

Responsibility and Liability of Marine Pollution by Oil *Balikpapan Bay Pollution Case*

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Abstract: Incidents of marine pollution occurred once more in Indonesian waters. It took place in Balikpapan Bay on March 31, 2018 due to the fact that PT Pertamina, Co. subsea pipeline was cut off then the crude oil contaminated the sea. The problem is all about who is responsible and liable in restoring those destructions?, It also the problem how to enforce the law on this case. Based on the collected data, there come up casualties, environmental pollution and the fishermen's losses. This research methode uses juridical-normative together with the statute and conceptual approach. The purpose is to recognize how the law enforcement in environmental pollution does and who the responsible person is. The result of the research stated that the main focus of the effort has been done to overcome the emergency post-oil spill occurred in various ways, in line with Presidential Regulation No. 109/2006, including the polluter pays principle and strict liability. This is in accordance with the 1992 Civil Liability Convention and Convention on Compensation for Oil Pollution Damage 1971. Meanwhile, consistent with Law No. 32/2009, the polluters are also compulsarily required to restore the environment from damages to the marine ecosystem. Therefore, the government may apply for additional compensatory restoration.

1 INTRODUCTION

Environmental pollution occurs in waters resulting in the damage of marine ecosystem, coastal community losses and environment. The source of the pollution at sea is caused by land, oil, ships, dumping, exploration and exploitation activities from air space and others that cause damage to the marine environment. (Patricia Birnie et.al, 2009)

One of the activities on exploration and exploitation in a sea are offshore mining or laying down the pipelines or cables in underwater. When the owner wants to install the structure or laying down the pipelines or cables, they should have a permission or an agreement from coastal state eventhough an agreement of the zone belongs to EEZ and Continental Shelf. The regulation of laying down the pipelines or cables is regulated in UNCLOS 1982 and several national laws in Indonesia.

In Indonesia, there are many cases of marine environment pollution as it happened in the Bay of Balikpapan, on March 31, 2018. The case is quite popular and pay a public attention. This incident began when Panama's MV Ever Judger ship, transporting coal to Balikpapan, crossed to

Balikpapan Bay. Since the condition Balikpapan Bay is not too deep (approximately 25 meters closed to the seabed), so before the docks, the Port States has sent a sea patrol ship to guide this coal carrier ship into the port. Balikpapan Bay has a several "red zones" because there is a seabed pipelines used to deliver crude oil connecting between Lawe-lawe Terminal and Pertamina's Balikpapan oil refinery. (Mongabay, 2018)

Based on the testimony of the witness, there are both miscommunication and misinterpretation between the Captain of the MV vessel Ever Judger and the Captain of the Sea Patrol ship. According to the Captain (a chinese), the anchor of the ship can put up to 1 meter above the surface of the sea. But the Captain dropped the entire ship's anchor of 27.5 meters longer 'till it reached the seabed. It resulted in the breaking up of Pertamina's oil pipeline. The breaking up of the oil pipe caused the pollution in Balikpapan bay, blackened seawater including fire caused victims of 5 fishermen. The police set the ship's Captain MV Ever Judger as a suspect. In relation to pollution in Balikpapan Bay due to oil spill, The question came up; who is the responsible

for the incident, and how the liability system and recovery should work.

2 DEFINITION OF BAY

International law always recognizes that Bays have a close connection with land and it is more appropriate that they should be considered as internal waters than as territorial sea. International customary law recognised that the baseline could in principle be drawn across the mouth of bays, enclosing them as internal waters. But, customary international law fails to provide clear rules on two essential points: the criteria of by which an indentation of the coast would be recognised as a bay and the maximum length of the closing line across a bay. (Churchill, 1999: 41)

The territorial sea convention, in article 7, established clear and precise rules for the determination of both herbs and the convention article 10. At the outset it should be noted that these rules do not apply to cases where the coasts belong to more than one state. (Churchill, 41)

According to article 1 point 7 of Law 6/1996 on Indonesian Waters, the meaning of the bay is a distinct indentation whose penetration is in proportion to the width of its mouth until the concealed seawater is more than a mere coastal arch, but a notion is not a bay unless the area is wider or wider than the area of the semicircle which is in the middle drawn across the mouth of the indentation.

3 REGULATIONS OF MARINE POLLUTION BY OIL

3.1 International Treaties

- International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969
- International Convention on Civil Liability for Oil Pollution Damage (CLC) 1969
- International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND) 1971
- International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER) 2001
- United Nation Convention on The Law of The Sea (UNCLOS) 1982

3.2 National Regulations

- Law Number 6 of 1996 on Indonesian Waters
- Minister of Transportation Regulation Number 94 of 1999 on the Protection and Security Communication System Underwater
- Law Number 32 of 2009 on Protection and Management Human Environment (UU 32/2009)
- President Decree Number 109 of 2006 on Emergency response of Oil Spill at Sea (Perpres 109/2006)
- Minister of Transportation Regulation Number 58 of 2013 on Pollution Control in Waters and Ports (Permen 58/2013).
- Minister of Transportation Regulation Number 71 2013 on Salvage and/or underwater work.
- Government Regulation Number 101 of 2014 on Toxic and Hazardous Waste Mangement (PP 101/2014)

4 STATE RESPONSIBILITY AND LIABILITY ON MARINE POLLUTION

Arrangements on pollution of the marine environment, started in many cases of marine environmental pollution, caused by oil spills from ships, such as Torrey Canyon Case, 1967, Amco Cadiz 1978, Exxon Valdez 1989 and Sea Empress 1996. (Meinhard Doelle & Chris Tollefson, 2009) In Article 1 (4) UNCLOS, the so-called marine pollution is

“..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 living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and othe legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities”.

In order to preserve and protect the marine environment, States are required to take the necessary action against pollution occurring in their territory individually or jointly, such action shall be within its jurisdiction and captivity, and shall not transfer damage or harm or alter any type of pollution to in other types. (Article 195 of UNCLOS 1982) In maximizing the protection of the marine environment, the state is required to monitor and

analyze environmental assessments, in cooperation with competent organizations on an ongoing basis.

Related to laying down the subsea pipelines and cables regulations are found in Chapter II UNCLOS 1982 regarding territorial sea, stated that coastal States have a rights to establish the requirements on laying down and maintenance the subsea cables and pipelines which is located in territorial sea. Coastal State also can make a regulation to protect the subsea cable and pipelines in territorial sea.

If a marine pollution dispute occurs caused by broken or damaged pipelines or cables in underwater then there are environmental damages such as oil spill and harm the marine biota, according to that incident the polluters have to responsible to recover the environment and pay the compensation. It is based on the Polluter Pays Principle and the Absolute liability listed on the Law No. 32/2009.

4.1 State and Individual Responsibility

Under Principle 21 of the Stockholm Declaration of 1972, the principle of state responsibility has been formulated. Under this Declaration stated that States may exploit their resources as they wish but must not endanger others.

Then in the Second Principle of the 1992 Rio Declaration stated States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign rights to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of the other states or of areas beyond the limits of national jurisdiction.

Whereas in Law 32/2009, the State has the responsibility to protect and utilize the existing environment for the welfare of the people. Apart from the state, the community must also be responsible and protect and protect the environment. For regions which are unique that needs to be protected, then tankers are prohibited from passing in the area, also it must be announced to all ships that will cross the territorial sea. The Coastal States or Port States, and every ship must obey the provisions. Includes "red zones" are set by the Government of Indonesia for the Balikpapan Bay.

The principle of absolute liability contained in Law No. 32 of 2009 in Article 88, states that "any person whose actions, business, and / or management of hazardous and toxic materials waste, produce and / or manage hazardous and toxic materials waste and / or poses a serious threat to the environment responsible for absolute responsibility for losses

incurred without the need to prove the element of error ". Referring to the Balikpapan Bay case, the one responsible for the oil spill in the sea is the Captain's MV Ever Judger and the Government in this case is Pertamina, Co. has an obligation to make compensation payments to the surrounding community. (Tribun Kaltim, 2018)

In the International Convention on Civil Liability for Oil Pollution Damage, commonly known as Liability Convention 1976, stipulates that the obligation of the owner or operator of the vessel to provide compensation to the polluter who suffered loss or damage to the pollution of the marine environment by oil. The principle of indemnity used is strict liability, which is the obligation to pay compensation immediately after the loss, regardless of whether the ship is wrong or not, (Dina Sunyowati, Enny Narwati, 2011) This principle is a new development in the principle of liability based on fault. The principle of absolute liability can be exempted in 2 things: there is force majeure, or if a ship accident is caused by negligence of the state monitor to maintain good guidance and navigational aids. (IMO, 1954)

Implementation UNCLOS and national regulation concerning the subsea pipelines or cables should pay attention in several things, such as :

- Requires cooperation between the owner and the operator the subsea cables via International Cables Protection Committee
- UN don't have a special information of institutional framework for national legislation on underwater cables.
- The implementation of regulation on broken and damaged underwater cables still lacking
- Regulation related to install and laying down the subsea pipelines/cables in the Law No. 6/1996

5 CONCLUSIONS AND RECOMMENDATIONS

Currently the case is still continues and investigations are conducted to determine who is responsible for polluting oil spill in Balikpapan bay. In the interim, the police have appointed the ship's Captain of MV Ever Judger as a suspect. As an effort to prevent and obligate the State, Pertamina, Co. as the owner of pipelines in Balikpapan Bay compensates, reduces oil spill and restores the marine environment.

The government should review and emphasized the shipping lanes and marine navigation system and

inform the user. In addition, there is a need for monitoring and evaluation continuously of all parties and processes in the voyage, especially regarding areas where there are pipelines or subsea installations.

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