

Dossier du BHI No. SPWG-2

<p>LETTRE CIRCULAIRE 19/2003 27 février 2003</p>
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**RAPPORT DE LA SECONDE REUNION DU GROUPE DE TRAVAIL
SUR LA PLANIFICATION STRATEGIQUE (SPWG)
Goa, Inde, du 20 au 22 janvier 2003**

Monsieur le Directeur,

Le rapport de la 2e réunion du SPWG qui s'est déroulée à Goa (Inde) du 20 au 22 janvier est joint en annexe.

Ce rapport a déjà été communiqué aux représentants des Commissions hydrographiques régionales (CHR) en vue de sa distribution ultérieure aux pays membres des CHR et, conformément aux procédures convenues, il est actuellement distribué, sous couvert d'une lettre circulaire du BHI, à tous les Etats membres de l'OHI.

Comme l'indique le rapport, la 2e réunion concernait principalement un nouveau projet de modèle de structure pour l'Organisation. Les commentaires relatifs à ce rapport et au modèle proposé devront être adressés aux représentants des CHR ou, dans le cas des Etats membres qui ne sont pas membres d'une CHR, au SPWG via le Bureau.

Il est également possible aux Etats membres de consulter le forum SPWG à l'adresse suivante : <http://www.iho.shom.fr/cgi-bin/lwgate>.

Tous les commentaires reçus seront coordonnés par le groupe directeur du SPWG en vue d'un examen plus approfondi par le SPWG lors de la prochaine réunion qui aura lieu du 12 au 14 mai 2003 à Lima, Pérou.

Veillez agréer, Monsieur le Directeur, l'assurance de ma haute considération.

Pour le Comité de direction,

(original signé)

Vice-amiral Alexandros MARATOS
Président

P.J. : (1) - Rapport de la 2e réunion du SPWG.

**DEUXIEME REUNION DU NOUVEAU GROUPE DE TRAVAIL
SUR LA PLANIFICATION STRATEGIQUE
20-22 Janvier 2003, Goa, Inde**

RAPPORT

1) Date et lieu

La deuxième réunion du SPWG a eu lieu à l'Hôtel Cidade de Goa, à Goa, Inde, du 20 au 22 janvier 2003, sous la présidence de M. F. Klepsvik (Norvège). Celle-ci était parrainée et organisée par le Service hydrographique indien. Toutes les Commissions hydrographiques régionales de l'OHI étaient représentées à la réunion, ainsi que les six pays suivants : Bangladesh, Japon, Maroc, République de Corée, Tunisie et RU. La liste des participants est fournie dans l'Appendice 5.

2) Points de l'ordre du jour No.1 et No.2: Accueil des participants, présentations, notifications. Compte-rendu de la réunion précédente.

Le président a accueilli les participants et a noté que toutes les Commissions hydrographiques régionales étaient présentes. Il a résumé les travaux effectués par le SPWG depuis la 1^{ère} réunion et a également présenté les aspects les plus importants des sujets traités par le groupe directeur du SPWG lors de ses deux dernières réunions.

Le rapport de la 1^{ère} réunion a été officiellement adopté.

3) Point de l'ordre du jour No.3 - Actions découlant de la précédente réunion

Le président a examiné la liste d'actions devant être mises en œuvre à l'issue de la première réunion. Toutes les actions devant être exécutées avant la réunion avaient été menées à bien.

Pays mettant à disposition des conseillers juridiques. Comme envisagé lors des précédentes réunions, il a été décidé qu'avant le 15 février, les membres du SPWG informeraient le président (avec copie au secrétaire) eu égard aux experts juridiques disponibles pour apporter leur assistance au SPWG lors de la révision/amendement de la Convention.

Il est prévu que ces experts participeront aux travaux qui seront exécutés à l'issue de la réunion du SPWG de Lima.

4) Point de l'ordre du jour No. 4 - Rapide examen de la Vision et de la Mission

Les vision et mission de l'OHI proposées ont été rapidement examinées et approuvées par la réunion.

5) Point de l'ordre du jour No. 5 - Finalisation des objectifs

Les objectifs provisoires, déjà soumis par les membres du SPWG aux fins de commentaires ont été présentés, discutés et approuvés avec certains amendements, comme indiqué dans l'Appendice 1. L'on a reconnu l'importance qu'il y avait à refléter le Chapitre V de la Convention SOLAS dans les objectifs, en tenant compte du rôle élargi de l'OHI dans le futur ainsi que des aspects régionaux et globaux des objectifs de l'Organisation :

L'on a convenu qu'il n'était pas approprié d'inclure dans la Convention l'Objectif proposé visant à gérer des services centraux ou conjoints pour les Services hydrographiques nationaux des Etats membres. Cependant, il a par ailleurs été décidé d'examiner cet Objectif en vue de son éventuelle inclusion dans un autre document pertinent de l'OHI.

6) Point de l'ordre du jour No.6 – Forces et faiblesses - résumé des données des CHR et des EM. Analyse de la situation globale.

Le groupe directeur a présenté un tableau résumant les réponses reçues des CHR. Ce tableau a été discuté par les membres du SPWG.

Le SPWG a décidé que les conclusions ainsi que les forces et faiblesses identifiées à partir des réponses au questionnaire devraient être incluses dans le rapport exhaustif nécessaire proposant de nouvelles structures et des principes généraux pour le fonctionnement de l'OHI, rapport qui sera produit par le groupe directeur. Il est prévu que ce rapport sera rédigé lors de la prochaine réunion du groupe directeur (mars 2003) et distribué aux membres du SPWG avant la fin du premier trimestre 2003.

7) Point de l'ordre du jour No.7 – Présentation du BHI sur l'étude relative à la Convention

Le BHI a présenté une étude identifiant les articles de la Convention susceptibles d'être affectés par les modifications apportées à la structure de l'OHI. L'objectif de cette étude était de parvenir à une compréhension commune en la matière.

8) Point de l'ordre du jour No. 8 – Explication de "l'acceptation tacite" et des "procédures d'application provisoires".

Le président a expliqué les concepts d' "acceptation tacite" et d' "application provisoire" tels qu'analysés par le juriste M. David Sagar, dans une étude effectuée pour l'OHI et distribuée aux Etats membres de l'OHI avec le compte-rendu de la première réunion du SPWG.

Certains membres du SPWG ont demandé que le rapport soit de nouveau communiqué en vue d'un examen plus approfondi et de commentaires supplémentaires. Il est donc joint en annexe à ce compte-rendu en tant qu'Appendice 6.

9) Points de l'ordre du jour No.9, No.10 et No. 11 – Groupes d'étude du SPWG

Le SPWG a approuvé la proposition du groupe directeur visant à créer deux groupes d'étude chargés d'examiner des questions spécifiques. Au cours de la réunion, suite aux progrès réalisés en ce qui concerne la structure, il est clairement apparu que le groupe d'étude pouvait travailler par correspondance et que tous les membres pourraient donc y participer.

Des directives pour le groupe d'étude chargé de l'amélioration de la structure de l'OHI et pour le groupe d'étude chargé de la Convention relative à l'OHI ont été préparées et approuvées par le SPWG. Celles-ci sont jointes en tant qu'Appendice 2.

Un certain nombre de propositions ont été présentées par le groupe directeur. Celles-ci reposaient sur les forces et les faiblesses identifiées dans les réponses au Questionnaire et proposaient différentes options en vue d'une nouvelle structure de l'Organisation ainsi que des principes généraux de fonctionnement. Le SPWG a préféré le modèle reposant sur une Assemblée, un Conseil, un Secrétariat et des Comités permanents. Le Conseil a été reconnu comme un élément important afin d'accroître, ainsi qu'il est requis, l'efficacité, le dynamisme et la réactivité de l'Organisation. Le SPWG a encore développé les principes généraux de fonctionnement de ce modèle. (voir Appendice 3).

Le Groupe d'étude travaillera par correspondance sur cette question et les membres du SPWG lui adresseront tout commentaire ultérieur à ce sujet. Le groupe d'étude produira le rapport mentionné au paragraphe 6.

Le BHI a notamment été chargé de présenter au groupe directeur un premier texte en vue de la révision de la Convention sur la base du modèle de proposition préféré. Ce premier projet sera examiné par le groupe directeur lors de la réunion mentionnée au point 6 et distribué aux membres du SPWG avant la fin du premier trimestre 2003.

En ce qui concerne le groupe d'étude chargé de l'amélioration de la Convention, il a été accepté que les détails relatifs à ce groupe d'étude seraient convenus lors de la 3^e réunion organisée à Lima (Pérou).

10) Points de l'ordre du jour No. 12 et No. 13- Implications budgétaires et programme des futurs travaux

Comme suggéré par le groupe directeur du SPWG et présenté dans les Documents de la 2^e réunion, il a été convenu que les conclusions et les recommandations du groupe d'étude chargé de l'amélioration de la structure de l'OHI, après examen et décision de la 3^e réunion, nécessiteront une analyse détaillée des répercussions financières. Celle-ci sera effectuée par un groupe de travail « ad hoc » oeuvrant en parallèle avec le groupe d'étude chargé de l'amélioration de la Convention, dont le mandat fera l'objet d'une décision lors de la 3^e réunion. Le président du Comité de direction du BHI a proposé que le BHI effectue, avec l'aide de la Commission des finances, une étude sur les implications budgétaires, laquelle sera transmise pour examen au SPWG.

L'approche générale du programme en ce qui concerne les futurs travaux du SPWG a également été approuvée et est incluse dans ce rapport en tant qu'Appendice 4.

11) Point de l'ordre du jour No.14 - Détails relatifs aux prochaines réunions du SPWG

Il a été estimé souhaitable de prévoir une réunion de 3 jours à Lima (Pérou), afin de disposer de suffisamment de temps pour discuter de toutes les questions devant être examinées. La 3^e réunion du SPWG aura donc lieu à Lima, Pérou, du 12 au 14 mai 2003. Ces dates ont, depuis lors, été confirmées par les autorités péruviennes.

Le SPWG a également estimé qu'il pourrait être nécessaire d'organiser une 5^e réunion du SPWG (non encore prévue) probablement en 2004, afin de finaliser toutes les questions du SPWG lors de la 3^e Conférence hydrographique internationale extraordinaire, d'avril 2005.

Une liste des actions résultant de la 2^e réunion du SPWG est fournie ci-après.

LISTE D' ACTIONS

1. Tous les membres du SPWG adresseront au Président et au secrétaire, avant le 15 février, des informations concernant les experts juridiques qui seront disponibles pour aider le SPWG lors de la révision/amendement de la Convention.
2. Le groupe d'étude chargé de l'amélioration de la structure de l'OHI travaillera par correspondance et les membres du SPWG lui adresseront leurs commentaires. Le groupe directeur produira un rapport sur les conclusions et les propositions du groupe d'étude avant fin mars 2003 et le distribuera aux membres du SPWG avant la fin du premier trimestre 2003.
3. Le BHI préparera et présentera au groupe directeur un premier texte d'amendements à la Convention, rédigé à partir du modèle de proposition préféré.
4. Le BHI vérifiera auprès du Service hydrographique péruvien les dates de la troisième réunion de Lima (NOTE: cette vérification a déjà été effectuée et les dates de la réunion du 12 au 14 mai 2003 ont été confirmées)..
5. Pour aider l'Inde et le Maroc à obtenir les approbations nécessaires, le BHI enverra une lettre aux représentants de ces pays, en les invitant officiellement à la 3^e réunion.

OBJECTIFS DE L'OHI

1. Promouvoir l'utilisation de l'hydrographie pour la sécurité de la navigation et pour toutes les autres activités maritimes et accroître la prise de conscience générale de l'importance de l'hydrographie.
2. Améliorer la couverture globale, la disponibilité et la qualité des données, des informations, des produits et des services hydrographiques, ainsi que leur accessibilité.
3. Faire progresser les capacités hydrographiques globales ainsi que les moyens, les sciences et les techniques.
4. Mettre en place et soutenir le développement de normes internationales pour la qualité et les formats des données, informations, produits, services et techniques hydrographiques afin de parvenir à la plus grande uniformité possible dans l'utilisation de ces normes.
5. Fournir en temps utile, aux gouvernements et aux organisations internationales, des conseils faisant autorité, sur toutes les questions hydrographiques.
6. Faciliter la coordination des activités hydrographiques entre les Etats membres, et
7. Améliorer la coopération en matière d'activités hydrographiques, entre les Etats, sur une base régionale.

**DIRECTIVES POUR LE GROUPE D'ETUDE CHARGE DE L'AMELIORATION
DE LA STRUCTURE DE L'OHI**

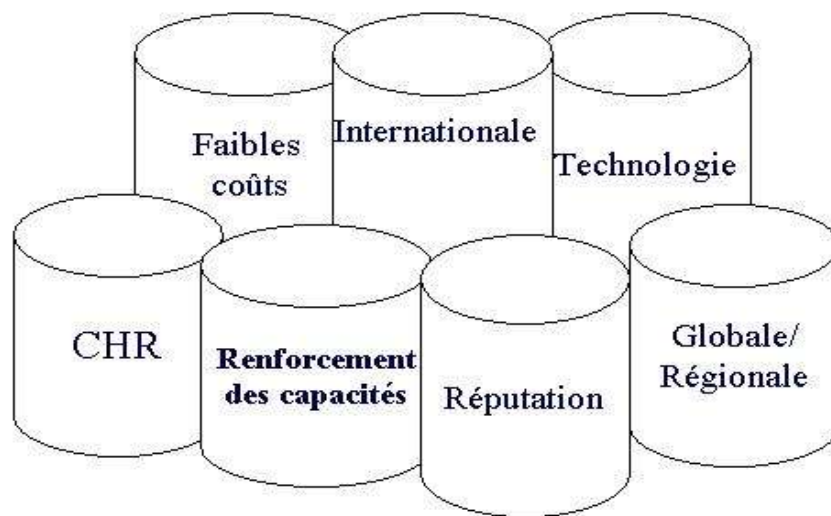
1. Préparer des propositions pour le SPWG concernant le futur modèle organisationnel et les futures procédures de haut niveau de l'OHI, en tenant compte, entre autres, des points suivants :
 - Décisions de la XVIe Conférence
 - Résumé des réponses au questionnaire sur les forces et les faiblesses
 - Précédents modèles soumis par les EM
 - Nouvelles Vision et Mission et les nouveaux Objectifs de l'OHI
 - Rôle prééminent des Etats membres au sein d'un forum intergouvernemental.
Garder présent à l'esprit le fait que les EM formulent des politiques et agissent par le biais de la Conférence/Assemblée. Le succès de l'OHI dépend de la participation, de la coopération et de l'engagement actifs des EM : la structure doit faciliter cela.
 - **Fréquence/centre d'intérêt des Conférences.**
*Changer l'appellation pour « Assemblée » ?
La 2^e Conférence extraordinaire a décidé que les réunions devraient être plus fréquemment tenues. A quelle fréquence ? En quel lieu ?*
 - **Nécessité d'un Conseil, de Comités et de groupes de travail.**
*Un Conseil permanent? Si « Oui », avec quel rôle et quels pouvoirs ? Procédure d'élection ?
Comités permanents? Quels mandats ?*
 - **Nécessité de processus plus rapides en ce qui concerne la prise de décisions et la mise en œuvre de ces dernières.**
*Vote de la Conférence? Vote par courrier?
Approbation tacite, par exemple pour les décisions techniques ?
Applications provisoires ? Rôle du Conseil ? Fréquence de l'Assemblée ?*
 - **Planification stratégique.** *Continuer comme actuellement ? Fonction du Conseil ? Comité permanent ?
Examen continu du plan stratégique. Comment surveiller la progression des travaux ? Alignement du Budget sur le programme de travail ?*
 - **Aspects techniques.** *Organiser tous les travaux techniques dans le cadre d'un Comité permanent ?
Comment participer à l'établissement de normes ?*
 - **Aspirations/représentation régionales**
Pratiques identiques à celles d'organisations internationales similaires ?
 - **Interaction avec le secteur privé et les ONG.**
Groupes consultatifs ? Partie de la structure d'un Comité ? Membres associés ?
 - **CHR.** *Rôle renforcé ? Fonctionnement efficace ?*
 - **Programmes de renforcement des capacités.** *Axés sur la région? Nécessité d'une coordination centrale ? Mécanismes de financement (par ex Fonds d'affectation spéciale) ?*
 - **Croissance potentielle du nombre d'Etats membres.**
Si la taille doublait, la structure conviendrait-elle toujours?
 - **Rôle/structure du Secrétariat/Bureau.**
*Bureau ou Secrétariat? Président ou Secrétaire Général? Directeurs ou Assistant du Secrétaire Général ?
Responsabilités? Relations avec le Conseil et les Comités ? Nombre et rôle des Adjoints techniques ? Election des officiels ?*
2. Présenter les propositions au SPWG avant le 11 avril 2003.

DIRECTIVES POUR LE GROUPE D'ETUDE CHARGE DE L'AMELIORATION DE LA CONVENTION RELATIVE A L'OHI

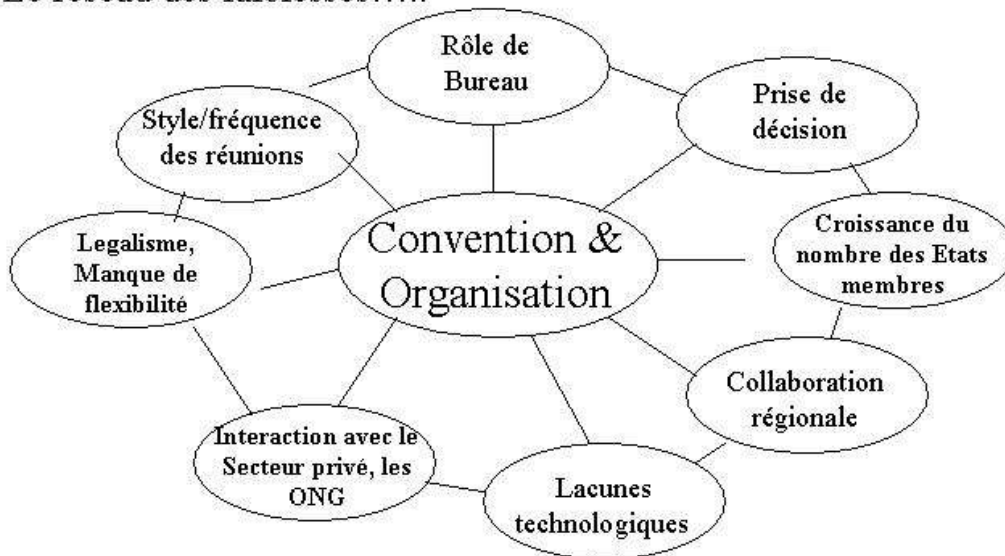
1. Préparer des propositions pour le SPWG concernant les améliorations à apporter à la Convention relative à l'OHI, en tenant compte, entre autres, des points suivants :
 - Etudes entreprises par le BHI
 - Propositions spécifiques concernant les Articles XX, XXI
 - Décisions de la XVIe Conférence
 - Propositions du groupe d'étude sur la structure, concernant :
 - *le résumé des réponses au Questionnaire sur les forces et les faiblesses*
 - *les nouvelles Vision et Mission et les nouveaux Objectifs de l'OHI*
 - *les modèles précédemment soumis par les EM*
 - *le rôle prééminent des Etats membres au sein d'un forum intergouvernemental.*
 - *la fréquence/le centre d'intérêt des Conférences.*
 - *la nécessité d'un Conseil, de Comités, de Groupes de travail.*
 - *la nécessité de processus plus rapides en ce qui concerne la prise de décisions et la mise en œuvre de ces dernières.*
 - *la planification stratégique.*
 - *les aspects techniques.*
 - *l'interaction avec le secteur privé et les ONG.*
 - *les CHR.*
 - *les programmes de renforcement des capacités.*
 - *la croissance potentielle du nombre d'Etats membres*
 - *les aspects techniques*
 - *les aspirations régionales*
 - *le rôle/la structure du secrétariat/Bureau*
2. Identifier les ajustements consécutifs pour l'Accord de siège et autres Documents de base.
3. Présenter les propositions au SPWG avant le 1er septembre 2003.

UNE PROPOSITION DU GROUPE DIRECTEUR VISANT A STIMULER LE DEBAT ET A
PRESENTER UN RESUME DES FORCES ET DES FAIBLESSES

Le réservoir des forces.....

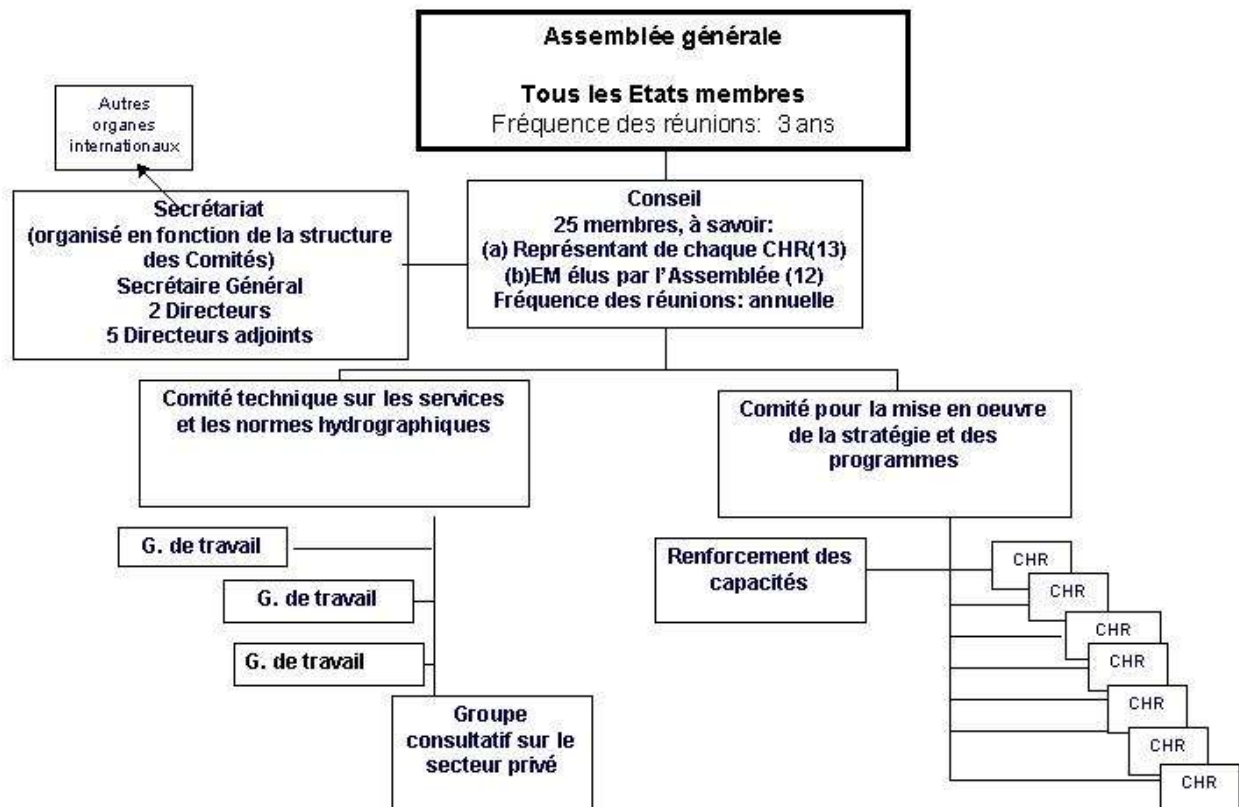


Le réseau des faiblesses.....



Principes généraux:

- Maintien des forces, élimination des faiblesses
- La structure et la convention doivent aider l'Organisation à réaliser sa mission, sa vision ainsi que ses objectifs et non pas constituer une gêne
- L'essentiel de notre mission, de notre vision et de nos objectifs:
 - une organisation globale agissant régionalement
 - établissant des normes et fournissant des directives
 - améliorant l'accès mondial à nos données, à nos produits et à nos services
 - améliorant les possibilités et les capacités globales
- Nous avons donc besoin d'instruments permettant de répondre aux questions relatives à :
 - La détermination de la politique à suivre
 - La technologie, les normes, la fourniture de conseils
 - La coopération globale et régionale
- La meilleure structure est une structure simple



Principes :

L'Organisation, dans son ensemble, comprend l'Assemblée, le Conseil, le Secrétariat, les comités permanents.

- Assemblée :

Tous les EM se réunissent tous les 3 ans

- Elit le président et le vice-président de l'Assemblée
- Elit le secrétaire général (et les directeurs?)
- Etablit les politiques à suivre en matière de stratégie d'ensemble
- Etablit les mandats/les pouvoirs du Conseil
- Elit les membres du Conseil
- Approuve le plan triennal

- Conseil:

1/4 des EM (soit, initialement, 18 à 20). Représentants des CHR, plus membres élus.
Se réunit une fois par an (au minimum)

- Coordonne les activités de l'Organisation
- Approuve les projets concernant le programme de travail et les estimations budgétaires
- Examine les rapports ainsi que les propositions des comités (nomme les directeurs ?)
- autorise le Secrétariat à établir des accords eu égard aux relations de l'OHI avec d'autres organisations

- Secrétariat :
 - 1 secrétaire général
 - 1 directeur par comité permanent
 - des directeurs adjoints, en fonction de la structure du comité
 - 1 directeur adjoint pour les finances/le personnel
 - 1 directeur adjoint pour le secrétaire général

Structure des comités permanents:

- Comité technique pour les services et les normes hydrographiques
- Sous-comités pour la cartographie et l'hydrographie
- Mise en œuvre de la stratégie et des programmes
- Sous-comité pour le renforcement des capacités
- Supervision des CHR

Secrétariat :

- 1 Secrétaire général
 - élu par l'Assemblée
 - mandat renouvelable 3 fois au maximum (9 ans)
 - reconfirmé dans ses fonctions lors des réunions de l'Assemblée
- 2 directeurs
 - 1 pour chaque comité permanent
 - sélectionnés/révoqués par le Conseil
 - mandats d'une durée maximum de 9 ans
- Directeurs adjoints
 - sélectionnés par le secrétaire général
 - choisis parmi les EM
 - mandats de 4 à 7 ans
 - 1 pour chacun des Comités permanents et des principaux sous-comités
 - 1 pour les finances/le personnel
 - 1 pour le secrétaire-général
- Personnel de soutien
 - structuré et nommé par le secrétaire général

SCHEDULE OF THE FUTURE SPWG WORK

SPWG AND MILESTONES

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



The Final Report should be distributed to IHO M.S. by 1st August 2004 to allow the necessary time to prepare proposals to the 3rd Extraordinary Conference (11 to 15 April 2005)

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

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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 Depository 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 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 Depositary.

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 XX1.3, 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)