THE EXPANSION OF THE LIABILITY OF A SHIPOWNER IN OIL TANKER CASULTIES IN SOUTH AFRICAN JURISDICTIONS

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In die geval waar skade veroorsaak word as gevolg van oliebesoedeling in die Suid-Afrikaanse territoriale waters, mag die situasie ontstaan waartydens die Suid-Afrikaanse howe die skade veroorsaak, kompensasie vir die skade asook die aanspreeklikheid van die skeepseienaar moet interpreteer. Die huidige Suid-Afrikaanse reëls ten opsigte van die aanspreeklikheid van die skeepseienaar in sodanige gevalle mag onvoldoende wees ten einde aanspreeklikheid vas te stel.

Tans is die interpretasie van skade en aanspreeklikheid wat deur Suid-Afrikaanse howe gevolg word beperkend van aard en daar word voorgestel dat 'n meer liberale en uitgebreide interpretasie toegepas moet word ten einde die aanspreeklikheid van die skeepseienaar te verhoog.

Die doel van die skripsie is om resente en relevante internasionale tendense te ondersoek waar die aanspreeklikheid van die skeepseienaar vir skade as gevolg van oliebesoedeling gereël word. Die uitgangspunte van verskeie internasionale omgewingsinstrumente kan dien as riglyne by die interpretasie van skade en aanspreeklikheid van die skeepseienaar.

'n Regsvergelykende studie van die Basel Protokol, die CLC Konvensie, die Amerikaanse oliebesoedelingswetgewing, die Oliebesoedelingsfonds Konvensie sowel as die 1992 Protokolle tot die twee laasgenoemde konvensies mag relevant wees vir die interpretasie van skade en aanspreeklikheid.

Alhoewel die HNS Konvensie die aanspreeklikheid van die skeepseienaar reël in gevalle van omgewingskade veroorsaak deur gevaarlike en giftige stowwe, mag die bepalings daarin vervat ook relevant en van toepassing wees vir Suid Afrikaanse jurisdiksies vir doeleindes van die interpretasie van skade as gevolg van oliebesoedeling.

Table of contents

Key words

International Convention on Civil Liability for Oil Pollution Damage of 1969

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

1992 Protocols to the CLC and the Fund Convention

Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal of 1989

International Convention on Liability and Compensation for Damage in Connection with Carriage of Hazardous and Noxious Substances by Sea of 1996

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

Pure economic loss

Shipowner's liability

Oil pollution damage

Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution of 1969 (TOVALOP) and *Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution* of 1971 (CRISTAL)

The United States Oil Pollution Act of 1990

1. Introduction

South Africa has three thousand miles of coastline. It forms the extremity of the land mass of Africa around which much of the world's tanker tonnage has to pass to reach its markets. The possibility of oil tanker casualties is therefore extremely high. The legal issues that might arise from such casualties, for example determining the admissibility of claims, considering and assessing claims for pure economic loss, environmental damage and the reasonableness of measures of reinstatement of the environment are also more evident then elsewhere. Hence, South Africa has the responsibility to give careful consideration to the proper and effective regulation of the liability of a shipowner concerning a possible oil tanker disaster.

Pure economic loss (*inter alia* loss of profit) suffered by industries and businesses as a result of contamination of the environment caused by an oil spill, for example, is one of the legal issues currently not properly regulated in South African law. Should an oil tanker casualty occur that gives rise to such damage in the territorial water of South Africa, South Africa could be legally unprepared to effectively address the liability consequences.[1] The country's liability regime is based upon the outdated limitation figures of the 1969 *International Convention on Civil Liability for Oil Pollution Damage,*[2] which was adopted in South Africa in 1981 by the *Marine Pollution (Control and Civil Liability) Act* 6 of 1981[3].[4]

Recent protocols to the CLC are the *Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage* of 1984[5] and the *Protocol to Amend the International Convention on Civil Liability for Oil*

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[1] Hare J *Shipping Law and Admiralty Jurisdiction in South Africa* 406.
[2] *International Convention on Civil Liability for Oil Pollution Damage*, 1969 (hereafter referred thereto as the CLC).
[3] *Marine Pollution (Control and Civil Liability) Act* 6 of 1981 (hereafter referred to as th *Marine Pollution Act*).
[4] Hare J *Shipping Law and Admiralty Jurisdiction in South Africa* 406.
[5] *Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damag* of 1984 (hereafter referred thereto as the 1984 Protocol to the CLC).

Pollution Damage of 1992 [6] both of which South Africa did not ratify. These protocols to the CLC mainly amend the original definition of pollution damage as originally defined in the CLC. The effect of this expanded definition includes an expansion of the possible liability of a shipowner in oil tanker disasters.

The CLC defines pollution damage as:

> ...loss or damage caused outside the ship carrying oil, by contamination resulting from escape or discharge of oil...[7]

This was only a general definition of pollution damage and it was left to the member states to the CLC to give a more precise interpretation of the definition and to determine its scope. Environmental damage and pure economic loss suffered as a result of environmental pollution was not generally considered as pollution damage. The result was that shipowners, in terms of the CLC, were not liable for these kinds of damages. This is still the *status quo* in South Africa.

The 1984 Protocol to the CLC and the 1992 protocol to the CLC expanded the definition of pollution damage to include environmental damage and pure economic loss arising from environmental pollution. These two protocols have had been widely accepted internationally and are in line with recent international trends regarding the regulation of maritime environmental liability. These recent liberal regulations are encompassed in *inter alia The United States Oil Pollution Act* of 1990[8], the *Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution* of 1969[9], the *Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution* of 1971[10], the *International Convention on Liability and Compensation for Damage in Connection with Carriage of Hazardous and Noxious Substances by Sea* of 1996[11], the *Basel Convention on the Control of Transboundary Movements of*

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[6] *Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damag* of 1992 (hereafter referred to as the 1992 Protocol to the CLC).
[7] Section 1(6) of the CLC.
[8] *The United States Oil Pollution Act* of 1990 (hereafter referred to as OPA).
[9] *Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution* of 1969 (hereafter referred to as TOVALOP).
[10] *Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution* of 1971 (hereafter referred to as CRISTAL).
[11] *International Convention on Liability and Compensation for Damage in Connection with Carriage of Hazardous and Noxious Substances by Sea*, 1996 (hereafter referred to as HNS).

Hazardous Waste and Their Disposal of 1989[12] and the *Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal* of 1999[13] thereto.

The question thus arises whether South Africa should also follow recent international trends in the regulation of the liability of a shipowner in oil tanker casualties as explained, and if so to what extent

2. The liability of a shipowner in terms of South African law

2.1 Marine Pollution (Control and Civil Liability) Act 6 of 1981[14]

The *Marine Pollution Act* is concerned with the protection of the marine environment from pollution by oil and other harmful substances and provides for the determination of liability in respect of loss or damage caused by the discharge of oil from ships, tankers and offshore installations. [15] The *Marine Pollution Act* gives effect to the CLC by including the essence of a number of its provisions. The scope of the *Marine Pollution Act*, however, is wider than that of the CLC. It covers not only damage–causing events such as discharges of oil, but also includes discharges of harmful substances. [16] A wide range of oil spill types is covered by this *Marine Pollution Act*, which is bolstered by the definition of oil that is both broader than the definition of oil in the CLC and specifically reiterates that pollution from ships, tankers and offshore installations all fall within the scope of the *Marine Pollution Act.*[17]

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[12] *Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal* of 1989 (hereafter referred to as the *Basel Convention*).

[13] *Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal* of 1999 (hereafter referred to as the *Basel Protocol*)

[14] *Marine Pollution (Control and Civil Liability) Act* 6 of 1981 (hereafter referred to as th *Marine Pollution Act*).

[15] Preamble to th *Marine Pollution Act.*

[16] According to section 1 of the *Marine Pollution Act* harmful substances are defined as "any substance which, if introduced into the sea, is likely to create a hazard to human health, har living resources and marine life, damage amenities or interfere with other legitimate uses of the sea, and includes oil and any other substance subject to control by MARPOL 1973/78, and mixtures of such substances and water or any other substance".

[17] According to section 1(a) of the *Marine Pollution Act* oil is defined "...in relation to a discharge of oil from a ship, tanker or offshore installation in that part of the prohibited area which constitutes the territorial waters of the Republic and the sea adjoining the said territorial

Discharge is widely defined as:

> ...any release, howsoever caused, from a ship, a tanker or an offshore installation into a part of the sea which is a prohibited area, and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying.

Importantly, the *Marine Pollution Act* pertains not only to discharges from oil tankers (as was the case with the CLC), but also to discharges from ships and offshore installations. Ships are defined as:

> ...any kind of vessel or other sea-borne object from which oil can be discharged, excluding a tanker, whether or not such vessel or object has been lost or abandoned, has stranded, is in distress, disabled or damaged, has been wrecked, has broken up or has sunk.[18]

The geographical scope of the *Marine Pollution Act* covers the prohibited area that is defined as including internal waters, territorial waters, the exclusive economic zone and the sea within the limits of the continental shelf. [19] This too is broader than the scope of the CLC, which only included pollution damage within the state's territory (including territorial sea).

The *Marine Pollution Act* renders it a criminal offence to discharge oil from a ship, tanker or offshore installation. However, this is not the case if the discharge was executed for the purposes of securing the safety of the vessel as a result of damage to the vessel. It is additionally required that all reasonable steps should have been taken to stop or reduce the escape of oil as soon as possible after the damage occurred or the leakage has been discovered.[20]

With regard to civil liability the most important provision of the *Marine Pollution Act* is section 9, which deals with liability for loss, damage or costs

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waters to the landward side thereof..." as "...any kind of mineral oil and includes spirit produced from oil and a mixture of such oil and water or any other substance". Pursuant to Section 1(b) of the *Marine Pollution Act* oil is defined "...in relation to a discharge of oil fro to a ship, tanker or offshore installation in that part of the prohibited area which adjoins the said territorial waters to the seaward side thereof..." as "...any kind of mineral oil and includes spirit produced from oil and a mixture of such oil and water or any other substance which contains one hundred parts or more of oil in a million parts of the mixture".

[18] Section 1 of the *Marine Pollution Act.*

[19] Section 1 of the *Marine Pollution Act.*

[20] Section 2(1)(c) of th *Marine Pollution Act.*

caused by the discharge of oil. The question that arises here is whether this definition for loss or damage also includes pure economic loss. According to South African law, pure economic loss occurs where the plaintiff's pecuniary loss does not flow from physical damage to the person or property of the plaintiff.[21] In addition the loss must have been reasonably foreseeable and finite, and the number of potential plaintiffs limited.[22] However, South African courts are hesitant and stringent in awarding claims for pure economic loss, especially in the instance where the success of the claim could invite a multitude of claims for incalculable losses.[23]

The *Marine Pollution Act* renders the owner of the relevant ship, tanker or offshore installation liable for any loss or damage that is caused by pollution that results from the discharge of oil from the vessel in question.[24] The owner is also liable for the costs of any measures that are taken or caused to be taken by the relevant authority after the casualty has occurred for the purposes of reducing the loss or damage that has been caused.[25] Such measures are deemed to include:

> ...any measures taken or caused to be taken by the authority in terms of this act to remove or prevent pollution of the sea by oil discharged or likely to be discharged.[26]

This renders such an owner liable for the costs of preventative measures that may need to be taken in the aftermath of an oil spill, such as the use of booms to cordon off areas from an oil slick, the use of special vacuum tanks to suck oil from the water or the use of chemicals to break up the slick. Thus section 9 of the *Marine Pollution Act* also provides specifically for the recovery of pure economic loss.

The costs referred to in section 9 of the *Marine Pollution Act* are defined as including those expenses that have been reasonably incurred in the taking of

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[21] Boberg *The Law of Delict* 103.
[22] Boberg *The Law of Delict* 104.
[23] Boberg *The Law of Delict* 105.
[24] Section 9(1)(a) of th *Marine Pollution Act.*
[25] Section 9(1)(b) of the *Marine Pollution Act.*
[26] Section 9(2)(a) of th *Marine Pollution Act.*

these measures. [27] These costs also include an amount that is regarded as sufficient to compensate the *South African National Foundation for the Conservation of Coastal Birds*[28] (or any other similar approved organisation) for the expenses incurred in rescuing, conveying, treating, feeding, cleaning and rehabilitating coastal birds polluted by oil discharged.[29] However, this is actually indicative of the fact that the legislation wanted to constitute liability for pure economic loss as a result of environmental pollution. Since this is liberal and suggests such liability for pure economic loss based on environmental degradation in any way, South Africa should extend liability accordingly. Besides, this will bring South Africa in line with the international standards.

Furthermore, the shipowner is also liable for any loss or damage that is caused by the taking of any such measures.[30] Rehabilitation measures are covered by this provision, which once again shows that a claim for pure economic loss is provided for.

It should be noted that the *Marine Pollution Act* does not use the phrase pollution damage as it is used in the CLC, but instead refers to loss or damage caused by oil pollution. This is a restrictive reference. The latter phrase is not defined in the *Marine Pollution Act,* but arguably it clearly includes claims for damage caused as a result of the pollution or degradation of the environment. It also indicates that the legislation enacting the *Marine Pollution Act* must have had in mind, that damage caused by pollution can have more indirect results and give rise to more consequential damages. This widens the scope of liability of the shipowner and also suggests a liberal liability tendency towards delictual accountability.

Although South Africa is not a party to the 1992 CLC Protocol and is accordingly not bound by the more recent, broader definition of pollution

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[27] Section 9(2)(b)(i) of the *Marine Pollution Act.*
[28] The *South African National Foundation for the Conservation of Coastal Birds* (hereafter referred to as SANCCOB).
[29] Section 9(2)(b)(ii) of th *Marine Pollution Act.*
[30] Section 9(1)(c) of th *Marine Pollution Act.*

damage, its domestic legislation nevertheless makes provision for damage claims arising from oil pollution that are very similar in their ambit to those stipulated under the 1992 CLC Protocol. The 1992 CLC Protocol increases the liability limit of the shipowner further and replaces the original definition of pollution damage. The new definition allows for compensation for damage to the marine environment, yet is clearly limited to the costs of reasonable measures to restore the polluted environment. This constitutes a claim for pure economic loss. It would therefore seem that non-monetary harm, such as loss of aesthetic value and damage to the environment *per se*, is excluded.[31]

The extent of the shipowner's liability in terms of the *Marine Pollution Act* is not limitless. Provided that the damage or costs incurred resulted from an incident which was not due to the owner's fault, the aggregate of all amounts payable by the owner in respect of this liability is not to exceed the stipulated amounts.[32]

Subsequently it can be concluded that in the *Marine Pollution Act* there are already a few indications, like section 9(2)(b)(ii) and section 9(1)(c) of the *Marine Pollution Act,* pointing in the right direction, *viz.* to widen the definition of pollution damage to include claims for pure economic loss as a result of environmental pollution. The expansion of the definition of pollution damage is of importance. The restrictive or limiting definition of damage in South African law is a tool to limit liability.

South African legislation has unintentionally, as referred to above, paved the way for the acceptance of these international conventions, which will be discussed below. Their stipulations and provisions do not contradict the intention of the South African legislation, but rather complement it. Due to these facts South Africa should extend the liability of shipowner by ratifying the international conventions referred to above accordingly.

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[31] Redgwell 1992 *MP* 93.
[32] Section 9(8)(a) of th *Marine Pollution Act.*

3. The liability of a shipowner in terms of international la

3.1 The International Convention on Civil Liability for Oil Pollution Damage of 1969[33]

This convention, incorporated into South African law in 1981 by the *Marine Pollution Act*, establishes an international oil pollution compensation syste whereby strict liability is imposed on the owners of certain categories of vessels that cause oil pollution damage. However, this is subject to certain exceptions.[34] Liability is limited to a prescribed amount linked to the tonnage of the ship in question, unless the incident arose as a result of the actual fault of the owner. Liability is then potentially limitless.[35]

The provisions of the CLC apply only to pollution damage that is caused in the territory (including the territorial sea) of a contracting state. Pollution damage is defined as:

> ...loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures.[36]

Accordingly the applicability of the convention is limited only to oil pollution. This is a restrictive definition, but pure economic loss may be included in this definition. The broadly worded definition of pollution damage was initially the subject of considerable criticism, as it was unclear whether it included only physical damage within its scope (such as actual damage to property), or whether pure economic loss, such as loss of income by fishermen or hotel owners, could also be recovered. It was equally unclear whether damage to the environment as such was covered by pollution damage, and if so how such

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[33] *International Convention on Civil Liability for Oil Pollution Damage* , 1969 (hereafter referred to as the CLC).
[34] Section 3 of the CLC.
[35] Section 5(2) of the CLC.
[36] Section 1(6) of the CLC.

damage could be quantified in monetary terms. [37] The definition itself provided no answer to the question of whether or not damage to the environment *per se* could be compensated, and accordingly it was left to national courts to resolve the question in the light of domestic law.[38]

Two protocols to the CLC were adopted.[39] These protocols will be addressed in full detail in section 3.3.

3.2 The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971[40]

At the outset it should be noted that South Africa has not acceded to this convention. This is due to the fact that contributions to the fund established by the convention are dependant on oil imports and the previous government was unwilling to disclose relevant import information in this regard.[41] However, it is desirable that the new government accede to the convention as soon as practically possible[42] in order for the country to enjoy the greater limits to liability which this convention offers. Section 25(1) of the *National Environmental Management Act* 107 of 1998 states that:

> Where the Republic is not yet bound by an international environment instrument, the Minister may make a recommendation...which may deal with...benefits to the Republic...[43]

Thus, with regard to the *Fund Convention,* in order to fulfil his obligation under the *National Environmental Management Act,* the Minister should recommend that South Africa access and ratify this convention and its two protocols[44].

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[37] Glazewski J *Environmental Law in South Afric* 802.
[38] Jacobsson and Trotz 1986 *J. Mar. L. & Com.* 479.
[39] The 1984 Protocol to the CLC and the 1992 Protocol to the CLC.
[40] The *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* of 1971 (hereafter referred thereto as th *Fund Convention*).
[41] Hare J *Shipping Law and Admiralty Jurisdiction in South Africa* 413; Glazewski J *Environmental Law in South Africa* 804.
[42] Glazewski J *Environmental Law in South Afric* 804.
[43] Section 25(1)(c) of the *National Environmental Management Act* 107 of 1998 (hereafter referred to as the *National Environmental Management Act*).
[44] These two protocols are th *Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* of 19

The *Fund Convention* complements the CLC by providing further compensation for victims of oil pollution damage. An international fund for compensation for pollution damage is established by the convention.[45] Compensation is to be paid by the Fund to persons who have suffered pollution damage and who are unable to obtain full compensation for the damage under the CLC due to the fact that:

- no liability for the damage arises under the CLC;[46]
- liability does arise under the CLC but the ship owner is financially incapable of meeting these obligations and the financial security provided likewise does not cover the claim,[47] and
- the damage exceeds the liability limit laid down in the CLC.[48]

There are a number of exceptions to this obligation. The Fund may likewise be wholly or partially absolved from such obligations if the owner through fault or privity failed to comply with specified international agreements, and the damage was caused (wholly or partially) by such non-compliance.[49]

Three protocols were developed in an attempt to amend the convention, with only the *Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* of 199 [50] having been adopted. South Africa has not adopted the *Fund Convention* but should consider doing so. The advantages for South African claimants are significant. They can now, for instance, join in the drastically increased Fund compensation for oil pollution losses. South Africa could further benefit fro the ratification of the *Fund Convention* due to the fact that this convention increases the shipowner's liability for damages and thus disburdens the public

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and the *Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* of 1992.

[45] The International Oil Pollution Compensation Fund is established by section 2(1) of the *Fund Convention* (hereafter referred thereto as the Fund).

[46] Section 4 (1)(a) of the *Fund Convention.*

[47] Section 4 (1)(b) of th *Fund Convention.*

[48] Section 4(1)(c) of th *Fund Convention.*

[49] Section 5(3) of th *Fund Convention.*

[50] *Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1992* (hereafter referred to as the *1992 Protocol to the Fund Convention*).

hand. It is therefore strongly recommended that South Africa take steps to accede to the *Fund Convention.*

Because of the fact that the top-ups are paid from the Fund itself, to which a claimant state needs to have been a contributor, it is not possible simply to enact the Fund's higher limits into domestic legislation.[51] This is why South Africa should access and ratify the *Fund Convention* and its two protocols.

3.3 The 1992 Protocols to the CLC and the Fund Convention

The 1984 Protocol and the 1992 Protocol to the CLC increase the liability caps of a shipowner[52], because after the Amoco Cadiz disaster in 1978 it was felt that the limits of liability under the oil pollution conventions were too low.[53] Due to the fact that the definition of pollution damage in the CLC was rather vague and unclear, the 1992 CLC Protocol replaces the original definition of pollution damage with the following definition:

> ...loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken[54]

and

> ...the costs of preventive measures and further loss or damage caused by preventive measures.[55]

This new definition allows for compensation for damage to the marine environment, yet it is clearly limited to the costs of reasonable measures to restore the polluted environment. It would therefore seem that non-monetary harm, such as loss of aesthetic value and damage to the environment *per se*, are excluded. The new definition makes it possible to claim compensation for certain types of economic loss resulting from the impairment of the environment

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[51] Hare J *Shipping Law and Admiralty Jurisdiction in South Africa* 419.
[52] Section 6(1) of the 1992 Protocols, replacing section V(1) of the CLC.
[53] Brans 1994 *TMA* 64.
[54] Section 2(3) of the 1992 Protocols to the CLC.

and for environmental damage, but only in so far as measures to reinstate the environment are reasonable and are actually undertaken or to be undertaken.[56]

In comparison to the previous definition of the CLC, where it was unclear as to whether damage to the environment as such was covered by pollution damage, the recent definition now states explicitly that economic loss as defined above is covered. Use of the wording 'actually undertaken or to be undertaken' further limits the scope of the definition and therefore limits its application. Compensation is based on a theoretical calculation of damage to the environment rather than actual proof of reinstatement costs being provided for. Although this new definition is more specific, it is still up to the courts to decide on the interpretation and application of the wording of the definition.[57] The fact as to what is regarded as reasonable might be a basis for deviating interpretations and difficult decisions by the national courts of member states.

It should be noted that while South Africa acceded to the CLC, it has not adopted either of these two protocols.[58] This is an anomaly resulting in South Africa lagging behind in the liberal liability provisions which most coastal states provide for.

According to section 25 of the *National Environmental Management Act,* the Minister should recommend that South Africa access and ratify these 1992 Protocols to the CLC and the *Fund Convention*. South Africa could benefit by ratifying these protocols in two instances. Firstly the 1992 Protocol would increase the shipowner's liability for damages significantly and would therefore take the financial burden from the government and the public hand. Due to the fact that the 1992 Protocol provides for claims and compensation for certain types of economic loss resulting from the impairment of the environment and for environmental damage, it will secondly improve the situation of South African claimants considerably.

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[55] Section 2(3) of the 1992 Protocols to the CLC.
[56] Brans 1995 *Env. Liability* 66.
[57] Brans 1995 *Env. Liability* 66.

3.4 The Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal of 1989[59] and the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal of 1999[60] [61]

The *Basel Convention* does not necessarily relate to oil pollution and the liability of a shipowner but is nevertheless worth a brief mention. It can be used to illustrate recent international trends regarding the regulation of maritime environmental liability and can therefore act as a guideline on how one could deal with compensation and liability pertaining to pollution damage.

South Africa acceded to the *Basel Convention* in May 1994[62] and published a rather poorly drafted proposed policy on hazardous waste managemen [63] later that year.[64] To date, seven years later, the proposed policy remains a policy and nothing further has been done.[65] However, South Africa has not yet acceded to the *Basel Protocol*, but as the government is considering becoming a party to the protocol, the provisions of the *Basel Protocol* are of relevance.

The *Basel Convention* was the first comprehensive global attempt to address problems relating to the generation and transboundary movements of hazardous waste. This convention does not ban the transboundary movement of waste, but rather seeks to regulate the international transport and disposal of hazardous and other waste. It imposes duties on transportation and disposal of waste fro countries of origin, while acknowledging individual countries' rights to prohibit

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[58] South Africa acceded to the Convention in March 1976.
[59] Hereafter referred to as th *Basel Convention.*
[60] Hereafter referred to as th *Basel Protocol.*
[61] According to section 1 of the *Basel Protocol* the objective of the protocol is to provide for comprehensive regime for liability and adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other wastes and their disposal including illegal traffic in those wastes. According to section 4 of th *Basel Protocol* the person who the incident shall be liable for damage until the disposer has taken possession of the hazardous wastes and other wastes.
[62] GN 1501 *GG* 19162 21 Aug. 1998 p 1.
[63] Proposed policy in terms of the *Environment Conservation Act* 73 of 1989 – on Hazardous Waste Management, GN 1064 in *GG* 15987 30 Sept. 1994.
[64] Kidd M *Environmental Law* 142.
[65] Glazewski J *Environmental Law in South Afric* 676.

the importation of waste.[66] Its ultimate aim is to protect human health and the environment from danger of hazardous and other wastes.[67]

The issue of civil liability and compensation was left open by the *Basel Convention*. However, section 12 of the *Basel Convention* requires the contracting parties to:

> ...co-operate with a view of adopting, as soon as practicable, a protocol setting out rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes.

Accordingly, the *Basel Protocol* was adopted at the fifth meeting of the conference of the parties in December 1999. However, it is not in operation yet. The *Basel Protocol* provides civil liability and compensation for victims of pollution and environmental damage resulting from transboundary movement of hazardous waste. Damage as defined in the *Basel Protocol* includes:

> ...loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment, taking into account savings and costs;[68]

or

> ...the cost of measures of reinstatement of the impaired environment, limited to the costs of measures actually taken or to be taken[69]

and

> ...the cost of preventive measures, including any loss or damage caused by such measures, to the extent that the damage arises out of or results from hazardous properties to the waste involved...[70]

The *Basel Convention* does not refer to pollution damage, but only to damage. This constitutes a difference to the international conventions and the protocols thereto discussed above, which refer expressly to pollution damage.

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[66] Section 4(1)(a) of th *Basel Convention.*
[67] Preamble to th *Basel Convention.*
[68] Section 2(2)(c)(iii) of th *Basel Protocol.*
[69] Section 2(2)(c)(iv) of the *Basel Protocol.*
[70] Section 2(2)(c)(v) of the *Basel Protocol.*

According to this definition, damage arising from environmental damage unassociated with economic loss is therefore not covered by the *Basel Protocol.* Damage can only be recovered if it relates to loss of income directly derived from an economic interest in any use of the impaired environment and the cost of measures of reinstatement of the impaired environment and the costs of preventive measures according to the definition. When comparing this definition of the *Basel Protocol* with the ones contained in the 1992 Protocols to the CLC and the *Fund Convention,* it is obvious that they broadly concur.

The author can see no reason why South Africa, seven years after it proposed a policy on hazardous waste management, still has not ratified the *Basel Convention* and why it has not acceded to the far-reaching *Basel Protocol* yet.

Regarding the definition of pollution damage in order to expand the shipowner's liability in oil tanker casualties, South Africa should investigate the feasibility of incorporating similar provisions to those adopted by the *Basel Convention* and the protocol thereto, with a view to incorporating these into South African domestic law, *viz.* into the *Marine Pollution Act.* This would facilitate the liability of environmental damage and damage arising from environmental impairment.

3.5 Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution of 1969 [71] *and Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution of 1971*[72]

Due to a lack of efficient international law[73] providing comprehensive relief for victims of an oil pollution incident, as well as compensation for clean-up costs, tanker owners entered into the voluntary legally binding agreement TOVALOP. This agreement makes provision to reimburse national governments for expenses of preventing or cleaning up oil spills affecting their coastlines. That is why the scope of application is very limiting. Liability is therefore restricted.

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[71] Hereafter referred to as TOVALOP.
[72] Hereafter referred to as CRISTAL.
[73] Neither the CLC nor the *Fund Convention* was in force at the time.

Like TOVALOP, CRISTAL was a voluntary scheme, furnished to supplement compensation to governments and third parties who had suffered from damage by oil pollution in cases where the limited funds from TOVALOP and the CLC were insufficient to provide full compensation.

These private industry agreements provide for the capping of liability with regard to compensation for environmental damage resulting from oil spills. Due to this connection these agreements can be used to illustrate the development of international standards regarding the expansion of the liability of a shipowner in oil tanker casualties. At the outset it should be noted that although these two private industry agreements lapsed in 1997, they played a major part in the general scheme of compensation and assistance to be provided to victims of oil pollution.[74] The TOVALOP standing Agreemen [75] is only applicable when the CLC does not apply.[76] The claimant therefore has an additional possibility at his disposal to receive compensation. By means of that, TOVALOP contributes to the expansion of the liability of the shipowner.

The TOVALOP standing Agreement defines pollution damage as:

> ...loss or damage caused outside the tanker by contamination resulting from the escape or discharge of oil...and includes the costs of preventive measures, wherever taken, and further loss or damage caused by preventive measures but excludes any loss or damage which is remote or speculative, or which does not result directly from such escape or discharge.[77]

Thus pollution damage also includes any economic loss that can be proved as having actually been sustained. It is thereby irrelevant whether or not it has resulted from original physical damage, as long as it can be shown to be the direct result of contamination by the oil pollution incident.

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[74] For a comprehensive discussion on TOVALOP and CRISTAL see Bloodworth 1998 HYPERLINK http://www.law.fsu.edu//journals/landuse/Voll32/Bloo.ht 27 Sept.

[75] TOVALOP has been amended on numerous occasions. The most important changes took place in 1978 and 1987. In 1987, the TOVALOP Supplement was added to the original TOVALOP standing Agreement.

[76] Clause 4(B) of the TOVALOP standing Agreement.

[77] Clause 1(K) of the TOVALOP standing Agreement.

In conclusion, the TOVALOP standing Agreement provides for payment of compensation for pollution damage if all of the following requirements are met:

- the damage must result directly from an escape of oil;
- the tanker concerned has to be entered in the TOVALOP standing Agreement;
- reasonable preventive measures must have been taken, even in case of a threat of a spill, and
- the 1969 CLC does not apply.[78]

The fact that TOVALOP also allows for the reimbursement of the costs of preventive measures taken when the threat of pollution exists, namely before any oil has escaped from the ship but after the incident has taken place, is the greatest advantage of TOVALOP. When comparing TOVALOP with the international conventions discussed above, one must conclude that the inclusion of compensation of expenses incurred through threat removal measures makes the TOVALOP a more liberal and far reaching agreement.

CRISTAL defines pollution damage similar to that in TOVALOP.[79] CRISTAL also allows compensation for expenses incurred through threat removal measures.[80] Thus, according to CRISTAL and TOVALOP, the shipowner is also liable for compensation of expenses incurred through threat removal measures. This is therefore an expansion of the shipowner's liability.

In conclusion it can be noted that pollution damage is defined quite similarly to that in the *1992 Protocols to the CLC and the Fund Convention,* and it therefore shows once again what the international standards for shipowner liability are.

The South African liability regime, based upon CLC, and since 1997 without the supplement of TOVALOP and CRISTAL, has fallen far behind international norms. Since TOVALOP and CRISTAL were abolished in 1997 and therefore do not constitute a backup any more to supplement compensation to the South

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[78] Chao W *Pollution from the Carriage of Oil by Sea: Liability and Compensation* 108.
[79] Chao W *Pollution from the Carriage of Oil by Sea: Liability and Compensation* 116.
[80] Chao W *Pollution from the Carriage of Oil by Sea: Liability and Compensation* 116.

African government and third parties, in the case where the CLC does not apply or where the limited funds from the CLC were insufficient to provide full compensation, it is even more urgent for South Africa to catch up with international standards. This can be done by ratifying the respective conventions, namely the *Fund Convention* as well as the *1992 Protocols to the CLC and the Fund Convention.*

3.6. The International Convention on Liability and Compensation for Damage in Connection with Carriage of Hazardous and Noxious Substances by Sea of 1996[81]

The *HNS Convention* has been debated since 1984 because it was felt that it is necessary to develop a liability and compensation scheme for the damage which may occur as a consequence of an incident from vessels transporting chemicals and other hazardous substances.[82] Such liability was excluded from provisions in the previously discussed conventions pertaining to the carriage of oil and waste. A major oil spill is a catastrophe, but it is not the worst type of pollution. Spills of hazardous chemicals and noxious substances can be much more serious [83]

There is a need to ensure that adequate, prompt and effective compensation is available to persons who suffer damage caused by incidents in connection with the carriage by sea of hazardous and noxious substances. Pursuant to section 7(1) of the *HNS Convention* the shipowner shall in general be liable for such damages. The aims of the *HNS Convention* are to provide, *inter alia*, for claims against the shipowner for pure economic loss as a result of environmental pollution suffered by victims of contamination and strict liability on the part of the shipowner. Besides that, it aims for higher limits of liability than the present general limitation regimes, and a system for adequate, prompt and effective compensation available to claimants.

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[81] Hereafter referred to as *HNS Convention.*
[82] Brans 1995 *Env. Liability* 68.
[83] Cooney 1993 *Hous. J. Int'l L.* 359.

The HNS Convention has adopted a two-tier regime of liability and compensation, which is modelled closely on the liability provisions developed in the CLC and the *Fund Convention*. The two-tier system provides for effective compensation.

Firstly, strict liability is placed upon the shipowner with a very limited range of defences [84] Furthermore the *HNS Convention* defines damage, *inter alia*, as:

> ...loss or damage by contamination of the environment caused by the hazardous and noxious substances, provided that compensation for impairment of the environment other than loss or profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.[85]

Thus the *HNS Convention* does not provide for claims for pure economic loss as a result of environmental pollution, but provides for claims for pure economic loss resulting from environmental impairment.

This definition is similar to the definition contained in the 1992 Protocol to the CLC. Compensation for loss of profit is mentioned explicitly in the definition to make it clear that claims for pure economic loss fall within the scope of application of the *HNS Convention*. This is noteworthy because it is in line with the objective of section 1(6)(c) of the *HNS Convention,* which intends to avoid as much as possible speculative claims based on abstract calculations of damage. Moreover the shipowner will be required to maintain insurance or other financial security to cover his liability for damage under the *HNS Convention*.

South Africa has signed the *HNS Convention,* but has not yet ratified it. Subsequently it can be concluded that if South Africa would ratify the *HNS Convention,* this will extend the protection of people and industries who suffer a loss of income or profit as a result of pollution incidents caused by hazardous and noxious substances enormously. In addition, the carriers of hazardous and

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[84] Section 7 of the *HNS Convention*
[85] Section 1(6)(c) of th *HNS Convention*

noxious substances will have to take extra care to prevent such casualties. South Africa should therefore consider ratifying the *HNS Convention*.

Regarding the definition of pollution damage in order to expand the shipowner's liability in oil tanker casualties, South Africa should investigate the feasibility of incorporating similar provisions to those adopted by the *HNS Convention*, with a view to incorporating these into South African domestic law, *viz.* into the *Marine Pollution Act*. This would facilitate the liability of environmental damage and damage arising from environmental impairment.

4. The liability of a shipowner in terms of the law of the United States of America

The government of the United States, however, has hindered further development of an international solution on civil liability for oil pollution damage. It has not ratified any of the abovementioned international conventions. It also refused to sign the 1984 Protocol to the CLC, which called for increased liability limits, thus preventing the protocol from coming into effect. [86] The United States refused to ratify the treaty because it contained low liability limits and because the treaties would pre-empt state law.[87]

Although the United States of America has not ratified any of the abovementioned international conventions, it seems to be one of the leading authorities where claims for pure economic loss with regard to maritime legislation have been considered.[88] The United States Congress instead adopted its own oil pollution legislation in the *Oil Pollution Act* of 1990.[89]

OPA is perceived as being one of the most comprehensive and onerous federal laws governing liability and compensation for oil pollution the world has ever known.[90] The majority of OPA provisions were targeted at reducing the number

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[86] Cooney 1993 *Hous. J. Int'l L.* 346.
[87] Cooney 1993 *Hous. J. Int'l L.* 346.
[88] Swanson 2001 *J. Mar. L. & Com.* 174.
[89] See text *supra* fn 6.
[90] De La Rue (ed) *Liability for Damage to the Marine Environment* 131.

of spills followed by reducing the quantity of oil spilled. OPA also created a comprehensive scheme to ensure that sufficient financial resources are available to clean up a spill and to compensate persons damaged by a spill.[91]

Under section 2702(b)(2)(B),(C) and (E) of OPA, each vessel operator or vessel owner discharging oil into navigable waters is liable to private claimants. Section 2702(b)(2)(B) of the OPA allows recovery for

> ...damages for injury to, or economic losses resulting fro destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.[92]

Furthermore section 2702(b)(2)(C) of the OPA allows recovery for

> ...damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed or lost, without regard to the ownership or management of the resources.[93]

Finally, section 2702(b)(2)(E) of the OPA allows recovery for

> ...damage equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss or real property, personal property, or natural resources, which shall be recoverable by any claimant.[94]

In addition, OPA defines natural resources to

> ...include...land, fish, wildlife, biota, water, ground water, drinking water supplies.[95]

OPA goes into great detail regarding the liability of responsible parties for consequences of natural resources damage. Non of the abovementioned international conventions provide for liability of the shipowner or of the vessel operator or of any responsible party for consequences of natural resources damage. This definition is more liberal than previously mentioned definitions. The provisions on the recoverability of damages for lost profits or impairment of earning capacity due to the injury, destruction or loss of natural resources and

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[91] American Petroleum Institute 1999 Oil Prevention and Response HYPERLINK http://www.api.org/oilspills/opa.ht 27 Oct.
[92] Section 2702(b)(2)(B) of OPA.
[93] Section 2702(b)(2)(C) of OPA.
[94] Section 2702(b)(2)(E) of OPA.
[95] Section 2701(20) of OPA.

the recoverability of damages for loss of subsistence use of natural resources, are remarkable.[96] In this way, the OPA makes an inroad into the economic loss doctrine and Robins' bright-line rule, which only permits recovery of financial loss if the loss resulted from physical damage to the claimant's property.[97]

The significance of the comprehensive list of recoverable damages listed above is that it overrules this 70 year-old doctrine.[98] Under OPA, however, remote parties with no direct interest in damaged property may properly recover fro the vessel owner, operators or other responsible persons economic loss in the absence of a showing of impact to property.[99] Thus, a claimant is now entitled to recover lost profits or lost wages due to the injury or destruction of natural resources. All that needs to be shown is a direct or proximate cause between the oil spill and the subsequent loss in order for a claimant to be entitled for compensation.[100]

The Congress did not define the specific class of claimants that may recover economic loss under section 2702(b)(2)(E) of the OPA. However, the legislative history indicates congressional intent to broaden the class previously allowed to recover under the Robins bright-line rule.[101] The expanded class allows claimants to recover, even though they do not own the damaged property. The Conference Committee Report states:

> Section 2702(b)(2)(E) provides that any claimants may recover for loss of profits or impairment of earning capacity resulting fro injury to property or natural resources. The claimant need not be the owner of the damaged property or resources to recover for lost profits or income. For example, a fisherman may recover lost income due to the damaged fisheries resources, even though the fisherman does not own those resources.[102]

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[96] Brans 1994 *TMA* 85.

[97] The economic loss doctrine was approved by the U.S. Supreme Court in *Robins Dry Dock & Repair Co v Flint* 275 US 303 (1927), has been affirmed many times and is now a rule of general maritime law. The rule seeks to limit liability in situations that have wide-reaching and potentially endless economic repercussions, such as oil spills. See Brans 199 *TMA* 85.

[98] De La Rue (ed) *Liability for Damage to the Marine Environment* 144.

[99] Brans 1994 *TMA* 85.

[100] De La Rue (ed) *Liability for Damage to the Marine Environment* 146.

[101] The Robins bright-line rule allows for recovery of economic loss only when the plaintiff has a proprietary interest in property that has suffered direct, physical damage. See Brans 199 *TMA* 85.

[102] Conference Committee Report No. 653, 101 st Cong., 2nd Session 103 (1990) reprinted in 1990 U.S.C.C.A.N. 780.

According to OPA, the responsible party is now liable for damages to natural resources.[103] Natural resource damage can be measured by the cost of restoring, replacing, or acquiring the equivalent of the damaged resources, and the diminution in value as well as the cost of assessing the damages. [104] It is the measurement of these potential damages, particularly the "the loss of use values"[105] and the "loss of non-use values"[106] that is so troublesome.

Compared with international oil regimes OPA is the harshest oil pollution legislation to date. It imposes higher limits of liability on vessels owner than the oil pollution and compensation conventions and it allows states in the United States to impose unlimited liability schemes. Without limited liability a fundamental conflict exists between the law of the United States and that of the international regimes.

Further, OPA permits full compensation for damage to the environment. Account is taken of restoration costs and the lost market values of damaged natural resources, as well as of non-use values such as option, existence and intrinsic value. OPA attempts to assess the total extent of environmental damages in a dollar amount. In addition, OPA created the Oil Spill Liability Trust Fund in order to compensate the costs associated with a massive spill. Funded by a tax on the petroleum industry, the fund contains $1 billion.[107]

Due to the fact that under OPA the claimant merely has to prove the direct or proximate cause between the oil spill and the subsequent loss in order to be entitled for compensation the way is open for speculative damage. One can therefore anticipate that the way of the United States with OPA and its liberal provisions will not be a possible way for South Africa when considering

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[103] See text *supra* fn 74.
[104] Section 2706(d) of OPA.
[105] Examples of use value include hunting, fishing, boating, bird-watching, and other actual uses of a natural resource.
[106] An example of a non-use value includes knowledge that the natural resource exists and may be used or valued by present or future generations.
[107] American Petroleum Institute 1999 Oil Prevention and Response HYPERLINK http://www.api.org/oilspills/opa.ht 27 Oct.

economical aspects. South Africa should rather catch up with the international standard by ratifying the international conventions discussed above.

South Africa should investigate the feasibility of incorporating similar provisions as those adopted by the OPA with a view to incorporating these into South African domestic law, *viz.* into the *Marine Pollution Act*. This would facilitate the liability of environmental damage and damage arising fro environmental impairment.

5. Conclusion

With regard to the CLC it can be concluded that the compensation of natural resource damage under the CLC and the *Fund Convention* is limited to quantifiable economic loss as a result of the damage to the environment. If the assessment of compensation is made on the basis of an abstract quantification and in accordance with theoretical models, the claim is not accepted. Due to the vagueness of the definition of pollution damage in the CLC, the compensation for environmental damage is an issue in a few pollution cases in member states.

The *1992 Protocols to the CLC and the Fund Convention* will end the confusion as to the admissibility of certain claims for environmental damage. Under the new protocols, a shipowner may be held liable for impairment of the environment, other than for loss of profits. The liability for the impairment is limited to costs for reasonable measures of reinstatement actually undertaken or to be undertaken. What is regarded as reasonable might be a basis for deviating interpretations and difficult decisions by the South African courts.

The situation in South Africa under the *Marine Pollution Act* is based upon the CLC. Although section 9 of the *Marine Pollution Act* also concerns pure economic loss, this definition for loss is still not inclusive of pure economic loss arising from environmental damage.

In conclusion it can be stated that in the *Marine Pollution Act* there are already a few hints[108] indicating a movement towards widening the definition of pollution damage with regard to pure economic loss as a result of environmental damage. The South African liability regime, based upon the CLC, and since 1997 without the supplement of TOVALOP and CRISTAL, has fallen far behind international norms. Since TOVALOP and CRISTAL were abolished in 1997 and therefore do not constitute a backup to the CLC any more, it is even more urgent for South Africa to catch up with international standards. This can be done by ratifying the respective conventions, namely the *Fund Convention* as well as the *1992 Protocols to the CLC and the Fund Convention.*

The expansion of the definition of pollution damage is of importance. The restrictive or limiting definition of damage in South African law is a tool to limit liability. Due to these facts South Africa should extend the liability of shipowner by ratifying the *1992 Protocols to the CLC and the Fund Convention.*

If one heeds the South African conditions, it becomes even more obvious why South Africa should take further steps. The South African coastline experiences extreme physical conditions, such as bad weather, heavy seas, abnormal waves and seasonal poor visibility. Furthermore, it lies on one of the most important oil traffic routes in the world and therefore forms a high-risk area for oil pollution.

It has consequently been strongly suggested that South Africa become a party to the 1992 Protocol to the CLC, as well as to the *Fund Convention.* This would enable the country to benefit from far higher liability limits allowed by these conventions than are currently provided for in domestic legislation. The advantages offered by these conventions with regard to liability limitations are relevant to further oil spills. It is accordingly suggested that a proactive stance be taken and that the government accede to these instruments.

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[108] Section 9(2)(b)(ii) and section 9(1)(c) of the *Marine Pollution Act.*

The definition of pollution damage according to the *Basel Protocol* as well as the definition of pollution damage according to the two international agreements, TOVALOP and CRISTAL, broadly follows the *1992 Protocols to the CLC and the Fund Convention.* These conventions and protocols resemble international norms and standards for vesting liability and therefore make it clear once again which recent international standards South Africa should consider following.

The *HNS Convention* does not necessarily relate to oil pollution and the damage caused thereby, but was merely used as a guideline to illuminate recent international trends regarding the regulation of maritime environmental liability. When one examines the *HNS Convention* , however, its advantages became apparent. The *HNS Convention* extends protection to people and industries who suffer a loss of income or profit as a result of pollution incidents caused by hazardous and noxious substances enormously. In addition, the carriers of hazardous and noxious substances will have to take extra care to prevent such casualties. South Africa should therefore, apart from the conventions with regard to oil pollution, also consider ratifying the *HNS Convention* and use its benefits.

Regarding the definition of pollution damage in order to expand the ship owner's liability in oil tanker casualties, South Africa should investigate the feasibility of incorporating similar provisions to those adopted by the *HNS Convention*, with a view to incorporating these into South African domestic law, *viz.* into the *Marine Pollution Act.* This would facilitate the liability of environmental damage and damage arising from environmental impairment.

Furthermore, the possibility of access to funds for oil pollution damage from the *South African Maritime Safety Authority*[109] fund should be investigated. This fund is financed by a levy imposed on vessels and as SAMSA is responsible for "safe clean seas", this possibility warrants attention.

A further suggestion relates to the difficulty in quantifying damage to the environment. Compared with international oil regimes, OPA is the harshest oil pollution legislation to date. It imposes higher limits of liability on vessel owners than the oil pollution and compensation conventions, and it allows states in the United Sates to impose unlimited liability schemes. Furthermore, OPA permits full compensation for damage to the environment.

Due to the fact that under OPA the claimant merely has to prove the direct or proximate cause between the oil spill and the subsequent loss in order to be entitled for compensation the way is open for speculative damage. One can therefore anticipate that the way of the United States with OPA and its liberal provisions will not be a possible way for South Africa when considering economical aspects. South Africa should rather catch up with the international standard by ratifying the international conventions discussed above.

Thus it is suggested that the feasibility of incorporating similar provisions to those adopted by the *United Sates Oil Pollution Act* of 1990 be investigated with a view to incorporating these into South African domestic law, in other words into the *Marine Pollution Act*. This would facilitate the liability of environmental damage and damage arising from environmental impairment.

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[109] *South African Maritime Safety Authority*, established by *Act* 5 of 1998 and having the power of administration of the *Marine Pollution Act* (hereafter referred to as SAMSA).

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7. Abbreviations

Env. Liability	*Environmental Liability*
GG	*Government Gazette*
GN	General Notice
Hous. J. Int'l L.	*Houston Journal of International Law*
J. Mar. L. & Com.	*Journal of Maritime Law and Commerce*
MP	*Marine Policy*
TMA	*Themaat Milien Aanspreeklikhijd*