



## IMCO

INTERNATIONAL CONFERENCE ON  
MARINE POLLUTION, 1973  
Agenda item 8

CONSIDERATION OF A DRAFT PROTOCOL RELATING  
TO INTERVENTION ON THE HIGH SEAS IN CASES  
OF MARINE POLLUTION BY SUBSTANCES OTHER THAN OIL

Note by the Secretariat

Attached hereto for consideration by the Conference is the text of the Draft Protocol and its Annex, together with comments received from Governments as at 8 October 1973.

DRAFT PROTOCOL RELATING TO INTERVENTION ON THE HIGH  
SEAS IN CASES OF MARINE POLLUTION BY SUBSTANCES  
OTHER THAN OIL

GENERAL REMARKS

SWEDEN

The heading of the Protocol should include the word "casualties".

UNITED KINGDOM

Only those States which are Parties to the 1969 Convention should be able to become Parties to the Protocol.

DRAFT TEXT

REMARKS

DRAFT PROTOCOL RELATING TO INTERVENTION ON THE  
HIGH SEAS IN CASES OF MARINE POLLUTION BY  
SUBSTANCES OTHER THAN OIL

Preamble

The States Parties to the present  
Protocol,

Being Parties to the International  
Convention relating to Intervention on  
the High Seas in Cases of Oil Pollution  
Casualties, (hereinafter referred to as  
"the Convention") done at Brussels on  
29 November 1969, <sup>1/</sup>

Taking into account the resolution  
on International Co-operation concerning  
Pollutants other than Oil adopted by the  
diplomatic conference in Brussels at the  
same time,

Further taking into account that  
pursuant to the resolution, the Inter-  
Governmental Maritime Consultative

France

Paragraph 2

The French Government favours the deletion  
of this paragraph, which needlessly restricts  
the scope of the Convention. It is not in  
fact necessary to establish a link between  
pollution by oil and pollution by other  
noxious substance since two legal instru-  
ments can be independent of each other. An  
autonomous text which could either adopt the  
provisions of the 1969 Convention or make  
express reference to them would have the  
advantages, by opening the Convention to all  
States, of making it apply to a larger  
number of vessels, thus assuring better  
protection of the coastlines.

Organization has intensified its work, in collaboration with all interested international organizations, on all aspects of pollution by agents other than oil,

Have agreed as follows :

Article I

1. Parties to the present Protocol may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline<sup>2/</sup> or related interests from pollution or threat of pollution<sup>3/</sup> by substances other than oil following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.

2. Substances other than oil as referred to in paragraph 1 shall be :

- (a) those substances enumerated in a list annexed to the present Protocol. This list shall be maintained by the Maritime Safety Committee which shall

Article I

Sweden

Paragraph 2

The text of this paragraph should be worded along the lines of footnote 5(1).

France

Paragraph 2(a)

In the terms of this subsection, any amendments to the list of noxious substances will be adopted by the Maritime

communicate all amendments to the list to Parties to the present Protocol and to Members of the Organization.<sup>4/ 5/</sup>

- (b) these other substances which are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.

3. Whenever an intervening Party takes action with regard to a substance not included in the list referred to in paragraph 2(a), that Party shall in addition to establishing that the conditions set out in Article I of this Protocol have been satisfied<sup>6/</sup>, have the burden of establishing that the substance had under the circumstances present at the time of the intervention the characteristics of a substance as described in paragraph 2, sub-paragraph (b) above.<sup>5/</sup>

- 1/ The Committee observed that if it were decided that States which are not Parties to the 1969 Convention might become Parties to the Protocol this paragraph should be deleted.
- 2/ Some delegations favoured the insertion here of the phrase "areas under their jurisdiction" as an alternative to the words "their coastline".

Safety Committee and then "communicated" to the States Parties. The French Government cannot accept this amendment procedure insofar as it is not specified that these amendments will not bind States which declare them unacceptable. Any decisions taken by the Maritime Safety Committee must be approved either expressly or tacitly by the Contracting Parties; in the latter case provision should be made in the text of the Protocol for an approval period of about six months following receipt of the notification by the Government concerned.

#### Paragraph 3

The French Government proposes the following words : Any Party may take such exceptional action as is provided for in paragraph 1 with regard to any one of the substances referred to in sub-paragraph 2 b). In such a case that Party shall be responsible for establishing that it has satisfied the conditions laid down in paragraph 1 and in sub-paragraph 2 b).

#### Sweden

##### Paragraph 3

The text of this paragraph should be worded along the lines indicated in footnote 5(i). In this paragraph reference should be made to "paragraph 1" instead of "Article 1 of this Protocol".

#### United Kingdom

##### Paragraphs 2(b) and 3

The United Kingdom Government prefers the alternative text of Article I, paragraph 2(b) and 3, set out in footnote 5(ii), without the words in brackets. It is not enough to prove that a substance

3/ Some delegations were in favour of maintaining the words "of the sea" as they appear in the 1969 Convention in order to indicate clearly that the Protocol would not go beyond the objective of this Convention. Other delegations on the other hand were of the view that it would be undesirable to refer only to pollution of the sea. In their view it was necessary in relation to substances other than oil, to allow for the possibility of damage arising from pollution of the atmosphere, for example.

4/ (i) Some delegations preferred the following text of paragraph 2(a):

"(a) those substances enumerated in a list established and maintained by the Maritime Safety Committee and communicated to Contracting Parties to the present Protocol and to Member States of the Organization."

These delegations expressed the opinion that the Maritime Safety Committee should, immediately after the adoption of the Protocol, prepare and establish the list referred to, and that a resolution be passed by the diplomatic conference asking the Maritime Safety Committee to accomplish this task, taking also into account the views of other competent international organizations.

may have the characteristics set out in paragraph 2(b) of the main text, what is important is whether a non-listed substance in view of the quantity in which it is present, or the particular conditions in which it may be spilled, can cause grave and imminent danger of a kind such as would be expected from a listed substance.

#### France

##### Footnote 3

The French Government is in favour of retaining the words "of the sea" as they appear in the 1969 Convention, as pollution of the atmosphere on the high seas need not be a "grave and imminent danger" to the coastlines. On the other hand the measures to be taken should not be generalized and should remain exceptional courses of action.

- (ii) Some delegations proposed an additional sentence to be added to sub-paragraph (a) to the effect that criteria qualifying substances to be included in the list should be set out in the introduction to such a list.
- (iii) One delegation stated in its understanding, the right of the Maritime Safety Committee to maintain the list did not imply the power of the Maritime Safety Committee to change the list without reference to the Parties to the Protocol.
- (iv) One delegation observed that, in maintaining the list to be annexed to this Protocol, representatives of States Parties to it but not Members of the Maritime Safety Committee should participate in that Committee. Another delegation was of the opinion that only States Parties to the Protocol should be entitled to propose and adopt amendments to the list, and that these States should be convened in a committee of revision for the purpose.
- 5/ (i) Some delegations considered that the "list clause" and "general clause" concepts should be combined in a single paragraph 2 with the "general clause" concept taking precedence. Paragraphs 2 and 3 would then read :

- "2. 'Substances other than oil' means those substances which are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or interfere with other legitimate uses of the sea, including but not limited to those substances enumerated in a list annexed to the present Protocol. This list shall be maintained by the Maritime Safety Committee which shall communicate all amendments to the list to Parties to the present Protocol and to Members of the Organization.
3. Whenever an intervening Party takes action with regard to a substance not included in the list referred to in paragraph 2, that Party shall in addition to establishing that the conditions set out in Article I of this Protocol have been satisfied have the burden of establishing that the substances had under the circumstances present at the time of the intervention the characteristics referred to in paragraph 2 above."



(ii) Some other delegations proposed the following alternative text for paragraphs 2(b) and 3, differing in principle from that contained in the text of the Draft Protocol and also from the alternative text appearing in footnote 5(i):

"2.(b) those other substances capable under the prevailing circumstances of posing a grave and imminent danger analogous to that posed by any of the substances enumerated in the above list.

3. Whenever an intervening Party takes action with regard to a substance referred to in paragraph 2(b) that Party shall, in addition to establishing that the conditions set out in Article I of this Protocol have been satisfied, have the burden of establishing that the substance under the circumstances present at the time of the intervention could reasonably pose a grave and imminent danger analogous to that posed by any of the substances enumerated in the list referred to in paragraph 2(a)."

6/ Some delegations raised doubts as to the precise scope of paragraph 3 and, in particular, the precise scope of the burden of proof specified therein. These delegations considered that the terms

used in the paragraph were general and even vague, and did not specify that the State which intervened on the high seas in respect of a substance not on the list Annexed to the Protocol would be required to prove that the general conditions laid down in the paragraph 1 of Article I of the Protocol had been satisfied. In order to express this idea they proposed that the words within square brackets should be inserted in the paragraph. Other delegations considered that this addition would be superfluous. Moreover, some of these delegations felt that apart from being superfluous, such an addition could, by a process of a contrario reasoning, cause interpretations contrary to the spirit of Article I, paragraph 1 of the Protocol and Article I of the Convention.

## Article II

1. The provisions of paragraph 2 of Article I and Articles II to VIII of the Convention and the Annex thereto as they relate to oil shall be applicable with regard to the substances referred to in Article I of this Protocol.

2. For the purpose of this Protocol the list of experts referred to in Articles III(c) and IV of the Convention shall be extended to include experts qualified to give advice in relation to substances other than oil. Nominations to the list may be made by Member States of the Organization and by Parties to this Protocol.

### Note

Some delegations favoured the insertion of an Article to the effect that Masters of ships carrying substances as specified in the list referred to in Article I, paragraph 2(a), should as soon as possible report any maritime casualty likely to present such a danger as referred to in Article I. The report should be sent to the State most likely to be affected by the danger. Upon receipt of such information a Contracting State should at the request of the ship use its best endeavours to assist in preventing, mitigating or eliminating the danger.

It was, however, felt by the majority of the Legal Committee that such an Article, while appropriate in a convention for preventing pollution of the sea, would not be appropriate in an instrument of this type.

## Article II

### Sweden

#### Note

An Article should be inserted covering the idea indicated in the note.

### France

#### Note

A provision such as this would indeed be appropriate in a convention for preventing pollution or co-operating in pollution control, but it seems dangerous and its scope seems ill-defined in the present Protocol. In fact it would risk involving a generalisation of the measures of intervention, solely from the point of view of the reports submitted by ships' Masters. On the other hand what could be the responsibility of a Master who had failed to give notice of a casualty likely to present a danger?

ANNEX TO THE PROTOCOL

LIST OF SUBSTANCES OTHER THAN OIL AS  
REFERRED TO IN ARTICLE I(1) OF THE  
DRAFT PROTOCOL\*

Substances included in this list are those which are highly hazardous to human health as expressed by a LD<sub>50</sub> (p.o.) less than 5 mg/kg, or which are highly toxic to aquatic life as expressed by a TL<sub>m</sub> less than 1 ppm.

Substance	UN Number
Acetyl chloride	1017
Acrolein	1092
Acrylonitrile	1093
Aldrin	-
Azinphos methyl - Guthion	-
Cadmium chloride	-
Carbaryl - Sevin	-
Carbon disulphide	1131
Chlorine	-
D.D.T.	-
Dimethoate - Cygon	-
Endosulphan - Thiodan	-
Endrin	-

REMARKS

Sweden

The list contained in the annex to the Protocol is to be considered as an example. It should be completed.

United Kingdom

Having studied the draft Protocol and the views of the group of experts given in the footnote to the Annex the United Kingdom Government remains of the opinion that the formula proposed by the Legal Committee of using a list coupled with a provision for intervention even in respect of non-listed substances, offers the best prospect of wide international agreement. With regard to the comments of the group of experts, the United Kingdom Government considers that in the drawing up of a list it is proper to have regard only to criteria relating to the characteristics of the cargo itself. The other two criteria mentioned by the group of experts, relating to the environment and the casualty, are not appropriate to the drawing up of the list but to the question of whether, in the circumstances of the case, the preconditions for intervention under Article I of the Protocol apply.

Such considerations suggest the listing of a small number of substances which would be likely to create a grave danger of

Ethyl parathion	-
Lindane - gammexane, BHC	-
Malathion	-
Mercuric acetate	-
Mercuric chloride	-
Mercuric sulphate	-
Mercury alkyl	-
Parathion	-
Phosphorus - elemental	1338
Potassium cyanide	-
Toxaphene	-
2,4 - D	-

pollution in almost any circumstances; and the list proposed by Sweden accords with this concept. There could, however, be advantage in including in the list some of the most serious pollutants which are normally carried in bulk.

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\* The following list of substances was prepared and submitted to the Legal Committee by the delegation of Sweden and was examined, insofar as time would permit, by certain of the experts concerned in evaluating the hazards of noxious substances for the purposes of Annex II to the Draft International Convention for the Prevention of Pollution from Ships, 1973. The views of these experts, which should be regarded as preliminary, are as follows :

"In the development of any such list from a technical point of view, three main groups of criteria must always be borne in mind. These are :

1. Those relating to cargo : physical and chemical characteristics, e.g. state, solubility, specific gravity, vapour

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pressure, toxicity to humans,  
toxicity to fish, liability to bio-  
accumulation.

2. Those relating to environment, such as geographical location especially in relation to population centres, fishing grounds, hydrographical conditions such as depth of water, currents, nature of sea bed, etc., meteorological conditions such as wind and sea state, stable or unstable atmospheric conditions, etc.; biological factors such as proximity to commercial fishing grounds, fish nursery areas, etc. Nature of probable damage - chronic or acute, size of fish kill, etc., manner and effect of intended intervention.
3. Those relating to the casualty, such as :
  - (a) Cargo quantity: whether bulk or package, type of package, position of stow, etc., rate of actual or expected release and expected duration of release.
  - (b) Type of casualty: collision, stranding, fire, etc., safety of crew, likelihood of salvage of ship or cargo.

It is apparent that all these factors are intimately related.

In reviewing the list of substances proposed by Sweden it appeared that consideration had only been given to the toxicological properties of substances as they relate to human health and aquatic life. Such properties only relate to part of the first group of criteria to be evaluated.

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The experts concluded that many of the factors necessary for a proper evaluation cannot be known until the incident occurs, and that any list of substances however derived cannot satisfy the variety of interrelated factors needed for such evaluations.

The experts further concluded that a listing of substances could be developed which would be illustrative of the type of substances which may come within the scope of the Protocol; however, this list by necessity should contain practically all noxious and hazardous substances transported, i.e. most products listed in Appendices 2 and 3 of Annex II, and most products listed or controlled by the IMCO Dangerous Goods Code."

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