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Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage: A Critical Analysis

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Abstract: *Sea, the home for billions of organisms, is a beautiful creation of the God. Nature has done everything possible to keep this place clean and beautiful without harming the inhabitants. But human activities, such as shipping have posed a danger of spillage of oil that they discharge into the sea, thus resulting in oil pollution. The spilt oil, being heavier than water, does not sink into it nor mixes with it. It forms a top layer on the water surface which is detrimental to the hydro ecology. This hampers the human beings also. So, this Convention was set up as a supplement to The International Convention on the Civil Liabilities for Oil Pollution Damage, 1969, (CLC, 1969). This convention sets up a Fund for the Oil Pollution Damage from where the victims are compensated in the cases that have been discussed in the following chapters. The jurisdiction on the high seas has been discussed to understand how a ship's nationality can be determined so as to hold it liable. A beam of light has also been thrown on the conventions and laws of sea prior to the adoption of the Convention. Finally, an analysis on the implementation of the Convention in India has been provided.*

Keywords: *Damage, Fund Convention, Oil Pollution, The Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage, 1971, The International Convention on the Civil Liabilities for Oil Pollution Damage, 1969*

I. Introduction

We, the human beings, are social animals who share our home, the planet earth with other organisms starting from organisms like micro-organisms to whales. All the living and non-living beings on the earth together constitute our environment. All the things in the environment be it organismic or inorganismic, are in a symbiotic relation with each other. And in this chain of dependency, human beings are very much dependent on the natural resources that are available for their survival as well as luxury. These resources are particularly the non renewable resources like the coal, petroleum, oil, etc. These resources are undoubtedly important. Their indiscriminate uses have certain disadvantages also. In addition to the depletion of these resources, with continuous use they can cause pollution to the environment.

These pollutions are of different types like that of air, water, soil, oil, etc. Air pollution, water pollution and soil pollution are pollutions where the harmful substances mix up with these resources. But oil pollution is not where pollutants mix up with the oil. Oil pollution is caused when the discharge of oil into water bodies pollutes the latter. But the question that arises here is that what kind of discharge can be termed as discharge causing pollution. In order to answer this question, a scrutiny has to be done on the conventions in the International Forum that define discharge. The Oil Pollution Act, 1990 defines discharge in its Section 1001(7) as all intentional and unintentional emissions other than the natural seepages which include processes like spilling, pumping, pouring, emitting, leaking, emptying, dumping, etc.

The discharge from the vessels, i.e., watercraft or other artificial contraption used, or capable of being used, as a means of transportation on water are one of the main sources of water pollution. Water bodies, particularly oceans are polluted on a daily basis by oil from oil spills, shipping, run-offs and dumping. These oil spills, although make only 12% of the oil in the oceans with rest coming from shipping travel, dumping and drains, have severe effect on the environment. It is because a huge quantity of oil is being spilled into one place. It can have a local effect but at the same time it can be catastrophic to the marine wildlife. Oil, being insoluble in water, forms a thick layer in the water which suffocates the marine organisms. It sticks to the feathers of the marine birds restricting them from flying. It also harms the aquatic plants. The oil layer formed impedes the sunlight from reaching these plants hence hampering their fundamental process of photosynthesis.

Apart from the environmental problems, oil spills have certain economic impacts also. Oil spills prove as a hindrance for water activities like boating, swimming, etc. Hotel Owners who are dependent on tourists for their livelihood may also suffer losses as these spills would reduce tourists. Moreover, the industries like fishing that rely on the sea water suffer a lot for their normal functions are affected by the oil spills. Desalination plants and Power stations, which draw large capacity of seawater, can be particularly at risk, especially if their water intakes are located close to the sea surface, which thereby increases their possibility of drawing in floating oil. Other coastal activities like shipyards, ports, etc. also get disturbed as a result of oil spills and their clean up.

The magnitude of the problem is too high. So, to tackle these problems there have been certain conventions in the International Forum like the Oil Pollution Act, The Civil Liabilities Convention, the Fund Convention, etc. The purpose of this paper is to make a critical analysis of the various aspects of these Conventions, in general and the Fund Convention, in particular. However before going to discuss about the provisions of various conventions, it is important to ascertain the jurisdiction on the High Seas so as to fix the liability for polluting the sea.

II. Jurisdiction on the High Seas

As per the International Law, the foundation for the maintenance of order on the High Sea has rested upon the concept of nationality of the ship and the consequent jurisdiction of the flag state over the ship. Basically the Flag State will enforce the rules and regulations of its municipal law as well as international law. A ship without a flag will be deprived of many benefits and rights that are available under the regime of high sea.

The Lotus Case also enumerates that the vessels on the high sea are subject to no authority except of that State whose flag they fly. Each State is required to elaborate the conditions necessary for the grant of the nationality to the ship, for the registration of ships in its territory and for the right to fly its flag. The Nationality of the ship will depend on the flag it flies. The Article 91 of the 1982 UNCLOS Convention also stipulates that there must be a genuine link between the State and the ship.

III. The Pre- Convention Phase

The Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage was adopted in 1971. Prior to that there were some other Conventions that looked after the regulations to prevent pollution of seas. The 1958 Convention on the High Seas required the states to draw up regulations preventing the pollution of the seas by discharge of the oil or dumping of the radioactive wastes. While the International Convention on Intervention on the High Seas, 1969 provided for actions to be taken to end the threats to the coasts of the states, International Convention on Civil Liability for Oil Pollution Damage, 1969 came up with the liabilities of the owners of the ships causing oil pollution damage to pay the compensation. The United Nations Convention on the Law of the Sea (UNCLOS) was codified on the Dec 10, 1982. It was described as a "constitution for oceans".

The UNCLOS contained precise and detailed regulations on many issues. But it merely provided a framework for issues on Safety of Shipping, Pollution prevention, etc. It laid down broad principles but left the elaboration principles to other treaties. Hence, these standards were met by the International Maritime Organization, a specialized agency of the UN. Along with other functions, the IMO also adopted strict anti-pollution standards for ships. Some examples of these standards are the CLC, Fund Convention, etc.

The Convention on the Civil Liability, 1969 was adopted for ensuring that adequate compensation was provided to people who suffer oil pollution damage that result from maritime casualties involving oil carrying ships. The liability for such damage was placed on the ship owner from whose ship the polluting oil discharged. The Convention required the ships covered by it to maintain an insurance or other financial security in sums equivalent to the owner's total liability in one such incident. It did not apply to warships and other vessels used for non- commercial use. However, it applied in the respect of liability and jurisdiction to Government Vessels having commercial use.

The Convention covered pollution damage resulting from spills of persistent oils that were suffered in the territory of a state party to the Convention. It was applicable to ships which were actually carrying oil in bulk as cargo, i.e. generally laden tankers. Spills from tankers in ballast or bunker spills from ships other than tankers were not covered, nor was it possible to recover costs when preventive measures were so successful that no actual spill occurred. However, the ship owner cannot limit liability if the incident occurred as a result of the owner's personal fault.

What so ever, the 1969 Convention on the Civil Liability provided a useful mechanism for the payment of compensation for oil pollution damage. But it did not satisfy all the legal, financial and other questions that were raised during the Conference while adopting this Convention. Hence, the IMO was recommended by the Conference to prepare a scheme that would supplement the Civil Liability Convention.

IV. The Convention: The International Convention on the establishment of an International Fund for Compensation of Oil Pollution Damage.

The convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage was adopted in 1971. It is also known as the Fund Convention. It was a supplement to the Convention on Civil Liabilities for Oil Pollution Damage, 1969. It was established to prevent compensation in circumstance not covered by the 1969 Convention. It also aids ship owners in their additional financial responsibilities.

The main aim of the Fund are enumerated in the Article 2 of the Convention which states that the Convention is aimed to provide compensation for the Oil Pollution to the extent to which the 1969 Convention does not provide and give relief to the ship owners with respect to the additional financial burden that the 1969 Convention had imposed with subject to the conditions put forward to ensure compliance with the safety in the sea and other Conventions along with giving effect to other related provisions set out in the Convention.

The Fund has certain obligations to fulfill under the three main primary purposes set out in Article 2. Illustrating some of the Obligations of the Fund are to pay compensation for oil pollution damage to states and individuals if they are unable to obtain the compensation from the owner of the ship from which the oil discharged or if the compensation due from such owner is not sufficient to cover the damage suffered.

Under the Fund Convention, victims of oil pollution damage can get compensated beyond the level of the ship owner's liability. However, the Fund's duties are limited. Where there is no liable ship owner or the ship owner liable is unable to meet its liability, the Fund will be obligatory to pay the whole amount of compensation due. Under such circumstances, the Fund's maximum liability may increase.

The Fund's obligation is to pay the compensation for oil pollution damage suffered in the territories and territorial seas of the Contracting States. It also takes the responsibility of paying compensation in respect of measures undertaken by these States outside their territory. The Fund can also provide support to the Contracting States who are threatened or affected by pollution and wish to take measures against it. This may be done in the form of personnel, material, credit facilities or other aid.

As regards to the other function of the Convention, the Fund is obliged to indemnify the ship owner or his insurer for a portion for which he is liable under the 1969 Convention for Civil Liabilities for Oil Pollution Damage. But the Fund is under no obligation or responsibility to indemnify the ship owner if the damage is caused by the willful misconduct of the aforesaid person. The main requisite to attract the benefits from this Convention is on the part of the ship owner to comply with the conditions for safety at sea and other international conventions. So if the accident is caused because of the reason that the ship did not comply with the provisions of certain international conventions, then the ship owner is not entitled to get indemnified by the Convention. The Convention also talks about the rights, liabilities, obligations and jurisdictions. It requires the contributions to be made by the persons in the Contracting States who receive oil by sea.

4.1 Protocol of 1992:

Convention on the Establishment of an International Fund for the Compensation of Oil Pollution Damage, 1971 was followed by various Protocols adopted in 1976 and 1984. These were superseded by the Protocol of 1992. This was adopted on 27th November, 1992 and it came into force on the 30th May, 1996. It is known as the International Oil Pollution Compensation Fund 1992. It is also known as the IOPC Fund 1992 and the 1992 Fund. It came as a supplement to the 1992 Civil Liabilities Convention which administers the liability of ship owners for oil pollution damage. Here the principle of strict liability is applied for ship owners and it creates a scheme of compulsory liability insurance. The ship owner is generally permitted to limit his liability to an amount which is allied to the tonnage of his ship.

The main purpose of this Protocol was to modify the force requirements and increase the compensation amounts. The maximum amount payable from the Fund as compensation under this Protocol for a single incident is 135 million SDR. However, if three States that are contributing to the Fund receive more than 600 million tonnes of oil per annum, the maximum amount can be raised to 200 million SDR.

The 1992 Fund Convention, however, does not pay compensation if the occurrence of the damage took place in a State that is not a member to the 1992 Fund. In order to become parties to the Convention, the States also require being the members of the 1992 Civil Liability Convention. The Compensation cannot be attracted if the pollution damage resulted from acts of war or spills from a warship or if the claimant fails to prove that the damage resulted from an incident having one or more ships.

The competent courts that can try out the cases against 1992 Fund are the Courts of the State which is a party to the Convention and where the damage occurred.

4.2 Protocol of 2000:

After the Protocol of 1992, another Protocol was adopted in the year 2000. It was adopted on the 27th September 2000 and it came into force on the 27th June 2001.

The Convention came up with the main purpose of terminating the 1971 Fund Convention. The provisions of the Protocol required the 1971 Fund Convention to cease its force on the date the number of Contracting States reduced to a number less than twenty five. The Convention faced such a fateful day on the 24th May 2002 where there was denunciation of the States Parties to the 1971 in favor of their membership in the 1992 Fund.

V. The Protocol of 2003:

The 2003 Protocol established an International Oil Pollution Compensation Supplementary Fund which was adopted on the 16th May 2003. Its entry into force was on the 3rd March 2005. The main aim of this Fund is to supplement the compensation available under the 1992 Civil Liability and the Fund Conventions with an additional third tier of compensation. It is an optional Protocol whose participation is open to all the States that are parties to the 1992 Convention.

This supplementary Fund provides for a limitation of a combined total of 750 million Special Drawing Rights (SDR) including the amount of compensation paid under the CLC and the Fund Convention for one incident. This Fund will apply to damage in the territory and the Exclusive Economic Zone of the Contracting States.

The Annual Contributions that are to be made to the Fund are to be made in respect of the each Contracting State by any person who would have received total quantities of oil exceeding 150000 tons in any calendar year.

This function of the Fund can be understood be referring a few cases in this regard. One of the leading case in this aspect is the ERIKA case. The Erika, a French Ship, broke in two off the Atlantic coast of Brittany in France, on the 12th December 1999. Approximately 19 800 tons of oil were spilt in the marine environment. The oil which started reaching the coast by the end of December polluted 400 kilometers of coastline. The ship-owner's responsibility in this case was limited to 84,2 million French Francs (8,1 million 2001 Pounds), and the IOPC Fund's intervention was upto 1,212 million French Francs (116,8 million 2001 Pounds). Similarly, the Aegean Sea ran aground at the entrance of the port of La Coruna in Spain on the 3rd of December 1992. The ship carried 80 000 tons of oil, of which an unknown amount was spilt. The liability of the ship-owner in this case was limited to Pesetas 1, 121 million (5,4 million 2001 Pounds). The IOPC Fund intervention was limited to Pesetas 9,513 million (36,8 million 2001 Pounds). Compensation for the damages caused by the accident is still on-going, with a large number of claims being dealt with both under the CLC and IOPC Fund regime and in the Spanish courts.

The compensation limits established under the Protocol can be amended by an implicit acceptance procedure, so that the amendment adopted in the Legal Committee of IMO by a two-thirds majority of Contracting States present and voting, can enter into force 24 months after its adoption.

VI. The Fund Convention: In Indian Scenario

The provisions of the above discussed conventions are of much relevance for India. Because, India is a state which is surrounded by water bodies on three sides of its territory with a coastline of 7517 km or 4671 miles. It is surrounded by the Bay of Bengal in the Southeast, Indian Ocean in the south and the Arabian Sea in the Southwest. As per the United Nations Convention on the Law of the Sea, 1982, the territorial sea of the India extends to a distance of 12 Nautical Miles from the coast baseline.

This wide territorial sea of the State makes it a very decent place for the marine activities like shipping. India has been practicing marine trade from a very long time. The British possession of India originated from the trading activities that took place between India and the England through sea. This wide stretch of marine trade in India makes it more prone to the pollution like oil pollution caused by the spillage of oil. Hence, the prevention and management of these disasters is very significant in a country like India which has such a large coastline and eight major commercial docks.

The Government of India has taken various steps to prevent and manage the problems arising out of the oil pollution damage. It has adhered by the following three Conventions. These are

a. International Convention relating to the Intervention on the High Seas in cases of Oil Pollution Damage, 1969
b. International Convention on the Civil Liability for Oil Pollution, 1969
c. International Convention on the Establishment of an International Fund for Oil Pollution Damage, 1971.

The Indian Shipping Policy has not differed from the global maritime and environment laws. The main sources of maritime law in India are International Conventions to which India has been a signatory. The major legislation dealing with the fighting of oil pollution are as follows-

a) The Merchant Shipping Act of 1958 (MS Act)
b) The Marine Insurance Act of 1963
c) The Merchant Shipping (Prevention of Pollution of Sea by Oil) Rules, 1974.

Part XB and XC of the Merchant Shipping Act, 1958 deals with the Civil Liability for Oil Pollution Damage while Part XC deals with the International Oil Pollution Compensation Fund in the sections 352S to Sec. 352 ZA.

India has ratified the Convention on the Establishment of an International Fund for the Compensation of Oil Pollution Damage in the year 1990. Part XC deals with the IOPC. S. 352T deals with the contributions to the

Fund which are to be made in accordance with Art. 10 and 12 of the Fund Convention. Under this, a person who shall be liable to pay the compensation shall be an importer of the contributing oil or a person by whom the oil is to be received in India.

Sec. 352V of the Act empowers the Central Government to call on for information regarding the persons who are under the obligation to make contributions to the Fund. Any non compliance with this is punishable under the Act. Sec 352X of the Act provides that the cases regarding the claims against the Fund for Compensation have to be brought under the High Court.

VII. Conclusion

The International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage, 1971 had been set up with the purpose of compensating the victims of oil pollution damage in the cases where the CLC, 1969 was inadequate. Its aim was also to Compensate in the cases where the damage amount exceeded the ship owner's liability or it was difficult to have a liable ship owner. It was ratified by many nations. However, it ceased its existence in the year 2002 by complying with its denunciation procedures as mentioned in the Convention and its 1992 Protocol continued its existence till 2003 where it was supplemented by a 2003 Protocol. Its aim was to reduce the burden on the ship owners in the compensation. In 2013, the Convention had 111 member nations where India was also a signatory. India, being a signatory has ratified the Convention and implemented it in its Municipal laws namely the Merchants Shipping Act, 1958. It is expected that these Conventions can be helpful in tackling the problem of oil pollution.

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