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Open letter to

The Hon Sibusiso Ndebele
Minister of Transport
Government of the Republic of South Africa

By email to: ministry@dot.gov.za

And copy to: The Deputy Minister of Transport
The Minister of Finance
The Minister in the Presidency
The Minister of International Relations and Cooperation

Dear Minister Ndebele

THE INTERNATIONAL OIL POLLUTION COMPENSATION (IOPC) FUND

Nearly thirty years ago the Spanish tanker Castillo de Bellver developed a crack, caught fire, broke in half and sank in two parts - one 12 miles off Saldanha Bay and the other towed to comparative safety 300 miles offshore. She was carrying 292 000 tonnes of crude oil. All of it either burnt, spilled into the sea or still lies in what remains of the wreck. It remains the second biggest tanker oil-spill in history. The gods were with us - no oil came ashore. But it could have. All 292 000 sticky, suffocating tonnes of it. The West coast fishing industry would have been decimated. Ports would have closed. Koeberg would have shut down.

At much the same time, the tanker Amoco Cadiz dumped 257 000 tonnes of oil onto the shores of Brittany. Human error was blamed. The cost was over R4 billion. In 1989 the Exxon Valdez, by comparison carrying only 53 000 tonnes of crude, ran aground in Alaska, also through human error. The clean-up costs and other oil pollution losses for a spill of some 40 000 tonnes hit R20 billion. And the litany of catastrophes continued: the Erika off the coast of France and the Prestige off Spain both resulted in pollution claims of over R6 billion for comparatively small spills.

The shipping world reacted. Led by the EU, limits of compensation available to affected countries was increased to a staggering R9,3 billion. European maritime states, Australia & New Zealand, Canada and many others - all sleep easier knowing that if catastrophe comes, as it is bound to do somewhere, sometime, their costs of making the best of an appalling situation will at least be covered by the international oil industry. At very little cost to themselves.

Yet we in South Africa still do not sleep easy. If the *somewhere* is here, and the *sometime* is before our government 'gets its Act together' in relation to liability and compensation for oil pollution from tankers, all we will be able to claim in compensation is a paltry R180 million from the owner or insurer of the ship that does the damage.

How do we find ourselves in this woeful position where you and I as citizens would have to pick up such an unthinkable tab for oil pollution caused to us by a passing ship in which we have no interest and over which we have little or no control, delivering oil from a foreign seller to a nameless buyer across the seas? The history is as unedifying as it is a poor reflection of your Ministry. I tell this history not to point an accusatory finger but out of exasperation for having spent 16 years explaining, cajoling, writing and speaking about this crisis. Yet it would seem that polluted coastlines are too far from Pretoria for there to be any real appreciation of the enormity of our exposure.

Traditionally, from the earliest times that ships carried oil either to power their own engines or as cargo, shipowners were held to account for pollution - which was insured by their liability insurers, called P&I Clubs. The 1960's brought the supertanker. It was in that era that we enacted our oil pollution control and liability legislation. In line with international practice (necessary to enable us to collect from the Clubs) we imposed strict liability on owners against which they have few defences, in return for a capping of liability to a maximum of (currently) R180m. That capping still stands in our law, and it removes claimants' abilities to claim in any other way: beyond that figure, you bear your own losses.

Move forward a decade or two: it became clear that holding the shipowner liable for the damage that the cargo caused was letting the main player off the hook. For it was the oil majors not the shipowners who made by far the greater profits from moving oil around the world. The oil majors stepped up to the plate and a new liability regime came into being to top up the shipowner's liability. Enter the 'Fund Conventions'.

The Fund Conventions employ a simple formula. A contribution is levied from all the world's oil importers on each tonne of oil moved in or out of any port in states which are parties to the Convention. The levy is held in a fund, ready to meet the costs of oil pollution catastrophes in the waters of any contracting state. So Japanese, Korean and Indian oil traders (who pay by far the biggest contributions) and all other traders operating in contracting states pay their dues to compensate anyone in any contracting state who suffers oil pollution losses - even innocent bystander maritime states like us, through whose seas the big players' oil shipments pass. Claims are made direct against the appropriate Fund, and they don't hassle - they are there to settle claims. At present there are two levels of contribution and therefore of cover: the first layer fund provides maximum cover of 203m IMF Special Drawing Rights (SDRs) per incident, and the post-

Erika/Prestige Supplementary Fund ups this to 750m SDRs. These SDR caps equate to approx R2,5 billion and R9,3 billion respectively. Because our cover comes from the totality of the world's oil industry contributions and not just our own, we would enjoy compensation cover (using first tier Fund 2011 levies for illustration) for about three cents per tonne payable by our importers – reduced to a price per litre, this is too small to reflect in the pump price of fuel.

There was however, for us, a rub. Contributions to the Funds are assessed on oil movement returns submitted to the Fund managers by each importer. Until 1994, our oil trade was cloaked in the secrecy of sanctions. It was not feasible for us to participate in the Funds. But when our lights went back on, the then Department of Transport under Minister Maharaj, lost no time in commissioning specialists to advise on all aspects of maritime transport. I was privileged to chair that initiative and one of the aspects we raised was the urgent need to accede to the Fund Convention. The long process began.

After much groundwork with Parliamentary sub-committees, and a decision in principle to embrace the first layer Fund, the government's accession file was the lost somewhere between Transport and Foreign Affairs and the whole process had to start over. It was only in June 2004 that South Africa eventually deposited our instrument of accession, after which there was a one year lead-in period before we could claim full membership and benefits.

It is a principle of our law that while the state is bound by conventions the government signs, our citizens are not bound until a convention is enacted by Parliament into our domestic law. Accession to the Fund Convention was thus not the end of the story. What was then needed was legislation to change the R180m capping in the present Act, and to make the Convention part of South African law. In the process, the law would impose a legal obligation on our oil traders to submit oil returns to our government to be filed with the Fund managers in London, and a 'money bill' would require the traders then to pay their invoiced contributions to the Fund. Like any insurance, if you don't pay your premiums, you can't claim cover.

During 2005/6 the SA Maritime Safety Authority (SAMSA) prepared draft Bills, with broad input including from the SA Maritime Law Association, the SA Petroleum Industry Association (SAPIA) and indeed from the International Oil Pollution Compensation (IOPC) Fund managers in London. Everyone wanted to help, none more so than SAMSA – which has the unenviable task of managing casualties on our coast.

That was seven years ago. Seven Cape winters ...

Those of us involved have used every platform available throughout this long period of bureaucratic torpor to try to get the Bills passed. They were on Parliament's order book for the second semester of 2011 but were inexplicably removed. And thus we remain dangerously and I respectfully suggest shamefully inadequately covered.

What is the way out of this impasse? The IOPC and our oil importers are anxious to have us become fully paid up Fund members so we can enjoy the best international oil pollution insurance available. I now understand that the draft Bills have been lying in

Treasury for many months, delayed by the impression that Treasury seems to hold that contributions should be collected by the state and not paid direct by the traders to the Fund. All other member states except Canada require their traders to pay direct upon invoices sent to them by the Fund. If Treasury is standing on some dictate of exchange control, they are playing high stakes for bureaucratic intervention in a very simple process. Even if Treasury regards these contributions as a *money bill* levy, the law makes provision for exemptions allowing for statutory levies (if that is what the contributions are) to be paid elsewhere than the National Revenue Fund. But whichever way the money flows, this is detail which the government has now had more than enough time to sort out.

For my part, I now appeal to you, Mr Minister, to get this job done - and done better than your predecessors. It is now 16 years since the government was advised to accede urgently to the first layer Fund Convention. That step took an inexplicable 8 years, and now another 8 years have dragged by since accession. Our government has an obligation under the Constitution to enact legislation to give effect to these international convention obligations. The government owes a duty to everyone to protect the environment and to enact legislation to prevent pollution and ecological degradation. And it may not waste public funds which would surely occur on a grand scale if a worst-case casualty befalls us. On all these grounds I believe that there would be little difficulty in persuading the Constitutional Court to require the government to close this legislative gaping hole.

Sixteen frustrating years since I first became involved in this project I find myself close to bringing a concerned citizen's Constitutional Court challenge as a last resort. But I, and I know other of my colleagues, would rather plough our energies into helping your Department to get this legislation passed. I again offer you that help, no T's & C's. And I urge you to take immediate steps to accede to the Supplementary Fund so that we may take full advantage of the best available internationally funded cover.

If we do not move forward, our government needs to grasp the reality that the ghastly mess that an oil pollution catastrophe would cause on our coast will flow all the way to the corridors of Pretoria - and could cost the Treasury and the taxpayer billions.

Yours sincerely



John Hare
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