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Oil pollution incidents can cause damage of many kinds. Often such incidents result in damage to property. Owners or users of property that has been contaminated or damaged may suffer consequential losses. Major spills frequently lead to great costs for cleanup of contaminated areas. Very often considerable costs also will arise to prevent or minimize pollution damage. These types of damage can give rise to complicated legal problems. However, they are 'traditional' types of damage that are well known to lawyers in all legal systems.

Oil pollution incidents also may cause damage to the marine environment. In recent years, this type of damage has given rise to considerable interest. Most countries have no legislation dealing explicitly with damage to the marine environment, and jurisprudence has not yet been developed in this field.

When discussing matters relating to damage to the marine environment, it is important to distinguish between two kinds of damage, namely economic loss suffered as a result of pollution of the marine environment and damage to the marine environment per se.

The purpose of this paper is to discuss some questions relating to damage to the marine environment in the context of the system of liability and compensation established by two international legal instruments: the 1969 Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention) and the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention).

The international conventions

The Civil Liability Convention establishes a regime of strict liability for the shipowner in respect to oil pollution damage from laden tankers, and provides a system of compulsory insurance. Unless the incident is due to the fault or privity of the shipowner himself, his liability is limited to an amount that is linked to the tonnage of the ship.

The Fund Convention is supplementary to the Civil Liability Convention, and its purpose is to provide additional compensation to those who cannot obtain full and adequate compensation under the Civil Liability Convention. To administer the regime of compensation created by the Fund Convention, an intergovernmental organization, the International Oil Pollution Compensation Fund (IOPC Fund), was set up.

The IOPC Fund has developed certain principles on the admissibility of claims. These principles have been developed primarily by the director in negotiations concerning claims against the IOPC Fund, and they have then either been explicitly approved by the competent bodies of the IOPC Fund (its Assembly or Executive Committee) or reported to and endorsed by one of these bodies.

As at October 1, 1986, 57 states were contracting parties to the Civil Liability Convention and 34 states were parties to the Fund Convention. The United States is not a party to either convention.

In 1984, a diplomatic conference adopted two protocols amending the conventions. For the purpose of this paper, the most important amendment concerns the definition of "pollution damage" in the Civil Liability Convention.

The protocol to the Civil Liability Convention was signed by 13 states and that to the Fund Convention by 12 states; in both cases, the United States was among the signatories. The protocols have not yet come into force. In fact, by October 1, 1986, only South Africa had become a party to the protocol to the Civil Liability Convention, and the protocol to the Fund Convention had not been ratified by any state. However, legislation implementing the protocols is being prepared in many states.

Definition of "pollution damage"

The 1969 Civil Liability Convention. The notion of "pollution damage" is defined as follows in the 1969 Civil Liability Convention

1. For a detailed analysis of the notion of "pollution damage" as defined in the Fund Convention, see M. Jacobsson and N. Trotz.
is defined (Article 1.8) as "any occurrence, or series of occurrences occurring to prevent or minimize pollution damage." This definition refers to the concept of "preventive measures," as defined below (Article 1.7): "Preventive measures" means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage.

In its turn, this definition refers to the notion of "incident," which is defined (Article 1.8) as "any occurrence, or series of occurrences having the same origin, which causes pollution damage."

The definitions of "pollution damage," "preventive measures," and "incident" laid down in the Civil Liability Convention are, by reference, included in the Fund Convention (Article 1.2).

The 1984 protocol to the Civil Liability Convention. In the 1984 protocol to the Civil Liability Convention, "pollution damage" is defined as "(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may be, or (b) the costs of preventive measures and further loss or damage caused by preventive measures."

The major substantive amendment was the addition of the proviso at the end of item (a) dealing with compensation for impairment of the environment.

Consequential loss and pure economic loss

Persons whose property has been contaminated or damaged may suffer losses as a consequence ("consequential losses"). The example can be given of the fisherman who is prevented from using his boat for some time because it has been polluted by oil and has to be cleaned, resulting in loss of income. All legal systems seem to accept in principle that compensation should be granted for such losses. Even if there are differences regarding the criteria to be applied to delimit the consequential losses that are to be compensated, these claims do not present any fundamental legal problems.

The situation is different in respect to persons who suffer economic loss as a result of oil pollution, without any damage being caused to their property. This kind of damage is referred to here as "pure economic loss." Fishermen may suffer economic losses if a large area of the sea is heavily polluted, making it impossible for them to fish there for some time, and they may not have the possibility of fishing elsewhere. As a result of a pollution incident, tourists may refrain from going to an area where the coast has been polluted, resulting in economic losses for hotel, restaurant and shop owners in the area.

In most countries, the courts generally have taken a restrictive attitude to claims for pure economic loss. This is because it is difficult to find clear criteria for the admissibility of claims. Most jurisdictions have taken the position that such damage is compensated only if it relates to a defined recognized right, for example, the right to property. However, loss of income of the kind mentioned above is normally considered as damage to a recognized right. The situation may be different in some countries. In Japan, for example, fishermen have a kind of proprietary right to carry out fishing activities in a designated area. An oil spill can cause damage to cultivated fish and cultivated seaweed, and in this case, the right to such fish or seaweed could be considered as a right to property.

In recent years, there has been a trend in many countries toward a less restrictive approach, in particular with regard to detrimental effects of pollution on an established trade or economic activity.

Problems connected with pure economic loss have been dealt with in a number of court cases in the United States. American courts have generally accepted claims made by commercial fishermen for compensation for damages to fisheries. However, it may often be difficult for the fishermen to prove the damage they have suffered. For example, a U.S. court held that it must be shown that the oil spill did in fact diminish aquatic life, and that this diminution reduced the profits that the plaintiffs would have realized from their commercial fishing in the absence of the spill; this reduction in profits must be established with certainty and must not be remote, speculative or conjectural.

The problem of pure economic loss is not dealt with in the definition of "pollution damage" in the 1969 Civil Liability Convention, i.e., the convention in its original version. The question of whether and to what extent such loss is recoverable would, therefore, have to be decided by the national courts in the various contracting states by means of interpreting the definition of "pollution damage" in the convention.

Claims for pure economic loss often have been submitted to the IOPC Fund. The latter has agreed to compensate economic loss suffered by persons who depend directly on earnings from coastal or sea-related activities, e.g., loss of earnings suffered by fishermen and by hoteliers and restaurateurs at seaside resorts. Assessment of the amount of the damage has been made by a comparison with the income that the claimant had earned in previous years during a comparable period. It must be recognized, however, that income from fishing can vary considerably from one year to another, even under normal circumstances. Also, income from tourism is not necessarily stable over the years.

The new definition of "pollution damage" in the 1984 protocol to the Civil Liability Convention clarifies the legal situation in respect to pure economic loss. Loss of profit from impairment of the environment would thus be recoverable under the conventions as amended by the 1984 protocols. By adopting the new definition, the 1984 Diplomatic Conference endorsed the IOPC Fund's policy that hoteliers, restaurateurs and shopkeepers who obtain their income from tourists at seaside resorts should be able to recover loss of income caused by the reduction in tourism as a result of oil pollution, and that fishermen should be entitled to compensation for loss of income actually suffered as a result of the impairment of the environment.

However, even under the new definition, it is by no means clear how far the right to compensation extends in the cases mentioned. The national courts will have to develop criteria to arrive at a reasonable delimitation of the right to compensation for pure economic loss. It appears reasonable to require that the claimant's activity would have to depend on the use of the marine environment in an area that has become polluted, and that the impairment of the environment adversely affected this activity, thus reducing his profit. In many jurisdictions, the courts would probably require that the loss of profit be a "direct result" of the pollution.

It seems reasonable that only establishments close to the polluted coastal area should be allowed to claim compensation for pure economic loss. As for hotels, restaurants and shops further away, it may be difficult for the claimants to prove the link between the loss of income and the incident. In most legal systems, the principle of foreseeability is applied, and compensation then would be granted only if it was foreseeable that contamination of a certain beach could cause loss of income to the claimant.

Damage to the environment

Oil pollution incidents may cause damage to the marine environment as such. Damage of this kind cannot be easily assessed in monetary terms, as the marine environment does not have direct market value. When compensation is claimed for alleged damage to the marine environment, technical and scientific, as well as legal problems arise. Detailed knowledge of the resource before the spill usually is lacking. Differences of opinion normally will arise, therefore, on the extent of the damage, the recovery potential of the resource, and the long-term effects, even when a study program has been instituted immediately after the incident. It frequently will be argued that an oil spill has caused damage to the ecosystem as a whole, and that since the basis of the food chain leading to commercial species has been damaged, this will result in an economic loss in the future.

In the view of the author, this line of argument is based on the false assumption that the damage is extensive, and requires sweeping assumptions regarding relationships between different components of the environment and economic values. Any calculations of the damage suffered in monetary terms will, of necessity, be arbitrary. For these reasons, it is maintained that it would be inappropriate to admit claims for
compensating damage to unexploited natural resources that have no owner and that, in many cases, are not constrained by national boundaries. It should be noted that American courts have made attempts to assess the value of non-commercial species. Some states, such as Florida, have established fish-value tables by statute; that state's value tables have been upheld by the courts. The idea that compensation should be granted for the value of migratory waterfowl killed by an oil spill also has been accepted by an American court. One problem in such a case would obviously be that of quantifying the number of birds allegedly killed.

On the other hand, oil spill damage to the marine environment may make it necessary for the public authorities to take measures to restore the environment to its pre-spill condition, to the extent possible. Such measures often will be very costly. Costs incurred for such purposes are quantifiable. It would be possible, therefore, to compensate the public authorities for the costs actually incurred for restitution.

In the United States, the leading case in respect to damage to the environment is the well-known SS Zoe Colocotroni case. The District Court held that damage to a bay resulting in a decline in the numbers per acre of certain non-commercial organisms should be assessed on the basis of replacement costs, using prices from biological supply laboratories. This judgment was not upheld on appeal. The appellate court considered the appropriate standard for determining damages in a case of this kind to be the costs reasonably to be incurred to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as feasible without grossly disproportionate expenditures. However, the Court of Appeals did not accept the assessment of the damages as made by the District Court, in part because the plaintiffs did not represent that they proposed to purchase organisms for actual introduction into the sediments.

This case also raised the question of assessment of damage to the ecosystem, in this case a mangrove lagoon ecosystem. The District Court held that the correct assessment was the cost of restoring the site to its original condition. On appeal, the defendants maintained that the assessment should be based on the diminution in value of the damaged property in comparison with comparable property in the vicinity. This method was rejected by the Court of Appeals, as its application would frustrate appropriate measures to restore or rehabilitate the environment. Nevertheless, the Court of Appeals did not accept the District Court's assessment, as it considered unreasonable the restoration plan presented by the plaintiff.

The problem of damage to the marine environment also has been dealt with in the Soviet Union, where special legislation lays down criteria for the calculation of damages. The amount of damages is calculated on the assumption that each ton of oil that escapes from a ship pollutes a certain volume of sea water; damages are then awarded at an amount corresponding to a given sum per cubic meter of water that is considered as polluted. This legislation has been applied in two court cases that have arisen under the Civil Liability Convention, the Antonio Gramsci and Globe Asimi cases. In these cases, certain claims of an abstract nature were submitted for damage to the marine environment, relating to damage to resources and costs and expenses of restoring the polluted water to a clean condition. As a result of a decision by the Soviet court in the Antonio Gramsci case, the IOPC Fund's Assembly in 1980 adopted an important resolution on the admissibility of claims of this kind. The resolution states that the assessment of compensation "...is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models." This means that compensation can be paid by the IOPC Fund only if a claimant, who has a legal right to claim under national law, has suffered quantifiable economic loss. Consequently, the IOPC Fund does not accept claims for non-economic environmental damage.

The question of damage to the marine environment also has been dealt with in a recent court case in Italy to which the Civil Liability Convention applied—the Patmos case. In this case, the Italian government claimed compensation for unspecified damage to the marine environment. The claim was rejected by the court of first instance on the grounds that the State of Italy had not suffered any economic loss. The Italian government has lodged an appeal against this judgment.

The definition of "pollution damage" in the original text of the Civil Liability Convention does not have any specific provision concerning damage to the natural resources of the marine environment, nor does it deal with the question of costs of restoration of the marine environment. The new definition adopted in the 1984 protocol clarifies these issues. The proviso added to the definition makes it clear that non-economic damage to the marine environment is not to be compensated. On the other hand, it provides that reasonable costs incurred in restoring the marine environment after a pollution incident are compensable.

Compensation for restoration of the marine environment is expressly limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken. In line with the resolution adopted in 1980 by the IOPC Fund's Assembly, the new definition excludes compensation based on a theoretical calculation of damage and restoration costs.

Under the new definition, only costs of reasonable measures are recoverable. The measures must be reasonable from an objective point of view. The costs must not be disproportionate to the results achieved or to the results that could reasonably be expected. Another factor that must be taken into account is the capacity of the marine environment to restore itself. It must also be recognized that restoration of a contaminated environment to its pre-spill condition is not always possible. The criterion of reasonableness will allow the rejection of abusive or speculative claims.

Final remarks

For reasons indicated, oil pollution damage to the marine environment raises difficult legal questions. Problems relating to foreseeability, remoteness, and causation will have to be addressed, and the assessment of the alleged damage in monetary terms often will be extremely difficult, sometimes virtually impossible. The problems discussed by no means exist only in the field of oil pollution, although oil pollution incidents tend to attract great attention from the general public as well as from the news media.

In view of the increased public awareness in the environmental field, the problems referred to briefly can be expected to become even more important in the future.

References

4. State Department of Pollution Control v International Paper Company, 329 So. 2d 5 (1976)
6. Union Oil Company v Oppen, 501 F. 2d 558 (9th Cir. 1974)