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**TREATY LAW PROBLEMS ARISING OUT OF AMENDMENTS
TO THE ENTRY INTO FORCE PROVISIONS OF THE
1984 PROTOCOLS TO THE 1969 CIVIL LIABILITY
CONVENTION AND THE 1971 FUND CONVENTION**

Note by the Director

Introduction

1 In the light of the conclusions reached at its first session, the Intersessional Working Group requested the Director to examine the treaty law problems that would arise if the entry into force provisions in the 1984 Protocols to the Civil Liability Convention and the Fund Convention were to be amended along the lines discussed by the Working Group. The Director was also instructed to prepare, if possible, a draft text for amending the entry into force provisions in the 1984 Protocols to the Civil Liability Convention and the Fund Convention along these lines, in the form of appropriate instrument(s) (document FUND/WGR.6/5, paragraph 8 (d) and (e)). The present document sets out the results of the examination requested by the Working Group.^{<1>}

Treaty Law Questions

General Remarks

2 Two different but inter-related questions of treaty law arise in considering the possible amendment of any provisions of the 1984 Protocols to the Civil Liability Convention and the Fund Convention when the Protocols themselves are not yet in force. The first question is whether it is legally possible to amend the Protocols prior to their entry into force and, if so, by what procedure. The second question is what would be the relationship between the amended Protocols and the original 1984 Protocols and, in particular, how would conflicts between the two sets of instruments be avoided.

3 It should be noted that these questions apply to the amendment of any parts of the 1984 Protocols. Consequently, the considerations set forth in this document would be equally relevant to a proposal to amend any provisions other than those relating to the entry into force, including the substantive articles of the Protocols.

<1> This document has been prepared on the basis of a study carried out, at the Director's request, by Dr T A Mensah, former Assistant Secretary-General and Director of Legal Affairs and External Relations Division, International Maritime Organization.

Legality of Amendments

4 According to the international law of treaties, a treaty may be amended by agreement between the States which are Parties to that treaty. This general principle is laid down in Article 39 of the Vienna Convention on the Law of Treaties. The procedure for amending a treaty is governed by the rules of that Convention "except in so far as the treaty may otherwise provide".

5 The 1984 Protocols contain elaborate provisions on the procedure for their revision or amendment (Articles 14 and 15 of the 1984 Protocol to the Civil Liability Convention and Articles 32 and 33 of the 1984 Protocol to the Fund Convention). However, neither the procedure laid down in the Vienna Convention for amendment "by agreement between the Parties" nor amendment according to the procedures stipulated in the Protocols can be used before the entry into force of the Protocols. Firstly, there are no Parties to the Protocol which can agree to any amendment until the Protocols are in force. The Vienna Convention defines a "Party" to a treaty as a "State which has consented to be bound by the treaty and for which the treaty is in force" (Article 2 (g)). Furthermore, the provisions of the Protocols on revision and amendment cannot apply since they become legally operative only when the Protocols have entered into force. In any case, the amendment procedures laid down in the Protocols require the participation of "Parties" to the Protocols and, as indicated, there are no "Parties" to the Protocols prior to their entry into force.

6 These considerations would lead to the conclusion that no changes could be made to the provisions of the Protocols until the Protocols have actually entered into force. However, such a conclusion would be based on the assumption that the changes envisaged to the 1984 Protocols would be "amendments" to these Protocols in the strict treaty law sense. In the Director's view, this would not necessarily be the case.

7 It may well be that, prior to its entry into force, a treaty in the sense of a legally binding instrument does not exist. At the same time, however, it is correct to speak of the existence of the treaty with respect to the text. Consequently, although there may be no agreement which can be "amended" by the Parties in accordance with treaty law, there would be a treaty text which can be modified, revised or even completely replaced. Therefore, there is no fundamental legal obstacle to the modification or replacement of a treaty text which has not yet received the ratifications, acceptances etc required for entry into force.

8 In this connection reference should be made to three precedents which are directly relevant to the issues being considered in relation to the 1984 Protocols, viz amendments to MARPOL 1973, amendments to the United Nations Convention on a Code of Conduct for Liner Conferences and envisaged amendments to the Torremolinos Convention for the Safety of Fishing Vessels.

9 When it became clear that the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL 1973) was not likely to enter into force in the form in which it had originally been adopted, the International Maritime Organization (IMO) decided to convene a new international conference in order to consider and adopt a revised version of that Convention which would have better prospects for entry into force. As a result an International Conference held in 1978 adopted the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL 1978). This Protocol, which contains significant changes to the text of the 1973 Convention, was adopted at a time when the 1973 Convention itself had not entered into force. Indeed, the Protocol was adopted with the specific purpose of facilitating the entry into force of the 1973 Convention. No legal objections were raised, at the time or since, to the legality of the revision.

10 A further precedent supporting the legality of revising a treaty text prior to the entry into force is given by the 1974 United Nations Convention on a Code of Conduct for Liner Conferences. Article 52, paragraph 4 of that Convention provides that, if the Convention has not "entered into force five years from the date of the adoption of the Final Act", a plenipotentiary conference should be convened "in order to review the provisions of the Convention and its annex and to consider and adopt appropriate amendments". The conference would be convened "at the request of one-third of the States entitled to become Contracting Parties" to the Convention. This provision was, no doubt, based on acceptance of the view that the adoption of amendments to the text would be in order even when the Convention had not entered into force.

11 Also relevant in this context is the action which is being contemplated in respect of the Torremolinos International Convention for the Safety of Fishing Vessels, 1977. When it became clear that there was no realistic prospect of the Convention entering into force in the form in which it was adopted in 1977, the Maritime Safety Committee of IMO recommended that consideration be given to amending the text in order to improve the prospects of entry into force. This recommendation has been endorsed by both the Council and the Assembly of IMO, and appropriate amendments are being elaborated for consideration and adoption in due course. It should be noted that the amendments being considered relate mainly to the entry into force provisions of the 1977 Convention.

12 In the light of what is stated above concerning the position of international treaty law and certain precedents, the Director believes that amending the entry into force provisions of the 1984 Protocols to the Civil Liability Convention and Fund Convention would not be contrary to either general treaty law or the practice adopted in the United Nations system with regard to the modification of treaty texts.

Procedure to be Adopted for Amending the 1984 Protocols

13 Amendments to the 1984 Protocols to the Civil Liability Convention and the Fund Convention cannot be adopted by decision of the Parties, since there are no Parties to the Protocols until they have entered into force. However, it is possible to consider any amendments as amendments to the parent Conventions, ie the 1969 Civil Liability Convention and the 1971 Fund Convention, and not to the 1984 Protocols. Since the Protocols are not yet in force the only instruments which can be "amended", in terms of strict treaty law, are the 1969 and 1971 Conventions. This means, in effect, that new amendments would be adopted to the 1969 Civil Liability Convention and the 1971 Fund Convention, to replace the amendments adopted in 1984 by means of the 1984 Protocols. On this basis a conference "to consider amendments" to the 1984 Protocols would be no different in legal status to the Conference which adopted the 1984 Protocols, because the new conference would, strictly speaking, be a conference to adopt amendments to the 1969 and 1971 Conventions.

Participation In the Conference

14 It will be recalled that the 1984 Conference decided to resolve the problem of participation by means of a compromise arrangement which permitted participation by all the States entitled to become Parties to the 1969 Civil Liability Convention and 1971 Fund Convention. However, the compromise also recognised the special status of the States which were actually Parties to these Conventions at the time of the Conference. Consequently, the Conference decided that amendments to the 1969 Civil Liability Convention and the 1971 Fund Convention would be adopted by two-thirds of the States participating in the Conference, provided that the two-thirds included also one-half of the votes of the States Parties to the respective Conventions, present and voting. This arrangement gave all States participating in the Conference the right to vote, but with a special importance assigned to the votes of the States which were Parties to the respective Conventions.

15 The Director believes that it would be appropriate to use the same procedure as the one applied in 1984 for effecting any amendments which may be deemed necessary to the provisions of the 1984 Protocols. This would involve the convening by IMO, the depositary to the 1969 Civil Liability Convention and the 1971 Fund Convention, of an international conference to which would be invited all the States normally invited to attend conferences convened in the United Nations system. Subject to the agreement of the conference, all the participating States would be entitled to vote at that conference. The same majorities would be required as at the 1984 Conference.

Form of Instrument to be Adopted

16 As indicated above, the amendments to be adopted at the proposed conference would, from a legal point of view, be amendments to the 1969 Civil Liability Convention and the 1971 Fund Convention. Those amendments would replace the amendments adopted in 1984. For this reason, it would seem preferable that the conference adopts new protocols to amend the 1969 Civil Liability Convention and 1971 Fund Convention rather than instruments to supplement the 1984 Protocols themselves. The adoption of new protocols to replace the 1984 Protocols would simplify the procedure for ratification or acceptance of the amendments, since States would only have to ratify or accept the new protocols, without also having to take any action in respect of the 1984 Protocols. The 1984 Protocols would be deemed to have lapsed, in the same way that the 1973 MARPOL Convention was considered as no longer viable after the adoption of the 1978 MARPOL Protocol.

17 The new protocols, to replace the 1984 Protocols, would consist of the provisions of the 1984 Protocols with the modifications to the entry into force provisions which may be agreed by the conference. Thus, supposing that the conference were to be held in 1992, the instruments adopted would be:

- (a) Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969; and
- (b) Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.

Relationship between the 1984 Protocols and the New Instruments

18 If it were decided to adopt new protocols as suggested above, the new protocols would constitute the 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. It would be important to ensure that the 1984 Protocols are no longer viable. There are no legal means by which States would be prevented from bringing the 1984 Protocols into force. However, the conference adopting the new protocols might find it useful to make a recommendation, possibly in the form of a conference resolution, to the States concerned that they ratify or accept only the new protocols which would incorporate and modify the 1984 Protocols. This approach was taken by the Conference adopting the 1978 Protocol to MARPOL 1973, which made a similar recommendation in a Resolution annexed to the Final Act of the Conference.

Conflict of Treaties

19 To the extent that the new protocols were to contain modifications to the 1984 Protocols, there would be differences between the two sets of instruments. Accordingly there would, in theory at least, be the possibility of conflict of treaties in the event that both sets were to enter into force. However, in the view of the Director, the possibility of such a conflict is only theoretical. The Director considers that it is very unlikely that the conditions for the entry into force of the 1984 Protocols would be satisfied following the adoption of new protocols. States which decide to participate in a modernised

regime of compensation based on the Civil Liability Convention and Fund Convention would accede to the new protocols. It is hardly conceivable that States which contribute 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.

Conclusions

- 20 In the light of what is stated above, the Director draws the following conclusions:
- (a) There is no legal impediment to the "amendment" of the entry into force provisions of the 1984 Protocols to the Civil Liability Convention and the Fund Convention, if it were to be considered that such amendment would facilitate the entry into force of the content of the 1984 Protocols.
 - (b) 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 along the lines discussed by the Working Group. If agreement were reached between the States concerned, it would also be possible to adopt modifications to some of the substantive provisions. The new protocols would replace the 1984 Protocols.
 - (c) The procedure for convening the conference to adopt the new protocols, and the rules on participation and voting at the conference, might be the same as those applied in respect of the Conference which adopted the 1984 Protocols.
 - (d) The conference might make appropriate recommendations, in the form of a resolution, to States to take action only in relation to the new protocols, and thus ensure that the 1984 Protocols do not enter into force.

Treaty Instruments

21 In accordance with the instructions given to him by the Working Group, the Director has prepared draft instruments for amendments of the requirements for the entry into force of the content of the 1984 Protocols to the Civil Liability Convention and the Fund Convention. These draft texts, which are in the form of two protocols, are set out in Annexes I and II to this document.

Action to be Taken by the Intersessional Working Group

22 The Intersessional Working Group is invited to consider the information contained in this document.

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ANNEX I

DRAFT

PROTOCOL TO THE INTERNATIONAL CONVENTION ON CIVIL LIABILITY
FOR OIL POLLUTION DAMAGE, 1969

THE PARTIES TO THE PRESENT PROTOCOL,

HAVING CONSIDERED the International Convention on Civil Liability for Oil Pollution Damage, 1969, and the 1984 Protocol thereto,

HAVING NOTED that the 1984 Protocol to that Convention, which provides for improved scope and enhanced compensation, has not entered into force,

AFFIRMING the importance of maintaining the viability of the international oil pollution liability and compensation system,

AWARE OF the need to ensure the entry into force of the content of the 1984 Protocol as soon as possible,

RECOGNISING that special provisions are necessary in connection with the introduction of corresponding amendments to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971,

HAVE AGREED as follows:

Article 1 - Article 11

Identical to the text of Article 1 to Article 11 of the 1984 Protocol to the Civil Liability Convention.^{<1>}

Article 12

Signature, ratification, etc

1 This Protocol shall be open for signature at London from to by all States.

2-6 Identical to the text of Article 12.2 - 12.6 of the 1984 Protocol to the Civil Liability Convention.^{<1>}

<1> The references to "1984" in the 1984 Protocol to the Civil Liability Convention should be replaced by references to "19XX" in Article XII ter, Article 11.2, Article 12.4, Article 13.2, Article 14.1 and 14.2, Article 15.5, Article 16.5 and Article 17.2 (a)(ii) and in the certificate annexed to that Protocol.

Article 13

Entry into Force

1 This Protocol shall enter into force twelve months following the date on which ten States including [four] [five] States each with not less than one million units of gross tanker tonnage have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General of the Organization.

2-4 Identical to the text of Article 13.2 – 13.4 of the 1984 Protocol to the Civil Liability Convention.<2>

Article 14 to Article 18

Identical to the text of Article 14 to Article 18 of the 1984 Protocol to the Civil Liability Convention.<2>

DONE AT LONDON, this day of

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments for that purpose, have signed this Protocol.

* * *

<2> See note <1> on previous page.

ANNEX II

DRAFT

**PROTOCOL TO THE INTERNATIONAL CONVENTION ON THE ESTABLISHMENT OF AN
INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE, 1971**

THE PARTIES TO THE PRESENT PROTOCOL,

HAVING CONSIDERED the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 and the 1984 Protocol thereto,

HAVING NOTED that the 1984 Protocol to that Convention, which provides for improved scope and enhanced compensation, has not entered into force,

AFFIRMING the importance of maintaining the viability of the international oil pollution liability and compensation system,

AWARE OF the need to ensure the entry into force of the content of the 1984 Protocol as soon as possible,

RECOGNISING the advantage for the States Parties of arranging for the amended Convention to coexist with and be supplementary to the original Convention for a transitional period,

CONVINCED that the economic consequences of pollution damage resulting from the carriage of oil in bulk at sea by ships should continue to be shared by the shipping industry and by the oil cargo interests,

BEARING IN MIND the adoption of the Protocol of 19XX to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969,

HAVE AGREED as follows:

Article 1 to Article 27

Identical to the text of Article 1 to Article 27 of the 1984 Protocol to the Fund Convention.^{<1>}

Article 28

Signature, ratification, etc

1 This Protocol shall be open for signature at London from to by any State which has signed the 19XX Liability Convention.

<1> The references to "1984" in the 1984 Protocol to the Fund Convention should be replaced by references to "19XX" in Article 2.1, 2.3, 2.4, 2.5 and 2.6; Article 3, Article 6.1, 6.2, 6.3 and 6.5; Article 9.1, Article 10, Article 11.1, Article 36 bis, Article 36 quater, Article 27, Article 28.4, Article 30.2 and 30.6, Article 33.5 and Article 34.4.

2-7 Identical to the text of Article 28.2 – 28.7 of the 1984 Protocol to the Fund Convention.↔

Article 29

Identical to the text of Article 29 of the 1984 Protocol to the Fund Convention.

Article 30

Entry into force

1 This Protocol shall enter into force twelve months following the date on which the following requirements are fulfilled:

- (a) At least eight States have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General of the Organization; and
- (b) The Secretary-General of the Organization has received information in accordance with Article 29 that those persons who would be liable to contribute pursuant to Article 10 of the 1971 Fund Convention as amended by this Protocol have received during the preceding calendar year a total quantity of at least [500] [450] [400] million tons of contributing oil.

2-6 Identical to the text of Article 30.2 – 30.6 of the 1984 Protocol to the Fund Convention.↔

Article 31 to Article 39

Identical to the text of Article 31 to Article 39 of the 1984 Protocol to the Fund Convention.↔

DONE AT LONDON, this day of

IN WITNESS WHEREOF the undersigned being duly authorized for that purpose have signed this Protocol.
