NATIONAL REPORT

TACKLING EXTRA-TERRITORIAL SHIP-BREAKING: FROM THE EU WASTE SHIPMENT REGULATION TO THE EU SHIP RECYCLING REGULATION – REFLECTIONS AFTER THE ROTTERDAM DISTRICT COURT'S JUDGMENT IN *SEATRADE*

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Introduction

On 15 March 2018, the Rotterdam District Court created an important international precedent with respect to liability for extra-territorial ship-breaking. In its judgment,[1] the Court held that SeaTrade, a Dutch shipowner, was criminally liable for transporting four container ships from the ports of Rotterdam and Hamburg to beaches in India, Bangladesh and Turkey, where they were subsequently taken apart, in breach of the European Waste Shipment Regulation.[2] Apparently, this judgment was the first of its kind.[3] The main legal question, answered in the affirmative by the Court, was whether the European Waste Shipment Regulation applies to ships, and in particular, whether entire functioning ships can be qualified as 'waste' under the Regulation. The judgment, however, also invites us to consider the international and European legislative patchwork pertaining to ship recycling, and to reflect on the EU's role in improving environmental and labour standards in global ship-breaking activities.

In this note, we start out by briefly highlighting the hazards of ship-breaking (section 1). We go on to discuss how the Rotterdam District Court creatively used the European Waste Shipment Regulation to address past practices of ship-breaking (section 2). Finally, we outline how, over time, specific international and European legal instruments aimed at regulating ship-breaking have come into being: the Hong Kong Convention and the EU Ship Recycling Regulation (section 3). We note, however, that issues remain with ratification and implementation of these instruments.

1. The hazards of ship-breaking

Ship-breaking, scrapping or recycling of ships all refer to the taking apart of ocean tankers. The large majority of end-of-cycle ships are recycled through beaching, by which ships are run up against beaches, often in South Asia, to be dismantled. While this beaching method certainly is lucrative for shipowners, it presents an array of hazards for the environment and for workers dismantling the ships. Ship waste often consists of various dangerous substances, including asbestos, lead, mercury, oil and arsenic,[4] substances which cause enormous damage to local ecosystems and marine life.

* The research which resulted in this publication has been funded by the European Research Council under the Starting Grant Scheme (Proposal 336230 – UNIJURIS) and the Dutch Organization for Scientific Research under the VIDI Scheme (No 016.135.322).

[1] *Prosecutor v X (The Seatrade)* Court of Rotterdam, 15 March 2018, ECLI:NL:RBROT:2018:2108.

[2] EU Regulation 1013/2006.

[3] NGO Shipbreaking Platform 'Press Release: SeaTrade Convicted for Trafficking Toxic Ships' http://www.shipbreakingplatform.org/press-release-seatrade-convicted-for-trafficking-toxic-ships/.

[4] Center for International Environmental Law 'Shipbreaking and the Basel Convention: Analysis of the Level of Control Established under the Hong Kong Convention' http://www.ciel.org/Publications/Shipbreaking_22Apr11.pdf.

At the same time, workers often handle these substances barehanded, without adhering to any safety or health regulations, which can cause cancer and other illnesses. Additionally, a large portion of the workforce consists of children.[5] Owing to a lack of safety measures, lethal accidents are a common occurrence. The International Labour Organization (ILO) has characterised ship-breaking as 'amongst the most dangerous of occupations, with unacceptably high levels of fatalities, injuries and work-related diseases'.[6]

2. The Rotterdam District Court's creative use of the EU Waste Shipment Regulation

Ship-breaking is insufficiently regulated locally, and even if it is, laws appear to be insufficiently enforced. The transnational aspects of ship-breaking obviously complicate adequate regulation and enforcement. Thus, international regulation is called for, and this has materialised in the form of the Hong Kong Convention[7] and the new EU Regulation on Ship Recycling.[8] These instruments will be discussed later in this note, but it is observed at the outset that they are of very recent vintage and have not fully entered into force yet. They are not, or at least not fully, applicable to past cases of ship-breaking, which law-enforcement agencies and courts are currently addressing. To address past ship-breaking practices, some legal creativity is then in order. Such creativity has been displayed by the prosecutor and the Rotterdam Court in *SeaTrade*, as they relied on the 2006 European Waste Shipment Regulation, ie the EU's implementation of the Basel Convention.[9] The European Waste Shipment Regulation and the Basel Convention were not designed to deal specifically with ship recycling, but simply with the shipment and transport of 'waste'.

The legal question in *SeaTrade* was whether ships could be considered 'waste' under the European Waste Shipment Regulation and, if so, from what point onwards. For its definition of waste,[10] the European Waste Shipment Regulation refers to Directive 2006/12/EC on waste, which has since been replaced by Directive 2008/98/EC (EU Waste Directive). This piece of legislation defines waste as 'any substance or object which the holder discards or intends or is required to discard'.[11] In order better to identify the meaning of the term 'to discard', the Rotterdam Court cited case law of the Court of Justice of the EU (CJEU), which had ruled that whether the holder truly intended to discard the substance or object 'must be determined in the light of all the circumstances, regard being had to the aim of that directive and the need to ensure that its effectiveness is not undermined'. The CJEU had also emphasised that, as the aim of the Waste Directive is to ensure that the handling of waste does not, in any way, have a negative impact on the environment or human health, the concept of 'discarding' cannot be interpreted restrictively.[12] Relying on various internal SeaTrade communications, the prosecutor alleged that SeaTrade executives had no intention of keeping the ships in their fleet and were well aware of the transport prohibition in place, and refuted the defendants' argument that the transport of the tankers took place before it was decided they would be recycled (which would have resulted in the case falling outside of the Regulation's scope). The Rotterdam Court sided with the views of the prosecutor, holding that SeaTrade intended to recycle the tankers and was therefore in violation of the European Waste Shipment Regulation's rules on transboundary shipments of waste.

[5] FIDH and YPSA 'Child-breaking yards: child labour in the ship recycling industry in Bangladesh' http://www.shipbreakingplatform.org/shipbrea_wp2011/wp-content/uploads/2011/11/Report-FIDH_Childbreaking_Yards_2008.pdf.
[6] ILO 'Ship-breaking: a hazardous work' http://www.ilo.org/safework/info/WCMS_110335/lang--en/index.htm.
[7] The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (Hong Kong Convention).
[8] EU Regulation 1257/2013.
[9] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.
[10] European Waste Shipment Regulation art 2(1).
[11] Directive 2008/98/EC art 3.
[12] Joined Cases C-241/12 and C-242/12 *Shell Nederland Verkoopmaatschappij BV & Belgian Shell NV v Netherlands & Belgium* ECLI:EU:C:2013:821 para 38.

3. Specific international and European legal instruments addressing ship-breaking: the Hong Kong Convention and the EU Ship Recycling Regulation

SeaTrade demonstrates that ship-breaking can, in principle, be addressed on the basis of general legal instruments pertaining to waste disposal. As this requires some legal boundary pushing, it is, however, advisable to adopt legal instruments which specifically target ship-breaking. Adoption of such instruments has an important signalling function regarding the illegality of certain ship-breaking practices. It may lead to a more far-reaching behavioural change in the shipping industry as compared to reliance on general instruments. In fact, some time before the Rotterdam Court handed down its judgment in *SeaTrade*, the international community had decided that the fight against irresponsible ship recycling deserved its own international legal instrument. In 2009, the International Maritime Organization (IMO), the ILO and the Secretariat to the Basel Convention pushed for the adoption of the Hong Kong Convention, a specific international treaty the scope of which (only) concerns safe and environmentally sound ship recycling.

The Hong Kong Convention has a so-called two-tier design: the main provisions and procedural rules are contained in the Convention itself, while the more specific details and regulations are contained in an Annex. While the two are linked and have the same legal value, the annex allows for easier amendments in case of changing technical or scientific practices.[13] While an amendment of one of the Convention's articles requires acceptance by two-thirds of the parties,[14] this voting arrangement is reversed for the Annex: any amendment of the Annex is accepted unless one-third of the parties object to it.[15] The Hong Kong Convention contains provisions which apply to both shipowners and ship recycling facilities. The scope of application of the Hong Kong Convention is broad, although there are some exemptions for smaller ships, ships which never leave the territory of their flag state and ships not used for commercial purposes.[16] The concept of 'ship recycling' is also defined broadly, including partial dismantling of ships as well as storage and treatment of parts and materials.[17] Furthermore, the Hong Kong Convention establishes that all ships must carry an inventory of hazardous materials,[18] and creates various requirements for ship recycling facilities.[19]

The Hong Kong Convention did not immediately enter into force. To ensure that the Hong Kong Convention could actually make a difference, as well as to give shipowners sufficient time to adapt to the new regime, the criteria for entry into force were made rather stringent: at least 15 countries, representing 40 per cent of the world's merchant shipping, must ratify it.[20] Even after those criteria are met, the Hong Kong Convention does not enter into force for two years.[21] Ratification of the Hong Kong Convention among states turned out to be so slow that it remains to be seen whether the Hong Kong Convention will enter into force before 2020.[22]

Confronted with this delay in the entry into force of the Hong Kong Convention and the legally binding implementation of its provisions, the EU, which has styled itself as a global environmental leader,[23] has opted to implement the substantive provisions of the Hong Kong Convention ahead of

[13] K P Jain, J F J Pruyn and J J Hopman 'Critical analysis of the Hong Kong International Convention on Ship Recycling' (2013) 7(10) *International Scholarly and Scientific Research and Innovation* 686.
[14] Hong Kong Convention art 18(2)(5)(1).
[15] ibid art 18(2)(5)(2).
[16] ibid art 3.
[17] ibid art 2(10).
[18] ibid Regulation 5.
[19] ibid Regulation 8.
[20] ibid art 17(1).
[21] ibid.
[22] In fact, so far only the DRC, France, Norway, Belgium, Panama and Denmark have ratified it.
[23] See eg A R Zito 'The European Union as an environmental leader in a global environment' (2005) 2(3) *Globalizations* 363; J Vogler and H R Stephan 'The European Union in global environmental governance: leadership in the making?' (2007) 7(4) *International Environmental Agreements: Politics, Law and Economics* 389.

schedule. At the same time, it has also gone beyond the Hong Kong Convention's standards and requirements in substantive terms.[24] The relevant new EU legal instrument is the EU Ship Recycling Regulation, which entered into force in 2013.[25] The Ship Recycling Regulation, unlike the previous EU Waste Shipment Regulation, is not based on the concept of 'waste'. Also, it departs from some of the principles of the old regime, such as the proximity principle[26] and the procedure of prior informed consent.[27] Like the old regime, the Ship Recycling Regulation contains a transport prohibition, but it also lays down substantive rules to which all ships flagged in EU Member States must adhere. It provides that all ships must carry on board an 'inventory of hazardous materials'[28] and may only be recycled at recognised ship recycling facilities included on a European list.[29]

As regards the inventory of hazardous materials, compared to the Hong Kong Convention the Ship Recycling Regulation adds two substances to the list of materials that need to be declared pursuant to inventory of hazardous materials requirements, namely PFOS and HBCDD,[30] after a study conducted by the European Maritime Safety Agency documented their hazards.[31] This goes to show that the Ship Recycling Regulation does not only implement the substantive provisions of the Hong Kong Convention at an earlier stage than internationally required, but it is also more ambitious in setting environmental standards.

As regards the ship recycling facilities, it is of note that the Ship Recycling Regulation makes the selection of recycling facilities more flexible.[32] While the old legislation only allowed recycling in states parties to the Organisation for Economic Cooperation and Development (OECD),[33] the new regime allows recycling at any facility which meets the requirements for it to be included on the European list.[34] Theoretically, this includes recycling facilities in third countries.[35] However, as of yet, no non-EU recycling facilities have been included on the list.[36] The question arises whether such facilities could ever meet the sheer amount of requirements imposed on them,[37] eg regarding downstream waste management[38] (ie what happens with ship waste after it has been extracted from the ship in question).

Confronted with all these requirements, shipowners may possibly decide to reflag their end-of-cycle ships to a non-Member State company so as to evade application of the Regulation.[39] However, such reflagging will be of no consequence if the ship continues to visit EU ports, since the

[24] European Commission COM(2008) 767 final 5.

[25] Pursuant to art 31 of the Regulation.

[26] The proximity principle, incorporated in TFEU art 191, stipulates that environmental damage should primarily be rectified at the source: the polluter pays.

[27] The procedure of prior informed consent, incorporated in art 3(1) of Regulation 1013/2006, entails that legal transboundary shipments of waste must be notified to the authorities and subsequently authorised.

[28] EU Ship Recycling Regulation art 5.

[29] ibid art 13.

[30] Perfluorooctane sulfonic acid (PFOS) and the brominated flame retardant hexabromocyclododecane (HBCDD), which are found in ships and can compromise both the environment and the health of workers.

[31] EMSA 'Study of two hazardous substances (PFOS and HBCDD) included in the annexes of regulation (EU) 1257/2013 on ship recycling' http://www.emsa.europa.eu/news-a-press-centre/external-news/item/3168-emsa-study-of-two-hazardous-substances-pfos-and-hbcdd-included-in-the-annexes-of-regulation-eu-1257-2013-on-ship-recycling.html.

[32] See EESC COM(2012) 118 final para 4.4.

[33] European Waste Shipment Regulation art 36.

[34] EU Ship Recycling Regulation art 6(2)(a).

[35] ibid art 16(b).

[36] The Commission is currently in the process of assessing the information provided and/or gathered on non-EU recycling facilities (Commission Decision (EU) No 2018/684 1).

[37] The Commission, in its impact assessment, noted that technical assistance might be useful for third-country facilities in order to meet these requirements. However, it concluded that the current problem is not so much a lack of technical or financial resources but a lack of political will in major recycling countries (European Commission SWD(2012) 47 final p 36).

[38] See European Commission Communication 2016/C 128/01 p 13.

[39] See eg G A Moncayo 'International law on ship recycling and its interface with EU law' (2016) 109 *Marine Pollution Bulletin* 301. As to the prevalence of the reflagging method, the NGO Shipbreaking Platform held in its 2013 annual report that two-thirds of all the European-owned ships that were scrapped were registered under flags of convenience (non-EU flags).

requirements do not only apply to EU-flagged ships but also to non-EU-flagged ships that arrive at an EU port.[40]

Not all provisions of the Ship Recycling Regulation are of immediate application. Full application of the Ship Recycling Regulation is triggered by the annual output of all recycling facilities on the European List exceeding 2.5 million light displacement tonnes.[41] Current output is nowhere near reaching this benchmark.[42] This situation will only worsen as the United Kingdom prepares to leave the EU: post-Brexit, the European List of recycling facilities will be three British recycling yards shorter.[43] Admittedly, the European List was amended by a Commission Decision,[44] adding to the list three new facilities in Estonia, France and Poland and doubling the theoretical maximum output of one of Lithuania's facilities. This decision amounts, roughly, to a 4.7 per cent increase in overall theoretical output and 8.9 per cent in actual output. Even after the amendment, however, it is extremely unlikely that the 2.5 million LDT benchmark will be reached soon. This creates a problem for the full application of the Ship Recycling Regulation, as there are simply not enough recognised facilities to handle the demand. Inclusion of non-EU facilities is therefore a priority if the Ship Recycling Regulation truly aims to change the current ship-breaking regime. However, as mentioned above, non-EU facilities may face particular problems in meeting the Ship Recycling Regulation's requirements, unless they are offered financial incentives.[45] This is a problem dogging also the Hong Kong Convention. While for the Hong Kong Convention this will mean that non-EU states will be less likely to sign the Convention, for the Ship Recycling Regulation it means that non-EU facilities will not be included on the European List. The shortage of approved recycling facilities may further exacerbate re-flagging practices.

4. Concluding observations

The Dutch *SeaTrade* case shows that shipowners could be prosecuted for dangerous ship-breaking practices on the basis of general rules regarding waste shipment. However, legal reform was called for to better protect workers' health and the environment. In this regard, the more specific EU Ship Recycling Regulation is a welcome addition in the fight against illegal ship-breaking activities.

The global impact of this Regulation should not be underestimated:[46] it affects foreign operators' ship-breaking practices taking place outside the EU, and it may affect non-EU-flagged ships visiting EU ports. For one thing, the EU sets high environmental, labour and health standards for recycling facilities, and may be seen effectively to impose its own standards on third country facilities. These facilities can either comply and have the prospect of being included in the list, or refuse to comply and lose out on business. So far, no third country facility seems to have passed the stringent EU test. For another, the new Regulation has a major impact on the international shipping industry, as the EU sets particularly high standards regarding the inventory of hazardous materials which ships are required to carry, including non-EU ships which arrive at EU ports.

[40] Entry into force regarding non-EU-flagged ships will, however, not happen until after 31 December 2020: see EU Ship Recycling Regulation art 32(2)(b). See for the opportunities of exercising port state jurisdiction in general C Ryngaert and H Ringbom 'Introduction: port state jurisdiction: challenges and potential' (2016) 31 *International Journal of Marine and Coastal Law* 379.

[41] EU Ship Recycling Regulation art 32.

[42] The European List states that all listed facilities combined delivered an annual output of 303 065 LTD, against a theoretical output of 1.116.999 LTD, with the exception of the Portuguese Navalria: Docas, Construções e Reparações Navais, which did not submit any information on its theoretical capacity.

[43] Currently, the European List features 3 recycling facilities located in the United Kingdom: Able UK Limited, Harland and Wolff Heavy Industries Limited and Swansea Drydock Ltd, good for a total annual output of 86.815 LTD and a theoretical output of 604.999 LTD annually. This means that the UK facilities account for roughly 26.3% of the new List's practical output and 51.6% of the new List's theoretical maximum output.

[44] European Commission, Implementing Decision EU 2018/684, L 116.

[45] See Jain, Pruyn and Hopman (n 13) 689.

[46] See more generally on the territorial extension of EU law and the global effect of EU regulation J Scott, 'Extraterritoriality and territorial extension in EU law' (2014) 62 American Journal of Comparative Law 87; A Bradford 'The Brussels effect' (2012) 107 *Northwestern University Law Review* 1, 6.

For global economic operators, it makes sense to adhere to only one regulatory regime, usually the strictest one.[47] In this sense, the EU may be exerting pressure on operators to comply with the 'golden' EU standard also in their global operations. By promulgating, ahead of schedule, higher environmental, labour and health standards, the EU leads the way in the fight against irresponsible ship-breaking practices, setting an example that other actors may well follow. While the new regime is far from perfect and its future implications remain to be seen, the Ship Recycling Regulation makes it easier for regulators to address ship-breaking, without having to resort to creative solutions like those employed in *SeaTrade*.

[47] Bradford 'The Brussels effect' (n 46) 6.