



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: NON-SUBMISSION OF CONTRIBUTING CARGO REPORTS UPON RATIFICATION, AND ANNUALLY THEREAFTER

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

Summary:	This document discusses policy proposals for the non-submission of contributing cargo reports upon ratification, and annually thereafter, 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 set out in paragraphs 2 and 3 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 on the concept of receiver are dealt with in document 92FUND/WGR.5/3. Proposals for contributions to the LNG Account are dealt with in document 92FUND/WGR.5/2. In this document the sponsors have considered the reporting obligations and propose potential solutions to the non-submission of contributing cargo reports.

2 Non-submission of contributing cargo reports, upon ratification of the Convention and annually thereafter

- 2.1 At the Assembly's October 2007 session most States agreed that the non-submission of contributing cargo reports, upon ratification of the HNS Convention and annually thereafter, is a disincentive to the States who will be significant contributors to the HNS Fund and a major obstacle to entry into force. States further agreed that submission of these reports is a

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

fundamental treaty obligation and any State that has not submitted contributing cargo reports upon ratification has not complied with Article 43.

Policy Proposal

- 2.2 It is now accepted by most States that the 1996 HNS Convention is deficient in so far as it lacks a direct link between the transitional provisions for reporting of contributing cargo and the final clauses for the ratification, acceptance or approval of the Convention. The consequence of this lacuna is that it permits a State to ratify without ever complying with its treaty obligations to report cargo or, upon entry into force, to contribute to the HNS Fund's running costs or post incident levies.
- 2.3 To ensure that all States comply with their reporting obligations and to ensure legal certainty, the sponsors believe it is necessary to apply strictures for non-reporting. This would resolve the concerns of States whose industries will be significant contributors to the HNS Fund. It will also mitigate or negate altogether any disproportionate economic impact on industries in States Parties that do submit contributing cargo reports and whose contributors will meet the HNS Fund's legal liabilities in the event of a claim.
- 2.4 Article 15 of the 2003 Supplementary Fund Protocol provides an appropriate solution. Under that Protocol, no compensation shall be paid for an incident in a State Party until it fully complies with its obligations to submit contributing cargo reports for all years prior to the occurrence of that incident. The sponsors propose to introduce the Article 15 Supplementary Fund provision into the HNS Convention, but with the following exception. The HNS Convention includes the right to claim for death and injury and the sponsors do not wish to deny compensation to any individual in such circumstances. It is recommended, therefore, to allow all eligible claims for death and injury irrespective of whether a State submits reports or not.
- 2.5 It should be noted that the proposed new article (non reporting) set out below will only apply to the reporting requirements under the HNS Convention, *as amended by the protocol*. This means that, in order to avoid the proposed strictures for non-reporting, States will need to report all eligible cargo, as required, from the time of their ratification of the Protocol.

3 Suggested Draft Treaty Text (New text in BOLD)

- 3.1 It is proposed that Article 45, paragraph 3 (Signature, ratification, acceptance, approval and accession) be amended as follows:
 - 3 Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect **and, at the time of the deposit of this instrument, the deposit of the information on contributing cargo as referred to in Article 43**, with the Secretary-General.
- 3.2 It is further proposed that a new Article be inserted, possibly between Articles 21 (Reports) and 22 (Non-payment of contributions):

Non-reporting

- 1 **No compensation shall be paid by the HNS Fund for damage in the territory, territorial sea in accordance with Article 3 (a) of this Convention, exclusive economic zone or other area in accordance with Article 3 (b) of this Convention, or damage in accordance with Article 3 (c) of this Convention, of a State Party in respect of a given incident or for preventive measures, wherever taken, in accordance with Article 3 (d) of this Convention, until the obligations to communicate to the Director according to Article 21, paragraph 2, [as well as the obligations to communicate to the Secretary-General according to Article 43 annually after depositing an instrument referred to in Article 45, paragraph 3,] have been complied with in respect of that State Party for all years prior to the**

occurrence of that incident. The Assembly shall determine in the Internal Regulations the circumstances under which a State Party shall be considered as having failed to comply with its obligations.

2 Where compensation has been denied temporarily in accordance with paragraph 1, compensation shall be denied permanently in respect of that incident if the obligations to communicate to the Director under Article 21, paragraph 2, have not been complied with within one year after the Director has notified the State Party of its failure to report.

3 Any payments of contributions due to the HNS Fund shall be offset against compensation due to the debtor, or the debtor's agents.

4 This Article shall not apply to claims for loss of life and personal injury.

4 Transitional provisions

4.1 The following text in square brackets invites further discussion at the HNS Focus Group and is included in this document because some States wish to consider these matters further.

4.2 [The policy objective of the proposed new paragraph 4 (below) in Article 45 is self explanatory. It seeks to prevent the Convention entering into force where not all Contracting States have fulfilled the reporting requirements for the years following their ratification. For example, if two Contracting States have provided up to date information on contributing cargo and between them they trigger entry into force, but other Contracting States have not submitted such information, the affected industries in the two reporting States would carry the entire economic burden. The possibility of this occurring could prevent some States from ratifying the Protocol. It should be noted that if States have not fulfilled their reporting requirements in the years following their ratification they will not lose their status as Parties to the Convention.

4.3 It is proposed to add a fourth paragraph to Article 45 (Signature, ratification, acceptance, approval and accession) as follows:

4 In addition to the requirements to submit reports at the time of ratification, any State that fails to submit a contributing cargo report each year for the period between ratification and entry into force of the Convention shall not be counted as a ratifying State for the purposes of meeting the entry into force provisions in Article 46.]

5 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;
 - (b) to consider the proposals set out in paragraphs 2 and 3 and decide on solutions to the issues discussed in this document; and
 - (c) to consider the proposed transitional provision in paragraph 4.
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