

The Protection of the Marine Environment – 1999

by Louise de La Fayette*

Introduction

This article reports on the work of the International Maritime Organisation (IMO) in 1999 relating to the protection of the marine environment from international shipping activities.¹ Although the IMO mandate cites the safety of shipping and the protection of the marine environment as separate issues, the two are necessarily related, for safe ships navigating safely are less likely to have accidents which damage the environment. Hence, the two main technical committees, the Maritime Safety Committee (MSC) and the Marine Environment Protection Committee (MEPC) frequently work on the same subjects and the various specialised Subcommittees report to both. This report focuses on developments that are both *legal and primarily environmental*, which means that the other extremely valuable work of IMO, such as its extensive programme of technical co-operation, is not covered.

Every two years, the IMO Assembly meets to consider and adopt the Organisation's budget and programme of work, as well as a wide range of resolutions prepared by its subordinate bodies. As 1999 was an Assembly year,

much of the work of the Organisation focused on the preparation of resolutions incorporating the results of deliberations of the five main committees: MSC, MEPC, the Legal Committee, the Facilitation Committee and the Technical Co-operation Committee. In addition, in the Legal Committee and the Marine Environment Protection Committee, negotiations continued on several legally binding instruments and sets of guidelines which are expected to be adopted over the next several years. As usual, work proceeded on the almost continuous revision of the International Convention on the Prevention of Pollution from Ships, 1973/78 (MARPOL) necessary to keep the Convention up to date, to respond to newly perceived problems and new technological solutions.

A. IMO Assembly

The 21st session of the IMO Assembly met from 15 to 26 November 1999 and adopted 28 resolutions, including those approving the work programme and budget for 2000–2001, setting forth the long-term work plan of the Organisation up to 2006, and announcing the “Objectives of the Organisation in the 2000s” (Resolution A.900(21)). In relation to the protection of the marine environment, the IMO's main objectives include the implementation of a more proactive policy to take measures to protect the environment at the earliest feasible stage; shifting the

* Reader in International Law, University of Southampton; IUCN representative to IMO. Any opinions expressed are personal and do not necessarily reflect the views of IUCN.

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emphasis on to people;² ensuring the effective and uniform implementation of IMO standards and regulations; promoting the early and broad acceptance of MARPOL Annexes not yet in force; developing a safety culture and an environmental conscience, and strengthening the IMO technical co-operation programmes.

Other resolutions directly relevant to environmental protection include:

- A.881(21) Self-Assessment of Flag State performance
- A.882(21) Amendments to the procedures for Port State Control
- A.885(21) Procedures for the identification of particularly sensitive sea areas and the adoption of associated protective measures and amendments to the guidelines contained in Resolution A.720(17)
- A.893(21) Guidelines for voyage planning
- A.895(21) Anti-fouling systems used on ships
- A.896(21) Provision and use of port reception facilities
- A.897(21) Amendments to the revised specifications for the design, operation and control of crude oil washing systems
- A.898(21) Guidelines on ship owners' responsibilities in respect of maritime claims
- A.901(21) IMO and technical co-operation in the 2000s

Several resolutions not listed above focusing primarily on safety may also be indirectly relevant to environmental protection, but are not discussed here for lack of space. Details of the subjects covered by most of the listed resolutions are given below.

In addition, the Assembly approved the convening of three diplomatic conferences in 2000–2001, in order to adopt:

1. the "HNS Protocol" to the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation (Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances);
2. a new convention on liability and compensation for pollution from ships' bunkers;
3. a new Convention to regulate the use of shipboard anti-fouling systems; in particular, to phase out paints containing organotins such as tributyltin (TBT).

B. Developments involving both the Maritime Safety Committee (MSC) and the Marine Environment Protection Committee (MEPC)

1. The International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships (INF Code)

At its 71st session held from 17–28 May 1999, the MSC adopted amendments to Chapter VII (Carriage of

Dangerous Goods) of the International Convention for the Safety of Life at Sea (SOLAS) to make mandatory the application of the INF Code. Under the tacit acceptance procedure, the amendments are expected to enter into force on 1 January 2001. The Code contains regulations providing for the safe carriage of irradiated nuclear fuel, plutonium and high-level radioactive waste. Although the Code applies to all ships carrying INF material (except for warships and other non-commercial government ships) the regulations vary slightly according to the total radioactivity of the cargo.

Specific regulations cover matters such as survey and certification, damage stability, fire safety, temperature control of cargo spaces, structural considerations, cargo securing, electrical power supplies, radiological protection and shipboard emergency plans. Voyage planning was not included, as this is covered by the general guidelines in Resolution A.893(21). Although the Code does not cover all *desiderata* of coastal states concerned about the hazards of INF voyages in waters under their jurisdiction, the fact that it was made mandatory may be seen as a victory for those who wanted strict mandatory controls to prevent a marine casualty involving INF material. If ships carrying INF material conform to the provisions of the Code, there would be less risk of an accident that might cause damage to human health and the environment.

2. The Flag State Self-Assessment Form

Because flag state members of IMO are very jealous of what they consider to be their "sovereignty", they have refused to submit their compliance with IMO treaty requirements to outside scrutiny, except in the case of the training and certification of seafarers. They do not appear to recognise that, under international law, all states parties to the relevant conventions have a legal interest in knowing whether and how they are being implemented. Consequently, the Sub-Committee on Flag State Implementation (FSI) has experienced considerable difficulty in devising ways to encourage flag states to improve their implementation of and compliance with their international obligations. Nevertheless, in 1999 FSI completed its development of a "Flag State Self-Assessment Form" designed to assist flag states in evaluating their compliance with obligations relating to ship safety and the protection of the marine environment.

The expectation is that if completion of the form reveals some weakness in implementation or enforcement of existing obligations, the flag state would take measures to improve its performance. The form consists of an initial section outlining the main requirements of IMO instruments, with a second section comprising a highly structured set of questions corresponding to internal and external criteria for judging states' performance.

Assembly Resolution A.881(21) adopting the Self-Assessment Form confirms that flag states have primary responsibility to ensure that their vessels conform to requirements in IMO instruments, and urges such states to use the form to assess their performance. Further, it encourages flag states to submit their forms to IMO on a voluntary basis when requesting technical assistance, to

² This appears to mean that as it is human beings who are responsible for ship safety and environmental protection, measures should be taken to ensure that seafarers are well trained and treated well and that ship managers abide by the International Safety Management Code.

enable the secretariat better to ascertain what type of assistance might be required. Flag states are also invited to submit their forms voluntarily in confidence to IMO for the purpose of establishing a database. Due to the fear of public disclosure of their deficiencies on the part of certain flag states, the Resolution emphasises that the completed form is confidential and may only be made public by the express wish of the flag state concerned.

3. Port State Control

At a meeting held in Abuja, Nigeria on 22 October 1999, 16 West and Central African states signed a memorandum of understanding (MOU) on Port State Control in the West and Central African Region. The meeting was organised by IMO, which had assisted in the development of the MOU. A set of administrative procedures was also agreed for implementation during the three year interim period before the MOU becomes fully effective. Participating in the meeting were Angola, Benin, Cameroon, Cape Verde, Congo, Cote d'Ivoire, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea, Liberia, Mauritania, Namibia, Nigeria, Senegal, Sierra Leone, South Africa, and Togo. The MOU Secretariat will be established in Lagos, while the information centre will be located in Abijan.

The adoption of the MOU as the seventh instrument of its kind marks another step in the effort to organise co-operation in Port State Control in all regions of the world. Eventually, it is hoped that every major port should implement similar measures for the inspection of visiting ships to ensure that they fulfil the requirements of international standards on ship safety and environmental protection. If that happens, there will be no "safe haven" for substandard ships.

C. The Marine Environment Protection Committee (MEPC)

The MEPC met in its 43rd session from 28 June to 2 July 1999. The main issues were the elaboration of two new conventions on toxic anti-fouling systems and on the management of ships' ballast water. Also significant were the establishment of a Working Group on the provision of adequate reception facilities under MARPOL, and the approval of new procedures for the designation of Particularly Sensitive Sea Areas and associated protective measures.

1. Alien Organisms and Pathogens in Ships' Ballast Water

Scientific research has shown that severe damage can be caused to marine resources and ecosystems by organisms and pathogens carried in ships' ballast water and sediments from one sea area to another. Foreign organisms can devastate native species and proliferate to completely dominate their new environment, while pathogens may cause illness in humans as well as native flora and fauna. IMO has been working on ways to prevent harm by alien organisms in ballast water since the mid-1970s and has adopted two sets of guidelines, the most recent of

which was in 1997 in Assembly Resolution A.868(20). In the latter, MEPC was also requested to prepare a legally binding instrument to control the spread of alien organisms and pathogens in ships' ballast water.

Following a general discussion of the main issues in 1999 at MEPC 43, the majority of delegations agreed to develop an independent legal instrument on the management of ships' ballast water, rather than yet another Annex to MARPOL. In my view, this was the right decision, not only because MARPOL deals with pollution by harmful substances and alien organisms are not harmful substances, but also because the mechanisms of control are likely to be very different. Although the United States had submitted an excellent complete draft convention for the consideration of the Working Group, the Chair preferred to proceed on the basis of a draft prepared by the Secretariat. This draft followed very closely the structure of MARPOL.

In 1998, it had been hoped that work on the convention might be completed in time for a diplomatic conference to be held in 2000. However, at MEPC 43 serious differences of opinion emerged on a number of crucial issues. The most important was whether the application of the convention should be "universal" to cover all areas of the oceans, or restricted to designated "Ballast Water Control Management Areas", where the release of "foreign" ballast water would be prohibited. A second point of contention was whether the convention should cover all ships carrying ballast water (except for those entitled to sovereign immunity), or whether certain sizes and/or categories of vessels should be exempted. From a scientific perspective, the convention would be pointless unless it were universal and covered all ships, for it is impossible to know in advance which organisms will cause damage in which areas, and because the size or function of a ship is irrelevant to the damage that might be caused by its ballast water.

Other issues requiring further discussion are the development of standards for approval of alternative ballast water management options and the development of regional agreements. The only management option that is currently viable and that has received full consideration thus far is that of exchanging ballast water in the deep ocean. In the very deep ocean far from shore there are fewer organisms in the sea to be taken up and the foreign organisms released are less likely to survive. Although industry organisations are generally in favour of an international regime, in order to avoid potentially conflicting local requirements, some country and industry delegations wish to delay the adoption of an instrument. They argue that deep water ballast exchange is too dangerous, and that more time is needed to develop alternative ballast water management methods. The cost of managing ballast water is an unmentioned factor.

However, the Maritime Safety Committee has considered the safety aspects of the issue and there are already other methods of ballast water management under investigation, including filtration, and thermal, chemical and radiation treatment to kill the organisms while they are in the vessel. Furthermore, there is the possibility of discharg-

ing foreign ballast water into reception facilities in ports and of the corresponding provision of clean ballast water for take up, where necessary. The discussions at MEPC 43 were so chaotic that, if the negotiations continue in the same vein, some other methods are certain to be discovered before they conclude.

2. Toxic Anti-Fouling Systems

Since the 1960s most ships' hulls have been painted with anti-fouling paints containing the biocide tributyltin (TBT), in order to prevent marine organisms from attaching themselves to the hull. Molluscs and other marine life clinging to the hull will slow down a ship and cause a consequential increase in fuel consumption. Toxic paint containing TBT will kill them and so prevent them from attaching to the hull. However, scientific research soon found that TBT leaching from the paint caused serious harm and even death to a range of marine organisms, even affecting marine mammals by progression through the food chain. In 1990, MEPC adopted Resolution MEPC. 46(30) recommending the prohibition of the use of TBT on vessels under 25 feet in length and the elimination of use of paints with a leaching rate of more than four microgrammes of TBT per square centimetre per day. Since then, the deleterious effects of the use of TBT have escalated and after preliminary consideration of the issue in a correspondence group, MEPC began work in 1998 on a legally binding agreement to ban the use of TBT in anti-fouling paints.

At MEPC 43, the TBT Working Group made considerable progress on the development of a new convention. At the close of the meeting, delegations in plenary had to decide whether work on the draft convention was sufficiently advanced to warrant a request to IMO Council to hold a diplomatic conference to adopt it in the biennium 2000–2001. Because of a marked divergence of views, the Committee departed from its usual practice of acting by consensus by holding a roll call vote. By a fairly wide margin, delegations voted to go forward with the request. Council then approved the holding of the diplomatic conference in 2001.

Hence, MEPC submitted a draft Resolution to the Assembly, calling for a convention to ban the application of TBT in anti-fouling paints by 2003 and the presence of such paints on ships' hulls by 2008. At the Assembly, some industry organisations protested the inclusion of these dates, claiming there were no alternatives to paint containing TBT. However, the Resolution was easily adopted

by consensus. In fact, there are a number of alternative paints, some of which are already in use, and others which are under development. Although they are more expensive than paints containing TBT, the price should decrease with mass production. Furthermore, contrary to ship owners' contentions, some new paints last just as long as TBT-based paints. Finally, the term anti-fouling "systems", rather than "paints", is being used, because research is underway into new systems to prevent marine organisms from attaching to ships' hulls without the use of special paint.

The essence of the convention is the obligation of states parties to restrict the use of anti-fouling systems listed in an annex. The restriction may be partial or may be a complete prohibition on use.

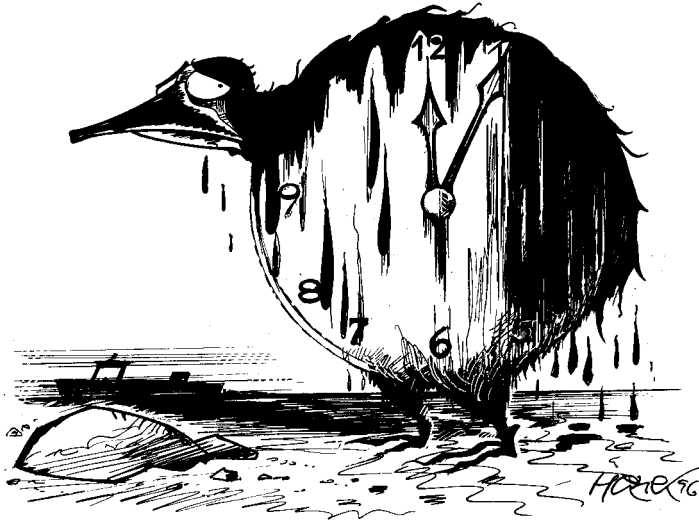
In the current draft, the only system listed is paints containing TBT, which will be subject to a total prohibition. Furthermore, the convention will include a procedure for adding substances or systems to that list through the submission of proposals by states parties. Such proposals would be examined by panels of scientific experts, appointed by governments. In addition to a "blacklist" of prohibited substances and systems, the Netherlands also proposed

the establishment of a "whitelist" of approved anti-fouling systems. However, the proposal was withdrawn for lack of support.

There are two further issues still to be resolved. One is how to enforce the restrictions, whether by flag states or port states, or both. The other is whether to ban anti-fouling systems which are generally known to be hazardous, or whether to require a full-scale risk assessment. Environmentalists fear that, due to the difficulties of performing risk assessments in widely varying ocean environments, it might either be impossible to prove that anything posed a risk, or it might require decades to produce the evidence, during which time a great deal of damage might be done. Furthermore, some are of the view that a requirement for a risk assessment would be contrary to the precautionary principle, which requires that action not be delayed in the absence of full scientific certainty, if there is reason to believe that harm might ensue.

3. Protection of Particularly Sensitive Sea Areas (PSSAs)

In 1991, in Resolution A.720(17), the IMO Assembly adopted the "Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas" establishing criteria and procedures for the adop-



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tion of Special Areas under MARPOL, as well as for the designation of Particularly Sensitive Sea Areas (PSSAs). PSSAs are sea areas of special sensitivity smaller than Special Areas which, for a variety of reasons, are vulnerable to damage from international shipping activities. Since 1998, the Guidelines have been under review because only two PSSAs have been designated and delegations believe that the 1991 Guidelines are too long and complicated, difficult to understand and out of date in certain parts.

All delegations, except the United States, wished to revise the Guidelines in order to make them easier to use. For reasons not unrelated to a Cuban proposal for a PSSA off its coast, the United States Navy became interested in the issue. It proposed retaining the old guidelines, but adding new procedures for the designation of PSSAs and the adoption of measures to protect them. Some delegations feared that the US proposal would, in fact, complicate the guidelines still further and hinder the designation of new PSSAs. Others thought that the United States hoped that states would just ignore the Guidelines and focus on their new procedures, which were quite demanding.

In 1998, a Drafting Group was established to review the Guidelines and the US proposal. In order to provide the Drafting Group with a concrete basis for discussion, the IUCN submitted to MEPC 43 a proposal for revised Guidelines in the form of two draft texts: one for Guidelines for the designation of Special Areas under MARPOL and the other for the designation of Particularly Sensitive Sea Areas. Based upon the main elements of the 1991 Guidelines, the new texts are much shorter and simplified, shorn of outdated and extraneous material, and brought up to date to include new scientific criteria and newly available protective measures.

Although the IUCN paper was supported by several environmental groups and country delegations, the United States insisted upon only the adoption of its own proposal. As a compromise, IUCN and the other environmental groups agreed to the immediate adoption of the new procedures, as modified by the Drafting Group, provided that work proceed subsequently on the revision of the Guidelines as a whole. The recommendation of the Drafting Group was endorsed in plenary, and after a review by the Sub-Committee on the Safety of Navigation, the new procedures were adopted in an Assembly Resolution. On a proposal by Cuba, the Resolution also added to the 1991 Guidelines a description of the PSSA in the Sabana-Camaguey Archipelago.

In brief, the new PSSA procedures require states wishing to designate an area of their Exclusive Economic Zone (EEZ) as a PSSA to submit a proposal to MEPC, explaining first how the area meets ecological, biological and other criteria for identification as a sea area of particular sensitivity. Second, the proposing state must explain how the area is vulnerable to damage from international shipping activities, and must propose navigational and safety measures within the competence of IMO to protect the area in question. If MEPC considers that the area needs protection, it will provisionally identify it as a PSSA and send the proposal for protective measures to the relevant Committee or Sub-Committee for approval. If the measures

are approved, the MEPC will decide upon final designation as a PSSA. The area will then be appropriately marked on navigational charts.

4. International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC Convention)

MEPC 43 discussed arrangements for the holding of a diplomatic conference in conjunction with MEPC 44 in March 2000 to adopt the Protocol on Preparedness, Response and Co-operation to Pollution by Hazardous and Noxious Substances (HNS Protocol). The Protocol applies to spills of hazardous substances (*e.g.* chemicals) the same provisions on reporting of spills, contingency planning and positioning of equipment, emergency response and inter-state co-operation as already apply to oil spills under the OPRC Convention. A number of conference resolutions were finalised at MEPC 43 and the 21st Assembly formally approved the convening of the conference. In relation to the implementation of the OPRC Convention, the Committee expressed continuing disappointment at the persistent refusal of IMO Council to approve a budget increase to support an oil pollution response unit within the Secretariat, in order to carry out the functions assigned to IMO under the Convention.

5. Amendments and Revisions to the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78)

MEPC 43 adopted amendments to Regulation 13G of Annex I (Oil Pollution) of MARPOL 73/78 to make existing oil tankers between 20,000 and 30,000 tons dead weight carrying persistent product oil (including heavy diesel oil and fuel oil) subject to the same construction requirements as crude oil tankers. Under the tacit acceptance procedure, the amendments are expected to come into force on 1 January 2001. Pursuant to the new Regulation 13G, existing tankers must comply with the requirements for new tankers for double hulls or alternative arrangements set out in Regulation 13F not later than 25 years after delivery. Also adopted was an amendment to Annex II of MARPOL (Control of Pollution by Noxious Liquid Substances in Bulk) to add a new Regulation 16 to require the preparation and carriage of a shipboard marine pollution emergency plan for noxious liquid substances.

In addition, work continued on complete revisions of Annexes I and II to bring them up to date and make them easier to use. The target date of 2002 for the revision of Annex II is dependent upon the completion by GESAMP (Joint Group of Experts on the Scientific Aspects of Marine Environment Protection) of new hazard profiles for chemicals subject to the International Bulk Chemicals (IBC) Code. Consequently, MEPC 43 was dismayed to learn that the deadline could not be met without the provision of funds for additional meetings. However, Council refused to increase the budget. Fortunately, when the problem was presented to the Assembly, the United Kingdom offered to donate the necessary amount. ■

With respect to Annex III (Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form), the Committee approved amendments, opposed by Norway, to delete tainting as a criterion for marine pollutants from the Guidelines for the identification of harmful substances in packaged form. Tainting refers to the uptake of substances by seafood so as to adversely affect the taste or smell, making it unpalatable. The proposed draft amendments will be circulated with a view to adoption at MEPC 44.

MEPC has also been considering how to promote the entry into force of Annex IV (Prevention of Pollution by Sewage from Ships). Having investigated the reasons why states were reluctant to ratify Annex IV, the Committee is proceeding to revise it to make it more attractive. One of the main problems is that states do not wish to provide port reception facilities for ships' sewage. A possible solution might be to require all larger ships to have sewage treatment facilities on board. Some already do. At MEPC 43 progress was made on preparing amendments to Annex IV, which will be further considered at MEPC 44.

Finally, on 1 August 1999, the amendments to Regulation 10 of Annex I to MARPOL came into force establishing a Special Area in the North West European Waters. In Special Areas restrictions on the discharge of oily wastes are more stringent than under the general provisions. The North West European Waters include the North Sea and its approaches, the Celtic Sea, the English Channel and its approaches and part of the north-east Atlantic immediately to the west of Ireland.

6. Implementation and Enforcement of MARPOL

a. Adequacy of Port Waste Reception Facilities

MARPOL requires all states parties to maintain port reception facilities to receive wastes generated on board ship. Because MARPOL places limits upon (and in some cases prohibits) the release of shipboard wastes into the sea, the existence of adequate port reception facilities is essential for the implementation of the Convention. Obviously, if the ship cannot discharge its wastes at port, the only option is to discharge them at sea. Unfortunately, 27 years after the entry into force of the Convention, full implementation is being hindered by the many states parties not fulfilling their obligations to provide adequate reception facilities in their ports. MEPC 43 formed a Working Group on Reception Facilities to discuss means of improvement of reception facilities, including a methodology and general action plan, criteria for determining adequacy, a generic port waste management plan and an analysis of successful port waste reception facilities. On the recommendation of the Working Group, MEPC approved an Assembly Resolution requesting MEPC to develop guidelines on the provision and use of port reception facilities. The Resolution was adopted and work on the guidelines will continue at MEPC 44.

b. MARPOL – How to do it

In 1999, work proceeded on the preparation of a new publication – *MARPOL – How to do it* – as an easy-to-understand guide for administrators on the implementa-

tion and enforcement of MARPOL. During the discussions on the guide at MEPC 43, disagreement arose as to how to refer to the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Some IMO members not parties to UNCLOS objected to the inclusion of references to articles of UNCLOS in almost every section. One solution might be to delete the specific references and to include in the introduction a general explanation of the relationship of MARPOL to UNCLOS.

7. MARPOL Annex VI (Prevention of Air Pollution from Ships)

In 1997, the diplomatic conference which adopted the new Annex VI to MARPOL (Prevention of Air Pollution from Ships) requested MEPC to proceed with work on certain issues in order to prepare for the entry into force of the Annex. This preparatory work includes the development of guidelines for implementation and a review of technical requirements. One hotly contested issue at the diplomatic conference was the limit on the sulphur content of fuel. Some delegations insisted on limits which others claimed were higher than those in fuels currently in use. However, in order to obtain accurate data of the sulphur content of existing fuels an agreed methodology for measurement was required. Work on the issue culminated in 1999, with the adoption by MEPC in Resolution MEPC.82(43) of Guidelines for monitoring the worldwide sulphur content of residual fuel oils supplied for use on board ships. In addition, MEPC agreed to review the NOX Technical Code associated with Annex VI at MEPC 44, in the light of recent technical developments.

8. Follow-Up to the United Nations Conference on Environment and Development (UNCED)

The issue of the prevention of pollution from offshore oil and gas activities has been somewhat controversial, as some states and environmental groups would prefer mandatory requirements in a global legal instrument, while the industry insists upon voluntary measures developed at a regional level. At present, the industry view appears to have prevailed, not only at IMO, but also at the UN Commission on Sustainable Development (CSD). The problem is that in some regions, there is little or no environmental protection, and many states lack the expertise and the resources to develop appropriate regulations or voluntary agreements.

MEPC 43 considered a report submitted by Brazil and the Netherlands on the results of the Expert Meeting on Environmental Practices in Offshore Oil and Gas Activities which they had organised from 17–20 November 1997 in Noordwijk, the Netherlands. One of the main conclusions of the Meeting was that sustainable development in such activities could be achieved through the development of environmental best practice guidelines in discussions between the states concerned and interested organisations. The item will be retained on the agenda of MEPC, so that the Committee might monitor future developments.

The second issue relating to the UNCED in 1999 was the draft report of the Seventh Session of the CSD, focusing mainly on "Oceans and Seas". Because the final re-

port was not yet available, discussion was deferred to MEPC 44.

D. The Legal Committee

The IMO Legal Committee held its 79th session from 19–21 April and its 80th from 11–15 October 1999. Although initially the focus of the Committee was on the revision of the Athens Convention on liability for injury to ships' passengers and their luggage, when negotiations reached an impasse, attention turned to the draft convention on ships' bunkers, which came very close to being finalised. In contrast, there was little progress on the elaboration of the draft Convention on Wreck Removal.

1. Guidelines on Financial Security

On the question of the provision of financial security, the Committee prepared a Resolution, later adopted by the Assembly, setting out new IMO Guidelines on ship owners' responsibilities in respect of maritime claims. At



present, ship owners are only required to hold insurance to cover third party liability under the Convention on Civil Liability for Oil Pollution Damage (CLC), if their flag state is a party, or where required for entry into ports. Although most ship owners also carry insurance cover for other claims, some do not. Because the major flag states resisted initial proposals for compulsory insurance to cover all ships for all claims, the Legal Committee compromised on recommendatory guidelines intended to encourage all ship owners to arrange for insurance to cover their liabilities for all claims in connection with the operation of their

ships. The Guidelines recommend that ship owners hold appropriate financial security, carry a certificate attesting to such cover, and "take proper steps when relevant claims arise". In other words, they should carry insurance and pay claims for compensation when their liability is established. If ship owners do have such financial security, it should assist in the payment of compensation for damage to the environment.

2. Convention on Liability and Compensation for Pollution from Ships' Bunkers

Negotiations continued at both Legal Committee sessions on the new Draft International Convention on Civil Liability for Bunker Oil Pollution Damage. This would provide compensation for pollution damage caused by oil used in the propulsion and operation of all kinds of ships. The existing CLC regime provides for compulsory insurance and the strict liability of the registered ship owner for damage caused by oil spills from tankers. In cases where the ship owner is exonerated from liability or where

his financial security fails or is inadequate, compensation payable by the registered ship owner under the CLC is supplemented by a second tier of compensation provided by the "receivers" of oil in the states parties, under the International Oil Pollution Fund (IOPC Fund) Convention. Thus, under the CLC regime, companies having interests in the cargo that caused the damage contribute to the compensation of the victims. The system in the HNS Convention,³ dealing with liability for damage caused by hazardous substances, is similar in that it has two tiers of compensation.

However, in the bunker regime, since no cargo is involved, there is no second tier and no recourse to a fund if the registered owner is not liable or cannot pay. Consequently, in order to attempt to ensure that compensation would be available even where the registered ship owner for some reason could not pay, the draft Bunkers convention also makes liable the charterer, manager and operator of the ship. Yet, since only the registered owner would be required to hold insurance to cover

its liability, there is no guarantee that compensation would actually be forthcoming, for it is possible, albeit unlikely, that none of the other persons liable would have the necessary funds available.

Furthermore, unlike the CLC and the HNS Convention, the Bunkers draft does not contain its own free-standing provisions on limitation of liability. Instead, the liability of the ship owner would be limited in accordance

³ International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.

with the provisions of whatever completely separate national or international liability regime would be applicable in the particular circumstances. Nevertheless, the amount of liability could not be higher than the limits in the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims (LLMC), 1976. Because the limits in some national and international regimes are generally very low, the Convention would not provide any security that all the claims would actually be paid. In addition, if a national limit were higher than the LLMC, the higher limit could not be applied.

Two further disturbing features of the draft relate to the definition of pollution damage and the removal of the immunity from liability from persons taking preventive measures. The definition of pollution damage in the draft convention is identical to the awkward and outdated one in the CLC Convention, which does not even mention several kinds of damage which are normally compensated under the CLC and Fund Conventions, and which refers to others only by implication in a negative formulation. In order to make the definition easier to read and to understand, IUCN submitted a revised definition, with all the heads of damage explicitly and clearly set out in a list and stated positively, so that victims could understand clearly what kinds of damage were liable for compensation. Unfortunately, members of the committee preferred to retain a definition with which they were familiar and even viewed the lack of clarity as an advantage.

In the other unfortunate development, the proponents of the convention removed the traditional immunity from suit of persons taking measures to prevent or mitigate pollution, so important in the CLC, HNS and many other conventions. Presumably, this was because the states supporting the proposal viewed the possibility of suing persons taking preventive measures as a substitute for a second tier of compensation. The IUCN, supported by other NGOs (including ITOPF⁴ and the International Group of P&I Clubs⁵), protested that the deletion of responder immunity would deter people from taking measures to prevent or mitigate pollution, which would result in even greater environmental damage. However, the proponents insisted upon their position and even sought to stifle the debate. As a compromise, the UK proposed a conference Resolution supporting responder immunity in national law.

3. Wreck Removal Convention (WRC)

In the discussions on the Wreck Removal Convention at the 79th session it proved impossible to reach agreement on a number of crucial issues. Indeed, disagreement on the financial provisions – making the ship owner liable for removal and other costs – appeared to jeopardise the success of the negotiations. In an effort to devise a text to which all delegations could agree, the co-ordinator of the WRC correspondence group adopted the novel approach

of presenting the 80th Session with a drastically cut draft, deleting all articles on which there had been a divergence of views. The theory was that these questions could be dealt with under national law. Hence, the new text does not contain any financial provisions to ensure that the ship owner will pay for the removal and other costs and no provisions on the reporting of wrecks and casualties. The justification for the latter deletion was that there are reporting requirements in other conventions. However, the IUCN pointed out that the affected coastal state must be given the specific information necessary for it to be able to determine whether the wreck constituted a hazard, which might not be provided in reports under MARPOL or SOLAS. The co-ordinator agreed and included the IUCN proposal in his report.

Although there was very little time for discussion at the 80th session, it rapidly became clear that many delegations believed that the surgery had been too radical. They wished some of the deletions to be reinstated, *inter alia*, because one of the reasons for developing the convention in the first place was to ensure the uniformity of the relevant rules in national law. Discussions are continuing in the correspondence group.

E. The Maritime Safety Committee (MSC)

In 1999, the MSC considered again the question of navigation in the Turkish Straits (Strait of Istanbul, Strait of Canakkale and the Marmara Sea). Because it was considered that the Rules and Recommendations adopted by IMO in 1994 had been working well, and because Turkey did not wish any changes, the Committee agreed to discontinue its review of the 1994 Rules and Recommendations. Turkey undertook to inform IMO of any developments in the establishment of Vessel Traffic Services, the provision of pilotage services and further efforts to enhance safety and environmental protection. In the only other development directly related to environmental protection, the MSC considered a draft framework for a Code on Polar Navigation prepared by the Sub-Committee on Ship Design and Equipment. Because the United States, supported by a majority of delegations who spoke, was highly critical of the draft, the MSC decided to instruct the correspondence group and sub-committees to prepare a new draft for recommendatory guidelines only, based upon an agreed nine point framework.

F. Co-operation with Other International Organisations

In 1999, IMO received requests from various United Nations (UN) bodies to collaborate on issues which some delegations believed to be beyond its mandate. Although the IMO Convention requires it to co-operate with the United Nations, it may clearly only do so on subjects related to its competence to deal with the safety of international shipping and the protection of the marine environment from damage caused by shipping activities. Hence, the question is whether the new proposals relate closely enough to IMO's mandate and, if so, how IMO could help.

⁴ ITOPF (the International Tanker Owners Pollution Federation) provides advice to states, ship owners and P&I Clubs on how to clean up oil spills.

⁵ Protection and Indemnity Clubs are ship owners' mutual insurance associations, which provide the compensation for most third party liability claims against ship owners.

1. Ship Recycling (Scrapping)

In a paper submitted to MEPC 43, Norway proposed that the Committee include the issue of ship recycling on its work programme. Because of their high steel content, ships taken out of service are sold for scrap to companies which dismantle them to recover reusable metal. Most of these companies are located in developing countries in South Asia. The problem is that ships sold for scrap frequently contain many hazardous substances, such as asbestos, polychlorinated biphenyl (PCBs), heavy metals, hydrocarbons, ozone-depleting substances, *etc.* in materials used in their construction, in their operative systems and as wastes and residues. Because of poor working conditions and the lack of effective environmental and health controls in most of the countries concerned, these hazardous substances impair the health of workers and pollute the air, water and soil in and near the scrapping location.

Supported by Denmark, Greenpeace and the ICFTU (International Council of Free Trades Unions), Norway argued that there was a compelling need to develop measures to ensure that the recycling of ships would be effected in a manner that protected human health and the environment. Because the IMO's mandate includes the safety and environmental soundness of ships and international shipping activities, the proponents believed that the Organisation should take the lead in tackling this complex issue.

While supporting the proposal, the International Chamber of Shipping warned that nothing should discourage the decommissioning of substandard ships. The Netherlands informed MEPC about the Ship Scrapping Summit (later renamed *Ship Recycling Summit*) which had been held the previous week to facilitate an exchange of views on this increasing problem. Suggestions for improvements had been made and industry had already begun to act. Finally, a representative of UNEP announced that the Open-ended *Ad Hoc* Committee for the Implementation of the Basel Convention⁶ had prepared a draft decision on Ship Dismantling for consideration by the fifth Meeting of the Conference of the Parties to the Basel Convention to be held in December 1999.

In the discussion, many delegations supported the Norwegian proposal that MEPC should examine the matter and develop measures for the environmentally sound dismantling of ships. They believed that, if one took a "cradle to grave" approach to ships and shipping, the question of decommissioning ships was clearly within the IMO's mandate. However, some delegations disagreed, believing that once a ship was removed from a register and was no longer operating as a ship it was, in effect, not a ship, but simply a piece of hazardous waste. Furthermore, they pointed out that dismantling activities took place onshore and were therefore within the exclusive jurisdiction of the state in which they occurred.

On the other hand, during the debate, the Committee recalled Resolution MEPC.53(32) on the development of the capacity of ship scrapping for the smooth implementation of the amendments to Annex I of MARPOL 73/78 adopted on 6 March 1992, recommending that govern-

ments take measures to develop the ship scrapping industry and to provide assistance to developing countries in this regard. Certainly, as international safety and environmental requirements become more stringent, many old ships will be discarded, because it would be too difficult and expensive to bring them up to current standards. Given the divergence of views, MEPC decided to place the item on the agenda for MEPC 44 and to invite submissions on how the matter might be dealt with by IMO.

2. Illegal, Unregulated and Unreported Fishing

For many years illegal, unregulated and unreported fishing (IUU), primarily by fishing vessels from open registries, has been depleting valuable fish stocks all over the globe. In order to avoid regulations in their home country implementing restrictions in fishing agreements or adopted by regional fisheries organisations, unscrupulous fishermen frequently re-register their vessels in "flag of convenience" states not party to any regional or international fishing agreements. This phenomenon is commonly known as re-flagging. The problem has long been a matter of concern both to the Food and Agriculture Organisation (FAO) and to other UN bodies, including the United Nations General Assembly. Unfortunately, the attempt to deal with the issue in the 1993 FAO Compliance Agreement⁷ was not successful, because flag states resisted any controls on re-flagging. Instead the Agreement requires flag states to assume responsibility for the compliance with international fishing regulations of fishing vessels flying their flag and not to grant the vessels fishing licences if they believe they

are not in a position to control their vessels' fishing activities.

The problem with uncontrolled fishing vessels resembles that of other types of vessels registering in certain states in order to evade international regulations regarding safety and environmental protection, matters clearly within the competence of IMO. Furthermore, in the Subcommittee on Flag State Implementation (see above), IMO is actively engaged in trying to find ways to encourage all flag states to fulfil their international obligations. Second, because of the irresponsibility of certain flag states, IMO is promoting a second line of defence through the development of regional port state control agreements to ensure inspections of ships in foreign ports to verify whether they comply with international standards for ship safety and environmental protection.

For these reasons, in 1999, the CSD, the FAO and the UN General Assembly all requested the assistance and co-operation of IMO in addressing the general issue of how to deal with irresponsible flag states. Unfortunately, when the FAO placed the question before the 71st Session of the Maritime Safety Committee, it aroused the ire of certain flag states by using the term "flags of conven-



⁶ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989.

⁷ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993.

ience". At the IMO Assembly, the issue was raised again by a representative of the United Nations Secretariat, who drew the Assembly's attention to the request of the CSD in paragraph 35(a) of the Report of its Seventh Session and its endorsement by the General Assembly in Resolution A/54/32. Although no action was taken at that time, the question of the collaboration of IMO with other UN bodies in addressing the problem of IUU will be considered by IMO at various committee meetings in 2000.

3. Protection of the Marine Environment from Land-based Activities

As one of the measures for the implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities (GPA), the United Nations General Assembly, in Resolution 51/189, called upon IMO to develop a clearing-house mechanism for oil and litter in the marine environment. Because the IMO's mandate extends only to the protection of the marine environment from *ship-based* activities, and because there were no additional funds to work on *land-based* activities, the 20th Assembly had decided that it was not in a position to undertake this task. However, in 1999, Canada informed the 21st Assembly that, in response to the UN's request, it was collaborating with the IMO Secretariat to prepare a pilot scale GPA clearing-house for oil and litter, compatible with both the GPA and IMO electronic information systems. The pilot project would be completed by the end of January 2000, after which a decision on future co-operation would be made.

G. Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention 1972)

Although the London Convention 1972 is not an IMO convention, IMO provides the secretariat for the London

Convention and accommodates most LC meetings.⁸ Because of severe budgetary problems, it was suggested by IMO Council that the Organisation might consider ceasing to fund the London Convention Secretariat. When the issue was briefly discussed at the 1999 Consultative Meeting of the Parties to the Convention and at IMO Assembly, most delegations which spoke were strongly against the proposal. They pointed out that, from a legal point of view, both the 1972 Convention and the 1996 Protocol stipulated that secretariat functions be provided by IMO. No one had ever questioned this before. Second, from a practical perspective, the work of the LC was related to that of IMO, because most dumping was of material from dredging ports and harbours to make them more accessible to ships. Finally, the LC secretariat also functions as an integral part of the IMO Marine Environment Division providing services to IMO generally.

Discussions will continue at both LC and IMO meetings in 2000.

Conclusion

Although IMO accomplished a great deal in 1999, many important issues remain unresolved, including the problem of alien organisms in ballast water, for which a solution appears increasingly elusive. Moreover, proposals for new items on the work programme and for co-operation with other UN bodies are proving to be a considerable challenge for an already overburdened organisation. Finally, the Erika oil pollution disaster at the very end of 1999 has already provoked calls for new measures to prevent and combat oil pollution. Clearly, interesting times lie ahead. □

⁸ Recently, the Scientific Group has held every second meeting in one of the States Parties.