Transport Canada Transports Canada

Maritime Transport of Hazardous and Noxious Substances: Liability and Compensation

Discussion Paper

International Marine Policy
Transport Canada
October 2010

TP 15093E

Canada

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***The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010* (2010 HNS Convention)**

Introduction

In Canada, over the last nine years (2001-2010) there have been at least 98 chemical spills from vessels in Canadian waters.[1] Although most of these were small spills, the high volume of HNS carried by sea-going vessels, particularly in our international trade, highlights the potential for a major chemical spill occurring in Canadian waters.

In the 1990's, several incidents involving water-borne spills of HNS highlighted a gap in the marine liability system and prompted the international community to take action. Through the International Maritime Organization (IMO), a liability regime was devised to compensate claimants in the event of spills involving chemicals and other hazardous substances. This effort culminated in the HNS Convention, which was adopted under the auspices of the IMO in 1996.

Canada signed the Convention in 1997 following widespread consultations with industry stakeholders, which resulted in the development of the *Maritime Law Reform* Discussion Paper. It was released in 2005 and recommended the ratification and implementation of the HNS Convention. This sent a signal to stakeholders and the international community that Canada intends to give favourable consideration to the Convention's ratification and to the legislation required to implement the regime in national law. The *Maritime Law Reform* Discussion Paper also allowed for initial consultations with stakeholders. Following the release of the paper, Canada was part of discussions among states at the international level, which focused on finding solutions to issues raised within the existing 1996 HNS Convention. However, in 2007 it was agreed that a Protocol was needed to deal with obstacles to the implementation of the Convention by states.

The Protocol is intended to address the underlying causes that have inhibited the entry into force of the HNS Convention, i.e.:

1) Contributions to the Liquefied Natural Gas (LNG) Account and the fact that titleholders to LNG cargoes in non-state parties would not contribute to cover compensation from LNG incidents. This would of lead to situations where those with certain types of LNG supply contracts would not have contributed to the HNS Fund if they were located outside of the jurisdiction of an HNS Convention state party;

[1] Canadian Coast Guard Marine Pollution Incident Reporting System (CCG MPIRS).

2) The concept of 'receiver' and the difficulties in effectively implementing a reporting and contributions system for packaged HNS. The complex logistics chain for packaged HNS and uncertainty over who would be considered the actual "receiver" meant that states would of needed to put in place very burdensome reporting and tracking requirements for packaged HNS; and

3) Non-submission of contributing cargo reports by states, on ratification of the Convention and annually thereafter. The 1996 HNS Convention did not impose any sanctions against states that did not report the HNS received in their territory and this presented an unfair sharing of the burden among states when assessing contributions to the HNS Fund.

As it currently stands, the original HNS Convention of 1996 was signed, subject to ratification, by eight states[2] and was ratified by 14 states[3] but never came into force internationally as one of the entry into force provisions was never met. The particular entry into force provision that was never met by those states that ratified the Convention is the requirement to submit reports on its contributing cargo to the future HNS Fund (i.e. how much HNS received in that state over the thresholds established in the Convention).

The 2010 Protocol to the HNS Convention, was developed, first by a Working Group set up by the International Oil Pollution Compensation (IOPC) Fund's 1992 Fund Assembly, and then by the IMO's Legal Committee with the aim of facilitating the entry into force of the HNS Convention.

The Protocol, which addressed these practical problems that have prevented many states from ratifying the original Convention, was adopted by the IMO at a diplomatic conference held on April 26-30, 2010. That conference also adopted four resolutions relating to the setting up of the HNS Fund, the promotion of technical co-operation and assistance, avoidance of a situation in which two conflicting treaty regimes are operational, and the implementation of the 2010 HNS Protocol.

This section sets out an overview of the instrument's main provisions, Canadian legislation in this regard, the policy questions to be addressed if Canada were to ratify the Convention, and a recommended way forward.

Overview of the 2010 HNS Convention

The Convention sets out a shared liability regime to compensate claimants for damages arising from the international or domestic carriage of HNS by seagoing vessels. It is a regime, which combines the shipowners' liability (tier 1) and the HNS Fund made up of contributions from the receivers or importers of HNS cargo (tier 2).

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[2] Canada, Denmark, Finland, Germany, Netherlands, Norway, Sweden, and the United Kingdom

[3] Russian Federation, Liberia, Angola, Tonga, Slovenia, Samoa, St. Kitts and Nevis, Morocco, Cyprus, Syrian Arab Republic, Sierra Leone, Lithuania, Hungary, and Ethiopia.

The HNS Convention follows the two-tier model of compensation of the international oil pollution liability and compensation regime (Civil Liability Convention (CLC) and the IOPC Fund), which Canada adopted in 1989. That is, the shipowner assumes liability in the first place, which is supplemented beyond a certain level by a fund made up of contributions collected from receivers of HNS cargoes. The regime provides up to 250 million Special Drawing Rights (SDR)[4], or approximately $500 million per incident in total compensation to claimants. Loss of life and personal injury are also included under the HNS Convention and these types of damages are not covered by the IOPC Fund system. The prioritization for payment of compensation before the satisfaction of other types of claims is an additional significant development in this regime. Fire and explosion damage caused by an HNS substance (including oil), is also covered under the Convention.

The Convention differs from the oil pollution regime mainly in that it covers many more substances and combines the shipowner liability regime and the HNS Fund into one instrument. The key provisions of the Convention are outlined below.

HNS substances

Estimates indicate there are approximately 6,500 substances covered under the definition of HNS. The definition of HNS substances and the relevant Codes can be found in Article 1(5) of the HNS Convention (see Annex 1). Table 3 provides an overview of the substances covered under the Convention.

Table 3 – HNS Substances

Substances covered	**Conventions Codes**	**Reference (www.imo.org/)**
Bulk		
Oils	MARPOL 73/78[5]	Annex I, Regulation 1
Noxious Liquids	MARPOL 73/78	Annex II, Regulation 1.10
Dangerous liquids Liquids with a flashpoint not exceeding 60ºC	IBC Code[6]	Chapter 17
Gases	IGC Code[7]	Chapter 19
Solids	IMBSC Code[8]	(if also covered by the IMDG Code in packaged form)
Packaged	IMDG Code[9]	

[4] The average value of 1 SDR over the last 10 years has been approximately two Canadian dollars. The actual total amount of compensation would be set in accordance with the value of the SDR in Canadian dollars at the time of an incident.

[5] *International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto*

[6] International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, as amended.

[7] International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, as amended.

[8] International Maritime Solid Bulk Cargoes Code (IMBSC Code).

[9] International Maritime Dangerous Goods Code (IMDG Code).

An electronic system, known as the HNS Convention Cargo Contributor Calculator (HNS CCCC), has been developed to assist states and potential contributors in identifying and reporting contributing cargoes covered by the HNS Convention, which will be re-evaluated and updated in light of the adoption of the 2010 HNS Protocol. The name or United Nations number of the substance can be used to find out whether or not a chemical falls within the definition of HNS. The use of the HNS CCCC is discussed in greater details below.

HNS damage covered by the Convention

The Convention covers the following damage resulting from the carriage of HNS by sea:

- **loss of life or personal injury** on board or outside the ship carrying HNS;
- **loss of, or damage to, property outside the ship;**
- **loss or damage caused by contamination of the environment; and**
- **costs of preventive measures** taken by any person after an incident has occurred to prevent or mitigate damage.

All or some damages are covered depending on where they occur geographically. Specifically, the Convention covers any damage caused during the international or domestic carriage of HNS by any seagoing vessels in the territory including the territorial sea of a state party to the Convention. It also covers pollution damage in the exclusive economic zone, or equivalent area, of a state party. In addition, the Convention covers damage (other than pollution damage) caused by HNS carried on board seagoing vessels of member states when they are outside the territory or territorial sea of any state. This information is summarized in Table 4 below.

Table 4 - Scope of Application and Coverage

Scope of Application	Damages Covered
Territorial sea (0-12 nautical miles) of a state party	Any damage (loss of life, injury, pollution, property, preventative measures)
Exclusive Economic Zone (EEZ) (12 - 200 nautical miles) of a state party	Pollution damage including preventive measures
On board a seagoing vessel of a state party beyond the territorial sea	Any damage excluding pollution

The Convention does not cover:

- Damage caused during the transport of HNS on land before or after carriage by sea.[10];

[10] Article 1(9) of the HNS Convention defines *"carriage by sea"* as "*the period of time from when the hazardous and noxious substances enter any part of the ship's equipment, on loading, to the time they cease to be present in any part of the ship's equipment, on discharge. If no ship's equipment is used, the period begins and ends respectively when the hazardous and noxious substances cross the ship's rail."*

- Pollution damage caused by persistent oil, since such damage is already covered under the existing international regime established by the 1992 CLC and Fund Conventions. However, it covers non-pollution damage caused by persistent oil, i.e., damage caused by fire or explosion; and
- Damage caused by radioactive material in either bulk or packaged form.

Claimants

Any victim of damage in Canada would be entitled to make a claim. Claimants can be any individual or partnership or any public or private body including a state or any other level of government within that state.

Tier 1 – The Shipowner's liability

Under the Convention's two-tiered system, claimants first directly seek compensation from the shipowner (tier 1), who is held strictly liable for any damage caused, subject to certain defences (e.g. an act of war, negligence of governmental authority to maintain navigational aids, act or omission of a third party). The shipowner's liability is based on the tonnage of the ship, as depicted in Table 5, up to the maximum limit of 100 million SDR (approximately $200 million) for bulk HNS. That maximum limit of liability for the shipowner increases to 115 million SDR (approximately $230 million) when the damage is caused by packaged HNS or by both bulk HNS and packaged HNS.

Table 5 – Ship Size and Limits of Liability

Ship Size	**Limits of liability for bulk HNS**	**Limits of liability for packaged HNS**
Ships ≤ 2,000 gross registered tones (grt)[11]	10 million SDR (approx. $20 million)	11.5 million SDR (approx. $23 million)
Ships between 2,001 and 50,000 grt	1,500 SDR per gross ton = a maximum of 82 million SDR at 50,000 grt (approx. $164 million)	1,725 SDR per gross ton = a maximum of 94.3 million SDR at 50,000 grt (approx. $188.6 million)
Ships between 50,001 grt and 100,000 grt	360 SDR per gross ton = a maximum of 100 million SDR at 100,000 grt (approx. $200 million)	414 SDR per gross ton = a maximum of 115 million SDR at 100,000 grt (approx. $230 million)
For ships ≥ 100,000 grt	100 million SDR (approx. $200 million)	115 million SDR (approx. $230 million)

[11] grt refers to gross registered tonnage of a vessel.

The Convention requires all shipowners transporting HNS to have onboard the vessel a certificate of insurance issued by a state party indicating they have coverage for their liability under the Convention.[12] The shipowner's insurance must provide for direct action so that claimants can pursue their claims for compensation directly with the shipowner's insurer rather than having to seek compensation from the shipowner. State parties must ensure that any ships carrying HNS entering or leaving a port in its territory or offshore facility in its territorial sea, irrespective of where that vessel is registered, have the required insurance certificate.

Tier 2 – The HNS Fund

When damage costs exceed the shipowner's limit of liability under tier 1, additional compensation will then be paid under tier 2 - by the HNS Fund - up to a maximum of 250 million SDR (approximately $500 million) per incident, including the shipowner's portion. If the total amount of admissible claims does not exceed the maximum amount available for compensation, then all claims will be paid in full. Otherwise, the payments will be prorated, i.e. all claimants will receive an equal proportion of their admissible claims.

Claims for loss of life and personal injury have priority over other claims. Up to two thirds of the available compensation amount is reserved for such claims.

To claim against the HNS Fund, the claimants have to prove there is a reasonable probability that the damage resulted from an incident involving one or more seagoing ships. The HNS Fund may be liable to pay compensation "from the first dollar up" if the particular ship causing the damage cannot be identified. In the event that the shipowner is exonerated from liability, or if the shipowner is financially incapable of meeting his/her obligations, the Fund is also liable. However, as is the case of the shipowner, the HNS Fund can also apply certain defences that exempt it from paying compensation e.g. if the damage was caused by an act of war, or by HNS discharged from a warship.

HNS Fund Accounts

The HNS Fund will consist of four separate accounts:

- oil *(Oil Account);*
- liquefied natural gas (*LNG Account);*
- liquefied petroleum gas *(LPG Account); and*
- all other HNS *(General Account)*

[12] Compulsory insurance applies to seagoing ships registered in a state party and carrying HNS (with the exception of warships and other ships owned or operated by a state party and used only for the provision of government non-commercial services).

The principal reason for the separate accounts is to ensure that each account pays its own claims, thus avoiding cross-subsidization of claims among major HNS groups and the industries involved. However, during the early existence of the HNS Fund, it is possible that there may not be sufficient HNS received in member states to set up all four separate accounts. If this were to be the case, the separate accounts may be postponed and the HNS Fund may for a period of time be comprised of only two accounts:

1. Oil Account; and
2. General Account including three sectors: LNG, LPG and all other HNS.

Contributions to the Fund and the concept of "receiver"

The HNS Fund and its account will be financed by annual contributions from those persons located in a state party who in the preceding calendar year:

- received over 150,000 tonnes of persistent oil;
- received over 20,000 tonnes of LPG;
- received any quantity of LNG cargo;
  - or held title to an LNG cargo immediately prior to its discharge where:
    - the titleholder has entered into an agreement with the receiver that the titleholder shall make such contributions;
    - the receiver has informed the State Party that such an agreement exists; and
- received any other bulk HNS cargo, including oils other than persistent oil, in quantities exceeding 20,000 tonnes.

While the Convention covers damages caused by HNS carried in whatever quantity, the duty to pay levies will rest only with those persons who exceed the above thresholds of HNS received in a given year.

The contributions to the HNS Fund will be made in respect of HNS carried by seagoing vessels and received in Canadian ports. The contributions will be made post-event, i.e. they will only be due after an incident occurs and will be levied only in respect of the account(s) involved in that incident (i.e. Oil/LNG/LPG/all other bulk HNS). The levies applying to individual receivers will be calculated according to the quantities of contributing cargo received in the year preceding the year of the incident. Levies may be spread over several years depending on the progress of payment of claims resulting from the incident.

It is important to note that receivers of packaged or containerized HNS would not be required to report receipts or pay contributions to the HNS Fund. However, damages caused by packaged HNS would continue to be covered by both the shipowners' liability and the HNS Fund.

State parties can choose either of these two definitions of "receiver" in Article 1.4:

> 1.4 (a) ***the person who physically receives contributing cargo*** *discharged in the ports and terminals of a State Party; provided that if at the time of receipt the person who physically receives the cargo acts as an agent for another who is subject to the jurisdiction of any State Party, then the principal shall be deemed to be the receiver, if the agent discloses the principal to the HNS Fund;* or
>
> 1.4 (b) ***the person in the State Party who in accordance with the national law of that State Party is deemed to be the receiver*** *of contributing cargo discharged in the ports and terminals of a State Party, provided that the total contributing cargo received according to such national law is substantially the same as that which would have been received under (a)."*

Article 1.4(a) allows the physical receivers of cargo, such as storage companies, to pass on the obligation to pay a levy, to principal receivers or the owners of the cargo, by identifying the final receivers. Both the person who physically receives the contributing cargo in a port or terminal, and the designated third party must be subject to the jurisdiction of a state party to enable the physical receiver to pass on the levy. In such a case, the final receiver or owner of the cargo will include it in their annual report if the total amount they received in the year exceeds the applicable thresholds of "contributing cargo". The agent or storage company would in this case not have any obligation to pay levies in respect of the bulk HNS cargo they handle on behalf of their principal.

If the agents or storage company cannot disclose who their principal is, or if the principal is located in a non-contracting state, the agent or storage company will include such cargo in their annual report. In this situation, the agent or storage company would be considered to be the "receiver" of the bulk HNS and would be responsible for payment of any levies in respect of the contributing cargo.

Article 1.4 (b) allows a state to establish its own definition of "receiver" under national law. Such a definition must result in the total quantity of contributing cargo received in the state in question being the same as if the definition in 1.4 (a) had been applied.

Treatment of cargo in transit

While the HNS Convention covers any damage arising from HNS in transit, such "cargo in transit" is not a contributing cargo, as provided in Article 1(10):

> *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 a contributing cargo <u>only</u> in respect of receipt at the final destination.*

This means that where the bulk HNS is stored at an intermediary stage, in between carriage by sea, with the transhipment being direct (ship-to-ship) or through a port or a terminal, the receipt of such a bulk HNS cargo at an intermediary stage does not constitute a "contributing cargo" since this is a transhipment in the "course of carriage by sea". The purpose of this provision is to avoid the situation where two separate levies from two separate contributors, first at the port of transhipment and then again at the port of final destination, would be paid on the same HNS cargo. However, bulk HNS cargo received in a port for transhipment by truck or rail to its final destination would be subject to a levy at that port.

In the case of persistent oil, the "receiver" under the HNS Convention will be the same as the party responsible for paying contributions under the IOPC Fund. This will mean that, for a levy in respect of persistent oil, the agent/principal relationship will not apply. As a result, the person who receives the oil cargo is liable and must pay contributions even if that person acts as an agent for the principal receiver.

Furthermore, reports of receipts of persistent oil would need to be submitted to both the HNS Fund and the IOPC Fund. However, considering that the thresholds for reporting receipts of persistent oil are the same under both Conventions (HNS and Fund Convention), the reporting obligation should not significantly increase the administrative burden on those receivers.

In the event of an incident involving persistent oil, the receivers may be required to pay levies to both the HNS Fund and the IOPC Fund, but only if and to the extent that damages arise under both Conventions. For example, should an oil tanker covered by both Conventions explode, levies could be due to the IOPC Fund to cover pollution damage resulting from the oil spilled,[13] as well as to the HNS Fund to cover damages other than pollution, e.g. personal injury caused by the explosion.

Reporting requirements

One of the key obligations state parties must fulfill under the HNS Convention is to report on HNS cargo received. More specifically, the state party must ensure that the name of any person liable to pay contributions appears on a list to be established by the Director of the HNS Fund. State parties are responsible for the levies lost as a result of the non-submission of reports by persons liable to pay them and therefore it is in the state's interest to ensure that accurate reporting takes place. To that end the Convention enables state parties to take appropriate measures under their national law, including the imposition of sanctions, with a view to achieving the effective implementation of any obligations for which the receivers of HNS are responsible.

[13] Currently, Canada's Ship-source Oil Pollution Fund pays all IOPC Fund levies for Canadian contributors.

Sanctions for non-reporting of contributing cargo

As previously mentioned, one of the major issues facing states prior to the adoption of the 2010 HNS Protocol was the fact that there were no sanctions or consequences for states that do not fulfill their obligations to report contributing cargo. Without appropriate sanctions, states that ratified the Convention were exposed to paying for compensation in states that did not report and thus affecting the equal sharing of the financial burden.

In the Convention, there are three instances when states are required to report their contributing cargo:

- Upon ratifying the Convention;
- Annually, to the Secretary General of the IMO, in the period prior to the Convention enters into force (to fulfill one the entry into force requirements of calculating the amount of contributing cargo); and
- Annually, to the Director of the HNS Fund, following the entry into force of the Convention.

The 2010 Protocol introduced new sanctions in respect of states that not submit contributing cargo reports. These are as follows:

- an instrument of ratification by a state, which is not accompanied by a contributing cargo report, will not be accepted by the Secretary General of the IMO;
- in the period prior to the Convention coming into force, a state will be temporarily suspended from being counted as a contracting state should it not submit annual reports to the IMO; and
- following the entry into force of the Convention, no compensation shall be paid for any incident in a state that does not submit a report unless a report is submitted to the Director of the HNS Fund. States would have one year to submit missing reports after being notified of its failure to fulfill its obligations. It should be noted that these sanctions will not apply in respect of death or personal injury claims and these claims would continue to be assessed and paid.

Exclusion of seagoing vessels under 200 grt

Although the Convention applies to any seagoing vessel, including seagoing vessels navigating in domestic waters, state parties have the choice to exclude from the Convention, seagoing vessels under 200 grt engaged in domestic voyages and carrying packaged HNS only. If a state decides to exclude such vessels, no contributions will be due on any cargo carried by these vessels and they would not be subject to the compulsory insurance provisions. Likewise, the HNS Fund would not be liable for any compensation for pollution or other damage caused by such vessels. In these cases, national law would continue to apply to such incidents.

Entry into force provision

The Convention will enter into force 18 months after ratification by at least 12 states that during the preceding calendar year, received a minimum of 40 million tonnes of bulk HNS cargo. In addition, four of the 12 states must have a total registered ships' tonnage of at least two million gross tonnes.

Canadian Context and Legislation

Under current Canadian law, a shipowner's limits of liability for pollution damage for HNS is subject to the limitation of liability for maritime claims as set out in Part 3 of the *Marine Liability Act* (MLA). As an example, the maximum liability of a vessel of 20,000 gross registered tonnes would be about $16 million, compared to $74 million under tier 1 (shipowners' liability) of the HNS Convention. Combined with tier 2, the maximum compensation under the HNS Convention would be $500 million.

At the international level Canada is a much larger exporter of HNS substances than importer. At the national level the volume of HNS carried by ships within Canada is relatively low. This scenario suggests that the risk of incidents is higher for goods moving on seagoing vessels in and out of Canada than through Canadian internal waters on domestic trade routes. Furthermore, the majority of HNS shipped domestically is oil and oil products, which are generally shipped on seagoing vessels coming from offshore oil platforms.

Although HNS imports are understood to be much lower than HNS exports, the number of importers in Canada that receive over 20,000 tonnes of HNS annually and would be potentially liable to pay contributions to the HNS Fund is unknown at this time, but has been estimated to be relatively few. It is expected that this consultative process will provide a sense of the number of contributors in Canada.

In terms of the potential costs of the Convention to Canadian receivers of HNS, this will depend on a number of variables. As with any liability regime that involves contributions to a common fund to pay for claims made against it, the amount of any contribution from receivers in a given year will be determined by the size and frequency of HNS incidents and the cost of claims paid by the HNS Fund. In addition, contributions would likely be spread over several years, especially in the case of a major incident, and would likely be reduced by recoveries obtained by the HNS Fund under any recourse action taken against other parties. The only experience in this field that may provide some measure of potential obligations to pay contributions to the HNS Fund is the IOPC Fund. From that perspective, the contributions levied over the years by the IOPC Fund (on average about 5¢ per tonne of oil) seem to be reasonable.

Policy Options

There are two policy options for consideration in regard to this Convention. They are:

Option 1 – Do not ratify the Convention

Under this scenario, Canada would not ratify the HNS Convention and in the event of an HNS spill, Canada would continue to apply the existing regime relating to shipowner's liability in so far as any pollution damage is concerned. Thus, Part 6, Division 2 of the MLA would continue to govern the liability of the shipowner, subject to the limits of liability found in Part 3 of the MLA. The shipowner's liability would remain lower than under the HNS Convention and would not be supported by compulsory insurance with direct action against the insurer or an additional layer of compensation that is available from the HNS Fund. There is also the risk that, in the event of a major HNS incident in Canada, the costs of response, clean-up and third party damages may not be recoverable from the shipowner and taxpayers would be required to fund a portion of these costs. It follows that there would be no extra burden placed on Canadian receivers of HNS to pay any contributions to the HNS Fund and compensation for these claims exceeding the shipowner's limit of liability would not be available in Canada, as is the case at the present time.

Option 2 – Ratify the Convention

Ratifying the Convention would provide a level of compensation for HNS incidents caused by seagoing vessels that is vastly superior to that which is currently available under the MLA, and which more aptly addresses the higher level of risk posed by the larger volume of international movements of HNS. The strict liability of the shipowner for pollution and other damages including injury and death, the requirement to maintain insurance, the right of direct action against the insurer, and the HNS Fund, would ensure that claimants of damages arising from HNS incidents in Canadian waters would receive prompt and adequate compensation analogous to that provided by the IOPC Fund to oil pollution claimants.

However, the option to ratify requires consideration of several policy issues, including those that the Convention has left to the contracting states to decide. These are:

Meaning of "carriage by sea" and "domestic carriage of HNS"

As noted earlier, the Convention covers any damage caused during the international or domestic carriage of HNS by any seagoing vessel in the territory or territorial sea of the contracting state. While the Convention refers in various articles to "carriage by sea", consistent with its title, it would be more prudent in the Canadian context to stipulate that the term "carriage by sea" should be read to mean "carriage by water". This will leave no doubt that **seagoing vessels** operating in our internal waters and carrying HNS cargo, be it international or domestic in origin, would be covered in the event of any incident. It follows that such cargo would also be considered "contributing cargo" for the purposes of the annual threshold under the various HNS accounts.

Notwithstanding the proposed provision on "carriage by water", the Convention will not apply to domestic carriage of HNS by **non-seagoing vessels**. Such vessels will continue to be covered under the existing regime in Part 6 of the MLA. As indicated earlier, the existing regime covers only pollution damage, at a lower level of shipowner's liability than the HNS Convention. However, the principal commodity moved domestically by non-seagoing vessels are oil and other bulk products, in relatively small quantities when compared to the volume of HNS carried by seagoing vessels in Canada.

Given the relatively low risk presented by this type of domestic trade, the existing regime in Part 6 of the MLA should be more than adequate to deal with any incident that may involve non-seagoing vessels engaged in domestic carriage of HNS. Moreover, for incidents involving oil pollution, the domestic Ship-Source Oil Pollution Fund would continue to provide an additional level of compensation for any claims exceeding the shipowner's liability, up to about $155 million per incident.

It is proposed that the liability of non-seagoing vessels engaged in domestic carriage of HNS cargo continue to be governed by Part 6, Division 2 of the MLA; and, that such HNS cargo not be considered as "contributing cargo" for the purposes of the HNS Convention.

Exclusion of seagoing vessels under 200 grt

Although the Convention applies to any seagoing vessel, state parties have the choice to exclude from the Convention seagoing vessels under 200 grt engaged in domestic voyages and carrying packaged HNS only. This option has been introduced in the Convention on the grounds that this category of vessels poses a relatively low risk of damage, given the smaller volume of their cargo, especially when carried in packaged form. From a practical standpoint, excluding this category of vessels would reduce the administrative burden of obtaining and processing insurance certificates for small vessels that might be affected by the Convention.

Similarly, receivers of cargo carried by these vessels would not be required to report it to the HNS Fund. It follows that damage caused by such ships will not be governed by this Convention, but rather by national law. Thus, like in the preceding case involving non-seagoing vessels, the existing regime in Part 6 of the MLA would also apply to seagoing vessels below 200 grt.

It is proposed that seagoing vessels not exceeding 200 grt engaged in domestic carriage of HNS in packaged form be excluded from the application of the Convention in Canada and that their liability be governed by the existing regime in Part 6 of the MLA.

The adoption of the definition of "receiver":

As noted earlier, the Convention allows state parties to choose from two definitions of a receiver. Under Article 1.4 (a), the receiver is:

- the physical receiver of cargo in the port of discharge, including an agent or storage company that receives the cargo for carriage to a final destination in the state party; or
- the person who physically receives the HNS cargo. This could be the principal receiver or an agent of the principal receiver. The agent would not be required to report such cargo for the purposes of their own annual threshold, provided that the principal is located in the contracting state and the agent discloses the principal to the HNS Fund (or "designated authority").

Alternatively, under Article 1.4(b), the state party can formulate its own definition of receiver so long as contributions to the HNS Fund are the same as they would have been under Article 1.4(a).

Many states intending to ratify the Convention have indicated their preference for the definition in Article 1.4 (a) on the grounds that it contributes to certainty in the interpretation of who is considered a receiver. Moreover, this definition creates a certain level of stability for industry stakeholders in that no new state controlled mechanism would need to be created in order to satisfy the conditions of keeping track of contributing cargo and receivers within the state.

It is proposed that the definition of receiver set out in Article 1.4(a) be adopted in Canadian law.

Reporting System

As noted earlier, the HNS Fund will be financed by contributions from receivers mainly after an incident has taken place (i.e. post-incident – with the exception of administrative costs). Contributions or levies will be based on reports of HNS receipts exceeding certain thresholds in the year preceding an incident. In order to ensure that all persons who are obliged to contribute to the HNS Fund can be located and invoiced if necessary, the Convention requires all state parties to report to the Director of the HNS Fund, on an annual basis, details of all persons (i.e. contact details and quantities of contributing cargo) in a state who are liable to contribute to the Fund. Contracting states will therefore need to implement a reporting system in support of this obligation. Two main administrative options have been discussed internationally how this obligation could be discharged:

a) national reporting system administered and closely monitored by a national authority; and
b) self-reporting system by industry with provisions for verification by a national authority.

Option (b) has been the preferred option of the majority of states and industry stakeholders. It consists of a system where receivers self-identify and report relevant information to a designated national authority on a yearly basis.[14] The national authority takes on the duty of spot verification (or audits) of reports and submission of information to the Director of the HNS Fund.

National law and regulations will have to provide appropriate measures for enforcement of the reporting requirements and for penalties when these are not met. There is a precedent in Canada to this approach. In order to discharge its responsibility as a member of the IOPC Fund, Canada adopted a set of regulations creating an effective mechanism for compliance with reporting requirements and for state verification of reporting responsibilities for receivers of oil. The authority for these regulations are found in Part 7 (section 125) of the MLA.

A decision to ratify the Convention comes with the obligation to implement the reporting system in advance of the entry into force of the Convention in that state. This obligation requires the state to provide data on the amount of HNS received in the 12 months prior to the ratification of the Convention.

It is proposed that regulations be adopted to set out the reporting requirements of receivers and the role and functions of a designated authority responsible for enforcing these requirements in Canada.

It is also proposed that this system of reporting begin 12 months in advance of the Canadian ratification of the HNS Convention.

A lower threshold for reporting

Consideration will also be given in the regulations on reporting requirements to adopting a lower threshold for reporting HNS shipments than the one provided for in the HNS Convention. This would allow the designated authority to better monitor the HNS trade flows and those parties that are on the margins of the annual threshold and that could potentially be brought into the levy system in any given year. This might be a particularly important option for Canada, as the expected number of receivers has initially been estimated to be quite low with many smaller receivers under the annual 20,000 tonne threshold. It is important to note that the establishment of a lower national threshold is being considered only for the purpose of reporting annual HNS receipts to a designated national authority and not for the purpose of providing contributions to the HNS Fund. Information collected from those under the contribution threshold would not be shared with the HNS Fund in any way.

[14] The "designated national authority" will be determined at an appropriate time to ensure smooth operation of the Convention.

As mentioned earlier, in order to facilitate reporting requirements, receivers will be able to use the HNS CCCC, to identify and report HNS received to the designated national authority. The HNS CCCC will also allow a receiver to input the amount of bulk HNS received in a Canadian port and to calculate whether the total bulk HNS cargo received annually meets the thresholds in the Convention. Upon ratification of the Convention, the HNS Fund will invoice directly individual receivers for the amount of contributions payable to the Fund.

With the adoption of the 2010 Protocol, this system will be reviewed and it is anticipated that it will be accessible through a website in the future.

It is proposed to adopt in Canadian law a lower annual threshold of 17,000 tonnes for receivers of non-persistent oil, LPG and other bulk HNS falling under the General Account.

Treatment of associated persons

Article 16(5) of the HNS Convention requires that quantities of HNS received in the same state by associated persons must be aggregated for the purpose of determining whether the threshold for payment of contributions has been reached. The objective of this provision is to maintain an equitable treatment of all receivers by ensuring that the duty to pay a levy cannot be avoided by spreading the receipts of HNS cargoes among several associated companies.

The Convention defines "associated person" as: *"any subsidiary or commonly controlled entity. The question of whether a person comes within this definition must be determined by the national law of the State concerned"*. In the case of "associated persons", all entities receiving HNS within the group will have to submit the details of the HNS cargo even if they do not exceed the Convention thresholds since the assessment for the levy will be based on the aggregated HNS received within the group of "associated persons". The HNS CCCC will allow users to enter the details of associated persons so that the contributions can be aggregated.

It is proposed to adopt the same definition of "associated persons" as contained in sections 60 and 66 of the MLA to assess aggregate quantities of HNS received by several related entities. This definition, which relates to contributions to the IOPC Fund, reads as follows:

"If two bodies are affiliated with each other within the meaning of section 2 of the Canada Business Corporations Act, they are deemed to be 'associated persons'…

Fines to be levied for not having an insurance certificate

As noted earlier, under tier 1 shipowners will be required to have a certificate of insurance or other financial security covering their liability under the regime. These certificates will be issued by a designated authority in the state party against evidence of insurance or other security provided by the shipowner. A valid certificate has to be carried on board the ship and be available for inspection along with other ship's documents. Under the enforcement provisions of the MLA, ships can be detained for not having a CLC Certificate or Bunkers Convention Certificate and it is foreseen as the same provision would also apply to the HNS Convention.

This requirement raises the question of sanctions or fines for not having a valid insurance certificate. Using the example of current legislation for oil pollution in Part 6 of the *Marine Liability Act*, a shipowner that does not have a valid insurance certificate as prescribed in that Part, is subject to a fine up to $100,000. These fines were updated in 2009 and it would seem prudent to apply the same scheme of fines for not having an appropriate certificate of insurance in the case of the HNS Convention.

It is proposed that fines for not carrying an appropriate insurance certificate be set at a level consistent with Part 8 of the MLA.

Role of the Ship-Source Oil Pollution Fund (SOPF)

As mentioned previously, the HNS Fund will be financed by contributions from receivers after an incident has taken place. In the IOPC Fund system, Canada is unique in that it already had a domestic fund - the SOPF - established in 1973, which pays all contributions to the international fund on behalf of oil receivers in Canada. The SOPF is a crucial part of Canada's oil pollution liability and compensation regime and it provides additional coverage for the spilling of any type of oil from any type of ship (the IOPC Fund only pays for persistent oil from tankers).

The largest commodity transported by ship covered by the HNS Convention is oil, which has its own "Oil Account" in the HNS Fund. The HNS Convention covers damages for loss of life and personal injury on board or outside the ship, i.e. damages that are not covered under the IOPC Fund system. There is the possibility that claims relating to loss of life and personal injury caused by persistent oil spills, in addition to damages caused by non-persistent oil spills, would be a significant portion of the total HNS Claims. Thus, similar to the current arrangement with the IOPC Fund, the SOPF would also take on the responsibility of reporting Canadian receipts of persistent and non-persistent oil and paying contributions on behalf of Canadian receivers to the future HNS Fund. This would ensure that levies imposed on oil receivers by the HNS Fund are financed through the same mechanism – the SOPF - as levies imposed on the receivers of persistent oil by the IOPC Fund.

It is proposed that the levies to the HNS Fund in respect of persistent and non-persistent oil be paid from the SOPF and that the Administrator of the SOPF assumes the same roles and responsibilities for this obligation to the HNS Fund as the Administrator currently has for the IOPC Funds.

Policy Recommendations

In view of these considerations it is recommended that:

1. **The MLA be amended to implement the HNS Convention in Canada;**

2. **Transport Canada put in place the means for one year of reporting HNS receipts prior to ratification, as required by the HNS Convention; and**

3. **Canada ratify HNS Convention along with proposed methods for proceeding with the implementation of the various aspects of the Convention in Canada as soon as is practicable.**