

**INTERNATIONAL HYDROGRAPHIC
ORGANIZATION**



**ORGANISATION HYDROGRAPHIQUE
INTERNATIONALE**

THIS CIRCULAR LETTER REQUIRES YOU TO VOTE

IHB File No. S1/0015

**CIRCULAR LETTER 02/2009
12 January 2009**

PROTOCOL OF AMENDMENTS TO THE IHO CONVENTION

Reference: IHB CL 57/2007 dated 21 June

Dear Hydrographer,

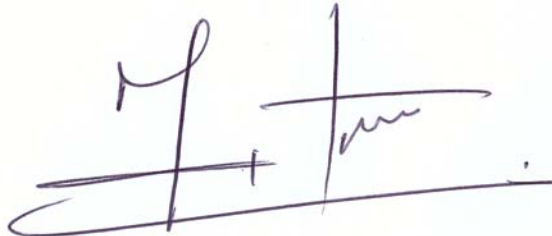
1 A Protocol of Amendments to the IHO Convention was adopted at the 3rd Extraordinary International Hydrographic Conference (3rd EIHC) that took place in April 2005. A question that arises is whether States joining the Organization after the 3rd EIHC have the right or not to vote on the Protocol, in accordance with Article XXI(3) of the IHO Convention. The specific question is whether the requirement for a two-thirds majority, under Article XXI(3) of the IHO Convention, refers to those Contracting Parties with the right to vote at the date of the 3rd EIHC Decision or to a figure at some later date, which may be greater as new Member States join the Organization. Article XXI(3) of the IHO Convention is not clear on the subject, and there is not any past experience to turn to.

2 The Directing Committee asked the Legal Advisory Committee (LAC) to consider the issue in conjunction with the procedure that the Organization follows in defining the two-thirds majority required for the acceptance of new Member States under Article XX of the IHO Convention. The practice of the IHO in relation to the two-thirds majority under Article XX has been to fix the total number of Member States at the number who are Member States at the time an application is received by the Government of Monaco and to discount from that number those Member States who, at that time, have had their rights suspended in accordance with Article XV of the IHO Convention. The Directing Committee also asked the LAC to look into the procedure that should be followed when the number describing the required two-thirds majority is not an integer number. If this number is not an integer, the practice of the IHO is to round it up to the next higher integer number if the first decimal is 5 or higher and to round it down if the first decimal is less than 5.

3 Annex A provides the letter of response from the Chair of the LAC together with recommendations. It should be noted that these recommendations are the result of a consensus of the members of LAC. Annex B provides a proposed Administrative Resolution T6 "Practical Implementation of Voting Processes" setting out the LAC's recommended procedures for determining the two-thirds majority for the implementation of Articles XX and XXI(3) of the IHO Convention, as well as the rounding-up and rounding-down procedure.

4 You are kindly requested to complete the voting form at Annex C and return it to the Bureau no later than Tuesday 25th February 2009. In accordance with paragraph 6 of Article VI of the IHO Convention, a simple majority of all Member States is required for the acceptance of the proposed Resolution. If approved, the Technical Resolution will become effective as from this date.

On behalf of the Directing Committee
Yours sincerely,

A handwritten signature in dark ink, consisting of a large, stylized 'M' followed by a horizontal line and a vertical line, with a small flourish at the end.

Vice Admiral Alexandros MARATOS
President

Annex A: Letter from the LAC Chairman
Annex B: Proposed Administrative Resolution T6
Annex C: Voting Form

Vice Admiral Alexandros Maratos
President
International Hydrographic Organisation

Dear Admiral Maratos,

I refer to your email of 11 June 2008.

The Legal Advisory Committee (LAC) has considered your further questions relating to the reference currently before it. Two further submissions (Canada and UK) have been received and these are enclosed for your assistance.

The members of the LAC have generously responded in providing learned and considered views on the reference. Those responses have addressed a range of legal and practical issues.

The LAC has agreed by consensus that the most effective way to assist the IHO is by recommending the legal approach which provides the most effective operational solution for the IHO.

The LAC recognises that there are sound legal arguments for retaining the currently applying differing voting methods in relation to Articles XX and XXI of the Convention. However, there are also well based arguments, both legal and practical, for adopting a more consistent approach. The legal and practical arguments are explored further below in this submission.

To assist the IHO the LAC's recommendations, in short form, are set out below:

Recommendation 1

That the International Hydrographic Conference may decide, by simple majority vote of the Member Governments represented at the Conference, that in order to determine the date of entry into force of any amendment to the Convention, the expression "approval by two-thirds of the Contracting Parties", in paragraph 3 of Article XXI of the Convention shall be interpreted as meaning two-thirds of the Contracting Parties entitled to vote at the time of the approval by the Conference.

Recommendation 2

That the International Hydrographic Conference may decide in rounding up or down results of voting calculations the IHO to adopt the standard practice known as Symmetric Arithmetic Rounding or Round-Half-Up (Symmetric Implementation):

- Decide which is the last digit to keep.
- Increase it by 1 if the next digit is 5 or more (rounding up)
- Leave it the same if the next digit is 4 or less (rounding down)

Discussion

Recommendation 1

There is a consensus position within the LAC that the view expressed by Germany as follows is the better legal view as to the interpretation of Article XXI:

“The two-thirds requirement of notifications of approval for the entry into force of amendments in Article XXI paragraph 3 of the current version of the IHO Convention relates to all Contracting Parties at any date after the Conference that has adopted the amendments, and therefore includes all countries acceding to the Convention at a later date.”

That interpretation is clearly the fairest. It is the most democratic as it allows parties joining after the Conference, and which will be bound by the amendment, to register their vote.

Canada and Germany have also expressed the view that States denied “rights and benefits” pursuant to Article XV should be considered in determining the two-thirds under Article XXI(3) of the Convention. However, they may not propose amendments or notify their approval. This view is based on the sound legal argument that those suspended States will nevertheless be bound by the amendment.

However, the LAC must take account of the practical difficulties of the situation. In that regard there is the difficulty that the IHO applies a different method of determination under Article XX. Under that provision the two-thirds is calculated against the number of Member Governments determined at the time of application but does not include States denied rights and benefits. It is apparently a long standing practice. There is no doubt that such practice is lawful. Paragraph 3(b) of Article 31 of the Vienna Convention on the Law of Treaties (the Vienna Convention) clearly establishes that “...subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” shall be taken into account in interpreting the treaty.

The method used in relation to Article XX is simpler as the total number of Member Governments remains stable until the required number is reached.

The United Kingdom points out that the method adopted for Article XX has the effect of creating two classes of members – those entitled to vote and those not entitled to vote. If the method were adopted for Article XXI similar considerations would apply. Apart from States denied rights under Article XV States joining after the vote of the Conference could not vote and nor would they be counted in determining the two-thirds majority.

There is a consensus emerging in the LAC that consistency in interpretation between the Articles is a preferable position. I consider that there is also a consensus view emerging that the simpler method is preferred. Thus, I take the view and recommend to the IHO that the voting method currently utilised for Article XX be also utilised for Article XXI.

I now turn to consider how the IHO may implement the change. The treaty is silent on determining the applicable interpretation of a provision. However, it is clear in paragraph 3(a) of Article 31 of the Vienna Convention that parties to a treaty may enter into an agreement regarding the interpretation of that treaty or the application of its provisions. Accordingly, at the International Hydrographic Conference a Resolution may be presented, negotiated and voted

upon regarding the interpretation of Articles XX and XXI. It is common practice to agree on the interpretation of treaty provisions by way of Resolution (see e.g. Resolution 4.1 on the Interpretation of Article 10bis of the Ramsar Convention, which concerns the entry into force of amendments to that Convention).

Recommendation 2

There is no legal prescription as to the correct method to round off votes. Similarly the Convention is silent on the issue. In these circumstances the LAC recommends that the IHO adopts the common international standard practice known as Symmetric Arithmetic Rounding or Round-Half-Up (Symmetric Implementation):

- Decide which is the last digit to keep.
- Increase it by 1 if the next digit is 5 or more (rounding up)
- Leave it the same if the next digit is 4 or less (rounding down)

The LAC recognises that there is validity to the view that rounding down could result in determination of less than a two-thirds majority (e.g. 47.33 being two-thirds is rounded down to 47 which is technically .33 less than the specified two-thirds). In the circumstances the LAC considers that the issue should be determined by a vote of the Conference.

General Comment

The LAC recognises that the above recommendations represent a consensual approach to the issues and therefore Member Governments may propose alternative approaches. The forthcoming 4th Extraordinary International Hydrographic Conference would provide an opportunity for discussion of such proposals.

Yours sincerely

Ken Pogson

Chairman

Legal Advisory Committee

**CHAPTER T
ADMINISTRATION**

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- =====

Section 6 - Practical Implementation of Voting Processes

In considering the Report provided by the IHO Legal Advisory Committee (LAC), Member States decided that the following meanings should be used to determine the two-thirds majority required for the voting procedures under Articles XX and paragraph 3 of Article XXI of the IHO Convention.

T 6.1 Determining the majority required to approve amendments to the Convention.

In order to determine the majority required to approve the entry into force of an amendment to the Convention in accordance with paragraph 3 of Article XXI of the Convention, the expression "approval by two-thirds of the Contracting Parties" shall be interpreted as meaning two-thirds of the Contracting Parties entitled to vote at the time of the approval by the Conference.

T 6.2 Determining the majority required to approve admission to the IHO.

In order to determine the majority required to approve admission to the IHO under Article XX of the Convention, the expression "approved by two-thirds of the Member Governments" shall be interpreted as meaning two-thirds of the Contracting Parties entitled to vote at the time of the application by a Government to the Principality of Monaco.

T 6.3 Calculating the majority in IHO voting processes.

The IHO follows the standard practice known as Symmetric Arithmetic Rounding or Round-Half-Up (Symmetric Implementation) in determining the integer value that will constitute a majority in a vote. When the result of the calculation is not naturally a whole number – for example - 37; the result shall be determined by increasing it to the next integer value if the first decimal place is 5 or more (rounding up) – thus 37.50 becomes 38, or by retaining the integer value if the first decimal place is less than 5 (rounding down) – thus 37.49 becomes 37.

VOTING FORM

(to be returned to the IHB by 25th February 2009

E-mail: info@ihb.mc - Fax: +377 93 10 81 40)

Member State:.....

Contact:.....

E-mail:

1. "Do you agree with the Administrative Resolution T6 as indicated in Annex B of this CL02/2009?

YES

NO

Comments:

.....
.....
.....
.....
.....

Name/Signature: **Date:**