

Ship Recycling under International Law: An Analytical Overview on Existing and Upcoming Legal Regime

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Abstract

The ship recycling is one of the most popular and debatable issues in the present world. The international commerce being dependent on marine ways and the ship being one of the giant equipment in the world, dismantling of the same is notably an issue of concern. The pollution by the ships during operation and after end of life both in marine water and on the environment is a global issue. Absence of legally binding instrument on this issue eventually degraded the occupational safety and environmental condition. The International Maritime Organisation (IMO) lead initiative for a Convention on Ship Recycling is yet to come front to act. So, unless or until the international community is ready with a legally binding and effective instrument to deal with ship recycling all the efforts till to date for protection of environment and occupational health will be of no means.

1. Introduction

Dismantling of old ships is one of the major problems in the maritime world and now the same has become a global issue being raised by the environmental activists due to its negative impact on

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the environment. There is no specific international convention or treaty on ship recycling; rather global operation of ship recycling is regulated by a number of international instruments in scattered way. Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, 1989(hereinafter Basel Convention) though addressed the hazardous wastes and their transboundary movement but it was silent on ship recycling. Subsequently Basel Technical Guideline on Ship Recycling specified that the ship recycling should be in compliance with the Basel Convention. Side by side IMO in its Guideline on Ship Recycling focused on the point that the use of hazardous material should be minimized in the design, construction and operation of ships without compromising the safety and operational efficiency. These initiatives are found to be overlapping in many cases and did not succeed due to lack of coordination. Therefore the environmental activists approached for a universally applicable and legally binding instrument and hence IMO has developed a Draft Convention on Ship Recycling in association with the International Labour Organisation (ILO) and Basel Action Network (BAN) with a view to provide a holistic legal regime on this issue. The present study therefore aims to critically examine the existing institutional and instrumental mechanisms for ship recycling and also critically analyze the Draft Convention for Safe and Environmentally Sound Recycling of Ships.

2. Impact of Ship Recycling on Environment

The ship recycling industry though considered as a profitable business for the ship owners and others related to this industry, but it has divergent negative impact on the environment. Ship breaking activities is a threat to both the terrestrial and marine environment as well as to public health. It is like a mini version of a city that

Ship Recycling under International Law: An Analytical Overview on Existing and Upcoming Legal Regime

discharges every kind of pollutants a metropolis can generate like liquid, metal, gaseous and solid pollutants. The release of oil, lubricants and other toxic waste from the ship during cutting destroys the biodiversity of the adjacent area to the ship yard. It in one hand hampers the marine resources and also a threat to the life of the people living on marine resources like fisheries, agriculture etc¹. Every ship on average coated with 10 to 100 tons of paint containing lead, cadmium, organotins, arsenic, zinc and chromium which are very much toxic in nature. The asbestos used in the ship are necessary for heat insulation, but after scrapping when the asbestos are release in the air it goes into the human body through inhalation and cause cancers². Ship recycling activities are a source of lethal Persistent Organic Pollutants (POPs)³ and pose a risk of causing adverse effects to the human population, wildlife and the environment. There has been a realization that these pollutants, upon exposure of human population, can cause serious health effects ranging from increased incidence of cancers to disruption of hormonal system.⁴ Ship scrapping activities pollute the seawater environment in the coastal area. As a result, toxic concentration of ammonia, marine organisms found in seawater had an increase in P^H levels. Extensive human and mechanical activities accelerate the rate and amount of seashore erosion and results in higher turbidity of seawater.⁵ Indiscriminate expansion of ship recycling activities poses a real threat to the coastal inter-tidal zone and its habitat.⁶

3. Existing International Legal Principles and Norms for Environmentally Safe Ship Breaking

There is no specific international Convention or treaty on ship recycling. But global operation of ship recycling industry is regulated by a number of international instruments. They are discussed below-

3.1 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, 1989

Basel Convention is the principle instrument in respect of hazardous waste acting universally as legally binding on all the state parties to it. Initially the Basel Convention did not deal with the ship recycling specifically till 2004 mainly on the ground that Basel Convention did not recognize old ships as wastes. But after the decision of Conference of Parties taken in its seventh meeting the old ships are considered as wastes within the ambit of Basel Convention⁷. However it had an indirect effect on ship recycling mainly on the ground that the ultimate objectives of the Basel Convention stood up on defining and determining the state parties' responsibility for management of hazardous waste including establishment of a waste disposal mechanism at source and minimization of transboundary movement of hazardous waste⁸. Basel Convention specifically puts obligation not to export any hazardous waste to any country without providing prior information to the importing state and prohibition on exporting of hazardous waste to the state which does not consent in writing for such import⁹. This Convention also puts obligation on state parties to ensure environmentally sound management for disposal of hazardous wastes¹⁰. The relationship between ship recycling and Basel Convention therefore stands on the point that ship contains asbestos, paint containing heavy metals like lead, Poly Chlorinated Biphenyl (PCB) and other chemicals which are listed in the Annexure of Basel Convention. But absence of specific obligation in respect of ship recycling allowed the polluters to escape from liability mainly on the ground that this Convention does not provide any specific mechanism to declare the old ship as waste rather it depends upon the intention of the parties and as such the traders can declare a ship to be old at the exporting state or transitory state or at the ship recycling yard.¹¹ However in *Sandrien Case*¹² the Dutch Court widened the scope of the

Ship Recycling under International Law: An Analytical Overview on Existing and Upcoming Legal Regime

Convention to apply jurisdiction if the state has reason to believe that the ship will be scrapped in violation of the Basel Convention which has a persuasive value in the absence of clear provision in the Convention in this regard.¹³ Besides this, the Convention did not defined that when a ship can be considered as old ship which makes it difficult to differentiate between an old ship and running ship and as such the polluters once again grab the opportunity to avoid responsibility.¹⁴

3.2 Basel Convention Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships 2003

Understanding the problems in the ship recycling practice degrading the environmental condition and ignoring the occupational safety of the workers the Basel Technical Guidelines for Dismantling of Ships was adopted in 2003. The Basel Technical Guideline recognise that problems generated by the insufficiencies of current ship-dismantling practices have consequences for not only the environment but also for occupational safety and health of the workers. It provides for conducting an inventory survey of materials prior to or on arrival at the ship recycling yard and to remove the residual materials like lubricants, oils etc. consumable and loose equipments and hazardous chemicals etc. before cutting the ship which will ensure safe and secure entry into the ship for cutting¹⁵. Side by side it had provided for legal, institutional and technical measures for ensuring environmentally sound management of ship recycling. This guideline is considered as a best practice on the ship recycling and the same is not mandatory.

3.3 International Maritime Organisation (IMO) Guidelines on Ship Recycling 2003

The IMO has overall responsibility for coordinating issues associated with ship-recycling and responsibility for monitoring issues arising during ship design, building and operation which may have an impact on recycling, including preparations for recycling on board. The role of IMO is to ensure proper ship design, proper inventorying and decontamination of hazardous substances prior to disposal, and the safe and sound operation of the ship.

The IMO Guidelines adopted in 2003 on ship recycling recognise that, in order to contribute towards improvements in ship recycling, it is necessary to consider the ship throughout its life cycle, and also that the use of hazardous materials should be minimized in the design, construction and maintenance of ships, without compromising their safety and operational efficiency, and that there is a need to prepare ships for recycling in such a manner as to reduce environmental and safety risks and health and welfare concerns as far as practicable.

According to guideline, the following potentially hazardous materials should be identified before ship recycling and removed from the ship:

- fuel, lubricants, and coolants;
- floatable materials (e.g., plastics, Styrofoam insulation);
- materials possibly containing PCBs such as wiring insulation;
- harmful aquatic organisms in ballast water;
- asbestos used as insulation material and in accommodation panelling.

The guidelines have also elaborated the concept of Green Passport. According to guideline no. 5, the Green Passport for ships is a document providing information with regard to materials known to

Ship Recycling under International Law: An Analytical Overview on Existing and Upcoming Legal Regime

be potentially hazardous utilised in the construction of the ship, its equipment and systems. This should accompany the ship throughout its operating life. Successive owners of the ship should maintain the accuracy of the Green Passport and incorporate into it all relevant design and equipment changes, with the final owner delivering the document, with the ship, to the recycling facility. Administrations, designers, shipbuilders, and equipment manufacturers should take measures to facilitate the preparation of the Green Passport.

Guideline 6 recognises that some of the problems associated with ship recycling might be addressed at the design and construction stage, not only in relation to the ships themselves but also in respect of ships equipment. The first step is to identify any potentially hazardous materials which might be incorporated, as a matter of routine, in the structure of ships and their equipment and, where practicable, and consider using less hazardous alternatives. The second step is to minimize hazardous materials generated during the operating life of a ship and at the end of a ship's life.

According to guideline 8, the following preparations should be taken for ship recycling:

- the recycling facility selected should have the capability to recycle the ships in a manner consistent with national legislation and relevant international conventions. Shipowners should ensure that appropriate insurance is in place to cover response and liability in respect of the voyage of the ship to the recycling facility.
- The preparation of a ship for recycling should address occupational safety and health, environmental issues and the safe operation of the ship prior to and on its final voyage to the recycling facility.
- The plan of ship recycling should be designed in such a way to ensure that wastes potentially contributing to pollution of the environment or potential hazards to worker health and safety, are properly identified and handled.

The Chittagong University Journal of Law

- The last owner of a ship sold for recycling should, consistent with the safe operation of the ship, minimize the quantities of fuel, diesel, lubricating, hydraulic and other oils and chemicals on board at delivery to the facility.

Furthermore, prior to recycling, the shipowner should consistent with the safe operation of the ship:

- provide or arrange for a gas-free certificate or hot work safe certification as applicable, issued by a relevant and appropriate body, for enclosed spaces on board ship.

- ensure that any compartments on the ship which may contain an oxygen-deficient atmosphere are clearly marked as such, and that the facility is duly notified of these and other hazardous enclosed spaces.

However, the guidelines have been criticised on several grounds. The guidelines are not based on the internationally recognised Polluter Pays principle. The burden for the responsibility for handling hazardous waste is exclusively put in the hands of the workers on the shipbreaking yards.

Moreover, the guidelines are recommendatory in nature and presuppose voluntary implementation by ship owners. As the IMO is not an enforcing body, it cannot control the apparently common standard business practices engaged in by many shippers, nor can it pressure countries to comply with environmental standards.

According to Greenpeace, the IMO Guidelines are not adequate to protect workers or the environment partly because neither they contain effective mechanisms to monitor or ensure compliance nor provides adequate guidance for companies, courts and governments on how they should deal with the export of ships for scrapping in a manner which is fully consistent with other existing international commitments.¹⁶ Greenpeace International considers the Guidelines lack real state involvement and basic elements like the obligation for ship-owners to report on the export of the vessel and the presence of hazardous materials.¹⁷

Ship Recycling under International Law: An Analytical Overview on Existing and Upcoming Legal Regime

3.4 IMO Draft International Convention for the Safe and Environmentally Sound Recycling of Ships

The need for a universally applicable and legally binding international instrument was first felt by the Danish Government being failure to comply its obligation under Basel Convention in the incident of Kong Frederik IX @ Frederik @ Ricky¹⁸, and as well the Danish Government pursued the Marine Environment Protection Committee¹⁹ (hereinafter referred as MEPC) by submitting a formal proposal on the issue in the 53rd Session of MEPC describing the set of provision necessary in the matter.²⁰ In response to this proposal the MEPC in its 53rd Session approached the IMO for adopting a new instrument on ship recycling focusing on design, construction, operation and preparation of ships for facilitating the environment friendly operation and recycling of ships.²¹ Side by side the MEPC relied upon the report of ILO/IMO/BC Joint Working Group to avoid overlapping issues. After holding a series of consultation and discussion globally the MEPC adopted the Draft Convention on Ship Recycling (hereinafter referred as the Convention) which is going to be adopted in the upcoming IMO Diplomatic Conference.²² The significance of the Draft Convention is that it addresses the issue of “green shipbuilding and design”, that neither the Basel Convention nor any other international body currently addresses directly.

The salient features of this draft convention are appended below:

1. The Convention is applicable for all ships entitled to fly flag of a party or for the party under whose jurisdiction the recycling is being operated. But it does not applied for war ships and ships below 500GT.²³
2. The Convention setup the obligation of the parties to conduct survey and obtain certification and to get proper authorization for ship recycling.²⁴

3. The Convention provides a comprehensive mechanism for detection of violations and follow-up actions through cooperation for investigation, gathering evidences, initiate proceedings, passing necessary information to the parties etc.²⁵
4. In respect of design and construction of ships the Convention provides for control use of hazardous materials and to prepare an inventory therefore.²⁶
5. For the purpose of ship recycling it has provided for disclosing relevant information along with the inventory of the hazardous materials used in the ship. However the parties are to obtain authorization for ship recycling to ensure that it has met the compliance standard.
6. The Convention has provided for three types of surveys like initial survey at the time of entering into the service, periodical survey at five year cycle, additional survey at the request of ship owner and final survey when the ship is taken out of the survey. Further it also empowered the Flag Administrator to conduct survey at any time the Administration thinks fit.²⁷
7. For the purpose of ship recycling it has provided that there should be a Recycling Facility Management having a good understanding of roles and responsibilities, trained workers, capacity to meet emergency circumstances, sufficient measures for tackling accidents etc.²⁸
8. The Convention provides for a notification and reporting system to the proper authority to make sure that the parties are in compliance with the provisions of the convention.²⁹
9. The Convention invested the power to enforce any mechanism under the Convention to both the Flag State and Port State.

4. Critical Analysis on Draft Convention:

Ship Recycling under International Law: An Analytical Overview on Existing and Upcoming Legal Regime

The Draft Convention on Ship Recycling though is an intensive action taken by the IMO but it failed to get proper appreciation from different quarter because of some latent defects in it which in a nutshell are as follows:

1. The Convention does not incorporate any substantive issues into its Articles rather the substantive issues are inserted into the 'Annexes' and as such it remained far from defining the basic obligations under it. The way the substantive issues are dealt with under the Convention is used for providing technical lists, forms, etc. and as such it makes it clear that the framers are not really concerned about the core element of the Convention.
2. The Convention exempted the military and government owned ships from the scope of this Convention.
3. The Convention does not provide any provision regarding end of life of ships mainly on the ground that it is silent that at what age the life of ship ends and also it does not have a comprehensive list of hazardous materials that are used for ship building.
4. At the time of recycling of ship the ship owner has no obligation rather the obligation has been imposed upon the state party under whose jurisdiction the recycling is being facilitated. Under the Convention the ship owner is still be able to avoid the responsibility to comply the labor standards, environmental compliances and so on.³⁰
5. The Convention applies jurisdiction over the state parties and thus it cannot apply its jurisdiction over the ship owner and non-party State directly which creates a good possibility for frustrating the objective of the draft convention.
6. The Convention does not provide for any provision for facilitating the developing countries to adopt effective technology to deal with the hazardous materials and as such

The Chittagong University Journal of Law

the Convention is against the interest of the developing countries which should get priority in respect of ship recycling.³¹

7. The Convention is in contravention with Principle 14 and 16 of Rio Declaration on Sustainable Development mainly on the ground that the Convention ignored the provision for building cooperation to prevent environmental degradation and the polluters pay principle.³²
8. The Convention is silent about the trading of ships between state party and non-party state and as such it will suffer from applying its jurisdiction in many cases.
9. The Convention does not provide for any provision for existence of valid contract for ship recycling which is necessary under the Basel Convention in which the exporting state is under obligation to receive written confirmation about the existence of a contract between exporter and disposer specifying environmentally sound management of the wastes³³.
10. The inspection mechanism provided under the Convention is limited in the sense that the authority is only entitled to inspect the onboard inventory rather it should have authority to inspect the other materials may cause harm at the ship recycling situation³⁴.
11. The Convention does not provide for any safety net issues to build the capacity of the developing countries with financial support in order that they can adopt the technological knowhow to reduce the negative impact of ship recycling. For example, Basel Convention provides for a common fund for providing technical and financial support to the developing states to build their capacity to dispose of hazardous waste under environmentally sound management of wastes.³⁵

Ship Recycling under International Law: An Analytical Overview on Existing and Upcoming Legal Regime

12. The Convention provided provision for reporting at various ways but it failed to insert the interest and rights of the transitory states and so also there is no provision to obtain prior permission for export from the importing and transitory states.

Conclusion

Now at this moment one question may arise about the ultimate object of IMO in developing the draft Convention that whether it is to mitigate the existing legal and environmental issues or it is to be used as an alternative instrument to Basel Convention in this regard. The reason behind raising this question is that from the inception of the draft Convention on Ship Recycling it is clear that the Convention itself confused about its objects. It failed to address the existing problems in adequate manner and side by side it could not create a bridging relationship with other international convention related to ship recycling specially the Basel Convention. But still the lacuna in the draft is removable without any complexity, so it will not be meaningless to wait for a good convention for the protection of environment if the world leaders consider to do so.

Notes and references:

¹ Dr. Md. M Hossain and M M Islam, *Ship Recycling Activities and Its Impact on the Coastal Zone of Chittagong, Bangladesh: Towards Sustainable Management*, (Chittagong: YPSA, 2006) p. 30.

² *Ibid.* p. 23.

³ Persistent Organic Pollutants (POP's) are chemicals that are highly toxic, remain intact in the environment for long periods, become widely distributed geographically, bio accumulate through the food web, accumulate in the fatty tissue of living organisms.

The Chittagong University Journal of Law

⁴ Dr. Md. M Hossain and M M Islam, see *supra* note i, p.24

⁵ *Ibid.*

⁶ *Ibid.*

⁷ See the Proceedings of the seventh meeting of Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989, Geneva, 25–29 October 2004 available at < <http://www.greenpeaceweb.org/shipbreak/BCdecisionOct04.pdf>>, (accessed on 24 April 2009)

⁸ See “Ship Recycling and the Legal Obligations Under the Basel Convention”, A Report submitted by the Basel Action Network and Greenpeace International for the Fourth Session of the Legal Working Group of the Basel Convention, 10 January 2002.

⁹ See Article 4 of Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989.

¹⁰ See Article 2(8), *Ibid.*

¹¹ See *supra* note viii.

¹² *Upperton Ltd. of Mauritius v. The Minister of Housing, Spatial Planning and the Environment (2001)*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ See Article 6 of the Basel Convention Technical Guidelines for the Environmentally Sound Management of the full and Partial Dismantling of Ships 2003.

¹⁶ Recycling of Ships, Comments on the Report of the Correspondence Group by Greenpeace International, I:/MEPC/49/3-2.Doc

¹⁷ Agenda Item 3 Recycling of Ships, IMO MEPC 51- submitted by Greenpeace International.

¹⁸ Kong Frederik IX, later renamed Frederik and after that Ricky is a 51 year Old Danish Ferry which was sold for recycling in India under a false declaration.

¹⁹ It is the Senior Technical Body of International Maritime Organization working on marine pollution related matters.

²⁰ Available at < <http://www.ban.org/Library/MEPC-53-3-7.pdf>> (accessed on 25 April 2009)

Ship Recycling under International Law: An Analytical Overview on Existing and Upcoming Legal Regime

²¹See MEPC 53rd session, 18-22 July 2005 available at :
<http://www.imo.org/Newsroom/mainframe.asp?topic_id=109&doc_id=4469#4>
(accessed on 25 April 2009)

²² IMO Briefing 47/2008 available at :
<http://www.imo.org/Newsroom/mainframe.asp?topic_id=1709&doc_id=10263>
(accessed on 25 April 2009)

²³ See Article 3 of the IMO Draft International Convention for the Safe and Environmentally Sound Recycling of Ships.

²⁴ See Article 5 and 6, *Ibid*

²⁵ See Article 9 & 10, *Ibid*

²⁶ See Article 5 of Annex, *Ibid*.

²⁷ See Regulation 11, *Ibid*

²⁸ See Regulation 19 & 20, *Ibid*

²⁹ See Chapter 4 of Annex, *Ibid*.

³⁰See Global NGO Platform on Ship breaking Critique of Draft I.M.O. Convention on Recycling of Ships, available at:
<http://www.ban.org/Library/IMO_Draft_Convention_CritiqueFINAL.pdf >
(accessed on 25 April 2009)

³¹*Ibid*.

³²*Ibid*.

³³ See Article 6.3.b of the Basel Convention.

³⁴ See Article 8 of the IMO Draft Convention on Ship Recycling.

³⁵ See Article 14 of the Basel Convention.