

LAWS AND CONVENTIONS ADDRESSING TRANSBOUNDARY HARM AND PRECAUTIONARY PRINCIPLE IN INTERNATIONAL ENVIRONMENTAL LAW

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ABSTRACT

The article explores the relationship between transboundary harm and the precautionary principle in international environmental law. Transboundary harm refers to the environmental damage caused by activities in one country that affect the environment or people in another country. The precautionary principle is a fundamental principle that requires states to take preventative measures in situations where the risk of harm is uncertain but potentially significant. This article examines various international conventions and agreements that address transboundary harm and the precautionary principle. The article emphasizes on the importance of the proactive approach to environmental protection particularly in the context of transboundary harm and the role of the precautionary principle in ensuring that states take appropriate measures to prevent harm to the environment and people.

Keywords: International environmental law, Transboundary harm, Precautionary principle, Rio Declaration.

INTRODUCTION

The massive urbanization and the technological revolution across the globe evolved into multiple environmental catastrophes. A specific type of environmental damage that is inferred by or originating in one state and disturbing the territory of another is referred to as transboundary harm. Such transboundary harm creates remedial liability on the state originating it. And further, this led to the origin of effective rules governing the transboundary movement of hazardous waste.

Transboundary harm and the precautionary principle are two essential concepts in international environmental law. As globalization and interdependence of nations increase, environmental harm often crosses national borders, affecting people and ecosystems in different countries. The precautionary principle aims to prevent harm to the environment or human health before

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it occurs, by taking precautionary measures even when scientific evidence is uncertain or incomplete.¹

TRANSBOUNDARY HARM

Transboundary harm is a growing concern in the international community due to the increasing interdependence and globalization of economies. The environmental impacts of economic activities such as mining, logging, and manufacturing often extend beyond national borders, affecting neighboring countries' ecosystems and communities. Transboundary harm can also arise from natural disasters, such as oil spills, radioactive fallout, or air pollution from wildfires. In some cases, it may be challenging to attribute responsibility for the harm to a specific actor, making it difficult to seek compensation or hold someone accountable.

It is therefore important that laws and conventions exist that require nations to take action to prevent or mitigate such harm. One such law is the precautionary principle, which is a cornerstone of international environmental law. In this article, we will explore the various laws and conventions that discuss the precautionary principle in the context of transboundary damage.

LEGISLATIONS ON TRANSBOUNDARY HARM

The main objective of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal is to safeguard the environment and human health against any harmful impacts arising from the movement and disposal of hazardous wastes on an international scale. The convention recognizes the importance of the precautionary principle in addressing the risks associated with the transboundary movement of hazardous wastes. The Basel Convention was adopted in 1989 and has been signed by over 180 countries.

The Convention on Long-Range Transboundary Air Pollution is another convention that regulates air pollution that crosses international borders. The convention sets emission reduction targets for specific pollutants, including sulfur dioxide, nitrogen oxides, and persistent organic pollutants. The convention also establishes a framework for monitoring and assessing the effects of air pollution on human health and the environment.²

¹ Philippe Sands, Jacqueline Peel and Adriana Fabra, *Principles of International Environmental Law* (4th edition, Cambridge University Press 2017) 191

² Xue Hanqin, *Transboundary Damage in International Law* (Cambridge University Press, 2003) 2

Recognizing this growing threat, the ILC began working on a set of draft articles aimed at guiding nations in developing effective regulations and policies to prevent or minimize such adverse impacts. The process commenced in 1996 and culminated in 2001 with the adoption of 19 draft articles under the title "Prevention of Transboundary Harm from Hazardous Activities".

The Prevention of Transboundary Harm from Hazardous Activities resolution is an essential legal tool in the continuous effort to balance economic development, environmental protection, and the well-being of populations across borders. By setting forth clear principles and responsibilities of states, the 2001 draft articles provide a solid foundation for international cooperation in addressing complex industrial hazards while encouraging sustainable practices.

GUIDELINES OF THE PREVENTION OF TRANSBOUNDARY HARM FROM HAZARDOUS ACTIVITIES, 2001

General Prevention: Countries must follow internationally recognized standards and practices to minimize the risk posed by these activities.³

Assessment and risk evaluation: Nations must carry out an assessment of potential risks before embarking on any hazardous activity.⁴

Mitigation and compensation: States are responsible for mitigating any damage caused by hazardous actions, including providing compensation if there's significant transboundary harm.

PRINCIPLE MAXIM

"*Sic utere tuo ut alienum non laedas*" is a Latin maxim that translates to "Use your property in such a way as not to injure others." It is a fundamental principle in tort law, which holds that individuals have a duty to use their property and conduct themselves in a way that does not cause harm to others. The maxim emphasizes the importance of responsible behavior and respect for the rights of others.⁵

The maxim is also relevant in the context of environmental law, particularly in relation to the concept of transboundary harm. Transboundary harm occurs when activities in one country or

³ The Prevention of Transboundary Harm from Hazardous Activities, 2001, art 3

⁴ The Prevention of Transboundary Harm from Hazardous Activities, 2001, art 7

⁵ Siddharth Jain, 'Transboundary Harm in International Law' (*ipleaders*, 4 September 2018) <<https://blog.ipleaders.in/transboundary-harm/>> accessed 18 April 2023

jurisdiction cause harm to the environment or people in another country or jurisdiction. The principle of "*sic utere tuo*" recognizes that states have a duty to ensure that their activities do not cause harm to the environment or people in other states.

The principle has been recognized in various international environmental conventions and agreements. For example, the 1992 Rio Declaration on Environment and Development, which sets out the principles for sustainable development, includes the principle that "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."⁶

Similarly, the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses includes a provision that requires states to use international watercourses in a way that does not cause significant harm to other states sharing the watercourse.

PRECAUTIONARY PRINCIPLE

The precautionary principle is another important principle in international environmental law. It is based on the idea that where there are threats of serious or irreversible harm to the environment or human health, in the absence of full scientific certainty, precautionary measures should be taken to prevent harm. The principle emphasizes the need to anticipate and prevent harm, rather than waiting for scientific proof of harm. It is based on the understanding that environmental problems are complex, and scientific uncertainty may persist.

It is based on the idea that where there are threats of serious or irreversible harm to the environment or human health, in the absence of full scientific certainty, precautionary measures should be taken to prevent harm. This principle has been incorporated into several international environmental agreements and conventions.

⁶Shelley Ranii, 'Do Common but Differentiated Responsibilities Belong in the Post-2015 SDGs?' (Center on International cooperation, 21 March 2014) <<https://cic.nyu.edu/resources/do-common-but-differentiated-responsibilities-belong-in-the-post-2015-sdgs/>> accessed 18 April 2023

LEGISLATIONS ON PRECAUTIONARY PRINCIPLE

The Rio Declaration on Environment and Development is a seminal document that emphasizes the precautionary principle. The principle acknowledges that the presence of uncertainty should not serve as a justification for delaying actions aimed at preventing environmental degradation. Furthermore, it highlights that in situations where there exists the possibility of irreversible or significant harm, the absence of complete scientific certainty should not be utilized as a basis for delaying the implementation of practical measures aimed at preventing environmental degradation. The Rio Declaration was adopted in 1992 and has been signed by over 170 countries.

The United Nations Framework Convention on Climate Change (UNFCCC) is another international agreement that includes the precautionary principle. The convention was adopted in 1992 and aims to prevent dangerous human interference with the climate system. It recognizes that the global climate is a common concern of humankind and that action should be taken to protect the climate system, even in the face of scientific uncertainty.

The Cartagena Protocol on Biosafety is an international agreement that regulates the transboundary movement of genetically modified organisms (GMOs) and aims to ensure the safe handling, transport, and use of GMOs. The protocol requires parties to take measures to prevent harm to human health and the environment, even in the absence of scientific certainty. The Cartagena Protocol was adopted in 2000 and has been signed by over 170 countries.

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The Convention on Biological Diversity is an international agreement that aims to conserve biological diversity, promote the sustainable use of its components, and ensure the fair and equitable sharing of the privileges ascending from the use of ancestral resources. The convention recognizes the importance of the precautionary principle in addressing the risks associated with the use and handling of living organisms. The convention was adopted in 1992 and has been signed by over 190 countries.

IMPORTANCE OF LEGISLATIONS IN TODAY'S WORLD

1. Protects human health and safety: The framework helps in reducing the risks posed by hazardous activities on human health by requiring nations to take appropriate preventive measures.

2. Preserves the environment: The guidelines in this framework ensure that the environment and its natural resources are not subjected to irreversible damage.

3. Promotes international cooperation: By fostering information sharing and consultations, the Prevention of Transboundary Harm from Hazardous Activities encourages nations to work together for the betterment of global safety.

4. Prevents conflict: By setting uniform principles and practices, the framework helps to reduce potential disputes between nations over hazardous activities conducted close to their borders.

RELATIONSHIP BETWEEN TRANSBOUNDARY HARM AND PRECAUTIONARY PRINCIPLE

The precautionary principle is particularly relevant to transboundary harm. When it comes to transboundary harm, the principle highlights the need for preventive action and taking precautionary measures, even in the absence of full scientific certainty. This is because transboundary harm can have severe and irreversible consequences, and the effects may not be known until it is too late. The precautionary principle can, therefore, provide guidance on how to address transboundary harm by emphasizing the need for preventative measures.

Transboundary harm and the precautionary principle are crucial concepts in international environmental law. Transboundary harm is a growing concern due to the globalization of economies and increasing interdependence, while the precautionary principle seeks to prevent harm to the environment and human health before it occurs, even in the absence of full scientific certainty. The relationship between these two concepts is critical, as the precautionary principle can provide guidance on how to address transboundary harm by emphasizing the need for preventative measures. As such, international environmental law should continue to promote the principle of state responsibility and the precautionary principle to address transboundary harm effectively.

CASE LAWS

Trail Smelter Arbitration (1941): This was one of the earliest cases to deal with transboundary pollution. The Trail Smelter was a Canadian smelting plant that emitted pollutants that crossed the border into the United States, causing harm to crops and forests. The United States brought a case against Canada, arguing that it was responsible for the harm caused by the smelter. The

arbitration tribunal agreed and held that a state cannot use its territory in a way that causes harm to another state.⁷

Barcelona Traction case (1970): This case dealt with the concept of erga omnes obligations, which are obligations owed by a state to the international community. The Barcelona Traction Company was a Canadian company that had investments in Spain. When the Spanish government expropriated the company's assets, Canada brought a case against Spain. The International Court of Justice held that Canada did not have standing to bring the case, but also held that Spain had violated its erga omnes obligations by expropriating the assets of a foreign company.⁸

Corfu Channel case (1949): This case dealt with the use of force by one state against another state's vessels. The United Kingdom had laid mines in the Corfu Channel, which were struck by Albanian vessels. The United Kingdom then used force against Albania. The International Court of Justice held that the use of force was not justified and that the United Kingdom had violated Albanian sovereignty.⁹

Pulp Mills case (2010): This case dealt with the discharge of effluent from a pulp mill in Uruguay into the Uruguay River, which flows into Argentina. Argentina brought a case against Uruguay, arguing that the effluent was causing harm to its environment and population. The International Court of Justice held that Uruguay had violated the procedural requirements of the 1975 Statute of the River Uruguay, which required it to consult with Argentina before authorizing the pulp mill.¹⁰

Nuclear Tests cases (1974): These cases dealt with the atmospheric testing of nuclear weapons by France in the South Pacific. Australia and New Zealand brought cases against France, arguing that the tests were causing harm to their environment and population. The International Court of Justice held that the tests were a violation of the principle of good faith and that France had an obligation to prevent the harm caused by the tests.¹¹

These cases demonstrate the importance of the precautionary principle in international environmental law, which requires states to take action to prevent harm to the environment,

⁷ *United States v. Canada*, [1938 and 1941], 3 R.I.A.A. 1905.

⁸ *Belgium v Spain*, [1970], ICJ Rep 3

⁹ *United Kingdom vs Albania*, [1949], ICJ Rep 24

¹⁰ *Argentina vs Uruguay*, [2006], ICJ Rep 113

¹¹ *Australia vs France*, [1974], ICJ Rep 25

even in the absence of full scientific certainty. They also demonstrate the importance of addressing transboundary harm, which can cause harm to other states and to the international community.

CONCLUSION

Transboundary harm poses a significant threat to the environment and people across borders, requiring international cooperation and a proactive approach to environmental protection. The precautionary principle is a key tool in preventing transboundary harm, requiring states to take preventive measures in situations where the risk of harm is uncertain but potentially significant.

Overall, the precautionary principle plays a crucial role in ensuring that states take appropriate measures to prevent harm to the environment and people in the face of uncertainty. It is essential that the principle is integrated into international environmental law and decision-making processes so that effective action can be taken to prevent and mitigate transboundary harm.

