

Trans-boundary Pollution in International law

By

Prof. Dr. Mohammad Naqib Ishan Jan

*Presented at International Conference on Law and Society (ICLAS
II 2013), IIUM, 18-19 Sept 2013, organised by AIKOL*

Introduction

- **Pollution**, as one author put it, **respect no jurisdictional boundaries**
- **Transboundary Pollution**
 1. Definition of trans.bp
 2. Types of trans.bp
 3. Effect of trans.bp
- **IL RESPONSE**
 4. Duty of source country to prevent trans.bp
 5. Breach of the duty entails responsibility
 6. Issue of liability If duty to prevent tbp is breached

What is transboundary pollution?

- **Transboundary pollution** is damage to the environment* that is caused by harmful substances that **starts in one country** and then **spreads to other countries**.
- Pollution that originates in one State but, by crossing the border **through pathways of water or air**, is **able to cause damage** to human health and the environment in **another State**.

Types of transboundary pollution

- Two main types of transboundary pollution:

1. Water pollution

Def. WP is any chemical, physical or biological change in the quality of water that has a harmful effect on any living thing that drinks or uses or lives (in) it.

-Polluted water has serious effects on human health

-water carries dangerous substances from one nation to another

-major water pollutants:

i. bacteria, viruses and parasitic worms that enter sewage systems and untreated waste.

ii. wastes that can be decomposed by oxygen-requiring bacteria.

-Causes death of organisms including fish – destroys Earth's land surfaces and may even cause land pollution

3. Air pollution

-particles or gases in the air that are not part of air normal composition

-these particles or gases are called "**air pollutants that** can cause serious health and environmental problems.

-Caused either by nature or human activities as explained later

- **Emphasis is given in air pollution**

-

Importance of Air

- Air is the natural mixture of gases that surround the earth (consists of 79% nitrogen, 20% oxygen, & 1% other gases, mostly carbon dioxide,
- **Air** is important for many reasons:
 - it contains oxygen - which we breathe.
 - Crucial for human survival -U can't live without air –
 - is a major part of the biosphere
 - is essential for organisms to live - Organisms do not produce energy in the absence of **air**. So organisms can't live.

Air Pollution: Definition and Causes

- **Definition:**

- **Air pollution** is the introduction into the atmosphere of chemicals, particulates, or biological materials that **cause** discomfort, disease, or death to humans and damage environment
- Air pollution is basically harmful chemicals in our atmosphere. When air contains things like dust, gas, smoke and fumes air pollution occurs.
- Transboundary pollution **spread through wind** and by **water** currents

- **Causes:**

- 1. natural causes**

- volcanic eruptions
- wildfires

- 2. man-made causes (vast majority)**

- i) smoke from fire (fire to heat, cook, etc)**

- 2,000 years ago, the Romans were complaining about the bad air in their cities (at that time, the air was thick with smoke from fires....)

ii) Fire for the purpose of land clearance that cause haze:

- **Haze** is an atmospheric phenomenon where dust, smoke & other dry
- Occasionally intentional forest fires in Indonesia causes haze & thus air pollution in Malaysia, Thailand and Singapore.
- foreign corporations, such as Singaporean & Malaysian operate in Indonesia
- Haze poses serious health hazards, especially to those with a history of respiratory illness.

iii) Industrial activities

- Burning coal causes acid rain – and acid rain pollute the air
- Acid rain can be harmful to environment. It harms buildings, plants & animals**

iv) Nuclear Radiation:

-Eg.' the explosion at **Chernobyl** (accidental) released nuclear radiation into the air

-**The Fukushima accident** - released approx. 10,000 tons of radioactive water into the sea

Effect of air pollution

- Visibility reduced
- Vegetation damaged
- Property and clothing soiled
- Tourism industry adversely affected
- More importantly causes health problems – causes serious illnesses (eg., lung cancer) leading to lost days at work and school
- In short adversely affects **h. health,**
environment & economy

Transboundary Pollution vis-à-vis human rights

- The right to a healthy environment, to breath clean air or to drink clean water is a human right
- It is an aspect of the **right to life** - the right to life – includes, *inter alia*, the right to survive as a species, quality of life, the right to live with dignity & the right to livelihood (Principle 1 of the [Stockholm Declaration](#) (1972))
- Although ICCPR & ICSECR fall short of recognizing a healthy environment as a basic human right, some provisions in these instruments points in that direction.

International law of Transboundary Pollution

1. Does international law impose a duty upon states to prevent transboundary pollution?
2. What if a state breach its duty, if so, what would be its consequence?

The duty to **Prevent Transboundary Pollution**

- The question whether international law impose a duty upon states to prevent transboundary pollution may be explained with reference to two theories:
 1. Theory of *Absolute Territorial Sovereignty*
 2. *The Theory of Limited Territorial Sovereignty*
- Both theories are based on international custom, one old the other new

1. The Theory of *Absolute Territorial Sovereignty* . -

- This theory holds the source state is free to engage in any activity it chooses within its territory , without regard for the effects on the territory of another state
- Based on this theory the source country is under no duty to prevent transboundary pollution
- This theory is, however outmoded - Absolute territorial sovereignty is no longer the prevailing rule of IL

2. The Theory of Limited Territorial Sovereignty

- This theory holds that a state may make use of its territory but should use it in a way that cause no harm to other sovereign states'

- Oppenheim state 1912:

“A State, in spite of its territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State.” Oppenheim on International Law (1912: 243–44) Chapter Eight p.220

- *The theory of limited territorial sovereignty* is supported by international and domestic tribunals' decisions, as well as pronouncements of private and public international bodies.
- In *The Island of Palmas Case (United States v. The Netherlands, award in 1928)* the sole arbitrator Huber, who was then President of the Permanent Court of International Justice, stated that:

“Territorial sovereignty involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States.”

(*Island of Palmas Case, 2 RIAA (1949), pp.829–90*)

- In the *Trail Smelter Case* (US v. Canada, awards in 1938 and 1941) the Arbitral Tribunal decided that *that a state has responsibility for environmental damage extending beyond its territorial limits.*
- *The arbitral tribunal further stated that:*
 - “*Under principles of international law, no 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 person therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.*”
- The *Trail Smelter* case extended to international relations an ancient civil law maxim, *sic utere tuo ut alienem non laedus*, i.e., use your own property so as not to harm that of another

- The *Corfu Channel case*, although it did not concern pollution, also supports the general principle of limited territorial sovereignty. The ICJ held in that case that it is “every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”
- In its 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the ICJ recognizes: “The existence of the general obligations of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”

- Principle 21 of the United Nations' Stockholm Declaration on the Human Environment provides that states have the “sovereign right to exploit their own resources pursuant to their own environmental policies,” but along with this right comes the “responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limit of national jurisdiction.”

- Principle 2 of the Rio Declaration on Environment and Development also provides:

“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental 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 principle of ‘good neighbourliness’ further strengthen the idea of limited sovereignty.
- Thus, under the limited territorial sovereignty theory states are duty bound to prevent transboundary pollution

Breach of Duty to Prevent Transboundary pollution: The Doctrine of State Responsibility

- When a state breaches an international obligation it commits an internationally wrongful conduct for which it is responsible.
- Article 1 of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001(hereinafter cited as Draft Articles) affirms the customary international law principle that every internationally wrongful conduct of a State entails the responsibility of that State.
- The jurisprudence of World Court confirm that breach of any obligation, of whatever origin, gives rise to State responsibility.

- A state can be held responsible for the **positive conduct of its organs** as well as for **their omission**.
- This means whoever is behind transboundary pollution – private or public companies the source state to bear the responsibility so long the pollution started within its territorial jurisdiction and that it failed to exercise due diligence vis-à-vis its prevention allowing it to harm other countries.
- So the test to establish liability of the source country is due diligence. This custom-based test is accepted generally as the most appropriate standard for the duty to prevent transboundary harm.
- The rule of due diligence is imposed on all states to ensure that activities within their jurisdiction do not cause damage to the environment of other States, or of areas beyond the limits of their national jurisdiction.

- Thus, the due diligence rule is most appropriate rule as for as the liability for transboundary pollution is concern.
- **However, under the due diligence rule, states in general are not automatically liable for damage caused.**
- In other words, due diligence does not require an absolute guarantee against the occurrence of harm; rather it involves reasonable efforts by a State to take appropriate measures in a timely fashion to prevent environmental harm.
- The liability under this rule arises when the state in question in spite of its ability failed to take appropriate, reasonable and timely measures to prevent transboundary pollution.

The liability of the Transboundary Polluter

- The transboundary polluter that caused harm to others should not be allowed to escape liability for otherwise the problem will persist.
- The **liability** of the polluter may be **determined through an appropriate, authoritative and impartial body**. This can be determined through **arbitration**, as in the *Trails Smelter case*, or through judicial means, such as the **International Court of Justice (ICJ)** provided both the source state and the affected state consent to the jurisdiction of the court.
- **Consent of the parties** is important in constituting an arbitral tribunal as well as in conferring jurisdiction to the ICJ. In the absence of either parties consent the problem cannot be resolved either through arbitration or the ICJ.

EQUAL ACCESS TO REMEDIES

- That environmental victims be granted equal right to seek judicial remedy in the originating state.
- That they should be given equal rights as citizen of originating state.
- The essence is to enhance environmental justice without discrimination.
- But the problem is that in some cases, like for example haze, an entire population of a country could be affect – **floodgate situation**.

Application of jurisdictional principles

1. Territorial principle;
2. Nationality principle;
3. Protective (or Security) principle;
4. Passive personality principle; and
5. Universality principle;

The effect doctrine

 - operates where a party, acting abroad, is producing effects within the tt of the State claiming jurisdiction

Duty to cooperate to prevent transboundary pollution

- the duty to cooperate is a fundamental principle in the prevention of pollution

- in 2002 the ASEAN members drafted the *ASEAN Agreement on Transboundary Haze Pollution*. [*ASEAN Agreement on Transboundary Haze Pollution, opened for signature 10 June 2002 (entered into force November 2003)* <http://www.aseansec.org/agr_haze.pdf > 28 May 2007.]
- *This Agreement entered into force in 2003 with its ratification by seven ASEAN member states, Brunei, Laos, Myanmar, Malaysia, Singapore, Thailand and Vietnam. Indonesia, which has caused the forest fires, has not as yet ratified the Agreement, nor have Cambodia and the Philippines.*
- So although there is common concern among ASEAN countries in dealing with forest fires, there is divergence on implementation for political, economic or other reasons.

Conclusion

- Every State has an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.
- If this duty is breached and an exhaustive diplomatic approach failed then legal proceeding against the polluters become unavoidable
- Causing transboundary pollution is an international wrongful conduct – a wrong that should be set right by reparation

- If pollution create global environmental problems its prevent would become an *obligatio erga omnes*
- *obligatio erga omnes* arises when pollution causes the extinction of the world's biodiversity, the pollution of international waters, and is the threat of climatic change.
- The world's climate and biodiversity were identified as a 'common concern' of mankind in the 1992 Conventions on Climate Change and Biodiversity

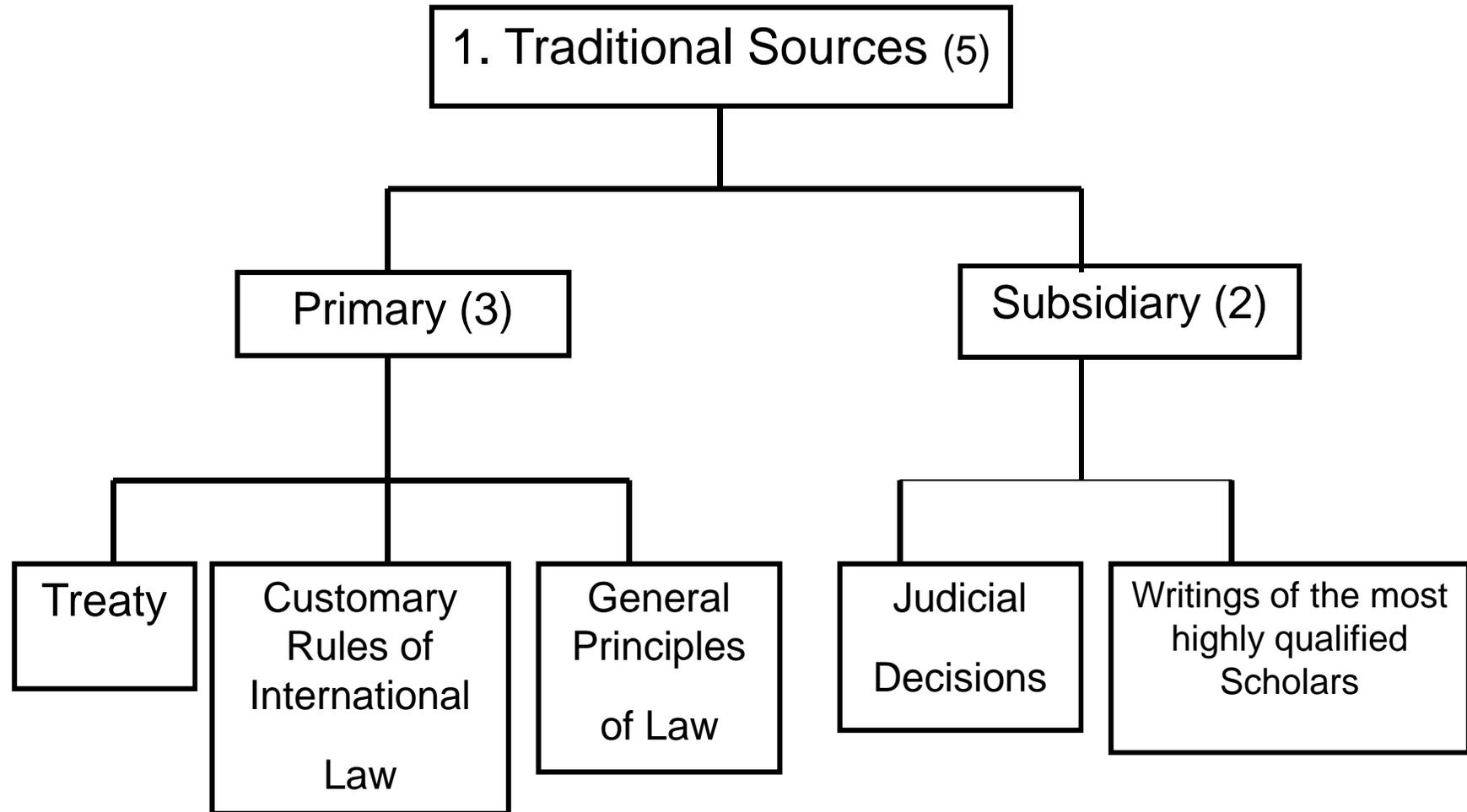
- Gradually, it incorporates elements of responsibility, liability and compensation followed by penalties, sanctions, implementation and dispute settlement. However, the changing institutional structure of international cooperation and governance has created new trends where conferences of parties (COPs) and systems of implementation reviews (SIRs) have become vital elements. Regional laws, bilateral agreements and national instruments play a complementary role.
- In the Gabcikovo Nagymaros Case, the ICJ stated that:
- [...] the existence of a general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

Case Concerning the Gabcikovo - Nagymaros Project: (Hung. v. Slovak.), (25 Sept 1997) ICJ Reports 1997 p.7.

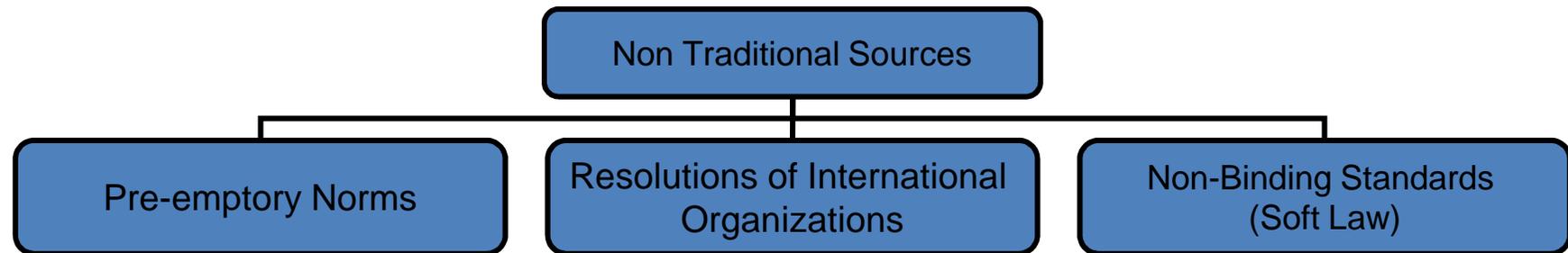
- Summarizing these authorities, Weeramantry J. observed “these principles of Environmental Law thus do not depend for their validity on treaty provisions. They are part of customary international law. They are part of the ‘*sine qua non*’ for human survival.” ICJReports1996 p. 258
- to take preventive measures in order to avoid transboundary pollution’s impacts

- In summary it is possible to identify three sets of obligations, which the India owes
- to Sri Lanka, and which give rise to rights, which Sri Lanka can invoke against
- India:
- (a) the obligations of India to cooperate with Sri Lanka to address the
- concerns in a manner that can command the confidence of all
- stakeholders of the SSCP Project;
- (b) the obligations of India to carry out a joint environmental
- assessment of the effects on the environment of the construction and
- with the operation of the Sethusamuduram Ship Channel;
- (c) the obligations of India to protect the marine environment of the
- Palk strait and Gulf of Manna area, including by taking all necessary
- measures to prevent, reduce and control further pollution of the Sea.

SOURCES OF INTERNATIONAL LAW



2. Non-traditional Sources (3)



Branches or Fields of Public International Law

