

The Study on International Environmental Law and Governance: Focusing on the Montreal Protocol and the Role of Transboundary Liability Principle

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Abstract: The international environmental governance and law scholars suggested the Montreal protocol has promoted the the principle of transboundary liability. The principle of transboundary liability plays an important role in the area of international environmental law and governance. The used of the principle of transboundary liability in the area of international 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 Montreal protocol is concerned, the Protocol created an essential mechanism to protect environment from negative effects of hazardous chemicals globally. Therefore, this study examines the used of the principle of transboundary liability in the Montreal protocol with relation to the international environmental law and governance by identifying actions and cases which deal with environmental protection. This study is also identifying the relation between the Montreal protocol which applied the principle of transboundary liability and sustainable development as a means to protect mother nature.

Key words: International environmental law and governance, Montreal protocol, the principle of transboundary liability, ozone, Malaysia

INTRODUCTION

The international environmental governance and law scholars suggested the Montreal protocol has promoted the the principle of transboundary liability. The principle of transboundary liability plays an essential part in the area of international environmental law and governance. The used of the principle of transboundary liability in the area of international 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 Montreal protocol is concerned, the Protocol formed an important means to safeguard environment from negative effects of hazardous chemicals globally such as CFCs and halon. Therefore, the primary purpose of this study is looking at the promotion of the principle of transboundary liability in the international environmental law and governance with regards of the Montreal protocol and the relations of the interstates participation response.

Montreal protocol: The Montreal protocol has been enacted for the protection of the ozone layer by taking precautionary measures to control world emissions of

substances that deplete the ozone (Conservation and Environmental Management Division, MOSTE, 2004) by promoting the principle of transboundary liability. Awareness on the existence of ozone layer i.e., O₃ at the stratosphere and threat of Chlorofluorocarbons (CFCs) as ozone depletion substance has increased radically at the early years of 1970s (Seaver, 1997; Breitmeier, 2000; Breitmeier *et al.*, 2006). Moreover, both scientists and policy makers had made a lot of initiatives in order to capture global attention about the threat of CFCs towards the ozone layer. As a result, at the middle 1980s, ozone layer problems became global concerns due to transboundary movement of the said chemicals (Breitmeier, 2000; Breitmeier *et al.*, 2006). Starting from this point, the global concerns became the catalyst for the international environmental cooperation and gave birth to the Montreal protocol in order to acheive sustainable development (Bjorn, 2007).

MATERIALS AND METHODS

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 mentioned 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 v Great Britain 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. 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.

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 (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.

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 v 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 (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 above-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 above mentioned matter. Later, both countries signed up a convention, where both countries submitting the above-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 mentioned smelter company required ensuring that the

company operations and activities shall not cause fumes into the territory of the United States of America. This 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 v 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 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 discussion by this 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, 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 (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 (Sands, 1995).

RESULTS AND DISCUSSION

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 (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 (Wolf and White, 1995).

Transboundary pollution: Basically, there were two major disasters in the middle 1980's, which involved transboundary pollution and the violation on the concept of sustainable development. One incidence happened in Soviet Union and the other occurred in Switzerland. 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 in urban region 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 incident 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 for the present and future safety of the mankind. This disaster is known as Chernobyl Explosion (Norsulfa, 1997; Razman and Jahi, 2002). This disaster clearly shown that the absence of the compliance with the concept of sustainable development which emphasises that all development that meets the needs of the present generation without compromising the ability of the future generations to meet their own needs. The second incidence and disaster happened when a company's warehouse, which 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 things and creatures in the Rhine River and surrounding urban region. Switzerland authority only informed the neighbouring countries, 24 h after the disaster. Immediately, after the notification, France government shut down all the water supply along the said river. As the result of this disaster, Sandoz Corporation had paid a lot of claims privately. Nevertheless none of the neighbouring countries brought the action against Switzerland for the present and future safety of the mankind. This incidence and disaster is

known as Sandoz Spill (Norsulfa, 1997; Razman and Jahi, 2002). The second disaster also highlighted the violation on the concept of sustainable development which failed to ensure the safety of present and also future generations. Based on the above discussion, both countries, Switzerland and Soviet Union free from the mentioned liability. There was no action has been taken against these two countries in the year, which the said incidents and 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 famous international legal documents that try to address the above mentioned matter.

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; Razman and Jahi, 2002). 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; Razman and Jahi, 2002).

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 to ensure to the safety of the present and future generations. This clearly shown the growth and the development of

the principle of transboundary liability and environmental protection and the concept of sustainable development.

CONCLUSION

In this study, the Montreal protocol that promotes the principle of transboundary liability is rather an important feature to encourage and influence states around the globe to participate in the Montreal protocol based on the past experiences of Sandoz spill and Chernobyl explosion. The opportunity to enhance the growth of this transboundary liability principle has been show in the Montreal protocol through state practice, after a series of negotiations, most of the negotiating countries felt that the Montreal protocol would be able to supply the market for substitutes of CFCs and would not be exaggerated upsetting the global cost-effectively and to ensure the principle of transboundary liability will not be infringed and at the same time the concept of sustainable development been imposed in the protocol.

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