INTERNATIONAL MARITIME ORGANIZATION

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

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LIST OF ANNEXES

1 INTRODUCTION

1.1 The Legal Committee held its ninety-fourth session at IMO Headquarters from 20 to 24 October 2008, under the chairmanship of Professor Lee-Sik Chai (Republic of Korea).

1.2 The session was attended by delegations from the following Member States:

ALGERIA
ANGOLA
ANTIGUA AND BARBUDA
ARGENTINA
AUSTRALIA
BAHAMAS
BELGIUM
BELIZE
BOLIVIA
BRAZIL
CANADA
CHILE
CHINA
COLOMBIA
COOK ISLANDS
CÔTE D'IVOIRE
CROATIA
CUBA
CYPRUS
DENMARK
DOMINICAN REPUBLIC
ECUADOR
EGYPT
ESTONIA
FINLAND
FRANCE
GERMANY
GHANA
GREECE
HONDURAS
INDIA
INDONESIA
IRAN (ISLAMIC REPUBLIC OF)
IRELAND
ISRAEL
ITALY
JAMAICA
JAPAN
KENYA
KUWAIT
LATVIA
LIBERIA
LIBYAN ARAB JAMAHIRIYA
LITHUANIA
MALAYSIA
MALTA
MARSHALL ISLANDS
MEXICO
MOROCCO
NETHERLANDS
NEW ZEALAND
NIGERIA
NORWAY
PANAMA
PAPUA NEW GUINEA
PERU
PHILIPPINES
POLAND
PORTUGAL
REPUBLIC OF KOREA
ROMANIA
RUSSIAN FEDERATION
SAUDI ARABIA
SINGAPORE
SOUTH AFRICA
SPAIN
SWEDEN
SWITZERLAND
SYRIAN ARAB REPUBLIC
THAILAND
TURKEY
TUVALU
UKRAINE
UNITED KINGDOM
UNITED REPUBLIC OF TANZANIA
UNITED STATES
URUGUAY
VANUATU
VENEZUELA

and the following Associate Member of IMO:

HONG KONG, CHINA

1.3 The session was also attended by representatives from the following United Nations and specialized agencies:

INTERNATIONAL LABOUR ORGANIZATION (ILO)

1.4 The session was also attended by observers from the following intergovernmental organizations:

EUROPEAN COMMISSION (EC)
MARITIME ORGANIZATION FOR WEST AND CENTRAL AFRICA (MOWCA)
INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS (IOPC FUNDS)

and by observers from the following non-governmental organizations in consultative status:

INTERNATIONAL CHAMBER OF SHIPPING (ICS)
INTERNATIONAL UNION OF MARINE INSURANCE (IUMI)
INTERNATIONAL RADIO-MARITIME COMMITTEE (CIRM)
COMITÉ MARITIME INTERNATIONAL (CMI)
BIMCO
INTERNATIONAL ASSOCIATION OF CLASSIFICATION SOCIETIES (IACS)
OIL COMPANIES INTERNATIONAL MARINE FORUM (OCIMF)
INTERNATIONAL FEDERATION OF SHIPMASTERS' ASSOCIATION (IFSMA)
INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO)
THE INTERNATIONAL GROUP OF P & I ASSOCIATIONS (P & I Clubs)
INTERNATIONAL MARITIME RESCUE FEDERATION (IMRF)
INTERNATIONAL SHIP SUPPLIERS ASSOCIATION (ISSA)
CRUISE LINES INTERNATIONAL ASSOCIATION (CLIA)
THE INSTITUTE OF MARINE ENGINEERING, SCIENCE AND TECHNOLOGY (IMarEST)
INTERNATIONAL CHRISTIAN MARITIME ASSOCIATION (ICMA)
THE FEDERATION OF NATIONAL ASSOCIATIONS OF SHIP BROKERS AND AGENTS (FONASBA)
INTERNATIONAL ASSOCIATION OF MARITIME UNIVERSITIES (IAMU)
INTERNATIONAL TRANSPORT WORKERS' FEDERATION (ITF)

The Secretary-General's opening address

1.5 In the absence of the Secretary-General, his opening address was given by Dr. Rosalie Balkin, Director, Legal Affairs and External Relations Division (LED). The full text of the opening address is reproduced in document LEG 94/INF.2.

Chairman's remarks

1.6 The Chairman thanked the Secretary-General, through Dr. Balkin, for his remarks and said that the Committee would bear them in mind during the course of its deliberations, particularly the reference to the importance of widespread implementation of IMO treaties. He also thanked the United Kingdom Government for its generous support with regard to the refurbishment of the IMO Headquarters building.

Adoption of the agenda

1.7 The agenda for the session, as adopted by the Committee, is attached at annex 1.

1.8 A summary of deliberations of the Committee with regard to the various agenda items is set out hereunder.

2 REPORT OF THE SECRETARY-GENERAL ON CREDENTIALS

2.1 The Committee noted the report by the Secretary-General that the credentials of all delegations attending the session were in due and proper form.

3 ELECTION OF OFFICERS

3.1 The Committee re-elected, by acclamation, Professor Lee-Sik Chai (Republic of Korea) as Chairman for 2009. The Committee also re-elected, by acclamation, Mr. Kofi Mbiah (Ghana) and Mr. Walter de Sá Leitão (Brazil) as Vice-Chairmen for 2009.

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

4.1 The Secretariat and the representative of the IOPC Funds introduced document LEG 94/4 containing a draft protocol to the International Convention on Liability and Compensation for Damage in Connection with the carriage of Hazardous and Noxious Substances by Sea, 1996 prepared by the HNS Focus Group and adopted by the fourth session of the 1992 Fund Administrative Council, acting on behalf of the 1992 Fund Assembly.

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

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

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

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

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

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

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

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

Packaged HNS

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

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

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

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

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

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

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

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

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

Contributions to the LNG Account

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

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

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

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

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

4.22 Other questions included:

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

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

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

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

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

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

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

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

- add at the end of paragraph 1*bis*(c), the new sentence set forth at the end of paragraph 4 of document LEG 94/4/2;

- delete the word "national" in paragraph 1*bis*(d).

- In article 16, paragraph 5 (of the Convention), the reference to "article 19 paragraph 1(c)" is replaced with "article 19 paragraph 1(b)";

- In article 17, paragraph 3 and in article 18, paragraph 1 and paragraph 2 (of the Convention), the reference to "article 19 paragraph 1" is replaced with "article 19 paragraph 1 and paragraph 1*bis*";

- In article 17 paragraph 2 (of the Convention), the deletion of the words "or, in respect of cargoes referred to in article 19, paragraph 1(b) discharged";

- In article 19, paragraph 2 (of the Convention), the reference to "paragraph 1 above" is replaced with "paragraph 1 and paragraph 1*bis* above";

- In article 21 (of the Convention), the text of subparagraph 5(b) is replaced with the text in paragraph 17 of LEG 94/4/1;

- In article 21 (of the Convention), the following sentence is added at the end of subparagraph 5(b): "These persons shall be identified in accordance with the national law of the State concerned";

- article 6 (of the draft protocol) replaces the text of article 17, paragraph 2 (of the Convention);

- article 8 (of the draft protocol), replaces the text of article 20, paragraph 1 (of the Convention); and

- article 11 (of the draft protocol) replaces the text of article 23, paragraph 1 (of the Convention).

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

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

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

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

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

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

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

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

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

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

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

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

- the concept of temporary suspension has been employed in other treaty instruments;

- while article 77 of the Vienna Convention on the Law of Treaties, 1969 provides a list of Depositary functions, this was only an indicative list. This article makes it clear that the Parties to a treaty may expressly confer other functions on the Depositary. Since the function to refuse to accept an instrument is not on the indicative list, it was essential for the protocol to provide specific instruction in this regard. However, simply because it was unusual did not make the function unlawful;

- the protocol is not an extension of the 1996 Convention but a free-standing instrument, with its own entry-into-force provisions. Accordingly, any State that has not ratified the protocol would not be eligible to receive compensation under it;

- pursuant to article 16, paragraph 8, a State which has expressed its consent to be bound by the 1996 HNS Convention shall be deemed to have withdrawn this consent on the date on which it has signed the protocol or deposited an instrument of ratification, acceptance, approval of or accession. Based on the present status of ratifications and of the submissions of information on contributing cargoes, it would be extremely unlikely that the 1996 HNS Convention would enter into force, hence the need to join the protocol; and

- the Depositary would not question the validity of the data received from a State but would simply accept it at face value.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Title: Approved

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

Article 1: **Definitions**: Approved.

Article 2: **General Obligations**: Approved.

Article 3.1: Approval of updated definitions of hazardous and noxious substances (HNS) in article 1, paragraph 5(a) (i), (ii), (iii), (v) and (vii) of the Convention, subject to replacement of the words "the International Maritime Dangerous Goods Code, as amended", (where secondly appearing in subparagraph 5(a)(vii)), with the words "the International Maritime Dangerous Goods Code as in effect in 1996".

Article 3.2: Approval of new paragraphs *5bis* and 5*ter* to article 1 of the Convention, containing definitions of "Bulk HNS" and "Packaged HNS".

Article 3.3: Approval of the replacement of article 1, paragraph 10, of the Convention by a new text relating to contributing cargo.

Article 4: Approval of the deletion of article 5, paragraph 5, of the Convention.

Article 5: Approval of the replacement of article 9, paragraph 1, of the Convention by an alternative text.

Article 6: Approval of the replacement of article 17, paragraph 2, of the Convention by an alternative text.

Article 7: Approval of the replacement of the text of this article by the draft amendments to article 19 of the Convention (*Annual contributions to separate accounts*), with certain changes, as set forth in document LEG 94/4/1, paragraphs 15.1, 16 and 17. Also approved were consequential amendments to article 16, paragraph 5; article 17, paragraphs 2 and 3; article 18, paragraphs 1 and 2; article 19, paragraphs 1 and 2; and article 21 of the 1996 HNS Convention.

Article 8: Approval of the replacement of article 20, paragraph 1, of the Convention by an alternative text.

Article 9.1: Approval of the replacement of article 21, paragraph 4, of the Convention by an alternative text.

Article 9.2: Approval of the replacement of article 21, paragraph 5(b), of the Convention by an alternative text.

Article 10: Approval of an additional new article 21*bis,* of the Convention, entitled "Non-reporting".

Article 11: Approval of the replacement of article 23, paragraph 1, of the Convention by an alternative text.

Article 12: Approval of the deletion of article 43 of the Convention.

Article 13: Approval of the replacement of the model certificate annexed to the Convention by the model annexed to the draft protocol.

Article 14: **Interpretation and application:** Approved**.**

Article 15: Approval of the insertion of new article 44*bis,* of the Convention, relating to the final clauses of the 1996 Convention, as amended by the draft protocol.

Article 16: **Signature, ratification, acceptance, approval and accession:** Approved.

Article 17: **Entry into Force:** Approved**.**

Article 18: **Revision and Amendment:** Approved.

Article 19: **Amendment of limits:** Approved**.**

Article 20: **Denunciation:** Approved.

Article 21: **Extraordinary sessions of the Assembly:** Approved.

Article 22: **Cessation:** Approved.

Article 23: **Winding-up of the HNS Fund:** Approved.

Article 24: **Depositary:** Approved.

Article 25: **Languages:** Approved.

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

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

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

Recommendation for the convening of a diplomatic conference

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

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

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

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

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

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

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

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

- the Council should be informed, by means of the Committee's report, of the unanimous wish of delegations to see the HNS Convention enter into force at the earliest possible time;

- there was, in principle, general agreement that the best way to achieve this was to adopt an HNS protocol as soon as possible;

- while many delegations were satisfied with the text of the protocol as amended at this session, many other delegations considered that the Committee needed more time for further consideration of the text at its next session;

- to facilitate this consideration, the Secretariat would prepare a clean version of the protocol, which incorporated all the amendments thus far agreed at this session, together with a consolidated version of the 1996 Convention and the prospective protocol; and

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

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

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

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

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

5 PROVISION OF FINANCIAL SECURITY

(i) Progress report on the work of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers

5.1 The Director, LED, introduced documents LEG 94/5 and LEG 94/5/1, containing the reports of the seventh and eighth sessions of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers (Joint Working Group or Group), both held at the Headquarters of the International Labour Organization (ILO), in Geneva, from 4 to 7 February 2008 and from 21 to 24 July 2008, respectively. As for the previous sessions, the Group was chaired by Mr. Jean-Marc Schindler (France).

5.2 She recalled that the Group had been established in 1999, under the provisions of the Agreement of Co-operation between IMO and ILO, in order to ensure, through the operation of appropriate international instruments, the rights of seafarers when they are abandoned by the owners or operators of ships on which they have been serving, often in foreign ports far from their countries of origin.

5.3 The Group's major achievement so far had been the development of two resolutions and related Guidelines, one on Provision of financial security in case of abandonment of seafarers, the other on Shipowners' responsibilities in respect of contractual claims for personal injury to or death of seafarers, adopted by the IMO Assembly in November 2001 (resolutions A.930(22) and A.931(22)) and by the Governing Body of ILO also in November 2001.

5.4 Both the resolutions and associated Guidelines, the aim of which was to provide seafarers and their families with a level of protection that has hitherto been lacking in respect of two fundamental areas of seafarer welfare, took effect on 1 January 2002. However, while the vast majority of seafarers work under fair conditions and have the support of their employers when

problems occur on board ship, some were still subject to harsh treatment and unreasonable conditions. It was, therefore, for organizations such as ILO and IMO to look for appropriate standards to safeguard their legitimate interests.

5.5 Although the 2006 ILO Maritime Labour Convention (MLC, 2006) went some way towards providing a solution to many of the issues before the Joint Working Group, the Group had continued to examine the issues of financial security for seafarers and their dependants with regard to compensation in cases of personal injury, death and abandonment, taking into account the relevant IMO and ILO instruments, including the MLC, 2006, and to monitor the implementation of the Guidelines adopted by these two resolutions.

5.6 The Group also considered the development of longer-term sustainable solutions to address the problem, with a view to making appropriate recommendations to the IMO Legal Committee and the ILO Governing Body.

5.7 At its seventh session, the Joint Working Group completed an assessment of the Guidelines and identified significant gaps in the MLC, 2006, with regard to the protection of abandoned seafarers. The Group also agreed to develop a mandatory text leaving the decision as to the appropriate legal framework for the instrument for later consideration.

5.8 At the eighth session, the Government representatives met separately to discuss the issue of abandonment of seafarers, on the basis of a joint submission by the Social Partners, and reported their recommendations to the Joint Working Group. These would be further discussed at the Group's ninth session. On the issue of claims for personal injury and death, the positions of the Social Partners had been quite divergent. While a majority of Governments had expressed support for the development of a mandatory instrument to tackle this issue, it was emphasized that the Social Partners needed to make every effort to bridge existing differences. The Governments had agreed to work intersessionally, in consultation with the Joint Secretariat, to help resolve the critical issue regarding insurance. The Social Partners had also agreed to continue to explore alternatives within the commercial insurance market and other forms of financial security.

5.9 The Joint Working Group had adopted draft revised terms of reference, according to which, at its next session, it should complete its discussions; proceed with the development of principles to facilitate the drafting of mandatory provisions for inclusion in an appropriate instrument or instruments; and formulate appropriate recommendations to the IMO Legal Committee and the ILO Governing Body.

5.10 The ninth session of the Joint Working Group had been scheduled to take place from 2 to 6 March 2009, at the Headquarters of ILO, in Geneva.

5.11 The representative of ILO informed the Committee that the ILO Governing Body would have before it, at its 303rd Session in November 2008, the two reports of the Joint Working Group and was expected to take a decision on the holding of its ninth session from 2 to 6 March 2009 and on the revised the terms of reference of the Joint Working Group.

5.12 She referred to the progress made by the Social Partners on the content of a mandatory instrument on financial security for abandonment and that of the Government Group at the eighth session, as a result of which there was now a good basis for moving forward on this question. On the issue of financial security for claims for death and injury, she stated that more work needed to be done both by the Social Partners and the Governments. She encouraged informal and intersessional consultations on this issue, to enable a concrete outcome at the next meeting of the Joint Working Group. She drew the attention of the Committee to the significant

information provided by the International Group of P & I Associations (P & I Clubs) at the eighth meeting of the Group. This related to the decision taken to change two of the Clubs' rules as of 20 February 2009, namely, the "pay to be paid" principle and the retrospective cancellation of coverage. She was hopeful that, with the support of the Legal Committee and the ILO Governing Body, it would be possible to advance the work on these two important subjects at the Group's next session.

5.13 In introducing document LEG 94/5/2 on behalf of the co-sponsors, the delegation of the United States thanked the Joint Secretariat for coordinating the Joint Working Group's seventh and eighth sessions and its Chairman, Mr. J.-M. Schindler (France) for his excellent leadership, commending him and the Group members on the substantial progress achieved during his tenure.

5.14 The delegation noted the considerable progress achieved during the year and stated that it remained committed to ensuring that adequate solutions to the problems of abandonment of seafarers and claims for personal injury and death are put into effect as quickly as possible.

5.15 Document LEG 94/5/2 was intended to increase awareness of the seriousness of the problems of abandonment of seafarers and crew claims regarding death and personal injury, and to encourage the members of the Committee to continue to support the development of long-term solutions to these problems. While differing views remained on some minor, technical issues, the delegation was confident that the Social Partners and Governments would be able to find an effective solution to these issues. The ninth session of the Joint Working Group was expected to finalize a notional text and make recommendations to both Organizations to negotiate a mandatory binding instrument.

5.16 The delegation reiterated that the practice of abandonment is unacceptable, inhumane, and detrimental to the global interests of recruiting, training, and retaining qualified seafarers. Despite the adoption of the voluntary Guidelines on provision of financial security in case of abandonment of seafarers and other past efforts to address this problem, seafarers continued to be abandoned in foreign ports around the world. Time had proven that the voluntary Guidelines were an insufficient solution and that mandatory measures were needed urgently.

5.17 With respect to the issue of crew claims, the delegation noted its commitment to develop a binding instrument addressing those problems as well. He commented that Governments had separate and distinct interests that were gravely impacted in cases of abandonment and where claims for personal injury and death were not properly addressed, and it was, therefore, critical that they supported the development of a binding solution in order to ensure that their interests were adequately communicated and addressed.

5.18 The delegation was appreciative of the level of commitment and dedication demonstrated by both IMO and ILO, the participating Governments, and the representatives for seafarer and shipowner interests and looked forward to continuing this important work at the Joint Working Group's ninth session.

5.19 Many delegations that spoke stated their support for the document, noting that the practice by some shipowners to abandon seafarers as an economic choice was unacceptable and had a detrimental social impact. It was also unacceptable that Governments were left with the responsibility to resolve the problem, not the shipowner who actually abandoned the seafarers.

5.20 Some delegations expressed disappointment at the outcome of the Group's last session and, to ensure a positive outcome at the next session, it was suggested that the members of the Joint Working Group hold consultations in advance of the session.

5.21 There was unanimity among the large number of delegations which spoke that the Joint Working Group should continue its work and develop draft mandatory provisions on abandonment of seafarers. The form of such an instrument would be decided at a later stage, although one suggestion was that it be included in the MLC, 2006. Support was expressed for the content of document LEG 94/5/2 as well as appreciation to the delegation of the United States for its presentation on abandonment of seafarers the previous day.

5.22 It was emphasized that abandonment was a real problem, with humanitarian dimensions, and could become more frequent as a consequence of the negative impact on the shipping industry of the global financial crisis. It was important to find a solution, not only for humanitarian reasons, but also for the efficiency of the industry as a whole. The Social Partners were encouraged to reach agreement on the form of the security system.

5.23 Some delegations stressed that it would be essential to consider the draft instrument before taking a final decision on the development of a mandatory instrument. Governments were invited to support both mandatory and non-mandatory instruments to eradicate the abandonment malpractice.

5.24 Concern was expressed about the lack of concrete proposals on personal injury to and death of seafarers. It was noted that those seafarer-supplying States, in which it was the practice to delay payment of wages for an entire year, should change this practice.

5.25 Noting that 2009 would mark the tenth anniversary of the commencement of the Joint IMO/ILO *Ad Hoc* Expert Working Group, the observer delegation of the International Transport Federation (ITF) stated that it fully supported the joint document presented by the United States and that it was encouraged by the overwhelming support from so many Governments for a mandatory instrument and would continue to work towards a common solution. It welcomed the forthcoming changes to the P & I Clubs' Rules as set out in paragraph 89 of document LEG 94/5/1, as more fully explained by the representative of the observer delegation of the P & I Clubs, whose statement is attached at annex 4.

5.26 The observer delegation of the ICS stated that if a ship-owning company unilaterally terminates a contract of employment with a seafarer in a foreign country, it was obligated to repatriate him and to pay the seafarer's maintenance and other costs consequent on the abandonment. The problem was how to secure seafarer claims for abandonment and how to insure them and fit them within the mechanisms of the MLC, 2006. If States wished to introduce a system of State certification, this would create additional administrative problems. Governments should therefore exercise caution before deciding to establish such a system. The statement made by ICS is attached at annex 5.

5.27 In response to the question as to whether it was possible to amend the MLC, 2006, before its entry into force to incorporate mandatory provisions on abandonment, the observer delegation of ILO stated that that there was no legal obstacle under international treaty law to do so and, in fact, this had been done by ILO in a few cases where the objective was to address impediments to ratification. The question was more one of political expediency and timing. She hoped that there was sufficient momentum for the early entry into force of the MLC, 2006, and, with the timetable in mind, the question could be a theoretical one. She emphasized that it was more important to get consensus on the content to be included in the mandatory instrument. Once this was done it would be easier to find the most appropriate home for it.

5.28 The Legal Committee took note of the reports of the seventh and eighth sessions of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers, as contained in documents LEG 94/5 and LEG 94/5/1. In particular, the Committee unanimously:

- noted and approved the revised terms of reference for the Group, as contained in paragraph 125 of the annex to document LEG 94/5/1 and attached at annex 6 to this report;

- urged the Joint Working Group to complete its discussions at its next session, keeping in mind the debates at this session; and

- encouraged the Group to formulate appropriate recommendations to the Committee and to submit the outcome of its work to the ninety-fifth session.

5.29 The Committee thanked the Joint Working Group, and in particular its Chairman, Mr. Jean-Marc Schindler (France), for the excellent work produced so far.

(ii) Follow-up on resolutions adopted by the International Conference on the Removal of Wrecks, 2007: development of a single model compulsory insurance certificate

5.30 In introducing document LEG 94/5/3, the Director, LED, made reference to document LEG 94/11/Corr.1, which corrected the agenda title and sub-title, as well as the symbol of that document, originally issued as LEG 94/11.

5.31 She recalled that the resolution on compulsory insurance certificates under existing maritime liability conventions, adopted by the International Conference on the Removal of Wrecks, 2007, invites the Committee to develop a model for a single insurance certificate which may be issued by States Parties in respect of ships, under the relevant IMO liability and compensation conventions.

5.32 She recalled further that the resolution invites IMO to follow the same procedure as that adopted in relation to the reciprocal recognition of certificates by States Parties to the 1969 and 1992 Civil Liability Conventions. She noted, in this connection, that for ease of reference, circular LEG/Circ.1 (dated 27 April 1998) was attached as annex 2 to the document

5.33 The Director explained that annex 1 of the document under consideration contained a draft single model insurance certificate prepared by the Secretariat, at the request of the Committee, at its last session. The model combines certificates issued under article VII of the CLC 1969, article 7 of the CLC 1992, article 12 of the HNS 1996, article 7 of the Bunkers Convention 2001 and article 12 of the Nairobi Wreck Removal Convention.

5.34 The model certificate did not, however, include the 1976 Athens Protocol, due to its different nature as compared with the other liability conventions, and the IMO Reservation and Guidelines for the implementation of the Athens Convention, which included a number of specific exclusions in the Protocol, to reflect existing standard market conditions.

5.35 She suggested that the Committee should consider whether the new model certificate should include the IMO registered owner identification number and the IMO company identification number.

5.36 She noted the Secretariat's view that, as each certificate was an integral part of the treaty in question, the single insurance certificate could only become binding in terms of treaty law if all the treaties referred to in it were formally amended, so as to include the single insurance certificate model instead of the original models regulated in each of them. Accordingly, the alternative suggested by the Wreck Removal Conference – recommending the implementation of the single insurance certificate by the same procedure as that adopted for the recognition of the 1969 and 1992 CLC insurance certificates – could only operate as a recommended alternative to the models regulated in the treaties referred to.

5.37 Finally, the Director suggested that the Committee should also consider, *inter alia*, the following practical issues:

- consequences of the adoption of future amendments to the treaties concerned, which may affect the contents of the single insurance model certificate;
- different dates of expiration of insurance cover depending on the treaty; and
- whether the single insurance certificate could only be issued by a Party to all treaties included in it.

5.38 In introducing document LEG 94/5/4, the observer delegation of ICS, also on behalf of the P & I Clubs, noted the industry's eagerness to cut down administrative burdens and thanked the Secretariat for document LEG 94/5/3. However, important aspects needed to be examined in developing a solution.

5.39 The delegation agreed that the basis for a single certificate should be an agreement adopted by an Assembly resolution. However, in the event that not all States which are requested to issue the certificate are Parties to all the Conventions, the reciprocal recognition of such a certificate might become an issue which could be only resolved by means of a common understanding.

5.40 It would be useful if the solution could include the Athens Convention, together with the wording of the Reservation and Guidelines related thereto. It should also address the practical issue of the interface between the proposed model single insurance certificate and the electronic databases to maintain records of certificates. Finally, it was suggested that work on this matter could progress intersessionally.

5.41 There was general consensus that a single insurance certificate would be desirable, since it could lead to a reduction in the administrative burden of States and shipowners/insurers when compared with the system prescribed by the Conventions.

5.42 It was noted, however, that there would be several legal and practical issues to address and resolve, as highlighted in both documents under consideration. The Committee considered the possibility of establishing a working group at its next session. In this connection, some delegations noted that the Committee, at that session, would have two priority items to consider, namely the revision of the HNS Convention and abandonment of seafarers, and that, therefore, the establishment of a working group might not be a good idea.

5.43 This view was shared by other delegations, which commented that it would be premature to establish a working group at the next session in view of the fact that not all of the Conventions covered in the prospective model single certificate had entered into force.

5.44 The Committee decided instead to establish an informal correspondence group in order to progress intersessionally on the legal as well as on the technical and practical aspects of the consolidated model certificate, including port State control and inspection.

5.45 The delegation of the Netherlands accepted to act as coordinator of the correspondence group and to submit the outcome of its consultations with other interested delegations to the Committee's ninety-fifth session. In so doing, this delegation recalled that it had promoted the adoption of that particular resolution at the Nairobi Conference.

5.46 Members and observer delegations were invited to contact the delegation of the Netherlands, and in particular Mr. Jan de Boer, by e-mail at Jan.de.Boer@minvenw.nl.

5.47 The Committee agreed to retain this item on its agenda for its next session, but with low priority, and noted that any decision whether to pursue the issue of the single insurance certificate would be taken on the basis of the work produced intersessionally by the correspondence group.

6 FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

6.1 The Director, LED, introduced the information provided in document LEG 94/6. In this regard, she recalled that the Guidelines on fair treatment of seafarers in the event of a maritime accident were adopted by the Committee at its ninety-first session on 27 April 2006 in resolution LEG.3(91), and that they had also been adopted by the ILO Governing Body at its 296th Session on 12 June 2006, and subsequently circulated by IMO as Circular letter No.2711 dated 26 June 2006. Member Governments were invited to implement the Guidelines as from 1 July 2006.

6.2 She further recalled that, at its ninety-third session, the Committee had "reiterated its concern regarding the fair treatment of seafarers and agreed that it would be appropriate to gain experience with the current Guidelines before considering any revisions". The Committee had agreed at that time that the Joint IMO/ILO *Ad Hoc* Expert Working Group on Fair Treatment of Seafarers in the Event of a Maritime Accident (Joint Working Group) should be reconvened to monitor the implementation of the Guidelines. The Committee had requested the IMO and ILO Secretariats to consult with a view to determining an appropriate time and place for the next meeting of the Joint Working Group.

6.3 The Committee was informed that the Joint IMO/ILO Secretariat had issued Circular letter No.2825 on 7 November 2007, requesting that any information concerning the mistreatment of seafarers in the event of a maritime accident be transmitted to IMO or to ILO. Any information received was to be provided to the Joint Working Group for its consideration. Thirteen responses had been received (from the Bahamas, Bulgaria, Estonia, Finland, Germany, Honduras, Mauritius, Mexico, Morocco, Panama, Qatar, Samoa and Spain), and all 13 stated that they had not received any reports of mistreatment.

6.4 The Committee was further informed that the IMO and ILO Secretariats had consulted with each other and with the Social Partners on reconvening the Joint Working Group. No specific time and place have been agreed for holding the next meeting.

6.5 The Committee also noted the information provided in document LEG 94/6/1 relating to the adoption by the Maritime Safety Committee, at its eighty-fourth session (in May 2008), of amendments to the SOLAS Convention which include a provision on the right of a seafarer from whom evidence is sought in a casualty investigation to "be informed, and allowed access to legal advice, regarding" the risk of self-incrimination. This decision was taken in the context of

the MSC approval of the Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (Casualty Investigation Code). The MSC agreed that the Casualty Investigation Code and the amendments to SOLAS chapter XI-1 should be deemed to have been accepted on 1 July 2009 and take effect on 1 January 2010. The text of the adopted amendment was provided in document LEG 94/6/1.

6.6 The delegation of India made a statement concerning the detention of the master and chief officer of the **Hebei Spirit** in the Republic of Korea. The statement is set out in annex 7 to this report. The delegation of China also made a statement concerning developments relating to the **Hebei Spirit**. The statement is set out in annex 8. A number of other delegations said they shared the concern regarding the circumstances surrounding the **Hebei Spirit** on the grounds that, in their view, the treatment of the seafarers involved was not consistent with the principles set out in the IMO/ILO Guidelines on fair treatment of seafarers in the event of a maritime accident.

6.7 In reply, the delegation of the Republic of Korea made a statement regarding the current status of the judicial process relating to the **Hebei Spirit**. The statement is set out in annex 9. The delegation of Korea also suggested there may be a need to clarify certain aspects of the IMO/ILO Guidelines. A number of delegations expressed their thanks to the delegation of Korea for this explanation and said that they hoped that the matter would be resolved soon to enable the two seafarers to return home.

6.8 The delegation of the Islamic Republic of Iran made a statement concerning shore-leave restrictions placed on seafarers. The statement is set out in annex 10.

6.9 The delegation of the United Kingdom made a statement expressing its concern about the trend towards detention of seafarers and said accidental pollution should not be considered to be a crime. The statement is set out in annex 11. A number of delegations supported this statement.

6.10 The observer delegation of the Comité Maritime International (CMI) made a statement concerning the apparent lack of application of the IMO/ILO Guidelines in recent incidents. The statement is set out in annex 12. The CMI offered to present a document on the fair treatment of seafarers to the Committee's ninety-fifth session.

6.11 The observer delegation of the ICS, on behalf of a number of other observer organizations, made a statement concerning the situation surrounding the **Hebei Spirit** and its general impact on the maritime industry. The statement is set out in annex 13.

6.12 The observer delegation of the International Transport Federation (ITF) made a statement regarding the treatment of seafarers from the **Hebei Spirit** and the overall impact of the criminalization of seafarers. The statement is set out in annex 14.

6.13 The observer delegation of the International Association of Maritime Universities (IAMU) expressed concern on behalf of students attending maritime training institutions. He noted that they might well be deterred from pursuing a career as seafarers because of such cases.

6.14 The observer delegation of the International Federation of Shipmasters' Associations (IFSMA) made a statement concerning an incident involving a collision between a commercial ship and an Egyptian naval vessel, which resulted in the continued imprisonment of the master and detention of the crew. The statement is set out in annex 15. In reply, the delegation of Egypt said the incident was under investigation by a special court, and communication with other authorities was being conducted by diplomatic means.

6.15 A number of delegations expressed agreement with the Secretary-General's opening remarks in which he said "there is a crying need for proper and widespread implementation of the Guidelines on fair treatment, not only from the perspective of individual seafarers but also in view of the shipping industry's increasingly acute problem of manpower recruitment and retention and such treatment could have an adverse impact on recruitment of seafarers". Concern was expressed that mistreatment of seafarers could have a negative impact particularly on efforts to recruit young persons to a seafaring life.

6.16 It was noted that the primary purpose of an independent casualty investigation was to determine the cause of the accident in order to prevent its recurrence and should not be confused with a criminal investigation.

6.17 Regarding the future work of the Joint Working Group, one delegation expressed the view that, in the absence of any new submissions or proposals on this subject there was no urgency for reconvening the Joint Working Group and instead underlined the importance of continuing to monitor and gain experience in the implementation of the Guidelines. Other delegations, however, said they felt it would be useful for the Joint Working Group to be reconvened for the purpose of continuing to monitor application of the Guidelines. In this connection the Committee urged States to provide the information as requested by Circular letter No.2825.

6.18 States were urged to give the Guidelines and the Casualty Investigation Code full and complete effect following a maritime accident.

6.19 The Committee requested the Secretariat to continue to consult with the ILO Secretariat and representatives of the Social Partners for the purpose of determining when it would be most appropriate for the Joint Working Group; and to continue to gather information pursuant to Circular letter No.2825, concerning cases of mistreatment of seafarers in the event of a maritime accident. In this regard, the Committee accepted the offer of the CMI to submit a document on this subject to its next session.

7 MATTERS ARISING FROM THE TWENTY-FOURTH EXTRAORDINARY SESSION OF THE COUNCIL, THE TWENTY-FIFTH REGULAR SESSION OF THE ASSEMBLY AND THE HUNDREDTH REGULAR SESSION OF THE COUNCIL

7.1 The Committee took note of the information provided by the Secretariat in document LEG 94/7 on matters arising from the twenty-fourth extraordinary session of the Council, the twenty-fifth regular session of the Assembly and the hundredth regular session of the Council.

8 TECHNICAL CO-OPERATION ACTIVITIES RELATED TO MARITIME LEGISLATION

8.1 The Director, LED, introduced document LEG 94/8, referring in particular to the Legal Committee's outputs for the 2008-2009 biennium, and to the options open to the Committee to consider how best to help IMO identify a pool of qualified legal experts, available to undertake technical co-operation missions to assist developing countries in the area of maritime legislation.

8.2 The Director, Technical Co-operation Division (TCD), introduced document LEG 94/8/1 referring, in particular, to the measures being taken to expand the pool of experts through enhancement of capacity-building, in particular, by establishing a roster of all IMLI and WMU graduates, and sending them on missions with experts to enable them to gain important experience.

8.3 The Director, TCD, also made the following points:

- IMO has continued to finance fellowships for IMLI students;
- many countries were being helped with developing maritime legislation, but as such missions were normally limited to 7 to 10 days for cost reasons, countries could help by mobilizing national legal resources, including IMLI graduates, to work with consultants;
- the Integrated Technical Co-operation Programme (ITCP) was designed to enhance capacity for implementing IMO rules and standards. The Committee has established a framework of major areas of concern in the field of maritime legislation as a base for developing countries to identify their specific needs, and this will guide IMO in developing the ITCP for 2010-2011; and
- in order to demonstrate that technical co-operation acted as a catalyst for change, an Impact Assessment Exercise (IAE) of the ITCP has been carried out, including maritime legislation, and this was submitted to TC 58 in June 2008. Any comments by Member States will be discussed at TC 59 in June 2009.

8.4 The delegation of Bolivia, introducing document LEG 94/8/2, described action taken by the Bolivian Maritime Administration to implement international and regional maritime treaties and agreements, and thanked IMO for its technical help in this regard. IMO was requested to provide technical co-operation for drafting a new Navigation Act, and to facilitate the acceptance of requests by Bolivian candidates for places at WMU and IMLI.

8.5 A number of delegations gratefully acknowledged the technical assistance being given to IMO Member States, especially in the field of implementation of maritime conventions, and the benefits gained by students at IMLI and WMU. Support was given to the requests made in the Bolivian document. The delegation of Italy indicated that two Bolivian students would be attending the course at the Institute in Genoa later in 2008.

8.6 The Committee noted the recommendations in paragraph 3 of document LEG 94/8 and in paragraph 8 of document LEG 94/8/1.

9 REVIEW OF THE STATUS OF CONVENTIONS AND OTHER TREATY INSTRUMENTS ADOPTED AS A RESULT OF THE WORK OF THE LEGAL COMMITTEE

9.1 The Secretariat introduced documents LEG 94/9, LEG 94/9/Add.1 and LEG 94/WP.1, containing information on the status of conventions and other treaty instruments adopted as a result of the work of the Legal Committee.

9.2 The Committee noted that the annex to document LEG 94/9 reported on the developments regarding these instruments from 19 October 2007 to 15 August 2008, and that this information had been further updated to 17 October 2008 in document LEG 94/WP.1.

9.3 The Committee noted that document LEG 94/9/Add.1 commented on the current status of certain treaties adopted as a result of the work of the Legal Committee, which are not yet in force, and reported on initiatives by the International Association of Ports and Harbors (IAPH) and by the ICS in conjunction with the International Shipping Federation (ISF).

9.4 The delegation of the Russian Federation informed the Committee regarding its progress towards ratification of the 2001 Bunkers Convention which would be considered by its Parliament in November 2008. It hoped to be able to submit an instrument of ratification in 2009, subject to promulgation of internal regulations.

9.5 The delegation of China informed the Committee that it hoped to deposit an instrument of accession to the 2001 Bunkers Convention before the Convention enters into force on 21 November 2008.

9.6 The delegation of Germany informed the Committee that its Government had decided to sign the Nairobi International Convention on the Removal of Wrecks, 2007, in the near future.

9.7 The delegation of Indonesia informed the Committee that it had made progress on adoption of a new national maritime law and this would accelerate ratification of IMO instruments including Annex VI of MARPOL.

9.8 The delegation of the Netherlands informed the Committee that it too would be signing the Nairobi International Convention on the Removal of Wrecks, 2007, in the near future.

9.9 The delegation of the Islamic Republic of Iran informed the Committee that it had recently deposited instruments to become Party to the CLC 1992 and would soon be depositing an instrument to become a Party to the 1992 Fund Protocol and MARPOL Annex VI. Also, progress was being made towards ratification of the Nairobi International Convention on the Removal of Wrecks, 2007.

10 WORK PROGRAMME

Guidelines on methods of work

10.1 The Committee recalled that, at its ninety-seventh session, the Council had agreed that it would be appropriate and beneficial that the Legal Committee, taking into consideration its differing needs, should harmonize its work methods with those of the Maritime Safety Committee (MSC) and the Marine Environment Protection Committee (MEPC). The Committee also recalled that, at its ninety-third session, it had requested an Informal Working Group, under the chairmanship of Ms Birgit Olsen (Denmark), to consider what provisions of the MSC-MEPC guidelines on the methods of work might appropriately be incorporated into the Legal Committee's guidelines on methods of work. At that time, the Committee had agreed that the Group's recommendations should be presented to the present session of the Committee for its consideration.

10.2 In commenting on the Working Group's recommendations, as contained in the annex to document LEG 94/10, a number of delegations expressed satisfaction with the proposals and said it was essential that the Committee establish working methods which were harmonized with those of other IMO bodies.

10.3 Taking into account the fact that the text as presented in the document would require editorial adjustments (such as renumbering) and that some delegations expressed the wish to have a chance to consider the draft in more detail, the Committee requested the Secretariat to prepare a clean text for the next session, at which time the Committee intended to take a final decision on adoption of new guidelines on its methods of work.

11 ANY OTHER BUSINESS

International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001

(a) Information regarding fuel oil and other oil spill incidents exceeding the limits of international treaties

11(a).1 The delegation of Japan introduced document LEG 94/11/1 proposing that the IMO Secretariat should collect information on incidents of fuel oil spills that exceeded the limits of the shipowner's liability limitation under the Bunkers Convention and other international conventions. The delegation informed the Committee that the proposal should be expanded to include not only fuel oil spill incidents covered by the Convention, but also spills covered by other treaties.

11(a).2 One delegation referred to the usefulness of collecting this information on the basis of its experience of incidents that had exceeded the limits imposed by the LLMC. In those cases such incidents had been fully covered by national law establishing higher limits than those regulated in the treaty. This solution had been made possible through the exclusion of the treaty compensation limits by operation of the reservation allowed by article 18, paragraph 1. In accordance with this provision, States Parties can exclude from the Convention claims referred to in article 2 paragraphs 1(d) and 1(c), namely, claims in respect of the raising, removal, destruction, and rendering harmless, of sunk, wrecked, or abandoned ships, including anything that is, or has been, on board the ship.

11(a).3 It would be possible to include in this category bunker oil emitted during clean-up, or discharge of bunker oil remaining in a wreck, as well as the removal of the wreck itself. The delegation noted that, under such circumstances, claims exceeding compulsory insurance limits imposed by the Bunkers Convention, by reference to LLMC limits, would have to be covered by additional P & I insurance. The delegation suggested that the information requested in document LEG 94/11/1 should also indicate the cases in which, by operation of similar reservations, the incident had been covered by additional insurance up to the limits established by national legislation.

11(a).4 Another delegation suggested that it might also be useful to obtain information regarding claims that fell below the limits in addition to those that were above.

11(a).5 The Secretariat noted that, following consultations within the Organization, it had concluded that it did not have the means to perform the task of collecting, analysing and distributing such information. As a regulatory body, it was not involved in the processing of claims and that, consequently, it might be better to seek this information from other entities, perhaps the P & I Clubs.

11(a).6 The observer delegation of the P & I Clubs expressed its readiness to assist with regard to the possibility of providing the information required, in consultation with other organizations such as the International Tanker Owners Pollution Federation Ltd. (ITOPF).

11(a).7 The Committee noted this proposal with thanks.

(b) Issuing of insurance certificates regulated in the Bunkers Convention

11(b).1 The observer delegation of the P & I Clubs introduced document LEG 94/11/2, submitted by the P & I Clubs and the ICS, containing information on the issuing of compulsory insurance certificates by States Parties to the Bunkers Convention to ships flying the flag of non-Party States. The delegation reported that, while as at August 2008, no Party was ready to issue such certificates, the situation had changed, thanks to the co-operation of several States. He also referred to the increasing number of certificates that would have to be issued on expiration of the present cover on 20 February 2009, and requested States Parties to inform the delegation if they would not be prepared to issue certificates to ships calling at one of their ports or terminals. He expressed the hope that, by then, more States would have become Parties to the Bunkers Convention and would be in a position to issue certificates, not only in connection with their own ships, but also in connection with ships flying the flag of non-Party States. He reminded the Committee of the advantages of issuing certificates on the strength of electronic blue cards.

11(b).2 Several States Parties to the Bunkers Convention indicated their willingness to issue certificates against the presentation of blue cards, including electronic cards, and also for the period between the entry into force of the Bunkers Convention and 20 February 2009. One State Party indicated that it was reviewing its policy in this regard as it had doubts about whether it should issue such certificates to ships on the Paris MOU Port State Control black or grey list.

11(b).3 The Committee noted with thanks the information provided and thanked those State Parties/Governments/Administrations which were willing to assist non-Party States with the issue of certificates.

(c) Implementation of the Bunkers Convention and bareboat registration

11(c).1 The delegation of the Marshall Islands requested the views of the Committee in connection with two issues, namely:

- insurance certificates for bareboat charter registered vessels, which were issued by the Marshall Islands as the flag State and not by the State of the underlying registry; and

- the legal status of offshore drilling units, or MODUs, bearing in mind that the Bunkers Convention does not discriminate between propelled and non-propelled ships and defines a ship as being any type of seagoing vessel and seaborne craft of any type whatsoever. In view of the definition of bunker oil contained in article 1.5, it would appear that MODUs and other non-propelled units which use hydrocarbon mineral oil, including lubricating oil, for the operation of the ship, should be included within the scope of the Convention.

11(c).2 While some delegations supported the views of the Marshall Islands on both issues, other delegations noted that their legislation provided for the State of the underlying registry rather than the flag State to issue certificates attesting compulsory insurance, not only in connection with the Bunkers Convention, but also in connection with the Civil Liability Convention.

11(c).3 The Committee noted that both issues raised complex questions of law and, accordingly, suggested that any further consideration would require submission of documents.

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ANNEX 1

AGENDA FOR THE NINETY-FOURTH SESSION

Opening of the session

1 Adoption of the agenda

2 Report of the Secretary-General on credentials

3 Election of officers

4 Monitoring the implementation of the HNS Convention: development of a possible draft protocol to the Convention

5 Provision of financial security:

(i) progress report on the work of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers; and

(ii) follow-up on resolutions adopted by the International Conference on the Removal of Wrecks, 2007: development of a single model compulsory insurance certificate

6 Fair treatment of seafarers in the event of a maritime accident

7 Matters arising from the twenty-fourth extraordinary session of the Council, the twenty-fifth regular session of the Assembly and the hundredth regular session of the Council

8 Technical co-operation activities related to maritime legislation

9 Review of the status of conventions and other treaty instruments adopted as a result of the work of the Legal Committee

10 Work programme

11 Any other business

- Single model insurance certificates under existing IMO maritime liability conventions

- Bunker Oil Pollution Incidents

- Entry into force of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001

12 Report of the Committee

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ANNEX 2

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

Text of the draft protocol

DRAFT PROTOCOL OF [20..] TO AMEND THE INTERNATIONAL CONVENTION ON LIABILITY AND COMPENSATION FOR DAMAGE IN CONNECTION WITH THE CARRIAGE OF HAZARDOUS AND NOXIOUS SUBSTANCES BY SEA, 1996[1]

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

The Parties to this Protocol,

RECOGNIZING the significant contribution which can be made by the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (hereinafter referred to as the "Convention") to the preservation of the environment and the adequate, prompt and effective compensation of persons who suffer damage caused by incidents in connection with the carriage of hazardous and noxious substances by sea,

RECOGNIZING ALSO that, over many years, a large number of States have consistently expressed their determination to establish a robust and effective compensation regime for the maritime carriage of hazardous and noxious substances based on a system of shared liability and have worked towards a uniform implementation of the Convention,

ACKNOWLEDGING, HOWEVER, that certain issues have been identified as inhibiting the entry into force of the Convention and, consequently, the implementation of the international regime contained therein,

DETERMINED to resolve these issues without embarking on a wholesale revision of the Convention,

AWARE OF the need to take into account the possible impact on developing countries, as well as the interests of those States which have already ratified the Convention or are at an advanced stage in so doing,

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

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

CONSIDERING that this objective may best be achieved by the conclusion of a Protocol relating to the Convention,

HAVE AGREED as follows:

Definitions

Article 1

For the purposes of this Protocol:

1 "Convention" means the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.

2 "Organization" means the International Maritime Organization.

3 "Secretary-General" means the Secretary-General of the Organization.

General obligations

Article 2

The parties to this Protocol shall give effect to the provisions of this Protocol and the provisions of the Convention, as amended by this Protocol.

Article 3

1 Article 1, paragraph 5, of the Convention is replaced by the following text:

5 "Hazardous and noxious substances (HNS)" means:

(a) any substances, materials and articles carried on board a ship as cargo, referred to in (i) to (vii) below:

(i) oils, carried in bulk, as defined in regulation 1 of Annex I to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended;

(ii) noxious liquid substances, carried in bulk, as defined in regulation 1.10 of Annex II to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended, and those substances and mixtures provisionally categorized as falling in pollution category X, Y or Z in accordance with regulation 6.3 of the said Annex II;

(iii) dangerous liquid substances carried in bulk listed in chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, as amended, and the dangerous products for which the preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph 1.1.3 of the Code;

(iv) dangerous, hazardous and harmful substances, materials and articles in packaged form covered by the International Maritime Dangerous Goods Code, as amended;

(v) liquefied gases as listed in chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, as amended, and the products for which preliminary suitable conditions for the carriage have been prescribed by the Administration and port administrations involved in accordance with paragraph 1.1.6 of the Code;

(vi) liquid substances carried in bulk with a flashpoint not exceeding 60ºC (measured by a closed-cup test);

(vii) solid bulk materials possessing chemical hazards covered by the Code of Safe Practice for Solid Bulk Cargoes, 2004, as amended, to the extent that these substances are also subject to the provisions of the International Maritime Dangerous Goods Code ~~as amended~~ **in effect in 1996**[2], when carried in packaged form; and

(b) residues from the previous carriage in bulk of substances referred to in (a)(i) to (iii) and (v) to (vii) above.

2 The following text is added as article 1, paragraphs 5*bis* and 5*ter*, of the Convention:

5*bis* "Bulk HNS" means any hazardous and noxious substances referred to in article 1, paragraph 5(a)(i) to (iii) and (v) to (vii) and paragraph 5(b).

5*ter* "Packaged HNS" means any hazardous and noxious substances referred to in article 1, paragraph 5(a)(iv).

3 Article 1, paragraph 10, of the Convention is replaced by the following text:

10 "Contributing cargo" means any bulk HNS which are carried by sea as cargo to a port or terminal in the territory of a State Party and discharged in that State. Cargo in transit which is transferred directly, or through a port or terminal, from one ship to another, either wholly or in part, in the course of carriage from the port or terminal of original loading to the port or terminal of final destination shall be considered as contributing cargo only in respect of receipt at the final destination.

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

Article 4

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

Article 5

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

1 The owner of a ship shall be entitled to limit liability under this Convention in respect of any one incident to an aggregate amount calculated as follows:

(a) Where the damage has been caused by bulk HNS:

(i) 10 million units of account for a ship not exceeding 2,000 units of tonnage; and

(ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):

for each unit of tonnage from 2,001 to 50,000 units of tonnage, 1,500 units of account;

for each unit of tonnage in excess of 50,000 units of tonnage, 360 units of account;

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

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

(i) [10 + W] million units of account for a ship not exceeding 2,000 units of tonnage; and

(ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):

for each unit of tonnage from 2,001 to 50,000 units of tonnage, [1,500 + X] units of account;

for each unit of tonnage in excess of 50.000 units of tonnage, [360 + Y] units of account;

provided, however, that this aggregate amount shall not in any event exceed [100 + Z] million units of account.

Article 5*bis*

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

Article 6

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

2 Annual contributions payable pursuant to articles 18, 19 and article 21, paragraph 5, shall be determined by the Assembly and shall be calculated in accordance with those articles on the basis of the units of contributing cargo received ~~or, in respect of cargoes referred to in article 19, paragraph1(b), discharged~~ during the preceding calendar year or such other year as the Assembly may decide.

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

Article 6*bis*

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

Article 7

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

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

1*bis* (a) In the case of the LNG account, subject to article 16, paragraph 5, annual contributions to the LNG account shall be made in respect of each State Party by any person who in the preceding calendar year, or such other year as the Assembly may decide, was the receiver in that State of any quantity of LNG.

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

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

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

(c) If the titleholder referred to in subparagraph (b) does not make the contributions or any part thereof, the receiver shall make the remaining contributions. The Assembly shall determine in the internal regulations the circumstances under which the titleholder shall be considered as not having made the contributions and the arrangements in accordance with which the receiver shall make any remaining contributions.

(d) Nothing in this paragraph shall prejudice any rights of recourse or reimbursement of the receiver that may arise between the receiver and the titleholder under the applicable ~~national~~ law.

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

Article 8

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

1 In respect of each State Party, initial contributions shall be made of an amount which shall for each person liable to pay contributions in accordance with article 16, paragraph 5, articles 18, 19 and article 21, paragraph 5, be calculated on the basis of a fixed sum, equal for the general account and each separate account, for each unit of contributing cargo received in that State during the calendar year preceding that in which this Convention enters into force for that State.

Article 9

1 Article 21, paragraph 4, of the Convention is replaced by the following text:

4 If in a State Party there is no person liable to pay contributions in accordance with articles 18, 19 or paragraph 5 of this article, that State Party shall for the purposes of this Convention inform the Director of the HNS Fund thereof.

2 Article 21, paragraph 5(b), of the Convention is replaced by the following text:

5(b) instruct the HNS Fund to levy the aggregate amount for each account by invoicing individual receivers, or in the case of LNG, the titleholders, if Article 19, paragraph 1*bis*(b), is applicable, for the amount payable by each of them. If the titleholder does not make the contributions or any part thereof, the HNS Fund shall levy the remaining contributions by invoicing the receiver of the LNG cargo. These persons shall be identified in accordance with the national law of the State concerned.

Article 10

The following text is added as article 21*bis* of the Convention:

Non-reporting

Article 21*bis*

1 Where a State Party does not fulfil its obligations under article 21, paragraph 2, and this results in a financial loss for the HNS Fund, that State Party shall be liable to compensate the HNS Fund for such loss. The Assembly shall, on the recommendations of the Director, decide whether such compensation shall be payable by a State Party.

2 No compensation for any incident shall be paid by the HNS Fund for damage in the territory, including the territorial sea in accordance with article 3(a) of this Convention, exclusive economic zone or other area in accordance with article 3(b) of this Convention, or damage in accordance with article 3(c) of this Convention, of a State Party in respect of a given incident or for preventive measures, wherever taken, in accordance with article 3(d) of this Convention, until the obligations under article 21, paragraphs 2 and 4, have been complied with in respect of that State Party for all years prior to the occurrence of an incident for which compensation is sought. The Assembly shall determine in the internal regulations of the HNS Fund the circumstances under which a State Party shall be considered as not having fulfilled these obligations.

3 Where compensation has been denied temporarily in accordance with paragraph 2, compensation shall be denied permanently if the obligations under article 21, paragraphs 2 and 4, have not been fulfilled within one year after the Director has notified the State Party of its failure to fulfil these obligations.

4 Any payments of contributions due to the HNS Fund shall be set off against compensation due to the debtor, or the debtor's agents.

5 Paragraphs 2 to 4 shall not apply to claims in respect of death or personal injury.

Article 11

Article 23, paragraph 1, of the Convention is replaced by the following text:

1 Without prejudice to article 21, paragraph 5, a State Party may at the time when it deposits its instrument of ratification, acceptance, approval or accession or at any time thereafter declare that it assumes responsibility for obligations imposed by this Convention on any person liable to pay contributions in accordance with articles 18, 19, 20 or article 21, paragraph 5, in respect of hazardous and noxious substances received in the territory of that State. Such a declaration shall be made in writing and shall specify which obligations are assumed.

Article 12

Article 43 of the Convention is deleted.

Article 13

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

Interpretation and application

Article 14

1 The Convention and this Protocol shall, as between the Parties to this Protocol, be read and interpreted together as one single instrument.

Article 15

In chapter VI, the following text is inserted as article 44*bis* of the Convention:

Article 44*bis*

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

1 Articles 1 to 44 and Annexes I and II of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, as amended by the Protocol of [20..] thereto, together with the final clauses, shall constitute and be called the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, [20..] ([20..] HNS Convention).

2 The final clauses of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea [20..] shall be this article and the final clauses of the Protocol of [20..] to amend the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996.

3 The articles comprising the final clauses of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, as amended by the Protocol of [20..] shall be renumbered sequentially with the preceding articles of that Convention. References within the final clauses to other articles of the final clauses shall be renumbered accordingly.

FINAL CLAUSES

Signature, ratification, acceptance, approval and accession

Article 16

1 This Protocol shall be open for signature at the Headquarters of the Organization from [……..] to [……..] and shall thereafter remain open for accession.

Subject to the provisions in paragraphs 4 and 5, States may express their consent to be bound by this Protocol by:

(a) signature without reservation as to ratification, acceptance or approval; or

(b) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval; or

(c) accession.

3 Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.

4 An expression of consent to be bound by this Protocol shall be accompanied by the submission to the Secretary-General of data on the total quantities of contributing cargo liable for contributions received in that State during the preceding calendar year in respect of the general account and each separate account.

5 An expression of consent which is not accompanied by the data referred to in paragraph 4 shall not be accepted by the Secretary-General.

6 Each State which has expressed its consent to be bound by this Protocol shall annually thereafter on or before 31 May until this Protocol enters into force for that State submit to the Secretary-General data on the total quantities of contributing cargo liable for contributions received in that State during the preceding calendar year in respect of the general account and each separate account.

7 A State which has expressed its consent to be bound by this Protocol and which has not submitted the data on contributing cargo required under paragraph 6 for any relevant years shall, before the entry into force of the Protocol for that State, be temporarily suspended from being a Contracting State until it has submitted the required data.

8 A State which has expressed its consent to be bound by the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 shall be deemed to have withdrawn this consent on the date on which it has signed this Protocol or deposited an instrument of ratification, acceptance, approval of or accession in accordance with paragraph 2.

Entry into force

Article 17

1 This Protocol shall enter into force eighteen months after the date on which the following conditions are fulfilled:

(a) at least twelve States, including four States each with not less than 2 million units of gross tonnage, have expressed their consent to be bound by it, and

(b) the Secretary-General has received information in accordance with article 16, paragraphs 4 and 6, that those persons in such States who would be liable to contribute pursuant to article 18, paragraphs 1(a) and (c), of the Convention, as amended by this Protocol, have received during the preceding calendar year a total quantity of at least 40 million tonnes of cargo contributing to the general account.

2 For a State which expresses its consent to be bound by this Protocol after the conditions for entry into force have been met, such consent shall take effect three months after the date of expression of such consent, or on the date on which this Protocol enters into force in accordance with paragraph 1, whichever is the later.

Revision and amendment

Article 18

1 A conference for the purpose of revising or amending the Convention, as amended by this Protocol, may be convened by the Organization.

2 The Secretary-General shall convene a conference of the States Parties to this Protocol, for revising or amending the Convention, as amended by this Protocol, at the request of six States Parties or one third of the States Parties, whichever is the higher figure.

3 Any instrument of ratification, acceptance, approval or accession deposited after the date of entry into force of an amendment to the Convention, as amended by this Protocol, shall be deemed to apply to the Convention as amended.

Amendment of limits

Article 19

1 Without prejudice to the provisions of article 18, the special procedure in this article shall apply solely for the purposes of amending the limits set out in article 9, paragraph 1, and article 14, paragraph 5, of the Convention, as amended by this Protocol.

2 Upon the request of at least one half, but in no case less than six, of the States Parties, any proposal to amend the limits specified in article 9, paragraph 1, and article 14, paragraph 5, of the Convention, as amended by this Protocol, shall be circulated by the Secretary-General to all Members of the Organization and to all Contracting States.

3 Any amendment proposed and circulated as above shall be submitted to the Legal Committee of the Organization (the Legal Committee) for consideration at a date at least six months after the date of its circulation.

4 All Contracting States, whether or not Members of the Organization, shall be entitled to participate in the proceedings of the Legal Committee for the consideration and adoption of amendments.

5 Amendments shall be adopted by a two-thirds majority of the Contracting States present and voting in the Legal Committee, expanded as provided in paragraph 4, on condition that at least one half of the Contracting States shall be present at the time of voting.

6 When acting on a proposal to amend the limits, the Legal Committee shall take into account the experience of incidents and, in particular, the amount of damage resulting there from, changes in the monetary values and the effect of the proposed amendment on the cost of insurance. It shall also take into account the relationship between the limits established in article 9, paragraph 1, and those in article 14, paragraph 5, of the Convention, as amended by this Protocol.

7 (a) No amendment of the limits under this article may be considered less than five years from the date this Protocol was opened for signature nor less than five years from the date of entry into force of a previous amendment under this article.

(b) No limit may be increased so as to exceed an amount which corresponds to a limit laid down in this Protocol increased by six per cent per year calculated on a compound basis from the date on which this Protocol was opened for signature.

(c) No limit may be increased so as to exceed an amount which corresponds to a limit laid down in this Protocol multiplied by three.

8 Any amendment adopted in accordance with paragraph 5 shall be notified by the Organization to all Contracting States. The amendment shall be deemed to have been accepted at the end of a period of eighteen months after the date of notification, unless within that period no less than one-fourth of the States which were Contracting States at the time of the adoption of the amendment have communicated to the Secretary-General that they do not accept the amendment, in which case the amendment is rejected and shall have no effect.

9 An amendment deemed to have been accepted in accordance with paragraph 8 shall enter into force eighteen months after its acceptance.

10 All Contracting States shall be bound by the amendment, unless they denounce this Protocol in accordance with article 20, paragraphs 1 and 2, at least six months before the amendment enters into force. Such denunciation shall take effect when the amendment enters into force.

11 When an amendment has been adopted but the eighteen month period for its acceptance has not yet expired, a State which becomes a Contracting State during that period shall be bound by the amendment if it enters into force. A State which becomes a Contracting State after that period shall be bound by an amendment which has been accepted in accordance with paragraph 8. In the cases referred to in this paragraph, a State becomes bound by an amendment when that amendment enters into force, or when this Protocol enters into force for that State, if later.

Denunciation

Article 20

1 This Protocol may be denounced by any State Party at any time after the expiry of one year following the date on which this Protocol comes into force for that State.

2 Denunciation shall be effected by the deposit of an instrument to that effect with the Secretary-General.

3 A denunciation shall take effect twelve months, or such longer period as may be specified in the instrument of denunciation, following its receipt by the Secretary-General.

4 Notwithstanding a denunciation by a State Party pursuant to this article, any provisions of this Protocol relating to obligations to make contributions under articles 18, 19 or article 21, paragraph 5, of the Convention, as amended by this Protocol, in respect of such payments of compensation as the Assembly may decide relating to an incident which occurs before the denunciation takes effect shall continue to apply.

Extraordinary sessions of the Assembly

Article 21

1 Any State Party may, within ninety days after the deposit of an instrument of denunciation the result of which it considers will significantly increase the level of contributions from the remaining States Parties, request the Director to convene an extraordinary session of the Assembly. The Director shall convene the Assembly to meet not less than sixty days after receipt of the request.

2 The Director may take the initiative to convene an extraordinary session of the Assembly to meet within sixty days after the deposit of any instrument of denunciation, if the Director considers that such denunciation will result in a significant increase in the level of contributions from the remaining States Parties.

3 If the Assembly, at an extraordinary session convened in accordance with paragraph 1 or 2, decides that the denunciation will result in a significant increase in the level of contributions from the remaining States Parties, any such State may, not later than one hundred and twenty days before the date on which the denunciation takes effect, denounce this Protocol with effect from the same date.

Cessation

Article 22

1 This Protocol shall cease to be in force:

(a) on the date when the number of States Parties falls below six; or

(b) twelve months after the date on which data concerning a previous calendar year were to be communicated to the Director in accordance with article 21, of the Convention, as amended by this Protocol, if the data show that the total quantity of contributing cargo to the general account in accordance with article 18, paragraphs 1(a) and (c), of the Convention, as amended by this Protocol, received in the States Parties in that preceding calendar year was less than 30 million tonnes.

Notwithstanding subparagraph (b), if the total quantity of contributing cargo to the general account in accordance with article 18, paragraphs 1(a) and (c), of the Convention, as amended by this Protocol, received in the States Parties in the preceding calendar year was less than 30 million tonnes but more than 25 million tonnes, the Assembly may, if it considers that this was due to exceptional circumstances and is not likely to be repeated, decide before the expiry of the above-mentioned twelve month period that the Protocol shall continue to be in force. The Assembly may not, however, take such a decision in more than two subsequent years.

2 States which are bound by this Protocol on the day before the date it ceases to be in force shall enable the HNS Fund to exercise its functions as described under article 23 and shall, for that purpose only, remain bound by this Protocol.

Winding up of the HNS Fund

Article 23

1 If this Protocol ceases to be in force, the HNS Fund shall nevertheless:

(a) meet its obligations in respect of any incident occurring before this Protocol ceased to be in force; and

(b) be entitled to exercise its rights to contributions to the extent that these contributions are necessary to meet the obligations under (a), including expenses for the administration of the HNS Fund necessary for this purpose.

2 The Assembly shall take all appropriate measures to complete the winding up of the HNS Fund including the distribution in an equitable manner of any remaining assets among those persons who have contributed to the HNS Fund.

3 For the purposes of this article the HNS Fund shall remain a legal person.

Depositary

Article 24

1 This Protocol and any amendment adopted under article 19 shall be deposited with the Secretary-General.

2 The Secretary-General shall:

(a) inform all States which have signed this Protocol or acceded thereto, and all Members of the Organization, of:

(i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession together with the date thereof and data on contributing cargo submitted in accordance with article 16, paragraph 4;

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

(iii) the date of entry into force of this Protocol;

(iv) any proposal to amend the limits on the amounts of compensation which has been made in accordance with article 19, paragraph 2;

(v) any amendment which has been adopted in accordance with article 19, paragraph 5;

(vi) any amendment deemed to have been accepted under article 19, paragraph 8, together with the date on which that amendment shall enter into force in accordance with paragraphs 9 and 10 of that article;

(vii) the deposit of any instrument of denunciation of this Protocol together with the date on which it is received and the date on which the denunciation takes effect; and

(viii) any communication called for by any article in this Protocol; and

(b) transmit certified true copies of this Protocol to all States that have signed this Protocol or acceded thereto.

3 As soon as this Protocol enters into force, a certified true copy thereof shall be transmitted by the depositary to the Secretary-General of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

Languages

Article 25

This Protocol is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

DONE AT [ ] this [ ] day of [ ] two thousand and [ ].

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments for that purpose, have signed this Protocol.

ANNEX I

CERTIFICATE OF INSURANCE OR OTHER FINANCIAL SECURITY IN RESPECT OF LIABILITY FOR DAMAGE CAUSED BY HAZARDOUS AND NOXIOUS SUBSTANCES (HNS)

Issued in accordance with the provisions of Article 12 of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, [20..]

Name of ship	Distinctive number or letters	IMO ship identification number	Port of registry	Name and full address of the principal place of business of the owner

This is to certify that there is in force in respect of the above-named ship a policy of insurance or other financial security satisfying the requirements of Article 12 of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, [20..].

Type of security

Duration of security

Name and address of the insurer(s) and/or guarantor(s)

Name

Address

This certificate is valid until

Issued or certified by the Government of
(Full designation of the State)

At (Place) On (Date)

(Signature and Title of issuing or certifying official)

Explanatory Notes:

1 If desired, the designation of the State may include a reference to the competent public authority of the country where the certificate is issued.

2 If the total amount of security has been furnished by more than one source, the amount of each of them should be indicated.

3 If security is furnished in several forms, these should be enumerated.

4 The entry "Duration of the Security" must stipulate the date on which such security takes effect.

5 The entry "Address" of the insurer(s) and/or guarantor(s) must indicate the principal place of business of the insurer(s) and/or guarantor(s). If appropriate, the place of business where the insurance or other security is established shall be indicated.

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ANNEX 3

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

Statement by Cyprus

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

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

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

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

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

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

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

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

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ANNEX 4

PROVISION OF FINANCIAL SECURITY

(i) Progress report on the work of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers

Statement by the International Group of P & I Associations (P & I Clubs)

The International Group has been asked to advise the Legal Committee of a recent policy decision taken by the Group Clubs which was repeated to the eighth session of the joint IMO/ILO Expert Working Group.

The International Group Clubs have agreed to amend their Rules such that the pay to be paid and the retrospective withdrawal of cover for non-payment of premium rules will not be relied on in respect of valid claims for death and personal injury, brought by seafarers or their dependants. The policy will take effect from the time the Rules are amended and it is intended that Club Rules will be amended as from 20 February 2009. The policy will apply to claims notified after the Rule change but will not apply to existing claims or claims notified prior to the Rule change. Claims will be subject to any mandatory limits applied by the Clubs. Currently those limits are US$2 billion for death and injury to passengers and US$3 billion for death and personal injury to passengers and crew combined.

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ANNEX 5

PROVISION OF FINANCIAL SECURITY

(i) Progress report on the work of the Joint IMO/ILO *Ad Hoc* Expert Working group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers

Statement by the International Chamber of Shipping (ICS)

The position of the Industry within the Joint IMO/ILO Working Group has been provided by the ISF. Their representatives could not attend this meeting and, in their absence, please accept our intervention.

To avoid any misunderstandings, the Industry fully recognizes that, if a shipowner company unilaterally terminates a contract of employment with a seafarer in a foreign country, the shipowner has an obligation to repatriate him at the shipowners' costs and to pay the seafarer's maintenance and other costs deriving from the abandonment.

Governments and Social Partners wish to have a mandatory, binding solution to the problems of abandonment, but however, this is not easy because of the requirements of the MLC, 2006 and the structures of the insurance industry. The Industry is engaged in discussions with interested Parties and is trying to find a solution for the next Joint Working Group meeting.

As the distinguished delegate of the Netherlands said, we need clarification. It should be noted that binding legal mandatory instruments are different from Guidelines and have to be carefully drafted because they will represent the basis of legal claims. Furthermore, important aspects need consideration such as the definition of abandonment, limits of liability and the limits of the available insurance structures.

Finally, there are problems as to how to secure seafarer claims for abandonment and how to insure them and fit them within the mechanisms of the MLC, 2006. If States wish to introduce a system of State Certification, this will create additional administrative problems. The Industry therefore urges Governments to proceed with caution when deciding to establish such a system.

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ANNEX 6

TERMS OF REFERENCE FOR FURTHER WORK OF THE JOINT IMO/ILO *AD HOC* EXPERT WORKING GROUP ON LIABILITY AND COMPENSATION REGARDING CLAIMS FOR DEATH, PERSONAL INJURY AND ABANDONMENT OF SEAFARERS

1 The Joint IMO/ILO *Ad Hoc* Expert Working Group should continue with its examination of the issue of financial security for crew members/seafarers and their dependants with regard to compensation in cases of personal injury, death and abandonment.

2 In so doing the Joint Working Group should take account of relevant IMO and ILO instruments, including those currently under review or likely to be adopted in the near future.

3 It should continue the monitoring of the problem of abandonment of crew members/seafarers taking into account all relevant information including technical solutions available for financial security.

4 It should complete the discussions and agree on principles to facilitate the drafting of mandatory provisions for inclusion in an appropriate instrument or instruments.

5 At the next session it should make appropriate recommendations to the IMO Legal Committee and the ILO Governing Body.

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ANNEX 7

FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

Statement by India

Mr. Chairman,

I thank you for the opportunity given to this delegation to intervene. Our intervention is related to the continuing unjust and unreasonable detention of the two Indian nationals, Captain Jasprit Chawla and Chief Officer Mr. Syam Chetan, of the **Mt Hebei Spirit**, who were acquitted by a Court of the Republic of Korea, as being innocent of all charges violating the nation's Ocean Pollution Law, following an oil spill incident on 7 December 2007, when a floating crane collided with the anchored **Hebei Spirit.**

The continued detention highlights the injustices that are often perpetrated on ship masters, who more often than not, bear little responsibility for an accident, other than the fact that they are in command of the vessel that is involved in an accident.

Yet again, in the incident of the **Hebei Spirit,** we see, with regret and anguish, that seafarers are being victimized due to a malicious tangled web of extra-judicial and/or extra-legal interpretation of the local law. When even some of the worst civil or criminal offenders worldwide can be released on bail and allowed to live in their place of normal residence, pending trial or re-trial, why can these two innocent seafarers not also be released, since their only fault was to be on board an anchored VLCC when a vessel towing a crane barge collided with it?

We fully accept the need for a thorough investigation of accidents and for those responsible for wrongful conduct, to face the consequences.

We wish to convey our surprise, disappointment and great concern that the Republic of Korea's courts have determined to continue to detain the ship's officers, despite their acquittal, for possibly as long as a year, pending further hearings. Such measures appear to be unjustified, unreasonable and a contravention of human rights.

We remind those responsible for the continued detention of the seafarers, that the trial courts have determined that another vessel, which had been towing the floating crane that struck the anchored tanker, was wholly responsible for the incident. Despite this finding, the seafarers have continued to be detained, notwithstanding their own and their employer's assurance that, should a further trial take place, they would attend it.

The two officers have been detained in the Republic of Korea since 7 December 2007 and we believe from recent experience in similar cases, that such continued unjust detention may well affect the physical and mental health of the two men. This could be avoided by permitting them to return to their home town and families until such a time as they are needed to assist any further investigation in the Republic of Korea.

As an industry serving international society, we remain committed to protecting the environment, and to the prompt and thorough investigation of accidents at sea. We are committed to bringing justice to those involved in intentional actions that may damage the marine environment.

However, we cannot and will not support the criminalization of seafarers, nor unjust, unreasonable and unfair treatment that is contrary to the principles of IMO and ILO. The "Guidelines on fair treatment of seafarers in the event of a maritime accident" are pertinent to this issue.

Earlier this month our Honourable Minister for Shipping, who led a trade delegation to the Republic of Korea, met the two officers and took up their cause with his counterpart in the Korean Government. We await a positive response from the Republic of Korea to remedy this ongoing and continued detention.

We are afraid that the industry's recruitment crisis will worsen unless its members unite to protect seafarers from unreasonable legal attack. What is more, if the industry does not protect crew members, it will become even more difficult to find new recruits.

We all derive our living from the sea and seafaring, in one way or another. Let us hold our heads high and let us hold our seafaring colleagues' freedom and respect even higher.

We appeal to our colleagues from the Republic of Korea here, to use their influence in helping Captain Jasprit Chawla and Chief Officer Mr. Syam Chetan to return home as soon as possible. Let there be two families in India who can say, with happiness and pride, that "at sea, a sailor never leaves the other in distress; our seafaring family members/sons were rescued by industry colleagues on land, too".

Thank you, Mr. Chairman.

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ANNEX 8

FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

Statement by China

The Chinese Government is seriously concerned about the latest developments in the **Hebei Spirit** case in the Republic of Korea. As it is known, the authorities of the Republic of Korea refused to allow the master and chief officer to leave the country despite their acquittal by the court of the country and the seafarers are once again put on trial before an appeal court.

The unjustified long detention of the master and chief officer and the insistence of the authorities of the Republic of Korea to criminalize the seafarers are in contravention of international law and, in particular, the recently-adopted IMO/ILO Guidelines on the fair treatment of seafarers in the event of a maritime accident. Such criminalization attempts are thought to have an increasingly negative impact on the sustainable and sound development of international shipping, given the worldwide shortage of seafarers and the challenges of attracting young people to the career of seafaring.

Therefore, the Chinese Government calls for the authorities of the Republic of Korea, a large shipping country as it is, to take effective and prompt action to stop the criminalization of the seafarers and allow the master and chief officer of the **Hebei Spirit** to return to India as soon as possible. Meanwhile, we would also appeal to the authorities of the Republic of Korea to pay full respect to the international law, *inter alia*, the IMO Code for the investigation of marine casualties and incidents and the IMO/ILO Guidelines on the fair treatment of seafarers in the event of a maritime accident, to ensure an objective and impartial accident investigation and a fair trial in the **Hebei Spirit** case.

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ANNEX 9

FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

Statement by the Republic of Korea

From the outset, my delegation would like to thank the distinguished delegates from India, China, Liberia and the Philippines for raising the matter regarding two Indian seafarers who have been staying in the Republic of Korea.

Since the **Hebei Spirit** incident took place in the Republic of Korea last year, restoration and rehabilitation operations have been successfully undertaken and nearly come to a close with the warm assistance from major international organizations such as IOPC Funds, IMO, ITOPF and many IMO Member States.

Taking this opportunity, my delegation would like to transmit to them the deep gratitude of the Korean Government for their timely and invaluable assistance and dedication.

Mr. Chairman,

Taking note of those interventions made by those distinguished delegates from India and China in a cautious way, my delegation feels compelled to make some comments on the **Hebei Spirit** case.

My delegation would like to begin by stressing the Korean Government's firm commitment to fair treatment of seafarers after accident and the enhancement of their welfare as a whole. With this in mind, Mr. Chairman, my Government has taken a careful look at this issue from the beginning with solemn responsibility that it has always held to that end. This is especially because the Republic of Korea is one of those countries which sends many seafarers abroad to work on board ship.

Mr. Chairman,

My delegation is of the view that this is basically a legal matter which should be dealt with by the Korean judicial body with its independent authority and pursuant to relevant domestic laws and regulations. In this context, my delegation, just for the purpose of reference, would like to point out that respect for domestic judicial process is well articulated as one of the basic principles in the IMO Guidelines on fair treatment of seafarers in the event of a maritime accident.

Mr. Chairman,

The **Hebei Spirit** incident had caused a catastrophic pollution to the western coastline of the Republic of Korea, and the case is now being brought before the appellate court with the latter stage of its judicial proceedings. Unlike a common law country, Mr. Chairman, in the Republic of Korea factual aspects of the case are normally ascertained with definite and final authority at the appellate court. Consequently, when a prosecutor appeals against the decision of the trial court, the process of determining the facts of the case is extended, and the defendant is required to appear at the court of appeal.

Mr. Chairman,

Two Indian seafarers at issue are now staying in a luxurious hotel enjoying full protection and fair treatment in accordance with relevant international human rights law without any physical restriction in the Republic of Korea. They are free to move, meet people, and communicate with their families in India, as they like. As a result of the full respect by the Korean prosecution for the IMO Guidelines, they are neither in custody nor in prison even if they are under indictment.

Mr. Chairman,

Noting with caution the significance attached to this issue by the international maritime community, my delegation would like to say that the Korean Government has been making every possible effort, especially including close consultation with relevant authorities, in order that the ongoing judicial process should be completed at the earliest possible opportunity and in a proper way. According to recent information, the judicial process by the appellate court is expected to be completed possibly by the end of this November.

In this regard, reiterating my Government's firm belief in and commitment to the spirit of fair treatment of seafarers especially in the event of maritime accident, my delegation earnestly hopes two Indian seafarers return back home soon.

Thank you for your attention.

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ANNEX 10

FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

Statement by the Islamic Republic of Iran

This delegation, while underlining the importance of the subject of fair treatment of seafarers in the event of maritime accident, would like to draw the attention of the Legal Committee to the increasing phenomenon of depriving of seafarers of shore leave which, in our view, is important for the shipping community, from both the human rights and safety of shipping viewpoints and also, as has correctly been pointed out by Dr. Balkin, distinguished and able Director of the Legal Affairs and External Relations Division in IMO, in respect of attracting new recruits to the industry.

It has been reported, during recent months, that Iranian seafarers, on a number of occasions, have been deprived of shore leave in some foreign ports, and this is not the case just for Iranian seafarers. Apparently, the main reason for such unfair treatment is the possible security risk that the seafarers may pose simply because of their nationality! In our view, as some maritime scholar has indicated, such treatment not only is in obvious contradiction of the principle of equality before the law and the dignity of the seafarers concerned, who have spent weeks and sometimes months at sea, but also has a drastic impact on the safety of shipping and creates grave concern among seafarers and particularly the people who aspire to join the profession.

Mr. Chairman, nowadays everybody acknowledges that fatigue is one of the main risk factors leading to a maritime accident. In our view, the most important maritime safety Conventions, namely the "SOLAS" and "STCW" Conventions not only oblige flag States to prevent and mitigate the phenomenon of fatigue in their registered ships, but also oblige port States to prevent any undue action, such as depriving shore leave, that might increase fatigue among the seafarers on foreign ships.

If this is the case, does not undue deprivation of shore leave, after a long time of hard work on board ship lead to increased fatigue?

Bearing in mind the paramount importance of welfare facilities in ports for the health of seafarers and the activities of ILO in this regard, namely the adoption of Convention number 163 and 3 international recommendations, i.e., recommendation number 48 adopted in 1936, number 138 adopted in 1970 and number 173 adopted in 1987, it seems to this delegation that hard-working seafarers need recreation time while in foreign ports. So in our view, as some maritime scholars have rightly pointed out, it is about time that States whose economies are largely dependent on seafarers, cease to treat them as "human pawns" in legal and political games. It is also about time that our international community recognizes the enjoyment of facilities such as shore leave, as a right or, at least, legitimate expectation for seafarers, regardless of their nationality. This, of course, has to be regulated by international law.

Finally, we think that the Legal Committee of IMO is one of the most suitable forums to seriously take into consideration these issues and to address the concerns associated with seafarers' treatment as it deems appropriate.

Thank you Mr. Chairman.

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ANNEX 11

FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

Statement by the United Kingdom

This is a general comment not specific to any case.

The United Kingdom Government strongly opposes the trend towards the criminalization of seafarers, which is evident in certain parts of the world. We do not seek to create domestic offences, which will unfairly penalize seafarers or others engaged in the field of maritime transport. On the contrary, we value the role of qualified, highly-motivated seafarers operating modern, technologically-advanced ships in delivering the economic benefits of trade and the benefits to the environment of efficient, clean and safe shipping.

The United Kingdom does not accept any unfair or unlawful detention of masters or crews for the purpose of accident investigations and generally does not regard pollution resulting from a maritime accident as being criminal.

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ANNEX 12

FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

Statement by the Comité Maritime International (CMI)

Mr. Chairman, Distinguished Delegates,

I am grateful for the opportunity to make a short statement on behalf of the Comité Maritime International (CMI). I am the Chair of the CMI Working Group on Fair Treatment of Seafarers (WGFTS).

The CMI WGFTS has taken note that the Legal Committee, at its ninety-third session in Panama, visited this subject and considered issues relating to the Guidelines on Fair Treatment of Seafarers that were adopted in 2006. At the ninety-third session it was agreed that it would be appropriate to gain experience of the current Guidelines before considering any revision.

The CMI understood that a reasonable period of time would have to pass before the effect of the Guidelines could be assessed. In our view, such a reasonable time has now passed.

It had been hoped that the IMO/ILO Guidelines would significantly alleviate some of the problems encountered by seafarers in the aftermath of a marine accident. Regrettably, it appears that despite the entry into force of the Guidelines, fair treatment of seafarers continues to be a problem. Such cases as the **Zim Mexico III**, Mobile, the United States, the **Coral Sea**, Aegion/Patras, Greece, **Cosco Busan**, San Francisco, the United States, and **Hebei Spirit**, Daesan, the Republic of Korea, are causing international concern.

A significant aspect of the "unfairness" issue is that legislation, intended for other purposes, is sometimes employed against seafarers, and this can severely affect the rights of seafarers caught up in these situations.

Existing regulations, aimed at improving safety of shipping are sometimes abused by non-flag States wishing to investigate the casualty that occurred outside their jurisdiction.

It has been my personal experience, during the last two years, that the use of existing provisions, such as port State control inspections, are being widely used by States to force and to pressurize seafarers into co-operation in unofficial investigations of marine accidents where the State has no territorial jurisdiction of flag State involvement in the matter. States often collude in this respect.

It is the view of the CMI Working Group that all seafarers are entitled to the basic human rights of all citizens under existing laws and international conventions. They and their families are very vulnerable to the unfair exercise of sovereign power and can often suffer great hardship.

As a matter of comment, I would point out, as has been mentioned here today by several distinguished delegates, the unfair treatment of seafarers has the potential to very adversely affect recruitment into the maritime industry.

The CMI Working Group will seek your permission to present a document on these topics for consideration at the ninety-fifth session of the Legal Committee.

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ANNEX 13

FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

Statement by the International Chamber of Shipping (ICS)

With the greatest respect to you, Mr. Chairman, and to the representatives of the Republic of Korea, on behalf of the shipping industry and seafarer associations (namely, BIMCO, ICS, ISF, INTERCARGO and INTERTANKO, the P & I Clubs and the International Transport Workers' Federation), we also wish to convey our great concern at the continued detainment or "exit ban" of the two ship's officers, despite their acquittal, pending further hearings. We have listened with great care to the statement of facts by the Government of the Republic of Korea, however, we understand that assurances have been given by the ship managers, and the officers, that they will attend any further hearings they are required to attend and the P & I Club concerned has undertaken to pay their costs of doing so. We would add that the shipowners and officers are fully supported by their P & I Club which is a member of the P & International Group of P & I Clubs.

In these circumstances, the measures taken to continue to refuse the officers permission to leave the country appear to be contrary to the principles established in the Joint IMO/ILO Guidelines on the fair treatment of seafarers in the event of a maritime accident.

The two officers have been refused permission to leave the Republic of Korea for some ten months. Such a detainment or "exit ban" (albeit that the officers are staying in a hotel), in a foreign country and away from their families, could affect their psychological wellbeing. We could add that this situation is all the more hard to understand for them and the industry when the officers have been exonerated of all blame by the Korean court in the first instance.

To avoid any misunderstandings, an industry serving the international community, we remain committed to protecting the environment and to the prompt and thorough investigation of accidents at sea. We are committed to appropriate penalties for those involved in intentional actions that may damage the marine environment.

The industry is also concerned at certain recent public negative comments that have been made in relation to the IMST enquiry and would ask that full respect is given to the application of international standards to such an enquiry, in particular, in the criteria and standards contained in the Casualty Investigation Code. Industry would also ask that IMO/ILO Guidelines on the Fair Treatment of Seafarers in the Event of a Maritime Accident are observed as strictly as possible.

We are concerned that this incident gives rise to an impression that an important and highly regarded seafaring nation does not respect the principles agreed in the Joint IMO/ILO Guidelines on the fair treatment of seafarers in the event of a maritime accident. This impression is unfortunately gaining currency in the seafaring community and has grave implications for the two men concerned but also for the entire industry at a time when, as the Secretary-General's introductory comments to this meeting so lucidly expressed, it is already facing a crisis of recruitment and retention of seafarers.

We therefore join in the appeal to the Government of the Republic of Korea to take the necessary action to ensure that the seafarers are immediately permitted to return to their homes and families.

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ANNEX 14

FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

Statement by the International Transport Federation (ITF)

In addition to the statement of the industry which included the ITF we would like to say that we strongly support the statements made by the Governments of the People's Republic of China and India.

As well as the other statements made, especially the need for maritime casualty investigation to see fair treatment of seafarers in a wider context, we also express our sympathy to the People of the Republic of Korea who have been adversely impacted by pollution.

If we want to address the crisis of recruitment and retention of seafarers we need to change the reality for seafarers and address their concerns.

We cannot overstate the adverse impact criminalization, amongst other things, is having on the seafaring community.

We also would like to stress the importance of reporting cases of unfair treatment of seafarers in order to allow an evaluation of the impact of the Guidelines.

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ANNEX 15

FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

Statement by the International Federation of Shipmasters' Associations (IFSMA)

This matter concerns a very serious incident which is of grave concern to IFSMA and involves the imprisonment of a shipmaster and the arrest of his crew on a vessel in Egypt. This issue has wider implications, as the unfair treatment concerned could be imposed on any vessel calling at Egyptian ports or passing through the Suez Canal.

On 25 September 2008, whilst mooring in Port Said, the vessel made contact with an Egyptian Navy vessel, which took in some water as a result. The collision happened whilst the pilot was onboard during the mooring operation, with the engine stopped. As a consequence of this accident, the vessel's master was arrested and taken to prison in Port Said. The master has been imprisoned ever since, and his crew are still under arrest on the vessel.

On 1 October this year, the master appeared before a military District Attorney who ordered that his detention be extended for four more days until 5 October. According to Egyptian military law, colliding with a navy vessel is classified as a severe felony which will lead to a hearing in the Military Court.

Again, recent information states that the master will be liable to imprisonment in the military prison and he will not be expected to be released unless pardoned, or after the very substantial and disputed civil claim resulting from the collision and consequential damages are settled. On 9 October, the captain had to go through another military investigation in Ismalia, resulting in his detention for another 15 days. I am informed that under Egyptian law the Convention on Limitation of Liability for Maritime Claims, 1976, does not apply in relation to collisions with warships. Any reliance on the Convention would require an application to Court, which could take several months during which time the master, vessel and cargo will be further detained.

The Egyptian Navy wants US$17 million as security to release the vessel and its cargo, but this would not include the release of the master, who is expected to be brought before the Military Court and to be given a three-year prison sentence, perhaps more, pending the settlement of the claim. My latest information is that the master is currently in prison and his crew remain arrested on the vessel.

I ask the Committee to note this extreme example of unfair treatment of seafarers and I respectfully call on the Egyptian delegates present to raise this issue at home through the appropriate channels to help have the master and his crew released as soon as possible.