



ASSEMBLY  
13th extraordinary session  
Agenda item 5

92FUND/A/ES.13/5  
16 May 2008  
Original: ENGLISH

FIFTH INTERSESSIONAL  
WORKING GROUP

92FUND/WGR.5/8

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

### Note by the Director

**Summary:**

At its first meeting, held from 12 to 13 March 2008, the HNS Focus Group considered proposals by States in respect of the three issues which had been identified as inhibiting the entry into force of the HNS Convention, ie the concept of 'receiver', contributions to the LNG Account and the non-submission of contributing cargo reports. The Group also considered and approved the text of a draft Protocol to the Convention implementing these proposals, subject to various amendments (section 11). The Secretariat was requested to produce a revised draft Protocol for the next meeting of the Focus Group in June 2008, together with a consolidated text of the Convention, for information purposes only.

**Action to be taken:**

Information to be noted.

### **1 Introduction**

- 1.1 The 5th intersessional Working Group ('the HNS Focus Group') was established by the 1992 Fund Assembly at its 12th session, held in October 2007, with the aim of facilitating the entry into force of the HNS Convention and with the Terms of Reference set out in section 4 (document 92FUND/A.12/28, paragraph 27.16). The Group held its first meeting from 12 to 13 March 2008 under the Chairmanship of Mr Alfred Popp QC (Canada).
- 1.2 In accordance with the Terms of Reference, all governmental and non-governmental delegations that have the right to participate in the 1992 Fund Assembly were invited to participate.

### **2 Adoption of the Agenda**

The HNS Focus Group adopted the Agenda as contained in document 92FUND/WGR.5/1.

### 3 **Participation**

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

Algeria	Greece	Philippines
Australia	Grenada	Portugal
Bahamas	India	Qatar
Belgium	Italy	Republic of Korea
Bulgaria	Japan	Russian Federation
Cameroon	Kenya	Singapore
Canada	Latvia	Spain
China (Hong Kong Special Administrative Region)	Liberia	South Africa
Cyprus	Lithuania	Sweden
Denmark	Malaysia	Turkey
Estonia	Malta	United Arab Emirates
Finland	Monaco	United Kingdom
France	Morocco	Vanuatu
Gabon	Netherlands	Venezuela
Germany	Nigeria	
Ghana	Norway	
	Panama	

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

Saudi Arabia                      Ukraine<sup><1></sup>

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

*Intergovernmental organisations:*

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

*International non-governmental organisations:*

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

### 4 **Terms of Reference**

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

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<sup><1></sup> At its 40th session, held on 10 and 13 March 2008, the 1992 Fund Executive Committee decided to grant observer status to Ukraine on a provisional basis, pending the decision of the Assembly at its next session.

**Terms of Reference of the HNS Focus Group**

- 1.1 Recognizing that, over many years, a large number of States have consistently expressed, both in the 1992 Fund and IMO as well as in other international or regional organisations, their determination to establish a robust and effective compensation regime for the maritime carriage of hazardous and noxious substances based on a system of shared liability, the 1992 Fund Assembly has decided to establish a Working Group ("the HNS Focus Group") with the aim of facilitating the rapid entry into force of the HNS Convention.
- 1.2 The HNS Focus Group shall have the following mandate:
- (a) to examine the underlying causes of the issues which have been identified as inhibiting the entry into force of the HNS Convention, ie:
    - (i) Contributions to the LNG Account,
    - (ii) The concept of 'receiver', and
    - (iii) Non-submission of contributing cargo reports, on ratification of the Convention and annually thereafter;
  - (b) to examine any issues of an administrative ("house-keeping") nature as identified by the Secretariat which would facilitate the operation of the HNS Convention;
  - (c) to identify and develop legally-binding solutions to these issues, taking into account *inter alia* the impact on developing countries, in the form of a draft protocol to the HNS Convention;
  - (d) to complete its work as quickly as possible in order to facilitate the rapid entry into force of the HNS Convention.
- 1.3 The HNS Focus Group shall not embark on a wholesale revision of the HNS Convention but shall confine its work solely to the issues and solutions set out in paragraph 1.2 (a), (b) and (c).
- 1.4 The HNS Focus Group shall aim to complete its work according to the following timetable:
- (a) interested delegations shall submit concrete policy proposals accompanied by draft treaty text to the Secretariat by 18 January 2008, at the latest;
  - (b) based on these proposals, the Chairman of the Group, in conjunction with the Secretariat, shall develop a draft text of a protocol to the HNS Convention for circulation to delegations by 15 February 2008;
  - (c) the Group shall meet in March 2008 and, if required, again in June 2008 in order to:
    - (i) consider the draft text of the protocol; and
    - (ii) make recommendations to the Assembly upon the completion of its work, ideally at an extraordinary session of the Assembly to be held in June 2008.

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

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

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

92FUND/WGR.5/1	Provisional annotated agenda
92FUND/WGR.5/1/1	Information on the venue
92FUND/WGR.5/2	Policy Proposal on Contributions to the LNG Account for the Development of a Protocol to the HNS Convention Submitted by Canada, Denmark, Germany, Latvia, the Netherlands, Norway, Sweden and the United Kingdom
92FUND/WGR.5/2/1	Contributions to the LNG Account Submitted by France
92FUND/WGR.5/2/2	Contributions to the LNG Account Submitted by the International Group of Liquefied Natural Gas Importers (GIIGNL)
92FUND/WGR.5/2/3	Contributions to the LNG Account Submitted by Algeria
92FUND/WGR.5/3	Policy Proposals for the Development of a Protocol to the HNS Convention: The concept of receiver Submitted by Canada, Denmark, France, Latvia, the Netherlands, Norway, Spain, Sweden and the United Kingdom
92FUND/WGR.5/4	Policy Proposals for the Development of a Protocol to the HNS Convention: Non-submission of contributing cargo reports upon ratification, and annually thereafter Submitted by Canada, Denmark, France, Germany, Italy, Latvia, the Netherlands, Norway, Sweden and the United Kingdom
92FUND/WGR.5/5	Analysis of claims data on list of HNS incidents involving vessels entered in an International Group Member Club in the period 2002 - 2007 Submitted by the International Group of P&I Clubs
92FUND/WGR.5/6	Draft Protocol Note by the Chairman
92FUND/WGR.5/7	Draft Protocol Note by the International Maritime Organization (IMO)

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

- 6.1 The Chairman recalled that, as set out in paragraph 1.4 of the Terms of Reference, interested delegations had been required to submit concrete policy proposals accompanied by draft treaty text to the Secretariat by 18 January 2008, at the latest. He noted that by that date three such proposals had been received, together with four related documents. Based on these proposals, the Chairman, in conjunction with the Secretariat, had developed a draft text of a Protocol to the HNS Convention which had been circulated to delegations by 15 February 2008 (document 92FUND/WGR.5/6).
- 6.2 The Chairman invited the HNS Focus Group to consider the draft text of the Protocol with a view to making recommendations to the Assembly upon the completion of its work, ideally at an extraordinary session of the Assembly to be held in June 2008.
- 6.3 The Chairman reminded delegates that the timescale was very short - the intention of the Assembly having been that the Group should only meet in March 2008 and, if required, again in June 2008. He made the point that the Assembly needed to be able to consider and approve the text of the draft Protocol in June 2008 in order that it could be considered by IMO's Legal Committee at its meeting in October 2008, with a view to the holding of a Diplomatic Conference as soon as possible. The Chairman made the point that the bulk of the work therefore needed to be done during the March meeting. The Chairman therefore indicated that the Group should concentrate its attention on the text of the draft Protocol and not, for example, on theoretical discussions as to whether a protocol was necessary, since the Assembly had instructed the Group to develop one.
- 6.4 The HNS Focus Group endorsed the Chairman's proposal to structure the discussions as follows:
- (a) Specific policy issues
    - (i) The concept of 'receiver'
    - (ii) Contributions to the LNG Account
    - (iii) Non-submission of contributing cargo reports
      - before the Convention enters into force for a State
        - on ratification
        - annually thereafter
      - after the Convention has entered into force
  - (b) Other issues relating to the text of the Protocol.

For each specific policy issue, the Chairman proposed:

1. a brief presentation of each relevant document by its author(s), concentrating on the policy issues;
  2. a relatively short discussion of the concrete policy proposal to see whether there was general agreement;
  3. a brief presentation by the Chairman of the way in which the policy proposal had been implemented in the draft Protocol (if appropriate); and
  4. a detailed discussion of the relevant treaty text (if appropriate).
- 6.5 The Chairman introduced document 92FUND/WGR.5/6, which contained the text of the draft Protocol. He noted that, in preparing the draft Protocol, he had attempted to follow the spirit of the policy proposals and to implement them using appropriate treaty language. He noted that the concrete policy proposals in the documents which had been submitted had therefore all been implemented in the draft proposal, but not necessarily either in the same Articles or using the same language as had been proposed in the original submissions. He pointed out that footnotes had been provided wherever appropriate in the draft Protocol to highlight any such deviations.

- 6.6 The Chairman also noted that the draft Protocol consisted of a total of 26 Articles, of which 11 Articles constituted the Final Clauses. He noted that the majority of the Articles in the Final Clauses were identical to those of the 1996 HNS Convention but that it had been necessary to repeat all of those Articles since they would form the Final Clauses both of the draft Protocol and also of the new Convention which would be created by amending the 1996 HNS Convention.
- 6.7 The Chairman further noted that, in conjunction with the Secretariat, he had worked closely with the IMO Secretariat in order to ensure that the draft Protocol was in compliance with international treaty law, taking due account of the interests of those States that had already ratified the 1996 HNS Convention or were at an advanced stage in so doing. The Chairman therefore thanked the staff of IMO's Legal Affairs and External Relations Division for their excellent cooperation in this regard.
- 6.8 Finally, the Chairman made the point that it was inevitable that dissenting views would be expressed during the discussion. He assured delegations that their views would be fully reflected in the Report and that there would be further opportunities to express their views in the 1992 Fund Assembly, the Legal Committee and at the Diplomatic Conference.

## **7 The concept of 'receiver'**

- 7.1 The HNS Focus Group took note of the proposal set out in document 92FUND/WGR.5/3, submitted by Canada, Denmark, France, Latvia, the Netherlands, Norway, Spain, Sweden and the United Kingdom, which contained a policy proposal to exclude packaged goods from contributions to the HNS Fund. Incidents involving packaged goods would still be covered by the HNS Fund as regards compensation to ensure that victims would be protected in the event of a major incident. However, in order to maintain the concept of shared liability, the shipowner's limit would be increased in the Protocol compared with the original Convention.
- 7.2 The delegation of Norway, introducing the document on behalf of the other co-sponsors, recalled that one of the main issues in implementing the 1996 HNS Convention had been how to organise a system for reporting contributing cargo. It was explained that, whilst bulk cargoes were not considered a problem, it had not been possible to find a practicable way to collect data and make reports on packaged goods. The point was made that the reporting of packaged HNS presented many complex problems for both industry and States and that as a result there was a potential for large-scale and long-term under-reporting. It was also indicated that the issue had served as a disincentive to many States who would probably otherwise have ratified the Convention and that there were grounds for believing that it was the reason why eight out of the ten States which have ratified the Convention had not submitted reports on contributing cargo.
- 7.3 The HNS Focus Group also took note of the information contained in document 92FUND/WGR.5/5 submitted by the International Group of P&I Clubs, which contained an analysis of the claims data for HNS incidents involving vessels entered in an International Group Member Club in the period 2002 - 2007.
- 7.4 Introducing that document, the observer delegation of the International Group explained that the document had been submitted in response to a request from the Government of the United Kingdom on behalf of a number of other States for data on incidents during the preceding five years that would have been covered by the HNS Convention. The methodology that had been used to collect the data was described and it was explained that the data had been analysed as if the HNS Convention had been in force at the time of the incident.
- 7.5 It was explained that data had been collected on a total of 126 incidents and that, in 124 of these incidents, the total cost of claims had fallen within the shipowner's limit and that only two incidents had resulted in damage which would have involved the HNS Fund. It was further explained that the total cost of all 126 incidents had been approximately 137 million SDR and that, out of that total, only 17 million SDR would have been paid by the HNS Fund. The point was made that, in that

delegation's view, the claims data painted a fairly clear picture and that, based on historical data only, there was ample coverage within the existing limits.

- 7.6 During the discussion, many delegations stated their wish that the Convention should enter into force as quickly as possible and supported the policy proposal in order to remove a stumbling block to the ratification of the Convention. Several delegations, however, expressed their concern about requiring one party to pay for a system or service which would solely be to the benefit of a different party. One delegation expressed its concern that this was a constitutional issue for its State and another delegation suggested that an alternative solution could be an increase in the threshold of 20 000 tonnes for packaged goods.
- 7.7 One industry delegation made the point that the shipping industry was committed to the early entry into force of the Convention in order to have an international system with shared liability and that, as a result, it was willing to support any reasonable effort to help States bring that about. The point was made that all the problems which had been identified were connected with the second tier and, in particular, with packaged goods. However, there was no evidence that retaining packaged goods in the second tier as regards compensation would result in any financial burden for the HNS Fund. Nevertheless, that delegation indicated that, since a catastrophic incident could not be excluded and taking into account political factors, the shipping industry reluctantly supported the policy, provided that any increase in the limits was modest and was restricted to packaged goods. The other industry delegations aligned themselves with those views.
- 7.8 Summing up the discussion, the Chairman made the point that, apart from one delegation which had stated that its government could ratify the Convention in its existing form, there was general agreement that there was a problem with packaged goods which the policy proposal would resolve and, as a result, there was substantial support for the model. He noted that one delegation had indicated that, given the large movements of HNS that occurred, better data were required on incidents involving HNS.
- 7.9 The Chairman noted that most of the debate had centred around the question of whether there was a need to increase the limits of liability for shipowners and that most delegations that had spoken, including the industry representatives, had agreed that if, in the interest of compromise, an increase was necessary, then there should be an increase, albeit a modest one. He noted that there had been no support for the idea that the reporting threshold for packaged goods could be increased in order to reduce the administrative burden for packaged goods. As regards the question of the actual limits, he made the point that these of course would be decided at the Diplomatic Conference but that it was in any case useful to have had an exchange of views on the subject. He also noted that it would not be practical to use Article 48, as had been suggested by one delegation, to adjust the limits in respect of packaged goods since the amendment procedure could not be triggered until the Convention was in force.
- 7.10 The Chairman recalled that in the draft Protocol, contained in document 92FUND/WGR.5/6, the policy proposal set out in document 92FUND/WGR.5/3 had been implemented by means of the addition of the following policy amendments:
- Article 1, 5bis and 5ter added (definitions of bulk HNS and packaged HNS introduced to simplify drafting)
  - Article 1, paragraph 10 (exclusion of packaged HNS from definition of contributing cargo and therefore contributions to the HNS Fund)
  - Article 9, paragraph 1(a) and (b) (increased shipowner limits for incidents involving packaged HNS)
- 7.11 The Chairman further recalled that a consequential amendment to Article 5, by means of the deletion of paragraph 5, was required, since packaged goods no longer qualified as contributing cargo and so did not require a specific exclusion for the purposes of this article. He explained that the rationale

for Article 5 as a whole could also be questioned since it provided for a State or States to declare that the Convention did not apply to ships of 200 GT or less and which carried HNS only in packaged form, while they were engaged on voyages between ports or facilities of that State or States.

- 7.12 Some delegations agreed that the whole of Article 5 could be deleted whilst others disagreed, in one case because the Article had been inserted at the specific wish of that State and in other cases because they wished to have more time to consider the consequences of such deletion.
- 7.13 The HNS Focus Group decided to maintain the current wording in the draft Protocol and, in particular, to delete Article 5, paragraph 5, but to revert to the question of whether the whole of Article 5 should be deleted at the next meeting and to make a decision then, when delegations had had more time to consider the matter.

## **8 Contributions to the LNG Account**

- 8.1 The HNS Focus Group took note of document 92FUND/WGR.5/2, submitted by Canada, Denmark, Germany, Latvia, the Netherlands, Norway, Sweden and the United Kingdom, which contained a policy proposal to change the person liable for contributions to the LNG Account from the person who 'immediately prior to its discharge, held title to an LNG cargo discharged in a port or terminal of that State' to the standard definition of receiver as defined in Article 1.4 of the Convention.
- 8.2 The delegation of Canada, introducing the document on behalf of the other co-sponsors, stated that, in the view of the co-sponsors, the proposed solution was simple, practical and could be easily implemented by all the States which will be members of the HNS Fund. It was explained that the proposed solution would harmonise contributions to the LNG Account with those to the three other accounts, as well as with the IOPC Funds. It was also said that the proposal incorporated the 'Polluter Pays' principle. Finally, it was stated that the proposal was more equitable in respect of developing countries and took into account their concerns that the current policy represents a serious economic burden to them since they represent a significant proportion of those States which are LNG producers/exporters. The point was made that the current arrangement would only benefit a very small and select number of wealthy countries and that, whilst as a consequence some States would inevitably be opposed to the proposal, it was important to note that the current situation was unacceptable to a large number of States.
- 8.3 As regards other possible solutions to the issue such as financial guarantees, that delegation pointed out that such solutions would impose a heavy administrative burden on the States involved and on the HNS Fund and that the global market for LNG was evolving rapidly, with a larger proportion of LNG being traded on the spot market so that the titleholder of an LNG cargo could change several times during the course of a voyage.
- 8.4 The HNS Focus Group also took note of document 92FUND/WGR.5/2/3, submitted by Algeria, which contained a similar proposal in respect of contributions to the LNG Account. Introducing the document, the Algerian delegation stated that the proposal would lead to the equitable and harmonised treatment of contributions to the LNG Account and as a result would contribute to the rapid ratification of the Convention by States which were exporters of LNG. That delegation referred to the substantial investments which had been made within those States as regards exploration, liquefaction and, above all, transport of LNG and made the point that it was important for there to be an appropriate balance between exporters and importers of LNG.
- 8.5 The HNS Focus Group noted document 92FUND/WGR.5/2/1, submitted by France, which set out France's concerns in respect of the proposal. That delegation made the point that, whilst France was completely committed to ratifying the HNS Convention, it was concerned about the economic balance between exporters and importers of LNG and considered that the current proposal was too brutal in this respect.

- 8.6 The HNS Focus Group further noted document 92FUND/WGR.5/2/2, submitted by GIIGNL, which contained information on the operation of the LNG industry and several proposed solutions.
- 8.7 During the discussion of the policy proposal, a number of States, including most of the major importers of LNG, opposed the proposal. Several drew attention to the historical background for the decision to make the titleholder immediately prior to discharge liable for contributions as opposed to the receiver. It was recalled that, at the time the Convention was being drafted, very few States had been involved in the LNG trade and, as a result, it had been considered that those States, in consultation with industry representatives, should determine who should be responsible for contributions to the LNG Account. One delegation made the point that the Terms of Reference of the HNS Focus Group explicitly referred to 'a...compensation regime...based on a system of shared liability', stating that the proposal under discussion would be contrary to this notion. A number of States also referred to the impact that the proposal would have on the LNG trade, pointing out that long-term contracts had been made with the expectation that the titleholder immediately prior to discharge, and not the receiver, would be the person liable for contributions.
- 8.8 However, other States supported the proposal, stressing that the LNG industry had changed considerably in the intervening years, with many more States being involved and with increased spot-trading as opposed to long-term contracts, and that a solution which had seemed appropriate at the time was no longer appropriate and was likely to lead to problems with non-reporting. One delegation made the point that the balance referred to in the Terms of Reference was intended to refer to the balance between the shipowner and the cargo interests and not that between the exporter and the importer.
- 8.9 The delegations of many developing States strongly supported the proposal indicating that the issue in respect of contributions to the LNG Account was one of the major impediments to the early entry into force of the Convention and that the proposal would therefore encourage ratification of the Convention by those States.
- 8.10 One observer organisation recalled that the industry delegations all supported the early entry into force of the HNS Convention and made the point that the receiver also had an important role to play as regards safety aspects.
- 8.11 Summing up the debate on the policy proposal, the Chairman noted that there had been an extended debate during which most delegations that spoke had supported the proposal. However, some very important objections had been made and it was clear that, whilst the proposal would encourage some States to ratify the Convention, it would also deter others. Several States therefore indicated that they would consider making an alternative proposal whilst others indicated that there was a need for further information before making a decision.
- 8.12 The HNS Focus Group approved the text of the relevant draft articles for drafting purposes only.
- 8.13 The Chairman recalled that in the draft Protocol, contained in document 92FUND/WGR.5/6, the policy proposal set out in documents 92FUND/WGR.5/2 and 92FUND/WGR.5/2/3 had been implemented by means of an amendment to Article 19, paragraph 1(b) (the words 'any person who...immediately prior to its discharge, held title to an LNG cargo discharged in a port or terminal of that State' have been changed to 'any person who...was the receiver in that State').
- 8.14 The Chairman further recalled that consequential amendments had also been made as follows:
- Article 17, paragraph 2 (the words 'or, in respect of cargoes referred to in Article 19, paragraph 1(b), discharged' have been deleted)
  - Article 20, paragraph 1 (the words 'or, in the case of LNG, discharged in that State,' have been deleted)
  - Article 21, paragraph 5(b) (the words 'or, in the case of LNG, the title holder who discharges within the jurisdiction of that State Party,' have been deleted)

- Article 23, paragraph 1 (the words 'or discharged' have been deleted)
- Article 43 (actually implemented in Article 45) (the words 'or, in the case of LNG, discharged in that State' would have been deleted)

8.15 During the discussion of the treaty text, the question was raised as to whether or not a threshold, eg of 20 000 tonnes, should be introduced for LNG, to bring that account into line with the other separate accounts. A few States felt that a threshold of 20 000 tonnes was appropriate whereas some other States felt that it was not necessary.

8.16 The HNS Focus Group decided to maintain the current wording in the draft Protocol but to keep the footnote referring to the possibility of introducing a threshold.

## **9 Non-submission of contributing cargo reports**

9.1 The HNS Focus Group took note of document 92FUND/WGR.5/4, submitted by Canada, Denmark, France, Germany, Italy, Latvia, the Netherlands, Norway, Sweden and the United Kingdom, which contained a series of policy proposals relating to the non-submission of contributing cargo reports upon ratification, and annually thereafter.

9.2 The United Kingdom delegation, introducing the document on behalf of the other co-sponsors, drew attention to information contained in the IOPC Funds most recent Annual Report, indicating that 31 Member States had not submitted reports on contributing oil for the previous year in respect of the 1992 Fund and that a further 21 Member States had submitted 'nil' reports. It was essential to ensure that the reporting problem which had become endemic in the IOPC Funds was not repeated in the HNS Fund. The point was made that reporting contributing oil was relatively straightforward, since there was only one type of substance to report and the threshold for reporting was relatively high at 150 000 tonnes. By comparison, however, HNS covered a very wide range of substances and the thresholds were much lower. As a result, there would be very few States which would be able to submit a 'nil' report. In addition, the types of companies which would be involved in making reports were much more diverse and the administrative burden would be much higher, both for individual companies and for States. It was therefore absolutely essential to ensure that States complied with their treaty obligations in this regard and the proposals set out in the document were designed to ensure this.

9.3 The HNS Focus Group also took note of document 92FUND/WGR.5/7, submitted by IMO, which contained some proposed amendments to the text of Article 45 as contained in the draft Protocol set out in document 92FUND/WGR.5/6.

9.4 Introducing that document, the representative of IMO made the point that the proposed changes to Article 45 did not seek to change any matter of substance contained in document 92FUND/WGR.5/6 but simply to improve the drafting by making the duties of the depositary rather clearer than they were in the current text and also to make several of the provisions more consistent with the Law of Treaties. She drew attention in particular to the revised paragraph 4 and the new paragraph 5, which replace the existing paragraph 4, reflecting IMO's concern about the terminology used in that paragraph: 'will not be recognised by the Secretary-General'. She explained that this terminology did not provide the Secretary-General as depositary with a sufficiently precise mandate or instruction, since the depositary could accept or reject documents but was not able to recognise or not recognise documents. IMO had therefore provided a choice of two wordings, either of which would be acceptable as far as IMO was concerned, the first of which was modelled on Article 17, paragraph 5 of the Athens Protocol whereas the second was new wording but, in IMO's view, the effect was the same. She further explained that the revised paragraph 4 set out the requirement which a State must fulfil in relation to the submission of data on contributing cargo when ratifying the Protocol whereas the new paragraph 5 set out the effect of a State not fulfilling this requirement and placed a positive obligation on the Secretary-General not to accept a ratification by a State which has not fulfilled its obligation. She pointed out that a consequential amendment was then required to paragraph 2 and that the word 'condition' had been replaced by 'provisions' since the proposed new paragraph 5 did

not contain a condition. As regards paragraph 7 of the revised Article 45, the representative of IMO explained that the concept of suspension was more in accordance with general principles of treaty law and that the use of the term 'withdrawal' might cause problems for States arising from the need to submit new instruments of accession to IMO.

- 9.5 At the suggestion of the Chairman, the HNS Focus Group agreed that discussion to follow would be based on the draft Protocol, as set out in document 92FUND/WGR.5/6, with Article 45 replaced as per the Annex of document 92FUND/WGR.5/7.
- 9.6 As regards the non-submission of reports on ratification of the Protocol and annually thereafter, the Chairman recalled that the policy proposal set out in document 92FUND/WGR.5/4 had been implemented in the draft Protocol by means of the deletion of Article 43 and the amendment of Article 45.
- 9.7 The HNS Focus Group approved the policy proposal and the relevant articles of the draft Protocol, for drafting purposes. As regards Article 45, the Group decided on the second of the alternative texts proposed by IMO in paragraph 4 and to remove the square brackets in paragraphs 6 and 7.
- 9.8 As regards the non-submission of reports after the Protocol has entered into force, the Chairman recalled that the policy proposal set out in document 92FUND/WGR.5/4 had been implemented in the draft Protocol by means of the replacement of Article 21, paragraph 4, and the addition of Article 21 bis.
- 9.9 During the discussion, many delegations strongly supported the policy proposal, emphasising that it was absolutely essential to safeguard the functioning of the system by ensuring, to the extent possible, that all States continued to submit reports once the Protocol had entered into force. The point was made that it was a question of balance between the rights and obligations of a State and that claims for death and injury were specifically excluded from these sanctions in order to limit the impact on claimants. It was also pointed out that a State could correct the situation even after an incident had occurred by simply submitting the outstanding reports. One delegation referred to the fact that, under Article 21 bis, paragraph 2, the Assembly would determine in the internal regulations of the HNS Fund the circumstances under which a State would be considered as having failed to fulfil its obligations.
- 9.10 However, some States were strongly opposed to the introduction of sanctions for States which failed to submit reports, indicating that such sanctions could act as an additional disincentive for some States to ratify the Protocol. Several delegations made the comparison with the Supplementary Fund Protocol but pointed out that, whereas the Supplementary Fund only provided supplementary compensation, the sanctions did not apply under the main system, ie the 1992 Fund Convention. One delegation indicated its concern that Article 21 bis, paragraph 2 did not provide any flexibility as regards the withholding of compensation and drew attention to Article 21 bis, paragraph 4, which, in its view, already provided the Assembly with a mechanism to obtain any outstanding reports.
- 9.11 Summing up the discussion, the Chairman noted that the overwhelming majority of those delegations that spoke supported the policy proposal and the proposed treaty text, subject to the redrafting of the text concerning geographical exclusion. He noted that, whilst most delegations considered it was a fair and balanced approach to non-reporting, some delegations had reservations and felt that it did not provide sufficient flexibility. He therefore strongly encouraged those delegations to work together to propose alternative treaty text with the aim of circulating it in the form of a document well in advance of the June meeting.
- 9.12 The HNS Focus Group approved the policy proposal and the relevant articles of the draft Protocol, subject to the Secretariat reconsidering the text as regards geographical exclusion and correcting a mistake in the cross references in Article 21 bis, paragraph 3.

**10 The remainder of the articles in the draft Protocol**

- 10.1 One delegation enquired whether States would have to ratify both the 1996 HNS Convention and the Protocol thereto or just the Protocol. The representative of IMO confirmed that it would only be necessary to ratify the Protocol.
- 10.2 The Chairman recalled that in document 92FUND/WGR.5/6 he had drawn attention to the following topics which fell outside the mandate of the HNS Focus Group, but where consideration of amendments to the Convention either by the 1992 Fund Assembly or by IMO's Legal Committee might be beneficial:
- Shortening of the time periods for the amendment procedure in Article 48, in line with Article 24 of the Supplementary Fund Protocol.
  - Setting the entry into force conditions in Article 46 at an appropriate level, since these will be crucial to ensuring the successful entry into force of the Convention.
- 10.3 The Focus Group agreed that these points would be reflected in the Report of the meeting. As regards updating of the definition of HNS in Article 1.5, to take into account changes to the structure of the Codes and Conventions on which the definition is based, the Group further agreed that the IMO Secretariat would make a concrete proposal to the next meeting of the Focus Group.
- 10.4 The HNS Focus Group adopted the remainder of the draft articles, subject to an appropriate numbering system to be agreed between the Secretariats of the IOPC Funds and IMO.
- 10.5 As regards the Preamble to the Protocol, there were no comments and the HNS Focus Group agreed that it would be retained in the next draft.
- 10.6 The HNS Focus Group requested the Secretariat to produce a revised draft Protocol for consideration at the next meeting of the Focus Group in June 2008.
- 10.7 One delegation requested the production of a consolidated text of the new HNS Convention, ie the 1996 HNS Convention as amended by the Protocol, with the changes highlighted. The representative of IMO recalled that that approach had been found very useful during the preparation of the 2005 Protocols to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) and made the point that a consolidated text would be beneficial not just for meetings of the IOPC Funds but, later on, when the matter was considered at IMO's Legal Committee. The representative of IMO offered to assist the IOPC Funds Secretariat to produce such a text.
- 10.8 The Focus Group asked the Secretariat to produce a consolidated text of the HNS Convention as an aid to the interpretation of the Protocol but emphasised that the consolidated text would be purely for information purposes and that the document which would be submitted for consideration by the Legal Committee would be the draft Protocol.

**11 Summary of decisions made by the HNS Focus Group***The concept of 'receiver'*

- 11.1 The HNS Focus Group decided to maintain the current wording in the draft Protocol and, in particular, to delete Article 5, paragraph 5, but to revert to the question of whether the whole of Article 5 should be deleted at the next meeting and to make a decision then, when delegations had had more time to consider the matter (paragraph 7.13).

*Contributions to the LNG Account*

- 11.2 The HNS Focus Group decided to maintain the current wording in the draft Protocol but to keep the footnote referring to the possibility of introducing a threshold (paragraph 8.16).

*Non-submission of contributing cargo reports*

- 11.3 As regards the non-submission of reports on ratification of the Protocol and annually thereafter, the HNS Focus Group approved the policy proposal and the relevant articles of the draft Protocol, for drafting purposes. As regards Article 45, the Group decided on the second of the alternative texts proposed by IMO in paragraph 4 and to remove the square brackets in paragraphs 6 and 7 (paragraph 9.7).
- 11.4 As regards the non-submission of reports after the Protocol has entered into force, the HNS Focus Group approved the policy proposal and the relevant articles of the draft Protocol, subject to the Secretariat reconsidering the text as regards geographical exclusion and correcting a mistake in the cross references in Article 21 bis, paragraph 3 (paragraph 9.12).

*The remainder of the articles in the draft Protocol*

- 11.5 The Focus Group agreed that the following topics, which fell outside the mandate of the HNS Focus Group, but where consideration of amendments to the Convention either by the 1992 Fund Assembly or by IMO's Legal Committee might be beneficial, would be reflected in the Report of the meeting:
- Shortening of the time periods for the amendment procedure in Article 48, in line with Article 24 of the Supplementary Fund Protocol.
  - Setting the entry into force conditions in Article 46 at an appropriate level, since these will be crucial to ensuring the successful entry into force of the Convention.

As regards updating of the definition of HNS in Article 1.5, to take into account changes to the structure of the Codes and Conventions on which the definition is based, the Group further agreed that the IMO Secretariat would make a concrete proposal to the next meeting of the Focus Group (paragraphs 10.2 and 10.3).

- 11.6 The HNS Focus Group adopted the remainder of the draft articles, subject to an appropriate numbering system to be agreed between the Secretariats of the IOPC Funds and IMO (paragraph 10.4).
- 11.7 As regards the Preamble to the Protocol, the HNS Focus Group agreed that it would be retained in the next draft (paragraph 10.5).
- 11.8 The HNS Focus Group requested the Secretariat to produce a revised draft Protocol for consideration at the next meeting of the Focus Group in June 2008 (paragraph 10.6).
- 11.9 The Focus Group asked the Secretariat to produce a consolidated text of the HNS Convention as an aid to the interpretation of the Protocol but emphasised that the consolidated text would be purely for information purposes and that the document which would be submitted for consideration by the Legal Committee would be the draft Protocol (paragraph 10.8).

**12 Future work**

- 12.1 It was recalled that the next meeting of the HNS Focus Group would take place in June 2008 with the aim of considering the revised draft text of the Protocol and making recommendations to the Assembly on the completion of its work, at an extraordinary session of the Assembly to be held during the same week. The Chairman reminded delegations of the need to submit documents in good time, since this was the only way of ensuring that all documents could be issued in the three

official languages of the 1992 Fund and also that members of the Group would be able to give any proposals due consideration.

- 12.2 On behalf of the HNS Focus Group, the Chairman thanked the Government of Monaco for its generosity in hosting the meeting and also the Secretariats of the IOPC Funds and IMO for the hard work which had gone into producing the draft Protocol.

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