

# Contributing cargo and the receiver

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# Contributing cargo definition; art. 1.10

## Elements:

1. Any HNS (art. 1.5)
2. Carried by sea as cargo
3. Discharged in a port or terminal in the territory of a State Party
4. Cargo in transit: only at final destination (2nd sentence)



# Receiver definition; art. 1.4

“Receiver” means either:

- (a) Person who physically receives contributing cargo, with agency option, or
- (b) Person to be determined by national law, provided total contributing cargo substantially the same as under (a)

# Receiver; art. 1.4; a choice for States Parties

NB. Not relevant for persistent oil & LNG

- Two options for implementing States, (a) and (b); no order of preference
- (a) and (b) both contain a full definition, with their own requirements, but:
  1. (b) requires national legislation to be operational
  2. (b) requires “substantially the same” outcome as (a) would have had



# We know the IOPC Funds system: what is the same or similar?

- Basic concept: physical receipt in territory of a State Party (so IOPC Funds experience and practice can be built upon)
- Concepts of “person” and “associated person”
- Concept of “terminal (installation)”
- Persistent oil: reference to 1992 Fund Convention

# We know the IOPC Funds system: where are minor differences?

- No parallel provision in HNSC to art. 10.1(b) 1992 Fund Convention
- LNG: title holder
- Some exclusions, most notably art. 5.1 (small ships; within one State; packaged HNS) and 5.2 (same, but between neighbouring States)



# What is so different that there might be problems?

1. Levy only at final destination (art. 1.10): what is a genuine trans-shipment?
2. Agency option in art. 1.4(a): what is required for the option to apply?
3. State using art. 1.4(b): what does this require from the State involved?
4. Separate accounts

# Potential problem 1

## Trans-shipment; art. 1.10

- IOPC Funds system:
  1. movement within the same port area is not carriage by sea
  2. ship-to-ship transfer is not a receipt
- Where to draw the line between a trans-shipment and a receipt?
- Wording: "Cargo in transit" and "in the course of carriage"
- Interpretation; look at rationale behind the provision: to exempt genuine trans-shipments and levy only at final destination. (Obviously not to create a loophole)



# Trans-shipment; elements that may be taken into account

Ottawa-meeting discussed inter alia:

1. The HNS should not leave the port or terminal area between two sea legs
2. What is declared in the relevant documentation for the carriage
3. To what extent was deviated from what follows from the documentation, and for what reason
4. How much time has passed between two sea legs
5. What was the reason for any delays

HNS Fund Assembly may adopt criteria/guidelines

# Result: 4 possible situations

1. Trans-shipment in State Party; final destination in State Party: levy only at final destination
2. Trans-shipment in third State; final destination in State Party: levy at final destination
3. Trans-shipment in State Party; final destination in third State: no levy
4. Trans-shipment in third State; final destination in third State: no levy; HNSC does not apply



# Potential problem 2

## Receiver; requirements for the agency option

NB. Not relevant for persistent oil & LNG

- Physical receiver receives as agent for another (“principal”)
- Principal is subject to the jurisdiction of a State Party
- Agent discloses principal to the HNS Fund

# “receives as an agent for another”

- Concept of “agency” not defined in HNSC; national law
- “Another”: not necessarily the owner
- Agent/physical receiver proves the agent-principal relationship where necessary (documentation; contracts, etc.) As long as the agent does not demonstrate, the State reports the physical receiver
- Reporting and monitoring schemes of States Parties must take agency option into account (no double levies/no gaps/communication)



# “discloses the principal to the HNS Fund”

- Interpretation: look at rationale behind the provision: enable physical receiver to pass on to “real cargo interest” (Obviously not to create a loophole)
- Interest of the HNS Fund: have a receiver to invoice for all contributing cargo received in State Parties
- Therefore: agent must put Fund in same position in respect of the principal
- Contacting; invoicing; agency relationship
- Criteria/guidelines: HNS Fund Assembly

# Potential problem 3

## Use of art. 1.4(b) by States Parties

Requirements for use of option (b):

1. Person (receiver) in the State Party where contributing cargo is discharged, determined by the national law of that State Party
2. Total contributing cargo according to such national law is substantially the same as what would have been received under (a)



# “substantially the same as...”

- Burden of proof is on State Party involved
- Seems to require fictitious calculation applying (a) in addition/parallel to the administration of option (b) itself
- Rationale of the provision: as long as no negative consequences for (contributors in) other States Parties, a State Party may decide “who pays” internally (Obviously not to create a loophole)
- So: “total contributing cargo” or “total contributions for HNS received in that State”? (Ottawa: not lead to increased contributions in other States Parties)
- Criteria/guidelines: HNS Fund Assembly

# Potential problem 4

## Separate accounts

- Persistent oil: no problem; IOPC Funds system
- Non-persistent oil: physical receiver; with agency option (is problem 2)
- LPG: physical receiver; with agency option (is problem 2)
- LNG: title holder at discharge; will depend on contract used

What if title holder not in or under jurisdiction of any State Party?