REPORT

Remote Legal Assistance on the effective implementation of IMO conventions relating to oil pollution and liability and compensation

Namibia
2020

Global Initiative for Western, Central and Southern Africa

Consultant:

Dr. Emmanuel Kofi Mbiah*

* The views expressed in this report are those of the consultant and do not necessarily represent the views of IMO or IPIECA.

NOTE

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Executive summary

The remote review provided an opportunity for the consultant, together with the GI WACAF Project team, IMO officers, the IOPC Funds representatives and the Focal Points for the participating countries i.e. the Gambia, Liberia, Namibia and Nigeria, to remotely review the respective national legislation relating to oil pollution and liability and compensation. The review analyzed the gaps in the existing pieces of legislation and made recommendations towards the transposition of relevant IMO conventions into national legislation and their effective implementation. Oral feedback would subsequently take place with the National Focal Points to iron out areas of complexities and address outstanding issues before a finalization of the Report.

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Overview of the GI WACAF Project

Launched in 2006, the Global Initiative for West, Central and Southern Africa (GI WACAF) Project is a collaboration between the International Maritime Organization (IMO) and IPIECA, the global oil and gas industry association for advancing environmental and social performance, to enhance the capacity of partner countries to prepare for and respond to marine oil spills.

The mission is to strengthen the national system for preparedness and response in case of an oil spill in 22 West, Central and Southern African Countries in accordance with the provisions set out in the International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 (OPRC 90).

To achieve its mission, the GI WACAF Project organizes and delivers workshops, seminars and exercises, that aim to communicate good practice in all aspect of spill preparedness and response, drawing on expertise and experience from within governments, industry and other organizations working in this specialized field. To prepare and implement these activities, the Project relies on the Project's network of dedicated government and industry focal points. Promoting cooperation amongst all relevant government agencies, oil industry business units and stakeholders both nationally, regionally and internationally is a major objective of the Project during these activities.

GI WACAF operates and delivers activities with contributions from both IMO and seven oil company members of IPIECA, namely BP, Chevron, ExxonMobil, Eni, Shell, Total and Woodside.

More information is available on the Project's website.

1. Introduction

This remote assistance assignment for the enhancement of the capacities of four partner countries, initially consisted of a sub-regional workshop on the ratification and effective implementation of IMO Conventions relating to pollution and liability and compensation which was to be held in Accra, Ghana from 27th to 30th April, 2020. Seven English-speaking countries of the region were invited. The workshop was expected to address various challenges faced with the ratification and effective implementation of key IMO conventions as noted by participants of the 8th GI WACAF Regional Conference held in October, 2019[1].

However, due to the COVID- 19 Pandemic, the workshop was postponed and a remote legal assistance was initiated to achieve some of the activity's objectives remotely with the voluntary countries pending the possible organization of a sub-regional workshop.

As a preparatory step, questionnaires were sent to the National Focal Points of the four countries and the responses provided together with additional information on some of the relevant national legislation formed the basis for an overview of the conventions and gap analysis of the existing policy and legislative framework and the national legislation giving effect to the IMO Conventions. The questionnaires and responses are attached herewith as **Annex I**.

1.1. Objectives

The objectives as stated in the Terms of Reference, is to:

(i) assist policy makers, legislative advisers and/or drafters, responsible for the effective implementation, and transposition of IMO conventions into their domestic legislation.

(ii) provide the policy makers, drafters and legislative advisers with a deeper understanding of the underlying principles and objectives of the conventions.

(iii) guide policy makers, legislative drafters/or advisers on the legislative mechanisms that should be applied when developing and updating national laws.

To provide an insight into the legal implications of the ratification and adoption of the Marine Pollution Instruments, in particular the International Convention on Oil Pollution Preparedness, Response and Cooperation 1990 (OPRC 1990), The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Bunkers 2001), The International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC 1992), The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND 1992), the Protocol of 2003 to the FUND 1992 Convention (Supplementary Fund Protocol), and the Convention on Limitation of Liability for Maritime Claims 1976, as amended by the Protocol of 1996 (LLMC 1996).

The Terms of Reference are attached herewith as **Annex II**.

[1] Full report available through the following link: https://www.giwacaf.net/en/our/activities/8th-gi-wacaf-regional-conference/report

1.2. Expected outcomes

(a) To provide the four (4) beneficiary countries with a written gap analysis based on the review of the relevant national legislation.

(b) To provide the designated National Focal Points of the four (4) countries with tailored and comprehensive written and oral feedback for the domestication of the relevant IMO conventions.

1.3. Facilitators

Legal Affairs and External Relations Division of IMO

Mr. Jan de Boer, Senior Legal Officer

Ms. Aicha Cherif, Legal Officer

Marine Environment Division

Sub-Division for Implementation

Ms. Colleen O'Hagan, OPRC and OPRC-HNS Technical Officer

Mr. Clement Chazot, Technical Officer

GI WACAF Team

Mr. Julien Favier, GI WACAF Project Manager

Ms. Emilie Canova, GI WACAF Project Coordinator,

International Oil Pollution Compensation Funds (IOPC Funds)

Mr. Thomas Liebert, Head, External Relations & Conference

Mr. Mark Homan, Claim Manager,

2. Activities

On the 8th June 2020, Ms. Emilie Canova organized a meeting on Microsoft Teams in which Thomas Liebert, Jan de Boer, Aicha Cherif, Julien Favier, Clement Chazot and Dr. Mbiah participated. The meeting highlighted the objectives of the remote legal assistance on the effective implementation of IMO Conventions relating to oil pollution and liability and compensation. It also spelt out the modalities for the successful accomplishment of the assigned tasks. It noted in particular the gaps in the existing national legislations that seek to implement the relevant IMO Conventions.

The discussions during the Microsoft Team meeting also pointed out the need to provide an overview of the relevant conventions and the pertinent and underlying principles that should reflect in national legislation to make for effective implementation. Based on the said meeting, Emilie Canova got in touch with the National Focal Points of the respective countries and provided further materials in relation to the gap analysis of the various national legislation.

On 11th June, 2020, Jan de Boer, Senior Legal Officer and Aicha Cherif, Legal officer of the Legal Affairs and External Relations Division of the IMO also had a Microsoft Teams meeting with the Consultant. The meeting focused especially on the Bunkers Convention, the LLMC as amended and the limits of liability under the CLC and Fund Conventions. It noted the challenges that existed with some sections of the national legislations of some of the countries seeking to implement the provisions of the CLC and Fund Convention.

3. General observations

As indicated earlier, as part of the process of gathering information with respect to the current state of affairs of the respective countries, in relation to the relevant IMO conventions, questionnaires were sent to the respective countries. The Gambia responded with respect to The Gambia's acceptance of the relevant instruments, steps taken towards providing national legislation and the level of implementation.

Part 1 - Overview of the international instruments

1. International convention on oil pollution preparedness, response and cooperation 1990 (OPRC 1990)

Recognizing the serious threat posed to the marine environment by oil pollution incidents involving ships, offshore units, and oil handling facilities, IMO, in collaboration with other like-minded international organizations, worked to put together a convention on oil pollution preparedness, response and cooperation: the OPRC 1990.

1.1 Oil Pollution Emergency Plans

The Convention requires operators of offshore units, port authorities, terminals and oil handling facilities in contracting States to have an oil pollution emergency plan. It requires that when such plans are put in place, they should be harmonized with the national environmental pollution plans. In the same vein, ships are required to have on board an oil pollution emergency plan in line with the appropriate provisions of MARPOL.

1.2 Reporting Requirements

The Convention also requires ship masters and others in charge of ships, offshore units, sea ports and oil handling facilities, maritime inspection vessels or aircraft, and pilots of civil aircrafts to report any discharge or probable discharge of oil or the presence of oil.

Another very important provision is Article 5 which requires that as soon as the relevant authorities receive a report of pollution, an immediate assessment of its extent ought to be conducted. Once information is gathered based on the assessment, and if any action has been taken, same shall be communicated to other States with affected interests or States whose interests are likely to be affected by the pollution. It is also a requirement that this information be transmitted to the IMO or through the relevant regional organization, especially where the pollution damage is severe.

1.3 Designation of Competent Authorities

As a minimum requirement, the OPRC convention also requires under Article 6 that State Parties designate competent authorities for oil spill preparedness and response, receipt and transmission of oil spill reports, as well as those responsible for decision making. This is expected to be incorporated into an oil spill contingency plan. Article 6 is also important in view of the obligation it imposes on

contracting States to have at all times a minimum level of oil spill combating equipment, as well as a training and drills programme with a communication plan for coordination and response.

1.4 International Cooperation

One of the cardinal features of the OPRC Convention is the opportunity it provides for countries through the application of their national legislation to cooperate with other member States with respect to technical support services, equipment in dealing with marine pollution incidents should they arise. Coupled with the above provision is also the encouragement given to States to exchange information on research and development and to encourage dialogue for the development of standards in combating pollution. The above provisions are also buttressed by provisions in the convention which call for provision of support, transfer of technology and the development of joint research and development programmes, all geared towards effectively dealing with marine pollution. The Convention also in the spirit of cooperation, encourages bilateral and multilateral arrangements between States for effective preparedness and response in dealing with marine pollution.

National legislation could also be guided by provisions in the Convention that designate the IMO to perform functions and activities related to information services, education and training, technical services and technical assistance.

It is also important to mention that annexed to the Convention is a guidance on the reimbursement of the costs of assistance in accordance with the provisions of the International Oil Pollution Compensation Funds. The critical elements to note for the purpose of the transposition of the OPRC 1990 into national legislation is attached herewith as Annex V.

2. The international convention on civil liability for oil pollution damage 1992 (CLC 1992) and the international convention on the establishment of an international fund for compensation for oil pollution damage 1992 (Fund 1992)

2.1. International regime for ship source pollution

The international legal regime for the regulation of liability and compensation with respect to ship source pollution is governed essentially by three regimes, taking into account that the 2007 Nairobi Wreck Removal Convention may also apply, namely:

(i) **Tanker oil spills** – CLC 1992, Fund 1992 and the Supplementary Fund Protocol 2003.

(ii) **Bunker Oil Spills** – Bunkers 2001

(iii) **Damage caused by Hazardous and Noxious Substances** – International Convention on Liability and Compensation for Damage in Connection With the Carriage of Hazardous and Noxious Substances by Sea 2010 (HNS Convention).

For a country to cover issues of liability and compensation for pollution damage it needs to ratify or accede to all of these conventions. There are many IMO Member States who are parties to the CLC 1992 and the Fund 1992.

2.2. Salient features of the CLC 1992

The impetus for the development of the civil liability convention of 1969 was driven by the *Torey Canyon* disaster of 1967. The current international compensation regime for oil pollution damage is based on the CLC 1992, the 1992 Fund Convention and the Supplementary Fund Protocol of 2003.

The current international regime in its scope of application, **applies to pollution damage caused by spills of persistent oil from tankers in the territory (including the territorial sea) or the Exclusive Economic Zone (EEZ)** or equivalent area of a State party to the respective treaty instrument.

Under the CLC 1992, all liability is channeled to the registered shipowner with strict liability for pollution damage caused by the escape or discharge of persistent oil from the ship of the owner. By implication, the owner is therefore liable without proof of fault. i.e. the liability of the shipowner is not fault based.

The owner would however be exempt from liability under certain specific circumstances. The owner would have to prove that:

(i) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character or

(ii) the damage was wholly caused by an act or omission done with the intent to cause damage by a third party, or

(iii) the damage was wholly caused by the negligence or the wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids, in the exercise of that function.

The Convention defines pollution damage as “loss or damage caused by contamination”. In the case of environmental damage (other than loss of profit from impairment of the environment) compensation is restricted to costs actually incurred or to be incurred for reasonable measures to reinstate the contaminated environment.

Generally speaking, an oil pollution incident can give rise to claims for five types of pollution damage:

(i) Property damage

(ii) Cost of clean-up operations at sea and on shore

(iii) Economic losses by fishers or those engaged in mariculture

(iv) Economic losses in the tourism sector

(v) Costs of reinstatement of the environment.

It is important to stress especially for the sake of national legislation, that under the convention, pollution damage includes measures, wherever taken to prevent or minimize pollution damage on the territory, territorial sea, or EEZ or as mentioned earlier, when dealing with the issue of scope of application, the equivalent area of a State party to the convention.

In addition, and especially, as some of these matters are subject to practical application, it is important to state that where preventive measures are undertaken which are deemed to be reasonable, the expenses are recoverable even where there is no spill of oil provided it can be established that there was a grave and imminent threat of pollution damage.

2.2.1 Limitation of Liability

The shipowner is normally entitled to limitation of liability in an amount determined by the tonnage of the ship for any one incident. It is also important to note that the unit of account for the limitation of liability is the Special Drawing Rights (SDR) of the International Monetary Fund. Adequate provision is made in the Merchant Shipping Act of 2013 reflecting the application of the Special Drawing Rights.

Limitation Amounts

The shipowner is normally entitled to limit his liability to an amount determined by the size of the ship, as set out in the following table.

SHIPS TONNAGE	**CLC LIMIT**
Ship not exceeding 5000 units of gross tonnage	4510 000 SDR
Ship between 5000 and 140000 units of gross tonnage	4510 000 SDR plus 631 SDR for each additional unit of tonnage
Ship 140000 units of gross tonnage or over	89 770 000 SDR

2.2.2 Compulsory Insurance

For ships carrying more than 2,000 tonnes of oil as cargo in bulk, the shipowner is obliged to maintain insurance to cover the shipowner's liability under the convention. One very important aspect of the CLC 1992 is the right of the claimant to direct action against the insurer. The Convention deals with laden oil tankers, and to bunker spills from unladen oil tankers having residues of persistent oil from a previous voyage on board following the carriage of oil in bulk as cargo. Tankers are required to carry on board a certificate of proof of insurance coverage and requisite provisions ought to be included in national legislation not only for ships flying the flag of State parties to the Convention but also to non-parties to the CLC 1992 Convention.

2.2.3 Channelling of Liability

As mentioned earlier, due to the channeling of liability to the registered owner, the 1992 CLC prohibits claims against the servants or agents of the owner, the members of the crew, the pilot, the charterer (including a bareboat charterer), manager or operator of the ship, or any person carrying out salvage operations or taking preventive measures, unless the pollution damage resulted from the personal act

or omission of the person concerned, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

For ships not registered in a State party, the Competent Authority of any State Party may issue the insurance certificate or inspect the certificate in standard form (known as the Blue Card) issued by the insurer as evidence of cover.

2.2.4 Scope of Application

It is also important to state that the CLC 1992 applies to any sea-going vessel and any seaborne craft of any type whatsoever constructed or adopted for the carriage of oil in bulk as cargo. The convention in principle applies to barges if they are sea-going and this must be noted for the purposes of national legislation. It is also important to note that the Convention defines oil as "any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil whether carried on board a ship as cargo or in the bunkers of such a ship". In effect the convention does not cover gasoline, light diesel oil, kerosene, palm oil, whale oil, olive oil, biofuels.

2.2.5 Jurisdiction

Courts of the State Party to that Convention in whose territory, territorial sea or EEZ or equivalent area the damage occurred can assume jurisdiction in actions against the owner for compensation for oil pollution damage. National legislation should thus make provision to ensure that State Courts are clothed with the requisite jurisdiction to handle such matters.

2.3. Salient features of the 1992 Fund Convention

The 1992 Fund Convention is supplementary to the 1992 CLC and establishes a regime for compensating victims when compensation under the 1992 CLC is unavailable or inadequate. The Fund pays compensation in situations where:

(i) the damage (claims) exceeds the limit of the ship owner's liability under the 1992 CLC; or

(ii) the owner is exempt from liability under the CLC; or

(iii) the owner is financially incapable of meeting the claims obligations under the CLC and there is insufficient insurance cover for all the claims.

States are required to be parties to the 1992 CLC in order to become parties to the 1992 Fund Convention.

2.3.1 Contribution oil (cargo)

The 1992 Fund is financed by contributions levied on any person who has received in one calendar year more than 150,000 tons of crude oil and or heavy fuel oil (contribution oil) in a Member State of the Fund. Again, requisite provisions ought to be made in national legislation to take account of this. It is also important to note that the 1992 Fund would not pay compensation where:

(a) the damage occurred in a State which was not a member of the 1992 Fund; or

(b) the pollution damage resulted from an act of war or was caused by a spill from a warship; or

(c) the claimant cannot prove that the damage resulted from an incident involving one or more ships as defined (i.e. a sea-going vessel or seaborne craft of any type howsoever constructed or adopted for the carriage of oil in bulk as cargo).

2.3.2 Limits of Compensation

The maximum compensation payable by the 1992 Fund is 203 million SDR for incidents occurring on or after 1st November 2003, irrespective of the size of the ship. For incidents which occurred before the 1st November 2003, the maximum amount payable is 135 million SDR. These maximum amounts include the sums actually paid by the shipowner by virtue of the provisions of the 1992 CLC.

2.3.3 Jurisdiction

Courts of the State Party to that Convention in whose territory, territorial sea or EEZ or equivalent area the damage occurred can assume jurisdiction in actions for compensation under the 1992 Fund.

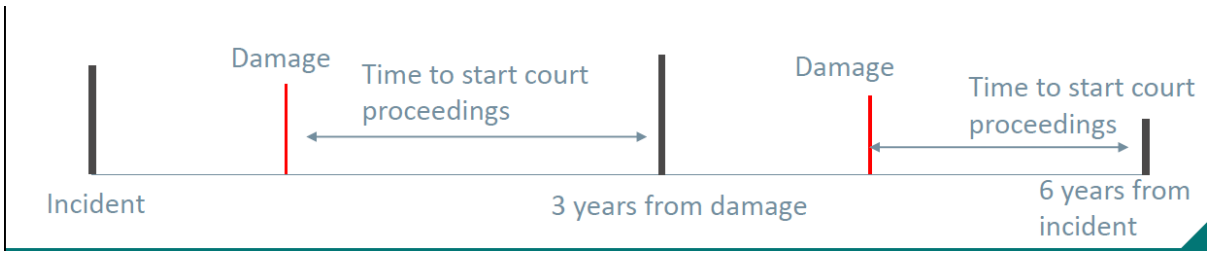
2.3.4 The Supplementary Fund Protocol

The supplementary Fund Protocol was adopted in 2003 and entered into force in 2005 and thus brought into being the Oil Pollution Compensation Supplementary Fund, 2003 (Supplementary Fund).

The Supplementary Fund is purposed to provide additional compensation beyond the amount available under the 1992 Fund Convention in 1992 Fund Member States which are also parties to the Protocol. The total amount available for each incident is 750 million SDR including the amounts payable under the 1992 Conventions (i.e. the CLC and Fund Conventions). Membership of the Supplementary Fund is optional and any State which is a member of the 1992 Fund may join the Supplementary Fund. The Gambia is not a party to the Supplementary Fund.

2.3.5 Time bar

Rights to compensation under the 1992 CLC, the 1992 Fund Convention and the Supplementary Fund Protocol shall be extinguished unless action is brought within 3 years from the date when the damage occurred. However, in no case shall an action be brought after 6 years from the date of the incident which caused the damage. This is to take account of latent pollution damage. It should be noted that notification to the Fund of an action against the shipowner does not interrupt the six years period.



For the proper and equitable functioning of the liability and compensation regimes for oil pollution damage, it is crucial that the conventions are applied and implemented uniformly in all States so that claimants would be given equal treatment with regards to compensation enjoyed by all State parties. This is why it is important that national legislation reflects accurately the tenets of the instruments.

In this regard, it is also essential that State parties set a comparable time of three years from the date of damage being incurred, for filing claims at any limitation court established, in order to ensure that claimants are given full opportunity to file claims and receive any compensation they may be due.

3. The international convention on civil liability for bunker oil pollution damage 2001 (Bunkers 2001)

3.1 Salient Features of the Bunkers Convention

After the adoption of the Civil Liability and Fund Conventions, it became clear that there was still an "orphan" in the liability and compensation regime that had not been attended to. The CLC regime dealt with oil tankers and not other ships whose bunkers had the capacity to pollute. The Bunkers Convention, even though modeled on the Civil Liability Convention for oil pollution damage is a free-standing instrument covering pollution damage from ships' bunker oil only.

The Convention was adopted to ensure that adequate, prompt and effective compensation is available to persons who suffer damage caused by spills of oil when carried as fuel in ships' bunkers. The Convention applies to damage caused on the territory, including the territorial sea, and in the Exclusive Economic Zones of States Parties to the Convention.

The main features of the Bunkers Convention include the strict liability of the shipowner including the registered owner, the bareboat charterer, manager and operator of the ship. Under the Convention, the shipowner is entitled to limitation of liability but must obtain compulsory insurance and the Convention also provides for direct action against the insurer.

Even though the Bunkers Convention is modelled along the lines of the CLC 1992, there are marked differences between the two regimes which ought to be taken note of, especially in the elaboration of national legislation. The definition of oil (bunker oil) is different from the definition of oil under the CLC. Under the Bunkers Convention, the bunker oil of a ship includes "any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil".

For national legislation therefore, it must be noted that an acceptance of the CLC regime cannot be a substitute for the adoption of the provisions of the Bunkers Convention and separate legislation ought to be enacted to give vent to the Bunkers Convention.

The definition of bunker oil under the Bunkers Convention, even though broad, still requires proof of intention of use for a distinction to be made between fuel and cargo oil.

Apart from the definition of bunker oil, other definitions are of significant importance and they must be made to reflect appropriately in national legislation.

The shipowner is defined to include the registered owner, bareboat charterer, manager and operator of the ship. It is therefore important to bear in mind that there is no civil liability responder immunity; so while the registered owner, bareboat charterer, manager, operator of the ship may be covered by

the immunity of the shipowner, others that are associated with the operations of the ship such as the crew and salvors may be left exposed to claims especially where the national law imposes strict liability in all circumstances. The same may apply to State Authorities where they respond to an oil spill.

It is however important to note that the Conference which adopted the Bunkers Convention also adopted Resolution 3 on Protection for persons taking measures to prevent or minimize the effects of oil pollution, attached to the Final Act of the Bunkers Convention. By virtue of the Resolution, State Parties are permitted to legislate at the national level for such immunity to persons taking measures to prevent or minimize the effects of bunker oil pollution damage. The legislative drafter should thus take cognizance of this and include appropriate provisions of immunity to encourage measures to prevent or minimize bunker pollution damage. Pollution from warships or ships on Government non-commercial service unless a State Party decides otherwise, are excluded from the application of the Convention. It needs to be noted that where State owned ships are used for commercial purposes they then come under the purview of the Convention and the jurisdiction provisions become applicable.

3.1.1 Limitation of Liability

The Convention permits the shipowner or any other person providing insurance or other financial security the right to limitation of liability. It is however worthy of note that unlike the 1992 CLC, the Convention permits such limitation under any applicable national or international regime such as the Convention on Limitation of Liability for Maritime Claims 1976, as amended. In this regard, and for the purposes of national legislation, it is important to note that attached to the Final Act of the Conference that adopted the Bunkers Convention is Resolution 1 on Limitation of Liability which urges all States to ratify or accede to the 1996 Protocol to the LLMC 76. The purpose is to create flexibility for the increase of the Fund available for all claims, including bunker pollution claims.

3.1.2 Compulsory Insurance

The threshold for maintenance of insurance by the registered owner is ships with a gross tonnage of 1,000 and above. The insurance is expected to cover the liability in an amount equal to the limits of liability under the applicable national or international regime but not exceeding an amount calculated in accordance with the Convention on limitation of liability for Maritime Claims 1976 as amended. It is thus clear that the Bunkers Convention sets no limits of its own and national legislation may thus set the limits in accordance with the LLMC 76, as amended.

Article 7(1) of the Bunkers Convention dealing with compulsory insurance or financial security states the following:

> 'The registered owner of a ship having a gross tonnage greater than 1000 registered in a State Party shall be required to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover the liability of the registered owner for pollution damage in an amount equal to the limits of liability under the applicable national or international limitation regime, but in all cases, not exceeding an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.'

In effect, in drafting national legislation on the Bunkers Convention, it would be important to align the Bunker Pollution Damage Limitation Amount (which in this case does not include claims in respect of

death or personal injury except if these are caused by contamination) to the amounts provided under the LLMC 76, as amended. Indeed, this is important in view of the fact that if higher limits should be provided under national law there would be no insurance cover for any higher limits which go beyond the LLMC 76, as amended.

In drafting national legislation, provisions with respect to liability and compensation on oil spills cannot be made generic to cover both the 1992 CLC and the Bunkers Convention. The CLC 1992 sets the compulsory insurance requirement to a ship carrying a minimum of 2,000 tonnes of oil as cargo while the bunkers convention sets the compulsory insurance limits of ships of 1,000 gross tonnes and above regardless of the type of ship.

The national legislation may also make provisions to exclude vessels on domestic voyages from the compulsory insurance requirement provided for in Article 7 (15). As pointed out earlier, personal injury and death is not covered under the Convention if not caused by contamination.

3.1.3 Jurisdiction

It is also worth noting that national courts which assume jurisdiction under the Convention may be called upon in special circumstances to interpret an incident that creates a "grave and imminent threat of causing such damage". Requisite provisions would thus have to be incorporated in national legislation on Bunker Pollution damage to take account of compensation for pro-active mobilization of equipment and support services.

3.1.4 Time Limits

The time limits of three and six years are as under the 1992 CLC and 1992 Fund Convention and same may be incorporated into national legislation. In drafting national legislation on Bunkers, where the country is already party to the 1992 CLC and the 1992 Fund Convention, it should be noted that under Article 4 (1) relating to exclusions, the Bunkers Convention does not apply to pollution damage as defined in the CLC 1992, whether or not compensation is payable under that Convention. The Bunkers Convention is a stand-alone instrument and not an alternative or additional scheme to the 1992 CLC or the 1992 Fund Convention.

The Bunkers Convention is established to fill a gap in the liability and compensation regimes of oil pollution damage. In effect therefore, where pollution damage is caused by tankers, one can only look to the 1992 CLC and the 1992 Fund Convention or the 2003 Supplementary Fund as the case may be, for compensation.

A presentation by Jan de Boer which covers all the essential elements of the Bunkers Convention and which will be useful for the national Focal Points is attached herewith as **Annex III**. See also the Guidance on the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Bunkers Convention) as **Annex IV**.

4. Convention on limitation of liability for maritime claims 1976 as amended by the 1996 protocol

4.1 Salient Features of the Convention

"I agree that there is not much justice in this rule, but limitation of liability is not a matter of justice. It is a rule of public policy which has its origins in history and its justification in convenience"

Per Lord Denning in his so-called final word in the case of the *Bramley Moore.*

Limitation of liability is thus a legal concept with historical origins, which places a limit on the financial exposure of the shipowner regardless of the actual claim for which he is to be liable. In its origins, it was based upon the concept of abandonment and indeed that was the basis for the development of the International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Sea going vessels 1924 bringing into being the concept of global limitation after the Titanic incident in 1912. Thus, the limitation amount was tied to the value of the ship after the casualty.

4.1.1 Limitation According to Tonnage of Ship

The International Convention relating to the Limitation of Liability of Owners of Seagoing Ships 1957 introduced the concept of limitation according to the tonnage of the ship and which has since been followed by the Convention on Limitation of Liability for Maritime Claims 1976 and its subsequent amendments.

The 1976 Convention, sets the maximum financial liability for ship owners and salvors in respect of all claims arising out of a maritime incident which involves property damage and injury and loss of life.

Persons entitled to limit liability is interpreted in Article 1 to include owner, charterer, manager and operator of a sea-going ship. It also includes salvors, any person for whose act or neglect or default the shipowner or salvor is responsible and insurers of liability to the same extent as the assured. National legislation would be required to set this out clearly.

4.1.2 Increased Limits

The 1976 Convention increased substantially the limits of liability set by the 1957 Convention and as a *quid pro quo* for the increase, it provided for a practically unbreakable system of limiting liability. Limitation of liability could only be broken by proving that that loss was occasioned by the personal act or omission of the shipowner, committed with the intent to cause such a loss, or recklessly and with knowledge that such loss would probable result.

In setting the maximum limits, the Convention distinguished between claims for personal injury and death, and other claims.

Even though the limits were fixed in SDR and were considered at the time to be very high, over time, they were eroded by inflation and needed revision.

4.2 Protocol of 1996

New limits were therefore adopted in 1996 through the Protocol to the 1976 Convention. Under the 1996 Protocol, the limit of liability for personal injury claims of ships up to 2,000 gross tonnes was set at 2 million SDR. Since the liability was tied to the ship's tonnage, maximum limits were set for larger ships:

- at 800 SDR for each tonne from 2,001 to 30,000 tonnes; and
- at 600 SDR for each tonne 30,001 to 70,000 tonnes.

For other claims, the limits for ships not exceeding 2000 gross tonnes was set at 1 million SDR.

For larger ships the following maximum amounts were set:

- At 400 SDR for each tonne from 2,001 to 30,000 tonnes;
- At 300 SDR for each tonne from 30,001 to 70,000 tonnes; and
- At 200 SDR for each tonne in excess of 70,000 tonnes.

It is important to note that Article 8 of the convention provided a vent for future increases in limits through the tacit amendment procedure with a provision for the effective date of the coming into force of such amendments after 36 months.

4.3 New Limits

Time again eroded the limits and thus in 2012 the tacit amendment procedure was invoked for new limits which took effect on 8th June 2015. The adjustment of the increase was up to 51 percent of the existing limits.

The new limits were set as follows:

- At 1,208 SDR for each tonne from 2,001 to 30,000;
- At 906 SDR for each tonne from 30,001 to 70,000 tonnes; and
- At 604 SDR for each tonne in excess of 70,000 tonnes.

It has to be noted that the limit for loss of life or personal injury on ships not exceeding 2000 gross tonnes is 3.02 million SDR.

The limits were also adjusted for other claims as follows:

- 1.51 million SDR for ships not exceeding 2000 gross tonnes
- For larger ships:
    - At 604 SDR for each tonne from 2,001 to 30,000 tonnes;
    - At 453 SDR for each tonne from 30,001 to 70,000 tonnes; and
    - At 302 SDR for each tonne in excess of 70,000 tonnes.

4.4 Claims Subject to Limitation

The claims that could be subject to limitation are clearly spelt out in the convention as follows:

(i) Claims in respect of loss of life or personal injury or loss of or damage to property.
(ii) Claims resulting from delay. Article 2 (1) (b) right to limit with respect to delay in carriage of goods by sea, passengers or luggage.
(iii) Claims for infringement of rights other than contractual rights occurring in direct connection with the operation of the ship or salvage operations. Article 2(1) (c) e.g. blocking the approach channels to the port, pure economic loss.
(iv) Claims for wreck & cargo removal and for removal of dangerous cargo for destruction.
(v) Claims in respect of measures taken in order to avert or minimize loss.

4.5 Claims Excepted from Limitation

The Convention also provides for claims which are exempted from limitation and these include:

(a) Salvage and General Average. This applies to direct claims by salvors
(b) Claims for oil Pollution Damage within the meaning of CLC
(c) Nuclear damage claims
(d) Claims by Servants of the shipowner or salvor
(e) Claims excluded by reservations (Article 18)

4.6 Conduct Barring Limitation

The Convention also provides for conduct that bars the invocation of limitation.

A person liable shall not be entitled to limitation of liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

4.7 Limitation Fund

LLMC 1976 as amended provides that limitation of liability may be invoked even without the constitution of a Fund. But countries can provide in national legislation that limitation of liability actions brought in their courts to enforce a claim which is subject to limitation, shall be subject to the establishment of a limitation fund.

The specific rules of procedure are to be governed by the law of the State party in which the fund is constituted.

4.8 Bar to Other Actions

Once a fund is constituted, in accordance with the Convention, any claimant against the fund cannot exercise any right in respect of such claim against any other assets of a person by or on whose behalf the fund was constituted. Also, once a fund is constituted, an arrested ship may be released and this should be provided for appropriately in national legislation for practical purposes.

4.9 Note on LLMC

The IMO Legal Committee is annually provided with the status of conventions and other treaty instruments emanating from its work. The advice regarding the **Convention on Limitation of Liability for Maritime Claims, 1976** and the **Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims,** 1976 is the following:

Governments which intend to be Party to the LLMC as amended by the Protocol of 1996 are strongly encouraged to ratify the Protocol only, rather than the parent Convention and the Protocol, as the Protocol provides for significantly higher limitation amounts regarding maritime claims for loss of life or personal injury and for other claims than those in the Convention. Also, as between the Parties to the Protocol, article 9(1) of Protocol of 1996 provides that the Convention and the Protocol shall be read and interpreted as one single instrument. In addition, article 9(2) of Protocol of 1996 provides that "a State which is Party to this Protocol but not a Party to the Convention shall be bound by the provisions of the Convention as amended by this Protocol in relation to other States Parties hereto, but shall not be bound by the provisions of the Convention in relation to States Parties only to the Convention." Therefore, there is no risk that although being Party to the Protocol of 1996, the lower limitation amounts of the original Convention of 1976 are still applied in treaty relations to Parties to the Convention.

Furthermore, in addition to increasing the limitation amounts regarding compensation payable in the event of an incident, the Protocol also introduces a "tacit acceptance" procedure for updating these amounts such that, when necessary, amounts can be raised with a given date for entry into force after consideration and adoption by the Legal Committee, provided no objections are received from a specified number of Contracting States.

Part 2 – Assessment of Namibia

1. List of pieces of legislation examined

- Bill for an Act entitled Marine Pollution Act, 2013 (Marine Pollution Bill, 2013)
- Chapter VI of the Marine Pollution Bill 2012 – OPRC 1990
- Chapter VII – Liability and Compensation for Pollution Damage
- Division 1 Liability for Oil pollution
- Section 200 – Liability for oil Pollution in case of tankers
- Section 201- Liability for oil pollution in case of other ships
- Division 2 International Oil Pollution Compensation Fund
- Draft Merchant Shipping Bill 2012
- Chapter XVII – Limitation and Division of Liability

2. Gap analysis table

INTERNATIONAL INSTRUMENT	NATIONAL LEGISLATION	WEAKNESS/ GAP	RECOMMENDATION
CLC 1992	MARINE POLLUTION BILL (2013) Section 200 Liability for oil pollution in case of Tankers	The section should bear the appropriate heading.	Civil liability for oil pollution damage. So it can be differentiated from criminal liability for oil pollution damage.
		Section 199 is the interpretation section. In defining a "ship" the definition is made subject to section 201(4). This is done in an attempt to cover other ships	There is the need to provide separately national legislation that covers the CLC 1992 dealing with tankers and provisions of pollution damage dealing with non-tankers or other ships.

		and makes the understanding of the national legislation rather difficult. There are also no definitions with respect to “pollution damage”, “Preventive Measures” and “Incident”.	It is important to appropriately define “pollution damage”, “Preventive Measures” and “Incident” in alignment with the definitions in the CLC 1992.
	Section 200	There are no definitions in the opening of the section dealing with pollution in case of tankers Section 201 extends the coverage beyond tankers and creates problems with the drafting as this is referred to a number of times in the legislation.	The definitions in the conventions are very important for the purpose of interpretation by the court and they should be included in the text. They also provide guidance for implementation and they should be aligned closely to the convention text. There should be no application of the convention to other ships.
CLC 1992	Deals with damage caused outside the ship	Restricts the scope of application to the territory of Namibia	Needs to follow closely the convention text and must include: in the territorial sea of a contracting State the EEZ of a contracting State established in accordance with international law… and preventive measures whenever taken to prevent or minimize such damage.
CLC 1992	Section 200	This section, even though it has taken account of some of the definitional issues, is drafted in a convoluted style and does not make for easy understanding.	This section ought to be redrafted and be bought in close alignment with the convention so that the definitional provisions will be well spelt out especially in relation to Article II of the CLC 1992.
	Section 201 Liability for oil Pollution in case of other ships	Once again, this provision intends to mimic “pollution damage” but due to	The provisions are however not clear enough and does not provide for pollution incidents in the territorial

		its application to other ships it is not compatible with the CLC 1992.	sea and EEZ. This may be due to the fact that the legislation is made to cover other ships not only oil tankers.
CLC 1992	Sub section (4) of section 201 defines "ship" to include a vessel which is not sea going	The definition is not in accord with the convention. See also section 203 which is not in accord with the Convention.	The Convention defines "ships" as any sea-going vessel and seaborne craft of any type whatsoever…" This is why the definitions of the national legislation must be closely aligned with the convention text. The attempt to fuse the CLC which deals with tankers or other seaborne craft with non sea- going vessels will create difficulties in application and hence the need to separate the CLC 1992 from eg The Bunkers Convention.
CLC 1992	Exceptions from Liability under sections 200 and 201	Gender neutral language is not used.	The appropriate gender neutral language may be used with respective consequential amendments.
CLC 1992	Section 202 Exceptions from Liability under sections 200 and 201	All the three exemptions from liability under Article III (2) of the CLC 1992 are covered but the choice of words may involve a different interpretation as "third party" is just put as "another person not being agent or servant"	The provisions must be aligned closely to the language of the convention. "Third party" may not only mean servants or agents but also others not directly associated with the shipowner.
		The Marine Pollution Bill does not reflect Article III (3) which provides protection to the shipowner where the pollution damage results from acts or omissions done with intent to cause damage by the	This provision should be in consonance with Article III 3 of the Convention and must be aligned closely to the text. (Section 203 of the Marine Pollution Bill 2013 needs revision)

		person who suffers the damage. The provisions on limitation of liability refer to the Tonnage Regulations under the Merchant Shipping Act 2010. This is a mistake as there is no Merchant Shipping Act 2010. Under section 203 (1) (ii) the word "cost" should be replaced with the word "loss" Protection afforded through the channelling of liability as currently drafted is limited to servants and agents.	The reference to the Merchant Shipping Act of 2010 needs to be corrected. As provided for in Article III (4) the protection through the channelling of liability ought to extend to pilots, charterers etc.
		Also Section 203 sub section (2) (a) refers to a servant or agent of the owner and leaves out crew. Furthermore in the quest for brevity, section 203 (3) fails to address all the elements captured within the definition of pollution damage under Article 1(6) (a)	It is important for the provisions to reflect the tenets of the convention by referring to servants, agents or the members of the crew. The words in the definition of pollution damage under the Convention are important for the purposes of interpretation of the Convention and the national law provisions should be made to reflect this as much as possible.
CLC 1992	The conditions under which no claim for compensation may be made as	The conditions are outlined in the convention and the caveat "unless the damage resulted	It is recommended that the language should be aligned close to the text and the caveat should come at the end of the provision as

	captured in sub paragraphs (a) – (f)	from their personal act or omission, committed with intent to cause such damage, or recklessly and with knowledge that such damage would probably result is provided as a prelude to the exceptions for compensation.	provided for in the convention, since that provides a better understanding of the exceptions for the payment of claims for compensation. Redrafting of the provision is necessary in order to bring out the intended meaning
		The convention provides in Article III (5) a right of recourse of the owner against third parties but this is omitted in the national legislation.	Nothing in the convention shall prejudice any right of recourse of the owner against third parties should be included in the national legislation.
	Section 204 Limitation of Liability under section 200	In section 204 (3) the word cost does not provide an accurate meaning.	Replace “cost” with “loss” in 204 (3) line 3
CLC 1992		Article 1 (6) (a) makes provision for situations where loss of profit for impairment of the environment may be recovered as a way of encouraging action to deal with pollution damage.	This is not provided for in the national legislation and ought to be provided for in line with the convention. It must also provide for the costs of preventive measures and further loss or damage caused by preventive measures. (See Article 1 (6) (b)
	Section 205(6) (b)	This subsection makes a cross reference to section 421 of the Merchant Shipping Act which makes reading of the text cumbersome	It could be simplified to a person entitled to limitation of liability under this part. The gravamen of the provisions of Section 421 of the Draft Merchant Shipping Bill 2012 could be the subject of regulations.
	Section 205 Limitation of Actions	Even though provision is made for the assumption of jurisdiction by the Namibian Courts, the rendition is not in accord with Article IX of CLC 1992 and thus	The provisions that clothe Namibia with jurisdiction, should be closely aligned to the provisions of Article IX of the CLC 1992. It should relate to the territorial sea and EEZ and indicate that once the Fund is

		leads to omissions of the scope of application that are contained in the Article. For the purpose of availing the owner of the limitation amount, the owner may constitute a Fund for the total sum representing the limit of liability to the court. This is omitted.	constituted in Namibia it shall be exclusively competent to determine all matters relating to the apportionment and distribution of the Fund. Article V (3) should be reflected in the provisions. The procedure is also outlined and should be reflected for ease of application in the jurisdiction. The Fund can be constituted either by depositing the sum or by the production of a bank guarantee or other guarantee acceptable by Namibia if the Fund is constituted there.
	Section 206 Restriction on enforcement after establishment of limitation fund	The provisions here seek to transpose Article VI of CLC 1992 into the national legislation but do not reflect in all respects the underlying provisions of the Article.	The provision in Article VI (1) (a) relating to the exercise of rights against "any other assets of the owner' should be included in the national legislation.
	Section 206 (1) (b)	This section attempts to reflect the caveat in Article VI (2) of the CLC1992 but the language adopted is convoluted and does not make clear the import of the caveat	A very simple language as that contained in Article VI (2) of the CLC 1992 may be adopted for the national legislation so that there will be uniformity in its application.
CLC 1992	Section 207 Concurrent Liabilities of owners and others	It is not clear whether section 207 is meant to reflect the provision of Article IV of the CLC 1992 dealing with incidents involving two or more ships.	Appropriate provisions should be inserted in the national legislation to reflect the tenets of Article IV of CLC 1992 dealing with joint and several liability.
	Section 208	The drafting here is a little convoluted, makes reference to	The appropriate language of the Convention should be adopted to make this

	Establishment of Limitation Funds outside Namibia	different sections of the legislation and the import is not clear.	clear. The side note of Section 208 should reflect Namibia instead of The Gambia.
	Section 210 Compulsory Insurance against liability for pollution	This is no gap or weakness as such but the expression Liability Convention State if not defined can be confusing.	The expression contracting state may be more appropriate.
	Section 213 Jurisdiction of The Namibia Court and registration of foreign judgements.	The national legislation in this section reflects Article X of the CLC 1992. However, the exceptions are not included in the section. It also is not aligned to the convention in terms of the recognition and enforcement of foreign judgements recognized under the convention.	The two exceptions, i.e. where the judgement was obtained by fraud and where the defendant was not given reasonable notice and a fair opportunity to present its position should be included and so should be Article X(2). Generally, the provisions should reflect the recognition and enforcement of foreign judgements recognized under the convention.
	Section 215 Limitation of Liability under section 201	This provision seems to fuse limits of liability under the CLC 1992 with limits of liability under the LLMC in a bid to make the Marine Pollution Act take care of pollution by tankers and other ships.	The provisions in respect of limitation of liability for oil pollution damage under the CLC 1992 should be distinguished from the limitation provisions under the LLMC which may apply to the Bunkers Convention It would thus be appropriate to draft separate national legislation to cover these distinct areas of the law.
1992 FUND	Section 217 Dealing with Interpretation	It indicates that “ship” means any ship (within the meaning of sub-part 1 of this part) to which section 200 applies. As already indicated the section referred to, defines ship to include “a	The definition is not in accord with the CLC 1992 and ought to be corrected and brought in line with the definition of “ship” in the CLC 1992.

		vessel which is not sea going". The attempt to cover other forms of pollution damage under the CLC 1992 leads to a lot of cross referencing which makes an appreciation of the import of the convention rather difficult.	The transposition into national legislation should start with the definitions in the 1992 Fund and be closely aligned to the text of the convention. Some very important definitions in the 1992 Fund Convention text are missing from the national legislation and it would be important to include these and align them as closely as possible to the convention text.eg "Contributing oil", "Terminal Installation" which is later defined in section 218 should all be in the definitions section.
	Section 220 Liability of the Fund	This section is expected to take account of the scope of application as provided for in Article 3 but is restrictive	The national legislation should include the EEZ and should be closely aligned to the convention provisions. It should also include preventive measures wherever taken to prevent or minimise such damage.
1992 FUND	Section 225 Supplementary provisions as to proceedings involving the Fund		The convention makes provision under Article 4 (6) for the Assembly of the Fund to pay compensation in exceptional circumstances even if the owner of the ship has not constituted a Fund in accordance with Article V para 3 of CLC 1992. It would be apposite to include a provision in national legislation to that effect.
		It is also important to note that under Article 15(4), the State party is liable to compensate the Fund	(c) The national legislation has to provide clear language to indicate the State party i.e. Namibia or its relevant agency reports

		for financial loss if it fails to fulfil its obligations with respect to oil reports but no provision has been made in this regard.	to the IOPC Fund and ensures the fulfilment of its obligations and the sanctions for non-fulfilment
1992 FUND			A close examination of the CLC 92 and Fund 92 indicates that some provisions may have been omitted for the sake of brevity and precision but they would undoubtedly affect the effective implementation of the Convention under national law.
OPRC 1990	Chapter VI Sections 188 to 198 deals with the OPRC	The sections cover to a very great extent the provisions of the convention but could do with regulations that provide greater details for effective implementation.	The regulations must make provision for defining the frequency of update of the National Contingency Plan In addition, it must provide for formalizing participation and contribution of members of a national pollution preparedness and response forum. The regulations can also further elaborate on mechanisms or arrangements to coordinate the response to an oil pollution incident.
LLMC	The Draft Merchant Shipping Bill 2012 Chapter XVII Sections 420 to 441 deal with Limitation and Division of Liability	The provisions, in my view covers the tenets of the Convention. It however does not reflect the 2012 amendments which increase the limits of liability.	The national legislation should empower the Minister to make regulations to take care of amendments and compliance with the provisions of the legislation.

3. Detailed analysis

3.1. Maritime policy and implementation of IMO conventions on marine pollution

It is important to note that a very basic and important question was posed in the questionnaire to each country. An important starting point for honouring a country's international maritime obligations with respect to international legal instruments is its National Maritime Transport Policy (NMTP). It is the starting point not only for the formulation of the policy but also for the appropriate legislative framework that gives backing to the policy and ensures its effective implementation and enforcement.

Before an examination of the various national legislation that seek to implement the relevant conventions, it would be appropriate and in line with the Terms of Reference, to examine the general maritime policy framework of the respective countries and the implementation of IMO Conventions.

In answer to the question on Maritime Policy and regulatory framework, Namibia indicates that there is a National Transport Policy. The National Transport Policy covers the various modes of transport including Maritime Transport. The Maritime Transport segment of the policy states the objectives as follows:

- To provide separation of policy, regulatory and operational functions
- Remove safety responsibilities (at present self- regulation) from port operations
- Prioritize the implementation of IMO Conventions
- Develop HRD and training capacities accordingly.

There is a clear intention to cover maritime transport within the framework of the National Transport Policy. It is however clear from a study of the document that it is not far-reaching in addressing the multifaceted challenges that face the maritime transport sector. At best, the section on Maritime Transport Policy serves as a framework for the development of a comprehensive National Maritime Transport policy along the guidance provided by the IMO[2].

There is no doubt that the National Policy has delineated the roles of the various institutions. There is however the need to build capacity for the implementation of the role of the Maritime Authority.

The Maritime Transport Policy could consider the following for the attainment of the objectives of the Authority:

- ❖ Should be tailored towards easing IMO Member State Audit Scheme (IMSAS) audits
- ❖ Protect the marine environment and promote the sustainable use of the oceans
- ❖ Assist in achieving maritime related Sustainable Development Goals

[2] See the IMO website:
http://www.imo.org/en/OurWork/TechnicalCooperation/Pages/NationalMaritimeTransportPolicy.aspx

- The achievement of good maritime governance.
- The management of multiple sea use conflicts
- Assist in and expedite the effective implementation of flag, port and coastal State obligations

It is recommended that the Namibia engages with IMO to request technical assistance on the development of a national maritime transport policy.

With respect to the ratification and implementation of IMO conventions, Namibia practices monism as a means of implementing international instruments. It is however to be noted that most IMO conventions are technical in nature and many provisions thereof are not self-executing or have direct binding force. In this respect, even as a monist State, it is imperative to transpose the operative provisions of the international conventions into national law for the purposes of implementation and enforcement.

3.2. Ratification of the conventions and national legislations

In making these comments, I am not oblivious of the fact that the interpretation of international instruments, once they have been extrapolated into national law, is the preserve of adjudicating bodies of individual States. I only need to add that under the Vienna Convention on the Law of Treaties (Article 27), no municipal law may be relied upon as a justification for violating international law. Thus, even though a State is entitled to the interpretation of its national laws, they must not for the purpose of uniformity depart from the underlying tenets of international instruments.

Namibia has ratified the 1992 CLC, and the 1992 Fund Convention but has not ratified the Supplementary Fund 2003 whose ratification is optional for States. Judging from its present limitations in terms of capacity and the historical records of pollution damage, the ratification of the Supplementary Fund is not a priority for Namibia.

While this project was underway, IMO sent information indicating that Namibia has acceded to the Bunkers Convention 2001. There are provisions under the Marine Pollution Bill 2013 dealing with liability for oil pollution in case of oil tankers and provisions on liability for oil pollution in case of other ships. Section 201 of the Marine Pollution Bill 2013 provides for liability with respect to non-tanker spills and it seems that this is a provision of domestic legislation which is similar but far less elaborated than that of the Bunkers Convention and therefore cannot give full effect to it. As pointed out earlier in this report, even though there are some similarities between the provisions of the 1992 CLC and the Bunkers Convention, the Bunkers Convention is a stand-alone convention with some peculiarities and its provisions would have to be drafted separately especially in relation to issues of limitation of liability.

Namibia has not acceded to LLMC 1976, nor to the Protocol of 1996. The provisions of the 1996 LLMC Protocol have however been incorporated into the Merchant Shipping Bill 2012 by virtue of Chapter XVII (on Limitation and Division of Liability). The national legislation has however not taken account of the 2012 increase in limits of the 1996 LLMC Protocol adopted through resolution LEG.5 (99). Namibia is also a party to the Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC

1990). It ratified the Convention in 2007. The provisions of the OPRC have been incorporated in Chapter VI (sections 188 to 198) of the Marine Pollution Bill 2013. See below the Status of the conventions under consideration and respective national legislation.

NAMIBIA

CONVENTION	STATUS	NATIONAL LEGISLATION
MARPOL 73/78	RATIFIED	Marine Pollution Bill 2013
CLC 1992 FUND 1992	RATIFIED RATIFIED	Marine Pollution Bill 2013
SUPPLEMENTARY FUND	NOT RATIFIED	NIL
OPRC 1990	RATIFIED	Marine Pollution Bill 2013
BUNKERS 2001	NOT RATIFIED	No definitive national legislation but seems to have been incorporated into the Marine Pollution Bill 2013
LLMC 1996	NOT RATIFIED	Provisions incorporated into Merchant Shipping Bill 2013.

3.3. National law and gap analysis

The relevant national legislation giving effect to the international instruments under consideration are still in the form of Bills before the Parliament of Namibia. The draft Bills have attempted to incorporate provisions of the international conventions into national law. There are however some gaps in the national legislation that would have to be addressed before the Bills are finally passed into law. Having acceded to the Bunkers Convention, Namibia would have to extrapolate its provisions into national law and provide for limits of liability in accord with the provisions of the Bunkers Convention and not fuse it with limitation provisions that generally apply to other instruments.

The gaps identified in the drafting relating to the Marine Pollution Bill 2013 giving effect to the Civil Liability, Fund and OPRC Conventions would have to be addressed to make for practical implementation and enforcement of the provisions.

It should also be noted that there are differences in the drafting of the provisions implementing the 1992 CLC and the 1992 Fund Convention. For example, whilst the limits under the CLC are implemented in the Marine Pollution Bill 2013 taking the text verbatim from the 1992 CLC, the provisions implementing the 1992 Fund Convention refer to the limits as in the Convention, without reproducing them verbatim. See also additional Quick GAP analysis table in respect of the Conventions under consideration attached herewith as **Annex VI.**

Conclusions

Namibia has ratified a good number of the IMO conventions under consideration. Even though it has two very useful (draft-) national legislation (The Marine Pollution Bill 2013 and the Draft Merchant Shipping Bill 2012) that seek to implement the conventions under consideration, there are some short-comings that will pose challenges for an effective implementation and enforcement of the national legislation. The attempt to have the Marine Pollution Bill 2013 and Part XVII of the Draft Merchant Shipping Bill 2012, cover all liability and compensation issues including limitation of liability for oil pollution damage, is problematic. In effect, it fuses the implementation of the Bunkers Convention with that of the CLC 1992, Fund 1992 and the LLMC 1996. As indicated earlier, even though the Bunkers Convention is modelled along that of the CLC 1992, the Bunkers Convention is a stand-alone convention and there are some marked differences between the two instruments. The nuances would therefore have to be taken into consideration with respect to the drafting of national legislation that seeks to give effect to these instruments.

The TC Activities, (a copy of which is attached herewith as **Annex VII**), indicates that a number of missions have been fielded by IMO with respect to the development of national legislation in Namibia. There is no doubt that this has been useful. From the response to the questionnaire however, it may seem that there still remain issues of human resource capacity that ought to be addressed.

Main recommendations

Namibia should consider to:

1. review the existing legislation and ensure the legislative drafters/lawyers from the Administration and from the Attorney General's Office have a clear understanding of the conventions considered in this report and work together with technical officers of the different administrations concerned for the effective implementation of these conventions in the national legislation;

2. draft regulations for the implementation of the OPRC 1990;

3. ratify the 2001 Bunkers Convention and to adopt appropriate implementation accordingly in order to ensure the payment of adequate, prompt and effective compensation for damage caused by pollution resulting from the escape or discharge of bunker oil from ships in the territory, including the territorial sea, and EEZ, or equivalent 200 nm zone;

4. ratify the 1996 LLMC Protocol only and to adopt appropriate implementation accordingly in order to ensure enhanced compensation for bunker spills and to establish a simplified procedure for updating the limitation amounts.

Part 3 – Feedback meeting and action plan

Meeting summary

The remote review provided an opportunity for the consultant, together with the GI WACAF Project team, IMO officers, the IOPC Funds representatives and the Focal Points for Namibia, to remotely review the respective national legislation relating to oil pollution and liability and compensation. The review analysed the gaps in the existing pieces of legislation and made recommendations towards the transposition of relevant IMO conventions into national legislation and their effective implementation. A **virtual meeting** subsequently took place **on 30th September 2020** with Namibian authorities to provide oral feedback, iron out areas of complexities and address outstanding issues before a finalization of the Report.

Participants to the meeting:

Namibia representatives	Review team
Pinehas Auene, Ministry of Works and Transport, Directorate of Maritime Affairs, Deputy Director Marine Pollution Control and SAR Shapua Kalomo, Ministry of Works and Transport, Directorate of Maritime Affairs Emilia Nghiteeka, Ministry of Works and Transport, Directorate of Maritime Affairs, legal team Uanangura Kaputu, Ministry of Works and Transport, Directorate of Maritime Affairs, legal team Lukas Iipinge, Ministry of Works and Transport (Directorate of Maritime Affairs, legal team Raundjua Hengari, Ministry of Justice	Dr Emanuel Kofi Mbiah – GI WACAF consultant Jan de Boer – IMO Senior Legal Officer Mark Homan - IOPC Claim Manager Clément Chazot – IMO Technical Officer Julien Favier - GI WACAF Project Manager Emilie Canova - GI WACAF Project Coordinator

The objectives of the meeting were to:

- Discuss the key findings of the study (gap analysis and recommendation) with the consultant and representatives of IMO and the IOPC Funds; and
- Draft a national action plan with concrete objectives and outcomes to implement the agreed recommendations.

Key takeaways of the meeting

Dr Kofi Mbiah first presented the key findings of the report, highlighting the areas in the legislations where there is room for improvement.

Concerning transposition issues in general, he highlighted the importance to have first a **parent Act** incorporating the key elements of the Convention and then more specific implementation provisions by means of **regulations** that can be easily amended following the amendments to the Conventions.

He especially emphasised that a **clear differentiation should be made between the provisions implementing the CLC 92 and provisions implementing the Bunkers Convention 2001** as the latter is a standalone convention, which bears some differences with the CLC regime (for example, the Bunkers Convention 2001 does not have its own limits and refers to the limits in the LLMC or in the national legislation and the definition of what constitutes a ship or (bunker) oil is different in the two Conventions).

He also highlighted the importance to keep the definitions from the conventions in the national legislation to avoid any confusion.

Following this, a few comments were made by Namibian representatives, including the following:

1. **Accession to the 2001 Bunkers convention and other IMO instruments in July 2020**

Pinehas Auene mentioned that Namibia has acceded to the 2001 Bunkers Convention in July 2020 and it is due to enter into force on October 15, 2020. Along with the 2001 Bunker Convention, Namibia has acceded to the Ballast Water Management Convention and the 1997 Marpol Protocol and has accepted Marpol Annex IV.

2. **Clarification on the procedure to formally enact the draft Bill**

It was pointed out that the two main implementing legislations reviewed, the Marine Pollution Bill 2013 and the Merchant Shipping Bill 2013 were still draft bills that needed to go through the enactment process and eventually through Parliament in order to become Acts that could be enforced. The steps of the enactment process were detailed by Namibian authorities as follow:

a. Stakeholders consultations and engagement (this process was already undertaken for the draft bills, but may need to resume to take into account the findings of the report as described below);
b. The draft Bill goes to cabinet for approval;
c. Then it goes through CCL;
d. Legal drafters draft the Act;
e. It goes to the Attorney General office;
f. And finally, the Act has then to be approved by Parliament.

It was highlighted that it is a long process and therefore, in order to avoid further delays, regulations implementing the Act should be drafted in parallel so that when the Act is passed, they also enter into force immediately.

Another point of concern was the repartition of responsibilities and how to coordinate between the various national agencies and ministries involved in the implementation of such a comprehensive bill. It was suggested that this could be put in the regulations giving mandate to the agencies and organising the concrete coordination as regulations are easier to amend.

3. Ballast water management convention (BWM)

As Namibia has also ratified the BWM convention, Namibia has to adopt appropriate implementation regulations accordingly. However, the BWM being a very technical and specific convention, it was asked whether it would be better to draft a separate bill or if it should be included in the marine pollution bill taking the opportunity of this review.

It was suggested that it could be included in the marine pollution bill but doing so would delay the review process because the BWM is very technical and dense convention. Therefore, it was suggested that the review process and enactment of the bill should go ahead with the possibility to amend the Act later on to include BWM provisions. In order to make the amendment process not too cumbersome, a possibility is to have the responsible/concerned Minister only approve the amendment and not all the Ministers included in the bill.

4. Formal communication

The Namibian authorities requested that the final report including this action plan should formally be communicated to the Principals (Executive director) of the Maritime affairs directorate of the Ministry of Works and Transport through an official GI WACAF/IMO letter with details on the review process and outcomes.

5. Capacity building

Namibian representatives highlighted the insufficiency of legal and technical capabilities regarding transposition-related matters.

Therefore, discussions followed on how capacity building activities could be provided to Namibia to better empower the existing expertise in the country. The following elements were identified:

- Request assistance on the content/rationale of IMO conventions and how to transpose them into Namibia national law;
- Explore ways (even remotely) to train legal drafters on the drafting of legislation implementing the relevant IMO conventions; and
- Share information and expertise at national level between Ministry of Justice (legal drafters) and the Ministry of Works and Transport (technical understanding of the conventions).

Main recommendations and actions

Recommendations	Action to take by order of priority

Review the existing legislation and ensure the legislative drafters/lawyers from the Administration of the Attorney General's Office have a clear understanding of the conventions considered in this report and work together with technical officers of the different administrations concerned for the effective implementation of these conventions in the national legislation;	- Share the report amongst the relevant stakeholders; - Resume stakeholders consultation / engagement; - Request assistance on capacity-building activities (see above); - Make sure that the legal drafters work hand in hand with technical officers from various administrations (especially the legal department of the Ministry of works and transports who have the technical knowledge of the relevant conventions); and - Start the enactment process (see above)
Draft regulations for the implementation of the OPRC 1990;	Draft the regulations to be developed side by side with the Act following the requisite capacity building activity (see above).
Ratify the 2001 Bunkers Convention and to adopt appropriate implementation accordingly in order to ensure the payment of adequate, prompt and effective compensation for damage caused by pollution resulting from the escape or discharge of bunker oil from ships in the territory, including the territorial sea, and EEZ, or equivalent 200 nm zone;	Develop appropriate national legislation/regulation to give effect to the Bunkers convention
Ratify the 1996 LLMC Protocol **only** and to adopt appropriate implementation accordingly in order to ensure enhanced compensation for bunker spills and to establish a simplified procedure for updating the limitation amounts.	Legal division to initiate the process of ratification by a Cabinet agenda memorandum and go through the usual procedure. Consider **section 4.9** of the report.

ANNEX I - QUESTIONNAIRES AND RESPONSES

Questionnaire to Participants

Full Name	PINEHAS AUENE
Country	NAMIBIA
Your Current Position	DEPUTY DIRECTOR: MARINE POLLUTION CONTROL AND SEARCH & RESCUE

Please insert name of country	**Status of ratification**	**Legislation implementing the convention into national law**	**Status of implementation**	**Comments**
CLC 69	-----	------	-----	------
CLC 92	Ratified	See attach draft marine pollution bill.	Implementation is taking place but it ineffective without national legislation	Top priority. IMO assistance required to finalize the draft bill.
Fund 92	Ratified	See attached draft marine pollution bill.	Implementation is taking place but it ineffective without national legislation	Top priority. IMO assistance required to finalize the draft bill.
Sup. Fund	Not ratified	-------	---------	Not a priority now
Bunker	Approved by Parliament	Partially covered in draft marine pollution bill.	Implementation will take place but it ineffective without national legislation	Pending depositing of instrument of accession with the IMO SG. See attached Minutes of Namibian Parliament, part 8. There is a need to fully provide for the Bunker convention in the draft marine pollution bill.
LLMC 76	Not ratified	None	--------	
LLMC 96	Not ratified	None	--------	Priority. IMO assistance required.

Maritime policy and regulatory framework	Is there a national maritime policy or strategy? What is the lead agency responsible for it? Which is the national authority responsible for maritime civil law matters and for issuing insurance certificates?	There is a national transport policy, which covers maritime issues in general/high-level terms. There is a need for a detailed maritime policy. IMO assistance needed in this regard. Lead Agency and National authority is the Ministry of Works and Transport, Directorate of Maritime Affairs.	
Ratification of civil liability conventions	What are the main challenges/bottlenecks on the way towards ratification?	Lack of coordination	
		Lack of priority	
		Lack of legal expertise	X
		Lack of technical expertise	X
		Lack of financial resources	
Implementation of IMO conventions	What is the procedure of implementation of IMO safety, marine pollution and liability and compensation conventions into domestic law?	In terms of the Namibian constitution, international treaties - once ratified/acceded to by Namibia, become part of national law i.e. Namibia has a so-called monistic method of implementing international treaties. However, there is still a need to transpose the international treaty into national law and make provision for, inter alia, offences and penalties – otherwise enforcement becomes almost impossible.	
	If your country is not Party to any/some of the IMO civil liability conventions, does the existing legislation provide a prevention or liability and compensation regime for oil pollution and bunker pollution?	Most of our national laws are inherited from colonial South Africa and are outdated. The draft marine pollution bill is an attempt to modernize Namibia's maritime law covering both preventive and remedial aspects. To our knowledge, there are currently no national laws covering aspects of prevention or liability and compensation regime for oil pollution and bunker pollution that Namibia has not ratified.	
Implementation of IMO convention • **1992 IOPC Fund Convention** • **Supplementary Fund Protocol**	Does the implementing legislation identify the national authority in charge of the submission of oil reports?	Yes – the draft marine pollution bill makes provision for this (92 Fund). Supplementary Fund Protocol is not applicable to Namibia.	

	Does the implementing legislation create an obligation and a mechanism under national law for the entities receiving contributing oil to submit oil reports and pay contribution?	Yes - draft marine pollution bill
	Is there a mechanism under the implementing legislation to allow for increased limits of liability to be enacted under national law?	Yes - draft marine pollution bill makes provision
	Does the implementing legislation allow for the IOPC Fund to intervene in legal proceedings as per article 7(4)?	Yes - draft marine pollution bill makes provision
	What are the time-bar provisions for the CLC/Fund conventions in the implementing legislation?	Generally 3 years
Enforcement of IMO conventions	What is the legal basis for the enforcement of civil law claims related to marine pollution and other maritime claims?	See attached Prevention and Combating of Pollution of Sea by Oil Act of 1982 as amended (which is currently in force and draft marine pollution bill).

ANNEX II - TERMS OF REFERENCE FOR THE CONSULTANT

Remote legal assistance on the effective implementation of IMO conventions relating to oil pollution and liability and compensation

Introduction

1 In light of the current Coronavirus pandemic and in the interest of the health and safety of the participants, experts and host-country, it was decided to postpone until further notice the sub-regional workshop described below. However GI WACAF remains committed to supporting the countries invited to this workshop, with particular focus on the four (4) countries that agreed to engage with a remote review of the text of their relevant national legislation followed by an online debriefing on the outcome of the legislation review for each country.

2 The initial activity consisted of a sub-regional workshop on the ratification and effective implementation of IMO conventions relating to oil pollution and liability and compensation to be held in Accra, Ghana, from 27 to 30 April 2020. This workshop was organized in response to several requests for assistance made by partner countries during the 8th GI WACAF Regional Conference in October 2019, to address the various challenges faced with the ratification and effective implementation of these key IMO conventions.

3 This remote activity is carried out within the framework of the Global Initiative for West, Central and Southern Africa (GI WACAF), a partnership between IMO and IPIECA, with the principle aim of enhancing the capacity of GI WACAF countries to prepare for and respond to marine oil spills.

Objectives

4 The overall objective of the activity remains the same, which is to assist policy makers, legislative advisers and/or drafters, responsible for the effective implementation, and transposition of IMO conventions into their domestic legislation in understanding the objectives, principles and legal implications of specific IMO instruments (i.e. OPRC 1990, CLC and FUND 1992as well as the Bunkers Convention and the 1996 LLMC Protocol), and to guide them on the legislative mechanisms that should be applied when developing and updating national laws.

5 The main expected outcomes of the remote assistance are:

a. To provide the four (4) beneficiary countries with a written gap analysis undertaken at national level, based on the review of the relevant sections of national legislation of these four (4) countries; and

b. To provide the designated National Focal Points of the aforementioned countries with tailored and comprehensive written and oral feedback, thus helping them in the domestication of the above-mentioned IMO Conventions.

Tasks and activities

6 The Consultant will, in collaboration with IMO legal officers, representatives of the IOPC Funds, the GI WACAF Project team and officials designated by the national authorities, undertake the completion of the following tasks:

.1 a home-based review of each of the national legal systems of the four beneficiary countries and of each of the relevant pieces of legislation relating to oil spill pollution, preparedness, response and liability and compensation, provided by the national authorities of these countries, including compilation and review of the responses to the questionnaires already sent out and based on the preliminary work undertaken by IMO legal officers;

.2 a gap analysis of relevant policies and legislative framework in each of the four beneficiary countries in terms of national maritime legislation, with a particular focus on the mechanism for the effective implementation of IMO conventions and specifically the OPRC 1990, CLC and FUND 1992, the Bunkers Convention and the 1996 LLMC Protocol;

.3 a comprehensive report detailing the results of the review and of the gap analysis; and

.4 the preparation and delivery of written and oral tailored feedback, provided in report form to, and followed up by a virtual meeting with, the respective national Focal points in each country, which will also include recommendations on the drafting of national maritime legislation in order for the four beneficiary countries to meet their current and future obligations for the effective implementation of the conventions mentioned above.

Timeframe

7 The objective is to complete the consultancy mission and send the final report by the **26th of July.**

Reporting

8 The consultant will provide the final consolidated activity report, detailing findings, descriptions of the outputs delivered, conclusions and recommendations **as applicable**, based on the report template shared by the GI WACAF team.

9 IMO should be provided with an electronic copy of the report using software compatible with Microsoft Office. The report should be submitted **to Ms Emilie Canova, GI WACAF Project Coordinator**, with copy to Mr Julien Favier, GI WACAF Project Manager, no later than one month following the completion of the consultancy services**.**

ANNEX III - INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR BUNKER OIL POLLUTION (BUNKERS 2001)

Overview

- Adoption: 23 March 2001
- Entry into force: 21 November 2008
- 95 Contracting States representing 92.99% of world tonnage
- Objective: "To ensure that adequate, prompt, and effective compensation is available to persons who suffer damage caused by spills of oil, when carried as fuel in ships' bunkers"
- Last significant gap in the international regime for compensating victims of oil spills from ships
- Application: Applies to damage caused on the territory, including the territorial sea, and in the EEZ of States Parties.

Principles

- Strict liability of ship owners and some others
- Limitation of liability
- Compulsory insurance
- Certificates
- Direct action against insurer

Definitions – Article 1

- **Ship** (Article 1.1): Any seagoing vessel and seaborne craft, of any type whatsoever.
  - Broad definition covering a large number of floating objects as well as traditional ships.
  - However, the Convention will not apply unless the vessel in question is carrying "bunker oil".

- **Shipowner** (Art. 1.3): the owner, including the registered owner, bareboat charterer, manager and operator of the ship.
- **Bunker oil** (Art. 1.5): hydrocarbon mineral oil, including lubricating oil used for the operation or propulsion of the ship, and any residues of such oil.

- Broad definition, but the proof of intention of use would be required in order to make distinction between fuel and cargo oil.

- Pollution damage (Art. 1.9): loss or damage … by contamination resulting for the escape or discharge of bunker oil".

  Compensation for impairment of the environment "other than loss of profit from such impairment" is limited to the cost of reasonable measures of reinstatement.
- Accords with the definition of pollution damage in CLC.

Scope of application – Article 2

- to **pollution damage** caused:
    - in the territory, including the territorial sea, of a state party, and
    - in the exclusive economic zone of a state party;
- to preventive measures, wherever taken, to prevent or minimize such damage
- **Preventive measures** (Article. 1.7): Any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage.

Liability of the shipowner (Article 3)

- Strict liability: no requirement for fault for the liability to arise: the shipowner at the time of the incident (which includes the range of persons listed in the definition) is liable (Art. 3.1)
- Joint and several liability (Art. 3.2).
- Defences to the shipowner: limited exemptions as in CLC (Art. 3.3).
- The shipowner may also be excused from liability where it is shown that the person who suffered the damage caused or contributed to it (Art. 3.4).
- Immunity from other suit (Art. 3.5).
- However, shipowner's right of recourse (Art. 3.6)

Exclusions – Article 4

- Pollution damage covered by the CLC.
- Pollution from warships or ships on Government noncommercial service unless a State Party decides otherwise. On the other hand where State owned vessels are used for commercial purposes the Convention applies including the jurisdiction provisions of Article 9.

Limitation of liability – Article 6

- The shipowner and the person providing insurance or other financial security have the **right to limit liability** under any applicable national or international regime, such as the **convention on limitation of liability for maritime claims**, 1976, as amended.
    - The Convention is accompanied by a Conference Resolution on

      Limitation of Liability which urges all States to ratify or accede to the 1996 Protocol to the LLMC 1976 thus increasing the fund available for all claims – including bunker pollution claims.

Compulsory insurance and direct action against the insurer

- Which ships must be insured? Article 7.1
    - Ships greater than 1,000 gross tonnage
- Who must be insured?
    - The **registered owner** of a ship having a gross tonnage greater than 1000 registered in a state party is required to maintain insurance (or other financial security)
- Level of insurance cover?
    - to cover the liability for pollution damage in an amount equal to the limits of liability under the applicable national or international limitation regime,
    - but not exceeding an amount calculated in accordance with the convention on limitation of liability for maritime claims, 1976, as amended.

Insurance certificates – Article 7

Evidence of insurance:

- A certificate attesting that insurance is in force shall be issued to **each ship** after the **appropriate authority** of a State Party **determines** that the requirements of the convention have been complied with
- With respect to a ship registered in a State party such certificate shall be issued or certified by the appropriate authority of the State of the ship's registry
- With respect to a ship not registered in a State Party it may be issued or certified by the appropriate authority of any State Party
- A State Party may authorise another institution or organisation to issue the certificates
- The Convention provides for the model form
- Certificates must be in either English, French or Spanish or, if in another language, must be translated into one of the three specified languages.
- The certificate has to be carried on board at all and a copy shall be deposited with the authorities
- The State of the ship's registry shall determine the conditions of issue and validity of the certificate
- Information on the financial situation of providers of insurance may be obtained from other States

- Certificates issued or certified under the authority of a State party shall be accepted by other states parties
- The Article also provides for the holding of certificates in electronic format.

Direct action – Article7.10

- Any claim for compensation for pollution damage may be brought **directly against the insurer**
- The defendant may invoke the defences which the shipowner would have been entitled to invoke, including limitation

Consequences if no insurance is in place – Article 7.11-7.12

- A State party **shall not permit** a ship under its flag to operate at any time, unless a certificate has been issued
- Each State party shall ensure, under its national law, that insurance or other security is in force in respect of any ship having a gross tonnage greater than 1000, wherever registered, entering or leaving a port in its territory, or arriving at or leaving an offshore facility in its territorial sea

Time limits and jurisdiction - Article 8 and 9

- The action should be brought **within three years from the date when the damage occurred**
- In no case shall an action be brought more than **six years** from the date of the incident which caused the damage
- Claimants may pursue claims before the courts of the State or States in which the pollution has occurred or where measures to prevent or minimise pollution have taken place. Where security for claims has been posted by the shipowner, insurer, or other person providing security action may be brought where that security has been provided.

Bunkers Convention v. Civil Liability Convention

- Bunker has a different definition of "oil"
- There is no second tier "Fund"
- Claims are not channelled on to the "registered owner"
- No limits of its own, but links to limits set out by the LLMC 1976/96 (new limits entered into force in June 2015)
- Compulsory insurance requirement set at over 1,000 gt regardless of the type of ship

Implementation of Bunker Convention

- Issuance of Bunkers certificates
- Assembly Resolution on the issuing of insurance certificates for bareboat chartered ships recommending that all States parties should recognize that certificates for ships under bareboat charter should be issued by the flag State, if that State is party to the Convention (A.1028 (26)).
- Assembly Resolution on the issue of bunkers certificates to ships that are also required to hold a CLC certificate recommending to States to require ships flying their flag or entering or leaving their ports to hold a certificate as prescribed by the Bunkers Convention, even when the ship concerned also holds a certificate issued under the CLC (A.1055(27)).

- Verification of insurers
  - Problem faced by Administrations when issuing certificates under the Bunkers Convention to assess the solvency of some of the insurers or guarantors.
  - Guidelines for accepting insurance companies, financial security providers and the international group of protection and indemnity associations (P & I Clubs) (CL 3145 of 2011 replaced by CL 3464 of 2014)

- Domestic legislation to provide a prevention and compensation regime for bunker pollution
  - Ensure that owners of ships of 1,000 gross tonnes or more:
    - registered owners are required to have insurance to cover their liability (with accompanying offences); and
    - certificates should be carried on board ships to verify that insurance exists (with accompanying offences);

- Administrative details concerning issuing and checking of certificates by the Administration
- Ensure that courts have jurisdiction to hear claims and there is a clear guidance on where claims for compensation may be taken;
- Recognise the final judgments from courts in other State parties in respect of convention claims;

ANNEX IV - GUIDANCE ON THE INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE 2001 (BUNKERS 2001).

1. Introduction

The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Bunkers 2001) entered into force on 21 November 2008.

The Convention was adopted to ensure that adequate, prompt, and effective compensation is available to persons who suffer damage caused by spills of oil, when carried as fuel in ships' bunkers.

The Convention applies to damage caused on the territory, including the territorial sea, and in exclusive economic zones of States party of the Convention.

“Pollution damage" means:

(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker 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; and

(b) the costs of preventive measures and further loss or damage caused by preventive measures.

The convention is modeled on the International Convention on Civil Liability for Oil Pollution Damage, 1969. As with that convention, a key requirement in the bunkers convention is the need for **the registered owner** of a vessel to maintain compulsory insurance cover.

Another key provision is the requirement for direct action - this would allow a claim for compensation for pollution damage to be brought directly against an insurer. The Convention requires ships over 1,000 gross tonnage to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover the liability of the registered owner for pollution damage.

1. Application

Flag State party to the Convention:

Generally, the Evidence of Insurance (known as "Blue Cards") will be issued by the P&I Clubs. Further, member States will issue the statutory government certificates based on their national legislation. Note: “Blue Cards” are non-mandatory supplementary documents only.

Flag State not party to the Convention:

Vessels of ship owners registered in a State which is not party to the Convention should obtain a State issued certificate from a state party to the Convention. Ideally, if calling at a port or terminal in a state party, the certificate could be obtained from the issuing authority of that particular state. Alternatively, in the event that this is not possible, a state issued certificate may be obtained from any other State party to the Convention. This may also be the case, when a ship sails under the conditions of a bare-boat charter registration and the certificate of insurance has been issued by the authority of the underlying register and not by the flag state.

For on overview of States party to the Convention refer to www.imo.org (Conventions-Status of Conventions by Countries) or the PSCO Manual – Table of ratification of IMO Conventions.

2. Control Requirements for Port State Control

Port State Control inspections should be carried out observing the following principles:

1. Port States party to the Bunker Convention shall ensure, that any ship, wherever registered, having a gross tonnage greater than 1000 entering or leaving a port of its territory, or arriving at or leaving an off-shore facility in its territorial sea is carrying a certificate according to the Bunker Convention,
2. Bunker oil Certificates issued by the competent authorities must be duly signed by a certifying official. “Blue-cards”, issued by P & I Clubs are not sufficient,
3. Certificates of Insurance, duly issued by an authority of a State Party to the Bunker Convention shall also be recognized.

4. Action taken

The absence of a valid Bunker Certificate must be rectified before departure and the PSCO should consider a detention.

ANNEX V - TRANSPOSITION OF THE OPRC CONVENTION INTO NATIONAL LEGISLATION

Key aspects of the OPRC whose transposition into national legislation should be checked:

- **Article 3 -** Requirements for oil pollution emergency plans for ships, offshore units, sea ports and oil-handling facilities aligned to the national system
- **Article 4 -** Reporting procedures for discharges or probable discharges of oil irrespective of the source
- **Article 6:**
  - **a) (i) -** Designation of the competent national authority or authorities with responsibility for oil pollution preparedness and response
  - **a) (ii) -** Designation of the national operational contact point or points, which shall be responsible for the receipt and transmission of oil pollution reports as referred to in article 4
  - **a) (iii) -** Designation of an authority which is entitled to act on behalf of the State to request assistance or to decide to render the assistance requested
  - **b) –** Establishment of a national contingency plan for preparedness and response
  - **2) a) -** Establishment and operation of spill response capabilities as may be required to meet the existing risk.
  - **2) b) -** requirements for mandatory training and exercising of contingency plans and response operations for those likely to be involved with the preparedness and response to an oil spill
  - **2) d) -** mechanism or arrangement to co-ordinate the response to an oil pollution incident
- **Article 7 –** mechanism to facilitate offers and requests of international Co-operation and assistance during a spill incident.

Further considerations which can be checked also:

- legislation and regulations to create a national pollution response framework and obligation to protect the marine environment from harmful substances;
- legislation that places liability for incidents from offshore units, including response costs and compensation, squarely on the operator;
- legislation specifying penalties e.g. for failure to report;

- legislation to ensure that operators are liable and able to meet potential compensation claims;
- legislation defining the frequency of update of the national contingency plan;
- legislation formalizing participation and contribution of members of a national pollution preparedness and response forum;
- etc.…

ANNEX VI - ADDITIONAL QUICK GAP ANALYSIS TABLE

NAMIBIA

CLC 69	CLC 92	Fund 92	Sup. Fund	Bunkers	LLMC 76	LLMC 96
NOT RATIFIED	Ratified Draft marine pollution bill. Implementation is taking place but it is ineffective without national legislation. Top priority. IMO assistance required to finalize the draft bill for Marine Pollution Act 2013 Part VII – liability and compensation for pollution damage Sub-part 1 – liability for oil pollution (art. 200) The Prevention and liability of Pollution of the Sea by Oil Act 6 of 1981: Art.9(5)(b) limits of up to 14 million is not in conformity with CLC 92	Ratified Draft marine pollution bill. Implementation is taking place but it is ineffective without national legislation. Top priority. IMO assistance required to finalize the draft bill for a MARINE POLLUTION ACT 2013 Part VII – liability and compensation for pollution damage Division 2 – International oil pollution compensation fund	Not Ratified Not a priority now	Approved by Parliament Partially covered in draft marine pollution bill. Implementation will take place but it ineffective without national legislation. Pending depositing of instrument of accession with the IMO SG. Minutes of Namibian Parliament, part 8. There is a need to fully provide for the Bunker convention in the draft marine pollution bill for a MARINE POLLUTION ACT 2013 Part VII – liability and compensation for pollution damage Sub-part 1 – liability for oil pollution (art. 201), however section 199 does not exist!	NOT RATIFIED But Limitation of liability apparently through Part XVII Merchant Shipping Act Art. 422(1)(a) ??	NOT RATIFIED Priority. IMO assistance required.

				+ art 215 regulates limits + HNS included: Sub-part 3 – carriage of HNS		

ANNEX VII - TC ACTIVITIES LEGAL MATTERS (Reviewing national legislation or drafting exercises)

Namibia

- **2010** Maritime Legislation Drafting, from 13th May – 14th July 2010
- **2011** National Stakeholders Forum on Maritime Legislation: 12 to 14 September 2011
- **2013** Advisory and Follow-up Mission on the Review/Updating of the National Maritime Legislation 25 February to 01 March 2013
- **2016** Follow up mission on Maritime regulation and Stakeholders Forum 13 to 15 September 2016
- **2019** Two participants from the Ministry of Works and Transport attended the Workshop on general principles of drafting national legislation to implement IMO conventions held at IMO Headquarters in London from 30 September to 4 October 2019.