

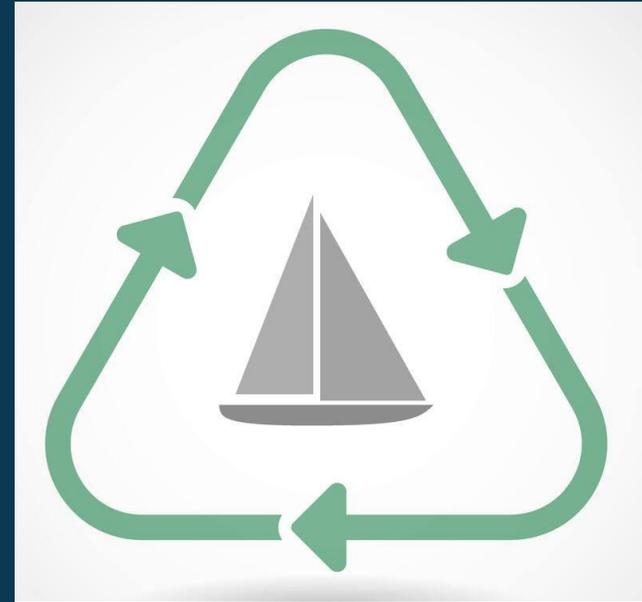
# The legal matrix of ship recycling anno 2020

*The impact of the Basel Ban Amendment on the legality of Regulation (EU) No 1057/2013 on ship recycling*

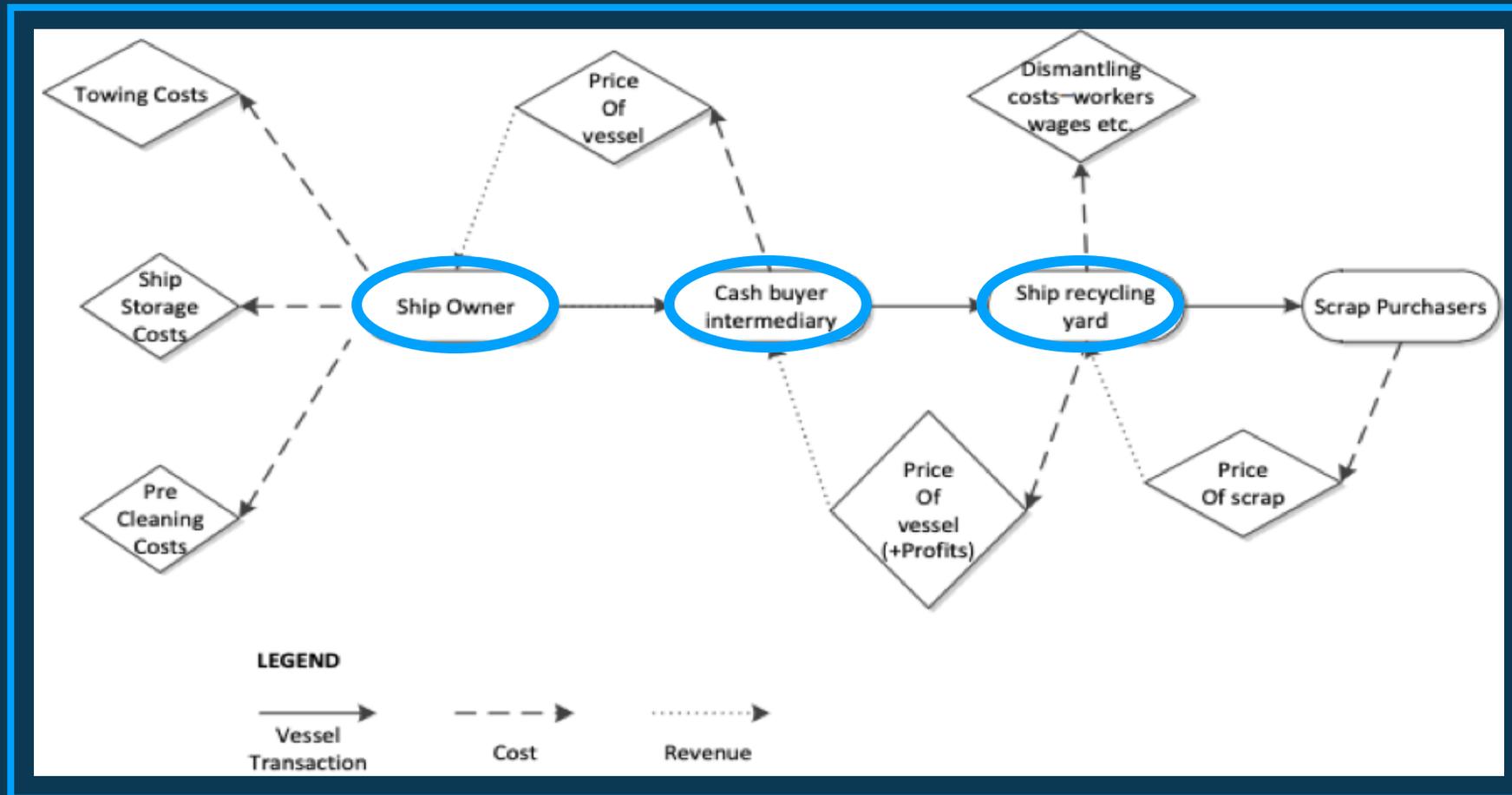
*by Ingvild K. Hoel*

# Overview

- Introduction to the world of ship recycling and the legal landscape
- Legal analysis
- The way forward



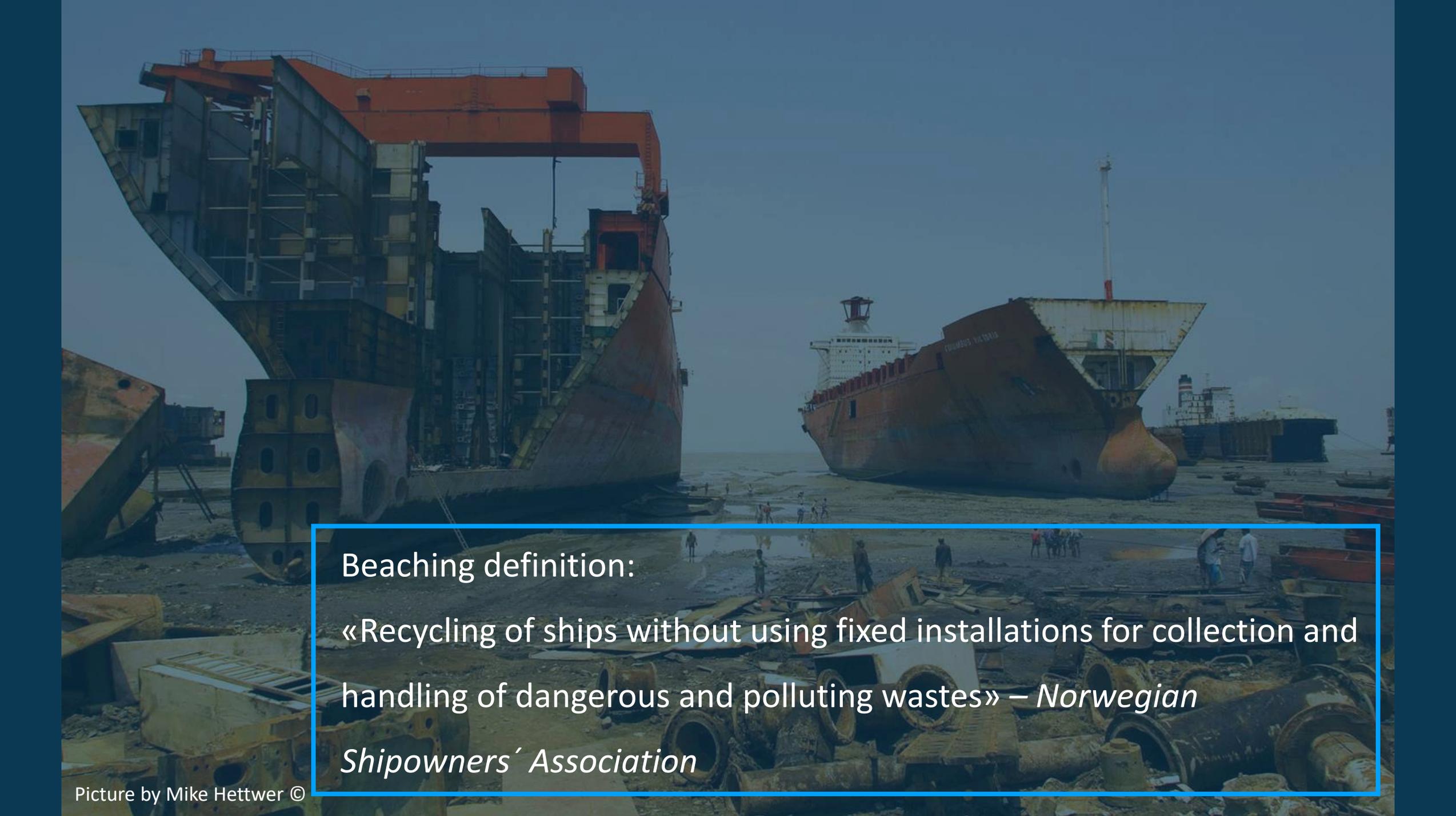
# Transactions and cash flows in ship recycling



M. Ahuja, "Driving Sustainable Ship Recycling: A Case Study of the Container Shipping Industry (Master thesis)," p. 38, NTNU Norwegian University of Science and Technology, 2012.

# Ship recycling statistics

- Ship recycling totalled 18.9 million gross tonnage (GT) in 2018.
- 89,9% of ships recycled got 'beached', equalling 17 million GT.
- Beaching mainly occurs on the beaches of India, Pakistan and Bangladesh.

A large ship is being dismantled on a beach. A massive red crane is positioned over the ship's hull, which is being lifted or moved. The ship's name, "FRANÇOIS MARTEL", is visible on the side. The beach is covered with debris, including large metal pipes and other ship parts. Several people are visible in the distance, some standing near the water's edge. The sky is overcast.

Beaching definition:

«Recycling of ships without using fixed installations for collection and handling of dangerous and polluting wastes» – *Norwegian*

*Shipowners' Association*

# Hazardous materials in ships

**Table 3.1. Amount of hazardous material per million GT on merchant and navy vessels**

Hazardous Material	Unit	Merchant Vessels**		Navy Vessel**	
		Material/ million GT	Panamax tanker 40,000 GT	Material/ million LDT	Destroyer class 5,000 LDT
<b>Asbestos</b>	ton	510	20	17,000	86
<b>PCBs</b>					
PCB liquids (transformers, etc.)	kg	0	0	No info.	available
PCB solids (capacitors, ballasts, etc.)*	kg	1.7	0.07	5,500	28
<b>Hydraulic oil</b>	ton	110	5.0	1,600	8.0
<b>Ozone-depleting substances (ODS)</b>					
ODS liquids (CFC, Halons, etc.)	ton	7.0	0.3	No info.	available
ODS solids (e.g., polyurethane (PU))	ton	1,800	70	No info.	available
<b>Paints</b>					
Paints no info	ton	420	17	39,000	200
Paints containing tributyltin (TBT)	ton	14	0.56	No info.	available
Paints containing PCBs	ton	No info.	available	No info.	available
Paints containing metals	ton	No info.	available	25,500	130
<b>Heavy metals</b>					
Cadmium (merchant); lead (naval)	ton	1.9	0.08	34	0.17
Mercury	kg	44	1.8	75	0.38
<b>Radioactive substances</b>	kg	No info.	available	No info.	available
<b>Waste liquids organic</b>	m <sup>3</sup>	5,650	230	1,900	9.0
<b>Reusable liquids organic (HFO, diesel)</b>	ton	3,200	130	23,000	110
<b>Miscellaneous</b>					
Ballast water (C-34)	ton	60,000	2,400	280,000	1,400
Sewage (C-35)	m <sup>3</sup>	660	26	No info.	available
Garbage (C-42)	ton	2.3	0.09	No info.	available
Incinerator ash (C-41)	ton	1.9	0.08	No info.	available
Oily rags (C-45)	ton	3.1	0.12	No info.	available
Batteries nickel/ cadmium	units	170	7.0	No info.	available
<b>Waste liquids inorganic (acids)</b>	m <sup>3</sup>	0.28	0.01	430	2.0
<b>Reusable liquids organic (other)</b>	m <sup>3</sup>	620	25	1,500	7.0
<b>Equipment</b>					
Batteries lead (C46)	ton	2.2	0.09	34,000	170

\*Merchant vessel does not estimate PCBs in cables due to lack of data.

\*\*For both categories an example is given for a typical-size vessel. The underlying IHM datasets include 14 merchant and 13 navy vessels.

\*\*All figures are rounded to two significant figures.

# Estimation of accumulated hazardous wastes amounts between 2010-2030

Hazardous material	Unit	Bangladesh**	Pakistan**
Asbestos	ton	79,000 (62,000)	5,200 (11,700)
PCB*** (mainly in cables)	ton	240,000 (192,000)	16,000 (36,000)
ODS (mainly in PU foam)	ton	210,000 (168,000)	14,000 (32,000)
Paints (metals, TBT, and PCB)	ton	69,200 (59,800)	4,550 (102,000)
Heavy metals****	ton	678 (542)	45 (101)
Waste liquid organic	m <sup>3</sup>	1,980,000 (1,580,000)	130,000 (292,000)
Miscellaneous (mainly sewage)	m <sup>3</sup>	107,000 (85,600)	7,000 (15,700)
Waste liquids, inorganic (acids)	ton	775 (620)	51 (115)
Reusable liquids, organic	ton	675,000 (540,000)	44,200 (99,500)

M. Sarraf, F. Stuer-Lauridsen, M. Dyoulgerov, R. Bloch, S. Wingfield and R. Watkinson, "The Ship Breaking and Recycling Industry in Bangladesh and Pakistan," p. 5, The World Bank, 2010.

# The ship recycling countries' conflict of interest

- Employ 225 000 in ship recycling and ancillary operations (2019 estimation)
- Ship recycling provide 80-90% of Bangladesh steel supply.
- Circular economy: on average, 1.9 tonnes of carbon is emitted per tonne of steel produced.
- 5-12 billion Pakistani Rupees (€25 143 419 – 60 368 551) in taxes annually.

- 400 deaths at shipbreaking yards since 2009.
- In Bangladesh: Asbestosis in 35% of workers, 20 years shorter life expectancy for shipbreaker than the average population,
- 80% reported eye-, lung-, gastrointestinal- and musculoskeletal-related symptoms.
- Approximately 13% of the ship breaking workforce is made up by child labour.
- Significant pollution of the marine environment in the vicinity of beaching areas.

## Transparency International corruption index:

- India 80/198
- Pakistan 120/198
- Bangladesh 140/198

# The legal matrix of ship recycling

## Waste shipment legislation:

- The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989)
- Regulation (EC) No 1013/2006 on Shipments of Wastes («EWSR»)

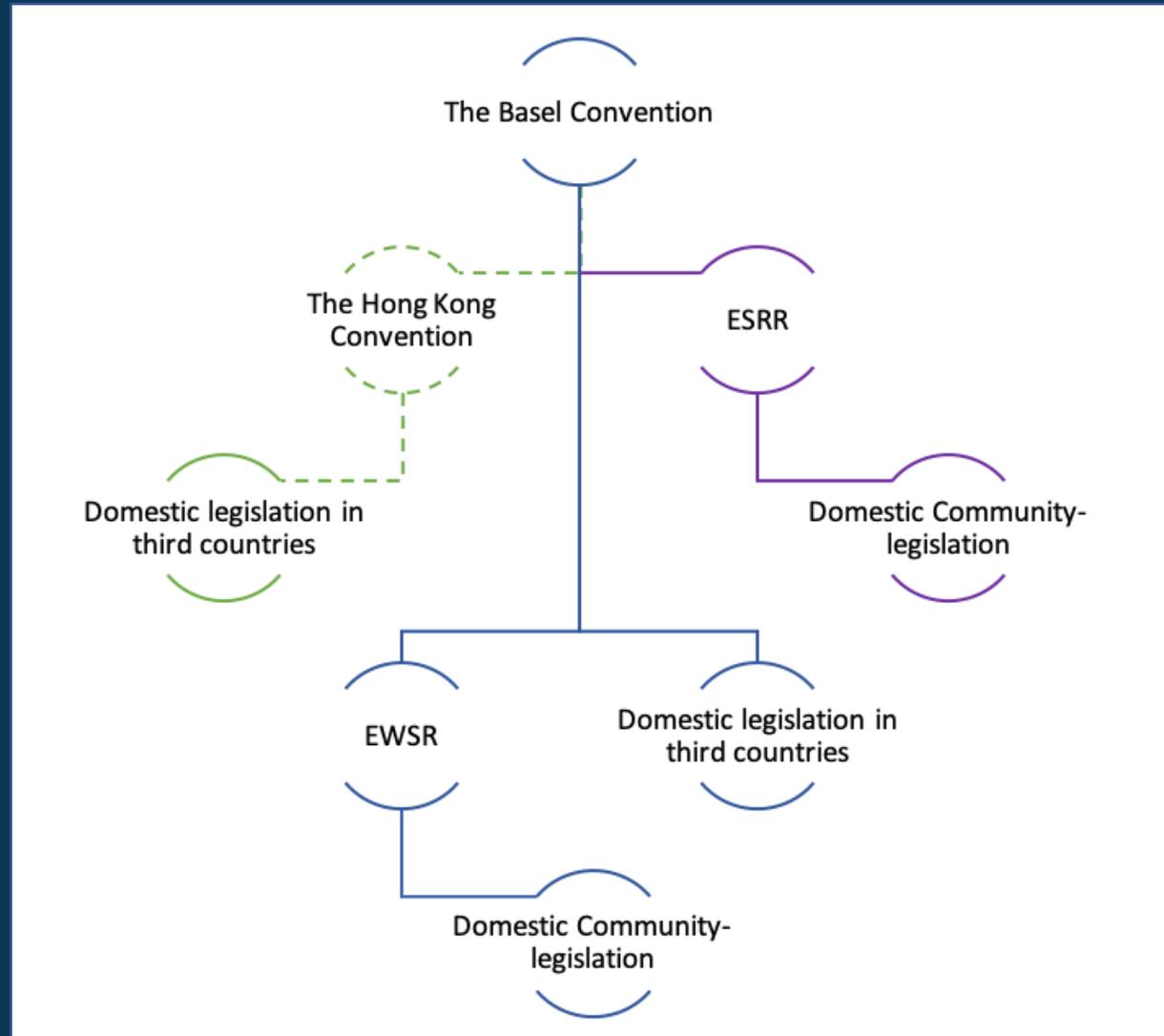
## Ship recycling legislation:

- The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (2009)
- Regulation (EU) No 1057/2013 on Ship Recycling («ESRR»)

# Vienna Convention on the Law of Treaties, 1969/86

- VCLT art. 26: «*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*».
  - Case 104/81 (1982), ECR-3641 para. 18 ; Case C-61/94 (1996) I-3989 para. 30.

# The legal matrix



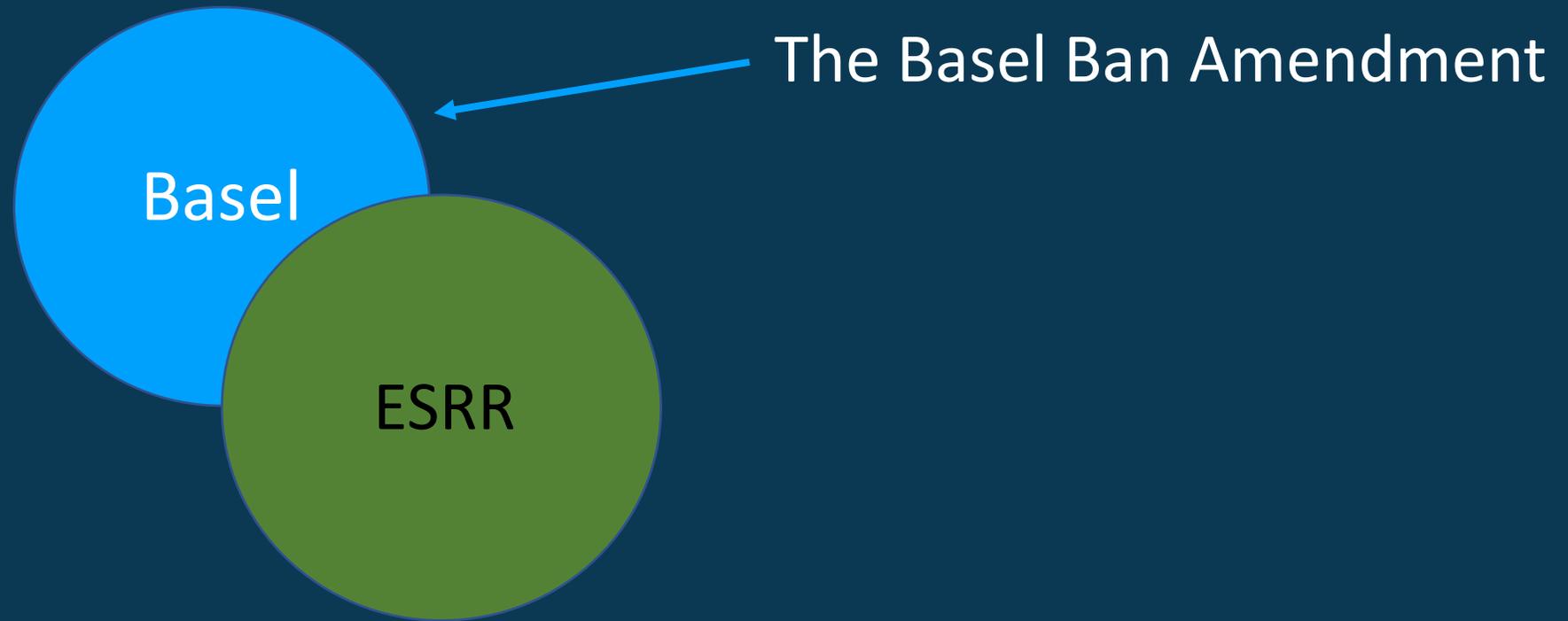
# The Basel Ban Amendment

- The Basel Ban Amendment entered into force the 5<sup>th</sup> of December 2019.
- Basel art. 4A(2): *«Each Party listed in Annex VII shall [...] prohibit [...] all transboundary movements of hazardous wastes under Article 1(1)(a) of the Convention which are destined for operations according to Annex IV B to States not listed in Annex VII [...]»*

# The Basel Ban Amendment

- Contra ESRR art. 15 cf. Art. 13:
  - Community facilities shall be authorised and added to the EU-list if they are compliant with the requirements of article 13, while facilities in «*third countries*» may apply for inclusion.
  - The ESRR makes no reservation for applications from facilities in non-OECD+ countries, and so the text of the Regulation allow for export of end-of-life ships to non-OECD+ countries, insofar as the destination-facility meet the criteria in article 15.

# The legal matrix



# The legal matrix

- Basel art. 26: «*no reservation or exception may be made to this Convention*».

# Article 11

«Notwithstanding the provisions of article 4 paragraph 5, Parties may enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes [...] with Parties or non-Parties provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes [...] required by this Convention. These agreements [...] shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries»

# Article 11 criteria

- «[...] agreements or arrangements [...]»
- «[...] regarding transboundary movement [...]»
- «[...] provided that such agreements [...] do not derogate from the environmentally sound management of hazardous wastes [...] required by this Convention.»
- «[...] provisions which are not less environmentally sound [...]»

We will only focus on the criterion «*do not derogate*».

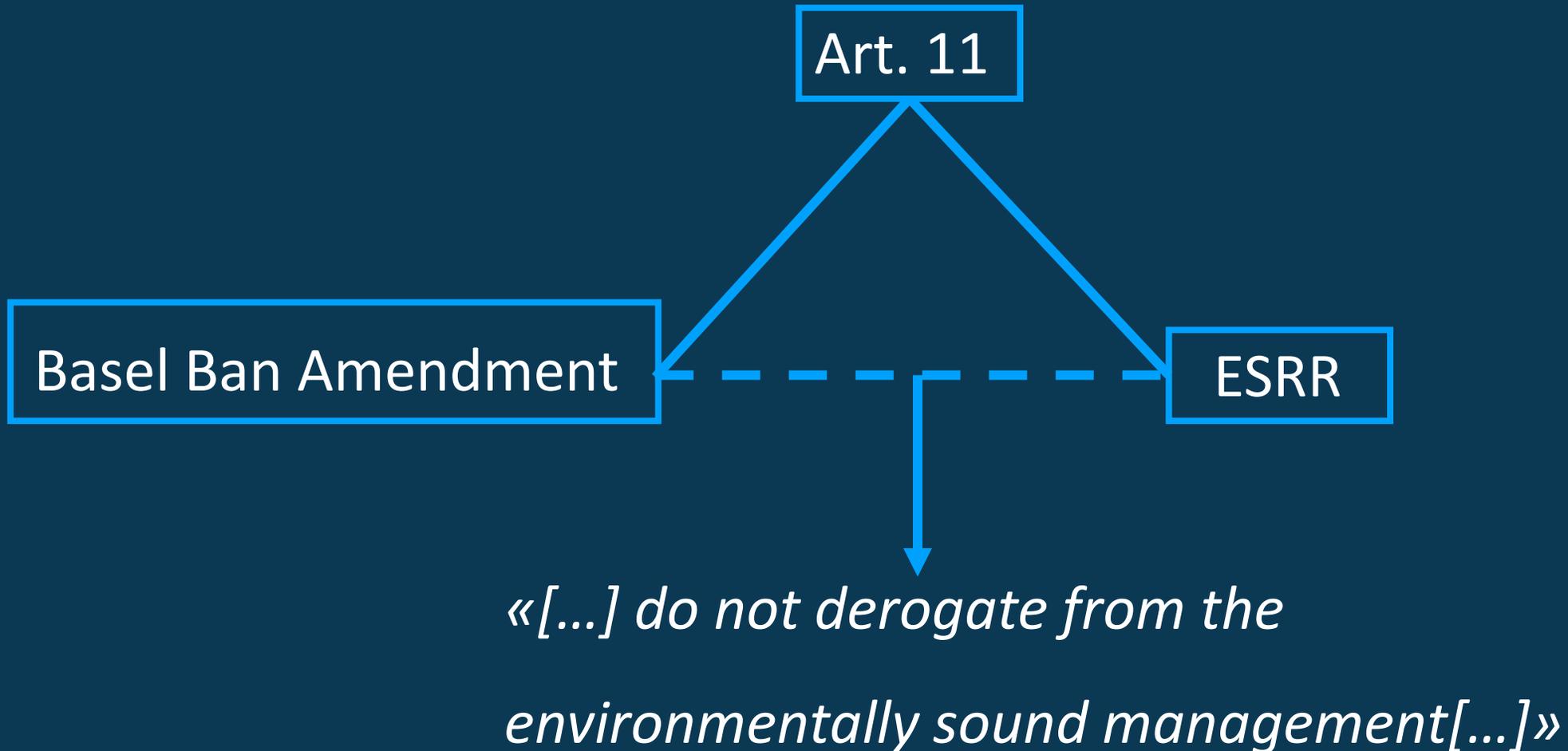
# VCLT Treaty interpretation

Art. 31(1): «*in accordance with [...] **the ordinary meaning** to be given to the terms of the **treaty in their context and in light of its object and purpose**»*

Art. 31(3)(b): «*[...] **any subsequent practice** in the application of the treaty which establishes the agreement of the parties regarding its interpretation*»

Art. 32(a): «*[...] **the circumstances of its conclusion**» where the initial interpretation «leaves the meaning ambiguous»*

# Article 11 analysis



# Article 11 analysis

**Any subsequent practice** in the application of the treaty which establishes the agreement of the parties regarding its interpretation...

Conference of the Parties:  
*«Equivalent level of control and enforcement»*

*«Equivalent level of control»* cf. 7<sup>th</sup> CoP Decision VII/26; 8<sup>th</sup> CoP Decision VIII/11; 9<sup>th</sup> CoP Decision IX/30; 10<sup>th</sup> CoP Decision X/17; *«A level of control and enforcement equivalent to that provided under the Basel Convention»*, cf. 11<sup>th</sup> CoP deliberation, pt. 2 p. 21.

# Article 11 analysis conclusion

The arrangement would «*derogate*» from the Conventions' Ban Amendment in every «*ordinary meaning*» of the term, and is therefore unable to fulfil the criteria of article 11. As the article is inapplicable in relation to the Ban Amendment, no additional equivalency-assessment can be made. The text of the treaty does not allow for the creation of an arrangement that circumvent the Ban Amendment and indeed the EU themselves deemed such an arrangement to be «*unacceptable from a legal point of view*». The conclusion is that article 11 cannot be applied in relation to the Ban Amendment.

# Equivalent level of control and enforcement

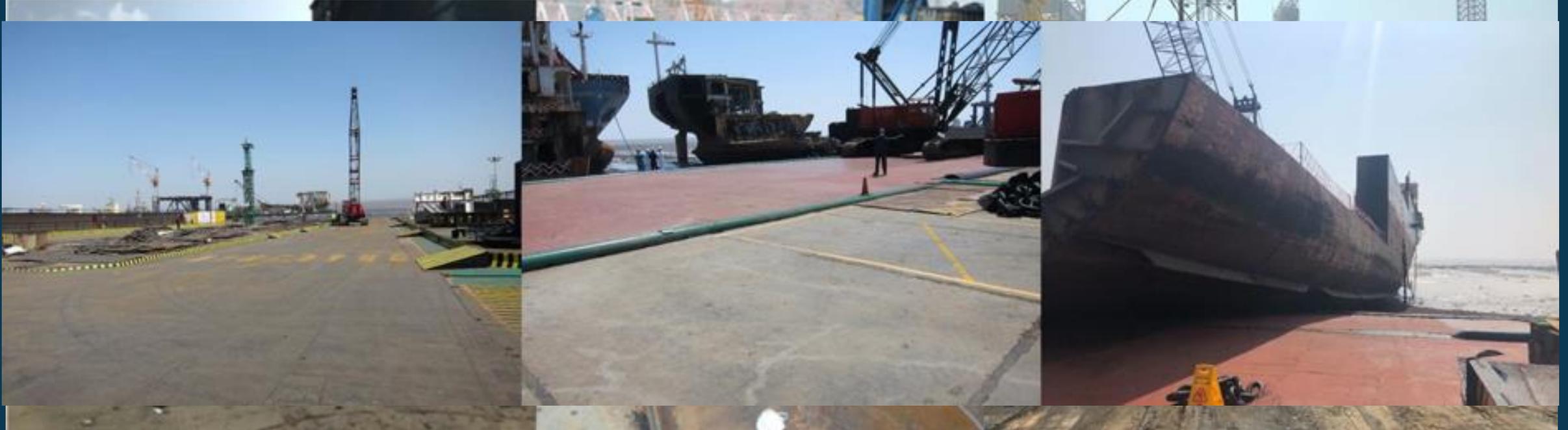
## Basel Ban Amendment

- Ban is safeguarded by the PIC-procedure require written consent from country of export and import. Tacit approval only for transit countries.
- Wide access to intervene with a shipment upon suspicion of unsound management.
- Meet imminent threats with takeback obligation.
- Criminalisation of illegal traffic.

## ESRR

- No PIC-procedure, only certificates.
- Acceptance of tacit approval of ship-specific recycling plan.
- Limited access to intervene, cf. Directive 2009/16/EC; ESRR art. 11(1)-(3).
- No takeback-obligation, only possible to request «*action*» from the Commission.
- Illegal traffic decriminalised – removed from the Environmental Crime Directive. Preamble recommend «*civil or administrative nature*».

# The way forward



# Contact



Linkedin:

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Master thesis ([bora.uib.no](https://bora.uib.no)):

The legal matrix of ship recycling anno  
2020: The impact of international legal  
developments on the legality of EU  
Regulations