TRANSBOUNDARY ENVIRONMENTAL HARM AND STATE RESPONSIBILITY: CUSTOMARY INTERNATIONAL LAW

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Keywords: air pollution, aquifer, basin states, environmental law, global warming, groundwater, Harmon Doctrine, Helsinki Rules, international law, marine pollution, ozone layer, Rio Declaration, riparian state, Stockholm Declaration, Trail Smelter arbitration, transboundary environmental harm, transboundary shipment, waste dumping, water pollution, watercourse

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Summary

In some areas and between some states liability for transboundary environmental harm has been specifically delimited by treaties or other international instruments. For the most part, however, the law of transboundary environmental harm is still customary

international law. While customary international law has long recognized the right of a state to exploit natural resources within its territory, limits are imposed on that right when the exploitation causes harm to the territory of a neighboring state. The precise extent of these limits remains somewhat unclear and is subject to innumerable local variations as a result of bilateral or multilateral regional practice.

Customary international law, in contrast to conventional international law, is derived from the practice of states as international actors rather than from explicit written agreements. Customary international law may thus be described as a set of normative expectations developed through observation of the actions and reactions of states. A commonly used, although not necessarily comprehensive, list of the sources of international law can be found in Article 38(1) of the Statute of the International Court of Justice, which provides that:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- international custom, as evidence of a general practice accepted as law;
- the general principles of law recognized by civilized nations;
- subject to the provisions of Article 59 [of the Statute], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

For the most part, the sources of law listed in the Statute, other than international conventions, can be grouped together under the heading of "customary international law." General principles of law have traditionally been seen as a third category of public international law. However, they can also be seen as "supplemental rules" or as a "secondary source of law." Judicial decisions and the teachings of the most qualified publicists are merely “subsidiary means for the determination of rules of law.” In any event, judicial decisions and (to the extent that a state actually observes them) general principles of law are state practice and thus form the basis for normative expectations.

1. Customary International Law Approaches to Transboundary Environmental Harm

Recent attempts by the United Nations and other international organizations to codify the law regarding transboundary environmental harm have been only partially successful. Continuing state practice shows a marked lack of consensus, and many of the aspirational documents and framework conventions adopted by international bodies have found little or no acceptance in the practice of states.

Transboundary environmental harm commonly takes one of three forms: air pollution, pollution of a transboundary watercourse, or transboundary shipment or dumping of wastes. Of these, the regime regarding pollution of transboundary watercourses is perhaps the most fully developed and provides the most useful examples. It is also possible for a state to cause global environmental harm or harm to the global commons.

Harm of this nature includes global warming and destruction of the ozone layer, marine pollution, and damage to Antarctica, and is increasingly a concern in the development of international environmental law.

There are four traditional legal theories regarding environmental harm to transboundary watercourses: (1) absolute territorial sovereignty, (2) absolute territorial integrity, (3) limited territorial sovereignty, and (4) the community theory. These principles, or closely related ones, are generally applicable to localized air pollution damage as well. In more general form, the underlying principles are applicable to all of the categories of environmental harm described in the preceding paragraph.

2. Absolute Territorial Sovereignty: The Harmon Doctrine

Absolute territorial sovereignty, as the name implies, is the theory that a riparian state has complete control over all waters lying within its territory, and may utilize those waters without regard for the effects on the downstream or co-riparian states. Hugo Grotius, often regarded as the founding theorist of modern international law, expressed the theory of absolute territorial sovereignty three and a half centuries ago when he said "a river, viewed as a stream, is the property of the people through whose territory it flows, or the ruler under whose sway that people is...to them all things produced in the river belong."

Absolute territorial sovereignty is also known as the Harmon Doctrine, after a nineteenth-century American official. In 1895, in response to Mexico's protest against the United States' diversion of water from the Rio Grande (the river that forms much of the border between the US and Mexico), then Attorney General Judson Harmon stated that "the rules, principles, and precedents of international law impose no liability or obligation upon the United States." This may not have been true even then, and it is even less likely to be true today.

The absolute territorial sovereignty theory is naturally more appealing to upstream states than to downstream states. The appeal of the theory is somewhat diminished, however, by the fact that most countries are both upper and lower riparians.

International legal theorists and political figures routinely denounce the Harmon Doctrine. Although no state formally adheres to the theory of absolute territorial sovereignty with regard to transboundary rivers, many states continue to base their practice on such a theory, using a river's waters without regard for the welfare of downstream states. On the whole, the doctrine is more appealing to developing states than to developed states. The United States that initially expressed the Harmon Doctrine, in 1895, was itself a developing country; it was not the United States of today.

3. Absolute Territorial Integrity

Absolute territorial integrity is the lower riparian states' logical counterpart to absolute territorial sovereignty. The theory is that a downstream riparian state may demand the continuation of the full flow of the river from an upper riparian state, free from any diminution in quantity or quality. Absolute territorial integrity naturally appeals to lower

riparians. As with absolute territorial sovereignty, though, the appeal is somewhat diminished by the fact that most states are both upstream and downstream states.

4. Limited Territorial Sovereignty

The limited territorial sovereignty theory holds that a state may make use of the waters flowing through its territory to the extent that such use does not interfere with the reasonable use of waters by the downstream states. Limited territorial sovereignty is an international law analogue of the Roman law maxim *sic utere tuo ut alienum non laedas* (use your property so as not to injure that of another). State practice, as well as decisions of international and domestic tribunals and pronouncements of private and public international bodies, indicates that this is the approach most often applied to transboundary watercourse problems.

4.1. Decisions of International Tribunals

4.1.1. The Trail Smelter Arbitration

Almost all discussions of international environmental law and liability take as their foundation the Trail Smelter arbitration, among the earliest expressions of the principle that a state has responsibility for environmental damage extending beyond its territorial limits. The Trail Smelter arbitral tribunal stated in dicta 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.”

This *sic utere tuo* concept has become the core rule of international transboundary pollution, and is often known (not entirely accurately) as the “Trail Smelter rule” or “Trail Smelter principle.”

4.1.2. The Corfu Channel Case

The decision of the International Court of Justice in the Corfu Channel Case incorporated this general principle of limited territorial sovereignty, stating 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." This Corfu Channel principle provides a more authoritative and more generally applicable statement of the principle previously enunciated in the Trail Smelter arbitration.

4.1.3. The Lac Lanoux Arbitration

The Trail Smelter addressed transboundary air pollution, and the Corfu Channel case adopted a limited territorial sovereignty rule in a holding dealing with military, rather than strictly environmental, dangers. The Lac Lanoux Arbitration involved a watercourse dispute: France proposed to divert the waters of the Carol, which flows across the border from France into Spain, in order to generate electricity. Water equal in quantity and quality would be returned to the Carol before it entered Spain. The arbitral

tribunal stated: "According to the rules of good faith, the upstream state is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own."

The Lac Lanoux tribunal added a new consideration: Along with this statement of limited territorial sovereignty came a complementary limit on territorial integrity: "On her side, Spain cannot invoke a right to insist on a development of Lake Lanoux based on the needs of Spanish agriculture. . . . Spain . . . can only urge her interests in order to obtain, within the framework of the scheme decided upon by France, terms which reasonably safeguard them."

The Lac Lanoux arbitral tribunal went on to deny the Spanish claim because there was no diminution in either the quantity or the quality of the water delivered to Spain.

4.2. Decisions of Municipal Courts

Municipal courts have also applied the concept of limited territorial sovereignty. The decisions of these courts, while in most cases not creating a binding precedent even in the jurisdictions in which they are reached, nonetheless may serve as sources of international law under Article 38(1) of the Statute of the International Court of Justice. Decisions of municipal courts are "judicial decisions" within the meaning of the statute and are also evidence of state practice. Some of these, including the two that follow, have been referred to sufficiently often by international tribunals and scholars that they are essential to a discussion of the customary international law of transboundary environmental harm.

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Biographical Sketch

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