7. International Maritime Organization (IMO)

Communication transmitted to the Secretariat, 26 July 2022:

Provisional application of the 2006/2008 amendments to the Convention on the International Mobile Satellite Organization (IMSO)

Introduction

The *Convention on the International Mobile Satellite Organization* (IMSO), of which the IMO is the Depositary, was adopted on 3 September 1976 and entered into force on 16 July 1979.[214] It does not include a provision on provisional application. However, there have been a few instances of provisional application of amendments to the IMSO Convention. These largely allow for administrative arrangements to be undertaken in anticipation of expanded organizational responsibilities, as follows:

the 2006 amendments, adopted by the IMSO Assembly at its 18th session on 29 September 2006, and whose provisional application was decided by the IMSO Assembly at its 19th (extraordinary) session, in March 2007; and

the 2008 amendments, adopted by the IMSO Assembly at its 20th session, on 2 October 2008, and whose provisional application was decided at that same session.

The procedure for amendments to enter in force is enshrined in Article 20 of the IMSO Convention, which provides that the instrument of acceptance of the amendments should be deposited with the Depositary of the Convention, the Secretary-General of the International Maritime Organization (IMO). The amendments shall enter into force 120 days after the Depositary has received notices of acceptance from two-thirds of those States which, at the time of their adoption by the IMSO Assembly, were Parties to the IMSO Convention.

The 2006 amendments and the decision on their provisional application

The 2006 amendments to the IMSO Convention were adopted at the Eighteenth Session of the IMSO Assembly.[215] The amendments regulate the *Global Maritime Distress and Safety System* (GMDSS) and the *Long Range Identification and Tracking of Ships* (LRIT).[216] In short, these amendments aim to extend the oversight functions of IMSO to all GMDSS providers in the future, and to give IMSO the task of overseeing LRIT. The amendments were adopted in accordance with Article 18 of the IMSO Convention, therefore, they would enter into force

[214] The *International Maritime Satellite organization* (INMARSAT) was established in 1979 at the behest of the IMO as a non-profit intergovernmental organization pursuant to the *Convention on the International Maritime Satellite Organization*, 1976. The objective of the Organization was to establish a satellite communications network for the maritime community, with the main aim of improving the safety of life at sea and the management of distress situations, particularly through the Global Maritime Distress and Safety System (GMDSS). The mission of the Organization was further extended to land mobile and aeronautical communications. INMARSAT was privatized in 1999 and was divided into two entities, both based in London: the *International Mobile Satellite Organization* (IMSO) as an intergovernmental regulatory body for satellite communications, and the UK-based company *Inmarsat Ltd* managing the INMARSAT's operational unit. This privatization was established through amendments to the INMARSAT Convention and the Operating Agreement between telecommunications entities public or private, which were adopted by the INMARSAT Assembly in 1998. In 1999, the Assembly and Council of INMARSAT decided to implement the amendments pending their formal entry into force which happened in 2001.

[215] See: Doc. ASSEMBLY/18/16/RD, paras. 4.1.2 and 4.2.7.

[216] Set out in Annexes IV to VII of Doc. ASSEMBLY/18/16/RD.

> "one hundred and twenty days after the Depositary has received notices of acceptance from two-thirds of those States which, at the time of adoption by the Assembly, were Parties."

The IMO Maritime Safety Committee (MSC), at its 82nd session, decided to appoint IMSO as the LRIT Co-ordinator and invited IMSO to take whatever action it could in order to ensure the timely implementation of the LRIT system (document MSC 82/24, paragraph 8.49). MSC was informed by IMSO that the IMSO Assembly would be convened in 2007 to consider the measures to fulfil the LRIT Co-ordinator functions through provisional application of the amendments. At its 82nd session, MSC noted that:

> "the IMSO Assembly had yet to make a decision on the provisional implementation of these adopted amendments and an extraordinary session of the IMSO Assembly would be convened in March 2007 to consider the measures required".[217]

At 19th extraordinary session, held from 5 to 6 March 2007, the IMSO Assembly

> "decided that the amendments to the IMSO Convention adopted at the Eighteenth Session of the Assembly should enter into force on the basis of provisional application from 7 March 2007, pending their formal entry into force in accordance with Article 18 of the IMSO Convention".[218]

Thus, the implementation of the provisional application of the 2006 amendments was formulated through a decision of the IMSO Assembly contained in the Record of Decisions (document A 19/8/RD). This agreement therefore takes the form of a "resolution, decision or other act adopted by an international organization or at an intergovernmental conference, in accordance with the rules of such organization or conference, reflecting the agreement of the States or international organizations concerned" as envisaged by Guideline 4, paragraph (*b*)(i) of the *Guide to Provisional Application of Treaties* of the ILC providing for the form that the agreement on provisional application may take.[219]

The decision of the Assembly provides that the amendments should be provisionally applied from 7 March 2007.[220] The decision also provides that the end date of provisional application should coincide with the entry into force of the amendments. In this sense, it is in line with Guideline 9, paragraph 1 which states that

> "the provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned."

The need for provisional application to follow a formal entry into force in accordance with the Convention's procedure is recalled in the decision, where the Assembly

> "urge[s] all Parties to use their best endeavours to accept the amendments in accordance with Article 18 of the IMSO Convention as soon as possible so as to expedite their formal entry into force".[221]

In the case of IMSO, the States adopted a clause subordinating the decision to national law requirements:

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[217] See: Doc. MSC 82/24, para. 8.11.

[218] See: Doc. ASSEMBLY/19/8, para. 7.5.

[219] See: Part Two, Sec. A, below, at p. 218..

[220] See: Doc. ASSEMBLY 19/8, para. 7.5.

[221] See: Doc. ASSEMBLY 19/8/RD, para.7.7.

> "The Assembly noted that such provisional application would mean that Parties will conduct themselves, in their relationships with each other and the Organization, within the limits allowed by their national constitutions, laws and regulations, as if the amendments were in force with effect from such date."[222]

This seems to echo Guideline 12 of the Guide of the ILC which guarantees

> "the right of the States […] to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of States."[223]

The 2008 amendments

After the decision on provisional application of the amendments was taken at the 19th extraordinary session of the IMO Assembly, several State Parties led by the United States objected to that decision. They also considered that the decision to provisionally apply the amendments "was flawed because it was not taken by consensus".[224] The United States proposed revision of the 2006 amendments and provisional application of the new version.[225]

In its proposal, the United States set out reasons for establishing provisional application of the new amendments as follows:

> "formal entry into force of the amendments […] may take years and is unlikely to occur quickly enough to meet the need to promptly establish a firm legal foundation upon which IMSO can perform its duties and functions as LRIT Coordinator".[226]

Provisional application would be "a way forward to allow the Organization to promptly and properly perform its role as LRIT Coordinator".[227] The US explained that they wanted to modify the amendments adopted by the IMSO Assembly at its 18th session because

> "it believed that the one sentence amendment adopted at the Eighteenth Session of the IMSO Assembly was substantively deficient and did not provide the necessary legal framework for IMSO to undertake the necessary functions and duties of the LRIT Coordinator".[228]

The 20th Assembly adopted, by consensus, the new amendments and decided, at that same session, that they should be applied provisionally from 6 October 2008, pending their formal entry into force in accordance with Article 18 of the IMSO Convention.[229] In order to give way to the provisional application of the 2008 amendments, which incorporate the 2006 amendments while modifying their content, the Assembly decided at its 20th session to terminate its decision to apply the 2006 amendments on a provisional basis.[230]

Provisional application of the amendments to the 2009 London Protocol

The *1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972* (London Protocol) was adopted in 1996 in order to

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[222] See: Doc. ASSEMBLY/19/8, para. 7.6.

[223] Guideline 12, reproduced below, at p. 210.

[224] See: Doc. ASSEMBLY/20/13.2, para. 1.1.

[225] See: Doc. ASSEMBLY/20/13.2.

[226] See: Doc. ASSEMBLY/20/13.2, para. 1.5.

[227] *Ibid.*

[228] See: Doc. ASSEMBLY/20/13.1, annex 1, page 1.

[229] See: Doc. ASSEMBLY/20/16/RD, paras. 13.2.8 and 13.2.9.

[230] See: Doc. ASSEMBLY/20/Record, para. 13.2.13.

modernize and eventually replace the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972* (the "London Convention"). The London Protocol entered into force in 2006 and established more restrictive provisions than the London Convention by prohibiting all dumping of wastes at sea unless explicitly permitted. Annex 1 to the Protocol provides a list of wastes and other matter which may be considered for dumping at sea, subject to permit.

Article 21 of the Protocol provides for the amendment procedure and requires explicit acceptance by two thirds of the Contracting Parties for the amendment to enter into force. The Protocol does not provide for its provisional application.

In 2009, the Meeting of Contracting Parties adopted resolution LP.3(4) amending Article 6 of London Protocol. The amendment added a second paragraph to Article 6 providing that "the export of carbon dioxide streams for disposal in accordance with annex 1 may occur, provided that an agreement or arrangement has been entered into by the countries concerned".

By October 2019, the London Protocol had 53 Contracting Parties but only six States accepted the amendment. To remedy this situation, the Contracting Parties to the London Protocol, at the 14th Meeting on 11 October 2019, adopted resolution LP.5(14) on provisional application of the 2009 amendment, pending its entry into force. The resolution requires those Contracting Parties who want to provisionally apply the amendment (and therefore enter into agreements to export carbon dioxide streams for disposal) to deposit a declaration to that effect.

The 2021 *Guide to Provisional Application of Treaties* of the International Law Commission (ILC) provides, in its Guideline 4 ("Form of agreement", paragraph *b*), that provisional application of treaties can be agreed by "any other means or arrangements [than a separate treaty], including: (i) a resolution, decision or other act adopted by an international organization or at an intergovernmental conference …". Thus, Resolution LP. 5(14) providing for provisional application of the amendment to article 6 complies with the Guide.

There are currently 9 acceptances of the 2009 amendment, out of which Norway, the Netherlands, Denmark and the Republic of Korea have declared its provisional application.

International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM Convention)

The *International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM)* was adopted in February 2004 and entered into force in September 2017. The Convention contains standards with which the ships of the States Parties must comply and sets a fixed date for compliance with those standards. In 2013, the compliance dates provided in the Convention were approaching, however the treaty was not yet in force. Therefore, IMO Member States embarked on a discussion on how to amend the compliance dates in a treaty that has not yet entered into force. It was of an utmost importance for the shipping industry to have clarity about the compliance dates and uncertainty concerning this issue delayed the ratification process.

A Correspondence Group on the application of the BWM Convention was established to consider options to relax the implementation schedule of regulations included in the Convention. It submitted its report at the 65th session of the Marine Environment Protection Committee (MEPC). Among the proposed options was the provisional application of Article 19 of the Convention (Option C) which provides for the amendment procedure of the treaty.[231]

Article 19 allows a classical amendment procedure and a tacit acceptance procedure. The proposal suggested that the tacit acceptance procedure of Article 19 should be provision-

[231] See: Doc. MEPC 65/2/11, paras. 31 to 33 and annex 7.

ally applied in order to amend the Convention and to change the dates of implementations of specific standards of the Convention which were too close in time.

The proposal referred to Article 25(1)(*b*) of the *Vienna Convention of Law on Treaties* (VCLT) which allows negotiating States, when the treaty does not provide for provisional application, as in the case of the BWM Convention, to enter into an agreement "in some other manner" to bring the treaty into force provisionally. Thus, it was proposed that the negotiating States to the BWM Convention should agree on the provisional application of Article 19 through an Assembly resolution allowing [the opening of] the amendment procedure. According to the proposal, provided that such a resolution embodied the intent of the Member States represented in the Assembly to adopt a binding agreement concerning the provisional application of Article 19 of the BWM Convention, it would qualify as an agreement in terms of Art. 25(1)(*b*) of the VCLT. The agreement (adopted by way of IMO Assembly resolution) to apply certain parts of the treaty would provisionally constitute a separate binding ("subsidiary") agreement and the proposal suggested that the negotiating States that agree on provisional application would subsequently be treated as "States Parties" to the Convention.

Following the work of the Correspondence Group and its proposal for an Assembly resolution on the provisional application of Article 19 of the BWM Convention, the IMO Secretariat provided legal advice to the 65th session of MEPC[232] in which it did not recommend the option of provisional application.[233]

Issues raised by this proposal

Whereas provisional application usually concerns substantive provisions, in this case the proposal was to provisionally apply an article regulating the amendment procedure of the Convention. Article 25 of the VCLT does not limit provisional application to substantive articles only. However, as the legal advice of the Secretariat states, the use of Article 25 of the VCLT to provisionally apply a procedural provision would be "untested and without precedent".[234]

The proposal was also problematic from the point of view of the status of States who would have concluded the agreement on provisional application. In accordance with the VCLT, only negotiating States can agree on provisional application, that is States which took part in drawing up and adopting the text of the treaty. In the case of the BWM Convention, those States would have been those present at the diplomatic conference in 2004, not the MEPC Members or the Assembly (both composed of all Members of the IMO). Furthermore, it was unclear whether Article 25(1)(*b*) requires all of the negotiating States to agree on the provisional application or whether only some may so agree.

The proposal suggested also that the negotiating States that would agree on provisional application of Article 19 would subsequently be treated as "States Parties" to the Convention.[235] Thus, a State which would have participated in the negotiation of the BWM Convention, but which would not be a contracting State having expressed its consent to be bound by the Convention, could have agreed on provisional application of Article 19 and would have the right to amend the Convention, without being bound by the whole treaty. It would enable States that had not ratified the Convention itself to participate in amending its substantive provisions such as, *e.g.* those contained in the regulations. Conversely, a contracting State that would have not agreed on the provisional application of Article 19

[232] See: Doc. MEPC 65/2/18.

[233] *Ibid*., para. 20.

[234] *Ibid*., para. 20.1.

[235] See: Doc. MEPC 65/2/11, annex 6, para. 3.

of the BWMC would have no right to amend the treaty. The right of negotiating States to provisionally apply a treaty should not be confused with the right of States Parties to amend that treaty.[236]

Another problem was that the amendment procedure could not be applied while the Convention was not in force. Indeed, such provisional application would infringe Article 39 of the VCLT, whereby only parties can amend a treaty. Pursuant to Article 2(1) of the VCLT, a "party" is a "State which has consented to be bound by the treaty and for which the treaty is in force". As long as the treaty is not in force, there are no "parties". Thus, the amendment procedure of Article 19 of the BWM Convention could not be applied before the Convention entered into force. The legal advice of the Secretariat argued that:

> "So long as the BWM Convention does not enter into force, there are no Parties (as opposed to negotiating States or Contracting States), so that no one can utilize the procedure set out in the article".[237]

The proposal on provisional application of Article 19 on amendment procedure of the BWM Convention was not supported by the Marine Environment Protection Committee. In any case, the provisional application of the amendment procedure would also not resolve the problem of the compliance dates as the amendments adopted by virtue of the tacit acceptance take around 24 months to enter into force which would be already beyond the compliance dates.

[236] See: Doc. MEPC 65/2/18, para. 20.5.

[237] *Ibid.*, para. 20.4.