INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

ASSEMBLY - 6th session
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CONSIDERATION OF DISCUSSIONS IN THE LEGAL COMMITTEE OF THE INTERNATIONAL MARITIME ORGANIZATION TO REVISE THE FUND CONVENTION

Note by the Director

1 The Legal Committee of IMO continued its discussions on the revision of the Civil Liability Convention and the Fund Convention at its 49th and 50th sessions (4-8 October 1982 and 7-11 March 1983, respectively). It is likely that the last session of the Committee devoted to this issue before the Diplomatic Conference in spring 1984 will be the 51st session to be held from 19 to 23 September 1983, ie the week immediately preceding the IOPC Fund's Assembly session. Between the 49th and the 51st Legal Committee sessions two informal meetings were held in London to which the IOPC Fund had invited interested Governments, to allow further time for the consideration of different aspects relating to the revision of the CLC and the Fund Convention. The reports of the Legal Committee on its 49th and 50th sessions and the reports of the Chairman of the two informal meetings have been submitted to the Legal Committee; reference is made to IMO documents LEG 49/8, LEG 50/4/7, LEG 50/8 and LEG 51/3/1.

2 In order to facilitate the discussion within the Legal Committee of issues which are of paramount importance to the administration of the Fund Convention, the Director offered to the Legal Committee a study on the question of whether it is legally possible for the IOPC Fund, as established under the 1971 Fund

Convention, to administer, in addition to the 1971 Fund Convention, the new compensation scheme which is to be set up by the 1984 Protocol to the Fund Convention. This study (a copy of which is annexed to this document), has been elaborated on behalf of the IOPC Fund by Mr C D van Boeschoten, Netherlands, and has been submitted to the 51st session of the Legal Committee (LEG 51/3/13).

3 On the basis of the discussions to be held at the 51st session of the Legal Committee of IMO, the IOPC Fund's Assembly may find it appropriate to consider certain aspects of the draft Protocol to the Fund Convention, especially as regards the administration of the new compensation scheme. It may also wish to discuss the possibility of certain administrative arrangements covering the transitional period of the passing over from the 1971 Fund Convention to the Fund Convention as amended by the 1984 Protocol, and possible future working arrangements between the 1971 IOPC Fund and the organisation which may be established by the 1984 Protocol to the Fund Convention. However, since the contents and the outcome of the discussions of the 51st session of the Legal Committee will be known only immediately before the opening of the sixth session of the IOPC Fund's Assembly, it is not possible to submit to the Assembly any preparatory documentation in addition to that which has been made available to the Legal Committee of IMO and which has been referred to in paragraph 1 above.

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ANNEX

INTRODUCTORY OPINION IN RESPECT OF THE RECONSTITUTION OF THE INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE.

Introduction

1. Negotiations are in progress in respect of the prospective revision of (i) the 1969 International Convention on civil liability for oil pollution damage, (ii) the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (IOPC Fund). Presumably the international instrument providing for the revision of the Fund Convention will take the form of a (1984) Protocol to amend the 1971 Convention. A number of external documents and an internal memorandum from the Fund Secretariat concerning the pending negotiations have been submitted for my perusal, which show that one of the main problems facing the delegations is the succession of treaties and/or the succession of international organisations, and more specifically by which method either the existing fund may take on the powers and duties attributed by the convention as amended by the 1984 Protocol, or alternatively how a new fund under the Protocol may take over from the existing fund. The internal memorandum from the Fund Secretariat mainly deals with this one fund or two funds dilemma.

2. I have been requested to prepare a memorandum in respect of the following question:

> "Is it legally possible that the International Oil "Pollution Compensation Fund (IOPC Fund), a legal entity "established by the International Convention on the "Establishment of an International Fund for Compensation "for Oil Pollution Damage (Fund Convention) of 1971, "administers the Fund Convention as amended by a Protocol "to be adopted by a Diplomatic Conference to be convened "in accordance with Article 45 of the Fund Convention?"

Further instructions given in response to preliminary observations by the undersigned emphasize that this opinion should deal with this one question and is not expected to comment upon the complicated issues relating to the phased in or delayed denunciation approaches set out in the various papers which have been submitted. Clearly however the treaty technique will have to adapt itself to the choice between the one fund or two fund approaches.

General approach to subject matter

3. Where the Contracting States, parties to the two existing 1969 and 1971 Civil Liability and Fund Conventions, only envisage to amend or revise those conventions and do not want to conclude entirely new conventions creating altogether different legal regimes, it would clearly be more consistent with this approach to solely amend or supplement the functions, powers and duties of the existing fund rather than constitute a new fund as a new international organisation, to be distinguished from the 1971 IOPC Fund. Therefore one would be tempted to try and find ways and means to the one fund solution: from the point of view of international legal organisation it would certainly be preferable to have the existing fund continue as the sole legal entity dealing with oil pollution compensation rather than have to admit that in order to amend the existing fund rules the constitution of a new fund is the only way out. Evidently the advocates of the one fund solution do not propose more than the application in the international sphere of what is generally accepted in the national sphere: that the legislator may amend the constitution of a state or the rules applicable to a

public body or government agency without being obliged to discontinue and wind up the existing legal entity and replace it by a new one. Nevertheless what appears to be self-evident in the sphere of the national state offers an intricate problem in the international sphere.

Succession of conventions

4. The first issue to deal with is that of amendment, modification and succession of conventions. Formerly it has been the traditional view that it is only permissible to amend treaties and conventions (I use this term here in the sense of a treaty drafted by an international organisation) with the approval of all the parties (see the separate opinions of Van Eysinga and Schücking to the Oscar Chinn case (1934), Permanent Court of International Justice, series A-B, no 63, pp 131 ff; Schermers, International Institutional Law (1980) no 1164). In modern international law this rule is no longer accepted. The modern rule has been expressed in the Vienna Convention on the Law of treaties, articles 39 and 40 junctis article 9: a convention may be amended at an international conference by a two thirds majority unless the conference, with the same majority, decides to apply a different rule. However, if the number of ratifications necessary for the entry into force of the amending protocol or convention has been obtained, generally the amendment will only become effective between the parties having ratified, the original text continuing to bind those States which have not yet ratified the amendment, art. 40 par. 4 Vienna Convention. As it is mostly not desirable to make the entry into force of an amendment subject to the

condition that all States parties to the original text have ratified it, it is quite common to have the original text continue to be effective between a number of States, even for a considerable length of time, after the entry into force of an amending Protocol or Convention.

5. In most cases this succession of conventions, and more specifically the succession of conventions of a private law nature, do not offer insolvable problems and the succession normally will be effected without the denunciation of the original convention being required. As an example one may cite The Hague 1954 Convention on civil procedure whose preamble states that the Signatory States want to amend the prior 1905 Convention and have decided to conclude a new convention to that effect. Article 29 of the 1954 Convention then goes on to say that it will replace the original convention, but only in the relations between the States that ratify this new convention. The effect of this provision is twofold: on the one hand it ensures that the original convention will remain in force even for a State becoming party to the new one in its relations to States which do not ratify the latter, on the other hand it causes the original convention to gradually drop out of existence without any State being obliged to formally denounce it. The same method has been adopted in the 1965, 1970 and 1980 conventions on service abroad, on the taking of evidence, and on access to justice, replacing various chapters of the 1954 convention. A somewhat different method was however followed in the 1968 Brussels Protocol to amend the 1924 Brussels Convention for the unification of certain rules relating to bills of lading. Here

article 6 provides that as between parties to the protocol and to the convention the two instruments shall be read and interpreted together as one single instrument, without a party to the protocol being obliged to apply the provisions of the protocol to bills of lading issued in a State which is a party to the convention but not to the protocol. The protocol does not require denunciation of the original convention but does in its article 7 provide that a denunciation of the convention shall not be construed as a denunciation of the convention as amended by the protocol.

6. Does it make a significant difference whether or not a convention contains a provision in respect of its revision or amendment as does the 1971 Fund-convention in its article 45? I would think not. Under the old doctrine that a treaty or convention can only be amended with the approval of all States parties to it, a provision that a conference to amend may be - or in certain cases shall be - convened, might have been capable of the interpretation that such a conference has powers to amend or revise the convention by majority decision even where otherwise the consensus of all parties would have been required. In modern international law however a provision of this kind rather appears to state the obvious, more in particular as long as it does not provide for the non-consenting parties being bound by the majority decision and does not provide for any other legislative powers than those vested in the contracting States.

Succession of international organisations

7. The situation is clearly more complex where the revision or amendment is contemplated of a treaty or convention by which an international organisation has been created and which forms the constitution or charter of that organisation. In principle the same rules as described above will apply but whereas the existence of original and amended conventions in matters of substantive uniform private law, private international law, or international procedural law need not cause unsurmountable difficulties, this is certainly far less easy where the convention concerned ensures the life of the organisation and establishes the rules by which its organs and officers shall be bound. Even if the convention, as is generally admitted, may be amended even where no specific provision to that effect has been made, and where the amendments can only bind the parties ratifying them, the continuing force of the original text may be questioned. If the original text, as one must suppose, remains binding for the States, members of the organisation, that have not ratified the amendments, can they require application of the original text by the States that have ratified the amendments and have become bound by the new text? One can either expressly provide for this possibility or avoid the difficulty by providing that a State ratifying the amendment will not become bound by the amended text until the moment its denunciation of the original convention has become effective (cf article 24.4 (i) UK-paper of May 1983, part II N59AAK).

8. However, even if one can imagine the 1971 Fund Convention remaining in force for a certain

period after the entering into force of the amending protocol, it is hardly possible to visualize a smooth functioning of the (one) Fund if the amending Protocol does not simply create a new fund but only changes the powers and duties of the existing fund. Of course there are examples of a new organisation having been created by treaty or convention which continues the legal personality of the old one, the most noteworthy example being the reconstitution of OEEC (Organisation for European Economic Cooperation) into OECD (Organisation for Economis Cooperation and Development). Article 15 of the 1960 OECD Convention provides:

> "When this Convention comes into force the reconstitution "of the Organisation for European Economic Co-Operation "shall take effect, and its aims, organs, powers and name "shall thereupon be as provided herein. The legal "personality possessed by the Organisation for European "Economis Co-Operation shall continue in the Organisation, "but decisions, recommendations and resolutions of the "Organisation for European Economic Co-Operation shall "require approval of the Council to be effective after the "coming into force of this convention."

Similarly the text proposed as alternative I for Article 3 of the Amending Protocol continues the legal personality of the existing 1971 Fund:

> The International Oil Pollution Compensation Fund, hereinafter referred to as "The Fund", established by the 1971 Fund Convention, shall continue to function with the following aims .....
> .....
> The fulfilment by the Fund of these aims shall be without projudice to its fulfilment of the aims under the 1971 Fund Convention for however long that Convention may remain in force.

It has, however, been rightly observed that the obligation of States to recognise the effectiveness of such a transfer of functions and powers depends on their consent, express of implied (cf D.W. Bowett, The Law of International Institution, 3rd ed. 1975, p

339/341). I do however not see how in the present instance one could say that such consent has been given by States, parties to the 1971 Fund Convention, as long as they have not ratified the Protocol. But, not having ratified the Protocol, they would not be bound by the proposed provision and, so it would appear to me, States having ratified the Protocol but still bound by the 1971 Convention by applying the new rules to the existing fund might violate their treaty obligations under the 1971 Convention. Moreover, as far as the 1969 and 1984 Liability Conventions and the 1971 and 1984 Fund Conventions would be incompatible, the director of the one fund, administering the two sets of conventions, might easily find himself in a quandary.

9. It might have been otherwise if certain legislative powers had been granted to the Fund and/or its organs. However, as far as I can see neither the Fund Assembly nor the Executive Committee have legislative powers enabling them to amend the powers and duties of the Fund by majority decision. The legislative powers therefore have remained vested in the Contracting States and can only be exercised in a conference for the revising or amending of the convention pursuant to its Article 45. This article in itself is, in my opinion, not capable of a construction by which parties to the 1971 Fund Convention would be bound by a majority decision at a conference, even if they do not ratify the revising convention or the amending protocol.

Conclusions

10. On the foregoing grounds I am provisionally of the opinion that, though it is technically possible to adopt a convention or protocol which continues the legal personality of the existing Fund, it is so unlikely that it would be possible to obtain the consent of all States concerned in such a way that all parties to the 1971 Convention would become bound to the amending protocol before the amended Fund convention enters into force, that it would not be a wise course of action to try and continue the 1971 Fund. Instead it would appear advisable to create a new fund to assume the duties under the revised or amended convention. If so, however, one wonders whether instead of adopting a Protocol to amend the 1971 Fund Convention it would not be preferable to conclude a new convention establishing a new fund. The conference adopting such a convention might, at the same time, operate as a revision convention in the sense of article 45 of the 1971 Convention. The example of The Hague 1954 Convention of Civil Procedure shows that a conference, though convened to revise an existing convention, may adopt an integral new convention.

The Hague,
August 9th, 1983

(C.D. van Boeschoten)