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The Principle of Transboundary Liability and Interest Approach from International Legal Perspectives Towards Environmental Protection

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Abstract: The principle of transboundary liability plays an important role in protecting environment. The used of the principle of transboundary liability to the area of the environmental protection with the interest approach largely in reply to the necessity of every each person to protect, their rights and interests in property from being polluted. Therefore, this study will examine the used of the principle of transboundary liability in relation with interest approach from the international legal perspectives, identify actions and cases which deal with environmental protection and also identify the relation between the principle of transboundary liability and interest approach as a means to protect environment.

Key words: Transboundary liability, principle, environmental protection, legal perspectives, Indonesia

INTRODUCTION

Rio Declaration has laid down essential obligations which contribute the growth and development of the environmental management and law (Jamaluddin, 2001). 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 earlier-said obligation is clearly reflect recognition of the principle of transboundary liability (Sands, 1995). 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 (Norsulfa, 1997).

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 (Hughes, 1992).

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 as for the compensation. After that the earlier-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 earlier-mentioned dispute to the Arbitral Tribunal. The Arbitral Tribunal held that:

> ...Uunder 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 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 earlier-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 earlier-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 earlier discussion by the earlier-said 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 (Sands, 1995). Therefore, there are many international environmental treaties, other international acts, international agreements and declarations which reflect the international co-operation and good neighbourliness that derived from the principle of transboundary liability (Birnie and Boyle, 1994), such as the Stockholm Declaration, 1972, the World Charter for Nature, 1982 the ILC Draft Articles on International Liability and the Rio Declaration, 1992 (Sands, 1995).

As for the Rio Declaration is concerned, the declaration has clearly shown an attempt to ensure the international co-operation and good neigbourliness on the matter to protect environment against pollution in order to achieve the sustainable development (Ball and Bell, 1995). The earlier-mentioned objective is set out in the Principle 27 of the Rio Declaration which provides that:

> States and people shall co-operate in good faith and spirit of partnership in the fulfillment of the principles embodied in this declaration and further development of international law in the field of sustainable development

According to Sands (1995), this obligation has been accepted in reality of all international agreements on environmental matters of bilateral, regional applications and global instruments as been highlighted in Table 1. The obligation may be in the manner of specific provisions under a treaty or general provisions which in connection with the implementation of the treaty's objectives (Table 2).

State practice applying this obligation of international co-operation and good neighbourliness on the matter to protect environment against environmental harm and damage is reflected in awards and decisions in Arbitral Tribunals and also in international courts of justice (Harris, 1991).

An example, in the dispute over the Gabcikovo Dam and the proposed diversion of the Danube River where the dispute was between Hungary and Slovakia. In this dispute, clearly the obligation of international co-operation and good neighbourliness has been the central issue (Sands, 1995). Here, Hungary laid down claimed against Slovakia on the ground that Slovakia implement of principles affecting transboundary resources which inconsistent with the obligation of international co-operation and good neighbourliness (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

Table 1: Examples of the international environmental agreements and instruments on the obligation of international co-operation and good neighbourliness

Bilateral agreements and regional applications	Global instruments
Article 2 (1)	Article 5
Alpine Convention 1991	Biodiversity Convention 1992
Article 12 (2)	Article 2 (2)
London Convention 1933	Vienna Convention 1985

Table 2: Examples of the obligation may be in the manner of specific provisions under a treaty or general provisions which in connection with the implementation of the treaty's objectives

Specific provisions	General provisions
Article 4 (1) (e)	Article 5
Climate change Convention 1992	Biodiversity Convention 1992
Article 14	Article 16 (1)
Lome Convention 1989	African conservation Convention 1968

Sands (1995)

jurisdiction without concern for the protection of world environment (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 (Birnie and Boyle, 1994).

In the Trail Smelter Case, the Arbitral Tribunal indicated that 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 which clearly shown that it is of all states responsibility to prevent, reduce and control environmental harm and pollution within their jurisdiction. In addition, in the Corfu Channel Case support the similar obligation where the International Court of Justice had concluded every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states (Birnie and Boyle, 1994).

Moreover, in the case of Spain vs. France in 1957, 24 I.L.R. 101, well known as Lac Lanoux Case where in this case, concerned about the proposed diversion of the international river by France. The Arbitral Tribunal certified that a state has an obligation not to exercise its rights to the extent of ignoring the rights of other state (Harris, 1991). The Arbitral Tribunal further explained:

> France is entitled to exercise her rights; she cannot ignore the Spanish interest. Spain is entitled to demand that her rights be respected and that her interests be taken into consideration

This second obligation is not only being supported by awards and decisions in Arbitral Tribunals and also in international courts of justice which have been discussed as earlier but also is being affirmed in virtually by United Nation General Assemblies and global treaties (Table 3).

Table 3: Examples of the United Nation General Assemblies and global treaties on the obligation of state responsibility not to cause environmental harm and damage

United Nation (General assemblies)	Global treaties
1974 United Nation Assembly Resolution 3281 States to ensure not to cause environmental damage to other state or beyond national limit	Baltic Convention 1992
1972 United Nation Assembly Resolution 2849 to avoid producing harmful effects on other countries	Vienna Convention 1985
1961United Nation Assembly Resolution 1629 to avoid harmful biological consequences of other states by increasing levels of radioactive fallout	Long-range Transboundary air Pollution (Geneva) 1979

Sands (1995)

TRANSBOUNDARY POLLUTION

There are two major disasters in the middle 1980's which involved transboundary pollution. One incidence happened in Schweizerhale, Switzerland and the other occurred in Chernobyl, Soviet Union.

The first disaster happened in Chernobyl, Soviet Union where a nuclear reactor exploded on 26th April, 1986. A huge amount of radioactive emitted to the atmosphere, especially European atmosphere. A number of people outside Soviet Union were affected by the disaster. Soviet Union authority informed public only after 15 days after the disaster took place. At the time of the notification made by Soviet Union authority, number of people in the European Continent had already affected. Unfortunately, there was no action taken against the Soviet Union. This disaster is known as Chernobyl Explosion (Norsulfa, 1997).

The second incidence and disaster happened when a company's warehouse that was Sandoz Corporation's warehouse in Schweizerhale, Switzerland caught fire on 1st November, 1986. The chemical from the said warehouse had polluted Rhine River by seeping through the Sandoz Corporation's sewer system. This had caused the formation of toxic which harmful to the living creatures in the Rhine River. Switzerland authority only informed the neighbouring countries, 24 h after the incidence. Immediately after the notification, France government shut down all the water supply along the said river. As the result of this incidence, Sandoz Corporation had paid a lot of claims privately. Nevertheless none of the neighbouring countries brought the action against Switzerland. This incidence is known as Sandoz Spill (Norsulfa, 1997).

INTEREST APPROACH FROM THE INTERNATIONAL LEGAL PERSPECTIVES

According to Barrett (2003), Hasenclever *et al.* (1997) and Haggard and Simmons (1987), the interest approach is one of the essential elements that influence in the negotiations of the MEAs. These scholars, also argue that this approach helps states around the globe to realise the common interests during the MEAs negotiations. This interest approach can be divided into two groups (Barrett, 2003; Hasenclever *et al.*, 1997; Haggard and Simmons, 1987), namely the first group that emphasises on the international institutions and second group which is less using the international institutions.

Interest approach (the first group): The first group emphasises on the international institutions effort to bring together states around the globe to realise the common interests that balance with benefits and costs involvement

in creating international environmental co-operations which include in creating MEAs (Hasenclever *et al*., 1997). The international institutions always ensure that all states will be benefited with the co-operation that being created in order to achieve joint gains and to reduce potential costs expenditure. Nevertheless, the international institutions are capable of making all states that are involved to notice the common interest in that particular international environmental co-operations even when the elements that brought them in the first place being no longer effective (Hasenclever *et al*., 1997). As for Hasenclever *et al*. (1997), this situation as co-operation under the umbrella of anarchy or utilitarian approach. In addition, Hasenclever *et al*. (1997), also regarded this approach as a game theory. Meanwhile, Keohane (1984, 1988) and Oye (1986) argued that the international institutions will not be able to fulfill the optimal outcomes of every member state, for instance in the position of the prisoner's dilemma game. However, the international institutions may facilitate and smooth the progress of gaining common benefits by heartening reciprocity in the negotiation which treated others as you would like to be treated with upgrading level of communication and information. Therefore, the international institutions will able to persuade state response in order to maneuver results in the international environmental co-operations.

Interest approach (the second group): According to Haggard and Simmons (1987), the second group is less using international institutions and the game-theory as vehicles to gain from the interest approach in the international environmental co-operations which include creating of MEAs. As for Barrett (2003), interest in creating MEAs under the umbrella of the international environmental co-operations must be derived from individual state needs and capacity. Each individual state will calculate it own benefits and perceived costs that will be incurred. Interest of a state begins when a particular issue that is being raised has shown a lot of benefits to the said state (Barrett, 2003; Haggard and Simmons, 1987).

Finally, it is very important to bring in the interest approach in the negotiations of creating of the MEAs in order to acheive the international environmental co-operations regardless, if the interest approach is using the first group theory or the second group ideas. The main purpose to build up the international environmental co-operations is to tackle global environmental problems (Snidal, 1991; Barrett, 2003).

CONCLUSION

The principle of transboundary liability imposed liability towards a state for the adverse activities and operations within the said state jurisdiction that caused harm to the other state. In dealing with this principle of transboundary liability and the environmental protection, however this principle is still evolving and required of further development and growth.

The opportunity to enhance the growth of this principle of transboundary liability and the protection on the environment, through state practice, following the two transboundary environmental disasters Sandoz Spill and Chernobyl Explosion were lost due to the decision by the injured states not to take international legal action for causing environmental pollution, even though the injured states have their right to do so (Sands, 1995).

The support made by the states around the globe on the International Law Commission's Draft Articles on the Non-Navigational Uses of International Water courses Law, 1994 and the Rio Declaration, 1992 are clearly reflected the acceptance and the growth of this principle of transboundary liability and the protection on the environment (Sands, 1995).

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