



## CONSIDERATION OF A DRAFT TEXT OF A PROTOCOL TO THE HNS CONVENTION

### REPORT OF THE CHAIRMAN OF THE HNS FOCUS GROUP

#### Note by the Chairman of the HNS Focus Group

**Summary:**

This report of the June 2008 meeting of the HNS Focus Group contains a summary of the key decisions of the Group. A list of amendments to the draft text of the Protocol (document 92FUND/WGR.5/10 and 92FUND/A/ES.13/5/1) decided by the Group is contained in the Annex.

A full report of the meeting, containing a detailed account of the discussions in the HNS Focus Group, will be prepared for circulation after the meeting, in accordance with normal practice.

**Action to be taken:**

Decide whether to instruct the Director to submit the text of the draft Protocol, to the Secretary-General of IMO requesting him to refer it to the Legal Committee with a view to convening a Diplomatic Conference to consider the draft Protocol at the earliest opportunity.

### **1 Introduction**

- 1.1 At its 12th session held in October 2007 the Assembly decided to establish a Working Group ('the HNS Focus Group') with the aim of facilitating the entry into force of the HNS Convention and with the mandate set out in the Annex to document 92FUND/WGR.5/9.
- 1.2 In accordance with paragraph 1.4 of the Terms of Reference, the HNS Focus Group was invited to develop a draft text of a protocol to the HNS Convention and to make recommendations to the Assembly upon the completion of its work, ideally at an extraordinary session of the Assembly to be held in June 2008.

### **2 Considerations of the HNS Focus Group**

- 2.1 At the second meeting of the HNS Focus Group, held in June 2008, the Group considered a draft text of a Protocol to the HNS Convention which had been revised in the light of the discussions at its first meeting in March 2008 (document 92FUND/WGR.5/10).

*Amendments to the text of the draft Protocol*

- 2.2 The HNS Focus Group considered proposals by IMO to amend the text of Article 1 of the 1996 HNS Convention (definition of HNS) and Article 16 of the draft Protocol (signature, ratification, acceptance, approval and accession), as set out in documents 92FUND/WGR.5/10/2 and 92FUND/WGR.5/10/3. The Group decided to amend the text of the draft Protocol (document 92FUND/WGR.5/10 and 92FUND/A/ES.13/5/1) as set out in the Annex, subject to any change that might be necessary in respect of Article 1, paragraph 5(a)(vii) of the Convention being agreed between the Secretariats of the IOPC Funds and IMO.
- 2.3 The HNS Focus Group also considered proposals by Germany and the European Chemical Industry Council (CEFIC) in respect of the concept of receiver (documents 92FUND/WGR.5/12/1 and 92FUND/WGR.5/12). The Group decided not to adopt these proposals.
- 2.4 The HNS Focus Group recalled that at its first meeting it had decided to delete Article 5, paragraph 5 of the Convention but to revert to the question of whether the whole of Article 5 should be deleted at its next meeting and to make a decision then, when delegations had had more time to consider the matter (document 92FUND/WGR.5/8, paragraph 7.13). The Group decided not to delete the whole of Article 5.

*Contributions to the LNG Account*

- 2.5 The HNS Focus Group considered documents containing proposals to amend the text of the draft Protocol in respect of contributions to the LNG Account submitted by Italy, Japan and the Republic of Korea (document 92FUND/WGR.5/11/1), Singapore (document 92FUND/WGR.5/11/2) and the International Group of Liquefied Natural Gas Importers (GIIGNL) (document 92FUND/WGR.5/11).
- 2.6 The HNS Focus Group noted that the proposals contained in the three documents had in common the concept of the titleholder being the primary person liable for contributions to the LNG Account, with the receiver being liable in certain circumstances as a fallback.
- 2.7 After a lengthy discussion, the HNS Focus Group decided to maintain the current wording of Article 7 of the text of the draft Protocol, ie that the person liable for contributions to the LNG Account would be the receiver as defined in Article 1.4 of the Convention. However, the Group noted that, whilst the majority of the Group was in favour of maintaining the current wording, a substantial number of delegations supported the concept of the titleholder being the primary person liable for contributions.
- 2.8 The Focus Group noted that the differences between the two sides were of a political, economic and policy nature and not just a matter of drafting. The Group further noted that it was essential for efforts to be made to bridge the gap between the two sides in order to reach a consensus on this issue quickly. It was noted that failure to reach a consensus by the time of the meeting of the Legal Committee in October 2008 could threaten the viability of the Protocol, since the Legal Committee could only decide to recommend holding a Diplomatic Conference with the aim of adopting a Protocol if it were clear that there would be a good chance of success.
- 2.9 It was noted that a revised proposal on this issue could be considered by the Legal Committee at its October 2008 meeting. Delegates were reminded that any such proposal would have to be submitted to the IMO Secretariat in accordance with the Committee's deadlines, ie that basic and bulky documents (over six pages of text) should reach the IMO Secretariat not later than Friday, 15 August 2008 and all other documents, including information documents, not later than Friday, 19 September.

*Submission of the Protocol to the Assembly*

- 2.10 The HNS Focus Group decided to submit the text of the draft Protocol, as described in paragraph 2.2, to the Assembly for consideration at its June 2008 session. The Group also decided to invite the Assembly to authorise the Director to finalise the text of the draft Protocol, retaining such footnotes as he considers useful for information purposes. The Group further decided to invite

the Assembly to instruct the Director to submit the text of the draft Protocol to the Secretary-General of IMO requesting him to refer it to the Legal Committee with a view to convening a Diplomatic Conference to consider the draft Protocol at the earliest opportunity.

- 2.11 The HNS Focus Group also decided to invite the Assembly to instruct the Director to bring the following topics, which fell outside the mandate of the Focus Group but where consideration of amendments to the Convention by IMO's Legal Committee might be beneficial, to the attention of the Secretary-General of IMO:
- The time periods for the amendment procedure in Article 48, which might be brought into line with Article 24 of the Supplementary Fund Protocol.
  - The entry into force conditions in Article 46, since these will be crucial to ensuring the successful entry into force of the Convention.
- 2.12 The HNS Focus Group noted that a full report of the meeting, containing a detailed account of all the discussions in the HNS Focus Group, would be prepared for circulation to delegations after the meeting, in accordance with normal practice.

### **3 Action to be taken by the Assembly**

The Assembly is invited:

- a) to consider the text of the draft Protocol;
- b) to authorise the Director to finalise the text of the draft Protocol, retaining such footnotes as he considers useful for information purposes;
- c) to instruct the Director to submit the text of the draft Protocol to the Secretary-General of IMO requesting him to refer it to the Legal Committee with a view to convening a Diplomatic Conference to consider the draft Protocol at the earliest opportunity; and
- d) to instruct the Director to bring the topics mentioned in paragraph 2.11 to the attention of the Secretary-General of IMO.

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## ANNEX

### Changes to Articles 3 and 16 of the draft text of the Protocol contained in document 92FUND/A/ES.13/5/1

#### Article 3

1 **Article 1, paragraph 5 is replaced by the following text:**

5 "Hazardous and noxious substances" (HNS) means:

- (a) any substances, materials and articles carried on board a ship as cargo, referred to in (i) to (vii) below:
- (i) oils, carried in bulk, ~~listed in appendix I~~ as defined in regulation 1 of Annex I to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended;<sup>1</sup>
  - (ii) noxious liquid substances, carried in bulk, ~~referred to in appendix II~~ as defined in regulation 1.10 of Annex II<sup>2</sup> to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended, and those substances and mixtures provisionally categorized as falling in pollution category ~~A, B, C or D~~ X, Y or Z in accordance with regulation ~~3(4)~~ 6.3 of the said Annex II;
  - (iii) dangerous liquid substances carried in bulk listed in chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, ~~1983~~<sup>3</sup>, as amended, and the dangerous products for which the preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph [1.1.~~36~~] of the Code;
  - (iv) dangerous, hazardous and harmful substances, materials and articles in packaged form covered by the International Maritime Dangerous Goods Code, as amended;
  - (v) liquefied gases as listed in chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk ~~1983~~<sup>4</sup>, as amended, and the products for which preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph 1.1.6 of the Code;'
  - (vi) liquid substances carried in bulk with a flashpoint not exceeding 60°C (measured by a closed-cup test);
  - (vii) solid bulk materials possessing chemical hazards covered by appendix B of the Code of Safe Practice for Solid Bulk Cargoes, as amended, to the extent that these substances are

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<sup>1</sup> As it stands in the HNS Convention, the definition of oil carried in bulk is restricted to a reference to the list in the appendix I of MARPOL, Annex I, regulation 1, thus giving the impression that the list is a closed one. The amendment suggested restores the list to its true, indicative, nature, as clearly stated in regulation 1, namely "without limiting the generality of the foregoing" (MARPOL, Annex I, regulation 1). The Secretariat proposes this change in light of advice given by its technical experts to the effect that the reference to the list would be confusing unless placed in the general indicative context of regulation 1.

<sup>2</sup> The paragraph needs to be updated in light of the revised Annex II to MARPOL which no longer contains an Appendix II; nonetheless, the "noxious liquid substances carried in bulk" referred to by this appendix remain covered by regulation 1.10 of revised Annex II. The effect of the revision of Annex II to MARPOL has been reflected in resolutions MEPC.160(50) and LEG.4(91).

<sup>3</sup> IBC Code was adopted in 1983. However, the title of the IBC Code does not include reference to the year of adoption. Accordingly, the Secretariat suggests deleting this reference.

<sup>4</sup> Idem.

also subject to the provisions of the International Maritime Dangerous Goods Code when carried in packaged form; and

- (b) residues from the previous carriage in bulk of substances referred to in (a)(i) to (iii) and (v) to (vii) above.

**2 The following text is added as Article 1, paragraphs 5bis and 5ter, of the Convention<sup>5</sup>:**

5bis "Bulk HNS" means any hazardous and noxious substances referred to in article 1, paragraph 5(a)(i) to (iii) and (v) to (vii) and paragraph 5(b).

5ter "Packaged HNS" means any hazardous and noxious substances referred to in article 1, paragraph 5(a)(iv).

**3 Article 1, paragraph 10, of the Convention is replaced by the following text<sup>6</sup>:**

10 "Contributing cargo" means any bulk HNS which are carried by sea as cargo to a port or terminal in the territory of a State Party and discharged in that State. Cargo in transit which is transferred directly, or through a port or terminal, from one ship to another, either wholly or in part, in the course of carriage from the port or terminal of original loading to the port or terminal of final destination shall be considered as contributing cargo only in respect of receipt at the final destination.

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## FINAL CLAUSES

### Signature, ratification, acceptance, approval and accession

#### Article 16

- 1 This Protocol shall be open for signature at the Headquarters of the Organization from [.....] to [.....] and shall thereafter remain open for accession.
- 2 Subject to the provisions in paragraphs 4 and 5, States may express their consent to be bound by this Protocol by:
- (a) signature without reservation as to ratification, acceptance or approval; or
  - (b) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval; or
  - (c) accession.
- 3 Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.
- 4 An expression of consent to be bound by this Protocol shall be accompanied by the submission to the Secretary-General of data on the total quantities of contributing cargo liable for contributions received in that State during the preceding calendar year in respect of the general account and each separate account.
- 5 An expression of consent which is not accompanied by ~~such data~~ the data referred to in paragraph 4<sup>7</sup>

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<sup>5</sup> Note by Chairman: Definitions introduced to distinguish between bulk and packaged HNS in order to simplify drafting of article 1, paragraph 10 and article 9, paragraph 1.

<sup>6</sup> Policy proposal in respect of exclusion of packaged HNS from contributions to the HNS Fund has been implemented using new definition in article 1, paragraph 5bis: 'hazardous and noxious substances' changed to 'bulk HNS'

<sup>7</sup> This is an editorial amendment. No change in meaning.

~~shall not be valid and~~<sup>8</sup> shall not be accepted by the Secretary-General.

- 6 Each State which has expressed its consent to be bound by this Protocol shall annually thereafter on or before 31 May until this Protocol enters into force for that State submit to the Secretary-General<sup>9</sup> data on the total quantities of contributing cargo liable for contributions received in that State during the preceding calendar year in respect of the general account and each separate account.
- 7 A State which has expressed its consent to be bound by ~~the~~ this<sup>10</sup> Protocol and which ~~is in breach of its obligation under paragraph 6 to submit data on contributing cargo~~ has not submitted the data on contributing cargo required under paragraph 6<sup>11</sup> for any relevant years shall, before the entry into force of the Protocol for that State, be temporarily suspended from being a Contracting State until it ~~has complied with this obligation~~ has submitted the required data<sup>12</sup>.
- 8 A State which has expressed its consent to be bound by the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996<sup>13</sup> shall be deemed to have withdrawn this consent on the date on which it has signed this Protocol or deposited an instrument of ratification, acceptance, approval of or accession in accordance with paragraph 2.

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<sup>8</sup> On further reflection, the IMO Secretariat decided it would be better to delete any reference to validity in order to avoid any conflicting interpretation as to the legal effect of the expression of consent and in order to avoid any embarrassment to States in the event they are compelled to return to their parliaments for a fresh instrument.

<sup>9</sup> This is an editorial amendment. No change in meaning.

<sup>10</sup> This is an editorial amendment. No change in meaning.

<sup>11</sup> The IMO Secretariat is of the view that the use of term “obligation” is not appropriate due to the fact that, at this point in time, the Convention is not in force. The obligations of States can be considered when the Convention is in force. However, the practical effect of the new wording is no different.

<sup>12</sup> See footnote 11.

<sup>13</sup> This is an editorial amendment to clarify the meaning of this paragraph in the consolidated text of the Convention.