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The Development of International Law Regarding the Transboundary Movement of Hazardous Wastes

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INTRODUCTION

Dioxin-contaminated soil from the 1976 chemical plant explosion at Seveso, Italy went missing in 1982. In 1983 it finally turned up in northern France, and this incident made the world aware of problems involving the transboundary movement of hazardous wastes. More recently, there have been reports of illegal dumping at sea by ships carrying hazardous wastes, and of hazardous wastes being dumped in African countries.[1] Chapter 20 of Agenda 21 says it is possible that "part of the international movement of toxic and dangerous products is being carried out in contravention of existing national legislation and international instruments, to the detriment of the environment and public health of all countries, particularly developing countries." In the Asia-Pacific region, hazardous wastes move not only across national borders from developed to developing countries; their transferal is diversifying so that they are also moving from NIEs to other Asian developing countries. There were hopes that this problem could be solved quickly through involvement with, among other things, developing countries' accumulated debts. The Organization for Economic Cooperation and Development (OECD) and the United Nations Environment Programme (UNEP) considered what should be done to deal with this situation, and on March 22, 1989 the Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal (the "Basel Convention") was adopted.[2] This convention, which comprises 29 articles and six annexes, became effective on May 5, 1992 when the number of ratifying nations reached 20. It does not allow reservations. The Basel Convention was built on compromise between the developed and developing nations, which were in confrontation over the strictness of its controls.

This paper discusses liability under international law for the transboundary movement of hazardous wastes.

THE LIABILITY FOR TRANSBOUNDARY POLLUTION, AND INTERNATIONAL LAW

1. GENERAL PRINCIPLES OF INTERNATIONAL LAW

Damage to the environment across national borders is generally caused by private parties. When transboundary environmental damage, caused by the activities of private parties, infringes upon another country's law-protected interests, this violates obligations under international law, but for a state to be held internationally liable requires the lack of that state's "due diligence," such as in permitting such activities. Even now a state's international liability for environmental damage caused over national borders is covered by the culpa doctrine, and therefore now, when science and technology are advancing at such a rapid pace, redressing victims is achieved by objectifying the obligation for caution.

There are also many international judicial precedents that objectified the obligation for exercising due diligence. Some representative examples are the Trail Smelter case,[3] the Gut Dam case,[4] and the decision in the Corfu Channel case.[5] The decision in the Trail Smelter case pointed out the responsibility for controlling use of the area, and it clearly demonstrated the substance of the obligation for exercising due diligence. Specifically, it found that states generally are responsible for exercising due diligence in preventing damage caused by activities under their jurisdiction. It also held that states are internationally liable when a situation involves serious consequences, and infringement is proved by clear and unmistakable evidence. This decision set forth a standard for the obligation to exercise caution.

The responsibility for managing the use of domains is incorporated into Principle 21 of the Declaration of the United Nations Conference on the Human Environment, which provides that, "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 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." This principle derives from the legal principle of *sic utere tuo ut alienum non laedas*, meaning that when using something of one's own, one should not harm the possessions of others. Principle 2 of the Rio Declaration also confirms Principle 21, and one could say that now this principle has become international customary law.

With the advances in science and technology has come development in space and the deep sea bed, and of nuclear power, and as a consequence there have been increases in ultrahazardous activities such as artificial satellites falling to earth, marine pollution, and nuclear power accidents. It has already become impossible to deal adequately with such activities using the responsibility for controlling domain use, which is based on the conventional doctrine of fault liability. Often these activities are legal, which means that a violation of international law cannot be used as the basis for a state's international responsibility. Thus the thinking behind the doctrine of liability for hazards is to use the danger of ultrahazardous activities as a basis. If we look very carefully at this thinking behind the doctrine of liability for hazards, we see that it leads to the doctrine of liability without fault, which does not require an act in violation of international law or negligence. Instead, a state is considered internationally liable if there is legally sufficient cause between an act as the cause, and the occurrence of damage. However, the doctrine of liability without fault is established under separate conventions, so it cannot be considered as having become international customary

law. Under such international law, generally the only way to deal with the damage caused by ultrahazardous activities is through individual conventions, not by applying liability without fault. That is why there is still a great deal of room for the culpa doctrine.

There is a necessity to codify the specific international liability for environmental damage, but both Principle 22 of the Stockholm Declaration and Principle 13 of the Rio Declaration stop at provisions calling for the further development of international and domestic law for liability and compensation. The International Law Commission is working on the codification of international liability for injurious consequences arising out of acts not prohibited by international law, but this work has yet to be completed.

The international community uses individual conventions on compensation liability to deal with the liability to compensate for ultrahazardous activities. Conventions that incorporate liability without fault can be divided into several types.

1.1 Oil Pollution

Representative examples are the Brussels International Convention on Civil Liability for Oil Pollution Damage,[6] the Convention on Civil Liability for Oil Pollution Damage from Exploitation of Seabed Mineral Resources,[7] and the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution.[8]

Under the Convention on Civil Liability for Oil Pollution Damage, ship owners and the operators of facilities connected with the exploitation of seabed resources have limited liability without fault, and they must maintain monetary security such as insurance. However, ships' countries of registry and countries that exercise sovereign rights over related facilities do not have direct involvement in compensation liability, for they are only obligated to enact domestic measures to see that the convention is observed.

1.2 Nuclear Power

European countries have established the European Atomic Energy Community, the Organization for European Economic Cooperation, and the European Atomic Energy Agency, and have prepared the following conventions, which integrate private law, concerning compensation for damage by nuclear power.

Europe has the Convention on Third Party Liability in the Field of Nuclear Energy (Paris Convention; revised in 1964, 1968, and 1982),[9] and the Convention Supplementary to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy (revised in 1964 and 1982).[10] And because the Paris Convention was meant for OECD members, the International Atomic Energy Agency created the Convention for Civil Liability for Nuclear Damage (Vienna Convention)[11] and the Optional Protocol Relating to the Compulsory Settlement of Disputes. After the Chernobyl accident, the Joint Protocol Relating to the Application of the Vienna and the Paris Conventions (September 21, 1988) was created. There are also the Convention on the Liability of Operators of Nuclear Ships[12] and the Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material.[13]

The major characteristic of conventions in the field of nuclear power is that they give primary limited liability without fault to ship and facility operators and managers, and impose upon governments that permit their activities the obligation for paying damages that exceed the operators' and managers' ability to pay.

The IAEA adopted the legally nonbinding Action Program on the Transboundary Movement of Radioactive Wastes[14] to address the movement of such wastes, which is not covered by the Basel Convention. Under this program the transboundary movement of radioactive wastes requires the permission of involved countries based on prior notification, and it requires control and technical capabilities, as well as control systems, enabling compliance with international safety standards.

1.3 Space

There are the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Space Convention, December 12, 1969) and the Convention on International Liability for Damage Caused by Space Objects (March 29, 1972).

The Space Convention provides that governments are internationally liable for damages to third parties regardless of whether activities in space are conducted by government agencies or by non-governmental entities, and the Convention on International Liability for Damage Caused by Space Objects provides that launching states have liability without fault.

The UN International Law Commission is working on the codification of international liability for injurious consequences arising out of acts not prohibited by international law. However, there is debate over whether to include blanket liability without fault with regard to compensation arising from ultrahazardous activities that cause transboundary damage. This is because under existing individual treaties the form of liability changes depending on the form of the activity. Specifically, liability is civil under oil pollution conventions and mixed under nuclear power conventions, while under space conventions it is mainly governments that have liability.

Principle 22 of the Stockholm Declaration and Principle 13 of the Rio Declaration are limited to provisions calling for the further development of international and domestic law for liability and compensation, saying only that under international law governments' liability for compensation arises when one state causes harm to another owing to a violation of its international obligations. This makes it necessary to clarify the specifics of the obligation for caution when a state is liable for compensating damages under international law.

2. Lawsuits Concerning Transboundary Pollution

As noted above, when there are no individual conventions that impose liability on states for environmental damage, the victims of transboundary environmental damage file civil lawsuits in courts where the illegal act was committed, or in courts of the countries to which the polluters belong. But court cases such as this involve problems of jurisdiction.

When there are no governing individual conventions, a victim files a civil claim in the court of jurisdiction in the polluter's country, but this involves the problem of forum non conveniens (The term refers to discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum, *Black's Law Dicrtionary*, 6th ed.). The concept of equal right of access is useful in solving this problem.

The concept of equal right of access has undergone formation and development mainly under the OECD. It consists of two elements: The right of access to information, and the qualification to be a plaintiff.[15]

Equal right of access is a procedural method for the principle of nondiscrimination. Nondiscrimination includes the following elements:

(a) A state that has caused transboundary pollution must apply legal provisions that are neither stricter nor less strict than those applied to the same kind of pollution arising within its own borders.
(b) The extent of transboundary pollution must not exceed what is considered acceptable within the country.
(c) All countries that apply the polluter pays principle must apply it to all polluters, even when pollution has impacts in other countries.
(d) Individuals subjected to transboundary pollution must receive treatment that is as advantageous, but not more so than, that received by individuals subjected to the same kind of pollution in the country which has caused the transboundary pollution.[16]

A representative example of a convention that has overcome the jurisdiction problem is the Convention on the Protection of the Environment between Denmark, Finland, Norway, and Sweden.[17] Its Article 3 has provisions for equal right of access. Specifically, it provides that entities who have been or may possibly be affected by environmentally harmful activities within the borders of another party to the convention have the right to file suit in the appropriate court of that other country to determine whether those activities are permissible, and that right is of the same extent and conditions as those of a legal entity of the country where those activities arise. This applies also to lawsuit procedures concerning compensation for damages arising from environmentally injurious activities. If this convention's provisions become usual, it will be possible for them to legally bind states under international law, which will solve the jurisdiction problem.

Under the aforementioned individual conventions, courts in the country where damages arise are generally designated as the courts of jurisdiction. Article 235.2 of the United Nations Convention on the Law of the Sea is of note because it provides that parties shall ensure that natural persons can make civil claims in the country of the polluter for damage caused by pollution of the marine environment.

There is also the problem of extra-territorial application in relation to jurisdiction. The Basel Convention requires that parties not permit exports of hazardous wastes when there is the possibility that disposal is not "environmentally sound," but people have often pointed to the activities of transnational corporations in connection with the transboundary movement of hazardous wastes. Although the Basel Convention makes no provisions for extraterritorial application, one view is that in consideration of the current state of hazardous waste processing by transnationals, in the event that environmentally sound processing is not conducted upon the transboundary movement of hazardous wastes, the laws of the exporting country should be given extraterritorial application on the grounds that a transnational's parent company in the exporting country exercises effective control over its subsidiary in the importing country.[18] Judicial precedents in environmental damage cases such as Bhopal and the Amoco Cadiz recognize the jurisdiction of courts in the countries where the incidents occur.[19]

3. Soft Law

Sections 20 7 (b) and 20.35 of Agenda 21 call for facilitating the implementation of protocols on liability and compensation for the transboundary movement of hazardous wastes. Article 12 of the Basel Convention has similar provisions. The convention at this time has no provisions for liability and compensation, for which reason some people are calling for basing action on soft law according to current international law. Environmentally related recommendations and declarations can, under international law, be regarded as soft law.

The following are a number of recommendations and declarations on liability for transboundary environmental damage. On hazardous substances there are the OECD Governing Council Recommendation on Information Exchange Related to the Export of Banned and Severely Restricted Chemicals,[20] the Cairo Guidelines and Principles for the Environmentally Sound Management and Disposal of Hazardous Wastes,[21] and the London Guidelines for the Exchange of Information on Chemicals in International Trade;[22] and on liability and compensation there is the OECD Governing Council Recommendation for the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution.[23]

Recommendations and declarations such as these do not require ratification procedures as do conventions, and they make flexible responses possible. Although they are not legally binding, they are based on international consensus. They also play a vital role in the development of hard law (the Basel Convention).

4. International Funds

An example of an international fund is the International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage.[24] This convention is applied to damage that exceeds the owners' limit of liability under the 1969 convention. The fund is run by an assembly of convention parties, and is a legal entity qualified to be plaintiff and defendant in the domestic courts of the parties. Furthermore, the IMO's International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea[25] imposes strict liability on owners primarily for emissions from ships, and provides that when damage exceeds the owner's ability to pay or when the owner is insolvent, the claimant who suffered the damage can direct his claim to the international fund. Establishing such funds to cover transboundary movements of hazardous wastes necessitates that one ensure contributions from waste operators to the funds.

5. Arbitration Systems

The Convention on International Liability for Damage Caused by Space Objects described previously provides in Article 14 that if a settlement cannot be reached through diplomatic negotiations, a Claims Commission will be established at the request of either party, and in

Article 19 it says that the decision of the Commission shall be final and binding if the parties have so agreed. The creation of arbitration systems in the field of hazardous wastes is therefore conceivable. Article 3 of the Basel Convention's Annex VI specifies solutions by an arbitral tribunal. Part XV of the United Nations Convention on the Law of the Sea provides for the settlement of disputes. Under these provisions, parties can, in order to settle disputes concerning the interpretation and application of the convention, make one or more choices from among the International Tribunal for the Law of the Sea provided for in Annex VI, the International Court of Justice, the arbitral tribunal established under Annex VII, and the special arbitral tribunal established under Annex VIII.

An International Joint Commission was established under Article 7 of the Treaty Relating to the Boundary Waters and Questions Arising Along the Boundary (January 11, 1909)[26] between the U.S. and Canada. This commission's job is to solve environmental problems that cross the boundary between the two countries.

6. Protocols on Liability and Compensation

The foregoing has been a discussion of liability for transboundary pollution. The main tasks performed after adoption of the Basel Convention were the adoption of protocols on liability and compensation. In response to Article 12 of the Basel Convention, which provides that "The Parties shall co-operate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes and other wastes," a working group started in March 1991 to work on the Draft Protocol on Liability and Compensation for Damage Resulting from Transboundary Movement of Hazardous Wastes and Their Disposal.[27]

Conclusion

In the transboundary movement of hazardous wastes, the emphasis is placed on controlling the movement of such wastes from the developed to the developing countries, which is desirable from the perspective of preserving the developing countries' environments. Since the Basel Convention became effective, the parties have been working on corresponding domestic legislation, and thanks to the efforts of international organizations, we are seeing the formation of rules in international society for controlling hazardous wastes. Moreover, continuing efforts are being made toward the adoption of the Draft Protocol on Liability and Compensation for Damage Resulting from Transboundary Movement of Hazardous Wastes and Their Disposal. We are also seeing the appearance of a new way of thinking on the extraterritorial application of jurisdiction in an effort toward transboundary environmental protection. One hopes for a solution to the problem of the transboundary movement of hazardous wastes based on the Basel Convention, and through cooperation between governments and international organizations.

Notes

1. *Time*, January 2, 1989, pp. 32-33; *Newsweek*, Japanese edition, December 15, 1988, pp. 60-63. Concerning this incident, see: Goto, Norihiro, "Hazardous Waste Dumping Incident in Nigeria," in *Kankyo Kenkyu* (Environmental Studies), No. 74, pp. 47-53.
2. UNEP/IG. 80/3 22 March 1989, *Environmental Policy and Law* 19/2(1989) pp. 68-77.
3. Trail Smelter Case, 3 R.I.A.A. 1907, 1965 (1941).
4. Gut Dam Arbitration, 4 *ILM* 468 (1965), 8 *ILM* 118 (1969).
5. Corfu Channel, 1949 ICJ Rep. 4.
6. International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 16 ILM 617 (1977), Revised.
7. Convention on Civil Liability for Oil Pollution Damage from Exploitation of Seabed Mineral Resources, Dec. 17 1976, 16 *ILM* 1450 (1977).
8. Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution, Jan. 7, 1969, 8 *ILM* 497 (1969).
9. Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 956 UNTS 251.
10. Jan. 31, 1963, 2 ILM 685 (1963).
11. Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1063 UNTS 265.
12. Convention on the Liability of Operators of Nuclear Ships, May 25, 1962.
13. Convention Relating Civil Liabiliy in the Field of Maritime Carriage of Nuclear Material, Dec. 17, 1971, 10 *ILM* 130 (1971).
14. 30, *ILM* 556 (1991).
15. OECD, Recommendations of the Council on Equal Right of Access in Relation to Transfrontier Pollution, Annex, OECD Doc. C (76) 55 (1976).
16. OECD Recommendations of the Council on Principles Concerning Transfrontier Pollution title C, OECD Doc. C (74) 224.
17. Convention on the Protection of the Environment between Denmark, Finland, Norway, and Sweden, Feb. 19, 1974, 13 *ILM* 591 (1974).
18. Murase, Nobuya, "States' Liability for Control under International Environmental Law," *Kokusaiho Gaiko Zasshi*, Vol. 93, nos. 3/4, 1994.
19. In re Union Carbide Corp. Gas Plant Disaster at Bohpal, India in December, 1984, 634 F. Supp. 842, Appeal hearing: 809 F. 2d 909 (1983), 954 F. 2d 1279.
20. OECD Doc. C (84) 37 (Apr. 4, 1984).
21. UNEP/GC/DEC (Governing Council Decision) 14/30 (June 17, 1987).
22. Doc. UNEP/GC/DEC 15/30 (May 25, 1989)
23. OECD Doc. C (77) 28 (May 23, 1977).
24. Dec. 18, 1971, *ILM* 284 (1972).
25. *Nihon Keizai Shimbun*, May 3, 1996.
26. U.S.-Canada, 36 Stat. 2448.
27. Draft Articles of a Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movement of Hazardous Wastes and their disposal, UNEP/CHW. 1/WG. 1/3/L6, 24 February 1995.