

New Roles and Responsibilities of Flag States and Port States in the Context of the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009

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Abstract: The ship-recycling activity is a friendly way of disposing obsolete ships at the end of ship's life cycle for a long time. In this context this article briefly outlines the features of ship recycling industry. However, the international legal framework for the ship recycling industry goes back to 1980's and it is to say, the legal framework is in its infancy. In this regard, this article firstly outlines historical background of legal framework related to ship recycling and, then introduces the Hong Kong Convention. Subsequently, the article discusses new roles and responsibilities of Flag States and Ports States in the context of the Hong Kong Convention from a legal viewpoint. Finally, this article states for conclusion remarks.

Keywords: Hong Kong Convention, Flag Stats, Port State.

1. INTRODUCTION

A vessel may stay with one owner or may change ownership several times during its whole life, however that life has unavoidable finite and at the final stage, generally there is only one voyage left which is to the ship recycler. Even though ship recycling process is not the only option for obsolete ships at the end of their life cycle [5], [6], [19] disposal of ships at the end of their economic life via ship-recycling has great significance for the continual renewal of the merchant marine fleet [15], [21] and for sustainable development [20]. However, ship-recycling activities have adverse effects on environment [11], occupational health and safety [1], [12], [17]. On one hand, ship recycling activities contribute to sustainable development and is the environmentally way of disposing obsolete ships [15] and economically integrated to life chain of them [2]. On the other hand, unfortunately, ship recycling activities impose adverse impacts on marine environment and some social, occupational, health disadvantages [1], [2], [11], [12].

Ship recycling costs are comparatively higher in developed countries such as in European Union member States (EU) or in United States of America (USA) than less developed countries due to strict regulations related to environment, occupational health

and safety concerns. Thus, ship recycling activities in developed countries are not economically viable and in connection with cost concerns in developed countries, ship recycling activities are transferred from developed countries to less developed countries, particularly to five of them; India, Pakistan, Bangladesh, China and Turkey [7].

At the final stage of obsolete ship's life cycle, subject matter ship contains a range of hazardous, noxious and toxic substances [11], [12], [21]. In EU, USA and Member States of the Organization for Economic Co-operation and Development (OECD), materials generating from ships that contain hazardous, noxious and toxic substances are subject to monitoring and their disposal is strictly regulated under the international/domestic legal instruments [13]. Most of the hazardous, noxious and toxic substances generating from ships are strictly limited or banned under the existing regime of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989 (the Basel Convention). Persistent Organic Pollutants (POPs) are kinds of hazardous substances that persist in the atmosphere, and then bio-accumulate in human beings as well as in fauna and flora. In this regard, the Stockholm Convention on Persistent Organic Pollutants was promulgated in 2001 to protect human health and environment from any adverse effects of POPs. The Stockholm Convention lists Polychlorinated Biphenyl (PCB) as one of the POPs stated under the Stockholm Convention. The Stockholm Convention limits the scope of exporting the POPs including PCB without the prior informed consent of the importing country. Moreover, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade entered into force in 2004. The Convention lists a number of chemicals and requires for informed consent from the importing country prior to export.

Accordingly the IMO has adopted Guidelines on Ship Recycling in 2003. The ultimate purpose of the Guidelines is to promote ship recycling as the best option for the disposal of obsolete ships. In this regard, the Guidelines provide guidance on how to prepare ships for recycling and minimize the possible adverse effects of hazardous materials [8], [9].

Furthermore, the ship recycling industry imposes occupational accident and health threats to workers in ship recycling/breaking yards. Workers in ship recycling/breaking industry located in less developed countries generally do not have proper occupational trainings; do not wear protective dresses and equipments to avoid any possible accidents and; there are no warning signs referring to danger at ship recycling/breaking yards. One of the main reason for occupational accidents and health threats to workers arising out of ship recycling/breaking industry is that, most of the States are lack of appropriate and adequate domestic labour law, social security and occupational safety and health law framework [12]. In addition to that, ship recycling locations around the world make the enforcement of laws and regulations very difficult or even impossible [2].

Accordingly, the International Labour Organization adopted guidelines called as 'Safety and Health in Shipbreaking: Guidelines for Asian Countries and Turkey'. The ultimate purpose of the Guidelines is to improve the occupational safety and health of workers in ship recycling yards. The ILO Guidelines urge ship recycling countries to promulgate a national legal framework to ensure the occupational safety and health of workers employed in ship recycling activities [7].

Even though there is a number of international legislative documents regulating the environmental and occupational issues for ship recycling industry, the truth in the global world is that; shipping industry relies on less developed/developing countries to dispose of obsolete ships through the ship recycling/ship breaking process [2], [10]. As a result, currently, the shipping industry in developed countries avoids the burden of complying with

the high cost standards in order to manage hazardous, noxious, dangerous wastes generating from ship-recycling activities and occupational safety and health measures.

Taking into account rise of environmentalism [4], economical, social and occupational considerations [2], the International Maritime developed and adopted the Hong Kong Convention. The Hong Kong Convention's enforcement requires flag states', port states' and coastal states' joint efforts and works. In this regard this article, initially, introduces background of the Hong Convention and outlines the framework in the second chapter. While the chapter three addresses the Flag States' roles and responsibilities, the chapter focuses on Port States' roles and responsibilities under the Hong Kong Convention. Finally, chapter five states remarks for conclusion.

2. THE HONG KONG CONVENTION

The Hong Kong Convention was developed under the joint efforts of International Maritime Organization, International Labour Organization and the Basel Convention Working Group on Ship Scrapping. During the drafting process of the Convention it was consulted to the all relevant shipping industry parties and so, the Hong Kong Convention reflects considerations of all those parties. The Hong Kong Convention intends to be legally binding, globally applicable and easily enforceable.

The Hong Kong Convention comprises twenty one articles that cover the general obligations of Party States, definitions, application of the Hong Kong Convention, controls related to ship recycling, survey and certification of ships, authorization of ship recycling facilities, exchange of information, inspection of ships, detections of violations, violations, undue delay or detention of ships, communication of information, technical assistance and co-operation, dispute settlement, relationship with international law and other international agreements, signature, ratification, acceptance and accession procedures, entry into force conditions, amendments procedure, denunciation, depositing procedures and official languages of the Hong Kong Convention.

The Annex to the Hong Kong Convention comprises four chapters. Chapter 1 is dedicated to the "General Provisions" of Regulations 1-3. Chapter 2 outlines Requirements for Ships in Regulations 4-14. Chapter 3 of the Annex elaborates "Requirements for Ship Recycling Facilities" of Regulations 15-23. And, finally Chapter 4 of the Annex outlines "Reporting Requirements" in Regulations 24-45.

In addition to the Annex, the Hong Kong Convention comprises seven appendices. Appendix 1 outlines "the Control of Hazardous Materials". The Appendix 1, initially lists the types/names of the hazardous materials, then defines them in details and finally applies the control measures. The "Minimum Lists of Items for the Inventory of Hazardous Material" is introduced under the Appendix 2. The Appendix 3 denotes "Form of the International Certificate on Inventory of Hazardous Materials", "Endorsement to Extend the Certificate if Valid for Less Than Five Years Where Regulation 11.6 Applies", "Endorsement Where the Renewal Survey Has Been Completed and Regulation 11.7 Applies", "Endorsement to Extend the Validity of the Certificate Until Reaching the Port of Survey or for a Period of Grace Where Regulation 11.8 or 11.9 Applies" and Endorsement for Additional Survey. In dealing with ship-recycling facilities, Appendix 4 outlines the "Form of the International Ready for Recycling Certificate" and "Endorsement to Extend the Validity of the Certificate until Reaching the Port of Ship-Recycling Facility for a Period of Grace Where Regulation 14.5 Applies". Consequently, the "Form of

the Authorization of Ship Recycling Facilities” is adopted under the Appendix 5. The Appendix 6 outlines the “Form of Report of Planned Start of Ship Recycling”. And, finally, the Appendix 7 goes through the “Form of the Statement of Completion of Ship Recycling”.

The Hong Kong Convention creates an integrated system. By virtue of Article 1.5, unless expressly provided otherwise, a reference to this Convention constitutes at the same time a reference to its Annex. In this respect, Parties to the Hong Kong Convention have no right to raise reservations or objections to the Annex.

3. FLAG STATES’ ROLES AND RESPONSIBILITIES IN THE CONTEXT OF THE HONG KONG CONVENTION

3.1 Terminology Problem

The phrase of “Flag States” is a well known and established concept in International Customary Law and International Law. Historically, this concept has been transferred from customary law into legislative documents under international law. It is to say, the concept of Flag States was initially stipulated under the Convention on the High Seas, 1958 and codified the primacy of Flag State jurisdiction, consequently, the concept was transferred into newly international legislative documents.

The Convention on High Seas, 1958 Article 5.1 stipulates that, “each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag”. The corresponding Article 91 of the United Nations Conventions on the Law of the Sea, 1982 (UNCLOS) deals with the grant of nationality by a State to a ship. The Article 94 of the UNCLOS imposes duties on the Flag States

The Hong Kong Convention refers to the concept of Flag State; however, the Hong Kong Convention prefers to stipulate “... ships entitled to fly the flag of a Party or operating under its authority” in Article 3.1.1, “sovereignty or jurisdiction of the State whose flag the ship is entitled to fly” in Article 3.3, “ships flying its flag or operating under its authority” in Article 5, “ships flying the flag of that Party” in Article 12.4, instead of explicit term of “Flag State”. Different terminology stipulated under the Hong Kong Convention relating to Flag State concept brings legal questions and ambiguities.

Do terms stipulated under the Hong Kong Convention have differences rather than the “Flag State”? Even though Article 2 of the Hong Kong Convention prescribes the definitions, the Article is in a silence for the definition of Flag State. Moreover, while the Hong Kong Convention is describing the “administration”, the Convention consistently stipulates “...of the State whose flag the ship is entitled to fly...”. Since the Hong Kong Convention does not describe the Flag State and stipulates different terminology, the meaning should be investigated under the International Law.

By virtue of Article 15.1 of the Hong Kong Convention, nothing in the Convention shall prejudice the rights and obligations of any State under the UNCLOS, 1982 and the customary international law of the sea. In this context meaning of Flag State should be particularly investigated in accordance with UNCLOS, 1982.

Article 91 of the UNCLOS, 1982 outlines the nationality of ships and stipulates that, every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. While Article 92 of the UNCLOS, 1982 is addressing the status of ships, it refers to the flag of one State, in

other words “Flag State”. The term of “Flag State” has been explicitly prescribed under the Article 94 of the UNCLOS, 1982, as “Duties of the Flag State”. In accordance with Article 94, every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

This limited analysis in the Hong Kong Convention and the UNCLOS, 1982 indicates that, terminology stipulated for the Flag State has not been unified yet under the international legislative documents and instruments. This may lead lack of coordination and inconsistencies for the simultaneous enforcement of international legislative documents.

The second fault related to Flag State concept arises out of Article 3.1.1, that stipulates “ships entitled to fly flag of a Party or operating under its authority”. The first part of the sub-article “ships entitled to fly flag of a Party” is discussed and investigated above. It is to say first part of the sub-article may conform to Flag State concept under the International Law. However, what is the meaning of “operating under its authority? The definitions of the Hong Kong Convention do not answer for this question. Literally it might be thought that, the phrase “operating under its authority” refers to ships operating under the Party’s authority; in other words, ships owned or operated by a Party and used for only on government non-commercial service. However, since Article 3.2 of the Hong Kong Convention excludes the government ships for non-commercial service for the application the Convention, abovementioned idea is legally groundless.

Another idea might be discussed that, this phrase refers to the ships that do not fly the Flag of a State but operate under the State’s authority. Every State has the right to regulate its domestic law and the State may not require its ships to fly a Flag. This possibility might be acceptable under very limited conditions, if the ship solely sails through the inland and territorial waters of the State. However, Article 3.3 of the Hong Kong Convention has already excluded these types of ships from the enforcement of the Convention. Moreover, recently, for any State in the global world, it is impossible not to impose flying the Flag of the State even in its inland and territorial waters, in connection with the safety and security matters.

As a sum up, it is to say, drafting methodology of the Hong Kong Convention may lead further discussions in the context of Flag State concept.

3.2 Roles and Responsibilities of the Flag States

Article 1 of the Hong Kong Convention imposes general obligations on State Parties as Port State, Flag State and Coastal State. In connection with the general obligations stipulated under the Article 1.1, each Party to the Hong Kong Convention undertakes to give full and complete effects to Convention’s provisions in order to prevent, reduce, minimize and, to the extent practicable, eliminate accidents, injuries and other adverse effects on human health and environment as a result of ship recycling. The purpose of the Article is to enhance ship safety, protection of human health and the environment throughout a ship’s operating life. By virtue of Article 1.4 State Parties undertake to encourage the continued development of technologies and practices which contribute to safe and environmentally sound ship recycling. In accordance with Article 1.3 Party States shall endeavour to cooperate for the purpose of effective implementation of, compliance with and enforcement of the Hong Kong Convention. Furthermore, in accordance with Article 9.1, each Party State shall cooperate in the detection of violations and the enforcement of the provisions stipulated under the Hong Kong Convention. By virtue of Article 10.1, State Parties are

obliged to regulate its national law and adopt appropriate legislative instruments to avoid any violations of the requirements of the Hong Kong Convention

By virtue of Article 4.1 each Party State shall require that ships entitled to fly its flag or operating under its authority comply with the requirements set forth under the Hong Kong Convention and shall take to the extent effective measures to ensure such compliance.

Flag States are imposed to survey and certify the ships entitled to fly its Flag. In this context, Article 5 prescribes that, each Flag State shall ensure that ships flying its flag and subject to survey and certification are surveyed and certified in accordance with the regulations in the Annex of the Hong Kong Convention.

In accordance with Article 10.1.1, Flag State has the authority and jurisdiction over the ship wherever the violation occurs. If the Flag State administration is informed of such kind of a violation by a Party State, the Flag State administration shall investigate the matter and may request the reporting Party State to furnish additional evidence of the alleged violation. If the Flag State is satisfied with the submitted evidence(s), the Flag State administration shall take appropriate proceedings as soon as possible, in accordance with its national law. The Flag State administration, then, shall promptly inform the Party State that reported the alleged violation of any action taken. If the Flag State administration has not taken any action within one year after receiving the information, the Flag State shall inform the Party that reported the alleged violation, of the reasons why no action has been taken.

By virtue of Article 12 of the Hong Kong Convention the Flag State shall report to the International Maritime Organization the below information:

- annual list of ships flying the flag of that State Party which an International Ready for Recycling Certificate has been issued;
- an annual list of ships recycled within the jurisdiction of that Party;
- information concerning violations of the Convention; and
- actions taken towards ships under the jurisdiction of that Party.

4. PORT STATES' ROLES AND RESPONSIBILITIES IN THE CONTEXT OF THE HONG KONG CONVENTION

4.1 The Evolution of International Law Instruments in the Context of the Port States' Roles and Responsibilities

Traditionally, the establishment of the maintenance of good order on high seas has based upon the concept of nationality of the ship and consequent jurisdiction of the Flag State over the ship. The Flag State responsibility has been in an evolution since the medieval ages and well established in the international law and international customary law [14], [18]. However, as a regulatory system, the Flag State responsibility has been developed by the Member States of the IMO over the past fifty years in a global legal manner [14]. In an ideal world, the Flag States would command and enforce upon their shipowners, standards of design, maintenance, operation and manning which would ensure a very high standard of safety at sea. Coastal States, along whose coasts ships sail through and Port States, at whose ports for shipping calls, would have no cause and involvement to concern themselves with the control and enforcement of such standards. Unfortunately, in the current world of shipping industry, this demonstration is beyond the realities [14].

The principal concern for an effective Flag State responsibility and regime is the will, capacity and ability of the Flag State to provide appropriate and adequate infrastructure and legal capability for the administration and the enforcement of applicable legal instruments for maritime industry [14]. Even though, the Flag State regime is well established in the customary law and incorporated into international Conventions, it is realized that the Flag State responsibility system does not work properly and ineffective cause of many reasons as follows:

- Due to economic and financial considerations, creation of flags of convenience [16],
- Ineffective national maritime administrations for monitoring ships under its control [14],
- Lack of financial resources and technical infrastructure to register and administer the ships flying its flag on a global basis and to monitor the registered ships under its national registration system [14], [16]
- Inappropriate and unqualified maritime administration personnel for inspections,
- Lack of political will and legal capacity to incorporate international legal instruments into national legal system [14],
- Delegation of Flag State's responsibilities for inspection, survey and certificate to private organizations that often do not have the capacity to carry out and conclude such kind of technical and administrative duties on behalf of the Flag State [14], [16],
- Lack of any mandatory regime for the international law-making institutions to enforce effective implementation of their legal instruments [3], [14].

All those problems have put intense pressure on the international law-making institutions to draw up a new international legal instrument for the achievement of a globally applicable and enforceable regime. In this connection, international cooperation and joint works have concluded and introduced a new legal instrument, so called '*Port State responsibility*' to achieve the ultimate purpose of international maritime safety and security regime [16].

4.2 Roles and Responsibilities of the Port States

Port State concept and Port States' responsibilities has been transferred into the Hong Kong Convention taking into account faults arising out of Flag State concept. Even though, the Port State and Coastal State maybe the same Country in some cases, a study on the Coastal State and its responsibilities is beyond the limits of this research. In this context, the coming paragraphs firstly outline the general obligations and responsibilities the Port States, then focuses on particular obligations and responsibilities of the Port States in connection with the Hong Kong Convention.

In this regard, every Port State that is Party to the Hong Kong Convention, is obliged to give full and complete effect to provisions of the Convention in order to prevent, reduce, minimize and, to the extent practicable, eliminate accidents, injuries and other adverse effects on human health and the environment as a result of ship recycling activities. By virtue of Article 1.3, Port State shall endeavour to cooperate for the purpose of effective implementation of, compliance with and enforcement of the Hong Kong Convention. Article 9.1 of the Hong Kong Convention stipulates that, Party States, including the Port State, shall cooperate in the detection of violations and the enforcement of the provisions of the Convention.

Article 8 of the Hong Kong Convention stipulates for the inspection of ships. In this context, 1st paragraph of the Article prescribes that, Port State that is a Party to the Convention is entitled to inspect a ship which the Hong Kong Convention applies, in any port or offshore terminal of that Party for the purpose of determining whether the ship is in compliance with the Convention. Such an inspection is limited to verifying that there is on board either a valid International Certificate on Inventory of Hazardous Materials or an International Ready for Recycling Certificate. However, where a ship does not carry a valid certificate or there are clear grounds for believing that:

- the condition of the ship or its equipment does not correspond substantially with the particulars of the certificate, and/or Part I of the Inventory of Hazardous Materials listed in the Appendices 1 and 2; or
- there is no procedure implemented on board the ship for the maintenance of Part I of the Inventory of Hazardous Materials listed in the Appendices 1 and 2

Port State may carry out a detailed inspection taking into account guidelines developed by the International Maritime Organization.

By virtue of Article 9.3, the Port State may take steps to warn, detain, dismiss, or exclude the ship from its port if the ship is detected to be in violation of the Hong Kong Convention. Port State shall immediately inform the Administration of the ship concerned and the International Maritime Organization about such actions.

In accordance with Article 10.2, the Port State is entitled to prohibit and establish sanctions under its law if there is any violation of the requirement of the Hong Kong Convention within the jurisdiction of the Port State. Whenever such a violation occurs, the Port State shall either:

- cause proceedings to be taken in accordance with its law; or
- furnish to the Administration of the ship such information and evidence as may be in its possession that a violation has occurred.

The sanctions provided for by the laws of the Port State shall be adequate in severity to discourage violations of the Hong Kong Convention.

Article 11.1 of the Hong Kong Convention stipulates that, Port State shall make all possible efforts to avoid a ship being unduly detained or delayed under the Article 8, 9 and 10 of the Convention. And, if the ship is unduly detained or delayed under the above-mentioned Articles of the Hong Kong Convention, it shall be entitled to compensation for any loss or damage suffered.

5. CONCLUSION REMARKS

Even though ship recycling is an integrated tier of shipping industry for such a long time, legal framework is far beyond to correspond with the expectations of industry and interested parties. The Hong Kong Convention is the very first significant step to integrate ship recycling industry into international maritime law regime. The Hong Kong Convention introduces new legal instruments for ship recycling industry to achieve an integrated management and legal system for the global shipping industry in a vertical scheme.

Together with the traditional Flag State responsibilities, the Hong Kong Convention introduces Port State's responsibilities in details as legal instrument in order to prevent, reduce, minimize and, to the extent practicable, eliminate accidents, injuries and other

adverse effects on human health and the environment caused by ship recycling activities. In this context, Port State controls are expected to prevent deficiencies arising out of Flag States control, particularly of Flag of Convenience.

Although the very new Hong Kong Convention is a significant development for the maritime safety, marine protection and occupational safety and health regimes, the Convention still has deficiencies. These deficiencies arise out of the structure of the Convention, as it lacks an integrated management system after all ship recycling process. Furthermore, the success of the Hong Kong Convention depends on the signatures of five leading ship recycling States; Bangladesh, China, India, Pakistan and Turkey. Amongst five leading ship recycling States, only Turkey has signed the Convention on 27.08.2010; however, ratification documents have not been deposited yet to the International Maritime Organization by the Turkish authorities [9]. Furthermore, aside China and Turkey, remaining Countries are either lack of national legal framework and have reservations on signing the new Convention. These issues may affect the future viability of the Hong Kong Convention; even so, it is important to note that the Hong Kong Convention will offer a significant improvement in the global maritime safety, marine environment and occupational safety and health regimes upon its coming into force.

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