

## NATIONAL INTEREST ANALYSIS

### Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973 (the “Intervention Protocol”)

#### Executive Summary

1. As an island nation dependent on shipping for the majority of its exports and imports New Zealand has a strong interest in the effective regulation of international and domestic shipping in its waters.
2. New Zealand is party to *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969* (the Intervention Convention), which came into force on 6 May 1975. The Intervention Convention affirms New Zealand’s right to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate danger to its coastline or related interests from oil pollution following a maritime casualty.
3. The *Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973* (Intervention Protocol) extends the regime of the Convention to incidents involving pollution by hazardous and noxious substances (HNS) other than oil. New Zealand signed the Intervention Protocol (the Protocol) on 2 November 1973, but has not yet become party.
4. New Zealand has already accepted the underlying principles of the Protocol, both as a signatory and as a party to the related Intervention Convention. Not being party to the Protocol places the country out of step with many major and likeminded States. It may also undermine New Zealand’s present position as a member of the Council of the International Maritime Organization (IMO).

#### Nature and timing of proposed treaty action

5. New Zealand became party to the Intervention Convention on 26 March 1975. The Convention affirms the right of States to intervene on the high seas in respect of oil pollution threats. It came into force internationally on 6 May 1975.
6. New Zealand signed the Intervention Protocol on 2 November 1973. The Protocol extends the regime of the Convention to incidents involving pollution by HNS other than oil. New Zealand has yet to ratify the Protocol, which came into force internationally on 30 March 1983.
7. It is proposed that New Zealand become party to the Intervention Protocol by depositing an Instrument of Ratification with the International Maritime Organization (IMO) following consideration of the Protocol and implementing its requirements in domestic law.
8. The Government intends to introduce legislation (through amendments to the Maritime Transport Act 1994) into Parliament in 2009 to permit compliance with the Protocol. If this legislation is passed, New Zealand could complete binding treaty action in 2010. The Protocol would enter into force in respect of New Zealand ninety days after the deposit on an Instrument of Ratification.

## **Reasons for New Zealand to become party to the Protocol**

9. The Intervention Protocol allows measures to be taken by the State against any sea-going vessel or craft to prevent, mitigate or eliminate danger to its coastline or related interests from HNS pollution (other than oil) following a maritime casualty. It also prescribes the limits to which a State may act; and provides for the settlement of any disputes arising in connection with the application of the Protocol. HNS includes a wide range of substances, including but not limited to hazardous chemicals, which may be carried by sea in bulk, such as LPG and tallow or in packaged form as Dangerous Goods in shipping containers. The substances covered are listed in an annex attached to the end of the Protocol.
10. New Zealand has already accepted the underlying principles of the Protocol, both as a signatory and as party to the related Intervention Convention. Only minor legislative changes will be required to meet Protocol requirements.
11. By becoming party to the Protocol New Zealand would have a greater range of response options to ensure the protection of its marine environment in the event of a maritime HNS incident.
12. There are no further costs associated with ratifying the Protocol (although intervention costs would be incurred should New Zealand elect to exercise its Protocol powers).
13. At present there are 52 parties to the Intervention Protocol including the following major and like-minded countries: Australia; Belgium; China; Denmark; Ireland; Italy; the Netherlands; Portugal; the Russian Federation; South Africa; Spain; Sweden; Switzerland; United Kingdom; and the United States.

## **Advantages and disadvantages to New Zealand of the Intervention Protocol entering into force and not entering into force for New Zealand**

### Advantages of treaty action

14. The Intervention Protocol is an important element in the IMO marine protection regime, of which New Zealand is a committed supporter. The advantages to New Zealand of ratifying the Protocol are:
  - the Protocol affirms New Zealand's right to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate danger to its coastline or related interests from HNS pollution following a maritime casualty; and
  - ratifying the Protocol would maintain New Zealand's good international standing and interests as a member of the IMO Council.

### Disadvantages of treaty action

15. There are no significant disadvantages to New Zealand in becoming party to the Protocol. While there is a potential risk of government liability if subsequent intervention measures are taken in contravention of the Protocol, this can be minimised by following Protocol procedures; for example consulting with independent experts before taking action.

### Disadvantages of not taking treaty action

16. Given New Zealand's role as a member of the IMO Council, a decision not to ratify the Protocol may undermine New Zealand's stated intention to be a good international citizen. This is particularly so in light of the number of major and like minded States that are

already party, and the time that has elapsed since New Zealand signalled its intent to become party.

### **Legal obligations that would be imposed on New Zealand by the treaty action**

17. The Intervention Protocol would not require New Zealand to undertake any action. New Zealand's opportunity to take action, if it wished, would be limited by the following legal obligations:
  - only taking such intervention action as is necessary, and after due consultations with appropriate interests; including, in particular, the flag State or States of the ship or ships involved, the owners of the ships or cargoes in question and, where circumstances permit, independent experts appointed for this purpose (Articles 1 and 2);
  - only exercising intervention powers (in the high seas) where a ship has suffered major damage and where there is a grave and imminent threat of harmful consequences to New Zealand's coastline, or related interests, from pollution (Article 1);
  - not taking intervention measures against any warship or other ship owned or operated by a State and used, for the time being, only on government non-commercial service (Article 2); and
  - paying compensation for damage caused by any intervention measures taken beyond those permitted in the Protocol (Article 2).

### Reservations

18. There is no provision in the Protocol for States to make a reservation when becoming party.

### Dispute Resolution

19. The Intervention Convention's existing dispute resolution procedures, set out in Article 7 of the Convention, also apply to the Protocol. The Convention provides that disputes may be settled by negotiation between the affected parties. In the event this is unsuccessful, either of the parties may request that a Conciliation Commission be established to examine the case and make a non-binding recommendation. The conciliation shall be deemed unsuccessful if either party does not accept the recommendation within 90 days of it being made.
20. Where conciliation is unsuccessful, a request for arbitration may be made within 180 days of the failure of the conciliation. The Arbitration Tribunal will consist of three members: one nominated by the coastal State that took the measures: one by the State the nationals or property of which have been affected by those measures; and a Chairman nominated by mutual agreement. The award of the Tribunal will be final and without appeal. The Parties shall immediately comply with the award.

### **Measures which the government could or should adopt to implement the treaty action**

21. There are no operational or administrative requirements to implement the Protocol. The only measure required is legislative amendment.
22. The Maritime Transport Act 1994 already provides substantive cover for most Protocol provisions within New Zealand continental waters. Article 1 of the Protocol can be covered by minor amendments to:
  - Part 19 (protection of marine environment from harmful substances);

- Part 20 (protection of marine environment from hazardous ships, structures and offshore operations);and
  - Part 21 (protection of marine environment from dumping, incineration, and storing of wastes).
23. Minor amendments to Parts 19 and 21 will also be required to ensure complete alignment with applicable definitions and terminology in Articles 2 to 9.
24. There will be suitable publicity when the rights and obligations of the Intervention Protocol come into force through the Maritime Transport Amendment Bill. No additional notification process is required.

### **Economic, social, cultural and environmental costs and effects of the treaty action**

#### Environmental

25. Ratifying the Protocol will allow for earlier intervention in a spill of substances other than oil, meaning that HNS pollution could potentially be avoided or significantly reduced before the spill impacts on New Zealand's coastal area.

#### Economic, Social and Cultural

26. No discernable economic, social or cultural costs or effects are expected as a result of ratifying the Protocol.

### **The costs to New Zealand of compliance with the treaty**

27. New Zealand legislation is already largely compliant with the Protocol and allows statutory intervention in HNS incidents within the country's continental waters. Therefore any implementation costs are expected to be minimal.
28. The Protocol has no direct compliance obligations or costs for the New Zealand shipping industry.
29. The Protocol does not require an intervention to be made. New Zealand does not have to intervene should such an action not be in the national interest. Intervention is only likely where the costs of intervention are expected to be offset by the benefits of an early intervention minimising the impact of HNS spills on New Zealand's coastal area.
30. While there is a potential risk of increasing government liability if any intervention is in contravention of the Protocol, this risk can be minimised through following Protocol procedures when taking any action.
31. The Protocol has no direct compliance obligations or costs for the New Zealand shipping industry.

### **Consultation with the community and parties interested in the treaty action**

32. Consultation with stakeholders was in the form of a discussion document *Four International Maritime Environmental Conventions/Protocols* released in November 2007. The Intervention Protocol was one of the Protocols covered in the document. Hard copies were sent to interested parties and the document was made available on the internet. A majority of the submissions agree that the Protocol is in the national interest, and support New Zealand becoming party. One submission argued that sufficient intervention powers already existed within the provisions of the Maritime Transport Act 1994.

33. The following government agencies were consulted: the Ministry for the Environment, the Ministry of Economic Development, the Ministry of Fisheries, the Ministry of Agriculture and Forestry, Treasury, New Zealand Customs Service, the Ministry of Civil Defence and Emergency Management, the Department of Internal Affairs, the Ministry of Justice, the New Zealand Defence Forces, the Ministry of Defence, the Department of Conservation, the Department of Labour, the Ministry of Tourism, the Ministry of Foreign Affairs and Trade, Te Puni Kōkiri, the Environmental Risk Management Agency, Maritime New Zealand, and the New Zealand Fire Service. The Department of the Prime Minister and Cabinet was informed.
34. No Māori concerns have been identified concerning the Protocol.

### **Subsequent protocols and/or amendments to the treaty and their likely effects**

35. The IMO may convene a conference for the purpose of revising or amending the Protocol at the request of not less than one-third of the Contracting Parties.
36. Article 3 of the Intervention Protocol introduces a 'tacit acceptance' procedure for the list of HNS whereby amendments are adopted by agreement of a two-thirds majority of the Contracting States to the Convention. This means that an amendment to the Protocol shall come into force automatically unless more than one-third of the parties to the Protocol make their objection known to the Secretary-General of the IMO. These amendments and the tacit acceptance procedure apply only to the list of substances other than oil covered by the Protocol.
37. Any proposal to revise the list would be submitted to the IMO and circulated to all IMO members and parties to the Protocol at least three months prior to consideration. Amendments are adopted by a two-thirds majority of Parties to the present Protocol present and voting. Any amendment shall be deemed to have been accepted at the end of a period of six months after it has been communicated, unless within that period an objection to the amendment has been communicated to the IMO by not less than one-third of the Parties to the present Protocol.
38. No amendments have been made to the main text of either the Convention or the Protocol since they came into force (respectively) in 1975 and 1983. Any substantive amendment would be considered on a case by case basis and subject to usual domestic approval process.
39. The Annex listing the HNS substances covered by the Protocol has been amended three times since the Protocol came into force, and is likely to be the subject of ongoing review (Article 3).

### **Withdrawal or denunciation provision in the treaty**

40. The Protocol may be denounced by any Party at any time after the date on which the Protocol enters into force for that Party. Denunciation would take one year, or longer as may be specified in the instrument of denunciation, after its deposit with the Secretary-General of the IMO (Article 7).

### **Adequacy Statement**

41. The Ministry of Transport confirms that this National Interest Analysis is adequate and that the principles of the Code of Good Regulatory Practice and the regulatory impact analysis requirements have been complied with.