

**Laws to Incorporate the International Convention  
on Civil Liability for Bunker Oil Pollution  
Damage, 2001 into the Laws of the Republic of  
Senegal and to Provide for the Effective  
Implementation Thereof**

**A Legislation Drafting Project submitted in partial fulfillment of the  
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*To my Wife and my Daughter*

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## LIST OF ABBREVIATIONS

<b>Bunkers Convention</b>	International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.
<b>CLC 1969, as amended</b>	International Convention on Civil Liability for Oil Pollution Damage, 1969, and its amendments by the Protocol of 1992.
<b>EEZ</b>	Exclusive economic zone.
<b>HNS 1996, as amended</b>	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996, and its amendments by the Protocol of 2010.
<b>IMO</b>	International Maritime Organization.
<b>LLMC 1976, as amended</b>	Convention on Limitation of Liability for Maritime Claims, 1976, and its amendments by the Protocol of.
<b>MARPOL</b>	International Convention for the Prevention of Pollution from Ships, 1973, and its amendments by the Protocol of 1978.
<b>NMAA</b>	National Maritime Affairs Agency.
<b>UNEP</b>	United Nations Environmental Programme.

## Introduction

In Africa, the numerous oil tankers sailing off its west coast<sup>1</sup> spill a significant amount of oil either by seepage or offloading<sup>2</sup> which, as a result, has a serious impact on the rich biodiversity<sup>3</sup> of African coastal waters. Admittedly, the continent has not experienced disastrous marine pollution due to oil, but the frequency of relatively recent<sup>4</sup> maritime accidents in Europe, causing disastrous maritime damage,<sup>5</sup> has encouraged the international community to take steps to establish a civil liability regime and thereby encourage the black continent to be prudent and to take appropriate measures to be able to cope with possible disasters. The massive ratification of the International Maritime Organization's (IMO) instruments, relating to environmental protection and the establishment of a civil liability regime, by the West African countries demonstrates in many regards the determination of those countries to tackle the challenging problems in the maritime domain.

Senegal, for its part, attaches particular importance to its environment and guarantees its protection in its Constitution<sup>6</sup> and confers the task of protecting the environment mainly to the public authorities<sup>7</sup>. It can therefore be noted that environmental protection is the

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<sup>1</sup> According to Sandra Kloff & Clive Wicks 'Each year, between 400 and 500 million tonnes of crude oil and refined products are transported from Nigeria, Gabon and Angola to European countries and the United States (UNEP, 2004)' Sandra Kloff & Clive Wicks, *Gestion environnementale de l'exploitation de pétrole offshore et du transport maritime pétrolier*, Programme Régional de Conservation de la zone côtière et Marine en Afrique de l'ouest (PRCM), Initiative conjointe de WWF, IUCN, FIBA, en partenariat avec la Commission Sous-Régionale des Pêches (CSRP) et le Réseau Sous-Régional de Planification Côtière. 20. Available at : [http://prcmarine.org/sites/prcmarine.org/files/1\\_Gestion\\_environmentale\\_de\\_l\\_exploitation\\_de\\_petrole\\_off.pdf](http://prcmarine.org/sites/prcmarine.org/files/1_Gestion_environmentale_de_l_exploitation_de_petrole_off.pdf) Accessed: 28 May, 2020.

<sup>2</sup> Ibid. Sandra Kloff & Clive Wicks: 'In 2002 the Australian oil company Woodside carried out an analysis of existing oil-related pollution off the Mauritanian coast. Woodside attributes this pollution to natural seepage but also believes that many of these slicks can be attributed to ships routinely discharging their oil waste'.

<sup>3</sup> Ministère de l'Environnement, de la Protection de la Nature, des Bassins de rétentions et des Lacs artificiels, Direction de l'Environnement et des Etablissements Classés, *Rapport national sur l'état de l'environnement marin et côtier*, 2002. 16. Available at : <https://www.oceandocs.org/handle/1834/2884>

<sup>4</sup> George Eddings, Andrew Chamberlain and Holly Colaço, *The shipping law review* (Sixth Edition), 2019. 1.

<sup>5</sup> Sinking of the *Torrey Canyon* in 1967 and the *Erika* in December 1999.

<sup>6</sup> Article 25 (2) states that: 'everyone has the right to a healthy environment.' Constitutional Law n°2016-10 of April 5<sup>th</sup>, 2016 on the revision of the Constitution.

<sup>7</sup> Ibid. Article 25 (2) Constitutional Law n°2016-10 states that: 'The defence, preservation and improvement of the environment are the responsibility of the public authorities. Public authorities have the obligation to preserve, restore essential ecological processes, provide for the responsible management of species and ecosystems, preserve the diversity and integrity of the genetic heritage, require environmental assessment for plans, projects or programmes, promote environmental education and ensure the protection of

responsibility of several national structures and administrations such as ministerial departments,<sup>8</sup> agencies<sup>9</sup> and commissions, national public and private companies, associations and non-governmental organizations. Senegal has, in addition to the provisions of its Constitution, ratified a number of Conventions related to the protection of the marine environment.<sup>10</sup> Now, Senegal must remain in its logic of protection of the environment in accordance with its Constitution by acceding to and implementing the International Convention on Civil Liability for Bunker Oil Pollution Damage (the Bunkers Convention), especially as it constitutes a legal complement to certain IMO instruments that it has already ratified.

The Bunkers Convention was adopted to ensure adequate, prompt and effective compensation of persons suffering damage caused by oil spills, when carried as fuel in non-oil tankers. It also aims to establish an adequate, prompt and effective compensation regime for pollution damage caused by spills of bunker oil from ships other than oil tankers. Adopted on 23 March 2001 in London and entered into force on 21 November 2008, this Convention is a complement to the International Convention on Civil Liability for Oil Pollution Damage (CLC 1969), as amended. As such, it is particularly important for Senegal insofar as it will contribute to the harmonization of its environmental legislation with international measures.

The objective of this project is therefore to provide for the accession and effective implementation of the Convention in Senegalese law. It begins with an explanatory note that will set out the basic provisions of the Convention and stress the importance of acceding to the Convention and amending the Merchant Marine Code for the effective

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*populations in the development and implementation of projects and programmes with significant social and environmental impacts.'*

<sup>8</sup> Ministry of the Environment and Sustainable Development (*Ministère de l'Environnement et du Développement durable*) ; Ministry of Fisheries and Maritime Economy (*Ministère de la Pêche et de l'Economie Maritime*) ; Ministry of Health and Social Action (*Ministère de la Santé et de l'Action Sociale*) ; Ministry of Water and Sanitation (*Ministère de l'eau et de l'assainissement*).

<sup>9</sup> National Maritime Affairs Agency (*Agence Nationale des Affaires Maritimes ANAM*) ; High Authority Responsible For Coordinating Maritime Safety, Maritime Security And Protection Of The Marine Environmen t (*Haute Autorité chargée de la coordination de la Sécurité Maritime, de la Sûreté Maritime et de la protection de l'environnement Marin « HASSMAR »*) ; Autonomous Port of Dakar (*Port Autonome de Dakar*).

<sup>10</sup> International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 and its Annexes. International Convention on Civil Liability for Oil Pollution Damage (CLC 1969) and its amendments by the 1992 Protocol etc.



implementation of the Convention in national legislation. The implementation process will also be discussed and explained, including the instrument of accession to the Convention and the drafts amendment to the Merchant Marine Code implementing the Bunkers Convention in national law.

## **EXPLANATORY NOTE**

### **1. THE BUNKERS CONVENTION**

#### **1.1. Scope of Application**

##### ***1.1.1. Territorial scope and types of loss covered***

Geographically speaking, the Bunkers Convention applies to pollution damage occurring in the territory, territorial sea, exclusive economic zone or equivalent area of a State Party. It follows,<sup>11</sup> in some extent, the same regime as the International Convention on Civil Liability for Oil Pollution Damage, 1992 (*CLC 1992 or 1992 Oil Pollution Convention or 1992 Civil Liability Convention*). In effect, according to Article 2, the Bunkers Convention applies exclusively to pollution damage caused by bunker oil from a ship in the territory, including the territorial sea, of a State Party and in the exclusive economic zone (EEZ) of a State Party or, if no EEZ is established in conformity with international law, in the equivalent zone of 200 nautical miles from the baselines from which the breadth of its territorial sea is measured. The Convention has a very wide spatial scope and it is not the location of the accident that is relevant but rather the occurrence of the pollution damage affecting the above-mentioned areas.<sup>12</sup>

The Bunkers Convention covers liability and compensation for pollution damage caused by spills of oil when carried as fuel in non-oil tankers and for fuel pollution from tankers if the bunker oil is non persistent. In other words, it applies to bunker oil pollution damage and to measures to prevent or limit such damage.<sup>13</sup> The key to the appropriation of this part of the Convention lies in understanding the definitions of certain salient terms. Thus, for a better understanding of the applicability of the Bunkers Convention it is necessary to

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<sup>11</sup> Norman A. Martinez, *Limitation of Liability in International Maritime Conventions: The relationship between global limitation conventions and particular liability regimes* (Routledge, Taylor and Francis Group, London and New York 2011) 159.

<sup>12</sup> See also Konstantinos Bachxevanis, *The Bunker Pollution Convention 2001* (Reed Smith LLP, Litigation Department Shipping Group, Admiralty & Casualty Department, September 2009.) 2.

<sup>13</sup> Bunkers Convention, 2001, Art.2.

explain the definitions provided by the Convention of the terms '*Pollution Damage*' and '*Bunkers oil*' and '*Ship*'.

#### **1.1.1.1. *Pollution damage***

Pollution Damage is defined as:<sup>14</sup>

*‘(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.’*

Except for the substitution of the word ‘oil’ for ‘bunker oil’, which in fact ‘*modifies the scope of application of the Bunkers Convention*’<sup>15</sup> the definition is identical<sup>16</sup> to that of CLC 1992. With regard to the paragraph (a), pollution damage is defined as loss or damage caused outside the ship by contamination resulting from the escape or discharge of ‘bunker oil’ from the ship. It certainly covers basic clean-up costs caused by contamination. The definition also recognises that there may be recovery of economic losses in the form of lost profits resulting from environmental damage. Damage or loss due to explosion or fire and any claim for damage to the environment are not covered<sup>17</sup> by the Convention. Similarly, death or injury is not covered, although it is accepted that injuries actually caused by contamination are covered.<sup>18</sup>

Paragraph (b), copied in extenso<sup>19</sup> from Article 1 (7) of the CLC 1992, concerns the definition of 'preventive measures' also known as 'threat removal costs' taken to prevent or reduce pollution from bunker oil. Article 1(7) of the Bunkers Convention states that: *‘preventive measures means any reasonable measures taken by any person after an incident have occurred to prevent or minimize pollution damage’*. That’s in accordance to

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<sup>14</sup> Ibid. Art.1 (9).

<sup>15</sup> Martienez (n°11) 159.

<sup>16</sup> Bachxevanis (n°12) 4.

<sup>17</sup> Martinez (n°11) 160.

<sup>18</sup> Bachxevanis, (n°12) 4: *‘The exclusion of such claims is, however, subject to the interpretation of the Bunker Convention by national courts.’*

<sup>19</sup> Martinez (n°11) 160.

Martinez: *'the Bunkers Convention allows recovery of costs incurred in taking any reasonable measures after an incident has occurred to prevent or minimize pollution damage'*.<sup>20</sup> In other words, the costs incurred in taking measures to prevent oil pollution damage are recoverable only when they are reasonable, i.e. taken without exaggeration, in an appropriate manner and as a reasonable person would have done.

#### **1.1.1.2. 'Bunker oil'**

*'Bunker Oil'* is defined<sup>21</sup> as *'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.'*

This definition covers a variety of hydrocarbons and includes some that are not considered bunker oil in the common parlance of seafarers. It also covers oily engine room bilges, which are generally mixtures of water, bunkers and lubricating oil.<sup>22</sup> As regards the term *'residues'* which is not defined in the Convention, it would perhaps cover solidified tank residues, sludge or bunkers which stick to the hull of a tank etc. The definition is not limited to persistent oil<sup>23</sup> and the only restriction is related to whether or not the oil is intended to be used. Indeed, it is the intention that determines the distinction between the cargo and the oil.

#### **1.1.1.3. Ship**

Ship is defined as *'any seagoing vessel and seaborne craft, of any type whatsoever'*.<sup>24</sup>

In contrast to the CLC, the definition of ship in the Bunkers Convention is very wide and implies the application of the liability regime to any ship<sup>25</sup> with almost rare exceptions. Indeed, the definition given by the Bunkers Convention includes for example bulk carriers, passenger ships, container ships, tugs, fishing vessels, launches etc. The main restriction built into the definition is the reference to *'navigation at sea'*. However, this term may lead to misunderstandings and imply different interpretations of the Convention. It may refer

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<sup>20</sup> Ibid.

<sup>21</sup> Bunkers Convention, 2001, Art.1 (5).

<sup>22</sup> Bachxevanis (n°12) 3.

<sup>23</sup> Martinez (n°11) 160.

<sup>24</sup> Bunkers Convention, Art.1 (1).

<sup>25</sup> Gaskell, N. & Forrest, G., (2008), *'Marine pollution Damage in Australia: Implementing the Bunker Oil Convention 2001 and the Supplementary Fund Protocol 2003'*, The University of Queensland Law Journal, Vol.2, No.2, pp.103-165. Available at: <http://classic.austlii.edu.au/au/journals/UQLawJl/2008/15.pdf>.

either to a ship that is physically fit to navigate at sea, or to a ship that is legally authorised to navigate at sea or that meets all legal requirements, or to a ship that actually navigates at sea. The term may also include a combination of all of the above.<sup>26</sup>

### **1.1.2. Exclusions**

Article 4(1) provides that the Bunkers Convention does ‘*not apply to pollution damage as defined in the Civil Liability Convention, whether or not compensation is payable in respect of it under that Convention*’. The bunkers convention, as Martinez states, ‘*will not apply to a bunker oil spill from a laden tanker even if the relevant State is a party to the bunkers convention but not to the 1969 CLC or 1992 CLC. The same scenario would follow if the State is party to 1969 CLC but not to 1992 CLC and the tanker in question is on ballast and has residues of oil from the proceeding voyage. The reason for this is that the 1969 CLC applies only for ships actually carrying oil as cargo and the bunkers convention would not apply because the said damage would fall within the meaning of 1992 CLC*’.<sup>27</sup> However, the 1992 CLC covers bunker oil pollution damage only if the bunker oil escapes from a ship constructed or adapted for the carriage of oil as cargo.<sup>28</sup>

The Bunkers Convention does not apply to warships, naval auxiliaries or other ships owned by a State.<sup>29</sup> However, a State Party may decide to apply the Convention to such ships.<sup>30</sup> In such a case, the State Party must inform the Secretary-General of the IMO and will be prosecuted in the jurisdictions provided for in the Bunkers Convention.<sup>31</sup>

## **1.2 Liability**

### **1.2.1 Persons liable and joint and several liabilities**

Article 3 of the Bunkers Convention establishes strict liability of the shipowner at the time of an incident resulting in pollution damage caused by bunker oil on board or from the ship.

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<sup>26</sup> Kamyla A. Barrientos Pineda (Guatemala), *A Legislation Drafting Project submitted in partial fulfilment 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* (Academic Year 2018-2019) 9.

<sup>27</sup> Martinez (n°11) 162.

<sup>28</sup> United Nations, *Liability and Compensation for Ship-Source Oil Pollution: An Overview of the International Legal Framework for Oil Pollution Damage from Tankers* (Studies in Transport Law and Policy - New York and Geneva, 2012 No. 1) 33.

<sup>29</sup> Bunkers Convention, Art. 4. (2).

<sup>30</sup> Ibid. Art. 4. (3).

<sup>31</sup> Ibid. Art. 4. (4).

In other words, the owner of the ship at the time of an incident is liable for any pollution damage caused by bunker oil. In this case, fault is not required for liability to arise, i.e. the ‘shipowner’ is liable for ‘pollution damage’ caused by any person on board the ship, provided that the bunker oil is ‘on board or from the ship’. The Bunkers Convention implements a system of shipowner’ strict liability and makes it possible to investigate the liability of the charterer, the ship-owner and the operator of the ship. The shipowner is defined in the Bunkers Convention as ‘the owner, including the registered owner, the bareboat charterer, the manager and the operator of the ship’.<sup>32</sup> These categories of persons can all be expected to have an interest in the manner in which the ship is operated. Furthermore, if an incident consists of a series of occurrences having the same origin, the owner's liability is established at the time of the first of these occurrences.

Finally, in order to provide the injured party with diversified sources of compensation, the channelling of creditors has been avoided<sup>33</sup> in the Bunkers Convention. Indeed, claims against persons other than the shipowner who are involved in the operation of the ship are not excluded<sup>34</sup> under the Bunkers Convention.

Article 3(2) of the Bunkers Convention provides that ‘where more than one person is liable in accordance with paragraph 1, their liability shall be joint and several’.<sup>35</sup> This provision means that injured parties have the possibility to choose the best possible option for compensation, i.e. they can choose from among all the persons falling under the definition of shipowner the one who is the most financially strong.

Article 5 of the Convention deals with situations of incidents involving two or more ships. It provides that ‘when an incident involving two or more ships occurs and pollution damage results therefrom, the shipowners of all the ships concerned, unless exonerated under article 3, shall be jointly and severally liable for all such damage which is not reasonably separable’. This provision covers pollution damage caused by two or more ships. It

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<sup>32</sup> Ibid. Art. 1 (3).

<sup>33</sup> Martinez (n°11) 163.

<sup>34</sup> Comité Maritime International: International Working Group (Polar Shipping), *working paper on the legal framework for civil liability for vessel-source oil spills in Polar Regions*, p.12. Available at: <https://comitemaritime.org/wp-content/uploads/2018/05/2017-12-15-Civil-Liability-WP-Final.pdf>.

<sup>35</sup> Bachxevanis (n°12) 7: ‘The above provision, in essence, means that the damaged third party or state authorities can ignore litigation between the parties falling under the definition of “Shipowner” and recover in accordance to the best option available from the financially healthiest shipowner’.

provides for joint and several liabilities where the damage is not reasonably separable. All ships concerned must be covered by the Bunkers Convention. Article 5 does not apply and there is no joint and several liabilities even if the damage is not separable where, for example, damage caused by one ship is covered by the Bunkers Convention while damage caused by the other ship is covered by the CLC 1992. In such a case, the claimant could presumably sue each ship separately, trying to quantify the damage suffered and showing the degree of fault.

### ***1.2.2 Defences to the shipowner's right of recourse***

However, the owner's liability is not absolute. Similarly to the 1992 CLC, exemption from liability is limited to cases such as acts of war, natural phenomena of an exceptional and unavoidable nature, deliberate action or omission to act by a third party, negligence on the part of the person responsible for the maintenance of navigational aids, but also in cases where the shipowner proves that the victim is liable.<sup>36</sup> Sharing responsibility with the victim may thus make it possible to avoid paying compensation if the victim has not taken the necessary preventive measures.<sup>37</sup>

The Bunkers Convention does not affect any rights of recourse of the defendant. Indeed, Article 3(6) provides that '*nothing in this Convention shall prejudice any right of recourse of the shipowner which exists independently of this Convention*'. The shipowner has the right of recourse against any other party at fault if his liability under the strict regime of the Bunkers Convention arises as a result of the fault of that party. Thus, he may have recourse against a charterer in time for ordering his ship to an unsafe port or, in the example of the harbour tug given earlier, against the tug and its owners.

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<sup>36</sup> Bunkers Convention. Art.3 (3)-(4).

<sup>37</sup> Ibid. Art.3 (3)-(4).

### 1.3. Compulsory Insurance or Financial Security and Direct Action against the Insurer

#### 1.3.1. *Persons and vessels to be insured and the level of insurance coverage*

The owner of a ship of more than 1,000 gross tonnage registered in a State Party is required to maintain insurance or other financial security, such as a bond from a bank or similar financial institution, to cover his liability for pollution damage.

A certificate attesting that insurance or other financial security is valid shall be issued to each ship by the competent authority of a country and shall be carried on board the ship. A copy must also be deposited with the authority which keeps the ship's register of registry. Article 7 of the Bunkers Convention provides for compulsory insurance or other financial security in much the same way as the 1992 CLC and the Nairobi Convention.<sup>38</sup> The Convention applies to all ships<sup>39</sup> as defined in the Convention, but this obligation is imposed only on registered owners of ships of more than 1 000 gross tonnage.<sup>40</sup> Indeed, the owner of a ship of more than 1,000 gross tonnage registered in a State Party is required to maintain insurance or other financial security, such as a guarantee from a bank or similar financial institution, to cover his liability for pollution damage. A certificate attesting that insurance or other financial security is valid shall be issued to each ship by the competent authority<sup>41</sup> of a country and shall be carried on board the ship and a copy must also be deposited with the authority which keeps the ship's register of registry.<sup>42</sup> Under Article

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<sup>38</sup> Martinez (n°11) 166.

<sup>39</sup> Ibid.

<sup>40</sup> Mr Konstantinos Bachxevanis states that : *'The threshold of 1,000 gross tons for the applicability of the insurance obligation has been the subject of much debate as it excludes most tugs and distant water fishing vessels which have the potential to carry large quantities of bunkers. Some countries wanted a lower threshold (e.g. 400 or 300 grt), while some ship-owning countries, in order to reduce the impact of the compulsory insurance provision on their fleets, wanted a higher threshold (e.g. 5,000 grt). Some statistics (based on Lloyd's Register of Shipping data which, however, refer to limited ship types) were presented, showing that when considering general cargo and bulk carriers, the average bunker capacity is about 1,000 tons for a ship registered at 10,000 gt and that ships under 2,000 tons use mainly diesel fuel. In addition, the inclusion of ships of less than 1,000 grt would lead to an increased administrative burden for certifying States Parties and, in this respect, concerns have been expressed by some of them. The figure of 1,000 gross tons was a political compromise of the Diplomatic Conference as part of a broader final package that included three elements: (i) the gross tonnage figure, (ii) the relatively high entry into force requirements of Article 14, and (iii) the inclusion of Article 7(15) relating to the right of a State Party to exclude ships engaged on domestic voyages from the insurance obligation.'* (n°12) 10.

<sup>41</sup> Bunkers Convention, Art. 7(2).

<sup>42</sup> Ibid. Art. 7(5).

7(15), a Member State may declare that the provisions of compulsory insurance do not apply to ships sailing in its territorial waters.

Under Article 7(1), only the registered owner must be covered by insurance. While any party meeting the definition of shipowner can be sued and held liable under the Bunkers Convention, only the registered owner needs to have insurance for this purpose. Managers and operators, at least, would like to cover this new liability by contractual commitments on the part of the shipowner and this contractual right of recourse is preserved by Article 3(6). In practice, however, any bareboat charterer, manager or operator would probably want some form of insurance cover in case of insolvency of the registered owner. It might be expected that some form of joint coverage (or P&I registration) could be arranged or that the coverage would be expressly extended to these other parties.

### ***1.3.2. Evidence of insurance and direct action against the 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 registered owner's liability for pollution damage in an amount equal to the limits of liability under the applicable national or international limitation regime, but in any event not exceeding an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the 1996 LLMC Protocol,<sup>43</sup> which entered into force in 2004. In other words, the insurance or other financial security must be sufficient *‘to cover the liability of the registered owner for pollution damage up to the limits of liability provided by the applicable national or international limitation regime, but in any event not exceeding an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as amended’*.<sup>44</sup>

The certificate of insurance is provided for in Article 7 (2) of the Bunkers Convention which, in this case, follows again the CLC 1992 certification scheme. Where a ship is registered in a State Party to the Bunkers Convention, a certificate of insurance must be obtained from the competent national authority.<sup>45</sup> Ships registered in non-signatory States

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<sup>43</sup> Ibid. Art. 7(1).

<sup>44</sup> Ibid.

<sup>45</sup> Ibid. Art. 7(2).



will have to obtain a certificate from a State Party.<sup>46</sup> The certificate must be in the form of the model set out in the Annex to the Convention and must contain the following information (a) name of the ship, distinguishing 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 the security; (e) name and principal place of business of the insurer or other person providing security and, where appropriate, the place where the insurer or security provider is established; (f) period of validity of the certificate, which shall not exceed the period of validity of the insurance or other security. Certificates shall be in English, French or Spanish, or the text shall be translated into one of those languages.<sup>47</sup>

Provided that at least three months' notification is given to the IMO, the delegation by the State Party of the function of issuing certificates to recognised institutions or organizations is allowed under Article 7(3). However, *“in all cases, the State Party shall fully guarantee the completeness and accuracy of the certificate so issued and shall undertake to ensure the necessary arrangements to satisfy this obligation”*. According to Article 7(5), *‘the certificate shall be carried on board the ship and a copy shall be deposited with the authorities who keep the record of the ship's registry or, if the ship is not registered in a State Party, with the authorities issuing or certifying the certificate’*. Furthermore, the administration of a State Party is obliged to recognize all certificates issued by States Parties, even if the insurer is completely unknown.<sup>48</sup> With regard to the financial standing of the insurer or other guarantor, an issuing State Party may rely on information provided by other States or organizations, but this does not relieve it of its responsibility as the issuer of the certificate.<sup>49</sup> Where the financial standing and credibility of the insurer or other guarantor is called into question, a State Party may request consultation with the issuing State Party.<sup>50</sup>

The direct action against the insurer is provided for in Article 7 (10). Direct action against the insurer is a fundamental protection for the claimant. This, in fact, removes one of main difficulties many claimants had in past bunker pollution incidents to recover their costs and

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<sup>46</sup> Ibid.

<sup>47</sup> Ibid. Art. 7(2)-(3)-(4).

<sup>48</sup> Ibid. Art. 7(9).

<sup>49</sup> Ibid. Art. 7(8).

<sup>50</sup> Ibid.

damages.<sup>51</sup> However, the defendant may invoke the same exclusions that the shipowner would have been entitled to invoke in accordance with the Convention.<sup>52</sup> The defendant shall have the right to demand that the shipowner be associated with the proceedings.

## **1.4. Limitation of Liability and Time Limits**

### ***1.4.1. Limitation***

The Bunkers Convention does not itself contain any provisions expressly entitling a shipowner to limit his liability<sup>53</sup> and in accordance with its Article 6 it does not create a separate limitation regime.<sup>54</sup> What it does say, however, is that if a shipowner has a right to limit his liability under the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC), that limit can be used in respect of claims made under the Bunkers Convention. The Bunkers Convention is based on strict liability and provides for direct action against the insurer who nonetheless maintains the rights and defences of the insured as well as a right to limit his own liability to the amount of the insurance certificate (the limit under the LLMC). This holds true even in circumstances where LLMC limitation is not available to the shipowner. Indeed, in accordance with Article 6, if the shipowner is not entitled to the limitation of liability, the Respondent may nevertheless limit the liability to an amount equal to the amount of insurance or other financial security required.<sup>55</sup> The Convention also provides that claims may only be brought in the State party where damage has occurred.<sup>56</sup>

### ***1.4.2 Time limits***

The provisions of the Bunkers Convention regarding time limits are identical to the 1992 CLC Convention. Legal action must be brought within three years of the occurrence of the damage in order to be entitled to compensation. Furthermore, no legal action may be brought after six years.<sup>57</sup> Indeed, the Convention provides for a period of six years from the date of the incident causing the damage because it is possible for oil to escape several years later after the sinking

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<sup>51</sup> Bachxevanis (n 12) 14.

<sup>52</sup> Pineda (n 26) 12.

<sup>53</sup> Gard News 191. August/October 2008, *Entry into force of Bunker Convention*, Available at: <http://www.gard.no/web/updates/content/52003/entry-into-force-of-bunker-convention.>>

<sup>54</sup> Martinez (n 11) 165.

<sup>55</sup> Pineda (n 26) 12-13.

<sup>56</sup> Bunkers convention, Art. 9(1).

<sup>57</sup> Ibid. Art. 8.

of a ship.<sup>58</sup> It should be remembered that Article 1(8) of the Convention states, an incident is *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.*'

## **1.5. Jurisdiction and Recognition and Enforcement of Judgements**

### ***1.5.1. Jurisdiction***

Like the CLC, the Bunker Convention affirms the exclusive jurisdiction of the courts of the States Parties to the Convention and the recognition by any State Party of a judgment given by those courts, provided that there is no longer any ordinary remedy. The judgment is then enforceable in each State Party.

Regarding jurisdiction, the action must be brought in the courts of the State where the pollution damage has been caused. It is relevant to note that the Convention established the obligation to specify which domestic Court is going to have competence to attend that matter. According to Article 9 (1), the Courts of State that suffered damage within its territory or EEZ have jurisdiction to hear any claim against the shipowner or the insurer or other guarantor. Article 9 (2) provides that reasonable notice of any action taken under the Bunker Convention shall be given to each defendant.

### ***1.5.2. Recognition and enforcement of judgements***

Article 10 deals with recognition and enforcement<sup>59</sup> and final judgements from a State will be recognized and will be enforceable in all State Parties irrespective of which limitation regime is applicable in the State where the enforcement is sought. It appears that, with the exceptions only mentioned in the above article, no other reason, whether related to public policy or otherwise, would allow a State Party to fail to recognize a foreign judgement. This would be probably the case even the party suffered pollution damage was under a contract with the shipowner and the contract contained an exclusive jurisdiction clause. This clause would be unenforceable; and, if enforced, the resulting judgement would be in breach of the Bunkers Convention.

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<sup>58</sup> Bachxevanis (n 12) 13.

<sup>59</sup> Article 10 states '1. *Any judgement given by a Court with jurisdiction in accordance with article 9 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognised in any State Party, except: (a) where the judgement was obtained by fraud; or (b) where the defendant was not given reasonable notice and a fair opportunity to present his or her case.* 2. *A judgement recognised under paragraph 1 shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened.*'

## **2. RESOLUTIONS OF THE INTERNATIONAL CONFERENCE ON LIABILITY AND COMPENSATION FOR BUNKER OIL POLLUTION DAMAGE, 2001**

During the International Conference on Liability and Compensation for Bunker Oil Pollution Damage, held on 27 March 2001, the Conference adopted some resolutions that are to be taken in consideration regarding the Bunkers Convention, because they complement the Convention.

### **2.1. Resolution on Limitation of Liability<sup>60</sup>**

The Conference advised and urged the States, that have not yet done so, to ratify or accede to the Protocol of 1996 to amend the LLMC 1976 and encouraged State Parties to the LLMC 1976 to denounce that Convention, with the purpose of implementing the Protocol of 1996 and most important they recommended that each State, at the moment of the implementation of the Bunkers Convention in the national law has to make clear which limitation of liability regime is applicable according to Article 6 of the Bunkers Convention.

### **2.2. Resolution on Promotion of Technical Co-Operation<sup>61</sup>**

Technical co-operation is very important for the correct and effective implementation of the Bunkers Convention in each Member State. Therefore, the IMO urged through this resolution States to promote and provide directly or through IMO, support to States that request technical assistance for that purpose. This includes the assessment of the implications of ratifying, accepting, approving, or acceding to and complying with the Bunkers Convention, the development of national legislation to give effect to the Convention; and also the introduction of other measures for and the training of personnel charged with the effective implementation and enforcement of the Convention. The government of Senegal will be advised to rely on the technical co-operation specially for the training of judges, lawyers and maritime actors.

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<sup>60</sup> International Maritime Organization, International Conference On Liability And Compensation For Bunker Oil Pollution Damage, 2001, '*Adoption of the Final Act and Any Instruments, Recommendations and Resolutions resulting from the Work of the Conference: Conference Resolutions*' (LEG/CONF.12/18 27 March 2001) <[https://www.mardep.gov.hk/en/aboutus/pdf/scc\\_p134\\_annex3.pdf](https://www.mardep.gov.hk/en/aboutus/pdf/scc_p134_annex3.pdf)>, accessed 23 May 2020.

<sup>61</sup> Ibid. LEG/CONF.12/18 27 March 2001.

### **2.3. Resolution on Protection for Persons Taking Measures to Prevent or Minimize the Effects of Oil Pollution 62**

This resolution was taken based in the CLC 1969, as amended, which unlike to the Bunkers Convention contain provisions on protection for persons taking measures to prevent or minimize the effects of oil pollution. Consequently, the Conference urged the States, that at the moment of implementation in their domestic law to consider the need to introduce legal provision for protection for persons taking measures to prevent or minimize the effects of bunker oil pollution, so that they can 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 the resolution, the Conference recommended that the provisions of Article 7, paragraphs 5 (a), (b), (d), (e) and (f) of HNS 1996 should be taken into consideration.<sup>63</sup> Accordingly, a provision dealing with responder immunity will be introduced in the draft.

## **3. IMO MEASURES**

### **3.1. Issue of Bunkers Certificates to Ships that are also Required to Hold a CLC Certificate <sup>64</sup>**

Another IMO resolution concerns the issue of certificates required under the CLC 1969, as amended, and the Bunkers Convention. This resolution recommends that even where a State is a party to CLC 1969, as amended, and has an obligation to issue a CLC certificate, States parties to the Bunkers Convention should issue the certificate required by the Bunkers Convention even if the ships concerned also hold a CLC certificate.

### **3.2. Electronic Blue Cards Resolution<sup>65</sup>**

As required by the Bunkers Convention, sufficient financial security should be provided to ensure prompt and fair compensation. Thus, at its 97th session, the Legal Committee of the

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<sup>62</sup> Ibid.

<sup>63</sup> Indeed, the Conference recommended that the provisions of article 7, paragraph 5, of HNS 1996 be considered, but it should be pointed out that paragraph (c), which dealt with any charterer (however described, including a bareboat charterer), manager or operator of the ship, was omitted. Paragraphs (d) and (e) have therefore been renumbered accordingly.

<sup>64</sup> A 27/Res.1055 of 20 December 2011.

<sup>65</sup> LEG 97/15 of 1 December 2010.

IMO approved the Guidelines for Acceptance of Documents from Insurance Companies, Financial Security Providers and P & I Clubs with the aim of providing States Parties to the Bunkers Convention with criteria that should be taken into account when accepting 'Blue Cards' or similar documents from insurance companies.

States Parties to the Bunkers Convention are recommended to accept a Blue Card issued by a member of the International Group of P&I Associations only when the Blue Card can be verified from the website of the P&I Clubs. Where a State Party receives a Blue Card or similar documents from insurance companies, financial security providers and P&I Clubs outside the International Group, it should verify the financial situation and solvency of the company to ensure prompt and adequate compensation of victims in case of bunker oil pollution damage.

States Parties are also encouraged to exchange information on the P&I Clubs outside the International Group which have been accepted by them as part of the bunker oil Convention certificate issuing process and on the criteria they have established for accepting the relevant Blue Cards. This information exchange between States Parties plays an essential role in minimising administrative burdens. A provision for the use of Blue Cards will be introduced in the present draft.

#### **4. THE IMPLEMENTATION OF THE BUNKERS CONVENTION IN THE SENEGALESE LAW**

##### **4.1. Why Does Senegal Need to Implement the Bunkers Convention?**

##### ***4.1.1. For the harmonization of national legislation with international maritime law and for the effective protection of the marine environment***

With its 700 km of coastline, Senegal is not only worryingly subject to pollution from land-based sources,<sup>66</sup> but is also affected by increasing pollution from ships. Aware of this situation, it has ratified a number of International Conventions to ensure effective protection of its environment and at the same time strengthen its internal legal system.

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<sup>66</sup> Sarah SAKHO, a journalist of France 24 states that: “In Senegal, despite the country's hundreds of kilometers of coastline, a recent report on marine pollution is likely to put you off going for a swim. The ocean around the Dakar peninsula is contaminated with traces of pollutants, often in significant quantities according to a recent study. One major cause is sewage due to just a single treatment plant in the capital - home to 20 percent of the country's population.” Available at: <<https://www.france24.com/en/20171208-focus-senegal-dakar-ocean-water-pollution-sewage-fishing-health-tourism-report>> accessed 28 May 2020.

Among these conventions is the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 and its Annexes<sup>67</sup> I, II, III, IV and V (MARPOL). With regard to liability and compensation, Senegal has ratified the CLC 1969 and its amendments by the 1992 Protocol,<sup>68</sup> in keeping with its logical approach, it has also ratified the Convention on the International Fund for Compensation for Oil Pollution Damage,<sup>69</sup> signed in 1992.

Given that the Bunkers Convention covers an important legal gap in that it applies to any type ‘sea going vessel’<sup>70</sup> not covered by the CLC, Senegal would benefit from acceding to the Convention and implementing it to protect its economic interests and its economic actors. Indeed, bunker oil spills from other types of ships, such as dry cargo ships and passenger ships, were not covered even though these ships carry significant quantities of bunker fuel, in some cases exceeding the cargo carrying capacity of some tankers.

Conventions such as the Bunkers Convention under the auspices of IMO aimed at protecting the environment and ensuring prompt and fair compensation to victims of pollution. For this reason, the accession of States to these conventions makes it possible to acquire a legal regime that is fairly dissuasive for those involved in maritime transport but also very protective of the environment. Indeed, the health of the oceans is of vital importance for the functioning and productivity of marine ecosystems and, in particular, for sustainable fisheries, coastal protection and carbon sequestration as well as food security.

Senegal has an interest in acceding and implementing the Bunkers Convention in order to adapt and conform its legislation to the international conventions to which it has acceded and then ensure coverage of its economic actors and to keep the pace of the harmonization of its legislation.

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<sup>67</sup> The Annex VI of MARPOL which was adopted in 1997 and amended in 2005 has entered into force on January 2020.

<sup>68</sup> However, Senegal did not denounce the 1969 convention by acceding to the 1992 protocol thus creating a duality on the regime of oil pollution damage.

<sup>69</sup> LAW No. 2006-29 7 August 2006 authorising the President of the Republic to ratify the Convention on the International Fund for Compensation for Oil Pollution Damage, signed in 1992. Available at: <<http://www.jo.gouv.sn/spip.php?article5138>>. Accessed 28 May 2020.

<sup>70</sup> Bunkers Convention Art. 1.

#### 4.1.2. For the protection of the economic interests of the state and economic actors

Currently the Senegalese economy is mainly supported by fishing and tourism. In addition, Senegal has three ports<sup>71</sup> but the most important is that of Dakar which plays a key role in international and sub-regional trade.

Indeed, the Senegalese coast is one of the fishiest in the world. This is why fishing plays a key role in the economic growth of the country.<sup>72</sup> With an annual catch rate of 450,000 tonnes per year, Senegal is the second largest producer in the sub-region, behind Nigeria (530,000 t), closely followed by Ghana (344,000 t).<sup>73</sup> The landings in the first four months of the year were up by 15,824 tonnes, compared to the same period in 2015, mainly due to industrial fishing, up by 25.2% in April 2016 compared to 2015.<sup>74</sup> Fishing is also the country's primary export branch and the country's socio-economic life is therefore largely determined by the fishing sector, which employs about 600,000 Senegalese.<sup>75</sup>

Concerning tourism in Senegal it is the second source of foreign exchange after fishing. Senegal recorded in 2016, nearly 1,600,000 tourists, against 984,000 in 2015 according to the authorities.<sup>76</sup> In 2018, tourism represents 6% of Senegal's GDP and generates nearly 100,000 jobs.<sup>77</sup> Senegal has 718 km of fine sandy beaches, stretching from Saint-Louis to Casamance. It is positioned as the leading seaside destination in French-speaking Africa.<sup>78</sup> The tourism sector in Senegal has established itself as the real engine of the economy, in second place after fishing.

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<sup>71</sup> Ports of Dakar, Kaolack and Ziguinchor.

<sup>72</sup> Ministry of Fisheries and Maritime Economy: Maritime Fisheries Division, *General Results of Maritime Fisheries*, Final Report 2015, p. 7 : 'The total catch landed by Senegalese maritime fishing in 2015 amounts to 430 667 tonnes, for a commercial value estimated at 153.991 billion CFA francs, while those of 2014 were 425 002 tonnes in volume and 134.95 billion CFA francs. The evolutions in relative value are respectively of 1.33% and 14% in volume and value'. Available at: <<http://www.statsenegal.sn/peche/func-startdown/52/>> accessed 28 May 2020.

<sup>73</sup> Ministry of Fisheries and Maritime Economy: Maritime Fisheries Division, *General Results of Maritime Fisheries*, Final Report 2015, *Op.cit.* p. 7.

<sup>74</sup> Marine Fisheries Division (*Direction des pêches maritimes*). Available at : <<https://www.senegal-export.com/les-ressources-halieuistiques.html>> accessed 28 May 2020.

<sup>75</sup> ISS, Institute for Security Studies - 2016 report. <<https://issafrica.s3.amazonaws.com/site/uploads/2016-ISS-Annual-Review-FR.pdf>> accessed 28 May 2020.

<sup>76</sup> <[https://www.lejecos.com/Rapport-sur-le-secteur-du-tourisme-Le-Senegal-sur-une-bonne-pente\\_a9966.html](https://www.lejecos.com/Rapport-sur-le-secteur-du-tourisme-Le-Senegal-sur-une-bonne-pente_a9966.html)> accessed 28 May 2020.

<sup>77</sup> Sénégal sunureew 'Focus sur le Tourisme (Plan Sénégal Emergent)', 11 juillet 2017. Available at : <[https://fr.wikipedia.org/wiki/Tourisme\\_au\\_S%C3%A9n%C3%A9gal](https://fr.wikipedia.org/wiki/Tourisme_au_S%C3%A9n%C3%A9gal)> accessed 28 May 2020.

<sup>78</sup> Mamadou Diombéra, *Le tourisme sénégalais à la recherche d'une nouvelle identité*, p. 21-30. Available at: <<https://journals.openedition.org/teoros/2299>> accessed 28 May 2020.



The Autonomous Port of Dakar, it aggregates nearly 95% of foreign trade and contributes more than 90% of customs revenue.<sup>79</sup> Located at the intersection of the maritime lines linking Europe to South America and North America to South Africa, the port of Dakar enjoys an exceptional geographical position. This allows ships coming from the North to have a two to three day navigation gain compared to other ports on the West African coast.<sup>80</sup> Perfectly signposted, the port of Dakar is one of the rare ports on the West African coast where ships of all categories can access at any time thanks to the exceptional nautical conditions of the site (maximum tides vary between 0.20 and 1.80m).<sup>81</sup>

In consideration of the above, the Senegalese economy would suffer an enormous loss if a bunker oil spill were to occur today in the country's maritime zone. Indeed, Senegal has neither established strict liability for bunker oil pollution damage nor compulsory insurance for ships with a gross tonnage of more than 1000. Consequently, the Government would have to bear the costs of pollution recovery, clean-up, restoration operations and damage to third parties. This would be a heavy burden on the national budget and an immeasurable loss for economic actors, especially fishermen and those involved in the tourism sector. The list of victims could be endless as bunker oil pollution would affect public authorities, the tourism sector, fisheries etc. The oil used for bunker fuel is generally of inferior quality to that carried as cargo and, therefore, even a relatively small spill can cause significant damage and disproportionate clean-up costs.<sup>82</sup> Indeed, the very nature of fuel oil makes cleaning up spills of these oils more difficult and costly.

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<sup>79</sup> <<http://www.portdakar.sn/fr/nous-decouvrir/message-du-dg>> accessed 28 May 2020.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> 'For example, in 1997, the 43,000 dwt wood chip carrier *Kure* struck the dock at a loading facility in California causing a spill of 105 barrels of bunker fuel. The response operation lasted ten days and the final cost amounted to some US\$47 million, setting a new record for the most expensive oil spill in terms of dollars per barrel. The potentially grave nature of bunker oil pollution has recently been highlighted again in the context of the *Rena* incident, where the grounding of a container vessel, in October 2011, resulted in the spill of 400 tonnes of fuel oil off the coast of New Zealand, described as the country's worst maritime environmental disaster.' See: United Nation Conference on Trade and Development, *Liability and compensation for Ship-source oil pollution: an Overview of the international legal framework for oil pollution damage from tankers*, Studies in Transport Law and Policy - 2012 No. 1, p. 33-34. Available at: <[https://unctad.org/en/PublicationsLibrary/dtlitlb20114\\_en.pdf](https://unctad.org/en/PublicationsLibrary/dtlitlb20114_en.pdf)> accessed 28 May 2020.

## 4.2. How to Implement the Bunkers Convention in Senegalese Law?

### 4.2.1. *The accession of Senegal to the Bunkers Convention*

Senegalese law provides for a special procedure for the incorporation of international treaties into local law. Article 95 of the Senegalese Constitution<sup>83</sup> provides that: ‘*The President of the Republic negotiates international commitments. He ratifies or approves them if necessary with the authorization of the National Assembly*’. However, this procedure is only adequate when the country concerned has signed the Convention. As far as Senegal is concerned, it has not signed the Bunkers Convention. That is why it will deposit an instrument of accession which will be annexed to this note at the General Secretariat of the organisation to mark its accession to the Bunkers Convention.

### 4.2.2. *The amendment of the Senegalese Merchant Marine Code*

Article 98 of the Constitution of Senegal provides that treaties or agreements duly ratified or approved have, upon publication, an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party. The Constitution affirms the superior authority of international treaties and conventions but does not specify the procedure for their effective incorporation into domestic law. For this reason, after a thorough study of the Bunkers Convention, it has become clear that accession alone is not sufficient to ensure implementation of the Convention. Indeed, it is necessary to amend the Senegalese Merchant Shipping Code, in particular its Title II, in accordance with the requirements of the Bunkers Convention. The latter imposes on State parties the obligation of regulating some aspects of the Convention, in particular the following:

**Definitions (Article 1 Bunkers Convention):** the Convention sets some definitions of terms that are part of the Convention. In addition to those definitions and in order to establish a good understanding for Senegal terms such as Authority, Bunkers Convention, Bunker oil, Civil Liability Convention, Gross tonnage, Incident, Organization, Person, Pollution damage, Preventive measures, Registered owner, Ship, Shipowner and State of the ship's registry must be defined.

**Scope of application (Article 2 Bunkers Convention):** Senegal declared its EEZ, therefore it is not necessary to establish the limits in accordance with international law. The

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<sup>83</sup> Constitutional Act No. 2016-10 of 05 April 2016 revising the Constitution, *Title IX: International Treaties*, O.J. No. 6926 of Thursday 07 April 2016. Available at: <<http://www.jo.gouv.sn/spip.php?article10799>> accessed 28 May 2020.

provisions of the new Merchant Marine Code will therefore, in addition to the territorial sea and the EEZ, apply to internal waters.

**Exclusions (Article 4 Bunkers Convention):** the Convention gives States Parties the possibility of applying it to their warships or to ships belonging to them. The State of Senegal is the owner of ships dedicated to the transport of passengers and the carriage of goods that navigate in internal waters. In the draft, which is annexed to this explanatory note, we will take this aspect into consideration when applying the Convention to the State's commercial vessels. However, warships will be excluded.

**Limitation of liability (Article 6 Bunkers Convention):** the Convention establishes that the limitation must be under national or international law, it refers to the limitations provided for in the LLMC 1976 as amended. Senegal is not yet a party to this Convention, but there is a fair reference to it in the Merchant Shipping Code, in particular by making reference to the provisions of the LLMC with regard to liability. It is therefore important, until the future accession to the LLMC by Senegal, to specify the limits of liability. That is why, in the draft amendment to the Code, provisions will be included setting out the limits that must be taken into consideration until Senegal accedes to the 1996 LLMC Protocol, as amended.

**Compulsory Insurance or Financial Security Certificate (Article 7 Bunkers Convention):** The registered owner of a ship with a gross tonnage greater than 1,000 is obliged under the Bunkers Convention to maintain insurance or at least other financial security to cover its liability. As the Convention requires Senegal will issue to each ship under its registration a certificate that insurance or financial security is in force. The National Maritime Affairs Agency<sup>84</sup> of Senegal will comply with this duty as a competent authority and should also keep a copy of the certificate. The certificate will be issued in French the official language of the State with translation into English. The conditions for its issuance and the validity of the certificate must be determined by the above-mentioned authority. It shall establish and determine the reasons for the conditions of validity of the

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<sup>84</sup> National Maritime Affairs Agency, see about its status: DECREE No. 2009-583 of 18 June 2009 on the creation, organisation and operation of the National Maritime Affairs Agency (NMAA), (*DECRET n° 2009-583 du 18 juin 2009 portant création, organisation et fonctionnement de l'Agence nationale des Affaires Maritimes (ANAM)*).

certificate and ensure that ships flying the Senegalese flag are not operated without a certificate issued in accordance with the law. It shall also ensure that no ship, irrespective of its place of registration, may enter or leave Senegalese waters unless it is insured in accordance with the law.

Senegal as a State Party will accept a Blue Card issued by a member of the International Group of P&I Associations, only when it is possible to verify the Blue Card from the P&I Clubs website. If Senegal receives a Blue Card or other similar documentation from insurance companies, financial security providers and P&I Clubs outside the International Group, it has to verify the financial status and solvency of the company to assure the prompt and adequate compensation for the victims in case of bunker oil pollution damage.

Senegal will provide information regarding which P&I Clubs outside the International Group they have accepted in the process of issuing Bunkers Convention certificates and the criteria they established to accept the certificates, if it is required.

**Jurisdiction (Article 9 Bunkers Convention):** concerning claims for pollution damage, the law will determine the competent national courts whose jurisdiction covers this area. In the case of Senegal, Tribunal of High Instance<sup>85</sup> of Dakar, which is a tribunal of general jurisdiction, will be designated.

**Responder Immunity:** Although the Bunkers Convention did not exclude from liability persons who take reasonable measures in response to a bunker oil spill, the resolution of the Conference, recommended to do so, as it encourages persons to undertake preventive measures without the fear of resulting liable by any chance. Therefore, the provision about that matter will be taken in consideration in the law implementing the Convention in Senegal.

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<sup>85</sup> Decree No. 2015-1145 of 3 August 2015 establishing the composition and jurisdiction of the courts of appeal, the Tribunal of High Instance and Tribunals of Instance (*Décret n° 2015-1145 du 03 août 2015 fixant la composition et la compétence des Cours d'appel, des Tribunaux de Grande Instance et des Tribunaux d'Instance*).

## **5. A LAW TO AUTHORIZE THE PRESIDENT OF THE REPUBLIC TO ACCEDE TO THE CONVENTION.**

LAW No. .... 2020 authorising the President of the Republic to accede the International Convention on Civil Liability for Bunker Oil Pollution Damage, signed in London in 2001.

### **STATEMENT OF REASONS**

Concerned about the protection of its environment and the potential victims of damage that may be caused by pollution resulting from oil spills or discharges from ships, Senegal has ratified the 1969 Civil Liability Convention and the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, as amended by two Protocols in 1992 and in force on 30 May 1996.

The CLC applies only to oil from tankers and does not cover bunker oil that is particularly polluting and difficult to clean, unless it is carried as cargo. For this reason, the international community, under the auspices of the IMO, adopted the International Convention on Civil Liability for Bunker Oil Pollution Damage in London in 2001 with the aim of supplementing the existing oil pollution regime and covering pollution caused by bunker oil and its residues. The Bunkers Convention was drafted on the model of the 1992 CLC.

It covers bunker oil defined as *‘all mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and residues of such oil’*. Like the CLC, it gives the opportunity to States to exclude from its scope warships and other ships owned or operated by a State and used for non-commercial public service. The damage covered is both the loss suffered as a result of the spill of bunker oil and the cost of and damage caused by preventive measures.

Moreover, the Convention has a relatively broad scope of application. It applies to *‘pollution damage occurring in the territory, including the territorial sea, of a Contracting State and in the Exclusive Economic Zone of a Contracting State established in accordance with international law or, if a Contracting State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State, as determined by that State in accordance with international law and extending not beyond two hundred miles (200).000) nautical miles from the baselines from which the breadth of the territorial sea is measured and to preventive measures, wherever taken, designed to avoid or minimize such damage’*.

The Convention provides that the shipowner is directly liable for any pollution damage caused by bunker oil and establishes a system of covering bunker oil pollution damage by requiring a valid certificate of insurance or other financial security to be issued by the State in accordance with a model annexed to the Convention. As regards the amounts of liability

defined by the Bunkers Convention, they are based on those calculated in accordance with the LLMC Convention.

Legal action must be brought within three years of the occurrence of the damage to give rise to a right to compensation. Furthermore, no legal action may be brought after six years. The Bunkers Convention affirms the exclusive jurisdiction of the courts of the States Parties to the Convention and the recognition by any State Party of a judgment given by those courts, provided that there is no longer any ordinary remedy. The judgment is then enforceable in each State Party.

The Bunkers Convention entered into force on 21 November 2008 'one year after the date on which eighteen States, including five States each with ships of not less than 1 million gross tonnage, either signed it without reservation as to ratification, acceptance or approval, or deposited an instrument of ratification, acceptance, approval or accession with the Secretary-General'. In accordance with the provisions of Article 14, paragraph 1, the Convention shall enter into force for Senegal three months after the date of deposit of its instrument of accession with the Secretary-General.

Given the decisive role of marine and coastal resources on its socio-economic development and the risks of accidental spills from which no country is immune, it is in Senegal's interest to become a party to the Bunkers Convention. Moreover, the protection of its economic and social actors and the adjustment and updating of its legislation to the international standards set by the international community to which it has acceded are clearly a guarantee of a prosperous and sustainable maritime economy.

That is the essence of this draft law.

The National Assembly adopted, in its session of ..... 2020;

The President of the Republic promulgates the following law:

**Single article:** The President of the Republic is authorized to accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage, signed in London in 2001.

This Law shall be executed as a Law of the State.

Done in Dakar, on ..... 2020  
By the President of the Republic  
Macky SALL.

## **6. ANNEX**

### **INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE, 2001**

The States Parties to this Convention,

**RECALLING** article 194 of the United Nations Convention on the Law of the Sea, 1982, which provides that States shall take all measures necessary to prevent, reduce and control pollution of the marine environment,

**RECALLING ALSO** article 235 of that Convention, which 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 of international law,

**NOTING** the success of the International Convention on Civil Liability for Oil Pollution Damage, 1992 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 in ensuring that compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of oil carried in bulk at sea by ships,

**NOTING ALSO** the adoption of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 in order to provide adequate, prompt and effective compensation for damage caused by incidents in connection with the carriage by sea of hazardous and noxious substances,

**RECOGNIZING** the importance of establishing strict liability for all forms of oil pollution which is linked to an appropriate limitation of the level of that liability,

**CONSIDERING** that complementary measures are necessary 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,

**DESIRING** to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases,

**HAVE AGREED** as follows:

## Article 1

### Definitions

For the purposes of this Convention:

1. **‘Ship’** means any seagoing vessel and seaborne craft, of any type whatsoever.
2. **‘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.
3. **‘Shipowner’** means the owner, including the registered owner, bareboat charterer, manager and operator of the ship.
4. **‘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.
5. **‘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.
6. **‘Civil Liability Convention’** means the International Convention on Civil Liability for Oil Pollution Damage, 1992, as amended.
7. **‘Preventive measures’** means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage.
8. **‘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.
9. **‘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.



10. '*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.
11. '*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.
12. '*Organization*' means the International Maritime Organization.
13. '*Secretary-General*' means the Secretary-General of the Organization.

## **Article 2**

### **Scope of application**

This Convention shall apply exclusively:

- a. to pollution damage caused:
  - i. in the territory, including the territorial sea, of a State Party, and
  - ii. in the exclusive economic zone of a State Party, established in accordance with international law, or, if a State Party has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;
- b. to preventive measures, wherever taken, to prevent or minimize such damage.

## **Article 3**

### **Liability of the shipowner**

1. Except as provided in paragraphs 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 paragraph 1, their liability shall be joint and several.
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 Convention.
- 6. Nothing in this Convention shall prejudice any right of recourse of the shipowner which exists independently of this Convention.

#### **Article 4**

##### **Exclusions**

- 1. This Convention shall not apply to pollution damage as defined in the Civil Liability Convention, whether or not compensation is payable in respect of it under that Convention.
- 2. Except as provided in paragraph 3, the provisions of this Convention shall not apply to warships, naval auxiliary or other ships owned or operated by a State and used, for the time being, only on Government non-commercial service.
- 3. A State Party may decide to apply this Convention to its warships or other ships described in paragraph 2, in which case it shall notify the Secretary-General thereof specifying the terms and conditions of such application.
- 4. With respect to ships owned by a State Party and used for commercial purposes, each State shall be subject to suit in the jurisdictions set forth in article 9 and shall waive all defences based on its status as a sovereign State.

## **Article 5**

### **Incidents involving two or more ships**

When an incident involving two or more ships occurs and pollution damage results therefrom, the shipowners of all the ships concerned, unless exonerated under article 3, shall be jointly and severally liable for all such damage which is not reasonably separable.

## **Article 6**

### **Limitation of liability**

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.

## **Article 7**

### **Compulsory insurance or financial security**

1. 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.
2. A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a State Party has determined that the requirements of paragraph 1 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. This certificate shall be in the form of the model set out in the annex to this Convention 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;
- (f) period of validity of the certificate which shall not be longer than the period of validity of the insurance or other security.

**3.**

- (a) A State Party may authorize either an institution or an organization recognized by it to issue the certificate referred to in paragraph 2. Such institution or organization shall inform that State of the issue of each certificate. In all cases, the State Party shall fully guarantee the completeness and accuracy of the certificate so issued and shall undertake to ensure the necessary arrangements to satisfy this obligation.
- (b) A State Party shall notify the Secretary-General of :
  - i. the specific responsibilities and conditions of the authority delegated to an institution or organization recognised by it;
  - ii. (the withdrawal of such authority; and
  - iii. the date from which such authority or withdrawal of such authority takes effect.

An authority delegated shall not take effect prior to three months from the date on which notification to that effect was given to the Secretary-General.

- (c) The institution or organization authorized to issue certificates in accordance with this paragraph shall, as a minimum, be authorized to withdraw these certificates if the conditions under which they have been issued are not maintained. In all cases the institution or organization shall report such withdrawal to the State on whose behalf the certificate was issued.

- 4. The certificate shall be in the official language or languages of the issuing State. If the language used is not English, French or Spanish, the text shall include a translation into one of these languages and, where the State so decides, the official language of the State may be omitted.

5. The certificate shall be carried on board the ship and a copy shall be deposited with the authorities who keep the record of the ship's registry or, if the ship is not registered in a State Party, with the authorities issuing or certifying the certificate.
6. An insurance or other financial security shall not satisfy the requirements of this article 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 paragraph 2 of this article, before three months have elapsed from the date on which notice of its termination is given to the authorities referred to in paragraph 5 of this article, unless the certificate has been surrendered to these authorities or a new certificate has been issued within the said period. The foregoing provisions shall similarly apply to any modification which results in the insurance or security no longer satisfying the requirements of this article.
7. The State of the ship's registry shall, subject to the provisions of this article, determine the conditions of issue and validity of the certificate.
8. Nothing in this Convention shall be construed as preventing a State Party from relying on information obtained from other States or the Organization or other international organisations relating to the financial standing of providers of insurance or financial security for the purposes of this Convention. In such cases, the State Party relying on such information is not relieved of its responsibility as a State issuing the certificate required by paragraph 2.
9. Certificates issued or certified under the authority of a State Party shall be accepted by other States Parties for the purposes of this Convention and shall be regarded by other States Parties 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 State Party. A State Party may at any time request consultation with the issuing or certifying State should it believe that the insurer or guarantor named in the insurance certificate is not financially capable of meeting the obligations imposed by this Convention.
10. 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. 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 article 6. Furthermore, even if the shipowner is not entitled to limitation of liability according to article 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 paragraph 1. Moreover, the defendant may invoke the defence that the pollution damage resulted from the wilful 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. The defendant shall in any event have the right to require the shipowner to be joined in the proceedings.

11. A State Party shall not permit a ship under its flag to which this article applies to operate at any time, unless a certificate has been issued under paragraphs 2 or 14.
12. Subject to the provisions of this article, each State Party shall ensure, under its national law, that insurance or other security, to the extent specified in paragraph 1, 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.
13. Notwithstanding the provisions of paragraph 5, a State Party may notify the Secretary-General that, for the purposes of paragraph 12, ships are not required to carry on board or to produce the certificate required by paragraph 2, when entering or leaving ports or arriving at or leaving from offshore facilities in its territory, provided that the State Party which issues the certificate required by paragraph 2 has notified the Secretary-General that it maintains records in an electronic format, accessible to all States Parties, attesting the existence of the certificate and enabling States Parties to discharge their obligations under paragraph 12.
14. If insurance or other financial security is not maintained in respect of a ship owned by a State Party, the provisions of this article 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 paragraph 1. Such a certificate shall follow as closely as possible the model prescribed by paragraph 2.
15. A State may, at the time of ratification, acceptance, approval of, or accession to this Convention, or at any time thereafter, declare that this article does not apply to ships operating exclusively within the area of that State referred to in article 2(a)(i).

## **Article 8**

### **Time limits**

Rights to compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought more than six years from the date of the incident which caused the damage. Where the incident consists of a series of occurrences, the six-years' period shall run from the date of the first such occurrence.

## **Article 9**

### **Jurisdiction**

1. Where an incident has caused pollution damage in the territory, including the territorial sea, or in an area referred to in article 2(a)(ii) of one or more States Parties, or preventive measures have been taken to prevent or minimise pollution damage in such territory, including the territorial sea, 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 States Parties.
2. Reasonable notice of any action taken under paragraph 1 shall be given to each defendant.
3. Each State Party shall ensure that its courts have jurisdiction to entertain actions for compensation under this Convention.

## **Article 10**

### **Recognition and enforcement**

1. Any judgement given by a Court with jurisdiction in accordance with article 9 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognised in any State Party, except:
  - (a) where the judgement was obtained by fraud; or
  - (b) where the defendant was not given reasonable notice and a fair opportunity to present his or her case.
2. A judgement recognised under paragraph 1 shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened.

## **Article 11**

### **Supersession clause**

This Convention shall supersede any Convention in force or open for signature, ratification or accession at the date on which this Convention is opened for signature, but only to the extent that such Convention would be in conflict with it; however, nothing in this article shall affect the obligations of States Parties to States not party to this Convention arising under such Convention.

## **Article 12**

### **Signature, ratification, acceptance, approval and accession**

1. This Convention shall be open for signature at the Headquarters of the Organization from 1 October 2001 until 30 September 2002 and shall thereafter remain open for accession.
2. States may express their consent to be bound by this Convention by:
  - (a) signature without reservation as to ratification, acceptance or approval;
  - (b) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval; or
  - (c) accession.
3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.
4. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention with respect to all existing State Parties, or after the completion of all measures required for the entry into force of the amendment with respect to those State Parties shall be deemed to apply to this Convention as modified by the amendment.

## **Article 13**

### **States with more than one system of law**

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.



2. Any such declaration shall be notified to the Secretary-General and shall state expressly the territorial units to which this Convention applies.
3. In relation to a State Party which has made such a declaration:
  - (a) in the definition of "registered owner" in article 1(4), references to a State shall be construed as references to such a territorial unit;
  - (b) references to the State of a ship's registry and, in relation to a compulsory insurance certificate, to the issuing or certifying State, shall be construed as referring to the territorial unit respectively in which the ship is registered and which issues or certifies the certificate;
  - (c) references in this Convention to the requirements of national law shall be construed as references to the requirements of the law of the relevant territorial unit; and
  - (d) references in articles 9 and 10 to courts, and to judgements which must be recognized in States Parties, shall be construed as references respectively to courts of, and to judgements which must be recognized in, the relevant territorial unit.

## **Article 14**

### **Entry into force**

1. This Convention shall enter into force one year following the date on which eighteen States, including five States each with ships whose combined gross tonnage is not less than 1 million, have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General.
2. For any State which ratifies, accepts, approves or accedes to it after the conditions in paragraph 1 for entry into force have been met, this Convention shall enter into force three months after the date of deposit by such State of the appropriate instrument.

## **Article 15**

### **Denunciation**

1. This Convention may be denounced by any State Party at any time after the date on which this Convention comes into force for that State.

2. Denunciation shall be effected by the deposit of an instrument with the Secretary-General.
3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after its deposit with the Secretary-General.

## **Article 16**

### **Revision or amendment**

1. A conference for the purpose of revising or amending this Convention may be convened by the Organization.
2. The Organization shall convene a conference of the States Parties for revising or amending this Convention at the request of not less than one-third of the States Parties.

## **Article 17**

### **Depositary**

1. This Convention shall be deposited with the Secretary-General.
2. The Secretary-General shall:
  - (a) inform all States which have signed or acceded to this Convention of:
    - i. each new signature or deposit of instrument together with the date thereof;
    - ii. the date of entry into force of this Convention;
    - iii. the deposit of any instrument of denunciation of this Convention together with the date of the deposit and the date on which the denunciation takes effect; and
    - iv. other declarations and notifications made under this Convention.
  - (b) transmit certified true copies of this Convention to all Signatory States and to all States which accede to this Convention.

## **Article 18**

### **Transmission to United Nations**

As soon as this Convention comes into force, the text shall be transmitted by the Secretary-General to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

## **Article 19**

### **Languages**

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

Done at London this twenty-third day of March, two thousand and one.

In witness whereof the undersigned being duly authorised by their respective Governments for that purpose have signed this Convention.

**7. INSTRUMENT OF ACCESSION OF THE INTERNATIONAL  
CONVENTION ON CIVIL LIABILITY FOR BUNKER OIL POLLUTION  
DAMAGE, 2001.**

To be deposited with the Secretary-General of IMO, London.

WHEREAS the International Convention on Civil Liability for Bunker Oil Pollution Damage, was adopted at London on 23 March 2001 by the International Conference on Liability and Compensation for Bunker Oil Pollution Damage, 2001,

AND WHEREAS the Republic of Senegal being a State entitled to become a party to the said Convention by virtue of Article 12 thereof,

NOW THEREFORE the Government of Senegal having considered and approved the said Convention, hereby formally declares its accession to the International Convention on Civil Liability for Bunker Oil Pollution Damage [,as amended].

IN WITNESS WHEREOF I, Macky SALL President of the Republic of Senegal have signed this Instrument of Accession and affixed the official seal.

DONE at ....., this..... day of ..... two thousand and.....

(Seal) (Signature)  
Macky SALL  
President of the Republic of Senegal

## **8. A LAW TO AMEND THE MERCHANT MARINE CODE.**

**Law No. ...., amending Law No. 2002-22 of 16 August 2002 on the Merchant Marine Code**

### **STATEMENT OF REASONS**

Aware of its status as a State with a maritime vocation and enjoying an economy largely supported by maritime resources, Senegal has always opted to adopt a legal regime to protect its marine environment and its economic actors, in particular by acceding to several international instruments adopted by the International Maritime Organization, such as MARPOL and the International Convention on Civil Liability for Oil Pollution Damage, 1969.

Faithful to its maritime policy, Senegal is constantly updating and adapting its legislation to take account of new developments from the international community. That is why by law number ..... the National Assembly authorized the President of the Republic to accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage which was adopted at London on 23 March 2001 by the International Conference on Liability and Compensation for Bunker Oil Pollution Damage, 2001. This Convention is modelled on the 1969 International Convention on Civil Liability for Oil Pollution Damage and was adopted to ensure adequate, prompt and effective compensation to persons who suffer damage caused by oil spills, when carried as fuel in ships' bunkers.

The accession of the Senegalese State to this convention requires, for an effective implementation of the standards laid down in it, a modification of the Title II of Book VII entitled "Pollution Police" of Act No. 2002-22 of 16 August 2002 on his Merchant Shipping Code which does not cover the civil liability of polluters by bunker oil.

The modification of the Merchant Shipping Code requires the insertion of key provisions such as the requirement for direct action which will allow a claim for compensation for pollution damage to be brought directly against an insurer. Indeed, 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 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 addition, the Convention applies to damage caused in the territory, including the territorial sea, and exclusive economic zones of States Parties. The Bunkers Convention is indeed an autonomous instrument which covers only pollution damage.

In view of the decisive role of marine and coastal resources on its socio-economic development and the risks of accidental spills from which no country is immune, it is in Senegal's interest to incorporate and implement the 2001 Bunkers Convention by amending its Merchant Shipping Code, taking into account the key provisions of that Convention. That is the essence of this draft law.

The National Assembly adopted, in its session of ..... 2020;

The President of the Republic promulgates the following law:

**Article 1** : After Chapter II of Title II of Book VII entitled ‘Pollution Police’ of Act No. 2002-22 of 16 August 2002 on the Merchant Marine Code, a Chapter number III ‘CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE’ is added, containing the articles, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613 and 614 worded as follows:

## **‘SECTION I: DEFINITIONS AND SCOPE OF APPLICATION**

### **Articles 587: Definitions**

For the purpose of this chapter the following terms are defined as follow:

‘**Authority**’ means ‘*Ministry of Fisheries and Maritime Economy*’.

‘**Bunkers Convention**’ means the International Convention on Civil Liability for Bunker Oil Pollution Damage, signed at London on 23 March 2001, as amended, and includes the related mandatory instruments, standards and specifications adopted or developed by the Organisation.

‘**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.

‘**Civil Liability Convention**’ means the International Convention on Civil Liability for Oil Pollution Damage, 1992, as amended.

‘**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.

‘**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:

- 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.

‘**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.

‘**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.

#### **Article 588: Scope of application**

The provisions of this chapter shall apply:

- a) to pollution damage caused in the territory, including internal waters, the territorial sea and the exclusive economic zone of Senegal;
- b) to preventive measures, wherever taken, to prevent or minimize such damage, in the territory, including the internal waters, the territorial sea, and in the exclusive economic zone of Senegal.

#### **Article 589: Application of the provisions to ships owned or operated by the State**

The provisions of this chapter shall apply to ships owned or operated by the State and used exclusively for a non-commercial public service, in particular for the public transport of passengers and goods in the internal waters.

#### **Article 590: Conditions and procedures for applying the dispositions to Senegalese State vessels**

The Ministry of Fisheries and Maritime Economy shall determine by Executive Order the conditions and procedures for applying this Decree to Senegalese State vessels and shall notify the Secretary-General of the Organisation thereof.

#### **Article 591: Exclusion of warships and auxiliary ships**

The provisions of this chapter shall not apply to warships and auxiliary ships belonging to the State of Senegal.



## **Article 592: Overlap with Civil Liability Convention**

This chapter shall not apply to pollution damage as defined by the Civil Liability Convention 1969 as amended, whether or not compensation is due for such damage under the Bunkers Convention or under the Title II of Law No. 2002-22 of 16 August 2002 on the Merchant Marine Code of Senegal.

## **SECTION II: LIABILITY FOR POLLUTION DAMAGE**

### **Article 593: Liability of the shipowner**

Except as provided in Articles 596 and 597, 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.

### **Article 594: damage to the marine environment resulting from discharges of bunker oil in exceptional circumstances**

The shipowner, including the registered owner, the bareboat charterer, the shipowner manager and the operator of the ship shall be liable for damage to the marine environment resulting from discharges of bunker oil into the marine environment under the exceptional circumstances provided for in Article 578 of the Merchant Marine Code

### **Article 595: Joint and several liability**

When an incident involving two or more ships occurs and pollution damage results therefrom, the shipowners of all the ships concerned, unless exonerated under article 598, shall be jointly and severally liable for all such damage which is not reasonably separable.

### **Article 596: Exemptions**

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.

#### **Article 597: Contributory negligence**

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.

#### **Article 598: Responder Immunity**

No claim for compensation for damage under this chapter or otherwise may be made against:

- a) the servants or agents of the owner 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 of the owner or on the instructions of a competent public authority;
- d) any person taking preventive measures; and
- e) the servants or agents of persons mentioned in (c) and (d);

Whenever any of the persons listed are undertaken preventive measures, unless the damage resulted 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.

#### **Article 599: Limitation of Liability.**

Any shipowner or person providing insurance or other financial security has the right to limit liability as provided for in this law.

### **Article 600: Calculation of limits of liability**

Until Senegal accedes to and implements the 1996 Protocol to Amend the Convention on Limitation of Liability for Maritime Claims, as amended, the limits of liability in respect of claims of bunker oil pollution damage shall be calculated as follows:

- a) 1 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,
- b) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (a):
  - ✓ for each ton from 2,001 to 30,000 tons, 400 Units of Account;
  - ✓ for each ton from 30,001 to 70,000 tons, 300 Units of Account;
  - ✓ and for each ton in excess of 70,000 tons, 200 Units of Account.

### **Article 601: Loss of the right to limit his liability**

The shipowner shall lose his right to limit his liability if the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the shipowner.

## **SECTION III: INSURANCE RELATING TO LIABILITY FOR BUNKER OIL POLLUTION DAMAGE**

### **Article 602: Compulsory insurance or financial security**

The registered owner of a ship having a gross tonnage greater than 1,000 registered in Senegal 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 of liability equal to the limits of liability under the article 600.

### **Article 603: Appropriate Insurance Certificate**

A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this law shall be issued to each ship after the Authority has determined that the requirements of Article 602 have been complied with. The Authority shall establish through Legal Notice, the specific requirements, procedures and fees for the issue of the certificate referred in this Article.

#### **Article 604: Form of the certificate**

The certificate shall be in the form of the model set out in the annex to the Bunkers Convention 2001 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;
- f) period of validity of the certificate which shall not be longer than the period of validity of the insurance or other security.

#### **Article 605: Blue Cards or similar documentation**

The Authority shall accept Blue Cards or similar documentation issued by a member of the International Group of P&I Associations (even if this is submitted in electronic format), when it is possible to verify the Blue Card from the relevant P&I Club's website.

The Authority shall accept a Blue Card or other similar documentation from insurance companies, financial security providers and P&I Clubs outside the International Group, only when it is able to verify the financial status and solvency of the company. For this purpose, the Authority shall require:

- a) adequate documentation on the company's financial standing and hence solvency.
- b) adequate documentation on approval by the relevant authority that the company is eligible to carry out insurance business in the country of the authority;
- c) adequate documentation on reinsurance coverage on claims met by the company for liability incurred under the Bunkers Convention;
- d) a guarantee by the company and its parent company, if one exists, that it will cover liability incurred under the Bunkers Convention and up to the limits of liability according to the provisions of Article 600 or limits of liability according to the LLMC 1976, as amended;

- e) a statement to the effect that liability incurred under the Bunkers Convention due to an act of terrorism is covered; and
- f) the rating that the insurance company and/or its reinsurers hold by an independent and internationally recognized rating agency.

#### **Article 606: Language of the certificate**

The certificate shall be issued in French with translation into English.

#### **Article 607: Obligations**

The certificate shall be carried on board the ship and a copy shall be deposited with the Authority which shall keep the record of the ship's registry.

#### **Article 608: Prohibition of proceeding to sea without appropriate certificate**

No Senegalese ship to which this law applies shall proceed or attempt to proceed to sea unless there is in force in respect of the ship the certificate referred to in Article 603. Also, no foreign flagged ship to which Article 602 of this law applies shall proceed or attempt to proceed to ports, installations or the territorial waters of Senegal unless there is in force in respect of the ship the certificate referred to in Article 603.

### **Section III: JURISDICTION**

#### **Article 609: Action for compensation**

Where an incident has caused pollution damage in the territory, including internal waters, the territorial sea, and in the EEZ of Senegal; or preventive measures have been taken to prevent or minimize pollution damage in such territory, including internal waters, the territorial sea, or the EEZ of Senegal, 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 Senegal. The competent Court will be the Tribunal of High Instance of Dakar.

### **Article 610: Direct action against the insurer**

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. 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.

### **Article 611: Limitation of liability amount**

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 Article 600.

### **Article 612: The defence of the defendant**

The Defendant may raise the defence that the pollution damage resulted from the wilful misconduct of the owner of the vessel, but may not raise any other defence which it might have been entitled to raise in any proceedings brought by the owner of the vessel against the defendant. In any event, the defendant has the right to require the shipowner to be joined in the proceedings.

### **Article 613: Recognition and enforcement of foreign judgements**

Any judgement given by a Court with jurisdiction which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognised in Senegal, except:

- a) where the judgement was obtained by fraud; or
- b) where the defendant was not given reasonable notice and a fair opportunity to present his or her case.

This recognized judgment is enforceable in Senegal as soon as the formalities provided for the exequatur of foreign decisions required by Senegalese law are fulfilled. The formalities shall not permit the merits of the case to be re-opened.

#### **Article 614: Time limits**

Rights to compensation under this chapter shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought more than six years from the date of the incident which caused the damage. Where the incident consists of a series of occurrences, the six-years period shall run from the date of the first such occurrence.’

#### **Article 2: Abrogation**

The second indent of the second paragraph of Article 115 is repealed.

#### **Article 3: Entry into force**

The law shall enter into force three days after its publication in the Official Gazette.

This Law shall be executed as a Law of the State.

Done in Dakar, on ..... 2020  
By the President of the Republic  
Macky SALL.

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