Lissie Klingenberg Jørgensen

Fra: Maria Bruun Skipper <mbs@shipowners.dk>
Sendt: 10. september 2015 11:30
Til: Berit Hallam; Lissie Klingenberg Jørgensen
Cc: Per Winther Christensen; Simon Christopher Bergulf; Jesper Stubkjær
Emne: Brev til ministeren vedr. Hong Kong konventionen
Vedhæftede filer: Fællesbrev til miljøminister Eva Kjer Hansen.pdf

Opfølgningsflag: Opfølgning
Flagstatus: Afmærket

Kære Berit og Lissie,

Tak for et godt møde i tirsdags. Som aftalt og blot til orientering får I her brevet til ministeren, som går afsted i dag. Dermed er kronikken også på trapperne.

Dbh. Maria

Maria Bruun Skipper
Underdirektør // Director
Security, Health, Environment and Innovation
Danmarks Rederiforening/Danish Shipowners' Association
Phone: +45 3311 4088/Direct: +45 3348 9286
Mobile: +45 2128 4966
E-mail: mbs@shipowners.dk
www.shipowners.dk

Lissie Klingenberg Jørgensen

Fra: Maria Bruun Skipper <mbs@shipowners.dk>
Sendt: 8. oktober 2015 09:28
Til: Berit Hallam; Lissie Klingenberg Jørgensen
Cc: Per Winther Christensen; Simon Christopher Bergulf
Emne: ShippingWatch: ophugning

Opfølgningsflag: Opfølgning
Flagstatus: Afmærket

Kære begge,

Tak for et rigtig godt arrangement i mandags. Vi er - nok ikke så overraskende - ikke så tilfredse med ministerens svar. Dansk Metal er også skuffede. SW bringer i dag nedenstående og vi beder nu om et møde med ministeren snarest.

Dbh. Maria

Rederne: Regional enegang om ophug skaber global usikkerhed
REDERIER: <http://shippingwatch.dk/Rederier/>
Der er ingen grund til at vente på EU-regler, når implementeringen af Hongkong-konventionen har været i gang i længere tid, er holdningen hos Danmarks Rederiforening oven på ministersvar om ophugning.

_____
AF CHRISTIAN BARTELS<mailto:cb@shippingwatch.dk>
Offentliggjort 07.10.15 kl. 16:52

Det falder ikke i god jord hos Danmarks Rederiforening, at Miljø- og Fødevareminister Eva Kjer Hansen (V) først ratificerer Hongkong-konventionen for bæredygtig ophugning, når EU-reglerne for ophugning er på plads.

Minister: EU-regler i vejen for Hongkong-konvention<http://shippingwatch.dk/eceRedirect?articleId=8088073>

Det siger underdirektør i Danmarks Rederiforening, Maria Bruun Skipper, til ShippingWatch.

"Vi behøver ikke at vente på implementering af EU-regler vedtaget i 2013, som kun gælder for EU-flagede skibe, når Hongkong-konventionen, der dækker globalt, blev vedtaget i 2009," siger hun.

Miljøstyrelsen bebuder, at de i 2016 har en road map klar, der skal lede til ratifikation af Hongkong-konventionen. Men den Road Map kommer ikke med svar på, hvornår den endelige ratificering finder sted, siger Maria Bruun Skipper.

"Implementeringen af Hongkong-konventionen kan jo godt have lange udsigter, selv når der kommer en road map fra Miljøstyrelsen i 2016. Det handler ikke kun om jura, men også om politisk vilje," siger hun.

Udmeldingen kommer i kølvandet på en korrespondance mellem Danmarks Rederiforening og Miljø- og Fødevareminister Eva Kjer Hansen (V).

Rederne opfordrede i et brev ministeren til hurtigt at implementere Hongkong-konvention, men det vil ministeren ikke tage hul på, før fælles EU-regler om ophugning er på plads i Danmark.

Politisk nøl skaber usikkerhed

Netop den politiske prioritering af EU-reglerne frem for Hongkong-konventionen er med til at skabe usikkerhed i branchen, når den finder sted hos en af de store toneangivende søfartsnationer, argumenterer Maria Bruun Skipper.

"Det er jo netop regional enegang på EU-plan, der er med til at skabe usikkerhed og forsinkelse i det globale regelværk. IMO er den rette regulator for skibsfarten, men leverer IMO's medlemslande ikke varen i form af ratifikation af de regler, som de selvsamme lande har vedtaget, så ser vi desværre regionale særregler," siger hun.

Ifølge hendes oplysninger, arbejder nationer som Belgien, Tyskland, Spanien og Holland med at implementere Hongkong-konventionen, som Frankrig, Congo og Norge på nuværende tidspunkt allerede har tiltrådt.

Lov i tre trin

Implementeringen af EU-regler volder øjensynligt de statslige instanser besvær.

I Miljøstyrelsen skal man ifølge svaret fra Eva Kjer Hansen (V) til Danmarks Rederiforening koordinere "juridiske problemstillinger" med Udenrigsministeriet og Kammeradvokaten for at få implementeret de fælles EU-regler, der grundlæggende set er en positivliste over værfter, der ophugger overvejende bæredygtigt.

Ifølge Miljøstyrelsens oplysninger til ShippingWatch, skal EU-reglerne implementeres i tre trin, hvoraf det andet skal være implementeret færdig senest 31. december 2018.

Sidste trin finder senest anvendelse fra 31. december 2020 og handler om optegnelser over farlige materialer ombord, oplyser Miljøstyrelsen.

Udfordringen med Hongkong-konventionen er, at den først træder i kraft to år efter, at den er ratificeret af 15 stater, der til sammen repræsenterer 40 procent af verdens samlede bruttotonnage. Og endelig skal de lande, der har ratificeret, selv have en kapacitet til at hugge udtjente skibe op, der svarer til tre procent af verdenshandelsflåden.

Sent from my iPhone

Lissie Klingenberg Jørgensen

Fra: Berit Hallam
Sendt: 17. april 2016 17:49
Til: Maria Bruun Skipper
Cc: Lissie Klingenberg Jørgensen; Camilla Bjerre Søndergaard (MST); Berit Hallam
Emne: SV: Ship recycling: publication of the guidelines under Regulation (EU) No 1257/2013 on ship recycling

Kære Maria,
Ja, den har været længe undervejs. Vi har ikke nået at nærlæse kravene endnu, men er opmærksom på Kommissionens fortolkning om, at alt affald skal behandles på fast underlag. Det ligger i hvert fald fast, at der er stor usikkerhed om, hvad der oprindeligt var hensigten. Der er således flere af medlemslandenes oversættelser, der ser ud til at afvige fra den engelske version, og hvor det i nogle tilfælde både kan læses som at det gælder alt affald eller kun farligt... Et komma kan virkelig nogen gange have større betydning end man tror.

Vi mener umiddelbart, at det vil give mest mening, hvis kravet om fast underlag kun gælder for farligt affald og farligestoffer/ materialer. På Estlands initiativ er der pt en dialog i gang mellem medlemslandene, Rådets juridiske service og Parlamentet for at få afklaret, hvad der egentlig var intentionen bag de ændringer af forordningsudkastet, som blev foretaget umiddelbart inden vedtagelsen, herunder også en drøftelse af muligheden for et eventuelt corrigendum.
Vh
Berit

-----Oprindelig meddelelse-----
Fra: Maria Bruun Skipper [mailto:mbs@shipowners.dk]
Sendt: 14. april 2016 10:38
Til: Berit Hallam; Lissie Klingenberg Jørgensen
Emne: Fwd: Ship recycling: publication of the guidelines under Regulation (EU) No 1257/2013 on ship recycling

Kære begge,
Så kom FAQ'en langt om længe. Som forventet har Kommissionen anlagt en meget restriktiv tilgang, hvilket betyder, at ALT skal behandles på underlag - også det ikke farlige affald - den gamle kommadiskussion. Det har vi også været i pressen og kritisere. Jeg husker, at I på vores sidste møde, også var af den opfattelse, at kun farligt affald skal behandles på underlag.
Så jeg tænkte på, om I har en holdning til FAQ'en? Vi hører, at flere lande vil gøre indsigelser overfor Kommissionen.
Dbh. Maria

Sent from my iPhone

Start på videresendt besked:

Fra: <ENV-SHIP-RECYCLING@ec.europa.eu<mailto:ENV-SHIP-RECYCLING@ec.europa.eu>>
Dato: 12. april 2016 kl. 10.47.06 GMT+1
Til: <ENV-SHIP-RECYCLING@ec.europa.eu<mailto:ENV-SHIP-RECYCLING@ec.europa.eu>>
Emne: Ship recycling: publication of the guidelines under Regulation (EU) No 1257/2013 on ship recycling

Dear colleague,

On Monday 4 April, the College of Commissioners has adopted a Commission Communication on Requirements and procedure for inclusion of facilities located in third countries in the European List of ship recycling facilities. The

Communication is a technical guidance note under Regulation (EU) No 1257/2013 on ship recycling<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:330:0001:0020:EN:PDF>; it provides clarifications on the requirements for ship recyclers.

The Communication was published today in the Official Journal of the European Union<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:128:FULL&from=EN>. With the template for applications<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D2398&from=EN> published last December, ship recyclers outside the EU may now submit their formal applications for inclusion on the European List to the European Commission. Section 1 of the Communication details the application procedure, while sections 2 and 3 describe the environmental and administrative requirements respectively.

Best regards,

The Ship Recycling Regulation Team

[cid:image001.gif@01CE9DC1.27551760]
European Commission
Directorate-General for Environment
A2 - Waste Management & Recycling
Avenue de Beaulieu 9 – 5/107
B-1049 Brussels/Belgium

+32 229-91811
env-ship-recycling@ec.europa.eu<mailto:env-ship-recycling@ec.europa.eu>

Please note that all our remarks only reflect the opinion of the Commission services and are not legally binding. A final binding legal interpretation of EU legislation can only be provided by the European Court of Justice. The above remarks are without prejudice to the position the Commission might take should the issue arise in a procedure before the Court of Justice.

Lissie Klingenberg Jørgensen

Fra: Jesper Stubkjær <js@shipowners.dk>
Sendt: 18. oktober 2016 23:21
Til: Berit Hallam
Cc: Lissie Klingenberg Jørgensen; Rasmus With; Per Winther Christensen
Emne: SV: Spørgsmål vedrørende ophugning af skibe
Vedhæftede filer: EU-ejede skibe.pptx

Sag: 001-15448
Sagsdokument: 5975808

Kære Berit
Vi har allerede nu et svar klar på det ene af dine spørgsmål – det om ikke-EU-flagede skibe. Jeg har vedhæftet tre slides.

Det andet spørgsmål er langt sværere at svare på, og vi kommer kun til at kunne besvare det delvist. I bedste fald kan vi give jer oplysninger om, hvilke danskejede skibe, der er sendt til ophugning – det er i sig selv en større opgave, men burde være mulig. Til gengæld vil det ikke være muligt at inkludere skibe, som tidligere har været under dansk ejerskab, og som er sendt til ophugning under ny ejer, da vi ganske enkelt ikke har data.

Bh Jesper

Fra: Berit Hallam [mailto:beha@MST.DK]
Sendt: 18. oktober 2016 15:22
Til: Jesper Stubkjær
Cc: Lissie Klingenberg Jørgensen; Berit Hallam
Emne: Spørgsmål vedrørende ophugning af skibe

Kære Jesper,
Som aftalt sender jeg her nogle spørgsmål til brug for Miljøstyrelsens redegørelse til miljø- og fødevareministeren, som jeg gerne vil have jeres input til så hurtigt som muligt. Det drejer sig om følgende:

Har I nogen oplysninger om, hvor mange europæisk ejede skibe, som i dag sejler under ikke-europæisk flag?
Hvilke dansk-ejede skibe er – eventuel under anden ejer – siden 1998 ophugget på strande i Indien eller Bangladesh?

Vh
Berit

Med venlig hilsen
Berit Hallam
Funktionsleder l Jord & Affald
+45 72544434 l beha@mst.dk
Mobil +45 40615652

Miljø- og Fødevareministeriet
Miljøstyrelsen l Strandgade 29 l 1401 København K l Tlf. +45 72 54 40 00 l mst@mst.dk l www.mst.dk

For more information please visit http://www.symanteccloud.com

Europæiske rederes ejerskab af handelsskibe fordelt på EU og ikke-EU flag

Tabel 1	Antal skibe	Bruttotons	Ton dødvægt
Alle flag	17.142	405.462.588	609.102.228
Ikke-EU flag	7.784	220.514.791	342.494.841
Andel ikke-EU	45,4 %	54,4 %	56,2 %

Kilde: IHS Seaweb

Danish Shipowners' Association

Metode

Data rummer handelsflåden for rederier med kontrollerende hovedsæde (hovedkvarter) i EU

Frankrig er inkl. Monaco grundet den høje forekomst af rederier i regionen

Storbritannien er ekskl. Isle of Man, da IoM primært benyttes som åbent register og ikke som domicil

Danish Shipowners' Association

Forbehold

Data inkluderer ikke alle EU-ejede skibe, idet flere rederier med hovedsæde i Bermuda, Marshall Islands, Britiske Jomfruøer m.fl. ejes af europæiske enkeltpersoner. Disse rederier udgør en ikke uanseelig samlet størrelse, men den udeladte datamængde vurderes ikke til at have en størrelsesorden, der ændrer det overordnede billede i tabel 1.

Danish Shipowners' Association

Lissie Klingenberg Jørgensen

Fra: Jesper Stubkjær <js@shipowners.dk>
Sendt: 19. oktober 2016 20:24
Til: Berit Hallam
Emne: Re: SV: Spørgsmål vedrørende ophugning af skibe

Sag: 001-15448
Sagsdokument: 5980650

Kære Berit
Ja, det er data pr. 1. Oktober 2016.

Bh Jesper

Den 19. okt. 2016 kl. 06.51 skrev Berit Hallam <beha@MST.DK<mailto:beha@MST.DK>>:

Kære Jesper,
Mange tak for det tilsendte – jeg går ud fra at det er data fra 2016?
Fsva det andet spørgsmål, så er det naturligvis fint, at I finder frem til de data, som det nu er muligt. Det er i den sammenhæng selvfølgelig også en væsentlig oplysning for os, hvilke data I ikke har.
Vh
Berit

Med venlig hilsen
Berit Hallam
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Fra: Jesper Stubkjær [mailto:js@shipowners.dk]
Sendt: 18. oktober 2016 23:21
Til: Berit Hallam
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Fra: Berit Hallam [mailto:beha@MST.DK]
Sendt: 18. oktober 2016 15:22
Til: Jesper Stubkjær
Cc: Lissie Klingenberg Jørgensen; Berit Hallam
Emne: Spørgsmål vedrørende ophugning af skibe

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Lissie Klingenberg Jørgensen

Fra: Per Winther Christensen <pwc@shipowners.dk>
Sendt: 10. november 2016 11:16
Til: Berit Hallam
Emne: Ophugning af dansk kontrollerede skibe 2010-2016

Kære Berit,

Vi har gennemgået IHS Fairplay database for dansk kontrollerede skib ophugget efter 1. Januar 2010 og resultatet fremgår af listen nedenfor.

Listen er delt op således, at første del indeholder dansk kontrollerede skibe, der er hugget op af DRF medlemmer (eller tidligere medlemmer som er gået konkurs).

Anden del indeholder dansk kontrollerede skibe der er hugget op af rederier, der ikke var DRF medlemmer på tidspunktet for ophugningen.

I forhold til at vurdere om skibe, der er videresolgt fra dansk kontrol til fremmet flag, er hugget op kort tid efter, og hvor denne ophugning er foregået, har vi ikke desværre ikke oplysninger til at kunne svare på.

Skibe solgt direkte til ophugning af danske rederier siden 2010 -2016 (oktober)

Ophugget af DRF medlemmer:

Indien

IMO	Navn	Rederi	BT	Ophugget
7222762	**SEA CORONA**	CS & P RoRo I	12.110	2010
8311297	**SIGLOO MOSS**	Camillo Eitzen	10.075	2010
7430735	**TOR MINERVA**	CS & P (DFDS)	21.215	2010
8000989	**SIGLOO F INN**	EITZEN GAS	8.630	2011
8107141	**SIGLOO POLAR**	EITZEN GAS	8.878	2011
7813705	**CHARLOTTENBURG**	DANNEBROG / NORDANA LINES	31.007	2011
7359553	**NAESBORG**	DANNEBROG / NORDANA LINES	32.173	2011
8100571	**SIAM PROJECT**	DANNEBROG / NORDANA LINES	9.019	2011
7736335	**NORD SCAN MUMBAI**	DANNEBROG / NORDANA LINES	5.280	2011
8501531	**SIGLOO STAR**	EVERGAS	10.195	2012
7716660	**MARIENBORG**	DANNEBROG/NORDANA	32.875	2012
8820248	**CS GITTE**	CONTAINER SHIPPING	8.777	2013
8122830	**AALBORG**	DANNEBROG REDERI	24.869	2013
9057159	**SELMA**	REDERIET HANSEN OG LANGE I/S	14.619	2013
8108133	**PEGASUS**	J. Poulsen Shipping	1.161	2014
9232319	**Clipper Concord**	Clipper Group	6.714	2014
9105932	**Maersk Wyoming**	Maersk Line A/S	50.698	2016
9155119	**Maersk Georgia**	Maersk Line A/S	50.698	2016

Bangladesh

7907348	**NINA**	K/S Nina Shipping (CS & Partnere)	1.713	2010
9031466	**CS CHRISTINE**	CONTAINER LEASING A/S	14.848	2012
9057458	**PIONEER ATLANTIC**	Investeringsgruppen Danmark	37.978	2016

Ophugget af <u>ikke</u> DRF medlemmer:

Indien

IMO	Navn	BT	Ophugget

6606234	**SPLIT 1700**	BLUE LINE INTERNATIONAL	6.474	2010
8800779	**BURGOS**	SEAFLEX A/S	4.959	2010
6608098	**ANCONA**	BLUE LINE INTERNATIONAL	12.394	2011
8500135	**EBONY**	TRANSSEA C/O SEAFLEX	7.915	2011
8800767	**GORGONILLA**	SEAFLEX / TRANSSEA 1	4.959	2012
9014729	**SEAPOWET**	DIFKO LXXIII	41.189	2012
8908519	**PHILIP**	DANIA MARINE - PHILIP K/S	10.868	2013
9004205	**SUJIN**	SUJIN K/S (DANIA MARINE)	10.396	2013
8415641	**VOLOS**	DANIA MARINE ApS	10.282	2013
9153678	**WILL**	Silver Valley Ltd	9.068	2014
7516761	**DALMATIA**	Blue Line International	12.087	2014
8812631	**MERAY ALAMAR**	Janchart Shipping A/S	17.126	2016

Bangladesh
Ingen

Kind regards

Per Winther Christensen
Deputy Technical Director
Naval Architect, Master Mariner

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Tel: +45 33 11 40 88 / +45 33 48 92 52
Mobile: +45 29 45 83 24
E-mail: pwc@shipowners.dk
www.shipowners.dk

Lissie Klingenberg Jørgensen

Fra: Per Winther Christensen <pwc@shipowners.dk>
Sendt: 14. december 2016 12:42
Til: Lissie Klingenberg Jørgensen; Berit Hallam
Cc: Simon Christopher Bergulf
Emne: Danske værfter nomineret til EU hvidlisten.

Opfølgningsflag: Opfølgning
Flagstatus: Afmærket

Hej Berit og Lissie

På vores sidste møde om ophugning, talte vi om EU hvidlisten i fortalte at der var et af de to værfter der var indstillet fra dansk side der ikke behandlede alt materiale på "ikke gennemtrængeligt" underlag. Pointen var at den danske fortolkning af komma problemet tillod, at danske værfter der ikke fortog alt behandling af materiale på "ikke gennemtrængeligt" underlag, stadig kunne optages på listen.

Jeg ved at det er Fornæs og Smedegaarden i Esbjerg der er optaget på listen, men hvilke af de to værfter er værftet der ikke kører 100% på "ikke gennemtrængeligt" underlag?

Kind regards

Per Winther Christensen
Deputy Technical Director
Naval Architect, Master Mariner

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www.shipowners.dk

Miljø- og
Fødevareministeriet
Miljøstyrelsen

Jord og Affald
Ref. BEHA
Den . januar 2017

Telefonnotat samtale med Per Winther Christensen (PWC), Danmarks Rederiforening

PWC ringede som opfølgning på sin mail af 14. december 2016 om danske værfter nomineret til EU hvidlisten.

Anlæggene Fornæs og Smedegaarden er godkendt til optag på listen af deres respektive godkendelsesmyndigheder. Jeg oplyste, at Smedegaarden tilsyneladende opbevarer ikke-farlige materialer/affald på ikke-fast underlag. Men at jeg regnede med, at der om nødvendigt var vilkår i virksomhedens miljøgodkendelse eller den fysiske indretning af pladsen, fx ved omfangsdræn eller lignende, der tog højde for det.

Lissie Klingenberg Jørgensen

Fra: Jesper Stubkjær <js@shipowners.dk>
Sendt: 10. oktober 2016 08:36
Til: Berit Hallam
Emne: SV: Minister skal forklare ophugning af Mærsk-skibe i Indien

Beklager, Det var ikke Ida Auken, der fik brevet, men derimod Eva Kjer.

Derfor "Ida Auken" nu slettet nedenfor.

Jesper

Fra: Jesper Stubkjær
Sendt: 10. oktober 2016 08:31
Til: beha@mst.dk
Emne: SV: Minister skal forklare ophugning af Mærsk-skibe i Indien

Kære Berit
Ovenpå weekendens mediefokus på ophugning, og specifikt Pia Olsen Dyhrs udtalelser til Ritzau, regner vi med i dag at sende en berigtigelse til Pia O.D., da hun har misforstået flere forhold omkring reglerne.

Nedenstående udkast er ikke godkendt her i Rederiforeningen endnu, så du får det bare til din egen orientering. Jeg sender endelig version til dig, når vi forventeligt sender til Pia i dag.

Bh Jesper

_____

Kære Pia Olsen Dyhr
På Ritzau i går er du citeret for at ville kalde miljøministeren i samråd for at afklare, om Mærsk har presset den danske regering i sagen om ophugning af skibe i Alang.
Danmarks Rederiforening finder det vigtigt, at debatten foregår på et faktuelt korrekt grundlag, og jeg skriver derfor til dig for at belyse fakta i sagen og for at gøre opmærksom på to vigtige forhold.

1. Rederiforeningen har siden 2009 anbefalet sine medlemmer at følge FN's Hong Kong Konvention, selvom den endnu ikke er trådt i kraft, og opfordrer til at flest muligt nationer, herunder Danmark, ratificerer konventionen hurtigst muligt, så vi får et globalt regelsæt, der regulerer ophugningsindustrien. Rederiforeningen har i flere omgange opfordret skiftende miljøministre til at sørge for dansk ratifikation af konventionen.

2. Rederiforeningen støtter EU's ophugningsforordning og arbejder for, at EU's kommende liste over godkendte ophugningsfaciliteter tager hensyn til, at ophugningsindustrien er global, og at listen derfor ikke udelukker faciliteter, der er certificeret efter Hong Kong Konventionen.

I forhold til dine citater hos Ritzau, er det vigtigt at bemærke følgende:

<u>EU's Ophugningsforordning</u>
EU vedtog ophugningsforordningen i 2013. Den EU-lovgivning, der regulerer, hvordan EU-flagede skibe (samt skibe med sidste anløb i EU-havn inden ophugning) skal ophugges, er således vedtaget knap 3 år inden, at Mærsk besluttede at lade sine to skibe ophugge i Alang. Forordningen forholder sig ikke til, *hvor* i verden EU-skibe må ophugges, men stiller derimod krav til, *hvordan* ophugningen foregår. Det er dermed ikke korrekt, at EU stiller krav om ikke at ophugge på strande i Indien.

EU-reglerne er ikke trådt i kraft endnu, og ophugningen af skibe i Alang skal derfor ikke på nuværende tidspunkt ske i henhold til EU-regler. EU-forordningen er baseret på Hong Kong konventionens krav.

FN's Hong Kong Konvention

Den internationale konvention om ophugning, FN's Hong Kong Konvention, blev vedtaget i 2009, men er ikke trådt i kraft endnu, da for få lande har ratificeret. Den danske miljøminister har i september 2016 sendt et lovforslag i høring, som skal muliggøre dansk ratifikation af konventionen, efter planen i foråret 2017. Hong Kong Konventionen vil sikre miljø – og arbejdsforholdsmæssigt forsvarlig ophugning af skibe fra hele verden, og vil således have langt mere vidtrækkende effekt end EU-forordningen.

Konventionen indebærer blandt andet, at skibe skal have en liste over farlige stoffer ombord, hvilket muliggør forsvarlig håndtering under ophugningen. Derudover indebærer den, at forsvarlige miljø- og arbejdsforhold sikres på ophugningsfaciliteterne.

Til din orientering vedhæfter jeg Danmarks Rederiforenings politik om ophugning.

Jeg vil meget gerne mødes med dig for at drøfte sagen nærmere, samt for at forklare Rederiforeningens tilgang til sikring af forsvarlig ophugning.

Med venlig hilsen,

Anne H. Steffensen

Lissie Klingenberg Jørgensen

Fra: Camilla Bjerre Søndergaard (MST)
Sendt: 10. oktober 2016 11:54
Til: Michel Schilling; Berit Hallam; Lissie Klingenberg Jørgensen
Emne: VS: Mulig mail til Pia Olsen Dyhr om ophugning
Vedhæftede filer: Policy Paper_Recycling_DK_oktober 2016.pdf

t.o. udkast til mail, som rederiforeningen overvejer at sende til SF.
Vh Camilla

Fra: Jesper Stubkjær [mailto:js@shipowners.dk]
Sendt: 10. oktober 2016 11:32
Til: Camilla Bjerre Søndergaard (MST)
Emne: Mulig mail til Pia Olsen Dyhr om ophugning

Kære Camilla
Til fortrolig orientering – brev der muligvis sendes afsted i dag.

Mvh. Jesper

Jesper Forup Stubkjær
Chefkonsulent, fg. underdirektør
Sikkerhed, Sundhed, Miljø og Innovation

Danmarks Rederiforening
Amaliegade 33
DK-1256 København K
Telefon: 3311 4088 / Direkte: 3348 9237
Mobil: 3146 3246
E-mail: js@shipowners.dk
www.shipowners.dk

Danish Shipowners' Association | Rederiforeningen af 2010 | Bilfærgernes Rederiforening

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Kære Pia Olsen Dyhr
På Ritzau i går er du citeret for at ville kalde miljøministeren i samråd for at afklare, om Mærsk har presset den danske regering i sagen om ophugning af skibe i Alang.
Danmarks Rederiforening finder det vigtigt, at debatten foregår på et faktuelt korrekt grundlag, og jeg skriver derfor til dig for at belyse fakta i sagen og for at gøre opmærksom på to vigtige forhold.

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2. Rederiforeningen støtter EU's ophugningsforordning og arbejder for, at EU's kommende liste over godkendte ophugningsfaciliteter tager hensyn til, at ophugningsindustrien er global, og at listen derfor ikke udelukker faciliteter, der er certificeret efter Hong Kong Konventionen.

Følgende fakta værd at bemærke:

EU's Ophugningsforordning

EU vedtog ophugningsforordningen i 2013. Den EU-lovgivning, der regulerer, hvordan EU-flagede skibe (samt skibe med sidste anløb i EU-havn inden ophugning) skal ophugges, er således vedtaget for knap 3 år siden. Forordningen forholder sig ikke til, *hvor* i verden EU-skibe må ophugges, men stiller derimod krav til, *hvordan* ophugningen foregår. Det er dermed ikke korrekt, at EU stiller krav om ikke at ophugge på strande i Indien.

EU-reglerne er ikke trådt i kraft endnu, men vil gøre det senest i 2018. Ophugningen af skibe i Alang er derfor ikke på nuværende tidspunkt underlagt EU-regler. EU-forordningen er baseret på Hong Kong konventionens krav, men stiller nogle yderligere specifikke krav relateret til miljø og sikkerhed.

FN's Hong Kong Konvention

Den internationale konvention om ophugning, FN's Hong Kong Konvention, blev vedtaget i 2009, men er ikke trådt i kraft endnu, da for få lande har ratificeret. Den danske miljøminister har i september 2016 sendt et lovforslag i høring, som skal muliggøre dansk ratifikation af konventionen, efter planen i foråret 2017. Hong Kong Konventionen vil sikre miljø – og arbejdsforholdsmæssigt forsvarlig ophugning af skibe fra hele verden, og vil således have langt mere vidtrækkende effekt end EU-forordningen.

Konventionen indebærer blandt andet, at skibe skal have en liste over de farlige stoffer, der findes ombord, hvilket muliggør forsvarlig håndtering under ophugningen. Derudover indebærer den, at forsvarlige miljø- og arbejdsforhold sikres på ophugningsfaciliteterne.

Til din orientering vedlægger jeg Danmarks Rederiforenings politik om ophugning.

Jeg vil meget gerne mødes med dig for at drøfte sagen nærmere, samt for at forklare Rederiforeningens tilgang til sikring af forsvarlig ophugning.

Med venlig hilsen,

Anne H. Steffensen

Lissie Klingenberg Jørgensen

Fra: Per Winther Christensen <pwc@shipowners.dk>
Sendt: 4. november 2016 10:17
Til: Lissie Klingenberg Jørgensen
Emne: SV: Spørgsmål til brochuren "skibsfarten i tal maj 2016"

Opfølgningsflag: Opfølgning
Flagstatus: Fuldført

Kære Lissie,

661 er det rigtige tal.

Kind regards

Per Winther Christensen
Deputy Technical Director
Naval Architect, Master Mariner

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Amaliegade 33
DK-1256 Copenhagen K
Tel: +45 33 11 40 88 / +45 33 48 92 52
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www.shipowners.dk

Danish Shipowners' Association | Rederiforeningen af 2010 | Billedgemes Rederiforening

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Fra: Lissie Klingenberg Jørgensen [mailto:likjo@mst.dk]
Sendt: 3. november 2016 15:51
Til: Per Winther Christensen
Emne: Spørgsmål til brochuren "skibsfarten i tal maj 2016"

Kære Per

Jeg håber du kan hjælpe med opklaring af, hvor mange skibe der er i den danske handelsflåde. Jeg har fundet 3 forskellige tal i brochuren.

På side 3 står der, at størrelsen på den danske handelsflåde er 661.
Men på side 6, tabel 2.7, fremgår det at 591 skibe, sejler under dansk flag
Og på s. 10, tabel 2.14 fremgår det at 691 skibe, sejler under dansk flag.

Har du mulighed for at oplyse mig om, hvilket af disse tal, der er den korrekte?

Jeg kunne også godt tænke mig at vide, hvilke skibe, der er omfattet af begrebet "handelsflåde"

Jeg skal bruge informationen til ministerens beredskab, så hvis du har mulighed for at svare i morgen, vil jeg sætte stor pris på det.

Venlig hilsen

Lissie Klingenberg Jørgensen
Cand Jur | Jord og Affald
+45 72 54 43 76 | likjo@mst.dk

Miljø- og Fødevareministeriet
Miljøstyrelsen | Strandgade 29 | 1401 København K | Tlf. +45 72 54 40 00 | mst@mst.dk | www.mst.dk

Lissie Klingenberg Jørgensen

Fra: Per Winther Christensen <pwc@shipowners.dk>
Sendt: 7. september 2016 07:10
Til: Lissie Klingenberg Jørgensen
Emne: SV: EMSA Guidance on IHM_final.docx

Opfølgningsflag: Opfølgning
Flagstatus: Fuldført

Kære Lissie,

Vi har gennemgået EMSA's Best Practice Guidance on the Inventory of Hazardous Materials og har haft den i høring hos vores medlemmer.

Konklusionen er at det er en udmærket og brugbar guideline, som giver en præcis instruktion til rederen om hvordan en IHM skal udarbejdes, hvilke stoffer der skal inkluderes og hvordan den skal godkendes.

Samtidigt adskiller den sig ikke væsentligt fra RESOLUTION MEPC.269(68) - 2015 GUIDELINES FOR THE DEVELOPMENT OF THE INVENTORY OF HAZARDOUS MATERIALS, hvilket er meget vigtigt, da Hong Kong Konventionens krav vil være udgangspunkt for mange rederier uden for EU.

Annex A er en vigtig del af guiden – her kunne man godt ønske sig en mere overskuelig fremstilling af de forskellige deadlines.

Kind regards

Per Winther Christensen
Deputy Technical Director
Naval Architect, Master Mariner

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Mobile: +45 29 45 83 24
E-mail: pwc@shipowners.dk
www.shipowners.dk

Danish Shipowners' Association | Rederiforeningen af 2010 | Billægernes Rederiforening

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Fra: Lissie Klingenberg Jørgensen [mailto:likjo@mst.dk]
Sendt: 8. juli 2016 13:34
Til: Per Winther Christensen
Cc: Berit Hallam
Emne: EMSA Guidance on IHM_final.docx

Kære Per

Jeg har netop modtaget denne IHM best practice guidance fra EMSA.
EMSA anmoder om at modtage eventuelle bemærkninger til den senest 9. september 2016.
Hvis du har bemærkninger til guiden, er du velkommen til at sende dem til mig inden 9. september.

Lissie Klingenberg Jørgensen

Fra: Berit Hallam
Sendt: 24. januar 2017 11:12
Til: Lissie Klingenberg Jørgensen
Emne: Vs: ship recycling - EU list of approved facilities

Opfølgningsflag: Opfølgning
Flagstatus: Afmærket

Med venlig hilsen
Berit Hallam
Funktionsleder l Jord & Affald
+45 72544434 l beha@mst.dk
Mobil +45 40615652

Miljø- og Fødevareministeriet
Miljøstyrelsen l Strandgade 29 l 1401 København K l Tlf. +45 72 54 40 00 l mst@mst.dk l www.mst.dk

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Fra: Per Winther Christensen [mailto:pwc@shipowners.dk]
Sendt: 11. januar 2017 12:39
Til: Berit Hallam
Emne: VS: ship recycling - EU list of approved facilities

Hej Berit,

Hermed en oversigt over de europæiske værfters kapacitet.

European list of ship recycling facilities

	Actual	Theoretical	Length	Width	Draught	Length >= 200 m theoretical capacity
Belgium	34.000	50.000	265,0	36,0	12,5	50.000
Denmark	30.000	50.000	150,0	25,0	6,0	
Denmark	20.000	50.000	170,0	40,0	7,5	
France	16.000	18.000	150,0	18,0	7,0	
France	18.000	23.000	240,0	37,0	17,0	23.000
France	5.500	10.000	225,0	34,0	27,0	10.000
Latvia	0	15.000	165,0	22,0	7,0	
Lithuania	1.500	15.000	130,0	35,0	10,0	
Lithuania	3.910	6.000	80,0	16,0	6,0	
Lithuania	20.140	45.000	230,0	55,0	14,0	45.000
The Netherlands	52.000	100.000	405,0	90,0	11,6	100.000
The Netherlands	9.300	45.000	200,0	33,0	6,0	45.000
Poland	4.000	10.000	120,0	20,0	6,0	
Portugal	1.900					
Spain	0	60.000	169,9			
UK	66.340	230.000	337,5	120,0	6,7	337,5

UK	13.200	300.000	556,0	93,0		300.000
UK	7.275	74.999	200,0	27,0	7,0	74.999
	303.065	664.999				648.337

Kind regards

Per Winther Christensen
Deputy Technical Director
Naval Architect, Master Mariner

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Lissie Klingenberg Jørgensen

Fra: Per Winther Christensen <pwc@shipowners.dk>
Sendt: 21. april 2016 22:06
Til: Lissie Klingenberg Jørgensen
Cc: Maria Bruun Skipper
Emne: Hastehøring af nyt udkast til bekendtgørelse om udpegning af kompetente myndigheder og supplerende bestemmelser i henhold til forordning om ophugning af skibe

Kære Lissie,

Rederiforeningen har ikke yderligere bemærkninger til fremsendte revideret udkast til bekendtgørelse om udpegning af kompetente myndigheder og supplerende bestemmelser i henhold til skibsophugningsforordningen.

Kind regards

Per Winther Christensen
Deputy Technical Director
Naval Architect, Master Mariner

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DK-1256 Copenhagen K
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Mobile: +45 29 45 83 24
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www.shipowners.dk

Danish Shipowners' Association | Rederiforeningen af 2010 | Billedgrænes Rederiforening

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Fra: Lissie Klingenberg Jørgensen [mailto:likjo@mst.dk]
Sendt: 18. april 2016 10:11
Til: Lissie Klingenberg Jørgensen
Emne: Hastehøring af nyt udkast til bekendtgørelse om udpegning af kompetente myndigheder og supplerende bestemmelser i henhold til forordning om ophugning af skibe

Kære høringsparter

I tillæg til høring af bekendtgørelse om udpegning af kompetente myndigheder og supplerende bestemmelser i henhold til forordning om ophugning af skibe, udsendt den 18. marts 2016, udsendes nu en hastehøring af et nyt udkast til bekendtgørelsen.

Miljøstyrelsen er blevet opmærksom på, at oplysninger om proceduren for godkendelse af de skibsspecifikke skibsophugningsplaner skal oplyses til Kommissionen samtidig med meddelelse om, hvilke danske skibsophugningsanlæg, der skal optages på den europæiske liste. Proceduren er derfor blevet indarbejdet i det vedhæftede nye udkast til bekendtgørelse. Udkastet er derudover blevet præciseret et par steder.
Alle ændringer er markeret med rødt.

Høringsfristen er kort, fordi bekendtgørelsen skal træde i kraft hurtigst muligt.

Bemærkninger til vedhæftede bekendtgørelsesudkast sendes til likjo@mst.dk **senest 21. april 2016**

Venlig hilsen

Lissie Klingenberg Jørgensen
Cand Jur | Jord og Affald
+45 72 54 43 76 | likjo@mst.dk

Miljø- og Fødevareministeriet
Miljøstyrelsen | Strandgade 29 | 1401 København K | Tlf. +45 72 54 40 00 | mst@mst.dk | www.mst.dk

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Fra: Lissie Klingenberg Jørgensen
Sendt: 18. marts 2016 07:04
Til: Lissie Klingenberg Jørgensen
Emne: Høring af udkast til bekendtgørelse om udpegning af kompetente myndigheder i henhold til skibsophugningsforordningen

Hermed fremsendes:

1) Udkast til bekendtgørelse om udpegning af kompetente myndigheder og supplerende bestemmelser i henhold til Europa Parlamentets og Rådets forordning (EU) nr. 1257/2013 af 20. november 2013 om ophugning af skibe
2) Høringsbrev
3) Høringsliste

Bemærkninger til udkastet bedes sendes til likjo@mst.dk **senest 15. april 2016**

Venlig hilsen

Lissie Klingenberg Jørgensen
Cand Jur | Jord og Affald
+45 72 54 43 76 | likjo@mst.dk

Miljø- og Fødevareministeriet
Miljøstyrelsen | Strandgade 29 | 1401 København K | Tlf. +45 72 54 40 00 | mst@mst.dk | www.mst.dk

Lissie Klingenberg Jørgensen

Fra: Per Winther Christensen <pwc@shipowners.dk>
Sendt: 6. oktober 2016 07:48
Til: Lissie Klingenberg Jørgensen
Emne: SV: Høring af udkast til: Forslag til lov om ændring af lov om beskyttelse af havmiljøet og lov om miljøbeskyttelse (Implementering af dele af Hong Kong-konventionen)

Sag: MST-736-00014
Sagsdokument: 5997469

Kære Lissie,

Danmarks Rederiforening støtter Danmarks planer at ratificere af Hong Kong-konventionen om sikker og miljømæssig forsvarlig ophugning af skibe. Dette er et meget vigtigt skridt mod en forbedring af sikkerheden og miljøforholdene på verdens ophugningsfaciliteter.

Vi støtter således også lovforslaget der skal tilvejebringe hjemmelsgrundlag til at Danmark kan tiltræde Hong Kong-konventionen og at havmiljølovens anvendelsesområde udvides således, at skibsophugningsforordningens krav til skibe, kan administreres efter loven.

Kind regards

Per Winther Christensen
Deputy Technical Director
Naval Architect, Master Mariner

Danish Shipowners' Association
Amaliegade 33
DK-1256 Copenhagen K
Tel: +45 33 11 40 88 / +45 33 48 92 52
Mobile: +45 29 45 83 24
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www.shipowners.dk

Danish Shipowners' Association | Rederiforeningen af 2010 | Billedgermes Rederiforening

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Fra: Lissie Klingenberg Jørgensen [mailto:likjo@mst.dk]
Sendt: 6. september 2016 12:37
Til: Lissie Klingenberg Jørgensen
Emne: Høring af udkast til: Forslag til lov om ændring af lov om beskyttelse af havmiljøet og lov om miljøbeskyttelse (Implementering af dele af Hong Kong-konventionen)

Hermed fremsendes følgende dokumenter:

1) Udkast til: Forslag til lov om ændring af lov om beskyttelse af havmiljøet og lov om miljøbeskyttelse (Implementering af dele af Hong Kong-konventionen)
2) Bilag 1 – Hong Kong-konventionen
3) Bilag 2 – Dansk oversættelse af konventionen
4) Høringsbrev
5) Høringsliste

Eventuelle bemærkninger til udkastet kan sendes til likjo@mst.dk **senest fredag den 14. oktober 2016**

Dokumenterne offentliggøres også på Høringsportalen.

Venlig hilsen

Lissie Klingenberg Jørgensen
Cand Jur | Jord og Affald
+45 72 54 43 76 | likjo@mst.dk

Miljø- og Fødevareministeriet
Miljøstyrelsen | Strandgade 29 | 1401 København K | Tlf. +45 72 54 40 00 | mst@mst.dk | www.mst.dk

Lissie Klingenberg Jørgensen

Fra: Per Winther Christensen <pwc@shipowners.dk>
Sendt: 6. oktober 2016 07:48
Til: Lissie Klingenberg Jørgensen
Emne: SV: Høring af udkast til: Forslag til lov om ændring af lov om beskyttelse af havmiljøet og lov om miljøbeskyttelse (Implementering af dele af Hong Kong-konventionen)

Sag: MST-736-00014
Sagsdokument: 5997469

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Danmarks Rederiforening støtter Danmarks planer at ratificere af Hong Kong-konventionen om sikker og miljømæssig forsvarlig ophugning af skibe. Dette er et meget vigtigt skridt mod en forbedring af sikkerheden og miljøforholdene på verdens ophugningsfaciliteter.

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Kind regards

Per Winther Christensen
Deputy Technical Director
Naval Architect, Master Mariner

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Danish Shipowners' Association | Rederiforeningen af 2010 | Billedgermes Rederiforening

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Fra: Lissie Klingenberg Jørgensen [mailto:likjo@mst.dk]
Sendt: 6. september 2016 12:37
Til: Lissie Klingenberg Jørgensen
Emne: Høring af udkast til: Forslag til lov om ændring af lov om beskyttelse af havmiljøet og lov om miljøbeskyttelse (Implementering af dele af Hong Kong-konventionen)

Hermed fremsendes følgende dokumenter:

1) Udkast til: Forslag til lov om ændring af lov om beskyttelse af havmiljøet og lov om miljøbeskyttelse (Implementering af dele af Hong Kong-konventionen)
2) Bilag 1 – Hong Kong-konventionen
3) Bilag 2 – Dansk oversættelse af konventionen
4) Høringsbrev
5) Høringsliste

Eventuelle bemærkninger til udkastet kan sendes til likjo@mst.dk **senest fredag den 14. oktober 2016**

Dokumenterne offentliggøres også på Høringsportalen.

Venlig hilsen

Lissie Klingenberg Jørgensen
Cand Jur | Jord og Affald
+45 72 54 43 76 | likjo@mst.dk

Miljø- og Fødevareministeriet
Miljøstyrelsen | Strandgade 29 | 1401 København K | Tlf. +45 72 54 40 00 | mst@mst.dk | www.mst.dk

Lissie Klingenberg Jørgensen

Fra: Per Winther Christensen <pwc@shipowners.dk>
Sendt: 13. januar 2017 15:02
Til: Lissie Klingenberg Jørgensen
Emne: SV: Spørgsmål i relation til skibsophugningsforordningen

Sag: MST-719-00155
Sagsdokument: 6278348

Hej Lissie,

Jeg tror godt du kan bruge denne tilgang.

Kind regards

Per Winther Christensen
Deputy Technical Director
Naval Architect, Master Mariner

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DK-1256 Copenhagen K
Tel: +45 33 11 40 88 / +45 33 48 92 52
Mobile: +45 29 45 83 24
E-mail: pwc@shipowners.dk
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Fra: Lissie Klingenberg Jørgensen [mailto:likjo@mst.dk]
Sendt: 13. januar 2017 14:47
Til: Per Winther Christensen
Emne: SV: Spørgsmål i relation til skibsophugningsforordningen

Hej igen

Nu har jeg tænkt lidt mere over det. Den situation du nævner, vil jeg men er dækket af forordningens art. 9, stk. 3, litra c):

Administrationen eller den anerkendte organisation, som denne har godkendt, udsteder eller påtegner efter omstændighederne og med forbehold af stk. 4 et fortegnelsescertifikat, hvis det periodiske syn er korrekt gennemført mere end tre måneder inden det eksisterende fortegnelsescertifikats udløbsdato og det nye certifikat er gyldigt fra datoen for afslutningen af det periodiske syn ind til en dato, der ikke overstiger fem år fra datoen for gennemførelsen af det periodiske syn.

Art. 9, stk. 6, tror jeg handler om en situation, hvor skibet i en længere periode har været taget ud af drift som følge af omfattende reparationer.
SFS har nemlig henvist mig til Resolution A.1104(29) SURVEY GUIDELINES UNDER THE HARMONIZED SYSTEM OF SURVEY AND CERTIFICATION (HSSC), 2015, hvoraf følgende fremgår:

5.5 Application of "special circumstances"

References: SOLAS 74/88 regulation I/14(g), LLC 66/88 article 19(7), MARPOL Annex I, regulation 10.7, MARPOL Annex II regulation 10.7, MARPOL Annex IV regulation 8.7, MARPOL Annex VI regulation 9.7, IBC Code regulation 1.5.6.7, IGC Code regulation 1.5.6.7 and BCH Code regulation 1.6.6.7.
The purpose of these regulations or article is to permit Administrations to waive the requirement that a certificate issued following a renewal survey that is completed after the expiry of the existing certificate should be dated from the expiry date of the existing certificate. The special circumstances when this could be permitted are where the ship has been laid-up or has been out of service for a considerable period because of a major repair or modification. Whilst the renewal survey would be as extensive as if the ship had continued in service, the Administration should consider whether additional surveys or examinations are required depending on how long the ship was out of service and the measures taken to protect the hull and machinery during this period. Where this regulation is invoked, it is reasonable to expect an examination of the outside of the ship's bottom to be held at the same time as the renewal survey when it would not be necessary to include any special requirements for cargo ships for the continued application of SOLAS 74/88 regulation I/10(a)(v).

Hvad tænker du om det?

Venlig hilsen

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Fra: Per Winther Christensen [mailto:pwc@shipowners.dk]
Sendt: 13. januar 2017 08:40
Til: Lissie Klingenberg Jørgensen
Emne: SV: Spørgsmål i relation til skibsophugningsforordningen

Kære Lissie

Tak og godt nytår til dig også.

I forhold til nedenstående spørgsmål er den eneste situation jeg kan komme i tanke om, hvor en reder vil ønske en kortere løbetid en 5 år, vil være i forbindelse med harmonisering af certifikater.

Hvis fx et skib får udstedt det første fortegnelsescertifikat 1/2/2017 og alle andre certifikater på skibet udløber fx 15/3/2020, så kunne rederen være interesseret i at få udløbsdatoen på fortegnelsescertifikat sat til 15/3/ 2020 og ikke 1/2/2022.

Rederen kunne selvfølgeligt vælge at lade certifikatet udløbe 1/2/ 2022 og så blot lave synet når de andre certifikater udløber (i vinduet 15/1/2020 til 15/3/2020). Men problemet er hvis synet af alle certifikater fx laves den 20/2/2020 vil alle certifikater få en ny udløbsdato den 15/3/2025 - undtagen fortegnelsescertifikat som vil få udløbsdatoen 20/2/2025.

Håber at dette giver mening – hvis ikke er du velkommen til at ringe.

Kind regards

Per Winther Christensen
Deputy Technical Director
Naval Architect, Master Mariner

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Fra: Lissie Klingenberg Jørgensen [mailto:likjo@mst.dk]
Sendt: 12. januar 2017 16:18
Til: Per Winther Christensen
Emne: Spørgsmål i relation til skibsophugningsforordningen

Kære Per

Godt nytår!

Jeg er i gang med et udkast til en bekendtgørelse, der skal fastsætte supplerende regler til den del af skibsophugningsforordningen, der handler om skibe.

I artikel 9, stk. 6, i skibsophugningsforordningen fremgår følgende:

"Under særlige omstændigheder, der fastlægges af administrationen, behøver et nyt fortegnelsescertifikat ikke at være dateret fra det eksisterende certifikats udløbsdato som fastsat i stk. 3, litra a) og b), og stk. 7 og 8. Under disse særlige omstændigheder er det nye certifikat gyldigt for en periode, der ikke overstiger fem år fra datoen for gennemførelsen af det periodiske syn."

Hvis der findes sådanne særlige omstændigheder, skal de nævnes i bekendtgørelsen.

Kan I komme i tanker om særlige omstændigheder, der kan udløse denne undtagelse?

Venlig hilsen

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Lissie Klingenberg Jørgensen

Fra: Per Winther Christensen <pwc@shipowners.dk>
Sendt: 5. april 2016 10:05
Til: Lissie Klingenberg Jørgensen
Emne: VS: Høring af udkast til bekendtgørelse om udpegning af kompetente myndigheder i henhold til skibsophugningsforordningen

Kære Lissi,

Med reference til fremsendte hørring af udkast til bekendtgørelse om udpegning af kompetente myndigheder i henhold til skibsophugningsforordningen, har Rederiforeningen umiddelbart følgende bemærkninger:

1. § 3, c) og § 4, d) dem maksimale skibsophugningsmængde bør opgives med en enhed – fx i tons stål/år.
2. § 6, Miljøstyrelsen opretter og ajourfører en liste …. Hvornår kan en facilitet søge om optagelse – er det en kontinuerlig proces eller er det planen foretage årlige opdateringer af listen til kommissionen? Det er vigtigt for Rederiforeningen at Kommissionen opdaterer listen så ofte som muligt, så en facilitet der er godkendt og klar til at ophugge EU flagede skibe, kan starte arbejdet med det samme og ikke skal vente på at Kommissionen får udgivet en opdateret liste.

Kind regards

Per Winther Christensen
Deputy Technical Director
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Danish Shipowners' Association | Rederiforeningen af 2010 | Bilfærgernes Rederiforening

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Fra: Lissie Klingenberg Jørgensen [mailto:likjo@mst.dk]
Sendt: 18. marts 2016 07:04
Til: Lissie Klingenberg Jørgensen
Emne: Høring af udkast til bekendtgørelse om udpegning af kompetente myndigheder i henhold til skibsophugningsforordningen

Hermed fremsendes:

1) Udkast til bekendtgørelse om udpegning af kompetente myndigheder og supplerende bestemmelser i henhold til Europa Parlamentets og Rådets forordning (EU) nr. 1257/2013 af 20. november 2013 om ophugning af skibe
2) Høringsbrev
3) Høringsliste

Bemærkninger til udkastet bedes sendes til likjo@mst.dk **senest 15. april 2016**

Venlig hilsen

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Lissie Klingenberg Jørgensen

Fra: Maria Bruun Skipper <mbs@shipowners.dk>
Sendt: 19. januar 2017 16:25
Til: Lissie Klingenberg Jørgensen; Per Winther Christensen
Cc: Berit Hallam
Emne: SV: Opfølgning på førstebehandlingen af lovforslaget

Opfølgningsflag: Opfølgning
Flagstatus: Afmærket

Kære Lissie,

Mange tak for meldingen. Dejligt med bred opbakning til dansk ratifikation.

Vi vender tilbage med bud på den økonomiske omkostning ved det nævnte mulige ændringsforslag.

Umiddelbart tænker jeg, at der er nogle juridiske implikationer ved at pålægge fremmedflagede skibe danske særkrav. EU SRR omfatter af den grund netop kun EU flagede skibe. Er de juridiske implikationer noget, som MST ser på?

Dbh. Maria

Maria Bruun Skipper
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Fra: Lissie Klingenberg Jørgensen [mailto:likjo@mst.dk]
Sendt: 19. januar 2017 14:35
Til: Per Winther Christensen; Maria Bruun Skipper
Cc: Berit Hallam
Emne: Opfølgning på førstebehandlingen af lovforslaget

Kære Maria og Per

Førstebehandlingen af lovforslaget gik godt. Alle partier støttede det. EL, SF og AL vil dog gerne have strengere regler, og vil formentlig fremsætte et ændringsforslag om, at alle danskejede skibe skal ophugges på den europæiske liste.

Har I mulighed for at vurdere, hvilke økonomiske konsekvenser det ville have, eller hvor mange skibe, det ville dreje sig om?
De skibe der kommer i spil er dem der ikke er omfattet af forordningens anvendelsesområdet allerede. Dvs:

1) Danskejede skibe, der ikke sejler under en EU medlemsstats flag
2) Danskejede skibe under 500 BT, statsejede etc.

Venlig hilsen

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Lissie Klingenberg Jørgensen

Fra: Maria Bruun Skipper <mbs@shipowners.dk>
Sendt: 19. april 2016 14:23
Til: Berit Hallam; Per Winther Christensen
Cc: Lissie Klingenberg Jørgensen
Emne: SV: Finansieringsfond for skibsophugning

Kære Berit,

Det synes jeg lyder som en fornuftig tilgang. Vi ser frem til at blive inviteret til et møde, hvor vi kan uddybe vores synspunkter samt bidrage til en konkret strategi.

Dbh. Maria

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Danish Shipowners' Association | Rederiforeningen af 2010 | Billedergernes Rederiforening

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Fra: Berit Hallam [mailto:beha@MST.DK]
Sendt: 18. april 2016 14:27
Til: Maria Bruun Skipper; Per Winther Christensen
Cc: Lissie Klingenberg Jørgensen; Berit Hallam
Emne: Finansieringsfond for skibsophugning

Kære Maria og Per
Som I ved, har Regeringens Implementeringsråd anbefalet, at der sker tidlig interessentinddragelse i processen op til at Kommissionen senest d. 31. december 2016 skal forelægge en rapport for Europa-Parlamentet og Rådet om en finansieringsfond for skibsophugning.

Vi skal til Implementeringsrådets næste drøftelse heraf præsentere en procesplan for, hvordan og hvornår interessentinddragelsen skal finde sted. Jeg vil derfor gerne tale med jer om det.

Umiddelbart vil jeg foreslå, at vi orienterer Implementeringsrådet om, at vi snarest muligt holder et møde med jer og Danske Havne (som også har udtrykt interesse for emnet) og aftaler nærmere om, hvordan vi kan påvirke Kommissionen og således at vi inden sommer får fastlagt en proces.

Jeg har modtaget bestillingen i dag med vanlig kort frist – Implementeringsrådets næste møde er i maj, men vi har frist til onsdag til at levere input.

Vh
Berit

Med venlig hilsen
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Lissie Klingenberg Jørgensen

Fra: Maria Bruun Skipper <mbs@shipowners.dk>
Sendt: 13. juni 2016 11:21
Til: Berit Hallam; Lissie Klingenberg Jørgensen
Cc: Per Winther Christensen
Emne: Financial scheme - legal opinion
Vedhæftede filer: Legal Opinion - Ship Reycling License Scheme_Final.pdf

Opfølgningsflag: Opfølgning
Flagstatus: Fuldført

Kære begge,

Tak for et godt møde i mandags. Jeg lovede jo ECSA's policy papir med argumenter imod den finansielle mekanisme, men det viste sig, at papiret ikke var klappet 100 % af blandt ECSA's medlemmer. Til gengæld har vores tyske kollegaer fra VDR fået udarbejdet vedlagte juridiske analyse af, hvorfor en sådan mekanisme rammer en række juridiske udfordringer.

Glæder mig til at høre nærmere om dagens møder i Bruxelles.

Dbh. Maria

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The EU Ship Recycling Financial Incentive

–

Legal Opinion on the Option under Consideration by the European Commission of a Combination of a Permit for Ships Calling at EU Ports and a Public Fund

by:

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Institute for Maritime Law and the Law of the Sea,

University of Hamburg

Table of Contents

Three-Page "Executive Summary" of this Legal Opinion

As mandated by the European Commission (DG Environment), a consortium led by ECORYS Nederland B.V.[1] has extensively pondered various approaches on how to implement – by 31 December 2016 – Article 29 of Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC.[2]

The consortium has described a number of policy options for possible legislative action, ranging from a passive approach ("*Do nothing*") to different, more pro-active concepts (e.g., a ship recycling guarantee, an escrow account, an insurance model or a port levy). Ultimately, assessing the practical impact of different approaches and considering the legal problems and challenges associated with each of the different approaches, the consortium has generally favoured the introduction of a time-based ship recycling license (i.e. an EU Ship Recycling License Scheme), possibly to be combined with features of the previously pondered options ("*Combined/hybrid option*").[3]

Based on an analysis of applicable EU law, this legal position paper first highlights two specific issues associated with EU procedure and competency (section A.): First, because of its "primarily fiscal" nature, the EU Ship Recycling License assumes tax-like functions. Objective and verifiable factors, i.e., the aim and content of implementing Article 29 of the EU Ship Recycling Regulation mandate the application of Article 192(2)(a) of the Treaty of the Functioning of the European Union (TFEU)[4] as the correct legal ground for such a measure under EU procedural requirements. Consequently, political unanimity among <u>all</u> EU members is required to introduce an EU Ship Recycling License. Second, the EU lacks the institutional competency to autonomously designate completely new funds to the general EU budget. The exclusive administration of an EU Ship Recycling Scheme by the EU itself would violate both the principle of conferral (Article 5(1) of the Treaty on the European Union (TEU)[5] as

[1] Ecorys et al., Financial instrument to facilitate safe and sound ship recycling, 2nd Interim Report (30 October 2015).
[2] OJ L330/1 of 10 December 2013, hereinafter: "EU Ship Recycling Regulation".
[3] Ecorys et al., Financial instrument to facilitate safe and sound ship recycling, 2nd Interim Report (30 October 2015), pp. 35.
[4] Hereinafter: "TFEU". The exact wording of Article 192(2)(a) TFEU and other applicable provisions of the Lisbon Treaty are cited in Section A.
[5] Hereinafter: "TEU".

well as the rules established under Article 311 TFEU and the currently applicable system of governing the EU's own resources under Council Decision 2007/436/EC.

Furthermore, based on an analysis of legally-binding principles of the law of the sea, international environmental law (section B.) as well as the applicable legal regime of the law of the World Trade Organization (WTO, section C.), this legal opinion challenges the practicability, legality and proportionality of the conceptual approach brought forward by the consortium. The legal possibilities for the EU to impose rules on foreign ships are confined to those available under UNCLOS, under general international law and under WTO Law.

First, a proposed EU Ship Recycling License scheme measure is not "*consistent with international law*", in particular with the United Nations Convention on the Law of the Sea (UNCLOS).[6] The scheme would neither be discharge-related, nor related to the construction, design, equipment and manning of vessels ("CDEM") nor has it been internationally accepted as reflecting a present or future international standard to be prescribed and enforced by port States on behalf of the rest of the world. The limit on enforcement jurisdiction of port States to protect and preserve the marine environment is set out explicitly in Article 218 UNCLOS limiting this right to violations relating to illegal discharges. The proposed scheme exceeds the legal limits of port States' prescriptive jurisdiction and it is in excess of enforcement jurisdiction of port States as recognized under UNCLOS. Second, the proposed scheme is disproportionate both under general public international law and under WTO law. In addition, implementing an EU Ship Recycling License scheme in EU ports is even illegal under WTO law because it violates both Article V:3 GATT 1994 and Article XXXVII:1(c)(i) GATT 1994. The latter provision has been completely disregarded by the consortium.

With regard to Article V:3 GATT 1994, transit duties or charges cannot be justified by considerations of necessity or reason under WTO law and are thus illegal. A fee imposed on vessels for implementing an EU Ship Recycling License scheme has no correlation at all to actual transportation services or administrative expenses entailed by transit. It would be levied on the mere occasion of traffic (i.e. vessels) in transit but it would not serve transportation purposes. Rather, it would purely serve as a measure to build up capital for a future EU Ship Recycling fund. As such, fees arising under the scheme fall under illegal "*other charges imposed in respect of transit*" as outlawed by Article V:3 GATT 1994. The scheme also fails the applicable legal justifica-

[6] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, U.N.T.S., vol. 1833, p. 3 (entered into force 16 November 1994).

tion tests for establishing a "*reasonable*" or "*necessary*" charge. In addition, fees levied under an EU Ship Recycling License scheme would violate Article XXXVII:1(c)(i) GATT 1994 which states that developed WTO members shall "*refrain from imposing new fiscal measures"* to the detriment of developing WTO member countries. Three WTO developing countries are currently global market leaders in the shipbreaking business. In case ship recycling facilities are situated in those WTO developing countries and are not included in the future "European List", an EU financial incentive mechanism has similar economic effects like an antidumping duty or a countervailing measure because it will directly detract ship dismantling business opportunities from a more competitive and more price-efficient market. Rather the EU seeks to implement the "Polluter Pays Principle" (PPP) without any legal differentiation between affected WTO developing countries.

In section D. it is finally argued that the EU approach – i.e. favouring exclusively EU-listed ship recycling facilities – would completely ignore the established principle of "*Common But Differentiated Responsibilities [for Developing Countries]*" (known as CBDR). In the 21st century, CBDR is explicitly recognized in various areas of public international law, including international regulation of waste and international shipping. It needs to be acknowledged in the regulation of ship recycling as well, in particular, as the global resources and knowledge base of the global market leaders cannot be supplemented on short notice. From a development cooperation perspective, some of the "polluters", i.e., certain sub-standard recycling facilities in non-EU countries, could also be identified as being in need of financial incentives to be able to implement safe and sound ship recycling *in situ*. Ultimately, this leads to a call for earmarking Official Development Aid (known as "ODA") in order to make ship recycling in South East Asia more environmentally sustainable. With Bangladesh, one major ship recycling country is even eligible for funding under the WTO's Aid for Trade (AfT) package. The wording of Article 29 of the EU Ship Recycling Regulation does not outlaw a much more development-law oriented view. To include the recycling facilities into the debate on a possible financial instrument could also possibly prevent an unstainable relocation of ship recycling services with a possible devastating effect for the affected third-country economies and it would not take several decades to feel any practical effects once an EU ship recycling license regime (complemented by a publicly administered fund) has generated enough capital to become operational.

A. EU Procedure and EU Competency in Implementing Article 29 EU Ship Recycling Regulation

According to its opening statement, the EU Ship Recycling Regulation is – as a whole – based on Article 192(1) TFEU.[7] In conjunction with Article 191 TFEU, this provision sets out the objectives and rules concerning the delivery of EU environmental policy:

> *"The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191 [TFEU]."*[8]

The reference of the EU Ship Recycling Regulation to Article 192(1) TFEU to establish the shared competency of the EU and its member States in this area represents the common approach in EU environmental regulation.[9] However, a more specific legal act to implement Article 29 EU Ship Recycling Regulation by introducing a license scheme, including the creation of a fund mechanism, cannot be based on Article 192(1) TFEU. Rather, it must be based on Article 192(2)(a) TFEU. This provision states that:

> *"By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:*
>
> *(a) provisions primarily of a fiscal nature;*
> *[…]*

[7] Hereinafter: "TFEU".
[8] In particular, Article 191(1) TFEU states that: "*Union policy on the environment shall contribute to pursuit of the following objectives:*
- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change."
[9] See generally *Hedemann-Robinson*, Protection of the marine environment and the European Union: some critical reflections on law, policy and practice, Journal of International Maritime Law (10) 2004, pp. 254 (263 et seq.).

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph."

As a result, for certain environmental matters specifically addressed in Article 192(2) TFEU, EU measures may only be adopted by the EU Council unanimously. "*Primarily fiscal measures*" are thus subject to the decision-making process which deviates from the default decision-making procedure (i.e. the ordinary legislative procedure under Article 294 TFEU).[10]

1. EU Procedure: Establishing an EU Ship Recycling License is a "*primarily fiscal measure*" pursuant to Article 192(2)(a) TFEU

According to the case law of the Court of Justice of the European Union,[11] the determination of the correct legal basis of an EU act must be based on objective and verifiable factors, most importantly, the aim and content of the act in question.[12] In this context, the wording of Article 29 of the EU Ship Recycling Regulation and its Recital (19) clearly indicate that the general aim of a future implementing act relating to the provisions is

- to create a "*financial mechanism*",
- to initiate "*financial incentives*" and
- "*to generate resources*".

The Court of Justice of the EU (CJEU) has confirmed that the EU should apply the legal ground that correlates with the "principal" objective of an act while "accessory" objectives should be disregarded.[13] Thus, it will not be enough for the EU to refer only in very general terms to a governing principle of international environmental law,

[10] This procedural provision extends over 13 paragraphs and is thus not reproduced here.
[11] Hereinafter: CJEU.
[12] See, e.g., Case 45/86, Commission v Council [1987] ECR 1493, para. 11; Case 62/88, Greece v Council [1990] ECR 1527, para. 13; Case C-295/90, Parliament v Council [1992] ECR I-4193, para. 13.
[13] See Case C-155/91, Commission v Council [1993] ECR I-939. In this case, the CJEU concluded that although the Directive on waste management had the potential to affect the internal market, Article 192 TFEU (as of now) would still be the correct basis for the Directive.

i.e., the **Polluter Pays Principle (PPP)**[14] as enshrined explicitly in Article 191(2) TFEU.[15] Moreover, as early as 1997, the **Commission Communication on Environmental Taxes and Charges in the Single Market**[16] generally acknowledged that:

> *"In the area of environmental taxation, different meanings are often given to similar terms in different member States, and no precise definitions are offered by EU legislation. Nevertheless, it is important to stress that it is the characteristics and the effects of a measure which determine how it will be judged with respect to Community law and not the denomination[s …]."*[17]

Furthermore, the Communication has already identified "two main categories" of environmental levies, i.e., "*emission levies*" and "*product levies*". While it is natural that an EU Ship Recycling License cannot be categorized as an "*emission levy*", even the practical examples of the Commission for "*product levies*" evidence that it is not legally appropriate to categorize an EU Ship Recycling License Scheme under established criteria of environmental levies.[18] In particular, none of the traditional environmental product levies is designed to accumulate capital for a potential later disbursement via a public fund, under certain multiplied conditions and even with the possibility of forfeiture of individual benefits accrued.

Building up on earlier OECD work, a **1996 study of the European Environment Agency (EEA)** also adopted a classification of environmental taxes based on their policy objectives, distinguishing between the main uses to which the revenues can be put.[19] Even twenty years later, the ideas expressed in the EEA study have not lost

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[14] On the differences between a broad and a narrow understanding of PPP, see, with further references, *Zhu*, Is the Polluter Paying for Vessel-Source Pollution?, Journal of Business Law 2015, pp. 348 (at 355): "*In its broad sense, the polluter's responsibility also extends to other costs, including charges, taxes, clean-up costs and compensation.*"

[15] This provision states that: *"Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."*

[16] See Commission Communication (97/C 224/04) OJ No. C 224/6 of 23.07.1997.

[17] Ibid, p. 10.

[18] Ibid, p. 8: The practical examples for product levies referred to by the Commission are: *"[…] raw materials and Intermediate inputs such as fertilizers, pesticides, natural gravel, and ground water, and on final consumer products such as batteries, one way packaging, car tyres and plastic bags. […] taxes on gasoline, diesel and heating oils and electricity.*"

[19] European Environmental Agency (ed.): Environmental Taxes; Implementation and Environmental Effectiveness, Brussels 1996.

their general legal relevance. It generally differentiates between three different types of environmental taxes:[20]

1. Cost-covering charges;
2. Incentive taxes;
3. Fiscal environmental taxes.

The authors of the EEA study admit that the three types of environmental taxes could have overlapping features and are thus not mutually exclusive.[21] However, for the purposes of this legal opinion, three main deductions can be inferred from an analysis of the three general types of environmental taxes:

1. The proposed EU Ship Recycling License does not fall under the category of cost-covering charges because the instrument will not be designed to cover a specific (user-related) or otherwise earmarked public environmental service (like, e.g. treating waste water, disposing of waste or toxic products).

2. Art. 29 of the EU Ship Recycling Regulation is officially entitled "*Financial Incentive*". Generally, incentive taxes are levied purely with the intention to change an environmentally damaging behaviour, e.g., by consumers or traders, however, without any specific intention to raise revenues. If there are any revenues, these are often used to further encourage behaviour change via grants or tax incentives. The possibility of forfeiture of accrued rights and the fact that an EU Ship Recycling fund will only make a payment to the last shipowner (who potentially never participated in the "incentive scheme" for years before) do not support a pure legal categorization as an incentive tax.

3. Fiscal environmental taxes are mainly designed to raise "significant revenues" – whether specifically earmarked for certain ends or not. The wordings of Article 29 and Recital (19) of the EU Ship Recycling Regulation both evidence that the general aim of a future implementing act is to create a "*financial mechanism*" and "*to generate resources*". The proposed system cannot work without accumulating significant revenues for some years/decades.

[20] Ibid., p. 21.
[21] Ibid., p. 22.

As a result, the proposed EU Ship Recycling License system combines both elements of the categories “incentive tax” and “fiscal environmental tax”. However, while the protection of the environment might be a later effect of generating financial resources, especially during the first years after a possible installation, both the implementation of an EU Ship Recycling License scheme and/or the creation of an EU Ship Recycling public fund have the principal objective of building up a substantial capital-stock via enforcing a primarily fiscal measure over a longer period of time.

Generating monetary resources via a primarily fiscal measure and creating a corresponding financial mechanism will not protect the environment in itself. Rather, the protection of the environment could possibly be an accessory long-term effect of generating financial resources in the first place. In other words, the financial mechanism is a long-term catalyst to contribute to the general objective of global environmental protection. **This sequence of action cannot be disregarded as Article 192(2)(a) TFEU explicitly covers such “primarily fiscal measures” in an environmental context.** Otherwise the provision would be rendered completely useless and factually replaced by simply referring always and in any situation to the more generally phrased Article 192(1) TFEU.

As a practical example of the past, the former Commission Proposal for a Council Directive Introducing a Tax on Carbon Dioxide Emissions and Energy[22] had been explicitly based on the legal predecessor of Article 192(2)(a) TFEU and resulted in political failure due to lack of political unanimity among the member States. So far, the EU has never introduced any “green tax” based on Article 192(2)(a) TFEU. As a consequence, the Commission generally eschews legal references to Article 192(2)(a) TFEU. Rather, the Commission prefers to base all of its environmental legal acts broadly on Article 192(1) TFEU.

The view that the proposed measures are of primarily fiscal nature is finally reinforced by the fact that the EU Ship Recycling License scheme shall also serve as a penalty scheme in case of shipowners failing to comply which shall result in the forfeiture of accrued rights under the scheme.[23] Thus, in cases of forfeiture the scheme works exactly like a purpose-built “eco tax” and not like a premium (where the user usually acquires at least some advantage by adhering to the public payment obliga-

[22] O.J. 1992 C 196/1, see also COM(92)246 final.

[23] See Ecorys et al., Financial instrument to facilitate safe and sound ship recycling, 2nd Interim Report (30 October 2015), p. 35.

tions). Additionally, for all shipowners selling their vessels after some years of operation the scheme will not generate any return as the accrued rights under an EU Ship Recycling License shall stick to the ship and not to its owner(s).

2. Conclusions on EU Procedure

In sum, the EU Ship Recycling License clearly assumes tax-like functions. The fact that the scheme may also serve as a premium for those owners who categorically do not intend to sell their vessels during their whole operational lifespan (which is a rather unpractical scenario) cannot nullify the tax-built purposes of the whole scheme. As a result, objective and verifiable factors, i.e., the aim and content of implementing Article 29 EU Ship Recycling Regulation by introducing an EU Ship Recycling License mandate the application of Article 192(2)(a) TFEU as the correct legal ground for such a measure under EU procedural requirements. Consequently, political unanimity among EU members is required to introduce an EU Ship Recycling License.

3. EU Competency: The EU Lacks Institutional Power to Directly Administer and Enforce the Details of an EU Ship Recycling License

Even in case the EU Council should decide unanimously to implement Article 29 EU Ship Recycling Regulation by way of introducing an EU Ship Recycling License (and/or including the financial mechanism of a publicly administered EU Ship Recycling fund), **the EU itself lacks the institutional power to enforce the relevant rules directly**. According to Article 193 TFEU,[24] EU measures enacted under Article 192(2)(a) TFEU may only include minimum harmonization.[25] The call for minimum harmonization is an expression of the principles of subsidiarity and proportionality pursuant to Articles 5(3) and 5(4) TEU. It may be recalled that these paragraphs of Article 5 TFEU mandate that:

[24] Article 193 TFEU states that: "*The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.*"

[25] Commentary on the TFEU by Calliess/Ruffert, EGV/EUV AEUV, Article 192, para. 20; *Derlén/Lindholm*, Not enough room for optimal choices? The European legal framework for green taxes, pp. 167 (at 171 and 178), in: *Cullen/VanderWolk/Xu* (ed.), Green Taxation in East Asia.

(3) Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

(4) Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The EU and the member States share equal competency for all measures relating to Title XX of the TFEU (Environment). The CJEU has explicitly recognized a principle of procedural autonomy of EU member States reflected in the EU legal framework.[26] In particular, the CJEU has highlighted:

> *"In the absence of [EU] rules governing the matter, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of [EU] law."*[27]

a. Procedural Autonomy of the EU members in Environmental Policy

Precisely because of the applicable CJEU jurisprudence and in accordance with Article 291(1) TFEU,[28] environmental measures relating to carbon dioxide reduction and the EU-wide greenhouse gas emission allowance trading scheme (ETS) according to Directive 2003/87/EC[29] are implemented and enforced by the member States. This example evidences that the EU is competent to establish a general policy framework for action in environmental matters.

However, only in exceptional circumstances ("*duly justified specific cases*" pursuant to Article 291(2) TFEU),[30] this also involves a complementary EU power to directly

[26] See, e.g., Case C-430/93 Van Schijndel.
[27] Ibid., para. 17.
[28] Article 291(1) TFEU states that "*Member States shall adopt all measures of national law necessary to implement legally binding Union acts.*"
[29] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, p. 32–46.
[30] Article 291(2) TFEU states that: "*Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified*

enforce the rules. Otherwise the following might be questioned: On the one hand, a "global" topic like decarbonisation falls under the general distribution of institutional competencies, i.e., the Union establishing the policy framework and the members legally enforcing it. Why should ship recycling – on the other hand – be subject to an exceptional understanding under EU competency rules as it represents a "global" environmental challenge as well? Consequently, there is no practical substance to argue that the general objectives of a financial incentive for environmentally sound ship recycling are only achievable by exclusive administration by the EU and by enforcement of the EU itself.

b. The Legal Rules for Designating Completely New Funds to the General EU Budget

The EU lacks the institutional competency to autonomously designate completely new funds to the general EU budget. Generally, this view stems from the principle of conferral (Article 5(1) TEU) which means that the EU may only undertake an act if it seeks to achieve an objective entrusted to it by the member States under the Treaties.[31] The principle of conferral also results in the consequence that the EU has no competency to "invent" new forms of taxation of any kind.[32]
In contrast, tax sovereignty still lies with the member States. Article 311 TFEU explicitly states that

> "*the Union shall provide itself with the means necessary to attain its objectives and carry through its policies. Without prejudice to other revenue, the budget shall be financed wholly from own resources*."

Financial resources generated by a prospective EU Ship Recycling License, however, cannot be legally categorized as the EU's "*own resources*": Effective from 2007, the basic rules for the own resources system are laid down in **Council Decision**

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specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council."
[31] The provision states that: "*The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.*"
[32] See, e.g., *Schmidt-Kötters/Held*, Die Kompetenzen der EG zur Erhebung von Umweltabgaben und die „Emissionsüberschreitungsabgaben" für PKW-Hersteller, NVwZ 2009, pp. 1390 (at 1393).

2007/436/EC.[33] This "system of the European Communities' own resources" is still legally applicable until today. Nowhere in the text does the relevant Council Decision refer to environmental taxes or premiums as a possibility for generating revenue to constitute "*own resources*" and to be entered in the general EU budget.
According to Article 311 TFEU new categories of "*own resources*" have to be approved by the member States in accordance with their respective constitutional requirements. This institutional balance represents another reason why the EU lacks the competency to administer and enforce the financial resources generated by a future EU Ship Recycling License on its own. Rather, this task would fall into the procedural autonomy and remaining tax autonomy of the member States.

4. Conclusions on EU Competency

According to Article 291(1) TFEU, any specific environmental measures, also including the implementation of financial rules on sustainable ship recycling, are to be implemented by the EU members. The member States are also competent to enforce any relevant rules.
The EU lacks the institutional competency to autonomously designate completely new funds to the general EU budget. The exclusive administration of an EU Ship Recycling Scheme by the EU itself would violate both the principle of conferral (Article 5(1) TEU) as well as the rules established under Article 311 TFEU and the currently applicable system of governing the EU's own resources under Council Decision 2007/436/EC.

B. Legal Tension with the Law of the Sea (UNCLOS) and General Rules of Public International Law

UNCLOS is the legally-binding global *"constitution for the seas*".[34] Consequently, Article 15 of the IMO's Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships of 2009[35] explicitly addresses the relationship of

[33] 007/436/EC, Euratom: Council Decision of 7 June 2007 on the system of the European Communities' own resources, OJ L 163/17, 23.06.2007.
[34] *Scott*, The LOS Convention as a Constitutional Regime for the Oceans, in: *Oude Elferink* (ed.), Stability and Change in the Law of the Sea: the Role of the LOS Convention, pp. 9–38.
[35] Hereinafter: Hong Kong Ship Recycling Convention.

the convention with the international law of the sea and other international agreements.[36] However, the text of the EU Ship Recycling Regulation does not refer at all to UNCLOS. This non-reference contrast the fact that the EU Ship Recycling Regulation is intended to serve as implementation of the Hong Kong Ship Recycling Convention.[37]

The EU's omission aggravates the presumption that the EU Ship Recycling Regulation does not integrate into the applicable international rules and principles of the law of the sea to prevent "excessive port State jurisdiction". However, being a party to UNCLOS, the jurisdictional framework established under UNCLOS has binding legal effects on the EU.[38] Specifically, the role of the EU and its member States as flag States/coastal States/port States is governed by UNCLOS provisions. Part XII of UNCLOS addresses the protection of the marine environment although ship recycling is not explicitly addressed by any UNCLOS provision because it was not conceived as a problematic topic when the UNCLOS provisions were drafted between 1982 and 1994. However, UNCLOS lays down the jurisdiction of States to establish national rules (prescriptive or legislative jurisdiction) and to give effect to those rules (enforcement jurisdiction) over foreign ships.[39] The legal possibilities for the EU to impose rules on foreign ships are thus largely confined to those available under UNCLOS and under general international law.

1. An EU Ship Recycling License is Not Compatible With the UN Law of the Sea Convention (UNCLOS)

The EU Ship Recycling Regulation and the implementation of its Article 29 shall apply to all vessels, regardless of the flag they are flying. While the access of (foreign) vessels to ports may be subject to certain conditions,[40] under UNCLOS, the jurisdiction of port States to impose requirements on foreign ships is legally limited. Taking into account the hierarchy of the legal sources of public international law, the treaty provi-

[36] Article 15.1 of the Hong Kong Convention states that *"[N]othing in this Convention shall prejudice the rights and obligations of any State under the United Nations Convention on the Law of the Sea, 1982, and under the customary international law of the sea.*" Article 15.2 of the Hong Kong Convention clarifies that *"[N]othing in this Convention shall prejudice the rights and obligations of Parties under other relevant and applicable international agreements."*

[37] See, e.g., *Hedemann-Robinson*, Enforcement of European Union Environmental Law, p. 469.

[38] *Engels*, European Ship Recycling Convention, p. 108.

[39] *Ringbom*, The EU Maritime Safety Policy and International Law, p. 4.

[40] *Lowe*, The Right of Entry into Maritime Ports in International Law, 14 San Diego Law Review 1977, pp. 597–622.

sions of the UNCLOS represent the most important legal source of restraint. For example, matters which are purely internal to the ship lie beyond the jurisdiction of port States but are subject to exclusive flag State jurisdiction. As a result, for example, it is a purely internal matter and a commercial decision of a current shipowner

- "*to probably sell the vessel at some indefinite point of time in the future*"
- which could be followed by a buyer's decision to re-sell the ship further for dismantling purposes.

If at all, it is only relevant for information purposes of the flag State (in this case, the flag State's obligations under the Hong Kong Convention on Ship Recycling once the convention has entered into force). Additionally, the jurisdiction of the coastal State where a recycling facility is located could be involved, (for example, if a vessel destined for dismantling in the coastal State has not been sufficiently pre-cleaned and is being towed into coastal waters in a problematic technical condition).

a. "*Applicable International Rules and Standards*" and "*Discharge Requirements*"

The enforcement jurisdiction of port States is primarily governed by Article 218 UNCLOS. For example, the first two paragraphs of Article 218 UNCLOS prescribe:

> *"1. When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference."*
>
> *2. No proceedings pursuant to paragraph 1 shall be instituted in respect of a discharge violation in the internal waters, territorial sea or exclusive economic zone of another State unless requested by that State, the flag State, or a State damaged or threatened by the discharge violation, or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or exclusive economic zone of the State instituting the proceedings."*

These provisions evidence two important facts with regard to the enforcement powers of port States under UNCLOS: First, the system is generally characterized by references to the applicable international rules and standards.[41] Under UNCLOS, port States may both prescribe[42] and enforce those. International conventions as agreed under the auspices of the IMO represent a legal establishment of "*applicable international rules and standards*" under UNCLOS.[43] Consequently, once ratified by a sufficient number of IMO members,[44] the Hong Kong Convention on Ship Recycling will represent some operational "*applicable international rules and standards*" as well.
Second, with regard to "*applicable international rules and standards*", UNCLOS provides for universal jurisdiction of port States over violations of international discharge requirements.[45] However, this is not the case with respect to other (i.e. non-discharge related) requirements. As a consequence, the absence of explicit provisions representing "*generally accepted rules and international standards*" establishes excessive unilateral port State jurisdiction which is potentially illegal under public international law.

b. Enforcement of Legal Rules by Port States under UNCLOS

Materially, UNCLOS differentiates between prescription and enforcement by port States in relation to

- discharge requirements (see Article 218 UNCLOS),
- static "CDEM" requirements (i.e. "construction, design, equipment, manning", see, e.g., Articles 194(3) UNCLOS).[46]

[41] See *Keselj*, Port State Jurisdiction in Respect of Pollution from Ships: The 1982 United Nations Convention on the Law of the Sea and the Memoranda of Understanding, 30 Ocean Development and International Law 1999, pp. 127 (at 133).
[42] An example for a purely prescriptive provision, i.e. without any enforcement elements, is Article 211(3) UNCLOS. The first sentence of the provision reads: "*States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their offshore terminals shall give due publicity to such requirements and shall communicate them to the competent international organization.*"
[43] See generally: Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, Study by the Secretariat of the International Maritime Organization (IMO), IMO Doc. LEG/MISC.7 of 19 January 2012.
[44] See Article 17 of the Hong Kong Convention on Ship Recycling.
[45] *Ringbom*, The EU Maritime Safety Policy and International Law, p. 214.
[46] The sub-provision states that: "*The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, inter alia, those designed to minimize to the fullest possible extent:*

Additionally, other operational requirements might be relevant for both port and coastal States (as evidenced by the legal qualifications to "innocent passage" possible under Article 21 UNCLOS).

The Hong Kong Convention on Ship Recycling itself introduces some "CDEM" and operational requirements, for example, by calling for each new ship to have on board an **Inventory of Hazardous Materials** (IHM, see both Article 5 of the Hong Kong Convention on Ship Recycling and Article 5 of Regulation (EU) No 1257/2013). Thus, even though the Hong Kong Convention on Ship Recycling is not yet in force, from an UNCLOS perspective, it is not generally problematic if the EU prescribes and enforces accepted future international standards in advance (see Article 5 of the EU Ship Recycling Regulation). However, this legal approval does not extend "endlessly" to features and elements which are not an internationally agreed part of the applicable rules and standards.

Like many other IMO conventions, the Hong Kong Convention on Ship Recycling itself includes a provision which explicitly addresses the question under discussion here. Residual jurisdiction of port States to legislate in matters regulated in the conventions often refers to the fact that this has to be conducted "*in accordance with international law*". As a result, Article 1(2) of the Hong Kong Convention on Ship Recycling states that "*no provision of this Convention shall be interpreted as preventing a Party from taking, individually or jointly, more stringent measures consistent with international law, […]*".

However, when it comes to the implementation of the EU Ship Recycling financial incentive mechanism, the EU and its members – in their functions as port States – would try to prescribe and enforce a feature which has already been explicitly rejected in the forum of the competent international organisation by a majority of the international community. Thus, it is not possible to establish a legal link to "*generally accepted rules and international standards*" when the EU seeks to implement Article 29 of the Regulation (EU) No 1257/2013, i.e., the financial incentive mechanism, via an EU Ship Recycling License. If port States were to have the unrestricted right to ex-

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(a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping;
(b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;
[(c) and (d) omitted]."

ceed any standard of applicable IMO Conventions, the multilateral objects and purposes of those conventions would be defeated.[47]

c. Unilaterally Enforcing an EU Ship Recycling License Would Represent "Excessive" Port State Jurisdiction

Specifically, in the area of ship recycling, the combination of two factors differentiates the proposed financial incentive from all other potentially controversial "excessive" instruments to be applied by port States (for example in the area of monitoring, reporting and verifying CO2 emissions where the EU just recently also implemented unilateral measures):[48] **An EU Ship Recycling License is neither discharge-related, CDEM-related or in any other way operationally relevant nor has it been internationally accepted as reflecting a present or future international standard to be prescribed and enforced by port States on behalf of the rest of the world.** The proposed measure is, thus, not "*consistent with international law*" as prescribed by Article 1(2) of the Hong Kong Convention on Ship Recycling.

Thus, a port State requirement which prescribes a certain type of conduct in respect of foreign ships before, during or after their presence within the port States' territorial jurisdiction – in this case, payment of the EU Ship Recycling License fee – can exceed the limits of port State prescriptive jurisdiction as envisioned by UNCLOS. A prospective EU Ship Recycling License scheme would thus be in excess of enforcement jurisdiction of port States as recognized under UNCLOS.

Moreover, the EU and its member States have no enforcement jurisdiction under UNCLOS to charge the fees for an EU Ship Recycling License Scheme when non-EU flagged vessels voluntarily enter EU ports. The limit on enforcement jurisdiction of port States to protect and preserve the marine environment is set out explicitly in Article 218 UNCLOS limiting this right to violations relating to illegal discharges. This is also why, e.g., Australian rules on compulsory pilotage in the Torres Strait have been

[47] See generally, Article 31(1) of the VCLT which states that *"[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"

[48] Regulation (EU) 2015/757 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport OJ L123/55 of 19 May 2015.

identified as incompatible with Article 218 UNCLOS.[49] The same verdict would apply to a prospective EU Ship Recycling License Scheme.

2. Issues Relevant for General Public International Law

The absence of particular provisions on "excessive enforcement jurisdiction" of port States is generally treated as evidence that the matter is, if at all, rather regulated by general public international law than by UNCLOS.[50] However, the right to impose more stringent requirements is limited by certain generally accepted principles of public international law. Among those are the principles of

- non-discrimination,
- good faith,
- the prohibition of abuse of rights and
- proportionality.

The issue of non-discrimination is not under discussion here as the EU intends to implement its measures without any differentiation and regardless of any flag of vessels entering EU ports. Additionally, it does not seem productive to discuss the issue of good faith or the prohibition of abuse of rights which is also explicitly recognized by Article 300 UNCLOS.[51] By implementing a prospective EU Ship Recycling License scheme, the EU's general intention is, above all, to incentivise the use of certified ship recycling facilities, i.e. those included in the relevant European List.[52] This objective cannot be regarded as a breach of good faith or an abuse of rights in itself.
However, there is hardly any sub-area of public international law where the applicability of the principle of proportionality could be denied.[53] The application of propor-

[49] See *Beckmann*, PSSAs and Transit Passage – Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS, 38 Ocean Development & International Law 2007, pp. 325 (at 345).
[50] *Ringbom*, The EU Maritime Safety Policy and International Law, p. 215.
[51] The provision states that: „*States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right*."
[52] See Article 16 of the EU Ship Recycling Regulation.
[53] See *Delbrück*, Proportionality, in: *Bernhardt* (ed.), Encyclopedia of Public International Law, Vol. III, pp. 1140.

tionate enforcement measures is also applied by two UNCLOS provisions, namely its Articles 221 and 232.[54]

As a result, the means employed to achieve a certain objective have to be proportionate to that objective, also in the area of legislative and prescriptive port State jurisdiction. However, the following discussion on the WTO incompatibility will ultimately highlight that the EU approach of institutionalizing a unilateral Ship Recycling License Scheme is disproportionate.[55] Thus, whether the EU's conceptual approach is "*reasonable*" and "*necessary*" is discussed further and in more detail in the following sub-sections of this opinion.[56]

C. Non-Compliance with WTO Law: Article V:3 GATT 1994 and Article XXXVII:1 (c) (i) GATT 1994

For good reasons, the consortium questions whether the introduction of a financial instrument and the creation of a new financial obligation accords with the existing commitments of the EU and its member States under the legal order of the World Trade Organisation (WTO).[57] The ongoing trade dispute "*Russian Federation — Recycling Fee on Motor Vehicles*" – *inter alia* initiated by the EU – evidences that a recycling instrument may potentially generate trade distorting effects which could even be relevant for a WTO dispute.[58]

Furthermore, the 1997 the Commission Communication on Environmental Taxes and Charges in the Single Market[59] already warned that

> *"[…] The use of environmental taxes and charges may also affect obligations towards third countries, e.g. in the context of the World Trade Organization (WTO). member States need to take account of all these linkages in order to ensure that national environmental taxes and charges are implemented in a way which is compatible with their WTO [and Treaty] obligations."*

[54] Article 221 UNCLOS addresses measures to avoid pollution arising from maritime casualties and Article 232 regulates the liability of States arising from enforcement measures.
[55] Se generally on the issue proportionality under WTO law: *Mitchell*, Proportionality and Remedies in WTO Disputes, The European Jounrnal of International Law (17) 2007, pp. 985.
[56] See sections C. 2. a. and b.
[57] See Ecorys et al., Financial instrument to facilitate safe and sound ship recycling, 2nd Interim Report (30 October 2015), Annex B, pp. 67.
[58] For further details see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds463_e.htm.
[59] See *infra* Commission Communication (97/C 224/04) OJ No. C 224/6 of 23 July 1997.

While a prospective EU Ship Recycling License scheme applicable to all vessels would not be problematic under the general concept of non-discrimination among all WTO members, the mechanism as currently proposed would generally violate the right to freedom of transit as guaranteed under Article V:3 GATT 1994. Moreover, as part of the section on "Trade and Development" (Part IV GATT 1994), Article XXXVII:1 (c) (i) GATT 1994 mandates all developed WTO members explicitly "*to refrain from imposing new fiscal measures*" which potentially have a negative trade effect on the economies of developing countries.

In the context discussed here, Bangladesh, India and Pakistan could be possible applicants for demanding dispute settlement negotiations and for further establishing a panel against the EU, as a result of the negative commercial effects of an EU Ship Recycling License on ship recycling facilities situated within their respective territories. It has to be recalled at this point that 50.000 people are directly employed in ship recycling in Bangladesh while half a million people work in associated industries.[60] These numbers underline the domestic economic importance for Bangladesh and a comparable economic assessment can also be made for Pakistan or India.

1. An EU Ship Recycling License Scheme Violates the Substance of Article V:3 GATT 1994

As a whole, Article V GATT 1994 serves to protect WTO members from unnecessary delays or restrictions, such as limitations on freedom of transit, or unreasonable charges or delays (via paragraphs 2-4). Moreover, the provision extends the Most-Favoured-Nation (MFN) treatment to WTO members' goods which are "*traffic in transit*" (via paragraphs 2 and 5) or "*have been in transit*" (via paragraph 6). Vessels as a means for the international transport of goods are explicitly mentioned in Article V:1 GATT 1994 and, *argumentum e contrario*, the coverage of vessels is also evidenced by the explicit exclusion of aircraft in Article V:7 GATT 1994.[61]

Article V:3 GATT 1994, however, has never been interpreted by any GATT or WTO panel in the past. So far, Article V GATT 1994 has been subject to one single WTO dispute, mainly concentrating on Article V:2, 6 GATT 1994.[62] As part of this dispute, the panel has stressed that it is a difficult legal task to interpret Article V of the GATT

[60] See Lloyd's List of 15 February 2016 ("*Making recycling sustainable*"), p. 9.
[61] See also Analytical Index of the GATT, Art. V GATT, p. 214.
[62] Columbia – Indicative Prices and Restrictions on Ports of Entry, WT/DS366/R, 27 April 2009.

1994 "*without any meaningful guidance*".[63] Article V GATT 1994 represents a difficult and complex article.[64] Nevertheless, both the panel report "*Columbia – Port of Entry Measures*" and a legal analysis of the exact wording of the sub-provisions can still provide some meaningful guidance for determining whether a future EU Ship Recycling License would be in contradiction to Article V:3 GATT 1994. At the outset, Article V:3 GATT 1994 reads:

> "*Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered." [emphasis added]*

The panel report "*Columbia – Port of Entry Measures*" has generally confirmed a broad understanding of Article V GATT 1994 where the reference to "*freedom*" means "*the unrestricted use of something*", in particular, because of the fact that neither "*freedom*" nor "*transit*" are defined anywhere in the WTO legal order.[65] In any case, freedom of transit must also be provided to "traffic in transit".[66] Moreover, the general principles of treaty interpretation as set forth by the Appellate Body in *US – Gasoline* are applicable to avoid interpretations that reduce WTO provisions to inutility.[67]

In international trade law, Article V:3 GATT serves two main objectives: First, unless there is a failure to comply with applicable customs laws and regulations, a WTO member must not subject goods in transit coming from and going to another WTO member to delays or restrictions. Limiting the substance, the provision proscribes only delays or restrictions which are "*unnecessary*". Second, by using the conjunction "*and*", the sub-provision further states that traffic coming from or going to the territory of a WTO member shall be exempt from

[63] The panel used the term "*arduous*", ibid., para. 7.388.
[64] *Jackson*, World Trade and the Law of GATT, p. 511.
[65] Columbia – Indicative Prices and Restrictions on Ports of Entry, WT/DS366/R, 27 April 2009, paras. 7.399 and 7.456. However, Article V:1 GATT 1994 provides a fairly good concept of "transit".
[66] Ibid., para. 7.400.
[67] Ibid., para. 7.467.

(i) customs duties;

(ii) all transit duties; and

(iii) other charges imposed in respect of transit, except charges for (a) transportation or (b) those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

Notably, the term "*unnecessary*" only appears directly before the reference to "*delays or restrictions*". It does not re-appear after the conjunction "*and*" which opens up another category of illegal inflictions with the freedom of transit. This implies a more categorical and technical approach to customs duties, transit duties or other charges where issues of political "necessity" do not seem to be part of the equation. In contrast, Article V:4 GATT 1994 does not refer to "*unnecessary*" but to the term "*reasonable*" stating that:

> "*All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic."*

Article V:4 GATT 1994 must refer to legitimate "*charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered*" as referred to in Article V:3 GATT 1994. Representing another legal category, however, "*customs duties, transit duties and other charges imposed in respect of transit*" are generally outlawed by Article V:3 GATT without any reference to necessity or reason.

In other words: Reasonable transportation charges can be justified as legal measures under the WTO system. Legitimate transportation charges and regulations as referred to in Article V GATT 1994 must be governmentally imposed as the relevant measures are, e.g., defined as: "*[…] including charges for transportation by Government-owned railroads or Government-owned modes of transportation*".[68] This defini-

[68] Preparatory Committee of the International Conference on Trade and Employment, Committee II, Report of the Technical Sub-Committee, UN Doc. E/PC/T/C.II/54/Rev.1, 28 November 1946, p. 10.

tion serves to clarify that there must be some government ownership of the mode of transport in question before a transportation charge can be levied.[69]
As a consequence, privately-imposed harbour fees do not fall under the categories of costs as regulated by Article V GATT 1994. Practical examples for reasonable transportation charges are, e.g., train costs (as some WTO members require that traffic in transit use alternative modes of transportation, for example, if applicable quotas for trucks have already been filled).[70] A practical example for "*charges commensurate with administrative expenses entailed by transit or with the cost of services rendered*" is, e.g., the filing of transit documents.[71] Consequently, this expression mainly relates to physical goods in transit and not to the means for transporting the goods to enter transit areas.

2. Conclusion on the Violation of the Material Substance of Article V:3 GATT 1994

As evidenced by the practical examples for legal transportation charges, the annual or monthly fee imposed on vessels for implementing an EU Ship Recycling License scheme has no correlation at all to actual transportation services or administrative expenses entailed by transit. Rather, it would be levied on the mere occasion of traffic (i.e. vessels) in transit and it would not serve transportation purposes but as a measure to build up capital for the financial administration of an EU Ship Recycling fund. Thus, EU Ship Recycling License fees must fall under the catch-all category of "*other charges imposed in respect of transit*" as mentioned in Article V:3 GATT 1994. **Transit duties or charges of that kind cannot be justified by considerations of necessity or reason under WTO law and are thus illegal**.

3. An EU Ship Recycling License Cannot be Justified Under Article V:3 GATT 1994 as "*Necessary*" or "*Reasonable*"

Even if a WTO dispute panel should conclude that the categories of "*necessary*" and "*reasonable*" should apply in examining a possible justification for EU Ship Recycling

[69] *Valles*, Commentary on Article V GATT 1994, in: *Wolfrum/Stoll/Hestermayer* (eds.), Max Planck Commentaries on World Trade Law, Vol. 5, para. 16.
[70] Ibid.
[71] Ibid.

License fees as "*other charges imposed in respect of transit*", the relevant test would result in concluding that the financial obligations imposed on vessels in transit are "*unnecessary*" and "*unreasonable*". There is extensive jurisprudence on the meaning of the word "*necessary*" in the relevant sub-paragraphs of Article XX GATT 1994. The term "*reasonable*" has been interpreted less frequently, however, the panel report in "*Dominican Republic – Import and Sale of Cigarettes*" provides guidance as it construed "*reasonable*" as mentioned in Article X GATT 1994.[72]

a. The Test for a "*Reasonable*" Charge

Remarkably, the panel in "*Dominican Republic – Import and Sale of Cigarettes*" turned to the "New Oxford English Dictionary" and noted that: *"[…] the ordinary meaning of the word "reasonable" commonly refers to notions such as:*

- "*in accordance with reason*",
- "*not irrational or absurd*",
- "*proportionate*",
- "*having sound judgement*",
- "*sensible*",
- "*not asking for too much*",
- "*within the limits of reason, not greatly less or more than might be thought likely or appropriate*", *and*
- "*articulate*".[73]

First, the inclusion of a financial mechanism into the legal framework of the Hong Kong Convention on Ship Recycling was politically rejected by a majority of the IMO members during the course of the negotiations on the convention.[74] Thus, to set up a financial incentive mechanism in the area of ship recycling has been disapproved by the majority of the international community as being disproportionate, unsound and asking too much from shipowners and other stakeholders involved.

[72] Panel Report, Dominican Republic – Importation and Sale of Cigarettes, WT/DS302/R, para. 7.385.
[73] Ibid.
[74] See specifically: *Yujuico*, Demandeur pays: The EU and funding improvements in South Asian ship recycling practices, Transportation Research Part A 67 (2014) pp. 340 (at 348): "*Efforts to implement a ship recycling fund were sunk at the global level during HKC negotiations and have been put in the dock at the EU level due to implementation difficulties*."

Second, a WTO panel could construe "*reasonable charges*" to mean those charges that the market is willing to bear in the light of alternative routes of transportation available.[75] There are no alternative routes of transportation available since avoiding EU ports completely is not a commercially viable alternative for most shipping businesses. A market enquiry on whether shipowners (and private or public port authorities) would be willing to bear the estimated costs (of about 16.000 EUR/year) and, additionally, the administrative burdens of implementing an EU Ship Recycling License scheme would, however, result in the obvious conclusion that this approach should be rejected as being unreasonable.

b. The Test for a "*Necessary*" Charge

Testing the "*necessity*" element, the WTO Appellate Body has developed a "two-tiered" approach in the context of Article XX GATT 1994 (as applied since the 1996 dispute "*US – Gasoline*").[76] The Appellate Body has explained that both elements must be satisfied in order for a measure to be provisionally justified under a sub-paragraph of Article XX GATT 1994:

First, there has to be a provisional justification by reason of characterisation of the measure under the relevant sub-paragraph of Article XX GATT 1994. Additionally, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves generally inconsistent with the GATT 1994. However, it may be recalled that the above analysis has evidenced that an EU Ship Recycling License would be in conflict with the concept of Article V:3 GATT 1994, thus resulting in general WTO-inconsistency.

Second, a further appraisal of the same measure under the introductory clauses of Article XX GATT 1994 would follow.[77] This includes the test whether a measure must be "*necessary*" to secure compliance with national laws or regulations. A WTO member which invokes one of the sub-paragraphs of Article XX GATT 1994 as a justification for a trade-distorting measure has the burden of demonstrating that both of these

[75] *Valles*, Commentary on Article V GATT 1994, in: *Wolfrum/Stoll/Hestermayer* (eds.), Max Planck Commentaries on World Trade Law, Vol. 5, para. 19.
[76] Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3.
[77] Appellate Body Report, *US – Gasoline*, p. 22.

two requirements are met.[78] The Appellate Body – when examining the concept of "*necessary*" (in the context of Article XX(d) GATT 1994 in *Korea – Various Measures on Beef*) – concluded that, in order to be considered "*necessary*" to secure compliance, a measure does not need to be "*indispensable*" but should constitute something more than strictly "*making a contribution to*":

> *"[…] the term 'necessary' refers, in our view to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to'. We consider that a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'."*[79]

> *[…] determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' […], involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."*[80]

In a more recent assessment of the meaning of the term "*necessary*" in connection with a defense raised under Article XX(b), the Appellate Body indicated that a panel may evaluate whether a measure is "*necessary*" based on the extent to which the measure is "*apt to produce a material contribution to the achievement of its objective*".[81]

Finally, the Appellate Body has clarified that a measure will not be considered "*necessary*" (in this case: within the meaning of Article XX(d) of the GATT 1994*)* "*if an alternative measure which [a member] could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it*".[82] However,

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[78] Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.
[79] Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.
[80] Appellate Body Report, *Korea – Various Measures on Beef*, paras. 162-164.
[81] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[82] Appellate Body Report, *Korea – Various Measures on Beef*, para. 165, citing to GATT Panel Report, *US – Section 337*, footnote 69, para. 5.26: "*It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent*

here a complaining WTO member has the burden to identify possible alternatives to the measure at issue that the respondent could have taken.[83]

It is questionable why a financial measure like an EU Ship Recycling License and the administration of a fund which needs several years (if not decades) to generate any practical effects could be categorized as "*apt to produce a material contribution to the achievement of its objective*", i.e. sustainable and sound ship recycling globally. The possibility of accrued funds generated from the EU Ship Recycling License Scheme being forfeited already anticipates that an undefined number of shipowners will not change their approach to ship recycling. In fact, it would rather be a widespread ratification of the Hong Kong Convention on Ship Recycling which could be categorized as "*apt to produce a material contribution"* to the achievement of the objective of sustainable ship recycling globally. Additionally, satisfying their burden of proof, complaining WTO members like India, Pakistan or Bangladesh could point to the political alternatives of having all EU members ratify the Hong Kong Convention on Ship Recycling and to further utilize the instruments of official development aid (ODA) to modernize ship recycling facilities in traditional ship recycling countries.

4. Under Article XXXVII:1(c)(i) GATT 1994, Developed WTO Members "*Shall Refrain From Imposing New Fiscal Measures*"

As part of their deliberations on the alleged WTO consistency of an EU Ship Recycling License,[84] the consortium has completely disregarded Part IV of the GATT 1994 (Trade and Development). However, Part IV GATT 1994 is not an insignificant "annex" to Parts I - III GATT 1994. Rather, the three provisions of Part IV GATT postulate additional legal requirements which are legally binding for all WTO members including the EU. Already before 1995, this has been confirmed by earlier GATT jurisprudence stating that the provisions of Part IV GATT 1994 could be "*breached*"[85] and

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with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."

[83] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

[84] Ecorys et al., Financial instrument to facilitate safe and sound ship recycling, 2nd Interim Report (30 October 2015), pp. 77.

[85] GATT Panel, EEC – Restrictions on Imports of Apples from Chile, GATT BISD 27S/98 (117, paras. 4.22-4.23): "*The Panel examined the EEC measure in relation to the objectives and commitments embodied in Articles XXXVI and XXXVII [...] Although the EEC measure did affect the ability of a developing country to export into the EEC market, the Panel noted that the EEC had taken certain ac-*

that Article XXXVII GATT 1994 reflects "*additional obligations*".[86] For example, Brazil has relied explicitly on Part IV GATT 1994 in a former dispute against the European Community (EC).[87]

Article XXXVII GATT 1994 is entitled "*Commitments*" (of developed WTO members towards developing WTO members). The second paragraph of the provision introduces so-called "*stand still provisions*". In particular, Article XXXVII:1(c)(i) GATT 1994 states:

> *"1. The developed contracting parties shall to the fullest extent possible – that is, except when compelling*
> *[…]*
> ***(c) (i) refrain from imposing new fiscal measures**,*
> *[…]*
> *which would hamper, or which hamper, significantly the growth of consumption of primary products, in raw or processed form, wholly or mainly produced in the territories of less-developed contracting parties, and which are applied specifically to those products."*

The final part of Article XXXVII GATT 1994 evidences that this provision is a purely product-related provision. As such, it mainly focusses on fiscal measures applied to primary products wholly or mainly produced by developing country WTO members. However, the product-focus is true for the whole GATT system and the existence of a variety of "*special and differential treatment (SDT) provisions*" in the WTO legal order evidences that Article XXXVII:1(c)(i) GATT 1994 cannot be read in isolation.

In any case, the process of ship dismantling generates huge amounts of scrap metal and raw steel plates. Thus, a dynamic interpretation of Article XXXVII:1(c)(i) GATT 1994 supports the view that the generation of raw steel/steel parts (and every product on a vessel to be cut off or segmented in the process of ship dismantling) establish

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tions, including bilateral consultations in order to avoid suspending imports of apples from Chile. After a careful examination, the Panel could not determine that the EEC had not made serious efforts to avoid taking protective measures against Chile. Therefore the Panel did not conclude that the EEC was in breach of its obligations under Part IV.".

[86] Ibid., (133-134, para. 12.32) „[*...] However, the Panel noted that the commitments entered into by contracting parties under Article XXXVII were additional to their obligations under Parts I-III of the General Agreement, and that these commitments thus applied to measures which were permitted under Parts I-III. As the Panel had found the EEC's import restrictions to be inconsistent with specific obligations of the EEC under Part II of the General Agreement, it therefore did not consider it necessary to pursue the matter further under Article XXXVII."*

[87] GATT Panel, *European Communities – Refunds on Exports of Sugar*, GATT BISD 27S/69 (80 et seq.).

the necessary "product link" for triggering the general applicability of Article XXXVII:1(c)(i) GATT 1994.

As evidenced by the above discussion relating to Article 192(2)(a) TFEU,[88] the financial mechanism as envisioned by Article 29 EU Ship Recycling Regulation represents a [primarily] "*fiscal measure*" as materially covered by Article XXXVII:1(c)(i) GATT 1994. The intended effect of this fiscal measure – which developed WTO members shall refrain from in relation to WTO developing countries – is to incentivise shipowners to contract with ship recycling facilities which are included in the "European List" as set out in Article 16(2) EU Ship Recycling. However, if a ship recycling facility – situated in a developing country like Bangladesh, Pakistan or India – would not be included in the "European List" it will potentially lose a substantial amount of its former ship recycling business. This would be a simple causal result of the application of the financial incentive mechanism implemented via an EU Ship Recycling License (and via disbursements to shipowners from an EU Ship Recycling License fund).

Even before the creation of the WTO, Article XXXVII:1(c)(i) GATT 1994 was reinforced by Article XXXVII:3(c) GATT 1994 which reads:

> *3. The developed contracting parties shall:*
> *[…]*
> *c) have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties.*

In the context of Article XXXVII:3(c) GATT 1994 "*other measures*" covers, e.g., measures like antidumping duties or countervailing measures.[89] The basic compatibility with those measures is enough to affirm the existence of "*other measures*". In relation to ship recycling facilities – situated in WTO developing countries which are not included in the "European List" – the financial incentive mechanism has similar economic effects like an antidumping duty or a countervailing measure because it has the direct effect of detracting ship dismantling business opportunities from a more competitive and more price-efficient market. "*Essential interests*" of Bangla-

[88] See supra, section A.1.
[89] Analytical Index of the GATT, Art. XXXVII GATT, p. 1066.

desh, India and Pakistan would be affected. "*Constructive remedies*" to the benefit of those countries have not been discussed. Rather the EU seeks to implement the **"Polluter Pays Principle" (PPP)** without any differentiation between affected WTO developing countries.

The effect of losing ship breaking business as a result of a possible "non-inclusion" would even be felt commercially – if affected ship recycling facilities were to be officially certified/accredited under the "global" Hong Kong Convention on Ship Recycling system (once set in force) at the same time. As a result, implementing Article 29 EU Ship Recycling via the imposition of a new fiscal measure – detrimental to at least three WTO developing countries as global market leaders in the shipbreaking business – contradicts completely with the EU's legal obligations under Part IV GATT, in particular with its obligations under Article XXXVII:1(c)(i) GATT 1994.

D. Favouring EU-listed Ship Recycling Facilities Conflicts with the Principle of Common but Differentiated Responsibilities (CBDR)

The discussion so far also has to highlight an important variation in the legal definition of a "*ship recycling facility*" between the EU Ship Recycling Regulation on the one hand and the Hong Kong Convention on Ship Recycling on the other hand. The latter defines the term "*ship recycling facility*" to mean "*a defined area that is a site, yard or facility used for the recycling of ships*". In contrast, the EU definition omits the term "*site*" and defines a "*ship recycling facility*" to mean "*a defined area that is a yard or facility located in a member State or in a third country and used for the recycling of ships*".

The practical effects of the omission of "*sites*" could work against the inclusion of certain ship recycling companies in the "European List".[90] By obviously demanding a concrete structure (or other form of "*defined area*" which is not a "*site*") the EU deviates from the international accord and maximizes a domestic ship recycling standard to be applied globally, neglecting the fact that environmentally sound and sustainable

[90] See generally: *Tsimplis*, Recycling of EU Ships: From Prohibition to Regulation?, Lloyd's Maritime and Commercial Law Quarterly 2014, pp. 415 (433).

ship recycling cannot be generally outlawed from a standard-based approach (see Regulation 3 of the Hong Kong Convention on Ship Recycling).[91]

In particular with regard to the practical consequences, the EU's approach would completely ignore the principle of **"Common But Differentiated Responsibilities [for Developing Countries]" (CBDR)**. This principle has been developed over time as an answer to developing country parties' calls for fairer rules and procedures in international environmental cooperation.[92] For example, in the context of transboundary waste management, Article 11(1) of the Basel Convention explicitly recognizes CBDR.[93] After decades of increasing international cooperation on environmental issues, the notion of CBDR has now evolved into a cardinal principle of international environmental law, e.g., in the context of international negotiations under the UN Framework Convention on Climate Change (UNFCCC). CBDR is now not only explicitly recognized under the UNFCCC but there are also manifestations in various other areas of public international law, namely in:

- The Convention on Biodiversity,
- the UN Convention to Combat Desertification
- the variety of "SDT" provisions in the WTO legal order
- the Montreal Protocol on Substances that Deplete the Ozone Layer
- the Post-2015 negotiations and prospective Sustainable Development Goals.

In fact, CBDR is not an antagonist but simply an outgrowth of the PPP which is promoted so broadly by the EU: "*The equitable considerations intrinsic to the polluter-pays principle also suggest that it is appropriate for developed countries, whose development is imposing significant negative externalities on the environment of both*

[91] The provision states that: "*Parties shall take measures to implement the requirements of the regulations of this Annex, taking into account relevant and applicable standards, recommendations and guidance developed by the International Labour Organization and the relevant and applicable technical standards, recommendations and guidance developed under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.*"

[92] The starting point was, e.g., the formulation of Principle 7 of 1992 Rio Declaration on Environment and Development; see also: The Principle of Common But Differentiated Responsibilities: Origins and Scope, A CISDL Legal Brief for the World Summit on Sustainable Development 2002, Johannesburg; DIE Discussion Paper No. 6/2014: Different Perspectives on Differentiated Responsibilities, p.7.

[93] "*[…] 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 and other wastes as required by this Convention. These agreements or arrangements 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.*"

developed and developing countries, to help developing countries meet their environmental obligations."[94]

Remarkably, even in shipping, CBDR is now continuously recognized in practical discussions, for example, when it comes to bunker fuel emission control, as part of the efforts to combat climate change: In the IMO, a recently formed group of "*like-minded developing countries*"[95] has asked the IMO to work in accordance with the principles and provisions of the UNFCCC, in particular with the principles of equity and CBDR.[96] In sum, the principle of CBDR needs to be acknowledged in the practice of regulating ship recycling as well, in particular, as the global resources and knowledge base of the global market leaders cannot be supplemented on short notice. Ultimately, this would lead to a call for earmarking official development aid (ODA) more intensively in order to make ship recycling in South East Asia more environmentally sustainable – instead of using shipowners as a "cash cow" for a bureaucratic experiment with unknown material and financial contributions.

E. Conclusions on the Disproportionality and Non-Compliance with International Law

A measure which is identified as being disproportionate in one sub-area of public international law (here: WTO law) cannot be held to be clearly proportionate in other sub-areas of public international law. The fact that developing countries, including one least-developed country (Bangladesh), are economically affected by the EU's proposed measures adds some political sensitivity to weighing the balance between proportionality and disproportionality.

In conclusion, an EU Ship Recycling License has to be categorized as disproportionate under public international law due to its possible detrimental effects on the shipbreaking business in case leading ship recycling facilities, located in developing countries, are not included on the "European list". This outcome, however, seems to be pre-determined since the legal definition of "*ship recycling facility*" under EU law

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[94] *Dernbach*, Sustainable Development as a Framework for National Governance, 49 Case Western Law Review (1998), p. 1.

[95] The first meeting of the group on climate change was hosted by China in 2012.

[96] Submission by Algeria, Argentina, Bolivia, Brazil, China, Cuba, Ecuador, Egypt, El Salvador, India, Malaysia, Nicaragua, Pakistan, Saudi Arabia, South Africa, Thailand, Uruguay, and Venezuela, on cooperative sectoral approaches and sector-specific actions in order to enhance the implementation of Article 4 paragraph 1(c) of the Convention; see http://unfccc.int/files/bodies/awg-lca/application/pdf/submission_by_like-minded_countries_1.b.iv25may.pdf.

differs from the approach of the Hong Kong Convention on Ship Recycling.[97] However, generally disregarding topographic conditions in major ship recycling countries and excluding the possibility that a ship recycling facility could also be operated sustainably and adhering to highest environmental standards from a "*site*" is disproportionate. This assumption is reinforced by the fact that, e.g., four Indian ship recycling facilities also operating on "*sites*" have only recently been officially certified by classification societies under the criteria as governed by the Hong Kong Convention on Ship Recycling.[98]

F. Final Alternative Thoughts on a More Constructive Implementation of Article 29 of Regulation (EU) No. 1257/2013

The short description of the relevant European Commission tender which led to the reports of the consortium led by ECORYS Nederland B.V. highlighted that

> "[…] *shipowners may be tempted to avoid the new recycling-related requirements applicable to EU flag ships by re-flagging their ships to flag states which do not impose similar rules. To address the issue, a financial mechanism to incentivise shipowners to recycle ships in a safe and environmentally sound manner has been considered in the Hong Kong Convention on Ship Recycling and the EU Ship Recycling Regulation contexts respectively. Under Article 29 of the EU Ship Recycling, the Commission is invited to table, if appropriate, a legislative proposal regarding the feasibility of establishing a financial incentive for the safe and sound recycling of ships. The contractor will be tasked with investigating this feasibility, analysing earlier studies and advising on potential ways forward."*[99]

The inclusion of financial mechanisms to incentivise shipowners to recycle ships in a safe and environmentally sound manner has been rejected politically as part of the negotiations leading up to the Hong Kong Convention on Ship Recycling.[100] Nevertheless, Article 29 of the EU Ship Recycling Regulation still reads:

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[97] See supra, section D.
[98] See Lloyd's List of 16 December 2015 „*Class NK certifies two more ship recycling yards in India*"; Lloyd's List of 29 September 2015, „*Asian shipowners welcome certification of Indian recycling yards*".
[99] See http://ted.europa.eu/udl?uri=TED:NOTICE:239689-2014:TEXT:EN:HTML.
[100] *Yujuico*, Demandeur pays: The EU and funding improvements in South Asian ship recycling practices, Transportation Research Part A 67 (2014) pp. 340 (at 348).

"The Commission shall, by 31 December 2016, submit to the European Parliament and to the Council a report on the feasibility of a financial instrument that would facilitate safe and sound ship recycling and shall, if appropriate, accompany it by a legislative proposal."

However, the exact wording of Article 29 of the EU Ship Recycling Regulation (as well as the short description of the tender notice) do both not necessarily imply that "*a financial instrument that would facilitate safe and sound ship recycling*" must, in any case, be directly connected to the operation of vessels. Rather, it is exclusively Recital (19) of the EU Ship Recycling Regulation which establishes this link by stating:

„*In the interest of protecting human health and the environment and having regard to the 'polluter pays' principle, the Commission should assess the feasibility of establishing a financial mechanism applicable to all ships calling at a port or anchorage of a member State, irrespective of the flag they are flying, to generate resources that would facilitate the environmentally sound recycling and treatment of ships without creating an incentive to out-flag."*

In the context of EU law, the purpose of using Recitals is to set out concise reasons for the key provisions of a legal act, without reproducing or paraphrasing them.[101] However, the CJEU has confirmed that Recitals have no legal value as such.[102] It is further claimed that they "*cannot be relied on as a ground for derogating from the actual provisions of the act in question*".[103] Nevertheless, Recitals are often used in interpretation by courts.[104] In any case, the text of the operative provision of a legal act has higher legal authority as compared to the text of a Recital.

As a result, the substance of Article 29 of the EU Ship Recycling Regulation does not generally outlaw other complementary ideas which could link "*a financial instrument that would facilitate safe and sound ship recycling*" directly to existing ship recycling facilities, both within the EU and, in particular, in third countries. This would not imply a disconnection to the commercial operation of vessels since certain "CDEM" requirements as established both under the Hong Kong Convention on Ship Recycling

[101] Joint Practical Guide for persons involved in the drafting of European Union legislation, p.20. http://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf.

[102] ECJ Judgment of the Court (Fifth Chamber) of 19 November 1998, Case C-162/97, Criminal Proceedings against Nilsson, Hagelgren & Arrborn, 1998 E.C.R. I-07477 para. 54.

[103] Ibid.

[104] Manual of precedents for acts established within the Council of the European Union, 2012 edition. ("*The Court often refers to the recitals in order to interpret the enabling provision of an act.*").

and under the EU Ship Recycling Regulation (as discussed above)[105] would still remain valid.

However, the current understanding of the EU Ship Recycling Regulation is based on a strict desire to counter commercial "avoidance strategies" of ship owners, i.e., owners of end-of-life ships and cash-buyers who are not as much concerned about reputational issues (as compared to most other "active" shipowners) and who are willing to detour to the most profitable recycling opportunity. The exact wording of Article 29 EU Ship Recycling Regulation, however, does not suggest a "quasi automatic" and legally compelling link of a possible financial incentive to the operation of vessels calling at EU ports. It is rather the broadest legal understanding of the "Polluter Pays Principle" (PPP) which – in this case *ex ante* – seeks to identify and anticipate shipowners as "*soon to be polluters*" who should ultimately pay for the safe and sound recycling of their vessels, not only once these have reached the end of their operating lifespan but already during the start and/or course of all of their commercial operations.[106]

The preamble of the Hong Kong Convention on Ship Recycling also explicitly refers to internationally accepted environmental principles, above all, to the "**Precautionary Principle"** (as set out also, e.g., in Principle 15 of the Rio Declaration on Environment and Development)[107] and referred to in IMO-Resolutions.[108] The precautionary principle requires States to take measures to protect the environment where there is evidence of serious environmental damage even if scientific certainty is lacking.[109]

In contrast, it is striking that the Hong Kong Convention has eschewed to include comparable explicit references to the PPP. Thus, in the context of ship recycling, the EU Ship Recycling Regulation applies a much broader understanding of PPP as compared to the global accord. However, for practical reasons, (e.g. "*to generate resources*" […] "*without creating an incentive to out-flag*"), it is, in fact, rather the ship recycling facilities which buy end-of-life vessels to be dismantled – and not the shipping companies – and which should thus be categorized as "co-polluters".

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[105] See supra, section B.1.b. and c.

[106] Admittedly, this "from the cradle to the grave approach" is also generally accepted by the Hong Kong Convention on Ship Recycling via the inclusion of the rules on the "Inventory of Hazardous Materials" (IHM), Chapter 2, Regulation 5.

[107] The principle states that: "*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*."

[108] See, e.g., IMO Doc. MEPC 37/22/Add.1: Resolution MEPC.67(37) adopted on 15 September 1995 ("*Guidelines on incorporation of the precautionary approach in the context of specific IMO activities*").

[109] See, e.g., *Atapattu*, Emerging Principles of International Environmental Law, p. 204.

From a development cooperation perspective, some of those "polluters", i.e., certain sub-standard recycling facilities in non-EU countries, could also be identified as being in need of financial incentives to be able to implement safe and sound ship recycling *in situ*. The wording of Article 29 EU Ship Recycling Regulation ("*a financial instrument that would facilitate safe and sound ship recycling*") does not outlaw such a view. To include the recycling facilities into the debate on a possible financial instrument could also possibly prevent an unstainable relocation of ship recycling services with a possible devastating effect for the affected third-country economies[110] and it would not take several decades to feel any practical effects once a license regime (complemented by a publicly administered fund) has generated enough capital to become operational.

From a combined political, economic and legal perspective it is equally as important to adhere to the CBDR principle as giving effect to the PPP. As a consequence, "*to generate resources*" could also imply that PPP – for reasons of EU development cooperation objectives – should be converted and understood as a ***"Demandeur Pays Principle"***. A recent academic contribution in the area of ship recycling has explicitly postulated this politically and economically appropriate modification of the PPP which also takes account of the CBDR.[111]

In the given context, the French term "*demandeur*" can be translated as "the requester" or "the petitioner". The EU in its role as *demanding* the implementation of the highest environmental standards in global ship recycling is financially capable to support its own desired environmental objectives. For example, the European Commission on International Cooperation and Development finances several development cooperation projects on "Integrated Solid Waste Management" (e.g. with Georgia, Azerbaijan, Armenia or Kyrgyzstan), evidencing that ship recycling and sustainable waste management also represent project areas which could be earmarked for the purposes of future EU development cooperation with Bangladesh, India or Pakistan.

This development-oriented approach would also integrate more effectively into the most recent efforts of both ship recycling States (for example, the Bangladesh government has announced an intention to invest US$ 150 million to develop green ship

[110] For the economic relevance for Bangladesh, see supra, note 60.

[111] See *Yujuico*, Demandeur pays: The EU and funding improvements in South Asian ship recycling practices, Transportation Research Part A 67 (2014) pp. 340.

recycling facilities)[112] and their existing ship recycling facilities to adhere fully to the requirements of the HKC and to be officially certified by classification societies or other certification bodies.[113]

Additionally, and precisely because of the fact that the legality of an EU financial incentive regime in implementation of Article 29 EU Ship Recycling Regulation has been challenged under the law of the WTO in this legal opinion, it has to be stressed further that one major ship recycling country – which could be negatively affected by the current understanding of Art. 29 of the EU Ship Recycling Regulation (i.e. Bangladesh) – is even **eligible for funding under the WTO's Aid for Trade (AfT) package** which is also part of the Official Development Assistance (ODA). The AfT initiative was launched at the WTO's Hong Kong Ministerial Meeting in 2005 with the aim of extending financial and technical support to least-developed countries (LDCs). Under AfT such support is provided *inter alia* to counter a domestic lack of resources, poor infrastructure, weak productive capacity and technological base, low competitiveness, weak institutions, bureaucratic complexities and lack of trade-related professional expertise. Bangladesh has already received support under the AfT initiative in the past, namely in: economic infrastructure, building productive capacity, and trade policy and regulation.[114]

Thus, apart from the questionable legality of an EU Ship Recycling License under WTO law, it may be generally questioned why the EU would have an interest in undermining the international community's AfT efforts based on the EU's broadest understanding of PPP and via the currently proposed implementation of Article 29 EU Ship Recycling Regulation. As a result, even an academic proponent of a global EU Ship Recycling fund approach has already correctly stated that:

> **"*The fund should be utilised to assist national governments and recyclers in the Third World to establish adequate green ship recycling measures and facilities.*"**[115]

Hamburg, February 15, 2016 - signed: Prof. Dr. Henning Jessen, LL.M. (Tulane)

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[112] This is also highlighted by the final report of the consortium, see Ecorys et al., Financial instrument to facilitate safe and sound ship recycling, 2nd Interim Report (30 October 2015), p. 77; see also Lloyd's List of 15 February 2016 ("*Making recycling sustainable*"), p. 8-9.

[113] See Tradewinds of 20 November 2015, p. 22 ("*A clear line has been drawn in the Alang sand*").

[114] European Report on Development 2014: Financing and other means of implementation in the post-2015 context Country Illustration Report: Bangladesh, available at https://ec.europa.eu/europeaid/sites/devco/files/erd5-country-illustration-bangladesh-2015_en.pdf

[115] *Puthucherril*, From Shipbreaking to Sustainable Ship Recycling, p. 205

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Lissie Klingenberg Jørgensen

Fra: Per Winther Christensen <pwc@shipowners.dk>
Sendt: 1. september 2016 13:29
Til: Lissie Klingenberg Jørgensen
Cc: Berit Hallam
Emne: SV: Anmodning om input til dansk holdning til licensmodel til fremme af sikker og miljømæssig forsvarlig ophugning af skibe
Vedhæftede filer: Høringssvar til Miljøstyrelsen.pdf

Opfølgningsflag: Opfølgning
Flagstatus: Fuldført

Sag: MST-719-00131
Sagsdokument: 5846052

Kære Lissie,

Hermed Rederiforeningernes om input til dansk holdning til licensmodel til fremme af sikker og miljømæssig forsvarlig ophugning af skibe.

Kind regards

Per Winther Christensen
Deputy Technical Director
Naval Architect, Master Mariner

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Danish Shipowners' Association | Rederiforeningen af 2010 | Bilfærgernes Rederiforening

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Fra: Lissie Klingenberg Jørgensen [mailto:likjo@mst.dk]
Sendt: 5. juli 2016 14:06
Til: neh@danskehavne.dk; Clea Henrichsen; thf@danskemaritime.dk; kro@danskemaritime.dk; Maria Bruun Skipper; Per Winther Christensen; Mads Røddik Christensen; info.dk@greenpeace.org; info@ecocouncil.dk
Cc: Berit Hallam
Emne: Anmodning om input til dansk holdning til licensmodel til fremme af sikker og miljømæssig forsvarlig ophugning af skibe

Kære alle

Rapporten om "financial instrument to facilitate safe and sound ship recycling" er blevet offentliggjort på Kommissionens hjemmeside: http://ec.europa.eu/environment/waste/ships/studies_projects.htm

Rapporten anbefaler en licensmodel som økonomisk instrument til at fremme sikker og miljømæssig forsvarlig ophugning af skibe.

Vi vil på baggrund af input fra jer, udarbejde en dansk holdning til licensmodellen, som skal sendes til Kommissionen inden de udkommer med deres egen rapport. Hvis vi skal levere noget konstruktivt til Kommissionen, har vi brug for konkret og præcis input fra jer. Det kunne f.eks. være information om konsekvenser, der ikke er belyst, eller beskrevne konsekvenser, der ikke er retvisende (med argumentation for hvorfor de ikke er det). Konsekvensanalyse af licensmodellen findes i rapportens kapitel 4.

I rapporten foreslås det, at en EU institution skal stå for administration af licensmodellen. Rapporten lister på s. 69 en række opgaver, som denne institution kunne have. Har I nogen bemærkninger til det?

I bedes sende jeres eventuelle bemærkninger til mig **senest 5. september 2016**.

Hvis I fuldt ud eller delvis støtter modellen, hører vi også gerne fra jer.

Venlig hilsen

Lissie Klingenberg Jørgensen
Cand Jur | Jord og Affald
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Danish Shipowners' Association | Rederiforeningen af 2010 | Bilfærgernes Rederiforening

Cand. Jur. Lissie Klingenberg Jørgensen
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1 September 2016 scb

Reference is made to the final report on Financial instrument to facilitate safe and sound ship recycling, issued June 2016 by ECORYS, DNV.GL and Erasmus.

Danish Environmental Protection Agency has called for comments to the report and below is the reply from the Danish Shipowners' Associations.

Executive Summary:
The Danish Shipowners' Association cannot support the idea of a regional license for ship recycling for the following reasons:

- The financial mechanism is not necessary if the EU takes an inclusive approach to its list of approved recycling facilities;
- The European Union's ship recycling regulation is yet to enter into force and prove its worth. It is therefore premature to add another level of legislation before assessing the impact that the EU's own regulation will have. In addition, it ignores the progress of the International Hong-Kong Convention and would be made redundant once this Convention enters into force. This goes completely against the EU's own rules for better regulation;
- Should it be introduced, the financial mechanism will not have full effect before 15-20 years and assumes that ship recycling will not evolve during this period;
- The financial mechanism proposed does not base itself on the steel price, which is the main driver behind the large changes in the scrap value of a vessel;

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- The financial mechanism could distort competition and be anti-competitive;
- The financial mechanism faces serious legal concerns and could be in breach of WTO/GATT rules;
- In its current format the license, even after 20 years of annual fee payments will not suffice to cover the gap between advanced recycling and low-standard recycling;
- The imposition of such a regional burden on all vessels calling the EU (irrespective of flag) will have an impact on international trade and will lead to retaliatory actions by other regions.

I. General European and international context of the proposal

The Danish Shipowners' Association (DSA) would like to start by briefly outlining the current context in which the discussions on the financial mechanism for ship recycling are taking place. Indeed, the debate on potential fund cannot be separated from the current implementation of the EU Ship Recycling Regulation[1] and the ratification of the Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships.

At this point in time, the **European institutions** are yet to agree on the criteria for the inclusion of a recycling facility on the EU list of approved facilities. This is mainly due to discrepancies between the different linguistic versions of the adopted legislation. These are, however, very important differences between the linguistic versions (English and the Danish version for example), which in practice could lead to a de facto exclusion of many advanced recycling facilities, should the most restrictive approach be chosen. Indeed, the UK version of the text does not differentiate between the treatment of hazardous and non-hazardous material, leading to a situation whereby both have to be treated equally (i.e. on impermeable floors), whilst the Danish version does make this rather logical distinction. As long as this has not been clarified, it will be difficult to assess the applications sent by recycling facilities on an equal and fair basis. But it also makes it difficult to assess the full impact of the financial mechanism put forward by the consultants in their report.

For DSA, this fundamental point will have a profound effect on the actual need for any financial mechanism and the impact of the European ship recycling legislation. Should the EU chose to take an inclusive approach to its list of approved facilities and for example include some of the yards in India, which have made substantial

[1] Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC Text with EEA relevance

progress to reach international standards, then the EU list could be the very tool many have been calling for to raise the recycling standards globally.

At **international level**, the IMO has adopted the Hong-Kong Convention (HKC) for the Safe and Environmentally Sound Recycling of Ships in 2009. This is an ambitious text which will serve to raise the bar globally. Whilst it is yet to be ratified by a sufficient amount of states, its impact can already be witnessed first-hand, not least in India where four recycling yards have received certificates of compliance with the HKC from reputable classification societies. It should be stressed that the HKC sets up the necessary and ambitious framework to regulate all stakeholders at every stage of the ship's life, thereby delivering health, safety and environmental improvements while ensuring the required sustainable level playing field in ship recycling activities worldwide. The approach of the Hong Kong Convention is to regulate the use of materials during the design, construction, operation and maintenance of ships and also includes the requirement to maintain an inventory of hazardous materials during the entire lifetime of a ship, is a radical progress from the Basel framework. It is hoped that this forward looking approach (and notably one which encompasses possible changes in ship designs and materials to address end of life responsible recycling) might in the future completely eliminate the generation of hazardous materials during the recycling process. Further, the Convention lays down a uniform set of technical standards for ship recycling facilities and procedures as an integral part of the instrument itself. In this way, the Hong Kong Convention will standardise the ship-breaking process across jurisdictions. This has been welcomed and acknowledged by the EU.[2]

II. Better regulation

The European institutions and the Commission in particular recently re-affirmed their commitment to ensure that EU legislation is prepared, evaluated, drafted and implemented always in accordance with the principles of "Better Regulation" (the "Interinstitutional Agreement on Better Law-Making", signed on 13 April 2016). This requires all of the EU institutions to observe general principles of EU law, including, proportionality and legal certainty and to avoid overregulation and administrative burdens.

Applying these principles to this proposal, it is apparent that much more needs to be done to demonstrate the need for the proposed scheme, and that it would effectively fulfil its objective. Indeed, the financial scheme suggested is analysed prior to the

[2] Council Conclusions of 21 October 2009 on an EU Strategy for Better Ship Dismantling, also mentioned in the Proposal of 23 March 2012 for a Council Decision requiring Member States to ratify or to accede to the Hong Kong Convention.

EU's own regulation entering into force and proving is worth (as highlighted supra). Moreover, the scheme has been proposed against the background of an existing international Convention that once implemented would make the proposed scheme redundant.

III. Lack of concrete effect and faulty basis for calculation

It is worth noting that the Report's own estimation is that the financial incentive would be available only after a period of 15-20 years when there will be sufficient funds to make the financial incentive viable (page 85). The Hong Kong Convention on the other hand is expected to be in force by 2020 (page 21). The Report therefore completely ignores the substantial progress made over the past few years in several ship recycling yards around the world and assumes that this progress will not continue in the coming years. DSA firmly disagrees with this assumption and questions the value of setting up an administratively heavy regional system which will not deliver any impact before 15-20 years and would, in the meantime, be made redundant by international rules.

Moreover, the amount of credit that is to be accumulated by ships under the Financial Incentive Mechanism is to be based solely on the difference in operational recycling costs between EU list and non-EU List facilities, with significant influencing factors such as steel prices and labour costs ignored. Given the limitation of this scope it is difficult to see how the financial instrument could succeed in bridging the anticipated cost gap between recycling yards realistically given that the necessary capital to accumulate may change significantly over the coming years when a greater number of compliant facilities are competing or steel prices change. For example, DSA has witnessed, first-hand, variations in recycling prices of over 50-60% **in the same yard over the period of one year**.

IV. Distortion of competition

In addition to be ineffective, such a regional scheme could more worryingly lead to substantial distortion of competition. Indeed, in the context of the transfer of ships to non-EU flags, the proposed scheme would be to the detriment of the transferability of ship's ownership, creating a parallel market of ships that trade predominantly in Europe and have to pay into the Fund. These ships would have a sum of money tied to them within the fund as a consequence of their purchase of licenses in order to operate. Owners would not sell their ships at a loss, and so the value of the money tied in the European Mechanism will be included in the sale price of the ship, making it more expensive than one which has not accrued the additional money tied into the Mechanism.

As such the EU Regulation - compliant shipowner is at a disadvantage when selling his ship in the wider global second hand ship market, because his competitor will be able to sell ships at a comparative discount, thereby making them more attractive to buyers. The negative effects on the competitiveness of European shipping are very clear, and offer no incentive towards compliance with the EU Regulation – the stated aim of the mechanism.

Furthermore, such a regional financial instrument imposed on non-EU flag ships based on an EU Regulation that goes beyond international Hong Kong Convention requirements would create a risk of retaliation measures on the part of non-EU states.

V. Legal questions raised by the proposed scheme

The Report explores the legal viability of the scheme and concludes that this is a valid exercise of EU Member States' territorial jurisdiction (page 130 of the Report) but that it would entail imposing an obligation also on non-EU flag ships to comply with it, requiring them also to obtain a license prior to calling at an EU port. However an analysis of the relevant principles of international law raises questions as to whether it is indeed possible for the EU to impose and enforce the ship recycling license scheme on non-EU ships whether under the United Nations Convention on the Law of the Sea (UNCLOS), general public international law or international trade/WTO Law.

As a starting point, the issue of where and how the ship is to be finally recycled is a ship operational matter, governance of which lies with the flag state of the ship. The proposal put forward now would amount to an extra-territorial assumption of that flag state competency. The proposal would require the ship to contribute to a fund constituted by the EU designed to ensure compliance with the EU Regulation of safe ship recycling. In order to recover the amounts contributed, the non EU flagged ship would need to demonstrate that the ship was recycled in accordance with the EU Regulation. This is naturally of concern for non EU ships which are not subject to EU jurisdiction.

While it is accepted that ships that enter the port of a foreign state voluntarily submit to the laws of that state, Port State jurisdiction tends not to impinge on matters that are otherwise the domain of internal flag state jurisdiction other than to ensure compliance with measures to prevent or avoid pollution by discharge (Art 218 UNCLOS) or to ensure compliance with internationally accepted law and standards.

The extent of Port State jurisdiction in these matters is regulated by the Memoranda of Understanding (MoU) based on the original Paris MoU. The proposal however relates to a regional rather than an international regulation, and is not related to pollution by discharge. It would therefore be contrary to what is permitted by UNCLOS and in excess of what is currently permitted under Port State Control under the applicable Paris MOU.

The Report concludes, nonetheless, that the proposal is compliant with UNCLOS, being made in “good faith” and is not “arbitrary or unreasonable” and furthermore, that it is “justified as necessary” to achieve the public policy objectives of the EU in the EU Regulation. DSA does share this analysis. As highlighted supra the proposal is made without due regard to the Hong Kong Convention or even the implementation of the EU Ship Recycling Regulation.

As regards WTO/GATT, aside from the problems of establishing proportionality, reasonableness and necessity, implementing an EU Ship Recycling License scheme in EU ports would be problematic under WTO law as it violates both Article V:3 and Article XXXVII:1(c)(i) GATT 1994. Indeed, With regard to Article V:3 GATT 1994, transit duties or charges can only be justified by considerations of necessity or reason under WTO law: a fee imposed on vessels for implementing an EU Ship Recycling License scheme has no correlation at all to actual transportation services or administrative expenses entailed by transit. It would be levied on the mere occasion of traffic (i.e. vessels) in transit but it would not serve transportation purposes. It would purely serve in effect as a measure to build up capital for a future EU Ship Recycling fund. Arguably therefore, the license fee would be considered illegal being “other charges imposed in respect of transit” and which is not permitted by Article V:3 GATT 1994. The proposed scheme also fails the applicable legal justification tests for establishing a “reasonable” or “necessary” charge.

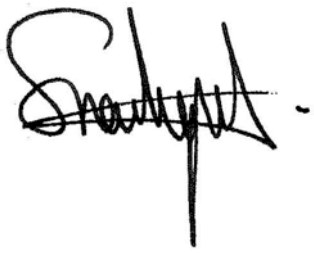
In addition, fees levied under an EU Ship Recycling License scheme may also be in contravention of Article XXXVII:1(c)(i) GATT 1994 which states that developed WTO members shall “refrain from imposing new fiscal measures” to the detriment of developing WTO member countries. Three WTO developing countries are currently global market leaders in the shipbreaking business. In the case where ship recycling facilities are situated in those WTO developing countries and are not included in the future “European List”, an EU financial incentive mechanism would have similar economic effects to an anti-dumping duty or a countervailing measure because it would directly divert ship dismantling business opportunities from a more competitive and more price-efficient market.

VI. Conclusion

It is apparent that the proposed scheme would require considerable legislation to establish and maintain, inter alia: a European agency to administer the issuance of licenses, an EU financial authority/agency to manage the accumulated capital, an EU authority to monitor where ships are recycled in order to determine rights to accrued funds, rules to decide payment/forfeiture of the funds, rules as to the use of forfeited funds in the general purpose ship recycling fund, and measures to allow Port State oversight of ships for license compliance. DSA questions whether the expected results of such a financial mechanism (bearing in mind very long timeframe of 15-20 years) outweigh the many negative effects of the scheme as highlighted in this paper.

DSA therefore calls upon the European Commission not to follow the proposal of the Consultants and refrain from devising a financial incentive scheme. Instead, the European Commission should concentrate its efforts on getting EU Member States to ratify the IMO Hong Kong Convention. In addition, the Commission should recognise the efforts being made by recycling yards in Asia to gain certification in accordance with IMO standards. These yards should be given a fair chance to be included in the EU list of approved recycling facilities that is being established under the EU Ship Recycling Regulation.

Kind regards



Simon C. Bergulf
Director EU Affairs

DANISH SHIPOWNERS' ASSOCIATION
Brussels Representation
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1040 Bruxelles

Lissie Klingenberg Jørgensen

Fra: Maria Bruun Skipper <mbs@shipowners.dk>
Sendt: 8. januar 2016 16:38
Til: Berit Hallam
Cc: Lissie Klingenberg Jørgensen
Emne: SV: mødet med miljø- og fødevareministeren

Kære Berit,

Vi vil først og fremmest fokusere på udfordringen med den manglende DK ratifikation. Dernæst på EU hvidlisten og endelig vil (dog ikke bekræftet endnu) vores formand, Claus V. Hemmingsen fortælle om Mærsks initiativ på Alang. Dette skal jeg dog nok give endelig besked om.

God weekend,

Maria

Maria Bruun Skipper
Underdirektør // Director
Security, Health, Environment and Innovation
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Danish Shipowners' Association | Rederiforeningen af 2010 | Bilfærgernes Rederiforening

Fra: Berit Hallam [mailto:beha@MST.DK]
Sendt: 8. januar 2016 10:28
Til: Maria Bruun Skipper
Cc: Lissie Klingenberg Jørgensen
Emne: mødet med miljø- og fødevareministeren

Kære Maria,
Vi er ved at lægge sidste hånd på materiale til ministerens møde med jer d. 21. januar.
I den forbindelse vil jeg høre om I under punktet om Hong Kong Konventionen udelukkende vil drøfte ratificering eller om I kan tænkes at bringe andre emner vedrørende skibsophugning på bane?
Vh
Berit

Med venlig hilsen
Berit Hallam
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+45 72544434 I beha@mst.dk

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Lissie Klingenberg Jørgensen

Fra: Maria Bruun Skipper <mbs@shipowners.dk>
Sendt: 29. marts 2016 21:24
Til: Berit Hallam
Cc: Lissie Klingenberg Jørgensen
Emne: SV: Møde med Mærsk vedr. ophugning

Kære Berit,

Jo tak – dejligt med et par fridage. Håber også I har nydt ferien.

Meget fint med den 21. april – jeg har sendt en outlook invitation. Samtidig sender jeg jer (separat mail) også den formelle invitation fra ECSA til fact finding turen til Alang. Sig endelig til, hvis det giver anledning til spørgsmål etc.

God aften,

Maria

Maria Bruun Skipper
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Fra: Berit Hallam [mailto:beha@MST.DK]
Sendt: 29. marts 2016 08:49
Til: Maria Bruun Skipper
Cc: Lissie Klingenberg Jørgensen
Emne: SV: Møde med Mærsk vedr. ophugning

Kære Maria,
Jeg håber, du har haft en god påske og mange tak for din mail og forslagene til møde-dato. Det vil passe os bedst med et møde d. 21. april om formiddagen.
Vh
Berit

Fra: Maria Bruun Skipper [mailto:mbs@shipowners.dk]
Sendt: 23. marts 2016 15:12
Til: Berit Hallam; Lissie Klingenberg Jørgensen
Emne: Møde med Mærsk vedr. ophugning

Kære begge,

Som drøftet på telefonen med Berit i fredags, vil vi meget gerne invitere jer til et møde, hvor Mærsk vil fortælle om deres ophugningsprojekt på Alang.

VI foreslår følgende datoer og tænker, at mødet maks vil vare en 1½ time:

14/4: formiddag
15/4: hele dagen
21/4: hele dagen

Derudover har vi været i kontakt med ECSA (den europæiske rederiforening) vedr. besøget på Alang. I er som dansk myndighed meget velkommen og der er stadig plads i delegationen. Se vedlagte mail og se bort fra deadline den 2. marts.

Rigtig god påske!

Maria

Maria Bruun Skipper
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Danish Shipowners' Association | Rederiforeningen af 2010 | Bilfærgernes Rederiforening

Lissie Klingenberg Jørgensen

Fra: Maria Bruun Skipper <mbs@shipowners.dk>
Sendt: 31. marts 2016 16:52
Til: Berit Hallam
Cc: Lissie Klingenberg Jørgensen
Emne: SV: Dan Watch er i gang med artikel om shipping - herunder skibsophugning

Kære Berit,

Fik aldrig svaret dig på denne. Tak for orienteringen. DanWatch har også kontaktet mig og været forbi til hvad, der indtil videre er et baggrundsinterview.

Dbh. Maria

Maria Bruun Skipper
Underdirektør // Director
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Danish Shipowners' Association | Rederiforeningen af 2010 | Bilfærgernes Rederiforening

Fra: Berit Hallam [mailto:beha@MST.DK]
Sendt: 18. marts 2016 16:49
Til: Maria Bruun Skipper
Cc: Lissie Klingenberg Jørgensen
Emne: Dan Watch er i gang med artikel om shipping - herunder skibsophugning

Kære Maria,
Til din orientering har Lissie i dag talt med Dan Watch, som er i gang med researche til en artikel om shipping og skibsophugning, og som i den forbindelse spurgte til en status på DKs tiltrædelse af Hong Kong-konventionen.

Med venlig hilsen
Berit Hallam
Funktionsleder l Jord & Affald
+45 72544434 l beha@mst.dk

Miljø- og Fødevareministeriet
Miljøstyrelsen l Strandgade 29 l 1401 København K l Tlf. +45 72 54 40 00 l mst@mst.dk l www.mst.dk

Lissie Klingenberg Jørgensen

Fra: Maria Bruun Skipper <mbs@shipowners.dk>
Sendt: 5. april 2016 11:49
Til: Berit Hallam
Cc: Lissie Klingenberg Jørgensen
Emne: Fwd: SV: ECSA fact-finding visit to Alang, India
Vedhæftede filer: image001.jpg; image002.png; image001.jpg; image002.png; image003.jpg; image001.jpg; image002.png

Kære Berit,
Se meldingen nedenfor fra min kollega i Bruxelles. Jeg håber, I har mulighed for at deltage i turen.
Dbh. Maria

Sent from my iPhone

Start på videresendt besked:

Fra: Simon Christopher Bergulf <scb@shipowners.dk<mailto:scb@shipowners.dk>>
Dato: 5. april 2016 kl. 11.36.07 CEST
Til: Maria Bruun Skipper <mbs@shipowners.dk<mailto:mbs@shipowners.dk>>
Emne: SV: ECSA fact-finding visit to Alang, India

Hej Maria,

Belgien, Frankrig og Tyskland har sagt de kommer med. Grækenland skal sende deres endelig bekræftelse. Og det er desværre begrænset til en deltager per delegation.

Dbh.

Simon

Fra: Maria Bruun Skipper
Sendt: 4. april 2016 20:51
Til: Simon Christopher Bergulf
Emne: SV: ECSA fact-finding visit to Alang, India

Super – tak :)

Maria Bruun Skipper
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[igangværende:Projekter:Rederiforeningen:STATIONARY:logos:Logos together:DS_R10_BR_full.eps]

Fra: Simon Christopher Bergulf
Sendt: 4. april 2016 16:57
Til: Maria Bruun Skipper
Emne: SV: ECSA fact-finding visit to Alang, India

Hej Maria,

Jeg mener også at Frankrig har udtrykt sin interesse og ja max en person. Jeg kan lige kontakte ECSA for at få seneste deltagere liste.

Dbh.

Simon

Fra: Maria Bruun Skipper
Sendt: 4. april 2016 15:53
Til: Simon Christopher Bergulf
Emne: VS: ECSA fact-finding visit to Alang, India

Hej Simon,

Det er Tyskland, Belgien, Frankrig og Grækenland ik'? Og ja, max én person?

Dbh. Maria

Maria Bruun Skipper
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[igangværende:Projekter:Rederiforeningen:STATIONARY:logos:Logos together:DS_R10_BR_full.eps]

Fra: Berit Hallam [mailto:beha@MST.DK]
Sendt: 4. april 2016 11:33
Til: Maria Bruun Skipper

Cc: Lissie Klingenberg Jørgensen; Berit Hallam
Emne: SV: ECSA fact-finding visit to Alang, India

Kære Maria,
Mange tak for invitationen til besøget på Alang. Vi er i intern dialog for at afklare om vi kan deltage – jeg antager, at vi i givet fald skal begrænse vores deltagelse til 1 person? Har du i øvrigt nogen oplysninger om, hvilke andre medlemsstater, som er inviteret?
Vh
Berit

Med venlig hilsen
Berit Hallam
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Fra: Maria Bruun Skipper [mailto:mbs@shipowners.dk]
Sendt: 29. marts 2016 21:26
Til: Berit Hallam
Cc: Lissie Klingenberg Jørgensen
Emne: ECSA fact-finding visit to Alang, India

Dear Berit Hallam,

As ECSA, we have been actively involved on the ship recycling file. The shipping industry is committed to the global efforts to improve the conditions applicable to recycling operations and has welcomed the fact that the international Ship Recycling Hong Kong Convention (HKC) requirements are reflected in the European Union's Regulation on Ship Recycling. Our plea is that European Member States must as a matter of priority ratify the HKC and, in conjunction with the EU, strive to ensure that key Recycling States and Flag States follow suit.

In this respect, it is worth noting that an increasing number of non-EU ship recyclers are engaged in establishing standards equivalent to the Hong Kong Convention and are receiving statements of compliance from classification societies, this is notably the case for some of the Indian yards.

Individual ECSA members that recently have undertaken similar visits on their own initiative, in particular to yards in Alang, have brought home encouraging reports that would justify a full-scale European visit, involving the European Commission and EU Member States. The aim of such an official visit is to see how ship recycling operations can take place sustainably in intertidal zones, and can thus be potentially compliant with the provisions of the EU Regulation.

With this purpose, the ECSA secretariat has been in contact with the Indian authorities to organise a fact-finding visit to ship recycling yards in Alang. We are pleased to inform you that the Indian Authorities have positively replied to our request.

I would like herewith to inform you that the visit will take place from 27 April to 2 May 2016 (travel included).

For your information, the Commission DG ENV and MOVE have already informally confirmed their participation.

The reason I'm contatcting you is to seek the Danish authorities interest of participation in the ECSA delegation.

Please be advised that the Indian Authorities will proceed with the required official clearance for the visit. On the basis of the list of participants that we will communicate soonest through the Indian Embassy in Brussels, the Indian central Authorities will provide participants with an official invitation. The official invitation will allow participants to proceed with the visa request.

As a first step, I would be grateful if you could inform us about the name of a representative and contact details of your administration who would be interested to participate.

Any informal confirmation as soon as possible would be highly appreciated, so that we can already further proceed with practical arrangements and clearance procedures for the visit.

For any additional information or clarification about the visit, please don't hesitate to contact me.

I look forward to receiving your response.

Best regards,

Benoît Loicq

[ECSA]
Benoît Loicq
Director - Maritime Safety and Environment
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[Footer om sexchikane uk] <https://www.shipowners.dk/en/arbejdsmarked/personalepolitik/mobning-og-chikane/>

[igangværende:Projekter:Rederiforeningen:STATIONARY:logos:Logos together:DS_R10_BR_full.eps]

Lissie Klingenberg Jørgensen

Fra: Maria Bruun Skipper <mbs@shipowners.dk>
Sendt: 15. juni 2016 14:27
Til: Lissie Klingenberg Jørgensen
Cc: Berit Hallam; Per Winther Christensen
Emne: SV: Opfølgning på mødet i ophugningskomitéen

Opfølgningsflag: Opfølgning
Flagstatus: Fuldført

Kære Lissie,

Mange tak for opdateringen – meget interessant, at man måske kan bruge implementeringsakten som et værktøj (dog uden at løse det grundlæggende problem). Det viser dog også vigtigheden af dialog med MEP'erne – noget som vores CSR-udvalg bakker fuldt op omkring.

Tænker om vi kunne drøfte det lidt mere i dybden, inden sommerferien er over os alle. Jeg er på pinden til den 20. juli, hvor jeg går på barsel. Så hvis I kunne komme med et forslag til mødetidspunkt, så vil det være super.

Dbh. Maria

Maria Bruun Skipper
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Danish Shipowners' Association | Rederiforeningen af 2010 | Bilfærgernes Rederiforening

Fra: Lissie Klingenberg Jørgensen [mailto:likjo@mst.dk]
Sendt: 15. juni 2016 10:15
Til: Maria Bruun Skipper
Cc: Berit Hallam
Emne: SV: Opfølgning på mødet i ophugningskomitéen

Kære Maria

Kommissionen oplyste til mødet i mandags at konsulenternes rapport vil blive cirkuleret i løbet af et par dage. På baggrund af konsulentrapporten, vil Kommissionen udarbejde den rapport, som de i henhold til forordningen skal forelægge Rådet og EP inden 31. december 2016. KOM oplyste at licensmodellen er blevet grundig analyseret i den endelige konsulentrapport. KOM er ikke forpligtet til at bruge konsulentrapportens anbefalinger.

Angående muligheden for berigtigelse af forordningens art. 13(1)(g) (om det er alt affald eller kun farligt afflad, der skal håndteres på et uigennemtrængeligt underlag) så kan en sådan kun blive gennemført, hvis der er enighed i Rådet og hvis EP ikke gør indsigelser. Det er derfor ikke særligt sandsynligt, at en berigtigelse vil finde sted.

Som bekendt har Kommissionen i sin tekniske vejledning i henhold til forordning (EU) nr. 1257/2013 om ophugning af skibe, hvor der fastlægges krav til og procedure for optagelse af anlæg beliggende i tredjelande på den europæiske liste over skibsophugningsanlæg, valgt at fortolke forordningen således, at det er alt affald, der skal håndteres på uigennemtrængeligt underlag.

Optagelse af anlæg sker ved gennemførelsesretsakter efter den såkaldte undersøgelsesprocedure, hvor et kvalificeret flertal af MS skal støtte et forslag, for at det kan blive vedtaget og anlægget optaget på listen. EP skal ikke stemme. Etablering af den europæiske liste, kan med andre ikke finde sted, hvis ikke et kvalificeret flertal af MS støtter det, og på den måde kan MS presse Kommissionen på dennes fortolkning. Kommissionen har oplyst, at optagelse af anlæg beliggende i MS vil ske ved en omnibus beslutning. Anlæg beliggende uden for EU vil blive optaget enkeltvis. Der skal stemmes både om de anlæg, som Kommissionen vurderer skal på listen, og de anlæg, som Kommissionen mener ikke skal på listen, fordi de ikke opfylder forordningens krav.

Vi får besøg af Ingvild fra Shipbreaking Platform på fredag.

Venlig hilsen

Lissie Klingenberg Jørgensen
Cand Jur | Jord og Affald
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Miljø- og Fødevareministeriet
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Fra: Maria Bruun Skipper [mailto:mbs@shipowners.dk]
Sendt: 15. juni 2016 10:02
Til: Berit Hallam; Lissie Klingenberg Jørgensen
Emne: Opfølgning på mødet i ophugningskomitéen

Kære begge,

Har I mulighed for blot at give en kort indikation af hvordan mandagens møde gik – både hvad angår den finansielle mekanisme og FAQ'en?

VI har møde i vores CSR-udvalg i eftermiddag, hvor emnet (status) er på dagsordenen og på mandag får vi besøg af Shipbreaking Platform.

På forhånd mange tak,

Maria

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Danish Shipowners' Association | Rederiforeningen af 2010 | Bilfærgernes Rederiforening

Lissie Klingenberg Jørgensen

Fra: Maria Bruun Skipper <mbs@shipowners.dk>
Sendt: 22. februar 2017 10:46
Til: Lissie Klingenberg Jørgensen; Per Winther Christensen
Cc: Berit Hallam
Emne: SV: Opfølgning på førstebehandlingen af lovforslaget
Vedhæftede filer: 2016-07-25 Ship Recycling Financial - Legal Opinion.pdf

Opfølgningsflag: Opfølgning
Flagstatus: Afmærket

Sag: 001-16015
Sagsdokument: 6406101

Kære Lissie,

Vi har nu tjekket op på tallene ift. jeres forespørgsel om konsekvenserne af særkrav for danskejede skibe. Først de specifikke tal:

Danskejede skibe, der ikke sejler under EU flag: 619
Danskejede skibe > 500 GT, der ikke sejler under EU flag: 430
Danskejede skibe < 500 GT: 389 (her er der ikke sondret mellem dansk og fremmed flag)
Tallene skal læses med forbehold for, at der kan være nogle statsejede skibe, der er > 500 GT og dermed ikke er omfattet af forordningen.

Danske rederier ophugger generelt meget få skibe. Således har danske rederier i gennemsnit ophugget godt 10 skibe årligt siden 2009 og dette på faciliteter både Danmark, Europa og tredjeverdens lande. Selv om danske rederier grundet den generelle markedssituation i de kommende år forventes at ophugge flere skibe, vil de danskejede skibe stadig udgøre en meget lille del af det samlede antal ophugninger på verdensplan.

De specifikke økonomiske konsekvenser er meget svære at sige noget om, idet vi hverken kender stålprisen eller den endelige EU liste over godkendte faciliteter, hvilket må forventes at have indflydelse på stålprisen.

Så et dansk særkrav i tillæg til en international konvention vil kun have meget lille effekt i ophugningsindustrien, idet danske rederier kun sender ganske få skibe til ophugning. Til gengæld er der ingen tvivl om, at et særkrav, som kun vil gælde for danske rederier vil have en negativ effekt på det at drive rederivirksomhed fra Danmark. Der gøres i disse år et stort arbejde fra regeringen og erhvervets side for at tiltrække rederier til Danmark og det danske flag. Dertil kommer, at et sådant særkrav vil have karakter af overimplementering af EU regler, hvilket også strider imod den siddende regerings målsætninger.

Endeligt er der nogle juridiske begrænsninger ift. at regulere skibe under fremmed flag. Denne problemstilling var også til drøftelse under vedtagelsen af EU SRR, hvor den tyske rederiforening fik udarbejdet en juridisk analyse (vedlagt), der belyser implikationerne af Havretskonventionen. Jeg mener, at vi i forbindelse med tidligere drøftelser om det finansielle instrument, har delt et uddrag af analysen med jer, men I får således her den fulde rapport.

Giver dette anledning til yderligere spørgsmål, er I meget velkomne til at vende tilbage.

Dbh. Maria

P.S. Jeg har tidligere fået oplyst, at der er indkaldt til samråd den 2/3. Det fremgår dog ikke af FT's hjemmeside. Er samrådet udskudt eller?

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Danish Shipowners' Association | Rederiforeningen af 2010 | Bilfærgernes Rederiforening

Fra: Lissie Klingenberg Jørgensen [mailto:likjo@mst.dk]
Sendt: 20. januar 2017 11:29
Til: Maria Bruun Skipper; Per Winther Christensen
Cc: Berit Hallam
Emne: SV: Opfølgning på førstebehandlingen af lovforslaget

Kære Maria

Vi vil bestemt kigge på, om der er juridiske implikationer ved forslaget. Men hvis I allerede ligger inde med sådanne vurderinger, må I meget gerne dele dem med os.

God weekend!

Venlig hilsen

Lissie Klingenberg Jørgensen
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Fra: Maria Bruun Skipper [mailto:mbs@shipowners.dk]
Sendt: 19. januar 2017 16:25
Til: Lissie Klingenberg Jørgensen; Per Winther Christensen
Cc: Berit Hallam
Emne: SV: Opfølgning på førstebehandlingen af lovforslaget

Kære Lissie,

Mange tak for meldingen. Dejligt med bred opbakning til dansk ratifikation.

Vi vender tilbage med bud på den økonomiske omkostning ved det nævnte mulige ændringsforslag.

Umiddelbart tænker jeg, at der er nogle juridiske implikationer ved at pålægge fremmedflagede skibe danske særkrav. EU SRR omfatter af den grund netop kun EU flagede skibe. Er de juridiske implikationer noget, som MST ser på?

Dbh. Maria

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Fra: Lissie Klingenberg Jørgensen [mailto:likjo@mst.dk]
Sendt: 19. januar 2017 14:35
Til: Per Winther Christensen; Maria Bruun Skipper
Cc: Berit Hallam
Emne: Opfølgning på førstebehandlingen af lovforslaget

Kære Maria og Per

Førstebehandlingen af lovforslaget gik godt. Alle partier støttede det. EL, SF og AL vil dog gerne have strengere regler, og vil formentlig fremsætte et ændringsforslag om, at alle danskejede skibe skal ophugges på den europæiske liste.

Har I mulighed for at vurdere, hvilke økonomiske konsekvenser det ville have, eller hvor mange skibe, det ville dreje sig om?
De skibe der kommer i spil er dem der ikke er omfattet af forordningens anvendelsesområdet allerede. Dvs:

1) Danskejede skibe, der ikke sejler under en EU medlemsstats flag
2) Danskejede skibe under 500 BT, statsejede etc.

Venlig hilsen

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The EU Ship Recycling Financial Incentive

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Legal Opinion on the Option under Consideration by the European Commission of a Combination of a Permit for Ships Calling at EU Ports and a Public Fund

by:

Prof. Dr. Henning Jessen, LL.M. (Tulane)

Institute for Maritime Law and the Law of the Sea,

University of Hamburg

Table of Contents

Three-Page "Executive Summary" of this Legal Opinion

As mandated by the European Commission (DG Environment), a consortium led by ECORYS Nederland B.V.[1] has extensively pondered various approaches on how to implement – by 31 December 2016 – Article 29 of Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC.[2]

The consortium has described a number of policy options for possible legislative action, ranging from a passive approach ("*Do nothing*") to different, more pro-active concepts (e.g., a ship recycling guarantee, an escrow account, an insurance model or a port levy). Ultimately, assessing the practical impact of different approaches and considering the legal problems and challenges associated with each of the different approaches, the consortium has generally favoured the introduction of a time-based ship recycling license (i.e. an EU Ship Recycling License Scheme), possibly to be combined with features of the previously pondered options ("*Combined/hybrid option*").[3]

Based on an analysis of applicable EU law, this legal position paper first highlights two specific issues associated with EU procedure and competency (section A.): First, because of its "primarily fiscal" nature, the EU Ship Recycling License assumes tax-like functions. Objective and verifiable factors, i.e., the aim and content of implementing Article 29 of the EU Ship Recycling Regulation mandate the application of Article 192(2)(a) of the Treaty of the Functioning of the European Union (TFEU)[4] as the correct legal ground for such a measure under EU procedural requirements. Consequently, political unanimity among <u>all</u> EU members is required to introduce an EU Ship Recycling License. Second, the EU lacks the institutional competency to autonomously designate completely new funds to the general EU budget. The exclusive administration of an EU Ship Recycling Scheme by the EU itself would violate both the principle of conferral (Article 5(1) of the Treaty on the European Union (TEU)[5] as

[1] Ecorys et al., Financial instrument to facilitate safe and sound ship recycling, 2nd Interim Report (30 October 2015).
[2] OJ L330/1 of 10 December 2013, hereinafter: "EU Ship Recycling Regulation".
[3] Ecorys et al., Financial instrument to facilitate safe and sound ship recycling, 2nd Interim Report (30 October 2015), pp. 35.
[4] Hereinafter: "TFEU". The exact wording of Article 192(2)(a) TFEU and other applicable provisions of the Lisbon Treaty are cited in Section A.
[5] Hereinafter: "TEU".

well as the rules established under Article 311 TFEU and the currently applicable system of governing the EU's own resources under Council Decision 2007/436/EC.

Furthermore, based on an analysis of legally-binding principles of the law of the sea, international environmental law (section B.) as well as the applicable legal regime of the law of the World Trade Organization (WTO, section C.), this legal opinion challenges the practicability, legality and proportionality of the conceptual approach brought forward by the consortium. The legal possibilities for the EU to impose rules on foreign ships are confined to those available under UNCLOS, under general international law and under WTO Law.

First, a proposed EU Ship Recycling License scheme measure is not "*consistent with international law*", in particular with the United Nations Convention on the Law of the Sea (UNCLOS).[6] The scheme would neither be discharge-related, nor related to the construction, design, equipment and manning of vessels ("CDEM") nor has it been internationally accepted as reflecting a present or future international standard to be prescribed and enforced by port States on behalf of the rest of the world. The limit on enforcement jurisdiction of port States to protect and preserve the marine environment is set out explicitly in Article 218 UNCLOS limiting this right to violations relating to illegal discharges. The proposed scheme exceeds the legal limits of port States' prescriptive jurisdiction and it is in excess of enforcement jurisdiction of port States as recognized under UNCLOS. Second, the proposed scheme is disproportionate both under general public international law and under WTO law. In addition, implementing an EU Ship Recycling License scheme in EU ports is even illegal under WTO law because it violates both Article V:3 GATT 1994 and Article XXXVII:1(c)(i) GATT 1994. The latter provision has been completely disregarded by the consortium.

With regard to Article V:3 GATT 1994, transit duties or charges cannot be justified by considerations of necessity or reason under WTO law and are thus illegal. A fee imposed on vessels for implementing an EU Ship Recycling License scheme has no correlation at all to actual transportation services or administrative expenses entailed by transit. It would be levied on the mere occasion of traffic (i.e. vessels) in transit but it would not serve transportation purposes. Rather, it would purely serve as a measure to build up capital for a future EU Ship Recycling fund. As such, fees arising under the scheme fall under illegal "*other charges imposed in respect of transit*" as outlawed by Article V:3 GATT 1994. The scheme also fails the applicable legal justifica-

[6] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, U.N.T.S., vol. 1833, p. 3 (entered into force 16 November 1994).

tion tests for establishing a "*reasonable*" or "*necessary*" charge. In addition, fees levied under an EU Ship Recycling License scheme would violate Article XXXVII:1(c)(i) GATT 1994 which states that developed WTO members shall "*refrain from imposing new fiscal measures"* to the detriment of developing WTO member countries. Three WTO developing countries are currently global market leaders in the shipbreaking business. In case ship recycling facilities are situated in those WTO developing countries and are not included in the future "European List", an EU financial incentive mechanism has similar economic effects like an antidumping duty or a countervailing measure because it will directly detract ship dismantling business opportunities from a more competitive and more price-efficient market. Rather the EU seeks to implement the "Polluter Pays Principle" (PPP) without any legal differentiation between affected WTO developing countries.

In section D. it is finally argued that the EU approach – i.e. favouring exclusively EU-listed ship recycling facilities – would completely ignore the established principle of "*Common But Differentiated Responsibilities [for Developing Countries]*" (known as CBDR). In the 21st century, CBDR is explicitly recognized in various areas of public international law, including international regulation of waste and international shipping. It needs to be acknowledged in the regulation of ship recycling as well, in particular, as the global resources and knowledge base of the global market leaders cannot be supplemented on short notice. From a development cooperation perspective, some of the "polluters", i.e., certain sub-standard recycling facilities in non-EU countries, could also be identified as being in need of financial incentives to be able to implement safe and sound ship recycling *in situ*. Ultimately, this leads to a call for earmarking Official Development Aid (known as "ODA") in order to make ship recycling in South East Asia more environmentally sustainable. With Bangladesh, one major ship recycling country is even eligible for funding under the WTO's Aid for Trade (AfT) package. The wording of Article 29 of the EU Ship Recycling Regulation does not outlaw a much more development-law oriented view. To include the recycling facilities into the debate on a possible financial instrument could also possibly prevent an unstainable relocation of ship recycling services with a possible devastating effect for the affected third-country economies and it would not take several decades to feel any practical effects once an EU ship recycling license regime (complemented by a publicly administered fund) has generated enough capital to become operational.

A. EU Procedure and EU Competency in Implementing Article 29 EU Ship Recycling Regulation

According to its opening statement, the EU Ship Recycling Regulation is – as a whole – based on Article 192(1) TFEU.[7] In conjunction with Article 191 TFEU, this provision sets out the objectives and rules concerning the delivery of EU environmental policy:

> *"The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191 [TFEU]."*[8]

The reference of the EU Ship Recycling Regulation to Article 192(1) TFEU to establish the shared competency of the EU and its member States in this area represents the common approach in EU environmental regulation.[9] However, a more specific legal act to implement Article 29 EU Ship Recycling Regulation by introducing a license scheme, including the creation of a fund mechanism, cannot be based on Article 192(1) TFEU. Rather, it must be based on Article 192(2)(a) TFEU. This provision states that:

> *"By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:*
>
> *(a) provisions primarily of a fiscal nature;*
> *[…]*

[7] Hereinafter: "TFEU".
[8] In particular, Article 191(1) TFEU states that: "*Union policy on the environment shall contribute to pursuit of the following objectives:*
- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change."
[9] See generally *Hedemann-Robinson*, Protection of the marine environment and the European Union: some critical reflections on law, policy and practice, Journal of International Maritime Law (10) 2004, pp. 254 (263 et seq.).

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph."

As a result, for certain environmental matters specifically addressed in Article 192(2) TFEU, EU measures may only be adopted by the EU Council unanimously. "*Primarily fiscal measures*" are thus subject to the decision-making process which deviates from the default decision-making procedure (i.e. the ordinary legislative procedure under Article 294 TFEU).[10]

1. EU Procedure: Establishing an EU Ship Recycling License is a "*primarily fiscal measure*" pursuant to Article 192(2)(a) TFEU

According to the case law of the Court of Justice of the European Union,[11] the determination of the correct legal basis of an EU act must be based on objective and verifiable factors, most importantly, the aim and content of the act in question.[12] In this context, the wording of Article 29 of the EU Ship Recycling Regulation and its Recital (19) clearly indicate that the general aim of a future implementing act relating to the provisions is

- to create a "*financial mechanism*",
- to initiate "*financial incentives*" and
- "*to generate resources*".

The Court of Justice of the EU (CJEU) has confirmed that the EU should apply the legal ground that correlates with the "principal" objective of an act while "accessory" objectives should be disregarded.[13] Thus, it will not be enough for the EU to refer only in very general terms to a governing principle of international environmental law,

[10] This procedural provision extends over 13 paragraphs and is thus not reproduced here.
[11] Hereinafter: CJEU.
[12] See, e.g., Case 45/86, Commission v Council [1987] ECR 1493, para. 11; Case 62/88, Greece v Council [1990] ECR 1527, para. 13; Case C-295/90, Parliament v Council [1992] ECR I-4193, para. 13.
[13] See Case C-155/91, Commission v Council [1993] ECR I-939. In this case, the CJEU concluded that although the Directive on waste management had the potential to affect the internal market, Article 192 TFEU (as of now) would still be the correct basis for the Directive.

i.e., the **Polluter Pays Principle (PPP)**[14] as enshrined explicitly in Article 191(2) TFEU.[15] Moreover, as early as 1997, the **Commission Communication on Environmental Taxes and Charges in the Single Market**[16] generally acknowledged that:

> *"In the area of environmental taxation, different meanings are often given to similar terms in different member States, and no precise definitions are offered by EU legislation. Nevertheless, it is important to stress that it is the characteristics and the effects of a measure which determine how it will be judged with respect to Community law and not the denomination[s …]."*[17]

Furthermore, the Communication has already identified "two main categories" of environmental levies, i.e., "*emission levies*" and "*product levies*". While it is natural that an EU Ship Recycling License cannot be categorized as an "*emission levy*", even the practical examples of the Commission for "*product levies*" evidence that it is not legally appropriate to categorize an EU Ship Recycling License Scheme under established criteria of environmental levies.[18] In particular, none of the traditional environmental product levies is designed to accumulate capital for a potential later disbursement via a public fund, under certain multiplied conditions and even with the possibility of forfeiture of individual benefits accrued.

Building up on earlier OECD work, a **1996 study of the European Environment Agency (EEA)** also adopted a classification of environmental taxes based on their policy objectives, distinguishing between the main uses to which the revenues can be put.[19] Even twenty years later, the ideas expressed in the EEA study have not lost

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[14] On the differences between a broad and a narrow understanding of PPP, see, with further references, *Zhu*, Is the Polluter Paying for Vessel-Source Pollution?, Journal of Business Law 2015, pp. 348 (at 355): "*In its broad sense, the polluter's responsibility also extends to other costs, including charges, taxes, clean-up costs and compensation.*"

[15] This provision states that: *"Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."*

[16] See Commission Communication (97/C 224/04) OJ No. C 224/6 of 23.07.1997.

[17] Ibid, p. 10.

[18] Ibid, p. 8: The practical examples for product levies referred to by the Commission are: *"[…] raw materials and Intermediate inputs such as fertilizers, pesticides, natural gravel, and ground water, and on final consumer products such as batteries, one way packaging, car tyres and plastic bags. […] taxes on gasoline, diesel and heating oils and electricity.*"

[19] European Environmental Agency (ed.): Environmental Taxes; Implementation and Environmental Effectiveness, Brussels 1996.

their general legal relevance. It generally differentiates between three different types of environmental taxes:[20]

1. Cost-covering charges;
2. Incentive taxes;
3. Fiscal environmental taxes.

The authors of the EEA study admit that the three types of environmental taxes could have overlapping features and are thus not mutually exclusive.[21] However, for the purposes of this legal opinion, three main deductions can be inferred from an analysis of the three general types of environmental taxes:

1. The proposed EU Ship Recycling License does not fall under the category of cost-covering charges because the instrument will not be designed to cover a specific (user-related) or otherwise earmarked public environmental service (like, e.g. treating waste water, disposing of waste or toxic products).

2. Art. 29 of the EU Ship Recycling Regulation is officially entitled "*Financial Incentive*". Generally, incentive taxes are levied purely with the intention to change an environmentally damaging behaviour, e.g., by consumers or traders, however, without any specific intention to raise revenues. If there are any revenues, these are often used to further encourage behaviour change via grants or tax incentives. The possibility of forfeiture of accrued rights and the fact that an EU Ship Recycling fund will only make a payment to the last shipowner (who potentially never participated in the "incentive scheme" for years before) do not support a pure legal categorization as an incentive tax.

3. Fiscal environmental taxes are mainly designed to raise "significant revenues" – whether specifically earmarked for certain ends or not. The wordings of Article 29 and Recital (19) of the EU Ship Recycling Regulation both evidence that the general aim of a future implementing act is to create a "*financial mechanism*" and "*to generate resources*". The proposed system cannot work without accumulating significant revenues for some years/decades.

[20] Ibid., p. 21.
[21] Ibid., p. 22.

As a result, the proposed EU Ship Recycling License system combines both elements of the categories “incentive tax” and “fiscal environmental tax”. However, while the protection of the environment might be a later effect of generating financial resources, especially during the first years after a possible installation, both the implementation of an EU Ship Recycling License scheme and/or the creation of an EU Ship Recycling public fund have the principal objective of building up a substantial capital-stock via enforcing a primarily fiscal measure over a longer period of time.

Generating monetary resources via a primarily fiscal measure and creating a corresponding financial mechanism will not protect the environment in itself. Rather, the protection of the environment could possibly be an accessory long-term effect of generating financial resources in the first place. In other words, the financial mechanism is a long-term catalyst to contribute to the general objective of global environmental protection. **This sequence of action cannot be disregarded as Article 192(2)(a) TFEU explicitly covers such “primarily fiscal measures” in an environmental context.** Otherwise the provision would be rendered completely useless and factually replaced by simply referring always and in any situation to the more generally phrased Article 192(1) TFEU.

As a practical example of the past, the former Commission Proposal for a Council Directive Introducing a Tax on Carbon Dioxide Emissions and Energy[22] had been explicitly based on the legal predecessor of Article 192(2)(a) TFEU and resulted in political failure due to lack of political unanimity among the member States. So far, the EU has never introduced any “green tax” based on Article 192(2)(a) TFEU. As a consequence, the Commission generally eschews legal references to Article 192(2)(a) TFEU. Rather, the Commission prefers to base all of its environmental legal acts broadly on Article 192(1) TFEU.

The view that the proposed measures are of primarily fiscal nature is finally reinforced by the fact that the EU Ship Recycling License scheme shall also serve as a penalty scheme in case of shipowners failing to comply which shall result in the forfeiture of accrued rights under the scheme.[23] Thus, in cases of forfeiture the scheme works exactly like a purpose-built “eco tax” and not like a premium (where the user usually acquires at least some advantage by adhering to the public payment obliga-

[22] O.J. 1992 C 196/1, see also COM(92)246 final.

[23] See Ecorys et al., Financial instrument to facilitate safe and sound ship recycling, 2nd Interim Report (30 October 2015), p. 35.

tions). Additionally, for all shipowners selling their vessels after some years of operation the scheme will not generate any return as the accrued rights under an EU Ship Recycling License shall stick to the ship and not to its owner(s).

2. Conclusions on EU Procedure

In sum, the EU Ship Recycling License clearly assumes tax-like functions. The fact that the scheme may also serve as a premium for those owners who categorically do not intend to sell their vessels during their whole operational lifespan (which is a rather unpractical scenario) cannot nullify the tax-built purposes of the whole scheme. As a result, objective and verifiable factors, i.e., the aim and content of implementing Article 29 EU Ship Recycling Regulation by introducing an EU Ship Recycling License mandate the application of Article 192(2)(a) TFEU as the correct legal ground for such a measure under EU procedural requirements. Consequently, political unanimity among EU members is required to introduce an EU Ship Recycling License.

3. EU Competency: The EU Lacks Institutional Power to Directly Administer and Enforce the Details of an EU Ship Recycling License

Even in case the EU Council should decide unanimously to implement Article 29 EU Ship Recycling Regulation by way of introducing an EU Ship Recycling License (and/or including the financial mechanism of a publicly administered EU Ship Recycling fund), **the EU itself lacks the institutional power to enforce the relevant rules directly**. According to Article 193 TFEU,[24] EU measures enacted under Article 192(2)(a) TFEU may only include minimum harmonization.[25] The call for minimum harmonization is an expression of the principles of subsidiarity and proportionality pursuant to Articles 5(3) and 5(4) TEU. It may be recalled that these paragraphs of Article 5 TFEU mandate that:

[24] Article 193 TFEU states that: "*The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.*"

[25] Commentary on the TFEU by Calliess/Ruffert, EGV/EUV AEUV, Article 192, para. 20; *Derlén/Lindholm*, Not enough room for optimal choices? The European legal framework for green taxes, pp. 167 (at 171 and 178), in: *Cullen/VanderWolk/Xu* (ed.), Green Taxation in East Asia.

(3) Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

(4) Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The EU and the member States share equal competency for all measures relating to Title XX of the TFEU (Environment). The CJEU has explicitly recognized a principle of procedural autonomy of EU member States reflected in the EU legal framework.[26] In particular, the CJEU has highlighted:

> *"In the absence of [EU] rules governing the matter, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of [EU] law."*[27]

a. Procedural Autonomy of the EU members in Environmental Policy

Precisely because of the applicable CJEU jurisprudence and in accordance with Article 291(1) TFEU,[28] environmental measures relating to carbon dioxide reduction and the EU-wide greenhouse gas emission allowance trading scheme (ETS) according to Directive 2003/87/EC[29] are implemented and enforced by the member States. This example evidences that the EU is competent to establish a general policy framework for action in environmental matters.

However, only in exceptional circumstances ("*duly justified specific cases*" pursuant to Article 291(2) TFEU),[30] this also involves a complementary EU power to directly

[26] See, e.g., Case C-430/93 Van Schijndel.
[27] Ibid., para. 17.
[28] Article 291(1) TFEU states that "*Member States shall adopt all measures of national law necessary to implement legally binding Union acts.*"
[29] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, p. 32–46.
[30] Article 291(2) TFEU states that: "*Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified*

enforce the rules. Otherwise the following might be questioned: On the one hand, a "global" topic like decarbonisation falls under the general distribution of institutional competencies, i.e., the Union establishing the policy framework and the members legally enforcing it. Why should ship recycling – on the other hand – be subject to an exceptional understanding under EU competency rules as it represents a "global" environmental challenge as well? Consequently, there is no practical substance to argue that the general objectives of a financial incentive for environmentally sound ship recycling are only achievable by exclusive administration by the EU and by enforcement of the EU itself.

b. The Legal Rules for Designating Completely New Funds to the General EU Budget

The EU lacks the institutional competency to autonomously designate completely new funds to the general EU budget. Generally, this view stems from the principle of conferral (Article 5(1) TEU) which means that the EU may only undertake an act if it seeks to achieve an objective entrusted to it by the member States under the Treaties.[31] The principle of conferral also results in the consequence that the EU has no competency to "invent" new forms of taxation of any kind.[32]
In contrast, tax sovereignty still lies with the member States. Article 311 TFEU explicitly states that

> "*the Union shall provide itself with the means necessary to attain its objectives and carry through its policies. Without prejudice to other revenue, the budget shall be financed wholly from own resources*."

Financial resources generated by a prospective EU Ship Recycling License, however, cannot be legally categorized as the EU's "*own resources*": Effective from 2007, the basic rules for the own resources system are laid down in **Council Decision**

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specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council."
[31] The provision states that: "*The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.*"
[32] See, e.g., *Schmidt-Kötters/Held*, Die Kompetenzen der EG zur Erhebung von Umweltabgaben und die „Emissionsüberschreitungsabgaben" für PKW-Hersteller, NVwZ 2009, pp. 1390 (at 1393).

2007/436/EC.[33] This "system of the European Communities' own resources" is still legally applicable until today. Nowhere in the text does the relevant Council Decision refer to environmental taxes or premiums as a possibility for generating revenue to constitute "*own resources*" and to be entered in the general EU budget.
According to Article 311 TFEU new categories of "*own resources*" have to be approved by the member States in accordance with their respective constitutional requirements. This institutional balance represents another reason why the EU lacks the competency to administer and enforce the financial resources generated by a future EU Ship Recycling License on its own. Rather, this task would fall into the procedural autonomy and remaining tax autonomy of the member States.

4. Conclusions on EU Competency

According to Article 291(1) TFEU, any specific environmental measures, also including the implementation of financial rules on sustainable ship recycling, are to be implemented by the EU members. The member States are also competent to enforce any relevant rules.
The EU lacks the institutional competency to autonomously designate completely new funds to the general EU budget. The exclusive administration of an EU Ship Recycling Scheme by the EU itself would violate both the principle of conferral (Article 5(1) TEU) as well as the rules established under Article 311 TFEU and the currently applicable system of governing the EU's own resources under Council Decision 2007/436/EC.

B. Legal Tension with the Law of the Sea (UNCLOS) and General Rules of Public International Law

UNCLOS is the legally-binding global *"constitution for the seas*".[34] Consequently, Article 15 of the IMO's Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships of 2009[35] explicitly addresses the relationship of

[33] 007/436/EC, Euratom: Council Decision of 7 June 2007 on the system of the European Communities' own resources, OJ L 163/17, 23.06.2007.
[34] *Scott*, The LOS Convention as a Constitutional Regime for the Oceans, in: *Oude Elferink* (ed.), Stability and Change in the Law of the Sea: the Role of the LOS Convention, pp. 9–38.
[35] Hereinafter: Hong Kong Ship Recycling Convention.

the convention with the international law of the sea and other international agreements.[36] However, the text of the EU Ship Recycling Regulation does not refer at all to UNCLOS. This non-reference contrast the fact that the EU Ship Recycling Regulation is intended to serve as implementation of the Hong Kong Ship Recycling Convention.[37]

The EU's omission aggravates the presumption that the EU Ship Recycling Regulation does not integrate into the applicable international rules and principles of the law of the sea to prevent "excessive port State jurisdiction". However, being a party to UNCLOS, the jurisdictional framework established under UNCLOS has binding legal effects on the EU.[38] Specifically, the role of the EU and its member States as flag States/coastal States/port States is governed by UNCLOS provisions. Part XII of UNCLOS addresses the protection of the marine environment although ship recycling is not explicitly addressed by any UNCLOS provision because it was not conceived as a problematic topic when the UNCLOS provisions were drafted between 1982 and 1994. However, UNCLOS lays down the jurisdiction of States to establish national rules (prescriptive or legislative jurisdiction) and to give effect to those rules (enforcement jurisdiction) over foreign ships.[39] The legal possibilities for the EU to impose rules on foreign ships are thus largely confined to those available under UNCLOS and under general international law.

1. An EU Ship Recycling License is Not Compatible With the UN Law of the Sea Convention (UNCLOS)

The EU Ship Recycling Regulation and the implementation of its Article 29 shall apply to all vessels, regardless of the flag they are flying. While the access of (foreign) vessels to ports may be subject to certain conditions,[40] under UNCLOS, the jurisdiction of port States to impose requirements on foreign ships is legally limited. Taking into account the hierarchy of the legal sources of public international law, the treaty provi-

[36] Article 15.1 of the Hong Kong Convention states that *"[N]othing in this Convention shall prejudice the rights and obligations of any State under the United Nations Convention on the Law of the Sea, 1982, and under the customary international law of the sea.*" Article 15.2 of the Hong Kong Convention clarifies that *"[N]othing in this Convention shall prejudice the rights and obligations of Parties under other relevant and applicable international agreements."*

[37] See, e.g., *Hedemann-Robinson*, Enforcement of European Union Environmental Law, p. 469.

[38] *Engels*, European Ship Recycling Convention, p. 108.

[39] *Ringbom*, The EU Maritime Safety Policy and International Law, p. 4.

[40] *Lowe*, The Right of Entry into Maritime Ports in International Law, 14 San Diego Law Review 1977, pp. 597–622.

sions of the UNCLOS represent the most important legal source of restraint. For example, matters which are purely internal to the ship lie beyond the jurisdiction of port States but are subject to exclusive flag State jurisdiction. As a result, for example, it is a purely internal matter and a commercial decision of a current shipowner

- "*to probably sell the vessel at some indefinite point of time in the future*"
- which could be followed by a buyer's decision to re-sell the ship further for dismantling purposes.

If at all, it is only relevant for information purposes of the flag State (in this case, the flag State's obligations under the Hong Kong Convention on Ship Recycling once the convention has entered into force). Additionally, the jurisdiction of the coastal State where a recycling facility is located could be involved, (for example, if a vessel destined for dismantling in the coastal State has not been sufficiently pre-cleaned and is being towed into coastal waters in a problematic technical condition).

a. "*Applicable International Rules and Standards*" and "*Discharge Requirements*"

The enforcement jurisdiction of port States is primarily governed by Article 218 UNCLOS. For example, the first two paragraphs of Article 218 UNCLOS prescribe:

> *"1. When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference."*
>
> *2. No proceedings pursuant to paragraph 1 shall be instituted in respect of a discharge violation in the internal waters, territorial sea or exclusive economic zone of another State unless requested by that State, the flag State, or a State damaged or threatened by the discharge violation, or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or exclusive economic zone of the State instituting the proceedings."*

These provisions evidence two important facts with regard to the enforcement powers of port States under UNCLOS: First, the system is generally characterized by references to the applicable international rules and standards.[41] Under UNCLOS, port States may both prescribe[42] and enforce those. International conventions as agreed under the auspices of the IMO represent a legal establishment of "*applicable international rules and standards*" under UNCLOS.[43] Consequently, once ratified by a sufficient number of IMO members,[44] the Hong Kong Convention on Ship Recycling will represent some operational "*applicable international rules and standards*" as well.
Second, with regard to "*applicable international rules and standards*", UNCLOS provides for universal jurisdiction of port States over violations of international discharge requirements.[45] However, this is not the case with respect to other (i.e. non-discharge related) requirements. As a consequence, the absence of explicit provisions representing "*generally accepted rules and international standards*" establishes excessive unilateral port State jurisdiction which is potentially illegal under public international law.

b. Enforcement of Legal Rules by Port States under UNCLOS

Materially, UNCLOS differentiates between prescription and enforcement by port States in relation to

- discharge requirements (see Article 218 UNCLOS),
- static "CDEM" requirements (i.e. "construction, design, equipment, manning", see, e.g., Articles 194(3) UNCLOS).[46]

[41] See *Keselj*, Port State Jurisdiction in Respect of Pollution from Ships: The 1982 United Nations Convention on the Law of the Sea and the Memoranda of Understanding, 30 Ocean Development and International Law 1999, pp. 127 (at 133).
[42] An example for a purely prescriptive provision, i.e. without any enforcement elements, is Article 211(3) UNCLOS. The first sentence of the provision reads: "*States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their offshore terminals shall give due publicity to such requirements and shall communicate them to the competent international organization.*"
[43] See generally: Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, Study by the Secretariat of the International Maritime Organization (IMO), IMO Doc. LEG/MISC.7 of 19 January 2012.
[44] See Article 17 of the Hong Kong Convention on Ship Recycling.
[45] *Ringbom*, The EU Maritime Safety Policy and International Law, p. 214.
[46] The sub-provision states that: "*The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, inter alia, those designed to minimize to the fullest possible extent:*

Additionally, other operational requirements might be relevant for both port and coastal States (as evidenced by the legal qualifications to "innocent passage" possible under Article 21 UNCLOS).

The Hong Kong Convention on Ship Recycling itself introduces some "CDEM" and operational requirements, for example, by calling for each new ship to have on board an **Inventory of Hazardous Materials** (IHM, see both Article 5 of the Hong Kong Convention on Ship Recycling and Article 5 of Regulation (EU) No 1257/2013). Thus, even though the Hong Kong Convention on Ship Recycling is not yet in force, from an UNCLOS perspective, it is not generally problematic if the EU prescribes and enforces accepted future international standards in advance (see Article 5 of the EU Ship Recycling Regulation). However, this legal approval does not extend "endlessly" to features and elements which are not an internationally agreed part of the applicable rules and standards.

Like many other IMO conventions, the Hong Kong Convention on Ship Recycling itself includes a provision which explicitly addresses the question under discussion here. Residual jurisdiction of port States to legislate in matters regulated in the conventions often refers to the fact that this has to be conducted "*in accordance with international law*". As a result, Article 1(2) of the Hong Kong Convention on Ship Recycling states that "*no provision of this Convention shall be interpreted as preventing a Party from taking, individually or jointly, more stringent measures consistent with international law, […]*".

However, when it comes to the implementation of the EU Ship Recycling financial incentive mechanism, the EU and its members – in their functions as port States – would try to prescribe and enforce a feature which has already been explicitly rejected in the forum of the competent international organisation by a majority of the international community. Thus, it is not possible to establish a legal link to "*generally accepted rules and international standards*" when the EU seeks to implement Article 29 of the Regulation (EU) No 1257/2013, i.e., the financial incentive mechanism, via an EU Ship Recycling License. If port States were to have the unrestricted right to ex-

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(a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping;
(b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;
[(c) and (d) omitted]."

ceed any standard of applicable IMO Conventions, the multilateral objects and purposes of those conventions would be defeated.[47]

c. Unilaterally Enforcing an EU Ship Recycling License Would Represent "Excessive" Port State Jurisdiction

Specifically, in the area of ship recycling, the combination of two factors differentiates the proposed financial incentive from all other potentially controversial "excessive" instruments to be applied by port States (for example in the area of monitoring, reporting and verifying CO2 emissions where the EU just recently also implemented unilateral measures):[48] **An EU Ship Recycling License is neither discharge-related, CDEM-related or in any other way operationally relevant nor has it been internationally accepted as reflecting a present or future international standard to be prescribed and enforced by port States on behalf of the rest of the world.** The proposed measure is, thus, not "*consistent with international law*" as prescribed by Article 1(2) of the Hong Kong Convention on Ship Recycling.

Thus, a port State requirement which prescribes a certain type of conduct in respect of foreign ships before, during or after their presence within the port States' territorial jurisdiction – in this case, payment of the EU Ship Recycling License fee – can exceed the limits of port State prescriptive jurisdiction as envisioned by UNCLOS. A prospective EU Ship Recycling License scheme would thus be in excess of enforcement jurisdiction of port States as recognized under UNCLOS.

Moreover, the EU and its member States have no enforcement jurisdiction under UNCLOS to charge the fees for an EU Ship Recycling License Scheme when non-EU flagged vessels voluntarily enter EU ports. The limit on enforcement jurisdiction of port States to protect and preserve the marine environment is set out explicitly in Article 218 UNCLOS limiting this right to violations relating to illegal discharges. This is also why, e.g., Australian rules on compulsory pilotage in the Torres Strait have been

[47] See generally, Article 31(1) of the VCLT which states that *"[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"

[48] Regulation (EU) 2015/757 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport OJ L123/55 of 19 May 2015.

identified as incompatible with Article 218 UNCLOS.[49] The same verdict would apply to a prospective EU Ship Recycling License Scheme.

2. Issues Relevant for General Public International Law

The absence of particular provisions on "excessive enforcement jurisdiction" of port States is generally treated as evidence that the matter is, if at all, rather regulated by general public international law than by UNCLOS.[50] However, the right to impose more stringent requirements is limited by certain generally accepted principles of public international law. Among those are the principles of

- non-discrimination,
- good faith,
- the prohibition of abuse of rights and
- proportionality.

The issue of non-discrimination is not under discussion here as the EU intends to implement its measures without any differentiation and regardless of any flag of vessels entering EU ports. Additionally, it does not seem productive to discuss the issue of good faith or the prohibition of abuse of rights which is also explicitly recognized by Article 300 UNCLOS.[51] By implementing a prospective EU Ship Recycling License scheme, the EU's general intention is, above all, to incentivise the use of certified ship recycling facilities, i.e. those included in the relevant European List.[52] This objective cannot be regarded as a breach of good faith or an abuse of rights in itself.
However, there is hardly any sub-area of public international law where the applicability of the principle of proportionality could be denied.[53] The application of propor-

[49] See *Beckmann*, PSSAs and Transit Passage – Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS, 38 Ocean Development & International Law 2007, pp. 325 (at 345).
[50] *Ringbom*, The EU Maritime Safety Policy and International Law, p. 215.
[51] The provision states that: „*States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right*."
[52] See Article 16 of the EU Ship Recycling Regulation.
[53] See *Delbrück*, Proportionality, in: *Bernhardt* (ed.), Encyclopedia of Public International Law, Vol. III, pp. 1140.

tionate enforcement measures is also applied by two UNCLOS provisions, namely its Articles 221 and 232.[54]

As a result, the means employed to achieve a certain objective have to be proportionate to that objective, also in the area of legislative and prescriptive port State jurisdiction. However, the following discussion on the WTO incompatibility will ultimately highlight that the EU approach of institutionalizing a unilateral Ship Recycling License Scheme is disproportionate.[55] Thus, whether the EU's conceptual approach is "*reasonable*" and "*necessary*" is discussed further and in more detail in the following sub-sections of this opinion.[56]

C. Non-Compliance with WTO Law: Article V:3 GATT 1994 and Article XXXVII:1 (c) (i) GATT 1994

For good reasons, the consortium questions whether the introduction of a financial instrument and the creation of a new financial obligation accords with the existing commitments of the EU and its member States under the legal order of the World Trade Organisation (WTO).[57] The ongoing trade dispute "*Russian Federation — Recycling Fee on Motor Vehicles*" – *inter alia* initiated by the EU – evidences that a recycling instrument may potentially generate trade distorting effects which could even be relevant for a WTO dispute.[58]

Furthermore, the 1997 the Commission Communication on Environmental Taxes and Charges in the Single Market[59] already warned that

> *"[…] The use of environmental taxes and charges may also affect obligations towards third countries, e.g. in the context of the World Trade Organization (WTO). member States need to take account of all these linkages in order to ensure that national environmental taxes and charges are implemented in a way which is compatible with their WTO [and Treaty] obligations."*

[54] Article 221 UNCLOS addresses measures to avoid pollution arising from maritime casualties and Article 232 regulates the liability of States arising from enforcement measures.
[55] Se generally on the issue proportionality under WTO law: *Mitchell*, Proportionality and Remedies in WTO Disputes, The European Jounrnal of International Law (17) 2007, pp. 985.
[56] See sections C. 2. a. and b.
[57] See Ecorys et al., Financial instrument to facilitate safe and sound ship recycling, 2nd Interim Report (30 October 2015), Annex B, pp. 67.
[58] For further details see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds463_e.htm.
[59] See *infra* Commission Communication (97/C 224/04) OJ No. C 224/6 of 23 July 1997.

While a prospective EU Ship Recycling License scheme applicable to all vessels would not be problematic under the general concept of non-discrimination among all WTO members, the mechanism as currently proposed would generally violate the right to freedom of transit as guaranteed under Article V:3 GATT 1994. Moreover, as part of the section on "Trade and Development" (Part IV GATT 1994), Article XXXVII:1 (c) (i) GATT 1994 mandates all developed WTO members explicitly "*to refrain from imposing new fiscal measures*" which potentially have a negative trade effect on the economies of developing countries.

In the context discussed here, Bangladesh, India and Pakistan could be possible applicants for demanding dispute settlement negotiations and for further establishing a panel against the EU, as a result of the negative commercial effects of an EU Ship Recycling License on ship recycling facilities situated within their respective territories. It has to be recalled at this point that 50.000 people are directly employed in ship recycling in Bangladesh while half a million people work in associated industries.[60] These numbers underline the domestic economic importance for Bangladesh and a comparable economic assessment can also be made for Pakistan or India.

1. An EU Ship Recycling License Scheme Violates the Substance of Article V:3 GATT 1994

As a whole, Article V GATT 1994 serves to protect WTO members from unnecessary delays or restrictions, such as limitations on freedom of transit, or unreasonable charges or delays (via paragraphs 2-4). Moreover, the provision extends the Most-Favoured-Nation (MFN) treatment to WTO members' goods which are "*traffic in transit*" (via paragraphs 2 and 5) or "*have been in transit*" (via paragraph 6). Vessels as a means for the international transport of goods are explicitly mentioned in Article V:1 GATT 1994 and, *argumentum e contrario*, the coverage of vessels is also evidenced by the explicit exclusion of aircraft in Article V:7 GATT 1994.[61]

Article V:3 GATT 1994, however, has never been interpreted by any GATT or WTO panel in the past. So far, Article V GATT 1994 has been subject to one single WTO dispute, mainly concentrating on Article V:2, 6 GATT 1994.[62] As part of this dispute, the panel has stressed that it is a difficult legal task to interpret Article V of the GATT

[60] See Lloyd's List of 15 February 2016 ("*Making recycling sustainable*"), p. 9.
[61] See also Analytical Index of the GATT, Art. V GATT, p. 214.
[62] Columbia – Indicative Prices and Restrictions on Ports of Entry, WT/DS366/R, 27 April 2009.

1994 "*without any meaningful guidance*".[63] Article V GATT 1994 represents a difficult and complex article.[64] Nevertheless, both the panel report "*Columbia – Port of Entry Measures*" and a legal analysis of the exact wording of the sub-provisions can still provide some meaningful guidance for determining whether a future EU Ship Recycling License would be in contradiction to Article V:3 GATT 1994. At the outset, Article V:3 GATT 1994 reads:

> "*Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered." [emphasis added]*

The panel report "*Columbia – Port of Entry Measures*" has generally confirmed a broad understanding of Article V GATT 1994 where the reference to "*freedom*" means "*the unrestricted use of something*", in particular, because of the fact that neither "*freedom*" nor "*transit*" are defined anywhere in the WTO legal order.[65] In any case, freedom of transit must also be provided to "traffic in transit".[66] Moreover, the general principles of treaty interpretation as set forth by the Appellate Body in *US – Gasoline* are applicable to avoid interpretations that reduce WTO provisions to inutility.[67]

In international trade law, Article V:3 GATT serves two main objectives: First, unless there is a failure to comply with applicable customs laws and regulations, a WTO member must not subject goods in transit coming from and going to another WTO member to delays or restrictions. Limiting the substance, the provision proscribes only delays or restrictions which are "*unnecessary*". Second, by using the conjunction "*and*", the sub-provision further states that traffic coming from or going to the territory of a WTO member shall be exempt from

[63] The panel used the term "*arduous*", ibid., para. 7.388.
[64] *Jackson*, World Trade and the Law of GATT, p. 511.
[65] Columbia – Indicative Prices and Restrictions on Ports of Entry, WT/DS366/R, 27 April 2009, paras. 7.399 and 7.456. However, Article V:1 GATT 1994 provides a fairly good concept of "transit".
[66] Ibid., para. 7.400.
[67] Ibid., para. 7.467.

(i) customs duties;

(ii) all transit duties; and

(iii) other charges imposed in respect of transit, except charges for (a) transportation or (b) those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

Notably, the term "*unnecessary*" only appears directly before the reference to "*delays or restrictions*". It does not re-appear after the conjunction "*and*" which opens up another category of illegal inflictions with the freedom of transit. This implies a more categorical and technical approach to customs duties, transit duties or other charges where issues of political "necessity" do not seem to be part of the equation. In contrast, Article V:4 GATT 1994 does not refer to "*unnecessary*" but to the term "*reasonable*" stating that:

> "*All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic."*

Article V:4 GATT 1994 must refer to legitimate "*charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered*" as referred to in Article V:3 GATT 1994. Representing another legal category, however, "*customs duties, transit duties and other charges imposed in respect of transit*" are generally outlawed by Article V:3 GATT without any reference to necessity or reason.

In other words: Reasonable transportation charges can be justified as legal measures under the WTO system. Legitimate transportation charges and regulations as referred to in Article V GATT 1994 must be governmentally imposed as the relevant measures are, e.g., defined as: "*[…] including charges for transportation by Government-owned railroads or Government-owned modes of transportation*".[68] This defini-

[68] Preparatory Committee of the International Conference on Trade and Employment, Committee II, Report of the Technical Sub-Committee, UN Doc. E/PC/T/C.II/54/Rev.1, 28 November 1946, p. 10.

tion serves to clarify that there must be some government ownership of the mode of transport in question before a transportation charge can be levied.[69]
As a consequence, privately-imposed harbour fees do not fall under the categories of costs as regulated by Article V GATT 1994. Practical examples for reasonable transportation charges are, e.g., train costs (as some WTO members require that traffic in transit use alternative modes of transportation, for example, if applicable quotas for trucks have already been filled).[70] A practical example for "*charges commensurate with administrative expenses entailed by transit or with the cost of services rendered*" is, e.g., the filing of transit documents.[71] Consequently, this expression mainly relates to physical goods in transit and not to the means for transporting the goods to enter transit areas.

2. Conclusion on the Violation of the Material Substance of Article V:3 GATT 1994

As evidenced by the practical examples for legal transportation charges, the annual or monthly fee imposed on vessels for implementing an EU Ship Recycling License scheme has no correlation at all to actual transportation services or administrative expenses entailed by transit. Rather, it would be levied on the mere occasion of traffic (i.e. vessels) in transit and it would not serve transportation purposes but as a measure to build up capital for the financial administration of an EU Ship Recycling fund. Thus, EU Ship Recycling License fees must fall under the catch-all category of "*other charges imposed in respect of transit*" as mentioned in Article V:3 GATT 1994. **Transit duties or charges of that kind cannot be justified by considerations of necessity or reason under WTO law and are thus illegal**.

3. An EU Ship Recycling License Cannot be Justified Under Article V:3 GATT 1994 as "*Necessary*" or "*Reasonable*"

Even if a WTO dispute panel should conclude that the categories of "*necessary*" and "*reasonable*" should apply in examining a possible justification for EU Ship Recycling

[69] *Valles*, Commentary on Article V GATT 1994, in: *Wolfrum/Stoll/Hestermayer* (eds.), Max Planck Commentaries on World Trade Law, Vol. 5, para. 16.
[70] Ibid.
[71] Ibid.

License fees as "*other charges imposed in respect of transit*", the relevant test would result in concluding that the financial obligations imposed on vessels in transit are "*unnecessary*" and "*unreasonable*". There is extensive jurisprudence on the meaning of the word "*necessary*" in the relevant sub-paragraphs of Article XX GATT 1994. The term "*reasonable*" has been interpreted less frequently, however, the panel report in "*Dominican Republic – Import and Sale of Cigarettes*" provides guidance as it construed "*reasonable*" as mentioned in Article X GATT 1994.[72]

a. The Test for a "*Reasonable*" Charge

Remarkably, the panel in "*Dominican Republic – Import and Sale of Cigarettes*" turned to the "New Oxford English Dictionary" and noted that: *"[…] the ordinary meaning of the word "reasonable" commonly refers to notions such as:*

- "*in accordance with reason*",
- "*not irrational or absurd*",
- "*proportionate*",
- "*having sound judgement*",
- "*sensible*",
- "*not asking for too much*",
- "*within the limits of reason, not greatly less or more than might be thought likely or appropriate*", *and*
- "*articulate*".[73]

First, the inclusion of a financial mechanism into the legal framework of the Hong Kong Convention on Ship Recycling was politically rejected by a majority of the IMO members during the course of the negotiations on the convention.[74] Thus, to set up a financial incentive mechanism in the area of ship recycling has been disapproved by the majority of the international community as being disproportionate, unsound and asking too much from shipowners and other stakeholders involved.

[72] Panel Report, Dominican Republic – Importation and Sale of Cigarettes, WT/DS302/R, para. 7.385.
[73] Ibid.
[74] See specifically: *Yujuico*, Demandeur pays: The EU and funding improvements in South Asian ship recycling practices, Transportation Research Part A 67 (2014) pp. 340 (at 348): "*Efforts to implement a ship recycling fund were sunk at the global level during HKC negotiations and have been put in the dock at the EU level due to implementation difficulties*."

Second, a WTO panel could construe "*reasonable charges*" to mean those charges that the market is willing to bear in the light of alternative routes of transportation available.[75] There are no alternative routes of transportation available since avoiding EU ports completely is not a commercially viable alternative for most shipping businesses. A market enquiry on whether shipowners (and private or public port authorities) would be willing to bear the estimated costs (of about 16.000 EUR/year) and, additionally, the administrative burdens of implementing an EU Ship Recycling License scheme would, however, result in the obvious conclusion that this approach should be rejected as being unreasonable.

b. The Test for a "*Necessary*" Charge

Testing the "*necessity*" element, the WTO Appellate Body has developed a "two-tiered" approach in the context of Article XX GATT 1994 (as applied since the 1996 dispute "*US – Gasoline*").[76] The Appellate Body has explained that both elements must be satisfied in order for a measure to be provisionally justified under a sub-paragraph of Article XX GATT 1994:

First, there has to be a provisional justification by reason of characterisation of the measure under the relevant sub-paragraph of Article XX GATT 1994. Additionally, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves generally inconsistent with the GATT 1994. However, it may be recalled that the above analysis has evidenced that an EU Ship Recycling License would be in conflict with the concept of Article V:3 GATT 1994, thus resulting in general WTO-inconsistency.

Second, a further appraisal of the same measure under the introductory clauses of Article XX GATT 1994 would follow.[77] This includes the test whether a measure must be "*necessary*" to secure compliance with national laws or regulations. A WTO member which invokes one of the sub-paragraphs of Article XX GATT 1994 as a justification for a trade-distorting measure has the burden of demonstrating that both of these

[75] *Valles*, Commentary on Article V GATT 1994, in: *Wolfrum/Stoll/Hestermayer* (eds.), Max Planck Commentaries on World Trade Law, Vol. 5, para. 19.
[76] Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3.
[77] Appellate Body Report, *US – Gasoline*, p. 22.

two requirements are met.[78] The Appellate Body – when examining the concept of "*necessary*" (in the context of Article XX(d) GATT 1994 in *Korea – Various Measures on Beef*) – concluded that, in order to be considered "*necessary*" to secure compliance, a measure does not need to be "*indispensable*" but should constitute something more than strictly "*making a contribution to*":

> *"[…] the term 'necessary' refers, in our view to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, is 'necessary' taken to mean as 'making a contribution to'. We consider that a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'."*[79]

> *[…] determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' […], involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."*[80]

In a more recent assessment of the meaning of the term "*necessary*" in connection with a defense raised under Article XX(b), the Appellate Body indicated that a panel may evaluate whether a measure is "*necessary*" based on the extent to which the measure is "*apt to produce a material contribution to the achievement of its objective*".[81]

Finally, the Appellate Body has clarified that a measure will not be considered "*necessary*" (in this case: within the meaning of Article XX(d) of the GATT 1994*)* "*if an alternative measure which [a member] could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it*".[82] However,

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[78] Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.
[79] Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.
[80] Appellate Body Report, *Korea – Various Measures on Beef*, paras. 162-164.
[81] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[82] Appellate Body Report, *Korea – Various Measures on Beef*, para. 165, citing to GATT Panel Report, *US – Section 337*, footnote 69, para. 5.26: "*It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent*

here a complaining WTO member has the burden to identify possible alternatives to the measure at issue that the respondent could have taken.[83]

It is questionable why a financial measure like an EU Ship Recycling License and the administration of a fund which needs several years (if not decades) to generate any practical effects could be categorized as "*apt to produce a material contribution to the achievement of its objective*", i.e. sustainable and sound ship recycling globally. The possibility of accrued funds generated from the EU Ship Recycling License Scheme being forfeited already anticipates that an undefined number of shipowners will not change their approach to ship recycling. In fact, it would rather be a widespread ratification of the Hong Kong Convention on Ship Recycling which could be categorized as "*apt to produce a material contribution"* to the achievement of the objective of sustainable ship recycling globally. Additionally, satisfying their burden of proof, complaining WTO members like India, Pakistan or Bangladesh could point to the political alternatives of having all EU members ratify the Hong Kong Convention on Ship Recycling and to further utilize the instruments of official development aid (ODA) to modernize ship recycling facilities in traditional ship recycling countries.

4. Under Article XXXVII:1(c)(i) GATT 1994, Developed WTO Members "*Shall Refrain From Imposing New Fiscal Measures*"

As part of their deliberations on the alleged WTO consistency of an EU Ship Recycling License,[84] the consortium has completely disregarded Part IV of the GATT 1994 (Trade and Development). However, Part IV GATT 1994 is not an insignificant "annex" to Parts I - III GATT 1994. Rather, the three provisions of Part IV GATT postulate additional legal requirements which are legally binding for all WTO members including the EU. Already before 1995, this has been confirmed by earlier GATT jurisprudence stating that the provisions of Part IV GATT 1994 could be "*breached*"[85] and

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with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."

[83] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

[84] Ecorys et al., Financial instrument to facilitate safe and sound ship recycling, 2nd Interim Report (30 October 2015), pp. 77.

[85] GATT Panel, EEC – Restrictions on Imports of Apples from Chile, GATT BISD 27S/98 (117, paras. 4.22-4.23): "*The Panel examined the EEC measure in relation to the objectives and commitments embodied in Articles XXXVI and XXXVII [...] Although the EEC measure did affect the ability of a developing country to export into the EEC market, the Panel noted that the EEC had taken certain ac-*

that Article XXXVII GATT 1994 reflects "*additional obligations*".[86] For example, Brazil has relied explicitly on Part IV GATT 1994 in a former dispute against the European Community (EC).[87]

Article XXXVII GATT 1994 is entitled "*Commitments*" (of developed WTO members towards developing WTO members). The second paragraph of the provision introduces so-called "*stand still provisions*". In particular, Article XXXVII:1(c)(i) GATT 1994 states:

> *"1. The developed contracting parties shall to the fullest extent possible – that is, except when compelling*
> *[…]*
> ***(c) (i) refrain from imposing new fiscal measures**,*
> *[…]*
> *which would hamper, or which hamper, significantly the growth of consumption of primary products, in raw or processed form, wholly or mainly produced in the territories of less-developed contracting parties, and which are applied specifically to those products."*

The final part of Article XXXVII GATT 1994 evidences that this provision is a purely product-related provision. As such, it mainly focusses on fiscal measures applied to primary products wholly or mainly produced by developing country WTO members. However, the product-focus is true for the whole GATT system and the existence of a variety of "*special and differential treatment (SDT) provisions*" in the WTO legal order evidences that Article XXXVII:1(c)(i) GATT 1994 cannot be read in isolation.

In any case, the process of ship dismantling generates huge amounts of scrap metal and raw steel plates. Thus, a dynamic interpretation of Article XXXVII:1(c)(i) GATT 1994 supports the view that the generation of raw steel/steel parts (and every product on a vessel to be cut off or segmented in the process of ship dismantling) establish

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tions, including bilateral consultations in order to avoid suspending imports of apples from Chile. After a careful examination, the Panel could not determine that the EEC had not made serious efforts to avoid taking protective measures against Chile. Therefore the Panel did not conclude that the EEC was in breach of its obligations under Part IV.".

[86] Ibid., (133-134, para. 12.32) „[*...] However, the Panel noted that the commitments entered into by contracting parties under Article XXXVII were additional to their obligations under Parts I-III of the General Agreement, and that these commitments thus applied to measures which were permitted under Parts I-III. As the Panel had found the EEC's import restrictions to be inconsistent with specific obligations of the EEC under Part II of the General Agreement, it therefore did not consider it necessary to pursue the matter further under Article XXXVII."*

[87] GATT Panel, *European Communities – Refunds on Exports of Sugar*, GATT BISD 27S/69 (80 et seq.).

the necessary "product link" for triggering the general applicability of Article XXXVII:1(c)(i) GATT 1994.

As evidenced by the above discussion relating to Article 192(2)(a) TFEU,[88] the financial mechanism as envisioned by Article 29 EU Ship Recycling Regulation represents a [primarily] "*fiscal measure*" as materially covered by Article XXXVII:1(c)(i) GATT 1994. The intended effect of this fiscal measure – which developed WTO members shall refrain from in relation to WTO developing countries – is to incentivise shipowners to contract with ship recycling facilities which are included in the "European List" as set out in Article 16(2) EU Ship Recycling. However, if a ship recycling facility – situated in a developing country like Bangladesh, Pakistan or India – would not be included in the "European List" it will potentially lose a substantial amount of its former ship recycling business. This would be a simple causal result of the application of the financial incentive mechanism implemented via an EU Ship Recycling License (and via disbursements to shipowners from an EU Ship Recycling License fund).

Even before the creation of the WTO, Article XXXVII:1(c)(i) GATT 1994 was reinforced by Article XXXVII:3(c) GATT 1994 which reads:

> *3. The developed contracting parties shall:*
> *[…]*
> *c) have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties.*

In the context of Article XXXVII:3(c) GATT 1994 "*other measures*" covers, e.g., measures like antidumping duties or countervailing measures.[89] The basic compatibility with those measures is enough to affirm the existence of "*other measures*". In relation to ship recycling facilities – situated in WTO developing countries which are not included in the "European List" – the financial incentive mechanism has similar economic effects like an antidumping duty or a countervailing measure because it has the direct effect of detracting ship dismantling business opportunities from a more competitive and more price-efficient market. "*Essential interests*" of Bangla-

[88] See supra, section A.1.
[89] Analytical Index of the GATT, Art. XXXVII GATT, p. 1066.

desh, India and Pakistan would be affected. "*Constructive remedies*" to the benefit of those countries have not been discussed. Rather the EU seeks to implement the **"Polluter Pays Principle" (PPP)** without any differentiation between affected WTO developing countries.

The effect of losing ship breaking business as a result of a possible "non-inclusion" would even be felt commercially – if affected ship recycling facilities were to be officially certified/accredited under the "global" Hong Kong Convention on Ship Recycling system (once set in force) at the same time. As a result, implementing Article 29 EU Ship Recycling via the imposition of a new fiscal measure – detrimental to at least three WTO developing countries as global market leaders in the shipbreaking business – contradicts completely with the EU's legal obligations under Part IV GATT, in particular with its obligations under Article XXXVII:1(c)(i) GATT 1994.

D. Favouring EU-listed Ship Recycling Facilities Conflicts with the Principle of Common but Differentiated Responsibilities (CBDR)

The discussion so far also has to highlight an important variation in the legal definition of a "*ship recycling facility*" between the EU Ship Recycling Regulation on the one hand and the Hong Kong Convention on Ship Recycling on the other hand. The latter defines the term "*ship recycling facility*" to mean "*a defined area that is a site, yard or facility used for the recycling of ships*". In contrast, the EU definition omits the term "*site*" and defines a "*ship recycling facility*" to mean "*a defined area that is a yard or facility located in a member State or in a third country and used for the recycling of ships*".

The practical effects of the omission of "*sites*" could work against the inclusion of certain ship recycling companies in the "European List".[90] By obviously demanding a concrete structure (or other form of "*defined area*" which is not a "*site*") the EU deviates from the international accord and maximizes a domestic ship recycling standard to be applied globally, neglecting the fact that environmentally sound and sustainable

[90] See generally: *Tsimplis*, Recycling of EU Ships: From Prohibition to Regulation?, Lloyd's Maritime and Commercial Law Quarterly 2014, pp. 415 (433).

ship recycling cannot be generally outlawed from a standard-based approach (see Regulation 3 of the Hong Kong Convention on Ship Recycling).[91]

In particular with regard to the practical consequences, the EU's approach would completely ignore the principle of **"Common But Differentiated Responsibilities [for Developing Countries]" (CBDR)**. This principle has been developed over time as an answer to developing country parties' calls for fairer rules and procedures in international environmental cooperation.[92] For example, in the context of transboundary waste management, Article 11(1) of the Basel Convention explicitly recognizes CBDR.[93] After decades of increasing international cooperation on environmental issues, the notion of CBDR has now evolved into a cardinal principle of international environmental law, e.g., in the context of international negotiations under the UN Framework Convention on Climate Change (UNFCCC). CBDR is now not only explicitly recognized under the UNFCCC but there are also manifestations in various other areas of public international law, namely in:

- The Convention on Biodiversity,
- the UN Convention to Combat Desertification
- the variety of "SDT" provisions in the WTO legal order
- the Montreal Protocol on Substances that Deplete the Ozone Layer
- the Post-2015 negotiations and prospective Sustainable Development Goals.

In fact, CBDR is not an antagonist but simply an outgrowth of the PPP which is promoted so broadly by the EU: "*The equitable considerations intrinsic to the polluter-pays principle also suggest that it is appropriate for developed countries, whose development is imposing significant negative externalities on the environment of both*

[91] The provision states that: "*Parties shall take measures to implement the requirements of the regulations of this Annex, taking into account relevant and applicable standards, recommendations and guidance developed by the International Labour Organization and the relevant and applicable technical standards, recommendations and guidance developed under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.*"

[92] The starting point was, e.g., the formulation of Principle 7 of 1992 Rio Declaration on Environment and Development; see also: The Principle of Common But Differentiated Responsibilities: Origins and Scope, A CISDL Legal Brief for the World Summit on Sustainable Development 2002, Johannesburg; DIE Discussion Paper No. 6/2014: Different Perspectives on Differentiated Responsibilities, p.7.

[93] "*[…] 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 and other wastes as required by this Convention. These agreements or arrangements 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.*"

developed and developing countries, to help developing countries meet their environmental obligations."[94]

Remarkably, even in shipping, CBDR is now continuously recognized in practical discussions, for example, when it comes to bunker fuel emission control, as part of the efforts to combat climate change: In the IMO, a recently formed group of "*like-minded developing countries*"[95] has asked the IMO to work in accordance with the principles and provisions of the UNFCCC, in particular with the principles of equity and CBDR.[96] In sum, the principle of CBDR needs to be acknowledged in the practice of regulating ship recycling as well, in particular, as the global resources and knowledge base of the global market leaders cannot be supplemented on short notice. Ultimately, this would lead to a call for earmarking official development aid (ODA) more intensively in order to make ship recycling in South East Asia more environmentally sustainable – instead of using shipowners as a "cash cow" for a bureaucratic experiment with unknown material and financial contributions.

E. Conclusions on the Disproportionality and Non-Compliance with International Law

A measure which is identified as being disproportionate in one sub-area of public international law (here: WTO law) cannot be held to be clearly proportionate in other sub-areas of public international law. The fact that developing countries, including one least-developed country (Bangladesh), are economically affected by the EU's proposed measures adds some political sensitivity to weighing the balance between proportionality and disproportionality.

In conclusion, an EU Ship Recycling License has to be categorized as disproportionate under public international law due to its possible detrimental effects on the shipbreaking business in case leading ship recycling facilities, located in developing countries, are not included on the "European list". This outcome, however, seems to be pre-determined since the legal definition of "*ship recycling facility*" under EU law

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[94] *Dernbach*, Sustainable Development as a Framework for National Governance, 49 Case Western Law Review (1998), p. 1.

[95] The first meeting of the group on climate change was hosted by China in 2012.

[96] Submission by Algeria, Argentina, Bolivia, Brazil, China, Cuba, Ecuador, Egypt, El Salvador, India, Malaysia, Nicaragua, Pakistan, Saudi Arabia, South Africa, Thailand, Uruguay, and Venezuela, on cooperative sectoral approaches and sector-specific actions in order to enhance the implementation of Article 4 paragraph 1(c) of the Convention; see http://unfccc.int/files/bodies/awg-lca/application/pdf/submission_by_like-minded_countries_1.b.iv25may.pdf.

differs from the approach of the Hong Kong Convention on Ship Recycling.[97] However, generally disregarding topographic conditions in major ship recycling countries and excluding the possibility that a ship recycling facility could also be operated sustainably and adhering to highest environmental standards from a "*site*" is disproportionate. This assumption is reinforced by the fact that, e.g., four Indian ship recycling facilities also operating on "*sites*" have only recently been officially certified by classification societies under the criteria as governed by the Hong Kong Convention on Ship Recycling.[98]

F. Final Alternative Thoughts on a More Constructive Implementation of Article 29 of Regulation (EU) No. 1257/2013

The short description of the relevant European Commission tender which led to the reports of the consortium led by ECORYS Nederland B.V. highlighted that

> "[…] *shipowners may be tempted to avoid the new recycling-related requirements applicable to EU flag ships by re-flagging their ships to flag states which do not impose similar rules. To address the issue, a financial mechanism to incentivise shipowners to recycle ships in a safe and environmentally sound manner has been considered in the Hong Kong Convention on Ship Recycling and the EU Ship Recycling Regulation contexts respectively. Under Article 29 of the EU Ship Recycling, the Commission is invited to table, if appropriate, a legislative proposal regarding the feasibility of establishing a financial incentive for the safe and sound recycling of ships. The contractor will be tasked with investigating this feasibility, analysing earlier studies and advising on potential ways forward."*[99]

The inclusion of financial mechanisms to incentivise shipowners to recycle ships in a safe and environmentally sound manner has been rejected politically as part of the negotiations leading up to the Hong Kong Convention on Ship Recycling.[100] Nevertheless, Article 29 of the EU Ship Recycling Regulation still reads:

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[97] See supra, section D.
[98] See Lloyd's List of 16 December 2015 „*Class NK certifies two more ship recycling yards in India*"; Lloyd's List of 29 September 2015, „*Asian shipowners welcome certification of Indian recycling yards*".
[99] See http://ted.europa.eu/udl?uri=TED:NOTICE:239689-2014:TEXT:EN:HTML.
[100] *Yujuico*, Demandeur pays: The EU and funding improvements in South Asian ship recycling practices, Transportation Research Part A 67 (2014) pp. 340 (at 348).

"The Commission shall, by 31 December 2016, submit to the European Parliament and to the Council a report on the feasibility of a financial instrument that would facilitate safe and sound ship recycling and shall, if appropriate, accompany it by a legislative proposal."

However, the exact wording of Article 29 of the EU Ship Recycling Regulation (as well as the short description of the tender notice) do both not necessarily imply that "*a financial instrument that would facilitate safe and sound ship recycling*" must, in any case, be directly connected to the operation of vessels. Rather, it is exclusively Recital (19) of the EU Ship Recycling Regulation which establishes this link by stating:

„*In the interest of protecting human health and the environment and having regard to the 'polluter pays' principle, the Commission should assess the feasibility of establishing a financial mechanism applicable to all ships calling at a port or anchorage of a member State, irrespective of the flag they are flying, to generate resources that would facilitate the environmentally sound recycling and treatment of ships without creating an incentive to out-flag."*

In the context of EU law, the purpose of using Recitals is to set out concise reasons for the key provisions of a legal act, without reproducing or paraphrasing them.[101] However, the CJEU has confirmed that Recitals have no legal value as such.[102] It is further claimed that they "*cannot be relied on as a ground for derogating from the actual provisions of the act in question*".[103] Nevertheless, Recitals are often used in interpretation by courts.[104] In any case, the text of the operative provision of a legal act has higher legal authority as compared to the text of a Recital.

As a result, the substance of Article 29 of the EU Ship Recycling Regulation does not generally outlaw other complementary ideas which could link "*a financial instrument that would facilitate safe and sound ship recycling*" directly to existing ship recycling facilities, both within the EU and, in particular, in third countries. This would not imply a disconnection to the commercial operation of vessels since certain "CDEM" requirements as established both under the Hong Kong Convention on Ship Recycling

[101] Joint Practical Guide for persons involved in the drafting of European Union legislation, p.20. http://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf.

[102] ECJ Judgment of the Court (Fifth Chamber) of 19 November 1998, Case C-162/97, Criminal Proceedings against Nilsson, Hagelgren & Arrborn, 1998 E.C.R. I-07477 para. 54.

[103] Ibid.

[104] Manual of precedents for acts established within the Council of the European Union, 2012 edition. ("*The Court often refers to the recitals in order to interpret the enabling provision of an act.*").

and under the EU Ship Recycling Regulation (as discussed above)[105] would still remain valid.

However, the current understanding of the EU Ship Recycling Regulation is based on a strict desire to counter commercial "avoidance strategies" of ship owners, i.e., owners of end-of-life ships and cash-buyers who are not as much concerned about reputational issues (as compared to most other "active" shipowners) and who are willing to detour to the most profitable recycling opportunity. The exact wording of Article 29 EU Ship Recycling Regulation, however, does not suggest a "quasi automatic" and legally compelling link of a possible financial incentive to the operation of vessels calling at EU ports. It is rather the broadest legal understanding of the "Polluter Pays Principle" (PPP) which – in this case *ex ante* – seeks to identify and anticipate shipowners as "*soon to be polluters*" who should ultimately pay for the safe and sound recycling of their vessels, not only once these have reached the end of their operating lifespan but already during the start and/or course of all of their commercial operations.[106]

The preamble of the Hong Kong Convention on Ship Recycling also explicitly refers to internationally accepted environmental principles, above all, to the "**Precautionary Principle"** (as set out also, e.g., in Principle 15 of the Rio Declaration on Environment and Development)[107] and referred to in IMO-Resolutions.[108] The precautionary principle requires States to take measures to protect the environment where there is evidence of serious environmental damage even if scientific certainty is lacking.[109]

In contrast, it is striking that the Hong Kong Convention has eschewed to include comparable explicit references to the PPP. Thus, in the context of ship recycling, the EU Ship Recycling Regulation applies a much broader understanding of PPP as compared to the global accord. However, for practical reasons, (e.g. "*to generate resources*" […] "*without creating an incentive to out-flag*"), it is, in fact, rather the ship recycling facilities which buy end-of-life vessels to be dismantled – and not the shipping companies – and which should thus be categorized as "co-polluters".

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[105] See supra, section B.1.b. and c.

[106] Admittedly, this "from the cradle to the grave approach" is also generally accepted by the Hong Kong Convention on Ship Recycling via the inclusion of the rules on the "Inventory of Hazardous Materials" (IHM), Chapter 2, Regulation 5.

[107] The principle states that: "*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*."

[108] See, e.g., IMO Doc. MEPC 37/22/Add.1: Resolution MEPC.67(37) adopted on 15 September 1995 ("*Guidelines on incorporation of the precautionary approach in the context of specific IMO activities*").

[109] See, e.g., *Atapattu*, Emerging Principles of International Environmental Law, p. 204.

From a development cooperation perspective, some of those "polluters", i.e., certain sub-standard recycling facilities in non-EU countries, could also be identified as being in need of financial incentives to be able to implement safe and sound ship recycling *in situ*. The wording of Article 29 EU Ship Recycling Regulation ("*a financial instrument that would facilitate safe and sound ship recycling*") does not outlaw such a view. To include the recycling facilities into the debate on a possible financial instrument could also possibly prevent an unstainable relocation of ship recycling services with a possible devastating effect for the affected third-country economies[110] and it would not take several decades to feel any practical effects once a license regime (complemented by a publicly administered fund) has generated enough capital to become operational.

From a combined political, economic and legal perspective it is equally as important to adhere to the CBDR principle as giving effect to the PPP. As a consequence, "*to generate resources*" could also imply that PPP – for reasons of EU development cooperation objectives – should be converted and understood as a ***"Demandeur Pays Principle"***. A recent academic contribution in the area of ship recycling has explicitly postulated this politically and economically appropriate modification of the PPP which also takes account of the CBDR.[111]

In the given context, the French term "*demandeur*" can be translated as "the requester" or "the petitioner". The EU in its role as *demanding* the implementation of the highest environmental standards in global ship recycling is financially capable to support its own desired environmental objectives. For example, the European Commission on International Cooperation and Development finances several development cooperation projects on "Integrated Solid Waste Management" (e.g. with Georgia, Azerbaijan, Armenia or Kyrgyzstan), evidencing that ship recycling and sustainable waste management also represent project areas which could be earmarked for the purposes of future EU development cooperation with Bangladesh, India or Pakistan.

This development-oriented approach would also integrate more effectively into the most recent efforts of both ship recycling States (for example, the Bangladesh government has announced an intention to invest US$ 150 million to develop green ship

[110] For the economic relevance for Bangladesh, see supra, note 60.

[111] See *Yujuico*, Demandeur pays: The EU and funding improvements in South Asian ship recycling practices, Transportation Research Part A 67 (2014) pp. 340.

recycling facilities)[112] and their existing ship recycling facilities to adhere fully to the requirements of the HKC and to be officially certified by classification societies or other certification bodies.[113]

Additionally, and precisely because of the fact that the legality of an EU financial incentive regime in implementation of Article 29 EU Ship Recycling Regulation has been challenged under the law of the WTO in this legal opinion, it has to be stressed further that one major ship recycling country – which could be negatively affected by the current understanding of Art. 29 of the EU Ship Recycling Regulation (i.e. Bangladesh) – is even **eligible for funding under the WTO's Aid for Trade (AfT) package** which is also part of the Official Development Assistance (ODA). The AfT initiative was launched at the WTO's Hong Kong Ministerial Meeting in 2005 with the aim of extending financial and technical support to least-developed countries (LDCs). Under AfT such support is provided *inter alia* to counter a domestic lack of resources, poor infrastructure, weak productive capacity and technological base, low competitiveness, weak institutions, bureaucratic complexities and lack of trade-related professional expertise. Bangladesh has already received support under the AfT initiative in the past, namely in: economic infrastructure, building productive capacity, and trade policy and regulation.[114]

Thus, apart from the questionable legality of an EU Ship Recycling License under WTO law, it may be generally questioned why the EU would have an interest in undermining the international community's AfT efforts based on the EU's broadest understanding of PPP and via the currently proposed implementation of Article 29 EU Ship Recycling Regulation. As a result, even an academic proponent of a global EU Ship Recycling fund approach has already correctly stated that:

> **"*The fund should be utilised to assist national governments and recyclers in the Third World to establish adequate green ship recycling measures and facilities.*"**[115]

Hamburg, February 15, 2016 - signed: Prof. Dr. Henning Jessen, LL.M. (Tulane)

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[112] This is also highlighted by the final report of the consortium, see Ecorys et al., Financial instrument to facilitate safe and sound ship recycling, 2nd Interim Report (30 October 2015), p. 77; see also Lloyd's List of 15 February 2016 ("*Making recycling sustainable*"), p. 8-9.

[113] See Tradewinds of 20 November 2015, p. 22 ("*A clear line has been drawn in the Alang sand*").

[114] European Report on Development 2014: Financing and other means of implementation in the post-2015 context Country Illustration Report: Bangladesh, available at https://ec.europa.eu/europeaid/sites/devco/files/erd5-country-illustration-bangladesh-2015_en.pdf

[115] *Puthucherril*, From Shipbreaking to Sustainable Ship Recycling, p. 205

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