



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

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Agenda item 15

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REPLACEMENT OF INSTRUMENTS ENUMERATED IN ARTICLE 5.3
OF THE FUND CONVENTION

Note by the Director

Introduction

1 According to Article 5.3 of the Fund Convention, the IOPC Fund may be exonerated, wholly or partially, from its obligation to pay indemnification to the shipowner or his guarantor if the IOPC Fund proves that, as a result of the actual fault or privity of the owner, the ship in question did not comply with the requirements laid down in the four instruments listed in subparagraph (a)(i) - (iv) of that Article and that the incident or the damage was caused wholly or partially by such non-compliance. This provision applies even in cases where the flag State of the vessel concerned is not a Party to the relevant instrument.

2 The instruments originally listed in Article 5.3(a) are:

- (i) the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended in 1962 (OILPOL 54);
- (ii) the International Convention for the Safety of Life at Sea, 1960 (SOLAS 60);
- (iii) the International Convention on Load Lines, 1966; and
- (iv) the International Regulations for Preventing Collisions at Sea, 1960 (COLREG 60).

3 The purpose of Article 5.3 was to encourage shipowners, by means of indirect financial inducement, to make their ships conform to the requirements of the instruments mentioned in that Article, thereby reducing the risk of oil pollution incidents.

So far, there has been no case in which the IOPC Fund has been exonerated from its obligation to pay indemnification to the shipowner or his guarantor in accordance with Article 5.3.

4 The Fund Convention provides a procedure of replacement of the instruments listed in paragraph 5.3(a)(i) - (iv) by new instruments. At its 7th session, the Assembly briefly discussed the possibility of including the 1981 Amendments to SOLAS 74 in the list of instruments contained in Article 5.3(a) of the Fund Convention; SOLAS 60 had previously been replaced by SOLAS 74 and SOLAS 78. The Assembly was of the opinion that no urgent action was required and that the subject should be dealt with at its 8th session.

5 The Assembly may want to re-examine the question of whether the 1981 Amendments to SOLAS 74 and SOLAS 78 should be included in the above-mentioned list of instruments. Other amendments have also been made in recent years to the instruments at present included in the list contained in Article 5.3: 1981 Amendments to COLREG 72, 1983 Amendments to SOLAS 74 and 1984 Amendments to MARPOL 73/78. The Assembly may wish to consider whether these amendments should be included in the list.

Procedure for Amending the List in Article 5.3(a)

6 Under Article 5.3(a)(v), amendments to an instrument cited under (a)(i) - (iii) which have been determined as being of an important nature in accordance with the procedure laid down in that instrument, and which have been in force for a period of twelve months, are automatically made part of the enumeration of instruments in Article 5.3(a). So far, no amendment of an "important nature", as mentioned in Article 5.3(a)(v), has become effective for the purpose of Article 5.3.

7 Article 5.4 provides a procedure of replacement of the instruments specified in Article 5.3(a). These instruments may, under certain conditions, be replaced by new instruments if so decided by the IOPC Fund's Assembly. Upon the entry into force of a new Convention designed to replace, in whole or in part, any of the instruments specified in Article 5.3(a), the Assembly may thus decide that the new Convention will replace such an instrument or part thereof for the purpose of Article 5.3. The Assembly will then fix the date from which such a replacement will take effect.

8 The Assembly has so far decided in accordance with Article 5.4 of the Fund Convention to replace:

- (a) OILPOL 54 by the International Convention for the Prevention of Pollution from Ships, 1973, as modified by a Protocol of 1978 (MARPOL 73/78);

- (b) SOLAS 60 by the International Convention for the Safety of Life at Sea, 1974 (SOLAS 74), which in its turn was subsequently partly replaced by the 1978 Protocol to SOLAS 1974 (SOLAS 78); and
- (c) COLREG 60 by the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREG 72).

The replacements that have been decided are set out in detail in the Annex to this document.

9 Article 5.5 of the Fund Convention deals with the case where an amendment to an instrument listed in Article 5.3 does not automatically become included in the list, not having been declared of an important nature, or where the Assembly has not applied Article 5.4 to a new Convention. If, in such a case, a ship complies with the requirements in an amendment to an instrument specified in Article 5.3, or with requirements in a new Convention where the amendment or Convention is designed to replace such an instrument in whole or in part, the ship shall be considered as complying with the requirements in the said instrument for the purpose of Article 5.3.

Discussions at Earlier Sessions of the Assembly

10 The interpretation of Articles 5.3 and 5.4 was discussed by the Assembly at its 1st session. The discussion was based on a note prepared by the IMO Secretariat (OPCF/A.I/9/1). In the note it was stated that, under the provisions of the Fund Convention, the Assembly would not seem to be empowered to make provision for a date of replacement in respect of amendments such as those of 1969 to the 1954 Pollution Convention which were not adopted under the "important nature" provision, bearing in mind that the provision of the Fund Convention regarding amendments in Article 5.3(a)(v) was expressly limited to amendments of an important nature and that Article 5.4 did not mention any amendments of any kind. The Assembly was invited to express its opinion as to whether this was a lacuna in the Fund Convention.

11 The Assembly took note of the absence in Article 5 of a means of replacing out of date provisions in the instruments listed in Article 5.3(a), where such provisions were modified by amendments not falling under the "important nature" provision in the pertinent Convention. It deferred consideration of whether this matter would require further attention to a subsequent session (OPCF/A.I/D, agenda item 12).

12 The matter was discussed again at the 2nd session of the Assembly on the basis of a document submitted by the Director (FUND/A.2/11). The Assembly decided not to take any action for the time being in respect of this matter (FUND/A.2/16/1 paragraph 15).

13 The interpretation of Article 5.4 was also discussed by the Assembly at its 4th session. The Assembly then decided to replace the 1974 SOLAS Convention by the 1978 Protocol to that Convention, to the extent that the Protocol contains amendments to the 1974 SOLAS Convention. In a document submitted by the Director (FUND/A.4/14, paragraph 4), the Director stated that, even if the Protocol was not a "Convention" as required by Article 5.4 of the Fund Convention, the Protocol should be considered as a treaty instrument which fulfilled the requirements of Article 5.4. The Protocol had the character of a separate legal instrument, like a Convention. He expressed the view that the wording of Article 5.4 required a wider interpretation so as to cover protocols. Only such an interpretation would in his view allow the IOPC Fund to take full account of recent developments in the field of safety of shipping and pollution prevention. Even if the decision of the Assembly did not contain any explicit statement in this regard, it may be concluded that the Assembly in deciding on the replacement shared the Director's opinion as regards the interpretation of Article 5.4 in relation to the 1978 Protocol to SOLAS 74.

14 At its 4th session, the Assembly dealt, in addition, with the problem that had arisen due to the fact that SOLAS 74 does not contain any provisions for amendments under an "important nature" procedure. Amendments to SOLAS 74 would instead be adopted by a conference or the Maritime Safety Committee of IMO pursuant to Article VIII of SOLAS 74 and then subject to a "tacit acceptance procedure". The question was whether all amendments to SOLAS 74 adopted in accordance with Article VIII would be considered as amendments of an important nature (FUND/A.4/14 paragraph 6). The Assembly decided that amendments to SOLAS 74 to be adopted by the Maritime Safety Committee could not be considered as being of an "important nature" as defined in Article 5.3(a)(v) of the Fund Convention and would not, therefore, automatically become relevant for the purpose of Article 5.3.

15 At the 7th session of the Assembly, the Director suggested a decision, in accordance with Article 5.4 of the Fund Convention, which would imply that a ship had to comply with both SOLAS 74 and the 1981 Amendments to the SOLAS Convention in order that the IOPC Fund be obliged to pay indemnification to the shipowner. Under that proposal, Article 5.3(a)(ii) should read as follows:

"(ii) The International Convention for the Safety of Life at Sea 1974, as amended in 1981, and as modified by the Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974;"

As already stated, the Assembly was of the opinion that no urgent action was required and deferred its decision to its 8th session.

Inclusion of Amendments Adopted by Means of a Tacit Acceptance Procedure in the List in Article 5.3(a)

1981 Amendments to SOLAS 74 and to SOLAS 78

16 Unlike SOLAS 60, neither SOLAS 74 nor SOLAS 78 provides for a procedure to determine that amendments are of an important nature, as referred to in Article 5.3(a)(v) of the Fund Convention. Amendments to SOLAS 74 and SOLAS 78 are adopted either by a conference or by the Maritime Safety Committee of IMO and then subject to a "tacit acceptance procedure". The 1981 Amendments to SOLAS 74 and SOLAS 78 were adopted under the tacit acceptance procedure specified in Article VIII(b) of the SOLAS Convention (Resolutions MSC.1(XLV) and MSC.2(XLV)). Under this procedure, an amendment adopted by the Maritime Safety Committee or a conference, as the case may be, is communicated by the Secretary-General of IMO to the Governments of Contracting States. The amendment is deemed to have been accepted unless more than one third of these Governments, or the Governments of States representing half of the world's tonnage, have notified the Secretary-General of their objection to the amendment. An amendment that comes into force will in principle enter into force in respect of all Contracting States except those having filed objections.

17 The 1981 Amendments to SOLAS 74 consist of the complete replacement of Chapter II-1 (Construction - Subdivision and Stability, Machinery and Electrical Installations) and Chapter II-2 (Construction - Fire Protection, Fire Detection and Fire Extinction), editorial changes to Chapter III (Life-Saving Appliances, etc) and amendments to Chapter IV (Radiotelegraphy and Radiotelephony), Chapter V (Safety of Navigation) and Chapter VI (Carriage of Grain). These amendments include important new provisions concerning the safety of tankers and the prevention of pollution.

18 The 1981 Amendments to SOLAS 78 include minor changes to Regulation 29 of Chapter II-1 of SOLAS 74 in order to make the provisions of that Regulation consistent with those of the 1981 Amendments to SOLAS 74. The provisions of SOLAS 78, other than Chapter I, were in substance overtaken by the provisions of the 1981 Amendments to SOLAS 74. The latest SOLAS requirements concerning tanker safety are thus contained in SOLAS 74 as amended in 1981 in respect of construction, equipment and operation (Chapters II - VIII of the Annex to the Convention), and SOLAS 78 in respect of survey and certification (Chapter I).

19 No Government made any objection to the 1981 Amendments to SOLAS 74 and SOLAS 78 within the prescribed period. The Amendments entered into force in respect of all Contracting States to the respective instrument on 1 September 1984.

20 The 1981 Amendments cannot be considered as amendments "of an important nature", as referred to in Article 5.3(a)(v) of the Fund Convention. Consequently these amendments will not automatically become part of the enumeration of instruments in Article 5.3.

21 The question that will have to be answered is whether it is legally possible for the Assembly to include Amendments to an instrument listed in Article 5.3(a) which have been adopted under a tacit acceptance procedure. The position taken by the Assembly at its 4th session implies that these amendments would not automatically become included in the list. At that session the Assembly accepted that the 1978 Protocol to SOLAS 74 was a treaty instrument fulfilling the requirements of Article 5.4. The Assembly did not address itself to the question of whether amendments adopted not in the form of a protocol but in the form of a resolution by the Maritime Safety Committee and then subject to the tacit acceptance procedure would also be considered as a treaty instrument fulfilling these requirements. It should be noted that the 1978 Amendments to SOLAS 74 were adopted in the form of a protocol and not in the form of a resolution only because SOLAS 74 was not yet in force at that time. It was considered that the provisions in SOLAS 74 concerning amendments were not applicable until the Convention came into force.

22 In view of the purpose of Articles 5.3 and 5.4, it could be argued that a reasonable interpretation of the Fund Convention is that the procedure laid down in Article 5.4 covers also instruments of the kind represented by Resolutions MSC.1(XLV) and MSC.2(XLV), even if such an instrument is not a "new Convention" in the technical sense. By these Resolutions, the Committee adopted amendments to SOLAS 74 and SOLAS 78, as set out in the Annexes to the Resolutions. The Resolutions are worded in a way which very often is used in the preamble to a convention or a protocol. The Resolutions and their Annexes are, taken together, similar to a protocol amending a Convention. Only such a wider interpretation would enable the Assembly to include, under the system laid down in Article 5.3, amendments to the instruments contained in the list adopted with the purpose of reducing the risk of oil pollution incidents.

23 It must be realised, however, that such an interpretation is not beyond dispute. In the case of litigation, it would fall upon the national courts to interpret the Fund Convention in order to establish whether the Assembly has the authority, under the Convention, to apply the procedure laid down in Article 5.4 to the 1981 Amendments. It may nevertheless be considered as unlikely that a national court would not accept an interpretation of the Fund Convention adopted by the Assembly of the IOPC Fund on this point.

24 It may be important to examine whether any difficulties would arise if the 1981 Amendments to SOLAS 74 were not to become part of the enumeration of instruments in Article 5.3(a) of the Fund Convention. There would in fact be no difficulties as regards those ships which comply with the requirements laid down in the 1981 Amendments to SOLAS 74, since such ships would be considered as complying with the requirements of SOLAS 74 in its unamended form (Article 5.5 of the Fund Convention). A problem may arise with regard to a ship which does not comply with the requirements of the 1981 Amendments. If such a ship complies with the requirements of SOLAS 74, it would be regarded as satisfying the provisions of Article 5.3 of the Fund Convention, in spite of the fact that the safety of the ship does not meet the latest standards for tankers under SOLAS. The IOPC Fund would, therefore, be obliged to pay indemnification to the owner of the ship. In such a case, the IOPC Fund would be relieved of its obligation to pay indemnification only if the 1981 Amendments were included in the list of instruments in Article 5.3(a).

25 In view of the purpose of Article 5, paragraphs 3, 4 and 5, ie to encourage shipowners, by means of indirect financial inducement, to make their ships conform to the requirements of international legal instruments elaborated with the purpose of reducing, inter alia, the risk of pollution incidents, the Director is of the opinion that the list in Article 5.3(a) should, to the greatest extent possible, be adapted to changes made in international legal instruments in order to improve these instruments. In addition, the Director considers that the only reasonable interpretation of Article 5.4 is to include amendments which are adopted under a tacit acceptance procedure of such a kind as laid down in SOLAS 74. In the view of the Director, there is also a practical need to include the 1981 Amendments to SOLAS 74 in the list contained in Article 5.3(a). The Director is further of the opinion that there is no need to include the 1981 Amendments to SOLAS 78 in the list.

26 It is suggested, therefore, that the instrument to be listed in Article 5.3(a)(ii) of the Fund Convention should be "SOLAS 74 as modified by the 78 Protocol and as amended in 1981". The reference to the instrument listed in Article 5.3(a)(ii) should thus be amended to read as follows:

"(ii) The International Convention for the Safety of Life at Sea, 1974, as modified by the Protocol of 1978 relating thereto and as amended by Resolution MSC.1(XLV) adopted by the Maritime Safety Committee of the International Maritime Organization on 20 November 1981;"

27 It has been the policy of the IOPC Fund's Assembly, when making decisions on the replacement of instruments, that the date of replacement should be chosen carefully, in order to avoid that Member States declare their non-acceptance of such a decision in accordance with Article 5.4 of the Fund Convention. Replacements of Conventions under that Article have been made after a sufficient number of Member States of the Fund Convention have become Contracting Parties to the instrument in question. Under Article 5.4, the date of replacement may not be earlier than six months from the date of the decision of the Assembly. As mentioned above, the 1981 Amendments to SOLAS 74 entered into force on 1 September 1984. It is proposed that, if the Assembly were to decide on a replacement, such a replacement should take effect from 1 May 1986.

1981 Amendments to COLREG 72

28 At its 1st session, the IOPC Fund Assembly decided to replace the International Regulations for Preventing Collisions at Sea, 1960 (COLREG 60) by the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREG 72)).

29 The Assembly of IMO, at its 12th session in 1981, adopted amendments to COLREG 72 (Resolution A.464(XII)) in accordance with a tacit acceptance procedure under Article VI of that Convention. This procedure is similar to the tacit acceptance procedure under SOLAS 74 and SOLAS 78. The Amendments entered into force on 1 June 1983 for all Contracting Parties to COLREG 72.

30 The Amendments relate mainly to minor editorial changes of provisions concerning navigation (Part B - Steering and Sailing Rules), lighting (Part C - Lights and Shapes, Annex I, Positioning and Technical Details of Lights and Shapes), sound and light signals (Part D - Sound and Light Signals, Annex III, Technical Details of Sound Signal Appliances).

31 COLREG 72 does not have any provisions concerning amendments of an important nature. The question arises as to whether it is legally possible to include the 1981 Amendments to COLREG 72 in the list contained in Article 5.3(a) of the Fund Convention by application of the procedure laid down in Article 5.4, and, if so, whether it is necessary to do so.

32 If the Assembly were to accept that the procedure laid down in Article 5.4 of the Fund Convention may be applied to the 1981 Amendments to SOLAS 74 and SOLAS 78, it appears that this

procedure could, in principle, be applied also as regards the 1981 Amendments to COLREG 72 which were adopted under a similar tacit acceptance procedure. The question would then be whether, in view of their character, the 1981 Amendments to COLREG 72 ought to be included in the list of instruments contained in Article 5.3(a) of the Fund Convention.

33 As indicated in paragraph 30 above, the substantive provisions of the 1981 Amendments to COLREG 72 mostly relate to requirements concerning navigation, lights and sound signals, which are mainly in the domaine of the crew's responsibility. There are also some amendments to the requirements as regards lighting and sound signalling equipment, which may relate to the owner's responsibility for the seaworthiness of his vessel. Even so, these amendments are limited to special types of vessels and operations and do not have any major importance as regards oil tankers.

34 Bearing in mind the purpose of Article 5.3 of the Fund Convention, the 1981 Amendments to COLREG 72 do not seem to be relevant for the purpose of Article 5.3 of the Fund Convention. The Director is of the view, therefore, that the 1981 Amendments to COLREG 72 need not be included in the list contained in Article 5.3(a) of the Fund Convention.

1983 Amendments to SOLAS 74

35 Further amendments to SOLAS 74 were adopted by the IMO Maritime Safety Committee in 1983 by Resolutions MSC.4(48), MSC.5(48) and MSC.6(48) (1983 Amendments). The 1983 Amendments are mainly related to Chapter III (Life Saving Appliances and Arrangements) and Chapter VII (Carriage of Dangerous Goods, International Bulk Chemicals Code, International Gas Carriers Code) with consequential amendments to Chapter II-1 (Sub-division and Stability, Machinery and Electrical Installations), Chapter II-2 (Construction - Fire Protection, Fire Detection and Fire Extinction) and Chapter IV (Radiotelegraphy and Radiotelephony). However, few provisions of the 1983 Amendments are directly related to the improvement of the safety standards of tankers.

36 The 1983 Amendments to SOLAS 74 will enter into force on 1 July 1986 unless they are specifically rejected before 1 January 1986 by either one third of all Contracting Parties or by Contracting Parties whose combined merchant fleets total more than 50% of the world's gross tonnage.

37 The Director is of the view that, considering the purpose of Article 5.3 of the Fund Convention, the 1983 Amendments to SOLAS 74 need not be included in the list contained in Article 5.3(a) of the Fund Convention.

1984 Amendments to MARPOL 73/78

38 At its 6th session the IOPC Fund Assembly decided to replace OILPOL 54 by the International Convention for the Prevention of Pollution from Ships, 1973 as modified by a Protocol of 1978 (MARPOL 73/78). Amendments to MARPOL 73/78 were adopted by Resolution MEPC.14(20) of the Maritime Environment Protection Committee of IMO in September 1984 (1984 Amendments). These Amendments relate to Annex I (Regulations for the Prevention of Pollution by Oil) which came into force on 2 October 1983 and consist of changes of a number of regulations and the forms of certificates and oil record books. They are intended to provide practical solutions to the problems involved in the implementation of the Annex. The requirements under the 1984 Amendments are generally no stricter than the requirements under the existing provisions of MARPOL 73/78.

39 The 1984 Amendments to MARPOL 73/78 will come into force on 7 January 1986.

40 Considering the purpose of Article 5.3 of the Fund Convention, the Director is of the view that the 1984 Amendments to MARPOL 73/78 should be included in the list contained in Article 5.3(a) of that Convention. Since these Amendments will enter into force shortly after the 8th session of the IOPC Fund's Assembly, the Director proposes that the Assembly decide, already at that session, to replace the instrument listed in Article 5.3(a)(i) of the Fund Convention by "MARPOL 73/78 as amended in 1984".

41 Accordingly, it is suggested that the reference to the instrument listed in Article 5.3(a)(i) should be amended to read as follows:

"the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 thereto, and as amended by Resolution MEPC.14(20) adopted by the Maritime Environment Protection Committee of the International Maritime Organization on 7 September 1984;"

42 It is suggested that this replacement shall take effect as from 1 August 1986.

Action to be Taken by the Assembly

43 The Assembly is invited to consider the issues dealt with in this document and to decide whether to include in the list of instruments contained in Article 5.3(a) of the Fund Convention:

- (a) the 1981 Amendments to SOLAS 74 and the 1981 Amendments to SOLAS 78 (paragraphs 25-27 above);
- (b) the 1981 Amendments to COLREG 72 (paragraph 34 above);
- (c) the 1983 Amendments to SOLAS 74 (paragraph 37 above);
and
- (d) the 1984 Amendments to MARPOL 73/78 (paragraphs 40-42 above).

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ANNEXInstruments Replaced by the Assembly up to its 7th Session1 1st Session November 1978

Document OPCF/A.I/D, page 4:

"The Assembly decided in accordance with Article 5(4) that the Convention on the International Regulations for Preventing Collisions at Sea, 1972 shall replace, with effect from 1 June 1979, the International Regulations for Preventing Collisions at Sea, 1960 referred to in Article 5(3)(a)(iv)."

2 3rd Session March 1980

Document FUND/A.3/15, paragraph 14:

"The Assembly decided to replace the International Convention for the Safety of Life at Sea, 1960, by the International Convention for the Safety of Life at Sea, 1974. This replacement shall take effect on 1 January 1981."

3 4th Session October 1980

Document FUND/A.4/16, paragraph 18:

"The Assembly decided, in accordance with Article 5.4 of the Fund Convention, to replace the 1974 SOLAS Convention by the 1978 SOLAS Protocol, to the extent that the Protocol contains amendments to the 1974 SOLAS Convention. This replacement shall take effect on 1 May 1982.

"In consequence of this replacement, the treaty instrument under Article 5.3(a)(ii) of the Fund Convention reads as follows:

'(ii) the International Convention for the Safety of Life at Sea, 1974, as modified by the Protocol of 1978 Relating to the International Convention for the Safety of Life at Sea, 1974;'. "

4 6th Session September 1983

Document FUND/A.6/16, paragraph 17.3:

"The Assembly agreed to replace the 'International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended in 1962', (OILPOL 54), with MARPOL 73/78. Article 5.3(a)(i) of the Fund Convention now reads as follows:

- '(i) the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973; or'.

"It was decided that this replacement shall take effect as from 1 July 1984."
