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FIJI MARITIME (BUNKER) REGULATIONS 2015

A Legislation Drafting Project submitted in partial fulfillment of the requirements for the award of the Degree of Master of Laws (LL.M.) in International Maritime Law at the IMO International Maritime Law Institute

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EXPLANATORY NOTE¹
FIJI MARITIME (BUNKER) REGULATIONS 2015

1 INTRODUCTION

1.1 The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunker Convention, 2001) is premised on the umbrella convention, the United Nations Convention on the Law of the Sea, 1982 (UNCLOS). Article 194 of UNCLOS provides that States shall take all measures necessary to prevent, reduce and control pollution of the marine environment. Article 235 of UNCLOS further provides that, with the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the further development of relevant rules.

1.2 It is to be highlighted that the International Convention on Civil Liability for Oil Pollution Damage, 1992, as amended, which the Republic of Fiji is a party to, covering oil spills does not include bunker oil spills from ships other than tankers.² In this regard, the Bunker Convention, 2001 ensures 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.

2 BACKGROUND

2.1 The following provides the historical background and timelines which has led to the conclusion of the Bunker Convention, 2001:³

¹ The Explanatory Note has followed the format, numbering and layout used in the Republic of Fiji.

² Definition of "ship" in Article 2 (1) of the International Convention on Civil Liability for Oil Pollution Damage, 1992, as amended refers to ships carrying only oil in bulk as cargo.

³ http://www.imo.org/blast/contents.asp?topic_id=67&doc_id=457 15 January 2015.

- 2.1.1 Early 90's – the regime covering pollution from ships' bunkers was first debated during discussions on the 1992 Protocols to the International Convention on Civil Liability for Oil Pollution Damage, 1969 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971. However, at that time, the general consensus was that the inclusion of bunkers in those instruments would complicate matters as there was a clear difference between oil carried as cargo and bunker fuel oil;
- 2.1.2 1994 – Australia submitted a paper to the 38th session of IMO's Marine Environment Protection Committee (MEPC) proposing the development of a liability and compensation regime for damage in the event of damage caused by oil from ships' bunkers. The MEPC requested the IMO Legal Committee to give the matter due consideration.
- 2.1.3 1995 – At the 73rd session of the IMO Legal Committee, it was agreed to include the matter in its work programme.
- 2.1.4 1996 – At the 75th session of the IMO Legal Committee, the need for a bunkers convention was highlighted in a joint submission by Australia, Canada, Finland, Norway, South Africa, Sweden and the United Kingdom. It referred to the United Kingdom P & I Club's Analysis of Major Claims 1993 which stated that “... *half of the total number of pollution claims arose from incidents involving ships not carrying oil cargo.*”⁴ Essentially, these referred to ships outside the coverage of the International Convention on Civil Liability for Oil Pollution Damage, 1969 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971.
- 2.2 Some 10 or so years later, at the IMO 2001 Diplomatic Conference held in London, the Bunker Convention, 2001 was finally concluded by IMO. According to IMO, the last

⁴ http://www.imo.org/blast/contents.asp?topic_id=67&doc_id=457 15 January 2015.

significant gap in the international regime for compensating victims of oil spills from ships was closed with the adoption by IMO of the Bunker Convention, 2001.⁵

2.3 The IMO 2001 Diplomatic Conference also adopted three resolutions. This will be explained further in Sub-section 3.2.

2.4 As of 6 January 2015, there are 78 State Parties to the Bunker Convention, 2001 including the following South Pacific countries – Kiribati, Samoa, Tonga, Tuvalu and Vanuatu.⁶ The Convention met the criteria for entry into force on 18 November 2007 and came into force internationally a year later, on 18 November 2008.⁷

3 OVERVIEW OF THE BUNKER CONVENTION, 2001

3.1 The following highlights some of the salient features and limitations of the Bunker Convention, 2001:

3.1.1 Article 1 – Definitions

This Article provides all the definitions relating to the Bunker Convention, 2001, some of which are highlighted below:

“Bunker oil” means 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;

“Incident” means any occurrence or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage.

⁵ http://www.imo.org/blast/contents.asp?topic_id=67&doc_id=457 15 January 2015.

⁶ <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx> 15 January 2015.

⁷ Article 14 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

“ship” refers to any seagoing vessel and seaborne craft, of any type whatsoever.

“Shipowner” includes the registered owner, bareboat charter, manager and operator of the ship and is referred to in Article 3, 5, 6, 7 (10) and 9 of the Bunker Convention, 2001.

“State of the ship’s registry” means, in relation to a registered ship, the State of registration of the ship and, in relation to an unregistered ship, the State whose flag the ship is entitled to fly.

“Registered owner” means the person registered as the owner or a person owning the ship and is referred to in Article 7 (1) and 13 (3) (a).

The Bunker Convention, 2001 covers pollution damage in the following instances:

- i. 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
- ii. The costs of preventive measures and further loss or damage caused by preventive measures.

In addition, unregistered ships do not escape the obligations (and limitation of liability) of the Bunker Convention, 2001 as per the definition of “registered owner” and by reference in the definition of “State of the ship’s registry”.

3.1.2 *Article 2 – Scope of Application*

The Bunker Convention, 2001, applies to pollution damage caused and preventive measures to prevent or minimize such damage of a State Party:

- i. in the territory, including territorial sea; and
- ii. in the Exclusive Economic Zone.

The Republic of Fiji has established its territorial sea (12 nautical miles from the baseline) and exclusive economic zone (200 nautical miles from the baseline) in accordance with the Marine Spaces Act (Cap 158A), and thus the Convention will apply accordingly.

This Article also means that irrespective of the incident occurring in the high seas, the fact that the pollution damage affects the territory, including the territorial sea and the Exclusive Economic Zone of the Republic of Fiji, the Bunker Convention, 2001 will apply.⁸

Further to the above, as the Republic of Fiji is an archipelagic State and the reference to “territory” may include “archipelagic waters”, to remove any doubt, the scope of application in the proposed Regulations will include “archipelagic waters” when referring to the territory.

3.1.3 *Article 3 – Liability of the shipowner*

Paragraph 1 of this Article establishes strict liability when bunker oil (oil used or intended to be used as fuel for shipping) is released into the marine environment. In this event, the ship-owner will be strictly liable for reasonable economic costs

⁸ Gutierrez, N A Martinez; *Limitation of Liability in International Maritime Conventions*, Routledge, New York, 2011, p. 159.

incurred by any affected party and for reasonable costs of environmental mitigation.

In addition, this Article provides in Paragraph 3 and 4 the exceptions to strict liability, provided the shipowner proves that the damage:

- i. resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or
- ii. was whole caused by an act or omission done with the intent to cause damage by a third party; or
- iii. was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

Furthermore, if the shipowner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the shipowner may be exonerated wholly or partially from liability to such person.

Paragraph 6 provides that nothing in the Bunker Convention, 2001 will prejudice the shipowner's right of recourse which is independent of the Bunker Convention 2001; meaning that the shipowner can claim against other persons liable for the damage.⁹

3.1.4 *Article 4 – Exclusion*

This Article provides that the Bunker Convention, 2001 does not apply to:

⁹ Gutierrez, N A Martinez; *Limitation of Liability in International Maritime Conventions*, Routledge, New York, 2011, p. 165.

- i. Pollution damages as defined in the International Convention on Civil Liability for Oil Pollution Damage, 1992, as amended, whether or not compensation is payable in respect of it under that Convention; and
- ii. warships, naval auxiliary or other ships owned or operated by a State and used, for the time being, only on Government non-commercial service.

In relation to (ii) above, the State may decide to apply the Bunker Convention, 2001 in which case, it shall notify the Secretary-General and specify the terms and conditions of such application.

It is to be noted that Government vessels used for commercial purposes shall be subject to Article 9 (Jurisdiction) and waives its defenses based on its status as a sovereign State.

3.1.5 *Article 5 – Incidents involving two or more ships*

This Article provides that subject to Article 3 (Liability of the Shipowner), the shipowners shall be jointly and severally liable for all such damage which is not reasonably separable.

For the Republic of Fiji, this is reflected in Part 6 of the Maritime Transport Decree 2013.

3.1.6 *Article 6 – Limitation of Liability*

Article 6 of the Bunker Convention 2001 states the following:

Nothing in this Convention shall affect the right of the shipowner and the person or persons providing insurance or other financial security to limit liability under any applicable national or international regime, such as

the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.

In the Republic of Fiji, the shipowner and the person or persons providing insurance or other financial security may limit liability their liability under Part 5 of the Maritime Transport Decree 2013.

As Part 5 of the Maritime Transport Decree 2013 only reflects the Convention on Limitation of Liability for Maritime Claims 1976, the Republic of Fiji will include in the proposed Regulations that Part 5 of the Maritime Transport Decree 2013 will apply provided that limitation of liability does not exceed the amount calculated in the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims 1976.

This will then enable the Republic of Fiji to comply with Article 6.

3.1.7 Article 7 – Compulsory insurance or financial security

Paragraph 1 of this Article states that registered owners of ships over 1000 gross tonnage are 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 provisions of the national or international limitation regime provided it does not exceed the amount calculated in the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims 1976.

As mentioned in Sub-paragraph 3.1.6 above, Part 5 of the Maritime Transport Decree 2013 only reflects the Convention on Limitation of Liability for Maritime Claims 1976. As such, the Republic of Fiji will include in the proposed Regulations that Part 5 of the Maritime Transport Decree 2013 will apply provided that limitation of liability does not exceed the amount calculated in the

Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims 1976.

In addition, a State Party is obliged to issue a Certificate attesting that insurance or other financial security is in force in accordance with the Bunker Convention, 2001 as per the model form in the Annex to the Bunker Convention, 2001.

The ship is required to carry this Certificate on board and in the event that the State Party does not require the ship to carry such on board, the State Party will have to notify the Secretary-General, on the condition that such information is provided in electronic format and is accessible by other State Parties.

The issuance of the Certificate may be delegated by a State Party to a recognized organization on the condition that the State Party notifies the Secretary-General. In any event, the State Party is still responsible for the completeness and accuracy of the certificate so issued.

Another significant provision in the Bunker Convention, 2001 is the right for direct action, i.e., a claim for compensation for pollution damage can be brought directly against an insurer or other person providing financial security for the registered owner's liability. In addition, Paragraph 10 of this Article further provides that even if the shipowner is not entitled to limitation of liability, the insurer may limit liability to an amount equal to the amount of insurance required under Paragraph 1.

Paragraph 11 obligates the State Party to not permit a ship under its flag to which Article 7 applies to operate at any time unless a certificate has been issued. Hence, in order to enable compliance, the failure to comply with the requirement will be included as an offence in the proposed Regulations. Furthermore, having reviewed other national legislations such as Malta, the wording in the proposed

Regulations will be further clarified to include the *attempt* to proceed to sea without an appropriate insurance certificate, an offence.

3.1.8 *Article 8 – Time limits*

This Article stipulates that a persons' right to compensation is extinguished unless an action is brought within three years from the date when the damage occurred. Furthermore, the Article provides that no action shall be brought more than six years from the date of the incident which caused the damage.

3.1.9 *Article 9 – Jurisdiction*

This Article provides that each State Party shall ensure that its courts have jurisdiction to entertain actions for compensation under the Bunker Convention, 2001.

In this regard, the High Court of Fiji would have jurisdiction, under section 18 (2) of the High Court Act (Cap 13), to entertain actions for compensation.

3.1.10 *Article 10 – Recognition and enforcement*

This Article obliges a State Party to recognize and enforce the judgment of another State Party provided that the judgment was not obtained by fraud or where no natural justice was afforded to the defendant.

3.2 The Conference which adopted the Bunker Convention, 2001 also adopted three additional resolutions:¹⁰

3.2.1 The first resolution on the limitation of liability urged States that have not done so to ratify, or accede to the Protocol of 1996 to amend the Convention on

¹⁰ http://wmo.omo.org/blast/mainfraime.asp?topic_id=256&doc_i 26th March 2015.

Limitation of Liability for Maritime Claims, 1976. This Protocol increases the limits of liability. Subsequently, this increases the amount of compensation payable in the event of an incident.

As highlighted in Sub-paragraphs 3.1.6 and 3.1.7, the Republic of Fiji is not a Party to the Convention on Limitation of Liability for Maritime Claims, 1976 nor the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976. However, the Republic of Fiji has included the limits of liability stipulated in the Convention on Limitation of Liability for Maritime Claims, 1976 in Part 5 of the Maritime Transport Decree 2013. As such, the proposed Regulations will reflect the application of Part 5 of the Maritime Transport Decree 2013 with the proviso that the limit of liability shall not exceed the amount calculated in the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims 1976.

3.2.2 The second resolution urged all IMO Member States, in co-operation with IMO, other interested States, competent international or regional organizations and industry programs, to promote and provide directly, or through IMO, support to States that request technical assistance for:

- i. the assessment of the implications of ratifying, accepting, approving, or acceding to and complying with the Bunker Convention, 2001;
- ii. the development of national legislation to give effect to the Bunker Convention, 2001;
- iii. the introduction of other measures for, and the training of personnel charged with, the effective implementation and enforcement of the Bunker Convention, 2001.

With this explanatory note and the proposed Regulations, sub-paragraph (i) and (ii) will be addressed. In relation to sub-paragraph (iii) above, the Republic of Fiji

has the opportunity to capitalize on seeking technical assistance from IMO, other interested States, competent international or regional organizations and industry programs to train its personnel for the effective implementation and enforcement of the Bunker Convention, 2001.

- 3.2.3 The third resolution related to the protection for persons taking measures to prevent or minimize the effects of oil pollution.

When implementing the Convention, States were urged to consider the need to introduce legal provision for the protection of persons taking measures to prevent or minimize the effects of bunker oil pollution with the recommendation that States consider the relevant provisions of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 as a model for their legislation. It further recommended that such persons be exempt from liability unless the liability in question resulted from their personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that such damage would probably result.

In this regard, the provision of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 will be included in the proposed Regulations. After reviewing other national legislations such as Malta, the wording in the proposed Regulations will be further clarified to include that any persons performing salvage operations will require the consent of or on instructions of a competent person *so authorized by the Maritime Safety Authority of Fiji*. Essentially, this will ensure a form of regulatory control over competent persons giving such consent or instructions during a salvage operation.

4 SIGNIFICANCE TO FIJI

- 4.1 As a coastal State with a declared 1.29 million square kilometers of exclusive economic zone, the relevance of the Bunker Convention, 2001 to the Republic of Fiji is without a doubt, substantial. For an island nation whose economy is largely dependent on earnings from the Tourism and the Fisheries industries, the thought of having its source of livelihood (or a part of) damaged by marine spills is most unpleasant. But such is the reality that we face.
- 4.2 The Bunker Convention, 2001 offer State Parties or victims, the possibility to be financially compensated in the event of a ship bunker-related oil spill within the State party territory.
- 4.3 Unfortunately, the Republic of Fiji or the victims cannot claim compensation for pollution damage caused by ship bunker-spills because of the Republic of Fiji's non-party status and/or domestication of the Bunker Convention, 2001.
- 4.4 The Republic of Fiji or the victims will only be able to fully utilize the compensation for pollution damage framework under the Bunker Convention, 2001, once it becomes a party to the Convention and/or includes the Bunker Convention, 2001 as part of its laws.
- 4.5 Related to this is the National Marine Spill Contingency Plan (NATPLAN) which is necessary in establishing the initiation and termination of responses to marine spills in the Republic of Fiji. The NATPLAN, which is currently in its draft form, stems from the Maritime Transport Decree 2013 and one of the features of the NATPLAN is that it requires the Maritime Safety Authority of Fiji to commence cost-recovery actions against the Polluter's representatives with the view to fully recover costs of response.
- 4.6 Ratifying and domesticating the Bunker Convention, 2001 will enable the Republic of Fiji or the victims to gain an additional benefit and that is to be compensated for damages caused by marine spills from ship bunkers.

5 FIJI'S OBLIGATIONS UNDER THE BUNKER CONVENTION, 2001

- 5.1 There is no fee to be incurred by the Republic of Fiji by becoming a Party to the Bunker Convention, 2001.¹¹
- 5.2 In general, a State Party is obliged to ensure that every ship-owner of a ship having a gross tonnage greater than 1000 shall maintain the insurance or other financial security to cover the liability. Currently, there are 13 vessels on the Fiji Register who will be required to have such a cover.
- 5.3 Furthermore, the State Party, or through its delegated institution or authority, is obliged to issue the certificate attesting that insurance or other financial security is in force. The State of ship's registry shall determine the conditions of issue and validity of the certificate.
- 5.4 A State Party shall not permit a ship under its flag to operate at any times without the certificate. Foreign vessels entering Fiji waters will be required to have this certificate and this will be checked through the Republic of Fiji's Port State Control.
- 5.5 No annual reports are required for this Convention and there are no meetings dedicated specifically to this Convention. Any matters that may arise in connection with this Convention are discussed by the IMO Legal Committee.¹²

6 PROPOSED REGULATIONS

- 6.1 The domestication of the Bunker Convention, 2001 will be by way of Regulations wherein, in accordance with *Section 240 (2) (hh)* of the *Maritime Transport Decree 2013*,

¹¹ It is the Republic of Fiji standard form to include a statement whether there is any fee that the Republic of Fiji is obligated to pay on acceding to any Convention.

¹² It is the Republic of Fiji standard form to include a statement whether any annual report is to be submitted or any meeting that the Republic of Fiji is obligated to attend on acceding to any Convention.

the Minister has the powers to make such Regulations. It must be noted that for Regulations, there is no Long Title as required for an “Act”, “Decree” or “Promulgation”.

6.2 The proposed Regulations are divided into six parts as summarized in 27 regulations. In its content, the proposed Regulations present the following key features:

6.2.1 Part 1 – Preliminary

This part relates to the title, interpretation, application and commencement date of the proposed Regulations.

6.2.2 Part 2 – Liability under Bunker Oil Convention

This part deals with the liabilities of the shipowners and handling of claims of two or more ships, responder immunity and the limitation of liabilities in accordance with Part 5 of the Maritime Transport Decree 2013.

6.2.3 Part 3 – Compulsory Insurance Relating to Liability for Pollution Damage

This part covers the compulsory insurance or financial security for ships of more than 1000 gross tonnes, the option of delegating the authority of the Maritime Safety Authority of Fiji to an institution or organization recognized to issue an insurance certificate on its behalf, the rights of third parties against insurers and the requirement for the carriage of insurance certificate when any Fiji and Foreign registered ships are in operation or enter or depart ports, in Fiji.

This part also reflects a strict liability offence for the failure of the registered owner or master of a ship to carry an insurance certificate when in operation. In this regard, the fines and the imprisonment duration marked in bold and brackets in the proposed regulations 11 and 13 reflect the standard sanctions that is in the Maritime Transport Decree 2013. However, the legislators may wish to change these figures and duration upon discussion.

6.2.4 Part 4 – Application, Issue and Cancellation of Insurance Certificate

This part deals with the application for, issue, form and cancellation of an insurance certificate. Furthermore, this part also reflects the application fee for the insurance certificate marked in bold and brackets in the proposed regulation 15. However, the legislators may wish to change this fee upon discussion.

6.2.5 Part 5 – Port State and Flag State Control

This part covers the powers of the Port State Control Officers and the Enforcement and Compliance Officers and the offences and penalties provisions when a registered owner or master fails to carry or disclose the insurance certificate.

6.2.6 Part 6 – Miscellaneous provisions applying to the Regulations Generally

This part deals with the limitation of criminal proceedings linked to section 253 of the Maritime Transport Decree 2013 wherein a person can only be charged within 6 months after the matter arises. In addition, for civil matters, the right to compensation is extinguished unless the action is brought within 3 years from the date when damage occurred. Furthermore, this part provides that the court has jurisdiction to hear claims for compensation and that the Republic of Fiji recognize the final judgment from courts in other State Parties.

This part also reflects a strict liability offence for the failure of a person to produce an appropriate insurance certificate. In this regard, the fines and the imprisonment duration marked in bold and brackets in the proposed regulations 21 and 22 reflect the standard sanctions that is in the Maritime Transport Decree 2013. However, the legislators may wish to change these figures and duration upon discussion.

7 CONSULTATIONS

- 7.1 Information sessions and national publication on the Bunker Convention, 2001 have been undertaken by the Maritime Safety Authority of Fiji around Fiji, particularly for the shipowners of the 13 vessels over 1000 gross tonnage.
- 7.2 It is recommended that the proposed Regulations come into force 3 months after the date of publication in the gazette to enable the registered owners of the 13 vessel to comply with the compulsory insurance.

8 CONCLUSION

- 8.1 The benefits to be gained by the Republic of Fiji in becoming a party to the Bunker Convention, 2001 outweigh any disadvantages:
- 8.1.1 the Republic of Fiji will extend the liability and compensation regime whereby claims and compensation for pollution damage of an economic nature can actually be calculated, for example, losses suffered by the Fisheries and Tourism industry.
- 8.1.2 the Republic of Fiji can claim the cost of preventive measures and further loss or damage caused by such measures by imposing strict liability which provides faster and effective compensation.
- 8.2 The reforms currently being undertaken in the Republic of Fiji's marine laws provide the appropriate environment for the adoption and domestication of the Bunker Convention, 2001.

9 RECOMMENDATIONS

9.1 Cabinet is invited to agree that the:

9.1.1 Republic of Fiji accede to the Convention on Civil Liability for Bunker Oil Pollution Damage, 2001; and

9.1.2 Minister for Infrastructure and Transport endorse and sign Fiji's Maritime (Bunker) Regulations 2015.

[LEGAL NOTICE NO.]

MARITIME TRANSPORT DECREE 2013
(DECREE NO. 20 OF 2013)

Fiji Maritime (Bunker) Regulations 2015

IN exercise of the powers conferred upon me by section 240 (2) (*hh*) of the Maritime Transport Decree 2013, I hereby make these Regulations—

PART 1—PRELIMINARY

Short title and commencement

1. These Regulations may be cited as the Fiji Maritime (Bunker) Regulations 2015 and shall come into force 3 months after the date of publication in the *Gazette*.

Interpretation

2. In these Regulations, unless the context otherwise requires,—

“Archipelagic waters” has the same meaning under section 2 of the Decree;

“Authority” means the Maritime Safety Authority of Fiji;

“Bunker oil” means 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;

“Bunker Convention, 2001” means the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001;

“Certificate” means the insurance certificate issued by a Contracting State;

“Competent public authority” means any person or organization that has the legally delegated or invested authority, capacity, or power to perform a designated function;

“Contracting State” means a State who is a party to the Bunker Convention, 2001;

“Chief Executive Officer” means the Chief Executive Officer of the Authority;

“Civil Liability Convention” means the International Convention on Civil Liability for Oil Pollution Damage, 1992, as amended;

“Decree” means the Maritime Transport Decree 2013;

“Exclusive economic zone” has the same meaning under section 2 of the Decree;

“Enforcement and Compliance Officer” has the same meaning under section 2 of the Decree;

“Fiji ship” shall have the same meaning as in the Ship Registration Decree 2013;

“Foreign ship” has the same meaning under section 2 of the Decree;

“Gross tonnage” means gross tonnage calculated in accordance with the tonnage measurement regulations contained in Annex 1 of the International Convention on Tonnage Measurement of Ships, 1969;

“Incident” means any occurrence or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage;

“Minister” has the same meaning under section 2 of the Decree;

“Organization” means the International Maritime Organization;

“Person” means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions;

“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;

“Port” has the same meaning under section 2 of the Decree;

“Port State Control Officer” has the same meaning under section 2 of the Decree;

“Preventive measures” means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage;

“Registered owner” means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However, in the case of a ship owned by a State and operated by a company which in that State is registered as the ship’s operator, “registered owner” shall mean such company;

“Secretary-General” means the Secretary-General of the Organization;

“Ship” means any seagoing vessel and seaborne craft, of any type whatsoever;

“Shipowner” means the owner, including the registered owner, bareboat charterer, manager and operator of the ship;

“State of the ship’s registry” means, in relation to a registered ship, the State of registration of the ship and, in relation to an unregistered ship, the State whose flag the ship is entitled to fly; and

“Territorial sea of Fiji or territorial sea” has the same meaning under section 2 of the Decree.

Application

3. — (1) These Regulations shall apply to —

(a) pollution damage caused –

(i) in the territory, including the archipelagic waters and the territorial sea, of Fiji; and

(ii) in the exclusive economic zone of Fiji;

(b) preventive measures, wherever taken, to prevent or minimize such damage.

(2) These Regulations shall not apply to —

(a) pollution damage as defined in the Civil Liability Convention, whether or not compensation is payable in respect of it under that Convention.

(b) except as provided in sub-regulation (3), warships, naval auxiliary or other ships owned or operated by the State and used, for the time being, only on Government non-commercial service.

(3) The Authority may decide to apply this Regulation to its warships or other ships described in sub-regulation (2) (b), in which case, the Minister shall notify the Secretary-General thereof specifying the terms and conditions of such application.

(4) With respect to ships owned by the State and used for commercial purposes, Fiji shall be subject to suit in the jurisdictions set forth in regulation 25 and shall waive all defences based on its status as a sovereign State.

PART 2—LIABILITY UNDER BUNKER CONVENTION, 2001

Liability of the shipowner

4. — (1) Except as provided in sub-regulations (3) and (4), the shipowner at the time of an incident shall be liable for pollution damage caused by any bunker oil on board or originating from the ship, provided that, if an incident consists of a series of occurrences having the same origin, the liability shall attach to the shipowner at the time of the first of such occurrences.

(2) Where more than one person is liable in accordance with sub-regulation (1), their liability shall be joint and several in accordance with Part 6 of the Decree.

(3) No liability for pollution damage shall attach to the shipowner if the shipowner proves that:

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

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

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

(4) If the shipowner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the shipowner may be exonerated wholly or partially from liability to such person.

(5) No claim for compensation for pollution damage shall be made against the shipowner otherwise than in accordance with this regulation.

(6) Subject to sub-regulation (7), no claim for compensation for damage under these Regulations or otherwise may be made against –

(a) the servants or agents of the shipowner or the members of the crew;

(b) the pilot or any other person who, without being a member of the crew, performs services for the ship;

(c) any person performing salvage operations with the consent or on the instructions of the shipowner or on the instructions of a competent person so authorized by the Authority;

(d) any person taking preventive measures; and

(e) the servants or agents of persons mentioned in paragraphs (c) and (d) above;

provided that the damage did not result from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

(7) Nothing in these Regulations shall prejudice any right of recourse of the shipowner which exists independently of these Regulations.

Incidents involving two or more ships

5. When an incident involving two or more ships occurs and pollution damage results therefrom, the shipowners of all the ships concerned, unless exonerated under regulation 4, shall be jointly and severally liable for all such damage which is not reasonably separable in accordance with Part 6 of the Decree.

Limitation of liability

6. — (1) Where the shipowner incurs liability under regulation 4, the shipowner and the person (s) providing insurance or other financial security may limit their liability in accordance with Part 5 of the Decree, but in all cases, not exceeding the amount calculated in accordance with the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976.

(2) Sub-regulation (1) shall not apply where pollution damage results from the personal act or omission of the shipowner, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

PART 3— COMPULSORY INSURANCE RELATING TO LIABILITY FOR POLLUTION
DAMAGE

Compulsory insurance or financial security

7. — (1) The registered owner of a ship having a gross tonnage greater than 1000 shall 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 not exceeding the amount calculated in accordance with Part 5 of the Decree but in all cases, not exceeding the amount calculated in accordance with the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976.

(2) A certificate attesting that insurance or other financial security is in force in accordance with the provisions of these Regulations shall be issued by the Authority to each ship after the Authority has determined, in accordance with regulation 17 (1), that the requirements of sub-regulation (1) have been complied with.

(3) With respect to a foreign ship –

(a) registered in a Contracting State, such certificate may be accepted by the Authority if the certificate is issued or certified by the appropriate authority of that State; or

(b) registered in a State who is not a party to the Bunker Convention, 2001, the Authority may –

(i) subject to Part 4 of these Regulations, issue the certificate if such ship calls at a port in its territory or arrives at or departs an offshore facility in its territorial waters; or

(ii) accept the certificate if the certificate is issued by the appropriate authority or delegated authority of a Contracting State.

(4) For the purpose of sub-regulation (3) (b) (i), the certificate issued by the Authority shall be in English with a copy of the certificate retained by the Authority.

(5) An insurance or other financial security shall not satisfy the requirements of this regulation if it can cease, for reasons other than the expiry of the period of validity of the insurance or security specified in the certificate under sub-regulation (2), before three months have elapsed from the date on which notice of its termination is given to the Authority, unless the certificate has been surrendered to the Authority or a new certificate has been issued within the said period.

(6) Sub-regulation (5) shall similarly apply to any modification which results in the insurance or security no longer satisfying the requirements of this regulation.

(7) Nothing in these Regulations shall be construed as preventing the Authority from relying on information obtained from other States or the Organization or other international organizations relating to the financial standing of providers of insurance or financial security for

the purposes of this regulation. In such cases, the Authority in relying on such information is not relieved of its responsibility as a State issuing the certificate required by sub-regulation (2).

(8) Certificates issued or certified under sub-regulation (3) shall be accepted by the Authority for the purposes of these Regulations and shall be regarded by the Authority as having the same force as certificates issued or certified by them even if issued or certified in respect of a ship not registered in a Contracting State.

(9) The Authority may at any time request consultation with the issuing or certifying authority or State should it believe that the insurer or guarantor named in the insurance certificate is not financially capable of meeting the obligations imposed by these Regulations.

Delegation of authority

8. — (1) The Authority may authorize either an institution or an organization recognized by it to issue the certificate referred to in regulation 7 (2) on terms and conditions as it deems fit.

(2) Such institution or organization shall inform the Authority of the issue of each certificate.

(3) In all cases, the Authority shall fully guarantee the completeness and accuracy of the certificate so issued and shall undertake to ensure the necessary arrangements to satisfy this obligation.

(4) The Minister shall notify the Secretary-General of –

(a) the specific responsibilities and conditions of the authority delegated to an institution or organization recognized by the Authority;

(b) the withdrawal of such authority; and

(c) the date from which such authority or withdrawal of such authority takes effect.

(5) An authority delegated under sub-regulation (4) (a) shall not take effect prior to three months from the date on which notification to that effect was given to the Secretary-General.

(6) The institution or organization authorized to issue certificates in accordance with this regulation shall, as a minimum, be authorized to withdraw these certificates if the conditions under which they have been issued are not maintained.

(7) In accordance with sub-regulation (6), the institution or organization shall report such withdrawal to the Authority.

Rights of third parties against insurers

9. — (1) Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the registered owner's liability for pollution damage.

(2) In such a case, the defendant may invoke the defences (other than bankruptcy or winding up of the shipowner) which the shipowner would have been entitled to invoke, including limitation pursuant to regulation 6.

(3) Furthermore, even if the shipowner is not entitled to limitation of liability in accordance with regulation 6, the defendant may limit liability to an amount equal to the amount of the insurance or other financial security required to be maintained in accordance with regulation 7 (1).

(4) Moreover, the defendant may invoke the defence that the pollution damage resulted from the willful misconduct of the shipowner, but the defendant shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the shipowner against the defendant.

(5) The defendant shall in any event have the right to require the shipowner to be joined in the proceedings.

Ships must carry insurance certificate when entering or departing ports in Fiji etc.

10. A Fiji ship or a ship shall not enter or depart or attempt to enter or depart –

(a) a port in Fiji; or

(b) an offshore facility in its archipelagic waters or territorial sea;

if the ship does not have on board an insurance certificate issued under regulation 17 (1).

Ships registered in Fiji must carry insurance certificate when in operation

11. — (1) A person commits an offence under regulation 10 if –

(a) the person is the registered owner or master of a ship; and

(b) at the time the ship is in operation, the ship does not have on board an appropriate insurance certificate for the ship, that is in force.

(2) An offence under sub-regulation (1) is an offence of strict liability and any persons referred to in sub-regulation (1) (a) is liable upon conviction –

(a) in the case of the registered owner,—

(i) if an individual, to a fine not exceeding **[\$10,000]** or imprisonment for a term not exceeding **[2 years]**, or both;

(ii) if a corporate body, to a fine not exceeding **[\$40,000]**; or

(b) in the case of a master, to a fine not exceeding **[\$10,000]** or imprisonment for a term not exceeding **[2 years]**, or both.

(3) Sub-regulation (1) does not apply if –

- (a) an appropriate insurance certificate for the ship is in force at the time referred to in sub-regulation (1) (b); and
- (b) the issuer of the certificate has notified the Secretary-General that it maintains records in an electronic form that attest to the existence of the certificate; and
- (c) the records are accessible to all Contracting States.

Foreign Ship must carry insurance certificate when entering or departing ports in Fiji etc.

12. A foreign ship or a ship shall not enter or depart or attempt to enter or depart –

- (a) a port in Fiji; or
- (b) an offshore facility in the archipelagic waters or the territorial sea of Fiji;

if the ship does not have on board an insurance certificate complying with the particulars of regulation 18 and showing that there is in force in respect of the ship a contract of insurance or other financial security in accordance with the provisions of regulation 7 (3).

Foreign ship must carry insurance certificate when in operation

13. — (1) A person commits an offence under regulation 12 if –

- (a) the person is the registered owner or master of a ship; and
- (b) the ship –
 - (i) enters or departs a port in Fiji; or
 - (ii) arrives at or departs an offshore facility in the archipelagic waters or the territorial sea of Fiji; and

(c) at the time the ship does so, the ship does not have on board an appropriate insurance certificate for the ship, that is in force.

(2) An offence under sub-regulation (1) is an offence of strict liability and any persons referred to in sub-regulation (1) (a) is liable upon conviction –

(a) in the case of an registered owner,—

(i) if an individual, to a fine not exceeding **[\$20,000]** or imprisonment for a term not exceeding **[2 years]**, or both;

(ii) if a corporate body, to a fine not exceeding **[\$100,000]**; or

(b) in the case of a master, to a fine not exceeding **[\$20,000]** or imprisonment for a term not exceeding **[2 years]**, or both.

(3) Sub-regulation (1) does not apply if –

(a) an appropriate insurance certificate for the ship is in force at the time referred to in sub-regulation (1) (c); and

(b) the issuer of the certificate has notified the Secretary-General that it maintains records in an electronic form that attest to the existence of the certificate; and

(c) the records are accessible to all Contracting State.

Ships not required to carry insurance certificate

14. — (1) The Minister may notify the Secretary-General that, for the purposes of regulation 7 (1), ships are not required to carry on board or to produce the certificate, when entering or departing ports or arriving at or departing from offshore facilities in its territory including archipelagic waters and the territorial sea, provided that the Minister has notified the Secretary-

General that it maintains records in an electronic format, accessible to all Contracting States, attesting the existence of the certificate and enabling Fiji to discharge its obligations under this regulation.

(2) If insurance or other financial security is not maintained in respect of a foreign ship, the provisions of this regulation relating thereto shall not be applicable to such ship, but the ship shall carry a certificate issued by the appropriate authority of the State of the ship's registry stating that the ship is owned by that State and that the ship's liability is covered within the limit prescribed in accordance with regulation 7 (1).

(3) A certificate issued in accordance with sub-regulation (2) shall reflect as closely as possible the form prescribed by regulation 18.

PART 4—APPLICATION, ISSUE AND CANCELLATION OF INSURANCE CERTIFICATE

Application for certificate

15. — (1) A person may apply to the Authority for the issue of a certificate for a ship that is registered –

(a) in Fiji; or

(b) in a State who is not a party to the Bunker Convention, 2001.

(2) The following documents are to be submitted together with the application –

(a) a notarized copy of the flag certificate showing the name of ship, distinctive number or letters and port of registry;

(b) a notarized copy of the certificate of ownership showing the name and principal place of business of the registered owner; and

(c) receipt of payment of application fee.

(3) In addition to the documents required under sub-regulation (2), evidence of the following information are to be submitted with the application –

(a) IMO ship identification number;

(b) type and duration of security;

(c) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established; and

(d) period of validity of the certificate which shall not be longer than the period of validity of the insurance or other security.

(4) The fees payable on an application for a certificate is [**FJD\$500.00**] exclusive of tax.

Form of application

16. An application must be –

(a) in accordance with the form approved by the Authority; and

(b) accompanied by the fee prescribed in regulation 15 (4).

Decision on application

17. — (1) If the Authority is satisfied that the registered owner of the ship is maintaining insurance or other financial security for the ship in an amount that will cover the limits of liability referred to in regulation 7 (1), it shall issue a certificate for the ship within 10 working days of submission of application.

(2) If the Authority is not so satisfied that the person providing the insurance will be able to meet his obligations thereunder or whether the insurance or other security will cover the registered owner's liability, it shall refuse to issue a certificate for the ship.

Form of certificate

18. — (1) A certificate issued in accordance with sub-regulation (2) shall be in the form set out in **SCHEDULE 1** and shall contain the following particulars –

(a) name of ship, distinctive number or letters and port of registry;

(b) name and principal place of business of the registered owner;

(c) IMO ship identification number;

(d) type and duration of security;

(e) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established; and

(f) period of validity of the certificate which shall not be longer than the period of validity of the insurance or other security.

(2) A certificate issued under sub-regulation (1) –

(a) comes into force on the day specified in the certificate; and

(b) remains in force for the period specified in the certificate.

(3) The period of validity referred to sub-regulation (2) (b) shall not be longer than the period of validity of the insurance or other financial security.

Cancellation of Certificate

19. — (1) Notwithstanding regulation 18 (2) (b), the Chief Executive Officer may cancel a certificate issued under these Regulations if he is satisfied that the registered owner of the ship is no longer able to maintain his insurance or other financial security for the ship in an amount that will cover the limits of liability specified in regulation 7 (1).

(2) The Authority shall give notice of the cancellation to –

(a) the registered owner of the ship; and

(b) the master (if any) of the ship; and

(c) if, when the certificate was issued, the ship was registered in a State who is not a party to the Bunker Convention, 2001, that State.

(3) The cancellation takes effect on the day specified in the notice of cancellation.

Certificate ceasing to be in force

20. A certificate issued under regulation 18 immediately ceases to be in force if, when the certificate was issued –

(a) the Fiji ship ceases to be registered in Fiji; or

(b) in relation to a foreign ship registered in a State who is not a party to the Bunker Convention, 2001, the ship ceases to be registered in that country or when that country becomes a Contracting State.

PART 5—PORT STATE AND FLAG STATE CONTROL

Port State Control Officer or Enforcement and Compliance Officer may require insurance certificate to be produced

21. — (1) A Port State Control Officer or an Enforcement and Compliance Officer may require the master or other person in charge of a ship to produce to the officer an appropriate insurance certificate for the ship that is in force if –

- (a) for a ship that is registered in Fiji, the ship is in Fiji; or
- (b) for any other ship, the ship is at a port in Fiji or at an offshore facility in the archipelagic waters or territorial sea of Fiji.

(2) A person commits an offence if –

- (a) the person is subject to a requirement under sub-regulation (1); and
- (b) the person fails to comply with the requirement.

(3) An offence under sub-regulation (1) is an offence of strict liability and any persons referred to in sub-regulation (2) is liable upon conviction –

(a) in the case of the registered owner,—

- (i) if an individual, to a fine not exceeding **[\$2,000]** or imprisonment for a term not exceeding **[2 years]**, or both;
- (ii) if a corporate body, to a fine not exceeding **[\$20,000]**; or

(b) in the case of a master, to a fine not exceeding **[\$2,000]** or imprisonment for a term not exceeding **[2 years]**, or both.

Port State Control Officer or Enforcement and Compliance Officer may detain ships

22. — (1) A Port State Control Officer or an Enforcement and Compliance Officer may detain a ship in relation to regulations 10, 12 and 21 if the Officer has reasonable grounds to believe that,

at the time the ship attempts to leave the port, there is not an appropriate insurance certificate for the ship that is in force.

(2) The Port State Control Officer or Enforcement and Compliance Officer may detain the ship until the certificate is produced to the Officer or the Officer is satisfied that the certificate has been obtained.

(3) A person commits an offence if –

(a) the person is the registered owner or master of a ship to which this Part applies; and

(b) an Officer has detained the ship under sub-regulation (1) in a port in Fiji; and

(c) the ship departs the port while it is under detention.

(4) An offence under sub-regulation (3) is an offence of strict liability and any persons referred to in sub-regulation (3) is liable upon conviction –

(a) in the case of the registered owner,—

(i) if an individual, to a fine not exceeding **[\$30,000]** or imprisonment for a term not exceeding **[2 years]**, or both;

(ii) if a corporate body, to a fine not exceeding **[\$80,000]**; or

(b) in the case of a master, to a fine not exceeding **[\$30,000]** or imprisonment for a term not exceeding **[2 years]**, or both.

PART 6— MISCELLANEOUS PROVISIONS APPLYING TO THE REGULATIONS

GENERALLY

Limitation of proceedings

23. The prosecution under the Magistrate Court or the High Court for an offence against these Regulations shall be in accordance with section 253 of the Decree.

Time limits

24. — (1) Rights to compensation under these Regulations shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred.

(2) However, in no case shall an action be brought more than six years from the date of the incident which caused the damage.

(3) For the purpose of sub-regulation (2), where the incident consists of a series of occurrences, the six-years' period shall run from the date of the first such occurrence.

Jurisdiction

25. — (1) Where an incident has caused pollution damage in the territory, including the archipelagic waters, territorial sea or the exclusive economic zone, of one or more Contracting States, or preventive measures have been taken to prevent or minimize pollution damage in such territory, including the archipelagic waters, territorial sea or the exclusive economic zone, or in such area, actions for compensation against the shipowner, insurer or other person providing security for the shipowner's liability may be brought only in the courts of any such Contracting States.

(2) Reasonable notice of any action taken under sub-regulation (1) shall be given to each defendant.

(3) The High Court of Fiji has jurisdiction, under section 18 (2) of the High Court Act (Cap 13), to entertain actions for compensation under these Regulations.

Submission to jurisdiction

26. — (1) In any proceedings brought in a court in Fiji to enforce a claim in respect of a liability incurred under the applied provisions, the Contracting State is taken to –

(a) have submitted to the jurisdiction of that court; and

(b) have waived any defence based on its status as a sovereign country.

Recognition and enforcement

27. — (1) Any judgment given by a Court with jurisdiction in accordance with regulation 25 upon an action for compensation against the shipowner, insurer or other person proving security for the shipowners liability where it is no longer subject to ordinary forms of review, shall be recognized in Fiji, except where the –

(a) judgment was obtained by fraud; or

(b) defendant was not given reasonable notice and a fair opportunity to present his or her case.

(2) A judgment recognized under sub-regulation (1) shall be enforceable in Fiji as soon as the formalities required in Fiji have been complied with.

(3) The formalities shall not permit the merits of the case to be re-opened.

Made this day of 2015.

P. TIKODUADUA
Minister for Infrastructure and Transport

SCHEDULE 1

(Regulation 18)



CERTIFICATE OF INSURANCE OR OTHER FINANCIAL SECURITY IN RESPECT OF CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE

Issued in accordance with the provisions of Article 7 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

Name of Ship/Distinctive Number or letters
IMO Ship Identification Number
Port of Registry

Name and full address of the principal place of business of the registered owner.

This is to certify that there is in force in respect of the above-named ship a policy of insurance or other financial security satisfying the requirements of Article 7 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

Type of Security

Duration of Security

Name and address of the insurer (s) and/or guarantor (s)

Name

Address

This certificate is valid until.....Issued or certified by the Government of
(Full designation of the State)

OR

The following text should be used when a State Party avails itself of Article 7 (3):

The present certificate is issued under the authority of the Government of
(Full designation of the State) by(name of the institution or organization)

At..... On.....
(Place) (Date)

.....
CHIEF EXECUTIVE OFFICER