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**MONITORING THE IMPLEMENTATION OF THE HNS CONVENTION:
DEVELOPMENT OF A POSSIBLE DRAFT PROTOCOL TO THE CONVENTION**

Note by the Secretariat

SUMMARY

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|------------------------------------|---|
| <i>Executive summary:</i> | This document contains a draft protocol to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 |
| <i>Strategic direction:</i> | 1.1; 2 |
| <i>High-level action:</i> | 1.1.2; 2.1.1 |
| <i>Planned output:</i> | As specified in the documents submitted to other bodies; 2.1.1.3 |
| <i>Action to be taken:</i> | Paragraph 6 |
| <i>Related document:</i> | LEG 93/13, paragraphs 6.1 to 6.14 |

1 Annex 1 to this document contains a draft protocol to amend the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (hereinafter “the Convention”). The draft protocol was prepared by the HNS Focus Group (hereinafter “the Group”) established by the 1992 Fund Assembly (hereinafter “the Assembly”) with the aim of facilitating the entry into force of the Convention.

2 At its first meeting, held in March 2008, the Group considered proposals by States in respect of the three issues which had been identified as inhibiting the entry into force of the Convention, i.e. the concept of receiver, contributions to the LNG account and the non-submission of contributing cargo reports. The Group approved the text of a draft protocol to the Convention (hereinafter “the draft protocol”) implementing these proposals, subject to various amendments.

3 At its second meeting, held in June 2008, the Group considered the draft protocol, which had been revised in the light of the discussions at its first meeting. Following further discussions, the Group decided to submit the text of the draft protocol to the Assembly for consideration.

For reasons of economy, this document is printed in a limited number. Delegates are kindly asked to bring their copies to meetings and not to request additional copies.

4 At its fourth session in June 2008, the 1992 Fund Administrative Council, acting on behalf of the Assembly, approved the text of the draft protocol at annex 1 for submission to IMO, and instructed the Director of the 1992 Fund to submit the text to the Secretary-General of IMO and to request him to refer it to the Legal Committee for consideration with a view to convening a diplomatic conference to consider the draft protocol at the earliest opportunity.

5 The Administrative Council further instructed the Director to send to the Secretary-General the Record of Decisions of the fourth session of the Administrative Council (annex 2) and to bring the following topics to the Secretary-General's attention, where consideration of amendments to the draft protocol by the Legal Committee might be beneficial:

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

Action requested of the Legal Committee

6 The Legal Committee is invited to consider the text of the draft protocol contained in the annex to this document and to comment and decide as appropriate.

ANNEX 1

**DRAFT PROTOCOL OF [200...] TO AMEND THE INTERNATIONAL CONVENTION
ON LIABILITY AND COMPENSATION FOR DAMAGE IN CONNECTION
WITH THE CARRIAGE OF HAZARDOUS AND NOXIOUS SUBSTANCES
BY SEA, 1996**

The Parties to this Protocol,

RECOGNIZING the significant contribution which can be made by the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (hereinafter referred to as the “Convention”) to the preservation of the environment and the adequate, prompt and effective compensation of persons who suffer damage caused by incidents in connection with the carriage of hazardous and noxious substances by sea,

RECOGNIZING ALSO that, over many years, a large number of States have consistently expressed their determination to establish a robust and effective compensation regime for the maritime carriage of hazardous and noxious substances based on a system of shared liability and have worked towards a uniform implementation of the Convention,

ACKNOWLEDGING, HOWEVER, that certain issues have been identified as inhibiting the entry into force of the Convention and, consequently, the implementation of the international regime contained therein,

DETERMINED to resolve these issues without embarking on a wholesale revision of the Convention,

AWARE OF the need to take into account the possible impact on developing countries, as well as the interests of those States which have already ratified the Convention or are at an advanced stage in so doing,

CONSIDERING that this objective may best be achieved by the conclusion of a Protocol relating to the Convention,

HAVE AGREED as follows:

Definitions

Article 1

For the purposes of this Protocol:

- 1 “Convention” means the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.
- 2 “Organization” means the International Maritime Organization.
- 3 “Secretary-General” means the Secretary-General of the Organization.

General obligations

Article 2

The parties to this Protocol shall give effect to the provisions of this Protocol and the provisions of the Convention, as amended by this Protocol.

Article 3

1 Article 1, paragraph 5 is replaced by the following text:

5 “Hazardous and noxious substances” (HNS) means:

- (a) any substances, materials and articles carried on board a ship as cargo, referred to in (i) to (vii) below:
 - (i) oil, carried in bulk, as defined in regulation 1 of Annex I to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended;¹
 - (ii) noxious liquid substances, carried in bulk, as defined in regulation 1.10 of Annex II² to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended, and those substances and mixtures provisionally categorized as falling in pollution category X, Y or Z in accordance with regulation 6.3 of the said Annex II;
 - (iii) dangerous liquid substances carried in bulk listed in chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk³, 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 1.1.6 of the Code;
 - (iv) dangerous, hazardous and harmful substances, materials and articles in packaged form covered by the International Maritime Dangerous Goods Code, as amended;

¹ Note by IMO: The definition of oil carried in bulk was restricted to a reference to the list in the appendix 1 of MARPOL, Annex 1, regulation 1, thus giving the impression that the list was a closed one. The amendment suggested restores the list to its true, indicative, nature, as clearly stated in regulation 1, namely ‘without limiting the generality of the foregoing’ (MARPOL, Annex I, regulation 1). This change was proposed in light of advice given by IMO’s technical experts to the effect that the reference to the list would be confusing unless placed in the general indicative context of regulation 1.

² Note by IMO: The paragraph needed to be updated in light of the revised Annex II to MARPOL which no longer contains an Appendix II; nonetheless, the ‘noxious liquid substances carried in bulk’ referred to by this appendix remained covered by regulation 1.10 of revised Annex II. The effect of the revision of Annex II to MARPOL has been reflected in resolutions MEPC.160(50) and LEG.4(91).

³ Note by IMO: The IBC Code was adopted in 1983. However, the title of the IBC Code does not include reference to the year of adoption. Accordingly, ‘, 1983’ has been deleted.

- (v) liquefied gases as listed in chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk⁴, 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 the Code of Safe Practice for Solid Bulk Cargoes, 2004, as amended,^{4bis} to the extent that these substances are also subject to the provisions of the International Maritime Dangerous Goods Code, as amended, when carried in packaged form; and^{4ter}
- (b) residues from the previous carriage in bulk of substances referred to in (a)(i) to (iii) and (v) to (vii) above.

2 The following text is added as Article 1, paragraphs 5bis and 5ter, of the Convention⁵:

5bis “Bulk HNS” means any hazardous and noxious substances referred to in article 1, paragraph 5(a)(i) to (iii) and (v) to (vii) and paragraph 5(b).

5ter “Packaged HNS” means any hazardous and noxious substances referred to in article 1, paragraph 5(a)(iv).

⁴ Note by IMO: Idem.

^{4bis} Note by IMO: IMO advises that it is likely that MSC 85 (26 November to 5 December 2008) will change the name of the 2004 Code to the International Maritime Solid Bulk Cargoes (IMSBC) Code; if so the change of name should be reflected in any subsequent draft instrument.

^{4ter} Note by IMO: Changes to Article 1, paragraph 5 (a)(vii) were agreed between the Secretariats of the IOPC Funds and IMO, pursuant to paragraph 5.4 of the Record of Decisions of the Fourth Session of the IOPC Fund Administrative Council (annex 2 of LEG 94/4). An explanation of the changes is as follows:

- (a) The year ‘2004’ was added to the title of the ‘Code of Safe Practice for Solid Bulk Cargoes’ in accordance with the decision of MSC 193(79) when it adopted the revised Code;
- (b) The words ‘appendix B of’ the 2004 Code have been deleted because appendices A, B and C were replaced by Groups A, B and C in the revised 2004 Code. Solid bulk materials possessing chemical hazards are only referred to in Group B of the 2004 Code. Therefore it is unnecessary to specify ‘Group B’ in the draft protocol; and
- (c) The words ‘as amended’ are added after ‘the International Maritime Dangerous Goods Code’, for consistency.

⁵ Note by IOPC Funds: Definitions introduced to distinguish between bulk and packaged HNS in order to simplify drafting of article 1, paragraph 10 and article 9, paragraph 1.

3 Article 1, paragraph 10, of the Convention is replaced by the following text⁶:

- 10 “Contributing cargo” means any bulk HNS which are carried by sea as cargo to a port or terminal in the territory of a State Party and discharged in that State. Cargo in transit which is transferred directly, or through a port or terminal, from one ship to another, either wholly or in part, in the course of carriage from the port or terminal of original loading to the port or terminal of final destination shall be considered as contributing cargo only in respect of receipt at the final destination.

Article 4

Article 5, paragraph 5, of the Convention is deleted⁷.

Article 5

Article 9, paragraph 1, of the Convention is replaced by the following text⁸:

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

- (a) Where the damage has been caused by bulk HNS:

- (i) 10 million units of account for a ship not exceeding 2,000 units of tonnage; and
(ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):

for each unit of tonnage from 2,001 to 50,000 units of tonnage, 1,500 units of account;

for each unit of tonnage in excess of 50,000 units of tonnage, 360 units of account;

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

- (b) Where the damage has been caused by packaged HNS, or where the damage has been caused by both bulk HNS and packaged HNS, or where it is not possible to determine whether the damage originating from that ship has been caused by bulk HNS or by packaged HNS:

⁶ Policy proposal in respect of exclusion of packaged HNS from contributions to the HNS Fund has been implemented using new definition in article 1, paragraph 5*bis*: ‘hazardous and noxious substances’ changed to ‘bulk HNS’.

⁷ Consequential amendment: Paragraph deleted as a result of change to article 1, paragraph 10, in respect of contributing cargo. The rationale behind article 5 as a whole could also be questioned.

⁸ Policy proposal in respect of increased shipowner limits for damage caused by packaged goods has been implemented by combining paragraphs (b) and (c) and by using new definitions in article 1, paragraphs 5*bis* and 5*ter*.

- (i) [10 + W] million units of account for a ship not exceeding 2,000 units of tonnage; and
- (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):

for each unit of tonnage from 2,001 to 50,000 units of tonnage,
[1,500 + X] units of account;

for each unit of tonnage in excess of 50,000 units of tonnage,
[360 + Y] units of account;

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

Article 6

Article 17, paragraph 2, of the Convention is replaced by the following text⁹:

- 2 Annual contributions payable pursuant to articles 18, 19 and article 21, paragraph 5, shall be determined by the Assembly and shall be calculated in accordance with those articles on the basis of the units of contributing cargo received during the preceding calendar year or such other year as the Assembly may decide.

Article 7

Article 19, paragraph 1(b), of the Convention is replaced by the following text¹⁰:

- (b) in the case of the LNG account, by any person who in the preceding calendar year, or such other year as the Assembly may decide, was the receiver in that State of any quantity¹¹ of LNG;

⁹ Consequential amendment: The words ‘or, in respect of cargoes referred to in article 19, paragraph 1(b), discharged’ have been deleted as a result of the change to article 19, paragraph 1(b) in respect of LNG cargoes.

¹⁰ Policy proposal in respect of change to standard definition of receiver for LNG cargoes: ‘immediately prior to its discharge, held title to an LNG cargo discharged in a port or terminal of that State’ changed to ‘was the receiver in that State of any quantity of LNG’.

¹¹ Note by IOPC Funds: The change to the standard definition of receiver for LNG cargoes implies a change to the standard threshold, which would imply that ‘any quantity’ should be changed to ‘total quantities exceeding 20,000 tonnes’, bearing in mind the administrative burden related to the reporting of contributing cargo and the payment of contributions.

Article 8

Article 20, paragraph 1, of the Convention is replaced by the following text¹²:

- 1 In respect of each State Party, initial contributions shall be made of an amount which shall for each person liable to pay contributions in accordance with article 16, paragraph 5, articles 18, 19 and article 21, paragraph 5, be calculated on the basis of a fixed sum, equal for the general account and each separate account, for each unit of contributing cargo received in that State during the calendar year preceding that in which this Convention enters into force for that State.

Article 9

1 Article 21, paragraph 4, of the Convention is replaced by the following text¹³:

- 4 If in a State Party there is no person liable to pay contributions in accordance with articles 18, 19 or paragraph 5 of this article, that State Party shall for the purposes of this Convention inform the Director of the HNS Fund thereof.

2 Article 21, paragraph 5(b), of the Convention is replaced by the following text¹⁴:

- (b) instruct the HNS Fund to levy the aggregate amount for each account by invoicing individual receivers for the amount payable by each of them. These persons shall be identified in accordance with the national law of the State concerned.

Article 10

The following text is added as article 21bis of the Convention¹⁵:

Non-reporting

Article 21bis

- 1 Where a State Party does not fulfil its obligations under article 21, paragraph 2, and this results in a financial loss for the HNS Fund, that State Party shall be liable to compensate the HNS Fund for such loss. The Assembly shall, on the recommendations of the Director, decide whether such compensation shall be payable by a State Party.¹⁶

¹² Consequential amendment: The words 'or, in the case of LNG, discharged in that State,' have been deleted as a result of the change to article 19, paragraph 1(b) in respect of LNG cargoes.

¹³ Note by IOPC Funds: This paragraph, which is based on article 15, paragraph 1, of the Supplementary Fund Protocol, is required to support the policy proposal implemented in article 21bis because Article 21, paragraph 2, of the Convention does not require States to make reports if there are no persons in that State liable to pay contributions. The existing paragraph 4 has been moved to paragraph 1 of article 21bis.

¹⁴ Consequential amendment: The words 'or, in the case of LNG, the title holder who discharges within the jurisdiction of that State Party,' have been deleted as a result of the change to article 19, paragraph 1(b) in respect of LNG cargoes.

¹⁵ Policy proposal to withhold payment of compensation in States which have not submitted reports on contributing cargo: based on Supplementary Fund Protocol, article 15.

¹⁶ Note by IOPC Funds: Paragraph 4 of article 21 of the 1996 HNS Convention has been moved to paragraph 1 of this article, in order to bring together all provisions relating to non-reporting. The words 'to communicate to the Director of the information referred to in' have been deleted to bring the text into line with the following paragraphs.

- 2 No compensation for any incident shall be paid by the HNS Fund for damage in the territory, including the territorial sea in accordance with article 3 (a) of this Convention, exclusive economic zone or other area in accordance with article 3 (b) of this Convention, or damage in accordance with article 3 (c) of this Convention, of a State Party in respect of a given incident or for preventive measures, wherever taken, in accordance with article 3 (d) of this Convention, until the obligations under article 21, paragraphs 2 and 4, have been complied with in respect of that State Party for all years prior to the occurrence of an incident for which compensation is sought. The Assembly shall determine in the internal regulations of the HNS Fund the circumstances under which a State Party shall be considered as not having fulfilled these obligations.
- 3 Where compensation has been denied temporarily in accordance with paragraph 2, compensation shall be denied permanently if the obligations under article 21, paragraphs 2 and 4, have not been fulfilled within one year after the Director has notified the State Party of its failure to fulfil these obligations.
- 4 Any payments of contributions due to the HNS Fund shall be set off against compensation due to the debtor, or the debtor's agents.
- 5 Paragraphs 2 to 4 shall not apply to claims in respect of death or personal injury.

Article 11

Article 23, paragraph 1, of the Convention is replaced by the following text¹⁷:

- 1 Without prejudice to article 21, paragraph 5, a State Party may at the time when it deposits its instrument of ratification, acceptance, approval or accession or at any time thereafter declare that it assumes responsibility for obligations imposed by this Convention on any person liable to pay contributions in accordance with articles 18, 19, 20 or article 21, paragraph 5, in respect of hazardous and noxious substances received in the territory of that State. Such a declaration shall be made in writing and shall specify which obligations are assumed.

Article 12

Article 43 of the Convention is deleted¹⁸.

Article 13

The model of a certificate annexed to the Convention is replaced by the model annexed to this Protocol.¹⁹

¹⁷ Consequential amendment: The words 'or discharged' have been deleted as a result of the change to article 19, paragraph 1(b) in respect of LNG cargoes.

¹⁸ Note by IOPC Funds: The provisions of deleted article 43 are incorporated in paragraphs 4 and 6 of article 45.

¹⁹ The original certificate refers to the 1996 HNS Convention.

Interpretation and application

Article 14

- 1 The Convention and this Protocol shall, as between the Parties to this Protocol, be read and interpreted together as one single instrument.

Article 15

In chapter VI, the following text is inserted as article 44bis of the Convention:

Article 44bis

Final clauses of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, [200...]

- 1 Articles 1 to 44 and Annexes I and II of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, as amended by the Protocol of [200...] thereto, together with the final clauses, shall constitute and be called the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, [200...] ([200...] HNS Convention).
- 2 The final clauses of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea [200...] shall be this article and the final clauses of the Protocol of [200...] to amend the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.
- 3 The articles comprising the final clauses of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, as amended by the Protocol of [200...] shall be renumbered sequentially with the preceding articles of that Convention.²⁰ References within the final clauses to other articles of the final clauses shall be renumbered accordingly.

FINAL CLAUSES²¹

Signature, ratification, acceptance, approval and accession

Article 16

- 1 This Protocol shall be open for signature at the Headquarters of the Organization from [.....] to [.....] and shall thereafter remain open for accession.

²⁰ Note by IMO: Renumbering is necessary in order to avoid the consolidated text of the Convention having more than one article with the same number, cf articles 28 to 36 of the 1992 Fund Convention, which appear both in the body of the Convention and again in the Final Clauses.

²¹ In general, the same wording has been used for the Final Clauses of the Protocol as for the Final Clauses of the 1996 HNS Convention, except that 'Convention' has been replaced by 'Protocol' and, where articles prior to the Final Clauses are referred to, 'of the Convention, as amended by this Protocol,' has been added for clarification.

- 2 Subject to the provisions in paragraphs 4 and 5, States may express their consent to be bound by this Protocol by:
- (a) signature without reservation as to ratification, acceptance or approval; or
 - (b) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval; or
 - (c) accession.
- 3 Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.
- 4 An expression of consent to be bound by this Protocol shall be accompanied by the submission to the Secretary-General of data on the total quantities of contributing cargo liable for contributions²² received in that State during the preceding calendar year in respect of the general account and each separate account.^{23,24}
- 5 An expression of consent which is not accompanied by the data referred to in paragraph 4 shall not be accepted by the Secretary-General.
- 6 Each State which has expressed its consent to be bound by this Protocol shall annually thereafter on or before 31 May²⁵ until this Protocol enters into force for that State submit to the Secretary-General data on the total quantities of contributing cargo liable for contributions received in that State during the preceding calendar year in respect of the general account and each separate account.²⁶
- 7 A State which has expressed its consent to be bound by this Protocol and which has not submitted the data on contributing cargo required under paragraph 6 for any relevant years shall, before the entry into force of the Protocol for that State, be temporarily suspended from being a Contracting State until it has submitted the required data.²⁷
- 8 A State which has expressed its consent to be bound by the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 shall be deemed to have withdrawn this consent on the date on which it has signed this Protocol or deposited an instrument of ratification, acceptance, approval of or accession in accordance with paragraph 2.

²² Note by IOPC Funds: The word ‘relevant’ has been changed to ‘total’ and ‘liable for contributions’ has been added, to clarify that quantities are subsequent to application of provisions on agent/principal relationship and thresholds.

²³ Note by IOPC Funds: The provisions of deleted article 43 are incorporated in paragraphs 4 and 6 of this article.

²⁴ Policy proposal: a State must submit data on contributing cargo in order to express its consent to be bound by the Convention.

²⁵ Note by IOPC Funds: Date required in order to be able to ascertain when the entry into force provisions have been met, cf Supplementary Fund Protocol, article 20. The inclusion of this date is supported by the IMO Secretariat to facilitate the calculation of quantities of contributing cargo.

²⁶ Note by IOPC Funds: The provisions of deleted article 43 are incorporated in paragraphs 4 and 6 of this article.

²⁷ Policy proposal: the Convention will not enter into force for a State which has not fulfilled all its obligations in respect of the annual submission of data on contributing cargo.

Entry into force

Article 17²⁸

- 1 This Protocol shall enter into force eighteen months after the date on which the following conditions are fulfilled:
 - (a) at least twelve States, including four States each with not less than 2 million units of gross tonnage, have expressed their consent to be bound by it, and
 - (b) the Secretary-General has received information in accordance with article 16, paragraphs 4 and 6²⁹, that those persons in such States who would be liable to contribute pursuant to article 18, paragraphs 1(a) and (c), of the Convention, as amended by this Protocol, have received during the preceding calendar year a total quantity of at least 40 million tonnes of cargo contributing to the general account.
- 2 For a State which expresses its consent to be bound by this Protocol after the conditions for entry into force have been met, such consent shall take effect three months after the date of expression of such consent, or on the date on which this Protocol enters into force in accordance with paragraph 1, whichever is the later.

Revision and amendment

Article 18³⁰

- 1 A conference for the purpose of revising or amending the Convention, as amended by this Protocol, may be convened by the Organization.
- 2 The Secretary-General shall convene a conference of the States Parties to this Protocol, for revising or amending the Convention, as amended by this Protocol, at the request of six States Parties or one third of the States Parties, whichever is the higher figure.
- 3 Any instrument of ratification, acceptance, approval or accession deposited after the date of entry into force of an amendment to the Convention, as amended by this Protocol, shall be deemed to apply to the Convention as amended.

Amendment of limits

Article 19³¹

- 1 Without prejudice to the provisions of article 18, the special procedure in this article shall apply solely for the purposes of amending the limits set out in article 9, paragraph 1, and article 14, paragraph 5, of the Convention, as amended by this Protocol.

²⁸ This article is identical in substance to Article 46 of the 1996 HNS Convention.

²⁹ Consequential amendment: The paragraph reference has changed as a result of the changes to Article 16.

³⁰ This article is identical in substance to Article 47 of the 1996 HNS Convention.

³¹ This article is identical in substance to Article 48 of the 1996 HNS Convention.

- 2 Upon the request of at least one half, but in no case less than six, of the States Parties, any proposal to amend the limits specified in article 9, paragraph 1, and article 14, paragraph 5, of the Convention, as amended by this Protocol, shall be circulated by the Secretary-General to all Members of the Organization and to all Contracting States.
- 3 Any amendment proposed and circulated as above shall be submitted to the Legal Committee of the Organization (the Legal Committee) for consideration at a date at least six months after the date of its circulation.
- 4 All Contracting States, whether or not Members of the Organization, shall be entitled to participate in the proceedings of the Legal Committee for the consideration and adoption of amendments.
- 5 Amendments shall be adopted by a two-thirds majority of the Contracting States present and voting in the Legal Committee, expanded as provided in paragraph 4, on condition that at least one half of the Contracting States shall be present at the time of voting.
- 6 When acting on a proposal to amend the limits, the Legal Committee shall take into account the experience of incidents and, in particular, the amount of damage resulting there from, changes in the monetary values and the effect of the proposed amendment on the cost of insurance. It shall also take into account the relationship between the limits established in article 9, paragraph 1, and those in article 14, paragraph 5, of the Convention, as amended by this Protocol.
- 7
 - (a) No amendment of the limits under this article may be considered less than five years from the date this Protocol was opened for signature nor less than five years from the date of entry into force of a previous amendment under this article.
 - (b) No limit may be increased so as to exceed an amount which corresponds to a limit laid down in this Protocol increased by six per cent per year calculated on a compound basis from the date on which this Protocol was opened for signature.
 - (c) No limit may be increased so as to exceed an amount which corresponds to a limit laid down in this Protocol multiplied by three.
- 8 Any amendment adopted in accordance with paragraph 5 shall be notified by the Organization to all Contracting States. The amendment shall be deemed to have been accepted at the end of a period of eighteen months after the date of notification, unless within that period no less than one-fourth of the States which were Contracting States at the time of the adoption of the amendment have communicated to the Secretary-General that they do not accept the amendment, in which case the amendment is rejected and shall have no effect.
- 9 An amendment deemed to have been accepted in accordance with paragraph 8 shall enter into force eighteen months after its acceptance.
- 10 All Contracting States shall be bound by the amendment, unless they denounce this Protocol in accordance with article 20, paragraphs 1 and 2, at least six months before the amendment enters into force. Such denunciation shall take effect when the amendment enters into force.

- 11 When an amendment has been adopted but the eighteen month period for its acceptance has not yet expired, a State which becomes a Contracting State during that period shall be bound by the amendment if it enters into force. A State which becomes a Contracting State after that period shall be bound by an amendment which has been accepted in accordance with paragraph 8. In the cases referred to in this paragraph, a State becomes bound by an amendment when that amendment enters into force, or when this Protocol enters into force for that State, if later.

Denunciation

Article 20³²

- 1 This Protocol may be denounced by any State Party at any time after the expiry of one year following the date on which this Protocol comes into force for that State.
- 2 Denunciation shall be effected by the deposit of an instrument to that effect with the Secretary-General.
- 3 A denunciation shall take effect twelve months, or such longer period as may be specified in the instrument of denunciation, following its receipt by the Secretary-General.
- 4 Notwithstanding a denunciation by a State Party pursuant to this article, any provisions of this Protocol relating to obligations to make contributions under articles 18, 19 or article 21, paragraph 5, of the Convention, as amended by this Protocol, in respect of such payments of compensation as the Assembly may decide relating to an incident which occurs before the denunciation takes effect shall continue to apply.

Extraordinary sessions of the Assembly

Article 21³³

- 1 Any State Party may, within ninety days after the deposit of an instrument of denunciation the result of which it considers will significantly increase the level of contributions from the remaining States Parties, request the Director to convene an extraordinary session of the Assembly. The Director shall convene the Assembly to meet not less than sixty days after receipt of the request.
- 2 The Director may take the initiative to convene an extraordinary session of the Assembly to meet within sixty days after the deposit of any instrument of denunciation, if the Director considers that such denunciation will result in a significant increase in the level of contributions from the remaining States Parties.
- 3 If the Assembly, at an extraordinary session convened in accordance with paragraph 1 or 2, decides that the denunciation will result in a significant increase in the level of contributions from the remaining States Parties, any such State may, not later than one hundred and twenty days before the date on which the denunciation takes effect, denounce this Protocol with effect from the same date.

³² This article is identical in substance to Article 49 of the 1996 HNS Convention.

³³ This article is identical in substance to Article 50 of the 1996 HNS Convention.

Cessation

Article 22³⁴

- 1 This Protocol shall cease to be in force:
 - (a) on the date when the number of States Parties falls below six; or
 - (b) twelve months after the date on which data concerning a previous calendar year were to be communicated to the Director in accordance with article 21, of the Convention, as amended by this Protocol, if the data show that the total quantity of contributing cargo to the general account in accordance with article 18, paragraphs 1(a) and (c), of the Convention, as amended by this Protocol, received in the States Parties in that preceding calendar year was less than 30 million tonnes.

Notwithstanding sub-paragraph (b), if the total quantity of contributing cargo to the general account in accordance with article 18, paragraphs 1(a) and (c), of the Convention, as amended by this Protocol, received in the States Parties in the preceding calendar year was less than 30 million tonnes but more than 25 million tonnes, the Assembly may, if it considers that this was due to exceptional circumstances and is not likely to be repeated, decide before the expiry of the above-mentioned twelve month period that the Protocol shall continue to be in force. The Assembly may not, however, take such a decision in more than two subsequent years.

- 2 States which are bound by this Protocol on the day before the date it ceases to be in force shall enable the HNS Fund to exercise its functions as described under article 23 and shall, for that purpose only, remain bound by this Protocol.

Winding up of the HNS Fund

Article 23³⁵

- 1 If this Protocol ceases to be in force, the HNS Fund shall nevertheless:
 - (a) meet its obligations in respect of any incident occurring before this Protocol ceased to be in force; and
 - (b) be entitled to exercise its rights to contributions to the extent that these contributions are necessary to meet the obligations under (a), including expenses for the administration of the HNS Fund necessary for this purpose.
- 2 The Assembly shall take all appropriate measures to complete the winding up of the HNS Fund including the distribution in an equitable manner of any remaining assets among those persons who have contributed to the HNS Fund.
- 3 For the purposes of this article the HNS Fund shall remain a legal person.

³⁴ This article is identical in substance to Article 51 of the 1996 HNS Convention.

³⁵ This article is identical in substance to Article 52 of the 1996 HNS Convention.

Depositary

Article 24³⁶

- 1 This Protocol and any amendment adopted under article 19 shall be deposited with the Secretary-General.
- 2 The Secretary-General shall:
 - (a) inform all States which have signed this Protocol or acceded thereto, and all Members of the Organization, of:
 - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession together with the date thereof and data on contributing cargo submitted in accordance with article 16, paragraph 4³⁷;
 - (ii) data on contributing cargo submitted annually thereafter, in accordance with article 16, paragraph 6, until the date of entry into force of this Protocol³⁸;
 - (iii) the date of entry into force of this Protocol;
 - (iv) any proposal to amend the limits on the amounts of compensation which has been made in accordance with article 19, paragraph 2;
 - (v) any amendment which has been adopted in accordance with article 19, paragraph 5;
 - (vi) any amendment deemed to have been accepted under article 19, paragraph 8, together with the date on which that amendment shall enter into force in accordance with paragraphs 9 and 10 of that article;
 - (vii) the deposit of any instrument of denunciation of this Protocol together with the date on which it is received and the date on which the denunciation takes effect; and
 - (viii) any communication called for by any article in this Protocol; and
 - (b) transmit certified true copies of this Protocol to all States that have signed this Protocol or acceded thereto.
- 3 As soon as this Protocol enters into force, a certified true copy thereof shall be transmitted by the depositary to the Secretary-General of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

³⁶ This article is identical in substance to Article 53 of the 1996 HNS Convention, except for paragraphs (2)(a)(i) and (ii).

³⁷ Note by IOPC Funds: Text re circulation of data added to clarify responsibilities of depositary.

³⁸ See note 37.

Languages

Article 25³⁹

This Protocol is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

DONE AT [] this [] day of [] two thousand and [].

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments for that purpose, have signed this Protocol.

³⁹ This article is identical in substance to Article 54 of the 1996 HNS Convention.

ANNEX I⁴⁰

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, [200...]

| Name of ship | Distinctive number or letters | IMO ship identification number | Port of registry | Name and full address of the principal place of business of the owner |
|--------------|-------------------------------|--------------------------------|------------------|---|
| | | | | |

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, [200...].

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)

At (Place) On (Date)

(Signature and Title of issuing or certifying official)

Explanatory Notes:

- 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.

⁴⁰ This Annex is identical in substance to Annex I of the 1996 HNS Convention.



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

ADMINISTRATIVE COUNCIL
4th session
ASSEMBLY
13th extraordinary session
Agenda item 12

92FUND/AC.4/A/ES.13/9
27 June 2008
Original: ENGLISH

RECORD OF DECISIONS OF THE FOURTH SESSION OF THE ADMINISTRATIVE COUNCIL

ACTING ON BEHALF OF THE 13TH EXTRAORDINARY SESSION OF THE ASSEMBLY

(held from 23 to 27 June 2008)

Chairman: Mr Jerry Rysanek (Canada)
First Vice-Chairman: Professor Seiichi Ochiai (Japan)
Second Vice-Chairman: Mr Edward K Tawiah (Ghana)

Opening of the session

- 0.1 It was noted that the Assembly's Chairman had attempted to open the 13th extraordinary session of the Assembly at 9.30 am on Monday 23 June 2008, but that the Assembly had failed to achieve a quorum.
- 0.2 Only the following 43 Member States of the 1992 Fund had been present at that time, whereas a quorum required 51 States to have been present:

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

- 0.3 It was recalled that at its 7th session the Assembly had adopted 1992 Fund Resolution N°7 whereby, whenever the Assembly failed to achieve a quorum, the Administrative Council established under Resolution N°7 should assume the functions of the Assembly, on the condition that, if the Assembly were to achieve a quorum at a later session, it would resume its functions.
- 0.4 In view of the fact that no quorum was achieved, the Chairman concluded that, in accordance with Resolution N°7, the items of the Assembly's agenda would therefore be dealt with by the Administrative Council.
- 0.5 It was recalled that, at its 1st session in May 2003, the Administrative Council had decided that the Chairman of the Assembly should *ex officio* be the Chairman of the Council (document 92FUND/AC.1/A/ES.7/7, paragraph 2).
- 0.6 The Chairman opened the session and welcomed the members of the Administrative Council, observer delegations and members of the public to the newly-refurbished IMO building.
- 0.7 The Chairman reported with regret the extensive loss of life in the Philippines due to the capsizing of the *Princess of the Stars* ferry in the recent typhoon and asked the delegation of the Philippines to extend the sincere condolences of the 1992 Fund Administrative Council to the Government of the Philippines.
- 0.8 The Administrative Council discussed the use of the new television screens in the Conference Room which showed those who were speaking and, although some delegations felt that it could be intimidating to see oneself on a large screen, there was sufficient support for their use, albeit on a trial basis.

Procedural matters

1 Adoption of the Agenda

The Administrative Council adopted the Agenda as contained in document 92FUND/A/ES.13/1.

2 Examination of credentials

- 2.1 The Administrative Council recalled that, at its March 2005 session, it had decided to establish, at each session, a Credentials Committee composed of five members elected by the Assembly on the proposal of the Chairman to examine the credentials of delegations of Member States and that the Credentials Committee established by it should also examine the credentials in respect of the Executive Committee, provided the session of the Executive Committee was held in conjunction with a session of the Assembly. It was recalled that the Assembly had inserted provisions to this effect in the respective Rules of Procedure.
- 2.2 In accordance with Rule 10 of the Assembly's Rules of Procedure, the delegations of Cameroon, Denmark, Malaysia, Panama and Republic of Korea were appointed members of the Credentials Committee.

2.3 The following Member States were present:

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

2.4 After having examined the credentials of the delegations of the members of the Administrative Council, the Credentials Committee reported in document 92FUND/A/ES.13/2/1 that all except two of the above-mentioned members of the Council (Colombia and Tunisia) had submitted credentials which were in order. The Administrative Council noted that subsequent to the preparation of the Credentials Committee Report credentials had been received from Tunisia and that they were in order. The Council further noted that the Committee expected that Colombia would provide its credentials shortly after the sessions^{<1>}.

2.5 The Administrative Council expressed its sincere gratitude to the Members of the Credentials Committee for its work during this session.

2.6 The following non-Member States were represented as observers:

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

2.7 The following intergovernmental organisations and international non-governmental organisations were represented as observers:

Intergovernmental organisations:

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

International non-governmental organisations:

Comité Maritime International (CMI)
European Chemical Industry Council (CEFIC)
International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)

<1> Note by the Director: Credentials in respect of Colombia had not been received when the final version of this Record of Decisions was issued.

International Group of Liquefied Natural Gas Importers (GIIGNL)
International Group of P&I Clubs
International Tanker Owners Pollution Federation Ltd (ITOPF)
International Union of Marine Insurance (IUMI)
Oil Companies International Marine Forum (OCIMF)

Secretariat and administrative matters

3 Election of members of the Audit Body

- 3.1 The Administrative Council took note of the information contained in documents 92FUND/A/ES.13/3 and 92FUND/A/ES.13/3/1.
- 3.2 The Administrative Council noted that the term of office of the current Audit Body would expire at the October 2008 sessions of the governing bodies and that an election of the members for a new term of office would take place at the same sessions. Four members of the current Audit Body elected from Member States had already served two terms of office and were therefore not eligible to serve a third term whereas the remaining two members were eligible to serve a second term of three years. He further stated that, in response to a circular from the Director calling for nominations, only five nominations, including two from those members who had only served one term, had been received from 1992 Fund Member States for the six available positions by the deadline of 16 May 2008.
- 3.3 The Director outlined the options proposed in paragraph 4.2 of document 92FUND/A/ES.13/3 as to how to proceed given that only five nominations had been received. These options were:
- (a) to send a second circular to 1992 Fund Member States calling for further nominations. When choosing this option, the Administrative Council would also have to decide whether the position of the five candidates whose nominations had been received within the deadline given in the first circular would be affected or not, given that, without a second circular, these candidates would have been elected with certainty in October 2008. This could be done either (i) by issuing the second circular only for the purpose of filling the remaining position or (ii) by deciding that all candidates, whether nominated in response to the first or to the second circular, should be on an equal footing at the October 2008 election; or
 - (b) a second circular would not be sent and the five candidates for whom nominations had been received within the deadline given in the first circular would be automatically elected to the Audit Body at the October 2008 sessions of the governing bodies, and outgoing members of the Audit Body having already served two three-year terms of office and not from a Member State which had submitted a new candidature would be asked if one of them would be willing to serve a third and final term.
- 3.4 With respect to option (b), the Director stressed that he had not discussed the possibility of an outgoing member of the Audit Body having already served two three-year terms serving a third term with the members concerned. He added that, as none of the options mentioned above guaranteed that a sixth nomination would be received, there was a possibility that, whichever option was chosen, the Audit Body would have only five members nominated by 1992 Fund Member States during its next term of office. He further stated that it would perhaps be wise to revise the composition and mandate of the Audit Body to avoid a similar situation arising in the future.
- 3.5 One delegation expressed his surprise that for the second time it was proving difficult to find candidates to fill the positions on the Audit Body and wondered whether this was possibly linked to the level of remuneration paid to the members of the Audit Body. Another delegation felt that

remuneration was not the cause of the problem as, in its view, it was an honour to serve on the Audit Body.

- 3.6 Whilst taking nothing away from the very valid candidatures which had already been received, the Director expressed his disappointment that not more candidatures had been received and felt that one reason was perhaps that the Audit Body was not yet sufficiently well-known amongst Member States. He suggested that an exchange of views on the role of the Audit Body might be useful at a future October session of the governing bodies to encourage more active participation from a larger number of Member States.
- 3.7 Most delegations which took the floor expressed their preference for the option found in paragraph 4.2(a)(i) although a small number of delegations expressed a preference for the option outlined in paragraph 4.2(a)(ii).
- 3.8 A number of delegations expressed their agreement with the Director's suggestion that the composition and mandate of the Audit Body be revised to avoid a similar situation arising in the future.
- 3.9 The Chairman concluded that there was almost unanimous support for the option proposed in paragraph 4.2(a)(i), ie that the candidates whose nominations had been received within the deadline given in the first circular would be automatically elected in October 2008 and that a second circular would be sent by the Director to 1992 Fund Member States calling for further nominations to fill the remaining position. If more than one candidature was received for this position, an election would take place.
- 3.10 The Chairman introduced document 92FUND/A/ES.13/3/1 and reminded the Administrative Council that the term of office of the member of the Audit Body not related to the Organisations ('outsider') with expertise and experience in financial matters would also expire at the October 2008 session of the governing bodies when he would have served two terms of office of three years each. He had received a letter from the Chairman of the Audit Body indicating the Audit Body's view that the experience of Mr Nigel Macdonald, the outside expert, was essential to the continuity of the functioning of the Audit Body and that, given that there would be a substantial change in the membership of the Audit Body in 2008, it would be wise to renew Mr Macdonald's term of office for a further and final three years so that the new Audit Body could benefit from the experience that he had obtained during his time in office.
- 3.11 The Chairman indicated that he shared the Audit Body's view and recommended that the Administrative Council decide that, as an exceptional measure, Mr Macdonald be allowed to be re-elected to the Audit Body in October 2008 for a further and final three-year term.
- 3.12 The Administrative Council endorsed the Chairman's proposal that he recommend Mr Macdonald for re-election in October 2008.

Compensation matters

4 Submission of Technical Guidelines on methods of assessing losses in the fisheries sectors

- 4.1 The Administrative Council took note of document 92FUND/A/ES.13/4. It noted that at its 3rd session, held in June 2007, the Administrative Council, acting on behalf of the Assembly, had approved a revised version of the Technical Guidelines for assessing fisheries sector claims, which were intended to assist the 1992 Fund's worldwide network of fishery experts in assessing claims, and had instructed the Secretariat to publish this as a Fund document.
- 4.2 The Administrative Council further noted that, at the same session, it had instructed the Secretariat to develop a simplified version of the Guidelines for claimants in the subsistence fisheries sector and to present it to the 1992 Fund Assembly for consideration at its next session.

- 4.3 The Director had engaged a fisheries expert who had worked for the Funds in the past to prepare a simplified set of guidelines which would be easily understandable by claimants in this sector. The draft guidelines had been further circulated among other fisheries experts for comments.
- 4.4 The Administrative Council expressed its appreciation for the work of the Secretariat and the experts and for the contents and quality of the resulting document.
- 4.5 Some delegations asked whether the Secretariat planned to publish the Guidelines in the languages of countries where a spill occurred and whether there was a plan to prepare further guidelines for the other economic sectors which might be affected by an incident.
- 4.6 The Director explained that it had been decided to prepare guidelines for claimants in the subsistence fisheries sector since, in the Fund's experience, victims from this sector tended to be the most likely to need such guidance. He further explained that it had also been agreed that these guidelines could be based on the existing Technical Guidelines for experts for assessing fisheries sector claims. The Director stated that there were no plans at the moment to develop guidelines for any other economic sectors which might be affected by an incident. The Director also stated that the guidelines would, for the time being, be produced in the three official languages of the 1992 Fund, but that there was always the possibility of translating them into the language of a State affected by a major incident and that this had in fact been done in the past with the Claims Manual.
- 4.7 The Director informed the Administrative Council that, were the Council to decide that the Fund should publish the Guidelines as a Fund document, a disclaimer similar to the one in the Claims Manual would be added to the text. The Director also requested the Council's authorisation to make any editorial amendments that might be necessary prior to publication.
- 4.8 The Administrative Council reviewed the draft Guidelines and decided that the Fund should publish the Guidelines as a Fund document. It also decided that the Secretariat should make any editorial amendments as required before publication.

Other matters

5 International Convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea - Report of the 5th intersessional Working Group (HNS Focus Group)

- 5.1 The Administrative Council recalled that the Assembly had decided to establish the HNS Focus Group at its 12th session held in October 2007, with the aim of facilitating the entry into force of the HNS Convention and with the mandate set out in the Annex to document 92FUND/WGR.5/9. It was further recalled that, in accordance with paragraph 1.4 of the Terms of Reference, the HNS Focus Group had been invited to develop a draft text of a protocol to the HNS Convention and to make recommendations to the Assembly upon the completion of its work, ideally at an extraordinary session of the Assembly to be held in June 2008.
- 5.2 The Administrative Council acting on behalf of the Assembly took note of the Report of the Chairman of the HNS Focus Group contained in document 92FUND/A/ES.13/5/3.
- 5.3 It was noted that the HNS Focus Group had held two meetings and that at the second meeting of the HNS Focus Group, held in June 2008, the Group had considered a draft text of a Protocol to the HNS Convention which had been revised in the light of the discussions at its first meeting in March 2008 (document 92FUND/WGR.5/10).
- 5.4 It was also noted that at its June 2008 meeting the Group had considered proposals by IMO to amend the text of Article 1 of the 1996 HNS Convention (definition of HNS) and Article 16 of the draft Protocol (signature, ratification, acceptance, approval and accession), as set out in documents 92FUND/WGR.5/10/2 and 92FUND/WGR.5/10/3. It was noted that the Group had decided to

amend the text of the draft Protocol (document 92FUND/WGR.5/10 and 92FUND/A/ES.13/5/1) as set out in the Annex, subject to any change that might be necessary in respect of Article 1, paragraph 5(a)(vii) of the Convention being agreed between the Secretariats of the IOPC Funds and IMO.

- 5.5 It was further noted that the HNS Focus Group had also considered proposals by Germany and the European Chemical Industry Council (CEFIC) in respect of the concept of receiver (documents 92FUND/WGR.5/12/1 and 92FUND/WGR.5/12) and that the Group had decided not to adopt these proposals.
- 5.6 It was also noted that at its first meeting the HNS Focus Group had decided to delete Article 5, paragraph 5, of the Convention but to revert to the question of whether the whole of Article 5 should be deleted at its next meeting and to make a decision then, when delegations had had more time to consider the matter (document 92FUND/WGR.5/8, paragraph 7.13). It was noted that the Group had decided not to delete the whole of Article 5.
- 5.7 As regards contributions to the LNG Account, it was noted that the HNS Focus Group had considered documents containing proposals to amend the text of the draft Protocol in respect of contributions to the LNG Account submitted by Italy, Japan and the Republic of Korea (document 92FUND/WGR.5/11/1), Singapore (document 92FUND/WGR.5/11/2) and the International Group of Liquefied Natural Gas Importers (GIIGNL) (document 92FUND/WGR.5/11).
- 5.8 It was also noted that the proposals contained in the three documents had in common the concept of the titleholder being the primary person liable for contributions to the LNG Account, with the receiver being liable in certain circumstances as a fallback.
- 5.9 It was noted that, after a lengthy discussion, the HNS Focus Group had decided to maintain the current wording of Article 7 of the draft Protocol, ie that the person liable for contributions to the LNG Account would be the receiver as defined in Article 1.4 of the Convention. However, it was noted that, whilst the majority of the Group had been in favour of maintaining the current wording, a significant number of delegations had supported the concept of the titleholder being the primary person liable for contributions.
- 5.10 It was noted that the differences between the two sides were of a political, economic and policy nature and not just a matter of drafting. It was further noted that it was essential for efforts to be made to bridge the gap between the two sides in order to reach a consensus on this issue quickly. It was noted that failure to reach a consensus by the time of the meeting of IMO's Legal Committee in October 2008 could threaten the viability of the Protocol, since the Legal Committee could only decide to recommend holding a Diplomatic Conference with the aim of adopting a Protocol if it were clear that there would be a good chance of success.
- 5.11 It was noted that a revised proposal on this issue could be considered by the Legal Committee at its October 2008 meeting. Delegates were reminded that any such proposal would have to be submitted to the IMO Secretariat in accordance with the Committee's deadlines, ie that basic and bulky documents (over six pages of text) should reach the IMO Secretariat not later than Friday 15 August 2008 and all other documents, including information documents, not later than Friday 19 September.
- 5.12 The Administrative Council noted the recommendations of the HNS Focus Group contained in document 92FUND/A/ES.13/5/3. The Council also noted that a full report of the meeting, including a detailed account of the discussion of all the proposals that had been considered by the HNS Focus Group, would be prepared for circulation to delegations after the meeting, in accordance with normal practice.

- 5.13 In the oral presentation of his Report, the Chairman of the HNS Focus Group stated that he was optimistic that in due course a compromise would be found in respect of contributions to the LNG Account that would facilitate the rapid entry into force of the HNS Convention.
- 5.14 The delegation of Malaysia offered to coordinate an informal correspondence group with the aim of developing a compromise proposal in respect of contributions to the LNG Account that would make the HNS Convention attractive to as many States as possible. He stated that the Correspondence Group would hopefully be able to submit a compromise proposal in the form of a document to the October meeting of the Legal Committee. That delegation invited any interested States and organisations to participate in the work of the Correspondence Group. He stated that those who wished to participate in the work of the Group should give their contact details to the Malaysian delegation in person or by email to razifahmad@marine.gov.my.
- 5.15 The Administrative Council expressed its gratitude to the Malaysian delegation for its very helpful and constructive proposal and noted that many States from both sides of the divide had expressed their intention to participate in the Correspondence Group.
- 5.16 During the discussion, some delegations referred to the Terms of Reference of the HNS Focus Group and stated that they intended to monitor any compromise proposal which was developed within the Correspondence Group to ensure that it would not be detrimental to the interests of developing States.
- 5.17 The Chairman of the HNS Focus Group stated that he sincerely hoped that there would be only one proposal for the Legal Committee to consider in respect of contributions to the LNG Account. He reminded delegations that, in order to recommend the holding of a Diplomatic Conference, the Legal Committee had to be convinced that there was a good chance of success and that that would only be possible if the Committee were able to approve a compromise proposal with broad support. He implored States to have an open mind when considering possible solutions and not to become entrenched in their positions.
- 5.18 The Administrative Council approved the text of the draft Protocol, as described in paragraph 5.4, and instructed the Director to finalise the text, retaining footnotes of a technical or editorial nature in order to aid the interpretation of the draft Protocol.
- 5.19 The Administrative Council instructed the Director to submit the text of the draft Protocol to the Secretary-General of IMO requesting him to refer it to the Legal Committee for consideration with a view to convening a Diplomatic Conference to consider the draft Protocol at the earliest opportunity.
- 5.20 The Administrative Council also instructed the Director to include with his letter to the Secretary-General the Record of Decisions of this session of the Administrative Council and to bring the following topics to his attention, where consideration of amendments to the Protocol by the Legal Committee might be beneficial:
- The time periods for the amendment procedure in Article 48, which might be brought into line with Article 24 of the Supplementary Fund Protocol.
 - The entry into force conditions in Article 46, since these will be crucial to ensuring the successful entry into force of the Convention.
- 5.21 The Administrative Council expressed its thanks to Mr Popp for his excellent work as Chairman of the HNS Focus Group and to the Secretariats of the IOPC Funds and IMO for their support.

6 Grant of observer status

- 6.1 The Administrative Council took note of the information contained in document 92FUND/A/ES.13/6 and decided to confirm the decision of the Executive Committee at its March 2008 session and grant observer status to Ukraine on a permanent basis.
- 6.2 The Ukrainian delegation expressed its gratitude to the Administrative Council for that decision and also to the Director for having invited Ukraine to attend both the meeting of the Executive Committee in March 2008 and the current sessions of the 1992 Fund Governing Bodies. That delegation stated that its participation in these meetings had led to a clearer understanding of the work of the IOPC Funds. This information had been passed on to the relevant authorities in Ukraine who were in the process of examining the 1992 Fund Convention and the appropriate procedures to follow if Ukraine were to decide to accede to the Convention. That delegation confirmed that it would remain in contact with the IOPC Funds' Secretariat, keeping them fully informed of any developments in this regard.
- 6.3 The Chairman, on behalf of the Administrative Council, welcomed Ukraine as an observer to the 1992 Fund and expressed satisfaction that it was considering ratification of the Convention.

7 Any other business

7.1 Levy of contributions

- 7.1.1 The Administrative Council took note of the information contained in document 92FUND/A/ES.13/7, which set out the situation in relation to the *Volgoneft 139* and *Hebei Spirit* incidents, which occurred on 11 November 2007 and 7 December 2007 respectively, and considered possible ways of funding future payments of compensation by the 1992 Fund.
- 7.1.2 The Administrative Council noted the Director's proposals in relation to a possible levy of contributions in respect of the *Volgoneft 139* and *Hebei Spirit* incidents.
- 7.1.3 One delegation asked whether the use of the term 'loans' when lending funds from one Major Claims Fund to another was correct as Major Claims Funds were not separate legal entities. This delegation also asked why there was a need to charge interest as the funds belonged to one and the same legal entity, namely the 1992 Fund. In response, the Director said that funds for each Major Claims Fund were ring-fenced for that particular incident and therefore monies lent from one Major Claims Fund to another would, for the period involved, not generate interest from any investment to the benefit of the Major Claims Fund from which it was lent, as otherwise would have been the case. He also indicated that the term 'loans' was set out in the 1992 Fund's Financial Regulations, as approved by the Assembly.
- 7.1.4 As regards the *Volgoneft 139* incident, some delegations questioned the need to make decisions as to how to finance compensation payments in respect of this incident, given that the Executive Committee had decided at its 41st session not to authorise compensation payments in respect of this incident until various uncertainties concerning this incident had been addressed and clarified, hopefully at its next session. The Director stated that, in view of the decision taken by the Executive Committee, he agreed with this position. The Administrative Council decided that future funding for this incident should be reviewed at the next session of the Assembly.
- 7.1.5 In respect of the *Hebei Spirit* incident, one delegation asked what the risk would be if contributions were not levied for payment in 2008, which would lessen the administrative burden on contributors. In response, the Director stated that it could not be guaranteed that an agreement would be concluded between the Club and the Korean Government in the near future, enabling the Club to continue to make payments up to its CLC limit. He pointed out that, as long as there was not a fully operative agreement in place, there was a real risk that the Club would have to deposit the limitation amount with the competent court. In that case the Fund would, in accordance with past practice, be called

upon to make payments, probably for significant amounts. The Director concluded that without a decision at this session to levy, it could not be guaranteed that sufficient funds would be available to make payments prior to 1 March 2009.

7.1.6 The Administrative Council decided to levy contributions of £50 million to the *Hebei Spirit* Major Claims Fund payable by 1 November 2008.

7.1.7 The Administrative Council further approved the Director's proposal that, should the 1992 Fund be called upon to make payments in relation to the *Hebei Spirit* incident exceeding the amount payable from the General Fund prior to 1 November 2008, these payments should be financed through loans to the *Hebei Spirit* Major Claims Fund from the *Erika* and *Prestige* Major Claims Funds and, if required, from the General Fund.

7.1.8 It was noted that the contributions referred to in paragraph 7.1.6 would be calculated as follows:

| Major Claims Fund | Date of incident | Oil year | Estimated total oil receipts (tonnes) | Payment by 1 November 2008 | |
|---------------------|------------------|----------|---------------------------------------|----------------------------|----------------------------|
| | | | | Levy £ | Estimated levy per tonne £ |
| <i>Hebei Spirit</i> | 07/12/07 | 2006 | 1 503 530 682 | 50 000 000 | 0.0332551 |

7.2 Presentation of Claims Handling Database

7.2.1 The Administrative Council recalled that at its October 2007 session the Assembly had been informed of a new claims handling database (the Web-based Claims Management System (WCMS)). The Council also recalled that the system, which had been developed in-house, would greatly facilitate the handling of incidents, in particular those where claimants, governments, experts, etc, made large amounts of data available to the Fund, and would provide the Director with useful management information.

7.2.2 A presentation was given of the finalised database, which was now being used by the Secretariat and Claims Handling Offices for various incidents.

7.2.3 The Chairman, on behalf of the Administrative Council, thanked Ms Della Mea (Claims Manager) and Mr Owen (IT Manager) for an excellent presentation on the WCMS, showing how the new system operated and how the use of this new technology would assist the claims handling process. He noted that it was both useful and timely to see the system, which had only been put in place a few months ago, in operation.

7.2.4 One delegation asked whether changes to claims handling practices and, in particular, the use of electronic systems to transmit and store data had any legal implications for the operation of the Convention, for example in respect of the application of the time-bar provisions. The Director explained that, whilst the use of the system facilitated the Fund's claims handling process, the rules governing the application of the Convention remained exactly the same. He stated that it was not possible to give a categorical answer as to whether electronic data transmission satisfied, for example, the requirements for notification laid down in the Convention, since this would differ between jurisdictions depending on the method of transmission used. He did not consider, however, that the use of the WCMS would bring about any changes in respect of the application of the time-bar provisions.

- 7.3 Entry into force of the International Convention on Civil Liability for Bunker Oil Pollution Damage (2001) ('Bunkers Convention')
- 7.3.1 The Administrative Council took note of the information contained in document 92FUND/A/ES.13/8 submitted by the observer delegation of the International Group of P&I Clubs.
- 7.3.2 Given that the next meeting of the IMO Legal Committee was due to take place only one month prior to the entry into force of the Bunkers Convention and that the subject would ordinarily be dealt with by that Committee, in introducing the document, the delegation of the International Group of P&I Clubs thanked the Director for allowing the document to be submitted for consideration by the Administrative Council.
- 7.3.3 The Administrative Council recalled that following the entry into force of the Bunkers Convention every ship that is registered in a State Party or enters or leaves a port in the territory of a State Party, and has a gross tonnage (GT) greater than 1 000, will be required to maintain insurance or other financial security in accordance with the provisions of the Convention and to obtain a certificate issued by a State Party attesting that such insurance or financial security is in place.
- 7.3.4 The delegation of the International Group informed the Council that since the March 2008 session of the Executive Committee, when this issue was first raised (document 92FUND/EXC.40/11, section 4.1), contact had been made with a number of States Parties to the Bunkers Convention to determine the situation with regard to the issue of certificates to vessels registered in non-contracting States and that, to date, the International Group was not aware of any State Party that was prepared to issue certificates to such vessels unless they were calling at a port or terminal in that State. The International Group reiterated its view that this situation was of concern to the industry and had the potential to cause significant problems when the Convention entered into force, in particular the risk of delays of vessels entering ports or terminals in a State Party.
- 7.3.5 That delegation pointed out that prudent shipowners were likely to want to have certificates even in the absence of immediate plans to call at a State Party and urged States to adopt a more flexible approach which would lead to a close cooperation among States Parties to facilitate the issue of such certificates to vessels registered in non-Contracting States.

8 Adoption of the Record of Decisions

The draft Record of Decisions of the Administrative Council, as contained in document 92FUND/AC.4/A/ES.13/WP.1, was adopted, subject to certain amendments.

* * *

ANNEX

**Changes to Articles 3 and 16 of the draft text of the Protocol
contained in document 92FUND/A/ES.13/5/1**

Article 3

1 Article 1, paragraph 5 is replaced by the following text:

5 "Hazardous and noxious substances" (HNS) means:

- (a) any substances, materials and articles carried on board a ship as cargo, referred to in (i) to (vii) below:
- (i) oils, carried in bulk, ~~listed in appendix I~~ as defined in regulation 1 of Annex I to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended;¹
 - (ii) noxious liquid substances, carried in bulk, ~~referred to in appendix I~~ as defined in regulation 1.10 of Annex II² to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended, and those substances and mixtures provisionally categorized as falling in pollution category A, B, C or D, X, Y or Z in accordance with regulation ~~3(4)~~6.3 of the said Annex II;
 - (iii) dangerous liquid substances carried in bulk listed in chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, ~~1983~~³, as amended, and the dangerous products for which the preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph [1.1.~~36~~]36] of the Code;
 - (iv) dangerous, hazardous and harmful substances, materials and articles in packaged form covered by the International Maritime Dangerous Goods Code, as amended;
 - (v) liquefied gases as listed in chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk ~~1983~~⁴, as amended, and the products for which preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph 1.1.6 of the Code;
 - (vi) liquid substances carried in bulk with a flashpoint not exceeding 60°C (measured by a closed-cup test);
 - (vii) solid bulk materials possessing chemical hazards covered by appendix B of the Code of Safe Practice for Solid Bulk Cargoes, as amended, to the extent that these substances are

¹ As it stands in the HNS Convention, the definition of oil carried in bulk is restricted to a reference to the list in the appendix 1 of MARPOL, Annex 1, regulation 1, thus giving the impression that the list is a closed one. The amendment suggested restores the list to its true, indicative, nature, as clearly stated in regulation 1, namely "without limiting the generality of the foregoing" (MARPOL, Annex I, regulation 1). The Secretariat proposes this change in light of advice given by its technical experts to the effect that the reference to the list would be confusing unless placed in the general indicative context of regulation 1.

² The paragraph needs to be updated in light of the revised Annex II to MARPOL which no longer contains an Appendix II; nonetheless, the "noxious liquid substances carried in bulk" referred to by this appendix remain covered by regulation 1.10 of revised Annex II. The effect of the revision of Annex II to MARPOL has been reflected in resolutions MEPC.160(50) and LEG.4(91).

³ IBC Code was adopted in 1983. However, the title of the IBC Code does not include reference to the year of adoption. Accordingly, the Secretariat suggests deleting this reference.

⁴ Idem.

also subject to the provisions of the International Maritime Dangerous Goods Code when carried in packaged form; and

- (b) residues from the previous carriage in bulk of substances referred to in (a)(i) to (iii) and (v) to (vii) above.

2 The following text is added as Article 1, paragraphs 5bis and 5ter, of the Convention⁵:

5bis "Bulk HNS" means any hazardous and noxious substances referred to in article 1, paragraph 5(a)(i) to (iii) and (v) to (vii) and paragraph 5(b).

5ter "Packaged HNS" means any hazardous and noxious substances referred to in article 1, paragraph 5(a)(iv).

3 Article 1, paragraph 10, of the Convention is replaced by the following text⁶:

10 "Contributing cargo" means any bulk HNS which are carried by sea as cargo to a port or terminal in the territory of a State Party and discharged in that State. Cargo in transit which is transferred directly, or through a port or terminal, from one ship to another, either wholly or in part, in the course of carriage from the port or terminal of original loading to the port or terminal of final destination shall be considered as contributing cargo only in respect of receipt at the final destination.

* * *

FINAL CLAUSES

Signature, ratification, acceptance, approval and accession

Article 16

- 1 This Protocol shall be open for signature at the Headquarters of the Organization from [.....] to [.....] and shall thereafter remain open for accession.
- 2 Subject to the provisions in paragraphs 4 and 5, States may express their consent to be bound by this Protocol by:
- (a) signature without reservation as to ratification, acceptance or approval; or
 - (b) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval; or
 - (c) accession.
- 3 Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.
- 4 An expression of consent to be bound by this Protocol shall be accompanied by the submission to the Secretary-General of data on the total quantities of contributing cargo liable for contributions received in that State during the preceding calendar year in respect of the general account and each separate account.
- 5 An expression of consent which is not accompanied by ~~such data~~ the data referred to in paragraph 4⁷

⁵ Note by Chairman: Definitions introduced to distinguish between bulk and packaged HNS in order to simplify drafting of article 1, paragraph 10 and article 9, paragraph 1.

⁶ Policy proposal in respect of exclusion of packaged HNS from contributions to the HNS Fund has been implemented using new definition in article 1, paragraph 5bis: 'hazardous and noxious substances' changed to 'bulk HNS'

⁷ This is an editorial amendment. No change in meaning.

~~shall not be valid and~~⁸ shall not be accepted by the Secretary-General.

- 6 Each State which has expressed its consent to be bound by this Protocol shall annually thereafter on or before 31 May until this Protocol enters into force for that State submit to the Secretary-General⁹ data on the total quantities of contributing cargo liable for contributions received in that State during the preceding calendar year in respect of the general account and each separate account.
- 7 A State which has expressed its consent to be bound by ~~the~~ this¹⁰ Protocol and which ~~is in breach of its obligation under paragraph 6 to submit data on contributing cargo~~ has not submitted the data on contributing cargo required under paragraph 6¹¹ for any relevant years shall, before the entry into force of the Protocol for that State, be temporarily suspended from being a Contracting State until it ~~has complied with this obligation~~ has submitted the required data¹².
- 8 A State which has expressed its consent to be bound by the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996¹³ shall be deemed to have withdrawn this consent on the date on which it has signed this Protocol or deposited an instrument of ratification, acceptance, approval of or accession in accordance with paragraph 2.

⁸ On further reflection, the IMO Secretariat decided it would be better to delete any reference to validity in order to avoid any conflicting interpretation as to the legal effect of the expression of consent and in order to avoid any embarrassment to States in the event they are compelled to return to their parliaments for a fresh instrument.

⁹ This is an editorial amendment. No change in meaning.

¹⁰ This is an editorial amendment. No change in meaning.

¹¹ The IMO Secretariat is of the view that the use of term "obligation" is not appropriate due to the fact that, at this point in time, the Convention is not in force. The obligations of States can be considered when the Convention is in force. However, the practical effect of the new wording is no different.

¹² See footnote 11.

¹³ This is an editorial amendment to clarify the meaning of this paragraph in the consolidated text of the Convention.