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Study on the Islamic Banking Towards Sustainable Development: Focusing on the Principle of Transboundary Liability

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Abstract: Islamic banking is ready to accept legal framework on the principle of transboundary liability which based on the concept of sustainable development. The concept of sustainable development has been defined by the world commission on environment and development as development that meets the needs of the present generation without compromising the ability of the future generations to meet their own needs. The before said concept covers two essential scopes, i.e., environment and governance aspects. As the result, one of the legal framework approach under the concept of sustainable development is the principle of transboundary liability. The principle of transboundary liability plays an important role in the area of environmental law and governance. The used of the principle of transboundary liability in the area of environmental law and governance is largely in respond to the inevitability of every human being around the globe to protect environment from being polluted in their surroundings. As for the Islamic banking is concerned, the bank may created an essential mechanism to achieve sustainable development. Therefore, this study examines the used of the principle of transboundary liability in Islamic banking with relation to the environmental law and governance by identifying actions and cases which deal with environmental protection. This study is also identifying the relation between the Islamic banking which applied the principle of transboundary liability and Rio Declaration as a means to protect mother nature.

Key words: Islamic banking, sustainable development, principle of transboundary liability, protect, environment, Malaysia

INTRODUCTION

Basically, the banking system can be divided into two types of banking system. The first system is known as conventional banking. Meanwhile, the second system is known as Islamic banking or also be known as syariah banking. The conventional banking system introduced by the West, as for the Islamic banking system that is based on the teachings of Islam, refers to the Al-Quran and Hadith (Abd Rahman, 2008).

ISLAMIC BANKING

Islamic banking is based on the banking activities according to syariah law, called fiqh transactions regulation of the transaction. Rules and practices derived from the Al-Quran and Sunnah and other secondary sources of Islamic law, as agreed in the collective opinion among scholars syariah (Ijma), analogy (Qiyas) and personal reasoning (Ijtihad). Application of Islamic banking can be seen in the practical through the development of Islamic economics. Islamic banking is free from riba. This is because syariah prohibits the payment or receipt of interest by the interest from loans and investing in businesses that provide goods or services is considered contrary to the principles (Abd Rahman, 2008). At the end of the 20th century, Islamic banks become famous bank on the growing awareness and to maintain harmonious Islamic community itself. Today, Islamic banking is not only applicable if the Muslim community but also non-Muslim communities mostly prefer to use Islamic banking services.

ISLAMIC BANKING FINANCIAL TRANSACTIONS

According to Lee and Detta (2007), Islamic banking financial transactions can be divided into several parts: Bai' Al-Inah (sale and purchase agreements); Bai' Bithaman Ajil (deferred payment); Bai' Muajjal (credit

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sale); Musyarakah (joint-venture); Mudarabah (partnership); Murabaha (sale price which includes a profit margin agreed by both parties); Musawamah (negotiating the sale price between two parties without any reference by the cost or ask the seller a good price); Bai 'salam (means a contract in which money is printed for the goods delivered in the future); hibah (this is a sign that is given voluntarily by the debtor to the creditor in return for loans); Ijarah (means lease, hire or reward); Sukuk (Islamic bond); Wadiah (saving account); Wakalah (will occur when a person becomes a representative to conduct a transaction on behalf of the owner of the account with approval by the owner's of the account) and Takaful (Islamic insurance) (Lee and Detta, 2007; Sulaiman *et al*., 2011).

Islamic banking system is a direct engagement with the practice financial but it is based on Islamic syariah and fiqh method. Easily between Islamic principles to be observed is the elimination of riba, the prohibition of any form of gharar, the prohibition of gambling, the focus of the activities and commodities are lawful and focus on the concept of justice. In addition, there are other principles of Islamic banking in such a God as the absolute owner, people, as caliph, the integration of moral values, profit sharing and positive attitude towards the economy and pay the zakat (Salamon, 1989; Sulaiman *et al*., 2011). Banking as well as Islamic banking institution is a very important to the nation. Islamic banking plays an essential role to the development of a country. Islamic banking serves many products which include saving and investment in order to increase capital, subsequently generate wealth (Abd Rahman, 2008; Sulaiman *et al*., 2011). Even though, Islamic banking is very essential to the nation, however to what extent, bank especially Islamic banking is ready to accept legal framework the concept of sustainable development (Sulaiman *et al*., 2011) with one of the approach under the principle of transboundary liability. Therefore, this study will explore the answer.

THE CONCEPT OF SUSTAINABLE DEVELOPMENT

The concept of sustainable development has been defined by the world commission on environment and development as development that meets the needs of the present generation without compromising the ability of the future generations to meet their own needs. The above-said concept covers two essential scopes, i.e., environment and social aspects. This concept of sustainable development has been highlighted in the 1992 United Nations Conference on sustainable development in Rio de Janeiro, as the results, Agenda 21 and Rio Declaration has been established. According to Sands (1995, 2003), Agenda 21 emphasises the following matters which include sustainable human settlement, population, consumption pattern, poverty and human health (Sulaiman *et al*., 2011). On the other hand, Mensah (1996) stated that the Rio Declaration addresses on mankind entitlements and rights which include health and productive life (Sulaiman *et al*., 2011; Zainal *et al*., 2011). Basically, this concept of sustainable development has been an element in the international legal framework since early as 1893. According to the case of United States of America vs. Great Britain in 1893, 1 Moore's Int. Arb. Awards 755 well known as pacific fur seals arbitration where in this case the United States of America has stated that a right to make sure the appropriate and lawful use of seals and to protect them, for the benefit of human beings, from meaningless destruction (Razman *et al*., 2009a, b; Razman *et al*., 2010c; Emrizal and Razman, 2010; Emrizal *et al*., 2011).

Sands (1995) indicated that this concept of sustainable development is perhaps the greatest contemporary expression of environmental policy, commanding support and presented as a fundamental at the Rio Summit, Rio Declaration on environment and development in year 1992.

According to Article 33 of the Lome Convention in 1989 states that in the framework of this convention, the protection and the enhancement of the environment and natural resources, the halting of deterioration of land and forests, the restoration of ecological balances, the preservation of natural resources and their rational exploitation are basic objectives that the African Caribbean Pacific (ACP) states concerned shall strive to achieve with community support with a view to bring an immediate improvement in the living conditions of their populations and to safeguarding those of future generations (Razman *et al*., 2009c; Emrizal and Razman, 2010). The above mentioned Article 33 introduces into legal framework of the concept of sustainable development with one of the approach under the principle of transboundary liability.

THE PRINCIPLE OF TRANSBOUNDARY LIABILITY

Rio Declaration has laid down essential obligations which contribute the growth and the development of the environmental management and environmental law (Emrizal and Razman, 2010; Sulaiman and Razman, 2010;

Sands, 2003). One of the essential obligations is on the matter that all states in the world are required to ensure not to cause environmental harm to other states. This obligation has been laid down under the principle 2 of the Rio Declaration which states that:

> States have, in accordance with the Charter of the United Nations and the principles of the international law, the sovereign right to exploit their own resources pursuant to their on environmental and development policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction

The before mentioned obligation is clearly reflect recognition of the principle of transboundary liability. The principle of transboundary liability is derived and based on the legal maxim of sic utere tuo, et alienum non laedas which means one should use his own property in such a manner as not to injure of another (Sands, 1995).

This principle of transboundary liability has been adopted in the case of United States vs. Canada in 1941, 3 RIAA 1905, well known as Trail Smelter Case. In this case, the principle of transboundary liability was subsequently relied upon and further explained by the arbitral tribunal (Emrizal and Razman, 2010; Sulaiman and Razman, 2010; Sands, 1995).

The fact of the case: At a place called Trail situated in Canada which about 10 miles from the border between United States of America and Canada where the Canadian Consolidated Mining and Smelting Company had run activities that concerned about smelting zinc and lead. These activities had caused the emission of fumes. These fumes that contained sulfur dioxide had contributed to the damage to the plantations and land in the territory of the United States of America. In the year 1931, the United States of America Canada International Joint Commission which was formed under the boundary Waters Treaty, 1909 had made decision and required Canada to pay United States of America for the amount US $350,000.00 as for the compensation. After that, the before mentioned smelting company continued to run the operations and activities as usual. United States of America had made complaints on further damage suffered. Only in the year 1935, the United States of America and Canada agreed to form an arbitral tribunal on the earlier mentioned matter. Later, both countries signed up a convention where both countries submitting the before mentioned dispute to the arbitral tribunal. The arbitral tribunal held that:

> Under the international law no state has the right to use or allow to use of it's territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence

Therefore, the arbitral tribunal gave the decision in favour to the United States of America where the before mentioned smelter company required ensuring that the company operations and activities shall not cause fumes into the territory of the United States of America.

The before mentioned decision has made the establishment of the growth of the principle of transboundary liability and environmental protection. The principle of transboundary liability has been re-affirmed by the International Court of Justice in the year 1949. This is based on the case of United Kingdom vs. Albania in 1949, ICJ 4, well known as Corfu Channel Case. In this case, where the International Court of Justice held that under the international law, the Albania is found guilty and held responsible towards the explosions which caused loss of life and damage. The said explosions occurred in Albanian waters on 22nd October, 1946. The earlier decision is based on the application of the principle of transboundary liability from the case of trail smelter case with an additional input where every states is required to inform and notify other states of any harm and danger. If a state failed to notify another state of the said matter, the International Court of Justice shall imposed award to the injured state on the liability for failure to disclose information of the said matter that could have reduced danger and harm toward the other state. Based on the above discussion by the discussed cases, it is clearly that the principle of transboundary liability has promoted two important obligations. There are:

- International co-operation and good neighbourliness
- State responsibility not to cause environmental harm and damage

International co-operation and good neighbourliness: The obligation of international co-operation and good neighbourliness has been laid down based on Article 75 of the United Nation Charter in connection with commercial, social and economic subjects which has been defined into the development and application of rules promoting international environmental protection co-operation (Emrizal and Razman, 2010; Sands, 2003). Therefore, there are many international environmental treaties, other international acts, international agreements and international declarations which reflect

the international co-operation and good neighbourliness that derived from the principle of transboundary liability (Emrizal and Razman, 2010; Sands, 1995), such as the stockholm declaration, the world charter for nature, the ILC draft articles on international liability and the Rio Declaration and the montreal protocol (Emrizal and Razman, 2010; Sands, 1995).

State responsibility not to cause environmental harm and damage: International law does not permit states around the globe to run operations and activities within their jurisdiction without concern for the protection of world environment (Sulaiman and Razman, 2010; Wolf and White, 1995). International law also requires states to take adequate and reasonable measures to regulate and control sources of serious environmental harm and pollution within their jurisdiction. This obligation has been imposed to all states around the globe to prevent, reduce and control environmental harm and pollution within their jurisdiction. This has been supported and reflected in awards and decisions in arbitral tribunals and also in international courts of justice (Sulaiman and Razman, 2010; Wolf and White, 1995).

ROLE OF THE PRINCIPLE OF TRANSBOUNDARY LIABILITY AND ISLAMIC BANKING IN ORDER TO ACHIEVE THE CONCEPT OF SUSTAINABLE DEVELOPMENT

Based on the discussion, the approach on the principle of transboundary liability would shift the burden of proof and need the project proponent who intends to develop a project to bring evidences which the-said project will not cause harm to the environment in order to attain sustainable development (Sands, 1995; Razman *et al*., 2010c; Sulaiman *et al*., 2011). Whereas, the traditional approaches indicate that the burden of proof is on the shoulder of the party who oppose a development project. Later the oppose party to the said development project is required to bring evidences to proof that the said development project is likely to cause harm to the environment (Sands, 2003; Razman *et al*., 2010b; Sulaiman *et al*., 2011).

Clearly that the above-said provision requires the project proponent to bring evidences in the form of a report which indicate that the development project will not cause harm to the environment in order to achieve sustainable development and if the project is likely to harm the environment, the project proponent is required to proposed measures that shall be undertaken to prevent, reduce or control the adverse impact on the environment (Razman and Azlan, 2009; Razman *et al*., 2010a; Sulaiman *et al*., 2011).

According to Malaysian experience on environmental impact assessment which also Islamic banking in Malaysia also looking at this provisions in considering the project proponent loan application where it is clearly shown as the state practice to attain sustainable development. The state practice has adopted the principle of transboundary liability approach in order to achieve sustainable development. Based on Article 38 (1) (b) of the Statute of the International Court of Justice identifies state practice as the international customary law and this international customary law being classified as one of the sources of the international law. Finally, the principle of transboundary liability approach may be considered as one of sources of the international environmental law as the principle position as a general principle of law and also an international customary law in order to attain sustainable development where the banking Institutions as well as Islamic banking also taking part on regards this matter (Sulaiman *et al*., 2011; Zainal *et al*., 2011).

CONCLUSION

From the results, this study suggests that the Islamic banking has incorporated the principle of transboundary liability. The principle of transboundary liability plays an important role in the area of environmental law and governance. The opportunity to enhance the growth of the principle of transboundary liability has been show in the some practices in banking Institutions as well as Islamic banking.

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