Issues of State Liability for Transboundary Environmental Damage

By Allan Rosas *

Introduction

The international protection of the environment may involve a multitude of approaches, as demonstrated also by the contributions to this special issue of the Nordic Journal of International Law. In the following we shall focus upon questions of responsibility and liability, that is, issues relating to the legal consequences arising out of acts which cause environmental damage. Moreover, our primary field of interest is the question of state (international) liability for transboundary damage. But as will be shown below, a discussion on state liability should not bypass the question of civil liability, bestowed upon private operators. The latter aspect is more fully considered in the contribution by Peter Wetterstein.

By transboundary damage we mean harm caused by activities carried out in places under the jurisdiction or control of one state and arising in places under the jurisdiction or control of another state or in places outside national jurisdiction (the global commons).¹ We shall consider both damage arising out of accidents and disasters of the Chernobyl and Basel (Sandoz) type and harm involving continuous pollution resulting from more or less normal human activities. This is not to say that these two situations should necessarily always be treated in the same manner. The term “environmental” (damage) in the title does not designate a delimitation to injuries to the ecology (environment per se), as apart from damage to persons or property, but is simply an illustration of our focus upon transboundary harm arising as a physical consequence of industrial and other activities.

The concept of liability instead of that of responsibility appears in the title of the article because we are primarily concerned with the legal consequences of environmental damage, such as the obligation to compensate, including consequences which may follow from lawful acts. We are in this sense following the language adopted by the International Law Commission, which has restricted its draft articles on state responsibility to internationally wrongful acts (breaches of international obligations), while the preliminary draft articles presently considered by the Commission on “injurious consequences arising out of acts not prohibited by international law” use the concept of liability.²

While state responsibility usually entails liability (at least in abstracto), liability does not necessarily presuppose state responsibility. Liability in the strict sense of a

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duty to pay compensation or make other reparation presupposes on the other hand
the occurrence of damage (injury, harm), while state responsibility may sometimes
arise out of a breach of an international obligation even if no concrete damage has
occurred.\(^3\) As will be seen below, the draft articles on international liability consid-
ered by the International Law Commission presently use the concept of liability also
in a broader sense, to include some "primary" obligations (albeit of a procedural
nature) aimed at preventing environmental harm from occurring. Even then, liability
is linked to damage (harm), or rather, its prevention or minimization. State responsi-
bility, on the other hand, involves features not only of "civil law" but also of "penal
law", as illustrated by the efforts of the ILC to include in its draft on state responsi-
bility a definition of "international crimes".\(^4\)

State responsibility and liability for transboundary environmental damage in-
volve highly complex issues, all of which cannot be dealt with in this context. We
shall attempt here to highlight some aspects which in our view provide a *raison
d'\^etre* for international norms entailing state responsibility and liability, as a comple-
ment to norms on environmental co-operation and damage prevention, on the settle-
ment of environmental disputes and on civil liability for environmental damage.
This discussion on the reasons and need for state liability will be preceded by a brief
general survey of recent trends and developments.

**General Survey**

State responsibility was traditionally linked to injuries inflicted upon *aliens* and their
property present in the territory of a particular state rather than issues of transbound-
ary environmental damage. When the perspective of transboundary damage became
more acute, guidelines were sought in such general principles as *sic utere tuo ut alie-
num non laedas* ("one must use one's own so as not to damage that of another"),
good neighbourliness, abuse of rights and sovereign equality of states.\(^5\) While such
principles may explain the background for state responsibility and liability with
respect to transboundary damage, they seem to be of little help in deciding concrete
liability cases.

The legal principles involved were somewhat clarified by international litigation. It
is not possible nor necessary here to explain the leading cases in greater detail.
The value of the perhaps most significant case, the *Trail Smelter* (1941), is diminish-
ed by the fact that the basic obligation of Canada to compensate had already been
settled by a bilateral treaty with the United States.\(^6\) Nevertheless, the Tribunal
phrased its *dictum* in a general sense, referring to an obligation of states not "to use
or permit the use" of their territory for certain activities, with the qualification that
"the case is of serious consequence and the injury is established by clear and
convincing evidence". It would seem, then, that the case is of relevance above all for
the question of continuous but serious and concrete transboundary pollution, rather
than for more or less sudden accidents such as Torrey Canyon, Chernobyl or Basel
(Sandoz).

The *Corfu Channel* case (merits), decided by the International Court of Justice,
to some extent contained similar elements, although it did not concern transbounda-