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# FACILITATING THE ENTRY INTO FORCE OF THE HNS CONVENTION: CONSIDERATION OF A DRAFT TEXT OF A PROTOCOL TO THE HNS CONVENTION

## POLICY PROPOSALS FOR THE DEVELOPMENT OF A PROTOCOL TO THE HNS CONVENTION: THE CONCEPT OF RECEIVER

**Submitted by Canada, Denmark, France, Latvia, the Netherlands, Norway, Spain, Sweden and the United Kingdom**

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| ***Summary:*** | This document discusses policy proposals for the concept of receiver, identified in the HNS Focus Group's mandate. |
| ***Action to be taken:*** | The Focus Group is invited to take note of the information within this document, to consider the proposals in paragraph 2 and decide on solutions to the issues discussed. |

## 1 Introduction

1.1 The Assembly, at its 12th session held in October 2007, established the HNS Focus Group with a mandate to develop a Protocol to the HNS Convention. States were invited to develop and present policy proposals to the Focus Group[<1>].

1.2 The HNS Focus Group has a very short timeframe in which to complete its work, find solutions to the problems identified and recommend draft treaty text to the Assembly for consideration at its extraordinary session in June 2008. If the Assembly were to agree with the text it would be submitted as a draft Protocol to IMO's Legal Committee for consideration and approval at its meeting in October 2008.

1.3 Proposals for the non-submission of contributing cargo reports upon ratification, and annually thereafter are dealt with in document 92FUND/WGR.5/4. Proposals for contributions to the LNG Account are dealt with in document 92FUND/WGR.5/2. In this document the sponsors have considered the concept of receiver and invite other States and observer delegations to consider these proposals for adoption.

## 2 The concept of 'receiver' and reporting contributing cargo for packaged goods

2.1 At the June 2007 meeting of the 1992 Fund Administrative Council some States proposed to amend Article 1.4(a)[<2>] (cf document 92FUND/A/ES.12/9/2). However, this approach was not supported by the Administrative Council. Document 92FUND/A.12/25/2 reminded States that:

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<1> cf paragraphs 27.1 to 27.19 and Annex II of document 92FUND/A.12/28.

<2> Article 1.4(a): 'The person who physically receives contributing cargo discharged in the ports and terminals of a State Party; provided that if at the time of receipt the person who physically receives the cargo acts as an agent for another who is subject to the jurisdiction of any State Party, then the principal shall be deemed to be the receiver, if the agent discloses the principle to the HNS Fund.'

- The first part of the definition of 'receiver' of Article 1.4(a) is the same as under the 1992 Fund Convention, ie the person physically receiving the cargo; and
- the proviso creates an exception for the physical receiver to pass his responsibilities to a principal, where an agent/principle relationship exists.

2.2 For bulk HNS the definition in Article 1.4(a) is clear and the State should be able to identify the receiver of bulk cargoes. However, many States believe that reporting cargoes for packaged HNS is a complex and bureaucratic undertaking as the physical receiver is often either a port or terminal operator. This presents a number of problems. For example, a RoRo port or terminal, which simply provides the infrastructure to enable a truck or lorry to disembark a ferry, transit the port and immediately join the road network, cannot, in most circumstances, identify a principal. Even if the principal could be identified, the added administrative burden to report every HNS product passing through the port or terminal may be overwhelming for industry and States.

2.3 Reporting of packaged HNS presents many complex problems for industries and States and there is real potential for large scale and long-term underreporting. There can be no question that the complexity and scale of the administrative burden has served as a disincentive to many States who might otherwise have ratified the HNS Convention. Moreover, the evidence strongly suggests that this burden is one of the principal reasons why eight of the ten Contracting States have not submitted contributing cargo reports either upon ratification or thereafter.

*Policy Proposal and Justification*

2.4 At its October 2007 session the Assembly decided to maintain the concept of shared liability in order to meet the requirements of industry and States. In view of the seemingly intractable problems that the reporting of packaged goods presents to affected industries and administrations, the sponsors recommend, as the most practical solution, that packaged goods are not liable for reporting, running cost contributions or post incident levy to the HNS Fund. However, in keeping with the concept of shared liability, compensation for incidents involving packaged HNS would continue to be covered by the general account of the HNS Fund.

2.5 Some States may be concerned that if there is no obligation on receivers of packaged HNS to make contributions to the Fund, additional economic burdens might be imposed on receivers of bulk general account cargoes (cf HNS Convention Article 18, paragraph 1) should an incident call upon the HNS Fund. The claims history provided by the International Group of P&I Clubs for incidents occurring between 2002 and 2007 involving vessels entered in an International Group member Club has shown that no incidents arising from the carriage of packaged HNS have exceeded the shipowner's liability limits (cf document 92FUND/WGR.5/5). However, under this proposal, should a major incident occur involving packaged HNS that exceeds the present shipowner's limit of liability, bulk receivers would have to fund the payment of compensation from the 2nd tier HNS Fund. Therefore, to offset some of the potential additional burden on receivers of bulk general account cargoes, the sponsors propose that the shipowners liability limits for ships carrying packaged HNS are adjusted.

2.6 The sponsors suggest that Article 9 be amended to make a distinction between liability for damages caused by bulk HNS, or residues from such a cargo, and damages caused by ships carrying packaged HNS. However, a ship may be carrying both bulk and packaged HNS. To ensure legal clarity there is also a need to make a distinction where the damage is caused by bulk HNS (or residues from such a cargo) or packaged HNS on board the same ship. Furthermore the proposed text shall also cover incidents where it is not possible to determine whether damage was caused by bulk or packaged HNS, or damage by both, on the same ship. The sponsors propose that when it is not possible to determine whether the damage has been caused by bulk or packaged HNS, on board the same ship, the adjusted 1st tier limits for packaged HNS would apply.

Furthermore, such limits would apply when the damage has been caused by both bulk and packaged HNS on board the same ship.

2.7 Liability under Article 9 would continue to be covered by compulsory insurance under Article 12, however we do not believe there to be a need to adjust Article 12. The consequences of the new text would be that for a ship carrying both bulk HNS (and/or residues from such carriage) and packaged HNS the financial security shall be in the sums fixed by applying the adjusted 1st tier limits of liability prescribed in new Article 9.1(b). The insurance will then in some cases have a different limit than the limitation amount applicable, eg if the damage is only caused by bulk HNS.

*Suggested Draft Treaty Text (new text in BOLD)*

2.8 It is proposed that Article 1, paragraph 10 be amended as follows:

10 'Contributing cargo' means any hazardous and noxious substances **except substances as defined under paragraph 5(a)(iv)** 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.

It is proposed that new provisions (b) and (c) be added to Article 9 (Limitation of Liability), as follows:

1 The owner of a ship shall be entitled to limit liability under this Convention in respect of any one incident to an aggregate amount calculated as follows:

**(b) Where damage is caused by dangerous, hazardous and harmful substances, materials and articles carried in packaged form, as defined in Article 1, paragraph 5(a)(iv):**
**- 10 + X million units of account for a ship not exceeding 2,000 units of tonnage;**
**for a ship with a tonnage in excess thereof, the following amount in addition:**
**- for each unit of tonnage from 2,001 to 50,000 units of tonnage , 1,500 + Y units of account; and**
**- for each unit of tonnage in excess of 50,000 units of tonnage, 360 + Z units of account provided, however, that this aggregate amount shall not in any event exceed 100 + W million units of account**

**(c) Where it is not possible to determine whether the damage from one ship has been caused by HNS carried in bulk or by residues from such carriage as mentioned in (a) of this paragraph or by HNS carried in packaged form as mentioned in (b) of this paragraph, the limits under (b) of this paragraph shall apply for such a ship.**

**Where the damage from one ship has been caused by both HNS carried in bulk or by residues from such carriage as mentioned in (a) of this paragraph or by HNS carried in packaged form as mentioned in (b) of this paragraph, the limits under (b) of this paragraph shall apply for such a ship.**

2.9 Consequential amendments would need to be made to Article 9 (Limitation of Liability), paragraph 1 as follows:

1 The owner of a ship shall be entitled to limit liability under this Convention in respect of any one incident to an aggregate amount calculated as follows:

**(a) Where damage is caused by bulk cargoes as defined in Article 1, paragraph 5(a)(i) to (iii) and (v) to (vii), or by residues from the carriage of such cargoes as defined in Article 1, paragraph 5, (b):**

- 10 million units of account for a ship not exceeding 2,000 units of tonnage; and

for a ship with a tonnage in excess thereof, the following amount in addition:

- for each unit of tonnage from 2,001 to 50,000 units of tonnage, 1,500 units of account; and
- for each unit of tonnage in excess of 50,000 units of tonnage, 360 units of account

provided, however, that this aggregate amount shall not in any event exceed 100 million units of account.

## 3 Action to be taken by the HNS Focus Group

The Focus Group is invited:

(a) to take note of the information contained in this document; and

(b) to consider the proposals set out in paragraph 2 and decide on solutions to the issues discussed in this document.