Introduction note for States regarding the reporting of HNS contributing cargo

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Introduction

Following discussions with the Contracting States[1] to the 2010 HNS Protocol as well as other States currently in the ratification-preparation process, it has been recognised that an efficient and jointly approved system for reporting HNS cargo is key to ensuring the success of the 2010 HNS Convention (the "Convention").

This issue is therefore being addressed as a priority in order to ensure that the Convention is viable going forward.

Objective of this document

Taking into account the Guidelines on reporting of HNS contributing cargo, endorsed by the IMO Legal Committee in 2013 (the 2013 Guidelines), and noting the experiences of those that are already Contracting States to the 2010 HNS Protocol, as well as the views of those intending to soon ratify the Protocol, the opportunity is being taken to review and clarify the existing practices and guidance.

This preliminary document aims to engage with Contracting States and those intending to soon ratify the Protocol, in order to ascertain how they are already dealing with the cargo reporting issue and how they are interpreting the 2013 Guidelines. The sharing of such information will assist all States and interested parties in obtaining a clearer understanding of the existing IMO Guidelines. If all relevant States are able to provide details of their HNS reporting methods and the problems that they are facing, this will facilitate an effective review of the current established practices.

This document contains:

- A summary of the main issues to be resolved (Annex I);
- One questionnaire for Contracting States (Annex II); and
- One questionnaire for the States preparing to ratify the 2010 HNS Protocol (Annex III).

Once completed and returned, these questionnaires will help determine whether there is sufficient clarity with respect to certain aspects of HNS reporting, in particular terms such as the "Receiver", the "Principal", the "Agent" (and other types of names used to describe these roles). This should assist all interested parties in managing their reporting process going forward, including agreeing with the Secretariat the support they require in order to identify individual contributors and any other issues raised.

Following the completion of this exercise, further documents related to the HNS reporting process will be circulated.

[1] Prior to the entry into force of the 2010 HNS Protocol, those States who have ratified or acceded to the Protocol are referred to as 'Contracting States'. Following entry into force, those States will become States Parties to the 2010 HNS Convention.

ANNEX I

A summary of the main issues to be resolved relating to the reporting of HNS contributing cargo

Based on discussions with a number of States, it appears that the definition of "Receiver" – especially the "Agent/Principal" option in Article 1.4 (a) is difficult to deal with in practice. The Agent/Principal issue also entails a lot of administration and oversight by States, especially if the Agent is in one State and the Principal in another State.

1) Relationship between the "Physical Receiver" and the "Principal" if the "Physical Receiver" acts as an "Agent".

The definition of the "Receiver" of contributing cargo is mentioned in Article 1.4 of the 2010 HNS Convention:

Article 1.4

(a) the person who physically receives contributing cargo discharged in the ports and terminals of a State Party; 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, then the principal shall be deemed to be the receiver, if the agent discloses the principal to the HNS Fund; or

(b) the person in the State Party who in accordance with the national law of that State Party is deemed to be the receiver of contributing cargo discharged in the ports and terminals of a State Party, 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).

This Article provides two options for the definition of "Receiver", but there is a general consensus that the definition under Article 1.4 (a) (i.e. the physical receiver) should be the one to be used by States, for reasons of practicality and fairness.

Article 1.4(a)

Under that definition, it is the person who **"physically receives"** contributing cargo discharged in the ports and terminals of a State Party, who is deemed to be the **"Receiver"**.

However, if at the time of receipt, the person who is the "physical receiver" of the cargo acts as an **"Agent"** for another person (called the "Principal") and who is subject to the jurisdiction of any State Party, then the "Principal" shall be deemed to be the "Receiver", but only if the "Agent" discloses to the HNS Fund the details of the "Principal".

By default, such a definition necessarily brings the potential for more administration, and regulation of not only the Physical Receiver but the Principal too, and could even lead to lower overall HNS contributing cargo being reported if the Principals fail to reach the necessary reporting thresholds.

To clarify those points, the following set of definitions for the terminology could be used in reference to the obligations of the reporting of HNS contributing cargo:

"Receiver" means either:

A "Physical Receiver", which is the entity who physically receives contributing cargo discharged in the ports and terminal of a State Party.

Or

A "Principal", which will be deemed to be the "Receiver" if the contributing cargo has been physically received by an "Agent" on behalf of the "Principal" with two conditions:

1. The "Principal" is subject to the jurisdiction of a State Party to the 2010 HNS Convention; and

2. The "Agent" discloses the "Principal" to the HNS Fund.

Article 1.4(b)

Another option that could be considered is the use of Article 1.4(b) by States. Indeed, according to (b), States can decide in their national law who is the "Receiver", on the condition that the total contributing cargo received under such law is substantially the same as the total received under Article 1.4(a).

Article 1.4(b) was originally intended as an alternative for States who wanted to use an existing system, or to assist with the creation of new national entities to be used for HNS. However, since the adoption of the 2010 HNS Protocol, it appeared that the "Physical Receiver" in Article 1.4(a) and a self-reporting mechanism was the preferred option. As already mentioned, the Agent/Principal option in Article 1.4(a) seems to be causing difficulties when States are implementing the Convention and it also raises a lot of practical issues, both for States and for the HNS Fund. This could also lead to uncertainty and possibly unfair application of the Convention in cross-border States, which should clearly be avoided. Furthermore, the 2013 Guidelines concluded that the initial reporting period should focus on the physical receiver, and practically, this would solve many potential issues going forward.

As such, it could be decided that States must ensure that their national law identifies the Physical Receivers as the "Receiver" of contributing cargo in their ports and terminals.

For that to occur, the solution should be to use the option of Article 1.4(b) under which States can rely on the **physical receiver only**, and not use the Agent/Principal option within Article 1.4(a).

This would mean that States put the obligation of reporting and contributing solely on the Physical Receivers, in the same way as they do for the purpose of managing oil reporting and contributions for the IOPC Funds. This will significantly simplify the management of reporting and contributions for States and for the HNS Fund.

The Physical Receiver acting as an Agent could then make a contractual arrangement with the Principal to be reimbursed for any contributions due to the HNS Fund for that received cargo. States could either regulate this in their domestic law or alternatively leave this to the parties to agree in a contract. Such a (commercial) contractual arrangement could also cover the situation in which the Physical Receiver acting as an agent is located in a Contracting State while the Principal is not. The Agent and the Principal will already have commercial contracts regulating delivery, payments and other particulars of the trade. A reimbursement clause for HNS costs would form a part of their contractual arrangements.

This way of interpreting Article 1.4(b) could therefore offer a solution from the difficulties presented by the Agent/Principal option and relieve States and the HNS Fund from the administrative burden of keeping track of Agents and Principals. In addition, this solution ensures that HNS cargoes are reported in full as it will not be possible to use a potential "threshold" for every Principal in that case.

2) Management of Principal Receivers located in other States than the location of the Physical Receiver

This issue will only appear if a State follows Article 1.4(a) (Agent/Principal option)

a) Determining the State responsible for HNS volumes in cross-border cases and the States to which both the Agent and the Principal should submit their reports

Some States are particularly concerned by this type of situation, because of the large number of Physical Receivers acting as Agents for Principals in their own country or others, and whether Principals in those other countries would be bound by the Convention.

b) Reporting thresholds in trans-border Agents networks

The reporting thresholds for Agents and Principals located in different Contracting States create difficulties with the volume thresholds. That is the case of low-volume Agent or Principal receivers, where the risk is that some of those do not report being below the "threshold", and thus less HNS cargo is reported than is delivered in reality.

Given the potential complexity of managing these issues, it is important to keep in mind that these could be solved efficiently by using the definition of Article 1.4(b) as proposed above in question 1.

3) Unclear identification of the actual receivers within Contracting States

It is important for States to identify their actual receivers, to be in a position to provide their own contributing cargo reports, especially when the Convention comes into force. Indeed, Article 21 states that each Contracting State shall ensure that any person liable to pay contributions […] appears on a list to be established and kept up to date by the Director [of the HNS Fund].

In addition, it is also a risk for the Contracting State which has failed to submit contributing cargo to be temporarily suspended from the 2010 HNS Convention (Art 45.7).

Another risk is described in Art 21bis where no compensation shall be paid for any incident in a Contracting State that does not submit its HNS reports.

ANNEX II

Questionnaire for Contracting States to the 2010 HNS Protocol

Should you wish to provide additional explanations or documentation to accompany any of your answers, please do so via email when you send the questionnaire back.

State:

1. **Have you made the HNS reporting obligation a mandatory task in your domestic legislation?**

2. **Have you identified individual companies that will have to submit reports of HNS contributing cargo to the Government?**

3. **How do you currently, or how do you plan to, identify the individual reporting companies?**

4. **If you have made the rules applicable to the reporting of HNS contributing cargo mandatory in your domestic legislation, are you:**

   a) Using Article 1.4(a) as the basis for your legislation? If so, what does your domestic legislation indicate regarding the definitions of:

      i) "Receiver"

ii) "Principal"

iii) "Agent"

b) Using Article 1.4(b) as the basis for your legislation? If so, kindly provide details of your application of Article 1.4(b).

5. If you have not yet implemented domestic legislation regarding the Convention, what do you intend to do?

a) If decided, and it is not following the definitions of Article 1.4, kindly describe your legislation:

b) If undecided, would you consider using Article 1.4(b) as described in Annex I and summarised below?

i) Identify the Physical Receivers as the only receivers of contributing cargo in your ports and terminals. This means that you do not need to consider the potential relationships between Agents and Principals and other issues related to the location of Principals outside of your own State.

ii) The Physical Receivers may make contractual arrangements with Principals for any required payments to cover potential contributions due to the HNS Fund. States could either regulate this in their domestic law or simply leave this to the parties to agree in their own contracts.

6. **Does your domestic legislation include anything regarding sanctions for not reporting HNS cargo?**

7. **Have you established (or identified) the national authorities responsible for the management of HNS contributing cargo reporting, and have those authorities identified the relevant contacts within local industry?**

8. **What sources of information have you used or will you be using to check the figures provided by the receivers? (e.g. customs administration or data provided by port operations during the relevant year).**

ANNEX III

Questionnaire for those preparing to become Contracting States to the 2010 HNS Protocol

Should you wish to provide additional explanations or documentation to accompany any of your answers, please do so via email when you send the questionnaire back.

State:

1. **Have you planned to make the HNS reporting obligation a mandatory task in your domestic legislation?**

2. **Have you identified individual companies that will have to submit reports of HNS cargo to the Government once the legislation is in force?**

3. **How do you currently, or how do you plan to, identify the individual reporting companies?**

4. **If you are planning to make the rules applicable to the reporting of HNS contributing cargo mandatory in your domestic legislation, will you:**

   a) Use Article 1.4(a) as the basis for your legislation? If so, what will your domestic legislation indicate regarding the definitions of:

      i) "Receiver"

ii) "Principal"

iii) "Agent"

b) Use Article 1.4(b) as the basis for your legislation? If so, kindly provide details of your application of Article 1.4(b).

5. If you have not yet developed domestic legislation regarding the Convention, what do you intend to do?

a) If decided, and it does not follow the definitions of Article 1.4, kindly describe your future legislation:

b) If undecided, would you consider using Article 1.4(b) as described in Annex I of that document and summarised below?

i) Identify the Physical Receivers as the only receivers of contributing cargo in your ports and terminals. This means that you do not need to consider the potential relationships between Agents and Principals and other issues related to the location of Principals outside of your own State.

ii) The Physical Receivers may make contractual arrangements with Principals for any required payments to cover potential contributions due to the HNS Fund. States could either regulate this in their domestic law or simply leave this to the parties to agree in their own contracts.

6. **Will your domestic legislation include anything regarding sanctions for not reporting HNS cargo?**

7. **Have you established (or identified) the national authorities responsible for the management of HNS contributing cargo reporting, and have those authorities identified the relevant contacts within local industry?**

8. **What sources of information have you used or will you be using to check the figures provided by the receivers? (e.g. customs administration or data provided by port operations during the relevant year).**