

Working papers from  
**HNS CORRESPONDENCE GROUP**  
Special Consultative Meeting  
June 3-5, 2003, Ottawa

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## HNS CORRESPONDENCE GROUP

Special Consultative Meeting

June 3-5, 2003, Ottawa

Submission by the Director of the International Oil Pollution Compensation Funds

### **The Interrelationship between the Maritime Liability Conventions**

1. A maritime incident can result in the application of several Conventions relating to liability and compensation. This note has been prepared in order to illustrate how these Conventions would interrelate in five hypothetical cases.
2. The note has been based on the following assumptions.
  - a) Each incident causes damage only in one State.
  - b) The State where the damage occurs is a party to the following instruments which are in force:
    - i) The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention)
    - ii) The International Convention on Civil Liability for Oil Pollution Damage, 1992 (1992 Civil Liability Convention) (1 November 2003 limits)
    - iii) The International Convention on the Establishment of an International Fund for Oil Pollution Damage, 1992 (1992 Fund Convention), (1 November 2003 limit)
    - iv) Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (Supplementary Fund Protocol)
    - v) The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunker Convention)

- vi) The 1974 Athens Convention relating to the carriage of passengers and their luggage by sea as amended by the 2002 Protocol thereto.
  - vii) The 1976 Convention on the limitation of liability for marine claims (LLMC) as amended by the 1996 Protocol thereto.
- c) There are no complications due to the flag State of the ship not being Party to a particular Convention.
  - d) The potential conflict between the HNS Convention and the 1910 Convention for the Unification of Certain Rules of Law with respect to Collision between Vessels (Collision Convention) has not been taken into account.
4. It is also assumed that the shipowner is entitled to limit his liability and that the shipowner and/or his insurer are capable of paying compensation up to the applicable limitation amount.
5. The note has not taken into account
- a) the provision in Article 4, paragraph 2 of the HNS Convention relating to workers compensation or social security schemes,
  - b) the provisions in Article 11 and Article 14, paragraph 6 under which certain priority should be given to claims in respect of personal injury and death.

#### *Scenario 1*

6. Scenario 1 envisages that a chemical tanker of 15 000 GT ruptures a cargo tank containing benzene whilst berthing in a port. Due to the volatile and toxic nature of benzene no attempt is made to recover the spilled cargo from the sea surface, but the port is closed temporarily and an extensive area downwind of the wreck is cordoned off until concentrations of benzene in air are reduced to safe levels. Specially trained port personnel assist the crew in transferring the cargo remaining in the damaged tank to a shore tank.
7. Benzene enters a nearby estuary where a number of floating fish cage culture farms and an intertidal shellfishery are impacted. There are reports of large numbers of fish and shellfish having been killed giving rise to property damage and consequential economic loss claims.
8. The authorities undertake a number of studies on the effects of the benzene vapours on personnel involved in the response. Environmental impact studies are also undertaken to measure benzene levels in sediments before the shellfishery is re-opened.
9. The total amount of compensation available under the HNS Convention is 250 million SDR, of which the first 29.5 million is covered by the shipowner's liability and the HNS Fund covers the remaining 220.5 million SDR.
10. If the above incident occurred in a State that is not a party to the HNS Convention, the limitation amount would be calculated in accordance with the 1976 LLMC as amended. In scenario 1 the limitation amount would be 12.4 million SDR for loss of life and personal injury and 6.2 million SDR for other damage.

#### *Scenario 2*

11. Scenario 2 involves a fire and explosion onboard an oil tanker (120 000 GT) laden with crude oil in a port. Sixteen crew and port workers are killed in the explosion and crude oil cargo is spilled. Due the risk of further explosions the authorities decide to evacuate part of the town in which the port is located. Further explosions which caused some damage to property in the town and in the port itself resulting in the ship sinking at a depth of some 60 metres with

an estimated 50 000 tonnes of oil on board.

12. A major clean-up operation is mounted by the port authority, as a result of which most of the oil is confined within the port limits. Nevertheless, the hulls of a large number of vessels as well as piers and jetties are polluted, which lead to major disruption to port operations over several weeks. An operation is undertaken to remove the remaining cargo from the wreck and this operation lasts for six months.
13. Both the HNS Convention and the 1992 Civil Liability/Fund Conventions would be applicable to this incident. The HNS Convention would cover compensation for the deaths of the crew and port workers and property damage resulting from the fire and explosions. The total amount of compensation available under the HNS Convention would be 250 million SDR, of which the first 100 million SDR is covered by the shipowner's liability and the HNS Fund covers the remaining 150 million SDR.
14. The 1992 Civil Liability/Fund Conventions and the 2003 Supplementary Fund Protocol would apply to compensation for damage caused by oil pollution, including costs of clean-up and preventive measures, property damage, consequential economic loss and pure economic loss as well as the costs of the pumping of the remaining oil cargo from the wreck. The total amount of compensation available would be 750 million SDR, of which the first 77.1 million SDR would be covered by the shipowner under the Civil Liability Convention, the next 126 million SDR by the 1992 Fund Convention and the remaining 547 million SDR by the 2003 Fund Protocol Establishing a Supplementary Fund.

### *Scenario 3*

14. Scenario 3 envisages an oil product tanker (25 000 GT) grounding on rocks, as a result of which several cargo tanks and a bunker tank are holed. Both persistent oil (heavy and medium fuel oil) and non-persistent oil (gasoline) are spilled.
15. No attempt is made to clean-up the gasoline due to its extreme volatility, but in an effort to limit the escape of further quantities, preventive measures are taken by lightering the remaining cargo onboard. A major clean-up response is undertaken in respect of the medium and heavy fuels oils and the remaining bunkers are taken off the grounded vessel.
16. Both persistent and non-persistent oil enters an area of mangroves, killing a large number of mature trees. Biologists are unable to determine whether the damage to the trees was due to the toxic effects of the gasoline or the smothering effects of the heavy/medium fuel oil, but decide to carry out a reinstatement programme involving the replacement of sediments and the planting of mangrove saplings. Under the definition of 'damage' in Article 1.6 of the HNS Convention, where it is not reasonably possible to separate damage caused by the hazardous and noxious substances from that caused by other factors, all such damage shall be deemed to be caused by these substances except if, and to the extent that, the damage caused by other factors is damage of a type covered by the Civil Liability/Fund Conventions. It is not clear how the liability for the damage would be shared between the HNS Convention and the Civil Liability/Fund Conventions in this scenario. Had the other factor been an outbreak of a red tide the liability would be covered by the HNS Convention.
17. A localised fishing ban is imposed whilst floating (persistent) oil remains at sea, which gives rise to pure economic loss claims.
18. Both the HNS and the 1992 Civil Liability/Fund Conventions would apply to this incident. The HNS Convention would apply to compensation for the costs of preventive measures in respect of the gasoline cargo and might also apply to the costs of the reinstatement of mangroves, including the costs of any associated studies. The total amount of compensation available under the HNS Convention would be 250 million SDR, of which the first

44.5 million SDR is covered by the shipowner's liability and the HNS Fund covers the remaining 205.5 million SDR.

19. The 1992 Civil Liability/Fund Conventions and the 2003 Supplementary Fund Protocol would apply to compensation for damage caused by oil pollution, including costs of clean-up and preventive measures, property damage, consequential economic loss and pure economic loss, and might also apply to the costs of reinstatement of mangroves, including the costs of any associated studies. The total amount of compensation available would be 750 million SDR, of which the first 17 million SDR would be covered by the shipowner under the 1992 Civil Liability Convention, the next 186 million SDR by the 1992 Fund Convention and the remaining 547 million SDR by the 2003 Fund Protocol Establishing a Supplementary Fund.

#### *Scenario 4*

20. Scenario 4 envisages a general cargo vessel (8 500 GT) breaking up and sinking in heavy seas as result of which several drums of pesticide became detached from the vessel and most of the vessel's bunker fuel was released to the sea.
21. All of the drums of pesticide lost overboard were recovered, but a number were found to have lost their contents. A salvage operation to recover other drums of pesticide from the holds of the sunken vessel is undertaken. Following fears that the pesticide may have impacted a number of fish farms, samples of fish are taken for analyses. The analyses indicate high levels of pesticide in fish tissue, as result of which the authorities order the destruction of all stocks.
22. A clean-up response is organised to combat the spillage of bunker fuel. Some oil affects the floating fish cages and a number of stationary fishing nets.
23. Both the HNS Convention and the Bunker Convention would apply to this incident. The HNS Convention would apply to compensation for the costs of preventive measures in respect of the recovery of the drums of pesticide, the environmental impact studies of cultivated fish, the subsequent destruction and disposal of the fish and the consequential economic losses suffered by the farm owners. The total amount of compensation available under the HNS Convention would be 250 million SDR, of which the first **20** million SDR is covered by the shipowner's liability and the HNS Fund covers the remaining **230** million SDR.
24. The Bunker Convention would cover claims for compensation in respect of the costs of clean-up of the bunker oil pollution as well as property damage and consequential economic losses. The maximum amount of compensation available under the Bunker Convention would be 3.6 million SDR.

#### *Scenario 5*

25. Scenario 5 envisages a collision in coastal waters between a laden chemical tanker (20 000 GT) and a cruise ship (85 000 GT), as a direct result of which 5 passengers are killed and a further 30 are injured, some seriously. One of the cruise ship's bunker tanks is breached causing the escape of heavy fuel oil. Two of the chemical tanker's cargo tanks, one containing lubricating oil and the other epichlorohydrin, are breached following the collision each losing the entire contents. The highly toxic vapours of epichlorohydrin kill ten passengers who are standing on the deck of the cruise ship.
26. A clean-up response is mounted to combat the pollution caused by the bunker fuel from the cruise ship and the lubricating oil from the tanker. The bunker oil causes damage to fishing nets and mariculture facilities.
27. Compensation claims arising from the involvement of the cruise ship would be covered by

the Athens Convention as amended by the 2002 Protocol and the Bunker Convention. Compensation claims relating to the chemical tanker's involvement in the incident would be covered by the HNS Convention as well as the 1992 Civil Liability/Fund Convention and the Supplementary Fund Protocol.

28. Claims in respect of the death and injury of the cruise ship passengers would be covered by the Athens Convention. Under that Convention, as amended by the 2002 Protocol, the carrier has strict liability of up to 250 000 SDR per passenger for which the carrier must maintain insurance. However, if and to the extent that the damage for a particular passenger exceeds that limit, the carrier is further liable for an amount of 150 000 SDR per passenger, ie for a total of 400 000 SDR per passenger, unless he is able to prove that the incident occurred without the fault or neglect of the carrier. It is assumed that there was no damage to passenger baggage.
29. The 1976 LLMC as amended contains a provision on global limitation of liability for loss of life and personal injury of passengers (Article 7, paragraph 1). The global limit is 175 000 SDR multiplied by the number of passengers which the ship is authorised to carry according to its certificate. In scenario 5 the global limitation would apply only if the maximum number of permitted passengers is below 103.
30. Passengers who are killed by the epichlorohydrin that escaped from the tanker could also claim under the HNS Convention. The maximum amount of compensation available under that Convention would be 250 million SDR, of which the first 37 million SDR is covered by the shipowner's liability and the HNS Fund covers the remaining 213 million SDR.
31. Claims for compensation in respect of pollution damage caused by the escape of bunker fuel from the cruise ship would be covered by the Bunker Convention. The maximum amount of compensation available under that Convention would be 8.2 million SDR.
32. Claims for pollution damage arising from the spillage of lubricating oil from the chemical **tanker** would be covered in the first instance by the shipowner in accordance with the 1992 Civil Liability Convention. The maximum amount of compensation available under that Convention would be 14 million SDR. In the unlikely event that the total admissible claims were to exceed this amount, compensation up to a total of 189 million SDR would be available under the 1992 Fund Convention and a further 547 million SDR from the Supplementary Fund.

#### *Actual incidents*

33. The scenarios set out above are not of only theoretical interest as the following examples of past incidents show. In 1978 the tanker *Independenta* collided with the dry cargo vessel *Evrialy* in the entrance of the Strait of Bosphorus. The *Independenta* exploded. The explosion killed 42 of the crew of the *Independenta* and caused damage to property and smoke pollution over parts of Istanbul. A large quantity of oil escaped from the tanker and caused significant pollution damage. In 1985 a fire and explosion occurred on board the Panamanian tanker *Pertragen One* when discharging its cargo of naphtha in Algericas Bay (Spain). The fire spread to another tanker, berthed at the same terminal, the *Camponavia*, which also exploded and sank. The incident caused the death of 35 crew and dock workers and 39 persons were injured. The incident also caused pollution damage. In 1999 the container ship *Ever Decent* collided in the Dover Strait with the cruise liner *Norwegian Dream* which had 1750 passengers and 838 crew members on board. Some of the containers carrying hazardous substances fell on to the deck of the cruise liner and some containers fell overboard. Eighteen containers on board the *Ever Decent* caught fire. Three passengers on board the cruise ship suffered minor injuries. A major disaster could have occurred.

34. Information on other incidents can be found on the HNS Correspondence Group's web site at <http://folk.uio.no/erikro/WWW/hns.html>>Accidents>List of HNS incidents.

*Need for co-operation between various bodies involved*

35. In view of the interrelationship between the various Maritime Liability Conventions it will be beneficial if, in future incidents, there is close co-operation between the shipowners' insurers and the Secretariats of the 1992 Fund, the 2003 Supplementary Fund and the HNS Fund. To that end Memoranda of Understanding (MOU) between the above organisations should be agreed along similar lines to the one between the International Group of P&I Clubs and the 1992 Fund. Such MOUs would require that, subject to there being no conflict of interest, the insurers and the respective Secretariats should use the same technical experts and surveyors, who would be jointly instructed and who should report directly to the respective parties, the fees and costs of the experts and surveyors being shared between the insurer and the relevant Fund in proportion to their respective liabilities. The MOUs would also require the insurer and the relevant Fund Secretariat to carry out the assessments of claims for compensation jointly.

*Position of victims when the instruments in question do not apply*

36. Whilst the 1992 Civil Liability Convention and the 1992 Fund Convention have been ratified by a large number of States and more States are expected to become parties to these Conventions in the near future, the situation is different in respect of the other instruments referred to above. The HNS Convention and the Bunker Convention are not in force. The Athens Convention and the LLMC are only in force in their original versions since the respective Protocols of 2002 and 1996 are not in force.
37. A comparison could be made between, on the one hand, the position of victims in States which are parties to the instruments referred to above, and on the other hand, that of victims in States which are not parties to these instruments or some of them.
38. Pending the entry into force of the HNS Convention, liability and compensation for damage caused by hazardous and noxious substances is governed by national law, and the victims will in most cases have to prove that the shipowner or carrier was at fault. Limitation of liability would be governed by the 1976 LLMC in its original version, or by national law. The same would apply to bunker spills from ships other than tankers. As regards carriage of passengers the low limits under the Athens Convention in its original version would apply. There would not be any obligation on the international level for ships (other than tankers) to have liability insurance and there would not normally be any right for victims to take legal action directly against the insurer.

## HNS CORRESPONDENCE GROUP

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Submission by Norway

### Insurers and Insurance Certificates

#### **1 Outline of the insurance provisions**

1 HNSC article 12 requires that a State Party shall ensure that all ships registered in that State Party and all ships entering or leaving its ports have got insurance cover for the liability under the Convention (paragraphs 1, 10, and 11). The scope of the coverage is the liability of the owner, but there are certain modifications set out in the Convention, including the defence of wilful misconduct of the shipowner (article 12, paragraph 8). The insurer can be sued directly (article 12, paragraph 8) in the jurisdictions set out in HNSC article 38.

2 Other security may be substituted for insurance (article 12, paragraphs 1 and 14).

3 A State Party has a duty to issue certificates in respect of its own ships. Ships from other States Parties will, similarly, have their certificates issued by their flag state. A State may issue certificates to a ship from a non State Party, but is under no obligation to do so (article 12, paragraph 1).

#### **2 Insurance availability as a prerequisite for entering into force**

4 Before committing themselves to the HNSC, most states would first consider carefully whether or not it is likely that the required insurance (or other financial security) will be available in the market. One would, of course, avoid imposing obligations on shipowners that are practically impossible to comply with.



5 Although it is pertinent to pose this problem, it appears that the necessary insurance will be offered. The Protection and Indemnity Clubs of the International Group of P&I Clubs offer liability insurance to shipowners up to well over USD 4,000,000,000 per incident. In HNSC, few ships would require higher insurance than SDR 80,000,000 per incident, and none more than SDR 100,000,000.<sup>1</sup> Even if the clubs may wish to be more careful to commit themselves in respect of HNSC insurance than in respect of liability or indemnity insurance in general, there should still be plenty of insurance capacity available. Indeed, other insurers also offer insurance within these ranges.

### **3 The tasks of the States Parties in respect of issuing insurance certificates**

#### ***3.1 Implementation in national law***

6 Each State Party must designate an authority, *e.g.* the maritime directorate or another public or private (!) body, to issue insurance certificates on behalf of that State Party. One must also decide whether or not one wishes to issue certificates to foreign vessels, and whether or not there should be any fees or charges for the certificate.

7 There are no requirements in international law as to how these decisions should formally be carried out. National law may require decisions in writing by certain authorities, *e.g.* the Parliament. In all events, it is, of course important that the rules are communicated to foreign shipowners.

#### ***3.2 The certificate***

8 The form of the certificate is determined by article 12, paragraphs 2 and 3, and the Annex to the Convention. The details of the certificate include:

- (a) name of the ship, distinctive number or letters and port of registry;
- (b) name and principal place of business of the owner;
- (c) IMO ship identification number;
- (d) type and duration of security;
- (e) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established; and

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<sup>1</sup> HNSC article 9, paragraph 1. 1 SDR = 1.4 USD, see <http://www.imf.org/external/np/tre/sdr/basket.htm>.

- (f) period of validity of certificate, which shall not be longer than the period of validity of the insurance or other security.

9 The certificate may be issued in one or more national languages, but must in all events be available to the shipowner either as a copy or an original in English, Spanish or French (article 12, paragraph 3).

10 One copy of the certificate must be forwarded to the authorities that keep the register of ships where the ship is registered, if in a State Party (article 12, paragraph 4). Because States Parties generally issue certificates in respect of their own vessels, this means that the issuing authority is obliged to forward the certificate to another authority within the same State. A copy should in all events be kept by the issuing authority.

11 There are plans to make information on insurance certificates available on the Internet.<sup>2</sup> Governments may wish to include in their implementation legislation a requirement that insurers must submit this information in an appropriate format.

### ***3.3 Consideration of the application***

12 It is for the applicant to prove that the requirements for issuing a certificate are fulfilled. The main part of the application is a blue card issued by an insurer, that is a confirmation that they undertake the obligations of the insurer under the HNSC. The issuing authority may wish to consider the following:

- Does the undertaking cover all obligations required by HNSC? One should require an express statement to this effect. If such a statement is given, it does not matter whether the insurer is a liability insurer or an insurer of another kind.
- Does the insurer have the financial capability necessary for his undertaking? If in doubt, one should require a statement to this effect from the relevant authorities in the state in which the insurer has his main office.<sup>3</sup>
- Will the insurer have sufficient funds available in a State Party when a claim is made? A judgment under the HNSC may be enforced in any State Party (article 40), but not necessarily elsewhere. The applicant should therefore demonstrate that the insurer will have funds available in a State party until claims arising during the validity of the certificate are time-barred. Alternatively, the applicant may provide an undertaking by the insurer that they accept that a judgement against him by a court of any State Party is enforced even in non State Parties.

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<sup>2</sup> Equasis already includes general insurance information, see <<http://www.equasis.org/>>.

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

13 Governments may cooperate by keeping each other informed about their decisions on whether to accept or reject a blue card when in doubt. The easiest way to this is to maintain a fax/email list for circulating information. This list should be maintained by the Fund secretariat.

### ***3.4 The duration of the certificate***

14 The duration of the certificate should not be longer than the undertaking by the insurer (HNSC article 12, paragraph 2(f)).

## **4 The tasks of the States Parties in respect of control of insurance certificates**

### ***4.1 Implementation***

15 Each State Party must organize a system to monitor that the ships that need insurance actually comply with the requirements. The implementation measures are likely to include:

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

### ***4.2 Control procedures***

16 The control procedures could be based on the following routines:

- Running registers of national cargo ships against the national register of HNSC insurance certificates issued to see that all ships have got an HNSC insurance certificate.
- Checking whether an HNSC certificate has been issued when considering vessels for port state control if information about HNSC certificates is available in the database used for such screening (*e.g.*, Equasis<sup>4</sup>).

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<sup>4</sup> See <<http://www.equasis.org/>>.

- Checking whether there is an HNSC certificate on board when carrying out port state safety control of foreign vessels or similar control of national vessels.
- Requiring cargo ships to give details of their HNSC certificate when they (as is common practice) identify themselves when approaching the coastline.
- Requiring cargo ships to give details of their HNSC certificate when they give notice to the authorities or the harbormaster that there are dangerous goods on board.<sup>5</sup>

17 In all cases, if a cargo ship does not have an HNSC certificate, that warrants further scrutiny by the same inspector or another inspector, to see whether there is actually HNS on board, or such substances have been on board in the jurisdiction.

18 Most cargo ships would need an HNSC insurance certificate from time to time, and are permanently covered by insurance because their owners are members of a P&I club. It should therefore be considered to require (by national law) all ships with a cargo certificate to maintain HNSC certificates permanently. In that way, one avoids the trouble of determining whether or not there actually is HNS on board. Alternatively, one could establish a rule in national law that it is for the shipowner to prove that there is no HNS on board.

19 What is said above about cargo ships also apply to passenger ships carrying cargo, such as ferries.

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<sup>5</sup> Such notices are required in the European Union, see, *e.g.*, Council Directive 2002/59/EC of 27 June 2002 establishing a Community vessel traffic monitoring and information system <<http://europa.eu.int/cgi-bin/eur-lex/udl.pl?REQUEST=Seek-Deliver&COLLECTION=oj&SERVICE=eurlex&LANGUAGE=en&DOCID=20021208p10&FORMAT=pdf>>.

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Submission by Norway

**HNSC and the Collision Convention, 1910**

1 HNSC article 42 allows States Parties to retain all older conventions, including the 1910 Collision Convention. Thus there is formally no problem not to denounce that convention when ratifying the HNSC. However, this paper will argue that it is better to denounce the 1910 Collision Convention after all.

2 The problem is that the 1910 Collision Convention does not allow strict liability within its scope (articles 2,3, 4 and 6), while the liability under the HNSC is strict (article 7).<sup>1</sup> The scope of the two conventions overlap to some extent, at least in respect of some damage on board the vessels (see HNSC article 1, paragraph 6, and the 1910 Collision Convention article 1).

3 In respect of a vessel from a State that is a Party to the 1910 Collision Convention, but not a party to the HNSC, the Collision Convention will prevail (HNSC article 42). This is so even in the territory of a State Party to the HNSC if that State Party is also a party to the 1910 Collision Convention. This may be regarded as unfortunate, both because the claimant may not recover and because the two ships involved in the collision may be subject to different liability regimes.

4 In the CLC/FUND Convention, this problem is resolved by making the Fund liable (Fund Conventions article 4, paragraph 1(c)). In HNSC article 14, paragraph 1(c), there is no similar provision (see annex). Therefore, it is of the greatest importance to reconsider the 1910 Collision Convention when ratifying the HNSC.

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<sup>1</sup> Also HNSC article 8 may cause problems in relation to the 1910 Collision Convention.

5        When denouncing the 1910 Collision Convention, its rules can be maintained in national law with the small exception for HNSC claims.

## Annex

<b>HNSC article 14, paragraph 1(c)</b>	<b>FUND article 7, paragraph 1(c)</b>
<p>1 For the purpose of fulfilling its function under article 13, paragraph 1(a), the HNS Fund shall pay compensation to any person suffering damage if such person has been unable to obtain full and adequate compensation for the damage under the terms of chapter II:</p> <p>---</p> <p>(c) because the damage exceeds the owner's liability under the terms of chapter II.</p>	<p>1 For the purpose of fulfilling its function under article 2, paragraph 1(a), the Fund shall pay compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for the damage under the terms of the Liability Convention:</p> <p>---</p> <p>(c) because the damage exceeds the owner's liability under the Liability Convention as limited pursuant to article V, paragraph 1 of that Convention or under the terms of any other international Convention in force or open for signature, ratification or accession at the date of this Convention.</p>

## HNS CORRESPONDENCE GROUP

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Submission by the International Group of P&I Clubs

### **The provision of Certificates of Responsibility (COFR) under the HNS Convention**

1. **Introduction.** At the Diplomatic Conference which was held in 1996 it was indicated that although Club Boards had not been consulted on the issue, it was expected that, given the precedent of CLC, Clubs would agree to provide COFRs under the HNS Convention.
2. **Terrorism.** However, problems have arisen in the interim which will need to be addressed before the HNS Convention can be implemented. In particular as a consequence of the terrorist attacks of 9.11 the insurance market has introduced a wide-ranging terrorism exclusion which applies not just to the reinsurance of the Clubs but to all reinsurances world-wide. As a consequence the Clubs are unable to obtain reinsurance in respect of terrorist risks. Therefore, since the Convention does not contain an exemption from liability in respect of terrorism, the Clubs are not able to provide certificates asserting that cover is in place in respect of this risk. The same issue arose at the Diplomatic Conference which considered the Protocol to the Athens Convention but delegates chose to ignore the point.
3. The CLC does not provide an exemption from liability in respect of terrorism either but Clubs are able for the moment to continue to provide COFRs because reinsuring underwriters are prepared to accept that the Clubs' own exclusion in this context is sufficiently broad to encompass the new terrorist exclusion. This construction is essentially unsatisfactory for two reasons. First, the Clubs are issuing certificates which are expected to respond in respect of



liabilities under the Convention when, given their own exclusion they plainly cannot. Second, the shipowner is responsible in respect of a liability under the Convention for which he has no cover.

4. **Issue of Certificates.** It has been suggested that the Clubs could be given authority by States to issue Certificates directly instead of issuing confirmation to Flag States which then issue the certificates required under the Convention. The provisions of Article 12 of the HNS Convention were closely modelled on the equivalent provision of CLC which plainly provide that the certificate required under the Convention must be issued by the Flag State. The language of Article 12 does not in our view permit a State to avoid the obligation of issuing certificates by authorising a third party to do so on its behalf. This could only be done by importing a rather forced concept of agency which the Clubs would not accept in any event, preferring the tried and tested procedures established under CLC which have operated successfully for over thirty years.
5. **Miscellaneous Issues.** Although it may not be necessary in view of what we have said above, it should perhaps be stated for the record that the Clubs do not agree with several of the arguments put forward by Professor Rosaeg in a paper which he wrote some years ago entitled “HNS Insurers and Insurance Certificates.” The reasons for our objections are set out below:
  - i. Article 12.7. It is suggested that the effect of this provision is to permit States to refuse to accept certificates issued by other States unless its own domestic requirements have been followed. In our view the language employed is plainly intended to suggest the opposite, that States are obliged to accept certificates issued by other States.
  - ii. Article 12.6. This provision is explicitly ‘subject to the provisions of this article’ so can hardly justify the imposition of additional domestic requirements with regard to assets or jurisdiction.
  - iii. It follows from the argument above, taken to its logical conclusion, that States may accept Blue Cards issued by ‘insurers of questionable standing (see para iii of Professor Rosaeg’s paper). Moreover States are obliged to issue a certificate if the Blue Card complies with the provisions of the Convention and furthermore may not impose additional requirements.
  - iv. Article 12.11. This provision is relied upon for the proposition that the Convention permits computerized information whereas the introductory words ‘subject to the provisions of this article’ would necessarily import the provisions of paragraph 2 with the implication that more mechanical means are envisaged.

## **HNS CORRESPONDENCE GROUP**

Special Consultative Meeting  
June 3-5, 2003, Ottawa

### **Submission by European Chemical Industries Council (CEFIC)**

#### **Insurance Aspects of the HNS Convention**

##### **Summary**

This paper outlines some of the Insurance and other requirements set out in Article 12 of the HNS Convention, particularly the obligations of contracting parties.

##### **Introduction.**

Implementation of the HNS Convention will introduce a three-fold increase in shipowner liability when compared to the current limit under the 1976 Limitation of Liability Convention. Also, the HNS Convention requires compulsory insurance or other financial guarantees from the shipowner, to a specified level, thus providing security for payment to victims of an incident.

A State Party to the Convention is obliged to ensure that all ships registered in that State, and all ships entering and leaving its ports, have effective insurance cover to the level required by the Convention.

In Article 12, the Convention also requires action by State Parties to:

- ensure adequacy of financial cover;
- issue and certify insurance certificates;
- check the financial status of the insurer;
- monitor and validate the insurance regime.

If insurance by the shipowner is inadequate or does not exist, the victim will still receive compensation because the HNS Fund will pay the difference. In the absence of adequate controls ensuring implementation of the requirements under Article 12, the chemical industry would strongly oppose what amounts to an inequitable additional burden being placed on it.

## **The Basis of the Regime**

During the 1996 Diplomatic Conference that formulated the HNS Convention, many concepts and mechanisms were derived from the 1992 CLC and Fund Conventions. However, it should be emphasized that there are many differences between trading practices in the oil and chemical industries. Over 5000 different chemicals are classified and shipped as HNS substances; at least 8000 ships carry these products which are "received" by hundreds of enterprises. More importantly, very few of these shipments are in tankers; many of the bulk deliveries will be in demountable tanks that are carried as general cargo.

**Table 1: World Shipping Fleet 1998 - Source: Lloyds Register**

<b>Ship Type</b>	<b>Number of Ships</b>	<b>Percentage</b>
<b>Crude Oil Tanker</b>	<b>1760</b>	<b>3.86</b>
<b>Oil Products Tanker</b>	<b>5200</b>	<b>11.41</b>
<b>Chemical Tanker</b>	<b>2363</b>	<b>5.18</b>
<b>LPG Tanker</b>	<b>957</b>	<b>2.10</b>
<b>LNG Tanker</b>	<b>108</b>	<b>0.24</b>
<b>Container</b>	<b>2382</b>	<b>5.23</b>
<b>Bulk Dry</b>	<b>4939</b>	<b>10.84</b>
<b>General Cargo</b>	<b>16842</b>	<b>36.95</b>
<b>Ro-Ro cargo</b>	<b>1769</b>	<b>3.88</b>
<b>Other</b>	<b>9256</b>	<b>20.31</b>
<b>Total</b>	<b>45,576</b>	<b>100</b>

This table indicates that the majority of HNS substances will not be carried in tankers. In contrast to the transport of oil there are many more ships carrying HNS, some of which will be small and not dedicated to the carriage of hazardous substances. The HNS Convention includes hazardous packaged goods which could be carried on general cargo vessels. It can be presumed that many of these vessels will only have irregular inspections.

The oil regime is workable because most vessels are tankers which are usually insured through a member of the International Group of P&I Clubs. It is, therefore, much easier to verify the financial security of the shipowner. The implementation of the HNS Convention must take account of the many other vessels which are not entered into International Group Clubs. Many of the additional insurers who currently handle HNS shipments will now be required to increase the limits of their cover in order to provide the necessary certificate.

## **Options for Implementation**

The current situation, as outlined above, raises the question of how a State Party can check the financial security of a ship carrying HNS substances. While recognising that it is not the function of the HNS Convention to regulate insurance regimes, it is essential that governments put national legislation in place, so that they can meet their obligations. The responsibilities for contracting governments are clearly stated, but the Certificate to be provided by State Parties, (Annex 1 to the Convention), does not provide an attestation that the shipowner insurance meets the necessary criteria. Even if the insurance provisions and the certificate are

satisfactory, there will still be a need for effective verification and inspection regimes within the receiving state.

### **i. Role of National Agencies**

An Agency within the contracting state should assume responsibility for financial security of vessels carrying HNS cargoes that enter its ports.

As an example, the National Pollution Funds Centre in USA issues Certificates of Financial Responsibility to foreign and domestic vessels that are subject to USA regulations. The NPFC Guidelines outline the requirements that must be met by an insurer to provide the appropriate guarantees, including:

- financial soundness and ability to write risks at the intended levels;
- confirmation that the company is prepared to comply with legal requirements;
- that the company has established procedures which are similar to the International P&I Clubs or the USA equivalent;
- the company is participating in a sound re-insurance programme.

### **ii. International Guidelines**

International Guidelines that enable governments to check the soundness of both insurers and re-insurers would assist in providing appropriate guarantees. Ideally, there should be advice for a common approach to issues, including:

- whether the company covers all obligations contained in the Convention;
- the assessment of the financial standing of the insurer and re-insurer;
- the content of the statement from the country where the insurer is located;
- the recognition of insurance regulations in other state parties, and the validity of an authorisation in that State.

### **iii. Information Exchange**

The provision of comprehensive information on the Internet should be welcomed. However, state parties will require information that is much more specific in content if they are to meet their obligations.

### **iv. Control Procedures**

State Parties will need to consider their arrangements for checking HNS Certificates on ships and for maintaining registers of Certificates that are issued.

In addition, there must be a mechanism for communicating with ships to ascertain details of their certificates before the ship enters the port.

### **v. General Cargo Ships**

HNS substances, particularly in drums and packages, can be transported in a wide variety of ships. Many of these ships will not have insurance cover for shipments of HNS, particularly if their owners are not insured using a P&I Club member.

One solution would be to encourage all cargo ships to apply for HNS Certificates if they wish to consider future transportation of HNS substances.

**May 2003**

**HNS CORRESPONDENCE GROUP**

Special Consultative Meeting  
June 3-5, 2003, Ottawa

Submission by the Netherlands

**Discussion paper on the notion of “receiver” and “contributing cargo” under the HNS Convention.**

**I. Receiver; article 1, paragraph 4; general.**

**Par. 1**      **Text: “Receiver means either: ... (a) or ... (b).”**

1.      This wording makes it clear that the receiver under the convention is one of the two; it cannot be both, or a mixture<sup>1</sup>. A State Party that does not fully implement option (b) will be subject to option (a) and levied accordingly.
2.      There is no *formal* order of preference in the convention, so the implementing State is free to choose either of the two possibilities. An implementing State would, for instance, not have to demonstrate that option (a) would not be workable for that State, before it could implement on the basis of option (b).
3.      There is a *logical* order however, because option (b) refers to option (a) for the determination of the minimum level of the total contributing cargo received under option (b). This means that also a State implementing option (b) would have to know what option (a) would lead to in terms of total contributing cargo, in order to be able to demonstrate that the total contributing cargo arrived at under option (b) is “substantially the same as that which would have been received under option (a).” Option (b) would therefore only be interesting for States that want to allocate the levies differently (i.e. to

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<sup>1</sup> Formally, that is. As to the effect, there is a possibility of creating a mixture; see par. 6.

other persons or entities) than as would follow from option (a), but not for States that want to avoid using or setting up the mechanisms or infrastructure to administer and monitor option (a).

## **II. Receiver; article 1, paragraph 4 (a).**

**Par. 2 Text: “the person who physically receives contributing cargo discharged in the ports and terminals of a State Party, provided that ...”**

1. This first part, containing the notion of physical receipt, basically is the CLC/FC definition, which means that the existing CLC/FC practice can serve as model. Although different accents might be needed due to the differences of the HNS trade as compared to the oil trade, it should be possible to start with and build upon the experience gained under the oil system with the interpretation of the notion of physical receipt.

2. Furthermore this part of the text contains the words “contributing cargo”, which notion is defined in article 1, paragraph 10. This has the effect - which is clearly different from the CLC/FC system - that the notion of physical receipt of HNS only relates to receipt at the port of final destination as described in that paragraph. Thereby an exclusion is established for transshipments of HNS (see par. 12 and 13).

**Par. 3 Text: “provided that if at the time of receipt the person who physically receives the cargo acts as an agent for another who is subject to the jurisdiction of any State Party, ...”**

1. This part of the definition creates an exception to the rule that the physical receiver pays. It requires “agency”, a concept which is not defined in the convention, nor can a specific uniform meaning be derived from other provisions of the Convention. Therefore, the question whether there is “agency” in a given case should probably be answered according to the national law of the implementing State. This could - at least theoretically - lead to problems where there is agency according to the national law of the State Party of the physical receiver, whereas there is no agency according to the national law of the State Party of the principal. Whether this risk is real depends on the degree of divergence in the agency law of States Parties. Since the notion of “agency”

in this context was adopted by the 1996 Diplomatic Conference without hesitation, it would not appear very likely to give rise to problems in practice. Furthermore, since in practice in most cases the more substantial quantities of HNS will be physically received by large terminal operator facilities in major harbour and port areas, the possibility to use this clause may add to the acceptability of the Convention for the key players in the handling of HNS cargoes worldwide. By doing so, terminal operators will be able to direct the contributions to the relevant interests in the HNS cargo.

2. The wording makes it clear that the exception only applies in the case of agency for a principal who is subject to the jurisdiction of a State Party. In a case of agency for a principal subject to the jurisdiction of a “third country” the physical receiver cannot escape his responsibility towards the Fund to pay contributions. Of course he can always try to make contractual arrangements with his principal regarding the question who ultimately carries the financial burden, but this is not of direct relevance to the HNS Fund.

**Par. 4 Text: “then the principal shall be deemed to be the receiver, ...”**

This part makes it clear that once the physical receiver/agent has demonstrated that the requirements of the exception are fulfilled, there is no possibility for the principal to escape his duty to contribute to the Fund (provided, of course, his total tonnage is above the threshold). This illustrates the importance of the information to be provided (and if necessary, proved) by the physical receiver/agent.

**Par. 5 Text: “if the agent discloses the principal to the HNS Fund;”**

1. What would this mean in practice? To start with, it should be kept in mind that the exception was meant to enhance fairness towards those physical receivers who have no real economic interest in the cargo received. The provision should therefore be interpreted in connection with this purpose. In general, therefore, the physical receiver/agent has the obligation to provide the Fund with the evidence necessary to put the Fund in respect of the principal in the same position as it is in respect of himself.

This means in any case:

- The information necessary to enable the Fund to contact and invoice the principal (name, valid address etc. in State Party);



- The information necessary to establish that the physical receipt was made as an agent for the principal (this could for instance be done by providing evidence on the contractual relationship between the agent and the principal).

2. In this respect it will be beneficial for the HNS Fund if both the legislation implementing the Convention in the State Party in which the receiver/agent is located, and that of the State Party in which the principal is located, were to provide for a mechanism to ensure that the information received by the Fund is trustworthy also in this respect. Such mechanisms should be corresponding in both directions. With this it should be kept in mind that article 21, paragraph 4 of the Convention provides for a liability of the State that does not fulfil its obligations to communicate to the Director the relevant information as indicated under paragraph 2 of the same article.

In case of reasonable doubt or where the information provided by the physical receiver/agent is contested by the principal, the burden of proof is on the physical receiver/agent, since he invokes - for his own benefit - an exception to the general rule that the physical receiver/agent pays contributions. It would enhance legal certainty for contributors if the first HNS Assembly could decide on the information required in this respect.

3. It was accepted however that in some circumstances the exception could work out to the detriment of the Fund, for instance in cases where the receipt added to the total of the principal does not qualify for contribution because of the threshold, whereas it would have qualified if added to the total of the physical receiver (although the reverse would equally be possible of course!), or when the principal would go bankrupt. The physical receiver/agent is therefore, once he has properly demonstrated the requirements of the exception, in no way a “guarantor” for the Fund in the sense that he remains (subsidiarily) liable to pay contributions up to the moment the principal has done so.

### **III. Receiver; article 1, paragraph 4 (b).**

#### **Par. 6 General remark**

The implementing State is totally free to regulate the duty to contribute in its national law, as long as it stays within the limits of option (b) as explained hereafter

(para's 7-9). This means i.a. that it could adopt elements of option (a) under option (b), thereby – although formally implementing on the basis of option (b) – in effect creating a mixed system. It should be noted that staying within the limits of option (b) would in any case mean that the possibility existing under option (a) to identify a principal could only be used in the case of a principal within the implementing State (“... the person *in* the State Party ...”; see par. 7).

**Par. 7 Text: “the person in the State Party”**

Contrary to option (a), where the responsibility can be shifted to a person in another State Party, here the implementing State can only appoint persons in that State itself to be deemed to be the receiver. In this sense option (b) is more limited than option (a).

**Par. 8 Text: “who in accordance with the national law of that State Party”**

The fact that the appointment of any receiver under option (b) should be according to the national law of the implementing State forms part of the definition. This means that without such legislation in place option (b) is not applied by the implementing State (since a requirement of the definition is not fulfilled) and therefore the Fund is, as regards receipts in that State, entitled to contributions on the basis of option (a), be it from the contributors or (on the basis of art. 21 par 4) from the State that has implemented the convention insufficiently. In other words: the intent to use option (b), or not to use option (a), is not enough; option (b) only has effect when legislation to this effect is in place.<sup>2</sup>

**Par. 9 Text: “provided that the total contributing cargo received according to such national law is substantially the same as that which would have been received under (a)”**

1. Also the fact that the total outcome as regards contributing cargo should be substantially the same forms part of the definition. This means that if the outcome is not substantially the same, option (b) is not applied by the implementing State and therefore

the Fund is, as regards receipts in that State, entitled to contributions on the basis of option (a), be it from the contributors or (on the basis of art. 21 par. 4) from the State that has implemented the convention insufficiently. In other words: even if legislation is in place, this only has the effect envisaged if it ensures “substantially the same” total of contributing cargo. A State implementing option (b) should therefore be very sure its legislation leads to substantially the same tonnage, because it could find the Fund to be levying on the basis of option (a) if that were not the case.

NB. With this it should be kept in mind that the Convention refers to contributing *cargo*. It does not say that the total amount of *contribution* should be substantially the same. Theoretically there could be a considerable difference<sup>3</sup>, since the thresholds for actual contribution are not in the definition of “contributing cargo” (art. 1, par. 10). However, the assumption behind this wording was no doubt that there will be no relevant difference in practice and indeed the only justification for allowing a State to use an alternative way of determining the “receiver” lies in the guarantee that such an alternative method would not lead to a higher levy for contributors in other States. Therefore this provision should be interpreted in such a way that using option (b) would only be acceptable if as a result the Fund would not be in a worse position financially than under option (a).

2. The word “substantially” is open to interpretation, since no meaning is defined in the Convention, nor can a specific meaning be derived from the provisions of the Convention. The Fund Assembly will probably have to decide on a policy for this, possibly including some general rules for monitoring in view of the need for equal treatment. The fact that any deficit will go directly to the detriment of contributors in other States Parties will probably form a strong incentive to be strict on this point.

#### **IV. Contributing cargo; article 1, paragraph 10**

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<sup>2</sup> Although option (a) does not explicitly require national legislation, the situation of insufficient implementation might also arise there, because of the complications connected to reporting in the case of receipt by agents (see par. 5).

<sup>3</sup> Except for the LNG account, since there is no threshold for that (see art. 18 and 19)

**Par. 10 Text: “Contributing cargo means any hazardous and noxious substances...”**

This part simply refers to the definition of HNS in article 1, paragraph 5, and does not seem to give rise to difficulties. The HNS database developed by the IOPC Fund will be very useful in this respect, both for contributors and for governments.

**Par. 11 Text: “... which are carried by sea as cargo to a port or terminal in the territory of a State Party and discharged in that State.”**

This part of the text reflects the main rule regarding the notion of (physical) “receiver” and does not seem to give rise to difficulties. It largely mirrors article 10 of the 1992 Fund Convention, which will enable the HNS Fund to build upon the practice and experience developed by the IOPC Fund over the years.

**Par. 12 Text: “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 ...”**

1. This provision clarifies that transshipments within the limits prescribed by this paragraph do not constitute a receipt of “contributing cargo”. Such transshipment can be direct, or through a port or terminal. Read together with the definition of “terminal” in article 1, paragraph 14, this means that, unlike for oil under the 1992 Fund Convention, storage of HNS after (physical) receipt does not necessarily lead to the conclusion that such HNS is contributing cargo. Where the HNS is stored as an intermediary stage between carriage by sea from the port or terminal of original loading and carriage by sea to the port or terminal of final destination, a receipt of that HNS in such storage does not constitute a receipt of contributing cargo, provided this all happens “in the course of carriage”.

2. Although it might be hard to determine beforehand in concrete terms the exact consequences of the words “in the course of carriage”, this might not be so difficult in the everyday practice of ports and terminals. In any case these words should be interpreted in connection with the purpose of the exception. This is to distinguish genuine cases of transshipment for further transport by sea to the final destination of the HNS, with a view to imposing a levy on the receiver only in the port or terminal of final destination. It was

not the idea of course to create a loophole in the contribution system, since the non-final parts of the carriage by sea involve the risk that the Convention intends to cover too.

3. Although the wording does not provide complete clarity about the borderline between transshipment and receipt, it does contain some indications that may provide guidance on this issue. Firstly it is clear that a ship-to-ship transfer of HNS suffices (“directly”) and it is difficult to imagine that this would not be “in the course of carriage”. Secondly, a ship-port/terminal-ship transfer may suffice too (“or through a port or terminal”). Because it is clear that stretching the interpretation too far for these cases would certainly create a loophole, the first Assembly of the HNS Fund should decide on the criteria to be fulfilled in order for a transshipment to be exempted from contribution. The following may be considered:

- a. The HNS should not leave the port or terminal area between the two voyages by sea. Firstly this would break “the course of carriage” (by sea) because any other mode of transport would have to be involved and secondly this would effectively make it impossible for States to monitor the reporting.
- b. The HNS should not in any way be used between the two sea legs,<sup>4</sup> since that would break “the course of carriage”.
- c. What is actually declared in the relevant bill of lading or cargo manifest.
- d. The Convention text does not provide for a time limit within which transshipments will be exempt from contribution; decisive is whether they take place “in the course of carriage”. It is therefore questionable whether a maximum period of storage could be determined by the HNS Fund Assembly. This might, in certain circumstances, seem to make it difficult for States Parties to effectively monitor the movements of the HNS. It is not very likely however that this will be a real problem in practice, since economic factors will normally make sure that HNS is transhipped quickly.

4. The first sentence of paragraph 10 of article 1 reflects the main rule in respect of contribution: (physical) receipt of HNS after carriage by sea as cargo. The second sentence constitutes an exception to this rule: “transshipments” are excluded from contribution. According to a normal distribution of the burden of proof the applicability of the exclusion should be established by the one who has an interest in it. State Parties will have to report under the Convention, so there will be a need to provide them with a

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<sup>4</sup> It is difficult to foresee whether this could be a real issue in practice.

uniform mechanism to establish whether the exclusion is applicable. In the Rotterdam Port area for example, some 50% of the HNS is received in transshipment and will therefore not be considered “contributing cargo” under the Convention. Possible mechanisms may be derived from accounts and other information provided by harbour, safety and financial authorities.

**Par. 13 Text: “... 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.”**

1. The basic idea of the exclusion in the second sentence of paragraph 10 of article 1 is that, although any HNS carried by sea, whether received in, or transported in passage in the vicinity of the coastline of a State Party, poses the risk the Convention intends to cover, such HNS should be paid for only once and shall therefore be considered as “contributing cargo” only once, namely in the port or terminal of final destination. In practice three situations can be distinguished:

- a. The port or terminal of final destination is located in a State Party, while transshipment has taken place in another State Party. In this case the exclusion for the transshipment in the other State Party is not relevant, since the HNS will be considered as “contributing cargo” under the Convention in the State Party of final destination and a levy will therefore<sup>5</sup> be made for it.
- b. The port or terminal of final destination is not located in a State Party, while transshipment has taken place in a State Party. In this case application of the exclusion means that no levy is made for HNS that has been carried by sea to a port or terminal of at least one State Party and that has been discharged and received there, thus posing the risk the Convention intends to cover.
- c. The port or terminal of final destination is not located in a State Party, and transshipment has taken place in another non-State Party, but transport has taken place in passage in the vicinity of the coastline of a State Party. Also in this case no levy is made for HNS that has posed the risk the Convention intends to cover.

2. The exclusion mentioned under 1 b has the effect that no levy is made for HNS that has been (physically) received in a State Party at least once. This is however the

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<sup>5</sup> In principle that is, leaving aside the thresholds.

direct consequence of the choice made in the Convention. The fact that this involves HNS that has posed, to a State Party, the risk the Convention intends to cover, cannot lead to another conclusion since also in cases of transport in passage in the vicinity of the coastline of a State Party (as under 1 c) this is the case. In this regard it is also important to note that, by using ports of distribution, larger quantities of HNS can be shipped over the ocean at once, thereby probably reducing the risk of exposure for such cargoes under the Convention.

## **V. Related issues.**

### **Par. 14 Article 16, paragraphs 5 and 6; “associated persons”**

Paragraph 5 of article 16 determines that for the purpose of the provisions dealing with contribution, the contributing cargo received by an “associated person” shall be taken into account for determining whether the threshold for actual payment of contributions has been reached. The definition of “associated person” in paragraph 6 therefore co-determines the amount of contribution to be levied. Both the provision and the definition are essentially the same as the corresponding provisions in the 1992 Fund Convention (art. 10, par. 2 (a) and (b)), which means that the present practice of the IOPC Fund may be followed. It does not appear that the IOPC Fund has encountered difficulties with these provisions in the past and the HNS database developed by the IOPC Fund already seems to incorporate the notion of “associated person”.

## HNS CORRESPONDENCE GROUP

Special Consultative Meeting  
June 3-5, 2003, Ottawa

Submission by the UK

### **National Regulations on Reporting Requirements and Industry Concerns – the UK experience to date**

#### **1. Convention requirements – Reporting contributing cargo**

1.1 *Article 21* of the HNS Convention requires each Contracting State to ensure that persons liable to pay contributions under the Convention are identifiable and accessible by the HNS Fund.

1.2 Furthermore, *Article 43* of the Convention requires Contracting State, when depositing an instrument of ratification or accession to the Convention, to submit information to the IMO Secretary General on the relevant quantities of contributing cargo received, or in the case of liquefied natural gases (LNG) discharged, in that State during the preceding calendar year until the Convention enters into force in that State.

1.3 The actual specifics of the reporting requirements are not outlined in the Convention. Therefore, in order to comply with these duties it is necessary for Contracting States to implement a national reporting scheme for contributing HNS cargo into their domestic legislation.

#### **2. National Reporting System – UK experience**

##### *UK and Irish Legislation*

2.1 The UK has passed legislation to implement the Convention, but has not ratified and, therefore, must seek positive approval to do so from Parliament,

2.2 The UK's enabling legislation requires contributions to be paid in accordance with the Convention, but only following ratification of the Convention itself. The UK's enabling powers do not provide for the implementation of a statutory reporting regime without prior ratification. However, the draft Irish implementing legislation that is currently placed before both Houses of Legislature, allows implementation of a suitable national regime for reporting contributions in advance of ratification of the Convention.



### *Early Reporting System*

2.3 Consideration should be given to the establishment of a reporting scheme *prior to ratification of the Convention* in order to facilitate the process of reporting receipts of HNS by contributors, and the State as a future Contracting State. Specifically, the introduction of a reporting regime in a State prior to ratification of the Convention, and its international entry into force, should:

- help industry to identify, prior to the operation of the HNS Fund, those substances that will, and will not, be classified as contributing cargo as well as the potential contributors to the HNS Fund;
- help States to identify potential contributors to the HNS Fund;
- help the identification of both the principal receivers of HNS and where applicable the physical receivers of such cargo who act as agents for another who may or may not be subject to the jurisdiction of any State Party, and
- assist both industry and Governments to ensure that the reporting arrangements operate efficiently and equitably in the State prior to the introduction of the financial requirements on HNS receivers, i.e. the invoicing and levying of receivers when the Convention is in force in order to finance the HNS Fund.

2.4 States may wish to consider the development of a voluntary (non-statutory) reporting system, and whether this would be appropriate and effective, prior to ratification of, or accession to, the Convention.

### *Lower Threshold Limits*

2.5 States should also give consideration to setting the threshold limits for contributing cargo, on a national basis, lower than those laid down in the HNS Convention. This will aid States in identifying those receivers whose annual receipts do not exceed the thresholds, but may fluctuate enough in the future to exceed the thresholds established in the Convention.

2.6 Without knowing the extent of these fluctuations it may be difficult for a Contracting State to set an appropriate means of identifying the various levels of contributing cargo under each separate account established under the Convention.

### *UK Industry Concerns*

2.7 The UK has undertaken an initial Regulatory Impact Assessment (RIA) on the costs of UK ratification to all relevant, and affected, national parties. In particular, the RIA has focused on the potential financial burden to be placed on the receivers of HNS in the UK following carriage by sea, and the principal receivers on whose behalf physical receivers may be acting.

2.8 As the UK moves towards ratification a consultation process with UK industry representatives has been undertaken over the last year. Representatives of the storage companies potentially affected by ratification have, in particular, expressed the

following concerns, with specific reference to the definition of 'receiver' in Article 1 (5):

- any financial obligations placed on storage companies would add a very substantive additional costly burden on the industry when they are only acting as third parties in the storage of HNS, rather than the owners of such cargo;
- storage companies are, generally, third party storage companies who do not necessarily own the cargo and therefore have no responsibility for its carriage by sea;
- a significant % of products stored by storage companies in the UK, following carriage by sea, originates from States that are unlikely to become party to the HNS Convention, and a smaller % is destined for such States;
- the possibility of companies based in a Contracting State fragmenting in order to avoid any financial liability, (although it must be noted that initial indications from UK industry have indicated that this may, administratively, be more expensive than any financial liability that might actually be incurred).

2.9 The financial obligations to contribute to the HNS Fund can, of course, be forwarded to a principal receiver by the physical receiver if they are acting as an agent on their behalf and if they fall under the jurisdiction of the Convention. Therefore, the physical receiver of HNS in a Contracting State will not be able to forward the liability for financial contributions for HNS cargo received following transport by sea, if they are acting as an agent for a principal who is in a non-Member State.

2.10 The application of the definition of '*receiver*' in the HNS Convention envisages a number of scenario's that may arise in respect of liability for reporting and financial liability for contributing to the HNS Fund, as contained in the Annex to this document.

2.11 In considering the more detailed aspect of implementing a national reporting system and the identification of '*receivers*', UK port representatives (as physical receivers of HNS) have expressed concern that whilst they may have a contract with the shipping line transporting the HNS by sea to the port concerned (or with a shipping agent), in many cases they will not have a contract with the '*principal*' who receives the HNS after it has been handled by, and transported from, the port itself. In such cases the ports may not be aware of the details of the principal receiver, causing potential difficulties for the port concerned in terms of forwarding the financial obligations to contribute to the HNS Fund.

2.12 The most simplified and practical system for reporting HNS and defining '*receiver*' should ease, to an extent, the concerns of industry. In addressing these specific concerns the following points have been addressed with UK storage company representatives during the UK consultation process:

- a) whilst storage companies do not, generally, own the products they store following carriage by sea, it is an integral part of their business, and an integral part of the system by which HNS is carried by sea, and

- b) the % of HNS products stored by storage companies following carriage by sea that has originated from States unlikely to become party to the Convention would be considered as ‘contributing cargo’ for the purposes of the regime **only if** it has been received in a port or terminal in the a Contracting State following carriage by sea. In this respect the location of the exporting country is not relevant for the purposes of the HNS Convention.

2.13 Experience over the years, and especially since the HNS Convention was adopted in 1996, suggests that once in force the actual financial burden falling on individual receivers in the form of levies ought to be quite small i.e. pence per tonne of contributing cargo. This is primarily because of the relatively high level of shipowners’ liability under the HNS Convention. However, this will ultimately depend on the number, location, and frequency of HNS incidents occurring in State Parties and the number of States party to the regime.

#### **Action to take**

2.14 Delegations are invited to consider and discuss the issues raised in this paper, and to consider recommending to the IMO Legal Committee that potential State Parties should:

- a) consider the establishment of a national reporting system (statutory or voluntary) prior to actual ratification of the HNS Convention, and
- b) consider the case for implementing lower threshold limits for reporting contributing cargo than those laid down in the Convention.

**Scenario 1: The physical receiver (i.e. a storage company) receives the HNS, after carriage by sea, in a State Party to the Convention, whilst the principal receiver (for whom the physical receiver is acting as an agent to receive the HNS) is also located within the jurisdiction of the Convention:**

The HNS Convention allows persons, such as storage companies, who act as agents for another and physically receive HNS on their behalf, to designate that principal as the receiver for the purposes of the Convention. However, in order for the principal to be financially liable for contributions to the HNS Fund, both the person who physically receives the contributing cargo in a port or terminal, **and** the designated principal, must be subject to the jurisdiction of a State Party to the Convention.

In general, therefore, the physical receiver has the obligation to provide the Fund with the information necessary in order to ensure that the Fund can contact, and invoice, the principal. This includes the:

- The information necessary to enable the Fund to contact and invoice the principal (name, valid address within the State Party);
- The information necessary to establish that the physical receiver was acting as an agent for the principal (this could for instance be done by providing information on the contractual relationship between the physical receiver and the principal); and
- In cases of reasonable doubt, or where the information provided by the physical receiver is contested by the principal, the burden of proof is on the storage company, since it is he who invokes - for his own benefit - an exception to the general rule.

**Scenario 2: The physical receiver receives the hazardous goods after transportation by sea in a State Party to the Convention, whilst the principal is located in a non State Party and is, therefore, not subject to the jurisdiction of the Convention.**

If, at the time of receipt, the physical receiver acts as an agent for another who is not subject to the jurisdiction of a State Party the physical receiver is financially liable for the contributing cargo discharged in the ports and terminals of a State Party. In this instance the physical receiver cannot pass the financial liability under the Convention of receiving the HNS to the principal. However, it is possible for the physical receiver to cover the potential financial burden imposed by the subsequent invoicing and levying system through contractual arrangements with the principal, if the principal is not subject to the jurisdiction of the Convention.

**Scenario 3: The physical receiver who receives the hazardous goods after transportation by sea is located in a State not Party to the Convention, whilst the principal is located within the jurisdiction of the Convention.**

If, at the time of receipt, the physical receiver is located in a State not Party to the Convention and is acting as an agent for another who is subject to the jurisdiction of a

State Party then the application of the Convention, and subsequently the reporting requirements and financial liability provisions, will not apply. In order for the HNS Convention to apply in respect of contributions, and therefore for a receiver to be considered liable to pay contributions, the HNS must have been discharged in a port or terminal in a State Party.

**Scenario 4: The physical receiver is located in a State not party to the Convention and receives the HNS after transportation by sea and is acting as an agent for a principal who is also not located within the jurisdiction of the Convention.**

If, at the time of receipt, the physical receiver is located in a State not Party to the Convention and receives the HNS for another who is not subject to the jurisdiction of any State Party then the application of the Convention, and subsequently the reporting requirements and financial liability provisions, will not apply. Again, the HNS must have been discharged in a port or terminal in a State Party.

**Scenario 5: The physical receiver receives a cargo of liquefied natural gases (LNG) transported by sea from a State Party to the Convention.**

If, at the time of receipt the physical receiver is located in a State Party to the Convention and receives a cargo of LNG, the financial liability for contributions to the HNS Fund applies to the person who, immediately prior to its discharge held title to the LNG cargo discharged in that port or terminal of that State<sup>1</sup>.

**Scenario 6: The physical receiver receives a cargo of liquefied natural gases (LNG) transported by sea from a non-State Party.**

The owner of the LNG cargo, immediately prior to its discharge, is still financially liable to contribute to the HNS Fund. The LNG account under the HNS Convention contains no threshold level, so any transportation by sea of LNG means the original owner of the cargo is liable. The provision for financial contributions to be made to the HNS Fund for LNG means that any LNG discharged in a State Party to the Convention is liable for contribution regardless of the nationality of the person who immediately prior held its title or whether the cargo is carried by sea from a State Party or a non-State Party.

Whilst this may cause concerns in respect of enforcement if the financial contributor is located in a non-State Party, the State Party in which the physical receiver is located is required to ensure that the reporting of receipts for such contributing cargo and the following application of financial liability for contributions to the HNS Fund, is fulfilled. Furthermore the 'receiving' State Party shall take appropriate measures under its law with a view to determining the effective execution of any such obligation<sup>2</sup>.

**Scenario 7: The physical receiver receives the hazardous goods after transportation by sea but is unaware of the identity of the principal.**

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<sup>1</sup> Article 19 (1) (b)

<sup>2</sup> Article 6 of the HNS Convention

The physical receiver has the obligation to provide the Fund with the information necessary to put the Fund in contact with the principal who is liable. If the physical receiver cannot identify the principal owner, then they are liable.

**HNS CORRESPONDENCE GROUP**

Special Consultative Meeting  
June 3-5, 2003, Ottawa

Submission by Canada

**Responsibility of States Parties in Respect of  
Compliance and Verification**

**Introduction**

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1. The purpose of this paper is to provide the basis for an agreement among potential State Parties on a harmonized approach to monitoring compliance and verification of reporting requirements established in the HNS Convention.
2. Provisions of Articles 18, 19, 20, and 21 of the Convention require State Parties to adopt compliance and verification procedures to fulfill their duty to monitor and manage the reporting system for contributing cargo as reported to the HNS Fund.
3. In support of these (*Annual contributions to the general account, General contributions to separate accounts, Initial contributions, Reports*) regulations or guidelines will need to be adopted by State Parties to establish:
  - a) the manner in which they would fulfill their responsibilities in respect of the reporting system for contributing cargo; and
  - b) the measures they would have at their disposal to ensure a uniform discharge of the responsibilities of the receivers of HNS under their jurisdiction.

## **Compliance Procedures: Uniform Monitoring System or Self-reporting?**

4. Article 21 is the principal source of the responsibility of the State Parties under the HNS Convention. The obligation under Article 21(1) is to ensure that the name of any person liable to pay contributions appears on a list to be established by the Director of the HNS Fund. Article 21(2) sets out the type of information that the State Party must communicate to the Director for the purposes of that list. This requirement sets out the “compliance” aspect of the of the responsibility of State Parties.
5. There are two main options for States Parties to consider:
  - i) reporting system administered and closely monitored by a national authority
  - ii) self-reporting system by the industry with provisions for verification by a national authority.
6. During earlier discussions, the Correspondence Group considered these two options and unanimously agreed that option (ii) be recommended to States Parties when implementing the Convention.

## **Compliance and Verification – Canadian Model**

7. To discharge its responsibility as a State to the 1971 IOPC Fund and, later on to the 1992 IOPC Fund, Canada adopted a set of regulations creating an effective mechanism on compliance and verification of responsibilities of receivers of oil. These regulations are set out below as a possible model for consideration in the context of the HNS Convention. Although many States might already have in place various mechanisms to deal with their responsibility under the IOPC regime, clearly, a harmonized approach under the HNS Convention would go a long way towards achieving uniformity of reporting systems and, thus, equity among all States Parties.
8. It should be noted that these regulations are fully consistent with the reporting software developed by the IOPC Fund. It complements the database, which will serve not only as an HNS identifier system but also as an account manager. Report listings, contributors’ profiles, and other relevant information to be made available through the HNS database will be used as a means to verify and ensure compliance with reporting requirements under the HNS Convention.
9. The proposed regulations, set out in Annex, can be applied to both a traditional reporting system (paper) and an electronic method (IOPC Database), thus ensuring that the self-reporting system is supported by rules that are binding and enforceable.



## ***Regulations on Compliance and Verification***

### ***Preamble***

#### **General obligations under the Convention<sup>1</sup>**

- Each State Party undertakes to give effect to the provisions of the Convention and to these regulations.
- Unless expressly provided otherwise, a reference to the HNS Convention constitutes at the same time a reference to these regulations

### ***Regulation 1***

#### **Reporting of contributing cargo**

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

- (a) any amount of LNG is received;
- (b) the total amount of non-persistent oil received exceeds 20,000 tons;
- (c) the total amount of LPG received exceeds 20,000 tons<sup>1</sup>
- (d) the total amount of substances covered under the General Account received exceeds 20,000 tons.

### ***Regulation 2***

#### **Designated Authority**

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

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<sup>1</sup> Each State Party should set appropriate penalties for breaching these regulations.

### ***Regulation 3***

#### **Records and Books**

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

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

### ***Regulation 4***

#### **Disposal of records**

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

### ***Regulation 5***

#### **Make available for inspection**

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

## ***Regulation 6***

### **Inspection<sup>2</sup>**

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

(a) examine anything on the premises and copy or take away for further examination or copying any record, book, account, voucher or other document that they believe, on reasonable grounds, contains any information relevant to the enforcement of Article 18,19; & 21(5) and

(b) require the owner, occupier or person in charge of the premises to give the person all reasonable assistance in connection with the examination under paragraph (a) and to answer all proper questions relating to the examination and, for that purpose, require the owner, occupier or person in charge of the premises to attend at those premises with the person.

## ***Regulation 7***

### **Certificate of designation**

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

## ***Regulation 8***

### **Report to State Party**

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

## ***Regulation 9***

### **Return of original or copy of documents**

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

## ***Regulation 10***

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<sup>2</sup> Due regard should be given to national law of each state party as legal search practices of private properties may vary from one State to another.

### **Notice of application for extension of time**

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

### ***Regulation 11***

#### **Copies of documents**

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

### ***Regulation 12***

#### **Obstruction, false statements**

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

**HNS CORRESPONDENCE GROUP**

Special Consultative Meeting  
June 3-5, 2003, Ottawa

**Preparations for Implementation of the HNS Convention in the  
Republic of Korea**

(MINISTRY OF MARITIME AFFAIRS AND FISHERIES  
REPUBLIC OF KOREA)

**Introduction**

Ministry of Maritime Affairs and Fisheries, the Republic of Korea, has prepared the followings in order to implement the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996(HNS Convention).

- HNS Convention was translated into Korean and has been set out to users from 1999.
- Amount of HNS imported, HNS importers, amount of contributing cargoes and receivers were surveyed at 2000.
- Draft of Act on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea was developed at 2002.
- HNS Search Program was developed in order to search for about 6000 HNS by their names, UN no., synonyms or Harmonized System(HS) Code used by custom on internet or stand alone for users friendly at

2002.

- HNS Management Program will be developed in order to manage amount of HNS imported, HNS importers, amount of contributing cargoes, receivers etc linking with Port Management System and Custom System at 2003.
- Establishment of HNS Management Organization will be planed at 2003.

## Status

Ships and amount of HNS imported, HNS importers, contributing cargoes, and receivers were surveyed from aug. 1999 to aug. 2000.

Total ships except for fishing vessels registered to Republic of Korea were 4,906 including 4,096 of not exceeding 200 gt in 1998. HNS convention applies to 689 ships excluding 4,096 ships not exceeding 200 gt and 121 ships not certified for carrying HNS.

### < kind of ships in 1998, Republic of Korea >

	total	passenger ship	cargo ship	oil carrier	tug	others
total	<b>4,906</b>	<b>175</b>	<b>702</b>	<b>628</b>	<b>1,073</b>	<b>2,328</b>
not exceeding 200 gt	4,096	117	288	417	1,010	2,264
over 200 _ 2,000 gt	533	48	199	171	63	52
over 2,000 ton gt	277	10	215	40	-	12

Amount of HNS imported were about 150 million tons. HNS importers were 175. Contributing cargoes were about 146 million tons. Receivers were 67.

<amount of HNS imported, HNS importers, contributing cargoes, and receivers in 1999>

(unit : ton)

kind of accounts	kind of HNS		amount of HNS imported	contributing cargoes	HNS importers	receivers
general account	solid bulk materials		-	-	-	-
	others		6,871,940	2,634,549	82	31
	sub-total		6,871,940	2,634,549	82	31
separate accounts	oils	persistent	114,590,561	114,590,561	11	11
		non-persistent	12,490,830	12,243,832	71	19
		sub-total	127,081,391	126,834,393	82	30
	LNG		12,284,342	12,284,342	1	1
	LPG		4,747,302	4,660,000	10	5
	sub-total		144,113,035	143,778,735	93	36
total			150,984,975	146,413,284	175	67

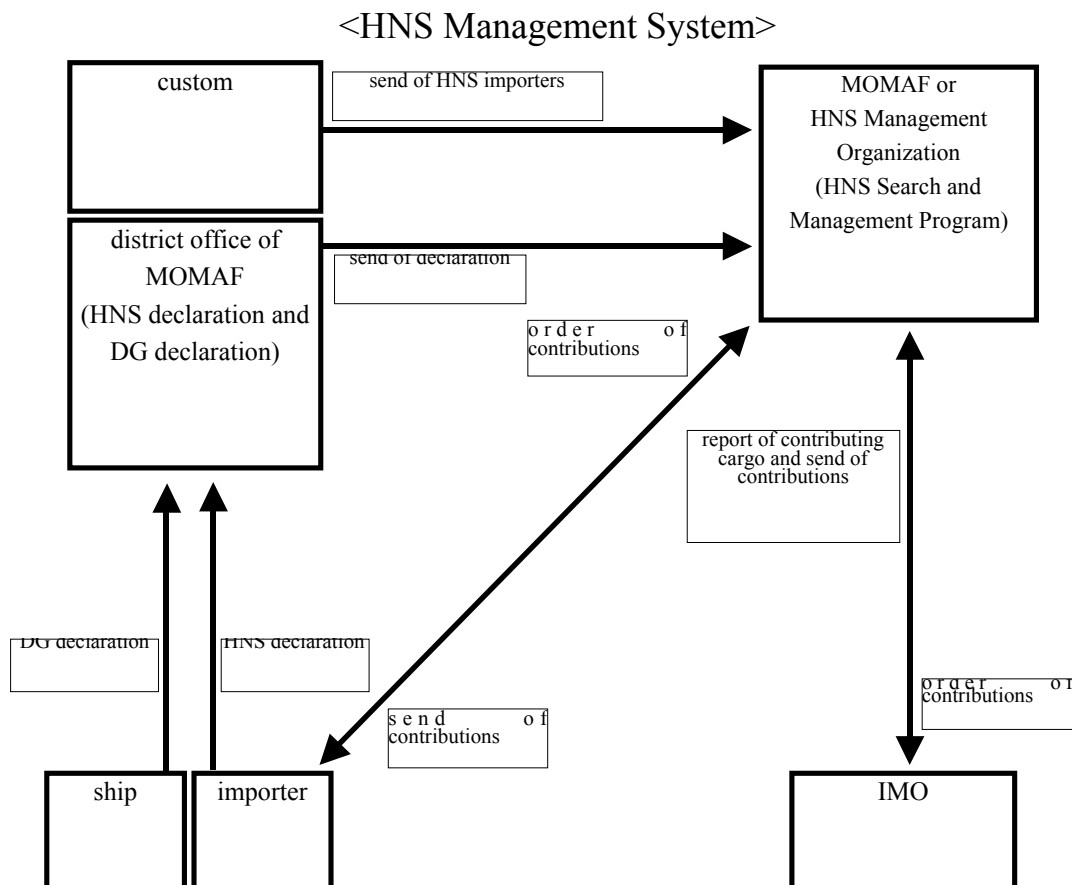


## HNS Management System

HNS Management System have been developed as three parts such development of national law, development of HNS Search and Management Program and establishment of HNS Management Organization.

Draft of Act was developed and HNS Search Program was developed in order to search for about 6000 HNS at 2002.

HNS Management Program will be developed in order to manage HNS linking with Port Management System and Custom System and establishment of HNS Management Organization will be planed at 2003.



## **Development of National Law**

Draft of Act on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, including definition of HNS, compensation for damage, duties of receiver etc, was developed at 2002.

## **HNS Search Program**

HNS are consisted of several kinds and many products, especially chemicals of HNS has synonyms. It is difficult that a cargo is identified as HNS. HNS Search Program was developed in order to search for about 6000 HNS by their names, UN no., synonyms or HS Code used by custom on internet or stand alone for users friendly at 2002.

- 5 synonyms were added for each HNS.
- HS Code and CAS(Chemical Abstract Service) no. was added for each HNS
- users can identify a cargo as HNS on internet or CD

## **HNS Management Program**

This program will be developed in order to manage HNS imported, to identify and report contributing cargo, to calculate contributions for HNS FUND as follows at 2003.

- HNS declaration program that HNS importers declare kind of HNS, amount of HNS etc.
- HNS identification and report program that Receiver and contributing cargoes can be identified and reported to IMO.
- calculation of contribution program that contributions for each HNS and receiver can be calculated.

- program linked with port management system and custom management system for high product and accuracy of HNS management.

### **HNS Management Organization**

HNS Management Organization will be planned to be established in order to manage HNS under the Act on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances.

2003. 5

**HNS CORRESPONDENCE GROUP**

Special Consultative Meeting

June 3-5, 2003, Ottawa

Submission by the Director of the International Oil Pollution Compensation Fund 1992

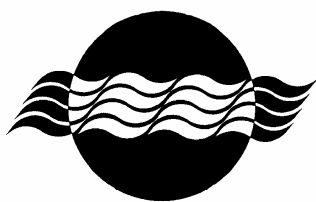
**Preparations for the setting up of the HNS Fund**

In accordance with a Resolution of the Conference which adopted the HNS Convention, the Director of the 1992 Fund had been instructed by the 1992 Fund Assembly to consider the administrative preparations for the setting up of the HNS Fund.

At its 1st session, held from 7 to 9 May 2003, the 1992 Fund Administrative Council, acting on behalf of the Assembly, considered a document submitted by the Director on the administrative preparations for the entry into force of the HNS Convention (document 92FUND/A/ES.7/4).

The above-mentioned document and an extract of the relevant part of the Record of Decisions of that session are reproduced at Annexes A and B.

## ANNEX A



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1992

ASSEMBLY  
7th extraordinary session  
Agenda item 5

92FUND/A/ES.7/4  
31 March 2003  
Original: ENGLISH

### PREPARATIONS FOR THE ENTRY INTO FORCE OF THE HNS CONVENTION

#### Note by the Director

<b>Summary:</b>	The Assembly has instructed the Director to carry out certain tasks necessary for the setting up of the Hazardous and Noxious Substances Fund (HNS Fund). This document deals with a number of issues which will have to be considered in this regard, eg Secretariat function, location of Headquarters, Rules of Procedure for the HNS Fund Assembly and subsidiary bodies, Internal and Financial Regulations, financial aspects and claims handling.
<b>Action to be taken:</b>	Give the Director instructions in respect of the preparations for the entry into force of the HNS Convention.

#### 1 Introduction

- 1.1 At its 1st session, held in June 1996, ~~the~~ Assembly noted that, in a Resolution of the Conference which had adopted the International Convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea (HNS Convention), the Assembly had been invited to assign to the Director of the 1992 Fund, in addition to his functions under the 1992 Fund Convention, the administrative tasks necessary for setting up the International Hazardous and Noxious Substances Fund (HNS Fund) in accordance with the HNS Convention. This Resolution is reproduced at the Annex. The Assembly instructed the Director to carry out the tasks requested by the HNS Conference on the basis that all expenses incurred would be repaid by the HNS Fund (document 92FUND/A.1/34, paragraphs 33.1.1 - 33.1.3).
- 1.2 At its 7th session, held in October 2002, the Assembly invited the Director to prepare a document on the administrative preparations for the setting up of the HNS Fund (document 92FUND/A.7/29, paragraph 28.6). This document deals with certain issues of an administrative nature which will have to be

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1.1 and 1.2 from A.6/25

considered in this context.

## **2 Conditions for the entry into force of the HNS Convention**

- 2.1 The HNS Convention shall under Article 46 enter into force 18 months after the date on which the following conditions are fulfilled:
- (i) at least 12 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
  - (ii) the Secretary-General of IMO has received information in accordance with Article 43 that those persons in such States who would be liable to contribute pursuant to Article 18, paragraphs 1 (a) and (c), have received during the preceding calendar year a total quantity of at least 40 million tonnes of cargo contributing to the general account.
- 2.2 Three States, Angola, Morocco and the Russian Federation, have acceded to the HNS Convention. No reports on contributing cargo have been received by the Secretary-General from these States.
- 2.3 The following States have signed the Convention but not yet acceded to it:
- |         |             |                |
|---------|-------------|----------------|
| Canada  | Germany     | Sweden         |
| Denmark | Netherlands | United Kingdom |
| Finland | Norway      |                |

## **3 Preparations for the entry into force of the HNS Convention carried out so far**

- 3.1 The implementation of the HNS Convention has been considered by the Legal Committee of IMO, most recently at its 85th session held in October 2002. At that session the United Kingdom delegation reported on the work carried out by a Correspondence Group established by the Committee to assist it with the monitoring of the implementation of the HNS Convention (document LEG85/11, paragraphs 105-117). Reference was made to the establishment of the IMO HNS Correspondence Group website on the HNS Convention.
- 3.2 At that session a number of delegations spoke of the importance of early implementation of the HNS Convention and of their Governments' preparations for implementation. It was proposed that the Correspondence Group should meet to agree the results of its work during 2003, which would enable a comprehensive report to be made to industry in autumn 2003. It was also proposed that the meeting should not be a formal meeting of the Correspondence Group but rather a meeting of "like-minded" States. The meeting will be held in Ottawa (Canada) from 3 to 5 June 2003.
- 3.3 At the 85th session of the Legal Committee there was support for a United Kingdom proposal that the IMO Secretariat should monitor cargo contributions and report to each session of the Committee in order to enable it to monitor the efforts of States and to identify the point when 40 million tonnes of contributing cargo has been reached, thereby triggering the entry into force of the Convention. The Committee stated that it was imperative to have a reporting and contribution mechanism in place when the Convention entered into force.
- 3.4 The Correspondence Group has developed a short overview of the HNS Convention which was approved by the Legal Committee at its 84th session in April 2002. The overview has been posted on IMO's website and has been circulated in written form to Governments.
- 3.5 The 1992 Fund Secretariat has been developing a system to assist in identifying and reporting contributing cargo under the HNS Convention, and this work is in its final phase. The database will include all substances qualifying as hazardous and noxious cargo.
- 3.6 On 18 November 2002 the European Council adopted a Decision (2002/971/EC) which required all European Union Member States to take the necessary steps to ratify, or accede to, the HNS Convention within a reasonable time period and, if possible, before 30 June 2006.

#### **4 Questions to be considered by the first HNS Fund Assembly**

- 4.1 The first Assembly of the HNS Fund will have to take decisions on a number of issues, *inter alia*
- (a) Secretariat of the HNS Fund
  - (b) Location of the HNS Fund's Headquarters
  - (c) Financial issues
  - (d) Handling of claims for compensation
- 4.2 The HNS Fund Assembly will have to adopt several documents setting out the framework for the operation of the HNS Fund, for example:
- (a) Headquarters Agreement
  - (b) Rules of Procedure for the Assembly and subsidiary bodies
  - (c) Internal Regulations and Financial Regulations and, possibly, Staff Regulations and Staff Rules
  - (d) Observer Status of intergovernmental and international non-governmental organisations
- 4.3 The above-mentioned documents could be drafted along the lines of the corresponding documents already applied by the IOPC Funds. The Director considers that it would be useful to study the IOPC Funds' documents in order to determine whether modifications should be made in view of the difference between the oil pollution liability regime and the HNS regime and in the light of experience gained over the years from the operation of the IOPC Funds.

#### **5 Location of the HNS Fund's Headquarters and Headquarters Agreement**

- 5.1 The relationship between the Host State and the 1971 and 1992 Funds is governed by Headquarters Agreements between the United Kingdom Government and the Funds.
- 5.2 If the HNS Fund's Headquarters were to be located in the United Kingdom it would be necessary to conclude a Headquarters Agreement between the United Kingdom Government and that Fund, setting out the privileges and immunities of the HNS Fund, of delegates to its meetings and of staff members.
- 5.3 Should the Headquarters of the HNS Fund be located outside the United Kingdom, a Headquarters Agreement would have to be concluded between the Host State in question and the HNS Fund.

#### **6 Secretariat of the HNS Fund**

- 6.1 There appear to be two possible solutions as to the Secretariat function for the HNS Fund. One option would be for the HNS Fund to have a Secretariat separate from that of the IOPC Funds. The other option would be for a joint Secretariat to administer both the IOPC Funds and the HNS Fund <sup><1></sup>. The latter option would obviously only be practical if the HNS Fund were to be located in the United Kingdom.
- 6.2 Consideration will have to be given to the employment conditions for the members of staff of the HNS Fund Secretariat. The Staff Regulations and Staff Rules applied to the IOPC Funds' Secretariat could serve as a model.

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<sup><1></sup> It is possible that the 1971 Fund will have been wound up when the HNS Convention enters into force. In that case the present IOPC Funds' Secretariat would be Secretariat of the 1992 Fund only. If the proposed Supplementary Fund has been set up by this time the present Secretariat may be administering also that Fund.

**7 Agreement with IMO**

- 7.1 Under the Resolution adopted by the 1996 Conference the Director should hold negotiations with IMO to enable the HNS Fund to conclude agreements as soon as possible on the necessary premises and support services.
- 7.2 The IOPC Funds have an Agreement with IMO mainly in respect of the meetings of the IOPC Funds in the IMO Headquarters.
- 7.3 An agreement between the HNS Fund and IMO would be meaningful only if the HNS Fund were to be located in London. If the HNS Fund were to share Secretariat with the IOPC Funds it would not be necessary for the agreement with IMO to address the issue of premises, since the IOPC Funds are no longer located in the IMO building.

**8 Rules of Procedure**

The Rules of Procedure of the HNS Fund Assembly and any subsidiary bodies should in the Director's view in the main be the same as the Rules of Procedure of the IOPC Fund bodies, particularly if the HNS Fund were to be located in the United Kingdom and share a Secretariat with the IOPC Funds. The Director would need to examine the Rules of Procedure of the 1971 and 1992 Fund bodies in order to establish whether any amendments would be appropriate as regards the HNS Fund, either in the light of experience or in view of the differences between the two compensation regimes.

**9 Internal Regulations and Financial Regulations**

- 9.1 The 1971 and 1992 Funds each have Internal Regulations governing a number of aspects of the administration of the Funds. They deal, in particular, with the payment of contributions, accounts and budget, reports of contributing oil receipts, the filing of claims, intervention in legal proceedings, the settlement of claims, loans and investments, assistance to States in emergency situations and the extension of credit facilities in respect of preventive measures. These Regulations have been amended from time to time.
- 9.2 The 1971 and 1992 Funds' Financial Regulations deal with various aspects of the Funds' finances, in particular in respect of accounts, budget and investments. These Regulations also have been amended from time to time.
- 9.3 It is suggested that the Internal Regulations and Financial Regulations of the HNS Fund could in the main be the same as those applied by the IOPC Funds, in particular if the HNS Fund were to share a Secretariat with the IOPC Funds. The Director would need to examine the IOPC Funds' Regulations in order to establish whether modifications would be appropriate for the purpose of their application to the HNS Fund.



**10 Observer status of intergovernmental and international non-governmental organisations**

- 10.1 Under the Fund Conventions and the HNS Convention, the respective Assembly determines which non-Contracting States and which intergovernmental and international non-governmental organisations should be admitted to take part, without voting rights, in meetings of the Assembly and subsidiary bodies.
- 10.2 The Rules of Procedure of the 1971 and 1992 Fund Assemblies contain provisions governing the admission of intergovernmental and international non-governmental organisations as observers. The governing bodies of the IOPC Funds have also adopted criteria for granting observer status. The Director intends to examine these criteria in order to establish whether they would be appropriate in respect of the HNS Fund.
- 10.3 It is suggested that the IOPC Funds and the HNS Fund should be invited as observers to each other's meetings.

**11 Financial issues**

- 11.1 The HNS Fund will have its own accounts and its own budget. Consideration will have to be given to the appointment of an External Auditor and other issues relating to the audit of the Organisation and the investment of its assets.
- 11.2 If the IOPC Funds and the HNS Fund were to have a joint Secretariat, agreement would need to be reached between the Organisations on a formula for sharing the costs of running the Secretariat between the 1971 Fund (if still in existence), the 1992 Fund, the Supplementary Fund (if it has been set up) and the HNS Fund.

**12 Handling of claims for compensation**

According to Article 26 (i) of the HNS Convention, the HNS Fund Assembly shall establish a Committee on Claims for Compensation with at least 7 and not more than 15 members. It would be necessary to decide on the composition and mandate of this Committee by taking into account the requirement concerning an equitable geographical distribution of members.

**13 Future preparatory work**

It is important that the first session of the HNS Assembly will have before it documentation that will enable it to take decisions on the issues dealt with above so as to ensure that the HNS Fund will be operative at an early stage. It is suggested therefore that the Director be instructed to study these issues further and submit draft texts for preliminary examination by the 1992 Fund Assembly at a future session. These texts would be revised in the light of the 1992 Fund Assembly's observations and instructions. The documents would then be submitted to the first session of the HNS Assembly which will take the final decisions.

**14 Action to be taken by the Assembly**

The Assembly is invited:

- (a) to take note of the information contained in this document and;
- (b) to give the Director such instructions in respect of the preparations for the entry into force of the HNS Convention as it may deem appropriate.

## ANNEX

### Resolution 1 of the 1996 International Conference

#### RESOLUTION ON SETTING UP THE HNS FUND

##### THE CONFERENCE,

**HAVING ADOPTED** the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention),

**CONSIDERING** that before the HNS Convention enters into force and for some time thereafter, it will be necessary to prepare some administrative and organizational measures in order to ensure that, as from the date of entry into force of the Convention, the International Hazardous and Noxious Substances Fund (HNS Fund), to be set up under the Convention, can operate properly,

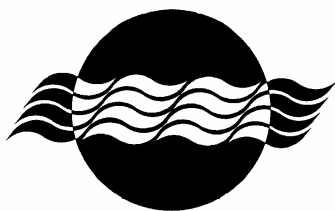
**REQUESTS** the Assembly of the International Oil Pollution Compensation Fund, 1992 (IOPC Fund 1992), set up by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (1992 Fund Convention), to give its Director the following assignments, on the basis that all expenses incurred would be reimbursed by the HNS Fund:

- (a) to carry out, in addition to the tasks under the 1992 Fund Convention, the administrative tasks necessary for setting up the HNS Fund, in accordance with the provisions of the HNS Convention, on condition that this does not unduly prejudice the interests of the Parties to the 1992 Fund Convention;
- (b) to give all necessary assistance for setting up the HNS Fund;
- (c) to make the necessary preparations for the first session of the Assembly of the HNS Fund, which is to be convened by the Secretary-General of the International Maritime Organization, in accordance with article 44 of the HNS Convention;
- (d) to hold negotiations with the International Maritime Organization to enable the HNS Fund to conclude agreements as soon as possible on the necessary premises and support services; and

2 **RECOMMENDS** that on behalf of the HNS Fund, the IOPC Fund 1992 should hold negotiations with the host Government to ensure that the question of the privileges, immunities and facilities accorded to the HNS Fund is considered and satisfactorily settled by mutual agreement, taking into account the privileges, immunities and facilities currently accorded at present to the IOPC Fund 1992.

\* \* \*

## ANNEX B



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1992

ADMINISTRATIVE COUNCIL  
1st session  
ASSEMBLY  
7th extraordinary session

92FUND/AC.1/A/ES.7/7  
9 May 2003  
Original: ENGLISH

### RECORD OF DECISIONS OF THE FIRST SESSION OF THE ADMINISTRATIVE COUNCIL

ACTING ON BEHALF OF THE 7TH EXTRAORDINARY SESSION OF THE ASSEMBLY

(held on 8 and 9 May 2003)

Chairman: Mr W Oosterveen (Netherlands)

#### **6 Preparations for the entry into force of the HNS Convention**

- 6.1 It was recalled that at its 7th session, held in October 2002, the Assembly had invited the Director to prepare a document on the administrative preparations for the setting up of the HNS Fund (document 92FUND/A.7/29, paragraph 28.6).
- 6.2 The Administrative Council took note of the information in document 92FUND/A/ES.7/4 which dealt with certain administrative aspects of the preparations for the entry into force of the HNS Convention. It also noted the preparations for the entry into force of the Convention carried out so far as set out in section 3 of that document.
- 6.3 It was noted that three States (Angola, Morocco and the Russian Federation) had acceded to the HNS Convention. It was also noted that at the 86th session of the Legal Committee of the International Maritime Organization, held during the week of 28 April 2003, a number of States had indicated the progress made towards ratification (IMO document LEG/86/1).
- 6.4 It was noted that the first Assembly of the HNS Fund would have to take decisions on a number of issues, *inter alia*:
- (a) Secretariat of the HNS Fund
  - (b) Location of the HNS Fund's Headquarters
  - (c) Financial issues
  - (d) Handling of claims for compensation

**Merknad:** 92FUND/A/ES.7/4 → bas  
ed on paragraph 1.2

- 6.5 It was further noted that the HNS Assembly would have to adopt several documents setting out the framework for the operation of the HNS Fund, for example:
- (a) Headquarters Agreement
  - (b) Rules of Procedure for the Assembly and subsidiary bodies
  - (c) Internal Regulations and Financial Regulations and, possibly, Staff Regulations and Staff Rules
  - (d) Observer Status of intergovernmental and international non-governmental organisations
- 6.6 It was noted that the administrative arrangements would to a large extent depend on the location of the Secretariat of the HNS Fund. A number of delegations expressed the view that the most practical solution would be for the HNS Fund to have a joint secretariat with the IOPC Funds and to be based in London. The point was made that the use of a joint Secretariat would enable the HNS Fund to benefit from the experience gained by the IOPC Funds and would reduce the administrative costs for both the HNS Fund and the IOPC Funds. One delegation expressed the view that since the HNS Fund would have a different membership to the IOPC Funds, it should have a Secretariat separate to the IOPC Funds so as to ensure that there was a clear delineation of its operations and costs.
- 6.7 The Administrative Council recognised that the decision as to the location of the HNS Fund would be taken by the HNS Fund Assembly. However, the Council instructed the Director to continue the preparatory work for the time being on the assumption that the HNS Fund would have a joint Secretariat with the IOPC Funds and would be based in London. It was recognised that the HNS Fund would be a separate legal entity.
- 6.8 The Administrative Council accordingly instructed the Director to study the issues set out in paragraphs 6.4 and 6.5 further and submit draft texts for preliminary examination by the 1992 Fund Assembly at a future session. It was agreed that the forum where further discussion should take place would have to be considered at a later stage.
- 6.9 Several delegations stressed the importance of the preparatory work for the entry into force of the HNS Convention and recommended participation in a meeting to be held in Ottawa from 3 to 5 June 2003. It was also pointed out that useful information for States considering ratifying or acceding to the HNS Convention was available at a dedicated website (<http://folk.uio.no/erikro/WWW/HNS/hns.html>).

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30 May 2003

Mr John Wren  
Head of Branch  
Shipping Policy 1a  
Department for Transport  
2/28 Great Minster House  
76 Marsham Street  
London SW1P 4DR

Dear John

### **HNS CONVENTION: IMPLEMENTATION**

Unfortunately ICS is unable to be represented at the special consultative meeting next week in Ottawa. However, we do not want our absence to be interpreted as indifference, and I would therefore be grateful if the following comments on the subject could be relayed to those participating in the meeting.

As you will recall, we participated actively in the negotiations leading up to the adoption of the Convention in 1996. During that process, our views on various issues were made known.

Following the diplomatic conference, ICS immediately promoted the early entry into force of the 1996 Protocol to the 1976 Limitation of Liability for Maritime Claims Convention (1996 LLMC) as a means of ensuring increased compensation for all maritime claims including HNS claims. Subsequently, we encouraged the early ratification of the HNSC in addition to the 1996 LLMC. We are pleased that the entry into force of the 1996 LLMC is now imminent and we hope that the HNSC will enter into force in the not too distant future. We support the efforts of the IMO Correspondence Group in this regard.

We have been asked whether the shipping industry is concerned about the HNSC compulsory insurance requirements (Article 12). The provisions are modelled on 1969/1992 CLC and we have assumed that there will be a similar procedure for compliance.

As a practical matter, some of our members have asked whether it might be possible for tanker owners to obtain a single CLC/HNSC compulsory insurance certificate. The possibility is not contemplated in the Conventions but – if there was support for the concept – perhaps it could be addressed in an IMO Resolution.

The International Group of P&I Clubs has referred to the problems that have arisen as a consequence of the terrorism exclusion that is applicable to all reinsurances world-wide. Nevertheless, ICS subscribes to the view that shipowners would be exonerated from liability in respect of terrorism by virtue of Article 7(2)(b) (intentional damage by a third party). However, you will recall the debate last year in the lead up to the adoption of the Protocol to the Athens Convention. We hope that it can be clarified beyond doubt that shipowners have no liability in respect of terrorism. Would it be possible for States to agree an official interpretation or common understanding on this issue?

Best wishes for a productive meeting.

Yours sincerely

Linda Howlett  
General Manager (Legal)