Criminal liability based on European Regulations for ship recycling in South Asia: dead in the water?

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In December 2021, the European Commission published a (new) Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law and replacing Directive 2008/99/EC. The Commission specifically mentioned illegal ship recycling as one of the areas in need of more decisive enforcement. The new directive, therefore, will require criminal sanctions for illegal ship recycling. This begs the question at which point legal ship recycling becomes illegal ship recycling, when ship recycling can lead to criminal liability under the European legal framework. The author analyses both the Waste Shipment Regulation and the Ship Recycling Regulation to answer this question. It is concluded both regulations can easily be avoided, hampering effective enforcement.

Introduction

The recycling of ships under dire circumstances in South Asia has been a thorn in the side of environmental organisations and the European Union alike for a considerable amount of time. In 2008, the European Parliament considered it 'ethically unacceptable to permit the humanly degrading and environmentally destructive conditions involved in the dismantling of ships to continue any longer'.[2] Although the European Union has tried to enact regulations that are aimed at drastically reducing the number of European owned vessels that are recycled in an unsound manner in this region, the viability of that industry has hardly decreased.

In this article I will briefly outline (the shortcomings of the enforcement of) the Waste Shipment Regulation[3] when applied to end-of-life ships. Subsequently, and more in depth, I will discuss the Ship Recycling Regulation.[4] This article intends to clarify the extent to which European shipowners can expect to face criminal liability based on European regulations if their (former) ships are recycled in South Asia.[5]

First, a short outline of the relevant parts of both the Waste Shipment Regulation and the Ship Recycling Regulation is undertaken. Then I will consider the shortcomings of the Ship Recycling

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[2] European Parliament resolution of 21 May 2008 on the Green Paper on better ship dismantling (2009/C 279 E/09).

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

[4] Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on Ship Recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC.

[5] More specifically in the major ship recycling nations of Bangladesh, India and Pakistan.

Regulation in practice. Subsequently, I will explore why the Ship Recycling Regulation resists being interpreted in a way that could make it more effective before reaching a short conclusion.

A comparison of European regulations

The Waste Shipment Regulation is the European codification of an international instrument: the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention). Both legal instruments – broadly speaking – share the same underlying system.[6] Although the Waste Shipment Regulation has proven mostly ineffectual in the field of ship recycling, it was intended to be applicable to ships, as is the Basel Convention.[7]

With its dismal record[8] in providing a basis for successful enforcement concerning end-of-life ships leaving the European Union for recycling, the Waste Shipment Regulation was eventually (partly) replaced with the Ship Recycling Regulation. The latter regulation closely follows the system of the Hong Kong Convention and is meant to expedite the coming into force of a number of standards of the Hong Kong Convention.[9] The Hong Kong Convention was drafted by the International Maritime Organization (IMO) to tackle the specific difficulties that dogged effective enforcement of the Basel Convention (and the Waste Shipment Regulation by association). Because the Hong Kong Convention requires ratification by a minimum number of signatories representing a substantial share of the world's shipping tonnage, it has yet to enter into force.

Provided a ship is covered under the Ship Recycling Regulation, it is excluded from the Waste Shipment Regulation.[10] However, it is questionable if this is a legally sound arrangement, as discussed further below.

Waste Shipment Regulation

Put simply, the Waste Shipment Regulation creates a system that prevents export of certain wastes from the European Union without proper notification to authorities.[11] A selection of these wastes can only be exported to OECD countries. The Waste Shipment Regulation prohibits the export of hazardous wastes, for instance end-of-life ships,[12] to developing countries.[13] The regulation aims to prevent these developing countries being taken advantage of as low-cost dumping grounds for hazardous waste. It is significant to point out that the Waste Shipment Regulation requires movements across international borders to trigger its procedures. For the purpose of this article this

[6] The Waste Shipment Regulation also incorporated the Ban Amendment of the Basel Convention, that had not yet come into force at the time. The Basel Convention Ban Amendment – in a nutshell – prohibits transboundary movements of waste from OECD/EU states to non-OECD/EU states.

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'An EU strategy for better ship dismantling' COM (2008) 767 final 3: 'Ships are not exempted from waste shipment law'.

[8] According to the 'Executive Summary of the impact assessment' that accompanied the proposal of the Ship Recycling Regulation (SWD)(2012) 45 final 2: 'This legislation is almost systematically circumvented. In 2009, more than 90% of EU-flagged ships were indeed dismantled outside the OECD'.

[9] See Council Decision of 14 April 2014 concerning the ratification of, or the accession to, the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009, by the Member States in the interests of the European Union, 2014/241/EU.

[10] Article 27 of the Ship Recycling Regulation adds an exception in art 1(3)(i) of the Waste Shipment Regulation. The Waste Shipment Regulation still applies to ships excluded from the Ship Recycling Regulation (for example ships of less than 500 gross tonnage). Besides, the Ship Recycling Regulation requirement of ship recycling on designated recycling yards came into force on 31 December 2018, so earlier cases also (continue to) fall under the Waste Shipment Regulation.

[11] It mimics the system of the Basel Convention in that respect.

[12] To be precise: a ship that has been properly emptied of hazardous materials does not constitute a hazardous waste. If cleaning to the required standard is possible, a ship might be considered green listed waste. See Annex III of the Waste Shipment Regulation, but also the judgment of the Dutch Council of State in the *Sandrien* case. It dealt with hazardous materials built into the structure of vessels, which makes it impossible to qualify the ship as green-listed waste.

[13] As mentioned above (see n 6), the Ban Amendment of the Basel Convention is an integral part of the Waste Shipment Regulation and applies within Europe.

rudimentary outline will have to suffice, as it covers the basics that are needed to understand the subject at hand.[14]

It follows from the above that the Waste Shipment Regulation – like the Basel Convention – takes a territorial approach.[15] Only wastes that are – at some point during transit – inside of the territory of a Member State of the EU, are subject to its rules. This makes sense when it comes to the export of 'wastes' in a traditional sense. For instance, a European company that wants to export discarded refrigerators to a non-OECD country might have to follow the prior informed consent (PIC) procedure (presupposing that these appliances are destined for recovery and the refrigerators can be classified as a green listed waste). The company will consequently have to contact the authorities of the intended destination before it can start arranging transportation. Presuming that the company intends to ship these goods to a previously identified destination, this procedure poses no problem if the destination and classification are in accordance with the Waste Shipment Regulation.

However, when applied to ships the situation becomes muddled. This has everything to do with the definition of waste that is utilised in the Waste Shipment Regulation.[16] The core – as far as is relevant to this article – is that 'waste' means any object 'which the holder discards or intends … to discard'.[17] It is generally accepted that it is difficult to establish when a ship becomes waste.[18] Even the Commission acknowledged that the Waste Shipment Regulation is not adapted to the specificities of ships, thus making it difficult to identify when ships turn into waste.[19]

This means that if the shipowner does not disclose its plan to scrap the ship while the ship is in European territory, the above-mentioned waste definition cannot be enforced.[20] Therefore, even if a ship does leave from a European port for its final voyage, no action can be taken by the authorities if the shipowner does not declare his intention to discard until the ship is on the high seas (and beyond the jurisdiction of Member States).[21] In a European Commission communication that preceded the Ship Recycling Regulation, the weak implementation of the Waste Shipment Regulation is indeed explicitly mentioned.[22]

It is widely accepted, therefore, that the system of the Waste Shipment Regulation exhibits significant problems when ships that are actively trading are concerned. Because of their kinship, manoeuvres that had been utilised to avoid the Basel Convention can also be deployed to circumvent the Waste Shipment Regulation.[23] Such behaviour by shipowners can be motivated by the higher prices on offer in the regions to which these instruments restrict access, but also by a lack of recycling capacity in other regions.

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[14] See G Arguëllo Moncayo 'International law on ship recycling and its interface with EU law' (2016) 109 *Marine Pollution Bulletin* 301.

[15] The Basel Convention does so by way of regulating *transboundary* movements of waste between parties to the convention.

[16] The Waste Shipment Regulation itself refers to the definition of 'waste' in article 1(1)(a) of Directive 2006/12/EC, whereas it refers to art 1(4) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste for its definition of 'hazardous waste'.

[17] More precisely, art 1(1)(a) reads: '"waste" shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'. A comparable – but not identical – definition is utilised in art 2(1) of the Basel Convention.

[18] See eg para 4.3 of the Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council on ship recycling' (COD) 2012/C 299/29.

[19] Commission Green Paper on better dismantling COM (2007) 269 final 16–17. See also Rapporteur Schlyter's Draft Report (first reading) dated 8 November 2012 on the proposal of the Ship Recycling Regulation 2012/0055(COD) 79.

[20] See n 18.

[21] Opinion of the Legal Service No 16995/12 (28 November 2012) 3.

[22] See COM (2008) 767 final (n 7) 4: '[T]o apply the EC Waste Shipment Regulation and its export ban is difficult when a ship becomes waste outside European waters. Recent cases have also shown uncertainty on the part of some Member State authorities as to when and how to enforce the waste shipment rules in relation to suspected end-of-life ships'.

[23] See 2012/C 299/29 (n 18) s 5.8: 'Two much-used ways of circumventing the requirements of the Basel Convention are reflagging a ship from a European Member State to a non-EU state or selling the ship to a buyer. If the sale takes place in European waters, the buyer may not export the ship to a non-OECD country for recycling, as it falls under the rules of the Basel Convention. But the buyer can make a declaration, stating that he is not buying the ship for scrapping but for economic use. As soon as a ship of this type has left European waters it often immediately sets sail for the beaches of South East Asia, and the declaration proves to have been false'.

In the maritime industry, the Waste Shipment Regulation had long been assumed to presuppose a dichotomy between ships that are in class and able to trade, and ships that are no longer able to move under their own power. The latter would, for instance, need tugs to undertake their final voyage. Therefore, their final destination would be set before they exit the EU. As such, these were a decent fit for the system of the Waste Shipment Regulation. Indeed, in a few cases the system of the Waste Shipment Regulation has been applied to prevent the export of end-of-life ships.[24] Advisers to the European Parliament during the legislative procedure of the Ship Recycling Regulation aligned themselves with this dichotomy: '[A] ship that is not able to travel with its own means is clearly a waste and should therefore fall under the waste shipment regulation'.[25]

It came as a shock to the international shipping community in 2018, however, that the Dutch district court in Rotterdam found a Dutch shipowner liable under Dutch criminal law for violating the Waste Shipment Regulation.[26] The court decided that the rules of the Waste Shipment Regulation can be applicable to ships that are in class and trading when they leave the EU, if the ships are subsequently recycled outside the EU.[27] However, it does need to be apparent that the intent to scrap the ships exists as the ships leave the territory of the EU.

The established intent of the shipowner was crucial in the district court decision. But this is not a solid argument in cases where a ship is in class and trading. Decision-making on ship recycling tends to be a continuous process. Shifting market conditions might at some point earmark a ship for recycling.[28] However, the same ship might still be trading years later, if market conditions change again and a new contract is sourced. This means a ship can theoretically fall both inside and outside the scope of 'waste' as circumstances change, which is undesirable.[29] It would mean that shipowners could be exposed to criminal prosecution inadvertently as their ships cross borders, by merely contemplating different options for a ship as market conditions change.

Given the problems associated with the enforcement of the Waste Shipment Regulation concerning ships, enough political goodwill was presumed to be available to further regulate ship recycling.[30] This would eventually result in the drafting of the Ship Recycling Regulation.

Ship Recycling Regulation

In this section I will outline the system of the Ship Recycling Regulation as far as it regulates the transfer of European flagged ships to ship recycling facilities, more commonly known as scrapyards. This requirement came into force on 31 December 2018.[31] One of the main goals of the regulation

[24] Well-known examples concern the vessels *Sandrien* and *Otopan*, both decided by the Dutch Council of State (in Dutch: Raad van State). See also (in a criminal procedure) the Rotterdam District Court (30 November 2021) ECLI:NL:RBROT:2021:11861, which ruled that the Waste Shipment Regulation applied to the *Emsstrom*, which was being towed to Turkey when it sank off the UK coast in 2013.

[25] See Schlyter (n 19) 18. However, this suggestion obviously does not concern the types of ships that are not self-propelled by design.

[26] See eg one of the judgments (in Dutch): Rotterdam District Court (15 March 2018) ECLI:NL:RBROT:2018:2364. These judgments have been overturned on appeal on procedural grounds and – at the time of writing – the public prosecutor will have to decide if the shipowners are to be prosecuted again before the district court.

[27] Consequently, other cases followed. According to the National Public Prosecutor's Office for Financial, Economic and Environmental Offences website, a non-prosecution agreement was concluded in 2019 after the *HMS Laurence* was beached in India, when its owner Holland Maas Scheepvaartbeheer II BV offered to pay the maximum fine of €780,000. See https://www.om.nl/actueel/nieuws/2019/01/17/scheepseigenaar-betaalt-transactie.

[28] Proposal for a Regulation of the European Parliament and of the Council on ship recycling COM (2012) 118 final (23 March 2012) 3.

[29] This argument has also been utilised in cases in which trading with the vessel clearly was not on the horizon of the possibilities, ie in the *Otopan* case. Given the state of that vessel, the judges did not accept the argument.

[30] Schlyter (n 19) 80 describes this period as follows: 'The European Parliament adopted two resolutions on ship dismantling – one in response to the Commission's Green Paper in 2008, one in response to the Commission's strategy in 2009 … In both resolutions, Parliament took a clear stance, calling for full implementation of the export ban of hazardous waste also for waste ships, an explicit prohibition of beaching, an inventory of hazardous materials for all ships calling at EU ports, as well as a fund based on mandatory contributions from the shipping industry to ensure environmentally sound recycling'.

[31] See Ship Recycling Regulation art 32(1)(b).

is to prevent European shipowners from recycling their ships in yards that do not meet 'requirements to ensure protection of the environment, the health and safety of workers and the environmentally sound management of the waste recovered from recycled ships'.[32]

The biggest difference between the two regulations is that the Ship Recycling Regulation, like the Hong Kong Convention, does not restrict transboundary movements of end-of-life ships.[33] Accordingly, the Ship Recycling Regulation does away with the need for a PIC procedure with authorities in the receiving country before exporting an end-of-life ship from the EU. Instead, the Ship Recycling Regulation bans recycling of European flagged ships in yards that are not included in the so-called European list.[34] The purpose of the creation of this European list is to steer shipowners away from substandard sites where – for lack of protection of the health of the workers and the environment – scrap prices are higher. A considerable portion of the Ship Recycling Regulation therefore deals with the requirements that yards need to meet to be eligible for inclusion on the European list.

The relevant section of the Ship Recycling Regulation for this article is (a part of) Article 6(2) ('General requirements for shipowners'). It reads as follows:

> 2. Shipowners shall ensure that ships destined to be recycled:
> (a) are only recycled at ship recycling facilities that are included in the European list;
> …

The definitions of the term ship and shipowner can be found in Article 3 ('Definitions):

> (1) 'ship' means a vessel of any type whatsoever operating or having operated in the marine environment, and includes submersibles, floating craft, floating platforms, self-elevating platforms, Floating Storage Units (FSUs), and Floating Production Storage and Offloading Units (FPSOs), as well as a vessel stripped of equipment or being towed;
> …
> (14) 'shipowner' means the natural or legal person registered as the owner of the ship, including the natural or legal person owning the ship for a limited period pending its sale or handover to a ship recycling facility, or, in the absence of registration, the natural or legal person owning the ship or any other organisation or person, such as the manager or the bareboat charterer, who has assumed the responsibility for operation of the ship from the owner of the ship, and the legal person operating a state-owned ship;

Although a number of exceptions have been made to the definition of 'ship' (most notably to exclude ships of less than 500 gross tonnage), it follows that the Ship Recycling Regulation aspires to be applicable to ships in all stages of their life span if they are destined for recycling. As noted above, ships that fall under the scope of the Ship Recycling Regulation no longer fall under the scope of the Waste Shipment Regulation.[35]

Article 22 of the Ship Recycling Regulation describes enforcement by the Member States. However, the obligations are vague and effectively amount to little more than requiring provisions in national law concerning infringements of the Ship Recycling Regulation.[36]

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[32] ibid preface 7.

[33] Opinion of the Legal Service No 16995/12 (n 21) 5.

[34] https://ec.europa.eu/environment/system/files/2021-11/List%20of%20applicant%20yards%20located%20in%20third%20countries%20October%202021.pdf.

[35] See n 10. This was part of the Proposal from the start; see COM (2012) 118 final (n 28) 8: '[i]n order to avoid confusion, overlaps and administrative burden, ships covered by this new legislation would no longer be covered by the Waste Shipment Regulation'.

[36] The Commission can issue notices on enforcement, as it did with 'Guidelines on the enforcement of obligations under the Ship Recycling Regulation relating to the inventory of hazardous materials of vessels operating in European waters' 2020/C 349/01, concerning the (im)possibilities of shipowners to ready inventories of hazardous materials in time for the 31 December 2020 deadline because of the Covid-19 restrictions. The new 'Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC' COM (2021) 851 final (15 December 2021) introduces mandatory criminal sanctions for failing to observe the requirements of art 6(2)(a) of the Ship Recycling Regulation. See art 3(1)(g) of the proposal.

As has been observed by most stakeholders, the Ship Recycling Regulation suffers from serious shortcomings that hamper its effect on the transitioning of recycling of European owned ships to selected yards that conform to higher standards. In the next section I will take stock of the main reasons that have rendered the Ship Recycling Regulation ineffective in this respect.

Shortcomings of the Ship Recycling Regulation in practice

Given the size of the loophole that leads to its circumvention, it did not come as a surprise to even the most casual of observers that the Ship Recycling Regulation turned out to be ill-suited to its intended purpose of regulating the sale of end-of-life ships to scrap yards. The European Economic and Social Committee issued a scathing opinion on the proposal of the Ship Recycling Regulation, calling it 'a rather pale reflection of the previous green paper and the communication on the same subject' and that '[T]he measures proposed in the proposal for a regulation do not, however, solve these problems'.[37]

Around the same time, the Legal Service of the Council of the European Union offered a concise analysis of the problems of the international conventions on which the respective European regulations were based. It submitted that:

> Crucially, therefore, the means by which a shipowner could escape control under the Basel Convention, by not declaring his intention to discard the ship until it was on the high seas, is irrelevant for the purposes of the Hong Kong Convention. Conversely, a shipowner wishing to evade the mechanisms of the Hong Kong Convention could always re-flag his ship, in accordance with Article 91 of the United Nations Convention on the Law of the Sea. The ship's flag is irrelevant for the purposes of the Basel Convention.[38]

These difficulties have been transferred to the corresponding European regulations, ie the Waste Shipment Regulation and Ship Recycling Regulation. To focus on the Ship Recycling Regulation, its Achilles' heel is indeed that the scope of the regulation is limited to ships flying the flag of a Member State of the EU.[39] 'Without the ratification of the Hong Kong Convention, stricter ship recycling rules would apply only in Europe, hence incentivizing circumvention of the Ship Recycling Regulation through re-flagging', as was noted in a report prepared for the European Commission.[40]

And, indeed, it is tremendously simple to sidestep the Ship Recycling Regulation. It only requires a change of flag, which in the scenario of a final voyage tends to heavily favour so-called flags of convenience. These flag states do not actively inspect ships for safety and technical standards and charge very affordable rates.[41] Unencumbered by a European flag, the ship can then be sold to a non-compliant scrapyard for maximum profit.

Hence it can be submitted that a major reason for the circumvention of the selected recycling yards on the European list of the Ship Recycling Regulation, is a financial one. Ship owners – or their lenders – can maximise the monetisation of their end-of-life assets by selling to substandard yards, either directly or through middlemen called 'cash buyers'.[42]

Although it can be surmised that European shipowners are primarily influenced by financial considerations when they choose to recycle their ships in substandard yards, the onus does not only rest with them. Another major flaw of the Ship Recycling Regulation in practice has to do with the introduction of a European list of approved ship recycling facilities. At the time of writing, the

[37] See 2012/C 299/29 (n 18) s 1.4.

[38] Opinion of the Legal Service No 16995/12 (n 21) 5.

[39] Ship Recycling Regulation art 2(1).

[40] Final report on Financial instrument to facilitate safe and sound ship recycling, drafted by Ecorys in 2016 for the Directorate-General for Environment of the European Commission, 27.

[41] According to the United Nations Convention on the Law of the Sea (UNCLOS), ships are subject to the exclusive jurisdiction of their flag states while they are on the high seas. See below for a more detailed description.

[42] Commission Staff Working Document 'Impact Assessment accompanying the proposal for a Ship Recycling Regulation dated 23 March 2012' SWD (2012) 47 final 9.

majority of facilities are located in the European Union. A total of eleven facilities located outside of the European Union have been approved, eight in Turkey, two in the UK and one in the United States.[43]

On the one hand, the shipping community has pointed out that the listed (approved) facilities lack sufficient real-world capacity to recycle the required number of ships. Furthermore, these facilities cannot physically accommodate the largest class of ships.[44] On the other hand, NGOs in the field maintain that the projected European list capacity is ample for the required tonnage.[45] Regardless of who is right in this respect, it cannot be disputed that the European list does not have a global reach as yet.

It would appear that the EU, by means of introducing the European list, envisaged a win-win scenario in which only high-quality yards would be tasked with the recycling of European flagged ships, and a relatively minor European industry – ship recycling – could perhaps regain viability.[46] Whatever the reason, the decidedly regional mindset of the EU in drafting this instrument backfired. European flagged ships trade around the globe. Especially as ships age, they might be sent to trade in markets in which they are less likely to face strict inspections by port authorities[47] and perhaps less stringent demands are made by customers as regards the appearance of the vessel. When a ship is deemed ready for recycling, it might therefore be located a very long way away from the nearest facility on the European list. By not providing for facilities outside of the OECD countries, the EU inadvertently provides an extra reason to reflag ships that were trading in these parts of the world.

To assume that shipowners will send an end-of-life ship back to Europe from a remote location for its final voyage is foolhardy, seeing as the other – considerably cheaper – options for the shipowner are to simply reflag the ship or sell it to a third party, like a cash buyer. Besides, it might not even be feasible to sail the ship back to Europe, for instance if the reason for recycling is damage sustained in an accident of some sort. If the ship is reflagged, not only can it be sold for recycling locally, but also for a higher price. If the ship is sold to a third party, it will probably be reflagged shortly after being acquired by the new owner.[48]

Ship Recycling Regulation: the ineffective result of political compromise

As noted above, the ambitions prior to drafting the Ship Recycling Regulation were clear.[49] However, the final wording of the regulation has severely hampered the possibility of its successful enforcement to further its goals. In this section, I will examine three reasons that contribute to this outcome.

Criminal liability of a shipowner according to the Ship Recycling Regulation

The relevant part of the definition of 'shipowner' that was cited above is: 'the natural or legal person registered as the owner of the ship, including the natural or legal person owning the ship for a limited period pending its sale or handover to a ship recycling facility'. According to Article 6(2) of the Ship Recycling Regulation, it is the shipowner who is tasked with ensuring that a ship is recycled at

[43] See Commission Implementing Decision (EU) 2022/691 of 28 April 2022.

[44] See Marprof *Report on the European List of Ship Recycling Facilities* (updated report December 2020) 23 and also https://www.bimco.org/news/priority-news/20201203-bimco-eu-ship-recycling-regime-improved-but-gaps-remain.

[45] Basel Action Network and others 'Contradiction in terms: European Union must align its waste shop exports with international law and green deal' (September 2020) 3.

[46] The subject of strengthening EU ship dismantling capacity is mentioned in the Green Paper (section 3.3), but at that time did not seem to be an explicit goal, nor did the Green Paper already foresee a European list of facilities. The European Parliament noted in its explanatory statement in its report on the Green Paper on better ship dismantling (2007/2279(INI)) 12: '[T]here is no intention of artificially bringing ship recycling operations back to the EU, thereby depriving the countries of Southern Asia of a major source of revenue and necessary materials'.

[47] G Vuillemey 'Evading corporate responsibilities: evidence from the shipping industry' Working paper (2020) 5.

[48] In the Commission Staff Working Document Impact Assessment SWD (2012) 47 final (n 42) 90 it is noted that both options (selling to a non-EU owner and reflagging) are legal.

[49] See n 32.

a facility included on the European list. Logically, the latter obligation can only apply to a shipowner who can factually decide on the sale or handover, ie the ship is to be transferred to the recycling facility during the ownership of this specific owner.

As such, application of this part of the definition would appear restrictive in the sense that it has a singular outcome. Even if the subsequent owner is a cash buyer, after a sale the penultimate owner no longer qualifies as a shipowner under the Ship Recycling Regulation. This holds true, although in most cases a cash buyer will be bound by contract to recycle the ship and, as such (at least theoretically), does not have a say in the decision if a ship is to be recycled. Be that as it may, a cash buyer has an identical responsibility for the ship as the erstwhile operating shipowner when the former acquires the ship, according to the Ship Recycling Regulation.[50]

In the original text of the proposal of the Ship Recycling Regulation, this consequence was meant to be remedied by casting a wider net on the enforcement side of the regulation. Article 23(5) of the proposal read as follows:

> 5. Where a ship is sold and, within less than six months after the selling, is sent for recycling in a facility which is not included in the European list, the penalties shall be:
> (a) jointly imposed to the last and penultimate owner if the ship is still flying the flag of an European Member State;
> (b) only imposed to the penultimate owner if a ship is not flying anymore the flag of an European Member State.[51]

Obviously, this penalty aims to prevent circumvention of the Ship Recycling Regulation, but its legality raised concerns with members of parliament. It was consequently deleted through amendments during the legislative procedure and not replaced.[52] Hence, according to the final text of the Ship Recycling Regulation the sale of a vessel completely clears the penultimate owner.

This apparently holds even when a ship is sold to an intermediary such as a cash buyer with the intent to (ultimately) recycle it, because after the ship is sold, the obligations of the Ship Recycling Regulation exclusively target the subsequent owner, as explained above. Therefore, it falls upon the new owner – be it a cash buyer or not – to ensure that the European flagged ship is recycled in a yard included in the European list. This is further substantiated by the fact that joint liability of the shipowner and its penultimate owner was considered in the drafting process but reneged in the final text of the Ship Recycling Regulation.

This outcome might seem counterintuitive, because the Ship Recycling Regulation had been envisioned as a legal instrument that could overcome the problems associated with enforcement of the Waste Shipment Regulation. However, it is supported by other notable changes during the legislative procedure.

In the original text of the proposal, Article 23(6) stated:

> 6. Exemptions to the penalties mentioned in paragraph 5 may be introduced by Member States in the case where the shipowner has not sold its ship with the intention to have it recycled. In that case, Member States shall request evidence supporting the shipowner's claim including a copy of the sales contract.[53]

This seems to be an attempt to mitigate the overreach of the proposed paragraph 5. However, both paragraphs were absent in the revised compromise text by the Presidency.[54] Instead, a section was

[50] See also ICS *Shipping industry guidelines on transitional measures for shipowners selling ships for recycling* (2nd edn 2016) 13.

[51] COM (2012) 118 final (n 28).

[52] Amendments 247 and 248, with the justification: 'There are concerns about the legality of such penalty imposed on a sale (trade) transaction (IMO rules, freedom of trade, freedom of will, proportionality etc)'. See Draft Report (Amendments 124–258) dated 20 December 2012 on the proposal of the Ship Recycling Regulation 2012/0055(COD) 78.

[53] COM (2012) 118 final (n 28).

[54] ibid Revised Presidency compromise text (22 June 2012).

added to Article 23(1) (as an infringement that Member States should penalise): '(g) selling a ship with the intention to send it to a recycling facility not included in the European list'. However, that section was also deleted, although it is not clear why.[55]

Although apparently various ways of incorporating the intent of the act of selling were attempted, be it as a culpable or exculpatory component, it seems real-world concerns prevented this. As was remarked in the justification of the deletion of Article 23(5):

> (a) what can be considered as evidence to prove that the shipowner has not sold the ship with the intention to have it recycled? And (b) in cases where this is proved to be true (the first owner did not sell the ship with the intention of having it recycled) and the next owner, who is not flying an EU flag, does recycle the ship, what actions can be taken against the new owner by the competent authorities? It is clear that these provisions cannot be implemented.[56]

In the final text, the above-mentioned paragraphs on (the intent of) penultimate owners were omitted. As it is very clear that a shipowner who did not sell a ship with the intent to have it recycled should not be penalised under the Ship Recycling Regulation,[57] neither can – given the wording of the regulation and the reneged liability of penultimate owners – previous owners fall under the scope of the Ship Recycling Regulation for selling the ship at some point.

During the legislative procedure, the European Economic and Social Committee pointed out that previous owners were being omitted from the scope of the proposed Ship Recycling Regulation:

> The EESC notes that the Commission's proposal incorporates the main elements of the Hong Kong Convention, which apportions responsibility between flag states, recycling states and port states on the one hand, and shipowners, shipbuilders and recycling facilities on the other. The Committee has doubts, however, about the balance of this apportionment and would have liked to see the position of the previous owners / beneficial owners addressed.[58]

However, the final text of the Ship Recycling Regulation did not remedy this omission. Consequently, criminal liability can be avoided by selling a ship to a third party who in turn sells the ship for recycling.

Reflagging a ship destined to be recycled to avoid liability

It is widely acknowledged that by reflagging a ship to a non-European flag it is no longer covered by the Ship Recycling Regulation.[59] As one research paper commissioned by an NGO puts it: 'One major loophole in the regulation is that it only applies to EU-flagged ships. This leaves the door wide open to use a Flag of Convenience to avoid the regulation'.[60] This loophole has not escaped the attention of the European Commission. To increase the effectiveness of the Ship Recycling Regulation, a financial incentive is being reconsidered.[61]

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[55] Judging from the Draft Report (8 November 2012) (n 19).

[56] Draft Report (Amendments 124–258) (20 December 2012) on the proposal of the SRR, 2012/0055(COD) 78.

[57] ibid 79. Amendment 249 (concerning Ship Recycling Regulation art 23(5)) removed the six months of extended liability and noted that: '[P]enalties must be imposed on any owners who can be shown to have acted with fraudulent intent and/or in bad faith. Penalties that apply automatically, irrespective of whether there was any fraudulent intent, would be inappropriate'.

[58] See (COD) 2012/C 299/29 (n 18) para 5.9.

[59] The impact assessment accompanying the proposal already noted that: '[s]ince changing flag is legal, easy and negligible one can expect that some shipowners would continue to change flags in order to circumvent the legislation'. See Impact Assessment SWD (2012) 47 final (n 42) 25, 87: '[T]he challenge that represents the possibility to change flag for the effectiveness of any legislation at national, European and International level covering the dismantling of ships was mentioned by the large majority of the stakeholders'.

[60] G van Gelder and others 'Financial mechanisms to ensure responsible ship recycling. a research paper prepared for the NGO Shipbreaking Platform' (Profundo 2013) 7.

[61] It had also been considered during the drafting of the Ship Recycling Regulation, but at the time the political will to pursue such an instrument apparently fell short.

The reasoning behind such an instrument is as follows. By ensuring that the shipowner of an end-of-life ship has access to a financial allowance under the condition that the ship is recycled at a facility on the European list, the financial gain from substandard scrapping will be offset. Consequently, the theory is that shipowners – freed from financial considerations – will choose to recycle at a facility on the European list. The latter pays considerably less per lightship ton (/LDT) than substandard facilities, but the financial incentive negates this by covering the difference in revenue. This proposal should therefore remove the foremost incentive for reflagging (and circumventing the Ship Recycling Regulation).

Be that as it may, especially as the financial incentive has yet to be decided on at the time of writing, there are other aspects of reflagging that are of more interest for the subject of this article, chief among which is the answer to the question of whether the reflagging of a ship *after* the decision has been made to have it recycled can lead to criminal liability according to the Ship Recycling Regulation.

To deny such a possibility would leave the Ship Recycling Regulation dead in the water. It means that intentionally reflagging with the explicit aim of circumventing the Ship Recycling Regulation indemnifies a shipowner from enforcement of the Ship Recycling Regulation. Nevertheless, judging from the legislative procedure and papers of researchers and NGOs referred to in this article, this is indeed the case. An analysis of the applicable part of the Ship Recycling Regulation explains why.

As mentioned above, a shipowner shall ensure that 'a ship that falls under the scope of the Ship Recycling Regulation' is recycled at a facility included on the European list. This definition is not met when a ship is reflagged, for ships that fly non-European flags are not covered by the Ship Recycling Regulation. Put another way: a shipowner who reflags avoids non-compliance with the Ship Recycling Regulation. That might sound implausible but is legally correct, the reason being that, by reflagging the vessel, a shipowner ensures that the ship does not fall under the scope of the Ship Recycling Regulation. This obviously sidesteps the operative part of the definition, which is intended to be the part that 'the shipowner ensures that the ship is recycled at a facility included on the European list'. Reflagging therefore clearly – but legally – defeats the goal of the Ship Recycling Regulation.

The legality of reflagging derives from the regime of the United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS provides that a ship is subject to the exclusive jurisdiction of its flag state while on the high sea.[62] That state may exercise executive, legislative and judicial jurisdiction over a vessel.[63] This means that 'this obligation [ie the European list, EMW] can be easily evaded by shipowners through timely reflagging of the ship to a non-EU flag', to quote from a recent report prepared for the European Commission.[64] This position is acknowledged by NGOs that oppose ship recycling on substandard yards. For instance, in a briefing paper the NGO Shipbreaking Platform describes the situation as follows:

> [b]oth the Hong Kong Convention and the EU Ship Recycling Regulation are easy to circumvent by the use of FOCs … The requirements of the EU Ship Recycling Regulation can be circumvented by simply flagging out to a non-EU flag – a completely legal and already widespread practice.[65]

It goes on to clarify:

> Whilst circumvention of the Basel Convention and Waste Shipment Regulation involve the illegal practice of not disclosing the intent to dispose a ship to relevant authorities and can be criminally

[62] UNCLOS arts 91 and 92. See also Ecorys (n 40) 132. As Vuillemey puts it: '[t]he flag of a ship is its nationality, and determines the national law it must comply with, including safety, labor and environmental regulations'. See Vuillemey (n 47) 8.

[63] For a short outline of the tasks of a flag state see T Ormond 'Enforcing EU environmental law outside Europe? The case of ship dismantling' (2009) 1 *Elni Review* 14.

[64] Ecorys (n 40) 34.

[65] NGO Shipbreaking Platform 'What a difference a flag makes' Briefing paper (2015) 6.

> sanctioned, circumvention of the Hong Kong Convention and Ship Recycling Regulation is completely legal as it involves the legitimate business of changing the flag of a ship, also known as 'flag-hopping'.[66]

Obviously, the threat posed by reflagging for the effective enforcement of the Ship Recycling Regulation had already been recognised when the Ship Recycling Regulation was drafted. In the impact assessment assembled by the Commission staff it was remarked that:

> [c]hanging a flag is cheap, easy and will constitute a serious risk of non-compliance as long as two recycling markets (one compliant and one substandard) are co-existing and competing with each other … In order to address the remaining risk of reflagging, specific sanctions will be introduced in the legislation. They will address in particular the cases where ships are sold and reflagged prior to their recycling in order to circumvent the legislation.[67]

As described above, these sanctions were removed from the final text of the Ship Recycling Regulation.[68] This leads to the sobering conclusion that: '[a]lthough re-flagging is not illegal, doing so with the direct intention of circumventing the Ship Recycling Regulation is against the spirit of the regulation';[69] indeed, a rather pale reflection of the previous ambitions on the subject, as remarked by the European Economic and Social Committee.[70]

Put simply, the current Ship Recycling Regulation cannot be effectively deployed against substandard ship recycling. Criminal liability can be avoided by reflagging.

The legality of the European list

The final problem with the Ship Recycling Regulation to be discussed in this article concerns the reason why the facilities currently included in its European list are almost exclusively located in the European Union, UK and Turkey, with a single outlier in the United States.[71] Although the European list is in its ninth iteration at the time of writing, no yards from the major ship recycling nations are included – although the Ship Recycling Regulation does provide the possibility to do so.

The explanation for this situation requires a brief overview of the differences between the Hong Kong Convention and the Ship Recycling Regulation. The Hong Kong Convention 'basically requires ships flying the flags of Parties to the Convention to be recycled only in recycling facilities authorized by other Parties to the Convention'.[72] As such, it intends to incentivise the major ship recycling nations to become signatories. As more states ratify the Hong Kong Convention, ships will have to comply with its rules to pass port state controls, for instance about an inventory on hazardous materials. It would still be possible to flag out to a non-signatory of the Hong Kong Convention with the aim of recycling a ship in South Asia, but that would limit the area in which ships can trade. The reasoning behind the Hong Kong Convention is therefore long term – with each increase of its signatories, its reach expands. As more shipowners will (or perhaps: are pressured to) prioritise environmentally sound recycling of their ships, South Asian recycling facilities will have to become Hong Kong Convention certified to continue to attract business to their region.

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[66] ibid 6, n 16. See also Ecorys (n 40) 21.

[67] See Impact Assessment SWD (2012) 47 final (n 42) 48.

[68] Further reaching sanctions were submitted, but ultimately discarded. For instance, the lengthening of the period of six months in art 23(5) to two years, with a penalty for the last owner flying a European flag, regardless of the number of intermediary owners until the last owner of the ship. See Amendment 112 in the Draft Report (first reading) (8 November 2012) (n 19) 70.

[69] Ecorys (n 40) 44.

[70] See above.

[71] See Commission Implementing Decision (n 43). Facilities in Great Britain were no longer included in the European list after the transition period ended on 31 December 2020, according to a notice of the Directorate-General Environment (8 June 2020). They have been readmitted as third country facilities in the ninth iteration of the list. Northern Ireland falls under a different regime.

[72] See Impact Assessment SWD (2012) 47 final (n 42) 71.

As we saw above, the Ship Recycling Regulation created the European list as a means of designating approved facilities. One of the goals of the regulation is to facilitate and expedite the ratification of the Hong Kong Convention by the Member States of the European Union. In the spirit of that objective and to avoid unnecessary administration, Hong Kong Convention approved yards and the facilities on the European list should eventually be mutually recognised, according to the proposal of the Ship Recycling Regulation.[73] Obviously, as the Hong Kong Convention at the time of writing has yet to enter into force, such a mechanism cannot be implemented as of yet.

However, a number of ship recycling facilities in South Asia have already been audited by classification societies against the norms of the Hong Kong Convention and have been certified as meeting or surpassing these norms.[74] So why have these yards not been included in the most recent iteration of the European list?[75]

A possible explanation is the fact that the Ship Recycling Regulation added more rigorous procedures to the standards set out in the Hong Kong Convention.[76] If the Asian yards with a statement of compliance based on the standards of the Hong Kong Convention fall short of the higher standards of the Ship Recycling Regulation, it could be argued that this is an acceptable outcome. That situation is not incompatible with the Hong Kong Convention, which leaves room for its parties to take more stringent measures.[77] The question is, however, whether this is the only factor at play here.

In choosing the Hong Kong Convention as the blueprint for the Ship Recycling Regulation, the European Union created a legal puzzle. As mentioned above, the Hong Kong Convention takes a different approach from the Basel Convention and the Waste Shipment Regulation, being one that does not take transboundary movements of waste as the basis for its rules. However, the Waste Shipment Regulation *did* regulate the transboundary movements of waste *and* implemented the ban amendment.[78] By extracting ships from the scope of the Waste Shipment Regulation, the European Union could – if the standards of the Ship Recycling Regulation are met – allow transboundary movements to non-OECD countries of end-of-life ships that under the Waste Shipment Regulation would have been qualified as waste and whose transfer to non-OECD states would, therefore, have been prohibited.

In order to be able to exclude ships from the scope of the Basel Convention, to which the European Union is a party, the EU invoked Article 11(1) of the Basel Convention (quoted as far as relevant):

> [P]arties may enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes … provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention. These agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries.

Tellingly, the European Union did not manage to convince the Conference of the Parties to the Basel Convention that the Hong Kong Convention and/or the Ship Recycling Regulation are indeed

[73] See COM (2012) 118 final (n 28) 7–8. See also Impact Assessment SWD (2012) 47 final (n 42) 39: 'Under option D, ships would be allowed to go for dismantling worldwide in facilities meeting the requirements of the Hong Kong Convention'.

[74] N Mikelis *The Recycling of Ships* (2nd edn Springer 2019) 58–62.

[75] For a list of applicants for inclusion in the European list (45 in total) see https://ec.europa.eu/environment/system/files/2021-11/List%20of%20applicant%20yards%20located%20in%20third%20countries%20October%202021.pdf.

[76] See, amongst others, COM (2012) 118 final (n 28) 4–5. It falls outside of the scope of this article to analyse the differences between the Ship Recycling Regulation and the Hong Kong Convention.

[77] ibid 11(5).

[78] See n 6 above.

equivalent to the Basel Convention.[79] To add insult to injury, during the drafting of the Ship Recycling Regulation the Legal Service of the Council of Europe concluded on the matter:

> [i]t amounts to arguing that the proposed regulation's provisions concerning the recycling of ships in, for example, China or India, '[a]re not less environmentally sound' than the outright ban required by the Ban Amendment in respect of those two States. Conceptually, a prohibition appears on the face of it to be more protective of the environment than a regime of managed exports of hazardous waste.[80]

The facilities currently on the European list are all located in OECD member states. A different regime for the transport of end-of-life ships is therefore applied on account of the Ship Recycling Regulation, which – on a purely practical level – is not problematic at all because the OECD states are far less vulnerable to exploitative trade than developing countries.[81]

However, if a facility in one of the major shipbreaking countries were to be included, the credibility for the argument on invoking article 11 of the Basel Convention would expire, as none of the major shipbreaking nations are OECD countries. Rapporteur Schlyter, the adviser to the European Parliament during the legislative procedure of the Ship Recycling Regulation noted:

> Ship recycling involves large quantities of hazardous materials. If we are to exceptionally legalize the export of EU flagged ships from the EU to non-OECD countries for scrapping due to their special nature, then we have to be sure that the treatment is done in compliance with this regulation. As such, regular inspections should be a prerequisite for any facility to qualify for the EU list.[82]

It is disputed if such an arrangement would be sufficient. According to the NGO Shipbreaking Platform and other NGOs, the European Union and its Member States have 'a strict legal mandate not to allow the export of hazardous end-of-life ships' to non-OECD countries, because they have ratified the Ban Amendment.[83] According to these NGOs, any instrument 'cannot be deemed equivalent to the Basel Convention unless it also incorporates the Ban Amendment'.[84] Hence, I submit that one of the major reasons for the European Union not to include facilities in these countries is that doing so would result in it unequivocally breaching the Basel Convention. This analysis seems to be shared by the EU itself, judging from a letter that was sent to the Director of the NGO Shipbreaking Platform in November 2020 from the European Commission Directorate-General Environment.[85]

But even the present iteration of the European list might present a problem. Rossi writes:

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[79] Valentina Rossi 'The EU Regulation on Ship Recycling: interaction and tension between different legal regimes at global and regional levels' in Marta Chantal Ribeiro and Erik J Molenaar (eds) *Maritime Safety and Environmental Protection in Europe* (Gráfica Ediliber 2015) 76.

[80] Council of the European Union; Opinion of the Legal Service No 16995/12 (n 21) 11. This opinion was echoed by Rossi (n 79) 71: '[T]he derogation introduced by the Regulation is questionable under EU law and under international law'. It has been even more forcefully advocated by Basel Action Network and others (n 45) 6–7: 'Blanket removal of EU flagged ships from Basel application by the EU by virtue of their coverage under the Ship Recycling Regulation is not a valid application of the requirements of Article 11 and stand as wilful non-compliance by the EU to binding international law … With the 5 December 2019 entry into force of the Ban Amendment, it is simply not legally possible to assert that the Hong Kong Convention provides an "equivalent level of control" or, more legally precise, as possessing "provisions which are not less environmentally sound than those provided for by this Convention [Basel] in particular taking into account the interests of developing countries".'

[81] And all are Basel signatories, with the notable exception of the United States of America.

[82] Draft Report (8 November 2012) (n 19) 59.

[83] Basel Action Network and others (n 45) 2.

[84] ibid 7.

[85] The relevant paragraph reads: 'We would also like to note that since no facilities from non-OECD countries are included on the EU list currently, it is at present impossible that an EU-flagged end-of-life ship gets dismantled in non-OECD countries in conformity with the Ship Recycling Regulation. On this basis, we consider that there are currently no inconsistencies between the regime of the Basel Convention and that of the Ship Recycling Regulation, as neither allows the export of EU-flagged end-of-life ships to non-OECD countries.'

> In the present situation, it seems highly questionable to sustain that the EU unilateral derogation to the Basel Convention does not constitute a breach of its obligations under this agreement; as a consequence, the Regulation may be inconsistent with article 216 of the TFEU and open to judicial revision by the EU Court of Justice.[86]

If the Ship Recycling Regulation, or at least the concept of a European list, is found to be in breach of the Basel Convention, no criminal liability can be derived from it, for (that part of) the regulation may be non-binding. If that is indeed the case, the obligation posed by Article 6 paragraph 2 section 'a' would become unenforceable.

Conclusion

The answer to the question posed in the introduction whether European shipowners can expect to face criminal liability based on European regulations if their (former) ships are recycled in an unsound manner is that, theoretically, they could. However, it is surprisingly easy to avoid liability based on either the Waste Shipment Regulation or the Ship Recycling Regulation, as is illustrated by the previous sections of this article.

In its reaction on the Green Paper in 2008, the Committee on Transport and Tourism of the European Parliament noted that it:

> Calls for a global strategy which ensures that ship recycling is carried out in such a way that all those involved in the process (shipowners, recycling/scrapping facilities, the flag state of the ship, the state in which the ship's recycling will take place, etc.) are coordinated and assume their due share of responsibility.[87]

This is a prudent approach that should have been taken heed of. But instead, the European Union misjudged the uniquely international arena of shipping and the laws of the sea that govern it. The limitations of a regional legal instrument were never going to be compensated through the sanctions that were envisaged, for reflagging and thus circumventing the regulation is simply too easy.

The former notwithstanding, the Ship Recycling Regulation could gain significance through a financial instrument that counteracts the reality that substandard yards can offer higher returns. Through such an instrument, shipowners can be swayed to have their ships recycled in accordance with the Ship Recycling Regulation.[88] However, I submit this merely camouflages the fact that the Ship Recycling Regulation is a regional instrument for a global problem.

The regional scope of the Ship Recycling Regulation tends not to attract much disapproval. The debate on ship recycling seems to be dominated by parties that seek to dismiss the Hong Kong Convention (and by association the Ship Recycling Regulation) as a 'non-equivalent' agreement that does not satisfy the requirements of the Basel Convention. And although the Hong Kong Convention is indeed less strict than the Basel Convention or even the Ship Recycling Regulation, one should take into account the following.

First, it is unlikely the Basel Convention could be amended in such a way that its loopholes could no longer be exploited by companies through (mis)use of the law of the sea. Secondly, by expanding the European list, European shipowners will be increasingly dissuaded by the Ship Recycling Regulation to use yards that meet or exceed Hong Kong Convention standards but which are not on the European list. This will make it less likely for the operators of such facilities to want to invest in upgrading their facilities to meet Hong Kong Convention standards. And as it is unlikely that these facilities are going to close shop, the unintended consequence of the Ship Recycling Regulation is

[86] Rossi (n 79) 83.

[87] See Report on the Green Paper on better ship dismantling 2007/2279(INI) 19 (n 46).

[88] As also noted by Schlyter (n 19) 31: '[A]n economic instrument is needed to counterbalance the current perverse incentive for the last shipowner to go to the lowest standards as well as the possibility of reflagging to escape this Regulation, and to finance environmentally sound ship recycling'.

that it reinforces the status quo in yards for the (considerably larger) substandard recycling market which remains freely accessible for all European shipowners by simply reflagging.

The Green Paper that started the route towards the Ship Recycling Regulation was constructed around 'the final objective of reaching a globally sustainable solution'.[89] At the moment of writing, the EU is considering a bilateral agreement with India in a bid to expand the reach of the European list, whilst not infringing the rules of the Basel Convention.[90] One could argue that by including yards in more countries on the list, the European Union detracts from the intended pressure for ship recycling nations to ratify the Hong Kong Convention. Given the pitfalls discussed in this article, it is highly questionable whether more emphasis on the Ship Recycling Regulation will have a noticeable influence on improving the fate of the environment and unskilled labourers in South Asia.

[89] COM (2007) 269 final (n 19) 3.

[90] European Commission Directorate-General Environment 'Note on the potential article 11 EU–India bilateral instrument on ship recycling' (23 November 2020) 4: '[a] bilateral arrangement in the form of a Memorandum of Understand (MoU) on ship recycling between the EU and India sides would represent the best way forward'.