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Agenda item 12

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**REPORT OF THE LEGAL COMMITTEE ON THE WORK OF ITS
NINETY-FOURTH SESSION**

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

4.1 The Secretariat and the representative of the IOPC Funds introduced document LEG 94/4 containing 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 prepared by the HNS Focus Group and adopted by the fourth session of the 1992 Fund Administrative Council, acting on behalf of the 1992 Fund Assembly.

4.2 Preliminary views were expressed as to the need for a draft protocol, the respective roles of the IOPC Fund and the Legal Committee in developing it and the convening of a diplomatic conference to adopt it.

4.3 With respect to the question of need, the majority of delegations that spoke agreed that there was such a need and that a draft protocol should be adopted as soon as possible. In their view, the monitoring work undertaken by the Legal Committee over many sessions had demonstrated the existence of major obstacles which rendered improbable the fulfilment of the entry-into-force conditions of the treaty, adopted in 1996. The draft protocol elaborated by the Focus Group offered simple and straightforward solutions to remove these obstacles.

4.4 Some delegations, however, expressed reservations regarding the adoption of an HNS protocol at this stage. In this regard, they referred to the difficulties posed by the draft protocol for States that had become Contracting Parties to the original treaty and those that were far advanced in the process of completing implementing legislation. It was noted that if many of the States that had signed the 1996 Convention had become Parties to it, the treaty would be in force today.

4.5 In connection with the respective roles of the IOPC Funds and the Committee, it was noted that, as reflected in the report of its last session (document LEG 93/13, paragraph 6.14), the submission contained in document LEG 94/4 was in line with the Committee's stated readiness to consider any proposals based on the outcome of the deliberations of the 1992 Fund's HNS Focus Group (Focus Group).

4.6 In response to the comment that the membership of the IOPC Funds was different from that of IMO and that, consequently, some IMO Members had been deprived of an opportunity to participate in the deliberations of the IOPC Funds, the point was made that even non-Fund members had a right to participate as observers. Furthermore, there was ample precedent for preliminary work being undertaken by the Fund, the most recent example being in connection with the 2003 Fund Protocol.

4.7 It was noted, furthermore, that any final decision as to the content of the proposed protocol would be taken by the Committee, which would also have to make a recommendation on the timing of a diplomatic conference. The aim should be to approve the draft at this session, with a view to convening a diplomatic conference in the autumn of 2009. This objective should, however, not prevent a full discussion by the Committee of the draft protocol.

4.8 In response to the suggestion that any amendments to the HNS Convention should be undertaken only pursuant to the amendment provisions of the Convention, it was noted that the Convention was not in force and the draft protocol was, in fact, a free-standing treaty which was intended to complement the HNS Convention. The intention was to ensure that both instruments be read together and in this way to provide a workable solution to the problems of implementation that had so far prevented many States from becoming Party.

4.9 The Committee decided to use the draft protocol prepared by the Focus Group, contained in document LEG 94/4, as the basic text for its deliberations (hereafter the “basic text”).

Packaged HNS

4.10 The Committee noted that one of the main reasons preventing States from becoming Party to the HNS Convention was the difficulty in collecting data and reporting on packaged HNS.

4.11 The representative of the IOPC Funds introduced a “package” of proposals set out in document LEG 94/4 which he described as a possible compromise solution, in terms of which packaged HNS should not contribute to the Fund, while damages caused by packaged HNS would still be covered by the Fund, maintaining a “2-tier system”. To compensate the proposal involved the possibility to increase the limits of liability of the shipowner in cases where the damage was caused by packaged HNS, by both bulk and packaged HNS originated from the same ship or, where it was impossible to assess whether the damage had been caused by packaged or bulk HNS from that ship.

4.12 There was general agreement that the difficulties presented by packaged HNS could be overcome and that, consequently, entry into force of the HNS Convention would be facilitated through these proposals. The proposals were described as a practical solution which would reduce the administrative burden on governments and industry while at the same time ensuring the retention of an adequate level of compensation for victims.

4.13 Most delegations expressed their readiness to accept the increase in shipowner liability on packaged HNS, provided that it was moderate and that the principle of shared liability of shipowner and cargo interests be maintained. Other delegations expressed doubts about the need for any such increase, bearing in mind that, according to the statistical data, accidents caused by packaged HNS had not exceeded first tier limits; nonetheless they were prepared to go along with a moderate increase as a compromise. One delegation however called for more substantial increases.

4.14 The observer delegation of the International Chamber of Shipping (ICS) expressed its support for the adoption of the protocol in general, as the way to facilitate not only the early entry to force of the Convention but also its wide acceptance. It also supported a modest increase of limits proposed for the first tier, restricted to packaged goods, if this was considered necessary by Governments to balance and support the principle of shared responsibility.

4.15 The observer delegation of the International Group of P & I Associations (P & I Clubs) confirmed that the data that had been presented for the consideration of the HNS Focus Group in document 92 FUND/WBR 5/5 showed that past incidents did not involve amounts exceeding the limits for the first tier. It noted, however, that as this situation could change in the future, and in the interests of compromise it would be prudent to support a modest increase in the limits.

4.16 The Committee decided to adopt the proposal contained in the basic text. To this effect, the Committee approved the following provisions of the basic text:

- definitions of “Bulk HNS” and “Packaged HNS” (article 3, paragraph 2, of the draft protocol);
- new definition of “contributing cargo” (article 3, paragraph 3, of the draft protocol); and
- amendments to provisions on limitation of liability (article 5 of the draft protocol).

The Committee also noted that the actual limit was for the diplomatic conference to decide upon.

Contributions to the LNG Account

4.17 The representative of the IOPC Funds outlined the work of the Focus Group on this issue, which had identified the need to change the person liable for contributions on LNG from the titleholder to the receiver. Among the reasons for this change was the need to eliminate inconsistencies with other contributing cargo regimes in the Convention and to provide for a more equitable distribution of financial responsibility between developed and developing countries. He explained that after lengthy discussion the text contained in the basic document had been approved by the Administrative Council, acting on behalf of the 1992 Fund Assembly and that it had not been easy to find a solution due to differences of a political, economic and policy nature.

4.18 The delegation of Malaysia introduced document LEG 94/4/1 on behalf of a co-sponsoring group of 12 delegations. The group had acted upon the decision at the Administrative Council to establish an informal working group to look into the possibilities to find a compromise on LNG which could attract widespread support. The group agreed on the need for a change from the 1996 Convention, but the simple substitution of the receiver by the titleholder did not provide the necessary flexibility. The Group therefore proposed that the person liable for contributions would normally be the receiver, except that, by agreement between the titleholder and receiver, the titleholder would be liable. However, if the titleholder defaulted, the receiver shall make the contribution. This, in its view, was the best compromise, flexible, simple to apply and it allowed for the current realities of the LNG trade.

4.19 The Committee considered the following three options: option A, retaining the titleholder as in the 1996 Convention; option B, imposing liability solely on the receiver, as in document LEG 94/4; and option C, the compromise proposal in document LEG 94/4/1.

4.20 While two delegations stated their support for options A and B respectively, most delegations that spoke were in favour of option C, which, in their view, provided the necessary flexibility, took into account industry practice, was easy to manage, put LNG receivers on a level playing-field with receivers in other accounts and resolved the potential legal problem of collecting contributions from a non-Member State of the HNS Fund.

4.21 In response to the question as to how the inequitable distribution between developed and developing countries was dealt with in the proposal, it was noted that this was by making the receiver liable in the first instance and giving the option for its substitution by the titleholder.

4.22 Other questions included:

- how the proposal would be applied in practice;
- whether there was a need for elaboration of guidelines relative to agreements between receivers and titleholders for payment of contributions;
- why LPG was treated differently from LNG; and
- the need to resolve the issue of port to port shipments within the jurisdiction of a single State.

4.23 The Committee considered a proposal by the IOPC Funds Secretariat to include in the draft protocol the text proposed in paragraph 4 of document LEG 94/4/2 as follows:

“The Assembly shall determine in the internal regulations the circumstances under which the titleholder shall be considered as not having made the contributions and the arrangements in accordance with which the receiver shall make any remaining contributions.”

4.24 The majority of delegations that spoke supported this inclusion on the basis that it provided legal certainty for the internal regulations and would enhance uniform application by the courts. This will ensure that short deadlines are set for making contributions to the LNG account by receivers who become liable following a contractual default by titleholder.

4.25 The Committee however did not see the need for changing the definition of receiver as contained in paragraph 3 of the same document.

4.26 In response to concerns about the reference to “applicable national law” in the determination of financial issues arising between receivers and titleholders, the Committee agreed to delete the word “national” from article 19.1*bis*(d).

4.27 The Committee approved the following proposed amendments, including consequential amendments, to the draft protocol:

- In article 19 (of the 1996 HNS Convention):
 - delete paragraph 1(b) and renumbering of paragraph 1(c) as new paragraph 1(b);
 - insert new paragraph 1*bis*(a) to (d) immediately after paragraph 1;

- add at the end of paragraph 1*bis*(c), the new sentence set forth at the end of paragraph 4 of document LEG 94/4/2;
- delete the word “national” in paragraph 1*bis*(d).
- In article 16, paragraph 5 (of the Convention), the reference to “article 19 paragraph 1(c)” is replaced with “article 19 paragraph 1(b)”;
- In article 17, paragraph 3 and in article 18, paragraph 1 and paragraph 2 (of the Convention), the reference to “article 19 paragraph 1” is replaced with “article 19 paragraph 1 and paragraph 1*bis*”;
- In article 17 paragraph 2 (of the Convention), the deletion of the words “or, in respect of cargoes referred to in article 19, paragraph 1(b) discharged”;
- In article 19, paragraph 2 (of the Convention), the reference to “paragraph 1 above” is replaced with “paragraph 1 and paragraph 1*bis* above”;
- In article 21 (of the Convention), the text of subparagraph 5(b) is replaced with the text in paragraph 17 of LEG 94/4/1;
- In article 21 (of the Convention), the following sentence is added at the end of subparagraph 5(b): “These persons shall be identified in accordance with the national law of the State concerned”;
- article 6 (of the draft protocol) replaces the text of article 17, paragraph 2 (of the Convention);
- article 8 (of the draft protocol), replaces the text of article 20, paragraph 1 (of the Convention); and
- article 11 (of the draft protocol) replaces the text of article 23, paragraph 1 (of the Convention).

Remedies to ensure submission of contributing cargo reports by States, on ratification of the Convention, and annually thereafter

4.28 In introducing this item, the representative of the IOPC Funds noted that there were two aspects to this issue. The first concerned the consequences of non-submission of reports before the entry into force of the Convention, while the second concerned the consequences of the failure to report once the Convention had entered into force.

4.29 With regard to the first aspect, he noted that, although article 43 of the 1996 HNS Convention requires States, when depositing their consent to be bound by the Convention and annually thereafter, until the Convention enters into force, to submit to the Secretary-General of IMO data on the relevant quantities of contributing cargoes received, not all the Contracting States had done so. As a consequence, the Secretary-General was not in a position to determine the date of entry into force of the Convention.

4.30 In order to rectify this position, it was proposed to require States to submit reports on contributing cargo as an essential precondition for the validity of expressing their consent to be bound by the protocol. Accordingly, any expression of consent which is not accompanied by such reports would not be accepted by the Secretary-General.

4.31 The Contracting State would also be obliged to continue to submit reports annually thereafter until the protocol enters into force. Failure to do so would render that State temporarily suspended from being a Contracting State, which situation would continue until it had submitted the required data. The protocol would, therefore, not enter into force for a State which is in arrears with its reports nor would that State be counted for the purposes of entry into force of the protocol.

4.32 With regard to the obligation to submit reports **after** the entry into force of the protocol, the representative of the IOPC Funds made the point that the non-submission of reports on contributing oil had threatened the proper functioning of the 1992 Fund Convention and that, learning from that experience, it was essential that States comply with the reporting obligations of the HNS Convention.

4.33 In this connection he noted that, in the 1992 Fund Convention, there are no adverse legal consequences for States Parties which do not submit reports; however, appropriate changes had been introduced in the 2003 Supplementary Fund Protocol aimed at addressing this issue and at ensuring that those who wished to claim the benefits of the Protocol also had to comply with their reporting obligations.

4.34 Using the 2003 Supplementary Fund Protocol as a model, the HNS Focus Group had thought it desirable to propose the insertion of similar provisions addressing this question in the HNS protocol. Although some members of the Focus Group had felt that those provisions could constitute a disincentive for States to ratify the protocol, most had taken the view that this would improve the functioning and balance of the regime, while at the same time providing sufficient flexibility for States Parties to submit outstanding reports.

4.35 Article 10 of the draft protocol accordingly proposed the addition of a new article 21*bis* to the Convention pursuant to which, once the protocol has entered into force for a State, compensation would be withheld temporarily pending compliance with the reporting obligation, except for claims for death and personal injury. If the State in question failed to report within one year after receiving notification from the Director of its failure to fulfil these obligations, compensation would be denied permanently.

4.36 Most delegations that spoke expressed their support for the policy behind these proposed changes. In their view, reporting was an essential element of the Convention since it was impossible for the HNS Fund to function if reports on contributions were not received. The failure of some States to make contributions would result in other States being required to shoulder a larger burden. It was pointed out that the HNS Fund would function as a mutual insurance system; accordingly, in order to obtain compensation, there was a need to fulfil obligations.

4.37 However, some delegations expressed concern as to whether the temporary suspension referred to in article 16, paragraph 7, as well as the powers conferred on the Depositary to refuse to accept an instrument not accompanied by data on contributing cargo referred to in article 16, paragraph 5 were in line with international law. The questions were also asked whether a State Party to the Convention that does not accept the protocol would be eligible for compensation under it and whether, for purposes of entry into force of the protocol, the Depositary would have the competence to decide on the adequacy of information supplied by a State Party on contributing cargoes.

4.38 In response to these questions, the Director, LED, gave the following advice:

- the concept of temporary suspension has been employed in other treaty instruments;
- while article 77 of the Vienna Convention on the Law of Treaties, 1969 provides a list of Depositary functions, this was only an indicative list. This article makes it clear that the Parties to a treaty may expressly confer other functions on the Depositary. Since the function to refuse to accept an instrument is not on the indicative list, it was essential for the protocol to provide specific instruction in this regard. However, simply because it was unusual did not make the function unlawful;
- the protocol is not an extension of the 1996 Convention but a free-standing instrument, with its own entry-into-force provisions. Accordingly, any State that has not ratified the protocol would not be eligible to receive compensation under it;
- pursuant to article 16, paragraph 8, a State which has expressed its consent to be bound by the 1996 HNS Convention shall be deemed to have withdrawn this consent on the date on which it has signed the protocol or deposited an instrument of ratification, acceptance, approval of or accession. Based on the present status of ratifications and of the submissions of information on contributing cargoes, it would be extremely unlikely that the 1996 HNS Convention would enter into force, hence the need to join the protocol; and
- the Depositary would not question the validity of the data received from a State but would simply accept it at face value.

4.39 One delegation expressed the view that a basic difference between the 2003 Supplementary Fund Protocol, which contains a sanction clause (non-payment) and the 1992 IOPC Fund Convention, which does not, is that before the Supplementary Fund is called on to provide compensation, the Fund will already have done so, at least partially, to the upper limit of the 1992 Fund. The introduction of a similar sanction clause in the HNS protocol will, in effect penalize victims, owing to the failure of Member States to fulfil their obligation under the HNS protocol. Since that would be contrary to the underlying aim of the HNS Convention, namely, the compensation of victims, it was not supportable.

4.40 Some delegations noted that, in spite of the simplification afforded by the protocol, it remains a complex treaty instrument, in particular for developing States. In this context, these delegations noted the importance of capacity-building in ensuring universal and uniform application of IMO instruments, as addressed in resolution A.998(25). IMO and the IOPC Funds were invited to step up their assistance to make sure that developing States could cope with the complexities of the proposed HNS regime and were assisted in its implementation.

4.41 In response to these concerns it was noted that the Committee would be discussing technical co-operation matters under item 8 of its agenda. The Committee's attention was drawn to the work already undertaken by the Committee in developing an HNS implementation guide as well as the HNS cargo calculator, both of which could be found in the website of the IOPC Funds.

4.42 Following this discussion, the Committee approved article 9, paragraph 1; and articles 10, 11, 12 and 16 of the protocol.

Definition of HNS (article 3 of the protocol amending article 1, paragraph 5 of the 1996 Convention)

4.43 In introducing the proposed amendments, the Director, LED, explained that they had been prepared in consultation with the technical divisions of the Organization and were intended to ensure that the definitions of HNS were fully up to date. A full explanation for each amendment was indicated in the footnotes to the individual subparagraph under article 3 of the draft protocol in annex 1 to document LEG 94/4.

4.44 She stressed that the amendments were not intended to alter in any way the scope of application of the Convention as agreed by the Conference in 1996. In this regard, she noted that the words “as amended” had been inserted by the Secretariat in subparagraph (vii), after the reference to the International Maritime Dangerous Goods Code, purely for drafting consistency with other references in the same article. However, since these words had not been included in the 1996 text of the subparagraph, they could have an inadvertent effect on the substances covered by the protocol. If it was decided not to include these words, then it would be necessary to clarify exactly which version of the IMDG Code it was intended to refer to; that is, whether the reference to the IMDG Code was to the Code as it existed in 1996, or as it exists at the time of the conference which will be convened to adopt the draft protocol.

4.45 The Committee recalled that the 1996 Conference had agreed that the HNS Convention should not apply to certain materials (for example coal, woodchips, fishmeal) and that subparagraph (vii) had been carefully formulated to ensure that result.

4.46 Some delegations voiced their concern that if the words “as amended” were taken out of the definition, the list might become outdated and other substances (apart from those specifically intended to be excluded in 1996) which might pose a danger would not be subject to the Convention.

4.47 However, most delegations that spoke were of the view that the words “as amended” should be deleted and that there was a corresponding need to identify the version of the IMDG Code intended to be applied. In this connection, they noted that the reference should be to the IMDG Code as it was in effect or in force in 1996.

4.48 For the sake of transparency and to assist in the application of this subparagraph, the view was expressed that specific exclusions could be listed in the draft protocol. However, the Committee requested the Secretariat, in consultation with the technical divisions of the Organization, to consider the practicality of preparing either a list of substances which would have been included under subparagraph (vii) using the 1996 version of the IMDG Code as the reference, or a list of substances that would have been excluded using that same reference. It was also suggested that any such list should be entirely separate from the draft protocol to avoid re-opening a debate about substances which was settled in 1996. Such a list, if feasible, might be issued as a circular as a matter of information.

4.49 The Committee approved the proposed amendments to the definition of HNS contained in article 1, paragraph 5 of the 1996 HNS Convention (article 3 of the draft protocol), subject to the replacement of the words “as amended” immediately after the reference to the IMDG Code in paragraph 5(vii), by the words “as in effect in 1996” (refer to the International Maritime Dangerous Goods Code, approved by the Organization by resolution A.81(IV) and incorporating amendments up to and including Amendment 27-1994 (Amdt.27-94), the latter being adopted by MSC/Circ.643, in accordance with Assembly resolution A.716(17).

4.50 With reference to article 3.1, the Committee requested the IMO Secretariat to verify which version of the Code was in effect in 1996, and to consider producing a list of products included in, or excluded from, that Code, for circulation to Member Governments.

Topics referred by the Administrative Council for consideration by the Legal Committee

4.51 The representative of the IOPC Funds introduced the two topics referred to in paragraph 5 of document LEG 94/4. In so doing, he noted that these topics had not been extensively discussed, but the Administrative Council was of the view that consideration of possible amendments to the draft protocol by the Legal Committee might be beneficial.

4.52 The first topic referred to the **entry-into-force conditions** in article 17 of the draft protocol, which, at present, reflect the 1996 HNS Convention. Since the protocol would bring a free-standing instrument into force, the question for consideration was whether the current text was still appropriate for the protocol, particularly in view of the timing of the call for contributions to the Funds.

4.53 The Director, LED, referring to the discussion in the Focus Group, noted that the question had been raised as to whether the 18-month period referred to in paragraph 1 of this article should be shortened, possibly to 12 months, taking into account the obligation to report annually and the sanctions applicable in default of such reporting contained in draft article 16, paragraphs 6 and 7 of document LEG 94/4.

4.54 One delegation stated that, as a result of article 16, paragraphs 6 and 7, a State that has given its consent in the previous year could be temporarily suspended from being a Contracting Party after 31 May of the next year. Meanwhile, the entry-into-force conditions of article 17 could have been met earlier on that year, based also on the consent of this Contracting Party, but without the contributing cargo being reported by this State over the preceding calendar year. This results in a period of uncertainty of possibly five months with regard to the total quantity of contributing cargo being received, while the entry-into-force conditions of the protocol have been met. It is also possible that after this period of five months there may be a significantly lower number of Contracting States than initially taken into account for the entry into force.

4.55 Therefore, a period of 18 months, as currently provided in article 17 of the protocol is justifiable, in view of all the practical arrangements to be made, e.g., insurance certificates.

4.56 The second topic concerned the procedure for the **amendment of limits** in article 19 of the draft protocol, which the representative of the IOPC Funds suggested might be brought into line with article 24 of the 2003 Supplementary Fund Protocol. In making this suggestion, he referred to the tendency, in conventions adopted since the 1996 HNS Convention, to make it easier to initiate amendment procedures by, *inter alia*, shortening the time periods.

4.57 The Committee decided that any resolution of these two topics needed to be made by the diplomatic conference.

Decisions taken, in principle, by the Committee on the articles of the draft protocol

Title: Approved

Preamble: Approved, with the addition to the fifth paragraph of “the principles enshrined in resolution A.998 of the twenty-fifth session of the Assembly of the International Maritime Organization and”.

- Article 1:** **Definitions:** Approved.
- Article 2:** **General Obligations:** Approved.
- Article 3.1:** Approval of updated definitions of hazardous and noxious substances (HNS) in article 1, paragraph 5(a) (i), (ii), (iii), (v) and (vii) of the Convention, subject to replacement of the words “the International Maritime Dangerous Goods Code, as amended”, (where secondly appearing in subparagraph 5(a)(vii)), with the words “the International Maritime Dangerous Goods Code as in effect in 1996”.
- Article 3.2:** Approval of new paragraphs *5bis* and *5ter* to article 1 of the Convention, containing definitions of “Bulk HNS” and “Packaged HNS”.
- Article 3.3:** Approval of the replacement of article 1, paragraph 10, of the Convention by a new text relating to contributing cargo.
- Article 4:** Approval of the deletion of article 5, paragraph 5, of the Convention.
- Article 5:** Approval of the replacement of article 9, paragraph 1, of the Convention by an alternative text.
- Article 6:** Approval of the replacement of article 17, paragraph 2, of the Convention by an alternative text.
- Article 7:** Approval of the replacement of the text of this article by the draft amendments to article 19 of the Convention (*Annual contributions to separate accounts*), with certain changes, as set forth in document LEG 94/4/1, paragraphs 15.1, 16 and 17. Also approved were consequential amendments to article 16, paragraph 5; article 17, paragraphs 2 and 3; article 18, paragraphs 1 and 2; article 19, paragraphs 1 and 2; and article 21 of the 1996 HNS Convention.
- Article 8:** Approval of the replacement of article 20, paragraph 1, of the Convention by an alternative text.
- Article 9.1:** Approval of the replacement of article 21, paragraph 4, of the Convention by an alternative text.
- Article 9.2:** Approval of the replacement of article 21, paragraph 5(b), of the Convention by an alternative text.
- Article 10:** Approval of an additional new article *21bis*, of the Convention, entitled “Non-reporting”.
- Article 11:** Approval of the replacement of article 23, paragraph 1, of the Convention by an alternative text.
- Article 12:** Approval of the deletion of article 43 of the Convention.
- Article 13:** Approval of the replacement of the model certificate annexed to the Convention by the model annexed to the draft protocol.

- Article 14: Interpretation and application:** Approved.
- Article 15:** Approval of the insertion of new article 44*bis*, of the Convention, relating to the final clauses of the 1996 Convention, as amended by the draft protocol.
- Article 16: Signature, ratification, acceptance, approval and accession:** Approved.
- Article 17: Entry into Force:** Approved.
- Article 18: Revision and Amendment:** Approved.
- Article 19: Amendment of limits:** Approved.
- Article 20: Denunciation:** Approved.
- Article 21: Extraordinary sessions of the Assembly:** Approved.
- Article 22: Cessation:** Approved.
- Article 23: Winding-up of the HNS Fund:** Approved.
- Article 24: Depositary:** Approved.
- Article 25: Languages:** Approved.

4.58 The Committee noted that the delegation of Japan had proposed an amendment to article 3: “*Scope of application*” in the 1996 HNS Convention, as follows:

“(d) to preventive measures, wherever taken, **to prevent or minimize such damage**”.

4.59 The delegation indicated that it would formally put forward the amendment at the ninety-fifth session of the Committee.

Recommendation for the convening of a diplomatic conference

4.60 The Committee exchanged views on the timing for the convening of a diplomatic conference to consider and adopt a protocol based upon the draft text considered by the Committee at this session.

4.61 Most delegations that spoke proposed that the diplomatic conference be held in 2009 *in lieu* of the autumn session of the Legal Committee. In their view, the adoption of the protocol was necessary in order to bring the 1996 Convention into force. Without it the Convention would never enter into force because so few States that had ratified it had complied with the obligation to submit reports on contributing cargo.

4.62 Failure to adopt the protocol would encourage regional initiatives, particularly if any incident involving HNS were to occur before a global liability and compensation HNS regime was operational. In such an event it would also be difficult to explain to victims why the HNS Convention was not yet in force. These delegations were of the view that the discussions in the Committee had demonstrated sufficient consensus regarding the main provisions contained in the text. Accordingly, there was no need for any further sessions of the Committee.

4.63 Other delegations were of the view that it was premature to go to a diplomatic conference at this point in time and that further discussions on the draft were needed, bearing in mind that some issues had not been properly clarified. Among these issues, mention was made of the legal situation of States that, having become Parties to the 1996 HNS Convention, would have now to consider first adopting, and then becoming Parties to the protocol.

4.64 The argument was made that, theoretically, the possibility existed that both the HNS Convention and the protocol could enter into force, in which case complex treaty relationships would arise. Even if the 1996 Convention never came into force, Government officials in States that had either signed, or become Contracting Parties to it, would be faced with the difficult task of advising their constitutional bodies on a substantive change of policy based upon the fact that they had ratified an unsuccessful treaty and, as a result, would have to withdraw their signature or ratification of the Convention, which might violate relevant international treaty law rules, which should be further considered by those States and the Committee.

4.65 In response to these concerns, reference was made to the precedent of the co-existence of the two IOPC Fund Conventions (the 1971 Convention and its 1992 Protocol) and how this situation had been successfully managed by the progressive denunciation by States of the 1971 Convention in favour of the 1992 Protocol. It was also noted that the option for an HNS protocol did not imply a change of policy, but rather the enforcement of a remedy to the very serious obstacles to ratification posed by the 1996 treaty.

4.66 Reference was also made to the need to develop capacity-building programmes before the adoption of the protocol, in order to help developing countries to cope with its complexities. In response, it was noted that the need to develop such programmes should not be used to delay the adoption of treaties whose implementation was overdue, as was the case of the HNS Convention. In any event, the protocol aimed at facilitating the application of the parent Convention by making it simpler for developed and developing countries alike to implement it. It was also proposed that the capacity-building objectives essential to the global application of the HNS regime could be enshrined in the Preamble to the protocol.

4.67 Bearing in mind these considerations and the lack of consensus regarding the timing of a diplomatic conference, the Committee agreed to a compromise proposal made by the Secretariat as follows:

- the Council should be informed, by means of the Committee's report, of the unanimous wish of delegations to see the HNS Convention enter into force at the earliest possible time;
- there was, in principle, general agreement that the best way to achieve this was to adopt an HNS protocol as soon as possible;
- while many delegations were satisfied with the text of the protocol as amended at this session, many other delegations considered that the Committee needed more time for further consideration of the text at its next session;
- to facilitate this consideration, the Secretariat would prepare a clean version of the protocol, which incorporated all the amendments thus far agreed at this session, together with a consolidated version of the 1996 Convention and the prospective protocol; and

- accordingly, the Committee would recommend to the Council that a diplomatic conference be convened as soon as possible in 2010, to consider and adopt the prospective protocol (attached at annex 2).

4.68 The Committee requested the Secretariat to prepare a document on the legal issues arising out of the transition from the original 1996 treaty to the prospective protocol. Since the work of the Focus Group was completed, delegations were also invited to submit documents in connection with any issue related to the basic text to the Legal Committee.

4.69 The delegation of Cyprus expressed its understanding that the adoption of amendments to the basic text agreed at this session in no way implied that the question of whether a protocol was needed or not had been discussed exhaustively by the Committee. The statement containing its reservations is attached at annex 3. This statement was supported by some delegations, but in so doing, one delegation noted that this did not mean that it opposed the protocol, in principle.

4.70 The Committee decided to accept the Secretariat's proposals and to revert to this agenda item at its next session.

4.71 The Committee expressed its appreciation to the Focus Group and the IOPC Funds for the work they had done in developing the protocol.

ANNEX 2

**MONITORING THE IMPLEMENTATION OF THE HNS CONVENTION:
DEVELOPMENT OF A POSSIBLE DRAFT PROTOCOL TO THE CONVENTION****Text of the draft protocol****DRAFT PROTOCOL OF [20..] TO AMEND THE INTERNATIONAL CONVENTION
ON LIABILITY AND COMPENSATION FOR DAMAGE IN CONNECTION
WITH THE CARRIAGE OF HAZARDOUS AND NOXIOUS SUBSTANCES
BY SEA, 1996¹**

[Text of draft protocol prepared by the HNS Focus Group established by the 1992 IOPC Fund Assembly and approved, in principle, with amendments, by the IMO Legal Committee at its ninety-fourth session.]

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,

¹ (Notes: Bold face additions, and overstriking, show changes to the text in document LEG 94/4, annex 1. Articles inserted as *bis* in this text will be numbered, and consequential re-numbering of other articles will be inserted in the final version of the draft protocol).

ALSO AWARE OF the principles enshrined in IMO Assembly Resolution A.998(25) “Need for capacity-building for the development and implementation of new, and amendments to existing, instruments”, [adopted on 29 November 2007,]

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, of the Convention 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, 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;
 - (ii) noxious liquid substances, carried in bulk, as defined in regulation 1.10 of Annex II to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended, and those substances and mixtures provisionally 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 Bulk, as amended, and the dangerous products for which the preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph 1.1.3 of the Code;
 - (iv) dangerous, hazardous and harmful substances, materials and articles in packaged form covered by the International Maritime Dangerous Goods Code, 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, 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, to the extent that these substances are also subject to the provisions of the International Maritime Dangerous Goods Code ~~as amended in effect in 1996~~², 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 Convention:

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 text:

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.

² Refer to the International Maritime Dangerous Goods Code, approved by the Organization by resolution A.81(IV) and incorporating amendments up to and including Amendment 27-1994 (Amdt.27-94), the latter being adopted by MSC/Circ.643, in accordance with Assembly resolution A.716(17).

Article 4

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

Article 5

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

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:

(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 5bis

In article 16, paragraph 5, of the Convention, the reference to “paragraph 1(c)” is replaced by a reference to “paragraph 1(b)”.

Article 6

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

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 ~~or, in respect of cargoes referred to in article 19, paragraph 1(b), discharged~~ during the preceding calendar year or such other year as the Assembly may decide.

2 In article 17, paragraph 3, of the Convention, a reference to “and paragraph 1bis,” is inserted immediately after the words “article 19, paragraph 1”.

Article 6bis

In article 18, paragraphs 1 and 2, of the Convention a reference to “and paragraph 1bis,” is inserted immediately after the words “article 19, paragraph 1” in both paragraphs.

Article 7

1 In article 19, paragraph 1(b) is deleted and paragraph 1(c) becomes paragraph 1(b).

2 In article 19 of the Convention, after paragraph 1, a new paragraph is inserted as follows:

1bis (a) In the case of the LNG account, subject to article 16, paragraph 5, annual contributions to the LNG account shall be made in respect of each State Party 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 quantity of LNG.

(b) However, any contributions shall be made by the person who, immediately prior to its discharge, held title to an LNG cargo discharged in a port or terminal of that State (the titleholder) where:

(i) the titleholder has entered into an agreement with the receiver that the titleholder shall make such contributions; and

(ii) the receiver has informed the State Party that such an agreement exists.

- (c) If the titleholder referred to in subparagraph (b) does not make the contributions or any part thereof, the receiver shall make the remaining contributions. The Assembly shall determine in the internal regulations the circumstances under which the titleholder shall be considered as not having made the contributions and the arrangements in accordance with which the receiver shall make any remaining contributions.
- (d) Nothing in this paragraph shall prejudice any rights of recourse or reimbursement of the receiver that may arise between the receiver and the titleholder under the applicable ~~national~~ law.

3 In article 19, paragraph 2, of the Convention a reference to “and paragraph 1bis” is inserted immediately after the words “paragraph 1”.

Article 8

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

- 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 text:

- 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 text:

- 5(b) instruct the HNS Fund to levy the aggregate amount for each account by invoicing individual receivers, or in the case of LNG, the titleholders, if Article 19, paragraph 1bis(b), is applicable, for the amount payable by each of them. If the titleholder does not make the contributions or any part thereof, the HNS Fund shall levy the remaining contributions by invoicing the receiver of the LNG cargo. 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 Convention:

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.
- 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 text:

- 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 deleted.

Article 13

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

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 44*bis* of the Convention:

Article 44*bis*

Final clauses of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, [20..]

- 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 [20..] 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, [20..] ([20..] 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 [20..] shall be this article and the final clauses of the Protocol of [20..] 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 [20..] shall be renumbered sequentially with the preceding articles of that Convention. References within the final clauses to other articles of the final clauses shall be renumbered accordingly.

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.

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 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 May 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.
- 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.
- 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.

Entry into force

Article 17

- 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 6, 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 18

- 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 19

- 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.
- 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 20

- 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 21

- 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.

Cessation

Article 22

- 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 subparagraph (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 23

- 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.

Depositary

Article 24

- 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 4;
 - (ii) data on contributing cargo submitted annually thereafter, in accordance with article 16, paragraph 6, until the date of entry into force of this Protocol;
 - (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.

Languages

Article 25

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.

ANNEX I

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, [20..]

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, [20..].

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.

ANNEX 3**MONITORING THE IMPLEMENTATION OF THE HNS CONVENTION:
DEVELOPMENT OF A POSSIBLE DRAFT PROTOCOL TO THE CONVENTION****Statement by Cyprus**

The 1992 Fund Assembly currently has 102 Member States and the draft protocol on the HNS Convention was based on an initiative by a few Member States within the auspices of that organization.

The International Maritime Organization (IMO) is the specialized body mandated by the United Nations to compile international conventions and its current membership currently stands at 168 Member States.

It is the opinion of the Republic of Cyprus that the Legal Committee at its ninety-fourth session decided to approve the text of a draft international treaty to amend the existing HNS Convention, 1996 without any proper consideration by the membership of the International Maritime Organization.

The Legal Committee never conducted a study, or requested the membership of the Organisation to report the reasons which prevented them from ratifying the existing HNS Convention, 1996. Neither any document exists within the Organization which underlines and supports an associated decision by the Legal Committee on this issue or indeed whether the HNS Convention as it currently stands will never be ratified and hence come into force.

On the contrary, the initiative made by this select group of countries to proceed with the protocol, in effect, made the ratification process of the existing Convention redundant.

In light of the decision of the Legal Committee and on the fact that the Republic of Cyprus ratified the HNS Convention and fulfilled any associated reporting obligations from the relevant active provisions of the Convention, Cyprus is now extremely cautious as to whether the proposed protocol would 'solve' the 'ratification problems' 'identified'. We therefore reserve our position on the proposed amendments on the liability limits and on the LNG issue and we maintain serious concerns over the viability of the new non-reporting clauses.

The delegation of Cyprus will also strongly object and oppose that this case be used as a precedent for any future submissions for a draft text convention by any group of States without any proper consideration of the issue within the IMO bodies and that includes the need to amend any existing International Convention whether or not in force.

Cyprus remains committed to the aims and intent of the HNS Convention and maintains eagerness to see the HNS Convention in force as soon as possible.
