AC208.2

International Mobile Satellite Organization
ADVISORY COMMITTEE
Twentieth Session
11 – 13 December 2007
Agenda item 8.2

IMSO/AC/20/8.2
Origin: Director
Date: 28 November 2007

PROPOSED AMENDMENTS TO THE IMSO CONVENTION

Executive Summary:	this document discusses legal advice received from the IMO Secretary-General, as Depositary of the IMSO Convention, regarding the amendments to the IMSO Convention submitted by the United States
Action to be taken:	to consider legal advice received from the Depositary, and advise the Director accordingly.
Related documents:	none

1 BACKGROUND

1.1 At its Nineteenth Session, the Committee noted that the United States had formally submitted amendments to the Convention on 22 June 2007, and recognised that it was outside of its mandate to discuss the document.

1.2 Some members of the Committee recommended that the United States invite all IMSO Member States to participate in an informal correspondence group in order to improve, if necessary, the proposed amendments to the Convention and the proposed resolution on administrative issues, for consideration at the next Assembly session. The Committee recognised that the Director is already performing some of the functions recommended in the proposed amendments and resolution.

1.3 Other Members raised that there may be legal implications to further amendments being introduced to the IMSO Convention in relation to the 2006 amendments, and the Committee requested the Director to seek advice from IMO as the Depositary of the Convention.

1.4 The proposed US amendments were translated and circulated by the Director to all Member States and to Inmarsat in accordance to Article 19 of the IMSO Convention on 20 July 2007.

2 LEGAL ADVICE

2.1 In response to the request of the Committee, the Director wrote to the Secretary-General of the International Maritime Organization as Depositary to the IMSO Convention (the Depositary), seeking legal advice regarding whether there are any legal implications to further amendments being introduced to the IMSO Convention in relation to the 2006 amendments which were adopted by the Eighteenth Session of the IMSO Assembly and which are provisionally applicable from 7 March 2007, pending their formal entry into force.

2.2 The IMO Director of Legal Affairs and External Relations Division replied to the IMSO Director on behalf of the IMO Secretary-General on 24 July 2007. Copies of the correspondence were sent to all Parties and are attached at Annex 1.

3 ACTIONS REQUESTED BY THE ADVISORY COMMITTEE:

The Advisory Committee is invited to consider legal advice received from the IMO Secretary-General as Depositary of the IMSO Convention and advise the Director accordingly.

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ANNEX

TEXT OF LETTER FROM THE IMSO DIRECTOR
TO THE IMO SECRETARY-GENERAL
DATED 10 JULY 2007

IMSO/2007/IMO/018

Dear Mr Secretary-General

On 29 June 2007, the United States formally submitted to me, under Article 19 of the IMSO Convention, proposed amendments to the Convention.

I have been requested by the IMSO Advisory Committee to request your advice, as Depositary to the IMSO Convention, regarding whether there are any legal implications to further amendments being introduced to the IMSO Convention in relation to the 2006 amendments which were adopted by the Eighteenth Session of the IMSO Assembly and which are provisionally applicable from 7 March 2007, pending their formal entry into force.

I am enclosing a set of the amendment package for your information, pending their translation into the French, Russian and Spanish languages.

I look forward to hearing from you in due course.

With best wishes and many thanks.

Yours faithfully

[signed]
Esteban Pacha-Vicente
Director

Mr Efthimios E. Mitropoulos
Secretary-General
International Maritime Organization
55 Victoria Street
London SW1

TEXT OF LETTER FROM THE IMO DIRECTOR OF LEGAL AFFAIRS AND EXTERNAL RELATIONS DIVISION TO THE IMSO DIRECTOR DATED 24 JULY 2007

Dear Mr Pacha-Vicente

On behalf of the Secretary-General, I acknowledge receipt of your letter dated 10 July 2007, reference number IMSO/2007/IMO/018, concerning amendments to the IMSO Convention being proposed by the United States to provide the legal framework for IMSO to perform the functions and duties of the LRIT Co-ordinator, with your request for our views on any legal implications to further amendments being introduced to the IMSO Convention in relation to the 2006 amendments which were adopted at the Eighteenth Session of the IMSO assembly and which are provisionally applicable from 7 March 2007, pending their formal entry into force. I have been asked to respond to you on behalf of the Secretary-General.

The amendments proposed by the United States appear to be consistent, in substance, with the decisions taken by the Maritime Safety Committee regarding the introduction and operation of the LRIT. Whether they are needed, in light of Article 4 (Other Functions) which is included in the 2006 amendments referred to above, and which explicitly provides authorization for IMSO to assume functions and/or duties of the LRIT Co-ordinator, must be left to the judgement of the IMSO Assembly.

With respect to drafting, we have one observation on the US proposal for subparagraph (h) of Article 11 (Assembly – Functions) which would require the IMSO Assembly "to review and approve any amendment made by the MSC to section 14 of the Annex to Resolution MSC.210(81)." Because the proposed amendments would presumably obligate IMSO to perform the LRIT Co-ordinator functions pursuant to arrangements agreed by MSC, we would raise a doubt about a process that also requires to the IMSO Assembly to "approve" the amendments already agreed in that Committee. There would theoretically be a risk that the IMSO Assembly would baulk at or wish to revise the amendments already agreed by MSC, and this possibility should be avoided.

With regard to your concern about amending amendments which are not yet in force, we believe this can pose a problem from a treaty-making point of view. It is not possible to amend an amendment that is not yet in force. The amendments adopted in 2006 are not in force and therefore are not yet subject to the amendment process of Article 19 of the IMSO Convention. (We note that one third of the 91 Parties to the IMSO Convention must deposit instruments of acceptance before the 2006 amendments can come into force; and no such instruments have been received.) Where proposals have been made in the past to amend amendments to IMO Conventions which were not yet in force the amendments were actually scheduled to come into force on a specific date (under the tacit amendment process)

and an amendment could be adopted in reasonable anticipation of the coming into force of the text which was being modified. In effect, the amendment was then to a text which was already in force. The fact that the IMSO Assembly has agreed to apply the 2006 amendments on a provisional basis does not alter the fact that hose amendments are not yet in force and therefore cannot be amended in their current form.

This is not to say that the IMSO Assembly could not consider and, if appropriate, adopt the proposed amendments subject to certain conditions. For example, the US proposals could be adopted with an explicit understanding that they would not come into force until some period (presumably 120 days as set in Article 19) after the date on which the 2006 amendments have entered into force; and, then, using the precedent of provisional application which has been agreed for the 2006 amendments, the amendments to expand the text for LRIT functions could also be the subject of provisional application (and provisional application of the 2006 amendments would be withdrawn). Alternatively, if the Us proposals make no substantive change but simply involve consequential re-numbering of the paragraphs in the 2006 amendments and are a total replacement of those amendments, then the IMSO Assembly could adopt the US "package" as amendments to the text of the Convention which is currently in force, subject to the following conditions: (a) the Assembly would withdrawn provisional application of the 2006 amendments and adopt a resolution calling on States not to adopt them; and (b) the Assembly would agree to apply the new set of amendments (i.e., the US package as adopted) on a provisional basis. Obviously, one important aim is to avoid a situation where two sets of incompatible amendments – even those involving editorial matters such as numbering – come into force.

We hope the above observations are helpful.

Yours sincerely,

[signed]
Dr Rosalie P. Balkin
Director, Legal Affairs and
External Relations Division