

On Trans-boundary Damages

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I. Introduction

Considering the reality of human society development and the tendency of national responsibility institutions, the UN International Law Commission, while making The Draft for the International Responsibility of Damages Caused by the Activities Which are not Prohibited by the International Law, made it clear that a key aspect of the present civilization based on science is that global resources are used more and more for economic, industrial and scientific purposes. The scarcity of nature resources, the need for efficient use of resources and for creating substitute materials and the capability of controlling organisms and microorganisms spur people on to find new mode of production, which could cause unforeseen consequences. Due to the interacting relations of economy and ecosystem, activities involved in the use of resources within one nation's territory or jurisdiction district may have damaging effects on other countries and their citizens. The fact that such activities often cause harmful

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consequences in other countries only show that the international society is an interdependent world.

Two important issues have resulted from the development of national responsibility institutions. The first is the definition of international crime, the second being the responsibility of compensation coming from the damages caused by the activities not prohibited by international law and regulations. As one aspect of national responsibility institutions, the emergence of the institutions of trans-boundary damage responsibility is a need for the development of international law, especially for the development of national responsibility institutions.

II. The Definition of Trans-boundary Damage

According to the Draft for International Responsibility of Damages Caused by the activities Which are not Prohibited by International Law handed in by the International Law Commission (ILC) in 1996 to the UN Conference, the definition of trans-boundary damage is followed: trans-boundary damage means any damage in one country's (other than the originating country's) territory or jurisdiction or controlled district, no matter the countries in question have or have not contiguous areas.¹⁾ This definition includes not only the classic activities originated in one country to cause damages to another country, but also the activities originated in one country's or controlled district, for instance, the activities originated in public sea causing damages in another country. As the International Law Commission pointed out: "ILC can not predict all trans-boundary damages in the future. However, it hopes to make clear that its aim is to draw a line to define the originating country and the damaged country. The line is territory, jurisdiction and controlled district. Therefore, the words trans-boundary damage should be related to and explained with the sentence "in the territory or jurisdiction or controlled district".²⁾ Obviously, ILC's definition is very comprehensive.

1) The 51th UN Conference, *Supplementary No.10, Report of the 48th meeting of the International Law Commission*, p211.

Compared with the definition of trans-boundary pollution made by the International Law Society (ILS) in 1982, it is almost perfect. The International Law Society's definition limits the pollution and damages within one country's territory, in other words, trans-boundary pollution only occurs in national territories.³⁾ More precisely, pollution is a pollution occurring in one or more country's territory and affecting another or more other countries' territories.

It is too easy to find that this definition is too narrow. Firstly, if pollution does not occur in one country's territory but in the district controlled by this country, and this pollution has harmful consequences to another country, the pollution must be "trans-boundary" pollution. Secondly, trans-boundary pollution should include the pollution consequences in one country caused by facilities (for instance, ship and aircrafts) registered in or owed by another country. For the interests of victims, "trans-boundary" should be explained in broad sense. Besides national territory, it should include the districts over which nations have sovereignty or control, ship, aircrafts and personnel. ILC's definition has remedied ILS definition' defect.

But, ILC's definition is too cautious. It does not include the areas over which nations have no sovereignty. For instance, activities originated in public seas and the north and south poles also can cause damages to one or more countries. Should or not anyone who has such activities bear responsibilities for the damages? Obviously, the answer is in the affirmative, since harmful activities from these areas can cause damages to one or more countries. The definition of trans-boundary damage should include damages to global public areas.

The so-called "global public areas" is a new concept in international environmental law, and it refers to the areas over which no nations have jurisdiction. The areas are the places with no or few people living in and with no or few private or national properties. What are the international law consequences for the damages to the global public areas? Some think that for law only concerns to damages that are harmful to

2) The 51th UN Conference, *Supplementary No.10(A/51/10)*, Report of the 48th meeting of the International Law Commission, pp202-258

3) The International Law Society, *the 1982 International Law Society Report*, p159

people and properties, damages to environment could be understood only by considering the damaged people and countries' interests. Therefore, it is not easy to assess the damages to global public area environment. First, it is difficult to suggest a bottom line according to the losses of people or properties for damages to global public areas in order to establish compensation responsibility institutions. Secondly, it is impossible to be sure of what damages to properties may result from the damages to global public areas. Thirdly, since damages are to global public areas, it is difficult to find the accused. Besides, the damages to global public areas often are the damages harmful results of which to people and properties are not in reality and are still to come. However, to hothouse effect, most people think that although its harm to human beings is not very clear, it is reasonable to believe its damages to human society on the globe are great and irretrievable.⁴⁾ In fact, damages to the areas can raise legal consequences. According the 1988 Convention for South Pole Mineral Resources, developers should bear the responsibilities for any damages to the environment exceeding the limits by the Convention, despite the limits are not clearly defined. The 1972 UN Declaration for Human Environment and the 1992 UN Rio de Janeiro Declaration for Environment and Development also insist that, according to UN Charter and the principles of international law, all nations have the duties to control activities originated in their territories or their jurisdiction or their controlled areas, not to cause damages to other nations and the environment over which no nations have sovereignty or jurisdiction.⁵⁾

In brief, trans-boundary damage has broad extension. First, it means the environmental pollution that has transnational effects, for instance, transnational water pollution, transnational underground water pollution and transnational air pollution. It also means the pollution to international areas, such as high sea, the South Pole and the space. Finally, it must be pointed out that in the recent years sea shipping and navigation increased greatly both in quality and in quantity, only raising the potential or actual

4) Zhou Zhonghai(ed), *Peace, justice and Law*, China Broadcasting Press, 1993, pp373-374

5) China Environment Newspaper, *Selected UN Documents on Environment and Development*, China Environment Press, 1992, p29 and p159

damages to the environment. The development of supertankers has caused great danger to the environment.

Trans-boundary damage has some features that are difficult to grasp. It may be a sort of local phenomenon resulting from border events. It may be air pollution concerning international transportation of pernicious materials. It could be caused by national activities. It could be caused by private activities. It could be a result of intended activities. It also could be an accident like the Rhine pollution in German in 1986 in and the nuclear power station accident in the former Soviet Union in the same year. All these aspects, in despite of lack of systematic and reliable international law principles, must be considered for the establishment of international law order.

III. The Features of Trans-boundary Damages

Like national law, international law also does not absolutely prohibit the activities that cause trans-boundary damages, and national developments in bordering areas could to some degrees produce harmful results to neighboring countries. The living world on the global does not always have their activities have political meanings. Some lawful events in one country could have harmful effects to the other countries. But, the harmful events can be tolerated if their consequences do not reach a degree of seriousness. In other words, the activities that only cause indirect and minor trans-boundary damages are tolerable. However, as the norm for international activities, to what degree should international law prohibit trans-boundary damages? It is a question of the establishment of standards for trans-boundary damages. Besides, damages to the environment tend to be gradually evident, therefore, for the sake of protecting environment, any damages the consequences of which may be assessed should legally be limited.⁶⁾ It is right to say that not all trans-boundary damages bring about compensation duties. Truly, for instance, natural disasters in one country,

6) Zhou Zhonghai(ed), *Peace, justice and Law*, China Broadcasting Press, 1993, p366

like earthquake, can cause damages to another country, but no one should bear compensation responsibility for the damages. Again, national policies like taxation and devaluation of currency in one country could cause damages to another country, but no governments should bear responsibility for the damages. As pointed out by the ILC, in order to limit the subject to a manageable range, national financial, economic and social policies could not be considered as the activities resulting in trans-boundary damages. The ILC also insists that the best way to limit the subject to a manageable range is to stipulate that trans-boundary damaging activities are the activities that have trans-boundary harmful consequences and cause serious damages.⁷⁾

In conclusion, we outline some important features of trans-boundary damages as below.

First, trans-boundary damages must be caused by human activities and must be material and countable in quantity. In other words, the damages must have some actual harmful consequences to other nations' health, property, environment, industrial and agricultural production. The standards used to assess the damages must be realistic and objective. In making "the Bill for the International Responsibilities of Damages Caused by the Activities not Prohibited by International Law", the ILC has insisted on the material and visible consequences of trans-boundary damages and has firmly maintained that trans-boundary damages must be the real results of the activities, ruling out the possibility for any national financial, economic and social policies to be considered as "harmful activities to cause trans-boundary damages".

Secondly, the visible damages caused by harmful activities must be serious. In civil law, damages means harmful consequences caused by one party's activities to other parties' property and living body. That is to say, damages in civil law include property damages and personal damages. In international law, damages not only include property and personal damages, but also environmental damages and any damages in the future.

For the question of "on what degree should the international society prohibit

7) ILC, *Report of the 48th meeting of the International Law Commission*, p208

trans-boundary damages”, international legal documents and opinions tend to establish the standard of seriousness. For instance, the ILS in 1966 explained: “the so-called damages must be serious”.⁸⁾ This standpoint was maintained by the ILS in making “the Draft International Regulations for Trans-boundary Pollution”.⁹⁾ Besides, international conventions and treaties such as the 1988 Convention for South Pole Mineral Resources, the 1990 Code of Conduct for Trans-boundary Accidental Inland Water Pollution and the 1991 Convention for Assessment of Trans-boundary environmental influences all use the words like “serious”, “grave” and “significant”.¹⁰⁾

Certainly, the words have to some degree ambiguity in their meanings. But it is generally acceptable that “serious” exceeds “visible”, “grave” or “significant” exceeds “serious” in degrees.¹¹⁾

Finally, the visible consequences of damaging activities must be trans-boundary. The word “trans-boundary” means to exclude the activities which only cause damages to inland interests but do not cause damages to other nations and global public areas. The so-called trans-boundary damages refer to the harmful consequences caused by the damaging activities that stride across national borders. To be precisely, boundary here refers to national border, jurisdiction line and control line. Without “trans-boundary”, there will be no trans-boundary damages. Therefore, “trans-boundary” is an important aspect of the concept of trans-boundary damage.

8) ILS, *the 52th Meeting of ILS Report*, 1966, p500

9) ILS, *the 60th Meeting of ILS Report: Legal Issues of Environment Protection*, 1982, pp160-163

10) UN, *International Cooperation on Environment Protection, the UN 27th Conference Official Records : Supplementary No.30*. p496.

11) The UN 51th Conference, *Supplementary No.10(A/51/10), the 4t meeting of ILC Report*, p202