



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

ASSEMBLY
14th session
Agenda item 17

FUND/A.14/14/Add.1
2 September 1991

Original: ENGLISH

**FUTURE DEVELOPMENT OF THE INTERGOVERNMENTAL
OIL POLLUTION LIABILITY AND COMPENSATION SYSTEM
BASED ON THE 1969 CIVIL LIABILITY CONVENTION
AND THE 1971 FUND CONVENTION**

RECOMMENDATIONS TO BE MADE BY A FUTURE DIPLOMATIC CONFERENCE

Note by the Director

Introduction

1 The Sixth Intersessional Working Group established by the Assembly at its 13th session reached a number of conclusions regarding the treaty law problems which would arise in connection with the possible "amendment" of the entry into force provisions of the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention. The conclusions included the following (document FUND/WGR.6/12, paragraph 9.2(b) and (c)):

- (a) The most practical way of bringing about such "amendment" would be by adopting new protocols to modify the 1969 Civil Liability Convention and the 1971 Fund Convention. The new protocols would incorporate the provisions of the 1984 Protocols, but with different entry into force provisions, as set out in the draft texts for new protocols contained in Annexes II and III to the Working Group's report.
- (b) The new protocols would constitute amending instruments to the 1969 Civil Liability Convention and the 1971 Fund Convention, and would replace the 1984 Protocols. States would be expected to ratify or accept only the new protocols.

2 The Working Group considered it very unlikely that the conditions for the entry into force of the 1984 Protocols would be satisfied after the adoption of new protocols to replace them. The Working Group believed that States which decided to participate in a modernised regime of compensation based on the Civil Liability Convention and the Fund Convention would accede to the new protocols. In the view of the Working Group "it was hardly conceivable that States which contributed to bringing the new protocols into force would be willing to bring the 1984 Protocols into force also, thus creating a situation in which two conflicting treaty regimes would become operational".

3 However, the Intersessional Working Group considered that it would be important to ensure that the 1984 Protocols were no longer viable. While it recognised that there were no legal means by which States would be prevented from bringing the 1984 Protocols into force, the Working Group

concluded that a future conference convened to adopt the proposed new protocols could help in achieving that objective. The Working Group expressed the view that the conference might find it useful to make a recommendation, possibly in the form of a conference resolution, to the States concerned to take action only in relation to the new protocols and thus ensure that the original 1984 Protocols did not enter into force.

4 The Intersessional Working Group instructed the Director to study any outstanding treaty law issues in connection with the Working Group's conclusions, and to make appropriate proposals to the Assembly at its 14th session. In particular, the Director was requested to consider the scope of the recommendation which a future conference might be invited to make concerning the action to be taken by States in relation to the new protocols (document FUND/WGR.6/12, paragraph 9.4). The present document contains a study of these issues.

Purpose of a Possible Recommendation

5 The purpose of any recommendation by the conference would be to ensure that the only international regime of compensation which would become operational would be based on the new protocols to be adopted by that conference. Since this purpose could not be achieved if the original 1984 Protocols were also to enter into force, it would be important to organise matters in such a way that the conditions for entry into force of the 1984 Protocols would not be fulfilled. This would only be ensured if:

- (a) States which decided to participate in the modernised regime of compensation deposited the appropriate instruments of ratification, acceptance, approval or accession (hereinafter referred to as instruments of ratification) only in respect of the new protocols; and
- (b) no further instruments of ratification were deposited in respect of the 1984 Protocols.

6 In this way, although the original 1984 Protocols would continue to exist as "treaty texts", they would not constitute viable treaty instruments. Consequently, upon their entry into force, the new protocols would (in addition to the 1976 Protocols) be the only operational protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention. There would thus be only one international treaty regime on liability and compensation for oil pollution damage, ie the 1969 and 1971 Conventions as modified by the new protocols.

Precedent within IMO

7 Although the Intersessional Working Group concluded that it was "hardly conceivable that States which contributed to bringing the new protocols into force would be willing to bring the 1984 Protocols into force also", experience in the International Maritime Organization (IMO) and the United Nations system in general indicates that State action in respect of international treaties may not always be in conformity with the requirements of the relevant treaties. For example, the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL 73/78) was clearly intended to replace the original 1973 Convention, and both the Marine Environment Protection Committee (MEPC) and the Secretary-General of IMO repeatedly stressed that States were expected to deposit instruments of ratification only in respect of the 1978 Protocol, and should therefore disregard the original 1973 Convention. Nevertheless, instruments of ratification relating to the original 1973 Convention continued to be received by the depositary long after the 1978 Conference. In many cases, the instruments in relation to the 1973 Convention were sent together with instruments constituting acceptance also of the 1978 Protocol. There were also cases in which the same instrument was intended to cover both the 1973 Convention and the 1978 Protocol. Because of this there was, for some time, a well-founded concern that the conditions for the entry into force might be fulfilled in respect of both the 1973 and 1978 treaties, and a co-ordinated campaign had to be organised by the MEPC and the Secretariat of IMO to persuade States to restrict their actions to only the 1978 Protocol.

8 In the campaign the Secretariat of IMO took two courses of action. The first was to inform Governments, in communications concerning MARPOL 73/78 and also in contacts with Government representatives, that instruments of ratification were to be deposited only in respect of the 1978 Protocol, and that it was not necessary or indeed desirable for any instruments to be deposited also in relation to the original 1973 Convention. The second action was taken when, in spite of the efforts to dissuade them, Governments deposited instruments expressing their consent to be bound by the 1973 Convention, whether on its own or in addition to the 1978 Protocol. In such cases, the Secretariat had to recognise that a refusal to accept the instrument in question could create administrative, political or even constitutional problems for the administration concerned. It was also noted that in such cases the deposit of the instrument reflected the clear wish of the State to participate in the MARPOL regime, and that the issue of the wrong instrument was, in almost all cases, the result of a clerical error or a misunderstanding of the legal situation on the part of some official or officials. For this reason the instruments were retained by the Secretariat, but the Governments concerned were informed, through their diplomatic missions or directly through the appropriate ministries, that the instrument which was received was not appropriate or necessary, as the case might be.

9 The Secretariat of IMO also offered suggestions on how the situation might be regularised. The suggestions varied according to the instruments actually received:

- (a) Where the instrument received purported to constitute ratification of only the 1973 Convention, it was suggested that the instrument would be retained but no action would be taken on it. The Government was then invited to prepare another instrument for deposit which related only to the 1978 Protocol.
- (b) Where the instrument received stated that it related to ratification of both the 1973 Convention and the 1978 Protocol, the suggestion was that the reference to the 1973 Convention be disregarded and that the instrument would be accepted for formal deposit only in respect of the 1978 Protocol. A formal communication to that effect would then be addressed to the Government stating that the Secretary-General would proceed to act on that basis unless the Government indicated that this was not acceptable to it. In most cases no objections were raised, and in some cases notifications were received confirming the Governments' agreement to the proposed course of action.
- (c) Where separate instruments were received in respect of the 1973 Convention and the 1978 Protocol, the Secretariat suggested that the instrument relating to the 1973 Convention would be disregarded and interested Governments would, accordingly, be informed only that the State had accepted the 1978 Protocol. Again, communications were sent to the Governments in question stating that action would be taken as suggested unless the Secretariat was informed that this was not acceptable to the Governments. On these occasions too, no objections were received and, in some cases, positive confirmation was provided that the suggested course of action was acceptable.

10 It may be of interest to note that the procedure followed within IMO in these cases was checked to ensure that it was in conformity with the depositary practice of the Secretariat of the United Nations, and the actions taken were considered by the relevant services of the United Nations Secretariat to be fully in accord with the law applicable to the functions of the depositary of treaties.

Proposed Recommendation In Respect of the Protocols to the Civil Liability Convention and the Fund Convention

11 In view of the experience gained within IMO, the Director is of the opinion that it might be useful if the conference adopting the new protocols to the 1969 Civil Liability Convention and the 1974 Fund Convention adopted a recommendation along the lines set out below.

12 The recommendation in respect of the new protocols to the Civil Liability Convention and the Fund Convention is to be addressed primarily to States, since its aim is to make them aware of the need to avoid the situation in which two conflicting treaty regimes would be operational, and also to advise them on the procedure to be followed in order to avoid such a situation. However, in the light of the information set out above concerning possible problems which may arise, and the ways in which similar problems have been dealt with in the past within IMO, it would be useful for any recommendations by the conference on the subject to be addressed not only to the States concerned but also to IMO and its Secretary-General. The reason for this proposal is that IMO and its Secretary-General would be responsible for depositary and related functions in relation to the new protocols, as is the case in relation to the 1984 Protocols.

13 The recommendation to States would invite and urge them to ratify only the new protocols and to disregard altogether the original 1984 Protocols. This would ensure that the 1984 Protocols would not enter into force.

14 The recommendations to IMO and its Secretary-General would be:

- (a) to bring the terms of the Conference recommendation to the attention of all States concerned;
- (b) to provide, in co-operation with the Director of the IOPC Fund, all possible advice and assistance to States considering ratification of the new protocols, in order that the action taken by the States would be in accordance with the terms of the Conference recommendation;
- (c) to take appropriate action, in conformity with the law of treaties and the depositary practice of IMO and the United Nations, to ensure that all instruments deposited by States after the adoption of the new protocols would facilitate the entry into force of only the new protocols and not the original 1984 Protocols. In taking such action the Secretary-General would, of course, have full regard to the wishes of the States concerned;
- (d) to consult with the Legal Committee or the Council of IMO, as may be appropriate, in dealing with problems which may arise in the implementation of the recommendation; and
- (e) to seek the views and assistance of the Director of the IOPC Fund in implementing the terms of the recommendation.

15 A draft resolution incorporating these recommendations is set out in the Annex to this document.

Action to be Taken by the Assembly

16 The Assembly is invited to:

- (a) consider the information contained in this document;
- (b) examine the draft resolution set out in the Annex; and
- (c) make such proposals to the Secretary-General of IMO as it deems appropriate in respect of matters dealt with in this document.

ANNEX

DRAFT RESOLUTION

THE CONFERENCE,

HAVING ADOPTED the Protocol of 19... to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (the 1969 Civil Liability Convention) and the Protocol of 19... to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (the 1971 Fund Convention) (hereinafter referred to as the "19... Protocols"),

RECALLING the Protocols which were adopted in 1984 to amend the 1969 Civil Liability Convention and 1971 Fund Convention (hereinafter referred to as the "1984 Protocols"),

NOTING that the 19... Protocols incorporate all the provisions of the 1984 Protocols with the exception of the provisions on entry into force,

HAVING AGREED that the 19... Protocols should constitute the amending instruments to the 1969 Civil Liability Convention and the 1971 Fund Convention, in place of the 1984 Protocols which should no longer be viable,

CONSIDERING that the entry into force of the 19... Protocols as well as the 1984 Protocols would create an undesirable situation in which two conflicting regimes would become operational,

CONVINCED that the 1969 Civil Liability Convention and the 1971 Fund Convention, as modified by the 19... Protocols, constitute an adequate international treaty regime on liability and compensation for oil pollution damage,

SATISFIED that States which decide to participate in a modernised regime on compensation for oil pollution damage need only to express their consent to be bound by the 19... Protocols without also taking any action in respect of the 1984 Protocols,

DESIROUS of bringing the 19... Protocols into force with minimum delay in order to bring the modernised regime of compensation into operation as soon as possible,

- 1** **INVITES** all States to give early and urgent consideration to the 19... Protocols with a view to their acceptance thereof at an early date;
- 2** **URGES** all States which decide to participate in the modernised regime of compensation to deposit the appropriate instruments with the Secretary-General of the International Maritime Organization (IMO) as soon as possible;
- 3** **APPEALS** to all States which decide to participate in the modernised regime to ensure that they deposit instruments only in respect of the 19... Protocols and without any references to the 1984 Protocols;

- 4** **REQUESTS** the Secretary-General of IMO to bring the terms of this resolution, and in particular the appeal in operative paragraph 3 above, to the attention of all States entitled to become Parties to the 19... Protocols;
 - 5** **FURTHER REQUESTS** the Secretary-General of IMO, in co-operation as necessary with the Director of the International Oil Pollution Compensation Fund (IOPC Fund), to provide all possible advice and assistance to States considering becoming Party to the 19... Protocols, in order to ensure that the action taken by the States shall be in accordance with the terms of this resolution;
 - 6** **AUTHORISES AND REQUESTS** the Secretary-General, in his capacity as depositary of the Protocols, to take all appropriate steps, in conformity with the law of treaties and the depositary practice of IMO and the United Nations, to ensure that all instruments deposited by States after the adoption of the 19... Protocols will facilitate the entry into force of only the 19... Protocols, and will not also contribute to fulfil the conditions for the entry into force of the 1984 Protocols;
 - 7** **INVITES** the Secretary-General of IMO to seek the views and guidance of the Legal Committee or the Council of IMO, as may be appropriate, in dealing with problems which may arise in connection with the implementation of this resolution; and
 - 8** **REQUESTS** the Secretary-General of IMO to seek the views and co-operation of the Director of the IOPC Fund in connection with the implementation of this resolution.
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