

**ENVIRONMENTAL LIABILITY UNDER THE TERMINAL
OPERATORS CONVENTION:
A SOUTH AFRICAN PERSPECTIVE**

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Abstract

This dissertation examines the *Convention on the Liability of Operators of Transport Terminals in International Trade Terminal Operators Convention* (hereafter the TOC) in light of South Africa's environmental law. Entrenched in section 24 of the *Constitution of the Republic of South Africa, 1996* and other sectoral environmental legislation, are environmental rights and responsibilities, that may govern a terminal operator's activities irrespective of other international environmental obligations. This dissertation explains the role of a terminal operator and illustrates how his activities pose potential adverse effects the environment. Under South African law, a terminal operator who pollutes the environment will under certain circumstances be liable for environmental damage and loss. The dissertation focuses on interpreting article 5(1) of the TOC by using some South African modes of judicial interpretation. In particular, it considers whether under the TOC, a terminal operator could be liable for loss or damage to the environment. To facilitate this determination, a comprehensive study of the principle of remoteness, and the role it plays in determining the extent to which loss or damage can be covered, is made. The dissertation postulates that the TOC would use similar principles to determine the scope of damages it governs.

The dissertation notes the inadequacies of the TOC, the greatest being that it is unlikely to cover environmental loss and damage. The author draws ideas from the TOC and other international environmental instruments, and proposes that South Africa should promulgate suitable legislation that imposes rigorous liability on a terminal operator, for environmental pollution.

Afrikaans Summary

Internasionale handel vorm 'n belangrike onderdeel van die wêreld ekonomie. Verskeie rolspelers is betrokke in die internasionale handelsiklus. 'n Toenemend belangrike onderdeel in hierdie siklus is die dienste wat verskaf word aan invoerders, uitvoerders en skeepseienaars deur die vervoerterminaal operateur. Die operateur se dienste sluit onder andere in: die opberging van goedere voordat vervoer geskied, asook ander dienste gewoonlik geassosieer met aktiwiteite in 'n kaai of 'n dok.

Die noodsaaklikheid vir effektiewe en omvangryke juridiese regulering van die aktiwiteite van die terminaal operateur, het duidelik na vore gekom met die daarstelling van die *Convention on the Liability of Operators of Transport Terminals in International Trade*, 1991 (hierna die TOC). Die TOC het ten doel om *inter alia*: regsekerheid te skep ten opsigte van die aanspreeklikheid van die operateur. Laasgenoemde word bewerkstellig deur minimum standaarde van aanspreeklikheid daar te stel, asook om aanspreeklikheid vir die beskadiging van of verlies aan goedere vanaf die eienaar van die goedere, of die versender van die goedere, na die operateur te verskuif.

Artikel 5(1) van die TOC vestig die regsvoorskrifte ten opsigte van aanspreeklikheid. Hierdie voorskrifte is relevant tydens die bepaling van die omvang van die operateur se aanspreeklikheid vir enige skade veroorsaak tydens die stoor van goedere onder sy beheer. Artikel 5(1) bepaal egter slegs dat die operateur aanspreeklik is vir skade as gevolg van skade of verlies aan die goedere self. Die aktiwiteite van die operateur mag, afgesien van skade aan die goedere onder sy beheer, ook moontlik skade aan die omgewing veroorsaak wat in hierdie konteks geklassifiseer kan word as gevolgskade. Gevolgskade wat moontlik veroorsaak kan word deur *inter alia* die berging van goedere word gevolglik nie deur die TOC aangespreek nie.

Vervoerterminaal operateurs bied daaglik grootskaalse essensiële dienste in Suid-Afrika aan. Afgesien van algemene bepalings vervat in die *Grondwet van die Republiek van Suid-Afrika*, 1996 en die *Nasionale Wet op*

Omgewingsbestuur 107 van 1998, bestaan daar geen uniforme nasionale wetgewing wat betrekking het op die aktiwiteite en aanspreeklikheid van operateurs nie. Daar moet ook gelet word in die konteks, dat Suid-Afrika nie 'n party tot die TOC is nie.

Hierdie skripsie onderstreep die belangrikheid vir die daarstel van relevante wetgewing wat op 'n effektiewe wyse die aanspreeklikheid van die operateur reël veral in soverre dit betrekking het op aanspreeklikheid vir skade aan die omgewing. Onderzoek word ingestel na die omvang van die aanspreeklikheidsbepalings van die TOC, algemene Suid-Afrikaansregtelike reëls wat betrekking het op aanspreeklikheid vir gevolgschade asook die lewensvatbaarheid van die TOC vir die Suid-Afrikaanse scenario. 'n Regsvergelykende studie word verder in die verband onderneem ten einde benaderings ten opsigte van aanspreeklikheid vir gevolgschade te ondersoek soos wat dit vervat is in die *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment*, 1993; die *Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea*, 1996 en die *Convention on Civil Liability for Oil Pollution Damage*, 1969. Die benaderings wat deur hierdie instrumente gevolg word, mag rigtinggewend wees vir 'n toepaslike benadering onder die TOC vir die doeleindes van die Suid-Afrikaanse reg.

Die studie kom tot die gevolgtrekking dat die aktiwiteite van die vervoer terminaal operateur, moontlik skadelik vir die omgewing mag wees. Huidige beginsels in die Suid-Afrikaanse reg, voorsien vir 'n aanspreeklikheidsbasis in die geval waar skade aan die omgewing veroorsaak word as gevolg van die nalatigheid van die operateur en in die mate wat die skade voorsienbaar was. Die aanspreeklikheidsregime word dus gebaseer op skuld. In die opsig word aanbeveel dat die Suid-Afrikaanse wetgewer eerder skuldlose aanspreeklikheid as basis moet oorweeg soos wat dit vervat word in ander relevante internasionale konvensies. Skuldlose aanspreeklikheid mag die eiser se saak in alle opsigte vergemaklik omdat dit verskeie prosedurele probleme uit die weg ruim. Op grond van Suid-Afrikaanse reëls van wetsuitleg, word daar ook tot die gevolgtrekking gekom dat skade soos gedefinieer onder die TOC, moontlik nie

omgewingskade sal insluit nie. Ten opsigte van laasgenoemde mag 'n gevolglike inkorporasie van die bepalings van artikel 5(1) teenstrydig wees met Suid-Afrikaanse grondwetlike bepalings en ander relevante omgewingswetgewing. Die TOC behoort dus nie deur Suid-Afrika geratifiseer te word nie.

Ten slotte word klem geplaas op die noodsaaklikheid vir 'n Suid-Afrikaanse aanspreeklikheidsregime wat streng is, wat voldoende vergoeding voorsien en wat gevolglik gehoor gee aan belangrike omgewingsoorwegings. Daar word aanbeveel dat Suid-Afrika spesifieke wetgewing daarstel wat die aktiwiteite van die operateur op 'n deursigtige en omvangryke wyse reguleer. So 'n inisiatief moet in alle opsigte sensitiwiteit openbaar vir die belange van internasionale handel asook die belange van die omgewing.

1 Introduction

International trade forms an integral component of the world economy, where various actors are involved to successfully realise trade on a global scale. For the sake of legal certainty, the intricate complexities of international trade are regulated by international trade law, which consists of rules made by states in concert on how goods, services, and money can be exchanged between themselves and individuals with whom they trade.¹ With the continuous expansion of international trade, progressive harmonisation and unification of international trade law is of the essence. As much as uniformity of law is required within the general ambit of international trade law, equally so, uniformity is essential for the various sectors thereof. One of these sectors includes the services of a terminal operator, who provides transport-related services during the international carriage of goods.²

The need for a uniform and unambiguous regime to regulate legal aspects normally associated with the terminal operator, is evident from the establishment of the *Convention on the Liability of Operators of Transport Terminals in International Trade* (hereafter the TOC).³ The TOC is one of a tripartite⁴ international transport regime, which is essentially aimed at uniformity of law.⁵ The TOC was drafted with the objective that it would contribute significantly to universal economic co-operation among states; remove, or reduce, legal obstacles to the flow of international trade; and eliminate discrimination in international trade.⁶ It also aims to provide for a liability regime which may arise when goods are still in the care of

¹ Booyesen *International Trade* 4.

² Article 1(a) of the TOC.

³ The TOC was prepared by the United Nations Commission on International Trade (UNCITRAL) and was opened for signature and accession on 19 April 1991. It is, however, still not in force.

⁴ The other two instruments include the *United Nations Convention on the Carriage of Goods by Sea* (Hamburg Rules) and the *United Nations Convention on the International Multimodal Transport of Goods*. See, Harris 1993 *Canadian Business Law Journal* 231. Note, however, the two conventions will not be discussed for the purpose of this dissertation due to length constraints.

⁵ Uniformity of law is sought in areas such as the standard of liability, the basis of liability, the burden of proof and the financial limits of liability. UNCITRAL 2002 HYPERLINK <http://www.uncitral.org>.

the terminal operator, and the carrier's liability has not yet begun at the port of shipment, or has already ended at the port of destination.⁷

An importer, exporter, shipowner, or charterer will inevitably, at one time or another, require the services of a terminal operator, usually before and after carriage of goods.⁸ These services are wide-ranging and include *inter alia* warehousing, wharfing and stevedoring.⁹ Moreover, radical changes resulting from containerisation and multi-modal transport currently necessitate that a terminal operator also provide:

an efficient and economic interface between vessels and inland transportation in order for the ports or terminals to remain competitive in a containerised cargo market.¹⁰

In terms of liability, the TOC accomplishes its goals through, *inter alia*, prescribing minimum but mandatory standards of liability for the terminal operator, by shifting the risk of loss or damage from a cargo owner or consignor to a terminal operator.¹¹ Article 5(1) of the TOC is the centrepiece provision which establishes and

⁶ Preamble of the TOC.

⁷ UNCITRAL 2002 HYPERLINK <http://www.uncitral.org> 19 June 2002.

⁸ A terminal operator's services are generally required in the case of goods shipped at the stage between ship and shore. The need for a terminal operator may more specifically arise when one needs to store goods pending their shipment, or subsequent to goods being unloaded at the port of destination, or pending the mandatory customs procedure. The terminal operator's services may also be required for purposes of degrouping cargo, or because of delays owing to congestion at the terminal port.

⁹ The wide range of services also include picking and packing, labelling, inventory control, local trucking, providing a safe berth for vessels, loading and unloading of vessels, dunnaging, trimming and lashing. Anonymous 2003 HYPERLINK <http://www.travelers.com/marine/ocean/operators.html> 3 February 2003; Article 1(e) of the *Terminal Operators Convention*; Palmer and DeGiulio 1989 *Tulane Law Review* 340.

¹⁰ DeGiulio and Palmer 1989 *Tulane Law Review* 299. The importance of maintaining competitiveness is underscored by the fact that employment of longshoremen in ports of the United States fell dramatically between 1977 and 1982, despite the increase of annual volume of cargo in that period due to the effects of containerisation and multimodal transport.

¹¹ Through the principle of freedom of contract, a terminal operator is able to:

limit his liability for goods by restricting his standard of care, excluding or limiting acts of his employees or agents, placing on the claimant the burden of proof of circumstances establishing the operator's liability and setting low financial limits of liability.

UNCITRAL 2002 HYPERLINK <http://www.uncitral.org> 19 June 2002.

determines the extent to which a terminal operator will be liable for any loss incurred in the course of storage of cargo in the import and export sequel.¹² It, however, simply states that an 'operator is liable for loss resulting from loss of or damage to goods.'¹³ Consequential loss¹⁴ that might arise from *inter alia* the storage of goods whilst in the import and export sequel, is not properly addressed or governed by the TOC.¹⁵ Whilst the focus of this regime is on the loss of, or damage to, goods in transit, no provisions are established to regulate consequential loss, which in this context, may include loss or damage to the environment.

A terminal operator, in the course of his trade, handles large quantities of diverse goods, some of which, in the event of a pollution incident, may have adverse effects on the environment.¹⁶ Furthermore, his operations take place mainly at, or close to, seashores which are considered to be sensitive aquatic biodiversity areas.¹⁷ Section 24 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the 1996 Constitution) as well as various provisions of the *National Environmental Management Act 107 of 1998* (hereafter the NEMA), relate to issues of environmental liability and responsibility in general.¹⁸ The 1996 Constitution

¹² Article 5(1) of the TOC states:

The operator is liable for loss resulting from loss of or damage to the goods, as well as from delay in handing over the goods, if the occurrence which caused the loss, damage, or delay took place during the period of the operator's responsibility for the goods as defined in article 3, unless he proves that he, his servants or agents or other persons of whose service the operator makes use for the performance of the transport-related services took all measures that could reasonably be required to avoid the occurrence and its consequences.

¹³ Article 5(1) of the TOC.

¹⁴ Consequential damage is loss which flows from direct loss. Direct loss is the immediate consequence of a damage causing event. See Visser and Potgieter *Law of Damages* 59.

¹⁵ UNCITRAL 2002 HYPERLINK <http://www.uncitral.org> 19 June 2002.

¹⁶ See paragraph 3 below for a detailed discussion of the effect a terminal operator's activities may have on the environment.

¹⁷ In South Africa, coastal areas are identified as being vulnerable and accordingly these areas require special legislation to protect them, as envisaged in the proposed *National Coastal Management Bill*, yet to be promulgated. See, chapter 4 of the *National Environmental Management: Biodiversity Bill* (B29-2003) and chapter 3 of the *National Environmental Management: Protected Areas Bill* (B39-2003).

¹⁸ Section 24 of the 1996 Constitution states that:

makes it incumbent upon the government to promulgate legislation that would *inter alia* advance pollution prevention, ecological sustainable development, and proper use of natural resources. It is proposed that one of the key means to attain the aforementioned goals, is to pay particular attention to individual civil liability, liability assessment, and liability allocation in the context of environmental considerations.¹⁹ Environmental liability and responsibility are matters of great concern in South Africa. A proactive and sensitive legal approach to environmental issues lies at the core of South African environmental law and policy.²⁰ It seems that to reach the predetermined legislative goals, a liability regime would be required which is stringent, which places a tough burden on a polluter, and which provides for adequate compensation whilst not undermining the goal of sustainable development.

In the above context, the TOC may be of special interest to South Africa, since the country is a leading international trade centre in Africa.²¹ Throughout South Africa, terminal operators conduct core business related to import and export, each with diverse terms for rendering their services. As South Africa has not acceded to, nor ratified the TOC, it could be important for the government to make an informed

Everyone has the right (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protect, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

See also in this regard *inter alia* the preamble, section 2, section 25, section 28 and section 30 of the NEMA which either directly or indirectly relate to issues of liability.

¹⁹ *Roben Civil Liability* 821- 843.

²⁰ See in this regard *Director, Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Other* 1999 2 SA 709 (SCA) read together with section 38 of the 1996 Constitution.

²¹ South Africa is one of the two countries in Africa that accounts for half of Sub-Saharan's total trade of goods and services, and more than half the gross development product (GDP). See United States Department of Commerce 2003 HYPERLINK <http://www.buyusa.gov/southafrica/en/page243.html> 18 June 2003.

decision to determine whether the import and export industry, as well as the environment, would benefit from this regulatory instrument.²²

Of particular interest and concern, would be to determine whether, and how, the TOC regulates environmental liability and responsibility as possible consequential loss. The purpose of this dissertation is to construe article 5(1) of the TOC, to establish whether it includes liability for environmental damage and degradation (which manifests in consequential loss), and to discover the extent to which it accommodates South African environmental law and policy, be it embodied in the 1996 Constitution or other relevant environmental legislation.

By literature review, this research thus: examines, compares, and contrasts, the nature of a terminal operator's role at common law, the NEMA, and the TOC;²³ considers the impact a terminal operator's activities may have on the environment;²⁴ ascertains the current status of the terminal operator's liability for environmental pollution and degradation under common law and statutory law; illustrates how other regimes apply the polluter-pays principle and consider its influence on liability;²⁵ investigates, compares, and contrasts what constitutes consequential loss at common law, international law, and statutory law;²⁶ applies rules of construction to article 5(1) of the TOC to determine whether it includes environmental loss and degradation;²⁷ and investigates relevant and applicable guidelines established in international instruments, to determine the comparable scope, content, and implications of liability for environmental damage and

²² Section 25(i)(c) and 25(d) of the NEMA expects that a recommendation on whether South Africa should ratify an international environmental instrument, should address the benefits and disadvantages of such ratification. The incorporation of international legal instruments is a priority of the South African government. This corresponds with the latter's constitutional duty to heed international law when interpreting the Bill of Rights contained in the 1996 Constitution.

²³ See paragraph 2 hereafter.

²⁴ See paragraph 3 hereafter.

²⁵ See paragraph 4 hereafter.

²⁶ See paragraph 5 hereafter.

²⁷ See paragraph 6 hereafter.

degradation.²⁸ The instruments are, the *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment*,²⁹ the *Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea*,³⁰ and the *Convention on Civil Liability for Oil Pollution Damage*.³¹ Lastly, the research draws conclusions regarding the possible inclusion of liability for environmental damage and degradation under the TOC, making recommendations, and describing the suitability of the TOC to South Africa in the area of environmental law.³²

2 Definition and role of a terminal operator: a comparative perspective

2.1 Terminal Operators Convention

The TOC defines a terminal operator as:

... a person who in the course of his business undertakes to take in charge goods involved in international carriage in order to perform or procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access or use.³³

Essential to the definition of a terminal operator, are the definitions of international carriage³⁴ and transport-related services.³⁵ It is evident from the definitions of the latter, that a terminal operator functions within the domain of goods transported between at least two different states, during which he provides services necessary to successfully execute such transport.

²⁸ See paragraph 7 hereafter.

²⁹ The *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment* was adopted on 21 June 1993.

³⁰ The *Convention on Liability for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea* was adopted in 1996.

³¹ The *Convention on Civil Liability for Oil Pollution Damage* was adopted on 29 November 1969.

³² See paragraph 8 hereafter.

³³ Article 1(a) of the TOC.

³⁴ International carriage is defined as any carriage in which the place of departure and the place of destination are located in two different states at the time when the terminal operator takes the goods in charge. Article 1(c) of the TOC.

³⁵ See footnote 9 for the range of services a terminal operator may offer.

Throughout the TOC, the phrase 'taken them in his charge' is used in respect of goods delivered to the operator by the consignor.³⁶ Furthermore, the operator is at a customer's request obliged to acknowledge receipt of such goods.³⁷ He is expected to acquaint himself reasonably well with the condition of goods he receives.³⁸ Additionally, the operator, as a depositary, has the power of a lien over the goods entrusted in his care.³⁹ This, no doubt, is the basis of the depositary's liability for loss or damage for the goods entrusted in his care.⁴⁰

The operator, in view of article 5(3), is also obliged to timeously hand over the goods to, or place them at the disposal of, a person entitled to take delivery of them in accordance with the terms of the contract between him and his client. Failure, or delay, in handing over the goods may result in a claim from the depositary for the consequences.⁴¹

2.2 South African common law and the NEMA

As far as could be established, there is no specific mention in South African common law as to the office of a terminal operator. However, it can be deduced from his principal function,⁴² that his office would be similar to that of a depositary – an office known to common law. In terms of common law, the depositary is obliged to be a faithful custodian of property entrusted into his care.⁴³ A depositary would, in good faith but for no remuneration,⁴⁴ enter into a contract to safely keep

³⁶ In the second paragraph of the preamble to the TOC, article 3 and alluded to in article 5(1) by reference to article 3.

³⁷ He could issue, sign and date his own document acknowledging receipt of the goods; or he could acknowledge receipt by signing, dating and making due acknowledgement of receipt on a document presented by the customer. See article 4 (1)(a) and (b) of the TOC.

³⁸ Article 4(1)(b) of the TOC.

³⁹ Article 10 of the TOC.

⁴⁰ Article 5 of the TOC.

⁴¹ See article 5(4) of the TOC. The extent of the consequences is not clear. This dissertation, in part, looks into this subject.

⁴² See paragraph 2.1 above.

⁴³ Voet states, 'He who gives it back the worse is not understood to have restored it, and unless he at the same time makes good the damages.' *Voet Commentary* 16 3 7.

⁴⁴ The common law position has since developed to reflect modern practices. It is obvious that today a depositary will in most cases require payment for services he renders.

the property of another on condition that he would, on demand, restore⁴⁵ the actual goods, or their worth.⁴⁶ This constitutes a contract of *depositum*, the core of which requires the depository to have possession of, control over, and custody of the property deposited.⁴⁷ Notwithstanding this, title in the deposited property remains with the owner and does not pass to the depository.⁴⁸ A contract of *depositum* recognises that a depositor need not be the owner of the deposit, and that the contract could be entered into for the benefit of parties other than the depositor.⁴⁹

As is the case at common law, the NEMA does not explicitly provide for the office of a terminal operator. It does, however, implicitly recognise the role of a depository and terminal operator. For instance, if the definition of 'pollution' in section 1 of the NEMA is attributed a broad application, the activities of the terminal operator may fall under pollution caused by:

...any activity, including the storage or treatment of waste or substances, construction and the provision of services, whether engaged by any person or an organ of state...⁵⁰

The NEMA also espouses a number of principles, which may be applicable to the activities of a terminal operator. The polluter-pays principle, as a principle which governs liability and responsibility for environmental damage, is directly relevant.⁵¹ The NEMA also supports both the preventive and precautionary principles by

⁴⁵ Restoration could be either actual or constructive. It would be constructive if the deposited property were immovable. Voet *Commentary* 16 3 2.

⁴⁶ Where property had been valued before being handed in for safekeeping, it was permissible to restore an amount equivalent to the valuation. Voet *Commentary* 16 3 1.

⁴⁷ By contrast, in *Electra Rubber Products (Pty) Ltd v Socrat (Pty) Ltd* 1981 4 SA 451 (ZA), the court held that a guard service who did not possess, have custody over, nor control the suit premises, had not entered into a contract of *depositum*.

⁴⁸ Voet *Commentary* 16 3 1.

⁴⁹ The contract could be entered into for the benefit of a third party, a depositor and third party or both depositor and depository. Voet *Commentary* 16 3 7.

⁵⁰ Section 1 of the NEMA.

⁵¹ Section 2(4)(p) of the NEMA states that all costs due to environmental pollution, as well as costs for preventing, controlling, or minimising pollution should be paid for by those responsible for pollution. The polluter-pays principle is accordingly applied specifically when a polluter is identified and is required to pay the remedial costs for environmental degradation. Sunkin *et al Sourcebook* 52.

encouraging exercise of due diligence during activities, so as to anticipate negative impacts on the environment in order to prevent or minimise them.⁵²

It could also be argued that section 30(b)(iii) of the NEMA, implicitly recognises the role of a depositary – and therefore a terminal operator – as the responsible person who would be in control of any hazardous substance involved in an incident, if indeed the goods under the terminal operator’s control are hazardous.⁵³

It can be deduced that the NEMA does not explicitly define a terminal operator. The activities of the terminal operator may however, at the very least, fall under the NEMA, in as far as the activities may be responsible for pollution, and in as far as the terminal operator may be identified as either the responsible person, or the person who owns, controls, or has a right to use land or premises on which a polluting activity occurs.

2.3 Comparison of definitions

The difference between the definitions of a terminal operator under the TOC, and at common law, reflects changes brought about by modernisation, globalisation of markets, capitalism, and trends emerging in international trade.⁵⁴ The TOC definition reflects the diverse services a terminal operator is currently likely to be called upon to offer, other than storage.⁵⁵ The common law definition, on the other hand, embodies the traditional function of a terminal operator – the provision of storage service, warehousing and baileeship. In view of the foregoing, it may be justifiable to liken the terminal operator to a depositary, and the contract to one of

⁵² Sections 2(4)(i),(ii),(vii) of the NEMA.

⁵³ Sections 30(b)(i), (ii) and (iii) of the NEMA state that a responsible person includes any person who:

...is responsible for the incident; owns any hazardous substances involved in the incident; or was in control of any hazardous substances involved in the incident at the time of the incident.

⁵⁴ FitzGerald 1985 *Annals of Air and Space Law* 32.

⁵⁵ These other services are enumerated at footnote 8.

depositum.⁵⁶ Although the NEMA does not explicitly provide for the office of a terminal operator, it can implicitly regulate his activities. It is therefore proposed that the TOC definition of a terminal operator is comparable to that implied under statutory law, albeit wider than the definition under common law, which is restrictive.

If a terminal operator can be regarded as a depositary, he would presumably, at the very least, be liable at common law for the same damages as a depositary would in similar circumstances. The common law liability may be further expanded by provisions of the NEMA, which relate to the possible polluting activities of the terminal operator. It is, however, possible, that the TOC varies with South African law. Whether this is in fact the case, is determined hereafter.⁵⁷

3 The activities of a terminal operator and environmental concerns

A terminal operator will, in the course of his trade, handle a wide variety of goods, both dangerous and safe.⁵⁸ The dangerous goods may by nature be toxic, possibly to all forms of life,⁵⁹ or even volatile.⁶⁰ Fire at a warehouse, persistent leaks from, or the rupture of, an underground or above-ground storage tank, the explosion of volatile substances either in, or within, the precincts of a warehouse, could in all probability result in environmental pollution and degradation, not to mention possible adverse health and safety consequences that might arise.⁶¹ Even goods

⁵⁶ The core of both contracts satisfy two similar *essentialia*. First, delivery of the object for safekeeping and custody; second, restoration of the object to the depositary.

⁵⁷ See paragraph 6.

⁵⁸ The International Maritime Organisation (IMO), registers about 2300 sea-going products with potential chemical and toxicological properties. Miller Associates 2003 HYPERLINK http://www.cqjournal.com/World_Wire_Events/MEPC_44/Mar_9/mar_9.htm 14 July 2003.

⁵⁹ This includes human, animal, plant, and marine life.

⁶⁰ Pesticides, chemicals, heavy metals, radioactive materials and petro-chemicals are examples of toxic goods. Volatile goods include, flammable liquid gas, petrol, explosive powders and oil.

⁶¹ If pesticides, for instance, leak into ground water or percolate through soil, weeds, insects, fungi, and algae would be destroyed. Water could be polluted, which may cause death of fish and other sea animals. Should oil spill onto both land and water, devastating effects may be registered. In *Standard Oil Co v R L Pitcher Co* 1923 CA1 Me 289 F 678, the defendant's premises burnt down after an explosion occurred during unloading of petroleum products at the plaintiff's storage facility. In *Citizens & Southern Trust Co. v Phillips Petroleum Co.* 1989

that are not by nature hazardous may pose a threat to the environment should they, for example, upon combustion take on a harmful form or emit poisonous fumes.

It has been reported that 74% of incidents of loss and damage to goods happen at terminals during transport related operations, compared to 12% during carriage aboard sea vessels.⁶² Consequently, the terminal operator's activities may have significant potential to bring about a change in the surroundings within which humans exist – a change that could have an adverse effect on human-health and well-being.⁶³ The consequent damage to the environment could be significant, because the cost of damage might far exceed the cost of the goods involved.⁶⁴

4 The liability regime

4.1 Common law liability

A depositary who undertakes his duties for reward,⁶⁵ is obliged to exercise due care lest he be held liable for negligence.⁶⁶ This form of liability reflects fault liability which connotes 'the attachment of liability to an actor who causes the harm

192 GA App 499, 385 SE2d 426, gasoline leaked over a four year period from defective underground petroleum storage tanks and damaged the plaintiff's property. These are just a few examples of the destructive effect the terminal operator's activities may have on the environment.

⁶² The Mercer Report ('Legal liability in maritime transport with particular reference to short sea shipping and the Hamburg Rules. Final Report') presented in December 1994 to General Directorate VII of the Commission of the European Communities. UNCITRAL 2002 HYPERLINK <http://www.uncitral.org> 19 June 2002. Bovio 1998 *Uniform Law Review/Revue de Droit Uniforme* 609.

⁶³ Section 1(xi) and 1(xxiv) of the NEMA define environment and pollution.

⁶⁴ The Exxon Valdez grounded at Bligh Reef Alaska rupturing 8 cargo tanks and spewing 10.8 million gallons of crude oil into Prince William Sound on 24th March 1989. Civil settlement ran up to US\$900 million, with a possibility of an additional US\$ 100 million. Note that there are still claims pending by private parties. Anonymous 2003 HYPERLINK <http://www.oilspill.state.ak.us/facts/settlement.html> 6 February 2003; Anonymous 1997 HYPERLINK <http://www.response.restoration.noaa.gov/photos/ships/shipts.html> 6 February 2003.

⁶⁵ *Essa v Divaris* 1947 1 SA 753 (A) 768-769 is an acknowledgement that a *depositum* could be undertaken for reward.

⁶⁶ See in this regard, *Medallie and Schiff v Roux* 1903 20 SC 438 440; *WJ Lineveldt (Edms) Bpk v Immelman* 1980 2 SA 964 (O) and *South Eastern Auto Rental Services (Pty) Ltd t/a Swans Rent A Car v Sank Bros Holdings (Pty) Ltd t/a Market Toyota* 1986 3

intentionally or negligently.⁶⁷ Liability is not only for loss or damage to the item in his care, but additionally for any associated loss and damage.⁶⁸ Where an undertaking had been made gratuitously, a depositary would only be liable for loss and damage in respect of the object deposited, if he had been fraudulent⁶⁹ or grossly negligent.⁷⁰ Common law thus recognises that a depositary's undertakings entail the risk that he could sustain loss owing to the negligence and/or fraudulence of the depositor.⁷¹ In that event, the depositary would be exempted from liability, and the depositor himself would instead bear the costs of damages.⁷²

From the foregoing, it can be deduced that the depositary could, if negligent and/or fraudulent, be liable for not only the direct loss or damage to the deposit, but also for consequential loss. Consequential loss flows from special and incidental circumstances existing at the time of breach of contract or commission of a tort.⁷³ Consequential loss ought to have arisen in connection with the item deposited. If explosives, for instance, entrusted to the care of a depositary, are stored in a warehouse, but explode owing to the negligence or fraudulence of the depositor, not only would the depositor be liable for the explosives, but also for the warehouse and loss of crop in a nearby field that burnt down as a result of the spread of the fire. In light of this, it is arguable that at common law, it may be possible to succeed in a claim against the depositary for consequential loss, including environmental damages, provided that it could be proven firstly, that the loss had arisen in connection with the item deposited and secondly, that the depositary had been fraudulent or negligent in bringing about the damage.

SA 636 (C).

⁶⁷ Goldie 1965 *International Comparative Law Quarterly* 1196.

⁶⁸ Van Leeuwen does not detail the nature of associated loss that could be incurred.

⁶⁹ Failure by a depositary to return the deposited article immediately upon its recall constituted fraud, irrespective of whether the property had been recalled earlier than expected.

⁷⁰ The Courts have been reluctant to regard this rule as the guiding light. It has, however, been applied in *Challinger v Speedy Motors* 1951 1 SA 340 (C), but has also been resisted in *Larter v Daly* 1914 EDC 23 28.

⁷¹ Van Leeuwen *Cens For* 1 4 6 5.

⁷² Van Leeuwen *Cens For* 1 4 6 5.

⁷³ Consequential loss is discussed further at paragraph 5.

Under the law of delict, a terminal operator may be sued at common law under the *actio legis Aquiliae*.⁷⁴ He would be obliged, should his acts or omissions result in environmental pollution or degradation, to compensate the damage suffered.⁷⁵ Provided adequate evidence is adduced, the extent of compensation could cover expenses incurred to prevent, remedy or compensate environmental pollution or degradation.⁷⁶

4.2 South African statutory law

One of the principal concerns in South Africa, is that natural resources should be utilised in a manner that 'will sustain human, plant, and animal life over the longest possible period.'⁷⁷ This mirrors the principle intrinsic to environmental protection, namely, sustainable development.⁷⁸ This principle demands conduct and liability that can meet its demands. For this reason, section 28(1) of the NEMA, imposes a general duty of care that requires all persons to care for the environment, whether they ordinarily, persistently, or on a regular and on-going basis cause pollution; or whether they in the past caused pollution, or may in future do so. The provision requires the entire populace (a terminal operator included), to be wary, to examine past, present, and future conduct as it pertains to the environment, as well as to ensure the prevention or minimisation of environmental pollution and/or degradation.

⁷⁴ Neethling, Potgieter and Visser *Delict* 8-9.

⁷⁵ Neethling, Potgieter and Visser *Delict* 27-257. All elements of a delict namely conduct, wrongfulness, fault, causation and damage, will have to be proved.

⁷⁶ This three-fold objective is mirrored by section 28 of the NEMA.

⁷⁷ *White Paper on Conservation and Sustainable use of South Africa's Biological Diversity*, May 1997.

⁷⁸ This is a guiding principle in the evolution of environmental law on an international and regional level. A similar definition is found in the 1987 *Brundtland Report on World Commission on Environment and Development* (WCED). It encompasses four main principles namely the conservation of natural resources for the benefit of future generations; the exploitation of natural resources in a sustainable or prudent manner; the equitable use of natural resources; and the integration of environmental considerations into economic and development plans, programmes and projects. Sunkin *et al* (eds) *Sourcebook* 45-46.

Section 28 of the NEMA gives special consideration to three categories of pollution namely: that which is on-going, that which occurred in the past, and that which is legally authorised. In respect of these special categories, there is a duty to undertake reasonable measures to minimise or rectify the pollution or degradation. Such reasonable measures, it must be pointed out, are not cheap evasive measures. They could involve great expense. For instance, the measure to evaluate and assess the measure of pollution, may require expert input. One may additionally be required to go as far as remedying the pollution or degradation, which could entail excessive costs.⁷⁹

Those who fail to voluntarily comply with their duty as stipulated under section 28(1) of the NEMA, may be obliged to pay costs as assessed by the statutory institution which takes up the mandatory duty to clean up and repair the environment.⁸⁰ This duty, it is argued, is in the nature of a secondary duty, following failure of a person to abide by the primary duty stipulated under section 28(1) as read together with section 28(3) of the NEMA.⁸¹ To escape liability, it is incumbent on the polluter to prove he took reasonable measures to minimise or rectify the pollution or degradation.

Persons who may be approached by the stated statutory body, are those responsible for pollution, or those who have directly, or indirectly, contributed to the pollution; the owner of land where pollution has occurred or his successor in title; the person who controls the land or has a right to use the land and lastly any person who negligently fails to prevent the pollution causing activity.⁸² A terminal operator may fall under each of the above categories, although mainly under the first three.⁸³ Hence, a terminal operator who offers stowage, storage and other services in South Africa, has a duty to care for the environment. His duty will be to take up the

⁷⁹ Section 28(3)(a) and 28(3)(f) of NEMA.

⁸⁰ Section 30(8) and 30(9) of the NEMA.

⁸¹ This reflects a shift in international trends where governments now take a back-seat, and instead require the individual polluter to take primary responsibility for pollution. Roben *Civil Liability* 821-841.

⁸² Sections 28(8)(a) to 28(8)(d) of the NEMA.

responsibility to prevent, remedy, or compensate any environmental damage that occurs when the goods he stows, stores, transports, or otherwise deals with, pollute and/or degrade the environment.

The provisions of the *National Water Act* 36 of 1998 (hereafter the NWA) and the *Environment Conservation Act* 73 of 1989 (hereafter the ECA) are, together with the NEMA provisions, of further significance. Both acts fall within the legal framework stipulated in the NEMA, and may apply to a terminal operator's activities. A terminal operator might lease or own land, from where he conducts business, which may be close to a water source or marine environment which is susceptible to pollution. Section 19 of the NWA, requires an owner, controller, occupier, and/or user of land to take measures to prevent water pollution.⁸⁴ As vividly illustrated by the facts of *Cambridge Water Company v Eastern Counties Leather Plc*,⁸⁵ through persistent leaks on land, toxic and dangerous chemicals can seep through subterranean soil, and leak into ground water, which is situated at, close to, or a distance from a terminal operator's work site.

If water is polluted, it is incumbent upon the terminal operator in his capacity as landowner, controller, occupier or user of the land, to take remedial measures to prevent *inter alia* recurrence of pollution. If, however, a terminal operator fails to take appropriate action as stipulated under the NWA, he would still be liable to repay the costs incurred by the Catchment Management Agency, a statutory body constituted under the NWA to carry out remedial measures.⁸⁶ In the event of an

⁸³ See paragraph 2.2 above.

⁸⁴ The net is wide enough to easily identify a terminal operator as only one of the groups.

⁸⁵ *Cambridge Water Company v Eastern Counties Leather plc* 1994 1 AER 53 (A HL) for instance, vividly illustrates that through persistent leaks, chemical solvents or indeed any other toxic and dangerous substances, may seep through layers of subterranean soil over a great distance and pollute groundwater. It is stated in this case that the total spillage could have amounted to 1000 gallons over a number of years. Although the seepage did not take place in a warehouse as such, it may be expected that incidents of spillage of water insoluble substances occur from time to time in a warehouse, or in underground storage facilities which may consequently pollute both soil and water.

⁸⁶ Section 19(5)(a) and 19(5)(b) of the NWA. In this context the landowner too may be liable, for example a situation whereby a terminal operator though not directly responsible for pollution, actually owns the land on which pollution takes place.

emergency involving spilling of a harmful substance that finds, or may find its way into a water resource, persons responsible to take up remedial and other measures as stipulated under the NWA's section 20(4), are those who caused the incident.⁸⁷ These are the owner of the pollutant, or the person in control of the pollutant at the time of the incident, which could include a terminal operator.⁸⁸

A terminal operator, furthermore, has to ensure that the handling and storage facilities he uses for any dangerous and hazardous substances are approved, and comply with sections 21 and 22 of the ECA.⁸⁹ A terminal operator may, for example, engage in transportation activities. As an activity identified under section 21 of the ECA, as being potentially detrimental to the environment, he is under an obligation to ensure the vehicles he uses to transport hazardous goods comply with statutory regulations.⁹⁰ The rationale behind these provisions is to address the risk of environmental degradation and other adverse effects, should spills or explosions occur in a road traffic accident involving such goods. In all the legislation discussed above, it is upon the aggrieved party to prove his claim against the terminal operator. This is unlike the position under the TOC, where the burden of proof is reversed.

Having noted that a terminal operator has a duty of care towards the environment, the question arises as to the nature of liability he may incur under South African

⁸⁷ Section 20(2)(a) of the NWA.

⁸⁸ See section 20(2) of the NWA. A terminal operator engaged in, for instance, loading and unloading of petroleum products, might cause an accidental spilling.

⁸⁹ Section 1(c)(ii) of Schedule I, Gazette Notice Regulation 1182 of the 5 September 1997, under the ECA, identifies *inter alia* the construction, erection, and upgrading of storage and handling facilities, in respect of dangerous and hazardous goods, as an activity detrimental to the environment. Thus, under section 22 of the ECA, only after special authorisation, may a person engage in such activity. A terminal operator will thus have to ensure that the storage and handling facilities he uses are approved.

⁹⁰ Under sections 275 and 278 of Government Gazette Notice Regulation 225 of 17 March 2000, and under the *National Road Traffic Act* 93 of 1996, a terminal operator's vehicles ferrying dangerous goods, must comply with a number of South African Bureau of Standards (hereafter SABS) specifications. These include SABS 1398 'Road tank vehicles for petroleum-based flammable liquids', SABS 1518 'Transportation of dangerous goods – design requirements for road tankers' and SABS 0232-1 'Transportation of dangerous goods – Emergency information systems', Part 1 'Emergency information systems for road transportation.'

law, should environmental damage occur. Oosthuizen⁹¹ suggests that fault liability may be incurred. If this is the case, an aggrieved party who seeks compensation for environmental damage and degradation may encounter two major hurdles. Firstly, the claimant has to prove that the defendant (in this case, the terminal operator) is at fault. The claimant will be required to adduce evidence relating to the circumstances leading to damage, which knowledge is primarily in the repository of the defendant.⁹² Secondly, the claimant will have to prove a causal connection between the damage and the occurrence of pollution. Depending on the nature of damage, expert evidence is to be provided since it is not always easy to prove causation on a preponderance of facts.⁹³ If conflicting expert evidence is adduced, proving a causal link may prove to be an insurmountable hurdle to cross. In the face of such difficulties, Germany decided to legislate for a presumption of causation in environmental pollution causes.⁹⁴

4.3 Polluter-pays principle

Under the NEMA, the polluter-pays principle burdens a polluter with responsibility and liability.⁹⁵ The polluter-pays principle, as initially implemented by the Organisation for Economic Co-operation and Development (hereafter the OECD), aimed at encouraging the rational use of scarce environmental resources and avoiding distortions in international trade.⁹⁶ This was to be accomplished through

⁹¹ Oosthuizen 1998 *South African Journal of Environmental Law and Policy* 360. Note however that Soltau argues that the NEMA predominantly imposes strict liability. See, Soltau 1999 *South African Journal of Environmental Law and Policy* 33-51.

⁹² FitzGerald 1985 *Annals of Air and Space Law* 44.

⁹³ See in this regard Hoffman 1991 *Netherlands International Law Review* 34. This will apply irrespective of the nature of liability incurred. However, if fault liability prevails, it will be an additional barrier to face.

⁹⁴ German *Environmental Liability Act* 1990 (BGB I 2634).

⁹⁵ See section 2(p) of the NEMA. The polluter-pays principle is by nature an economic principle supporting free-trade principles. See Candice 1994 *Cornell International Law Journal* 580. It should however be noted that the principle, in and of itself, is vague and imprecise. Its contents and limits are to be discovered in light of the statutory provisions the principle seeks to enable. See Kramer *Environmental Law* 97.

⁹⁶ OECD member countries implement goals via government policies. See Stevens 1994 *Cornell International Law Journal* 577.

re-allocating the cost of pollution prevention and introducing control measures.⁹⁷ However, with the passage of time, the principle changed to a principle of liability.⁹⁸ In Germany for instance, under the *Environmental Liability Act*, 1990, strict liability is imposed, by way of the principle, for damages caused by air and soil pollution.⁹⁹ In India, it was held in *MC Mehta v Union of India*¹⁰⁰ that the polluter-pays principle is interpreted as:

...an absolute liability for harm to the environment and extends not only to compensate the victims of pollution but also the cost of restoring environmental degradation.¹⁰¹

The *Proposed European Parliament and Council Directive on Environmental Liability* (hereafter the *Environmental Liability Directive*),¹⁰² also applies strict liability. It is expected to apply to occupational activities, such as a terminal operator's, which may present a risk for the environment. Therein, the polluter-pays principle is designated a fundamental principle, and an operator whose

⁹⁷ OECD, Council Recommendation on the Implementation of the Polluter-Pays Principle, Recommendation C (74) 223, adopted on 14 November 1972, reprinted in *International Legal Materials* 1975 Volume 14 234-236. As encouraged in principle 16 of the Rio Declaration, the polluter-pays principle works by modifying market prices of goods and services. Costs are internalised by establishing a charge for scarce environmental resources. A polluter is discouraged from delaying pollution control because charges are on going even if the polluter attempts to avoid the costs. A polluter is placed under pressure to reform and use environmental friendly systems. Raney 1994 *Stellenbosch Law Review* 54. There is a similar stated objective in the proposed Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage. COM (2002) 17 final – 2002/0021 (COD).

⁹⁸ OECD, Council Recommendation on the Application of the Polluter-Pays Principle to Accidental Pollution, Recommendation C(89)88, adopted on 7 July 1989, reprinted in *International Legal Materials* 1989 Volume 28 1320 – 1325.

⁹⁹ Schulze *Pollution Control* 118.

¹⁰⁰ Environmental Law Alliance Worldwide 2003 HYPERLINK <http://www.elaw.org/resources/topical.asp?topic+Polluter%20Pays%20Principle>, 6 February 2003.

¹⁰¹ *M.C. Mehta v Union of India* WP 3727/1985 19 December 1996 (Tanneries Case Calcutta).

¹⁰² The White Paper is designated as COM (00) 66. The Environmental Liability Directive was submitted by the European Commission on 21 February 2002. COM (2002) 17 final – 2002/0021 (COD); Anonymous 2003 HYPERLINK http://www.mina.vlaanderen.be/wiedoetwat.aminal/taken/europa/environmental_liability/source_book/proposal_for_directive.pdf 3 April 2003.

activities have caused environmental damage, or imminently threatened environmental damage, may be held financially liable.¹⁰³

Remediation of the damaged environment is part of the process of sustainable development and, as such, the polluter is liable to compensate aggrieved claimants and pay for costs of reversing the damaged ecology.¹⁰⁴ It is important that this risk, in the import and export sequel, be internalised by a terminal operator. It should not be borne by the owner or buyer of the goods left in the control of a terminal operator.

4.4 The Terminal Operators Convention

The TOC is based on presumed fault liability. The implication is that, although liability attaches to an act that intentionally or negligently causes harm, there is a shift from the customary burden of proof, which states that he who alleges, must also prove.¹⁰⁵ The terminal operator, as defendant, instead bears the burden to prove he took all measures that could reasonably be required to avoid the cause of loss and its consequences.¹⁰⁶ He will be liable only to the extent that his failure to take all requisite reasonable measures to avoid loss indeed causes loss, damage, or delay.¹⁰⁷ Although the TOC does not detail the nature of reasonable measures a terminal operator could undertake to avoid loss, it is arguable that the statutory measures stipulated under sections 28 and 30 of the NEMA apply.¹⁰⁸

¹⁰³ Clause 14, Environmental Liability Directive. COM(2002) 17 final – 2002/0021 (COD). States of the European Union, the polluter-pays principle, enshrined in article 174(2) of the European Commission Treaty, has 'achieved the status of a generally applicable rule of customary international law.' The *European Commission White Paper on Environmental Liability* proposed far-reaching measures in relation to the polluter-pays principle which are now reflected in the Environmental Liability Directive.

¹⁰⁴ Similarly held in *M.C. Mehta v Union of India*, WP 3727/1985 19 December 1996 (Tanneries Case Calcutta). See Mehta 1999 *Acta Juridica* 10.

¹⁰⁵ Goldie 1965 *International Comparative Law Quarterly* 1196.

¹⁰⁶ See article 5(1) of the TOC. Note that a terminal operator includes his servants, agents or other person whose services the operator makes use of to perform transport-related operations.

¹⁰⁷ See article 5(2) of the TOC.

¹⁰⁸ See paragraph 4.2 above.

The terminal operator is also liable for delay in handing over goods.¹⁰⁹ His responsibility is limited to the period when he has taken charge of goods from the customer, up to the time he hands them over to the person entitled to take delivery of them.¹¹⁰

His liability, where modes of transport other than sea are used, is limited to 8.33 units of account per kilogram of gross weight of the goods lost or damage.¹¹¹ Where sea transport is used, his liability is limited to an amount not exceeding 2.75 units of account per kilogram of gross weight of the goods lost or damaged.¹¹² This formula is applied to calculate the minimum measure of compensation. It would, presumably, also be applied to environmental loss, if covered under the TOC. If it is so applied, the question arises whether this measure of compensation accords with current constitutional and environmental legislation provisions.

From the exposition above, it is noted that under common law, statutory law, and the TOC, liability for loss is based on negligence. Under the TOC however, the burden of proof is shifted to a terminal operator whereas under common law and statutory law, the onus of proof lies with the depositor who *inter alia* alleges that the terminal operator has been negligent.¹¹³ Therefore, the TOC makes a claimant's case much easier, because he need not adduce evidence of negligence which occurred in circumstances that are better known to the terminal operator himself. If environmental damage occurs, it follows that fault liability and a reversed burden of proof will be applicable, if the TOC does, in fact, cover such damage. Since a depositary and a terminal operator may be likened, it may be expected that an operator under the TOC, would be liable for environmental damages as consequential loss. This is determined hereafter.¹¹⁴

¹⁰⁹ See article 5(3) of the TOC. This should be within the agreed period, otherwise within a reasonable time.

¹¹⁰ See article 3 of the TOC.

¹¹¹ Article 6(1)(a) of the TOC.

¹¹² Article 6(1)(b) of the TOC.

¹¹³ This is in accordance with the customary burden of proof.

5 The interpretation of damage as a core concept

Defining damages is critical, because it determines the extent to which a defaulting party may be liable for compensation. The TOC does not define damage. Instead, article 5(1) classifies loss that will be compensated into loss resulting from loss or damage of goods and loss resulting from delay in handing over the goods.¹¹⁵

A correct interpretation of article 5(1) is therefore required to determine the specific nature of loss that can be compensated. Since principles used to determine the latter differ from one legal system to another, it is necessary to compare the approach in international law with that of South Africa, to unravel the precise scope of loss that can be compensated under the TOC.

5.1 Definition of consequential loss

Consequential loss is loss which flows from special and incidental circumstances existing at the time of breach of contract or commission of a delict.¹¹⁶ An example of consequential loss, in the context of the import and export industry, is environmental damage which may result from the activities of a terminal operator. Due to the existence of special circumstances, the extent and nature of consequential loss may differ from case to case.¹¹⁷ Normal damage, on the other hand, can be described as loss which every plaintiff in a similar situation will suffer.¹¹⁸ Consequential loss is not ordinarily recoverable in South Africa unless a contract provides for, or contemplates it,¹¹⁹ or under delict, if it is not too remote.¹²⁰

¹¹⁴ See paragraph 6 for a discussion of whether the TOC covers environmental damage.

¹¹⁵ Although Larsen *et al* point out that article 5(1) includes consequential loss, it should be noted that that term and other terms such as 'general damage' and 'special damage' are not used in the TOC. Larsen, Sweeney and Falvey 1989 *Journal of Maritime Law and Commerce* 27.

¹¹⁶ Walker *Oxford Companion* 273.

¹¹⁷ Lawrence *Radin Law Dictionary* 18, and Neethling, Potgieter, and Visser *Delict* 222.

¹¹⁸ McGregor *Damages* 17.

¹¹⁹ *Holmdene Brickworks v Roberts Construction* 1977 3 SA 670 (A).

¹²⁰ McGregor *Damages* 17. This applies to a cause of action based on delict.

In the context of South African law, principles of remoteness of damage are employed to determine the nature and extent of loss which will be compensated.

5.2 *Consequential loss in international law*

In the realm of international law, the term consequential loss is not used.¹²¹ Instead an all-encompassing term namely 'direct damage' is employed to connote consequential loss that can be compensated.¹²² A public international law tribunal will apply principles of remoteness to assess whether damage ought to be compensated.¹²³ The process of determining whether, when, or the conditions under which consequential loss can be restored in international delicts, entails an analysis of whether the cause of loss was too remote, or whether there was a 'sufficiently direct causal relationship' between the cause and the resulting damage.¹²⁴

In view of the foregoing, it is expected that principles of remoteness of damage are also applicable to the TOC. Accordingly, principles of remoteness may be employed to construe the extent and nature of damages recoverable under the TOC, even in the context of South African law. To avoid conflict, the above principles applicable to the TOC, must however be in harmony with South African principles on law of damages. When a claim based on either breach of contract or the

¹²¹ See paragraph 8 below.

¹²² In paragraph 8, the various international instruments' definitions of damage are discussed. Generally, damage is defined to also make provision for indirect damage, although it may not be directly referred to as such.

¹²³ These principles may differ in common law and civil law jurisdictions. The latter establishes the equivalent or adequate causal connection between the internationally wrongful act and the actual damage caused. The former is dependent, sometimes, on the nature of tort involved and only those proximate and natural consequences of acts are considered relevant. Anonymous *Encyclopedia* Vol 1 932.

¹²⁴ A loss will be regarded as a normal consequence of an act if it is attributable to the act as a proximate cause. Other terms used to describe a causal relationship which is normal include, 'adequate causality', 'ordinary cause of events', 'cause not too remote or speculative', and 'foreseeability'. See in this regard Graefrath 1984 *Recueil des Cours* 95. By way of comparison, it is interesting to note that similar expressions have been used in *Silva's Fishing Corporation (Pty) Ltd v Maweza* 1957 2 SA 256 (AD) 264B, which include: *causa causans*, effective cause, proximate cause, substantial cause and negligence materially contributing to the result.

wrongful act of a terminal operator is made under South African law, it is essential to clarify the principles that will determine whether the loss claimed can be compensated, and to understand whether any conflicts arise, if any.¹²⁵

5.3 Consequential loss under South African law

In awarding damages, the South African judiciary's basic tenet is to place the aggrieved party, as far as possible through monetary compensation, in the position he would have been had the contract been properly performed, or had the delict not occurred,¹²⁶ provided the party in default is not unduly harassed.¹²⁷

Assuming the TOC was applicable to South African law, the following hypothetical case, based on breach of contract, should be considered.¹²⁸

X, a terminal operator in Durban enters into a contract to which the TOC applies with B, a consignor. The contract is for stowage of twenty thousand tons of petroleum. In breach of the contract, X incorrectly stows B's barrels of petroleum, thereby perforating a number of the barrels. The petroleum which pours from the barrels, spills onto land and subsequently pollutes both soil and water. Neither X nor B fulfill their primary duty to remedy the environmental damage.¹²⁹ The statutory body constituted under the NEMA takes up the task to clean up and remedy the pollution that has occurred.¹³⁰ B, as owner of the petroleum, is required to reimburse clean-up costs incurred by the statutory institution. B reimburses the

¹²⁵ Note that a claimant may have a choice between two causes of action. Assuming the TOC is applicable in South African municipal law, it would apply under the law of delict. Where, however, parties have by voluntary obligation agreed to be bound by the terms of the TOC, an aggrieved party could base his cause of action on contract. See a discussion on how an aggrieved party could elect to base his claim on either delict or contract in Neethling, Potgieter and Visser *Delict* 6.

¹²⁶ *Victoria Falls & Transvaal Power Co. Ltd v Consolidated Langlaate Mines Ltd* 1915 AD 1 22.

¹²⁷ This principle is stated in *Holmedene Brickworks v Roberts Construction* 1977 3 SA 670 (A) 687C and *Katzenellenbogen Ltd v Muller* 1977 4 SA 855 (A) 875C.

¹²⁸ Although the writer here focuses on a cause of action based on contract, a hypothetical case involving the commission of a delict, could also be given. Therefore, where applicable, parallel comments in footnote will be made in respect of a cause of action based on delict.

¹²⁹ The primary duty is discussed at paragraph 4.2 above.

statutory body and in addition institutes a claim against X for *inter alia* the amount of expenses incurred in reimbursing the statutory body's costs. One of the tasks the relevant judicial body may be faced with, is to determine whether clean-up costs claimed by B, must be compensated by X, especially in light of the contractually implied TOC terms.¹³¹

The court's first task would be to examine issues pertaining to causation. Contractual law in South Africa distinguishes between factual causation and legal causation.¹³² Legal causation limits the extent to which damages can be awarded.¹³³ Two inquiries are made. The first in respect of factual causation,¹³⁴ which can be formulated as: but for the breach of contract, would the alleged damage have occurred?¹³⁵ Although the question may be answered in the affirmative,¹³⁶ a further inquiry has to be made to establish legal causation.¹³⁷ This determination entails the clarification of whether the breach of contract is linked sufficiently closely or directly to the loss.¹³⁸ If this is also answered in the affirmative, the damages are sufficiently proximate to be awarded.¹³⁹

¹³⁰ This is the secondary duty as discussed at paragraph 4.2 above.

¹³¹ Van der Merwe *et al Contract* 196-197 defines the terms that are implied into a contract by law as their *naturalia*. Note that the hypothetical example assumes that X and B have either expressly or impliedly agreed that the TOC applies to their contract.

¹³² Van der Merwe *et al Contract* 300 and Neethling, Potgieter and Visser *Delict* 171-208.

¹³³ Van der Merwe *et al Contract* 300 and Neethling, Potgieter and Visser *Delict* 181.

¹³⁴ *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700E.

¹³⁵ This is the *conditio sine qua non* test which would also be applied in a cause of action based on delict. For a further discussion in this regard see Van der Merwe *et al Contract* 300. A similar test would be applied in a cause of action based on delict.

¹³⁶ If the question is not answered in the affirmative, the plaintiff's case is put to an end 'because no policy can be strong enough to warrant the imposition of liability for loss to which the defendant's conduct has not in fact contributed'. See Fleming *Torts* 169.

¹³⁷ *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700H. In the following cases, the same two inquiries have been made: *Silva's Fishing Corporation (Pty) Ltd v Maweza* 1957 2 SA 256 (A) 264; *Kakamas Bestuusraad v Louw* 1960 2 SA 202 (A) 222; *Minister of Police v Skosana* 1977 1 SA 31 (A) 34E-35A; *Standard Bank of South Africa Ltd v Coetsee* 1981 1 SA 1131 (A) 1138H-1139C and *Siman Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A) 914F-915H.

¹³⁸ A similar determination is made in *Holmedene Brickworks v Roberts Construction* 1977 3 SA at 687 (A) 687D-F and *Thoroughbred Breeders' Association v Price Waterhouse* 2001 4 SA 551 (SCA) 579.

¹³⁹ *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A).

Assuming factual causation is apparent (perhaps it is obvious that had X properly stowed the container of petroleum in accordance with given instructions, the barrels of petroleum would not have become perforated and the petroleum would not have poured out and contaminated ground water, nor formed an impenetrable oil slick over soils in the surrounding environs, prior to clean-up), the next task would be to determine legal causation. This is determined by establishing the nature of damage that has occurred.

If either general or special damage occur, the party in default may be held liable. If the loss that ensues on breach of contract can be said to flow naturally and directly from the breach, the contractants are presumed to have contemplated it. This is general damage and would accordingly be compensated. However, if the law cannot presume that the contractants would have considered the loss, the damage will be regarded as special damage. This damage can only be recovered if at the conclusion of a contract, contractants actually or presumably provided for the occurrence of loss. But, if the nature of damage falls into neither classification, the loss is too remote to be compensated.¹⁴⁰

Under South African law, consequential loss comprises mostly of special damages. But, when applying South African law of damages to the TOC, these terms are not significant because of the broadly worded categories of loss that can be compensated under the TOC. The idea is that the broad categories of loss envisaged to be compensated under the TOC would have to find their place within the context of damages awarded under South African law. It would be determined whether environmental loss resulting from loss and/or damage to goods in the charge of a terminal operator, falls under general or special damage in South African law, because only these damages are compensated under South African law. As noted, in both the TOC and South African law, the principle of remoteness of damages is applicable. Thus, it is opined that consequential loss under the TOC

may fall under either general or special damage. There is, therefore, no conflict, despite the use of different terminology.

From the facts of the hypothetical case above, and making an assumption in favour of factual causation, an enquiry has to be made to ascertain whether the clean-up costs claimed by B fall under general damage or special damage.

To fall within the ambit of general damage, the clean-up costs ought to have been within the contemplation of X and B. In other words, there ought to have been a serious or realistic possibility that environmental damage would occur, should X, in breach of his contract, improperly stow the barrels of petroleum, as he did.¹⁴¹ To determine the degree of possibility, the event causing the loss ought to have been reasonably foreseeable, or it could occur and the loss incurred 'would tend to follow the breach as a matter of course.'¹⁴²

If the damage does not fall under general damage, the next broad inquiry would be whether it falls under special damage. In respect of special damage, South African courts may apply either the convention principle or the contemplation principle.¹⁴³ Although a resolution by the courts is yet to be reached in favour of either one of these principles, it must be noted that the convention principle has long been

¹⁴⁰ *Holmedene Brickworks v Roberts Construction* 1977 3 SA 687 (A) 687D-F. A similar approach was followed in *Thoroughbred Breeders' Association v Price Waterhouse* 2001 4 SA 551 (SCA) 579.

¹⁴¹ *Thoroughbred Breeders' Association v Price Waterhouse* 2001 4 SA 551 (SCA) 581.

¹⁴² *Thoroughbred Breeders' Association v Price Waterhouse* 2001 4 SA 551 (SCA) 581.

¹⁴³ *Shatz Investments (Pty) Ltd v Kalovyrrnas* 1976 2 SA 545 (A) 550. However, if the hypothetical case were based on a cause of action in delict, for instance, that the terminal operator negligently stowed the the barrels of oil, a flexible approach would determine legal causation, as ruled in *S v Mokgethi* 1990 1 SA 31 (A) 39. The question would be whether the terminal operator's conduct in stowing the barrels of petroleum, and the petroleum pouring out and causing environmental damage can be imputed onto the terminal operator in light of policy considerations. In light of environmental principles such as the polluter-pays principle, sustainable development, and justiciable environmental rights, environmental loss of this nature could be included.

discredited in England.¹⁴⁴ This may in future influence such a determination by South African courts.¹⁴⁵

According to the convention principle, to successfully claim consequential loss a defaulting party ought to have been aware of special and incidental circumstances pertaining to the contract and on the basis of such knowledge, entered into the contract.¹⁴⁶ This requires that the contract contain either an express or implied term concerning the payment of damages. Thus, liability is limited. Assuming the contract between X and B did not contain such an express term, the question arises whether the TOC implies any term in connection with payment of damages.

Article 9(a) of the TOC, in anticipation that a terminal operator may unwittingly receive in his charge dangerous goods, outlines his right to destroy, render innocuous, or dispose of them, should they pose a danger to any person or property. The TOC is silent on a terminal operator's rights, in similar threatening circumstances, over goods he receives in his charge, mindful of their inherent dangerous nature. Assuming the TOC was part of South African law, its provisions would constitute implied terms.¹⁴⁷ It is evident that a terminal operator is expected to take into consideration all requisite factors when he accepts to take in his charge goods that he knows are dangerous in character. Based on this, it is arguable that a terminal operator who knowingly takes in his charge dangerous goods, enters into such a contract on the basis of special and incidental matters pertaining to the contract,¹⁴⁸ and, thereby, meets the criteria of the convention principle.¹⁴⁹

According to the contemplation principle, 'the party in default is only liable for damages which may be considered to have been within the contemplation of the

¹⁴⁴ *Thoroughbred Breeders' Association v Price Waterhouse* 2001 4 SA 551 (SCA) 581.

¹⁴⁵ *Thoroughbred Breeders' Association v Price Waterhouse* 2001 4 SA 551 (SCA) 581.

¹⁴⁶ *Lavery v Jungheinrich* 1931 AD 156 175.

¹⁴⁷ These are terms embodied in law and are written into every contract to which they would apply. See in this regard Van der Merwe *et al* Contract 197.

¹⁴⁸ *Lavery v Jungheinrich* 1931 AD 156 175.

¹⁴⁹ *Lavery v Jungheinrich* 1931 AD 156 175.

parties at the conclusion of the contract.¹⁵⁰ At that time, the damage ought either to have been actually foreseen, or be reasonably foreseeable. To determine this, reference has to be made to the subject matter and the terms of the contract itself, or to the special circumstances known to the contracting parties at the time of the contract. An objective test rather than a subjective test is applied for this purpose. Knowledge of the special circumstances carries with it the extra responsibility for consequential loss flowing therefrom.

For instance, in view of the duty of care for the environment imposed by the NEMA upon a terminal operator, environmental damages could be argued to have been contemplated. It furthermore appears that article 9 of the TOC assumes it would be easy for a terminal operator to identify dangerous goods in his charge, through requisite and appropriate markings, labels, packaging, or documentation.¹⁵¹ The question would therefore arise as to whether a terminal operator who is aware of the nature of the dangerous good through *inter alia* marks and labels, could be said by virtue of that fact only, to have actually foreseen or reasonably foreseen a consequential loss. It is proposed that the answer would vary from case to case. In a situation, for instance, where there are explicit instructions on how to handle a dangerous item and warnings on what would happen should the instructions not be followed, it could be said that a terminal operator who fails to abide by the instructions, actually or reasonably foresees the consequential loss.¹⁵² The increase in public awareness of the effects of various substances to the environment and knowledge of technical aspects of pollution, could also determine whether the damage was reasonably foreseeable.¹⁵³

As may be noted from the foregoing, irrespective of the nature of damage, a common standard of 'contemplation' is employed to ascertain the nature of

¹⁵⁰ *Dennil v Atkins* 1905 TS 282 288 – 289.

¹⁵¹ Article 9(b) TOC.

¹⁵² Note that there are various instructions contained in SABS 0228 '1995 Code of Practice on the identification and classification of dangerous substances and goods' and SABS 0229 '1996 Code of Practice on the packaging of dangerous goods for road and rail transportation in South Africa.'

damage.¹⁵⁴ This contemplation involves principles of foreseeability. It clearly emerges that a universal principle to restrict the growth of loss to infinity pervades international law and South African law. Moreover, foreseeability, whether termed contemplation or otherwise, is generally regarded as a sensible manner of justifying compensation.

It is probable that the clean-up costs B claims from X, depending on the circumstances, may comprise of either general or special damage. Because a terminal operator's activities may pose a threat to the environment, environmental related loss would not be merely speculative. Therefore, from a *prima facie* examination of the terms of the contract, depending on the merits of each case, it may be possible for a terminal operator to be liable for environmental damages. However, the overriding factor that determines whether the TOC envisages the inclusion of environmental damages, is the construction of article 5(1).

6 Construction of article 5(1) of the Terminal Operators Convention

The TOC does not expressly delimit the nature of consequential loss that may be claimed under it. Article 5(1) appears to cover all types of consequential loss provided that it is 'loss resulting from loss of or damage to the goods.'¹⁵⁵ This is ambiguous. What principles would a South African court then use to construe article 5(1)?¹⁵⁶

Du Plessis¹⁵⁷ suggests three broad categories into which statutory interpretation by the South African judiciary may fall, namely interpretive formalism, contextualism, and purposivism.¹⁵⁸

¹⁵³ Sunkin *et al* (eds) *Sourcebook* 48.

¹⁵⁴ Nienaber JA, refers to this as the *minimum desideratum* common to both so-called limbs or subrules. See *Thoroughbred Breeders' Association v Price Waterhouse* 2001 4 SA 551 (SCA) 580.

¹⁵⁵ See footnote 20 above where article 5(1) of the TOC is outlined.

¹⁵⁶ This would become relevant in the event that the TOC is ratified by South Africa and enacted as part of South African law.

¹⁵⁷ Du Plessis *Re-interpretation* 100.

For statutory provisions which are ambiguous, as is the case with article 5(1) of the TOC, Du Plessis¹⁵⁹ proposes modes falling under *inter alia* contextualism. The South African judiciary favours this method, particularly in as far as it pertains to constitutional matters.¹⁶⁰ It is observed that an integral part of construing article 5(1) would be performed against the backdrop of the fundamental right to a safe and healthy environment.

One mode of interpreting is by perusing an entire statute, rather than concentrating only on the provisions to be interpreted, so as to ascertain the intention of the legislature.¹⁶¹ The question is: did the legislature intend to include a claim for environmental damages under the TOC? One would, on the one hand, note factors in the TOC which favour a broader interpretation that includes environmental damage. A literal interpretation of the phrase 'loss resulting from loss of or damage to the goods', in accordance with the legal principle that words must be given their ordinary and grammatical use,¹⁶² suggests that any loss, including environmental loss, is included. Secondly, the TOC anticipates that a terminal operator will keep in his charge dangerous goods. It is argued that since it is reasonably foreseeable in certain circumstances that a terminal operator's activities could result in

¹⁵⁸ Interpretive formalism requires the wording of a provision to be interpreted to be clear and unambiguous and reflect with certainty the intent of the legislature. The provision could therefore be interpreted literally. It is the writer's view that article 5(1) of the TOC construed literally, appears to include a claim for environmental loss. However, it is not certain whether this is in fact the intention of the TOC. Another method of interpretation would be to follow the golden rule by upholding the plain literal meaning of the words, unless it would result in a ridiculous meaning. Applying the golden rule to construe article 5(1) to include a claim for environmental loss would not lead to an absurdity, yet it is noted that such claim is not clearly expressed to be contrary to the intention of the TOC. The third way would be to discover the legislature's intention and effect it. This would for instance require an investigation of the ideas behind the written text. Lastly, falling under interpretive formalism, the court could limit itself to the written text in trying to discover the purpose of the enactment. It is argued that the methods of interpretation falling under interpretive formalism are unsuitable to construe article 5(1) because the intention pertaining to liability under the TOC is not clearly expressed. Du Plessis *Re-interpretation* 100 – 119.

¹⁵⁹ Du Plessis *Re-interpretation* 111-115.

¹⁶⁰ See in this regard *S v Makwanyane* 1995 3 SA 391 (CC).

¹⁶¹ This is followed mainly in constitutional interpretation. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC).

¹⁶² *Ameen v South African Eagle Insurance Company Limited* 1997 1 SA 628 (D); *Bromarin AB Nd Another v IMD Investments Ltd* 1998 STC 244 and *Investors Compensation Scheme Ltd v West Bromich Building Society* 1998 1 AER 98 (HL).

environmental damage, it may be expected that the phrase 'loss resulting from loss of or damage to the goods' does indeed anticipate such damage.

On the other hand, however, one notes factors which indicate a narrow interpretation which favour the exclusion of a claim for environmental damage. Firstly, the TOC is silent on damage caused by dangerous goods to third parties, whether direct or consequential.¹⁶³ Secondly, the limits of liability, which are based on a fraction of the gross weight of the goods lost or damaged, are too low to cover the potentially huge costs for environmental damages that could be incurred, noting that often such damages far exceed the value of the goods themselves that are lost or damaged.¹⁶⁴ The formulae in question are more suitable for compensating loss of, and damage to goods, rather than environmental damage.

Another method of construction under contextualism necessitates that the language used be interpreted in the context of its matter, apparent purpose, background, and even its historical context.¹⁶⁵ The inclusion of environmental damages could undermine the objective of the TOC to harmonise international trade law and remove, or reduce, legal obstacles to the flow of international trade.¹⁶⁶ Liability under the TOC is pegged on presumed fault-liability, whereas for most part, the trend in international, regional, and domestic environmental regimes is to base liability strictly.¹⁶⁷

Under purposivism, a statute is to be interpreted to give effect to its policy, object, and purpose.¹⁶⁸ The object of the TOC is to *inter alia* harmonise international trade law. International trade law consists of rules made by states in concert on how goods, services and money can be exchanged between themselves and individuals

¹⁶³ Fitzgerald 1985 *Annals of Air and Space Law* 56.

¹⁶⁴ See paragraph 3 above.

¹⁶⁵ Du Plessis *Reinterpretation* 118.

¹⁶⁶ See paragraph 1 above.

¹⁶⁷ See paragraph 4.3 above.

¹⁶⁸ Du Plessis *Re-interpretation* 117.

they trade with.¹⁶⁹ This arguably implies that it may be less concerned with environmental considerations which may adversely affect trade. Consequently, it could be argued that consequential loss which may be claimed under article 5(1) of the TOC does not extend to include a claim for environmental loss.

In light of the foregoing discussion on existing methods of construction, it is argued that the South African judiciary, by construing article 5(1) contextually and purposively, is likely not to read into it a claim of environmental loss. Section 233 of the 1996 Constitution enjoins every court to give preference of interpretation to that which is reasonable and in line with international law over any other interpretation that is contrary to international law. As far as could be established, no primary material on environmental law discusses the TOC in light of environmental damages. It is therefore unlikely that a South African court would be in favour of construing article 5(1) to cover environmental damages as consequential loss. This may render a claim for environmental damages as consequential loss under the TOC in South African law, unsuccessful.

What could South Africa learn in regard to defining loss or damage, establishing a liability regime, and causality, from a comparative study of other international regulatory instruments such as the *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment* (hereafter the Lugano Convention), the *Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea* (hereafter the HNS Convention), and the *Convention on Civil Liability for Oil Pollution Damage* (hereafter the CLC Convention)?

¹⁶⁹ Booyesen *International Trade* 4.

7 Guiding principles derived from the Lugano Convention, HNS Convention and CLC Convention

The Lugano Convention aims at ensuring adequate compensation for damage resulting from activities dangerous to the environment, and also provides means of prevention and reinstatement.¹⁷⁰ Under the Lugano Convention, a person who exercises control over a dangerous activity, which includes a third party, can be held liable for damages.¹⁷¹ To become liable for damages, the person ought to be handling or storing dangerous substances, or genetically modified organisms that pose a significant risk to the environment, in a professional capacity.¹⁷²

As already noted, a terminal operator will, in his professional capacity, handle and store a variety of substances and goods that are dangerous and which could pose a danger to the environment. Although the Lugano Convention does not cover damage resulting from loading and unloading, it is argued that it could, nonetheless, apply to the activities of a terminal operator. Article 4 thereof states that its provisions are applicable to carriage performed entirely in an installation that is inaccessible to the public, provided the carriage is accessory to other activities and is an integral part thereof. It is argued that a terminal operator's business falls squarely within the provisions of article 4 above. A terminal operator often has to provide trucking services. This service is accessory to other activities such as providing storage facilities, yet the trucking service is an integral part of the service because the terminal operator has to facilitate the safe conveyance of the goods in his charge, whether it is for purposes of, for example, storing within his installation or stacking. The Lugano Convention is also applicable to carriage by pipeline.¹⁷³ A terminal operator may also provide such services if he is dealing with storage of oil or petroleum products, hence his activities could be subject to the Lugano Convention.

¹⁷⁰ Article 1 of the Lugano Convention.

¹⁷¹ This person is referred to in article 2(5) of the Lugano Convention as the operator.

¹⁷² Article 2(2) of the Lugano Convention. The element of 'significant risk' to the environment is key.

Article 2(7) of the Lugano Convention expressly defines damage by excluding direct loss and including only what could be considered as consequential loss, albeit restricted.¹⁷⁴ Once again, it can be noted that there is an attempt to limit the loss recoverable by expressly delimiting the scope of consequential loss. For instance, compensation for impairment of the environment excludes loss of profit and will be limited to costs of measures of reinstatement actually undertaken or to be undertaken.¹⁷⁵ Even then, the costs of measures of reinstatement are further limited to those that are reasonable.¹⁷⁶

A similar trend of delineating damage can be observed in the CLC Convention and the HNS Convention. The latter's definition of damage is similar, in all respects, to that under the Lugano Convention.¹⁷⁷ The CLC clearly delimits consequential loss to costs of preventive measures and loss further caused by preventive measures undertaken to remedy an incident of pollution.¹⁷⁸

Under the Lugano Convention, an operator is strictly liable for damage caused by the activity over which he has control.¹⁷⁹ He will be exempted from responsibility if he proves that the damage was caused *inter alia* by war, the intentional acts of a third party, from compliance with a specific order, or by pollution at tolerable levels by a dangerous activity taken lawfully in the interests of the person who suffered the damage.¹⁸⁰ Similarly, both the HNS Convention and the CLC Convention impose strict liability.¹⁸¹

¹⁷³ Article 4(1) of the Lugano Convention.

¹⁷⁴ Article 2(7)(b) of the Lugano Convention excludes damage to property held under the control of the operator at the site of the dangerous activity from the definition of damage. Loss, such as impairment of the environment, loss of life, and personal injury are included in the definition of consequential loss as damage. Consequential loss does not extend to loss of profit from impairment of the environment.

¹⁷⁵ Article 2(7)(c) of the Lugano Convention.

¹⁷⁶ Article 2(8) of the Lugano Convention.

¹⁷⁷ Article 1 of the HNS Convention.

¹⁷⁸ Article I(6) of the CLC Convention.

¹⁷⁹ Article 6(1) of the Lugano Convention.

¹⁸⁰ Article 8 of the Lugano Convention.

Article 2(1)(a) of the Lugano Convention identifies as dangerous, the handling and/or storage of substances that constitute a significant risk for the environment – the very activity a terminal operator engages in.¹⁸² In relation to proof of causation, article 10 of the Lugano Convention provides that a court of law shall take into due consideration, the increased potential to cause damage that is inherent in the dangerous activity undertaken by an operator. Thus, the Lugano Convention provides a sympathetic approach to alleviate the difficulties that could be encountered by a claimant in proving a causal link between an incident and damage.

From the foregoing, it is noted that the Lugano Convention, the HNS Convention, and the CLC Convention, rather than leaving the matter concerning what specifically constitutes consequential loss to interpretation, expressly state what is excluded and what is included. The terms are unequivocal. It is clear, for instance, that under all the international instruments discussed, not all loss pertaining to environmental damage is covered. In respect of the Lugano Convention and the HNS Convention, it is also clear that not only should the loss be measurable, but also reasonable, in respect of costs undertaken for remedial measures. In this instance, only a small portion is left for interpretation as to the meaning of the word reasonable.

In contrast, the TOC leaves the entire matter as to what constitutes consequential loss to interpretation, thereby running the risk of conflicting interpretations from different legal regimes. The former approach is preferable because clarity aids in achieving uniformity of law. The TOC is conspicuously flawed, since it does not define damage. Furthermore, it ignores damage that could occur after a terminal

¹⁸¹ See articles III(1), III(2) and III(3) of the CLC Convention and articles 7(1) and 7(2) of the HNS Convention.

¹⁸² Article 2(2) of the Lugano Convention.

operator takes goods into his control, when he still may not appreciate the danger they pose, even if conspicuously labelled as dangerous goods.¹⁸³

It can be deduced that the TOC operates on the basis of the preventive principle and works on the assumption that the terminal operator will be aware of danger imminent from goods under his control and, thereafter, take suitable measures to deal with the danger before it actually happens. However, it fails to provide for the situation where damage happens irrespective of the terminal operator becoming aware of the danger posed.

For the above reasons, it is proposed that South Africa ought not to ratify the TOC because, in so far as environmental loss is concerned, it is not in harmony with international trends in environmental policy, and conflicts with South Africa's environmental statutory regime.

8 Conclusions and recommendations

From the research, it is apparent that a terminal operator's activities are diverse, as they are part and parcel of the intricate import and export sequel. Nevertheless, because of the wide range of dangerous, toxic, and hazardous goods handled, they may pose an imminent threat to the environment. South African law is such that a terminal operator will be liable for environmental damage he negligently causes.

¹⁸³ Article 9(a) of the TOC only stipulates intervention measures that either destroy the goods, or render them innocuous, before an incident actually occurs. It states:

If dangerous goods are handed over to the operator without being marked, labelled, packaged or documents in accordance with any law or regulation relating to dangerous goods applicable in the country where the goods are handed over and if, at the time the goods are taken in charge by him, the operator does not otherwise know of their dangerous character, he is entitled: (a) to take all precautions the circumstances may require, including, when the goods pose an imminent danger to any person or property, destroy the goods, rendering them innocuous, or disposing of them by any lawful means, without payment of compensation for damage to or destruction of the goods resulting from such precautions,...

However, not all loss that occurs will be compensated. Rather, only that which is foreseeable. In these two matters, both South African law and the TOC concur. However, it is the writer's view that with fault liability, the goals of sustainable development will be hindered by the two major hurdles a litigant will have to cross, namely, proof of fault and causation. Hence, strict liability is preferable because the plaintiff carries a lighter burden. He only faces the latter hurdle. Moreover, other legal regimes appear to make rigorous demands in regard to liability and responsibility for environmental pollution.¹⁸⁴ This may be because in many modern industries and undertakings, there is a high risk that damage could occur – and the threatened harm is so serious as to justify strict or absolute liability. Under a strict liability regime, it becomes necessary for parties concerned to exercise painstaking care to ensure that damage does not occur.¹⁸⁵

Because damage is not defined in the TOC, various modes of judicial construction have to be applied to interpret article 5(1), to determine whether the TOC indeed covers environmental damage. Applying both the contextual and purposive modes, it has been concluded that the TOC is unlikely to cover environmental damages. For this reason, it may be unsuitable for South Africa, as it is not in line with the constitutional obligation to safeguard the environmental rights.

The onus of proof adopted under the TOC conflicts with statutory law. Furthermore, it is unlikely that the compensation formulae provided under the TOC would satisfy the 1996 constitutional environmental goals, because the compensation is likely to be woefully inadequate in the event of the occurrence of

¹⁸⁴ See paragraph 4.3 above. Note too that the Environmental Liability Directive hopes for a two-tier liability regime: fault liability, for activities not identified as posing an actual or potential risk for *inter alia* the environment; strict liability for those activities posing a risk to the environment. Clause 16, Environmental Liability Directive. COM (2002) 17 final – 2002/0021 (COD). The strict liability means that the polluter need not be negligent or at fault to be liable. Under article 9 however, are listed exemptions to liability. These include environmental damage caused by armed conflict, acts of God, legally authorised emissions, emissions not known to be harmful according to scientific and technical knowledge at the time of the activity or emission.

¹⁸⁵ Van der Walt 1968 *Comparative and International Law Journal of South Africa* 49-83.

serious environmental pollution. Inadequate compensation may jeopardise the goal of sustainable development.

Lastly, it is acknowledged that the issue of liability is critical to success in achieving *inter alia* sustainable development and pollution prevention. What is required is a liability regime that effectively upholds constitutional goals, through stringent liability standards and adequate compensation. It is important to ensure that all legal provisions pertaining to these matters can be easily construed with certainty, and not left open to multiple interpretation. This could save time and money in the litigation process.

The writer proposes, therefore, that special legislation be introduced to govern a terminal operator's activities. It should be clear whether the liability regime is strict, or fault, or both. This legislation should also be clear on the definition of damages. A two-tier liability regime, both strict and fault is recommended. The proposed legislation should cover the issue of causation, taking into account the difficulties in proving causation in an environmental pollution context. To ameliorate the difficulties posed by causation, much could be gained from legislating a presumed fault liability as subsists under the TOC, as well as considering to introduce presumption of causation, as under the German *Environmental Liability Act*, 1990.

The proposed legislation should provide the statutory body under the NEMA with the means to accomplish the ends for which it was enacted. The solution could lie in requiring terminal operators in South Africa to participate in mandatory financial security schemes that would fund preventive and remedial measures undertaken under section 28 of the NEMA. Both the HNS Convention and the Lugano Convention, propose schemes with similar aims.¹⁸⁶

¹⁸⁶ See article 23 of the HNS Convention and article 12 of the Lugano Convention.

In the above ways, it is hoped, the South African government will achieve the aspirations of the 1996 Constitution pertaining to a safe and healthy environment.

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