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THE BLUE LADY CASE AND THE INTERNATIONAL ISSUE OF SHIP DISMANTLING

Florent Pelsy

COMMENT



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## COMMENT

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## INTRODUCTION

Alang, situated in Gujarat, on the West coast of India is the biggest ship-recycling site in the world. Two hundred end-of-life ships from all over the world are scrapped there every year.<sup>1</sup> This industry is a great source of revenue for the State of Gujarat. It provides steel to the growing Indian economy and direct and indirect employment to around 40,000 people.<sup>2</sup>

However, the dismantling industry in Alang has been strongly criticised since it is polluting the environment and it is highly hazardous to the health of the workers and the communities living around it.<sup>3</sup> Indeed, most of the ships that are dismantled on the beach of Alang still contain hazardous wastes such as PCB's and asbestos and safety and environmental standards are very poor in the ship dismantling plots.

The ship dismantling industry in Alang is in fierce competition with the ship-scrapping sites in Bangladesh and Pakistan. The economic activity in Alang is dramatically decreasing. One of the reasons of the slow down of the activity in Alang is that India imposes certifications which ensure that the oil tankers are free of gas residues before they are scrapped, while Bangladesh does not enforce such obligations.<sup>4</sup> Therefore, oil tankers moved out of Indian yards. Furthermore, the return of the *Clemenceau* also had a negative impact on the activity of the scrapping industry in Alang.<sup>5</sup>

In such context, the *Blue Lady* (ex-France) which has been sold to an Indian dismantling company was seen as a great opportunity to revive the economic activity of Alang. However, ship dismantling companies in India do not have the capacities to remove the hazardous wastes it contains in a safe and environmentally friendly manner. Several NGOs pointed out that issue, and filed a petition in the Supreme Court of India under the Public Interest Litigation procedure in order to prevent the dismantling of the *Blue Lady* in Alang.

In a highly controversial decision, the Supreme Court decided to allow the dismantling of the *Blue Lady*. This article strongly criticises the Supreme Court of India's decision that prioritises the commercial interest of the dismantling companies over the social and environmental concerns of the workers and the communities living in Alang. It also analyses the *Blue Lady* case from an international perspective. It provides an overview of the Basel Convention on ship dismantling issues and a study of the *Clemenceau* case before the French Conseil d'Etat. It then concludes that a better control of end-of-life ships in OECD countries and a new international convention on ship dismantling would be necessary in order to prevent environmental and social disasters in Alang.

# 1

## THE PRO- ECONOMIC APPROACH OF THE COURT IN THE BLUE LADY DECISION

### 1.1 The Blue Lady Decision in Context

#### 1.1.1 *The Ship-breaking Industry in Alang*

Following a public interest petition on the question of import of hazardous wastes filed by the Research Foundation for Science, Technology and Natural Resource Policy in 1995, the Court constituted the High Powered Committee on Management of Hazardous Wastes (hereinafter referred to as HPC) in order to investigate that issue in India. One of

1 Government of India, Report of the High Powered Committee on Management of Hazardous Waste, available at [http://envfor.nic.in/cpcb/hpcreport/chapter\\_3.htm#3.3.4%20Shipbreaking%20activities%20and%20hazardous%20wastes](http://envfor.nic.in/cpcb/hpcreport/chapter_3.htm#3.3.4%20Shipbreaking%20activities%20and%20hazardous%20wastes).

2 *Id.*

3 Judith Kanthak and Nityanand Jayaraman, *Steel and Toxic Wastes for Asia: Finding of a Greenpeace Study on Workplace and Environmental Contamination in Alang-Sosiya Ship-breaking Yards, Gujarat, India* (Hamburg: Greenpeace, 2001), available at <http://www.ban.org/Library/ALANG%202000%20final.pdf>.

4 See Anonymous, *Shipbreaking*, available at <http://www.greenpeace.org/india/campaigns/toxics-free-future/ship-breaking>.

5 'L'Inde Donne son Feu Vert au Démantèlement de l'Ex-Paquebot France', *Le Monde*, 11 Septembre 2007. Available at [http://www.lemonde.fr/cgi-bin/ACHATS/acheter.cgi?offre=ARCHIVES&type\\_item=ART\\_ARCH\\_30J&objet\\_id=1004412](http://www.lemonde.fr/cgi-bin/ACHATS/acheter.cgi?offre=ARCHIVES&type_item=ART_ARCH_30J&objet_id=1004412).

the commitments of the HPC was to make a report on the ship-breaking industry in Alang. According to the report, the ship-breaking industry accommodates 182 plots spread along ten kilometres of the sea coast of Alang, which makes this site the largest ship-breaking yard in the world.<sup>6</sup>

The report stated that the Alang ship-breaking industry generated around two million tonnes of re-rollable steel per annum and it provided employment to around 40,000 people in direct and indirect ways.<sup>7</sup> The report also underlined that around 200 ships were broken up every year.<sup>8</sup> However, the High Powered Committee pointed out that, throughout its investigation, the site was highly polluted and observed for example that during the breaking process various solid wastes some of which were hazardous and highly toxic such as asbestos sheets, ropes and insulation were generated.<sup>9</sup>

The HPC also mentioned that some ships might have been contaminated with radio-active materials.<sup>10</sup> The HPC underlined that gases such as ammonia, chlorofluorocarbons from the air conditioning system and inflammable gases may be present in the dismantled pipelines of oil tankers.<sup>11</sup> Furthermore, the Committee observed that there was considerable and environmentally unsound disposal of solid waste all over the beach. According to the report, hazardous wastes generated by the ship-breaking industry 'are not handled as per the laws and guidelines on ship-breaking in force'.<sup>12</sup>

Finally, the report underlined that this activity was highly hazardous to the health of the workers. Indeed it mentioned that approximately five tonnes of asbestos are generated from the dismantling of every vessel and workmen are hardly equipped to handle such toxic material. It also pointed out that the rate of industrial accidents in Alang was dramatically high since an average of up to 40 deaths has been reported every year.<sup>13</sup>

A study conducted by Greenpeace on workplace and environmental contamination in Alang showed that the ship-breaking industry was highly polluted and hazardous for the workers and the communities living around Alang. Greenpeace study confirmed the presence of asbestos dust in the workplace, living quarters and public areas, including the hinterland around Alang.<sup>14</sup> They also underlined the presence of heavy metals, dangerous levels of organotins (aggressive pollutant which is used in anti-fouling ship paints since 70's), and cancer causing poly aromatic hydrocarbons.<sup>15</sup> Moreover, the Greenpeace report pointed out that the level of pollutants in the soils and sediments in and around Alang was high enough to classify those soils and sediments as hazardous wastes.<sup>16</sup> Finally, Greenpeace stated that every fourth worker in Alang, because of the lack of safeguards in handling hazardous material, is expected to contract cancer.<sup>17</sup>

Therefore, workers that are mostly illiterate and migrants and earn as little as 2.50 dollars a day are putting their lives in danger and are slowly dying because of the lack of infrastructure to decontaminate ships in a safe and environmentally sound manner.

### *1.1.2 The Actual Economic Context in Alang*

The ship dismantling industry in Alang is competing with China, Pakistan, and Bangladesh. This fierce competition is creating environmental and social dumping. The ship-owners who have decided to end the economic life of a vessel, therefore, try to find a cash buyer that will accept to buy a ship not decontaminated and at the highest price.<sup>18</sup> Such conditions have a direct influence on the working and environmental conditions of the workers. For example, the Indian legislation imposes certifications which ensure that the oil tankers are free of gas residues before they are scrapped while Bangladesh

6 See Government of India, note 1 above.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 See Kanthak and Jayaraman, note 3 above.

15 *Id.*

16 *Id.*

17 *Id.*

18 The Commission of the European Communities, Green Paper on Better Ship Dismantling (Brussels: The Commission of the European Communities, 2007).

does not enforce such obligation. Therefore, oil tankers moved out of Indian yards.<sup>19</sup>

Due to this fierce competition, the activity of ship-breaking in Alang is dramatically decreasing. One of the main owners of the ship dismantling industry in Alang mentioned in a French newspaper that the industry was in agony.<sup>20</sup> The return of the French Warship, the Clemenceau, to France has also had a negative and important economic impact on the ship dismantling industry in Alang. Thereafter, the Blue Lady (ex France) was welcomed by the ship dismantling industry as a new opportunity to foster the development of Alang even though it was considered to be full of asbestos and toxic wastes.

### 1.1.3 The Blue Lady Itinerary

In 2003, a boiler explosion on the SS Norway (former name of the Blue Lady) killed seven of its crew and injured seventeen in the port of Miami. The ship was towed to Germany, left German waters in May 2005, and docked in Malaysia to become a floating hotel. It then went to Dubai and then towards Bangladesh where it was refused entry by the Bangladeshi Government (because of the hazardous waste it contained). It then moved towards the ship dismantling site of Alang in May 2006, but an application in the Supreme Court of India prevented it from entering Indian waters. Because of the monsoon, the owner of the ship at that time, pleaded humanitarian grounds and the Court permitted anchorage at Pipavav port near Alang, 25 days after being anchored, it was beached at Alang breaching the order of the Supreme Court that only permitted its anchorage. Throughout this itinerary, the Norwegian Cruise Line sold the ship to Bridgend Shipping of Monrovia for scrapping. It was then sold to Haryana Ship Demolition Pvt. Ltd, which finally sold it to its current owner Priya Blue Industries Pvt. Ltd, a ship dismantling company in Alang. Such a practice is commonly used by European ship-owners in order to avoid their obligation to decontaminate ships before they send it for scrapping.<sup>21</sup>

<sup>19</sup> See Anonymous, note 4 above.

<sup>20</sup> See note 5 above.

<sup>21</sup> Lyla Bavadam, 'Shipload of Trouble', *Frontline*, 16 November 2007.

## 1.2 The Decision of the Supreme Court on the Blue Lady

### 1.2.1 The Report of the Committee of Technical Experts

A public interest litigation challenging the import of hazardous wastes into the country was filed in 1995 in the Supreme Court of India by the Research Foundation for Science, Technology and Natural Resource Policy. The petition provided that 'the import of hazardous/toxic wastes endangering the environment and life of the people of India is unconstitutional'.<sup>22</sup>

It is under this writ petition, that in September 2007 the Supreme Court of India granted the permission to dismantle the Blue Lady at Alang.<sup>23</sup> The Supreme Court ordered the constitution of a Committee of Technical Experts (hereinafter referred to as CTE) whose task was 'to find out whether the infrastructure as existing at Alang presently is adequate'<sup>24</sup> in order to dismantle the Blue Lady. The Supreme Court of India specifically asked the Committee to review three aspects:

- whether pre-conditions for dismantling have been complied with;
- whether 80 per cent of the asbestos is reusable;
- what steps have been taken to control the environmental impacts of asbestos dust generated in the process of dismantling;<sup>25</sup>

The report was submitted by the CTE on May 2007 and accepted by the Court on September 2007. The Supreme Court argued that it accepted the report

<sup>22</sup> See *Research Foundation for Science Technology and Natural Resource Policy v. Union of India and Others*, Supreme Court of India, Civil Original Jurisdiction Writ Petition no.657 of 1995, available at <http://www.elaw.org/node/1400>.

<sup>23</sup> *Research Foundation for Science Technology and Natural Resource Policy v. Union of India and Others*, Supreme Court of India, Civil Original Jurisdiction Writ Petition no.657 of 1995, Judgement of 11 September 2007.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

mainly because 'it was all pervasive and it contains opinions of expert including retired navel officers'.<sup>26</sup> According to the report 'beaching is an irreversible process'. On the issue of radio active material the Supreme Court stated that an inspection was undertaken by Atomic Energy Regulatory Board and mentioned that 'the apprehension expressed by the Petitioner was right'. But, surprisingly, the Supreme Court added that 'as the matter stands today Atomic Regulatory Board has certified that the said vessel Blue Lady beached in Alang no more contains any radio active material on board the ship'.<sup>27</sup>

The report of the CTE has recommended grant of permission for dismantling the ship Blue Lady at Alang in accordance with the recycling plan submitted by Priya Blue Industries. According to the recycling plan, all major quantity of asbestos (85 per cent) is in form of wall partitions, ceilings and roofing in rooms and gallery and therefore it is reusable. However, the Committee recommended 'appropriate respiratory protection to be provided and gears in the form of whole body coveralls, gloves, safety shoes, helmet, and goggles' when asbestos is removed.<sup>28</sup> The Supreme Court of India considered that the Report of the Committee of Technical Experts was 'foolproof and had taken into account international standards to regulate ship-breaking industry'.<sup>29</sup> However, such opinion on the Committee of Technical Expert was methodically challenged by the NGO platform on ship-breaking that argued that the Committee did not properly assess the Blue Lady.

#### *1.2.2 NGO Platform Comments on the Report of the Committee of Technical Expert*

The NGO platform paper on the report of the Committee of Technical Expert underlines that this report is 'lacking in scientific rigor and makes a mockery of appropriate public policy which should always be aimed to maximise worker and environmental protection and appears to reveal

industry - governmental collusion at the expense of public welfare'.<sup>30</sup>

Furthermore, some previous technical inspections have been done on the Blue Lady in France and in Germany that discovered a huge quantity of hazardous waste. According to the inspection by Ship Decommissioning Industries in Germany, the Blue Lady may contain 1200 tons of asbestos (significant portion of this asbestos being directly friable) and due to an explosion in the engine room, part of this asbestos has been released in the atmosphere spoiling the air actively polluting several desks. The inspection also identified many other hazardous substances.<sup>31</sup>

Moreover, the NGO platform stresses that the CTE targeted its inspection primarily for loose materials onboard the vessel. According to the NGO platform, the Committee seemed 'unconcerned with the fact that the ship-breaking hazard are always within the structure of the vessel'.<sup>32</sup> Finally the NGO platform criticises the claim of the Committee that states that 'hazardous materials can be safely removed, handled, and disposed of in Alang'. Indeed, the Committee does not give any proof that Alang possesses acceptable destruction technology for asbestos removal and disposal of hazardous waste compliant with international standards.

Thus, the statement of the Committee goes completely against the opinion of the expert Bjorn Andersen who works for a Norwegian company that focuses on developing maritime environmental technologies that said in June 2006 that 'if asbestos is removed by the current methods in Alang, it is likely that the amount of contaminated material will increase with a factor of ten. This is primarily due to the inability to isolate the substance both in association to actual removal but also in relation to transportation and storage'.<sup>33</sup>

The Committee of Technical Experts has produced a report on the assessment of hazardous waste

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

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<sup>30</sup> NGO Platform on Ship-breaking, Comments on the Indian Committee Inspection Report on the Hazardous Materials onboard the SS Blue Lady, 31 July 2006, available at [http://www.ban.org/Library/NGO\\_Platform\\_Critique\\_on\\_TC\\_Inspection\\_Report\\_Final.pdf](http://www.ban.org/Library/NGO_Platform_Critique_on_TC_Inspection_Report_Final.pdf).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*



contained in the Blue Lady. Such reports have been strongly criticised by the NGO platform on ship-breaking, as studied above, because it contains many loopholes and shows the complete disregard of the Committee towards the health of the workers and the environment. However, such reports have been accepted by the Supreme Court of India. The decision of the Court to blindly follow the report of the CTE underlines its pro-economic approach in the Blue Lady case.

### 1.2.3 *The Economic Rhetoric of the Supreme Court*

In the Blue Lady decision, the Supreme Court uses a specific rhetoric that emphasises that India needs the Blue Lady's steel for its economic development.

For example, it mentions that 'breaking of the vessel Blue Lady will provide to this country 41,000 MT of steel and it would give employment to 700 workmen'.<sup>34</sup> It then stresses that 'India after globalisation is an emergent economy along with Brazil, Russia, and China with an economic growth of above nine per cent. However that growth is lop-sided. A large section of the population lives below poverty line. Unemployment is an endemic in India.'<sup>35</sup>

In other words, the Supreme Court is arguing that the dismantling of the Blue Lady is a great opportunity for India because it will help the development of the Indian economy. However, the Supreme Court does not take into consideration the highly probable negative consequences of the dismantling of the Blue Lady on the workers, the communities living in Alang and on the environment. The Court dilutes these negative impacts by applying the concept of sustainable development in such a way that it should respect the principle of proportionality based on the concept of balance of interest.

### 1.2.4 *Distortion of the Concept of Sustainable Development*

The concept of sustainable development was first defined by the Bruntland Commission Report 'Our

Common Future' in 1987 as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.<sup>36</sup> According to Daniel Barstow Magraw and Lisa Hawke, it mainly consists of the obligation to take into account the needs of the present and future generation (inter-generational equity principle), the needs of the world's poor (intra-generation equity), the preservation of the environment, and the integration of economic, social and environmental policies.<sup>37</sup> The concept of sustainable development has a broader perspective than the protection of the environment. It can be viewed as a meta-principle that tries to address solutions from a holistic approach by reconciling human rights, environmental concerns and economic development that are more and more considered as interlinked issues.<sup>38</sup>

The Johannesburg declaration on sustainable development clarifies that sustainable development is based on three pillars, economic development, social development and environmental protection that have to be applied in an integrated manner at the local, national, regional, and global level.<sup>39</sup>

However, the Supreme Court of India sets a new approach to the concept of sustainable development based on the principle of proportionality. The Court quotes Lord Goldsmith that asserts in his paper 'Global Constitutionalism' that the British Constitution though unwritten is based on three principles: rule of law, commitment to fundamental freedom and principle of proportionality.<sup>40</sup> The Court also mentions that the European Convention on Human Rights also refers to the concept of balance.<sup>41</sup> The Court then quotes a citation of Judge Pasayat in the case *T.N. Godavarman v. Union of India* which refers to the concept of balance in the notion of development.

36 Daniel Bodansky, Jutta Brunnée and Ellen Hey, *The Oxford Handbook of International Environmental Law* 615 (Oxford: Oxford University Press, 2006).

37 *Id.*

38 *Id.*

39 United Nation Declaration on Sustainable Development, Johannesburg, World Summit on Sustainable Development, UN Doc. A/CONF.199/20 (2002).

40 See *Research Foundation for Science Technology and Natural Resource Policy* note 23 above.

41 *Id.*

34 See *Research Foundation for Science Technology and Natural Resource Policy*, note 23 above.

35 *Id.*

It cannot be disputed that no development is possible without some adverse effect on the ecology and environment, and the projects of public utility cannot be abandoned and it is necessary to adjust the interest of the people as well as the necessity to maintain the environment. A balance has to be struck between the two interests. Where the commercial venture or enterprise would bring in results which are far more useful for the people, difficulty of a small number of people has to be bypassed. The comparative hardships have to be balanced and the convenience and benefit to a larger section of the people has to get primacy over comparatively lesser hardship.<sup>42</sup>

The Supreme Court argues, regarding the Pasayat's quotation, that while applying the concept of sustainable development 'one has to keep in mind the principle of proportionality based on the concept of balance'.<sup>43</sup> It then mentions that the application of the principle of proportionality in the concept of sustainable development is an exercise in which 'we have to balance the priorities of development on one hand and environmental protection on the other hand'.<sup>44</sup> Finally, the Court argues that when the principle of sustainable development is applied 'we need to keep in mind the concept of development on the one hand and the concepts like generation of revenue, employment and public interest on the other hand'.<sup>45</sup>

Such application of the concept of sustainable development based on the principle of proportionality dilutes the genuine definition of sustainable development and prioritises economic development over environmental concerns and human rights issues. In the case of the Blue Lady, such approach of sustainability disregards the negative impacts of the dismantling of the ship on the environment, on the communities in Alang and on the workers. According to the Supreme Court of India point of view, the benefits of the dismantling (a source of revenue, employment, and steel for the Indian economy) seem more important than the highly probable suffering of people living and

working in Alang. By using such approach, the Supreme Court does not take into account that sustainable development is based on three pillars, economic development, social development and environmental protection that have to be applied in an integrated manner and not prioritised one over another.

#### *1.2.5 Contradiction with the 2003 Decision on Ship dismantling*

In 2003, the Supreme Court of India passed a very progressive and environmentally friendly decision on the regulation of ship dismantling in India. For example, unlike the 2007 judgement on the Blue Lady and its restrictive approach of sustainable development the 2003 decision provides that 'in order to achieve sustainable development environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'.<sup>46</sup> Then the 2003 decision mentions that 'the ship breaking operation cannot be permitted to be continued without strictly adhering to all precautionary principles'.<sup>47</sup> Moreover, the Supreme Court in the 2003 decision orders that 'before a ship arrives at port, it should have proper consent from the concerned authority or the State maritime Board, stating that it does not contain any hazardous waste or radioactive substances onboard'.<sup>48</sup> Finally the Supreme Court in this decision obliges that all ships 'should be properly decontaminated by the ship owner prior to the breaking'.<sup>49</sup>

The Supreme Court decision on the Blue Lady case seems to have forgotten the previous orders it set in the 2003 decision. Such incoherence shows the biased behaviour of the Supreme Court of India in the Blue Lady case that is clearly privileging the interest of the dismantling companies over the interest of the workers and the environment.

Most of the ships that are sent to Alang to be dismantled without being decontaminated are ships

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42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

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46 See *Research Foundation for Science Technology and Natural Resource Policy v Union of India and Others*, Supreme Court of India Civil Original Jurisdiction Writ Petition No.657 of 1995, Order dated 12 April 2003.

47 *Id.*

48 *Id.*

49 *Id.*

that were owned by companies situated in OECD countries. However, in the European Union, for example, such practice is forbidden. Indeed, the European Union implemented the Ban Amendment of the Basel Convention that bans all exports of hazardous waste to non-OECD countries. This Amendment includes old ships sent for scrapping when they still contain hazardous wastes. In the case of ships it is, however, hard to enforce such regulation since it is difficult to control when ships are sent for scrapping. Therefore, better measures are needed to enable authorities in OECD countries that have implemented the Ban Amendment to impede ships before being sent to India, Pakistan, and Bangladesh without being decontaminated of their hazardous waste. As an alternative to Basel Convention, the International Maritime Organisation is working on an international convention on ship dismantling that will provide certain environmental and safety standards.

## 2 THE CONTROL OF END-OF-LIFE SHIPS WITH HAZARDOUS WASTES FROM AN INTERNATIONAL PERSPECTIVE

### 2.1 End-of-Life Ships and the Basel Convention

#### 2.1.1 General Obligations under the Basel Convention

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal is the most comprehensive global environmental treaty on hazardous and other wastes.<sup>50</sup> 170 Countries are Parties to the Convention, India is one of them. This international legal framework was established in order to react against the rise of toxic trading. Indeed, the strict

<sup>50</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, 28 *Int'l Leg. Mat.* 657(1989).

environmental standards in industrialised countries led to a dramatic rise in the cost of hazardous waste disposal. Therefore 'toxic traders' began shipping hazardous waste to developing countries where there were no facilities to dispose hazardous waste in an environmentally sound manner.

The Basel Convention sets an exhaustive list of products and materials that it considers to be hazardous wastes. However, the Convention also applies to the wastes that are defined as, or are considered to be hazardous wastes by the domestic legislation of the Party of export, import or transit.<sup>51</sup> The Basel Convention is based on the prior informed consent of the country of export and the country of import of hazardous wastes. For example, Article 6 states that 'the State of export shall notify, or shall require the generator or exporter to notify, in writing, through the channel of the competent authority of the State of export, the competent authority of the States concerned of any proposed trans boundary movement of hazardous wastes or other wastes'<sup>52</sup> and then the State of import shall 'respond to the notifier in writing, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information'.<sup>53</sup> Pursuant to the Convention, Parties 'shall not permit the export of hazardous wastes and other wastes to the Parties which have prohibited the import of such wastes, and shall prohibit or shall not permit the export of hazardous wastes and other wastes if the State of import does not consent in writing to the specific import'.<sup>54</sup> As the whole agreement is export based- that is precaution has to be exercised at the instance of export therefore India is in conformance and no violation has been committed.

The Basel Convention tries to establish the traceability and the control of hazardous wastes and tries to ensure that those wastes will be disposed of in an environmentally sound manner. For example, the Convention requires that 'hazardous wastes be packaged and labelled and transported in conformity with generally accepted international rules'.<sup>55</sup> It also

<sup>51</sup> *Id.* Article 1(b).

<sup>52</sup> *Id.* Article 6(1).

<sup>53</sup> *Id.* Article 6(2).

<sup>54</sup> *Id.* Article 4(1)(c).

<sup>55</sup> *Id.* Article 4(7)(b).

obliges 'hazardous wastes [to] be accompanied by a movement document from the point at which a transboundary movement commences to the point of disposal'.<sup>56</sup> The Convention also states that 'each Party shall require that hazardous wastes or other wastes, to be exported, are managed in an environmentally sound manner in the State of import or elsewhere'. However the Convention does not give a detailed definition of 'environmentally sound management of hazardous waste' that has to be followed by State Parties. It only refers to non-obligatory technical guidelines.<sup>57</sup>

#### *2.1.2 The 1995 Basel Amendment*

In March 1994, advised by developing countries, Parties agreed to an immediate ban on the export from OECD to non-OECD countries of hazardous wastes intended for final disposal. They also agreed to ban, by 31 December 1997, the export of wastes intended for recovery and recycling.<sup>58</sup> However, because this decision was not incorporated in the text of the Convention itself, the question as to whether it was legally binding or not arose. Therefore, in 1995, it was proposed that the ban be formally incorporated in the Basel Convention as an amendment.<sup>59</sup> The Ban Amendment does not use the distinction OECD/non-OECD countries. Rather, it bans export of hazardous wastes for final disposal and recycling from what are known as Annex VII countries (Basel Convention Parties that are members of the EU, OECD, and Liechtenstein) to non-Annex VII countries (all other Parties to the Convention).<sup>60</sup> However, the Basel Amendment, in order to enter into force, must be ratified by three fourth of the Parties who accepted it.<sup>61</sup> Until now, only 64 countries ratified it.<sup>62</sup>

<sup>56</sup> *Id.* Article 4(7)(c).

<sup>57</sup> *Id.* Article 4(8).

<sup>58</sup> Decision II/12 of the Second CoP Meeting, in the Report of the Second Meeting of the Conference of Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Geneva, 21-25 March 1994, Doc. No. UNEP/CHW. 2/30 (1994).

<sup>59</sup> Decision III/I Adopted at the Third Conference of the Parties to the Basel Convention (COP3), 22 September 1995, Geneva, Switzerland.

<sup>60</sup> See Basel Convention, note 50 above, Article 4.

<sup>61</sup> See Basel Convention, note 50 above, Article 17(3).

<sup>62</sup> Information available on the Basel Convention website at <http://www.basel.int/ratif/ban-alpha.htm>.

#### *2.1.3 The Application of the Basel Convention to End-of-life Ships*

The Convention mentions the issue of ships in its Article 1.4 which states that 'wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument, are excluded from the scope of this Convention'.<sup>63</sup> This Article simply recognises the competence of a pre-existing treaty (MARPOL) on the regulation of wastes derived from a normal operation of a ship such as bilge water, fuel, and sewage. Therefore, this article does not exempt ships which contain hazardous wastes from the Basel Convention. The Seventh Conference of Parties, in order to clarify that issue, asserted that end-of-life ships that contain hazardous wastes could be qualified as hazardous wastes under the Basel Convention. The Decision VII/26 adopted by consensus of all 160 Parties states that 'Recognising that many ships and other floating structures are known to contain hazardous materials and that such hazardous materials may become hazardous wastes as listed in the annexes to the Basel Convention'.<sup>64</sup> As Greenpeace argues, such statements only point out that materials in ships can be hazardous wastes but it does not clarify when such material become wastes.<sup>65</sup> However, the next statement in decision VII/26 clarifies that a ship can be a waste. It states that 'noting that a ship may become a waste as defined in Article 2 of the Basel Convention and that at the same time it may be defined as a ship under other international rules'.<sup>66</sup> Article 2 of the Basel Convention mentions that 'Wastes are substances or objects which are disposed of or are intended to be disposed of [...]'<sup>67</sup>

Therefore, those two statements underline that end-of-life ships are, when intended to be disposed of, (with regard to Article 2 of the Basel Convention) hazardous wastes falling under the Basel Convention.

<sup>63</sup> See Basel Convention, note 50 above, Article 1.4.

<sup>64</sup> See Decision VII/26 Adopted at the Seventh Conference of the Parties to the Basel Convention (COP7), 29 October 2004, Geneva.

<sup>65</sup> Basel Action Network/ Greenpeace Legal Review of Industry Working Party on Ship Recycling, Position Paper, 15 February 2005, available at <http://www.ban.org/Library/Legal%20application.pdf>.

<sup>66</sup> *Id.*

<sup>67</sup> See Basel Convention, note 50 above, Article 2.

## 2.2 The Enforcement of the Basel Convention for End-of-Life Ships: The Clemenceau Case

### *2.2.1 Background on the Clemenceau*

According to the Greenpeace fact sheet on the Clemenceau, in 1997, the Clemenceau was not used anymore as a warship.<sup>68</sup> Since 1997, some parts of the Clemenceau have been sold to the Brazilian government that owns the Foch, which was its sister ship.

The Clemenceau is supposed to host 130 tons of Asbestos and many other toxic wastes. First the warship was to be used as a lifelike target during high seas military exercises and sunk in the middle of the Ocean. This plan was cancelled. Then, the city of Marseille proposed in 2001 to sink the Clemenceau in the Mediterranean Sea as an 'artificial reef' but the warship had to be decontaminated of its most toxic wastes. In the end, the project was abandoned in 2003. The French government after all these unsuccessful plans decided to sell the Clemenceau to ship dismantling companies. The Clemenceau was then auctioned in the public market under the condition that it would be decontaminated of asbestos in Europe.<sup>69</sup>

Pending decontamination, the French State stated that it would remain the registered owner of the Clemenceau. A Spanish company won the bid in April 2003. This company had attempted to resell the ship to a Turkish ship-breaker. However, the Turkish authorities refused to accept the ship because they considered that it would be an illegal trade in hazardous waste contrary to the Basel Convention. As the boat was being dragged to Turkey, the French Navy was forced to board the Clemenceau to impede the ship to be sent to Turkey. Then, in October 2003 ThyssenKrupp, the second-highest bidder won the contract to trade and scrap the Clemenceau.<sup>70</sup>

According to the Greenpeace fact sheet on the Clemenceau, the location clause of the contract

allowed some of the decontamination work to be carried out in India. Indeed, the German Company struck a deal with Shriram Vessel Scrap Pvt. Ltd, a ship-breaking company in India. The warship was then sent by the German company to Greece supposedly to be decontaminated before going to India, but the Greek authorities refused the Clemenceau because they considered that they did not have the capacities to remove asbestos from such a big structure.<sup>71</sup>

The Clemenceau returned to France and in 2004 a French company started superficial asbestos removal activities (30 per cent of asbestos was removed). In July 2005 another subcontractor started removal of asbestos but most of the asbestos was still within the ship (500 tons). In December, the Clemenceau left Toulon to be dismantled in Alang.<sup>72</sup> In January 2006, the Supreme Court of India issued a temporary order stating that the Clemenceau could not enter Indian waters in order to be dismantled in Alang. The Court then constituted a Committee whose goal was to assess whether the Clemenceau should be dismantled or not. The Committee gave a split verdict on the issue, with seven members in favour of accepting the ship under strict conditions and three others recommending its return to France.

However, the Indian Supreme Court, on 13 February, decided to create a new panel consisting of retired navy officers and other specialists to investigate again whether the former aircraft carrier should be allowed to enter the country in order to be broken at the Alang scrapping yard in Western Gujarat.<sup>73</sup> This Committee never gave its point of view on the dismantling of the Clemenceau because Jacques Chirac ordered the Clemenceau on 15 February 2006 to return to French waters following the judgement of the Conseil d'Etat that considered such an operation illegal.

### *2.2.2 The Decision of the Conseil d'Etat on the Clemenceau*

Several anti-asbestos and environmental NGOs filed a case to the French Civil Court of Paris (TGI)

<sup>68</sup> Greenpeace International, *The Clemenceau: Fact Sheet*, 12 January 2006, available at [www.greenpeace.org/international/press/reports/the-clemenceau-fact-sheet](http://www.greenpeace.org/international/press/reports/the-clemenceau-fact-sheet).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

because they considered that the contract between the French Government and the German Company did not respect the disposition of the Basel Convention and the ban Amendment ratified by the State of France.

However, the French Civil Court argued that it was not competent on that issue. It stated that although the dismantling contract 'is a private contract between the French State and the German company, the ex-military vessel the *Clemenceau* is still to be considered war material'.<sup>74</sup> Therefore, according to the Civil Court, 'the Decision leading to the contract is an administrative decision concerning the destination of war material'.<sup>75</sup> Thereafter, the same NGOs decided to challenge the decision of the French authorities to send the *Clemenceau* to India to the Administrative Tribunal of Paris.

However, in December 2005 the Administrative Tribunal refused to suspend the decision to transfer the hull of the *Clemenceau* to India where it would be decontaminated of the remaining asbestos. The Tribunal, in regard of Article L.521-1 of the Code of Administrative Justice, did not accept the claim of the plaintiffs to suspend the decision to transfer the *Clemenceau* because it considered that this claim did not establish a serious doubt about the legality of the controversial decision. The Plaintiffs appealed to the Conseil d'Etat which is the highest Administrative Court of France.<sup>76</sup> The Conseil d'Etat squashed the judgement of the Administrative Tribunal of Paris and stated that there was enough serious doubt about the legality of the controversial decision to transfer the *Clemenceau* to India to suspend such a decision.

### *2.2.3 Legal Grounds*

The Conseil d'Etat stated that Article 2 of the Council Regulation of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community refers to the

Council directive of 15 July 1975 to define waste. According to this directive waste 'shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'.<sup>77</sup> The Conseil d'Etat also mentioned that Annex I contains a provision that states that 'any material, substances or products whose use has been banned by law' is considered waste.<sup>78</sup>

It then underlined that a French decree of December 1996 completely outlawed the use of any variety of asbestos and of product that contains asbestos.<sup>79</sup> Furthermore, the Conseil d'Etat considered that the fact that the French State decided to auction the *Clemenceau* in the public market and concluded a contract for the dismantling of the ship, illustrates the will of the French State to discard the hull of the *Clemenceau*. Therefore, the Conseil d'Etat concluded that the hull of the *Clemenceau* that still contained asbestos was considered as a waste under the Council Regulation of February 1993 on the supervision and control of shipments of waste within, into and out of the European Community.<sup>80</sup>

This Regulation, which is a stricter transposition of the Ban amendment of the Basel Convention, states in its Article 14 that 'all exports of waste for disposal shall be prohibited, except those to the European Free Trade Association countries which are also parties to the Basel Convention'.<sup>81</sup> As India is not part of the European Free Trade Association; the Conseil d'Etat argued that the decision to send the hull of the *Clemenceau* was illegal under the Council Regulation of February 1993 on the supervision and control of shipments of waste within, into and out of the European Community. The *Clemenceau* should, thus, have been decontaminated of its hazardous wastes before being sent to India.

### *2.2.4 Critics on the Enforcement of the Basel Convention to End-of-life Ships*

In the case of the *Clemenceau*, the Council Regulation of February 1993 could be applied

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Section du Contentieux - 6ème et 1ère Sous-Sections Réunies, Séance du 13 février 2006 - Lecture du 15 février 2006 No 288801 - 288811 Association Ban Asbestos France et Autres, February 2006 available at [http://www.conseil-etat.fr/ce/jurispd/index\\_ac\\_ld0607.shtml](http://www.conseil-etat.fr/ce/jurispd/index_ac_ld0607.shtml).

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

because the *Clemenceau* remained a French flagged ship even though it was going to be dismantled. Indeed, this Regulation is applicable only to EU-flagged ships or to ships leaving or entering EU waters according to the United Nations Convention on the Law of the Sea.<sup>82</sup> However, it is very easy for a ship to change its flag before its dismantling in order to escape the 1993 Regulation. Furthermore, it is very difficult for EU Member State authorities to foresee when the owner of a ship decides to send it for scrapping. Thereafter, the majority of former EU ships are scrapped in South Asian countries illegally, due to their mobility and the relative incapacity to know when a ship is going to be sent for dismantling or not. The EU green paper on better ship dismantling suggests thus that there should be 'more controls by port authorities in European ports, targeting ships that are above 25 years old or where other indications make it likely that they are intended for dismantling' and 'additional guidance by the Commission and the member States on the definition of waste and hazardous in relation to ships'.<sup>83</sup>

The green paper also mentions that there should be 'more cooperation and information exchange between Member States and the Commission, including the use of data bases, press reports to identify potential end-of-life ships'. Finally, the green paper states that there should be 'more cooperation with third countries that are recycling states and transit states'.<sup>84</sup>

Due to the difficulties to control end-of-life ships under the Basel Convention, the international community under the IMO is currently drafting a future Convention for the safe and environmentally sound recycling of ships with binding international standards that would create a level playing field worldwide.

### 2.3 The Future International Convention on Ship Dismantling

It is commonly argued that the most important issue in ship dismantling is to ensure that ships are recycled

in an environmentally sound and safe way worldwide.<sup>85</sup> The future international Convention is trying to address that issue.

The actual draft Convention undertakes a different approach than the Basel Convention. It does not ban the dismantling of ships that contain hazardous wastes in non-OECD countries. The future Convention takes a 'cradle to grave' approach to ship recycling.<sup>86</sup> It regulates the design, construction and operation of ships so that they could easily be recycled in a safe and environmentally sound way. It obliges ships to have onboard an Inventory of Hazardous Materials. The annex of the future Convention also establishes several requirements that must be respected by ship recycling facilities. It provides for example that 'ship recycling facilities shall establish management systems, procedures and techniques which do not pose health risks to the workers or the population in the vicinity of the facility and which will reduce, minimise and eliminate to the extent practicable adverse effect on the environment'.<sup>87</sup>

Moreover the draft Convention states that ship recycling facilities shall prepare a recycling facility management plan. In addition, pursuant to the Convention, ship recycling facilities shall prevent accidents such as explosions by ensuring 'gas-free-for-hot work'. Finally, it mentions that 'ship recycling facilities shall ensure safe and environmentally sound removal of any hazardous material contained in a ship'.<sup>88</sup>

## CONCLUSION

The decision on the *Blue Lady* underlines the shift of approach of the Supreme Court of India against the poor. In the *Blue Lady* case the Supreme Court is neglecting the social and environmental concerns of the workers and the communities living in Alang. The Apex Court is taking a strong economic

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<sup>82</sup> See The Commission of the European Communities note 18 above.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

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<sup>85</sup> *Id.*

<sup>86</sup> See Preview: Marine Environment Protection Committee (MEPC)-54<sup>th</sup> Session: 20-24 March 2006 available at [http://www.imo.org/Safety/mainframe.asp?topic\\_id=1320&doc\\_id=6198](http://www.imo.org/Safety/mainframe.asp?topic_id=1320&doc_id=6198).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

approach in favour of the ship dismantling industry. It goes, on many points, against a 2003 Supreme Court decision on ship dismantling, and finally distorts the concept of sustainable development in order to justify its decision.

The Blue Lady case also has an international, and a North South dimension. Indeed, most of the ships - such as the Blue Lady - that are dismantled in Alang come from developed countries. The Basel Convention applies to end-of-life ships as it has been demonstrated in the case of the *Clemenceau*. However, in the case of private ships, it is very easy to escape the disposition of the Basel Convention, due to the mobility of the ships, the possibility to reflag them, and the difficulty to know when a ship will be illegally sent for scrapping.

The international community is thus working on a future Convention on safe and environmentally sound recycling of ships that establishes 'a cradle to grave' approach and wants to create an international state of play where the same safety and environmental standards will be applied in the ship dismantling facilities. However, some fear that the future convention, which will probably enter into force later than 2010, will not ensure an equivalent level of control and enforcement as under the Basel Convention.<sup>89</sup>

The coming years are crucial since, in 2010, around 800 single-hull tankers will have to be phased out. Therefore measures must urgently be taken at the domestic level and at the international level in order to avoid further environmental and social disasters.

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<sup>89</sup> The Basel Action Network on Behalf of the Global NGO Platform on Ship-breaking, Critique of draft I.M.O. International Convention for Safe and Environmentally Sound Recycling of Ships, 15 March 2006, available at [http://www.ban.org/Library/IMO\\_Draft\\_Convention\\_CritiqueFINAL.pdf](http://www.ban.org/Library/IMO_Draft_Convention_CritiqueFINAL.pdf).



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