The Ospar Convention and its Implementation: Radioactive Substances*

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As the source of the increasingly topical "zero discharge" issue, the Convention for the Protection of the Marine Environment of the North-East Atlantic – otherwise known as the OSPAR Convention – is starting to exert growing influence on the conditions under which certain industrial facilities are licensed and operated, particularly with regard to discharges from such facilities to rivers and the sea.

In this respect, the vast amount of work that has been undertaken and new texts adopted since the Convention was signed have led to a number of misconceptions or inconsistencies.

It would therefore seem timely to take stock of the impact of what might best be referred to as the OSPAR "corpus". This paper attempts to meet this objective by describing the main provisions of the OSPAR Convention (1) and the principal conclusions drawn from the meetings that have been held within its framework (2) with regard to the specific example of nuclear activities.

I. Main Provisions of the Convention

1. Historical overview

The OSPAR[1] Convention followed on from the Oslo and Paris Conventions. It may be recalled that the Convention for the Prevention of Pollution by Dumping from Ships and Aircraft, the Oslo Convention signed in February 1972, represented a major step forward in terms of official recognition of the hazards posed by pollution of the seas and oceans. A similar agreement, the Convention for the Prevention of Marine Pollution from Land-based Sources (transported by rivers or pipelines), known as the Paris Convention, was subsequently opened for signature in June 1974 and entered into force in 1978.

A meeting held in September 1992 between the two commissions responsible for administering the Oslo and Paris Conventions resulted in the merging and updating of the two conventions and the adoption of the Convention for the Protection of the Marine Environment of the North-East Atlantic, the OSPAR Convention, whose unifying and simplifying nature was heralded at the time in that all potential sources of pollution of the maritime area concerned were now covered by a single convention.

The OSPAR Convention, signed in Paris on 22 September 1992 and ratified by France on 29 December 1997, entered into force on 25 March 1998.

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1. OJEC No. C 172/1 of 07/07/95.

The Contracting Parties are Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom and the European Union.

2. General features of the Convention

It should first be noted that the Convention specifies from the outset, under Article 2 on general obligations, that the parties must comply with two principles already identified earlier in similar terms under international environmental law:

- the precautionary principle, which is defined separately in the Convention in the following terms: "preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects";

- the polluter pays principle, by virtue of which the "costs of pollution prevention, control and reduction measures are to be borne by the polluter".

Note should also be taken of the explicit reference in Article 3 to the use of best available techniques and "clean" technology in the implementation of programmes and measures aimed at meeting the objectives of the Convention.

Lastly, the right of access of the general public to information regarding the state of the maritime area and measures introduced in accordance with the Convention is formally laid down in the Convention (Article 9). Even though not identified as such, this right of access should be related to a more general principle, namely the right to information on the environment, which is starting to emerge with ever-increasing precision and clarity in international environmental law.[2]

Four annexes, which are an integral part of the Convention, cover specific domains. Annex I deals with the prevention and elimination of pollution from land-based sources; Annex II the prevention and elimination of pollution by dumping or incineration; Annex III the prevention and elimination of pollution from offshore sources; and Annex IV the assessment of the quality of the marine environment (the "quality status report" on the marine environment).

A fifth Annex was adopted at the ministerial meeting of the OSPAR Commission in 1998 which provides for measures relating to the protection and conservation of the ecosystems and biological diversity of the maritime area; it will enter into force once ratified by seven of the Contracting Parties.

With regard to its bodies, Article 10 of the Convention provides for creation of a Commission made up of representatives of each of the Contracting Parties. This Commission, which has a Secretariat based in London, superseded the Oslo and Paris Commissions. Responsible for administering the Convention and for drawing up strategies and international agreements in the areas covered by the Convention, the Commission is in fact the cornerstone for the monitoring and development of the Convention.

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2. See in particular the Aarhus Convention of 25 June 1998 on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, and the draft Directive by the European Parliament and the Council of 29 June 2000 with regard to public access to information on the environment.

Article 11 of the OSPAR Convention provides for the participation of observers, including non-governmental organisations (NGOs), in the work of the Commission. Observers are admitted by unanimous vote of the Commission and do not have the right to vote.

Observer status has been granted to governmental organisations such as the Organisation for Economic Co-operation and Development (OECD), the European Environment Agency (EEA) and the International Atomic Energy Agency (IAEA), to mention but a few examples, and to non-governmental organisations such as Friends of the Earth, Greenpeace International, WWF, the International Union of Producers and Distributors of Electrical Energy (UNIPEDE) and the European Council of Chemical Manufacturers' Federations (CEFIC).

3. The OSPAR Commission, the cornerstone for implementation of the Convention

The OSPAR Commission, the executive body within which each of the Contracting Parties has one vote, plays a central role in the monitoring and updating of the Convention. Responsible for supervising the implementation of the Convention, and more specifically for drawing up programmes and measures for the prevention and elimination of pollution and for the control of activities which may adversely affect the maritime area, it has the power in particular, under certain conditions, to take legally binding decisions. It is also the body which allows the Convention to evolve, through the adoption of amendments to the Convention or its Annexes or Appendices.

3.1 Powers of the Commission

In accordance with Article 13 of the Convention, the Commission can adopt two types of instrument, of differing legal force, namely: recommendations, which cannot under any circumstances be binding on the Contracting Parties; and decisions, which may be binding but only under certain specific conditions. Thus a decision is binding on the expiry of a period of 200 days after its adoption for those Contracting Parties that voted for it and that have not within that period given notification that they are unable to accept the decision, provided that at the expiry of the period three-quarters of the Contracting Parties have either voted for the decision and not withdrawn their acceptance or given notification in writing that they are able to accept the decision. Furthermore, such a decision is binding on any other Contracting Party which has given notification that it is able to accept the decision.

Decisions and recommendations are subject to the same procedure and in principle must be adopted by unanimous vote; should unanimity not be attainable, and unless otherwise provided in the Convention, the Commission may nonetheless adopt decisions or recommendations by a three-quarters majority vote of the Contracting Parties.

3.2 Changes to the Convention: amendments and new Annexes

Under Article 16, any amendment to the Convention put forward by one of the Contracting Parties may be adopted by unanimous vote of the Commission. An amendment that has been adopted under this procedure enters into force for those of the Contracting Parties which have ratified, accepted or approved it, on the thirtieth day after receipt by France of the ratification, acceptance or notification by at least seven of the Contracting Parties. These provisions also apply to the adoption of most of the Annexes to the Convention.

3.3 Reports submitted to the Commission

Under Article 22 of the Convention, the Contracting Parties are obliged to report to the Commission at regular intervals on the measures or decisions taken by them for the implementation of the Convention and on the effectiveness of such measures and, where appropriate, any problems they may have encountered in implementing the provisions of the Convention.

On the basis of these reports, the Commission can call for steps to be taken to ensure full compliance with the Convention and the decisions adopted for its implementation.

II. Annual Meetings of the Ospar Commission

The OSPAR Commission held a meeting on 22 and 23 July 1998 in Sintra, Portugal. As the Convention had entered into force on 25 March 1998, this was the first meeting to be held within the framework of the new Convention. The main outcome of the meeting was the adoption of a "statement" which had no legal force but which was to lend political momentum to the action of the OSPAR Commission.

The second meeting opened on 26 June 2000 in Copenhagen and resulted in a fierce debate over the cessation of spent nuclear fuel reprocessing activities.

1. Main outcomes of the Sintra meeting

1.1 The main consequences of the work accomplished at the 1998 OSPAR meeting were, on the one hand, the adoption of an Annex V to the Convention, on the protection and conservation of the ecosystems and biological diversity of the maritime area covered by the Convention and a related appendix, and, on the other hand, a decision to eliminate disused offshore installations.

Furthermore, the Commission adopted strategies and an associated action plan for the period 1998-2003 with a view to setting out the directions for its work in the following four main areas: eutrophication, hazardous substances, the protection and conservation of ecosystems and biological diversity, and radio-active substances.

The strategy in relation to radioactive substances thus constitutes the guiding principle for the future work of the Commission in this area. It is based on the general premise of preventing pollution of the maritime area from ionising radiation through progressive and substantial reductions of radioactive discharges, with the ultimate aim of achieving concentrations in the environment near background values or close to zero, depending upon the type of radioactive substance concerned. It should be noted that account must be taken of technical feasibility and radiological impacts in achieving this objective.

In addition, new rules were introduced on the participation of non-governmental organisations in the work of the Commission in order to organise the involvement of such organisations in all the work of the Commission's various bodies.

1.2 On 24 July 1998, the Environment Ministers of the Contracting Parties adopted – and it is this issue that has attracted the most attention from commentators – a statement now commonly referred to as the "Sintra statement". This statement makes mention in particular of two measures, based on French proposals. Firstly, the reduction of discharges of hazardous and radioactive substances; and secondly, a ban on the dumping of steel installations from offshore oil rigs.

The Sintra statement, which was widely reported in the media, has since its adoption been frequently cited in discussions on the lowering of rates of discharge of radioactive substances. Often quoted out of context, the statement has also occasionally given rise to some contentious interpretations, for which, it is only fair to say, the verbose and opaque wording of the statement is partly to blame.

The first issue to be addressed is that of the legal character of the statement. This issue is one of major importance given the way in which some commentators have maintained a degree of ambivalence by tending to treat the Sintra statement either purely and simply as an amendment to the Convention, or as a decision by the Commission which, having been adopted unanimously, is therefore binding on all the Contracting Parties.

In fact, the Sintra statement is neither a recommendation nor a decision as described *supra*, and even less so is it an amendment to the Convention. It should be viewed simply as a policy commitment that is not legally binding.

The second issue relates to the scope of the Sintra statement and the objectives it sets out.

Although primarily referred to in debates over the reduction of radioactive discharges from nuclear installations, it should be noted that the Sintra statement is not restricted solely to radioactive substances but also addresses hazardous substances in general.

With regard to the latter, the stated objective is to prevent pollution by continuously reducing discharges in order to achieve concentrations in the environment of near background values for naturally occurring substances and close to zero for synthetic substances. In addition to this general objective there is also a statement of intent to work towards achieving the complete cessation of discharges by the year 2020.

The stated objective with regard to radioactive substances is apparently the same, namely to achieve, through progressive and substantial reductions of discharges, emissions and losses of radioactive substances, concentrations in the environment near background values for naturally occurring radioactive substances and close to zero for artificial radioactive substances. Against this background, however, a number of issues need to be taken into account, of which technical feasibility and the radiological impacts to man and biota are by no means the least important.

At the same time, the statement also sets the objective of reducing radioactive discharges, by the year 2020, to a level where the additional concentrations resulting from the said discharges are close to zero.

In the final analysis, it appears from this series of provisions that the objectives that have been set, either in general or for the year 2020, are to achieve concentrations of artificial radioactive substances in the environment that are close to zero and not to achieve discharge levels that are close to zero. This objective must be met through a programmed reduction of radioactive discharges that takes account of criteria relating to technical feasibility and radiological impacts.

The concept of the impact of a discharge to man and to his environment would in this respect appear to be a major criterion in achieving the objective set, a criterion that must not be obscured through reference simply to the level of radioactive discharges or through reference solely to the notion of the concentration of radioactive substances.

2. Conclusions of the Copenhagen meeting

In addition to work on eutrophication, biodiversity and chemical substances used in offshore activities, the reprocessing of nuclear waste and discharges to the sea from nuclear reprocessing facilities were at the forefront of the discussions at the conference held on 26 to 30 June 2000 in Copenhagen.

Denmark and Ireland put forward draft decisions on the cessation of the reprocessing of spent fuel which, in view of their highly radical nature, met with major objections in principle, primarily from the French and UK delegations.

Discussions on the contested Danish proposal ultimately led to the adoption, by twelve out of the fifteen Contracting Parties, of OSPAR Decision 2000/1, a watered down version of the initial text, with regard to "substantial reductions and elimination of discharges, emissions and losses of radioactive substances, with special emphasis on nuclear reprocessing." This text, which in practical terms was aimed at reducing permitted releases from the reprocessing plants at Sellafield and Dounreay in the United Kingdom and at La Hague in France in particular, stated that "current authorisations for discharges or releases of radioactive substances from nuclear reprocessing facilities shall be reviewed as a matter of priority by their competent national authorities", with a view to, *inter alia*, implementing the non-reprocessing option (for example dry storage) for spent nuclear fuel management.

Neither France nor the United Kingdom voted in favour of OSPAR Decision 2000/1, nor did Luxembourg which was not present at the vote. This Decision is therefore not legally binding on these States, although Luxembourg will probably endorse it rapidly.

Apart from the Decision on reprocessing, other texts were finalised at the Copenhagen meeting but received less attention from the media. One example is the programme for the more detailed implementation of the OSPAR strategy with regard to radioactive substances,[3] which although adopted unanimously, simply sets out general directions and which in practice is merely a more formal restatement of the progress report on this strategy.

Lastly, the Quality Status Report 2000 for the North-East Atlantic (QSR 2000) was presented at a press conference organised on 30 June 2000. This report emphasises the efforts that still remain to be made, notably with regard to releases of hazardous substances and nitrates.

While the speed with which this Convention was ratified and entered into force – a feat sufficiently unusual in international environmental law to be worthy of note – cannot but be applauded, the difficulties encountered at the vote on OSPAR Decision 2000/1 with regard to the reprocessing of spent nuclear fuel clearly illustrates the limits to the initial consensus.

There can be little doubt that the contentious issues mentioned above will resurface at forthcoming meetings of the Commission under the pressure of diverging interests in a context in which feelings often run high.

3. Strategy adopted at the Sintra meeting.