Chapter 3
States Responsibility and Liability for Transboundary Environmental Harm

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Contents

3.1 Introductory Remarks

As discussed in Chapter 2 (Chap. 2 ¶ 20 (Sect. 2.2.2)), one strategy to address environmental degradation caused by transnational human activities is to focus on States as the principal actors and law-makers on the international plane. In order to address environmental challenges, States have by and large three avenues for 1

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regulatory management at their disposal: the first one is domestic legislation on pollution control and conservation within the boundaries of jurisdictional limits set by international law (Chap. 7); the second avenue is action through regional organisations of economic integration which have the power of supranational law-making, although these also have to observe the same jurisdictional limits in relation to the international community; and the third avenue is traditional international law-making, the method on which this Chapter focuses.

2 As far as international law is concerned, States can explicitly agree or tacitly acquiesce to an extensive variety of international approaches to prevent and address transboundary environmental harm. Within the framework of recognised sources of international law, States may impose not only on themselves, as international persons, but also on domestic public and private actors, international environmental obligations of conduct and result. Any breach of these legal obligations then triggers consequences for the duty holder to make reparations for the environmental harm caused (¶ 64 *et seq*). In addition to this, States may agree on their own duty or, as the case may be, on the duty of domestic public and private actors to provide financial compensation for transnational environmental damage solely because the damage occurred and was caused by certain activities or omissions of a given duty holder (¶ 68 *et seq*). The obligations of States of origin to compensate an environmentally affected State for transboundary environmental harm emanating from the former's territory necessarily and exclusively arises from international law as the sovereign equality of States prevents domestic law from regulating inter-State relations. In contrast, the obligation to compensate owed by domestic public and private actors which have caused transboundary harm can either be directly established by international rules or these rules impose on States the duty to implement corresponding liability rules in their domestic legal orders (Chap. 5, ¶ 7 *et seq* (Sect. 5.2)).

3.2 Conceptual Distinction Between State Responsibility and State Liability

3 The above categorisation differs between the duty to make financial compensations because of a breach of international environmental rules and the duty to compensate because of the occurrence of transboundary environmental damage. Colloquially, both categories can be referred to as environmental liability, however, international legal usage of the term 'liability' has developed its own distinct meaning, primarily on account of the International Law Commission (ILC).

4 The ILC introduced the conceptual distinction between State responsibility and State liability in its early reports on the law of State responsibility, specifically in a report entitled "International Liability for the Injurious Consequences of Acts not

Prohibited by International Law".[1] While the responsibility concept enshrined in the 2001 Articles on State Responsibility (ASR) refers to the legal consequences of a wrongful act attributable to a State, the ILC utilised the term 'liability' to denote the State's obligation to provide reparation for damage that arises from lawful activities. Even though it is safe to say that academia has gradually espoused the ILC's approach,[2] it still faces some valid criticism.[3] Most importantly, the ILC's narrow definition of State liability was driven by the Commission's own conceptual needs and deliberately set aside other international and domestic usages of the term. Taking Article 139(2) UNCLOS as an example, the provision stipulates that damage caused by a failure of a State party to carry out its responsibilities under this part shall entail liability (Chap. 13).[4] Another example is the usage of the term liability in civil liability conventions, where it refers to obligations in private law, such as operators' liability under national law for any damage they cause in other States (Chaps. 6 and 7). Most notably, in domestic law, the term liability is often regarded as an equivalent of the term responsibility.[5]

Drawing a conceptual distinction between responsibility and liability is not only open to challenge with respect to general usage, it also conveys the impression there is a clear dividing line between State responsibility and State liability, however, any such line can be easily blurred, as is exemplified by the *Trail Smelter case*. **5**

Trail Smelter Case (the United States v Canada) **6**

The 1941 Trail Smelter Award[6] is a landmark decision that highlighted for the first time the limits of State sovereign rights to allow its territory to be used for any form of environmentally significant activities with cross-border impacts. The origins of Trail Smelter date back to the late nineteenth century when a Canada-based corporation began operating a smelter plant that emitted

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[1] Report of the International Law Commission on the Work of its Thirty-Seventh Session, UN Doc A/40/10 (1985), para. 108-163; Draft Articles on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, UN Doc A/CN.4/423 (1989).

[2] But see Orrego Vicuña, Eighth Commission of the Institute de Droit International, 1997, Resolution on Responsibility and Liability under International Law for Environmental Damage, Article 4 "Responsibility for Harm Alone", available at https://www.idi-iil.org/app/uploads/2017/06/1997_str_03_en.pdf, last accessed 25 April 2022.

[3] de la Fayette (1997), p. 322.

[4] Accordingly, the Seabed Dispute Chamber of ITLOS, in its Advisory Opinion, ITLOS *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion), 1 February 2011, ITLOS Reports 2011, 10, para. 178, speaks of liability under customary international law within the meaning reflected in Article 2 ASR.

[5] *Preliminary Report of SR Quentin-Baxter on international liability for injurious consequences arising out of acts not prohibited by international law*, 28 July 1980, UN Doc A/CN.4/334, para. 12.

[6] PCA *Trail Smelter Case* (United States v Canada) (1941) 3 RIAA 1905.

hazardous fumes (sulphur dioxide) that caused damage to plant life, forest trees, soil and crop yields across the border in Washington State in the United States (US). In 1935, the US and Canada agreed on establishing an arbitral tribunal which, in its first decision (1938) decided that harm had occurred between 1932 and 1937 and ordered the payment of US$78,000 as the "complete and final indemnity and compensation for all damage which occurred between such dates". The Tribunal's second decision (1941) was concerned with the final three questions presented by the 1935 agreement between the US and Canada, namely, the latter's responsibility for as well as appropriate mitigation and indemnification of future harm. The Tribunal landmark conclusion with respect to future harm stated that: "(U)nder the principles of international law (. . .) 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".[7]

7 The Trail Smelter Award's legacy has been the subject of a wealth of academic writing[8] and had a handful of subsequent manifestations, most notably in Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration.[9] Irrespective of these modern manifestations, there is still some academic debate about the proper understanding of the Trail Smelter Award, particularly whether it addresses Canada's international liability or its international responsibility.[10] The core of the original dispute lies in the fact that the smelter's activity, processing of lead and zinc ore, did not violate international law. Consequently, the issue of Canada's responsibility or liability depends on the point of reference for the legal assessment: If a primary rule of customary environmental law obliges States to prevent or mitigate transboundary industrial emissions occurring within their territory (duty to prevent), Canada is responsible for infringing this obligation and accordingly has to make reparations to the USA whose territory is significantly affected. However, if the focus is on the smelting activity, which is not prohibited under international law, Canada would only be liable for the significant

[7] PCA *Trail Smelter Case* (United States v Canada) (1941) 3 RIAA 1905.

[8] See e.g. Bratspies and Miller (2006), Craik (2004), pp. 139–164, Read (1963), Mickelson (1993).

[9] Report of the Stockholm Conference UN Doc A/CONF.48/14, at 7, reprinted in International Legal Materials (1972) 1420; Rio Declaration on Environment and Development, UN Doc A/CONF.151/26 (Vol. 1), reprinted in International Legal Materials (1992), p. 874.

[10] See e.g., Brownlie (1983), p. 50: State Responsibility—including the *Trail Smelter Case*—is concerned with categories of lawful activities (i.e. smelting) which have caused harm; see also Ellis (2006), p. 56.

environmental damage on US territory.[11] The existence of such liability would stem from a primary rule of international law, namely the duty to pay damages, that stipulates the polluter-pays principle whereby the one who creates the risk to others has to bear the costs (¶ 38 *et seq*; Chap. 5).[12] In contrast, a State's responsibility for any breach of the primary environmental duty to prevent significant transboundary harm from happening falls within the category of secondary rules of international law.

8 Although the Trail Smelter Arbitration Panel decided on the dispute well before the ILC introduced its conceptual distinction between State responsibility and State liability, the wording of the 1941 award points towards Canada's responsibility for transboundary environmental harm. This responsibility was triggered by the violation of Canada's primary obligations under international law to both not cause transboundary harm and to take measures to prevent actors under its jurisdiction from doing so ("no State has the right to use or permit to use its territory. . ."),[13] The damages that Canada had to pay to the United States were therefore the consequence of Canada's international responsibility because it breached its duty to prevent the harmful activities of the privately-owned smelter.[14] In the 7th recital of its 2006 draft principles on the allocation of loss, the ILC explicitly acknowledges that States bear responsibility when infringing their obligations under international law to prevent harmful activities and reserves the liability for transboundary harm to all cases that do not involve State responsibility.[15]

9 It is beyond the scope of this book to thoroughly examine the terminological confusion and disputes involving the terms liability and responsibility,[16] especially since the underlying conceptual decision of the ILC is not mandatory as illustrated by the language of international treaties and ICJ jurisprudence.[17] Undeniably, State responsibility and State liability are closely related and even intrinsically interconnected.[18] Given this book's focus on corporate liability, it utilises the term liability to denote any duty to pay monetary compensation for damage (Chap. 2 ¶ 36 *et seq* (Sect. 2.3)). The legal prerequisites of this obligation do not stem from the term liability but from the applicable legal instrument. In conformity with international usage, State responsibility is reserved exclusively for the purpose of denoting

[11] Liability was the initial approach of the ILC to transboundary environmental harm, see Boyle (2010), p. 96, see ILC Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, YBILC 2006 II/2.

[12] de la Fayette (1997), p. 325.

[13] Drumbl (2006), p. 86.

[14] PCA *Trail Smelter Case* (United States v Canada) (1941) 3 RIAA 1905.

[15] ILC Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries (2006). YBILC Vol. II, Part Two, UN Doc A/61/10, at 61.

[16] Crawford (2013), p. 63.

[17] See e.g., ICJ Fisheries Jurisdiction (Federal Republic of Germany v Iceland) Merits, Judgment, ICJ Reports 1974, 175, 208: ". . .the Court was merely asked to indicate the unlawful character of the acts and to take note of the consequential liability of Iceland to make reparation."

[18] Sucharitkul (1996).

the legal consequences of an internationally wrongful act that consists, *inter alia,* of States' obligation to redress any damage incurred (Article 36 ASR). Consequently, this study refers to State liability only when discussing the legal obligation to pay damages that do not fall within the scope of Article 36 ASR (¶ 44 *et seq*).

3.3 Potential Sources of International Environmental Liability

10 It is a truism that international environmental law, including its liability and compensation rules, stems from the same legal sources as other areas of international law.[19] It is equally true that a mere reference to the traditional legal sources mentioned in Article 38(1) ICJ Statute provides an incomplete picture of the relevant legal sources of international environmental law. While international environmental law is not unique in terms of the legal sources available to it, like other areas of international law, it has its own particularities concerning the function of certain sources and methods of identifying the law produced by them. As *Jutta Brunnée* observed: "(I)nternational environmental law is a relatively pragmatic discipline, focused on problem-solving, including through alternative standard-setting modes and compliance mechanisms"[20]. Notably, the legal relevance of nonbinding instruments is especially high in international environmental law;[21] their successful reconfirmation by international actors and authorities over time often significantly contributes to the formation and identification of international law stemming from traditional sources, which will be outlined below.

3.3.1 Multilateral Environmental Agreements and Environmental Liability

11 As of February 2022, the International Environmental Agreements (IEAs) Database Project, developed and maintained by the University of Oregon, lists 1414 Multilateral Environmental Agreements (MEAs).[22] MEA is the generic term for a treaty, convention, protocol or other binding instrument related to the environment and

[19] Birnie et al. (2009), p. 14.

[20] Brunnée (2017), p. 961.

[21] Friedrich (2013), pp. 143–170.

[22] International Enviromental Agreements (IEAs) Database Project (2002–2020), available at https://iea.uoregon.edu/iea-project-contents, last accessed 25 April 2022.

concluded between more than two parties.[23] While there is a significant number of MEAs in force, only a small fraction of them address the question of liability for environmental damage.

Statistics: Multilateral Environmental Agreements with liability elements **12**

State liability: 2 MEAs, both in force

1. Convention on International Liability for Damage Caused by Space Objects[24], in force, (Chap. 11);
2. arguably Article 7(2) 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses, in force, (¶ 27).

State liability that is triggered by a breach of an international obligation, i.e. state responsibility: 2 MEAs, both in force:

1. UNCLOS (Chap. 13);
2. Fish Stocks Agreement.

Civil liability regimes: 13 MEAs of which four are in force[25], (Chap. 5) for details

1. Convention on Third Party Liability in the Field of Nuclear Energy;
2. Convention on the Liability of Operators of Nuclear Ships;
3. Vienna Convention on Civil Liability for Nuclear Damage;
4. International Convention on Civil Liability for Oil Pollution Damage, replaced by the 1992 Protocol;
5. Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources;
6. Convention on the Regulation of Antarctic Mineral Resource Activities;
7. Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty;
8. Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels;
9. Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment;

(continued)

[23] UNEP, Glossary of Terms for Negotiators of Multilateral Environmental Agreements, 2007, at 63.

[24] This is not an MEA *per se* but relates to the environment of private and public property damaged by a space object.

[25] In force for the States parties are the Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960, the Vienna Convention on Civil Liability for Nuclear Damage, the International Convention on Civil Liability for Oil Pollution Damage and the International Convention on Civil Liability for Bunker Oil Pollution Damage.

10. Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea;
11. Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal;
12. Convention on Civil Liability for Bunker Oil Pollution Damage;
13. Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters.

Administrative liability regime: 1 MEA

1. Nagoya - Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, in force, for details, (Chap. 14);

Provisions in MEAs on the future development of administrative or civil liability rules in international law: 17 MEAs all but one[26] of which are in force, however, only one has led to the adoption of a Protocol[27]:

1. Article 235(3) UNLCOS;
2. Article X Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matters;
3. Article 15 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter;
4. Article 14 Convention on Biological Diversity;
5. Article 27 Cartagena Protocol on Biosafety to the Convention on Biological Diversity (implemented);
6. Article 25 Convention on the Protection of the Marine Environment of the Baltic Sea Area;
7. Article 16 Convention for the Protection of the Mediterranean Sea Against Pollution;
8. Article XIII Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution;
9. Article XIII Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment;
10. Article 14 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region;

(continued)

[26] Not in force: The Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific.

[27] Article 27 Cartagena Protocol on Biosafety to the Convention on Biological Diversity was implemented through the Nagoya - Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety.

11. Article 15 Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region;
12. Article 15 Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region;
13. Article 20 Convention for The Protection of the Natural Resources and Environment of the South Pacific Region;
14. Article 29 Framework Convention for the Protection of the Marine Environment of the Caspian Sea;
15. Article XXIV African Convention on the Conservation of Nature and Natural Resources;
16. Article 13 Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific (not in force);
17. Article 12 Convention to Ban the Importation into the Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region.

Provisions in MEAs on national rules addressing damage: 4 MEAs, all of which are in force:

1. Article 235(2) UNCLOS;
2. Article 12 Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety;
3. Article XVI Convention on the Protection of the Black Sea Against Pollution;
4. Article 11 Convention for the Protection of the Marine Environment and Coastal Area of the Southeast Pacific

Exclusion of liability: arguably 2 MEAs, both of which are in force:

1. para 51 of Decision 1/CP.21 adopting the Paris Agreement (Chap. 16);
2. footnote to Article 8(f) Convention on Long-Range Transboundary Air Pollution.

The above table shows that many MEAs introducing liability rules are not yet in force or that their provisions on the development of an international liability regime remain unimplemented. Taken in isolation, these observations have legal significance for each treaty regime, its effectiveness to prevent environmental degradation and the cost allocation in cases of environmental damage. However, when considered in the broader context, the number of MEAs with liability provisions, the total number of signatory States and, ultimately, the willingness of States to ratify these **13**

MEAs are of importance to the overall picture of environmental liability rules which includes those of a customary law nature.

3.3.2 Customary International Law and Environmental Liability

14 Being a legal source independent of conventional law, customary international law has the potential to bridge geographic and thematic gaps in existent and future MEAs. ILC Special Rapporteur *Michael Wood* wrote in the commentary to the draft conclusions on the identification of customary international law: "(T)reaties that are not yet in force or which have not yet attained widespread participation may also be influential in certain circumstances, particularly where they were adopted without opposition or by an overwhelming majority of States."[28] The observation that broad participation in the adoption of a treaty text (Article 9 VCLT) can contribute to the identification of customary international law as was supported by the ICJ in *Continental Shelf*. In this case, the ICJ considered UNCLOS a reflection of customary international law given that it was adopted by 117 States even though it had not yet entered into force, something which only occurred in 1994, some nine years after the *Continental Shelf* judgment.[29] However, this case is rather special as the ICJ could rely on centuries of practice in the use of the high seas. In addition, the role of unratified treaties for customary international law is only one aspect of many that have to be taken into consideration when identifying the rules of customary international law.

Identification of Rules of Customary International Law

15 The search for rules of customary international law is often characterised by a desire to find a specific international rule to address what is perceived as a critical gap in the law. Accordingly, much has been written about methodological sound approaches to establishing what is customary international law, including the ILC in its 2018 draft conclusion on the identification of customary law.[30] A starting point for all such approaches is Article 38(1)(b) ICJ Statute which takes "international custom, as evidence of a general practice accepted as law". However, this does not specify what counts as evidence for practice and *opinio iuris*, what a viable ratio between the two elements should be, how consistent incidents of practice have to be and how rapidly they may lead to legal development. From a methodological point

[28] ILC Draft Conclusions on the Identification of Customary International Law, 2018, Conclusion 11, para. 3, YBILC 2018 Vol II Part 2, UN Doc A/74/10 at 144.

[29] ICJ *Continental Shelf* (Libyan Arab Jamahiriya v Malta) [1985] ICJ Rep 13, para. 27.

[30] ILC Draft conclusions on Identification of Customary International Law, YBILC 2018 Vol II Part 2, UN Doc A/74/10.

of view,[31] the question is then whether or not the identification of customary international law requires inductive reasoning, i.e. empirically established instances of State practice and legal conviction (*opinio iuris*) over time which, when taken as a whole, create customary international law. Alternatively, customary international law could allow for deductive reasoning, the starting point of which is a general and abstract principle from which rules of customary international law are deduced.[32] This value-based approach puts UN General Assembly resolutions and other non-binding instruments with a certain amount of authority ('soft law') at the centre of their identification process. Even if the ICJ itself does not always work with methodical transparency, there is no denying that the Court predominantly follows the inductive approach to customary international law which emphasises the international law-making process, with State practice and *opinio iuris* related thereto.[33] That said, in *North Sea Continental Shelf* the ICJ hinted at the possibility that the strength of either State practice or *opinio iuris* may make up for the weakness of the other.[34] Nevertheless, the ICJ considers the lack of sufficient State practice or conflicting State practice as detrimental to "the authority of a general rule of international law."[35] Despite the ICJ' obvious methodological preference, there are instances of the Court using deductive reasoning to identify a rule of customary law based on logical and functional imperatives, most notably in the *Arrest Warrant* case.[36]

The traditional inductive approach to customary international law does not render acts of international organisations, the existence of adopted but unratified treaties and universal declarations as irrelevant. They are commonly discussed as evidence of *opinio iuris*, the psychological element of the two components forming customary **16**

[31] See Schwarzenberger (1947), pp. 539 *et seq*; Sauer (1963), pp. 121 *et seq*; Bos (1984), pp. 218 et seq; Kirchner (1992), pp. 215 *et seq*.

[32] Schüle (1959), p. 146.

[33] For a summary of the relevant ICJ jurisprudence see ICL Draft conclusions on identification of customary international law, 2018, YBILC 2018, Viol II part 2.

[34] ICJ *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark, Federal Republic of Germany v the Netherlands) [1969] ICJ Rep 3, para. 74: "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked."

[35] ICJ *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 131. However, in the *Nicaragua Case* the court backpedaled from this position stating that it is deemed "sufficient that the conduct of states should, in general, be consistent with such rules and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule." See ICJ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v US) [1986] ICJ Rep 14, para. 98.

[36] ICJ *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium) [2002] ICJ Rep 3, para. 54; see Talmon (2015), p. 418.

international law.[37] This has been widely discussed and accepted, including the ICJ,[38] with respect to General Assembly Resolutions and final documents adopted at large-scale UN conferences, most notably the 1972 Stockholm Declaration and the 1992 Rio Declaration. However, soft law instruments reflecting progressive *opinio iuris* will easily be outweighed by conservative, or even regressive, State practice as the ICJ noted in the *Nuclear Weapon* Case:

> The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio iuris* on the one hand, and the still strong adherence to the practice of deterrence on the other.[39]

17 This traditional understanding of customary law is often accused of not adequately responding to pressing global challenges.[40] Consequently, there is broad and, at times, inventive academic debate on how the process of forming customary international law can be accelerated, simplified and altered to meet the needs of specialised branches of international law such as environmental law or human rights law.[41] One proposed method is to merge the two elements into one category by considering occurrences such as the verbal claims of relevant entities as both *opinio iuris* and State practice.[42] The International Law Association argued in 2000 that resolutions of intergovernmental organisations are a form of State practice, viewing them as "a series of verbal acts by the individual member States participating in that organ."[43] The ILC concurred in its commentary on draft conclusion 6 of its 2018 draft conclusions on the identification of customary law. In para 2 draft conclusion 6 itemises these different forms of practice by stating:

> Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts.[44]

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[37] Friedrich (2013), p. 145.

[38] ICJ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v US) [1986] ICJ Rep 14, para. 188.

[39] ICJ *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, para. 73.

[40] de Visscher (1956), p. 472: "It cannot be denied that the traditional development of custom is ill suited to the present pace of international relations"; Kolb (2003), p. 128: "...the time has come to put à plat the theory of custom and to articulate different types (and thus elements) of it in relation to different subject matters and areas."

[41] See e.g., D'Amato (1998); Charlesworth (1998).

[42] Akehurst (1974), p. 10.

[43] International Law Association, London Conference (2000), Committee on Formation of Customary (General) International Law, Final Report of the Committee, Statement of Principles Applicable to the Formation of General Customary International Law, Section 11 at 19.

[44] ICL Draft Conclusions on Identification of Customary international Law with Commentaries, 2018, YBILC 2018, Vol II Part 2, UN Doc A/73/10 at p. 133.

According to the ILC commentary, the phrase "conduct in connection with resolutions adopted by an international organization" includes acts by States related to the negotiation, adoption and implementation of resolutions, decisions and other acts adopted within international organisations. This observation is of special importance in areas of international law which are distinguished by highly active specialised organisations, as typical in the area of international environmental law. However, the ILC emphasised[45] that no form of practice has *a priori* primacy over another in the identification of customary international law, which makes the identification process a holistic endeavour. **18**

The non-exclusive list provided by draft conclusion 6 para 2 supports a generous understanding of State practice. In addition, it is to a certain extent an invitation to see both State practice and *opinio juris* in even a single, legally non-binding resolution of an international organisation that enjoyed wide support from member States. The same argument can be made when State representatives adopt a treaty text at an international conference. Voting in favour of a resolution, or failing to object, can be seen as a form of evidence that States accept the resolution's content as reflecting law (*opinio iuris*, cf. para 2 of draft conclusion 10). However, this interpretation of approval ignores the fact that States are well aware of which forums and what language indicate the non-binding status of a document. With regard to the adoption of a treaty text to consider a positive vote, or the failure to object, an incident of both State practice and *opinio iuris* disregards the legal significance of acts such as parliamentary approvals, formal ratifications and reservations in the later stages of the treaty-making process. Therefore, the ILC considered it necessary to make a clear negative statement with regard to the impact of legally non-binding resolutions, namely that they cannot in and of themselves create a rule of customary international law.[46] That said, even if non-binding instruments or treaties that did not attract sufficient ratifications (so-called 'failed treaties') do not form customary international law in and of themselves, they are not without legal significance: the possibility remains that the legal and policy approaches expressed in these instruments will shape the future practice of States when the growing need for urgent action in areas such as environmental law necessitates the use of on-hand solutions. **19**

No-Harm Rule and Environmental Liability

Despite the accelerated push for environmental action seen thus far in the twenty-first century, the main pillar of customary environmental law, the no-harm rule, dates to a bygone era. Having its origin in the 1941 *Trail Smelter* award (¶ 6), the undisputed and fundamental rule imposes primary environmental obligations on States that are the source of significant environmental harm. The violation of the no-harm rule triggers the international responsibility of the harming State, including its duty to provide monetary compensation for the transboundary harm caused **20**

[45] ICL Draft Conclusions on Identification of Customary International Law with Commentaries, 2018, YBILC 2018, Vol II Part 2, UN Doc A/73/10 at p. 133 para. 1.

[46] Draft Conclusions on Identification of Customary International Law with Commentaries, 2018, YBILC 2018, Vol II Part 2, UN Doc A/73/10, Resolution 12 para. 1.

(Article 36 ASR). In keeping with the conceptual distinction introduced by the ILC, the no-harm rule is a primary environmental obligation and, as such, cannot be classed as a rule on State liability (¶ 3 *et seq*).

21 The 1941 Trail Smelter Award highlighted the two facets of the no-harm rule it put in place, namely that States have a 'negative obligation' to refrain from actively causing significant harm to the environment of another State and their 'positive obligation' to prevent other, usually private actors[47] under their jurisdiction, from doing so. [48] However, the award's distinction between a State's obligation "not to cause harm", conceived as an absolute prohibition, and its duty "to prevent harm" caused by others, which is a due diligence obligation, has become blurred in the ICJ's jurisprudence. The Advisory Opinion entitled Legality of the Threat or Use of Nuclear Weapons illustrates the ICJ's approach to avoid conceptually distinguishing between polluting actors and rather include both public and private sources of pollution under the prevention principle. In contemplating the use of nuclear weapons by States, the Court observed: "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or areas beyond national control is now part of the corpus of international law relating to the environment."[49] This comprehensive prevention approach, which has since been adopted by other international tribunals[50] and the ILC Draft Articles on Prevention,[51] has consequences for State obligations concerning their own environmentally harmful activities: each State's obligations under the prevention principle are those of conduct not of result, even if the State itself is the polluter. In other words, in a case involving transboundary environmental damage caused by a State's activities, that State may escape its international responsibility if it can demonstrate that State authorities have complied with all due-diligence obligations required under international law when permitting such activities.

22 Today it is widely recognised as a customary international rule that States are duty-bound to prevent, reduce and control the risk of environmental harm to other States and, according to the ICJ,[52] to areas beyond State jurisdiction (global commons).[53] These preventive obligations require States to act with due diligence, which

[47] In addition to private actors, this 'positive obligation' to prevent transboundary harm would extend to curtailing the activities of foreign states that have, for example, armed forces present in the state's territory or international organisations operating within that state (e.g. the UN).

[48] Cf. PCA *South China Sea Arbitration* (Philipines v China) (2016) 33 RIAA 1, para. 941.

[49] ICJ *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, para. 29.

[50] PCA *Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway* (Belgium v Netherlands) (2007) 27 RIAA 35, para. 222.

[51] ILC Draft Articles on Prevention of transboundary Harm from Hazardous Activities, 2001.

[52] ICJ *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, para. 29.

[53] Birnie et al. (2009), pp. 143–152.

means that they have to take the appropriate amount of care to avoid and, if necessary, address transboundary harm through necessary action. The ICJ does not treat due diligence as a one-size-fits-all standard under international law but requires the application of a subject-matter specific due diligence standard.[54] Consequently, one has to consult the environment-centred ICJ cases to obtain insights into the understanding of the international standard of care required under the duty to prevent environmental damage. In *Pulp Mills*, the ICJ noted that particular care is required when implementing obligations in the field of environmental protection due to the irreversibility of some environmental harm, i.e. the due diligence standard becomes more demanding in correlation to the expected permanence of the harm.[55] Then again, a State is required to use 'all means at its disposal' to prevent environmental harm, which underlines that the standard of care is context-specific for both the environmental risk entailed and the actual capacities of the State concerned.

23 A State's obligation to prevent transboundary pollution consists of two subcomponents, namely procedural obligations and substantive obligations. A State's procedural obligations involve risk management before any potentially harmful activities start. In *Certain Activities and Construction of a Road*, the ICJ observed: "(T)o fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment."[56] An environmental impact assessment (EIA) includes a description of possible damage containment measures,[57] the implementation of which then falls within the categories of the States' substantive obligations.

24 A State's substantive obligations require enacting appropriate damage prevention and containment measures, such as taking needed regulatory and administrative steps[58] which, when exercised, exonerate it from international responsibility even if the measures diligently taken were not successful (obligation of conduct).[59] Which measures are appropriate will depend on several factors and may vary. In contrast, procedural obligations are quite specific about what is required for 'appropriate' risk

[54] MacDonald (2019), p. 1045.

[55] ICJ *Pulp Mills on the River Uruguay* (Argentina v Uruguay) [2010] ICJ Rep 14, para. 185–187.

[56] ICJ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) *and Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v Costa Rica) [2015] ICJ Rep 665, para. 104.

[57] Cf. Annex II of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991).

[58] ICJ *Pulp Mills on the River Uruguay* (Argentina v Uruguay) [2010] ICJ Rep 14, para. 101; ICJ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) *and Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v Costa Rica) [2015] ICJ Rep 665, para. 115.

[59] Mayer (2018), p. 132.

management. Domestically this includes the diligent execution of preliminary risk assessment and, if required due to the identified risk, an EIA. Internationally, procedural obligation after a risk has been identified includes providing notification to as well as consultations and negotiations with any potentially affected States.[60] If States fail to take these steps, they are internationally responsible for the violation of their procedural obligations irrespective of whether any transboundary harm has occurred.[61] Accordingly, procedural obligations are obligations of result with respect to the required actions but are still classed as obligations of conduct with respect to the transboundary environmental harm. If the latter occurs even though a State has taken all the appropriate procedural and substantive measures, that State is not internationally responsible for any resultant transboundary harm and thus does not have to compensate those affected for environmental damage.

25 The point of discussion then is whether it falls within the scope of the customary no-harm rule that States have domestic laws in place that will enable claimants situated in an affected State to take action seeking damages against public or private polluters in cases of transboundary environmental harm. The assumption of such a duty is not completely far-fetched, especially as liability rules can have preventive effects (Chap. 2). This is further highlighted by the Institut de Droit International's 1997 resolution on responsibility and liability under international law for environmental damage which states in its preamble: "*Realizing* that both responsibility and liability have in addition to the traditional role of ensuring restoration and compensation that of enhancing prevention of environmental damage."[62] Based on these preventive traits, it could be argued that the availability of national liability provisions and their cross-border accessibility is a part of the substantive limb of States' preventive due-diligence obligations, alongside their duty to enforce their administrative damage containment measures.[63]

26 The ICJ is not driven by such utilitarian considerations when fleshing out the different aspects of the customary no-harm rule. In *Pulp Mills*, the ICJ observed with regard to EIAs that they are:

[60] Duvic-Paoli (2018), p. 168.

[61] Indicated by ICJ *Pulp Mills on the River Uruguay* (Argentina v Uruguay) [2010] ICJ Rep 14, para. 204: Am EIA "may" be considered to be a requirement under general international law and, in this case, is separate from due diligence as is indicated by the word "moreover"; differentiation is not as clear as in ICJ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) *and Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v Costa Rica) [2015] ICJ Rep 665, para. 104; on this issue see Brunnée (2021), p. 275.

[62] Institut de Droit International, Responsibility and Liability under International Law for Environmental Damage, 4. September 1997 (IDI Resolution), available at https://www.idi-iil.org/app/uploads/2017/06/1997_str_03_en.pdf, last accessed 25 April 2022; see on the details of the IDI Resolution (Sect. 5.6).

[63] Given that national liability rules do not inform about a state's decision to authorise any given project as planned, the extension of such liability rules' scope to include transboundary environmental harm cannot mean they are then classed as procedural obligations under the no-harm rule.

> a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.[64]

To date, there is no comparable international judicial ruling on domestic liability legislation as a part of States' due-diligence obligations. In contrast to the detailed procedural obligations identified by the ICJ, no substantive core obligations under the no-harm rule have yet been authoritatively identified. However, this does not call into question the existence of these core obligations, including States' duty to have not only administrative control mechanisms but also civil liability rules in place.

In keeping with the methods for the identification of customary rules (¶ 15 *et seq*), liability legislation can only be regarded as a core obligation under the no-harm rule if it can be established that States accept liability and compensation as an indispensable element of prevention. However, this is difficult to substantiate as Article 7(2) of the 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses exemplifies.[65] Whereas para. 1 of the provision captures the essence of the no-harm rule, para. 2 turns to the question of compensation in cases where States diligently tried to prevent harm but failed to achieve the desired result. Only the occurrence of significant harm triggers a conditioned obligation to "discuss" compensation at the intergovernmental level "where appropriate", which may well result in a no-compensation outcome. **27**

1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses, in Force Since 2014 with 37 States Parties **28**

Article 7(1) Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.

(2) Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

Civil liability conventions also do not demonstrate that States consider liability provisions a necessary component of their preventive due-diligence obligations. Such conventions stipulate an operator's strict liability in cases involving environmentally ultra-hazardous activities (Sect. 5.3) which, in short, requires neither intention nor negligence to incur liability. Given that such an operator cannot escape **29**

[64] ICJ *Pulp Mills on the River Uruguay* (Argentina v Uruguay) [2010] ICJ Rep 14, para. 204.

[65] Convention on the Law of the Non-navigational Uses of International Watercourses, 2999 UNTS 77.

liability, even if all the precautionary and protective measures required by law were in place and, on top of that, was insured for damage caused, civil liability conventions are less linked to prevention than to the polluter-pays principle (¶ 38 *et seq*). This is succinctly highlighted by the preamble of the Lugarno Convention which States in its 6th recital: "Having regard to the desirability of providing for strict liability in this field taking into account the 'polluter pays' principle".[66]

30 Even though it has not yet been established that environmental liability is a necessary part of due diligence under the no-harm rule, customary international law may come to recognise a separate and independent legal obligation for States to provide for liability in cases of transnational environmental harm, a possibility which will be discussed below (¶ 38 *et seq*).

3.3.3 General Principles of International Law and Environmental Liability

31 One prominent feature of international environmental law is the pivotal role of environmental principles, which has heavily proliferated over the last 50 years.[67] The main characteristics required of environmentally-centred legal principles are that they are general, essential and fundamental and when used by way of deductive reasoning, seemingly carry environmental values and progressiveness into the international legal system. Given customary international law lacks responsiveness to pressing and rapidly evolving environmental problems because States prioritise short-term economic factors above all else, the reliance on environmental principles as a driving force to guide legal development does not come as a surprise. However, their normative weight has been disputed in individual cases, largely based on the given principle's source, specific content and frequency of its reception.

Identification of General Principles of (International) Law

32 General principles of law are only partially captured by Article 38(1)(c) ICJ Statute as this provision refers solely to general principles which can be identified in all major national legal systems and are then elevated to the international legal level. This method of identification distinguishes them from general principles of international law. Despite certain terminological ambiguities in academic writing, the latter are foundational principles formed within the international legal order as they are widely acknowledged in treaties, customary international law and, as the case may be, soft law instruments.[68] Despite the difference in provenance, namely

[66] Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, ILM 32 (1993) 1228 (not in force).

[67] Starting with the United Nations Conference in the Environment, held in Stockholm in 1972; cf Martin (2018), pp. 13 *et seq*.

[68] ILC SR Marcelo Vázquez-Bermúdez, Second Report on General Principles of Law, 9 April 2020, paras. 118 to 221, UN Doc A/CN.4/741 (not mentioning soft law documents).

domestic law and international law, the line between the two categories of principles easily blurs as the two legal spheres are not hermetically separated but in constant transposition. By way of example, the polluter-pays principle started as an economic principle in place in several major market economies,[69] its value was subsequently recognised and the principle was moulded into various other national and European Union laws. Subsequently, it attained the status of a principle of international environmental law used in numerous international documents (e.g. Principle 16 of the 1992 Rio Convention) and conventions (e.g. Article 3(1) of the 1996 London Protocol to the Convention on the Prevention of Marine Pollution by the Dumping of wastes and other matters).

The above shows that principles, in order to be legally relevant in the international sphere, require broad recognition by States or other international actors with law-making capacity, domestically and on the international plane. The importance of a principle's recognition as a legal principle was reemphasised by the *Iron Rhine* arbitration award. **33**

***Iron Rhine ("Ijzeren Rijn") Railway Case* (Belgium v the Netherlands)** **34**

The 2005 *Iron Rhine* award[70] concerned a dispute between The Kingdom of Belgium and The Kingdom of the Netherlands over the reactivation of the Iron Rhine railway (Ijzeren Rijn) to link the Belgian port of Antwerp and the German city of Mönchengladbach via the Dutch provinces of Noord-Brabant and Limburg. The railway began operating in 1879 but saw reduced use in the twentieth century which resulted in some sections being closed and freight trains forced to use other routes. The reactivation of the Iron Rhine railway was not contested between the parties but they differed over the entitlement of Belgium to establish the plan for its reactivation and the entitlement of the Netherlands to insist on conditions specified under Dutch law for such a reactivation. The Tribunal ruled, *inter alia,* that Belgium had an obligation to fund the environmental element of the overall costs of the reactivation. The importance of the award for international environmental law lies in the Tribunal's approach to the environmental aspects within the broader sustainable development principle: "Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate such harm. This duty, in the opinion of the Tribunal, has now become a principle of general international law."[71]

[69] OECD, The Polluter Pays Principle, Paris 1992, OCDE/GD(92)81.

[70] PCA *Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway* (Belgium v Netherlands) (2007) 27 RIAA 35.

[71] PCA *Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway* (Belgium v Netherlands) (2007) 27 RIAA 35, para. 59.

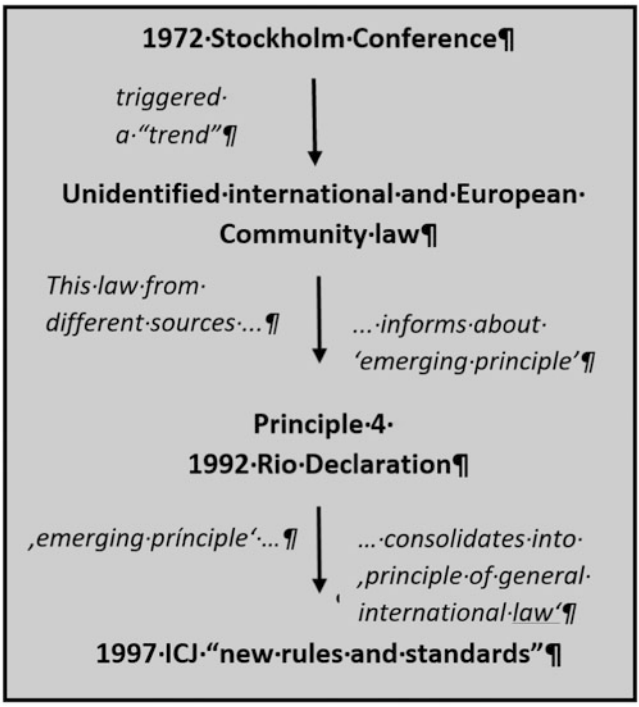

Fig. 3.1 Identification of principles of general environmental law by the Iron Rhine Award

35 In order to verify the existence of an international legal duty to prevent significant environmental harm within the territory where the development project is situated (Fig. 3.1), the Arbitral Tribunal in the 2005 *Iron Rhine* award first referred to the 1972 Stockholm Conference on the Environment.[72] This event was considered as the starting point of a 'trend' in international and European law to integrate environmental measures in the design of economic development activities. Instead of identifying the relevant pieces of legislation, the Tribunal decided to point at Principle 4 of the 1992 Rio Declaration, which the tribunal viewed as capturing the said legislative trend. Principle 4 emphasises that "environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." Labelled as an 'emerging principle' in the year 1992, the Tribunal considered it to be a 'principle of general international law' in 2005 with reference to

[72] PCA *Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway* (Belgium v Netherlands) (2007) 27 RIAA 35, para. 59.

the ICJ's *Gabčíkovo-Nagymaros* case,[73] where the Court spoke of 'new norms' and 'new standards' which States have to take into consideration when realising infrastructure projects.[74]

36 By considerring 'new rules and standards' to which the ICJ vaguely refers as manifestations of the 'principle of general international law', the *Iron Rhine* award provides a telling example for the tendency to blur the lines between principles and rules as well as principles of general international law and customary international law to suit the needs of judicial reasoning.[75] Indeed, principles of general international law taking the form of rules are associated with a process of considerable methodological simplification, which makes them so compelling when compared to customary international law. The high level of abstraction, which is generally considered a characteristic of general principles of law (such as "good faith"),[76] had already been abandoned by the time the principles were enshrined in the 1992 Rio Declaration. The concise language of many Rio principles foresees the most important function of general principles of international environmental law, namely to initiate and facilitate the emergence of international rules on the basis of which legal environmental obligations can be determined without the need to identify corresponding State practice and *opinio iuris*.[77]

37 Whether or not a principle of general international law evolve into a rule depends on many factors, not only as to the principle's language in terms of the level of abstraction but also as to its function (e.g. driving legal development or providing

[73] ICJ *Gabčíkovo-Nagymaros* (Hungary v Slovakia) [1997] ICJ Rep 7, para. 140.

[74] The Tribunal took note of the debate on the differences between principles and rules but refused to enter into the controversy of the PCA *Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway* (Belgium v Netherlands) (2007) 27 RIAA 35, para. 58-60. However, it is noteworthy that the Tribunal rather considered the 'environemtanl norms' as relevant in the context of Article 31(3)(c) of the Vienna Convention on the law of Treaties ("any relevant rules of international law applicable in the relations between the parties").

[75] It is worth noting that the Tribunal is not entirely consistent in its argument that an emerging principle has crystalised into a new rule in para. 59. This is evident from the fact it used a different method in para. 223; after referring in para. 222 to the traditional no-harm rule and the principle of prevention, both of which address transboundary environmental harm, the reasoning continued in para. 223 that: „The Tribunal is of the view that, *by analogy*, where a state exercises a right under international law within the territory of another state, considerations of environmental protection also apply." (emphasis here).

[76] ICJ *International Status of South West Africa* (separate opinion *McNair*) [1950] ICJ Rep 146, 148.

[77] Martin (2018), p. 19.

political orientation).[78] Principle 2 of the 1992 Rio Declaration phrased the principle of prevention in distinct normative language ("State have . . . the responsibility to ensure, that"), whereas when elucidating the polluter-pays principle, Principle 16 gives political guidance at best ("National authorities should endeavour to promote the internalization of environmental cost. . ., taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."). The choice of language in 1992 has had an enduring impact as it still resonates today when the polluter-pays principle is invoced by States and discussed in academic writing.

Polluter-Pays Principle and Environmental Liability

38 Since its introduction by the OECD in 1972, the polluter-pays principle (Chap. 2 ¶ 10 (Sect. 2.2.1)) has left its marks on innumerable international, European and domestic environmental instruments and laws.[79] What was originally perceived as a political instrument for the allocation of costs for pollution prevention and pollution control developed into an all-encompassing principle designed to shift the cost burden for environmental damage to the polluter (Fig. 3.2).[80] This secures the legal principle's place in the environmental-liability context, as illustrated by Directive 2004/35/EC on environmental liability, which provides in Art 1 that: "The purpose of this Directive is to establish a framework of environmental liability based on the 'polluter-pays' principle, to prevent and remedy environmental damage."[81] While it is clear that environmental liability is one way to implement the polluter-pays principle's approach to cost allocation, the question remains whether the principle prescribes the polluter's liability for any environmental damage caused.

[78] Martin (2018), pp. 16–17; See on the various utilisations of „principles" in international jurisprudence, SR Marcelo Vázquez-Bermúdez (ILC), First Report on General Principles of Law, 4 April 2019, UN Doc A/CN.4/732.

[79] OECD, Recommendation of the Council Concerning International Economic Aspects of Environmental Policies, C(72)128, para. 4: "The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called "Polluter-Pays Principle"; available at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0102, last accessed 25 April 2022.

[80] Schwartz (2018), p. 262.

[81] PCA *Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway* (Belgium v Netherlands) (2007) 27 RIAA 35, para. 59.

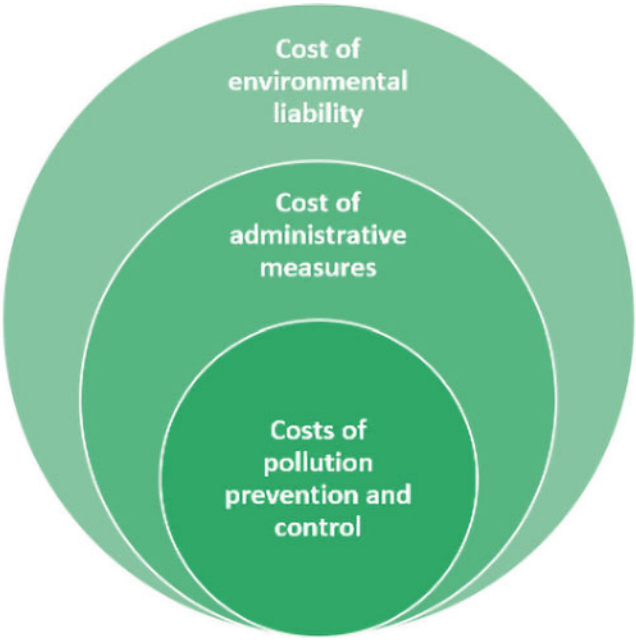

Fig. 3.2 Expansion of the polluter-pays principle, Sources: European Court of Auditors (European Court of Auditors, The Polluter Pays Principle: Inconsistant Application across EU Environmental Policies and Action, Special Report 2021, at 7, available at: https://www.eca.europa.eu/Lists/ECADocuments/SR21_12/SR_polluter_pays_principle_EN.pdf, last accessed 25 April 2022.)

Despite the omnipresent invocation of the polluter-pays principle in international, regional and national instruments, the principle's legal implications are far from clear.[82] The arbitral tribunal in the 2004 *Rhine Chlorides* case supports this view by observing that "(the polluter-pays) principle features in several international instruments, bilateral as well as multilateral, and that it operates at various levels of effectiveness. Without denying its importance in treaty law, the Tribunal does not view this principle as being a part of general international law."[83] On this basis, the tribunal refused to consider the principle under Article 31(3)(c) VCLT, which allows for the systemic interpretation of a treaty by taking into account "any relevant rules of international rules of international law applicable between the parties". Although, **39**

[82] Boyle (1991); de Sadeleer (2005), pp. 21–33; Sands and Peel (2018), pp. 240–244; Kravchenko et al. (2012), p. 53 "perhaps emerged as a customary rule of international law".

[83] This case concerned the Auditing of Accounts between the Kingdom of the Netherlands and the French Republic Pursuant to the Additional Protocoll of 25 September 1991 to the Convention of the Protection of the Rhine against Pollution by Chlorides of 3 December 1976, PCA *Audit of Accounts Between the Netherlands and France in Application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976* (Netherlands v France) (2004) 25 RIAA 267, para. 103 (unofficial English translation of the Award).

it is worth noting that the arbitral tribunal in the 2005 *Iron Rhine case* considered the principle of prevention as falling within the ambit of Article 31(3)(c) VCLT (¶ 33 *et seq*).[84]

40 Given that the polluter-pay principle serves as a label, rationale and guiding principle for a vast variety of instruments concerned with the allocation of environmental costs, it appears to lack the necessary legal precision to support an obligation for States to implement a specific cost-allocation model. By way of example, one can ask the question of who can be classed as a 'polluter'? Is it only those who directly cause the environmental damage or does it also include those who contributed indirectly, such as consumers? The answer here is not obvious from the principle itself but is determined by the relevant rules which give expression to the polluter-pays principle in one way or another.[85] In addition, there is more than one environmental liability model available for States to choose from (Chap. 5) with some of the better-known being centred on:

- civil liability (the horizontal legal relationship between a polluter and an injured party);
- administrative liability (the vertical legal relationship between State authorities and a polluter);
- governmental liability (the vertical legal relationship between a State and an injured party), with the possibility for the State to take, if appropriate, recourse against the polluter.

41 The variety of legal options under the conceptual umbrella of the polluter-pays principle does not diminish its legal status and value as a general principle of international environmental law[86] which, according to ICJ Judge *Cançado Trindade*, justify, inspire, inform and conform to the legal system's rules.[87] In addition, the polluter-pays principle is one of many widely-recognised principles of international environmental law, all of which are interrelated and complementary as they mutually reinforce their legal and conceptual clout.

42 An integrated approach to international environmental principles brings the polluter-pays principle within the scope of the prevention principle the ultimate goal of which is the avoidance of environmental harm.[88] From this perspective, it can be argued that the polluter-pays principle's aim is not only to remedy environmental damage and internalise environmental costs but also to contribute to harm avoidance. The consequence of this understanding is that the polluter-pays principle

[84] PCA *Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway* (Belgium v Netherlands) (2007) 27 RIAA 35.

[85] Schwartz (2010), p. 247; van Calster and Reins (2013), para. 1.55.

[86] See e.g., the 1990 International Convention on Oil Pollution, Preparedness, Response and Cooperation, which states in its preamble (7th recital): "Taking into account of the 'polluter pays' principle as a general principle of international environmental law", 1891 UNTS 78.

[87] ICJ *Pulp Mills on the River Uruguay* (Argentina v Uruguay) (separate opinion Cançado Trindade) [2010] ICJ Rep 135, para. 201.

[88] Duvic-Paoli (2018), p. 167.

does not support environmental liability models that effectively shield the actual polluter from recourse and responsibility.[89]

From this, it follows that it only requires a small step to establish an 'emerging principle' that combines the polluter and preventive principles into the following new rule: The polluters' ultimate[90] responsibility and liability shall not be excluded invariably, indiscriminately[91] and arbitrarily[92]. **43**

3.4 State Responsibility for Transboundary Environmental Harm

The violation of both a duty under either a bilateral or multilateral environmental agreement (¶ 12) or rules of general international law (¶ 14 *et seq*) by a State entails its international responsibility vis-à-vis the injured State (Article 1 ASR) or, depending on the specific rule infringed, vis-à-vis any other State representing a collective legal interest (Article 48 ASR). As a legal consequence, the responsible State is obliged to make reparations (Article 34 ASR) with a monetary payment (compensation) being only one of many means of providing reparation for injury. However, compensation is often provided in practice to offset the environmental damage because restitution in kind is not possible (cf. Article 36 ASR).[93] **44**

In the context of this book's overall topic, namely corporate liability for transnational environmental liability, two ASR issues are of particular interest which will be considered in more detail below. First, under what legal conditions is corporate conduct attributable to a State so that the State is responsible for any transnational environmental damage caused by a given corporation (¶ 46 *et seq*)? Second, are the customary rule on compensation (Art 36 ASR) suitable to provide adequate compensation for damage to the environment (¶ 64 *et seq*)? **45**

[89] This approach allows mandatory insurance for environmentally-hazardous activities (Chap. 5 ¶ 13 (Sect. 5.2)) or state liability (Chap. 11), since effective financial compensation is covered by the polluter-pays principle. In this regard, the principle has to balance compensation and prevention, as the former can be undermined by the polluter's bankruptcy (see the 2000 *Baia Mare Cyanide Spill* case, (Chap. 5 ¶ 5 (Sect. 5.1)).

[90] The phrase ‚ultimate responsibility and liability' allows for cost recovery and recourse.

[91] E.g., if national law and practice releases domestic public and private polluters *per se* from responsibility and liability.

[92] E.g., if national law and practice releases domestic public and private polluters of an economic sector, such as the car industry, from liability without objective reason.

[93] ICJ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) [2018] ICJ Rep 15, para. 31.

3.4.1 Responsibility for Public Activities and Omissions

46 The 1941 Trail Smelter Award carefully noted that "no State has the right to use (. . .) its territory" and thereby addressed public activities. Any State, acting through its organs (Article 4 ASR), can directly cause damage to the environment of the neighbouring State by engaging in a variety of activities, such as weapons tests or public infrastructure projects.[94] By way of example, in the 2015 *Certain Activities and Construction of a Road* case, the ICJ had to assess Nicaragua's and Costa Rica's environmental duties linked to Nicaragua's dredging activities and Costa Rica's road construction.[95]

47

Article 4(1) ASR: Conduct of Organs of a State
"The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or a territorial unit of the State."

48 When acting in their official capacity, State organs represent the State irrespective of whether the act is of a sovereign or commercial legal nature.[96] Proceeding from the preventive obligations under the no-harm rule that applies to both public and private harmful activities (¶ 21), one may conclude that it does not matter whether a State is responsible for a failure to prevent harmful private activities or whether it is directly responsible for an environmentally harmful outcome arising from its pubic activities due to attribution. However, this conclusion would be premature because, with regard to private activities, customary international law acknowledges that a State has limited knowledge of what happens on its territory in the private economic sphere (e.g. the illegal use of CVC-11 gas in Eastern China[97]).[98] Obviously, if the harmful activities are attributable to the State it is not accepted under the rules of State responsibility for the State to exonerate itself by claiming it had no control over or knowledge of the activities. This fact, however, does not turn the State' obligation under the no-harm rule into an obligation of result in the sense that the occurrence of significant transboundary harm caused by State organs necessarily triggers the

[94] PCA *Trail Smelter Case* (United States v Canada) (1941) 3 RIAA 1905, *see also:* PCA *Lac Lanoux Arbitration* (France v Spain) (1957) 12 RIAA 281.

[95] ICJ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) *and Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v Costa Rica) [2015] ICJ Rep 665, para. 100 and 177.

[96] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, YBILC 2001 Vol. II Part 2, UN Doc A/56/10, Article 4 ASR para. 6.

[97] Montzka et al. (2018), p. 413.

[98] Seršić (2016), p. 163.

State's responsibility. Rather, the State's obligation remains a due diligence obligation of conduct because the State does not necessarily have full control over transboundary environmental impacts when implementing governmental projects. Nevertheless, a State has considerably more courses of action available to prevent transboundary environmental damage when such damage is of its own making.

3.4.2 Environmentally Harmful Activities of State-Owned Corporations

The flexible standard of care in international environmental law draws attention to State-owned enterprises (SOEs) and State-controlled entrepreneurial activities. In many industrialised States (OECD States), private producers and private consumers cause the vast majority of environmental damage with SOEs playing a relatively minor role as there are so few of them.[99] By way of contrast, in emerging economies such as China, India and Brazil, as well as post-transition economies such as Russia, Hungary and the Baltic States, governments are still significant shareholders in many large companies carrying out important domestic activities, for example, in the mining and energy sectors as well as in telecommunications, banking and transport.[100] When this is the case the State has, in one way or another, influence on the decisions and activities of the SOE. **49**

Generally speaking, the ILC commentaries on the ASR's rules of attribution are of little help as far as the acts of SOEs are concerned. In the context of Article 4 ASR, which deals with the conduct of the organs of a State, the commentaries do not address the question of whether SOEs can be considered as State organs. Even the commentary to Article 8 ASR, dealing with the private conduct directed or controlled by a State, avoids explicitly mentioning SOEs. In contrast, the ILC commentary to Article 5 ASR does provide some insight into this matter, as seen in the box below. **50**

[99] See the definition of an SOE in OECD, OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015, https://doi.org/10.1787/9789264244160-en, last accessed 25 April 2022: "A state-owned enterprise is any corporate entity recognised by national law as an enterprise and in which the central level of government exercises ownership and control."

[100] OECD, The Size and Sectoral distribution of State-Owned Enterprises, 2017, 8, https://doi.org/10.1787/9789264280663-en, last accessed 25 April 2022.

51 **Article 5 ASR: Conduct of Persons or Entities Exercising Elements of Governmental Authority**
"The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

52 According to the ILC commentary to Article 5 ASR, the fact that (1) a company is classified as public in the domestic legal system, (2) a State participates in a company's raising of capital or (3) the State has ownership of company assets are not decisive criteria for attribution of the company's conduct to the State under Article 5 ASR.[101] Rather, every company, be it State-owned or not, empowered by domestic law to exercise governmental authority falls within the scope of Article 5 ASR. To this end, domestic law has to clearly recognise certain activities of any company in question as having public purposes, in contrast to having private for-profit purposes, to attribute any acts undertaken in performing these functions to the State.[102] Having said that, Article 5 ASR does not rule out that under specific circumstances SOEs can be considered *de facto* organs which, according to the ICJ, fall under the scope of Article 4 ASR (see ¶ 47).[103] The ICJ considers any entity in a relationship of complete dependence on the State as a *de facto* organ, even if it does not enjoy organ status under domestic law.[104] If this complete dependence is established, the legal nature of the act, i.e. whether it was undertaken with governmental authority or as a commercial act, is of no consequence for attribution. In this respect, it is important not to paint all SOEs worldwide with the same brush but to have a closer look at the particulars and traditions of specific States. For example, the author *Ji Li* considers the relationship between the Chinese government and Chinese SOEs as quite different from that of their western counterparts.[105] In any case, special relevance in the context of Article-4 attribution is the dual function of SOEs' executives as both State organs and chief executive officers (CEOs). In

[101] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, YBILC 2001 Vol. II Part 2, UN Doc A/56/10, Article 5 para. 3.

[102] Attribution of a state-owned corporation-act to a state according to Article 5 ASR is of special importance in international investment law, see *Emilio Augustín Maffezini v Spain* ARB/97/7, 13 November 2000, para. 77–83.

[103] ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) [2007] ICJ Rep 43, para. 392.

[104] ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) [2007] ICJ Rep 43, para. 397.

[105] Li (2015), p. 403.

addition, the State's authority to give comprehensive and binding instructions to an SOE's management is also of relevance.[106]

If the prerequisites of neither Article-4 nor Article-5 attribution are given, an SOE must be considered as a private actor. As a rule, any unlawful conduct of private individuals and companies within a State's territory does not lead to the international responsibility of the State for the private conduct unless the conduct is attributable to the State under the strict conditions of Article 8 ASR.[107] 53

Article 8 ASR: Conduct Directed or Controlled by a State 54
"The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

Most importantly, it does not suffice for the purpose of attribution under Article 8 ASR that a private actor has committed an environmentally harmful act on a State's territory or that the State holds a certain percentage of ownership that goes hand in hand with structural control (voting rights) and oversight responsibilities. Unquestionably, a State's voting rights are important factors in the context of Article-8 attribution, together with the right to nominate and dismiss upper management, the right to give specific instructions and to exercise veto powers.[108] However, the ICJ made it plain that for Article-8 attribution it does not suffice that the State has overall control concerning the entity's activities; the State must have instructed or exercised effective control over the harmful act, for example, the introduction of toxins into the transboundary river. This degree of effective control exercised by State organs can be difficult to establish as far as the day-to-day business of an enterprise is concerned, even if it is State-owned. Most importantly, if the management of an SOE acts contrary to instructions issued by the company's oversight bodies in which the State is represented, the State can be deemed as having no effective control over the SOE's acts. As a result, these acts, e.g. clandestine toxic emissions, are not attributable to the State under Article 8 ASR.[109] 55

[106] ICSID *Deutsche Bank v Sri Lanka* ARB/09/2, 31 October 2012, para. 405b.

[107] Contradictory in this respect, the PCA *Trail Smelter Case* (United States v Canada) (1941) 3 RIAA 1905, at 1965, 1966 "Dominion of Canada is responsible in international law for the conduct of the Trail Smelter."

[108] Dereje (2016), pp. 405–407.

[109] Note that *ultra vires* acts (Article 7 ASR) are attributable to the state but Article 7 does not apply to Article 8 ASR, meaning unauthorised private acts are not attributable due to the state's obvious lack of effective control over the conduct.

Chernobyl

56 The Chernobyl nuclear disaster (1986) caused significant environmental damage as a result of nuclear fall-out in Sweden, Germany and the United Kingdom. Even though the Chernobyl Nuclear Power Station was a Soviet SOE, no injured State openly discussed the State responsibility of the Soviet Union based on legal attribution (Articles 4 to 8 ASR) when reserving their right to assert claims for damages against the Soviet Union. From the injured States' statements,[110] it can be concluded that they considered it a source of legal uncertainty that the Soviet Union was not a party to any international convention on the civil liability of operators.[111] Referring to the absence of treaty obligations as a basis of the Chernobyl Nuclear Power Station's operator liability, the Swedish government mentioned "customary international law principles", which probably refers to the no-harm rule and which may be invoked to support a claim against the Soviet Union.[112] Even if legal uncertainties shaped the opinions of the injured States at the time, the Chernobyl case can be used today as an example of the tendency of States to avoid bringing up the delicate issue of attribution as far as SOEs are concerned. More generally, the lack of meaningful international claim and compensation practice in the aftermath of Chernobyl is the reason why the case's significance for the international no-harm rule is rather limited. However, it is noteworthy that after 1986 States rushed to amend existing[113] and negotiate new nuclear civil liability conventions.[114] This illustrates that the international community of States favoured a path that involved the civil liability of SOEs to redress damage rather than pursuing State responsibility triggered by the attribution of the SOE's harmful acts.

[110] Reprinted in Sands and Peel (2018), p. 753 *et seq*.

[111] See Hansard, House of Commons 16 November 1987, Vol 122, Col 888 (Ms Michael Forsyth) available at https://api.parliament.uk/historic-hansard/volumes/6C/index.html, last accessed 25 April 2022.

[112] Correspondence between Sands and the Swedish Embassy in London, 10 December 1887, reprinted in Sands and Peel (2018), p. 753.

[113] In September 1986, less than six months after Chernobyl, experts from both the OECD/NEA and the IAEA concluded that a joint protocol uniting the Paris and Vienna Conventions would be the most practical and effective solution for closing existing nuclear-liability gaps. The result was the adoption, in September 1988, of the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention (Joint Protocol).

[114] E.g., 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage.

3.4.3 *Responsibility of the Home State for Corporate Activities Abroad*

The above considerations focused on the responsibility of a State of origin for transboundary environmental damage caused by a local public or private actor. Even though the legal conditions of the no-harm rule and the responsibility triggered by its violation are relatively clear-cut as far as the State of origin is concerned, they appear too narrow to effectively address environmental harm caused by transnationally operating companies. One aspect that appears unaddressed by the no-harm rule is the responsibility of the home State of a transnational corporation (TNC)[115] whose international subsidiaries operate in other States (so-called 'host States') and where they cause environmental damage. The transboundary aspect here is not the environmental damage but rather the managerial control of the parent company over its subsidiaries. **57**

Texaco Oil Extraction **58**

That the issue of transboundary managerial control of the parent company needs addressing is exemplified by Texaco, a subsidiary of Chevron since 2001, whose oil extraction operations outside of its home State (the USA) between 1964 and 1992 led to serious crude oil contamination of the soil, water pollution, deforestation and soil erosion in Ecuador.[116] In 1995, Texaco reached a US$40 million agreement with the Ecuadorian government for a remediation programme, however, environmentalists subsequently disputed the success of the clean-up efforts. So far, the USA's sole contribution to the case is a US court ruling from 2011, according to which an Ecuadorian Lago Agrio judgment of 2001 requiring Chevron to pay US$9.5 billion for the environmental damage is not enforceable in the US due to serious procedural defects (judicial corruption).[117]

The academic debate about home-State responsibilty for environmental damage in the host State is split along three legal avenues: the direct international responsibility of the parent company and/or subsidiary (Chap. 4), the liability of the parent company under the laws of the home State (Chap. 7) and the responsibility of the parent company's home State, which is the focus of this Chapter. As discussed below (Chap. 7) a home State has the right to regulate the activities of its **59**

[115] A TNC is characterised by geographically dispersed units whereby its headquarters and subsidiaries are located in different countries, see Sageder and Feldbauer-Durstmüller (2019), pp. 1 *et seq*.

[116] Morgera (2009), p. 6.

[117] The US ruling has been echoed by the decision of an arbitral tribunal administered by the Permanent Court of Arbitration, PCA Case No 2009-23, Chevron v Ecuador, Second Partial Award on Track II of 30 August 2018, para 10.13.

corporations outside of its territory as long as the home State has some accepted basis for jurisdiction, such as the active personality principle linked to the corporation's nationality (Sect. 7.7). It is, however, a completely different matter whether home States are obliged under international law to diligently take appropriate measures to prevent TNCs from damaging their host State's environment either directly or through their subsidiaries.

60 **Canatuan Mining Project**

In 2004, a representative of a Philippine municipality visited Canada to raise concerns about alleged violations of environmental and human rights at the Canatuan mining project on the island of Mindanao. The mine operator was owned by Canadian mining company TVI Pacific.[118] In reaction to these complaints, the Parliamentary Subcommittee on Human Rights and International Development expressed concerns that Canada does not yet have laws to ensure that the activities of Canadian mining companies abroad conform to human rights standards. In its report to the Canadian Parliament, the Committee called for "clear legal norms" to ensure that Canadian corporations and residents were held accountable for environmental and human rights violations abroad.[119] In October 2005, the Canadian government rejected the Committee's recommendation to establish accountability rules. While the Government acknowledged that States are primarily responsible for the promotion and protection of human rights as well as the environment, it deemed that Canadian laws with extraterritorial application would conflict with the sovereignty of foreign States.[120]

61 Considering the reluctance of the overwhelming majority of home States to force their TNCs into compliance with environmental norms in their foreign operations, it is difficult to establish that there is State practice and *opinio iuris.* (¶ 15 *et seq*) indicating the conviction of home States that they are legally obliged to regulate their TNCs' worldwide environmental conduct. This creates an obvious problem as such a conviction would be the basis of the home State's possible international duty to prevent harm caused by a TNC abroad. That said, there is no denying that the harm-prevention rule has the potential to evolve in this direction, as past developments of the traditional no-harm rule illustrate:[121] Whereas in 1941 the Trail Smelter award's focus was on reparation, Principle 21 of the 1972 Stockholm Declaration shifted the emphasis of the rule to States' positive duty to prevent. In addition, Principle 21 extended the no-harm rule to the global commons, which was declared a part

[118] The case is reported in Seck (2008), p. 180.

[119] House of Commons, Standing Comm. On Foreign Affairs & International Trade, 1st Sess, 38th Parl., 14th Report: Mining in Developing Countries 1 (2005) (Can) at 3.

[120] Seck (2008), p. 120.

[121] See Brent (2017), pp. 32–44.

of customary international law by the ICJ in the 1996 Nuclear Weapons Advisory Opinion.[122] Fourteen years later, the ICJ identified in the 2010 *Pulp Mills* case definite procedural obligations as part of the no-harm rule. All of this gives rise to legitimate expectations that the no-harm rule has not yet reached the end of its legal development. Most importantly, the nexus between human rights and a healthy environment may mean that customary environmental due-diligence obligations of a TNC home State may develop in the wake of extraterritorial human rights obligations (Chap. 10; Sect. 10.2).[123]

62 Having already moved ahead of general environmental law in this regard, human rights law cautiously embraces a duty of the home State to ensure that a parent company uses its corporate influence over its international subsidiaries to ensure that the latter respect human rights standards in host States. The Human Rights Committee in its recent General Comment No. 36 (2018) on Article 6, which deal with the right to life, elucidated that States parties to the ICCPR must "take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities taken by corporate entities based in their territory or subject to their jurisdiction, are consistent with Article 6 (. . .)."[124] In communication No. 2285/2013 (*Yassin v Canada*) of 2017, the Human Rights Committee took a more cautious tone by observing that "human rights obligations of a State on its territory cannot be equated in all respects with its obligations outside its territory". Nevertheless, the Committee pointed out that there are situations where a State party has an obligation to ensure that rights under the ICCPR are not impaired by extraterritorial activities conducted by enterprises under its jurisdiction, particularly in cases where violations of human rights are very serious.[125]

63 In the same General Comment No 36 (2018), the Committee underlined that the right to life has an environmental dimension, noting that environmental degradation and climate change constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The Committee thus concluded that the obligations under international environmental law should conform to the content of Article 6 of the International Covenant on Civil and Political Rights (ICCPR).[126] When considering all of these elements of the Human Rights Committee's interpretation of Article 6 ICCPR as a whole, the obligation of

[122] ICJ *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, para. 29.

[123] Viñuales (2016), p. 218.

[124] Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life—Doc. CCPR/C/GC/36, 2018, para. 22 (footnotes omitted).

[125] Human Rights Committee, Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2285/2013, 26 October 2017, Doc. CCPR/C/120/D/2285/2013 para. 6.5.

[126] Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life—Doc. CCPR/C/GC/36, 2018, para. 62.

the home State to respect the environmental aspects of the right to life by regulating its TNC's transnational operations begins to take on a more substantive shape. Nevertheless, a word of caution is due: in contrast to human-rights courts, the Human Rights Committee lacks the legal power to authoritatively interpret the ICCPR as a 'living instrument'. Even though the international community, including the ICJ, ascribes great weight to the interpretations of the Committee,[127] progressive developments of obligations under the ICCPR require either the explicit or implicit acceptance of States parties over a certain period (cf. Article 31(3)(b) VCLT).[128] States parties have predominantly refrained from commenting on Draft Comment No. 36 before its adoption by the Human Rights Committee,[129] however, this silence does not necessarily mean that all States parties share the Committee's views. This is also evidenced by the heated debate involving the earlier Zero Draft on a "legally binding instrument to regulate (. . .) the activities of transnational corporations and other business enterprises", published by the UN Human Rights Council's intergovernmental working group on 16 July 2018.[130] Draft Article 9 of the Zero Draft stipulated home-State obligations comparable to those described in General Comment No 36 and had provoked harsh criticism by industrial States, most notably the European Union and its Member States (Chap. 4 ¶ 40 *et seq* (Sect. 4.2.3)).[131] Despite this dissent, the Human Rights Committee's extensive interpretation of the States parties' obligation vis-à-vis transnationally operating corporations is the first small step towards an internationally recognised responsibility for a home State if it fails to do all in its power (due diligence) to prevent its companies from causing environmental damage and human suffering in host States.

[127] ICJ *Ahmadou Sadio Diallo* (Republic of Guinea v Democratic Republic of the Congo) [2010] ICJ Rep 639, para. 66.

[128] ICJ *Application opf the International Convention on the Eliminationof All Forms of Racial Discrimination* (Qatar v United Arab Emirates), Judgment of 4 February 2021, para 101.

[129] But see Canada: "The Committee's interpretation of Article 6 attempts to expand the scope of the Covenant beyond the territory under the jurisdiction of the State. Such an interpretation would impinge on well-established principles of sovereignty. Canada requests that the General Comment reflect the exact language of Article 2(1) of the Covenant." USA: "Similarly, the United States does not agree with the Committee's assertions of the positive measures articulated in paragraphs 26" (in the adopted General Comment para. 22); The Netherlands: "Additionally, the text of paragraph 26 referring to corporate entities goes beyond the UN Guiding Principles on Human Rights and Business, which does not require States to regulate extraterritorial activities of businesses domiciled in their territory and/or jurisdiction." online available at https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx, last accessed 25 April 2022.

[130] Zero Draft of the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises**,** available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf, last accessed 28 August 2022.

[131] Cf. Zamfir, European Parliament Research Service, Briefing: Towards a binding international treaty on business and human rights, November 2018, p. 10, 11, available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630266/EPRS_BRI(2018)630266_EN.pdf, last accessed 25 April 2022.

3.4.4 State Responsibility and Compensable Damage to the Environment: The ICJ Wetland Compensation Case

In 2018, the ICJ had the opportunity to adjudicate for the first time in its existence on a claim for compensation for environmental damage (*Wetland Compensation* Case).[132] The case concerned compensation owed by Nicaragua to Costa Rica brought about by Nicaragua's excavation activities in a wetland border area protected under the Ramsar Convention. Highly anticipated by international environmentalists, the judgment is indicative of the general reluctance of the international judiciary to depart from an economy-centred view on redress for environmental harm. This general observation is valid irrespective of whether a State caused the environmental harm (*Wetland Compensation*) or a corporation (*Trail Smelter*).[133] **64**

The *Wetland Compensation* case illustrates the dilemma in which the ICJ finds itself: on the one hand, the Court acknowledged the value of an intact environment but, on the other hand, it struggled to properly quantify environmental damage due to its economy-centred value system. Having developed into an important international environmental court for inter-State disputes, the ICJ begins with a promising statement on the intrinsic value of the environment: "(. . .) it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself, in addition to expenses incurred by an injured State as a consequence of such damage."[134] **65**

With regard to the valuation of the lost or impaired environmental goods and services, the ICJ took the view that international law does not prescribe specific methods of valuation and thus opted for a holistic approach by considering the ecosystem as a whole rather than attributing monetary values to specific categories of environmental goods and services with different recovery periods.[135] Despite this auspicious point of departure, which may have an important impact on future environmental law cases before other international courts and tribunals, the ICJ judgment itself did not live up to the expectations of many. Besides stating the fact that the ecosystem should be treated as a whole, the Court abstained from outlining the parameters of any possible overall valuation. After discussing the methods proposed by Costa Rica as the applicant ('ecosystem approach') and **66**

[132] ICJ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) [2018] ICJ Rep 15 (so-called Wetland Compensation Case).

[133] Kindji and Faure (2019), p. 7.

[134] ICJ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) [2018] ICJ Rep 15, para. 41.

[135] ICJ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) [2018] ICJ Rep 15, para. 78.

Nicaragua as the respondent ('cost of replacement approach'), the Court ultimately settled on what it considered a "reasonable" amount of damages.[136] That said, the Court deemed that the removal of approximately 300 trees to be the most significant damage. In this respect, the ICJ awarded Costa Rica a moderate sum (US$120,000) in direct relation to the costs and expenses incurred in preventing irreparable prejudice to the wetland which was degraded by Nicaragua's excavation activities.[137] Most importantly, the Court did not make any equity considerations, such as the character of the affected terrain and the implications of deforestation for climate change.[138] In relation to this, Judge Bhandari's criticism is hardly surprising when he noted in his separate opinion that "(o)nly if those causing harm to the environment are made to pay beyond the quantifiable damage can they be deterred from causing similar harm in the future."[139]

67 Another prominent issue in environmental litigation, the causal nexus between damage and unlawful activity, was only shallowly addressed by the ICJ in the *Wetland Compensation case* and even then, it was provided without any legal guidelines of practical value apart from the observation that it is within the Court's discretion to determine whether the causal nexus is sufficiently proven:

> "In cases of alleged environmental damage, particular issues may arise with respect to the existence of damage and causation. The damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court. Ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered."[140]

In the given case, the Court had no problems establishing a causal link between the four categories of environmental goods and services for which Costa Rica claimed compensation (trees, other raw materials, gas regulation and air quality services, as well as biodiversity) and Nicaragua's excavation activities in the area. It considered the impairment and loss without further ado a direct and certain consequence of the activities.[141] As such, the *Wetland Compensation* case can be regarded as an example for a rather conventional causal nexus determination and is therefore unrewarding for cases of cumulative damage or long-standing damage to the

[136] ICJ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) [2018] ICJ Rep 15, para. 52 and 86.

[137] ICJ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) [2018] ICJ Rep 15, para. 86.

[138] ICJ *Certain Activities Carried Out by Nicaragua in the Border Area* (dissenting opinion *Dugard*) (Costa Rica v Nicaragua) [2018] ICJ Rep 119, para. 7.

[139] ICJ *Certain Activities Carried Out by Nicaragua in the Border Area* (separate opinion *Bhandari*) (Costa Rica v Nicaragua) [2018] ICJ Rep 96, para. 19.

[140] ICJ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) [2018] ICJ Rep 15, para. 34.

[141] ICJ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) [2018] ICJ Rep 15, para. 75.

environment not attributable to a single entity or State but to a sector or types of hazardous and harmful activities that are at the core of an increasing number of environmental litigations.

3.5 State Liability for Transboundary Environmental Damage

As discussed above (¶ 3 *et seq*), the legal concept of State liability for environmental harm covers all the rules which are not concerned with the international wrongfulness of a State's action or inaction. Consequently, operationalising State liability requires a conventional or customary primary rule which can be used to oblige a State to pay damages for environmental harm. In the absence of any general treaty on State liability for environmental damage, customary international law remains the main option as a source a primary liability rule (¶ 14 *et seq*). Such a rule would not only require the supporting general practice of States, such as domestic jurisprudence, laws or international treaties to this effect, but also States' acceptance that these practices are required under international law (*opinio juris*).[142] At first glance, the Trail Smelter Award, considered to be a landmark decision of modern international environmental law[143], seems to provide such a liability rule.[144] However, the wording of the 1941 award points towards Canada's responsibility for transboundary environmental harm rather than Canada's liability (¶ 7).[145] Similarly, international treaty practice does not support the existence of a customary rule of State liability for lawful acts that cause damage. If a plethora of liability instruments were in existence that amounted to sufficient State practice and *opinio juris*, an argument could be made for a rule under customary international law. However, among the 1414 currently active MEAs (¶ 11), only one imposes liability on States for damage caused by lawful activities under their jurisdiction or control, namely the Convention on International Liability for Damage Caused by Space Objects.[146] The Convention on the Law of the Non-navigational Uses of International Watercourses considers State liability an option if the State of origin and the affected State agree on it (Article 7 para 2; ¶ 28).[147] By way of comparison, 13 MEAs establish a regime that focuses

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[142] Article 38(1)(b) Statute of the International Court of Justice: "international custom, as evidence of general practice accepted as law".

[143] Schoenbaum (2006), p. 196.

[144] PCA *Trail Smelter Case* (United States v Canada) (1941) 3 RIAA 1905; amongst the wealth of academic writing see Bratspies and Miller (eds) (2006); Read (1963), p. 213; Mickelson (1993), p. 219.

[145] PCA *Trail Smelter Case* (United States v Canada) (1941) 3 RIAA 1905, 1965.

[146] Convention on International Liability for Damage Caused by Space Objects of 29 March 1972, entered into force 1 September 1972) 961 UNTS 13810.

[147] Convention on the Law of the Non-navigational Uses of International Watercourses of 21 May 1997, entered into force 17 August 2014, 2999 UNTS 77.

on the civil liability of private or public operators for ultra-hazardous activities, although only four of such agreements are in force (Chap. 5 ¶ 2 *et seq* (Sect. 5.1)).[148] At least when seated at the negotiating table, civil liability is a more palatable option for States than their own liability.

69 The Liability Convention for Damage Caused by Space Objects regulates the highly specialised area of outer space and is not predominantly environment orientated, which make the Convention *lex specialis* rather than evidence of a general rule. Article 7(2) of the 1997 Convention of the Non-navigational Uses of International Watercourses makes provision for compensation, even if the State using the watercourse complied with its preventive obligations pursuant to Article 7(1). However, the Convention only stipulates the duty to discuss State liability with the affected watercourse States after significant harm has occurred, which is exemplary for States' reluctance to commit in advance to their being liable. When negotiating the 2010 Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Regress, the topic "State liability for transboundary damage caused by living modified organism" was quickly removed from the table due to a lack of support.[149] The same thing happened during the negotiations of a liability instrument implementing Art 16 of the 1976 Barcelona Convention for the Protection of Marine Environment and the Coastal Region of the Mediterranean:[150] Not only were the Contracting Parties unable to agree on a legally binding instrument and had to settle for guidelines (Chap. 5 ¶ 37 *et seq* (Sect. 5.4)), they were also unwilling to support any concept that includes residual State liability if, for example, the liable operator defaults.[151] Finally, the liability-hostile interpretative statements to environmental treaties such as the 2015 Paris Agreement (Chap. 16) and the 1979 Convention on Long-Range Transboundary Air Pollution v 1979 (footnote to Article 8) show that, at least in principle, States will not readily accept liability unless they can be made internationally responsible for unlawful acts or omissions.

70 The lack of conventional liability rules is not remedied by general principles of law. The polluter-pays principle does not support a primary rule of State liability for transboundary environmental damage. At best, the principle can justify operator liability under international law, irrespective of whether the operator is public or private (¶ 38 *et seq*). However, State liability and operator liability are two different liability concepts since only the former is triggered by the occurrence of transboundary environmental damage regardless of the operator to whom the damage is attributable.

71 The aspects discussed above, when considered as a whole, make it evident that customary international law does not currently provide any rule on State liability for

[148] Daniel (2003).

[149] Lefeber (2016), p. 80.

[150] The 1976 Barcelona Convention (1102 UNTS 44) was amended several times; what was originally Art 12 is now the 1995 amendment to Art 16.

[151] Guideline A para. 2, Doc UNEP(DEPI)/MED.IG,17/10 of 18 January 2008; 210; for details see Scovazzi (2009).

transboundary harm due to a lack of meaningful State practice and, most importantly, *opinio iuris* (¶ 16).

3.6 Conclusion

72 Much has been written about State responsibility for transboundary environmental harm, not only to make sense of the 1941 *Trail Smelter Award* in a modern context but also because of the growing number of ICJ judgments that shape the modern understanding of the no-harm rule and the preventive obligations of States attached to it. Despite a number of remaining legal uncertainties, among them the shape and form of possible substantive due-diligence obligations, the no-harm rule, or the harm-prevention rule as it is also referred to, is a beacon of hope for international environmental law. This cannot be said about the state of affairs surrounding States' potential liability for transboundary environmental harm. The notion that the State of origin could be primarily, residually and second-tier liable for transboundary environmental damage, irrespective of any wrongdoing or lack of diligence, has little to no governmental support in international negotiations. This is especially true for any commitment within multilateral environmental regimes which, from the perspective of States, would be incalculably expensive, and therefore intolerable, public-liability risks.

73 What is of particular interest in the context of this study are any obligations of States under customary international law and general principles of environmental law to provide for corporate liability for transboundary environmental damage. Therefore, the question arises whether States' own substantive due-diligence obligations under the no-harm rule could encompass a State's duty to ensure the liability of a corporation in cases where a risk of transboundary environmental harm materialises. Even though civil liability can rightly be considered an important part of any prevention strategy, a customary rule that links corporate liability provisions to States' substantive obligations under the no-harm rule does not exist yet. Another avenue of interest pursued by this Chapter is the use of general principles of international environmental law to establish a duty for States to provide for corporate environmental liability within their domestic legal systems. The polluter-pays principle appears to be ideally suited for this purpose, however, it is still essentially only a policy guideline that allows for many different legislative solutions to apply civil liability for any environmental harm done. That said, it can be argued that the combined principles of polluter-pays and prevention have the potential to restrict the legislative margins of policy choices when States shape their national liability regimes: the polluters' ultimate responsibility and liability for any significant environmental damage caused shall not be excluded invariably, indiscriminately and arbitrarily.

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