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INTERNATIONAL CONVENTION ON LIABILITY AND COMPENSATION FOR DAMAGE IN CONNECTION WITH THE CARRIAGE OF HAZARDOUS AND NOXIOUS SUBSTANCES BY SEA

DEPOSITING INSTRUMENTS OF RATIFICATION WITHOUT ACCOMPANYING CONTRIBUTING CARGO REPORTS AND COMMON RATIFICATION OF THE HNS CONVENTION

Submitted by Canada, Denmark, Finland, France, Germany, The Netherlands,
Norway, Sweden and the United Kingdom

Summary:	This document provides an update on work undertaken since the Assembly's 12th extraordinary on the issue of non-reporting of contributing cargo upon submission of an instrument of ratification to the HNS Convention and annually thereafter, and on the issue of a common ratification date across States.
Action to be taken:	Information to be noted.

1 Introduction

- 1.1 The HNS Convention (HNSC) aims to ensure adequate, prompt and effective compensation for damage caused by the maritime transport of hazardous and noxious substances. To this end, the HNSC establishes a 'two-tier' compensation regime. The first tier is provided by the shipowner through compulsory insurance under Chapter II of the HNSC. The second tier is provided by the HNS Fund under Chapter III of the HNSC.
- 1.2 Article 45 of the HNSC requires States to deposit an instrument of ratification to the Secretary General of the International Maritime Organization (IMO). Article 43, provides that, upon depositing an instrument of ratification, States must submit contributing cargo reports for receipts of HNS for the preceding calendar year. Before the Convention can enter into force, Article 46 requires twelve States to deposit instruments of ratification according to the provisions in Article 43.
- 1.3 Since the HNSC was agreed at the Diplomatic Conference in 1996, nine states^{<1>} have deposited instruments of ratification. However, only two States submitted contributing cargo reports at the time of, or shortly after, ratification, as required by Article 43.
- 1.4 At the June 2007 session of the 1992 Fund Administrative Council, acting on behalf of the Assembly, four HNSC related documents were submitted by States. Three of these documents sought to resolve three major outstanding issues which, in the view of some of the delegations that participated in the discussion, presented obstacles to their ratification of the HNS Convention. The documents proposed:

<1> Angola, Cyprus, Morocco, the Russian Federation, Slovenia, Saint Kitts and Nevis, Samoa, Tonga and Lithuania.

- To ensure contributions are made to the LNG account when a titleholder is based in a non State Party (document 92FUND/A/ES.12/1);
 - A common definition of receiver to be applied across States Parties to the HNSC (document 92FUND/A/ES.12/2);
 - A solution to the problem of non reporting of contributing cargo upon submission of an instrument of ratification to the HNS Convention and annually thereafter. This document included a proposal for an IMO Assembly Resolution (document 92FUND/A/ES. 12/4).
- 1.5 On two of the three above mentioned documents (92FUND/A/ES.12/2 and 92FUND/A/ES. 12/4), the Administrative Council did not reach consensus. Consequently, the States which submitted the documents along with other interested parties, agreed to continue their work and to provide an update on these outstanding issues and to report to the October 2007 session of the Assembly.
- 1.6 Regarding the issue of ratifications submitted without accompanying contributing cargo reports, the Administrative Council's Record of Decisions^{<2>} shows that the observer delegation of IMO recognised that compliance with the reporting obligations in the Convention was crucial for its entry into force and emphasised the need for compliance with international treaty law as regards the role and function of the depositary. That delegation felt that rejection of any ratification submitted in due and proper form was not an action that the depositary could lawfully take, as such action was not compatible with the text of the HNSC or with international treaty law on depositary practice.
- 1.7 The Administrative Council invited those delegations who had expressed an interest in this issue to further explore possible solutions to the problem of non-reporting in conjunction with IMO, the IOPC Funds Secretariat and other interested delegations, with a view to making proposals to the October sessions of the 1992 Fund Assembly and of the IMO's Legal Committee.
- 1.8 Another document was submitted to the 3rd session of the Administrative Council in June 2007. This document considered a proposal for a common ratification date across a number of States (document 92FUND/A/ES.12/9/3). As the passage of this document was dependant on consensus being reached on the other outstanding issues, it was not discussed, but it was recommended that the issue should be brought before the Assembly at a future date. Accordingly the Administrative Council agreed that the document could be resubmitted for further consideration^{<3>}.

2 Intersessional work

- 2.1 Further work on the Convention's reporting requirements has been carried out by the sponsors of this document who have sought to find workable and practical pre ratification solutions to this difficult problem. In order to obtain further information from IMO on its role as depositary the sponsors invited the United Kingdom to write to the IMO's Legal Division on their behalf seeking further clarification on the role and function of the depositary. A redrafted IMO Assembly Resolution was also attached for IMO comment. The Legal Division also kindly submitted an alternative Resolution (annexed) for the sponsors to consider.
- 2.2 The IMO's legal division replied to the letter from the sponsors as follows:

I confirm the advice which I gave interested parties at the IOPC Fund meeting in Montreal, Canada, in June 2007, to the effect that, by accepting and circulating instruments of accession which were not accompanied by the information on contributing cargo required under article 43 of the HNS Convention, the Secretariat has acted in accordance with its obligations pursuant to article 53 of the treaty, as well as pursuant to article 77(1) (d) and (e) of the Vienna Convention on the Law of Treaties, 1969, for the following reasons:

<2> 92FUND/AC.3/A/ES.12/14 paragraphs 9.16 and 9.17.
 <3> 92FUND/AC.3/A/ES.12/14 paragraph 9.18.

- IMO's obligations pursuant to article 53(2)(a)(i) of the 1996 HNS Convention as well as article 77(1) (e) of the Vienna Convention are to inform all IMO Member States of each new signature or deposit of an instrument of ratification, acceptance, approval or accession together with the date thereof;
- Pursuant to article 77(1)(d) of the Vienna Convention, IMO, as depositary, is required to examine whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bring the matter to the attention of the State in question. However, as the International Law Commission had noted in its commentary on this provision (1966 (II) Yearbook of the ILC, p269), this is the limit of the depositary's duty in this connection - it is no part of the depositary's functions to adjudicate on the validity of the instrument;
- The instruments of accession received were examined and found to be in due and proper form; and, accordingly, there was no legal ground for the Secretariat to refer them back to the depositing State, or to refuse to accept and circulate them. In fact, quite the contrary - had the Secretariat done so, it would have been acting in breach of its duties as depositary;
- Although article 43 of the HNS Convention requires States, when depositing an instrument of ratification or accession, to submit to the Secretary-General information on receipts of relevant cargo, the omission or failure to do so does not invalidate the expression of consent to be bound by the Convention which is exercised by the deposit of such instruments pursuant to article 45- I note in this connection that paragraph 3 of article 45 provides that 'ratification, acceptance, approval or accession *shall be effected* by the deposit of an instrument to that effect with the Secretary-General' (emphasis added). This leaves no room for discretion on the part of the depositary.

- 2.3 Conscious of this situation, on 1 July 2005 and, again, on 27 July 2007, the Secretariat wrote to those HNS Contracting States, which had not submitted information on contributing cargo, reminding them of their obligations under Article 43 of the HNS Convention. The Secretariat has also issued a Circular Letter to all States (Circular Letter HNS.1/Circ.8, dated 19 July 2007), as a reminder of the entry into force conditions in Article 46 of the HNS Convention and to point out the serious consequences of non-compliance with the reporting obligation.
- 2.4 In light of the IMO Legal Division's response to the letter submitted by the United Kingdom, the sponsors of this document have decided not to submit the Resolution on the grounds that it does not provide an appropriate solution to the problem of non-reporting of contributing cargo upon submission of an instrument of ratification to the HNSC.

3 Harmonised date for ratification

- 3.1 As the issue of non-reporting of contributing cargo upon submission of an instrument of ratification to the HNSC and annually thereafter is still unresolved, the sponsors of this document have decided that it would not resubmit document 92FUND/A/ES.12/9/3 at this stage. That document sought to establish a common date for ratification.
- 3.2 Due to the present situation regarding the non-submission of cargo reports upon ratification or thereafter, some of the States who have shown interest in the HNSC and who are likely to be major contributors have to take into consideration that it may be necessary for them to defer ratification until such time as there is evidence of sufficient contributing cargo to the general account so as to ensure that no single State's industry bears exceptionally high and disproportionate economic burdens compared to other contracting States. However, despite this, some States have expressed a desire to continue with their ratification process.

4 Action to be taken by the Assembly

The Assembly is invited to note the information contained in this document.
