

## The Impact Assessment Issue at IMO

### Summary:

This paper has been prepared to inform Pacific high ambition delegations to IMO negotiations GHG emissions reduction at ISWG11 and MEPC78 in 2022.

The International Maritime Organization (IMO) has agreed on a process to assess the impact of new GHG emissions reduction measures on member states. The current debate at IMO will determine the Impact Assessment (IA) process in which the measures would be tested against. This paper discusses the issue of IAs required for measures proposed under the IMO's *Initial IMO Strategy on reduction of GHG emissions from ships* (Initial Strategy)<sup>1</sup>. The Initial Strategy recognises that the impacts on states of a measure should be assessed and taken into account as appropriate before adoption of the measure. Definition and processes for preparing such IAs are unclear and have become somewhat weaponized by different negotiating blocs. One school of thought argues that the IA process should be an evolving one developed in parallel with the implementation of candidate measures while others argue that no measure should be agreed until the comprehensive IA is completed and the impacts fully understood and provided for. The issue is closely connected with the concurrent debate over delineating Disproportionate Negative Impacts (DNI) arising from measures and the type and degree of compensation that might be afforded those adjudged to incur DNI.

This paper also discusses the different types of impact assessments such as the Environmental Impact Assessment (EIA) versus the Regulatory Impact Assessment (RIA). IMO employs RIA which does not integrate environmental or social impacts into the assessment therefore a critique of this procedure is demonstrated. The paper concludes by providing a number of potential solutions in addressing the current shortfalls in the IMO's IA process which would be beneficial to SIDs and LDCs including Pacific Island states.

### Purpose of Paper

1. This Working Paper<sup>2</sup> has been prepared to provide background information and analysis to Pacific high ambition delegations and negotiators participating in ongoing negotiations at the International Maritime Organisation (IMO) negotiating Greenhouse Gas (GHG) emission reductions for international shipping<sup>3</sup>. At the same time, the content may be useful to inform other delegations and actors.
2. This paper discusses the issue of Impact Assessments (IAs) required for measures proposed under the IMO's *Initial IMO Strategy on reduction of GHG emissions from ships* (Initial Strategy)<sup>4</sup>. Definition and processes for preparing such IA's are unclear and has become somewhat weaponized by different negotiating blocks, with some (including Pacific high ambition delegations) arguing the IA process should be an evolving one developed in parallel with the implementation of candidate measures, others arguing that no measure should be agreed until the comprehensive IA is completed and the impacts fully understood and provided for. The issue is closely connected with the concurrent debate over delineating Disproportionate Negative Impacts (DNI) arising from measures and the type and degree of compensation that might be afforded those adjudged to incur DNI<sup>5</sup>.
3. The discussion is further complicated by disagreement between the major blocs as to whether IA's should only consider potential negative, as opposed to potential positive, effects, with developed

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<sup>1</sup> MEPC 72 adopted resolution MEPC.304(72) to confirm the Initial Strategy in April 2018

<sup>2</sup> This working paper is authored by Pierre-Jean Bordahandy, Peter Nuttall, Alison Newell and Maria Sahib. It is one of a series of MCST working papers to inform Pacific high ambition delegations participating in IMO negotiations on emission reduction and has been prepared with financial support from [Ocean Conservancy](https://oceanconservancy.org/). See <https://mcst-rmiusp.org/> for additional information. The paper will be revised for peer-reviewed publication. All opinions expressed are those of the authors. This working paper has been prepared with financial support from Ocean Conservancy.

<sup>3</sup> Corbett J et al (2020) <https://www.tandfonline.com/doi/abs/10.1080/09644016.2019.1705057>. In 2015, RMI led a high-level Pacific diplomatic mission to IMO to call for decarbonization targets commensurate with 1.5 degree. This high ambition coalition has continued to advocate for the strongest possible measures in IMO since.

<sup>4</sup> MEPC 72 adopted resolution MEPC.304(72) to confirm the Initial Strategy in April 2018

<sup>5</sup> Disproportionate Negative Impacts (DNI) is the subject of a parallel MCST Briefing Paper.

economies arguing all impacts should be weighed and emerging economies arguing that only negative effects should be assessed in this process. The issue of DNI is in danger of being conflated with the debate over the role of the Principle of Polluter Pays, provision for the principle of CBDR-RC, in particular in relation to the dispersal of revenues arising from measures, and the IMO's unique convention of No More Favorable Treatment (NMFT) between ships/flags.

4. Ultimately, the IA process needs to reflect accurately the overarching principles at international law under which the IMO's emissions reduction strategy is being constructed. The guiding principles referenced in the initial Strategy are unclear and ambiguous and, in regard the Principle of Precautionary Approach, diametrically opposed in its IMO definition to other UN agencies<sup>6</sup>.
5. The issues surrounding IAs will arise throughout the 2022 IMO negotiating sessions. The process to date has clearly been unsatisfactory and the subject of long debate in relevant IMO negotiation sessions. In recognition of this, the IMO Secretariat has designated a 'lessons learnt' exercise, commencing with an Ad Hoc Experts Working Group prior to ISWG11. The debate over IA and definition of DNI will greatly influence the outcome and progress of the sessions on Mid/Long-Term Measures at the Intercessional Working Group meetings and MEPC.
6. Pacific states are heavily invested in this issue. The Pacific high ambition bloc was central to the discussion on IA when it was formed under the Initial Strategy, with RMI, Tonga and Solomon Islands in particular pressing for recognition of the unique issues facing our international shipping dependency. Pacific SIDS will clearly be amongst the most heavily affected if abatement measures for shipping emissions generate negative impacts on states. At the same time, these states are pressing for the highest ambition measures possible to maintain a 1.5 agenda as quickly as possible. Ongoing delays in agreeing the IA process associated with such measures pose a high risk to progress.
7. The IMO's initial strategy is predicated on a design of short-term (2018-2023), mid- (2023-2030) and long-term measures (2030-2050). With the short-term measure now agreed with only marginal effectiveness on total emissions projected<sup>7</sup>, it is clear that a 1.5 agenda now demands that the mid-long-term measures comprise a basket consisting of, inter alia, a universal GHG levy followed by agreed fuel standards<sup>8</sup>. As the process is currently structured, each individual measure proposed requires an initial assessment and then agreed candidate measures require development of individual comprehensive IAs.
8. This paper argues this is not efficient or effective. We invoke the agreed principle of an evidence-based approach to propose that the MEPC first agree the necessary basket of measures now required to meet the revised IMO targets<sup>9</sup> and then contract UNCTAD to undertake a single comprehensive IA of the agreed basket as was successfully done for the short-term measure. As the measures are all proposed to be part of an overall strategy comprising multiple measures that will be implemented in parallel to each other, the impacts of any measure will be relative and affected by the implementation of all other measures. No logic is found in preparing individual IAs for individual measures in isolation. Evoking the principle of the precautionary approach as articulated under UNFCCC processes, we argue it is not necessary for the IAs to be fully determined prior to agreeing the selection of mid-term measures and the design of their implementation. We expect that the findings of the IA, based by necessity on assumptions and modelling, will be further refined and adjusted through monitoring and evaluation of

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<sup>6</sup> See Nuttall P et al, 2021 <https://repository.usp.ac.fj/12848/> and Columbia Law School White Paper (2021) [https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3753&context=faculty\\_scholarship](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3753&context=faculty_scholarship) for discussion and analysis on the initial legal principles pertaining to MBMs at IMO.

<sup>7</sup> Comber, B (2018), Relating short-term measures to IMO's minimum 2050 emissions reduction target, ICCT, [https://theicct.org/wp-content/uploads/2021/06/IMO\\_Short\\_term\\_potential\\_20181011.pdf](https://theicct.org/wp-content/uploads/2021/06/IMO_Short_term_potential_20181011.pdf)

<sup>8</sup> <https://www.u-mas.co.uk/new-study-suggests-a-multi-pronged-policy-approach-can-close-the-competitiveness-gap-between-fossil-and-zero-emission-fuels-while-enabling-an-equitable-transition/>

<sup>9</sup> The 2018 Initial Strategy comprised on an overall reduction target of 'at least' 50% by 2050. The Initial Strategy agrees that the transition pathway must be evidence based. Since the Initial Strategy was agreed, IPCC has confirmed current science (including the IPCC 1.5 and AR6 reports) as requiring far greater stringency in reduction targets to maintain a 1.5 degree guardrail. While the Pacific high ambition coalition failed to get agreement to its call at MEPC77 for a resolution on resetting the overarching target to 100% by 2050 (MEPC77/7/x), a clear majority of members have signalled that the target must be revised upward in the Revised Strategy in 2023.

the measures implementation in practice and therefore require flexibility, not rigidity, built into their design.

9. The issue of IAs will become increasingly technical over the course of the 2022 negotiations. Impact assessment theory and practice is a relatively new, imprecise and evolving science generally and for IMO in particular. It is important that delegations and negotiators are fully apprised on the origins of this discussion at IMO (and its more broader context) as the definitions applied this year will have far reaching consequences for the matters of prime concern to the Pacific, in particular the level of ambition and the definition of “equitable transition”.

### Context

10. As early as 1995, the Conference of the Parties (CoP) to the United Nations Framework Convention on Climate Change (UNFCCC) asked the convention’s Subsidiary Body for Scientific and Technological Advice (SBSTA) to address the issue of allocation and control of emissions from combustion of international bunker fuels. At SBSTA 4 in 1996, the Secretariat presented a paper, which included eight options for allocation of shipping emissions<sup>10</sup>.
11. The IMO is a specialized UN agency comprising 174 member states with a broad global mandate to regulate international shipping, including the effects arising from the impact of shipping’s activities on the environment<sup>11</sup>. IMO’s leading instrument in relation to the environment is the MARPOL Convention,<sup>12</sup> which is the vector chosen to address the issue of GHG reduction in the context of shipping.
12. The IMO published its first GHG report in 2000<sup>13</sup>. In 2003 the IMO adopted resolution A.963(23) on IMO policies and practices related to the reduction of greenhouse gas emissions from ships which urged the Marine Environment Protection Committee (MEPC) to identify and develop the mechanisms needed to achieve the limitation or reduction of GHG emissions from international shipping. A.963(23) specifically mandated MEPC with “the evaluation of technical, operational and market-based solutions[emphasis added]”<sup>14</sup>.
13. In 2006/07 IMO began considering proposals from members for measures to abate shipping emissions of GHG (as well as SOX and NOX). Norway proposed establishment of a GHG emission fund in MEPC56/4/9<sup>15</sup> and Denmark proposed MEPC57/4/4, a basket approach comprising a mandatory CO2

<sup>10</sup> Kågeson, P, Linking CO2 emissions from international shipping to the EU ETS, Nature Associates. July 2007.

<http://www.natureassociates.se/wp-content/uploads/2011/03/Linking-CO2-Emissions-from-International-Shipping-to-the-EU-ETS.pdf>

<sup>11</sup> Convention on the International Maritime Organization Geneva, 6 March 1948 – Consolidated text available in IMO Basic Documents (2018 edition) -ISBN 978-92-801-1714-1 – Electronic version reference EC001E includes the April 2020 supplement. “PART I - Purposes of the Organization - Article 1 - The purposes of the Organization are: (a) To provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters related to the purposes set out in this Article.” This is reiterated in IMO’s mission statement:

<https://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx>

<sup>12</sup> IMO – MARPOL Convention at UN Treaty Collection

<https://treaties.un.org/doc/Publication/UNTS/Volume%201340/volume-1340-A-22484-English.pdf>

“MARPOL Article 1. General Obligations Under The Convention - ( 1) The Parties to the Convention undertake to give effect to the provisions of the present Convention and those Annexes thereto by which they are bound, in order to prevent the pollution of the marine environment by the discharge of harmful substances or effluents containing such substances in contravention of the Convention.”

<sup>13</sup> Study of greenhouse gas emissions from ships. Final report to the International Maritime Organization. Issue 2, 31 March 2000.

<sup>14</sup>[https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.963\(23\).pdf](https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.963(23).pdf)

<sup>15</sup> MEPC 56/4/9, Prevention of air pollution from ships. Elements of a possible market-based CO2 reduction scheme, Norwegian authorities, May 2007.

design index for new ships and a levy on marine bunker primarily for acquiring CO2 emission reductions through the purchase of CO2<sup>16</sup>.

14. In similar timeframes, the EU began to assess the potential options for including shipping within its ETS, confirming in April 2007 that it would propose adding shipping companies to the European Union Emissions Trading Scheme (ETS) rather than wait for action at international level<sup>17</sup>.

#### Reference to Impact Assessment in previous IMO processes

15. It is thought the 2008 Danish sponsored bunker fuel levy is the first time an IMO emission reduction measure proposal included reference to impact assessments. In MEPC 57.Inf.13., at section 3, entitled “Impact and Implementation Assessment” and using the OECD study completed in cooperation with the Annex I Expert Group on the UNFCCC<sup>18</sup> and the first IMO GHG study work on impacts as its foundation, the submission refers to adopting “basic criteria” for the purpose of analysing the impact of the proposal and principles for determining evaluation, namely:

- Does the proposed levy scheme warrant a commercially level playing field?
- Does the proposed levy scheme enable and facilitate efficient international trade?
- Does the proposed levy scheme cater to a need for simple and fraud free implementation and operation?
- Does the proposed levy scheme drive and promote investments in emission reducing technology, or otherwise impact positively on CO2 emissions?
- Does the proposed levy scheme promote optimized technical, operational and commercial ship deployment practices?
- Does the proposed levy scheme cater to a need for accomplishment of the goals at minimum overall cost?
- Does the proposed levy scheme provide a predictable long-term framework?
- Does the proposed levy scheme appear legally acceptable with respect to international legislation?

16. The resultant initial IA contained in MEPC57.Inf.13 was very light, focussing primarily on the measures potential to reduce effects on the environment and the trade and cost barriers to states. Some paragraphs are used for a largely qualitative analysis to comment on the various criteria before concluding broadly that:

- A levy applied to marine bunker is, in general, not likely to have a significant impact on total emissions of CO2 from international shipping but can be utilized to achieve significant CO2 emission reductions elsewhere through the purchase of CO2 credits.
- funds generated by a bunker levy potentially have a significant disruptive impact in the existing carbon markets and further economic modelling and analysis is required to evaluate this in detail.
- The establishment of a transparent and fraud free levy collection, transfer and disbursement system appears to be complex, but possible.
- The principles of no more favourable treatment must be applied to preclude any non-participating countries potentially providing a source of bunker with no levy imposed.

17. IMO work on GHG reduction measures continued in the period 2008-13 where the MEPC’s attention turned to the contested discussions on Market-based Measure (MBM) designs for shipping. Ultimately ten separate proposals from various consortia of sponsors were submitted and MEPC 60 determined to undertake a feasibility study **and impact assessment** of all the market-based measure proposals submitted in accordance with the work plan<sup>19</sup> for further consideration of MBMs [emphasis added]. An

<sup>16</sup> Prevention of air pollution from ships. MEPC 57/4/4., Danish authorities, May 2008

<sup>17</sup> Kågeson, P, Linking CO2 emissions from international shipping to the EU ETS, Nature Associates. July 2007.

<http://www.natureassociates.se/wp-content/uploads/2011/03/Linking-CO2-Emissions-from-International-Shipping-to-the-EU-ETS.pdf>. It is notable that the EU analysis does not include any reference to an IA of the proposal.

<sup>18</sup> Special issues in carbon/energy taxation: marine bunker fuel charges. OCDE/GD(97)/77, OECD 1997.

<sup>19</sup> MEPC 59/J/10

Expert Group on Feasibility Study and Impact Assessment of Possible Market-Based Measures (2010–2013) was established for this purpose.

18. The Expert Group was provided, *inter alia*, with the following Terms of Reference:
  - .1 The scope of the feasibility study and the impact assessment is to review the practicability of implementing the various options for a MBM that have been proposed to the Committee as referred to in paragraph 2.3 above.
  - .2 The study and assessment referred to in paragraph 2.4.1 above shall also aim to identify for each proposed MBM; the reduction potential on GHG emissions from international shipping, its impact on world trade, and the shipping industry, and the maritime sector in general, giving priority to the maritime sectors in developing countries, as well as recognition of the maritime sector in the global efforts to reduce the GHG emissions.
  - .3 The study/assessment carried out shall provide information on how the difference in the socioeconomic capability between developing and developed states, as well as the special needs and circumstances of developing countries, can be addressed by each different MBM proposal.
19. The Expert Group and subsequent MEPC meetings failed to reach consensus, mainly divided along the heavily contested firewall of Kyoto Accord Annex 1 and non-Annex 1 countries with debate pivoting over who should bear the costs involved and who should receive benefit. In 2013 the IMO determined to abandon the debate on MBMs for the foreseeable future.
20. MEPC61 in 2010 considered the work of the Expert Group on Feasibility Study and Impact Assessment of possible Market-based Measures<sup>20</sup>. Although the Expert Group terms of reference refer to IAs of MBMs, only two such assessment are actually detailed and overall there is little more than passing reference to IAs<sup>21</sup>.
21. At para 1.51 there is references to an impact assessment of the proposed MBMs by the Indian National Shipowners' Association with findings that implementation of technical and operational measures to reduce fuel consumption would result in substantial cost savings and reduce GHG emissions but noting ship operators would face challenges in implementing mitigation measures, including access to technology and additional finance.
22. MEPC 60/4/54, submitted by Germany, was entitled “Impact Assessment of an Emissions Trading Scheme with a particular view on developing countries”. The IA considered impacts on transport costs by ship and cargo types on the shipping sector and on the GDP of five regions (but not the impact on states).
23. Ultimately the MEPC did not require a comprehensive impact assessment of any of the measures then under consideration. Psaraftis et al (2021) recall a proposal by Andreas Chrysostomou, the then chairman of MEPC who was also the chairman of the Expert Group on MBMs (2010–2013), for such an impact assessment study to be carried out but this was turned down by the Committee<sup>22</sup>.

#### **Impact Assessments under the Initial Strategy**

24. In 2015, Pacific high ambition members called for IMO to establish hard targets for decarbonisation under submission MEPC68/5/1. The MEPC deferred to await the outcome of COP21 at Paris. In 2017, IMO committed to developing a Roadmap for Reduction of GHG Emissions from international Shipping and in 2018, MEPC confirmed an Initial Strategy would be developed of short, mid and long-term measures. The initial Strategy is scheduled to be revised in 2023.
25. In the lead up to adoption of the Initial Strategy, the Pacific high ambition coalition advocated strongly that their states unique characteristics and shipping scenario needed to be recognised and provided for. In addition to the recognition that such states already pay a disproportionately high price for

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<sup>20</sup> MEPC 61/INF.2 Full report of the work undertaken by the Expert Group on Feasibility Study and Impact Assessment of possible Market-based Measures. <http://martrans.org/documents/2009/air/MEPC61-INF2.pdf>

<sup>21</sup> The term “Impact Assessment appears 24 times in the 318 page report, 15 references are to the term in titles and only 9 times in the text of the report.

<sup>22</sup> Psaraftis, H.N., Zis, T., and Lagouvardou, S. (2021), A comparative evaluation of market based measures for shipping decarbonization. *Maritime Transport Review* 2. <https://doi.org/10.1016/j.martra.2021.100019>



shipping connectivity whilst enjoying the lowest connectivity index ranking of all states, they successfully argued for inclusion of criteria that reflected the critical role of shipping in providing transport security for a wide range of essential goods and services, including security of food and essential commodity supply (including medical supplies, fuel and all manufactured goods) and the critical role dependable and affordable shipping plays in the ongoing and continuous response to natural disasters that the region increasingly faces<sup>23</sup>. This led to the inclusion of specific criteria on food and essential supply security and natural disaster response within the list of eight criteria to be assessed under the initial IA procedures as set out in MEPC.1/Circ. 885 Procedure for Assessing Impacts on States of Candidate Measures issued in May 2019.

26. MEPC.1/Circ.858 sets out a four-step process: initial assessment, commenting documents, proponent's response, comprehensive assessment. At para 5, it states that the impact assessment should be undertaken in parallel with the consideration and development of a candidate measure. At para 17 it states that once the impact assessment is completed, and disproportionately negative impacts assessed and addressed, as appropriate, the measure may be considered for adoption. This has been interpreted by a bloc of largely emerging economies as meaning that no measure can be adopted until the comprehensive IA and the compensatory mechanism for DNI arising from each individual measure is agreed by the Committee.
27. Pacific high ambition delegations have consistently argued that the IA process needs to be flexible and adaptative. While it is critical that the impacts of measures are accurately assessed and, where appropriate, disproportionate negative effects on states are avoided, remedied or mitigated, the impact assessment process should not be used to delay development and implementation of the measures needed to achieve a 1.5-degree compatible decarbonisation transition. As discussed in greater detail below, impact assessments of regulatory measures is an emerging and imperfect practice and impact assessments as they apply to shipping decarbonisation measures are only just now being considered and evaluated.
28. It is likely the IA process and methodology will need further refinement as measures are implemented and the results monitored. Deferring development and implementation of core candidate mid and long-term measures until IA processes are finalised is incompatible with a science-based approach (which demands the highest possible ambition from all emitting sectors now) or with a normally held definition of the Precautionary Approach Principle<sup>24</sup>. Since the Rio Summit in 1992, this principle recognises the need to take necessary action to protect the environment, even when our knowledge of the projected outcome is imperfect.
29. In recognition of these matters, Solomon Islands and Tonga have twice proposed practical methods to work around the issue of imperfect knowledge of impacts, primarily by inserting review processes into the IA to allow for refinement and adjustment as data on the scale, range and type of impact generated by the measures is accrued and analysed. This approach relies less on obtaining all data before acting and more on adherence with the guiding principles under which the Strategy is being implemented. As discussed elsewhere, the current definition of the Guiding Principles is ambiguous and unclear<sup>25</sup>.

### Where does the IMO IA process come from?

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<sup>23</sup> Pacific island states are the most exposed countries in the world to natural disasters including cyclones, droughts, earthquakes, volcanic eruptions, floods and storm surges. Many Pacific states, such as Tonga, are in a perpetual state of disaster preparedness and response and large portions of the national economies are tied to repaying debt from such events.

<sup>24</sup> Columbia Law School White Paper (2021)

[https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3753&context=faculty\\_scholarship](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3753&context=faculty_scholarship) The principle is enshrined in the Rio Declaration, which provides: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." The principle has been incorporated into the UNFCCC and other multilateral treaties, and recognized by at least one international court. In the specific context of IMO resolutions, the precautionary principle is discussed in juxtaposition with the need for evidence-based decision making".

<sup>25</sup> See Nuttall P et al, 2021 <https://repository.usp.ac.fj/12848/> and Columbia Law School White Paper (2021) [https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3753&context=faculty\\_scholarship](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3753&context=faculty_scholarship) for discussion and analysis on the initial legal principles pertaining to MBMs at IMO.

30. Whilst IA are relatively new and untested in IMO processes, they are well established in many other sectors. In their earliest form, impact assessments were meant to assess the impact of human activity on the environment. The International Association for Impact Assessment (IAIA) defines an **Environmental Impact Assessment (EIA)** as "*the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made*".<sup>26</sup>
31. EIA's are well understood and are principally employed in any industry which activity is known or likely to have an impact on the environment. There are existing established metrics and methodologies for measuring the various impacts an activity may incur in this context. The classic example of this is in the mining industry where each mining project has to be backed with a EIA.
32. The actual content of the EIA varies from country to country and from activity to activity. So there is a range of assessment processes that range from EIA with minimal requirements to IEA that are particularly stringent. Some of the most stringent EIA are certainly those required during a merger acquisition of a company, especially noticeable in extractive industries under the duty of disclosure process. Such EIA are often extremely rigorous because the acquirer needs a full understanding of the liability attached with the previous exploitation of the resources.
33. However, the IA process proposed at IMO is not an EIA. The Initial Strategy calls for assessment of the impacts of a regulatory measure on States – not on the environment. In this regard it is a **Regulatory Impact Assessment (RIA)**, a very different type of assessment. The aim of a RIA is to assess the impact of any policy or regulatory decision **before they are introduced**. Here technicians talk about assessment **ex ante** (before the introduction of a measure) versus assessment of impact **ex post** (assessing the actually occurred measurable impacts of a regulation or policy).
34. The aim of an RIA is therefore substantially different from the aim of an EIA and the ambition and stringency of the assessment varies depending on the impacts that the RIA will consider. For instance, some RIA are limited to economic impact, whilst other purport to include socio-economic and other type of impacts.<sup>27</sup> It is therefore critically important to understand precisely the scope of a relevant RIA.

#### What is a Regulatory Impact Assessment?

35. It is important to understand the historical context to RIA in order to understand their development and reasons why they would be adopted or rejected. RIA involves a systematic appraisal of the costs and benefits associated with a proposed new regulation and evaluation of the performance of existing regulations<sup>28</sup>. The first occurrence of an RIAs are generally attributed to the Carter Administration (1978) in relation to "inflation". The RIA requirement was broadened during the Reagan administration, with **benefit-cost analysis** becoming the standard methodological approach. Another early adopter of a RIA requirement was Australia (1985). By 2000, 20 of 28 OECD countries had implemented RIA requirements<sup>29</sup> and currently, virtually all OECD countries use RIA. RIA requirements had also begun to be strongly promoted to its client countries by the World Bank. As a result, an increasing number of developing countries have now adopted RIA requirements.<sup>30</sup>

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<sup>26</sup> Principle of Environmental Impact Assessment Best Practice - International Association for I.A.(1999) [https://web.archive.org/web/20120507084339/http://www.iaia.org/publicdocuments/special-publications/Principles%20of%20IA\\_web.pdf](https://web.archive.org/web/20120507084339/http://www.iaia.org/publicdocuments/special-publications/Principles%20of%20IA_web.pdf)

<sup>27</sup> Australia Office of Best Practices (OBPR) - Published Impact Analyses <https://obpr.pmc.gov.au/published-impact-analyses-and-reports> In Australia, the RIS process involves extensive analysis of the underlying policy problem, the presentation and impact analysis of at least three viable solutions, and comprehensive stakeholder consultation. Policy proposals must also quantify the regulatory burden on individuals, businesses, and community organisations under the viable options. Following announcement of a decision, the impact analysis used to support Government decision-making is published online, as is OBPR's assessment of the quality of that analysis and the processes undertaken, for transparency purposes.

<sup>28</sup> Kirkpatrick, C, and D Parker (2004). "Regulatory impact assessment and regulatory governance in developing countries." *Public Administration and Development: The International Journal of Management Research and Practice* 24, no. 4: 333-344

<sup>29</sup> OECD (2002)Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance. p 45

<sup>30</sup> Ibid

36. RIA requirements have broadened in scope over time in many countries in which they have been adopted. Conversely, few if any countries have abandoned the use of RIA after having adopted it.<sup>31</sup> However, so far, the adoption of RIA has been confined mainly to OECD countries.
37. It is important to consider the abstract of the following research paper on “*Regulatory Impact Assessment in Mexico: A Story of Interest Groups Pressure*”.

*“Over the last decade, many developing countries have adopted the Regulatory Impact Assessment (RIA). Despite the promise of bringing economic development, the results have been largely disappointing. The conventional wisdom is that the lack of administrative capacity and data availability are the two main reasons behind this failure. However, an in-depth analysis of two recent high-impact RIAs performed by Mexican authorities reveals that regulatory capture might be an additional and significant problem.*

***In both cases, RIAs appear as merely instrumental to confer a scientific aura to the political rhetoric supporting a regulation that favoured a specific interest group. In this vein, absent a sufficiently strong system of checks and balances, a greater sophistication of government officials might paradoxically reduce accountability and transparency.”***<sup>32</sup>

38. This research suggests that RIAs are not necessary the complete tool they are often portrayed as and that the process of assessing the value of a policy or regulation through a RIA can be distorted. The **key** is therefore to understand what is a specific RIA aim and what are the factors and criteria that a specific RIA will take into consideration to assess what kind of impacts. In other words, the scope of the impacts considered will determine the effectiveness of an RIA.
39. The OECD defines “impact” in an RIA as:

*“Impact is the extent to which the intervention has generated or is expected to generate positive or negative, intended or unintended, higher-level effects.”*<sup>33</sup>

40. More interestingly, the European Commission defines an impact as:
- “The term impact describes all the changes which are expected to happen due to the implementation and application of a given policy option/intervention (such as investment in a Research Infrastructure and its activities). Such impacts may occur over different timescales, affect different actors and be relevant at different scales (local, regional, national and EU)”*<sup>34</sup>.
41. As discussed below, there are various ways a RIA scope of application can be defined so as not to include important impacts or to nominally include certain impacts but not fully and technically considering them through a lack of actual or adequate measurement. For our purpose it is therefore important to understand that in the context of identifying the Disproportionate Negative Impact in the context of the IMO, we will have first to understand what are the impacts that are to be considered in the first place.
42. In addition to the issue of determining or defining “impacts”, there is also the issue about capacity and data availability to conduct a proper RIA, now a very well recognised concern, especially in relation to poorer and smaller states. Furthermore, Pacific States, as with most developing countries, face additional logistical and capacity constraints in relation to the management and execution of RIA, as now flagged in repeated reports.<sup>35</sup>

<sup>31</sup> Reyes, R., Romano A. & Sottiolotta, C.E. (2015) Regulatory Impact Assessment in Mexico: A Story of Interest Groups Pressure, Law and Development Review Vol. 8 No 1, pp. 99-121. <https://doi.org/10.1515/ldr-2014-0030>

<sup>32</sup> ibid

<sup>33</sup> Elina Griniece, Jelena Angelis, Alasdair Reid – EFIS Centre - Silvia Vignetti, Jessica Catalano – CSIL - Ana Helman, Matias Barberis Rami – ESF - Henning Kroll – Fraunhofer ISI - Research Infrastructure Impact Assessment Pathways (RIPATHS) [https://ri-paths-tool.eu/files/RI-PATHS\\_Guidebook.pdf](https://ri-paths-tool.eu/files/RI-PATHS_Guidebook.pdf) referring to OECD/DAC Network on Development Evaluation Better Criteria for Better Evaluation - Revised Evaluation Criteria Definitions and Principles for Use at <https://www.oecd.org/dac/evaluation/revised-evaluation-criteria-dec-2019.pdf>

<sup>34</sup> (RIPATHS) Ibid referring to Chapter III Guidelines on impact assessment

<https://ec.europa.eu/info/sites/default/files/better-regulation-guidelines-impact-assessment.pdf>

<sup>35</sup> Delia Rodrigo - OECD Regulatory Impact Analysis in OECD Countries - Challenges for developing countries at <https://www.oecd.org/gov/regulatory-policy/35258511.pdf>



43. Finally, and for the same reasons as other impacts that are non-easily quantifiable in economic terms, the integration of environmental questions into RIA is not self-evident.<sup>36</sup> Paradoxically, that is likely to be the case in relation to the IMO's work on GHG.
44. As a result, it is fair to consider that RIA suffer the effect of a technological tool that has the appearance of scientific undeniable accuracy and exactitude but that, in fact, may be inadequate to assess many other important impacts and offer the possibility for policy makers and other stakeholders to obtain the result they wish. In this regard, RIA risks being used simply as proxy and is open to capture and distortion.
45. Where does this leave us in assessing the value and role of RIA in the current IMO Initial Strategy process? The literature of RIA use in other contexts suggests that it is at best an imperfect tool and at risk of providing a formal semi-scientific basis to avoid responsibility and liability for incorrect policymaking, as long as the agreed process has been followed. To put it bluntly, this is a victory of process and form over substance and reasoning. Perhaps the bigger flaw of RIA is not the RIA themselves, which we know will only give a partial view of an issue, but it is the use that is made of this tool. As Renda (2006) clearly infers;

*When it comes to regulatory impact assessment, the scientific ambition of economics is heavily challenged: a crystal ball enabling a full vision of the future social, environmental and economic impact of proposed regulations is nowhere to be found. After all, this brings bad news and good news. The bad news is that ex ante impact assessment is no panacea, and is doomed to be always found imperfect and – to a certain extent – arbitrary<sup>37</sup>.*

46. The finding is clearly that RIA needed to be treated as one tool, not an outcome, in an ongoing process of monitoring, evaluation and learning. It is important that, if we going to employ this tool in the context of the IMO's emissions reduction strategy, we understand the origins of the tool, its limitations (so we are not overly reliant on it) and the lessons learnt from its existing deployment in other environments.

### EU Impact Assessment Procedure, what precedents does this set?

#### What are the origins of the EU RIA experiment?

47. The EU appears to have embraced the RIA system wholeheartedly particularly since the Constitutional crisis of 2005. At the time, the French and the Dutch voted NO by referenda to the adoption of a European Constitution.<sup>38</sup> There is a large amount of literature on the topic, but one of the main causes for the rejection of the further integration of the European Union is due to the inadequacy of some EU regulations.<sup>39</sup> From then on, the idea was to try to reconcile EU businesses and citizen with the EU project by generating better regulation through rigorous assessment that would benefit them directly and as a result of which they would increase adherence to the European project.<sup>40</sup>
48. However, the already narrow diagnosis of the EU Constitution failure as a need for better and fairer regulations found very quickly an even narrower technical implementation in the form of regulations and policies that would essentially promote competitiveness.<sup>41</sup>

<sup>36</sup> Klaus Jacob, Sabine Weiland, Johanna Ferretti, Dirk Wascher, Daniela Chodorowska - OECD - integrating the environment in regulatory impact assessments <https://www.oecd.org/gov/regulatory-policy/Integrating%20RIA%20in%20Decision%20Making.pdf>

<sup>37</sup> Renda A (2006) *Impact Assessment in the EU: The State of the Art and the Art of the State*. Available from: [https://www.researchgate.net/publication/260400094\\_Impact\\_Assessment\\_in\\_the\\_EU\\_The\\_State\\_of\\_the\\_Art\\_and\\_the\\_Art\\_of\\_the\\_State](https://www.researchgate.net/publication/260400094_Impact_Assessment_in_the_EU_The_State_of_the_Art_and_the_Art_of_the_State) [accessed Jan 19 2022].

<sup>38</sup> SciencePo Bibliothèque - The Dutch and French NOs to the referenda on the Treaty establishing a Constitution for Europe (Mai 2019). <http://dossiers-bibliotheque.sciencespo.fr/une-vie-politique-europeenne-european-political-life/dutch-and-french-nos-referenda-treaty>

<sup>39</sup> OECD - Better Regulation in Europe - Executive Summaries - p.24 <https://www.oecd.org/gov/regulatory-policy/45079126.pdf>. See also Laursen, F (2008), *The Rise and Fall of the EU's Constitutional Treaty*, Leiden, Nijhoff. See also Lionel Beehner - Council on Foreign Relations - EUROPEAN UNION: The French & Dutch Referendums - <https://www.cfr.org/backgrounder/european-union-french-dutch-referendums>

<sup>40</sup> *ibid*

<sup>41</sup> The European Commission Action Plan on simplifying and improving the regulatory environment (COM(2002) 278) was part of a wider better regulation package launched in June 2002. See also the European Commission Communication,

### The EU REFIT program - The EU Better Regulation Toolbox & Better Regulation Guidelines, the Handbook on Trade Sustainability Impact Assessment

49. Following the better regulation agenda, the EU has adopted the REFIT program, which aims at making sure that all EU regulations and legislations are “fit for purpose”. Specifically, the REFIT program aims to achieve that, “[p]ursuant to the better regulation Guidelines, all evaluations and fitness checks should assess the performance of an existing intervention against the same five criteria of effectiveness, efficiency, relevance, coherence and EU added value.” The REFIT program is detailed in the better regulation toolbox, which also details the process of impact assessment in the EU.<sup>42</sup> This agenda has shaped all EU RIA development since.
50. The 2021 version of the toolbox has revised the content and operation of Impact assessment in a document that has inflated from 540 pages in 2017 to 604 pages in 2021. The 2021 version of the toolbox provides ever more precise direction on identification of impacts, competitiveness, research an innovation etc.<sup>43</sup> In parallel, the EU has also created a set of guidelines on better regulations, which also provide some elements in relation to impact assessments.<sup>44</sup>
51. Additionally, but independently the EU also has a specific Sustainability Impact Assessment (SIA) process for trade agreements in order to assess their sustainability.<sup>45</sup> The relationship and interaction between the EU RIA and SIA is not entirely clear, nor is it clear which instrument would have precedence in the case of conflict under EU law.

#### Socio Economic Impact assessed in the EU RIA

52. Despite having access to all these methodologies developed over nearly two decades to assist RIA processes now contained in the EU toolbox, it is observed that although all sorts of impacts are encouraged to be assessed, it is very likely that only a few of them, and these being the most easily assessable, are considered.
53. For instance, the socio-economic impacts considered under the EU RIA procedure, appear to consist essentially in assessing the economic implications<sup>46</sup>. It is worth noting however, that the SIA on the other hand do have a strong focus on economic, social, human rights and environmental analysis.<sup>47</sup> Under the SIA process, there is a requirement to assess the impact on the environment (within the EU and outside) of agreements that the EU enters into, in its domain of competence presumably. The SIA handbook, for instance, suggests that:

*“International trade can serve as an important catalyst for global climate action and environmental protection. SIAs should contain a detailed assessment of likely environmental impacts of the trade agreement under negotiation.”<sup>48</sup>*

Furthermore, the European Commission has adopted a proposal in July 2021 for a “Carbon Border Adjustment Mechanism” (CBAM), whose function is to prevent “carbon leakage” resulting from EU regulation generation of relocated EU Carbon emissions to non-EU countries. In the Commission’s own words:

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“Better regulation for growth and jobs in the European Union”, COM(2005)97, 16 March 2005. In the press release, the Commission introduced the equation of “Less red tape = more growth” (see Press Release, IP/05/311, 16 March 2005). For a description of the Commission’s new approach, see section 2.3. See also Renda A (2006) Ibid.

<sup>42</sup> [https://ec.europa.eu/info/law/law-making-process/better-regulation-why-and-how\\_en](https://ec.europa.eu/info/law/law-making-process/better-regulation-why-and-how_en)

<sup>43</sup> EU Better regulation "Toolbox" 2021 [https://ec.europa.eu/info/sites/default/files/br\\_toolbox-nov\\_2021\\_en\\_0.pdf](https://ec.europa.eu/info/sites/default/files/br_toolbox-nov_2021_en_0.pdf)

<sup>44</sup> Better Regulation Guidelines - [https://ec.europa.eu/info/sites/default/files/swd2021\\_305\\_en.pdf](https://ec.europa.eu/info/sites/default/files/swd2021_305_en.pdf)

<sup>45</sup> Handbook for trade sustainability impact assessment second edition [https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc\\_154464.PDF](https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.PDF)

<sup>46</sup> The aviation and maritime sectors and the EU ETS: challenges and impacts – Study -

<https://research4committees.blog/2021/10/25/the-aviation-and-maritime-sectors-and-the-eu-ets-challenges-and-impacts-study/>

See also Research for TRAN Committee – The aviation and maritime sectors and the EU ETS: challenges and impacts.

[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/690897/IPOL\\_STU\(2021\)690897\(SUM01\)\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/690897/IPOL_STU(2021)690897(SUM01)_EN.pdf)

<sup>47</sup> Handbook for trade sustainability impact assessment second edition Ibid P. 19.

<sup>48</sup> Ibid P. 19

*“On 14 July 2021, the Commission adopted a proposal for a new Carbon Border Adjustment Mechanism which will put a carbon price on imports of a targeted selection of products so that ambitious climate action in Europe does not lead to ‘carbon leakage’. This will ensure that European emission reductions contribute to a global emissions decline, instead of pushing carbon-intensive production outside Europe. It also aims to encourage industry outside the EU and our international partners to take steps in the same direction.”<sup>49</sup>*

Interestingly the CBAM initiative has itself been subject to an impact assessment process.<sup>50</sup>

This would then raise the question of whether MARPOL ANNEX VI would need to be reassessed if an EU SIA or a CBAM type of process was required to ensure adequate protection from environmental income and to ameliorate the risk of carbon leakage.

### EU Impact Assessment Procedure in relation to their ETS

54. For our purpose and in the context of GHG emissions, one of the best ways to evaluate the operation of the EU Impact Assessment Procedure is to briefly analyse its application to their proposed Emission Trading Scheme (ETS). The EU ETS has been in existence since 2005, being subject in this time to regular comments, reviews, and criticism. In relation to the RIA of the EU ETS by the EU itself, the key document is the 2020 *Commission Staff Working Document Impact Assessment* and notably *Chapter 6* of that document (page 48-112).<sup>51</sup>
55. A wide range of impacts are considered under that assessment, inter alia: impact on policies interaction, impact on GHG target, impact on renewables, impact on sectorial transition, specific environmental impacts, air pollution and health, impacts on bio energies (synergies and trade off), energy system impacts, macro-economic impacts, COVID 19 impacts, social impact and just transition, impact on households and environmental impacts of policy aspects.
56. As a general comment on the RIA of the EU ETS, it appears that the study finds there is no or very minimal impact on all the areas considered. Beyond the fact that this seems to be a trend as far as RIA are concerned, the OECD for instance found that EU Emissions Trading System does not hurt firms' profitability.

*“The Joint Impact of the EU ETS on Carbon Emissions and Economic Performance compares financial data from around 2,000 firms operating ETS-regulated facilities across the EU with data from similar-sized unregulated firms from the same countries and sectors. It finds that ETS regulations had no negative effect on revenue, profits, fixed assets or jobs, and, in fact, firms subject to the ETS tended to perform better.”<sup>52</sup>*

57. Whether this is because the relevant industries have been able to transition successfully, or whether it is because the ETS revenue and compensation mechanism has been able to minimise the impact would require a better understanding of the ETS, beyond the scope of this study. Alternatively, one might attribute the lack of substantial impact in that assessment exercise to the fact that it had very limited scope of analysis as it concentrated on carbon emissions and economic performance.<sup>53</sup>
58. The EU ETS RIA discussed here appears quite extensive and thorough, at least nominally. However, a lot of the analysis provided under this RIA has been through modelling and in absence of specific actual

<sup>49</sup> European Commission – EUGreenDeal – Carbon Adjustment Mechanism [https://ec.europa.eu/taxation\\_customs/green-taxation-0/carbon-border-adjustment-mechanism\\_en](https://ec.europa.eu/taxation_customs/green-taxation-0/carbon-border-adjustment-mechanism_en)

<sup>50</sup> European Commission, Directorate-General for Taxation and Customs Union, Carbon border : adjustment mechanism, Publications Office, 2021, <https://data.europa.eu/doi/10.2778/584899>

<sup>51</sup> Commission Staff Working Document Impact Assessment (2020) - Accompanying the document communication from the commission to the European Parliament, the Council, the European Economic and social committee and the committee of the regions - Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people. [https://eur-lex.europa.eu/resource.html?uri=cellar:749e04bb-f8c5-11ea-991b-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:749e04bb-f8c5-11ea-991b-01aa75ed71a1.0001.02/DOC_1&format=PDF)

<sup>52</sup> <https://www.oecd.org/newsroom/eu-emissions-trading-system-does-not-hurt-firms-profitability.htm>

<sup>53</sup> Antoine Dechezleprêtre, Daniel Nachtigall and Frank Venmans (2020), The Joint Impact of the European Union Emissions Trading System on Carbon Emissions and Economic Performance, Economics Department Working Paper No. 1515 - [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP\(2018\)63&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2018)63&docLanguage=En)

data.<sup>54</sup> The modelling and metadata expand on situations based on various assumptions, which risk the overall accuracy of the RIA.

59. More importantly for our purpose, when it comes to the assessment of “*Social impacts and just transition of achieving combinations of GHG emission reduction, Renewable Energy Sources, and energy efficiency*”,<sup>55</sup> even at the EU level, with all the resources and skills available, the *ex ante* assessment is still subject to caution. Said differently, the social and just transition impacts are inadequately assessed compared to other, more economic focused impacts.
60. Lastly, the reading of the conclusion of the EU RIA in relation to social impacts illustrates that: a) only the pure economic and most particularly macro-economic impacts can be forecasted with some relevance, b) that the social impacts such as food security and standard of living are not correctly considered and that any lessons learnt in that respect are not likely to be transposable to Pacific states.<sup>56</sup>
61. There are a number of independent critical appraisal of the EU Impact Assessment procedure<sup>57</sup> or of its application to the ETS policy.<sup>58</sup> However, once again, most of them are limited to macro-economic considerations in relation to the ETS without discussing in depth the socio economic impacts.

*“The scenarios included in the IA tend to be technology-focused without addressing much the impact of potential societal changes, as well as missing a true vision for a circular economy by 2030”.*<sup>59</sup>

62. Incidentally, there are also many relevant analyses of the ETS itself which are worth considering. Some of them suffer the usual criticism of focusing solely on macro-economic impacts and competition.<sup>60</sup> Others however, provide acute description of the role of pressure groups and political economy on the design, operation and beneficiaries of the ETS system.<sup>61</sup>

#### Characteristics of the IMO Impact Assessment for GHG measures

63. In the light of the above commentary, the following observations that can be made in relation to the IMO proposed RIA procedure contained in MEPC.1/Circ. 885:
- The procedure does not define the word impacts, which might leave us to refer by default to the OECD definition<sup>62</sup>, which is potentially problematic for the Pacific, requiring them to insist on considering impacts that cannot be directly or easily quantifiable in economic terms..
  - The formulation of “*particular attention should be paid to the needs of SIDS and LDCs*” suggest that these states would have to evidence those needs.
  - The notion of Disproportionate Negative Impact suggest that there is a threshold below which impacts will not be considered as a basis for a readjustment. The question is then whether the threshold is the same for all or if there are differentiations.

<sup>54</sup> Commission Staff Working Document Impact Assessment (2020)

Ibid. AINS model, E3ME and E-QUEST models, JRC-GEM-E3 model, GEM-E3-FIT model, etc Ibid at 6.5 page 84

<sup>56</sup> Commission Staff Working Document Impact Assessment, Ibid. Page 122-124

<sup>57</sup> Impact Assessment of European Commission Policies: Achievements And Prospects Statement of the EEAC Working Group on Governance - <https://www.oecd.org/greengrowth/40033017.pdf>

<sup>58</sup> Climate & Ecologic Institute - Analysing the Impact Assessment on raising the EU 2030 climate target [https://www.ecologic.eu/sites/default/files/publication/2020/eu2030-ia-analysis\\_final.pdf](https://www.ecologic.eu/sites/default/files/publication/2020/eu2030-ia-analysis_final.pdf)

<sup>59</sup> Ibid Page 4

<sup>60</sup> OECD / EU - the joint impact of the European union emissions trading system on **carbon emissions and economic performance** -

[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP\(2018\)63&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2018)63&docLanguage=En) “We find that the EU ETS has induced carbon emission reductions in the order of -10% between 2005 and 2012, **but had no negative impact on the economic performance of regulated firms.**”

<sup>61</sup> Verbruggen, A (2021) – A political Economy of the ETS – in Pricing Carbon Emissions - Routledge – 1st Ed. 2021 ISBN 9781003173816 <https://www.taylorfrancis.com/chapters/oa-mono/10.4324/9781003173816-7/political-economy-eu-ets-aviel-verbruggen?context=ubx&refid=800172e2-e6bc-4327-9d4d-f5188a4529f6>

- d. The RIA also assess the impacts on ships, whilst the process was meant to assess the impact on states. So this adds another inconsistency.
  - e. The process of inclusion or exclusion of the type of impacts that can be considered for the initial impact assessment is quite broad, however, they all have to:
    - i. Be quantifiable in economic terms and, more specifically, in terms of variation of Transport Cost, Trade and GDP. This greatly limits the scope of the type of impacts that can be considered.
    - ii. Impacts can be positive which opens the door for a positive impact on the environment to be used to offset the negative impact on a state, therefore nullifying the claim of a state for disproportionate negative impact. This is a particular risk for Pacific states, especially if the assessments of the positive impact is actually subjective as opposed to objective.
  - f. The procedure does not integrate environmental or social impacts into the assessment. This means that:
    - i. the actual value of a measure in terms of GHG emission reduction is not taken into consideration to assess the benefit of such a measure.
    - ii. The assessment just has to indicate **IF** the measure has some impact on Emissions.
    - iii. This results in the environmental impact of a measure not being taken into consideration to assess its value, which could lead to that measure being benchmarked against others, but it might be taken into consideration to moderate the disproportionate negative effect that a state might face.
64. The effect of the whole procedure and notably of paragraph 15 can be read as qualifying the needs of SIDS & LDCS requiring them to prove:
- a. The impact
  - b. Their needs and the impacts in relation to these needs
  - c. The disproportionate nature of these impacts
  - d. The assessment is conducted according to accepted methods of qualitative and quantitative assessment.

#### **Implications/Consequences of an IMO Impact Assessment for Pacific countries**

- 65. It appears the primary goal of the current IMO impact assessment process is to assess economic impacts and, more specifically, to determine if a proposed regulation will alter the competitiveness or comparative advantage that a member state currently has over its markets. The notion of disproportionate negative impact probably encapsulates this idea the best. Given that Pacific states have almost NO comparative advantage on their export markets, the exercise of the impact assessments in that respect could be futile for most export trade.
- 66. For import trade, Pacific states might be able to build on the food security and disaster relief notions. However, given the caveat of having to prove those “needs” in an acceptable quantifiable way as per the IA procedure, this might be difficult.
- 67. For all other impacts, such as socio-economic and others, their inclusion and recognition appears equally difficult. The fact that the impact of the measures on the environment is also not included suggests that it will be difficult to rank and support measures that are in the interest of Pacific states in relation to climate change. However, if positive impacts are considered for the assessments of a measure and for the DNI, this may make it a double punishment for Pacific states that will not be able to press for high ambition measures and will likely be penalised for any forecasted (ex-ante) positive impact that a measure might have where it applies.
- 68. It can be observed that the IMO appears to have operated a few in legal transplants or has at least made some of its original core principles to evolve in a “pro trade ideology” using the dedicated



terminology now enshrined at the World Trade Organisation it.<sup>63</sup> For one example, the “Principle of Non-discrimination”, contained in the IMO Constituting Convention article I,<sup>64</sup> which was written in 1948 at the start of the Cold War. With the passing of the time, the idea of “non-discrimination” appears to have mutated into the requirement of “No More Favourable Treatment”, which one might legitimately argue comes from the “General Most Favoured Nation Clause” requirement in the WTO-GATT Treaty.<sup>65</sup>

69. At WTO, both the “General Most Favoured Nation Clause” and the “Science-based measures” all have moderating factors and exceptions that have not been transplanted to IMO. For example:
- The GATT and other WTO instruments only apply to products and there is extreme reluctance in extending those requirements to services – such as shipping.
  - Not only does the GATT agreement accepts differential treatments in some cases,<sup>66</sup> but it also has a list of exceptions that allow countries to adopt discriminatory or anti competitive stands to protect the environment amongst other reasons (e.g. GATT Art XX –, SPS agreement, etc).<sup>67</sup>
  - The IMO providing a process for conducting RIA, without providing or considering the technical capacity of States, such as the Pacific, to conduct these.

In this context, it is possible to argue that the IMO has gone much further in the “pro trade stance” than any other UN organisation or International Treaty on Trade have been able to. Whether this is at the expense of the environment now remains the open question before MEPC. As discussed above, the IMO Constituting Convention in Article I gives mandate to IMO to protect the environment from shipping.<sup>68</sup> At question is whether that mandate has now mutated into a mandate to protect shipping trade above the environment.

70. The general observation made above can be extended to specific mandates, such as the one that the IMO has received from the UNFCCC.<sup>69</sup> As a candid legal comment, in Agency Law, the agent is bound by the mandate that the principal has provided and by the actual powers of the principal. In the context of the UNFCCC remit to address the GHG emission reduction issue for ships, the application of agency law would mean that the IMO is bound not only to reduce GHG emission as a first priority but to do so applying the rules that are applicable at the UNFCCC, which include Differentiation, CBDR-RC, Highest Possible Ambition, etc. This would also raise the question of the use of a RIA where the Principal does not use these tools, which are about preserving competition more than protecting the environment.

### Synthesis – Questions to be considered - Strategy

71. RIA are a simple analytical tool that has well known limits (inaccuracies, assumptions, inadequate to assess certain type of impacts, requiring expertise that most do not have, subject to groups of pressure, bias and distortion, etc.).

<sup>63</sup> VanGrasstek, C (2013), The History and Future of the World Trade Organization.

[https://www.wto.org/english/res\\_e/booksp\\_e/historywto\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/historywto_e.pdf)

<sup>64</sup> Convention on the International Maritime Organization Geneva, “Part I Article 1 - The purposes of the Organization are: (b) To encourage **the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination; assistance and encouragement given by a Government for the development of its national shipping and for purposes of security does not in itself constitute discrimination, provided that such assistance and encouragement is not based on measures designed to restrict the freedom of shipping of all flags to take part in international trade.**”

<sup>65</sup> [https://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm)

<sup>66</sup> WTO - Differential and more favourable treatment reciprocity and fuller participation of developing countries

[https://www.wto.org/english/docs\\_e/legal\\_e/enabling1979\\_e.htm](https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm)

<sup>67</sup> GATT Art. XX General Exceptions (b) necessary to protect human, animal or plant life or health;

<sup>68</sup> IMO Convention Art. I. See footnote number 11, “facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and prevention and control of marine pollution from ship”.

<sup>69</sup> IMO Video presentation on its environmental mandate.

<https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/Documents/IMO-UN%20context-4.mov>

72. The process of establishing the GHG reduction regulatory environment that the IMO has created is not conducive to an adequate debate on how to reduce GHG, but rather aims to protect global trade as the imperative.
73. The use of RIA as the primary, even sole, analytical tool in the context of the IMO negotiations on GHG reduction is questionable.
74. The effect of the RIA designed by the IMO on Pacific states is likely to:
  - a. Primarily highlight purely economic loss.
  - b. The purely economic loss that can be identified by Pacific states runs the risk of being offset by “ex-ante” forecasted positive impact, thereby drastically reducing or nullifying any Pacific claims to being disadvantage and penalised.
  - c. The existing disadvantage that the Pacific is subjected to in terms of disproportionately high transport costs will not be compensated.
  - d. Non quantifiable additional loss or disadvantage will not be adequately taken into consideration.
75. Pacific high ambition states have to now consider their options in relation to the IMO impact assessment process and the, as yet undefined, concept of disproportionate negative impact.
  - a. The Pacific now finds itself in a position where it has agreed, by consensus with the other IMO members, to the inclusion of an RIA process within the Initial Strategy which now has now shown itself to be deficient. This is particularly problematic in regard the presumed need for SIDS/LDCs to have to demonstrate or evidence the potential negative impacts on their States. Given the vexed and politically charged nature of the debate at IMO on IA to date, addressing for the issues of particular concern to SIDS/LDCs could easily be lost in the wider geo-political negotiations.
  - b. The Pacific has previously argued on various occasions that it should simply be held that SIDS/LDCs are assumed to be disproportionately disadvantaged as they are in other fora (e.g. Montreal Protocol, Vienna Convention, UNFCCC) and therefore not burdened with the need to validate or prove evidence of this. That this does not currently apply as of right is due to the concerns held over the unique IMO convention of NMFT. However, the convention of NMFT applies only to the need for consistency between FLAGS, yet in the RIA process it is being applied to the impacts on STATES.
  - c. One option for the Pacific might be to argue for a waiver of the IA on both that basis and on the grounds that the requirements on SIDS/LDCs is unconscionable (excessive) at public international equity law. We can also argue that we do not have the technical means or resource to deliver the IMO’s RIA procedure in regard proposals that SIDS/LDCs themselves might propose (such as the GHG levy proposal submitted by RMI/SOL) or to participate adequately in the RIA process of alternative submissions by other members, and would therefore be reliant on third parties to protect the Pacific’s position.
  - d. However, a waiver would be comparable to suggestions that we employ exemptions from measures for ships servicing SIDS/LDCs as an option for avoiding the impacts of measures on those states. This provides at best only short term relief and at worst increases the risk of increasingly stranded shipping asset being deployed on such routes with ultimately increased fossil fuel dependency and cost in the long term. A waiver would mask, not resolve the issues sustainably. We would effectively be just postponing the need for a long term solution for the scenario SIDS/LDCs now find themselves in.

#### **Recommended next priority actions**

76. A more comprehensive solution is obviously now required. We suggest this might comprise the following:

- i. **Resolve the data issue for SIDS/LDCs.** Consistently identified now for at least 15 years<sup>70</sup>, the lack of reliable and verifiable baseline data for Pacific states makes any analysis of potential impacts on our states extremely problematic and subjective. Our unique economies – extreme import/export imbalance and often dominated by primary resource extraction fees, out migration, aid and remittances with a high proportion of income targeted at debt servicing and disaster response – means we do not conform to the market economics of most global trading economies. Pacific states have repeatedly requested assistance to address their data issues over many years to agencies such as ADB, WB, UNCTAD, UNESCAP and IMO. Resolving the data issue will confirm (or otherwise) our assumption that our states are already disproportionately negatively impacted by the existing ‘level playing field’ and to what degree. This then provides a proxy for the level of DNI we can anticipate from GHG reduction measures and resolves much of the current debate on defining DNI.
- ii. **Amend the current IMO initial strategy RIA process as discussed at 8. above**, to first confirm the needed basket of mid/long term measures as identified by science (i.e. a minimum of two measures, being a GHG levy followed by a fuel standard) and then request from UNCTAD a single comprehensive IA on the basket, as opposed to individual IAs for individual candidate measures.
- iii. **Expand the currently agreed RIA process**, which largely favours assessment of strict economic impact on trade, to include a more robust assessment of socio-economic and environmental metrics. At a minimum both non-competitive loss and competitive loss need to be recognised.
- iv. **We need agreement that the IA is a process, not an outcome.** The resultant IA tool needs to be both ex ante, to allow projection of potential impact and ex poste with a robust monitoring evaluation learning (MEL) framework and review of impacts against monitored data to allow flexibility to adapt as our knowledge of the impacts increases over time. We again reference the previous submissions from the Pacific for built-in review clauses.
- v. **We agree that the IA should consider both positive and negative impacts of the basket.** With this in place, we need to agree the definition of DNI, which must include a waiver for positive effects not offsetting our claims because our states did not contribute to the situation. Once again this differentiation is entirely possible here because the convention of NMFT does not apply between STATES.
- vi. **And finally, we need to distinguish between the DNI of implementing the basket of measures on our states and the related compensation owed as a result of shipping’s emissions and the need for equitable dispersal of revenues generated from measures to ensure an equitable transition.** The differentiation at v. above applies only in relation to the DNI assessment.

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<sup>70</sup> ADB (2007) Oceanic Voyages: Aviation and Shipping in the Pacific Region. <https://www.adb.org/publications/oceanic-voyages-aviation-and-shipping-pacific-region>