

FORTY-FOURTH CONSULTATIVE MEETING
OF CONTRACTING PARTIES TO THE
LONDON CONVENTION
&
SEVENTEENTH MEETING OF
CONTRACTING PARTIES TO THE LONDON
PROTOCOL
3-7 October 2022
Agenda item 11

LC 44/11
29 July 2022
Original: ENGLISH
Pre-session public release:

MATTERS RELATED TO THE MANAGEMENT OF RADIOACTIVE WASTES

Legal advice on the application of the London Protocol

Note by the Secretariat

SUMMARY

Executive summary: This document provides information and advice on the scope of the London Protocol, as requested by the Contracting Parties at LC 43 in 2021.

Action to be taken: Paragraph 23

Related documents: LC 43/11, LC 43/11/1, LC 43/11/2 and LC 43/17

Introduction

1 At their joint session in 2021, the governing bodies considered three submissions with respect to the Fukushima Daiichi Nuclear Power Plant in Japan, documents LC 43/11 (Greenpeace International), LC 43/11/1 (Republic of Korea) and LC 43/11/2 (Japan).

2 Following extensive discussion, the governing bodies requested the Secretariat to provide, inter alia, legal advice on the issue of the scope of LC/LP, in particular in relation to discharges from land-based facilities, to the next meeting of the governing bodies in 2022, while also noting the objection by Japan to the proposal to seek legal advice as requested, as well as the objection by the Republic of Korea, which had stated that the legal advice should focus specifically on the Fukushima Daiichi Nuclear Power Plant (LC 43/17, paragraphs 11.3 to 11.5).

Legal advice on the scope of LC/LP, in particular in relation to discharges from land-based facilities

Disclaimer and assumption

3 The legal issue to consider is whether the foreseen release or discharge of treated water from the Fukushima Daiichi Nuclear Power Plant into the ocean falls within the scope of

LC/LP. The following comments are provided with the understanding that they do not in any way pre-empt any final interpretation of the provisions of the London Convention or London Protocol, which remains the sole prerogative of the respective Contracting Parties to the treaties.

4 It is assumed that the foreseen release or discharge of treated water from the Fukushima Daiichi Nuclear Power Plant into the ocean would be via a pipeline from a land-based facility. The following two questions need to be considered: 1) whether the definition of "dumping" includes the disposal of waste through pipelines, and, in this context, 2) whether pipelines count as "man-made structures at sea" for the purposes of the definition of dumping. To be able to answer the first question, it is necessary to answer the second one first. The analysis will also consider the interpretation of the scope of the London Protocol, in particular with respect to articles 2 on "Objectives" and 3 on "General obligations".

Definitions of "dumping"

5 In article 1(4) of the London Protocol, "Dumping" means:

- .1 any deliberate disposal into the sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea;
- .2 any deliberate disposal into the sea of vessels, aircraft, platforms or other man-made structures at sea;
- .3 any storage of wastes or other matter in the seabed and the subsoil thereof from vessels, aircraft, platforms or other man-made structures at sea; and
- .4 any abandonment or toppling at site of platforms or other man-made structures at sea, for the sole purpose of deliberate disposal."

6 In the London Convention, "Dumping" is defined in article III(1)(a) as:

- "(i) any deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea;
- (ii) any deliberate disposal at sea of vessels, aircraft, platforms or other manmade structures at sea."

7 Under UNCLOS, "Dumping" is defined as:

- "(i) any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea; or
- (ii) any deliberate disposal of vessels, aircraft, platforms or other man-made structures at sea".¹

8 Based on the assumption that the foreseen release or discharge into the ocean would be via a pipeline, it can be inferred that it would not be carried out from a vessel, aircraft or platform. It is therefore necessary to consider whether such release or discharge would be considered to be from "other man-made structures at sea".

¹ The precise scope of the term "dumping" has been the subject of intense debate, despite of it being defined in these three instruments (and others international and regional treaties). The use of the words "at sea" was ambiguous in the London Convention, and several interpretative issues arose. The terms "at sea" after "disposal" in the definition in the London Convention were changed to "into the sea" in the London Protocol.

Definition of "sea"

9 In article 1(7) of the London Protocol, "Sea" means all marine waters other than the internal waters of States, as well as the seabed and the subsoil thereof; it does not include sub-seabed repositories accessed only from land.

Definition of "other man-made structures at sea"

10 The term "other man-made structures at sea" is not defined under the London Convention, nor under the London Protocol. The *Specific guidelines for assessment of platforms or other man-made structures at sea* (adopted in 2000) considered that the category of "other man-made structures at sea" "could include lighthouses, buoys, and offshore transfer facilities". The Revised guidelines, adopted in 2019, consider that they "could refer to other structures for which the Contracting Party requires a permitting procedure to abandon or dispose of, in accordance with domestic legislation or other relevant international obligations and taking into account the objectives of LP/LC in article 2 and articles I and II, respectively" (LC 41/17/Add.1, annex 8).

11 These references may indicate that pipelines are not considered man-made structures at sea. This is somewhat evidenced by article 1, paragraph 4.2.3 of the London Protocol, which, in the definition of what dumping does not include ("Dumping does not include abandonment in the sea of matter (e.g. cables, pipelines and marine research devices) placed for a purpose other than the mere disposal thereof") considers that "matter" includes the pipelines themselves, not the material that might be carried or dumped by them.

12 In addition, and more importantly, the London Protocol expressly excludes "sub-seabed repositories accessed only from land" from the definition of "Sea". By analogy, pipelines that are connected to land would also, strictly speaking, not be considered to be "at sea", although the discharged waste would be "into the sea".

13 Moreover, pipelines and outfall structures are specifically referred to in Article 207(1) of UNCLOS relating to pollution from land-based sources. Given this specific reference to pipelines in Article 207(1), and whilst it can only be inferred through a broad interpretation of Article 210 (on Pollution from dumping), the general rule of interpretation is that the specific trumps the general. It follows that pipelines and outfall structures attached to land may not count as "man-made structures at sea" and may therefore not be covered by the definition of dumping in LC/LP, but the authority to regulate them exists separately, in Article 207.

Relation to article 2 (Objective) and article 3 (General obligations)

14 Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), the general rule of interpretation provides that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Article 2 of the London Protocol (Objectives) refers to the obligation of protection and preservation of the marine environment from all sources of pollution to prevent, reduce and where practicable eliminate pollution caused by dumping or incineration at sea of wastes or other matter. Article 3(1) provides for the obligation to apply a precautionary approach. An analysis of the travaux préparatoires of the London Protocol shows that these articles were the object of lengthy discussions, in parallel with the development of the definition of "pollution". Both articles however are specific to dumping ("prevent, reduce and where practicable eliminate pollution caused by dumping or incineration at sea"; and "precautionary approach to environmental protection from dumping of wastes or other matter"). In addition, the wording of paragraphs 1 and 3 of article 3 refers to the principle "in implementing the provisions of the Protocol". In the discussions on the term "pollution", there were views that the

terms "substances or energy" may be more appropriate than "wastes or other matter" as part of the definition of "pollution" and that the terms "or energy" should also be included in the article on the precautionary approach. However, the Eighteenth Consultative Meeting agreed to follow the advice given by GESAMP that thermal energy or energy emitted by radioactive substances were very unlikely to be candidates for disposal at sea under the current terms of the [draft Protocol] and that, therefore, inclusion of "or energy" would probably not be essential, largely academic, and should therefore be deleted.²

15 The interpretation of LC/LP is a sole prerogative of its Parties and a broad application of the treaties was considered in the past. For example, during the discussions as to whether disposal of low-level radioactive wastes into a repository, constructed in bedrock either totally or partially beneath the sea, and accessed from shore (e.g. via tunnel or other conduit) would be "dumping at sea" under the terms of the London Dumping Convention, the delegation of Spain argued that the definition of dumping referred "not so much to the place from which the dumping is made as to the ultimate destination of the dumping. The object and purpose pursued by the Convention is the protection of the marine environment against pollution by dumping, irrespective of the means of dumping and the way in which it enters the sea. It is the idea of destination and not that of origin which characterizes dumping "at sea" in accordance with the terms of the Convention and with its object and purpose."³

16 It could be argued (like the Spanish delegation cited above) that the object and purpose pursued by the Convention and the Protocol are the protection of the marine environment against pollution by dumping, irrespective of the means of dumping and the way in which it enters the sea. However, that interpretation would contradict the general rules of interpretation between Article 210 and Article 207 of UNCLOS, described above. Again, this is a question of interpretation that should be left to the Contracting Parties.

17 In 2014, the Legal Affairs Office provided advice regarding the scope of LC/LP and its relationship with other international organizations and bodies, in relation to the issue of whether pipeline discharges from land were covered by the scope of LC/LP. The advice remarked that the jurisdictional "wall" between LC/LP and land-based sources was less clear than the jurisdictional "wall" between MARPOL and LC/LP, for example. From a legal point of view there seemed no direct borderline between the scope of the definition of dumping as in UNCLOS and LC/LP and the scope of article 207 of UNCLOS. Therefore, the Parties to LC/LP could decide that outfall pipes were "other man-made structures at sea" within the meaning of the definition of "dumping" in LC/LP and take action accordingly, either by amending the Convention to make such a distinction clear, or by a resolution.⁴

18 At the thirty-seventh Consultative Meeting of Contracting Parties to the London Convention, several delegations did not consider that the phrase "other man-made structures at sea" included outfalls, or that LC or LP were intended to cover discharges from outfalls. Addressing such discharges would be a major expansion of their scope. Several other delegations stressed the importance of the precautionary approach and that it was incumbent on the Parties to address this issue to protect the marine environment.⁵

² Document LC 18/11/Rev.1, paragraph 5.23.

³ Document LDC 12/6/2/Add.1.

⁴ Document LC 37/9/2.

⁵ Document LC 37/16, paragraphs 9.5 to 9.9.

Conclusion

19 As stated above and in previous advice provided by the Legal Affairs Office on the marine disposal of mine tailings, for example, the interpretation of the provisions of the London Protocol should remain the sole prerogative of the Contracting Parties. As provided above, there are arguments demonstrating that disposal from land through pipelines does not fall under the definition of dumping and is not within the scope of LC/LP. It is not certain that a broad interpretation of London Protocol would consider that such disposal would fall within the scope of the treaty.

20 UNCLOS, in Article 207, contemplates the discharge from pipelines and requires States to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources and to take other measures as may be necessary to prevent, reduce and control such pollution. However, no international instrument currently covers that pollution. LC/LP is not limited in its remit to the confines of the IMO Convention, that, under Article 1, only limits activities of IMO to pollution from ships. Therefore, nothing would prevent the Contracting Parties to the London Convention/London Protocol from adopting a new instrument covering land-based dumping into the sea and thereby filling a space currently unoccupied by other instruments.

21 During past discussions, some delegations had considered that although the discharge in question would not be considered dumping under the London Convention (at the time) and that the Convention would not apply, it was considered that the Meeting of Contracting Parties to the Convention could still be a forum to at least discuss these issues. The meetings of the Contracting Parties to the London Convention and the London Protocol have often given the opportunity to address issues not considered under the treaties, or not envisaged by the drafters at the time of drafting, but that would nevertheless need to be discussed with a view to finding a resolution to the issue at hand.⁶

22 When such questions of interpretations of the scope of the London Convention arose in the past, the Meetings of Contracting Parties used to convene an Ad Hoc Group of Legal Experts on Dumping to work on very specific questions.⁷ A similar process could be followed for the issue at hand.

Action requested of the governing bodies

23 The governing bodies are invited to take note of the information provided and to comment as they deem appropriate.

⁶ References to the several resolutions adopted in the framework of the London Convention and the London Protocol, including, for example, resolution LDC.40(13) on the protection of the oceans and all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas.

⁷ For example, when discussing the disposal into a sub-sea-bed repository of low-level radioactive wastes, the eleventh Consultative Meeting of Contracting Parties to the London Convention instructed the Secretariat to issue a circular asking for views and comments from Contracting Parties with specific questions, such as "Perspectives of contracting Parties as to whether the Consultative Meeting of Contracting Parties to the London Dumping convention is the appropriate forum to consider disposal of low-level radioactive wastes into a sub-sea-bed repository accessed from the sea, such as via a mobile platform, or fixed platform or artificial island" and "Perspectives of Contracting Parties as to whether disposal of low-level radioactive wastes into a repository, constructed in bedrock either totally or partially beneath the sea, and accessed from shore (e.g. via a tunnel or other conduit) would be dumping at sea under the terms of the London Dumping Convention."