



HNS CONVENTION

Note by the Director

| | |
|----------------------------|---|
| Summary: | Information is given on recent developments in respect of the preparations for the entry into force of the HNS Convention, including the outcome of discussions in IMO's Legal Committee regarding a draft Protocol to the HNS Convention. The need to update the software and the database of substances of the HNS Convention Contributing Cargo Calculator (HNS CCCC) to reflect the implications of the draft Protocol is considered. |
| Action to be taken: | Decide whether to instruct the Secretariat to carry out the work required to update the software and the database of substances of the HNS CCCC to reflect the implications of the draft Protocol. |

1 Introduction

The Assembly noted at its 1st session that, in a Resolution of the Conference which had adopted the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention), it had been invited to assign to the Director of the 1992 Fund, in addition to his functions under the 1992 Fund Convention, the administrative tasks necessary for setting up the International Hazardous and Noxious Substances Fund (HNS Fund) in accordance with the HNS Convention. The Assembly instructed the Director to carry out the tasks requested by the HNS Conference (document 92FUND/A.1/34, paragraphs 33.1.1 - 33.1.3), on the basis that all expenses incurred would be repaid by the HNS Fund with interest.

2 Status of the Convention

- 2.1 As at 29 May 2009, 13 States have ratified the Convention, ie Angola, Cyprus, Hungary, Liberia, Lithuania, Morocco, the Russian Federation, Saint Kitts and Nevis, Samoa, Sierra Leone, Slovenia, Syrian Arab Republic and Tonga.
- 2.2 Article 43 of the HNS Convention requires a State, when submitting an instrument of ratification and annually thereafter until the Convention enters into force for that State, to submit information on the total quantities of contributing cargo received in respect of each account and sector to the Secretary-General of IMO. As at 29 May 2009, only two of the States (Cyprus and Slovenia) that have ratified the Convention had submitted such information.

3 Development of a draft Protocol to the HNS Convention

- 3.1 At its 12th session in October 2007, the 1992 Fund Assembly decided to establish an HNS Focus Group with the aim of facilitating the entry into force of the HNS Convention and appointed Mr Alfred Popp QC (Canada) as its Chairman. The HNS Focus Group had the following mandate:
- (a) to examine the underlying causes of the issues which have been identified as inhibiting the entry into force of the HNS Convention, ie:
 - (i) Contributions to the LNG Account;
 - (ii) The concept of 'receiver'; and
 - (iii) Non-submission of contributing cargo reports, on ratification of the Convention and annually thereafter.
 - (b) to examine any issues of an administrative ('house-keeping') nature as identified by the Secretariat which would facilitate the operation of the HNS Convention;
 - (c) to identify and develop legally-binding solutions to these issues, taking into account *inter alia* the impact on developing countries, in the form of a draft protocol to the HNS Convention;
 - (d) to complete its work as quickly as possible in order to facilitate the rapid entry into force of the HNS Convention.
- 3.2 The HNS Focus Group held two meetings: the first in Monaco in March 2008 and the second in London in June 2008 (cf documents 92FUND/A/ES.13/5 and 92FUND/A.13/22).
- 3.3 At its meeting in June 2008, the 1992 Fund Administrative Council, acting on behalf of the Assembly, noted that, in accordance with its Terms of Reference and based on the discussions at its two meetings, the HNS Focus Group had developed a draft text of a Protocol to the HNS Convention. The Council noted that the Group had reached a consensus on all outstanding issues, except that regarding the person liable to pay contributions to the LNG Account.
- 3.4 After a lengthy discussion, the HNS Focus Group had decided to maintain the wording of Article 7 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, whilst the majority of the Group had been in favour of maintaining that wording, a significant number of delegations had supported the concept of the titleholder being the primary person liable for contributions. It was noted that the differences between the two sides were of a political, economic and policy nature and not just a matter of drafting and 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.
- 3.5 It was noted that failure to reach a consensus by the time of the meeting of IMO's 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. The delegation of Malaysia therefore offered to co-ordinate an informal correspondence group with the aim of developing a compromise proposal in respect of contributions to the LNG Account that would make the HNS Convention attractive to as many States as possible.
- 3.6 The Administrative Council approved the text of the draft Protocol. As instructed by the Council, the Director finalised the text of the draft Protocol, retaining footnotes of a technical or editorial nature in order to aid its interpretation and, by means of a letter dated 29 July 2008, submitted the text of the draft Protocol to the Secretary-General of IMO, requesting him to refer it to the Legal Committee for consideration with a view to convening a Diplomatic Conference to consider the draft Protocol at the earliest opportunity.

3.7 As further instructed, the Director included with his letter to the Secretary-General the Record of Decisions of the June 2008 session of the Administrative Council. He also brought the following topics to his attention, where consideration of amendments to the Protocol by the Legal Committee might be beneficial:

- The time periods for the amendment procedure in Article 19 of the draft Protocol, which might be brought into line with Article 24 of the Supplementary Fund Protocol.
- The entry into force conditions in Article 17 of the draft Protocol, since these would be crucial to ensuring the successful entry into force of the Convention.

Discussions at the 94th session of IMO's Legal Committee in October 2008

3.8 The IMO Secretariat submitted the draft Protocol and related information for consideration by the Legal Committee during its 94th session in October 2008 (cf document LEG 94/4). The Legal Committee also considered a document submitted by Australia, Belgium, Canada, Denmark, France, Germany, Japan, Malaysia, the Netherlands, Norway, Sweden and the United Kingdom, which contained a compromise proposal in respect of contributions to the LNG Account that had been developed by the Correspondence Group co-ordinated by the delegation of Malaysia (cf document LEG 94/4/1). Italy also supported this proposal.

3.9 The Legal Committee decided to inform the IMO Council of the unanimous wish of delegations to see the HNS Convention enter into force at the earliest possible time. Whilst many delegations were satisfied with the text of the Protocol as amended at that session, many other delegations considered that the Committee needed more time for further consideration of the text at its next session in March/April 2009. To facilitate this consideration, the Secretariat agreed to prepare a 'clean' version of the Protocol incorporating all the amendments thus far agreed, together with a consolidated version of the 1996 Convention and the prospective Protocol.

3.10 The Legal Committee decided to recommend to the IMO Council that a Diplomatic Conference be convened as soon as possible in 2010 to consider and adopt the prospective Protocol (cf document LEG 94/12, paragraph 4.67).

Discussions at the 101st session of IMO Council in November 2008

3.11 At its 101st session, held in November 2008, the IMO Council endorsed, in principle, the Legal Committee's recommendation that a Diplomatic Conference be convened as early as possible in 2010, for the purpose of considering and adopting a protocol to the 1996 HNS Convention (cf document C 101/D, paragraph 8.3).

Discussions at the 95th session of IMO's Legal Committee in April 2009

3.12 At its 95th session, in April 2009, IMO's Legal Committee considered some further issues relating to the draft Protocol to the HNS Convention, one of which was a proposal by the delegation of the Bahamas to amend the wording of Article 5, paragraph (a)(vii) of the Convention which defines which solid bulk materials constitute hazardous and noxious substances (HNS) (cf document LEG 95/3/4).

3.13 It was recalled that, at the 1996 Diplomatic Conference, substances such as coal, fishmeal and woodchips had been permanently excluded from coverage by the Convention by restricting Article 5, paragraph (a)(vii) to cover only those solid bulk substances that were also covered by the IMDG Code in force at the time of the Conference. It was further recalled that this issue had been very divisive in 1996 and that the wording in the text reflected a compromise agreed to at that time after long and exhausting negotiations.

- 3.14 Although the proposal by the delegation of the Bahamas received considerable support, the Legal Committee decided to maintain its decision to restrict the reference in the definition of the HNS Convention to IMDG substances to the substances included in the 1996 version of the Code.
- 3.15 The Legal Committee undertook an article-by-article reading of the draft Protocol and approved the text, as amended by its decisions at that session, for the purpose of its submission for consideration by a Diplomatic Conference and agreed to advise IMO Council accordingly.
- 3.16 Full details of the discussions which took place are contained in the Legal Committee's report of that session (document LEG/95/10).

Timing of the Diplomatic Conference

- 3.17 The IMO Council is expected to make a decision as to the timing of the Diplomatic Conference, which is tentatively scheduled for April 2010 in lieu of the Legal Committee's Spring 2010 session, at its 102nd session to be held during the week of 29 June 2009.

4 Possible updating of the HNS Convention Contributing Cargo Calculator (HNS CCCC)

- 4.1 As instructed by the Assembly at its 6th session, held in October 2001, the Secretariat developed a system to assist in identifying and reporting contributing cargo under the HNS Convention, the HNS Convention Contributing Cargo Calculator (HNS CCCC), which included a database of all substances qualifying as hazardous or noxious substances. The final system was made available during 2005 in the form of both a CD-ROM and a dedicated website (www.hnscccc.org), in the English language only.
- 4.2 The Assembly originally granted an extra appropriation of £150 000 for this purpose, provided that the costs incurred, including interest, would be reimbursed to the 1992 Fund by the HNS Fund when the HNS Convention entered into force (document 92FUND/A.6/28, paragraph 28.5). It was reported at the October 2005 session that the actual costs incurred amounted to some £68 000 (cf document 92FUND/A.10/33, paragraph 2.10).
- 4.3 Under the budgetary principles applied by the 1992 Fund, an unused portion of an appropriation cannot be carried over to the following year. The administrative budget for 2009, which was adopted by the Assembly at its 13th session in October 2008, therefore included a further appropriation of £30 000 to cover the costs of preparing for the entry into force of the HNS Convention (documents 92FUND/A.13/19, paragraph 5.3.3 and 92FUND/A.13/25, paragraph 22.9).
- 4.4 The Assembly is invited to consider whether it would be useful to update both the website software and the database of substances within the HNS CCCC to reflect the policy proposals contained in the draft Protocol and, if so, to instruct the Secretariat to carry out the work required. It is expected that this work could be carried out within the existing 2009 budget appropriation of £30 000 set out in paragraph 4.3.

5 Action to be taken by the Assembly

The Assembly is invited to:

- (a) take note of the information contained in this document; and
- (b) decide whether to update both the website software and the database of substances within the HNS CCCC to reflect the policy proposals contained in the draft Protocol and, if so, to instruct the Secretariat to carry out the work required (cf paragraph 4.4 above).
-