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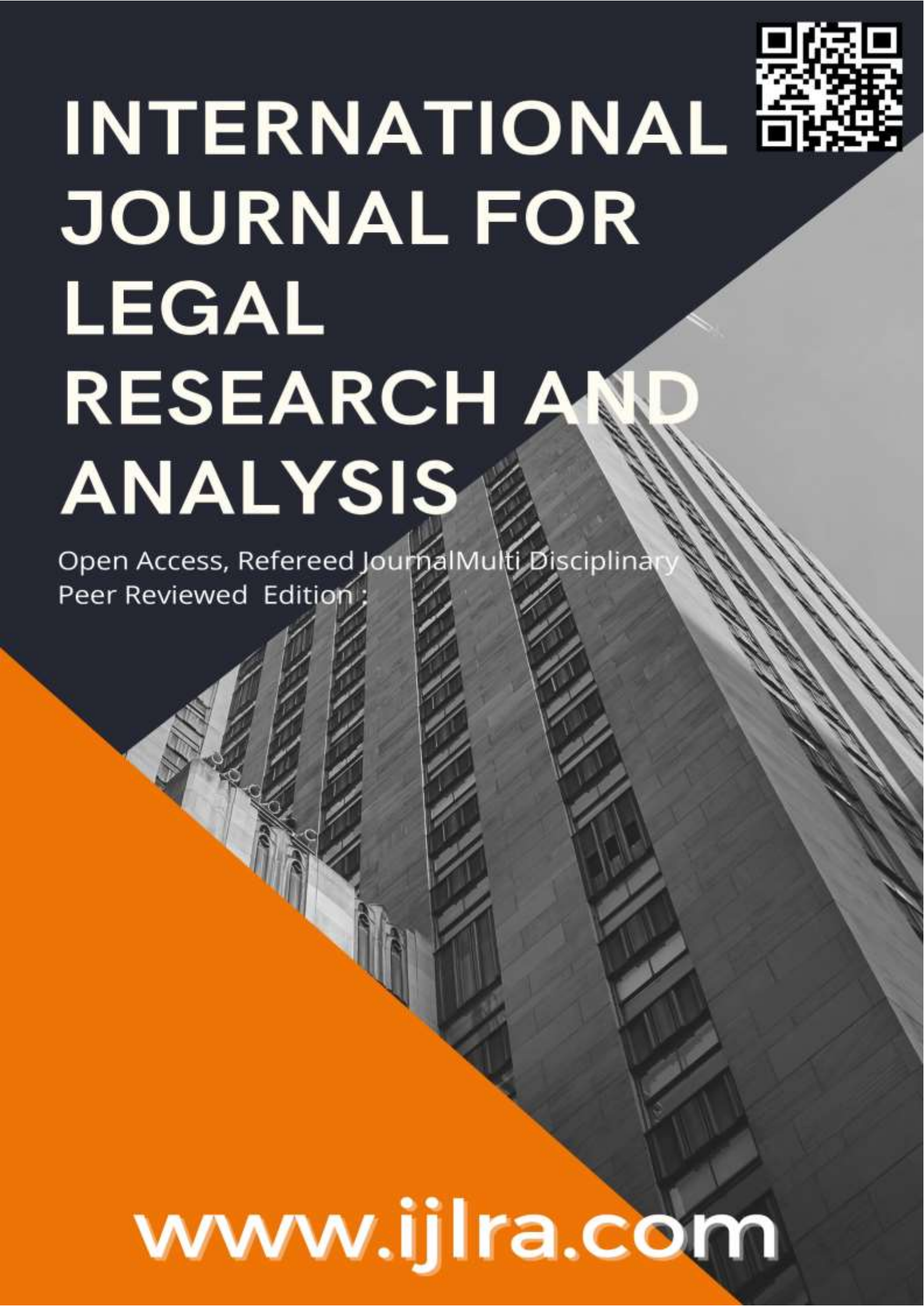

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TRAIL SMELTER ARBITRATION (UNITED STATES V CANADA): TRANSBOUNDARY POLLUTION AND STATE RESPONSIBILITY

AUTHORED BY – NAVYA SINHA

ABSTRACT

The Trail Smelter Arbitration is a known case in International environmental law for creating a nexus between transboundary pollution and principle of state responsibility. This dispute, arising from the operation of a smelter factory in Trail, Canada and its impact on the environment in the neighbouring states raised concern on cross-border pollution. This paper explores the legal and environmental areas of the Trail Smelter Arbitration and the impact on international environmental law. This cases also highlighted the loopholes in traditional method in addressing the international cases of transboundary pollution and the establishment of principles such as the "no-harm rule" and the doctrine of equitable apportionment.

This paper also addresses the broader application of the principles and rules established with the development of the Trail smelter case and contemporary environmental issues like the Covid-19 pandemic to managing environmental disputes across borders, especially in an era where global environmental issues require cooperative solutions. In conclusion, the Trail Smelter Arbitration not only set a precedent for addressing transboundary pollution and in forming the part of customary international law but also advanced a greater understanding of state responsibilities in the context of environmental harm.

Keywords: Transboundary pollution, international environmental law, doctrine of equitable apportionment.

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STATEMENT OF PROBLEM

How to get to a settling position between nations when one has right to pollute for the purpose of development, and the other has its right not to be harmed by a foreign country's development projects.

Method and materials

The primary method used in this paper is legal dogmatic and traditional legal method.
Mostly literature of prominent scholars has used has been used by in some cases other opinions have also been considered. Also, only official sites of international organizations have been used to maintain authenticity of the sources.

1. Introduction

This case establishes fundamental principles related to International environmental laws. The case is between United States and Canada. There are two towns, Northport in Washington, and Trail in Canada, they both sit along the same Columbia River.

The Trail smelter company was causing injury to the flora and fauna, nearby farmlands in Washington state. The industry was smelting zinc (Zn) and lead (Pb), this was in turn polluting the environment as large amount of sulphur dioxide was releasing. Waste was passing by same Columbia River. It was raising environmental concerns and causing damage to the nearby farmer's land; however, it gained active operational status because of the need of economic development and political power.

This case is a deep analysis of economic profits versus environmental protection. The two principles arising from the Trail smelter case plays i.e., (1) the polluter pays and (2) that the states have an obligation to prevent transboundary harm or transboundary harm principle significant part in international environmental law.

1.1 Background

Back then in 1896, in British Columbia, Trail smelter was opened. It was owned by the Canadian Pacific Railroad corporation, which has its name in itself. Later in 1905, the industry was incorporated as the Consolidated Mining and Smelting Company. It was not so far from the Canadian American border, approximately 11 miles north. (Figure 1)

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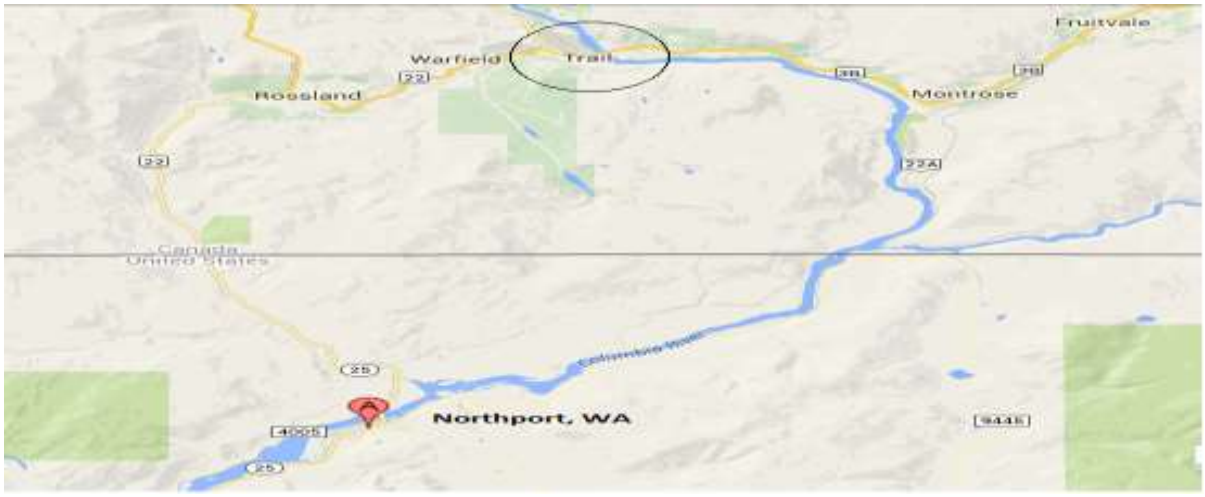

Figure 1 (https://www.google.com/maps)

At that time, smoke did not affect environmental pollution; rather it was a sign of employment for locals. A blessing in disguise. As said by Julio Barboza, "the damages caused, even if economically significant, were small in proportion to the value of the smelters production". The town Trail was so proud as they named the local Hockey team as "Smoked Eaters." John D. Wirth once said that the smell of smoke is "the smell of money and jobs".

In 1896, another smelter was opened (Breen Cooper Smelter) in Northport but it was no luck and prosperity like Trail smelter. The factory failed miserably, and the town face the Great depression, followed by drought. As opposed to this, Trail smelter was a great success.

The first people to file the case against the Trail smelter were the local farmers. The factory explored their options and bought nearby land within five miles of the factory. Secondly it purchased smoked easement with the local citizens to protect future litigation. One of the suits was filed by a Canadian farmer and the Canadian Supreme Court ordered to serve damages to the farmers but no other restriction was declared against the factory.

1.2 Decision Analysis

This case has been marked landmark for it being one of the cases where an international Tribunal or court has served its decision on an instance so remote and localized. Neither the local farmers nor the smelter company thought the matter would become of so much importance. In fact, the factory was trying to suppress the matter as soon as possible but the matter went to the international tribunal.

In this case the Tribunal was looking for a balanced decision as the remedy must be served to the local farmers and at the same time the smelter industry does not all shut down as to hamper the

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economic development of Trail.

The decision was in favour of the USA. The factory is responsible and accountable for its actions and the tribunal declared 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 properties or persons therein, when the case is of serious consequence".

The Tribunal declared that Canada has violated the sovereignty principle of international law. Also, to violate this the amount of pollution and its consequence must be of serious nature as to harm the environment and sovereignty of neighbour countries. However, the court did not mark any definition for what actually will be conferred as "serious", and it depends on the circumstances.

Majorly, the court laid down two principles. First, a state has a duty to prevent transboundary harm. Second, that the country does so suffers to pay the damages i.e., polluter pays.

The tribunal relied upon the case of the US Supreme Court Story Parchment Company v. Paterson Parchment Paper Company (1931); it was concluded that relief must be provided to the people who have suffered injury. Further, the relief must be provided in the form of monetary compensation. Accordingly, farmers were paid and successfully the principle of polluter pays was established.

The Tribunal intent was clear, it wanted to conclude to a balanced decision and hence never wanted to completely shut down the factory even for the time being the case is pending as it would suffer heavy economic and development loss. Therefore, the second remedy in respect to the factory was to change the way of operation as to reduce the amount of harmful chemicals emitted during processing. This remedy turned out to cost the smelter company around $20 million.

The Tribunal did not shut the factory rather it established the principle that a company may pollute if it is paying the price. It diminished the injury the pollution was causing but did not end the pollution.

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2. Cross border pollution and principles of State responsibility and Customary International Law on Transboundary Pollution

State responsibility in view of international law requires conventional or customary rule which can ascertain the liability of the State in respect of damages/environmental harm it causes.

There is no general treaty so customary international law is the primary source. State's acceptance (opinio juris) [1] is a significant factor other than international treaties, jurisprudence, and laws to bring stable rules into effect.

After the Tribunal's landmark decision on environmental concerns in the Trail smelter case[2], apparently it seemed appropriate that decision was in favour of the USA and the farmers were paid the damages however, it marked the Trail smelter's responsibility not its liability.

There was not sufficient conventions and treaties as to impose the State's liability, there is a vital need of State practice and opinio juris too in this regard. However, there is one convention i.e., "Convention on International Liability for Damage Caused by Space Objects" that imposes liability on the State for causing damage even for economic development purposes, but it is not predominantly environmental orientated rather outer space.

Later in 2015 Paris Agreement and in 1979 Convention on Long-Range Transboundary Air Pollution it came out that the State will be liable only in cases where it is responsible at global level for pollution.

The second principle which was evolved in the Trail smelter case was polluter pays but this is not whole in itself as it only highlights the liability of the operator not the State. Liability of the operator and the State are two different things. Only State's responsibility is proportionate to transboundary environmental damages.

Therefore, it can be concluded that currently there is no customary international law which can provide laws for ascertaining liability of the State in relation to international environmental damages it causes as there is no specific state practice or opinio juris which can be followed.

[1] Article 38(1)(b) Statute of the International Court of Justice: "international custom, as evidence of general practice accepted as law".
[2] PCA Trail Smelter Case (United States v Canada) (1941) 3 RIAA 1905, 1965.

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2.1 Contemporary transboundary harm principle

2.1.1 Treaty and International Law Commission (ILC) Codification

Transboundary harm principle was evolved in the Trail smelter case and later, in the absence of any specific law, has been come across as a general rule and followed as customary international law binding among all the States.

Some other principles that were emerged in the Trail smelter case was codified as Treaties for e.g., the Stockholm Declaration on the Human Environment (1972), to develop "the draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities."

According to the Report of the International Law Commission on the work of its fifty-third session, prevention is necessary in cases where there is a threat to transboundary harm due to certain activities of one state. It is important to understand the meaning of prevention in this situation. It is obligation of state to consider this transboundary harm principle before they might actually start the projects. Compensatory remedy in these cases might not actually bring back the environment as it was before the actions that took place so its prevention is necessary. The policy of prevention is better than cure in these cases also the link between cause (activity) and harm needs to be evaluated before any activity.

In respect of transboundary natural resources and harm to environment Article 10 states:

"States shall, without prejudice to the principles laid down in articles 11 and 12, prevent or abate any transboundary environmental interference or a significant risk thereof which causes substantial harm—i.e. harm which is not minor or insignificant."[3]

2.1.2 Transboundary Harm Principle as the framework for resolving cases involving border-transcending harm.

A. Pulp Mills on the River Uruguay (Argentina v. Uruguay) (2010)[4]

In this case, Argentina and Uruguay has a common river as their border and they have 1975 Statute of the River Uruguay for the prevention of water pollution and other activities. Uruguay planned to build pulp mills along the river but according to Argentina it would substantially violate the 1975 Statue. It was argued that it would create transboundary pollution.

[3] Environmental Protection and Sustainable Development: Legal Principles and Recommendations (London, Graham and Trotman/ Martinus Nijhoff, 1987), p. 75, adopted by the Experts Group.
[4] Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14 (Apr. 20).

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The court tried to find similar options as in the case of Trail smelter and concluded that the regulation of transboundary harm principle on the river by stating that "optimum and rational utilization" of the river and proportionate need of "protection of the environment and joint management of this shared resource."

Further the court pointed out that the two states according to their Statute should coordinate their industrial activities and plan their economic development measures by coordination to prevent transboundary environmental harm.

Further the court stated that according to Art. 41 of the Statute the two states must align their domestic regulatory work as to with the aim to prevent transboundary environmental harm.

The Court pointed out that Uruguay has satisfied the obligation of Environment Impact Assessment (EIA) by reference to "State practice and the International Law Commission 2001 draft Articles on Prevention of Transboundary Harm from Hazardous Activities."

B. Nuclear Tests Case (Australia & New Zealand v. France) (1974)[5]

The court ordered injunction to suspend nuclear weapons tests in the South Pacific while the case was still pending to France. Australia argued that any radio-active material crossing its territory done by France's nuclear test would be covered under the aspect of transboundary harm principle. This is of serious consequence and should be applied strictly as compared to equitable rule applied in the Trail Smelter case, this is codified in the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.

Australia claimed its territorial sovereignty under the provisions of general international law to protects its citizens from the harmful effects of activities conducted by neighbouring countries. The quantum of harmful effects is much more serious as compared to Trail smelter.

The court observed that there is a possibility of hamper to the legal interest of Australia and therefore it is important to safeguard the same.

Transboundary Harm Principle and other environmental norms do not put a "total restraint during military conflict" as conclude by the court. The court further stated that the states have domestic regime of self-defence as the states should consider the factor of proportionality and necessity

[5] Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 253 (Dec. 20); Nuclear Tests (NZ v. Fr), Judgment,1974 I.C.J. 457 (Dec. 20).

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before conduction nuclear tests for transboundary environmental harm.

C. Namibia Case (Namibia v South Africa) 1971[6]

There are certain cases where the state does not hold any "control" of jurisdiction as recognized in international law on some activities or events. The state has *de facto* jurisdiction but not *de jure* in cases like unlawful annexation. This can be inferred by the advisory opinion in *Namibia case*. It was held that South Africa has illegal maintenance of administration on Namibia was asked to withdraw by the court.

The Court further held that:

"*The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States."*

2.1.3 The Transboundary harm principle and the Covid-19 pandemic

It is difficult to talk about Transboundary Harm principle without thinking about Covid-19. It is one of the greatest examples in history as it had outburst in one country and impacted several countries miserably.

It has been brought up by the scientist that the outburst was not natural. So, it can be concluded that is activity in China precipitated the pandemic affecting the whole world. [7] It satisfied the first principle of 'clear and convincing evidence' standard that it emerged from Wuhan, China.

One of the theories is that the domestic source of meat came into contact with infected wildlife

[6] Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, International Court of Justice (ICJ), 21 June 1971, https://www.refworld.org/jurisprudence/caselaw/icj/1971/en/15371 [accessed 01 April 2024].

[7] China has sought to challenge the fact of the outbreak's origins in that country. The Council on Foreign Relations "Backgrounder" report noted that "Chinese officials have consistently rejected not only the hypothesis that the virus originated at the Wuhan laboratory, but that it originated in China at all . . . Meanwhile, Beijing has called on the WHO to inv
estigate the possibility that the pandemic started in other countries, including in the United States." Claire Felter, Will the World Ever Solve the Mystery of COVID-19's Origin?, COUNCIL ON FOREIGN RELATIONS – BACKGROUNDER (Nov. 3, 2021), https://www.cfr.org/backgrounder/will-world-ever-solve-mystery-covid-19s-origin [https://perma.cc/9H7T-E8JW].

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and it started spreading through human beings after the consumption of infected meat.[8] Almost every theory shows that there is a sign of regulatory failure with respect to food safety on the side of China.

Further it would be covered under the definition of serious harm as the pandemic took lives in numbers that cannot be counted. It costs serious injury economically and financially. The transboundary harm principle applies to some non-environmental injuries relevant in the context of Covid-19 pandemic. Although, the COVID-19 outbreak was a mortal havoc and devastatingly disrupted economic activity, it did not tangibly harm property or ecosystem.

Human lives will also be covered under the principle as it was stated by the court in the *pulp mills case* that injury to "people, property and the environment", similarly in *nuclear test case*,

There was risk to the whole human population. The ICJ recognized that the environment *"is not an abstraction but represents the living space, the quality of life and the very health of human beings."*

3. Erga Omnes and the Environment

Erga Omnes is a Latin term which means "towards everyone". This principle states an obligation towards every other state in international law. The concept of *erga omnes* was first introduced in the case of *Barcelona Traction,* where the International Court of Justice observed that there should a line drawn between obligations of state towards the international community and those arising out of diplomatic protection. The former is concerned to all the states and all the states have legal interest in their protection, so therefore they are obligated *erga omnes.*

These obligations are arising in international law from basic human rights which all countries should be obligated to follow, e.g., protection from slavery and racial discrimination. These rights possess quasi-universal nature.

The ILC Draft on State Responsibility 2001 Art 48 also shows the obligation to follow the doctrine of erga omnes:
"Any state other than an injured State is entitled to invoke the responsibility of another in

[8]For examples of arguments supporting the Zoonotic theory, see Steven Poole, 'Zoonotic': The Covid-19 Origins Theory that is Not that Batty, THE GUARDIAN (June 18, 2021), https://www.theguardian.com/books/2021/ jun/18/zoonotic-the-covid-19-origins-theory-that-is-not-that-batty [https:// perma.cc/8LRL-P3XM].

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accordance with paragraph 2 if:

(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) the obligation breached is owed to the international community as a whole."

The International Criminal Tribunal for the Former Yugoslavia (ICTY) in its Furundzija judgement stated that:

"Furthermore, the prohibition of torture imposes on States obligations erga omnes, that is, obligations owed towards all the other members of the international community, each of which then is a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative rights of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued."

The difference between bilateral agreement and erga omnes can be easily equated as difference between domestic contract law and public law obligation.

Traditionally, fundamental human rights were considered as the obligation erga omnes but in contemporary world jurisprudence added protection of environment in the list too.

3.1 The Principle of sustainable development

The basis for this principle is that the states should use their resources for the development as for future generation does not face problem of lack of resources. Need of future generation should be considered while making development projects.

The Brundtland Report or the World Commission on Environment and Development in 1987 defined the sustainable development as: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

The Rio Declaration Principle 3 concisely describes it as: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations"

States should find alternatives as to control global warming and other environmental harm.

3.2 The Precautionary Principle

The basis of this principle is scientific uncertainties. It has been originated from the concept of "Vorsorgeprinzip" and the domestic German laws. Principle 15 of the Rio Declaration, which

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provides the following:

"In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

This principle can also be established in Article 206 of the 1982 UNCLOS which provides that: "When states have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments to the IMO."

3.3 The Principle of Co-operation

A general obligation can be inferred from The Stockholm Declarations principle 24 which states that "international measures concerning the protection and improvement of the environment should be handled in a co-operative spirit".

Further, according to Principle 7 of the Rio Declaration:

"States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem".

4. Conclusion

As a general rule in international law states have sovereignty power and they can use their resources and make development projects as they seem appropriate unless they are against the principles of international law and does not harm the sovereignty of another state. Territory invasion of state can also be intangible when the pollution from development projects of one state invades neighbouring states, what we commonly call as transboundary pollution. This obligation has been supported by the principle 21 of the Stockholm Declaration, Principle 2 of the Rio Declaration and in the preamble of United Nations Framework Convention on Climate Change.

It is a known fact these obligations are not binding in nature but with the evolving nature of international law and decisions as of Trail smelter arbitration has marked these obligations as part of the customary international law and hence now binding in nature.

"One should use his own property in such a manner as not to injure that of another" has been

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rightly translated for legal maxim “Sic utere tuo, ut alienum non laedas” which has no legal obligation but stand as a principle in international law.

According to The ILC Draft Articles on State Responsibility it has been cleared that any transboundary activity or environmental harm of a state will attract state responsibility. Industries which is in the jurisdiction on ones’ state territory if harming state of another territory will face consequences for the same. It is be seen as a breach of international obligation. It harms the environment terribly and states should be held responsible if limit is crossed as to take actions at international level. It is irrelevant whether the industries are private or public because state cannot be ignorant when the amount of pollution is terribly high. Regulation of industries whether public or private is always in the hands of the state.

In the Trail smelter case, emission of greenhouse gases was causing farm loss to the US farmers. Even though is impossible to articulate what amount of damaging effect on the farm have done by the industry’s emitted gases. In this case the amount of pollution was so high was to affect climate change hence the matter was taken by the international tribunal and later came as a landmark judgement with principles which are followed as customary international law.

Later in time, many more cases, treaties, conventions and principles shaped the concept of transboundary environmental harm principle, it is important to note that responsibility of state in these cases should not only be restricted to damages in monetary term but also as to control the pollution and protect the environment.

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