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Transboundary Harm: Trail Smelter To Municipal Environmental Law

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ABSTRACT

The principle of territorial integrity in international law has been recognized to be of utmost importance when examining state responsibility for an internationally wrongful act, however this principle is seldom equipped to protect a state from damage that occurs outside its territorial boundaries. The manner in which the international community has dealt with such situations has varied, however the underlying theme has remained the same- the state causing the damage is held responsible and made to pay adequate reparations. This theme although modest in conception and widely accepted forms the basis of this paper's scrutiny of regulation, policies and laws that are contemporary and extend to claims made by States for compensation for damage that originates in a different state and the development of municipal law from this basic idea. Damage to another territory has been catalyzed with the advent of ever changing modern technology, development of industries across the globe as well as population explosion. These factors have played a huge role in increasing the pollution in water bodies, generating more waste, accelerating ozone depletion among other disastrous consequences. As a result of the environment being a common resource that all countries have to share States have often approached the international judicial set-up for remedies. This paper traces the origins of the principle of transboundary harm while exploring its application and relevance in domestic environmental laws.

KEYWORDS: Tran boundary Harm, Trail Smelter, Environmental Law, Air Pollution.

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INTRODUCTION

Over the last three decades, the culture of mass production that spread across the world has given rise to large scale agricultural, industrial as well as technical endeavors that have threatened to cause environmental damage to states where such activities may not have originated. However, environmental damage to the territory of another state or to global commons, is not an unusual problem in international law. Damage that transcends boundaries of states has resulted in several theories of liabilities for states, which focus on corrective rules. Despite the existence of certain treaties and general principles of international law, state practice remained inconsistent for a long period of time. These inconsistencies and uncertainties were resolved as a result of international dialogue that resulted in consensus on what we examine as the jurisprudence of the principle of transboundary harm. Major issues that the International Law Commission has sought to resolve in the past decades have been centered on injurious consequences and international liability for the same along with the degree of responsibility of a state.

The Trail Smelter Arbitral Tribunal judgments are recognized as part of the foundation of the edifice of Transboundary Harm. The two core principles stated by tribunal were, first that all states have an obligation imposed upon themselves to prevent the causation of transboundary harm, and second, that in case such harm has been caused it is incumbent on the state to pay adequate compensation for the same. Trail Smelter is the seed from where the doctrine of transboundary harm emerged. It is the earliest articulation of the pollution regimes and environmental principles of harm originate. It will form the crux of the analysis in this paper, as the author seeks to study the impact of this case on current environmental municipal laws.

Part II of the paper discusses the principle of transboundary harm as well as the nature and extent of liability of the same under international law. Part III highlights historical foundations of the principle by discussing the Trail Smelter case in detail and the influence which it has had on international environmental law while seeking to understand whether the Smelter case continues to hold an unknown legacy. Part IV seeks to draw connections between the influences of the Trail Smelter case in international as well as domestic law. This part explores the contemporary significance this case has had in shaping national regulations.

TRANSBOUNDARY HARM AS A PRINCIPLE OF INTERNATIONAL LAW

Transboundary harm is also known as environmental damage of a specific type, viz. damage caused to the environment of one state as a result of actions of another state. Often, the activity that causes such harm is originating in another territory. Such damage can be the result of a wide variety of activities that are conducted by one state but impose negative effects in another. Conventionally,

though, transboundary damage as a phrase refers to damage crossing state borders through water, air or land. Recently, however, such kind of environmental harm is categorized in four different forms. *First*, air pollution; *second*, pollution of a waterbody; *third*, transboundary dumping of wastes and *fourth* damage to the global commons. Out of these forms, treaties regarding transboundary watercourses are the most well-defined and provide us with useful examples to understand liability. International treaties also exist on oil pollution, land-source damage to the ocean, air-pollution (long range) as well as damage to international waters. These treaties are structured differently, few treaties delineate strict rules of procedure and liability and most treaties are only directive in nature with general provisions on state responsibility and leave scope for implementation based on future action.

There has been a worldwide demand for increase in protection of the environment, from across spheres- jurists, developed nations, academics for transboundary harm. Their demands are for more stringent regulation of international liability for environmental harm, some scholars argue for strict liability (no- fault liability) to be recognized as a principle of international law in cases on transboundary environmental damage. Strict liability in cases of environmental damage is a principle of law recognized by several domestic jurisdictions including India.

In order to prove a claim of transboundary boundary harm before the International Court of Justice, a state must establish four elements. First, the claiming state must establish a causal relationship between the damage and activity. This relationship must be a physical relationship. The second element must be of human causation, the third element is threshold requirement to assess severity of harm; and the fourth requirement is to prove the movement of harmful effects across borders. Each case of transboundary harm is one that is contingent on the facts and circumstances of the case. These elements are merely indicative based on precedent as well as state practice. The next part discusses the evolution of these elements and their significance in establishing transboundary harm.

EVOLUTION OF TRANSBOUNDRY HARM

The Trail Smelter Arbitration Award in the first half of the 20th century gave rise to the principle of Transboundary harm. Every case on Transboundary harm has considered and cited the arbitral tribunal's famous conclusion:

“[N]o State has the right to use or permit the use of its 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.”

The case arose due to the presence of a Lead and Zinc Smelter located in Trail, Canada along the border Canada shares with United States of America. The River Columbia was along this Smelter and ran into United States of America and this Smelter emitted noxious fumes that polluted Washington State in America. United States claimed for injunctive as well as declaratory relief. The Tribunal relied on the maxim '*sic uteretur alienum non laedas*,' laying down the foundation for the good neighbor principle.

This case was followed up by the *Corfu Channel* dispute in the International Court of Justice. This dispute examined the liability (civil) of the State of Albania that had laid out mines in sovereign waters. Upholding the Trail Smelter and including the principle of limited territorial sovereignty the Court held that states have an obligation to prevent their territory from being used in a manner 'knowingly' for acts that will abrogate the rights of other states. The *Lac Lanoux Arbitration*, is another decision that has played a role in illuminating our understanding of this principle. The facts of the case involved France diverting the water of a river that would otherwise flow into Spain, while the Tribunal upheld the earlier principle of *sic uteretur*, they denied Spain relief as there compensatory water was sufficient and claims of Spain to establish a lake from that water were not founded in this principle as they represented a special requirement based on Spanish agricultural needs. Other important cases in Transboundary harm jurisprudence are the Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *North Sea Continental Shelf Case* and the *Barcelona Traction case*. Transboundary harm as a result of consistent state practice and judicial decisions has resulted in forming part of customary international law.

APPLICATION OF TRANSBOUNDARY HARM IN MUNICIPAL LAWS

The role of international law and its interaction with municipal laws depend heavily on the nature of country one is examining, a monist country and a dualist country. While monist countries understand international law and national law to be at par and in conformity, dualist countries require an additional ratification by the legislature of the state. Thus, all monist countries automatically adopt all treaties on transboundary harm discussed in Part III above, and the implications of the same are observable directly within their territory. There are sixteen monist countries in the world, with the most notable being the United States of America followed by China, Chile and Austria. A far more direct example of the application of the principle of transboundary harm in municipal law is observed in Singapore. In 2014, Singapore enacted *The Transboundary Haze Pollution Act, 2014*. This Act provides for extra territorial jurisdiction to Singapore Courts for acts that originate outside Singapore but cause 'haze' or smoke within Singapore. This was enacted as a reaction to the serious

smog crisis in Singapore as a result of agricultural practices followed in South East Asia, especially Indonesia. This Act even provides for criminal along with civil liabilities on agricultural companies along with the provision for a hefty fine. While the Act itself provides for several presumptions and implementations seems difficult, even to the prosecution, the idea behind the Act is to recognize that action is required to be taken by states to ensure that environmental damage is curtailed.

CONCLUSION

The environment is not a natural resource that can be divided along national boundaries, it is connected and changes in one part of the world affect and impact the environment in other parts of the world. Thus, it is imperative that countries work together to help preserve the environment. While, this realization is not a new one, several international bodies have recognized this need and there has been ample documentation of the same. The Stockholm and Rio Declarations are simply testaments of the same. The unique nature of transboundary harm reflect just this need and although it is an important principle of international law, it brings with it the drawback associated with international law, viz. the problems with respect to implementation and biases. The trickle down of the principle of transboundary harm from international law to domestic law is a beacon of hope for the environment. Laws such as Transboundary Haze Pollution Act, 2014 provide countries the teeth they need to fight cross-border activities that will harm their surroundings. The need for any mechanism to prevent such long term harm is urgent, the smog in Delhi in November 2017 shows us the requirement exists very close to home.

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