

## **Fifteenth meeting of the Noumea Convention**

### **Fifteenth ordinary meeting of the Contracting Parties to the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region and related protocols (Noumea Convention)**

Apia, Samoa  
29 August 2019

#### **AGENDA ITEM 7.1: Entry into force of protocols to the Convention**

##### **Purpose**

1. To evaluate the options for streamlining the entry into force of three instruments under the Noumea Convention:
  - The Protocol on Oil Pollution Preparedness, Response and Cooperation in the Pacific Region (the "Protocol on Oil Pollution");
  - The Protocol on Hazardous and Noxious Substances Pollution, Preparedness, Response and Cooperation in the Pacific Region (the "Protocol on HNS Substances"); and
  - The Amendment to the Protocol for the Prevention of Pollution of the South Pacific Region by Dumping (the "Amending Protocol").

##### **Background**

2. During the Conference of the Plenipotentiaries on 10 November 2006, the Parties to the Convention for the Protection of the Natural Resources and Environment of the South Pacific (Noumea Convention) adopted two new protocols as new instruments to implement the provisions of the agreement.
3. The two protocols, respectively the "Protocol on Oil Pollution" and the "Protocol on HNS Substances", constitute new commitments of the parties to take effective regional actions for the prevention of marine pollution from two specific clusters of pollutants: oil and hazardous and noxious substances. These two Protocols, once in force, will supersede the Emergencies Protocol.
4. In addition, the Amending Protocol was adopted in 2006. It amends the current Protocol for the Prevention of Pollution of the South Pacific Region by Dumping. It has not yet entered into force.
5. Members have informed the Secretariat that the administrative burden for ratifying the Protocols is high and have sought advice from the Secretariat as to whether there are alternate methods for bringing the instruments into force.

*Applicable provisions of the Convention*

6. Article 23 of the Noumea Convention establishes that Protocols to the Convention may be adopted by the Parties at conferences of plenipotentiaries. Article 29 states that the Convention and any protocol thereto shall be subject to ratification, acceptance or approval, as appropriate.
7. Article 24 provides for the procedure for the amendment of the Convention and any of its protocols. Under Article 24, an amendment to a protocol that is currently in force will only enter into force 30 days after receipt by the depositary for the Convention of instruments of acceptance by three-fourths of Parties to the Convention.

*The Amending Protocol*

8. The Amending Protocol, which amends a current protocol in accordance with Article 24, must be accepted, ratified or approved, in accordance with Article 29. Currently, in order to bring the Amending Protocol into force, ratification is required by 3/4s of Parties to the Protocol for the Prevention of Pollution of the South Pacific Region by Dumping.

*The Protocols to replace the Emergencies Protocols*

9. As the Protocol on Oil Pollution and the Protocol on HNS Substances are new protocols to the Convention, adopted under Article 23, they may be distinguished from the Amending Protocol. While they too currently require ratification, as they are new protocols and do not amend protocols already in force, additional options apply. Therefore, the options below apply only to the Protocol on Oil Pollution and the Protocol on HNS Substances.

**Action**

10. There are a number of options available to the Parties. These are set out below:

*Option 1: Amend the Convention to allow for the entry into force of Protocols by either tacit acceptance or definitive signature*

11. Tacit acceptance at international law is the process by which states become bound by new obligations through taking no positive action. In practice, it occurs when a new obligation comes into force and is binding on all parties from a specific date. Under some treaties, Parties may object to the new obligation, however all parties that have not objected are considered to have tacitly accepted the new obligation. The tacit acceptance procedure is the way in which new annexes to the Noumea Convention enter into force.
12. Definitive signature establishes the consent of the state to be bound by the treaty, without requiring ratification, acceptance or approval.
13. It is proposed that Parties may decide to amend the Convention to allow for new protocols to be adopted and enter into force by tacit acceptance or by definitive signature. Furthermore, any amendments to protocols could also be done by tacit acceptance or definitive signature (for example, this would allow for the Amending Protocol to also enter into force without ratification).

14. If the Parties were to decide to amend the Convention, a conference of plenipotentiaries would need to be convened (in accordance with Article 24). Parties would then be required to ratify the amended Convention in order to bring the amendment into force.
15. Following entry into force of the amendment to the Convention, the Protocols on Oil Pollution and HNS Substances could then be readopted under the new tacit acceptance procedure.
16. This process may take a number of years to complete. However, it would provide the opportunity to 'future-proof' the Convention and reduce the administrative burden on Parties in the case of the adoption of further additional protocols.

*Option 2: Re-adopt the content of two of the Protocols as annexes*

17. Article 25 provides for adoption and amendment of annexes to the Convention and to its Protocols. Under the Article, a new annex will enter into force for all Parties 100 days from the date of communication of the new annex by SPREP. Parties may however opt out of a new annex by notifying SPREP within 100 days of adoption of the annex.
18. One option available to Parties would be to re-adopt the two Protocols as annexes to the Convention. This would allow for entry into force to occur without Parties having to take any additional positive treaty actions (e.g. ratification, acceptance).
19. However, it is a matter for Parties to decide whether the content of the current Protocols would be suitable for an annex-level instrument:
  - A protocol is generally a treaty-level instrument that supplements, complements or otherwise adds to another treaty. A protocol is generally able to read as separate to the head-treaty to which it relates (though, this is not always).
  - An annex usually contains provisions integral to the direct subject matter of the treaty or elaborates on content found in the treaty. An annex is unlikely to be suitable to be read-alone.
20. In addition, the two Protocols are intended to replace the Emergency Protocol upon entry into force. If these Protocols were re-adopted as annexes to the Convention, the Emergency Protocol would need to be actively suspended or terminated.

*Option 3: Provisional Application*

21. The tension between the often urgent need for effective legal arrangements in modern international law and the much slower internal procedures for finalisation of commitment to treaties has led to the practice of provisional application of treaties. The two primary forms of provisional application are detailed below:

Provisional entry into force:

22. Under the Vienna Convention on the Law of Treaties 1969 (VCLT), a treaty may be provisionally applied by its Parties pending entry into force on agreement of the negotiating parties. Once a Treaty has entered into force provisionally, it is binding on the parties which agreed to bring it into force provisionally.

23. The nature of the legal obligations resulting from provisional entry into force would appear to be the same as the legal obligations in a treaty that has entered into force, as any other result would create an uncertain legal situation. It is the criteria for formal entry into force that have not been met, however the legal standard of the obligations remains (see Article 25(1) VCLT).
24. In order to effect this form of provisional application, the Parties may take a decision to bring either or both of the Protocols into force provisionally.

Provisional application of a treaty that has not entered into force:

25. Provisional application of a treaty that has not entered into force may occur when a state notifies that it would give effect to the legal obligations specified in that treaty provisionally. These legal obligations are undertaken by a conscious voluntary act of the state consistent with its domestic legal framework. Provisional application may be terminated at any time.
26. In contrast, a state which has consented to be bound by a treaty through ratification or definitive signature is governed by the rules on withdrawal specified in the treaty concerned (see Articles 54 and 56, VCLT).
27. To give effect to this form of provisional application, Parties may individually nominate to provisionally apply the provisions of either or both Protocols.

**Recommendations:**

28. It is proposed that Parties:
1. agree to bring the Protocols into force provisionally (Option 3) from 1 January 2020, while work is ongoing to formally bring the content of the protocols into international legal force.
  2. agree to discuss inter-sessionally the proposal to amend the Convention to allow for the tacit acceptance procedure (Option 1) to be used for the adoption of further protocols.
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