

International Max Planck Research School for Maritime Affairs  
at the University of Hamburg

Urs Daniel Engels

# European Ship Recycling Regulation

Entry-Into-Force Implications  
of the Hong Kong Convention

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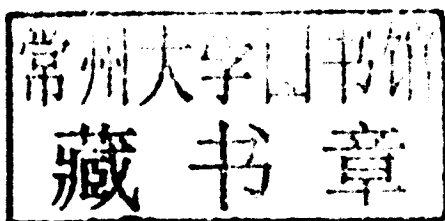


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International Max Planck Research School (IMPRS)  
for Maritime Affairs  
at the University of Hamburg

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# Hamburg Studies on Maritime Affairs

## Volume 24

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*Dedicated to K. L.*

# Preface

This study completed in early 2012 and accepted by the Bucerius Law School as doctoral dissertation is the result of research conducted during my time as a scholar of the International Max Planck Research School for Maritime Affairs (IMPRS) under the supervision of *Professor Dr. Doris König*. I am most grateful for her continuous and generous support and for being my academic mentor. I would also like to thank *Professor Dr. Peter Ehlers* for the second opinion and his continuing commitment rendering the IMPRS a truly multifaceted experience.

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Hamburg, Germany  
October 2012

Urs Daniel Engels

# Abbreviations

AG	Advocate General
A.J.I.L.	American Journal of International Law
Am. Polit. Sci. Rev.	American Political Science Review
Am. Soc'y Int'l L. Proc.	American Society of International Law Proceedings
Am. U. J. Int'l L. & Pol'y	American University Journal of International Law & Policy
Annu. Rev. Env't & Resources	Annual Review of Environment and Resources
AVR	Archiv des Völkerrechts
AWES	Association of European Shipbuilders and Shiprepairers
B. C. Int'l & Comp. L. Rev.	Boston College International & Comparative Law Review
BIMCO	The Baltic and International Maritime Council
CFI	Court of First Instance
Chi. J. Int'l L.	Chicago Journal of International Law
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Cornell Int'l L. J.	Cornell International Law Journal
Denv. J. Int'l L. & Pol'y	Denver Journal of International Law and Policy
DG TREN	Directorate-General Energy and Transport (January 2000 to February 2010)
Duke L. J.	Duke Law Journal
E. J. I. L.	European Journal of International Law
E. P. I. L.	Encyclopedia of Public International Law
EC	European Commission
ECJ	European Court of Justice



Ecology L.Q.	Ecology Law Quarterly
Econ. J.	The Economic Journal
EFTA	European Free Trade Association
ELNI Review	Review of the Environmental Law Network International
EMAS	Eco-Management and Audit Scheme
EMSA	European Maritime Safety Agency
ESM	Environmentally sound management
EuGRZ	Europäische GRUNDRECHTE-Zeitschrift
EuR	Europarecht
Eur. Econ. Rev.	European Economic Review
Eur. J. Int'l L.	European Journal of International Law
Eur. L. J.	European Law Journal
Eur. L. Rep.	European Law Reporter
FOC	Flags of convenience
FS	Festschrift
Ga. J. Int'l & Comp. L.	Georgia Journal of International & Comparative Law
Geo. L. J.	Georgetown Law Journal
Global Gov.	Global Governance
Harv. Int'l L. J.	Harvard International Law Journal
HKC	2009 Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships
HSE	Health, Safety and Environment
Hum. Rts. L. J.	Human Rights Law Journal
I.C.L.Q.	International and Comparative Law Quarterly
IILJ	International Law and Justice
ILA	International Law Association
I. L. M.	International Legal Materials
Ind. J. Global Legal Stud.	Indiana Journal of Global Legal Studies
Int'l Environmental Agreements	International Environmental Agreements
Int'l J. Marine & Coastal L.	The International Journal of Marine and Coastal Law
Int'l J. Occup. & Environ. Health	International Journal of Occupational and Environmental Health
Int'l Org.	International Organization
Int'l Rev. L. Econ.	International Review of Law and Economics
Int'l Sec.	International Security
ISO	International Organization for Standardization
ITLOS	International Tribunal for the Law of the Sea
J. E. E. P. L.	Journal for European Environmental & Planning Law
J. Econ. Lit.	Journal of Economic Literature

J. Econ. Perspect.	Journal of Economic Perspectives
J. Econ. Surveys	Journal of Economic Surveys
J. Env'tl. L.	Journal of Environmental Law
J. Int'l Econ. L.	Journal of International Economic Law
J. Int'l. L. & Int'l. Rel.	Journal of International Law & International Relations
J. Legal Stud.	The Journal of Legal Studies
J. Nat. Resources & Env'tl. L.	Journal of Natural Resources & Environmental Law
JZ	JuristenZeitung
L. J. Int'l L.	Leiden Journal of International Law
La. L. Rev.	Louisiana Law Review
MARAD	United States Department of Transportation, Maritime Administration
Mich. J. Int'l L.	Michigan Journal of International Law
M.P.E.P.I.L.	Max Planck Encyclopedia of Public International Law
N.Y.U. J. Int'l L. & Pol.	N.Y.U. Journal of International Law & Politics
Nat. Resources & Env't.	Natural Resources & Environment
Nat. Resources J.	Natural Resources Journal
NCEE	National Center for Environmental Economics
NJW	Neue juristische Wochenschrift
Nordic J. Int'l L.	Nordic Journal of International Law
NuR	Natur und Recht
N.Y.I.L.	Netherlands Yearbook of International Law
Ocean Dev. & Int'l L.	Ocean Development & International Law
OEWG	Open-ended Working Group of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
OHSAS	Occupational Health and Safety Assessment Series
Organ. Sci.	Organization Science
ÖZöRV	Österreichische Zeitschrift für öffentliches Recht und Völkerrecht
Pace Int'l L. Rev.	Pace International Law Review
Paris MoU	Paris Memorandum of Understanding
PCIJ	Permanent Court of International Justice
PIC	Prior Informed Consent
Proc. N. A. S.	Proceedings of the National Academy of Sciences of the United States of America

RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RdC	Academie de Droit International Recueil des Cours
RECIEL	Review of European Community and International Environmental Law
Rev. Econ. Stat.	The Review of Economics and Statistics
S. Cal. L. Rev.	Southern California Law Review
SAJ	Shipbuilders' Association of Japan
San Diego Int'l L. J.	San Diego International Law Journal
SchweizJIR	Schweizerisches Jahrbuch für Internationales Recht
Sing. J. Int'l & Comp. L.	Singapore Journal of International and Comparative Law
Suffolk Transnat'l L. Rev.	Suffolk Transnational Law Review
SZIER	Schweizerische Zeitschrift für Internationales und Europäisches Recht
Tex. Int'l L. J.	Texas International Law Journal
TFEU	Treaty on the Functioning of the European Union
Tul. Mar. L. J.	Tulane Maritime Law Journal
U. Chi. L. Rev.	University of Chicago Law Review
U.N.T.S.	United Nations Treaty Series
UCLA L. Rev.	University of California at Los Angeles Law Review
UNCh	United Nations Charter
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
USD	U.S. Dollar
Va. Env'tl. L. J.	Virginia Environmental Law Journal
Va. J. Int'l L.	Virginia Journal of International Law
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Vand. L. Rev.	Vanderbilt Law Review
VCLT	Vienna Convention on the Law of Treaties
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer
Widener L. Symp. J.	Widener Law Symposium Journal
WSR	Waste Shipment Regulation
Yale L. J.	Yale Law Journal
Yearbook ILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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# Introduction

‘Scrapping ships, sacrificing men’ was the title of a compelling series of articles published in the *Baltimore Sun* in 1997.<sup>1</sup> Awarded with the Pulitzer Prize, these investigative reports revealed the dark side of a little-known ‘reckless industry’, illustrated the environmental and social costs involved, and accused, among others, the U.S. Navy and Defense Department of sending its hazardous problems to South Asian beaches.

Almost 12 years later, the International Maritime Organization’s Diplomatic Conference on Ship Recycling adopted the *Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009* (Hong Kong Convention). While the convention has been slammed by environmentalists as ‘already obsolete’,<sup>2</sup> others emphasise that it strikes the right balance instead<sup>3</sup> and describe its adoption not only as a ‘good outcome’ but also herald the ‘birth of a more responsible industry’.<sup>4</sup>

Whether these assessments are valid, whether the green lobby has eventually left its mark on ship recycling,<sup>5</sup> whether entry-into-force of the convention will still take at least another 5 years,<sup>6</sup> and whether interim European Union measures are capable of sufficiently tackling the issues at stake will be analysed in this study.

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<sup>1</sup> The award-winning articles are available on the Pulitzer Prizes’ website, <<http://www.pulitzer.org/works/1998-Investigative-Reporting>> accessed 31 January 2012.

<sup>2</sup> Wallis, ‘New convention slammed for legitimising beaching of ships’, *Lloyd’s List*, 18 May 2009, at 1.

<sup>3</sup> Adamson, ‘Recycling convention strikes right balance’, *Lloyd’s List*, 21 May 2009, at 4.

<sup>4</sup> Corbett, ‘A fresh start for vessel recycling’, *Tradewinds*, 29 May 2009, at 2.

<sup>5</sup> Browne, ‘The greening of ship recycling’, *Fairplay*, 23 April 2009, at 24–25.

<sup>6</sup> Garfield, ‘Crucial rules for a global industry’, *Tradewinds*, 12 February 2010, at 26.

## A. Globalisation and International Governance

Ship recycling, as presently conducted, is inextricably linked to a trend which is commonly referred to as 'globalisation'. Basically, this term relates to the fact that due to technological improvements and societal changes the "mobility of products, capital, labour and services has strongly intensified."<sup>7</sup> Therefore, some have labelled transport "one of the [...] cornerstones of globalisation."<sup>8</sup> This development does not only have positive implications as "[t]he increasing technological possibilities provide *inter alia* for producers of waste possibilities to use economies of scale and enable them to look for the place where, for example, incineration costs (or taxes) may be the lowest. This export of environmental problems, leading effectively to a globalization of trade in pollution (more particularly waste), does not go undisputed."<sup>9</sup> Consequently, with the ship recycling business providing one example of international trade in materials which could be labelled 'waste', also the environmental and social problems caused by and related to ship recycling operations cannot be explained without a particular reference to the wider concept of globalisation.

Although the term 'globalisation' is increasingly used in all professions and aspects of life, its actual meaning is however hard to grasp.<sup>10</sup> Such problems

<sup>7</sup> Faure, 'Globalization and multi-level governance of environmental harm', in Faure/van der Walt (eds.), *Globalization and Private Law* (2010), 383, at 389.

<sup>8</sup> Hoffmann/Kumar, 'Globalisation – the Maritime Nexus', in Grammenos (ed.), *The Handbook of Maritime Economics and Business*<sup>2</sup> (2010), at 35.

<sup>9</sup> Faure, 'Globalization and multi-level governance of environmental harm', in Faure/van der Walt (eds.), *Globalization and Private Law* (2010), 383, at 389.

<sup>10</sup> Many scholars refer to 'globalisation' with specific regard to the period since the end of the Cold War; see Delbrück, 'Globalization of Law, Politics, and Markets', 1 *Ind. J. Global Legal Stud.* 9 (1993), at 9; see also Kadelbach, 'Völkerrecht und Ethos im Zeitalter der Globalisierung', in Assmann/Sethe (eds.), *Recht und Ethos im Zeitalter der Globalisierung* (2004), p. 37, 38; others have generally labelled what has been experienced after World War II in the fields of law, politics and markets a process of 'internationalisation'; cf. Neff, 'A Short History of International Law' in Evans (ed.), *International Law*<sup>2</sup> (2006), p. 29, 50: "There scarcely seemed any walk of life that was not being energetically 'internationalized' after 1945 [...]"; Delbrück, however, explicitly warns about confusing the concept of globalisation with internationalisation: "Internationalization refers to cooperative activities of national actors on a level beyond the nation state but in the last resort under its control. Globalization is of a different kind. It is a multifaceted phenomenon that escapes easy definition. [...] globalization has been fully recognized as a specific feature of international relations, which impacts the political, economic, ecological, social and cultural life of societies around the globe in an unprecedented manner.", Delbrück, 'Structural Changes in the International System and its Legal Order: International Law in the Era of Globalisation', 11 *SZIER* 1 (2001), at 13, 14; cf. Kiss, 'Economic Globalization and the Common Concern of Humanity', in Kiss/Shelton/Ishibashi (eds.), *Economic Globalization and Compliance with International Environmental Agreements* (2003), p. 3: "'Globalization' [...] refers to the interconnections and consequent interdependence of peoples and governments throughout the world."; cf. also Shelton, 'The Impact of Economic Globalization on Compliance', in Kiss/Shelton/Ishibashi (eds.), *Economic Globalization and Compliance with International Environmental Agreements* (2003), p. 35: "Globalization is often characterized as 'the intensification of economic, political, social and cultural

notwithstanding, the concept of globalisation—as understood here—refers to an indistinct, but at the same time breath-taking process of primarily economic, but also political, environmental and ultimately psychological internationalisation characterised by

[...] an increase of transnational actors with political negotiation power, global threats, challenges beyond the capacity of states to regulate, and far-reaching changes in societal and political interaction.<sup>11</sup>

With regard to its economic implications, globalisation encompasses the growing influence of large, multi-national organisations and their shifting focus on competition in local and national markets to global fora.<sup>12</sup> This notion is accompanied by a large number of negative repercussions including job losses in industrialised countries as well as the (alleged) promotion of social injustice and contribution to workers' exploitation in the less industrialised world.<sup>13</sup> In a political sense, the term refers to a shift of autonomy, responsibility and potentially sovereignty from states' to the international or transnational level,<sup>14</sup> involving more and more non-state actors.<sup>15</sup> Regarding the environmental impact of globalisation, the industrial revolution and subsequent technical developments have transformed environmental

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relations across borders'"; Berman, 'From International Law to Law and Globalisation', 43 *Colum. J. Transnat'l L.* 485 (2005), at 552: "[...] the intensification of global interconnectedness, in which capital, people, commodities, images, and ideologies move across distance and physical boundaries with increasing speed and frequency".

<sup>11</sup> Hobe, 'The Era of Globalisation as a Challenge to International Law', 40 *Duq. L. Rev.* 655 (2002), at 656; see also Dicke, 'Erscheinungsformen und Wirkungen von Globalisierung auf universaler und regionaler Ebene sowie gegenläufige Renationalisierungstendenzen', 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* 13 (2000), at 21; Delbrück agrees in that one typical element of globalisation is its global effects transcending the control capacity of the nation-state, see Delbrück, 'Structural Changes in the International System and its Legal Order: International Law in the Era of Globalisation', 11 *SZIER* 1 (2001), at 31; see also Shelton, 'The Impact of Economic Globalization on Compliance', in Kiss/Shelton/Ishibashi (eds.), *Economic Globalization and Compliance with International Environmental Agreements* (2003), 35, at 35–39.

<sup>12</sup> Shelton, 'The Impact of Economic Globalization on Compliance', in Kiss/Shelton/Ishibashi (eds.), *Economic Globalization and Compliance with International Environmental Agreements* (2003), p. 35, 36; in this context, see also Basedow, 'The Effects of Globalization on Private International Law', in Basedow/Kono (eds.), *Legal Aspects of Globalization* (2000), p. 1, 2–4; Hauschka, 'Internationalisierung der Wirtschaft und ordoliberales Rechtsdenken', 21 *Rechtstheorie* 374 (1990), at 378–380.

<sup>13</sup> Kaufmann, *Globalisation and Labour Rights* (2007), at 8–10.

<sup>14</sup> Shelton, 'The Impact of Economic Globalization on Compliance', in Kiss/Shelton/Ishibashi (eds.), *Economic Globalization and Compliance with International Environmental Agreements* (2003), p. 35, 37–38; see also Kunugi, 'Challenges Posed by Globalization and Synergistic Responses: Multilateral Institutions in Transition', in Kiss/Shelton/Ishibashi (eds.), *Economic Globalization and Compliance with International Environmental Agreements* (2003), p. 13, 28–29; cf. Kadelbach, 'Völkerrecht und Ethos im Zeitalter der Globalisierung', in Assmann/Sethe (eds.), *Recht und Ethos im Zeitalter der Globalisierung* (2004), p. 37, 40–41.

<sup>15</sup> For a thorough analysis of the past involvement of non-governmental organisations in international governance, see Charnovitz, 'Two Centuries of Participation: NGOs and International Governance', 18 *Mich. J. Int'l L.* 183–286 (1997).



pollution issues from a local and regional problem to an increasingly international concern. Furthermore, relocation of industries has led to an externalisation of the environmental costs of production,<sup>16</sup> i.e. a separation of the benefits derived from a good on the one side from the associated environmental costs on the other.<sup>17</sup> However, environmental globalisation has also witnessed a huge expansion of the international environmental framework. The adoption of the Hong Kong Convention provides but one example. Such specific developments, among many others, have ultimately facilitated a global psychological vision of interdependency, borderless mobility and openness which carries both opportunities<sup>18</sup> and threats<sup>19</sup> for humanity.<sup>20</sup>

One of the decisive preconditions of this process, apart from the industrial revolution and new information technologies, was a change both in the attitude of states towards each other as well as within the international society itself. Whereas states were supposed to be the only relevant actors on the international stage in the early days of modern international law, they began to realise in the late nineteenth century that they not only had to make room for several other performers, but also had to reconsider their own status.<sup>21</sup> Consequently, the international law of states

<sup>16</sup> European Commission, 'Green Paper on better ship dismantling, EU-doc. COM(2007) 269, at 7; see also Rousmaniere/Raj, 'Shipbreaking in the Developing World: Problems and Prospects', 13 (4) *Int'l J. Occup. & Environ. Health* 359 (2007), at 359.

<sup>17</sup> Yang/Percival, 'The Emergence of Global Environmental Law', 36 *Ecology L.Q.* 615 (2009), at 641–642; for further information on trade of waste and hazardous substances being a rather bizarre example for such an externalisation, see Redgwell, 'Regulating Trade in Dangerous Substances: Prior Informed Consent under the 1998 Rotterdam Convention', in Kiss/Shelton/Ishibashi (eds.), *Economic Globalization and Compliance with International Environmental Agreements* (2003), pp. 75–88.

<sup>18</sup> Hobe recognises quite strong indications for a paradigm change from an international law of cooperation to an international law of the globalised world: Hobe, 'Die Zukunft des Völkerrechts im Zeitalter der Globalisierung', 37 *Archiv des Völkerrechts* 253 (1999), at 279; see also Raskin, *Great Transition* (2002), who predicts a global hierarchy of institutions replacing the existing system of sovereign states as the primary international political community in the future; in this context, see Aman, 'The Limits of Globalization and the Future of Administrative Law: From Government to Governance', 8 *Ind. J. Global Legal Stud.* 379 (2001), at 389; Baylis/Smith/Owens, *The globalization of world politics*<sup>4</sup> (2008), at 7: "A globalised world is one in which political, economic, cultural, and social events become more and more interconnected [...] the world seems to be 'shrinking', and people are increasingly aware of this".

<sup>19</sup> Cf. Kunugi, 'Challenges Posed by Globalization and Synergistic Responses: Multilateral Institutions in Transition', in Kiss/Shelton/Ishibashi (eds.), *Economic Globalization and Compliance with International Environmental Agreements* (2003), p. 13: "[...] the view is widely shared that it [globalisation] generates serious threats to the global ecosystems, economic and social stability and human security"; cf. also Kadelbach, 'Völkerrecht und Ethos im Zeitalter der Globalisierung', in Assmann/Sethe (eds.), *Recht und Ethos im Zeitalter der Globalisierung* (2004), p. 37, 38–39; Kaufmann, *Globalisation and Labour Rights* (2007), at 7–8.

<sup>20</sup> Cf. UN GA, *Globalization and its Impact on the Full Enjoyment of all Human Rights*, UN-doc. A/55/342 (31 August 2000).

<sup>21</sup> Delbrück, 'Structural Changes in the International System and its Legal Order: International Law in the Era of Globalisation', 11 *SZIER* 1 (2001), at 13.