NEGOTIATION AS AN OPTION OF DISPUTE RESOLUTION IN OIL POLLUTION BY TANKER IN INDONESIAN LEGAL SYSTEM

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ABSTRACT

The application of the polluter pays principle in Indonesian legal system is stated in Article 2 point 10 of Law No. 32 of 2009 on the Environmental Protection and Management (UUPPLH) and its explanation. It requires that every business who perform outlaw actions in the form of pollution or environmental damage shall pay compensation or perform certain actions. The obligation to pay compensation in particular amount charged to the party responsible for business becomes a problem that must be resolved through a legal system. According to the Indonesian legal system, dispute resolution for damages can be performed in two ways; judiciary (litigation) and out of court (non litigation).The dispute resolution option selected in Indonesian legal system is not only adapted to the international instruments that have been ratified but it is also in line with the legal culture in Indonesia. Non-litigation method by means of negotiating is the most appropriate choice for Indonesia in the dispute resolution of compensation to oil pollution by tanker. It is set forth in the UNCLOS (the United Nations Convention on the Law of the Sea) in Chapter XV of Dispute Resolution in Article 279 which regulates the obligation to resolve disputes peacefully for participating countries, as well as in Article 85 Paragraph 1 of UUPPLH.

Keywords : negotiation, dispute resolution, oil polution, tanker

Introduction

Oil pollution with tankers as pollutant sources often occurred in Indonesia. In 1999-2000, in Cilacap, the tanker of *MT King Fisher* was torn with 4,000 barrels of oil spills. In 2000, in Batam, the tanker of MT *Natuna Sea* ran aground with a spill of 4,000 tons of crude oil. In 2001, in Tegal-Cirebon, oil spill flooded in Seribu islands. In 2004, in Riau Islands, the tanker of *Vista Marine* sank due to bad weather and spilled waste oil in the slop tank of 200 tons, and then, in Cilacap, oil was spilled by MT *Lucky Lady* that loaded *Syria Crude Oil* of 625, 044 barrels. The volume of oil spilled into the water was about 8,000 barrels and spread 5 km along the coast. In 2004, it occurred in Indramayu beach, in Balikpapan with the oil spill from the company of Total E and P Indonesia (Purwendah and Marsudi Triatmodjo, 2015), and in Cilacap, Central Java, Indonesia. In the period from 2011 to 2012, three oil pollutions occurred (Purwendah and Agoes Djatmiko, 2014), and then, in 2015, oil pollution happened again by the tanker of MT. Martha Petrol which were decided by the Sailing Court due to the negligence the Master in his duties with the revocation of the Certificate of Seaman Expertise during a period of six months (the Sailing Court Decision No. HK.210 / 12 / V / MP.16). Oil pollution vessel MT. Martha Petrol caused disputes between fishermen (the Association of Indonesian Fishermen/ HNSI of Cilacap Branch) and PT. Pertamina Refinery Unit Cilacap (Pertamina).

Fishermen claimed for loss of oil pollution to Pertamina using the dispute resolution procedure of oil pollution in non-litigation with the procedure of consultation between the two parties, fishermen and Pertamina. Pertamina as the responsible oil business as stipulated in the Indonesian legal system in Law No. 17 of 2008 on Sailing as defined in Article 134 Paragraph (1), which states that any vessel operating in Indonesian waters must comply with the requirements of prevention and control of pollution. The provision provides a legal basis for the presence of pollution liability caused by tankers in Indonesian waters. The pollution responsible is commonly given through the procedure of *non-litigation;* in this case, the claim for damage due to pollution and litigation (through Sailing Court) to the professionalism of sailing performance for the crews. Some cases of pollution by tanker use a method of dispute resolution of negotiation with the model of bargaining between the parties. The negotiation method is selected because it gives all parties a win-win solution.

International law sets minimum obligations to all states (the UN members) to resolve international disputes peacefully (Article 1, 2 and 33 of the UN Charter). Although a country remains subject to the obligation of peaceful dispute resolution, it retains full authority to determine the ways or methods of dispute resolution. Dispute resolution of oil pollution compensation amicably through negotiation becomes an issue of concern to be analyzed in the paper through the conceptual approach and legislation approach.

Research Method

The study was a normative law study. The research data used in the research was secondary data. The aim of the study was oriented to reform *(reform-oriented research)* (Mahmud, 2007), which is the research intensively evaluates compliance with the

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applicable provisions. The approach used in the study was a conceptual approach. The specification of the qualitative analysis technique in the study was content analysis.

Result and Discussion

Law Number 32 of 2009 set forth Environmental Protection and Management providing the sense that the environment as a spatial unity with all things, state power, and living beings, including humans and their behavior which affect nature, the continuity of livelihood, and human and other living creature well-being. Furthermore, more specifically, the regulation for marine environmental protection is stipulated in the Law of the Republic of Indonesia Number 17 of 2008 on Sailing. The law confirms the limit in maritime environmental development and mastery of sailing which is in principle controlled by the state (Article 5, paragraph 1). The law governs the obligations of Seaport Business Entity to implement the provision and/ or service of port matters including the provision and maintainance of the aptness of port facilities (Article 94 point a); environmental preservation (Article 94 point e) and the setting of the accommodation of the substance of international maritime law and national maritime law national with the affirmation; "to comply with the law, both nationally and internationally". The principle of accountability accommodated in the shipping law adheres to the principle of strict liability with the understanding that each master or person in charge of other activity units in the waters are responsible for handling the pollution from ships and/or their activities.

The law is a breakthrough in terms of control and supervision of maritime environment protection as coastal states' responsibility in the protection of their maritime interests from the action of marine pollution, especially by tankers which is internationally regulated in various instruments from UNCLOS *(United Nations Convention on the Law of the Sea*), SOLAS*(Safety Of Life at* Sea) to the *CLC Convention 1969* affirmed in the *principle of strict liability* or the Shipping Law. Further, in practical terms, the Government Regulation No. 19 of 1999 regulates the Pollution Control and/or Marine Destruction. The regulation states that the protection of marine quality is based on the water quality of the sea, the standard criteria of damage to the sea and the quality status of the sea. The obligation of recovery is required by Article 16 Paragraph (1) and Article 24 Paragraph (1) and (2) which asserts that any person or the person in charge of operations and/or activities causing pollution and/or marine destruction shall bear the cost of pollution prevention and/or marine damage as well as the recovery cost, as well as the obligation to pay compensation for the injured party.

The payment for damages due to pollution can be made through a prosecution procedure performed by coastal states (victims of pollution) through the claim mechanism of formal litigation and/or non-litigation procedures with various methods. the United Nations (UN) Charter in Article 2 Paragraph (3) states that,*" all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any manner inconsistent with the purpose of the United Nations*." The obligation requires states to choose the disputes resolution through peaceful way as the mandate of the International Law Commission providing the principle of the prohibition or the use of violence as stated in the charter which is a general international law and universally applied, as stated,*" The principles regarding the threat or use of force laid down in the charter are... rules of general international law which are of today universal application*." The obligation to resolve the dispute amicably is further described in Article 33 of the UN Charter which states that "the parties to a dispute in which the dispute would endanger international peace and security, should first of all seek a solution by negotiation, investigation, mediation, conciliation, arbitration, court, handing over to the organizations or regional bodies or other peaceful settlement they choose (Davies, 1996: 7).

Article 33 of the UN Charter essentially divides two ways of peaceful dispute resolution as follows:

a. diplomatic resolution: negotiation, investigation, mediation and conciliation;
b. legal resolution; arbitration and court.

The main reason of the parties to conduct negotiation as the preferred method of dispute resolution procedures is that it can be monitored by the parties and its resolution is based on the agreement or consensus of the parties (Behrens, 1992: 14). Resolution through negotiation usually is the first way to do when the parties are in a dispute. Negotiation can be used to resolve any dispute. Even if the parties have submitted the dispute through a specific judicial body, the process of dispute resolution through negotiation is still possible to be implemented (Behrens, 1992: 159) The main weaknesses of the use of the method are: first, when the position of the parties is not balanced. One party is strong, while the other party is weak. The strong party is in a position to put pressure on another party (Malinverni, 1985: 159). Secondly, the process of negotiation is often slow and takes a long time. It is mainly due to the problems arising between countries, particularly the issues related to international economy. Besides, there were rarely the requirements of expiration date for the parties to resolve a dispute through negotiation. Third, when a party has highly hard stance, it makes a negotiation be unproductive.

In article 235 of the United Nations Conventions on the Law of the Sea (UNCLOS) on the state responsibilities and obligations of compensation, it states that the states are responsible for the compliance with their international obligations relating to the protection and preservation of marine environment; they assume compensation obligation in accordance with international law. The states shall ensure the availability of efforts by their legal system to obtain prompt and adequate compensation or other assistance related to the damage caused by the pollution of marine environment by individuals or by legal entities under their jurisdiction. The states shall cooperate to implement applicable international law and to the further development of international law relating to responsibility and liability for compensation for the assessment of the compensation of damages and the dispute resolution. It is necessary to develop the criteria and procedures for adequate compensation payment as well as mandatory insurance or compensation fund (Purwendah and Agoes Djatmiko, 2014: 61).

Indonesian Legal System governs the dispute resolution out of court in general through the laws, such as Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution in Article 1 point 10 which states that; "Alternative Dispute Resolution is the institution of dispute resolution or differences of opinion through the procedure agreed by the parties, which is a judicial resolution by means of consultation, negotiation, mediation, conciliation or expert judgment." Oil pollution by a tanker in marine environment refers to the general provisions on the environment, namely Law No. 32 2009 on Environmental Protection and Management. In Chapter XIII of Environmental Dispute Resolution, Article 84 Paragraph (1) states that, "The resolution of environmental disputes can be reached through the court or out of court." Paragraph (2) states that "the option of environmental dispute resolution is conducted voluntarily by the parties to the dispute." Paragraph (3), states that,"the lawsuit through the court can only be taken when the effort of dispute resolution out of court chosen is declared unsuccessful by one or both parties to a dispute".

The article is the legal basis for the choice of dispute resolution of oil pollution by tanker in Indonesia, especially in the case of claims for damages as further stipulated in Article 85 Paragraph (1) which states that "environmental dispute resolution out of court is made to reach agreement on: a. the form and amount of compensation; b. recovery action due to pollution and/or destruction; c. specific action to ensure no repeated pollution and/or destruction; and/or; d. measures to prevent negative impacts on the environment".

The dispute resolution on the claims for compensation of oil pollution by tankers in Indonesia uses the forum selection through mediation because the results, timing and final commitment are the agreement of the parties, especially given the presence of compensation fund in the form of compulsory insurance which shall be provided by the offender or polluter as a liability which is governed by international law in Article 3 (1) of the International Convention on Civil liability for Oil Pollution Damage*, 1969* (CLC 1969) which adheres to the principle of *strict liability* in marine pollution caused by oil. The offenders are required to pay compensation to the coastal state in real time during the oil spill at sea and losses regardless of guilt or innocence of the tanker concerned. The conditions of the CLC 1969 are ratified by the Presidential Decree No 18 of 1978 on Ratifying the *International Convention on Civil Liability for Oil Pollution Damage* 1969, the State Gazette of the Republic of Indonesia of 1978 Number 28 which was revised by the Presidential Decree No. 52 of 1999 on the Ratification of the *Protocol of 1992 to Amend The International Convention on Civil Liability for Oil Pollution Damage,* 1969 (the 1992 Protocol on the Changes to the International Convention on Civil Liability for Oil Pollution Damage, 1969), and the State Gazette of the Republic of Indonesia of 1999 Number 99. The liability of insurance as the basis for the payment of compensation of oil pollution directly and immediately is based on the principle of *strict liability*. Negotiation is selected for the bidding process conducted by the parties, namely the victims of pollution and perpetrators or polluters (or a third party who is responsible) only to determine the value of compensation agreed to be paid within the limits of the value of insurance claims under the CLC 1969 (Purwendah, 2016: 144).

Conclusion

Negotiation is selected in the dispute resolution of oil pollution by tanker in Indonesian legal system due to the presence of compensation fund in the form of compulsory insurance that must be provided by the perpetrators of pollution as a liability which is governed by international law with the principle of *strict liability* in marine pollution caused by oil. It also obliges the perpetrator pay compensation to coastal states in real time at the time of the oil spill at sea and losses regardless of guilt or innocence of the tanker concerned. Negotiation is selected for the bidding process conducted by the parties, namely the victims of pollution and polluter or perpetrator (or a third party who is responsible) only to determine the value of compensation agreed to be paid within the limits of the value of insurance claims under the CLC 1969.

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