

## Strict Liability in International Environmental Law: Still in dilemma?

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### ABSTRACT

This paper focuses on the rule of Strict Liability in International Environmental Law. The Rule of Strict liability in International Environmental law is about the responsibility of state upon any act that pollutes or affects the environment of any other state. State is held responsible if it causes any environmental harm outside its territory but only if such harm is done in breach of an international obligation. The paper starts from introducing the rule primarily in environmental agreements and also focuses on the development of norms on strict liability for Hazardous lawful activities. This research paper tries to demonstrate the present position of the rule of strict liability in the International Environmental Law and concluded with the same.

This paper is an attempt in bringing together all the information, developments and to mark the present position of Rule of strict liability in International Environmental law. The existence of this law seems to be very integral part in the view of continuously degrading Environment.

**Keywords:** Strict liability, International Environmental law, treaties, convention, norms etc.

## INTRODUCTION

In India, M.C. Mehta V. Union of India is a well-known case that laid down the concept of Absolute liability, which was further developed from the concept of strict liability in India. The concept is of utter importance since in the process of development human have forgotten about the importance of Nature and Environment. But the concept of strict liability as well as Absolute liability that ruled down in the case was the law prevailing in India. Every country has its own law in respect of controlling the pollution in the environment but there is always a question “what if a country pollutes the environment of another country in breach of international obligation?” It is pertinent to note that the concept of strict liability i.e. a state is responsible for any environmental harm it does to another state, in breach of international obligation has been developed very slowly in the context of International Environmental Law.

The breach of an obligation of environmental protection established under international law engages responsibility of the State (international responsibility), evolved by the loss caused due to environmental accidents taking into account the international responsibility of a State after the trans-boundary pollution dispute in the landmark case of *Trail Smelter*<sup>1</sup>. The dispute was between United States and Canada, regarding the smelting activities across Canada-US border in Washington. The issue went before the arbitral tribunal which convened to resolve the dispute recognizing the responsibility of the state and its organs. Located in British Columbia, Trail was established to treat lead and zinc ore from nearby areas. This resulted to the damage in the state of Washington due to air pollution. The question that was raised during proceeding was, “*Is it the responsibility of the State to protect other states against harmful acts by individuals from within its jurisdiction at all times?*”<sup>2</sup>

The tribunal found that, “*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 persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence*”.

The consequences of the arbitration came in two parts; one being economic compensation for the local farmers of Steven's County, Washington and second effecting laws for trans-boundary air pollution issues. Polluting nations were to be held responsible for harms caused

<sup>1</sup> 3 RIAA 1938, 1965.

<sup>2</sup> Wirth, John D. (1996). "The Trail Smelter Dispute: Canadians and Americans Confront Trans-boundary Pollution, 1927-41". *Environmental History*.

to another nation's environment. The failure by states to meet these responsibilities means they are breaching international law<sup>3</sup>.

Even after this, it was a big question in front of the tribunal as to what constitutes an injurious act and the question put a difficulty in front of the tribunal. There were claims for the absolute prohibition of these kind of activities which harm the environment of other countries but the tribunal differed from the claims and shows its assent towards the national court's precedents which states that it's the responsibility of the state to prevent the harm to other states and it should take reasonable steps for the fulfillment of its' responsibility. The state should take all those steps which is taken to protect it's own inhabitants. The tribunal concluded that if the state fails to regulate or prevent any serious harm from these activities, in the way it would have protected its own inhabitants, then the state is said to be constituted a wrongful act.

The case of *Trail Smelter*<sup>4</sup> started the discussion about the responsibility and liability of the states in environmental laws but it failed to demonstrate whether the state will be held responsible if it has exercised all due care as it would have taken for the protection of the inhabitants of its territory or not. In other way we can say the it goes in dilemma by the judgment of the tribunal that whether a state will be held liable only if it has not taken due care (fault based liability) or whether it will be held strictly liable for all the serious or significant environmental harm done to other state. In subsequent development, the international environmental law has been taken into consideration to distinguish between the responsibility which arises from the breach of international obligation and the responsibility for the injurious consequences of the activities done following the international obligations.

### STATE RESPONSIBILITY

*Trail Smelter*<sup>5</sup> case was finally settled in 1941 but again in 1949, International court of Justice referred to "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" in the another trans-boundary injury case of *Corfu Channel*<sup>6</sup> In the same year i.e. 1949 The United nations survey of International law stated that there is "general recognition of the rule that a State must not permit the use of its territory for

<sup>3</sup> Ellis, Jaye. "Has International Law Outgrown *Trail Smelter*?". Bratspies, Rebecca and Miller, Russell ed., *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (2010): 64

<sup>4</sup> 3 RIAA 1938, 1965.

<sup>5</sup> 3 RIAA 1938, 1965.

<sup>6</sup> ICJ Reports 1949, p. 22.

*purposes injurious to the interests of other States in a manner contrary to international law”.*<sup>7</sup>

The decisions given and the principles stated in the *Train Smelter* case and all the other cases regarding the concept needed to be combined. The Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration, 1972)<sup>8</sup> combined and restated these norms in the following words:

**“Principle 21** *States have the sovereign right to exploit their own resources pursuant to their own environmental 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 given in principle 21 of Stockholm Declaration was the exact copy of the rules stated previously that a state have the responsibility to ensure that the activities happening in its territory should not cause the trans-boundary harm to any other state.

This rule was again incorporated in Principle 2 of The Rio Declaration On Environment And Development (1992)<sup>9</sup> and has been confirmed again in the World Summit on Sustainable Development held on 2002. The rule was reaffirmed again many times in the further declarations adopted by the United Nation such as Charter of Economic Rights and duties of states and the World Charter for Nature. It is also pertinent to note that the rule was also accepted by other organization and conferences. The content of Principle 21 of the Stockholm Declaration was partly incorporated in The United Nations Convention on the Law of the Sea<sup>10</sup> and in Article 20 of ASEAN Agreement on the Conservation of Nature and Natural Resources.<sup>11</sup> Principle 21 of Stalkholm Declaration was again reproduced in The Geneva Convention on Long Range Trans-boundary Air Pollution held in 1979 as “the principle expresses the common conviction that states have on this matter”<sup>12</sup>

Also, apart from the principle 21 of the Stalkholm Declaration being incorporated many times Principle 2 of the Rio Declaration found its place in the preamble of the UN Framework

<sup>7</sup> UN Doc. A/CN.4/1/Rev.1, at 34 (1949)

<sup>8</sup> Available at <http://docenti.unimc.it/elisa.scotti/teaching/2016/16155/files/file.2017-03-11.7227158899>, last visited 15<sup>th</sup> Dec 2017

<sup>9</sup> Available at [http://www.unesco.org/education/pdf/RIO\\_E.PDF](http://www.unesco.org/education/pdf/RIO_E.PDF), last visited 15<sup>th</sup> Dec 2017

<sup>10</sup> United Nations Convention on the Law of the Sea , Available at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf), last visited 15<sup>th</sup> Dec 2017

<sup>11</sup> ASEAN Agreement on the Conservation of Nature and Natural Resources (Kuala Lumpur, 9 July 1985), 15 *Envil. Pol’y & L.* 64 (1985).

<sup>12</sup> The Geneva Convention on Long Range Trans-boundary Air Pollution, 1979, available at <https://www.unece.org/fileadmin/DAM/env/lrtap/full%20text/1979.CLRTAP.e.pdf>, last visited 16<sup>th</sup> Dec 2017

Convention on Climate Change, 1992 as well as in Article 3 of The Convention on Biological Diversity.<sup>13</sup>

Finally, After all the incorporations the International Court of Justice recognized the rule and stated that “[t]he existence of the 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”.<sup>14</sup>

In the para 53 of other case concerning *Gabcíkovo-Nagymaros Project*, the court recalled the statement given in the advisory opinion and stated that “the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind”

It can be concluded from the Principle 21 of Stockholm Declaration and all the other formulations stated above that it gives the right to use the rule of absolute liability on any trans-boundary harm done to another state, doesn't matter whether it was an intentional harm or accidental harm but the States even after having this formulation have never invoked the rule to get the claims for the accidental harm and thus it damaged the impact of the formulation.

It can be clearly seen in the Chernobyl Incident<sup>15</sup> happened in 1986. There was a explosion in one of the reactors of the Chernobyl nuclear power plant during a test which resulted in the melting of a portion of uranium fuel. However, there was no explosion and also the core of the reactor didn't melt, the incident was very serious and the flames of fire are still remembered. The next week had a very serious condition as the fire sent the long plumes of a large quantity of highly radioactive fallout into the atmosphere and which further spread beyond. After the incident, a 10-kilometer exclusive zone was enacted which resulted in the evacuation of approximately 50,000 persons from the near towns of the power plant but since the plumes and subsequent fallout continued even after the same the evacuation zone was further increased to 30-kilometer which resulted in further evacuation of approximately 70,000 people. Two persons immediately died, 29 later and hundreds of people got affected due to radioactive radiations. Foreign countries also suffered a lot of consequence even though was no death attributed immediately after the accident. There was a rapid change in the direction of the wind due to which the radioactive cloud thus formed due to accident crossed the airspace of series of countries. The first country to be affected was Scandinavia followed by

<sup>13</sup> The Convention on Biological Diversity, <https://www.cbd.int>

<sup>14</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I. C. J. Reports 1996, pp. 241 -242, Para. 29.

<sup>15</sup> See L. Malone, “The Chernobyl Accident: A Case Study in International Law Regulating State Responsibility for Transboundary Nuclear Pollution”, 12 *Colum. J. Env'tl. L.* 203, 222 (1987).

Germany, Austria, Switzerland, Yugoslavia and Italy. After approx 4 days of the accident, the radiation measurement was ten times higher than normal.

At the time of Accident, No conventional international regulation applied in the Soviet Union. Also the pollution occurred to the radioactive elements was excluded in the Convention on Long-Range Trans boundary Air pollution<sup>16</sup> and USSR was also not a contacting party to the Vienna Convention on Civil Liability for Nuclear Damage, 1963.<sup>17</sup> Therefore, only one path was left to recourse to the general rules of the International Environmental Law but after the consideration no any affected country stood and files a claim to Soviet Union. The affected countries did request the Governing Council of the International Atomic Energy Agency to conduct an extra-ordinary session in order to discuss and elaborate the measures to reinforce the international cooperation in respect of the nuclear security and radioactive protection. The session was to be scheduled with a group of governmental experts. The session took place at Vienna in July-August 1986 and two conventions were drafted and adopted after a month on the IAEA General Conference. The first convention was 'The Convention on Early Notification of a Nuclear Accident' and the second one was the 'Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency'.

The basic framework for the cooperation between the states and between the states and IAEA, in case of any nuclear accident or radioactive emergency was incorporated in the conventions. If The convention on assistance would have existed at the time of the incident, any state would have the power to find and obtain the assistance in spite of the fact that whether place of origin of accident or emergency was found under its jurisdiction or not.

However, It is pertinent to mention here that no any state party accept any obligation other the cooperating the each other and with the IAEA with an aim to facilitate early response. Apparently, it can be concluded that no state tried to conclude rules on State liability for accidental environmental harm. It is a well-accepted fact that the negotiation would have been lengthy and may have taken a long time over such matters and there must have been a huge difficulty on evaluation of the cost of consequences of the Chernobyl accident, and it should not be forgotten that the precautionary measures taken by the affected countries, also may have been a determinant factor in avoiding the issue of State responsibility.

It can be concluded from the above instances that the main preference has been given to the measures of prevention rather than the cure and there was a general ignorance was being

<sup>16</sup>Convention on Long-Range Trans boundary Air pollution, <https://www.unece.org>

<sup>17</sup> Vienna Convention on Civil Liability for Nuclear Damage, <https://www.iaea.org>

shown on imposing the rule of Strict liability on the state for the harmful acts done by the state of its citizens. Finally the International Law Commission completed its Draft Articles on the Responsibility of States for Internationally Wrongful acts on August 2001, which the United Nation General Assembly took note of in Resolution 56/83 (December 2001). As per the principle stated in Article 2 of the Draft Articles of the International Law Commission<sup>18</sup>, A state is said to be committed an internationally wrongful act if the action or omission constitutes a breach of international obligation of the state. Article 3 Further stated the an act can be characterized as internationally wrongful on the basis of international law. In other words, it can be said that the rights and duties of the state i.e. primary rules of conduct establishes whether an act or omission constitutes a wrongful act. At present, only a very few treaties make state strictly liable for the harm that occur to the other state as a result of some specific activities, even if the state would have complied with all its legal obligation. Most of the multilateral environmental treaties primarily focus on the on the conduct of the acting State and not on the harm to the injured State, imposing duties of actions and of result.

### **STRICT LIABILITY OF STATE IN ENVIRONMENTAL AGREEMENT**

Some activities such as exploration and exploitation of the outer space are new & dangerous and hence the concept of strict liability can be marked in the text regulating the activities like this which are new and dangerous. It is also pertinent to note that these kinds of activities are largely conducted by the state.

The Convention on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies,<sup>19</sup> consists of the provision for both the State responsibility and strict liability. Initially, article VI of the treaty provides that *“the States Parties bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities. The activities of nongovernmental entities in outer space, including the moon and other celestial bodies, require authorization and continuing supervision by the appropriate State party to the treaty”*,<sup>20</sup> Through this, it was clarified that there should be the state’s involvement.

Article VII provides further that *“Each State that launches or procures the launching of an object into space and each State from whose territory or facility an object is launched, is*

<sup>18</sup> Draft Articles of the International Law Commission. <http://legal.un.org/ilc>

<sup>19</sup> 27 January 1967, International Environmental Law, Multilateral Treaties (EMUT) 967:07

<sup>20</sup> Article VI, The Convention on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, <http://www.unoosa.org>

*liable to another State or to its natural or juridical persons for harm caused by such object, or its component parts, on the Earth, in air space or in outer space, including the moon and other celestial bodies”*

On reading and analyzing both the articles together, it can be concluded that both the articles draw a line between the Fault based responsibilities (art. VI) and strict liability regarding the dangerous consequences arising out of space activities (art. VII).

The Convention on International Liability for Damage Caused by Space objects<sup>21</sup> gave further information and has developed the principles given in art. VI and VII of The Convention on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies. It also discussed about the implementation of these principles. As per the provisions of the article II of the convention, the launching state becomes absolutely liable to pay the compensation for any harm or damage caused by its concerned space object on the surface or to the aircraft in flight. If two or more states jointly launch any object, they become jointly and severally responsible for any damage caused. A state can escape the liability to an extent if it proves the fact that the damage has been resulted from the act of another's negligence or from another's international act or omission. A state can't escape from the liability if the damage has been caused because of the activities of the state in the breach of any international obligation. However, the national and foreign national of the launching state can't ask for the damage caused to them under international law.

The Convention on International Liability for Damage Caused by Space Objects also does states that:

*“Each State which launches or procures the launching of a space object and each State from whose territory or facility a space object is launched is internationally liable for damage caused by such space objects or their component parts. This fully applies to the case of such a space object carrying a nuclear power source on board. Whenever two or more States jointly launch such an object, they shall be jointly and severally liable for any damage caused, in accordance with article V of the above-mentioned Convention.”*

The provision given establishes the concept of strict liability rather than that of a responsibility.

In the Antarctica, Efforts to make a liability Annex to the Madrid Protocol of 1991 was partially succeeded in 2005 with conclusion of a limited agreement on environmental

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<sup>21</sup> The Convention on International Liability for Damage Caused by Space objects, <http://www.unoosa.org>



emergencies, defined as any accidental event that takes place after the entry into force of the Annex when the accident results in or imminently threatens significant and harmful impact on the Antarctic environment. The agreement, adopted as Annex VI to the Protocol on Environmental Protection, will enter into force once all the present Consultative Parties have ratified it.

All governmental and non-governmental activities are incorporated in the scope of potential liability for which advance notice is required under the Treaty, including tourism. Thus the system can be said as a “mixed” one of liability for operators whether they are governmental or non-governmental actors. This is significant because many activities in Antarctica are conducted or sponsored by governments. The operators of each state party requires to undertake reasonable preventive measures, establish contingency plans for responses to incidents with potential adverse environmental impacts, and take prompt and effective responsive action when an emergency results from its activities. If the operator fails do the same, the relevant party is “encouraged” to take such action, as are other parties after notifying the party of the operator, if such notification is feasible. Any operator that fails to take prompt and effective response action is liable to pay the costs of response action taken by parties. Where the defaulting operator is a State operator and no party took response action, the State operator is liable to pay the equivalent of the costs of response action that should have been taken into a fund.

The fixed liability arises here but there are some instances where an operator will not be liable, if the operator proves that the emergency was caused by

- an act or omission necessary to protect human life or safety;
- an exceptional natural disaster which could not have been reasonably foreseen, provided all reasonable preventive measures have been taken;
- an act of terrorism; or
- an act of belligerency against the activities of the operator.

Sovereign immunity for warships is maintained, limits on liability are provided, and operators are to be required by each party to maintain adequate insurance or other financial security.

## The Development of Norms on State Liability for Hazardous

### Lawful Activities

The question being considered by the International Law Commission since 1978 was about the International Liability of the state for causing any injury through the act prohibited by the international law but in 1997 the International Law Commission started dealing with only one question i.e. the transboundary damage from hazardous activity. In the span of just 4 years, International Law Commission presented a complete set of 19 Article in this topic in the UN General assembly.<sup>22</sup> The General Assembly took the articles into consideration and pressed by some member States, directed the International Law Commission to continue working on this topic, "bearing in mind the interrelationship between prevention and liability...".<sup>23</sup> A draft incorporated of set of principles on Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities was initially adopted on first reading by International Law Commission,<sup>24</sup> and the draft was finally adopted on second reading in May 2006. These efforts can be said to form the supplement and complete the International Law Commission's articles on Responsibility of States for Internationally Wrongful Conduct to a large extent, although the content of the adopted rules appears largely to repudiate State liability when the State has complied with the Draft Articles on Prevention. The draft principles correctly approach the issue as one of allocating the risk of loss due to harm resulting from lawful economic or other activities, when the relevant State has complied with its due diligence obligations to prevent transboundary harm. The articles have merit in providing a general framework for States to adopt domestic law or conclude international agreements to ensure prompt and adequate compensation for the victims of transboundary damage caused by lawful hazardous activities. It is also explicitly stated that an additional purpose of the draft principles is "*to preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration and reinstatement*". The principle now progressed must be seen in the light of the broader definitions of damage, environment and hazardous activity set forth in Principle 2.

<sup>22</sup> Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, in Report of the International Law Commission on the Work of its Fifty-Third Session, UNGAOR, 56th Sess. Supp. No. 10, UN Doc. A/56/10, 370 (2001).

<sup>23</sup> UN Doc. A/Res/56/82 of 18 January 2002.

<sup>24</sup> UN Doc. A/59/10, 153-156.

These can be said as the clear circumstances in which the first and the foremost obligation of the state is to make sure that the harm doesn't occur. However, the ILC can be seen to have decided that the Strict liability does not even have support as a measure of progressive development in the law but ILC limits itself to noting that certain categories of hazardous activities might be included in treaties providing for State-funded compensation schemes to supplement civil liability. It stops well short of finding that such compensation is legally required. Strict liability of States thus remains very controversial and the preference is clearly in favor of imposing civil liability on operators. States can be seen agreed to accept liability for their own conduct, but not for that of private actors.

## CONCLUSION

The case of *Trial Smelter*<sup>25</sup> started the discussion about the responsibility and liability of the states in environmental laws but it failed to demonstrate whether the state will be held responsible if it has exercised all due care as it would have taken for the protection of the inhabitants of its territory or not. It was always the accepted rule that a State must not permit the use of its territory for purposes injurious to the interests of other States in a manner contrary to international law and if it does then will bear the responsibility. Initially the main preference has been given to the measures of prevention rather than the cure and there was a general ignorance was being shown on imposing the rule of strict liability on the state. Only a very few treaties make state strictly liable for the harm that occur to the other state as a result of some specific activities, even if the state would have complied with all its legal obligation. Most of the multilateral environmental treaties primarily focus on the on the conduct of the acting State and not on the harm to the injured State, imposing duties of actions and of result.

<sup>25</sup> 3 RIAA 1938, 1965.