



## REPORT ON THE SECOND MEETING OF THE FIFTH INTERSESSIONAL WORKING GROUP ('HNS FOCUS GROUP')

### Note by the Director

**Summary:**

At its second meeting, held from 23 to 24 June 2008, the HNS Focus 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). A summary of the issues relating to the text of the draft Protocol that were considered by the Group at its second meeting is contained in section 12 of this Report.

The Group decided to amend the text of the draft Protocol as described in paragraph 12.1 of this Report and to submit the text of the draft Protocol to the Assembly for consideration at its June 2008 meeting.

**Action to be taken:** Information to be noted.

### 1 **Introduction**

- 1.1 The 5th intersessional Working Group ('the HNS Focus Group') was established by the 1992 Fund Assembly at its 12th session, held in October 2007, with the aim of facilitating the entry into force of the HNS Convention and with the Terms of Reference set out in section 4 (document 92FUND/A.12/28, paragraph 27.16).
- 1.2 The HNS Focus Group had held its first meeting from 12 to 13 March 2008 under the Chairmanship of Mr Alfred Popp QC (Canada). The report of the meeting is contained in document 92FUND/WGR.5/8 and 92FUND/A/ES.13/5. At that meeting, the HNS Focus Group had considered proposals by States in respect of the three issues which had been identified as inhibiting the entry into force of the HNS Convention, ie the concept of 'receiver', contributions to the LNG Account and the non-submission of contributing cargo reports. The Group had also considered and approved the text of a draft Protocol to the Convention implementing these proposals, subject to various amendments (section 11 of that report). The Secretariat was requested to produce a revised draft Protocol for the next meeting of the Focus Group, together with a consolidated text of the Convention, for information purposes only.
- 1.3 The HNS Focus Group held its second meeting from 23 to 24 June 2008, also under the Chairmanship of Mr Alfred Popp QC (Canada).

- 1.4 In accordance with the Terms of Reference, all governmental and non-governmental delegations that have the right to participate in the 1992 Fund Assembly were invited to participate.

## 2 **Adoption of the Agenda**

The HNS Focus Group adopted the Agenda as contained in document 92FUND/WGR.5/9.

## 3 **Participation**

- 3.1 The following Member States were represented at the HNS Focus Group's first meeting:

|   |                  |                     |
|---|------------------|---------------------|
| Algeria   | Germany          | Papua New Guinea    |
| Angola  | Ghana            | Philippines         |
| Argentina                                       | Greece           | Poland              |
| Australia                                       | India            | Portugal            |
| Bahamas   | Italy            | Qatar               |
| Belgium   | Japan            | Republic of Korea   |
| Bulgaria  | Latvia           | Russian Federation  |
| Cameroon  | Liberia          | Singapore           |
| Canada  | Lithuania        | Spain               |
| China (Hong Kong Special Administrative Region) | Malaysia         | Sri Lanka           |
| Colombia  | Malta            | Sweden              |
| Cook Islands                                    | Marshall Islands | Trinidad and Tobago |
| Denmark   | Mexico           | Tunisia             |
| Dominican Republic                              | Morocco          | Turkey              |
| Fiji  | Netherlands      | United Kingdom      |
| Finland   | Nigeria          | Uruguay             |
| France  | Norway           | Venezuela           |
| Gabon   | Oman             |                     |
|   | Panama           |                     |

- 3.2 The following non-Member States were represented as observers at the meeting:

|         |              |                      |
|---------|--------------|----------------------|
| Benin   | Kuwait       | Syrian Arab Republic |
| Ecuador | Saudi Arabia | Ukraine              |

- 3.3 The following intergovernmental and international non-governmental organisations participated in the HNS Focus Group's meeting as observers:

*Intergovernmental organisations:*

European Commission  
International Maritime Organization (IMO)  
Regional Marine Pollution Emergency Response Centre for the Mediterranean (REMPEC)

*International non-governmental organisations:*

Comité Maritime International (CMI)  
European Chemical Industry Council (CEFIC)  
International Association of Independent Tanker Owners (INTERTANKO)  
International Chamber of Shipping (ICS)  
International Group of Liquefied Natural Gas Importers (GIIGNL)  
International Group of P&I Clubs  
International Tanker Owners Pollution Federation Ltd (ITOPF)  
International Union of Marine Insurance (IUMI)  
Oil Companies International Marine Forum (OCIMF)

#### 4 Terms of Reference

The Assembly gave the HNS Focus Group the following Terms of Reference (document 92FUND/A.12/28, Annex II):

##### Terms of Reference of the HNS Focus Group

- 1.1 Recognizing that, over many years, a large number of States have consistently expressed, both in the 1992 Fund and IMO as well as in other international or regional organisations, their determination to establish a robust and effective compensation regime for the maritime carriage of hazardous and noxious substances based on a system of shared liability, the 1992 Fund Assembly has decided to establish a Working Group ('the HNS Focus Group') with the aim of facilitating the rapid entry into force of the HNS Convention.
- 1.2 The HNS Focus Group shall have 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.
- 1.3 The HNS Focus Group shall not embark on a wholesale revision of the HNS Convention but shall confine its work solely to the issues and solutions set out in paragraph 1.2 (a), (b) and (c).
- 1.4 The HNS Focus Group shall aim to complete its work according to the following timetable:
  - (a) interested delegations shall submit concrete policy proposals accompanied by draft treaty text to the Secretariat by 18 January 2008, at the latest;
  - (b) based on these proposals, the Chairman of the Group, in conjunction with the Secretariat, shall develop a draft text of a protocol to the HNS Convention for circulation to delegations by 15 February 2008;
  - (c) the Group shall meet in March 2008 and, if required, again in June 2008 in order to:
    - (i) consider the draft text of the protocol; and
    - (ii) 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.

- 1.5 The Chairman of the HNS Focus Group, in conjunction with the Secretariat, will work closely with the IMO Secretariat in order to ensure that the draft Protocol is in compliance with international treaty law, taking due account of the interests of those States that have already ratified the Convention or are at an advanced stage in so doing.
- 1.6 If approved by the Assembly, the draft Protocol will be submitted for consideration by IMO's Legal Committee, ideally at its October 2008 session, with a view to the holding of a Diplomatic Conference as soon as possible.
- 1.7 The HNS Focus Group shall work intersessionally and shall be open to all governmental and non-governmental delegations that have the right to participate in the 1992 Fund Assembly. IMO, in particular, is strongly encouraged to participate actively in the Group. The Group shall follow the Rules of Procedure of the Assembly so far as they are applicable.
- 1.8 The 1992 Fund will organise meetings of the HNS Focus Group on the understanding that all expenses incurred will be repaid by the HNS Fund, once it is established, with interest.

## 5 Documents considered by the HNS Focus Group at its second meeting

The following documents were submitted to the HNS Focus Group's second meeting:

|                   |  |
|-------------------|--|
| 92FUND/WGR.5/9    | Provisional annotated agenda   |
| 92FUND/WGR.5/10   | Draft Protocol – Revised text<br>Note by the Secretariat   |
| 92FUND/WGR.5/10/1 | Draft Protocol – Consolidated text<br>Note by the Secretariat  |
| 92FUND/WGR.5/10/2 | Draft Protocol – Amendments to Article 1, Paragraph 5 of the HNS Convention<br>Note by the International Maritime Organization |
| 92FUND/WGR.5/10/3 | Draft Protocol – Amendments to Article 16 of the Protocol<br>Note by the International Maritime Organization                   |
| 92FUND/WGR.5/11   | Contributions to the LNG Account<br>Submitted by the International Group of Liquefied Natural Gas Importers (GIIGNL)           |
| 92FUND/WGR.5/11/1 | Contributions to the LNG Account<br>Submitted by Italy, Japan and the Republic of Korea  |
| 92FUND/WGR.5/11/2 | Contributions to the LNG Account<br>Submitted by Singapore   |
| 92FUND/WGR.5/12   | The definition of 'Receiver'<br>Submitted by the European Chemical Industry Council (CEFIC)                                    |
| 92FUND/WGR.5/12/1 | The definition of 'Receiver' – Proposal regarding the Article 14 of the HNS Convention<br>Submitted by Germany                 |

**6 Issues considered at the HNS Focus Group's second meeting**

- 6.1 The Chairman recalled that the first meeting of the HNS Focus Group had made a number of decisions in respect of the draft Protocol, as set out in the Report of that meeting (document 92FUND/WGR.5/8) and that these decisions were reflected in the version of the draft Protocol contained in document 92FUND/WGR.5/10). He noted that, as instructed by the Focus Group, the Secretariat had reconsidered the text of Article 21*bis* as regards geographical exclusion and had corrected a mistake in the cross references.
- 6.2 The Chairman noted that, as instructed by the HNS Focus Group, the Secretariat had also prepared a consolidated text of the revised HNS Convention, ie the 1996 HNS Convention as amended by the draft Protocol, which was contained in document 92FUND/WGR.5/10/1. He pointed out that, as requested by the HNS Focus Group, the Secretariat had agreed with IMO on an appropriate numbering system for the Final Clauses of the consolidated text. He also pointed out that the consolidated text was purely for information purposes and that the document which would be submitted for consideration by IMO's Legal Committee would be the draft Protocol.
- 6.3 The Chairman invited the HNS Focus Group to consider the draft text of the Protocol with a view to making recommendations to the Assembly upon the completion of its work, ideally at the extraordinary session of the Assembly being held during the same week.
- 6.4 The Chairman reminded the HNS Focus Group that the timescale was very short, since the Assembly needed to be able to consider and approve the text of the draft Protocol later in the week in order that it could be considered by IMO's Legal Committee at its meeting in October 2008, with a view to the holding of a Diplomatic Conference as soon as possible.
- 6.5 The Chairman noted that, in keeping with past practice, he did not intend to go through the Report of the first meeting of the HNS Focus Group but to take the document as read. He also noted that he did not intend to go through the draft Protocol article by article but to take that as read as well, except where there were submissions or other specific points to consider.
- 6.6 The HNS Focus Group endorsed the Chairman's proposal to structure the discussions as follows:
- (a) Submissions on various issues
    - (i) Amendments to Article 1, Paragraph 5 of the HNS Convention (definition of HNS) - proposal by IMO
    - (ii) Amendments to Article 16 of the draft Protocol (signature, ratification, acceptance, approval and accession) - proposal by IMO
    - (iii) The concept of 'receiver' - proposals by Germany and CEFIC
    - (iv) Contributions to the LNG Account - proposals by Italy, Japan and the Republic of Korea; Singapore; and GIIGNL
  - (b) Issues to be reconsidered at this meeting
    - (i) Concept of 'receiver' - reconsider whether the whole of Article 5 should be deleted
    - (ii) Topics outside the mandate of the HNS Focus Group
- 6.7 The Chairman made the point that it was inevitable that dissenting views would be expressed during the discussion. He assured delegations that their views would be fully reflected in the Report and that there would be further opportunities to express their views in the 1992 Fund Assembly, the Legal Committee and at the Diplomatic Conference.

**7 Amendments to Article 1, Paragraph 5 of the HNS Convention (definition of HNS)**

- 7.1 The HNS Focus Group took note of document 92FUND/WGR.5/10/2, submitted by IMO, which contained some proposed amendments to the text of Article 1, paragraph 5 of the HNS Convention in respect of the definition of HNS.
- 7.2 Introducing that document, the representative of IMO recalled that, at the first meeting of the HNS Focus Group, it had been agreed that IMO would make a concrete proposal to the Focus Group in respect of the updating of the definition of HNS in Article 1, paragraph 5, in order to take into account changes in the structure of the Codes and Conventions on which the definition is based.
- 7.3 The first proposed change was in respect of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto ('MARPOL 73/78'). The representative of IMO made the point that the existing definition in Article 1, paragraph 5(a)(i) referred to 'oils ... listed in appendix I of Annex I' of MARPOL 73/78, giving the impression that the list was a closed one. However, that appendix contained the statement 'This list of oils shall not be considered as comprehensive'. In fact, the list had not been amended since it was adopted many years ago and was not used by either the Parties to MARPOL or the IMO Secretariat. In the light of advice from its technical experts, IMO therefore proposed replacing the existing wording with 'oils ... as defined in regulation 1 of Annex I' in order to ensure that the list of oils covered was comprehensive. Oils are defined in regulation 1 of Annex I as follows:
- (1) *Oil* means petroleum in any form including crude oil, fuel oil, sludge, oil refuse and refined products (other than petrochemicals which are subject to the provisions of Annex II of the present Convention) and, without limiting the generality of the foregoing, includes the substances listed in appendix 1 to this Annex.
- 7.4 The second proposed change was an updating of paragraph 5(a)(ii) in light of the revised Annex II of MARPOL 73/78 which no longer contained an Appendix II; nonetheless, the 'noxious liquid substances carried in bulk' referred to by this appendix remained covered by regulation 1.10 of revised Annex II. It was recalled that this amendment had already been agreed to by the Legal Committee and that the effect of the revision of Annex II was reflected in resolutions MEPC.160(50) and LEG.4(91). Noxious liquid substances are defined in regulation 1 of Annex II as follows:
- (10) *Noxious liquid substance* means any substance indicated in the Pollution Category column of chapter 17 or 18 of the International Bulk Chemical Code or provisionally assessed under the provisions of regulation 6.3 as falling into category X, Y or Z.
- 7.5 The third proposed change related to the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, which was adopted in 1983. The change which was proposed was a purely editorial one, ie the deletion of ', 1983' from the name of the Code in paragraphs 5(a)(iii) and (v), since the year of adoption of the Code was not included in its title.
- 7.6 One delegation referred to the inclusion of the words 'as amended' in respect of each of the Codes and Conventions referred to in the definition of HNS and asked how States which ratified the HNS Protocol would be kept informed of any such amendments. The representative of IMO indicated that there was no existing practice in this respect, since the Convention had never come into force, but she expected that it would be by means of a circular letter. She stated that she would investigate how Parties to MARPOL 73/78 were kept informed of amendments to that Convention.
- 7.7 Another delegation pointed out that it was also necessary to update the definition in paragraph 5(a)(vii) as a result of amendments to the Code of Safe Practice for Solid Bulk Cargoes ('BC Code'). IMO's technical expert explained that the BC Code no longer contained an appendix B and that solid bulk materials possessing chemical hazards were now contained in Group B, which was the equivalent of the old appendix B. He also mentioned that the Maritime Safety Committee ('MSC') had decided to make the Code mandatory and to change its name to the 'International

Maritime Solid Bulk Cargoes Code'. This change of name had been approved at MSC's 84th session but still needed to be confirmed at its 85th session at the end of the year.

- 7.8 Summing up the discussion, the Chairman referred to the point made by one delegation that it was extremely important to know what substances were covered by the Convention as well as what substances were not and that it was essential that any references in the definitions of HNS should enable industry to identify conclusively whether or not a particular substance was covered.
- 7.9 The HNS Focus Group approved the changes to Article 1, paragraph 5 of the HNS Convention as set out in document 92FUND/WGR.5/10/2, subject to any change that might be necessary in respect of paragraph 5(a)(vii) being agreed between the Secretariats of the IOPC Funds and IMO.

**8 Amendments to Article 16 of the draft Protocol (signature, ratification, acceptance, approval and accession)**

- 8.1 The HNS Focus Group took note of document 92FUND/WGR.5/10/3, submitted by IMO, which contained some proposed amendments to the text of Article 16 of the draft Protocol, in respect of the Protocol's signature, ratification, acceptance, approval and accession.
- 8.2 Introducing that document, the representative of IMO made the point that most of the proposed changes to Article 16 were purely editorial, as set out in the footnotes to the document, and did not seek to change any matter of substance contained in the draft Protocol. However, she drew attention to two points where the proposed changes were not purely editorial.
- 8.3 The first of these points was the deletion of the phrase 'shall not be valid' from paragraph 5 of Article 16. In the view of the IMO Secretariat, it was 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 that they were compelled to return to their parliaments for a fresh instrument. The representative of IMO described the Organization's depositary practice and explained that, if IMO were to receive an instrument of ratification of the Protocol from a State, duly accompanied by the required data on contributing cargo, IMO would issue a circular letter to all States notifying them of the deposit of the instrument and informing them of the relevant quantity of contributing cargo. IMO would also write to that State acknowledging the receipt of the instrument and the accompanying data and setting out the details of the entry into force of the Protocol for that State. However, if IMO were to receive an instrument of ratification that was not accompanied by the required data on the quantities of contributing cargo, they would not accept the instrument of ratification and would notify the State in question that IMO could not accept the instrument in its present form because it was incomplete.
- 8.4 The second of these points was the deletion of the phrase 'breach of its obligation' from paragraph 7 of Article 16, since the IMO Secretariat was of the view that the obligations of States could not be considered until the Convention was in force and therefore the use of the term 'obligation' was not appropriate. However, the revised wording did not change the practical effect of the provision.
- 8.5 One delegation stated that it did not object to the proposed revision of Article 16, paragraph 7, but drew attention to the Vienna Convention on the Law of Treaties and, in particular, to Article 18 of that Convention, which set out various obligations incumbent on a State that had signed or expressed its consent to be bound by a treaty which was not yet in force, and to Article 24, paragraph 24, which set out that certain treaty provisions applied from the time of adoption of the text of the treaty. That delegation therefore questioned whether it was correct to state that the obligations of a State could only be considered once a treaty had entered into force.
- 8.6 Another delegation questioned whether it was appropriate for the depositary to judge the validity of a State's expression of consent to be bound by a treaty and proposed the deletion of paragraph 5 of Article 16 since the requirement to submit data on contributing cargo was clearly set out in paragraph 4 of that Article.

- 8.7 In response, the representative of IMO agreed with that delegation as regards the depositary's role in respect of the validity of an instrument but stated that it was essential to retain paragraph 5. She explained that, whereas paragraph 4 set out the responsibility of the State to submit the required data, paragraph 5 set out the responsibility of IMO not to accept an instrument which was not accompanied by the required data. She stated that this was a novel provision, that she had never seen anything similar in the final clauses of an international treaty and that it was therefore absolutely essential for there to be complete clarity as to the role of the depositary.
- 8.8 Many delegations supported the retention of paragraph 5, recalling the problems with non-submission of data that had been experienced in respect of both the HNS Convention and the 1971 and 1992 Fund Conventions, and stated that it was essential that these problems did not happen with the HNS Protocol. One of these delegations proposed the addition of the phrase 'who shall advise the State in writing' to the end of paragraph 5, to clarify the responsibilities of the depositary still further.
- 8.9 However, one delegation pointed to paragraph 7 which, in its view, contained sufficient sanctions against States which did not fulfil their obligations and stated that it should be up to IMO's Legal Committee to decide on the appropriate wording. Another delegation made the point that it might be better for such a responsibility of the depositary to be contained in, for example, a declaration adopted by the Diplomatic Conference, rather than in the treaty itself, since the presence of legal novelties in the treaty could slow down its ratification by States.
- 8.10 Summing up the discussion, the Chairman reiterated the importance that States attached to having a provision of this kind in order to avoid a repetition of the problems that had been experienced with other treaties and indicated that there was overwhelming support for retaining the revised paragraph 5 as proposed by IMO. He made the point that the policy objective was clear but that the exact wording was a treaty law issue which should be dealt with by IMO's Legal Committee.
- 8.11 The HNS Focus Group approved the changes to Article 16 of the draft Protocol as set out in the Annex of document 92FUND/WGR.5/10/3.

## **9 The concept of 'receiver'**

- 9.1 The HNS Focus Group took note of document 92FUND/WGR.5/12/1, submitted by Germany, which contained a policy proposal to exclude packaged goods from compensation by the HNS Fund. Compensation for incidents involving packaged goods would still be provided by the shipowner but, as regards the HNS Fund, packaged goods would be neither eligible for compensation nor liable for contributions.
- 9.2 Introducing that document, the delegation of Germany recalled that the issue had been discussed at length at the previous meeting of the HNS Focus Group and reiterated its support for removing packaged goods from contributions to the HNS Fund, since this removed major problems involved in respect of the implementation of the HNS Convention, and also for retaining packaged goods in the first tier of compensation. However, that delegation referred to the constitutional issues which would result for Germany as a result of receivers of bulk goods having to pay compensation for incidents involving packaged goods. The point was made that receivers of bulk goods would be obliged to make contributions for such incidents but would not gain any benefit thereby and that, as a result, there would be a lack of equity between receivers of bulk and packaged goods. It was recalled that an increase in the shipowner's limit of liability was proposed for incidents involving packaged goods in order to maintain the concept of shared liability, but noted that it could not be guaranteed that the HNS Fund would never be required to pay compensation for such incidents.
- 9.3 The HNS Focus Group also took note of the information contained in document 92FUND/WGR.5/12 submitted by CEFIC, which also proposed excluding packaged goods from compensation by the HNS Fund but proposed reviewing this exclusion after five years with a view to reinstating the cover if the impact on shipowners and receivers of bulk goods proved to be severe.

- 9.4 Introducing that document, the observer delegation of CEFIC explained that it strongly supported the removal of packaged goods from contributions to the HNS Fund, since this would bring about a dramatic reduction in the administrative burden both for industry and governments. However, that delegation expressed its serious reservations about requiring receivers of bulk goods to pay contributions to fund compensation for incidents involving packaged goods since, in its view, that would be a disincentive for receivers of packaged goods to reduce risks to their shipments, which went completely against the 'polluter pays' principle.
- 9.5 During the discussion, many States spoke against the proposals by Germany and CEFIC to exclude incidents involving packaged goods from compensation by the HNS Fund. A number of delegations made the point that the proposed solution was not perfect but that it was a workable solution which would overcome the difficulties that many States had encountered when trying to implement the 'perfect solution' which had been incorporated in the 1996 HNS Convention. Some delegations drew attention to the fact that the parts of the industry receiving bulk HNS and those receiving packaged HNS were not entirely separate and that therefore many receivers of bulk goods would also receive packaged goods. Many delegations also made the point that it was essential for the HNS Fund to provide cover for incidents involving packaged goods, even though hopefully these would only be very few. One delegation recalled that the acceptance by ICS of a modest rise in the shipowner's limit of liability for incidents involving packaged goods had been conditional on such incidents continuing to be covered by the second tier.
- 9.6 One delegation recalled that the original proposal had been based on two fundamental principles: the need for a balanced solution and the need to maintain shared liability in a two-tier system. It was noted that these had been key principles of the original HNS Convention and that a further aspect of that Convention had been the combination of the two tiers of compensation within the one instrument, in contrast to the Civil Liability and Fund Conventions. It was recalled that, at the previous meeting, data submitted by the International Group of P&I Clubs had seemed to demonstrate that the number of incidents involving packaged goods which might involve the HNS Fund was expected to be very small. However, based on their experiences with the IOPC Funds, all delegations were aware that the HNS Fund might have to deal with unlikely situations. As regards the question of fairness towards receivers of bulk goods, that delegation made the point that, whilst it seemed unlikely that receivers of such goods would have to pay for the costs of incidents involving packaged goods, it was important to bear in mind that a wide range of substances would give rise to contributions to the general account. It was therefore inevitable that some substances would generate contributions in respect of incidents which involved other substances.
- 9.7 Summing up the discussion, the Chairman noted that most of the delegations that spoke were opposed to the proposals by Germany and CEFIC to remove liability for spills involving packaged goods from the second tier and that there was little support for CEFIC's proposal for a review of the operation of the system after five years.
- 9.8 The HNS Focus Group therefore decided not to adopt either of the proposals but to maintain the current text of the draft Protocol in respect of packaged goods.

## **10 Contributions to the LNG Account**

- 10.1 The HNS Focus Group took note of 92FUND/WGR.5/11/1, submitted by Italy, Japan and the Republic of Korea, which contained a policy proposal based on the retention of the titleholder as the contributor to the LNG Account whilst providing that the receiver would be liable in the event that the titleholder defaulted on its contributions.
- 10.2 The delegation of Japan, introducing that document on behalf of the other co-sponsors, explained that the proposal set out in the document was a compromise which was intended to resolve the concerns which had been expressed by many delegations at the first meeting of the HNS Focus Group. That delegation made the point that, whilst those who wished to change the person liable for contributions from the titleholder to the receiver had argued that LNG trading practices had

undergone significant changes since the text of the HNS Convention had been agreed in 1996, there was no objective evidence that this was in fact the case. It was pointed out that the co-sponsors of the paper were deeply concerned by the potential for such a change to bring about a breakdown in the existing safety transport network, which had worked very well on the basis that the titleholder shared responsibility for the transportation of the LNG cargo with the ship operator. It was stated that this was one of the reasons for the excellent safety record of LNG transport. It was also stated that such a change could seriously interfere with current trade practices in the LNG industry.

- 10.3 That delegation further explained that the compromise proposal was intended to remove the concerns that had been expressed at the Monaco meeting in respect of titleholders which were not subject to the jurisdiction of a State Party to the HNS Convention, and which therefore could not be obliged to pay contributions to the HNS Fund, by making the receiver liable if the titleholder did not pay within a certain period, such as one, three or six months. The point was made that the co-sponsors expected that the appropriate procedures would be contained in the Internal Regulations of the HNS Fund but that they could be put into the text of the Protocol instead if that were the preference of other delegations.
- 10.4 It was pointed out that such a solution would not impose any additional workload on the Secretariat of the HNS Fund since the Secretariat would automatically issue an invoice to the receiver if the titleholder did not pay by the appropriate deadline. It was also explained that such a solution did not preclude the right of the receiver to take recourse against the titleholder. The co-sponsors did not believe that this presented any problems in terms of interpretation of international treaty law. However it was indicated that the co-sponsors could also accept the receiver's right to recourse being explicitly stated in the text.
- 10.5 The HNS Focus Group further took note of document 92FUND/WGR.5/11, submitted by GIIGNL, which contained a similar policy proposal to that made by Italy et al.
- 10.6 Introducing that document, GIIGNL referred to the brochure on the LNG industry which it had produced and circulated to delegations in order to provide detailed information on a number of unique features of the LNG industry. It was emphasised that the parties responsible for the cargo prior to its delivery had an important role to play in ensuring the safety of the cargo and, in conjunction with shipbuilders, in bringing about improvements in maritime safety. It was the view of the LNG industry therefore that the titleholder, ie the owner of the cargo immediately prior to discharge, should be the person primarily liable for contributions. However, it was recognised that there could be difficulties with this as a payment mechanism in individual cases. It was therefore proposed that the receiver should act as a guarantor in the event that the titleholder did not pay. The representative of GIIGNL reaffirmed the commitment of the industry to the work of the HNS Focus Group and to the rapid entry into force of the HNS Convention.
- 10.7 The HNS Focus Group also took note of document 92FUND/WGR.5/11/2, submitted by Singapore, which contained a similar policy proposal, ie that the titleholder would be the contributor to the LNG Account with the receiver as the fallback. However, the proposal also aimed to provide a legal disincentive in order to discourage titleholders outside the jurisdiction of States Party to the HNS Convention from defaulting on contributions, so as to remove unfairness to the receivers in such cases.
- 10.8 The Chairman made the point that the three proposals under consideration had in common the premise that the principle person liable for contributions should be the titleholder but that, under certain circumstances, the receiver would be liable in the event of payment difficulties. However, the proposals differed in the way the fallback to the receiver would operate. The HNS Focus Group endorsed the Chairman's proposal to start with a discussion on the general principle, which was common to all three proposals, with the aim of seeing how many delegations supported the idea of amending the text of the draft Protocol in such a way.

10.9 The following points were made in support of the titleholder as the primary person liable for contributions:

- It was recalled that, at the time the Convention was being drafted, it had been considered that those States involved in the LNG trade, in consultation with industry representatives, should determine who should be responsible for contributions to the LNG Account and the point was made that this consensus should be respected.
- It was stated that, as a traded commodity, LNG had a number of unique features, in respect of both specific supply contracts and also the LNG market as a whole and the long-term contracts used.
- The view was expressed that long-term contracts had been signed in the expectation that the titleholder immediately prior to discharge, and not the receiver, would be the person liable for contributions and that making the receiver the primary person liable for contributions would lead to serious disruptions to the current commercial system and distortion of competition.
- The point was made that the compromise proposals that had been made were intended to facilitate the ratification of the Convention by as many States as possible and that placing the financial burden purely on the receiver could prevent States from ratifying the Convention and therefore jeopardise its entry into force.
- The importance of safeguarding the principle of shared liability and of maintaining the balance between the importer and the exporter was reiterated.
- One delegation made the point that their domestic legislation did not permit the re-gasifier to also be the titleholder of the cargo at the time of discharge.

10.10 Those in favour of the receiver as the primary person liable for contributions made the following points:

- It was noted that those delegations that had co-sponsored the three proposals under discussion had accepted that trying to obtain payment from titleholders in non-State Parties would be likely to be time-consuming and ultimately unproductive for the HNS Fund. The point was made that, if significant contributions to the LNG Account were left unpaid, there would be unwelcome repercussions both for the timely payment of claims and for contributors to the General Account and that therefore the starting point needed to be the receiver and not the titleholder. It was pointed out that it would also be difficult for a State Party to obtain reports on receipts of LNG from titleholders which were not resident in that State.
- It was stated that the contribution system for LNG needed to be practical, simple to implement and enforceable, both for State Parties and for the HNS Fund, and that this would not be the case under these proposals. In particular, the point was made that the whereabouts of a titleholder often involved complex issues of international company law in respect of the nationality of companies and their subsidiaries and that the whereabouts of the titleholder should therefore not be referred to in the text of the Convention.
- As regards the apportionment of contributions between the titleholder and the receiver, it was said that this should not be dealt with in the Convention but in the contract between those two parties. There was nothing in the Convention to prevent such a contract from providing for recourse action between the two parties and therefore, in practice, the costs of contributions to the HNS Fund by titleholders would be passed on to the receivers and then on down the supply chain.

- As regards making the receiver the primary person liable for contributions leading to serious disruptions to the current commercial system and distortion of competition, it was stated that incidents resulting in contributions to the LNG Account were likely to be very rare and that the financial consequences were therefore likely to be limited. In contrast, it was said that other factors such as changes to taxes, energy prices and the spot market would be likely to have much more impact on LNG trade practices. The point was also made that long-term contracts contained periodic reviews which would provide an opportunity to address any imbalance. It was also pointed out that, according to the data provided by GIIGNL, the percentage of the LNG trade carried subject to spot- and short-term contracts was increasing steadily and so the issue would become less severe with time.
  - In response to the suggestion that the consensus at the time the Convention was being drafted, ie that the titleholder should be the person liable for contributions, should be respected, it was stated that the LNG industry at the time had been a closed shop but that the industry had grown significantly since then.
  - As regards the suggestion that making the receiver, rather than the titleholder, the person liable for contributions could bring about a breakdown in the existing safety transport network, it was said that it was misleading to suggest that only one part of the industry had an interest in safety. The observer delegation of OCIMF made the point that the receiver had an essential role to play in safety, particularly in respect of the vetting of vessels to use LNG terminals, which was largely based on data from OCIMF's Ship Inspection Report Programme (SIRE). That delegation stated that it did not accept that making the receiver liable for contributions would reduce the level of safety in the industry in any way.
  - In response to the suggestion that making the receiver liable for contributions would deter States from ratifying the HNS Convention, it was said that this argument was not backed up by experience with the Civil Liability and Fund Conventions, where States had found that they could not afford not to ratify these Conventions.
- 10.11 After a lengthy exchange of views, 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.
- 10.12 The HNS 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.
- 10.13 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 2008.

## **11 Issues to be reconsidered at this meeting**

### *Possible deletion of the whole of Article 5 of the HNS Convention*

- 11.1 The HNS Focus Group recalled that at its first meeting it had decided to delete Article 5, paragraph 5 of the Convention but to postpone the question of whether the whole of Article 5 should be deleted to its next meeting, to give delegations 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.

### *Issues outside the mandate of the HNS Focus Group*

- 11.2 The HNS Focus Group recalled that at its first meeting it had considered the following topics which fell outside the mandate of the HNS Focus Group, but where consideration of amendments to the Convention either by the 1992 Fund Assembly or by IMO's Legal Committee might be beneficial:
- Shortening of the time periods for the amendment procedure in Article 48 of the Convention, in line with Article 24 of the Supplementary Fund Protocol.
  - Setting the entry into force conditions in Article 46 of the Convention at an appropriate level, since these will be crucial to ensuring the successful entry into force of the Convention.
- 11.3 The HNS Focus Group decided to invite the Assembly to instruct the Director to bring these topics to the attention of the Secretary-General of IMO.

## **12 Summary of decisions in respect of the text of the draft Protocol**

- 12.1 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.
- 12.2 The HNS Focus Group also considered proposals by Germany and the 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.
- 12.3 The HNS Focus Group recalled that at its first meeting it had decided to delete Article 5, paragraph 5 of the Convention but to postpone the question of whether the whole of Article 5 should be deleted to its next meeting, to give delegations 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.
- 12.4 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 GIIGNL (document 92FUND/WGR.5/11).
- 12.5 After a lengthy exchange of views, 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.

**13 Recommendations of the Working Group**

- 13.1 The HNS Focus Group decided to submit the text of the draft Protocol, as described in paragraph 12.1, 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.
- 13.2 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 of the Convention, which might be brought into line with Article 24 of the Supplementary Fund Protocol.
  - The entry into force conditions in Article 46 of the Convention, since these will be crucial to ensuring the successful entry into force of the Convention.
- 13.3 The HNS Focus Group noted that the Chairman would make a short report to the Assembly later in the week (document 92FUND/A/ES.13/5/3) and 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.
- 13.4 The Chairman noted that the HNS Focus Group had completed the task assigned to it by the Assembly and that its work was therefore finished. On behalf of the Group, the Chairman thanked the Secretariats of the IOPC Funds and IMO for their hard work.

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## ANNEX

### Changes to Articles 3 and 16 of the draft text of the Protocol contained in document 92FUND/WGR.5/10

#### 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.