

# GREEN SHIPPING BULLETIN



**Environmental regulation of the shipping industry has been gathering pace in recent years and owners, charterers and shippers need to be aware of the current regulatory position and the changes that are on the horizon, to prevent falling foul of the new rules.**

In our inaugural Green Shipping Bulletin, we look at the future of sustainable shipping and analyse the current focus on eco-ships and the retro-fitting of existing vessels with eco-technology. One of the main barriers to retro-fit of environmentally sustainable technologies is the financing gap and we examine one suggested way forward.

Earlier this year, new Marpol Regulations came into force with regard to garbage disposal, which will require garbage to be commonly sent to shore-based reception facilities. We look at what owners, charterers and shippers need to do to comply with the legislation in respect of both traditional garbage, hold washing water removal and discharge of cargo residues. We then explore the drive to reduce the shipping industry's CO2 emissions, covering the current mandatory Energy Efficiency Design Index (EEDI) framework and looking at what new regulatory measures may be introduced over the next few years. Regulators are also seeking to reduce sulphur emissions and we consider the picture in Hong Kong.

Finally, slow steaming remains a feature globally due to both economic and regulatory pressures and we review the legal implications.

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## Sustainable Shipping – the future?

The combined pressures of increased environmental regulation, such as the Energy Efficiency Design Index that came into effect on 1 January 2013, overcapacity in the freight market and rising fuel costs have resulted in an increasing trend towards sustainable shipping, with a particular focus on environmental responsibility. This is reflected in the now wide-spread practice of slow steaming, which has gone a long way towards restoring the profitability of long haul operators and helped to absorb excess capacity. However, slow steaming only goes part of the way to solving these issues. The focus is now turning to eco-ships and the retro-fitting of existing vessels.

Eco-ships currently make up a fraction of the world fleet and there is a division of opinion in the industry about whether to invest in new fuel efficient ship designs, upgrade existing fleets or to do nothing. Some high profile companies have chosen to take a proactive approach. For example, Maersk Line have invested in Triple-E ships, as well as retro-fitting their fleet with performance enhancing measures such as anti-fouling paints, replacing bulbous bows and improving ballast. Other owners are less keen to invest until the payback of the new technologies is proven, but there have been suggestions this risks falling behind the competition and being unprepared for increasingly stringent emissions regulations.

Whilst it is acknowledged that there are some technologies in the market that are as yet unproven, others are already considered tried and tested. For example, container vessels have been designed and built for speed, manoeuvrability and loading efficiency with features such as special hull surface coatings and lightweight construction that improve

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efficiency by 5 and 7% respectively. Similar technologies have also been developed for tankers and bulkers.

Other technology providers are exploring a return to the age of sail-powered vessels. Cargill has recently partnered with SkySails, who have developed an innovative technology that uses a kite flying ahead of a vessel to generate enough propulsion to reduce consumption of bunker fuel by up to 35% in ideal sailing conditions. Similarly, the British company B9 has developed the world's first low-carbon, fossil-fuel-free freighter which operates using 60% wind power, supplemented by a bio-gas engine converting food waste into methane. The first B9 vessel has the potential to accommodate 9,000 tonnes of cargo and is capable of operating around European waters. This may seem limited in scope, but with further investment B9 could potentially produce larger ships capable of longer voyages.

The biggest barrier to a sustainable shipping industry is financing the retro-fit of environmentally sustainable technologies. This is particularly difficult in the context of time charters where the time required to pay back the initial investment in capital costs often takes longer than the charter period. It is this challenge that the Sustainable Shipping Initiative (SSI), facilitated by Forum for the Future, is seeking to resolve by working with an ambitious cross-industry group that includes ship owners and charterers, shipbuilders, engineers and service providers, banking, insurance, and classification societies. Holman Fenwick Willan is a

Knowledge Partner of the SSI and is providing legal advice on the contracts required. The project is committed to launching a commercially viable financial solution by September 2013.

To conclude, is sustainable shipping the future? The commercial incentive of significant fuel savings, workable finance solutions and increased regulation may mean it is inevitable that owners will have to adopt a more sustainable approach. This is likely to lead to a two tier system with non-fuel efficient vessels being discounted heavily against fuel efficient ships. Owners are therefore advised to look to the future and start planning any measures they need to adopt to avoid falling foul of new regulations and to keep ahead of the competition.

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## Marpol Annex V Regulations – a new regulation for owners, operators, charterers and shippers to contend with.

On 1 January 2013, new Marpol Regulations came into force with regard to the disposal of garbage from ships at sea, and largely prohibit the practice. As a result, it will become common practice for ships to send their garbage to shore-based reception facilities.



Marpol Annex V Regulations not only impact on what could be classed “traditional garbage” but also concern the issue of hold washing water removal and discharge of “cargo residues”. Remains of cargo in wash water are defined in the regulations as “cargo residues.”

### Summary

As the Marpol Annex V Regulations are voluminous, this article will only focus on its impact in relation to discharge of cargo residues and hold washing water. As this is very new legislation the law is yet to develop fully.

### The starting point

The starting point to understanding how this new regulation impacts on shipowners, operators, charterers and shippers is to consider the nature of the (1) cargo carried; and (2) the hold cleaning chemicals used.

It is necessary to consider if:

- 1) the cargo is “harmful” to the marine environment?; and
- 2) whether the hold cleaning chemicals are “harmful”?

If the answer to either question is positive then Marpol Annex V will have an impact.

### Is the cargo harmful?

The Annex V guidance notes state that, if the cargo meets certain criteria listed in the UN Globally Harmonized System for Classification and Labelling of Chemicals, then the cargo is harmful to the marine environment.

IMO Guidelines state the Shipper has an obligation to declare whether or not the cargo is harmful when providing the information required by section 4.2 of the IMSBC Code.

If the cargo is classified as harmful to the marine environment, then the hold washing water (i.e. “cargo residues”) have to be kept onboard and safely discharged into reception facilities ashore in all cases.

If cargoes that are harmful are carried, then this has to be fully documented in onboard records/the garbage book

### Non Harmful Cargo and Bilges

If the vessel is laden with non harmful cargo and liquid is being collected in the Vessel’s bilges whilst laden, then this liquid can be discharged at sea, subject to any other Marpol requirements.

### Harmful Cleaning Chemicals

Whether hold cleaning materials are harmful depends on whether they contain any carcinogenic, mutagenic or reprotoxic components. This should be clear from the Material Safety Data Sheet (MSDS)/product information.

If the cargo was not harmful, but the holds were cleaned with hold cleaning chemicals, which are harmful, then it is likely that the hold washing water would have to be kept onboard and discharged into reception facilities ashore.

### Non Harmful Cargo and Cleaning Chemicals

If the cargo (and any cleaning chemicals used) are not harmful to

the marine environment then hold washing water can be discharged at sea, within areas in which discharge is allowed, subject to any other Marpol requirements.

If the ship is in a Marpol “Special Area” discharge into the sea is only permitted (i) if the port of departure and next port of destination are both within a Special Area AND (ii) no adequate reception facilities are available at the port of departure and destination.

Marpol Special Areas are the Baltic Sea, North Sea, Mediterranean, the Gulfs Area, Wider Caribbean Region and the Antarctic Sea. Eventually, once shore reception facilities are available in the Black Sea and Red Sea, these regions may be classified as Special Areas for the discharge of garbage.

### Developing Standard Clauses

It is clear that that this regulation will have a major impact on owners, operators, charterers and shippers. As a result, over time new clauses will be created to try and clarify between the parties whose risk non-compliance with Marpol Annex V falls to.

As BIMCO’s August 2006 “BIMCO Hold Cleaning/Cargo Residue Clause” was produced prior to Marpol Annex V coming into force, it did not address the new issues raised by this particular Annex. The amendments to the 2006 Clause are limited, and whether they actually address all potential scenarios remains to be seen. Parties, perhaps charters in particular, may seek a more detailed clause to protect their interests.

BIMCO accordingly met to amend their standard clause and earlier this month published their revised Hold Cleaning/Residue Disposal Clause for Time Charter Parties 2013, addressing the new requirements. BIMCO are now working on a suggested standard clause for Voyage Charterparties.

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The North of England P&I Club has also produced specific clauses for both Voyage Charters and Time Charters that aim to respond to the new Annex V.

In due course it is naturally likely that either the amended BIMCO clause will be widely adopted or further bespoke clauses will be created that will reflect both the risks of non-compliance, as it comes to be understood, and the negotiating strengths of the parties to the contracts.

### Practical steps

For owners and operators it will be important that a proper protocol is put in place not only to ensure that the precise nature of the cargo is known, but also the hold cleaning chemicals used. Ideally this protocol would require the shippers to not only provide a declaration that the cargo is not harmful, but also provide supporting data such as MSDS.

If the new BIMCO Hold Cleaning/Residue Disposal Clause for Time Charter Parties 2013 is incorporated into the charterparty, charterers will have to provide a statement identifying hold cleaning chemicals used and stating that they do not contravene the new Annex V. The clause also requires that the removal and disposal of cargo residue, hold washing water and cleaning chemicals is to be done in accordance with the new MARPOL V rules.

Owners and operators will also have to maintain a proper and detailed record of cargo (and the usage of any hold cleaning chemicals) onboard the vessel.

While shippers are obliged to declare whether the cargo is harmful, in some circumstances it may be prudent for Owners and Operators to obtain expert verification of the cargo.

If on the other hand you are the shipper (or for that matter a charterer

passing on the cargo designation from a shipper to an Owner) you should recognise that this declaration of cargo is important information and that you may have an exposure if inaccurate information is given to the Owner.

This article is an update to that previously featured in the HFW Shipping Bulletin, March 2013.

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### EUmissions: the drive to reduce CO2 emissions

The international shipping industry is the most carbon efficient mode of commercial transport. CO2 emissions from the industry as a whole amount to approximately 3% of global

emissions, which is comparable to a major national economy. However, the shipping industry is increasingly the focus of initiatives to reduce CO2 emissions, most notably by the EU.

The impetus for these changes was the United Nations Framework Convention on Climate Change 1997 and the Kyoto Protocol, which sought to reduce greenhouse gas emissions. The aim of the Kyoto Protocol was to set reductions in recorded emissions amounting to an 8% decrease from 1990 levels over the five-year period from 2008 to 2012.

In order to meet its commitments under the Kyoto Protocol, the EU enacted the Emissions Trading Directive 2003/87/EC, which established a scheme for greenhouse gas emission allowance trading within the EU. The EU Emissions Trading System (ETS) came into effect in 2005. In broad terms, the ETS places a cap on the total amount of certain greenhouse gases that can be emitted by installations from the main energy-intensive industries, although shipping was not included in this. Within this cap, the installations receive emission allowances from the relevant EU Member State, which they can buy and sell from one another. At the end of the year, each installation must surrender enough allowances to cover all its emissions for that year, otherwise it may be fined. If an installation does not use all its allowances for that year, it can carry them over or alternatively sell



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DAISY RAYNER



them off to another installation that has used more than its allowances.

In 2008, Aviation Directive 2008/101/EC amended the Emissions Trading Directive to include, from 2012, aviation. This has met with fierce opposition from the aviation industry, particularly in the US and China who see it as an unlawful tax and an unwelcome move in light of the current economic outlook.

The EU's regulation of the aviation industry led to the belief that the shipping industry would be next in the EU's bid to achieve further emission cuts. In fact, the EU had indicated that it would seek to regulate the shipping industry itself if the IMO had not achieved something concrete by the end of 2011. A number of ideas were proposed to combat CO<sub>2</sub> emissions, including carbon credits, a mandatory emissions reduction scheme and a CO<sub>2</sub> emissions control area akin to the existing model for sulphur emissions.

In October 2012, the EU announced that it had abandoned plans to introduce regional CO<sub>2</sub> reduction legislation instead stating that it was keen to engage in pragmatic dialogue with the shipping industry and to work with the IMO to achieve a practical market-based mechanism to reduce CO<sub>2</sub> emissions. However, Brussels has recently introduced proposals that will make all vessels over 5,000 gross tonnes calling in European ports measure and report their annual CO<sub>2</sub> emissions, by 2018. This is seen by many as one step away from an emissions trading scheme and little is yet known about how a verification system such as this would work in practice.

This move puts pressure on the IMO to achieve a global solution to tackle the problem and avoid a regional patchwork of measures. In February this year, the IMO discussed plans to tackle emissions at an Expert

Workshop and is expected to deliver its final study in 2014. The IMO is also beginning to press ahead with its own plans to reduce greenhouse emissions. For example, on 1 January 2013, the new IMO regulations found in MARPOL Annex VI came into effect. These made the Energy Efficiency Design Index (EEDI) mandatory for new ships of at least 400 GT. The EEDI sets a minimum efficiency standard which ships must meet. It is open to owners to choose the technologies they want to employ to achieve the EEDI standard, but the aim is that energy consumption is reduced by 10% between 1 January 2015 and 31 December 2019, with further reductions totalling 30% by 2024. It remains unclear how the IMO will monitor and enforce the operation of the EEDI, but the IMO are currently working on draft Guidelines.

These Guidelines will provide some much needed clarity for the shipping industry, but what can shipowners, operators and managers be doing now to comply with the EEDI regulations and to help prepare for further measures that may be imposed by the EU? The focus in the immediate future is turning to monitoring, reporting and verification systems, the data from which will be used as a basis to develop a practical solution to reduce CO<sub>2</sub> emissions. Many progressive companies have already put this into practice resulting in both commercial and environmental benefits.

Another option for companies where possible is to pre-empt any mandatory emissions targets by gradually retrofitting their existing fleets with new and emerging technologies to improve fuel efficiency and cut emissions, as well as ensuring any new purchases include the latest eco-designs. More adventurous companies may even want to examine the possibility of going carbon neutral by using alternative sources of energy, such as algal oil.

In summary, it remains far from clear what further measures the EU and IMO will seek to introduce to regulate global emissions from the shipping industry. Although any measures are likely to be a number of years in the making, it is certain that they will be introduced in some form or another and the earlier the industry starts planning for these changes the easier the burden will be.

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## The air we breathe

When the Hong Kong Environmental Protection Department announced in March this year that it intended to introduce legislation requiring ocean-going vessels to burn low-sulphur fuel while berthing in Hong Kong waters, residents and pressure groups breathed a collective sigh of relief.

The news has also been welcomed by many of the shipping lines that use the world's third busiest port, even at a time when the industry's continued economic difficulties make it hard to absorb the increased costs of low-sulphur fuel.

In 2010, 17 shipping lines active in Hong Kong agreed a scheme by which they would voluntarily use low-sulphur fuel (up to 0.5% sulphur content) while approaching and berthing in the City. Known as the Fair Wind Charter, the pledge was initially intended to last for two years until legislation could be introduced regulating all ocean-going vessels.

Since coming into effect in January 2011, the Charter has applied to 3,600 vessels and reportedly reduced sulphur dioxide emissions by 890 tonnes.



## More carrot

In September 2012, the Hong Kong Marine Department (MARDEP) attempted to encourage more shipowners to participate in reducing their emissions through a three-year incentive scheme. Under the MARDEP scheme, ocean-going vessels burning low-sulphur fuel while approaching the port and berthing receive a 50% discount on port facilities and, based on their tonnage, light dues of HK\$43 (US\$5.50) for every 100 tons.

However, six months after its introduction, MARDEP's scheme has struggled to achieve the anticipated scale of participation. A recent report by BunkerWorld suggests that only 13% of ocean-going vessels berthing in Hong Kong are registered with the MARDEP scheme.

Aside from a burdensome administrative procedure, the scheme's financial benefit to shipowners is far outweighed by the additional cost of using low-sulphur fuel. According to Maersk, the MARDEP scheme still costs them about US\$2m per year, because the discount under the scheme covers only about 40% of the additional cost of burning low sulphur oil. However, it is not so much the increased cost of participating in low-sulphur initiatives that irks the major shipping lines as the wider potential business implications. A competitive imbalance has grown between participants and non-participants, which needs addressing.

In addition, participants fear that they will have no choice but to pass on the increased costs of compliance to customers, which risks them losing business to non-participants.

## Fair wind

In spite of this, in January of this year, the participants agreed to extend the Fair Wind Charter until the end of 2013. It is yet to be seen whether they will agree to extend their participation

beyond this point in the absence of legislation. "We would rather engage with government and contribute to the process of defining regulation that is practical, consistent and fair," explains Tim Smith, Maersk Line's chief executive for the North Asia Region and chairman of the Hong Kong Liner Shipping Association.

"At the moment, the 'good guys' pay for the cost of doing the right thing for the environment, while some less scrupulous competitors actually get a cost advantage from burning more polluting fuels."

This competitive imbalance may also extend to participating and non-participating ports.

Hong Kong's reluctance to introduce legislation reflects concerns that requiring shipowners to comply with potentially expensive emissions regulations will drive the 87% of vessels not participating in MARDEP's incentive scheme elsewhere.

There is no shortage of competition – 13 of the world's 20 largest ports are located in the region. Singapore, one of Hong Kong's main rivals in terms of container traffic, maintains that it can achieve its emissions reduction targets solely through its equivalent incentive scheme, the Green Port Programme.

## Wider remit

However, Hong Kong should not be worried. Rather than being a stand alone development, Hong Kong's offer to vessels approaching and berthing in the port looks to be the tip of the iceberg of environmental shipping regulation in the region. Shipowners and environmental campaigners alike are already throwing their weight behind establishing an emissions control area throughout the Pearl River Delta.

Before leaving office, former Chinese President Hu Jintao endorsed the effort and expressed his determination to strengthen co-operation on

environmental protection, improve air pollution control measures and support Guangdong-Hong Kong-Macao collaboration on controlling vessel emissions.

Should an emissions control area be established in the Pearl River Delta, it may take inspiration from the Sulphur Dioxide Emissions Control Area (SECA) currently in operation in the North Sea and Baltic Sea. Established under MARPOL 73/78 and amended by Annex VI, the North Sea SECA applies from the English Channel at Falmouth to Bergen in Norway.

Effective since August 2007, SECA prohibits vessels from using fuel with a sulphur content in excess of 1.0% (1.5% prior to 1 July 2010) while within the SECA area, unless fitted with an exhaust gas cleaning system or other technological method that brings the emissions in line with the sulphur content limit. Any vessel that fails to comply can be detained under Regulation 14 of MARPOL 73/78.

## Steady traffic

While the regulations have led to increased operational costs for shipowners, the increase in marine traffic in the North Sea has not faltered. Likewise, fears of undersupply of low-sulphur fuel and job losses consequent upon the regulations have proved unfounded.

From 1 January 2015, the sulphur content limit within the North Sea SECA will be reduced to 0.1%. This should reassure the Hong Kong Government and the authorities in the Pearl River Delta that a similar limit is workable.

As far as the major shipping lines are concerned, the introduction of legislation in Hong Kong is a taste of what they hope will occur on a global scale – an internationally recognised set of rules that will apply to all ports and reduce disparities between different regions and the ports



operating within those regions.

As Mads Stensen, global advisor on Environment and CSR in Maersk Line, says: “Fuel switching in Hong Kong is a local initiative but it is also a part of our global objective of driving down air emissions from our own fleet as well as for the shipping industry as a whole. This requires that we go beyond regulation in selected areas in order to drive a development towards a level playing field through regulation or financial incentive schemes.

“The establishment of a level playing field is crucial in order not to punish financially those companies that actually reduce their environmental impacts.”

This article first appeared in the May 2013 issue of Port Strategy

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### **Slow steaming ahead: the impact of economic conditions and environmental scrutiny**

The shipping industry has seen a return to slow steaming since the credit crunch in 2008 and as a result of reduced freight and increased bunker rates. Together with the increased focus on environmental efficiency, this has thrown up a number of interesting legal and commercial issues, most notably from a legal perspective, in relation to the implied charterparty obligation of due despatch and deviation for delay under bills of lading.

There is an obvious conflict between an obligation to prosecute a voyage with utmost despatch and an obligation to slow steam. The new BIMCO fuel efficiency terms for time charters recognise this issue and provide that if the Master exercises

due diligence in the performance of his/her instructions, he/she will not be in breach of the reasonable despatch obligation.

However, the problem does not end there. The utmost despatch obligation may also be on a contractual footing under the bill of lading. This exposes carriers to the risk of claims for deviation for delay. The BIMCO fuel efficiency terms seek to redress this by obliging charterers to ensure that the terms of the bill of lading, waybills and other documents evidencing the contract of carriage issued by or on behalf of owners state that compliance by owners with the fuel efficiency clause will not constitute a breach of the contract of carriage. The clause also requires charterers to indemnify owners against all consequences and liabilities arising under the bill of lading to the extent that they are a result of owners’ breach of the obligation to proceed with utmost despatch or are held to be a deviation. It is foreseeable that disputes will arise where there is a failure to incorporate the terms.

Owners attempting to slow steam under existing charters that do not incorporate the BIMCO terms, should pay particular attention to these dangers as they are exposing themselves to claims for breach of both the charterparty and bill of lading. Whilst it may be possible to obtain retrospective agreement from charterers, this will not be feasible under the bill of lading.

To date, there has not been any case law specifically on this point. However, issues relevant to slow steaming recently arose in the Commercial Court decision in *Bulk Ship Union SA v Clipper Bulk Shipping Ltd (The “Pearl C”)* [2012] 2 Lloyd’s Rep 533, which concerned an underperformance claim under the NYPE form. The key thing to come out of the decision was that the performance warranty will be used as a practical benchmark to assess

whether the vessel has proceeded with utmost despatch and in circumstances where there is an absence of a good explanation for poor performance this may be sufficient to establish a claim for breach of clause 8 (utmost despatch) or a claim of off-hire. On a strict interpretation of the contractual wording, this may appear incorrect as it effectively extends the performance warranty into a continuing warranty, but from a commercial perspective is the easiest way of assessing whether a vessel has underperformed or slow steamed.

Despite these potential pitfalls, slow steaming remains an attractive option because of the economic benefits and increased environmental scrutiny. The benefits of fuel efficiency have long been recognised in the container industry. However, with the financial recession and bunker rates now exceeding US\$700 per tonne, slow steaming has become more widespread, including in the dry bulk sector.

The BIMCO clauses are likely to solve the majority of slow speed claims which may arise between owners and charterers, although they would not have assisted the owners in the *Pearl C* because it was owners under the time charter who chose to slow steam. There is also likely to be litigation in instances where charterers fail to incorporate slow steaming terms into the bill of lading. Therefore, although the standard clauses are helpful, we recommend that owners and charterers carefully consider their individual needs to ensure that any necessary amendments are incorporated.

A version of this article first appeared in *The Baltic*, Winter 2012.

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## NEWS

### HFW hosts Sustainable Shipping Initiative Seminar

HFW will host a Sustainable Shipping Initiative ('SSI') briefing seminar on 4 September 2013, show-casing the SSI's Save As You Sail model for financing eco technology retro-fit. The event will include a presentation from the SSI setting out the reasoning behind the model and an explanation of how it works. In addition, the seminar will include interactive presentations from HFW covering the key environmental topics currently affecting the shipping industry.

### Sustainable Ocean Summit sets the pace

The World Ocean Council (WOC) Sustainable Ocean Summit, an international ocean business forum to advance responsible use of the seas, took place in Washington DC between 22–24 April 2013.

Baptiste Weijburg of HFW co-chaired the session on 'Ocean Policy and Ocean Industries in International Waters' with Peter Hincliffe of the International Chamber of Shipping. The session highlighted the useful role played by the WOC in bringing together responsible ocean industry and regulators and provided a platform for representatives of the regulated to understand the rationale for changes to the regulatory and ocean governance framework and for representatives of the regulators to understand the pressures currently being faced by the business community.

During the session discussions, the industry panel indicated a willingness to work within a regulatory framework but needed to be confident that regulators would seek consultation with stakeholders. Regulators needed to be mindful that solutions provided by the industry may be the most cost effective as this was the natural domain for the industry. The industry panellists also highlighted the willingness of industry to share environmental data (to the extent permitted) where this data could be used for the common good.

## Conferences and Events

### Lloyds Informa Bunker Management School

Bonhill House, London

'Exploring environmental regulation for bunkering' and 'Environmental regulations: How will this impact the bunker industry?'

(13 November 2013)

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