

Compensation for Maritime Ecological Damages in China Judicial Practice

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Abstract

The Article discusses the judicial experience of compensation for maritime ecological damages in China. The discussion focuses on the verdict of “Tasman sea” oil spill case. Scope and methods of assessment of ecological damages are major part of the discussion. Because of the absence of legislation on compensation for maritime ecological damages, the verdict is a significant guide to similar case trial in the future.

Key words: Compensation; Maritime; Ecological damages; Oil spill

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INTRODUCTION

In China there is no specific legislation regulating the compensation for ecological damages. Regulations for guiding the compensation are a set of industry standards made by government agencies. The standards are ruled in regulation *Technical guideline for the assessment of marine ecological damages caused by oil spill* which was issued by National Maritime Bureau in 2007. The guideline regulates the qualified claimant of the marine ecological damages as well as the content of the compensation. The guideline stipulates that Maritime administrations are qualified claimant who have rights to seek compensation from polluters. The Guideline

classifies marine ecological damages into six types, a) marine organisms, b) seawater quality, c) marine sediment environment, d) tidal flat environment, e) typical ecosystem and f) marine ecosystem. In calculating the amount of compensation, it includes four parts of costs which are direct loss of marine ecology, restoration expenses for habitat, restoration expenses for biotic populations, investigation and assessment fees. The sum of the four parts of costs compose total amount of the compensation for marine ecological damages caused by oil spill. As an industry standard made by National Maritime Bureau, the Guideline has certain significance on guiding the determination of marine ecological damages. Because of the difficulty in the determination of ecological damages, there is no common view on compensation scope for these damages. Contrary to absence in stipulation in current legislation, scope of ecological damages is not scarce in judicial practices in china. Courts have trialed some oil spill cases and made Judgments of compensation for ecological damages, the “Tasman Sea” spill oil damages case is a classic case. The incident triggered multiple lawsuits, which relates to the administrative litigation filed by maritime administration for seeking compensation for ecological damages, and civil actions brought by fisherman claiming for property and economic loss, as well as the cases filed by fishery management departments seeking for fishery resource compensation. The trial of the cases reflects the determination of the compensation for the ecological damages caused by the oil spill in the courts of China.

1. CASE REVIEW OF COMPENSATION FOR ECOLOGICAL DAMAGES

On November 23rd, 2002, 4:am in east sea area to Dagukou, Tianjin, about 118°50' 30"N, a Maltese flagged 8 million tons of oil tanker “Tasman Sea” Crashed on “Shunkai” a 7,000 tons ship from Dalian, China. The

accident resulted in a crack on the third ship cabin which in right side of "Tasman Sea", 205.924 tons of light crude oil were spilled in to sea and Caused serious pollution to Bohai area sea water. The leakage of oil were formed a drift about 2.5 nautical miles long and 1.4 miles wide. After the accident the Beihai Monitor Center of National Maritime Bureau was entrusted by the plaintiff, from December 23rd to November 26th, investigated and collected the evidence, the monitor center commit five investigation, proving that the incidental area was seriously polluted (China News net, 2002).

After the incident, Tianjin Maritime Administration, was authorized by the State Maritime Administration to file a lawsuit, to the Tianjin maritime court, against *Infinite Shipping Co. Ltd.* and the *London steamboat ship owners association* as the defendant. Claims of plaintiff are as follows: a) Compensating for the loss of marine environmental capacity for 36 million yuan. the marine ecosystem services loss for 7.3817 million yuan, recovery of marine sediments for 26.14 million yuan, restoration of intertidal biological environment for 3.06 million yuan, the recovery of phytoplankton for 608.4 thousand yuan, recovery of nekton for 9.38 million yuan, the bioremediation research costs and monitoring costs for 5,798,307 yuan, a total sum of compensation for ecological damages is 98,369,307 yuan. b) Two defendants are jointly and severally liable for the compensation c) Two defendants sustain the cost of litigation. In another suit, Tianjin fishery and fishing port administration on behalf of the State filed a suit against the above two defendants claiming for compensation for fishery resources loss for 17.82 million yuan. In the first litigation the court render a verdict that defendants should compensate the plaintiff Tianjin Maritime Bureau 7.50 million yuan for loss of environmental capacity; 2.45 million yuan for an investigation, monitoring, assessment and bioremediation research expense. Interests of all expenses are included in compensation. In the second case court sentenced that defendants to compensate the plaintiff Tianjin city fishery and fishing port administration 14.65 million yuan for fishery resources loss, 480 thousand yuan for investigation and assessment fee, interests also included in compensation.¹

In "Tasman Sea" oil spill pollution case, on the judicial remedy for ecological damages, the government complies with *Marine Environmental Protection Law* differentiate the ecological damages from fishery resources damages. Two types damages are claimed in separate litigation, based on different reasons, claiming by different agencies. In the case of compensation for ecological damages which was filed by the Tianjin Maritime Bureau, plaintiff, defendant and the maritime court have different opinions of the ecological damage compensation.

¹ See verdict of Tianjin Maritime Bureau VS Infinite Shipping Co. Ltd.

The claim of Tianjin Maritime Bureau on Ecological damage included ,loss of environmental capacity, loss of maritime ecological services, recovery of marine sediment, recovery of the tidal flat biological environment, recovery of the phytoplankton, recovery of marine nekton, costs of research on biological treatment of and monitoring evaluation fees, etc.. The recovery expenses of marine sediment, tidal flat biological environment, phytoplankton and nekton are the costs of restoration of natural resources which are the components of ecological system. Natural resources can be divided into two categories, one is the recovery of biological resources (phytoplankton, nekton), and the other is the recovery of non biological resources (the habitat of animals and plants). The ecological damages claimed by Tianjin Maritime Bureau can be divided into four types, the loss of environmental capacity, loss of natural resources, loss of marine ecosystem services, costs of biological treatment, costs of monitoring and evaluation. Finally the court's actual support only loss of environmental capacity, costs of biological treatment and costs of monitoring and evaluation. Compensation for the damages of biological and non biological natural resources and the damages of the ecological services was rejected. The reason is that recovery method for marine biological and non biological resources is considered to be infeasible. For example, the court considered that the loss of nektons should be compensated, but the method provided by Tianjin Maritime Bureau is ineffective, so the recovery costs can not be confirmed. As to the loss of phytoplankton, court considered the environment of pollution area is suitable for biological living and reproduction, it is reasonable relying on the recovery through self reproduction of phytoplankton, so the recovery costs are not recognized. For the sediment recovery, the court also considered the proposal recovery scheme of Tianjin Marine Bureau cannot be proved effective. So it was denied. The idea of compensation for ecological service was recognized by the Court. However the court rejected claim for the specific compensation, the view of the court was that the basis of calculation for ecological service is not sufficiently provided by Maritime bureau. At the end, as to four types of ecological damages claimed by Tianjin Maritime bureau, the court only recognized the loss of marine environmental capacity and costs of the research of the restoration of natural resources. The loss of marine environmental capacity refers to the loss of capacity that seawater accommodating the pollutants. Discharge of pollutants will decrease the capacity of seawater in accommodating pollutants. Alought the verdict of this case did not support the specific claim for compensation for damages of environmental capacity, it does not mean environmental capacity damages are not recognized by Chinese court as a compensation item of ecological

damages. The reason for the fail of the claim is that plaintiff's calculation method of recovery was not approved by the court.

In the second case in which Tianjin fishery management administration claiming for compensation for fishery resources, the bases in determination of damages are the fishes and other sea animals. It is difficult to ascertain the actual number of damaged natural fishery resources, thus the amount of compensation for loss of fishery is hard to be determined. The method adopted in determination of the damages. Is estimation which is through a sampling fishing in certain area to calculate the biological density of the area. then calculate the numbers of fishery resources according to acreage and density. The amount of loss of fishery can be estimated by comparing the difference of the biological density before and after pollutions. The accuracy of compensation for damages is highly dependent on the scientificity of the calculation method and the accuracy of the measurement which is the focus of disputes in real cases. In this case a main dispute between fishery management administration and polluters is medium and long term loss of fishery which refers to the decrease of fish population in a future period owing to the decline of reproduction of fishes resulted from water pollution. Fishery administration deemed medium and long term loss should be included in fishery sources loss, but polluters insisted that fishes reproduction increase randomly, the medium and long term loss is not inevitable result of pollution. At the end of the court held that the medium and long term loss is the theoretic classification in research, it has significance in practice, and the loss has been regulated in *Rules of fishery damages calculation in water pollution incidents* it should be compensated.²

2. THE SCOPE OF COMPENSATION FOR ECOLOGICAL DAMAGES

From the verdict of "Tasman Sea" oil pollution case, we can find that in judicial practice of China, the scope of marine ecological damages include the loss of marine environmental capacity, loss of marine natural resources, loss of ecological service. Marine natural resources loss including the loss of biological resources and non biological resources. In the "Tasman Sea" Case fishery resources loss is not included in the scope of compensation for ecological damages which claimed by Tianjin Maritime Bureau, but separately filed by the Tianjin fishery administration in another case. This arrangement might be interpreted as a result of the division of state government functions. According to the relevant laws and regulations, fishery management departments have the duty of maintaining the fishery resources, and

Maritime Bureau is responsible for management of marine resources other than fishery. In fact, both claims of the Tianjin Maritime Bureau and Tianjin fishery management departments should be classified into category of ecological damages. Fishery resources are a very broad concept, including fishes, shrimps, shellfishes and most of sea animals, these creatures are necessary elements of the marine ecosystem. The ecological services provided by fishery resources could not be ignored. It is unreasonable to exclude the damages of fishery resources from ecological damages. In the case brought by Tianjin Maritime Bureau, the Bureau does not calculate the loss of fishery into natural resources recovery. On the other hand, the Bureau required the pollutant to compensate the nekton damages. In the biological sense, fishes are typical nektons. Claim for nektons would presumably include compensations for fishes. As we know in the second case which was brought by Tianjin fishery management administration, it lay a claim to compensation for fishery damages as well. Two separate claims could result in double compensation for damages to fish resources.

Damages to marine environmental capacity are an important part of ecological damages compensation, marine environmental capacity refers to the maximum amount of pollutants that sea water environment can accommodate. The environment has self purification capacity, values of self purification can be reflected in a marine pollution. When the amount of pollutants exceeded a certain numerical value there is definite negative impact on the self purification (Liu, 2005). Environmental capacity loss comes from two aspects. First is reduction of the amount of environmental resources, such as reduction of the volume of sea water. The second is increased in pollutants. The calculation of compensation for damages of marine environmental capacity gets the influence from recovery method, that is, the cost of restoring the marine environment to the situation before pollution. In maritime oil spill, the recovery of capacity can be partly achieved through the removal of oil. In "Tasman Sea" case the defendant advocated that the environmental capacity is not mentioned in the *International Convention of the Civil Liability for Oil Pollution Damages*, therefore, shall not be liable for compensation. The court finally held that defendant is liable for the recovery costs of marine environmental capacity according to 1992 *Protocol of International Convention of the Civil Liability for Oil Pollution Damages* in which environmental capacity damage has been recognized as the part of civil damages for compensation. In fact, even if the application of the Convention rather than 1992 protocol, the court can still get the same results. In the guide for the Compensation for Oil Pollution Damages the tenth article clearly defined, "the cost of prevention measures (including cleaning and processing) should be compensated. The eleventh Article rules that compensation for environmental

² See verdict of Tianjin Fishery Administration Bureau VS Infinite Shipping Co. Ltd.

damages should be limited to the actual costs or the costs of reasonable recovery measures. In marine oil pollution incidents, clean-up process, as a method to restore the marine environmental capacity, is necessary part to restore the polluted marine environment to originate state which is before the pollution occurs. In this sense, compensation to the damages of environmental capacity has a clear legitimacy foundation.

3. APPLICATION OF THE METHOD OF ECOLOGICAL DAMAGE ASSESSMENT

Methods of damages assessment can be divided into two types, one is restoration based on *International Convention of the Civil Liability for Oil Pollution Damages*, the other is multiple assessment methods regulated in *Oil Pollution Act*, which was enacted by United States congress, it including similar environment restoration and reconstruction method. If the restoration could not be implemented. It will seek the resources which can provide similar services to the same value as the polluted resources to meet the environmental restoration effect. According to *Oil Pollution Act* In decision of the assessment plan, besides the restoration method, the governments as trustee have multiple choices of methods in which market value method, travel cost method are included (James, 1999). There is no legislation on the assessment of ecological damage compensation in China, in "The Tasman Sea" case the trial court recognized the restoration as method of damages assessment. But disagree on the calculation method. From a legal point of view, China should implement resources restoration as the main method for assessment of the damages, because China is a party of the *International Convention of the Civil Liability for Oil Pollution Damages* the rules of International convention is mandatory implemented in international cases. However, when trial a domestic case, owing to lack of legislation, courts should consider the reasonable method of compensation for environmental resources damages. Is it necessary to adhere to the application of restoration method or need more alternative assessment methods? In my point of view, more assessment method is inevitable in domestic oil pollution case trial and future legislation. Some resources can't be restored after oil

pollution and sometimes most of polluted resources can't be restored for the serious pollution. Under this situation optional method is necessary and alternative resources are needed in order to adequately compensate the damages to the environment. From the view of the development of international environment protection that environmental benefit has been paid more attention, the environmental protection standards would tend to be strict. Protocols which as amendments of the *International Convention of the Civil Liability for Oil Pollution Damages* and *Oil Pollution Damage Compensation guidelines* tend to accept comprehensive compensation for ecological damages. Differences on damages in assessment between international convention and *Oil Pollution Act* are gradually getting less. The domestic legislation of China should be forward-looking. Therefore, in the future legislation of assessment of ecological and environmental damages should adhere to the restoration method and supplement by other compensations.

CONCLUSION

Through the summary of judicial cases, the compensation to the ecological damages in China includes the loss of environmental capacity, loss of natural resources, loss of function of natural resources service, expenses of research and assessment of natural resources restoration. This is a reasonable ecological damage compensation scope. However, the trialed case is not a formal legal resource with binding power for future case, it is a significant reference for similar case trial, but more importantly is putting these rules in to legislation for the benefit of protection of environment and ecology

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