

## **Environmental Sustainability in the Basel Convention 1989 by Adopting the Principle of Transboundary Liability Towards Protection to the Consumer**

<sup>1</sup>Muhammad Rizal Razman, <sup>2</sup>Sakina Shaik Ahmad Yusoff, <sup>2</sup>Shamsuddin Suhor,  
<sup>2</sup>Rahmah Ismail, <sup>3</sup>Azimon Abdul Aziz and <sup>4</sup>Kartini Aboo Talib Khalid  
<sup>1</sup>Institute for Environment and Development (LESTARI), <sup>2</sup>Faculty of Law,  
<sup>3</sup>Faculty of Economics and Management, <sup>4</sup>Institute of Ethnic Studies (KITA),  
Universiti Kebangsaan Malaysia, 43600 UKM Bangi, Selangor, Malaysia

---

**Abstract:** Environmental sustainability derived from the concept of sustainable development that promotes the capacity to sustain the quality of life we value in order to safeguard environment, especially towards better living environment for consumer. One of the international law that harmonised the concept of sustainable development in order to achieve environmental sustainability for consumer protection is The Basel Convention 1989. Basically, the Basel Convention 1989 is an international legal instrument that control the transboundary movement of hazardous wastes in which incorporated and adopting the principle of transboundary liability. The principle of transboundary liability plays an important role in environment protection as well as consumer protection in order to achieve environmental sustainability. The used of the principle of transboundary liability in environmental protection is largely in respond to the inevitability of every consumer to environment from being polluted in their surroundings. As for the Basel Convention is concerned, the convention created an essential mechanism to protect environment as well as consumer protection in order to achieve environmental sustainability from negative effects of transboundary movement of hazardous wastes globally. Therefore, this study examines the used of the principle of transboundary liability in the Basel Convention 1989 looking at the international law and governance perspectives by identifying actions and cases which deal with environmental protection as well as consumer protection in order to achieve environmental sustainability. This study is also identifying the relation between the Basel Convention 1989 which adopting the principle of transboundary liability as a means to protect environment as well as consumer protection in order to achieve environmental sustainability.

**Key words:** Environmental sustainability, Basel Convention 1989, the principle of transboundary liability, consumer protection, wastes, Malaysia

---

### **INTRODUCTION**

Environmental sustainability is very essential to protect environmental surroundings as well as for better living environment for consumer. One of the international laws that adopted the principle of transboundary liability in order to achieve environmental sustainability is The Basel Convention 1989.

The convention created an essential mechanism to protect human habitat and environment from negative effects of transboundary movement of hazardous wastes globally in order to achieve environmental sustainability. The convention has created essential mechanisms which negotiated under auspices of United Nations Environment Programme (UNEP) that regulates the international trade hazardous wastes (Sands 2003). These international

regulations that stipulated in the Basel Convention 1989, contains on obligations on hazardous wastes exports from Organisation for Economic Co-operation and Development (OECD) to developing states for ending disposal and certain consignments for recovery and recycling (Sands 1995, 2003).

**The Basel Convention 1989:** The Basel Convention 1989 has entered into enforced by 5th May, 1992. The convention created international regulations which stipulated obligations on international trade in hazardous wastes (Sands, 1995, 2003). These international regulations incorporated the principle of transboundary liability.

The convention laid down forth general obligations requiring all parties to make sure that transboundary

movement of hazardous wastes and their disposal are decreased to the minimal reliable with environmentally sound (Sands, 1995, 2003).

The convention disallows on exports of hazardous wastes, however the convention gives leeway to the exporting country that incapacity to treat the hazardous wastes in an environmentally sound or efficient management for the treatment of hazardous wastes (Sands, 1995, 2003). This leeway is to ensure the two major disasters sandoz spill and chernobyl explosion will not be repeated in order to safeguard human habitat and environment as well as to achieve environmental sustainability that based on the concept of sustainable development.

**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 earlier 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. On the other hand, Mensah (1996) stated that the Rio Declaration addresses on mankind entitlements and rights which include health and productive life.

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, 2010; Emrizal and Razman, 2010).

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 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.*, 2009b; Emrizal and Razman, 2010).

The Article 33 introduces into legal framework of the concept of sustainable development with one of the approach under the the Principle of Transboundary Liability.

#### **THE PRINCIPLE OF TRANSBOUNDARY LIABILITY OBSERVATION FROM INTERNATIONAL LAW AND GOVERNANCE PERSPECTIVES**

Rio Declaration has laid down essential obligations which contribute the growth and the development of the human habitat and environmental protection (Ball and Bell, 1995). One of the essential obligations is on the matter that all states in the world are required to ensure not to cause human habitat and environmental harm to other states. This obligation has been laid down under the principle 2 of the Rio Declaration which stated 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

This 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 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 m 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 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:

... 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 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 in relation to human habitat 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 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 explosions occurred in Albanian waters on 22nd October 1946. The 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 matter, the International Court of Justice shall imposed award to

the injured state on the liability for failure to disclose information of the matter that could have reduced danger and harm toward the other state.

Based on the discussion by the 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 TOWARDS ENVIRONMENTAL SUSTAINABILITY FROM INTERNATIONAL LAW AND GOVERNANCE PERSPECTIVES**

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 international 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 neighbourliness on the matter to protect environment and human habitat 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 in spirit of partnership in the fulfillment of the principles embodied in this declaration and in further development of international law in the field of sustainable development

State practice applying this obligation of international co-operation and good neighbourliness on the matter to protect human habitat and 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 Gabčíkovo 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 TOWARDS ENVIRONMENTAL SUSTAINABILITY FROM INTERNATIONAL LAW AND GOVERNANCE PERSPECTIVES**

International law and governance does not permit states around the globe to run operations and activities within their jurisdiction without concern for the protection the environment as well as consumer protection in order to achieve environmental sustainability (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 its 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 earlier but also is being affirmed in virtually by United Nation General Assemblies and global treaties.

**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 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 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).

**POST SANDOZ SPILL AND CHERNOBYL EXPLOSION TOWARDS ENVIRONMENTAL SUSTAINABILITY FROM INTERNATIONAL LAW AND GOVERNANCE PERSPECTIVES**

Based on the earlier discussion, both countries, Switzerland and Soviet Union free from the liability. There

was no action has been taken against these two countries in the year which the disasters occurred. This due to insufficiently articulated any international obligations concerning to state obligation in the situation of transboundary environmental disasters.

These two disasters Sandoz spill and Chernobyl explosion have caused the growth of the international community awareness on the importance of the principle of transboundary liability on the transboundary environmental disasters. Therefore, there are two well-known international legal documents that try to address this matter:

- Principle 18 and Principle 19 of the Rio Declaration, 1992
- Article 27 and 28 of the International Law Commission's Draft Articles on the non-navigational uses of International Watercourses Law, 1994 (Norsulfa, 1997)

According to the Article 18 of the Rio Declaration, 1992 stated that:

States are required to take immediately action to notify other states of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of the other states

As for the Article 19 of the Rio Declaration, 1992 mentioned:

States shall provide prior and timely notification and relevant information to potentially affected states on activities that may have significant adverse transboundary environmental effect and shall consult with those states at early state and in good faith (Sands, 1995)

In the Article 27 of the International Law Commission's Draft Articles on the non-navigational uses of International Watercourses Law, 1994 laid down:

States are required to mitigate or prevent conditions of any disasters which might affect any other state

As for the Article 28 of the International Law Commission's Draft Articles on the non-navigational uses of International Watercourses Law, 1994 required:

States to notify other states of an emergency originating within its jurisdiction, to mitigate, prevent and eliminate any harmful effects of the emergency and to develop contingency plans for responsibility to the emergency (Norsulfa, 1997)

The International Law Commission's Draft Articles on the non-navigational uses of International Watercourses Law, 1994 is the complementing to the Rio Declaration, 1992 (Norsulfa, 1997). These two international legal documents expressly laid down the obligations of all states throughout the globe on transboundary environmental harms and disasters. This clearly shown the growth and the development of the principle of transboundary liability as a means to protect environment as well as consumer protection in order to achieve environmental sustainability.

## **CONCLUSION**

The principle of transboundary liability imposed liability towards a state for the adverse activities and operations within the state jurisdiction that caused harm to the other state. In dealing with this principle of transboundary as a means to protect environment as well as consumer protection in order to achieve environmental sustainability, 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 in protecting human habitat and 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 scientific 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 Watercourses Law, 1994 and the Rio Declaration, 1992 are clearly reflected the acceptance and the growth of this principle of transboundary liability as a means to protect environment (Sands, 1995) as well as consumer protection in order to achieve environmental sustainability.

## **ACKNOWLEDGEMENT**

This study was part of research study funded by research funding of the the UKM-AP-CMNB-02-2010 project.

## **REFERENCES**

Ball, S. and S. Bell, 1995. Environmental Law. Blackstone Press Ltd., London.

- Birmie, P.W. and A.E. Boyle, 1994. *International Law and the Environment*. Clarendon Press, Oxford.
- Emrizal and M.R. Razman, 2010. The study on international environmental law and governance: Focusing on the montreal protocol and the role of transboundary liability principle. *Social Sci.*, 5: 219-223.
- Harris, D.J., 1991. *Cases and Materials on International Law*. Sweet and Maxwell, London.
- Hughes, D., 1992. *Environmental Law*. Butterworth and Co. Publishers Ltd., London.
- Mensah, C., 1996. The United Nations Commission on Sustainable Development. In: *Greening International Institutions*, Werksman, J. (Ed.). Earthscan, London, pp: 21-37.
- Norsulfa, M.S.S., 1997. The right to clean air: Is there legal liability for transboundary pollution? *Bar Council Infoline*, 9: 3-7.
- Razman, M.R., A.S. Hadi, J.M. Jahi, A.H.H. Shah and A.F. Mohamed *et al.*, 2009a. The international law mechanisms to protect human habitat and environment: Focusing on the principle of transboundary liability. *Int. Bus. Manage.*, 3: 43-46.
- Razman, M.R., A.S. Hadi, J.M. Jahi, A.H.H. Shah, S. Sani and G. Yusoff, 2009b. A study on negotiations of the montreal protocol: Focusing on global environmental governance specifically on global forum of the United Nations environmental programme. *J. Food Agric. Environ.*, 7: 832-836.
- Razman, M.R., A.S. Hadi, J.M. Jahi, A.H.H. Shah, S. Sani and G. Yusoff, 2010. A study on the precautionary principle by using interest approach in the negotiations of the montreal protocol focusing on international environmental governance and law. *J. Food Agric. Environ.*, 8: 372-377.
- Sands, P., 1995. *Principles of International Environmental Law I: Frameworks, Standards and Implementation*. Manchester University Press, Manchester.
- Sands, P., 2003. *Principles of International Environmental Law*. 2nd Edn., Cambridge University Press, ISBN: 0-521-81794-3, 0-521-52106-8 Cambridge.
- Wolf, S. and A. White, 1995. *Environmental Law*. Cavendish Publishing Ltd., London.