

State's Responsibility Over Its Neighbouring States' Environment: A Customary International Law?

By

Mohd Jamizal Zainol*

1. INTRODUCTION

“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.”¹

1.1 The issue of whether or not Principle 21 of the Stockholm Declaration 1972 can be regarded as a customary international law is invariably interesting and a never-ending question to be pondered upon. It involves the discussion on the underlying principles embedded in the provision itself. Nonetheless, it is noted that this discussion may also be compounded by the disagreement to its precise meaning and ambiguities to its scope and application. As a matter of fact, this noble principle was derived from the efforts of states to develop a so-called set of rules in protecting human environment. Even though, the declaration is not binding but it is persuasive on states to comply with the provision. The principle has been well-accepted since it has been developed into various multilateral treaties and remodified in the 1992 Rio Declaration. For example, the principle has been incorporated in various multilateral treaties and domestic legislation such as the Convention on Biological Diversity 1992 and the Clean Air Act of United States of America.

1.2 On the other hand, to relate the principle and the concept of customary international law is quite a dicey question, which could pose difficulties to grasp

* The author is a Federal Counsel with the International Affairs Division of the Attorney-General's Chambers at Putrajaya.

¹ Principle 21 of the Declaration of the United Nations Conference on the Human Environment.

the issues before hand. It is observed that the customary international law is part of the sources of international law as provided for in Article 38 of the Statute of the International Court of Justice.² In the *Continental Shelf (Libya v Malta)* case, the Court stated that the substance of customary international law must be 'looked for primarily in the actual practice and *opinio juris* of States'.³ The detailed analysis of the concept of customary international law is in the following part.

1.3 For the purpose of this discussion, it is material for us to have an overview of the historical background of the inception of the 1972 Stockholm Declaration. After that, this paper is also intended in brief to discuss the concept of customary international law and the emerging trends of the international community to recognize soft-law concept as part of diplomacy on the negotiation at the international plane. After considering those concepts and its nexus with Principle 21 of the Stockholm Declaration, it is hoped that at the end of the discussion, we could untie the problem whether or not the principle can be regarded as customary international law.

2. Historical Background

2.1 The Stockholm Declaration of 1972 is the first UN Conference held specifically to consider problems of the environment and was attended by 113 States at Stockholm. The Conference was held pursuant to a General Assembly resolution which stated that there was an urgent need for intensified action at national and international level to limit and, where possible, to eliminate the impairment of human environment. The Conference intended to mobilize concerted action from UN member states to seriously act either at the national level or international level to prevent any impairment to human environment.⁴

2.2 Even though the Conference formulated only a Declaration which is not

² Article 38 of the International Court of Justice states that apart from international custom, international conventions, the general principles of law, judicial proceedings and the teachings of the most highly qualified publicist are also part of the international law's sources.

³ Akehurst, *Modern Introduction to International Law*, Peter Malanczuk, 1997, Routledge p.39

⁴ Birnie & Boyle, *Documents on International Law and Environment*, Oxford University Press, 1995, p.1.

primarily a legalistic document nor *prima facie* binding on states, it fulfills the inspirational purpose in the sense that it laid down the general principles which can be considered as being basic rules of international environmental law. In that sense it can be compared to the Universal Declaration of Human Rights 1948 which does not impose mandatory obligations to states to adhere to but it is persuasive in nature and acts as a minimum standard on the protection of human rights in the world.

2.3 It is observed from the text of Stockholm Declaration that some of the principles use the obligatory 'shall' form; most use 'should' or 'must' and there is evident reluctance to couch all principles in the form of clear duties of States. It is noted that some of the principles enunciated in the Declaration have been incorporated in some legally binding instruments. For example Principle 7 was adopted in Part XII of the 1982 UN Convention on the Law of the Sea and Principle 21 was thought to represent international law at the time of adoption, and has subsequently been referred to as such in a UNGA resolution and in a number of multilateral environmental treaties. It constitutes a basic principle of contemporary international environmental law and reappears in modified form in the 1992 Rio Declaration. The fact that Principle 21 has reappeared in modified form in the subsequent Declaration made it a pertinent principle in international environmental law.

2.4 Pursuant thereto, to better understand how Principle 21 of the Stockholm Declaration is pertinent in this context, it is essential to look into the actual wording of principle 21. Principle 21 read as follows:

“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.”

2.5 Principle 21 bears the following important elements:

- ◆ States have the sovereign right to exploit their own resources pursuant to the own environmental policies;

- ◆ States have a responsibility to ensure that activities within their jurisdiction do not cause damage to the environment of other States.

2.6 It observed that the Principle 21 has made reference to some documents such as Charter of the United Nations and general principles of international law and the term of sovereign rights, which bears legal connotation. For the sake of clarity, the Charter of the United Nations is intended to be a comprehensive document to govern conduct of the States. States are obligated to comply with the provisions of the Charter after being a member of the United Nations. Amongst the purposes of the United Nations is namely:

“To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other measures to strengthen universal peace”

2.7 Principle 21 has also made reference to general principles of international law. It could mean principles of state responsibility and good neighborliness, which relates to international environmental law, which have become established principles of international law and customary international law. The principle provides sovereign right to states to exploit their own resources pursuant to the environmental policies.

3. Customary International Law

3.1 Before embarking on the discussion of whether or not Principle 21 could constitute customary international law, it is prudent to have an overview on the concept of the customary international law. It is a source of international law as provided for in Article 38 of the Statute of the International Court of Justice as ‘*international custom, as evidence of a general practice accepted as law*’. Custom is constituted by two elements, the objective one of ‘a general practice’, and the subjective one ‘accepted as law’, or in other words, recognised as *opinio juris*. The main evidence of customary law is to be found in the actual practice of States, and a rough idea of a State’s practice⁵ can be gathered

⁵ The International Encyclopaedic of International Law states that in setting down the sources of international law, art.38 (1) (b) of the ICJ Statute refers to “international, as evidence of a general practice accepted as law”. It has been contended that this formulation is in fact expressed the wrong way round and that a general practice accepted as law is evidence of custom. It is

from published material - from newspaper reports of action taken by States, and from statements made by government spokesmen to Parliament, to the press at international conferences and the meetings of international organizations. But the vast majority of the material which would tend to throw light on a state's practice concerning questions of international law - correspondence with other States, and the advice which each state receives from its legal advisers which is normally not published.

3.2 Evidence of customary international law may sometimes also be found in the writings of international lawyers, and in judgments of national and international tribunals, which are mentioned as subsidiary means for the determination of rules of law in Article 38 (1) (d) of the Statute of the International Court of Justice.⁶ Similarly treaties can also be evidence of customary law, but great care must be taken when inferring rules of customary law from treaties, especially bilateral ones. In the case of multilateral treaties, it is easier to determine customary international law, if the treaty claims to be declaratory of customary law, or is intended to codify customary law, it can be quoted as evidence of customary law even against a state which is not a party to the treaty. This is so even if the treaty has not received enough ratifications to come into force.⁷

3.3 The question arises as to the position of Principle 21 which is only in the form of a declaration which has no binding force against States. It is apparent that a declaration may be difficult to be accepted as customary international law. However, the question would only be answered in the following discussion.

4. Principle 21 Constitutes Customary International Law?

4.1 Upon considering all the elements above, it is time to determine the crucial part of this discussion on the issue before hand whether or not Principle 21 of the Stockholm Declaration can be regarded as customary international law. In so doing, listed below are factors to be taken into account in accepting the principle as customary international law.

generally accepted that international custom has two elements: a general practice and a belief that the practice is followed because it conforms to the law (*opinio juris sive necessitatis*).

⁶ Akehurst, p.39.

⁷ *ibid.* p.40.

4.2 State Responsibility

4.2.1 One of the key principles in international environmental law is that of state responsibility for trans-boundary pollution. As encapsulated in Principle 21 of the Stockholm Declaration, state responsibility counter-balances state sovereignty. States may freely pursue their own environmental policies internally, provided that they are responsible for any damage caused to other states or to the global commons. The principle of state responsibility has often been emphasized by legal environment scholars, perhaps because it bears close resemblance to approaches and remedies in domestic law.⁸

4.2.2 Many see this concept as a cornerstone of international environmental law. It is also part of customary international law, and therefore binding on all states. Academic writers also provide a number of general legal principles to buttress Principle 21, such as “good neighborliness” and the right to territorial integrity. Many emphasize that, arising from the norm of state responsibility; states also have the obligation to take preventive actions, to give notice and consult and to take measures to abate any harm poses to another states. Based on these reasons, it is clear that Principle 21 has been evolving from just a soft law to a general principle of international law *vis-à-vis* state responsibility, good neighborliness and then to customary international law.

4.3 “Soft Law”

4.3.1 In addition to treaties, the classical instrument of international law-making, there is the controversial category of so-called ‘soft law’ instruments, which are often being regarded as being characteristic for international environmental diplomacy. These instruments which may be in the form of a declaration, resolution or a set of guidelines or recommendation, such as the 1972 Stockholm Declaration, are not formally binding, but nevertheless have an important political-legal significance as a guide for political action and as a starting point for the development of binding international environmental rules and principles, either in the form of a later treaty or in the form of customary international law.

4.3.2 The drafting of non-binding norms by States meeting in conferences is

⁸ Simon SC Tay, *Southeast Asian Fires: The Challenge for International Environmental Law and Sustainable Development*. LEXIS NEXIS.

particularly important in the field of environmental protection. Global conferences like the 1972 Stockholm Conference on Human Environment adopted declarations that articulated new values emerging from growing environmental awareness. Secondly State parties to international treaties, meeting in conferences of the parties, must often develop norms to guide compliance with the obligations contained in the treaties. In general, such norms have a non-binding character, because conferences of the parties are not invested with the power to impose hard obligations on the contracting parties. The question then arises how soft law, such as Principle 21, which has non-binding character to states, can become customary international law? It is observed that although soft norms may not be binding *per se*, they can indicate the likely direction in which formally binding legal obligations will develop. Compliance can lead to the formation of 'hard law' rules through the inclusion of soft law rules in binding international texts, or through the creation of customary international law on the basis of soft law norms.⁹

4.3.3 The soft principles not only can furnish a conceptual frame of reference for future agreements, but they facilitate the crystallisation process that give rise to customary law. In this context, "soft law" principles which are embodied in declarations, codes and other non-binding statements and documents play an important role in developing international environmental law. Soft law principles suggest the likely future direction of legal development and informally establish acceptable norms of behaviour for nations which, if backed sufficiently by the practice of states, may harden into customary international law.

4.3.4 Principle 21 is considered as soft law, which has the effect of non-binding obligations of the States but this principle is actually widely incorporated in various multilateral treaties and general principles of international law such as state responsibility, good neighborliness, precautionary principles and territorial integrity. State responsibility has become part of customary international law which provides an essential and strong foundation for international environmental law. Thus, Principle 21 has actually evolved from merely being a soft law to customary international law through general principles of international law as

⁹ Dinah Shelton, *Commitment and Compliance*, Oxford, 2000 p. 229.

regards to environment such as state responsibility, territorial integrity and good neighborliness principles.

4.4 The Development Of Precautionary Principle

4.4.1 Even though the Precautionary Principle, is new as an environmental policy imperative, it is not new as a human concept. Arguably, the principle's appeal to common sense underlies its remarkably swift international acceptance. The failure of environmental policy to prevent environmental degradation and the emergence of various potentially irreversible environmental problems have forced international environmental law to take a new approach to uncertainty. Where risks of serious or irreversible damage are identified but conclusive evidence is not available, a legal framework demanding certainty cannot produce appropriate responses. This insight is now translated into international environmental law and policy. Most recent legal instruments or policy documents endorse the general idea that absence of conclusive scientific evidence should not be used to postpone responses to threats of serious or irreversible damage. However, although it seems difficult to argue with this proposition, the simplicity of this "better safe than sorry" approach is more apparent than real.¹⁰

4.4.2 Reviewing the relevant literature and drawing upon a broad range of international documents and domestic sources, it is concluded that the **Precautionary Principle** has become **customary international law**. It is noted that precautionary principles is derived from the concept of state responsibility enunciated in the case of Trail Smelter Arbitration of a general prohibition against a State using its territory, or permitting the use of its territory, in such a way as to cause damage in a neighbouring State. The core of the principle can be distilled from the varied formulations of the precautionary principle, although disagreements remain as to the threshold at which the principle is triggered, whether it mandates only "cost-effective" or any necessary preventive measures, and the impact of the concept of "common but differentiated obligations."

¹⁰ Richard B. Bilder the Precautionary Principle and International Law. The Challenge of Implementation. (International Environmental Law and Policy Series, Vol. 31.) Edited by David Freestone and Ellen Hey.

4.5 Degree Of Repetition Over A Period Of Time

4.5.1 The repetition of the same norm in successive soft law instruments such as from Stockholm and the Rio Declaration can give rise to, and then express, the *opinio juris* of the international community. For example, international rules concerning trans-boundary environmental relations, for example, first were formulated in soft law instruments but now can be considered as constituting customary international law. In addition thereto, Principle 21 has been well established and be incorporated in the following multilateral treaties namely:

- Convention On Biological Diversity (1992);
- United Nations Framework Convention On Climate Change (1992);
- United Nations Convention To Combat Desertification In Those Countries; Experiencing Serious Drought And/Or Desertification, Particularly In Africa;
- Non-Legally Binding Authoritative Statement Of Principles For A Global Consensus On The Management, Conservation And Sustainable Development Of All Types Of Forests [The Forest Principles] (1992);
- Convention On Long-Range Transboundary Air Pollution (1979);
- Vienna Convention For The Protection Of The Ozone Layer (1985);
- The Rio Declaration On Environment And Development (1992).

4.5.2 In this connection, the case of the Legality of Threat or Use of Nuclear Weapon at the International Court of Justice may be worth a look. The International Court of Justice through the case has recognized a binding norm stemming in part from Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration. The Court expounded as follows:

*“The 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”*

4.5.3 In his dissenting opinion, Judge Weeramantry stressed that customary international law today prohibits actions that cause transfrontier environmental damage. Other international environmental norms regularly repeated in soft law instruments also have been accepted as customary law, such as the obligation to cooperate with other states for the protection of environment. Arguably, Principle 21 has been repeatedly remodified in various multilateral treaties, which bears the same scope and application. Thus, it is undeniable

that this principle can be regarded as customary international law based on those reasons.

4.6 Established Principles In Decided Case Law And Decision at International Organization

4.6.1 Upon considering all of the above, it is noted that the a general prohibition against a State using its territory or permitting the use of its territory, in such a way as to cause damage in a neighbouring State exists in customary international law, it is evident from the International Encyclopaedic on International Law which clearly states that:

“However there exists in customary law a general prohibition against a State using its territory, or permitting the use of its territory, in such a way as to cause damage in a neighbouring State.”

As a matter of fact the principle was well established in the case of Trail Smelter (1941) 3 RIAA 1905. This case involving damage to crops in the State of Washington, USA, by noxious sulphur fumes from a smelter in British Columbia, Canada. The decision established the principle of international law 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...”

4.6.2 In the Nuclear Test Case (Interim Protection) (1973) ICJ Rep 99 Australia instituted proceedings against France in respect of a dispute concerning the holding of atmospheric tests of nuclear weapons by the French Government in the Pacific Ocean. In this case, the Australian Government asked the Court to adjudge and declare that the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean was not consistent with applicable rules of international law and to order that the French Republic should not carry out any further such tests. On the same date the Australian Government asked the Court to indicate interim measures of protection. In a letter from the Ambassador of France to the Netherlands, handed by him to the Registrar on 16 May 1973, the French Government stated that it considered that the Court was manifestly not competent in the case and that it could not accept the Court's jurisdiction

and that accordingly the French Government did not intend to appoint an agent, and requested the Court to remove the case from its list.

4.6.3 In this case the Court decided that The Governments of Australia and France should each of them ensure that no action of any kind was taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case; and, in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on Australian territory.

4.6.4 The principle has also been rendered in the Organization for Economic Co-operation and Development (OECD) in the decision of the Council concerning the control of transfrontier movements of wastes destined for recovery operations. It decided that Member countries shall control transfrontier movements of wastes destined for recovery operations within the OECD.

5. Conclusion

5.1 Based on the foregoing discussion, it is observed that Principle 21 has been well accepted by the international community as a customary international law and therefore binding on all states. This argument is based on three main grounds, first the general international law of state responsibility as discussed above, secondly, the principle expounded in the case of Trail Smelter Arbitration, between Canada and the United States, which held 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” and, thirdly, the soft law instruments of the Stockholm and Rio Declarations, particularly Principle 21 and Principle 2, respectively, which contain similar wordings to the Trail Smelter arbitration. Additionally, Principle 21 has been embodied in some national laws and, to this extent, may be regarded as a general principle law.¹¹

¹¹ See U.S. Clean Air Act

5.2 Hence, to admit Principle 21 as a customary international law would be reasonable based on the above foregoing discussion. It is a well-established principle and has been well accepted in various multilateral treaties even though it started as only soft law. Even, for disputes between Malaysia and Singapore on unilateral reclamation of land by Singapore, our country has tendered arguments based on this principle *vis-à-vis* state responsibility and good neighborliness. Therefore Principle 21 undeniably is a customary international law.
