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Agenda item 11

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CONSIDERATION OF THE REPORT OF THE LEGAL COMMITTEE

Note by the Secretary-General

SUMMARY

<i>Executive summary:</i>	This document reports on the outcome of LEG 95.
<i>Strategic direction:</i>	1, 3, 4 and 6
<i>High-level action:</i>	1.1.2, 1.2.1, 3.5.1, 4.5.1 and 6.3.1
<i>Planned output:</i>	1.1.2.1, 1.2.1.1, 3.5.1.2, 4.5.1.1, 6.3.1.1 and 6.3.1.2
<i>Action to be taken:</i>	Paragraph 63
<i>Related document:</i>	LEG 95/10

NINETY-FIFTH SESSION OF THE LEGAL COMMITTEE

INTRODUCTION

1 The report of the ninety-fifth session of the Legal Committee (LEG 95/10) is submitted to the 102nd session of the Council in accordance with the provisions of Article 34(b) of the IMO Convention.

2 The ninety-fifth session of the Committee was held at IMO Headquarters from 30 March to 3 April 2009. It was chaired by Professor Lee-Sik Chai (Republic of Korea).

3 The main conclusions, decisions and recommendations of the Committee during the session under review are summarized in the ensuing paragraphs.

MONITORING THE IMPLEMENTATION OF THE HNS CONVENTION: DEVELOPMENT OF A POSSIBLE DRAFT PROTOCOL TO THE CONVENTION

4 The Committee concluded its consideration of a draft protocol to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.

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Definition of HNS

5 The Committee approved a number of amendments to the definition of HNS. In this connection, it also considered a proposal that, rather than restricting the application of the IMDG Code to its 1996 version, the HNS Convention should incorporate subsequent amendments, with specific reference to substances to be excluded, notably coal, fishmeal and woodchips.

6 After an extensive debate on this issue, the Committee decided to maintain its decision to restrict the reference in the definition of the HNS Convention to IMDG substances, to the substances included in the 1996 version of the IMDG Code.

Treaty law issues

7 The Committee noted the content of a document submitted by the Secretariat, providing information on the possible legal implications of a new protocol for States which are Contracting States to the 1996 HNS Convention.

Scope of application

8 The Committee approved a proposal to amend the current text of article 3(d) of the HNS Convention, clarifying the geographic scope of application of the Convention, subject to the substitution of the word “damages” by “damage”.

Article-by-article reading

9 The Committee undertook an article-by-article reading of the text of the draft protocol.

Recommendation for the convening of a diplomatic conference

10 The Committee approved the basic text, as amended by the decisions adopted by the Committee at this session, for the purpose of its submission for consideration by a diplomatic conference, and agreed to advise the Council accordingly.

11 In line with previous practice, the Committee instructed the Secretariat to prepare and circulate the basic text of the draft protocol, for consideration by a diplomatic conference and authorized the Secretariat to edit the text in line with the style and language of other treaties adopted by the Organization.

PROVISION OF FINANCIAL SECURITY: Progress report on the work of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers

12 The Committee noted with satisfaction the successful outcome of the ninth session of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers (the Group), held at the Headquarters of the International Labour Organization (ILO), in Geneva, from 2 to 6 March 2009, chaired by Mr. Charles Darr (United States).

13 Pending consideration of the full report, at LEG 96, the Committee noted that the Group considered that it had satisfied its remit, as well as the recommendation that an amendment to the 2006 ILO Maritime Labour Convention (MLC) was the best way to create mandatory provisions on abandonment and personal injury to, and death of, seafarers.

14 The Committee agreed to remain seized of the issue and to keep it under consideration, in the event that amendments to the MLC prove not to be feasible or timely. The joint Secretariat was instructed to remind Governments of IMO resolution A.930(22) concerning Guidelines on provision of financial security in case of abandonment of seafarers and to further urge its voluntary implementation, as well as resolution A.931(22) concerning Guidelines on shipowners' responsibilities in respect of contractual claims for personal injury to or death of seafarers.

FOLLOW-UP ON RESOLUTIONS ADOPTED BY THE INTERNATIONAL CONFERENCE ON THE REMOVAL OF WRECKS, 2007: DEVELOPMENT OF A SINGLE MODEL COMPULSORY INSURANCE CERTIFICATE

15 The Committee considered a document submitted by an informal correspondence group under the coordination of the delegation of the Netherlands, which had been established by LEG 94, in order to progress the legal, as well as the technical and practical aspects of the single model compulsory insurance certificate intersessionally, including port State control and inspection.

16 The Committee noted that the purpose of the single model insurance certificate was to facilitate the issuing of certificates, obviate the need to issue separate certificates in respect of each convention and thereby avoid unnecessary duplication. In particular, the reciprocal recognition of the certificate could be achieved by means of a common understanding, in the same way as that adopted for the recognition of the 1969 and 1992 CLC insurance certificates.

17 After debate, the Committee decided that the issue of a single model insurance certificate needed more study and agreed to establish a formal correspondence group with the following terms of reference:

- to ensure the development of a model for a single insurance certificate, as requested by the International Conference on the Removal of Wrecks of IMO and in particular the Legal Committee, the Correspondence Group (lead country the Netherlands) as established by, and taking into account the decisions in the Legal Committee will, with the aim of reducing the administrative burden:
 - .1 base itself on the draft of the model for a single insurance certificate as currently contained in annex 1 to document LEG 94/5/3 together with the content of document LEG 95/4 as the basic text for its work;
 - .2 make an analysis of the advantages and disadvantages (legal and practical) of a mandatory versus non-mandatory (recommended practices) character of a model for a single insurance certificate;
 - .3 make further recommendations on:
 - the inclusion of the 2002 Athens Protocol and the wording to cover the Athens Reservation/guidelines and the performing carrier;

- the issue of different dates of expiration of insurance cover;
 - the inclusion of the IMO registered owner identification number; and
 - appropriate boxes to be ticked off for each specific convention for which the single certificate is issued.
- .4 consider the possible use of electronic databases to maintain records of a single insurance certificate; and
- .5 report to the ninety-sixth session of the Legal Committee.

FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

18 The Committee considered a study submitted by the observer delegation of BIMCO indicating that the practice of using criminal sanctions against seafarers was a global problem, and not restricted to certain countries or regions. While criminal or negligent behaviour or intentional pollution should be penalized, in the case of accidental pollution, or where seafarers were involved in incidents beyond their control, there was an uncomfortable shift towards stricter liability. There was also an apparent tendency towards judging action taken following maritime accidents with the benefit of hindsight.

19 The study recognized the difficulty of balancing the fair treatment of seafarers against the risk of interference with States' sovereignty and indeed the IMO/ILO Guidelines on fair treatment of seafarers explicitly recognized that there was no intention to interfere with the domestic, criminal or civil law processes of any State. The study also noted problems of extortion and corruption in connection with port State control inspections.

20 Many delegations that spoke commended the BIMCO report, noting that the issue of fair treatment of seafarers was the direct responsibility of port, coastal and flag States, the State of the nationality of the seafarers, shipowners, and seafarers. Pursuant to the Universal Declaration of Human Rights and regional human rights instruments, as well as under national law, States were obliged to treat seafarers fairly. The stakeholders involved should co-operate to resolve problems after a maritime accident, rather than detaining the seafarers in the first instance. There was also a consensus that States should comply with the Guidelines on fair treatment of seafarers adopted by the Legal Committee.

21 However, the view was also widely expressed that the analysis provided by BIMCO in its document was only a partial one, and the conclusions arrived at with regard to corruption, for example, were not based on any statistics, investigation or scientific evidence and were, therefore, not done in a holistic manner. The point was also made that fair treatment and corruption were completely different issues and, consequently, should be dealt with separately.

22 The observer delegation of the Comité Maritime International (CMI) offered assistance in obtaining, through its member National Maritime Law Associations, more objective reports and assessments, in relation to current and future cases.

23 Most delegations were of the view that there was no need to reconvene the Joint IMO/ILO *Ad Hoc* Expert Working Group on Fair Treatment of Seafarers in the Event of a Maritime Accident at this point in time.

24 The Committee agreed that the Guidelines adopted by the Legal Committee and the Code of International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident adopted by the Maritime Safety Committee should be strictly applied by States so that a proper balance could be achieved between the need, on the one hand, for a thorough investigation of maritime accidents and, on the other hand, the protection of the rights of seafarers.

TECHNICAL CO-OPERATION ACTIVITIES RELATED TO MARITIME LEGISLATION

25 The Committee noted that activities for the review of national legislation to help implement the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (the Djibouti Code) had been included in the proposed Integrated Technical Co-operation Programme (ITCP) for the 2010-2011 biennium.

26 The Committee noted a statement by the Secretary-General regarding the problem of piracy in Somalia and the measures taken by the United Nations Security Council and other entities concerned to help to move the political process in Somalia forward. The co-operation of naval forces in the Gulf of Aden was of historical significance, since never before had navies from so many different States and regions worked together to fight crimes at sea. This co-operation for the purpose of preventing and counteracting acts of piracy was complemented by IMO's ITCP Programme, in particular its activities in the field of development of appropriate legislation to ensure the arrest, prosecution and punishment of pirates.

27 The Committee also noted a number of measures put in place by the Secretariat, aimed at expanding the pool of experts through enhancement of capacity-building, in particular, involving IMLI and WMU graduates.

28 Tribute was paid to the achievements of IMLI and its important role in studying, developing and implementing international maritime law. In this connection, the Committee was informed about a commemorative seminar on the theme of "20 Years in the Service of the Rule of International Maritime Law" to celebrate the 20th anniversary of the Institute, to be held at IMO Headquarters, on 5 May 2009.

29 The Committee approved a proposal that the Institute be invited, on a regular basis, to submit to the Committee a summary of its research activities.

30 The Committee expressed its appreciation over IMO's involvement in helping to resolve the problem of piracy in the Gulf of Aden. It was suggested that problems of piracy and armed robbery in other regions might benefit by similar initiatives. It was further suggested that a common understanding should be developed on the legal aspects of the prosecution of pirates in the Gulf of Aden region and that the Committee could include this in its work programme. The point was made that it was important to deal with the legal issues related to piracy in general in order to ensure that pirates and armed robbers were effectively brought to justice and it was suggested that the Legal Committee should be involved in this process.

WORK PROGRAMME

Guidelines on methods of work

31 The Committee adopted revised “Guidelines on work methods and organization of work of the Legal Committee” to replace the existing guidelines (LEG.1/Circ.4).

32 In so doing, the Committee approved a proposal to include a paragraph concerning capacity-building at the end of section 2.5.2. In this regard, the Committee noted that the MSC was in the process of developing a capacity-building mechanism to give effect to resolution A.998(25) and the Legal Committee would have an opportunity to revisit that section of its guidelines when that mechanism was finalized. The Committee agreed that its guidelines should reflect that the assessment of implications for capacity-building and technical co-operation was an ongoing process, and the assessment should not prevent progress on urgent items.

33 The Committee noted that all of the points listed from .1 to .7 of paragraph 2.8 of the draft guidelines should be taken into account as indications of a “higher priority” irrespective of their order and agreed that the Committee itself would establish the priority of an item proposed for its work programme.

34 The Committee recognized that paragraph 3.20 of the draft guidelines, concerning the need for a correspondence group to be established together with any intersessional working group, was not contained in the MSC-MEPC guidelines; however, this paragraph had been inserted in the existing Legal Committee guidelines to ensure that all delegations could participate in the work of the group even if they were not able to be present at the working group meeting(s).

35 With regard to section 4.5 of the draft guidelines, the Committee recognized that the deadlines for submission of documents were nearer to the opening of a session than was the case in the MSC-MEPC guidelines; however the documents submitted to the Legal Committee were generally less bulky and not as voluminous as the submissions to MEPC and MSC. Nonetheless, the Committee requested the Secretariat to try as far as possible to make all documents available online within the deadlines set out for that purpose in the guidelines.

36 The Committee recalled that operative paragraph 5 of Assembly resolution A.990(25) on the High-level Action Plan requested the Council and the Committees to review and revise the guidelines for the organization and method of their work in the light of the guidelines developed by the Council on the application of the Strategic Plan and the High-level Action Plan. Accordingly, it would be necessary to revisit the guidelines in due course, to ensure they take into account any new guidelines on application of the Strategic Plan and the High-level Action Plan when they are finalized.

Planned outputs for the 2010-2011 biennium

37 The Committee revised its planned outputs for the 2010-2011 biennium. In so doing, it noted that this was the first time an attempt had been made to convert its outputs into SMART terms and that it may be necessary to examine its planned outputs at every session in the future to ensure they were kept up-to-date and consistent with Committee priorities. Moreover, even if a particular output was not included in the list to be adopted by the Assembly, a Member State would still be entitled to propose a new work item during the biennium, based on compelling need, in accordance with the Committee's guidelines on work methods.

38 The Committee examined the existing strategic directions and high-level actions as set out in Assembly resolutions A.989(25) and A.990(25) and concluded that they remain valid for the anticipated work of the Committee.

Diplomatic conference

39 The Committee noted that the diplomatic conference to consider the draft protocol on the HNS Convention was tentatively scheduled for April 2010, which would be in lieu of its spring session for 2010.

Meeting weeks in the next biennium

40 The Committee agreed to recommend to the Council that it should hold one session in the latter half of 2010 (LEG 97) and one session in 2011 (LEG 98).

ANY OTHER BUSINESS

(a) Places of refuge

41 The Committee noted document LEG 95/9, introduced by the observer delegation of CMI, setting out the principal policy issues addressed by a draft text of an instrument on places of refuge developed by the CMI International Working Group.

42 However, all the delegations that spoke, although expressing their appreciation to CMI for the high quality of the draft treaty and its contribution in general to the Committee's work, restated the view that there was no need for a new convention at this point in time, since the international regime comprising the existing liability and compensation conventions for pollution damage at sea provided a comprehensive legal framework, especially when coupled with the Guidelines on places of refuge adopted pursuant to resolution A.949(23) and other regional agreements. Priority should instead be given to enhancing the implementation of existing conventions such as the Bunkers, CLC, HNS and Wreck Removal Conventions, which apply in these situations. Once all of these conventions had entered into force and their effectiveness had been assessed, the Committee would be in a better position to ascertain the existence of possible gaps.

43 The Committee decided not to develop a binding instrument on places of refuge at this stage.

(b) International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001: bunker oil pollution incidents

Bareboat charters

44 The Committee considered a submission that the flag State, in which bareboat-registered vessels are registered, should issue the certificate of insurance or other financial security in respect of civil liability for bunker oil pollution damage regulated in the Bunkers Convention.

45 An extensive debate ensued, during which differing views were expressed, as to whether the flag State or the State of the underlying ship's registry, was entitled to issue certificates.

46 While cogent arguments were put forward in support of both positions, a large majority of delegations that spoke supported the view that the responsibility for the issuance of the certificate should lie with the flag State of the bareboat-registered vessel.

47 This divergence of opinions was in part due to the fact that the text of the Bunkers Convention was not clear. While this matter was under discussion by the Legal Committee, practical and flexible solutions were needed, in order to ensure the validity of certificates issued by States Parties, in particular bearing in mind the need to avoid confusion over the acceptance of certificates providing insurance cover until February 2010.

48 The view was expressed that dual certification by both the flag State and the State of the underlying register, or the reciprocal endorsement of certificates issued by one of them, was not viable on account of the additional burden it would imply for shipowners and port States.

49 Following the debate, the Committee noted that, while it was moving towards a consensus, consensus had not yet been reached. Moreover, as neither the Legal Division of IMO nor the Legal Committee was a judicial body, they could only provide an opinion which was not binding on States and, accordingly, if a State decided not to accept that opinion, that was its sovereign right.

50 The Committee noted the readiness of those States, which were in the minority, which favoured the issuance of certificates by the State of the underlying registry, to reconsider their positions, bearing in mind that the large majority of delegations that spoke were of the view that the flag State should issue such certificates. Those States, however, would welcome further deliberation on this issue.

51 It was noted that, at this point in time, all certificates issued by States Parties had been recognized. It was accordingly suggested, and supported by many delegations, that, on an interim basis, all certificates issued by States Parties to the Bunkers Convention, including both flag States and States of the underlying registry, should be accepted as valid evidence of compulsory insurance.

52 The Committee agreed to include the question of the issuance of certificates to ships registered on a bareboat charter basis as a matter of priority among the terms of reference of the correspondence group on the implementation of the Bunkers Convention.

Other issues

53 The Committee noted the outcome of a meeting which had taken place in London on 8 January 2009, with the aim of discussing various issues where further clarification was needed in connection with the implementation of the Bunkers Convention. While consensus had been achieved on some of the issues, other issues showed that there may be different views on the interpretation of the Convention text, including whether oil tankers holding a CLC certificate were required to obtain, in addition, a Bunkers certificate; insurance and liability for claims where the provisions of the LLMC do not apply (claims concerning MODUs or those covered by a reservation under article 18(1) LLMC); the issuance of Bunkers Certificates to new buildings; and whether certificates issued by insurance companies outside the P & I Clubs were acceptable by States.

54 Given the importance, not only for developing States but also for developed States, to receive some guidance on the implementation of the Bunkers Convention, the Committee decided to establish a formal Correspondence Group with the following terms of reference:

To facilitate further ratifications and to promote harmonized implementation of the Bunkers Convention, the Correspondence Group is instructed to:

- consider as a matter of priority the issuance of certificates to bareboat-registered vessels based on the outcome of the debate in the Legal Committee at LEG 95, on documents LEG 95/9/1, LEG 95/9/4 and LEG 95/9/6, as reflected in the LEG 95 report, paragraphs 9(b).1 to 9(b).17;
- consider the issues regarding the implementation of the Bunkers Convention as contained in document LEG 95/9/2, paragraph 14;
- consider any additional issues in relation to the above that might provide clarity to promote wider acceptance and harmonized implementation of the Bunkers Convention;
- provide a progress report to LEG 96 and make necessary recommendations if possible on the priority issue regarding certificates to bareboat-registered vessels; and
- provide a final report to LEG 97 with appropriate guidance as to how the Committee will disseminate the outcome of the Group's conclusions.

55 The observer delegation of the International Group of P & I Associations (P & I Clubs), in introducing document LEG 95/9/5, noted its intention to revert to the Committee at its ninety-sixth session, with a formal position regarding the collection and analysis of information on bunker oil pollution incidents.

(c) Review of national legislation on piracy

56 The Committee took note of document LEG 95/9/3, regarding the Secretariat's intention to review existing national legislation to prevent and punish the crimes of piracy and armed robbery at sea as part of IMO's antipiracy strategy, in response to UN Security Council resolution 1851(2008), which notes with concern the lack of capacity, domestic legislation, and clarity about how to deal with pirates following their capture. A synopsis of the replies would be

submitted to the Committee at its next session, in order to facilitate an assessment of the legal situation, in particular regarding the capture, prosecution and extradition of alleged offenders. In this connection, IMO Members that had not yet done so were encouraged to submit information and the texts of their national legislation on piracy, in reply to IMO Circular letter No.2933, dated 23 December 2008.

57 The Committee noted that one aim of this exercise was to assist IMO to advise countries on the development of antipiracy legislation within the framework of IMO's ITCP Programme – Sub-programme for Maritime Legislation. CMI had offered to assist the Secretariat in this exercise and the Committee was reminded of the draft guidelines for legislation on maritime criminal acts submitted by CMI to its ninety-third session in October 2007.

58 The Committee was informed about the work of the MSC on piracy and armed robbery against ships, in particular, its comprehensive revision of the existing guidance provided by the Organization for preventing and suppressing piracy and armed robbery against ships. The Committee noted in this connection that any legal issues which may arise, which cannot be resolved at MSC 86, might be referred for consideration to the Legal Committee at its next session, as the related work had to be completed by the twenty-seventh session of the Assembly, at the latest.

59 The Committee took note of information regarding the Contact Group on Piracy off the Coast of Somalia which had been established pursuant to United Nations Security Council resolution 1851(2008) to facilitate discussion and coordination of actions among States and organizations to suppress piracy off the coast of Somalia. Among the four working groups that had been established, Working Group 2, which was convened by Denmark with the support of UNODC and which had its first meeting in Vienna on 5 March 2009, was addressing judicial aspects of piracy.

60 The Committee noted information from the observer delegation of CMI that the Joint International Working Group of International Organizations, which had produced a Model National Law on Acts of Piracy and Maritime Violence, had continued working on the harmonization of national legislation on maritime criminal acts in the light of the expanding problem of serious maritime criminal acts, including piracy, and on strengthening the implementation of existing international law.

(d) Amendments to the Rules of Procedure of the Legal Committee

61 The Committee made a number of amendments to its Rules of Procedure, consequent, in part, upon the institutionalization of the Facilitation Committee and upon the fact that the African Union is the successor organization to the Organization of African Unity.

(e) Rotterdam Rules

62 The Committee noted the information provided by the delegation of the Netherlands concerning the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (the Rotterdam Rules).

ACTION REQUESTED OF THE COUNCIL

63 The Council is invited to:

- .1 consider the report of the ninety-fifth session of the Legal Committee and, in accordance with Article 21(b) of the IMO Convention, transmit it, with its comments and recommendations, to the Assembly (paragraph 1);
- .2 endorse the Committee's recommendation that a diplomatic conference be convened in April 2010, in lieu of the Legal Committee spring session, for the purpose of considering and adopting a Protocol to the 1996 HNS Convention (paragraphs 10, 11 and 39);
- .3 note the Committee's actions and decisions with regard to the outcome of the ninth session of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers (paragraphs 12 to 14);
- .4 note the Committee's decision concerning the development of a single model insurance certificate (paragraph 17);
- .5 note the adoption of revised "Guidelines on work methods and organization of work of the Legal Committee" (paragraphs 31 to 36);
- .6 note the Committee's adoption of its planned outputs for the 2010-2011 biennium (paragraphs 37 to 38);
- .7 note the Committee's recommendation regarding meeting weeks for the biennium 2010 to 2011 (paragraph 40);
- .8 note the Committee's decision not to develop, at this stage, a binding instrument on places of refuge (paragraph 43);
- .9 note the Committee's deliberations with respect to the review of national legislation on piracy and, in particular, its encouragement to Members, which have not yet done so, to submit the legislation requested by circular letter No.2933 of 23 December 2008 (paragraph 56); and
- .10 note the Committee's decision to amend its Rules of Procedures (paragraph 61).