

TRANSBOUNDARY POLLUTION – THREAT TO GLOBAL COMMUNITY

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Abstract

Transboundary pollution is a pollution which is transportable beyond borders. It is not confined within one state. Transboundary pollutants may take the form of polluted water or deposition of polluted particles in air outside borders. Problems that cross borders, particularly environment attracts increasing attention. Being responsible the Cooperation of the nations in global community in monitoring pollution is the need of the hour. This article focuses on potential remedies available against the damaging effects of oil and gas pollution across borders, emphasising on United Nations Convention on the Law of the Sea (UNCLOS) and on relevant international instruments and particularly states responsibility in controlling the spill.

Key Words: Transboundary pollution, Oil pollution, Gas pollution, Marine Pollution, United Nations Law of Sea, State Responsibility, Remedies against Transboundary Pollution, Sustainable development.

Introduction

Transboundary pollutions having its origin in one state stretches greater impact in another state. Transnational problem is one of the eldest and tenacious problem in international law. As the population increases, production also increase the probability of pollution to spill from one country to another increases. Pollution can be caused within country crossing state lines and in fact it is referred as Transboundary pollution. Even for an affected party to stand in a court hall jurisdiction is essential to put forth their adjudication. Transboundary pollution has no jurisdiction and it crosses borders and it's difficult to address for a nation state. Transboundary ecological impairment commonly takes any of the forms viz., Air pollution and Marine pollution viz., Land based pollution (Acid rain), Ocean dumping and Vessel based pollution. This impact of pollution is increasingly a concern in the development of international law. it is more difficult to address the transboundary pollution substantially principles and norms are well established through various treaties, conventions and protocols.

Historical review of transboundary pollution

The general principle of international law replicates that one country should not allow the activities within its borders to interfere with activities within another sovereign state's borders. Hence the term "Transboundary" indicates actions within the jurisdictions of the country affect other countries and the damage to the environment is caused by human behaviour and other factors. Between some states liability for transboundary environmental damage has been explicitly surrounded by treaties or other international instruments. However, law of transboundary environmental harm is still customary. Customary international law recognised state to exploit natural resources within its territory, restrictions are imposed on their right. Customary international law⁹⁸, thus is a set of regulating expectations developed through observation and action and reactions of state. A landmark verdict about a dispute over environmental degradation was given in Trail Smelter Case⁹⁹

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⁹⁸ Sources of International law.

⁹⁹ U.S v. Canada, Vol.35 AJLL (1941), p.644

during 1938 and 1941 itself. International liability for damages caused to another state was recognised first through the decision made in Trial Smelter Case, even without any treaty obligation. The arbitral verdict of Trial smelter asserts a duty upon the states in preventing environmental damage beyond its territory and insists "Polluter pays principle"¹⁰⁰.

The primary source of international law that administers the oceans is the United Nations Convention on the Law of the Sea (UNCLOS)¹⁰¹ a framework agreement. Rights and obligations of States with respect to all uses of the oceans are set out in that. It contains the detailed provision on prevention, reduction and control of marine pollution. By accepting the detailed provisions of UNCLOS a state can become a party to it as it is not a stand-alone convention. UNCLOS identifies the ability of a specialised international organisation to prescribe rules to protect environment. The International monetary Organisation¹⁰² is recognised as the competent international organisation (IMO) with respect to the safety of maritime navigation. General provisions in UNCLOS repeatedly include the rules, standards, procedures and practices incorporated in IMO instruments which are being constantly updated by the IMO. Convention on Long-range Transboundary Air Pollution¹⁰³ was signed and entered into force and it is the first internationally legally binding instrument to deal with complications of air pollution on a broad multilateral basis. Contracting parties identify problems faced by transboundary air pollution and elaborate protocols on specific pollutants.

Effects of transboundary pollution

Transboundary Air Pollution comprises of Acid rain that contains destructive amount of sulphuric acid and nitric acid and sulphur oxides which are released into the environment when fossil fuels are burnt. These acid fall on Earth's surface in the form of rain, snow or fog which is a wet form or dry precipitation which has a greater impact in wildlife, forest and marine population. Convention on Long-range Transboundary Air Pollution formulated by UNECE¹⁰⁴ led to cleaner air, healthier forest, soils and lakes in North America, which paved the way regulating transboundary air pollution issues. Chemical compounds containing gaseous chlorine or bromine from industry and human activities cause depletion in ozone in the upper atmosphere of the Earth which is above the troposphere. The extent of ultraviolet rays that reach the earth's surface also increased. To combat the production of numerous substances that are responsible for ozone depletion and the transboundary effects of the same in the international arena Vienna Convention¹⁰⁵ was formulated which results in Montreal Protocol¹⁰⁶. Many amendments have been made in the same then and there. Greenhouse gas effect which led to climate change and in the result global warming is a major environmental hazard which creates a greater impact on atmosphere which led to air pollution. Vienna Convention and UNFCCC¹⁰⁷ plays a major role in protection of ozone layer and control of emission of greenhouse gases respectively.

The other major factor of transboundary pollution comprises of marine pollution which includes Ocean dumping viz., dumping of industrial waste which contains product like mercury, radioactive substances which results in destruction of marine population and human

¹⁰⁰ Economic principle adopted by Organisation for Economic Cooperation and Development in 1972.

¹⁰¹ United Nations Law of Sea was adopted in 1982 at Montego Bay, Jamaica.

¹⁰² Adopted in Geneva Conference February 1948.

¹⁰³ Multilateral agreement adopted in 1983 March.

¹⁰⁴ United Nations Economic Commission for Europe established in 1947.

¹⁰⁵ Convention for the protection of ozone layer takes effect in 1988

¹⁰⁶ International treaty came into force on 1989 January.

¹⁰⁷ United Nations framework convention on climate change came into force on March 1994.

health. Dumping of garbage results in depletion of oxygen in marine environment and have greater impact in marine life. Dumping of plastics and bottles is a great threat to animals in ocean. London Convention 1972¹⁰⁸ prohibits the dumping except for possibly acceptable wastes. Vessel based pollution is one in which the cargo ships unintentionally and intentionally discharge crude oil into oceans. The first oil spill occurred from S.S. Petriana¹⁰⁹ while transporting petroleum from Borneo to Australia on 1903. There were many occurrences regarding oil spills recorded in history which places the marine environment and population in menace. In Exxon-Valdez oil spill¹¹⁰ largest environmental settlement of compensatory damages was awarded. International law provides wide range of regulatory regimes in controlling marine oil pollution. Geneva convention 1958 contains the provisions for ocean environmental protection against oil pollution through pipelines or development of continental shelves. Further UNCLOS, the “umbrella convention” contains general provisions of protection of Marine environment. Principle 22 of Stockholm declaration¹¹¹ addresses the issue of liability and compensation for the environmental damage caused by Nation states within and outside of their jurisdiction. Agenda 21 of Rio declaration¹¹², a programme for sustainable development scheduled by UNCED in its chapter 17 speaks about protection of oceans, all kinds of seas, enclosed and semi-enclosed seas, coastal areas and the protection, rational use and development of their living resources. Torrey Canyon¹¹³ disaster in English Channel paved the way for establishment of a legal committee by IMO to deal with the deficiencies in international system for accessing liability and compensation for oil spill damage, and also a new sub-committee of the maritime safety committee to deal with environmental issues. As a result of this Convention for the Prevention from pollution of ships (MARPOL)¹¹⁴ has been adopted. UNCLOS stressed that the activities under state jurisdiction are so conducted as to not cause damage by pollution to other states and their environment out of the Montara oil spill.¹¹⁵

State responsibility - definition

State is a subject of international law and each State has a right and correlative duty to perform. State is responsible for the acts done to other states either by it originally or by its individuals. Every intentionally wrongful act of a State entails an international responsibility of that state.¹¹⁶ The state responsibility concerning international duties is, therefore a legal responsibility, for a state cannot abolish or create international law in the same way that it can abolish or create municipal law.¹¹⁷ The rules of international law as to State responsibility concern the circumstances in which and the principles whereby the injured State becomes entitled to redress for the damage suffered.¹¹⁸ Thus the state has obligations to perform even though it claimed Sovereignty over its resources for the transboundary environmental harm caused by the State. The state is responsible for its breach of duty by an act or omission. For breaching a treaty which has contractual obligations depending upon the nature of the

¹⁰⁸ Convention on the prevention of the Marine Pollution by dumping wastes and other matter.

¹⁰⁹ An oil tanker built in 1879 in England.

¹¹⁰ Oil spill occurred in Alaska in 1989 March.

¹¹¹ Declaration of the United Nations Conference on Human Environment drafted on 1972.

¹¹² United Nations Conference on Human Environment and Development drafted on 1992.

¹¹³ International convention relating to Intervention on High Seas in case of Oil Pollution casualties and International Convention Civil Liability for Oil Pollution damage adopted at Brussels on 1969.

¹¹⁴ It was adopted on 2nd November 1973 at International Maritime Organisation.

¹¹⁵ It occurred in November 2009, Timor Sea, Northern coast of Western Australia.

¹¹⁶ Article 1 of Draft Article prepared by International Law Commission.

¹¹⁷ Volume I. L. Oppenheim. International Law Volume I. Eighth edition, p 337.

¹¹⁸ I.A. Shearer, Starke's International Law, Eleventh Edition, p.264, Oxford University Press, 1994.

illegality and seriousness of the consequences reparation may be made.¹¹⁹ Reparation may range in form from apology, punishment of individuals responsible for the unlawful act.¹²⁰

UNCLOS and transboundary pollution

Marine ground is a mutual legacy of manhood and it should be preserved. Due to enormous growth in technology and science it has become possible to explore and exploit the ocean to a greater extent. United Nations Law of Sea is a comprehensive framework which contains many fundamental propositions regarding protection and preservation of Marine environment. Part XII of UNCLOS deals with the protection and preservation of environment. UNCLOS sets general rules and standards for activities from sea-bed and it grants exclusive Sovereign rights to states to explore and exploit the natural resources within its jurisdiction. It also formulates the obligations under general provisions for the state to oblige. Foreign nuclear-powered ships or ships carrying nuclear or other hazardous substances must carry documents and observe special precautionary measure established by international agreements.¹²¹ Under Article 43 of UNCLOS user states and bordering states has to cooperate by agreement for prevention, reduction and control of pollution from ships. State has the obligation to protect and preserve the marine environment.¹²² Monitoring of the risks of pollution and publication of results and assessment of effects enumerated under Article 204 to 206. Pollution from land-based sources, seabed activities subject to national jurisdiction, adoption of state laws to prevent, minimise and control pollution from vessels and pollution from or through the atmosphere.¹²³ Article 235 renders state responsible for fulfilment of their international obligations as to the marine environment. This is an undisputable provision that the states have to ensure that their legal systems will ensure suitable remedies for the damage caused by pollution of marine environment by persons under their jurisdiction.

State obligation under international law

Traditionally State responsibility is interpreted in the way of assuming state sovereignty, which emphasizes highest coercive power of state to protect its own interest and its subject. Sovereignty is the right of state to non-interference. By the same way it creates obligation over the state not to interfere in the territory and affairs of other country. State is responsible under international law to fulfil its international obligations to prevent, reduce and control pollution. If any act done in violation of the obligation, it is the duty of the state to ensure non-repetition of the said act. The state is under full obligation to make full reparation for the injury caused from the pollution of marine environment. The failure of the state to take due diligence and to that effect the damage has been occurred has to be associated and it cannot be presumed. The rules on responsibility and liability have been clarified on 2011 by Advisory opinion of Seabed Disputes Chamber of ITLOS¹²⁴ concerning the Responsibilities and obligations of States sponsoring persons and Entities with respect to activities in the area. The chamber has focussed its discussion much on jurisdiction and control of state that may cause marine environmental pollution. The first and foremost principle a state has to follow is no harm principle, the state should try to avoid the actions by applying 'precautionary

¹¹⁹ Chorzow Factory (Indemnity Case) (1928) PCIJ Ser A, No 17, p 29.

¹²⁰ Rainbow warrior affair 1986.

¹²¹ Article 23 UNCLOS.

¹²² Article 192 of UNCLOS.

¹²³ Article 207-212.

¹²⁴ International Tribunal on Law of Sea.

principle¹²⁵ which has its roots in early 1970's in German principle of foresight. State has to conduct Environment impact assessment and has to consult and notify regarding transboundary pollution. State has to exercise with due diligence after making environmental assessment. Bilateral treaties will render aid to this effect. State has to adopt appropriate rules and procedures. State has to act more vigilantly in enforcement of the rules framed and have to administer the same properly. State has to concentrate more in implementing their treaty obligations by making legislations in their domestic laws.

Suggestions and conclusions

The affirmative side in the arena of preserving marine environment from transboundary pollution is general principles computed by UNCLOS and principle of international law. Those principles have been interpreted in international courts and Tribunals in many cases. State has an international obligation under international law by agreeing with the principles of UNCLOS and principle of international law. Even though the State Sovereignty overrides State Responsibility, to an extent irrespective of their political and economic developments nation states had a focus on protecting and preserving environment by signing treaties and conventions. In addition to that each State has to make domestic legislations implementing the treaty obligation. And it will be more effective if they follow the pen paper agreements by implementing renewable energy resources such as wind and solar to limit offshore drilling. Agricultural fields near coastal areas can avoid pesticides and they can adopt organic farming and use eco-friendly pesticide as they drain out in Oceans at last. The very crucial need in any country is the proper sewage treatment and exploration of eco-friendly water treatment options. Industrial and manufacturing waste can be contained into landfills to avoid spillage or they can be properly treated before dumping. All types of nuclear activities should be banned. Instead of dumping the plastics in the ocean reduce, reuse, recycle formula can be followed. The one of the major causes of marine pollution, oil spilling, can be reduced by transporting oils with care and caution to avoid accidents. Bioremediation¹²⁶ process can be used to treat oils before discharging them into seas. The washing of oil tankers and ships near coastal areas can be avoided. Nation states by implementing these potential remedies to achieve sustainable development without depleting environment.

¹²⁵ Principle 15 of Rio Declaration on Environment and Development, 1992

¹²⁶ Use of specific Microorganisms to metabolise and remove harmful substances.