CHRIS-14-7.2E

14TH CHRIS MEETING
SHANGHAI, CHINA, 15-17 AUGUST 2002

POTENTIAL LIABILITY FOR IHO STANDARDS

Comment by Australia

Introduction

1. CHRIS paper 14/7/2D alerts Member States to a potential for exposure to legal liability for any shortcomings in the standards and technical regulations published by the IHO. The IHB has subsequently asked the IHO Legal Advisory Committee (LAC) to consider the legal status of the IHO in relation to such exposure.

2. On receipt of CHRIS paper 14/7/2D Australia sought urgent advice from the Australian Government Solicitor (AGS) on the matters raised in the paper. A preliminary Advice has now been received from the AGS and is included as an Annex to this paper. This AGS Advice will also form Australia's contribution to the LAC. The Advice, which is supported by references and identifies legal precedents clearly provides the opinion that neither the IHO nor its Member States are exposed to any significant risk.

3. As a result of the Advice from AGS, Australia is therefore of the view that unless other members of the LAC advance a contrary opinion, then further consideration or advice by the LAC is unnecessary. Similarly, no particular action seems required of the CHRIS, any Member State, the IHO or the IHB.

Action Required by the Committee:

4. Australia recommends that the CHRIS:

   a. **take note** of the Advice from the Australian Government Solicitor.

AUSTRALIAN GOVERNMENT SOLICITOR

Our ref: 02081642

5 August 2002

Commander Robert Ward
The Hydrographer RAN
Australian Hydrographic Office
Locked Bag 8801
South Coast Mail Centre NSW 2521

Dear Commander Ward

IHO Liability-Standards

1. We thank you for your email of 31 July 2002 in which you have requested an overview of the general principles and conclusions contained in a paper prepared by Rear Admiral Guy headed 'The Liability of International Organizations for their Standards'.

2. In essence, Admiral Guy has provided comment upon the liability that might arise to the International Hydrographic Organisation (IHO) or its Member States by reason of a third party suffering loss or damage which is in some way attributable to standards established by the IHO.

3. In essence, we consider it unlikely that the IHO could be sued as a result of an error in a standard as:

(a) although the IHO has a separate legal identity within the jurisdiction of Member States, the IHO will likely be immune from such a claim as a result of Article XIII of the Convention;

(b) the IHO may not be considered a separate legal entity able to be sued in Non-member States;

(c) even if the IHO could be sued under national law on the basis of negligence, it is unlikely such a claim would be successful;

(d) the IHO may not be considered an "international organisation" subject to a claim at international law outside Member States;

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(e) if the IHO were considered to be an "international organisation", it is likely that:

(i) no international tribunal would have jurisdiction to decide upon such a claim against the IHO;

(ii) the party which suffered a loss would not have standing in an international tribunal;

(iii) the IHO would not be considered to have breached its international responsibility; and

(f) Member States will not be liable for the activities of the IHO.

CAN IHO BE SUED?

4. Whether an action for damages arises from a party's reliance upon a standard published by the IHO requires the consideration of three issues, namely, whether the IHO has a legal personality and is capable of being sued, whether the IHO is immune from such a claim and thirdly, whether a cause of action could arise from the publication of a standard. We consider each of those questions below.

Legal personality

5. The IHO is established by the Convention on the International Hydrographic Organisation (the Convention). Article XIII of the Convention provides that:

> The organisation shall have a juridical personality. In the territory of each of its Members it shall enjoy, subject to agreement with the Member Government concerned, such privileges and immunities as may be necessary for the exercise of its functions and the fulfilment of its object.

6. That object is set in very broad terms in Article II. Accordingly each Member State is obliged to ensure that, in its jurisdiction, the IHO is provided with a 'legal' personality and provided with immunities. Therefore, subject to the immunities provided, the IHO will generally be entitled to sue and be sued in the jurisdiction of a Member State.

7. In Non-member States, as the question of legal personality will be determined by national law, it is perhaps doubtful that the IHO will be recognised as having such an identity. That is because it is unlikely that the domestic law of such States would have addressed the legal status of organisations with which they have no connection.

8. At international law it is likely that the IHO would be regarded as an 'international organization' and so endowed with legal rights and obligations at international law. That is, it is generally agreed that for an entity to qualify as an 'international organization' it must have the following characteristics:

(a) its membership must be composed of States and/or other international organizations;

(b) it must be established by a treaty;

(c) it must have an autonomous will distinct from that of its members and be vested with legal personality; and

(d) it must be capable of adopting norms addressed to its members.[1]

9. The IHO is established by a treaty, has a membership composed of States and is vested with legal personality pursuant to Article XIII. It is comprised of the Conference of Members and the Bureau, appears to have an autonomous will, and is capable of adopting norms addressed to its members.

10. Accordingly, it may be that the IHO would be considered to be:

(a) a separate legal entity capable of being sued in a Non-member State; and

(b) an international organisation 'subject to international law rights and obligations'.

National law

11. In States with a dualist system such as Australia, privileges and immunities in relation to the national law will not necessarily be granted to the IHO unless a specific law is enacted by the Member State to that effect.

12. In Australia, the IHO's privileges and immunities are set out in the *International Hydrographic Organisation (Privileges and Immunities) Regulations* 1997 (the Regulations), enacted in accordance with the *International Organisations (Privileges and Immunities) Act* 1963 (the Act). The consequence of those legislative instruments is that the IHO is declared to be body corporate with perpetual succession capable of suing and being sued (Regulation 4) and is immune 'from suit and other legal process' (Section 6 and the First Schedule of the Act). That immunity is subject to various exemptions and may be waived by the IHO but, subject to any waiver, would provide the IHO with an immunity from a suit commenced to recover damages in the scenario outlined above.

13. Immunity from suit extends to members of the Directing Committee as is accorded to diplomatic agents (Regulation 7 and the Second Schedule of the Act) and officials of the IHO in respect of any act or thing done in the course of their duties (Regulation 8 and Schedule Four of the Act).

14. We expect that such legislation has been adopted in most, if not all, Member States. In any event, in States in which international obligations are immediately

[1] Philippe Sands and Pierre Kleins, *Bowett's Law of International Institutions* (2001), p. 16

incorporated into the national law of that State (monist states), upon the State ratifying the Convention, the IHO will have accordingly been provided with "such privileges and immunities as may be necessary for the exercise of its functions and the fulfilment of its object have immunities". That is, it is arguable that, in order for the IHO to exercise its objects and functions which include the creation of international standards based upon the practice of national hydrographic organisations and international practice, it should be granted immunity from any suit arising from the creation and publication of those standards. Therefore, even without the introduction of a specific law in the Member State, the IHO may have an immunity of suit in relation to the scenario being considered.

15. In Non-member States, it is perhaps unlikely that any such immunity would be provided.

International law

16. As set out above, we consider that the IHO would be regarded as an international organisation subject to rights and obligations imposed by international law and subject to the rules of international law, including conventional and customary rules. The International Court of Justice (ICJ) in an advisory opinion stated:

> 'international organisations are subjects of international law and, as such, are bound by obligations encumbered upon them under general rules of international law, under their constitutions or other international agreements to which they are parties'[2]

17. International organisations are therefore subject to rules of customary international law and general principles of law recognised by civilised nations[3] which include the principle of international responsibility.

18. In Australia, an action could not be commenced which solely relied upon a breach of international law. However, if it was possible to bring a claim in a domestic court that sought to rely solely on a breach of international law as suggested above, no such immunity would appear to be available to Non-member States.

19. The only other apparently available jurisdiction in which a claim could be brought against the IHO is in an international tribunal. However, even if there was an international tribunal in which proceedings could be commenced, it appears unlikely that any party that wished to make a claim against the IHO would have standing in such a tribunal and be able to commence proceedings.

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[2] *Advisory Opinion on the Interpretation of the Agreement of March 25, 1951 between WHO and Egypt*, 1980 ICJ Reps, p.73 at 89-90.
[3] Sands and Kleins, *Bowett's Law of International Institutions* (2001), p.459

Cause of action

20. Obviously, if the IHO is immune from suit as a result of the matters set out above, the question of whether a cause of action may arise against the IHO is irrelevant. However, if the IHO is able to be sued in a particular jurisdiction, a cause of action may arise in accordance with national or international law. We consider each of these areas below.

National law

21. A claim in accordance with national law would generally arise either under a principle akin to negligence or in accordance with an enactment of the State. The most likely claim would appear to arise on the basis of negligence and a breach by the IHO of a duty of care it owed to the party bringing the claim. Such a claim would generally involve consideration of issues such as:

(a) the causal link between the alleged breach of duty and the damage suffered;

(b) the degree to which the IHO consulted and relied upon national hydrographic organisations and international practice in preparing the standards;

(c) the foreseeability of the damage;

(d) the extent and reasonableness of the parties reliance on the standard;

(e) the extent to which the party's own negligence contributed to the loss, etc.

22. However, realistically, in light of the role of the IHO and the manner in which standards are created, we consider the possibility of such a claim being successful to be remote, even if it could be commenced, which itself appears unlikely.

23. That is, in circumstances where the standards are:

(a) based upon information provided by national hydrographic offices and international practice;

(b) prepared in consultation with those offices; and

(c) published and made available to third parties on that basis;

it appears unlikely that negligence could be established against the IHO or that absolute and blind reliance on the standard would be considered to be reasonable.

24. Finally, even if such an action could be brought and was successful, unless the IHO had assets within the jurisdiction of the Non-member State in which the proceeding was commenced, depending upon any reciprocal relationship that State

may have with another Non-member State in which the IHO does hold assets, it is unlikely any judgement could be executed.

International law

25. If the IHO was considered to be an international organisation subject to international law rights and obligations, and a jurisdiction was available in which it could be sued on that basis, a claim could arguably be commenced on the basis of a breach of international responsibility.

26. That is, a claim which might be regarded as one in negligence is, broadly speaking, available under the general principles of international responsibility, which effectively embodies the principle of State responsibility as it applies to international organisations. Once an international organisation subject to international law is found to have breached its international responsibility, reparation must generally be made for the loss caused.

27. The emphasis in international law is upon a wrongful act committed in conflict with international responsibility. In general, issues which will be considered in the assessment of whether a tort has been committed in accordance with Australian law such as causation, negligence, remoteness of damage, etc. are issues which are often considered at international law where international responsibility is at issue.

28. In relation to standards prepared by the IHO, we consider it unlikely that an error in the standard or the process by which the standard was prepared would likely constitute a breach of international responsibility. A breach of international responsibility would normally be confined to the consideration of obligations with an international flavour imposed under a treaty or some other international principle. The potential breach of duty considered in this scenario is more appropriately categorised as one for consideration at a national level.

29. However, even if the scenario does involve a consideration of the IHO's compliance with its international responsibility, as set out in relation to a claim at a national level, it appears remote that any breach of that responsibility would be established. That is, in circumstances where the standards are:

(a) based upon information provided by national hydrographic offices and international practice;

(b) prepared in consultation with those offices; and

(c) published and made available to third parties on that basis;

it is unlikely that negligence could be established against the IHO or that absolute reliance on the standard was reasonable. Accordingly, a claim for reparation at international law would not be likely to be successful.

CAN MEMBER GOVERNMENTS BE SUED IN RELATION TO THE ACTIVITIES OF THE IHO

30. The final issue to consider is whether, in circumstances where it is alleged that a breach of the IHO of a duty has caused damage to a third party, the third party may commence proceedings against a Member State.

31. The first principle relevant to this question is the principle of customary international law that States are immune from the jurisdiction of other States. In Australia, that principle is embodied in the *Foreign States Immunities Act* 1985 which provides that a State shall be immune from suit, absent a submission to the jurisdiction, for damages arising from personal injury unless the injury arose from an action or omission occurring within Australia.

32. Accordingly, we consider it unlikely that any claim could be commenced at national law against a foreign Member State in relation to an activity of the IHO, regardless of whether the IHO was recognised as a legal entity in that jurisdiction.

33. If an immunity is not available, in national jurisdictions where the IHO is a recognised separate legal identity, the IHO will be the appropriate body to be sued. The same applies in the international arena as the IHO is likely to be categorised as an international organisation.

34. The issue was considered in relation to the International Tin Council (ITC) by the English Court of Appeal[4] which found that:

(a) the constituent instrument establishing the ITC showed no intention of creating a principal/agent relationship;

(b) there was no real opportunity of any one State to control the activities of the ITC;

(c) the absence of a no liability clause in the constituent instrument did not result in direct liability to creditors of the ITC and there was no contrary international principle of that nature; and

(d) as the Parliament had endowed the ITC with the legal capacities of a body corporate it was the appropriate body to sue.

35. The House of Lords also considered a claim against the Members of the ITC and found that the ITC:

> was invested with a legal personality distinct from its members, with the consequence that, when it entered into engagements, it and not the members was the contracting party.[5]

[4] *Maclaine Watson & co Ltd v International Tin Council* (No2) 80 ILR 110
[5] *J H Rayner v Department of Trade* (1989) 81 ILR 704 per Lord Aylmerton

36. These principles equally apply to the IHO and so we consider it unlikely that Member States could be sued for a loss suffered by a party as a result of reliance upon an IHO standard.

37. This advice has been settled by Mr Henry Burmester QC and Mr Ken Pogson. Please contact myself or Mr Pogson if you wish to discuss this matter further.

Yours sincerely

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