Incorporation of global environmental norms into Indian legal systems: Social and economic challenges, with special reference to ship-breaking

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Abstract

Some of the significant issues in the emerging economies have been the fact that these economies thrived on compromises that they made with their environment and human rights. Right at the Stockholm Conference the rift between ‘Developed’ and ‘Un-developed’ nations was apparent, with the latter demanding more development to sustain and advance their economies. The demand was greeted by the advanced nations in form of technology that was being weaned off and industries which were potentially polluting. This benevolent dictatorship was acceptable to the receiving economies and they were now re-christened as ‘Developing’ as they too had access to the technology of Northern nations. Some countries including India benefitted from this approach due to availability of cheap labour and its willingness to have lax environmental norms to host such activities. One such industry is ‘ship-breaking’. Breaking down of vessels has always been a vexing issue for the developed countries. High labour cost coupled with unwillingness to work, human rights issues and stringent environmental norms makes this activity an extremely expensive affair. India harbours the largest scrap yard of the world at Alang. With minimal norms on paper and meager implementation of those, in this area India beats even China. Its competitors Pakistan and Bangladesh remain weak solely due to their size. However, the past-decade has seen awareness over these issues in India and the ‘NIMBY’ attitude is being loathed by social groups mounting pressure on the Government, to have stricter norms. Further, India may face a backlash in terms of business in rejection of its products due to their non-compliance with global standards. Domestic and international pressure for stringent norms has led to a peculiar situation. This paper investigates into the aforesaid issues with ‘ship-breaking’ as an example and further finds out the possible solutions to the problem.

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1. Introduction

The drifting of MV Wisdom on Juhu beach in July has set in another round of debate on the ‘Ship-breaking’ activity carried out in India. There seems to be no unanimity on any issue related to it. While Human-Rights and Environmental activities loath it due to its hazardous nature, the industry seems to desperately want the scrapped material at cheap rate. Further the fact that it provides employment to quite a good number of unskilled labourers seems to be a scoring point in favour of this activity.

Ship-breaking is the process of dismantling and breaking down a vessel which has been discarded or scrapped. This activity is normally conducted at a pier, drydock or dismantling slip and it includes a wide range of activities, from removing all gear and equipment to cutting down and recycling the ship’s infrastructure. Ship-breaking is a challenging process, due to the structural complexity of the ships and the many environmental, safety, and health issues involved. Alang located on the western coast of Gulf of Cambay, in the western part of India, is the largest ship-recycling yard in the world. Ever since its inception in 1982, Alang has emerged as one of the choicest ship-scrapping destinations for the ship owners around the world. Hundreds of ships from all over the world find their final resting place in Alang every year. There are about 173 plots to carry out the ship-recycling activities. This activity forms an industry by itself, as it provides around 30,000 jobs in Alang itself and generates steel totaling to millions of tons every year (Florent Pesley)

Large merchant vessels, luxury liners and naval ships are brought to the scrap-yard for breaking down every year. The process exposes the workers and the environment to harmful chemicals and substances like asbestos, polychlorinated biphenyls, lead, mercury and other heavy metals, chlorofluorocarbons amongst others. The workers are also exposed to loud noise and have to work in confined conditions. They are often exposed to the risk of fire which could ignite from insulation, matting, lagging and residual fuel, lubricants and other flammable liquids. The activity flourishes due to availability of cheap labour willing to work without adequate training or proper personal protective equipment. The environmental norms are often much less stringent as compared to global standards or those of advanced economies. The implementation of the rules and regulations is marred by exercise of discretionary power for short-term gains, by corrupt and unscrupulous practices.

‘Clemenceau’ a French warship and “Blue Lady” a Norwegian luxury liner which came to Alang for breaking down raised the most controversial questions on this activity. There were lot of protests against breaking down of these ships and petitions were filed in the Supreme Court of India. While ‘Clemenceau’ was recalled to return back to French waters in February 2006 by the French Government, “Blue-Lady” managed to sail through protest and legal process to remain to be dismantled at Alang. It is noteworthy that President Jacques Chirac ordered ‘Clemenceau’ to return following the judgment of Conseil d’ Etat that considered such operation illegal. The recall of Clemenceau is said to have had a negative impact on the industry at Alang. Hence, the ship-breaking industry saw ‘Blue-Lady’ as a new opportunity to foster the development of Alang and welcomed it even though it was considered to containing asbestos and toxic waste.

A study of the journey of ‘Blue-Lady’ to Alang at this juncture would provide with useful insights into the legal and economic aspects of this industry. Formerly the ship was known as ‘SS Norway’ and explosion of boiler in 2003 had killed seven of its crew members. The ship was then towed to German water and then docked in Malaysia in 2005 to become a floating hotel. However, it further moved to Dubai and then to Bangladesh where it was refused entry by the Bangladesh Government because of the hazardous waste it contained. In May 2006 the ship moved towards Alang but was prevented entry into the India waters due to an order of Indian Supreme Court. On the onset of monsoon the owner of the ship pleaded humanitarian grounds and obtained the permission of the Court to anchor the ship at Pipavav port near Alang. About 25 days after it was anchored, it was beached at Alang violating the order of the Supreme Court. Beaching is an irreversible process. During this period SS Norway was sold to Bridgend Shipping of Monrovia for scrapping. It was then sold to Haryana Ship Demolition Pvt. Ltd, which finally
sold it to Priya Blue Industries Pvt. Ltd., a ship breaking company in Alang. Such a practice is commonly used by ship-owners from Developed Nations in order to avoid their obligations to decontaminate ships before they send it for scrapping.

Often differences in national laws lead to multinational companies to locate their operations in countries with lax environmental regulation. This results in harm to the environment of these countries as well as to indigenous people living in the area of the activity in question. Remedies are often not available in the country where the activity is conducted: the activity itself is usually lawful there, and affected indigenous people typically lack access to effective remedies in their home.

2. International legal framework pertaining to ship-breaking

The Basel Convention on the Control of Trans Boundary Movement of Hazardous Wastes and their Disposal is the most comprehensive treaty pertaining to this aspect. The strict environmental standards in industrialized countries led to a dramatic rise in the cost of hazardous waste disposal. Therefore, ‘toxic traders’ began shipping hazardous waste to developing countries where there were no facilities to dispose hazardous waste in environmentally sound manner (Basel Action Network). The Convention contains an exhaustive list of products and materials that it considers to be hazardous wastes. It applies to the wastes that are defined as, or are considered to be hazardous wastes by the domestic legislation of the party of export, import or transit. Article 6 of the Convention states that, ‘the State of export shall notify, or shall require the generator or exporter to notify, in writing, through the channel of the competent authority of the State concerned of any proposed trans boundary movement of hazardous wastes or other wastes’, thereafter, State of import shall, ‘shall respond to the notifier in writing, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information’.

According to Article 4(1) (c) of the Convention, Parties ‘shall not permit the export of hazardous wastes and other wastes to the parties which have prohibited the import of such wastes, and shall prohibit or shall not permit the export of hazardous wastes and other wastes if the State of import does not consent in writing to the specific import.’ Since the precaution has to be taken by the exporter, India as an importer is in conformance with the Convention.

In 1995 ‘Ban Amendment’ was proposed to the Basel Convention. It bans export of hazardous wastes for final disposal and recycling from what are know as Annex VII countries (Basel Convention Parties that are members of the EU, OECD, and Liechtenstein) to non – Annex countries (all Parties to the Convention). In order to evade the liability under this article, usually the ship sails through the hands of various owners and a different flag for varied purposes before it is finally harboured in India for breaking down. The regime thus only superficially tries to control the movement of hazardous waste and the waste manages to travel to India due to sheer lack of stringent environmental norms.

A little deeper insight into the detours of ‘Blue-Lady’ would show as to how easily the obligations can be surpassed. The ship-breakers normally resort to proxy-buying, a convenient lacuna that permits the buyer and seller to evade the laws that would have led to huge expenses. If ‘Blue-Lady’ were to be dismantled in, the owners would have required decontaminating the ship in Germany itself under the Basel Convention. This exercise would have cost the owners about 30 million euros. To avoid this, the ship was sold to Bridgend Shipping for an obscene amount of $ 10. It does not require a prudent man much imagination to guess the real price that obviously was paid off the record. Hence, proxy buyers are also called as ‘cash buyers’. Thus proxy buyers permit the ship-owners to keep up their reputation and avoid the cost of decontamination.

It is estimated that the controversial ship contains about 1,700 tonnes of asbestos, asbestos containing material and radioactive material Americium 241. If inhaled or ingested the same can remain in human body for decades and poses a potential threat of cancer to the workers working around the ship.2 Ship owners from richer countries buy a ‘flag of convenience’ in order to circumvent the provisions in
international law. On record India receives ships from countries like Liberia, St. Vincent, Grand dines and even land locked Mongolia and Tuvalu which make quick buck in return.

India needs to revamp not only its laws but also its philosophy towards environmental protection. Right from Stockholm conference in 1972, India has demanded ‘development’ to eradicate hunger and poverty which are more pressing issues. In theory the Government has tried to achieve ‘sustainable development’ but the attempt has failed even on paper. In practice compromise on environmental concerns is flagrantly evident in every possible area, from building dams to mining, from setting up power stations discharge of effluents the policy makers seem to have believe that resilience of natural resources is omnipotent. We also need to thoroughly investigate into whether this approach has at least removed the poverty? Or has it led to exploitation of workers and made them live in inhuman conditions? The Developing Nations have always been suspicious of the design of Developed Nations of exploiting there resources and using their weak laws against them in international trade. India has also faced such backlash when its products were under a scanner for using pesticides, improper fishing nets or child labour in some industries. The Indian Government needs to spare its though in allowing the environmental laws to be paper tigers as in future these may prove to be a live threat to its exports.

3. Legal regime in India for environmental protection:

As discussed in the foregoing paragraphs the laws in India are too feeble to protect the environment and people. The only two legislations that have touched upon the issue of hazardous wastes are the Environment Protection Act, 1986 under which the Hazardous Waste Management and Handling Rules have been formulated and The Public Liability Insurance Act which provides for a mandatory insurance policy in case of dealing with hazardous substance. Import of asbestos is banned under Rule 12 (1) of the Hazardous Waste Management and Handling Rules under the Environment Protection Act, 1986.

The Supreme Court of India has been proactive in protecting the environmental interests. However, in case of ship-breaking the Court does not seem to have taken a firm stand. At the time of the Clemenceau controversy the Supreme Court by an interim order prohibited the ships entry in India waters. It formed a committee to study into details of all the aspect of ship-breaking but before it could deliver an epoch making judgment, the ship was recalled. The judgment in the ‘Blue-Lady’ case however has been on completely different lines. It is noteworthy that the Supreme Court also ignored the fact that Blue-Lady was anchored in violation of the Court’s interim order.

The Supreme Court of India has given number of pro-environment decisions. It has on some occasions taken up to itself the task of framing a sustainable policy to tackle issues before it. The Taj Trapezium case, the Delhi vehicular pollution case or the Ganga pollution case could be cited as examples. The Court has also adopted international principles in its judgments. In Vellore Citizen’s Forum v/s Union of India the Supreme Court categorically laid down that the ‘Precautionary Principle’ and the ‘Polluter Pays’ principle form a part of the law of the land in India. The Precautionary Principle puts the onus of proving that the disputed activity is environmentally benign on the person undertaking the activity. It further states that lack of scientific clarity on environmental consequences of the activity should not be a reason to continue with the activity, it rather should be the reason to prohibit it. Applying this principle to ship-breaking would have sufficed to stop this in Indian waters. The ‘Polluter Pays’ principle lays down that the polluter should not only pay for the cost of removing the pollutants but also the cost of regeneration of the environment as well as compensating the victims. The Supreme Court has also propounded the ‘Absolute Liability Principle’ in M.C.Mehta v/s Union of India, holding the polluter absolutely liable for all the consequences of his acts. The Court applied this principle in Indian Council for Enviro-Legal Action v/s Union of India and it needs to be applied in case of ship-breaking.

However, while deciding the ‘Blue – Lady’ case the Supreme Court said, while applying the principle of ‘Sustainable Development’, the ‘Principle of Proportionality’ should be borne in mind. The Bench
observed,” It is an exercise in which we have to balance the priorities of development on one hand and environmental protection on the other hand.” While relying on the ‘concept of balance’ the Court relied on the keynote address delivered by Lord Goldsmith, former Attorney General of the United Kingdom, on “Global Constitutionalism”, as reported in the Stanford Law Review (Vol. 59, at p.1155). Goldsmith used the concept of balance, outlined in the lecture, to justify a law enacted in the United Kingdom in the wake of 9/11 to deal with foreign nationals who were thought to present a risk to national security, but could not be deported. The law provided for their detention if they would not leave voluntarily. Goldsmith argued that the Act was enacted keeping in mind the need to strike a balance between collective security and individual liberty, and it contained significant safeguards. Applying this principle to environmental law would be alien to the precautionary principle, which has held the ground all these years. The Bench added that though the court was not in favour of discontinuance of the ship-breaking activity, it should be strictly and properly regulated. In the case of Blue Lady, the court was satisfied with the approval given by the Committee of Technical Experts on Ship Breaking Activities, appointed by it, to the Dismantling Plan submitted by the recycler company. According to the plan, the major quantity of the ACMs (asbestos containing materials) on board is in the form of wall partitions, ceiling and roofing in rooms and the gallery, and is reusable. Therefore, the panels, partitions, ceilings and so on had to be removed in such a way that the ACMs were not damaged, the Bench said. The Bench reasoned that in the light of the many conditions to be fulfilled by the recycler to ensure safety during dismantling, the principle of sustainable development based on the concept of balance stood satisfied. In August 2006, M.G.K. Menon, former Union Minister and Chairman of the Supreme Court’s Committee on Hazardous Wastes, wrote to the Chief Justice of India that Blue Lady should be sent back without decontamination to Malaysia or to Germany, from where it had come. He said that any effort to dilute the court’s order on October 14, 2003, on the basis of his report to try to remove the concept of prior decontamination would be against the workers in the ship-breaking yards, and also be in violation of the Basel Convention. (V. Venkatesan)

The seriousness of the Government and more so the Gujarat Maritime Board towards the issue of Blue-Lady is evident from the report of visit of delegates from International Maritime Organisation to Alang in January 2008. The report available on the website of the Maritime Board contains details about the visit, the work the delegates did, their refreshments, gifts received by them, cultural programmes attended and that due to ‘overrun of time’ dropping of visit to the plot where Blue-Lady was being dismantled.

4. Issues of international trade and environment:

Environment and health related standards in developed country markets have the potential to create trade barriers. It is certainly possible that all the developed nations are not complying with all the global environmental standards. For example, the United States of America did not ratify the Kyoto Protocol. However, it still continues to play a dominant role in global politics and trade and may demand compliance of a stringent environment, hygiene and labour norms for products to find entry in its domestic market. Hence, developing countries including India have to adjust their standards according the standards of developed countries. Often the standards in the each developed country are different which necessitates adopting various standards by the same industry in order to find a way into the importers market. Though it is true that meeting these standards would require expensive and updated technology, India must incorporate it as non-incorporation would result in non-compliance of the norms and thus loss of trade opportunity.

It is necessary to distinguish between precautionary and protectionist environment – related – non-trade- barriers (ETBs). If a significant number of countries notify a particular ETB for a same product then it could be treated as a precautionary measure than a trade-restrictive measure. Around 185 products have been identified which face environment related trade barriers in at least one importing country. Most
of these commodities are agricultural and account for almost 62% of India’s export. Indian products like
peanuts and chillies face a problem while entering into the EU markets because of presence of ‘alfatoxin’. Food and sanitation laws and zero tolerance to insect’s policy in Japan have squeezed problems for citrus fruits and flowers from India. Indian spices were detained in Italian and German markets as it was feared that they contained pesticide residue. Textile exports which account for almost 55% of India’s export earnings has also to meet with the stringent environmental norms regarding use of dyes, to foray into the international and more specifically the European markets. Similar is the plight of Indian leather industry, which in global markets is expected to play a significant role as India has the largest livestock holding in the world.

Marine products are considered to be the most environmentally sensitive products in the international market. In India, till the late 1970’s, the export of marine products mainly consisted of dried items like fish, shrimp, shark fins and fish maws. However, later there was a decline in the export of dried marine products and subsequently export of processed items continued to make steady progress in marine trade. When frozen and canned items increasingly featured in the exports basket, the US, France, Canada, Japan and Australia became important markets for Indian marine products. During the 1980s canned products slowly disappeared and frozen items became prominent in India’s seafood trade. The environment related Non-Trade-Barriers faced by the Indian Seafood industry are largely related to minimum residual level for pesticides and antibiotics in the produce. The EU directive has also imposed process standards requiring hygiene during handling, processing and storage of marine products. In 1996, the US banned shrimps from entry unless harvested by turtle excluding devices or by manual instead of mechanical means or in cold water. The US lost the case at WTO when India and other affected countries challenged the ban. The ban however, affected India’s shrimp exports. (Chaturvedi and Nagpal)

Apart from the ‘routine’ oil spills and discharge of toxic waste in the process of dismantling of ships there are other incidents like those of MV Wisdom. This results in polluting the sea-water and adversely affecting the fishing activity. In areas around Alang, horticulture is the primary occupation. There have been adverse impacts on both the activities and use of pesticides has increased. Thus in pursuit of parasitic employment villagers are losing their primary source of earning.

Apart from the issues stated above, it needs to be noted that environmental awareness amongst the consumers has tremendously increased in the past two decades. The demand for quality products has increased which has necessitated that the national governments take adequate precautions in terms of product specifications for both domestic producers and exporters to these economies. Several countries have ‘eco-label’ their products and demand the same from those exporting products to these countries. The eco-labelling schemes in EU apply to process of production as well as to the final output. ‘Green Seal’ in the US, ‘Swan’ in Nordic and ‘Green Spot’ in Germany are some of the eco-labels around the world. Most of the eco-labels follow a ‘cradle to grave’ approach wherein the entire analysis based on the environmental consequences of their process of manufacture, use and disposal is carried out. Eco-labelling schemes may conflict with the WTO agreement on Technical Barriers to Trade. The eco-labelling issue blends into two other market access obstacles namely, environmentally – motivated government procurement and ISO 14,000 series. Though the series may be viewed as the facilitator of better environmental performance and international trade it certainly is a potential trade barrier.

The Government of India launched the ‘Ecomark’ scheme in the year 1991 with a view to increase consumer awareness and easy identification of the Environment-Friendly products. The specific objectives of the scheme are as follows:
1. To provide an incentive for manufacturers and importers to reduce adverse environmental impact of products.
2. To reward genuine initiatives by the companies to reduce adverse environmental impact of their products.
3. To assist consumers to become environmentally responsible in their daily lives by providing information to take account of environmental factors in their purchase decisions.
4. To encourage citizens to purchase products which have less harmful environmental impacts.
5. Ultimately to improve the quality of the environment and to encourage the sustainable management of resources.

The Government of India has notified the final criteria for 16 product categories like soaps and detergents, paper, food items, lubricating oils, packaging materials etc. However, later the categories were reduced to fourteen.

An earthen pot has been chosen as the logo for the Ecomark Scheme in India. The familiar earthen pot uses a renewable resource like earth, does not produce hazardous waste and consumes little energy in making. Its solid and graceful form represents both strength and fragility, which also characterizes the eco-system. The scheme however has failed to attract many takers.

5. Conclusions and suggestions:

India must frame its policies and legislations bearing in mind the international standards and the requirements of international market. Up-to-date national system for testing, certification and laboratory accreditation are also equally necessary. Government needs to take proactive steps in order to create awareness about voluntary eco-labelling systems. The manufacturers need to be given more incentives and consumers should be able to purchase these products at competitive if not lower rates. The process of obtaining ‘Ecomark’ has to be much simpler one. There is a strong possibility of eco-labelling schemes creating inadvertent or deliberate trade barriers. The criteria for granting an eco-label may be laid down to favour domestic product over foreign product. For example the German eco-labelling scheme ‘Blue-Angel’ prefers textile products with artificial dyes to those with natural dyes.

The Ship-Breaking activity flourishes in India due to weak environmental laws. Viewing this as an opportunity is undoubtedly short sighted. India will have to have stricter standards to meet the global demands and survive in international market. However, framing the policies bearing in mind only the trade benefits, will do more harm than good. The Government must bear in mind the interests and welfare of labourers and people at large. While assessing any damage caused to the environment it must adhere to the principle of ‘Inter-Generational Equity’. According to this principle the needs of the present generation must be fulfilled without compromising the ability of future generations to meet their own needs.

It is high time that India stops encouraging the NIMBY attitude and permitting its soil as a dumping ground for hazardous wastes. This would also require the government to re-think its trade policies and definitions of development.

References