

**IHB File No. SPWG-2**

**CIRCULAR LETTER 19/2003**  
**27 February 2003**

**REPORT OF THE SECOND STRATEGIC PLANNING  
WORKING GROUP (SPWG) MEETING  
Goa, India, 20-22 January 2003**

Dear Hydrographer,

The report of the 2<sup>nd</sup> Meeting of the SPWG, held in Goa (India) from 20 to 22 January, is attached herewith.

This report has already been distributed to the representatives of the IHO Regional Hydrographic Commissions (RHC) for further distribution to the RHC member countries and, in accordance with agreed procedures, it is now being dispatched, under cover of an IHB Circular Letter, to all IHO Member States.

As can be seen from the report, the 2<sup>nd</sup> Meeting dealt principally with a new draft structure model for the Organization. Comments on the report and the proposed model should be sent via the RHC representatives, or, in the case of those Member States which are not a Member of an RHC, to the SPWG via the Bureau.

It is also possible for Member States to use the SPWG forum <http://www.iho.shom.fr/cgi-bin/lwgate>.

All comments received will be coordinated by the SPWG Chair Group for further consideration by the SPWG at the next meeting to be held on 12-14 May 2003 in Lima, Peru.

On behalf of the Directing Committee  
Yours sincerely,

Vice Admiral Alexandros MARATOS  
President

Encl: (1) – Report of the 2<sup>nd</sup> SPWG Meeting.

**SECOND MEETING OF THE NEW IHO STRATEGIC PLANNING WORKING GROUP,  
20-22 JANUARY 2003, GOA, INDIA.**

**REPORT**

**1) Location and venue**

The second meeting of the SPWG was held at the Hotel Cidade de Goa, Goa, India, from 20 to 22 January 2003 under the chairmanship of Mr. F. Klepshvik (Norway). It was sponsored and organized by the Hydrographic Office of India. All the IHO Regional Hydrographic Commissions were represented at the meeting, together with six individual countries (Bangladesh, Japan, Morocco, Republic of Korea, Tunisia and UK). A list of participants is provided in Appendix 5.

**2) Agenda Items 1 and 2: Welcome, Introductions, Notices. Minutes of the Previous Meeting**

The Chairman welcomed the participants and noted that all Regional Hydrographic Commissions were present. He summarized the work carried out by the SPWG since the 1<sup>st</sup> Meeting and also tabled the most important aspects of the subjects handled by the SPWG Chair Group at its latest two meetings.

The Report of the 1<sup>st</sup> Meeting was officially adopted.

**3) Agenda Item 3 - Actions from the Previous Meeting**

The Chairman reviewed the List of actions scheduled to be carried out after the First Meeting. All actions to be carried out before the Meeting had been completed.

Countries providing legal advisors - As already considered in previous meetings, it was decided that SPWG members would inform the Chairman (copy to the Secretary) by 15 February about the legal experts who will be available to assist the SPWG in the reviewing/amendment of the Convention.

It is expected that these experts will participate in the work that will be carried out after the SPWG meeting in Lima.

**4) Agenda Item 4 - Brief Review of Vision & Mission**

The proposed IHO Vision and Mission were briefly reviewed and endorsed by the meeting.

**5) Agenda Item 5 - Finalisation of Objectives**

The draft Objectives, already submitted to the SPWG members for comments were tabled, discussed and endorsed with some amendments as shown in Appendix 1. There was agreement about the importance of reflecting SOLAS V in the Objectives taking into account the extended role of IHO in the future and the regional and global aspects of the aims of the Organization:

It was agreed that the proposed Objective "*To manage central or joint services for the National Hydrographic Offices of the Member States*" was not appropriate for inclusion in the Convention, but however it was further decided to consider it for potential inclusion in another relevant IHO document.

## **6) Agenda 6 - Strengths & weaknesses - summary of RHC & MS inputs. Analysis of overall picture.**

The Chair Group presented a Table summarizing the responses received from RHC. This Table was discussed by the SPWG members.

The SPWG decided that the conclusions and the identified weaknesses and strengths issuing from the responses to the Questionnaire should be included in the necessary comprehensive report proposing new structures and general principles for the functioning of the IHO, to be produced by the Chair Group. It is anticipated that such a report will be drafted at the next Chair Group meeting, to be held in March 2003 and distributed to the SPWG members by 2003 week no. 12.

## **7) Agenda Item 7 - IHB presentation on study of Convention**

The IHB presented a study identifying those articles of the Convention which may be affected by changes in the IHO structure. The purpose of this exercise was to establish a common understanding about this matter.

## **8) Agenda Item 8 - Explanation of Tacit Acceptance and Provisional Application procedures**

The Chairman explained the concepts of Tacit Acceptance and Provisional Application as analysed by the lawyer, Mr. David Sagar, in a study carried out for the IHO and distributed to the IHO Member States with the minutes of the 1<sup>st</sup> SPWG meeting.

Some members of the SPWG asked that the report be circulated again to allow further consideration and comments. Consequently it is attached to these minutes at Appendix 6.

## **9) Agenda Items 9, 10 and 11 – SPWG Study Teams**

The SPWG approved the proposal from the Chair Group to establish two Study Teams to consider specific matters. During the meeting, as a consequence of the progress made on the structure, it became clear that the ST can work by correspondence and, therefore, all members will be able to participate.

Guidelines for the Study Team on Improvements to the IHO structure and the Convention ST were developed and approved by the SPWG. They are included in Appendix 2.

A number of “strawman” proposals were tabled by the Chair Group. The proposals were based on the Strengths and Weaknesses identified in the responses to the Questionnaire and presented different options for a new structure for the Organization and the general principles for its functioning. The SPWG preferred the model based on an Assembly, a Council, Secretariat and Permanent Committees. The benefit of a Council was recognized as an important element in order to achieve the required increase in the efficiency, effectiveness and responsiveness of the Organization. The SPWG further developed the general principles for the functioning of this model. (See Appendix 3).

The ST will work by correspondence on this item and the SPWG members will forward any further comment on it. The Chair Group will produce the report mentioned in Paragraph 6.

As an action item, the IHB was tasked to present to the Chair Group a first text for a revised Convention based on the preferred “strawman” model. This first draft will be considered by the Chair Group in the meeting mentioned in item 6 and distributed to the SPWG members by week no.12 2003.

As regards the Study Team on Improvements to the Convention, it was agreed that the details about this Study Team would be agreed at the 3<sup>rd</sup> Meeting in Lima (Peru).

## **10) Agenda Items 12 and 13– Implications for the Budget and Schedule of Future Work**

As suggested by the SPWG Chair Group and tabled in the Documents for the 2<sup>nd</sup> Meeting, it was agreed that the findings and recommendations of the Study Team on Improvements to the IHO Structure, after being examined and decided at the 3<sup>rd</sup> Meeting, will require a detailed analysis of the financial implications. This will be carried out by an “ad hoc” Working Group, working in parallel with the Study Team on Improvements to the Convention, whose Terms of Reference would be decided at the 3<sup>rd</sup> Meeting. The President of the IHB Directing Committee proposed that the IHB, with the support of the Finance Committee, will carry out a study on budgetary implications to be passed to the SPWG for consideration.

The general approach of the programme for the future SPWG work was also approved and is included in this report at Appendix 4.

## **11) Agenda Item 14 – Details on the next SPWG Meetings**

It was felt desirable to schedule a 3-day meeting in Lima (Peru), in order to allow the necessary time to discuss all the matters to be scheduled. Therefore, the 3<sup>rd</sup> SPWG Meeting will be held in Lima, Peru from 12 to 14 May 2003. This schedule has since been agreed with the Peruvian authorities.

The SPWG also felt the possible need to plan a 5<sup>th</sup> meeting of the SPWG (not yet scheduled) probably in 2004 to finalize all the SPWG matters before the 3<sup>rd</sup> Extraordinary I.H. Conference, in April 2005.

A list of Actions resulting from the 2<sup>nd</sup> SPWG Meeting is given on the following page.

## LIST OF ACTIONS

1. All SPWG members will send, by 15 February, to the Chairman and Secretary, information about the legal experts who will be available to assist the SPWG in the reviewing/amendment of the Convention.
2. The Study Team on Improvements to the IHO Structure will work by correspondence and the SPWG members will forward comments to it. The Chair Group will produce a report on the conclusions and proposals of the Study Team by end March 2003 and distribute it to the SPWG members by 2003 week no. 12.
3. The IHB will develop and present to the Chair Group a first text of amendments to the Convention, based on the preferred "strawman" proposal model.
4. The IHB will check with the Peruvian Hydrographic Office the dates for the 3<sup>rd</sup> Meeting in Lima (NOTE: This action has already been completed and the dates for the meeting have been confirmed as 12 to 14 May 2003).
5. To assist India and Morocco in obtaining the necessary approvals, the IHB will send a letter to the representatives of these countries, inviting them officially to the 3<sup>rd</sup> Meeting.

**THE IHO OBJECTIVES**

1. To promote the use of hydrography for the safety of navigation and all other marine purposes and to raise global awareness of the importance of hydrography.
2. To improve global coverage, availability, quality and access to hydrographic data, information, products and services.
3. To improve global hydrographic capability, capacity, science and techniques.
4. To establish and support the development of international standards for the quality and formats of hydrographic data, information, products, services and techniques and to achieve the greatest possible uniformity in the use of these standards.
5. To give authoritative and timely guidance on all hydrographic matters to governments and international organizations.
6. To facilitate coordination of hydrographic activities among Member States.
7. To enhance cooperation on hydrographic activities amongst States on a regional basis.

**GUIDELINES FOR STUDY TEAM TO IMPROVE THE STRUCTURE OF THE IHO**

1. To develop proposals for the SPWG regarding the future organizational model and high-level procedures of the IHO, taking into account, amongst others, the following:

- Decisions of the XVIth Conference
- The summary of replies to the Strengths & Weaknesses Questionnaire
- Previous models submitted by MS
- The new Vision, Mission, Objectives of the IHO
- Pre-eminent role of Member States in an inter-governmental forum.  
*Remembering that the MS formulate the policies and act through Conference/Assembly.  
The success of the IHO depends on active participation, cooperation and commitment by MS:  
the structure must facilitate this.*
- Frequency/focus of Conferences.  
*Change name to Assembly?  
2<sup>nd</sup> Extraordinary Conference decided that meetings should be more frequent. How frequent? Meeting where?*
- Need for Council, Committees, Working Groups.  
*A Standing Council? If so, with what role and powers? How elected?  
Permanent Committees? What ToRs?*
- Need for more rapid decision-making processes and implementation.  
*Conference voting? Voting by mail?  
Tacit approval – e.g. for technical decisions?  
Provisional Application? Role of Council? Assembly frequency?*
- Strategic Planning.  
*Continue as now? Council function? Permanent Committee?  
Rolling review of Strategic Plan. How should work progress be monitored? Alignment of  
Budget with Work Programme?*
- Technical aspects.  
*Organise all technical work under a Permanent Committee?  
How to participate in Standard setting?*
- Regional aspirations/representation  
*Similar practices as in similar international organisations?*
- Interaction with Private Sector & NGOs.  
*Advisory Groups? Part of Committee Structure? Associate memberships?*
- RHCs.  
*Strengthened role? Efficient operation?*
- Capacity Building programmes.  
*Regional focus? Need for central coordination?*

*Funding mechanisms (eg Trust Funds)?*

- Potential growth in number of Member States .  
*If we doubled in size, could the structure cope?*

- Role/structure of Secretariat/Bureau.

*Bureau or Secretariat? President or Secretary General? Directors or Assistant Secretary Generals? Responsibilities? Relationships with Council and Committees? Number and roles of Professional Staff? Election of Officials?*

2. To present the proposals to the SPWG by 11th April 2003.

#### **GUIDELINES FOR STUDY TEAM TO IMPROVE THE CONVENTION OF THE IHO**

1. To develop proposals for the SPWG regarding improvements to the Convention of the IHO, taking into account (inter alia) the following:

- Studies undertaken by the IHB
- Specific proposals on Articles XX, XXI
- Decisions of the XVIth Conference
- Proposals from the Structure Study Team, regarding:

- *The summary of replies to the S&W Questionnaire*
- *The new Vision, Mission, Objectives of the IHO*
- *Models previously submitted by MS*
- *Pre-eminent role of Member States in an inter-governmental forum.*
- *Frequency/focus of Conferences.*
- *Need for Council, Committees, Working Groups.*
- *Need for more rapid decision-making processes and implementation.*
- *Strategic Planning.*
- *Technical aspects.*
- *Interaction with Private Sector & NGOs.*
- *RHCs.*
- *Capacity Building programmes.*
- *Potential growth in number of Member States*
- *Technical aspects*
- *Regional aspirations*
- *Role/structure of Secretariat/Bureau.*

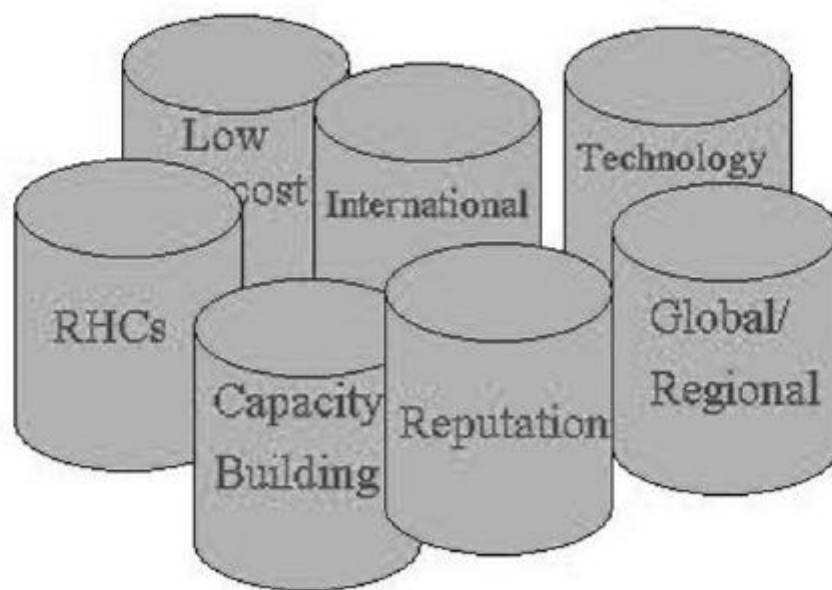
2. To identify consequent adjustments to the Host Agreement and other Basic Documents

3. To present the proposals to the SPWG by 1<sup>st</sup> September 2003.

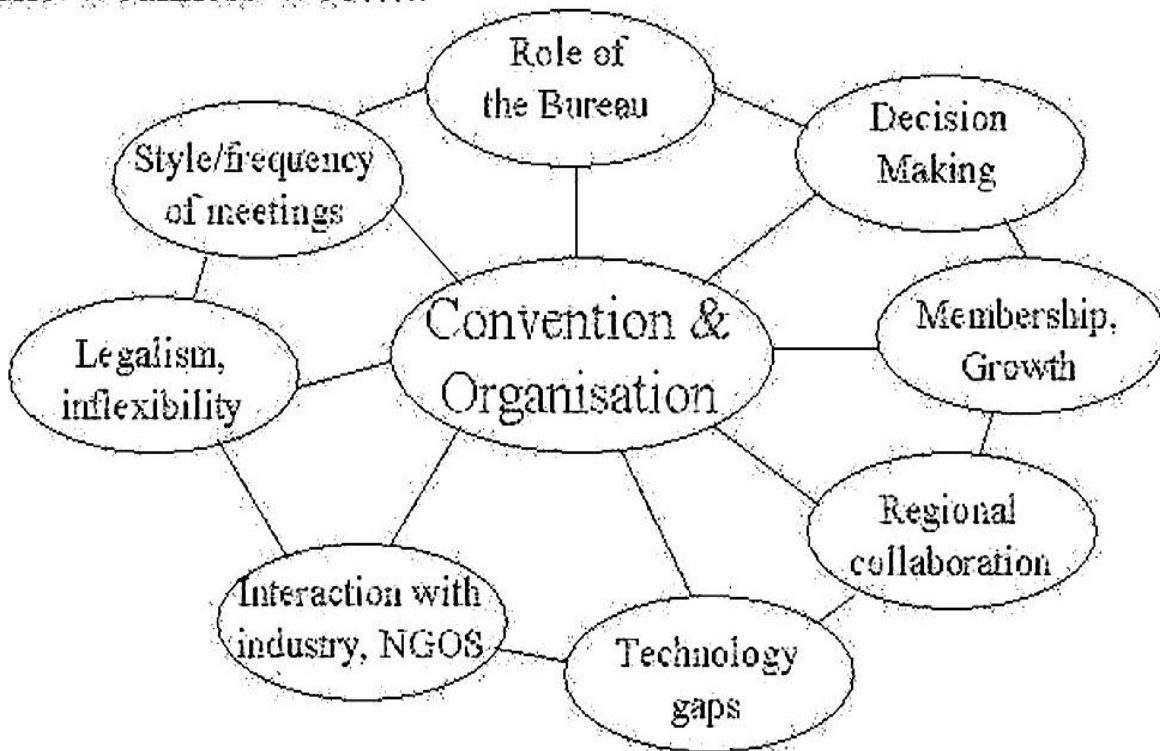


**A “STRAWMAN” PROPOSAL BY THE CHAIR GROUP TO STIMULATE DEBATE AND  
TO TAKE FORWARD THE SUMMARY OF THE STRENGTHS & WEAKNESSES**

The Strengths Storehouse.....

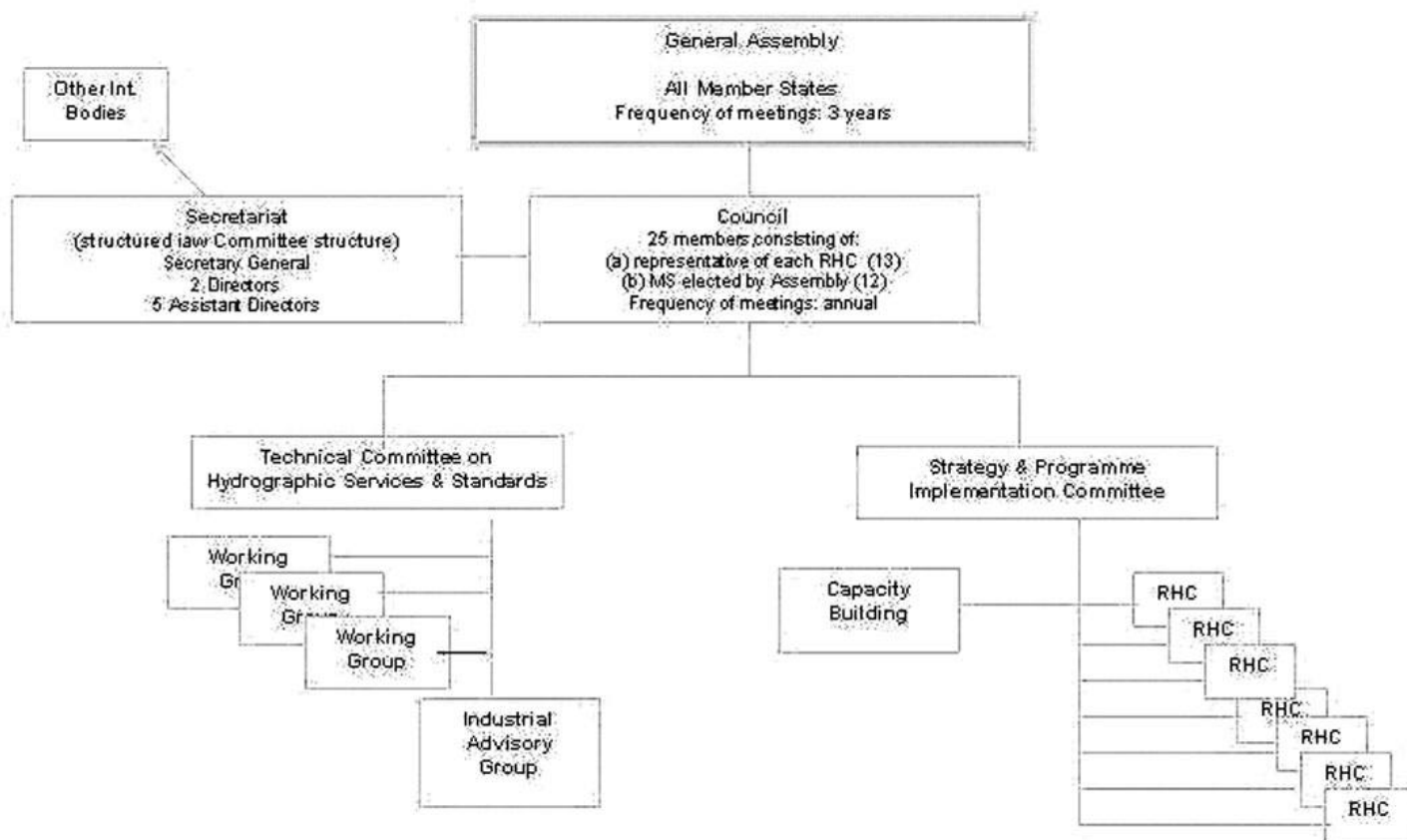


## The Weakness Web.....



### General Principles:

- Maintain the Strengths, eliminate the weaknesses
- The Structure & Convention must help (not hinder) the Organization to achieve its Mission, Vision and Objectives
- The *essence* of our Mission, Vision, Objectives:
  - a global organization, acting regionally
  - setting standards and giving guidance
  - improving worldwide access to our data/products/services
  - improving global capacity & capability
- So we need instruments to address:
  - Policy making
  - Technology, standards, advice-giving
  - Global & Regional cooperation
- The best structure is a simple one



## Principles:

Overall Organization comprises: Assembly, Council, Secretariat, Permanent Committees

### • Assembly:

All MS. Meets every 3 years

- ✍ elects President & VP of Assembly
- ✍ elects Secretary-General (& Directors?)
- ✍ establishes overall strategic policies
- ✍ establishes TORs/powers of the Council
- ✍ elects Council members
- ✍ endorses the 3-year Plan

### • Council:

1/4 of MS (i.e. 18-20 at start). Representatives of RHCs plus elected members.  
Meets once a year (minimum)

- ✍ co-ordinates activities of the Organization
- ✍ approves the draft work programme and budget estimates
- ✍ considers reports and proposals of the Committees
- ✍ (appoints the Directors ?)
- ✍ authorizes Secretariat to enter into agreements concerning the relationship of the Organization with other organizations

• Secretariat:

1 Secretary-General

1 Director per Permanent Committee

Assistant Directors as required by Committee structure

1 Assistant Director for finance/personnel

1 Assistant Director for the Secretary-General.

**Permanent Committee Structure:**

- Technical Committee for Hydrographic Services & Standards
- Sub-committees for Cartography, Hydrography
- Strategy and Programme Implementation
- Sub-committee for Capacity Building
- Oversight of RHCs

**Secretariat:**

• 1 Secretary-General

• elected by Assembly

• maximum tenure of office 3 periods (9 years)

• reconfirmed at each Assembly meeting

• 2 Directors

• 1 for each Permanent Committee

• selected/deselected by Council

• maximum tenure of office 9 years

• Assistant Directors

• selected by General Secretary

• nominations from MS

• term of office 4-7 years

• 1 for each Permanent Committee and major sub-committee

• 1 for finance/personnel

• 1 for the Secretary-General

• Supporting staff:

• structured & appointed by Secretary-General



## SCHEDULE OF THE FUTURE SPWG WORK

### SPWG AND MILESTONES

	JAN	FEB	MAR	APR	MAY	JUNE	JULY	AUG	SEP	OCT	NOV
<b>Chair Group Meetings</b>	After the meeting in Goa			16-17 ToRs for Basic Docs WG		No date yet fixed		NO date fixed			
<b>RHC Meetings</b>	NIO 17-19		SAI USC 24-27	SWP 15-16 RSA 21-22	NHC 6-7 EA ?	MBS 2-6			BS 12-14	SEP?	
<b>SPWG Meetings</b>	20-22 GOA				15-16 LIMA					6-8 SINGAPORE	
<b>Goals and Structure</b>		WG on Structure + All SPGW Report by 1 <sup>st</sup> April									
<b>Financial implications</b>						WG on Finance. Report by 1 <sup>st</sup> September					
<b>Convention and Basic Documents</b>						WG on Convention and Basic Documents SPWG+ Legal advisers					
<b>Draft Report</b>											
<b>Final Report</b>											

The Final Report should be distributed to IHO M.S. by 1<sup>st</sup> August 2004 to allow the necessary time to prepare proposals to the 3



**2nd SPWG MEETING  
20-22 January 2003  
Goa, India**

**LIST OF PARTICIPANTS**

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## IMPLEMENTATION OF AMENDMENTS TO THE IHO CONVENTION

Opinion by David Sagar

### 1 Introduction

The International Hydrographic Organization (IHO) is considering how to expedite the entry into force of certain amendments to the IHO Convention. This Opinion addresses legal options available to the IHO to achieve this purpose.

The three amendments currently under consideration by IHO are:

- (i) an amendment to Article X.2 relative to the Directing Committee, which was approved by the I.H. Conference at its XIIIth session;
- (ii) a proposed revised Article XX relative to the procedures for becoming a Member State of the IHO;
- (iii) a proposed amendment to Article XXI relative to the procedure for amending the Convention.

The purpose of the amendments is to bring the IHO Convention up to date in order to enable the Organization to function effectively in contemporary conditions. However, no amendments have entered into force since the adoption of the Convention in 1967. The reasons for this are apparently not substantive policy objections by Member Governments to the amendments as such, but rather to administrative or procedural delays by Governments in completing the requirements of Article XXI.3 for entry into force of the amendments.

### 2 Rules Relating to Amendment of the IHO Convention

The amendment of the IHO Convention is governed by Article XXI and, subject thereto, by international treaty law, as codified in the 1967 Vienna Convention on the Law of Treaties (“the Vienna Convention”).

Article XXI of the IHO Convention provides that an amendment shall be approved by the IHO Conference, by a majority of two-thirds of the Member Governments represented at the Conference. The amendment shall enter into force for all Contracting Parties three months after two-thirds of the Contracting Parties have notified the Depositary of their approval of the amendment.

The approval or acceptance of amendments to a convention by a qualified majority of Member States, after they have been adopted by the supreme organ of an intergovernmental organization (IGO), is a common feature of the constituent instruments of many IGOs. However, achieving the required number of approvals is often a very long process, especially in IGOs with large memberships, and this delay can frustrate the purposes of the IGO.

However, legal procedures exist in international law to enable such obstacles to be overcome. An increasing number of IGOs have resorted to these procedures to implement amendments to their constituent instruments without waiting for completion of the normal entry into force procedures, in order to fulfil the Organization’s purposes.

Two such procedures are those of *provisional application* and *tacit acceptance* of amendments. They may be resorted to by IGOs notwithstanding that their conventions do not explicitly provide for such procedures. Sections 3 and 4 below describe the basis for these procedures and the use made of them by IGOs in recent times.

### 3 Provisional Application

#### (i) Applicable Rules of International Treaty Law

Provisional application in relation to bilateral or multilateral treaties is a well established procedure in international law, and was codified in the Vienna Convention.

Although the IHO Convention entered into force on 22 September 1970, and the Vienna Convention entered into force on 27 January 1980, the Vienna Convention was widely regarded for the most part as declaratory of customary international law, and can, accordingly, apply to IHO.

Article 5 of the Vienna Convention provides that it applies to the constituent instrument of an IGO, without prejudice to the rules of the IGO. Article 39 provides that the rules in Part II of the Vienna Convention (which includes Article 25 on provisional application) also apply to agreements to amend a treaty, unless the treaty otherwise provides.

Article 25 of the Vienna Convention reads as follows:

## Article 25

- 1 A treaty or a part of a treaty is applied provisionally pending its entry into force if:
  - (a) the treaty itself so provides; or
  - (b) the negotiating States have in some other manner so agreed.
- 2 Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

The *travaux préparatoires* for Article 25 recognized that the State practice of provisional application of treaties by various methods was widespread. The purpose and scope of the Article were summed up thus: “The practice of provisional application was now well established among a large number of States and took account of a number of different requirements. One was where, because of a certain urgency in the matter at issue, particularly in connection with economic treaties, it was highly desirable that certain steps should be taken by agreement in the very near future”

Provisional application has been widely used in connection with the initial establishment of IGOs, i.e. by individual Member States applying the constituent instrument provisionally before its formal entry into force

Provisional application has also been used to implement amendments to the constituent instrument of an IGO without delay, by decision of the supreme organ of the IGO. These precedents demonstrate that the supreme organs of the IGOs concerned had *inherent* legal power to decide on provisional application of amendments. The precedents described below refer to the ITU, the UN, and the international satellite organizations (ISOs), i.e. Inmarsat, Intelsat and Eutelsat.

### (ii) Precedents of Provisional Application of Amendments to Constituent Instruments of IGOs

#### (a) *Practice of the International Telecommunication Union (ITU)*

For many years, ITU Plenipotentiary Conferences have provisionally applied new or revised constituent instruments of the ITU. A recent example was the adoption of a new ITU Constitution and Convention by the ITU Additional Plenipotentiary Conference (Geneva, 1992 (APP-92)), which made substantial changes to the structure of the Union as it existed under the ITU Telecommunication Convention (Nairobi, 1982).

The 1992 Conference also adopted Resolution 1 providing that the provisions of the Constitution and the Convention relating to the new structure and working methods of the Union should be applied provisionally as from 1 March 1993.

The ITU Legal Adviser advised the Conference that it had authority to adopt the Resolution, stated that “the ITU, as any other international organization, was a living organism or body being in a constantly evolving process, thus adapting itself to the new telecommunications environment and the changing requirements of its Member States”. At the ITU there was a “well-established practice with regard to the concept of provisional application”. Under Article 25.1 of the Vienna Convention, a treaty was applied pending its entry into force if either the treaty itself so provided, or the negotiating States have in some other manner so agreed. One “such other manner” would be the Resolution on provisional application under discussion.

The ITU Resolution was adopted by consensus. The legal effect of the provisional application was that, pending its formal entry into force, the relevant provisions of the new Constitution and Convention governed the functions of the various policy making organs of the ITU and the Secretariat, and enabled the ITU to enter into commitments on the basis of the new provisions.

#### (b) *United Nations Convention on the Law of the Sea, 1982 (UNCLOS)*

The 1994 Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea of 1982 (concerning the International Seabed Authority) was adopted by the UN General Assembly. Article 7 of the Agreement provided for States which had consented in the General Assembly to the adoption of the Agreement, or which had signed it, to apply the Agreement provisionally unless they notified the Depositary that they would not do so.

Furthermore, States applying the Agreement provisionally would do so “in accordance with their national or internal laws and regulations”. The purpose of the language was to overcome the difficulties of those States that had constitutional requirements for parliamentary authorization. This provision is relevant to the conclusions referred to in section 5 (i) below.

#### (c) *The International Mobile Satellite Organization (Inmarsat)*

Inmarsat’s experience with amending its Convention affords an important example of State practice in relation to provisional application.

The 1979 Inmarsat Convention provided for amendments to be adopted by its Assembly of Parties, by a two-thirds majority of Member States present and voting. Thereafter, the amendments entered into force when acceptances had been received by a qualified majority of all the Parties. There was no explicit provision authorising the provisional application of amendments to the Convention.

In 1985 and 1989, important amendments to the Convention were adopted by the Assembly, but were thereafter subjected to delays of many years before they entered into force. The reasons for this were partly due to the requirement for legislative action in some States, or to low priority or administrative delays in some States.

In 1994, the Assembly adopted amendments to the Convention to change the name of the Organization and to make a change to an Article relating to the composition of the Inmarsat Council, one of its governing bodies. Because of the experience of delays with the previous amendments, the Assembly also decided, by consensus, that the amendments would be implemented *with immediate effect* pending the formal entry into force of the amendments.

The words “*provisional application*” were not used in the decision because several Parties were unable to agree formally to the use of the doctrine without prior legislative approval. However, they had no active objection to the substance of the amendments and did not oppose the consensus decision using the alternative wording.

In 1998 –1999, Inmarsat adopted much more fundamental amendments to its Convention for the restructuring and privatization of the Organization. For commercial and political reasons, the Organization could not wait for the amendments to enter into force by the normal procedure.

Extensive consultations were held among the Inmarsat membership on the means whereby the amendments could legally be implemented without delay. Meetings of legal experts from Parties were held to review the issue, and opinions sought from international treaty lawyers. Account was taken of legal advice that treaties of a ‘constitutional character’ should be subject to somewhat different rules of interpretation, so as to allow for the intrinsically evolutionary nature of a constitution. This advice was supported by the doctrine and practice relating to dynamic interpretation of treaties that are the constituent instruments of IGOs. The Organization was also advised that, in addition to the Assembly’s *explicit* power to adopt amendments, it had *inherent* power to apply the amendments provisionally, if it found this to be necessary in the circumstances.

The Assembly considered that it was necessary to implement the restructuring amendments rapidly in order to enable Inmarsat to fulfil its basic purposes. It therefore decided to implement the amendments with effect from a specified date, pending and subject to their entry into force in accordance with the existing procedure.

Although the words “provisional application” were not used in the decision, for reasons similar to those mentioned in respect of the 1994 amendments, the practical effect of the decision was the same.

The decision was taken by consensus. The Inmarsat Convention and Rules of Procedure provided for substantive decisions of the Assembly to be taken by a two-thirds majority of Parties present and voting. In practice, most Assembly decisions were always taken by consensus, i.e. after discussion of the issue, the Chairman summed up by announcing that there was no objection to the decision and that there appeared to be agreement by the Assembly to it. In this respect, the practice was consistent with that used in many other IGOs.

It was apparent that if the decision had been put to a vote, many Representatives may have been formally required to oppose it. However, as most Members supported the need for the restructuring to proceed without delay, none was prepared to obstruct the process by formally objecting to a consensus decision.

(d) *The European Telecommunications Satellite Organization (Eutelsat)*

In 1999, Eutelsat, another ISO with a structure comparable to that of Inmarsat, also adopted amendments to its constituent instruments for the restructuring and privatization of the Organization.

The Eutelsat Assembly of Parties further adopted, by consensus, a Resolution authorising explicitly the provisional application of the amendments by 2 July 2001 if the amendments had not formally entered into force by then.

The Assembly also noted that “...the Parties would conduct themselves, in their relationships with each other, the Organization and the Company, within the limits allowed by their national constitutions, laws and regulations, as if the amendments had entered into force as at the specified date.”

(e) *The International Telecommunications Satellite Organization (Intelsat)*

Intelsat also completed its restructuring along similar lines to Inmarsat and Eutelsat in July 2001, and its Assembly adopted, by consensus, a decision to apply the restructuring amendments provisionally.

(iii) Use of Provisional Application for the Amendments to the IHO Convention

*Use Of Provisional Application Generally*

Taking into account the abovementioned rules of international treaty law and the State practice described in this Section, provisional application would be a legally sound and effective procedure to implement the amendments to the IHO Convention referred to in Section 1 without delay, pending their formal entry into force.

The I.H. Conference, as the Organization’s supreme organ, would have inherent authority to take the necessary measures to put into effect amendments designed to carry out the Organization’s purposes, when faced with long delays. This authority would be

strengthened in the event that there is little or no objection by Parties to the substance of the amendments, and that administrative or procedural factors are the cause of these delays.

One of the objections to the use of provisional application by some States is that their constitutional systems require the involvement of the legislature or other branches of the government before the State assumes international obligations or modifies obligations previously assumed.

It is therefore relevant to the proposed use of provisional application by the IHO that the amendments do not impose any financial or other obligations on Member States. Indeed, in the case of the amendment to Article XX, the admission of new Members would presumably benefit other Members through the additional financial contributions received from the new Members.

It is a feature of provisional application, that it is reversible if the amendment does not eventually enter into force. That may be a problem in cases where the practical effect of the amendments cannot be fully reversed, but that is not the case with respect to the amendments referred to in Section 1 above. If the amendments did not eventually enter into force, the Convention may revert to its former unamended state. That would not invalidate decision taken whilst amendments were being properly implemented under the provisional application decision, e.g the admission of new members.

It is important to recall that most of the IHO Member Governments were also members of the ITU, Inmarsat and Intelsat, and they have, accordingly accepted, at least by acquiescence in consensus decisions, the provisional application of major amendments to the constituent instruments of those Organizations.

### **Use of Provisional Application for the Specific IHO Amendments**

It is worthwhile considering the justification for using provisional application for each of the amendments referred to in Section 1.

*Article X.2* The amendment already adopted by the I.H. Conference to this Article is intended to streamline the management structure, and its early application will facilitate the functioning of the Bureau.

*Article XX.* The proposed amendment to Article XX is intended to overcome the obstacles to the prompt admission of new Member States to the Organization, caused by the requirement for approval of new Members by two-thirds of the Member Governments. The Indemer Study obtained by the I.H. Bureau has shown that the considerations which justify this requirement in some types of IGOs, do not apply to the IHO.

The objectives of the IHO, as set forth in its Convention, including its Preamble, envisage a membership of all maritime States, for safety of navigation on a global basis. As the Indemer Study points out, it is a technical and consultative Organization, and is universal in scope. The long delays to new membership obstruct the fulfilment of the IHO's purposes, and deprives the Organization of their financial contributions. Such delays do not appear to come from substantive policy objections to new members by Member Governments, but rather from the outmoded and cumbersome procedural requirement of Article XXI.3. These considerations would justify the use of provisional application for accelerating the amendment process.

*Article XXI.* The use of provisional application for the proposed amendments to Article XXI raise different considerations.. The proposed amendments to paragraphs 1 and 2 of Article XXI are of a procedural nature, designed to benefit Member Governments partly by allowing adequate time for consideration of proposed amendments. Use of provisional application should pose no practical problems.

Article XXI.3 is of a different character. Its purpose is partly to give all Parties time for reflection and to meet constitutional requirements for approval, so that the amendment can be implemented in their national law. Such a provision is common in the constituent instruments of IGOs. Legally, provisional application could be applied to the amendment to Article XXI.3, as evidenced, for example, by the precedent in the ISOs' restructurings. Parties may, however, prefer to retain the existing provision as a general procedure, and to decide whether or not to apply a particular future amendment provisionally, on a case by case basis.

## **4 Tacit Acceptance**

Another simplified procedure used in IGOs to implement amendments is that of "tacit acceptance" of the amendments by Member States, i.e., whereby the amendments enter into force by a particular date, unless a specified number of the Member States notify their objection prior to that date. This procedure has been used, in various forms, in a number of international conventions.

In general, the procedure has been restricted to amendments to provisions in the "technical annexes" to conventions. In recent years this technique has been successfully used to amend specific provisions in a treaty, such as those containing limits to be periodically updated. Amendments to the main articles are brought into force through the normal procedure which requires "explicit" acceptances by a specified majority of Member States.

Furthermore, "tacit acceptance" is also used in cases where there is an enabling provision in the parent treaty for the use of tacit acceptance procedures. In other words, the procedure is justified by the fact that the Member States are presumed to have agreed to the use of "tacit acceptance" when they express their consent to be bound by the parent treaty.

There is nothing in international treaty law to prevent the use of tacit acceptance procedures or to limit its use to technical provisions or to cases where the parent treaty explicitly provides for the use of such procedure.

A recent example of the use of the procedure to bring substantive provisions into force at an early date by tacit acceptance, despite the absence of an enabling provision in the parent treaty concerns the International Convention on the Establishment of an International Fund for Oil Pollution Damage, 1971. It became necessary to terminate the Convention expeditiously. Amendments to the Convention for that purpose could only be adopted at a conference convened by the International Maritime Organization (IMO), with no other procedures being laid down. A Protocol was adopted by such a conference, providing that the Convention should cease to be in force in certain circumstances. The Protocol would be deemed to have been accepted and to enter into force unless objections were made by not less than one-third of the Parties within a specified period. Parties which declared that they did not wish to be bound by the Protocol would be deemed to have denounced the Convention.

In the case of the IHO Convention, it is considered that tacit acceptance could not apply to the proposed amendments referred to in Section 1 above, because of the explicit provisions of Article XXI.

When a treaty amendment has entered into force pursuant to a tacit acceptance procedure, it takes effect *definitively* unless and until further amended. This contrasts with provisional application, which is an *interim* procedure, which comes to an end when the formal requirements for entry into force of the amendment is achieved.

Article XXI.3 of the IHO Convention explicitly provides for amendments to be accepted by a qualified majority of the Parties. A decision by the Conference to implement amendments could not override the necessity of obtaining such acceptances. Therefore, the amendments could be applied provisionally, but not implemented by tacit acceptance.

## 5 Procedural Considerations

A number of procedural aspects need to be addressed if it is decided to use provisional application to implement the IHO amendments prior to their formal entry into force.

### (i) Form of Decision

Once the Conference has decided to adopt the amendments, it should take a further decision or decisions to implement the amendments pending and subject to their formal entry into force in accordance with Article XXI.3. The implementation could take effect immediately, or it could take effect at a specified future date.

An example of such a decision, based on the precedents of some of the IGOs referred to above, would be:

*“The Conference, having adopted the amendment to [Article XX] further decides that the amendment will be applied provisionally, with [immediate effect] [effect from a (specified ) date], pending and subject to the entry into force of the amendment in accordance with Article XXI.3 of the Convention”.*

If some Parties have difficulties with the use of the terminology “provisional application”, the decision could use alternative language to the effect that the amendment would be *“implemented [with immediate effect] or [with effect from a specified date]*. The legal effect of this alternative language would be the same as if “provisional application” was used. This alternative terminology was used in the Inmarsat case, as referred to above.

***It may be also necessary for the Conference to make a formal acknowledgement relative to the restraints imposed on some Member States on acceptance of provisional application under their national laws.***

Some Governments are unable to vote in favour of a provisional application decision, unless either (a) the procedure has already been explicitly set down in the parent convention to which such Governments are a Party), or (b) the decision receives the prior approval by the legislature or another arm of government.

The experience of IGOs described in Section 4 above demonstrates that while this is an obstacle to the taking of provisional application decisions, procedures are available to overcome the problem.

In the Inmarsat and Eutelsat restructuring, a number of Parties supported politically the immediate implementation of the amendments. They were unable to vote in favour of provisional application but wished to refrain from obstructing a decision on the matter.

The provisional application decision was therefore accompanied by an express acknowledgement by the Assembly about the need for consistency of the decision with the national laws of each Party. The text of the wording is set out below. This became known as a “subordination clause”, i.e. subordinating the decision to national law requirements at the national level. In the Inmarsat case, the clause read:

*“The Assembly also noted: ‘that, in accordance with such decision, Parties will conduct themselves, in their relationships with each other, the Organization and the Company, within the limits allowed by their national constitutions, laws and regulations”.*

A similar acknowledgement was adopted by the Eutelsat Assembly, and it was also used in the case of the 1994 Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea of 1982, referred to above.

This acknowledgment by the Assemblies reflected the practice of other IGOs. It had the practical effect of enabling the amendments to take effect on the international law plane, while permitting individual Parties to continue to participate in the Organization, consistently with their national law, even if the amendments had not yet been accepted in their national law. In this respect, it is relevant that the

amendments did not impose additional financial or other obligations on the Member States which may have required approval under their national law.

(ii) **Majority Required**

Under the IHO Convention, Article VI.5, Conference decisions are taken by a simple majority of Member Governments represented at the Conference, except where the Convention provides otherwise.

Article XXI.2 requires that amendment proposals shall be decided upon by a two-thirds majority of the Member Governments represented at the Conference.

Under Article XXI.3, an amendment enters into force for all Contracting Parties three months after approvals by two thirds of the Contracting Parties have been received by the Depository.

There is no explicit authority in Article XXI for provisional application, but the Conference has *inherent* authority to adopt such a decision, if it considers this to be necessary for the fulfilment of the Organization's purposes .

It is of political and practical importance that the provisional application decision be widely supported by the membership. In the absence of explicit authority in the Convention for provisional application, the most satisfactory solution would be for the Conference to take the decision unanimously or at least by consensus. A unanimous vote by the Conference may be very difficult to achieve, because not all Parties may attend, or they may not have authority to vote in favour of such a decision.

A decision by consensus would overcome these difficulties, as demonstrated by the State practice referred to in Section 4. In this respect, consensus would mean that no objection to the decision would be raised by any Member Government represented at the Conference. Consensus decision making has become an important practice in the supreme organs of IGOs, resulting partly from the growth in membership, and the difficulties of obtaining affirmative votes of qualified majorities even if there is no basic objection by large numbers of Member States to the substance of the proposals.

However, it is the practice of the Organization for all Conference decisions to be taken by a vote, in accordance with the voting rules set forth in the IHO Convention and its Rules of Procedure. This would not legally preclude a decision being taken by consensus, but the Conference may not wish to change its practice.

If voting is used for the provisional application decision, it would be preferable, for practical and political reasons, that a majority of at least two thirds all the Contracting Parties approve the decision. As the approval of two-thirds of all the Contracting Parties is required for the amendment to enter into force, a similar majority at the Conference gives rise to the expectation that two-thirds of the Parties will formally approve the amendments under Article XXI.3.

If that cannot be achieved, the decision should at least be taken by two thirds of the Member Governments represented at the Conference, i.e the same majority as is required for approval of the amendments themselves at the Conference.

In either case, no votes should be cast opposing the provisional application decision. Those Parties who are subject to a restraint under their national law or policy from voting in favour of a decision on provisional application, should at least be encouraged to abstain from casting a negative vote. The reason for this is that, as provisional application is not explicitly provided for in Article XXI, a decision taken by the Conference to that effect, which is actively opposed by even one Member Government, may be vulnerable to legal action to invalidate the decision.

(iii) **Consultations with Parties**

It is very important to gain the support of the IHO Member Governments for the proposed amendments, and to the proposed provisional application decision well before the dates of the Conference. This is to ensure that the issues are fully understood and that their Representatives come to the Conference with authority to support the provisional application proposal in the event of a vote, or to abstain if they cannot actively support it. If it is decided to proceed by way of consensus, the Representative should not raise any objection.

**7 Conclusions**

1. The Conference has inherent authority to decide that the amendment to Article X.2 of the IHO Convention, approved at its XIIIth Session, and the proposed amendments to Articles XX and XX1, shall be applied provisionally, pending and subject to their formal entry into force in accordance with Article XXI.3, if it considers that it is necessary to do so to fulfil the purposes of the Organization under contemporary conditions.

2. The authority of the Assembly, as the supreme organ of the IHO, to take this decision derives from international treaty law, and is confirmed by State practice in similar decisions of the supreme organs of a number of intergovernmental organizations. The decision to apply the amendments provisionally may take effect immediately, or on a subsequent date to be fixed by the Conference.

3. In the absence of explicit provision for provisional application in the I.H. Convention, it would be preferable for the decision to be supported by the membership as a whole, either by a unanimous vote or a consensus decision. Alternatively, it would be politically and practically desirable for the decision to be taken by the Conference, either by affirmative vote of two-thirds of the Contracting Parties or, failing that, by two-thirds of the Member Governments represented at the Conference. It would also be

desirable for Governments which were unable to support actively a decision on provisional application under their national laws either to raise no objections to a consensus decision, or to abstain in the event of a vote being taken.

4 In order to assist a number of Member Governments to satisfy their national constitutional requirements relative to approval of amendments to international treaties, it is recommended that the Conference also notes that the provisional application decision would not have the effect of requiring such Governments to Act inconsistently with their national laws.

5 It is of importance to observe that most IHO Member Governments, are also Members of the ITU, Inmarsat and Intelsat, and they have, accordingly, participated in, or acquiesced in, provisional application decisions taken by those organizations in respect of substantial amendments to their constituent instruments.

6 It is recommended that detailed consultations be conducted with Member well prior to the Conference in order to assist them with respect to the application of the doctrine of provisional application, and to try to ensure that their Representatives have full authority at the Conference to participate in the relevant decision.

Signed

David Sagar  
(Date)