

**The Development of Environmental Salvage and the 1989 Salvage Convention:
The Proposed Amendments to the 1989 Convention and the issues regarding
the assessment of Environmental Salvage Awards.**

Sheila Cele

212555159

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COLLEGE OF LAW AND MANAGEMENT STUDIES

SCHOOL OF LAW

UNIT OF MARITIME LAW AND MARITIME STUDIES

Supervisor: Ms. Dusty-Lee Donnelly

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ABSTRACT

The International Salvage Union (ISU) believes that it is time to reconsider its provisions and amend the 1989 Salvage Convention to create a separate and distinct environmental salvage award. ISU is of the opinion that the present systems under the 1989 Salvage Convention and SCOPIC do not provide proper recognition of the salvor's efforts in protecting the environment.

For a long time, salvage was concerned with the principle of no cure no pay. In order to overcome this the 1989 Convention introduced the salvor's skill and effort to minimize or prevent damage to the environment as a criteria for fixing rewards in terms of Article 13; and Article 14 which allows for a special compensation to be paid even where no property was saved provided there were efforts to protect the environment. Due to difficulties with Article 14 SCOPIC was introduced, which is a clause that can be incorporated under the LOF. This dissertation will critically analyze the ISU's proposed amendments of the 1989 Salvage Convention and to consider whether this should be incorporated into the South African Wreck and Salvage Act, 1996.

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CHAPTER 1: INTRODUCTION

1.1 Introduction

Salvage is an ancient right which has been restricted to a reward for the saving of life and property at sea. This was according to the principle of “no pay no cure”, where salvors were successful in saving the ship or property they were awarded accordingly. However, should they fail to save the ship or property they will receive nothing.¹ Therefore, the principle of traditional salvage failed to allow an environmental award in cases where no property was actually saved.²

During the twentieth century, the world developed an environmental awareness in such a way that environmental concerns have been the centre of the development of the law of salvage and have shaped the Salvage Convention.³ In the 1960’s salvage rewards began to change because of the development of oil tankers and the increase of marine casualties in the 1960’s and 1970’s which resulted in huge pollution problems. For example, disasters such as the Torrey Canyon⁴, Atlantic Empress⁵ and Amoco Cadiz⁶ awakened environmental awareness in different States.

When the 1989 Salvage Convention⁷ came into force its drafters recognized the need to protect the environment and introduced two changes to the law of salvage, Article 13 and Article 14. Article 13(1)(b) looks at the skill and effort of the salvors in preventing or minimizing damage to the environment as one of the factors to be taken into consideration when calculating a salvage reward.⁸ Article 14 provides for special compensation even when no property has been saved, but the fact that the salvor was involved in a salvage operation that threatened damage to the environment and thereby prevented or minimized damage to the environment is taken into

¹ Brice *Maritime Law of Salvage* 5edn (2012) at 1.

² *Ibid.*

³ Bishop “The Development of Environmental Salvage and Review of the Salvage Convention 1989” *Tulane Maritime Law Journal* (2012) 37 at 65-66.

⁴ Torrey Canyon, United Kingdom, 1967. Available at: <http://www.itopf.com/in-action/case-studies/case-study/torrey-canyon-united-kingdom-1967/>. Accessed on 10 August 2017.

⁵ Atlantic Empress, West Indies, 1979. Available at: <http://www.itopf.com/in-action/case-studies/case-study/atlantic-empress-west-indies-1979/>. Accessed on 10 August 2017.

⁶ *Amoco Cadiz*, France, 1978. Available at: <http://www.itopf.com/in-action/case-studies/case-study/amoco-cadiz-france-1978/>. Accessed on 10 August 2017.

⁷ International Convention on Salvage (London 28 April 1989). UNTS 1953 (International Salvage Convention).

⁸ Article 13 (1) (b), International Salvage Convention of 1989.

consideration to compensate salvors for their effort.⁹ The 1989 Salvage Convention thus reduced the harshness of the principle of “no cure no pay”.¹⁰

Due to the House of Lords decision in the *Nagasaki Spirit* case¹¹ where the House of Lords held that “fair rates for the equipment, personnel actually and reasonably used in the salvage operation in Article 14 (3) meant a fair rate of expenditure and did not include an element of profit”¹², Article 14 was therefore replaced by the Special Compensation P&I Club Clause (SCOPIIC) which introduced a simpler tariff based mechanism for calculating special compensation.¹³ This is a clause which can be voluntarily incorporated into a LOF contract.

However, with regards to Article 14 “Special Compensation” in South Africa the Wreck and Salvage Act¹⁴ contradicts the House of Lords decision in the *Nagasaki Spirit* case¹⁵ and provides that Article 14 includes an element of profit having regard to the scope of work done and the prevailing market rate.¹⁶

In 2007 the International Salvage Union (ISU) felt it time for change and put forward its proposal for an environmental salvage award which was followed in 2012 by ISU’s position paper on the 1989 Salvage Convention. ISU believes that it is time to amend the 1989 Salvage Convention to create a separate and distinct environmental salvage award.¹⁷ ISU is of the opinion that the present systems under the 1989 Salvage Convention or a LOF incorporating SCOPIIC do not provide proper recognition of the salvor’s efforts in protecting the environment.¹⁸ ISU recognizes that

⁹ Article 14, International Salvage Convention of 1989.

¹⁰ Bishop *op cit* note 3 at 67.

¹¹ *Semco Salvage & Marine Pte. Ltd.v Lancer Navigation Co Ltd.* [1997] 1 Lloyd’s Rep 323 (HL). (*The Nagasaki Spirit*).

¹² *Ibid* at 332.

¹³ The Special Compensation P&I Clause (SCOPIIC). Available at: http://www.marine-salvage.com/documents/SCOPIIC_Appendix_A_2014.pdf. Accessed on 10 August 2017. For the history of the clause see Bishop *op cit* note 3 at 69-87.

¹⁴ The Wreck and Salvage Act 94 of 1996 (hereafter “the Wreck and Salvage Act”).

¹⁵ *The Nagasaki Spirit supra* note 11.

¹⁶ *Ibid*.

¹⁷ The International Salvage Union Position Paper on the 1989 Salvage Convention at 1. Available at: <http://www.marine-salvage.com/environmental/ISU%20Final%20Position%20Paper.pdf>. Accessed on 10 August 2017. See also: <http://www.comitemaritime.org/Uploads/Salvage%20Convention/ISU%20Final%20Position%20Paper%20on%20Environmental%20Salvage%20Awards%20April%202012.pdf>. Accessed on ...

¹⁸ *Ibid*.

“SCOPIC works and that salvors in many cases are rewarded for protecting the environment by Article 13 (1) (b)”.¹⁹ However, ISU argues that both Article 14 and SCOPIC’s main objective is to save property; Article 14 does not include the element of profit and SCOPIC is limited to a standard bonus of 25% irrespective of the work achieved by a salvor. ISU further states that recently society has become more environmentally conscious and now protecting the marine environment comes before saving property²⁰ and they feel that salvors are insufficiently paid for protecting the environment because both Article 14 and SCOPIC are a safety net and not a method of remuneration.²¹

Ex-president Todd Busch then went on to give three reasons for their environmental salvage award proposal, firstly, he said that environmental issues are dominant in every salvage case. Secondly, that the current system under the 1989 Salvage Convention and where applicable SCOPIC do not take into account the degree of success obtained by the salvor in protecting the environment. Thirdly, that the salvage industry lacks funding.²²

The ISU’s environmental award proposal was opposed by the P&I Clubs and shipowners because they were happy with the present system. Khosla submits that “the salvage system works!”²³

It is submitted that the shipping industry must be careful to ensure that resistance to change is based on sound reasons and not simply because the industry has become too comfortable with how the current system works, because taking care of the environment is now a fundamental concern.

¹⁹ Busch Fair Rewards for Protecting the Environment- the Salvor’s Perspective, at 4. Available at: <http://www.marine-salvage.com/media-information/conference-papers/fair-reward-for-protecting-the-environment-the-salvors-perspective/>. Accessed on 8 October 2017. See also Yearbook 2010 at 493-498 available at: <http://www.comitemaritime.org/Uploads/Yearbooks/Yearbook%202010.pdf>. Accessed on 8 October 2017.

²⁰ Wahi “Oil Spill in India 2016” a paper presented at the Oil Spill India 4th International Conference & Exhibition conference at JW Marroitt, Sahar, Mumbai, India on (11-12 August 2016). Available at: <http://www.marine-salvage.com/media-information/conference-papers/oil-spill-india-2016/>. Accessed on 8 October 2017.

²¹ Busch Fair Rewards for Protecting the Environment- the Salvor’s Perspective, *op cit* note 19 at 4.

²² *Ibid.*

²³ Khosla “Salvage Law-is it Working? Does it protect the environment?” at 5. Available at: <http://www.comitemaritime.org/Uploads/Salvage%20Convention/Salvage%20Environmental%20Salvage%20CMI%20%20Kiran%20Khosla%20ICS%20%20Final.doc>. Accessed on 10 October 2017. See also: CMI Yearbook 2010 at 478-487 available at: <http://www.comitemaritime.org/Uploads/Yearbooks/Yearbook%202010.pdf>. Accessed on 8 August 2017.

1.2 Study rationale

Environmental salvage raises awareness of the importance of the environment and specifically whether salvors are also rewarded for the part that they play in saving the environment and have an incentive to invest in the industry and respond to casualties even when they are unlikely to earn a traditional salvage award. This is an important issue to examine because the aim of the ISU proposal is to ensure that salvors are properly rewarded for protecting the environment while SCOPIC and Article 14's main objective is to save property. A separate environmental salvage reward may incentivize salvors and may help salvors to invest in better equipment and remain in business. Section 24 of the Constitution of the South Africa affords everyone the right to an environment which is not harmful to their health and also places an obligation on the State to take reasonable measures to protect the environment for present and future generations.²⁴

The purpose of this dissertation is to critically analyze the ISU's proposed amendments of the 1989 Salvage Convention and to consider whether this should be incorporated into the South African Wreck and Salvage Act.

1.3 Methodology

The dissertation has been conducted using desktop research, based on relevant international conventions, South African legislation, relevant case law, and journal and internet articles.

1.4 Research questions

1. How did environmental concerns shape the salvage awards payable under the 1989 Salvage Convention and the LOF?
 - Article 13
 - Article 14
 - SCOPIC.
2. Why does ISU believe it is time for the introduction of an environmental salvage award?
3. What is ISU's proposal for an environmental salvage award?
 - How is the damage to the marine environment going to be defined?

²⁴ The Constitution of the Republic of South Africa, 1996.section 24.

- What type of damage should be taken into account?
 - Who should pay for such awards?
 - How are such awards going to be calculated or assessed?
4. Whether ISU's proposal for an environmental salvage award should be incorporated into the South African Wreck and Salvage Act, 1996?

1.5 Chapter Outline

This dissertation is structured as follows:

Chapter one provides a brief introduction of the topic, the study rationale and purpose, the research questions and the chapter outline of this study.

Chapter two looks at the historical background and it will discuss the provisions of the Salvage Convention governing salvage awards under Article 13, and special compensation under Article 14. This discussion will therefore highlight where relevant amendments have been made to the Salvage Convention in South Africa in the Wreck and Salvage Act. This chapter will also examine the *Nagasaki Spirit* case²⁵ and consider the relevant provisions of SCOPIC.

Chapter three will discuss the ISU proposal and the reasons given by ISU for proposing an environmental salvage award. It will also discuss the proposed amendments to the 1989 Salvage Convention and the issues regarding the assessment of such an award because an environmental salvage award cannot be quantified.

Chapter four will discuss the constitutional and legal framework governing environmental rights and protection in South Africa. This chapter will look at section 24 of the Constitution, the National Environmental Management Act (NEMA),²⁶ National Environmental Management: Integrated Coastal Management Act (NEMICMA),²⁷ the Wreck and Salvage Act and case law.

Chapter five will provide a summary of the findings, recommendations and the final conclusion.

²⁵ *The Nagasaki Spirit supra* note 11.

²⁶ Act 107 of 1998

²⁷ Act 24 of 2008

CHAPTER 2: SALVAGE LAW AND THE ENVIRONMENT

2.1 Introduction

Salvage is an ancient right which for a very long time has been concerned with the saving of life and property. The earliest laws regulating salvage can be found in the ancient Rhodian maritime code.²⁸ In terms of Article 2 of the Brussels Convention²⁹ of 1910 the salvors needed to be successful in saving property in order for them to be awarded a salvage reward, but if they failed to save property they would receive nothing.³⁰ This is called the principle of “no cure no pay” and it was regarded as the cornerstone of the law of salvage.

In the 1960’s salvage rewards began to change as the world developed an “environmental conscience”. The development of oil tankers and the increase of marine casualties in the 1960’s and 1970’s gave birth to a huge problem- pollution.

In 1967 the world witnessed its first large disaster, the *Torrey Canyon*³¹ incident. This is the incident which awakened an environmental consciousness in different States.³² This incident triggered the International Convention on Civil Liability for Oil Pollution Damage,³³ which makes

²⁸ Brice *Maritime Law of Salvage* 2edn (1993) at 5. See also: Gengan *From Rhodian Law to Lloyds Open Form 2000 An analysis of the development of marine salvage law with special focus on the impact of oil pollution and the role of the salvor* (2003). (Dissertation submitted for LLM, University of Natal).

²⁹ *The International Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea* (Brussels, 23 September 1910).

³⁰ Article 2: “Every act of assistance or salvage which has had a useful result gives a right to equitable remuneration. No remuneration is due if the services rendered have no beneficial result. In no case shall the sum to be paid exceed the value of the property salvaged.”

³¹ *Torrey Canyon*, United Kingdom, 1967. Available at: <http://www.itopf.com/in-action/case-studies/case-study/torrey-canyon-united-kingdom-1967/>. Accessed on 10 August 2017. Another disaster was the *Amoco Cadiz*, France, 1978. Available at: <http://www.itopf.com/in-action/case-studies/case-study/amoco-cadiz-france-1978/>. Accessed on 10 August 2017. On the 16th of March 1978, the tanker *Amoco Cadiz* ran aground in the coast of Brittany spilling 223,000 tonnes of crude oil and 4,000 of bunker oil. In this case salvors were not rewarded for their effort of preventing damage to the environment they were in fact sued for their efforts. This is one of the disasters which led to the decision to replace the 1910 Brussels Convention and the introduction of LOF80. See also: Gengan *From Rhodian Law to Lloyds Open Form 2000 An analysis of the development of marine salvage law with special focus on the impact of oil pollution and the role of the salvor* (2003). (Dissertation submitted for LLM, University of Natal) at 65-72 for a detailed discussion of both the incidents.

³² Storgards “*Coastal State Intervention in Salvage Operations: Obligation and Liability Towards the Salvor*” (2012) (Master's thesis, Universitetet i Tromsø) at 9.

³³ International Convention on Civil Liability for Oil Pollution Damage (CLC) (Brussels, 29 November 1969) which together with the 1971 International Convention on the International Establishment of a Fund for Compensation for Oil Pollution Damage (FUND) and protocols provides for compensation for damages caused by oil pollution from oil tankers.

provision for compensation for damage caused by oil pollution from oil tankers. On 18 March 1967, the *Torrey Canyon* ran aground and spilled 119,000 tons of crude oil. Salvors tried everything to reduce the amount of oil and prevent damage to the environment but they failed. The British Government then gave orders for the *Torrey Canyon* to be bombarded with the hope of burning the remaining oil. However, this measure was unsuccessful because it did not prevent the oil from causing pollution and killing thousands of sea birds and threatening the lives of many people. Salvors were not rewarded for their efforts in the *Torrey Canyon* incident because they failed to save property.

Again in 1978 the world witnessed another disaster when the *Atlantic Empress*³⁴ and the *Aegean Captain* collided and both vessels began to leak oil and caught fire. With regards to the *Aegean Captain* salvors were able to successfully tow it to safety and they were accordingly compensated for the property they saved, but with the *Atlantic Empress* the salvors were instructed to tow the vessel 300 miles offshore where the vessel was ripped apart by explosions and sank. Since no property was saved the salvors received nothing. This was according to the principle of “no cure no pay”.

As the result of the principle of “no cure no pay” salvors not only earned no reward, in fact they made a loss by attempting to assist the vessel, taking into consideration the cost of equipment and personnel used, and expenses incurred such as bunkers for their tugs and hiring additional equipment. Therefore, salvors were reluctant to save vessels if there was no chance of a successful salvage operation.

In order to overcome this problem, the Lloyds Open Form (LOF) 1980 introduced an important change to the LOF salvage contract by reducing the harsh effect of the “no cure no pay” principle for the first time, and recognizing that preventing oil pollution of the environment was also important.³⁵ This new provision of the LOF 1980 was regarded as a safety net and such award

³⁴ Atlantic Empress, West Indies, 1979. Available at: <http://www.itopf.com/in-action/case-studies/case-study/atlantic-empress-west-indies-1979/>. Accessed on 10 August 2017. See also: Gengan *From Rhodian Law to Lloyds Open Form 2000 An analysis of the development of marine salvage law with special focus on the impact of oil pollution and the role of the salvor (2003)*. (Dissertation submitted for LLM, University of Natal) at 72-74. For a detailed discussion of the incident.

³⁵ Daines “The Lloyds Open Form and Special Compensation P&I Clause (SCOPIC)”. Available at: <http://www.comitemaritime.org/Uploads/Salvage%20Convention/Graham%20Daines%20-%20Scopic%20Paper.pdf>. Accessed on 12 September 2017

was paid only where the property being salvaged was an oil tanker laden or partly laden. This safety net award was only paid in the case of unsuccessful salvage operations, in which event the salvor could recover “*reasonably incurred expenses plus an increment up to a maximum of 15% of expenses*”.³⁶ This award was to be paid by the ship owner alone or his liability insurer. Redgwell³⁷ submits that the LOF 1980 was not concerned with minimizing or preventing damage to the environment; it focused more on saving property at sea.

In 1989 the International Salvage Convention³⁸ was introduced. As stated in chapter one, when the 1989 Salvage Convention came into force its drafters saw the need to protect the environment and introduced two changes to the law. Article 13(1)(b) looks at the skill and effort of the salvors in preventing or minimizing damage to the environment as one of the factors to be taken into consideration when calculating a salvage reward. Article 14 provides for special compensation even when no property has been saved, but there was a threat of damage to the environment. The 1989 Salvage Convention thus reduced the harshness of the principle of “no cure no pay”.³⁹

However, due to the difficulties experienced in applying article 14, highlighted by the *Nagasaki Spirit* case, the Special Compensation P & I Club Clause (SCOPIC) was introduced. As stated in chapter one SCOPIC is a clause which can be incorporated into a LOF salvage contract by the parties. Where SCOPIC is incorporated it replaces article 14 of the Salvage Convention.

Although the salvors’ efforts to protect the environment are now taken into account when calculating the salvage awards, nevertheless the rewards are still restricted by the value of the salvaged property and are still paid by the ship and cargo pro rata to the value of property saved.⁴⁰ Storgards submits that although protection of the environment has been a primary concern in the

³⁶ LOF 1980 clause 1 (a). Lloyd’s Open Form (LOF) 1980. Available at “Lloyd’s nautical Yearbook 1980” Lloyd’s of London Press, London, 1989. Available at: <https://catalogue.nla.gov.au/Search/Home?lookfor=Nautical+year+book++Lloyd%27s+nautical+yearbook&type=all&limit%5B%5D=&submit=Find>. Accessed on 10 November 2017. See: Gengan *From Rhodian Law to Lloyds Open Form 2000 An analysis of the development of marine salvage law with special focus on the impact of oil pollution and the role of the salvor (2003)*. (Dissertation submitted for LLM, University of Natal) at 77-81. See also: Miller “Lloyd’s Standard Form of salvage Agreement – LOF 80: A Commentary” *JMLC* (1981) 12 (2) at 247.

³⁷ Redgwell “The Greening of Salvage Law” *Marine Policy* (1990)14(2) at 147.

³⁸ International Convention on Salvage (London, 28 April 1989). UNTS 1953.

³⁹ Bishop *op cit* note 3 at 67.

⁴⁰ Article 13 (1)(a)- (b), 13(2), International Salvage Convention of 1989.

development of laws relating to the powers of coastal states to intervene in pollution incidents, the law of salvage has not developed to the same extent.⁴¹

In South Africa, the provisions of the 1989 Salvage Convention were enacted as a Schedule to the Wreck and Salvage Act.⁴²

This chapter will discuss the provisions of the Salvage Convention governing salvage awards under Article 13 (to be discussed in chapter 2.2), and special compensation under Article 14 (to be discussed in chapter 2.3). That discussion will highlight where relevant amendments have been made to the Salvage Convention in South Africa in the Wreck and Salvage Act. This chapter will then examine the *Nagasaki Spirit* case (to be discussed in chapter 2.4) and consider the relevant provisions of SCOPIC (to be discussed in chapter 2.5).

2.2 Article 13 (1) of the 1989 Salvage Convention

Article 13 of the International Salvage Convention of 1989 sets out the criteria for fixing the reward and provides as follows:

“The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:

- 1. (a) the salvaged value of the vessel and other property;*
- (b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;*
- (c) the measure of success obtained by the salvor;*
- (d) the nature and degree of the danger;*
- (e) the skill and efforts of the salvors in salvaging the vessel, other property and life;*
- (f) the time used and expenses and losses incurred by the salvors;*
- (g) the risk of liability and other risks run by the salvors or their equipment;*
- (h) the promptness of the services rendered;*
- (i) the availability and use of vessels or other equipment intended for salvage operations;*
- (j) the state of readiness and efficiency of the salvor's equipment and the value thereof.*

⁴¹ Storgard *op cit* note 32 at 4-5.

⁴² The Wreck and Salvage Act 94 of 1996.

2. *Payment of a reward fixed according to paragraph 1 shall be made by all of the vessel and other property interests in proportion to their respective salvaged values. However, a State Party may in its national law provide that the payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest against the other interests for their respective shares. Nothing in this article shall prevent any right of defence.*
3. *The rewards, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed the salvaged value of the vessel and other property.”*

Article 13 (1) (b) did not exist in the 1910 Brussels Convention.⁴³ When the 1989 Salvage Convention came into force it introduced an additional factor, Article 13 (1) (b), which looks at “the skill and efforts of the salvor in preventing or minimizing damage to the environment” in order to encourage salvors to assist ships that threaten to cause damage to the environment.

Article 13 (1)(b) is concerned with the threat of damage to the environment. However, for such an award to be successful the salvor must prove that he actually prevented or minimized damage to the environment.

Any award recovered under Article 13 is paid by the ship and the cargo provided that the amount of the reward does not exceed the values of the salvaged property. Therefore, regardless of the salvor’s success in preventing or minimizing damage to the environment no reward is payable if property was not saved. This is in accordance with the no cure no pay principle. In the *Nagasaki Spirit*⁴⁴ case the court held as follows:

“...thus where the efforts of the salvor prevent or minimize damage to the environment and the salvage services are successful, he will obtain a larger salvage award against ship and cargo than he would otherwise have done. Moreover, there is no reason why an award should not be substantially larger in appropriate cases.”

⁴³ Article 8(a) and (b) of the 1910 Brussels’ Convention listed the factors to be taken into consideration in the calculation of a salvage award.

⁴⁴ The *Nagasaki Spirit* case ([1995] 2 Lloyd’s Rep. 44 (H.C)).

This criterion is concerned with the assessment of a conventional salvage reward but not with an award under Article 14 of “special compensation” which may take into account the skill and efforts of the salvors in preventing or minimizing damage to the environment in assessing the increment allowable under Article 14.2.⁴⁵

2.3 Article 14 of the 1989 Salvage Convention

Article 14 of the International Salvage Convention of 1989 provides as follows:

1. *“If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.*
2. *If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph 1 may be increased up to a maximum of 30% of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph 1, may increase such special compensation further, but in no event shall the total increase be more than 100% of the expenses incurred by the salvor.*
3. *Salvor's expenses for the purpose of paragraphs 1 and 2 means the out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, taking into consideration the criteria set out in article 13, paragraph 1(h), (i) and (j).*
4. *The total special compensation under this article shall be paid only if and to the extent that such compensation is greater than any reward recoverable by the salvor under article 13.*

⁴⁵ Brice 2ed *op cit* note 28 at 153 para 2-124.

5. *If the salvor has been negligent and has thereby failed to prevent or minimize damage to the environment, he may be deprived of the whole or part of any special compensation due under this article.*
6. *Nothing in this article shall affect any right of recourse on the part of the owner of the vessel.”*

Article 14 was introduced as a safety net by the 1989 Salvage Convention to try and overcome the harshness of the principle of “no cure-no pay”. In terms of Article 14(1), if a salvor was involved in a salvage operation which threatened damage to the environment the salvor will be entitled to special compensation.

Special compensation is only claimed under Article 14(1) where the salvor has “failed to earn a reward under Article 13 at least equivalent to the special compensation”. Attachment 1 of the 1989 Salvage Convention provides as follows:

“It is the common understanding of the Conference that, in fixing a reward under article 13 and assessing special compensation under article 14 of the International Convention on Salvage, 1989 the tribunal is under no duty to fix a reward under article 13 up to the maximum salvaged value of the vessel and other property before assessing the special compensation to be paid under article 14.”

Special compensation under the 1989 Salvage Convention is triggered if there has been a threat of damage to the environment. Damage to the environment is defined by Article 1(d) of the Salvage Convention as follows:

“Damage to the environment means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.”

Bishop submits that the definition of “damage to the environment” came with a lot of problems. Although he argues that the general meaning of “damage to the environment” is clear, the problem comes when interpreting the word “substantial”.⁴⁶ In early decisions, LOF arbitrators seemed to

⁴⁶ Bishop *op cit* note 3 at 69.

follow the easy and simple interpretation of the word “accepting that a comparatively small quantity of oil could cause substantial damage if leaked into a particularly sensitive area.”⁴⁷ However, a good example of when a more strict approach has been taken is the *Castor* case discussed by Bishop. Near the Cabo de Palos the *Castor*, which was loaded with 30,000 tons of petroleum and 100 tons of heavy fuel oil, was prevented from grounding by the efforts of salvors. In this case the Appeal Arbitrators were not convinced that the threat of damage to the environment was ‘substantial’ enough to give rise to special compensation under Article 14(2). In his opinion, the arbitrator held as follows:

“I have considered as carefully as I can whether the damage to the birds and fish, which might have ensued from a grounding off Cabo de Palos, can be described as ‘substantial physical damage to marine life’ within the meaning of the Convention. ... [T]he scope for damage to birds, plankton and benthos and hence fish, in the event of a grounding off Cabo de Palos in winter, appears to me to have been very restricted indeed, notwithstanding the large volume of gasoline that might have escaped. Whilst there might have been some fatalities amongst birds and fish and some tainting of fish flesh, there was no evidence that the fish stocks or bird population would be significantly depleted by the limited damage which might have occurred. I have, therefore, found it difficult to conclude that there was a risk of ‘substantial physical damage to marine life’ off Cabo de Palos.”⁴⁸

The second problem is that the words “coastal or inland waters or areas adjacent thereto” are not defined in the 1989 Salvage Convention. Bishop points to this and indicates that although the word “coastal waters” may mean “territorial sea” under the United Nations Convention on the Law of the Sea (UNCLOS)⁴⁹ this is not certain as the words have not been interpreted by English Courts.⁵⁰ Furthermore, it is not clear what is meant by “areas adjacent thereto”.

For example, if a vessel runs into trouble on the high seas but is drifting towards coastal waters, it is unclear under the Salvage Convention whether a threat of “damage to the environment” exists immediately, or only when the vessel actually enters the coastal waters.

⁴⁷*Ibid.*

⁴⁸ The text of the opinion is quoted in Bishop *op cit* note 3 at 70.

⁴⁹ United Nations Convention on the Law of the Sea, art. 3 (10 December 1982, 1833 UNTS 397) defines territorial sea as including the area within 12 nautical miles of the coast.

⁵⁰ Bishop *op cit* note 3 at 70.

However, in South Africa damage to the environment is defined by section 2(7) of the Wreck and Salvage Act as:

“Damage to the environment as defined in article 1 of the Convention shall for purposes of this Act, notwithstanding anything to the contrary contained in this Act, not be restricted to coastal or inland waters or to areas adjacent thereto, but shall apply to any place where such damage may occur.”

This removes the second problem, because under South African law it is irrelevant where the vessel casualty occurs and where the threat of damage to the environment is expected to arise.

However, it has not solved the first problem identified by Bishop, as the definition of “damage to the environment” still requires proof of “substantial” damage, as required by article 1 of the Salvage Convention.

Bishop further states that once the special compensation has been activated, it must continue up until the end of the salvage operations in order to encourage salvors to remove the threat as soon as possible.⁵¹ For shipowners this could, however, mean that they end up paying more in special compensation than was necessary to remove the threat of damage to the environment. This might be an instance where the provisions favour salvors more.

The salvor does not have to succeed in saving property, he simply has to be involved in a salvage operation where there was a threat of damage to the environment to be entitled to recover his expenses.

In terms of Article 14(2), if the salvor manages to prevent or minimize damage to the environment as set out in Article 14(1), the special compensation he is entitled to may be increased up to a maximum of 30% (uplift) of expenses incurred.

The tribunal may also increase such special compensation further if it deems it just and equitable to do so but not exceeding 100% of the expenses incurred. This is weighed against the criteria

⁵¹ *Ibid* at 70.

listed in Article 13. It is important to note that the salvor is only entitled to an increase or uplift if he actually “prevented or minimized” damage to the environment. The test is on a balance of probabilities, that but for his services the damage would have occurred.⁵²

With regards to Article 14(3), expenses reasonably incurred by the salvor in Article 14(1) and Article 14(2) means out-of-pocket expenses and a fair rate for equipment and personnel actually and reasonably used in a salvage operation. Brice defines out-of-pocket expenses as the expenses sustained by a salvor which he would not have suffered if he was not involved in a salvage operation.⁵³ Bishop says this is “fairly easily ascertained”.⁵⁴ However, the salvor is also entitled to a fair rate for equipment and personnel actually and reasonably used in addition to out-of-pocket expenses and such “fair rate” does not refer to the normal rate.⁵⁵ Bishop agrees, stating that calculating a “fair rate” is a “particularly difficult problem.”⁵⁶

The assessment of a fair rate for equipment used in Article 14(3) proved to be difficult. The issue of fair rates was dealt with by the House of Lords in the *Nagasaki Spirit* case⁵⁷ (to be discussed below) where the argument that fair rates include an element of profit failed. However, section 2(8) of the Wreck and Salvage Act provides:

“Notwithstanding the provisions of article 14(3) of the Convention, for the purposes of this Act, the expression “fair rate” means a rate of remuneration which is fair having regard to the scope of the work and to the prevailing market rate, if any, for work of a similar nature.”

Thus, according to the Wreck and Salvage Act Article 14 includes an element of profit. The Wreck and Salvage Act does not really solve the problem that came with Article 14(3) of the Salvage Convention. It is still left to the Court or arbitrator to decide the “fair rate”, taking into consideration the market rate but not solely based on the market rate. There is also the difficulty of determining whether there is a market rate for that service, as this may not be the same as the rates charged by an individual salvor.

⁵² *Ibid* at 72.

⁵³ Brice 2ed *op cit* note 28 at 294, para 4-110. Brice further states that the following are not included as out-of-pocket expenses: “normal wages, the cost of oil and bunkers and the cost of normal maintenance which the salvor would have used in any event.”

⁵⁴ Bishop *op cit* note 3 at 73.

⁵⁵ Brice 2ed *op cit* note 28 at 294-295, para 4-112-113.

⁵⁶ Bishop *op cit* note 3 at 73.

⁵⁷ *The Nagasaki Spirit*, *supra* note 11.

2.4 The *Nagasaki Spirit* case

The *Nagasaki Spirit* was involved in a collision with the container ship called *Ocean Blessing*. This accident took place on the 19th of September 1992 at 23h20 in the Malacca Straits. The *Nagasaki Spirit* was loaded with 40,154 tons of crude oil and ended up spilling about 12,000 tons of crude oil. Both the ships caught fire and *Ocean Blessing* was lost together with all her crew.⁵⁸

On the 20th of September Semco Salvage Ltd entered into a Lloyd's Open Form agreement (known as the LOF 1990) in which they agreed to salvage the *Nagasaki Spirit* and her cargo. The LOF 90 incorporated Article 13 and 14 of the International Salvage Convention, 1989. The salvors therefore claimed under Articles 13 and 14 of the Salvage Convention and their claim was referred to an arbitration.⁵⁹

Salvors were then awarded special compensation in terms of Article 14 by an arbitrator and the award included an element of profit as part of the 'fair rate' for the equipment and personnel used in the oil prevention operation.⁶⁰ However, in the Court of Appeal, Lord Justice Staughton held that:⁶¹

“...a fair rate means...a rate of expense, which is to be comprehensive of indirect or overhead expenses and take into account the additional cost of having the sources instantly available. Remuneration, or uplift, or profit, is to be provided, if at all, under Article 14.2. Beyond that, what is a fair rate is a matter of judgement for the tribunals of fact.”

On Appeal, the House of Lords agreed with the Court of Appeal decision on this point, in that Lord Berwick held that:⁶²

“...Fair rate for equipment and personnel actually and reasonably used in the salvage operation in art. 14.3 means a fair rate of expenditure, and does not include any element of profit. This is clear from the context, and in particular from the reference to "expenses" in art. 14.1 and 2, and the definition of "salvors' expenses" in art. 14.3. No doubt expenses could have been defined so as to

⁵⁸ *The Nagasaki Spirit supra* note 11 at 323.

⁵⁹ *Ibid.*

⁶⁰ Yearbook 2010. Available at: <http://www.comitemaritime.org/Uploads/Yearbooks/Yearbook%202010.pdf>. Accessed on 12 September 2017.

⁶¹ *The Nagasaki Spirit supra* note 11 at 331.

⁶² *Ibid* at 334.

include an element of profit, if very clear language to that effect had been used. But it was not. The profit element is confined to the mark-up under art. 14.2, if damage to the environment is minimized or prevented.”

Lord Mustill said in his judgement:⁶³

“I do not accept that salvors need a profit element as a further incentive. Under the former regime the undertaking of salvage services was a stark gamble. No cure - no pay. This is no longer so, since even if traditional salvage yields little or nothing under Article 13 the salvor will, in the event of success in protecting the environment, be awarded a multiple not only of his direct costs but also the indirect standby costs, yielding profit. Moreover, even if there is no environmental benefit he is assured of an indemnity against his outlays and receives at least some contribution to his standing costs. Lack of success no longer means 'no pay' and the provision of this safety net does suffice ... to fulfil the purpose of the new scheme.”

The House of Lords further held that if the ‘concept of expenses was intended to include the element of profit, this was going to be done using simple and plain language.’⁶⁴ Lord Mustill further stated that:⁶⁵

“...the promoters of the Convention did not choose, as they might have done, to create an entirely new and distinct category of environmental salvage, which would finance the owners of vessels and gear to keep them in readiness simply for the purposes of preventing damage to the environment. Paragraphs 1, 2 and 3 of article 14 all make it clear that the right to special compensation depends on the performance of “salvage operations” which ... are defined by article 1(a) as operations to assist a vessel in distress. Thus, although article 14 is undoubtedly concerned to encourage professional salvors to keep vessels readily available, this is still for the purposes of a salvage, for which the primary incentive remains a traditional salvage award.”

The Lord Mustill went on to say that Article 14 (3) deals with the “restricted basis of recovery” as opposed to “remuneration”.⁶⁶

⁶³ *ibid* at 332.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid* at 333.

The *Nagasaki Spirit* case has been described as the straw that broke the camel’s back. Firstly, it is criticized for not providing for any element of profit in the calculation of a “fair rate”. At most the salvor recovers an additional 100% of expenses as an uplift.

Secondly, it is an expensive and difficult exercise to calculate the fair rate. Hare submits that with regards to fair rate the House of Lords avoided giving a clear indication on how to calculate fair rate for equipment used in a salvage operation. This is left to the court or arbitrators to decide on a case by case basis.⁶⁷

Bishop submits that there are great difficulties in applying measures of assessing expenses in Article 14(3).⁶⁸ The assessment of expenses using Article 14 in the *Nagasaki Spirit* was referred to as “an accounting exercise”,⁶⁹ but Bishop submits that the problem with this exercise is that it was time-consuming and expensive and it led to a lot of uncertainties and dissatisfaction.⁷⁰ Bishop went on to say that a proper assessment of expenses in Article 14(3) was needed which “requires an examination of all of the accounts of the salvor, not only in respect to the salvage equipment actually used in the salvage operation, but also to all the other equipment available for use, as well as administrative costs.”⁷¹

Thirdly, Hetherington points out that to be entitled to any uplift on expenses the salvor must prove not only that “damage to the environment would have resulted but for the salvor’s intervention but also the *extent of the damage* had the operation been unsuccessful”⁷² (own emphasis). He further submits that different experts such as naval experts, architects, drift experts and environmental experts would be needed.⁷³

⁶⁷ Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2ed (2009) at 443.

⁶⁸ Bishop *op cit* note 3 at 75.

⁶⁹ *The Nagasaki Spirit supra* note 11 at 335.

⁷⁰ Bishop *op cit* note 3 at 75.

⁷¹ *Ibid* at 75.

⁷² Hetherington “Report of the International Working Group on the Review of the Salvage Convention” (2012) at 7. Available at:

<http://www.comitemaritime.org/Uploads/Salvage%20Convention/2012/Report%20of%20IWG%20on%20Review%20of%20the%20Salvage%20Convention%20for%20consideration%20by%20delegates.pdf>. Accessed 12 September 2017.

⁷³ *Ibid*.

Article 14(4) states that such special compensation will only be paid if it is greater than any reward in Article 13.

2.5 The Special Compensation P&I Club Clause (SCOPIC)

The Special Compensation P&I Club Clause (SCOPIC) provides as follows:

“2. *Invoking the SCOPIC Clause*

The Contractor shall have the option to invoke by written notice to the owners of the vessel the SCOPIC clause set out hereafter at any time of his choosing regardless of the circumstances and, in particular, regardless of whether or not there is a “threat of damage to the environment”. The assessment of SCOPIC remuneration shall commence from the time the written notice is given to the owners of the vessel and services rendered before the said written notice shall not be remunerated under this SCOPIC clause at all but in accordance with Convention Article 13 as incorporated into the Main Agreement (“Article 13”).

...

5. (i) *SCOPIC remuneration shall mean the total of the tariff rates of personnel; tugs and other craft; portable salvage equipment; out of pocket expenses; and bonus due.*

(ii) *SCOPIC remuneration in respect of all personnel... shall be assessed on a time and materials basis in accordance with the Tariff set out in Appendix “A”. This tariff will apply until reviewed and amended by the SCOPIC Committee in accordance with Appendix B(1)(b). The tariff rates which will be used to calculate SCOPIC remuneration are those in force at the time the salvage services take place.*

...

(iv) *In addition to the rates set out above and any out of pocket expenses, the Contractor shall be entitled to a standard bonus of 25% of those rates ...*

6. *Article 13 Award*

(i) *The salvage services under the Main Agreement shall continue to be assessed in accordance with Article 13, even if the Contractor has invoked the SCOPIC clause. SCOPIC remuneration as assessed under sub-clause 5 above will be payable only by the*

owners of the vessel and only to the extent that it exceeds the total Article 13 Award (or, if none, any potential Article 13 Award) payable by all salvaged interests (including cargo, bunkers, lubricating oil and stores) before currency adjustment and before interest and costs even if the Article 13 Award or any part of it is not recovered.

...

7. *Discount*

If the SCOPIC clause is invoked under sub-clause 2 hereof and the Article 13 Award or settlement (before currency adjustment and before interest and costs) under the Main Agreement is greater than the assessed SCOPIC remuneration then, notwithstanding the actual date on which the SCOPIC remuneration provisions were invoked, the said Article 13 Award or settlement shall be discounted by 25% of the difference between the said Article 13 Award or settlement and the amount of SCOPIC remuneration that would have been assessed had the SCOPIC remuneration provisions been invoked on the first day of the services.”

SCOPIC is a clause which can be incorporated into the LOF. When SCOPIC is incorporated by the parties into the LOF contract it replaces Article 14. In order to rely on SCOPIC the salvor must invoke SCOPIC by giving a notice under sub-clause 2. He may do this at any time, even if there is no threat of damage to the environment.

SCOPIC was introduced due to the dissatisfaction arising from the House of Lord’s decision in the *Nagasaki Spirit* case regarding Article 14(3) “fair rate”.⁷⁴ As the result of this the International Salvage Union (ISU) launched Salvage 2000, which had the support of the P & I Clubs, to substitute “predetermined market rates of remuneration for Article 14 compensation.”⁷⁵ P & I Clubs then introduced the SCOPIC clause, which could be incorporated under the LOF 2000. SCOPIC was revised in 2005, 2007, 2011, and 2014.⁷⁶ The latest amendment is a 2017 amendment of rates in Appendix A.⁷⁷ SCOPIC was designed to encourage salvors to come to the assistance

⁷⁴ Hare *op cit* note 67 at 444.

⁷⁵ *Ibid* at 444.

⁷⁶ *Ibid*.

⁷⁷ Available at https://www.lloyds.com/~media/files/the-market/tools-and-resources/agency/salvage-arbitration-branch/scopic_appendix_a_2017.pdf?la=en, accessed on 12 September 2017.

of a ship which threatens damage to the environment just like Article 14 but with less complications.⁷⁸

Therefore, clause 5 states that SCOPIC remuneration is made up of tariff rates of personnel, tugs and other craft, portable salvage equipment; out-of-pocket expenses and in addition the salvor gets a bonus of 25%. It is important to note that while in the *Nagasaki Spirit* the House of Lords held that ‘fair rate’ in terms of Article 14.3 did not include an element of profit, the tariff rates for personnel, tugs and portable salvage equipment set in in Appendix A are based on market rates and thus do include a profit element.⁷⁹

SCOPIC is paid by the ship owner alone “to the extent that it exceeds” any Article 13 award that may be payable.⁸⁰

If SCOPIC is invoked and it happens that the Article 13 award is greater than SCOPIC remuneration, then the Article 13 reward will be discounted by 25% of the difference between the Article 13 reward and SCOPIC remuneration.⁸¹

Once SCOPIC has been invoked the ship owner may appoint a Special Casualty Representative (SCR) as set out in Appendix B,⁸² which enables shipowners to remain informed of how the salvage operation is progressing.

Igwe points out that SCOPIC was drafted by the maritime community for the benefit of the maritime community. He states that SCOPIC is a game of give and take which gives shipowners more control over the salvage operation and gives salvors a fair reward and better security. Therefore, the SCOPIC clause will benefit all the parties concerned.⁸³ Igwe further points out that

⁷⁸ Bishop *op cit* note 3 at 77-78.

⁷⁹ SCOPIC 2014, Clause 5 (ii).

⁸⁰ SCOPIC 2014, Clause 6 (i).

⁸¹ SCOPIC 2014, Clause 7.

⁸² SCOPIC 2014, Clause 12.

⁸³ Igwe “Transportation of Oil and Gas by Sea: Maritime Salvage, SCOPIC and the Vexed ISSUE of Environmental Salvage Regime” *Scholars Journal of Economics, Business and Management*, (2015) 2 (6A) at 618. See also: Daines “The Lloyds Open Form and Special Compensation P&I Clause (SCOPIC)”. Available

with SCOPIC salvors do not have to prove a threat of damage to the environment, and thus SCOPIC changed the situation for the better.⁸⁴ Khosla submits that SCOPIC did away with the difficulties that came with Article 14 of the 1989 Salvage Convention due the House of Lords decision in the *Nagasaki Spirit* case⁸⁵, in that SCOPIC rewards salvors even in cases which might not be financially attractive.⁸⁶

Although SCOPIC makes it easier to calculate the special remuneration payable to the salvor, SCOPIC does not take into consideration the effort of the salvors in preventing or minimizing damage to the environment or make any provision for him to earn a higher bonus on account of these efforts. It is limited to a standard bonus of 25%.

2.6 Conclusion

Salvage is indeed an ancient right, which for a very long time was concerned with the saving of property and required salvors to be successful in saving property for them to receive an award. This was in terms of the rule of “no cure-no pay”. In the early 1960’s and 1970’s the disasters such as the *Torrey Canyon* in 1967 and the *Atlantic Empress* in 1979 awakened an environmental consciousness in many States.⁸⁷

The 1989 Salvage Convention saw the need to protect the environment and introduced two changes: Article 13(1)(b) and Article 14. Article 13(1)(b) looks at the skill and efforts of the salvor in preventing and minimizing damage to the environment as a factor in determining a salvage award; and Article 14 which is regarded as a safety net affords salvors special compensation for their efforts in preventing or minimizing damage to the environment even where no property is saved if they failed to earn an equivalent reward under Article 13. With regards to Article 14, the House of Lords in the *Nagasaki Spirit*⁸⁸ held that “fair rate” or expenses used in terms of Article

at: <http://www.comitemaritime.org/Uploads/Salvage%20Convention/Graham%20Daines%20-%20Scopic%20Paper.pdf>. Accessed on 12 September 2017

⁸⁴ *Ibid.*

⁸⁵ *The Nagasaki Spirit supra* note 11.

⁸⁶ Khosla *op cit* note 23 at 5.

⁸⁷ Storgards *op cit* note 32 at 9.

⁸⁸ *The Nagasaki Spirit supra* note 11.

14.3 did not include an element of profit. However, in South Africa the Wreck and Salvage Act provides that “fair rates” includes an element of profit considering the work done and the market rates. Due to the difficulties because of the House of Lords decision in the *Nagasaki Spirit* case, Article 14 was replaced by SCOPIC in LOF contracts that incorporate the SCOPIC clause.

But in 2012 ISU proposed that the 1989 Salvage Convention be revised to allow for an environmental salvage award (to be discussed in Chapter three below) because SCOPIC does not properly reward salvors for their effort preventing damage to the environment.⁸⁹ The ISU proposal is discussed in the next chapter.

⁸⁹ International Salvage Union position Paper (ISU’s position paper) *op cit* note 17 at 1.

CHAPTER 3: THE INTERNATIONAL SALVAGE UNION'S PROPOSAL FOR AN ENVIRONMENTAL SALVAGE AWARD

3.1. Introduction

Environmental concerns have shaped the law of salvage, in that in today's world taking care of the environment is being recognized as equally important, arguably even more important, than salvaging personal property. As discussed in chapter two, the movement towards an environmental conscious began in the 1960's and 1970's due to the development of oil tankers and the increase of marine casualties which led to pollution problems. Disasters such as the Torrey Canyon, Atlantic Empress and Amoco Cadiz awakened an environmental awareness in different States. The International Salvage Union (ISU) expressed this view in 2016; that while traditional salvage's main objective was to save property, recently society has become more environmentally conscious and now protecting the marine environment comes before saving property.⁹⁰

The *Rena* in 2011⁹¹, the *Costa Concordia* in 2012⁹², and the Chennai oil spill in 2017⁹³ are recent examples of salvage operations where environmental concerns were important. ISU believes that it is time to amend the 1989 Salvage Convention and create a separate environmental salvage award. ISU believes the present systems under the 1989 Salvage Convention and where applicable the Special Compensation P & I Club Clause (SCOPIC) do not properly recognize the salvor's efforts in protecting the environment.⁹⁴ In 2007 ISU put forward its proposal for an environmental salvage award and this was followed in 2012 by ISU's position paper on the 1989 Salvage Convention.

ISU's proposal was greatly opposed by shipowners and P & I Clubs. Their argument was that they were happy with SCOPIC and that an environmental salvage award cannot be quantified therefore

⁹⁰ Wahi, "Oil Spill in India 2016" a paper presented at the Oil Spill India 4th International Conference & Exhibition conference at JW Marroitt, Sahar, Mumbai, India (ISU's conference paper) *op cit* note 20.

⁹¹ Rene, New Zealand, 2011. Available at: <http://www.itopf.com/in-action/case-studies/case-study/rena-new-zealand-2011/>. Accessed on 8 October 2017. This case involved containers with dangerous cargo and the spillage of fuel oil.

⁹² Costa Concordia, 2012. Available at: <https://www.newscientist.com/article/dn21388-will-the-costa-concordia-become-an-oil-spill-disaster/>. Accessed on 8 October 2017. This casualty involved fuel oil and toxic compounds spilled near the Italian coastline.

⁹³ India oil spill 2017. Available at: <http://www.icmam.gov.in/ospilMar2017.pdf>. Accessed on 8 October 2017. This casualty involved a spillage of fuel oil.

⁹⁴ ISU's Position Paper *op cit* note 17 at 1.

making it difficult to calculate. ISU's proposal would have made shipowners, and their P&I Clubs, liable for the payment of this new environmental salvage award. The objection raised was that all parties to the marine voyage, thus including cargo owners, should be liable.⁹⁵

Cargo interest's argument was that they cannot be expected to contribute to something they did not benefit from but they were in support of ISU's proposal and they even suggested that the only possible solution to the assessment of such an award is if it is based on a tariff system similar to SCOPIC.⁹⁶

This chapter will discuss the reasons given by ISU for proposing an environmental salvage award, before discussing the proposed amendments to the 1989 Salvage Convention and the issues regarding the assessment of such an award.

3.2 ISU's Proposal for an Environmental Salvage Award

ISU on behalf of salvors proposed that the 1989 Salvage Convention must be amended to create a separate environmental salvage award taking into consideration the degree of success obtained by a salvor in preventing damage to the environment. ISU believes that it is time for an environmental award to be created that will reward salvors for their efforts in protecting the environment.⁹⁷ ISU believes the present system under the 1989 Salvage Convention and where applicable SCOPIC does not properly recognize salvor's efforts in preventing or minimizing damage to the environment.⁹⁸

Bishop states that ISU's attempt to push this agenda was first discussed with the Lloyd's Form Salvage Group, which is responsible for keeping the LOF up to date and in line with the needs of the maritime industry. This fell short because the Subcommittee⁹⁹ which was set up by the Lloyd's

⁹⁵ Khosla *op cit* note 23.

⁹⁶ Gooding "Environmental Salvage: The Property Underwriter's view" at 3. Available at: http://www.comitemaritime.org/uploads/salvage%20convention/paper_4_nicholas_gooding.pdf. Accessed on the 8 October 2017.

⁹⁷ ISU's position paper *op cit* note 17 at 1.

⁹⁸ *Ibid.*

⁹⁹ The Subcommittee was made up of representatives from the property underwriters, the P & I Groups, the ISC and ISU.

Form Salvage Group did not agree on the matter.¹⁰⁰ ISU then approached the Committee Maritime International (CMI) and asked them to review the 1989 Salvage Convention. CMI accepted the matter and proceeded to set up an International Working Group (IWG) to work on ISU's proposal.¹⁰¹

The IWG first raised the matter of the ISU proposal in a meeting which was held in London in May 2010, and again in October 2010 ISU's proposal was discussed at a CMI colloquium which was held in Buenos Aires.¹⁰² Then in October 2012 the IWG prepared a full report for a conference which was held in Beijing.¹⁰³

ISU believes that environmental concerns are dominant in every salvage case. Todd Busch, the ex-president of the ISU at the CMI colloquium in Buenos Aires, expressed this view when explaining why the salvage industry felt it was not being properly rewarded for its efforts in preventing damage to the environment.¹⁰⁴ Busch went on to say firstly ISU acknowledges that in many cases salvors are rewarded for protecting the environment under article 13 (1) (b), but because of the low value of the salvaged property the tribunal cannot give full effect to this provision. He further explained that most cases that threaten damage to the environment are often of low value compared to the cost and effort involved in preventing or minimizing damage to the environment and it is in these cases that salvors feel inadequately rewarded.¹⁰⁵

Busch further explained that although Article 14 in such cases rewards salvors for their efforts in preventing or minimizing damage to the environment even where no property was saved, the problem is that Article 14 is "a safety net" and not "a method of remuneration" and the same can be said with SCOPIC.¹⁰⁶ He later refers to the "safety net" as a recovery of the "bare minimum", in other words a recovery only of the costs spent on the operation with no profit.

Moreover, salvors receive this bare minimum in 25% of all LOF cases where SCOPIC is applicable. He went on to say that:

¹⁰⁰ Bishop *op cit* note 3 at 89-90.

¹⁰¹ Storgards *op cit* note 32 at 43.

¹⁰² Bishop *op cit* note 3 at 90.

¹⁰³ Hetherington *op cit* note 72.

¹⁰⁴ Busch *op cit* note 19 at 4.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

“We recognize that the introduction of the SCOPIC Clause substantially improved the mechanism of assessing ‘special compensation’, as compared to the 1989 Salvage Convention’s Article 14, in LOF cases. But I emphasize, SCOPIC, like Article 14 is a method of compensation when an award to cover cost cannot be made. It is not a method of remuneration which is what we seek. Salvors would not be in the salvage business if their remuneration was restricted to an Article 14 or SCOPIC award.”¹⁰⁷

Busch gave three reasons for ISU’s environmental salvage award proposal:

“Firstly, much has changed since the Salvage Convention was first drafted in 1981. Environmental issues now dominate every salvage case and what may have been a satisfactory “encouragement” then is no longer so today. Further, there is more risk to the salvor from tougher regimes which can criminalize the actions of well-meaning salvors.

Secondly, while salvors always work to protect the environment whilst carrying out salvage operations, they are not fully rewarded for the benefit they confer. They are rewarded for saving the ship and cargo, but not the environment.

Thirdly, salvors and marine property insurers believe it is not fair that the traditional salvage reward that currently, but inadequately, reflects the salvors’ efforts in protecting the environment is wholly paid by the ship and cargo owners and their insurers without any contribution from the liability insurers, who cover the shipowners’ exposure to claims for pollution and environmental damage.”

ISU believes that environmental concerns are dominant in every salvage operation. This statement needs to be examined critically to see if ISU is justified in their first reason for change, however it is beyond the scope of this dissertation to undertake such a comprehensive survey.

If the ISU’s contention is correct, that environmental concerns now dominate each salvage operation then it appears that the International Salvage Convention, or SCOPIC where it is applicable, are no longer adequate. This is because in both Article 14 of the Convention and SCOPIC the main objective is to save property. Although they do recognise the need to protect the

¹⁰⁷ *ibid.*

environment the problem with Article 14 is that fair rates do not include profit and SCOPIC is limited to a standard bonus of 25% irrespective of the result achieved by a salvor.

ISU states that there has been a change in practical salvage in the last 30 years not only because the environment is central in each salvage operation, but also because there is now “enormous regulatory control” making the salvor’s task very difficult when they are subject to powers exercised by “inexperienced local officials”.¹⁰⁸ However, Hume submits that the only thing that has changed since 1989 is the scale and volume in which the public responds to environmental casualties, but that when it comes to casualty response nothing has changed whether substantially or practically.¹⁰⁹ ISU further points out that in recent decades priorities have changed in such a way that society has become more environmentally conscious in that protecting the marine environment comes before saving property.¹¹⁰ The cost of cleaning up an oil spill can amount to billions and this means that salvors need to invest in better equipment designed to help salvors protect the environment.

ISU’s second reason for change is that they feel that the present systems do not properly reward them for protecting the environment but they are rewarded for saving property. They argue that any reward under Article 13 is limited to the size of the salvaged fund weighed against the market value of the ship and cargo at the termination of the salvage service.¹¹¹ Where SCOPIC is applicable ISU acknowledges that SCOPIC operates well but the problem is that SCOPIC is based upon tariff rates and that it is not a reward system but merely compensation. It does not take into consideration the degree of success achieved by the salvor in preventing or minimizing damage to the environment.¹¹²

ISU points out that it has data collected starting from 1978 dealing with nearly 2900 Lloyds Form cases and the data shows that the annual salvage revenue equates to an average of 8.12% of salvaged

¹⁰⁸ Busch *op cit* note 19 at 5.

¹⁰⁹ Hume “CMI Review of the Salvage Convention 1989- Environmental Salvage” at 2. Available at: <http://www.comitemaritime.org/Uploads/Salvage%20Convention/Charles%20Hume%20paper%20-%20CMI%20Review%20of%20the%20Salvage%20Convention.pdf>. Accessed on 9 October 2017.

¹¹⁰ ISU’s conference paper *op cit* note 20 at 4.

¹¹¹ ISU’s Position Paper *op cit* note 17 at 2.

¹¹² *Ibid* at 3.

values (Awards and negotiated settlements). The highest revenue from Awards and settlements was in the year 2000 which amounted to an average of 12.5% of salvaged values.¹¹³ ISU therefore submitted that compared to the value at risk starting from 1978 to 2008 which under the Lloyd's Form have amounted US\$ 24.5 billion, "the revenue is comparatively modest".¹¹⁴

ISU conducted a further exercise of its annual pollution prevention survey since 1994. From 1994 to 2015 ISU members have salvaged 22 million tons of potential pollutants with an average of more than one million tons per year.¹¹⁵ ISU states that in 2016 alone they provided 213 services to vessels carrying over 2.5 million tons of potential pollution.¹¹⁶ ISU is aware that "not every vessel was a casualty which would have given rise to actual environmental damage".¹¹⁷ President of the ISU, John Witte, said:¹¹⁸

"Members of the ISU are often the only agency available with the necessary resources and experience to intervene in a casualty situation. And there is no doubt that, yet again, in 2016 our members' services have helped to protect the marine environment from potential damage. Improvements in shipping -vessel quality as well as crew training, improved aids to navigation and so on -have reduced the number of casualties but we are all aware that it only needs one major incident to cause an environmental disaster."

It is important to note that starting from 1994 up to 2016 members of ISU managed to salvage 24 800 899 tons of potential pollution.¹¹⁹ This shows there is an increase in the work done by salvors every year to prevent damage to the environment. This shows the ever-growing

¹¹³ *Ibid* at 2.

¹¹⁴ *Ibid*.

¹¹⁵ ISU's conference paper *op cit* note 20 at 4. It should be noted that at inception in 2004 the survey covered pollution from oil and refined products, but from 2014 the survey methodology has changed to include containers with their potentially hazardous cargo.

¹¹⁶ International Salvage Union members provide services in cases involving more than 2.5 million tons of potential pollutants in 2016 - issued on the 22/03/2017 Available at: <http://www.marine-salvage.com/media-information/our-latest-news/international-salvage-union-members-provide-services-in-cases-involving-more-than-2-5-million-tonnes-of-potential-pollutants-in-2016/>. Accessed on 10 August 2017.

¹¹⁷ ISU's Position Paper *op cit* note 18 at 3.

¹¹⁸ International Salvage Union members provide services in cases involving more than 2.5 million tons of potential pollutants in 2016, *op cit* note 116.

¹¹⁹ *Ibid*.

environmental concerns and that salvors are not paid for what they achieve in protecting the environment.

ISU is therefore correct that the current systems do not take into consideration the degree of success obtained by the salvor in minimizing or preventing damage to the environment, even though they do ensure that a salvor is paid Article 14 does not include profit and SCOPIC is limited to a bonus of 25%. An environmental salvage award will ensure that salvors are rewarded for their efforts and this also will encourage them to stay in business and find better ways to ensure that the environment is protected. Bishop submits that there are only about five international salvage companies operating worldwide that can deal with cases that “substantially” threaten damage to the environment.¹²⁰

3.3 ISU’s Proposed Amendments to the 1989 Salvage Convention

To be able to achieve an environmental salvage award ISU suggests that Articles 1(d), 13 and 14 be amended as follows:

3.3.1 Revised Article 1(d)

Revised Article 1(d) reads as follows:

“d) ‘Damage to the environment’ means significant ~~substantial~~ physical damage to human health or to marine life or resources ~~in coastal or inland waters or areas adjacent thereto,~~ caused by pollution, contamination, fire, explosion or similar major incidents.”

In defining “damage to the environment” firstly, ISU proposed that “significant” must replace “substantial” because they consider “significant” to be a more realistic measure when it comes to

¹²⁰ Bishop *op cit* note 3 at 99.

environmental concerns. The coastal states may consider even casualties with a few tons of oil as a significant threat to the environment.¹²¹

Secondly, ISU proposed that the geographical restrictions “in coastal or inland waters or areas adjacent thereto” be removed from the current definition, because when it comes to the environment there is no need for geographical limits.¹²² ISU’s proposal to remove the geographical limits is more in line with how “damage to the environment” is defined in section 2 (7) of the Wreck and Salvage Act¹²³ in South Africa which states that “damage to the environment is not restricted to in coastal or inland waters or areas adjacent thereto.”

Lastly, ISU is of the view that “any informed tribunal would be quite capable of making up its mind as to the risk of ‘significant’ damage to the environment in the light of all the circumstances and in the interest of simplicity sees no purpose in imposing any geographical limit.”¹²⁴ Alternatively, ISU further stated that the Exclusive Economic Zone would be more appropriate as a new limit because Conventions such as the Civil Liability Convention of 1992¹²⁵ (CLC), the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea of 2010 (HNS) and the International Convention on Civil Liability for Bunker Oil Pollution Damage of 2001 (BUNKER) already use the Exclusive Economic Zone.¹²⁶

3.3.2 Revised Article 13.1

ISU’s proposal involves very little change to the current Article 13. ISU has proposed that Article 13 (1) (b) must be deleted and be incorporated into the revised article 14.¹²⁷ Article 13 (1) (b) of

¹²¹ ISU’s Position Paper *op cit* note 17 at 4.

¹²² *Ibid.*

¹²³ The Wreck and Salvage Act 94 of 1996.

¹²⁴ ISU’s Position Paper *op cit* note 17 at 4.

¹²⁵ 1992 International Convention on Civil Liability for Oil Pollution Damage of 1992, Article I (6) (a) at 2. Available at: <http://www.iopcfunds.org/about-us/legal-framework/1992-civil-liability-convention/>. Accessed on 9 October 2017.

¹²⁶ *Ibid.*

¹²⁷ ISU’s Position Paper *op cit* note 17 at 5.

the Salvage Convention currently reads as follows: “(b) the skill and efforts of the salvors in preventing or minimizing damage to the environment.”

A new sub-article 13 (4) provides that the skill and efforts of the salvor in preventing or minimising damage to the environment will not be taken into consideration when calculating an award under the revised Article 13 (1).¹²⁸

3.3.3 Revised Article 14

ISU suggested that Article 14 needed to be amended the most. Article 14 was dealt with greatly in many LOF arbitrations between 1990 and 1999 and the House of Lords fully examined Article 14 in the *Nagasaki Spirit*¹²⁹. As discussed in chapter 2, article 14 was found to be uncertain, expensive and cumbersome to operate. Due to the difficulties Article 14 was replaced in the LOF by SCOPIC but Article 14 is still applicable in 59 countries. ISU’s proposal is that Article 14 must be struck out entirely and be replaced with the following:¹³⁰

“14.1. If the salvor has carried out salvage operations in respect of a vessel which by itself, or its bunkers or its cargo, threatened damage to the environment he shall also be entitled to an environmental award, in addition to the reward to which he may be entitled under Article 13. The environmental award shall be fixed with a view to encouraging the prevention and minimisation of damage to the environment whilst carrying out salvage operations, taking into account the following criteria without regard to the order in which they are presented below:

- (a) any reward made under the revised Article 13;*
- (b) the criteria set out in the revised Article 13.1(b) (c) (d) (e) (f) (g) (h) and (i); and*
- (c) the extent to which the salvor has prevented or minimised damage to the environment and the resultant benefit conferred.”*

In terms of the revised Article 14 (1) if the salvor has carried out a salvage operation in respect of a ship which threatened damage to the environment, the salvor shall be entitled to an environmental award which is to be paid in addition to a reward which the salvor is entitled to receive under

¹²⁸ *Ibid.*

¹²⁹ *The Nagasaki Spirit* supra note 11.

¹³⁰ ISU’s Position Paper *op cit* note 17 at 5.

Article 13. ISU is of the view that this award is fixed to encourage salvors to prevent and minimize damage to the environment.

ISU submits that an environmental award will be made by a tribunal whenever there is a *threat of damage* to the environment. It is not necessary to prove, as currently required by Article 13, that damage was prevented or minimised. All the salvor must do under the revised Article 14 is to be involved in a salvage operation that threatens damage to the environment. This is the same as the position under the current Article 14 (1). The amount of the award under the revised Article is left completely to the discretion of the tribunal. This is weighed against the criteria listed in the revised Article 14 (1).¹³¹

ISU further submits that the criteria listed in (a) and (b) mirror Article 13 and they give the tribunal the power to take into consideration the degree of success obtained by the salvor in preventing and minimizing damage to the environment and thereby award salvors the benefits they are entitled to.¹³² So, if there was a threat of pollution found in the water, this means that the benefits conferred to salvors will be much greater as opposed to a situation where no pollution was found.

ISU proposed that such an award will be paid by the shipowner and his liability insurers.¹³³

The current Article 14 special compensation is also paid by the shipowner. The difference is that an environmental award is not limited to expenses whereas the current Article 14 (1) is limited to expenses. Furthermore, an environmental award is paid in addition to the reward under Article 13, whereas with the current Article 14 (1) a salvor is entitled to special compensation only if he failed to earn a reward under Article 13 equivalent to the special compensation.

This is in fact quite a dramatic change when one considers that salvors will also receive an environmental award even in cases where salvors did not successfully prevent damage to the environment (in cases of no success) just by being involved in a case that threatens damage to the

¹³¹ ISU's Position Paper *op cit* note 17 at 6.

¹³² *Ibid.*

¹³³ *Ibid.*

environment, which will be paid in addition to the Article 13 reward. In the situation where the salvor successfully prevents or minimizes damage to the environment they will receive even more benefits as the degree of success obtained by the salvor is weighed together with the criteria listed in the revised Article 14 (1) (a-c).

ISU proposed that there must be a cap or limitation to an environmental award. ISU proposed the following:

- “14.2 Any reward payable by the Shipowner in respect of services to the environment, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed an amount equivalent to;*
- a) In respect of a vessel of 20,000 Gross Tons or less, ‘x’ Special Drawing Rights.*
 - b) For a vessel exceeding 20,000 Gross Tons, ‘x’ Special Drawing Rights, plus ‘y’ Special Drawing Rights for each ton in excess of 20,000, subject always to a maximum of ‘z’ Special Drawing Rights.”*

ISU suggested that there must be a limitation to such an award which looks “looks to the Gross Tonnage of the casualty with a multiplier of Special Drawing Rights.”¹³⁴ ISU further proposed the following:

- “14.3. For the avoidance of doubt, an environmental award shall be paid in addition to any liability the shipowner may have for damage caused to other parties.”*

ISU regards Article 14 (3) as important because it believes salvors must always receive their full environmental salvage reward and not be put in a position where that reward is reduced or lost because salvors are “competing with third party claimants”, which would also cause delays while the competing rights are being determined.¹³⁵

- “14.4 Any environmental award shall be paid by the shipowners.”*

¹³⁴ ISU Position Paper *op cit* note 17 at 6.

¹³⁵ *Ibid* at 5-6.

ISU suggests that such an award must be paid by shipowners alone because shipowners are liable for “any pollution under modern Conventions and Laws”.¹³⁶ Khosla disagrees with this and submits that there is a shared responsibility by shipowners, cargo interests, government and the public for the environment and its protection.¹³⁷ She further submits that this is done through the Civil Liability Convention of 1992¹³⁸ (CLC), the Fund Convention of 1992¹³⁹ and the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS) of 2010.¹⁴⁰ CLC provides that the owner is liable for environmental damage and that in the event where the owner is unable to pay the CLC claim or the claim exceeds CLC limits the Fund provides the additional payment.¹⁴¹ Khosla further submits that Fund payments are paid or contributed by the cargo interests.¹⁴²

It is submitted that Khosla’s position is possibly more workable. Any environmental salvage award must be paid by everyone who benefited from it, and thus the award must be distributed fairly amongst shipowners and their liability insurers, cargo owners and cargo insurers. Since Conventions hold shipowners liable for pollution, they will be liable for such an award with their liability insurers provided that it does not exceed the agreed amount. In cases where the claim exceeds the agreed amount, then the additional payments will be paid by the cargo interests.

The difficulty is that imposing any liability has been strenuously opposed by cargo underwriters. Bishop provides that insurers will only cover what they insure.¹⁴³ Gooding on behalf of property underwriters argued that hull and cargo underwriters insure loss and damage to property; they do

¹³⁶ *Ibid* at 7.

¹³⁷ Khosla *op cit* note 23 at 8.

¹³⁸ 1992 International Convention on Civil Liability for Oil Pollution Damage of 1992, Article I (6) (a). Available at: <http://www.iopcfunds.org/about-us/legal-framework/1992-civil-liability-convention/>. Accessed on 9 October 2017.

¹³⁹ International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND) Adoption: 18 December 1971; Entry into force: 16 October 1978; superseded by 1992 Protocol: Adoption: 27 November 1992; Entry into force: 30 May 1996 Available at: [http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-the-Establishment-of-an-International-Fund-for-Compensation-for-Oil-Pollution-Damage-\(FUND\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-the-Establishment-of-an-International-Fund-for-Compensation-for-Oil-Pollution-Damage-(FUND).aspx). Last accessed on 9 October 2017.

¹⁴⁰ Khosla *op cit* note 23 at 8.

¹⁴¹ Hare *op cit* note 67 at 556-558.

¹⁴² Khosla *op cit* note 23 at 8.

¹⁴³ Bishop *op cit* note 3 at 98.

not cover liabilities. It is not fair that the hull and cargo underwriters are expected to pay for measures to prevent pollution and other liabilities.¹⁴⁴

However, it seems that a solution has to be found because the types of cargos being carried on ships can pose a significant threat of damage to the environment. Sloane points out that oil is no longer the only pollutant. There are many pollutants listed in the International Maritime Dangerous Goods Code (IMDG), cargoes classified as hazardous and noxious substances, which can make the risk of environmental damage from oil seem “benign”.¹⁴⁵

Lastly, ISU proposed that if the salvor has been negligent and thereby fails the prevent damage, he will be deprived of any environmental award due to him in terms of Article 14 (5); and Article 14 (6) provides that nothing in this article shall affect the owner’s right of recourse.

3.4 Assessment of an Environmental Salvage Award

ISU submits that over the last 100 years, experience has shown that a competent and informed Tribunal is capable of weighing up relevant factors to make a fair and just award, and therefore an environmental salvage award will be left entirely to the discretion of a Tribunal.¹⁴⁶ The LOF system is a tried and tested system which on a yearly basis, deals with a lot of cases- “some of enormous proportions.” ISU further points out that there is no reason why a Tribunal cannot do the same when it comes the assessment of an environmental award, the only difference is that they will consider the danger of damage to the environment instead of the damage or loss to the ship and cargo.¹⁴⁷

¹⁴⁴ Gooding *op cit* note 96 at 1.

¹⁴⁵ Sloane *The Eye of the Storm, in CMI YEARBOOK (2010)* at 513. Available at: <http://www.comitemaritime.org/Uploads/Yearbooks/Yearbook%202010.pdf>. Accessed on 8 October 2017.

¹⁴⁶ ISU’s Position Paper *op cit* note 17 at 7.

¹⁴⁷ *Ibid.*

On the other hand, those opposing such change say that such an award will be difficult to calculate and based on too many uncertainties because it cannot be quantified.¹⁴⁸ Beale submits that the difficulty involved in calculating an environmental award makes ISU's proposal unacceptable.¹⁴⁹

While Article 14, SCOPIC and the revised Article 14 are all paid by shipowner, the difference is that SCOPIC and the current Article 14's main objective is to save property whereas the proposed Article 14's main objective is to save the environment. The problem with the current Article 14 is that fair rates do not include profit and SCOPIC is limited to a standard bonus irrespective of the work done. Both Article 14 and SCOPIC are merely compensation and not a reward system. Even though SCOPIC works well, it is based upon a tariff. SCOPIC is invoked by a written notice but it is not clear when the current Article 14 is triggered. The revised Article 14 is triggered by a threat of damage to the environment and such an award is paid in addition to Article 13 and it looks at the degree of success obtained by a salvor in preventing or minimizing damage to the environment. This will ensure that salvors are paid for what they achieved but the biggest problem such an award is that it is difficult to assess because it cannot be quantified. However, this does not mean it cannot be done.

Hurst provides that the assessment of any environmental award would be speculative, subjective, hypothetical and inconsistent with the current awards. He further points out that unlike SCOPIC an environmental salvage award would delay payments to salvors because of the uncertainties involved.¹⁵⁰ Khosla holds the same view as Hurst concerning ISU's proposal for an environmental award and she submitted an environmental award would:¹⁵¹

“alter the basis of salvage operations. The prime objection would be no longer to save property. The basis of the award would be the amount of pollution that salvors prevented. This in itself would be based on a hypothetical assessment of the damage that has been prevented. It hardly needs saying that this would entail a difficult and speculative enquiry into what damage might have occurred had

¹⁴⁸ Khosla *op cit* note 23 at 7.

¹⁴⁹ Beale “Environmental Salvage and the 1989 Salvage Convention: Proposed Amendments to the convention and Difficulties in Quantifying an Environmental Award”, *Environmental Law Review* (2014) 16 at 257.

¹⁵⁰ Hurst “Amending the Salvage Convention 1989 - The International Group of P&I Club's View” in CMI YEARBOOK (2010) at 508. Available at: <http://www.comitemaritime.org/Uploads/Yearbooks/Yearbook%202010.pdf>. Accessed on 8 October 2017.

¹⁵¹ Khosla *op cit* note 23 at 7.

pollution resulted from the casualty. There is moreover no guidance on what an appropriate award amount would be in any given incident. ...This would raise the bar significantly and the increased sums at stake would inevitably result in contentious expert evidence and speculative theorising. This would no doubt result in more litigation and serve no-one's interests.”

She further submits that SCOPIC guarantees that salvors will be paid, in that SCOPIC provides salvors with “profitable and reasonable rewards” for their efforts in protecting the environment and that SCOPIC rates have been increased significantly and they continue to do so.¹⁵²

Beale provides that the uncertainties of an environmental award makes it distasteful and difficult to calculate.¹⁵³ De la Rue submits that there has not been a significant change since the first oil incident when it comes to the assessment of the environmental impact because of the difficulties involved.¹⁵⁴ Beale submits that it is common that an oil spill can have a serious impact on the marine environment and life and he gave the example of dead sea birds soaked in oil¹⁵⁵, but assessment of an environmental award has proved to be difficult because of the “highly complex science” involved in the marine environment.¹⁵⁶

The extent and period of environmental damage caused by an oil spill is difficult to establish therefore making such an award difficult to calculate. To understand the importance and damage caused by an oil spill, you need to understand whether the oil spill affects results in breeding success, productivity, diversity and the overall function of the system which is a difficult process.¹⁵⁷

De la Rue submits that for nearly two decades the assessment of claims for oil pollution from tankers have been done by the International Oil Pollution Compensation Fund (IOPC Fund). In

¹⁵² Khosla *op cit* note 23 at 4-5.

¹⁵³ Beale *op cit* note 149 at 257.

¹⁵⁴ De la Rue “Environmental Salvage - plus ca change...?” at 10. Available at: https://www.skuld.com/Documents/Topics/Ship/Environmental_Salvage/Environmental_Salvage_Article_October_2012.pdf?epslanguage=en. Accessed on 11 October 2017.

¹⁵⁵ Beale *op cit* note 149 at 257.

¹⁵⁶ *Effect of an Oil Spill*. Available at: http://www.itopf.com/knowledge-resources/documents-guides/environmental-effects/category/environmental-effects/#filter_top. Accessed at 11 October 2017.

¹⁵⁷ *Ibid*.

practice under the IOPC Fund, the assessment of most claims depends on the facts and evidence of the actual loss suffered. The Fund takes time for an analysis to be made of the extent of damage and the data to be collected.¹⁵⁸ The Fund looks at the actual loss suffered whereas an environmental salvage award will be based on the “unknown unknowns” which will be resolved by staring into a “hazy crystal ball of hypotheticals”.¹⁵⁹ The degree of speculation involved in the assessment of such an award will result in lengthy and expensive legal actions which is not in the public interest nor the interest of the shipping industry.¹⁶⁰

Therefore, the majority of writers have disagreed with the ISU view that a Tribunal could handle the assessment of an environmental award.¹⁶¹ Howard QC, however, agrees with ISU that such an award can be achieved by competent arbitrators. He went on to say that even though an environmental award will be based on the “unknown unknowns” this does not mean that such awards cannot be achieved.¹⁶²

Moreover, Howard further points out that the solution is a practical one:

“An arbitrator would approach the matter much as he does in a normal salvage case. He would take into account many of the same factors as envisaged by the new Article 14; and if he lacks a value against which to measure his overall award, he is likely to have extensive evidence of potential cost and risk.”¹⁶³

Gooding on behalf of marine property underwriters provided a possible alternative solution on how an environmental salvage award can be calculated. He suggests that for such an award to be possible it must be based upon the SCOPIC tariff system and controlled by the Special Casualty Representative (SCR).¹⁶⁴

¹⁵⁸ De la Rue *op cit* note 154 at 10.

¹⁵⁹ Beale *op cit* note 149 at 258.

¹⁶⁰ Environmental Salvage - It Sounds Good, but Is It? *Gard News* 207. Available at: <http://www.gard.no/web/updates/content/20651771/environmental-salvage-it-sounds-good-but-is-it>. Accessed on 11 October 2017.

¹⁶¹ ISU's Position Paper *op cit* note 17 at 7.

¹⁶² Howard “Environmental Salvage Opinion” at 3-4. Available at: <http://www.marine-salvage.com/environmental/Michael%20Howard%20QC%20Opinion.pdf>. Accessed on 11 August 2017.

¹⁶³ *Ibid* at 4.

¹⁶⁴ Gooding *op cit* note 96 at 6.

In order to calculate such an award a tariff system similar to SCOPIC must be created costing all steps which are aimed at preventing environmental liabilities. Where there is a salvage operation a Representative must be appointed to apportion each step as either saving the property or minimizing environmental liabilities. It is suggested that steps directly or indirectly taken to prevent or minimize environmental liabilities should be taken into consideration when calculating an environmental salvage award.¹⁶⁵

Moreover, measures considered to have been taken to save the property must continue to be rewarded under the existing Article 13 or SCOPIC. Where measures are taken to prevent or minimize damage to the environment, such steps should be the subject of an environmental award alone. However, where steps are taken to save both the property and the environment the award should be apportioned between the ship and the cargo.¹⁶⁶ The SCR will be able to calculate the cost of such an award and an arbitrator has the power to uplift the environmental liability reward by a factor calculated with reference to the degree of risk that the liability would be crystallized and the extent of potential liabilities avoided. The uplift will be limited to a minimum of 25% and maximum of 100% subject to the overall limit.¹⁶⁷

Salvors must be encouraged to take environmental cases and they must be accordingly rewarded for what they achieve in protecting the environment. Therefore, Gooding's suggestion that such an award must be based on a tariff system similar to SCOPIC is arguably the best solution to the difficulties of calculating such an award. Beale points out that for such an award to work, the property underwriter's suggestion on how to calculate an environmental award will provide the most fair, impartial, and explicit way in assessing the rewards.¹⁶⁸

Bishop provides that such an award will benefit everyone in that an environmental salvage award will be distributed fairly amongst those liable to pay for them. He further states that there will be security in the shipping industry and in the public because salvors will be properly rewarded for

¹⁶⁵ *ibid* at 6.

¹⁶⁶ *ibid*.

¹⁶⁷ *ibid* at 6-7.

¹⁶⁸ Beale *op cit* note 149 at 260.

their achievement in protecting the environment. This will encourage salvors to invest in the future and better equipment which will help them remain in business. The proposed change is not intended to amount in huge rewards.¹⁶⁹

Sloane submits that after saving life, the environment has become the biggest factor in salvage, and that ISU's proposal will benefit the public by keeping the people "on the beach as opposed to the beach being covered in oil".¹⁷⁰

3.5 Conclusion

Environmental concerns have shaped the law of salvage. ISU has proposed that the current systems under the 1989 Salvage Convention and, where applicable, SCOPIC, must be amended to create a separate environmental award, because they do not properly reward salvors for their efforts in preventing damage to the environment.¹⁷¹

ISU argues that environmental concerns are dominant in every salvage operation and they argue that the current system's main objective is to save property, and does not adequately compensate the salvor for the degree of success achieved by a salvor in minimizing or preventing damage to the environment.¹⁷² Where SCOPIC is applicable it was argued that SCOPIC is based upon tariff rates and it is not a reward system.¹⁷³

ISU's proposal was not received well by the shipping industry, in that shipowners and their liability insurers argued that an environmental award is based on too many uncertainties because it cannot be quantified thereby making it difficult to calculate.¹⁷⁴ They were happy with SCOPIC arguing that it does properly reward salvors.

¹⁶⁹ Bishop *op cit* note 3 at 98.

¹⁷⁰ Sloane *op cit* note 145 at 514.

¹⁷¹ ISU's Position Paper *op cit* note 17 at 1.

¹⁷² Busch *op cit* note 19 at 4.

¹⁷³ ISU's Position Paper *op cit* note 17 at 3.

¹⁷⁴ Khosla *op cit* note 23 at 7.

ISU believes that an environmental award can be achieved by a competent Tribunal with the required skill and knowledge, arguing that experience over the years of adjudicating salvage awards has shown this. Marine property underwriters support ISU's proposal in part, but do not agree that cargo underwriters can be held liable to pay this award, and suggest that an environmental award can only be achieved if it is based upon a tariff system similar to SCOPIC which will be controlled by a Special Casualty Representative.¹⁷⁵

An environmental award will ensure that salvors are paid for what they really achieved in protecting the environment. This will help them invest in the future and in better equipment and help them stay in business.

It is submitted that the shipping industry must be careful to ensure that resistance to change is based on sound reasons and not simply because the industry has become too comfortable with how the current system works. While it is noted that SCOPIC works well and SCOPIC continues to increase its tariff rates as they recently revised their rates in the SCOPIC Appendix A in 2017, the problem is that SCOPIC is compensation and it is limited to a standard bonus of 25% regardless of the work done in protecting the environment. An environmental award looks at the degree of success obtained by a salvor in protecting the environment.

Taking care of the environment is now a fundamental concern. Section 24 of the Constitution of the Republic of South Africa provides people with the right to a healthy and not harmful environment and the right to have their environment protected.¹⁷⁶ Chapter 4 will discuss South Africa's approach to compensating salvors for protecting the environment, in the light of this Constitutional value.

¹⁷⁵ Gooding *op cit* note 96 at 6.

¹⁷⁶ The Constitution of the Republic of South Africa, 1996.section 24.

CHAPTER 4: THE CONSTITUTIONAL AND LEGAL FRAMEWORK GOVERNING ENVIRONMENTAL RIGHTS AND PROTECTION IN SOUTH AFRICA

4.1 Introduction

This chapter will discuss the constitutional and legal framework governing environmental rights and protection in South Africa as the foundation for a consideration of environmental salvage.

In South Africa section 24 of the Constitution¹⁷⁷ deals with environmental rights under section 24 (a) and (b) of the Constitution¹⁷⁸ (to be discussed below in 4.2).

The legal framework for environmental protection is provided by the National Environmental Management Act¹⁷⁹ (NEMA), which came into force in 1998 to “give effect to the constitutional obligations and entitlement”.¹⁸⁰ Section 2 of NEMA sets out principles that will guide the organs of state when making decisions that concern the environment. Section 28 of NEMA deals with the “duty of care” when it comes to environmental protection (to be discussed in 4.3 below).

NEMA does not stand alone; there is also the Wreck and Salvage Act¹⁸¹ which deals with environmental salvage and the protection of the environment. The Wreck and Salvage Act incorporated the 1989 Salvage Convention and made a few amendments (to be discussed below in 4.4).

4.2 Environmental rights

Environmental rights in South Africa are provided by section 24 of the Constitution¹⁸² and are made up of two parts namely, the right to the protection of the environment and the right to a healthy environment. Section 24 of the Constitution of the Republic reads as follows:¹⁸³

“Everyone has the right:

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations,

¹⁷⁷ The Constitution of the Republic of South Africa 108 of 1996.

¹⁷⁸ *Ibid.*

¹⁷⁹ The National Environmental Management Act 107 of 1998.

¹⁸⁰ Strydom *Fuggle and Rabie’s Environmental Management in South Africa* (2009) at 197.

¹⁸¹ The Wreck and Salvage Act 94 of 1996.

¹⁸² The Constitution of the Republic of South Africa 108 of 1996.

¹⁸³ *Ibid.*

through reasonable legislative and other measures that:

- (i) prevent pollution and ecological degradation;
- (ii) promote conservation; and
- (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

Both subsections 24 (a) and (b) refer to the ‘environment’, a concept that was discussed in the case of *BP Southern Africa*,¹⁸⁴ where the court defined environment as “all conditions and influences affecting the life and habits of man”.¹⁸⁵ NEMA defines the environment to mean the surroundings within which humans exist and that are made up of the land, water, earth, micro-organisms, plant and animal life.¹⁸⁶

Kidd submits that the environmental rights in section 24 consist of two parts as follows, the fundamental human rights in paragraph (a) and, in paragraph (b) a “directive principle which requires the state to take positive steps towards the achievement of the right.”¹⁸⁷

The first part of section 24 gives everyone the right to an environment which is not harmful to their health or well-being. The court in *Woodcarb*¹⁸⁸ confirmed the common law rule to use your own property in such a way that you do not injure other people’s properties.¹⁸⁹ This rule imposes a duty of care towards other people and their properties. Therefore, section 24 ensures that the common law duty of care is exercised in order to afford people an environment that will not harm their health or well-being.

¹⁸⁴ *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs*, 2004 (5) SA 124 (W).

¹⁸⁵ *Ibid* at [145].

¹⁸⁶ National Environmental Management Act No 107, 1998, at 63.

“environment means the surroundings within which humans exist and that are made up of-

(i) the land, water and atmosphere of the earth;

(ii) micro-organisms, plant and animal life;

(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and

(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.”

¹⁸⁷ Kidd *Environmental law* 2ed (2011) at 20.

¹⁸⁸ *The Minister of Health and Welfare v Woodcarb Pty (Ltd)* 1996 (3) SA 155 (N).

¹⁸⁹ *Ibid*.

In *Woodcarb's*¹⁹⁰ case, the neighbours complained to the Department of Health about the emission of smoke from the respondent's Rheese burner which was used to burn all non-sellable products of the sawmilling operation. The sawmilling plant caused serious air pollution and the respondent's certificate authorising him to run the Rheese burner had expired. The court in this case granted the Minister of Health's application for an interdict under the Atmospheric Pollution Prevention Act 45 of 1965 to stop the respondent from operating the Rheese burner.

Section 9 (1) of the Atmospheric Pollution Prevention Act prevents anyone who does not have a registration certificate from operating in a controlled area. The court held that the discharge of smoke without the registration certificate was an infringement of the neighbour's right to "an environment which is not detrimental to their health and well-being" contained in section 29 of the Constitution of the Republic of South Africa Act 200 of 1993 [now governed by section 24 of the Constitution].¹⁹¹

Furthermore, section 24 (a) gives the right to an environment that will not harm a person's 'well-being'. The phrase 'well-being' has been interpreted by our courts in *HTF Developers*,¹⁹² which held that well-being is "open-ended and manifestly ...incapable of precise definition. Nevertheless, it is critically important in that it defines for the environmental authorities the constitutional objectives of their task".¹⁹³

The court further quoted Glazewski as follows:¹⁹⁴

"In the environmental context, the potential ambit of a right to well-being is exciting but potentially limitless. The words nevertheless encompass the essence of environmental concern, namely a sense of environmental integrity; a sense that we ought to utilise the environment in a morally responsible and ethical manner. If we abuse the environment we

¹⁹⁰ *Ibid.*

¹⁹¹ *The Minister of Health and Welfare v Woodcarb Pty (Ltd)* 1996 (3) SA 155 (N) at 164f. see also: *Lone Creek River Lodge & Others v Global Forest Products & Others* [2007] ZAGPHC 307 at 8; *Lasky & Another v Showzone CC & other* 2007 (2) SA 48 (C) at [26]- [28].

¹⁹² *HTf Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism* 2006 (5) SA 512 (T).

¹⁹³ *Ibid* at [18].

¹⁹⁴ Glazewski *Environmental Law in South Africa* (2000) at 86.

feel a sense of revulsion akin to the position where a beautiful and unique landscape is destroyed, or an animal is cruelly treated.”

Glazewski points out that the term well-being includes the concepts of care for the spiritual and aesthetic aspect of the natural environment, as well as “sense of place”.¹⁹⁵ This may be interpreted to mean that a threat or damage to the environment may affect a person’s well-being, whether the threat or damage occurs in a place known to that person or it occurs to a place where that person has never been or wishes to go in the future.¹⁹⁶

The second part of section 24 is subsection (b) which affords people the right to have their “environment protected, for the benefit of present and future generations, through reasonable and other measures”. Section 24 (b) places the responsibility on the State to ensure that the environment is protected through reasonable and other measures for present and future generations. In *Grootboom’s*¹⁹⁷ case the court held that the State is obliged to take “reasonable legislative and other measures”. The State is required to take positive actions to achieve the intended outcomes, programs and policies which are put into effect by the Executive.¹⁹⁸

Section 24 (b) also deals with the concept of “sustainable development”. The term sustainable development was dealt with by the Constitutional court in the *Fuel Retailers*¹⁹⁹ case, where the Department of Agriculture, Conservation and Environment in Mpumalanga province granted authority to build a petrol station on a property in terms of section 22 (1) of the Environment Conservation Act, 1989 (ECA).²⁰⁰

¹⁹⁵ Glazewski *Environmental Law in South Africa* 2ed (2005) at 77.

¹⁹⁶ Kidd *op cit* note 187 at 23. Kidd gave the following example “that a person in Johannesburg may legitimately allege that her environmental well-being is detrimentally affected by a threat to the natural environment at St Lucia. This raises the idea that knowledge or reasonable anticipation of a threat to the environment anywhere may have an impact on a person’s environmental well-being”

¹⁹⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

¹⁹⁸ *Ibid* at [42].

¹⁹⁹ *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC). See also *MEC, Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* 2008 (2) SA 319 (CC).

²⁰⁰ Act 73 of 1989.

The Fuel Retailers Association of Southern Africa challenged the decision to give authority on grounds that the environmental authority in Mpumalanga failed to take into consideration the socio-economic impact of building the petrol station as obligated by section 24 of the Constitution.²⁰¹ The court held that what is evident from section 24 is the clear recognition of the duty to promote justifiable “economic and social development”.²⁰² The court further held that:²⁰³

“The Constitution recognises the interrelationship between the environment and development; indeed, it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing “ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.”

The court went to say that:²⁰⁴

“The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out.”

²⁰¹ *Fuel Retailers Association of Southern Africa v Director General: Environmental Management and others* supra note 199 at [5].

²⁰² *Ibid* at [44].

²⁰³ *Ibid* at [45].

²⁰⁴ *Ibid* at [102].

The importance of Constitutional environmental rights was showed in the *Save the Vaal*²⁰⁵ case where it was held that “our Constitution by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental consideration be accorded appropriate recognition and respect in the administrative process in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.”²⁰⁶

Section 24 recognizes that the right is enjoyed by everyone in the Republic and places an obligation on the State and environmental authorities to make decisions that are not harmful to the environment and people. The State is obliged to take “reasonable legislative and other measures” to protect the environment in terms of section 24.

Section 7 (1) and (2) of the Constitution provides that the Bill of Rights is the “cornerstone of democracy” in the Republic and places a duty on the State to “respect, protect, promote and fulfil” the rights contained in the Bill of Rights.²⁰⁷ Section 38 of the Constitution affords people in the Republic the right to apply to a competent court when the rights in the Bill of Rights have been violated or threatened.²⁰⁸

Accordingly, it is not insufficient that South Africa has the Wreck and Salvage Act²⁰⁹ which incorporates the International Salvage Convention of 1989. All law is subject to the Constitution. Therefore, the standard of which one needs to evaluate our Wreck and Salvage Act is whether it goes far enough to promote the objectives of the Bill of Rights, specifically the environmental rights provided by section 24 of the Constitution.

²⁰⁵ *Director General: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 SCA.

²⁰⁶ *Ibid* at 719 C-D.

²⁰⁷ The Constitution of the Republic of South Africa, 108 of 1996. Section 7 (1) and (2).

²⁰⁸ *Ibid.* section 38.

²⁰⁹ 94 of 1996.

4.3 Legal framework for environmental protection set out in NEMA

NEMA was introduced to give effect to the Constitutional obligations and it creates the legal framework for environmental protection in South Africa.²¹⁰ NEMA gives effect to section 24 of the Constitution. NEMA was amended in 2001, 2002, 2003, 2004, 2005, 2008, 2009 and again in 2014.

Section 2 of NEMA places an obligation on the State to make decisions that will not affect the environment. Section 2 of NEMA establishes principles that will guide organs of State when making decisions that concern the environment which must be in the interest of the public.²¹¹ Section 28 of NEMA is an important section because it deals with environmental compliance, enforcement and protection.

Section 28 (1) of NEMA places a duty of care on everyone “who has caused or may cause significant pollution or degradation” to the environment to remedy such pollution or degradation by taking reasonable measures.²¹² Section 28 (2) of NEMA places the obligation to take “reasonable measures” to prevent pollution or degradation on the owner, or person in control, or a person who has the right to use the land or premises where an activity occurs or any other situation exists which causes or has caused or threatens to cause significant pollution or degradation.

NEMA does not define what is meant by significant, but in the *Cape Produce* case,²¹³ the court held “the assessment of what is significant involves ... a considerable measure of subjective import”.²¹⁴ This is more in line with International Salvage Union’s (ISU) proposal in that ISU proposed that substantial must be replaced with significant when defining damage to the environment in the International Salvage Convention. As stated in Chapter three, ISU pointed out that every casualty must be assessed as even the smallest casualty can pose a significant threat to the environment.

²¹⁰ Strydom *op cit* note 180 at 197.

²¹¹ Section 2, National Environmental Management Act 107 of 1998.

²¹² *Ibid*, section 28 (1).

²¹³ *Hichange Investments (Pty) Ltd v Cape Produce* 2004 (2) SA 393 (E).

²¹⁴ *Ibid*.

Pollution is thereby defined in NEMA as “any change in the environment” which is caused *inter alia* by “substances ... emitted from any activity ... engaged in by any person ...”.²¹⁵ It is submitted that this definition could therefore cover a discharge of a substance such as oil or any hazardous or noxious cargo. It is submitted that the ship owner is engaged in the activity of a ship voyage by sea, where there is always a possibility of a marine casualty occurring and causing pollution. The full definition reads:

“pollution means any change in the environment caused by-

(i) substances;

(ii) radioactive or other waves; or

(iii) noise, odours, dust or heat,

emitted from any activity, including the storage or treatment of waste or substances, construction and the provision of services, whether engaged in by any person or an organ of state, where that change has an adverse effect on human health or well-being or on the composition, resilience and productivity of natural or managed ecosystems, or on materials useful to people, or will have such an effect in the future”

It is evident from the second part of the definition that one also has to consider the effect of the change, before it can be said to be pollution. The change must have an adverse effect on human health or well-being, the eco-system, or materials useful to people, or have such adverse effect in future. Some marine casualties will result in these types of adverse effect, but it would not necessarily apply to all marine casualties that the ISU proposal is concerned with.

²¹⁵ Section 1, National Environmental Management Act 107 of 1998.

NEMA does not provide a definition of the term degradation.

Kidd argues that the duty of care also places an obligation to remedy historic pollution or degradation. The issue historic pollution makes the requirement of section 28 practically unworkable.²¹⁶ Historic pollution was dealt with in *Bareki NO v Gencor Ltd and Others*.²¹⁷ The court in this case had to decide whether the provisions of section 28 of NEMA were retrospective. In *Bareki's* case an application had been brought against the respondent (Gencor) for an order requiring him to take reasonable measures to remedy pollution or degradation to the environment which was caused by asbestos mining activities between 1976 and 1981. The court in this case held that section 28 of NEMA was not retrospective. The court went on to say that there exists a prima facie rule at common law against holding that a provision has a retrospective effect.²¹⁸ The court further held that fairness was one of the deciding factors.²¹⁹

Kidd disagrees with the *Bareki* decision and states that the decision is wrong because it fails to take into consideration the fact that pollution is an ongoing process and also fails to take the correct account of the wording used in section 28 (1) “has caused”.²²⁰

Section 28 (3) of NEMA sets out reasonable measures that need to be taken to meet the requirements set out in section 28 (1). Reasonable measures may include:

- “(a) investigate, assess and evaluate the impact on the environment;
- (b) inform and educate employees about the environmental risks of their work and the manner in which their tasks must be performed in order to avoid causing significant pollution or degradation of the environment;
- (c) cease, modify or control any act, activity or process causing the pollution or degradation;
- (d) contain or prevent the movement of pollutants or the causant of degradation;
- (e) eliminate any source of the pollution or degradation; or

²¹⁶ Kidd *op cit* note 187 at 211.

²¹⁷ 2006 (1) SA 432 (T).

²¹⁸ *Bareki NO v Gencor Ltd and Others* 2006 (1) SA 432 (T) at 438J.

²¹⁹ *Ibid* at 439C.

²²⁰ Kidd *op cit* note 187 at 152.

(f) remedy the effects of the pollution or degradation.”

Section 28 (4) of NEMA provides that the Director-General or provincial head must direct any person who fails to take such measures to comply with the duty and take such measures. Section 28 (5) of NEMA sets out factors to be considered by the Director-General when contemplating any measures provided in subsection 4. Section 28 (7) of NEMA states that if any person fails to comply with such directive, the Director-General may take reasonable steps to recover cost or alternatively the Director-General may apply to the court for relief.

In South Africa, we also have the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (NEMICMA), which specifically deals with integrated coastal and estuarine management to promote the conservation of the coastal environment and to maintain the natural attributes of the coastal land and sea.

Section 58 of NEMICMA has incorporated the duty of care that is provided in section 28 of NEMA. Section 58 provides that the duty of care set out in section 28 of NEMA applies, with any necessary changes, to any impact which is caused by any person that has an adverse effect on the coastal environment.²²¹ Section 58 (1) (b) provides that “significant pollution or degradation of the environment” includes an adverse effect on the coastal environment and thus reference to “the environment” includes the coastal environment. The Minister by notice in the Government Gazette, may determine that an impact or activity amounts to an adverse effect until the contrary is proved.²²²

Section 58 (2) (b) states that section 28 (1) and (2) of NEMA applies to *inter alia*, “the owner or person in charge of a vessel, aircraft, platform or structure at sea ...in respect of which any activity

²²¹ National Environmental Management: Integrated Coastal Management Act 24 of 2008 ("NEMICMA"), section 58 (1) (a).

²²² *Ibid*, section 58 (2) (a).

that caused or is likely to cause adverse effect occurred”²²³ and further applies to “any person who ... discharged a substance which caused, is causing or is likely to cause, an adverse effect.”²²⁴

NEMA is the broad framework which sets out principles of general application, but NEMA does not refer at all to ships and the coastal environment, it is restricted to land. On the other hand, NEMICMA goes further to include specific reference in section 58 (2) (b) to vessels that caused or may cause an adverse effect to the coastal environment. Reading the two Acts together, it is submitted that it is clear that in a situation where a vessel casualty threatens to pollute the coastal environment there is a duty of care on the owner of that vessel to remedy the pollution by taking reasonable measures. This may be interpreted to include marine casualties where salvors assistance may be required to help a vessel in distress.

These Acts do not change the law of salvage in South Africa, nor do they affect the salvor’s rights to claim an award when his actions have prevented or minimised damage to the environment. Nevertheless, it is submitted that it is necessary to keep them in mind when considering what South Africa’s approach should be to the ISU’s proposal for a new environmental salvage reward.

There has been no academic discussion of whether the duty of care in section 28 of NEMA and section 58 NEMICMA applies to salvage operations. Environmental law textbooks in South Africa do not specifically refer to salvage.²²⁵

²²³ Section 58 (2) (b) (iii) of NEMICMA.

²²⁴ Section 58 (2) (b) (v) of NEMICMA.

Section 58 (2) (b) provides as follows: “the persons to whom section 28(1) and (2) of the National Environmental Management Act applies must be regarded as including— (i) a user of coastal public property; (ii) the owner, occupier, person in control of or user of land or premises on which an activity that caused or is likely to cause an adverse effect occurred, is occurring or is planned; (iii) the owner or person in charge of a vessel, aircraft, platform or structure 25 at sea, or the owner or driver of a vehicle, in respect of which any activity that caused or is likely to cause an adverse effect occurred, is occurring or is planned; (iv) the operator of a pipeline that ends in the coastal zone: or (v) any person who produced or discharged a substance which caused, is causing or is likely to cause, an adverse effect.”

²²⁵ Example: Kidd *Environmental law* 2ed (2011); Glazewski *Environmental Law in South Africa* (2000); Glazewski *Environmental Law in South Africa* 2ed (2005); Fuggle & Rabie’s *Environmental Management in South Africa* (2009); Du Plessis *Environmental Law and Local Government in South Africa* (2015); Paterson *Environmental Compliance and Enforcement in South Africa Legal Perspective* (2009).

It is submitted that this is an oversight. ISU's argument that salvors are the only persons with the equipment, personnel and expertise to immediately respond to marine casualties and prevent marine environmental pollution is a strong one. Unless we consider means to encourage salvors (considering that salvors act voluntarily²²⁶), it is submitted that we may be losing an important opportunity to promote the objectives of protecting the marine environment.

4.4 The Wreck and Salvage Act

NEMA does not stand alone, there is also Wreck and Salvage Act²²⁷ that deals specifically with salvage, environmental salvage and the protection of the environment. It is recognized that the Wreck and Salvage is only one piece of legislation. This is an area where there are many Acts²²⁸ that deal with pollution from ships (which could be caused by marine casualties, or which can arise through other means like accidental and operational discharges). However, only the Wreck and Salvage Act considers the rights and compensation payable to salvors for protecting the environment.

The Wreck and Salvage Act incorporated the 1989 Salvage Convention and made the following amendments:

Section 2 (6) of the Wreck and Salvage Act provides that salvage includes “any fixed or floating platform or any mobile offshore drilling unit whether or not it is engaged in the exploration, exploitation or production of sea-bed mineral resources”. Hare submits that section 2 (6) of the was included in the Wreck and Salvage Act to extend the requirements contained therein by Article 1 (c) of the 1989 Salvage Convention.²²⁹

²²⁶ There is a common law requirement that a salvor needs to act voluntarily. The position is different for the National Port Authority and other State authorities if they are acting under a duty. See *mv Cleopatra Dream Transnet Ltd t/a National Ports Authority v mv Cleopatra Dream and Another* 2011 (5) SA 613 (SCA) at [55].

²²⁷ Wreck and Salvage Act 94 of 1996.

²²⁸ For a discussion of the Acts covering marine pollution see Glazewski *Environmental Law in South Africa* 2ed (2005), chapter 23.

²²⁹ Hare *op cit* note 67 at 404.

Section 2 (7) of the Wreck and Salvage Act provides that:

“Damage to the environment as defined in article 1 of the Convention shall for purposes of this Act, notwithstanding anything to the contrary contained in this Act, not be restricted to coastal or inland waters or to areas adjacent thereto, but shall apply to any place where such damage may occur.”

Section 2 (7) provides that “damage to the environment” has no restrictions, that it shall apply to any place where damage to the environment takes place. This is line with ISU’s proposal in Article 1 (d) of the proposed Convention, that there is no need for geographical limits when dealing with the environment.

Section 2 (8) of the Wreck and Salvage Act provides:

“Notwithstanding the provisions of article 14(3) of the Convention, for the purposes of this Act, the expression “fair rate” means a rate of remuneration which is fair having regard to the scope of the work and to the prevailing market rate, if any, for work of a similar nature”

According to the South African Wreck and Salvage Act Article 14 includes an element of profit. Hare, with reference to section 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983, argues that where the Wreck and Salvage Act is silent on issues regarding Article 14 special compensation the English Law of Salvage as at 1 November 1983 will apply.²³⁰ The contrary view, expressed by Wallis, is that a term in a South African statute does not need to be interpreted in a manner bound by English law.²³¹ This is not to say that the court cannot consider English law in deciding how it will interpret the provision. As stated in chapter two the House of Lords decision in the *Nagasaki Spirit*²³² case went against the interpretation of fair rate which is set out in section 2 (8) of the Wreck and Salvage Act and held that fair rates for expenditure and equipment used in the

²³⁰Hare *op cit* note 67 at 401.

²³¹ Wallis *The Associated Ship and South African Admiralty Jurisdiction* (2010) at 75, footnote 100 where the author states that it has been ‘a curious feature’ of South African jurisprudence to interpret South African statutes with reference to section 6.

²³² *The Nagasaki Spirit supra* at note 11.

salvage operation did not include an element of profit. The decision and reasoning of the *Nagasaki Spirit* case clearly does not apply in South Africa, by virtue of section 2 (8) of the Wreck and Salvage Act.

However, the Wreck and Salvage Act does not go as far as ISU's proposal. First, with regards to Article 14 (3) fair rates, the ISU proposal is not simply considering introducing a 'profit' element for the services, but is proposing the introduction of an entirely new, separate reward which could be much higher. Secondly, this reward would not be payable only when an article 13 reward is not earned or is lower than the special compensation, which is the position under the International Salvage Convention and the Wreck and Salvage Act. The ISU environmental reward would be payable *in addition* to an Article 13 reward.

Although the Wreck and Salvage Act does not go as far as the ISUI proposal it does benefit salvors. In terms of section 2 (8) of the Wreck and Salvage Act a salvor can claim profit which is not limited to a standard bonus of 25 % like SCOPIC. Therefore, it is submitted that section 2 (8) of the Wreck and Salvage Act is a step closer to achieving the objective of incentivising salvors which is the basis of the ISU's proposal.

The Mbashi

There is one reported decision which has applied the provisions of the Wreck and Salvage Act, the *Mbashi* case.²³³ The case will not be discussed in detail because it deals mainly with whether services were rendered voluntarily or not; and because the salvage operation was successful the case did not discuss how special compensation (and a fair rate) is to be calculated.

A fire broke out in the vessel's engine room and the master sent out a radio signal to the Durban authorities. The court held that Transnet was entitled to a salvage reward, because Transnet responded to a call of a vessel that was in distress, which was outside the harbour. Therefore, Transnet was immune to section 5(4) of the Wreck and Salvage Act.²³⁴ The court held after

²³³ *Transnet Ltd v MV Mbashi and Others* 2002 (3) SA 217 (D).

²³⁴ *Ibid* at [225] [H]-[J].

considering the factors referred to in article 13 that a fair reward would be 2,5% of R128 498 396,04, being the values of the ship, containers, bunker fuel and cargo.

Although the case did not discuss special compensation it raises an interesting point of principle. The court held²³⁵ that “whilst the Court is enjoined to grant rewards which encourage salvors to rescue ships in distress, one should guard against the notion that rewards should be unduly burdensome to ship owners, cargo owners and other interests.”

The court in *Mbashi's* case recognized the importance of rewarding salvors to encourage them to help vessels in distress, however, the court cautioned that the calculation of a salvage reward must not place shipowners and cargo interests in an unfair position of having to pay huge rewards.

Therefore, it is submitted that ISU's proposal can be criticized that it does not strike a balance and it could be unduly burdensome to shipowners and cargo interests. An environmental award cannot be quantified, such an award will be speculative and be by “guess or God”²³⁶ which might result in huge awards being awarded to salvors thereby causing a disadvantage to everyone who is liable to pay for them. Further an environmental award based on too many uncertainties will probably result in lengthy and expensive litigation which will not be in the interest of the public. Bishop, however, submits that the proposed change is not intended to amount in huge rewards. This will encourage salvors to invest in the future and better equipment which will help them remain in business.²³⁷

4.5 Conclusion

In South Africa, environmental rights and protection are governed by section 24 of the Constitution of the Republic of South Africa²³⁸, which provides that everyone has a right to an environment which will not harm their health or well-being; and section 28 of NEMA which gives effect to section 24 of the Constitution, provides that everyone who has caused or will cause environmental pollution or degradation must take reasonable measures to remedy such pollution or degradation.

²³⁵ *Ibid* [230] [D]-[H].

²³⁶ Howard *op cit* note 162 at 3.

²³⁷ Bishop *op cit* note 3 at 98.

²³⁸ 108 of 1996.

Both the Constitution and NEMA place an obligation on the State to make decisions that will not cause harm to the environment. NEMA does not stand alone, in South Africa we also have Wreck and Salvage Act, which deals with salvage, and environmental salvage and the protection of the environment.

Although the Wreck and Salvage Act incorporated the 1989 Salvage Convention with certain amendments, as discussed above, it is submitted the Wreck and Salvage Act does not go as far as ISU's proposal. It is submitted that the environmental right enshrined in the Constitution requires South Africa to consider enacting legislation that would provide a stronger incentive to salvors to protect the environment for the benefit of present and future generations. However, this is an area of law in which it is desirable to have international uniformity. This is discussed further in the recommendations put forward in chapter 5.

CHAPTER 5: CONCLUSION

5.1 Introduction

The purpose of this dissertation is to critically analyze the International Salvage Union's (ISU) proposed amendments of the 1989 Salvage Convention and to consider whether this should be incorporated into the South African Wreck and Salvage Act, 1996.

5.2 Summary of the findings

In chapter two, Article 13 (1) (b) and 14 of the 1989 Salvage Convention, the Special Compensation P & I Club Clause (SCOPIC) and the *Nagasaki Spirit* case²³⁹ were discussed. It is evident that salvage is an ancient right which has been concerned with the saving of life and property at sea, according to the principle of “no cure no pay”.

It was only when the 1989 Salvage Convention was introduced that its drafters took an initiative and introduced two changes to the law to protect the environment. Article 13(1)(b) which looks at the skill and effort of the salvors in preventing or minimizing damage to the environment when calculating a salvage reward and Article 14 which provides for special compensation even when no property has been saved, but the salvor has prevented or minimized damage to the environment. The 1989 Salvage Convention thus reduced the harshness of the principle of “no cure no pay”.²⁴⁰

Difficulties came with the House of Lords decision in the *Nagasaki Spirit* case²⁴¹ that fair rates for the equipment, and personnel actually and reasonably used in the salvage operation did not include an element of profit.²⁴² Article 14 was thereafter replaced by SCOPIC which can be incorporated in the LOF salvage contract.

In chapter three, ISU's proposal for an environmental award was examined and the issues regarding the assessment of such an award were considered. In 2007 ISU put forward a proposal for an environmental salvage award which was followed by their position paper in 2012, in which

²³⁹ *The Nagasaki Spirit* supra note 11.

²⁴⁰ Bishop *op cit* note 3 at 67.

²⁴¹ *The Nagasaki Spirit* supra note 11.

²⁴² *Ibid* at 332.

ISU believed it was time for change. ISU wanted the 1989 Salvage Convention to be amended to make way for a new environmental salvage award because the present systems under the 1989 Salvage Convention and where applicable SCOPIC do not properly recognize the salvors' efforts in protecting the environment.²⁴³ ISU acknowledges that in many cases salvors are rewarded for protecting the environment under article 13 (1) (b), but because of the low value of the salvaged property the tribunal cannot give full effect to this provision. ISU argued that both Article 14 and SCOPIC's main goal is to save property and they are not a method of remuneration but a "safety net".²⁴⁴

Ex-president Todd Busch then went on to give three reasons for their environmental salvage award proposal. First, he said that environmental issues are dominant in every salvage case. Secondly, that the current system under the 1989 Salvage Convention and where applicable SCOPIC do not take into account the degree of success obtained by the salvor in protecting the environment. Thirdly, that the salvage industry lacks funding.²⁴⁵

ISU further stated that in order to achieve an environmental salvage award Article 1 (d), 13 and 14 needed to be amended as follows:

In defining "damage to the environment" in the revised Article 1(d), ISU proposed that "significant" must replace "substantial" because they consider "significant" to be a more realistic measure when it comes to environmental concerns.²⁴⁶ Secondly, ISU proposed that the geographical restriction "in coastal or inland waters or areas adjacent thereto" be removed from the current definition, because when it comes to the environment there is no need for geographical limits.²⁴⁷

ISU's proposal involves very little change to the current Article 13. ISU has proposed that Article 13 (1) (b) must be deleted and be incorporated to the revised article 14.²⁴⁸ In terms of the revised

²⁴³ ISU's Position Paper *op cit* note 17 at 1.

²⁴⁴ Busch *op cit* note 19 at 4.

²⁴⁵ ISU's Position Paper *op cit* note 17 at 1.

²⁴⁶ *ibid* at 4.

²⁴⁷ *ibid*.

²⁴⁸ *ibid* at 5.

Article 14 (1) if the salvor has carried out a salvage operation in respect of a ship which threatened damage to the environment, the salvor shall be entitled to an environmental award which is to be paid in addition to a reward which the salvor is entitled to receive under Article 13. ISU is of the view that this award is fixed to encourage salvors to prevent and minimize damage to the environment. ISU proposed that such an award must be paid by the shipowner and his liability insurers.²⁴⁹ ISU believes that a competent Tribunal that poses the required skill and knowledge will be able to handle the assessment of an environmental award.²⁵⁰

ISU's proposal was opposed by shipowner's and P & I Clubs, they argued that they were happy with SCOPIC and that an environmental award cannot be quantified therefore making difficult to calculate.²⁵¹ The marine property underwriters provided a possible alternative solution on how an environmental salvage award can be calculated. They suggest that for such an award to be possible it must be based upon the SCOPIC tariff system and controlled by the Special Casualty Representative (SCR).²⁵² With regards to the issue that only shipowners are liable to pay for an environmental award, Khosla disagrees with ISU and submits that there is a shared responsibility by shipowners, cargo interests, government and the public for the environment and its protection and that oil pollution is not the only pollutant.²⁵³

Chapter four discussed the Constitutional and legal framework governing environmental rights and protection in South Africa. Section 24 of the Constitution of South Africa provides environmental rights in South Africa and afford the people the right to an environment that is not harmful to their health or well-being and the right to have their environment protected. The legal framework for environmental protection in South Africa is created by National Environmental Management Act 107 of 1998 (NEMA) and was introduced to give effect to the Constitutional obligations.²⁵⁴ NEMA gives effect to section 24 of the Constitution. Section 28 (1) of NEMA places a duty of care on everyone "who has caused or may cause significant pollution or degradation" to the environment to remedy such pollution or degradation by taking reasonable

²⁴⁹ *Ibid.*

²⁵⁰ ISU's position paper *op cit* note 17 at 7.

²⁵¹ Khosla *op cit* note 23.

²⁵² Gooding *op cit* note 96 at 6.

²⁵³ *Ibid* at 8.

²⁵⁴ Strydom *op cit* note 180 at 197.

measures.²⁵⁵ We also have the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (NEMICMA), which deals with integrated coastal and estuarine management to promote the conservation of the coastal environment and to maintain the natural attributes of the coastal land and sea. Section 58 of NEMICMA deals with the duty of care and has incorporated the duty of care that is provided in section 28 of NEMA. NEMA does not stand alone, there is also Wreck and Salvage Act 94 of 1996 that deals specifically with salvage, environmental salvage and the protection of the environment. The Wreck and Salvage Act incorporated the 1989 Salvage Convention and amended section 2 (6), 2 (7) and 2 (8).

5.3 Recommendations

Although the Wreck and Salvage Act incorporated the 1989 Salvage Convention with certain amendments, as discussed above, it is submitted the Wreck and Salvage Act does not go as far as ISU's proposal. The environmental rights enshrined in the Constitution require us to enact legislation that would provide a stronger incentive to salvors to protect the environment for the benefit of present and future generations. Therefore, it is submitted that ISU's proposal is one South Africa should consider supporting. At present the ISU proposal does not have sufficient support yet to create an amendment to the International Salvage Convention. It is undesirable for there to be a lack of international uniformity in this area of law. Hare points out that the stated objective of the Salvage Convention²⁵⁶ is to introduce uniformity in the international law of salvage and that the Wreck and Salvage Act was enacted to bring South African law into line with the international rules.²⁵⁷ He further points out that the common law of salvage is only changed to the extent set out in the Convention.²⁵⁸ Therefore, South Africa must not, it is submitted, amend the Wreck and Salvage Act unless ISU's proposal has been adopted at an international level.

²⁵⁵ section 28 (1) of NEMA.

²⁵⁶ The Preamble to the Convention states that the drafters were "Recognizing the desirability of determining by agreement uniform international rules regarding salvage operations."

²⁵⁷ Hare *op cit* note 67 at 402-403.

²⁵⁸ *Ibid.*

5.4 Conclusion

ISU has proposed that the 1989 Salvage Convention be amended to create a separate environmental award because the current system under the 1989 Salvage Convention or SCOPIC, if applicable, do not properly reward salvors for protecting the environment. ISU proposed that an environmental award be paid in addition to Article 13. In South Africa, the Wreck and Salvage Act deals the right and compensation of salvors and section 2 (8) affords salvors a right to recover a profit. However, the Wreck and Salvage Act does not go as far as ISU's proposal. It is submitted that South Africa must support ISU's proposal, because the Constitution provides that the rights in the Bill of Rights must be fulfilled and this includes environmental rights in section 24. The difficulty with incorporating ISU's proposal into our own legislation is that presently it lacks uniformity as it has not been adopted internationally.

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