The principle that a State is responsible for causing environmental harm outside its territory in breach of an international obligation has been slow to evolve to address the allocation of loss due to accidents. The issue was not before the arbitral tribunal in the well-known dispute between the United States and Canada\(^1\) concerning the activities of the Canadian smelter located in Trail, British Colombia. The arbitral tribunal asserted a general duty on the part of a State to protect other States from injurious acts by individuals within its jurisdiction. The arbitral agreement itself recognized the responsibility of a State for the acts of non-State actors as well as those of the State or its organs. Summing up, the tribunal found 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”\(^2\).

The tribunal noted the difficulty of determining what constitutes an injurious act. Despite claims for absolute prohibition of harmful activities, the tribunal agreed with national court precedents that States should take reasonable precautions to prevent harm, the same as those it would take to protect its own inhabitants. It may be concluded that a State’s failure to regulate or prevent serious harm from polluting activities, in instances where it would protect its own inhabitants, would constitute a wrongful act.

The Trail Smelter arbitration set the foundations for discussions of responsibility and liability in environmental law\(^3\) but it left open the question of whether a State exercising all due diligence would be liable if transfrontier harm results despite the State’s best efforts. More generally, the tribunal did not clarify whether a State is liable only for intentional, reckless or negligent behavior (fault based

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1 1931-1941. 3 RIAA 1905.
2 3 RIAA 1938, 1965.
3 The case continues to be invoked. In 1972, Canada referred to the judgment when an oil spill in Washington polluted beaches in British Colombia. 11 CYIL 333–334 (1973).
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conduct) or whether it is strictly liable for all serious or significant transboundary environmental harm. In subsequent developments, international environmental law has come to distinguish responsibility, which arises upon breach of an international obligation, and liability for the injurious consequences of lawful activities. Progress towards clarification on this subject remains slow, however, as the following discussion demonstrates.4

I. State Responsibility

Following the Trail Smelter arbitration, the ICJ asserted a general duty to avoid transboundary injury in the 1949 Corfu Channel case, which referred to “every State’s obligation not to allow knowingly its territory to be used contrary to the rights of other States”.5 The same year as this decision, the United Nations Survey of International Law concluded that there is “general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interests of other States in a manner contrary to international law”.6

Principle 21 of the 1972 Stockholm Declaration restated the norm formulated in the Trail Smelter arbitration and other cases as follows:

“States have, in accordance with the Charter of the United Nations and the principles of international law ... 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.”

The rule was reiterated in Principle 2 of the 1992 Rio Declaration and was again confirmed in the 2002 World Summit on Sustainable Development. It has also been reaffirmed in declarations adopted by the United Nations, including the Charter of Economic Rights and Duties of States and the World Charter for Nature, and has been adopted by other international organizations and conferences.7


5 ICJ Reports 1949, p. 22.


7 See e.g., Preliminary Declaration of a Program of Action of the European Communities in respect to the Environment, OJEC C 112/1, 20 December 1973; Final Act, Conference