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GUIDELINES ON IMPLEMENTATION OF THE HNS PROTOCOL, 2010

Overview of the 2010 HNS Convention

Note by the Secretariat

SUMMARY

Executive summary: This document contains a proposed review of the Overview of the HNS Convention, 1996, prepared by the IMO Secretariat, in consultation with the IOPC Funds Secretariat, consistent with resolution 4 of the International Conference on the Revision of the HNS Convention

Strategic direction: 1.2 and 2

High-level action: 1.2.1 and 2.0.1

Planned output: 1.2.1.1, 1.2.1.5, 2.0.1.19 and 2.0.1.20

Action to be taken: Paragraph 4

Related documents: LEG 84/9, LEG 84/14, LEG/CONF.17/10, LEG/CONF.17/11 and the HNS Convention, 1996

Introduction

1 The Legal Committee, at its eighty-fourth session held in April 2002, approved an Overview of the HNS Convention, 1996. The purpose of the Overview was to provide guidance to States by giving explanations and useful information on the key issues that fell within the scope of the Convention. This was consistent with resolution A.932(22) adopted by the IMO Assembly at its twenty-second session, which, *inter alia*, urged Member States to place a high priority on working towards the implementation of the HNS Convention and on resolving any practical difficulties in setting up the new regime, with the aim of ratification, acceptance and approval of, or accession to, the HNS Convention.

2 The Legal Committee, at that session, agreed that an explanatory note would be added to the text of the Overview to the effect that its content had been considered and approved by the Legal Committee, and that the Overview should be posted on the IMO website.

3 At its ninety-seventh session, the Legal Committee agreed, *inter alia*, that States should give preliminary focus to the ratification and implementation of the 2010 HNS Protocol. For that purpose, and consistent with resolution 4 of the International Conference on the Revision of the HNS Convention, the IMO Secretariat has prepared draft amendments to the Overview, in consultation with the IOPC Funds Secretariat, to reflect the changes of substance introduced into the HNS Convention, 1996, by the 2010 HNS Protocol, as in the annex.

Action requested of the Legal Committee

4 The Legal Committee is invited to consider the revised Overview in the annex and to comment and decide as appropriate.

ANNEX

AN OVERVIEW OF THE INTERNATIONAL CONVENTION ON LIABILITY AND COMPENSATION FOR DAMAGE IN CONNECTION WITH THE CARRIAGE OF HAZARDOUS AND NOXIOUS SUBSTANCES BY SEA, 2010 (THE 2010 HNS CONVENTION)

Explanatory note

1 The original Overview of the HNS Convention, 1996 was approved by the Legal Committee of IMO at its eighty-fourth session, held in April 2002. In 2010, an International Conference adopted a Protocol to the 1996 Convention, which was designed to address the practical problems that had been perceived to prevent many States from ratifying the Convention. This Overview is a revision of the original document, taking into account changes introduced by the 2010 Protocol.

2 Together, these treaties constitute the 2010 HNS Convention. This Overview offers straightforward but fundamental information on the key issues that fall within the scope of the 2010 HNS Convention. It should also provide a useful basis from which to answer any queries from interested parties while explaining the broad effects of the Convention as well as its purpose. The Overview is merely explanatory and therefore does not contain any recommendation to be considered a source of any legal obligation regarding the implementation of the HNS Convention.

3 The Overview is consistent with resolution A.932(22) adopted by the IMO Assembly at its twenty-second session, which, *inter alia*, urged States to place a high priority on working towards the Convention's implementation and resolving any practical difficulties in setting up the new regime, with the aim of ratification, acceptance and approval of, or accession to, the HNS Convention. It also responds to resolution 4 of the 2010 International Conference, which calls for revision of the original Overview to take account of the 2010 Protocol.

Main reasons for the changes introduced into the 1996 Convention by the 2010 Protocol

4 It may be an aid to the understanding of the 2010 HNS Convention to explain briefly the underlying causes inhibiting the entry into force of the HNS Convention, 1996 and the solutions adopted in the 2010 Protocol, namely:

- (i) the heavy burden on States of having to report the vast range of packaged substances received by them. The remedy adopted was to differentiate between bulk and packaged HNS goods by excluding packaged goods from the definition of contributing cargo, and exempting receiving States from the obligation to make contributions to the HNS Fund for them. Nevertheless, damage caused by packaged goods remains covered under the compulsory insurance of the shipowner, and any excess is met from the HNS Fund. In order to maintain the concept of shared liability between the shipping industry and the cargo interests, the shipowner's limitation amount for carrying packaged goods was also increased;
- (ii) in the case of LNG cargoes, the Convention provided that the person responsible for making contributions should be the titleholder, who may, however, not be subject to the jurisdiction of a State Party, and the contributions may not, therefore, always be recoverable. The Protocol now

shifts responsibility for payment to the receiver, unless the titleholder has agreed to assume that responsibility; and

- (iii) non-submission of contributing cargo reports, on ratification of the Convention and annually thereafter, was also a serious obstacle. The solution was to require States to submit reports on contributing cargo as a condition of becoming Contracting States to the Convention, and thereafter to submit reports annually, in default of which they will be temporarily suspended from being Contracting States. States Parties failing to submit annual reports, after the entry into force of the Convention, will be unable to claim compensation until their reports are brought up to date. The only exception will be claims for deaths and personal injury.

Introduction to the 2010 HNS Convention

5 Compensation for damage caused by the carriage by sea of hazardous and noxious substances (HNS) is regulated by the 2010 HNS Convention.

6 The regime established by the 2010 HNS Convention is largely modelled on the existing regime for oil pollution from tankers set up under the International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (Fund Convention), which covers pollution damage caused by spills of persistent oil from tankers.

7 The HNS regime is governed by the 2010 Convention, the purpose of which is to provide adequate, prompt and effective compensation for loss or damage to persons, property and the environment arising from the carriage of HNS by sea. The Convention covers both pollution damage and damage caused by other risks, e.g. fire and explosion.

8 Under the 2010 HNS Convention, the shipowner is liable for the loss or damage up to a certain amount, which is covered by insurance (1st tier). A compensation fund (the HNS Fund) will provide additional compensation when the victims do not obtain full compensation from the shipowner or its insurer (2nd tier). The HNS Fund will be funded by those companies and other entities which receive HNS after sea transport in a Member State in excess of the thresholds laid down in the Convention.

Scope of application

9 The 2010 HNS Convention covers any damage caused by HNS in the territory or territorial sea of a State Party to the Convention. It also covers pollution damage in the exclusive economic zone, or equivalent area, of a State Party and damage (other than pollution damage) caused by HNS carried on board ships registered in, or entitled to fly, the flag of a State Party outside the territory or territorial sea of any State. The costs of preventive measures, i.e. measures to prevent or minimize damage, are also covered wherever taken.

10 The 2010 HNS Convention does not cover damage caused during the transport of HNS to or from a ship. Cover starts from the time when the HNS enters the ship's equipment or passes its rail, on loading, and the cover ends when the HNS ceases to be present in any part of the ship's equipment or passes its rail on discharge.

11 The 2010 HNS Convention covers incidents involving the carriage of HNS by sea by any sea-going craft of any type whatsoever, except warships and other ships owned or operated by a State and used, for the time being, only on Government non-commercial service. The Convention allows a State to exclude from the application of the Convention ships which do not exceed 200 gross tonnage and which carry HNS only in packaged form and while the ships are engaged on voyages between ports of that State.

12 The 2010 HNS Convention defines the concept of HNS largely by reference to lists of individual substances that have been previously identified in a number of international Conventions and Codes designed to ensure maritime safety and prevention of pollution. The references to the codes and regulations covering these HNS substances are set out in article 1.5 of the Convention, and, with one exception, they reflect amendments made to them by IMO bodies since the 1996 HNS Convention. The exception relates to solid bulk materials possessing chemical hazards which are subject to the provisions, *inter alia*, of the International Maritime Dangerous Goods Code (IMDG Code) in effect in 1996, when carried in packaged form.

13 HNS includes both bulk cargoes and packaged goods. Bulk cargoes can be solids, liquids including oils or liquefied gases. The number of substances included is very large: the IMDG Code, for example, lists hundreds of materials which can be dangerous when shipped in packaged form. Some bulk solids such as coal and iron ore are excluded because of the low hazards they represent.

Damage

14 Damage includes loss of life or personal injury on board or outside the ship carrying HNS, loss of or damage to property outside the ship, loss or damage caused by contamination of the environment, loss of income in fishing and tourism, and the costs of preventive measures and further loss or damage caused by such measures. The 2010 HNS Convention defines preventive measures as any reasonable measures taken by any person after an incident has occurred to prevent or minimize damage. These include measures such as clean-up or removal of HNS from a wreck if the HNS present a hazard or pollution risk.

15 The 2010 HNS Convention does not cover pollution damage caused by persistent oil, since such damage is already covered under the existing international regime established by the 1992 CLC and Fund Convention. However, non-pollution damage caused by persistent oil, e.g. damage caused by fire or explosion, is covered by the Convention. The Convention does not apply to damage caused by radioactive material.

16 The amount available for compensation from the shipowner and the HNS Fund will be distributed among claimants in proportion to their established claims. However, claims for loss of life and personal injury have priority over other claims. Up to two thirds of the available compensation amount is reserved for such claims.

1st tier – Liability of the shipowner

(a) Strict liability of the shipowner

17 The registered owner of the ship in question is strictly liable to pay compensation following an incident involving HNS. This means that he is liable even in the absence of fault on his part. The fact that damage has occurred is sufficient to establish the shipowner's liability, provided there is a causal link between the damage and the HNS carried on board the ship.

18 The shipowner is exempt from liability under the 2010 HNS Convention only if he proves that:

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

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

19 If the shipowner proves that the damage resulted, wholly or partly, either from an act or omission done with intent to cause damage, by the person who suffered the damage, or from the negligence of that person, the shipowner may be exonerated, wholly or partly, from its obligation to pay compensation to such person.

20 The 2010 HNS Convention does not impose liability on the owner of the HNS involved in the incident.

(b) Limitation of liability

21 The shipowner is normally entitled to limit his liability under the 2010 HNS Convention in respect of any one incident to an aggregate amount calculated on the basis of the units of gross tonnage (GT) of the ship, as follows:

- (a) Where the damage has been caused by bulk HNS:
 - (i) 10 million Special Drawing Rights (SDR)¹ for a ship not exceeding 2,000 GT; and
 - (ii) for a ship in excess of 2000 GT, 10 million SDR plus;
 - for each unit of tonnage from 2,001 to 50,000 GT, 1500 SDR;
 - for each unit of tonnage in excess of 50,000 GT, 360 SDR;

¹ The Special Drawing Rights is a monetary unit established by the International Monetary Fund (IMF); as at 30 December 2010, 1 SDR = £0.997755 or US\$1.54003.

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

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

- (i) 11.5 million SDR for a ship not exceeding 2,000 GT; and
- (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):

for each unit of tonnage from 2,001 to 50,000 GT, 1,725 SDR;

for each unit of tonnage in excess of 50,000 GT, 414 SDR;

provided, however, that this aggregate amount shall not in any event exceed 115 million SDR.

22 The shipowner will be denied the right to limitation of liability if it is proved that the damage resulted from his personal act or omission committed either with intent to cause damage, or recklessly and with knowledge that damage would probably result.

(c) Channelling of liability

23 As set out above, the registered shipowner is liable for pollution damage under the 2010 HNS Convention. No claim for compensation may be made against the following persons unless the damage resulted from their personal act or omission committed with intent to cause such damage, or recklessly and with knowledge that such damage would probably result:

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

(d) Compulsory insurance

24 The owner of a ship that carries HNS is required to take out insurance, or maintain other acceptable financial security to cover his liability under the 2010 HNS Convention.

25 The 2010 HNS Convention requires shipowners to provide evidence of insurance cover upon the ship's entry into port of any State which is party to the Convention by production of a certificate, regardless of whether the State of the ship's registry is party to the Convention. The certificates will be issued by the State of the ship's register or, if that State is not party to the Convention, by a State Party. States Parties are required to accept any certificate issued by any other State Party.

26 Claims for compensation may be brought directly against the insurer or person providing financial security.

2nd tier – HNS Fund

27 The HNS Fund will pay compensation when the total admissible claims exceed the shipowner's liability, i.e. the Fund pays "top up" compensation when the shipowner, or his insurer, cannot meet in full the loss or damage arising from an incident.

28 The HNS Fund also pays compensation in the following cases:

- the shipowner is exonerated from liability; or
- the shipowner liable for the damage is financially incapable of meeting his obligations.

29 To claim against the HNS Fund, the Convention requires claimants to prove that there is a reasonable probability that the damage resulted from an incident involving one or more ships. The HNS Fund may, in such cases, be liable to pay compensation even if the particular ship causing the damage cannot be identified.

30 The HNS Fund is also not liable to pay compensation if the damage was caused by an act of war, hostilities, etc., or by HNS discharged from a warship or other ship owned or operated by a State and used for the time being, only on Government non-commercial service.

31 If the HNS Fund proves that the damage resulted, wholly or partly, either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the HNS Fund may be exonerated, wholly or partly, from its obligation to pay compensation to such person. However, there shall be no such exoneration of the HNS Fund with regard to preventive measures.

Limit of compensation by the HNS Fund

32 The maximum amount payable by the HNS Fund in respect of any single incident is 250 million SDR, including the sum paid by the shipowner or his insurer. The 2010 HNS Convention also provides a simplified procedure to increase the maximum amount of compensation payable under the Convention in the future.

33 If the total amount of the admissible claims does not exceed the maximum amount available for compensation, then all claims will be paid in full. Otherwise the payments will have to be prorated, i.e. all claimants will receive an equal proportion of their admissible claims².

² A figure illustrating the compensation amounts under the 2010 HNS Convention, in graphic form, will be submitted in a separate document.

Financing of the HNS Fund

(a) Contributions to the HNS Fund

34 Compensation payments made by the HNS Fund will be financed by contributions levied on persons which have received, in a calendar year, contributing cargoes after sea transport in a Member State, in quantities above the thresholds laid down in the 2010 HNS Convention. For each contributor the levies will be in proportion to the quantities of HNS received by that person each year.

35 For the purpose of the contribution system, not only imported cargoes, but also cargoes received after sea transport between ports in the same State are taken into account. In this respect, contributing cargo means bulk HNS. However, cargo is not considered to be contributing cargo so long as it is in transit. That is, provided that the cargo is not imported, consumed or transformed, transshipment does not lead to a requirement for the payment of a contribution to the HNS Fund.

36 The contributions to finance the HNS Fund's compensation payments will be made post-event, i.e. levies will only be due after an incident involving the HNS Fund occurs. Levies may be spread over several years in the case of a major incident.

37 The 2010 HNS Convention allows a person who physically receives HNS on behalf of a third party, e.g., a storage company, to designate that third party as the receiver for the purposes of the Convention. Both the person who physically receives the contributing cargo in a port or terminal, and the designated third party must be subject to the jurisdiction of a State Party.

38 For liquefied natural gases (LNG), annual contributions shall be made by the receiver, or by the titleholder, if it has agreed with the receiver to do so, but, if the titleholder defaults in any payments, liability reverts to the receiver.

39 States are allowed to establish their own definition of "receiver" under national law. Such a definition must, however, result in the total quantity of contributing cargo received in the State in question being substantially the same as if the definition in the Convention had been applied. This allows States flexibility to implement the Convention in conjunction with existing national law, without giving any State the possibility of obtaining an unfair commercial advantage.

40 States Parties are required to inform the Director of the HNS Fund of the name and address of receivers of quantities of contributing cargo exceeding the thresholds during the preceding year, together with the quantities of cargo received by each of them. No compensation is payable by the HNS Fund until these reporting obligations have been fulfilled, except for death and personal injury. Contributing cargo is limited to bulk HNS, in contrast to the situation prior to adoption of the 2010 Protocol, when such cargo included packaged HNS goods. Nevertheless, damage caused by packaged goods remains covered under the shipowner's compulsory insurance, with any excess being met from the HNS Fund.

41 States are liable for any financial losses incurred by the HNS Fund as a result of the non-submission of reports. States also have the option of developing national regimes for the collection of contributions in respect of receipts of cargoes carried in domestic traffic (i.e. the trade by sea from one port or terminal to another within the same State).

42 When consenting to be bound by the 2010 HNS Protocol, and thereby the 2010 HNS Convention, and annually thereafter until the Protocol enters into force for a given State, Contracting States are obliged to submit information to IMO on contributing cargoes received. This will enable the Secretary-General of IMO to determine the date of the entry into force of the 2010 HNS Convention. A State that defaults in these reporting obligations shall be temporarily suspended from being a Contracting State until it has submitted the required data. A State failing to submit annual reports after the entry into force of the Convention, will be unable to claim compensation until it has submitted the required data, except for claims for death and personal injury.

43 States which decide to become Parties to the 2010 HNS Protocol should ensure that they deposit instruments only in respect of the Protocol, without any references to the HNS Convention, 1996.

(b) HNS Fund accounts

44 The HNS Fund, when fully operational, will have four accounts:

- Oil
- Liquefied Natural Gas (LNG)
- Liquefied Petroleum Gas (LPG)
- A general account with two sectors:
 - Bulk solids
 - Other HNS.

45 Each account will meet the cost of compensation payments arising from damage caused by substances contributing to that account, i.e. there will be no cross-subsidization.

46 Each separate account will only come into operation when the total quantity of contributing cargo received in Member States during the preceding year, or any such year as the HNS Assembly decides, exceeds the following levels:

- 350 million tonnes for the oil account
- 20 million tonnes for the LNG account
- 15 million tonnes for the LPG account.

47 However, during the early existence of the HNS Fund, there may not be sufficient contribution basis in the form of the quantities of HNS received in Member States to set up all the four separate accounts. Initially, the separate accounts may be **postponed** and the HNS Fund may, therefore, have only two accounts:

- one separate account for oil
- one general account including four sectors:
 - LNG
 - LPG
 - Bulk solids
 - Other HNS.

48 In addition, the separate accounts could be **suspended** if the total unpaid contributions to that account exceed 10% of the most recent levy to that account. As a result, any contributions due to a separate account that has been suspended will be paid into the general account and any relevant claims will be met from this account. Any decision to suspend or re-instate the operation of an account requires a two-thirds majority of the Assembly.

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

	Establishment of account	Contributions to account/sector
General account	40 million tonnes*	
• Bulk solids		20 000 tonnes
• Other HNS	No minimum quantity	20 000 tonnes
Separate accounts (or Sectors within the general account)		
Oil account	350 million tonnes	
• Persistent oil		150 000 tonnes
• Non-persistent oil		20 000 tonnes
LNG account	20 million tonnes	No minimum quantity
LPG account	15 million tonnes	20 000 tonnes

*Condition for entry into force

Competence of courts

50 Claimants can normally only take legal action in a court in the State Party in whose territory or waters the damage occurred. In this context waters means the territorial sea³ or the Exclusive Economic Zone (EEZ)⁴, or an equivalent area, of a State Party. This also applies to legal actions against any provider of insurance or financial security for the owner's liability, i.e. the shipowner's insurer.

51 Different rules apply if damage other than pollution damage to the environment occurs exclusively beyond the territorial seas of States Parties.

52 Actions against the HNS Fund should be brought before the same court as actions taken against the shipowner. However, if the shipowner is exempted from liability, or for another reason no shipowner is liable, legal action against the HNS Fund must be brought in a court which would have been competent had the shipowner been liable. Where an incident has occurred and the ship involved has not been identified, legal action may be brought against the HNS Fund only in States Parties where damage occurred.

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

⁴ The Exclusive Economic Zone is an area beyond the territorial sea defined in Article 57 of UNCLOS as not beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Administration

53 The HNS Fund will have an Assembly, a Secretariat and a Director, mirroring the organization of the International Oil Pollution Compensation Funds (IOPC Funds).

54 The Assembly will consist of all States Parties to the 2010 HNS Convention. The Assembly will have a number of functions, including approving settlements of claims against the HNS Fund, and deciding on amounts to be levied as contributions.

Entry into force of the 2010 HNS Convention

55 The 2010 HNS Convention will enter into force eighteen months after ratification of the 2010 HNS Protocol by at least twelve States subject to the following conditions:

- (i) four States must each have a registered ship's tonnage of at least 2 million GT; and
 - (ii) contributors in the States that have ratified the Convention must, between them, have received during the preceding calendar year a minimum of 40 million tonnes of cargo consisting of bulk solids and other HNS liable for contributions to the general account.
-