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Civil Liability for Bunker Oil Pollution

Damage Act

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

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EXPLANATORY NOTE

An Act to incorporate the International Convention on Civil Liability for Bunker Oil Pollution Damage into the Law of the Democratic Socialist Republic of Sri Lanka.

1. Introduction

The Democratic Socialist Republic of Sri Lanka (hereinafter referred to as Sri Lanka) is an island nation located southeast of the Indian subcontinent, in the Bay of Bengal in the Indian Ocean. Its land area is approximately 65,610 sq. km with a coastline of about 1,620 km. Located adjacent to the all important East-West shipping route across the Indian Ocean, Sri Lanka assumes an important role in the maritime industry. Three hundred ships pass daily through this shipping lane which lies at the edge of her territorial sea and within her exclusive economic zone. In addition 5000 ships call on annually to Sri Lankan Ports and 525 million tons of oil is transported annually across her coastal seas.¹

The sinking of two cargo ships this year in the coastal waters of Sri Lanka has focussed the attention on her marine pollution prevention laws as well as the need for an effective regime to deal with the civil liability for pollution damage caused by such maritime mishaps. In other words, it is timely that an effective scheme for adequate and prompt compensation is available to victims who suffer damage caused by spills of oil from such mishaps. Looking back at the marine mishaps off the coasts of Sri Lanka in the recent past and the resultant pollution, harm was caused by leaking bunkers of the ill fated vessels. Not a single tanker was, however, involved in these mishaps.

Sri Lanka is a party to the 1992 Protocol to the Convention on Civil Liability for Oil Pollution Damage 1969 (hereinafter referred to as the CLC 1992).² CLC was adopted to ensure that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships.³ Two issues have thus arisen; firstly, there is a grave doubt as to whether Sri Lanka, having a dualist system

¹ Ministry of Ports and Aviation, Sri Lanka http://www.ports-aviation.gov.lk/news_more.php?news=112 (January 12, 2013).

² The consolidated text of the 1969 Convention as amended by 1992 Protocol, to which Sri Lanka is a Party.

³ See, <[http://www.imo.org/about/conventions/listofconventions/pages/international-convention-on-civil-liability-for-oil-pollution-damage-\(clc\).aspx](http://www.imo.org/about/conventions/listofconventions/pages/international-convention-on-civil-liability-for-oil-pollution-damage-(clc).aspx)>. (January 10,2013).

of law, has implemented the CLC 1992 so as to give full effect to the provisions thereof. This is because some provisions of the CLC 1992 appear to have been implemented by incorporating them in the Marine Pollution Prevention Act no 35 of 2008 (hereinafter referred to as the 2008 Act), which is essentially a law for pollution prevention. Secondly, even if CLC 1992 is deemed incorporated in the law of Sri Lanka, it is not possible that its provisions could be invoked to deal with incidents of pollution damage caused by bunker oil of ships involved in mishaps referred to above.

Thus, what Sri Lanka urgently requires is a regime that will ensure that adequate, prompt, and effective compensation is available to persons who suffer damage caused by spills of oil, when carried as fuel in ships' bunkers.⁴ This is to be found in the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 which is presently in force (hereinafter referred to as the Bunker Convention).

In modern day shipping, however, when the issue of civil liability is discussed, it cannot be treated in isolation from 'limitation of liability.' The concept of limitation of liability allows the shipowner to limit his financial exposure for maritime claims up to a maximum specified sum regardless of the actual amount of the claims brought against him.⁵ This concept is deeply entrenched in the shipping industry and has found global acceptance today. Thus it is found in many Conventions ranging from carriage of goods by sea to liability for the removal of wrecks.⁶

This note will briefly examine the inadequacy of the CLC 1992 in dealing with the potential threats; the relevance of the Bunker Convention in dealing with the situation faced by Sri Lanka at present; and it will urge the Government of Sri Lanka (hereinafter referred to as GOSL) to accede to the Bunker Convention as a matter of priority. Further, it will highlight the necessity of acceding to the 1996 Protocol (hereinafter referred to as 1996 LLMC Protocol) to the Convention on Limitation of Liability for Maritime Claims 1976 (hereinafter referred to as LLMC Convention) for the meaningful domestic implementation of the Bunker Convention.

⁴ See, < [http://www.imo.org/about/conventions/listofconventions/pages/international-convention-on-civil-liability-for-bunker-oil-pollution-damage-\(bunker\).aspx](http://www.imo.org/about/conventions/listofconventions/pages/international-convention-on-civil-liability-for-bunker-oil-pollution-damage-(bunker).aspx)>. (December 20, 2012).

⁵ Martínez Gutiérrez, Norman A., "New Global Limits of Liability for Maritime Claims", forthcoming, *International Community Law Review*, Vol. 15, No. 3, 2013. p. 1 (draft article cited with the kind permission of the author).

⁶ Ibid.

This note will finally advocate for a self-standing Act of Parliament designed to give effect to the Bunker Convention and other matters connected therewith, should the GOSL accede to the said Convention.

2. Civil Liability Regime for Pollution Damage under the Bunker Convention

The Bunker Convention was adopted in 2001 under the auspices of International Maritime Organization (IMO) and entered into force in 2008. The Bunker Convention brings pollution from bunker spills within an international regime of liability, limitation and mandatory insurance. This Convention is regarded as having one of the most impressive levels of acceptance of any IMO Convention, especially in respect of liability Conventions.⁷ The primary aim of this Convention is to ensure that “adequate, prompt, and effective compensation is available to persons who suffer damage caused by spills of oil, when carried as fuel in ships' bunkers”.⁸ It differs fundamentally from the International Convention on Civil Liability for Oil Pollution Damage, 1969 (hereinafter referred to as CLC) which is aimed at ensuring adequate compensation to persons who suffer oil pollution damage resulting from maritime casualties involving tankers only and covering pollution from persistent oil carried as cargo and from persistent oil⁹ carried in the form of bunkers but only if the tanker was laden at the time of the incident.¹⁰ Bunkers in non-tankers continued to fall outside the compensation regime under the CLC.¹¹

Thus, it is widely regarded that the Bunker Convention fills a significant gap in the international regulations on marine pollution liability, in that, for the first time, it addresses the problem of pollution caused by the escape of bunkers from general cargo ships.¹² In other words all substances which may escape from a ship are now covered by

⁷Gaskell, Nicholas; “The Bunker Pollution Convention 2001 and Limitation of Liability,” Journal of International Maritime Law, Vol 15, issue 6, p 477.

⁸<[http://www.imo.org/about/conventions/listofconventions/pages/international-convention-on-civil-liability-for-bunker-oil-pollution-damage-\(bunker\).aspx](http://www.imo.org/about/conventions/listofconventions/pages/international-convention-on-civil-liability-for-bunker-oil-pollution-damage-(bunker).aspx)>(December 20,2012).

⁹Anderson, Caryn;“Persistent vs. Non-Persistent Oils: What You Need to Know”, The International Tanker Owners Pollution Federation Limited (ITOPF) Article in: “Beacon” (Skuld Newsletter) July 2001
“However, a precise definition of persistent oil is not provided and interpretation has historically relied on the examples given in the Conventions such as crude oil, fuel oil, heavy diesel oil and lubricating oil”.
See <<http://www.itopf.com/assets/documents/persistent.pdf>> (December 20,2012).

¹⁰ Griggs, Patrick; “International Convention on Civil Liability for Bunker Oil Pollution Damage; 2001.”
See <www.bmla.org.uk/documents/imo-bunker-convention.doc>.

¹¹ Ibid.

¹² Ibid.

a liability and compensation regime.¹³ It makes provision for improved victim protection. In other respects it must be noted that, the Bunker Convention is modelled on the similar lines as CLC. Thus, as in the case of CLC, one of the main requirements in the Bunker Convention is the requirement for a vessel owner to maintain a mandatory insurance cover.¹⁴

The Bunker Convention defines bunker oil 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.¹⁵ In contrast to the CLC, there is no reference to ‘persistent’ oil in the definition of bunker oil. Therefore it is more comprehensive, covering both heavy fuel oil and also lighter fuels such as marine diesels.¹⁶

The definition of a “vessel” within the Bunker Convention is sufficiently broad to apply to most types of ship such as bulk carriers, passenger ships, container ships, tugs, fishing vessels or launch, irrespective of size, only with the proviso that it is sea-going.¹⁷ It, however, specifically excludes warships and certain types of State owned vessels from the scope of application.¹⁸ Similarly the term “shipowner” has been given a much wider definition and it embraces “the owner, including the registered owner, bareboat charterer, manager and operator of the ship” - a much more extensive group of persons in comparison to the CLC.¹⁹

According to the scope of application in Article 2, the Bunker Convention applies exclusively to two broad areas:

- pollution damage caused in the territory, in the territorial sea and in the exclusive economic zone (EEZ) or equivalent zone of any State which is a Party to the Convention;
- measures taken to prevent or minimize such damage.

¹³ Martinez Gutierrez; Norman A, ‘Limitation of Liability in International Maritime Conventions – The Relationship between Global limitation Conventions and particular Liability Regimes’, Routledge, London 2011, p.158.

¹⁴ Article 7.

¹⁵ Article 1(5).

¹⁶ Özlem, Gürses; ‘The Bunker Convention’,

< [www.britanniapandi.com/download.cfm?docid=CD15857F-C549...>](http://www.britanniapandi.com/download.cfm?docid=CD15857F-C549...) (January 10,2013).

¹⁷Ibid. see also Article 1.

¹⁸ Article 4.

¹⁹ Article 1. See, Griggs, Patrick; *loc. cit.*,

The Convention defines “Pollution damage” as loss or damage caused outside the ship through contamination resulting from the escape or discharge of bunker oil from the ship.²⁰ It nevertheless limits the compensation payable for the damage to the environment other than loss of profit from such harm, to costs of reasonable measures of reinstatement. In other words, it is accepted that this definition covers costs for basic clean-up caused by contamination, as well as reasonable measures for returning the environment to its previous state. There may also be recovery of economic losses in the form of loss of profit from impairment of the environment. An example of this might be losses sustained by businesses relying on tourism that are adversely affected.²¹

Further, costs of preventive measures and additional loss or damage caused by such preventive measures are also included in the above definition.²² Therefore, in theory, a compensation claim could be made for costs incurred in taking preventative measures, even though no oil has actually leaked from a ship.

The Convention restricts its application to the pollution incidents occurring within a member State’s territory, including the territorial sea and the EEZ. In the event no EEZ has been established according to international law by a State Party or if it has not established such a Zone, then it shall apply to an area extending no more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured. Thus its application is restricted to areas under national jurisdiction of the member State. If, however, an incident occurs beyond the national jurisdiction, but the pollution permeates into the EEZ, then liability under the Convention will arise. Vessels on innocent passage will be subject to liability under the Bunker Convention but, such vessels, shall not be subject to the compulsory insurance requirement under the Convention.²³

Limited exceptions aside, the Bunker Convention provides for strict liability on a shipowner for pollution damage caused by any bunker oil on board or originating from

²⁰ Article 1.

²¹ Özlem, Gürses; *loc.cit.*

²² *Ibid.*

²³ *Ibid.*

the ship. In other words, it is not necessary for the claimant to prove fault on the part of the shipowner and liability occurs regardless of the underlying cause.²⁴

The Convention provides for the defences that can be relied on by a shipowner, thus, no liability will attach if the shipowner proves that:

- the damage resulted from an act of war, hostilities, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or
- the damage was caused by an act or omission done with intent to cause damage by a third party; or
- the damage was wholly caused by the negligence of any Government or other authority responsible for maintenance of lights or other navigational aids.²⁵

In the event where two or more ships are involved in an incident, causing pollution damage, the shipowners of all such ships causing damage will be held jointly and severally liable for any damage that is not reasonably separable.²⁶

As stated above the Convention provides for a compulsory insurance or financial security mechanism by the ship owners akin to the CLC. Thus owners of ships with a gross tonnage greater than 1000 registered in a State which is a party to the Convention are required to maintain insurance or such other financial security, such as a guarantee from a bank or similar financial institution, to cover their potential liability for pollution damage. The requisite amount of the insurance or financial security cover is to be 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 (LLMC) as amended.²⁷

A certificate attesting that insurance or other financial security is in force is required to be issued to each ship after the appropriate authority of a State which is a Party to the Convention has determined that insurance or such other financial security exists. This

²⁴ Griggs, Patrick; *loc.cit.* See also Article 3.

²⁵ Article 3.

²⁶ Article 5.

²⁷ Article 7(1). See also Özlem, Gürses; *loc.cit.*

certificate must be carried on board the ship and a copy must be deposited with the authorities who keep the ship's registration.²⁸

The Convention makes it obligatory on the part of member States to exercise both Flag State and Port State control. Thus a State must prevent ships flying its flag to operate without such certificates.²⁹ Similarly, the Convention requires a State Party to implement national laws requiring that all ships with a gross tonnage of 1,000 or more entering or leaving a port in its territory or arriving at or leaving an offshore facility in its territory to have such a bunker certificate.³⁰ As a result, virtually all ships trading internationally will now require an official State-issued certificate.³¹

Another significant feature of the Convention is that it allows any claim for compensation for pollution damage to be brought directly against the insurer or other person providing financial security under the terms of the bunker certificate for the registered owner's liability for pollution damage.³² Any claim would, however, be subject to the limits provided by the Convention.³³ The insurer is entitled to invoke the same defences the shipowner would otherwise be entitled to. In addition, the insurer may invoke the defence that the pollution damage resulted from the willful misconduct of the shipowner.³⁴

The Convention also provides for a mechanism to determine jurisdiction and for the enforcement of judgments. Accordingly, in an incident that has caused pollution damage in the territory of one or more States Parties to the Convention, actions for compensation against the shipowner, insurer or other person providing security may be brought only in the courts of any such States.³⁵ The Convention sets out the conditions under which a judgment given by a court in one State which is a Party to the Convention can be recognized or enforced in another.³⁶

²⁸ Article 7(5).

²⁹ Article 7(11).

³⁰ Article 7(12).

³¹ Özlem, Gürses; *loc.cit.*.

³² <<http://www.imo.org/about/conventions/listofconventions/pages/international-convention-on-civil-liability-for-bunker-oil-p>>. (December 30, 2012).

³³ Article 7(1).

³⁴ Özlem, Gürses; *loc.cit.*

³⁵ Article 9.

³⁶ Article 10.

Rights to compensation under this Convention will lapse if no action is brought within three years from the date when the damage occurred. In no case, however, may an action be brought more than six years from the date of the incident which caused the damage.³⁷

It is to be noted, however, that strict liability imposed on the ship owner is moderated by limitation of liability. Thus it is provided that nothing in the 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 1996 LLMC Protocol.³⁸ Thus it is seen that the Convention does not have a standalone scheme for limitation of liability.³⁹

4. Marine Pollution Prevention Act No 35 of 2008: A Law found wanting?

It will be appropriate at this stage to examine Sri Lanka's legal provisions which are designed to deal with the related issues. The 2008 Act, which came into force in October 2008, is widely regarded as the primary legislation which deals, *inter alia*, with marine pollution damage caused by oil replacing the existing law on the matter. It must be stated that, although Sri Lanka has acceded to the CLC 1992, no specific enabling legislation has been passed incorporating the provisions thereof. The 2008 Act nevertheless makes some provision with regard to civil liability for pollution “.....*damage caused by the discharge, escape or dumping of any oil, harmful substances or other pollutant....*”⁴⁰ It also provides for a mechanism for limitation of liability. Thus it is provided that such liability shall be limited in “.....*accordance with such of the provisions of the International Convention on the Civil Liability for Oil Pollution Damage 1992 as may be incorporated into regulations made under this Act.*”⁴¹ Understandably as Sri Lanka is not a party to the Bunker Convention, no mention is made therein. One may nevertheless argue as the definition of the term ‘oil’ is wide enough to deal with bunker oil as well.⁴²

One criticism of the 2008 Act is that it does not fully incorporate the provisions of CLC. What it contains is an *ad hoc* mixture of CLC and provisions of certain other

³⁷ Article 8.

³⁸ Article 6.

³⁹ Özlem, Gürses; *loc.cit.*

⁴⁰ Part IX, Section 34 (1) of 2008 Act.

⁴¹ *Ibid* Section 35.

⁴² The Act defines ‘oil fuel’ as oil used as fuel in connection with the propulsion and auxiliary machinery of the ship in which such oil is carried’.

International Conventions to which GOSL is signatory.⁴³ In this connection, Professor P.K Mukherjee, the IMO Consultant who served in an advisory capacity in reviewing and updating national maritime legislation in Sri Lanka observed that the new Act on the whole *'is quite inadequate' with 'no convention given effect to expressly or clearly.'*⁴⁴

Another major criticism of the 2008 Act is that although it purports to deal, albeit impliedly, with bunker oil spills as well as spills of oil carried as cargo, the limitation of liability and the compulsory insurance schemes the Act makes specific reference to, is the regime under the CLC.⁴⁵ In the manner the law is drafted at present, there is serious doubt as to whether civil liability mechanism of CLC can be used for liability arising out of bunker spills. Sri Lankan authorities hence cannot hold the owners liable for a bunker spill under an ostensible CLC regime. For instance, it cannot require a compulsory insurance certificate from the defendant-owner of a container vessel suspected of a bunker oil spill under the law for this reason. It is undoubtedly the wrongdoers or defendants to a claim who will benefit from such lacuna in the law. To this extent the 2008 Act is seriously flawed.

Therefore the advantages of giving effect to international law and obligations by including them in separate, stand alone, municipal legislation - rather than being included in an umbrella legislation such as the 2008 Act - cannot be emphasised more. The drafters in Sri Lanka are more than familiar with the practice of drafting independent legislation in giving effect to treaties. For example, examining some of the contemporary treaties and Conventions GOSL has ratified in recent times, such as the Hague Convention on Child Abduction,⁴⁶ Scheme relating to mutual assistance in criminal matters within the Commonwealth (Harare Scheme) 1990,⁴⁷ and Vienna Convention on

⁴³Fernando, S Anusha. "Marine Pollution Prevention and Marine Environment Protection Authority [two bills]" A Legislation Drafting Project submitted in partial fulfillment of the requirements for the award of the Degree of Master of Laws (LL.M.) at the IMO International Maritime Law Institute. 2008/2009. Archived at IMLI Library, Malta.

⁴⁴ Ibid.

⁴⁵ See Section 35 (1)(a), 36(1).

⁴⁶Civil Aspects of International Child Abduction Act No 10 of 2001. The preamble reads; An act to give effect to the Hague Convention on the Civil Aspects of International Child Abduction adopted at the Hague on 25th October 1980; to make provision for the return of children wrongfully removed from Sri Lanka or their country habitual residence and retained in any specified country or Sri Lanka; to extend the jurisdiction for the return of children wrongfully application for the high court of a province to hear removed or retained; and for matters connected therewith or incidental thereto.

⁴⁷ Mutual Legal Assistance in Criminal Matters Act No 25 of 2002.

Diplomatic Privileges,⁴⁸ it can be said that these corresponding enabling legislation, in the form of independent Acts of Parliaments have been most effective.

5. The Need for New Legislation: the Relevance of the Bunker Convention to Sri Lanka

In late 2006, *MV Amanat Shah*, a Bangladeshi flagged ship, sank off the coast of southern Sri Lanka while being towed after it developed engine trouble. Its cargo did not cause pollution but its bunkers caused considerable damage to the fragile marine eco-system off the southern coastal town of Koggala, Sri Lanka. Thereafter several more ships ran into trouble in recent times. These included the sinking of Singaporean flagged *Marina Sedna* Dredger and *MT Grandbar* a Turkish flagged ship off the eastern coast of Sri Lanka, in 2007 and 2009 respectively.

Very recently, there was another marine mishap involving the **Cypress** flagged bulk carrier *MV Thermopylae Sierra*. **This vessel laden with a cargo of steel sheets was anchored off the coast of Panadura as it was subject to protracted litigation for the past several years.** In August 2012 it sank during the rough monsoonal weather. **As of now, there is an imminent threat of its bunkers spilling,** raising serious concerns of potential environmental harm. Further, most recently on 31st of October 2012, a Vietnamese cargo ship, *Saigon Queen*, sank off the coast of Sri Lanka. The vessel, built in 2006, was carrying a cargo of wood products to India when it sank. The nature of the potential pollution hazard is yet to be assessed, but needless to say that her bunkers would be the primary concern. The above accounts are a clear indication that maritime mishaps are clearly on the rise within the maritime zones of Sri Lanka.

Recently GOSL commissioned its newest harbour in Hambantota in southern Sri Lanka. It will be Sri Lanka's largest port, after the Port of Colombo. The Port of Hambantota will service ships travelling along one of world's busiest shipping lines - the east-west shipping route which passes six to ten nautical miles south of Hambantota harbour. The first phase of the port project will provide bunkering, ship repair, ship building, and crew changes facilities. Later phases will raise capacity of the port up to a projected 20 million TEUs per year. When completed, the port will be the biggest port constructed on

⁴⁸ Diplomatic Privileges Act No 9 of 1996.

land to date in the 21st century. Further, in Trincomalee, Sri Lanka has its largest natural harbour which is widely regarded as the worlds' 5th largest natural harbour.⁴⁹ It is also home to a sizable population of Sperm and Humpback whales.

Being strategically located, right adjacent to a busy shipping route in the Indian Ocean, Sri Lanka is set to benefit significantly from the ever expanding shipping industry. Yet, this will expose Sri Lanka to greater risk of marine pollution brought about, *inter alia*, by oil spills. It is in this context that the increase in the incidence of ship mishaps noted above becomes most significant.

This, inevitably, leads to a further question. With the large incidence of marine pollution caused by bunker oil spills as enumerated elsewhere in this paper, can the CLC regime in the 2008 Act be used to deal with such situations? The answer is no. What needs to be emphasised is that CLC applies to ships carrying oil as cargo and not to general cargo vessels such as *Thermopylae Sierra* and the *Saigon Queen*. Disconcertingly, this would mean that as the law is structured at present the GOSL may not have a legal mechanism to address the most recent episodes of marine incidents stated above.

As noted elsewhere in this note, 5000 odd ships call over at harbours in Sri Lanka, the majority of which calling over at Colombo port in the capital city. The number of tankers carrying oil for domestic consumption, however, constitutes a fraction of this number and hence is negligible. Further Sri Lanka is not an oil producing country which means that there is not the need for oil tankers to traverse the Sri Lankan waters at regular intervals. On the contrary the recent ship mishaps highlighted above, caused substantial pollution to Sri Lanka's marine environment, not from the escape of cargos of the ill-fated ships, but by the escape of their bunkers. To highlight this issue further, the importance of the Bunker Convention is that nearly half of the total number of present day pollution and the resultant claims globally arise from bunker spills. Besides, due to the high viscosity and persistent character of bunker oil, cleaning up operations of such spills is far more cumbersome and costly than in the case of cleaning up of crude oil spills.⁵⁰

⁴⁹ Media centre for Government of Sri Lanka. <<http://www.development.lk/news.php?news=1500>>. (December 30, 2012).

⁵⁰N.A Martinez Gutierrez; *The Bunkers Convention and the Ship owner's Right to Limit Liability*, Journal of Maritime Law and Commerce, Vol.43.No 2, April, 2012, p.235.

As the law stands at present, no strict liability is imposed on a shipowner for bunker oil pollution damage which is not covered by CLC.⁵¹ Liability thus remains fault-based and this could be quite cumbersome in adducing proof. The accession to the Bunker Convention will afford Sri Lanka the benefit of proving the culpability of such shipowners on the basis of strict liability.

Further, at present there is no requirement on the part of the shipowners (other than vessels covered under CLC 1992) in Sri Lanka to maintain compulsory insurance to cover liability for bunker oil pollution damage. Should Sri Lanka accede to the Bunker Convention, all vessels over gross-tonnage of 1000 (including tankers) will be required to maintain compulsory insurance to cover such liability ensuing under Bunker Convention. This would be an extremely effective way of ensuring adequate compensation for victims of bunker oil pollution damage. Similarly acceding to the Bunker Convention will pave the way for direct action for compensation against insurers/providers of financial security by victims of such pollution damage – a system hitherto alien to the law in Sri Lanka.

It is in the foregoing context that a new Act based on the provisions of the Bunker Convention becomes extremely significant and beneficial to the interest of Sri Lanka. While such an Act would ensure an effective compensation regime to persons who suffer damage caused by bunker oil spills, provision for limitation of liability on the other hand will protect and promote the shipping industry. At present, liability remains unlimited.

7. Recommendations

For the reasons set forth above, incorporating the Bunker Convention into the law of Sri Lanka must be encouraged to the fullest as its importance and the advantages have been emphasised hereinbefore. The wide acceptance of the Bunker Convention is demonstrated by the very fact that by the end of 2012, 66 States representing around 90 per cent of the world tonnage were Parties to the Convention.⁵²

In these circumstances the Hon. Minister for Environment and Natural Resources may be advised to make recommendations to the Cabinet of Ministers of the GOSL to take steps to accede to the Bunker Convention without delay. Same policy considerations which

⁵¹Section 34, 2008 Act. Even if an incident of pollution damage comes within the scope of the CLC regime, yet, there is doubt whether strict liability could be imposed to such damage. This is because Sri Lanka is yet to incorporate the relevant provisions of CLC 1992 by way of regulation made under the 2008 Act as provided by Section 35 therein.

⁵² <www.imo.org/About/Conventions/StatusOfConventions/Docum... > (January 5, 2013).

encouraged GOSL to accede to the CLC should be of relevance in acceding to the Bunker Convention.

It is thus sought to be argued in this note that giving effect to the Bunker Convention should be done in clear, precise terms through a separate, stand alone Act of Parliament. Including such treaty provisions in a general pollution prevention law such as the 2008 Act is largely undesirable and should be avoided.

On the assumption that GOSL would accede to the Convention, a new Act to incorporate the Bunker Convention into the laws of Sri Lanka is hereby recommended. The new Act could make provisions to repeal provisions of any other law, including the 2008 Act, which may conflict or otherwise be inconsistent therewith.

The new Act may be cited as “An Act to incorporate the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 into the Laws of Sri Lanka” and the preamble may read “An Act to give effect to the International Convention on Civil Liability For Bunker Oil Pollution Damage (2001); To make provision for civil liability and compensation for damage caused by bunker oil in the territorial waters or any other maritime zone, its fore shore, and coastal zone of Sri Lanka; to provide for compulsory insurance of certain class of ships; to extend the jurisdiction of the High Court of a Province to hear and determine in connection therewith; AND for matters connected or incidental thereto”.

There is, however, another important factor which has to be borne in mind. Unlike the CLC and the 2010 HNS Convention,⁵³ the Bunker Convention does not create an independent self-governing limitation of liability regime.⁵⁴ The drafters of the Bunker Convention, however, had intended that any claim subject to the Bunker Convention would be subject to limitation of liability regime under any applicable national or international regime such as LLMC Convention as amended.⁵⁵ It would now appear that both the limits and procedure of 1996 LLMC Protocol would apply to any claim under the Bunker Convention.⁵⁶ Sri Lanka, however, has no domestic law dealing with limitation of liability and nor is Sri Lanka a Party to the LLMC Convention or its 1996 LLMC Protocol. All things considered, an international limitation of liability mechanism

⁵³ International Convention on Liability and Compensation for Damage in Connection with the Carriage of hazardous and Noxious Substances by Sea.

⁵⁴ Article 6 of the CLC.

⁵⁵ Article 6 of Bunker Convention and see, N.A Martinez Gutierrez, *The Bunkers Convention 2001: Challenges for its Implementation*. Paper presented at the round table ‘EU Maritime Policy and the (Northern) Adriatic’ on 20.5.2011 organised by MLAS, Slovenia.

⁵⁶ Ibid.

is preferable as opposed to a domestic mechanism. Therefore, in order to have access to an applicable international limitation of liability regime, it is best that GOSL accede to the 1996 LLMC Protocol as well. This would ensure full and effective implementation of the Bunker Convention.

For the reasons set forth in favour of enacting separate domestic legislation for the implementation of international agreements in this paper, the said 1996 LLMC Protocol too may be enacted through a separate Act of Parliament simultaneously.

The concept of limitation of liability is widely accepted throughout the world today and it is evidenced by the number of treaties in this sphere and the widespread ratifications thereof. It is also seen that the ‘recent trend has been for the international maritime community to seek increase in the limits of liability rather than seeking the abolition of the right of limitation of liability’.⁵⁷ This paper, however, will not discuss the implementation of the LLMC Protocol in Sri Lanka.

8. Implementation of the Bunker Convention in Sri Lanka: An Overview.

The very nature of the modern-day shipping industry has the effect of transcending national jurisdiction and geographical boundaries. It is of vital importance therefore that international regimes governing such areas as oil based pollution which have gained substantial global acceptance are included in municipal legislation to reflect the very purpose and object of such Conventions. Besides, there exists the requirement for a constitutional guarantee for the above.

A positive outcome of the 2008 Act is that it provides for a strong administrative framework to deal with incidence of pollution. The functionality of Marine Environment Protection Authority (MEPA),⁵⁸ along with other institutions such as the Office of Director Merchant Shipping (DMS)⁵⁹ and the Ports Authority⁶⁰ shall mean that Sri Lanka has already in place a system and an institutional structure which is capable of fulfilling her international treaty obligations satisfactorily.

⁵⁷ Martinez Gutierrez; Norman A, ‘Limitation of Liability in International Maritime Conventions – The Relationship between Global limitation Conventions and particular Liability Regimes’, p.201.

⁵⁸ Established under section 2 of the 2008 Act.

⁵⁹ “Director Merchant Shipping” shall mean, the person appointed under section 3 of the Merchant Shipping Act No. 52 of 1971.

⁶⁰ “Ports Authority“ shall mean the Authority established under the Sri Lanka Ports Authority Act No. 232 of 1981.

9. Mode of incorporation of Bunker Convention to the Laws of Sri Lanka:

The drafters will have to exercise caution in the preparatory stages of the new Act incorporating the Bunker Convention into the law of Sri Lanka. As the 2008 Act also purports to deal with related subject matter, one has to avoid a situation of overlap of legislation.

9.1 The New Act to prevail over Existing Law.

The 2008 Act makes provision with regard to pollution caused by ‘oil, harmful substances or other pollutants’. This would mean that all types of pollution caused by human intervention are contemplated in the scope of the 2008 Act.

‘Oil’ has been defined as ‘petroleum in any form including crude oil, oil fuel, sludge oil refuse, and refined products.....’ The ‘oil fuel’ has been defined as any oil used as fuel in connection with the propulsion and auxiliary machinery of the ship in which such oil is carried’. The bunker oil pollution thus could get caught up in the definition of ‘oil fuel.’ Therefore, one of the first tasks for the drafters would be to separate and remove oil pollution damage that may be caused by bunker oil from the scope of application of the 2008 Act. This may be done by including provision in the new Act to the effect that this Act shall prevail in the event of an inconsistency with any other Law in so far as bunker oil pollution damage and matters incidental thereto, are concerned. The rest can be left for legal interpretation.

9.2 Provisions of the New Act: Salient Points

Having paved the way exclusively for bunker related pollution in the new Act, provision will have to be made to enact the provisions of the Convention through the new Act along with additional provisions to make the substance of the Convention enforceable domestically. This will include punitive functions for violations.

The structure of the new Act can be categorized under several heads as follows;

9.2.1 Preliminary Matters

The definition of the common terms such as ‘ship’ and ‘pollution’ in domestic legislation differ vastly from the definitions given in the Bunker Convention. It is proposed that the definitions used in the Convention be incorporated in the new Act as far as practicable.

9.2.2 Jurisdiction of the High Court

In giving effect to Article 9 of the Bunker Convention which deals with jurisdiction, it may be said that the High Court of the Province established under Article 154 (P) of the Constitution of Sri Lanka may be vested with the jurisdiction to hear and determine the disputes concerning bunker oil pollution and the consequential matters, as the court of first instance.

One of the noteworthy provisions of the 2008 Act is section 48(3) which empowers the Court to make such orders and give such directions with regard to any matter relating to which no provisions or no adequate provisions have been made in proceedings pending before Court.⁶¹

It is therefore suggested that the provisions with regard to the exercise of judicial power, admissibility of evidence and other related provisions in the 2008 Act may be incorporated by reference in the new Act as it would provide clarity with regard to the procedure for judges and others involved in litigation process.

Therefore in addition to the above, provisions similar to those dealing with offences and penalties,⁶² sale of a ship,⁶³ chairman's certificate regarding pollution to be *prima facie* evidence,⁶⁴ offences and penalties,⁶⁵ and duty to co-operate⁶⁶ will be included in the new Act.

With regard to the provisions relating to limitation of liability in Article 6 of the Bunker Convention, on the premise that GOSL will accede to the LLMC Protocol, appropriate interim provisions will have to be made in the new Act pending such accession. As such transitional provisions will have to be provided incorporating the limits of liability prescribed by the 1996 LLMC protocol to bunker oil pollution claims. This shall be operative as an interim measure only.

⁶¹The section ensures that such orders and directions, however, are not inconsistent with provisions of the law.

⁶² Section 41.

⁶³ Section 46, where upon conviction for offence under this Act, if the owner is unable pay the fine or liability incurred is not discharged, the court has the power to recover the amounts due by ordering the sale of the ship.

⁶⁴ Section 49. The 'Chairman' is the chairman of the MEPA.

⁶⁵ Section 53.

⁶⁶ Section 55, master et al. under a duty not to obstruct the performance of duties by the MEPA.

9.2.3 The Role of MEPA

The MEPA is tasked with the function of administration and implementation of the 2008 Act. With the strong institutional knowhow, the overall administration, management and regulation of this Act is best entrusted to the MEPA. The Authority shall be empowered to act in respect of all Sri Lankan flag ships and all ships operating within the territorial limits of Sri Lanka.

9.2.4 Implementation of the Compulsory Insurance Provisions

The Convention stipulates the need for an ‘appropriate authority’ of the State of the ship’s registry to issue certificates attesting insurance or other financial security. In keeping with the requirements of the Bunker Convention, this function is most suited to be entrusted to the DMS under the existing domestic framework.

The main functions of the DMS would be to implement and supervise the compulsory insurance provisions in Article 7 of the Bunker Convention. It is proposed that the provisions on compulsory insurance in the 2008 Act can be used herein with necessary modifications.⁶⁷ The DMS will be required to determine the conditions of issue and the validity of the certificates which attest to the fact that insurance and other financial security is in force.⁶⁸ The evidence of the certification that is contemplated by the said Article 7 will be required by law to be had in the possession of the master (or any person in authority) of a ship to which this Article applies. The DMS shall, similarly be tasked to issue certificates confirming the ownership of vessels owned by the State to which, the compulsory insurance requirement will not apply.⁶⁹

The delegation of the function of issuing such certificate will not be considered at the present juncture and hence the notification of such delegation to the IMO Secretary-General will not arise.⁷⁰ The format of the certificate can be in the form contemplated in Article 7 and the same could be included as a schedule or an annexure to the main body of the new Act.

⁶⁷ Section 36.

⁶⁸ Article 7(7).

⁶⁹ Article 7(14).

⁷⁰ Article 7(3)(b).

The 2008 Act makes it a punishable offence to leave or enter the territorial waters of Sri Lanka without a valid certificate of insurance. This provision may be reproduced in the new Act in order to incorporate Article 7(11) and 7(12).

9.2.5 Miscellaneous Provisions

Other provisions such as the direct claim for compensation against the insurer and defences available for the insurer-defendant,⁷¹ period of prescription for action for damages,⁷² will be included in the new Act.

9.2.6 Additional Provisions: Responder Immunity

One of the criticisms of Bunker Convention is that it does not provide for responder immunity. This is, however, already a part of the law in Sri Lanka and as such similar exemption provisions could be included in the new Act.⁷³ At present under the 2008 Act all persons acting under the authority of MEPA shall be exempt from civil liability if such pollution further damage is caused while attempting to mitigate an incident of pollution damage.

As a practical measure of enforcement it is suggested that MEPA be conferred additional powers which have not been included in the Convention. Thus, it shall be made lawful for the MEPA to make provisional detention orders on ships suspected of wrong-doing. They may be used to restrict the movement of a ship which has committed an wrong doing or when there is credible information that such ship is about to commit such wrongful act described in the new Act and also to facilitate investigations; to secure the attendance of the offender at any legal proceeding and to effectively enforce sanctions imposed under the Act. The ship, however, may be released upon the owner of the ship furnishing sufficient security acceptable to the MEPA.

A provisional detention order would cease upon deposit of a bond or other financial security in its place or where this is not the case, the Court is empowered to make the detention order final. Such a detention order will prevail until the conclusion of any investigation or legal proceedings. In a case where no deposit is made and the detention order has been made final, provision has also been made for the recovery of the fine imposed on an offender who has been found guilty by a Court, by the sale of the ship.

It may finally be noted that, it is now resolved that bunker oil liability could be limited under LLMC Convention after some doubt that existed amongst the international

⁷¹ Article 7(10).

⁷² Article 8.

⁷³ Sections 24(4) and 33, 2008 Act.

academia.⁷⁴ Therefore, for the purposes of the new Act, it is required to make reference to the 1996 LLMC Protocol with regards to actual limits of liability in terms of SDR therein. Thus, as noted above, the transitional provisions specifying the limits of liability must be included in the main text of the new Act even if such provision shall be valid only till such time the accession and the enabling legislation giving effect to the LLMC Protocol becomes law in Sri Lanka.

(END)

Civil Liability for Bunker Oil Pollution Damage Act No: [.....]of 2013

[Certified onApril 2013]

AN ACT TO GIVE EFFECT TO THE INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR BUNKER OIL POLLUTION DAMAGE (2001); TO MAKE PROVISION FOR CIVIL LIABILITY AND COMPENSATION FOR DAMAGE CAUSED BY BUNKER OIL IN THE TERRITORIAL WATERS OR ANY OTHER MARITIME ZONE, ITS FORE SHORE, AND COASTAL ZONE OF SRI LANKA; TO PROVIDE FOR COMPULSORY INSURANCE OF CERTAIN CLASS OF SHIPS; TO EXTEND THE JURISDICTION OF THE

⁷⁴ Martinez Gutierrez. N.A; *The Bunkers Convention and the Ship Owner's Right to Limit Liability*, *Journal of Maritime Law & Commerce*, Vol.43,No.2, April,2012, p. 235.

HIGH COURT OF A PROVINCE TO HEAR AND DETERMINE IN CONNECTION THEREWITH; AND FOR MATTERS CONNECTED OR INCIDENTAL THERETO.

Be it enacted by the Parliament of the Democratic Socialist' Republic of Sri Lanka as follows:

1. This Act may be cited as the Civil Liability for Bunker Oil Pollution Damage Act No [...] of 2013, and shall come into operation on such date as the Minister may appoint by Order published in the Gazette (hereinafter referred to as the “appointed date”).
- Short title and the date of operation.

PART 1

Scope of Application.

2. This Act shall apply exclusively -
- (1) to pollution damage caused:
- (i) within the territory of Sri Lanka, including the territorial sea, and
- (ii) any other maritime zones, its fore shore, and coastal zone of Sri Lanka,
- (2) to preventive measures, wherever taken, to prevent or minimize such damage.

PART 2

Liability of the Shipowner, Exclusions and Limitation of Liability

3. (1) Except as provided in sub-sections 3 and 4, any 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 originating from the source, the liability shall attach to such shipowner at the time of the first of such occurrences.
- Liability of the shipowner.
- (2) Where more than one person is liable in accordance with sub-section (1) their liability shall be joint and several.

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

- (i) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or
- (ii) the damage was wholly caused by an act or omission done with the intent to cause damage by a third party; or
- (iii) the damage was wholly caused by the negligence or other wrongful act of any appropriate 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 exempt wholly or partially from liability to such person as the case may be. Exemption of liability of the shipowner.

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

(6) Nothing in this Act shall prejudice any right of recourse of the shipowner which exists independently of this Act.

4. (1) This Act shall not apply to pollution damage as defined in the Marine Pollution Prevention Act No 35 of 2008 whether or not compensation is payable in respect of it under the said Act. Exclusions.

(2) Except as provided in sub-section (3), the provisions of this Act shall not apply to any:

- (a) ship belonging to the Sri Lanka Navy, the Sri Lanka Army and the Sri Lanka Air force,
- (b) warships, naval auxiliary or other ships owned or operated by a State

and used, for the time being, only on State non-commercial service.

(3)The Minister may by publication in the gazette declare that the provisions of this Act shall apply to ships described in sub section 2(a) under such terms and conditions that may be prescribed and it shall be the duty of the Authority to notify, the Secretary-General of the International Maritime Organization thereof. Such notification shall include said terms and conditions of such application.

Duty to inform the Secretary General of IMO.

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

Incidents involving two or more ships.

6. Nothing in this Act shall affect the right of the shipowner and the person or persons providing insurance or other financial security to limit liability under any national law incorporating the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.

Limitation of liability.

PART 3

Exemption from Liability

7. (1) No person shall be made liable to any offence under this Act, if;

Acts done in good faith

(i) bunker oil is discharged or dumped in consequence of the removal by the Authority or any other person or persons acting under the written sanction of the Authority of any sunk, stranded, or abandoned vessel ;

(ii) bunker oil is discharged or dumped by the Authority or any other

person or persons acting under the written sanction of the Authority, for the purpose of combating a specific incident of pollution by mitigating or eliminating the damage therefrom.

- (2) No action shall lie against the Authority or any person or persons acting under the written sanction of by the Authority for damages in any civil court for any act done or purported to be done in good faith under this Act.

PART 4

Compulsory Insurance or Other Financial Security

8. (1) The registered owner of a ship having a gross tonnage greater than 1000 registered in Sri Lanka 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 set forth in section 23 hereof. Certain ships registered in Sri Lanka to maintain insurance or other financial security.
- (2) (i) A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Act shall be issued to each ship after the Director has determined that the requirements of sub-section (1) have been complied with. The certificate shall be in the form set out in the Schedule 01 to this Act and shall contain the following particulars: Director to issue certificate.
- (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.

(ii) It shall be lawful for the Director to withdraw such a certificate issued under sub-section (1) provided that the conditions under which such a certificate has been issued are not maintained or violated.

Director may withdraw certificate.

(iii) In no case will a certificate issued to a registered owner under sub-section (1) be transferable to another and accordingly any such transfer shall be null and void.

Certificate not to be transferred.

(3) The certificate shall be issued in Sinhala, Tamil and English languages.

Language of the Certificate.

(4) Subject to the provisions in section 10(5) the certificate shall be carried on board the ship in respect of which such certificate has been issued at all times and a copy thereof shall be deposited with the Sri Lanka Ports Authority.

Certificate to be carried on board.

(5) An insurance or other financial security shall not satisfy the requirements of this Part 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 section 8(2)(i), before three months have elapsed from the date on which notice of its termination is given to the Ports Authority, unless the certificate has been surrendered to Director 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 Part.

(6) The Director shall, subject to the provisions of this Part, determine the

Director to

conditions of issue and validity of the certificate.

determine conditions for certificate.

(7) Nothing in this Act shall be construed as preventing a the Director from relying on information obtained from other States or other international organizations relating to the financial standing of providers of insurance or financial security for the purposes of this Act.

Director may obtain information concerning the insurer.

(8) It shall be lawful for the Director to accept certificates issued or certified by the competent authority of a State Party and shall be regarded as having the same force as certificates issued or certified by the Director even if issued or certified in respect of a ship not registered in a State Party. The Director 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 Act.

Certificates issued by competent authorities of State Parties.

9.(1) It shall be lawful for any person who has suffered any physical damage or damage to property whatsoever as a consequence of any pollution damage to bring any claim for compensation directly against the insurer or other person providing financial security for the registered owner's liability for pollution damage.

Direct claim against insurers.

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

Defences.

(3) Even if the shipowner is not entitled to limit his liability according to section 6, the defendant may nevertheless limit liability to an amount equal to the amount of the insurance or other financial security required to be maintained in accordance with section 8.

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

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

10.(1) No ship registered in Sri Lanka to which the provisions of this Part apply shall be permitted to operate at anytime unless a certificate in prescribed form issued under section 8(2)(i) or in accordance with the provisions of 29 of this Act.

No Ship to operate without certificate.

(2) Subject to the provisions of this Part, no ship having a gross tonnage greater than 1000, wherever registered, shall enter or leave any port in Sri Lanka, or arrive at or leave any offshore facility of whatsoever description within the territorial sea without valid insurance or other security is in force, to the extent specified in section 8(2).

(3) The certificate of insurance or other security required by section 8(2)(i) in respect of a ship shall, on demand, be produced by the master to the Authority or any person authorized in that behalf by the Authority.

Certificate to be produced on demand.

(4) Where a ship fails to carry or the master of a ship fails to produce, a certificate as required by section 8(4) the owner, operator or the master of the ship shall be liable on conviction to a fine not less than rupees one million and not exceeding rupees six million.

Penalty for not carrying certificate on board.

(5) Notwithstanding the provisions of section 8(4), the Director may for the purposes of section 10(2), not require ships to carry on board or to produce the certificate required by section 8(2)(i) when entering or

Electronic records of certificate may be maintained by the Director.

leaving ports or arriving at or leaving from offshore facilities in the territory of Sri Lanka, provided that Secretary-General of the International Maritime Organization (IMO) has been notified that, the records of such certificate required by section 8(2)(i) are maintained in electronic format and accessible to other state Parties.

- 11.(1)The provisions of this Part shall not apply to any ship owned by the Government of Sri Lanka in respect of which no insurance or other financial security is maintained provided such ship carries a certificate issued by the Director stating that the ship is owned by the Government of Sri Lanka and that the ship's liability is covered within the limit prescribed in accordance with section 8(1). Such a certificate shall be in the prescribed form specified in section 8(2)(i) as far as practicable.
- State owned ships not required to carry certificate.
- (2)The Minister may, by order published in the gazette declare that the provisions of this Part should not apply to ships operating exclusively within the territory of Sri Lanka, including the territorial sea.
- Ministers Powers.

PART 5

Prescription, Jurisdiction of the Courts and Enforcement of Foreign Judgments.

12. No action for compensation may be brought under the provisions of this Act unless such an action is brought within three years from the date the damage occurred. In any event no action shall be brought later than six years from the date of the incident which caused the damage. Where the incident consists of a series of occurrences, the six-year period shall run from the date of the first such occurrence.
- Prescription.
- 13.(1) Notwithstanding anything to the contrary in the Judicature Act No 2 of 1978, every offence under this Act committed in the territorial
- Jurisdiction of the High Court.

waters of Sri Lanka or any other maritime zone, its fore-shore and coastal zone of Sri Lanka shall be triable by a High Court as provided in section 48 of the Marine Pollution Prevention Act, No. 35 of 2008.

(2) Where in any proceeding instituted under this Act any matter or question including the exercise of any power in respect of which no provision or adequate provision has been made by or under this Act or any other enactment, the court shall have the power to make such orders and give such directions in so far as the same shall not conflict or be inconsistent with any provision made by or under this Act or any other law.

14. In any suit or prosecution under this Act, a certificate issued under the hand of the Chairman to the effect that pollution specified in the certificate has in fact been caused, shall be admissible in evidence and shall be *prima facie* evidence of the matters contained therein.

Chairman's certificate to be admissible in evidence.

15.(1) Any final judgement given by a competent court in a foreign jurisdiction in relation to pollution damage, actions for compensation against shipowner, insurer or other person providing security contemplated under this Act and which are enforceable in the said foreign jurisdiction, shall be recognised by court of competent jurisdiction in Sri Lanka, except:

Recognition and Enforcement of foreign judgments.

(i) where it is proved that the judgement sought to be enforced was obtained by fraud; or

(ii) where the defendant was not given reasonable notice and a fair opportunity to present his case.

(2) A judgement recognised under sub-section (1) shall be enforceable

no sooner than the formalities specified in Enforcement of Foreign Judgments Act No 93 of 2001, are complied with.

- (3) In any event such compliance with formalities shall not have the effect of the merits of the case in respect of which the enforcement of the said judgement is sought, to be re-opened or re-agitated.

PART 6

Offence and Penalties

16.(1) Any authorized officer may detain any ship, if he has reasonable cause to believe that any bunker oil has been discharged from a ship into the territorial waters or any other maritime zone, its fore shore, and coastal zone of Sri Lanka, and the ship may also be so detained until the owner, operator, master or the agent of the ship deposits with the Authority such sum of money or furnishes such security as would, in the opinion of the authority, be adequate to meet the liability of the shipowner under this Act.

Power to detain a ship.

(2) Any authorized officer may arrest without a warrant in the area other than the Exclusive Economic Zone, any person who commits an offence under this Act and may produce him before the High Court exercising Admiralty jurisdiction as the case may be.

Arrest without a warrant.

17.(1) If any ship is detained under section 16 and should the ship proceed to sea before it is released by the Authority, the master, owner, operator agent or any other who is a party or privy to the act of sending the ship to sea, shall be guilty of an offence under this Act and shall be liable upon conviction to a fine not less than rupees six million and not exceeding rupees fifteen million.

Offences and penalties.

Sale of a ship.

- (2) Where the owner, operator, master or the agent of a ship has been convicted of an offence under the provisions of this Act and any fine imposed or any liability incurred is not discharged or is not paid within the time ordered by the Court, the Court shall, in addition to its powers for enforcing payment, have the power to direct that the amount due shall be levied by distraint and sale of the ship, her tackle, furniture and apparel.

PART 7

Miscellaneous Provisions

18. Whenever any foreign ship is detained under this Act or any proceedings are instituted under this Act against master or owner of a ship, notice shall forthwith be served by the Authority on the Consular Office for the country under whose flag the ship is registered.
- 19.(1)The master of any ship to which this Act shall apply, shall give the Authority or any person authorized in writing in that behalf by the Authority all reasonable assistance in his power to enable such Authority or person so authorized to perform or discharge his duties and functions under this Act,
- (2)Any person who obstructs or hinders the Authority or any person authorised by the Authority from performing or discharging his duties or functions under this Act shall be guilty of an offence under this Act and shall be liable on conviction to a fine not exceeding rupees one million.
- 20.This Act shall make provision for all matters concerning civil liability and compensation for damage caused by bunker oil in the territorial waters or any other maritime zone of sri lanka as specified in section 2; compulsory insurance of certain class of ships.

Notice of proceedings to be served on the relevant Consular office.

Duty to co-operate.

Provisions of this

Act to prevail in case of inconsistency.

21. In the event of any inconsistency between the provisions of this Act with any other law, the provisions of this Act shall prevail.

Sinhala text to prevail in case of any inconsistency.

22. In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.

PART 8

Transitional Provisions

Limits of liability for claims for loss or damage.

23.(1) For the purposes of section 6 and pending the enactment of the said Act referred thereto, limitation of any liability incurred under this Act shall be regulated in accordance with this Part.

(2) The limits of liability for claims for loss or damage caused by bunker oil pollution, arising out of any distinct occasion, shall be calculated as follows;

(i) 1,000,000 SDR's for a ship with a gross tonnage not exceeding 2,000.

(ii) For a ship with a gross tonnage in excess of 2,000, the following amount in addition to that mentioned in sub-paragraph (i) additional aggregate amount;

For each ton from 2001 to 30000 tons – 400 SDR

For each ton from 30001 to 70000 tons – 300 SDR

For each ton in excess of 70000 tons – 200 SDR.

(3) A shipowner shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such a loss, or recklessly and with knowledge that such loss would possibly result.

(4) The limits of liability determined in accordance with this part shall apply to the aggregate of all claims which arise on any distinct occasion.

Interpretations.

24. In this Act unless the context otherwise requires;

“Authority” means the Marine Environment Protection Authority established under the Marine Pollution Prevention Act, No. 35 of 2008.

“Authorized officer” shall mean every police officer and the following officers designated in writing in that behalf shall be an authorized officer for the purpose of section 16.

- (a) Member of the armed forces;
- (b) Ship surveyors of the Merchant Shipping Division of the Ministry of the Minister in charge of the subject of shipping;
- (c) An officer of the Sri Lanka Ports Authority having specialized knowledge in the prevention, control and mitigate reduction of pollution.

"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;

“Coastal zone” shall have the same meaning as in the Coast Conservation Act, No.57 of 1981;

“Chairman” shall mean the Chairman of the Marine Environment Protection Authority established under the Marine Pollution Prevention Act, No. 35 of 2008;

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

“Director” shall mean the Director of Merchant Shipping as appointed under section 3 of the Merchant Shipping Act No 52 of 1971;

"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 ;

“Maritime Zone” means any maritime zone declared under the Maritime Zones Law, No 22 of 1976 and includes-

- (a) The contiguous zone
- (b) The Exclusive economic zone
- (c) The continental shelf
- (d) The pollution prevention zone;

Declared by proclamation in terms of the aforesaid law, and any other Zone which may be declared at a future date under the said Law;

"Person" means any individual or partnership or any public or private body, whether corporate or not,

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

“Ports Authority” shall mean the Authority established under the Sri

Lanka Ports Authority Act No 232 of 1981;

"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;

"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;

"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 Party" shall mean State Parties to the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001;

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

SCHEDULE 01

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

DAMAGE

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

Name of
Ship.....

Distinctive Number or
letters.....

IMO Ship Identification
Number.....

Port of
Registry.....

...

Name and full address of the Principal place of business of
the.....

Registered
owner.....

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

Type of
Security.....

Duration of
Security.....

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

.....
Address.....

.....
.....

.....
This certificate is valid

until.....
Issued or certified by the Government of the Democratic Socialist Republic of Sri Lanka.

At.....

On.....

(Place) (Date)

.....

(Signature and Title of issuing or certifying official)

