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Agenda item 6

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**MONITORING IMPLEMENTATION OF THE HAZARDOUS AND NOXIOUS  
SUBSTANCES CONVENTION**

**Draft guide to the HNS Convention**

**Submitted by the United Kingdom**

**SUMMARY**

**Executive summary:** This information paper introduces the draft IMO guide for interested parties on the workings of the Hazardous and Noxious Substances Convention 1996 (HNS Convention) (the HNS Guide), and a proposed timetable for continuation of this work.

**Action to be taken:** The Committee is invited to:

- 1 - take note of the text of the draft HNS guide annexed to this document as an information paper; and
- 2 - consider and agree a timetable for taking further work forward on this item.

**Related documents:** LEG 82/8

**Introduction**

1 At its eightieth session the Legal Committee agreed that a Correspondence Group would prepare the ground for discussions within the Committee for monitoring the implementation of the HNS Convention. At its eighty first session the Committee agreed that the United Kingdom would initiate work within the Correspondence Group to develop a draft explanatory guide on the HNS Convention itself.

2 Subsequently, the UK initiated the development of a guide to enactment of the HNS Convention in order to give assistance to States interested in ratifying or acceding to the Convention, to potential claimants and to contributors to the HNS Fund.

3 Prior to the eighty-second session of the Legal Committee (LEG 82), the Correspondence Group considered the proposed framework for the guide as a single document, rather than in the form of separate documents for each interested party i.e. claimants, contributors and States Parties. At LEG 82, the Committee agreed that the Correspondence Group should continue to develop the guide as a single document containing all the necessary information for interested parties, and noted the intention of the Correspondence Group to produce a substantive draft document, with a target date for publication after the eighty-third session of the Legal Committee.

4 The UK further reported on the development of the guide at the informal consultative meeting held at the IMO Headquarters on 16 March 2001. The UK reported that members of the Correspondence Group were working on component parts of the guide, but that the guide was not yet complete at that stage. During the intersessional period, prior to and after the informal consultative meeting, a substantial amount of work has been undertaken within the Correspondence Group, resulting in the annexed draft guide. The United Kingdom would like to express its gratitude to all members of the Correspondence Group for their help in developing the draft guide so far, which includes contributions from those States, amongst others, who initiated work in the Correspondence Group on different topics relating to the monitoring and implementation procedure of the HNS Convention.

### **Continuing work of the Correspondence Group**

5 Given the nature of the annexed draft guide and the work already undertaken, the Correspondence Group has already been asked to consider further the following options in terms of the purpose of the guide itself:

- i is it to be a relatively simple overview? or,
- ii is it to be a definitive guide on implementation of the Convention?

6 A relatively simple overview of the HNS Convention would provide a useful tool of 'reference' for prospective Contracting States and interested parties with little or no practical knowledge of the Convention. A definitive Guide will be more than simply an explanatory guide to the HNS Convention, rather it should provide the basis for uniformity of implementation of the Convention. The development of the draft guide as contained in the annex to this document is already sufficiently advanced that, at this stage, it is not far from being a definitive document on the implementation of the HNS Convention. There has not been a great deal of feedback from within the Correspondence Group on these options, although those that have responded have indicated a preference for continuing with the development of a definitive guide, **and**, a relatively simple overview to be undertaken in quicker time as well. Therefore, with this in mind, it is suggested that the Correspondence Group continues to approach the work on this item as follows:

### **Definitive HNS Guide (as annexed)**

7 Taking into account the length and detail of the annexed draft guide at present, the Correspondence Group believes that it is appropriate, at this stage, that the guide is considered as an information paper by the Committee at this session, allowing delegations more time to reflect on its substance. The guide would then be developed further within the Correspondence Group during the subsequent intersessional period with a view to being submitted as a working paper to the Legal Committee for its review at the seventy-fourth session of the Legal Committee (LEG 84).

8 Given the substantive amount of information contained in the guide, it may then be necessary for a working party of interested States to finalise the details in the guide during the subsequent intersessional period ready for formal agreement at the seventy-fifth Legal Committee session. At this point, when the implementation period is clear and can be fully reflected in the text of the final version of the definitive guide, the detailed HNS guide should be published as a printed document. This timetable for finalisation of the guide is consistent with the stated intention of the Correspondence Group at the seventy-second session of the Legal Committee, and at the informal consultative meeting in March, that a substantive draft document would be produced, with a target date for publication after the eighty-third session of the Legal Committee.

### **Basic Overview of the HNS Convention**

9 Both CEFIC and the IOPC Fund have already indicated within the Correspondence Group that the development of a simpler guide in quicker time, whilst continuing the development of the more detailed guide in the time frame envisaged above, would provide useful information for all interested parties. Such an overview could be developed and agreed relatively quickly by the Correspondence Group during the intersessional period, ready for submission to, and formal agreement at, LEG 84. This would then be available to Member States, and other interested parties, whilst the detailed guide as contained in the annex is finalised and formally agreed.

### **Conclusion**

11 The Legal Committee is invited to consider the above recommendations and agree the proposed timetable for the continued development of a definitive HNS Guide, and also a simpler, basic document.

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ANNEX

**[Draft] IMO Guide  
for Interested  
Parties on the  
Workings of the  
Hazardous and  
Noxious  
Substances  
Convention 1996  
(HNS Convention)**

**Subject to change**

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Annex I - Correspondence Group Contacts

Annex II - Certificate of Insurance & Explanatory Notes

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## **(1) Introduction**

### **1.1 Purpose of the Guide**

This guide is aimed at all parties with an interest in the HNS Convention, in particular:

- Potential claimants;
- Potential contributors to the HNS Fund; and
- Potential State Parties to the HNS Convention.

This guide is intended to encourage and assist States in the implementation and enactment of the HNS Convention, whilst outlining the structure of the Convention in a manner that allows all parties to understand the complexities of the provisions in the Convention. However, different interested parties may wish to refer only to specific, relevant issues in this guide, or specific articles in the Convention, rather than all sections of the guide. In particular, excluding the introduction section, these issues may include matters relating to:

Potential claimants refer to	: Section 4.1 on Liability of the Shipowner <i>Related article in the Convention: 7</i>  Section 4.4 on Compulsory insurance <i>Related article in the Convention: 12</i>  Section 5.3 on Payment of Compensation <i>Related article in the Convention; 14</i>  Section 5.4 on Subrogation and recourse <i>Related Article in the Convention: 41</i>  Section 6.1 - 6.5 on Claims <i>Related Articles in the Convention: 3, 4, 5, 11, 37, 38 &amp; 39</i>
Potential contributors refer to:	Section 5.1 on Establishment of the HNS Fund <i>Related Article in the Convention: 13</i>  Section 5.2 on Organisation and administration of the HNS Fund <i>Related Articles in the Convention: 15, 24-36</i>  Sections 7.1- 7.9 on Contributions to the HNS Fund <i>Related Articles in the Convention: 16-23 and Annex II</i>  Annex III, Reporting Forms
Potential State Parties refer to:	Sections 3.1- 3.4 on Ratification of the Convention <i>Related Articles in the Convention: 45-53</i>  Section 4.4 on compulsory insurance of the shipowner <i>Related Article in the Convention: 12</i>  Section 4.5 on Certificate of insurance <i>Related Article in the Convention: 12 and Annex I</i>

## 1.2 Overview of the HNS Convention

The main objective of the HNS Convention is to provide adequate, prompt and effective compensation for loss or damage arising in connection with the carriage of HNS on sea-going ships. The Convention will establish a “two tier” compensation regime, similar to the existing regime for oil pollution from tankers. Compulsory insurance taken out by shipowners will provide cover for initial loss or damage (1<sup>st</sup> tier). The Convention will also create a compensation fund to cover the costs of loss or damage not fully compensated by the shipowners’ liability (2<sup>nd</sup> tier).

Once in force, the HNS Convention will bring considerable benefits to the victims of shipping incidents. It will establish a guaranteed level of compensation up to 250 million Special Drawing Rights <sup>1</sup> (about £200 million or US \$303 million) for many claims arising from the seaborne carriage of HNS. The amount met by the shipowner will range from 10million SDR to 100 million SDR, depending on the size of the ship. The HNS Fund will meet the balance up to the amount of 250 million SDR.

## 1.3 Status of the HNS Convention & progress towards implementation of the HNS Convention

A Diplomatic Conference convened by the International Maritime Organization (IMO), a specialised agency of the United Nations, adopted the HNS Convention in May 1996. The HNS Convention has not yet entered into force. It will do so eighteen months after ratification by twelve States, subject to the entry into force conditions contained in the Convention.

Canada, Denmark, Finland, Germany, the Netherlands, Norway, Sweden and the United Kingdom signed the HNS Convention within the 12 months the Convention was open for signature. All signatories will have to ratify the Convention before they are legally required to comply with it. Any State that wishes to be bound by the Convention, but has not signed it, will have to accede to the Convention.

The Russian Federation acceded to the HNS Convention on 20 March 2000. The United Kingdom has taken the necessary primary enabling legislation to ratify the Convention. Further Parliamentary approval is required prior to ratification by the United Kingdom. Ireland has legislation that is awaiting enactment to give effect to the Convention, thus enabling ratification.

Periodically, informal meetings have been held to discuss the implementation of the HNS Convention. States attending these meetings have agreed that it would be desirable to co-ordinate their ratification of the Convention. Such co-ordination has the objective of achieving an effective global compensation regime. It will maximise the benefits of the Convention to victims of marine incidents and to the environment. It will also reduce the risk of the industries concerned in any individual State being put at an unfair competitive disadvantage.

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<sup>1</sup> The SDR is the International Monetary Fund’s special drawing right - amounts are in effect made up of a ‘basket’ of currencies from the leading industrialised nations.

1 SDR = £ 0.887, \$1.257, YEN 156.25, Euros 1.445, as at 19 July 2001 prices

In October 1999 the IMO Legal Committee agreed to add the implementation of the HNS Convention to its work programme. A correspondence group within the Committee has been established to monitor the efforts and achievements in and of interested parties to implement the HNS Convention and, by doing this, to encourage other States to follow this path. The work of the Group will have the effect of assisting potential States in resolving any practical difficulties in setting up the new regime. In order to ensure that all the key issues are considered within the Group, the Group has agreed to work on the following key issues:

- the collection of information on contributing cargoes and the continuing work on the reporting forms;
- the identification of the term "receiver";
- HNS insurers and insurance certificates;
- The production of an initial guide to the HNS Convention, and
- compliance and verification of States responsibilities in respect of the system for contributing cargoes.

A co-ordinated report of the progress of the Group is presented to the IMO Legal Committee at each regular session.

The contacts of members of the IMO HNS Correspondence Group contained in Annex I may be able to provide advice on specific issues of the Convention.

## **(2) What are HNS?**

### **2.1 Definition of HNS**

The HNS Convention defines hazardous and noxious substances (HNS) as:

- (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 of Annex I to the International Convention for the Prevention of Pollution from Ships, 1973, as amended by the Protocol of 1978 relating thereto (MARPOL 73/78), as amended;
  - (ii) noxious liquid substances carried in bulk referred to in appendix II of Annex II to MARPOL 73/78, as amended, and those substances and mixtures provisionally categorised as falling in pollution category A, B, C or D in accordance with regulation 3(4) of 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 (IBC Code), 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 1.1.3 of the Code;
  - (iv) dangerous, hazardous and harmful substances, materials and articles in packaged form covered by the International Maritime Dangerous Goods Code (IMDG 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 (IGC Code), 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 (BC Code), as amended, to the extent that these substances are also subject to the provisions of the IMDG 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.

## 2.2 What substances are included in the definition of HNS?

The definition of HNS is largely based on lists of individual substances that have been previously identified in a number of Codes designed to ensure maritime safety and prevention of pollution. Many substances are covered under more than one section of the definition. There is considerable overlap between the three different definitions of liquid HNS, and some liquefied gases are also covered by the definition of dangerous liquid substances under the IBC Code.

HNS are very varied and include both bulk cargoes and packaged goods. Bulk cargoes can be solids, liquids including oils or liquefied gases. The number of substances included is very large: the IMDG Code, for example, lists hundreds of materials which can be dangerous when shipped in packaged form. In practice, however the number of HNS that are shipped in significant quantities are relatively small, as illustrated in Section 2.3.

Bulk solids are included if they are covered by appendix B of the BC Code, i.e. they possess chemical hazards, and if they are also subject to the provisions of the IMDG Code when carried in packaged form. This means that many of the major bulk solids are excluded since they either do not possess chemical hazards (e.g. iron ore, grain, bauxite and alumina, phosphate rock, cement and some fertilisers) or they are classified as materials hazardous only in bulk (MHB) (e.g. coal, reduced iron and woodchip). Bulk solids that are covered include some fertilizers, sodium and potassium nitrates, sulphur and some types of fishmeal.

Bulk liquids are included if they present safety, pollution or explosion hazards and include organic chemicals (e.g. methanol, xylenes and styrene), inorganic chemicals (e.g. sulphuric acid, phosphoric acid and caustic soda) and vegetable and animal oils & fats (e.g. palm oil, soybean oil and tallow). Both persistent and non-persistent oils of petroleum origin are also included, although the Convention only covers non-pollution damage caused by persistent oil, as explained below. Bulk liquids that are not covered include potable alcohol and molasses.

All liquefied gases which are transported in bulk are included, such as liquefied natural gas (LNG), liquefied petroleum gas (LPG), ammonia, ethylene, butadiene, ethane and propylene.

Packaged goods are included if they are covered by the IMDG Code, which comprises a very wide range of chemicals although many of these are only carried in small quantities.

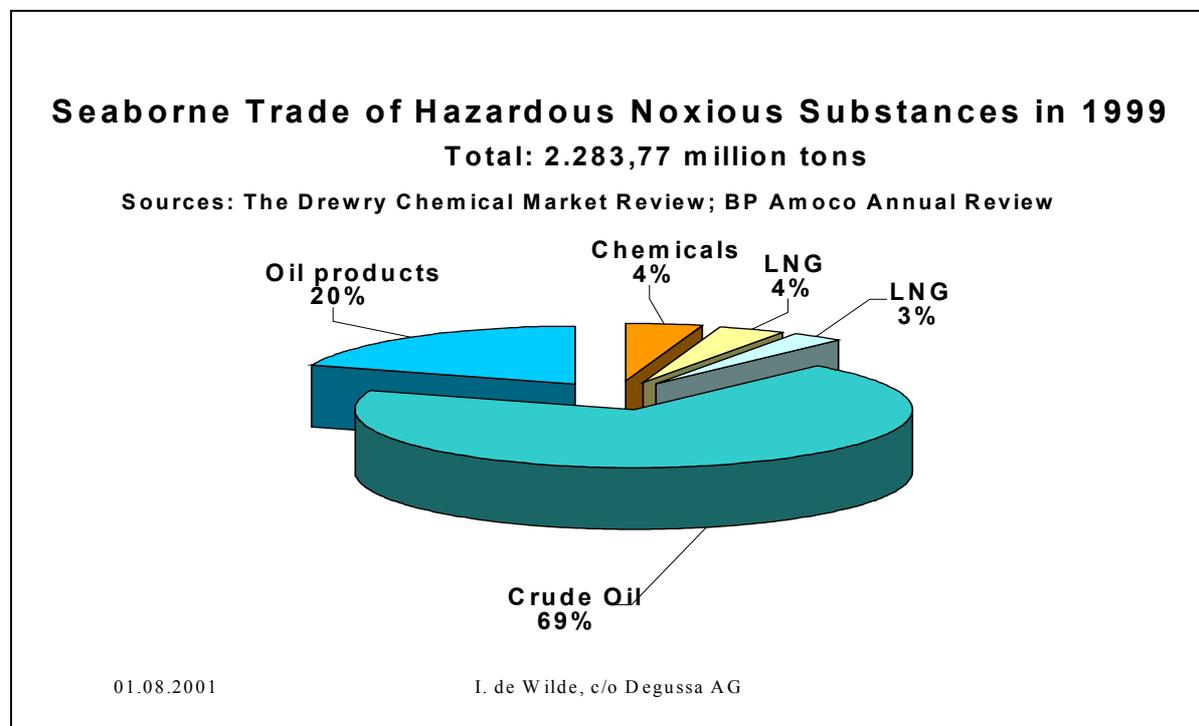
All substances that fall within the definition of HNS are covered by the HNS Convention in respect of compensation for damage resulting from incidents with the following exceptions:

- the Convention does not apply to pollution damage caused by persistent oil, since such damage is already covered by the existing regime for pollution damage caused by oil spills from tankers ie the Civil Liability and Fund Conventions.
- the Convention does not apply to damage caused by radioactive materials.

Receivers of all substances that fall within the definition of HNS are liable to pay contributions if the quantities they receive are above certain thresholds. However, some substances or groups of substances have been selected for special treatment so that the hazards they represent can be reflected in the contributions levied. Oils, LNG and LPG will each have either their own separate account or their own sector within the general account. Bulk solids will also have a separate sector within the general account.

## 2.3 Shipping Statistics – Trade & Imports of Hazardous and Noxious Substances

With reference to sections 1.3 and 6.1 in particular, the following graphs highlight, in part, the necessity for a co-ordinated ratification of the HNS Convention on a global basis.

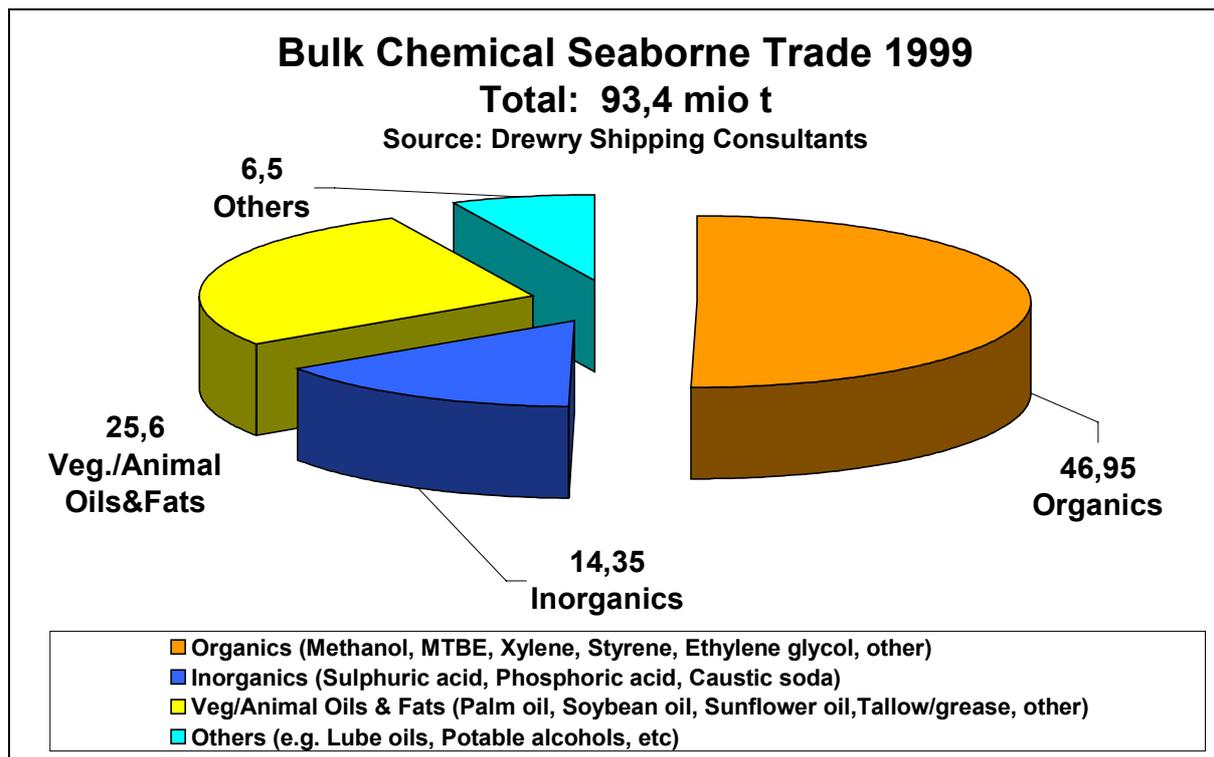


Due to the high % of sea-borne trade of HNS consisting of crude oil, and oil products like naphtha, gas oils, gasoline's etc, it is unlikely that the operation of the oil account will be postponed or suspended once the Convention enters into force and the account becomes operational.

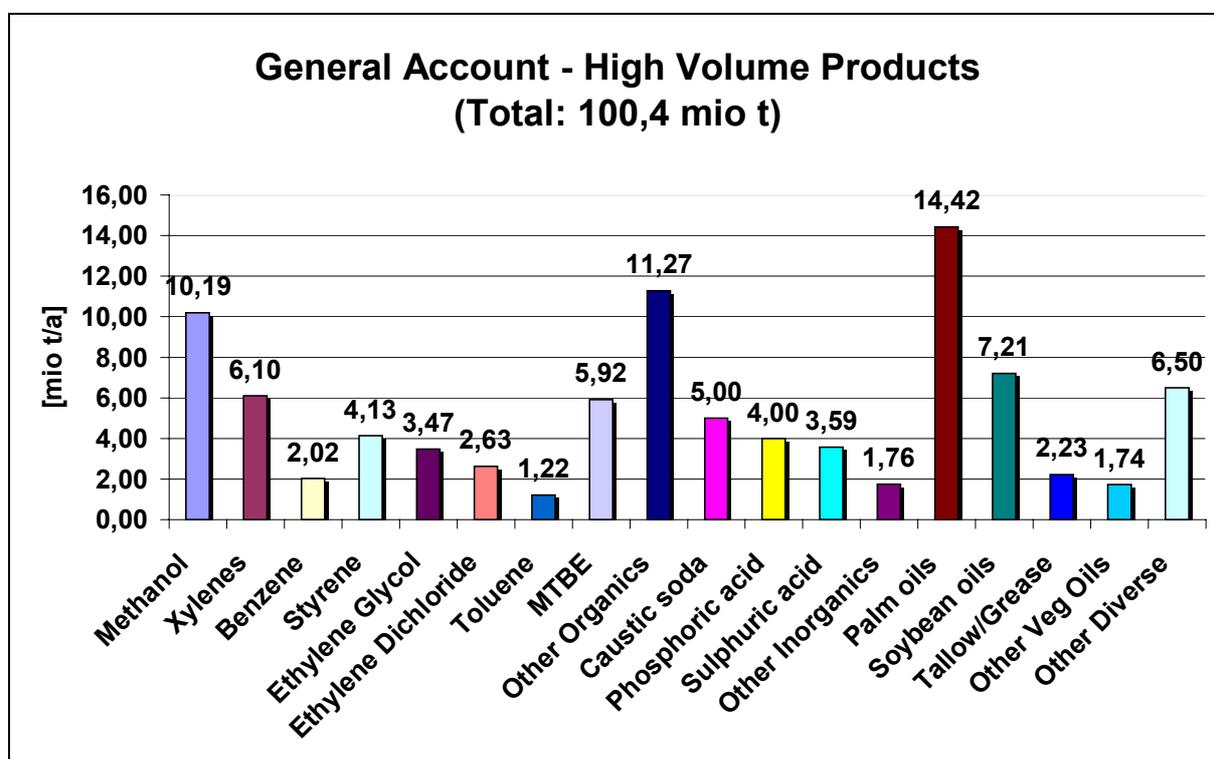
However, taking into account the relatively small % of cargoes falling under the general account and the two gas accounts respectively, further evaluation on sea-borne trade is desirable to ensure a smooth implementation of the HNS Convention.

The following consideration of chemical seaborne trade highlights some of the hazards presented by the products falling solely within the general account:

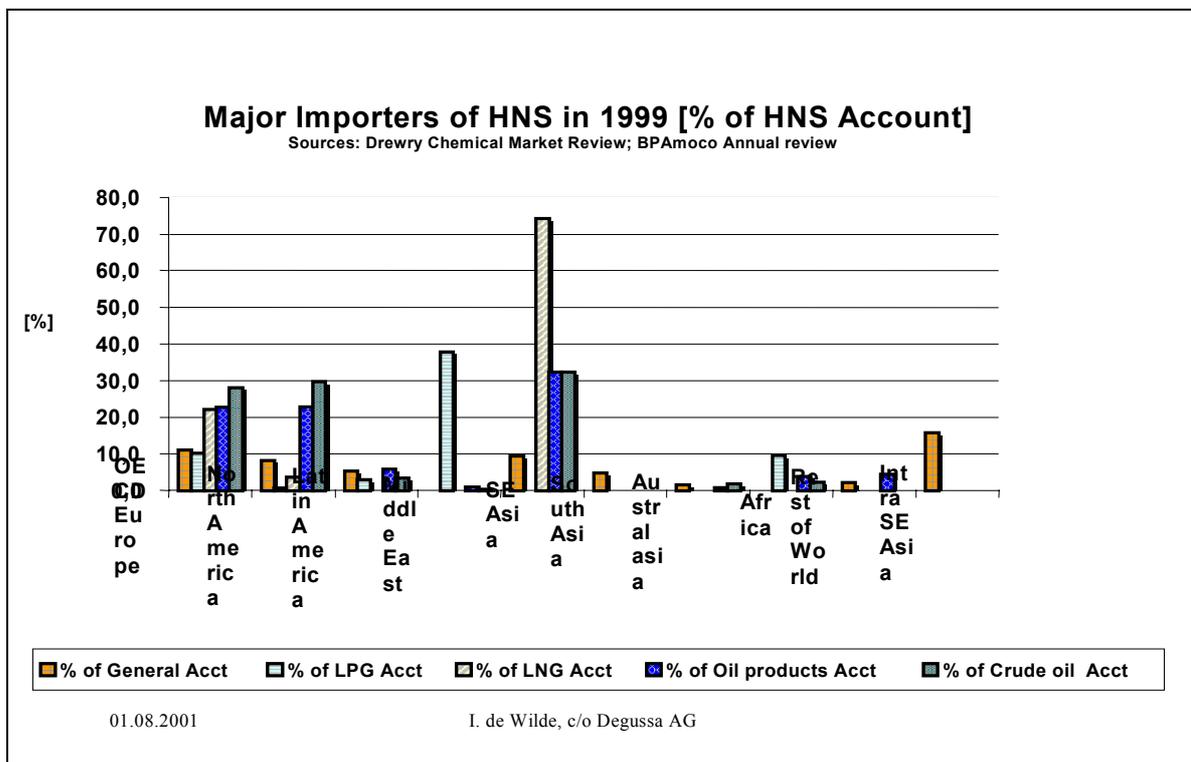
- several organics are flammable, whereas only few present a risk to the marine environment;
- inorganics mainly shipped in bulk are neither flammable nor polluting, but are corrosive. Preventive measures to be taken after an incident are very limited as they are immediately diluted when released;
- environmental pollution is the main hazard of vegetable or animal oils and fats.



The overview of high volume products falling under the general account serves as a tool for the reporting of contributing cargo. Complete lists of products in the Conventions referred to in Article 1 (5) of the HNS Convention on ‘Hazardous and Noxious Substances’ can be found in section 2.1 of this guide.



With the understanding that the figures used to prepare the following graph are not fully complete, the presentation of major importing regions gives some indication of the entry into force of the general account and/or the separate accounts, dependant on the ratification of, or accession to, the Convention by States in differing geographical regions. When also considering also the significant differences in market prices of the high volume products, ranging from about US \$ 30 to US \$ 1.000 per ton, the possible impact of ratification of, or accession to, the HNS Convention in importing regions can, roughly, be estimated.



### **(3) Ratification of the Convention**

#### **3.1 How to ratify the Convention**

It is assumed that every State Administration will have a legal department or lawyers, which may be attached to its marine administration or to a larger administrative department such as, for example, a Department or Ministry of Transport. It is further assumed for the purposes of this guide that these legal administrators (or lawyers) will have primary responsibility for the legislation that is necessary to implement the HNS Convention. Whatever the structure of the administration, it must be considered desirable for a single body to be given the overall responsibility for legislation, implementation and ratification. The legal system will, of course, vary from State to State.

It is highly likely that new legislation is required specifically for the purpose of implementing the HNS Convention. However, it is advisable to examine how other international maritime conventions have been implemented in the national law of the State concerned.

The Convention will enter into force following the deposition of an instrument of ratification, acceptance, approval or accession, when the entry into force requirements (see section 3.2) have been met. When the Convention is already in force, for those States depositing such an instrument, the Convention will enter into force three months after the deposition.

The implementing legislation should enter into force in a particular State no later than when the Convention enters into force for that State. To ensure that this will be the case, a State will have to initiate the preparation of such legislation well in advance of its accession to the Convention. This is particularly important if the implementing legislation is to be adopted by a parliament, congress etc.

#### **3.2 Entry into force**

The HNS Convention will enter into force eighteen months after both of the following criteria have been fulfilled:

- (1)** At least twelve states must have expressed their consent to be bound by the Convention, (typically) through ratification or accession. This must include four States each with a registered ships' gross tonnage of at least 2 million units.
- (2)** Contributors in the states that have ratified or acceded to the Convention must, between them, receive a minimum of 40 million tonnes of contributing cargo covered by the general account.

The criteria ensure that there will be sufficient quantities of contributing cargoes to ensure the financial viability of the HNS Fund when the HNS Convention enters into force, and also a sufficient number of States Parties to secure broad international participation.

In order to determine when the latter of the two criteria above are fulfilled, the HNS Convention requires a State to submit the following information to the Secretary-General of the IMO:

- when that State deposits an instrument of ratification, acceptance, approval or accession under Article 45 (3); and
- data on the quantity of contributing cargo received in that State in the preceding year; this information should also be provided on an annual basis until the Convention enters into force for that State,

This information will also be used in determining whether the operation of any of the separate accounts should be postponed and what initial contributions should be levied.

Each State Party has the option however, of assuming responsibilities that would otherwise fall on contributors. This option could be used in a number of different ways i.e. by channelling contributions from contributors to the HNS Fund through a State agency. This would allow the State to collect other levies at the same time as contributions to the HNS Fund and to monitor whether contributors are meeting their responsibilities.

Any State exercising this option is required to make a declaration to the Director of the HNS Fund or the Secretary General of the IMO on what responsibilities the State is assuming. Any withdrawal of such a declaration will take effect three months after the receipt by the Director of written notification. States also have the option of making use of the optional exclusion in Article 5 of the Convention.

The HNS Convention will supersede any earlier convention that conflicts with it. However, this only applies to treaty obligations between States Parties to the HNS Convention. The HNS Convention will take precedence over any conflicting claims previously brought under the 1976 Limitation of Liability for Maritime Claims Convention, as amended, for States party to both Conventions.

### **3.3 Implications of ratification**

#### **Duties of States Parties**

States Parties are required to inform the Director of the HNS Fund of the name and address of any receiver of contributing cargo, and any subsequent contributor to the Fund for the preceding year. States are also liable for any financial losses incurred as a result of the non-submission of a report, and are required to submit annual reports to the Director with details of their "receivers" that receive relevant quantities of contributing cargoes in the respective States, together with information on the quantities of cargo received. The Assembly shall, on the recommendation of the Director, decide whether such compensation shall be payable by a State Party.

In respect of contributions of domestic traffic of HNS i.e. the trade by sea from one port or terminal to another within the same State Party, States have the option of developing national regimes for the collection of contributions. Any such national regime however, must raise the same total contributions for that State as the mechanism specified in the Convention.

Any information supplied by individual contributors will be dealt with as confidential and shall not be divulged outside the HNS Fund, except in so far as it may be strictly necessary to enable the Fund to carry out its functions. This information will include data on the type and quantities of hazardous and noxious substances received by named companies or other entities, which could be commercially sensitive.

The Convention also requires that all ships under the jurisdiction of a flag or Port State Party, to have insurance or other security to cover the shipowner's liability up to the determined limits (Article 9). The Flag State, if party to the HNS Convention, is responsible for certifying that the shipowner has effective insurance cover within the terms of the Convention. Certification must be sought from the appropriate administration of a State party if the vessel is flagged in a non-state party.

The HNS Convention requires a State Party to ensure that all ships registered in that State, and all ships entering or leaving its ports, have insurance cover or other financial security for the liability under the Convention up to the determined limits (Article 12 of the Convention). If Party to the HNS Convention, the State of the ship's registry shall issue a certificate showing that there exists insurance or other financial security fulfilling the requirements set out in the Convention. A State Party may also issue certificates to a ship registered in a State not party to the Convention, but is under no obligation to do so. Certification must be sought from the appropriate administration of a State Party if the vessel is registered in a state that is not a Party to the HNS Convention. States Parties are required to respect any certificate issued by another State Party (see section 4.4 for more detailed information on States duties with regards to insurance requirements under the Convention).

Each State Party must organise a system to monitor that ships which are required to maintain insurance actually comply with the requirements. The implementation measures are likely to include:

- A legal basis in national law for the insurance requirement (typically an act of parliament).
- Penal sanctions against the master and the shipowner for non-compliance (Article 6)
- Designation of a public or private body to perform checks on behalf of the State Party.
- Inspection procedures, most likely based on random checks.

Control procedures based on:

- Running registers of cargo ships registered in the State in question against the national register of HNS certificates issued.
- Checking whether there is an HNS certificate on board when carrying out port state control of foreign vessels or similar control of national vessels.

- Checking whether an HNS certificate has been issued when considering vessels for port state control if information about HNS certificates is available in the database used for such screening (e.g., Equasis <<http://www.equasis.org/>>).
- Requiring cargo ships to give details of their HNS certificate when they (as is common practice) identify themselves when approaching the coastline.
- Requiring cargo ships to give details of their HNS certificate when they give notice to the authorities or the harbourmaster that there are dangerous goods on board.<sup>2</sup>

Most cargo ships would need an HNS insurance certificate from time to time. Such ships are permanently covered by insurance when their owners are members of a P&I Club. States may consider whether (by national law) all ships with a cargo certificate should be required by national law to maintain HNS certificates permanently, thereby avoiding the difficulty for the competent authorities of determining whether or not there actually is HNS on board. Alternatively, a State may establish in national law that it is for the shipowner to prove that there is no HNS on board.

### **Information on contributing cargo**

Each Contracting State will have a duty to submit information on contributing cargo received in that State. The State will also have to submit this information before the HNS Convention enters into force. This information is necessary to make it possible to determine the entry into force date of the Convention and whether the operation of any of the separate accounts should be postponed.

Contributing cargo will be recorded on reporting forms that can be used to make reports to the HNS Fund. There are 3 reporting forms, (see Annex II). Form 1 is a general form for receivers. Form 2 is a special form for agents and subsidiaries and will need to set a lower threshold for reporting than those set by the Convention, as the information provided will only cover part of the contributing cargo received by the mother company or the principal. Form 3 is for reports from States to the HNS Fund.

### **3.4 Revision, amendment, denunciation and cessation of the Convention**

The Convention provides for a tacit acceptance procedure for increases in the limit of shipowner liability and the limit on the total amount of compensation available from the shipowner and the HNS Fund. This procedure eliminates the necessity to renegotiate the Convention in order to increase the limits of compensation providing the required majority of Member States agree. The IMO Legal Committee would consider any proposed increases. If adopted by the Committee, the higher limits would enter into force for all State Parties, unless a significant proportion of these States registered an objection.

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<sup>2</sup> This is required in the European Union, see, e.g., Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods article 5 and Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European

#### **(4) Shipowner's Liability**

##### **4.1 Liability of the Shipowner**

Under the HNS Convention the shipowner is held to be strictly liable for damage caused, unless the circumstances fall within one of the stated exceptions set out in the defences available to the shipowner. Strict liability means that the liability is not dependent on the fault of the owner or any other person. The fact that damage has been caused by substances on board the ship is sufficient to establish the shipowners' liability. The shipowner is normally entitled to limit his liability under the Convention to an amount calculated on the basis of the units of tonnage of the ship, as follows:

- (a) 10 million SDR for a ship not exceeding 2, 000 units of tonnage;
- (b) for a ship in excess of 2,000 units of tonnage the shipowner is entitled to limit his liability to 10 million SDR plus the following amount :
  - (i) for each unit of tonnage from 2,001 to 50,000 units of tonnage, 1,500 SDR;
  - (ii) for each unit of tonnage in excess of 50, 000 units of tonnage, 360 SDR.

The aggregate amount of the shipowners' liability shall not exceed 100 million SDR.

In order to be able to limit liability the shipowner must establish a limitation fund, in accordance with the determined limit, with a competent court. This is so as to ensure that the limitation amount is actually available for the payment of compensation. Once a limitation fund has been established, no other assets of the owner may be seized i.e. 'legally arrested'. Any assets that had been seized before the fund was established must be released. Any other person also providing financial security also has the right to institute a limitation fund i.e. the shipowner's insurer.

When the limitation fund is distributed the court will set aside a sufficient sum in order to protect the shipowner against paying more than the applicable limit of liability. This is necessary if the distribution takes place before the expiry of the time bar period as the shipowner may still be liable for compensation payments for damage in a State not party to the Convention. This defence is also available to other persons who may be compelled to pay compensation. If a shipowner invokes one of the defences available to him/her, compensation would still be available from the HNS Fund in many cases.

Liability is channelled to the shipowner and shall not be attached to other persons connected with the operation of the ship, unless the damage resulted from their own fault. The aim is to prevent unnecessary litigation. Since the shipowner is strictly liable for damage and is required to maintain insurance or other financial security, the interests of claimants are subsequently protected.

The shipowner will be denied the right to limitation of liability if it is proved that the damage resulted from the shipowner's personal act or omission committed either with intent, or recklessly, and with knowledge that damage would probably result, as a result of the owner's personal act or omission. This is only the case in the event of an act or omission by the shipowner, not in the event of an act or omission by the master or crew of the ship. One possible example of such an act could be that a shipowner knowingly allows a ship to sail in such an unseaworthy condition that an accident is likely to occur.

The HNS Convention provides defences for the shipowner to be exempted from liability in certain cases (Article 7 (2)). No liability shall attach to the owner if the owner proves that:

- (a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or
- (b) the damage was wholly caused by an act or omission done with the intent to cause damage by a third party; or
- (c) the damage was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function; or
- (d) the failure of the shipper or any other person to furnish information concerning the hazardous and noxious nature of the substances shipped either:
  - (i) has caused the damage, wholly or partly; or
  - (ii) has led the owner not to obtain insurance in accordance with article 12;

provided that neither the owner, nor its servants or agents knew or ought reasonably to have known of the hazardous and noxious nature of the substances shipped.

Subparagraph (d) applies only if someone had failed to give the shipowner the relevant information, or if the shipowner had not obtained the necessary insurance cover as a consequence of this failure to provide information. If the shipowner invokes one of these defences and is not held liable, compensation may still be available from the HNS Fund.

The Convention also provides for the optional exclusion from the application of the Convention to ships satisfying certain criteria. This allows a State, when ratifying the Convention, to exclude voyages involving small ships which may face relatively high insurance premiums in relation to their revenue earning capacity. These criteria, contained in Article 5 of the Convention, are:

- (a) the ships' tonnage must not exceed 200 gross tons; and
- (b) the ships must carry HNS only in packaged form, not in bulk; and
- (c) the ships must be engaged only in domestic voyages.

Two neighbouring States can also agree to exclude voyages between those States from the scope of the Convention, providing the ships comply with (a) and (b) above. Any such declaration may be made or withdrawn by notification to the Secretary General of the IMO. Cargo carried on board ships covered by such a declaration are not considered to be cargo contributing to the HNS Fund.

The HNS Fund is not liable for any damage caused by HNS carried by a ship to which the Convention does not apply, following such a declaration if the damage occurred in the territorial sea, or the EEZ, of the State which has made the declaration.

#### **4.2 Channelling of Liability**

No claim for compensation may be made against the following, unless the damage resulted from their personal act or omission, committed with intent to cause such damage, or recklessly and with knowledge that such damage would probably result:

- (a) the servants or agents of the owner or members of the crew;
- (b) the pilot or any other person who, without being a member of the crew, performs services for the ship;
- (c) any charterer (including a bareboat charterer), manager or operator of the ship;
- (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
- (e) any person taking preventive measures; and
- (f) all servants or agents of persons mentioned in (c), (d) and (e).

#### **4.3 Incidents involving two or more ships**

The HNS Convention provides for the joint and several liability of all the shipowners involved if an incident occurs involving two or more ships carrying HNS substances, unless they are able to avail themselves of the defences provided under Article 7 of the Convention. Each shipowner is able to invoke a separate limit of liability. The number of ships involved in the incident governed by the HNS Convention will determine the overall amount available to claimants.

#### **4.4 Compulsory Insurance of the Shipowner**

Any owner of a ship that carries HNS will have to take out insurance, or maintain other acceptable financial security. Depending on the ship's tonnage, the shipowner and the shipowner's insurer will be liable to pay up to between 10 and 100 million SDR per incident.

The HNS Convention requires shipowners to provide evidence of insurance cover upon entry into port of any State that is party to the Convention by production of a certificate. This is necessary regardless of whether the State of the ship's registry party to the Convention. The responsibility for issuing insurance certificates will fall upon the States of the ship's registry. Initially, however, many ships may be registered in States that are not party to the HNS Convention and the burden of issuing the certificates will fall on a few State Parties). This is the same arrangement that is followed under the International Convention on Civil Liability for Oil Pollution Damage (CLC) regime. Ships registered in States not parties to the HNS Convention will be able to seek certificates from States that are party to the HNS Convention as long as they can satisfy the insurance requirements.

Actions for compensation can be brought directly against the insurer or person providing financial security (see Article 12 (8)). In such a case, the insurer will enjoy the defences that the owner would have had, including the right to limit liability, even in circumstances where the owner is not allowed to limit liability. The insurer also has an added defence if the damage resulted from the wilful misconduct of the shipowner.

If the shipowner's defences are upheld by the court the entire costs of the incident would, in many cases, fall on the HNS Fund.

#### 4.5 The insurance certificate

The compulsory insurance certificates issued to ship carrying HNS are required, under the Convention to contain the following particulars:

- (a) name of the ship, distinctive number or letters of port registry;
- (b) name and principal place of business of the owner;
- (c) IMO ship identification number;
- (d) type and duration of security;
- (e) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established; and
- (f) period of validity of the certificate, which shall not be longer than the period of validity of the insurance or other security.

The certificate may be issued in one or more national languages, but must in all events be available to the shipowner either as a translation or an original in English, French or Spanish.

Each State Party must designate an authority, e.g. the maritime directorate, coastguard agency or another private or public body, to issue insurance certificates on behalf of that State Party. A State must decide whether or not to issue certificates to foreign vessels, and whether or not there should be any fees or charges for the certificates.

There are no requirements in international law as to how the decisions relating to the issue of certificates are to be made. National law may require that rules are adopted by certain authorities, e.g. the parliament. In any events, it is important that the rules are communicated to foreign applicants if certificates are issued to foreign ships.

One copy of the certificate must be forwarded to the authorities that keep the register of ships registered in a State Party. Because States Parties generally issue certificates in respect of their own vessels, this means that the issuing authority may be obliged to forward the certificate to another authority within the same state. The issuing authorities should in any events keep a copy.

General insurance information is available on the following Internet website: <<http://www.equasis.org/>>. This information has been made available by insurers, and does not require issuing authorities take any particular action.

It is for the applicant to prove that the requirements for issuing a certificate are fulfilled. The main part of the application for a certificate is a proof of insurance issued by an insurer confirming that the insurer undertakes the obligations of the insurer under the HNS Convention. However, the issuing authority may wish to consider the following:

- Does the undertaking cover all obligations required by the HNS Convention? A state may require an express statement to this effect. If such a statement is given, it does not matter whether the insurer is a liability insurer or another kind of insurer.

- Does the insurer have the financial capability necessary for his undertaking? If in doubt, a State may require a statement to this effect from the relevant authorities in the state in which the insurer has its main office.<sup>3</sup>
- Will the insurer have sufficient funds available in a State Party when a claim is made? A judgement under the HNS Convention rendered by a court in one State Party is enforceable in any other State Party (Article 40), but not necessarily elsewhere.

Annex II sets out a standard format for the certificate required for all ships carrying HNS in accordance with Article 12 of the Convention, and the explanatory notes on the certificate as contained in Annex I of the Convention. The certificate, which will normally be issued by the State of the ship's registry, attests that the shipowner has insurance or other financial security covering his liability under the Convention.

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<sup>3</sup> In some cases, for example within the European Union, one is obliged to accept the financial standing of insurers located in other member states (see First Council Directive 73/239/EEC of 24 July 1973 on the co-ordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance article 7(1), as amended by Council Directive 92/49/EEC article 5).

## **(5) The HNS Fund**

### **5.1 Establishment of the HNS Fund**

The HNS Convention will establish a new compensation fund modelled on the existing International Oil Pollution Compensation Fund (IOPC) Fund.

The HNS Fund will complement the IOPC Fund regime by covering pollution damage arising from non-persistent oils and damage from fire, explosion or other hazards for all oils carried as cargo by sea. It will also cover a wide range of claims arising from incidents involving other types of dangerous and polluting cargoes carried by ship.

### **5.2 Organisation and administration of the HNS Fund**

An Assembly, Secretariat and a Director will be established for the HNS Fund, mirroring the precedent set by the IOPC Fund.

The HNS Fund shall be recognised as a legal person in each State Party. States must recognise the Director as the legal representative of the HNS Fund. This provision will allow the HNS Fund to operate in a similar manner to the IOPC Fund established by the Fund Convention.

The Assembly shall consist of all States Parties to the HNS Convention. Under normal circumstances the Assembly will meet once a year. The Assembly has a number of functions. The Assembly will decide on the settlement of claims as against the HNS Fund. It will keep the implementation of the Convention under review (every five years) and review the internal and financial regulations of the HNS Fund. This will enable it to assess whether the contributing system is working effectively and fairly. The Assembly will determine the amount of any levies needed and adopt the annual budget.

The Assembly is also required to consider, and approve as necessary, any recommendations from the Director regarding the application of the Convention in respect of contributing cargo. There is no specific requirement however, under the Convention for the Director to make such recommendations, although the Director does have a range of responsibilities relating to the operation of the HNS Fund.

For the purpose of the consideration of claims for compensation the Assembly shall establish a Claims Committee. This is based on the established practice under the Fund Convention whereby the majority of claims are handled by the Director; where claims involve new issues of principle the Director submits those claims to a Committee made up of certain States Parties elected by the Assembly.

The Assembly also has the task of admitting as observers States not parties to the Convention and, intergovernmental and international non-governmental organisations enabling them to attend meetings to contribute to debates on matters of policy, if appropriate.

- In addition to its main task of paying compensation, the HNS Fund also has the related tasks of:
- assisting States Parties to find necessary expertise to prevent or mitigate damage caused by incidents within the scope of the Convention; and
- providing credit facilities for preventive measures.

The HNS Fund is required to meet any expenses incurred in the operation of the Fund by a State Party, other than its representation at meetings of the Fund Bodies. The HNS Fund shall be exempt in all States Parties from direct and indirect taxation, custom dues (except for duties, taxes, or dues that merely constitute payment for public utility services). In order to ensure that companies cannot avoid the payment of contributions, the HNS Fund would take account of contributing cargo receipts spread among associated companies.

### **5.3 Payment of Compensation**

The HNS Fund normally becomes involved when the total costs of an incident exceed the shipowner's liability i.e. the Fund pays "top up" compensation when the shipowner, or his insurer cannot meet in full the damage arising from an incident.

In the first instance it will be the shipowner or his insurer who will be strictly liable to pay compensation following an incident involving HNS. As set out on page ... above, the shipowner is normally entitled to limit his liability to an amount calculated on the basis of the ship's tonnage.

If the compensation available from the shipowner or his insurer is insufficient, supplementary payments will be made, up to certain limits, by the "HNS Fund". Figure 2 outlines the available compensation amounts from the shipowner and the HNS Fund.

The HNS Fund will pay compensation in excess of the shipowner's liability, but with a limit of 250 million SDR (including the amount actually paid by the shipowner or his insurer). HNS cargo receivers in States party to the Convention will provide the funding for the second tier of compensation, in the form of levies after the incident has occurred.

The involvement of both tiers in compensation payments will not create any special complications for claimants. Claims will be submitted to the HNS Fund and, providing the claimants can substantiate their losses, and the claimants meet the criteria for admissibility, claimants should receive compensation from the shipowner's insurer or the Fund. If the total amount of the admissible claims are less than the maximum amount available, then all claims will be paid in full. Persons receiving compensation under the HNS Convention are subject to the fiscal legislation of the State where they are taxable.

The HNS Fund's main aim is to provide compensation to the extent that the compensation provided by the shipowner, or the shipowners' insurer or guarantor, is deficient or not available. The Convention provides for claims for loss of life and personal injury to have a certain priority over other claims. Up to two thirds of the available compensation limit is reserved for such claims, similarly to the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC '76).

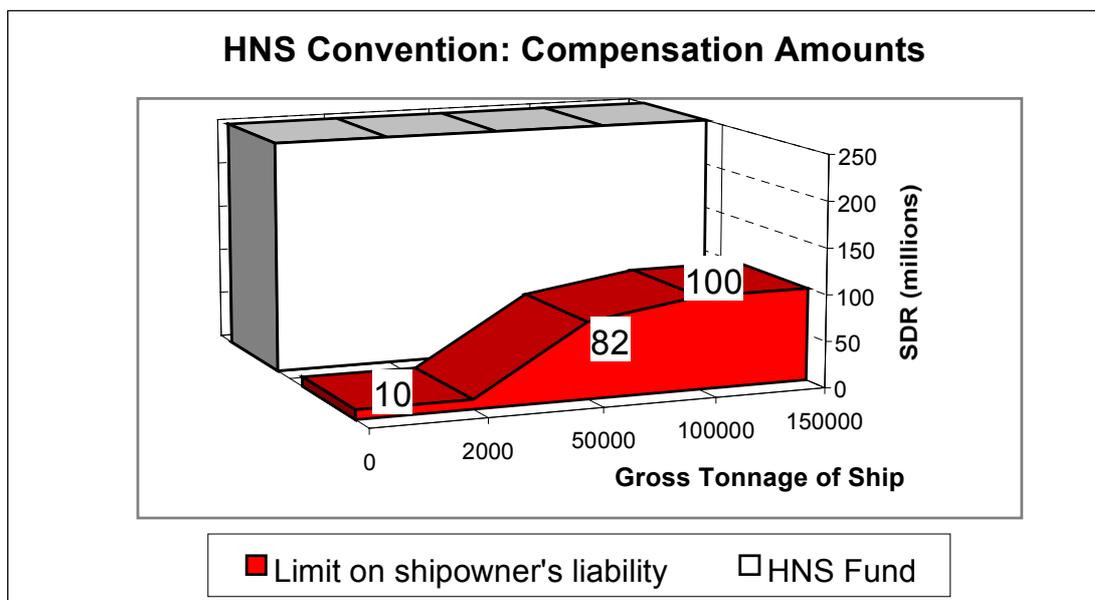
However, unlike LLMC '76, if there are no claims for loss of life and personal injury, under the HNS Convention the total amount of compensation is available for payment of claims for other types of damage.

If the total amount of the admissible claims exceeds the maximum amount available for compensation, and subject to the priority given to claims for loss of life or personal injury, the amount available is distributed among claimants in proportion to their established claims. All claimants will then receive an equal proportion of their established claims.

If the particular ship causing the damage cannot be identified, a claimant need only prove that there is a reasonable probability that the damage resulted from an incident involving one or more ships, in order to be entitled to compensation from the HNS Fund. .

The Fund is exempt from liability, in whole or in part, to a particular claimant if it can prove that the damage was caused by the negligence or deliberate act or omission by the person who suffered the damage. This does not apply to any parties undertaking reasonable measures after an incident has occurred to prevent or minimise damage.

**Figure 2 Compensation amounts available through the HNS Fund**



The HNS Fund shall also pay compensation, even if the owner has not constituted a limitation Fund, if:

- the damage resulted from a natural phenomenon of an exceptional inevitable and irresistible character;
- The owner liable for the damage is financially incapable; or
- Preventive measures to minimise a potential risk were taken by the shipowner.

#### 5.4 Subrogation and recourse

In order to ensure that compensation is paid quickly to victims of incidents, (so as to minimise financial hardship), the HNS Fund may pay compensation and thereby acquire the rights, by subrogation, that the claimants would have enjoyed against the shipowner, or the shipowner's guarantor, in order to obtain compensation. This will ensure the prompt payment of compensation from the Fund, even before the shipowner's limitation fund has been established, without the Fund losing the right to recover from the shipowner, or the shipowner's guarantor. However, the Fund is not prevented from exercising rights of recourse or subrogation's against other persons than the shipowner and the shipowner's guarantor, for example persons who have failed to furnish information concerning the nature of the substances shipped.

The Convention also provides for similar rights of subrogation for States Parties (or agencies) which have paid compensation for damage.

## **(6) Claims for Compensation**

### **6.1 Scope of Application**

Article 3 of the Convention establishes the geographical scope of the Convention. The Convention will apply to any damage caused in a State Party's territorial waters and to damage caused in the Exclusive Economic Zone (EEZ) of a State Party, or if such a zone has not been established, in an equivalent area. Any damage caused by ships registered in, or entitled to fly, the flag of a State Party is covered wherever it occurs, unless the damage occurs in the territory or the territorial sea of a State not party to the Convention. Compensation is also payable for the costs of preventive measures, wherever taken.

Anyone who has suffered pollution damage, as defined under the Convention, in a State Party to the HNS Convention, may make a claim for compensation. Claimants may be individuals, partnerships, companies, private organisations or public bodies, including States or local authorities.

The HNS Convention covers incidents involving the carriage of hazardous and noxious substances by sea by any sea-going craft of any type whatsoever, although some ships may be excluded from the scope of the Convention (see section 4.1). However, the HNS Convention does not cover damage caused by the polluting qualities of *persistent oil*, which is already covered under the existing international regime established by the 1992 CLC, and the 1992 Fund Convention. Non-contamination risks (fire, explosion etc.) **only** are covered in respect of persistent oil.

Also, the HNS Convention does not deal with liability and compensation for damage caused during the transport of HNS to or from a ship. The definition of 'carriage by sea' clarifies in which circumstances the HNS Convention will apply:

*“the period of time from the time when the hazardous and noxious substances enter any part of the ship's equipment, on loading, to the time they cease to be present in any part of the ship's equipment, on discharge. If no ship's equipment is used, the period begins and ends respectively when the hazardous and noxious substances cross the ship's rail.”*

'Damage' as defined under the Convention is similar to that contained in the 1992 Civil Liability Convention, but has been widened to cover loss of life, personal injury and some additional forms of property damage (see Article 1(6) of the HNS Convention).

### **6.2 Presenting a Claim**

Formally, claims for compensation should be submitted to the shipowner liable for the damage, or directly against his insurer, if the claim does **not** exceed the shipowner's liability (see page..). The insurer will normally be one of the Protection and Indemnity Associations (P&I Clubs) which insure the third party liabilities of shipowners.

To obtain compensation from the HNS Fund, claimants should, in the first instance, submit their claims directly to the Fund at its designated headquarters address. Full supporting documentation should be submitted either to the shipowner/P&I Club or to the HNS Fund.

In some cases, claims may be channelled through the office of a local surveyor designated by the HNS Fund and the P&I Club. Claimants should in such cases submit their claims to that office, for forwarding to the HNS Fund and the P&I Club for decision. If an incident gives rise to a large number of claims, the HNS Fund and the P&I Club may, jointly, set up a local claims office so that claims may be processed more easily. Claimants should then submit their claims to that local claims office. All claims are referred to the P&I Club and to the HNS Fund for decision on their admissibility. Admissibility of claims cannot be decided by designated local surveyors nor by local claims offices.

Claims against the HNS Fund should be made in writing. An invoice or other relevant supporting documentation must substantiate each item of a claim. It is the responsibility of claimants to submit evidence supporting their claims.

Each claim should contain, at least, the following basic information:

- The name and address of the claimant, and any representative;
- The identity of the ship involved in the incident;
- The date, place and specific details of the incident, if known to the claimant, unless this information is already available to the HNS Fund;
- The type of pollution damage sustained;
- The amount of compensation claimed.

### **6.3 Limitation of actions (including time bar provisions)**

The HNS Convention contains provisions for the limitation of actions, also known as “time-bar” provisions. Claimants should submit their claims as soon as possible after the damage has occurred. Rights to compensation expire three years after the date when the claimant knew, or ought reasonably to have known, of the damage and, as regards claims against the shipowner, of the shipowner’s identity. In order to avoid losing their rights to compensation, all claimants must lodge their claims in the appropriate court before the expiry of the three-year time-bar period.

Furthermore, no action may be brought later than ten years from the date of the incident that caused the damage. Where the incident consists of several occurrences, the ten-year period runs from the last of these. All outstanding claims will have to be lodged in the appropriate court prior to the time bar applying to the incident.

As the time bar date approaches it is probable that the HNS Fund Secretariat will provide advice to claimants. The government of the Member State concerned may also play a role in advising claimants of how to protect their claims from becoming time barred. The practise of the IOPC Funds has been to seek to continue to negotiate admissible claims with claimants after their rights have been secured by their lodging claims in court. The HNS Fund is likely to follow the same practise.

No claim for compensation may be made against the following either, unless the damage resulted from their personal act or omission, caused with intent to cause such damage:

- (a) the servants or agents of the owner or members of the crew;
- (b) the pilot or any other person who, without being a member of the crew, performs services for the ship;
- (c) any charterer (including a bareboat charterer), manager or operator of the ship;

- (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
- (e) any person taking preventive measures; and

all servants or agents of persons mentioned in (c), (d) and (e).

#### **6.4 Competent Courts**

Claimants can only take legal action in a court in the State Party in whose territory or waters the damage occurred. In this context waters means the territorial sea<sup>4</sup> or the Exclusive Economic Zone (EEZ)<sup>5</sup>, or an equivalent area, of a State Party. Therefore, if damage only affected the United Kingdom, claims could be brought only in United Kingdom courts. This also applies to legal actions against any provider of insurance or financial security for the owner's liability i.e. normally the shipowner's insurer.

Different rules apply if damage other than pollution damage to the environment occurs beyond the territorial seas of States Parties. In this case, the location of the competent court may depend upon the flag or ownership or the location of the shipowner's limitation fund.

Where damage by contamination is caused exclusively beyond the territory and territorial sea of a State Party, legal action may only be brought in the competent courts of the following States:

- the State Party where the ship is registered, or for an unregistered ship, the State whose flag the ship is entitled to fly;
- the State Party where the shipowner has his habitual place of residence or principal place of business; or
- the State Party where the shipowner's limitation fund has been established in accordance with Article 9 (3) of the HNS Convention.

Legal action taken against the HNS Fund should be brought before the same court as actions taken against the shipowner. However, if the shipowner is exempted from liability, or for another reason no shipowner is liable, legal action taken against the Fund must be brought in a court which would have been competent had the shipowner been liable.

Where an incident has occurred and the ship involved has not been identified, legal action may be brought against the HNS Fund only in States Parties where damage has occurred.

Where legal action is being taken against both the shipowner and the HNS Fund, the court where action has been taken against the shipowner has exclusive jurisdiction over legal action against the Fund. Where a legal action has been brought against the shipowner in a State Party, each party to the proceedings shall be entitled to notify the HNS Fund of the proceedings.

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<sup>4</sup> The breadth of the territorial sea is established in Article 3 of the United Nations Convention on the Law of the Sea (UNCLOS) as " up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention." The normal baseline is the low water line along the coast (Article 5 of UNCLOS).

<sup>5</sup> The Exclusive Economic Zone is an area beyond the territorial sea defined in Article 57 of UNCLOS as not beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

## **6.5 Recognition and Enforcement of Judgements**

Each State Party has an obligation under the HNS Convention to recognise and enforce the judgements given by courts in other States Parties, with certain specified exceptions, namely:

- (a) where the judgement was obtained by fraud; or
- (b) where the defendant was not given reasonable notice and a fair opportunity to present the case.

This obligation to recognise and enforce judgements applies to judgements against the HNS Fund as well as to those against the shipowner.

## **(7) Contributions to the HNS Fund**

### **7.1 The Contribution System**

Compensation payments made by the HNS Fund will be financed by levies on receivers of HNS. Levies will be in proportion to the quantities of hazardous and noxious substances received each year. This is a concept similar to that under the Fund Conventions, where receivers of oil above a minimum threshold pay contributions.

When fully operational the HNS Fund will have four accounts: three separate accounts for oil, liquefied natural gas (LNG) and liquefied petroleum gas (LPG) respectively plus a general account with two sectors for bulk solids and other HNS.

During the early existence of the HNS Fund, there may not be a sufficient contribution basis in the form of the quantities of HNS received in Member States to set up all the separate accounts. Initially, the HNS Fund may therefore have only two accounts: a separate account for oil and a general account with four sectors for LNG, LPG, bulk solids and other HNS.

Each account will meet the cost of compensation payments arising from damage caused by substances contributing to that account, i.e. there will be no cross-subsidisation. Contributions from receivers of relevant substances will finance such payments.

Receivers of HNS might have to contribute to one or more of the accounts. The levies applying to individual receivers will be calculated according to the quantities of contributing cargo received and, in the case of the general account, according to the Regulations in Annex II of the Convention. Liability to contribute to the HNS Fund will arise for a given receiver only when his annual receipts of HNS exceed the following thresholds:

Oil	persistent oil	150 000 tonnes
	non-persistent oil	20 000 tonnes
LNG		no minimum quantity
LPG		20 000 tonnes
Bulk solids and other HNS		20 000 tonnes

All receipts following seaborne movements of HNS count; whether the substances have been carried between two or more States or within one State.

Persons contributing to the HNS Fund, who in accordance with the national law of that State Party are deemed to be the receivers, are subject to the fiscal legislation of the State where they are taxable.

### **7.2 The separate accounts and the general account**

#### **Separate accounts**

Each of the separate accounts will only come into operation when the total quantity of contributing cargo in Member States during the preceding year, or another year decided by the Assembly, exceeds the following levels:

- (a) oil account 350 million tonnes
- (b) LNG account 20 million tonnes
- (c) LPG account 15 million tonnes.

The Assembly may suspend the operation of any of the separate accounts if the relevant quantities of contributing cargo in the preceding calendar year fall below these amounts, or if the total unpaid contributions to that account exceed 10% of the most recent levy to that account. Any contributions that are due to a separate account that has been suspended will be paid into the general account and any relevant claims will be met from this account. Any decision to suspend or re-instate the operation of an account requires a two-thirds majority at the Assembly.

### **General account**

The general account will have at least two sectors, for bulk solids and other HNS, and up to five, depending on whether any of the three separate accounts has been postponed or suspended.

### **7.3 Initial and annual contributions**

The HNS Convention provides for the levy of initial contributions from contributors in each Member State. The levy per unit of contributing cargo will be the same for the general account and for any of the separate accounts that are in operation.

Annual contributions will be levied to cover administrative expenses as well as the payments of compensation.

### **7.4 Definition of receiver**

Under the HNS Convention, the receiver is an individual or company that physically receives more than a specified quantity of hazardous and noxious substances in a given calendar year in a Member State. In the case of the LNG account, the receiver is any person who, immediately prior to the discharge of a cargo of LNG in a port or terminal of a Member State Party, held title to that cargo.

The HNS Convention allows a person who receives hazardous and noxious substances on behalf of a third party to designate that third party to the HNS Fund as the receiver for the purposes of the Convention. In such cases, both the person who physically receives the contributing cargo in a port or terminal and the third party, must be subject to the jurisdiction of a State Party. The aim of this provision is to meet concerns expressed by the operators of storage facilities, who do not actually own the substances that they receive.

States are allowed to establish their own definition of receiver under national law. Such a definition cannot be used however to reduce the overall contributions which that State's receivers would have had to pay if the definition in the Convention had been applied. This allows States flexibility to adopt the Convention in conjunction with existing national law, without giving any State the possibility of obtaining an unfair commercial advantage.

As regards receipts of cargoes carried in domestic traffic, i.e. the trade by sea from one port or terminal to another within the same State Party, States have the option of developing national regimes for the collection of contributions. Any such national regime, however, must also raise the same total contributions for that State as the mechanism specified in the Convention would have done.

Each State Party has the option of assuming responsibilities that would otherwise fall on contributors. This option could be used in a number of different ways, e.g. by channelling contributions to the HNS Fund from contributors through a State agency. This would allow the State to collect other levies at the same time as contributions to the HNS Fund and to monitor whether contributors are meeting their obligations.

Any State exercising this option is required to make a declaration to the Secretary General of the IMO if made before the entry into force of the Convention and if made thereafter to the Director of the HNS Fund specifying what responsibilities the State is assuming. Any withdrawal of such a declaration will take effect three months after the receipt by the Director of written notification.

In order to ensure that companies cannot avoid the payment of contributions, the HNS Fund would take account of contributing cargo receipts spread among associated companies.

## **7.5 Reports and reporting forms**

States Parties are required to submit annual reports to the Director of the HNS Fund including the name and address of any receiver of any contributing cargo, together with the quantities of cargo received in the preceding year. States are liable for any financial losses incurred as a result of the non-submission of a report. The Assembly shall, on the recommendation of the Director, decide whether such compensation shall be payable by a State Party.

In respect of contributions relating to domestic traffic of HNS, i.e. the transport by sea from one port or terminal to another within the same State Party, States have the option of developing national regimes for the collection of contributions. Any such national regime must however raise the same total contributions for that State as if the mechanism specified in the Convention had been applied.

Any information supplied by individual contributors will be dealt with as confidential and shall not be divulged outside the HNS Fund, except in so far as it may be strictly necessary to enable the Fund to carry out its functions. This information will include data on the type and amount of hazardous and noxious substances received by named companies, which could be commercially sensitive.

Contributing cargo will be recorded on 3 reporting forms, as contained in Annex III, that can be used to make reports to the HNS Fund;

- a general form for receivers (Form 1);
- a special form for agents and subsidiaries (Form 2); and
- a form for States to report to the HNS Fund (Form 3).

On a national basis, States may wish to seek statistics on 'receivers' of contributing cargo exceeding 10,000 tonnes in order to identify those 'receivers' exceeding the various account thresholds.

## **7.6 Calculation of Contributions**

### **Separate accounts**

Calculation of contributions to each of the separate accounts will be carried out in a similar way to the calculation of contributions to the IOPC Funds, i.e. the total levy decided by the Assembly for the relevant account will be divided by the total quantity of contributing cargo for that account to give the levy per tonne of contributing cargo.

### **General account**

Calculation of contributions for the different sectors of the general account is more complicated and is governed by the Regulations contained in Annex II of the Convention.

These Regulations allow for different levies per tonne of contributing cargo to be paid in respect of different groups of substances to reflect the different levels of risk they pose of involving the HNS Fund. A receiver of a high volume/low risk substance will therefore pay less per tonne than a receiver of a low volume/high risk substance.

### **Sector factor**

Individual sector factors will reflect the claims experience of each sector. The sector factor is calculated as the weighted average over the previous ten years of the claims/volume ratio i.e. the established claims against the HNS Fund for a particular year divided by the total quantity of contributing cargo for that year: the average is weighted by multiplying the claims/volume ratio for each year by 10 for the latest year, 9 for the preceding year and so on to the last year which has a weighting of 1, so that more recent claims have a larger effect on the sector factor than claims which occurred towards the beginning of the ten year period. The effect of this is that a large incident in one sector will have a decreasing effect on that sector's contributions year by year. Once ten years have passed, the established claims arising out of the incident will no longer appear in the calculation.

The Regulations provide default values to be used for the claims/volume ratio if the information required is not available for one or more years, as will be the case for the first ten years after the Convention comes into force. These default values are zero for bulk solids, oil, LNG and LPG and 0.0001 for other HNS. The effect of the zero default values is that all contributions to the general account will be levied against receivers of other HNS until incidents involving cargoes from one or more of the other sectors result in established claims. Conversely, the very low default value selected for other HNS means that the responsibility for payment of contributions will be transferred to the other sectors when and if such incidents do occur.

### **Levy/tonne**

A weighted volume for each sector, expressed as HNS points, is calculated by multiplying the sector factor by the total volume for each sector. The levy per HNS point for all sectors is calculated by dividing the total levy to the general account by the total HNS points for all sectors and the result converted to a levy per tonne for each sector by multiplying the levy per HNS point by the sector factor.

**Box 1. Calculation of levy/tonne for each sector**

<b>Terms used</b>	
<u>for each sector</u>	
sector factor = $s_i$	(calculated according to Regulations 2.4-2.8)
quantity received in tonnes = $q_i$	
levy per tonne = $l_i$	
HNS points per sector = $h_i$	
levy per HNS point = $l_i'$	
<u>for all sectors</u>	
total annual contributions for general account = $L$	
total HNS points for all sectors = $H = \sum h_i$	
<b>Calculation</b>	
$h_i = q_i \times s_i$	(Regulation 2.3)
$H = \sum h_i = \sum (q_i \times s_i)$	
$l_i' = \frac{L}{H}$	(Regulation 2.2)
$l_i = l_i' \times s_i$	(Regulation 2.1)
$= L \times \frac{s_i}{H}$	$= L \times \frac{s_i}{\sum (q_i \times s_i)}$

The Assembly is allowed flexibility as to which parts of the Regulations to apply to separate accounts that have been suspended. For example, if a separate account had accrued debts that it could not meet as a separate account, the Assembly may wish to make special provisions about its contributions.

**7.7 Non- payment of contributions**

Persons liable to pay contributions should do so within three months of the date on which the HNS Fund issues invoices in respect of each State Party. Overdue contributions shall be subject to payment of interest at rates determined by the HNS Fund. The Convention allows the Director to take appropriate action to recover any overdue contributions, e.g. court action. Any decision not to pursue a defaulting contributor must be made by a two-thirds majority at the Assembly.

**7.8 Potential costs to contributors**

At this stage, the costs to contributors cannot be assessed with any degree of certainty since this will depend on the number of States that ratify the Convention, the total quantities of HNS cargoes received in those Member States and the cost of compensation payments arising from future incidents.

States have the option to implement the reporting requirements required under the Convention before it enters into force, or if it is intending to become party to the Convention after it has entered into force. This will have the benefit of identifying the contributing cargo received in States and, therefore, assisting the smooth transition to when the obligation would begin to apply.

The general administrative costs of the HNS Fund should be similar to those incurred by the IOPC Funds i.e. about £2.5 million, or slightly less as it is envisaged that the two Funds would co-operate closely, resulting in savings through shared resources.

## 7.9 Compliance and Verification

The Convention requires State Parties to adopt compliance and verification procedures to fulfil their duty to monitor and manage the reporting system for contributing cargo and to report to the HNS Fund. In accordance with these provisions (annual contributions to the general account, general contributions to separate accounts, initial contributions, reports) regulations are required to establish for the purposes of State Parties:

- the manner in which to fulfil their responsibilities in respect of the reporting system for contributing cargo; and
- the necessary measures that would ensure a uniform discharge of their responsibilities, thus achieving equity in the reporting system.

Article 21 is the principal source of the responsibility of the State Parties under the HNS Convention. The obligation under Article 21(1) is to ensure that the name of any person liable to pay contributions appears on a list to be established by the Director of the HNS Fund. Article 21(2) sets out the type of information that the State Party must communicate to the Director for the purposes of that list. This requirement sets out the “compliance” aspect of the of the responsibility of State Parties.

Thus, set out below are the proposed regulations on compliance and verification to be adopted by the State Parties. These regulations are consistent with a “self reporting” system.<sup>6</sup>

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<sup>6</sup> The Correspondence Group considered two main options for States Parties in respect of their responsibility for “compliance and verification”:

- (A) reporting system administered and closely monitored by a national authority; or  
(B) self-reporting system by the industry with provisions for verification by a national authority.

The Correspondence Group unanimously agreed that Option (B) be recommended to States Parties when implementing the Convention.

## **Regulations for Compliance and Verification**

### *Preamble*

#### General obligations under the Convention<sup>7</sup>

Each State Party undertakes to give effect to the provisions of the Convention and to these regulations.

Unless expressly provided otherwise, a reference to the HNS Convention constitutes at the same time a reference to these regulations

#### ***Regulation 1***            **Reporting of contributing cargo**

Each person who receives contributing cargo in the preceding calendar year shall submit a report to the designated authority in the State Party if:

- any amount of LNG is received;
- the total amount of non-persistent oil received exceeds 20,000 tons;
- the total amount of LPG received exceeds 20,000 tons<sup>7</sup>
- the total amount of substances covered under the General Account received exceeds 20,000 tons.

#### ***Regulation 2***            **Designated Authority**

Each State Party shall designate an authority e.g. maritime directorate or another public or private body, to receive reports pursuant to Regulation 1 and to communicate to the Director relevant information pursuant to Article 21 of the Convention.

#### ***Regulation 3***            **Records and Books**

Every person referred to in the Convention from whom amounts payable pursuant to Articles 18, 19 and 21 (5) may be recovered shall keep records and books of account at their place of business in the State Party, or at any other place in the State Party that may be designated by the State Party, that sets out.

- (a) the amounts that are payable by that person;
- (b) the type and quantity of the substance in respect of which the amounts referred to in paragraph (a) are payable;
- (c) the time when and the place where the amounts referred to in paragraph (a) were paid or security for their payment was given; and
- (d) any other information that the State Party may require to determine the amounts referred to in paragraph (a) and the time when they become payable.

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<sup>7</sup> Each State Party should set appropriate penalties for breaching these regulations.

**Regulation 4 Disposal of records**

Every person or body who is required by these regulations to keep records and books of account shall, unless otherwise authorised by the State Party, retain every such record and book of account and every account or voucher necessary to verify the information contained in the record or book until the expiry of [ ] years from the end of the year to which the record or book of account relates.

**Regulation 5 Make available for inspection**

Every person who is required by these regulations to keep records and books of account shall, at all reasonable times, make the records and books of account and every account or voucher necessary to verify the information contained in them available to any person designated in writing by the State Party and give that person every facility necessary to inspect the records, books, accounts and vouchers.

**Regulation 6 Inspection<sup>8</sup>**

Any person designated in writing by the State Party for the purpose may, at any reasonable time, enter any premises where the person believes on reasonable grounds that there are any records, books, accounts, vouchers or other documents relating to payments under the Convention and

- a) examine anything on the premises and copy or take away for further examination or copying any record, book, account, voucher or other document that they believe, on reasonable grounds, contains any information relevant to the enforcement of Article 18,19; & 21(5) and
- b) require the owner, occupier or person in charge of the premises to give the person all reasonable assistance in connection with the examination under paragraph (a) and to answer all proper questions relating to the examination and, for that purpose, require the owner, occupier or person in charge of the premises to attend at those premises with the person.

**Regulation 7 Certificate of designation**

Persons designated by the State Party under regulation 6 shall be furnished with a certificate of their designation and, on entering any premises referred to in that regulation, shall, if so requested, produce the certificate to the owner, occupier or person in charge of the premises.

**Regulation 8 Report to State Party**

On the conclusion of an examination under Regulations 3 to 7, the person conducting the examination shall transmit a full report of their findings to the designated authority in the State Party.

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<sup>8</sup> Due regard should be given to national law of each state party as legal search practices of private properties may vary from one State to another.

***Regulation 9***            **Return of original or copy of documents**

The original or a copy of any record, book, account, voucher or other document taken away under Regulation 6 shall be returned to the person from whose custody it was taken within [...] days after it was taken or within any longer period that is directed by a judge of a superior court in a State Party for cause or agreed to by a person who is entitled to its return.

***Regulation 10***          **Notice of application for extension of time**

An application to a judge mentioned in Regulation 9 for a direction under that regulation may only be made on notice to the person from whose custody the record, book, account, voucher or other document was taken.

***Regulation 11***          **Copies of documents**

A document purporting to be certified by the State Party to be a copy of a record, book, account, voucher or other document made under Regulation 6 is admissible in evidence in any prosecution for an offence under this Act and is, in the absence of evidence to the contrary, proof of its contents.

***Regulation 12***          **Obstruction, false statements**

No person shall obstruct or hinder anyone engaged in carrying out their duties and functions under regulations 3 to 11, or knowingly make a false or misleading statement, either orally or in writing, to any person so engaged.

## ANNEX I

### **Correspondence Group Contacts**

Pending the entry into force of the HNS Convention further guidance on the proposed regime and specific items relating to the Convention may be sought from the following contacts, or alternatively on the website address (to be announced when finalised).

Co-ordinator of the IMO Legal Committee HNS Correspondence Group

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Initiating States on the collection of information on contributing cargo and the continuing work on the reporting form

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Initiating State on HNS Insurers and Insurance Certificates

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Initiating State on the work of compliance and verification of States responsibilities in respect of the reporting system for contributing cargo

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ANNEX II

**CERTIFICATE OF INSURANCE OR OTHER FINANCIAL SECURITY IN RESPECT OF LIABILITY FOR DAMAGE CAUSED BY HAZARDOUS AND NOXIOUS SUBSTANCES (HNS)**

*Issued in accordance with the provisions of Article 12 of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996*

<b>Name of ship</b>	<b>Distinctive number or letters</b>	<b>IMO ship identification number</b>	<b>Port of registry</b>	<b>Name and full address of the principal place of business of the owner</b>

*This is to certify that there is in force in respect of the above-named ship a policy of insurance or other financial security satisfying the requirements of Article 12 of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.*

**Type of security**.....

**Duration of security** .....

**Name and address of the insurer(s) and/or guarantor(s)**.....

**Name**.....

**Address**.....

*This certificate is valid until*.....

*Issued or certified by the Government of*.....

*(Full designation of the State)*

**Explanatory notes on the insurance certificate (as contained in Annex I of the Convention)**

1. If desired, the designation of the State may include a reference to the competent public authority of the country where the certificate is issued.
2. If the total amount of security has been furnished by more than one source, the amount of each of them should be indicated.
3. If security is furnished in several forms, these should be enumerated.
4. The entry "Duration of the Security" must stipulate the date on which such security takes effect.
5. The entry "Address" of the insurer(s) and/or guarantor(s) must indicate the principal place of business of the insurer(s) and/or guarantor(s). If appropriate, the place of business where the insurance or other security is established shall be indicated.

ANNEX III

**HNS FUND: STANDARD REPORTING FORMS FOR ANNUAL RECEIPTS OF RELEVANT CONTRIBUTING CARGO**

**Form 1: for receivers who receive contributing cargo on their own account**

<b>NAME OF RECEIVER:</b>		
<b>COMPANY NO<sup>i</sup>:</b>		
<b>ACCOUNT/SUBSTANCE</b>	Total amount of annual receipts between 10,000 tonnes and 20,000 tonnes annual receipts exceeding 10,000 tonnes	Total amount of annual receipts exceeding thresholds stated below
<b>GENERAL ACCOUNT (Threshold: 20,000 tonnes per annum)</b>		
Noxious liquid substances carried in bulk <sup>ii</sup>		
Dangerous liquid substances carried in bulk <sup>iii</sup>		
Dangerous, hazardous and harmful substances, materials and articles in packaged form <sup>iv</sup>		
Liquefied gases (excluding LPG and LNG) <sup>v</sup>		
Liquid substances carried in bulk with a flashpoint not exceeding 60° (measured by a closed cup test) <sup>vi</sup>		
Solid bulk materials possessing chemical hazards, except for those classified as MHB (materials which are hazardous only in bulk) <sup>vii</sup>		
<b>OIL ACCOUNT</b>		
Persistent oil (threshold: 150,000 tonnes per annum) <sup>viii</sup>		
Non-persistent oil (threshold: 20,000 tonnes per annum) <sup>ix</sup>		
<b>LNG ACCOUNT (No minimum threshold)</b>		
Liquefied natural gases of light hydrocarbons with methane as the main constituent <sup>x</sup>		
<b>LPG ACCOUNT (Threshold: 20,000 tonnes per annum)</b>		
Liquefied petroleum gases of light hydrocarbons with propane and butane as the main constituents <sup>xi</sup>		
<b>GRAND TOTAL</b>		

**Form 2: for Agents who receive contributing cargo for a principal should and any subsidiary or commonly controlled entity of a principal**

<b>NAME OF RECEIVER <sup>xii</sup></b>	
<b>COMPANY NO. <sup>xiii</sup> :</b>	
<b>ACCOUNT/SUBSTANCE</b>	Amount exceeding [x] tonnes per annum
<b>GENERAL ACCOUNT</b>	
Noxious liquid substances carried in bulk	
Dangerous liquid substances carried in bulk	
Dangerous, hazardous and harmful substances, materials and articles in packaged form	
Liquefied gases (excluding LPG and LNG)	
Liquid substances carried in bulk with a flashpoint not exceeding 60° (measured by a closed cup test)	
Solid bulk materials possessing chemical hazards, except for those classified as MHB (materials which are hazardous only in bulk)	
<b>OIL ACCOUNT</b>	
Persistent oil	
Non-persistent oil	
<b>LNG ACCOUNT</b>	
Liquefied natural gases of light hydrocarbons with methane as the main constituent	
<b>LPG ACCOUNT</b>	
Liquefied petroleum gases of light hydrocarbons with propane and butane as the main constituents	
<b>GRAND TOTAL</b>	

**Form 3: for STATES TO MAKE REPORTS TO THE HNS FUND**

<b>NAME OF STATE:</b>	
<b>NAME AND ADDRESS OF POTENTIAL CONTRIBUTOR:</b>	
<b>ACCOUNT/SUBSTANCE</b>	<b>TOTAL RECEIPTS</b>
<b>GENERAL ACCOUNT</b>	
Noxious liquid substances carried in bulk	
Dangerous liquid substances carried in bulk	
Dangerous, hazardous and harmful substances, materials and articles in packaged form	
Liquefied gases (excluding LPG and LNG)	
Liquid substances carried in bulk with a flashpoint not exceeding 60° (measured by a closed cup test)	
Solid bulk materials possessing chemical hazards, except for those classified as materials which are hazardous only in bulk (MHB)	
<b>OIL ACCOUNT</b>	
Persistent oil	
Non-persistent oil	
<b>LNG ACCOUNT</b>	
Liquefied natural gases of light hydrocarbons with methane as the main constituent	
<b>LPG ACCOUNT</b>	
Liquefied petroleum gases of light hydrocarbons with propane and butane as the main constituents	

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**Footnotes for Annex III**

- i The HNSC uses the term “person”. Article 1(2) defines the term. If a company is a subsidiary or subdivision of a parent company, the latter must collectively report the sum of the receipts of the parent company and all subsidiaries (HNSC, Articles 16,18 & 21).
- ii Substances referred to in appendix II of Annex II 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 categorised as falling in pollution category A, B, C or D in accordance with regulation 3(4) of Annex II (HNSC, Article 1(5)(a)(ii)).
- iii Substances listed in chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, 1983, as amended; and 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 1.1.3 of the Code (HNSC, Article 1(5)(a)(ii)).
- iv Substances covered by the International Maritime Dangerous Goods Code (IMDG-Code), as amended (HNSC, Article 1(5)(a)(iv)).
- v Substances listed in chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, 1983, 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 (HNSC, Article 1(5)(a)(vi)).
- vi HNSC, Article 1(5)(a)(vi).
- vii Substance covered by appendix B of the Code of Safe Practice for Solid Bulk Cargoes, as amended, to the extent that these substances are also subject to the provisions of the International Maritime Dangerous Goods Code when carried in packaged form (HNSC, Article 1(5)(a)(vii)).
- viii Contributing oil as defined in Article 1(3) of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, as amended (HNSC, Article 19(1)(a)(i)).
- ix Oils carried in bulk listed in appendix I 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 (HNSC, Article 1(5)(a)(i); and Article 19(1)(a)(ii)).
- x HNSC, Article 1(5)(a)(v); and Article 16(2)(b)
- xi HNSC, Article 1(5)(a)(v); and Article 16(2)(c)
- xii If the company is a subsidiary or subdivision of a parent company, name the latter if possible.
- xiii If known