WSC Response to the EC Public Consultation on Updating the EU Emissions Trading System and possible extension to include Maritime GHG Emissions

4 February 2021

Introduction

The World Shipping Council (WSC or the Council) is a non-profit trade association that represents the liner shipping industry, primarily operators of containerships, vehicle carriers, and roll-on/roll-off vessels. The Council's members carry over 90% of the world's containerized trade and include several of the world's largest lines headquartered in the European Union. WSC Member companies transport over 40 million TEUs of European export and import cargo each year or roughly two-thirds of the EU's seaborne trade by value; around 10 million TEUs of feeder cargo to and from the EU's trans-shipment hubs and 4 million TEU of cargo moved in pure intra EU trade. Roll on roll off cargo accounts for over 6 million EU imports and exports of light vehicles and over EUR10 billion of heavy machinery each year. WSC member companies play a pivotal role in European transport and logistics. Their operations and investments extend beyond ships to port terminals, warehouses, truck companies and the information technology systems that are critical for EU logistics and supply chains. The World Shipping Council is inscribed on the EU Transparency Register under number 32416571968-71.

The World Shipping Council welcomes the opportunity to contribute to this Public Consultation. The following comments are focused on Section D of the consultation as it pertains to the extension of the EU ETS to maritime GHG emissions.

Policy Options to apply a price to GHG emissions from EU Maritime Transport Activities:

It is unclear that inclusion of maritime shipping in the EU ETS or application of an EU tax on EU maritime transport emissions would result in significant environmental benefits, because a global solution through the IMO is necessary to achieve a truly effective policy response that can reduce and phase out GHG emissions from maritime transport. It is unlikely that a carbon price or tax will have significant effect when the technologies to use low-carbon and zero-carbon on the majority of ships are yet to be developed. Carbon pricing policies will be far more effective if the necessary technology pathways are available. Absent the

availability of these technologies, the regulated community will only be able to respond through the use of a very limited suite of renewable, alternative, and fossil-based fuels.

A mechanism such as the ETS is a tool, not an end in itself. The conceptual foundation of this particular tool is that requiring the purchase of credits for emissions will incentivize the uptake of new technologies that will result in lower emissions. The shipping industry is indeed seeking new fuels and related technologies, and has submitted a comprehensive proposal to the IMO for the creation of the International Maritime Research and Development Board to accelerate that work. We urge all EU member states to support that proposal. Currently, however, these new fuels and related technologies are not available, especially for trans-oceanic vessels, raising serious questions about the effectiveness of the ETS as a tool to reduce CO_2 emissions from shipping. Inasmuch as the Commission's Better Regulation Guidelines require under their "effectiveness" prong that the Commission evaluate the mechanisms by which the proposed action can be expected to deliver the desired policy outcomes, we urge the Commission to engage in a comprehensive review of how well suited the ETS tool is to the task of reducing CO_2 emissions from shipping in the context of the current level of technological readiness within the industry.

Should the EU decide to proceed with pricing measures, a framework that allows shipping's participation in the broader EU ETS while also allowing maritime carriers to participate in an alternative fund devoted to the development of low and zero-carbon maritime technologies may offer a framework that is better suited to address the relevant technical challenges that must be overcome if the maritime sector is to transition away from the use of fossil-based fuels as soon as possible. Eligibility to benefit from such a fund must also extend to international maritime projects to reflect the revenue contributions of non-EU shipping lines.

Should EU carbon pricing mechanisms be combined with EU standards concerning operational carbon intensity?

No. Design and implementation of operational efficiency regulations that are effective and equitable in their implementation is highly unlikely. Combining carbon pricing with operational standards would further complicate the necessary regulations without any assurance that the final regulatory product would prove to be better despite significantly increasing the complexity of the regulatory proposal. Moreover, the development of operational regulations by the EU would further complicate the current efforts in the IMO to develop and implement carbon intensity measures at the global level.

Regulated Entities / Party Responsible for Payment

The consultation seeks input as to whether a carbon price should be paid by commercial operators or by shipowners. WSC strongly recommends that any carbon price should be paid by the shipowner / company as defined in the current MRV rules. Restricting payment to commercial operators will exacerbate the current split-incentives that exist across

different segments of the maritime sector that insulate and decouple many owners from the necessary incentives to improve vessel performance and efficiency.

Exemptions

Excluded vessels should align with the current IMO DCS and EU MRV threshold (<5000 GT). Establishing a different threshold adds yet another complication to a regional scheme that impacts both EU and Non-EU players.

Geographic Scope

WSC strongly recommends that the scope of application be limited to intra-EEA voyages. Application to extra-territorial voyages (incoming and/or outgoing voyages) that extend thousands of kilometres across the globe raises a series of troubling issues that can be expected to create serious commercial and diplomatic tensions with trading partners across the world.

The potential application of EU regulations that are different from international regulations on the high seas and in the EEZs, territorial seas and inland waters of non-EU States also presents significant legal concerns that must be examined and addressed, not ignored. It is not enough to say that the concept of port state control answers the question of whether international law supports the exercise of EU jurisdiction over non-EU flagged ships operating beyond the internal waters, territorial seas and EEZ of EU member states. Although the ability of a port state to enforce its own laws with respect to vessels in its internal waters, territorial sea, and EEZ is broad, there are substantial limitations with respect to the exercise of port state control authority on the high seas and in the EEZs, territorial seas, and internal waters of other nations. The scope of port state control under the United Nations Convention on the Laws of the Sea (UNCLOS) is most directly addressed in Article 218. The EU ratified UNCLOS on behalf of EU member states in 1998, and the EU is bound by the terms of UNCLOS.

UNCLOS art. 218(1) provides as follows:

> When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference.

Art. 218(1) acts as both a recognition of port state authority and a limitation on that authority. The authority recognized is the authority of a port state, in certain circumstances, to exercise its jurisdiction over discharges from vessels beyond that port state's internal waters, territorial sea or exclusive economic zone. The subject matter scope of that

extraterritorial reach, however, extends only to violations of "applicable international rules and standards established through the competent international organization or general diplomatic conference." The ETS rules proposed to be made applicable to international shipping are EU law, not international law, and would thus fall outside of the scope of authority recognized by art. 218(1).

It is not clear at this point upon which legal theory proponents of extraterritorial application of the ETS to international shipping rely, and a full discussion of the applicable legal considerations will depend on prompt enunciation of that theory. In the interim, it appears at least that there is a recognition by the Commission that there are serious problems of legal overreach in attempting to apply the ETS to shipping at the geographic scope of the MRV regime. Specifically, there have been suggestions that conflicts with the sovereignty of other nations and with EU international law obligations could be finessed, for example by applying ETS to only 50% of the incoming and outgoing voyages, or other options restricting application to something less than all voyages covered by the current MRV regulation.

Such suggestions that the EU would limit the scope of its regulation to only half of what it might otherwise propose (presumably leaving half of that jurisdiction to the nation on the other end of a covered voyage) amounts to an offer to non-EU nations to join in a contravention of international law by dividing the spoils of regulatory overreach. Such an offer does not remedy the problem; it merely highlights the fact the architects of the scheme recognize the weakness in its foundation. The European Union exists on the basis of a shared concept of and respect for international law and shared competence over certain matters of common concern. As such, the EU is an entity that has stood as a defender of the importance of adherence to international law. The proposed extraterritorial application of the ETS to international shipping raises serious issues of jurisdictional overreach and direct infringement of the sovereignty of non-EU coastal and flag states. These serious questions must be part of the Commission's analysis on the front end. The Commission's Better Regulation Guidelines require such analysis as part of the "coherence" prong of that framework. Even more fundamentally, the EU's stature as a trading nation and a defender of international institutions and international law requires a complete and honest review of the legal issues.

Finally, and related to the legal questions above, application of the EU ETS to extraterritorial voyages is likely to seriously undermine the prospects for agreement at the global level and would constitute a major precedent inviting erosion of international cooperation and action at the global level. An *EU ETS Discussion Paper*[1] published by WSC in September 2020 offers further detail in examining the issue of geographic scope and the significant foreign policy and international policy issues at stake.

Based on the foregoing, the action as proposed raises serious questions both about EU compliance with its existing international law obligations and also with the EU's

[1] http://www.worldshipping.org/public-statements/regulatory-comments/WSC_EU_ETS_Discussion_Paper_10_September_2020_Final.pdf

commitment to the effectiveness of the IMO, which is the recognized international body with competence over greenhouse gas emissions from ships. These questions raise substantial issues under the "coherence" prong of the Commission's Better Regulation Guidelines, and as such must be fully evaluated and explained before regulatory interventions are proposed.

ETS Allocations and Allowances

Should the EU decide to include the maritime sector in the EU Emissions Trading System, we believe it is appropriate to provide a percentage of free allowances consistent with the original inclusion of other hard-to-abate sectors in the EU ETS. For example, aviation was granted 82% free allowances on its entry into the EU ETS during Phase 3. This would be important from an equitable treatment standpoint but also facilitate the transition of shipping into such a system

Type of Emissions Covered

For simplicity and effectiveness, actions should be limited to CO_2 emissions. Other GHG emissions are relevant, but CO_2 emissions constitute the vast majority of emissions generated by maritime transport. Considering the need to develop a focused and effective system, regulations should be focused on and limited to CO_2 emissions.

Research and Development Concerning Fuels and the Technologies needed for their Use

WSC encourages the Commission to make research and development focused on the technologies necessary to use carbon-neutral, low-carbon, and zero-carbon fuels a key element of its GHG strategy. This is a critical strategic issue that should be addressed as a matter of priority. These efforts may also be linked to efforts under consideration globally such as the proposal in the IMO to establish an *International Maritime Research and Development Board* (IMRB). A global effort in this area, combined with a complementary EU programme with similar objectives should provide a practical mechanism to accelerate the introduction of these fuels by recognizing and addressing the technical barriers that need to be resolved to accelerate introduction of the most promising fuels and technologies.

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