LIABILITY FOR OIL POLLUTION DAMAGE: AN ANGLO-SOUTH AFRICAN COMPARISON IN LIGHT OF THE INTERNATIONAL DISPENSATION

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Abstract

Oil pollution incidents have become increasingly prevalent in South African waters. Internationally there exists a comprehensive regime which provides for the compensation for damage caused by oil spilt by ships. South African legislation also makes provision therefore. This dissertation investigates the adequacy of the South African legislation in light of the international instruments. It also sets out practical means of incorporating the international instruments into domestic law, by investigating how this has been done under UK law. Here it was found that the South African oil pollution compensation regime is outdated and does at present not make provision for oil receivers to pay compensation for damage. Furthermore the liability limit set by legislation is far too low.

Afrikaanse opsomming

Die besoedeling van die Suid-Afrikaanse kus deur olieskepe vind al hoe meer plaas. Ingevolge internasionale reg bestaan daar 'n volledige stelsel vir die vergoeding vir skade wat aangerig word deur oliebesoedeling deur skepe. Suid-Afrikaanse wetgewing maak ook voorsiening hiervoor. Met hierdie studie word die doeltrefendheid van die Suid-Afrikaanse wetgewing in die lig van die internationale instrumente ondersoek. Dit sit ook die praktiese inkorporering van die internationale instrumente in die plaaslike wetgewing uiteen, deur dit met die regstelsel van die Verenigde Koninkryk te vergelyk.

Daar word bevind dat die skadevergoeding vir oliebesoedeling in die Suid-Afrikaanse regstelsel veroudered is en dat dit nie voorsiening maak vir diegene in die land wat olie ontvang om by te dra tot die skadevergoeding nie. Laastens is gevind dat die aanspreeklikheidsbeperking wat deur wetgewing gestel is, te laag is.

1 Introduction

South Africa, located on one of the busiest tanker routes in the world, has seen its fair share of shipping disasters, many of which have resulted in the spill of oil into the marine environment and coastline.[1] Of these, the most notorious were the Castillo del Bellver[2], the Treasure and the Jolly Robino.[3] The Treasure sank in Table Bay in 2000 and spilt a modest 13 000 tonnes of bunker fuel costing in excess of R45 million to clean.[4] Pollution of the marine environment by oil can emanate from any number of sources including: accidental discharges from vessels of fuel or cargo as a result of navigational accidents and the carriage of hazardous goods and as a result of operational discharges from ships and offshore prospecting and mining installations.[5]

Oil pollution incidents have led to drastic developments in the field of civil liability for oil pollution internationally, for instance, in the wake of the sinking of the Torrey Canyon, the *International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties* of 1969 (hereafter Intervention Convention) was negotiated and adopted. Most recently, the Erika disaster revealed numerous shortcomings in the compensation system in place and led to the International Maritime Organisation (hereafter IMO) bringing about numerous amendments thereto.[6]

Locally, the field of environmental law has also seen drastic development in the past few years, the reason for this being the value that South African society now

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1 WWF Newsroom 2005 HYPERLINK http://www.panda.org.za/article.php?id=247_3 March 2005.

2 The Castillo de Bellver caught fire 12 miles off the coast of Saldana Bay. It spilt 276 000 tonnes of oil into the ocean although none of the oil came ashore.

3 The Jolly Robino ran aground 200 metres from the shore of the St Lucia park which is listed as a world heritage site by UNESCO. The vessel caught fire and the crew had to abandon it. It had 1 300 tonnes of fuel and barrels of inflammable chemicals on board.

4 These incidents, however, cannot compare to the marine and coastal damage incurred internationally by vessels such as the Torrey Canyon, the Exxon Valdez and the Erika.

5 Glazewski *Environmental Law in South Africa* 635.

6 For example, it was noted that the amount the Fund could make available for claims was insufficient to cover the amount claimed, and thus the contribution levels were increased.

attaches to having a sound environment.[7] The incorporation of environmental rights into the Bill of Rights bears testimony thereto.[8] South Africa recently ratified the IMO's *Protocol of 1992 to Amend the International Convention on the Establishment of the International Fund for the Compensation of Oil Pollution Damages* of 18 December of 1971 (hereafter the Fund Convention) and became a member state on 1 October 2005. As a result, South Africa will need to enact legislation that makes provision for contributions to the Fund; that will provide directions on how to institute claims against the Fund and ascribe jurisdiction to our courts to institute claims against the Fund. The questions that this dissertation seeks to answer are firstly, whether or not South African legislation, at present, is compatible with the Fund Convention and secondly, how this Convention may be assimilated into our law.

These questions shall be answered by investigating the international instruments pertaining to oil pollution compensation. These will be compared to the legislative regime currently in place in South Africa. Lastly, the way in which the United Kingdom, (hereafter the UK) has implemented its international obligations into its domestic legislation will be investigated.[9] The international instruments that are discussed are, *inter alia*, *The United Nations Convention on the Law of the Seas, 1982* (hereafter 1982 UNCLOS), *International Convention for the Prevention of Pollution from Ships 1973* (hereafter "MARPOL") the *International Convention on Civil Liability for Oil Pollution Damage 1992* (hereafter "CLC Convention") and the Fund Convention.

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7 Havenga 1995 *SAMLJ* 187.

8 Section 24 of the Constitution.

9 The reasons for basing this comparison study on UK legislation are firstly, because South Africa was formerly a British colony, thus a large part of our law (specifically our maritime law and our law of delicts) is founded in UK law. Secondly, UK Maritime law is well developed as the UK is a major player in the shipping field, and it alone has seen three of the world's twenty biggest oil pollution disasters, (i.e. Torrey Canyon).

1.1 *Defining "pollution" and "pollution damage" as core concepts*

The marine environment is one of the most addressed environmental fields and there are numerous instruments devoted to the protection thereof.[10] Clear definitions must be established in order to orientate the focus of this dissertation as well as to bring legal certainty to the points of departure. Specifically, the terms "pollution" and "pollution damage" are defined.

The 1982 UNCLOS defines marine pollution as:

> the introduction by man, directly or indirectly, of substances or energy into the marine environment including estuaries, which result or is likely to result in such deleterious effects as harm to the living resources and marine life, hazardous to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of water and reduction of amenities.[11]

This definition was given effect in South Africa when it was entrenched domestically in the *Marine Pollution (Control and Civil Liability) Act* 6 of 1981, (hereafter the CLC Act).[12]

The definition of "pollution"[13] as set out in the *National Environmental Management Act* 107 of 1996 (hereafter the NEMA) should also be considered. Here pollution is defined as:

> a change in the environment which 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.

Pollution can also be termed as interference, presumably unjustifiable, with acquired possession and/or enjoyment of property, be it land or sea.[14] From this it can be seen that oil pollution in this context, is thus the:

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10 Larsson *The Law of Environmental Damage* 127.
11 Article 1(4) of the 1982 UNCLOS.
12 Glazewski *Environmental Law in South Africa* 657.
13 Section 1 (xxiv) of the NEMA.

> introduction of oil by a vessel or oil installation into the ocean which has the effect of causing damage to the marine ecosystem or legitimate human uses of the sea.

"Pollution damage" is defined by the CLC Convention,[15] the Fund Convention[16] and the UK *Merchant Shipping Act*, 1995[17] as being:

> damage caused outside a ship by contamination resulting from a discharge or escape of oil from the ship; the cost of preventive measures; and further damage caused by preventive measures. This does not include any damage attributable to any impairment of the environment except to the extent that any such damage consists of either: loss of profits; or the cost of any reasonable measures of reinstatement actually taken or to be taken.

However, in the South African context the CLC Act does not define pollution damage in section 1. Only the concept "loss or damage" is used when providing for civil liability.[18] From this it can be seen that there exists a discrepancy in South African law and thus the provisions of the CLC Act will have to be brought in line with the international instruments, as is done in the UK legislation, in order to make these definitions compatible with the international instruments.

The definition of pollution damage is restricted to the effect on human well-being, property and the reinstatement of the environment. From the definitions of "pollution" and "pollution damage", it can be seen that although the marine environment can be polluted, the damage that is done to it can only be compensated for in so far as is necessary for the reinstatement thereof. Thus, there can be no claim for the intrinsic value of the environment. This is consistent with the Fund Convention's reinstatement policy, which provides that the Fund will not compensate for claims for damages based on abstract quantification, nor award damages of a punitive nature. This may be because the value of the environment cannot be quantified.[19]

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14 Hill *Maritime Law* 419.
15 Article 2(6) of the CLC Convention.
16 Article 2 of the Fund Convention.
17 Section 181 of the *Merchant Shipping Act*, 1995.
18 Section 9(1) of the CLC Convention.
19 Burlington 2004 *Environmental Law Review* 85.

In the next paragraph the international marine pollution compensation instruments are investigated. This is in order to ascertain what standards have been set for compensation internationally and what new obligations South Africa has ascribed to under the Fund Convention.

2 International oil liability regimes

2.1 *Historical development*

The need for the international regulation of oil pollution was first addressed in 1926 in Washington, where a draft convention was drafted in order to address the development of the oil carrying tanker.[20] The draft convention was, however, set aside as the world fought its first and second world wars. Since then, major developments in the marine oil pollution sphere have materialised in the wake of oil pollution disasters. In 1954 the *International Convention for the Prevention of Pollution of the Sea by Oil* was signed in London in May of that year. This led to the adoption of the 1958 *Geneva Convention on the Law of the Sea*, (UNCLOS.) This convention broadly sets out the obligation that every state should provide for its own legislation that addresses pollution of the sea by oil tankers and the regulation of such oil tankers. In 1962 oil companies, as the shippers of tanker cargo, were asked to address the issue of discharge of oil from slops when cleaning the tanks before a new load of oil was loaded. The answers that they provided were entrenched in the 1973 MARPOL Convention.

Since these early developments, there have been various other international instruments that deal with the carriage of oil by sea.[21] For the purpose of this study only the most recent liability regimes are addressed. These include, the

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20 Hare *Shipping Law* 409.

21 Such as, the 1954 International Convention for the Prevention of Pollution of the Sea by Oil; the 1958 Geneva Convention on the Law of the Sea, UNCLOS; the 1969 International Convention on Civil Liability for Oil Pollution Damage; the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage and

MARPOL Convention, the 1992 CLC Convention, the 1992 Fund Convention and the 2003 Supplementary Fund.

2.2 *The MARPOL Convention*

MARPOL is the main convention controlling vessel-source pollution.[22] It aims to prevent or regulate deliberate operational discharges, rather than to deal with their consequences.[23] It sets out various rules and standards in its annexures that pertain to various scenarios, these being: the carriage of oil;[24] the carriage of noxious liquid substances carried in bulk;[25] harmful substances carried by sea in packaged form;[26] and sewage and garbage generated on board the vessel.[27] In article 3, MARPOL provides that it applies to all ships under the flag of a member state and to ships, although not flying the member state's flag, operating under its authority. The Convention, however, does not apply to state ships such as warships or other vessels involved in non-commercial service.[28] Article 4 of MARPOL provides that violations of convention requirements must be prohibited and sanctions must be established under the law of the flag state for ships. If there is a violation, the state must either bring proceedings itself or give evidence of the violation to the flag state. Penalties under the law of a member state are required to be severe enough to discourage violations and must be equally severe regardless of where the violations occur.[29]

MARPOL requires that all ships hold a certificate of compliance with MARPOL standards. In the event of substantial non-compliance, the port authority of the member state carrying out the inspection must take such steps to ensure that the

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the voluntary contribution scheme of Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL).

22 Brubaker *Marine Pollution* 122.
23 Glazewski *Environmental Law in South Africa* 655.
24 Annexure 1 of MARPOL.
25 Annexure 2 of MARPOL.
26 Annexure 3 of MARPOL.
27 Annexure 4 and 5 of MARPOL.
28 Brubaker *Marine Pollution* 123.
29 Brubaker *Marine Pollution* 124.

ship does not sail until it can proceed without presenting an unreasonable threat of harm to the marine environment.[30] A port state is allowed, upon request, to inspect a ship within its jurisdiction and, if sufficient evidence exists regarding a violation that has occurred anywhere, issue a report to the flag state and the member state requesting it. A port state may not, however, bring legal action for violations outside its jurisdiction.[31] Article 7 provides that all possible efforts be made by a state to avoid undue detention under articles 4, 5 or 6 to ships, and when there has been such undue detention, the ship is entitled to compensation for damages suffered.[32]

Annexure 1, which provides for oil pollution prevention, prohibits any discharge into the sea of oil or oily mixtures.[33] This regulation is, however, qualified by a number of exceptions. These are briefly, that the tanker may discharge oil but only in certain circumstances, for example when it is not in a special area,[34] or within 50 nautical miles of land and then only if the discharge does not exceed certain limits set out in MARPOL.

2.3 *The 1992 CLC Convention*

The CLC Convention was adopted to ensure that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships.[35] The provisions of the CLC Convention are not only imposed on all oil tankers registered in a member state, but are also imposed on all tankers entering and leaving a port or terminal installation located

30 Article 5 of MARPOL.
31 Brubaker *Marine Pollution* 124.
32 Brubaker *Marine Pollution* 124.
33 Regulation 9(1) of Annexure 1of MARPOL.
34 Special areas are defined by MARPOL and its amendments have added to the named special areas.
35 International Maritime Organisation 2005 HYPERLINK http://www.imo.org/Conventions/contents.asp?topic_id=256&doc_id=660 24 April 2005.

in the member state.[36] The CLC Convention applies to oil tankers actually carrying oil in bulk,[37] and does not apply to (persistent) bunker oil discharge.[38]

The 1992 CLC Convention provides that the owner of the ship is strictly liable[39] for the damage caused as a result of an incident. [40] The owner of the ship may limit his/her liability, but only if the damage caused was not as a result of the owner's fault or negligence, which was committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.[41] The burden of proof is on the plaintiff to show that the ship owner should be deprived of his/her right to limit.[42] In 2003 the limitations were increased by 50 percent and now stand at 4.51 million Special Drawing Rights (SDR),[43] if the ship does not exceed 5 000 gross tonnes. For a ship of 5 000 to 140 000 gross tonnes the liability is limited to 4.51 million SDR plus 631 SDR for each additional gross tonne over 5 000. For a ship over 140 000 gross tonnage, liability is limited to 89.77 million SDR. [44]

The owner of a ship carrying more than 2 000 tonnes of oil is furthermore obliged to procure marine insurance which is sufficient for the total of the ship owner's liability in one incident. Again, should a ship not have such marine insurance, the ship owner will not be able to limit his/her liability.[45] The ship then receives a

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36 Oosterveen 2004 *Environmental Law Review* 2.
37 Hare *Shipping Law* 412.
38 This is governed by the *International Convention on Civil Liability for Bunker Oil Pollution Damage*, 2001.
39 Strict liability means that the defendant will be held liable for the damage caused without the need for fault to be present. See Boberg *The Law of Delict* 16.
40 Article 4(1) of the1992 CLC Convention.
41 Article 6(2) of the 1992 CLC Convention, see Glazewski *Environmental Law in South Africa* 648; see International Maritime Organisation 2005 HYPERLINK http://www.imo.org/Conventions/contents.asp?topic_id=256&doc_id=660 24 April 2005.
42 Hill *Maritime Law* 438.
43 SDRs serve as the unit of account of the International Monetary Fund as well as certain other organisations, such as the International Oil Pollution Compensation Fund. One SDR was equal to R0.10779 on 4 October 2005, See http://www.imf.org/external/np/exr/facts/sdr.htm.
44 International Maritime Organisation 2005 HYPERLINK http://www.imo.org/Conventions/contents.asp?topic_id=256&doc_id=660.24 April 2005.
45 Glazewski *Environmental Law in South Africa* 648.

certificate attesting to the fact that it carries adequate insurance and without said certificate, the ship may be prevented from trading.[46]

The 1992 CLC Convention functions in a supplementary relationship with the Fund Convention.[47] The CLC Convention is the first layer of protection and the Fund Convention is the second layer which offers additional protection to victims of oil pollution damage who do not get full compensation under the CLC Convention, usually because the damage exceeds the ship owner's liability limit.[48] The two conventions thus share many concepts and essentially work hand-in-hand in order to ensure full and efficient compensation of claims.[49]

2.4 *The Fund Convention*

The Fund Convention[50] may be regarded as a widely accepted and readily used compensation regime. This is evident in that in the Fund's first 6 years of existence it paid out approximately US$ 42 million on 16 claims.[51] One of the aims of the Fund Convention is the notion that the ship owners should not be expected to bear the entire responsibility for oil spills and that the oil industry itself should at least bear part of it.[52] This incorporation of the liability of the oil industry is in line with the polluter pays principle, [53] which would dictate that the

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46 Hill *Maritime Law* 440.
47 Originally the *International Convention on the Establishing of a Fund Convention for Oil Pollution Damage,* 1971.
48 Oosterveen 2004 *Environmental Law Review* 3.
49 Hill *Maritime Law* 441; Glazewski *Environmental Law in South Africa* 649.
50 The Fund Convention establishes the International Oil Pollution Compensation Fund.
51 Brubaker *Marine Pollution* 158.
52 Hill *Maritime Law* 441; Brubaker *Marine Pollution* 156.
53 The "polluter pays principle" suggests that the polluter should bear the cost of abating waste and restoring the environment to an acceptable condition. By compelling the polluter to bear the expense, the cost of these clean up measures is reflected in the cost of the goods and services that generate the pollution through their production or consumption. When the price of goods and services reflects their environmental costs, consumers are not challenged to gather and consider information concerning a good's or service's effect on the environment.

oil industry, which generates a large profit out of the international sale of oil, should share the environmental risk inherent in shipping copious amounts of oil around the world.[54] Thus the Fund receives its contributions from persons in a member state who receive more than 1 500 tonnes of oil annually. Although South Africa has been a party to the CLC Conventions since 1978,[55] it only became a member of the Fund Convention on 1 October 2005.[56] As a result, it is necessary to understand the working of the Fund, should the need arise to claim from it.

The Fund Convention establishes a worldwide inter-governmental organisation that provides compensation for oil pollution damage resulting from spills from tankers. It is to be recognized in each member state as a legal entity capable of suing and being sued and having rights and liabilities.[57] The Fund receives its finances from those persons in a member state who receive more than 150 000 tonnes of oil in one calendar year. Each contributor pays a specified amount per tonne of oil received. The amount to be levied is decided on annually by the Fund Assembly.[58]

Compensation under the Fund is to be paid where the CLC Convention has proved to be inadequate, either because no liability has arisen under the CLC Convention, the offending owner cannot meet his financial responsibilities in full, or because the total value of the damage exceeded the owner's liability as limited by the CLC Convention.[59] However, certain exceptions to the Fund's obligation

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Rather, because consumers prefer the least expensive goods and services, the consumer generally makes a decision based on price alone, in which the social and environmental costs of contamination are already embedded. Consequently, the polluter pays principle ensures that the choices made in the self-interest of the consumer further environmental responsibility. See Larsen *Vanderbilt Journal of Transnational Law* 542. See further in this regard Oosthuizen 1998 *SAJELP* 355-361.

54 Hughs *Environmental Law* 557.

55 N58 *Government Gazette* No. 5867 dated 21 January 1978.

57 Hill *Maritime Law* 441.

58 See June 2005 Explanatory Note on the Fund Convention; International Maritime Organisation 2005 http://www.imo.org 20 July 2005.

59 Hill *Maritime Law* 441.

may apply. The Fund will not compensate if the damage was caused by an act of war or hostilities, or if the oil escaped from a warship or other ship owned or operated by a state. Neither will it pay if the claimant cannot show that the damage resulted from an incident involving at least one ship or, if the pollution was as a result of an act or omission, committed by the person who suffered damage, with the intent to cause such damage.[60]

In order for a claimant to institute a claim against the Fund, it must meet certain requirements. These are: firstly, that any expense, loss or damage must actually have been incurred; secondly, any expense must relate to measures that are considered reasonable and justifiable; thirdly, the expense, loss or damage must be considered to be caused by contamination resulting from the spill; fourthly, there must be a reasonably close link of causation between the expense, loss or damage, and the contamination caused by the spill, it must be a quantifiable economic loss. Lastly, a claimant has to prove the amount of his or her expense, loss or damage by producing appropriate documents or other evidence.[61]

The definition of pollution damage, as discussed in paragraph 1 above, is a combination of an open concept of damage and an open concept of causation. This created the flexibility that enabled the Fund to develop to a large extent its own doctrine in respect of liability and compensation for oil pollution damage.[62] The claims that can be instituted fall into three categories, these being: costs for preventive measures, compensation for loss of profit, and claims for reinstatement of the environment. In order to assist in the homogenisation of claims under the Fund Convention in different jurisdictions, the IMO developed a claims manual which sets out to what extent these three components of pollution damage may be claimed for. The provisions of this manual are discussed below.

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60 Article 6(3) of the Fund Convention.

61 Claims Manual 11 of the Fund Convention; International Maritime Organisation 2005 http://www.imo.org 20 July 2005.

62 Oosterveen W 2004 *Environmental Law Review* 3.

With regards to claims for preventive measures, the claims manual provides that clean-up operations are generally considered to be preventive measures, as, such measures are usually intended to prevent or minimise pollution damage. Costs for preventive measures, taken in the case of a grave and imminent threat of pollution damage, even if no pollution occurs, can be claimed for. It is, however, required that the measures taken were in proportion to the threat posed.[63] The test of reasonableness is an objective test made on the basis of all relevant facts and information available to the person taking the measures.[64] Loss or damage caused by reasonable measures to prevent or minimise pollution can also be claimed for.[65]

In terms of damage that causes loss of profit, the claims manual sets out two scenarios. Either there is a loss of profit due to consequential loss, which is when the loss or damage occurs as a result of damage to the claimant's property. For example, when fishermen cannot fish because their nets have been damaged by the oil that was spilt.[66] The second scenario, termed pure economic loss,[67] would be the loss derived from the inability to generate income because the sea may be polluted or because there may be a fishing ban. Compensation is claimable for pure economic loss but only if a sufficiently close link of causation exists between the contamination and the loss or damage. When considering whether such a close link exists, the Fund takes certain factors into account. These are: the geographic proximity of the claimant's business activity to the contaminated area; the degree to which a claimant's business is economically dependent on an affected resource; the extent to which a claimant had alternative sources of supply or business opportunities; and the extent to which a claimant's business

63 Claims Manual 22; International Maritime Organisation 2005 http://www.imo.org 20 July 2005.
64 Oosterveen 2004 *Environmental Law Review* 4.
65 Claims Manual 21; International Maritime Organisation 2005 http://www.imo.org 20 July 2005.
66 Claims Manual 25 International Maritime Organisation 2005 http://www.imo.org 20 July 2005.
67 See further in this regard Kotze 2002 *SAYIL* and Scott 2001 *THRHR* 681-689.

forms an integral part of the economic activity within the area affected by the spill.[68]

The last category provided for in the definition of pollution damage is for the reasonable costs of actual reinstatement of the environment.[69] To determine the 'reasonableness' of reinstatement measures the Fund takes into consideration criteria such as: that the measures, significantly speed-up the natural process of recovery, that the reinstatement measures prevent further damage as a result of the incident, that the measures are technologically feasible and that the costs of the measures are not out of proportion to the extent and duration of the damage and the benefits likely to be achieved.[70] The Fund will not compensate where the damages are of a punitive nature based on the degree of fault of the ship owner.[71] Compensation for damage caused solely to the intrinsic value of the environment cannot be claimed as these claims are essentially unquantifiable.

2.4 *The 2003 Supplementary Fund*

It soon became evident that should a major oil spill occur, the costs of the damage would far exceed the Fund's financial capacity. Thus the Fund Assembly sought a way to enhance the amount the Fund could make available for compensation claims. It was realised that even with the 50% increase of contribution levies, the Fund would still fall short in the event of a serious oil spill disaster. The final answer to this problem was to develop a third layer in this protection scheme, by adding a Supplementary Fund.

The Supplementary Fund Protocol was adopted in May 2003.[72] This Protocol was established in order to make a larger amount of compensation available to

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68 Claims Manual; 25 International Maritime Organisation 2005 http://www.imo.org 20 July 2005.
69 Article 2 of the Fund Convention.
70 Burlington *Environmental Law Review* 86.
71 Burlington *Environmental Law Review* 86.

claimants, without the need to drastically change the system as it was.[73] The Supplementary Fund builds fully on the 1992 Fund without having to do its own assessment of claims. This provides for a greater amount available for compensation, by creating a second Fund from which claimants can draw, without complicating the process and still allowing for speedy compensation. The Protocol uses the concept of an "established claim", which is defined as a claim which has been accepted as admissible either by the 1992 Fund, or by a binding and final decision of a competent court, and which would have been fully compensated but for the limit of the 1992 Fund Convention.

From the above it can be seen that, internationally there exists a comprehensive oil pollution compensation regime. The international regime must, however, be incorporated into domestic legislation in terms of certain Constitutional requirements. In the following paragraph the South African oil pollution legislation and environmental liability systems are investigated in order to establish how the MARPOL and CLC Conventions have been incorporated into our law and to determine how the Fund Convention will fit into this system.

3 South African law

For the purpose of this dissertation, the South African legislation dealing with marine pollution control is investigated in two categories. These are firstly, statutes of general application, and secondly, statutes specifically dealing with pollution from ships and shipping.[74] This paragraph includes an investigation into the common law position for the institution of a claim for environmental damage.

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72 South Africa has, however, not yet acceded to this Protocol.
73 Oosterveen 2004 *Environmental Law Review* 6.
74 Glazewski *Environmental Law in South Africa* 635.