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London Convention

The 1996 Protocol to the 1972 London Convention*

At a Special Meeting¹ held in London from 28 October to 8 November 1996, the contracting parties to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (hereinafter the London Convention)² adopted, on 7 November, the 1996 Protocol to the London Convention.³ The 1996 Protocol thoroughly revises the London Convention and consists of 29 Articles and three Annexes, which form an integral part of the 1996 Protocol. The Special Meeting also adopted Resolutions LC.55(SM) and LC.56(SM).⁴ This article aims at providing a concise analysis of the most important aspects of the 1996 Protocol, accompanied by a short account on the historical development of the London Convention.

Historical Development

Adopted 25 years ago, the London Convention was the first global convention to control and regulate the deliberate disposal at sea of wastes and other material of any kind.⁵ Since then, numerous initiatives have been taken to move away

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¹ Normally, a Consultative Meeting is held on a more or less annual basis. The 19th Consultative Meeting will be held in 1997.

² (1972) 11 ILM 1294. Signed in London, Mexico City, Moscow and Washington, DC on 29 December 1972. Entry into force 30 August 1975. As of December 1996, 75 states were parties to the London Convention.

³ The full name is the "1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972".

⁴ The text of the 1996 Protocol and the two Resolutions is contained in IMO Doc. LC/SM 1/6, 14 November 1996.

⁵ Note that Art. 25(1) of the 1958 High Seas Convention (450 UNTS 11) already required states to "take measures to prevent pollution of the sea from the dumping of radioactive waste". The London Convention does not cover the disposal of wastes or other matter incidental to or derived from the normal operations of vessels, aircraft, platforms or other man-made structures at sea and their equipment" (Art. III(1) of the London Convention and Art. 1(2)(1) of the 1996 Protocol), which are covered by, for example, MARPOL 73/78. (See note 16 below.)

gradually from controlled dumping and to work towards integrated land-based alternatives.⁶

A two-year moratorium was placed on the dumping of radioactive wastes in 1983, and has been continued ever since.⁷ In 1990, it was agreed to phase out sea disposal of industrial waste by 1 January 1996.⁸ The incineration of noxious liquid wastes at sea effectively ceased at the beginning of 1991, although the deadline was set for 31 December 1992.⁹ In 1992, the 15th Consultative Meeting also decided, after a proposal by Greenpeace International, to stop referring to the Convention as the "London Dumping Convention 1972" but instead to refer to it as the "London Convention 1972". Besides thus commemorating the 20th anniversary of the London Convention, this change satisfied the concern of several states that the old informal name suggested that contracting parties formed a "dumping club".¹⁰

Encouraged by Agenda 21,¹¹ the contracting parties agreed on a detailed review of the London Convention in 1993.¹² This review would have to incorporate these changes in a modern approach to waste management, based on precaution and prevention. Moreover, the revised the London Convention should bring about an increase in its membership. A first step was made the same year by adopting three important amendments which extended the list of materials not to be disposed at sea to include industrial waste and all radioactive waste or other radioactive matter, and prohibited the incineration at sea of industrial waste and sewage sludge.¹³

⁶ Amendments to the London Convention not further discussed in the text are: (1) 12 October 1978 (LDC.6(III)) (Disputes). Not yet in force. As at 19 November 1996, only 19 contracting parties have accepted these amendments. (2) 12 October 1978 (LDC.5(III)) (Incineration). In force 11 March 1979. (3) 24 September 1980 (LDC.12(V)) (Annexes I and II). In force 11 March 1981. (4) 3 November 1989 (LDC.37(12)) (Annex III). In force 19 May 1990.

⁷ Res. LDC.14(7) and LDC.21(9).

⁸ Res. LDC.43(13).

⁹ Res. LC.47(15) concerning the Status of Incineration of Noxious Liquid Wastes at Sea, adopted by the 15th Consultative Meeting in 1992. Earlier resolutions (LDC.35(11) and LDC.39(13)) already called for minimising incineration of noxious liquid wastes at sea.

¹⁰ IMO Doc. LC 15/16, para. 4.25. The proposal by Greenpeace can be found in IMO Doc. LC 15/5.

¹¹ See Agenda 21, Chapter 17, para. 30(b)(i).

¹² Res. LC.48(16).

¹³ The amendments were laid down in: Res. LC.49(16) concerning Phasing Out Sea Disposal of Industrial Waste; Res. LC.50(16) concerning Incineration at Sea; and Res. LC.51(16) concerning Disposal at Sea of Radioactive Wastes and Other Radioactive Matter. They were adopted on 12 November 1993 and entered into force on 20 February 1994. On 11 February 1994 Australia issued a declaration of non-acceptance to Res. LC.49(16), and on 18 February 1994 the Russian Federation issued a declaration of non-acceptance to Res. LC.51(16). For the text of these declarations see IMO Doc. LC 17/14, para. 2.2. See also R. Vartanov and C.D. Hollister, "Nuclear Legacy of the Cold War. Russian Policy and Ocean Disposal", (1997) 21 *Marine Policy* 1-15.

Choice of Instrument

The 1996 Protocol is in fact an entirely new convention, modifying and adding to virtually every aspect of the London Convention. Article 23 of the 1996 Protocol provides therefore that: "This Protocol will supersede the Convention as between Contracting Parties to this Protocol which are also Parties to the Convention." The reason behind this approach is to circumvent the normal entry into force requirements of two-thirds of the contracting parties for amendments under Article 15 of the London Convention. By way of Resolution LC.53(18) the contracting parties decided that the 1996 Protocol could have less stringent entry into force requirements, which have finally been laid down in Article 25. The 1996 Protocol will enter into force when 26 states have expressed their consent to be bound, among which at least 15 contracting parties to the London Convention. The amendment procedures under the 1996 Protocol have not changed substantively from those of the London Convention.

This circumvention of previously agreed procedural requirements by new requirements is perhaps uncommon, but not unique. Similar examples include the 1994 Implementation Agreement¹⁴ to the LOS Convention¹⁵ and the 1994 and 1995 amendments to MARPOL 73/78,¹⁶ SOLAS 74¹⁷ and STCW 78¹⁸ concerning port state control on operational requirements.¹⁹ These examples illustrate that states are not prepared to let formal requirements restrict their behaviour in cases where a concrete need for change arises and a large majority supporting this crystallises.

Objective and General Obligations

The objective of the 1996 Protocol is laid down in Article 2 and adds to the existing provision that contracting parties shall "where practicable eliminate pollution caused by dumping or incineration at sea of wastes and other matter".

¹⁴ Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, UN General Assembly Res. 48/263, 28 July 1994. Not in force. Text in *UN Law of the Sea Bulletin*, special issue IV (1994) 8-25.

¹⁵ United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994. Text in (1982) 20 ILM 1,245.

¹⁶ International Convention for the Prevention of Pollution from Ships, London, 2 November 1973. This Convention was not intended to enter into force. Text in (1973) 12 ILM 1319. 1978 Protocol, London, 1 June 1978. Text in (1978) 17 ILM 546. Annex I entered into force on 2 October 1983; Annex II on 6 April 1987; Annex III on 1 July 1992; Annex IV is not in force; and Annex V entered into force on 31 December 1988.

¹⁷ International Convention for the Safety of Life at Sea, London, 1 November 1974. In force 25 May 1980. Text in 1980 UKTS 46.

¹⁸ International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, London, 1 December 1978. In force 28 April 1984. Text in Cmnd. 7543.

¹⁹ 1994 amendments to MARPOL 73/78 concerning Regulations I/8A, II/15, III/8 and V/8 (IMO Doc. MP/CONF.2/8); in force 3 March 1996. 1994 amendments to SOLAS 74 concerning Regulation XI/4 (IMO Doc. SOLAS/CONF.2/27); in force 1 January 1996. 1995 amendments to STCW 78 concerning Regulation I/4 (IMO Doc. STCW/CONF/10 and three Attachments); in force 1 February 1997.

Apart from the fact that this formula leaves states some discretion, opinions differed as to its practical application. For some states it meant that dumping activities should be suspended altogether. Others regarded it as an obligation to clean up pollution caused by dumping in the past.

In Article 3 the 1996 Protocol embraces the precautionary approach and the polluter-pays principle. The precautionary approach has been couched in strong wording ("shall apply"), presumably to compensate for the enlarged list of wastes exempt from a general prohibition of dumping in Annex 1 (see below). Conversely, the wording chosen for the polluter-pays principle does not amount to more than a declaration of intent, with the use of phrases such as "in principle" and "shall endeavour".

Coverage

Much debate was devoted to the substantive and geographical coverage of the 1996 Protocol. Proposals to include activities related to offshore oil and gas exploration and exploitation were ultimately rejected (Article 1(4)(3)). Moreover, the disposal at sea of derelict offshore installations remains under the scope of the 1996 Protocol through its inclusion in the definition of "dumping" in Article 1(4)(4). Platforms are also included in the reverse list in Annex 1 and will therefore need a prior permit on a case-by-case basis. Concern for the environmental risks of the toppling of oil rigs, highlighted by the "Brent Spar" controversy in 1995, was expressed particularly by European states.²⁰ Furthermore, Article 10(4) stipulates that vessels and aircraft entitled to sovereign immunity do not fall under the scope of the 1996 Protocol. To accommodate dissatisfaction with this traditional approach, the Special Meeting adopted the "opting-in" provision in Article 10(5). This makes it possible for contracting parties to issue a declaration to the effect that it applies the 1996 Protocol to vessels and aircraft entitled to sovereignty immunity, while reserving the right to take enforcement action against such vessels and aircraft. As regards the geographical coverage, internal waters are not automatically covered (Article 1(7)), although Article 7 emphasises that contracting parties can do so at their own discretion.

Main Features

The core of the 1996 Protocol is formed by Articles 4 and 5 which prohibit dumping and incineration at sea. General exceptions to both activities, such as to secure the safety of human life in case of emergencies, are formulated in Article 8. More specifically, the dumping of wastes or other matter that appear in Annex 1 to the 1996 Protocol is excluded from the prohibition in Article 4(1). This

²⁰ See also J. Side, "The Future of North Sea Oil Industry Abandonment in the Light of the Brent Spar Decision", (1997) 21 *Marine Policy* 45-52, who discusses the different values involved in the decision-making process for the Best Practicable Environmental Option.

so-called "reverse listing", which replaces the existing "black" and "grey" lists in Annexes I and II to the London Convention, is already used by the 1992 OSPAR Convention,²¹ the Helsinki Conventions²² and the 1995 Dumping Protocol to the Barcelona Convention.²³ Annex 1 entitled "Wastes or Other Matter that May Be Considered for Dumping" contains the following list:

- (1) dredged material;
- (2) sewage sludge;
- (3) fish waste, or material resulting from industrial fish processing operations;
- (4) vessels and platforms or other man-made structures at sea;
- (5) inert, inorganic geological material;
- (6) organic material of natural origin; and
- (7) bulky items primarily comprising iron, steel, concrete and similarly unarmful materials for which the concern is physical impact, limited to those circumstances where such wastes are generated at locations, such as small islands with isolated communities, having no practicable access to disposal options other than dumping.

Not without controversy, at least from the European perspective, has been the inclusion of vessels and platforms under item (4). The upheaval surrounding the aborted dumping of the oil rig "Brent Spar" in 1995 was apparently unable to secure global support for its exclusion from this list. This reiterates the position taken by the rejection of the Danish proposal for a moratorium during the 18th Consultative Meeting. The Special Meeting also rejected a proposal to phase out the dumping at sea of vessels, but instead adopted Resolution LC.56(SM) entitled "Sea Disposal of Vessels". This resolution calls for research conducted by the Scientific Group with regard to "land-based alternatives, methods of assessment, procedures for preventing pollution and the rationale for sea disposal of vessels" and a review of the issue in five years. The specific circumstances under which item (7) may be invoked is remarkable, particularly the reference to small islands.

Section 3 to Annex 1 qualifies the list given above to the extent that these materials cannot be considered eligible for dumping when "containing levels of

²¹ Convention on the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992. Text in (1993) 32 ILM 1069.

²² Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, 22 March 1974. In force 3 May 1980. (1974) 13 ILM 546. Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, 9 April 1992. Not in force. Text in OJ No. L73, 16.3.94, p. 20.

²³ Convention for the Protection of the Mediterranean Sea against Pollution, Barcelona, 16 February 1976. In force 12 February 1978. Text in (1976) 15 ILM 290. 1995 Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea, Barcelona, 10 June 1995. Not in force. Text in UN Doc. UNEP(OCA)/MED IG.6/7.

radioactivity greater than *de minimis* (exempt) concentrations as defined by the IAEA and adopted by Contracting Parties". A commitment has also been made to conduct scientific studies on the dumping of all non-high level radioactive material within 25 years of 20 February 1994, and at each 25 year interval thereafter.

The list of materials in Annex 1 may be considered for sea disposal, subject to regularly reviewed permits, on a case-by-case basis and in compliance with Annex 2 entitled "Assessment of Wastes or Other Matter that May Be Considered for Dumping". Annex 2 replaces the existing Annex III and constitutes a functional system for assessing the impact of dumping activities on the marine environment.

Miscellaneous

Articles 1(4)(2)(1), 1(5) and 6 demarcate the 1996 Protocol from MARPOL 73/78 and the 1989 Basel Convention.²⁴ The 1996 Protocol contains no provision similar to Article XIII of the London Convention which refers to the law of the sea and the LOS Convention although the references to international law, such as in Article 3(4) would seem to have the same effect. Furthermore, the provision on reporting (Article 9) was strengthened although proposals to adopt compliance procedures came no further than an obligation to reconsider the matter within two years after the entry into force of the 1996 Protocol (Article 11). Whereas existing Article VII(2) envisaged no coastal state enforcement beyond the territorial sea, Article 10(2) simply refers to "appropriate measures in accordance with international law". This brings the mode of coastal state enforcement jurisdiction within its EEZ, based on Article 216 of the LOS Convention, under the scope of the 1996 Protocol.

In furtherance of the objective to attract new states to the 1996 Protocol that are not already parties to the London Convention, Article 26 provides a "transitional period" of a maximum of five years. Within this period of grace, specific provisions do not have to be complied with. No double standard is possible with respect to the incineration at sea or the dumping of radioactive wastes or other radioactive matter. Making use of the "transitional period" involves close monitoring arrangements but also brings technical assistance within range. As the provisions on technical assistance in Article 13 have been considerably strengthened, this may give new states an extra incentive to become a contracting party. Moreover, para. 3 of Article 26 obliges a state applying for the transitional period nonetheless to prohibit dumping activities for which it has not issued a permit. This would seem to place a considerable administrative burden on a state whose legislation is not on a par with the global norm.

²⁴ Convention on the Control of Transboundary Movement of Hazardous Waste and Their Disposal, Basel, 22 March 1989. In force 5 May 1992. Text in (1989) 28 ILM 657.

With respect to responsibility and liability, Article 15 essentially duplicates Article X of the London Convention. Since the Special Meeting could not reach a consensus for a draft resolution calling for a deadline for the development of liability procedures, not much progress is expected here. Conversely, progress was made on the issue of dispute settlement.²⁵ The dispute settlement provisions in Article 16 of the 1996 Protocol form part of the package as a whole and are thus more likely to become treaty law than the 1978 amendments. Article 16 provides for mandatory dispute settlement subject to the ability to exclude disputes about the interpretation or application of Article 3(1) or 3(2) (the precautionary approach and the polluter-pays principle). The forum with residual jurisdiction is the Arbitral Tribunal operating under Annex 3 entitled "Arbitral Procedure". Contracting parties may agree to make use of the dispute settlement procedure under the LOS Convention, whether or not they are also parties to that Convention. The 1996 Protocol therefore reinforces the central role of the dispute settlement system of the LOS Convention for law of the sea issues but not as much as, for example, the 1995 Straddling Stocks Agreement under which the LOS Convention dispute settlement system is the only option.²⁶

Conclusions

The adoption of the 1996 Protocol brings a temporary end to a comprehensive review of the London Convention. It embraces a modern approach to waste management, guided by the principles of precaution and the polluter-pays. As with all global instruments, it remains the product of compromises and criticism is therefore to be expected. An overall conclusion, however, is that the 1996 Protocol enhances the level of protection of the marine environment. Further progress is dependent on the unrelenting efforts on the international level, both by states and NGOs.

To a considerable extent the success of the 1996 Protocol will also depend on its capacity to attract new membership. It remains to be seen whether states decide that the prospects of technical co-operation and assistance outweigh the costs involved in finding alternatives for disposal at sea. In this context account should be taken of the so-called "indirectly binding effect" which the LOS Convention has on its state parties that have not also become parties to regulatory conventions such as the London Convention. Article 210 of the LOS Convention imposes on states parties the obligation to adopt and enforce "laws and regulations to prevent, reduce and control pollution of the marine environment by dumping". Paragraph (4) of that Article stipulates the level of

²⁵ As observed in note 6, the 1978 amendments to the London Convention concern dispute settlement but never entered into force.

²⁶ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995. Not in force. Text in *UN Law of the Sea Bulletin*, 29 (1995) 25-55. See Art. 30.

stringency of these national laws and regulations, namely that they "shall be no less effective . . . than the global rules and standards". The LOS Convention itself gives no guidance on the definition of the term "global rules and standards", but the 14th Consultative Meeting considered these to be those of the London Convention.²⁷ States parties to the LOS Convention who are not parties to the London Convention are thus nevertheless bound by its provision but miss the opportunity to influence the future direction of the London Convention. It is to be hoped that this will give them another incentive to participate in and work towards a universally accepted regime for ocean dumping.

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²⁷ IMO Doc. LC 17/14, p. 6, para. 2.5. This conclusion was also adopted in the 1995 Report of the UN Secretary-General on the Law of the Sea, UN Doc. A/50/713, p. 31, para. 107.