

Principle of Obligation to Pay in Terms of Pollution at Sea

Lynda Asiana¹, Supanto², Hari Purwadi³

¹ Student of Doctoral Program Faculty of Law Universitas Sebelas Maret, Surakarta – Indonesia

^{2,3} Universitas Sebelas Maret, Surakarta – Indonesia

lyndaasiana@yahoo.co.id

Abstract—One of the basic rights for all citizens is the right to a healthy environment. UNCLOS contains general provisions relating to environmental issues. One of UNCLOS's provisions is that States have the obligation to protect and preserve the marine environment. In terms of legal substantial, as a form of the constitutional mandate imposed on the government of the Republic of Indonesia is with the approval of the House of Representatives, the president ratified the legal regulations namely Law No. 32 of 2009 concerning Environmental Protection and Management and Law No. 32 of 2014 concerning Maritime Affairs. The principle of obligation to pay for pollution is regulated by the Organization for Economic Co-Operation and Development (OECD) in 1972. Regarding the Competence of Courts, the follow up of compensation in accordance with the CLC can only be done based on the court decision of the member state of the convention in the territorial environment where the sea accident occurred. If accidents and pollution occur in Indonesian marine, the investigation of the case is carried out by the Indonesian court based on the applicable laws and regulations. Legal liability in accordance with the CLC convention applies the Strick Liability principle with the exception of damage as a result of war or natural disasters, as a result, and sabotage of another party or damage caused by another party does not maintain navigation aids properly. In the Elucidation of article 87 of Law No. 32 of 2009 it is stated that the perpetrators of pollution in addition to paying compensation, the judge can burden the pollution perpetrators to take certain legal actions, for example, orders for a. installing or repairing waste treatment units so that the waste is in accordance with specified environmental quality standards; b. restore environmental functions; and/or c. eliminate or destroy the cause or emergence of environmental pollution and/damage.

Keywords—Pollution, Obligation to Pay, Compensation, Pollution Prevention.

I. INTRODUCTION

The development of science and technology, especially marine technology has enabled the increasing activity and ability of humans at sea. Efforts to exploit and explore marine resources as a form of increasing human activity, especially for the interests of corporations in the final analysis actually become a factor causing pollution of the marine environment that extends beyond national borders. Pollution of the marine environment caused by the nature of the sea and the geographical shape of the marine environment and the current currents and weather have caused two or more countries to feel the

impact. On that basis, sea pollution that occurs in a particular country often has a transnational impact.

There are four factors that influence transnational forms of sea pollution. They are: a) Natural marine environment; b) Weather and oceanographic characteristics; c) Offshore petroleum activities; d) The development of science and technology

According to Law No. 32 of 2009 concerning Environmental Protection and Management states that environmental pollution is the entry or entry of living things, substances, energy and / or other components into the environment by human activities so that they exceed the prescribed environmental quality standards (Article 1 paragraph 14). Meanwhile, according to the Office of the Ministry of Life and the Environment, marine pollution is a substance or energy, directly or indirectly by human activities into the marine environment including coastal areas so that it can cause adverse effects both on natural biological resources, human health, disruption to activities at sea, including fisheries and other uses that can cause a decrease in the level of sea water quality and reduce the quality of housing and recreation.

The serious impact of marine pollution, besides damaging marine biological resources that extend beyond national borders, is damage that occurs outside the sea area. It is a common symptom, that the result of industrial waste which is disposed of at sea which is immediately apparent is the change in the physical condition and the designation of an environment. River water or well water in the industrial location sector is polluted, which was originally clear in color, turned turbid, bubbly, and foul-smelling so that it is no longer feasible to be used by residents around for the purposes of bathing, washing, especially for drinking water raw materials. From the health aspect of the surrounding community, the impact of industrial waste has the potential to cause illnesses from mild diseases such as itching on the skin to the severe form of genetic defects.

Based on *Walhi's* observation, almost all regions of Indonesia have experienced industrial pollution at various scales and in various forms. Since its inception, the industrial sector has often caused problems, for example: location of factories close to residential areas, land acquisition is problematic, community members are not involved in making policies, poor quality

AMDAL/Analisis Mengenai Dampak Lingkungan (AMDAL, Environmental Impact Analysis, tends to be more formalistic to meet the requirements of a company), often there is no sewage treatment. Other impacts that arise are air pollution, water pollution, noise, and garbage. All these impacts are the main factors causing the riots that occur in the midst of the community. Community life becomes more vulnerable because of poor environmental quality due to poor environmental management.

In addition to sea pollution due to industrial waste, oil vessel leakage and oil pipeline leakage on the seabed, there is also sea pollution caused by sea accidents. Some cases related to marine pollution are:

- a. The collision of a Libyan-flagged oil carrier and a Singapore-flagged freighter in Singapore waters. The collision of the two ships occurred about 11 miles northeast of Pedra Branca, a remote island which is the easternmost point in Singapore. Oil spills from ships have polluted the oceans and their impact on the territorial islands of Indonesian waters. The most threatened island is the island of Bintang because the collision location is only 18.6 nautical miles north of the island of Bintang. Approximately 4,500 tons of oil due to the collision of the two ships spilled in the waters of Singapore which coincidentally borders the territorial waters of Indonesia. The waters of Indonesia and the nearby islands from the collision of the ship have been polluted and have caused material losses for local residents. The material loss in the collision event in the form of damage to the polluted environment and disturbed livelihoods due to the impact of environmental pollution has made the community uneasy, and the community demands that the Government not remain silent. They asked the Government to submit legal remedies to resolve the collision case.
- b. The Lapindo mudflow case in Sidoarjo, which until now has not been completely resolved. This case is obviously very detrimental to the wider community, especially the communities where their dwellings were directly affected by Lapindo mud.
- c. The case of North Sulawesi Buyat Bay pollution. Seawater pollution is caused by the result of heavy metals arsenic (As) and mercury (Hg) that have passed the threshold determined by law. In this case, PT. Newmont Minahasa is a company that is accused of being the culprit of seawater pollution because it dumps sailing (rock and soil extracted from gold ore) into the seabed in Buyat Bay. We are reminded by the Minimata tragedy that occurred in Japan in the 1960s which could also occur in Indonesia. The impact of the Minimata case was that the surrounding community who consumed fish in Minimata's custody suffered from neurological disorders and cancer that occurred after a dozen years of stone battery and battery companies that were operating there.
- d. MT Southern Mermaid Ship Case

The MT Shouthern Mermaid ship is an agency ship of PT. Serasi Shipping Indonesia. On Sunday, November 17, 2013, there was an incident of an oil spill from the MT Shouthern Mermaid ship in the Ciwandan waters of Banten caused by collision and oil leakage. The Government of Indonesia through the Ministry of Transportation's Directorate General of Sea Transportation is arresting the MT Shouthern Mermaid Ship with the aim of preventing oil spills in the wider sea.

The significance of the four cases stated above is related to the regulation on the obligation to pay compensation for perpetrators of water pollution at sea and the form of legal responsibility in the event of seawater pollution as referred to in Article 35 paragraph (1) of Law no. 32 of 2009. Article 35 of Law No. 32 of 2009 reads:

- (1) The party responsible for a business and/or activity whose business and activities have a major and significant impact on the environment, which uses hazardous and toxic materials, and/or produces hazardous and toxic material waste, is absolutely responsible for the losses incurred, with the obligation to pay direct and immediate compensation at the time of environmental pollution and /or damage.
- (2) The party responsible for a business and/or activity can be freed from the obligation to pay compensation as referred to in paragraph (1) if the person concerned can prove that environmental pollution and/or damage is caused by one of the following reasons:
 - a) Natural disasters or warfare; or
 - b) The existence of circumstances forced beyond human ability

Based on Article 35 of Law No. 32 of 2009 above, there are two things that need to be underlined, namely the regulation of the obligation to pay compensation and the form of responsibility for the perpetrators of seawater pollution. On the basis of these two things, it is necessary to formulate a problem in accordance with the title of this paper. *First*, How is the regulation regarding the obligation to pay compensation for perpetrators of water pollution at sea? And *Secconf* What is the form of legal responsibility in the event of sea water pollution?

II. RESEARCH METHOD

The research method used in this study is a juridical normative approach to the statute approach and conceptual approach. The specification of this research is descriptive research. The data used in the form of secondary data with the main material in the form of primary legal materials (legislation) and secondary legal materials in the form of literature text books and scientific journals on integrated assessments in narcotics crime. The data obtained were analyzed using qualitative analysis..

III. FINDINGS AND DISCUSSION

1. Arrangement of Obligation to Pay Compensation for Pollutants at sea

International Arrangements

1) *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping) 1972*

This convention is an extension of the contents of the Stockholm Convention. The purpose of this convention is to protect and preserve the marine environment from all forms of pollution. Protocol participants are obliged to harmonize their policies with this Convention. For this reason, based on this Convention, protocol participating countries are obliged to:

- a) Applying the *precautionary approach* to protect the marine environment from the disposal of waste or other materials.
- b) Implementing the *polluters pays principle*, namely the perpetrators of pollution must bear the cost of pollution.
- c) Participating countries may not cause damage to another environment or change one form of pollution to another.
- d) Prohibiting the discharge of any waste or other toxic material into the sea.
- e) Implementing administrative or legal requirements to guarantee that the issuance of permits and licensing requirements is in accordance with attachment 2 of the 1996 Protocol.

Exceptions to the obligations of the participating countries of the convention above are the necessity to obtain permits and burn at sea when an emergency arises due to pressure or weather, and in the event of a threat to human life and disposal is the only way to avoid the threat.

2) *International Convention for the Prevention of Pollution from Ships 1973 / 1978*

This convention is an international regulation which aims to prevent pollution at sea. Every system and equipment on board supporting this regulation must be certified by the class. This convention does not prohibit the disposal of pollutants into the sea, but rather regulates disposal methods so that the sea is not polluted so that the marine ecosystem is maintained.

3) *The International Convention on Oil Pollution Preparedness Response and Cooperation (OPRC)*

This convention states that if accidents and pollution occur at sea, appropriate measures must be taken to deal with pollution. For this reason, the aim of this convention is to encourage cooperation between emergency response plans on board, offshore and petroleum agencies and their loading and unloading facilities, together with national and regional emergency response plans. Another goal is

that convention countries provide co-operation facilities and help one another in providing and dealing with large pollution occurring, and encourage convention participating countries to develop and maintain the ability to tackle pollution together. This togetherness is needed because water pollution at sea often goes beyond national borders. Thus, the overall maritime environment sustainability will be created.

4) *United Nation Convention on the Law of Sea (UNCLOS) 1982*

UNCLOS 1982 is one of the provisions governing the most complete and successfully agreed sea issues by 130 participating countries. Since UNCLOS entered into force in 1994, in 1999 UNCLOS has been ratified by 130 countries and the charter has been deposited with the UN Secretariat General including Indonesia.

UNCLOS general provisions is relating to marine environment issues include protecting and preserving the marine environment. Article 192 UNCLOS states the obligations of the participating countries, namely:

- a) Obligations of participating countries to protect and preserve their marine environment.
- b) Obligations of participating countries to adapt their policies to the provisions of UNCLOS (Article 194 Paragraph 1)
- c) Obligation not to divert damage or danger or transfer one kind of pollution to another form (Article 196)
- d) The use of new technology or entry of foreign or new forms must meet the provisions of UNCLOS 1982
- e) UNCLOS participating countries need to conduct global and regional cooperation in order to preserve the marine environment for the common good.

National Legislation

1) Law No. 32 Tahun 2009

UU No. 32 Tahun 2009 UU no. 32 of 2009 clearly regulates the principle of polluter pays in Article 87 of Law No. 32 of 2009 In the Elucidation of article 87 of Law No. 32 of 2009 it is stated that the perpetrators of pollution aside from being burdened to: pay compensation, the judge can burden the pollution perpetrators to take certain legal actions, for example orders for a. installing or repairing waste treatment units so that the waste is in accordance with the specified environmental quality standards; b. restore environmental functions; and or c. eliminate or destroy the cause or emergence of environmental pollution and damage.

2) Law No. 32 of 2014

Law No. 32 of 2014 is concerning Maritime Affairs does not explain the meaning of the principle of polluter pays, but in Article 52 paragraph (3) it is stated that the process of dispute resolution and the application of the Marine Pollution sanctions referred to in paragraphs 1 and

2 are carried out based on the principle of polluter pays and the precautionary principle.

First, Limitation of Liability. Claims for damage to pollution under the CLC Convention can only be directed to registered ship owners. This does not prevent victims from claiming compensation outside this convention from anyone other than the owner of the ship. However, the convention prohibits making claims to representatives or agents of shipowners. Shipowners must resolve claims from third parties based on applicable national law.

Second, Compulsory Insurance. Tankers who carry more than 2000 tons of persistent oil are required to insure their ships to cover claims arising under the CLC Convention. Each tanker must bring the insurance certificate in question, ships entering the port of a CLC Convention member country, even though the flag state of the ship is not a member of the convention, are still required to bring the insurance certificate.

2. Form of Legal Liability About Sea Water Pollution

International Arrangements

UNCLOS regulates the issue of responsibility and obligation to pay compensation relating to the protection and preservation of the marine environment. Article 235 of UNCLOS confirms: Each State is responsible for carrying out international obligations regarding the protection and preservation of the marine environment, so that all States must bear the obligation of compensation in accordance with international law. Article 223 UNCLOS states that states must take measures to facilitate the hearing of witnesses and the submission of evidence presented by the authorities of other countries or by competent international organizations, and must facilitate attendance at such sessions official representatives from competent international organizations, flag states and any countries affected by pollution caused by each violation. Official representatives who attend the sessions must have rights and obligations in accordance with national legislation and international law. The owner of the tanker has the obligation to pay compensation for damage to pollution caused by oil spills and his ship in an accident. The owner can be free from the obligation to pay compensation with the reasons: 1. Damage as a result of war or natural disasters; 2. Damage due to and sabotage of other parties, or 3. Damage caused by because the authorities do not maintain navigation aids properly.

According to UNCLOS, each country must have laws and regulations regarding immediate and adequate compensation for damages caused by pollution of the marine environment by persons or legal entities in this case the companies in their jurisdiction. UNCLOS further stated, that each State must cooperate in applying international law governing responsibility for the obligation to pay compensation for compensation for losses due to pollution of the marine environment, and

also payment procedures such as mandatory insurance or insurance funds.

Regarding civil liability is regulated in the 1969 *International Convention on Civil Liability for Oil Pollution Damage*. This convention is a convention on compensation for marine pollution by oil due to tanker accidents. This convention applies to pollution of the territorial marine environment of States parties to the convention.

In the case of compensation for the pollution of the marine environment, the principle used is the Absolute Responsibility Principle. In Article 229 of UNCLOS, none of the provisions in this convention will affect the implementation of civil prosecutions with regard to loss or damage arising from pollution of the marine environment.

Finally, Article 235 paragraph (3) of UNCLOS states that the aim is to guarantee immediate and adequate compensation related to all losses caused by pollution of the marine environment. Countries must cooperate in implementing applicable international law and the development of international law relating to the responsibilities and obligations of paying compensation for assessments of compensation for damages and settlement of disputes that arise. Likewise, if deemed necessary, the development of criteria and procedures for payment of adequate compensation such as compulsory insurance or compensation funds.

National Arrangements

Regarding the obligation to pay compensation of water pollution at sea is contained in Article 35 of Law no. 32 of 2009 concerning Environmental Protection and Management. Article 35 states:

Paragraph 1

The party responsible for a business and/or activity whose business and activities have a major and significant impact on the environment, which uses hazardous and toxic materials, and/or produces hazardous and toxic material waste, is absolutely responsible for the losses incurred, with the obligation to pay compensation in a manner direct and instantaneous at the time of environmental pollution and/or damage.

Paragraph 2

The person in charge is responsible for a business and/or activity can be freed from the obligation to pay compensation as referred to in paragraph (1) if the person concerned can prove that environmental pollution and/or damage is caused by one of the reasons below:

- a) Natural disasters or warfare; or
- b) The existence of circumstances forced beyond human ability; or

- c) Third party actions that cause environmental pollution and/or damage.
Paragraph 3

A loss caused by a third party as referred to in paragraph (2) letter c, the third party is responsible for paying compensation. Based on Article 35 of Law No. 32 of 2009 it is clear that the form of legal liability in the terms of seawater pollution is the Absolute Liability called Strict Liability. According to the strict liability doctrine, a person can already be accounted for certain criminal acts even though there is no error in that person (Men's Rea). In short, strict liability is defined as "liability without error". Article 35 of Law No. 32 of 2009 is an exception to Article 1365 of the Civil Code (Onrechtmatigedaad) which obliges to prove the occurrence of violations of the law that were carried out intentionally or neglected and cause harm.

The phrase "*Absolute Liability*" was used for the first time by John Salmond in a book called *The Law of Tort* in 1907. Meanwhile, the expression strict liability was put forward by W. H. Winfield in 1926 in an article titled *The Myth of Absolute Liability*.

According to L.B. Curson, the strict liability doctrine is based on the following reasons:

- a) It is very important to ensure that certain important rules are adhered to for social welfare
- b) Proving the existence of *mens rea* will be very difficult for violations related to social welfare
- c) The high level of social danger caused by the act in question.

Although in Law No. 32 of 2009 is not explicitly stated exceptions to the doctrine of *Strict Liability*, but pollutants are still given the opportunity to prove that the perpetrators are innocent. Based on the *Restatement of Torts* § 519, that must be proven in *strict liability* are:

- a. The defendant's activities included in the abnormally dangerous activity, the measure of *abnormally dangerous activity* in the *torts* is:
 1. There is a high level of risk of harm to people, land or other movable property
 2. That the possibility of the danger generated (from its activities) will be large
 3. Inability to eliminate risk (from its activities) with the appropriate activities/ implementation
 4. The extent to which these activities are special or not a general matter
 5. Inaccuracy of activity to the place where the activity is.
 6. Whether the value of the activity proportional to the level of danger that might occur to the community
 7. The plaintiff still has to prove that *the damage was caused by some's act*. That is, the plaintiff still has to prove.
- b. Loss
- c. Causality

The responsibility of *strict liability* that does not cover the perpetrators of pollution to prove that he is innocent can be equated with reverse proof (*omkering van bewijslast theorie*) in criminal acts of corruption Article 37 of Law No. 31 of 1999. The reason underlying this reverse proof is, that the defendant still needs legal protection that weighs on violations of fundamental rights relating to the "*presumption of innocence*" and "*non self-incrimination*".

Aside from *strict liability*, in the terms that the perpetrator is a corporation, *vicarious liability* may also be liable. *Vicarious liability* is a criminal liability that is imposed on someone for the actions of others (*the legal responsibility of one person for the wrongful acts of another*). A concrete example is if there is a malpractice of a doctor in a hospital. Hospitals may be liable for *vicarious liability* for *malpractice* carried out by hospital doctors.

IV. CONCLUSION

Arrangements regarding the obligation to pay compensation by perpetrators of water pollution at sea are scattered in international conventions and national legislation which have ratified international conventions, especially in UNCLOS 1982, Law no. 32 of 2009 and Law No. 32 of 2014.

The form of legal liability in the terms of water pollution at sea is the responsibility of strict liability balanced with certain restrictions and vicarious liability legal liability.

REFERENCES

- [1] H. Poedjiastoeti, *Telaah Pencemaran Laut dan Pengelolaan Lingkungan di PP Morodemak Kabupaten Demak*, Makalah Seminar Nasional: *Research Sebagai Dasar Kebijakan Publik dan Implementasi di Sektor Industr*. Semarang: Lembaga Peneliti (LEMLIT) Universitas Islam Sultan Agung (UNISSULA), 2006.
- [2] B. Nawari Arief, *Pelengkap Bahan Kuliah Hukum Pidana*. Semarang: Badan Penerbit FH Undip, 1984.
- [3] E. Saefullah Wiradipradja, *Tanggung Jawab Pengangkut dalam Hukum Pengangkutan Umum Internasional*, Disertasi. Yogyakarta: Liberty, 1989.
- [4] B. Nawawi Arief, *Op.cit*.
- [5] I. Seno Adji, *Korupsi dan Pembalikan Beban Pembuktian*. Jakarta: Kantor Pengacara dan Konsultan Hukum Oemar Seno Adji dan Rekan, 2006.
- [6] R. Atmasasmita, *Asas-asas Perbandingan Hukum Pidana*. Jakarta: Yayasan Lembaga Bantuan Hukum Indonesia, 1989.