Civil Liability Issues Arising from Spills of Oil Cargo: Are International Agreements the Best Solution for Common Problem?

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***Abstract*—Civil liability issues arising from spills of oil cargo are internationally regulated through international agreements adopted under the auspices of the International Maritime Organization (IMO). Among major purposes of international agreements is to establish uniform rules and procedures regarding such relevant issues. Nevertheless, some influential maritime States are not fully participating in the relevant international agreements. Such attitude could jeopardize the common endeavor to achieve uniformity of the law and practices. This paper is an attempt towards achieving uniformity of the law and practices. To that endeavor, the author examined the background of relevant international agreements; scrutinized reasons for as well as challenges of limited participation of the United States of America; and comparatively studied the international agreements and national initiatives with particular focus on OPA 1990. Probably, one could realize the importance of collective and full participation of States in order to achieve uniformity purpose of international agreements.**

***Index Terms*—Civil liability, international agreements, oil pollution, uniformity.**

I. INTRODUCTION

Seaborne oil transport contributes to the pollution of the oceans. Initially, the use of oil as source of propulsion of the ships ignited the challenges of contamination of the oceans by oil [1]. As demand for oil as the primary energy source for the world has increased, transportation of oil by specialized vessels across the oceans has also increased. Consequently, the first initiatives at international level were preventive measures. Thus the adoption of the International Convention for the Prevention of Pollution of the Sea by Oil 1954 made oil the first ship-source pollutant to be regulated by international standards [2]. Recently, there are a number of other international agreements adopted for the purpose of protection of the marine environment, specifically for the prevention of oil pollution as well as to minimize its consequences once an oil spill occurs.

Civil liability and compensation issues arising from oil spills became serious international challenge when major oil spills proved to bring negative economic effects to the affected coastal States [3]-[4]. During that time it was also realized that there was a gap in international rules on such issues and therefore a need for specific rules [5]. Consequently, an attempt to encounter the challenges was considered by States under the auspices of the IMO. Currently, there are a number of international agreements regarding civil liability issues arising from seaborne oil trade.

There are some issues worthy being examined on the life of the international agreements on civil liability and compensation for oil pollution damage. Among other things, the adoption of such international agreements has always been triggered by the consequences of unprecedented oil spill [6]-[7]. Also, the United States of America (the USA) has not been fully participating in such agreements, thus jeopardize the purpose of international agreements [8]-[9]. Besides, until recently, there have been attempts to improve the relevant international agreements so as to achieve uniformity of the rules and procedures on civil liability for oil pollution damage [10]. Still, the international agreements stand in a better position to solve such common and complex issues; and uniform rules and procedures can be achieved through full participation of States.

II. INTERNATIONAL AGREEMENTS ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE CAUSED BY CARRIAGE OF OIL CARGO

The move for the adoption of international agreement for civil liability and compensation for oil pollution damage started when the negative effects of oil spills on the economy of affected States proved unbearable to individual States. Specifically the *Torrey Canyon* oil spill incident of 1967 brought about important legal issues concerning the liability and compensation for oil pollution damage. The *Torrey Canyon* ran aground on Pollard Rock in Seven Stones Reef off Lands Ends in England, causing oil pollution in the South Coast of England, up to the English Channel and across the West Coast of France. Among difficult legal issues included the choice of law, the choice of forum, proper offender, *locus standi*, availability of funds for clean-up purposes as well as for compensation for individuals affected by the incident [3].

It is worthy to note that, the States that were directly affected by the Torrey Canyon oil spill incident were in the forefront to request for assistance from the IMCO, currently the IMO, for the development of an international agreement to regulate complex issues of liability and compensation for oil pollution damage [6], [11]-[12]. Accordingly, the first international agreement for civil liability and compensation for oil pollution damage was adopted in 1969 i.e. the International Convention on Civil Liability for Oil Pollution Damage (1969 CLC).

With reference to the Preamble to the 1969 CLC, the

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creation of the 1969 CLC is rooted in the common desire of States to adopt international rules and procedures for issue of liability arising from oil pollution damage as well as to provide adequate compensation for the same. The 1969 CLC aimed to ensure availability of adequate compensation to persons who suffer pollution damage as a result of oil spill from ships. Such was reflected in the imposition of strict liability on the part of the ship-owner; introduction of compulsory liability insurance specifically for oil pollution damage; and the establishment of a system of additional fund for oil pollution damage through the International Oil Pollution Compensation Fund established under the 1969 CLC. While compulsory insurance is financed by the shipping interests, the additional fund is contributed by oil cargo interests; in that way oil spills have been made a shared responsibility within the industry.

In 1992, the 1969 CLC underwent a major amendment which was adopted in a form of a protocol i.e. the International Maritime Organization Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 1969 (1992 CLC Protocol). Among major changes brought by the 1992 CLC Protocol in the context of this paper is the increase in amount of compensation available and some improvements in the concept of 'pollution damage' [13]-[14]. To that effect, there is a proviso added to the definition of pollution damage that compensation is also payable for damage to the environment but in a stated limited manner.

It appears that at first, damage to the environment was not agreed to be included among compensable damage. Perhaps, the exclusion of environmental damage was logical considering the fact that compensation was not set at an amount that would reasonably cover for such claims. It could also be that the focus was on the protection of the economic interests of victims of oil pollution damage, as well as on clean-up costs and measures to prevent or minimize damage. Nevertheless, with lapse of time, the has been increased awareness and active involvements of communities in environmental issues, thus the current increased need for inclusion of environmental per se as compensable damage under the international agreements [15]. It is therefore, a high time for the State parties to reason together and make rightful decision on whether to cover for claims for environmental damage per se or not.

Recently, there has been established another tier of additional fund to cover claims for oil pollution damage i.e. the Protocol of 2003 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (2003 Supplementary Fund Protocol) [7]. The 2003 Supplementary Fund Protocol provides an increased responsibility to the shipping and oil industries, but in return a better protection for victims of oil pollution damage. So far, this tier of additional fund has not been applied in any oil pollution incident.

It is submitted that through international agreements there is well-established international rules regarding civil liability for oil pollution damage caused by ships carrying oil cargo in bulk. Nevertheless, considering some changes brought over time as well as the changing priorities, there has been a need to make some amendments necessary for the improvement of the rules and to provide better protection to the victims of oil pollution damage. Such amendments have proved to be acceptable and useful.

III. Participation of States in the International Agreements

A. Deliberations and Acceptance

Participation of States in the international agreements could take three important processes. Explicitly, let us discuss from the time of deliberations for adoption, through the time of signature, ratification and accession, to the implementation of the relevant international agreements (though the implementation process is not within the scope of this paper).

The international community is comprised of many sovereign States. Such States are neither equally endowed nor equally developed. Let us look at State Members to the IMO as the custodian of the relevant international agreements on civil liability for oil pollution damage caused by ships carrying oil in bulk. One can find that State Members to the IMO range from major coastal States like Canada, Indonesia, Russia, and Philippines, to very small or even landlocked States like DR Congo, Austria, Azerbaijan and Luxemburg. Also, among members of the IMO there are flag States, port States and others that are neither flag States nor port States. All these States share some common agenda for being part of the IMO, being it the need for peaceful interrelations or the protection of self-interests in relation to shipping and marine environment.

Therefore, during deliberations for the adoption of relevant international agreements, participation of all Member States and stakeholders is of utmost importance. Despite the acknowledging of the common problem, the existence of different interests makes deliberations for international agreements rather complex discussion. At the long end States come to a compromised decision. Such negotiated decision might not make each State fully satisfied. The same happened during deliberations for the adoption of the international agreements for civil liability for oil pollution caused by carriage of oil in bulk. Among negotiated issues include the channeling of liability to the owner of the ship, basis of liability whether to be strict liability or fault liability, and subsequent limits on liability[16]. Therefore, one could say that the adopted international agreements are purely the outcome of compromised position of actors in the relevant international arena.

After the adoption of the relevant international agreements on civil liability for oil pollution caused by ships carrying oil in bulk, the acceptance of the same has been noticeably wonderful. As at 10 October 2012, the number of State parties to the 1992 CLC Protocol has reached 108, including the top ten largest coastal States except the USA. Measuring from the level of acceptance globally and the ability demonstrated by the international agreement in resolving issues, one would not deny that it has been an accomplishment [17].

Nevertheless, the acceptance of the additional fund for oil pollution damage has not been correspondingly outstanding. It is noteworthy that only States that have accepted the 1992

CLC Protocol are eligible to accept relevant international agreements for additional fund. Among the top ten largest coastal States, Indonesia and the Peoples' Republic of China have disregarded the relevant international agreement for additional fund for oil pollution damage i.e. the International Maritime Organization Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971 (1992 Fund Convention). Under the 1992 Fund Convention, State parties are obliged to submit to the International Oil Pollution Compensation Fund (the IOPC Fund) financial contributions levied from oil importers in the respective States as prescribed under the international agreement. It is not surprising that, most States that have joined the 1992 CLC Protocol but not the 1992 Fund Convention do not want to incur the responsibility to contribute for additional fund basically in the protection of self-interest especially in connection with national economy [18]. Such could be reasonable excuse for smaller coastal States, but not major coastal States with potentially higher risk of oil spills. Higher risk of oil spills necessitates a greater need to protect interests of potential oil pollution victims.

In yet another step, the acceptance of the 2003 Supplementary Fund Protocol is not as impressive as that of the 1992 CLC Protocol. Only 27 States out of the 108 State parties to the 1992 CLC Protocol have joined the 2003 Supplementary Fund Protocol until recently. Perhaps States that have joined this international agreement are the mostly concerned or that they have experienced the pinch of adverse effects of oil spills. Of course, this other tier of additional fund comes with additional responsibilities to States and oil industry in order for victims to achieve even higher possibility of full compensation on claims for oil pollution damage. Therefore, it is highly recommendable for major maritime States to join the 2003 Supplementary Fund Protocol.

Subsequent to the ratification or accession procedure, there follows the obligation on the part of State parties to implement the relevant international agreements. As noted previously, issues of implementation of the relevant international agreements need thorough discussions beyond the scope of this paper. Nevertheless, it is worthy to note that the above discussed international agreements have already come into force and they are being applied in relevant oil pollution incidents in State parties, even before the courts of law.

B. Attitude of the USA towards International Agreements

As noted in the previous part of this paper, the United States of America is among major coastal States. The USA is also the largest importer of oil in the world. Besides, more than twenty states in the United States are coastal states thus a long coastline with significant movements of oil from one state to another. Therefore, there is high risk of oil spills from seaborne oil trade. It is of interest to note that the United States of America was among active participants in the deliberations preceding the adoption of the international liability and compensation regime for oil pollution damage. Nevertheless, the Unite States has never been a party to the international agreements regarding civil liability and compensation for oil pollution damage.

Among the reasons behind the United States declining to join other sovereign States include that it would pre-empt State laws within USA [8]-[9], [19]. It is submitted that another reason is the inadequacy of the CLC regime to satisfy potential cost of clean-up for spills of great magnitude as it failed to provide for unlimited liability [9], [20]. Nevertheless, it seems that the United States had fundamental interest in the adoption of the relevant international agreements only that they could not reach consensus on conflicting interests within the United States of America [19]. As a result, there was no way for the United States as a sovereign State could ratify or access the relevant international agreements.

Consequently, the United States stayed without any comprehensive legislation on liability and compensation for oil pollution damage until struck by the *M/T Exxon Valdez* oil spill incident of 1989. The incident was followed by several others within a short period of time resulting into costly and extensive litigations [21]. Additionally, the United States had no adequate funds to respond to a big oil spill. Therefore, enactment of comprehensive oil spill liability and compensation provisions was recommended [22], thus the United States Congress enacted the Oil Pollution Act 1990 (OPA 1990). The OPA 1990 among other things addresses issues related to oil pollution, including liability and compensation for oil pollution from ships. Also, the Oil Spill Liability Trust Fund was revived to cover for removal costs or damage caused by the spill where the responsible party is either unknown or is known but refuses to pay.

Lesson learned from the attitude of the United States of America is that, mankind learns best from own experiences. The USA did not see the urgency and importance of having sufficient relevant rules through lessons from the United Kingdom and France, until it happened into own waters. It could also be a proof of what is noted about policy that they shift more easily after accidents [23]. Therefore, one must step in the shoes of another to understand how it feels.

C. Consequences of Unsatisfactory States' Participation

As previously discussed, State participation in international agreements is very important for best results. During deliberations for relevant international agreements, it is important to have as many actors as applicable to clarify their concerns on the relevant issue and discuss upon the best ways to deal with the common problems internationally. Consequently, the solution agreed upon would be best option at least at the time of reaching the decision. Therefore, participation of all relevant actors is as important as the participation of most influential actors in the relevant issue.

Under normal circumstances, an agreement well agreed upon will be reflected in the acceptance of the same. Many relevant States will ratify or accede to such international agreement especially those who actively participated in the deliberation. Such could be most probable because such actors in the international arena are expected to understand better the reasons why the adopted international agreements appear in a particular manner.

The effect of limited participation of the USA and other influential States in international agreements for civil liability for oil pollution damage could devastate the journey towards uniformity of the rules and procedures worldwide. Perhaps some other sovereign States could decide not to join the

relevant international agreements but rather enact own diverse national legislations upon the foundation laid by the international agreements. With such ideas, the uniformity goal with be far from reach.

Also, the strength of the relevant international agreements could have been ameliorated with full participation of major oil receiving States. Since the additional funds depend on contributions from oil industry, participation of such States would mean more funds into the international agreement and therefore higher possibility of more satisfactory compensation for claims for oil pollution damage.

Therefore, international agreements find strength in the unity of all relevant and influential actors in the international arena. Besides, the choice to be party to international agreement or otherwise lies into the sovereign States individually.

IV. Comparative View of the International Agreements and OPA 1990

A. Similarities

It is of particular interest to note that as the international agreements were adopted as a result of some unprecedented oil spills, so is OPA 1990 [9]. Such happens to be a typical trend for the adoption of international agreements. Perhaps mishaps could be regarded vital in helping mankind to look at some circumstances from a different angle.

Also, examining the structure of OPA 1990 one would agree that basically it is built on the foundation of the relevant international agreements regarding civil liability and compensation for oil pollution damage cause by ships carrying oil in bulk. All basic elements found in the provisions of the international agreements are evident in the OPA 1990 specifically on channeling of liability, strict liability as basis of liability, requirement for financial guarantee, and the availability of additional fund for oil pollution damage. Therefore, generally, and on the face of it, the international agreements and OPA 1990 have the same structure.

B. Variances

Looking at the provisions of OPA 1990 in details, one can find that there are some significant departures from the international agreements. First, the purpose of the relevant international agreements is to ensure adequate compensation is available and payable to victims of oil pollution damage, but the purpose of OPA 1990 is to guarantee full and prompt compensation. It is worthy to note that adequate compensation might not necessarily mean full compensation.

Another difference is that while the international agreements focus on oil spills originating from ships that carry oil in bulk as cargo, the OPA 1990 regulates not only oil spills from ships but also from facilities like offshore facilities, deep-water ports and pipelines. Therefore, OPA 1990 regulate oil spills caused by all likely sources.

Additionally, the OPA 1990 is more specific on the issue of compensable damage. It has a list of compensable damage or costs that include damage to natural resources, loss of property, loss of Government revenue as well as increased public services. On the other hand compensable damage under the international agreements is limited by the concept of pollution damage as provided in the relevant agreements. Accordingly, one important difference is the fact that the concept of pollution damage in the international agreement is very much limited especially with regard to damage to the environment. Consequently, environmental compensation is more comprehensively available under the OPA 1990.

Although OPA 1990 also limits liability, such limit is higher comparing with limits set under the international agreements for single oil pollution incident. Additionally, OPA 1990 goes further to impose absolute liability in as far as removal costs are concerned. Such provision appears to be ideal for the protection of marine environment.

Therefore, OPA 1990 could be described as a national version of the international agreements for oil pollution damage. Although it is difficult to connect the reduction of oil spills and existence of the relevant international agreements and that of OPA 1990, they are all commended to be successful in own manners [17], [24]. Besides, the differences observed between the relevant international agreements and OPA 1990 reflects the fact that OPA 1990 represents the wish of one sovereign State considering its own domestic politics, social and economic development, as well as own environmental interests. In that case, international agreements are important vehicle towards uniform standards globally.

V. The Role of States in Realizing Uniformity of the Law and Procedures

Seaborne trade of oil is basically an international venture. With the current maritime trade there could arise complex legal issues regarding liability for oil pollution damage. One can find that the owner of the ship happens to be a citizen of one State, the ship bears a flag of another State, the owner of the carried oil cargo is a citizen of another State and the employees of the ship are from different countries all together. Besides, oil spills knows no boundaries. Oil spilled from a single ship could spread and pollute waters of a number of States. In such a case, there bound to arise some legal difficulties in pursuing issues of liability and compensation for damage caused by the spilled oil. Therefore, it is important to resolve such common problems together beyond national sovereignty.

It goes without saying that States design international agreements with the purpose to achieve uniformity of the rules. The coming into force of relevant international agreements regarding civil liability for oil pollution damage has been a step forward towards achieving uniformity. More importantly, it turns out that a good number of States have joined such international agreements including most of the coastal States. Such signify major development in realizing the need and desire of States for standardized rules regarding civil liability for oil pollution damage. Nevertheless, there are States that have not joined the relevant international agreements at all, and those that have joined only one international agreement and disregard other agreements especially regarding additional fund for compensation.

It is beneficial to remind ourselves that international agreements are a result of compromised deliberations of States with different status, diverse level of economic

development, varied domestic politics, legal systems as well as priorities. Consequently, international agreements might not provide for a flawless solution that would make every State fully satisfied in every way. Yet, State participation in international agreements is important in the achievement of standardized rules across the globe especially on such matters of international nature.

According to realists, even if there are established uniform laws, there would not be uniform results. It might not be possible to achieve uniform application of the law and procedures as long as there exists different legal systems [25]. Nevertheless, the number of legal systems in the whole world is less comparing to the number of sovereign States. Therefore, the coming into force of international agreements and acceptance of the same by all relevant States is one important phase for standardized rules throughout the world. The implementation of international agreements provides another phase in the achievement of uniform application of the law and procedures for more predictable rules in national jurisdictions. Besides, it is not even half a century since the first international agreement regarding civil liability for oil pollution damage was adopted, but has generally been progressing well.

Since joining international agreements does not prohibit filling in the possible gaps found therein, States have no reason to reject international agreements on basis of some issues worthy being determined together. Let everyone consider whether there would be uniformity of the rules internationally if every State would create own legislation that suits own environment.

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