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Convenient ship breaking:

Shortcomings of environmental obligations of EU ship owners and possible solutions

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Abbreviations

European Free Trade Association	EFTA
European Union	EU
Exclusive Economic Zone	EEZ
Flags of convenience	FOC
High Sea Convention	HSC
Hong Kong Convention	HKC
IMO's Marine Environment Protection Committee	MEPC
International Court of Justice	ICJ
International Labor Organisation	ILO
International Maritime Organization	IMO
International Transport Workers' Federation	ITF
Organisation for Economic Co-operation and Development	OECD
Polychlorinated biphenyls	PCB
Ship Recycling License	SRL
Ship Recycling Regulation	EU SRR
Treaty on the Functioning of the European Union	TFEU
UN Convention on the Law of the Sea	LOSC
Waste Shipment Regulation	EU WSR
World Trade Organisation	WTO

1 Introduction

1.1 Ship breaking

Nowadays, around 90% of world trade is carried out by the shipping industry.[1] Global maritime trade reached 10.7 billion tons in 2018.[2] The question arises: Where do all these ships go at the end of their life? The answer is: After their life span of 20 to 30 years[3] vessels are scrapped, mostly in environmentally highly questionable conditions. Ships contain, besides non-problematic materials like furniture, a variety of hazardous materials such as polychlorinated biphenyls (PCB), heavy metals, oils, anti-fouling agent hull paints containing tributyl tin or even radioactive substances.[4] Unfortunately, 90% of scrapping continues to take place in developing countries using the so-called beaching method[5] allowing pollutants to seep into the coastal and marine environment. Beaching means that a ship is driven up on the beach as high as possible at full power until it is firmly aground.[6] The vessel is then taken apart by workers with gas torches and, as the ship is lightened, it is towed progressively further inshore, while liquids are discharged on the beaches and in the sea, and wastes are burned on the beach.[7] Processes to scrap ships without letting harmful substances disperse into the marine environment do exist, applying sustainable waste management and appropriate dismantling techniques for those hazardous materials.[8] However, those methods are much more expensive than just driving a ship onto an Asian beach where it is taken apart by workers paid close to nothing and without strict environmental provisions in place.

It is important to work out the main actors of the industry. What seems especially problematic is how the beaching practice is especially widespread among vessels owned by EU nationals (EU ship owners/ EU owners): German owners for example beached 74% of their vessels in 2015 while the number for Greek owners at 87% is even higher.[9] The ship breaking itself then

[1] International Chamber of Shipping, *Shipping and World Trade* (25.03.2020), available at https://www.ics-shipping.org/shipping-facts/shipping-and-world-trade.
[2] UNCTAD, *Review of Maritime Transport 2018*, UNCTAD/RMT/2018 (2018), X.
[3] Barua, S; Rahman I; Mosharraf, M 'Environmental Hazards associated with open-beach breaking of end-of-life ships: a review.' (2018) *Environmental Science and Pollution Research* **25,** 30881.
[4] Hillyer, H. 'The Hard Reality of Breaking Up: The Global Transboundary Movement of Ocean Vessel Demolition and Waste.' (2012) *Vermont Journal of Environmental Law* **13**, 763.
[5] Barua, Rahman, Mosharraf, n 3, 30881.
[6] Galley, M. *Shipbreaking: Hazards and Liabilities* (Springer International Publishing Cham 2014), 11.
[7] Ibid, 11-12.
[8] Barua, Rahman, Mosharraf, n 3, 30881.
[9] European Commission, 'Thematic Issue: Ship recycling: reducing human and environmental impacts' (2016) *Science for Environment Policy* **55**, 3.

happens in the developing world at substandard ship breaking yards, with substantial impacts: Samples taken by the ship scrapping site in Alang, India showed unbelievable numbers of up to 16973% higher levels of heavy metals and petroleum hydrocarbons in both sediment and seawater than in comparable areas, as well as high concentration of harmful bacteria.[10] Additionally, high amounts of microplastic were found close to the yard.[11]

An uncomfortable truth comes to show: With EU law makers watching, EU ship owners operate vessels for decades, profiting greatly. As soon as the profit margins decrease, there are no qualms to sail those vessels full of asbestos and oil on a developing country's beach destroying their environment, and even making money from it in the process.

In this thesis, two terms will be used to distinguish between responsible methods (ship recycling) and irresponsible harmful methods in sub-standard yards (ship breaking).

1.2 How disguising tactics come into play

The subject of ship breaking is not a legal void. There have been both national and international regulations in place on the matter applicable to EU owners, such as the 1989 Basel Convention[12] or European law such as the Ship Recycling Regulation (EU SRR).[13] As will be shown in this thesis, the framework on ship breaking is at times vague and obligations are weak. But even where legislation is in place, EU owners have been successfully circumventing laws by disguising their intents or using flags of convenience (FOC).[14] Under international law every ship must be registered with a flag State, which is responsible for ensuring that the vessel's condition, manning and operation comply with both national law and any international treaties to which the State is a party.[15] In theory this is supposed to lead to effective enforcement on all ships even when navigating areas under no State's sovereignty. However, reality looks different. The majority of vessels is not registered in the countries of the owners but rather in countries of 'open registries"[16] where requirements to be registered are often low. As of 1

[10] Ibid, 9-10.
[11] Ibid, 12.
[12] The Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal of 22 March 1989 (1673 UNTS. 126).
[13] Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling.
[14] Puthucherril, TG. *From ship breaking to sustainable ship recycling: evolution of a legal regime* (Martinus Nijhoff Publishers Leiden 2010), 51.
[15] Galley, M. 'Flagging interest: ship registration, owner anonymity and sub-standard shipping.' (2013) *Mountbatten Journal of Legal Studies* **14**, 1.
[16] Negret, C. 'Pretending to be Liberian and Panamanian; Flags of Convenience and the Weakening of the Nation State on the High Seas.' (2016) *Journal of Maritime Law and Commerce* **47**, 4.

January 2018, the top three flags of registration were Panama, Marshall Islands and Liberia,[17] none of which are under the top 35 owners of world fleet.[18] On the other hand, German operators for example, as the fourth biggest owner of world fleet, owned 2869 vessels, of which only 319 (11%) were registered in Germany.[19] While EU ship owners control more than 40% of the world fleet, only 22% of vessels fly an EU member State flag.[20] Nearing the end of their life, the share decreases even more: only 7.7% of beached ships were still registered under an EU flag when they were wrecked.[21] EU owners go to great lengths to evade applicable rules. Notable in this respect is a statement from an official of the European Commission regarding the case:

> *Spain as the presumptive country of export is in the best position to take further measures (…). The EU or Commission can only play a limited role in this context.22*

Even where international regulations are in place their enforcement is uncertain and dependent upon national regimes and mechanisms.

1.3 Objective and research questions

This thesis assesses the international regulatory framework applicable to the real generators of waste, EU ship owners, and how to prevent them from evading obligations on ship breaking. The author will start by assessing the framework on ship breaking and its shortcomings. In the next step she will examine how FOCs come into play. Further, the author will offer solutions for identified legal shortcomings. It will be assessed how the legal framework on ship breaking should be changed to prevent EU ship owners from breaking the vessels in sub-standard breaking yards. Further, it will be discussed how the legal framework around FOCs should be changed to prevent EU owners from reflagging and circumventing otherwise applicable rules. This leads to the following overarching topic: <u>What is the legal situation around ship breaking for EU ship owners and what changes are necessary to make the industry more environmentally friendly?</u> The topic is broken down into the following research questions:

- What is the current regulatory framework at the global and EU level on ship breaking applicable to vessels owned by EU nationals?
- Which shortcomings can be identified in this framework?

[17] UNCTAD, n 2, 35.
[18] Ibid, 30.
[19] Ibid.
[20] European Commission, n 9, 3.
[21] Ibid.
[22] Ibid.

- How do disguising and reflagging practices by EU ship owners play into the issue of ship breaking?
- What could be possible solutions to address identified shortcomings in the international regulatory framework on ship breaking and the disguising and reflagging practices by EU ship owners?

  a) How should the framework be changed to prevent environmentally damaging practices in ship breaking vessels owned by EU nationals?

  b) How can the circumvention of existing rules by disguising and reflagging practices by EU owners be prevented?

1.4 Scope

The chosen topic is a very broad subject and exceeds the size limitations of an LL.M. thesis if discussed in its entirety. First and foremost, this is a thesis about **environmental issues in the domain of the law of the sea**. As such, all legal issues regarding human rights or labour law, and the highly problematic situation of workers in breaking yards, are excluded. The research will focus on the direct effects caused by the breaking process to the **marine** environment and how those can be addressed. The paper will not include a discussion regarding damage caused on land. For the same reason, the issue of invasive alien species[23] carried by vessels coming from all over the world is not covered. Importantly, the thesis will only assess the situation of **owners who are national to EU member States** and not cover other big originators of end-of-life ships as for example US American owned cruise ship companies.

1.5 Structure

The work consists of five main parts. After an introduction in Chapter 1 Chapter 2 will discuss the international regulatory framework of ship breaking applicable to EU owners and assess its shortcomings. Chapter 3 will then go on to highlight the issues around evasion tactics such as FOC and how they relate to ship breaking. Chapter 4 will propose (mostly) juridical solutions to the shortcomings assessed in Chapters 2 and 3. The thesis will end with a conclusion and an outlook in Chapter 5.

[23] Hillyer, n 4, 763.

1.6 Methodology and Sources

The author will mostly use a **legal doctrinal approach** of 'black-letter analysis" when assessing legal sources with both descriptive and analytical methods. She will start with examining the existing law regarding the subject in accordance with the rules of international law based on articles 31-33 of the Vienna Convention on the Law of Treaties[24]. The main sources used will be international conventions, which are a primary source of international law according to article 38 ICJ Statute[25], and EU law. When interpreting them, especially when identifying the gaps in the framework, the author also relies upon subsidiary sources of law according to article 38 ICJ Statute such as journal articles and books of legal scholars, reports and judicial decisions.

[24] Vienna Convention on the Law of Treaties of 23 May 1969 (1155 UNTS 332).
[25] Statute of the International Court of Justice, Annex to the UN Charter of 26 June 1945 (1 UNTS XVI).

2 The international regulatory framework of ship breaking applicable to EU owners

2.1 Global regime

Firstly, the global framework on shipbreaking will be discussed. While there is no international agreement in force specifically on shipbreaking multiple international agreements play a role.

2.1.1 The UN Convention on the Law of the Sea

While the UN Convention on the Law of the Sea[26] (LOSC) does not cover ship breaking as such multiple provisions touch the subject. The LOSC lays down ground rules on flag, coastal and port State jurisdiction throughout the text, such as in articles 56, 94 or 211 (3) LOSC. Further, there are the environmental obligations of States, such as the general obligation to protect and preserve the marine environment in article 192 LOSC. Those general obligations are further specified by articles 207 and 210 LOSC on pollution from land and by dumping.

2.1.1.1 Land-based source pollution

According to article 207 LOSC States shall adopt laws and regulations and take other measures regarding pollution from land-based sources, taking into account internationally agreed rules, standards and recommended practices and procedures, while they shall harmonize their policies and cooperate globally and regionally. The term «pollution» is defined in article 1 (1)(4) LOSC as the

> *introduction by man, directly or indirectly, of substances (...) into the marine environment (...) which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health (and) impairment of quality for use of sea water.*

Article 207 LOSC also covers accidental and indirect pollution.[27] The beaching process, taking apart vessels on the beach and letting oil and other substances seep into sediment and sea, falls under the definition. However, the provision hardly helps to prevent harmful shipbreaking practices. In cases of pollution from land-based sources the LOSC obliges States to take measures regarding the matter, and according to article 213 LOSC, States shall enforce those

[26] Convention on the Law of the Sea, of December 10 1982 (1833 UNTS 397).
[27] Wacht, F. 'Article 207' in A Proelss (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (Hart Publishing 2017), 1380.

laws. This is where the issue lies. The right (and obligation) to control pollution from land-based sources lies completely in the hands of the coastal State[28] – which in this case is the State conducting and profiting from the shipbreaking industry. Article 207 LOSC does not provide specific duties and leaves great leeway for States to only offer a weak framework. Developing States relying on the industry are highly unlikely to enforce strict environmental rules on breaking yards. Mostly, major ship breaking countries have not enacted measures.[29] Moreover, when India tried to establish national regulation, this led to ship owners finding alternate locations in Bangladesh instead of a more environmentally friendly industry. India for example imposed certifications ensuring that oil tankers are cleaned of residues before being scrapped. The industry then just migrated to locations with less rules.[30]

2.1.1.2 Dumping

According to art. 210 LOSC States shall adopt measures regarding dumping. The definition of dumping is found in art. 1(1)(5)(a) LOSC and means

> *any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea [or] any deliberate disposal of vessels, aircraft, platforms or other man-made structures at sea.*

It is questionable if the beaching of vessels falls under the provision. The practice of beaching falls under the scope of land-based source pollution as regulated in art. 207 LOSC: Land-based source pollution is a generic term and covers a wide variety of human activities such as, among others, industrial sources.[31] This raises the question: Can something that is land-based pollution *also* be dumping at the same time? The issue has been addressed by the IMO Legal Affairs and Relations Division regarding the disposal via land-based pipelines. It argued that there was no clear borderline between the scopes of the two articles and mutual exclusiveness was not indicated.[32]

The author however disagrees. The LOSC distinguishes clearly between 'dumping' (art. 210) and 'pollution from land-based sources' (art. 207). The reason for this lies in the role of coastal States: important industries are located on the coast, possibly discharging pollutants into the

[28] Puthucherril, n 14, 192.
[29] Ibid, 117.
[30] Pelsy, F. 'The Blue Lady Case and the International Issue of Ship Dismantling.' (2008) *Law, Environment and Development Journal* **4**, 137.
[31] Wacht, n 27, 1380.
[32] Ibid, p 1413; IMO, 'Interpretation of the London Convention and Protocol', IMO Doc. LC 37/9/2 (2015). Annex, paras. 3 et seq.

marine environment. Regulating land-based pollution would cause severe restrictions of activities on the coastal States' sovereign territory, which is why coastal States are hesitant to implement a strict regime. The situation for coastal States on land-based pollution is therefore different than for dumping at sea – while States might be willing to submit themselves to rules on dumping at sea, the situation of pollution from the coastline is a different regime which interferes with territorial sovereignty.[33] Therefore, a clear distinction between land-based pollution and dumping must be made. Additionally, the focus must be put on the fact that beaching is not conducted *at sea* but rather by an industry on the beach. For these reasons ship breaking making use of the beaching method does not fall under art. 210 LOSC.

2.1.2 London Dumping Convention and Protocol

The 1972 London Convention[34] is one of the first global conventions for the environmental protection from human activities, trying to prevent marine pollution by dumping of wastes and other matter. 87 States are parties.[35] The Convention defines dumping as

> *any deliberate disposal at sea of wastes or other matter [and] vessels.*[36]

In 1996 a Protocol to the Convention[37] was adopted, replacing the original version for its parties.[38] The Protocol changed the Convention to the reverse listing approach so that dumping is generally prohibited unless allowed.[39] It is possible to be party to either the London Convention, or the Protocol, or both. The issue of shipbreaking in the context of the London Convention and Protocol raises the question if the Convention is applicable.

Does Beaching fall under the London Conventio and Protocol?

When the Convention and Protocol were developed, ship breaking was not discussed which opens the question if it falls under the provisions.[40] Similar to the LOSC the question must be asked: Can something that is land-based pollution *also* be dumping? The Protocol 'takes into account' the LOSC in its preamble which is why the LOSC's valuations are transferred to the

[33] Wacht, n 27, 1318.
[34] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 13 November 1972.
[35] IMO, *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (*02.06.2020), available at http://www.imo.org/en/OurWork/Environment/LCLP/Pages/default.aspx.
[36] Art. III(1)(a) London Convention.
[37] Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter of 7 November 1996.
[38] Puthucherill, n 14, 124.
[39] Ibid.
[40] Galley, n 6, 73.

Convention and Protocol. As discussed above land-based source pollution and dumping are exclusive to each other. The Convention and Protocol are therefore not applicable. Furthermore, according to the Convention and Protocol's definition, dumping must be deliberate. However, the intent of ship breaking is to reuse the parts and sell them, they are not per se thrown in the sea. Virtually all parts of the ship are reused.[41] Most pollution is a side-effect of the breaking operations, such as the release of chemicals like PCB when burning plastic coated wires to recover copper,[42] and therefore not deliberate.

The Convention and Protocol offer provisions on the disposal of vessels. However, they do not include the process of beaching which is therefore not regulated.

2.1.3 Basel Convention and the Waste Shipment Regulation

Another instrument which influences ship breaking is the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. In the 1980s awareness of problematic practices regarding wastes grew: Headlines on practices such as the dumping of eight thousand drums of chemical waste on a Nigerian beach resulted in international outrage[43] and led to the conclusion of the 1989 Basel Convention. With 187 parties it covers most of the world, including the European Union. The Convention aims to protect human health and environment from hazardous wastes and has three main goals: the reduction of generation and the environmentally sound management of hazardous wastes, restrictions on their transboundary movements, and the regulation of transboundary movement if permissible.[44] In 1995, an amendment to the Convention, the 'Basel ban' was adopted and incorporated in the Convention as art. 4A:

> *Each Party listed in Annex VII shall prohibit all transboundary movements of hazardous wastes which are destined for operations according to Annex IV A, to States not listed in Annex VII.*

Parties listed in Annex VII are according to the Annex

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[41] Puthucherril, n 14, 15.
[42] Ibid, 17.
[43] Pitman, T, *Ivory Coast's toxic tragedy a lesson for others* (08.06.2020), available at http://www.nbcnews.com/id/15319791/ns/world_news-world_environment/t/ivory-coasts-toxic-tragedy-lesson-others/#.X13OOWczbeQ.
[44] Secreteriat of the Basel Convention, *Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (08.06.2020), available at http://www.basel.int/?tabid=4499#EU.
Secreteriat of the Basel Convention, *Overview* (09.06.2020), available at http://www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx.

Parties and other States which are members of OECD, EC, Liechtenstein.

The Amendment has been in force since December 2019 and counts 98 parties.[45] Much earlier, in 1997, such ban was incorporated in EU legislation in the Waste Shipment Regulation (EU WSR),[46] legally binding all member States. Its key element is the ban of shipment of all waste outside EFTA countries in article 34:

> *1. All exports of waste from the Community destined for disposal shall be prohibited.*
>
> *2. The prohibition in paragraph 1 shall not apply to exports of waste destined for disposal in EFTA countries which are also Parties to the Basel Convention.*

It must be discussed if and how this framework applies to shipbreaking. This thesis focusses on vessels owned by EU owners that are taken apart in shipbreaking yards in Bangladesh, India and Pakistan, which are all parties to the Basel Convention [47] and non-OECD/ EFTA countries.[48]

Are end-of-life ships waste?

The question in this context is if vessels from the EU that are exported to Asian breaking yards are considered hazardous waste: Does the Basel Convention apply to end-of-life ships? The answer to this is of practical importance since an affirmative answer would mean that the exporting States would be obliged to prevent the departure of the vessels.[49] According to art. 2(1) wastes are

> *substances or objects which are disposed of or are intended [or] required to be disposed of by the provisions of national law.*

Art. 1(1)(a) describes hazardous wastes as wastes contained in Annex I, as long as not excluded by Annex 3, or wastes that are defined as hazardous by the party of export, import or transit.

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[45] Secreteriat of the Basel Convention, *Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (09.06.2020), available at http://www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/Default.aspx.
[46] Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.
[47] Secreteriat of the Basel Convention, n 43.
[48] OECD, *List of OECD Member countries - Ratification of the Convention on the OECD* (15.06.2020), available at https://www.oecd.org/about/document/list-oecd-member-countries.htm
[49] Albers, J. 'Responsibility and Liability in the Context of Transboundary Movements of Hazardous Wastes by Sea. Existing Rules and the 1999 Liability Protocol to the Basel Convention.' (2014) *International Max Planck Research School (IMPRS) for Maritime Affairs*. University of Hamburg. **PhD**, 104.

Among others, Annex I lists waste substances and articles containing PCBs and wastes having copper, zinc or asbestos as constituents, all of which are found in old vessels.[50] The important question is: When is a ship «hazardous waste»? A vessel is, according to the definition, waste, if and when it is disposed of or intended to be disposed of. Old ships are hazardous as they contain a multitude of hazardous materials. The beaching of a ship is the «accumulation of material intended for operations which may lead to resource recovery» as listed in Annex IV of the Basel Convention and therefore waste.

At the point when a vessel is beached, however, the vessel in question was already sold to and has arrived at the Asian shipbreaking yard and its 'transboundary movement' according to article 2(3) Basel Convention is finished. The point when a port State could have stopped the export passed. The important question is if a vessel can be seen as waste *before* it is beached, and when it is still in the vicinity of the State of export. That would be the case if the vessel was 'intended to be disposed of". The point in time at which a ship can be considered waste becomes crucial.

At this point it is important to go into the process of ship disposal. When a ship is at the end of its life the ship owner is not the one that sells and eventually exports the vessel to the shipbreaking facilities. Rather, the ship is first sold to a 'cash buyer' who subsequently sells the vessel to a breaking yard.[51] The cash buyer is usually national to a country which is not bound by the export ban of the Convention: The three biggest cash-buyers who control 2/3 of the market are in the non-OECD countries Dubai, Hong Kong and Singapore.[52][53]

The industry's point of view

It is argued, by mostly the side of the shipping industry, that selling a vessel to a cash buyer cannot constitute the intent to dispose it and therefore the vessel is not waste at this point. According to that view the sale's purpose is the sale itself and its profit, not the ship's disposal. It is further said that a vessel can only be qualified as waste when it is not supposed to sail anymore[54] – how could a fully functioning, certified and insured ship, even carrying cargo on its last journey[55] be qualified as waste? If that was the case the vessel would have two contrary purposes at the same time. This view concludes that there is no intent to dispose the vessel when

[50] Hillyer, n 4, 763.
[51] NGO Shipbreaking Platform, *Cash Buyers* (12.06.2020), available at https://www.shipbreakingplatform.org/our-work/the-problem/cash-buyers/
[52] Ibid.
[53] OECD, n 48.
[54] Galley, n 6, 63.
[55] Ibid, p 65.

selling the ship to a cash buyer but rather only when the vessel is beached already. Further, as long as the ship is still sailing its purpose is to sail and it cannot constitute waste at the same time. According to those arguments the Basel Convention is not applicable.

A more convincing argumentation

There is, however, an opposing, more convincing, view on the subject, advocated by for example the NGO Shipbreaking Platform.[56] First of all, the argument that a ship cannot be waste and a ship at the same time cannot hold up. One must keep in mind that things are not only waste when they are out of order – there are manifold reasons to dispose an object other than that it's out of function: they could be of an economic nature or because a newer object has replaced the old one. Those cases must be covered under the provisions. The literal interpretation of art. 2(1) Basel Convention supports this: focus must be put on the *intention* of the owner, not external circumstances. In line with these arguments the 7th Basel Conference of Parties noted the following:

> *a ship may become waste as defined in article 2 of the Basel Convention and that at the same time it may be defined as a ship under other international rules.*[57]

The other argument that the sellers' intent is only the sale itself, not the disposal, must also be debunked. It fails to see the actual reason for selling the vessels: The cash-buyers' sole business is the further sale of the vessel to a breaking yard. The only reason for owners not to sell the vessel to the breaking yard directly is that they are legally prohibited to do so under the Basel Convention or EU WSR. The aim is to get rid of the ship and the owners are aware where it is going. The purpose of the Basel Convention is to hinder transboundary movement of hazardous waste – if it is transported to a cash-buyer whose only purpose it is to sell and bring it to a breaking yard or sold to the breaking yard directly cannot make a difference. Therefore, according to the view represented in this paper, the Basel Convention is applicable to end-of-life ships which are sold to cash buyers. Therefore, States are, according to articles 4(e) and 4A Basel Convention and article 34 EU WSR for EU flagged vessels, obligated to prevent sales to the cash buyers, as the intent of disposal is already given at the time of the sale. This is supported by for example the case of the *Sandrien*, which was the first court ruling that a ship was

[56] NGO Shipbreaking Platform, *Basel Convention* (15.06.2020), available at https://www.shipbreakingplatform.org/issues-of-interest/the-law/basel-convention/.
[57] 7th Basel Conference of Parties, Decision VII/26 (2004), 4;
CIEL, Orellana, MA; Azoulay, D; Bratrschovsky, K., *Legality of the EU Commission Proposal on Ship Recycling* (2012), 4.

considered hazardous waste by the Council of State in the Netherlands in 2002 and led to the arrest of the vessel.[58] That same year, Turkey was the first country that denied entry to the *Sea-Beirut* based on the finding that it was hazardous waste.[59]

Non-applicability to EU flagged vessels

It is important to note that while the Basel Convention and EU WSR are applicable to end-of-life ships they do not apply to vessels flying an EU member State flag. The reason for that is article 27 EU SRR which added article 1(3)(i) to the EU WSR. It excludes EU flagged vessels from the scope of the EU WSR since the EU SRR as the more specific instrument shall be the applicable law in these cases, implementing the Hong Kong Convention (HKC)[60] before it is even in force.[61] In practice that means that while the EU WSR is not applicable when the vessel in question is flying an EU member State flag it continues to apply to EU port States. While this might be confusing at first, it must be kept in mind that the instruments have different approaches to jurisdiction: The provisions of Basel Convention and EU WSR apply to the port State, while the provisions of the EU SRR apply to the flag State, creating a partly overlap. The applicability of different instruments will be further discussed in the following paragraph and in chapter 2.3.

An evaluation

The Convention is applicable to end-of-life ships and offers a strong mechanism in form of an export ban. However, it has substantial loopholes. Firstly, even if it seems evident that the only intent to sell to a cash buyer is the disposal of the ship such intent is hard to prove when the owners claim the ship is sold for repair or further use.[62] In many cases, EU waste shipment authorities could not prove the dismantling purpose and ships had to be released from custody.[63] Even more importantly, the provisions are easily circumvented for the following reason: The State that is obliged to prohibit the movement of waste is according to art. 2(10), (13), 4A Basel Convention the State of export, from which the

[58] Moen, A. 'Breaking Basel: The elements of the Basel Convention and its application to toxic ships.' (2008) *Marine Policy* **32**, 1057.
[59] Ibid.
[60] Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships of 15 May 2009.
[61] See below at 2.2.2.
[62] NGO Shipbreaking Platform, n 51.
[63] Ormond, T. 'Hong Kong Convention and EU Ship Recycling Regulation: Can they change bad industrial practices soon?' (2012) *elni Review*, 555.

> *transboundary movement of hazardous wastes or other wastes is planned to be initiated or is initiated*

or, according to article 2(22), 24 EU WSR the

> *'country of dispatch' [meaning] any country from which a shipment of waste is planned to be initiated or is initiated.*

The only thing ship owner and buyer have to do is to conduct the sale and start the transit in an area beyond national jurisdiction[64] or a country not bound by the amendment.[65] In that case there is no State of export or dispatch and the Basel Convention or EU WSR are not applicable. This shows that while the Convention is theoretically applicable to sales to cash buyers its regulations are easily evaded. At this point it is important to note how the IMO started to develop the HKC[66]. The reason for that was the awareness of the international community that the framework, including the Basel Convention, does not sufficiently regulate the issues around ship breaking, and of the necessity to address the substantial gaps. This can be seen through the example of the *Clemenceau,* a French aircraft carrier which reached the end of her life. Since it was too expensive to recycle it in France's own naval shipyard, the search for another final port began. France had to take the vessel back, after a Spanish company breached its contract by trying to take the ship to Turkey without removing toxic material. In 2005 the vessel left France, headed to Alang, India.[67]

2.1.4 IMO Instruments

2.1.4.1 Guidelines on ship recycling

In 2003, IMO adopted their Guidelines on Ship Recycling.[68] IMO guidelines are not legally binding but provide guidance on both legal and technical matters and have often led to the adoption of (legally binding) Conventions.[69] In addition, the IMO, ILO and Basel Conference of Parties created a Joint ILO/IMO/Basel Convention Working Group on Ship Scrapping with

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[64] Matz-Lück, N. 'Safe and Sound Scrapping of 'Rusty Buckets'? The 2009 Hong Kong Ship Recycling Convention.' (2010) *Review of European, Comparative and International Environmental Law* **19**, 100.
[65] NGO Shipbreaking Platform, n 51.
[66] Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships of 15 May 2009.
[67] The American Society of International Law, Orellana, M, *Shipbreaking and Le Clemenceau Row* (15.06.2020), available at https://www.asil.org/insights/volume/10/issue/4/shipbreaking-and-le-clemenceau-row.
[68] IMO Assembly resolution, 'IMO Guidelines on Ship Recycling' IMO Doc. A 23/Res.962 (2003).
[69] Engels, UD. 'European Ship Recycling Regulation. Entry-Into-Force Implications of the Hong Kong Convention' (2013) *International Max Planck Research School (IMPRS) for Maritime Affairs*. University of Hamburg. **PhD**, 27.

the aim to examine their relevant guidelines and identify gaps and overlaps.[70] These developments eventually led to the IMO Diplomatic Conference on Ship Recycling in Hong Kong, instigated by the IMO's Marine Environment Protection Committee.[71]

2.1.4.2 HKC

The conference cumulated in the adoption of the HKC, the aim of which is to protect human health and the environment from harm caused by ship breaking.[72] It is the first instrument addressing the issue of ship breaking as such. The Convention tries to solve the issues from multiple angles: it regulates not only the shipbreaking process at the end of the vessels' life but also provides rules on the design, construction, operation and maintenance of ships, thus implementing a 'cradle to grave' approach.[73] It consists of 21 main articles enumerating the basic principles for safe and environmentally sound ship recycling and an annex specifying the main technical requirements in 25 regulations.[74] A key provision is regulation 4 which prohibits the installation or use of hazardous materials listed in Appendix 1. According to regulation 5 each new ship shall have an Inventory of Hazardous Materials on board, which has to be updated during the ship's operational life. Of special importance is regulation 8 which provides that

> *Ships destined to be recycled shall: [only] be recycled at Ship Recycling Facilities that [are] authorized in accordance with this Convention*[75]

and

> *certified as ready for recycling by the Administration or organization recognized by it, prior to any recycling activity taking place.*[76]

Furthermore regulations 15-23 stipulate standards the facilities must comply with.[77] Important in this regard is regulation 17.1 which requires the facility to

[70] Ibid, 29f.
[71] Ibid, 33.
[72] IMO, *The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships* (23.06.2020), available at http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/The-Hong-Kong-International-Convention-for-the-Safe-and-Environmentally-Sound-Recycling-of-Ships.aspx.
[73] Engels, n 69, 36.
[74] Puthucherril, n 14, 149.
[75] Regulation 8.1 HKC.
[76] Regulation 8.6 HKC.
[77] Engels, n 69, 38.

establish management systems, procedures and techniques […] which will prevent, reduce, minimize and to the extent practicable eliminate adverse effects on the environment caused by Ship Recycling.

Regulations 19 and 20 then specify the facilities' duties to protect the environment and the safe and environmentally sound management of hazardous materials. It is important to note that the Convention references the IMO's guidelines throughout the text, which have to be taken into account when applying the HKC.[78] There are six guidelines established in the IMO's Marine Environment Protection Committee's (MEPC) sessions between 2009 and 2012 on different matters,[79] specifying the provisions of the Convention.[80]

2.1.4.3 An Evaluation

The HKC in general

The provisions of the HKC approach the subject of shipbreaking in a comprehensive manner, starting with the construction of ships, their operation and maintenance and finishing with their disposal. The issue of hazardous materials is considered even before vessels become waste. The structure of the Convention, with the main text providing main objectives and procedures and the Annex going into technical details, allows flexibility and enables States to keep up with best technical and scientific practices.[81]

There is, however, criticism towards the Convention. It is doubted if the instrument is able to offer more than procedural minimum standards.[82] While there are provisions on inventories, certificates and authorizations, there is no ban of the highly problematic beaching practice.[83] Responsibilities lie with flag States and States operating ship recycling facilities.[84] This gives them great leeway to keep hurtful practices of end-of-life ship disposal alive. There is no principle of prior informed consent as found in the Basel Convention.[85] Additionally, the

[78] Regulations 5, 9, 16, 17, 19, 20 Annex to the HKC.
[79] The rules are on inventory, facilities, the ship recycling plan, authorisation, survey and certification and inspection of ships.
Galley, n 6, 174.
[80] Ibid, 173.
[81] Matz-Lück, n 64, 100.
[82] Ibid, 99.
[83] Ibid, 99.
[84] Puthucherril, n 14, 178; art. 3(1) HKC.
[85] Puthucherril, n 14, 178.

Annex, supposed to provide technical details, stays vague in many areas,[86] for example regarding the obligations of ship-recycling facilities. They must operate in a way that will

> *prevent, reduce, minimize and to the extent practicable eliminate adverse effects on the environment.*[87]

Those obligations are not specified. While the Convention provides that IMO guidelines have to be 'taken into account', the rules are not explicitly stated by the Convention.[88] Another criticism is that the HKC promotes the 'not in my backyard-syndrome' where developed countries make developing countries bear the burden of their waste in form of end-of-life ships. The HKC for example does not entail an obligation for previous owners to pre-clean the vessel and the ship breaking State is supposed to bear the cost of pre-cleaning which shows the extent of environmental injustice.[89] EU owners generate the waste before then shipping it to the developing world to get rid of it as cheap as possible, leaving the dirty work to developing countries.

Issues with jurisdiction

Another crucial issue of the Convention must be discussed. According to article 3 the HKC shall apply to

> *.1 ships entitled to fly the flag of a Party or operating under its authority;*
>
> *.2 Ship Recycling Facilities operating under the jurisdiction of a Party.*

The Convention's interpretation, implementation and enforcement are up to each State party and violations are subject to national laws .[90] According to Article 4.1, it is the flag States that shall take measures to ensure compliance with the Convention's requirements. Flag States are left with great leeway in the implementation and enforcement of the rules, especially considering the overall vagueness of the Convention and the unclarity regarding the application of guidelines. While ships are subject to surveys and certifications it is the flag State which is responsible for conducting them.[91] According to Article 4.2 States are responsible for the Ship Recycling Facilities under their jurisdiction.[92] That means that the shipbreaking States

[86] Matz-Lück, n 64, 100.
[87] Regulation 17 Annex I to the HKC.
[88] Matz-Lück, n 64, 100.
[89] Mishra, S. 'Non-entry into force of the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009: An analysis from the perspective of India, Pakistan and Bangladesh.' (2018) *Journal of International Maritime Safety, Environmental Affairs, and Shipping*, 26.
[90] Galley, n 6, 173.
[91] Puthucherril, n 14, 153.
[92] Ibid; art. 6 HKC.

themselves are responsible for the creation and enforcement of rules to protect the environment from the ship breaking industry. Another issue is the authorisation of ship breaking facilities. While they have to be authorised according to regulation 8 of the Annex, article 6 HKC prescribes that it is the ship breaking State itself that authorises the facilities. The enactment of strict national environmental rules might limit the operations of ship breaking by ship breaking States. That those, who are highly dependent on the industry, enact such rules, seems unlikely. On the other hand, the HKC provides rights to act for port States: Article 9 gives port States the right to warn, detain, dismiss or exclude the ship from its ports. This might at least give ship owners the incentive to comply with the requirements regarding certificates if the non-compliance can lead to issues while operating the vessel.[93] The violation of the Convention and their sanction is, however, subject to national laws and enforcement.[94] The Convention does not offer elements of control for other State parties and lacks a powerful compliance control mechanism.[95]

A 'Hong Kong ban'?

It must be noted that the Convention does not contain a ban similar to the Basel or EU WSR ban which would prohibit the wrecking of ships in non-OECD/ non-EFTA countries. Instead the HKC works with a system of authorisation. However, a listing approach as taken in the EU SRR, which is discussed in detail below at 2.2, is more flexible: Instead of a complete export ban to certain areas vessels can be recycled in all facilities that are on a list regardless of where they are located. The goal is to ensure responsible ship recycling. For this ban is counter-productive: A complete ban discourages the improvement of facilities in developing countries.[96] Instead of hindering the utilisation of those existing facilities, their infrastructure and operation in less harmful ways should be enabled and promoted. This leads to the conclusion that a ban is not per se the most favourable option.

However, the HKC, while not offering a ban, does also not offer a listing approach. This means that while the ban is less favourable than the listing approach, the HKC does not even offer that. Instead, there is a weak authorisation process where States approve facilities on their own territory. The goal of the HKC should be to implement a system with a listing approach. This will be discussed further down in the chapter on solutions.

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[93] Matz-Lück, n 64, 101.
[94] Art. 10 HKC.
[95] Ibid.
[96] Andrews, A. 'Beyond the Ban – can the Basel Convention adequately Safeguard the Interests of the World's Poor in the International Trade of Hazardous Waste?' (2009) *Law Environment and Development Journal* **5**, 180.

Non-entry into force

The biggest issue is, however, that the Convention has not (yet) entered into force since the requirements of its article 17 have not been met. Article 17 HKC prescribes that

> *[the] Convention shall enter into force 24 months after the date on which the following conditions are met:*
>
> *.1 not less than 15 States have either signed it without reservation as to ratification, acceptance or approval, or have deposited the requisite instrument of ratification, acceptance, approval or accession in accordance with Article 16;*
>
> *.2 the combined merchant fleets of the States mentioned in paragraph 1.1 constitute not less than 40 per cent of the gross tonnage of the world's merchant shipping; and*
>
> *.3 the combined maximum annual ship recycling volume of the States mentioned in paragraph 1.1 during the preceding 10 years constitutes not less than 3 per cent of the gross tonnage of the combined merchant shipping of the same States.*

There are three requirements. Firstly, 15 States must have signed the Convention. With India's accession in the end of 2015 this requirement has been met.[97] The second requirement has, however, not been met. While there are 15 contracting States they only constitute 30.21% of the gross tonnage of the world merchant fleet.[98] There is also the third requirement, which is supposed to make sure that the parties have the capacity to meet their own ship recycling demands. This is made sure by requiring the combined maximum annual ship recycling volume to constitute at least 3% of their combined merchant fleet gross tonnage.[99]
If the HKC enters into force it can constitute a step in the right direction, addressing the issue of shipbreaking in a comprehensive manner. At the present State however, the Convention does not add to the existing framework, as it is not in force.

Conclusion

In conclusion, the HKC offers valuable provisions, considers the whole life of the ship from cradle to grave, and holds both flag and recycling States responsible. The process is held to a higher standard than before: Especially valuable is that only certified ships can be wrecked and

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[97] IMO, *India accession brings ship recycling convention a step closer to entry into force* (08.08.2020), available at http://www.imo.org/en/MediaCentre/PressBriefings/Pages/31-India-HKC.aspx.
[98] IMO (2020), *Status of IMO Treaties* (25.06.2020), available at http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20May.pdf.
[99] Engels, n 69, 51.

only authorized yards can conduct the process. However, it seems problematic that the practice of beaching is not prohibited by the Convention. Furthermore, the rules themselves are vague and hard to enforce. States have great leeway in applying the rules and it is also the State parties themselves with strong interests in the shipbreaking industry which decide on the authorization of facilities.[100]

2.2 EU regime – The Ship Recycling Regulation

Besides the EU WSR, which is discussed above, the EU SRR was adopted by the EU Parliament and the Council of the EU in 2013 with the objective to reduce negative impacts of ship recycling.[101] Firstly, the EU SRR promotes the HKC:

> *This Regulation also aims to facilitate the ratification of the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009 ('the Hong Kong Convention').*[102]

States are required to ratify the HKC without delay and implements its measures while including more stringent provisions.[103] Addressees of the regulation are, according to article 2(1) EU SRR, the flag States. The key obligation is article 6(2)(a) EU SRR which prescribes that

> *ship owners shall ensure that ships destined to be recycled [are] only recycled at ship recycling facilities that are included in the European List.*

It is important to note that the regulation sets higher standards than the HKC which does not operate under a listing approach but rather with a coastal State internal authorisation process. If the HKC was in force, article 1(2) HKC would clear up the relationship between the instruments enabling parties to implement stricter rules.

> *No provision of this Convention shall be interpreted as preventing a Party from taking, individually or jointly, more stringent measures consistent with international law, with respect to the safe and environmentally sound recycling of ships, in order to prevent, reduce or minimize any adverse effects on human health and the environment.*

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[100] Regulation 16 Annex to the HKC.
[101] NGO Shipbreaking Platform, *EU Ship Recycling Regulation* (26.06.2020), available at https://www.shipbreakingplatform.org/issues-of-interest/the-law/eu-srr/.
[102] Art. 1 EU SRR.
[103] Galley, n 6, 192.

The EU SRR provides a listing approach and contains rules on the authorisation process. According to article 14 EU member States authorise the facilities in their own countries. For third States the process is different. Article 15(1) EU SRR prescribes that

> *a ship recycling company owning a ship recycling facility located in a third country and intending to recycle ships flying the flag of a Member State shall submit an application to the Commission for inclusion of that ship recycling facility in the European List.*

To be included in the list facilities, located in the EU or not, must comply with the requirements set out in article 13 EU SRR. Besides the general obligation that they must be

> *designed, constructed and operated in a safe and environmentally sound manner,*[104]

the provision factually prohibits the practice of beaching. According to article 13(1)(b) EU SRR recycling activities must be conducted from built structures, while environmentally sound management has to be ensured through

> *the containment of all hazardous materials present on board during the entire ship recycling process so as to prevent any release of those materials into the environment; and in addition, the handling of hazardous materials, and of waste generated during the ship recycling process, only on impermeable floors with effective drainage systems.*[105]

Beaching, as the name suggests, happens on the beach, without any built structures and without impermeable floors or drainage systems and is therefore excluded.
Additionally, there is article 23(1) EU SRR. It provides that

> *natural or legal persons affected or likely to be affected by a breach of Article 13 in conjunction with Article 15 and Article 16(1)(b) of this Regulation, or having a sufficient interest in environmental decision-making relating to the breach of Article 13 in conjunction with Article 15 and Article 16(1)(b) of this Regulation shall be entitled to request the Commission to take action under this Regulation with respect to such a breach or an imminent threat of such a breach.*

[104] Art. 13(1)(b) EU SRR.
[105] Art. 13(1)(g)(i) EU SRR.

NGOs explicitly fall under the provision.[106] The Commission must consider those requests and inform the persons who submitted the request of the decision to accede or refuse the request for actions, providing reasons for its decision.[107]

Evaluation

The stricter provisions and heightened standards are a great step for the protection of the environment. Especially important is the list approach of the regulation. There is, however, an argument which the shipping industry uses against the EU SRR: It claims that the facilities do not have the capacity to meet the recycling demand of EU flagged vessels[108]. This is however not true. Eight new yards were added to the list in 2018. Besides EU facilities it now includes four sites in Turkey and one in the US.[109] Since the addition of the new yards the facilities on the EU list do have the capacity to recycle all EU flagged vessels.[110] At this point, however, it must be kept in mind that the main generator of end-of-life ships are not EU *flagged* ships but the far greater number of EU *owned* vessels. The EU list facilities just meet the demand for EU flagged ships while not having the capacity to recycle all EU *owned* vessels. Those are not covered by the EU SRR. From the point of view of ship owners flying an EU flag means a more rigorous framework and higher costs for ships that are recycled in the EU instead of being wrecked in substandard breaking yards. This leads to the situation that the implementation of stricter rules might not result in a higher standard of ship breaking but instead encourage owners to make use of FOC and reflag their vessels to countries which are not bound by the EU SRR, thus leading to an overall even lower number of vessels being responsibly recycled.[111] The main goal of the EU should be to achieve the environmentally friendly recycling of all ships with strong links to the EU, that means EU flagged vessels *and* vessels owned by EU nationals. The EU SRR fails to achieve that goal and focusses only on EU flagged vessels, deliberately leaving out a major part of the issue.

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[106] Art. 23(1) EU SRR.
[107] Art. 23 (2), (3) EU SRR.
[108] Seatrade Maritime News, EU-flag owners could face shortage of compliant ship recycling yards (15.08.2020), available at https://www.seatrade-maritime.com/europe/eu-flag-owners-could-face-shortage-compliant-ship-recycling-yards.
[109] Implementing decision (EU) No 2019/995 of the Commission of 17 June 2019.
[110] NGO Shipbreaking Platform and Transport & Environment, *EU-listed yards can handle the recycling demand of EU-flagged ships* (2018).
[111] European Commission, *On the feasibility of a financial instrument that would facilitate safe and sound ship recycling*, Final Report, COM (2017) 420 final (2017), 42.

While the rules are a great step in the direction of less environmentally harming shipbreaking practices, they miss the main generators of waste. Additionally, the rules itself are not strict enough. There is no clear provision on prior informed consent and no obligation for the exporting States to pre-clean the vessels.[112] Additionally, flag State jurisdiction gives flag States great leeway.[113]

2.3 Applicability of and relationship between the instruments

As discussed above, the Basel Convention, transposed in European law through the EU WSR, is applicable to end-of-life ships. They contain the Basel ban or respectively for countries bound by the EU WSR the EFTA ban, prohibiting member States from exporting their hazardous waste to the developing world. On the other hand, there are the HKC and the EU SSR which do not prohibit export of end-of-life ships to the developing world per se. Instead, they provide rules on the authorisation of facilities and the EU SRR established the European list of approved facilities where ship recycling is allowed. Under the HKC facilities can lie in the developing world if they were authorised by their State. At this point it is important to mention article 27 EU SRR. According to the provision the EU WSR is not applicable for ships falling under the scope of the SSR. This means that for ships flagged by EU member States the EU WSR ban is not applicable. Instead they have to comply with the EU SRR. In this part the applicability of the different instruments will be assessed on the basis of four scenarios. In all scenarios an owner who is a national of an EU member State sells the vessel to a cash buyer with the intent to scrap it at a shipbreaking yard that is not licensed by the EU and which does not conform to environmental minimum standards. It is assumed that, when talking about the Basel Convention, the respective States are not only party to the Basel Convention but especially to the Ban Amendment. At this point it is important to keep in mind that the Basel Convention lays obligations on port States while the EU SRR implements obligations on flag States.

Non-EU flag + OECD port State

In the first scenario the vessel is flagged with a non-EU flag and is supposed to start its journey to the breaking yard from an OECD port State. The EU SRR is not applicable to non-EU flag States which is why the European list approach does not apply in the present case. However, the Basel Convention and its ban apply to the OECD member State. If the State is an EU member State, the EU WSR is applicable. This means that, according to article 4A of the Basel

[112] Puthucherril, n 14, 206.
[113] Ibid.

Convention or in the case of an EU port State article 34 EU WSR, the State of export shall prohibit the transboundary movement of the ship. It is important to mention that this is the case where the application of the Basel Convention and the EU WSR on ship breaking as discussed in chapter 2.1.3 is crucial. If end-of-life ships did not fall under the definition of waste, no international laws would apply to the breaking process.

EU flag + non-OECD port State

In the second scenario the vessel is flagged with an EU member State flag, for example France, and lies in a non-OECD port. In that case the EU SRR is applicable to the flag State which has to ensure that the owners recycle the vessel only in approved facilities included in the European list. The Basel ban on the other hand is not applicable to the non-OECD port State since it only binds OECD members.

EU flag + OECD port State

In the third scenario the vessel flies an EU flag while it is supposed to start its journey to the breaking yard from an OECD port State. The European list approach is applicable to flag States which are obligated to ensure that owners only break ships in approved facilities. Additionally, OECD port States would usually be obligated to prohibit the transboundary movement of hazardous waste to non-OECD countries under the Basel ban, or if it is an EU member State to EFTA countries under the EU WSR ban. There are two possibilities within the scenario: (1) the OECD port State is also an EU member State or (2) the OECD port State is not an EU member State.

In the first option, the vessel is flagged by an EU member State and the port State falls under the scope of the EU WSR. At this point the relationship between the EU SRR and the EU WSR is important. The EU SRR is an instrument specifically developed to solve issues around shipbreaking. The participating States agreed that shipbreaking has to be regulated in such a ship breaking specific instrument (the EU SRR) and that the most suitable method is the list approach rather than a complete ban. It would be counterproductive if a port State which is party to the EU SRR had to stop the export of a ship to a breaking yard in a non-EFTA country even though the facility is operated in a way approved by the EU SRR authorisation process. States took that into account when developing the EU SRR and created articles 27 EU SRR and 1(3)(i) EU WSR which exclude EU flagged vessels from the scope of the EU WSR.[114]

[114] Also see discussion above at 2.1.3.

The following shall be excluded from the scope of this Regulation:

[…] ships flying the flag of a Member State falling under the scope of Regulation (EU) No 1257/2013 of the European Parliament and of the Council.

In the situation of a vessel flying an EU member State flag and starting its journey from an EU member port State the EFTA ban is therefore not applicable. The EU SRR listing approach applies.

In the second option the flag State is an EU member State. The port State is not a member of the EU, while being a member of the OECD. This creates the situation that the EU flag State must make sure the vessel is only recycled at an approved facility, even if this facility lies in a non-OECD State, while the port State has the obligation to prohibit the export to such a facility. The question is if a port State can (and must) prohibit the export even though the flag State is allowed to export the ship to an authorised non-OECD yard according to the EU SRR, and therefore rules on environmental protection are in place. Prohibiting the export even though a responsible recycling process is guaranteed according to the EU listing approach seems counterproductive. This however does not lift the port State's obligation to stop the export. The Basel ban is applicable law. At the same time, it is important to note how there have been extensive debates around the HKC which has not fulfilled the requirements to enter into force because of lack of ratification. Even if it was in place, the HKC would not entail the listing approach as laid out in the EU SRR. As discussed above, the HKC offers an authorisation process for facilities in which the State where the facility is located is responsible for the authorisation. The international community has not been able to agree on a listing approach. It cannot be assumed that States which did not even ratify the HKC, which on top of that is weaker than the EU SRR, are indirectly bound by the EU regulation. For these reasons the Basel ban applies, and the port State can, and must, stop the export of vessels headed for shipbreaking. This shows another flaw of the framework. A list approach is favourable because it is more flexible and makes use of all recycling capacities regardless of where the facility lies. In the present case, the port State would however be forced to stop a vessel from its journey to a recycling yard even if the yard is approved by the EU and complies with environmental standards. The right the EU legislation gives to EU coastal States is meaningless when it can be overridden by the port State which highlights the regulation's limited applicability.

Non-EU flag + non-OECD port State

Finally, there is the fourth scenario, in which the vessel flies a non-EU flag, for example Panama, and is supposed to start its journey to the breaking yard in the port of a non-OECD country. Neither the Basel ban nor the European list approach of the EU SRR are applicable. This shows the magnitude of the framework's loopholes. As further explained in chapter 3 the practice of reflagging ships or flying a non-EU flag from the beginning is a common practice. This means that a substantial number of vessels owned by EU member State owners evade regulations and operate without any real framework on environmental protection regarding ship breaking. It is important to note that this is also the case when there is no port State when the parties decided to sell the ship while it was in an area not under any State's jurisdiction.[115]

Evaluation

The chart below shows which instruments are applicable in which scenario.

		Basel ban/ EU WSR ban	EU SRR List	
1) Non-EU flag OECD port State		✓	x	
2) EU flag Non-OECD port State		x	✓	
3) EU flag OECD port State	a) EU port State	x	✓	
	b) Non-EU port State	✓	x	EU SRR (x) even though EU flagged vessel
4) Non-EU flag Non-OECD port State		x	x	Loophole

[115] See the evaluation in 2.1.3.

It is important to note that in the fourth scenario none of the instruments is applicable and owners national to EU member States operating their vessels under a non-EU flag, starting the vessels journey in a non-OECD port can easily make use of the loophole. It must also be highlighted that, while the EU SRR is applicable to EU member States, not in all cases of vessels flying the flag of an EU member State the regulation actually applies. In scenario 3b the Basel ban obliges the port State to stop the transfer, even if the vessel is headed to an EU approved facility. At this point it can also be seen how important the application of the Basel or WSR ban is. If end-of-life ships did not fall under the Convention loopholes would exist in the cases of 1) and 3) b) of the chart as well.

2.4 Conclusion

There are multiple legally binding and non-binding instruments on international and EU level dealing with shipbreaking. However, few of the instruments seem to offer sufficient environmental protection. The London Convention and Protocol are not applicable, while the LOSC is too general to regulate the matters. The applicability of the Basel Convention and its EU implementation through the EU WSR is highly debated. While in the end, as discussed above, they are applicable to end-of-life ships their provisions are easily circumvented. More promising is the HKC offering more stringent regulations for the protection of the environment, especially designed for the matters of ship recycling. The HKC is, however, not yet in force. Additionally, there is the EU SRR applicable to EU member State vessels in most cases. Its provisions seem to offer a good framework for ship disposal. The EU SRR, however, only addresses EU flagged vessels, and leaves out the real generators of waste, the EU owners.

In conclusion, States have realised that harmful shipbreaking practices cannot continue and started taking steps towards a greener ship recycling process. However, as shown on the basis of the different scenarios, there are substantial loopholes in the framework and the legislation is far from a comprehensive regime.

3 Evasion of rules

So far, this work has debated the regulatory framework on shipbreaking and whether the rules themselves offer a comprehensive regime. There is another issue that touches upon the matters of ship breaking which is the evasion of existing rules.

3.1 Circumvention of the Basel Convention and EU WSR

As discussed above, the Basel Convention and EU WSR focus on port State jurisdiction. A port State has to prevent the transboundary movement of an end-of-life ship to non-OECD or non-EFTA countries if it is considered waste. The important factor which makes an otherwise operative vessel waste is the 'intent to dispose'. As established above the sale to a broker does constitute this criterion and obliges the port State to stop the vessel from leaving the port. This is however easily circumvented. The only thing the owner has to do is to conclude the sale when the ship is in an area outside of the port States' jurisdiction. The port State does not have any access possibility here and the instruments do not apply.

3.2 FOC

There is another important issue touching upon shipbreaking which is the use of FOC and reflagging ships to evade otherwise applicable rules. According to article 92 (1) LOSC every ship

> *shall sail under the flag of one State only and […] shall be subject to its jurisdiction on the high seas.*

Article 94 LOSC prescribes that

> *Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*

Historically, ships would be registered according to their owners' nationality. This has however shifted with ship registries opening for the registration of vessels from other nationalities, starting with Panama in 1917.[116] From then on, more and more owners started to register their ships in a different country. This has led to the current situation that more than 70% of the global fleet is registered in so-called open registries.[117] In the beginning of the practice the

[116] Piniella, F; Alcaide; J, Rodríguez-Díaz, E 'The Panama Ship Registry: 1917–2017' (2017) *Marine Policy* **77**, 14.
[117] As of 2015; Ibid, 13.

reasons for using open registries were of political or military nature such as the maintenance of neutrality during war whereas today flagging out is mostly influenced by economic incentives.[118]

At this point the terms «open registry» and «FOC» must be assessed. While both expressions are commonly used there is no legally accepted definition for either of them, and they have been 'defined by usage'.[119] Two factors commonly surface in attempts to define the terms: The relationship between the flag State and the registered vessel and the flag State's reputation regarding compliance with international standards.[120] The term FOC describes the practice of registering a ship in country that does not match the State of vessel owner control or residence.[121] In 1974, the International Transport Workers' Federation (ITF) launched a campaign against FOC and defined FOC as a flag

> *where beneficial ownership and control of a vessel is found to be elsewhere than in the country of the flag the vessel is flying.*[122]

The ITF's fair practices committee maintains a list on which there are currently 35 flags which it declares FOC.[123] Open registries equate to FOC,[124] meaning registries offering registration to ships by foreign owners, often with minimal restrictions.[125] They tend to have few requirements for owner and vessel regarding financial and regulatory controls while the registration is as easy as possible. In many cases the registration process is automated and neither the owner nor the ship even must be present in the country of registration. In the Panamanian register for example the registration process takes less than four hours.[126]

Are FOC always weak?

Some scholars argue that on top of the divergence of owner's nationality and flag State definition of a FOC includes that the State is non-compliant regarding the promotion of certain

[118] Miller, DD; Sumaila, UR (2014). 'Flag use behavior and IUU activity within the international fishing fleet: Refining definitions and identifying areas of concern' (2014) *Marine Policy* **44**, 204.
[119] Ibid, 205.
[120] Ibid.
[121] Ibid, 204.
[122] IFT Global, *Flags of Convenience* (01.07.2020), available at https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience.
[123] Ibid.
[124] International Transport Workers' Federation, Churchill, RR, *The meaning of the 'genuine link' requirement in relation to the nationality of ships* (2000), 13.
[125] Alderton, T; Winchester, N. 'Globalisation and de-regulation in the maritime industry.' (2002) *Marine Policy* **26**, 36.
[126] Piniella, Alcaide, Rodríguez-Díaz, n 117, 15.

standards such as social and environmental issues.[127] This, however, cannot be the case. Non-compliance is a separate issue. While vessel owners might be inclined to use flags of States that are known for not enforcing international rules, there are flags of convenience that do comply with their duties and whose framework or enforcement cannot be described as weak in general. For example, it turned out that in some cases pay and conditions on vessels where owner nationality and flag correspond can be worse than on ships where the owner's and the register's nationality differ.[128] Thus, while those 'flags of non-compliance' and flags with weak laws certainly pose issues and often overlap with FOC, non-compliance or a weak legal framework cannot be an indispensable component of the definition of FOC. Therefore, a FOC must be defined as the mere divergence of nationality of ownership and flagging, for whatever advantage the owner seeks. While FOC often are weak they do not have to be. At this point it is important to note that the issue with ship breaking is not really non-compliance of certain flag States with environmental rules. The issue is rather that States register with flags that are not bound by certain rules such as the EU SRR.

The requirements the ship and owner must fulfil when registering a vessel are subject to national jurisdiction:

> *Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag.*[129]

The only condition imposed by the regime is found in article 91 (1) LOSC and art. 5 (1) of the 1958 High Seas Convention (HSC)[130]:

> *There must exist a genuine link between the State and the ship.*

What is the «genuine link»?

There has been extensive debate about the term 'genuine link' and no consensus among either States or scholars has been reached.[131] There is no definition of the term in either the LOSC or the High Seas Convention and there is no established meaning in international law since there is no earlier history of the use of the term.[132] Two central questions are raised:

(1) Is the genuine link between ship and flag State a mandatory requirement to receive the flag of a country?

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[127] Miller; Sumaila, n 118, 204f.
[128] Alderton; Winchester, n 125, 36. (2002).
[129] Art. 91 (1) LOSC.
[130] Convention on the High Seas of 29 April 1958 (450 UNTS 11).
[131] ITF, Churchill, n 124, 4.
[132] Ibid, 12.

And (2) what are the consequences if no such link exists. Can other States reject the flag?

Historical developments

A quick look at the development of the provisions might help. The International Law Commission (ILC) started dealing with the issue as early as 1950.[133] Controversial debates led to the creation of draft article 5 which read:

> *Each State may fix the conditions for the registration of ships in its territory and the right to fly its flag. Nevertheless, for purposes of recognition of its national character by other States, a ship must either:*
>
> *1. Be the property of the State concerned; or*
>
> *2. Be more than half owned by:*
>
> *(a) Nationals of or persons legally domiciled in the territory of the State concerned and actually resident there; or […].*

After further discussions in the following years, the article became article 29 which reads:

> *each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag.*
>
> *Nevertheless, for the purpose of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship.*

In the end article 29 became article 5 on the High Seas Convention with a vote of 65 - 0[134]. It provides that

> *each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. […] There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*

States dropped the element of non-recognition in the process and added the element of effective exercise of jurisdiction and control. This means that other States are not entitled to question the nationality of ships.

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[133] Ibid, 16.
[134] Cogliati-Bantz, VP 'Disentangling the 'Genuine link': Enquiries in Sea, Air and Space Law' (2010) Nordic Journal of International Law 79, 397.

Cases

There is a small number of cases discussing the nationality of ships. The first is the IMCO case[135] in which the ICJ was asked for an advisory opinion on the constitution of the Marine Safety Committee. The term 'largest ship owning nations' became important. The Court stated that 'ship owning' could be decided regardless of beneficial ownership.[136] The Court did not discuss the element of the genuine link. Another important case in the issue is the 1999 *M/V Saiga Case (No 2).*[137] The M/V Saiga was a St. Vincent flagged vessel arrested by Guinea for alleged violations of customs laws. It was Cypriot owned, managed by a Swiss company, and sailing with a Ukrainian crew. St. Vincent challenged the arrest while Guinea argued that the ship was not registered validly in St. Vincent and, if it was, there was no genuine link.[138] The Court decided that the registration under St. Vincent laws was valid since the registry of ships is under the States' exclusive jurisdiction. Further, in the opinion of the Court there was nothing in article 94 LOSC permitting the non-recognition of a flag by other States. According to the Court the purpose of the genuine link is the more effective implementation of flag State duties and does not establish criteria for the validity of the registration to be challenged by other States.[139] This view was upheld by ITLOS in its 2014 judgement on the *Virginia G.*[140] Guinea-Bissau had arrested a Panama-flagged vessel in Guinea-Bissau's EEZ. Guinea-Bissau argued the inadmissibility of Panama's claims because of the lack of a genuine link between the flag and the ship and that it therefore did not have to acknowledge the ship's right of navigation in its EEZ.[141] The Tribunal further stated that

> *once a ship is registered, the flag State is required, under article 94 of the Convention, to exercise effective jurisdiction and control over that ship in order to ensure that it operates in accordance with generally accepted international regulations, procedures and practices. This is the meaning of 'genuine link'.*[142]

[135] *Constitution of the Maritime Safety Cornmittee of the Inter-Governmental Maritime Consultative Organization*, (Advisory Opinion) [1960] ICJ. Rep 150.
[136] ITF, Churchill, n 124, 23.
[137] *M/V 'SAIGA' (No. 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment) [1999] ITLOS Rep 10.
[138] ITF, Churchill, n 124, 48.
[139] ITF, Churchill, n 124, 49.
[140] *M/V 'Virginia G' (Panama v Guinea-Bissau)* (Judgment) [2014] ITLOS Rep 4.
[141] Ibid, 44.
[142] Ibid, para 113.

Conclusion

Above discussion shows the turbulent history of the requirement of the genuine link and how many aspects seem unclear. However, some main points can be deducted: Firstly, there is the general agreement that a genuine link in some form is required. It is common agreement that it is the States' discretion how genuineness is ensured.[143] One form is national laws on nationality of ownership or crew. It is, however, not the only possibility, as seen by the fact that such requirement could not reach a majority in the process of developing art. 5 HSC.[144] In the end, the above discussions and especially consistent case law show that the meaning of the genuine link is the duty for flag States to exercise effective jurisdiction and control on vessels registered under their flag.

FOC in shipbreaking

The regulatory framework of ship registry causes issues related to ship breaking. Flag States have discretion in registering ships and thus are given substantive leeway. As established above the genuine link requirement poses the obligation for States to exercise effective jurisdiction and control on their vessels, which makes the genuine link a result of and not a precondition to register under a certain flag. This leads to the situation that ship owners can easily register in countries which are not bound by the Basel Convention, EU WSR or EU SRR. If ship owners register their vessels in countries that are not party to those Conventions the provisions do not apply to them. The genuine link 'only' means that the flag State must enforce laws applicable to them – if the main legal framework on ship breaking is not applicable, the rules run dry as owners can easily evade them by reflagging.

3.3 Conclusion

The subject of ship breaking is not a legal void and certain rules and standards do exist. This chapter showed how easy it is for vessel owners to circumvent these existing rules, by either disguising their intent to dispose of the vessel or by using FOC. This shows how it is not only important to implement strict rules on the subject of ship recycling, but especially to pay attention to the realities of the industry: Imposing stricter and stricter rules on flag and port States, which owners can evade easily by leaving the port States jurisdiction and reflagging, cannot be the way. Solutions must be found to prevent these practices to not only have a strict framework on paper but one that reaches the actual generators of waste – the ship owners.

[143] ITF, Churchill, n 124, 38.
[144] Ibid.

4 Possible Solutions to close the gaps

In the previous chapters the gaps in the framework on ship breaking were identified. The following section will assess how the identified gaps can be addressed. Firstly, it will be assessed how the different applicable instruments should be developed to be able to tackle the difficulties. In the second part possible changes regarding the framework of FOC will be discussed.

4.1 Changing the rules on ship breaking

4.1.1 The Basel Convention

The Basel Convention has three main issues. First, there is an ongoing discussion as to whether the Convention is applicable to end-of-life ships. The legal issue is if the sale of a ship to a cash buyer constitutes the intent to dispose the vessel and therefore if it falls under the definition of waste. The conclusion in this paper is that selling the ship to a broker does in fact constitute the intent to dispose of the vessel. A seemingly small change should be taken to solve the issue: The Convention should be rendered in the regard that the sale of end-of-life ships to a broker explicitly falls under the definition of waste, which could be possible by a decision by the Conference of Parties. It must be kept in mind that if the Basel Convention was not applicable, in the case of a non-EU flag and a non-EU port no international legislation would be applicable to the issues of shipbreaking (see scenarios above). The clear applicability of the Basel Convention on end-of-life ships is an important step to reach a higher level of legal certainty and close that loophole. However, the debate is still in full force and both the ship breaking industry and ship owners pose a strong lobby against that interpretation. Therefore, while desirable, it is unlikely that States will reach such agreement.

A second point of criticism regards the port State jurisdiction approach pursued by the Convention. It leads to the fact that the circumvention of rules is easy: If the sale is conducted when the ship is outside of a State's maritime zones the Convention is not applicable. A possible and desirable solution is the establishment of flag State jurisdiction which is applicable independently of a ship's location. That would mean that the flag State would have to stop the vessel's departure to a breaking yard regardless of where the vessel is when the sale takes place. It is however questionable if States would agree to a change to flag State jurisdiction. States have tried to implement an instrument relying (also) on flag State jurisdiction – the HKC. The HKC has not entered into force because the requirements of art. 17 HKC have not yet been fulfilled. At this point, the top flag States' participation must be evaluated – only two of the top

ten flag States, Panama and Malta, acceded to the Convention.[145] Keeping in mind that the top five flag States account for almost 50% and the top ten for 65% of the world's total ocean-going merchant fleet[146] it becomes understandable that without their participation the entry into force of the HKC is almost impossible. The reason for the flag States' hesitance is simple: The HKC imposes obligations on them regarding the ship breaking process without offering any substantial incentives. If one keeps in mind that flag States were not willing to implement an instrument relying on flag State jurisdiction specific to ship recycling it becomes clear why the implementation of such jurisdiction for all transboundary movements of waste is unlikely.

The third criticism of the Basel Convention and the EU WSR is their system of a ban instead of a listing approach for recycling facilities. As discussed above, the listing approach is favourable in the case of ship breaking. It is however in question how likely the incorporation of a listing approach is. States have developed the HKC at a global level. To this date it has not entered into force because of a lack of formal adherence in order to fulfil the requirements of article 17 HKC. One must keep in mind that this is the case even though the Convention does not include a ban or a listing approach – even though its rules are weaker than including a listing approach the implementation has not been possible. This implies strongly that the incorporation of a listing approach on a global level in the Basel Convention is unlikely. Such approach in the Basel Convention would not only cover ship breaking facilities but rather extend to all other forms of waste. If the adoption of a list for only ship breaking in the HKC has been impossible, the global community will not be able to agree on such approach for the recycling of all wastes.

4.1.2 The HKC

4.1.2.1 Stricter rules

As discussed above the HKC, which is not in force, offers ground rules on the operation of ships and breaking facilities. Firstly, its rules itself are discussed. Facilities must be authorised by the State they are operated in. However, it seems problematic that the State profiting from the industry is also the actor authorising the facilities and often just barely fulfils the minimum standards. A solution to ensure more environmentally friendly practices regarding ship breaking is the creation of an independent assessment body, evaluating and authorising facilities. It is, however, questionable whether States would agree on this. Even with the weaker provisions – namely authorisation by the breaking States itself instead of a listing approach such as in the

[145] IMO (2020), *Status of IMO Treaties* (10.08.2020), available at http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20June.pdf.
[146] Engels, n 69, 50.

EU SRR - States have not been able to reach the implementation of the agreement due to the inability to fulfil the requirements of article 17 HKC. In case of an independent institution authorising facilities ship breaking States would give up great leeway. Their sovereignty would be touched upon if an international institution could influence the operation of their industry. A provision in that regard does not seem likely at this point. Another important element to reach the goal of a less environmentally harmful ship breaking industry is to ban the beaching practice. Provisions comparable to the EU SRR are desirable. Additionally, the prior informed consent principle as in the Basel Convention should be implemented and the duty to pre-clean the vessel before it reaches the developing countries.

Further, as discussed above, the HKC offers neither a ban nor a listing approach. A listing approach as in the EU SRR is desirable. All proposed changes for the HKC however are confronted with the same issue: The Convention has not even managed to acquire enough parties for its implementation in its current, weaker form. The implementation with an even stricter listing approach seems unlikely.

4.1.2.2 Ensuring entry into force

Therefore, perhaps the most obvious solution at this point instead of thinking about stricter rules is to first at least reach the implementation of the HKC in its current form, offering ground rules on the safe and environmentally sound recycling of ships. Even if the rules are not as strict as would be desirable the HKC is the first international instrument specifically designed for ship breaking and could constitute an important legal basis. As said above it has not entered into force because the requirements of article 17 HKC have not been met. It must be discussed why the Convention has not managed to meet the required 40% of the gross tonnage of the world's merchant fleet and how the entry into force could be ensured. It is important to note how the major ship breaking countries have been hesitant to accede to the Convention – India and Turkey are the only two of the five major ship breaking countries that are parties to the Convention. Both only became parties relatively recently in 2019.[147] One reason for this is how the HKC imposes a wide array of duties for the countries operating ship breaking facilities in regulations 9 and 15 to 23 while failing to offer advantages or incentives to develop their ship recycling industry in a less environmentally harmful way. An example for that is how the flag State is not responsible for pre-cleaning, leaving the responsibility for bearing the costs to the ship breaking States who did not generate the waste or ever operated the respective ships.[148]

[147] IMO, n 145.
[148] Mishra, n 89, 26.

The entry into force of the HKC is desirable to reach understandable and comprehensive ground rules specifically for ship breaking. The Convention does however not give top flag States and ship breaking States convincing arguments to sign the agreement when laying multiple obligations on them from the operation of ships to the operation of ship breaking facilities without offering many advantages. Ways must be found to give them a reason to accede. The HKC at their current state does not convince the necessary parties. A solution might be the strengthening of EU rules, as discussed in the next chapter below.

4.1.3 The EU SRR leading to the implementation of the HKC?

A solution to the weak acceptance of the HKC might be the strengthening of EU rules leading to flag and ship breaking States wanting to participate in an international agreement. As seen above the approach to develop an international instrument is difficult. The actors are diverse and have very different interests. On the quest to find rules everyone agrees with the respective rules become more and more diluted until the framework that an international instrument such as the HKC can offer consists of only very basic ground rules. The HKC does for example not offer an effective authorisation process and beaching is still allowed. Another approach instead of a weak international instrument is the use of a regional agreement such as the EU SRR. European owned ships constitute a big share of the vessels that are broken in Asian ship breaking yards. Effectively hindering those to be broken in sub-standard breaking yards would constitute a strong incentive for breaking countries to adhere to environmental standards – if Europeans are forbidden to sell their vessels to the major ship breaking countries the ship breaking industry will be forced to change their practices to conform with the European list requirements. This would lead to a change in the ship breaking industry towards a greener future – and even constitute an incentive for ship breaking countries to become parties to an international agreement like the HKC.

Rules addressing owners

For this to happen the EU SRR must lead to the fact that in practice fewer European owned ships reach Bangladesh, India, and Pakistan, constituting a real threat to the industry how it is. The issue that shows itself here is that while the EU SRR's rules are strict and include a listing approach, at the moment they only apply to EU member States in their capacity as *flag* States while very few vessels owned by European owners are actually flagged in EU member States. The provisions do not address the far greater number of non-European flagged but European owned vessels which are able to, and do, sail to the substandard breaking yards unhindered.

While the EU SRR offers laudable provisions, for this reason its reach is limited. The EU SRR must be amended in the way that the *owner* State of the vessel is an addressee besides the flag State. European *owner* States shall have the obligation to prevent their nationals from exporting their vessels to facilities that are not included on the list. This is the only way the stream of vessels from Europe to breaking yards in Asia can be reduced and incite ship breaking countries to agree to rules offering stricter environmental protection. This means that besides the rules applying on flag States, EU member States shall have the duty to prohibit their ship owning nationals from wrecking their vessels in ship breaking yards which are not included in the European list. Only this way all ships which have a strong link to the EU – be it because of the flag or owner nationality – can be covered.

Intent to dispose

However, there is an issue with this approach. It could incite circumvention practices known from the Basel Convention: Owners would simply sell the vessel to a non-European broker and evade the rules. This shows one of the biggest flaws of the current system of ship breaking: The original ship owner who is the actual generator of the waste escapes all responsibilities by selling the ship to a cash buyer. *Puthucherril* formulates that the ship owners need to have more control over the vessels,[149] making it sound as if ship owners were somehow robbed of their rights on determining where the ship shall go. He is right in one way – ship owners should have more control over the vessels. However, there is more to it. Ship owners must face more *responsibilities* over the vessels they try to get rid of. In reality those owners do not want control over the end-of-life vessels – as soon as they are not profitable anymore they want to sell the ships and escape the responsibilities of recycling them in an environmentally friendly way. This out of sight-out of mind mentality must be thwarted.

The assessments of the Basel Convention regarding the *intent to dispose* must therefore be transposed to the EU SRR. This leads to two substantial changes the EU SRR needs to undergo:

> (1) European *owner* States shall prevent their nationals from breaking their ships in breaking yards which are not included in the European list.
>
> And (2) the decisive moment in time for the criteria of ownership shall be the initial owner's *intent to dispose* of the vessel. This includes, as the Basel Convention shall

[149] Puthucherril, n 14, 198.

be interpreted, the sale to a broker. An owner could therefore not sell a vessel to a broker when that ship will be sold further to a yard not included in the EU list.

Incentive to accede to the HKC

This solution, the added focus on owners instead of flag States in the EU SRR, has two expected effects. Firstly, the rules of the EU SRR based on owners' nationalities would cover a greater number of vessels and be harder to circumvent: Just registering the vessel in an open register would not suffice. Secondly, hindering EU *owners* from sailing their vessels to Asia would make the implementation of the HKC more likely: The major ship breaking States would receive much less business. That would constitute a strong incentive for the ship breaking States to agree to an instrument implementing stricter rules – such instrument could be the HKC. Ship breaking countries would first be incited to fulfil the standards of a European list to be able to receive business from EU owned vessels. In the future this would lead to the desire to become part of an international agreement such as the HKC, where the ship breaking States would not only have to comply with rules of a regional agreement in which they have no say but where they could rather influence the agreement. The end solution should be that ship breaking States, which at this point will have started to develop recycling facilities living up to the requirements of the European list, accede to the HKC, thus making it enter into force. Further, ship breaking States will want to be able to influence process of authorization instead of just living up to the EU list's requirements without having a place at the table. Therefore, the agreement on the adoption of a list approach in the HKC, executed by an independent international authority, seems possible in the future.

This solution also takes flag State interests into account. Instead of putting more and more obligations on them which can be easily circumvented anyways, the rules focus on owners – who are the real generators of the waste – and gives incentives to sub-standard facilities to implement less environmentally harming practices.

Future changes of the HKC

The changes in the EU SRR are expected to lead to the HKC's gradual acceptance and may lead to its entry into force. In the next step, the HKC should be strengthened by implementing stricter rules such as a ban of the beaching practice and the implementation of a prior informed consent principle. Rules on pre-cleaning the vessels should be added[150] and rules on the

[150] Ibid, 198.

'breaker-friendly' construction and operation of vessels should be followed.[151] At this point, the structure of the HKC which consists of the main text and an Annex is beneficial: The Annex is more flexible as it is easier to change, and it can be adjusted by and by as the approval of the Convention grows to facilitate a more regulated and greener future of ship breaking. In the long run, the HKC should offer the same framework as proposed for the EU SRR. A listing approach should be implemented in the international instrument and owners should be addressed. As argued above, such changes are unlikely at the moment since the HKC has not been able to enter into force yet, even with the weaker provisions. However, after the strengthening of the EU SRR leading to the entry into force of the HKC, those changes should be the long-term goals of the Convention.

4.1.4 Other mechanisms

In the previous part the unwillingness of States, especially ship breaking States, to implement the HKC because of the legal obligations it put on them was discussed. This, however, is not the only reason keeping States from acceding to the Convention. The reason why ship breaking is conducted in environmentally harmful ways on the beach instead of using more sustainable and preferable methods like the dry-dock procedure[152] is simple: Beaching is cheaper. Modifying and rebuilding the whole industry to meet stricter requirements of a new instrument is expensive and perhaps even unaffordable for the developing States.[153] At the same time, by far the greatest part of ships destined for disposal is generated by developed countries, a great part of it by EU owners.[154] They produce most of the waste while not having the recycling capacity for all EU owned vessels in their own countries. Creating recycling facilities meeting the EU SRR requirements would be expensive – thus they export their end-of-life ships to developing countries. Those two factors, developed countries producing waste and them not having enough capacities, cannot cumulate in the situation that developing countries are forced to renew their facilities at their own charge to meet the developed countries ship recycling demand. Developed countries must recognise their responsibilities and finance parts of the building or renewal processes. Developed States should meet the standards of the *polluter pays* principle as one of the fundamental principles of international environmental law,[155]

[151] Ibid, 202.
[152] Ibid, 197.
[153] Matz-Lück, n 64, 102-103.
[154] Puthucherril, n 14, 199.
[155] Engels, n 69, 167.

incorporated in EU law through article 191.2 of the Treaty on the Functioning of the European Union (TFEU),[156] as formulated in the Rio Declaration:[157]

> *National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.*

To put it in plain language: EU member States should pay for the development of ship breaking facilities in Asia which they so actively use because it is cheaper, and they do not have the facilities themselves. Something that could be imagined would be an arrangement of participation shares based on percentage of vessels owned by respective nationals, for example under the auspices of the IMO or under EU law such as the EU SRR. The EU as the real generator of wastes should (co-)finance the transition of Asian ship breaking facilities to include dry docks. Additionally, there should be rules in the HKC or other instruments prescribing technology transfer and adequate training of personnel. At the same time, EU member States should build facilities in the EU itself that meet the EU SRR's requirements and add facilities inside and outside of the EU to the list.

A strong lobby against the HKC and similar instruments is conducted by ship owners. Their concern is the rise of costs created by the HKC's provisions, for example when inventories on hazardous materials must be created and maintained, ultimately leading to disadvantages in competition with owners from non-EU countries.[158] It does not seem like mere requirements to keep an inventory will create strong disadvantages or that international competition should be a reason to put the development of a greener future for ship recycling on hold. However, when ship owners sell their old vessels to Asian ship breaking yards (or cash buyers who subsequently sell to the breaking yard) they receive the market price for scrap steel in return. If they sold the ships to breaking yards in the EU this would not be the case – instead of profiting from the scrap they might even have to pay for the disposal of toxic waste.[159] Financial incentives for them to encourage owners to choose more responsible ship recycling practices could be kept in mind as a mechanism to forward the acceptance and application of the instrument, for example

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[156] Ibid, 164;
Consolidated version of the Treaty on the Functioning of the European Union 2012/C 326/01 of 26 October 2012.
[157] United Nations Conference on Environment and Development. (1992). Agenda 21, Rio Declaration.
[158] Milieu and COWI, *Note on pros and cons of early transposition of the Ship Recycling Convention* (2009), 30.
[159] Puthucherril, n 14, 204.

in the form of tax reliefs. Another form of incentive for owners could be the Ship Recycling License (SRL), which is discussed further below.

Another approach is the regulation of ship breaking on a national level, meaning that the ship breaking States should create a stricter framework. It is however questionable if States would do this. The breaking States benefit directly from the industry, by renting out breaking plots and through taxes and customs.[160] When India strengthened the national framework on shipbreaking the industry migrated to Bangladesh instead.[161] This does not help the environment, it just leads to a race to the bottom between the ship breaking countries to be the most desirable - the cheapest – location.[162] Ship breaking is a global issue which cannot only be tackled on only the national level. Additionally, the EU as a big actor in generating the waste should not escape responsibilities by waiting for developing countries, which are dependent of the ship breaking industry, to create a national framework.

4.1.4.1 Conclusion

In the past decades States have realised the necessity of the development of rules on the breaking of ships and the protection of the environment. The above explanations show, however, that the goal of a less environmentally harmful ship breaking industry cannot be achieved through one of the discussed instruments at this point in time. Too many actors with diverging interests are part of the picture. When all of them, flag States, ship breaking States and States with many ship owners, developed and developing, try to design a common instrument, the result will be the lowest common denominator with vague, weak rules on environmental protection such as the HKC. As shown in chapter 2.3, in the domain of ship breaking different instruments are applicable to different actors, thus creating loopholes, while the development and acceptance of an overarching international agreement, attempted in form of the HKC, has not been possible (yet). While such overarching comprehensive regime should be the ultimate goal, intermediate steps must be taken first. Therefore, regardless of the implementation of one international instrument the further development of the whole framework is important. The acceptance of a regime regarding ship breaking is higher in the EU, as shown by the implementation of the EU SRR long before the HKC could enter into force. The EU SRR should therefore include rules directed to EU owners, effectively hindering vessels owned by EU owners from being sold to breaking yards that are not included in the list.

[160] Ibid, 200.
[161] Ibid, 192.
[162] Ibid.

This will curtail the braking yards' business while easing the flag States' sole responsibility, thus giving strong incentives to flag States and ship breaking States to accede to the HKC. With growing approval of the HKC, its provisions can be strengthened in the future. An international list approach such as in the EU SRR, executed by an independent organisation, should be the ultimate goal on the path to sustainable ship recycling. On the way there, the Basel Convention and its ban shall work as a catch mechanism for vessels that are not covered by the EU SRR. For the purpose of legal certainty, the text of the Convention should clarify that the sale of an end-of-life vessel to a broker fulfils the definition of 'waste'.

At this point it is important to note that the EU list facilities do not have the capacity to recycle all EU owned vessels. The EU list, which at this point, except for few facilities in Turkey and one in the US, almost only contains facilities in the EU,[163] must be extended.

4.2 Change the rules on FOC

The second approach to the issue of less environmentally harmful ship breaking practices focusses on changing the framework around ship registry in general instead of changing ship breaking specific provisions. If the use of FOC was prevented or made more complicated more EU owners would be forced to register their vessels in the EU and would therefore be bound by the EU SRR.

4.2.1 International law

The issue of FOC could be tackled on an international level. Different measures come to mind such as the strengthening of the genuine link requirement in the LOSC or the establishment of a Registration Convention.

Strengthening the 'genuine link' in the LOSC

A possibility could be the strengthening of the genuine link in the LOSC. States could agree on certain criteria to be necessary to fulfil the genuine link requirement, such as the nationality of owners or crew. This, however, seems highly unlikely. As discussed, States have not been willing to adopt such rules even though it has been a topic of debate since the 1950s. Rather it has been restated by courts that the registration process stays under the States' complete discretion and without requirements to the owner's or crew's nationality. Similarly, a non-recognition clause might seem like an effective way to stop reflagging practices. However, there has been insufficient support within the international community. The reason for that is

[163] Implementing decision (EU) No 2019/995 of the Commission of 17 June 2019.

that flagging of ships and their control is a central right of States which they do not want to give up. Further, the possibility of non-recognition would lead to chaos: Who decides which flags are not valid – each State for each foreign-flagged vessel in their maritime zones? What would that mean for vessels on the high seas? What if one State accepts the flag of a vessel and another does not – which nationality is valid? What would the consequence of non-recognition be – is the respective vessel stateless or does it have the nationality of the owners or the crew? If States could decide that a vessel is not of a certain nationality – could it then decide which nationality it is instead? All this could lead to the situation of multiple States trying to enforce jurisdiction on the same vessel or, the other extreme, no State feels responsible, and create an intolerable degree of legal uncertainty. According to article 92 LOSC

> *(s)hips shall sail under the flag of one State only and (…) shall be subject to its exclusive jurisdiction on the high seas.*

This provision is an important cornerstone of the law of the sea framework. Ships sailing in areas beyond national jurisdiction must be subject to effective jurisdiction and control of a State. This is only possible if it is evident which State is responsible. The responsibility must be clear from an objective point of view – the flag the vessel is flying – and not be subject to evaluation by different States. From the point of view of legal clarity, a system of non-recognition would only work if it was conducted by an independent authority. However, as stated above, flag States want to maintain their discretion over their vessels. The establishment of an international authority on which States transfer discretion to accept or reject flag States is unlikely.

Convention on the registration of ships

Another possibility could be an international instrument on the registry of ships. In the 1980s States developed such instrument and created the United Nations Convention on Conditions for Registration of Ships.[164] States, under the auspices of the United Nations Conference on Trade and Development (UNCTAD), defined the elements necessary to register a ship in a national registry, including, amongst others, provisions on the genuine link, ownership and role and accountability of the flag States.[165] It is important to note how States had to compromise on many of the provisions in order to reach an agreement. The Convention's provisions are not especially strict and flag State jurisdiction prevails: Article 8 for example regulates the ownership of ships flying a States flag. The Convention is unprecise and leaves it up to parties

[164] United Nations Convention on Conditions for Registration of Ships of 13 March 1986 (TD/RS/CONF/23)
[165] Kasoulides, G. 'The 1986 United Nations Convention on the Conditions for Registration of Vessels and the Question of Open Registry.' (1989) *Ocean Development and International Law* **20**, 543.

to decide which form they should have. It is only required that States have national rules on ownership and that those

> *should be sufficient to permit the flag state to exercise effective its jurisdiction and control over the ships flying its flag.*[166]

Article 9 of the Convention on manning is equally flexible. It provides that a State

> *Shall observe the principle that a satisfactory part of the [crew] be nationals or persons domiciled or lawfully in permanent domicile in that State.*

The State shall also ensure that

> *the manning of ships flying its flag is of such a level and competence as to ensure compliance with applicable international rules and standards.*[167]

Additionally, there is article 10. It prescribes that

> *The State of registration, before entering a ship in its register of ships, shall ensure that the shipowning company […] is established or has its principle place of business within its territory.*

This provision seems to be a strong tie between registration and location of the owner. However, it is diluted in its second paragraph which provides that the company can be established in another jurisdiction as long as the company offers a natural or juridical person as a representative or management person who is national to or domiciled in the registering State. The Registration Convention has an obvious issue: It is not in force since the requirements of its article 19 have not been met – the instrument has not reached the 40 needed signatures,[168] and it has not managed to achieve those signatures in the past 34 years. That is the case even though the provisions in the instrument are not especially strict: Flag State jurisdiction still gives States great leeway and the rules are far from defining the genuine link requirement in a way which leaves flag States little room to maneuver. If this rather weak instrument could not enter into force, the development of another international instrument which would actually strengthen the genuine link by provisions on ownership or manning seems highly unlikely, if not impossible.

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[166] Art. 8 Registration Convention.
[167] Art. 9 (6)(a) Registration Convention.
[168] United Nations, *7. United Nations Convention on Conditions for Registration of Ships* (22.08.2020), available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-7&chapter=12&clang=_en.

In conclusion, solving the issue of FOC on an international level seems improbable. Both States with many owners of the world fleet and top registering States want to keep the existing system alive. States have discussed the questions on defining more concrete standards regarding the genuine link by for example tying it to specific requirements such as ownership or residence for decades without reaching consensus. The entry into force of the 1986 Registration Convention or the adoption of a new instrument on the international level is not a probably solution.

4.2.2 EU level

The issue of FOC in the sector of ship breaking could be tackled on an EU level.

4.2.2.1 Registration Regulation/ Directive

Firstly, EU States could create an instrument on the EU level in which they develop obligations for EU owners regarding their registration. Rules could be created providing that if the owner is a company registered in a member State, its ships must be registered in the EU as well. However, the use of foreign flags has manifold reasons besides ship breaking and is a common practice. While demonstrating many legal issues such as tax evasion or the circumvention of environmental laws, there are a variety of legal reasons to fly a different flag. One of the basic pillars of the LOSC is that every ship must operate under a flag State's jurisdiction which shall exercise effective jurisdiction and control. Over the past decades, while the genuine link requirement has been subject to controversial debates, one thing was clear early on: It is under the States' discretion which ships they register. While stricter rules on the EU level might be desirable they would face strong headwinds from both the shipping industry and top registering countries. European owners benefit greatly from registering their vessels elsewhere. Under these factors it seems highly unlikely that an EU instrument could gain the necessary approval. It would ignore the realities of the market, when suddenly prescribing stricter rules on national registration without offering any advantages. Additionally, the EU does not even have the capacity to recycle all European owned vessels. The system of foreign registry has worked for a long time – and it has worked especially for EU member States. A sudden change of the system by an EU regulation or directive which prohibits the registry in foreign registers is not practicable; neither for registering States, nor the shipping industry or the EU who could not handle the stream of end-of-life ships. It is also very important to keep in mind that FOC are not only used relating to ship breaking but rather touch many other issues that cannot be evaluated in the scope of this thesis. An EU instrument on the registering of ships would change

the whole system of shipping. States must find a solution that not blindly prohibits reflagging but influences the ship breaking market in a sensible way, offering alternatives for the involved actors.

4.2.2.2 Shipbreaking Fund

A more sensible alternative is the development of a shipbreaking fund which could be a strong instrument to pave the way to a greener ship recycling industry. The ship breaking fund is a financial mechanism based on ships calling at EU ports, regardless of which flag vessels are flying. This might take away the reason to reflag just for the purposes of ship breaking and stop ship owners from circumventing the EU SRR. A starting point for the development of such fund is article 29 EU SRR:

> *The Commission shall, by 31 December 2016, submit to the European Parliament and to the Council a report on the feasibility of a financial instrument that would facilitate safe and sound ship recycling and shall, if appropriate, accompany it by a legislative proposal.*

This is further mentioned in recital 19 of the EU SRR:

> *In the interest of protecting human health and the environment and having regard to the 'polluter pays' principle, the Commission should assess the feasibility of establishing a financial mechanism applicable to all ships calling at a port or anchorage of a Member State, irrespective of the flag they are flying, to generate resources that would facilitate the environmentally sound recycling and treatment of ships without creating an incentive to out-flag.*

The current system of ship breaking relies on the fact that selling vessels to Asian ship breaking yards is cheaper than responsibly recycling in the EU. Major ship breaking yards save money by using non-environmentally friendly methods (such as beaching instead of the dry dock method), low expenses for labor and insufficient machinery.[169] Therefore, they can offer high prices to ship owners. The aim of a financial incentive would be to minimize the owners' profit gap between dismantling in substandard and EU list yards.[170]

[169] European Commission, n 111, 3.
[170] Ibid, 5.

2013 Proposal

In 2013 the Environment Committee of the EU Parliament proposed a ship recycling fund based on a levy system collected by ports. However, the Parliament rejected the proposal.[171] Reasons for that were the high administrative burdens for ports and the question if it was compliant with WTO rules and if it would be considered as a tax, which is outside the mandate of the EU.[172]

2016 study

A 2016 study by Ecorys, the Erasmus School of Law, and DNV GL[173] proposed the instrument of an SRL. The scheme is supposed to work as follows: Ships calling at EU ports are required to hold a license, the SRL. Owners can acquire the license from a centralized EU agency for a minor administration fee under a public administrative legal instrument,[174] which is thinkable either as a separate instrument or incorporated in the EU SRR. After that, the current ship owner is charged a premium, dependent on different factors, such as the type of the vessel, which is transferred to the shipbreaking fund.[175] The premium charged over the years is calculated so that it will mirror the gap between recycling the ship in a facility included on the EU list or breaking it in a substandard yard. After proving that the vessel, after reaching the end of its life, was recycled in a facility that is included on the EU list and in compliance with the other provisions of the EU SRR the premiums are payed back to the ultimate ship owner.[176] At this point it is important to note that the payments are tied to the ship, not to the owner.[177] In the case that the ship is not recycled in compliance with the EU SRR, the paid premium is transferred to a general benefit fund in the area of ship recycling based on an administrative law procedure with the possibility for judicial review.[178]

Evaluation

The SRL as proposed in 2016 has strong advantages. In the current regime of ship breaking most owners think of how to dispose a ship when the ship is at the end of its life. They are then confronted with two options:

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[171] Ecorys, DNV-GL, Erasmus School of Law, *Financial instrument to facilitate safe and sound ship recycling* (2016), 27.
[172] Ibid, 12.
[173] Ibid.
[174] Ibid, 12.
[175] Ibid, 12.
[176] Ibid, 12-13.
[177] Ibid, 41.
[178] Ibid, 13.

(1) The ship is sold to a non-EU broker while disguising the intent to dispose and/or while acting under a FOC. The broker then sells the ship to a substandard breaking yard and the owner obtains plenty of money for the sale

Or (2) the owner decides to recycle the vessel at a responsible yard. This means the owner will not obtain money for the sale and possibly even end up paying for the disposal of hazardous waste.

It is easy to understand why most ship owners make the economic decision and choose the sale to a broker or the operation under a FOC. The SRL has the potential to prevent these circumvention behaviors. Instead of facing the decision to either give millions of dollars away or recycle responsibly, owners will pay small premiums over the years. In the end the decision they face is a different one: They can either sell the ship to a substandard yard and obtain money for the sale or recycle it at an EU listed yard and receiving the paid premiums back. The second option has the advantage that the ship owner does not need to reflag the vessel or use other potentially complicated or cost intensive schemes such as the disguise of ownership to receive money. Further, by applying to all vessels calling in EU ports, regardless of their flag, EU owners are less inclined to circumvent the EU SRR's or other instruments' provisions by registering outside of the EU. This could constitute an important step in the direction of a framework that actually reaches all ships with strong links to the EU. Another advantage of the application to all vessels calling at EU ports is that it complies with WTO rules, namely the rule of non-discrimination. Payments from a fund could be seen as subsidiaries. In the proposed scheme however not only EU vessels can claim the payments but also foreign-flagged vessels and there is no discrimination.[179] Further, compared to the 2013 proposal, the payments are not taxes. Rather they are premiums creating credit to the future payment of a capital amount, which will benefit the ultimate owner of the ship if it is recycled responsibly.[180] If the vessel is broken in a non-EU list facility the owner will forfeit the credits to the future payment as a penalty.[181] There are, however, issues with the proposal. The first is that it will make operating costs for vessels higher. At this point it must be kept in mind that the SRL would apply to all vessels calling in at EU ports. Therefore, there is no distortion of competition or disadvantage for certain actors while the slightly higher costs for the sake of a more environmentally friendly ship breaking industry are reasonable, especially because ship owners can get most of the money back. Besides that, there is a second, more problematic criticism of the proposal which

[179] Ibid, 42.
[180] Ibid, 35.
[181] Ibid.

runs like a red thread through all developed countries' attempts to create a more responsible framework for the ship recycling industry. The SRL is supposed to stop end-of-life ships from going to substandard breaking yards and have them recycled at facilities on the EU list instead. That is the only desirable long-term solution, protecting the environment and safety of workers. However, as stated before, for now the EU list almost solely contains breaking yards in the EU, and those do by far not have the capacity to handle the recycling of all EU owned end-of-life ships. This could create the issue that owners will want to recycle their vessels responsibly to receive their premiums back but will not be able do so because EU breaking yards are out of capacity or they would be year-long waiting periods before a ship can be recycled. This seems counterproductive because it takes away the incentive to scrap responsibly. It is also unfair – the EU cannot create this incentive to make owners scrap their vessels at listed yards and then not have the capacity to do so. If there is no capacity and a vessel cannot be recycled at a listed yard even if the owner wants to – does that mean the owner will not receive the payments from the fund? Therefore, the SRL needs mechanisms to deal with the situation when owners want to recycle responsibly but cannot because of a backlog based on the lack of facilities. Firstly, the EU needs to work on expanding their capacities to recycle ships. It also needs to work on authorizing facilities outside of the EU and participate in building/ enhancing those facilities to comply with the EU list's requirements. For both those purposes the money from the general benefit fund could be used. Meanwhile, the instrument needs provisions that in cases when the owner is not at fault for delay or lack of capacities they can get their premiums back before the vessel has been recycled and that it is not their responsibility to store the vessel for years at their own cost. If the EU can guarantee this and continues working on the expansion of the EU list the SRL is a desirable instrument to make owners use more responsible practices without losing millions of dollars.

4.3 Relation between the EU SRR and the SRL

The proposals to address owners in the EU SRR and the SRL raise the question if both could co-exist. One might think that if the EU SRR addresses owners and prohibits them from breaking their vessels in sub-standard breaking yards the SRL as an incentive for owners would not be necessary – EU owners would be financially incentivized to do something they are legally obliged to do anyways. This argument can however not hold up for the following reasons. Firstly, it is still possible to disguise the real ownership in which case the EU SRR would not be applicable. Secondly it must be kept in mind that the SRL does not only apply to EU owners but to all vessels calling at EU ports. Its scope is wider. The application of the SRL

besides the prohibition of the EU SRR is also a good mechanism for the acceptance of changes in the market for the shipping industry. It is a softer instrument than the listing approach and takes the interests of vessel owners - who are an important lobby - into account. Another positive effect is the existence of the general benefit fund which can be used to bring forward the development of responsible recycling facilities. For these reasons the instruments do not contradict each other but rather complement each other and can work together.

5 Conclusion and Outlook

This thesis has assessed the international regulatory framework around ship breaking applicable to EU ship owners and worked out its shortcomings before dealing with the question which changes are needed to make the disposal of vessels of EU ship owners more environmentally friendly.

The current framework approaches the matter from different angles. States have developed multiple instruments at the global and regional level regulating different aspects, most importantly the Basel Convention and the EU WSR on transboundary movement of waste, and the HKC and its early EU transposition into the EU SRR.

However, as assessed in chapter 2, this framework is far from perfect. The biggest shortcoming is that the instruments apply to similar issues while addressing different actors, thus leaving loopholes for certain scenarios, as assessed in chapter 2.3. None of the instruments addresses the real generators of waste, which are the ship owners, but instead put vague rules on port and flag States. Additionally, both the ban and the list face a practical problem: The facilities in the OECD or EFTA countries, or respectively the ones included in the EU list, do not have the capacity to recycle all EU owned vessels. Further, the international community developed the HKC, which is supposed to constitute an overarching ship recycling specific instrument. The HKC, however, does not offer a sufficient framework to face the issues of ship breaking, as its rules are not strict enough and it incorporates neither a ban nor a listing approach, nor does it prohibit beaching. And, more importantly at this point, it has not entered into force, thus not even taking its weak effects.

This less than ideal situation is made even worse by EU owners evading their responsibilities by disguising their intent to dispose end-of-life ships or reflagging their vessels to FOC which are not bound by the existing rules, as discussed in chapter 3.

As discussed in chapter 4 solutions are needed which reach the real generators of waste, the ship owners, and hold them accountable, instead of putting vague obligations on flag or port States which can be easily evaded. The end goal is one overarching international legal instrument regulating ship recycling in a comprehensive way, applicable to ship owner States. In order to pave the way to such overarching scheme the international community primarily needs to work on two mechanisms:

Firstly, the EU SRR shall be amended so that its list approach is applicable not only on flag States but also on owner States. European *owner* States shall ensure that their nationals cannot export their vessels to facilities which are not included in the EU list. This will lead to the

drastic reduction of business in sub-standard breaking yards and substantively contribute to the ship breaking States' willingness to accede to the HKC, making it enter into force and offer global ground rules. In the long run, with growing acceptance, the HKC shall then be amended to contain stricter rules, such as an international list approach under the watch of an independent authority, and the prohibition of the beaching practice.

Secondly, to encourage EU owners to recycle their ships responsibly instead of reflagging and disguising their intent to dispose, the SRL shall be created, either as a separate instrument or incorporated in the EU SRR. Ship owners of vessels calling at EU ports would pay small premiums to a fund during the operation of the vessel. After responsible recycling the premiums are paid back to the ultimate owner, taking away the incentive to reflag the vessel – the sum which had been paid during the course of the vessel's life and which the last owner then receives should mirror the gap between recycling the ship in a facility included on the EU list and breaking it in a substandard yard.

A combination of those two main mechanisms is expected to lead to the implementation of the HKC as an overarching ship recycling specific instrument while preventing owners from evading the rules. Whilst these legal mechanisms take their effects, and more owners try to recycle their vessels responsibly, the EU must take practical steps as well. To make the rules' implementation practically possible, the EU list, and in the future the HKC list, must be continuously extended while also expanding the European ship recycling capacity. At the same time, the EU shall (co)finance the development of environmentally friendly ship recycling yards in the developing world, to meet their obligations pursuant to the polluter pays principle.

The international community has faced the issues around environmentally harmful ship breaking practices for a long time. It is especially intolerable how EU owners operate ships for decades, making large profits, to then in the end dispose of the vessels in the developing world, causing major environmental damage. What makes these practices even more unacceptable is that while there are rules on responsible ship recycling those are wilfully evaded. EU law makers must face their responsibility and put an end to those practices. The EU must take a leading role in making EU owners use responsible practices and must stop hiding behind weak, easily evadable rules on flag States anymore. The EU, as the real generator of a big part of the waste, must especially take a leading role in bringing forward the global framework on responsible ship recycling. In the future, the EU measures regarding the obligations for EU owners in the EU SRR and the development of an SRL on the basis of calling at EU ports could pave the way to an overarching global instrument on ship recycling, such as the HKC. This should be the EU's main goal.

Annex I: Works cited

International jurisprudence

Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, (Advisory Opinion) [1960] ICJ. Rep 150.

M/V 'SAIGA' (No. 2) (Saint Vincent and the Grenadines v Guinea) (Judgment) [1999] ITLOS Rep 10.

M/V 'Virginia G' (Panama v Guinea-Bissau) (Judgment) [2014] ITLOS Rep 4.

UN Materials

UNCTAD, *Review of Maritime Transport 2018*, UNCTAD/RMT/2018 (2018).

Books

Galley, M. *Shipbreaking: Hazards and Liabilities* (Springer International Publishing Cham 2014).

Puthucherril, TG. *From ship breaking to sustainable ship recycling: evolution of a legal regime* (Martinus Nijhoff Publishers Leiden 2010).

Wacht, F. 'Article 207' in A Proelss (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (Hart Publishing 2017).

Articles

Andrews, A. 'Beyond the Ban – can the Basel Convention adequately Safeguard the Interests of the World's Poor in the International Trade of Hazardous Waste?' (2009) *Law Environment and Development Journal* **5**, p 169.

Alderton, T; Winchester, N. 'Globalisation and de-regulation in the maritime industry.' (2002) *Marine Policy* **26**, 35.

Barua, S; Rahman I; Mosharraf, M 'Environmental Hazards associated with open-beach breaking of end-of-life ships: a review.' (2018) *Environmental Science and Pollution Research* **25,** p 30880.

Cogliati-Bantz, VP 'Disentangling the 'Genuine link': Enquiries in Sea, Air and Space Law' (2010) *Nordic Journal of International Law* **79**, 383.

European Commission, 'Thematic Issue: Ship recycling: reducing human and environmental impacts' (2016) *Science for Environment Policy* **55**, p 3.

Galley, M. ‘Flagging interest: ship registration, owner anonymity and sub-standard shipping.’ (2013) *Mountbatten Journal of Legal Studies* **14**, p 1.

Hillyer, H. ‘The Hard Reality of Breaking Up: The Global Transboundary Movement of Ocean Vessel Demolition and Waste.’ (2012) *Vermont Journal of Environmental Law* **13**, p 755.

Kasoulides, G. ‘The 1986 United Nations Convention on the Conditions for Registration of Vessels and the Question of Open Registry.’ (1989) *Ocean Development and International Law* **20**, p 543.

Matz-Lück, N. ‘Safe and Sound Scrapping of ‘Rusty Buckets’? The 2009 Hong Kong Ship Recycling Convention.’ (2010) *Review of European, Comparative and International Environmental Law* **19**, p 95.

Miller, DD; Sumaila, UR (2014). ‘Flag use behavior and IUU activity within the international fishing fleet: Refining definitions and identifying areas of concern’ (2014) *Marine Policy* **44**, 204.

Mishra, S. ‘Non-entry into force of the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009: An analysis from the perspective of India, Pakistan and Bangladesh.’ (2018) *Journal of International Maritime Safety, Environmental Affairs*, and Shipping, p 22.

Moen, A. ‘Breaking Basel: The elements of the Basel Convention and its application to toxic ships.’ (2008) *Marine Policy* **32**, p 1053.

Negret, C. ‘Pretending to be Liberian and Panamanian; Flags of Convenience and the Weakening of the Nation State on the High Seas.’ (2016) *Journal of Maritime Law and Commerce* **47**, p 1.

Ormond, T. ‘Hong Kong Convention and EU Ship Recycling Regulation: Can they change bad industrial practices soon?’ (2012) *elni Review*, p 54.

Pelsy, F. ‘The Blue Lady Case and the International Issue of Ship Dismantling.’ (2008) *Law, Environment and Development Journal* **4**, p. 137.

Piniella, F; Alcaide; J, Rodríguez-Díaz, E ‘The Panama Ship Registry: 1917–2017’ (2017) *Marine Policy* **77**, 13.

PhD dissertations

Albers, J. ‘Responsibility and Liability in the Context of Transboundary Movements of Hazardous Wastes by Sea. Existing Rules and the 1999 Liability Protocol to the Basel Convention.’ (2014) *International Max Planck Research School (IMPRS) for Maritime Affairs*. University of Hamburg. **PhD**.

Engels, UD. 'European Ship Recycling Regulation. Entry-Into-Force Implications of the Hong Kong Convention' (2013) *International Max Planck Research School (IMPRS) for Maritime Affairs*. University of Hamburg. **PhD**.

Reports and studies

CIEL, Orellana, MA; Azoulay, D; Bratrschovsky, K., *Legality of the EU Commission Proposal on Ship Recycling* (2012).

Ecorys, DNV-GL, Erasmus School of Law, *Financial instrument to facilitate safe and sound ship recycling* (2016).

European Commission, *On the feasibility of a financial instrument that would facilitate safe and sound ship recycling*, Final Report, COM (2017) 420 final (2017).

International Transport Workers' Federation, Churchill, RR, *The meaning of the 'genuine link' requirement in relation to the nationality of ships* (2000).

Milieu and COWI, *Note on pros and cons of early transposition of the Ship Recycling Convention* (2009).

NGO Shipbreaking Platform and Transport & Environment, *EU-listed yards can handle the recycling demand of EU-flagged ships* (2018).

Links

IMO, *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (*02.06.2020), available at http://www.imo.org/en/OurWork/Environment/LCLP/Pages/default.aspx

IFT Global, *Flags of Convenience* (01.07.2020), available at https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience.

IMO, *India accession brings ship recycling convention a step closer to entry into force* (08.08.2020), available at http://www.imo.org/en/MediaCentre/PressBriefings/Pages/31-India-HKC.aspx.

IMO, *The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships* (23.06.2020), available at http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/The-Hong-Kong-International-Convention-for-the-Safe-and-Environmentally-Sound-Recycling-of-Ships.aspx.

International Chamber of Shipping, *Shipping and World Trade* (25.03.2020), available at https://www.ics-shipping.org/shipping-facts/shipping-and-world-trade.

NGO Shipbreaking Platform, *Basel Convention* (15.06.2020), available at https://www.shipbreakingplatform.org/issues-of-interest/the-law/basel-convention/.

NGO Shipbreaking Platform, *Cash Buyers* (12.06.2020), available at https://www.shipbreakingplatform.org/our-work/the-problem/cash-buyers/

NGO Shipbreaking Platform, *EU Ship Recycling Regulation* (26.06.2020), available at https://www.shipbreakingplatform.org/issues-of-interest/the-law/eu-srr/.

OECD, *List of OECD Member countries - Ratification of the Convention on the OECD* (15.06.2020), available at https://www.oecd.org/about/document/list-oecd-member-countries.htm

Pitman, T, *Ivory Coast's toxic tragedy a lesson for others* (08.06.2020), available at http://www.nbcnews.com/id/15319791/ns/world_news-world_environment/t/ivory-coasts-toxic-tragedy-lesson-others/#.X13OOWczbeQ.

Seatrade Maritime News, *EU-flag owners could face shortage of compliant ship recycling yards* (15.08.2020), available at https://www.seatrade-maritime.com/europe/eu-flag-owners-could-face-shortage-compliant-ship-recycling-yards.

Secreteriat of the Basel Convention, *Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (09.06.2020), available at http://www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/Default.aspx

Secreteriat of the Basel Convention, *Overview* (09.06.2020), available at http://www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx

Secreteriat of the Basel Convention, *Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (08.06.2020), available at http://www.basel.int/?tabid=4499#EU.

The American Society of International Law, Orellana, M, *Shipbreaking and Le Clemenceau Row* (15.06.2020), available at https://www.asil.org/insights/volume/10/issue/4/shipbreaking-and-le-clemenceau-row.

United Nations, *7. United Nations Convention on Conditions for Registration of Ships* (22.08.2020), available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-7&chapter=12&clang=_en.

IMO Documents

IMO (2020), *Status of IMO Treaties* (25.06.2020), available at http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20May.pdf.

Up-to-date link for September: http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20August.pdf

IMO (2020), *Status of IMO Treaties* (10.08.2020), available at http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20June.pdf.

Up-to-date link for September: http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20August.pdf

IMO Assembly resolution, 'IMO Guidelines on Ship Recycling' IMO Doc. A 23/Res.962 (2003).

IMO, 'Interpretation of the London Convention and Protocol', IMO Doc. LC 37/9/2 (2015).

Basel Conference of Parties

7th Basel Conference of Parties, Decision VII/26 (2004).

Annex II: List of treaties and other instruments

Global instruments

Convention on the High Seas of 29 April 1958 (450 UNTS 11).

Convention on the Law of the Sea, of 10 December 1982 (1833 UNTS 397).

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 13 November 1972.
Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter of 7 November 1996.

Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships of 15 May 2009.

Statute of the International Court of Justice, Annex to the UN Charter of 26 June 1945 (1 USTS XVI).

The Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal of 22 March 1989 (*1673 UNTS. 126*)

United Nations Conference on Environment and Development. (1992). *Agenda 21, Rio Declaration, Forest Principles*.

United Nations Convention on Conditions for Registration of Ships of 13 March 1986 (TD/RS/CONF/23)

Vienna Convention on the Law of Treaties of 23 May 1969 (1155 UNTS 332).

EU Instruments

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01 of 26 October 2012.

Implementing decision (EU) No 2019/995 of the Commission of 17 June 2019.

Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.

Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling.