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**LEGAL MEASURES FOR THE PREVENTION OF OIL
POLLUTION BY SHIPS AND CIVIL LIABILITY FOR
OIL POLLUTION DAMAGE IN SOUTH AFRICAN MARINE
AND COASTAL WATERS**

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List of Abbreviations

AJIL	American Journal of International Law
CLC	1969 International Convention on Civil Liability for Oil Pollution Damage
CRISTAL	Contract Regarding an Interim Supplement for Tanker Liability for Oil Pollution
DEAT	Department of Environmental Affairs and Tourism
DOT	Department of Transport
EC	Eastern Cape
EEZ	Exclusive Economic Zone
EM	Environmental Management
FC	1992 International Convention on the Establishment of an International fund for the Compensation for Oil Pollution Damage.
FOPA	1990 Federal Oil Pollution Act
HSC	1958 Convention on the High Seas
HS	Hazardous substances
IC	1969 International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties
ICAM	Integrated Coastal Area Management
ICJ	International Court of Justice
ICS	1989 International Convention on Salvage
IOPC	1971 International Oil Pollution Compensation Fund
ILR	International Law Reports
IMO	International Maritime Organisation
ITLOS	International Tribunal of the Law of the Sea
MARPOL	1973/1978 International Convention for the

	Prevention of Pollution from Ships
MC	1976 Mediterranean Convention
MPCCL	Marine Pollution (Control and Civil Liability) Act 6 of 1981
MPPS	Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986 (MARPOL)
MSA	Merchant Shipping Act 57 of 1951
MZA	Maritime Zones Act 15 of 1994
NEMA	National Environmental Management Act 107 of 1998
OILPOL	1954 International Convention for the Prevention of Pollution of the Sea by Oil
OPRC	1990 International Convention on Oil Pollution Preparedness, Response and Co-operation
OSPAR	1992 Convention for the Protection of the Marine Environment of the North East Atlantic
PCP	Prevention and Combatting of Pollution of the Sea by Oil Act 6 of 1981
PF	Poincare Francs
PIC	Prior Informed Consent
SAJELP	South African Journal of Environmental Law and Policy
SALJ	South African Law Journal
SAMSA	South African Maritime Safety Authority
SDR	Special Drawing Rights
SOLAS	The 1974 International Convention for the Safety of Life at Sea
TOVALOP	Tanker Owners Voluntary Agreement

	Concerning Liability for Oil Pollution
UCT	University of Cape Town
UKZN	University of Kwa-Zulu Natal
UN	United Nations
UNCED	1992 United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environmental Programme
UNW	University of the North West
WSA	The Wreck and Salvage Act 94 of 1996

CHAPTER 1

A. BACKGROUND

1. Introduction

The predominant transportation of oil by ships in often large quantities results in an almost inevitable risk of oil pollution¹. ‘About one million tons of oil is lost annually at sea, which is the equivalent of one tenth of all oil transported across the ocean’². Oil pollution is a direct consequence of the dependence on oil and the shipping industry. ‘Without the shipping industry much of the world’s principal source of energy- oil - could not be moved from where it is extracted to where it is refined and marketed’.³

The reliance on oil is almost unprecedented, with the use spanning from products such as fertilizers, pesticides, paints and plastics to conducting electricity, heaters and lubricating machinery, from printing presses to bicycles.⁴ There is no part of human life which does not involve the use of oil on a daily basis, either directly or indirectly. As a result, the world has become totally dependent on oil, using nearly 3 billion gallons of oil each day.⁵

Before 1960, there was little to no concern about pollution of the sea⁶. However, on 18 March 1967, the Torrey Canyon, a Supertanker⁷ capable of carrying a cargo of 120,000 tons of crude oil, ran aground off the South Coast of England. She eventually spilled 100,000 tons of oil into the sea⁸ and this crude oil was carried out with the tide as 18 inches thick, black sticky ooze on the Cornish beaches, up the English Channel and across the West Coast of France.⁹

¹M Blumer ‘Oil Pollution of the Ocean’ available at www.whoi.edu/cms/files/dfino/2005/4/oceanus1969_2621.pdf accessed on 09/11/2012.

²*Ibid.*

³P Birnie, A Boyle & C Redgewell *International Law and the Environment* 3ed (2009) 398.

⁴‘An oil spill primer for students’ available at http://oceanservice.noaa.gov/education/stories/oilymess/supp_primer.html accessed on 09/11/12.

⁵ *ibid*

⁶R.R. Churchill & A.V. Lowe *The Law of the Sea* 3ed (1999) 328.

⁷ At the time, it was the 3rd largest oil tanker in the world.

⁸ 20 000 tons of oil was burned when the Torrey canyon was bombed.

⁹AE Utton ‘Protective Measures and the Torrey Canyon’ (1968) *Boston College Law Review* vol. 9 at 614.

It was noted that ‘the law relating to international shipping... was in a number of ways quite out of date’¹⁰ and the damage caused by the incident as well as the devastating environmental impact resulted in the international community questioning the adequacy of existing legal framework surrounding the prevention of pollution from ships. An overwhelming consensus was that a more stringent plan should be implemented to ensure that adequate standards are in place to prevent marine pollution from ships.

2. What is oil pollution and what are the forms of damage?

Oil pollution by ships is the release of liquid petroleum into marine waters, either operationally or accidentally. Operational pollution is the intentional method or manner in which ships operate; these activities include washing out oil tankers and disposing of oily residue at sea¹¹. This form of pollution accounts for seventy five percent of marine pollution¹². The remaining twenty five percent is the result of accidental spills; the latter is the more serious of the pollutants¹³ with the sinking of oil tankers such as the *Torrey Canyon*, *Amoco Cadiz*, *Exxon Valdez*, *Nakhodka*, *Erika* and *Prestige* exemplifying the severity of the accidents which is derived from the volume of oil or other pollutants released.¹⁴

Oil pollution is regarded as one of the most contentious types of pollution because wastes from municipalities and industries can be collected, treated and rendered harmless before it is discharged into the streams, whereas the release of petroleum causes irreversible damage to the marine environment, animals and ecosystems.¹⁵

Humans are dependent on the ocean for the vast resources it provides. While oil pollution has detrimental effects on the environment, there are also negative socio-economic impacts. In terms of environmental damage, when oil slicks reach the coast, the oil coats almost everything within the vicinity including plants, sand and grass, which makes the area unsuitable for the habitation

¹⁰[*supra* note 8] 617.

¹¹ [*supra* note 3] 399.

¹²A Griffin ‘Marpol 73/78 and Vessel Pollution: a Glass half Full or Half Empty’ (1994) *Indiana Journal of Global Studies* vol1 at 490.

¹³The result is that they harm coastal communities, fisheries, wildlife and local ecology- both short term and long term.

¹⁴ [*supra* note 3] 400.

¹⁵ AW Bruce & I Grossman ‘Oil: a New York State Pollution Problem’ (1971) *Journal: Water Pollution Control Federation*, Vol. 43, No. 3, Part I.

of wildlife. The oil then sinks into the sea and has damaging effects on underwater ecosystems, either killing or contaminating fish and organisms, which is detrimental as the underwater ecosystems are essential to the global food chain resulting in negative effects on both reproduction, and cell growth¹⁶. The oil spills also kills marine mammals such as dolphins and seals with the oil clogging the blow holes, making it impossible for them to breathe. Another example of the negative effects of oil pollution would be on seals; the seals' fur becomes coated, leaving them vulnerable to hypothermia¹⁷.

On a socio-economic level, the sea is relied upon for the livelihood of many people in South Africa. With its abundant resources of fish, it attracts both fishing communities and consumers. However, oil spills result in a reduction in the quantity of many species of fish, crabs and oysters. The fishing industry is then affected by the reduction, resulting in fewer yields, which have devastating effects on subsistence fishers.

Furthermore, tourism is an import economic sector; when an oil spill has occurred it has effects on coastal towns leading to disruption of coastal activities such as diving, surfing, swimming and sea related activities; Hotels and restaurants in the surrounding area are also affected by the damaged beaches and low yields of fish, resulting in a loss or reduction in the income usually received.¹⁸ The people dependent on the sea have a right to exercise the use of the sea and not have their rights infringed by oil pollution.

It is evident that oil pollution does not only have a negative effect on the marine environment, but it also has far reaching effects on people and the economy.

3. Extent of risk of oil pollution in the marine and coastal waters of South Africa

The earth's largest sink for pollutants is the ocean¹⁹ and the South African marine environment has not been spared by this phenomenon in terms of oil pollution. South Africa is situated on one

¹⁶L West 'How do oil spills affect the environment?' available at http://environment.about.com/od/petroleum/a/oil_spills_and_environment.htm accessed on 09/11/12.

¹⁷*Ibid.*

¹⁸ International Tanker Owners Pollution Federation 'Effects of Oil Pollution on Social and Economic Activities' available at <http://www.itopf.com/information-services/publications/documents/TIP12EffectsofOilPollutiononSocialandEconomicActivities.pdf> at 2 accessed on 09/11/12.

¹⁹W Marsh & JR Grossa *Environmental Geography: Science, Land use, and Earth Systems* 3ed (2005) at 52.

of the world's busiest shipping routes, with 327 million tons of crude oil transported by tankers off the South African coast annually²⁰. About 100 million tons of oil, coming from the Middle East passes through the Cape of Good Hope. This means that approximately 15,000 ships pass through South African waters every year.

Whilst these vessels are usually bound for continents such as Europe and North America, the severe sea conditions²¹, which are especially experienced during the winter months, coupled with the vast amounts of ships converging at the major turning point of Cape Town lead to accidental oil spills which are an unavoidable occurrence *en route*. These weather conditions make South Africa susceptible to ship accidents, and put the marine environment at an elevated risk of oil pollution.

The problem of piracy has gone unsolved by both local authorities and the international community; even though attempts have been made to combat the problem. As a result of the situation becoming so unmanageable, shipping companies are opting to take the longer route through the Cape of Good Hope off the coast of South Africa to avoid the possibility of a hijack or attack by pirates.²²In addition, incidents of piracy off the Horn of Africa constitute one of the biggest threats through the Suez Canal – one of the most vital maritime routes in the world.²³Thus, the preference of the international community using the South African route results in an increase and greater risk of oil pollution casualties.

South Africa has experienced numerous oil pollution incidents over the years. The *Castillo De Bellver* was South Africa's biggest oil spill. In 1983 a Spanish oil tanker, the *Castillo De Bellver*, exploded 80 kilometres off Table Bay, Cape Town. The tanker drifted off the coast and broke into two, resulting in a major oil spill. The tanker spilled 242, 262 of the 250, 000 tons of oil it was carrying. In addition, the tanker sank 36 kilometres off the coast, with 100, 000 tons of oil remaining in its tanks.²⁴ Whilst it is regarded as the biggest oil spill South Africa has experienced, the weather conditions were conducive to oil spill response. Had the weather been different, the situation could have been more disastrous. However, reliance should not be placed

²⁰AGS Moldan 'Marine pollution Oceans of Life off Southern Africa' (1989) at 41.

²¹ Cape Coast is known as the 'Cape of Storms' as a result of the severe weather conditions.

²²J A Osei 'The Root Cause of the Somali Piracy' (2011) *Kofi Annan International Peacekeeping Training Centre Occasional Paper* no 1 at page 3.

²³L B Struwe 'For a Greater Horn of Africa Sea Patrol' (2009) *Danish Institute for Military Studies* at page 2.

²⁴ [*supra* note 19] at 41.

on weather conditions which are conducive to spill response, but rather response mechanisms should be in place to ensure that despite external factors such as the weather, clean-up of oil spills are enforced in a uniform manner, which can only be done if a proper civil liability regime is put into effect to ensure that the parties involved pay for the cleanup of the oil pollution accident and for the damage caused.

In 1994, a bulk carrier named the *Apollo Sea* sailed with a full load of iron ore from Saldanha Bay.²⁵ Four hours later the ship suffered a catastrophic tragedy and sank in storm conditions off the Cape Coast and 2400 tons of heavy fuel was spilled into the sea. It was only discovered seven days after the occurrence yet the report had been received by the authorities that it had occurred.²⁶ The clean-up operation resulted in one of the most complex and costly clean-up operations in South Africa.

On 2 September 2012, an oil spill occurred on Blouberg's Dolphin Beach, Cape Town. After bad weather broke the wreck, an oil slick was released. Almost 3 years ago, the Turkish owned bulk carrier named the *Seli I* ran aground at Blouberg *en route* to Gibraltar carrying 600 tons of fuel and 30 000 tons of coal.²⁷ Persistent warnings were made of the environmental threat, however none were carried through. The South African Maritime Safety Authority (SAMSA) stated: '... we have been warning the Department of Transport for far too long that this was going to happen we suggested that the tanks should be opened correctly and have them physically removed.'²⁸ In this incident, weather conditions were not conducive, as the city's disaster response teams attempted to clear up the oil spill but 'continuous oil washed ashore due to the rough seas and high swells'²⁹. The aforementioned incidents prove South Africa is not immune to oil pollution accidents in its waters. In fact, the country's position makes it even more susceptible to oil pollution as tankers pass through the Cape of Good Hope.

²⁵ [*supra* note 19]

²⁶*Ibid.*

²⁷J Bester & W Meyer 'Oil Spill: Marine Life Threatened' *Weekend Argus*, Sunday Edition published on 2 September 2012

²⁸*Ibid.*

²⁹*Ibid.*

4. Legal Regimes

As oil pollution resulting from shipping activities increased globally over the years - often elevating in detrimental effects and damage to the environment - vigorous marine pollution control legislation began to develop. The international community concerned themselves with finding solutions to a number of issues regarding prevention and response to oil pollution. This included adopting standards to reduce or eliminate pollution; measures to avoid accidental oil pollution, putting into practice standards which all coastal States should adhere to in taking action in pollution casualties; dealing with emergencies; ascribing liability for pollution damage and implementation plans for clean-up exercises.

Thus dealing with oil pollution can be divided into 3 categories: prevention of oil pollution, response to oil pollution and civil liability. International Conventions were passed which provided stringent standards and methods for dealing with oil pollution. These include: the 1954 International Convention for the Prevention of Pollution of the Sea by Oil (OIPOL), the 1973/1978 International Convention for the Prevention of Pollution from Ships (MARPOL), the 1982 United Nations Convention on the Law of the Sea (UNCLOS); the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Intervention Convention), the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC) and the 1992 International Convention on the Establishment of an International Fund for the Compensation for Oil Pollution Damage (Fund Convention).

All three categories are interrelated and requires adherence to ensure proper mechanisms are undertaken to deal with oil pollution which is either imminent or has already occurred. In response to the *Apollo Sea* incident, it was noted that ‘no matter how much effort is put into prevention of oil pollution from vessels at sea, these accidents may still occur without any forewarning.’³⁰ However, if standards are adhered to, the scale of damage can be mitigated.

The international conventions that South Africa is a party to have been incorporated into domestic legislation and they include: The Prevention and Combating of Pollution of the Sea by

³⁰A Moldan ‘Response to Apollo Sea Oil Spill, South Africa’ (1997) *South African Oil Industry Environment Committee Paper 4*.

Oil Act 67 of 1971 as well as provisions in the Merchant Shipping Act 57 of 1951 and the National Environmental Management Act: Coastal Management Act 24 of 2008.

This paper will look at whether the legislation passed in South Africa aimed at preventing and prohibiting oil pollution, as well as current civil liability regimes for oil pollution accidents are adequate or if they fail to meet the standard required by international law. For instance, compensation for the damage and harm caused to the environment is vital in order to restore the sea and prevent further accidents. In terms of civil liability, South Africa ratified the Convention on Civil Liability, but failed to enact domestic legislation in terms of the Convention to regularly update current legislation so that the standards are high and enforceable in national law. The result was that South Africa was left financially unprepared to deal with future oil spills and prevention thereof.

South Africa accepted the gap in legislation which leaves the country under-prepared to deal with oil pollution and efforts have been made to deal with the aforementioned problem. Merchant Shipping Acts from the Minister of Transport dealing with oil pollution have since been passed; these Acts are the Merchant Shipping (Civil Liability Convention) Act; the Merchant Shipping (International Oil Pollution Compensation Fund) Act; the Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act; and the Merchant Shipping (International Oil Pollution Compensation Fund) Administration Act³¹. In December 2013, President of the Republic of South Africa Jacob Zuma signed the Merchant Shipping (International Oil Pollution Compensation Fund) Administration Act into law.³²

The value and effectiveness of the provisions of the aforementioned regimes as well as the effect it will have on South African Oil Pollution will be evaluated in the paper.

B. RESEARCH QUESTIONS

Is legislation in South Africa adequate to prevent oil pollution by ships? Is current legislation in terms of civil liability sufficient to ensure that South Africa is able to deal with response to oil

³¹ 'Merchant Shipping Oil Pollution Shipping Administration Bill Signed' available on <http://www.sabinetlaw.co.za/transport/articles/merchant-shipping-oil-pollution-administration-bill-signed> accessed on 04/05/2014

³² *ibid*

pollution accidents and that South Africa is not left in a financially unprepared situation? What is the effect of the new Acts passed? Are the new Acts sufficient to deal with oil pollution?

C. RATIONALE FOR STUDY

The legal measures taken by South Africa to prevent oil pollution in marine and coastal waters and civil liability regimes will be investigated. According to current measures in terms of civil liability, these are inadequate. This will leave South Africa underprepared should a major oil spill occur in the Republic again. In the event that such a disaster happens, one of the effects would be that the taxpayer would have to fund the clean-up and all activities related thereto. Thus, it is imperative that legislation be developed to fill this lacuna. A discussion will also ensue as to the gaps in oil pollution accidents and the need for ability to bring claims; whether the efforts made by new legislation meet international standards and whether it is enough to protect South Africa.

D. SUMMARY OF CHAPTERS

1. Chapter 1

This chapter is devoted to introductory aspects of oil pollution. Consideration is given to international incidents of oil pollution, the shipping industry and the reliance on oil. What oil pollution is and the negative effects thereof are dealt with next. Oil pollution is limited to accidental and operational discharge of oil from ships only and includes the extent of risk to South Africa from this form of pollution. An overview of international conventions and domestic legislation is provided in order to investigate whether the latter is sufficient or not.

2. Chapter 2

This chapter will identify the development of oil pollution prevention in international law. The purpose of this would be to establish the standards which are now placed on the international community to adhere to. International customary law regarding oil pollution will be investigated and a discussion on international conventions and South African legislation will follow.

3. Chapter 3

In this chapter, the need for claims for compensation and civil liability regimes according to international conventions are examined. The Convention on Civil Liability and the Fund Convention will be discussed and suggestions will be made on how it should be integrated into domestic legislation to ensure that States are not left financially unprepared in the event of an oil spill.

4. Chapter 4

This Chapter deals with domestic legislation regarding civil liability in South Africa; whether South Africa has the necessary funds to compensate affected parties and to accomplish an adequate clean-up of the oil spill with minimal environmental damage. Evaluation of the newly promulgated legislation will be discussed and assessed in light of its envisaged coverage.

An overview of the United States of America's regime on prevention and civil liability will be dealt with in this chapter. It is important to note that during the past 2 decades, the US has recorded a steady increase in oil imports and consumption, however the number volume of oil spillage has not followed similar course; the US has actually recorded a decline in the annual number and volume of oil spillage.³³

The US was once in the same position South Africa found itself (prior to the Merchant Shipping Acts), with regards to ratification of international conventions. However, the 1990 legislation which the United States of America effected, strengthened the existing liability provisions it had in place, providing greater provision for the prevention and response to oil pollution as well as civil liability. The result was that vessels which carried and spilled the most oil, decreased significantly.

Considering that the oil consumption and oil imports are steadily increasing, the trend of declining incidents of spill incidents is noteworthy and is the basis of the overview. This

³³ J.L Ramseur 'Oil Spills in U.S. Coastal Waters: Background, and Issues for Congress' (2010) *Congressional Research Service* available at http://books.google.co.za/books?id=-TnylQQKGHgC&pg=PA8&dq=oil+pollution+united+states+of+america&hl=en&sa=X&ei=oWdTU-SKOsfD7Aa_nYHIBA&ved=0CEgQ6AEwAjgK#v=onepage&q=oil%20pollution%20united%20states%20of%20america&f=false accessed on 04/05/2014 at i

overview will be used to identify how the US dealt with the problems and whether there are aspects of civil liability in the US that can be integrated into South African law.

5. Chapter 5

The final remarks and conclusions will be made in this Chapter. Remarks will be made regarding the overall legislative regime in South Africa, specifically what should be incorporated and how to move forward in terms of civil liability to ensure that South African legislation is in line with international law in the prevention, response to and liability for oil pollution.

Chapter 2

A. INTRODUCTION

Ships are pollution threats simply by the nature of their voyage across the oceans. Whether the ship is big or small, carrying dangerous cargo or not, ships are pollution threats. States acknowledged that there are underlying threats to the marine environment as a result of the ships' voyages and collectively decided that there was a need to establish at least minimum standards for environmental protection.¹ However, as efforts were being made to progressively codify and develop international law for prevention and control of oil pollution from vessels, it brought about a contention between environmentalists and coastal interests on the one hand and shipping concerns coupled with oil companies on the other hand'.²

With events such as the *Torrey Canyon* incident, it was decided that international maritime law should make adequate provision for the protection and preservation of the marine environment and to also provide for the necessary procedures and costs involved to reflect the environmental threats and interests therein.³ States have progressively, collectively and individually worked towards internationally agreed regimes for the prevention of oil pollution from vessels.⁴

B. INTERNATIONAL CUSTOMARY LAW

Customary international law provides a few relevant rules in terms of oil pollution. The *Corfu Channel Case, United Kingdom of Great Britain and Northern Island v People's Republic of Albania*⁵ arose from incidents which occurred when two British ships traversed through the Greek Island of Corfu from the Albanian Mainland.⁶ These ships struck mines in Albanian waters resulting in severe marine damage and loss of life. The Court held that every State was under an obligation 'not to knowingly allow its territory to be used for acts contrary to the rights

¹ DM Johnston *The Environmental Law of the Sea* (1981) 205.

²[*supra*note 1] 203.

³*Ibid.*

⁴[*supra* note 1] 204.

⁵*International Court of Justice* (ICJ) 9 April 1949, available at www.refworld.org/docid/402399e62.html accessed 07/05/14.

⁶'The Corfu Channel Case' available at www.invispress.com/law/international/corfu.html accessed on 07/05/14.

of other states'.⁷ The effect of this case shows that there is an onus on each state to ensure that they protect their environment from the misuse of its territory by others states.

The *Trail Smelter Case, United States of America v Canada*⁸ case dealt with the issue surrounding noxious fumes emitted from a Canadian smelter which caused pollution in the United States of America. Two important international law principles arose from the arbitration. Firstly, that all States have an obligation to prevent transboundary environmental harm and that no State has the right to use or permit the use of its territory in a manner so as to cause injury or pollution in another State; and secondly, that States have an obligation to pay compensation for the harm they cause. The principles which arose from the case resulted in the establishment of one of the first international pollution control regimes – the 1958 High Seas Convention.

The 1958 High Seas Convention entered into force on 30 September 1962 and was declaratory of these international customary law principles. The Convention provided that the freedoms associated with the high seas, which include the freedom of navigation⁹, freedom of fishing¹⁰, freedom to lay submarine cables¹¹ and pipelines and the freedom to fly over the high seas¹² should be exercised by all states with reasonable regard to the interests of other States in their exercise of the high seas¹³. Churchill and Lowe¹⁴ note that:

‘Taking the principles enunciated in Article 2 and in the *Corfu Channel* case together and extending the principle in the *Trail Smelter* case by analogy, there is a general rule of customary international law that States must not permit their nationals to discharge into the sea matter that could cause harm to the nationals of other States’.

However, customary international law seemed too vague to be effective and incapable of being developed into detailed standards and liability regimes which were required to have an effective international regime.¹⁵ Furthermore, States had considered customary international law to be

⁷1949 ICJ rep 3 at 22.

⁸*United Nations Reports of International Arbitration Awards*, 16 April 1938 – 11 March 1941 available on http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf accessed on 07/05/2014

⁹Article 2(1).

¹⁰Article 2(2).

¹¹Article 2(3).

¹²Article 2(4).

¹³ Article 2

¹⁴RR Churchill & AV Lowe *The Law of the Sea* 3ed (1999) 332.

¹⁵[*supra* note 13].

‘both inadequate and incapable of sufficiently speedy or extensive development to sustain effective action against pollution’¹⁶

International customary law could not provide the control and enforced international co-operation the marine pollution phenomenon presented. The deficiencies regarding customary international law resulted in treaty-based regimes dealing with oil pollution.

C. TREATIES DEALING WITH POLLUTION AT SEA

1. International Law

(a) The 1954 International Convention for the Prevention of Pollution of the Sea by Oil

The 1954 OILPOL Convention is the forerunner of contemporary marine pollution conventions and aimed at controlling only one substance: oil. It was observed that once an oil tanker discharged cargo containing oil, a certain amount of oil remained in the tanks, and that such oil had to be disposed of before a new cargo could be taken on board.¹⁷ In addition, many tankers washed out their empty tanks at sea, and used seawater as ballast to clean their tanks, ultimately leaving residues of oil in the sea. Having noticed the many ways in which oil entered the ocean, the first pollutant for which international control standards were set was oil.¹⁸

By 1969, 71 countries representing 90% of the world’s tonnage had adopted OILPOL.¹⁹ The Convention aimed at preventing oil pollution from tankers, and ensuring that discharges of persistent oil²⁰ or oily mixtures²¹ by tankers were prohibited in specific zones²². Furthermore, it provided that parties to the Convention provide reception facilities for the oily water which ships discharge.

¹⁶[*supra*note 13].

¹⁷[*supra* note 13].

¹⁸ [*supra* note 13] 339.

¹⁹J Glazewski *Environmental Law in South Africa* 2ed (2005)642.

²⁰A phrase that includes crude and heavy fuel oil but excludes the highly toxic refined products known as light oils.

²¹ The prohibition was: oil or oily mixture containing more than 100 parts of oil per million.

²² These specific zones are known as ‘prohibited zones’ and it covers an area of 50 miles from the nearest land.

The Convention entered into force on 26 July 1958. However, after its enactment, efforts were constantly made to pursue more stringent standards²³ and as a result the Convention was of limited effectiveness. Superseded by the 1973 International Convention for the Prevention of Pollution from Ships, the Oil Convention became obsolete. Nevertheless, a few parties to the 1954 Convention have not yet become parties to the 1973 Convention, and therefore remain bound by the 1954 Convention.

(b) The 1958 Convention on the High Seas

The concern with oil was further noted a few years later²⁴ in the 1958 Convention on the High Seas. Article 24 of the Convention provides that:

‘Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject.’

The High Seas Convention served to supplement the provisions in OILPOL by including pollution prevention on the high seas, as compared to the OILPOL Convention which provided for the prevention of pollution in specific zones only. Thus, the high seas were afforded protection against oil pollution.

(c) The 1973/1978 International Convention for the Prevention of Pollution from Ships (MARPOL 73/78)

Oil pollution disasters such as the *Exxon Valdez*²⁵ and *Amoco Cadiz*²⁶ illustrated the problems surrounding accidental vessel pollution. The international community took note that accidental spillage occurring from these tankers was not the only threat - an additional source of vessel pollution was the operational discharge of oil on the high seas. As a result, these operational

²³ The 1971 amendment to the convention called for new guidelines such as safety guidelines for newly-built oil tankers.

²⁴ [supranote 16] 642.

²⁵ An oil tanker bound for California struck Prince William Sound’s Bligh Reef and spilled 260,000 barrels of crude oil.

²⁶ Was a large crude carrier which ran aground on the Portsall Rocks, 5km from the coast of Brittany, France. The tanker split in three and sank spilling 219,797 tons of oil into the sea.

discharge incidents put pressure on governments to take stronger measures to prevent vessel pollution from both accidental and operational discharge.

At the multilateral level, the next landmark development in the control of vessel source pollution was the International Convention for the Prevention of Pollution from Ships (MARPOL), which was adopted by the International Maritime Organization (IMO) on 2 November 1973. The MARPOL Convention's objective was to deal with all forms of intentional pollution by ships. Glazweski²⁷ notes that the thrust of MARPOL was to prevent or regulate deliberate discharges rather than to deal with its consequences.

By 1978, the Convention was still a long way from receiving the necessary number of ratifications to enter into force. In an effort to speed up ratification a Protocol to the Convention was adopted by the IMO with the result that contracting parties to MARPOL are bound by Annex I and Annex II only, while the remaining Annexes remain optional. In this way the Convention received the required ratifications.

MARPOL extended the 1954 OILPOL Convention in Annex I. The objective was to provide for the complete elimination of international pollution of the marine environment by oil and other harmful substances, and to minimize accidental discharges of other harmful substances. In addition, it established generally applicable norms and substances for more stringent pollution control standards in certain internationally designated 'special areas'.

Annex 1 entered into force on 2 October 1983 and provides that:

'Subject to the provisions of regulation 4 of this annex²⁸ and paragraph 2 of this regulation²⁹, any discharge into the sea of oil or oily mixtures from the cargo area of an oil tanker shall be prohibited except when all the following conditions are satisfied: 1) the tanker is not within a special area³⁰; 2) the tanker is more than 50 nautical miles from the nearest land; 3) the tanker is proceeding *en route*; 4) the

²⁷ [*supranote 16*] 642.

²⁸ Regulation 4 provides that regulation 15 and 34 shall not apply to: the discharge into the sea of oil or oily mixture necessary for the purpose of securing the safety of a ship or saving life at sea; or the discharge into the sea of oil or oily mixture resulting from damage to a ship or its equipment.

²⁹ The provisions of paragraph 1 of this regulation shall not apply to the discharge of clean or segregated ballast.

³⁰ A 'Special Area' as defined in a regulation 11 means: 'a sea where for the recognized technical reasons in relation to its oceanographical and ecological condition and to the particular character of its traffic the adoption of special mandatory methods for the prevention of sea pollution by oil is required.'

instantaneous rate of discharge of oil content does not exceed 30 litres per nautical mile; 5) the total quantity of oil discharged into the sea does not exceed for tankers delivered on or before 31 December 1979, 1/15,000 of the total quantity of the particular cargo of which the residue formed a part, and for tankers delivered after 31 December 1979, 1/30,000 of the total quantity of the particular cargo of which the residue formed a part; and 6) the tanker has in operation an oil discharge monitoring and control system and a slop tank arrangement as required by regulation 29 and 31 of this Annex'.³¹

The Convention makes provision for special areas. These special areas are: the Mediterranean Sea Area; the Baltic Sea Area; the Red Sea Area; the Gulfs Area; The Gulf of Aden Area; the Antarctic Area; the North West European Waters and the Oman Areas of the Arabian Sea.³²

Regulation 7 of the Convention provides that an International Oil Pollution Prevention Certificate shall be issued after an initial or renewal survey to any oil tanker of 150 tons or above any other ships of 400 tons which are engaged in voyages to ports or offshore terminals under the jurisdiction of other parties to the Convention.³³ Furthermore, it introduced the requirement that new tankers be fitted with double hulls or mid height decks, and to provide for the phased introduction of this requirement for existing tankers.

MARPOL 73/78 attempts to strike a balance on two accounts: firstly, between the need to protect and preserve the marine environment and the desire not to impose laws which make shipping prohibitively expensive; and secondly to create an environmental enforcement regime which balances conflicting jurisdictional claims made by a flag State and a coastal State (historically flag States wanted to preserve exclusive jurisdiction over their vessels and coastal states wanted to be given authority to enforce MARPOL against the ships of other nations).³⁴

³¹Regulation 34.

³²Regulation 1 (11) 1-9.

³³Regulation 7.

³⁴A Griffin 'MARPOL 73/78 and Vessel Pollution: A Glass Half Full or Half Empty?' (1994) *Indiana Journal of Global Legal Studies* Available at www.repository.law.indiana.edu/ijgls/vol1/iss2/10 accessed on 07/05/14 490.

The MARPOL Convention has made some contribution towards reducing deliberate pollution from ships. The amount of oil entering the marine environment from maritime transport declined from 2.13 million tons to 0.57 tons after it came into force.³⁵ However, there are many instances where MARPOL is deficient. Firstly, MARPOL's regime lacks enforcement. Griffin³⁶ notes that the best way to ensure that ships comply with MARPOL would be to allow all States to inspect and punish any ship-owner who has violated the provisions. However the MARPOL leaves enforcement mechanisms solely in the hands of flag States, which often lack the resources to effectively enforce the Convention; thus there is often failure to prevent and catch polluters.

Secondly, a common problem is the lack of adequate reception facilities in the parties' ports. The parties are faced with a dilemma as they are reluctant to provide reception facilities unless they can charge the ships for their use in order to cover costs, but if the ships are faced with charges they are likely to go to a port with none or lower charges or discharge their residues illegally.

(d) The 1974 International Convention for the Safety of Life at Sea

In 1974, the MARPOL Convention was complemented by the 1974 SOLAS Convention. The SOLAS Convention encompassed MARPOL'S aim to combat accidental and operational pollution but included provisions dealing with matters such as partitioning and stability of cargoes, machinery and electrical installations and fire standards.

SOLAS was adopted in 1914 in response to the 1912 sinking of the *RMS Titanic*. The primary concern was the achievement of safety of life at sea; this was demonstrated in the first version of the Convention. However, subsequent amendments³⁷ to the Convention have included protection of the marine environment. Therefore it is submitted that while the maritime industry's most

³⁵[supranote 13] 342.

³⁶[supranote 33] 512.

³⁷ Since the first version, there have been four other SOLAS Conventions: the second was adopted in 1929 and came into force in 1933; the third was adopted in 1948 and entered into force in 1952 and the fourth was adopted in 1960 and entered into force in 1965. The present version was adopted in 1974 and entered into force in 1980 (www.mss-int.com/solas.html) accessed on 07/05/14

important concern is safety of personnel on board, it also attaches great importance to the prevention of marine pollution.³⁸

In 1993, SOLAS introduced a new chapter IX which gave effect to the International Safety Management Code of 1993. The objectives of the Code are to ensure safety at sea, prevention of human injury or loss of life, and avoidance to damage to the environment, in particular, to the marine environment and to property.³⁹

Thus SOLAS aims to ensure that safety of life is sea is effected but also aims to prevent pollution and pollution damage are also taken into account because of the seriousness of pollution currently.

(e) The 1982 United Nations Convention on the Law of the Sea

The Convention provides that States have the obligation to protect and preserve the marine environment⁴⁰; all States must take the appropriate measures that are necessary to prevent, reduce and control pollution of the marine environment⁴¹; and that States should take all the measures necessary to ensure that the activities which they undertake are conducted in such a manner that it does not cause damage to the environment or to another States environment.⁴²

Part XII of the Law of the Sea Convention (UNCLOS) contains the regulatory framework for protection and preservation of the marine environment and redefines the jurisdiction of the flag, coastal and port States.

Article 211 of UNCLOS contains provisions relating to pollution of the marine environment from vessels. Firstly, States should establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and to promote the same manner in minimizing the threats of accidents which might cause pollution to the marine environment. In

³⁸ A Wankhede 'Safety of Life at Sea (SOLAS) and Convention for the prevention of Marine Pollution (MARPOL): A General Overview' available at <http://www.marineinsight.com/misc/maritime-law/safety-of-life-at-sea-solas-convention-for-prevention-of-marine-pollution-marpol-a-general-overview/#ixzz23nBtZGhn> accessed on 07/05/14

³⁹ Article 121

⁴⁰ Article 192.

⁴¹ Article 194(1).

⁴² Article 194(2).

addition, these standards should be re-examined when necessary.⁴³ Secondly States should adopt laws and regulations to prevent, reduce and control pollution to the marine environment from vessels flying their flag.⁴⁴ Thirdly, States which establish these requirements should ensure that states give information regarding their standards before entry into a port.⁴⁵ Fourthly, a coastal State in exercising its sovereignty can adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels including vessels exercising the right of innocent passage.⁴⁶

Fifthly, coastal States can in their Exclusive Economic Zone, adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards.⁴⁷ Sixthly, where international rules and standards are inadequate, States can adopt special mandatory measures for the prevention of pollution from vessels. Furthermore, coastal States shall publish the limits of a clearly defined area and if the coastal state intends to adopt additional laws and regulations, shall notify and communicate this to an organization.⁴⁸

Finally, the Convention details the rules and standards which relate to prompt notification to coastal States, whose coastline or related interest may be affected by incidents, including maritime casualties which involve discharges or probability of discharges.⁴⁹

These provisions which are encompassed in UNCLOS also reflect the international customary law standards to ensure that ship-owners refrain from polluting the marine environment and that committed steps are taken to ensure the necessary prevention, reduction and control of marine pollution. Furthermore, UNCLOS imposes the duty not to transfer any type of damage of pollution into another State's territory or to introduce or transfer any dangerous technologies or alien species into the marine environment.⁵⁰

D. SOUTH AFRICAN LEGISLATION

⁴³211(1).

⁴⁴211(2).

⁴⁵211(3).

⁴⁶211(4).

⁴⁷211(5).

⁴⁸211(6).

⁴⁹211(7).

⁵⁰Article 219.

South African legislation dealing with marine pollution can be divided into two categories: statutes of general application and statutes dealing with pollution from ships.⁵¹

1. Statutes of general application

(a) *The Constitution of the Republic of South Africa 108 of 1996*

As international law has developed, so has the stance on environmental law where there is now worldwide expectation to effectively safeguard environmental rights, especially the pressing need to protect the right to a pollution free environment.⁵² In *Director: Mineral Development, Gauteng Region v Save the Vaal Environment*⁵³ the court recognised that South Africa has attached great importance to environmental rights and has elevated them to a fundamental human right in its Constitution. Thus the Constitution is the first statute which is considered.

Environmental rights are provided for in Section 24 of the Constitution. This section provides that everyone has the right to an environment that is not harmful to their health or well-being. Furthermore, 'everyone has the right to have the environment protected, taking into consideration inter-generational equity, through reasonable legislative and other means which prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'⁵⁴

Verwey⁵⁵ provides that in the context of section 24 and oil pollution, it may entail that a court may decide whether or not the damage caused by an oil spill into the sea, is in fact "significantly" harmful to health or well-being. The problem is that no action has been brought to court to decide this. Instead, there is a loophole in the Constitution where oil pollution has not been specifically addressed. Only once an action has been brought, will it be decided if the State

⁵¹MPE Verwey, 'Liability for oil pollution damage: an Anglo-South African comparison in light of international dispensation' (2005) available at http://dspace.nwu.ac.za/bitstream/handle/10394/939/verwey_mariape.pdf?sequence=1 accessed on 07/05/14 14.

⁵² Dr S Maswood 'Article 21 and the Right to pollution free environment: a human right approach' Central India law quarterly available at www.indiankanoon.org/doc/964435 viewed on 15/04/2013.

⁵³1999 (2) SA 709 (SCA) para 20.

⁵⁴ Section 24

⁵⁵[*supra*note 51] 16, 17.

may be held liable should it fail to implement reasonable legislative measures to address the harm. Given the nature of the effects of oil pollution on the environment as well as coastal communities, this loophole needs to be addressed by a court due to its socio-economic repercussions.

(b) South African Maritime Safety Authority Act 5 of 1998

A report by the Australian Maritime Authorities aptly titled ‘Ships of Shame’ as well as recommendations from a report entitled ‘Safe Ships, Cleaner Seas’ by Lord Donaldson was described as a ‘wakeup call’ to industries concerned with policing of sea routes and the pollution threats States face.⁵⁶ South Africa took into consideration these recommendations and formed the South African Maritime Safety Authority Act 5 of 1998. The objective of the Act is to ensure safety of life and property at sea and to promote the Republic’s marine interests, but also includes a consideration for the marine environment in section 1(b) which provides that the objective of the Act is to ‘prevent and combat pollution of the marine environment by ships’.

(c) National Environmental Management Act 107 of 1998

NEMA provides that all negative impacts on the environment and environmental rights should be anticipated and prevented and only in the event where they cannot be altogether prevented, they should be minimized and remedied.⁵⁷ Every person has a duty of care to take reasonable steps to prevent pollution from occurring and take further steps to prevent the continued or recurring pollution.

Every person who causes or caused significant pollution or degradation of the environment must take reasonable measures to ensure that further pollution is prevented from occurring, continuing or recurring and to ensure that the person takes the necessary measures to minimize and rectify the pollution by engaging in practises which investigate, assess and evaluate the impact on the

⁵⁶ J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2ed (2009) 329-340

⁵⁷Section 2(viii).

environment and to cease, modify or control any activity or process which causes the pollution or remedy the effects of the pollution.⁵⁸ Furthermore, the Act gives provincial governments the authority to recover all costs that are incurred as a result of the pollution damage from any person who is responsible or who directly or indirectly contributed to the pollution of potential pollution⁵⁹.

Section 30 provides for emergency incidents.⁶⁰ The person responsible for the incident must inform his employer and the person responsible should take all reasonable measures to contain and minimise the effects on the environment, undertake clean-up procedures, remedy the effects of the incident and assess the immediate and long-term effects of the incident on the environment. Based on the aforementioned principle, an accidental oil spill would be regarded as an emergency incident.

Furthermore, relevant State authorities must take the necessary action to contain and minimise the effects of the incident, undertake clean-up procedures and remedy the effects of the incident in view of the desirability of the state fulfilling its role as custodian, holding the environment in public trust for its people to ensure that there is no danger to the public or to the environment.⁶¹

NEMA thus provides for oil pollution incidents indirectly in its provisions. The Act encompasses the ‘polluter pays’ principle which entails that should an oil pollution incident take place in South African waters, SAMSA may take the necessary steps to curtail the damage caused as a matter of urgency and the costs incurred from such activity may be claimed back from the ship-owner.

(d) The Maritime Zones Act 15 of 1994

The Act deals with maritime casualties. Section 10 of the Act provides that in any area of the sea, the Republic may take any measures necessary against any vessel to protect its coastline or any

⁵⁸Section 28(1).

⁵⁹ Section 28(8)(a).

⁶⁰Emergency incident means an unexpected sudden occurrence; including a major emission, fire or explosion leading to serious danger to the public or potentially serious pollution of or detriment to the environment whether immediate or delayed.

⁶¹Section 30(6) and (8).

other related interests, including fishing, from pollution or any threat of pollution resulting from a maritime casualty or an act or omission relating to such casualty, which may be reasonably expected to result in major harmful consequences. Thus in terms of oil pollution, both accidental and operational discharge of oil are covered by the Act.

(e) National Ports Act 12 of 2005

The National Ports Act outlines the roles of ports in the South African economy, giving effect to Government policy on Commercial Ports.⁶² Provision is made for the protection of the environment in the Act. The Act provides that in the performance of its functions, the Ports Authority must ensure fair and reasonable balance is achieved between protecting the environment on the one hand and the establishment, development and maintenance of ports.⁶³ The Ports Authority must ensure that sustainable and transparent port planning processes are undertaken when formulating any port development framework.⁶⁴ Hence in the planning, the Ports Authority will take into consideration mechanisms and facilities which should be in place to deal with prevention of pollution from ships.

(f) Maritime Traffic Act 2 of 1981

Section 6(1)(a) provides that no person shall within the territorial waters or internal waters intentionally sink, dump or dispose, or cause to be sunk, dumped or disposed of, a ship, a wreck or a hull except at a place agreed by the Minister of Transport. Any person shall be guilty of an offence if they contravene this provision.⁶⁵ This Act provides consideration for prevention of oil pollution by obtaining consent for the disposal of ships which could be a pollution threat, especially if the ship contains oil on board which could be released in the ocean in the sinking or destroying of that ship.

2. Statutes Dealing with Oil Pollution

⁶² 'Port Legal Framework' available at <http://www.transnetnationalportsauthority.net/DoingBusinesswithUs/NationalPortAct/Pages/Port-Legal-Framework.aspx> accessed on 21/05/2014

⁶³ Section 69(1)

⁶⁴ Section 69(2)(a)

⁶⁵ Section 6(2)

South African statutory oil pollution prevention draws extensively from ratified international conventions. The domestic regime often echoes the conventions and transposes direct provisions into domestic legislation.

(a) The Prevention and Combating of Pollution of the Sea by Oil Act 6 of 1981

The Act prohibits the discharge of oil in the internal waters, the territorial sea and the exclusive economic zone of South Africa.⁶⁶ If any oil is discharged from a ship, the owner of the ship will be guilty of an offence unless he can prove any of the defences. The defences include discharging the oil as a means to ensure the safety of the ship or preventing damage to the ship⁶⁷; the oil in question escaped from the ship in consequence of damage to the ship and as soon as practicable after the damage occurred, all reasonable steps were taken to prevent further escape of the oil⁶⁸; and if the oil in question escaped from leakage that such leakage was not due to lack of reasonable care, after which the leak was found that steps were taken to prevent further leakage⁶⁹.

(b) The Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986 (MARPOL)

The Act echoes the sentiments of the MARPOL Convention in recognising the need to protect the environment from deliberate, negligent or accidentally released oil, which is a serious source of pollution. The Act also aims to achieve the complete elimination of pollution of the marine environment. Furthermore, the Act encompasses aspects of the Intervention Convention and the Civil Liability Convention.

The general aim of the Act is to prevent pollution of the marine environment by harmful substances such as oil. The Act applies to any South African ship, wherever it may be, and to any ship found within the Republic or its territorial waters or exclusive economic zone⁷⁰. Noncompliance with the Act is regarded as a criminal act; subject to a fine of R500 000 or a prison sentence of five years.

⁶⁶ This is known as a 'prohibited zone'.

⁶⁷ Section 2(1)(a).

⁶⁸ Section 2(1)(b).

⁶⁹ Section 2(1)(c).

⁷⁰[supranote51] 16, 17.

The main contribution of this Act was that it set the standard of a duty of care which all ships should abide by when faring within South African waters. The Act is seen as the primary instrument which sets minimum standards for marine safety standards and pollution prevention. Furthermore, the Act also makes provision for the Minister of Transport to make regulations to give effect to the Convention which is mirrored in the Act.

E. CONCLUSION

Before 1960, there was little concern with pollution of the sea, but owing to the disastrous environmental effects of the *Torrey Canyon* and the *Amoco Cadiz*, policy makers, legislators and the general public were alerted to the problem.⁷¹ As a result, international standards were developed in order to meet the needs of these problems. The degree and the manner of implementation have proven effective thus far. Although in certain respects, the problem lay with enforcement, evidence shows that the consensus has led to improved protection of the marine environment.⁷²

There have been some impressive overall developments of international maritime law. Strong efforts have been made to establish a viable regime, taking better account of the environment, while at the same time accommodating the basic needs of international navigation and transport, which has been mirrored in South African legislation.

⁷¹[*supra note 13*]328.

⁷²P Birnie, A Boyle & C Redgewell '*International Law and the Environment*' 3ed (2009) 441.

Chapter 3

A. Introduction

A civil liability regime for oil pollution accidents enables national victims of damage caused by the incident to make financial claims against the tank owners and the global oil cargo industry.¹ Soni² notes that in an economy where the entire world is dependent on petroleum, a properly structured civil liability regime is important; once a State has a competent system in place regarding civil liability, it has ‘the powerful effect of discouraging oil pollution discharged in the world’s waters and ensuring the unavoidable (presumably purely accidental) spillages are both contained and expeditiously cleaned up.’ Noting the importance of the ability to make claims available to the public, a civil liability regime for oil pollution was the first international liability regime to broaden compensation obligations which was beyond personal injury and property; it included damage provisions to the environment.³

The primary aim of international law with regard to marine pollution is to prevent the occurrence of pollution. A subsidiary aim of international law should be to facilitate the bringing of compensation claims to the people or government of the State concerned where the pollution has occurred and where the damage was suffered.⁴ An adequate civil liability regime will give rise to legal obligations which serves the interests of the public who are affected by an oil pollution incident and having such system in place will allow effective treatment of claims lodged by the affected public. In addition to compensating affected parties, it also ensures that environment is protected through the liability regime.

Thus the introduction of civil liability schemes has the positive effect of ensuring that the environment is protected by encouraging ship-owners to take extra care in observing and fulfilling their duty to prevent and respond to oil pollution incidents, as set out in international

¹M Mason ‘Civil liability for oil pollution damage: examining the evolving scope for environmental compensation in the international regime’ *Marine Policy* 27 (2003) 1 available at www.elsevier.com/locate/Marpol

²R Soni *Control of Marine Pollution in International Law* (1985) 190.

³[*supra* note 1] *ibid*

⁴R.R. Churchill & A.V. Lowe *The Law of the Sea* 3ed (1999) 358.

standards.⁵ As a result, provisions have been made for civil liability in various international conventions.

B. International Conventions

1. The 1982 Convention on the Law of the Sea

Article 235 of the Convention follows customary international law in dealing with liability; this section provides that States are responsible for the fulfilment of international obligations to ensure that the marine environment is protected and preserved.⁶ Each State shall ensure that recourse is available within their legal system to provide prompt and adequate compensation for the damage caused by the pollution.⁷ In ensuring prompt and adequate compensation, the States affected shall co-operate in the assessment of damages and settlement of disputes, development of criteria, and procedures for payment of adequate compensation from sources such as compulsory insurance schemes and compensation funds.⁸ In the aforementioned assessment, emphasis should be placed on existing international law and developments in international law

2. The 1969 International Convention on Civil Liability for Oil Pollution Damage

Previously, a person who had suffered damage from oil pollution would face difficulties in bringing a compensation action against the ship-owner; even if he could identify the vessel which had caused the pollution and even if he established the causal link between the pollution damage and the damage he suffered.⁹ Churchill & Lowe provide that some of the reasons for this would be:

- ‘a) most legal systems require proof of fault on (part) of the ship-owner;

⁵ [*supra* note 4] *ibid.*

⁶Article 235(1).

⁷Article 235(2).

⁸Article 235(3).

⁹ [*supra* note 2] 359.

b) he may find it difficult to bring an action before the courts of his own state where the ship-owner is a foreign national because the courts may be reluctant to assume jurisdiction and even if the claim succeeds it may be difficult to enforce the judgement; and

c) compensation awarded to the victim of pollution damage may exceed the financial resources of the ship-owners.¹⁰

As a result, the International Convention on Civil Liability for Oil Pollution Damage ('CLC') attempted to overcome the difficulties which victims may be faced with as a result of oil pollution and was originally adopted in 1969 under the auspices of the IMO. The convention in its preamble the Convention states that it is conscious of the dangers of pollution posed by the worldwide maritime carriage of oil, and of the need to ensure that adequate compensation is available to persons who suffer damage caused by pollution resulting from the discharge of oil in the territorial sea.¹¹ The Convention thus set out to provide a uniform set of international rules and procedures for determining questions of liability and provision of adequate compensation.

The CLC provides that where oil escapes or is discharged from a ship which causes damage to another contracting state, the ship-owner is strictly liable for the cost of any preventative measures taken, subject to 3 exceptions. The 3 exceptions are where damage:

- 1) results from war or acts of God
- 2) is wholly caused by an act or omission by a third party with the intent to cause damage; and
- 3) is wholly caused by the negligence or some other wrongful act of any government or any other authority responsible for the maintenance of lights or other navigational aids.¹²

It is important to note that no compensation is payable when the spillage does not cause damage inside a State's territorial sea; this is because the CLC is confined to damage caused by the pollution within the territorial sea of a state party so that preventative measures can be taken to minimize the damage done.¹³

¹⁰ [*supra* note 2].

¹¹ Preamble of the Convention.

¹² [*supra* note 2].

¹³ [*supra* note 4].

If the owner of the ship is found liable, he is entitled to limit his liability. The owner of the ship is entitled to limit his liability in respect of one incident, to an aggregate of 2,000 francs for each ton of the ships tonnage with the exception that the aggregate amount shall not exceed 210 million francs.¹⁴ However, if the incident occurred as a result of the actual fault or privity of the owner, he shall not be entitled to avail himself of the aforementioned limitation.¹⁵

One of the most important provisions in the CLC is the obligation of ship-owners carrying more than 2000 tons of oil, to carry insurance or other financial security to cover the maximum amount liable under the Convention and to ensure that proof of such in the form of a certificate is always carried on board.¹⁶ If such financial security is not maintained, the limit of liability falls away and the liability is potentially limitless. Damage claims can be brought when there is proof of damage within a State's territorial sea and must be made in the courts of that party.¹⁷

Where an incident results in damage to the territory of more than one state party, the courts are competent to settle issues of liability. Accordingly the owner may constitute in any eligible state court a compensation fund. There is only one way of avoiding inter party conflict as to which states courts will hear the issue, but it also allows choice of forum for the person liable for the damage. The owner is entitled to participate in the fund himself to recover expenses which he himself incurred while endeavouring to combat the adverse effects of the spillage.¹⁸

However a serious impediment in the CLC was the definition of 'pollution damage' which was so vague that it has been described as not being a definition at all.¹⁹ It was defined as:

'... loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the cost of preventative measures and further loss or damage caused by preventative measures'²⁰

¹⁴ CLC article v(1).

¹⁵ CLC article v(2).

¹⁶ [*supra* note 4].

¹⁷ J Glazewski *Environmental Law in South Africa* 2ed (2005) 647.

¹⁸ [*supra* note 2] 193.

¹⁹ [*supra* note 17].

²⁰ Article 1(6).

As a result of this vague definition, many questions arose as to causality and patrimonial loss as well as how to quantify damage to the environment in monetary terms. The phrase ‘loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship’ caused many indecisions due to its vague nature.²¹

In the *Castillo de Bellver* incident off the West Coast of South Africa, the oil ignited and the resultant pall of soot and oily smoke drifted onshore; rain fell and pollution precipitation caused damage to property. Some of the claimants were farmers whose sheep were contaminated and the local Dutch Reformed Church, which was affected by the black rain. The question was whether it includes only physical damage or pure economic loss would be recoverable. However, in this case, causation did not come before the court and the question still begged as to whether the definition includes only physical damage or would pure economic loss be recoverable.²²

In the incident regarding the *Antonio Gramsci*, a Union of Soviet Socialist Republics (USSR) tanker went aground off Soviet waters and the resultant oil slick caused damage to the Swedish and Finnish coastlines. As a result of the vague definition in the CLC, the court applied Soviet legislation and adopted a mechanic mathematical formula based on the water affected, for calculating the amount of damage to the polluted water, over and above the clean-up costs.²³

In *Commonwealth of Puerto Rico et al v SS Zoe Colocotroni*²⁴ a vessel went aground off the coast of Puerto Rico, releasing over 5000 tons of oil into the bay as result of the master’s attempt to re-float the ship. The problem was to quantify the damages claim for harm to mangrove swamps nearby. The court *a quo* applied the replacement cost formula to determine damage. It worked out that over 92 million organisms were destroyed by the spill. By multiplying out the total area affected by the amount of marine organisms found in a square metre, the result was an award of over \$5.5 million apart from the award for clean-up costs.²⁵ Thus, as a result of the inadequacies of this definition, efforts were made for an amendment to deal with the vagueness. The definition was then altered in the 1992 Protocol.

²¹ [*supra* note 17].

²² [*supra* note 17].

²³ [*supra*note 17].

²⁴ 628 F. 2d 652

²⁵ [*supra* note 15]

3. 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage

The CLC works in conjunction with the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the Fund Convention). The purpose of the Fund Convention is to supplement the inadequate maximum compensation limits provided for in the CLC. In order to qualify to be a member of the Fund Convention, a State party must have already been a member to the CLC. The incentive behind the adoption of this Convention was ‘a clear recognition by the oil industry that the shipping industry should not be obliged to shoulder the full burden of responsibility for the consequences of oil pollution damage from an escape or spill from a ship at sea’.²⁶ Thus the Convention provided supplementary compensation by raising the Fund’s income by way of levies on oil imports. As a result of this Convention, within the first 18 years of its existence, the Fund paid about 120 million pounds in respect of 72 incidents.

The Fund Convention provides that where the ship-owner is liable, but is financially incapable of meeting his obligations and where the pollution damage exceeds the limits of his liability, compensation will then be paid to the victims of the pollution damage from the International Oil Pollution Fund which was established by the Convention; to a limit of 60 million Special Drawing Rights. As a result, the Fund Convention provides relief of some of the financial burden to ship-owners of placed on them by the CLC by paying that part of the ship-owners liability which is in excess of 100 SDR’s per ton or 8.33 million SDR’s, whichever is less.²⁷

The Fund Convention will not incur any obligation if the pollution damage is a result of an act of war, hostilities, civil war or insurrection; or was caused by oil which escaped or has been discharged from a warship owned or operated by a State engaged in non-commercial activities; and if a ship used at the time of the incident whereby the claimant cannot prove that the damage resulted from an incident involving one or more ships.²⁸ Furthermore, the Fund will not be used to relieve a ship-owner if such pollution was caused by the ‘wilful misconduct’ of the owner or

²⁶S Hodges & C Hill *Principles of Maritime Law* (2001) 145.

²⁷ [*supra* note 2]

²⁸Article 2.

where the owner failed to observe the provisions of the Conventions concerned with shipping safety or oil pollution where by such failure resulted in pollution damage.²⁹

Contributions to the Fund shall be made in respect of each contracting state by any person in the ports or terminal installations in the territory of that state contributing oil carried by sea to such ports or terminal installations³⁰. In addition, the contributions made shall be calculated on the basis of a fixed sum for each ton of contributing oil received by Shipowner during the calendar year³¹. In assessing the amount to be paid the Assembly takes into consideration expenditure³² and income³³ of the State of the ship-owner.

Thus the Fund Convention ensures that ship-owners would not be subjected unfairly to bear the economic consequences of oil pollution alone.

4. Protocols

‘All international conventions from time to time need updating because it (*sic*) either changed economically or environmental circumstances or because there are gaps or vagueness in them has eventually caused continual and needless problems of interpretation. Oil pollution conventions are no exception.’³⁴

As a result of gaps in international conventions, two protocols to amend the Civil Liability and Fund conventions were adopted in 1984. However, without the participation or ratification of the Protocols, neither came into force as other states were unwilling to do so without US involvement.³⁵In 1992, two further Protocols, with similar substantive provisions to the 1984 Protocols, were adopted in because of the easier requirements and came into force in 1996. The

²⁹Article 5.

³⁰Article 10.

³¹Article 11.

³²Costs and expenses of the administration of the fund, payments to be made to the fund, repayments of loans and payments with regard to satisfaction of claims.

³³ Surplus funds from operations in preceding years, interest, initial contributions, annual contributions and any other income.

³⁴ [*supra* note 25].

³⁵[*supra* note 2] 360, 361.

Protocols require their parties to denounce the CLC and Fund Conventions in their original forms as such protocols effectively create two new conventions: the 1992 CLC and Fund Convention.³⁶

(a) 1992 CLC Protocol

One of the ambiguities of the 1969 CLC was the definition of pollution damage. The 1992 Protocol replaced the definition as

‘a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that such compensation for impairment of the environment other than the loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; preventative measures and further loss or damage caused by preventive measures’.

The new definition provides a wider meaning than the one attributed to in the 1969 CLC by providing clarity that preventative measures are those undertaken after an oil spill has occurred and that removal measures refers to measures taken before an oil spill occurs.

The 1969 CLC provided for the compensation for damage arising in the territorial sea of a contracting party only, but the 1992 protocol changed this standard and now includes compensation for preventative measures taken in the Exclusive Economic Zone of a contracting Party. This is done by imposing strict liability for oil pollution damage with the exceptions of damage arising from armed conflict or exceptional natural phenomena; negligence of a third party; government negligence in the maintenance of navigational aids; negligence of a person who suffered the damage or the intentional or reckless action of a crew member, charterer or sailor.³⁷ The extension of the geographical scope of the Convention to cover damage in the EEZ also includes the costs of preventative measures wherever taken. Furthermore such cost is recoverable even where there is no oil spill provided that there was a grave and imminent threat of pollution damage.

³⁶ [*supra* note 2].

³⁷ [*supra* note 17] 647.

The manner of payment was also changed under the protocol from Poincare Francs, which were initially used under the auspices of 1969 to Standard Drawing Rights (SDR's). However, the main change made by the 1992 protocol to the CLC is to increase the maximum limits of liability under the convention to 3 million SDR's for ships under 5000 tons: for larger ships liability increases by 420 SDR's per ton above 5000 tons to a maximum of 59.7 million SDR's.³⁸

(b) 1992 Fund Protocol

The Protocol to the Fund Convention raised the maximum limit of liability under the Convention to 135 million SDR's (including the amount payable to the ship-owner) to be increased to 200 million SDR's subject to the fulfilment of certain prescribed conditions; in addition, the protocol provides that the Fund will no longer be required to indemnify the ship-owner for part of his liability.³⁹

5) Private Agreements: CRISTAL and TOVALOP

The world's leading tanker and oil companies established two private schemes: the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) which came into force in 1969; and the Contract Regarding an Interim Supplement for Tanker Liability for Oil Pollution (CRISTAL) which came into force in 1971. These two schemes broadly mirrored the provisions of the CLC and the Fund Convention, but were of greater benefit to the victims of oil pollution damage in coastal states, which weren't a party to the CLC, as TOVALOP covered over 95% of the worlds' oil tankers. A further benefit was that CRISTAL could operate quite happily in conjunction with the CLC thus providing additional compensation and relieving ship owner's liability.

TOVALOP is an agreement between tanker owners intended to provide funds from their own resources to reimburse a State for the clean-up costs which they have suffered as a result of pollution damage. It provided that only national governments may make claims against ship-owners or charterers for the costs of cleaning up damage to their land or structures upon it. The damages were excluded are those from fire, explosion and ecological impairment, clean-up costs

³⁸ [*supra* note 2] 361.

³⁹ [*supra* note 2] 361.

incurred by private persons and the destruction of the property. The limitation was \$10 million or \$100 per gross ton, whichever was less.⁴⁰

However, it became evident that TOVALOP was inadequate to effectively compensate for ‘anything but relatively small oil spills’⁴¹ and as a result CRISTAL was brought about as a supplement for damages not covered by TOVALOP. CRISTAL came into being, extending coverage to governmental costs, private party damages and damages on both land and within the territorial sea.

However, like TOVALOP, CRISTAL had many inadequacies and Soni⁴² notes that these agreements are eventually no more than private agreements amongst tanker owners and oil companies for damage caused by oil pollution and because of its nature, this casts a shadow as to their influence on international law. Both agreements were terminated in the 1990’s.

C. CONCLUSION

Civil liability regimes are ever evolving in the attempt to keep both the public and the environment adequately protected from oil pollution accidents. International conventions try to keep up with the ever evolving needs and problems which arise out of the incidents. However, it is a State’s duty to ensure compliance with international standards by ratifying the conventions and adding further provisions in domestic legislation which will be sufficient to compensate the affected parties. The relationship between international conventions and domestic legislation is important to ensure that domestic legislation keeps up to date with international norms. Does South Africa have adequate domestic legislation which incorporates international standards for civil liability to meet claims for compensation?

⁴⁰ [*supra* note 2] 196.

⁴¹ [*supra* note 25] 144.

⁴² [*supra* note 4] 198.

Chapter 4

A. INTRODUCTION

South African oil pollution legislation is based on international conventions and the provisions contained therein are used as the model which South Africa uses to implement the international standards in domestic law. Thus, South Africa has various acts which incorporate civil liability in the event of an oil pollution accident.

B. SOUTH AFRICAN LAW

1. The Marine Pollution (Control and Civil Liability) Act 6 of 1981

South Africa was a party to the 1969 CLC and ratified the Convention. It implemented the CLC into domestic legislation by reproducing some of the text of the CLC in the Marine Pollution (Control and Civil Liability) Act; and where applicable, went beyond the confines of the CLC. The Act gives effect to the CLC not only by reference, but also by including specific provisions and adaptations.¹ In addition, the Act also refers to certain provisions in MARPOL and incorporates them into the Act. The Act was amended in 1997 to include other harmful substances since the position before only catered to oil pollution. No provisions of the Fund Convention are encompassed in the legislation as South Africa did not join the Fund Convention as it had the effect of disclosing its oil imports, which South Africa was not prepared to disclose at the time.

The Marine Pollution Act provides that if there is an oil discharge from a vessel, as a result of that discharge, there is civil and criminal liability associated with pollution of the sea. The Act was initially administered under the auspices of the Department of Transport, however after 1998; the administrative functions were transferred to SAMSA.² The Act grants SAMSA extensive powers to take a number of steps to prevent pollution of the sea where a harmful substance is likely to be discharged or is being discharged; additionally, the Act provides

¹ [*supra* note 15] 656.

²Established under the South African Maritime Safety Association Act 5 of 1998.

SAMSA with detailed regulations relating to the prevention and combating of pollution of the sea.³

The Act defines harmful substances as:

‘any substance which if introduced into the sea is likely to create a hazard to human health, harm living resources and marine life, cause damage to amenities or interfere with other legitimate uses of the sea and includes oil and any other substance subject to control by MARPOL 1973/1978 and mixtures of such substances and water or any other substance.’⁴

Glazewski⁵ notes that this definition echoes the definition provided for in UNCLOS; keeping South African legislation on par with international regimes. Although the Act has been broadened to encompass harmful substances, specific reference is still made to ‘oil’:

‘(a) a ship, tanker or offshore installation in that part of the prohibited area which constitutes the territorial waters of the Republic and the sea adjoining the said territory waters to the landward side thereof, means any kind of mineral oil and includes spirit produced from the oil and a mixture of such oil and water or any other substance; (b) a ship, tanker or offshore installation in that part of the prohibited area which constitutes the territorial waters of the Republic and the sea adjoining the said territory waters to the landward side thereof, means any kind of mineral oil and includes spirit produced from the oil and a mixture of such oil and water or any other substance which contains one hundred parts of more of oil in a million parts of the mixture’⁶

The Act thus encompasses the Republic’s internal waters, the territorial waters and the EEZ to ensure that these zones are adequately protected.

2. Criminal provisions

Section 2 of the Act provides for strict liability. If any oil is discharged from a ship, the master or owner of such ship, shall be guilty of an offence with the exception of the fact that the oil was

³ [*supra* note 15] 656.

⁴Article 1.

⁵[*supra* note 15] 656.

⁶Section 1(1).

discharged to secure the safety of the vessel, preventing damage or saving life and the discharge of the oil was necessary to achieve such purpose⁷; the oil escaped because of damage to the vessel and as soon as practicable thereafter reasonable steps were taken to prevent such discharge⁸; and the oil escaped because of the leakage and as soon as practicable after discovery all reasonable steps were taken for stopping or reducing it⁹. The onus rests on an accused in the matter and such accused will have to prove the defence he so wishes to choose.¹⁰

One of the most important provisions in the Act is section 2(3) which provides that:

‘if any prosecution for an offence under subsection 1 it is proved that a mixture containing oil was discharged from a ship tanker or offshore installation in the part of the prohibited area which adjoins the prohibited area of the Republic to the seaward side thereof it shall be deemed, unless the contrary is proved, that such mixture contained one hundred parts or more of oil in a million parts of that mixture.’¹¹

This section has come up in numerous cases; an illustration of this was seen in *S v Peppas*¹². In this case a prosecution was brought under the Marine Pollution Act against the master of the *Pearl Merchant*. The ship was lying about 15 miles off the coast of East London when it was apprehended by the patrol vessel. The members of the patrol vessel noticed that a dark brown substance was being released from the ship’s side via a discharge pipe. As a result, samples were taken by officials on the patrol vessels and then sent to a laboratory for testing. The sample was found to be in excess of the 100 parts per million. The result was therefore that the substance fell under the definition and criteria of what constitutes ‘oil’¹³.

However on appeal it was found that the method of sampling was inadequate; hence the act was amended by the insertion of a rebuttable presumption in favour of the state with the requirement

⁷ Article 2(1)(a).

⁸ Article 2(1)(b).

⁹ Article 2(1)(c).

¹⁰ Article 2(2).

¹¹ Article 2(3).

¹² 1977 (2) SA 643 (a).

¹³ [*supra* note 15] 658.

that the accused must prove the samples in a situation are not representative of the discharge, rather than the state proving that they are.¹⁴

3. Civil liability

With regard to civil liability, the Marine Pollution Act incorporates provisions of the CLC into South African law. Liability is strict and provides for loss, damage and costs caused by oil pollution in South Africa from the discharge of a ship.

The City of Cape Town incurred heavy clean-up costs when the *Apollo Sea* spill resulted in a severe contamination of the Cape Peninsula seaboard. To illustrate the use of civil liability under the Act, the City Council of Cape Town referred to article 9(1)(b) of the Act which provides that the owner of a ship shall be liable for the costs of any measures taken after an oil pollution incident has taken place of its coast for the purpose of preventing or reducing loss or damaged caused whether or not the discharge has occurred or will subsequently occur. The Act thus allowed liability for the clean-up to shift from the State to the owners of the *Apollo Sea*.

In addition, if the Cape Town City Council were to take any other preventative measures, liability would still attach to the owner by virtue of Article 9(1)(c) which provides that any loss or damage caused in the area of the Republic by any measures so taken or caused to be taken after the discharge, the owner will be liable; meaning that the owner will cover all costs relating to loss or damage which result from the oil spill and the measures used to deal with the oil spill such as rehabilitation of the area, its marine life and so on.

A significant difference between the CLC and the Act is that ‘loss or damage’ is used in the Act as compared to ‘pollution damage’ which is used in the CLC. ‘Loss or damage’ within the ambit of the Act is meant to be taken as the measures taken or caused to be taken by the Minister to remove or prevent pollution of the sea by oil discharge or likely to be discharged from any ship for the purposes of this section. However, by not including the words and phrases of the CLC exactly, it raises doubts as to whether it indeed complies with South Africa’s international law obligations.

¹⁴ [*supra* note 15] 658.

C. The Loophole in South African Law on Civil Liability for Oil Pollution

It was the pollution caused to the beaches from the *Prestige* oil spill off the coast of Spain, France and Portugal in 2002 that brought the attention of the inadequate and limited remedies available to South Africa if an oil spill was to occur.¹⁵ Despite the various pieces of domestic legislation and international conventions, which South Africa is a signatory to, parties who have suffered damage from pollution still faced difficulties in claiming compensation. South Africans faced instances where ship-owners did not have sufficient insurance to cover the compensation needed from them and judgements found in favour of the person requiring the compensation was difficult to enforce. Some of the claims were sometimes too remote from the actual direct damage to be recoverable under South African law.

Consequently, if an oil pollution spill had to take place in South African waters, claimants would be at a disadvantage on various provisions. Firstly, South Africa's oil pollution liability regime is based on the 1969 CLC, which is out-dated. The CLC limits the amount which can be claimed to approximately R1, 709, 00 per ton up to a maximum of 198 million SDR's which is not sufficient as liabilities can exceed this amount easily.¹⁶ The international community has increased the limit to about 770 million SDR's, but South Africa has not adopted nor have they incorporated the increased limit into domestic legislation.¹⁷ Secondly, the CLC Act states that if the damage was as a result of the owner's "actual fault or privity" he/she will be unable to limit his/hers liability whereas the 1992 CLC Convention uses the test of the owner's personal act or omission, committed either deliberately or recklessly, with the knowledge that pollution damage would probably result. This amendment would make it far more difficult for the claimant to deprive an owner of his/her limitation right.¹⁸ As a result, South African legislation is not keeping up with international standards relating to civil liability, which could mean that the government may have to cover the remaining costs of damage caused by an oil spill should a ship-owner fail to do so.

¹⁵www.webberwentzel.com/wwb/content/en/page1874?oid=359&sn=detail&pid=1874 viewed on 12 December 2012**

¹⁶ Holloway, P 'Places of Refuge for Ships in Need of Assistance: an international overview' available at www.webberwentzel.com accessed 19/12/2012

¹⁷ [*supra* note 55]

¹⁸MPE Verwey 'Liability for oil pollution damage: an Anglo-South African comparison in light of international dispensation' (2005) 24.

Thirdly, South Africa was disadvantaged once again as they failed to adopt the Fund Convention. The Fund Convention not only ensures that the oil companies share liability, but also that a levy is raised on oil imports allowing there to be an increase in the limit of liability over and above the CLC. In the event that liability does not attach to the ship-owner, compensation will be paid out to the victim from the International Oil Pollution Fund. However, South Africa was reluctant to adopt the Convention into domestic legislation as there was a conflict with a South African law which prohibited the dissemination of information on oil imports into the country, which the apartheid government was not willing to disregard.¹⁹

The CLC limit would be approximately 770 million SDR's, whereas the Fund Convention limit would be in the region of 1800 million SDR's. In certain circumstances the Fund Convention limit is increased to approximately 2570 million SDR's.²⁰ Thus there was a call for South Africa to accede to the Fund Convention:

‘It is without any doubt that the call by leading South African writers on the subject needs to be heeded and that South Africa should accede to the Fund Convention as soon as possible in order to significantly increase the current limits of liability which attach to a ship-owner.’²¹

South Africa eventually acceded to the Fund Convention in 2004, ensuring that these developments were on par with international standards for marine oil pollution compensation. Post-1994 South Africa is up to date with the international developments discussed above which are of particular importance in the new constitutional dispensation. Examples of this would be the important obligation set out in section 24(b) of the Constitution to provide for reasonable legislative measures to prevent pollution as well as Chapter 6 of NEMA to allow for the incorporation of international environmental law into domestic law.²²

As international standards develop, so should domestic law. However, this has not been the case with South African law. Further legislation needs to be brought in to ensure that the Fund Convention is set in domestic law. Verwey notes that provision must be made to oblige South

¹⁹ S Hiscox 'A critical examination of South African Law on Civil Liability for oil pollution damage from ships' (1993) UCT 31.

²⁰ [*supra* note 58].

²¹[*supra*note 59].

²² [*supra* note 58].

African oil receivers to contribute to the Fund annually; and that domestic legislation must set out in which instances a claimant will be able to claim from the Fund. Furthermore, he notes that legislation is required to make provision for the administration of claims, for instance, that the court will have the authority to administer these claims.²³

In an open letter to the Minister of Transport, Professor John Hare set out the problems which South Africa is facing in terms of the Fund Convention not being incorporated in domestic law. He states that in South Africa we cannot ‘sleep easy’ before the government ‘gets its Act together’ in relation to liability and compensation for oil pollution from tankers because all the government can claim is R180 million from the owner or insurer of the ships for the damage.²⁴ He poses the question:

‘How do we find ourselves in this woeful position where you and I as citizens would have to pick up such an unthinkable tab for oil pollution caused to us by a passing ship in which we have no interest and over which we have little or no control, delivering oil from a foreign seller to a nameless buyer across the seas?’²⁵

Hare points out that given the continuous occurrence of oil pollution, the Fund Convention is of utmost importance. Its simple formula consists of a contribution from all the worlds’ oil importers on each tonne of oil moved in or out of any port in states where each are party to the Convention. The levy would provide the necessary funds which a government would be given to cover all the costs of all the oil pollution catastrophes. Cognisance should be taken of countries such as Japan, India and Korea who vigilantly pay towards the Fund, knowing that an oil pollution incident could end up as a disaster, both environmentally and financially for their State.

In 2004, after the adoption of the Fund Convention, Hare points out that it is a principle of our law that while a State is bound by the conventions the government signs, our citizens are not bound until a convention is enacted by parliament into domestic law, which South Africa has not

²³ [*supra* note 58].

²⁴ [www.google.com/url?q=http://www.mlisa.co.za/wp-content/uploads/2012/06/prof-john-hare-letter2.pdf](http://www.mlisa.co.za/wp-content/uploads/2012/06/prof-john-hare-letter2.pdf) viewed on 07/01/2013.**

²⁵ [*supra* note 64].

done.²⁶ Therefore, a change is needed in legislation to increase the limit of R180 million in the present Act. By doing so, there would be a legal obligation to oil traders to submit oil returns to the government of South Africa to be filed with Fund managers, requiring them to pay their invoiced contributions to the Fund.

During 2005 and 2006, SAMSA prepared draft Bills to effect this, but the Bills were removed and as a result South Africa remained ‘dangerously and shamefully’ inadequately covered.²⁷ Hare noted that the government should take action as it has an obligation under the Constitution to effect international conventions; and furthermore it owes a duty to the citizens of South Africa to ensure that their environment is protected and that legislation adequately prevents pollution. In addition, government should not waste public funds, which would surely occur if a grand scale oil pollution disaster were to befall South Africa.

D. The loophole addressed: the development and promulgation of new legislation in South Africa

On 8 January 2014 the President of South Africa, Jacob Zuma signed into law the Merchant Shipping (International Oil Pollution Compensation Fund) Administration Act. This is in addition to the Merchant Shipping (Civil Liability Convention) Act and the Merchant Shipping (International Oil Pollution Compensation Fund) Act which came into effect in December 2013. The aforementioned legislative regimes which have been promulgated have the effect of implementing a ‘well-resourced international compensation fund which pays the damage arising from oil spills’.²⁸

1. The Merchant Shipping (Civil Liability Convention) Act 25 of 2013

This Act enacts the International Maritime organisations Protocol of 1992 and puts into operation the International Convention on Civil Liability for Oil Pollution damage into South African Law. Section 7 of the Act deals with claims for compensation and states that the High

²⁶ [*supra* note 64].

²⁷ [*supra* note 64].

²⁸ *ibid*

Court, in exercising its admiralty, has jurisdiction, including jurisdiction for all incidental purposes, to hear and determine claims for compensation in respect of incidents that have caused pollution damage in a place where the 1992 Liability Convention applies in relation to which preventable measures have been taken to prevent or minimise pollution damage in a place to which the 1992 Liability Convention applies.

Section 8 provides that the owner of a ship, the insurer or any other person providing financial security for the liability may apply to determine when he/she may limit their liability and if so, what will the limit be. If the liability is limited, the High Court may make an order it thinks is fit in respect of apportionment and distribution of a fund for the payment of a fund for payment of claims under those provisions²⁹.

Section 11 states that if a ship enters or leaves a port in the Republic, or arrives at a port in the Republic or arrives at a terminal in the territorial waters of the Republic without having on board the ship the relevant insurance certificate, both the Master and the owner of the ship will be guilty of an offence and liable on conviction of a fine not exceeding R250 000.00.

2. Merchant Shipping (International Oil Pollution Compensation Fund Contributions) Act 36 of 2013

The purpose of this Act is to provide for the imposition of the International Oil Pollution Compensation Fund Contributions levy. Section 3 provides that a levy is payable to the Commissioner by any person who, during the tax period, has received contributing oil in total quantities exceeding 150 000 metric tons in the ports or terminal installations of the Republic, contributing oil which has been carried by sea to such ports or terminal installations; and in any installations situated in the Republic, contributing oil which has been carried by sea and discharged in a port or terminal installation of a non-Contracting State of the 1992 Fund Convention, provided that contributing oil shall only be taken into account in terms of this paragraph on first receipt in the Republic.

²⁹ Section 8(2)

Where the quantity of contributing oil received in the Republic by any person in the tax period when aggregated with the quantity of contributing oil received in the Republic by any associated person exceeds 150 000 metric tons, each person must pay contributions in respect of the actual quantity of oil received by that person, despite the fact that the quantity did not exceed 150 000 metric tons.³⁰

3. Merchant Shipping (International Oil Pollution Compensation Fund) Administrative Act 35 of 2013

The Merchant Shipping Act has its Purpose of implanting the Protocol to the International Convention on Establishment of an International Fund for the Compensation of Oil Pollution Damage known as the Fund Convention.

Any administrative requirement and procedure for the purposes of the performance of any duty in terms of section 2 of the Contributions Act, must within 21 business days apply to the Commissioner to be registered for the levy.³¹ In addition every person receiving contributing oil must keep the following records – import declarations required for customs purposes for contributing oil in respect of which the levy may be payable and the records and books of account that set out the type and quantity of the contributing oil in respect of which the levy may be payable.

This legislation gives South African access to the Fund Convention, an internationally resolved compensation fund which contributes to damages arising from oil spills which is basically financed and run by cargo resource staff. It refines the work of the fund by stating that such is ‘to pay compensation to victims of pollution damage where there have been unable to obtain compensation or compensation in full under the provision of the civil liability Convention.’ The Merchant Shipping Administrative Act enables SARS to collect levies and for them to be

³⁰ Section 3(2)

³¹ Section 3

payable to the international pollution compensation fund such contributions in terms of the contributions Act.

South Africa has promulgated new legislation – legislation which aims to address the loophole regarding the need for civil liability in order to protect parties affected by the oil pollution accident and to protect the environment. It is interesting to note that South Africa, like the United States of America, had not ratified the CLC or the Fund Convention; one of the reasons the United States has submitted for non-ratification is that the limits of liability available to the ship-owner were too low.³² At the IMO conference which introduced the CLC and the Fund Convention, the US argued for higher limits of liability, which were eventually adopted. However as a result of the *Exxon Valdez* disaster, an environmental group lobbied for unlimited liability on the part of the owner whose ship had caused the pollution, but individual states felt that their rights to deal with pollution damage would be limited and thus, the US did not adopt the Conventions, but instead introduced its own domestic legislation; something which South Africa had failed to do in the absence on its non-ratification. The US approached protecting affected parties and the environment in oil pollution incidents differently; despite non ratification, the US ensured that they were always adequately protected.

E. The United States of America's regime on prevention and civil liability

In the United States of America (US), oil consumption is three times its production, making the country more dependent upon foreign suppliers than any other country in the world.³³ In 2006, the US's net imports stood at 12.2 million gallons of oil per day, making it more than twice as much as Japan and over three times as much as China - who are the world's next largest importers.³⁴ This transport of oil into the US is primarily carried out by sea through vessels and the frequent oil movement by sea have exposed the US to potentially large risks of marine oil pollution.

³²Hiscox, Stuart 'A critical examination of South African law on civil liability for oil pollution damage from ships' (1993) at 69.

³³Wang, H *Civil liability for marine oil pollution damage*(2011) at 170.

³⁴ [*supra* note 1] *ibid*.

The First federal legislation in the US dealing particularly with marine oil pollution was the Oil Pollution Act of 1924.³⁵ This Act prohibited the discharge of oil into US coastal waters; and if this wasn't adhered to, the imposition of a \$500 fine or imprisonment of 30 days would ensue.³⁶ In addition, the US Senate adopted the Federal Water Pollution Control Act of 30 June 1948 which specifically dealt with the responsibility of states in controlling and managing a national policy which dealt with the prevention, control and abatement of water pollution. The emphasis of this Act was to enhance water pollution prevention programmes.³⁷

When the *Torrey Canyon* incident occurred in 1967, further efforts were made by the US to strengthen its domestic measures aiming at the prevention of oil pollution, as they sought to gap the inadequacies prevalent in legislation. Whilst these efforts were attempted, in 1989 when the *Exxon Valdez* spill occurred, it proved that the US still lacked the adequate resources to respond to an oil spill, leaving the US susceptible to extreme environmental damage as a result of the oil spill. To deal with this problem, the Federal Oil Pollution Act was promulgated.

The 1990 Federal Oil Pollution Act is divided into 80 sections and is different from the international conventions in that it does not only deal with civil liability, but it incorporates all aspects of oil pollution including prevention and compensation. It also includes civil, criminal and administrative liabilities. It is noted³⁸ that this piece of legislation is one that is comprehensive, dealing with all aspects of oil pollution³⁹ as well as covering all the sources⁴⁰.

F. Prevention

The Act states that it is in the best interests of the US to participate in a regime which encompasses oil pollution liability and compensation that is effective in preventing oil pollution

³⁵ [*supra* note 1] *ibid.*

³⁶ [*supra* note 1] *ibid.*

³⁷ [*supra* note 1] *ibid.*

³⁸ [*supra* note 1] at 172.

³⁹ Being prevention, response, liability and compensation.

⁴⁰ Being tankers, non-tanker vessels, offshore facilities and onshore facilities.

incidents.⁴¹ This is undertaken by determining and prioritizing ports and channels which need new, expanded or improved vessel traffic systems. This is done by evaluating factors such as: the nature, volume and frequency of vessel traffic; the risks of collisions, spills, and damages associated with that traffic; the impact of installations, expansions or improvement of a vessel traffic service system and all other relevant costs and data.⁴²

Furthermore, the legislation provides that the US must undertake studies to assess whether existing laws and regulations are sufficient to ensure that there is safe navigation of vessels transporting oil over the exclusive economic zone.⁴³ In the study, various factors are taken into consideration and assessed such as: the size of tankers; evaluation of the adequacy of qualifications of training of crew members; the ability of members to take on emergency actions in the prevention of oil pollution; adequacy of equipment, navigation procedures in speed, daylight, ice, tides and weather; adequacy of inspection standards; consideration of past studies; size, cargo capacity and flag nation transporting the oil; identification of changes in the past 20 years; evaluation of risks, difficulties associated with tanker navigation, vessel control, accidents, oil spills, contamination and clean-up and the evaluation of a test program for remote alcohol testing for masters and pilots of vessels carrying large quantities of oil.⁴⁴

G. Civil Liability

The Clean Water Restoration Act of 1966 initially introduced the concept of Civil Liability into the US. It provided that anyone who discharged oil from a vessel into US waters was required to immediately remove the oil. If such person failed to do so, such offender was liable to compensate the removal costs incurred by the US and subject to a fine of up to \$2500 and imprisonment of one year.⁴⁵

However, the Federal Oil Pollution Act provided a more in depth liability regime. It provides that in the event of a discharge of oil, each party which has discharged oil or which poses a

⁴¹Sec 3001.

⁴² Sec 4107(B)(i-iv).

⁴³Sec 4111(a).

⁴⁴ Sec 4111(b)(1-12).

⁴⁵

substantial threat of an oil discharge into navigable waters or adjoining shorelines in the exclusive economic zone, is liable for the removal costs and the damages as a result thereof.⁴⁶

The general rule is that the total of the liability of a responsible party and the removal costs incurred by the responsible party shall not exceed certain limits⁴⁷; but this will not apply in the event of gross negligence or wilful misconduct or the violation of an applicable federal safety, construction or operating regulation by the responsible party.⁴⁸ This has been criticised because it has the effect that if the responsible party has infringed an operating or safety regulation he would lose his right to limit his liability.⁴⁹ In addition, if the responsible party knew of the incident and failed to report the incident as required by law and to provide all the reasonable cooperation and assistance requested by officials, such responsible party would not be entitled to limit his liability. The only available defence to a party who wants to avoid liability is to prove that such act was either an act of God; an act of war; an act or omission of a third party, or any combination thereof.⁵⁰

The Act lists specific damages which a responsible party will be held strictly liable for; these include:

- a) Injury to or destruction of or loss of natural resources;
- b) Injury to or economic losses resulting from destruction of real or personal property;
- c) Loss of subsistence use of natural resources which are recoverable by those claimants who were dependant on natural resources;
- d) Loss of taxes, royalties, rents and fees as a result to the injury or destruction of natural resources or property;
- e) Loss of profits or impairments of earning capacity due to the destruction; and
- f) Costs of providing additional or increased public services after removal activities.⁵¹

⁴⁶Sec 1002 (a).

⁴⁷E.g. \$1,200 per gross ton.

⁴⁸Sec 1004 (1) (A & B).

⁴⁹ [*supra* note 1] at 189.

⁵⁰ Sec 1003(a)(1-4).

⁵¹ Sec 1002 (b)(a-f).

An Oil Spill Liability Trust Fund was established. It was originally established in 1986 in the Inland Revenue Code. However, there was no legislation to authorize the use of the fund till the enactment this Act. The Fund is available to pay for the removal costs incurred by federal or state government; the costs for the government in assessing natural resource damages, developing and implementing restoration plans; uncompensated removal costs and uncompensated damages, and administrative benefits directly from the oil trading industry.⁵²

H. Analysis

The Federal Oil Pollution Act (FOPA) has been lauded as a landmark Act since it emphasised the concept of civil liability for oil pollution in the United States by implementing a new definition of oil pollution damage to the international community and setting realistic limits of liability in respect of damage resulting from oil pollution.⁵³ Furthermore, an interesting aspect of US civil liability is that they made the shift from a restricted negligence liability to that of strict liability.⁵⁴

Hodges & Hill note that ‘the US FOPA is demonstrably a draconian piece of legislation created by a single sovereign State to its territorial rights and those of its citizens to protect its own coastlines and adjacent waters against catastrophic spills’⁵⁵. Thus in the absence of ratification of international conventions, the adoption of the Act has had greater influence on the practice of oil shipping in the US; resulting in a declining trend of oil spill volume in the US since 1990.

However, there is always an inevitable risk of oil spills and the US has not been immune to it as certain oil spills have still occurred since the introduction of the Act. The US realized that the danger of large amounts of damage related to major oil spills were still left uncompensated; hence the legislators increased the financial limits and the amount of the compensation available under the Fund.⁵⁶

⁵² [*supra* note 1] at 189.

⁵³ [*Supra* note 4] at 71.

⁵⁴ [*supra* note 1] at 199.

⁵⁵Hodges, S & Hill, C *Principles of maritime law*(2001) 174, 175.

⁵⁶ [*supra* note 1] at 199.

I. What South Africa can learn from the US Regime

The Act sets out to ensure that the polluter pays and pays as handsomely as possible (by imposing harsh tests for determining the responsible party's entitlement to limit) and to ensure that as much funding is available to provide sufficient compensation to victims of all pollution incidents.⁵⁷ Thus through embracing these aims and carrying out the provisions in the Act, the US makes the anti-pollution regime a successful one; an innovative regime worthy of South Africa mirroring and implementing in its own domestic legislation. What the US lacked in ratifying internationally, they ensured that they covered all bases with domestic legislation so that they are not left financially unprepared and unable to respond in the event of an oil pollution incident. The US did not provide legislation which has vague provisions loosely based on international conventions – it went beyond the CLC and ensured that legislation in place will cover all its needs. In addition the US always kept abreast with international standards to ensure that legislation is always updated.

South Africa did not follow the US's suit – it instead placed the State in a very dangerous position if an oil pollution incident has occurred. However the new legislation in South Africa aims to ensure that the country is not left financially unprepared. South Africa should follow in the US's footsteps by always ensuring that the current regime not only meets the needs of the parties, but one that also keeps up to date with international standards. South Africa needs to keep up to pace to ensure that it is never kept in a vulnerable position.

⁵⁷ [*supra* note 28] at 175.

Chapter 6

Concluding Remarks

Oil spills have increased public awareness about the risks involved in the storage and transportation of oil on the world's seas. The current emphasis on environmental problems has resulted in the passing of new legislation and increasing public pressure upon individual companies seen as polluters.¹

South Africa has taken adequate measures in the prevention of oil pollution by acceding to international conventions on the prevention of oil pollution such as MARPOL. Sufficient provision has been made for the prevention of oil pollution in various pieces of domestic legislation which include: the National Environmental Management Act, the Prevention and Combating of Pollution of the Sea by Oil Act and the Marine Pollution (Prevention of Pollution from Ships) Act. As a result South Africa is better equipped to deal with the prevention of oil pollution by adhering to international standards and developments in international maritime law thereby ensuring the preservation of the environment and accommodation of international navigation and transport.

In addition, in terms of the Constitution of South Africa, the prevention and response mechanisms are in line with section 24 to ensure that the environment is protected by legislative measures to prevent pollution and ecological degradation.

However, the biggest problem which South Africa faced is in terms of its law on civil liability for oil pollution. By not introducing the complete text of the CLC into domestic legislation, and not updating the amounts in the Protocol, South Africa had not developed at the same pace as international law. Although it did seek to address the policing and administration of marine pollution, the regime was below the standards of international norms, especially in the case of oil tankers which pose the greatest risk in terms of the devastating effect that oil pollution would have on the environment.

¹Roos, L. 'Pollution, regulation & evaluation' Law & Society Review, Vol. 6, No. 4 (1972) at 509.

Cognisance should be taken of the United States of America's oil pollution response regime. They have not adopted any of the civil liability regimes into their domestic legislation; and they have rejected adherence to the uniformity of international rules and have instead formulated and adopted legislation which is more protective of the country's native interest and its own citizens.² In their failure to adopt international standards, they have still ensured that should an oil pollution incident occur, they have the resources and the finances to respond to it, as they have promulgated their own in-depth domestic legislation on oil pollution which covers all bases on all aspects of dealing with oil pollution incidents. Thus, the US is not left in a vulnerable position.

Changes were made to domestic legislation and South Africa is now placed in accordance with international law by introducing the Merchant Shipping Acts which leaves South Africa financially prepared and individuals who have suffered from oil pollution damage to be in a better position to recover the full extent of their losses.³ Furthermore, by introducing a higher limit to which the ship-owner may limit his liability, the ship-owner bears more of the costs related to the damage resulting from oil pollution damage.⁴ Thus, making the owner pay, has the effect of making ship-owners more careful in their transportation of oil, resulting in fewer oil pollution casualties off the South African Coast.⁵ However it must be borne in mind that the legislation has just been passed and its efficacy will only be tested in the event of an oil spill. South Africa should ensure that the legislation and its provisions are adhered to by all relevant parties so that should South Africa be faced with an oil pollution accident, it shall have all the relevant means to deal with the situation promptly and adequately.

²Hodges, S & Hill, C *principles of maritime law* (2001) at 167.

³Hiscox, S *a critical examination of South African law on Civil Liability for oil pollution damage from ships* (1993) at 76.

⁴ [*supra* note 3] *ibid.*

⁵ [*supra* note 2] *ibid.*

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