* to ship recycling.²⁴⁶

XXI. Adoption of the Hong Kong Convention and Stakeholders' Participation.

The role of dominant ship recyclers, overbearing shipping industries, and state representatives of serious interest in ship owning countries is notable in the negotiating stages of

²⁴⁰ HKC, *supra* note 23, at Reg. 12.

²⁴¹ *Id.* at Reg. 20.1.

²⁴² *Id.*

²⁴³ *Id.* at Reg. 20.2.

²⁴⁴ *Id.* at Reg. 20.3, 20.4.

²⁴⁵ Interview by IHS Maritime, Interview with Dr. Nikos Mikelis (Sep. 6, 2018), *available at* https://www.youtube.com/watch?time_continue=2&v=4SDUWaa8Tgc&feature=emb_logo.

²⁴⁶ Currently, none of the three-developing South Asian giant ship recycling countries has a suitable or authorized downstream waste management facility available in place, but they are the first being encouraged on priority by the IMO to ratify the convention immediately. It is noted that without at least two of these three states ratifying the convention, it is impossible to fulfill the third entry into force criteria of the convention. *See India Prepares to Ratify the Hong Kong Convention*, THE MARITIME EXECUTIVE (Dec. 2, 2017), https://maritime-executive.com/article/india-prepares-to-ratify-the-hong-kong-convention#gs.U_QyHvo.

the convention.²⁴⁷ The environmentalists present at the meeting were hardly able to influence the decisions.²⁴⁸ Reportedly there was an overtly robust appearance of the shipping industry at all levels of the IMO meetings where the convention was mainly formulated and adopted.²⁴⁹ In working group meetings, the key players from the leading ship recycling nations were unrepresented, and Bangladesh, the largest ship recycling state in terms of volume of recycling, was never a participant in any intercessional working group meeting.²⁵⁰ In fact, there was fierce opposition by the shipping industries and ship owning countries to many sensitive provisions, such as the inclusion of a list of hazardous materials as provided in other IMO conventions²⁵¹ and the necessary pre-cleaning of ships before they are exported to the recycling states.²⁵² These matters were formed part of the draft convention originally but were subsequently deleted from the convention on grounds that were mostly untenable.

The proposals of the European Commission for a final survey, an inventory of hazardous materials, a ship recycling plan, arrangement for removal and safe recovery or disposal of hazardous materials before the final voyage, and gas-freeing were all rejected.²⁵³ It was argued that the European Commission's proposals contradict many other provisions of the convention,²⁵⁴ without clearly indicating which provisions are contradictory and why these contradictions are unreconcilable. The Indian proposal to implement a certification requirement for ships' tanks was acknowledged as a critical issue by all participants in the meeting, but in the end, it was rejected outright without any cogent explanation for its deletion from the draft.²⁵⁵ At least a trimmed version of this law has been accepted despite vigorous opposition by most of the delegates from shipping companies. The limited law requires the ship-owner only to send a

²⁴⁷ See KARIM, PREVENTION OF POLLUTION, *supra* note 85, at 80.

²⁴⁸ See Rizwana Hasan, Final Speech of the NGO Platform on Shipbreaking at the International Conference on the Safe and Environmentally Sound Recycling of Ships, Hong Kong (May 15, 2009), https://www.shipbreakingplatform.org/wp-content/uploads/2019/01/IMOSpeechRIZWANA_HASAN1.pdf.

²⁴⁹ KARIM, PREVENTION OF POLLUTION, *supra* note 85, at 94.

²⁵⁰ Karim, *Environmental Pollution from Ship Breaking Industry*, *supra* note 129, at 221. See also Saiful Karim, *Recycling of Ships*, Switzerland, SPRINGER 101 (2015).

²⁵¹ Karim, *Environmental Pollution from Ship Breaking Industry*, *supra* note 129, at 210.

²⁵² KARIM, PREVENTION OF POLLUTION, *supra* note 85, at 91.

²⁵³ *Id.*

²⁵⁴ Karim, *Environmental Pollution from Ship Breaking Industry*, *supra* note 129, at 211.

²⁵⁵ KARIM, PREVENTION OF POLLUTION, *supra* note 85, at 95-96.

tanker to the facility ready for certification, but not yet certified ready for hot work.²⁵⁶ This provision is further diluted by making the rule conditioned upon the demand of recycling states.²⁵⁷ This effectively encourages the cash-strapped recycling countries to keep the threshold low to attract more business. Based on the prevailing culture of a ‘race to the bottom’ in the large recycling nations, it is extremely uncertain how much of this discretionary provision would survive, if at all.

Surprisingly, it was not only the shipping industries and developed shipbuilding nations, but also the highest bureaucrat from the IMO itself that consistently promoted the controversial idea of tidal beaching. Considerable attempts were notable during committee deliberations. According to Mikelis, there are some fundamental justifications for the continuation of tidal beaching as an acceptable method of recycling of ships in international law. First, the economic and political interests of Bangladesh, India and Pakistan, who have dominated the recycling industry for last several decades and employ this method. Second, without at least one of these three countries, the convention cannot be enforced even if the rest of the world ratifies it.²⁵⁸ According to Mikelis, this convention was developed with these three countries in mind.²⁵⁹

It is clear from the above comments of the top IMO official on ship recycling that inclusion of beaching method as an internationally accepted practice was a sort of compromise with prevailing practical realities of the world’s ship recycling industry. This scenario is indeed a result of ship owning nations exporting the costs of ship-breaking, an injustice prevailing the world over the last three decades. It was also known to the drafters of the HKC that these countries are unable to ensure environmentally sound management because of their financial incapability. However, this background reality does not correspond with the comments made by the IMO chief regarding ship recycling in connection with the drafting of the convention:

²⁵⁶ Karim, *Environmental Pollution from Ship Breaking Industry*, *supra* note 129, at 215.

²⁵⁷ *Id.* at 214-216.

²⁵⁸ *India Prepares to Ratify the Hong Kong Convention*, *supra* note 246.

²⁵⁹ See Interview with Dr. Nikos Mikelis, *supra* note 245. IMO’s active support in the beaching methods is also notable in different comments made by the most senior official of the IMO in ship recycling division. The head of pollution prevention, Nikos Mikelis, said "environmentalists present Bangladesh with a false choice. They say they are happy to have the industry, but not on the beaches. Where do they want it? In the mountains?" *Ship Breaking in Bangladesh Hard to Break Up*, THE ECONOMIST (Oct. 27, 2012), <https://www.economist.com/asia/2012/10/27/hard-to-break-up>.

“the underlying philosophy of the IMO Convention is to establish common standards for all ship recycling operations, without distinction as to which part of the world they take place, or the economic situation of the country in which they are carried out.”²⁶⁰

Read together, this evidences the continued inconsistency and vagueness around fixing a sound policy, a recurring issue in the convention. The above statement by the IMO chief of ship recycling contradicts the earlier intention of the proponents of this international convention. Although the proponents claimed that the instrument is applicable universally irrespective of geopolitical and economic circumstance of the member states, the drafters of the convention have chosen a criterion that is applicable only to a specific geographical location. The cost involved in beaching and the cost of dry-docking varies so significantly that it is impossible to sustain ship recycling business when these two are considered in otherwise equivalent terms in the same domestic market. In the international market the situation is worsened with a vast difference in labor cost²⁶¹ and standards of safety and environmental regulation, especially when comparing developed and developing countries. Indeed, sustaining a competitive dry-docking business in a developing country becomes next to impossible.

It is clear the IMO cannot deny that the regulation of SRFs would mostly apply to the three developing countries mentioned as a practical matter. The drafters were aware that the convention is setting a high threshold of standard in safety and environment that is virtually impossible in the current economic climate of those states. The HKC has attempted to almost entirely relieve the ship owners from core responsibilities to address the negative externalities involved in ship recycling. This approach has resulted in shifting the entire burden to ship recyclers, who happen to be members of the most impoverished part of the world. This issue was addressed delicately by the convention. The convention reserved vast discretion in the standards of performance by ship recyclers so that virtually all obligations of the convention can be met

²⁶⁰ Dr. Nikos Mikelis, Developments and Issues on Recycling of Ships at The East Asian Seas Congress, Haikou City, Hainan Province, PR China (Dec. 12-16, 2016), http://www.imo.org/blast/blastDataHelper.asp?data_id=17980&filename=Developments.pdf.

²⁶¹ It was reported that in the late 1980s, the average disposal cost for one tonne of hazardous waste in Africa was between \$2.50 and \$50 (USD), while in the OECD it ranged from \$100 to \$2000 (USD). See Jonathan Krueger, *The Basel Convention and the International Trade in Hazardous Wastes*, 2001/2002 Y.B. OF INT’L CO-OPERATION ON ENV’T & DEV. 43, 43-44, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.200.6196&rep=rep1&type=pdf>.

even by a low performer in recycling state. A great deal of legal loopholes and convoluted language have been used by the convention to camouflage the responsibilities of dominant stakeholders both nationally and globally.²⁶² The failure of the European Commission, NGO activists, and leading South Asian ship-breaking governments to ensure basic provisions to safeguard their interests can be seen in the HKC's final version.

India's extreme disappointment expressed before the conference of the parties to the Basel Convention is noteworthy. The meeting was about the massive failure to secure a minimum metric in almost all the sensitive issues covered by the ship recycling convention. India's failure is equally shared by the leading ship recycling nations of South Asia. Although abundant in population and workforce, these countries have lacked the capacity to ensure the basic infrastructure and funding needed for a safe and environmentally sound ship recycling. The proponents of the convention, dominated by the shipping industries and shipping nations, atrociously reject this reality. Accordingly, the Basel COP adopted the following decision in a categorical term:

"The Conference of the Parties . . . [i]nvites the International Maritime Organization to consider further incorporating clear responsibilities of all stakeholders in ship recycling, including ship owners, ship recycling facilities, flag States and ship recycling States, also taking into account their current capacity and the common but differentiated responsibilities and sovereign rights of the Parties."²⁶³

XXII. Conclusion and Recommendations

The above discussion has identified the following policy issues, which are recommended to the International Maritime Organization for possible implementation in future. This includes a mandatory funding arrangement to develop infrastructure in ship recycling states through contributions from various stakeholders including ship-owning nations, flag state nations, ship recycling states, international organizations, donor agencies, and ship recyclers' and owners' associations under the principle of common but differentiated responsibilities. This funding should be administered and distributed proportionately by competent international organizations

²⁶² Puthucherril, *supra* note 223, at 326.

²⁶³ Conference of the Parties, Basel Convention, *Decision VIII/11: Environmentally Sound Management of Ship Dismantling*, ¶ 5, http://www.ciesin.columbia.edu/repository/entri/docs/cop/Basel_COP008_011.pdf.

to ship recycling states based on previous five year record ship recycling by tonnage processed. This should also be reviewed every five years. More specific recommendations include:

- (1) A single journey exception to be created for EOL ships under the authority of the flag of the recycling states where the vessel is destined for recycling. Under this special end of life voyage, there should be no cargo carried onboard.
- (2) Taking undue advantage of the Flag of Convenience (FOC) and freedom of navigation with black- and gray-listed flags should be prohibited for the end of life vessels whose owners have decided to end navigation in international waters in order to scrap vessels. The administration should be taken over by flag states of the contracted ship recycling states before its last voyage begins.
- (3) Introduction of a consent requirement from competent authority of recycling states before exporting EOL ships for recycling to a recycling state. A precise, streamlined procedure of communication may be implemented for this purpose.
- (4) Separate and defined responsibility should be ensured for all intermediary stakeholders approved by the convention including cash buyers, contractors, sub-contractors, and leaseholders of authorized ship recycling facility in ship recycling states.
- (5) Ensure uniform technical and financial provisions for beaching methods in international law.
- (6) Arrangement to compensate recycling states, for environmental degradation and enhanced casualty arising out from beaching method, should be ensured by introducing the polluter pay principle. These provisions can be enforced against each ship from the end of ship recycling states according to a standard policy.
- (7) Record the IHM for a given ship against each ship's IMO number, and make records available online at the cost of ship-owners. These document may be updated as soon as a new inspection, or any structural change is made. This provision would not remove the requirement to hold a hardcopy of IHM onboard.
- (8) The ship-breaking labor regulations should be harmonized among ship recycling states, taking account of the special risks involved in ship-breaking work. Alternatively, a separate regime in international law (similar to the Maritime Labor Convention) incorporating the special rights of ship-breaking workers should be considered.
- (9) Standardization of worker training for ship-breaking and creation of a pool of minimum number of permanent workers should be ensured.
- (10) Enhance penalty provisions for intentional violation by ship owners and ship recycling facilities, and ensure a swift complaint procedure.

- (11) A clear and uniform disclosure policy about the activity of EOL ships and ship recycling facilities should be introduced in all ship recycling countries to enhance public accountability.
- (12) Mandatory liability insurance for pollution liability and workers injury.
- (13) Abolish manual work to the maximum degree possible based on the feedback received from the stakeholders.
- (14) Standardization of downstream waste management services across ship recycling nations.
- (15) An amendment to the convention as soon as possible, focusing on three fundamental areas: ship recycling method, pre-cleaning method, and the distribution of the fair share of financial responsibility, based on feedback received from major ship recycling states.

Without a doubt, the Hong Kong Convention has posed a potential threat to all three leading ship-breaking nations by promoting race to the bottom among these economically vulnerable countries. If fundamental issues such as ship-owner's liability, responsibility of states having jurisdiction over EOL ships, sources of funding, externalization of negative costs to coastal environment of ship-breaking nations, are not adequately addressed as recommended, the real contributions of this much awaited convention for this global industry of ship-breaking would amount to too little, too late.²⁶⁴

²⁶⁴ See European Parliament Resolution of 26 March 2009 on an EU Strategy for Better Ship Dismantling, 2010 O.J. (C 117) 1.