

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

# REVIEW OF MARITIME TRANSPORT 2010

*Report by the UNCTAD secretariat*

## *Chapter 6*



UNITED NATIONS  
New York and Geneva, 2010

# 6

## LEGAL ISSUES AND REGULATORY DEVELOPMENTS

### CHAPTER 6

*This chapter provides information on some important legal issues and recent regulatory developments in the fields of transport and trade facilitation, together with information on the status of ratification of some of the main maritime conventions. During 2009 and the first half of 2010, discussions continued at the International Maritime Organization regarding the scope and content of an international regime to control greenhouse gas emissions from international shipping. Moreover, a Protocol to the 1996 HNS Convention was adopted, in April 2010, with a view to facilitating the entry into force of the Convention. Standard-setting activities and other measures are continuing in the field of maritime and supply-chain security, in particular under the auspices of various international organizations such as the World Customs Organization, the International Maritime Organization and the International Organization for Standardization, but also at the national and regional level. The WTO negotiation on trade facilitation are now in their sixth year and are widely described as an area of the Doha Round in which tangible progress has been made; at the centre of the negotiations are the level of obligation and the level of precision that the new rules will have.*

## A. LEGAL ISSUES AND REGULATORY DEVELOPMENTS AFFECTING TRANSPORTATION

### 1. Developments relating to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: the “Rotterdam Rules”

In 2008, work was completed on the text of a Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. A final draft text – approved by the United Nations Commission on International Trade Law (UNCITRAL) – was then adopted by the United Nations General Assembly on 11 December 2008. The new United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as the Rotterdam Rules,<sup>1</sup> was opened for signature at a special conference held in Rotterdam in September 2009. An analytical overview of the complex provisions of the Rotterdam Rules was provided in the *Review of Maritime Transport 2009*,<sup>2</sup> which should be consulted in respect of the content of the new Convention. While the Convention has, at the time of writing, attracted 22 signatories,<sup>3</sup> it has not yet been ratified by any country. This is worth noting, as a number of press reports and articles published over the past year appear to suggest – based on the number of signatories – that the new Convention’s entry into force is imminent.

It should be noted that the Convention will enter into force only if and when 20 States have deposited their instruments of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.<sup>4</sup> Contracting States to the Rotterdam Rules are required to denounce the Hague Rules,<sup>5</sup> Hague-Visby Rules<sup>6</sup> or Hamburg Rules,<sup>7</sup> as the case may be, and therefore may not continue to adhere to maritime Conventions currently in force in relation to their different trading partners. Moreover, it is important to note that after the Convention’s entry into force, ratification, acceptance, approval or accession of the Rotterdam Rules by any additional State becomes effective only if and when denunciation of the Hague Rules, the Hague-Visby Rules or the Hamburg Rules, as the case may be, has become effective.<sup>8</sup>

### 2. Legal instruments and other developments relating to the environment

#### (a) *Reduction of greenhouse gas emissions from international shipping*

Although maritime transport is the most fuel-efficient way of carrying cargo, international shipping causes around 3 per cent of the global carbon dioxide (CO<sub>2</sub>) emissions from fuel combustion. Mid-range emissions scenarios show that, by 2050, in the absence of countervailing policies, emissions from ships may increase by a factor of 2 to 3 (compared to the emissions in 2007) as a result of the growth in shipping.<sup>9</sup> Bunker fuel emissions from international shipping are, however, not covered by the international regulatory framework under the Kyoto Protocol.<sup>10</sup> The United Nations Climate Change Conference held in Copenhagen in December 2009 marked the culmination of international climate change negotiations for the year, but failed to adopt a legally binding instrument to regulate greenhouse gas (GHG) emissions after the expiry in 2012 of the first Kyoto Protocol commitment period. A considerable number of countries reached agreement on matters reflected in the non-binding Copenhagen Accord,<sup>11</sup> of which the Conference took note. However, emissions from bunker fuels are not explicitly mentioned in the Copenhagen Accord.<sup>12</sup>

Substantive deliberations on effective control of GHG emissions from international shipping continue, under the auspices of IMO. Following earlier relevant work in the field,<sup>13</sup> control of GHG emissions and improvements to energy efficiency for ships was, once again, the crucial issue on the agenda of IMO’s Marine Environment Protection Committee (MEPC) at its sixtieth session, which was held from 22 to 26 March 2010. Although the scope and content of any mandatory regime on control of GHG emissions from international shipping remains to be agreed, considerable progress has been made towards the development of technical and operational measures needed for its efficient implementation.<sup>14</sup> The MEPC, at its sixtieth session, agreed to establish a Working Group on Energy Efficiency Measures for Ships, which would build on the progress made so far. In this context, a draft text was prepared by MEPC at its sixtieth session, on mandatory requirements for

the Energy Efficiency Design Index (EEDI) for new ships, and on the Ship Energy Efficiency Management Plan (SEEMP) for all ships in operation. However, the Committee noted that issues such as target dates, ship size and reduction rates in relation to the EEDI requirements still needed to be finalized. MEPC also agreed that a vessel's EEDI shall be equal or less than the required EEDI, and that the required EEDI shall be based on EEDI baselines and reduction rates yet to be agreed.<sup>15</sup>

In addition, work has continued at IMO on Market-Based Measures (MBMs) to regulate emissions from international shipping.<sup>16</sup> As discussed in the *Review of Maritime Transport 2009*, the Second IMO GHG Study 2009,<sup>17</sup> besides identifying considerable potential for reduction, concluded that MBMs were cost-effective policy instruments with a high degree of environmental effectiveness.<sup>18</sup> The MEPC at its fifty-ninth session held from 13 to 17 July 2009, having considered a large number of views and contributions on the subject, agreed by a majority that a market-based measure was needed as part of a comprehensive package of measures for the regulation of GHG emissions from international shipping.<sup>19</sup>

A number of proposals on MBMs to regulate emissions from international shipping were submitted at IMO, although there seems to be no clear preference for any particular proposal at this stage. The MEPC at its sixtieth session decided to undertake a feasibility study and impact assessment of all the proposed MBMs. To this end, it requested the IMO Secretary-General to establish the Expert Group on Feasibility Study and Impact Assessment of Possible Market-Based Measures (MBM-EG), to report to the sixty-first session of MEPC in September/October 2010. According to the terms of reference,<sup>20</sup> the remit of the Expert Group was "to evaluate the various proposals on possible MBMs with the aim of assessing the extent to which they could assist in reducing GHG emissions from international shipping, giving priority to the maritime sectors of developing countries, least developed countries (LDCs) and small island developing States (SIDS)." (...) The study/assessment would be conducted by a group of selected experts with appropriate expertise on matters within the scope of the study, who, in the discharge of their duties, would serve the Expert Group in their personal capacity. The terms of reference further envisage that the Secretary-General would invite "a proportionate number of organizations in consultative status with IMO, and relevant United Nations entities, as well

as intergovernmental or international organizations, which can contribute with data and/or with expertise to the work of the Expert Group and will participate as advisers." The MBM-EG completed its work on evaluation of the proposals at the end of August 2010, and its conclusions are set out below.

For ease of reference, a brief summary of the main groups of MBM proposals<sup>21</sup> submitted at IMO, which were considered by the MBM-EG, is provided first, as follows:

*Contribution- or levy-based (GHG fund, leveraged incentive scheme, Port States utilizing STEEM)*

(i) Proposals on the establishment of a GHG fund.<sup>22</sup> Inspired by the International Oil Pollution Compensation Fund mechanism, a GHG fund could be established as a separate legal entity under the structure of a new IMO convention. However, its revenues should be kept completely separate from the budget of IMO. In the basic proposal, the GHG fund would introduce mandatory registration for bunker fuel suppliers within its Parties, and voluntary registration in non-parties. These proposals are based on the assumption that since a significant reduction in absolute terms cannot so far be foreseen, only some of the future GHG emissions from international shipping can be offset. It is the GHG contributions that should be set at a given level, per ton of fuel purchased, to be established by the GHG fund's administrator, and to be added to the price of bunker fuel. The money collected by the fund would be used to finance Clean Development Mechanism (CDM) projects in developing countries, to support marine fuel emission R&D, and to support adaptation projects in developing countries etc.

(ii) The leveraged incentive scheme<sup>23</sup> represents a modification of the GHG fund proposal above, and aims to incentivize energy efficiency improvements. New elements that it introduces, compared to the GHG fund proposal, are that the contribution, at a fixed amount per ton of fuel purchased, should be paid by the ships directly to the GHG fund, rather than being collected via fuel suppliers. Payment would be made through electronic accounts established for individual ships. Furthermore, ships ranked as "good performance ships" would benefit from refunds out of the revenues collected, thus creating a strong economic incentive to accelerate improvements in the energy efficiency of ships. The criteria to be used for ship performance appraisal are based on the Energy Efficiency Design

Index (EEDI) and on the Energy Efficiency Operational Indicator (EEOI). The revenues to be generated from the contribution can be utilized for various purposes including adaptation and mitigation in developing countries.

The sponsors of this proposal argue that a cap on total CO<sub>2</sub> emissions from international shipping as proposed in the context of an Emissions Trading Scheme (ETS) is not an appropriate approach as seaborne transport is a variable dependent on global economic activity, which is unpredictable and not under the control of the maritime industries. Therefore, they suggest that “the regulatory package to be developed by IMO should use efficiency improvements as targets.”<sup>24</sup>

(iii) Another proposal focuses on “achieving reduction in GHG emissions from ships through Port State arrangements utilizing the Ship Traffic, Energy and Environment Model (STEEM).”<sup>25</sup> This proposal suggests that via a global agreement under IMO, all countries would be authorized to allow their ports to levy a globally uniform emissions charge on all vessels calling at their ports. The charge would be higher for heavier and dirtier fuels, and lower for cleaner fuels such as natural gas, and it would be structured in such a way as to achieve the global reduction targets for GHG emissions. The process would be enforced by the Port State by way of its port authorities. The amount of pollution produced by the ship during the voyage in arriving at a port would be used as the basis on which the emission charge would be levied.

It is further suggested that by using a matrix of all possible port pairs, it may be possible to determine the distance travelled to arrive at a particular port. Using predetermined factors based on STEEM calculations for particular vessel specifications, one can determine the amount of bunkers and marine fuel consumed during the voyage and determine the GHG emissions. Vessels would then be charged the emissions fee along with the other port dues.

The proposal argues that an emissions reduction mechanism administered by Port States and targeting the vessels themselves would overcome political and legal challenges inherent in the global shipping industry that arise with ships operating largely outside national boundaries, frequently in third party territories, and often changing nationalities. In addition, it states that such a mechanism has the advantages of “charging each unit of pollution, being universally applicable in all countries and ports, being uniform in its fee structure,

having a flexible adjustment mechanism, being trade-related, and allowing benefits to be accrued in the areas where the damage occurs.”<sup>26</sup>

### **Emissions Trading Scheme**

Another group of proposals are those on an open global Emissions Trading Scheme (ETS)<sup>27</sup> for international shipping, which could be developed in a new legal mechanism, probably as part of a new convention under the auspices of IMO. Such a scheme would function on the basis of GHG emissions allowances that would be sold to the shipping industry via an auctioning system. Ships would also be able to acquire emissions allowances and credits from other systems, including from the UNFCCC Clean Development Mechanism. An important element of the ETS would be a global emissions cap to be set for international shipping, on the total number of allowances sold during a compliance period, with a long-term declining emissions trajectory. The amount of allowances and credits purchased by a ship would have to correspond to its bunker consumption, and be periodically surrendered. This would be a condition for maintaining a valid GHG certificate for the compliance period. A fund would be generated by the auctioning of emissions allowances. This fund could be used for climate change mitigation and adaptation purposes in developing countries, for technical cooperation activities under IMO, and for research and development (R&D) within the maritime sector.

The sponsors of the ETS proposals generally believe that the main advantage of a global ETS for international shipping would be that it would respond to the need for precise emission control by establishing a cap on the total emissions from the international shipping sector. At the same time, it would provide for access to more cost-effective emission reductions in order to meet the cap, and so a greater level of emission reductions could be achieved for the same cost.

### **Efficiency-based (the Ship Efficiency Credit Trading with Efficiency Standards, and the Vessel Efficiency System)**

(i) The Ship Efficiency Credit Trading with Efficiency Standards<sup>28</sup> proposal focuses on and rewards enhanced vessel efficiency. It develops efficiency index baselines for existing ships of similar type and size using the EEDI as developed by IMO. A “required efficiency index” would be calculated for all ships, and it would gradually become more stringent.

An “attained efficiency index” would also be calculated periodically. It should be lower than or equal to the required efficiency index in order to demonstrate compliance. However, recognizing that not all ships would be able to meet this requirement, the proposal suggests that ships that are more efficient may sell their efficiency credit surplus to ships whose attained efficiency index does not meet the required efficiency index. Efficiency credits would be bought and sold through a Ship Efficiency Credit Trading Scheme, for which IMO would develop the necessary regulations and oversight but which IMO would not operate or implement. Only ships of 400 GT and greater carrying out international voyages would be included in this programme. Initially, only ship types with approved EEDI baselines would be required to comply. MARPOL annex VI<sup>29</sup> could potentially be used as the mechanism to implement efficiency index standards for new and existing ships.

(ii) The proposal of establishing a Vessel Efficiency System (VES)<sup>30</sup> is a combination of the vessel design efficiency concept applied to existing ships and the GHG fund concept. The proposal is based on:

- establishing efficiency design standards or targets for both new and existing vessels in the fleet where calculation of an EEDI baseline is deemed feasible;
- establishing mandatory efficiency standards applicable to new ships built after a particular year which may be tiered over time (e.g. X per cent by year 20XX, Y per cent by year 20XY);
- establishing different efficiency standards (less stringent than those applicable to new builds) that apply to the existing fleet after a given year to be determined by the parties;
- assessing charges (based on fuel consumption) for those existing vessels that fail to meet the applicable standard established for existing vessels; and
- establishing a fund populated by the charges collected.

The aim of combining vessel design efficiency with the fund concept is to produce an enhanced environmental result, to address criticisms on the one hand that the proposal to establish a fund through

fees on all bunkers sold would be an international commodity tax, and on the other hand that such an approach would have a limited impact on improving carbon efficiency across the world’s fleet. The aim is also to provide greater financial incentives to vessel operators that invest in efficiency improvements, and to discourage the long-term operation of the most inefficient vessels.

### **Differentiated proposals**

(i) The proposal on a rebate mechanism<sup>31</sup> aims to deliver on the UNFCCC principle of common but differentiated responsibilities and respective capabilities,<sup>32</sup> for any MBM for international shipping. The rebate mechanism, it is argued, would ensure that developing countries are not disadvantaged by such an instrument but rather benefit from it. The proposal argues that all the relevant proposals that have been submitted to the MEPC so far assume uniform application of a yet-to-be-agreed MBM for all ships in international trade, irrespective of the flag they fly. Also, it states that disbursement to developing countries of any revenue raised, in the ways proposed so far, is not generally perceived by these countries as fulfilling the UNFCCC principle of common but differentiated responsibilities and respective capabilities. The proposal suggests that each developing country party to the UNFCCC would be entitled to obtain an unconditional rebate equal to the cost incurred because of the maritime MBM. The amount of rebate would be calculated annually in proportion to a country’s share of global imports by value. A developing country could decide to forego the rebate, or a part of it. This would provide additional flexibility to reflect differentiated national circumstances. The net revenue raised, after the rebates have been issued, should be split between assisting developing countries in implementing climate change action, and assisting the global shipping sector to accelerate reductions of its growing emissions through technological advances. The disbursement of this net revenue could be managed by the operating entity of the financial mechanism of the UNFCCC, according to the relevant rules and provisions. In principle, the proposed rebate mechanism could apply and be integrated into any MBM, such as a levy and an ETS, provided that it generates enough gross revenue to cover the rebate needs. This would be a way to creatively reconcile the principles of IMO and the UNFCCC, and could unlock the debate and facilitate swift progress in this area.

(ii) Another proposal, which highlights the concerns of some developing countries, is entitled "Market-based instruments: a penalty on trade and development".<sup>33</sup> It first draws attention to the two main options currently being proposed regarding MBMs – one based on emissions trading, and the other on a levy (or contribution) on bunker fuel. As regards emissions trading schemes, it states that based on the experience of such schemes so far, brokers will buy and sell credits like any other commodity. They are likely to be operating in developed countries, where financial resources are more readily available, which means that the profits to be made in the process will be retained within developed countries. The proposal suggests that for an ETS to be successful on a global scale, certain criteria are essential, namely that:

- The countries involved must be at a similar level of economic development to avoid distortions in their ability to participate due to inequality of available funding;
- The countries concerned must have some degree of political cohesion to ensure that any disadvantages for one country vis-à-vis another can be dealt with;
- There must be a common central body that can ensure proper coordination of the measures.

According to this proposal, if these criteria are not satisfied, the system is bound to favour only developed countries, and may result in severe disadvantages for all developing countries, especially the most needy. Also, the proposal argues that efficiency gains are more difficult to achieve on older ships. Emission trading schemes, therefore, tend to favour owners who are able to afford newer ships and accordingly gain a competitive advantage from the scheme. Those engaged in trades in which older ships operate would be disadvantaged, as these tend to be trades carrying low-value cargoes, mainly from developing countries.

As regards the option of a levy or contribution on ship's bunkers to provide funds to alleviate the effects of climate change, the proposal expresses concern that although it has been called a levy or a contribution, in effect, it is a tax on international trade. It would set a precedent as the first internationally imposed tax, and once a precedent had been set, then other taxes could perhaps follow. The proposal also states that if a financial measure is to be applied to international shipping, then it should be proportional to the share of

shipping emissions in total global emissions, which is 2.7 per cent, because "proportionality must be the key to any measures proposed for shipping, especially if such measures have a financial component."

### **Reduction targets for international shipping**

MEPC, at its sixtieth session, revisited the topic of reduction levels, noting that reduction potential would be considered for each proposed MBM as part of the impact assessment. MEPC would need to consider whether or not the international maritime sector should be subject to an explicit emission cap, or to a reduction target comprising the entire world fleet of merchant vessels. The main questions would be how and through which international organization such a cap or reduction target should be established. Other questions regarding a cap or a target line would include the methodology by which the cap/target is set and maintained, as well as the possible connection with other transport modes and how they are regulated internationally.

After considering a number of documents<sup>34</sup> submitted on the matter, MEPC agreed that the debate on the reduction targets was a vital part of the Organization's GHG work, and that work on this matter should preferably continue in parallel with work on the development of market-based measures, with the aim of coming to a conclusion by the sixty-second session of MEPC in July 2011.

As has already been noted, the Expert Group on Feasibility Study and Impact Assessment of Possible Market-Based Measures (MBM-EG) completed its work on evaluating the MBM proposals at the end of August 2010. The full report of the work undertaken by the MBM-EG<sup>35</sup> includes the following five main parts dealing with evaluation of the various mechanisms:

- Proposals evaluated (chapter 6)
- Assumptions (chapter 7)
- Evaluation of the ten proposals against the nine criteria (chapters 9 to 18)
- General impacts of market-based measures on trade, competition and consumer prices (chapter 19)
- Conclusions (chapter 20)

The conclusions of the report suggest that further work is required on elaborating and developing the various proposals. The full text of the conclusions, contained in chapter 20 of the report, is reproduced below:

“20.1 The evaluation of the proposals was completed as requested by the Committee in accordance with the terms of reference, and each evaluation provides the required assessment as described in the terms of reference specifically in its paragraph 2.5.

20.2 The evaluation was complicated by the different levels of maturity of the various proposals. Proposals with a high level of maturity generated more discussion compared to those that were less developed.

20.3 The Group would like to point out that elements of the proposed measures would require further elaboration and development. Proposals at an early stage of development would be required to be developed further.

20.4 The Group reached its conclusions by consensus, apart from a few instances where the evaluation of legal or administrative aspects led to different views as captured in the report.

20.5 All proposals address control of GHG emissions from shipping. Some of the proposals go beyond mitigation and propose a mechanism that provides for substantial contribution to address the adverse effects of climate change.

20.6 The proposals have different ways of reducing emissions; some focus on “in-sector” reductions, and others also utilize reductions in other sectors. The extent of such reductions is detailed within the individual evaluation of each proposal in the report.

20.7 Cost-effective operational and technical emission-reduction measures are available to the shipping sector. However, barriers exist in the uptake of many of these measures.

20.8 The Group has considered sustainable development in a holistic way so that it has become an inherent part of the assessment rather than an isolated criterion, because this was deemed to be the best approach.

20.9 The Group has identified that the implications of implementing the different MBM proposals for international shipping are directly related to the stringency of the proposed measure. Irrespective of this, the Group concluded that all proposals could be implemented notwithstanding the challenges associated with the introduction of new measures.

20.10 The assessment of the impacts of an increase in bunker fuel prices and freight costs showed that implementation of the proposed measures would affect some countries and products more than others. In some cases, even small increases in costs could

have relatively significant consequences. Indirect economic costs and benefits were not considered in the analysis. Some of the proposed measures include mechanisms aiming to provide means to mitigate negative impacts.

20.11 The proposals lack, to various degrees, sufficient details for the necessary evaluation of issues such as international harmonization in implementation, carbon leakage, fraud, and traffic of vessels between non-party states, among others. These issues require further policy consideration in order to be addressed more properly.”<sup>36</sup>

### **(b) IMO conventions regarding the environment**

The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009 (Hong Kong Convention) was adopted in May 2009. Since then, in order to help shipowners and operators to handle the transition to the Convention’s requirements, a number of guidelines have been adopted or are under consideration at IMO. The Guidelines for the Development of the Inventory of Hazardous Materials were adopted by MEPC at its fifty-ninth session. At the sixtieth session of MEPC, a working group was established to continue work on developing the Guidelines for Safe and Environmentally Sound Ship Recycling, and also to begin the development of the Guidelines for the Development of the Ship Recycling Plan.

The Hong Kong Convention was open for signature from 1 September 2009 to 31 August 2010. Thereafter, it remains open for accession by any State. It will enter into force 24 months after the date on which 15 States, representing 40 per cent of world merchant shipping by gross tonnage, have either signed it without reservation as to ratification, acceptance or approval, or have deposited instruments of ratification, acceptance, approval or accession with the IMO Secretary-General. Furthermore, the combined maximum annual ship recycling volume of those States must, during the preceding 10 years, have constituted not less than 3 per cent of their combined merchant shipping tonnage.<sup>37</sup> MEPC, at its sixtieth session, encouraged more countries to sign the Convention in the remaining time, i.e. before the end of August 2010.

As regards ballast water management, MEPC at its sixtieth session agreed to grant final approval to a further five ballast water management systems that make use of active substances, and to grant

basic approval to a further eight. These should help to improve the prospects of the Ballast Water Management Convention 2004 gaining further ratifications. The 2004 Ballast Water Management Convention will enter into force 12 months after ratification by 30 States representing 35 per cent of the world merchant tonnage.<sup>38</sup>

As regards the issue of preventing air pollution from ships in general, and, in particular, issues related to MARPOL<sup>39</sup> annex VI,<sup>40</sup> MEPC, at its sixtieth session, adopted amendments to annex VI of the MARPOL Convention, entitled Regulations for the Prevention of Air Pollution from Ships, formally establishing the North American Emission Control Area, whereby emissions of sulphur oxides (SO<sub>x</sub>), nitrogen oxides (NO<sub>x</sub>) and particulate matter from ships will be subject to more stringent controls than the limits that apply globally. It also adopted a new MARPOL regulation to protect the Antarctic from pollution by heavy grade oils. These amendments are expected to come into force on 1 August 2011, by tacit acceptance procedure. MEPC, at its sixtieth session, also confirmed that the revised MARPOL annex VI and the NO<sub>x</sub> Technical Code 2008,<sup>41</sup> would come into force on 1 July 2010, as expected.

A diplomatic conference was held in April 2010 to adopt the Protocol to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention) 1996. Adoption of the Protocol represents a potentially important step towards strengthening the international liability framework for ship-sourced pollution by hazardous and noxious substances. The Protocol is designed to address practical problems that have prevented many States from ratifying the original HNS Convention which, despite having been adopted in 1996, still has not met the conditions for it to enter into force.<sup>42</sup>

The 1996 HNS Convention establishes a shared, two-tier compensation system for pollution arising from a variety of hazardous and noxious substances, with liability of the carrier supplemented by compensation available from a fund to which cargo interests contribute. The 1996 HNS Convention is thus modelled on the well-established and robust international liability regime for oil pollution damage from tankers under the International Convention on Civil Liability for Oil Pollution Damage 1969 (and its 1992 Protocol) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution

Damage 1971 (and its 1992 and 2003 Protocols). Entry into force of the 1996 HNS Convention would ensure that adequate and effective compensation is available to persons who suffer damage caused by incidents in connection with the carriage of a wide range of hazardous and noxious substances by sea, and would further contribute to the preservation of the marine environment. The main obstacles so far to ratification of the 1996 HNS Convention appear to have been the requirement for States to report the quantities they receive of a diverse range of hazardous and noxious substances governed by the Convention (contributing cargo), and difficulties in setting up the reporting system for packaged goods.

The 2010 HNS Protocol seeks to address these concerns by amending certain provisions of the 1996 HNS Convention. The Protocol sets out revised detailed reporting requirements for States on contributing cargo at the time of ratification of the Protocol, as well as regularly thereafter, accompanied by sanctions for non-compliance with these requirements. Failure of a Contracting State to comply with its annual reporting requirements, before entry into force of the Protocol, leads to temporary suspension from being a Contracting State until the relevant data have been submitted (Art. 20(7) 2010 HNS Protocol). Therefore, even after ratification by the required number of States, entry into force of the Protocol is conditional upon all of the relevant States having complied with their respective reporting requirements. In addition, the 2010 HNS Protocol excludes packaged goods from the definition of contributing cargo, and accordingly, receivers of these goods will not be liable for contributions to the HNS Fund. However, given that incidents involving packaged goods will remain eligible for compensation, shipowners' liability limits for incidents involving packaged HNS were increased.

As regards limits of liability under the 2010 HNS Protocol, if damage is caused by bulk HNS, compensation would first be sought from the shipowner, up to a maximum limit of 100 million Special Drawing Rights (SDR) (approximately \$150 million). Where damage is caused by packaged HNS, or by both bulk HNS and packaged HNS, the shipowner's maximum liability is 115 million SDR (approximately \$172.5 million). Once this limit is reached, compensation would be paid from the second tier, the HNS Fund, up to a maximum of 250 million SDR (approximately \$375 million), including compensation paid under the first tier. The Fund will have an Assembly, consisting of

all States Parties to the Convention and Protocol, and a dedicated secretariat. The Assembly will normally meet once a year.<sup>43</sup>

In terms of hazardous and noxious substances covered by the 1996 HNS Convention, it should be noted that the definition in Art. 1 (5) (vii) of the Convention, relevant in respect of certain bulk cargoes, makes reference to both the “International Maritime Solid Bulk Cargoes Code, as amended” and the “International Maritime Dangerous Goods Code in effect in 1996”.<sup>44</sup> Therefore, the definition excludes relevant bulk cargoes which are subject to the International Maritime Dangerous Goods (IMDG) Code as amended post-1996 but were not subject to the IMDG Code in effect in 1996. Therefore, if and when the HNS Convention as amended by the 2010 Protocol enters into force, it will not apply in respect of some hazardous cargoes which have been added to the list of substances subject to the IMDG Code since 1996. Agreement on this issue proved to be an important element of the compromise reached by delegations at the Diplomatic Conference.<sup>45</sup>

The HNS Protocol 2010 will be open for signature from 1 November 2010 to 31 October 2011 and will thereafter remain open for accession. Entry into force of the 2010 Protocol will, for Contracting States, lead to entry into force of the HNS Convention as amended by the 2010 Protocol (HNS Convention 2010).<sup>46</sup> In this context, it should be noted that the requirements for entry into force are in one respect more stringent than in the original 1996 HNS Convention. In addition to the existing requirements,<sup>47</sup> entry into force is conditional on Contracting States complying with their relevant annual reporting requirements as regards contributory cargo.<sup>48</sup>

### **3. Overview of recent developments relating to maritime and supply-chain security**

#### **(a) World Customs Organization – SAFE Framework of Standards**

In the context of its work on developing a global supply-chain security framework, the World Customs Organization (WCO) adopted, in 2005, the Framework of Standards to Secure and Facilitate Global Trade (the SAFE Framework), which has fast gained widespread international acceptance.<sup>49</sup> The SAFE Framework is a set of standards and guidelines that WCO member

customs administrations agree to implement on a national basis. However, this does not automatically lead to mutual recognition of customs security provisions and procedures between such countries. Mutual recognition is a concept inherent in the SAFE Framework, which calls for customs administrations to develop industry partnership programmes that are referred to as Authorized Economic Operator (AEO) programmes. An AEO is defined in the SAFE Framework as “a party involved in the international movement of goods ... that has been approved by or on behalf of national customs administrations as complying with the WCO or equivalent supply-chain security standards. AEOs include, inter alia, manufacturers, importers, exporters, brokers, carriers, consolidators, intermediaries, ports, airports, terminal operators, integrated operators, warehouses and distributors.”<sup>50</sup>

The SAFE Framework is built on two supporting pillars: (a) customs-to-customs and (b) customs-to-business cooperation arrangements. The cooperation among customs administrations towards achieving mutual recognition also assists in respect of the customs-to-business pillar, by providing, among other things, standardized security requirements for AEO programmes. The requirements for AEO recognition have been presented in some detail in previous editions of the *Review of Maritime Transport*,<sup>51</sup> but are restated here for ease of reference. They include:

- (i) Demonstrated compliance with customs requirements;
- (ii) A satisfactory system for management of commercial records;
- (iii) Financial viability;
- (iv) Consultation, cooperation and communication;
- (v) Education, training and awareness;
- (vi) Information exchange, access and confidentiality;
- (vii) Cargo security;
- (viii) Conveyance security;
- (ix) Premises security;
- (x) Personnel security;
- (xi) Trading partner security;
- (xii) Crisis management and incident recovery; and
- (xiii) Measurement, analyses and improvement.

Businesses that are awarded the status of AEO are considered reliable by national authorities. Such businesses are not only entitled to benefit from simplified declaration requirements, but also from simplified and facilitated customs controls. They are no longer regarded simply as users, but as “partners of customs administrations in making world trade more secure.”<sup>52</sup>

As noted in the *Review of Maritime Transport 2009*, both the national implementation of the AEO system and mutual recognition agreements are, in many cases, still at an initial stage of their development, and remain a challenge, particularly from the perspective of developing economies. According to the information provided by WCO, as at 30 July 2010, in addition to the 27 member countries of the European Union, 12 additional countries had operational AEO programmes,<sup>53</sup> and such programmes were soon to be launched in a further nine countries.<sup>54</sup> So far, 12 mutual recognition agreements for AEO programmes have been concluded globally,<sup>55</sup> and another 10 are being negotiated.<sup>56</sup>

Through its main capacity-building programme – the Columbus Programme: Aid for SAFE Trade<sup>57</sup> – WCO continues to assist national customs administrations in the implementation of the SAFE Framework. Relevant activities that have been carried out recently include a regional seminar held in Japan, in January 2010; a seminar for the private sector on SAFE, which focused mainly on AEO and mutual recognition, and was held in Brussels in February 2010; and an AEO conference for the private sector in Central and Latin America, which was held in Guatemala in April 2010.<sup>58</sup>

WCO’s Columbus Programme has already completed more than 100 diagnostic missions to member customs administrations. Recent reports from such missions have identified the complex nature of the customs operations at the start of the twenty-first century, and the need for a more strategic approach in the management of customs, including a broader range of management and development skills for customs managers and administrations. In response to these needs, WCO has developed a capacity-building development compendium; this will be a continuously evolving document with additional chapters added at regular intervals to reflect the ever-changing nature of customs reform and modernization.<sup>59</sup> It is also worth noting that on matters relating to the SAFE Framework, such as mutual recognition, AEO programmes, the participation of small and medium-

sized enterprises (SMEs) in them, and customs reform and modernization, WCO cooperates closely and is assisted by the Private Sector Consultative Group.<sup>60</sup>

### **(b) Some developments at European Union level and in the United States**

At the regional and national level, the European Union (EU) and the United States continue to be at the forefront in terms of developing measures to enhance maritime and supply-chain security. For this reason, and in view of the particular importance for many developing countries of trade with the European Union and the United States, some key regulatory developments in the field of international maritime and supply-chain security deserve particular mention here.

As reported in previous issues of the *Review of Maritime Transport*, at EU level, Regulation (EC) No. 1875/2006<sup>61</sup> was adopted in December 2006 to introduce a number of measures to increase the security of shipments into and out of the EU, and to implement Regulation (EC) No. 648/2005, which had first introduced the AEO concept into the Community Customs Code. Regulation (EC) No. 1875/2006 includes detailed rules regarding implementation of the AEO programme, and envisages that reliable economic operators that meet the conditions and criteria required for recognition of AEO status should be issued with AEO certificates as of 1 January 2008.<sup>62</sup> Companies seeking AEO status must comply with certain criteria, including an automated trade and transport data management system, proven financial solvency, and adequate safety/security standards (including physical security, access control, screening of personnel etc.). There are three types of certificate that may be applied for: Customs Simplifications (AEO-C); Security and Safety (AEO-S) and Customs Simplifications/Security and Safety jointly (AEO-F). A database of economic operators who hold a valid AEO certificate of any type and who have given their agreement for their details to be published, as well as a list of customs authorities competent to issue AEO certificates, has been available on the website of the European Commission since 2009, and is being regularly updated.<sup>63</sup>

According to EU statistics, as of 20 August 2010, a total of 5,573 applications for AEO certificates had been submitted, and a total of 3,448 certificates had been issued. The total number of applications rejected up until that date was 692 (i.e. 20 per cent of the applications received), and the total number

of certificates revoked was 82 (i.e. 2.38 per cent of the certificates issued). The number of applications received in the space of the one year from 20 August 2009 to 20 August 2010 was 2,385. The number of certificates issued during that same period was 2,028 (an average of 169 per month). The breakdown reported per certificate type issued was: AEO-F 2,423 (70.27 per cent); AEO-C 903 (26.19 per cent); and AEO-S 122 (3.54 per cent).<sup>64</sup>

Additionally, as laid down in Regulation (EC) 312/2009,<sup>65</sup> and in order to establish a unique system of registration and identification for economic operators in the EU, any economic operator established in the EU is required, from 1 July 2009 onwards, to have a valid Economic Operator Registration and Identification (EORI) number, used by one of the member States.<sup>66</sup>

The EU is continuing the process of negotiating agreements on mutual recognition of business partner programmes (AEO and similar) with some neighbouring States and with its major trading partners,<sup>67</sup> including in particular the United States. It is reported that further progress has been made with regard to reaching mutual recognition between the EU and the United States.<sup>68</sup> To this end, it has already been determined that the Customs–Trade Partnership Against Terrorism (C-TPAT) and the EU's AEO programme are compatible in principle, having similar requirements in place when it comes to their security criteria or standards. In order to move the process forward, three best practices workshops were held in 2009, which mainly clarified how the EU's programme works in theory. However, another very important phase of the mutual recognition process still needs to take place, which consists of joint exercises in Europe designed to ascertain the degree of compatibility between the two programmes on an operational level. It will also be helpful for C-TPAT to fully understand how the European Commission manages the programme across the EU and ensures uniformity and consistency from member country to member country. According to information provided by the EU, the signing of the Mutual Recognition Agreement was planned for the end of October 2010, and implementation of the Mutual Recognition decision was envisaged for 31 October 2011.

Achieving mutual recognition does not exempt any partner, whether domestic or foreign, from complying with other mandated requirements. As regards the United States, for instance, importers still need to comply with the requirements of the Interim Importer

Security Filing Rule,<sup>69</sup> which is known as the 10+2 rule and is aimed at gathering better information on shipments. Under the 10+2 rule, importers are required to submit to United States Customs and Border Protection – electronically and 24 hours prior to loading cargo onto a vessel bound for the United States – the following information: (a) the name and address of the manufacturer or supplier; (b) the name and address of the seller; (c) the name and address of the buyer; (d) the “ship to” name and address; (e) the container stuffing location; (f) the stuffer's name and address; (g) the importer of record number; (h) the consignee number(s); (i) the country of origin; and (j) the commodity's Harmonized Tariff Schedule of the United States number. Moreover, within 48 hours of the vessel's departure for the United States, carriers need to provide: (a) the vessel stowage plan; and (b) container status messages. It was envisaged that this interim rule would come into effect on 26 January 2009, but its full compliance date was postponed for 12 months, taking into account difficulties that importers might face in upgrading their systems.<sup>70</sup> Certain “flexibilities” were allowed in the application of the 10+2 rule during the interim period – from 26 January 2009 to 26 January 2010 – which involved the timing of transmissions for 2 of the 10 elements, and the range of responses for 4 of the 10 elements. All other requirements in this rule were considered as final. At the time of writing, it appears that even after the date for full compliance with the 10+2 requirements, i.e. 26 January 2010, the “flexibilities” will stay in effect until a structured review is completed and a decision on keeping, modifying or removing them is made by the Department of Homeland Security and other executive branch agencies.<sup>71</sup>

Statutory advance declaration of cargo is also envisaged at the EU level, with Regulation (EC) No. 1875/2006 stipulating the requirement of mandatory advance customs notification relating to goods brought into or out of the customs territory of the European Union. Also known as the “advance cargo declaration scheme”, the system, which in part corresponds to the United States' 24-hour rule,<sup>72</sup> would require economic operators to send manifest information to national authorities 24 hours prior to loading. This requirement was set to become mandatory on 1 July 2009, but in April 2009, Regulation (EC) No. 273/2009 was adopted, introducing a temporary derogation for 18 months, until 31 December 2010, from this requirement to provide advance electronic information for security and safety purposes. This was due to

unanticipated delays resulting from the complexity of the processes for introducing electronic entry and exit summary declarations. Also, the investments needed for automatic data transmission via the necessary IT and computer networks could have caused problems for economic operators in the short term. As was pointed out in the *Review of Maritime Transport 2009*, many exporters in developing countries would face particular challenges in meeting the requirements of the “advance cargo declaration scheme”, not least due to the level of computer technology required and the costs involved.<sup>73</sup> For a transitional period, from 1 July 2009 to 31 December 2010, however, the advance declaration continues to be an option for traders, and not an obligation. During this period, goods not declared in advance will be submitted to risk analysis after arrival or before departure.<sup>74</sup>

Developments regarding one further set of regulatory measures adopted in the United States deserve particular mention. While most of the regulatory and other initiatives aiming to enhance the security of maritime container transport that have been adopted in the United States and elsewhere over recent years<sup>75</sup> have enjoyed broad national and international acceptance and support, one legislative requirement introduced into United States law in 2007,<sup>76</sup> providing for 100 per cent scanning by July 2012, using non-obtrusive imaging equipment, of all containers bound for the United States before they are loaded at a foreign port, has proved to be controversial.<sup>77</sup> It is therefore important to note that the United States Department of Homeland Security has recently decided to postpone implementation of the requirement until July 2014.

With regard to the 100 per cent container scanning requirement, many industry representatives, customs organizations, and government officials and entities, both outside and inside the United States, had expressed concerns regarding its effectiveness, viability, and implementation costs.

In this regard, in a WCO resolution adopted in December 2007,<sup>78</sup> member customs administrations expressed concern that the implementation of 100 per cent container scanning would be detrimental to world trade and economic and social development, and could result in unreasonable delays, port congestion, and international trading difficulties. Similarly, in 2009, the European Parliament adopted two resolutions<sup>79</sup> calling on the United States to modify the regulation providing for 100 per cent scanning of inbound cargo, and urged it to work closely with the EU to ensure the

implementation of a multi-layered approach based on actual risk. This would include mutual recognition of the European Union’s and the United States’ trade partnership programmes, in accordance with the WCO SAFE Framework of Standards. More recently, in February 2010, the European Commission issued a report entitled “Secure trade and 100 per cent scanning of containers”,<sup>80</sup> which concluded that implementation of 100 per cent scanning by the EU would have serious repercussions for European and global maritime transport, trade and welfare. The report lists a number of potential areas of concern regarding a requirement to scan 100 per cent of outbound containers, arguing in some detail why it would be “an unnecessary economic burden for European ports; ... an expensive disruption of European transport; ... a potential new trade barrier; and ... a diversion from EU security priorities”. As an alternative way forward, the EU report proposes addressing the supply chain as a global challenge, enhancing international cooperation and strengthening all its elements, and implementing multilayered risk management for both exports and imports.<sup>81</sup>

In the United States, a report issued by the General Accountability Office in December 2009<sup>82</sup> found that a pilot programme for the 100 per cent scanning requirement (the Secure Freight Initiative) was being carried out with limited success in five designated pilot ports, three of which accounted for a relatively low volume of container traffic to the United States and two of which accounted for a high volume of traffic. The Department of Homeland Security (DHS) itself has also identified a number of serious challenges to implementing the 100 per cent scanning requirement, including logistical challenges related to port configuration and to design incompatibility with current scanning systems; the absence of technology to detect anomalies within cargo containers, which would necessitate further inspections; and high deployment and operating costs. “In order to meet the 100 per cent scanning deadline by the 2012 deadline, DHS would need significant resources for greater manpower and technology, technologies that do not currently exist, and the redesign of many ports.”<sup>83</sup> These were all “prohibitive challenges” that required the DHS to seek the time extensions authorized by law and to postpone implementation of the requirement to July 2014.

### **(c) International Organization for Standardization**

As reported in previous issues of the *Review of Maritime Transport*, the ISO 28000 series of standards specify the requirements for security management systems to ensure security in the supply chain. These standards

are intended for application by organizations involved in manufacturing, service, storage or transportation, by all modes of transport and at any stage of the production or supply process.

During 2009, work continued on development of the ISO/PAS 28000 series of standards, which aim to facilitate and improve controls on transport flows, to fight smuggling, to deal with the threats of piracy and terrorism, and to enable secure management of supply chains.

Work continued on both part 1 and part 2 of ISO 28005 “Security management systems for the supply chain – Electronic port clearance”. Part 2, entitled “Core data elements”, was updated and issued as a Draft International Standard.

Additionally, work continued on three projects to amend ISO 28004 to provide additional guidance to smaller ports (project 1) and smaller businesses (project 3) that wish to implement ISO 28000, and to provide guidance to organizations that wish to implement the best practices in supply chain security (ISO 28001), as part of their ISO 28000 management system (project 2).

The working group on project 1 had prepared an initial draft for review, containing:

- (i) a set of recommendations identifying the minimum requirements to be addressed in the supply-chain security management plan, and the acceptance criteria that would be used to measure compliance with the standard;
- (ii) a set of management, operational and security guidelines and metrics that can be used to evaluate compliance with the ISO 28000 standard;
- (iii) a mid- or small-sized port to be selected as a reference site to validate the certification procedures. The port of Riga (Latvia) was selected as a candidate reference site; and
- (iv) acceptance criteria and metrics for certifying compliance with the ISO standard.

With regard to project 2, to provide guidance to organizations wishing to implement the best practices in supply chain security (ISO 28001), as part of their ISO 28000 management system, the draft amendment would be circulated for comments and later be sent to ISO for editing. The work on project 3 would be

carried out by the same group that was working on project 2, and a draft of the proposed amendment was circulated too.<sup>84</sup>

It is important for developing countries to have access to international standards and to increase their participation in international standardization and conformity assessment activities, so that they can benefit from the technology transfer that the standards make possible, and can adapt their products and services to global requirements, thus increasing their competitiveness in world markets. In fact, three quarters of the 162 national standards bodies that make up the ISO network are from developing countries. This has prompted ISO to develop actions to assist in improving the standardization infrastructures and capacities in such countries. Moreover, the ISO Action Plan for Developing Countries 2005–2010 specifies five key objectives to be completed by 2010:

- (i) Improve awareness of key stakeholders in developing countries of the role of standardization in economic growth, world trade and sustainable development.
- (ii) Build the capacity of ISO members and stakeholders involved in developing the standardization infrastructure and participating in international standardization work.
- (iii) Increase national and regional cooperation to share experiences, resources, training, and information and communications technologies.
- (iv) Develop electronic communication and expertise in IT tools to participate in international standardization work, reach out to stakeholders, and make efficient use of ISO e-services.
- (v) Increase participation in the governance and technical work of ISO to voice priorities, contribute to and influence the technical content of ISO deliverables.

The actions carried out during this period include (a) national, regional and international seminars and workshops; (b) sponsorships to attend ISO standards development meetings; (c) e-learning courses; (d) implementation of ICT projects, with equipment and training; and (e) preparation of training materials and publications. ISO carried out more than 250 activities covering the five objectives of the Action Plan during the period 2005–2009, and more than 12,000

participants from developing countries benefited. Around 6 million Swiss francs have been spent directly on implementing these activities. Consultations with all of ISO's developing country members worldwide are under way to prepare the Action Plan 2011–2015. Using a bottom-up approach, these consultations will provide for the strategic objectives of the plan, and will identify the specific areas in which developing countries need assistance, so that such assistance is more targeted. Implementation of the next Action Plan, as has been the case up to now, is expected to be funded by donors and by ISO member contributors.<sup>85</sup>

#### **(d) International Maritime Organization**

The Maritime Safety Committee, at its eighty-seventh session held at IMO in London from 12 to 21 May 2010, while considering measures to enhance maritime security, and particularly the implementation of SOLAS chapter XI-2 and the ISPS Code, noted, among other things, the main conclusions of the Third Latin American Forum on Maritime and Port Security, which had been held in Colombia from 28 to 30 September 2009. The Forum had focused on issues that had arisen in the region after five years' implementation of maritime security measures under the ISPS Code, looking particularly at the question of whether it was necessary to establish new regulations or simply amend the existing ones. The basic conclusion of the Forum was that, as these measures were still going through the implementation stage, it would be premature to draft new regulations, but that it was important to continue to review the ways in which the ISPS Code was being implemented.<sup>86</sup> The Maritime Safety Committee also noted that maritime security issues had been addressed at the last meeting of the African Union held in Durban in April 2010, which had adopted an updated African Charter on Maritime Transport.<sup>87</sup> The observer from the African Union assured the Committee that the African Union would continue to increase its efforts to ensure maritime safety and security in waters off the coasts of Africa.

The Maritime Safety Committee also recalled that SOLAS regulation XI-2/13.4 requires that "Contracting Governments shall, at five-year intervals after 1 July 2004, communicate to the Organization a revised and updated list of all approved port facility security plans for the port facilities located in their territory together with the location or locations covered by each approved port facility security plan and the corresponding date of approval (and the date of approval of any amendments thereto) which will

supersede and replace all information communicated to the Organization, pursuant to SOLAS [regulation XI-2/13.3], during the preceding five years". The Maritime Safety Committee urged SOLAS Contracting Governments to meet their obligations under the above regulation, to communicate the relevant information to IMO, and to update it as and when changes occur.

## **4. Piracy**

In 2009, a total of 406 incidents of piracy and armed robbery were reported, the highest figure since 2003 when the problem was at its highest in the Straits of Malacca. It was also the third successive year that the number of reported incidents increased. Of these incidents, 217 were attributed to Somali pirates, with 47 vessels hijacked and 867 crew members taken hostage.<sup>88</sup> In the first two quarters of 2010, there was a relative decline in pirate attacks worldwide, with a total of 196 incidents recorded by the International Maritime Bureau's Piracy Reporting Centre, compared to 240 incidents for the same period in 2009. This included 31 vessels hijacked, 48 vessels fired upon and 70 vessels boarded. Also during this period, one crew member was killed, 597 crew members were taken hostage, and 16 were injured. The coast of Somalia remained particularly vulnerable, with 100 pirate attacks during this period, including 27 hijackings.<sup>89</sup>

A potentially important development that may contribute towards strengthening maritime security and fighting piracy and armed robbery against ships was the entry into force on 28 July 2010 of the 2005 Protocol<sup>90</sup> to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), 1988.<sup>91</sup> This Protocol extends the list of criminal offences actionable under the 1988 SUA Convention, and introduces provisions covering cooperation and procedures to be followed if a State Party desires to board a ship on the high seas that is flying the flag of another State Party, when the Requesting Party has reasonable grounds to suspect that the ship or a person on board the ship has been or is about to be involved in the commission of an offence under the 1988 SUA Convention (article 8 bis). The authorization of the flag State is required before such a boarding.<sup>92</sup>

In the context of multilateral action against piracy, the IMO Assembly at its twenty-sixth session (23 November to 2 December 2009) adopted, inter alia, resolution A.1025(26) on the Code of Practice for

Investigation of Crimes of Piracy and Armed Robbery Against Ships; and resolution A.1026(26) on Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia. These resolutions, among others, indicated avenues for further work at IMO, particularly at the Maritime Safety Committee, which could include:

- (i) Developing guidance for shipowners, masters and crews with respect to the investigation of piracy and armed robbery against ships;
- (ii) Developing guidance with respect to the fitness of ships to proceed and the care of seafarers and other persons on board who have been subjected to acts of piracy and armed robbery against ships; and
- (iii) Procedures for updating and promulgating IMO guidance on piracy and armed robbery against ships.<sup>93</sup>

In addition, in April 2010, the United Nations Security Council adopted a resolution<sup>94</sup> appealing to all States to “criminalize piracy under their domestic law and favourably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, consistent with applicable human rights law.” In this context, the Security Council welcomed the progress being made to implement the IMO Djibouti Code of Conduct,<sup>95</sup> and called upon its participants to implement it fully and as soon as possible. The Security Council also requested the United Nations Secretary-General to “present to the Security Council, within three months, a report on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia (CGPCS), the existing practice in establishing international and mixed tribunals, and the time and the resources necessary to achieve and sustain substantive results.”

The resolution noted the efforts of international organizations and donors, including the CGPCS, to “enhance the capacity of the judicial and corrections systems in Somalia, Kenya, Seychelles, and other States in the region.” Commending the efforts by

Kenya to “prosecute suspected pirates in its national courts and imprison convicted persons”, the Security Council encouraged Kenya to continue these efforts while acknowledging the difficulties that Kenya faced.<sup>96</sup>

The resolution also commended an earlier decision taken by the CGPCS on 28 January 2010, at its fifth plenary session, to set up an international trust fund, administered by the United Nations Office on Drugs and Crime, to support the initiatives of the CGPCS, to defray the expenses associated with prosecuting suspected pirates, and to support other counter-piracy initiatives. It welcomed the contributions of participating States, and encouraged other potential donors to contribute to the fund. In April 2010, it was announced that this trust fund was planning to support five projects, with a total value of \$2.1 million, aimed at assisting Somalia and its neighbours. Four of these projects will help strengthen institutions in Seychelles and the autonomous Somali regions of Puntland and Somaliland, in the areas of mentoring prosecutors and police, building and renovating prisons, reviewing domestic laws on piracy, and increasing the capacity of local courts. The fifth project aims to help the local media to disseminate anti-piracy messages within Somalia. The fund has 10 voting members<sup>97</sup> and three non-voting United Nations members.<sup>98</sup>

## 5. Seafarers

In choosing “2010: Year of the Seafarer” as the theme for this year’s World Maritime Day, IMO decided to pay tribute to the world’s 1.5 million seafarers, for their unique contribution and the important role that they play in helping to achieve IMO’s goal of safe, secure and efficient shipping in clean oceans. IMO considers that governments and the international community should focus on continuously improving conditions for seafarers and on avoiding unfair treatment.<sup>99</sup>

An important development giving further impetus to fair treatment for seafarers was the entry into force on 1 January 2010 of IMO’s Casualty Investigation Code. The Code contains compulsory provisions on considerations to be observed when obtaining evidence from seafarers in casualty cases.

As reported in previous issues of the *Review of Maritime Transport*, the International Labour Organization’s Maritime Labour Convention (MLC), adopted in February 2006, consolidated and updated

more than 65 international labour standards related to seafarers. The MLC was designed to be an important contribution to the international maritime regulatory regime, representing the “fourth pillar” alongside the three key IMO conventions, namely the International Convention for the Safety of Life at Sea, 1974 (SOLAS); the International Convention on Standards of Training,

Certification and Watchkeeping for Seafarers, 1978 (STCW); and the International Convention for the Prevention of Pollution from Ships (MARPOL). The 2006 Maritime Labour Convention will enter into force after it has been ratified by 30 member States of the International Labour Organization (ILO) with a total share of at least 33 per cent of world tonnage.<sup>100</sup> The high level required for ratification of 2006’s MLC reflects the fact that the enforcement and compliance system established under the Convention needs widespread international cooperation in order for it to be effective.

Since many of the obligations under the 2006 MLC are directed at shipowners and flag States, it is important that ILO members with a strong maritime interest and a high level of tonnage operating under their legal jurisdiction ratify the Convention. According to information from ILO, as at 31 August 2010, ten ILO member States had ratified the Convention.<sup>101</sup> In addition, it is hoped that entry into force of the MLC will be achieved in late 2010/early 2011.<sup>102</sup>

## **B. STATUS OF CONVENTIONS**

There are a number of international conventions affecting the commercial and technical activities of maritime transport, prepared or adopted under the auspices of UNCTAD. Box 6.1 provides information on the ratification status of each of these conventions, as at 31 August 2010.<sup>103</sup>

**Box 6.1. Contracting States party to selected conventions on maritime transport, as at 31 August 2010**

Title of convention	Date of entry into force or conditions for entry into force	Contracting States
United Nations Convention on a Code of Conduct for Liner Conferences, 1974	Entered into force 6 October 1983	Algeria, Bangladesh, Barbados, Belgium, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chile, China, Congo, Costa Rica, Côte d'Ivoire, Cuba, Czech Republic, Democratic Republic of the Congo, Egypt, Ethiopia, Finland, France, Gabon, Gambia, Ghana, Guatemala, Guinea, Guyana, Honduras, India, Indonesia, Iraq, Italy, Jamaica, Jordan, Kenya, Kuwait, Lebanon, Liberia, Madagascar, Malaysia, Mali, Mauritania, Mauritius, Mexico, Montenegro, Morocco, Mozambique, Netherlands, Niger, Nigeria, Norway, Pakistan, Peru, Philippines, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Senegal, Serbia, Sierra Leone, Slovakia, Somalia, Spain, Sri Lanka, Sudan, Sweden, Togo, Trinidad and Tobago, Tunisia, Turkey, United Republic of Tanzania, Uruguay, Venezuela (Bolivarian Republic of), Zambia. <b>(78)</b>
United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules)	Entered into force 1 November 1992	Albania, Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, Czech Republic, Dominican Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kazakhstan, Kenya, Lebanon, Lesotho, Liberia, Malawi, Morocco, Nigeria, Paraguay, Romania, Saint Vincent and the Grenadines, Senegal, Sierra Leone, Syrian Arab Republic, Tunisia, Uganda, United Republic of Tanzania, Zambia. <b>(34)</b>
International Convention on Maritime Liens and Mortgages, 1993	Entered into force 5 September 2004	Albania, Benin, Ecuador, Estonia, Lithuania, Monaco, Nigeria, Peru, Russian Federation, Spain, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Syrian Arab Republic, Tunisia, Ukraine, Vanuatu. <b>(16)</b>
United Nations Convention on International Multimodal Transport of Goods, 1980	Not yet in force – requires 30 contracting parties	Burundi, Chile, Georgia, Lebanon, Liberia, Malawi, Mexico, Morocco, Rwanda, Senegal, Zambia. <b>(11)</b>
United Nations Convention on Conditions for Registration of Ships, 1986	Not yet in force – requires 40 contracting parties with at least 25 per cent of the world's tonnage as per annex III to the Convention	Albania, Bulgaria, Côte d'Ivoire, Egypt, Georgia, Ghana, Haiti, Hungary, Iraq, Liberia, Libyan Arab Jamahiriya, Mexico, Oman, Syrian Arab Republic. <b>(14)</b>
International Convention on Arrest of Ships, 1999	Not yet in force – requires 10 contracting parties	Algeria, Benin, Bulgaria, Estonia, Latvia, Liberia, Spain, Syrian Arab Republic. <b>(8)</b>

Source: For official status information, see <http://www.un.org/law>

## C. THE WTO NEGOTIATIONS ON TRADE FACILITATION

### 1. Emergence of a sole negotiating text

The WTO negotiations on trade facilitation are now in their sixth year and are widely described as an area of the Doha Round in which tangible progress has been made.<sup>104</sup> A consolidated text of members' proposals was put forward in December 2009 (WTO document TN/TF/W/165 and its revisions), and this is now the sole negotiating text. The scope of the proposed substantive rules has remained largely unchanged since November 2008. Rules are proposed in the field of publication of trade regulations, consultations about trade regulations, appeal procedures, fees and charges, the release and clearance of goods, border agency cooperation, a customs cooperation mechanism, formalities, and transit. A subset of the proposed rules applies directly to customs unions; this involves harmonizing the administration of appeal and test procedures and harmonizing documentation requirements.

Given that the scope of the proposed rules remains largely unchanged, the negotiations have been focusing on the details of the proposed rules. At the centre of the negotiations are the level of obligation and the level of precision that the new rules will have, as well as their overall coherence. The negotiating text therefore contains multiple square brackets reflecting the various changes which delegations would like to make to the text and which are still subject to discussion.

### 2. Extensive use of best-endeavour language

More than half of the proposed rules contain so-called best-endeavour language, which reduces the binding character of a rule by using language such as "to the extent possible", and "should" instead of "shall". The extensive use of this so-called best-endeavour language is motivated by developing-country members' concerns about implementation, and also by issue linkage between the negotiations on trade facilitation and the Doha Round's other negotiating areas.<sup>105</sup> At the outset of the negotiations, it was made clear that developing countries would be granted special and differential treatment<sup>106</sup> to

accommodate implementation difficulties, and to facilitate access to technical assistance and capacity-building to overcome these gaps. Delegations are therefore negotiating a subset of rules on special and differential treatment. It seems, however, that progress in this field is slow, and that developing countries are not yet confident with the proposed rules on special and differential treatment. Much of the best-endeavour language currently in square brackets will therefore either remain or disappear, depending on how confident developing countries are with the provisions on special and differential treatment designed for this agreement, and with the overall progress in the Doha Round. It can be expected that resistance to legally binding rules in the field of trade facilitation will remain strong as long as no progress is achieved in the other areas of the Doha Round.

### 3. Variance in the level of precision

Another important aspect of the current negotiations is the level of precision of the rules. The objective of the agreement is to achieve trade facilitation reform through changes in the behaviour of States in response to the future WTO rules on trade facilitation. These rules can be drafted with different degrees of clarity, scope and inclusiveness. Given the different administrative and legal systems, as well as the different levels of development of WTO members, it is a challenging task to draft rules which are acceptable to all, and which can be effectively implemented in all countries. Delegations, therefore, have to strike a balance between more general rules, and rules that contain a high level of detail regarding the definition and the implementation of the rule.

The form of rule chosen has a bearing on the implementation process at the national and also at the international level. Precise international rules are best suited to formal enforcement through third-party adjudication. They are, however, limited as regards their adaptation to local circumstances and to legal, administrative or technological differences, and their implementation can trigger resistance if the relevant stakeholders have not been brought on board early on in the drafting of the rules. Less precise rules, on the other hand, have to be interpreted, and can lead to different forms of implementation. While this provides room for adaptability and for contributions from local stakeholders when designing the implementation solution, it requires the implementation process to

be monitored more closely to ensure a minimum of harmonization and commitment. The implementation process will therefore require activities such as training, information exchange, and the subsequent development of rules to guide interpretation and implementation.

#### 4. Linking WTO rules to other work on trade facilitation

Although WTO has been at the centre of public and professional attention in recent years when it comes to trade facilitation, many other international organizations – such as WCO, the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT), OECD, UNCTAD, the World Bank, regional integration secretariats, and private sector associations – carry out work on trade facilitation. Their work consists of recommendations, conventions, standards, and technical assistance projects, which do not have the binding force of WTO commitments. They are, however, relevant for the practical implementation of trade facilitation reforms, as they provide practical solutions, allow for the exchange of experiences, and develop harmonized approaches.

The negotiation process, and, in particular, the recent discussions on the level of precision and obligation, have made it clear that the legally binding WTO commitments are only one element of the efforts to harmonize and advance trade facilitation efforts.

There is an existing network of rules, recommendations, and standards which should be developed in a coherent manner and linked to WTO commitments. Organizations such as WCO and UN/CEFACT have already seen an increase in attention to and participation in their decision-making processes as a result of the WTO negotiations.

The current WTO negotiating text proposes linkages to the work of other organizations in two areas, namely, substantive rules which further clarify or facilitate the implementation of the commitment, and technical assistance and capacity-building. It is therefore proposed that authority to further develop rules, or recommendations on the implementation of a given rule, be delegated to the future supervisory body for the agreement, which will undertake this task in cooperation with international organizations and other technical bodies.

An information exchange is also envisaged on technical assistance provided by these different organizations, as well as on the technical assistance needs of individual countries and the implementation progress. Details of these procedural requirements and their operationalization are still under negotiation, but they hold out the prospect for effective cooperation and information exchange beyond the negotiating phase, which would be a unique characteristic of the WTO agreement on trade facilitation and a prerequisite for successful implementation of the rules.

#### Box 6.2. UNCTAD assistance in the area of the WTO negotiations on trade facilitation

As part of its work in the area of trade and transport facilitation, UNCTAD helps build capacities in developing countries to meet the challenges of the WTO negotiations on trade facilitation and to ensure a result from the negotiations that is appropriate to the needs and implementation capacities of developing countries and LDCs.

With the support of its development partners, UNCTAD provides training and advisory services on the WTO negotiations on trade facilitation through the UNCTAD Trust Fund on Trade Facilitation. Since 2005, UNCTAD has been organizing regional and national workshops to ensure a better understanding of the issues at stake, in Asia, Africa, and Latin America and the Caribbean. Together with its international partners (particularly the other Annex D organizations – the World Bank, the International Monetary Fund, OECD, the World Customs Organizations and the WTO secretariat), UNCTAD has conducted national trade facilitation needs assessments in 16 developing countries. UNCTAD has also complemented this analytical work with tailored advisory services to help countries prepare for the assessment, in particular by strengthening multi-agency and public-private stakeholder groups.

UNCTAD seeks to further its assistance to strengthen the strategic planning capacity in developing countries, with a view to compliance with the negotiated WTO commitments. This work builds on linkages with regional economic integration organizations (ALADI, OECS, SIECA, WAEMU) and with the private sector.

## ENDNOTES

- <sup>1</sup> On 11 December 2008, the United Nations General Assembly adopted the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. The General Assembly authorized the Convention to be opened for signature at a ceremony to be held on 23 September 2009 in Rotterdam, the Netherlands, and recommended that the rules embodied in the Convention be known as the “Rotterdam Rules”. The text of the Convention, as adopted, is set out in the annex to the General Assembly resolution 63/122, available at <http://www.uncitral.org>.
  - <sup>2</sup> See the *Review of Maritime Transport 2009*, pages 123–130. The UNCTAD secretariat has provided substantive analytical comment for consideration by the UNCITRAL working group throughout the drafting process. Relevant documentation, highlighting potential areas of concern, in particular from the perspective of developing countries, is available on the UNCTAD website at <http://www.unctad.org/ttl/legal>. This includes an article-by-article commentary on the original draft legal instrument (UNCTAD/SDTE/TLB/4), as well as a note entitled “Carrier liability and freedom of contract under the UNCITRAL draft instrument on the carriage of goods [wholly or partly] [by sea]” (UNCTAD/SDTE/TLB/2004/2). The documentation is also available on the UNCITRAL website as working documents A/CN.9/WG.III/WP.21/Add.1, A/CN.9/WG.III/WP.41 and A/CN.9/WG.III/WP.46.
  - <sup>3</sup> Armenia, Cameroon, Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Luxembourg, Madagascar, Mali, the Netherlands, Niger, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and the United States. Status information is available on the UNCITRAL website at <http://www.uncitral.org>.
  - <sup>4</sup> See Art. 88 and Art. 94(1) of the Rotterdam Rules. The Convention will enter into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval (signatory States) or accession (non-signatory States).
  - <sup>5</sup> International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (Hague Rules).
  - <sup>6</sup> International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (Hague Rules), as amended by the Visby and SDR protocols 1968 and 1979 (Hague-Visby Rules).
  - <sup>7</sup> United Nations Convention on the Carriage of Goods by Sea, 1978.
  - <sup>8</sup> See Art. 89(3).
  - <sup>9</sup> See the second IMO GHG study (2009). Final report incorporating changes listed in document MEPC 59/INF.10/Corr.1, International Maritime Organization, September 2009.
  - <sup>10</sup> The Kyoto Protocol was adopted in Kyoto, Japan, on 11 December 1997. It came into force on 16 February 2005, and, to date, has 191 Parties. It is an international agreement linked to the United Nations Framework Convention on Climate Change (UNFCCC), which provides the overall framework for international efforts to tackle climate change. While the UNFCCC encourages developed countries to stabilize GHG emissions, the Kyoto Protocol sets specific commitments, binding 37 developed countries to cut GHG emissions by about 5 per cent from 1990 levels over the five-year period from 2008 to 2012. The Protocol places a heavier burden on developed countries, as the largest contributors to GHG emissions over the years, under the principle of Common But Differentiated Responsibilities. For more information, see the UNFCCC website at <http://www.unfccc.int>.
  - <sup>11</sup> The text of the Copenhagen Accord is available at <http://www.unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf#page=4>. In addition, other COP 15 documents are available from the UNFCCC website at <http://www.unfccc.int>. For more information on the COP 15 and UNFCCC process, see also the Report of the Marine Environment Protection Committee on its sixtieth session, MEPC 60/22, pages 19–22.
  - <sup>12</sup> It should be noted that a draft text on emissions from international bunkers was proposed during the Conference by the facilitators of the informal consultation group on bunkers established by the Chair of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA). The draft text is also reproduced in paragraph 10 of document MEPC 60/4/9/Add.1. The AWG-LCA is a subsidiary body under the UNFCCC, established at the thirteenth Conference of the Parties (COP 13) by its decision 1/CP.13 (the Bali Action Plan), with the aim of conducting a process that would “enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome and adopt a decision at its fifteenth session.” The mandate of the AWG-LCA was extended by COP 15, and the group will continue its work drawing on its initial report to COP 15 and also on the progress made during the Conference. For more information and for AWG-LCA documents, see <http://unfccc.int/meetings/items/4381.php>.
  - <sup>13</sup> For an overview, see chapter 6 of the 2008 and 2009 editions of the *Review of Maritime Transport*.
  - <sup>14</sup> As reported in the *Review of Maritime Transport 2009*, four circulars on technical and operational measures were issued in August 2009 following the meeting of the Marine Environment Protection Committee at its fifty-ninth session. These may be found on the IMO website at <http://www.imo.org>.
  - <sup>15</sup> See the Report of the Marine Environment Protection Committee on its sixtieth session. MEPC 60/22, pages 33–34.
  - <sup>16</sup> For a concise description of selected market-based mitigation measures, and other potential mitigation options, see also the *Summary of Proceedings* from the UNCTAD Multi-year Expert Meeting on Transport and Trade Facilitation:
-

- Maritime Transport and the Climate Change Challenge, 16–18 February 2009, Geneva. UNCTAD/DTL/TLB/2009/1, pages 14–15.
- <sup>17</sup> The *Second IMO GHG Study 2009* is a comprehensive assessment of the level of greenhouse gases emitted by ships, and of the potential for reduction. The text is available at [http://www5.imo.org/SharePoint/mainframe.asp?topic\\_id=1823](http://www5.imo.org/SharePoint/mainframe.asp?topic_id=1823). For the main conclusions of the study, see the *Review of Maritime Transport 2009*, pages 145–146.
- <sup>18</sup> *Second IMO GHG Study 2009*, pages 81–86.
- <sup>19</sup> For more information on progress on market-based measures, see the Report of the Marine Environment Protection Committee on its sixtieth session. MEPC 60/22, page 35.
- <sup>20</sup> For the terms of reference and composition of MBM-EG, see *ibid.*, annex 8.
- <sup>21</sup> The sponsors for various MBM proposals are indicated in parentheses in notes 22–33 that follow.
- <sup>22</sup> MEPC 59/4/5 (Denmark), MEPC 60/4/8 (Cyprus, Denmark, the Marshall Islands, Nigeria, and the International Parcel Tankers Association).
- <sup>23</sup> MEPC 60/4/37 (Japan), MEPC 60/4/51 (Japan).
- <sup>24</sup> MEPC 60/4/51 (Japan).
- <sup>25</sup> MEPC 60/4/40 (Jamaica).
- <sup>26</sup> MEPC 60/4/40 (Jamaica) at para. 17.
- <sup>27</sup> MEPC 59/4/25 (France, Germany and Norway); MEPC 59/4/26 (France, Germany and Norway); MEPC 60/4/22 (Norway); MEPC 60/4/26 (United Kingdom); MEPC 60/4/41 (France); MEPC 60/4/43 (France, Germany, Norway and the United Kingdom).
- <sup>28</sup> MEPC 60/4/12 (United States).
- <sup>29</sup> See note 38 and the accompanying text.
- <sup>30</sup> MEPC 60/4/39 (World Shipping Council).
- <sup>31</sup> MEPC 60/4/55 (International Union for Conservation of Nature).
- <sup>32</sup> Article 3 (paras. 1, 2, 3 and 5) and article 4 (paras. 3 and 7) of the UNFCCC. The principles of equity and common but differentiated responsibilities and respective capabilities reflect the general acceptance by developed countries of their greater historical contribution to the accumulation of GHG emissions, and their relatively greater resource capacity to develop and carry out remedial actions. This principle is reflected in the additional obligations imposed on Annex I countries. See also note 10 above.
- <sup>33</sup> MEPC 60/4/10 (Bahamas).
- <sup>34</sup> MEPC 60/4/23, MEPC 60/4/28 and MEPC 60/4/55.
- <sup>35</sup> Reduction of GHG emissions from ships: Full report of the work undertaken by the Expert Group on Feasibility Study and Impact Assessment of Possible Market-Based Measures. MEPC 61/INF.2.
- <sup>36</sup> *Ibid.*, page 220.
- <sup>37</sup> Article 17 of the 2009 Hong Kong Convention. So far, five countries – France, Italy, the Netherlands, Saint Kitts and Nevis, and Turkey – have signed the Convention, subject to ratification or acceptance. See IMO news item, 27 August 2010, available at <http://www.imo.org>.
- <sup>38</sup> Article 18 of the 2004 BWM Convention. According to information provided on the IMO website, as at 31 August 2010, 26 States had become members of the BWM Convention, representing 24.44 per cent of world tonnage.
- <sup>39</sup> International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL).
- <sup>40</sup> MARPOL annex VI came into force on 19 May 2005, and by 31 August 2010 it had been ratified by 60 States, representing approximately 84.04 per cent of world tonnage. Annex VI covers air pollution from ships, including SO<sub>x</sub> and NO<sub>x</sub> emissions and particulate matter, but it does not cover CO<sub>2</sub> emissions, which are subject to separate discussions within IMO.
- <sup>41</sup> These two instruments were adopted unanimously by the MEPC at its fifty-eighth session in October 2008 by resolutions MEPC 176(58) and MEPC 177(58). For further information, see the *Review of Maritime Transport 2009*, page 145.
- <sup>42</sup> The 1996 HNS Convention will enter into force 18 months after the following conditions have been fulfilled: (a) 12 States have accepted the Convention, four of which have not less than 2 million units of gross tonnage; and (b) the persons in these States who would be responsible for paying contributions to the general account have received a total quantity of at least 40 million tons of contributing cargo in the preceding calendar year. By 31 August 2010, the Convention had been ratified by 14 States, representing 13.61 per cent of world tonnage.
- <sup>43</sup> This summary on limitation of liability provisions is based on the relevant press release on IMO's website <http://www.imo.org>.
- <sup>44</sup> The full provision in Art. 1(5)(vii) of the 1996 HNS Convention as amended by Art. 3 of the 2010 HNS Protocol states that the solid bulk goods falling within the scope of application of the amended Convention are "the solid bulk materials

possessing chemical hazards covered by the International Maritime Solid Bulk Cargoes Code, as amended, to the extent that these substances are also subject to the provisions of the International Maritime Dangerous Goods Code in effect in 1996, when carried in packaged form”.

<sup>45</sup> For some background information on the debate, see the Report of the IMO Legal Committee on the Work of its 95th Session. LEG/95/10, paras. 3.4–3.9.

<sup>46</sup> See Art. 18 of the 2010 HNS Protocol.

<sup>47</sup> These are summarized in note 42 above.

<sup>48</sup> See Art. 21(1) of the 2010 HNS Protocol.

<sup>49</sup> As at 15 September 2010, 162 of the 177 members of WCO had expressed their intention to implement the SAFE Framework.

<sup>50</sup> SAFE Framework of standards to secure and facilitate global trade. Rev. June 2007. Page 6, footnote 1.

<sup>51</sup> See the 2008 and 2009 editions of the *Review of Maritime Transport*.

<sup>52</sup> See “Focusing Customs on client service”. WCO News no. 61. February 2010. Available at <http://www.wcoomd.org>.

<sup>53</sup> Argentina, Canada, China, Japan, Jordan, Malaysia, New Zealand, Norway, the Republic of Korea, Singapore, Switzerland and the United States.

<sup>54</sup> Andorra, Botswana, Chile, Colombia, Costa Rica, Guatemala, Israel, San Marino, and the former Yugoslav Republic of Macedonia.

<sup>55</sup> United States–New Zealand; United States–Canada; United States–Jordan; Japan–New Zealand; United States–Japan; European Union–Switzerland; European Union–Norway; Canada–Japan; Canada–Republic of Korea; Canada–Singapore; Republic of Korea–Singapore; United States–Republic of Korea.

<sup>56</sup> Andorra–European Union; China–European Union; China–Singapore; European Union–Japan; European Union–San Marino; European Union–United States; Republic of Korea–New Zealand; New Zealand–Singapore; Norway–Switzerland; Singapore–United States. According to information provided by the European Union, as regards China–European Union mutual recognition of AEO programmes, the new rules for AEOs in China have not yet been published and this might occur later in 2010. These new rules need to be published and implemented before the European Union can declare equivalency and compatibility of the AEO programmes. For other general information on AEO implementation and mutual recognition, see also the ICC draft discussion paper entitled “ICC recommendations on mutual recognition”. Globalized version. Revised June 2010. Available from <http://www.iccwbo.org>.

<sup>57</sup> See WCO Columbus Programme brochure entitled “Enhancing the global dialogue on capacity-building”.

<sup>58</sup> For more information, see [http://www.wcoomd.org/event\\_cal2010\\_about.htm](http://www.wcoomd.org/event_cal2010_about.htm).

<sup>59</sup> For more information, see <http://www.wcoomd.org>. The publication will be shortly available for sale through the WCO bookshop.

<sup>60</sup> The PSCG was established in 2006 to advise WCO on the progress and issues in implementing the SAFE Framework. Its membership is limited to no more than 30 participants representing the business community, namely 17 companies and 13 international associations representing every region of the world. Membership may be renewed every two years. For further information, see the PSCG website at <http://www.wcopscg.org>.

<sup>61</sup> Regulation no. 1875/2006 is contained in *Official Journal L360*, 19 December 2006, on page 64.

<sup>62</sup> A number of guidance documents and tools have been prepared by the European Commission. These include detailed AEO guidelines published in June 2007, a common framework for risk assessment of economic operators called COMPACT which was published in June 2006, an AEO self-assessment tool, and an AEO e-learning tool. The AEO guidelines (TAXUD/2006/1450) and the AEO compact model (TAXUD/2006/1452) are available at <http://ec.europa.eu>.

<sup>63</sup> For updates, see [http://ec.europa.eu/taxation\\_customs/dds/cgi-bin/aeoquery?Lang=EN](http://ec.europa.eu/taxation_customs/dds/cgi-bin/aeoquery?Lang=EN).

<sup>64</sup> Information was provided by the European Commission’s Directorate-General for Taxation and Customs Union.

<sup>65</sup> OJ.L 98/3 of 17 April 2009 (<http://eur-lex.europa.eu>).

<sup>66</sup> For further information, see <http://ec.europa.eu>.

<sup>67</sup> In particular, Andorra, China, Japan, and San Marino. Negotiations with Canada are also likely to begin in 2010. For more information, see the European Commission’s website (<http://ec.europa.eu>). See also the 2008 and 2009 editions of the *Review of Maritime Transport*.

<sup>68</sup> For further information, see two documents dated 10 March 2010 that are available from the United States Customs and Border Protection website [www.cbp.gov](http://www.cbp.gov), namely “Mutual recognition information”, available at [http://www.cbp.gov/linkhandler/cgov/trade/cargo\\_security/ctpat/mr/mutual\\_recog.ctt/mutual\\_recog.pdf](http://www.cbp.gov/linkhandler/cgov/trade/cargo_security/ctpat/mr/mutual_recog.ctt/mutual_recog.pdf) and “Mutual recognition FAQ” available at [http://www.cbp.gov/linkhandler/cgov/trade/cargo\\_security/ctpat/mr/mutual\\_recog\\_faq.ctt/mutual\\_recog\\_faq.pdf](http://www.cbp.gov/linkhandler/cgov/trade/cargo_security/ctpat/mr/mutual_recog_faq.ctt/mutual_recog_faq.pdf)

<sup>69</sup> For the text, see <http://edocket.access.gpo.gov/2008/pdf/E8-27048.pdf>, where earlier comments by stakeholders are also addressed.

- <sup>70</sup> For further information, see also the frequently asked questions document, last updated on 1 February 2010, which is available at [www.cbp.gov](http://www.cbp.gov).
- <sup>71</sup> For further information, see [www.cbp.gov/xp/cgov/trade/cargo\\_security/carriers/security\\_filing/](http://www.cbp.gov/xp/cgov/trade/cargo_security/carriers/security_filing/)
- <sup>72</sup> For further information on the United States 24-hour rule, see <http://www.cbp.gov>. See also the UNCTAD report entitled "Container security: Major initiatives and related international developments" (UNCTAD/SDTE/TLB/2004/1) available at <http://www.unctad.org/ttl/legal>. It should be noted that the 24-hour rule requires carriers to provide advance manifest information to the United States Customs 24 hours prior to the loading of United States-bound cargo at a foreign port.
- <sup>73</sup> In this context, see, for instance, the UNCTAD report entitled "Maritime security: ISPS implementation, costs and related financing" (UNCTAD/SDTE/TLB/2007/1) available at <http://www.unctad.org/ttl/legal>. This report gives the results of a survey conducted by the secretariat which showed that the costs of compliance with the ISPS Code were proportionately higher for smaller ports.
- <sup>74</sup> For further information, see the European Commission's website <http://ec.europa.eu>.
- <sup>75</sup> See, for instance, "Container security: major initiatives and related international developments" (UNCTAD/SDTE/TLB/2004/1). For related issues, see also "Maritime security: ISPS implementation, costs and related financing" (UNCTAD/SDTE/TLB/2007/1). Both reports are available at [www.unctad.org/ttl/legal](http://www.unctad.org/ttl/legal).
- <sup>76</sup> Implementing Recommendations of the 9/11 Commission Act of 2007. Public Law 110-53. 3 August 2007. The full text is available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_public\\_laws&docid=f:publ053.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ053.110.pdf). For an analysis of the respective provisions, see UNCTAD's *Transport Newsletter* no. 45, first quarter 2010, available at [www.unctad.org/ttl](http://www.unctad.org/ttl).
- <sup>77</sup> For a more detailed overview of the legislation and the surrounding debate, see also UNCTAD's *Transport Newsletter* no. 45, first quarter 2010, available at [www.unctad.org/ttl](http://www.unctad.org/ttl).
- <sup>78</sup> See [www.tradeinnovations.com/Documents/News/Resolution\\_per\\_cent20CPG\\_PSCG\\_per\\_cent20E.pdf](http://www.tradeinnovations.com/Documents/News/Resolution_per_cent20CPG_PSCG_per_cent20E.pdf).
- <sup>79</sup> Resolutions P6\_TA(2009)0193 and P7\_TA(2009)0058 are available from the website of the European Parliament at [www.europarl.europa.eu](http://www.europarl.europa.eu)
- <sup>80</sup> The full text of the European Commission's staff working document entitled "Secure Trade and 100% Scanning of Containers" is available at [http://ec.europa.eu/taxation\\_customs/resources/documents/common/whats\\_new/sec\\_2010\\_131\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/common/whats_new/sec_2010_131_en.pdf).
- <sup>81</sup> For a similar position by the United States CPB, see "Risk-based, layered approach to supply chain security". Fiscal year 2010 report to Congress. 13 April.
- <sup>82</sup> The report issued on 2 December 2009 entitled "Homeland security: DHS's progress and challenges in key areas of maritime, aviation, and cybersecurity" is available on the GAO website at [www.gao.gov/new.items/d10106.pdf](http://www.gao.gov/new.items/d10106.pdf). Earlier GAO reports on the issue of 100 per cent scanning include: "Supply chain security: Feasibility and cost-benefit analysis would assist DHS and Congress in assessing and implementing the requirement to scan 100 per cent of U.S.-bound containers" (GAO-10-12, 30 October 2009); "Supply chain security: Challenges to scanning 100 percent of U.S.-bound cargo containers" (GAO-08-533T, 12 June 2008); and "Supply chain security: CBP works with international entities to promote global customs security standards and initiatives, but challenges remain" (GAO-08-538, 15 August 2008).
- <sup>83</sup> See the written testimony presented in December 2009 by the Secretary of DHS to the United States Senate Committee on Commerce, Science and Transportation, available at [http://commerce.senate.gov/public/?a=Files.Serve&File\\_id=77bc2a79-88f2-4801-a201-01eb1ddb823](http://commerce.senate.gov/public/?a=Files.Serve&File_id=77bc2a79-88f2-4801-a201-01eb1ddb823).
- <sup>84</sup> See the minutes of the twenty-eighth ISO/TC8 meeting held in Izmir, Turkey, 27–29 October 2009. Annex 3. Japan, the Republic of Korea, Singapore, the United Kingdom and the United States have designated representatives for these projects.
- <sup>85</sup> For further information, see the recent ISO publication entitled *ISO – A Trusted Partner for Development Donors*. See also the "ISO action plan for developing countries 2005–2010" and the "ISO strategic plan 2005–2010", available at [http://www.iso.org/iso/about\\_iso.html](http://www.iso.org/iso/about_iso.html).
- <sup>86</sup> See the "Draft report of the Maritime Safety Committee on its eighty-seventh session". MSC 87/WP.10, page 9.
- <sup>87</sup> Further details, and the text of the Charter, can be found on the African Union's website at [http://www.africa-union.org/root/au/Documents/Treaties/Text/AFRICAN\\_MARITIME\\_TRANSPORT.pdf](http://www.africa-union.org/root/au/Documents/Treaties/Text/AFRICAN_MARITIME_TRANSPORT.pdf)
- <sup>88</sup> See the "Piracy and armed robbery against ships" report for the period 1 January–31 December 2009, issued by the International Maritime Bureau's Piracy Reporting Centre (IMB PRC), available upon request at [www.icc-ccs.org](http://www.icc-ccs.org). See also the International Maritime Bureau's press release "2009 worldwide piracy figures surpass 400", available on the same website.
- <sup>89</sup> See the International Maritime Bureau's "Piracy and armed robbery against ships" report for the period 1 January–30 June 2010. See also "Pirates face new resistance as navies strike back, says ICC" in ICC News. 15 July 2010.
- <sup>90</sup> Nauru deposited its instrument of ratification of the 2005 Protocol to the SUA Convention and also of the 2005 Protocol to the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the

Continental Shelf (1988 SUA Protocol) on 29 April 2010, thus becoming the twelfth country to ratify the 2005 Protocol to the SUA Convention, and the tenth to ratify the 2005 Protocol to the 1988 SUA Protocol. Both protocols will come into force 90 days after this deposit, namely on 28 July 2010.

<sup>91</sup> The 1988 SUA Convention provides a basis for its States parties to prosecute pirates. Although the Convention does not contain an express definition of piracy and armed robbery against ships, its article 3(1)(a) stipulates that any person commits an offence if that person unlawfully and intentionally "seizes or exercises control over a ship by force or threat thereof or any other form of intimidation." Under the Convention, appropriate measures need to be taken by States to make this and other offences punishable by penalties, to establish jurisdiction over these, and to accept delivery of persons responsible for or suspected of committing such offences. For more details, see also the *Review of Maritime Transport 2009*.

<sup>92</sup> For a description of the amendments to the 1988 SUA Convention and to the 1988 SUA Protocol, adopted in 2005 under the auspices of IMO, see the *Review of Maritime Transport 2006*. The 1988 SUA Convention came into force on 1 March 1992. As at 31 August 2010, it had 156 parties, representing 94.73 per cent of world tonnage. The text of the Convention can be found at [www.admiraltylawguide.com](http://www.admiraltylawguide.com). For an update on its status, check the IMO website at [www.imo.org](http://www.imo.org).

<sup>93</sup> For further information, see document MSC 87/19/3.

<sup>94</sup> S/RES/1918(2010), 27 April 2010.

<sup>95</sup> For further information on the Djibouti Code of Conduct, see the *Review of Maritime Transport 2009*, page 135.

<sup>96</sup> S/RES/1918(2010), 27 April 2010. See also the United Nations press release "Security Council suggests possible tribunals to deal with Somali piracy problem".

<sup>97</sup> These are Djibouti, Egypt, France, Germany, Greece, Kenya, the Marshall Islands, Norway, Somalia, and the United States.

<sup>98</sup> These are IMO, UNODC, and the United Nations Country Team for Somalia. For more information, see United Nations press release "UN trust fund backs projects in fight against piracy off Somali coast". 23 April 2010.

<sup>99</sup> See "A message to the world's seafarers". Press briefing by IMO Secretary-General. 23 December 2009.

<sup>100</sup> Article 8(3) of the Convention.

<sup>101</sup> The ratifying States are the Bahamas, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Liberia, the Marshall Islands, Norway, Panama and Spain. For updated information on the status of the MLC convention, see [www.ilo.org/ilolex/cgi-lex/ratifce.pl?C186](http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C186).

<sup>102</sup> See: MLC to be ratified "by 2011". Fairplay Daily News, quoting the director of ILO's International Labour Standards Department. 2 July 2010.

<sup>103</sup> Up-to-date and authoritative information on the status of international conventions is available from the relevant depository. For United Nations conventions, see the United Nations website at <http://www.un.org/law>. This site also provides links to a number of websites of other organizations, such as IMO ([www.imo.org](http://www.imo.org)), ILO ([www.ilo.org](http://www.ilo.org)) and the United Nations Commission on International Trade Law ([www.uncitral.org](http://www.uncitral.org)), which contain information on conventions adopted under the auspices of each organization. Since the last reporting period, Albania, Benin, and Saint Kitts and Nevis have acceded to the International Convention on Maritime Liens and Mortgages, 1993. In addition, Benin has acceded to the International Convention on Arrest of Ships, 1999.

<sup>104</sup> To find out more on the history and objectives of the negotiations, see the *Review of Maritime Transport 2009*, chapter 6, as well as information from WTO at [http://www.wto.org/english/tratop\\_e/tradfa\\_e/tradfa\\_e.htm](http://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm).

<sup>105</sup> The other topics of the Doha Round of trade negotiations are agriculture, services, market access for non-agricultural products (NAMA), balance between agriculture and NAMA, and trade-related aspects of intellectual property rights (TRIPS).

<sup>106</sup> Special and differential treatment refers to provisions in the existing WTO agreements which allow developing countries to be treated differently, in particular with regard to exemptions from the most-favoured-nation principle, longer time periods for implementation, or exemptions from implementation.