

**A Study on the International Environmental Governance and Law:  
Focusing on Interest Approach That Promotes the Principle of  
Transboundary Liability in the Early Negotiations of the Montreal Protocol**

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**Abstract:** The international environmental governance and law scholars suggested that interest approach might influence in the early negotiations of creating Multilateral Environmental Agreements (MEAs). Moreover, the existence of interest approach would lead for international environmental collaborations by promoting the principle of transboundary liability, subsequently influence in the early negotiations of creating MEAs, which include the Montreal Protocol. The Montreal Protocol has managed to seek international environmental collaboration among almost all of the nations in the world, which made the Montreal Protocol become a successful one. Therefore, the primary purpose of this study is to explain the influence of interest approach that promotes the principle of transboundary liability in the international environmental governance and law on regards of the Montreal Protocol's early negotiations and the relations of the interstates participation response. Meanwhile, the methods of this study are based on qualitative set up, which is based on the meetings' proceeding reports of the Montreal Protocol. Finally, the results potentially provide with better understanding of the influence of interest approach in promoting the principle of transboundary liability in order to lead for further development and expansion of the rules on international environmental governance and law for achieving the global environmental protection goals.

**Key words:** Negotiations, interest approach, the Montreal Protocol, the principle of transboundary liability

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## INTRODUCTION

International environmental governance and law scholars suggested that interest approach might influence in the early negotiation of creating Multilateral Environmental Agreements (MEAs) (Barrett, 2003). Moreover the existence of the interest approach, would lead to international environmental collaborations by promoting the principle of transboundary liability.

This would influence in the early negotiations of creating MEAs, which include the Montreal Protocol (Barrett, 2003; Sands, 2003). Therefore, the primary purpose of this study is to explain the influence of the interest approach that promotes the principle of transboundary liability, in the international environmental governance and law with regards of the Montreal Protocol and the relations of the interstates participation response. When taking into consideration what position

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the scheming of interest that promotes the principle of transboundary liability in decision to become a member state of the Montreal Protocol, an outline of what prospective costs and benefits might have been perceived to take place as a result of becoming a member state is helpful. According to Sands (2003), environmental and financial concerns that promoted the principle of transboundary liability were motivating the negotiating countries leading up to the Montreal Protocol's early negotiation meetings when the Protocol was first adopted.

A potential benefit that promotes the principle of transboundary liability of the adoption of the Montreal Protocol is the possibility of a member state gaining financial and technical incentives (Breitmeier, 1997; Breitmeier *et al.*, 2006). Another benefit that promotes the principle of transboundary liability is the likelihood of sharing the burden of costs relative to the regulatory process among governments (Breitmeier, 1997; Breitmeier *et al.*, 2006). Besides that perceived costs by adopting the Montreal Protocol are the increasing prices due to the involvement of increasing costs in implementing the Montreal Protocol and likelihood of trade conflicts with the international trade laws (Seaver, 1997; Breitmeier, 1997). In explaining, the adoption of the Montreal Protocol as an international environmental legislation, interest approach that promotes the principle of transboundary liability play an essential position to the international environmental governance and law. Therefore, this interest-based approach that promotes the principle of transboundary liability emerges to be the explanation for the better understanding among countries in the international environmental governance and law, especially in the Montreal Protocol's early negotiations and the relations of the interstates participation response.

**Interest approach:** According to Barrett (2003) and Hasenclever *et al.* (1997) the interest approach is one of the essential elements that influence in the negotiations of the MEAs. These scholars also argue that this approach helps states around the globe to realize the common interests during the MEAs negotiations. This interest approach can be divided into two groups (Barrett, 2003; Hasenclever *et al.*, 1997), namely; the first group that emphasizes on the international institutions and the second group which is less using the international institutions.

The first group emphasizes on the international institutions effort to bring together states around the globe to realize the common interests that balance with

benefits and costs involvement in creating international environmental co-operations, which include in creating MEAs (Hasenclever *et al.*, 1997). The international institutions always ensure that all states will be benefited with the co-operation that being created in order to achieve joint gains and to reduce potential costs expenditure. Nevertheless, the international institutions are capable of making all states that are involved to notice the common interest in that particular international environmental co-operations even when the elements that brought them in the first place being no longer effective (Hasenclever *et al.*, 1997).

As for Hasenclever *et al.* (1997) this situation as co-operation under the umbrella of anarchy or utilitarian approach. In addition, Hasenclever *et al.* (1997) also regarded this approach as a game theory. Meanwhile, Keohane (1984) and Oye (1986) argued that the international institutions will not be able to fulfill the optimal outcomes of every member state, for instance, in the position of the prisoner's dilemma game. However, the international institutions may facilitate and smooth the progress of gaining common benefits by heartening reciprocity in the negotiation, which treated others as you would like to be treated with upgrading level of communication and information. Therefore, the international institutions will able to persuade state response in order to maneuver results in the international environmental co-operations.

According to Barrett (2003), the second group is less using international institutions and the game-theory as vehicles to gain from the interest approach in the international environmental co-operations, which include creating of MEAs. As for Barrett (2003), interest in creating MEAs under the umbrella of the international environmental co-operations must be derived from individual state needs and capacity. Each individual state will calculate it own benefits and perceived costs that will be incurred. Interest of a state begins, when a particular issue that is being raised has shown a lot of benefits to the said state (Snidal, 1991; Barrett, 2003; Sands, 2003). Finally, it is very important to bring in the interest approach in the negotiations of creating of the MEAs in order to achieve the international environmental co-operations, regardless, if the interest approach is using the first group theory or the second group ideas. The main purpose to build up the international environmental co-operations is to tackle global environmental problems (Snidal, 1991; Barrett, 2003; Sands, 2003).

**The principle of transboundary liability:** Rio Declaration has laid down essential obligations, which contribute the

growth and the development of the environmental management and environmental law (Sands, 2003). One of the essential obligations is on the matter that all states in the world are required to ensure not to cause environmental harm to other states. This obligation has been laid down under the Principal 2 of the Rio Declaration, which states that:

States have, in accordance with the Charter of the United Nations and the principles of the international law, the sovereign right to exploit their own resources pursuant to their on environmental and development 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.

The above-said obligation is clearly reflect recognition of the principle of transboundary liability. The principle of transboundary liability is derived and based on the legal maxim of *sic utere tuo, et alienum non laedas*, which means one should use his own property in such a manner as not to injure of another (Sands, 1995).

This principle of transboundary liability has been adopted in the case of United States vs. Canada in 1941, 3RIAA 1905, well known as Trail Smelter Case. In this case, the principle of transboundary liability was subsequently relied upon and further explained by the Arbitral Tribunal (Sands, 1995).

The fact of the case: at a place called Trail situated in Canada, which about 10 miles from the border between United States of America and Canada where the Canadian Consolidated Mining and Smelting Company had run activities that concerned about smelting zinc and lead. These activities had caused the emission of fumes. These fumes that contained sulfur dioxide had contributed to the damage to the plantations and land in the territory of the United States of America. In the year 1931, the United States of America-Canada International Joint Commission, which was formed under the Boundary Waters Treaty, 1909 had made decision and required Canada to pay United States of America for the amount US\$ 350,000.00 as for the compensation. After that the above-mentioned smelting company continued to run the operations and activities as usual. United States of America had made complaints on further damage suffered. Only in the year 1935, the United States of America and Canada agreed to form an arbitral tribunal on the above-mentioned matter. Later, both countries signed up a convention, where both countries submitting the above-mentioned dispute to the Arbitral Tribunal.

#### **The arbitral tribunal held that:**

...under the...international law...no state has the right to use or allow to use of it's 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.

Therefore, the Arbitral Tribunal, gave the decision in favour to the United States of America, where the above-mentioned smelter company required ensuring that the company operations and activities shall not cause fumes into the territory of the United States of America.

The above-mentioned decision has made the establishment of the growth of the principle of transboundary liability and environmental protection. The principle of transboundary liability has been re-affirmed by the International Court of Justice in the year 1949. This is based on the case of United Kingdom vs. Albania in 1949, ICJ 4, well known as Corfu Channel Case. In this case, where the International Court of Justice held that under the international law, the Albania is found guilty and held responsible towards the explosions, which caused loss of life and damage. The said explosions occurred in Albanian waters on 22nd October 1946. The above decision is based on the application of the principle of transboundary liability from the case of Trail Smelter Case with an additional input, where every states is required to inform and notify other states of any harm and danger. If a state failed to notify another state of the said matter, the International Court of Justice shall imposed award to the injured state on the liability for failure to disclose information of the said matter that could have reduced danger and harm toward the other state.

Based on the above discussion by the above-said cases, it is clearly that the principle of transboundary liability has promoted two important obligations. There are:

- International co-operation and good neighbourliness
- State responsibility not to cause environmental harm and damage

**International co-operation and good neighbourliness:** The obligation of international co-operation and good neighbourliness has been laid down based on Article 75 of the United Nation Charter in connection with commercial, social and economic subjects, which has been defined into the development and application of rules promoting international environmental protection co-operation (Sands, 2003). Therefore, there are many

international environmental treaties, other international acts, international agreements and international declarations, which reflect the international co-operation and good neighbourliness that derived from the principle of transboundary liability (Sands, 1995), such as the Stockholm Declaration, the World Charter for Nature, the ILC Draft Articles on International Liability and the Rio Declaration and the Montreal Protocol (Sands, 1995).

**State responsibility not to cause environmental harm and damage:** International law does not permit states around the globe to run operations and activities within their jurisdiction without concern for the protection of world environment (Wolf and White, 1995). International law also requires states to take adequate and reasonable measures to regulate and control sources of serious environmental harm and pollution within their jurisdiction. This obligation has been imposed to all states around the globe to prevent, reduce and control environmental harm and pollution within their jurisdiction. This has been supported and reflected in awards and decisions in arbitral tribunals and also, in international courts of justice (Wolf and White, 1995).

This study embarks on the following objectives:

- To identify and analyze the themes and sub-themes that relate to the influence of the interest approach that promotes the principle of transboundary liability in the early stage of negotiations that build up the international environmental cooperation in the Montreal Protocol
- To explain the influence of the interest approach that promotes the principle of transboundary liability in the early stage of negotiations that build up the international environmental cooperation in the Montreal Protocol

## **MATERIALS AND METHODS**

This study applied a qualitative set up. In line with the qualitative approach, the Montreal Protocol has been employed as a case study in this study. Hence, this study has analyzed some of the relevant meeting documents of the Montreal Protocol.

**Documents selection:** This study is intimately linked to the international environmental cooperation in the Montreal Protocol, the influence of interest approach and also the response of the member states. Therefore, the following documents have being selected as the main documents of this study are as follow:

- (i) Meeting reports of the First Session-Ad Hoc Working Group of Legal and Technical Experts for the Preparation of a Protocol on Chlorofluorocarbons to Vienna Convention for the Protection of the Ozone Layer' on 1-5 December 1986 at Geneva, Switzerland
- (ii) Meeting reports of the Second Session-Ad Hoc Working Group of Legal and Technical Experts for the Preparation of a Protocol on Chlorofluorocarbons to Vienna Convention for the Protection of the Ozone Layer on 23-27 February 1987 at Vienna, Austria
- (iii) Meeting reports of the First Meeting-Ad Hoc Working Group of Legal and Technical Experts for the Harmonization of Data on Production, Imports and Exports of Substances that Deplete the Ozone Layer on 9-11 March 1988 at Nairobi, Kenya
- (iv) Meeting reports of the Second Meeting-Ad Hoc Working Group of Legal and Technical Experts for the Harmonization of Data on Production, Imports and Exports of Substances that Deplete the Ozone Layer on 24-26 October 1988 at The Hague, Netherlands
- (v) Meeting reports-Meeting of Parties (Montreal Protocol) on 2-5 May 1989 at Helsinki, Finland
- (vi) Meeting reports of the First Session-Open-Ended Working Group of The Parties' (Montreal Protocol) on 21-25 August 1989 at Nairobi, Kenya

The above-said documents have been selected on the basis that those documents represent the early stage of negotiations of the Montreal Protocol. The first two documents represent negotiations in the making of the Montreal Protocol itself whereas the last four documents represent negotiations to persuade and attract more developing nations to join as members of the Montreal Protocol.

**Documents analysis:** All the above-mentioned documents were analyzed by using Nvivo 2 software. By using Nvivo 2 software, the researchers have built up and tested the coding schemes. This action was necessary in order to determine the reliability. According to Maxwell (2005), there are a few necessary steps in analyzing documents by using the software. All the documents are identified and selected for the purpose of fulfilling the study objectives, i.e., the above-mentioned documents. These documents are numbered (1-6). Later, these documents are scanned in order to transform them into transcripts that can be analyzed by computer software (Nvivo 2). By using computer software (Nvivo 2), the researchers identified themes and sub-themes based on the above-mentioned selected documents, which are in line with the study objectives. Following that, the researchers are

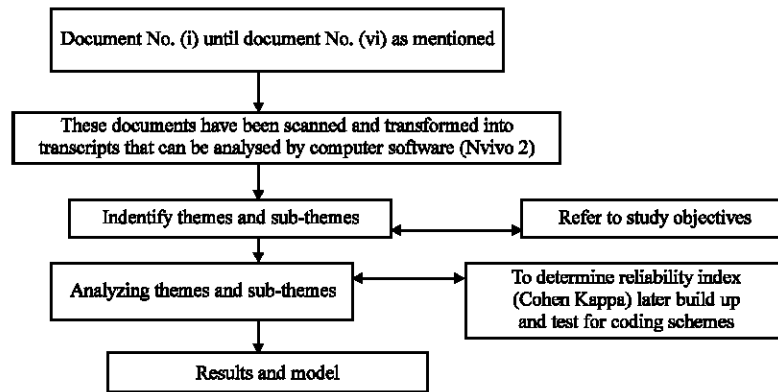


Fig. 1: Documents analysis process flow chart

required to determine the reliability of the coding schemes during the process of identifying themes and sub-themes by using computer software (Nvivo 2). This determination of reliability is based on the reliability index of Cohen Kappa. This process is required to be repeated many times, until the coding schemes manage to obtain the highest level of the reliability. Finally, these themes and sub-themes are built up by displaying these results in the form of a model. This process of documents analysis has been laid down in Fig. 1.

## RESULTS AND DISCUSSION

Based on the documents analysis on the influence of interest approach that promotes the principle of transboundary liability in the early negotiations of the Montreal Protocol, two main themes and eight sub-themes have been identified (Table 1). The themes are costs and benefits, while the sub-themes are implementation costs, market competitiveness, international trade conflict, increasing prices, flexibility, justice, incentives (technical and financial assistance) and cost-effectiveness.

**Costs:** When referring to the influence of interest approach in the negotiation of the Montreal Protocol, it is clear that the costs have played essential roles on this matter. This has been highlighted in document No. (ii) indicates the subject matter.

Another expert drew attention to the problems faced by small countries which might suffer increased costs or reduced availability of chemicals if producing nations restricted exports in favour of continued domestic consumption under regulatory measures (Para 177, document No. (ii)).

Table 1: Themes and sub-themes of documents analysis of the interest approach that promotes the principle of transboundary liability in the Montreal Protocol

Themes	Sub-themes
Costs	Implementation costs, market competitiveness, international trade conflict, increasing prices
Benefits	Flexibility, justice, incentives (technical and financial assistance), cost-effectiveness

**Implementation costs:** This study has shown that implementation costs were also being considered as factors that influence states to participate in international environmental cooperation of the Montreal Protocol. This has been highlighted in document No. (vi).

Incremental costs that might be covered by the international financial mechanism (Para 103, document No. (vi)).

**Market competitiveness:** Besides the implementation costs, which has been highlighted above, market competitiveness has also been mentioned for consideration in order to influence the negotiation of the Montreal Protocol. This has been highlighted in document No. (i) indicating the said matter.

The delegates warned that a freeze at the 1986 production level as contained in one draft protocol before the Group would lead to a production monopoly for current producers (Para 116, document No. (i)).

**International trade conflict:** In the early negotiation of the Montreal Protocol, all of the states around the globe were looking forward that controlling trade measures in the Montreal Protocol should be consistent with the international trade laws in order to avoid international

trade conflict that might caused international trade problems. This has been highlighted in document No. (ii) that indicates the subject matter.

The Sub-Group on Trade Issues considered the compatibility of measures for controlling trade between parties to the Protocol and trade between parties and non-parties, with the rules of international trade, especially the GATT (Para 301, document No. (ii)).

**Increasing prices:** In addition to the discussion under the main theme costs, which are based on document No. (vi), member states during the negotiation always ensure that the Montreal Protocol must take into consideration on the increasing prices due to the involvement of increasing costs in implementing the Montreal Protocol.

He outlined the elements of the cost as follows: the costs of using or manufacturing high price CFC substitutes, the costs of amortization, the cost of adjustments in industries using CFCs and halons as inputs and the higher costs of importation of equipment and goods using the substitutes (Para 91, document No. (vi)).

**Benefits:** The second main theme that influence the negotiation of the Montreal Protocol from the interest approach perspective, is also clear that the benefits have played essential roles on this matter. This has been highlighted in document No. (vi), which indicates the subject matter.

He first identified the needs of developing countries; their reticence to ratify the Montreal Protocol was due to lack of the resources necessary to met its requirements without serious disruption of their development efforts; what they needed was concessional funding and outright grants additional to existing aid programmes (Para 18, document No.(vi)).

**Flexibility:** These benefits are also including the aspect of flexibility. This aspect of flexibility really helps to influence states around the globe to join in and ratify the Montreal Protocol. During the negotiation of the Montreal Protocol many developing states have requested for the flexibility in implementing the Montreal Protocol. This has been highlighted in document No. (ii), which indicates the said matter.

Special clauses must be drafted for the developing countries that take into account their particular situation and that, at a minimum, permit them to continue their production and emission at current levels, since these countries are not in a position to replace these substances, in addition to which they are experiencing a very difficult economic situation (Para 96, document No. (ii)).

**Justice:** This study has shown in document no. (i) that justice also bring benefits to states around the world during the negotiation of the Montreal Protocol because with the application of the principle of fairness in the Montreal Protocol, the Montreal Protocol will become international law that would be accepted throughout the world.

He said, however, in doing so it was important to apply the principle of fairness so that the regulations would be acceptable to all (Para 85 document No. (i)).

**Incentives (technical and financial assistance):** Incentives on technical and financial assistance bring benefits to member states especially to the developing nations in accepting the Montreal Protocol as one of the international environmental laws. This has been highlighted in document no. (vi) that indicates the subject matter.

Two main purposes for financial or other support: first, compensation for the incremental costs of transition to substitutes of the ozone depleting substances and second, support which would serve as an incentive to ensure adherence to the Protocol (Para 178, document No. (vi)).

**Cost-effectiveness:** Cost-effectiveness, which bring benefits to member states by sharing the burden of costs relative to the regulatory process among governments. This has been highlighted in document No. (ii).

Mr. Mansfield enumerated some of these issues; on the substances that should be regulated; on the levels of limitations to be chosen; on the cost-effectiveness of regulations and on how the burden of costs relative to the regulatory process would be shared among governments (Para 32, document No. (ii)).

## CONCLUSION

This study suggests that interest approach that promotes the principle of transboundary liability is rather an important feature to encourage and influence states around the globe to participate in the Montreal Protocol. After a series of negotiations, most of the negotiating countries felt that the Montreal Protocol would be able to supply the market for substitutes of CFCs and would not be exaggerated upsetting the global cost-effectively and to ensure the principle of transboundary liability will not be infringed.

This study also suggests that the global economics and equity matters were also discussed in the negotiations of the Montreal Protocol. The developing states have tried to seek justice by promoting the principle of transboundary liability. Based on these two principles, the states managed to obtain flexibility in implementing the Montreal Protocol through the global forum of UNEP. Under this umbrella of the global forum of UNEP the Montreal Protocol has managed to minimize the conflict between the global environmental issues, the global economics and equity matters. Moreover, the developing states, which are regarded as Article 5 states in the Montreal Protocol have also been given incentives on technical and financial assistance through Multilateral Fund in order to help them in implementing the Montreal Protocol to avoid the infringement of the principle of transboundary liability. Finally, the preliminary findings indicate that the influence of interest approach in the international environmental governance is rather an important aspect to promote and persuade states around the globe to participate in Multilateral Environmental Agreements (MEAs) in protecting global environment by taking into consideration of the principle of transboundary liability in order to control world emissions of pollution.

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