INTERNATIONAL MARITIME ORGANIZATION

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PREVENTION OF AIR POLLUTION FROM SHIPS

Legal Aspects of the Organization's Work on Greenhouse Gas Emissions in the Context of the Kyoto Protocol

Note by the Secretariat

SUMMARY	
Executive summary:	This document provides the views of the Sub-Division for Legal Affairs on the legal aspects of the Organization's work on Greenhouse Gas Emissions in the context of the Kyoto Protocol
Strategic direction:	7.3
High-level action:	7.3.1
Planned output:	7.3.1.3
Action to be taken:	Paragraph 5
Related documents:	MEPC 57/21, paragraphs 4.63 to 4.121; and MEPC 58/4

1 The Committee has been carrying out substantive work on the reduction or limitation of Greenhouse Gas (GHG) emissions from international shipping since 1997, following adoption of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC), and the holding of the 1997 MARPOL Conference. Most recently, the Committee has agreed to expedite its work, with a view to adopting a regulatory package at MEPC 59, in July 2009, in advance of the Conference of Parties to the UNFCCC to be held in Copenhagen towards the end of that year, thus demonstrating that IMO is determined to deliver its mandate, as stipulated in Article 2.2 of the Kyoto Protocol to the UNFCCC.

2 Article 2.2 of the Kyoto Protocol provides the following: "The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively."

3 The issue that arises is whether this article means that any measures to be adopted by IMO should only be applicable to Annex I Parties to the UNFCCC and its Kyoto Protocol, in accordance with the common but differentiated responsibility approach (document MEPC 57/21, paragraph 4.74). The issue has been often debated at IMO meetings and, most recently, at MEPC 57. To clarify the matter, the Sub-Division for Legal Affairs of the Organization has studied the issue and is of the view that, as a matter of law, Article 2.2 of the Kyoto Protocol should not be interpreted so restrictively. Instead, Legal Affairs' view is that any measures that are adopted by IMO in this context shall be applicable across the board in the same way as are other regulations adopted by the Organization.

4 This view is based on the following analysis:

.1 Legal Affairs has not identified any potential treaty law conflict between the Kyoto Protocol and the provisions that may be developed by the Committee on GHG emissions from the combustion of marine bunker fuels, with a view to their incorporation in an appropriate IMO instrument;

.2 treaties can only conflict with each other when they regulate the same subject matter in a contradictory way. This is not the case of the Kyoto Protocol *vis-à-vis* an appropriate IMO instrument in connection with GHG emissions. The Kyoto Protocol should be viewed as an agreement, elaborated under the framework of the UNFCCC, which sets out objectives to be achieved in relation to GHG emissions, but which, in doing so, does not preclude the application of specific technical requirements and obligations developed pursuant to particular treaty law areas, such as maritime law; indeed, this notion is inherent in the very language of Article 2.2 of the Kyoto Protocol through its implicit recognition that IMO is the "proper" forum in which to pursue limitation or reduction of GHG emissions from marine bunker fuels;

.3 furthermore, the fact that the obligation contained in the Kyoto Protocol to "pursue" limitation or reduction of GHG emissions through IMO is addressed to some countries (i.e. Annex I countries) does not mean that, once measures to achieve these limitations or reductions are included in an appropriate IMO instrument, they should not apply to **all** Parties to such an instrument, irrespective of whether they happen to be Annex I countries under the Kyoto Protocol and UNFCCC. Article 2.2 of the Kyoto Protocol should be interpreted, rather, as an acknowledgement that the elaboration of provisions regulating GHG emissions from combustion of marine bunker fuels is a task which is properly within the purview of IMO. Any other interpretation would imply also that only Annex I countries should be involved in the negotiations within IMO;

.4 Article 2.2 of the Kyoto Protocol restricts itself to imposing upon countries in Annex I the obligation to "work through" IMO to "pursue limitation or reduction of emissions of greenhouse gases". This is not the same as limiting the outcome of IMO's decision-making process to application to Annex I countries exclusively;

.5 a general obligation imposed upon the countries included in Annex I to the Kyoto Protocol/UNFCCC to work through IMO cannot be interpreted as an instruction to IMO to restrict to these countries the application of maritime technical regulations, which, to be effective, must apply universally to all ships, as is the case of shipping regulations included in IMO treaties such as MARPOL. If this were not the case, shipowners, for example, could simply change flag to avoid the

impact of any regulations which they might regard as too onerous, a result which would frustrate the objective not only of MARPOL (or other IMO treaties) but also of Article 2.2 of the Kyoto Protocol;

.6 the Kyoto Protocol incorporates the UNFCCC principle of "common but differentiated responsibilities" in the context of addressing climate change. By comparison, IMO's mandate, as derived from the IMO Convention and UNCLOS, is based on the understanding that technical regulations, aimed at ensuring the safety and security of commercial shipping as well as protecting the marine and atmospheric environment, will, of necessity, be developed on the basis of universal rules which should apply without discrimination to all ships engaged in international commercial navigation;

.7 accordingly, concepts such as the "common but differentiated responsibilities and respective capabilities" have limited, if any, application in IMO-based conventions. By way of example, a ship belonging to a shipowner incorporated in a developed country, but registered or flagged in a developing country, cannot presumptively be considered as a source of emission coming either from the developing or developed country. It is simply a ship navigating across national boundaries and on the high seas. The objective of achieving reduction or limitation of GHG emissions from ships engaged on international voyages simply cannot be achieved if some ships are to be exempted from IMO regulations purely on the basis of the flag they fly; and

.8 it is due to the complexities of the international shipping trade (i.e. the interaction of private and public law in connection with registration; the right and obligation to fly a flag; and the further interaction between flag, port and coastal State jurisdiction) that IMO shipping regulations are, as a matter of principle, and must be, as a practical matter, global in nature and applicable to all commercial ships, with appropriate differences, if any, to be based on factors such as their type, structure, manning and operational features, irrespective of the flag they are flying or the degree of industrial development of the flag State or the State of nationality of the owner or the operator.

Action requested of the Committee

5 The Committee is invited to consider the views expressed in this document and decide as appropriate.