Specialeafhandling:
Piecing together a dismantling industry: A tentative assessment of alternative governance structures for sustainable shipbreaking

Fagområde: CEPRI – Centre for Private Governance

Problemformulering:
A tentative assessment of the feasibility of select alternative governance structures to promote sustainable shipbreaking

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Afleveringsdato: 20.12.21 | Karakter:
Resumé

Specialet undersøker hvordan bærekraftig skipsopphugging kan understøttes gjennom tre alternative styringsstrukturer: domstoler, EUs foreslåtte lisensordning og ESG-inspirerte initiativ. Temaet aktualiseres av regulatoriske utfordringer knyttet til industrien.

Gjennomgangen av gjenvinningsregelverket gjør det mulig å identifisere underliggende hensyn, som i stikkordsmessig form knyttes til sosiale, miljømessige og økonomiske interesser. Disse benyttes som parametere ved evalueringen av de alternative mekanismene.


I analysen av EUs lisensordning droftes rettslige og praktiske spørsmål. Kapittelet belyser også ordningens forhold til EUs autorisasjonskrav for opphuggingsverft, og det foreslås justeringer til disse for å avbøte enkelte nøkkelutfordringer ordningen reiser.

Det gis en innføring i hvordan ESG har vokst frem som en stadig mer aktualisert tematikk for aktører i næringslivet, og blitt opptakten til en rekke initiativ av betydning for skipsopphugging. Etter en gjennomgang av utvalgte initiativ (inkludert kontraktsmaler for finansiering og investeringsstrategier) konkluderes det med disse har en begrenset, men ikke ubetydelig rolle.

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1 Introduction

1.1 Background and research question

As once remarked, “If death is inevitable, one should try to die well.”¹ For commercial vessels reaching the end of their operative lives, prospects of such an outcome are gloomy, particularly if awaiting the murky seashores of the Indian subcontinent at the end of their final voyage. Along these beaches, the trade of tearing apart sizable ships, valued for their in-demand metals, has become a ‘billion rupees industry’.² At full speed, ships are propelled onto the sloppy sands. With these vessels comes the array of hazardous materials they contain, posing grave dangers for the local environment and the laborers set to dismantle them. Yet, with profits running high, standards to manage these risks involved are correspondingly lowered – if at all present. The adverse outcomes of this business model include severe ecological damage, serious health conditions and fatal accidents. However, steering the vessel into this fate is not unavoidable. Mainly clustering in Europe, where rigorous environmental and safety regulations apply, modern recycling facilities equipped with state-of-the-art machinery are able to provide for a responsible scrapping alternative to the notorious practices taking place on the subcontinent. But with raising standards comes raised costs. For those in the possession of an end-of-life ship, sending it for sound recycling means making next to nothing, or even having to pay. Sell it to a shipbreaking yard in South Asia, and millions can be expected. The average cost differential between these two locations are in fact estimated to be around 6 to 7 million euros per vessel.³ For shipowners, operating in a business where competition is fierce and profit margins are slim, the choice does not appear to require much deliberation. This is confirmed by figures revealing that more than two thirds of the global recycled tonnage has been scrapped in the shipbreaking hubs of India, Bangladesh and Pakistan the last 20 years.⁴

¹ The quote stems from Mary Jo Putney’s novel *Dark Mirror* (2011)
³ Economic, Social and Environmental Council opinion, “The European maritime transport policy with respect to sustainable development issues and climate commitments”, CESE11, 2017 at p. 47 (also noting that “…the European cost is around 2 million euros whereas it pays 4 to 5 million euros to sell the ship in Asia”)
While several attempts have been made to tackle the status quo through an array of legal instruments at the international and EU-level,\(^5\) regulating a truly international industry known for questionable reflagging practices, intermediary transactions and involving different (often colliding) interest between the actors involved, has proven to be a challenging task yet to be accomplished. With projections forecasting global demand for shipbreaking to increase drastically in the next 15 years\(^6\), the relevance of addressing this venture does not appear to disappear anytime soon.

While a regulatory approach so far has proven unsuccessful, alternative avenues for addressing the problem are starting to take shape. In Brussels, a EU initiative introducing a return-based financial scheme is starting to gain momentum. The perils of shipbreaking have also caught the attention of the financial sector, with some banks and investors taking an active lead for change by conditioning their lending agreements and investments on assurances that ship scrapping will be conducted sustainably. In addition, as select rulings of recent vintage show, domestic courts have demonstrated willingness to tackle shipbreaking-related issues and assume jurisdiction in cases where the actors involved are disbursed across the globe.

With this backdrop, and in light of unsuccessful regulatory efforts, this thesis seeks to provide a tentative assessment of the feasibility of select alternative governance structures to promote sustainable shipbreaking. In order to remain within the scope of a thesis, this paper will focus on three key structures: ESG-inspired initiatives, courts and the EU license scheme. The feasibility of deploying these mechanisms to confront shipbreaking will be evaluated in light of the key policy goals underpinning the existing international regulatory framework.

A short note should be made of the concept governance structures. While the term is somewhat elusive, it refers to mechanisms seeking to impose a pattern of behavior and steer conduct.\(^7\) While all forms of traditional regulatory activities carried out by government and its agencies is governance, not all governance is this form of regulation.\(^8\) The term alternative governance structures is used to clarify that the mechanisms explored in this thesis are distinguished from such traditional regulatory activities, but nevertheless perform a function in guiding conduct.

\(^5\) Mainly being the Hong Kong Convention and Basel Convention, alongside the European Waste Shipment Regulation and the European Ship Recycling Regulation

\(^6\) According to one projection model, worldwide demand is predicted to "...increase exponentially, at an average rate of close to 10 per cent per year..." between 2020 and 2036, see Solakivi et al. "The European Ship Recycling Regulation and its market implications: Ship-recycling capacity and market potential" in Journal of Cleaner Production, Vol. 294 (2021) at p. 8


As for the chosen alternative governance structures, the selection has been motivated by the fact that they all represent new and emerging avenues for addressing shipbreaking. It allows for reflections around how these novel mechanisms may (or may not) function as means to govern an industry where a regulatory approach over time has proved inadequate. In addition, the three selected structures provide an interesting variety, as they are the offspring of different actors: with the “courts structure” being judiciary-driven, the license scheme government-driven and the ESG-initiatives commercially driven.

1.2 Methodology, delimitations and remarks

This thesis will partly rely on a doctrinal approach, particularly where relevant regulation and jurisprudence is identified and analyzed. In addition, an empirical method will be integrated on account of assessing the feasibility of the governance structures from a functional angle. Such an approach affords insight into how the selected mechanisms may interact and function with the intricacies of the shipbreaking industry and the identified policy goals. This in turns provides a broader foundation for deducing potential advantages and shortcoming pertaining to the individual structures and, in extension, assessing their feasibility for promoting sustainable shipbreaking.

Understanding the relevance and feasibility of the selected governance structures in tackling shipbreaking warrants a brief introduction to (i) the industry on a practical level, and (ii) the current regulatory regime and its shortages. Both topics engage a host of nuances, which, within a scope of this thesis, cannot be explored in full. As such, and they will only be elaborated to the point of establishing a sufficient foundation for exploring the core of this thesis’ research topic – namely the alternative governance structures.

1.3 Structure

Onwards, section 2 gives a brief overview of the shipbreaking business from a practical angle, with the aim of providing the insight necessary to understand the concerns facing the industry. With a focus on international and corresponding EU-instruments, section 3 is dedicated to the regulatory framework attempting to regulate it, and the policy goals attached. In light of the key policy objectives

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9 As for the governance structure pertaining to courts, its novelty in addressing shipbreaking refers to the recent judicial developments pertaining to foreign direct liability as demonstrated by recent case law, to be discussed infra

10 See to this end, Boom, W. van et al., “Empirical legal research: charting the terrain”, in Boom, W. van et al. (eds), Empirical Legal Research in Action, Edward Elgar Publishing, (2018) at p. 2, particularly noting that an empirical legal approach “…focuses on the behavioral effects of legal instruments or views law in its social context or as a reflection thereof”
underpinning these instruments, the thesis proceeds to assessing the viability of three alternative governance structures in tackling shipbreaking, with section 4 dealing with courts, section 5 the EU ship recycling license and section 6 ESG-inspired initiatives. The thesis concludes with a comparative assessment of the mentioned structures, provided in section 7.
2 Understanding shipbreaking: industry insight and terminology

Shipbreaking can be understood as the process of tearing apart ships for their steel and other components, which are subsequently recycled.\(^\text{11}\) This operation goes by many names, including ship recycling, scrapping, or dismantling.\(^\text{12}\) Regardless of label, this is the fate most commercial vessels will meet upon reaching the end of their operational lives,\(^\text{13}\) as commercially viable alternatives usually do not exist.\(^\text{14}\)

A decision to sell the ship for scrapping is generally taken when the price obtained from doing so is higher than the price expected from selling it on the second-hand market.\(^\text{15}\) The latter is influenced by a number of factors, with freight demand being an important driver.\(^\text{16}\) In some instances, certain vessel classes may face new regulation\(^\text{17}\) or economic downturns, in which case the second-hand market may vanish fully.\(^\text{18}\) The ships are purchased by the scrapping yards on a dollar per light displacement tonnage (LDT) basis, a measurement referring to the ship’s empty weight.\(^\text{19}\) LDT-rates are known to be particularly volatile and are heavily influenced by host factors. Important elements include the global supply of end-of-life vessels and local demand in and around shipsrecycling nations for scrap steel, which is utilized across a number of domestic industries.\(^\text{20}\)

An end-of-life vessel is rarely sold directly by the shipowners to the shipbreaking yard. Instead, the transaction is normally structured by the use of intermediaries, referred to as cash buyers.\(^\text{21}\) These cash buyers function as middlemen and are specialized in the business of purchasing end-of-life ships and selling them on to shipbreaking yards. Important, besides offering market expertise and


\(^{12}\) These terms will be used interchangeably; Puthucherril, Tony, *From Ship Breaking to Sustainable Ship Recycling: Evolution of a Legal Regime* (2010) at p. 7


\(^{15}\) As was the case with the mandatory retirement of single-hull tankers in the beginning of the 2000s


readily available capital, these cash buyers provide shipowners with an opportunity for the latter to evade the dangers of legal liability and reputational damage entangled in selling ships to irresponsible shipbreaking yards.\textsuperscript{22}

Where this is the plan, the standard routine amongst cash buyers is to reflag the ship (along with changing its name and removing any corporate logos present). The flag can be expected to be a \textit{“last voyage flag”}\textsuperscript{23}, a special subcategory falling under the wider umbrella of flags of convenience.\textsuperscript{24} Many of these flags, which are otherwise unpopular during the operational life of vessels, are strikingly in-demand for ships that have reached their prime and prepared for recycling.\textsuperscript{25} The popular “last voyage”-registries can tempt with low-cost, easily obtainable registration packages, and advertise fast-track registration procedures absent of any nationality requirements.\textsuperscript{26} Most importantly, these flags belong to states that share a lacking interest in passing, not to mention enforcing, legal measures to prevent unsound shipbreaking practices.\textsuperscript{27}

With shipping being a business renowned for its global presence, the major shipbreaking yards, where the dismantlement of vessels is conducted, are remarkably concentrated. Currently, roughly 90\% of the global scrapping tonnage can be traced back to yards dispersed along three shorelines, all located on the Indian subcontinent: Alang (India), Chattogram (Bangladesh) and Gadani (Pakistan).\textsuperscript{28} Together, these three shipbreaking hubs enjoy an unmatched demand for demolition services, owing to simple explanation that they are able to offer the highest prices for EOL-vessels.\textsuperscript{29} This is in turn made possible for several reasons. Firstly, these states enjoy certain comparative advantages. The coastline of the Indian subcontinent, known for its lengthy, leveled

\textsuperscript{22} Pskowski, Rebecca, ”No Country for Old Ships?: Emerging Liabilities for Ship Recycling Stakeholders”, in \textit{Tulane Maritime Law Journal}, Vol. 45 nr. 1, (2020) at p. 63
\textsuperscript{23} Otherwise known as "end-of-life" flags
\textsuperscript{24} NGO Shipbreaking Platform, \textit{What a Difference a Flag Makes: Why Ship Owners’ Responsibility to Ensure Sustainable Ship Recycling Needs to Go Beyond Flag State Jurisdiction} (2015) at p. 13
\textsuperscript{26} NGO Shipbreaking Platform, \textit{What a Difference a Flag Makes: Why Ship Owners’ Responsibility to Ensure Sustainable Ship Recycling Needs to Go Beyond Flag State Jurisdiction} (2015) at p. 13
\textsuperscript{27} NGO Shipbreaking Platform, \textit{What a Difference a Flag Makes: Why Ship Owners’ Responsibility to Ensure Sustainable Ship Recycling Needs to Go Beyond Flag State Jurisdiction} (2015) at p. 16
beaches and high tidal ranges, offers a topography ideal for shipbreaking (specifically beaching), dismissing the need to build pricey infrastructure. Further, these states have access to abundant supplies of cheap manual labour, keeping operational costs low. Secondly, domestic environmental and safety regulations in these developing nations are, to varying degrees, scarce. To the extent such rules are in place, enforcement capabilities are weak and vulnerable to corruption. To this end, while the recycling nations on the subcontinent generally embrace international rules restricting waste imports, they notably lack the political will to prevent incoming vessels. This non-enforcement is reflective of their economic interests in the industry, with some arguing that there is a ‘race to the bottom’ among these countries to provide the most lucrative conditions for their domestic recycling industries. As such, shipbreaking yards can avoid investing in the machinery, equipment, scrapping methods and procedures needed to mitigate the array of environmental, labour safety concerns involved in shipscraping, thus preventing these expenditures cutting into their profit margins. Not having to bear the expense of providing safe conditions for its workers and the environment, the shipbreaking yards are prepared to pay the most compared to the safer options located elsewhere. Finally, a wide range of industries nearby provides a continuous demand for the steel recovered from the scrapped vessels.

The highly manual method of shipscraping deployed on these shores is beaching. In short, the method involves the vessel being emptied for all (non-essential) inventory and being propelled onto the beach at high tide. The withdrawal of the tide marks the commencement of the

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33 In India for instance, corruption has been severe to the point where it is said that “enforcement has changed from being a part of the problem to becoming the problem itself”, see Puthucherril, Tony, *From Ship Breaking to Sustainable Ship Recycling: Evolution of a Legal Regime* (2010) at p. 69 (footnote nr. 122)
34 Read: the Basel Convention, to be discussed *infra*
dismantling operation, where handheld torches are used to cut into the vessel. Piece by piece, components of the ship fall down on the sand (the “gravity method”), and are hoisted up the beach eventually ending up being reprocessed and utilized across several industries.

The shipbreakers set to perform this work find themselves in an extremely unsafe occupation, known for being among the most dangerous in the world. The life-threatening, and frequently fatal, hazards facing these workers include explosions from latent on-boards fumes, falling steel plates and unsecured fall traps. In addition, an assortment of poisonous materials and gasses contained in the vessel, ranging from asbestos to PCBs and lead, pose serious, long-term health risks. After working twelve-hour shifts under these pressuring conditions, the shipbreakers return to on-site lodging shacks where basic sanitation, running water and electricity are luxuries not to be expected.

Given the alarming state of occupational health and safety at these facilities, it is perhaps no surprise that environmental concerns are similarly neglected as well. Little is done to contain spillage of toxic and hazardous substance when vessels are beached. Much of the ships’ steel is hastily placed in furnaces without prior cleaning, discharging toxins and intensifying pollution levels. The leftovers that do not make it to the ovens will often get mixed with seawater and beach soil, causing considerable physical, chemical and biological harm to the environment. Some of these substances have long-term effects, and pose a significant threat to wildlife, the marine environment and humans.

Enabled by advanced technologies and machinery, environmentally sound shipbreaking is today possible and performed, largely in facilities located in Europe. Albeit to a lesser degree, Turkey

and China also provide for modern, and relatively acceptable demolition services, with occupational safety and health requirements in place. But heightened standards translate to increased costs, and unable to outbid the profitable destinations on the subcontinent, they all account for a negligible portion of the scrapping market. Aside from this clear disadvantage, the European shipscreapping industry is facing potential capacity shortages and is currently unequipped to service the clientele of larger commercial vessels. Beyond Europe, Beijing has ordered a nation-wide bar on entry for any foreign-flagged hulls for shipbreaking, effectively representing yet another hurdle for pursuing more responsible shipbreaking.

51 As confirmed by the figures presented supra, revealing that 90% of the global scrapping tonnage is recycled on the subcontinent
52 Concerns been raised with regard to the present recycling capabilities, and particularly the capacity needed in the feature (albeit volatile market conditions complicate projections of the future demand recycling), see Solakivi et al. “The European Ship Recycling Regulation and its market implications: Ship-recycling capacity and market potential” in Journal of Cleaner Production, Vol. 294 (2021) at p. 2
53 See Garfield, Geoff, TRADEWINDS, “China import ban threatens European recycling strategy”, (10 May, 2018), open-access copy available at https://www.gmsinc.net/gms_new/assets/pdf/2019-08-06dex_org.pdf; A few news outlets reported in the end of 2020 have that China is getting close to reversing its ban – but as of present it remains to be seen when or if this will become reality, see KUNDU, ANKUR, The Maritime Executive, “China on the Verge of Reversing Ship Recycling Ban” (27 Dec., 2020), https://www.maritime-executive.com/article/china-on-the-verge-of-reversing-ship-recycling-ban
3 Regulatory framework and key policy goals

3.1 Introduction

The array of regulatory instruments relevant to shipbreaking is wide and extensive. They range from international conventions with a global coverage, to regional regulations and domestic legislation in a number of varieties. This chapter is concerned with two framework sets of particular importance to the shipbreaking industry at an international and EU-level: the waste framework and the emerging specialized framework for ship recycling. At the international level, these frameworks take the shape of the Basel Convention and the Hong Kong Convention, respectively. Both of these instruments are echoed through two corresponding EU-instruments: namely the Waste Shipment Regulation and the Ship Recycling Regulation. A brief overview of these instruments and their deficiencies is provided below in section 2.2, while their underpinning key policy goals are identified and elaborated in section 2.3.

While the regulations outlined below are concentrated to those considered most central at the international and EU-level, they should not be considered an exhaustive list of international regulatory instruments of relevance to shipbreaking, as a number of other multi-later agreements are also influential.

54 Being a brief overview, the interplay between the regulatory instruments will not be discussed, including the discussion centered around the (in)compatibility between the instruments. On this topic, see for example Moncayo, Gabriela A., “International law on ship recycling and its interface with EU law”, in Marine Pollution Bulletin, Vol. 109(1), (2016) at p. 304 – 305

3.2 Regulatory framework

3.2.1 The waste regime

I) Basel Convention and the Ban Amendment

Although not specifically designed to regulate shipbreaking, the Basel Convention\textsuperscript{56}, adopted in 1989, establishes a global framework for transports of wastes between countries, and is considered the primary regulatory instrument for addressing the industry at the global level.\textsuperscript{57}

The main structure of the convention revolves around a system of “prior informed consent” (PIC).\textsuperscript{58} Waste exported from a member country (“the Exporting State”) can only be sent to another signatory\textsuperscript{59}, and must obtain the prior informed consent of the latter (“the Importing State”) on the basis that the waste will be handled in an environmentally sound manner.\textsuperscript{60} The Exporting State must bar exports if it believes the waste will not be handled in this way, or if the Importing State has prohibited such wastes from being imported.\textsuperscript{61} Shipments that do not adhere to the PIC-procedure are deemed illegal\textsuperscript{62}, and – if attributed to the exporter - shall be re-imported to the exporting country (a so-called “take-back”-obligation)\textsuperscript{63}\textsuperscript{64}.

Following the conclusion of the Basel Convention, an amendment was later adopted, commonly referred to as the ‘Basel Ban’, which entered into force as recently as 2019.\textsuperscript{65} As its name slightly suggests, the Amendment entails an absolute ban on all exports of hazardous wastes from

\textsuperscript{56} The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989 (“Basel”)
\textsuperscript{58} Basel art. 4 (1) and art. 6
\textsuperscript{59} Basel art. 4 (5)
\textsuperscript{60} Basel art. 4 (2) litra g., cf. art. 6 (2)
\textsuperscript{61} Basel art. 4 (2) litra c
\textsuperscript{62} Basel art. 9 (1)
\textsuperscript{63} Galley, Michael, Shipbreaking: Hazards and Liabilities (2014) at p. 62
\textsuperscript{64} Basel art 9 (2)
OECD to non-OECD countries. It is binding on all Convention States who have adopted the amendment, and on any country wishing to accede the Convention onwards.

A main difficulty with applying the Basel Convention (and its ban amendment) to shipbreaking revolves around the concept of “waste”, which it defines as “substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law”. One discourse that has arisen in this regard is whether end-of-life vessels at all may classify as (hazardous) “waste”. While certain stakeholders have vigorously opposed this notion, the presiding view amongst legal scholars and practice under the convention point clearly in the direction of the affirmative. They emphasize that a vessel – either in its structure or as its cargo – contains materials regulated by the Convention and that the processes routinely performed at shipscrapping yards fall within the examples of operations defined as “disposal” under the Convention. The more difficult question that surfaces pertains to when a vessel sent for shipbreaking becomes waste, and remains a key challenge to the application of the Basel Convention for tackling shipbreaking. This translates into a question of establishing when the vessel was “intended to be disposed of” in accordance with the waste-definition in article 2 (1) of the Convention. The intention-criterion is inherently subjective, rendering it difficult for authorities to detect – yet alone prove – when the vessel was disposed of. 

More specifically, wastes from OECD and the EC and Liechtenstein (OECD+ countries) to non-OECD+ countries; See, Basel Ban art. 4A

Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, Tulane Admiralty Law Institute (ALI), (2020) at p. 13

Basel art. 2 (1)

Particularly the shipping industry and shipbreaking states, see Bhattacharjee, Saurabh, “From Basel to Hong Kong: International Environmental Regulation of Ship-Recycling Takes One Step Forward and Two Steps Back” in Trade Law and Development, Vol. 1 (2), (2009) at p. 209; they note for example that noting that such vessels are fully operational and even commercially deployed on their last journey, see Pskowski, Rebecca, ”No Country for Old Ships?: Emerging Liabilities for Ship Recycling Stakeholders”, in Tulane Maritime Law Journal, Vol. 45 nr. 1, (2020) at p. 68


End-of-life vessels normally contain materials considered hazardous under Basel, such as waste oils, PCBs, asbestos and lead compounds, see Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, Tulane Admiralty Law Institute (ALI), (2020) at p. 12

The Convention lists a number of operations in its Annex IV, all of which are defined as disposal. See particularly Annex IV Section B (cf. art 2 nr. 4) which includes recovery operations, such as “resource recovery, recycling reclamation, direct re-use or alternative use”

Pozdnakova, Alla, “Ship recycling regulation under international and EU law” in Marlus vol. 535, (2020) at p. 59

At the latest, a ship may become waste when it is actually being disposed (i.e. when it is dismantled at the shipbreaking site), cf. art. 2 (1) of the Basel Convention. At this point however, the transboundary movement has already happened, and the opportunity of the export states (or transit states) to prevent the outbound movement is no longer present.
intent of the shipowner to dispose a vessel has arisen. It is rarely explicitly expressed, and authorities are left to scrabble for external indicators to deduce an intention, which in turn might be explained for other reasons. This provides an ideal setting for circumvention. For instance, shipowners can claim that the vessel is to voyage abroad for the purpose of repairs or conversions. Further, they may declare that their intent to scrap the vessel was formed when the vessel in question was positioned in international waters, in which case there is (arguably) no state of export. Perhaps even more convenient for shipowners, the intention can be declared once the vessel is present in waters of a recycling state, at which point the transboundary movement has already happened. Refuting such claims is difficult. As one scholar noted, no means exist “…to read the mind of the shipowner while the ship is sailing at high sea”. This represents just some of the problems of the Convention’s reliance on an intention-based criterion.

Beyond the concept of waste, a key difficulty relates to the concept of the ‘export state’ – whose responsibilities are essential to enforce many of the substantive provisions of the Convention. Some argue that the flag state should be considered the exporting state, which raises difficulties in identifying the correct state of export where the vessel is reflagged on its way to recycling. In addition, the popular demand for flags of convenience effectively makes the state of

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77 Such external indicators may be the conclusion of a sales contract with a cash buyer or a scrapping yards, as well as “…the deletion of the ship from the national ship registry, the non-renewal of relevant certificates or classifications, the cancellation or modification of insurance, preparatory steps towards the later dismantling of the ship, or simply the fact that the ship is taken out of traffic on a permanent basis or is not maintained anymore for transport of cargo or passengers”, see Albers, Jan, Responsibility and Liability in the Context of Transboundary Movements of Hazardous Wastes by Sea, Springer, (2014) at p. 107 (particularly footnote 325)
78 Albers, Jan, Responsibility and Liability in the Context of Transboundary Movements of Hazardous Wastes by Sea (2014) at p. 105 noting that this was the case when hundreds of vessels were placed in lay-up amid an on-going shipping crisis
79 Galley, Michael, Shipbreaking: Hazards and Liabilities (2014) at p. 105
80 Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, Tulane Admiralty Law Institute (ALI), (2020) at p. 12
81 Galley, Michael, Shipbreaking: Hazards and Liabilities (2014) at p. 105
83 For example, it is also argued that a shipowner selling its vessel to a cash-buyer does not have the intention to dispose of the vessel, but merely profit off of it. There are also difficulties with establishing a precise “cut-off limit”: if a shipowner decides that the vessel shall be sent for scrapping in a year, but chooses to keep it commercially operational in the meantime (even on the final leg of its journey to the recycling state), at which precise point does the vessel become waste?, see Galley, Michael, Shipbreaking Hazards and Liabilities (2014) at p. 65
84 Defined in Basel art. 2 (10) as ”a Party from which a transboundary movement of hazardous wastes or other wastes is planned to be initiated or is initiated”
85 For example with regards to preventing exports which are prohibited or not believed to be managed soundly by the importing state
86 Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, Tulane Admiralty Law Institute (ALI), (2020) at p. 12
export nations with insufficient capabilities (or incentives) to exercise sufficient jurisdictional control.\textsuperscript{87} Alternatively, the last port of call as the appropriate exporting state also encounters difficulties which relate back to the issues of a intention-based waste-criterion: the intent to recycle the vessel may not be announced or apparent until after the vessel has left the waters of the port state in question.\textsuperscript{88}

II) The EU Waste Shipment Regulation (‘EWSR’)

The Basel Convention and the accompanying Basel Ban Amendment have both been implemented at a EU-level, today through the European Waste Shipment Regulation (‘EWSR’).\textsuperscript{89} It applies \textit{inter alia} to shipments of waste from the EU to third countries.\textsuperscript{90}

A quick glimpse at the Regulation reveals that it resembles many of the key features of the Basel Convention and the Ban Amendment it seeks to implement. This includes restrictions on waste movements, such as a prohibition on export of hazardous waste from the EU to non-OECD states\textsuperscript{91}, “take-back” obligations applicable to non-compliant waste shipments\textsuperscript{92}, and a PIC-system\textsuperscript{93}.

In contrast to the Basel Convention, the EWSR explicitly recognizes that ships may become waste, confirming its applicability to end-of-life vessels.\textsuperscript{94} Combined with the fact that it enforces the Basel Ban, any vessel exported from the EU to be recycled on the subcontinent has been illegal under the Regulation.\textsuperscript{95}

Yet, as the Regulation generally follows the structure of the Basel Convention, it also bears the array of problems of the latter instrument. This particularly includes the issue of identifying when a vessel becomes waste (i.e. establishing the time of which an intent to dispose has arisen),\textsuperscript{96} providing shipowners with an opportunity to avoid its grasp. Vessel may easily depart from European waters without being detected, and thus escape the EWSR. Back in 2011, the Commission could

\textsuperscript{87} Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, \textit{Tulane Admiralty Law Institute (ALI)}, (2020) at p. 12
\textsuperscript{88} Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, \textit{Tulane Admiralty Law Institute (ALI)}, (2020) at p. 12
\textsuperscript{90} EWSR art. 1 (2) litra c
\textsuperscript{91} See EWSR art. 36 and art. 34
\textsuperscript{92} See EWSR chapter 4
\textsuperscript{93} EWSR art. 4
\textsuperscript{94} EWSR rectal 35
\textsuperscript{95} Galley, Michael, \textit{Shipbreaking: Hazards and Liabilities} (2014) at p. 227
inform that no less than 91% of vessels under the scope of the Regulation had ignored or circumvented its requirements.  

3.2.2 The specialized recycling regime

I) The Hong Kong Convention ('HKC')

As a response to the difficulties experienced of tackling shipbreaking through a general waste framework, the Hong Kong Convention 98 (HKC) was developed by the IMO. 99 The Convention is specifically designed to address the environmental, health and safety hazards related to shipbreaking. State parties must require that ships flying their flags and shipscrapping facilities operating within their jurisdictions comply with the Convention’s provisions. 100

Its hallmark is its so-called ‘cradle-to-grave’ approach that regulates a vessel throughout the various stages of its life. Already at the design and construction phase, the HKC bans the use of certain hazardous materials 101, while requiring its builders to declare any and all (accepted) hazardous materials the vessel contains in an Inventory of Hazardous Materials (IHM), 102 which specifies the location and quantities of such materials aboard the vessel. 103 During the vessels operational phase, shipowners must manage the IHM, which is to be kept onboard and held up-to-date on a continuous basis. 104 The IHM is issued and subsequently controlled by the flag state on the basis of various surveys. 105 These surveys are designed to verify the content of the IHM at various stages of the vessels life along with other specified requirements that the vessel must fulfill prior to it being sent to recycling. 106 Upon successfully completing surveys, different certificates are issued to the vessel in question, 107 which in turn are a prerequisite for being granted approval for recycling. 108

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98 Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (2009) (“HKC”)
99 Adopted in 2009 by the IMO; See Galley, Michael, Shipbreaking: Hazards and Liabilities (2014) at p. 223
100 See HKC art. 4 and Karim, Saiful, Shipbreaking in Developing Countries: A Requiem for Environmental Justice from the Perspective of Bangladesh, Routledge, (2017) at p. 79
101 Cf. HKC reg. 4; Hazardous materials are generally defined as materials “liable to create hazards to human health and/or the environment”, cf. HKC art. 2(9), and are further specified in an appendix to the Convention, cf. HKC Appendix 1.
102 HKC reg. 5(1) and 5(2)
103 HKC reg. 5(1.1)
104 HKC reg. 5(3)
105 HKC reg. 5 and reg. 10
106 HKC reg. 10
107 HKC reg 11, cf. reg. 10
108 Particularly the so-called Ready For Recycling-certificate. Vessels lacking this certificate are not to be accepted by shipbreaking facilities located in signatory states, see HKC reg. 17 (2)
prerequisite is that recycling takes place at authorized recycling facilities\textsuperscript{109} that meet specified standards.\textsuperscript{110}

Despite ambitions of the HKC to emerge as a meaningful, global instrument tailored to address the serious hazards accompanying shipbreaking, its ability to so has become subject to debate.\textsuperscript{111}

One criticism points to the HCK’s lacking enforcement mechanisms and vulnerability to circumvention, in other words echoing key shortcomings of the waste framework it seeks to address. Here, an issue lays in the fact that the HCK places key responsibilities on weak jurisdictional links\textsuperscript{112}: namely shipbreaking states and flag states (in practice often open registry states) – both of which generally have a bad track record with regards to enforcement and are prone to corruption.\textsuperscript{113} This problem is augmented by the fact that the Convention is heavily reliant on paper documentation, subject to verification/control by the two mentioned actors, who in addition to lacking sufficient enforcement capabilities have (economic) incentives to over-generously tolerate substandard recycling.\textsuperscript{114} A further key shortcoming is that the HCK is susceptible to re-flagging practices: re-registering the vessel under a non-party flag provides an opportunity to scrap the vessel at a yard in a non-party recycling state – which ultimately “may prove fatal for the success of the Convention”.\textsuperscript{115} Moreover, to the great concern of environmental activists, but plausibly to alleviate hesitancy on part of the recycling states whose support is vital to the Convention\textsuperscript{116}, the HKC does not (at least explicitly) ban beaching.\textsuperscript{117} To this end, it has been criticized for generally lacking sufficiently clear environmental

\textsuperscript{109} HCK reg. 8 (.1); This applies to all vessels falling under the scope of the HKC, meaning ships flying the flag of a state party to the convention or operating under its authority see HCK art. 3(1.1)
\textsuperscript{110} See HCK reg. 15 (1) and HCK chapter 3 generally
\textsuperscript{111} The HKC has received heavy criticism, with some even labeling it a “legal shipwreck”, see Jain et al., “Critical Analysis of the Hong Kong International Convention on Ship Recycling” in International Journal of Environmental, Ecological, Geological and Mining Engineering, Vol. 7 no. 10, (2013) at p. 683
\textsuperscript{113} Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, Tulane Admiralty Law Institute (ALI), (2020) at p. 15
\textsuperscript{114} For example, recycling states may have an economic incentive in granting authorization to sub-standard facilities, see Jain et al., “Critical Analysis of the Hong Kong International Convention on Ship Recycling” in International Journal of Environmental, Ecological, Geological and Mining Engineering, Vol. 7 no. 10, (2013) at p. 689; see also Mathew, Emil. “Ship recycling, market imperfections and the relevance of a consortium of ship recycling nations in the Indian subcontinent” in Journal of International Maritime Safety, Environmental Affairs, and Shipping, Vol. 5 no. 2, (2021) at p. 28
\textsuperscript{116} See Galley, Michael. Shipbreaking: Hazards and Liabilities (2014) at p. 225
\textsuperscript{117} Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, Tulane Admiralty Law Institute (ALI), (2020) at p. 15
requirements. Finally, and most importantly, the HKC is not in force, as far as it has not received the necessary ratifications, requiring inter alia the endorsement of states representing a specific portion of shipbreaking capacity.

II) EU Ship Recycling Regulation ("ESRR")

A growing recognition of the waste framework as a poorly fitted approach to shipbreaking and the pending ratification of the HCK prompted the emergence of the European Ship Recycling Regulation\(^{120}\) ("ESRR").\(^{121}\) The Regulation applies to vessels flying a EU-flag, which are in turn exempted from the EWSR.\(^{122}\)

The ESRR aims at facilitating the ratification of the HKC, and mirrors many of the provisions of the latter. This includes a requirement of vessels carrying an IHM\(^{123}\), a system of surveys and certificates\(^{124}\) and a scheme for approved recycling facilities.\(^{125}\) However, in substance, the regulation generally goes beyond the HKC’s standards and requirements.\(^{126}\) For example more substances are to be included in the IHM.\(^{127}\) Further, stricter criteria apply in relation to approved facilities. Such authorized facilities are compiled in the so-called ‘EU List’ (or ‘Green List’), which allows for the inclusion of facilitates located both in the EU and third-party states, subject to

\(^{118}\) Pozdnakova, Alla, “Ship recycling regulation under international and EU law” in MarIns vol. 535, (2020) at p. 67-68; The lack of sufficiently clear requirements are for example found in reg. 15 of the Convention, which imposes a general obligation on member states to ensure that scrapping facilities are operated “in a safe and environmentally sound manner in accordance” with the Convention, rendering it “highly questionable” whether this prohibits the beaching method, see Karim, Saiful, Shipbreaking in Developing Countries: A Requiem for Environmental Justice from the Perspective of Bangladesh (2017) at p. 85

\(^{119}\) Galley, Michael, Shipbreaking: Hazards and Liabilities (2014) at p. 223

\(^{120}\) 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; As the Regulation has been incorporated in the EEA Agreement, it also applies to vessel flying the flag of Norway, Iceland and Liechtenstein


\(^{123}\) In the Regulation’s terminology dubbed an “inventory certificate”


\(^{125}\) In addition, like the HKC, the ESRR uses a “cradle-to-grave”-approach and contains rules regulating types of materials which may (not) be used for building the vessel.


inspections being passed and a set of specified requirements being met. One of these requirements is that facilities must be operated out of “built structures.” As such, the ESRR—unlike the HKC—established a ban on shipscrapping sites using the beaching method. To this end, facilities in third countries must operate under safety and environmental standards “broadly equivalent” to those in the EU. EU-flagged vessels are only to be scrapped at a green-listed facility.

Like the HCK, neither the ESRR has evaded criticism. One specific point relates to the EU List—or more specifically the strict listing requirements it operates under, which in practice only allow for the authorization of yards concentrated in Europe, albeit some select yards have recently been authorized in Turkey and one in the US. This will be discussed in further detail infra, but suffice to say that the listing practices have raised concerns regarding recycling capacity, with some stakeholders arguing that the requirements “look like protectionism.” However, the most notable deficiency of the ESRR is that it can easily be avoided by simply re-flagging the (end-of-life) vessel to a non-EU country. Although the Regulation (effectually) entered into force quite recently, there are already signs of shipowners being more than willing to do so.

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128 Pozdnakova, Alla, “Ship recycling regulation under international and EU law” in MarIus vol. 535, (2020) at p. 76; yards are approved by the EU Commission, id.
129 See ESRR article 13 (1).
130 Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, Tulane Admiralty Law Institute (ALI), (2020) at p. 17.
132 Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, Tulane Admiralty Law Institute (ALI), (2020) at p. 17; the facilities must also comply with an array of other requirements further specified in the regulation, see particularly ESRR art. 13.
133 An overview of listed facilities is available at the Commission’s website, see https://ec.europa.eu/environment/topics/waste-and-recycling/ships_en (under the heading heading “Map of the EU-listed yards”).
137 The Regulation formally entered into force in 2013, but due to its “graded applicability”—approach first became more or less fully effective as of 31 December 2018, although some more specified requirements entered into force two years later see Glinis, Carola “Sustainable Shipping: The New Governance Approach to Ship Recycling” in Ulbbeck, V. and Girvin, S. (ed.), Maritime Organisation, Management and Liability, (2021) at p. 10 (of chap. 5, n.p.a.)
3.2.3 Summary

The outline above shows that there have been considerable regulatory attempts (albeit some not intentional) to address the adverse impacts of shipbreaking. It also reveals that these efforts are undermined for reasons ranging from circumvention, enforcement and untailored provisions raising confusion pertaining to substantive obligations, application and assignment of jurisdictional responsibilities. Moreover, the pending ratification of the HKC highlights the lack of a comprehensive international framework addressing shipbreaking, which is critical to tackle the highly transnational nature of the industry. It also illustrates the conflicting state interests involved in the venture, making it challenging to confront the industry through a regulatory prism.

3.3 Key policy goals

3.3.1 Foundational policy goals

The regulatory instruments defined above share a number of policy goals. This is logical, given the inherent connection between the instruments: the specialized shipbreaking regime has developed as a response to address the gaps left by the more general waste framework. At the same time, the international instruments pertaining to these two separate regimes are echoed through the EU regulations. The preambles and/or the substantive provisions of all the instruments make it possible to extract and identify shared foundational policy goals underpinning the regulatory instruments. These foundational policy goals must be held separate from the way in which they are specifically concretized through concomitant principles and measures seeking to realize their aims.

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*shipping: A cross-disciplinary view* (2019) at p. 239 (“...it is very likely that many, if not most, of these ships will change flag and go for recycling to South Asia, thus electing to ignore Brussels”)


140 Ahmed, Ishtiaque, “Unraveling Socio-Economic and Ecological Distribution Conflicts in Ship-Breaking in Bangladesh for Addressing Negative Externalities” in *Law and Policy Making*, Vol. 29 no. 2, (2020) at p. 208, noting: “Furthermore, the interests of South Asian recycling countries...who are essential to ratification, have complicated the process due to their economic vulnerability and internal complex policy choices.”

141 For example, the environmentally oriented policy goal (discussed *infra*) materializes differently between the two framework sets: the waste regime directs attention towards restricting the movements of wastes (c.i. (disputably)) end-of-life vessels). In contrast, the specialized regime can be said to facilitate such movements, but subject to a series of strict procedures and requirements meant to mitigate environmental concerns.
Firstly, one overall policy goal pertains to safeguarding environmental concerns. The Basel Convention’ preamble is filled with references emphasizing its determination “to protect… the environment”, with the EWSR correspondingly stating that its “objective… [is] to ensure protection of the environment”\(^\text{142}\). The HKC speaks of its resolve to “address… the environmental… risks related to ship recycling”\(^\text{143}\), and its preemptive implementer, the ESRR notes that its objective is to “prevent, reduce or eliminate adverse effects… on the environment” caused by shipbreaking\(^\text{144}\).

A second policy goal to be deduced may be expressed as the protection of social concerns, which in the context of shipbreaking particularly refers to the health and safety of workers employed in the shipbreaking yards.\(^\text{145}\) The HKC seeks to address “the occupational health and safety risks related to ship recycling”\(^\text{146}\), and the ESRR underlines that the necessity of protecting “the health and safety of workers”\(^\text{147}\). Similarly, the Basel Convention is “Determined to protect, by strict control, human health”\(^\text{148}\), and the EWSR notes the need to “ensure safe… management of ship dismantling in order to protect human health”\(^\text{149}\).

Finally, a third – but perhaps more subtly communicated - policy goal relates to taking account of the economic interests of (developing) shipbreaking nations. Despite its adverse effects, shipbreaking represents a valued industry for the impoverished nations stretched along the subcontinent, providing employment for millions (indirectly)\(^\text{150}\) and significant volumes of raw metal their secondary industries sectors heavily rely on.\(^\text{151}\) Grounds for support of this policy goal can be found in the Basel Convention, which explicitly mandates the need to take “into account the interests

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\(^\text{142}\) See EWSR recital 42  
\(^\text{143}\) HKC preamble para 9  
\(^\text{144}\) See ESRR recital 22  
\(^\text{145}\) It should also be mentioned that these health and safety concerns partly overlap with the environmental concerns referred to supra, and may also involve safeguarding other groups beyond shipbreakers as such. For example, the adverse environmental effects of certain shipbreaking operations, such as water and air pollution implicate health risks, and maybe suffered by local communities in proximity to the shipbreaking yards. See, “Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu”, A/HRC/12/26 15 July 2009 at para 22  
\(^\text{146}\) HKC preamble para 5  
\(^\text{147}\) ESRR recital (7)  
\(^\text{148}\) Basel last para  
\(^\text{149}\) EWSR recital (35)  
\(^\text{150}\) Only in India, it has been estimated that the shipbreaking provides jobs for 40 000 workers directly involved in the operation, while roughly one million other workers are dependent on the industry in secondary industries that have arisen from this venture, see Bhattacharjee, Saurabh, “From Basel to Hong Kong: International Environmental Regulation of Ship-Recycling Takes One Step Forward and Two Steps Back” in Trade Law and Development, Vol. 1 (2), (2009) at p. 198  
\(^\text{151}\) Bangladesh for instance, has no iron available domestically and relies on scrap metal from vessels to feed its secondary industries, Sawyer, John, “Shipbreaking and the North-South Debate: Economic Development or Environmental and Labor Catastrophe” in Penn State International Law Review, Vol. 20 nr. 3, (2002) at p. 547
of developing countries”, as stipulated in article 11\textsuperscript{152}. The EWSR in turn, attempts to implement the principles of the Basel Convention. Its recitals notes the relevance of article 11\textsuperscript{153}, highlights the importance of “international cooperation” and clarifies that the “shared responsibility and cooperative efforts” between the EU and third countries should be promoted.\textsuperscript{154} As for the HKC, the policy goal can be deduced from its integration of the sustainable development principle. This principle affirms that regulatory environmental efforts cannot be detached from the necessities mandated by poverty to ensure economic development.\textsuperscript{155} Accordingly, the HKC recognizes that shipbreaking states enjoy a right to development.\textsuperscript{156} The incorporation of the principle in the HCK can be inferred through its recital\textsuperscript{157} in combination with its substantive provisions, as the latter do not ban the export of vessels for dismantling (and arguably not even beaching). This approach indicates that its drafters were aware of the fact that a blanket export ban, akin to the Basel Amendment, would have barred the entry of end of life vessels to shipbreaking states, inevitably obliterating any incentive of the latter to develop sound recycling facilities in accordance with its own provisions.\textsuperscript{158} Likewise, the ESRR, which aims at implementing the principles of the HKC, can possibly be perceived to embody a policy goal of taking into account the interests of developing nations. Its provisions, similar to the HKC, do not prohibit the export of vessels to third countries, but explicitly provides procedures for authorizing facilities outside the EU.\textsuperscript{159}

3.3.2 Interplay between identified goals

Evidently, there exists a tension between the policy goals outlined above. The social and environmental objectives conflict with the economic interests of developing states, representing an “acute dilemma for policy-makers”\textsuperscript{160}. The detrimental outcomes arising out of insufficient or non-existent health, safety

\begin{itemize}
  \item \textsuperscript{152} Basel article 11
  \item \textsuperscript{153} See EWSR recital 30, see also art. 41 (1) b
  \item \textsuperscript{154} EWSR recital 36
  \item \textsuperscript{155} As the principle of sustainable development is articulated through principles 4 and 5 of the \textit{Rio Declaration On Environment And Development (1992)}
  \item \textsuperscript{157} Recognizing that recycling is the best option for end-of-life vessels as it contributes to “sustainable development”, see HKC preamble para 2
  \item \textsuperscript{159} Whether the ESRR is reflective of such a policy goal can also be disputed: the ESRR’s current listing requirements – as construed and applied by the Commission – have raised questions involving “EU protectionism”.
  \item \textsuperscript{160} Bhattacharjee, Saurabh, “From Basel to Hong Kong: International Environmental Regulation of Ship-Recycling Takes One Step Forward and Two Steps Back” in \textit{Trade Law and Development}, Vol. 1 (2), (2009) at p. 198
\end{itemize}
and environmental standards on the subcontinent are by now well documented, and addressing these risks has remained a priority for developed nations. While this task remains important, developing nations require leeway to leverage their competitive advantages to participate in the shipbreaking industry, thus allowing the continuation economic development. Imposing impossibly high environmental and labour standards or even outright export bans, diminishes their ability to partake in the industry, translating into further “impoverishment, unemployment, starvation and, at best, aid-dependency…” This clash of interests makes addressing shipbreaking challenging from a policy perspective, and invokes difficult political and ethical considerations that enter into the broader “North-South debate”.

While this conflicting dimension remains, it should not overshadow that these policy goals to some extent intersect. Shipbreaking allows for an environmentally friendly reutilization of resources, providing enormous quantities of recycled steel the shipbreaking nations are reliant on. Importantly, it does so while relieving pressure off of mining operations and conserving huge amounts of energy – which would otherwise be needed to produce and source the metals. Given this reutilization aspect, and in the absence of alternative disposal methods, shipbreaking has become a ‘sustainable necessity’. Further, the shipbreaking industry on the subcontinent has the capacity to handle the global demand of this necessity. This is in stark contrast to other regions, which lack the (green) capacity needed to dismantle the world fleet of sizable vessels. Cutting off the subcontinent from the shipbreaking industry may lead to a situation where shipowners resort to more dubious means

165 It is rather the method in which it is done that prompts enviromental concerns; Mikelis, Niklos. “Ship Recycling” in Psaraftis, H. (Ed), Sustainable shipping: A cross-disciplinary view (2019) at p. 212
166 Both Pakistan and Bangladesh produce very little steel, and is one of the key reasons why the ship recycling industries have been growing fast in these countries, see Mikelis, Niklos. “Ship Recycling” in Psaraftis, H. (Ed), Sustainable shipping: A cross-disciplinary view (2019) at p. 217
to dispose their vessels\textsuperscript{170}, or lead to an accumulation of end of life vessels.\textsuperscript{171} As experience has shown, such “mothballing” (indefinite storage of vessels) generates yet another environmental and safety hazard\textsuperscript{172} – which is presently avoided today through the readily available capacity provided by the shipbreaking nations of India, Bangladesh and Pakistan. While these aspects should not be taken as a justification of the adverse local environmental impacts of shipbreaking as it is currently practiced on the subcontinent, they do highlight a linkage between the environmental and economic interests involved, allowing some room for compatibility.

3.3.3 An overreaching policy goal and desired features of governance structures

The three identified policy objectives are partly conflicting, but also partly compatible. If viewed collectively, it is possible to conceive them as cumulating into one overreaching policy goal embodying all of them: the goal of sustainable shipbreaking. While sustainability is an ambiguous term, it may be understood as a concept entailing an aim of ‘reconciling and integrating’ the goal of economic development on the one hand with the aims of environmental and social protection on the other.\textsuperscript{173} Achieving sustainable shipbreaking requires a balance to be struck between these foundational policy goals.\textsuperscript{174} Doing so is a contentions matter, but such a balance inevitably requires a compromise, where environmental and social concerns must bargain against economic considerations. This balance must translate into solutions able to address the environmental and social concerns currently entangled in the industry on the subcontinent in a way that does not lead to its elimination.\textsuperscript{175} Changes are necessary in how shipbreaking operations are currently carried out. Measures are needed that \textit{inter alia} support and encourage facilities to upgrade infrastructure, develop adequate training procedures, better working

\textsuperscript{170} Puthucherril, Tony, \textit{From Ship Breaking to Sustainable Ship Recycling: Evolution of a Legal Regime} (2010) at p. 207
\textsuperscript{174} See Puthucherril, Tony, \textit{From Ship Breaking to Sustainable Ship Recycling: Evolution of a Legal Regime} (2010) at p. 93 noting that (“For development to be sustainable, conflicting interests must be balanced”) and at p. 192 noting (“To be sustainable, there has to be a balance between economic, social and ecological objectives”)
\textsuperscript{175} (As pointed out, “The one common point of agreement among all stakeholders in the industry is that shipbreaking must continue”), see Sawyer, John, “Shipbreaking and the North-South Debate: Economic Development or Environmental and Labor Catastrophe” in \textit{Penn State International Law Review}, Vol. 20 nr. 3, (2002) at p. 530-551
conditions and improve waste management.\textsuperscript{176} At the same time, measures seeking to raise standards must use a benchmark that is obtainable. Attaining sustainability requires nuanced solutions able to stimulate progress while incorporating the commercial interests in the industry. Alienating the shipbreaking nations depletes their economic interests and thus undermines the overreaching aim of sustainable shipbreaking.\textsuperscript{177}

For sustainable shipbreaking to take shape, functional governance structures are required. This implies mechanisms able effectively incentivize improvements on the subcontinent. In order to do so, structures are needed that overcome the intricacies of the industry that have made regulatory efforts a challenge. This includes issues pertaining to circumvention, reliance on jurisdictions with weak enforcement capabilities or incentives and the transnational underpinnings of the industry. Concurrently, such mechanisms should avoid regional disparities on the subcontinent, which otherwise would distort competition and prove advantageous to the nation(s) with the most relaxed (or non-enforced) standards.\textsuperscript{178} Further, in order to ensure that the sustainability principle is properly applied, the governance structures should incorporate a nuanced approach that is reflective of the underlying foundational goals. This means incorporating the commercial interests of shipbreaking nations, while stimulating social and environmental improvements in the region.

\textsuperscript{176} Puthucherril, Tony, \textit{From Ship Breaking to Sustainable Ship Recycling: Evolution of a Legal Regime} (2010) at p. 196
\textsuperscript{177} And in light of insufficient capacity, may also trigger new environmental and safety concerns, as discussed supra
\textsuperscript{178} This was previously the situation in a period where foreign pressure led to enforcement of specific national regulations in India, requiring minimum levels of decontamination before vessels would be allowed to arrive onshore. It lead led to a decline in shipbreaking business in the country, while its neighboring competitors Bangladesh and Pakistan – absent of such regulations – enjoyed increased market shares, see Sawyer, John, “Shipbreaking and the North-South Debate: Economic Development or Environmental and Labor Catastrophe” in \textit{Penn State International Law Review}, Vol. 20 nr. 3, (2002) at p. 548, and Puthucherril, Tony, \textit{From Ship Breaking to Sustainable Ship Recycling: Evolution of a Legal Regime} (2010) at p. 192
4 Governance structure: courts

4.1 Introduction

On a general level, the array of adverse effects associated with shipbreaking has so far been inadequately addressed by legislative powers.\(^{179}\) This has left a void for the judiciary, which has not been left untapped. Indeed, courts have to an increasing extent been called upon to take a stance on the issues arising from the shipbreaking industry.\(^{180}\) From London to New Delhi, pioneering case law has surfaced from domestic courts, which have demonstrated creativity and innovation in addressing the concerns of an industry seemingly impossible to regulate. With reference to select developments in case law, this chapter will explore key aspects as to the various roles assumed and approaches taken by courts in addressing shipbreaking, and as such provide insight into the feasibility of a ‘judiciary sponsored model’\(^{181}\) as a governance structure. Attention will be concentrated on domestic courts within the jurisdictions of two relevant actors in shipbreaking: the recycling states on the subcontinent and the shipowner-hub of Europe. As for the latter, focus will be maintained on courts acting in the capacity of handling foreign direct liability claims, particularly on the basis of the law of negligence. This concentration is motivated by recent and interesting developments in case law, which in turn allow for broader considerations of courts as a governance structure. The delimitation should not overshadow other possible roles courts may assume to addressing shipbreaking – for example in cases involving export and import control or criminal liability.\(^{182}\) However, a typical feature (and often an obstacle) in these cases is that courts are extensively reliant on the underlying (international) regulatory framework.\(^{183}\)

\(^{179}\) (Read: inadequate regulation)

\(^{180}\) As illustrated by the recent case law of European courts, to be discussed infra. This development has also been particularly noticeable in India, see Puthucherril, Tony, *From Ship Breaking to Sustainable Ship Recycling: Evolution of a Legal Regime* (2010) at p. 65

\(^{181}\) The term is coined from Puthucherril, Tony, *From Ship Breaking to Sustainable Ship Recycling: Evolution of a Legal Regime* (2010) at p. 65


\(^{183}\) *Id.*
4.2 Courts of shipbreaking nations - the ocean liner Blue Lady

4.2.1 Background

In the leading shipbreaking nations on the sub-continent, lawmakers have generally been reluctant to introduce meaningful legislation domestically to tackle shipbreaking.\(^{184}\) Understandably, they are cautious of disadvantaging an industry serving as a much-needed boost for a regional economy in need of steel and employment opportunities. In countries where even the most basic of necessities is a daily struggle for many, economic development logically becomes an unrivaled political priority.\(^{185}\) Domestic courts in these countries are however also responsible for safeguarding a broader array of rights and freedoms – which extend beyond the economic realm to encompass aspects pertaining to the environment and the health and safety of its peoples,\(^{186}\) all of which are affected by the shipbreaking activities finding place within their jurisdictions.

The specific judicial approaches that have taken place in India, Bangladesh and Pakistan differ.\(^{187}\) Rather then a descriptive outline of the specific (and highly nuanced) advances\(^{188}\) made by the judiciaries in these jurisdictions, it is useful to assess the more general feasibility of these domestic courts in addressing shipbreaking for the purpose of this thesis.

\(^{184}\) Albeit it exists to some extent, current regulations are inadequate (even described as ‘negligible’) – and with governments generally reluctant to apply existing general norms (for example related to waste) to shipbreaking, see for example Karim, Saiful, *Shipbreaking in Developing Countries: A Requiem for Environmental Justice from the Perspective of Bangladesh* (2017) at p. 63, and Noiseux, Yanick and Rane, V., “Organising the unorganized: Academic and activist insights from shipbreaking yards in Mumbai” in George, S. and Sinha, S. (ed.) *Redefined Labour Spaces*, Routledge, (2017) p. 254.


\(^{186}\) See, Karim, Saiful, *Shipbreaking in Developing Countries: A Requiem for Environmental Justice from the Perspective of Bangladesh* (2017) at p. 43.

\(^{187}\) And have been accompanied by papers in scholarship analyzing these jurisdiction-specific developments, see for instance (regarding developments in Bangladesh): Karim, Saiful, *Shipbreaking in Developing Countries: A Requiem for Environmental Justice from the Perspective of Bangladesh* (2017) and (regarding developments in India) Puthucherril, Tony, *From Ship Breaking to Sustainable Ship Recycling: Evolution of a Legal Regime* (2010) chapter 3.

\(^{188}\) For instance, the Bangladesh Supreme Court has early on directed the government to prevent imports of ships containing hazardous materials, albeit with limited success; see, Karim, Saiful, “Environmental Pollution from the Shipbreaking Industry: International Law and National Legal Response” in *Georgetown International Environmental Law Review*, Vol. 22, (2010) at p. 234-235. The Indian Supreme Court has generally been considered the most proactive actor compared to its counterparts in the region (Bangladesh and Pakistan), having taken steps to form committees to monitor and evaluate proper implementation of international instruments (the Basel Convention) as well as issuing binding guidelines to ensure environmental compliance with the shipbreaking industry, albeit also with a limited degree of success, see generally Puthucherril, Tony, *From Ship Breaking to Sustainable Ship Recycling: Evolution of a Legal Regime* (2010) chapter 4 at p. 53 following.
4.2.2 Courts of shipbreaking nations – a flexible solution?

Arguably, a key advantage held by domestic courts is their ability to take into account the numerous and conflicting interests involved in the shipbreaking operations that take place within their jurisdictions. This is perhaps most clearly illustrated by the Blue Lady case – a decision that has sparked considerable controversy.

Similar to her ceremonial launch in Saint-Nazaire, attended by notables including President Charles De Gaulle, the story of the Blue Lady (Ex-SS France, Ex-SS Norway) is unusually eventful. The vessel, considered an “icon of French maritime pride”, originally operated as a luxurious passenger liner serving the transatlantic route. Prompted by prevailing market conditions, she was later sold to Norwegian Cruise Line and swiftly converted into a cruise ship to cover the popular Bahamas – Miami route. Following dramatic events in the latter location involving an on-board explosion claiming seven lives and injuring many more, Blue Lady (then SS-Norway) was towed to Germany, where she remained docked in lay-up for nearly two years. Before German authorities, the owner of Blue Lady – much likely aware of the applicable waste export regulations – claimed she was set for Singapore to undergo yet a third transformation: this time becoming a floating hotel. It would later be known that the vessel was in fact destined for beaching. Upon receiving (unwarranted) departure approvals in Germany, the Blue Lady set towards the Sub-Continent. After a failed attempt to enter Bangladesh, having been refused entry by the government due to efforts made by local environmental activists, Blue Lady eventually emerged on the outskirts of Alang (India). After a period of anchorage in Indian territorial waters pending a legal process initiated yet again by local activism, the vessel was finally propelled up on Alang and ultimately dismantled by virtue of the so-called Blue Lady

190 Fuel oil prices were reaching high levels, affordable air traffic emerged and state subsidies were withdrawn, see id. at p. 267
191 It was originally planned that she was to undergo reparations in Germany, but upon closer assessments, its owners found this to not be a commercially viable option.
192 At this point Blue Lady’s ownership had been transferred from Norwegian Cruise Line to its parent company, Star Cruises
195 See Karim, Saiful, Shipbreaking in Developing Countries: A Requiem for Environmental Justice from the Perspective of Bangladesh (2017) at p. 107-108
Its drafter, the Indian Supreme Court, had thus far—in contrast with the country’s regulators—become renowned for demonstrating great willingness to demand shipbreaking standards of a rigor and ambition unmatched on the subcontinent. It therefore came as a surprise that the judgment permitted the beaching of the Blue Lady vessel—a massive vessel packed with toxic materials, even including radioactive material—and where there were strong indications that its prior owner had acted deceitfully before local authorities in Germany. The criticism to follow was strong, with commentators noting that the Supreme Court reversed the “sustainable development jurisprudence” it had advanced over the years, that its judgment expressed “sustainability as monetary benefit” and that it had entirely ignored the many shipbreakers who would be placed at great risk when dismantling the vessel. Instead, the judgment interestingly emphasized that the scrapping of the Blue Lady would generate employment for 700 shipbreaker, and that this process would yield roughly 40 000 tonnes of in-demand recycled steel, considerably reducing the pressure on (not-so-environmentally-friendly) mining operations to generate the sought after metal.

On the outset, it appears far from obvious that the Blue Lady judgment in any way supports the notion that domestic courts in shipbreaking nations can play an important role in tackling the industry. Similar to the position taken by several scholars and NGOs, the judgment may very well be criticized for its reasoning and outcome, as it ultimately prioritized the above-mentioned economic benefits of beaching to the detriment of environmental and safety hazards generated by the venture. While this remains true, the judgment arguably illustrates a capacity of courts to deploy a flexibility allowing different conflicting interests to be balanced (in line with the policy goal of sustainability). In Blue Lady this became most notably concretized through a paragraph written by justice Kapadia, who, writing for the court, noted:


199 Puthucherril, Tony, From Ship Breaking to Sustainable Ship Recycling: Evolution of a Legal Regime (2010) at p. 91


201 See Puthucherril, Tony, From Ship Breaking to Sustainable Ship Recycling: Evolution of a Legal Regime (2010) at p. 88

202 See RFSTNRP v. UoI & Ors para. 11

“In an emergent economy, the principle of proportionality based on the concept of balance is important. It provides level playing field to different stakeholders ... When we apply the principle of sustainable development, we need to keep in mind the concept of development on one hand and the concepts like generation of revenue, employment and public interest on the other hand. This is where the principle of proportionality comes in.”

In Blue Lady, the environmental and safety risk associated with the vessel’s beaching did not harmonize well with the policy goals of environmentally sound management and social concerns, respectively. On the other hand, emphasizing resource conservation and securing jobs in a nation with an ‘endemic unemployment problem’ are clearly strong interests, which are also encompassed by these same policy objectives along with that of economic development. This is reflective of the tension between the policy goals underpinning the regulatory framework, and which the overreaching policy goal of sustainability seeks to embody by striking a balance. Achieving the latter is challenging, but – recalling the point made in section 3.3 – it mandates a flexible instrument able to balance the different interests involved, having regard to the present realities and necessities on the ground. In the shipbreaking countries, these clashes of interest materialize most clearly. The domestic courts of these nations may arguably be positioned to confront this task, as illustrated by Blue Lady. Here, with clear reference to the overreaching policy objective of “sustainable” shipbreaking, the Court sought to strike a balance between the conflicting interests arising by introducing a principle of proportionality. In the Supreme Court’s view, an appropriate balance of these interests would not be struck by the “discontinuing of shipbreaking activity” domestically, but through ensuring that such ventures are “strictly and properly regulated”.

While the concrete outcome of Blue Lady remains subject to debate, the judgment signals the ability of domestic courts to deploy a flexible and nuanced approach to the difficult dilemma presented by shipbreaking when conflicting interests arise and intersect. This aptitude becomes desirable from the point of view of the policy goal of sustainability, which demands these interests to be properly balanced.

206 RFSTNRP v. UoI & Ors, para. 43
207 RFSTNRP v. UoI & Ors, para. 43
4.2.3 Additional considerations

Beyond the promising flexibility of courts in shipbreaking nations, it has more generally been argued that the most efficient place to control shipbreaking is precisely in these jurisdictions. The opportunities to move or register vessels into jurisdictions with relaxed standards that allow for exports to the subcontinent, arguably makes the latter the ideal jurisdiction(s) to confront the industry. In this setting, the domestic courts may be positioned to take an active and progressive approach towards heightening environmental and labour standards. Here, a short point to be made is that such courts may be more removed from the (political) pressure placed on domestic legislators to accord preference to economic development. While the latter was ultimately given priority in the specific instance of Blue Lady, the pendulum might as well have swung in favor of the environmental and social implications of shipbreaking – both in that case, and those to come in the future. Indeed, case law from the developing shipbreaking nations on the sub-continent have shown that domestic (supreme) courts in many instances have taken a remarkably progressive stance on issues of shipbreaking, and demonstrated great creativity in utilizing the full extent of their powers – to a point even described as “[m]arshall-like resourcefulness” or stretching “the extent of…[their] legitimate confines”. This has included attempts to order governments to prevent the imports of hazardous ships, forming comities to monitor and evaluate proper implementation of domestic and international shipbreaking-related instruments, issuing binding guidelines to ensure environmental compliance within the shipbreaking industry and even directing responsible ministries to develop specialized regulatory frameworks.

Yet, while the regulatory gap left by legislators may be narrowed by efforts made by domestic judiciaries, their verdicts alone cannot effectively confront the perils of shipbreaking as long as enforcement within their jurisdictions remain weak. This stands as a persisting issue regardless of the

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211 Puthucherril, Tony, From Ship Breaking to Sustainable Ship Recycling: Evolution of a Legal Regime (2010) at p. 69
213 An initiative by the Supreme Court of India has done, See generally Puthucherril, Tony, From Ship Breaking to Sustainable Ship Recycling: Evolution of a Legal Regime (2010) at chapter 3
214 Id.
215 Done so by the Supreme Court of Bangladesh, see Hadjiyianni, I. and Klioni, A., “Regulating Shipbreaking as a Global Activity: Issues of Fragmentation and Injustice” in Journal of Environmental Law, Volume 33 (1), (2021) at p. 222
progressive efforts made by domestic courts and the more abstract notions of their promising flexibility – as such compromising their viability as an effective governance structure. This has been amply demonstrated both in India and Bangladesh, where their respective supreme courts have pursued progressive efforts: yet, with the “poor state of law enforcement” in India216, or with authorities having “totally failed” their enforcement-duties in the case of Bangladesh217, these nations remain the most popular destination for the global shipping industry’s end-of-life vessels218, while the conditions at their shipbreaking sites continue to raise alarming concerns to the detriment of its workers and the environment.219 As such, lacking enforcement represents a significant barrier to the ability of domestic courts to institute effective and meaningful standards in the industry – despite commendable efforts. To this end, a judiciary-sponsored model to tackle shipbreaking might reinforce the problems of enforcement by virtue of relieving pressure and responsibility off legislators – a body which is not only pivotal for passing meaningful laws on shipbreaking, but importantly also for establishing, overseeing and funding the mechanisms for their enforcement.220 As such, it seems that the efforts of domestic courts, no matter how determined and proactive, can only go thus far in absence of the sufficient political will to properly address shipbreaking.221 As summarized by one scholar: “…these countries…[are] littered with scores of examples where the ambitious judgments of higher courts on environmental issues have not been implemented at all”.222

These difficulties invites a question of whether courts beyond the shipbreaking nations may play a meaningful role in promoting change on the sub-continent, as assessed directly below.

216 see Puthucherril, Tony, From Ship Breaking to Sustainable Ship Recycling: Evolution of a Legal Regime (2010) at p. 89
218 In addition to Pakistan – a country where little information is available regarding shipbreaking according to a NGO-backed study attempting to investigate its industry, see SDIP and NGO Shipbreaking Platform, Pakistan Shipbreaking Outlook: The Way Forward for a Green Ship Recycling Industry – Environmental, Health and Safety Conditions, (2013) at p. 3
219 See for example Karim, Saiful, Shipbreaking in Developing Countries: A Requiem for Environmental Justice from the Perspective of Bangladesh (2017) at p. 124 concluding that “Serious environmental pollution and violation of labour rights are still going on unabated”.
220 As noted in the case of Bangladesh, a constant “lacunae in the enforcement machinery” is that bodies responsible for ensuring enforcement “suffer from a chronic lack of resources”, see Karim, Saiful, Shipbreaking in Developing Countries: A Requiem for Environmental Justice from the Perspective of Bangladesh (2017) at p. 123
221 This relates both to ensuring adequate enforcement (and funding), as well as implementing domestic and international legislation. See Hadiyianni, I. and Kloni, A., “Regulating Shipbreaking as a Global Activity: Issues of Fragmentation and Injustice” in Journal of Environmental Law, Volume 33 (1), (2021) at p. 223
222 Karim, Saiful, Shipbreaking in Developing Countries: A Requiem for Environmental Justice from the Perspective of Bangladesh (2017) at p. 64
4.3 Foreign direct liability - the oil tanker EKTA

4.3.1 Begum v Maran\textsuperscript{223} – an introduction

In more ways than one, the story of the oil tanker EKTA\textsuperscript{224} bears a likeness to that of Blue Lady. Just like the latter, EKTA was one of the largest vessels of her kind\textsuperscript{225}, had an eventful journey (involving a hijacking resulting in a historically unprecedented payment of ransom\textsuperscript{226}), and ended her days at a substandard scrapping site, albeit in Chattogram (Bangladesh). Here, EKTA was set to undergo dismantling. One of the many shipbreakers participating in this work fell from the top of the vessel, and – absent of protective measures as rudimentary as a safety harnesses – plunged nearly 8 stories and died of his injuries.\textsuperscript{227}

Before being sold to a cash-buyer and propelled onto the Chattogram shoreline, EKTA had been owned by an Athens-based shipping conglomerate.\textsuperscript{228} Acting in the capacity of an agent, Maran – a UK subsidiary of the group – had organized the sale of EKTA.\textsuperscript{229} The deceased shipbreaker’s widow brought a claim against Maran in English courts, seeking damages on the basis that Maran was liable in negligence. The underlying basis for the argument was that Maran owed a duty of care to ensure that the sale and subsequent demolition of the vessel would not jeopardize human safety or the environment.\textsuperscript{230} Maran replied by bringing a motion to have the widow’s claim summarily dismissed (a so-called “strike out”-judgment\textsuperscript{231}), maintaining that the case was not arguable.\textsuperscript{232} As such, the key question for both the High Court and the Court of Appeal was whether the widow had an arguable case that Maran owed a duty of care to the deceased shipbreaker.\textsuperscript{233} Although Bangladeshi law might have applied to the claim, both parties were content with having this question decided under English law, and there were no indications that there were material differences between the two

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\textsuperscript{223} Begum v Maran (UK) Ltd [2021] EWCA Civ 326 ("Begum v Maran")
\textsuperscript{224} The vessel had previously gone through several name changes
\textsuperscript{225} Ekta was among the largest oil tankers built at her launch in 1995, Vidal, John, THE GUARDIAN, “Mollah’s life was typical: the deadly ship graveyards of Bangladesh”, (31 Jan, 2020), https://www.theguardian.com/global-development/2020/jan/31/khalid-mollah-life-was-typical-the-deadly-ship-graveyards-of-bangladesh?CMP=Share_iOSApp_Other
\textsuperscript{226} Id
\textsuperscript{227} See Begum v Maran para 13
\textsuperscript{228} The Angelicoussis Shipping Group, see Begum v Maran para 6
\textsuperscript{229} Begum v Maran para 7 and 8
\textsuperscript{230} Begum v Maran para 14
\textsuperscript{231} The relevant test in this regard pertains to whether the claimant has a “realistic” as opposed to “fanciful” prospect of success, see Begum v Maran para 22
\textsuperscript{232} Begum v Maran para 22
\textsuperscript{233} Or more specifically a “…’realistic’ as opposed to ‘fanciful’ prospect of success”, see Begum v Maran para 22
governing bodies of law at this point. Through both court instances, Maran’s attempts proved unsuccessful: On March 10, 2021 the Court of Appeal upheld the High Court’s finding that Maran arguably owed the deceased shipbreaker a duty of care, and thus refused to strike out the negligence claim.

The Court of Appeal relied on a “well-established exception to the principle that a Defendant is not liable for harm caused by the acts of a third party”, applying in cases where “the Defendant is responsible for creating a state of danger which results in the third party causing injury to the Claimant”. As the Court noted, negligence claims based on a duty of care under such circumstances have been at the forefront of development.

In short, Maran advanced two key arguments as to why the exception did not apply. Firstly, Maran argued that it had merely sold EKTA to a cash buyer, adding that it had done so on contractual terms stipulating that she was to be dismantled under safe conditions. As such, it was the cash buyer – and not Maran - who made the decision of sending the vessel to beached on the shores of Chattogram. Secondly, that there was no proximity between Maran and the deceased shipbreaker, meaning that no a duty of care could be established.

These arguments failed to convince the Court. Utilizing a cash buyer did not exclude Maran’s possible influence or knowledge over the vessel’s final destination. A central element in this regard was the price Maran acquired from the sale to the cash buyer, roughly being US $16 million. Given the market conditions at the time, this figure was only consistent with EIKA being sent to Bangladesh. This was further supported by the fuel quantities left aboard the ship, as well as provisions in the sale contract between Maran and the cash buyer providing for the vessel’s name to be changed, its manager’s emblem painted over and it’s reflagging to the Republic of Palau (a popular “last-voyage” flag). As such, the Court found that there was an arguable case that “..the shipowner

234 Begum v Maran para 123
235 Begum v Maran para 116, cf. para 139 and 140
236 Begum v Maran para. 124; In addition, the Court of Appeal also explored an alternative route, which although found triable, was indicated to be being unlikely to succeed compared to the route commented here, see Begum v Maran para 50, cf. para 72
237 Begum v Maran para. 116
238 Maran also argued that the shipbreaker in any case could have met the same fate when working on another ship. The court briefly asserted that this submission did not do Maran any credit, see Begum v Maran para 131
239 Begum v Maran para 126
240 Begum v Maran para 128
241 Begum v Maran para 127
242 (“Its ship registry represents less than 0.001% of the world fleet, but 59.5% of last-voyage flags in 2019”), see Vuillemey, Guillaume, HEC Paris, “Evading Corporate Responsibilities: Evidence from the Shipping Industry”, (2020) at p. 29
243 Begum v Maran para 127
knew and intended that the ship would go to Bangladesh to be broken up, and that it exercised the same control over the ship’s destination as if it had been sold directly to the shipbreaker in Chattogram”.

As for the issue proximity, the Court referred to case law equating this concept with a measure of control over and responsibility for the potentially dangerous situation. While acknowledging that Maran did not have control over the working conditions at the Bangladeshi scrapping yard per se, the Court found that it retained control over exposing the deceased shipbreaker to the risks entailed from working on its vessel, which materialized by Maran’s decision to send EKTA for scrapping in Bangladesh. This was sufficient to establish the necessary proximity. The mentioned risks were also viewed as “entirely foreseeable”, with the court noting “[i]t was not a case where there was merely a risk that the shipbreaker would fail to take reasonable care for the safety of its workers. On the contrary, this was a certainty, as… [Maran] knew”.

As mentioned, the Court of Appeal’s ruling was confined within the limits of a strike-out decision (i.e. whether the case was arguable). Here, it should also be stressed it was litigated on a presumed sets of facts, which are likely to be disputed at trial. As such, no final word has been said, as the case will continue to proceed in the English court system. Even so, the case raised questions on novel points of law at the “forefront of development”, as recognized by the Appeal Court.

Commentators have characterized its decision as groundbreaking, and suggested its potential of having significant ramifications within and beyond the shipping industry. It offers insight into how transnational tort claims, arising from a shipbreaking nation in the subcontinent, can target shipowners (or, as in Begum, their subsidiaries) in courts overseas. Further, how such claims can trigger duties to evolve with implications for shipowners’ responsibility for recycling and interaction with cash buyers.

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244 Begum v Maran para. 127
245 Begum v Maran para. 128, cf. para 130
246 Begum v Maran para 130
247 Begum v Maran para 122, cf. para 130
248 Begum v Maran para 124
249 Begum v Maran para 71
As such, *Begum v Maran* provides for a springboard to a broader discussion on how courts, outside of shipbreaking nations, are positioned to tackle shipbreaking through foreign direct liability claims.

### 4.3.2 Foreign direct liability and shipbreaking: an advantageous development on the rise?

While *Begum v Maran* raised particular novel points of law, it also feeds into a growing number of transnational civil liabilities lawsuits, particularly in Europe.\(^{252}\) Increasingly, individuals who have suffered harm from the local activities of international corporations turn to the courts in the home country of these corporations abroad, in absence of abilities to obtain redress locally.\(^{253}\) Leveraging this foreign direct liability\(^{254}\) trend may prove a feasible route to promoting change in shipbreaking, as addressing this issue in the courts of the recycling states are limited.\(^{255}\) Pursuing action abroad – in courts of states where (many) shipowners are situated\(^{256}\) - emerges as an alternative, with the law of tort, particularly in the form of negligence claims emerging as a primary legal route.\(^{257}\) Yet, while foreign direct liability litigation against businesses has been on the rise in courts across Europe for some time,\(^{258}\) it is a novel concept in the context of shipbreaking.\(^{259}\) As illustrated by *Maran*, direct tort action

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\(^{253}\) Enneking, Liesbeth, *Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability*, Eleven International Publishing, (2012) at p. 44

\(^{254}\) Foreign direct liability refers to transnational civil liability claims against multinational companies in relation to harm caused to people or the planet abroad, see Enneking, Liesbeth, *Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (2012) at p. ix

\(^{255}\) Especially weak domestic enforcement systems (as discussed above), see also Hadjiyianni, I. and Kloni, A., “Regulating Shipbreaking as a Global Activity: Issues of Fragmentation and Injustice” in *Journal of Environmental Law*, Volume 33 (1), (2021) at p. 221; there are also barriers to achieve sufficient remedies, including insufficient funding options, corruption within the judiciary, and lack of available legal representation, see (more generally) Roorda, Lucas, “Broken English: a critique of the Dutch Court of Appeal decision in Four Nigerian Farmers and Milieudefensie v Shell” in *Transnational Legal Theory*, Vol. 12 (1), (2021) at p. 149, n. 27 with further references

\(^{256}\) Over 40% of the global merchant fleet is controlled by European shipowners, see Glinski, Carola "Sustainable Shipping: The New Governance Approach to Ship Recycling” in Ulbeck, V. and Girvin, S. (ed.), *Maritime Organisation, Management and Liability*, (2021) chap. 5

\(^{257}\) The basis for foreign direct liability cases is generally tort law, with the tort of negligence being particularly popular, see Enneking, Liesbeth, *Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (2012) at p. 55, cf. p. 129. Negligence claims were also the basis in *Begum v. Maran*, as well as in another foreign direct liability case regarding shipbreaking, involving *Erasmus London* – but this case was ultimately settled in an out-of-court settlement agreement, to be discussed infra.


\(^{259}\) See Leader, Daniel, “Human Rights Litigation against Multinationals in Practice – Lessons from the United Kingdom”, in Meeran, R. (ed.) *Human Rights Litigation Against Multinationals In Practice*, (2021) at p. 77 and Roorda, L. and Leader, D., “Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court” in *Business and Human Rights Journal*, Vol. 6 (2), (2021) at p. 374, both noting the novel claims raised in *Begum*; the author has not come across any other decisions involving foreign direct (civil) liability in the context of shipbreaking (a case involving the vessel *Erasmus London* was settled in an out-of-court agreement); see also Pskowski, Rebecca, “No Country for Old Ships?: Emerging Liabilities for
applied to shipbreaking involves particular features most generally absent in transnational civil liability cases otherwise. The latter cases have, to date, generally focused on parent-subsidiary control relationships: whether liability (a duty of care) can be imposed on parent companies or on their foreign subsidiaries, due to the latter’s activities in the state of the victims.\(^{260}\) Within the shipbreaking sector on the other hand, the shipbreaking process – generating the direct harm caused - is entirely outsourced to the privately operated facilities on the sub-continent. These recyclers are neither subsidiaries, corporate affiliates or otherwise integrated in the groups of shipowners, but can perhaps most appropriately be considered more loosely connected ‘supply chain partners’\(^{261}\) – although even this characterization may be challenged. It becomes complicated by the fact that shipowners distance themselves through cash buyers and/or multiple transactions before the vessels finally ends up in scrapping yard, which in turn might be a one-time outsourced recycling provider rather then a more established (supply chain) partner.\(^{262}\)

Although this outwardly distant relationship between shipowners and scrapping yards remain, the Maran judgment serves as a promising example of how courts, confronted with negligence claims, are positioned to cut through formalistic legal separations between the business enterprises involved in shipbreaking,\(^{263}\) and instead focus on the (economic) reality behind the transnational supply chains of shipowners.\(^{264}\) In doing so, they may broaden the scope of liability in a way that may prove fruitful in addressing shipbreaking.

Interestingly, and in line with the general developments mentioned above, the Court of Appeal in Maran specifically found and reflected guidance given in recent ‘parent company liability’ case law, including now well-recognized cases such as Vedanta v. Lungowe\(^{265}\) and Okpabi v Royal Dutch Shell\(^{266}\)

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\(^{260}\) See for example Vedanta v Lungowe [2019] UKSC 20, while mostly focused on the jurisdiction of English courts over a Zambian subsidiary, it also assessed the merits of a claim against the English parent company. See also Okpabi v. RDS [2021] UKSC 3 (discussed infra), concerning whether a Europe-based parent and its Nigerian subsidiary could be held liable.

\(^{261}\) To this end, see Leader, Daniel, ”Human Rights Litigation against Multinationals in Practice – Lessons from the United Kingdom”, in Meenan, R. (ed.) Human Rights Litigation Against Multinationals In Practice, (2021) at p. 77

\(^{262}\) As in the case of Begum, see to this end Salminen, J. and Rajavuori, M. "Private International Law, Global Value Chains and the Externalities Of Transnational Production: Towards Alignment?" In Transnational Legal Theory, Vol. 12, No. 2, (2021) at n. 39

\(^{263}\) I.e. the shipowner(s), cashbuyer(s) and recycler

\(^{264}\) In line with what is arguably mandated in order for transnational direct tort action to be truly effective, see Enneking, Liesbeth, Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability (2012) at p. 482

\(^{265}\) Vedanta Resources PLC and another v Lungowe and others, [2019] UKSC 20 (‘Vedanta’)

\(^{266}\) Okpabi and others v Royal Dutch Shell Plc and another, [2021] UKSC 3 (‘Okpabi’); the guidance of Vedanta is reflected in Okpabi.
decisions of the UK Supreme Court. The latter case concerned the claims of inhabitants in Nigeria holding Europe-based Royal Dutch Shell and its Nigerian subsidiary liable for local environmental damage, caused by Shell’s allegedly negligent maintenance of pipeline infrastructure and response following oil spill leakage. Like Maran, the Okpabi-decision was not a decision on the full merits of the case – but the UK Supreme Court provided some interesting clarifications on the extension of liability.

Firstly, the Supreme Court confirmed and clarified the approach it had taken in one of its previous cases, holding that a duty of care is not restricted to rigid and inflexible criteria. In the context of a parent company incurring a duty of care, it rather depends on how it has exercised control – or rather failed to so – over its subsidiaries. Secondly, and importantly in the context of shipbreaking (which do not directly concern parent-subsidiary relationships), the Supreme Court stressed that the liability routes it had laid out in previous case law should not be considered a fixed test; instead, other situations could be imagined where a duty of care could arise. Broadening the scope of company liability in such a matter significantly provides possibilities for future cases to test the limits of transnational direct tort claims - an opportunity grasped in the Begum-judgment.

Going one step further then parent-subsidiary relationships, Begum v Maran signal that a (shipowner) company may hold a duty of care which extends to its foreign business relations - in other words not confined to relations of ownership. While this was acknowledged to implicate “an unusual extension” of the law of negligence, the Appeal Court nevertheless found an arguable case in that (UK-based) Maran could owe a duty of care to a Bangladeshi shipbreaker based on its influence over where the vessel was being sent for recycling. As such, the decision, understood in conjunction with

267 See for example Maran v Begum para 24 and 71, 119
268 See Okpabi para 1:
269 See Okpabi para 25 and 27
270 See specifically Okpabi para 27.
275 See Begum para 65 (cf. also para 37)
276 See Begum para 27 (cf. also para 30)
preceding case law such as Okpabi, demonstrates an eagerness on part of (UK) courts to contemplate a more extensive scope of corporate liability.277

For shipowners, an important implication of this development is that leaving ship recycling to dubious shipbreaking facilities abroad, with or without cash buyers as an intermediary, does not exclude the possibility of incurring liability. Instead, Begum seems to imply that a (novel) duty of care may exist for shipowners at the time of the sale of the vessel to contemplate and mitigate the potential foreseeable harm prompted by selling a vessel for disposal – with a cash buyer.278 Admittedly, the final word has not been said in Begum, and (successful) negligence claims of the kind litigated in that case must in any case grow into a scalable form to become a meaningful tool to address shipbreaking. At the same time, the recent advancements in case law, not limited to Begum – but also included cases like Oktabi and Vedanta – all point in a direction that that a company’s global operations will increasingly become scrutinized by courts in the shipowner hub of Europe. Provided this trend of increased scrutiny continues to intensify, it may translate into a stricter responsibility placed on shipowners to manage where and how their ships are recycled. In this way, a court-based approach relying on transnational negligence claims to tackle shipbreaking may be an avenue that can spire change in the industry.

Interestingly, the considerations prompted by the aforementioned legal developments appears to neatly intersect with projections made by the International Commission of Jurists (ICJ)279 as far back as 2008 highlighting the potentially meaningful role of (transnational) civil liability to guide corporate conduct. In its report, ICJ noted:

“… civil liability is increasingly important as a means of assuring legal accountability when a company is complicit in gross human rights abuses… [and may] significantly influence patterns of behaviour in a society, raising expectations as to what is acceptable conduct, and preventing repeat of particular conduct, by both the actor held liable, and by other actors who operate in similar spheres or find themselves in similar situations”280

279 ICJ is a international human rights NGO
Although the quote specifically refers to human rights abuses, similar considerations are equally relevant in a broader context of foreign direct liability. The latter is not necessarily restricted to businesses complicit in human rights abuses as such, but include operations and conduct that may not as easily be identified as human rights violations, but nonetheless raise significant safety, health and environmental risks in the countries these companies are active.\textsuperscript{281} Accordingly, in the context of shipbreaking, courts – by expanding ‘corporate duties of care’, have the ability to both establish and enhance expectations and accountability that can guide the “transnational corporate conduct” of shipowners.\textsuperscript{282} Faced with the accountability raised by negligence claims, shipowners may be confronted with having to take a more active role in the decommissioning of their vessels. As Begum illustrated, utilizing cash buyers and pointing to cosmetic contractual clauses (found by the Court to be nothing more than “words on a piece of paper”\textsuperscript{283} possessing a “toothlessness”\textsuperscript{284}) does not necessarily relieve shipowners of this accountability. A hopeful prospect of this development is that shipowners instead are pushed to leverage their considerable influence\textsuperscript{285} vis-à-vis shipbreaking facilities to raise standards. It is arguably plausible that the threat of civil liability for negligence may motivate shipowners to work with and encourage their business relations (recycling yards) to take precautions to avoid the type of harm that may give rise to such claims in the first place.\textsuperscript{286} There are reports that such cooperation between shipowners and recycling yards has given promising results in terms of improved standards in the latter, such as the efforts made by shipowners Maersk, Stolt-Nielsen and TransOcean in Alang.\textsuperscript{287} As such, a benefit of utilizing courts through negligence claims is that they directly target the group, which arguably has the strongest influence over shipbreaking yards. Hopefully such claims may serve as a push for shipowners to exercise this influence to raise standards in shipscraping yards to the benefit for their employees and the environment, instead of abandoning the industry. This prospect would in turn harmonize well in the overreaching policy goal of sustainable development.

\textsuperscript{281} See Enneking, Liesbeth, \textit{Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability} (2012) at p. 129-130, also noting that tort systems are generally aimed at protecting general interests (life, dignity, integrity, property, etc.), making them suitable for addressing infringements of people- and planet-related interests irrespective of whether they may be labeled as human rights violations


\textsuperscript{283} See \textit{Begum v Maran} para 69

\textsuperscript{284} See \textit{Begum v Maran} para 112

\textsuperscript{285} Insofar shipowners are an indispensable customer group for the recycling facilities, providing the necessary stream of end-of-life ships which legitimate these facilities’ very existence

\textsuperscript{286} Enneking, Liesbeth, \textit{Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability} (2012) at p 609

More generally, as the judicial developments mentioned have illustrated, negligence claims are generally based on a dynamic and flexible norms – and as such are able to cut through formalized barriers pertaining to ownership. To this end, utilizing courts on the basis of negligence claims may sustain interference by virtue of flag changes, as well as avoid extensive reliance on weak jurisdiction links\textsuperscript{288} - being persisting issues pertaining to the regulatory framework.

Further, litigating negligence claims in courts in Europe – where a significant number of shipowners are situated\textsuperscript{289} (and which represents the largest single market sending vessels for shipbreaking on the subcontinent)\textsuperscript{290} – offers certain advantages over the domestic courts in shipbreaking states. An important factor to be mentioned is that litigating in such courts generally has better prospects of enforcement (as opposed to the case in the shipbreaking nations on the subcontinent), and allows for more then the ‘theoretical possibility of financial compensation’.\textsuperscript{291} In addition, the availability of public interests attorneys willing to take such cases, and a high level of media interest for ‘corporate wrongdoing’, have been cited as conveniences which may make litigating claims of the type seen in Begum in Europe particularly attractive.\textsuperscript{292} There may also be certain financial and procedural benefits in such courts, particularly in the UK. Here, extensive disclosure obligations may be particularly advantageous. Access to sales contracts and internal corporate documents through such disclosure proceedings can provide invaluable insight to indicate the shipowners available awareness and decision-making procedures in relation to the sale of the vessel and its subsequent dismantling, and as such essential for establishing any (breached) duty of care.\textsuperscript{293} To add, there are generally solid possibilities of class actions and usage contingency fee representation.\textsuperscript{294} Turning back to Europe in general, the policy context in the nations where these cases are filed may also be of importance, as they generally have a high CSR/ESG\textsuperscript{295} profile.\textsuperscript{296} Here, it should be mentioned that the

\textsuperscript{288} Flag states and (traditional) recycling states
\textsuperscript{289} Over 40% of the global merchant fleet is controlled by European shipowners, see Gliniski, Carola “Sustainable Shipping: The New Governance Approach to Ship Recycling” in Ulfbeck, V. and Girvin, S. (ed.), Maritime Organisation, Management and Liability, (2021)
\textsuperscript{290} See Gliniski, Carola “Sustainable Shipping: The New Governance Approach to Ship Recycling” in Ulfbeck, V. and Girvin, S. (ed.), Maritime Organisation, Management and Liability, (2021) at p. 3 (of chap. 5, n.p.a.), also noting that EU shipowners account for one-third of vessels that were beached for dismantling
\textsuperscript{291} Enneking, Liesbeth, Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability (2012) at p. 45
\textsuperscript{292} Enneking, Liesbeth, Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability (2012) at p. 45
\textsuperscript{293} To this end, see Roorda, L. and Leader, D., “Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court” in Business and Human Rights Journal, Vol. 6 (2), (2021) at p. 374
\textsuperscript{294} Enneking, Liesbeth, Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability (2012) at p. 45
\textsuperscript{295} These terms will be elaborated infra in section XX

44
EU along with individual states in the region are currently contemplating to roll out mandatory due diligence obligations on European companies to mitigate the adverse human and environmental impacts of their global business activities, including supply chains, with ambitions of fostering “long-term sustainable and responsible corporate behavior”. This brings to mind that the Begum decision in many ways is reflective of the current policy climate in Europe, with a rising appetite for accountability for corporate conduct – whether or not it takes place at home or abroad.

4.3.3 Foreign direct liability: shortcomings

While utilizing courts through direct tort action has appealing features, such an approach also carries its shortcomings.

A key issue with utilizing direct tort action (negligence claims) in transnational shipbreaking cases is that the viability of such proceedings relies on a sufficient degree of legal foreseeability and proximity being established. While these elements appeared to be successfully litigated in Begum v Maran, the specific factual circumstances of the case may differ in other similar cases, impeding their prospects of a similar outcome. Here, it should be stressed that the relationship between the Maran and the shipbreaking yard in mentioned case was fairly proximate: both in terms of the transactional structure – the sale was funneled through only one single cash buyer – as well as in time – the accident occurring less then a year following the sale of the vessel. To this end, the case was litigated on an assumed set of facts entailing that Maran knew where the vessel in question was heading. These features provide a rather close connection which, inconveniently for potential claimants, may not be present other cases. Instead of being sold once before arriving at a shipscrapping yard, a vessel may be sold several times before ending up at the scrapping yard, triggering the (open) question of how this influences - or diminishes - elements of foreseeability and proximity, as well as whom the duty of care extends to in such instances. Add a prolonged passage of time between the sales

296 Enneking, Liesbeth, Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability (2012) at p 45
298 In addition, Begum v Maran was based on an assumed set of facts (that may likely be disputed at trial)
299 See Begum v Maran para 3, cf. para 13
transaction in question and the occurrence of harm materializing, the plausibility of such negligence claims to remaining within the confines of tort/negligence principles appears even less likely.\(^{301}\)

To complicate the matter further, the concept of foreseeability – at least in personal injury cases - is to a great extent approached with regard to health, safety and labour standards as prescribed under national law.\(^{302}\) Can a Bangladeshi shipbreaker filing a negligence claim against a European-based shipowner rely on the applicable national labour standards of the latter’s jurisdiction when seeking to establish a sufficient foreseeability to the personal harm suffered? In the **Begum**-case, the importance of local standards seemed to be underplayed, with the Court’s focus being maintained on the end result of these lacking standards (i.e. the dangerous risks). An argument put forward by Maran was precisely that adherence to local practice was sufficient to discharge the duty of care, even if such standards were below those in other (more developed) areas of the world.\(^{303}\) While this aspect pertaining to the relevance of local standards appeared to be mostly absent in the reasoning of the Appeal Court\(^ {304}\), it came in the foreground of the High Court’s decision, with the judge swiftly stating: “…if standard practice was inherently dangerous, it cannot be condoned as sound and rational even though almost everybody does the same”\(^ {305}\) The Appeal Court on its hand emphasized that Maran was well aware of the “particularly egregious” safety standards in the yards in Chattogram, and the danger this involved.\(^ {306}\) As such, Begum may arguably signify that local practice and standards cannot shield shipowners from liability where they lead to obvious risks. At the same time, it should be noted that the Court of Appeal stressed that establishing a duty of care in the case would by no means be straightforward.\(^ {307}\) To this end, it has been argued that shipbreakers who have suffered harm must instead rely on the applicable standards set domestically.\(^ {308}\) An expansive outtake as that seen in Begum raises difficult questions, that ultimately results in a:


\(^{304}\) The Appeal Court seemed to be sufficed with referring to the local safety standards as “negligible” and “particularly egregious”, see **Begum v Maran** para 7 and para 31

\(^{305}\) **Begum v Maran** [2020] EWHC 1846 (QB) (for the High Court) at Para 15

\(^{306}\) **Begum v Maran**, para 31, cf. para 132

\(^{307}\) **Begum v Maran** para 64 and 132

“…policy analysis [of] whether freedom of contract carries with it a reasonable duty of care not to sell a physical object which is potentially dangerous to a foreign buyer who is most probably reselling the dangerous object to another foreign place where existing [domestic] health and safety standards are highly likely to be violated…”

It goes without saying that establishing such a legal relationship between a shipowner and workers in sites on the other side of the world is - carefully put - problematic, and thus may render the feasibility of negligence claims to tackle shipbreaking questionable.

A further shortcoming related to utilizing negligence claims is the fact that such actions are to a limited extent able to address the full range of adverse impacts pertaining to shipbreaking. To the extent that negligence claims are successful, these will have to rely on demonstrating the occurrence of harm suffered. In the context of shipbreaking, this will most likely translate into injuries or fatal accidents occurring at yards. Many of the adverse impacts of substandard shipbreaking however, take more subtle forms. This includes long-term health risks generated by the toxic materials shipbreakers are exposed to during the dismantling process, as well as the adverse environmental (and ecological) impacts of unsustainable breaking. Building a viable negligence claims on such impacts is challenging. Firstly, the “harm” in such instances may not be triggered by one single event (e.g. the dismantlement of one individual ship), but are instead developed over a prolonged time period as an accumulated result of countless shipbreaking operations, and where potentially hundreds (if not thousands) of shipowners can be viewed as contributors. This raises severe difficulties in pinpointing a subject for liability as well as establishing causation and proximity. Secondly, a difficulty also lies in identifying any “victim” to bring a negligence suit. In terms of long term health impacts (which may be suffered by shipbreakers or those living within near shipbreaking sites), such victims may not themselves associate their complications with the shipbreaking activities, yet alone any legal transgression – and they might not even be aware of the harm per se. An even greater difficulty lies in identifying a harmed victim in the context of the more generally adverse environmental impacts of substandard shipbreaking. To this end, as negligence claims generally take a retrospective approach (i.e. restoring the status quo

310 An even more skeptical commentator to the reasoning Begum case is professor Tennenborn, who notes “The case for making owners responsible for policing the safety records of disponees is by no means obvious, any mo[re] than it is obvious that in selling my car I should have to take care lest the buyer is a known dr[unk driver]”, see Tennenborn, Andrew, OFFICIAL BLOG OF THE INSTITUTE OF INTERNATIONAL SHIPPING AND TRADE LAW (UNIVERSITY OF SWANSEA), “Careful Who You Sell That Ship To!”, (13 July, 2020) https://iistl.blog/2020/07/13/careful-who-you-sell-that-ship-to/, (13 July, 2020)
subsequent to a harm having materialized), such an approach may fail in preventing or reducing the more underlying risks present at the recycling yard _ex ante._\textsuperscript{311}

It should also be mentioned that, depending on the forum sought, difficult questions might arise as to choice of law and asserting jurisdiction. In Maran, both parties were content with litigating the issue of duty of care under English law principles\textsuperscript{312} – but doing so may not be as easy in other cases. In addition, as far the UK goes, possible revival of _forum non conveniens_ doctrine in the current aftermath of Brexit may further emerge as a jurisdictional challenge to foreign direct liability claims against shipowners (or their subsidiaries) domiciled in the UK.\textsuperscript{313}

In addition to the purely legal intricacies of establishing liability in such transnational cases, there are also other potential shortcomings of utilizing courts through foreign direct liability claims to spur change in the recycling industry.

One issue is that such claims – even where the chances of litigation success appear promising – are prone to settlement agreements, effectively removing them from the grasp of courts. This was recently demonstrated in 2015, by events also taking place at a Chattogram scrapping yard. In the spring of that year, a Bangladeshi shipbreaker, despite voicing safety concerns, was set to cut a 40-ton propeller from the hull of _Eurus London_ – a massive container ship.\textsuperscript{314} Once cut, the propeller dropped to the platform below and rebounded towards the shipbreaker, resulting in an amputated leg, blindness in one eye and a permanent incapacity to work.\textsuperscript{315} With the help of an NGO, the shipbreaker was provided pro bono council from a London-based law firm, which filed a negligence claim against the British owner of _Eurus London_.\textsuperscript{316} Preceding the case of _Begum_, the lawsuit was a first-of-its-kind, but never reached the court assessment.\textsuperscript{317} Only a month after being filed, the British shipowner, who previously had denied any and all liability, reached a private settlement with the shipbreaker.\textsuperscript{318}

\begin{footnotes}
\item[311] Enneking, Liesbeth, _Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability_ (2012) at p. 628
\item[312] As it had not been suggested there were material differences between this body of law and that of Bangladesh on that point
\item[313] Hardwicke-Hunter, Madison, _LINKLATERS_, “UK: Court of Appeal shipbreaking decision highlights potential liability risks arising from involvement with third parties’ harmful practices” (2 June 2021)
\item[314] Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, _Tulane Admiralty Law Institute (ALI)_ (2020) at p. 517-518
\item[315] Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, _Tulane Admiralty Law Institute (ALI)_ (2020)
\item[316] The owner was Zodiac Maritime; Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, _Tulane Admiralty Law Institute (ALI)_ (2020) at p. 518
\item[317] Pskowski, Rebecca, “No Country for Old Ships?: Emerging Liabilities for Ship Recycling Stakeholders”, in _Tulane Maritime Law Journal_, Vol. 45 nr. 1, (2020) at p. 87
\item[318] Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, _Tulane Admiralty Law Institute (ALI)_ (2020) at p. 518
\end{footnotes}
eyes of improvised shipbreakers (or those they leave behind), such agreements are understandably attractive. Also their legal councils, wary of the litigation risk involved in transnational negligence cases, may find it difficult to recommend any other strategy. If the frequency of negligence claims keeps remaining at modest levels, it is plausible that settlements will be manageable overhead costs for shipowners. Supporting this notion is the fact that many civil cases concerning transnational corporate misconduct vis-à-vis individuals in developing states have ended in private settlement agreements. As such, business can run as usual with no added incentive to ensure that their ships transpire in responsible shipbreaking yards. As stated by one scholar: “… a life-changing individual settlement to an injured worker might represent a very small cost of doing business for the… shipowner eager to stay out of the courts and the headlines”.

To this end, entering settlement agreements serves as a useful tool for avoiding any reputational damaged for shipowners which otherwise might arise from bringing such cases to court. Another practical concern to be mentioned is that shipbreakers lack the resources to initiate costly transnational litigation. This means that the viability of utilizing courts for tackling unsound shipbreaking by virtue of tort action is entirely dependent on attorneys willing to work on a contingency-fee basis, or the generosity of pro bono-council or third party financing.

Finally, while negligence claims may appear enticing, it is – for many of the reasons mentioned above - arguably not a scalable model for tackling shipbreaking. Relying on the sporadic ex-post responses from courts to individual incidents with their own distinct factual patterns is plausibly not an effective instrument to be introduced more broadly. Although the strike out-decision of Begum appears promising, it should not overshadow the fact that no full decision involving a successfully litigated foreign direct liability claim has been rendered within the context of shipbreaking. Further, while the open norms (such as duties of care) that underpin negligence claims provide courts with great flexibility, a downside is that it may result in legal uncertainty, with unpredictable and differing outcomes. To this end, it should also be noted that approaches and outcome of tort actions might differ significantly depending on which (European) state proceedings are brought. As mentioned

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320 Enneking, Liesbeth, Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability (2012) at p. 46
322 See Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, Tulane Admiralty Law Institute (ALL), (2020) at p. 32
323 Enneking, Liesbeth, Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability (2012) at p. 55
earlier, the UK (along with other common-law jurisdictions outside of Europe) may have particularly attractive procedural and financial advantages. However, jurisdictions in continental Europe are generally known to be a less suitable for foreign direct liability litigation, for example due to more restrictive funding options and rules on disclosure. This can lead to parallel tracks or deviating standards, laying the ground for a legal uncertainty and inconsistency inadequate to tackle the hazards of an industry as internationally oriented as shipbreaking.

4.4 Sub-conclusion

In a sphere where legislative efforts have proved unsuccessful, recourse to courts have emerged as an alternative avenue for addressing the shipbreaking enigma.

Domestic courts in recycling states are located in a setting where the conflicting interests entangled in the shipbreaking industry materialize most clearly. As such, they may on a general level be well positioned to deploy a nuanced approach in weighing these clashes, and thus reflect the balance embodied and mandated by the policy goal of sustainable shipbreaking. This means paving a way forward for the industry which does not neglect the economic realities their countries face, yet taking a proactive role to improve the environmental and social conditions along their shorelines. As for the latter, there is no lack of examples that courts on the subcontinent have embraced innovative and progressive tools in the service of raising standards in the industry. Yet, irrespective of the interventions made by domestic courts and their promising flexibility, these attractive notions remain mostly abstract given the deficient apparatuses for enforcement. This severely impedes the ability of domestic courts in shipbreaking nations to bring meaningful change in the industry.

Given the limitations of a national approach, directing efforts towards courts in Europe has emerged as an alternative. In this hotbed for shipowners, transnational civil litigation against multinational companies has been on the rise for some time. Recent contributions to this development have been the expansion of corporate duties of care, prompted by decisions arising from commercial ventures in Africa by European-controlled subsidiaries. As suggested by the Begum-decision, Courts are positioned to harness and further expand this movement to spire change in the shipbreaking industry. The feasibility of liability claims targeting shipowners for how their (previously owned) vessels are recycled may have significantly increased, following the broadening of the duty of care in the

mentioned ruling. A particular pioneering aspect in this regard was the Court’s willingness to look past formalistic separations and open the door for shipowners incurring liability for their business relations (i.e. recycling yards). This expansion of liability may function as an accountability mechanism that can guide the behavior of shipowners, hopefully as a push to take an active role in how their vessels are recycled and weight their influence to seek improvements in shipscrapping yards. As a governance structure, utilizing courts in Europe through leveraging the trend towards foreign direct liability also reaps the benefits in terms of enforcement and avoiding susceptibility to flag changes and reliance on weak jurisdictional links. The feasibility of such claims may also enjoy a boost from select procedural, financial and practical advantages available when litigating in Europe, albeit these may significantly vary between the UK and the continent.

Despite the supporting role courts may have, it is also important to acknowledge their limitations in addressing shipbreaking. Serving as the novel case guiding the notion of courts as a promising governance structure, Begum is nonetheless a decision crafted on an assumed set of facts and confined to arguability. As the case continues its course in the English judicial system – and absent of any comparable judgments - the lingering question as to the prospects of foreign direct liability claims to tackle shipbreaking remains. The practicalities involved from the time a vessel succumbs the hands of its original shipowner and finally reaches the shores on the subcontinent - occasioning multiple transactions, cash buyers and time – represent significant hurdles when merged with general negligence principles pertaining to proximity and foreseeability. And even if the end-outcome of Begum may become satisfying, it arguably cannot assume a scalable form to become a viable model for addressing shipbreaking. Presuming that the potential legal barriers are overcome, practical ones such as settlements still emerge. This may effectively forestall the direct liability cases needed for courts to grow into a meaningful governance structure able to address shipbreaking. At this stage, it seems that only time – and with it, future judicial advances – will tell whether courts may develop into an effective mechanism for bringing change to the industry.
5 Governance structure: the EU Ship Recycling License

5.1 Background

From the very beginning, drafters of the ESRR were aware of its vulnerability to out-flagging. As such, ideas of integrating a financial mechanism into the Regulation took form. During the legislative process leading up to the adaptation of the ESRR, the Environment Committee of the European Parliament prepared a draft amendment, recommending a so-called “Ship Recycling Fund” to be established. The Committee’s proposal went no further than the drawing board, as it was voted down by the European Parliament’s plenary assembly in the spring of 2013. Yet, the Parliament did not appear willing to abandon the idea of a financial instrument completely, as it adopted an amendment asking the Commission to submit “… a report on the feasibility of a financial instrument that would facilitate safe and sound ship recycling…”

Accordingly, the Commission issued its report in the summer of 2017. This report relied on a study, “Financial instrument to facilitate safe and sound ship recycling” (“the Study”), drafted by external specialists from academia and the private sector for the Commission. The study reviewed a number of instruments of potential interest, including privately managed capital mechanisms, port levies and penalties. However, – for reasons ranging from difficulties pertaining to ownership changes, circumvention and administrative burdens, to the legal boundaries narrated by WTO-rules and the competence of the EU – the study discarded nearly all options. Conversely, the study outlined a new promising instrument, a so-called Ship Recycling License (“SRL”).

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325 The ESRR itself suggests in its preamble the need for a mechanism to encourage that non-EU flagged vessels are recycled responsibly without incentivizing out-flagging behavior, see ESRR recital 19
326 In it’s essence, a levy scheme requiring every individual vessel calling at a EU-port to pay an amount – calculated on the basis of the ship’s gross tonnage - to a centralized fund
327 Erasmus University of Rotterdam, ECORYS, DNVGL (for the European Commission), Financial instrument to facilitate safe and sound ship recycling – final report (2016) (’the Study’ / ‘SRL Study’) at p. 27
328 SRL Study at p. 27
329 ESRR article 29; See also Devaux, C. and Nicolai, J., “Designing an EU Ship Recycling Licence: A Roadmap” in Marine Policy, Vol. 117, (2020) at p. 3
331 The research team consisted of Ercoys, DNV-GL and Erasmus School of Law.
332 European Commission, Report from the Commission to the European parliament and the Council on the feasibility of a financial instrument that would facilitate safe and sound ship recycling, Brussels, 8.8.2017, COM(2017) 420 final at p. 4
5.2 Key features of the SRL

As outlined in the Study\textsuperscript{334}, the scheme would work as follows: in order to call at any EU-port, a ship – regardless of its flag or ownership - would be required to hold its own ‘Ship Recycling License’. Upon applying for the license, which would be administered by a centralized EU agency, a contribution is charged to the shipowner. This contribution would be made up of two elements: (i) a minor fee to cover administrative expenses and (ii) a premium which would be directly transferred to a fund earmarked the individual ship, and be administered in a “transparent manner”, similar to a (locked) savings account. The premium levied is determined based on two factors. First, the “capital amount” that needs to be accumulated for the vessel in question, and secondly, the set time frame in which this amount is to be accrued. The “capital amount needed” will in turn depend on the characteristics of each individual ship, such as its size and type. As the study stresses, the capital amount would need to correspond with the amount required to bridge the financial gap between scrapping the particular vessel in a substandard yard (“the more lucrative option”) and scrapping it in an authorized yard included on the Green List\textsuperscript{335,336}. The amount accrued on the savings account is tied to the ship and will be refunded to the ultimate owner of the ship upon it being scrapped, subject to a condition precedent being that such scrapping takes place at an authorized recycling yard (i.e. a facility included on the European “Green” list pursuant to ESRR article 16). As such, the contributions paid for a license generates credit to future payment for the ultimate ship owner upon scrapping. Should the shipowner opt for scrapping at a non-listed facility, the savings account will be fully forfeited, with its capital reallocated to a designated fund used to stimulate green ship recycling practices. Validity of the license would be set to be time-based (as opposed to being based on the number of calls). It is envisioned that one-month license would be cheaper than an annual license, but in return provide for a lesser right to payment once the ship is scrapped. The Commission report – in line with the underlying study – holds the door open for incorporating additional, refined criteria into the scheme, for example to benefit vessels designed and constructed recycling-friendly.

\textsuperscript{334} SRL Study at p. 102
\textsuperscript{335} The “green list” refers to shipbreaking facilities authorized pursuant to ESRR art. 16, as discussed infra
\textsuperscript{336} It is currently unclear what methodology is envisioned to be used, but the SRL Study outlines some options, see the SRL Study at p. 35–36, and presents a calculation model relying on accumulated data pertaining to individual vessel classes, see the SRL Study at p. 75–80. However, there have been doubts as to how this model will be able to predict key elements such as fluctuating metal prices (which ultimately has implications for the amount needed to bridge the financial gap), see Devaux, C. and Nicolai, J., “Designing an EU Ship Recycling Licence: A Roadmap” in Marine Policy, Vol. 117, (2020) at p. 4
5.3 Current status

Presently, it is uncertain whether – or when - the license scheme will become reality. However, the Commission appears to be positively inclined, noting that the scheme “represents the most promising option investigated thus far”. Besides (the arguably expected) criticism from shipowner associations, the license scheme appears to have been welcomed among a range of key stakeholders. Still, in the words of the Commission, “a number of issues deserve further analysis” before the Ship Recycling License can expect to become a reality. The topic is be likely to appear on the Commission’s agenda again upon a review of the use and effects of the European list of ship recycling facilities – due for 2023. In the meantime, an assessment of the feasibility of deploying the scheme for tackling shipbreaking is warranted.

5.4 Limitations and weaknesses

5.4.1 Legal feasibility: coherence with international (trade) law

One potential weakness emphasized by stakeholders pertains to the SRL’s compatibility with international norms. A key feature of the SRL is that it leverages of port state jurisdiction with extraterritorial implications. In the view of the study, such port state jurisdiction provides a sufficient legal basis required to give the SRL extraterritorial effect to all vessels calling at EU ports. The concept of port state jurisdiction relates to the competence of a state to exercise jurisdiction (including legislative and enforcement powers) over vessels visiting their ports, and is said to derive from European Commission, Report from the Commission to the European parliament and the Council on the feasibility of a financial instrument that would facilitate safe and sound ship recycling, Brussels, 8.8.2017, COM(2017) 420 final at p. 6

ECSA (European Community of Shipowners), ASA (Asian Shipowners Association) and ICS (International Chamber of Shipping) have all expressed opposition to the Ship Recycling License

Including the NGO Shipbreaking Platform, a trade union confederation and a European shipyards association. An association representing European ports also interestingly withdrew its original opposition to the financial incentive; European Commission, Report from the Commission to the European parliament and the Council on the feasibility of a financial instrument that would facilitate safe and sound ship recycling, Brussels, 8.8.2017, COM(2017) 420 final at p. 5-6


A timeline is provided on the Commissions website: https://ec.europa.eu/environment/topics/waste-and-recycling/ships_en

SRI. Study p. 42-43


Marten, Bevan, Port State Jurisdiction and the Regulation of International Merchant Shipping, Springer, (2014) at p. 1
principles of state sovereignty and territorial jurisdiction. The outer limits to the extent of port state jurisdiction presently remains unclear, as international law does not seem to settle the point beyond doubt. Notably, its interaction with a (contested) customary right of access to ports, as well as other modes of jurisdiction, particularly on the basis of the flag state, have left the limits of port state jurisdiction unclear. With this backdrop, and given that the precise details of how the scheme will take its final form is uncertain, providing any clear-cut answers to the SRL’s legal feasibility is difficult. Nonetheless, it is clear that port state jurisdiction is not without its limits, but confined to boundaries prescribed by internationally prescribed norms. While a full review of the potential legal barriers that may confront the SRL is not possible here, the key restrictions potentially posed by international trade law under the WTO framework will be assessed. Exploring the SRLs coherence with WTO rules is particularly interesting for two reasons. Firstly, such rules have been cited as one of the main shortcomings of the SRL amongst stakeholders. Secondly, international trade law has been regarded as one of the main limitations to port state jurisdiction in legal scholarship. Exploring these potential boundaries can be of value in the context of determining the feasibility of the SRL as a governance structure.

One of the WTO-prescribed boundaries includes rules pertaining to non-discrimination - a principle that is articulated in other international instruments outside the WTO-framework as well.

350 As the Commission noted in its own report, the SRL’s compatibility with international law was not presently clear, see European Commission, Report from the Commission to the European parliament and the Council on the feasibility of a financial instrument that would facilitate safe and sound ship recycling, Brussels, 8.8.2017, COM(2017) 420 final at p. 6
A number of substantive provisions in the GATT\textsuperscript{355}, which regulates the trade of goods, prohibits discrimination in various forms, including discrimination between domestic and foreign originating products\textsuperscript{356}, between foreign products originating from two or more states\textsuperscript{357}, as well as discrimination based on a vessels flag and ownership\textsuperscript{358}. The WTO panel appears to have recognized that vessels may be considered a (imported/exported) “product” and thus within the scope of the relevant non-discrimination provisions\textsuperscript{359} as stipulated in GATT.\textsuperscript{360} The relevant GATT-provisions also extend to cover de facto discrimination.\textsuperscript{361} It appears evident that the SRL does not implicate concerns of direct discrimination.\textsuperscript{362} The license requirement is applicable to all vessels wishing to call at EU-ports, irrespective of ownership nationality or flag. Likewise, ownership or flag does not affect the contributions paid, which are instead calculated on the basis of vessel-specific factors such as size and weight. However, issues may arise pertaining to the possible indirect discriminatory effect of the SRL.\textsuperscript{363} The study does not preclude that the instrument might, in effect, influence “certain trade patterns and competitive relationships” between vessels. This may be the case where a forfeited amount due to non-compliant recycling may be viewed as a possible indirect tax levy, possibly competitively disadvantaging non-EU flagged vessels (in WTO-terminology: a “foreign product”) against EU-flagged vessels (the “domestic product”).\textsuperscript{364} Since the concrete effects of the SRL will remain unknown pending its implementation\textsuperscript{365}, it remains uncertain whether these effects will render the instrument as a (indirect) discriminatory measure in violation of the non-discriminatory principle as it takes shape in various forms under WTO-law and UNCLOS. In the context of the non-discrimination, also the GATS\textsuperscript{366} should be mentioned, which applies to measures affecting trade services\textsuperscript{367}, including environmental services and specifically ship recycling.\textsuperscript{368} Similarly to GATT, also GATS stipulates non-discrimination provisions. Particularly, member states are obliged to accord services and service suppliers of other

\textsuperscript{355} The “General Agreement on Tariffs and Trade” (1994) (‘GATT’). The agreement is part of the WTO-framework.

\textsuperscript{356} GATT article III

\textsuperscript{357} GATT article I

\textsuperscript{358} Article V:2. The non-discrimination principle is also reflected in the “chapeau” of the general exceptions-provision in GATT article XX (and GATS article XIV), discussed infra

\textsuperscript{359} Particularly GATT art. I and III. Article V:2 explicitly applies to vessels (in transit).

\textsuperscript{360} See Panel Report, European Communities – Measures Affecting Trade in Commercial Vessels, WT/DS301/R (adopted 20 June 2005), cf. SRL Study p. 120

\textsuperscript{361} SRL Study p. 120

\textsuperscript{362} SRL Study p 120

\textsuperscript{363} SRL Study p 120

\textsuperscript{364} SRL Study p 120-121

\textsuperscript{365} As the legal assessment concludes, the question of the SRL’s legal feasibility vis-à-vis the non-discrimination principle depends, ultimately, on “in-depth empirical data… which are not available at present” (the SRL Study p. 121)

\textsuperscript{366} The General Agreement on Trade in Services (1995) (‘GATS’); All WTO members are members of the GATS

\textsuperscript{367} See GATS art. I:1

\textsuperscript{368} See art. I:3 (b) and the SRL Study at p. 126
member states “no less favorable treatment” then that of like services/service suppliers of any other country. With regard to the strict listing requirements for facilities, and the (current) dominance of EU-approved facilities, the SRL arguably advantages services/service providers of developed (European) nations. Even if the strict listing requirements applies equally to any facility regardless of its location, the study acknowledges that the SRL scheme in practice could be perceived as establishing a regime where facilities in less developed nations, particularly those on the Indian subcontinent, “are likely to be affected in a disproportionate manner and thus discriminated against”. In light of the GATS preamble, which highlights the importance of facilitating the “increasing participation of developing countries in trade in services and… the strengthening of their domestic services capacity… and competitiveness”, the compatibility of the SRL with WTO-law as expressed through GATS may be questionable. It could however, be argued that environmentally sound recycling services cannot be equated with substandard recycling services, and are as such not "like services", thus falling outside the scope of the "no favorable treatment"-clause articulated in GATS art. II:2.

Notwithstanding the uncertainty as to the SRLs compatibility with the non-discrimination principle as expressed under WTO-law, the license scheme may nevertheless rely on the general exceptions provided in GATT and GATS. GATT Article XX, along with its counterpart in GATS article XIV provides for a number of exceptions that may justify measures otherwise deemed to violate a substantive provision. The relevant exceptions in context of the SRL relate to measures for the protection of “…public morals”, “…life or health” and “…natural resources”. The WTO Appellate board has interestingly opened the door for allowing the usage of extra-territorial measures under the latter exception, subject to a requirement of a “sufficient nexus” between the measure and the national interest in question. However, invoking the general exceptions is not without difficulty, insofar a series of conditions must be demonstrated. Besides having to show that the aim pursued by the SRL falls within the scope and meets the specific requirements pertaining to one of the exceptions, an additional condition must be satisfied. The SRL Study at p. 126

369 GATS art. II:1
370 SRL Study at p. 126
371 SRL Study at p. 126
372 The exceptions in GATS are similar to those in GATT, and have been interpreted and construed in the same manner by the WTO Appellate Body. Only the exception as provided under GATT will elaborated in the following, but is equally relevant in the context of GATS. A difference however, is that GATS does not contain any exception similar to GATT Article XX (g) (pertaining to the conservation of natural resources).
373 GATT, Article XX (a) and GATS article XIV (a)
374 GATT, Article XX (b) and GATS article XIV (b)
375 GATT, Article XX (g). This exception lacks a corresponding counterpart in GATS article XIV.
376 See United States - Shrimp, WT/DS58/23 para 133; see the SRL Study at p. 122-123
377 Such as showing that the measure in question is "necessary" for the protection of public morals, life or health
exceptions, the license scheme would also need to comply with the general requirement stipulated in the “chapeau” of article XX/XIV, which prohibits any measure being “…applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination…” The WTO appellate board has construed this as a requirement that the measure in question should not be applied rigidly or inflexibly. Importantly in the context of the SRL, the board has also signified that measures negotiated multilaterally are a clear indicator that this test is met, as opposed to the case for measures made unilaterally. Given this backdrop, the Study stresses that the SRL aims at giving effect to the ESRR “which in turn is nested in a series of international treaties” including the HKC and the Basel Convention, and suggests that the mechanism as such could be regarded “…as the offspring of a long process of international dialogue”. However, this perspective fails to take into account that a key component of the SRL, namely the authorization list (‘Green list’), far from being reflective of any inclusive dialogue, is an instrument purely dictated by the EU unilaterally. This reality is mirrored in the current status of the authorization list, with nearly all approved facilities concentrated in the EU/EEA-area. As such, strengthening efforts to expand the geographical distribution of authorized facilities by negotiating with non-EU nations with recycling capabilities, may be a plausible approach to ensure the flexibility required under article XX to benefit from one or more general exceptions. In these negotiations, the EU may have to, and arguably should, demonstrate willingness to revise current applicable authorization requirements, as further discussed infra.

Another barrier may be the “freedom of transit”-principle as prescribed under Article V of GATT. Under the GATT, a member state must allow goods (including vessels) in transit from or to any other member state to pass through their territory (article V:2). As such, a member state is prohibited from subjecting vessels in transit to “unnecessary restrictions” (article V:3). The precise meaning of the latter concept is unclear, and has not yet been expanded upon in case law. It is possible to conceive the SRL as a restriction necessary to safeguard environmental and safety interests involved in shipbreaking. However, arguments have been made that the relevant provision should be interpreted restrictively, confined to the more narrow article-V objectives relating to transit regulation and

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380 SRL Study at p. 124
381 SRL Study at p. 124
382 An overview of the listed facilities can be found on the Commission’s website: https://ec.europa.eu/environment/topics/waste-and-recycling/ships_en
Following this line of reasoning, it is plausible that the SRL may be deemed an “unnecessary restriction” on transit, considering the (at least up-front) financial burden it imposes on vessels calling at EU-ports. Besides prohibiting “unnecessary restrictions”, article V:3 also bars the imposition of transit-related charges, with the limited exception of charges pertaining to expenses for select transit services or administrative procedures. The question of whether the license qualifies, as a “charge” remains an unanswered question. The Study suggests that the license more fittingly resembles a “premium” insofar the required contributions are reimbursable, but admits that the possibility that the contributions will be forfeited in case of recycling at a non-listed facility “remains a problematic feature of the financial instrument vis-à-vis Article V:3”. It seems that the exact nature of the license depend heavily on the situation of the ultimate shipowner. If the latter is placed in a situation where his incentive or ability to chose recycling at a listed facility is lacking, due for example to capacity issues, conflicting obligations under overlapping license schemes or insufficiently calculated contributions, it seems more plausible to characterize the SRL as a “charge”, and thus raises question of the instruments compatibility with excising WTO-regulation. Nevertheless, to the extent the SRL involves any breach pertaining to the freedom of transit provision as expressed in article V, it may possibly rely on one or more of GATT’s general exceptions, as discussed supra.

With (partly) vaguely defined provisions and in absence of clear case law, the limitations imposed under WTO rules cannot be answered with certainty. Nevertheless, the outline above has shown that WTO-law entails potential legal barriers for implementing the license scheme. While this assessment has been limited to an outline of key provisions of relevance under the WTO framework, it is worth mentioning that general principles of jurisdiction, UNCLOS provisions, whether the scheme qualifies “tax” and additional sector-specific obligations under GATS are all aspects that may accentuate the issue pertaining to the SRL’s legal feasibility.

384 SRL Study at p. 118
385 For instance, as the SRL Study indicates, the legal status of the extent and limits of port state jurisdiction vis-à-vis inter alia flag state jurisdiction and a (disputed) customary right to access to ports remains unclear; see the SRL Study at p 134-135; In addition, and particularly if parallel regimes were to emerge, questions could also be raised as to the SRL’s proportionality – the latter generally regarded as a requirement in exercising jurisdictional powers, see Kopela, Sophia. “Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons” in Ocean Development & International Law, Vol. 47 (2), (2016) at. p. 111
5.4.2 Additional considerations

In addition to the issues centering around the legal feasibility of the SRL, there are also a number of practical issues with operationalizing the license scheme in its current, envisioned form.

One key difficulty relates to the possible emergence of similar regimes across other regions beyond the EU. It is plausible that the SRL will not be received warmly by non-EU nations (and their shipowners). Firstly, these nations have strong interest in international shipping being conducted without the hindrance of a (costly) mandatory license requirement being imposed upon ships calling to EU ports. Secondly, these states may take a dim view of the license scheme, by virtue of its integration with the “green list”-instrument, effectively entails that the EU unilaterally dictates the selection of (economically) accessible ship recycling facilities. For these reasons, the enactment of a license mechanism may trigger the response of other regional organizations developing similar license schemes. Stakeholders on the shipowner side have warned against the danger of such “retaliatory measures” from EU trading partners. The potential emergence of such parallel regimes creates a troublesome situation. A ship calling at ports across various regions becomes subject to multiple license requirements, thereby facing potentially staggering costs of paying multiple contribution fees. Further, these license regimes may operate with deviating lists of approved recycling facilities. To the extent that these lists are incompatible, shipowners may be placed in a deadlock where recycling in compliance with one regime means non-compliance with another, thereby forfeiting amounts paid in contributions becomes unavoidable. It should also be noted that there is no guarantee against the potential emerging regimes including facilities with questionable environmental and safety standards on their authorization lists. In such a case, depending on the total sums levied under the competing regimes, it may very well be that a shipowner is left with a stronger (financial) incentive to scrap the vessel in what may be considered a substandard recycling yard.

A final issue relates to the authorization lists. The SRL is connected with the “green list”-mechanism for facilities: redemption of accrued contributions paid for the recycling license is

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388 On this issue, see the SRL Study at p. 127
conditioned on a vessel being recycled at an authorized facility. Environmental, health and safety standards, which a facility must meet in order to be included on the list, are set high, pursuant to article 13 of the ESRR and further detailed through technical guidelines issued by the Commission. Facilities located outside the EU may apply to be included on the list, but with stringent authorization requirements nearly all approved facilities are concentrated in Europe, with the exception of a few yards located in Turkey and one in the US. This restrictive listing practice, with few authorized facilities (dispersed geographically unevenly), raises concerns whether the SRL will be able to accommodate the future (increased) demand for authorized recycling capacity if put into effect. Researchers and industry stakeholders have expressed strong doubt in this regard, noting that the Commissions capacity projections have been overly optimistic, as they have been based on outdated and insufficient data. As mentioned previously, (authorized) European facilities - which currently dominate the Green list – are predominantly rigged to service the “small vessel”-market, without being equipped to serve the segments presently retained by facilities on the subcontinent; namely large tankers, bulkers and container ships. In 2018 for instance, none of the approved facility in Europe had the track record of being able to recycle “even one “big” ocean-going vessel”. If the list of authorized facilities does not progress to include more non-EU facilities in the future, major changes in the European shipscrapping industry would be required to enhance recycling capabilities to accommodate an increased demand and a broader fleet of large-sized commercial vessel. This transition would

391 See the SRL Study p. 13
393 Pursuant to article 15 of the ESRR
394 As of writing; https://ec.europa.eu/environment/topics/waste-and-recycling/ships_en
398 Typically domestic and inland waterway vessels
400 See Solakivi et al. “The European Ship Recycling Regulation and its market implications: Ship-recycling capacity and market potential” in Journal of Cleaner Production, Vol. 294 (2021) at p. 1 noting “…current capacity of the EL [European List] is not adequate to cover the anticipated recycling demand. This implies that substantial additional capacity located outside the EU is needed” (emphasis added).
encounter significant practical and commercial hurdles\textsuperscript{401}, and nevertheless likely to be a lengthy process.\textsuperscript{402} If the SRL is to be put in effect in the near future, its aim of re-directing scrapping demand towards sustainable recycling yards would be at risk of being undermined if its integrated “green list”-requirements entails that such capacity is insufficient in many years to come.\textsuperscript{403} It also remains unclear what position shipowners holding licenses would be placed in if faced with a situation where no authorized capacity is available when needed. The option of reimbursing the accrued contributions in such a case, prior to scrapping having happened, would necessarily remove the financial incentive to recycle responsibly. Compensating shipowners for temporary lay-up until capacity is available could potentially be very expensive, given the large number of vessels expected to hold licenses and uncertainties as to when sufficient capacity capabilities will be restored.\textsuperscript{404}

5.5 Advantages

The strongest advantage with the license scheme rests in the fact that it provides a strong incentive for choosing sustainable shipbreaking without relying on weak jurisdictional links. As has been discussed in section 3, a fundamental barrier with the regulatory framework at both a EU and international level has been the assignment of responsibility to recycling states, flag states and port states (with insufficient enforcement capabilities or incentives). The license scheme, being designed as a financial incentive-based mechanism, withstands the impeding limitations of such a jurisdictional dependence.

\textsuperscript{401} A key problem in Europe is attracting market entrants to the local recycling industry. Profit margins have generally been slam due to low local demand for scrap steel and high operational costs. The financial risk involved (due to the volatility of scrapping demand and steel prices) have further contributed to making shipsblacking an unattractive venture in Europe, see Solakivi et al. "The European Ship Recycling Regulation and its market implications: Ship-recycling capacity and market potential" in Journal of Cleaner Production, Vol. 294 (2021) at p. 8; One can also question how practice it is to “recycle large ships in Europe to produce scrap that will have to compete with the large quantities of other European ferrous scrap in order to be sold and transported to countries most of which already recycle ships”, see Mikelis, Niklos. “Ship Recycling” in Psaraftis, H. (Ed) Sustainable shipping: A cross-disciplinary view (2019) at p. 218

\textsuperscript{402} It seems plausible that such a transition would require an industry-wide overhaul; large investments would be needed to establish new facilities, expand the infrastructure of existing ones, and train a specialized workforce. Incentives to attract new market entrants would have to be in place, along with plans for either utilizing the new incoming volumes of scrap steel domestically (which seems unlikely given that the EU is a net-exporter of scrap steel as discussed supra) or finding profitable avenues to export it.

\textsuperscript{403} A similar dilemma was present during the drafting of the HKC – an instrument that notably does not ban beaching for reasons pertaining to the “prevailing realities… that at least two thirds” of global recycling capacity relies on the method, see Pskowski, Rebecca, “No Country for Old Ships?: Emerging Liabilities for Ship Recycling Stakeholders”, in Tulane Maritime Law Journal, Vol. 45 nr. 1, (2020) at p. 70

\textsuperscript{404} So-called “mothballing” is generally considered to be extremely costly, seeing Sawyer, John, “Shipbreaking and the North-South Debate: Economic Development or Environmental and Labor Catastrophe” in Penn State International Law Review, Vol. 20 nr. 3, (2002) at p. 551
Similarly to some of the regulatory instruments, the license scheme also implicates (EU) port state jurisdiction. However, an innovative feature of the scheme is that it combines port state jurisdiction with an extraterritorial aspect. While this feature raises questions as to the legal feasibility of the SRL, it concurrently has benefits from a compliance and enforcement perspective. Any ship calling to a EU-port, thus submitting itself to the jurisdiction of the port state, would be required to ascribe to a system placing a financial enticement to it being recycled in a facility deemed suitable by the EU. When the vessel proceeds to leaving the jurisdiction of EU ports, the financial incentive attached to it remains, enduring – and even intensifying ⁴⁰⁵ – throughout the vessels lifetime. This contrasts to the traditional regulatory instruments, where departure from a port states jurisdiction means avoiding the grasp of their applicability and/or enforcement. The arrangement provided for under the SRL provides benefits from an enforcement perspective, as compliance with the license requirement would be ensured through control and inspections by EU-port states. ⁴⁰⁶ Here, an interesting aspect is that port state enforcement efforts through traditional regulatory instruments primarily focuses on outbound ships departing from the jurisdiction in question, entailing severe difficulties for authorities having to both identify and control vessel departures in potential violation of regulatory rules. In contrast, under the EU license scheme, enforcement is primarily directed towards inbound vessels seeking access to EU ports. Here, enforcement is made relatively manageable; port control (with the possibility of additional assistance from member states’ coastal guards) can refer to a digital database and easily verify whether an incoming or docked ship holds the required license. ⁴⁰⁷

Further, the license mechanism does not depend on other port states beyond the EU, where incentives and capabilities to enforce recycling regulations may be lacking, or where such regulations could be more or less entirely absent. Instead, enforcement takes place in the EU, where optimal resources and capabilities to do so are in place, while the incentive to recycle responsibly (e.g. at an approved yard) applies extraterritorially and without the reliance of the effective enforcement of other, non-EU jurisdictions. To this end, a favorable characteristic with the license scheme is its non-reliance on flag-state jurisdiction. A recurring setback with a number of the regulatory instruments is that they are jeopardized by reflagging practices, providing for easy and swift circumvention. At the EU-level, this has become especially apparent, where the ESRRs applicability can be avoided by simply reflagging the vessel to a non-EU register. The license scheme introduces a new approach, where the

⁴⁰⁵ The accumulated amounts in the locked “savings account” will grow
⁴⁰⁶ See the SRL Study at p. 104-105
⁴⁰⁷ See the SRL Study at p. 105
effectual applicability of the (incentive-based) instrument rests on calling to a EU port, rather than the flag of the vessel. In a reversed scenario, where the mechanism would only apply to EU-flagged vessels, a strong incentive would be placed on shipowners to their fleets out of the EU. As such, the license scheme is able to remain an effective instrument, without encouraging re-flagging to non-EU jurisdictions (or shipowners avoiding putting their ships under EU-flags from the start). From a EU-perspective this is an attractive option, as it does not undermine the competitiveness of European registries.

Often seen in the combination with re-flagging (when the flag falls within the “last voyage”-category), is the presence of cash buyers, which have complicated the application of regulatory instruments and distanced shipowners from liabilities.\(^{408}\) Also here, the SRL provides for an interesting solution: by its design, the financial incentive remains attached to the ship until recycling is completed, and thus rests with the ultimate shipowner. As such, the economic incentive to recycle the vessel at a listed facility persists notwithstanding changes of ownership to intermediaries prior to the vessels last voyage and the legal opportunities provided for by utilizing these types of transaction structures.

In addition to avoiding reliance on flag state, the SRL avoids placing excessive confidence in recycling states. As has been shown, these states lack the means to ensure effective enforcement of international and domestic ship recycling regulations and ensuring minimum compliance with safety and environmental standards. Perhaps just as importantly, is the lack of incentives to so (as reflected by the pending ratification of the HKC and the fact that traditional ships-scraping states continue to allow for the import of vessels for recycling). The SRL-scheme, by virtue of the “Green List” ensures the compliance of any non-EU facility by making authorization conditional on providing evidence of observance to the listing requirements, together with certifications from independent verifiers.\(^{409}\) Such yards will also have to accept being subject to on-site inspections by the Commission or its agents.\(^{410}\) Any facility not compliant with the EU listing-requirements will simply not receive authorization. Combined with a sufficiently strong financial incentive attached to the ship in question, such non-authorized facilities will become an economically unfeasible option for scrapping vessels (subject to the SRL). In this way, the license scheme holds the potential to provide an effective

\(^{408}\) Such as the intention-based approach under the waste-regime


incentive for these yards to progress towards heightened safety and environmental standards in pursuit of being listed.\footnote{411 Provided current listing requirements are perceived as obtainable, which in turn will require specific adjustments, to be discussed supra}

5.6 Suggested adjustments

As has been shown above, the SRL represents an innovative approach in addressing shipbreaking that carries several advantages. However, several obstacles have also been outlined, rendering the scheme’s feasibility questionable. Addressing these requires some modifications to the SRL and how it is operationalized.

5.6.1 Alterations to current listing practices: a gradual approach

A key consideration is reforming the current listing practices of the EU by adjusting standards required facilities seeking authorization. While improving environmental and working conditions in the global shipbreaking industry remains a key objective on the pathway to sustainable shipbreaking, this policy goal also mandates that policy makers set standards considerate of the economic interests of shipbreaking nations. It also requires that ship recycling meet capacity demand; so as to perform its vital role the shipping industry depends on. As has been discussed above, the Green List in its current form excludes much of the world’s recycling market. Should the SRL become reality, the strict standards pertained in the listing requirements poses significant challenges in terms of capacity and the ability of the traditional shipsrapping nations to partake in the industry. This may arguably lead to a counterproductive outcome, undermining sustainability and leaving shipowners with end-of-life vessels with few options. As such, a suggested alternative is to adjust the current listing requirements. As an alternative to rapidly imposing rigorous standards unachievable for sites along the subcontinent, altering authorization requirements may provide for a more feasible approach and final outcome.

Here, one option could be to deploy a gradual approach. A possibility would be to prescribe more basic environmental and safety standards that are economically and practically manageable to implement, such as providing training, safety equipment and demanding that certain high-risk activities to be fully or partly automated. Within set time frames, heightened standards could gradually be introduced, aimed for example towards more complex upgrades of infrastructure, and advancing techniques, procedures and monitoring systems, similar to the current requirements currently prescribed under the ESRR (article 13 (1)). A gradual approach may serve as a better incentive for
(non-EU) sites to strive towards improving their recycling practice in pursuit of being listed, compared to the discouraging effect of being confronted with seemingly unobtainable high standards up-front.\footnote{Devaux, C. and Nicolai, J., “Designing an EU Ship Recycling Licence: A Roadmap” in Marine Policy, Vol. 117, (2020) at p. 2 and 5; and Solakivi et al. “The European Ship Recycling Regulation and its market implications: Ship-recycling capacity and market potential” in Journal of Cleaner Production, Vol. 294 (2021) at p. 5} To this end, the approach would, particularly in its early phases, allow for a wider number of facilities outside the EU being authorized, thereby responding to the increased demands for listed capacity triggered upon the SRL given effect.

Both from a practical and policy goal perspective, reforming the listing requirements to take a more pragmatic approach seem advantageous. For the shipbreaking nations on the subcontinent, the current listing practices equate to unobtainable standards. Far from encouraging improvements, they arguably exclude the south-Asian industry all together,\footnote{Ahammad, H. and Sujauddin, M., “Final Report for the IMO-NORAD SENSREC Project: Contributions of Ship Recycling in Bangladesh: An Economic Assessment” (2017) at p. 41} and remove inducements for upgrades in the region.\footnote{“But even if the European ships… choose to comply with the… [EU list], what a hollow victory the Commission will have scored! ...[P]reventing the progressive minded European market from using HKC compliant yards in South Asia… would torpedo the progress that has taken place so far. Without the demand for responsible recycling that is currently filling the HKC compliant yards in South Asia, one of the major driving forces for change would be removed”), see Mikelis, Niklos. “Ship Recycling” in Psaraftis, H. (Ed) Sustainable shipping: A cross-disciplinary view (2019) at p. 239} However, employing a gradual approach would allow time for shipbreaking nations to acclimatize to raised standards, incentivize steady advances and make authorization an achievable prospect for shipbreaking facilities.\footnote{Sawyer, John, “Shipbreaking and the North-South Debate: Economic Development or Environmental and Labor Catastrophe” in Penn State International Law Review, Vol. 20 nr. 3, (2002) at p. 560} The adjustments outlined above takes the approach that the developing shipbreaking nations should not be denied a right to partake in the industry, or that high standards must be realized overnight. As has been noted, relatively minor and inexpensive upgrades of current recycling practices on the subcontinent could lead to rapid and considerable advancements in labour and environmental standards.\footnote{See Devaux, C. and Nicolai, J., “Designing an EU Ship Recycling Licence: A Roadmap” in Marine Policy, Vol. 117, (2020) at p. 5; See also Mikelis, Niklos. “Ship Recycling” in Psaraftis, H. (Ed) Sustainable shipping: A cross-disciplinary view (2019) at p. 243 and p. 246} Adjusting the listing requirements to allow shipbreaking nations to harness their competitive advantages while stimulating improvements would also help maintain dismantling capacity at a scale needed to meet global demand. To this end, it would encompass the foundational policy goals and provide a pathway promoting sustainable shipbreaking.

Pursuant to a reform of the listing requirement, another feature of the SRL may prove useful in facilitating non-EU sites wishing to make improvements: namely the “Recycling Fund”. The Study has envisioned that any forfeited amounts from vessels subject to the SRL would be funneled...
into a “general benefit fund in the area of ship recycling”. This presents a possibility; the amounts accrued in the special benefit fund could be used to cross-subsidize investments in environmental and safety upgrades for yards on the subcontinent (seeking approval for listing). Depending on the amounts being accumulated, this could prove to be a useful contribution in stimulating the transition towards enhancing environmental and social standards.

5.6.2 Ensuring coherence between emerging parallel regimes

Besides the needed changes in listing requirements, the possibility of other regional license schemes emerging remains a key problem. These two issues are however, intertwined. In the case of parallel regimes being established, harmonization of the authorization lists under the different instruments is vital. Here, it would be necessary to ensure coherence amongst authorization lists by aligning (safety, health and environmental) standards for approval across any and all regimes. This avoids a scenario where shipowners are faced with incompatible recycling alternatives, and also lays the foundation for introducing a system providing exemptions or deductions for shipowners subject to two or more coexisting regimes. To the extent that such harmonization is possible, the introduction of parallel regimes may prove to be less of a problem and more of an opportunity for sustainable shipbreaking, as the financial incentive to recycle responsibly is expanded in scope, reaching shipowners with vessels not calling at EU-ports. If emerging regimes also operate with a benefit fund-structure similar to the SRL, an additional opportunity may also present itself to accelerate improvements in substandard yards through reinforcing cross-subsidization of upgrades in recycling yards on the subcontinent. However, any prospects of such a functional coexistence between license systems, including harmonizing lists and arranging for exceptions and financial deductions, relies on a coordinated effort between any and all emerging regimes. Whether the political resolve for such cooperation can be achieved, remains an open question.

A final point to be made is that a reform of the listing requirements and cooperation with parallel regimes (should such systems emerge) may mitigate the SRL’s potential incompatibility with WTO-law. A more inclusive approach to the facilities on the subcontinent would reduce the instruments disproportionate effects on developing nations, arguably lessening the SRL’s tension with

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417 See the SRL Study at p. 13
418 As suggested by certain stakeholders, see the SRL Study at p. 104
the non-discrimination provisions provided under the framework. Further, to the extent that aspects of the SRL are found to violate substantive provisions under GATT or GATS, a more inclusive list built on collaboration with non-EU counterparts may enhance the feasibility of invoking the general exceptions. It is here worth reiterating that the WTO appellate board has shown a greater degree of leniency to measures that are multilaterally inclusive, and not rigidly or inflexibly designed.

5.7 Sub-conclusion

While the future of a recycling license scheme still remains uncertain, the proposed instrument represents a pioneering governance structure with several promising aspects for tackling shipbreaking. Its key component is requiring any vessel calling to the EU to subscribe to scheme whereby contributions are paid. These contributions are effectively transformed into a financial incentive, irremovable from the vessel in question, and utilized to ensure that it recycled in a sustainable, authorized facility. The ingenuity of this design pertains to the fact that the mechanism is able to withstand circumvention through re-flagging practices and ownership changes, as well as overcome the gaps associated with relying on weak jurisdictional links. The mechanism leverages (EU) port state jurisdiction to impose the license requirement, while having extraterritorial repercussions: the financial incentive remains attached to vessel proceeding to leave European waters, with its realization conditioned upon recycling taking place at an authorized facility pursuant to a list dictated and administered unilaterally by the EU. While this arrangement reaps benefits from an enforcement and compliance perspective, the extraterritorial aspect raises questions of SRLs compatibility with international law, which cannot currently be determined with certainty. Even if the SRL were to conform to binding international norms, two key shortcomings can be identified with the instruments. Firstly, the mechanism’s integrated ‘Green List’ as it is currently applied may trigger a situation where the available authorized recycling capacity it mandates (provided the scheme becomes fully effective) is insufficient to meet predicted levels of demand. Secondly, the SRL might prompt the emergence of similar regimes beyond Europe, giving rise to incompatible recycling incentives placed on vessels subject to overlapping systems. To address these concerns, changes to the current listing requirements are necessary. A shift from imposing high standards up-front to a gradual approach is recommended, as the listing of non-EU facilities becomes an attainable objective which may incentivize improvements in these sites, thus expanding needed capacity while safeguarding key policy goals. In addition, ensuring future harmonization between the EU list and lists under future parallel systems provides an important
basis for securing a functional interface with regimes emanating outside of Europe. These adjustments may in turn be conducive to enhancing the SRL’s legal feasibility vis-à-vis WTO-law.
6 Governance structure: ESG-inspired initiatives

6.1 Introduction

While circumvention, enforcement and lacking ratifications have rendered the international regulatory framework ineffective, select stakeholders in the shipping industry have taken voluntary action to promote more sustainable shipbreaking. Their initiatives may be motivated on ethical grounds or for commercial reasons – or perhaps both. This development may be viewed in light of the emergence of environmental, social and governance (ESG) issues on the corporate agenda. While there are diverse and sector-specific conceptions of what ESG entails, it may generally be understood as a corporate ‘social rating score’, which inter alia postulates a company’s attentiveness to social and environmental impacts. In addition, a firm’s governance performance is taken into account, relating to aspects such as legal compliance and internal control procedures. ESG may be viewed as a “hard-edged” variant of so-called corporate social responsibility (CSR), as ESG-performance tends to be associated with (more) commercial and financial implications for the company in question.

The rising focus towards ESG has also grown to reach the shipping sector. Shipbreaking is deeply intertwined with ESG-concerns, as the industry’s environmental and social track record on the subcontinent most clearly illustrates. As a response, select companies have increasingly been taking an interest in address these concerns. Financial stakeholders, such as shipping banks and investors have taken a particularly active role. In addition, and perhaps as a response to the growing institutional pressure, certain shipowners have taken steps to make improvements themselves. The efforts from the financial sector and shipowners have taken shape in a number of voluntary, ESG-inspired initiatives.

Below, select initiatives will be explored. While they do not represent an exhaustive list, they are meant to demonstrate the nature of some of the newer ESG-inspired efforts currently being pursued,

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420 See Galley, Michael, Shipbreaking: Hazards and Liabilities (2014) at p. 205
422 Silvola, H. and Landau, T., Sustainable Investing - Beating the Market with ESG (2021) at p. 20
424 This term can be understood to revolve around a company’s social responsibilities and awareness, but - as one author notes – it carries nearly 40 definitions, rendering it a significantly ambiguous concept, see Levermore, Roger, “SDP and corporate social responsibility” in Collison, H. et al. (eds.) SDP and corporate social responsibility, Routledge, (2018) at p. 104
426 As illustrated by the efforts made by lending banks under the RSRS-scheme along with investment screening initiatives by select institutional stakeholders, discussed infra
and provide a footing for reflections on the viability of the voluntary initiatives of stakeholders as a governance structure for addressing shipbreaking.

6.2 Contracting initiatives: the Responsible Ship Recycling Standards

In the absence of an effective regulatory framework, contractual incentives may play a role in promoting sustainable shipbreaking practices. On this topic, an important development has been the efforts of lending banks. These institutions are pivotal for shipowners, as they provide financing for their activities, and are thus in a position to leverage their influence to accelerate change in the shipbreaking industry. One way this has taken form is by incorporating sustainable shipbreaking-related provision in their loan documentation. Here, an interesting and fairly new initiative is the Responsible Ship Recycling Standards (RSRS), which has gained the support of select financial stakeholders. In the following, these standards will further be explored as an example of a contractual ESG-inspired initiative.

The RSRS standards were introduced by a selection of Dutch and Scandinavian shipping banks in 2017, and later gained the endorsed of a number of other northern-European institutions. The standards layout guidelines for lending practices, with the aim of mitigating risks shipbreaking poses to people and environment – the latter explicitly recognized as a “key ESG issue” in the standards. The lending banks partaking in the RSRS-initiative subscribe to a number of general commitments. These include integrating the standards into their ESG policies and lending practices, commitments to omit financing cash buyers and unsustainable ship recycling facilities and to engage with clients in

427 Here, lending banks refer to banks in their capacity of providing financing for shipowners
428 There are also other (and older) standard contracts that may play a role in this regard, such as BIMCO's standard contract RECYCLECON. Unlike RSRS, BIMCO does not explicitly make mention of ESG as such does not directly involve financial stakeholders, but is rather an individual sales contract between a shipowner (“seller”) and cash buyer/recycling yard (“buyer”) for the purpose of (environmentally sound) recycling; see RECYCLECON Standard Contract for the Sale of Vessels for Green Recycling, (particularly part II, clause 17), a sample copy is available at BIMCO's website: https://www.bimco.org/contracts-and-clauses/bimco-contracts/recyclecon#.
429 The banks were ABN AMRO, ING, NIBC, SEB and DNB; see Dutch, Scandinavian Banks Setting Up Responsible Ship Recycling Standards, OFFSHORE ENERGY (30 may, 2017), https://www.offshore-energy.biz/dutch-scandinavian-banks-setting-up-responsible-ship-recycling-standards/
430 For an overview of the RSRS members per March 2021, see the RSRS at p. 9
432 RSRS (i)
433 RSRS (iv)
434 RSRS (iii)
discussions around ship recycling practices. By joining the RSRS, the same members also subscribe to a number of pledges, to be adhered to on a “best effort basis.” These include promises in relation to financing transactions, where the banks shall require that ships are recycled in accordance with the specialized ship-recycling framework (the HKC and/or the ESRR) and carry an IHM. The RSRS also outlines a number of expectations the member banks have vis-à-vis their shipping clients, and details how the members can report the results of their implementation of the RSRS.

Importantly, loan agreements represent a way for lending banks to leverage their financial power vis-à-vis shipowners to promote the overreaching objective of the RSRS to minimize the impact on the environment and society resulting from poor recycling practices. This opportunity is explicitly recognized by the RSRS, and is something it seeks to bring into play through a number of template clauses. These clauses serve as suggested outlines of language that the member banks may integrate in their loan agreements with shipowners/borrowers, for example as covenants or condition precedents. A commonality shared amongst the clauses is that they all refer to the Hong Kong Convention (HKC) and the European Ship Recycling Regulation (ESRR), reflecting the standards’ aim to support international regulations and conventions.

Several draft clauses seek to secure that the shipowner/borrower maintains an Inventory of Hazardous Material (IHM) in accordance with either the HKC or ESRR. The RSRS clauses provide multiple examples, with the IHM-requirement formulated as a condition precedent, an on-going covenant, as well as an undertaking.

While carrying an IHM may prove beneficial to facilitate environmentally sound and safe recycling, the framework provided under the model clauses may be insufficient to boost change in the industry. One issue pertains to the fact that the IHM-related clauses, similarly to the recycling clause (to be discussed infra), do not specify the consequences of a non-compliant IHM or provide any contractual remedies. As such, the effectiveness of the clauses rely on the extent to which the individual

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435 RSRS (vi)  
436 RSRS at p. 2  
437 RSRS (x)  
438 RSRS (vii)  
439 See RSRS at p. 2, (i) – (viii)  
440 See RSRS Appendix 5, cf. RSRS (xii)  
441 RSRS Appendix 3 first para  
442 See generally RSRS Appendix 3  
443 RSRS Appendix 3 second para  
444 RSRS para 6 and 7  
445 RSRS Appendix 3 (i)  
446 RSRS Appendix 3 (ii)  
447 See RSRS Appendix 3 (iii) first para in fine.
RSRS-member banks choose to supplement them with any remedies, and how these will be defined. Questions to be contemplated in this regard may for example include whether a minor default in the IHM shall result in a default of the entire loan, and the ability of the borrower to rectify a non-compliant inventory. To this end, it is also difficult to envision how the lending banks will effectually control and ensure that the IHM carried by the borrower is compliant with the requirements of the HKC and/or the ESRR as prescribed in the clauses. The IHM itself and the corresponding requirements stipulated in the regulatory instruments are highly complex and intricate matters, requiring familiarity of the specifics of hazardous materials aboard the vessel, their concentration and location. This raises the question of what knowledge the lending banks have in regards to this matter, whether they want to invest in obtaining this knowledge, and even so – their ability to assess the truthfulness of the information in an IHM provided by the borrower.

Beyond the IHM-related provisions, the RSRS also provides a template clause aimed more directly at ensuring responsible dismantling of vessels. The clause stipulates an undertaking of the borrower/shipowner that the vessel is to be scrapped at a shipbreaking yard operated in “a socially and environmentally responsible manner, in accordance with the provisions of the Hong Kong Convention and/or the EU Ship Recycling Regulation”. However, the effectiveness of this stipulation is questionable. Firstly, the obligation of the shipowner/borrower to ensure that recycling takes place at such a facility only applies in instances where “…any Ship owned or controlled by it [is] taken out of service for dismantling… or sold to an intermediary with the intention of being dismantled…” Such a clause is rendered ineffective in instances where the shipowner sells the vessel to the second hand market. In such a case, the original borrower/shipowner is relieved of the contractual obligation to ensure responsible shipbreaking. Meanwhile, no contractual relationship endures between the lender and the vessel’s new successive owner. In fact, the standards make no mention of the instances where borrowers sell their ships to parties other than cash buyers/intermediaries. As such, they contain no (recommended) provisions ensuring that any subsequent sale on part of the borrower shall be accompanied with transferring

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448 As discussed supra in section 3 of this thesis
449 RSRS Appendix 3 (iii)
450 RSRS Appendix 3 (iii)
451 This practical relevance of this problem can be highlighted by the business practices of Maersk. The shipping giant has received criticism from the NGO shipbreaking platform for selling its vessels to the second-hand market, yet integrating the same vessels back into their fleet through long-term chartering contracts – thereby avoiding the (legal and reputational) responsibility entailed in ownership of end-of-life vessels when the time comes for recycling, see NGO Shipbreaking Platform Annual Report (2015) at p. 16
obligations to recycle responsibly to succeeding purchasers.\textsuperscript{452} This contractual set-up seems weak. Shipowners (and their financiers) may very easily avoid any (direct) engagement in vessel recycling by keeping their shipping fleets young while passing vessels to second-hand buyers. While they avoid any possible interference with the clause as stipulated in RSRS, the risk of the vessel ending up in unsound recycling remains. This problem is not without practical relevance. Maersk for example, has attracted NGO-criticism for selling its vessels to the second-hand market, yet integrating the same vessels back into their fleet through long-term chartering contracts.\textsuperscript{453} In this way, legal and reputational impracticalities coming with ownership of an end-of-life vessel is avoided – as would non-compliance with the clause as formulated under the RSRS.

In the event that a vessel covered by the clause is not to be sold to the second hand market, but instead is destined for recycling, the borrower/shipowner will most likely use an intermediary.\textsuperscript{454} Although such transactions are covered by the clause to the extent that the vessel is “sold to an intermediary with the intention of being dismantled”, they may complicate lending banks’ ability to confirm that the vessel in fact is recycled at a yard that conducts responsible shipbreaking pursuant to the clause and underlying ESRR/HKC-provisions. One issue in this regard is that shipowners may point to clauses in the sale contracts they have entered into with cash buyers stipulating that recycling will be conducted soundly, but in actuality are purely “cosmetic” – as was the case in \textit{Maran v Begum}. The ability and capacity of financial institutions to identify the reality behind such contractual pronouncements is questionable, making it difficult to secure compliance with the RSRS-formulated draft clause.\textsuperscript{455} Notably, the clauses places no due-diligence duties or best effort obligations on the shipowner to ensure or follow up that an intermediary buyer will actually arrange for the responsible recycling of a vessel. Similarly, any clearly defined corresponding commitments on part of the lenders to ensure the same is absent in the RSRS.\textsuperscript{456} Another matter is that the RSRS generally provides that “the Banks \textit{expect} their clients to develop policies and practices for responsible ship recycling… [and] undertake appropriate due diligence of yards as basis for recycling decisions…” (Emphasis added).\textsuperscript{457}

\textsuperscript{452} But even in this case, a remaining problem becomes what incentives a subsequent purchaser would have to follow up this obligation, and would thus – at the least - need to be supplemented contractual remedies in case of breach.


\textsuperscript{455} RSRS Appendix 3 (iii)

\textsuperscript{456} The commitments and guidelines applicable to banks are generally loosely formulated. The RSRS mentions that banks merely shall require, on a best effort basis, that vessels are recycled in accordance with the HKC or the ESRR in relation to financing transactions (see RSSS p. 2 (x)), but fails to specify any clear commitments to ensure that such requirements are actually complied with.

\textsuperscript{457} See RSRS p. 2
How meaningful such a general expectation is remains debatable, particularly when it is not integrated as an obligation under the standards’ suggested contractual framework for loan agreements.

Further, the responsible dismantling clause goes no further than applying as long as the borrower is “in a lending relationship” with the lender. However, the pertinence of scrapping a vessel may, as is often the case, arise at a point following the conclusion of the loan facility’s period. In this setting, the RSRS-clause may be rendered an ineffective tool to promote sustainable shipbreaking in one-off financing transactions for individual ships, where the relationship between the shipowner/borrower and the lending bank is limited. Beyond individual loan agreements, the clause may have a greater impact in more established lending relationships between an RSRS-member bank and large-fleet shipowners. Here, the continuous financing of a shipowner upholds the obligation of the shipowner to ensure responsible ship recycling for its entire fleet, while providing greater financial leverage for the lending bank to exercise its influence vis-à-vis the shipowner.

Finally, the recycling clause, as with the IHM-related clauses, is silent as far as contractual remedies. No guidelines or recommendations exist as to what course of action shall be taken where the borrower/shipowner, either alone or through a cash buyer, has recycled the vessel at a non-ESRR/HKC-compliant yard. Without sufficient remedies in place, any incentive to comply with the lending agreements stipulations vanishes. Indeed, rigorous contractual remedies have generally been emphasized as a crucial feature in contracting for better shipbreaking. As such, the effectiveness of the RSRS clauses depends on the extent to which banks are willing to design and implement sufficient contractual remedies, for example that breach of contract should trigger a loan default or provide a legal basis for the lender to engage with the client in other ways. To the extent that banks do not supplement the RSRS draft examples with additional provisions specifying remedies and enhancing due-diligence responsibilities, the outlined language in the clauses alone appear to be too simple and underdeveloped to provide a meaningful contractual framework that can significantly promote sustainable shipbreaking.

A more general question is whether the banks have the proper incentive to follow up that recycling is actually carried out properly. Such due diligence is a resource demanding activity (and does

458 RSRS Appendix 3 (iii)
459 As the clause in RSRS Appendix 3 (iii) applies to “any Ship owned or controlled…” by the shipowner “as long as it is in a lending relationship…” with the bank
460 See for instance Pskowski, Rebecca, ”No Country for Old Ships?: Emerging Liabilities for Ship Recycling Stakeholders”, in Tulane Maritime Law Journal, Vol. 45 nr. 1, (2020) at p. 97 with further references
not directly translate into profits). The notable absence of sufficiently clear responsibilities for banks to diligently secure that its borrowers recycle properly, – whether in the form of commitments or as integrated provisions in the model clauses – may be indicative of this lacking interest on part of the banks. This absence also creates a comfortable environment for the financing banks, where they can claim deniability of any knowledge in the event that recycling of the vessels they finance is conducted unsoundly, while maintaining a boosted ESG-profile. This lacking incentive is perhaps more generally confirmed by the separation between Banks’ commitments under the RSRS and the more ambiguous best effort pledges under the RSRS. While avoiding financing of unsound ship recycling facilities and cash buyers is formulated as a commitment on part of the RSRS-members, all main provisions of relevance to shipowners in relation to vessel-transactions (and recycling standards thereof) are only defined as best-effort pledges.\(^{462}\) Considering that recycling facilities and cash buyers are plausibly either not a (or an insignificant) part of the customer base of such financing banks, whereas shipowners very much are,\(^{463}\) the distinction between commitments and best effort pledges may arguably be indicative of a the lacking incentives of the RSRS-members to promote change in the shipbreaking industry.

A final point to be made, highlighting a general deficiency in contracting for improved recycling, is that contractual liability as such will not be available to those that suffer most from the industry, namely shipbreakers.\(^{464}\) Those who are exposed to the array of health, safety and environmental risks from the industry are inconveniently not in a contractual relationship with the shipowners nor those that finance their activities, and thus stand without any (contractual) remedies available. As such, a contractual approach may arguably play a limited role as a mechanism to ensure corporate accountability.\(^{465}\)

The shortcomings of the RSRS outlined above illustrate the lack of means and incentives for lending banks to actually enforce any stipulations aimed at sound recycling. As such, the initiative echoes a key issue of the regulatory instruments they seek to support, namely creating a sufficient mechanism for enforcement. On a more positive note, the more overreaching pursuit declared by lending banks to address shipbreaking, and furthered detailed through the range of committees and best efforts-pledges, may represent a push in the direction of sustainable recycling. As will be discussed supra, ESG-initiatives must go beyond the engagement of an individual company to become a

\(^{462}\) See the RSRS commitments (iii) and (iv) compared with the "best effort" pledges, particularly (vii) – (x)

\(^{463}\) Many of the RSRS members are generally recognized as major shipping banks

\(^{464}\) Enneking, Liesbeth, *Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (2012) at p. 131-132

\(^{465}\) Enneking, Liesbeth, *Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (2012) at p. 131-132

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meaningful driver for sustainable shipbreaking. In this context, the RSRS demonstrates enthusiasm for industry collaboration, which in turn is crucial in order for voluntary initiatives to have any significant effect in addressing the industry. Such a prospect may be particularly likely if the statements in the RSRS translate into banks actively taking action to screen potential clients and exclude those with a poor track record of recycling practices. At a scalable format, with more banks beyond select northern-European institutions joining to address shipbreaking (within the RSRS-framework or not), such efforts may transform to function as a meaningful financial pressure on shipowners to be more closely involved in the scrapping of their vessels, and enhance their related polices thereof. The lingering question is whether lending banks’ enthusiasm to promote change in the industry outweighs the impracticalities this work entails – the answer to which remains to be seen.

6.3 Investment screening initiatives

The ESG-oriented financial stakeholders are not limited to lending banks. A parallel development to the contracting initiatives has been that investors have started to look for ways to contribute to sustainable shipbreaking.

Perhaps the most attention-grabbing move in this regard was a recent push by the Government Pension Fund Global (GPFG) of Norway. In 2018, it instigated a decision to exclude four shipping companies from its fund because these shipowners had scrapped their ships in Pakistan and Bangladesh under substandard conditions.\(^\text{466}\) The decision was based on recommendations provided by the funds internal Council on Ethics.\(^\text{467}\)

The Council provided some interesting comments centering around the actual knowledge of shipowners when their vessels – via cash buyers – end up at substandard sites on the sub-continent. It stated that the use of intermediary cash buyers was not a mitigating factor, and noted that using one makes it “at the outset clear” that the vessel is being sold for the “sole purpose of scrapping.”\(^\text{468}\)

\(^{466}\) Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, Tulane Admiralty Law Institute (ALI), (2020) at p. 34

\(^{467}\) Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, Tulane Admiralty Law Institute (ALI), (2020) at p. 34; see for example GOVERNMENT PENSION FUND GLOBAL, Recommendation to exclude Evergreen Marine Corp (Taiwan) Ltd from the Government Pension Fund Global (GPFG), (2017), https://etikkradet.no/evergreen-marine-corp-taiwan-ltd-2/

\(^{468}\) GOVERNMENT PENSION FUND GLOBAL, Recommendation to exclude Evergreen Marine Corp (Taiwan) Ltd from the Government Pension Fund Global (GPFG), (2017), at p. 8
further equated a high sale price to awareness that the vessel would be beached. On this background, the Council presumed that shipowners who sell their vessels under such conditions (i.e. for a high sales price to an intermediary buyer) are “fully aware of what will happen to it next”, adding that the substandard conditions on the subcontinent were to “be considered as general knowledge in the shipping industry”.

As recognized by scholar Dr. Henning Jessen, this “clarity” identified by the Council and its attached reflections may generate some interest in a developing legal discussion, particularly with regards to establishing legal foreseeability. To this end, it is interesting that the reasoning by the Council of Ethics directly corresponds to that of the UK Court of Appeal in Begum v. Maran when it found an arguable case for foreseeability (and proximity) being established. Whether this reflects a concrete interaction between the two governance structures (courts and ESG-initiatives) remains speculative, but it arguably signifies a potential relationship. In support of this notion, it is also worth mentioning that the (relatively) strong focus on ESG-relevant topics in Europe has been cited as a reason why Courts in this region have been considered an attractive forum for claims of the type seen in Begum. Arguably, intensified awareness to ESG-oriented concerns may influence perceptions of accountability and responsibility, and ultimately (in negligence terminology) expand conceptions as to how extensive duties of care are reasonable to impose. Fittingly, members of civil society have leveraged Courts (through foreign direct liability claims) to make “direct legal inroads” of what are on the outset voluntary ESG-oriented aims. In this way, what starts off as voluntary initiatives may hold a potential to transpire to mandatory implications for shipowners. This may serve as a signal that ESG-inspired initiatives can reinforce the position of Courts to address shipbreaking, and thus highlights an interconnection between the governance structures.

469 GOVERNMENT PENSION FUND GLOBAL, Recommendation to exclude Evergreen Marine Corp (Taiwan) Ltd from the Government Pension Fund Global (GPFG), (2017), at p. 8
470 GOVERNMENT PENSION FUND GLOBAL, Recommendation to exclude Evergreen Marine Corp (Taiwan) Ltd from the Government Pension Fund Global (GPFG), (2017), at p. 8
472 See particularly Begum v. Maran para 124 and 127
473 Enneking, Liesbeth, Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability (2012) at p. 46 (this work refers to “CSR”, but these considerations are equally relevant for ESG as it can be considered a form of CSR, as discussed supra)
474 To this end, see Enneking, Liesbeth, Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability (2012) at p. 49 noting that “…society change can be viewed as causes of legal change”
475 Enneking, Liesbeth, Foreign Direct Liability and Beyond - Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability (2012) at p. 54
Beyond the concept of mere foreseeability, it is similarly interesting that the Council had few hesitations with asserting the influence of shipowners as to where their vessels end up being recycled - and as such the responsibility they should bear for their practices:

“[Substandard scrapping on the subcontinent]…is a consequence of an active choice on the part of the company that owned the vessel to maximise its profit. In the Council’s opinion, that company must shoulder an independent responsibility for doing so… In the opinion of the Council on Ethics, therefore, there exists a tangible connection between the shipowner’s actions and the violation of ethical norms…” 476 (emphasis added)

The Council’s position was made clear: shipowners, who may utilize cash buyers as an attempt to skirt legal responsibility in relation to the dismantling of their vessels, are still not relived of ethical responsibility. While this notion must be held separate and distinct from any legal implications, it may have an impact on ship recycling. Taking a stance as a large fund by holding shipowners ‘morally accountable’ 477 may send a strong signal to an increasingly ESG-focused shipping industry, and as such fertilize similar ideas amongst other investors and financial stakeholders. As such, demanding that shipowners answer to the moral issues accompanying unsound ship recycling practices (whether with or without the involvement of a cash-buyer), may have financial repercussions for the same shipowners. If sufficiently large, this may in turn prove to become a forceful financial incentive for shipowners to develop responsible recycling practices – or else face the risk of investors pulling out. 478 Perhaps especially forceful in this regard is that this investor-driven conceptualization of unsound ship recycling as a violation of ethical norms makes this governance structure self-reinforcing. Heightened awareness amongst the one or a few select actors may spread in a world where ESG is high on the agenda. Illustrative of this possibility is the fact that a pension fund (KLP) quickly divested from select shipping companies that had sent their vessels for scrapping under substandard conditions, following

476 GOVERNMENT PENSION FUND GLOBAL, Recommendation to exclude Evergreen Marine Corp (Taiwan) Ltd from the Government Pension Fund Global (GPFG), (2017), at p. 8
478 As remarked by the head of global transportation at JP Morgan: “Pension funds will not invest in companies that do not comply with ESG requirements and, while the acronym sounds like jargon now, in two years, everyone will have the message”, see LLOYD’S LIST, “Top 10 in ship finance 2019”, (10 Dec, 2019), https://lloydslist.maritimeintelligence.informa.com/LL1130305/Top-10-in-ship-finance-2019
the decision of GPFG.\textsuperscript{479} It even adopted the recommendation provided by the latter’s ethics committee.\textsuperscript{480} In addition, three Canadian pension funds (Caisse de Depot, CCP and OMERS) were reportedly also said to be reviewing their sectorial investments in shipping over “ethical and green considerations” in the aftermath of the GPFG’s decision.\textsuperscript{481}

More generally, investors – through threats of disinvestments like above, or by showing a clear preference to actively invest in shipping companies that take recycling seriously – may leverage this financial influence to improve conditions at the shipbreaking yards. This remains especially true if they combine it with active client engagement. As the head of group sustainable finance at Nordea made clear, the bank has “no issue of disinvestments”, but preferred the approach of encouraging companies to “take responsibility” in addressing shipbreaking.\textsuperscript{482} There are reports indicating that is the preferred approach amongst several institutional investors in the industry.\textsuperscript{483} As such, investment-driven initiatives may serve as a means not to merely exclude substandard facilities altogether, but instead work towards improving them. In contrast to a financial ‘blanket ban’ on any association with yards on the subcontinent, utilizing investor’s influence to stimulate ship owners to work in collaboration with these shipbreaking facilities to develop needed upgrades harmonizes with overreaching policy objective of sustainability. A hopeful outcome in the long term is that this push leads to environmental and working improvements in the yards, meanwhile preserving the economic interests of the South Asian shipbreaking nations and dampening concerns regarding recycling capacity.

These recent developments on the investment-side demonstrate that ESG-inspired initiatives may have the function as an economic driver to promote sustainable shipbreaking. However, the effectiveness of such investor-related initiatives ultimately rests on whether they expand in popularity beyond select (Scandinavian) pension funds to a wider group of investors.

\textsuperscript{479} Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, Tulane Admiralty Law Institute (ALI), (2020) at p. 34

\textsuperscript{480} Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, Tulane Admiralty Law Institute (ALI), (2020) at p. 34


\textsuperscript{482} Saul, J. and Jessop, S., \textit{REUTERS}, “Shipping’s financiers turning the tide on shipbreaking practices”, (15 May, 2018)

\textsuperscript{483} (“Most of the 18 institutional investors contacted by [news agency] Reuters said they preferred engagement to disinvestment, at least at first”), Saul, J. and Jessop, S., \textit{REUTERS}, “Shipping’s financiers turning the tide on shipbreaking practices”, (15 May, 2018)
6.4 Shipowner-driven initiatives

A short mention should also be made of the shipowner-driven initiatives. Parts of these pushes may be explained for reasons pertaining to the shipowners own in-house CSR-targets, but also be conceived as a result from the increasing institutional pressure arising from lending banks and investors with their own ESG-ambitions.484 Irrespectively, interesting initiatives have spired from shipowners that warrant a brief presentation.

For instance, the Ship Recycling Transparency Initiative has gathered momentum. It is a member-based information-sharing platform aimed at increasing transparency, and allows shipowners to publicize their ship recycling practices.485 As such, it serves a platform that enables investors and shippers to target their business towards those shipowners attentive to responsible shipbreaking.486

On this note, an interesting development is that select shipowners have taken interest in improving standards at shipbreaking yards on the subcontinent.487 Maersk for instance, has been referred to “the corporate poster-child” for safe and environmentally sound shipbreaking.488 For many years, it has had as its in-house policy to follow the (not presently in force) HKC by only recycling its vessels at HKC-compliant yards (relying on accreditations from classification societies).489 For some time, this meant that Maersk recycled at facilities located in China, which even the NGO Shipbreaking Platform has characterized as “state of the art”. As of 2016, Maersk decided to opt for recycling in India instead. Here, it has collaborated with select ship recycling yards in Alang to upgrade their social and environmental standards. Maersk’s move has not been without controversy. It has received NGO-criticism for inter alia withholding detailed information revealing its financial dedication to upgrade Indian facilities.490 Moreover, one of the yards Maersk had actively promoted as an example of Indian

485 Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, Tulane Admiralty Law Institute (ALI), (2020) p. 35
486 Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, Tulane Admiralty Law Institute (ALI), (2020) p. 35
489 See Silvola, H. and Landau, T., Sustainable Investing - Beating the Market with ESG (2021) at p. 61
490 “When asked, the company is consequently not able to put a number to its investments in Alang”, see NGO Shipbreaking Platform, (21 October, 2016) Platform News – Maersk maintains beaching mantra and chooses to ignore facts revealed by
progress suffered an incident leaving investors concerned about their continued investment in the shipping giant.\textsuperscript{491} Despite the criticism, meaningful changes have occurred in Alang, India. Other shipowners beyond Maersk have dedicated efforts and resources to cooperate with select beaching yards on the subcontinent, and have lead to improvements in procedures, infrastructure and training programs for workers.\textsuperscript{492} Around 50\% of the recycling yards in Alang have made heavy investments in infrastructure and procedures (such as hybrid beaching methods\textsuperscript{493}) – and have received HKC-compliance status from classification societies as a result.\textsuperscript{494}

As with the other ESG-initiatives, a remaining problem is that shipowner-driven initiatives rely on voluntary efforts. As such, such shipowner initiatives on their own are plausibly not a scalable avenue for addressing the perils of shipbreaking. However, the initiatives demonstrate that proactively involved and ESG-oriented (or ESG-pressured) shipowners may facilitate change on the subcontinent. To this end, as illustrated by the recent improvements in Alang, these initiatives may signal an undergoing transformation process in the shipscrapping industry, moving closer towards sustainability.\textsuperscript{495}

\subsection*{6.5 Sub-conclusion}

The outline above has been limited to a review of some, but far from all, ESG-inspired initiatives of relevance to ship recycling. These developments, whether being contractual, investment-oriented or shipowner driven, show that voluntary ESG-inspired initiatives may play a role in promoting sustainable shipbreaking – independent of any government- or court-mandated initiatives (as represented by the two other governance structures evaluated supra). The mentioned initiatives differ in outcome as to their (current) ability to address shipbreaking.

\textsuperscript{491} Pskowski, Rebecca, “Cradle to Graving-Dock? The Limits of Modern Shipbreaking Reform”, Tulane Admiralty Law Institute (ALI), (2020) p. 34
\textsuperscript{492} See also; Mikelis, Niklos. “Ship Recycling” in Psaraftis, H. (Ed) Sustainable shipping: A cross-disciplinary view (2019) at p. 240
\textsuperscript{495} According to Dr. Jessen, such developments “manifest an ongoing transformation process to achieve the environmental sustainability objectives of the twenty-first century in this area”, Id. At p. 96; albeit the NGO Shipbreaking Platform appears more skeptical, noting that the HKC-related requirements are ambiguous allowing for easy obtainable statements of compliance, without looking into the practice of a yard nor the adequacy of the claimed compliance, see NGO Shipbreaking Platform Annual Report (2017), https://www.shipbreakingplatform.org/wp-content/uploads/2018/07/Annual-Report-2017-Final-Spreads.pdf
The key problem with the RSRS-standards, as has been illustrated by its model clauses, relates to the lack of incentives and means amongst lending banks to enforce any strict stipulations on recycling. As has been made clear, and which is amongst the elements lacking in the RSRS-clauses, is that addressing irresponsible shipbreaking clauses requires continuous and thorough due diligence efforts. In this regard, the investor-driven initiatives may prove a meaningful role. As the decisions of some select institutional investors as shown, and concretized through the lead taken by the Norwegian Pension Fund’s ethical council, shipowners obliviousness to the well-documented substandard conditions on the subcontinent – or their attempts to distance themselves thereof - will not go ignored. This may serve as a promising economic driver to promote sustainable shipbreaking. If utilized correctly, investors may leverage their financial power against shipowners to prompt change in the facilities on the subcontinent. This drive towards improvements in the recycling yards may be further pushed the initiatives fronted by the shipowners themselves. Perhaps partly motivated by the growing institutional pressure, select shipowners have also shown that they are able to play a role in pushing for change on the subcontinent in collaboration with local recycling yards, ultimately contributing to the overarching policy goal of sustainability.

However, while the initiatives might be inspiring, resolving the social and environmental problems prevalent in today’s shipbreaking industry through voluntary ESG-oriented schemes seems unrealistic – pricelessly because they are voluntary. Today’s shipping industry is highlighted for extreme competition and tight profit margins. As such, serious doubts can be raised as to the ability of these initiatives becoming a scalable and realistic option to address the adverse impacts of ship recycling. Leaving this pursuit in the hands of the voluntary efforts made by a minority of image-conscious lending banks, institutional investors and shipowners concentrated in northern Europe, does not appear to be a forceful solution on its own – at least presently.

However, the picture is not entirely negative. Admittedly, in an industry where profits have triumphed most other concerns for decades, relying on the voluntary efforts of a select few will not be sufficient to address the environmental and social challenges facing the industry. But the initiatives may nonetheless serve as a push in the right direction, and compliment other alternative governance structures. Perhaps especially promising is the fact the initiatives are both self- and mutually reinforcing. For example, the ESG-initiatives provided by financial stakeholders transform to pressure on individual

496 Through cash byers
shipowners, who in turn may be prompted to roll out their own initiatives. Also, as illustrated by the Pension Fund’s decision, even one unilateral move by a single actor to address shipbreaking may be enough to spire and escalate similar efforts amongst commercial counterparts. As such, the aspirations of one individual company to push for improvements in shipbreaking may spread to a wider audience – with the business community’s increasing ESG-focus providing additional tailwinds. Moreover, as commented above, the general focus on ESG-related criteria in Europe may possibly strengthen the position of courts to address the industry through foreign direct liability cases. In this way, the voluntary initiatives may provide a model for growth, and support progress for sustainable shipbreaking across governance structures.
7 Conclusion

This section brings together the feasibility of the governance structures individually evaluated above by providing a closing, comparative assessment.

To begin with however, it is worth reiterating that a policy goal of sustainability has arisen out of the merger of several considerations entangled in shipbreaking, which it seeks to reconcile by striking a balance between the social, environmental and economic interests implicated in this industry. In order for this principle to be successfully applied, it requires the development and implementation of effective tools.

A key issue with the regulatory framework has been its ineffectiveness to ensure compliance by virtue of insufficient mechanisms for enforcement and to prevent circumvention. Here, both courts - through foreign direct liability claims – and the license scheme holds promising features. Through transnational tort cases, the adverse outcomes of the industry may be litigated in European courts where prospects of enforcement are comparably strong, which in turn may influence shipowners and how they recycle abroad. Similarly, the license scheme – should it come into being – holds strong advantages from an enforcement perspective, as it can be effectively controlled from Europe while its financial incentive can guide shipowners conduct globally. As such, courts (through foreign direct liability claims) and the license scheme share in common that they are governance structures administered locally in Europe, but yet hold a strong potential for enforcement and are able to effect behavior abroad. As for the ESG-initiatives, this prospect is arguably more restricted. As the contractual initiative of the RSRS have illustrated, there are limits to the means and/or the incentives of commercial actors to properly enforce responsible ship recycling practices. This is reflective of the voluntary character of the ESG-initiatives that contrasts with the more compulsory nature of the courts and license structures. Nevertheless, in a time where ESG continues to rise on the agenda of financial stakeholders, the latter’s initiatives combined with their economic influence might serve as an extralegal solution to advance progress in shipbreaking. As the decision by institutional investor NBIM has illustrated, this approach may also be self-reinforcing.

A potential weakness shared amongst all the governance structures is doubt as to whether they can grow into a scalable format required to become effective structures. The role of courts will depend on their willingness to further broaden the scope of corporate liability to include supply chain relations, and how they respond to the procedural and practical hurdles associated with foreign direct liability claims. As of current it is not clear whether the license scheme will become reality. Presuming both that it does and is found compliant with international norms, significant challenges still lay ahead pertaining
to the possible emergence of similar regimes and capacity shortages (in absence of adjustments to the EU list). The ESG-initiatives are again particularly vulnerable, as their prospect of growing into an effective tool rests on the goodwill of a sufficiently large number of commercial stakeholders.

From a policy goal perspective, courts in shipbreaking nations possess a flexibility to strike a balance between the conflicting interests, which materialize most clearly within their jurisdictions. Also European courts may function to promote sustainability. By leveraging the law of negligence to guide corporate conduct, courts can stimulate shipowners to become more heavily involved in the end of their supply chains and seek improvements. As for the EU-license scheme, its compatibility with the overarching sustainability objective depends on the final configuration of the EU green lists. Current practices must be adapted, and making provisions for obtainable standards that can stimulate improvements in recycling yards instead of alienating them from the industry is essential. This would both enhance and secure a balance between all the foundational policy goals, along with addressing the some of the legal and practical concerns the scheme arises. The ESG-inspired initiatives take several forms. While their ability to become an effective tool may be questionable, pressure from a wider range of financial stakeholders may add a layer of economic incentives for shipowners to be more heavily involved to promote environmental and social upgrades in shipbreaking yards, as illustrated by (amongst others) Maersk’s efforts in Alang.

An important aspect is the potential interplay between the individual governance structures. A shared commonality amongst the explored mechanisms is that they generate liabilities for shipowners recycling their vessels. Courts (via negligence claims), the EU license scheme and the ESG-driven initiatives all represent a financial and/or reputational liability for shipowners who peruse a mode of recycling which is deemed non-compliant according what is found ‘acceptable’ under legal, contractual or even ethically ascribed standards. At the same time, the governance structures explored carry variations in their design and substance, which in turn provide specific advantages and shortcomings. But together, the liabilities they implicate form a governance patchwork of expectations and accountability. Collectively, these mechanisms translate into a system that may effectively guide the behavior of shipowners to take a proactive role in where and how their vessels are recycled. What starts off as a pioneering negligence claim in a European court, may reach and raise attention amongst ESG-oriented stakeholders. Regardless of the legal outcome of a particular case, this scrutiny may add a layer of financial pressure for a broader range of shipowners, which again may be further reinforced with the emergence of a license scheme. Concurrently, the intensified ESG-focus in Europe has been cited as a reason for why courts in the region remain an attractive forum for litigating foreign direct liability
claims. As such, working in concert, these governance structures hold the potential to achieve synergies that cumulate into a multilayered governance framework able to promote sustainable shipbreaking.

This hopeful prospect is not without a caveat however. It remains to be seen whether the separate governance structures are allowed to develop, and - as far as the license scheme – that necessary adjustments are made. To do so, they must navigate through significant legal, commercial, and practical obstacles. These serve as a reminder of the intricacies of the shipbreaking industry that makes governance a challenging task. The title of one publication on this topic aptly captures the situation: “Breaking up is hard to do”.

Looking ahead, the governance structures will hopefully progress as a means to promote long-term sustainability in the industry. This would help address the social, environmental and economic concerns that rest ashore the beaches of the subcontinent – making breaking up a little easier.

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