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The International Maritime Organization and the Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea: An Update on Recent Activity

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The International Maritime Organization and the Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea: An Update on Recent Activity

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I. INTRODUCTION

“States have the obligation to protect and preserve the marine environment.”¹

1. United Nations Convention on the Law of the Sea, Oct. 7, 1982, art. 192, 21 I.L.M. 1261, 1308 [hereinafter LOS Convention]; *see also* Aldo E. Chircop, *The Marine Transportation of Hazardous and Dangerous Goods in the Law of the Sea—An Emerging Regime*, 11 DALHOUSIE L.J. 612, 629-30 (1988). The convention requires all states to minimize the release of toxic substances into the marine environment, including “pollution from vessels, in particular measures for preventing accidents . . . , ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation, and manning of vessels.” LOS Convention, *supra*, art. 194, para. 3(b), 21 I.L.M. at 1308. Further, flag states must enforce violations of pollution laws applying to their ships, including adequate inspection, certification, penalties, and investigation. *Id.* art. 217, para. 3.

Conversely, the convention recognizes that states have a right, based on their sovereignty, to protect and preserve the marine environment off their coasts and in their economic zones. *See id.* art. 56, para. 1(b)(iii).

More than fifty percent of all cargo transported by sea, whether solid, liquid, or gas, consists of hazardous or noxious substances (HNS).² Due to increased shipment of HNS by sea, worldwide concern with the risks of HNS, growing public environmental awareness, and the economic and non-economic implications of maritime accidents,³ the international community has formulated and adopted standards of ship design, construction, and operation to promote maritime safety and decrease the probability of and resultant damage from marine pollution caused by HNS.⁴ Current international law,

2. CLEOPATRA E. HENRY, *THE CARRIAGE OF DANGEROUS GOODS BY SEA* 92 (1985); see also Chircop, *supra* note 1, at 613. Because of the complex administrative and economic issues involved, the definition of HNS is a point on which the International Maritime Organization (IMO) cannot currently agree. This dissent is one reason why the IMO did not adopt the 1984 Draft Convention on Liability and Compensation in Connection with the Carriage of Noxious and Hazardous Substances by Sea, see *infra* note 3. A recent American proposal to the Convention defines HNS as "substances defined . . . as either 'dangerous cargoes' or 'flammable residues'" which are listed in specific annexes to the convention. *Consideration of a Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea, Submission by the United States*, IMO Legal Comm. 63rd Sess., Agenda Item 3, para. 7.1, IMO Doc. LEG 63/3/3 para. 7.1 (Aug. 17, 1990). The most recent Draft Convention substitutes the term "dangerous goods" for "HNS" and defines "dangerous goods" very broadly, incorporating hazardous substances listed under several international pollution conventions and ship construction codes. See *infra* notes 224-29 and accompanying text.

The International Convention for the Prevention of Pollution From Ships, 1973, and its 1978 Protocol define "harmful substance" as "any substance which, if introduced into the sea, is liable to create hazards to human health, to harm living resources and marine life, . . . or to interfere with other legitimate uses of the sea" International Convention for the Prevention of Pollution From Ships, 1973, Nov. 2, 1973, art. 2, para. 2, 12 I.L.M. 1319, 1320 (1973); Protocol of 1978 Relating to the International Convention for the Prevention of Pollution From Ships, 1973, Feb. 17, 1978, (entered into force Oct. 2, 1983), reprinted in 3 NAGENDRA SINGH, *INTERNATIONAL MARITIME LAW CONVENTIONS*, at 2414 (1983) [hereinafter MARPOL 73/78] (prohibiting all forms of intentional pollution of the sea from ships).

The essential problem of "hazardous goods," as Chircop points out, "concerns the management of goods which by their very nature . . . may potentially impair human welfare, vessel and cargo safety, certain marine uses, and the health of the ocean and coastal environment." Chircop, *supra* note 1, at 613-15.

3. Damages from HNS incidents can include property and environmental damage, personal injury, loss of life, cleanup costs, and preventive measures costs. See *Draft Convention on Liability and Compensation in Connexion With the Carriage of Noxious and Hazardous Substances by Sea*, IMO Legal Comm., Agenda Item 6, art. 1, para. 6, IMO Doc. LEG/CONF.6/3 (Jan. 13, 1984), reprinted in 23 I.L.M. 150, 151 (1984) [hereinafter *1984 Draft HNS Convention*].

4. Aline F. De Bievre, *Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances By Sea*, 17 J. MAR. L. & COM. 61, 61 (1986).

The United Nations Group on the Scientific Aspects of Marine Pollution defines "marine pollution" as the "[i]ntroduction by man, directly or indirectly, of substance or energy into the marine environment (including estuaries) resulting in such deleterious effects as harm to living resources, hazard to human health, hindrance of marine activities including fishing, impairment of quality for use of sea water and reduction of amenities." Quoted in Michael

however, does not adequately address a second, important aspect of the marine pollution problem: adequate compensation of the victims of HNS incidents. Currently, no internationally accepted agreement exists that assigns liability and compensation for damages caused by HNS accidents. Current international law, embodied in such international pacts as the International Maritime Dangerous Goods Code (IMDGC),⁵ has been described as inadequate to deal with the problem.⁶

Several interests are involved in any consideration of liability for damages resulting from the international marine transportation of hazardous goods. First, the international community must balance the competing interests of unencumbered international commerce against protecting the marine environment.⁷ Second, individual nations have specific interests, particularly in terms of territorial juris-

Hardy, *Definition and Forms of Marine Pollution*, in 3 *NEW DIRECTIONS IN THE LAW* 73, 73 (Robin Churchill, et al. eds., 1973).

5. INTER-GOVERNMENTAL MARITIME CONSULTIVE ORGANIZATION, INTERNATIONAL MARITIME DANGEROUS GOODS CODE (1977) [hereinafter IMDGC]. The IMDGC is a guide to mariners and shippers of dangerous goods that provides information on the goods' nature. It is descriptive, rather than regulatory, and is not internationally enforceable. See Edgar Gold, *Legal Aspects of the Transportation of Dangerous Goods at Sea*, 10 *MARINE POL'Y* 185, 186 (1986); see also *infra* note 214.

6. Synopsis, *Recent Developments in the Law of the Sea 1983-1984*, 22 *SAN DIEGO L. REV.* 801, 832 (1985).

7. Chircop, *supra* note 1, at 615. The international community, not solitary states, must tackle the problem. First, the international community can efficiently disseminate HNS information. Second, international participation best promotes uniformity of law, and facilitates international navigation and trade. Third, international participation encourages even the smallest state to concern itself with and take steps to correct the problem. Finally, an international regime is the most efficient way of handling cross-national liability and compensation issues.

The international community must cooperate to solve the HNS problem. Principle 24 of the Stockholm Declaration of the United Nations Conference on the Human Environment states:

International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big or small, on an equal footing. Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce, and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.

United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14 and Corr. 1, *Report of the United Nations Conference on the Human Environment*, reprinted in 11 *I.L.M.* 1416, 1420-21 (1972). The UN Law of the Sea Convention reiterates this principle:

States shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards, and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

LOS Convention, *supra* note 1, art. 197.

diction, where they are primarily responsible for making and enforcing any marine protection scheme.⁸ Third, special interest groups have relevant concerns. For example, shippers want economic, safe shipment of their cargo. Shipowners want economic, safe, and unencumbered movement of their vessels. Seamen and shipboard workers have concerns regarding their health and the safety of their work environment. Insurers have ultimate financial responsibility for any system of liability compensation.⁹ Developing countries that desire to expand their maritime industries find it difficult to comply with international rules for ship design, construction, equipment, and manning, and fear damage to their shipping industries from further imposition of liability.¹⁰ As a result of these competing factors, any successful international scheme for carrying hazardous substances and assigning liability for HNS accidents must provide for: (a) human safety; (b) protection of the marine environment; (c) free international navigation; (d) polluter liability; (e) compensation for injured parties; (f) assistance for developing countries; (g) the free exchange of information and technology; and (h) international cooperation.¹¹

In September, 1977, faced with an increase in maritime accidents

8. The United Nations Convention on the Law of the Sea gives coastal states sovereign rights to explore, exploit, and manage the living resources of its 200 nautical mile "Exclusive Economic Zone" (EEZ). The convention gives coastal states jurisdiction to establish and use artificial islands, installations, and structures; to conduct marine scientific research; and to protect and preserve the marine environment. LOS Convention, *supra* note 1, arts. 55-60.

In further support of coastal state interest, article 221 states:

1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.

2. For the purpose of this article, "maritime casualty" means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

Id. art. 221.

9. Chircop, *supra* note 1, at 615-16.

10. *Id.* at 618. Chircop also asserts that international organizations such as the United Nations Environment Program (UNEP), the International Atomic Energy Agency (IAEA), the International Labor Organization (ILO), the World Health Organization (WHO), the Food and Agricultural Organization (FAO), and the World Meteorological Organization (WMO) have interests in marine accidents and the associated pollution liability scheme due to the nature of their work. *Id.* at 616. Also, various other interests may become involved as a result of each particular incident. For example, in a collision scenario, salvage and towing concerns may become relevant. *Id.* at 616 n.7.

11. *Id.* at 623-25.

involving HNS,¹² the Legal Committee of the International Maritime Organization (IMO) gave "highest priority" to work on a comprehensive international convention¹³ to establish a liability and compensation system for damage caused by vessels carrying HNS at sea.¹⁴ As a result, an international conference was held at IMO headquarters in London from April 30 to May 25, 1984.¹⁵ Seventy member states and thirty observer nations considered the *Draft HNS Convention*.¹⁶ The conference did not ratify the draft convention proposed by the Legal Committee, however, because time constraints prohibited resolution of the complex issues involved.¹⁷ The conference returned the draft to the Legal Committee to for additional work.¹⁸ The Legal Committee has since been at work on a revised draft convention for consideration at a future diplomatic conference. The conference will probably convene in 1994.¹⁹

This Comment will trace the evolution of the *1984 Draft HNS Convention* to the *1991 Draft HNS Convention*, with emphasis on the work of the IMO Legal Committee to revise the draft and on the various proposals from all countries that are being considered. It will discuss the following issues that have prevented the draft from gaining international acceptance: equitable apportionment of liability between shipowners and shipping interests, substances to be covered by the convention, and funding of the liability scheme. Part II of this Comment will briefly discuss the history of the IMO and international agreements with respect to the maritime shipment of hazardous and noxious substances. Part III will discuss the text of the 1984 Draft and the reasons why it was not adopted. This part will also focus on the concept of "damage" as defined in the Draft Convention, the defi-

12. See *infra* notes 32-64 and accompanying text.

13. A "convention," synonymous with "treaty" or "agreement," is a legal statement of an international undertaking. It is intended to provide a clear, conclusive statement of the rights of the states that are party to it *vis-a-vis* each other. A convention is binding generally only on ratifying states, unless it becomes part of customary international law by subsequent general practice. R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 5 (1988).

14. De Bievre, *supra* note 4, at 68-69 (quoting the *Resolution of the Legal Committee*, IMO Doc. LEG 33/5, para. 52 (1977)). This Comment discusses the ensuing proceedings to develop this liability and compensation system. The *1984 Draft HNS Convention*, *supra* note 2, has not been passed due to the inability of the delegates to agree on definitions, liability, and funding for catastrophic damage.

15. See *International Maritime Organization: Convening of an International Conference on Liability and Compensation for Damage in Connection with the Carriage of Certain Substances by Sea*, Circular Letter No. 958 (Nov. 2, 1983), reprinted in 23 I.L.M. 148 (1984).

16. De Bievre, *supra* note 4, at 72.

17. *Id.*

18. *Id.* at 72-3.

19. Telephone Interview with Capt. J. Collum, United States Coast Guard, Chief, Coast Guard Maritime and International Law Division (Oct. 22, 1991).

inition of "hazardous substance," and the types of cargo affected. Part III will further discuss several concepts addressed by the Legal Committee that depart from traditional international admiralty law in the areas of strict liability, limitation of liability, mixed liability of the shipper and shipowner, and requirements for compulsory insurance. Part IV will discuss the negotiations that were conducted for a revised Draft Convention. Part V will explore the substance of the most recent Draft, promulgated in January, 1991.²⁰ Finally, Part VI will analyze the future work of the Legal Committee in anticipation of the pending 1994 international diplomatic conference.

It has been said that, too often, the international approach to this type of problem is determined by the type of pollutant spilled (e.g., oil, radioactive waste), its method of introduction into the sea (e.g., ocean dumping, routine operations), or the location of the damage (e.g., territorial waters, contiguous zone, high seas).²¹ This approach often results in a "fragmented and piecemeal" means of correcting the problem of ocean pollution.²² A successful program to eliminate the damage caused by hazardous and noxious cargo pollution at sea through imposing liability must be cohesive and proactive, and must take into account all relevant factors, causes, interests, and consequences.²³

II. THE INTERNATIONAL MARITIME ORGANIZATION AND THE SCOPE OF THE PROBLEM

A. *The International Maritime Organization*

The International Maritime Organization (IMO), the chief United Nations (UN) agency that specializes in international maritime issues, "is a forum in which Member States can express their views reflecting state or international shipping practice."²⁴ Membership includes the traditional maritime powers and nations which rely largely on other nations for their shipping.²⁵

20. *Consideration of a Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea, Submission Under the Lead Country Procedure by Canada, Denmark, Finland, France, Germany, Japan, the Netherlands, Sweden, the United Kingdom, the United States, and the U.S.S.R.*, IMO Legal Comm., 64th Sess., Annex, Agenda Item 4, IMO Doc. LEG 64/4 (Jan. 25, 1991) [hereinafter *1991 Draft HNS Convention*].

21. CHARLES S. PEARSON, *INTERNATIONAL MARINE ENVIRONMENT POLICY* 41 (1975).

22. K. Ramakrishna, *Environmental Concerns and the New Law of the Sea*, 16 J. MAR. L. & COM. 1, 8 (1985); see also *infra* note 30.

23. See De Bievre, *supra* note 4, at 61-62; Ramakrishna, *supra* note 22, at 19.

24. THE INTERNATIONAL MARITIME Organization 1 (Samir Mankabady ed., 1984) [hereinafter *Mankabady*].

25. The countries with a special interest in shipping include Australia, Belgium, Denmark,

The IMO was intended to be a conservative body; its decision making method of conference, deliberation, and negotiation has resulted in cautious change to international marine law and policy.²⁶ The UN originally intended that the IMO would not initiate international legislation, but would advise periodic international conferences of the need to act on maritime matters.²⁷ However, international marine pollution was not considered a problem in 1948.²⁸ Since then, increased recognition of the likelihood and degree of marine pollution has resulted in increased IMO responsibilities, including a proactive stance on preventing ocean pollution.²⁹

Because its work is fundamental to the development of a liability

Finland, France, the Federal Republic of Germany, Greece, Ireland, Iceland, Italy, Japan, Liberia, the Netherlands, Norway, Poland, Sweden, Spain, the United Kingdom, the United States, and the Soviet Union. Wilhelm H. Lampe, *The "New" International Maritime Organization and its Place in Development of International Maritime Law*, 14 J. MAR. L. & COM. 305, 306 n.5 (July, 1981). For a complete list of membership, see 1 THE RATIFICATION OF MARITIME CONVENTIONS I.1-4 (1990).

26. David. J. Bederman, Comment, *Dead in the Water: International Law, Diplomacy, and Compensation for Chemical Pollution at Sea*, 26 VA. J. INT'L L. 485, 509 (1986).

27. The purpose of the IMO is

to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage the general adoption of the highest practicable standards in matters concerning maritime safety efficiency of navigation, and the prevention and control of marine pollution from ships

Convention on the Intergovernmental Maritime Consultive Organization, Mar. 6, 1948, art. 1(a), 9 U.S.T. 621, 623, 289 U.N.T.S. 48, 48, *reprinted with amendments in SINGH, supra* note 1, at 3169, 3169-70 [hereinafter IMO Convention] (emphasis added).

Originally, the organization's powers were to make recommendations, convene conferences, and draft conventions to submit to governments for approval. Lawrence Juda, *IMCO and the Regulation of Ocean Pollution From Ships*, 26 INT'L & COMP. L.Q. 558, 559 (July, 1977). Juda points out that one disadvantage to this unavoidably slow process is that treaty provisions fall behind changing technology and social needs, encouraging individual States to take unilateral action, which might disrupt international shipping. *Id.* at 574.

The original name of the IMO was the "Inter-Governmental Maritime Consultive Organization" (IMCO). The name was changed to IMO to reflect its "increasingly important role in implementing the developing body of international maritime law." Lampe, *supra* note 25, at 305-306.

Note that this "recommendation only" function is in contrast to other United Nations agencies, such as the International Civil Aviation Organization (ICAO), the International Telecommunications Union (ITU), the World Meteorological Organization (WMO), and the World Health Organization (WHO), whose charters empower them to adopt, revise, and repeal international regulations which bind member States without further State action. Juda, *supra*, at 573.

28. Juda, *supra* note 27, at 560.

29. For thorough histories of IMO's role in preventing marine pollution, see David Abecassis, *IMO and Liability for Oil Pollution from Ships: A Retrospective*, 1983 LLOYD'S MAR. & COM. L.Q. 45, 45-49; Ramakrishna, *supra* note 22; Lampe, *supra* note 25; Juda, *supra* note 27.

regime for marine pollution, this Comment extensively discusses the Legal Committee of the IMO. This committee handles legal matters that come before the IMO, including the legal aspects of a draft convention such as the *Draft HNS Convention*.³⁰ Upon completion of a draft instrument, the Legal Committee submits it to a conference which is open to all members of the United Nations, including those nations not in the IMO. After adopting a convention, the conference submits it to governments for ratification.³¹

B. *The Nature of the HNS Problem*

Since 1958, international trade in hazardous and noxious substances has greatly increased;³² as a consequence, the danger of damage from pollution, fire, and explosion caused by HNS has also increased.³³ Carrying large quantities of HNS on vessels at sea cre-

30. Ramakrishna, *supra* note 22, at 4. The IMO created the Legal Committee after the *Torrey Canyon* incident in 1967 to prepare draft conventions on marine pollution. The Legal Committee has drafted, inter alia, the International Convention on Civil Liability for Oil Pollution Damage, Nov. 29 1969, 973 U.N.T.S. 3 [hereinafter 1969 CLC] (creating strict liability for damage caused by the shipowner's oil cargo); the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18 1971, 1110 U.N.T.S. 57 [hereinafter 1971 Fund Convention] (where the shipowner cannot meet his liability under the 1969 CLC, a supplemental fund will provide compensation to the victim); MARPOL 73/78, *supra* note 2; and the Convention on Limitation of Liability for Maritime Claims, Nov. 19, 1976, 16 I.L.M. 606 (1977) [hereinafter 1976 LLMC]. Ramakrishna argues that the shortcoming of this scheme is that all conventions were drafted as a response to some environmental disaster. As a result, the scheme's development lacks planning and forethought. See Ramakrishna, *supra* note 22, at 4-5.

For a discussion of how these conventions interrelate to form a framework for the initial 1984 *Draft HNS Convention*, see *infra* notes 78-85.

31. Ramakrishna, *supra* note 22, at 10-11.

32. Jonathan R. Pawlow, Note, *Liability for Shipments by Sea of Hazardous and Noxious Substances*, 17 LAW & POL'Y INT'L BUS. 455, 457 (1985).

Advances in scientific technology and ship design and technology have contributed to the increased shipment of hazardous goods at sea. Larger, safer ships can carry more HNS. Also, because aircraft are forbidden by law from carrying most HNS, HNS is primarily shipped worldwide by sea. Gold, *supra* note 5, at 185-186.

33. Pawlow, *supra* note 32, at 457-58.

The Transportation Research Board of the National Research Council suggests that HNS transportation is increasing dramatically at sea and port areas. Minor HNS casualties can result in major or catastrophic damage to the ship and her crew, the marine environment, the shoreline, and the coastal population. Mark Abkowitz & Jorge Galarraga, *Tanker Accident Rates and Expected Consequences in U.S. Ports and High Seas Regions*, reprinted in RECENT ADVANCES IN HAZARDOUS MATERIALS TRANSPORTATION RESEARCH, AN INTERNATIONAL EXCHANGE 161 (1986).

A five year study (1976-1980) cataloguing types of spills (accident, movement), locations (harbor, bay, high seas), types of accidents (collision, fire, explosion, or grounding), number of accidents, number of injuries, and monetary losses was conducted. The study concluded that accidents occur more frequently in harbors than on the high seas, but that high seas spill rates are greater than those in other locations and have higher rates of expected damage, due primarily to the severity of the accident and the unavailability of assistance. The study

ates the risk of HNS marine accidents. "These vessels pass through the territorial seas of various countries, through straits and canals, or call at ports, thus creating serious risks to certain communities and to the marine environment in general."³⁴ Dangerous chemicals pose a potentially great risk because they disperse more easily at sea and are more toxic than oil.³⁵ The type, character, and quantity of the substance(s) released into the sea,³⁶ the type of casualty resulting in the spill,³⁷ the distance of the accident from population centers, the ecological sensitivity of the surrounding area, the local weather conditions,³⁸ and the use of the water,³⁹ all influence the magnitude of the damage resulting from an HNS incident. The environmental and economic costs of maritime casualties involving hazardous and noxious substances can be astronomical,⁴⁰ thus requiring quicker, more efficient, and possibly more expensive cleanup of HNS.⁴¹

Early on, the international community (as embodied by the IMO) did not perceive a strong need for an international liability scheme for HNS accidents. The international community generally lacked experience in dealing with HNS pollution damage⁴² and the IMO doubted the likelihood of high cleanup costs.⁴³ As a result, with the exceptions of conventions addressing the intentional dumping of hazardous waste and compensation for nuclear accidents at sea,⁴⁴ the

concluded that amounts of HNS released vary significantly, depending on the cause and the severity of the accident. *Id.* at 166-68.

34. *Consideration of a Possible Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), Submission by Poland*, IMO Legal Comm., 62nd Sess., Agenda Item 4, at 1, IMO Doc. 62/4/5 (March 14, 1990) [hereinafter *Submission by Poland 62nd*].

35. Bederman, *supra* note 26, at 486. Oil is not the most noxious of marine pollutants because cleanup efforts can separate it from the sea and marine bacteria eventually break down its residue. HNS, on the other hand, does not biodegrade, and cannot be removed from the sea. Marine organisms can also absorb HNS, affecting the entire food chain. CHURCHILL AND LOWE, *supra* note 13, at 244.

36. For example, a hazardous substance can be released as solid, liquid, or gas, and may be flammable or explosive. Pawlow, *supra* note 32, at 459 (citing *International Conference on Liability and Compensation for Damage in Connection with the Carriage of Certain Substances by Sea, Submission by the International Group of P & I Associations*, IMO Doc. LEG/CONF.6/14 at 4 (Feb. 27, 1984)). "Protection and Indemnity Clubs," insurance concerns based in London, insure approximately 70% of the world's shipping. Bederman, *supra* note 26, at 488 n.15.

37. *I.e.*, collision, grounding, fire, explosion, or sinking. Pawlow, *supra* note 32, at 459 n.21.

38. Water temperature, and wind and current direction and speed can affect damage. *Id.*

39. *E.g.*, navigation, recreation, or fishing. *Id.*

40. De Bievre, *supra* note 4, at 61.

41. Bederman, *supra* note 26, at 486.

42. De Bievre, *supra* note 4, at 63-64.

43. *Id.* at 66.

44. Bederman, *supra* note 26, at 487 nn.9-10 (citing International Convention for the

international community has not developed international conventions specifically to assign liability and provide compensation to injured parties for damages resulting from maritime HNS accidents.⁴⁵ Currently, an injured party must resort to the law of the country where the accident occurs, which may place liability on the shipper, or, more likely, the shipowner.⁴⁶ Generally, damages from minor HNS incidents are sufficiently covered, but major damages or catastrophes receive inadequate coverage under traditional shipowner liability limitations.⁴⁷

Traditionally, prior to the mid 1960s, most maritime shipments of dangerous cargo were by package.⁴⁸ Because the IMO believed that packaged substances would not create great damages, international regulations, such as the International Maritime Dangerous Goods Code (IMDGC),⁴⁹ focused on protecting the ship and crew from fire, explosion, poisoning, or corrosion, rather than protecting the external environment.⁵⁰ However, when HNS began to be shipped in larger quantities and in bulk,⁵¹ the international commu-

Prevention of Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120 (applying to seas globally, and requiring parties to adopt measures to prevent marine pollution caused by the dumping of hazardous, noxious, and radioactive waste)); Convention for the Prevention of Marine Pollution by Dumping From Ships and Aircraft, Feb. 15, 1972, 932 U.N.T.S. 3 (applying to North Sea and Northeast Atlantic).

45. Bederman, *supra* note 26, at 487. Another convention that considered HNS was The Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other than Oil, Nov. 2, 1973, T.I.A.S. No. 10561, which authorized States to protect their coastal areas from marine pollution by substances other than oil; this convention did not assign liability or provide compensation for damages. Pawlow, *supra* note 32, at 459-60.

46. Pawlow, *supra* note 32, at 462.

47. *Id.* at 462-63. For example, under United States law, existing levels of liability inadequately cover catastrophic HNS damages. Unless a shipowner's negligence is proven, liability is limited to the value of the ship plus freight pending. Where there is loss of life or personal injury, the shipowner is liable for another \$60 per ton of the vessel. See 46 U.S.C. §§ 191-194 (1982). If the incident involves catastrophic HNS damage, the vessel may have been destroyed, rendering negligible the amount of compensation collected from the shipowner.

Two other United States statutes apply limitation of liability for HNS damage. Under the Clean Water Act (CWA), 33 U.S.C. § 1321(a) (1982), the owners of vessels that discharge hazardous material into United States coastal and inland waters are liable to the United States for removal costs up to \$250,000 or \$150 per ton of the vessel, whichever figure is greater. Also, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(c) (1982) sets liability at the greater of \$5 million or \$300 per vessel ton for damage to natural resources caused by HNS. These statutes cover different injuries and may provide some compensation, but catastrophic damage, personal injuries, and deaths due to HNS pollution are inadequately covered. Pawlow, *supra* note 32, at 462-63 nn.35-40.

48. HENRY, *supra* note 2, at 93.

49. See *supra* note 5.

50. De Bievre, *supra* note 4, at 64.

51. Solid and liquid chemicals, gases, products for and of the oil refinery industry, and products of the nuclear industry are often transported in bulk. Today, 15% of the goods

nity became more aware of potential environmental risks, including external damage from explosion, fire, and pollution.⁵²

The *Torrey Canyon*⁵³ and *Amoco Cadiz*⁵⁴ shipping accidents illustrated the need for an international regime for HNS liability.⁵⁵ Exemplifying the reactive nature of the international community, the IMCO⁵⁶ called an emergency session in response to the *Torrey Canyon* disaster on May 4, 1967. At the session, the British Government noted that international law inadequately dealt with pollution at sea.⁵⁷ Great Britain further asserted that the international community should not limit its interest in ocean pollution to oil, but should include HNS.⁵⁸ As a result, during the late 1960s the IMO began to develop codes for constructing, equipping, and operating ships carrying dangerous chemicals in bulk.⁵⁹ Unfortunately, codes generally focused on maintaining ship safety, not preventing pollution.⁶⁰ Shipboard HNS spills involving the Danish vessel *Cavtat* and Greek vessel *Klearcos* magnified the problem,⁶¹ as did the later *Dana Optima* and *Mont Louis* incidents.⁶² Realizing the need for an international

transported by sea—30% of the total amount of HNS shipments—are in bulk form. HENRY, *supra* note 2, at 92.

52. De Bievre, *supra* note 4, at 64.

53. The Liberian oil tanker *Torrey Canyon* grounded off the coast of Great Britain on March 18, 1967, spilling 60,000 tons of oil into the sea and damaging 100 miles of British coast. The spill eventually spread to Brittany on the French coast. Juda, *supra* note 27, at 558.

54. The American oil tanker *Amoco Cadiz* ran aground off the French coast on March 16, 1978, spilling 60 million gallons of oil and damaging 130 miles of French beach. THEODORE H. ALLEGRI, SR., *HANDLING AND MANAGEMENT OF HAZARDOUS MATERIALS AND WASTE*, at 311 (1977); Paul Lewis, *Last of an Oil Spill Arrives in Brittany Via Chicago*, N.Y. TIMES, Apr. 28, 1984, at A3. Although the *Torrey Canyon* and *Amoco Cadiz* incidents were oil spills, the magnitude of the accidents alerted the international community to the need for international liability and pollution compensation measures. The *Torrey Canyon* incident set in motion the 1969 CLC and the 1971 Fund Convention, which have also formed the basis and structure of the *Draft HNS Conventions*. See De Bievre, *supra* note 4, at 62-72; Juda, *supra* note 27, at 562-72; Abecassis, *supra* note 29, at 45-49; Synopsis, *supra* note 6, at 824; Bederman, *supra* note 26, at 488-92; see also *infra* notes 78-85 and accompanying text.

55. The *Torrey Canyon* incident demonstrated the inadequate preparation of the world shipping industry for the consequences of a major maritime disaster. Gold, *supra* note 5, at 188.

56. "IMCO" was the original name of the IMO. See *supra* note 27.

57. Juda, *supra* note 27, at 562.

58. *Id.*

59. Bulk cargo is contrasted to packaged cargo, a distinction which will continue to surface throughout the discussion of HNS.

60. De Bievre, *supra* note 4, at 64.

61. Bederman, *supra* note 26, at 486 n.7. The Yugoslav vessel *Cavtat* sank with 900 drums of tetramethyl lead off the coast of Sardinia in 1980; recovery of the drums cost \$6 million. The Greek vessel *Klearcos* sank off the coast of Sardinia in 1981 with a cargo of packaged arsenic that damaged local fishing grounds and cost \$10 million to clean up. *Id.*

62. Pawlow, *supra* note 32, at 458. Rough seas washed 16 tons of weed killer overboard

“mechanism to provide victims with prompt compensation for damages resulting from the release of hazardous and noxious substances into the environment, or from related fires and explosions,”⁶³ the Legal Committee began drafting an HNS liability convention in 1977.⁶⁴

III. THE 1984 DRAFT HNS CONVENTION

The first *Draft HNS Convention*, presented to the IMO by the Legal Committee in 1984,⁶⁵ provided a framework for compensating the victims of HNS accidents. The Draft covered the release of HNS into international or coastal waters or the atmosphere by shipboard spill, fire, or explosion. The Draft also addressed loss of life, personal injury, property, and pollution damages resulting from maritime HNS releases.⁶⁶ Further, it provided for pollution cleanup costs and prevention. It listed forty-five hazardous and noxious substances, and applied to seagoing ships and other seaborne craft⁶⁷ carrying hazardous substances as cargo in bulk.⁶⁸ The Draft provided for strict liabil-

from the deck of the Danish ship *Dana Optima* in January, 1983. It was estimated that such an amount, if the contents of the drums were exposed, could kill everything on a square mile of the seabed. Thirty containers of uranium hexafluoride were on board the French freighter *Mont Louis* when it collided with a passenger ferry and sank off the Belgian coast in August, 1984. *Id.*; Natalie Angler, *A Shipwreck Sends a Warning*, TIME, Sept. 10, 1984, at 33. Three barrels of partially processed uranium were also on-board the freighter. Environmental groups criticized that ships transporting nuclear cargo take inadequate safety measures.

63. Pawlow, *supra* note 32, at 455. The 1969 Diplomatic Conference that adopted the 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 CLC) considered whether such a convention should also include HNS. However, the Conference determined that too little was known about HNS. It adopted a resolution that IMO “intensify its work . . . on all aspects of pollution by agents other than oil.” Mankabady, *supra* note 24, at 351-2.

64. Pawlow, *supra* note 32, at 464.

65. *1984 Draft HNS Convention*, *supra* note 3.

66. The *1984 Draft HNS Convention* defined “damage” as

loss of life or personal injury on board or outside the ship carrying the hazardous substances, caused by those substances, and any other loss or damage outside the ship caused by those hazardous substances. Damage includes the cost of preventive measures and further loss or damage caused by preventive measures.

Id., art. 1, para. 6.

67. The *1984 Draft HNS Convention* defined “ship” as “any sea-going vessel and any seaborne craft of any type whatsoever carrying one or more hazardous substances as cargo.” *Id.* art. 1, para. 1.

68. The Draft defined “hazardous substance” as “any substance listed in the Annex to the present Convention when carried without any intermediate form of containment in a hold or a tank which is a structural part of a ship or in a tank or container permanently fixed in or on a ship.” *Id.* art. 1, para. 5; Pawlow, *supra* note 32, at 465 n.56. The initial Draft only covered damage caused by enumerated chemicals carried in bulk aboard a vessel. The Legal Committee was concerned that including packaged substances would expand the list of covered substances by several hundred items, increasing the cost of insurance and the administration of the system. It also believed that packaged cargo presented less of a danger

ity⁶⁹ for the shipowners,⁷⁰ carriers and shippers⁷¹ of certain HNS carried in bulk.⁷² Its framework was a "two-tier" system of liability that held shipowners responsible for basic damages and shippers for catastrophic damages up to a certain limit above the shipowner's limit of liability.⁷³ Joint and several liability attached to damage caused by a collision or incident involving two or more ships if each ship was carrying HNS and if the damage was not reasonably separable.⁷⁴ A compulsory insurance fund would compensate victims,⁷⁵ and the

than bulk cargo, partly because packaged cargo is shipped in smaller quantities. The 45 substances enumerated included high volume cargoes such as liquid natural gas, butane, ethane, ethylene, vinyl chloride, propane, phosphorus, propylene, and creosote. *1984 Draft HNS Convention, supra* note 3, Annex 1; Mankabady, *supra* note 24, at 354-55.

69. Strict liability holds the actor responsible even if the harm was not intentional and was not caused by failing to meet an objective standard of reasonable care. WILLIAM PROSSER, ET AL., *CASES AND MATERIALS ON TORTS* 669 (8th ed. 1988).

70. The *1984 Draft HNS Convention, supra* note 3, art. 3, provides for strict liability of the shipowner. The Draft Convention defines "owner" as "the person or persons registered as the owner of the ship, or, in the absence of registration, the person or persons owning the ship." *1984 Draft HNS Convention, supra* note 3, art. 1, para. 3. A "person" can be any individual, partnership, corporation, public or private body, or state. *Id.*, art. 1, para. 2.

71. The *1984 Draft HNS Convention, supra* note 3, art. 7, provides for strict liability of the shipper for damage above the shipowner's limit of liability or ability to pay. The Draft defined "shipper" as "the person on whose behalf, or by whom as a principal, the hazardous substances are delivered for carriage." *Id.* art. 1, para. 4.

72. The *1984 Draft HNS Convention* defined bulk substances as those carried "without any intermediate form of containment in a hold or a tank which is a structural part of a ship or in a tank or container permanently fixed in or on a ship." *Id.* art. 1, para. 5. *See supra* note 67. The Legal Committee decided to exclude packaged cargo from the Draft based on the findings of an informal group of experts who advised that including packaged cargo would complicate a reasonable list of covered substances and that the minimum levels of HNS requiring insurance would be arbitrary. *See De Bievre, supra* note 4, at 81-87.

73. The Draft stated "[t]he owner at the time of an incident of a ship carrying hazardous substances as cargo shall be liable for damage caused by any such substance during its carriage by sea . . ." *1984 Draft HNS Convention, supra* note 3, art. 3. In the second tier of liability, the shipper of a hazardous substance is "liable to pay compensation to any person suffering damage caused by that substance during its carriage by sea if such person has been unable to obtain from the owner full compensation for the damage . . . because the damage exceeds the owner's [limitation of] liability . . . [or the owner] is financially incapable of meeting his obligations in full." *Id.* art. 7. Although liability is strict, the 1984 Draft allows both shipowner and shipper to claim such defenses as act of war, intentional act of a third party, or negligence of the government in maintaining navigational aids for which it is responsible. *Id.* art. 3, paras. 2-3.

The form and substance of this early draft is based largely on two previous liability conventions dealing with oil pollution. The 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 CLC), *supra* note 30, and the International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage (1971 Fund Convention), *supra* note 30. The 1969 CLC holds the shipowner strictly liable for damages and mandates insurance. The 1971 Fund Convention requires shippers and cargo owners to indemnify the shipowner for liability that exceeds the shipowner's insurance rates. Mankabady, *supra* note 24, at 350-51. *See infra* notes 78-85 and accompanying text.

74. *1984 Draft HNS Convention, supra* note 3, art. 4.

75. The Draft reads:

Contracting States had the responsibility of ensuring that shippers and shipowners obtained the required insurance before transporting HNS.⁷⁶ Prospective plaintiffs would bring actions for compensation only in the courts of the Contracting State on whose territory the accident occurred.⁷⁷

The format of the HNS liability scheme originated largely from the 1969 Convention on Civil Liability for Oil Pollution Damage (1969 CLC)⁷⁸ and the 1971 International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage (1971 Fund Convention).⁷⁹ The 1969 CLC provided for strict liability of shipowners for oil pollution caused by their tankers. It placed an upper limit of liability for oil pollution claims at 2,000 Poincare francs (\$134.40) per ton of the vessel, or a total of 210 million francs (\$14.1 million), whichever was less.⁸⁰ If the shipowner or his insurer created a fund representing the limit of liability, no claimant could exercise any rights against any of the shipowner's other assets.⁸¹

Because it soon became evident that the 1969 CLC did not provide adequate compensation in cases of catastrophic spills,⁸² delegates drafted the 1971 Fund Convention. The 1971 Convention is important because, in an attempt to give relief to shipowners (by not increasing their liability from levels set by the 1969 CLC), it introduced the concept of distributing the risks of ocean shipping between the shippers and shipowners, an idea that eventually was incorporated

The owner of a ship registered in a Contracting State shall be required to maintain insurance or other financial security . . . in the sums fixed by applying the limits of liability . . . under the present Convention . . . The shipper of a consignment of hazardous substances shall be required to maintain insurance or other financial security, to cover his liability for damage under the present convention.

Id. arts. 11, 11A. Claims under the Draft are allowed directly against the insurer. *Id.* art. 11B, para. 3. The only exception to the compulsory insurance provision is the situation where the shipper or shipowner was the government of the Contracting State. *Id.* art. 11B, para. 4.

76. Contracting States must ensure that both ships of their registry and ships of other Contracting States loading or unloading in their ports comply with the compulsory insurance provision. *Id.* art. 11C. The draft requires Contracting States to enact legislation to enforce this obligation. *Id.* art. 11C, para. 3.

77. *Id.* art. 14, para. 1. Further, the courts of the State in which the compulsory fund exists are exclusively competent to determine all matters concerning distribution of the fund. *Id.* art. 14, para. 3.

78. 1969 CLC, *supra* note 30.

79. 1971 Fund Convention, *supra* note 30.

80. 1969 CLC, *supra* note 30, art. 5, para. 1. A Poincare franc is a gold franc.

81. *Id.* art. 6, para. 1(a).

82. In the case of the *Torrey Canyon* spill, *supra* notes 53-55, the 1969 CLC limited the vessel owner's liability to about \$8 million, which was less than half the amount of damage caused by the spill. Bederman, *supra* note 26, at 489 n.30.

into the 1984 HNS Draft.⁸³ The Fund pooled the resources of oil shippers as a secondary, supplementary source of compensation in cases where the shipowner was insolvent or incapable of meeting obligations, or where the oil pollution damage exceeded the 1969 CLC limits on shipowner's liability.⁸⁴ The limits of liability under both the 1969 CLC and 1971 Fund Convention were increased in 1984.⁸⁵ For reasons discussed below, the same conference that approved the increases in the 1969 CLC and 1971 Fund Conventions rejected the *1984 Draft HNS Convention*.

Many essential details of the *1984 Draft HNS Convention* were not fully resolved before the 1984 diplomatic conference.⁸⁶ Topics left for development at the conference included the following: a specific list of HNS covered by the Convention and whether to include packaged goods; the definition of "damage"; which "tiered" compensation scheme to adopt and how to ensure adequate funding; and a definition of "shipper" specific enough to ensure that somebody could easily be identified for liability purposes.⁸⁷

At the conference, the delegates sharply debated the issue of what constituted a "hazardous substance."⁸⁸ The delegates initially raised three questions, based on the assumption that the convention would extend at least to bulk HNS: Should the regime extend to chemicals carried in packages? Should it include flammable and explosive substances? Should it specifically enumerate which substances were covered?⁸⁹ Although the initial treaty covered only damage caused by enumerated chemicals carried in bulk aboard a ves-

83. *Id.* at 490. However, membership in the 1969 CLC does not require membership in the 1971 fund. 55 states have ratified the 1969 CLC and 30 states have ratified the 1971 Fund. A.H.E. Popp, *Liability and Compensation for Pollution Damage Caused by Ships Revisited—Report on an Important International Conference*, 1985 LLOYD'S MAR. & COM. L.Q. 118, 119 n.6.

84. 1971 Fund Convention, *supra* note 30, art. 4, para. 1.

85. The former liability limits were no longer considered adequate. For example, the *Amoco Cadiz* spill caused \$53.77 million in cleanup costs and \$500 million in economic damages. Bederman, *supra* note 26, at 491 n.45. The \$14 million liability ceiling originally provided for in the 1969 CLC was increased to \$60 million. Synopsis, *supra* note 6, at 833.

For an in depth discussion of the 1969 CLC, the 1971 Fund Convention, and the 1984 Protocols, see Popp, *supra* note 83.

86. United States Coast Guard Background Paper, *Consideration of a Liability and Compensation Regime for Damage Caused by the Maritime Carriage of Hazardous and Noxious Substances* 2-3 (1990) [hereinafter USCG Background Paper]; Gold, *supra* note 5, at 190; Bederman, *supra* note 26, at 492-93.

87. *1984 Draft HNS Convention*, *supra* note 3; USCG Background Paper, *supra* note 86, at 1-3; Pawlow, *supra* note 32, at 470-80; Bederman, *supra* note 26, at 493-507.

88. Pawlow, *supra* note 32, at 474-75; Bederman, *supra* note 26, at 494-96.

89. USCG Background Paper, *supra* note 86, at 2-3; Bederman, *supra* note 26, at 494-96.

sel,⁹⁰ a number of delegates strongly advocated including HNS shipped in packages.⁹¹ Delegates proposed the following arguments for including packaged chemicals: packaged chemicals had been known to cause extensive damage; exclusion would render the new regime irrelevant for coastal nations that suffer from spills of packaged chemicals; and, if packaged chemicals were not included, shippers could transport chemicals in packages to escape liability under the Convention.⁹² Opponents of this position preferred a second, separate convention for packaged goods, because including them would greatly expand the list of substances covered by the Convention and create complicated problems of implementation and administration.⁹³ If packaged chemicals were included, the Convention would apply to many more ships because most commercial vessels have the capacity to carry packaged chemicals.⁹⁴

Under the 1984 Draft, the claimant had a low standard of proof—the claimant need not prove that the shipowner (or shipper, in the second tier) was negligent, only that a hazardous substance as defined in the Convention caused the injury.⁹⁵ This standard of strict liability was never at issue;⁹⁶ the majority of the delegates favored it even in the initial stages of negotiation.⁹⁷ Strict liability was proposed

90. The 1984 Draft defined "hazardous substance" as "any substance listed in the Annex to the present Convention when carried without any intermediate form of containment in a hold or a tank which is a structural part of a ship or in a tank or container permanently fixed in or on a ship." *1984 Draft HNS Convention*, *supra* note 3, art. 1, para. 5.

91. Pawlow, *supra* note 32, at 474.

92. Bederman, *supra* note 26, at 495.

In discussing the early history of the *1984 Draft HNS Convention*, De Bievre outlines reasons for including packaged HNS cargo:

- (1) ships carrying HNS in bulk are built for that purpose and are therefore relatively safe;
- (2) bulk ships are operated by highly trained crews and terminal personnel;
- (3) packaged HNS is carried at random on general cargo ships;
- (4) handling and stowing of packaged HNS lacks due care and vigilance;
- (5) packaged cargo shipment is increasing, and is surpassing the rate of bulk shipping;
- (6) limiting application to bulk transport would cause shippers to shift to packaged HNS as the preferred method of shipment to escape liability.

De Bievre, *supra* note 4, at 87.

93. Pawlow, *supra* note 32, at 474.

94. Bederman, *supra* note 26, at 494-95.

95. *1984 Draft HNS Convention*, *supra* note 3, art. 3, para. 1. The Draft stated: "[T]he owner at the time of an incident of a ship carrying hazardous substances as cargo shall be liable for damage caused by any substance during its carriage by sea . . ." *Id.* The defenses available to the owner were act of war, exceptional natural phenomenon, act or omission of third party done with intent to cause damage, negligence or wrongful act of the Government, or negligence of the victim. *Id.* art. 3, paras. 2-3. See also Bederman, *supra* note 26, at 499.

96. Bederman, *supra* note 26, at 499.

97. *Id.* at 488. Some delegations favored fault-based liability with the burden of proof

in order to avoid time consuming, costly litigation and to ensure speedy compensation.⁹⁸ However, the conference delegates vigorously debated imposing liability on both the shipowner and the shipper of HNS cargo. The inability of the delegates to agree on this issue was a primary reason why they did not adopt the *1984 Draft HNS Convention*.⁹⁹

The concept of strict, two-tiered liability between the shipper and shipowner advanced by the *1984 Draft*¹⁰⁰ departs from current admiralty practice.¹⁰¹ Notwithstanding the 1969 CLC and 1971 Fund Convention (which were negotiated and established separately), shipper's liability is a relatively new concept in maritime law, which normally channels liability to the shipowner who has the most operational control of cargo at sea.¹⁰² The *1984 Draft*, however, renders the shipper liable if the shipowner, who has primary liability, does not provide full compensation because of financial inability or limitation of liability.¹⁰³ This scheme essentially results from a policy of diversifying risk and allocating cost. The shipowner has exclusive

shifted to shipping interests. *Id.* Insurance interests, the primary opponents to strict liability as applied to the shipper, argued that no traditional insurance system existed for such liability and that setting up such a system would be very expensive and would adversely affect international trade. De Bievre, *supra* note 4, at 74. De Bievre asserts that the *1984 HNS Convention* lacked support primarily due to uncertainty about the new regime's effect on the insurance market. *Id.* at 77.

98. De Bievre, *supra* note 4, at 74.

99. *Id.* at 74-77; Bederman, *supra* note 26, at 498-501; Pawlow, *supra* note 34, at 470-71.

100. The *1984 Draft HNS Convention*, *supra* note 3, art. 3, proposed primary liability for the shipowner. The Draft further provided for secondary shipper liability as follows: "The shipper of a hazardous substance shall be liable to pay compensation to any person suffering damage . . . if such person has been unable to obtain from the owner full compensation . . . because the damage exceeds the owner's limitation of liability, [or] . . . the owner is . . . financially incapable of meeting his obligations . . ." *Id.* art. 7, paras. 1(a)-(b). The shipper had the same defenses available as the shipowner. *Id.* art. 7, para. 5.

101. General admiralty law requires some finding of negligence before imposing liability. See THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* §§ 4-1 - 4-17 (1987). However, the Clean Water Act, *supra* note 47, and the Comprehensive Environmental Response, Compensation, and Liability Act, *supra* note 47, place strict liability on the party causing the pollution.

102. De Bievre, *supra* note 4, at 69. This may not be true for HNS, where operating procedures may have little to do with an accident caused by improper shipper packaging or handling.

103. Traditionally, admiralty has limited a shipowner's liability for negligent acts. The general maritime law, codified in the Limitation of Shipowners' Liability Act, 46 U.S.C. §§ 181-189, provides that shipowners can limit their liability for damages to the value of the ship itself or freight pending. SCHOENBAUM, *supra* note 101, § 14-1.

The *1984 Draft HNS Convention* provided two alternatives for limiting the liability of the shipowner: a liability scheme based on the liability levels set in the 1976 LLMC and its amendments, or an independent level based on an amount that was yet to be determined. *1984 Draft HNS Convention*, *supra* note 3, arts. 6C, 6A, 6B. However, the Draft denied the shipowner any limitation on his liability if "the damage resulted from his personal act or

responsibility for the safe operation of the vessel and the safety of the goods in custody. On the other hand, the shipper is responsible for placing HNS into maritime commerce, and imposing liability on the shipper encourages proper identification and packaging of substances.¹⁰⁴

Delegates to the Convention argued chiefly about this "two-tier" arrangement (primary liability of the shipowner, secondary liability of the shipper).¹⁰⁵ First, the shipowning interests attempted to disavow all liability, arguing that this posed an unreasonable burden because vessels carrying HNS at that time constituted only five percent of the world's tonnage.¹⁰⁶ Shipowners argued that shipping HNS was a joint venture between the shipowner and the shipper. Additionally, shipowning interests argued that, unlike most cargoes carried at sea, the hazardous nature of the substance shipped and the packing procedures used, which are the responsibilities of the shippers and not the result of shipboard procedures, are the key sources of danger.¹⁰⁷ Damage from HNS does not necessarily result from inadequacies in ship conduct or from other factors in the shipowner's control, but from the inherently harmful characteristics of HNS and from unsafe packing, which are the responsibilities of the shipper.¹⁰⁸ Finally, the shipowners argued that the marine insurance market capacity could not support increased liability levels, and that shippers have deeper pockets.¹⁰⁹

To counter the position of the shipowners, shippers argued that traditional maritime casualties (groundings, collision, fire) result from operator negligence, and that shippers could do little to reduce those risks of carriage.¹¹⁰ Shipowners control crew training, vessel operation, and navigation.¹¹¹ Further, shipper liability is generally inconsistent with customary international and domestic maritime law.¹¹² Also, shipowners would have less incentive to police their actions. The International Union of Marine Insurers (IUMI) argued that, because no traditional insurance market capacity to cover civil liability of the shipper existed, creating the required scheme would be very

omission, committed with intent . . . or recklessly and with knowledge that such damage would probably result." *Id.* art. 6A.

104. Mankabady, *supra* note 24, at 356-57.

105. De Bievre, *supra* note 4, at 69.

106. *Id.*

107. *Id.*

108. *Id.*

109. 7 Int'l Envtl. Rep. (BNA) No. 5, at 139 (May 9, 1984); Pawlow, *supra* note 32, at 470.

110. *Id.* at 470-71.

111. *Id.* at 471 n.101.

112. *See supra* notes 100-104 and accompanying text.

expensive;¹¹³ an insurance system for covering shipowner liability already existed.¹¹⁴ Finally, shipping concerns argued that victims of HNS damage should be able to look to one party for compensation; the shipowner is the party most easily and effectively identified.¹¹⁵ The delegates rejected the proposed alternative schemes.¹¹⁶

Another difficulty arose with the Legal Committee's definition of "shipper." Because proposed second-tier liability, as provided for in the *Draft HNS Convention*, lies with the shipper, the Legal Committee decided that the shipper should be clearly identifiable and have access to an insurance market.¹¹⁷ Unlike oil shipping, however, identifying an HNS shipper for liability for pollution damages can prove difficult. With oil, the same business generally controls the drilling, transport, refining, and distribution of the product. Identifying the oil shipper is easy and makes shipper liability workable.¹¹⁸ However, problems created by carrying HNS at sea are much more complex. Different consignments may make up HNS cargoes, various types of vessels transport it, and the chemical industry is diverse.¹¹⁹ With HNS, various unrelated parties such as "the manufacturer, the consignee or buyer, the freight forwarder, the reseller, or the trading concern" might have an interest in shipping the cargo.¹²⁰ Shipping concerns also argued that shippers of small quantities of substances "would bear an unreasonable insurance cost."¹²¹ The Legal Committee, the shipping interests argued, did not adequately account for these interests by broadly defining the "shipper" as the "person, on whose behalf, or by whom as a principal, the hazardous substances are deliv-

113. De Bievre, *supra* note 4, at 74.

114. See Pawlow, *supra* note 32, at 477.

115. Mankabady, *supra* note 24, at 359.

116. Alternative schemes considered were to hold the shipowner and shipper jointly liable; shipper primarily liable with shipowner responsible for damage above the shipowner's limit of liability or ability to pay; shipper solely liable (rejected as too expensive to set up an insurance market); and shipowner solely liable (rejected as providing inadequate compensation for catastrophic damage). Mankabady, *supra* note 24, at 359; Bederman, *supra* note 26, at 499. The Federal Republic of Germany suggested that each cargo be insured so that direct action could proceed against the insurance company in a scheme resembling no fault insurance. This proposal was criticized for not fully eliminating shippers' personal liability, and for not assigning fault. Pawlow, *supra* note 32, at 472-73. Because of the problems with the existing shipowner insurance system and the need for an additional "deep pocket" to provide adequately for catastrophic damage, most delegations favored the primary tier shipowner, secondary tier shipper liability as a basis for future work. Mankabady, *supra* note 24, at 359.

117. *Id.* at 364 (citing *Report of the Legal Committee*, IMO Legal Comm., 43rd Sess., paras. 20-24, IMO Doc. LEG 43/5 (1980); *Report of the Legal Committee*, IMO Legal Comm., 44th Sess., paras. 29-34, IMO Doc. LEG 44/7 (1980)).

118. Bederman, *supra* note 26, at 500.

119. *Submission by Poland 62nd*, *supra* note 34, at 1.

120. Bederman, *supra* note 26, at 500.

121. Pawlow, *supra* note 32, at 472.

ered for carriage."¹²²

Many delegations also opposed the definition of "shipowner."¹²³ Many bareboat charterers, rather than owners, actually exercise control of the vessel.¹²⁴ The proposed definition of shipowner eases the determination of who owns the ship by simply relying on the ship's registry lists; the potential liability for a shipowner who does not have operational control of the vessel is disadvantageous.

The 1984 Conference did not ratify a new HNS liability regime, thus resulting in the IMO's first outright rejection of any convention proposed by the Legal Committee.¹²⁵ Critics blamed this rejection on the meeting's cramped timetable,¹²⁶ the general lack of confidence in the Legal Committee's preparatory work,¹²⁷ and the lack of a formal agenda.¹²⁸ The interrelatedness of the issues presented prevented determination of any single issue.¹²⁹ Finally, the power of the environmental lobby weakened from the time the Legal Committee commenced work to the time of the conference¹³⁰ because fears of imminent pollution damage requiring immediate action had abated. The lack of a major HNS incident in the then-recent past left the delegates without a strong incentive to negotiate successfully.¹³¹

122. *Id.*; 1984 Draft HNS Convention, *supra* note 3, art. 1, para. 4. Again, this definition works better for an oil shipper than an HNS shipper.

123. The 1984 Draft HNS Convention defines "shipowner" as "the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship." *Id.* art. 1, para. 3.

124. *See infra* note 196 for a definition of "bareboat charter".

125. Bederman, *supra* note 26, at 492.

126. *Id.* at 492. In three weeks of meeting, the international conference not only included the 1984 Draft HNS Convention, but also revisions of the 1969 CLC and 1971 Fund Convention on its agenda. Not enough time was available to reach consensus on the HNS issues in contention.

127. *Id.*

128. *Id.*

129. The issues in the HNS Convention negotiations were highly interrelated. For example, the issue of whether to include packaged HNS greatly complicates ascertaining the shipper's identity, the two tier system, administering the compulsory insurance scheme, and also increases the number of vessels subject to the Convention. On the other hand, valid reasons exist for including packaged cargo. *See supra* note 92 and accompanying text; Bederman, *supra* note 26, at 494-95.

130. Work commenced in September 1977, and the conference commenced in April 1984.

131. Bederman, *supra* note 26, at 512. The *Mont Louis* incident was yet to occur. *See supra* note 62. Indeed, the international regime has been criticized as too reactive. In hastening to respond to accidents, international efforts have foregone careful planning and forethought. Bederman closes by sadly musing that a new liability regime may not be concluded until a new, major HNS disaster of international scope occurs. *Id.* at 514. This sentiment is echoed in Pawlow, *supra* note 32, at 457.

IV. RECENT ACTIVITY

A. *The United States' Position*

Throughout the development of the *1984 Draft HNS Convention*, the United States delegation to the Legal Committee supported the initiative, focusing on problems from a legal, technical and equitable standpoint, arguing that further study was necessary.¹³² The United States is primarily concerned with protecting its people, its ports, and its environment from HNS damage. To that end, the United States desires that the victims of HNS damage receive adequate compensation, that the responsible parties are held responsible for the damage, and that the resulting system should be administratively feasible.¹³³ On the other hand, as a major importer and exporter of chemicals and other substances that would be classified as HNS, the United States desires to protect its chemical industries and improve the balance of trade.¹³⁴ Also, the United States has an interest in maintaining its own environmental programs.¹³⁵

The United States strongly endorsed the HNS Convention in principle, but objected to the proposed limits of liability as too low to adequately protect the victims of maritime disasters involving HNS.¹³⁶ Further, the United States viewed the compulsory insurance provisions as unduly burdensome on small shippers and on developing nations seeking to enter the shipping industry.¹³⁷ The United States supported creating a separate regime for HNS damage consistent with the previous protocols on oil pollution, the 1969 CLC and 1971 Fund Convention, to ensure that the victims of catastrophic incidents would not have to compete for compensation with non-HNS claimants.¹³⁸

Also, the U.S. viewed the two-tier liability system as "flawed," "primarily because of the unworkable definition of 'shipper' and the anticipated problems in obtaining adequate insurance at a reasonable cost."¹³⁹ A primary concern of the United States delegation was that

132. USCG Background Paper, *supra* note 86, at 2.

133. Pawlow, *supra* note 32, at 475-76.

134. *Id.*

135. *Id.*

136. *Id.* at 456 n.10.

137. *Id.*

138. USCG Background Paper, *supra* note 86, at 2. For example, the 1976 LLMC, *supra* note 30, provides compensation for HNS related damages, but has not entered into force because its liability limitations render compensation inadequate and because its broad application forces victims of HNS incidents to compete with non-HNS claimants, diluting the limited compensation available to HNS victims. Pawlow, *supra* note 32, at 461-62.

139. USCG Background Paper, *supra* note 86, at 2.

shipper liability is potentially unfair to United States shippers who compete with European shippers throughout the world. The geography of the United States *requires* HNS shipment by sea to Europe; European shippers of HNS would not encounter the same increased insurance costs as American shippers because much of their HNS travels over land. This increased cost to United States shippers *vis-a-vis* European shippers might result in lost sales.¹⁴⁰ To facilitate acceptance of a two-tier system, viewed by the United States as necessary to provide adequate compensation, the United States urged a broader definition of shipper.¹⁴¹

In 1988, the United States delegation submitted a position paper¹⁴² that urged the Legal Committee to study all practical HNS options carefully¹⁴³ and to proceed with work before a major casualty occurred. To provide structure for the regime's development, the United States proposed a number of general principles: (1) any regime should provide necessary funding for reasonable environmental response and adequate compensation for claimants; (2) any regime should be practical and account for the operational and economic realities of the maritime, chemical, and insurance industries; (3) any regime should allow those held liable some recourse against third parties in the case of strict liability; (4) costs of the compensation scheme should be shared among the commercial parties who benefit from shipping HNS; and (5) as the scope of covered risks becomes broader, higher liability limits should be employed to provide adequate compensation.¹⁴⁴ The paper seemed to indicate a shift

140. Pawlow, *supra* note 32, at 476. During the conference the American delegation received an Office of Management and Budget (OMB) communication expressing concern that American industry could be adversely affected by an HNS convention. USCG Background Paper, *supra* note 86, at 3.

141. The proposed definition included the:

person who designates, as a principle, a specific ship for transport of a listed hazardous substance. Where the shipowner or ship operator selects the ship under the terms of the charter party or contract of affreightment, the owner or the vessel operator shall be deemed to be the agent of the shipper.

USCG Background Paper, *supra* note 86, at 2. This definition would satisfy those delegates who wanted to see increased operator liability.

142. *Consideration of the Question of Liability for Damage Caused by the Maritime Carriage of Hazardous and Noxious Substances (HNS)*, Submission by the United States, IMO Legal Comm., 59th Sess., Agenda Item 5, IMO Doc. LEG 59/5/1 (Mar. 30, 1988) [hereinafter *Submission by the United States 59th*].

143. The United States suggested "that the broader the scope of covered risks and type of harm, the higher the limits of liability must be to provide (1) sufficient funding for environmental response and cleanup; and (2) adequate compensation for damages." Complicating the equation is the capacity of the insurance market to insure for catastrophic damage. *Id.* at 2.

144. *Id.* at 1-2. The 1991 Draft HNS Convention, *supra* note 20, a joint submission to which

in the United States' thinking toward including packaged cargoes in the resulting convention. To promote study, the United States paper listed seven technical questions concerning packaged cargoes.¹⁴⁵ Further, it recognized the significant potential harm posed by packaged HNS.¹⁴⁶ The United States followed up these questions by providing a framework of essential elements and related issues to the 60th session of the Legal Committee in September 1988.¹⁴⁷ The United States has sought interagency, Congressional, and public input concerning the shipment of HNS throughout the study process, into late 1991.¹⁴⁸

B. *Developments Since 1987*

Despite the 1984 Convention's inability to reach an agreement,¹⁴⁹

the United States is a party, addresses and incorporates each of these concerns. *See infra* notes 220-274.

145. The questions were:

1. What selection criteria should be employed in developing the list of packaged HNS cargoes?
2. Should the covered HNS be listed as individual products as in the Intervention on the High Seas Convention and other instruments or by reference to classes such as those set out in the IMDG Code?
3. If the covered HNS are listed as individual products, what mechanism should be employed for updating the list?
4. Should minimum HNS quantities be established as the threshold for applicability of the convention to a particular vessel?
5. What account should be taken of the interactive potential of HNS cargoes?
6. Should there be separate schemes for bulk and packaged HNS cargoes?
7. If the draft convention incorporates a requirement for verifying insurance coverage, what are the practical implications associated with handling packaged HNS cargoes, particularly when containers are employed for carriage?

Id. Annex.

146. *Id.* at 3.

147. *Consideration of a Possible Convention on Liability and Compensation for Damage Caused by the Carriage of Hazardous and Noxious Substances by Sea, Submission by the United States*, IMO Legal Comm., 60th Sess., Agenda Item 3, IMO Doc. LEG 60/3/2 (Sept. 13, 1988).

148. Notice, U.S. Shipping Coordinating Committee (SHC) Meeting, Mar. 5, 1991 (dated Feb. 6, 1991); Notice, U.S. Shipping Coordinating Committee (SHC) Meeting, Nov. 20, 1991 (dated Oct. 11, 1991); USCG Background Paper, *supra* note 86, at 8. The notices requested the views of the public and of the maritime, commercial, and environmental interests.

For an overview of United States domestic HNS liability, *see generally* David A. Bagwell, *Hazardous and Noxious Substances*, 62 TUL. L. REV. 433 (1988). Briefly, the Federal Water Pollution Control Act, 33 U.S.C. § 1251(a)(3) (1986) prohibits the discharge of hazardous substances in or on navigable waters. Hazardous substances are defined as substances other than oil that present an "imminent and substantial danger to the public health or welfare, including . . . fish, shellfish, wildlife, shorelines, and beaches." *Id.* § 1321(b)(2)(A). The Executive Branch has also published a complete list of hazardous substances that dictates which spills must be reported. 40 C.F.R. § 116.4 (1990). For a detailed discussion of the United States HNS regulatory scheme, *see ALLEGRI, supra* note 54.

149. *See supra* notes 65-131 and accompanying text.

the delegates recognized the need for an international HNS liability regime.¹⁵⁰ In August 1987, ten nations jointly submitted an outline of options to resume work, suggesting two alternate liability schemes: (1) primary shipowner liability with secondary compulsory shipper cargo insurance; and (2) shipowner only liability with increased liability limits of the 1976 LLMC (U.S. \$100 million)¹⁵¹ up to a level providing sufficient compensation for all damage, including HNS, or in the alternative creating a special layer (a "gap") available exclusively for HNS damage above and beyond the general liability limits.¹⁵² This proposal suggested further that any new system of HNS liability should meet the following criteria: (1) packaged HNS, not only bulk, should be included; (2) liability should rest with an easily identifiable party; (3) as far as practicable, strict liability should be imposed; and (4) any limit of liability should be sufficiently high to adequately compensate for damage.¹⁵³

In preparation for the 60th session, the Secretariat of the Legal Committee prepared a list of questions, raised at the 58th and 59th sessions, for use as a focal point of future work:

- A. What should be the geographic scope of application?
- B. What specific substances should be covered by the convention and by what method should a list of substances be incorporated into the convention and amended?
- C. Should packaged substances be covered?
- D. Should residual products and waste material transported for dumping or incineration at sea be included in the scope of application of the new convention?
- E. How should "damage" be defined in the new convention?
- F. Should costs for prevention and cleanup be compensated under the new convention?
- G. Should liability rest solely with the shipowner, or should it be shared with cargo interests?
- H. Should liability be strict?
- I. What limitation amount should be established?

150. See De Bievre, *supra* note 4, at 73.

151. *Id.* The 1976 LLMC, *supra* note 30, attempted to codify a change in international maritime law from a limitation on shipowner liability at the value of the vessel to the maximum available capacity of the insurance market to insure maritime risks, regardless of the vessel's value. The International Union of Marine Insurers testified in 1976 that this upper limit in the market was \$100 million per vessel, per accident. Mankabady, *supra* note 24, at 239-41.

152. USCG Background Paper, *supra* note 86, at 3-4. The contributing nations were Canada, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, the Netherlands, Poland, Sweden, and Switzerland.

153. *Id.* at 4.

J. Who should be able to take advantage of the limitation of liability limits?

K. How should the new convention relate to the 1976 LLMC?

L. What are the insurance implications of each of the above questions?¹⁵⁴

The delegations to the 60th Session, October 10-14, 1988, devoted two days to discussing HNS. Support had grown for a regime that involved sharing the costs of compensation between the shipowner and cargo interests. Also, the Legal Committee agreed that the new convention should be based on strict liability.¹⁵⁵ Attention also focused on the lack of specific information regarding the availability, total capacity, and cost of liability insurance.¹⁵⁶ The London Group of Shipowners Protection and Indemnity Associations (P&I Clubs) submitted a paper to the 60th session that asserted that the volatile state of the insurance market made speculation as to whether market capacity could cover increased liability under the limits of an HNS convention impossible.¹⁵⁷ Many delegations opined that further study was needed on the impact of any proposed system of liability on the insurance market.¹⁵⁸

The United Kingdom introduced a proposal for a second tier to provide supplementary compensation when the limits of the first tier shipowner's liability were exceeded.¹⁵⁹ Cargo insurers would fund this second tier of compensation by collecting a levy from shipping interests in order to finance the purchase of a "pool" of comprehensive insurance. Shipping interests would prepay levies on export cargoes of substances listed in the IMDGC, based on the value of the cargo.¹⁶⁰ A potential problem with this proposal is that a substance's potential risk might bear little or no relation to its value.¹⁶¹ However, the advantage of this scheme is its certainty. Cargo insurers would be responsible for collecting the levies and applying them to insurance, with violators facing criminal sanctions.¹⁶²

The definition of "damage" took firmer shape at the 60th session.

154. *Consideration of a Possible Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS)*, Note by the Secretariat, IMO Legal Comm., 62nd Sess., Annex 1, Agenda Item 4, IMO Doc. 62/4 (Dec. 15, 1989).

155. *Id.* Annex 2, para. 64.

156. *Id.* Annex 2, para. 13. The P&I Clubs insure 70% of the world's ocean tonnage against various types of liability. Bederman, *supra* note 26, at 488 n.15.

157. *Note by the Secretariat, supra* note 154, Annex 2, para. 13.

158. *Id.* Annex 2, para. 14.

159. *Id.* Annex 2, para. 12.

160. *Id.*

161. *Id.*

162. *Id.*

Most delegations favored including loss of life and personal injury wherever they occur, property damage that occurs outside the ship, and the cost of prevention and cleanup in the definition.¹⁶³ Some delegations, however, desired broader definition, including "any damage caused by the dangerous nature of the substance."¹⁶⁴ Recoverable preventive measures would include, if necessary, large scale evacuation of people from coastal areas ordered by a government.¹⁶⁵ Whether or not purely economic loss would be covered remained open for future discussion. Some delegations believed that individual national legal systems would best decide this, but others advocated international uniformity under precise convention provisions.¹⁶⁶

On the issue of substances to be covered, although some delegations continued to advocate covering only bulk cargo because of the ease in administering a bulk cargo system,¹⁶⁷ and others advocated covering only HNS which could cause catastrophic damage,¹⁶⁸ many delegations favored a wide scope of application to include all HNS incidents caused by either bulk or packaged cargo.¹⁶⁹ The Legal Committee focused on all levels of HNS damage, not only on catastrophic incidents.¹⁷⁰ Further, the Committee agreed, without prejudice to any final decision on the matter, to proceed with discussions on the assumption that the new convention would apply to packaged HNS.¹⁷¹

HNS received the highest priority of Legal Committee business during the 62nd session, which convened April 2-6, 1990.¹⁷² This session was devoted almost exclusively to HNS and focused on draft conventions submitted by the Netherlands and the United Kingdom.¹⁷³ The draft submitted by the Netherlands proposed a liability scheme under which the shipowners would be strictly liable up to a specific level of HNS damage, which the draft left undefined. The

163. *Id.* Annex 2, paras. 24-29.

164. *Id.* Annex 2, para. 27.

165. *Id.* Annex 2, para. 31.

166. *Id.* Annex 2, para. 37. Some delegations believed that agreement on the concept of "economic damages" was not possible because the concept varies widely among different legal systems.

167. *Id.* Annex 2, para. 39.

168. *Id.* Annex 2, para. 40.

169. *Id.* Annex 2, para. 41.

170. *Id.*

171. *Id.* Annex 2, para. 58.

172. At the 61st session, the Legal Committee reaffirmed its previous position that top priority should be given to work on the Convention during 1990. *Note by the Secretariat, supra* note 154, para. 5.

173. The Secretariat outlined the list of issues, developed in the 58th and 59th sessions, to be considered prior to any international conference to ratify a new Draft as follows:

draft also did not impose a second tier of shipper liability.¹⁷⁴

The draft submitted by the United Kingdom incorporated the Netherlands proposal as its first tier,¹⁷⁵ but also included a second tier international fund financed by a levy charged to cargo interests. The proposed fund's purpose was to provide supplemental compensation in cases where the first tier limits were exceeded.¹⁷⁶ The United Kingdom proposed liability ceiling figures of \$89.6 million standard drawing rights (SDR) for the first tier and \$300 million SDR for the second tier.¹⁷⁷ The submission favored a flat liability rate for shipowners, rather than a tapered rate based on vessel tonnage, because one package of a particular HNS cargo might cause as much damage as a 40,000 ton bulk HNS carrier fully laden with another type of HNS cargo.¹⁷⁸ Levies charged on exports of HNS carried in bulk would finance the second tier.¹⁷⁹ This system would simplify the levy

(1) What should be the geographic scope of application?

(2) What substances should be covered, and by what method should they be incorporated and amended?

(3) Should packages be covered? (The list of issues suggested by the U.S. was interposed here. *See supra* note 144).

(4) Should residual products and waste material transported for dumping or incineration at sea be included?

(5) How should "damage" be defined?

(6) Should costs for prevention and cleanup be compensated?

(7) Should liability rest solely on the shipowner, or should it be shared with cargo interests?

(8) Should liability be strict?

(9) What limitation amount should be established?

(10) What are the insurance implications of each question?

Note by the Secretariat, supra note 154, Annex 1.

174. *Consideration of a Possible Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), Submission by the Netherlands*, IMO Legal Comm., 62nd Sess., Agenda Item 4, at 5-6, IMO Doc. LEG 62/4/1 (Jan. 3, 1990).

175. The Dutch draft did not have a second tier. *Consideration of a Possible Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea, Submitted by the United Kingdom Delegation*, IMO Legal Comm., 62nd Sess., Agenda Item 4, Paras. 6-7, IMO Doc. LEG 62/4/2 (Feb. 8, 1990) [hereinafter *Submission by the United Kingdom 62nd*].

176. *Id.* Annex 2, art. 4, para. 1(b).

177. *Id.* Annex 2, art. 4. The ceiling figures are roughly U.S. \$100 million to U.S. \$310 million.

178. *Submission by the United Kingdom 62nd, supra* note 175, art. 7, para. 17(a). The Polish submission to the 62nd session also favored a scheme unrelated to vessel tonnage. *Consideration of a Possible Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea, Submission by Poland*, IMO Legal Comm., 62nd Sess., Agenda Item 4, para. II(D), IMO Doc. LEG 62/4/5 (March 14, 1990) [hereinafter *Submission by Poland 62nd*].

179. *Submission by the United Kingdom 62nd, supra* note 175, Annex 2, at 7, para. 27. Poland's submission specifically favored this proposal. *Submission by Poland 62nd, supra* note 178, para. III(G).

and collection procedure, and minimize the number of shipments involved. The scheme, however, would compensate for damage caused by both bulk and packaged substances.¹⁸⁰ The second tier would use the income received from the levies collected from cargo interests to purchase insurance on the international insurance market and to build up a cash "stand by" fund.¹⁸¹

Many delegations expressed preliminary support for total HNS compensation in the range of \$100 to \$300 million SDR.¹⁸² The Protection and Indemnification (P&I) Clubs,¹⁸³ however, reported that because of the state of the current market conditions, the insurance market worldwide had contracted; the insurance capacity for HNS could not exceed \$100 million SDR.¹⁸⁴ Also, most delegations agreed that the shipowner should be strictly liable.¹⁸⁵ Further, many delegations recognized that adequate funding for compensation required the shipowner and the shipping/cargo interests to share liability,¹⁸⁶ thereby making the second tier necessary.¹⁸⁷ Although a second tier supplemental compensation fund may be difficult to develop, the Legal Committee endorsed continued efforts to refine the operating features of the international fund proposed by the United Kingdom.¹⁸⁸

The Legal Committee continued its progress at the 63rd session, which convened September 17-21, 1990. Participation in and submissions to the session were considerable, possibly indicating the delegates' sense of a need for cooperation.¹⁸⁹ Major developments included further endorsement of United Kingdom efforts to develop

180. *Submission by the United Kingdom 62nd, supra* note 175, para. 27.

181. *Id.* para. 26.

182. *Report of the Legal Committee on the Work of its Sixty-Second Session*, IMO Legal Comm., 62nd Sess., Agenda Item 7, para. 20, IMO Doc. LEG 62/7 (Apr. 24, 1990) [hereinafter *Report of the Legal Committee 62nd*].

183. The London Group of Shipowners Protection and Indemnity Associations ("P&I Clubs"), insures 70% of the world's ocean tonnage against various types of liability. Bederman, *supra* note 26, at 488 n.15.

184. *Report of the Legal Committee 62nd, supra* note 182, para. 18. Some delegations doubted that this figure accurately represented the upper limit that would be available. *Id.* para. 23.

185. *Id.* para. 24.

186. *Id.* para. 25.

187. *Id.* paras. 90-91.

188. *Id.* paras. 88-95.

189. Submissions to the conference were made by Poland, The International Group of P&I Clubs, the United States, Norway, the German Democratic Republic, the Federal Republic of Germany, the Netherlands, Sweden, the United Kingdom, and the European Council of Chemical Manufacturers' Federations (CEFIC). *Report of the Legal Committee on the Work of Its Sixty-Third Session*, IMO Legal Comm., 63rd Sess., Agenda Item 4, para. 9, IMO Doc. LEG 63/14 (Sept. 27, 1990) [hereinafter *Report of the Legal Committee 63rd*].

the second tier of a possible two-tier regime, and adoption of "Guidelines and Terms of Reference" to direct the work of an ad hoc group of experts who were asked to develop recommendations relating to the technical provisions for the new HNS regime.¹⁹⁰ The Legal Committee narrowed discussion to the following issues: (1) the acceptability of imposing liability on the operator of the ship; (2) linking the HNS compensation scheme to the levels set in the 1976 LLMC; (3) whether to establish a two-tiered HNS regime in one treaty or in two; (4) defining "HNS damage"; and (5) the features of the possible second tier.¹⁹¹

The Polish delegation emphasized that the principal objective of the convention should be to provide effective compensation to the victims of an HNS incident without undue delay.¹⁹² To this end, the delegation proposed that strict liability¹⁹³ for HNS damage should attach to a vessel's operator, not the shipowner or the shipper, because the operator creates the risk of incident.¹⁹⁴ Only the operator can exercise sufficient proper care to reduce the risk of an HNS incident to an acceptable minimum.¹⁹⁵ Also, placing liability on the operator accounts for situations where the shipowner parts with possession and control of the vessel, such as letting the vessel on a bareboat charter.¹⁹⁶ To ensure the regime's effectiveness, the Polish delegation urged direct liability of the insurer to the victim.¹⁹⁷ Port or customs authorities would inspect insurance certificates to the loading of a consignment of HNS.¹⁹⁸

Notwithstanding Poland's proposal, imposition of liability on the ship's operator instead of the shipowner or shipper lacked sufficient

190. *Id.* Annex.

191. *Id.* para. 18.

192. *Consideration of a Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), Submission by Poland*, IMO Legal Comm., 63rd Sess., Agenda Item 3, para. 3(A), IMO Doc. LEG 63/3/1 (July 27, 1990) [hereinafter *Submission by Poland 63rd*].

193. Poland advocated removing the legal concept of "willful misconduct" as a defense to strict liability, because it was "a common law notion not fully understandable" to the civil-law jurists of Europe. *See id.* para. 6.

194. *Report of the Legal Committee 62nd, supra* note 182, para. 16; *Submission by Poland 63rd, supra* note 192, para. 4. The Polish delegates argued tort liability should be linked to undertaking a certain activity, here, operating the vessel, but not to the ownership of tools used in the activity.

195. *Submission by Poland 62nd, supra* note 178, para. IIA.

196. *Id.* A "bareboat charter" is a charter or lease of a ship, where the charterer supplies his own crew. For all practical purposes, the charterer is the owner of the vessel for the period of the charter. BLACK'S LAW DICTIONARY 149 (6th ed. 1990).

197. *Submission by Poland 63rd, supra* note 192, para. 6.

198. *Submission by Poland 62nd, supra* note 178, para. IIE.

support at the session for several reasons.¹⁹⁹ First, international conventions on maritime law had generally imposed shipowner liability, thus a precedent had been set for the convention to follow.²⁰⁰ Second, most delegates had thought that ascertaining the shipowner's identity through public documents could be done relatively easily, while the identity of the specific operator at any given time could not always be so easily determined.²⁰¹ Also, the shipowner's interest in the ship as a whole created in the shipowner the inherent duty to supervise the operator's activities.²⁰² Finally, the shipowner, not the operator, would be responsible for obtaining the insurance necessary for any compensation payable by an offending ship.²⁰³

Shipping concerns continued to lobby against the second tier of shippers' liability at the 63rd session. Arguing that a system of shipowner liability would sufficiently compensate all damage claims, the European Council of Chemical Manufacturers' Federations (CEFIC) asserted that "[t]he number of grave accidents connected with the transport of 'HNS' substances is very small, and where such accidents have occurred, adequate compensation has been afforded."²⁰⁴ Should a serious incident occur, the current marine insurance market would have the necessary coverage capacity, and it should rest "with marine insurers to provide shipowners and operators with the possible additional cover."²⁰⁵ CEFIC feared a system of shippers' liability would become "needlessly complicated, cumbersome to implement and costly."²⁰⁶ Finally, CEFIC viewed the imposition of shippers' liability as a dangerous break between the operational responsibility of shipowners and civil liability, divorcing shipowners from accountability for their conduct.²⁰⁷

At the 63rd session, the United States submitted an innovative proposal to fund the second tier.²⁰⁸ The United States suggested an

199. *Report of the Legal Committee 63rd*, *supra* note 189, para. 19.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* para. 21.

204. *Consideration of a Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS)*, *Submission by the European Council of Chemical Manufacturers' Federations (CEFIC)*, IMO Legal Comm., 63rd Sess., Agenda Item 3, at 2, IMO Doc. 63/3/5 (Aug. 31, 1990).

205. *Id.*

206. *Id.*

207. *Id.* This concern seems to be unfounded because the danger of transporting HNS may result from the packaging and handling of the shipper as well as from shipowner error. See *supra* note 102 and accompanying text.

208. *Consideration of a Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances (HNS)*, *Submission by the United States*,

“HNS points approach,” directly linked to the dangerous nature of a particular substance, to provide a means of determining whether a levy must be collected from the shipper in the case of specific shipments of HNS.²⁰⁹ The mechanism compared the hazardous potential of a given substance with the quantity for shipment in order to determine whether a levy should be paid.²¹⁰ Levies collected would be pooled to establish and maintain a second tier supplemental insurance fund.²¹¹ The formula provides a balance between equity in the sharing of costs to finance a second tier and simplicity in administering the system. The proposal was met with support in principle, but several delegations expressed concerns with respect to how it might actually work.²¹²

In the debate over the definition of “hazardous substance” at the 63rd session,²¹³ several delegations recommended, for purposes of administrative ease and cost efficiency, using lists of substances developed for the International Maritime Dangerous Goods Code (IMDGC);²¹⁴ however, other delegations argued that the mere inclusion of previous lists would not meet the special requirements of a

IMO Legal Comm., 63rd Sess., Agenda Item 3, IMO Doc. LEG 63/3/3 (Aug. 17, 1990) [hereinafter *Submission by the United States 63rd*].

209. *Id.*

210. Specifically, the points approach would work as follows: For cargoes included in the IMO Code of Safe Practice for Solid Bulk Cargoes (IBC Code), which provides guidance on shipping and handling of bulk cargo, the “hazard factor” would reflect the substance’s safety and marine pollution characteristics by taking into account the required “ship type” under the IBC Code and the pollution category under MARPOL 73/78. *See supra* note 2:

<u>Required Ship Type</u>	<u>Pollution Category</u>	<u>Hazard Factor</u>
1	any	3
2	any	2
3	A	2
3	B,C,D,III	1

“Quantity factors” could be assigned as follows:

<u>Volume</u>	<u>Quantity Factor</u>
< 500 M ³	1
500 - 2000 M ³	2
> 2000 M ³	3

Applying these values, the magnitude of the risk of carrying a certain cargo would be determined by the formula:

$$\text{HNS Points} = \text{Hazard Factor (HF)} \times \text{Quantity Factor (QF)}$$

Levies would then be based on the amount of HNS points assigned. *Submission by the United States 63rd, supra* note 208, Annex 2 at 1-2.

211. *Id.*

212. *See Report of the Legal Committee 63rd, supra* note 189, paras. 55-58.

213. *See id.* paras. 31-49.

214. Some delegations favored use of the old lists because of the benefit of experience acquired in their use. Others thought that a new list would be unnecessarily lengthy, thereby increasing the cost of freight and insurance. *Id.* paras. 32, 35.

new HNS regime.²¹⁵ The majority agreed that a new HNS regime should cover the broadest possible range of substances in order to meet the international community's objectives of protecting the marine environment, pinpointing liability for accidents, and ensuring compensation to victims.²¹⁶ To resolve some of the issues before the Legal Committee, and to study and make recommendations as to how HNS should be defined in the convention, the Committee established a "Working Group of Technical Experts."²¹⁷ This group consisted of experts in manufacturing, shipping, carrying, regulating, and the risks of HNS.²¹⁸

V. THE CURRENT DRAFT

At the end of the 63rd session, the Legal Committee asked the United Kingdom to prepare a draft convention for consideration at the 64th session.²¹⁹ At the 64th session, held from March 18-22, 1991,²²⁰ eleven nations submitted a joint *1991 Draft HNS Convention*²²¹ under the lead country procedure.²²² The 1991 Draft

215. *Id.* para. 33. The INTERNATIONAL MARITIME DANGEROUS GOODS CODE (IMDGC), *supra* note 5, adopted in 1965, is a guide that provides mariners and shippers with information on the nature of dangerous goods. The IMDGC is contained in five loose-leaf volumes and lists nine classes of dangerous goods: explosives, gases, inflammable liquids, inflammable solids, oxidizers, poisons, radioactive substances, corrosives, and miscellaneous. The code lists substances; it does not constitute a regulation or liability scheme, and is not internationally enforceable. Mankabady, *supra* note 24, at 86-88; Lampe, *supra* note 25, at 318; Gold, *supra* note 5, at 186-87. Although some delegations have favored annexing the IMDGC to the HNS convention as a listing of HNS, many delegations consider it too broad to be easily administered, regulated, or insured.

216. *Report of the Legal Committee 63rd*, *supra* note 189, at 11, para. 38.

217. *Report of the Drafting Group*, Annex, Agenda Item 3, at 1, IMO Doc. LEG/WP.3 (Sept. 20, 1990). The Legal Committee gave the working group the following guidelines, which provided strong indication of the Committee's thinking with regard to specific issues:

- (1) The new regime will almost certainly impose strict liability on the shipowner;
- (2) The regime will be broad in scope with respect to the number of substances included;
- (3) Supplemental compensation is essential to ensure adequate coverage;
- (4) The financing of the second tier would probably be based on levies on bulk HNS; and
- (5) A specific list of HNS should be included to ensure that government officials and commercial interests who are responsible for daily implementation can quickly ascertain the regime's requirements in any given case.

Id. See *supra* notes 190-91 and accompanying text.

218. *Id.* Annex, at 1, para. 2.

219. *Id.* at 14, para. 59.

220. *Id.* at 26, para. 130.

221. See *1991 Draft HNS Convention*, *supra* note 20, Annex, at 1.

222. The "lead country" procedure allows nations to submit proposals to the Legal Committee without being in any way bound to their terms during consideration and negotiations. *1991 Draft HNS Convention*, *supra* note 20, at 1 n.1.

addressed and incorporated many of the considerations discussed above.²²³

A. *Scope of the Convention*

In order to incorporate concerns that substances covered by the convention should be broadly defined, the 1991 Draft substituted the term "dangerous goods" for the term "HNS" throughout the document.²²⁴ The type of damage covered by the Draft also received broad definition, consistent with the 1984 Draft.²²⁵ The 1991 Draft also added an important provision absent from the 1984 Draft: where the cause of loss is due to both dangerous goods and other factors, and if the causes of the damage are not reasonably separable, "all such damage shall be deemed to be caused by the dangerous goods."²²⁶

The 1991 Draft has a broad scope of application. First, the Draft

223. See *supra* notes 132-218 and accompanying text.

224. 1991 Draft HNS Convention, *supra* note 20, para. 3.

The definition of "dangerous goods," and therefore the scope of the Draft Convention, encompassed the following:

- (a) oils carried in bulk and noxious substances as listed in the 1978 Protocol relating to the International Convention for the Prevention of Pollution from Ships, 1973;
- (b) Type I or Type II substances carried in bulk under the International Code for the Construction of Equipment of Ships Carrying Dangerous Chemicals in Bulk, 1972;
- (c) Dangerous goods except nuclear substances as defined in the IMDGC;
- (d) liquified gases listed in the International Code for the Construction and Equipment of Ships Carrying Liquified Gases in Bulk, 1975;
- (e) substances with flashpoints less than 60 degrees centigrade which could explode during loading and unloading; and
- (f) substances with explosion risks arising from previously carrying oil, liquified gas, or substances capable of giving off gas with a flash point of less than 60 degrees centigrade.

Id. art. 1, para. 5.

225. 1984 Draft HNS Convention, *supra* note 3.

"Damage" as defined in the 1991 draft includes:

- (a) loss of life or personal injury on board or outside the ship carrying the dangerous goods caused by those goods;
- (b) loss of or damage to property outside the ship carrying the dangerous goods caused by those goods . . . ;
- (c) loss or damage by contamination of the environment caused by the dangerous goods, provided that compensation for impairment of the environment other than loss of profit . . . shall be limited to costs of reasonable measures of reinstatement . . . ; [and]
- (d) the costs of preventive measures and further loss or damage caused by preventive measures.

1991 Draft HNS Convention, *supra* note 20, Annex, art. 1, para. 6. "Preventive measures" were defined as "any reasonable measures taken by any person after an incident has occurred to prevent or minimise damage." *Id.* Annex, art. 1, para. 7.

226. *Id.* Annex, art. 1, para. 6.

Convention applies to claims for damage caused by dangerous goods at sea; however, it does not apply to those claims governed by specific contracts for carrying goods or passengers, and "to the extent that its provisions are incompatible with those of the applicable law relating to workmen's compensation or social security schemes."²²⁷ Only geographic area limits this application.²²⁸ Also, the 1991 Convention does not apply to damage caused by oil or nuclear substances governed by other conventions, or to damage caused by warships or other ships owned by a state on non-commercial service.²²⁹

B. *Liability of the Shipowner*

Consistent with the 1984 Draft and with most of the discussion and debate that has taken place since, the 1991 Draft extends strict liability for damage caused by dangerous goods at sea to the shipowner.²³⁰ Defenses to liability include damages resulting from an act of war or an "exceptional, inevitable and irresistible" natural phenomenon; damage caused by a third party's act or omission done with intent to cause damage; and damage caused by the negligence or wrongful act of a government responsible for maintaining navigational aids.²³¹ The 1991 Draft also adds a new defense, not available under the 1984 Draft. The shipowner is not liable for damage if the consignor failed to inform the shipowner that the consignment contained dangerous goods, and if the shipowner did not know nor could have known of the goods' dangerous nature.²³² Also, the shipowner can be exonerated wholly or partially from liability if the victim caused the damage either by personal negligence, or by an act or omission done with intent to cause damage.²³³ Finally, the shipowner

227. *Id.* Annex, art. 3, para. 2.

228. Geographically, the Convention applies:

(a) to any damage caused in the territory, including the territorial sea, of a Contracting State;

(b) to damage by contamination of the environment caused in the exclusive economic zone of a Contracting State [or if a State has not established an exclusive economic zone], in an area beyond and adjacent to the territorial sea of that State . . . extending not more than 200 nautical miles from . . . its territorial sea;

(c) to damage [other than environmental damage] caused outside the territory . . . of any State, if this damage has been caused by a ship registered . . . or . . . entitled to fly the flag of a Contracting State; and

(d) to preventive measures, wherever taken . . .

Id. Annex, art. 2.

229. *Id.* Annex, art. 3, paras. 3-4.

230. *Id.* Annex, art. 4, para. 1.

231. *Id.* Annex, art. 4, para. 2(a)-(c).

232. *Id.* Annex, art. 4, para. 2(d).

233. *Id.* Annex, art. 4, para. 3.

can move against the consignor or consignee of the dangerous goods if one of them actually caused the damage.²³⁴

C. Shipowner's Limitation of Liability

Article 6 of the 1991 Draft provides for limitation of liability of the shipowner, but it does not provide for specific liability limits, which presumably await negotiation. The owner cannot limit liability "if it is proved that the damage resulted from his personal act or omission, committed with intent to cause such damage, or recklessly and with knowledge that such damage would probably result."²³⁵

In order to take advantage of the Convention's liability limits, the owner must establish a fund with the Court by depositing the sum of liability or by producing some other guarantee.²³⁶ If the owner successfully limits liability, the Court will distribute the fund among all claimants "in proportion to the amount of their established claims."²³⁷ Under Article 9, claims for personal injury or death have priority over other claims, up to two-thirds of the amount of the fund.²³⁸

The proposed system also requires the shipowner to carry insurance to cover the limit of liability.²³⁹ This will require Contracting States to ensure that shipowners maintain this insurance for their ships and keep record of it in the State's registry. Contracting States will issue insurance certificates to be carried on board any voyage carrying dangerous goods,²⁴⁰ retaining a copy of the certificate for their files.²⁴¹ Claims for compensation "may be brought directly against the insurer or other person providing financial security for the owner's liability for damage."²⁴² When an action is brought directly against an insurer, any defenses to liability available to the owner, in addition to the defense of willful misconduct of the owner, are available to the insurer.²⁴³

234. *Id.* Annex, art. 4, para. 6.

235. *Id.* Annex, art. 6, para. 2.

236. *Id.* Annex, art. 6, para. 3.

237. *Id.* Annex, art. 6, para. 4.

238. *Id.* Annex, art. 9, para. 1.

239. Under Article 10, "[t]he owner of a ship registered in a Contracting State and carrying dangerous goods shall be required to maintain insurance or other financial security . . . in the sums fixed by applying the limits of liability prescribed in article 6, paragraph 1 to cover his liability for damage under this Convention." *Id.* Annex, art. 10, para. 1.

240. *Id.* Annex, art. 10, para. 2.

241. *Id.* Annex, art. 10, para. 2.

242. *Id.* Annex, art. 10, para. 8.

243. *Id.*

D. *The International Dangerous Goods Scheme*

1. LIABILITY

The 1991 Draft Convention addressed the need for a second tier of damage liability by establishing an "International Dangerous Goods Scheme" (the "Scheme")²⁴⁴ to "provide compensation for damage in connection with the carriage of dangerous goods by sea, to the extent that [recovery from the shipowner] is inadequate or unavailable."²⁴⁵ The Scheme requires each shipper of a dangerous substance and each owner of a carrying ship to purchase a dangerous goods certificate, stating the nature and amount of the cargo, and the voyage to which the certificate relates.²⁴⁶ Funds collected will be applied to compensate any victim damaged by dangerous goods carried at sea if (a) the shipowner is not liable for the damage; (b) the shipowner is liable for the damage but is incapable of fulfilling personal obligations and the liability limitation fund is insufficient to satisfy the claim; or (c) the damage exceeds the owner's limit of liability.²⁴⁷ The shipowner can also recover "expenses reasonably incurred or sacrifices reasonably made . . . voluntarily to prevent or minimize damage . . ."²⁴⁸

The Scheme does not provide compensation if the Director of the Scheme proves that an act of war caused the damage, that the substance originated from a warship or from another Government owned ship on non-commercial service, or that the incident did not involve a ship.²⁴⁹ Further, if the Director of the Scheme or the owner proves that the negligence of a victim or the act or omission of a victim done with intent to cause damage did in fact cause the damage, they may be exonerated wholly or partially as to that victim.²⁵⁰ The 1991 Draft provides for a ceiling figure for the liability of the Scheme, which is yet to be determined.²⁵¹ As with the liability fund of the shipowner, claims for personal injury and death have priority over all other claims, "to the extent that the aggregate of such claims exceeds two-thirds" of the Scheme's total liability.²⁵²

244. *Id.* Annex, art. 11.

245. *Id.* Annex, art. 11, para. 1(a).

246. *Id.*, art. 17., paras. 1-2.

247. *See id.* Annex, art. 12, para. 1(a)-(c).

248. *Id.* Annex, art. 12, para. 2.

249. *Id.* Annex, art. 12, para. 3(a)-(b). The Director is the legal representative of the Scheme. *Id.* Annex, art. 12, para. 2.

250. *Id.* Annex, art. 12, para. 4.

251. *See id.* Annex, art. 12, para. 5(a).

252. *Id.* Annex, art. 12, para. 6.

2. ADMINISTRATION

Scheme administration entails various functions: considering claims against the Scheme; preparing its budget and managing its income; calculating the market value of a dangerous goods certificate; and supplying dangerous goods certificates to, and receiving funds from, certificate issuing agents.²⁵³ The Scheme will be administered by an Assembly consisting of all Contracting States²⁵⁴ and a Secretariat headed by a Director.²⁵⁵ The Assembly is responsible to properly execute the Convention, which entails approving requirements for appointing issuing agents, for defining "contributing cargoes", and for approving claims settlements.²⁵⁶

3. JURISDICTION OF CLAIMS AND ACTIONS

If an incident has damaged the territorial sea of a Contracting State, the action must be brought in that Contracting State.²⁵⁷ If an incident causes damage outside a Contracting State's territorial sea, the action must be brought in the Contracting State where the ship is registered, or the Contracting State where the owner has its residence or principal place of business.²⁵⁸ Actions brought against the Scheme must be brought "before a court competent . . . in respect of actions against the owner" who is or would be liable.²⁵⁹ The Scheme may intervene as a party to any legal proceedings instituted under the convention, and is not bound by any judgment or settlement to which it is not a party.²⁶⁰ All Contracting States must give full faith and credit to a judgment or settlement under the Convention, except for those judgments obtained by fraud or obtained against a party not given reasonable notice of the proceedings and a fair opportunity to defend.²⁶¹ Proceedings to enforce a judgment in any Contracting State do not allow for review of the merits of a case.²⁶²

4. REACTION OF THE LEGAL COMMITTEE TO THE 1991 DRAFT

Initial reaction to the draft was favorable. Some delegations submitted proposals for revision of some portions of the Convention.

253. *Id.* Annex, art. 13, para. 1.

254. *Id.* Annex, art. 21.

255. *Id.* Annex, art. 20.

256. *Id.* Annex, art. 22.

257. *Id.* Annex, art. 33, para. 1.

258. *Id.* Annex, art. 33, para. 2(a)-(b).

259. *Id.* Annex, art. 34, para. 1.

260. *Id.* Annex, art. 34, para. 4.

261. *See id.* Annex, art. 35, para. 1.

262. *Id.* Annex, art. 35, para. 2.

Finland stated that passenger car ferries carry about one-third of the dangerous goods moved on Finnish ships, and expressed concern that "[t]he definition of damage in the draft HNS convention differs in a significant way from the definition of pollution damage in the Conventions on liability for oil pollution damage in the sense that damage in the HNS convention includes also loss of life and personal injury."²⁶³ Finland expressed concern that an incident involving the collision of two passenger ships, with one carrying dangerous substances, would raise complicated issues of liability and compensation, resulting in the application of different conventions to the passengers' claims.²⁶⁴ "Passengers on board the ship not carrying dangerous goods could base their claims for the HNS damage on the HNS Convention, while the passengers on board the ship carrying dangerous goods would be in a different position and could only present their HNS claims according to the contract of carriage."²⁶⁵ Finland recommended covering passengers involved in an HNS incident, regardless of the contract of carriage, under the Convention.²⁶⁶

While Australia "applaud[ed] the efforts of the Legal Committee to include in the draft Convention a clause imposing liability for damage caused by contamination of the environment,"²⁶⁷ it asserted that "there is no reason . . . to limit recovery for such environmental loss to the EEZ or equivalent zone, even if the question of recovery for such loss might occur only on rare occasions."²⁶⁸ Australia and some other nations have continental shelves which extend further than a 200 nautical mile EEZ, and some nations have nationals who fish beyond the EEZ.²⁶⁹ Australia recommended extending the scope of protection to include this potential damage.²⁷⁰

The European Chemical Industry Council (CEFIC) approved of the 1991 Draft's first tier shipowner liability, and of the second tier which does not impose liability directly on the shipper.²⁷¹ CEFIC

263. *Consideration of a Draft International Convention on Liability and Compensation for Damage in Connection with the Carriage of Dangerous Goods by Sea, Submission by Finland*, IMO Legal Comm., 65th Sess., Agenda Item 3, at 1, IMO Doc. LEG 65/3/2 (Aug. 28, 1991).

264. *Id.* at 2.

265. *Id.*

266. *See id.* at 4.

267. *New Draft Article 2(bb), Proposal by Australia*, IMO Legal Comm., 65th Sess., Agenda Item 3, at 1, IMO Doc. LEG 65/3/4 (Aug. 30, 1991).

268. *Id.* The EEZ is a nation's Exclusive Economic Zone. *See supra* note 8.

269. *Id.* at 2.

270. *Id.*

271. *Consideration of a Draft International Convention of Liability and Compensation for Damage in Connection with the Carriage of Dangerous Goods by Sea, Submitted by the European Chemical Industry Council (CEFIC)*, IMO Legal Comm., 65th Sess., Agenda Item 3, at 2, IMO Doc. LEG 65/3/8 (Sept. 10th, 1991).

continues to question the need for the second layer of compensation, asserting that "the cover of 100 million SDR per incident—possibly supplementing the 1976 LLMC limitations—should permit adequate compensation in the vast majority of cases."²⁷² If the Legal Committee deemed the second tier necessary, CEFIC would approve of an administrative compensation scheme, as established by the International Dangerous Goods Scheme. However, CEFIC was concerned that the system of collecting contributions was impractical.²⁷³ CEFIC recommended that shipowners be responsible for incorporating the cost of contributing to the Scheme into the freight price and forwarding that levy to the Scheme on a quarterly basis. A shipowner who failed to pay contributions in any year would be refused registration until the contributions were paid.²⁷⁴

VI. CONCLUSION

Because the significant potential for a major catastrophe involving HNS,²⁷⁵ an HNS Convention is needed to protect the victims of future HNS incidents.²⁷⁶ The goals of such a scheme should be primarily to stop marine pollution by deterring would-be polluters, and secondarily to provide prompt and adequate compensation for claimants, and effective, equitable, and peaceful vindication of the rights of all parties. A proper scheme will insure funding for compensation, environmental response, and cleanup. International law will benefit by increased uniformity, with resultant beneficial effects on maritime trade, navigation, and environmental health. Further, legal certainty benefits the interests of marine transportation and third parties by providing "guidance on the legitimacy, and compensability, of damage claims."²⁷⁷

The 1991 Draft should receive strong support from the international community.²⁷⁸ It incorporates three elements which seem to be common to all discussions of the second, supplementary tier. First, all discussions address the shipper's responsibility. Second, they

272. *Id.*

273. *Id.*

274. *Id.*

275. *Consideration of a Possible Convention on Liability and Compensation for Damage Caused by the Carriage of Hazardous and Noxious Substances by Sea, Submission by the United States*, IMO Legal Comm., 60th Sess., Agenda Item 3, at 1, IMO Doc. LEG 65/3/8 (Sept. 13, 1988).

276. Pawlow, *supra* note 32, at 457.

277. De Bievre, *supra* note 4, at 88.

278. Telephone Interview with Lt. Mark A. Yost, United States Coast Guard, United States Representative to IMO Legal Committee (Jan. 25, 1991). For an additional discussion of the British proposal, see *supra* notes 175-82 and accompanying text.

include an on-board certificate as proof of payment of a levy or an insurance premium. Third, they generally propose an international body to operate or supervise the system.²⁷⁹ Under the current proposal, HNS shipowners and shippers would be required to purchase an HNS certificate, based either on bulk or amounts of HNS over a specified minimum quantity.²⁸⁰ Issuing agents from the government of the Contracting State would be authorized to issue HNS certificates on behalf of an international HNS body, which would collect the payments and then become the liable party, accountable to member states.²⁸¹ Contracting States would be responsible to examine a ship's certificates in port; and for properly supervising issuing agents.²⁸² This system would have the advantage of being relatively streamlined, particularly with a restricted group of agents rather than a multitude of shippers. Unfortunately, because the intermediate body would be liable, this system would probably divorce a shipper from a sense of responsibility for any accident caused by shipper negligence.

The maritime shipping of HNS creates complex problems.²⁸³ A system of compulsory insurance and a comprehensive list of HNS will mean that most cargo-carrying vessels will be affected by the Convention to some degree.²⁸⁴ Procedures must be such that Contracting States can enforce compulsory insurance and applicable safety standards. Also, the Convention must be easily amendable to account for development, production, and shipment of new chemicals and other forms of hazardous substances.²⁸⁵

If the Convention is to be truly workable, the IMO must aim for liability limits that are consistent with the insurance market's capacity and the magnitude of damages that may occur from catastrophic HNS incidents.²⁸⁶ For ease in administration, all issues should be resolved in a single document. The Convention should cover "both packaged and bulk substances and, while being as broad as possible, should support the development of a more comprehensive list of sig-

279. *Consideration of a Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances at Sea (HNS), Submission by the United Kingdom Delegation*, IMO Legal Comm., 63rd Sess., Agenda Item 3, para. 1, IMO Doc. LEG 63/3/7 (Sept. 3, 1990).

280. *1991 Draft HNS Convention*, *supra* note 20, arts. 10-11.

281. *Id.*, art. 14.

282. *Id.*, art. 17.

283. *See Submission by Poland 63rd*, *supra* note 192, para. 3(B).

284. Most vessels carry HNS in some amount and form. *Consideration of a Draft Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), Submission by the International Group of P&I Clubs*, IMO Legal Comm., 63rd Sess., Agenda Item 3, at 1, IMO Doc. LEG 63/3/2 (Aug. 13, 1990).

285. *See Chircop*, *supra* note 1, at 615.

286. Pawlow, *supra* note 32, at 477.

nificant risk substances.”²⁸⁷ The fairest system of liability will spread the risk of transporting hazardous cargo among those best able to pay. Those who most often engage in and benefit from an activity should bear its costs.²⁸⁸ Here, the shipowners and shippers should be responsible to insure against HNS catastrophes, while spreading the cost of that increased insurance to the hazardous substance consumer. This insurance interest could also prompt insurers to keep better track of the practices and safety records of their policyholders.²⁸⁹

An adequate definition of “shipper” must meet two concerns: “[f]irst, the victim should not have to untangle a chain of commercial transactions to determine which party to sue; second, that the definition must impose liability on some party in the best position to have insurance.”²⁹⁰ The shipper must be clearly identifiable prior to the voyage, and must have the financial resources to adequately insure the shipment.²⁹¹ In response to those who argue that vessel operators should be held liable, the definition of “shipowner” could be expanded to include carriers and operators of vessels when the owner does not retain control.²⁹² This would ensure that the party most responsible in any given incident would bear the most liability, and may force both shipowners and shippers to promote a positive and active safety attitude among their personnel.

Aside from providing adequate compensation to victims of marine disasters, the international community needs to protect the environment, people, and ports from the tragic effects of HNS prior to an accident. Carrying HNS means that specific measures for handling, packaging, loading, personnel training, and vessel operations must be promulgated, used, enforced, and frequently updated.²⁹³ The IMO should tighten and vigorously enforce “construction, safety, and prevention standards that are currently in effect to minimize the probability of HNS incidents.”²⁹⁴ Also, the international community should improve tracking requirements of HNS shipments and the advance notification systems for governments that are importing HNS.²⁹⁵ Finally, the world community must remember that it is both the right and the responsibility of each nation to protect and preserve

287. *Id.* at 479.

288. See Mankabady, *supra* note 24, at 349-350.

289. *Submission by the European Council of Chemical Manufacturers' Federation (CEFIC)*, *supra* note 189, at 2.

290. Mankabady, *supra* note 24, at 364.

291. *Id.*

292. Pawlow, *supra* note 32, at 478-79.

293. Chircop, *supra* note 1, at 615.

294. Pawlow, *supra* note 32, at 481.

295. *Id.*

the marine environment.²⁹⁶ International standards are required and can only be effective if each state participates.²⁹⁷ In a regime to protect the world's oceans from dangerous substances, a liability and compensation scheme can only be part of an overall international maritime safety and pollution prevention program.

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296. *See supra* note 1 and accompanying text.

297. *See supra* note 5 and accompanying text.