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Subject
Response to the letter by Minister Harbers on Floating Degassing (IENW/BSK-2023/24468)

Date: 30 January 2023

To the attention of Minister of Infrastructure and Water Management Mark Harbers:

We are grateful to the Minister for having engaged with our Report in the letter sent on 24 January 2023 to the Parliament (reference: IENW/BSK-2023/24468), and for having clarified his positions in relation to the international rights and responsibility of the Dutch state to regulate floating degassing.

On p. 2-3 of the letter, the Minister addresses our Report maintaining the position that a domestic ban on floating degassing is not possible by virtue of international law. There are three sets of arguments articulated by the Minister in this regard: 1) First, the Dutch state cannot act because Article 18 of the Vienna Convention on the Law of Treaties (VCLT); 2) second, there are some practical problems in adopting a ban; 3) third, having negotiated the 2017 CDNI Amendments, the Dutch state complies with human rights obligation.
In the following, **we offer a reply to these three sets arguments.**

1) On p. 2 of the letter, the Minister puts forward a concrete reasoning on why specific provisions of international treaties are considered to be an obstacle for the Dutch government to adopt regulatory measures on floating degassing. The letter states that the Netherlands cannot enact a domestic legislation to ban floating degassing because of Article 18 of the Vienna Convention on the Law of Treaties (VCLT). This Article provides that once a State has signed an agreement or, as in the case of the Netherlands, it has ratified it but the Treaty has not yet entered into force, the signatory or ratifying state 'is obliged to refrain from acts which would defeat the object and purpose of a treaty.' The Minister argues that the duty to set up the infrastructure for degassing, established in the Treaty, implies that a national ban without the establishment of such installation would be against the Treaty's provisions. (original Dutch text: 'Omdat de verplichting voor het aanleggen van

ontgassingsinstallaties is opgenomen in dit verdrag, zou een nationaal verbod zonder het aanleggen van ontgassingsinstallaties in strijd zijn met de bepalingen uit het verdrag.') This reasoning, however, is questionable. Article 5.02 of the 2017 Amendments provides that 'The Contracting States shall undertake to set up, or to have set up, the infrastructure and other conditions necessary for the deposit and reception of residual cargo, handling residues, cargo residues, wash water and vapours within a period of five years following the present Convention entering into force.' **This is a positive obligation, meaning that the state is obliged to do something. Nothing in the treaty bars the Dutch state to start establishing these infrastructures already.** The reasoning of the Minister would be sound if the provision would have been formulated as a negative obligation, that is, an obligation not to do something. For example, the article could have read: 'The Contracting States shall *not* undertake to set up, or to have set up, the infrastructure before the treaty has entered into force.' Nowhere in the treaty, such a negative obligation is to be found. This means that, should the Dutch state want to do so, it could already start to build such an infrastructure now. Likewise, in the treaty there is no obligation to not ban floating degassing or to not ban floating degassing through domestic regulation before the treaty enters into force. The treaty establishes a general and unconditional obligation to ban floating degassing. The Netherlands can ban floating degassing before the treaty enters into force.

In fact, if Art. 18 VCLT is to be invoked at all, it may be to argue the opposite. In this respect, we should note that one of the main goals of the treaty is the protection of the environment. The 2017 CDNI Amendments was negotiated to realize this goal. The negotiations were successful and consensus between the Contracting parties on content amendments was achieved. In 2017, the CDNI Amendments were adopted by Conference of the Contracting Parties. This bears witness that an internationally coordinated solution to floating degassing exists. **It is then difficult to understand how the 2017 Amendments' object and purpose, which is to protect the environment by enacting a prohibition on floating degassing, can be breached by a domestic regulation aimed at that.**

The letter of the Ministry further mentions that it would be prohibited to 'provisionally apply the treaty'. However, in our report, we demonstrated that states have the right to regulate for reasons other than safety during navigation, which includes the protection of the environment. This is different from provisional application of the CDNI Amendments. For example, according to the Art. 7.2.3.7.0 of the Annexed Regulations of the ADN, prohibition of degassing can be regulated through domestic legal measures. Unilateral domestic measures compatible with the 2017 Amendments would not necessarily amount to a provisional application of the treaty.

2) Beyond the question of the compatibility with international law, the Minister makes other arguments relating to effectiveness, such as the insufficient number of degassing facilities (Daarnaast zou een nationaal verbod niet doeltreffend zijn). In

our report we do not engage with questions of effectiveness, as we only focus on the question whether legal action is not possible because of international law.
While these arguments are beyond the scope of our Report, it could be incidentally noted that it is the responsibility of the Dutch state to find a solution to this problem. It is also understandable that there are not enough installations, given that the practice is allowed. Possibly, the adoption of the ban (with an adjustment period) could accelerate the establishment of such installations. As it now stands, the situation resembles a chicken-egg problem: because there are not enough degassing installations, the Minister believes that floating degassing cannot be prohibited and because there is no rule prohibiting degassing, the relevant infrastructure is not built. The risk of this reasoning is that any current deficiencies in the current legal-economic system can then be deployed as an excuse not to act. Moreover, considering that that the negotiations on the Amendment were initiated in 2012 and concluded in 2017 and that the expectations were that by 2020 all members should have ratified, it may have been reasonable to start building the infrastructure years ago. Similarly, the Netherlands has ratified the 2017 Amendment in 2020, and arguably it should have worked on the practical solutions to implement the agreed upon ban; lack of existing degassing installations is unlikely to be a justification for not fulfilling these obligations. In short, in light of its human rights obligations and the fact that CDNI may enter into force soon, the Dutch government is under the obligation of creating the conditions for implementing the ban.
The Minister also laments that a national ban would put the costs on the carriers. The 2017 Amendments establish that the charterer should bear the costs of degassing a vessel. From the letter of the Minister, it is not clear why the Dutch state cannot already adopt a regulation that follows this rule. When implementing the Treaty, the state will have to implement this rule and, from an international law point of view, there is no reason to not adopt a rule that puts the costs on the charterer already.

In short, in relation to the arguments around effectiveness, we would like to emphasize that the lack of sufficient conditions to implement a ban (such as the lack of enough degassing installations) does not appear a legitimate argument to further postpone the adoption of the necessary legislation to protect Dutch citizens and the environment from the harm caused by floating degassing.

3) Finally, the letter by the Minister states that the Netherlands fulfils its human rights obligations by having initiated the CDNI 2017 Amendments (Met betrekking tot de opmerking in het onderzoek van de Erasmus Universiteit dat in strijd wordt gehandeld met het mensenrechtenverdrag merk ik op dat Nederland de initiator was van de opname van een ontgassingsverbod in het Scheepsafvalstoffenverdrag en dat de regelgeving klaarligt voor implementatie. Nederland heeft dus zijn verantwoordelijkheid op dat gebied genomen.) It might be true and laudable that the Netherlands has taken an active role towards the adoption of the Amendments. Yet, **the mere act of negotiating and ratifying a convention is unlikely to satisfy the duty of care in this case. Likewise, it is hard to see how the fact that an**

implementing regulation is ready but not implemented can be equated to the respect of human rights obligations. If this would be the case, many governments could use international law and/or draft laws to dodge human rights obligations. The main question is whether the rights to life and to family life are sufficiently protected by the mere ratification or the existence of an implementing regulation.
Given the stalling situation around floating degassing and the fact that international treaties have been deployed as an argument not to act, it is questionable whether in this case the ratification and the existence of an implementing regulation could be considered as a sufficient condition to fulfil the human rights obligations.

In concluding this letter, we want to thank again the Minister for his effort to work on this dossier. We hope our contribution has helped this effort and demonstrated why the Dutch state can already act under international law and regulate floating degassing to protect public health and the environment. In fact, the Dutch state may have to do so in light of its human rights obligations. We remain available for further clarifications.

In faith,
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