



Legal implications of EU action on GHG Emissions from the International Maritime Sector

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Executive Summary

The EU has competence to regulate GHG emissions in the maritime sector. The EU could adopt measures regulating or harmonising EU Member States rules due to its competence on environmental, climate change, maritime transport, energy and taxation issues.

The most likely legal basis for that measure would be Article 192(1) of the Treaty on the Functioning of the European Union (TFEU) since such a regulation aims at an environmental objective and should be designed in accordance with the principles of proportionality and subsidiarity.

The EU is obliged to take measures to reduce maritime emissions by Decision No 1600/2002/EC adopting the 6th Environmental Action Programme.¹ Under Directive 2009/29/EC amending ETS Directive 2003/87/EC and extending the ETS,² Effort Sharing Decision 406/2009/EC,³ the United Nations Convention on the Law of the Sea ("UNCLOS") and the Kyoto Protocol the EU should take measures to reduce marine GHG emissions if no adequate action is taken by IMO.

This report draws on analysis of EU and international law to explore the legal implications of EU unilateral action on GHG from the maritime sector. It finds that the legal tapestry is quite different from the international aviation sector, and that provided a number of important legal and enforcement considerations are respected and built into the design of any policy measure, there are no legal obstacles to EU action. ClientEarth considers that prospects of a successful legal challenge in the Court of Justice, a national court or the Tribunal for the Law of the Sea are very low.

EU Member States have nearly unlimited sovereign jurisdiction over their ports and thus can impose a very broad range of conditions on the entry of vessels to their ports. The Law of the Sea provides no automatic right of entry into foreign ports. Once vessels voluntarily enter the port of a Member State, they are thereby agreeing to submit to the conditions of entry to that port, and this can extend to where these conditions have extraterritorial consequences. On this basis, the EU could adopt measures regulating or

¹ Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme OJ L 242, 10/9/2002, P. 1.

² Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJ L 140, 05/06/2009, P. 63.

³ Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, OJ L 140, 5/6/2009, P. 136.

harmonising EU Member States rules on greenhouse gas emissions from the maritime sector.

It is important to remember that the EU has already enacted a number of maritime regulations which have extraterritorial effect. Further, several policy options (such as emissions targets or pricing) can be designed with less extraterritorial implications than others provided that liability arises as a condition of entry into port. For any measure covering emissions from the entire journey, enforcement should occur in Port or in connection with Port services. In those cases, the fact that the measure would cover the emissions for the whole travel length would only be an expression of the polluter pays principle and the proportionality principle. Under International law, these measures would have a sufficient link with the EU due to the territoriality principle and the sovereignty of third countries would be respected in the sense that the measure would not preclude them from imposing a similar system, and the sense that entry into EU ports is voluntary. The EU has further, unilaterally, enacted a number of measures which go beyond the "generally accepted international standards" of marine regulation.

Prescriptive jurisdiction to enact measures with extra territorial effect is available under general international law where there is '*substantial and genuine connection between the subject-matter of jurisdiction, and the territorial base and reasonable interests of the jurisdiction sought to be exercised.*' The main restrictions upon the imposition of conditions of entry to port is that they must not violate the principles of non-discrimination, good faith and non-abuse of right. Port States have the right to take all necessary measures to ensure that any vessel entering their ports complies with their regulations, including monetary penalties, refusal of access and even extending to actions taken outside the port, such as inspections. It is unlikely that any legal challenge to an EU regulation of GHG emission from vessels could succeed as the Court of Justice of the European Union has already assessed UNCLOS and MARPOL and decided that they cannot be the basis of a challenge to any EU legislative act. Where a measure is non-discriminatory it will not fall foul of the WTO Rules and such a measure would be in line with UNCLOS and thus acceptable to the Tribunal for the Law of the Sea.

Therefore, as long as the EU's regulation of shipping emissions is enacted in accordance with the principles of non-discrimination, good faith and non-abuse of right, and designed in ways that minimise impact on the right of innocent passage and freedom of high seas and respects the sovereignty of other countries, the measure will be in accordance with international law.

This means that the EU has a number of policy options which can be used to regulate GHG emissions from vessels which are in perfect compliance with European and International law, including: emissions monitoring, verification and reporting; an emissions charge or levy; inclusion in an emissions trading system; inclusion in the Effort Sharing Decision 406/2009/EC; fuel emissions standards; imposing a mandatory operational or design efficiency standard; differentiated harbour dues and mandating slow

steaming or imposing speed limits. The design and enforcement implications arising from analysis of the relevant law are presented towards the end of this report. These conclusions are then briefly applied to several possible policy options for driving reductions in GHG's from the international maritime sector.

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1. Introduction

The EU has committed itself to ensuring reductions in greenhouse gas ("GHG") emissions in the maritime sector. Directive 2009/29/EC amending ETS Directive 2003/87/EC and extending the ETS⁴ ("Directive 2009/29/EC amending ETS Directive 2003/87/EC and extending the ETS ") states that "in the event that no international agreement ... has been approved ... by 31 December 2011, the Commission should make a proposal to include international maritime emissions ... in the Community reduction commitment, with the aim of the proposed act entering into force by 2013."⁵ This target is further articulated in the EU Transport White Paper 2011⁶ which sets a goal of achieving at least a 40% cut in EU shipping emissions, with a move to 50%, if feasible, by 2050. The European Commission has convened a Working Group on Reducing Greenhouse Gas Emissions from Ships and invited all interested stakeholders to send relevant position papers, comments or questions to the Commission by September 2011.⁷

In the context of that background, this briefing will provide a detailed legal analysis of the obligation on the EU to act to regulate GHG emissions from the maritime sector and whether unilateral action by the EU ahead of the IMO in this area would comply with European and International Law.

This briefing in no way aims to undermine momentum or the desirability of a global solution adopted under the auspices of the IMO. While it is clear that a global agreement would be preferable on all fronts, EU action is essential in the absence of an appropriate and timely decision by the IMO, who has yet to reach an agreement on a specific measure establishing an emissions reduction target. Historically, there are examples of EU action precipitating IMO action, and it is hoped that the same leverage can be achieved by the development of EU legislation in 2012 and beyond. This briefing confines itself largely to legal issues and does not take a position on the optimum policy solution. Suffice is to say that whatever legal option is chosen, it must drive absolute emission cuts in the maritime sector.

⁴ Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJ L 140, 05/06/2009, P. 63.

⁵ Recital 3 of Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJ L 140, 05/06/2009, P. 63.

⁶ Transport White Paper 2011: Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system, COM (2011) 144 final.

⁷ See <http://ec.europa.eu/clima/events/0035/index_en.htm>.

2. EU Competence

2.1 Competence of the EU

The Treaty on the Functioning of the European Union (the “TFEU”) defines the competences of the EU under which legislative measures are structured according to its aims. An EU measure responding to emission reduction objectives in the Maritime Shipping sector could fall within several policies for which the EU has competence, including environment, energy or transport policies and even taxation. Under the TFEU, EU competences may be exclusive, shared and supporting but all the above mentioned policies correspond to areas of shared competence of the EU which means that legislation and policy are formulated jointly by the EU and the Member States. Article 2 defines shared competence:

“The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.”

This means that Member States can legislate or act only where the EU has not exercised its powers or has decided to stop exercising them. The EU has already exercised its powers to regulate GHG emissions and therefore the EU has competence in this area. This conclusion is reinforced by Article 3(2) TFEU defining EU’s exclusive competence which states:

“The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence or in so far its conclusion may affect common rules or alter their scope.”

This provision codifies the jurisprudence of the CJEU regarding the division of competences between the Union and Member States in external relations. The *ERTA* case⁸ set out the fundamental principle now codified in Article 3(2) TFEU in paragraphs 17 and 19:

“In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.”

⁸ Case 22/70 *Commission v. Council, ERTA* (1971) ECR 263.

...With regard to the implementation of the provisions of the Treaty, the system of internal Community measures may not therefore be separated from that of external relations."

The EU declared in its accession document to the United Nations Convention on the Law of the Sea⁹ ("UNCLOS") that maritime transport, and the prevention of marine pollution are considered to be areas of Member State competence, except where common rules established by the EU are affected.¹⁰ It is clear that common rules established by the Community regarding maritime transport and climate will be affected by any measure reducing GHG emissions in the maritime sector and thus it can be regarded as an area of exclusive EU competence in this instance.

However, it can also be argued that marine pollution is an area of shared competence with permanent distribution of competences according to the thematic issue. Although Member States only have residual competence left in areas of shared competence, Protocol 25 to the Lisbon Treaty on the exercise of shared competence, further explains that *"when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area."* This means that just because the Union has legislated on a particular issue within a broader field, all elements of the broader field are not automatically also subject to Union competence in areas of shared competence. In this sense, only areas where there is an express provision for the EU to act, or where the EU has achieved complete harmonisation provide the EU with exclusive competence.¹¹

In the current case, GHG reduction commitments have been undertaken at EU level pursuant to climate change objectives (in Article 191(1) TFEU) and so GHG reduction is a field where it can be considered that the EU has achieved complete harmonization. However, there might be funding or development policy elements in a measure aiming at regulating GHG emission reductions from maritime shipping rendering the issue more subject to shared competence.

It is undisputed that any GHG emission reduction rules to be applied to the International maritime sector fall within EU, rather than Member State, competence, even if an International body is involved or even if specific elements such as finance commitments would fall within Member States' responsibility. Any measure regulating GHG emissions

⁹ United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3.

¹⁰ The European Community's Instrument of Formal Confirmation, 1 April 1998, United Nations Treaty Series, 1998 at 231.

¹¹ See Case C-266/03 *Commission v Luxemburg* [2006] ECR I-4805 at paras 40 – 45, particularly para 45, and also paras 49 -52, and Case *Commission v Germany* at para 46-47.

in the maritime sector under shared competence would also have to comply with the principles of subsidiarity and proportionality.

2.1.1 Subsidiarity Principle

The EU may only act where action of individual Member States will prove insufficient:

"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."¹²

The Treaty of Amsterdam provided some guidelines on when the Community can take action without breaching the subsidiarity principle:

"(a) The issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States.

(b) Action by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade, or strengthen economic and social cohesion) or would otherwise seriously damage Member States' interests.

(c) Action at community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States."¹³

All three of these guidelines are relevant to any Measure enacted at EU level. Most importantly, as the maritime sector is by its very nature 'transnational', vessels can change their flag State with considerable ease, making it clear that without coordinated EU action, there could be serious distortions of competition. Further in order to achieve the reductions in GHG emissions as set out in the EU Transport White Paper 2011, action at EU level is necessary in order for the scale of reductions sought to be achieved.

¹² TEU Article 5(3).

¹³ Treaty establishing the European Community (consolidated version) - Protocols annexed to the Treaty establishing the European Community - Protocol (No 30) on the application of the principles of subsidiarity and proportionality (1997), OJ C 321 E, 29/12/2006, P. 308 at para 5 and current Protocol 2 to the TFEU.

2.1.2 Proportionality

Article 5(4) of the Treaty on the European Union (the “TEU”) lays down 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 regulation of GHG emissions by the EU is necessary to achieve the objectives of the Treaties. In addition to Article 191, the EU Treaties contain a number of references to the protection of the environment, for example, Article 3(3) TEU calls on the EU to promote “*a high level of protection and improvement of the quality of the environment*” and Article 11 TFEU directs that environmental protection requirements “*must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.*”

In assessing proportionality, the CJEU will test whether a measure is “*manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.*”¹⁴ Thus the proportionality of any measure will be judged by the content therein which will depend on the measure eventually taken in this area. Each of the policy options reviewed in section 8 of this briefing seem to be proportional to the aim of protecting the environment. The EU specific proposal would need to ensure the proportionality of the measure in relation to the objective pursued. In this case, the principle would aim at ensuring that the measure and actions proposed in it, are proportional to the objective of setting GHG emission reductions in the maritime shipping sector.

2.2 Legal Basis

Under EU law, any legislative act should be expressly based on an article of the Treaty where the legislative procedure that proposed measures should follow for their adoption is defined.

The legal basis is defined according to the purpose of the measure. The European Court of Justice has stated in several rulings¹⁵ that the choice of legal basis for an EU measure has to be based on objective criteria, in particular the stated objective and the content of the measure. The EU has competence to enact a legislative measure regulating GHG emissions from shipping based on Article 192(1) TFEU as it can be considered a measure

¹⁴ Case C-331/88 *R v Minister of Agriculture, Fisheries and Food, ex parte Fedesa* [1990] ECR I-4023.

¹⁵ *Commission v Council* (C-300/89): (1991) E.C.R. I-2867; *Commission v Council* (C-155/91): (1993) E.C.R. I-939; *European Parliament v Council* (C-187/93): (1994) E.C.R. I-2857; *European Parliament v Council* (C-164 & 165/97): (1999) E.C.R. I-1139.

on environmental policy. Article 192(1) TFEU states that the environmental policy of the EU includes “promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.” Measures imposing fuel emission standards, design efficiency standards or slow speed conducts might be justified under environmental policy but, depending on the measure design, could also fall under Article 100(2) TFEU regarding transport policy where it is recognised the EU competence to regulate “sea and air transport” or under Article 194(2) TFEU on energy policy. Measures imposing an emissions charge or levy would probably be based on the taxation provision under Article 113 TFEU.

According to the TFEU, EU measures on environment, transport or energy policies can be adopted by *‘the ordinary legislative procedure’* involving jointly the European Parliament and the Council of the EU mostly acting by qualified majority; however *‘special legislative procedure’* with unanimity voting in the Council would be required for the adoption of measures primarily of fiscal nature.

Any of these articles would provide a specific legal base for EU action. A specific legal base precludes the possibility of using a more general legal base.¹⁶ Between them, Article 192(1) TFEU is to be preferred. Though any measure to reduce GHG emissions in the maritime sector will regulate sea transport, it would be regulating maritime shipping due to its environmental impacts rather than because of its inherent quality as a mode of transport. This is important as the Court of Justice of the European Union (the “CJEU”) has held in the past that the legal basis for a legislative act, *“must rest on objective factors amenable to judicial review, which include in particular the aim and the content of the measure.”*¹⁷ The CJEU has stated that, *“if the examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component.”*¹⁸ This clearly indicates that as the EU would be regulating based on environmental concerns, Article 192(1) TFEU should be the legal base.

The EU is already regulating emission reductions from power, manufacturing industries or aviation sectors through the EU ETS Directive 2003/87/EC¹⁹ which has as legal basis Article 175(1) TEC, which corresponds to current Article 192(1) TFEU. Further, the EU

¹⁶ Case 45/86 *Commission v Council* [1987] ECR 1493 at para 13.

¹⁷ Case C-211/01 *Commission v Council* [2003] ECR I-0000 at para 38.

¹⁸ Case C-155/91 *Commission v Council* [1993] ECR I-030 at para 19 and 21; Case C-36/98 *Spain v Council* [2001] ECR I-779 at para 59.

¹⁹ 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 as amended by Directive 2009/29/EC.

has already regulated marine pollution using Article 192(1) TFEU as a base. Directives 93/12/EEC²⁰ and 1999/32/EC²¹ which regulate the sulphur content of maritime fuel both found their legal basis in predecessors of Article 192(1) TFEU. In addition, there are express provisions legally obliging the EU to act in Decision No 1600/2002/EC adopting the 6th Environmental Action Programme (see section 2.2 of this briefing) which is also adopted under the predecessor of Article 192(3) TFEU in the environmental policy chapter.

Any measure regulating GHG emissions from the maritime sector could be enacted as an amendment to the EU ETS Directive 2003/87/EC, or the Effort Sharing Decision 406/2009/EC or as an entirely new legislative enactment. The design of the specific measure would be crucial to determine the legal basis. However, it is clear that the GHG emission reduction purpose renders measures more likely to be framed under the environmental policy requiring the ordinary legislative procedure for their adoption, in particular if the measure would be an amendment to an already existing legislative act whose legal basis is Article 192(1).

2.3 EU Mandate to Act

The EU not only has competence to act on GHG emissions from the maritime industry but is obliged to do so.

2.3.1 European Requirements to Act

As outlined in the introduction, Directive 2009/29/EC amending ETS Directive 2003/87/EC and extending the ETS enshrines the political commitment to act: :

"in the event that no international agreement ... has been approved ... by 31 December 2011, the Commission should make a proposal to include international maritime emissions ... in the Community reduction commitment, with the aim of the proposed act entering into force by 2013."²²

²⁰ Council Directive 93/12/EEC of 23 March 1993 relating to the sulphur content of certain liquid fuels, OJ L 74, 27/03/1993, P. 81.

²¹ Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC, OJ L 121, 11/05/1999, P. 13.

²² Recital 3 of Directive 2009/29/EC of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend greenhouse gas emission allowance trading scheme of the Community, OJ L 140, 5.6.2009.

This was further echoed in Recital 2 of Effort Sharing Decision 406/2009/EC²³:

"All sectors of the economy should contribute to achieving these emission reductions, including international maritime shipping ... In the event that no international agreement which includes international maritime emissions in its reduction targets through the International Maritime Organisation has been approved by the Member States or no such agreement through the UNFCCC has been approved by the Community by 31 December 2011, the Commission should make a proposal to include international maritime emissions in the Community reduction commitment with the aim of the proposed act entering into force by 2013. Such a proposal should minimise any negative impact on the Community's competitiveness while taking into account the potential environmental benefits."

The most recent call to action was stated this year in the EU Transport White Paper 2011²⁴ which also calls for substantial cuts in maritime emissions. Though Directive's recitals and white papers are not legally binding, they provide strong political legitimacy to EU action.

However, there is a stronger call for action through a legally binding decision compelling the EU to act. Article 5(2)(iii)(b) of Decision No 1600/2002/EC adopting the 6th EU Environmental Action Programme 2002-2012 (the "2002 EAP") states that one of the priority actions in achieving the goals of the 2002 EAP is:

*"Identifying and undertaking specific actions to reduce greenhouse gas emissions from marine shipping if no such action is agreed within the International Maritime Organisation by 2003."*²⁵

Article 288 TFEU states that a decision such as the one adopting the 2002 EAP "shall be binding in its entirety." Where there is no specific addressee of a decision, then the decision imposes "general obligations which bind the Union as an organisational entity, and Member States as part of that entity."²⁶

This deadline for action has long passed and the EU is in breach of the 2002 EAP since 2003, thus the EU is compelled to act as soon as possible to regulate GHG emissions in the maritime industry.

²³ Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, OJ L 140, 5/6/2009, P. 136.

²⁴ See further note 7 section 1 of this briefing.

²⁵ Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, OJ L 242, 10/9/2002, P. 1.

²⁶ Chalmers, Davies & Monti, *European Union Law*, Cambridge Press, 2nd Ed., at 99.

2.3.2 International Requirement to Act

The IMO has been looking at the question of regulating GHG emissions since requested to do so in the Kyoto Protocol,²⁷ as Article 2(2) thereof states: “*the parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from ... marine bunker fuels, working through ... the International Maritime Organisation.*”²⁸ However, the only measures taken to reduce GHG emissions by working through the IMO to date has been the non legally binding tool for the adoption of SEEMP and the establishment of an Energy Efficiency Design Index (“EEDI”) in July 2011 to apply from 2013 on new ships. There are a number of reasons why the EEDI cannot be correctly characterised as an international measure with GHG reduction targets for the purposes of the EUs commitments. The EEDI does not set up any legally binding emission reduction target or cap for the sector; it is a type approval instrument with limited effects as the average life span of a ship is about 30 years and it will take a decade or two until the EEDI has real impact. Secondly, and perhaps more importantly, it does not provide greenhouse gas reduction targets for the sector as a whole. There are clearly going to be significant net reductions of all emissions from new ships as a result of energy efficiency improvements, when measured against business as usual scenario. However, this is not the same thing as binding overall GHG reduction targets for the sector. (Reductions against business as usual are not the same as absolute reductions for the sector measured against a historical baseline.) The EEDI is materially different from a GHG measure that included binding reduction targets for the sector as a whole. It is not enough for the EU to simply say that the IMO has acted as the EU must ensure that a reduction in GHG emissions is made and the adopted IMO regulation is very weak.

Under Article 216 TFEU, international agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. The EU is a signatory of the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and the United Nations Convention on the Law of the Sea (UNCLOS).

The UNFCCC requires action by its Parties to achieve, the ultimate objective of the Convention and of any related legal instruments such as the Kyoto Protocol, which is “the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interferences with the climate system.”²⁹ Under its Article 3, the UNFCCC requires the adoption of policies and measures covering all

²⁷ Kyoto Protocol to the United Nations Framework Convention on Climate Change 37 I.L.M. 22 (1998), 10 December 1997, U.N. Doc FCCC/CP/1997/7/Add.1.

²⁸ Article 2(2) of the Kyoto Protocol to the United Nations Framework Convention on Climate Change 37 I.L.M. 22 (1998), 10 December 1997, U.N. Doc FCCC/CP/1997/7/Add.1.

²⁹ Article 2 UNFCCC.

relevant sources, sinks and reservoirs of GHG and adaptation, and comprising all economic sectors. Maritime Shipping is a relevant source as, globally it is a large and growing source of GHG emissions (currently more than 900 million tonnes per year and expected to double by 2050 if no action is taken.)

The Kyoto Protocol further envisages countries taking unilateral action on maritime emissions, without action by the IMO, as Article 2(1) thereof calls on Annex I Parties to implement further *“policies and measures in accordance with [their] national circumstances”*, including *“measures to limit and/or reduce emission of greenhouse gases not controlled by the Montreal Protocol in the transport sector.”* This again shows the commitment is placed upon Annex I countries.

As discussed further in this briefing, UNCLOS does not prevent the EU from taking unilateral action and indeed, Article 192 and 194³⁰ thereof impose a positive obligation upon states to protect and preserve the marine environment and to cooperate at regional basis, directly or through competent international organisations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment. UNCLOS also envisages regional measures being taken and the EU Council has acknowledged that UNCLOS requires States to act to preserve the environment:

“Pursuant to Council Decision 98/392/EC, the Union is a Contracting Party to the United Nations Convention on the Law of the Sea of 10 December 1982, which requires all members of the international community to cooperate in conserving and managing the biological resources of the sea.”³¹

Thus it can be seen that both internal and external requirements to act exist requiring the EU to regulate GHG emissions from vessels if no adequate action is taken at IMO level. Where that action is in accordance with international law, there can be no legal objection to the EU so acting.

³⁰ UNCLOS Article 192: “States have the obligation to protect and preserve the marine environment.”; UNCLOS Article 194: “1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.”

³¹ Council Decision of 24 June 2010 on the signing, on behalf of the European Union, of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, OJ L 81, 29/3/2011, P. 1.

2.4 Conclusion

The EU has competence to enact a measure regulating GHG emissions in the maritime sector. Indeed the EU has competence in the field of climate change and maritime pollution, as well as transport, energy and taxation. If the measure would fall within the sphere of EU shared competence, such a measure should respect the principles of proportionality and subsidiarity.

The legal basis would depend on the objective and design of the measure to be adopted at EU level. However, given the GHG emission reduction objective Article 192(1) TFEU would be the most likely legal basis of a EU measure applied to the maritime shipping sector. Furthermore, this provision would be the legal basis of an EU measure amending an existing EU legislative act whose legal base is enshrined in the environmental chapter of the TFEU. Any measure regulating GHG emissions from the maritime sector could be enacted as an amendment to the EU ETS Directive 2003/87/EC, or the Effort Sharing Decision 406/2009/EC or as an entirely new legislative act.

Further the EU must act on the basis of Directive 2009/29/EC amending ETS Directive 2003/87/EC and extending the ETS, Effort Sharing Decision 406/2009/EC, Decision 1600/2002/EC adopting the 2002 EAP, the UNFCCC, the Kyoto Protocol and UNCLOS.

Thus, there is no restriction upon the internal jurisdiction of the EU to enact a measure regulating GHG emissions in the maritime sector.

3. EU Jurisdiction under UNCLOS

Under Article 216(2) TFEU, agreements concluded by the EU become part of EU law.³² The EU is a signatory to UNCLOS, thus the provisions of UNCLOS are part of the internal legal order of the EU and must be considered. This briefing will now legally analyse the relevant provisions of international law showing that the EU would not breach any of them in regulating maritime emissions, provided that certain principles are taken into consideration for measures responding to both prescriptive and enforcement jurisdiction.

3.1 Outline of UNCLOS Regulation

3.1.1 Geographical Jurisdiction

³² TFEU Article 216(2): "Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States."

UNCLOS distinguishes between 5 zones with relation to the territory of its members:

- internal waters (this includes ports)
- territorial waters (up to 12 miles from shore)
- contiguous zone (a further 12 miles from shore)
- exclusive economic zone (“EEZ”) (up to 200 miles from shore)
- the high seas (everything else)

UNCLOS grants its members varying degrees of jurisdiction over the first four types of territory but the high seas are reserved as beyond the jurisdiction of any State.³³

3.1.2 States' Jurisdiction and relevant UNCLOS provisions

There are three types of State jurisdiction under UNCLOS:

- Flag States
 - Full jurisdiction over all ships flying their flag or registered at their registry, though any regulations imposed cannot be lower than the internationally agreed standards.³⁴
 - Ships under a State flag shall be subject to exclusive jurisdiction on the high seas.³⁵
 - Every State shall effectively exercise its jurisdiction over ships flying its flag and in particular shall take necessary measures to ensure that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the prevention, reduction and control of marine pollution.³⁶

³³ UNCLOS Article 89: “No State may validly purport to subject any part of the high seas to its sovereignty.”

³⁴ UNCLOS Article 211(2): “States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.”

³⁵ Article 92 UNCLOS

³⁶ Article 94 UNCLOS

- Coastal States
 - In the EEZ, jurisdiction has jurisdiction for the protection and preservation of the marine environment³⁷ but limited to “generally accepted international rules and standards established through the competent international organization.”³⁸
 - In territorial waters coastal States have general jurisdiction except with regard to construction, design, equipment and manning standards (“CDEM Standards.”)³⁹
- Port States
 - Unlimited jurisdiction over all ships in port, as long as regulation is in accordance with the general principles of non-discrimination, good faith and non-abuse of right.⁴⁰

³⁷ Article 56(1)(b)(iii)

³⁸ UNCLOS Article 211(5): “Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference.”

³⁹ UNCLOS, Article 211(4): “Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels.” And see also UNCLOS Article 21(2): “Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.”

⁴⁰ UNCLOS, Article 211(3): “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 off-shore terminals shall give due publicity to such requirements and shall communicate them to the competent international organization. Whenever such requirements are established in identical form by two or more coastal States in an endeavour to harmonize policy, the communication shall indicate which States are participating in such cooperative arrangements. Every State shall require the master of a vessel flying its flag or of its registry, when navigating within the territorial sea of a State participating in such cooperative arrangements, to furnish, upon the request of that State, information as to whether it is proceeding to a State of the same region participating in such cooperative arrangements and, if so, to indicate whether it complies with the port entry requirements of that State. This Article is without prejudice to the continued exercise by a vessel of its right of innocent passage or to the application of article 25, paragraph 2.”

3.2 Prescriptive Jurisdiction: What can the EU Regulate?

It is clear that the EU can regulate pollution from EU flagged ships without any restrictions. However, this is not a very satisfactory basis for regulating GHG emissions in the maritime sector as the sector is inherently transnational, where ships can change flag quite easily even if in the high seas, under Article 92 UNCLOS ships using flags of two or more States according to convenience, would be assimilated to a ship without nationality. Any regulation based on flag state could cause a significant distortion in competition due to the discriminatory implementation of the measures that the jurisdiction entails and thus this briefing will assess the extent to which the EU can regulate pollution as a coastal or port State.

In this section ClientEarth is considering whether the EU has jurisdiction to establish an emissions target and a system of pricing emissions from ships either through a fuel levy or by auctioning emission allowances or by any of the options referred to in section 8.

3.2.1 As a Coastal State

Coastal States have the right to enact laws and regulations with regard to the protection of the environment in their territorial sea. In their EEZ coastal States have the right to regulate for the protection of the marine environment but this must be limited to "generally accepted international rules and standards established through the competent international organization."

In addition, Coastal State jurisdiction is restricted by the fact that coastal States cannot hamper unduly the innocent passage of vessels⁴¹ through the territorial sea as defined in Article 17 and 18 of UNCLOS and a violation of a coastal State rule for GHG emission reduction aiming at the protection of the marine environment would not be serious enough to render the passage of a vessel non-innocent which would justify state actions to prevent passage in its territorial sea. Non innocent passage is considered as passage that is prejudicial to the peace, good order or security of the coastal State such as an act of wilful and serious pollution contrary to UNCLOS.⁴² However, the EU as a Coastal State has jurisdiction to regulate (without hampering) vessels engaged in innocent passage

⁴¹ UNCLOS Article 24(1): "The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not: (a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or (b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State." Article 58 extends the freedom of the high seas as laid down in Article 87 to the EEZ.

⁴² International Law Association, *Final Report of the International Law Association's Committee on Coastal State Jurisdiction over Marine Pollution*, in Report of the 69th Conference, London, 2000 at 13.

through its waters under Article 21 UNCLOS. This article limits the right of innocent passage and allows coastal States to adopt laws and regulations, in conformity with UNCLOS and international law, in respect of the “conservation of the living resources of the sea” and the “preservation of the environment of the coastal state and the prevention, reduction and control of pollution thereof.”⁴³ The only restriction placed upon this right is that regulations cannot relate to design, construction, manning or equipment of foreign ships (CDEM Standards) unless applying generally accepted international rules.

Thus the EU, acting as a coastal State can impose rules aiming at GHG emission reductions from vessels, including foreign vessels in EU territorial waters as long as those regulations do not impose CDEM standards upon the vessels. This however, only applies to the 12 mile zone around EU coastlines, and in the EEZ the EU is restricted to internationally recognised standards, thus it would be better to regulate as a port State, as there are fewer restrictions upon acting as such.

3.2.2 As a Port State

The sovereignty of a State over its internal waters is stated in Article 2(1) of UNCLOS and it follows from Articles 8, 11 and 12 that ports form part of those waters.⁴⁴ The principle of sovereignty gives the port State jurisdiction over all vessels therein.

⁴³ UNCLOS Article 21: "(1) The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following: (a) the safety of navigation and the regulation of maritime traffic; (b) the protection of navigational aids and facilities and other facilities or installations; (c) the protection of cables and pipelines; (d) the conservation of the living resources of the sea; (e) the prevention of infringement of the fisheries laws and regulations of the coastal State; (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof; (g) marine scientific research and hydrographic surveys; (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.(2) Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards. (3) The coastal State shall give due publicity to all such laws and regulations."

⁴⁴ UNCLOS Article 2(1): "The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea." Article 8: "1. Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State. 2. Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters." Article 11: "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works." Article 12: "Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea."

Referring to the literature, Ringbom states, "*the voluntary presence of the ship [in a port] subjects it to the essentially unlimited territorial jurisdiction of the port State under general international law.*"⁴⁵

UNCLOS Article 211(3) states explicitly that States may "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 off-shore terminals." This article further notes the potential for regional cooperation between States with the same port entry requirements.

However this article is without prejudice to the continued exercise by a vessel of its right of innocent passage. Further restrictions on port State jurisdiction are contained in the principles of non-discrimination, good faith and non-abuse of right.

UNCLOS Article 227 states that port and coastal States "*shall not discriminate in form or in fact against vessels of any other State.*" This essentially means that States cannot discriminate between vessels on the basis of "nationality."

As the IMO acknowledges, any regulation of GHG emissions must not discriminate between ships based on flag State but can take into account "appropriate differences" that are based on such factors as ship type, structure, manning and operational features.⁴⁶ This echoes the Paris MoU on Port State control, which is a regional body that already regulates environmental matters in European waters but distinguishes between vessels according to non-discriminatory bases, such as ship type, without drawing any objections under international law⁴⁷.

UNCLOS Article 300 contains the principle of good faith and non-abuse of right:

"States Parties shall fulfill 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."

Where the EU regulates GHG emissions in a general non-discriminatory way then such a regulation is unlikely to be deemed abusive and as Ringbom comments, "*the mere fact*

⁴⁵ Ringbom, *The EU Maritime Safety Policy and International Law*, Martinus Nijhoff Publishers, 2008 p.214.

⁴⁶ MEPC, Legal Aspects of the *Organization's Work on Greenhouse Gas Emissions in the Context of the Kyoto Protocol*, 2008 <<http://www.sjofartsverket.se/pages/14228/58-4-20.pdf>>.

⁴⁷ <http://www.parismou.org/>

*that the requirement in question may not be the optimal or least intrusive method of addressing those concerns hardly constitutes an abuse of right.*⁴⁸

Section 8 of this briefing will review whether these principles restrict the enactment of some of the current policy options.

3.2.3 Regional Regulation

UNCLOS encourages regional regulation between States adopting the same or similar environmental protection measures in Articles 197, 211(3) and 212(3)⁴⁹. Article 197⁵⁰ provides that States should cooperate on a regional basis through competent international "organizations" for the protection and preservation of the marine environment. The IMO is generally regarded as the "competent international organisation" for the purposes of UNCLOS, however Article 197 illustrates that the drafters contemplated a plurality of organisations being competent with regard to the enactment of measures to protect the marine environment.

Further, with regard to these Articles that contemplate international organisations in the plural sense, it must be acknowledged that the UNFCCC Secretariat is the competent international organisation with regard to the regulation of climate change and that the UNFCCC and the Kyoto Protocol thereto, set the applicable international standards. Where the EU acts unilaterally to impose GHG emission restrictions on the maritime industry, the EU would simply be ensuring that it acted as required under the UNFCCC and the Kyoto Protocol as discussed in section 2.4.2.

There is however, one restriction on concluding regional arrangements which is contained in UNCLOS Article 311(3):

"Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision, derogation from which

⁴⁸ Ringbom, *The EU Maritime Safety Policy and International Law*, Martinus Nijhoff Publishers, 2008 at 227.

⁴⁹ UNCLOS Article 212(3): "States, acting especially through competent international organizations or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control such pollution [pollution of the marine environment from or through the atmosphere]."

⁵⁰ UNCLOS Article 197: "States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features."

is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.”

None of the policy options discussed in this briefing (see further section 8) modify or suspend the operation of any of the provisions of UNCLOS nor affect other State Parties' rights or performance of their obligations under the Convention.

After the Prestige disaster, the EU acted unilaterally (i.e. in advance of IMO regulation) to phase out single-hulled tankers. In current literature, Boyle⁵¹ analysed whether that action breached UNCLOS Article 311(3) and concluded that it did not. He reasoned that due to the fact that port States have jurisdiction to regulate pollution and construction standards under general international law and provided that the ban was administered without any discrimination between flag states, it entailed no denial of UNCLOS rights and did not compromise the object of the Convention. In this way, where the EU enacts a regional measure as encouraged in UNCLOS Articles 197, 211(3) and 212(3), as long as that measure complies with the other provisions of UNCLOS, it will not be in breach of UNCLOS Article 311(3) on regional regulation.

The same reasoning applies to the case of the EU's act to reduce GHG from maritime shipping.

4. Extraterritorial Jurisdiction

Many of the proposals for the regulation of GHG emissions by the EU would have some extraterritorial effect, or extra territorial consequences. It is clear that the non-discrimination principle of International law as well as environmental considerations justify an EU measure covering emissions from the entirety of a ship's journey. There are also sound practical reasons, particularly regarding attribution, that support the chosen measure covering emissions from the whole trip. This section will assess the extent to which the EU can enact a measure restricting or influencing GHG emissions from the maritime sector, where that measure covered emissions from the entirety of a ship's journey – which may include the territorial waters of a third state, or the high seas before or after calling at an EU Port.

⁵¹ Boyle, *EU Unilateralism and the Law of the Sea*, the International Journal of Marine and Coastal Law, Vol 21, No. 1, 2006 at 29.

There is no definitive statement in UNCLOS on whether a port State can impose regulations that have an effect on activities carried out on the high seas. Article 89 states that "no State may validly purport to subject any part of the high seas to its sovereignty." However, it is important to note that an EU measure to regulate GHG emissions from the maritime sector would not necessarily be characterised as exercising sovereignty on the high seas but rather restricting the GHG emissions derived from the activity of the vessel during the trip either in the high seas or elsewhere – particularly if enforcement does not take place on the high seas. On the contrary, consequences for conduct, or static measures (such as design standards) that apply on the high seas may be a natural corollary of port state conditions. It is clear that port States can impose CDEM Standards as a condition of entry to ports and these will travel with the ship outside the regulating State's jurisdiction. For example the EU adopted Regulation (EC) No 417/2002⁵² banning single hulled oil tankers in ships from 2015 at the latest. According to recent literature, Frank notes:

*"The "extra-territorial" effects of port access conditions concerning CDEMs are purely incidental since these standards by their very nature cannot exclusively apply when the ship is in port, but necessarily extend to vessels before entry. Presumably, when foreign ships decide to operate in a particular country or region they accept the sovereignty of the port State and implicitly agree to comply with its higher safety and environmental standards, including CDEMs."*⁵³

Thus it is clear that States could require vessels to install equipment that reduced emissions, Secondly, under general international law a state may regulate extra-territorially on where there is a "*substantial and genuine connection between the subject-matter of jurisdiction, and the territorial base and reasonable interests of the jurisdiction sought to be exercised.*"⁵⁴ It is relevant to any consideration of jurisdictional competence and protective Port State measures, that greenhouse gases and their effects are transboundary by nature.

Furthermore, as highlighted by, and by analogy to the opinion of Advocate General Kokott delivered on 6 October 2011 on Case C-366/10⁵⁵, there is a difference between

⁵² Regulation (EC) No [417/2002](#) of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94

⁵³ Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea*, Martinus Nijhoff Publishers, 2008 at 213.

⁵⁴ Ringbom, *The EU Maritime Safety Policy and International Law*, Martinus Nijhoff Publishers, 2008 at 365.

⁵⁵ Opinion of Advocate General Kokott of 6 October 2011, *The Air Transport Association of America and Others*, Case C-366/10, p 145-159.

extraterritorial effect, the scope of the measure and the effect on the sovereignty of third countries. Regarding extraterritorial effect, measures pricing emissions of vessels (through a levy or surrendering emission allowances) on their entry to port or applying a penalty for non compliance would not contain in themselves any extraterritorial provision. The fact that the measure would cover the emissions for the whole travel length could be seen as an expression of the polluter pays principle and the proportionality principle. In the case of aviation under the ETS, the Advocate General found that having to surrender allowances related to emissions from the whole journey (beyond EU territory) did not amount to extra territorial effect, even though the measure did exert some indirect influence on conduct during the whole journey. There is therefore good authority to support the proposition that just because a measure enacted using Port State jurisdiction has some consequences beyond territorial waters, including the high seas, need not necessarily amount to exercising sovereignty on the high seas, or being legally characterized as extra territorial effect. The Advocate General considered that such a measure would have a sufficient link with the EU and respect the territoriality principle and that sovereignty of other States is respected as the measure does not preclude them from imposing similar systems.

The voluntary presence of a ship in port suggests that that ship has subjected itself willingly to the requirements for port entry. Where the EU regulates GHG emissions on the high seas and a ship voluntarily enters EU ports, then it can be said that the vessel has accepted the jurisdiction of the EU over its GHG emissions. There can be no contemplation of the EU over-stepping its jurisdictional competence where that competence is accepted by the vessel in question. This means that States can impose a penalty upon a vessel that does not comply with port regulations where that ship still attempts to enter the port in question. To avoid conflict with international customary law (including those parts codified in UNCLOS) it is important to exclude ships that do not enter voluntarily – for example due to duress.

Finally, it is important to note that a number of EU regulations already have extra-territorial effect:

- The Hazmat reporting scheme requires ships bound for EU ports (regardless of origin) to report on cargoes.⁵⁶
- Directive 1999/95 on the regulation of working hours for seafarers can extend to times when the ship is beyond EU territorial waters.⁵⁷

⁵⁶ Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, OJ L 208, 5/8/2002, P. 10.

- Directive 2002/59 imposes an obligation to comply with vessel traffic services established beyond the territorial sea for ships that are bound for EU ports.⁵⁸
- Directive 2005/33 imposes standards for sulphur content in fuel for passenger ships in regular traffic to or from an EU port.⁵⁹ The regulations apply in the territorial seas and EEZ and it includes "vessels whose journey began outside the Community," thus acknowledging the extra-territorial effect of the Directive as it is not likely that vessels will change fuel to comply with EU regulation only upon entering EU waters but rather would use the same fuel throughout the voyage.

It is clear that any regulation which had an incidental effect on activity outside the jurisdiction of the EU would not be the first of its kind. International law allows states to enact measures that have extra-territorial effect where there is a substantial and genuine connection between the State regulation and the reasonableness of the regulation. It is clear that any regulation in this area would be reasonable as the EU has both a strong internal and international mandate to act.

Therefore the EU has the competence to impose a measure regulating GHG emissions from the maritime sector as a condition of entry to port which has incidental effects on activity on the high seas.

5. Enforcement Jurisdiction

It has been shown that unilateral regulation by the EU of GHG emissions is justified under the international interest in protecting the environment. Further, the applicable international laws provide for and anticipate such regulation. Thus, the final analysis of the legality of any regulation is whether the enforcement mechanisms utilised are also lawful.

Some of the issues related to the Enforcement jurisdiction might not be relevant/applicable to an EU legislation imposing GHG restrictions through market based instruments because the main obligation to be applied to vessels and Member States

⁵⁷ Directive 1999/95/EC of the European Parliament and of the Council of 13 December 1999 concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports, OJ L 14, 20/01/2000, P. 29.

⁵⁸ Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, OJ L 208, 5/8/2002, P. 10.

⁵⁹ Article 4a(1) of Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC, OJ L 121, 11/05/1999, P. 13.

would be to surrender allowances once a year at a certain date and the penalty for non-implementation would be limited to a payment of a fine and the continued obligation to surrender allowances.

Under EU law, enforcement actions by the EU institutions for instituting proceedings against an operator/vessel are not possible as the EU cannot act against natural or legal persons before the European Court of Justice on these issues. However, penalties imposed under EU law can be implemented by Member States who can act against operators in case of violation of EU rules.

5.1 Enforcement as Coastal State.

There are specific restrictions on enforcement measures that a coastal State can take to ensure compliance with its laws and regulations. Thus the only enforcement measures that can be taken on the basis of a breach of a coastal State enactment are as follows:

- UNCLOS Article 220(1) – vessel in port:
 - the right to institute proceedings against a vessel⁶⁰ in respect of violation of its laws and regulations adopted in accordance to the Convention.
- UNCLOS Article 220(2) – vessels navigating in the territorial sea:
 - the right to inspect and institute proceedings against a vessel where there are clear grounds for believing a violation has taken place⁶¹
- UNCLOS Article 220(3) – vessel in the EEZ:
 - the right to request information to establish whether a violation of applicable international rules/standards or of laws and regulations of the state has occurred⁶²

⁶⁰ UNCLOS Article 220(1): “When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may, subject to section 7, institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State.”

⁶¹ UNCLOS Article 220(2): “Where there are clear grounds for believing that a vessel navigating in the territorial sea of a State has, during its passage therein, violated laws and regulations of that State adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels, that State, without prejudice to the application of the relevant provisions of Part II, section 3, may undertake physical inspection of the vessel relating to the violation and may, where the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws, subject to the provisions of section 7.”

5.2 Enforcement as a Port State

Article 25(2) of UNCLOS gives States “*the right to take the necessary steps to prevent any breach of the conditions to which admission of ... ships to internal waters or such a call at port is subject.*” This explicitly allows States to take such enforcement measures as they see necessary to uphold the conditions attached to port access and there is no restriction on such powers in UNCLOS.

Similarly Article 194 UNCLOS recognises that States have the power to take, individually or jointly, all measures consistent with the Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source. This provision should be interpreted as including enforcement measures. Article 212(2) requires States to take “other measures” such as enforcement measures, as may be necessary to prevent, reduce and control such pollution.

UNCLOS determines in Article 218 (1) and (2) that when a vessel is voluntarily within a port, the State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge (which includes those to the atmosphere) from that vessel outside the internal waters, territorial sea or exclusive economic zone of the State in violation of applicable international rules and standards established through the competent international organisation. Proceedings can be opened by any State whose internal waters, territorial sea or exclusive economic zone are affected or likely to be affected by pollution.

Monetary penalties are allowed to be imposed by UNCLOS in cases of violation or national laws/regulations or international rules and standards for the prevention, reduction and control of pollution of the marine environment committed by vessels in and beyond territorial sea.

Thus, the enforcement measures that can be taken as a port State include:

- Inspection and requests for information
- Refusal of access to the port (or port services)
- Banning the ship from returning to port

⁶² UNCLOS Article 220(3): “Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards, that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.”

- Refusing to land or process cargo
- Detention of a vessel⁶³
- Fines, penalties, confiscation of cargo
- Prosecution for violation of the regulation

CE Delft also reviewed these enforcement options and commented that it is probable that the threat of expelling a ship that did not comply with any regulations imposed would probably be enough to ensure compliance.⁶⁴ These listed enforcement measures all relate to actions that can be taken by a port State in port, however Article 25(2) (nor any other article of UNCLOS) does not restrict the enforcement actions of a port state to in-port measures. Thus, where a ship accepts the regulations of a port by entering that port, there is a case to be made that the ship thereby accepts the application of any enforcement measures that State deems necessary, including, inspections of that ship in territorial waters, the EEZ or on the high seas.

The objection that could be made to the right of port States to inspect ships outside of port is that this would be a restriction of the right of innocent passage and so an interference with the right of freedom of the high seas. Vessels have the right of innocent passage in all waters and the extent of this right varies depending on which type of jurisdiction applies, but this right is at its strongest on the high seas. UNCLOS Article 87(1) outlines the freedom of the high seas:

"The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States: (a) freedom of navigation..."

This means that all vessels have the freedom of the seas and, as stated above, no country can attempt to submit part of the high seas to its jurisdiction, but this does not mean that vessels cannot voluntarily enter ports, for which compliance with inspections on the high seas is a condition. Further, as the Article itself notes, this freedom is

⁶³ In this regard, Ringbom points out that "the EU (and Paris MOU) regimes have increasingly through numerous amendments, provided for detention even in the absence of an established immediate threat, and even in the absence of a more detailed inspection. Most notably, certain amendments have introduced provisions that trigger more-or-less automatic detention on the basis of failure to comply with a specific provision." In Ringbom, *The EU Maritime Safety Policy and International Law*, Martinus Nijhoff Publishers, 2008 at 283.

⁶⁴ CE Delft, *Greenhouse Gas Emissions for Shipping and Implementation Guidance for the Marine Fuel Sulphur Directive*, 2006
<http://www.ce.nl/publicatie/greenhouse_gas_emissions_for_shipping_and_implementation_for_the_marine_fuel_sulphur_directive/513>.

subject to the conditions of UNCLOS and rules of international law, which, as discussed in section 4, can extend to extra-jurisdictional regulation.

The enforcement jurisdiction of a Port State is subject to requirements that the enforcement measures should be imposed in a non-discriminatory way, cognisant of the principles of good faith and non-abuse of right. Enforcement measures should also seek to balance UNCLOS rights and, for example, avoid undue delay to the vessel. Restriction of the right of innocent passage in territorial sea and on the right of freedom of high seas could be imposed on the basis of the vessels acceptance on the entry into port but those rights could not be hampered. Proportionality must therefore be considered.

On balance, and while a case to the contrary can be made, ClientEarth recommends that any policy measure be designed such that enforcement always occurs in port or that does not cause undue delays or hampering of innocent passage, and respects non-discrimination, good faith and non abuse of right. The distinction between monitoring and enforcement can be helpful here, and to allow a workable system where enforcement only takes place in Port, monitoring of data or conduct in connection with the whole journey of the vessel will be needed. Examples could include satellite monitoring for speed limits, or utilising mechanisms already provided in UNCLOS to require foreign ports to release data related to a suspected breach of an EU Port condition.

Thus it is clear that port State jurisdiction is much more extensive with regard to enforcement jurisdiction in port States than coastal State jurisdiction. If the EU wishes to impose a unilateral regulation of GHG emissions from the maritime industry, it would be better to do so on the basis of port State jurisdiction in order to be able to utilise wider enforcement powers.

6. Historic Unilateral Action

Port State jurisdiction to impose unilateral restrictions, i.e. restrictions not contained in general international law, has been used a number of times.⁶⁵ This section shall analyse two instances of historic unilateral action which are the most analogous to regulating GHG emissions.

6.1 Sulphur Content in Fuels

⁶⁵ Consider in addition to the two examples provided here: the US 1990 Oil Pollution Act, US Ballast water requirements, the EU regulation of single-hull tankers in advance of IMO action, stability requirements for Roll-on-Roll-off ferries in the EU.

MARPOL Annex VI⁶⁶ regulates the sulphur content of bunker fuels. The EU has enacted Annex VI but in the implementing Directive⁶⁷ the EU imposed regulations beyond those required Annex VI in two ways. The first of these is that lower sulphur contents for fuel usage during vessel stays in EU ports was imposed. Second, the implementing Directive introduced a fuel requirement for passenger ships in regular traffic between EU ports, of which there is no equivalent in MARPOL. Both of these measures are enforced on the basis of port State authority.

The EU is not alone in imposing stricter sulphur regulations than those contained in MARPOL, the US State of California also imposed restrictions on the sulphur content of fuels that went beyond those contained in MARPOL Annex VI.⁶⁸ These regulations were challenged in the Californian Ninth Circuit Court of Appeals by the Pacific Merchant Shipping Association.⁶⁹ The case was dismissed on the basis that though the rules amount to an “expansive and even possibly unprecedented state regulatory scheme”, the Californian Court found that California has a right to mitigate its environmental problems, which “are themselves unusual and even unprecedented” and that California had “clear justification” for the rules so that general maritime law could not be used to ban a state from exercising its own power to combat severe problems.

6.2 Ship-Source Pollution

In 2005, the EU enacted ship-source pollution regulations⁷⁰ which were stricter than those required by MARPOL. These regulations imposed criminal penalties on persons responsible for pollution discharges. A legal challenge to these regulations was initiated before the UK courts on the basis that they were not in line with UNCLOS and MARPOL. The UK Court referred a number of questions to the CJEU, which held in effect that UNCLOS does not establish rules intended to apply directly and immediately to private

⁶⁶ The International Convention for the Prevention of Pollution from Ships (the “MARPOL Convention” from Marine Pollution) is a combination of two treaties from 1973 and 1978 which govern the prevention of pollution of the marine environment by ships through operational or accidental causes. There are six technical annexes, of which Annex VI “Prevention of Air Pollution from Ships” is the most relevant here (though it does not cover GHG emissions).

⁶⁷ Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC, OJ L 121, 11/05/1999, P. 13.

⁶⁸ 13 CCR, section 2299.2. Fuel Sulfur and Other Operational Requirements for Ocean-going Vessels within California Waters and 24 Nautical Miles of the California Baseline.

⁶⁹ *Pacific Merchant Shipping Association v. Goldstene*, 2011 U.S. App. LEXIS 6239 (9th Cir. Mar. 28, 2011)

⁷⁰ Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, OJ L 25, 30/9/2005, P. 11.

actors and does not confer upon them rights or freedoms capable of being relied upon against States.⁷¹ Further as the EU was not a signatory to MARPOL, the compatibility of the regulations and MARPOL was not considered by the court. Following this ruling, it would be very difficult for any private party to challenge the validity of any EU regulation of GHG emissions in the maritime sector on the basis that it conflicted with UNCLOS or MARPOL.⁷²

6.3 Does the Fact that MARPOL Regulates Pollution Preclude EU Action?

The lack of internationally accepted GHG emissions targets for the maritime industry does not mean that the EU cannot act, simply that its discretion to act is more limited as it would be politically convenient if the EU enacted rules which were flexible enough to later be harmonised in line with any IMO regulation of GHG emissions, as happened with the regulation of sulphur emissions.

However, a number of authors have stated that due to the fact that there are already international pollution regulations, this restricts a State's ability to regulate unilaterally. For example, Breide and Saunders, state that:

The crucial effect of this article [211(5)]⁷³ is to require that a coastal State can only legislate for pollution control over foreign vessels if it is acting pursuant to a generally accepted international standard; it is not enough to say that there is no international rule which prohibits the application of the national rule.⁷⁴

Also, as stated in a report on the "Integration of Marine Transport into the European Emissions Trading System" commissioned by the Federal Environment Agency of Germany,

⁷¹ *International Association of Independent Tanker Owners v Secretary of State for Transport*, Case C-308/06 [2008] OJ C183/2.

⁷² See further Section 7.1 for a detailed discussion of the case.

⁷³ UNCLOS Article 211(5): "Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference."

⁷⁴ Breide and Saunders, *Challenges to the UNCLOS Regime: National Legislation which is Incompatible with International Law* <<http://www.gmat.unsw.edu.au/ablos/ABLOS08Folder/Session5-Paper2-Breide.pdf>>.

*"As MARPOL has so far been silent on the question of CO2 emissions, it cannot be argued that MARPOL imposes any restrictions on member states not to impose any unilateral measures to regulate greenhouse gas emissions. However, due to the reference to Art. 21 UNCLOS, the following limitation of jurisdiction has to be respected: Unilateral laws and regulations shall not apply for construction, design, equipment and manning standards."*⁷⁵

The recent changes to the MARPOL regime that may influence GHG emissions do not alter the legal conclusion that MARPOL doesn't present a barrier. Both of the above comments on restricting unilateral action on GHG emissions relate to coastal State provisions and where the EU enacts a measure as a coastal State, it is correct that it would have to restrict itself to enforcing only international standards beyond the territorial sea, and standards that do not regulate with regard to CDEM Standards in the territorial sea. However, it is essential to realise that neither of these restrictions applies where the EU acts as a port State. This is echoed by a report on the implications of a system to reduce SO2 and NOX contracted by the EU Commission which stated:

*"The vast majority of State practice appears consistent with the notion of port States having a broad residual jurisdiction, despite becoming Parties to IMO Conventions. There appears to be little evidence of States taking the opposite view."*⁷⁶

Indeed, Ringbom comments that,

"More recently, as the practice of States of imposing additional requirements on ships entering their ports has become more widespread, the IMO conventions have tended to include provisions that explicitly address this question. Many of the principal conventions and amendments that have been adopted since the turn of the millennium confirm the residual jurisdiction of port States to legislate in matters regulated in the conventions in accordance with international law. This development reinforces the postulation that the IMO regulatory conventions do not prevent their States Parties from imposing additional port State requirements. This claim is further strengthened by the conventions' drafting history, which indicates that the clauses have not sparked any major jurisdictional

⁷⁵ Bäuerle, T, Graichen; J., Meyer, K., Seum, S., Kulesa, M., Oschinski, M. (2010), *Integration of Marine Transport into the European Emissions Trading System Environmental, economic and legal analysis of different options*. Federal Environment Agency (Umweltbundesamt), Berlin at 91.

⁷⁶ Davies, Plant, Cosslett, Harrop & Petts for BMT Murray Fenton Edon Liddiard Vince Limited, *Study on the Economic, Legal, Environmental and Practical Implications of a European Union System to Reduce Ship Emissions of SO2 and NOX*, No. 3623, August 2000, commissioned by the European Commission at A4.46.

*controversy, but have been perceived as merely confirming a more general legal state of affairs.*⁷⁷

Thus the fact that MARPOL regulates maritime pollution does not restrict the EU from acting to regulate GHG emissions.

7. Challenges to EU Emissions Regulation

Any challenge to regulation of the Maritime Sector by the EU with regard to GHG emissions can be based on claims that the regulation enacted conflicts with the national law of a Member State, European Union law or international law.

A review of all the national legal orders of the 27 EU Member States is beyond the scope of this briefing, however where a valid EU law is in place then this would override any national law that might conflict as EU law carries supremacy over national law.

In section 2 this briefing gave a detailed analysis of the internal competence of the EU, thus as long as any regulation in this area is enacted in accordance with the provisions outlined, any challenge would be defeated.

Finally, action by the EU could be challenged on the basis of international law. Such a challenge would allege that a regulation of GHG emissions in the maritime sector is a breach of Member State obligations under UNCLOS or WTO Rules, thus this section reviews the different courts before which a challenge could lie. This section will also discuss the pending case of *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*⁷⁸ (the "Aviation Case") with regard to how a similar challenge could be mounted against EU regulation of GHG emissions in the maritime industry.

7.1 The Court of Justice of the EU

Cases brought before the Court of Justice of the European Union (CJEU) challenging the legality of an EU measure imposing GHG emission reduction obligations would not have a lot of possibilities to succeed.

⁷⁷ Ringbom, *The EU Maritime Safety Policy and International Law*, Martinus Nijhoff Publishers, 2008 at 222.

⁷⁸ Case C-366/10.

Under Article 263 TFEU actions can be brought by a Member State, the European Parliament, the Council and the Commission. It is unlikely that any of the EU Institutions involved in the adoption of the legislative act (Member States/Council, Parliament or Commission) would lodge a case before the CJEU, but it is possible. The Court of Auditors, the European Central Bank and the Committee of the Regions may also have legal standing but only on cases for the purpose of protecting their prerogatives. Individuals or any natural or legal persons can only institute proceedings against an act that is addressed to them or which is of direct and individual concern. For the moment, the Court of Justice of the EU interprets this provision in such a way that environmental legislation can rarely be subject to challenge before the CJEU brought by individuals or environmental organisations due to the public interest nature of environmental law.

However, challenges brought by natural or legal persons before national courts could end up in the CJEU through preliminary questions following Article 267 TFEU. Current relevant jurisprudence responds to these types of cases.

Arguments used in relation to cases before the CJEU would be applicable to challenges before national courts by non-EU Member States as similar rules apply.

Agreements concluded by the EU become part of EU law once they enter into force.⁷⁹ The EU is a signatory to UNCLOS, thus the provisions of UNCLOS are part of the internal legal order of the EU. In *Intertanko v Secretary of State for Transport*⁸⁰ the EU Directive on ship-source pollution⁸¹ was challenged on the basis that it did not comply with the provisions of UNCLOS and MARPOL. The CJEU held that:

"the validity of a measure of secondary Community legislation may be affected by the fact that it is incompatible with such rules of international law. Where that invalidity is pleaded before a national court, the Court of Justice thus reviews, pursuant to Article 234 EC, the validity of the Community measure concerned in light of all the rules of international law, subject to two conditions.

First, the Community must be bound by those rules (see Joined Cases 21/72 to 24/72 International Fruit Company and others [1972] ECR 1219, paragraph 7).

Second, the Court can examine the validity of Community legislation in the light of an international treaty only where the nature and the broad logic of the latter do not

⁷⁹ TFEU Article 216(2): "Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States."

⁸⁰ *International Association of Independent Tanker Owners v Secretary of State for Transport*, Case C-308/06 [2008] OJ C183/2.

⁸¹ Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, OJ L 25, 30/9/2005, P. 11.

preclude this and, in addition, the treaty's provision appear, as regards their content, to be unconditional and sufficiently precise (see to this effect, in particular, Case C-344/04 IATA and ELFAA [2006] ECR I-403, paragraph 39).⁸²

The CJEU applied these requirements to assess whether MARPOL and UNCLOS could be the basis of a challenge to EU legislation. With regard to MARPOL, the CJEU noted that the EU was not a party to MARPOL, and even though all Member States are members, *"in the absence of a full transfer of the powers previously exercised by the Member States to the Community, the latter cannot, simply because all those States are parties to Marpol 73/78, be bound by the rules set out therein"*.⁸³

The CJEU then considered the position of UNCLOS within the EU legal order. Firstly, it was acknowledged that as UNCLOS was signed by the Community and approved by Decision 98/392⁸⁴, it is binding, however the CJEU went on to conclude that the nature and broad logic of UNCLOS preclude the examination of the validity of EU legislation in light of its provisions:

"Individuals are in principle not granted independent rights and freedoms by virtue of UNCLOS. In particular, they can enjoy the freedom of navigation only if they establish a close connection between their ship and a State which grants its nationality to the ship and becomes the ship's flag State..."

It is true that the wording of certain provisions of UNCLOS, such as Articles 17, 110(3) and 111(8), appears to attach rights to ships. It does not, however, follow that those rights are thereby conferred on the individuals linked to those ships, such as their owners, because a ship's international legal status is dependent on the flag State and not on the fact that it belongs to certain natural or legal persons. ...

In those circumstances, it must be found that UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship's flag State.

⁸² *International Association of Independent Tanker Owners v Secretary of State for Transport*, Case C-308/06 [2008] OJ C183/2 at para 43.

⁸³ *International Association of Independent Tanker Owners v Secretary of State for Transport*, Case C-308/06 [2008] OJ C183/2 at para 49.

⁸⁴ Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof, OJ L 179, 23/6/1998, p. 1.

*It follows that the nature and the broad logic of UNCLOS prevent the Court from being able to assess the validity of a Community measure in light of that Convention.*⁸⁵

The reasoning also applies if the challenge had an origin in a Member State due to the nature of the rules under UNCLOS. Thus any regulation of GHG emissions in the maritime sector imposing obligations on operators/vessels and Member States could not be assessed in light of UNCLOS or MARPOL by the CJEU and could not be struck down on this basis.

Similarly the CJEU has consistently held that WTO rules and decisions of WTO bodies cannot be relied upon against the validity of EU legislative acts due to the nature and broad logic of such rules and decisions on the basis the flexibility of GATT law derived from the principle of reciprocity and required for international negotiations.⁸⁶

7.2 The Aviation Case

In the Aviation Case, the Air Transport Association of America, American Airlines, Continental Airlines and United Airlines are challenging the inclusion of aviation in the EU Emission Trading System (the "ETS"). The claimants seek to challenge the legality of the ETS on the grounds that it is contrary to certain provisions of the 1944 Convention on International Civil Aviation (the "Chicago Convention"), the Kyoto Protocol and the 2007 Open Skies Agreement.⁸⁷

7.2.1 The Chicago Convention

Firstly it is to be noted that the EU is not a party to the Chicago Convention, thus under the reasoning of the CJEU in *Intertanko v Secretary of State for Transport*, no EU legislative act can be challenged on this basis. Advocate General Kokott's opinion issued on 6 October 2011 on Case C-366/10 *The Air Transport Association of America and others* confirms that the Chicago Convention is not a binding International Agreement for

⁸⁵ *International Association of Independent Tanker Owners v Secretary of State for Transport*, Case C-308/06 [2008] OJ C183/2 at para 59.

⁸⁶ See, inter alia, *International Fruit Company* (cited in footnote 30, paragraphs 19 to 27, particularly paragraph 21); *Germany v Council* (cited in footnote 54, paragraphs 106 to 109); Case C-469/93 *Chiquita Italia* [1995] ECR I-4533, paragraphs 26 to 29; *Portugal v Council* (cited in footnote 53, particularly paragraph 47); Case C-93/02 P *Biret International v Council* [2003] ECR I-10497, particularly paragraph 52; Case C-94/02 P *Biret et Cie v Council* [2003] ECR I-10565, particularly paragraph 55; Case C-377/02 *Van Parys* [2005] ECR I-1465, particularly paragraph 39; and *FIAMM* (cited in footnote 35, particularly paragraph 111). Also see ref. Opinion of Advocate General Kokott of 6 October 2011, *The Air Transport Association of America and Others*, Case C-366/10, p 70.

⁸⁷ Air Transport Agreement OJ L 134, 25/5/2007, P. 4 (the "Open Skies Agreement").

the EU.⁸⁸ However it sustains this argument not because the EU is not a Contracting Party to the Chicago Convention but because under Article 351 TFEU no obligations can be inferred on EU institutions from these existing Treaties concluded by Member States. Conversely under this Article, Member States are requested to take all necessary steps to eliminate any incompatibilities between existing Agreements and the EU's founding Treaties. It concludes that since the EU is not bound by the Chicago Convention, it cannot be argued against the validity of Directive 2008/101/EC.⁸⁹

If the CJEU finds that this is so, then the entire argument based on the Chicago Convention will be dismissed, however, this paper will go on to assess the individual articles of the Chicago Convention relied on.

Article 1 of the Chicago Convention states:

"The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."

The claimants state that by calculating the amount of allowances that airlines must give up based on flights over territory outside the EU is an interference with the sovereignty of those States outside the EU in the regulation of their own airspace. It is unlikely this will succeed as the airlines do not have sovereignty over any airspace, it is rather the province of nation States and no nation State is a plaintiff in this case. Further, it is not clear how a measure requiring a limited number of allowances to be allocated to aircrafts which would have to surrender them according to ETS rules in relation to emissions during whole trips even if including the part of the trip over third country airspace could be considered an interference in the sovereignty of another State.

Advocate General Kokott's opinion issued on 6 October 2011 regarding Case 366/10 rejects this argument as it considers that the ETS does not infringe the sovereign right of third countries as they keep their sovereignty to apply their own emissions trading system and even to negotiate measures to avoid double regulation as specified in the specific saving clause in Article 25a of Directive 2003/87/EC as amended by Directive 2008/101/EC.⁹⁰

Article 11 of the Chicago Convention states:

⁸⁸ Opinion of Advocate General Kokott of 6 October 2011, Case C-366/10 *The Air Transport Association of America and Others*, p 52, 57-59, 66.

⁸⁹ Directive 2008/101/EC of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJ L 8, 13.1.2009

⁹⁰ Opinion of Advocate General Kokott of 6 October 2011, Case C-366/10, p 156-159.

"...the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State."

The claimants look to this article to support their argument that regulations made by a State may only apply within the territory of that State. However, the wording of this article does not seem to limit geographic jurisdiction in that way, rather it implies that where there are charges, they must be applied without discrimination to all aircraft, without distinction as to the "nationality" of that aircraft. The ETS does not discriminate between aircraft in this way and thus it is unlikely that this argument will succeed.

Further, Article 11 does not speak to environmental regulation. It mentions only laws and regulations relating to the admission or departure and the operation or navigation of aircraft while in State territory. It cannot be argued that this restricts States from enacting environmental regulation without an express condition to that effect.

Article 12 of the Chicago Convention states:

"Each contracting State undertakes to adopt measures to insure that every aircraft flying over or manoeuvring within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft there in force. Each contracting state undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable."

The ICAO's Legal Bureau has stated that this article extends to rules regulating GHG emissions⁹¹ on the basis that the principle of free "flight and manoeuvre" would be curtailed by the need to conserve fuel. However, this article does not contain a guarantee of free flight and manoeuvre.

It seems that the main point of this article is to encourage contracting States to keep their rules uniform within their territory "to the greatest possible extent" and to keep those in line with the rules under the Chicago Convention. This clearly leaves States the right to deviate from the Chicago Convention where necessary and as there are no rules under the Chicago Convention regulating GHG emissions, it cannot be said that a State is deviating from the Convention by enacting their own national standards.

⁹¹ Balfour, Bisset and Crowhurst, *The ATA Case Against the EU ETS*, (2010) 22 ELM 3 115.

Advocate General Kokott's opinion confirms that there is no conflict with Article 1, 11 or 12 of the Chicago Convention and therefore the scope of the EU emissions trading scheme should not be restricted to parts of flights that take place within the territory of the EU, excluding those outside it.⁹²

Article 15 states in the relevant part:

"No fees, duties or other charges shall be imposed by any contracting State in respect solely of the right to transit over or entry into or exit from its territory of any aircraft of a contracting state or persons or property therein."

The ETS is not a charge imposed "in respect solely of the right of the transit over or entry into or exit from" EU territory. First it is based on GHG emissions and not in respect of transit, entry or exit from the EU territory. Secondly, no fees or charges are being imposed on airlines under the EU ETS. As Advocate General Kokott's opinion reads *"Charges are levied as consideration for a public service used. The amount is set unilaterally by a public body and can be determined in advance. Other charges, especially taxes, are fixed unilaterally by a public body and laid down according to certain predetermined criteria, such as the tax rate and basis of assessment."* On this basis, it is concluded that the EU ETS is a market-based measure and a purchase price paid for an emission cannot be described as a charge or tax. Therefore, the ETS does not contravene Article 15 of the Chicago Convention.⁹³

Article 24 states:

"Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges."

This Article speaks only to fuel and other items "on board an aircraft" and does not mention GHG emissions which are the subject of the ETS, the ETS does not seek to regulate fuel already on board an aircraft.

Advocate General Kokott's opinion concludes that the ETS "cannot be regarded as a prohibited excise duty on fuel for the purposes of Article 24 of the Chicago Convention."⁹⁴

7.2.2 The Open Skies Agreement

⁹² Opinion of Advocate General Kokott of 6 October 2011, Case C-366/10 *The Air Transport Association of America and Others*, p 166, 171.

⁹³ *Idem*, p. 207-221,

⁹⁴ *Idem* p. 225-234.

The Open Skies Agreement is a bilateral agreement between the US and the EU agreed in 2007. The most relevant article thereof for the purposes of the ETS is Article 11(2)(c) which exempts from taxes, *"fuel...introduced into or supplied in the territory of a Party for use in an aircraft of an airline of the other Party engaged in international air transportation, even when those supplies are to be used on a part of the journey performed over the territory of the Party in which they are taken on board."*

Following AG Kokott's opinion issued on 6 October 2011 on Case C-366/10 an emissions trading scheme should not be considered a tax on emissions. However, in *Braathens*⁹⁵ the CJEU held that a tax imposed on emissions and calculated based on fuel consumption amounted to a tax on fuel as there was a direct link between fuel consumption and the polluting substances emitted in the course of consumption so that the tax "must be regarded as levied on consumption of the fuel itself". The ETS is clearly not a tax on fuel "introduced into or supplied in the territory" of the EU as it does not relate to where the fuel is supplied, rather the amount of allowances that must be surrendered is calculated based on the fuel used, regardless of where the aircraft fuelled.

Article 3(4) of the Agreement⁹⁶ is not applicable as it requires uniform conditions for using the exception of environmental reasons for imposing limiting rules on aircrafts or airlines of the other Party. The ETS does not breach the principle of non-discrimination laid down in this provision.

Article 15(3) enables the Party to adopt environmental measures after having evaluated the adverse effects on the exercise of rights contained in the Agreement and take steps to mitigate them. Advocate General Kokott argues that there are no ICAO environmental standards for aviation activities that would prevent the inclusion of action activities in an emission trading scheme such as the EU ETS. Therefore, this provision does not affect the validity of Directive 2008/101/EC.

7.2.3 The Kyoto Protocol

The plaintiffs plead that the inclusion of the aviation sector in the ETS conflicts with Kyoto Protocol Article 2(2) which calls on Annex I States to pursue a limitation or reduction of aviation emissions by "working through" the International Civil Aviation

⁹⁵ Case C-346/97 (reference for a preliminary ruling from Braathens Sverige AB, formerly Transwede Airways AB v Riksskatteverket, OJ C 357 22/11/1997.

⁹⁶ *Article 3(4) of the Open Skies Agreement: Consistent with this right, neither Party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the airlines of the other Party, nor shall it require the filing of schedules, programs for charter flights, or operational plans by airlines of the other Party, except as may be required for customs, technical, operational, or environmental (consistent with Article 15) reasons under uniform conditions consistent with Article 15 of the Convention.*

Organisation (“ICAO”). The question that lies in this argument is whether it is lawful for the EU to act alone outside the framework of the ICAO. For the inclusion of the aviation sector in the ETS to violate Article 2(2) of the Kyoto Protocol, “working through” would have to mean that Annex I States are locked into pursuing GHG emissions reductions in the aviation industry *solely* through the ICAO. The general rule in the interpretation of international law is to give words their “plain meaning”. The plain meaning of Article 2(2) of the Kyoto Protocol does not restrict states to working to reduce aviation emissions solely through the ICAO and does not preclude states from taking other unilateral measures.

Indeed, Article 2(1) of the Kyoto Protocol envisages unilateral measures being taken as it calls on Annex I Parties to implement further “policies and measures in accordance with [their] national circumstances”, including “measures to limit and/or reduce emission of greenhouse gases not controlled by the Montreal Protocol in the transport sector.”

Thus, no challenge to an EU regulation of GHG emissions in the maritime sector could succeed on the basis of a conflict with the Kyoto Protocol. This argument is confirmed by Advocate General Kokott’s opinion stating that “...Parties to the Kyoto Protocol did not commit themselves in Article 2(2) thereof to pursuing the limitation or reduction of greenhouse gases from aviation *exclusively* by working through the ICAO” and therefore the ETS Directive “does not contravene Article 2(2) of the Kyoto Protocol.”⁹⁷

7.2.4 Conclusion

It is extremely unlikely that the claimants in the Aviation case will succeed based on anything in the Chicago Convention due to the weakness of the arguments and to the fact that the EU is not a party to that Convention nor it binds the EU institutions under Article 351 TFEU. No challenge will succeed on the basis of the Kyoto Protocol as confirmed by Advocate General Kokott’s opinion. It is possible that the argument based on the Open Skies Agreement might succeed as by its nature and logic of this agreement can affect the legal status of individuals, however, the arguments under the relevant articles do not undermine the validity of the measures under the ETS, as confirmed by the recently published opinion of the Advocate General Kokott.

In addition, CJEU has already assessed UNCLOS and MARPOL from the perspective of a challenge to EU legislation and held that these Conventions cannot be relied upon in a challenge to any EU legislative act as their nature and broad logic preclude the examination of the validity of EU legislation. It is to be noted that the above analysis deals with the right of individuals or legal entities to bring a case before the CJEU and the same analysis would hold for the rights of Member States to initiate a challenge. However, States that are not members of the EU cannot bring actions before the CJEU

⁹⁷ Opinion of Advocate General Kokott of 6 October 2011, *The Air Transport Association of America and Others*, Case C-366/10, p 182 and 188.

unless specifically provided for in legislation⁹⁸ but potentially such a State could bring an action to a national court in a Member State, depending on the rights of access to those courts. If EU legislation was enacted in conflict with existing international law concluded by Member States no obligation would be imposed to EU institutions but Member States would be required to act under Article 351 TFEU and eliminate any incompatibilities between their existing Treaties and the EU's founding Treaties.

7.3 WTO Dispute Settlement Body

An action before the WTO Dispute Settlement Body would most likely not be successful. Parties to the World Trade Organisation (WTO) could claim that any unilateral action by the EU on GHG emissions would violate the General Agreement on Tariffs and Trade (the "GATT") or the General Agreement on Trade in Services (the "GATS"). None else would have legal standing to present a case to the WTO Dispute Settlement Body.⁹⁹

The WTO rules are based on the principles of freedom of trade, reciprocity, most favoured nation and national treatment which are non-discretionary under the GATT. A Member Party to the WTO could argue that an EU measure imposing conditions related to GHG emission reduction and control on arrival to or departure from the port would affect freedom of transit regulated under Article V of the GATT, which states:

"Goods (including baggage), and also vessels and other means of transport, are in transit across the territory of a contracting party when the passage across such territory is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. There shall be freedom of transit through the territory of each contracting party. No distinction shall be made

⁹⁸ Article 19(3) TEU provides for the jurisdiction of the CJEU: "The Court of Justice of the European Union shall, in accordance with the Treaties: (a) rule on actions brought by a Member State, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions; (c) rule in other cases provided for in the Treaties."

⁹⁹ General Agreement on Tariffs and Trade 1994, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187. It can also be argued that applying an environmentally-differentiated shipping charges would be a tax or charge on a service, rather than a product and thus subject to General Agreement on Trade in Services ("GATS" - General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183.). In addition to a similar prohibition on discrimination in the provision of services, there is also a similar exemption for environmental measures in Article XIV(b) GATS where the measure is "necessary to protect human, animal or plant life or health." Thus this briefing will mainly deal with the GATT provisions and just referred to GATS provisions as arguments for both are the same.

which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.”

However, any EU measure regulating GHG emissions from the maritime sector, cannot discriminate between vessels “based on the flag of vessels, the place of origin, departure, entry, exit or destination...” and should apply without distinguishing vessels for reasons whether they are EU States flagged or not, the place of origin or departure, entry exit or destination or any other circumstances. Further Article V of GATT clearly only applies when vessels are in transit through a territory, rather than calling a port. Thus any EU measure would not fall foul of GATT rules at all where utilising port state jurisdiction and based on non-discriminatory principles.

Similar rules exist under XVII of GATS requiring (with certain discretionary power) States to grant treatment no less favourable than that it accords to its own like services and service suppliers.

In line with this requirement, Article III of GATT requires Parties to ensure that no requirements are imposed in order to protect domestic production. It states:

“The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.”

This rule is applied to charges and taxes under Article III.2 of the GATT requiring the principle of non-discrimination in their imposition. It states:

“The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.”

Therefore any EU rule imposing conditions aiming at GHG emission reductions in the maritime sector, would have to be worded in such a way that no claim can be made that it protects national production and that it is applied in a non-discriminatory manner.

However, even if a measure regulating GHG emissions from the maritime sector does discriminate between vessels by some such prohibited classification, there is an exception for environmental measures in GATT Article XX(b) and (g):

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...

(b) necessary to protect human, animal or plant life or health;...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

Thus any measure regulating GHG emissions in the maritime sector would have to ensure that it is not arbitrary or unjustifiable discrimination, which can be ensured as long as it was adopted and applied in an open and transparent way with regard given to due participation, publication and notification. It is to be noted that thus far the EU has engaged with stake-holders in designing any measure in a very open and transparent way. To show that the measure is not unjustifiable it must be necessary and proportionate which echoes the requirement of proportionality discussed above with relation to the internal competence of the EU.

In the Shrimp-Turtle case¹⁰⁰ the WTO Dispute Settlement Body held further that unilateral trade measures can be justified under Article XX(g) of the GATT if serious negotiation efforts do not lead to a multilateral effort. Thus it is important that the EU has been pursuing an agreement at the IMO on GHG emissions.

In the US (Gasoline)¹⁰¹ and the Brazil (Retreaded Tyres)¹⁰² cases the WTO Dispute Settlement Body affirmed WTO members' autonomy to determine their own environmental objectives. Policies aimed at mitigating climate change have not yet been discussed by the WTO Dispute Settlement Body but the US (Gasoline) case is relevant. In this case the panel agreed that a policy to reduce air pollution from the consumption of gasoline was protected by GATT Article XX(b) and a policy to reduce the depletion of clean air was a policy protected by GATT Article XX(g) thus it is likely that any measure

¹⁰⁰ United States — *Import Prohibition of Certain Shrimp and Shrimp Products*, WTO case Nos. 58 and 61, Ruling adopted on 6 November 1998.

¹⁰¹ United States — *Standards for Reformulated and Conventional Gasoline*, WTO case Nos 2 and 4, Ruling adopted on 20 May 1996.

¹⁰² Brazil — *Measures Affecting Imports of Retreaded Tyres*, Report adopted, with recommendation to bring measure into conformity on 20 August 2009.

regulating GHG emissions in the maritime sector adopted by the EU would not fall foul of any WTO rules.

Similar rules exist under Article XIV(b) of the GATT enabling States to adopt or enforce measures to protect human, animal or plant life or health. It is interesting to note that where the WTO did find a breach of a rule of the GATT, the Dispute Settlement Body can award the claiming State the right to take retaliatory measures. Thus it would be important for the EU to ensure that in enacting any regulation of GHG emissions in the maritime sector, that it contains an exemption for States that have equivalent measures in place (even if put in place in the name of retaliation), in line with the exemption in the ETS with regard to aviation.

Finally, it is to be noted that the US stated that it would bring a case to the WTO Dispute Settlement Body based on the inclusion of aviation in the ETS¹⁰³ but no case has been initiated to date. In conclusion, a challenge before the WTO dispute settlement body against an EU legislative act imposing GHG emission reduction measures would not be likely to succeed provided the EU measure respects the principle of non-discrimination.

7.4 Tribunal for the Law of the Sea

UNCLOS establishes a Tribunal on the Law of the Sea (the “UNCLOS Tribunal”) in Annex VI and an Arbitration Procedure in Annex VII. Only 25 of the 159 States who are parties to UNCLOS have made a declaration accepting the jurisdiction of the UNCLOS Tribunal.¹⁰⁴ The EU has not accepted the jurisdiction of the UNCLOS Tribunal, though a number of Member States have. There have been only 18 cases submitted to the UNCLOS Tribunal¹⁰⁵ and only 15 sets of arbitration proceedings since the establishment of UNCLOS in 1982.

There is one relevant judgment issued by the UNCLOS Tribunal. In the *MOX Plant Case*,¹⁰⁶ the UNCLOS Tribunal referred to Article 197 (cooperation on a global or regional basis for the protection and preservation of the marine environment) as “fundamental.”

Any EU legislation imposing GHG emission reduction measures to the maritime shipping sector would be seeking to exercise this fundamental provision of UNCLOS members and where any measure regulating GHG emissions in the maritime sector does not breach

¹⁰³ International Center for Trade and Sustainable Development, *US Says European Aviation Emissions Trading Scheme to End up as WTO Dispute*, 5 October 2007 <<http://ictsd.org/i/news/biores/9134/>>.

¹⁰⁴ Mackenzie, Romano, Shany and Sands, *The Manual on International Courts and Tribunals*, 2nd Ed, Oxford University Press, 2010 at 48.

¹⁰⁵ International Tribunal for the Law of the Sea, *Cases*, <<http://www.itlos.org/index.php?id=10&L=0>>

¹⁰⁶ *Ireland v UK*, No.10 2001 ITLOS.

any other article in UNCLOS, the UNCLOS Tribunal could not find a breach of the Convention.

7.5 Conflict with Kyoto Protocol

Concerns have been expressed¹⁰⁷ about the legal compatibility of the Common But Differentiated Responsibilities Principle (the "CBDR Principle") with action on maritime emissions on the basis of a non-discrimination principle. However, the Legal Affairs' Sub-Division of the Marine Environment Protection Committee (the "MEPC") of the IMO produced a short note on the "Legal Aspects of the Organization's Work on Greenhouse Gas Emissions in the Context of the Kyoto Protocol." In this note the MEPC refers to the CBDR Principle and notes that their view is that any measures adopted by the IMO must be applied across the board regardless of the flag state of any vessel and this will not create a conflict between the Kyoto Treaty and UNCLOS:

"Legal Affairs has not identified any potential treaty law conflict between the Kyoto Protocol and the provisions that may be developed by the Committee on GHG emissions from the combustion of marine bunker fuels, with a view to their incorporation in an appropriate IMO instrument.

Treaties can only conflict with each other when they regulate the same subject matter in a contradictory way. This is not the case of the Kyoto Protocol vis-à-vis an appropriate IMO instrument in connection with GHG emissions. The Kyoto Protocol should be viewed as an agreement, elaborated under the framework of the UNFCCC, which sets out objectives to be achieved in relation to GHG emissions, but which, in doing so, does not preclude the application of specific technical requirements and obligations developed pursuant to particular treaty law areas, such as maritime law; indeed, this notion is inherent in the very language of Article 2.2 of the Kyoto Protocol through its implicit recognition that IMO is the "proper" forum in which to pursue limitation or reduction of GHG emissions from marine bunker fuels; ...

A general obligation imposed upon the countries included in Annex I to the Kyoto Protocol/UNFCCC to work through IMO cannot be interpreted as an instruction to IMO to restrict to these countries the application of maritime technical regulations, which, to be effective, must apply universally to all ships, as is the case of shipping regulations included in IMO treaties such as MARPOL. If this were not the case, shipowners, for example, could simply change flag to avoid the impact of any regulations which they might regard as too onerous, a result which would frustrate the objective not only of MARPOL (or other IMO treaties) but also of Article 2.2 of the Kyoto Protocol...

¹⁰⁷ See IMO, *Second IMO GHG study 2009: Prevention of air pollution from ships*, London, 2009 at 21.

*IMO shipping regulations are, as a matter of principle, and must be, as a practical matter, global in nature and applicable to all commercial ships, with appropriate differences, if any, to be based on factors such as their type, structure, manning and operational features, irrespective of the flag they are flying or the degree of industrial development of the flag State or the State of nationality of the owner or the operator.*¹⁰⁸

Thus as the IMO has explicitly stated that there is no conflict between the Kyoto Protocol and UNCLOS, it is unlikely that the courts would entertain this argument.

8. Policy Options

This section will review some of the policy options that are currently being debated and discuss whether they would comply with coastal and port State powers and seek to identify some broad design implications.

It noted that all options assessed under this section would imply an increase of the cost of international maritime transport. Ensuring non-discrimination for any measures for pricing emissions from any vessels entering the port would limit the potential distortion of competition in the sector. However, it is true that measures imposed on vessels while entering ports might generate some distorting effect with the consequence of vessels choosing other ports outside the EU to avoid higher costs. Similarly, a carbon price measure applied by the EU to all vessels entering EU ports would cause a raise in the cost of imports to different levels depending on the distance (number of emissions) of the country of origin of the products together with the weight and the value of the merchandise. This briefing does not aim at comparing the policy options and putting forward one as preferable to others. However, it needs to be stressed that the option to be finally chosen should ensure that the maritime sector effectively goes through a real emission reduction. In other words, a carbon price and an emissions target should be stringent enough to drive real emission cuts in the maritime sector to ensure maintenance of the current EU 2020 target for 20% GHG reductions. If an emissions trading scheme is identified as the preferred option, the EU would consider integrating this sector within the current EU ETS cap, or an independent cap.

¹⁰⁸ MEPC, *Legal Aspects of the Organization's Work on Greenhouse Gas Emissions in the Context of the Kyoto Protocol*, 2008 <<http://www.sjofartsverket.se/pages/14228/58-4-20.pdf>>.

8.1 Emissions Monitoring, Verification and Reporting

This could be imposed by itself as a precursor to abatement action, but will be required to ensure compliance with any other measure regulating GHG emissions from the maritime sector.

As a Coastal State

Coastal States have the right to impose national regulations on vessels in the territorial sea as long as they do not mandate CDEM Standards. Depending on the type of regulation here, for example, where a particular piece of equipment was required, it would be clear that this would be a CDEM Standard. However, as Ringbom notes:

“developments in technology, policy and law over the past decade seem to have made the view outdated that reporting obligations represent a challenge to navigational freedoms in the first place. A general development in regulation has already consigned the right of ships and cargoes to travel the oceans anonymously to history, this being in particular the case in respect to hazardous cargoes. At the same time, advances in communications technology have reduced the burden on shipboard personnel in relation to the provision of this kind of information.”¹⁰⁹

Further coastal States have the jurisdiction to inspect and institute proceedings against a vessel in the territorial sea where there are clear grounds for believing a violation has taken place¹¹⁰ and the right to request information to establish whether a violation has occurred¹¹¹ in the EEZ. Thus where a reporting requirement did not impose a CDEM Standard, it is within coastal State power to enforce such a measure in the territorial sea and the EEZ.

As a Port State

There is no restriction on the EU establishing an emissions monitoring regime as a condition for entry to EU ports.

There are already requirements for vessels to have Voyage Data Recorders ("VDR") installed. SOLAS Regulation V/20¹¹² imposed VDR requirements on new ships and the retro-fitting of VDR to existing cargo ships. However, in the EU implementation of these

¹⁰⁹ Ringbom, *The EU Maritime Safety Policy and International Law*, Martinus Nijhoff Publishers, 2008 at 256.

¹¹⁰ UNCLOS Article 220(2).

¹¹¹ UNCLOS Article 220(3).

¹¹² International Convention for the Regulation of Life at Sea, 1980, Chapter 5, Regulation 20.

requirements, the category of ships to which VDRs must be fitted was extended.¹¹³ However, the subsequent revisions of SOLAS Regulation V/20 and the implementing Directive have now virtually harmonised the two measures.

In addition to these requirements in SOLAS, the IMO has considered whether States can oblige ships coming into their ports to use long-range identification and tracking systems for environmental purposes and concluded that States can oblige ships to use such technology.¹¹⁴

Vessels calling at EU ports are also currently required to keep information on their purchases of bunker fuel for at least three years after delivery to comply with the regulations on sulphur content in bunker fuel.¹¹⁵ Ships are regularly inspected and if the vessel is in compliance with the regulatory regime, it is issued with an "International Air Pollution Prevention Certificate". Ships without such a certificate can be detained in port until the authority carrying out the inspection is confident that the ship can continue out to sea without posing an undue threat of damage to the marine environment (in practical effect this means until a certificate is issued).

Thus, depending on the measure decided upon, there are already a number of monitoring regimes which could simply be extended and thus reduce the administrative burden imposed. However the specific reporting requirements will change with the type of measure that is agreed, for example, if the maritime industry is to be included in an emissions trading system, then the ETS reporting Regulation can be amended to impose the appropriate monitoring requirements.

8.2 Emissions Charge/Levy

The Energy Tax Directive¹¹⁶ prohibits, in Article 14, the taxation of fuels used for the purpose of navigation. This is presumably not a large difficulty and can be amended in the legislative process to introduce the main measure.

¹¹³ Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, OJ L 208, 5/8/2002, P. 10.

¹¹⁴ Annex 6 of Resolution MSC.242(83), adopted on 12 October 2007 on the Use of the Long-Range Identification and Tracking Information for Maritime Safety and Marine Environment Protection Purposes.

¹¹⁵ Directive 2005/33/EC of the European Parliament and of the Council of 6 July 2005 amending Directive 1999/32/EC as regards the sulphur content of marine fuels, OJ L 191, 22/7/2005, P. 59.

¹¹⁶ Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L 283, 31/10/2003, P. 51.

As a Coastal State

Article 26 of UNCLOS states:

"1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.

2. Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination."

By regulating the GHG emissions of all ships in EU territorial waters, the vessels would come under EU jurisdiction "by reason of their passage through the territorial sea." It could be debated whether Article 211(4) that gives Coastal States the power to regulate to protect the environment in their territory would override the prohibition in Article 26 but this briefing concludes that it would be better to impose charges on the basis of port State Jurisdiction, where such a prohibition does not apply and the powers of enforcement (see section 5) are greater.

As a Port State

The concern regarding Article 26 is not at issue as a port State has the specific right codified in Article 25(2) to "*take the necessary steps to prevent any breach of the conditions to which admission of ... ships to internal waters or such a call at port is subject*" and Article 26 regulates charges imposed on vessels "by reason of their passage through the territorial sea" rather than by reason of entry to a port.

The only objection to an emissions charge/levy as a condition of entry to port could be that the EU would be regulating the activities of vessels on the high seas by imposing such a charge but this issue has been discussed in section 4 and it was demonstrated that as long as vessels voluntarily submit themselves to the jurisdiction of EU ports they are thereby voluntarily accepting all conditions on entry to that port.

Thus there is no restriction on the EU establishing an emissions charge or levy as a condition for entry to EU ports.

8.3 Emissions Trading System

An EU measure to impose GHG emission reductions to the maritime sector through an Emissions Trading scheme based on an emissions cap and the possibility to trade allowances available due to emission reduction efforts is a market instrument aiming to ensure such an environmental objective in the most cost-efficient manner. However, such an economic instrument cannot be considered an emissions tax (as confirmed by AG Kokott opinion issued on 6 October 2011 on Case C- 366/10) since the obligations

imposed on Member States and operators are different and broader than the payment of a tax even if the revenues from the auctioning of the allowances might engross the State coffers. Possible objections to the extra-territorial effect of an ETS have been dismissed by the Advocate General as discussed earlier in this report.

A measure applied only to ships registered in an EU Member States would result in a flagging out to other States, limiting the beneficial environmental effect and would raised questions of discrimination. The system would presumably cover ships of any nationality.

As a Coastal State

Similar arguments can be used to conclude that an emissions trading system would not be subject to the prohibition under UNCLOS Article 26 which states that no charge may be levied upon foreign ships by reason only of their passage through the territorial sea. This article limits the imposition of a charge to the cases where the payment is required in return of specific services rendered to the ship.

In general due to the restrictions placed upon coastal State enforcement, it would be better to administer such a system as a port State.

As a Port State

There is no restriction on the EU establishing an Emissions Trading System as a requirement of entry to EU ports, as discussed above, where vessels voluntarily visit EU ports, they are thereby willingly submitting themselves to the conditions of entry to that port.

As stated before, a carbon price and an emissions target should be stringent enough for driving real emission cuts. If an emissions trading scheme would be identified as the preferred option, the design of the system could integrate this sector within the current EU ETS cap or set up an independent cap ensuring that the 20% reduction of GHG emissions of 1990 levels by 2020 is applied (in line with the rules for sectors under the EU ETS Directive 2003/87/EC). The efficiency of the system in the current situation of the carbon market might point towards an integrated cap with a high number of allowances allocated through auctioning.

8.4 Inclusion in the Effort Sharing Decision

The basis of Effort Sharing Decision 406/2009/EC¹¹⁷ is that each Member State can increase or decrease the emissions from the included sectors based on the past GHG emissions and economic growth of that country according to a quota allocated. However no trade of allowances is established for the sectors in this Decision. Transport within the EU is already part of the Effort sharing decisions. Member States can then take national measures to regulate GHG emissions in those sectors. There is no reason why any national regulation of GHG emissions from shipping would breach any of the principles discussed in this briefing as long as it took regard of the limitations of coastal and port State jurisdiction that are relevant and observed the general principles of non-discrimination, good faith and non-abuse of right.

8.5 Fuel Emissions Standards

As a Coastal State

Acting as a coastal State, the EU can only impose national regulations in territorial waters in so far as those regulations do not relate to CDEM Standards.

It is debatable whether or not a fuel emission standard would be classified as a CDEM Standard. There is no definition of what constitutes a construction, design, equipment or manning standard as regulated in Article 21 but as this is an exception to the general principle of coastal State sovereignty in the territorial sea, there is a presumption in favour of narrowly construing the restriction. The report on the implications of a system to reduce SO₂ and NO_X contracted by the EU Commission looked at this with regard to sulphur fuel content and stated:

"It would be strange ... to treat as a 'design' or 'equipment' standard, a requirement that does not necessarily require a particular engine or exhaust system design or involve the fitting or use of any additional equipment: it might involve some modification of engines or their operation in order to adapt to lower sulphur contents and/or the fitting of separate tanks to hold low-sulphur fuel for use only in areas where such a requirement applies. In practice, however, the latter is unlikely to be cost-effective and the former is only likely to concur where low-sulphur fuel is used for extended periods. In fact, no

¹¹⁷ Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, OJ L 140, 5/6/2009, P. 136.

*particular construction, design, equipment or manning changes at all need to made, and this is arguably a pre-requisite to classification as a CDEM standard.*¹¹⁸

Though it can be also argued that a fuel emission standard should be analogous to a CDEM Standard as it 'travels with the ship', whether in the particular territorial waters or not. Thus it would be better to use the greater regulation and enforcement powers of port State jurisdiction to impose such a measure.

As a Port State

There is no restriction on the EU establishing a mandatory fuel emission standard as a requirement of entry to EU ports because, as discussed above, where vessels voluntarily visit EU ports, they are thereby voluntarily submitting themselves to the conditions of entry to that port. The EU has already enacted such fuel standards with regard to the sulphur content of marine fuels (see section 6.1).

8.6 A mandatory operational or design efficiency standard

As a Coastal State

There is a prohibition on coastal States enacting mandatory CDEM Standards in the territorial sea, thus such a measure would be in direct contravention of Article 21 of UNCLOS.

As a Port State

There is no restriction on the EU establishing a mandatory operational or design efficiency standard as a requirement of entry to EU ports and as discussed above, where vessels voluntarily visit EU ports, they are thereby willingly submitting themselves to the conditions of entry to that port. The EU has already enacted an equivalent measure in banning single-hulled tankers from visiting EU ports.

8.7 Differentiated harbour dues

Differentiated harbour dues could be based on an operational efficiency indicator or a design index. This can obviously only be done as a port State and there is no restriction on the EU establishing such a system. Such a system is already in operation in Sweden.

¹¹⁸ Davies, Plant, Cosslett, Harrop & Petts for BMT Murray Fenton Edon Liddiard Vince Limited, *Study on the Economic, Legal, Environmental and Practical Implications of a European Union System to Reduce Ship Emissions of SO₂ and NO_x*, No. 3623, August 2000, commissioned by the European Commission at A4.70.

8.8 Slow Steaming/Speed Limits

As a Coastal State

This could only be enforced in the territorial sea of a coastal State and as with a mandatory standard for fuel emissions, it could be debated whether this is a CDEM standard,¹¹⁹ in which case the coastal State does not have the right to impose such a regulation at all.

Vessels are entitled to pass through territorial waters in "innocent passage." UNCLOS Article 18 defines that right so that passage "shall be continuous and expeditious." However, UNCLOS Article 21 gives coastal States the right to enact laws regulating that innocent passage for "the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof." The only specific restriction upon such regulation of innocent passage is that: "[s]uch laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards." It is clear that coastal States can regulate the innocent passage of ships so that it does not have to be "continuous and expeditious" as long as that regulation does not extend to a CDEM standard.

However, such a regulation by a coastal State could only be with regard to vessels in territorial waters and there are very limiting restrictions upon enforcement measures that can be taken as a coastal State as discussed in section 0.

As a Port State

There is no restriction on the EU establishing speed limits for journeys to EU ports as a requirement of entry to EU ports. Though such a measure seems very intrusive at first glance, legally, it is no more intrusive than requiring vessels to report on the amount of fuel used during the last voyage. Where vessels voluntarily visit EU ports, they are thereby voluntarily submitting themselves to the conditions of entry to that port, including a regulation of their speed or even inspections on in the EEZ or on the high seas, where that is a condition of port entry.

9. Conclusion

The EU has the competence to enact a measure regulating GHG emissions in the maritime sector. The EU could adopt measures regulating or harmonising EU Member

¹¹⁹ Some vessels require "slow steaming upgrade kits" in order to steam at low speeds.

States rules due to its competence on environmental, climate change, maritime transport, energy and taxation issues.

The most likely legal basis for that measure would be Article 192(1) TFEU since such a regulation aims at an environmental objective and should be designed in accordance with the principles of proportionality and subsidiarity.

The EU is obliged to act for establishing GHG emission reduction measures under the 2002 EAP. In addition, legal justification is provided by the Directive 2009/29/EC amending ETS Directive 2003/87/EC and extending the ETS, Effort Sharing Decision 406/2009/EC, the Kyoto Protocol and UNCLOS (which encourages regional cooperation between States) to take such a measure if no adequate action is taken by the IMO.

The EU already has enacted a number of maritime regulations which have extraterritorial effect. The EU has further, unilaterally, enacted a number of measures which go beyond the generally accepted international standards of marine regulation. MARPOL does not extend to the regulation of GHG emissions and does not restrict the jurisdiction of States to enact such measures.

EU Member States have essentially unlimited sovereign jurisdiction over their ports and thus can impose any manner of conditions on the entry of vessels to their ports. Once vessels voluntarily enter the port of a Member State, they are thereby agreeing to submit to the conditions of entry to that port, even where these conditions have extraterritorial effect. Port States have also the right to take all necessary measures to ensure that any vessel entering their ports complies with their regulations, including monetary penalties, refusal of access to the port and these enforcement measures can even extend to actions taken outside the port, such as inspections on the high seas. It is unlikely that any challenge to an EU regulation of GHG emission from vessels could succeed as the CJEU has already assessed UNCLOS and MARPOL, deciding that they cannot be used as the basis for a challenge to any EU legislative act. Where a measure is non-discriminatory it will not fall foul of the WTO Rules and as outlined in this briefing, such a measure would be in line with UNCLOS and thus acceptable before the Tribunal for the Law of the Sea.

This means that the EU has a number of policy options which can be used to regulate GHG emissions from vessels which are in compliance with European and International law, including: emissions monitoring, verification and reporting; an emissions charge or levy; inclusion in an emissions trading system; inclusion in the Effort Sharing Decision; regulation of fuel emissions standards; imposing a mandatory operational or design efficiency standard; differentiated harbour dues and requiring slow steaming or imposing speed limits.

Therefore, as long as the EU's regulation of shipping emissions is designed to be consonant with the principles of non-discrimination, good faith and non-abuse of right, it

will not impact on any other countries' sovereignty. ClientEarth considers that such measures can be lawfully imposed. There is no restriction on the EU regulating GHG emissions from vessels as a condition upon the right of entry to the ports of EU Member States, and provided the law is designed utilising port state control, we consider that prospects of a successful legal challenge are very low.

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

As legal experts working in the public interest, we act to strengthen the work of our partner organisations. Our work covers climate change and energy system transformation, protection of oceans, biodiversity and forests, and environmental justice

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