Chapter-6

Conclusions
The dumping of radioactive wastes at sea has been temporarily laid to rest by the broad agreement achieved by the Intergovernmental Panel of Experts on the Radioactive Dumping of Wastes, appointed by the Contracting Parties to the London Convention. This decision was half expected as few of the dumping States wanted a full-fledged regime on liability for dumping of wastes at sea. If the more stringent civil liability regimes for use of nuclear powered ships provide that the primary liability shall be that of the operator, it would be naïve to expect the London Convention to provide for a stringent regime on liability, including that of a residual state liability.

Be that as it may, it would be in the fitness of things, to undertake an appraisal of the legal and policy issues in the present study at hand and an attempt a quick recap of the issues involved.

While concluding, it would be heartening to begin by stating that the Russian Federation which was the 'last of the States standing', has formally agreed to the implementation of the ban on ocean dumping of radioactive wastes. On 17 May 2005, the Government of Russian Federation informed the Secretary General of the IMO, under whose auspices the London Convention is administered, that it had accepted the ban contained in the amendments to the London Convention under Resolution LC.51 (16). As a result, twelve years after its adoption, the prohibition of
the disposal of radioactive wastes at sea is finally in force for all Contracting Parties of the London Convention.

The oceans have long been and continue to be viewed by the nuclear States as the safest place for disposal of wastes. You do not have to go far to ask why? Decisions of a State or a territorial sovereign, do not involve peer reviews as is the case in land-based disposal which have to meet the requirements of stringent domestic laws on impact assessment; and above all it is extremely difficult to convince the lay mind that radioactive wastes are less dangerous as compared to the hazards associated with nuclear weapons. A rational and probabilistic assessment/argument cannot assuage the fears of common people. The Akatsaki Maru incident and the carriage of Japanese wastes for recycling through the Straits of Malacca a few years back, is a pointer in this direction. All the Strait States refused permission for passage of the ship carrying radioactive wastes through their territorial waters or exclusive economic zone.

Customary international law provides principles of good faith, sic utere tuo, good neighbourliness and abuse of rights as general principles of law recognized by civilized nations prohibiting transboundary harm. The Trail Smelter dictum on transboundary harm, and the other judicial decisions have stood the test of time and have contributed to the evolution of principles of reasonable regard towards protection of the environment beyond national jurisdiction. These principles are recognised in the Vienna
Convention on the Law of Treaties 1969, the UN Convention on the
Law of the Sea 1982, the UN Watercourses Convention, 1997 and a
number of other regional and bilateral agreements.

A number of judicial decisions have held that customary
international law prohibiting transboundary harm attracts rules of
state responsibility. However, as proof of harm was often difficult,
liability came to be regarded as based on "fault". This led to the
growth of a lex specialis sectoral liability regimes, where primary
liability was that of the operator and the State had residuary
liability in some cases. However, despite the time-tested usefulness
of these decisions for regulating transboundary pollution, one is
often skeptical whether they have in real terms contributed to the
proscription of transboundary harm. The right of territorial
sovereignty still holds good, notwithstanding the normative
framework provided by customary law.

State liability for transboundary harm is an exception, than
the rule and harm to the global commons or the global
environment per se, has always been outside the purview of even
customary law!

Besides, even common law proscriptions did not serve as a
sufficient deterrent to prevent the hazards caused by dumping. The
rigors of State responsibility i.e. proof of violation of an
international obligation and the necessity that States viewing such
obligation would be required to prove opinio juris, further hampered
any remedy against wanton pollution of the marine environment.
There also remained the difficulty of proof of attributability and the need for establishing a nexus between the damage caused and the evidence to bring an actionable claim against the polluter.

The international community aware of hazards involved in radioactive disposal at sea had raised the issue much before the law of sea conventions were adopted in 1958 and 1982. The 1958 Geneva Convention on the High Seas codified the need for showing reasonable regard in use of the oceans, while enjoying the freedoms to use the seas. Likewise, the UN Conference on Human Environment, 1972 (where dumping was to be a major issue but was kept aside due to political compulsions) established the Intergovernmental Working Group on Marine Pollution.

But the message was clear-ocean dumping as witnessed in the North East Atlantic and other places had assumed alarming proportions and serious efforts were needed at the international and regional levels, to combat the hazard. Little wonder that immediately after the Stockholm Conference, the London Dumping Convention (as it was then called) and the regional Oslo Convention on Dumping of Wastes and Other Matter were adopted in 1972, itself! However, it is to the credit of the international community that radioactive waste was recognised as a hazardous substance and for these reasons Part XII of the UN Convention on the Law of the Sea recognised ‘pollution by dumping” as a special category of pollution to the marine environment.

325
The adoption of the London Convention was in itself a momentous event. It heralded the efforts of smaller and weaker donee States who as recipients of wastes had little say in the regulation of dumping of radioactive wastes. It was also a major achievement in the efforts of the international community to draw up rules for orderly disposal of wastes on the basis of a permit system, dependent upon completion of agreed international safety and environmental standards and also assessment of the risk involved. So much so that the listing system adopted by the London Convention, has come to be regarded as a customary practice as evidenced by, practically all international and regional treaties regulating disposal of hazardous wastes.

The 1996 Protocol to the London Convention attempted to rectify some of the inherent weaknesses regulating ocean dumping. Much to the chagrin of dumper States, the Protocol provides for a precautionary approach to dumping. This would entail reversal of the burden of proof from the plaintiff/pollution victim to the polluter and would expressly allow only those substances to be dumped that have been scientifically proven to be non-hazardous. The Protocol also provides for mandatory environmental impact assessment and other clearances while granting special permits for dumping. It also states that land-based options must be pursued and exhausted before applying for ocean disposal of low level radioactive wastes.
The various agreements drawn up under the auspices of Regional Seas Programme of the United Nations Environment Programme are also a testament to this fact. Due diligence obligations to prevent, reduce and control environmental harm have encouraged a number of developing countries to devote more attention to problems of marine pollution abatement and prevention of dumping.

In this regard, the efforts of the South Pacific Island States deserve special mention. They have established a comprehensive legal regime regulating all aspects of radioactive contamination of the region—nuclear testing (underground and atmospheric), carriage and dumping of wastes, deep seabed mining, as well as emplacement of radioactive wastes in the sea bed. Similar is the record in the South East Pacific, the North East Atlantic and also the North Sea States.

Regional efforts, it is seen have been favoured by States for reasons of proximity, cultural homogeneity and economic well being, all important factors contributing to successful abatement actions. The prime example is the Mediterranean Action Plan (MAP), which is a comprehensive package for protection of the marine environment from all sources of pollution.

However, many commentators view that regional approaches cater to a certain sense of 'regional nationalism' as they in some ways weaken the international regime. While some may agree and others disagree with such a view, few can deny that the London
Convention has stood the test of time and increased its scope and effectiveness by the 1996 Protocol. Whereas, to some extent greater regionalism may involve setting of different standards, which in turn may weaken the established global regime, in reality, this should not be a worrisome matter. The UN Convention on the Law of the Sea, 1982 envisages such a situation and thus provides for regional efforts, supplementing global action programmes.

Any study on hazardous waste dumping will be incomplete without a study of the entailing liability for damage caused to human life, property and the environment. To be able to overcome the rigors of State responsibility, the international community entrusted the International Law Commission (ILC) with the task of formulating rules for international liability for hazardous activities, which have not been expressly prohibited. The work of the Commission on this topic, from 1978 to date, is laudable, and has resulted in: adoption of articles on Prevention of Transboundary harm arising out of Hazardous Activities and; the continuing work of the Commission on “Allocation of Loss” suffered by innocent victims. While the work on “prevention” has resulted in the adoption of a set of fundamental principles for regulating transboundary harm, the work on allocation is still continuing.

The significance of the work of the Commission lies in providing centre stage to the concept of “international liability” vis-à-vis “State responsibility” recognizing the ineffectiveness of traditional rules regulating hazardous activities that are not
prohibited, as they are essential for socio-economic development of a State and should have a separate regime.

It is seen that the study at hand may qualify (civilian use of nuclear energy) as an essential facet of development and therefore the ILC articles appear germane. However, is it right of every sovereign State to decide its own developmental goals and accordingly undertake the use of nuclear energy for peaceful or destructive purposes? Unfortunately, sometimes, public opinion often stands marginalised or not taken into considerations and safer and cheaper alternate sources of energy are not tried.

Further, the primary liability for undertaking a hazardous activity is placed at the doorstep of the operator, as has been emphasized in all civil liability regimes. While, legally speaking it sounds realistic and correct, but why should a State which sanctions a hazardous undertaking on its territory, fully aware of the risks involved for its own populace, be bereft of any liability?

Further, while States are not liable for such activities beyond areas under national jurisdiction and there can be any number of exculpatory defenses, why has the ILC study fought shy to even recognize that there is a possibility or threat to the “global commons or environment per se”? The continuing tsunamis, hurricanes in the US, Europe and Southern hemisphere, worldwide desertification and the recent earthquake in the Indian subcontinent, are indications that not all is well with the way man
has used his natural resources. A classic case of the "Tragedy of the Commons" may be unfolding before us.

Radioactive waste dumping at sea, as is well known cannot be circumscribed, because of ocean currents as well as the longevity of the radioactivity, with substances having half periods ranging from 3 hours to 35,000 plus years. In such a given scenario wastes dumped in the territorial waters or Exclusive Economic Zone (EEZ) of one State will surely be transported to maritime zones of other States. This is exactly what happened in the Farrallone Island incident, where strong tested cement canisters filled with liquid radioactive wastes by United States were found washed away, thousands of miles near the Irish coast. The oceans are a composite whole and any study regarding harm to their environment cannot be compartmentalized as "harm to the global commons per se bereft of any inter-linkages with the national jurisdictional environmental issues.

For these reasons the UN Convention on the Law of the Sea calls for the obligation to protect and preserve the marine environment, as a single entity. The high seas, though outside boundaries of national jurisdiction are an integral whole to coastal States, which derive their sustenance from the seas.

The danger lies in disregarding the basic tenets of international law and cooperation, as is clearly evident from the practice of recalcitrant States. While its is agreed that the breakdown of the erstwhile Soviet Union led to immense economic
hardships, protection from radioactive and other noxious hazards is recognized and protected in all "developed legal systems". Various non-governmental organizations such as the Greenpeace, Friends of Earth and the Bellona Foundation have highlighted how the Russian Federation used clandestine means to dump not only low-level radioactive wastes, but also high level wastes, absolutely dangerous for future generations.

What is shocking to say the least, is that high-level radioactive wastes have not only been dumped in adjacent waters of Norway and Japan, but also in one's own territory- fields and mountains of Chelyabinsk in Central Russia nicknamed the "nuclear graveyard of Europe". This is not to condone the recalcitrant attitude of States such as the UK and France, which have always kept their ocean dumping options open under the regional OSPAR Convention.

The study on radioactive wastes tells us clearly that international law on ocean dumping of radioactive wastes prohibits transboundary harm. Besides customary law, the UN Convention on the Law of the Sea guarantees "reasonable regard" to the use of the oceans. This conventional regime has been further strengthened by the adoption of the 1996 Protocol to the London Convention and its precautionary paradigm and number of very successful UNEP and other regional regimes controlling marine pollution by radioactive wastes.
The Protocol creates a more stringent legal framework for the orderly disposal of radioactive wastes at sea. The precautionary approach combined, with the reversal of the burden of proof from the victim to the polluter, marks a genuine international policy shift in the management of radioactive wastes.

Land-based disposal for high level and other wastes are still the best safe and manageable options available. Although other disposal options, such as disposal in outer space and the deep seabed geological sites are being undertaken on an experimental basis, it is important to bear in mind the costs involved and the threat to the "peace of global spaces,'' such options may pose.

A stable international legal order has been established by the UN Convention on the Law of the Sea 1982 and the Outer Space treaties and it is in the interest of entire international community to ensure, that this stability is not disturbed at any cost. Come 2007, a mad race to mine the seabed for poly-metallic nodules, combined with efforts to use the deep seabed for HLW dumping, can prove to be a potent recipe for disaster. While efforts to dump wastes at sea will not be given up easily by many States, care must be taken to guarantee the sustainable management of the ocean resources and marine life on the seabed.

It remains the solemn obligation of all States to ensure that the historic decision of the Russian Federation to ban dumping of radioactive wastes at sea is adhered to, appreciated and interpreted
in full letter and spirit! This can only be done by ensuring the early entry into force of the 1996 Protocol to the London Convention!