Annex 656

C. W. Jenks, "Liability for ultra-hazardous activities in international law", *Recueil des cours de l'Académie de droit international de La Haye*, 1966, pp. 99-200, pages 105-110, 193-196

LIABILITY FOR ULTRA-HAZARDOUS ACTIVITIES IN INTERNATIONAL LAW

by

C. WILFRED JENKS

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CHAPTER I

THE SCOPE AND NATURE OF ULTRA-HAZARDOUS LIABILITY IN INTERNATIONAL LAW

It has been argued by leading authorities, among them Sir Gerald Fitzmaurice,[1] that the theory of objective risk for ultra-hazardous activities increasingly accepted in certain municipal legal systems cannot be held to extend to international law. If by this it is meant that there is no comprehensive and clearly thought out theory or principle of ultra-hazardous liability, based on authoritative international decisions or widely ratified conventions and generally accepted, the proposition is a valid one. If the argument were to be carried a stage further, and to become a contention that there is no place in international law for the principle of liability for the objective risks arising from ultra-hazardous activities, it would, apart from the cogent objections of policy to such a view, be confronted at once with some awkward facts.

Important international conventions specify that civil liability for aviation hazards is not dependent on proof of fault or negligence; carriers' liability is presumed unless disproved on one of certain specified grounds by the carrier: liability to third parties on the surface attaches on proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom. The principle of international liability for air and water pollution without proof of fault has been a matter of controversy but is commanding increasing acceptance. Important international conventions relating to nuclear damage provide in terms that the civil liability of the operator is "absolute", or attaches "upon proof that such damage or loss was caused by a nuclear incident", or that the operator is absolutely liable for any nuclear damage upon proof that such damage has been caused by a nuclear incident; they also specify that these

1. *Yearbook of the International Law Commission*, 1957, Vol. I, p. 164.

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rules applying the theory of objective risk for ultra-hazardous activities to civil liability do not affect the possible international liability of the State for nuclear damage. Responsible proposals by governments concerning liability for space vehicle accidents provide that States shall be liable to each other for damage resulting from such accidents without proof of fault. In brief, the principle of liability for the objective risk arising from an ultra-hazardous activity has been fully accepted in special cases defined by international agreement, though the precise nature and extent of such liability, and the relationship of the civil and international elements therein, may still be subject to debate.

There are therefore, stating the matter in the most guarded terms, a growing number of significant exceptions to the alleged principle that liability in international law rests exclusively upon fault (including negligence); are they to be regarded as anomalous exceptions, or are they an anticipation of a major qualification of the principle, not yet fully realised or clearly stated, but increasingly necessary and apparent?

Seen in this light, the question is not whether international law can or should recognize ultra-hazardous liability but how far it recognizes such liability, whether such liability exists only in specific cases for which special provision has been made or whether it rests on some more general principle which we may expect to have a widening range of new applications, whether the liability is "absolute", "strict", or "without proof of fault", or constitutes some other variant of these possibilities, and how the elements of civil and international liability are related to each other. On either view of the scope of liability some difficult issues arise; on neither can we avoid the general questions whither the law is moving in the matter and how fast and how far it should be developed. On the view that such liability exists only in specific cases, it becomes necessary to consider, *de lege ferenda,* how many further scientific and technological developments will call for special action analogous to that which has been, or is being, taken in respect of aviation, nuclear energy and space. On the view that such liability rests on a general principle, it is necessary to consider the potential range of applications of the principle. On either view important questions concerning

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the events giving rise to liability, security for liability, the limitation of the amount of liability, joint liability, the extinction of rights, jurisdiction and execution call for solution. On either view the question arises how far the State is liable in respect of ultra-hazardous occurrences within, or originating within, its jurisdiction.

The expression ultra-hazardous activities is not a term of art and calls for some definition if it is to serve as the basis of our discussion. It does not imply that the activity is ultra-hazardous in the sense that there is a high degree of probability that the hazard will materialize, but rather that the consequences in the exceptional and perhaps quite improbable event of the hazard materializing may be so far-reaching that special rules concerning the liability for such consequences are necessary if serious injustice and hardship are to be avoided. Liability is shifted from fault (including negligence) to risk with a view to spreading more fairly the possible consequences of improbable but potentially disastrous misadventure, making the burden of insurance or the provision of other security for compensation in the event of misadventure a cost of the adventure, and eliminating a burden of proof which, in view of the nature of the risk, the victim cannot reasonably be expected to discharge and, in many cases, could never discharge; he can prove legal causation, in the sense of showing a required relationship between the fact of certain activities having been undertaken and the fact of damage, but he cannot prove what actually happened or hope to prove fault or negligence.

So conceived, liability for ultra-hazardous activities is essentially a practical problem rather than a question of principle and is increasingly so treated in negotiations among States and the deliberations of international organisations; the practical solutions adopted are unlikely to be viable unless they can be expressed in coherent and acceptable principles but practical considerations rather than general principles must be taken as the starting point; this is equally true of the civil and international aspects of such liability.

We can therefore afford to pass lightly over the varying fortunes of the concepts of fault and strict liability in the historical development of municipal law. It is true that at one stage the natural evolution of a maturing legal system appeared to be from absolute liability

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to fault, much as it also appeared to be from status to contract; it is no less true that in a later stage of development strict liability in an increasingly important range of cases, no less than status, has again become a marked characteristic of developed legal systems. With the modern development of statutory offences this has been true not only in tort but in crime; in social legislation, it has been the basis of employment injury schemes; and in tort the concept of strict liability has widened from dangers escaping from the land to embrace the more varied hazards of an industrialized society, including what are sometimes described as operational and product liability.

Nor should we attach any excessive importance to the consideration that there has been a similar evolution from absolute liability to fault (including negligence) in the course of the historical development of international law. It is, of course, both true and important that whereas Anzilotti and other positivist writers, rejecting the position of Grotius, expounded the view that the State, being incapable of a culpable intention, was responsible not for fault but for a fact contrary to international law, it is now accepted that fault (including negligence) is, in general, the basis of State responsibility in international law, especially in respect of occurrences not directly attributable to the acts or omissions of the State or its agents acting in the exercise of public authority. But the concept of ultra-hazardous liability does not involve any challenge to the principle that fault is, in general, the basis of State responsibility in international law or any attempt to revert to the principle of absolute liability as the general basis of responsibility; it represents a necessary and increasingly important but nevertheless limited exception to the principle of fault in cases in which that principle is inapplicable and impracticable.

The importance of the matter derives from the scientific and technological developments of our time.

The central and dominating fact is that scientific and technological progress has completely changed man's relationship to his environment. He can now soar into the air and descend into the sea; he can venture beyond the atmosphere of the earth and hopes to pierce the mantle which encloses its core; his mastery of chemical processes, unaccompanied by any corresponding social control, has resulted in

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widespread and increasingly dangerous pollution of the air and water on which he depends for life; his mastery of physical processes, likewise unaccompanied by any corresponding social control, has enabled him to release the explosive energies of the atomic nucleus in ways which may affect the fundamental constitution of matter in a manner beyond further human control and imperil the processes of biological reproduction; he is now, without having yet evolved an appropriate social control for such endeavours, seeking a mastery of weather and climate which could change profoundly, sometimes for better and sometimes for worse, natural environment, and the conditions of life dependent thereon, throughout the world; he is placing increasing reliance on electronic and cybernetic devices, likewise not yet subject to any appropriate social control, any error by which might produce far-reaching natural or political consequences of an irrevocable nature; molecular biologists, no longer content with the mutation of plants and animals, and also working outside any accepted social control, are now seeking a mastery of biological processes which envisages the biological and psychological reshaping of man.

These developments all transcend and bestride frontiers. As a minimum they call for common international rules; they may involve international liability.

There is, in the nature of things, nothing concerning most of these matters, all of them developments of the present century and most of them developments of the last twenty-five years, in the traditional textbooks of international law. Are they to be regarded as extra-legal phenomena which lawyers can hardly hope to understand and will be wise to leave to the scientists and technologists, if not permanently at least for some time to come? Or do they pose immediate problems for the law? The question is a fundamental one for it poses starkly the issue whether international law has or should have anything significant to say concerning these manifold developments which have completely transformed human life in our time and profoundly modified the basic elements of international relations.

Before venturing any answer to the question we will be wise to consider, with special reference to the question of liability for the objective risk of ultra-hazardous activities, how far these developments

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have been reflected in the emergence of new legal instruments, precedents and rules of law. On some of these matters, notably aviation, pollution, nuclear energy and space, there are already accepted principles translated with varying degrees of authority and precision into positive law in the form of custom, judicial decision, authoritative declaratory pronouncement or treaty; as regards others the lawyers have barely begun to grapple with matters which are now the object of daily debate among the scientists. In seeking an overall view of the position we must be content with a general picture of some of the leading developments in each of the fields in which we already have at least embryonic rules of law and a general indication of some of the questions which may arise in other fields. In the light of such a survey we can attempt to define some of the questions of principle which require fuller consideration and to sketch some possible lines of development. What is now called for is a general view of the subject as a whole. There is already a copious and highly specialized literature on such matters as the liability of the operators of aircraft, liability for pollution, and nuclear liability, much of it by writers with great practical experience, and there is an extensive though more speculative literature concerning space liability. What is still lacking is a sustained attempt to view these and related matters as parts of a wider problem.

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CHAPTER XII

A DECLARATION OF LEGAL PRINCIPLES CONCERNING ULTRA-HAZARDOUS LIABILITY?

Ultra-hazardous liability is clearly a matter with which international lawyers may expect to be increasingly concerned over a considerable period of time. It is one of the crucial problems which the progress of science and technology has posed for the law. The legal elements in the problem, which must be considered in a broader political and social context, include both large questions of principle and complex technicalities. Both the large questions of principle and the technicalities will require much further study; negotiations for international agreements concerning these matters may be protracted over a period of years; on some matters there may in the course of time be important international and national judicial decisions. Meanwhile the question arises whether any major step can be taken towards dealing with the problem as a whole in a responsible and authoritative manner corresponding to its importance.

The Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, unanimously adopted by the General Assembly of the United Nations on 13 December 1963, affords a highly suggestive precedent. A Declaration of Legal Principles Governing Ultra-Hazardous Activities Generally, adopted in the same authoritative manner, would be a comparable growing point for the future development of the law. It is not premature to envisage the possibility and possible content of such a declaration.

One of the difficulties of the matter is that the scope of the problem, and the degree of uncertainty concerning future scientific and technological developments, will create a natural reluctance to formulate principles, and even more markedly to enter into firm obligations, not yet tested by practical experience. Any such declaration must therefore be in general terms.

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It might nevertheless enunciate certain general principles which might conceivably be stated somewhat as follows:

1. The common interest of mankind in ensuring that the hazards of scientific and technological innovation and of continuing ultra-hazardous activities are equitably borne and do not fall upon their chance victim, and that such innovations and activities do not destroy, disrupt, disintegrate or pollute the natural environment on which human life and welfare depend or release forces having such a tendency which are liable to escape from human control, is a matter of public policy of general, profound and continuing international concern.
2. Every State has an obligation to co-operate in preventive measures for the avoidance of known and foreseeable hazards from ultra-hazardous activities in accordance with appropriate international conventions and regulations.
3. Every State has an obligation to participate in procedures of consultation and inquiry for the avoidance of unforeseen hazards before authorizing within its jurisdiction or under its authority scientific or technological innovations or continuing ultra-hazardous activities which may have a substantial influence on natural environment to the detriment of the world community or of other States or their nationals.
4. Every State has an obligation to avoid injury to the world community or to other States or their nationals from ultra-hazardous activities occurring or originating within its jurisdiction or undertaken on its behalf or with its authority.
5. Every State is liable for injury to the world community or to other States or their nationals from ultra-hazardous activities occurring or originating within its jurisdiction or undertaken on its behalf or with its authority.
6. Liability for injury from ultra-hazardous activities exists without proof of fault.
7. Every State is responsible for ensuring the provision of adequate financial security for the discharge of liability for injury from ultra-hazardous activities occurring or originating within its jurisdiction or undertaken on its behalf or on its authority; where the

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potential liability exceeds the available resources international co-operation in the provision of such security is desirable.

8. Liability for injury from ultra-hazardous activities is limited in principle to a prescribed amount to be fixed in respect of particular hazards by international agreement or in default of such agreement by the law of the jurisdiction where the matter arises.
9. No State may plead jurisdictional immunity in a matter arising from an ultra-hazardous activity.
10. Disputes between States concerning ultra-hazardous liability not settled by agreement between the parties shall, unless the parties otherwise provide, be referred for decision to the International Court of Justice.
11. Injury from ultra-hazardous activities includes loss of life or personal injury and the destruction or loss of, or damage to, property or economic interests.
12. Ultra-hazardous activities comprise all activities which involve a risk of serious harm on an international scale which cannot be eliminated by the exercise of the utmost care; subject to any exception accepted by common usage as not involving such a risk they include all activities which involve or may occasion a substantial change in the natural environment of the earth or another State, significant pollution of air or water, the release of nuclear or other sources of energy liable to escape from human control, disturbance of the equilibrium of geophysical forces and pressures, the modification of biological processes, the creation of automata a major error of which may be irreparable, and impact damage from such sources as aircraft in flight and spacecraft.

Thirty years ago international law was described by a great scholar with deep insight into the political foundations of the world community, Alfred Zimmern, as an amalgam of survivals from past conditions, rules of etiquette, and anticipations of things to come, rather than a body of rules governing the life of the international community, an expression of the life of a true society commanding obedience because it commands respect as a necessary element in the life and progress of the society. The criticism was harsh, as those of us among his students, colleagues and admirers who were train-

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ed in the law insisted at the time, but not wholly misplaced. It is much less applicable to the law as it has now evolved. How far it will have any continuing application to the law of tomorrow will depend in large measure on the progress made in bringing within a new world of law the impact of advanced science and technology upon contemporary society. A new synthesis of law, science and society is an essential condition of developing successfully a generally accepted and effective common law of mankind. A Declaration of Legal Principles concerning Ultra-hazardous Activities would be a useful element in the gradual development of such a synthesis.

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Annex 657

A. Boyle, "State responsibility and international liability for injurious consequences of acts not prohibited by international law: a necessary distinction?", *International and Comparative Law Quarterly*, 1990, pp. 1-26, pages 6-8

STATE RESPONSIBILITY AND INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW: A NECESSARY DISTINCTION?

ALAN E. BOYLE*

I. INTRODUCTION

THE topic "International Liability for the Injurious Consequences of Acts Not Prohibited by International Law" has been on the agenda of the International Law Commission since 1978.[1] Despite adopting an ever narrower focus, it remains a difficult and controversial one. There are two major reasons for this.

First, at a theoretical level, it is not clear that the conceptual basis on which it is distinguished from State responsibility is either sound or necessary. Second, at a more practical level, it is questionable whether it represents a useful basis for codification and development of existing law and practice relating to environmental harm, the field in which the Commission has mainly located the topic.

From either perspective, it is liable to seem at best a questionable exercise in reconceptualising an existing body of law, or at worst, a dangerously retrograde step which may seriously weaken international efforts to secure agreement on effective principles of international environmental law. The purpose of this article is to explore the arguments for the new topic and to examine briefly the Commission's main proposals.

II. STATUS, ORIGINS AND SCOPE OF THE TOPIC

A. *Present Status*

The first special rapporteur presented his preliminary report to the Commission in 1980.[2] Four more reports,[3] a schematic outline[4] and five

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1. (1978) II–2 Y.B.I.L.C. 149 *et seq*.
2. (1980) II–1 Y.B.I.L.C. 247.
3. (1981) II–1 Y.B.I.L.C. 103; *idem* (1982) II–1 51; *idem* (1983) II–1 201; *idem* (1984) II–1 155.
4. *Idem* (1982), p.62; *idem* (1983 am.) II–1 223.

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equality of States precluded claims of absolute freedom of conduct and absolute freedom from harm, and that the burdens of socially desirable activities had to be shared equitably.[46]

B. *The Second Rapporteur's Approach and Draft Articles*

The second rapporteur has retained the topic's basic conceptual framework, and the original schematic outline,[47] but his approach indicates significant changes in emphasis. The effect of these is:

(1) to focus more clearly on strict liability for transboundary harm as a primary duty, stronger than a negotiable expectation;[48] and
(2) to acknowledge the co-existing responsibility of States for breach of obligations of notification, negotiation and prevention of harm.[49]

Both changes further narrow the topic and its divergence from the regime of State responsibility for environmental obligations; they also make it easier to relate to State practice.[50]

These points are reflected in the new draft articles, which are based on three guiding principles similar to those of the first rapporteur:[51]

(1) every State must have the maximum freedom of action within its territory compatible with respect for the sovereign equality of other States;
(2) the protection of the rights and interests of other States requires the adoption of measures of prevention and reparation for injury;
(3) the innocent victim should not be left to bear his own loss.

Thus the articles themselves continue to acknowledge the concept of sovereign equality, and they oblige States to take all reasonable measures to prevent or minimise transboundary injury and to co-oper-

46. (1983) II–1 Y.B.I.L.C. 203: "the starting point is the exclusive authority that States enjoy in respect of national territory and the correlative duty they owe to other members of the international community . . . they discharge this duty by reaching agreements which accommodate their control or respective interests". See also *Island of Palmas Arbitration* (1928) II R.I.A.A. 839, and (1980) II–1 Y.B.I.L.C. 260, paras.45–46.
47. (1986) II–1 Y.B.I.L.C. 148, para.12.
48. *Idem*, pp.154–161, paras.42–69; (1987) UN Doc.A/CN.4/405, paras.67–69. See *infra* section IV.D.
49. Y.B.I.L.C. *idem*, pp.152–160, paras.34–41, 63–64. See *infra* section IV.B; (1989) draft Art.5 and (1989) UN Doc.A/CN.4/423, para.48.
50. Y.B.I.L.C. *idem*, paras.12, 41, 63.
51. (1988) UN Doc.A/CN.4/413, paras.85–86.

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ate with other States for this purpose.[52] The 1989 draft introduces new articles dealing with assessment, notification, information and negotiation.[53]

Where injury does occur, reparation must be negotiated according to criteria partly indicated in the commentary.[54] Two points are clear. Liability will be strict, in the sense that it is founded on cause, not on lack of due diligence or breach of obligation.[55] The source State will not be liable in full, so the victim will have to bear the resulting injury to some extent,[56] a view consistent with existing strict liability conventions on oil pollution and nuclear risks.[57]

The new draft articles also redefine their general scope by introducing thresholds of risk, which must be "appreciable", and injury, which must be "appreciably detrimental".[58] Thus, some degree of probability and seriousness of harm is now implied, albeit imprecisely. On the one hand, the rapporteur has not confined himself to those activities which are "ultra-hazardous" in the sense that very serious harm on a large scale may occur; indeed his use of the term "appreciable injury" is drawn from the Commission's work on international watercourses, where it was thought to mean merely harm that was more than perceptible but less than "serious" or "substantial".[59]

On the other hand, after initially confining the topic to risks involving only a greater than normal likelihood of injury,[60] the rapporteur has now responded to criticism by including both "the low probability of very considerable (disastrous) transboundary injury and the high probability of minor appreciable injury" arising from "the use of things" whose physical properties, location or use make injury likely.[61]

The implications of this redefinition of risk are important. The draft will now apply both to recurring discharges of moderate pollution, from a smelter, for example, where the risk may be high, and to large-scale but one-off accidents such as Chernobyl or Bhopal. In these cases the risk was probably not high, but the likelihood of serious harm if it did occur was very great. This looks like one sort of risk the rapporteur should be dealing with; it is certainly covered by existing oil pollution

52. Arts.6–8 (1989) UN Doc.A/CN.4/423.
53. *Idem*, Arts.10–17.
54. *Idem*, Art.9, paras.69–71.
55. (1987) UN Doc.A/CN.4/405, para.60; (1988) UN Doc.A/CN.4/413, para.113; (1989) UN Doc.A/CN.4/423, paras.44, 48.
56. *Idem* (1988), para.112.
57. See *supra* n.26.
58. Draft Arts.1, 2 (1989) UN Doc.A/CN.4/423, and para.23.
59. (1988) UN Doc.A/CN.4/413, para.42; (1982) II–1 Y.B.I.L.C. 98–99, paras.130–141.
60. UN Doc. *idem*, para.30.
61. (1989) UN Doc.A/CN.4/423, Art.2. The 1988 draft of Art.2 had referred to the use of "substances".

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and nuclear liability conventions,[62] and its earlier apparent exclusion from the topic was remarkable.

One further limitation is introduced by the new draft articles. The source State will be liable only if it knew or had the means of knowing that an activity involving risk was being or would be carried on in its territory or under its protection or control.[63] In itself this mirrors existing case law, notably the *Corfu Channel Case*.[64] But it amplifies a point implicit in draft Articles 1 and 2, that substances or activities involving no foreseeable risk of harm carry no liability under these articles.[65] This will absolve States from liability where, say, a chemical is used whose toxic properties are not at first appreciated and could not have been until the harm itself appeared, or where accidents occur in respect of a process not initially thought to be dangerous.[66] Liability it seems might arise in such cases only once the risk is appreciated.[67]

To summarise briefly, the present draft deals with a category of foreseeable environmental risks associated with activities which cause or may cause "appreciable" but not necessarily serious harm through the use of "things" whose properties or use make transboundary injury likely to occur, notwithstanding any precautions that have been taken. Compared with earlier drafts, this is now a prescription for dealing with a broader range of environmental injury; as we shall see, however, it remains open to question how far it represents an adequate basis for codification or development of new or existing law.

IV. THE TOPIC'S CONCEPTUAL VIABILITY: RELATIONS WITH STATE RESPONSIBILITY

THROUGHOUT the Commission's work, references abound to the conceptual distinctions between State responsibility and international liability.[68] It is worth summarising these, before considering the validity of separating the two topics.

A. *"Responsibility" and "Liability"*

Initially the Commission used these terms interchangeably, but it eventually adopted the view that "responsibility" was appropriate in cases

62. See *supra* n.26.
63. 1989 draft Arts.1, 3. The 1989 articles introduce a presumption of knowledge where there is no evidence to the contrary.
64. [1949] I.C.J. Rep. 3; see (1988) UN Doc.A/CN.4/413, paras.56 *et seq*.
65. UN Doc. *idem*, paras.24–27, 82–84.
66. *Idem*, para.27.
67. *Ibid*, and see 1987 Report, UN Doc.A/CN.4/405, para.14.
68. See especially (1969) II Y.B.I.L.C. 229; *idem* (1973) I 7–14; *idem* (1981) II-1 104–107; *idem* (1986) II-1 145–154.

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Annex 658

J. Cavender & J. Jager, “The History of Germany’s Response to Climate Change”, *International Environmental Affairs*, 1993, pp. 3-18, pages 6-9 of

ARTICLES

The History of Germany's Response to Climate Change

JEANNINE CAVENDER AND
JILL JÄGER

ABSTRACT. *The Federal Republic of Germany committed itself in June 1990 to reduce its carbon dioxide emissions by 25 percent of the 1987 level by the year 2005, as a measure of slowing down the increase in the greenhouse effect. The issue of a human-caused climate change, however, did not surface in Germany for the first time just a few years ago. The potential threat was recognized a half a century ago. This article traces the history of the German climate change debate in the last 50 years and discusses the forces and events that shaped it. The way in which various societal actors—among them scientists, the government, industry, non-governmental organizations (NGOs) and the media—entered into and influenced the debate is also examined. Unfolding the history of the global warming debate in Germany reveals how the country's current policy stance evolved.*

Introduction

In June 1990, the German Cabinet agreed to take internationally unprecedented action to reduce its carbon dioxide (CO_2) emissions.[1] This policy is based on what has emerged as a distinctly German environmental strategy called the Vorsorgeprinzip (the precautionary principle), which demands that action to prevent environmental damage be taken even before scientific certainty is achieved.

Germany's decision to approach global warming with long-term considerations is surprising in light of its recent history: Until the last decade, Germany was Western Europe's greatest polluter.[2] Twenty years ago, only a few specialists in the country seriously considered that human activity could influence climate on a global scale. Today, German scientists and politicians alike are convinced of the need to avert a potentially catastrophic warming of the

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fears within German society about the possibility of human-induced climate change surfaced long before the greenhouse effect became a household word.

Throughout the 1960s, there was little concern within Germany about a changing climate. The media occasionally presented warnings that fossil-fuel combustion could affect the global climate, but the research that generated these articles always came from the United States or elsewhere abroad.[8] Until the mid-1970s, German scientists learned about the potential for anthropogenic climate change primarily from their interactions with the international scientific community.

International initiatives in climate studies also formed at this time, including the creation of a worldwide satellite network to gather climate data and the development of a monitoring system to observe increases in carbon dioxide. These initiatives began to draw broader interest in climate change within the German scientific community. Finally, at the beginning of the 1970s, German researchers demonstrated their concern and became more outspoken about the issues, bringing the Federal Republic into the developing international debate about human impact in the global climate.

Part II

1970–1980: Foundation for change

AN INCREASE IN CLIMATE RESEARCH. The number of scientists involved in climate research increased dramatically in the 1970s, as did the amount of funding allocated for such research. Hamburg and Mainz formed the nuclei for the expansion of climate studies in Germany.[9] As climate research intensified in Germany, scientists organized a series of conferences about human impact on the climate, including the 1976 Dahlem Conference on Global Chemical Cycles and Their Alterations by Man (held in Berlin)[10] and a meeting on the global carbon cycle in Hamburg sponsored by the Scientific Committee on Problems of the Environment (SCOPE) in the spring of 1977.[11]

The media also paid more attention to climate change. Scientists began publishing articles on the greenhouse effect, arousing public awareness about the possibility of global warming.[12] A feature article in *Bild der Wissenschaft*, written by Hermann Flohn in 1975, presented a catastrophic scenario of a greenhouse world.[13] A newspaper that same year quoted him as saying, "The climatologists are now playing the role of Cassandra before the fall of Troy: had they believed her, Troy would have been saved."[14] Several years later, Wilfred Bach published the popular book, *Gefahr für unser Klima* (Our Threatened Climate), the first book of its kind to present to the public the threat of human-induced global warming and how it could be avoided.[15]

At the same time, however, scientists were debating whether the earth was warming or cooling.[16] Although a consensus could not be reached about whether palm trees or penguins would soon flourish in Germany, the notion of a climate catastrophe dominated both scenarios. Such debate within Germany mirrored the controversy within the international scientific community; the suspicion that humans could alter the climate was gaining potency.[17]

One episode in the mid-1970s regarding the intentional manipulation of the weather helped instill in the German people an understanding of how powerful humans had become in influencing the climate. Initial concern was precipitated by leaks to the press at the end of the Vietnam War that the United States had flown thousands of cloud-seeding sorties in an attempt to gain an advantage in fighting guerrilla warfare.[18] Fears erupted in Europe about the possibility of "weather wars" between the United States and the Soviet Union, since both superpowers were developing technology to manipulate the weather.[19] By the end of 1977, 21 nations signed the Geneva Treaty to Prohibit the Hostile Use of Weather Modification.[20]

RISING ENVIRONMENTALISM AND THE BIRTH OF VORSORGE. Even before the Germans began to debate climate change seriously, important events were taking place in the environmental arena. In the 1960s, the German public became sensitized to environmental problems through the publication of popular books such as Rachel Carson's *Silent Spring*. To a certain extent the environmental movement in the United States was exported to Germany. In addition, some measures had already been taken at both the state and federal levels for nature protection, air quality, water quality, waste removal, and noise pollution. Nonetheless, environmental protection was not yet a separate item on the national political agenda.[21]

The change began in October of 1969 with a speech given to Parliament by Chancellor Willy Brandt. The speech mentioned the need to address environmental problems.[22] Underlying this speech was the pressure the government felt to develop an environmental program before the 1972 Stockholm Conference on Humans and the Environment. By September 1971 the Cabinet had agreed to Germany's first Environment Program, which included basic declarations that have become part of the environmental policy of all parties, industrial organizations, and other social sectors. Based on three principles—Vorsorge (precautionary measures), Polluter Pays, and Industry-Government Cooperation—the program provided the philosophical underpinnings that have guided all subsequent environmental policies. Vorsorge has been the most important of these principles for the global warming debate. It declares that, in the face of an environmental threat, the risks of inaction are too great to delay preventive measures, even if scientific certainty has not yet been achieved. This declaration became pivotal in Germany's response to the greenhouse effect in the late 1980s.

THE ENTRANCE OF GLOBAL WARMING INTO ENERGY POLICY. The energy crises of 1973/1974 and 1978/1979 forced both of the major parties in Germany to back away from dependence on foreign oil.[23] One response of the government was to encourage greater reliance on domestic coal. A second response was to support and subsidize the expansion of nuclear power throughout the decade.

Despite the demand for greater coal consumption at that time, the coal industry foresaw the potential implications the greenhouse effect could have on this demand and, consequently, began to confront the issue early. After reading publications of the late 1970s by Hermann Flohn about the effects of fossil-fuel combustion on the earth's temperature, Gunter Zimmermeyer, the environmental director of Germany's hard coal mining association, began to include consideration of the CO_2 question in his recommendations for Germany's energy policies. In a paper Zimmermeyer co-authored for the 1980 World Energy Conference in Munich, for example, he proposed a plan that would increase the use of domestic coal and nuclear power while reducing CO_2.[24]

The nuclear energy industry, seeking to contribute a much larger share to Germany's energy supply despite burgeoning public opposition, began to broadcast its knowledge about the greenhouse effect. Since nuclear energy conversion does not involve the emission of greenhouse gases, the industry was able to use the greenhouse effect as an argument for greater use of nuclear power. Although used only as a secondary argument in the 1970s, by 1986 global warming was used as a major justification for the nuclear power industry's continued existence.[25]

Bitter disputes about the future of German energy policy arose in Parliament in the 1970s, splintering the solidarity of the Social Democratic Party (SPD), which was in power at the time. Evidence of this intra-party friction appeared as early as 1975. The *Frankfurter Allgemeine Zeitung*, a widely read national newspaper, ran an article that year quoting members of the SPD as supporting nuclear power, ostensibly because fossil fuels were known to emit CO_2 and might cause global warming.[26] SPD politicians began to use this argument at the same time the anti-nuclear movement was taking to the streets to protest the government's policy of supporting nuclear expansion. In 1976 and 1977, the CDU also began to make the connection between energy policy and carbon dioxide emissions. During this time, the party invited scientists to discuss the role of CO_2 with regard to climate change. By the end of the 1970s, however, the government had only just begun to grasp the implications of the global warming debate on German energy policy.[27]

It was not until the end of the decade, during preparations for the first World Climate Conference, that the government began to view climate change as more than a peripheral issue. The Federal Environment Agency had taken the lead as the first governmental body to research the issue,[28] yet its effort had little effect on national policy.[29] The government's first major initiative on the issue began in September of 1979 when the Federal Cabinet agreed to launch a nationally coordinated climate research program. This step was taken by the German government concurrently with the formation of a Europe-wide climate research program called the European Climate Action Plan.[30] Due to a lag in interest after the World Climate Conference in 1979 and to squabbles among the different ministries about which one should coordinate the program, however, the German Climate Research Program was not actually implemented until 1984.[31]

Part III

1980–1990: From research to action

By the end of the 1980s, disparate forces generated by increasing scientific research on climate change, by the environmental movement, by the debate about energy policy, and by concern about stratospheric ozone depletion converged, forming a consensus within the political arena to address global warming. With the establishment in 1987 of the highly influential Enquete Commission's "Vorsorge zum Schutz der Erdatmosphäre" (Precautionary Measures for the Protection of the Earth's Atmosphere) and the ensuing ministerial decision to reduce carbon dioxide emissions by 25 percent, Germany demonstrated the seriousness with which it approached the issue.

The forces that culminated in this decision developed abroad, but they had distinct impacts within Germany once they took root there. First, evidence of a significant increase in global carbon dioxide emissions caused scientific concern to arise abroad. This concern gained momentum within Germany in the 1970s and especially in the 1980s as prominent German scientists like Wilfred Bach, Egon Degens, and Hartmut Graßl continued to bring their increasing knowledge about global warming to the press. The trend created pressure on the German government to address global warming. Establishment of a government-sponsored research program on climate change in 1984 manifested the country's growing readiness to confront the issue. It also showed the importance the scientific debate had gained within the government.

Second, environmentalism began to rise in Germany. The movement, which had its origin across the Atlantic, increased the potency of environmental issues within Germany's political arena. This phenomenon made it politically attractive by the 1980s for politicians to take on the issue of global warming. Germany's environmental movement received a dramatic boost in 1981, when scientists concluded that more than half of the country's trees were dead or dying. The unexpected crisis jolted the German people, whose culture and folklore grew out of rich forests like the Odenwald and the Schwarzwald. The shock left behind the growing suspicion that this time the country had waited too long before heeding warnings of environmental danger. Despite the dearth of scientific evidence, a consensus emerged rapidly within the media, the public, environmental groups, and the government; they all indicted air pollution as the primary cause of this phenomenon they called Waldsterben ("forest dieback").[32] A dramatic scene depicting a forest choked by industrial

Annex 659

Y. Fumikazu, "Itai-Itai disease and the countermeasures against cadmium pollution by the Kamioka mine", *Environmental Economics and Policy Studies*, 1999, pp. 215-229

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Itai-Itai disease and the countermeasures against cadmium pollution by the Kamioka mine

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Abstract. The Itai-Itai disease case is one of four major pollution-related lawsuits occurring in Japan after World War H. This paper, which is based on investigations of the pollution source, the Kamioka mine, considers (1) the history of the disturbances to the environment caused by the Kamioka mine; (2) the Itai-Itai disease suit; (3) the pollution nprevention measures and methods of the Kamioka mine and refinery; (4) the reduction of cadmium pollution in the Jinzu River; and (5) the actual application of the "polluter pays principle". The authors conclude that the court decision and the agreements between the victims and Mitsui Mining made it possible to control and reduce the damage caused by cadmium pollution and four additional, contributory factors.

Key words: Itai-Itai disease, Cadmium pollution, Kamioka mine, Countermeasures, Polluter pays principle (PPP)

1 Introduction

Osteomalacia, softening of the bones as a result of renal tubular dysfunction, is now commonly known as Itai-Itai disease. It attacks women who have borne several children; during its final stages, when patients can neither stand, walk, nor talk, all they say is "itai-itai" (Japanese for "It hurts! It hurts!")-hence its common name. In one of the worst cases, a patient lost 30 cm as a result of pressure fractures of the vertebrae; and another patient suffered many fractures, 28 in the ribs alone.

The issue was recognized as serious when cases of Itai-Itai disease and renal tubular dysfunction were found among residents in a number of cadmium polluted areas throughout Japan, most seriously in the district of Toyama near the Jintsu River but also in Tsushima, Nagasaki Prefecture, the Kakehashi River basin in Ishikawa Prefecture, and the !chi River basin in Hyogo Prefecture.

The Japanese people have higher levels of daily cadmium intake and a higher concentration of cadmium in the renal cortex than any other group of people in the world. Because high cadmium levels have been found in rice grains, it is reasonable to suppose that this is the route by which cadmium enters the human body, from which it follows that the problem of toxic pollution by cadmium is not confined to the locality in which the cadmium was originally dispersed into the soil.

In 1972 victims of Itai-Itai disease living in the Toyama district brought a case against the main polluters (the Mitsui Mining and Smelting Co.). After the court had reached a decision and made a judgment against Mitsui, the victims and the corporation held negotiations and agreed on three points: (1) that compensation should be paid to the sufferers of Itai-Itai disease; (2) that compensation should be paid to those whose fields and crops had been polluted, as well as . compensating them for the detoxification of contaminated farm soil; and (3) that pollution prevention systems should be installed at the Kamioka mine and refinery. This last requirement has proved to be the most effective of the measures taken, as the company agreed to allow the victims, their lawyers, and interested scientists to survey and inspect the facilities without hindrance and at the company's expense.

Subsequently, sufferers, lawyers, and scientists, every year from 1972, have carried out an annual inspection of the Kamioka mine and refinery. In particular, the unhampered on-site inspections, the collection of data and disclosure of information about the types of material involved in the process, updated reports on the quality of process water and the conditions of drainage and emission, and the state of the soil, groundwater, and by-products have been powerful measures in preventing further pollution.

This paper, which is based on the reports of those inspections, considers the following issues: (1) the history of the disturbances to the environment caused by the Kamioka mine; (2) the Itai-Itai disease suit; (3) the pollution prevention measures and methods operated by the Kamioka mine and refinery; (4) the reduction of cadmium pollution in the Jinzu River; and (5) application of the polluter pays principle.

2 History of environmental damage caused by the Kamioka mine

In general, a mining operation consists of three stages: (1) the mining process; (2) the ore dressing process; and (3) the refinery process. All three stages have an effect on the environment. Although the metal-mining industry has played an important role in the modernization of Japan, the extensive development of the industry has also been responsible for many instances of environmental disturbance and damage.

In 1874 the Mitsui Corporation bought the Kamioka mine; in 1886 it introduced modern technology; and in 1889 it brought all the Kamioka mine operations under the umbrella of one administration. Within a year (in 1890), the local air was sufficiently polluted by White's rotary furnaces for the residents of Kamioka Town to lodge a complaint: This was the first instance of a formal protest by residents.

Since 1905 the main work of the pit has been the mining of zinc ore, which from the beginning required the development of technology to treat the poorer quality ore and to refine its dressing process. In 1909 Mitsui Corporation installed Potter's preferential flotation system to cope with its ore-dressing process. As means to treat the poor zinc ore were developed, the amount of ore increased, and the preferential system resulted in finer particles of tailing. The tailing slurry was thrown into the Jinzu River and was then precipitated in the rice paddies of the Toyama district. At the same time, the first cases of people suffering from Itai-Itai disease were reported.

After 1931 the organization representing the farmers, peasants, and fishermen of the Jinzu River basin repeatedly asked the Mitsui Mining Corporation to furnish proper facilities to prevent pollution; in response, Mitsui built its first tailing dam in the Shikamadani Valley (1931). The period of war, 1930-1945, saw a fourfold increase in the production not only of zinc but of zinc waste, which meant that more extensive areas of land in the Toyama district in and around the Jinzu River basin became contaminated.

Although the main aims of the "innovations" introduced after World War 11 (mass production and the saving of manpower) were designed to effect speedy restoration of the Kamioka mine and stimulate high economic growth, it took nearly 10 years for the Kamioka mine to reach prewar production levels.

As time went on, further innovations were introduced. In 1966 a significant change was made in the method of dressing ore: Instead of the direct bulk differential flotation process it had employed until then, the company adopted integrated bulk differential flotation. This process markedly increased the amount of ore-dressing treatment undertaken, which in turn led to a massive increase in tailing waste, with particles far finer than before. Because insufficient measures had been taken to prevent the random disposal of tailing waste (an earlier example of which was the collapse of the tailing dam at Wasabo in 1956), this inevitably led to a severe increase in pollution emanating from the Kamioka mine.

Although installation in 1944 of a German zinc electrolysis plant was intended to assist the recovery of cadmium, the period of high economic growth during the 1960s saw the production of vastly increased amounts of treated ore. The total loss of cadmium from the main processes of the Kamioka mine and refinery reached its highest recorded levels in 1970 (Kurachi et al. 1979).

3 Itai-Itai disease suit

When, after the end of World War 11, Dr. Noboru Ragino, a physician of Fuchu Town, Toyama Prefecture, reopened his private clinic in the town, he was alarmed by the number of patients who came to see him suffering from particularly severe, painful attacks of osteomalacia. It was not until 1955, however, that he and Dr. Minoru Kohno alerted the general public to the nature of Itai-Itai disease.

Although over the next 2 years a number of reports were published insisting that the osteomalacia was simply the result of vitamin deficiency, Dr. Hagino continued to investigate the possibility that other causes were responsible. He strongly suspected that the hazardous outflow from the Kamioka mine was a likely source of the disease because the area of agricultural land contaminated by the Kamioka mine perfectly overlapped the area from which the afflicted patients came.

In 1961, after Dr. Jun Kobayashi had published his data on the cadmium content of rice obtained from the contaminated land, Dr. Hagino and Dr. Kin-ichi Yoshioka published a report that set out to show that cadmium played an etiological role in the development of Itai-Itai disease. Two years later, in 1963, the Ministry of Health and Welfare instituted a study group to inquire into the disease. The group published its report in 1966, concluding that, in conjunction with other factors such as nutritional deficiencies, cadmium was one of the causes of Itai-Itai disease.

The victims were not happy with this report, and that same year they set up an organization (Task Force on Itai-Itai Disease) to ensure that the real culprit, cadmium, should be publicly acknowledged. In 1967 the task force entered into negotiations with the Mitsui Mining and Smelting Co., but nothing fruitful emerged from the discussions.

It appeared to the task force that the political and administrative approaches were likely to remain closed, so it decided, as a last resort, to take legal action. Supported by local residents and local government (town), more than 300 lawyers from all over Japan were organized to present the suit, which they filed against the Mitsui Corporation, basing it on Article 109 of the Mining Law, which covers a polluter's strict liability (Gresser and Morishima 1981). Soon after the appeal was brought to court, the Ministry of Health and Welfare declared that "Itai-Itai disease is caused by chronic cadmium poisoning during times of pregnancy, lactation, or when there is an imbalance of internal secretion, aging, a lack of calcium, etc."

In 1971, the Toyama district court handed down a decision that accepted the victims' claims as proven. Although Mitsui Mining and Smelting Co. appealed the decision to the Nagoya High Court and disputed the causality, the verdict for the victims was upheld. On the basis of this decision, Mitsui Corporation made reparations to more than 200 individuals suffering from the disease (Lawyers for Itai-Itai Disease Sufferers 1971-1974).

4 Pollution prevention after the "Itai-Itai disease suit"

Since 1972 the sufferers, lawyers, and interested scientific parties have carried out inspections of the Kamioka mine and refinery. The first two inspections revealed that: (1) the total amount of cadmium being discharged into the Jinzu-Takahara River was 35 kg/month (1972); (2) the total amount of cadmium being discharged into the air was 5kg/month (1972); (3) although both Mitsui and the agents for the victims checked the same samples, the data did not always coincide, so it could not be accepted as an accurate measurement; (4) discharge from abandoned mines had extensively polluted the Jinzu-Takahara River (Coalition of Sufferers by Cadmium along the Jinzu River Basin and Investigation Committees 1978).

Five working groups were organized to carry out remedial measures, which included the following.

1 Controlling the effluent from the Kamioka mine and refinery (Kyoto University)

2 Controlling smoke emissions from the Kamioka refinery (Nagoya University)

3 Monitoring the balance of materials at the Kamioka refinery (Tokyo University)

4 Monitoring the sedimentation and outflow of heavy metal into the Jinzu-Takahara River system (Toyama University)

5 Monitoring the structural stability of the tailing dams at the Kamioka mine (Kanazawa University)

The Kamioka mine, the largest zinc mine in Japan, is located midway along the northwest coast of Japan's crescent-shaped main island, Honshu (Fig. 1). Two plants employ a bulk-differential flotation process to refine the crude ore from the mine to lead, zinc, copper, and graphite concentrates. The lead concentrates are roasted and sintered, after which the coarse sinter is fed into a blast furnace. The crude lead is refined in electrolysis cells. The by-products of the lead refinery are gold, silver, and bismuth. The zinc concentrates are roasted into zinc calcine, which is then leached and refined in electrolysis cells. The by-products of the zinc refinery are sulfuric acid and cadmium.

As a result of closure of its Mozumi mine, the Kamioka Mine and Smelting Co. has recently changed the material used in its lead refinery processes from lead to lead batteries, and it has begun to import zinc ore from the Huanzala mine in Peru.

The effluent from kamioka mine is managed as follows: The average amount of water drawn from the mine is about 100000m^3/day. The mine water is divided into two grades: clear water and muddy water. The tailing slurry from the ore dressing mills is pumped out to the dam; and about half of the polluted water is recycled at the mills. After the tailing slurry has been separated into slime and sand, it is dumped onto the river bank or into standing water; about half of the effluent from the tailing slurry is reused.

Drainage of effluent and waste water from the kamioka mine and refinery is monitored at eight authorized checkpoints: (1) the Wasabo tailing dam; (2) the Rokuro zinc plant; (3) the Shikama ore dressing, lead, and sulfuric acid plant; (4) the Shikamadani tailing dam; (5) the Atotsu audit mouth; (6) the Otsuyama audit mouth; (7) the Masutani tailing dam; and (8) the Mozumi ore dressing plant (Fig. 2).

The total amount of effluent water is 110000m^3/day. Thanks to the separation of clear from muddy water, the recycling of process water at the ore dressing plant and the electrolysis cells, and an improvement in the process of the wastewater, the total amount of cadmium discharged has been reduced from 35 kg/month (1972) to 5kg/month (1997) (Fig. 3). At the same time, recycling the process water has brought about a savings of both materials and reagents; and OAkg/month in 1997. Apart from any unpredictable consequences that might result from a strong earthquake, scientists have ensured the stability and structural safety of the tailing dam.

5 Reduction of cadmium pollution in the Jinzu River

The Jinzu River, called the Takahara River at its source, arises in the Hida Mountains, an area affected by heavy winter snow. The river flows northward toward the Japan Sea (Fig. 1). The background cadmium level of the upper eaches of the Jinzu-Takahara River, unpolluted by the

Kamioka mine, is never more than 0.1 ppb. The cadmium level downstream of the Kamioka mine, on the other hand, can be as high as 10ppb

The total amount of known cadmium discharge from the eight authorized drainage points is about 5mg/s, and it is 1-3mg/s from the abandoned mines. At the Shin-Inotani Dam, however, which is located downstream of the Kamioka mine, the cadmium discharge into the river water can be as high as several tens of milligrams per second.

Attention was therefore paid to locating other likely, although at that time that runs underneath the zinc electrolysis plant from a nearby power station. unconfirmed, sources of pollution. The chief suspect was an underground tunnel that runs underneath the zinc electrolysis plant from a nearby power station. Measurements taken in 1977 revealed that the cadmium discharged from this channel accounted for as much as 70% of the pollutants from all outlets. At the same time, the quality of the groundwater from the drilling wells at the Rokuro electrolysis plant suggested that the plant might be an even more serious source of contaminants. Thorough investigation into the cause of the pollution linked to the underground tunnel and measures taken to counteract groundwater pollution have been both the most important and the most difficult items on the agenda for 20 years.

When the underground channel was inspected, it was found that groundwater with a high cadmium content issued from (1) an open sewer at Rokuro, (2) the drainage pond of the Higashimachi power station, and (3) the Rokuro dumping yard (Fig. 4). The Kamioka Mining and Smelting Co. therefore agreed to take action to protect the groundwater system from pollution to: (1) prevent leakage of contaminated groundwater into the channel; (2) pump up the contaminated groundwater through a recovery well; (3) cut off the infiltration of Rokuro Valley water into the ground; (4) analyze the quality of the groundwater at the site of the Rokuro electrolysis plant; and (5) repair or renew the floor and tanks of the Rokuro plant (Fig. 4).

Although as a result of these measures cadmium discharge from the channel fell from 21 kg/month in 1977 to 7 kg/month by 1980, during the period 1980-1990 the cadmium discharge did not change (Fig. 3). Hence in 1990 the Itai-Itai disease sufferers requested that the old electrolysis plant be rebuilt. The following year, 1991, the company spent ¥6 million to reconstruct the electrolysis plant with the aid of Belgium technology.

During the reconstruction it was discovered that the soil under the new plant, which was built alongside the old plant, was also severely contaminated with cadmium and zinc. The company therefore drilled cores at 15 sites to survey the contaminated soil and groundwater. On the basis of this survey, they have extended the recovery tunnel, which, for the purpose of pumping up the groundwater, was excavated along the eastern margin of the polluted area.

Use of the tunnel and the operation of the new plant have brought about a reduction of around 2-3 kg/month in the cadmium discharge. After 1995 the company spent ¥90 million to pump up the contaminated groundwater in the Hokuriku Electric Power Company channel. As a result of these measures, the cadmium discharge from the Hokuriku Electric Power Company channel dropped 0.3 kg/month after 1996 (Fig. 3). The mean concentration of cadmium in the river water at the Jinzu third dam fell from 1.5ppb in 1968 to 0.16ppb in 1977. After 1980 the mean concentrations of cadmium in river water at the Jinzu first dam and the Ushigakubi irrigation canal have been 0.1-0.2ppb, which is approaching the background level of cadmium found in the nonpolluted area since 1988.

Because the cadmium discharge from the Hokuriku Electric Power Company channel fell to about 0kg/month after 1996, the mean concentration of cadmium in river water anywhere along the Jinzu River was 0.1 ppb level (Fig. 5). The mean concentration of cadmium found in sediment at the Jinzu first dam fell from 16-18 ppm in 1968 to 1.39 ppm in 1976. Although since 1986 the level has been less than 1ppm, this figure is slightly higher than that found in the nonpolluted area (less than 0.5 ppm).

6 Situation of the "polluter pays principle"

During the summer of 1972, the Itai-Itai disease case was finally settled, and the victims came to an agreement with Mitsui Mining and Smelting Co. As a result of the agreement soil prevention measures were put into operation; but things did not go as smoothly as had been expected. This was because the assessors were obliged to designate an area and make a plan to begin soil pollution prevention as a public works measure. As a result, between 1974 and 1977 more than four attempts were initiated to designate land as soil pollution prevention areas, progressing from the first attempt when 1500ha was designated to the third attempt when more than 1000 ha was stipulated for soil dressing. There was, however, a "rollback" against the view of the Ministry of Health and Welfare on the cause of Itai-Itai disease, and consequently the local government of Toyama Prefecture, which had planned the land use project, drastically changed its plans for paddy fields contaminated by cadmium. The result was a delay in the public works project. As for the cause of Itai-Itai disease itself, the International Symposium on Itai-Itai Disease, Environmental Cadmium Pollution and Countermeasures, held at Toyama in May 1998, reconfirmed that Itai-Itai disease is indeed caused by cadmium poisoning (Abstracts of communications, international symposium on Itai-Itai disease, environmental cadmium pollution and countermeasures 1998).

At this point we need to clarify the roles played in this affair by the local governments, and we must therefore distinguish between the town or city government and the prefectural government. Because they have different allegiances, they sometimes act at cross purposes. The town or city governments, being closer to their constituencies, tend to support the victims by both political and financial means. The prefectural governments, on the other hand, are more sensitive to (and more easily swayed by) powerful pressure from industry and from the guidelines laid down by the central governments; hence their policies do not always favor the victims.

The first pilot scheme (Table 1), which was undertaken from the fiscal year 1979 to the fiscal year 1984, covered a small area of only 90ha, amounting to approximately ¥2.4 billion in business expenses, with the share to be borne by the industry fixed at a rate of 35.15%, equal approximately to ¥0.88 billion. From fiscal year 1983 to fiscal year 1994, more public works projects covering 441 ha with expenses of ¥12.4 billion were planned; but owing to the revision and reduction of the project in the middle of its operation, the project was cut to cover 356 ha, and the cost was cut to approximately ¥10 billion; the proportion of the cost to be borne by the industry rose slightly to 39.39%, equivalent to ¥4 billion (Table 1).

A third area of the 437 ha was next designated for treatment from the fiscal year 1992 to the fiscal year 2004, at a cost of ¥25.5 billion, with the entrepreneur bearing 39.39% of the burden (Table 1), equivalent to approximately ¥10 billion, although the converted land excluding agricultural land eventually extended to 563ha.

The reason for the increase in the land area to be converted in the third district selected for reclamation was the result of an increase in the area of land the local authorities planned to sell as a site for a housing complex and industrial plants. This decision, however, led to the question that had been previously overlooked: Who would take over and utilize the decontaminated land because once the land

Now, although more than 30 years have passed since the Itai-Itai disease case was brought before the court, the Toyama prefectural government and Mitsui Mining and Smelting have succeeded in postponing any further measures to prevent soil pollution and have also succeeded in reducing both the area designated for soil restoration and the ratio of expenses to be borne by the entrepreneur.

With regard to the polluter pays principle, the situation as it relates to Mitsui Mining and Smelting is this: On August 10, 1972 Mitsui Mining and Smelting made an agreement with the victims' organization with regard to the following items: (1) compensation for Itai-Itai disease victims; (2) clean-up of soil pollution; and (3) prevention of further pollution. Compensation paid by Mitsui Mining and Smelting based on item (1) was ¥3.7 billion overall, equivalent to ¥8.9 billion in 1996; ¥1.5 billion for nursing allowances, equivalent to ¥2A billion in 1996; ¥2.6 billion for medical expenses, equivalent to ¥3.2 billion in 1996; and ¥7.5 billion in total equivalent to ¥14.6 billion in 1996. Expenses for soil pollution prevention measures under item (2) were, as we have already seen, approximately ¥0.9 billion for the first project, equivalent to approximately ¥1.1 billion in 1996; approximately ¥4 billion for the second project, equivalent to approximately ¥4.6 billion in 1996; and ¥4.9 billion altogether, equivalent to ¥5.7 billion in 1996. Although approximately ¥10 billion has been estimated for the third project, this figure is likely to be lowered before the project is completed. In addition, compensation for the suspension of planting and the reduction of rice production in paddy fields contaminated by cadmium by more than 1ppm amounted to ¥11.8 billion altogether, equal to ¥14.1 billion in 1996. The total amount of compensation originally promised still exceeds the amount of money Mitsui Mining and Smelting has so far paid for soil pollution clean-up measures.

The accumulative total of expenses for the source measures based on the pollution prevention agreement came to ¥8.3 billion for drainage (¥11.8 billion in 1996), ¥3.2 billion for smoke treatment (¥5.0 billion in 1996), and ¥0.5 billion for treatment of closed and abandoned mines (¥0.8 in 1996), for a grand total of¥12.0 billion (¥17.6 billion in 1996) from 1970 to 1996 (Fig. 6). Additional expenses of an on-the-spot inspection came to approximately ¥0.2 billion.

Many other issues that need to be considered-such as death and damaged health due to Itai-Itai and kidney disease caused by cadmium poisoningare hardly calculated here. For instance, the question of the amount of compensation to be paid to those with Itai-Itai disease mentioned in item (1) faces the difficult problem of how to estimate an amount that can compensate adequately for irreparable damage to health. As for the soil pollution prevention measures under item (2), the principle in the agreement that "the polluter pays the total amount of expenses necessary for the measures [to be] undertaken" has not been adhered to. As a result of the reduction in the area designated for restoration from 1500ha to 1000ha and reducing the entrepreneur's burden-bearing ratio to 35% or 39%, Mitsui Mining and Smelting has been able to escape with an overall burden-bearing ratio of approximately 26%-27%. In addition, although Mitsui Mining and Smelting compensated farmers for suspending their planting and for their reduced income, ¥11.8 billion in total (Table 2), rice contaminated by cadmium to levels of 0.4-1.0ppm was purchased by the government.

Because the special law for mining pollution control enabled the company to include investments intended for the treatment of closed and abandoned mines within its calculations for expenses to prevent pollution, the expenses allocated as measures to contain pollution at the source (item 3) were overcalculated to finance the company's compensatory undertakings (and obligations). Consequently, we should discount the expenses incurred by the Mitsui Mining and Smelting Co. as being truly burden-bearing. From 1972 to 1997, the monies paid out by Mitsui Company to compensate for the injuries incurred by Itai-Itai disease totaled ¥36.5 billion, which was 66% of the company's ordinary incomes (¥55 billion) and 15% of its operating profit (¥245 billion) (Yoshida 1998).

If we consider the conditions of the original agreement between Mitsui Mining and the victims-compensation for damages to health, soil restoration, and means to prevent pollution at the source-we note that in regard to soil restoration the Mitsui Company (abetted by the prefectural government) has not honored its obligations under the polluter pays principle, as its burden-bearing share has been greatly reduced owing to the cutback in the size of the area to be restored and in the burden-bearing ratio itself. This is because Mitsui Mining was able to apply the agricultural land soil prevention law and the law concerning the entrepreneur's bearing of the cost of public pollution control works to suit itself. Because the two laws merely draw a distinction between "natural" and "other source of pollution," the company was able to persuade the authorities to substitute public money for their own costs: that is, the central government and the local authorities (both town and prefecture) have provided a subsidy.

When it comes to measures to prevent pollution at the source, the company was successful in limiting expenses Although not, historically, being quite the same as the OECD's (Organization for Economic Cooperation and Development's) polluter pays principle (PPP), Japan's **PPP** nonetheless has the character of a legal liability, and it is therefore easy to combine this principle with the principle of causation and responsibility as it is embodied in the clause of the law concerning the entrepreneur's bearing of the cost of public pollution control works, which sets out "the degree of recognition as a case of pollution." By interpreting and applying this principle rather flexibly, however, the Japanese government has been able to use it as a tool to reduce the burden on the polluters.

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7 Conclusions

If we consider that the restoration of land to its original condition entails, as a corollary, that the same pollution damage should never occur again, source prevention measures and soil pollution prevention measures are two of the main pillars supporting the recovery of land damaged by pollution. In this regard, Kamioka Mining and Smelting Co. source prevention measures, based on the pollution prevention agreement, have achieved a remarkable success by obtaining a natural background level of 0.1 ppb of cadmium outflow to the downstream area. These efforts should be highly valued.

Although we have sought to make it clear that Mitsui Mining and Smelting Co. has, to a certain extent, managed to evade some of its obligations, the court decision and the agreements made between the victims and the company have nevertheless made it possible to control and subsequently reduce the physical and economic damage caused by cadmium pollution emanating from the Mitsui Kamioka mine. We draw attention to four contributory factors: (1) the geographical and administrative separation of the mine area and the homes and farms of the sufferers, which has meant that "company town" problems have been avoided (as when powerful companies "lean on" their employees to conform or risk losing their jobs and their homes); (2) a firm tie-up between the victims, who typically are rice farmers, and the local (town) government to assist the sufferers; (3) a more serious undertaking over the last 25 years by Mitsui Mining and Smelting Co. to listen to the victims and their lawyers and to pay attention to their requests; and (4) an improvement in Mitsui Kamioka Mining Co.'s attitude to the environment and an increased willingness to look after it (because the company's size gives it the technical means to do what it has a moral obligation to undertake), and to carry out the necessary "downsizing and restructuring" of its own plant. The outlook is therefore not entirely black.

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Annex 660

B. Simma & D. Pulkowski, "Of Planets and the Universe: Self-contained Regimes in International Law", *European Journal of International Law*, 2006, pp. 483-529, pages 490-493

Of Planets and the Universe: Self-contained Regimes in International Law

Bruno Simma* and Dirk Pulkowski**

Abstract

Contemporary legal practice requires the allocation of authority within a complex system of legal prescriptions. As international law has extended to areas as diverse as trade, environmental regulation and human rights, the consequences of breach of international legal obligations become more difficult to assess. The authors probe the role of the lex specialis *maxim as a tool for the effective placing of special secondary rules within the general international law of state responsibility. The central question is: Are the general rules on state responsibility to apply residually? The authors answer in the affirmative. 'Conceptual' arguments for so-called self-contained regimes are unconvincing. Scholars who perceive international law as a unified legal order might be led to apply a presumption in favour of the applicability of the general international law of state responsibility. Scholars who regard international law as no more than the sum total of loosely interrelated subsystems tend to advocate a presumption in favour of the normative closure of a particular regime. In the authors' view, neither presumption is helpful, since both tend to obfuscate the value judgments that legal decision-making inevitably involves. Instead, the authors propose that a fallback on general international law, including resort to countermeasures, may be justified on normative grounds. A closer analysis of four subsystems that have often been associated with the notion of self-contained regimes – diplomatic law, European Community law, the WTO and human rights – concludes the discussion.*

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we look at how legal decisions are made, this assumption appears doubtful. Lawyers make use of various (and sometimes contradictory) 'tools' of interpretation, including the *lex specialis* principle, to reconcile competing rationalities expressed in different rules of law. As Koskenniemi has noted,

> [i]nterpretation refers to contested and conflicting principles, none of which can be held superior to the others in a general way. There are no rules on when to apply a literal and when a dynamic interpretation; when to have recourse to party will and when to the instrument's object and purpose. . . . The arbitrator can resolve the dispute only by leaving the ground of legal interpretation altogether.[22]

From a realist perspective, Schwarzenberger thus referred to the principles of treaty interpretation as merely 'tool[s] in aid of the *jus aequum* rule'.[23] In that sense, their function may resemble what Vaughan Lowe labelled as interstitial norms: 'The choice is made by the judge not on the basis of the internal logic of the primary norms, but on the basis of extraneous factors'.[24] The application of principles of treaty interpretation quite generally is not merely an exercise in legal logic. Nor is the characterization *vel non* of two norms, identified as dealing with the same subject matter, in terms of a special law/general law distinction, a schematic exercise. Whether a prescription is too general to govern a particular case is equally 'a matter of harmony with what, for want of a better word, one might term experience and common sense [: . . .] an unsystematized complex of moral, cultural, aesthetic, and other values and experiences.'[25] The true function of the *lex specialis* principle lies precisely in its capacity to give articulation to such values and experiences of the international decision-maker.

B *From* leges speciales *to So-called Self-contained Regimes*

1 *Self-contained Regimes: A Definition*

If we imagine a sliding scale of specialness, one could conceive a rule at one end that is only designed to replace a single provision of the set of rules on state responsibility, while leaving the application of this framework otherwise untouched. At the other end of the scale, a strong form of *lex specialis* could exclude the application of the general regime of state responsibility altogether, either by explicit provision or by implication, that is, by virtue of a regime's particular structure or its object and purpose. This latter concept of a strong *lex specialis* designed to exclude completely the general international law of state responsibility is what we denote as a 'self-contained regime'. ILC Article 55 is meant to cover all kinds of special rules, from weaker forms of specialness that only modify the general regime on a specific point to strong forms

22 Koskenniemi, 'Hierarchy in International Law: A Sketch', 8 *EJIL* (1997) 566, at 575–576.

23 Schwarzenberger, *supra* note 10, at 496.

24 Lowe, 'The Role of Law in International Politics', in M Byers (ed.), *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?* (2000) 216.

25 *Ibid.*, at 220.

such as self-contained regimes that attempt to exclude the application of the general rules of state responsibility altogether.[26]

The phrase 'self-contained regime' was coined by the Permanent Court of International Justice in the *S.S. Wimbledon* case. There, the Court was faced with the question whether the provisions of the Treaty of Versailles relating generally to German waterways also applied to the Kiel Canal. The Court pointed out that the drafters of the Treaty had devoted a special section to the Kiel Canal, which differed substantially from the rules relating to other watercourses.[27] The Court concluded that

> [t]he provisions relating to the Kiel Canal in the Treaty of Versailles are therefore self-contained; if they had to be supplemented and interpreted by the aid of those referring to the inland navigable waterways of Germany in the previous Sections of Part XII, they would lose their 'raison d'être' . . . The idea which underlies [the specific provisions regarding the Kiel Canal] is not to be sought by drawing an analogy from these provisions but rather by arguing *a contrario*, a method of argument which excludes them.[28]

In the *Wimbledon* case, the Court applied the concept of self-containment to resolve a question of treaty interpretation concerning the relationship between two sets of primary international obligations.

More recently, the International Court of Justice in its *Tehran Hostages* judgment transposed the concept of self-contained regimes to the level of secondary norms. The Court asserted that the regime of specific legal consequences contained in the Vienna Convention on Diplomatic Relations was self-contained *vis-à-vis* the customary international law of state responsibility. Consequently, in the event of violations of the Vienna Convention, no resort may be had to any of the remedies provided for by general international law, because 'diplomatic law by itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions'.[29] After exploring in detail the sanctions contemplated by the Vienna Convention (such as the option of declaring a diplomat *persona non grata*) the Court concluded:

> The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to the diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are by their nature, entirely efficacious.[30]

The concept of self-contained regimes attracted scholarly attention only after the *Tehran Hostages* ruling. Lack of uniform terminology has probably contributed a good deal to the controversial character of the discussion addressing the alleged self-containment of legal sub-systems. Various levels of autonomy have been associated with the term 'self-contained regimes'.

[26] ILC, *supra* note 9, at, 359 para 5.
[27] *S.S. Wimbledon*, PCIJ, Ser. A, No. 1, at 23.
[28] *Ibid.* at 24.
[29] *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports (1980), at 38.
[30] *Ibid.*, at 40.

First, the notion of 'self-contained regimes' has been misconceived as an argument in favour of entirely autonomous legal subsystems. Social systems cannot exist in splendid isolation from their environment. This point is conceded even by ardent proponents of regime specialization. According to Niklas Luhmann's *Systemtheorie*, for example, all systems are to some extent interlinked by structural coupling.[31] Similarly, legal subsystems coexisting in isolation from the remaining bulk of international law are inconceivable. There will always be some degree of interaction, at least at the level of interpretation. In the words of the Chairman of the International Law Commission's Study Group on 'Fragmentation of International Law':

> No treaty, however special its subject-matter or limited the number of its parties, applies in a normative vacuum but refers back to a number of general, often unwritten principles of customary law concerning its entry into force and its interpretation and application. Moreover, this normative environment includes principles that determine the legal subjects, their basic rights and duties, and the forms through which those rights and duties are modified or extinguished.[32]

Without the 'omnipresence of "general law"'[33] a special legal subsystem may, as Georges Abi-Saab put it, mutate into 'a legal Frankenstein' that 'no longer partakes in the same basis of legitimacy and formal standards of pertinence'.[34] Even the European Court of Justice has asserted that principles of general international law are applicable residually within the context of EC law, and has indicated its willingness to defer to the interpretation of an international agreement by a court established under such an agreement.[35] In the case of the WTO, the Appellate Body has acknowledged that the GATT remains firmly imbedded in general international law, stating that the Agreement 'is not to be read in clinical isolation from public international law'.[36] Thus, to avoid confusion, the term 'self-contained regime' should not be used to circumscribe the hypothesis of a fully autonomous legal subsystem.

Nor should the term be used to describe *leges speciales* at the level of primary rules, although it is precisely in the context of primary rules that the Permanent Court of International Justice had originally introduced the concept. In its original meaning, the concept denoted a set of treaty provisions that cannot be complemented through the application of other rules by way of analogy. After *Tehran Hostages*, however, scholarly debate on self-contained regimes has narrowed down to the specific question of the 'completeness' of a subsystem's secondary rules. Hence, we reserve the term 'self-contained regimes' to designate a particular category of

31 N. Luhmann, *Die Gesellschaft der Gesellschaft* (1997), at 170, 776, 779. Cf. *infra* for a discussion of fragmentation from the perspective of *Systemtheorie*.

32 Koskenniemi, *supra* note 8, at 7.

33 *Ibid.*

34 Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks', 31 *NYU J Int'l L Pol* (1999) 919, at 926.

35 Opinion 1/91, *EEA I*, 14 Dec. 1991, [1991] ECR, I-6079, at paras 39 and 40.

36 *US – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, 29 Apr. 1996, WT/DS2/AB/R at 17; cf. also: *US – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, 6 Nov. 1998, WT/DS58/AB/R, at 154–157.

subsystems, namely those that embrace a full, exhaustive and definitive, set of secondary rules. Thus, the principal characteristic of a self-contained regime is its intention to totally exclude the application of the general legal consequences of wrongful acts as codified by the ILC, in particular the application of countermeasures by an injured state.[37]

2 *Approaches to Self-contained Regimes by the International Law Commission*

The International Law Commission's stand with regard to the existence of so-called self-contained regimes concerning state responsibility has varied with each special rapporteur taking up the subject of legal consequences of internationally wrongful acts. In a nutshell, the ILC first appeared to embrace the concept of self-contained subsystems (Riphagen), then became highly critical of the systematic feasibility of such isolation from state responsibility (Arangio-Ruiz), and finally adopted the position of a pragmatic 'maybe' (Crawford).

Special Rapporteur Willem Riphagen's approach was characterized by considerable ambiguity.[38] On the one hand, Riphagen charted the international legal system as an order modelled on a variety of distinct subsystems, within each of which primary rules and secondary rules are closely interlinked.[39] The regime of state responsibility was perceived as merely part of one such subsystem. Consequently, in the Rapporteur's view, '[t]he idea that there is some kind of least common denominator in the regime of international responsibility must be discarded'.[40] On the other hand, Riphagen presented scenarios in which 'the subsystem itself as a whole may fail, in which case a fallback on another subsystem may be unavoidable'.[41]

In the era of Special Rapporteur Gaetano Arangio-Ruiz, debate concentrated on one, particularly contentious, aspect of self-contained regimes, namely the question whether such a 'so-called self contained regime affect[s], and if so in what way, the rights of the participating States to resort to the countermeasures provided for under general international law'.[42] Focusing on the admissibility of countermeasures, Arangio-Ruiz concluded that none of the systems envisaged as self-contained regimes[43] excluded the application of the rules of state responsibility *in concreto*. The Rapporteur added that, in any event, the very concept of closed legal circuits of

Cf. Simma, *supra* note 6, at 117. We thus adopt an autonomous 'international law' definition, which is not identical with Krasner's classical definition of international regimes as 'a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations'. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', in S. D. Krasner (ed.), *International Regimes* (1983) 2.

38 For a more extensive critique of Riphagen's theoretical approach, cf. Simma, *supra* note 6, at 115–117.

39 Riphagen, 'Third Report on State Responsibility', in *ILC Yearbook* (1982), Vol. II, Part One, at 24 para 16; cf. also Riphagen, 'State Responsibility: New Theories of Obligation in Interstate Relations', in R. St. J. Macdonald, D. M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983) 600.

40 *ILC Yearbook* (1982), Vol. I, at 201, para. 8.

41 Riphagen, 'Third Report', *supra* note 39, at 30 para. 54.

42 Arangio-Ruiz, *supra* note 11, at 35. Cf. also *ILC Yearbook* (1992), Vol. I, at 76.

43 Among them the European Communities, the GATT, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and diplomatic law.

Annex 661

M. Hinteregger, *Comparison*, in ENVIRONMENTAL LIABILITY AND ECOLOGICAL DAMAGE IN EUROPEAN LAW, ed. Monika Hinteregger (Cambridge, 2008), pages 581-583

Environmental Liability and Ecological Damage in European Law

Edited by

Monika Hinteregger

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Contents

level of care or can impose an obligation on the operator to guarantee the absence of nuisance.

In the common law countries of England and Ireland, as well as in Scotland, the plaintiff will be entitled to a cause of action in negligence. The plaintiff must, however, show that the defendant owed him a duty of care, that the defendant breached this duty of care, and that the occurrence and type of the damage was foreseeable. Courts may facilitate the burden of proof (i) by heightening the duty of care corresponding to the dangers inherent in the defendant's activity, a method that is also employed in all the other jurisdictions that have been analysed, and (ii) by applying the rule of *res ipsa loquitur*, which can be invoked when the only logical explanation for the damage was negligence by the defendant. This legal device comes close to the *prima facie* evidence rule, commonly accepted in the civil law countries.

B. Laws of the neighbourhood

In most countries, the laws of the neighbourhood play an important role in the compensation of damage caused by a polluting interference, as they do not require fault on the part of the defendant to be established. In Austria, this is explicitly provided by § 364a ABGB, as well as in Finland by the Act on Civil Liability for Environmental Damage 1994 which also covers negative interference and sudden incidents, and the Adjoining Properties Act 1920, with regard to continuous interference. Other countries that provide for this are Germany (§ 906(2) BGB, § 14 BimSchG), Greece (Articles 1003 and 1108 Astikos Kodikas), Italy (Article 844 Codice Civile) and Portugal (Article 1347 Código Civil). Section 364a of the Austrian ABGB, Article 1003 of the Greek Astikos Kodikas, Article 844 of the Italian Codice Civile and Article 1347 of the Portuguese Código Civil were originally inspired by the German law of the neighbourhood. Yet subsequent legal developments in these countries, as well as in Germany, have led to important differences in the wording and application of these provisions. In Spain, only the region of Catalonia provides for specific regulation on neighbourhood law on the lines of the German model.

In France, a similar result is reached through case law ('*troubles de voisinage*'), which covers excessive interference by noise, smoke or wastewater. As in Belgium, courts base neighbourhood liability on the definition of ownership.

In the common law countries (England, Ireland), the corresponding remedy is the action of private nuisance. Like the laws of the neighbourhood in Austria, Germany, Greece, Italy and Portugal, the private nuisance cause of action requires a continuous, unlawful and indirect interference with the use or enjoyment of land. It only covers damage to land or to chattels on the land. Although the rules of remoteness and foreseeability of damage (legal doctrines originally developed in cases concerning negligence) also apply to private nuisance, a finding of fault in creating the nuisance is not necessary. The English reporters, though, point out that, with regard to nuisance, the prerequisite of foreseeability of damage still needs further clarification. According to existing case law, a certain awareness on behalf of the defendant that his or her activity poses a threat to the rights of another appears to be necessary. In Scotland, the cause of action for a private nuisance will also apply, but, contrary to the position in England and Ireland, fault needs to be established. This is also the case in the Netherlands, where Article 5:37 Burgerlijk Wetboek provides for fault-based neighbourhood liability.

The right to claim damages requires that the interference exceed a certain threshold of tolerance. The methods of determining the threshold standard are quite different. In Austria, Greece, Italy, Portugal and Germany, the interference must be unusual and must lead to a substantial impairment of the enjoyment of the land, which itself must be customary under local conditions. In Finland, the decisive criterion is whether the damage is acceptable for the plaintiff, which is determined according to its usualness and overall impact on the environment. That the polluting activity was prior in time may be important for this assessment, but will not excuse the polluter from liability. Damage to persons and considerable property damage need not be tolerated.

In England and Ireland, an interference with the beneficial use of the injured party's land must be unreasonable to be actionable. The notion of unreasonableness is a rather flexible concept, and, as the Irish reporter notes, its application will often end up in a balance of interest. This is also the Swedish method of determining the illegality of the interference.

In all jurisdictions, the location of the polluting activity and the location of the polluted area are taken into consideration. All the reporters stress the fact that the threshold of tolerance is lower in residential areas than in industrial areas; although, in some countries, the location of the land would be irrelevant when contemplating actual and physical damage to land (England) or damage to health (Austria, Italy). In several countries, damage due to the unusual sensitivity of the claimant will not be actionable (Austria, Belgium, Germany, Greece, Scotland: unless perpetrated maliciously). This, however, does not apply to Finland.

A damages claim arising out of the laws of the neighbourhood or nuisance is only available to persons who have a close relationship to the affected land, such as the owner or otherwise-authorised occupant (e.g. atenant). A person who is only affected as to his ownership over movable property does not have the right to claim damages (Austria, Belgium, Germany, Sweden). In several countries, this action covers only real property damage, such as the costs of repairs or a diminution in the value of the property (Austria, Germany, Portugal, the Netherlands, England, Ireland). While loss of profit is awarded under Austrian, Greek, Dutch and Swedish law, this is not the case in England. In Ireland, a person whose interest in the land has been established can also sue for damages due to personal injury. Nevertheless, as the Irish reporter stresses, courts would rather decide on the basis of negligence. In England, although it is theoretically possible to recover for personal injuries, these must be shown to flow directly from the interference with the land. However, there has been no case specifically on this point for fifty years. Like in Ireland, English judges would seek to apply the law of negligence on this point. In Belgium, France, Greece, Italy and Sweden, neighbourhood liability also covers damages arising out of personal injury and death.

The Austrian, German, English and Portuguese reporters stress the importance of the laws of the neighbourhood as a remedy for environmenta damage cases. In Finland, neighbourhood law, which served as a model for the Environmental Damages Act 1994, will only be applied if the environmental impact does not amount to environmental damage.

C. Strict liability regimes

Hazardous installations or risky activities may also be under a regime of strict liability. In some countries, jurisdiction provides for a *comprehensive strict liability rule* with regard to environmental damage. In Finland, a comprehensive strict liability regime, comprising property damage as well as personal injury, has been established by the Environmental Damages Act of 1994. Although neither fault nor unlawfulness constitutes a prerequisite for liability, the fact that the damage was caused with intent or through a criminal act broadens the scope of compensation.

Annex 662

J. Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, 2009), pages 240-244

Conflict of Norms in Public International Law

How WTO Law Relates to other Rules of International Law

Joost Pauwelyn

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this process than regimes or norms which do not impose direct costs on non-compliance (such as most MEA regimes).[6]

In the remaining sections of this chapter we assume that the conflict prevention techniques just mentioned – both at the negotiation stage and at the enforcement/reliance stage – did not work and led to a situation of apparent conflict that has been submitted to an international adjudicator. We examine, more particularly, the techniques to which an international adjudicator may resort in order to avoid a finding of conflict. This is where the distinction referred to above between 'apparent' and 'genuine' conflicts comes into play. If the conflict-avoidance technique works successfully, the alleged conflict will only be apparent. If it does not work, the conflict becomes a genuine one.

The presumption against conflict

The presumption and its consequences

The wide definition of conflict suggested in chapter 4 must be tempered by the generally accepted presumption against conflict.[7] Every new norm of international law is created within the context of pre-existing international law and the presumption is that this new norm, much like new legislation enacted by the same legislator, builds upon and further develops existing law.

This 'presumption' has three major consequences:

(i) For a new norm to deviate from existing law explicit language must be found. It cannot, in other words, be presumed that states 'changed their minds'. Evidence in support that this actually happened must be submitted in order to rebut the presumption of continuity, inherent in any legal system (see the discussion on 'contracting out' in chapter 4 above, pp. 212–18).

(ii) As a result, the state relying on a conflict of norms will have the burden of proving it.

(iii) When faced with two possible interpretations, one of which harmonises the meaning of the two norms in question, the meaning

[6] *Ibid*., 701 ff.

[7] See, for example, Jenks, 'Conflict', 427 ('It seems reasonable to start from a general presumption against conflict'); and Michael Akehurst, 'The Hierarchy of the Sources of International Law' (1974–5) 47 BYIL 273 at 275 ('just as there is a presumption against the establishment of new customary rules which conflict with pre-existing customary rules, so there is a presumption against the replacement of customary rules by treaties and vice versa'). See also the panel report on *Indonesia – Autos*, para. 14.28 ('in public international law there is a presumption against conflict') and footnote 649.

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> that allows for harmonisation of the two norms – and hence avoids conflict – ought to be preferred.[8] As the ICJ noted in the *Right of Passage* case: '[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it'.[9]

The presumption that new law is consistent with pre-existing law, that is, the presumption against conflict, is of the same nature as the presumption that any state conduct – not just the conclusion of new law – complies with the law.[10] In *EC – Hormones*, for example, WTO arbitrators made it clear that 'WTO Members, as sovereign entities, can be *presumed* to act in conformity with their WTO obligations. A party claiming that a Member has acted *inconsistently* with WTO rules bears the burden of proving that inconsistency.'[11] The same presumption of legality exists in respect of acts of international organisations. As the ICJ noted in the *Certain Expenses* case: 'when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization'.[12]

[8] As noted by Max Srenson, *Les Sources du Droit International* (Copenhagen: E. Munksgaard, 1946), 226–7: 'Le texte est considéré comme partie du système global du droit international et l'interprétation se propose de la mettre en harmonie avec la réglementation générale de celui-ci. La présomption sur laquelle se base cette méthode d'interprétation est que les contractants, en rédigeant le traité, sont partis de certaines données qu'il n'était pas besoin de reproduire dans le texte, et auxquelles ils se sont référés tacitement.'

[9] *Right of Passage over Indian Territory* (Preliminary Objections), ICJ Reports 1957, 142.

[10] See Jacques-Michel Grossen, *Les Présomptions en Droit International Public*, thesis (Neuchâtel, 1954), 60–3 (referring to the 'présomption de respect par les Etats, du droit en général, et du droit international en particulier', also expressed in the form of the Latin adage *omnia rite praesumuntur esse acta*); 114–17 ('les parties sont présumées n'avoir pas voulu adopter des dispositions contraires aux traités conclu par elles avec des Etats Tiers'); and 115–17 ('les traités sont présumés ne pas déroger au droit coutumier').

[11] Decision of the arbitrators under DSU Art. 22 in *EC – Hormones* (*US request for suspension*), para. 9.

[12] ICJ Reports 1962, 168, continuing as follows: 'If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute "expenses of the Organization".' See, in the same sense, *Lockerbie* case (Provisional Measures), ICJ Reports 1992, para. 42 (presuming the validity of Security Council resolution 748).

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The limits of the presumption against conflict

At the same time, the effects of this presumption against conflict must not be exaggerated. First, it does not say anything about how conflict should be defined. Whatever conflict means, there is an initial presumption against it. But this presumption should not form an excuse to *define* conflict narrowly, the way Jenks and Karl have done, in much the same way that the presumption that state conduct is consistent with international law (until proved to the contrary) does not mean that breach of international law ought to be construed narrowly.

Second, in many cases, a new norm will be enacted with the very purpose of changing existing law. If this is the case, the presumption against conflict cannot stand in the way of this happening. The presumption against conflict is a presumption in favour of continuity, not a prohibition of change. It ought not to lead to a restrictive interpretation of the new, allegedly conflicting, norm (the same way the presumption of consistency of state conduct should not lead to a restrictive interpretation of the international law obligation allegedly breached).[13]

To put it differently, the presumption against conflict – and in favour of stability – must be balanced carefully with the need for change and evolution of the law. Or, as the Institute of International Law put it in the limited context of the problem of intertemporal law: 'it is necessary to promote the development of the international legal system whilst preserving the principle of legal stability which is an essential part of any judicial system . . . any solution of an intertemporal problem in the international field must take account of the dual requirement of development and stability'.[14]

Third, the presumption against conflict requires that an effort be made to interpret the new norm in a harmonious manner with existing law. If the new norm, as well as the potentially conflicting norm already in existence, is ambiguous enough, such harmonious interpretation may well be possible. But if reconciliation between the two norms is not feasible, that is where the presumption ends. The presumption is one against the *existence* of conflict, it is not a presumption *in favour of the earlier rule* in the event there is a real conflict. To put it differently, the presumption against conflict may show that an *apparent* conflict is

[13] As pointed out before, the principle *in dubio mitius* is of very questionable value. See chapter 4 above. *Contra* (confirming the principle): Appellate Body report on *EC – Hormones*, footnote 154.

[14] '1975 Resolution of the Institute of International Law', *Yearbook of the Institute of International Law* (1975), 537, preambles 2 and 3.

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not real. It cannot, however, *solve* a real conflict once such conflict has been established. It may be possible to interpret the terms of norm 1 in a way that avoids conflict with norm 2 (or vice versa). *But once norm 1 and norm 2 are found to be in conflict, an interpretation of either norm cannot solve the conflict*. As Jenks put it, the presumption against conflict 'will not suffice to reconcile clearly unreconcilable provisions . . . [it] may eliminate certain potential conflicts; it cannot eliminate the problem of conflict'.[15] The conflict must then be resolved by a third norm (such as a conflict clause in either treaty or a rule of general international law, such as Art. 30 of the Vienna Convention).

Finally, with Grossen, one could question whether this so-called 'presumption against conflict' is a genuine presumption.[16] The typical example of a presumption provided by Grossen is the English law rule that when one has no news from a person for more than seven years, that person is presumed dead. In other words, on the basis of one fact (seven years no news), one presumes the existence of another fact (death).[17] Or, as Art. 1349 of the French Civil Code states: 'Les présomptions sont des conséquences que la loi ou le magistrat tire d'un fait connu à un fait inconnu.'[18] As a result, genuine presumptions are of a positive nature. They do not constitute simple *evidence* (or 'mode de preuve'), but amount to conclusive *proof* (or 'dispense de preuve') unless the presumption can and has been rebutted. Establishing a presumption *positively* discharges one's burden of proof: for someone to prove under English law that a person is dead, it will suffice to prove that no news has been received from that person for more than seven years. This proven fact (seven years no news) will then be positively accepted as sufficient proof of an unknown fact (namely, that the person is, indeed, dead).

The presumption against conflict, in contrast, is of a negative nature only. This is so because it amounts essentially to a restatement of the basic rule on burden of proof: it is for the party invoking something to prove it (*ei qui dicit incumbit probatio*). In other words, it is for the party relying on the conflict of norms to prove that there is such conflict. The starting point is that there is no conflict, and this will remain so up to the point that proof to the contrary can be provided. The consequence of this presumption against conflict is purely negative: if the party invoking

15 Jenks, 'Conflict', 429.
16 Grossen, *Présomptions*, 63 and 117. In the same sense, see: J.-A. Salmon, 'Les Antinomies en Droit International Public', in Chaim Perelman (ed.), *Les Antinomies en Droit* (Brussels: Bruylant, 1965), 285 at 299.
17 Grossen, *Présomptions*, 16. 18 *Ibid.*, 18.

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conflict does not succeed in establishing its existence (including in situations of doubt), that party will lose. The presumption against conflict cannot produce the positive effects normally linked to a presumption. It will, for example, not be enough to rely on this presumption to counter a *prima facie* case raised by the opposing party that there *is* conflict.[19]

In sum, the presumption against conflict exists, but its importance ought not to be overstated. In essence, it means that the starting point is that new law is consistent with existing law and it is for the party claiming the opposite to prove it. Without this rule as to who bears the burden of proof, one could, indeed, imagine a situation where one party invokes the old law (claiming that it remains unaffected), whereas the other party relies on the new law (claiming that there is conflict and that the new law ought to prevail). In theory, each party must prove what it alleges (continuing existence of the old law versus prominence of the new law). Without the presumption against conflict, the party relying on the conflict could then argue that the other party relying on the old law must prove its continuing existence (and that it is not up to it to prove conflict and prevalence of the new law). The presumption against conflict solves this impasse *in favour of the party relying on the old law*.

Treaty interpretation as a conflict-avoidance tool

The inherent limits of treaty interpretation

Before examining the role of treaty interpretation as a conflict-avoidance technique[20] – that is, the extent to which interpreting one norm in the

[19] Grossen stated the following on the alleged presumption of consistency of state acts with international law: 'il n'y avait pas véritablement déplacement du fardeau de la preuve. En fait le juge, en "présumant" la licéité des actes étatiques, ne faisait que décider que la partie invoquant l'illicéité ne l'avait pas démontrée à suffisance. Cet aspect négatif de la règle ne se double d'aucun aspect positif susceptible d'en faire une présomption, c'est-à-dire que devant un commencement de preuve de l'illicéité, l'Etat poursuivi en responsabilité ne saurait se contenter d'invoquer à sa décharge la présomption de licéité des actes étatiques. Il faut donc conclure à l'inexistence d'une présomption de conformité des actes étatiques au droit international' (*ibid*., 63). In that sense, the presumption or *prima facie* case referred to in WTO jurisprudence under rules on burden of proof (i.e., the 'commencement de preuve' established by the complainant) is a genuine presumption: if the opposing party does not submit anything in response, the complainant wins. See Joost Pauwelyn, 'Evidence, Proof and Persuasion in WTO Dispute Settlement, Who Bears the Burden?' (1998) 1 JIEL 227.

[20] For an excellent overview of the interpretative methods used in the WTO, see Michael Lennard, 'Navigating by the Stars: Interpreting the WTO Agreements' (2002) 5 JIEL 17,

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Annex 663

A. Orakhelashvili, *Division of Reparation between Responsible Entities*, in THE LAW OF INTERNATIONAL RESPONSIBILITY, eds. James Crawford et al. (Oxford University Press, 2010), pages 656-661

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Part IV The Content of International Responsibility, Ch.44 Division of Reparation between Responsible Entities

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4 Practical aspects of the division of reparation

(a) Responsibility of States

It has been said that any mature system of law must contemplate multiple party responsibility for wrongs.[32] As for the plurality of responsible or injured States, the crucial question is 'what difference does it make to the responsibility of one State, if another State (or indeed several other States) is also responsible for the very same conduct, or also injured by it'.[33]

The ILC Articles attempt to resolve these issues. According to article 46:

> Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Thus the entitlement of each State to invoke reparation is independent from the similar entitlements of other States. In the *Wimbledon* case, there were several claimants asserting the freedom of passage in the Kiel Canal, but only one of them claimed monetary compensation and the Permanent Court acted accordingly.[34] At the same time, as Special Rapporteur Crawford pointed out, 'there may be a potential entitlement of the claimant State to full reparation, which has to be qualified at the level of invocation in order to avoid double recovery'.[35]

The special case of plurality of claimants is presented by ILC article 48 which provides for the standing of every State to vindicate the breaches of *erga omnes* obligations. This case is cognate to article 46, but whether the relevant claimant States are injured States (p. 657) in the technical sense is not material for their entitlement to demand reparation under article 48. At the same time, article 48 allows a claim reparation not for claimant States themselves but for the injured State(s) or non-State actors; third States can in particular claim restitution.[36]

The ILC commentary on article 46 considers the cases in which:

> one State may claim restitution whereas the other may prefer compensation. If restitution is indivisible in such a case and the election of the second State is valid, it may be that compensation is appropriate in respect of both claims.[37]

While the award of compensation runs the risk of double damages, certain other remedies can be awarded to individual injured States or non-State actors without any risk of duplication. This includes restitution, some forms of satisfaction such as the expression of regret, apology, nominal damages, as well as guarantees of non-repetition.

Generally, issues of the division of reparation are bilateral. The responsible States can arrange among themselves the modalities of reparation to the injured State as they wish. Such an arrangement was made, though in rather different circumstances, by the Persian Government which undertook to compensate a United States national, appointed as Treasurer to the Persian Government but then dismissed at Russian insistence. Persia's agreement to assume liability foreclosed the possibility of a claim against Russia,[38] even though Persia would not have dismissed the Treasurer but for Russian compulsion. The matter was bilateral both as between Russia and Persia and between Persia and the United States.

But in other contexts there may be limits on the power of States to dispose of claims of reparation, especially where the norms violated are peremptory in character. As Special Rapporteur Crawford noted, in certain cases the injured State is not entitled to waive restitution and prefer compensation, such as in case of forcible invasion and annexation of a

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State’s territory and illegal detention of persons.[39] This perspective imposes limits on the choice of injured parties.

The issue of plurality of responsible States is dealt with by ILC article 47, which provides that:

> Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

As the Commentary specifies, this provision requires that the responsibility of the State for the wrongful act shall not be reduced even if another State is also involved in the perpetration of the same wrongful act.[40] Such a concept of joint and several responsibility seems to be accepted in international law, as explained, for instance in the separate opinion of Judge Shahabuddeen in *Nauru*.[41] The Court’s judgment did not contradict that line of reasoning but did not follow it either, because of procedural obstacles to Nauru suing all three States.

As the ILC specified, if the two States combine their efforts in committing the wrongful act, the injured State can hold each responsible State to account for the wrongful act as a whole. Article 47 is also relevant in cases where two States act through a joint organ or (p. 658) where one State directs the other State in committing the wrongful act.[42] In some contexts, such as that of joint occupation and administration of territory, the presumption operates in favour of affirming the joint responsibility of occupying or administering States.[43] The issue of whether one responsible State, such as Australia, had to provide the whole reparation or only part of it was not resolved in *Nauru* because the Court pronounced only on the issue of jurisdiction and admissibility. However, the Court pointed out that had the case proceeded to the merits, regard might have been had to the special role played by Australia in the administration of Nauru.[44] The two other States involved in the process—UK and New Zealand— subsequently agreed to contribute to the payment made by Australia, which may be viewed as a *de facto* acknowledgment of this joint and several responsibility, but not on such clear terms as an examination of the question by the Court could have provided.[45]

Even if the commentary does not say so, article 47 is relevant also in the case of aid or assistance to the State in committing the wrongful act. The *Corfu Channel* case, for instance, related to the context where the United Kingdom could under international law have demanded reparation for the damage caused to its vessels both from Yugoslavia which had actually laid the mines and Albania which failed to warn the United Kingdom about the danger its vessels faced in the Albanian territorial waters. Given the limitations on the judicial process that made it possible to sue Albania only, the United Kingdom demanded the entire reparation from Albania, which was awarded by the Court.[46]

As for the nature of the collusion between Albania and Yugoslavia in laying mines, this can be characterized as a joint action which the ILC commentary expressly mentions. But given the distinct roles of Albania and Yugoslavia in this process, this could also be a case of aid or assistance in the commission of the wrongful act: the mine-laying by Yugoslavia did not in isolation cause the injury to British vessels; what caused it was the decision of Albania, which according to the Court knew or ought to have known about the mines, not to warn the United Kingdom about them. It is thus arguable that the principle of plurality of responsible States was applied by the Court to the case of aid or assistance to the State in committing the wrongful act.

That cases of aid or assistance call for the joint responsibility of the involved States is due to the fact that:

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> the whole conception of 'aid or assistance' as an autonomous wrong is in principle misconceived … In simple terms many strong cases of 'aid or assistance' will be primarily classifiable as instances of joint responsibility and it is only in the marginal cases that a separate category of delicts is called for.[47]

As for the assessment of damages, it is suggested that tribunals would assess damages against the complicit State at a level lower than those it might assess against the principal State.[48] But again, no *a priori* answer can be given to this question, as everything depends (p. 659) on the level of complicity and participation, the causal link, the capacity of individual States to pay, and the availability of judicial venues.

The International Court's jurisprudence generally admits the possibility of holding States responsible jointly and severally. The European Court of Human Rights has also pronounced on this issue, albeit in circumstances that cast doubt on the credibility of its findings. The Court in the *Ilaşcu* case[49] found that the breaches of the applicants' rights under article 3 (freedom from torture and inhuman treatment) and article 5 (freedom from arbitrary detention) of the European Convention of Human Rights were attributable to both defendant States—Moldova and Russia. The applicants came, according to the Court, within jurisdiction in terms of article 1 of the Convention in respect of both Moldova and Russia.

The relevant part of the Moldovan territory on which the 'Moldavian Republic of Transdniestria' is based came, according to the Court, under Russia's 'jurisdiction' as the MRT existed because it was supported by Russia militarily, politically, and economically.[50] As the violations of articles 3 and 5 took place on that territory, they engaged Russia's responsibility. While the Court accepted that the Moldovan Government did not exercise authority over part of its territory which was under the effective control of the 'Moldavian Republic of Transdniestria', it still asserted that even in the absence of effective control over the Transdniestrian region, Moldova had a positive obligation under article 1 of the Convention to take diplomatic, economic, judicial or other measures that were in its power to take and were in accordance with international law to secure to the applicants the rights guaranteed by the Convention.[51] Given all that, the Court awarded just satisfaction under article 41, ordering that both Moldova and Russia separately pay compensation to the three victims, as well as their costs and expenses.

While the finding of joint and several responsibility and the ensuing compensation for the combined action of States contributes to the effectiveness of human rights, the way the Court arrived at this decision casts doubt on its credibility. The reasoning that, as Moldova had positive obligations to secure the relevant rights of the applicants, the situation came within its jurisdiction under article 1 is strange. The Convention predicates State obligations, whether positive or negative, only where the situation comes within article 1.

The Court's reasoning affirming the responsibility of Moldova even in the absence of its effective control on the relevant territory contradicts its previous jurisprudence. For instance, the Court held in *Banković* that the 10 NATO member States could not be held accountable under the Convention because they exercised no effective control over the area where they conducted their military campaign.[52] If *Banković* is right, then *Ilasçu* should have been decided otherwise; if *Banković* is wrong, the Court should have said so. Furthermore, the Court's finding of responsibility for conduct in the absence of effective control also contradicts the jurisprudence on the matter of Northern Cyprus. For example, in *An v Cyprus*, claims originating from Northern Cyprus were rejected because Cyprus (p. 660) had no effective control there,[53] and in a series of decisions regarding Northern Cyprus the responsibility of Turkey was established for the very same reason.[54] The Court's

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reasoning in *Ilaşcu* involves a substantial degree of arbitrariness which also undermines the credibility of its finding that each of the defendants had to pay compensation individually.

In *Banković*, States which in the Court's view had no effective control over the territory of FRY were not obliged under article 1 of the Convention to abstain from the forcible action that has directly caused deaths and injuries, while in *Ilaşcu*, Moldova, although never having done anything to violate the applicants' rights, was considered bound to take positive measures, possibly diplomatic demarches and protests, to secure Convention rights to applicants. While *Banković* was killed off at the jurisdictional stage, *Ilaşcu* which had much less justification under article 1, was taken to the merits and pursued to the end. Such divergent treatment of different States is possible if one adopts, as the European Court did, mutually exclusive interpretations of article 1 on different occasions.

Apart from endorsing double standards in the law of the European Convention, *Ilaşcu* is at divergence with the general international law standard that States are not under an obligation to provide their nationals with diplomatic protection, which outcome prevailed in the *Abbasi* case before the English Court of Appeal.[55]

The issue of joint and several responsibility was also addressed within the framework of the UN Compensation Commission dealing with damage to States, natural and juridical persons during the Iraq's invasion of Kuwait in 1990–1991. In Decision 15 the Commission's Governing Council determined two criteria for granting compensation for losses suffered: (a) the loss must be the result of Iraq's unlawful invasion and occupation of Kuwait; (b) the causal link must be direct. The Commission has established that Iraq need not compensate those losses and damages which arose as a consequence of the trade embargo. Compensation was only to be paid to the extent that the losses were caused by the invasion and occupation and would have been caused irrespective of the introduction of the trade embargo. At the same time, the responsibility of Iraq was not excluded if the loss or damage was caused simultaneously by invasion by Iraq and the trade embargo.[56] Also, under the Compensation Commission scheme, Iraq had to pay for losses which resulted from the Coalition's military operations,[57] instead of the relevant damages being allocated among the responsible States in terms of the causal link between the action and the injury. Holding the State liable beyond what it had done has no legal justification—this principle underlies the law of joint and several responsibility.

(b) Responsibility to and of international organizations

When an international organization is injured by an internationally wrongful act, it can lodge a complaint against the responsible State even if the very same wrongful act has injured other State(s). This position appears to be recognized in the law of diplomatic protection. As the International Court emphasized in the *Reparations* Advisory (p. 661) Opinion, the organization must be able to present claims on behalf of its injured agents in order to ensure that in performance of their functions they are not dependent on their national States.[58] As the Court stated, there is no rule of law which assigns priority to the claim of the State or that of the organization and the outcome may be the 'competition between the State's right of diplomatic protection and the Organisation's right of functional protection.'[59]

In line with this, the ILC Special Rapporteur on Diplomatic Protection, John Dugard, proposed a draft article according to which the right of States to exercise diplomatic protection for their nationals shall not preclude the exercise of functional protection of the very same persons by an international organization whose agents they are.[60] On the other hand, the State of nationality can exercise its right of diplomatic protection even if the relevant national is also the agent of an international organization and functional protection is also a possibility.[61] Such a legal position enables both injured entities to demand the reparation for the same wrongful act. This enhances the position of the individual in

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and predictable standards in certain fields of joint and several responsibility, and the procedural principles as developed and applied by international tribunals severely (p. 665) undermine the effective implementation of State responsibility for actions of multiple States and the award of remedies.

Further reading

C Amerasinghe, 'Liability to Third Parties of Member States of International Organisations: Practice, Principle and Judicial Precedent' (1991) 85 *AJIL* 259

L Bouve, 'Russia's Liability in Tort for Persia's Breach of Contract' (1912) 6 *AJIL* 389

B Graefrath, 'Complicity in the Law of International Responsibility' (1966/2) *RBDI* 370

V Lowe, 'Responsibility for the Conduct of Other States' (2002) *Japanese Annual of International Law* 1

J Noyes & B Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 *Yale JIL* 225

A Orakhelashvili, 'The World Bank Inspection Panel in Context: Institutional Aspects of the Accountability of International Organisations' (2005) *International Organisations Law Review* 57

J Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) *BYIL* 77

M Shaw & K Wellens, *ILA Final Report on Accountability of International Organisations* (2004)

M Terwiesche, 'International Responsibility arising from the Implementation of a Security Council Resolution: The 2nd Gulf War and the Rule of Proportionality' (1995–1996) 22 *Polish YIL* 81(p. 666)

Footnotes:

1 *Factory at Chorzów, Merits, 1928, PCIJ, Series A, No 17*, p 4, 49, 58–59.

2 *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949*, p 149, 185–186.

3 G Gaja, First Report on Responsibility of International Organisations, 2003, A/CN.4/532, 8–9, 18–19; see also G Gaja, Second Report on Responsibility of International Organisations, 2004, A/CN.4/541, 3; see also C Amerasinghe, *Principles of the Institutional Law of International Organisations* (2nd edn, Cambridge, CUP, 2005), 401.

4 M Shaw & K Wellens, *ILA Final Report on Accountability of International Organisations* (2004), 27.

5 The US made a claim of joint and several responsibility against USSR and Hungary in the case of the *Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v Union of Soviet Socialist Republic, Hungary), Order of 12 July 1954, ICJ Reports 1954*, p 103; however, findings as to responsibility were never made because the respondents refused to accept the Court's jurisdiction. See also the discontinuance order in the *Lockerbie* cases, *Order of 10 September 2003*, *ICJ Reports 2003*, p 1. In *Banković*, where the European Court was asked to determine the responsibility of 10 NATO member States for the bombing of the Belgrade television station which claimed the life of several persons, the Court refused to adjudicate because the matter was allegedly beyond the Convention's *espace juridique*, see *Banković v Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and United Kingdom* (App No 52207/99), Decision on admissibility, *ECHR Reports 2001-XII* [GC]; for an analysis see A Orakhelashvili, 'Restrictive

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Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 *EJIL* 529, 538–551.

6 Commentary to art 6, paras 2 and 3.

7 *Drozd and Janousek v France and Spain* (App No 12747/87), *ECHR, Series A, No 240* (1992), paras 91–96.

8 Commentary, Chapter IV of Part I, para 8.

9 Commentary to art 16, para 4.

10 Commentary to art 16, para 5; see also the observations on the US financial assistance to Israel which contributes to the expansion of settlements in the West Bank, J. Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) 57 *BYIL* 77, 113.

11 V Lowe, 'Responsibility for the Conduct of Other States' (2002) *Japanese Annual of International Law* 1, 6.

12 Commentary to art 16, para 5.

13 Commentary to art 16, para 5.

14 B Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 *RBDI* 375.

15 Commentary to art 17, para 5.

16 Commentary to art 16, para 6.

17 Commentary to art 17, para 8.

18 Commentary to art 16, para 10.

19 G Gaja, Second Report on Responsibility of International Organisations, 2004, A/CN. 4/541, 15–18; see also C Amerasinghe, *Principles of the Institutional Law of International Organisations* (2nd edn, Cambridge, CUP, 2005), 403–404.

20 M Terwiesche, 'International Responsibility arising from the Implementation of a Security Council Resolution: The 2nd Gulf War and the Rule of Proportionality' (1995–1996) 22 *Polish YIL* 83.

21 G Gaja, Third Report on Responsibility of International Organisations, 2004, A/CN. 4/553, 17.

22 G Gaja, Second Report on Responsibility of International Organisations, 2004, A/CN. 4/541, 4.

23 G Gaja, Third Report on Responsibility of International Organisations, 2005, A/CN. 4/553, 11.

24 For the details of this process see A Orakhelashvili, 'The World Bank Inspection Panel in Context: Institutional Aspects of the Accountability of International Organisations' (2005) *International Organisations Law Review* 57.

25 G Gaja, Third Report on Responsibility of International Organisations, 2005, A/CN. 4/553, 12.

26 Concluding Observations of the Committee on Economic, Social and Cultural Rights: France, 30 November 2001, E/C.12/1/Add.72, para 32; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Belgium, 01 December 2000 E/C.12/1/ Add.54, para 31; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Germany, 24 September 2001 E/C.12/1/Add.68 para 31; Concluding

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Observations of the Committee on Economic, Social and Cultural Rights: Japan, 24 September 2001 E/C.12/1/Add.67 para 37.

27 G Gaja, Third Report on Responsibility of International Organisations, 2005, A/CN.4/553, 12.

28 *Maclaine Watson v Dept of Trade* [1988] 3 All ER 257, 311.

29 *JH Rayner Ltd v Dept of Trade* [1990] 2 AC 468, 513–516.

30 Ibid, 482.

31 As advanced in G Gaja, Third Report on Responsibility of International Organisations, 2005, A/CN.4/553, 16–18. For concerns arising out of such a requirement see also P Sands & P Klein, *Bowett's Law of International Institutions* (5th edn, London, Stevens, 2001), 520.

32 J Noyes & B Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 *Yale JIL* 258, 266.

33 J Crawford, Third Report on State Responsibility, 2000, A/CN.4/507.Add.2, 20; see in general, J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary* (Cambridge, CUP, 2002), 45–46.

34 *SS Wimbledon, 1923, PCIJ Reports, Series A, No 1*, p 4, 30–33.

35 J Crawford, Third Report on State Responsibility, 2000, A/CN.4/507.Add.2, 12

36 Commentary to art 48, paras 8–10, 13.

37 Commentary to art 46, para 4.

38 L Bouvé, 'Russia's Liability in Tort for Persia's Breach of Contract' (1912) 6 *AJIL* 389, 392–393.

39 J Crawford, Third Report on State Responsibility, 2000, A/CN.4/507/Add.1, 5.

40 Commentary to art 47, para 11.

41 Separate Opinion of Judge Shahabuddeen, *Certain Phosphate Lands in Nauru (Nauru v Australia), ICJ Reports 1992*, p 240, 283–285.

42 Commentary to art 47, para 2.

43 I Brownlie, *System of the Law of Nations. State Responsibility* (Oxford, OUP, 1983), 188.

44 *Certain Phosphate Lands in Nauru (Nauru v Australia), ICJ Reports 1992*, p 240, 258–259.

45 The settlement agreement between Nauru and Australia referred to Australia's denial of responsibility, art 1, 23 *ILM* 1475. Such denial is not conclusive in terms of whether responsibility can actually be established in law.

46 *Corfu Channel, Merits, ICJ Reports 1949*, p 4; *Corfu Channel, Assessment of the Amount of Compensation, ICJ Reports 1949*, p 244.

47 I Brownlie, *System of the Law of Nations. State Responsibility* (Oxford, OUP, 1983), 191.

48 J Quigley, 'Complicity in International Law: A New Direction in the Law of State Responsibility' (1986) 57 *BYIL* 77, 129.

49 *Ilaşcu and others v Moldova and Russia* (App No 48787/99), *ECHR Reports 2004-VII* [GC].

50 Ibid, para 392.

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51 Ibid, paras 330–331, 333–335; the Court added that Moldova had not been sufficiently attentive to this issue in its bilateral relations with the Russian Federation.

52 *Banković v Belgium, The Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, The Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom* (App No 52207/99), Decision on Admissibility, *ECHR Reports 2001-XII* [GC].

53 *An v Cyprus*, 13 *HRLJ* 44.

54 *Cyprus v Turkey* (App Nos 6780/74 & 6950/75), 2 *DR* 125; *Cyprus v Turkey* (App No 8007/77), 13 *DR* 145; *Chrysostomos v Turkey*, 12 *HRLJ* (1991); *Loizidou v Turkey (Preliminary Objections)* (1995) 103 *ILR* 622; *(Merits)* (1996) 108 *ILR* 443; *Cyprus v Turkey, Merits* (2001) 120 *ILR* 10.

55 *Abbasi v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2002] ECWA Civ 1598; 126 *ILR* 685.

56 UNCC Governing Council, Decision 15, 18 December 1992, 109 *ILR* 615, para 3.

57 *Criteria for Expedited Processing of Urgent Claims*, S/AC.26/1991/1 para 18; S/AC. 26/1991/7/Rev.1, paras 6, 21, 34.

58 *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949*, 174, 183.

59 Ibid, 185.

60 J Dugard, Fifth Report on Diplomatic Protection, 2004, A/CN.4/538, 8–9.

61 Ibid, 11, 13.

62 For the overview see C Amerasinghe, *Principles of the Institutional Law of International Organisations* (2nd edn, Cambridge, CUP, 2005), 421–425; for Amerasinghe's own approach see ibid, 440; see also CF Amerasinghe, 'Liability to Third Parties of Member States of International Organisations: Practice, Principle and Judicial Precedent' (1991) 85 *AJIL* 259.

63 *Attorney-General v Nissan* [1970] AC 179; 44 *ILR* 360, 375–376.

64 *Maclaine Watson v Dept of Trade* [1988] 3 All ER 257, 295–307 (Kerr LJ).

65 Ibid, 333–334.

66 *JH Rayner Ltd v Dept of Trade* [1990] 2 AC 468, 479.

67 *Maclaine Watson v Dept of Trade* [1988] 3 All ER 257, 333.

68 *Certain Expenses of the United Nations, Advisory Opinion, ICJ Reports 1962*, p 151, 172–179.

69 Cf C Amerasinghe, *Principles of the Institutional Law of International Organisations* (2nd edn, Cambridge, CUP, 2005), 440.

70 *M & Co v Federal Republic of Germany* (App No. 13258/87), ECHR, Decision on Admissibility, 9 February 1990, 33 *YB ECHR* 1990; *Waite & Kennedy v Germany* (App No 26083/94), *ECHR Reports 1999-I*; *Matthews v United Kingdom* (App No 24833/94), *ECHR Reports 1999-I*; *Bosphorus Hava Yollari Turizm v Ireland* (App 45036/98), *ECHR Reports 2005-VI*.

71 *Monetary Gold Removed from Rome in 1943, ICJ Reports 1954*, p 19, 31–32.

72 *Certain Phosphate Lands in Nauru (Nauru v Australia), ICJ Reports 1992*, p 240, 259–260.

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73 Ibid, 261.

74 *East Timor (Portugal v Australia), ICJ Reports 1995*, p 90, 104.

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Annex 664

R. S. J. Martha, *The Financial Obligation in International Law* (Oxford University Press, 2015), pages 402-412

The Financial Obligation in International Law

RUTSEL SILVESTRE J. MARTHA

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Contents

III. CURRENCY OF OBLIGATIONS

IV. VALUE RISKS OF OBLIGATIONS

V. VALIDITY OF OBLIGATIONS

VI. PRELIMINARY OBLIGATIONS

VII. IMPOSED OBLIGATIONS

Table of Cases

The table below contains chronological listings of the judgments and awards—of (1) the international arbitral tribunals; (2) the world courts and ajudicative bodies; (3) the international arbitral tribunals; (4) the regional courts (including the regional human rights courts); and (5) the domestic courts—that are mentioned in texts. Whereas the majority can be found at various websites,[1] where possible, the print source of the judgments and awards have been cited.

I. THE INTERNATIONAL ARBITRAL TRIBUNALS

[1] Websites: <http://www.un.org/law/riaa/>, <http://www.pca-cpa.org/>, <http://www.icj-cij.org/docket>, <http://www.world-bank.org/icsid>, <http://curia.europa.eu>, <http://hudoc.echr.coe.int/>, <http://www.worldcourts.com>, <http://www.corteidh.or.cr/>, <http://italaw.com>, <http://untreaty.un.org/unat/>, <www.ilo.org/tribunal>, <www.oas.org/tribadm/default_en.asp>.

44

Compensation for Damages Caused by Lawful Acts

As illustrated by the *Diverted Cargoes* case,[1] which involved the determination of the amount due by the UK to Greece for the diversion of certain cargo destined to Greece during the Second World War, compensation for damages for lawful acts is not alien to international law. Under the law of prize taking, during time of war private enemy ships and neutral merchantmen carrying contraband are subject to seizure.[2] Title to such vessels and their cargoes does not immediately pass to the captor State but, under international law, must be adjudicated by the captor State's prize court, which may condemn them as lawful prizes.[3] That was not the situation in this case. The two States were allies fighting a common enemy, and both countries deemed the diversion of the cargoes necessary. The compensation to which Greece was entitled was thus not tied to a liability for unlawful act. There are many other situations in which international law requires compensation to the injured party for damages caused by lawful conduct of the author. International courts and tribunals recognize that even where international responsibility cannot be admitted, compensation would still be given to injured parties when it can be established that the injury has been caused by the lawful conduct.[4] The following sections will describe a selection of these situations.

44.1 Ultra-hazardous Liability

44.1.1 The principle

Activities with extraterritorial injurious impact have always been topical in international relations and of concern to international law. International practice[5] and jurisprudence appear to have recognized that, in the exercise of their exclusive authority within or beyond their territories, over their ships and aircraft, for example, States are expected to have due regard for the interests of other States that may adversely be affected.[6] The *Trail Smelter* arbitration[7] laid the foundations for the discussions

[1] *The Diverted Cargoes Case (Greece, United Kingdom of Great Britain and Northern Ireland)*, XII UNRIAA, 53–81.

[2] See generally JHW Verzijl, WP Heere, and JPS Offerhaus, *International Law in Historical Perspective, Vol VII (The Law of Maritime Prize)* (AW Sijthoff, 1992).

[3] See also CJ Colombos, *A Treatise on the Law of Prize* (3rd edn, David McKay Co, 1949).

[4] *Mexico City Bombardment Claims (Great Britain v Mexico)*, 15 February 1930, V UNRIAA, 76 at 82.

[5] See A/CN.4/384, Survey of State Practice Relevant to International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law, prepared by the Secretariat, *ILC Yearbook* 1985, Vol II(1), Add 1.

[6] See generally J Barboza, 'International Liability for Injurious Consequences for Acts Not Prohibited by International Law and Protection of the Environment' (1994) *RdC* 247: 293.

[7] *Trail Smelter Case (United States, Canada)*, 16 April 1938 and 11 March 1941, III UNRIAA, 1905.

in international law about the idea that, although a party may make use of its rights in the way it sees fit, its conduct is subject to the qualification implied in the maxim *sic utere tuo ut alienum non laedas*. In that case, the tribunal examined the decisions of the US Supreme Court as well as other sources of law and reached the conclusion that 'under the principles of international law, as well as the law of the United States, 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'. Under the doctrine expressed in this maxim, the entitlement to exercise one's right remains unquestioned; but the exercise of any right entails by definition an obligation to undertake all that is necessary for the protection of those who the right holder knows might be expected to suffer any harm, what a prudent and reasonable man would regard as requisite, or usually sufficient, to prevent or compensate the harm. More generally, the tribunal did not clarify whether a right holder is liable only for intentional, reckless, or negligent behaviour (fault-based conduct) or whether it is strictly liable for all injurious conduct.

In subsequent developments, international law has come to distinguish responsibility, which arises upon breach of an international obligation, and liability for the injurious consequences of lawful activities.[8] Significantly, in *Corfu Channel* the ICJ stated that it was 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[9] This statement may be taken to include the maxim: *sic utere tuo ut alienum non laedas*.[10] In *Legality of the Threat or Use of Nuclear Weapons*, the ICJ opined that '[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment'.[11] Supplementing sovereign equality as the normative basis of the liability for lawful conduct with an inherent duty to respect the environment in the interest of mankind, the Court reiterated this statement in *Gabčíkovo-Nagymaros Project*, holding that it has 'recently had occasion to stress... the great significance that it attaches to respect for the environment, not only for States but for the whole of mankind'.[12]

This formulation of the norm raises the question whether the duty to repair the damages caused is a consequence of a breach of an obligation not to cause harm to third parties or whether it is a condition for the lawful engagement in

[8] NLJT Horbach, 'The Confusion About State Responsibility and International Liability' (1991) *Leiden Journal of International Law* 4: 47 and NLJT Horbach, *Liability Versus Responsibility Under International Law: Defending Strict State Responsibility for Transboundary Damage* (Diss Leiden, 1996); AE Boyle, 'State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?' (1990) *ICLQ* 39: 1. See also S Sucharitkul, 'State Responsibility and International Liability Under International Law' (1996) *Loyola of Los Angeles International and Comparative Law Review* 18: 821; X Hanqin, *Transboundary Damage in International Law* (Cambridge University Press, 2003).

[9] *Corfu Channel Case (UK v Albania) (Merits)*, 9 April 1949, ICJ Reports 1949, 4 at 22.

[10] Cf ILC,' Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, with Commentaries 2006', *ILC Yearbook* 2006, Vol II, Part Two, 141 ff.

[11] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996, ICJ Reports 1996, 226, para 29.

[12] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, ICJ Reports 1997, 7.

ultra-hazardous activities. In other words, is liability for lawful conduct established by primary rules or by secondary rules? There are, of course, authors who approach the issue of damages caused by ultra-hazardous activities in terms of responsibility for wrongful acts. For these authors, the causation of damages entails a breach of obligation requiring reparation.[13] According to the alternative view, which is the view adopted by the ILC,[14] States and other relevant international persons are not restricted in the use of natural resources within their territory as long as they do not interfere with the interests of other States enjoying the same right. This implies that the duty to respect the environment of other States or of areas beyond national control entails that when, despite all care undertaken, damage is caused to others, that will not render the activity unlawful provided such damage is repaired or due compensation is paid.[15]

It is thus recognized that a duty to make reparations may exist even where the party concerned takes all the necessary measures to prevent damage to others, but the damage nonetheless occurs.[16] For example, in 1981 Canada agreed to a lump-sum payment of Can$3 million from the Soviet Union in full and final settlement of all matters connected with the disintegration of the Soviet satellite Cosmos-954 in Canada. In that case, Canada referred to the general principle of the law of absolute liability for injury resulting from activities with a high degree of risk:

> The standard of absolute liability for space activities, in particular activities involving the use of nuclear energy, is considered to have become a general principle of international law. A large number of states, including Canada and the Union of Soviet Socialist Republics, have adhered to this principle as contained in the 1972 Convention on International Liability for Damage caused by Space Objects. The principle of absolute liability applies to fields of activities having in common a high degree of risk. It is repeated in numerous international agreements and is one of 'the general principles of law recognized by civilized nations' (Article 38 of the Statute of The International Court of Justice). Accordingly, this principle has been accepted as a general principle of international law. In calculating the compensation claimed, Canada has applied the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty.[17]

[13] See eg A Kiss, 'State Responsibility and Liability for Nuclear Damage' (2006) *Denver Journal of International Law and Policy* 35: 67.

[14] T Gehring and M Jachtenfuchs, 'Liability for Transboundary Environmental Damage Towards a General Liability Regime?' (1993) *EJIL* 4: 92.

[15] Sucharitkul (n 8), 821–39; also G Handl, 'Liability as an Obligation Established by a Primary Rule of International Law' (1985) *Netherlands Yearbook of International Law* XVI: 49.

[16] CW Jenks, 'Liability for Ultra-hazardous Activities in International Law' (1996) *RdC* 117: 105 at 105–10 and 195.

[17] *Protocol Between the Government of Canada and the Government of the Union of Soviet Socialist Republics Done on April 2, 1981, With Statement of the Canadian Claim*, available at: <http://www.jaxa.jp/library/space_law/chapter_3/3-2-2-1_e.html>. On this case, see EG Lee and DW Sproule, 'Liability for Damage Caused by Space Debris: The Cosmos 954 Claim' (1988) *Canadian Yearbook of International Law* 26: 273.

In many instances, such a basis for liability can be applied only by virtue of treaty provisions, but is also reflected in other forms of international practice.[18] Nevertheless, except where the parties concerned partake in a conventional regime which answers that question, the legal issues involved in the determination of the ensuing financial obligation remain largely unsettled.[19]

Jenks is more specific by suggesting that the following three arguments cumulatively establish the reasonable case for a limitation of the maximum amount of liability: (1) strict liability, being independent from fault, should in fairness always be qualified by a limitation of its amount; (2) the burden of a strict liability that is unlimited in amount is an excessive deterrent to initiatives in the development of new types of ultra-hazardous activity; and (3) strict liability for potentially large amounts is often accompanied by an obligation to provide security, and such security cannot readily be provided for an undefined and unlimited amount.[20] These arguments are actually the drivers behind the conventional limited liability regimes, including the financial security for liability.

The ILC does not seem to have accepted this idea of a maximum amount. In order to codify and develop the principles that cover such situations where damage results from non-wrongful conduct, it undertook to study the '*International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law*',[21] which resulted in the *Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*.[22] It is evident from this work that, unlike with respect to responsibility for international unlawful acts, the scope of the liability for hazardous conduct is far from crystalized. It is therefore difficult to state at this stage whether the obligations require only reasonable compensation or *restitutio in integrum*.[23] In its endeavour to codify and progressively develop the law in this area, the ILC proffered the concept of 'prompt and adequate compensation',[24] and discerned the following factors which will determine the terms or heads against which precise sums of compensation would be payable: (a) financially assessable damage, that is, damage quantifiable in monetary terms is compensable; (b) this includes damage suffered by the State to its property, or personnel, or in respect of expenditures reasonably incurred to remedy or mitigate damage, as well as damage suffered by natural or legal persons, both nationals and those who are resident and suffered injury

[18] See Survey of Liability Regimes Relevant to the Topic of International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (International Liability in Case of Loss from Transboundary Harm Arising Out of Hazardous Activities), Prepared by the Secretariat. International Law Commission, Fifty-sixth session, Geneva, 3 May–4 June and 5 July–6 August 2004, available at: <http://legal.un.org/ilc/documentation/english/a_cn4_543.pdf>.

[19] Cf A Cassese, *International Law* (2nd edn, Oxford University Press, 2005), 497–9.

[20] Jenks (n 16), 184–6.

[21] B Graefrath, 'Responsibility and Damage Caused: Relationship Between Responsibility and Damages' (1985) *RdC 15*: 9 at 104–19.

[22] UNGA 61/36. Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, 18 December 2006.

[23] Note similar comments made by scholars with a time difference of almost five decades: H Lauterpacht, *The Development of International Law by the International Court* (1958; repr. Grotius Publications, 1982), 316 and Cassese (n 19), 497–9.

[24] Principle 3, Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, Adopted at the 58th session of the ILC (2006), *ILC Yearbook* 2006, Vol II, Part Two.

on its territory; (c) the particular circumstances of the case, the content of the obligation breached, the assessment of reasonableness of measures undertaken by parties in respect of the damage caused, and finally, consideration of equity and mutual accommodation. From these the ILC derives the following guidelines on the basis of awards rendered by international courts and tribunals: compensation is payable in respect of personal injury, for directly associated material loss such as loss of earnings and earning capacity, medical expenses including costs for achieving full rehabilitation; compensation is also payable for non-material damage suffered as, for example, for 'loss of loved ones, pain and suffering as well as the affront to sensibilities associated with the intrusion on the person, home or private life'.[25]

It would seem to stand to reason that if an act that is not wrongful causes damage despite all the reasonable precautions undertaken by the author, any resulting obligation to compensate the injured party cannot be the same as in the case of responsibility for wrongful conduct. Going by Lauterpacht's analysis of *Chorzow Factory*, it is probably correct to say that in case of liability for hazardous activities only 'reasonable compensation' will be required rather than full reparation.[26] Still, it remains easier to state the principle that liability for ultra-hazardous activities is different from *restitutio in integrum*, but for a third party to set the amount in the absence of an agreed framework is immensely difficult,[27] which may explain the preference of parties for lump-sum settlements in such situations.[28] The payment of such a lump-sum amount of compensation agreed upon as a result of negotiations extinguishes the obligation of the liable party.

44.2 Liability for Harmful Exercise of Jurisdiction?

Because financial markets worldwide have become so intertwined, from the perspective of the concept of *sic utere tuo ut alienum non laedas*, the question whether a State should bear some financial consequences for the exercise of its (banking regulatory) jurisdiction is lawful but risky. This question needs not to be answered here, but it shows that the principle underlying central ruling in the *Trail Smelter* case has a much wider import than is usually ascribed to it. It would seem that for the time being the international community's response to the issue has been to develop prudential standards for the regulation of financial institutions. In the context of European integration, this includes the international obligation to provide depositors a certain guarantee. The EFTA Court's ruling in the *Icesave* case, which was discussed earlier in the context of *negotiorum gestio*,[29] also bears on the general question of the nature of the attendant obligations of States to ensure compensation for injury caused by hazardous

[25] ILC: Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, with commentaries 2006, *ILC Yearbook* 2006, Vol II, Part Two, 149–50.

[26] P Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Springer, 2007), 125; TS Hardman Reis, *Compensation for Environmental Damages Under International Law: The Role of the International Judge* (Kluwer Law International, 2011), 105.

[27] On this difficulty in relation to the *Amoco Cadiz* case, see Cassese (n 19), 499.

[28] Cf N Horbach and R Lefeber, 'Staatsaansprakelijkheid', in N Horbach, R Lefeber, and O Ribbelink, *Handboek Internationaal Recht* (TMC Asser Press, 2007), 309 at 344.

[29] See Chapter 43 in this volume.

activities or other harmful activities. Without going into the debate about whether providing banking services should be regarded as an ultra-hazardous activity, for the sake of the legal issue to be considered here it suffices to say that the risks for the public involved in banking services and the government's stake in the healthy functioning of the financial system justify the prudential and macro-economic governmental interventions in the financial markets. Nowadays, it is accepted that the government should also bear some of the risks inherent to the provision of financial services and should have a mechanism in place to ensure the pay-out of a minimum guaranteed amount to depositors in the case of a bank failure. Especially in the European region, this has been converted into conventional obligations for the States partaking in regional economic integration. In ruling in favour of Iceland in the *Icesave* case, the EFTA Court emphasized first that it was important to look at the specific provisions of the relevant directive in order to assess whether it imposed an obligation of result, that is an obligation on Iceland to ensure that all deposit holders were repaid following the failure of Icesave. In light of the fact that European directives generally left the choice of means to the Member State concerned, prescribing only a certain result, in this case establishing and supervising a deposit insurance scheme, it emphasized that deposit insurance was subject only to minimum harmonization. It also emphasized that the question of Iceland's potential State liability for loss and damage *to individuals* was a separate one, and outside the scope of its judgement. It can be inferred from this that for the time being the question whether under contemporary international law States are obliged to underwrite deposit liabilities of private banks must be answered in the negative.

44.3 Liability for Lawful Dispossessions

There is an on-going debate as to whether the payment of compensation is a condition for the lawfulness of a dispossession or whether the question of compensation is a matter that arises after a determination has been made regarding the lawfulness of a State's intervention.[30]

The first view can be said to be the approach principally adopted by the Iran–United States Claims Tribunal and in some investor-State arbitration cases, which recognize the payment of prompt compensation to be a consideration relevant to the lawfulness of a taking under customary international law.[31] It cannot be denied that the first view is somewhat circular, which may explain why some question whether the distinction between lawful and unlawful expropriation is really meaningful.[32]

[30] See S Ripinsky and K Williams, *Damages in International Investment Law* (BIICL, 2008), 71–83.

[31] CN Brower and JD Brueschke, *The Iran–United States Claims Tribunal* (Kluwer Law International, 1998), 499.

[32] Some investor-State tribunals have ignored the distinction between lawful and unlawful dispossessions, eg *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award of 8 December 2000; *Middle East Cement Shipping and Handling Co SA v Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award of 12 April 2002; *Metalclad Corporation v The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award of 30 August 2000; *Mr Franz Sedelmayer v The Russian Federation*, SCC, Award of 7 July 1998, available at: <http://www.italaw.com/sites/default/files/case-documents/ita0757.pdf>.

The second view holds that non-payment does not necessarily make an otherwise lawful taking unlawful because, for instance, some takings may not require compensation or because the compensation paid is commensurate to the lawfulness of the taking.[33] In the case of the law of the ECHR, an even more far-reaching position is assumed, namely that an interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the affected party's fundamental rights.[34] The implication of this is that there must be a reasonable relationship between the objective of the dispossessing measure and the means employed to achieve this aim, and that by consequence there may be instances where deprivation of property without compensation does not *per se* render the measure unlawful.[35] The tribunal in the *BIS Shares Repurchase* case took what could be called a neutral position by not choosing sides in this controversy on account of the fact that in the final analysis the issue boils down to one of valuation:

> A central issue in this case is the adequacy of the amount which the Bank paid for the recalled shares. Whether this question is characterized as one of 'reparations,' implying that the recall was unlawful, or as 'compensation,' implying that the recall was expropriatory and that its lawfulness is contingent upon the Bank's paying international law's measure of compensation, or as one of 'fair' price, implying, in a more neutral fashion, that the gravamen is simply one of determining the proper value of the recalled shares, all the Claimants and the Bank have agreed that the issue is one of valuation.[36]

In this sense, the question is thus the adequacy of the compensation paid. Inadequate compensation would render the dispossession unlawful and require a higher compensation involving a valuation to cover the loss suffered between the moment of taking and the date of award. Indeed, as already noted in Chapter 42 of this volume, according to the ruling in *Chorzow Factory* a distinction must be made between the secondary financial obligations in case of a lawful dispossession and an unlawful

[33] M Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press, 2004), 345.

[34] *Sporrong and Lönnroth v Sweden*, Judgment of 23 September 1982, ECHR Series A, No 52, §69.

[35] *Jahn and Others v Germany*, Judgment of 30 June 2005 (App nos 46720/99, 72203/01, and 72552/01), §86 ECHR 2005-VI, §89; *James and Others v The United Kingdom*, Judgment of 21 February 1986, ECHR Series A, No 98, §54; *The Former King of Greece v Greece*, Judgment of 23 November 2000 (App no 25701/94), ECHR 2000-XII, §89. See U Deutsch, 'Expropriation Without Compensation—The European Court of Human Rights Sanctions German Legislation Expropriating the Heirs of "New Farmers"' (2005) *German Law Journal* 6: 1367. But see differently *Bank of International Settlement—Partial Award*, 22 November 2002, XXIII UNRIAA, 183 at para 165: 'International law also requires that, in order to be lawful, an expropriation should be against payment of compensation. Indeed, the Bank recognized that the recall had the consequence for the private shareholders that they lost their rights. The Bank accepted from the beginning that such a deprivation of property could only be lawful against payment of compensation. The issues concerning the amount of compensation will be addressed separately. However, the Tribunal would underline that a decision by the BIS which has the effect of depriving the private shareholders of their property rights, *i.e.* their shares, cannot be considered lawful without the payment of compensation. This follows from the rules of general international law protecting private property as well as from general principles of law concerning share companies, a point which the Parties did not dispute.'

[36] *Bank of International Settlement—Partial Award* (n 35), 183, para 160.

expropriation. That ruling holds that the extent of the duty to pay compensation varies according to whether the intervention is lawful or not. Whereas in the case of a lawful expropriation the ensuing financial obligation is limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment (*damnum emergens*), in cases of unlawful expropriation compensation of the loss sustained as the result of the seizure must be added to that obligation (*lucrum cessans*).[37]

This being the default situation under general international law, it is of course possible for parties to establish different standards that apply to their bilateral relations or in specialized treaty regimes, even to the extent of developing a special branch in which the first view discussed above emerges as the prevalent state of the law. In the *BIS Shares Repurchase* case, the tribunal found that a *lex specialis* standard applied comprising 'a proportionate share of net asset value' method applied in that specific case.[38] The international practice in respect of investment protection is of more systemic consequence in this matter. The UNCTAD counts that between 1989 and 2003 the number of bilateral treaties for the promotion and protection of foreign investments rose from 385 to a total of 2,265 involving 176 countries. The pattern under these bilateral investment treaties is that neither party shall take any measure depriving, directly or indirectly, investors of the other contracting party of their investments unless such measure satisfies certain specified criteria, including that it is accompanied by provision for payment of just compensation, and that such compensation shall represent the genuine value of the investment. Against this background, the tribunal in *CME BV v Czech Republic* described the current situation in international law in the following terms:

> The requirement of compensation to be 'just' and representative of the 'genuine value of the investment affected' evokes the famous Hull Formula, which provided for the payment of prompt, adequate and effective compensation for taking of foreign owned property. This formula was controversial. Capital exporting countries viewed it as an expression of customary international law. Developing countries and Communist States maintained that the foreign investor was entitled to no more compensation than provided by the law of the host government however and whenever amended and applied. The controversy came to a head with the adoption by the General Assembly of the United Nations of the 'Charter of Economic Rights and Duties of States'. The major capital exporting States voted against the Charter. But in the end, the international community put aside this controversy, surmounting it by the conclusion of more than 2200 bilateral investment treaties. Today these treaties are truly universal in their reach and essential provisions. They concordantly provide for payment of 'just compensation', representing the 'genuine' or 'fair market' value of the property taken. Some treaties provide for prompt, adequate and effective compensation amounting to the market value of the investment expropriated immediately before the intention to embark thereon become public knowledge. Others provide that compensation shall represent the equivalent of the investment affected. These concordant

[37] *Factory at Chorzów (Merits)*, 1928, PCIJ Series A, No 17 at 47–8.

[38] *Bank of International Settlement—Partial Award* (n 35), 183, paras 160, 170, 175, and 195.

provisions are variations on an agreed, essential theme, namely that, when a State takes foreign property, full compensation must be paid.[39]

It may be inferred from this that, as the PCIJ stated in *Chorzow Factory*, if the dispossession meets the other criteria for its legality and is accompanied by a payment of compensation at the fair market value as it stood immediately before the intention of the taking became known to the public, including interest until the date of payment, that would render the measure lawful. Failure to do so would entail an unlawful dispossession, which would require compensation for loss of profits between the date of the taking and the date of the award/settlement, in addition to compensation of the value on the date of the taking.[40]

44.4 Damages Caused Under Circumstances Precluding Wrongfulness

As can be concluded from the annulment decision in *CMS v Argentina*, in any situation where there is an alleged breach of an international obligation, four basic issues need to be addressed. In the first place, it must be determined whether there has been non-performance or default in fact. This involves establishing the facts, interpreting the relevant international legal instrument, and answering questions such as what was required under the primary obligation. In the second place, if there has been non-performance or default in fact, it becomes necessary to determine whether such non-performance constitutes a breach of an international obligation, that is, whether there was any excuse or justification recognized by international law for non-performance. Third, in the absence of such an excuse or justification, if the breach is established, the question becomes what remedy or remedies are available to the aggrieved party. Finally, if damages have been caused under circumstances precluding wrongfulness, the question becomes whether and to what extent the author is nonetheless required to compensate the injured party.[41]

The ILC's articles codifying the law on State responsibility and the responsibility of international organizations contain six circumstances which, when invoked, justify or excuse the commission of acts that are otherwise unlawful. Subject to the limitation concerning *ius cogens*,[42] these circumstances are: consent, self-defence, countermeasures, *force majeure*, distress, and necessity.[43] The codified law of international

[39] *CME Czech Republic BV v The Czech Republic*, Award of 14 March 2003 at §497, available at: <http://ita.law.uvic.ca/documents/CME-2003-Final_001.pdf>.

[40] See, in this sense *ADC Affiliate Ltd and ADC and ADMC Management Ltd v Hungary*, ICSID Case No ARB/03/16 IIC 1 (2006).

[41] *CMS Gas Transmission Co v Argentina*, ICSID Case No ARB/01/8, Decision on Annulment, paras 129 and 136.

[42] Article 26 of the Articles on State Responsibility states that '[n]othing in this Chapter precludes the wrongfulness of a State which is not in conformity with an obligation arising under a peremptory norm of general international law'.

[43] S Szurek, 'The Notion of Circumstances Precluding Wrongfulness', in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press, 2010), 427 and A Ben Mansour, M Ménard, J-M Thouvenin, H Lesaffre, S Szurek, and S Heathcote, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility', in Crawford, Pellet and Olleson (eds), *The Law of international Responsibility*, 439 ff.

responsibility characterizes wrongful conduct in respect of which there exist exculpatory circumstances as 'non-wrongful', thus excluding international responsibility when one of these circumstances is successfully invoked.[44] Thus these circumstances remove responsibility entirely. However, it is made clear by the ILC that the invocation of a circumstance precluding wrongfulness is without prejudice to: (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists; (b) the question of compensation for any material loss caused by the act in question.[45] Thus, in essence the ILC made a reservation as to questions of possible compensation for damage in cases covered caused under circumstances precluding wrongfulness.[46] It pointed out in this regard that although the article uses the term 'compensation', it is not concerned with compensation within the framework of reparation for wrongful conduct. Rather, it is concerned with the question whether a party relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected. For the same reason, according to the ILC, the reference to 'material loss' is narrower than the concept of damage under the law of responsibility for wrongful acts and thus concerns only the adjustment of losses that may occur when a party relies on a circumstance that precludes wrongfulness. This position follows logically from the ILC's characterization of conduct in respect of which there exists exculpatory circumstances as 'non-wrongful'; it can have no other meaning than that the issue of compensation resides outside the domain of the law of international responsibility for wrongful acts. Consequently, the answer to the question whether and to what extent pecuniary compensation is due to the injured party must be sought in the principles concerning liability for injurious consequences of conduct not prohibited by international law.[47]

As commented in section 44.2, the application of the principles of liability for acts not prohibited by international law in respect of ultra-hazardous activities and trans-boundary environmental harm is mainly captured in the ILC's *Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*.[48] Beyond these areas, not much consensus exists regarding the application of these principles and practice has varied, especially in the area of international

[44] See, critically, V Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses' (1999) *EJIL* 10: 405 and C Farhang, 'Mapping the Approaches to the Question of Exemption from International Responsibility' (2013) *Netherlands International Law Review* 60: 93.

[45] See M Forteau, 'Reparation in the Event of a Circumstance Precluding Wrongfulness', in Crawford, Pellet, and Olleson (n 43), 887; S Ripinsky, 'State of Necessity: Effect on Compensation', 15 October 2007, available at: <http://ssrn.com/abstract=1546991> or <http://dx.doi.org/10.2139/ssrn.1546991>; J Crawford, *State Responsibility—The General Part* (Cambridge University Press, 2013), 318–20.

[46] That was indeed the title of draft Article 35 (current Article 27), which was adopted by the ILC, *ILC Yearbook* 1980, Vol II, Part Two, 61–2. See, in this sense *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, paras 260–1.

[47] Cf SP Jagota, 'State Responsibility: Circumstances Precluding Wrongfulness' (1985) *Netherlands Yearbook of International Law* XVI: 249 at 274; V Lowe, 'Precluding Wrongfulness: A Plea for Excuses' (1999) *European Journal of International Law* 10: 405 at 410–11. This explanation is better than the contradiction that the present author saw in the ILC stance in 1994; see RSJ Martha, 'Inability to Pay Under International Law and Under the Fund Agreement' (1994) *NILR* XLI: 85 at 105.

[48] UNGA 61/36. Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, 18 December 2006.

investment law. What is undisputable however, is that treaty regimes involving circumstances excusing the breaches or exculpating a conduct that would otherwise constitute a breach of a primary obligation ought to be treated as *lex specialis* relative to the regime codified by the ILC. The dispositive nature of the rules of general international law on this point was emphasized in the annulment decision in *Sempra Energy v Argentina*. The Annulment Committee in that case expressly rejected the notion invoked by the tribunal because international law is not a fragmented body of law as far as basic principles are concerned; parties are free to adopt special rules to regulate their bilateral relations. The Committee rightly pointed out that while there may be certain norms of international law, including customary law, which would render it unlawful under international law for parties to agree to adopt a provision inconsistent with those norms, this is not the case with the liability for injurious consequences of damages caused under circumstances precluding lawfulness.[49] A previous annulment decision in *CMS v Argentina* states in this respect:

> However the Committee finds it necessary to observe that here again the Tribunal made a manifest error of law. Article 27 concerns, *inter alia*, the consequences of the existence of the state of necessity in customary international law, but before considering this Article, even by way of *obiter dicta*, the Tribunal should have considered what would have been the possibility of compensation under the BIT if the measures taken by Argentina had been covered by Article XI. The answer to that question is clear enough: Article XI, if and for so long as it applied, excluded the operation of the substantive provisions of the BIT. That being so, there could be no possibility of compensation being payable during that period.[50]

This holding stands for the proposition that an international legal instrument can have the effect of excluding or limiting the liability for damages caused under circumstances precluding wrongfulness, which would otherwise apply under the regime of liability for injurious consequences of conduct not prohibited by international law.[51] Where, as is the case with most of the loan documentations of the multilateral financial institutions, the regime under a particular legal instrument does not purport to establish a special rule or dispense with the relevant rule under general international law, compensation may nevertheless be due in accordance with the principles of the latter regime. According to the ILC, the preferred way to effectuate this is through agreement between the relevant parties. In the absence of a negotiated settlement between parties, the determination of compensation may become the responsibility of an international court or tribunal. In those instances, the question of the extent of the liability will be the main issue.

[49] *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16, Decision on Annulment, 10 June 2010.
[50] *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8 (Annulment Proceeding), 25 September 2007.
[51] *LG&E Energy Corp LG&E Capital Corp, and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, paras 260–1.

45

Reparation for Damages Caused by Wrongful Acts

Under international law, legal consequences are entailed whenever there is an internationally wrongful act, which are without prejudice to, and do not supplant, the continued obligation of the responsible State to perform the obligation breached.[1] It follows logically from this that the delinquent party has an immediate obligation of cessation and assurances or guarantees of non-repetition and to wipe out the consequences of the unlawful conduct.[2] As stated in the words of Judge Cançado Trindade: 'breach and reparation go together, conforming an indissoluble whole: the latter is the indispensable consequence or complement of the former'.[3] This is indeed how the ICJ and its predecessor understand it, as witnessed by *Chorzów Factory*, where it was considered that '[i]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation' and that therefore reparation is the indispensable complement of a failure to comply with an international obligation, which needs not to be stated in the governing legal instrument.[4] To which Fitzmaurice adds: '[t]he notion of international responsibility would be devoid of content if it did not involve a liability to "make reparation in an adequate form".'[5] More importantly, the latter author underlines that '[w]hile these statements were made specifically with reference to breaches of international engagements, they would appear to be applicable to all forms of international wrongs, since treaties and other contractual engagements are merely a particular form of international obligation, and there is in principle no reason why breaches of them should entail general consequences that breaches of other international obligations... do not'.[6]

Resolving issues over the nature or extent of the reparation to be made for the breach of an international obligation is, in fact, one of the functions of international courts

[1] Article 29, Articles on State Responsibility; Article 29, Articles on the Responsibility of International Organizations; see the discussion in D Shelton, 'Righting Wrongs: Reparations in Articles on State Responsibility' (2002) *AJIL* 96: 833 and J Crawford, *State Responsibility—The General Part* (Cambridge University Press, 2013), 461.
[2] According to the ICJ, 'refusal to fulfil a treaty obligation involves international responsibility'. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, ICJ Reports 1950, 65 at 228.
[3] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), (Compensation Owed by the Democratic Republic of the Congo to the Republic of Guinea), Separate Opinion Cançado Trindade*, 19 June 2012, 12, available at: <http://www.icj-cij.org/docket/files/103/17046.pdf>.
[4] *Factory at Chorzów (Germany/Poland)*, 1928, PCIJ Series A, No 17, 29.
[5] G Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol I (Grotius Publications, 1986), 6.
[6] Fitzmaurice (n 5), 6.

Annex 665

J. Crawford, *Brownlie's Principles of Public International Law* (Oxford, 9ed., 2019), page 537

Oxford Public International Law

Part IX The law of responsibility, 25 The conditions for international responsibility

James Crawford SC, FBA

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James Crawford

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> treatment in the matter of protection or compensation, if any, as its own nationals (the plea of *diligentia quam in suis*). [81]

Victorious rebel movements are responsible—*qua* new government of the state—for unlawful acts or omissions by their forces occurring during the course of the conflict.[82] The state also remains responsible for the unlawful conduct of the previous government.

(p. 537) (E) Joint responsibility

The principles relating to joint responsibility of states[83] remain indistinct, and municipal analogies are unhelpful.[84] A rule of joint and several responsibility in delict should certainly exist as a matter of principle, but practice is scarce.[85] Practice in the matter of reparation payments for unlawful invasion and occupation in the immediate postwar period rested on the assumption that Axis countries were liable on the basis of individual causal contribution to damage and loss, unaffected by the existence of co-belligerency.[86] However, if there is joint participation in specific actions, for example where state A supplies planes and other material to state B for unlawful dropping of guerrillas and state B operates the aircraft, what is to be the position?

In *Certain Phosphate Lands in Nauru (Nauru v Australia)*, the International Court held that the possibility of the existence of joint and several responsibility of three states responsible for the administration of the trust territory at the material time did not render inadmissible a claim brought against only one of them.[87] The question of substance was reserved for the merits. In fact, a negotiated settlement was reached[88] and, subsequently, the UK and New Zealand, the other states involved, agreed to pay contributions to Australia on an *ex gratia* basis.[89]

ARSIWA Article 47 incorporates this reasoning, providing that the responsibility of each state may be invoked in the case of a plurality of responsible states, as long as total compensation does not exceed the damage suffered by the injured state. In other words, each state is separately responsible and that responsibility is not reduced by the fact that one or more other states are also responsible for the same act.

(F) Complicity

In *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, an issue arose concerning Serbia's alleged complicity for genocide within the meaning of Article III(e) of the Genocide Convention.[90] The Court said:

> [A]lthough 'complicity', as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the 'aid or assistance' furnished by one State for the commission of a wrongful act by another State … to ascertain whether the Respondent is responsible for 'complicity in genocide' within the meaning of Article III, paragraph (e), which is what the Court now has to do, it must examine whether (p. 538) organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished 'aid or assistance' in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.[91]

The Court thereby endorsed ARSIWA Article 16, which provides:

> *Aid or assistance in the commission of an internationally wrongful act*

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[85] Brownlie (1983) 189–92.

[86] But see *Anglo-Chinese Shipping Co Ltd v US* (1955) 22 ILR 982, 986.

[87] ICJ Reports 1992 p 240, 258–9; ibid, 301 (President Jennings, diss).

[88] Australia–Nauru Settlement, 10 August 1993, 32 ILM 1471.

[89] UK Agreement, 24 March 1994, in UKMIL (1994) 65 *BY* 625.

[90] On complicity: Ago, ILC *Ybk* 1978/II(1), 52–60; ILC *Ybk* 1978/II(2), 98–105; ILC *Ybk* 1979/II(2), 94–106; Quigley (1986) 57 *BY* 77; Aust, *Complicity and the Law of State Responsibility* (2011); Crawford (2013) ch 12; Jackson, *Complicity in International Law* (2015).

[91] ICJ Reports 2007 p 43, 217.

[92] ARSIWA, commentary to Art 16, paras 3–6.

[93] Brownlie (1983) 157–8; ARSIWA, Art 11 and commentary; Crawford (2013) 181–8.

[94] ICJ Reports 1980 p 3, 29–30, 33–6.

[95] ARSIWA, commentary to Art 11, para 6.

[96] Oppenheim 501. Further: Kelsen, *Principles of International Law* (2nd edn, 1952) 199–201.

[97] *Corfu Channel*, ICJ Reports 1949 p 4, 85–6 (Judge Azevedo). For 'circumstances precluding wrongfulness', see ARSIWA, Part 1, ch V.

[98] *The Jessie* (1921) 6 RIAA 57; *The Wanderer* (1921) 6 RIAA 68; *The Kate* (1921) 6 RIAA 77; *The Favourite* (1921) 6 RIAA 82.

[99] Borchard (1929) 1 *ZaöRV* 223, 225; Schachter (1982) 178 Hague *Recueil* 1, 189; Gattini (1992) 3 *EJIL* 253; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1994) 218–32; Pellet in Crawford, Pellet, & Olleson (2010) 3, 8–11; Crawford (2013) 60–2.

[100] *Neer* (1926) 6 RIAA 60, 61.

[101] *Roberts* (1926) 6 RIAA 77, 80.

[102] *Caire* (1929) 5 RIAA 516.

[103] Ibid, 529.

[104] Reports by García-Amador, ILC *Ybk* 1956/II, 186; ILC *Ybk* 1957/II, 106. This was the approach ultimately adopted in ARSIWA, commentary to Art 2, paras 1–4. But see Gattini (1999) 10 *EJIL* 397.

[105] Eagleton (1928) 209; Lauterpacht (1937) 62 Hague *Recueil* 95, 359; Ago (1939) 68 Hague *Recueil* 415, 498; Accioly (1959) 96 Hague *Recueil* 349, 364.

[106] *Casablanca* (1909) 11 RIAA 119; *Cadenhead* (1914) 11 ILR 177; *Iloilo* (1925) 6 RIAA 158, 160; *Pugh* (1933) 3 RIAA 1439; *Wal-Wal Incident* (1935) 3 RIAA 1657. Also: *Davis* (1903) 9 RIAA 460, 463; *Salas* (1903) 10 RIAA 720.

[107] *Home Missionary Society* (1920) 6 RIAA 42, 44.

[108] *Chattin* (1927) 4 ILR 248, 250. Also *Spanish Zone of Morocco* (1925) 2 RIAA 615, 644.

[109] *Prats* (1868) in Moore, 3 *Int Arb* 2886, 2895; *Russian Indemnity* (1912) 11 RIAA 421, 440. Further: Cheng (1994) 218–32.

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Annex 666

E. Sthoeger, “How do States React to Advisory Opinions? Rejection, Implementation, and what Lies in Between”, *American Journal of International Law*, 2023, pp. 292-297

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SYMPOSIUM ON THE CONTOURS AND LIMITS OF ADVISORY OPINIONS

HOW DO STATES REACT TO ADVISORY OPINIONS? REJECTION, IMPLEMENTATION, AND WHAT LIES IN BETWEEN

*Eran Sthoeger**

Advisory opinions of the International Court of Justice (ICJ) are non-binding and lack operative clauses requiring compliance. At the same time, they reflect the ICJ's views as to rights and obligations of states under international law. In that sense they are not different from binding judgments and generate expectations of implementation of the Court's determinations. Although some states may reject an opinion, others have pursued implementation through the requesting organ, or through alternative political and legal means. And although it is not always easy to ascertain the effect of an opinion on states' behavior, advisory opinions often have practical ramifications, even if they are not implemented.

The Legal Status of Advisory Opinions

Advisory opinions do not qualify as "decisions" under Article 59 of the ICJ Statute: they do not have parties and do not bind states. They do not have *dispositifs* (operative clauses). They contain "replies" to the questions asked. Whereas non-compliance with contentious cases may be brought before the Security Council under Article 94 of the United Nations Charter,[1] advisory opinions do not constitute decisions in the context of Article 94, as there is no party to the case required to comply with them. Therefore, there is also no party against whom the reply of an advisory opinion would be enforced. But that does not mean that they are void of legal significance.

Already in 1972, Judge Gros of the ICJ questioned whether the distinction between advisory opinions and binding judgments was overstated. Like judgments, advisory opinions are "judicial decisions"—subsidiary means for the determination of rules of law—within the meaning of Article 38 of the Statute of the ICJ.[2] Judge Gros argued that, aside from *dispositifs*, the Court's reasoning "in both cases, represents the Court's legal conclusions concerning the situation which is being dealt with, and its weight is the same in both cases: there are no two ways of declaring the law."[3] In other words, though advisory opinions do not, formally speaking, alter a pre-existing legal situation, an advisory opinion contains the Court's analysis of rights and obligations of states under international law.

Furthermore, as seen below, an advisory opinion addressed to the requesting organ normally generates a post-opinion phase within that organ, which in turn can lead to further legal and political action by actors seeking

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[1] Although this has been a rarity, for such an instance see UN Doc. S/18428 (Oct. 28, 1986).

[2] André Gros, *Concerning the Advisory Role of the International Court of Justice*, *in* TRANSITIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP 315 (Wolfgang Friedman, Louis Henkin & Oliver Lissitzyn eds., 1972).

[3] *Id.* at 314–15.

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implementation, internationally and domestically. In some situations, this can create political and legal pressure on states that have rejected the opinion, notwithstanding the fact that there is no formal "post-judgment" phase.

Though formally addressed to the requesting organs, advisory opinions may in reality primarily address the rights and obligations of particular states and other entities—recent examples include the *Wall* advisory opinion and the pending proceedings in the request concerning the policies and practices of Israel in the Occupied Palestinian Territory, the *Kosovo* case, and the *Chago*s advisory opinion. In such circumstances, there may be a greater expectation that the relevant states implement or comply with the opinion. Furthermore, implementation may also be easier to assess in situations requiring action from a limited number of states. Additionally, such expectations may reflect the rise in the prominence of principles such as the rule of law. Expectations may be even higher of states that regularly voice support for such principles.

State Acceptance or Rejection of Advisory Opinions

States' reception of the advisory opinions of the Court has been inconsistent from the very beginning. Pursuant to the ICJ's opinion in the *Reparations* case, Israel paid the United Nations compensation for the assassination of mediator Count Folke Bernadotte, and the secretary-general considered the matter settled.[4] On the other hand, some member states continued to use admission to the United Nations as a political tool, ignoring the ICJ's opinion in *Conditions for Admission*, that admissions should be considered solely on the basis of the criteria of Article 4 of the UN Charter.[5] This resulted in another request for an advisory opinion from the General Assembly, asking if it could admit new members without a Security Council recommendation. The Court answered in the negative.[6]

In more recent examples, Israel rejected the Court's advisory opinion regarding the illegality of its wall in the Occupied Palestinian Territories. The Supreme Court of Israel had occasion to consider the opinion shortly after it was delivered. Noting the non-binding nature of the opinion, the Supreme Court stated that, as the "highest judicial body in international law," the "ICJ's interpretation of international law should be given its full appropriate weight."[7] The Supreme Court, however, rejected the advisory opinion's implications for its established methodology of examining the legality of each segment of the wall separately.[8]

In response to the *Chagos* advisory opinion, the United Kingdom reaffirmed its position on its sovereignty over the Archipelago, and its commitment to the obligations identified by the Tribunal in the binding award in the *Chagos Arbitration*, mainly to return the Archipelago to Mauritius once it is no longer needed for defense purposes.[9] It further stressed the non-binding nature of the advisory opinion and that the status of the Archipelago "as a United Kingdom territory" is "essential" for the U.S. naval base Diego Garcia.[10] The United Kingdom remains committed to this position, though as will be explained below, the United Kingdom and Mauritius have since commenced negotiations. An unsuccessful attempt to rely on the opinion was also made before the English Court of

[4] UN Doc. S/1506 (June 14, 1950).

[5] Conditions of Admission of a State to Memberships in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 ICJ Rep. 57 (May 28).

[6] Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 ICJ Rep. 4 (Mar. 3).

[7] Mara'abe v. Prime Minister of Israel [2009] HCJ 7957/04, para. 56 (Sup. Ct. Isr.) (Isr.).

[8] *Id.*, para. 74.

[9] Philippa Webb, *The United Kingdom and the* Chagos Archipelago *Advisory Opinion: Engagement and Resistance*, 21 MELB. J. INT'L L. 1, pt. V (2021).

[10] Statement of UK in the General Assembly, at 11, UN Doc. A/73/PV.83 (May 22, 2019); Webb, *supra* note 9, at 12–16.

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Appeal. The Court of Appeal found that the opinion "is not a judgment in the traditional sense of determining a dispute as between parties where the judgment has binding effect."[11]

Seeking Implementation Through the Requesting Organ

As ICJ advisory opinions are directed to the requesting organ, one can expect that states seeking implementation initiate action within that organ. The success of such attempts has varied.

Recent examples in the General Assembly show this varying impact. For instance, after *the Wall* advisory opinion, the Assembly adopted a resolution which "considered" that "respect for the Court and its functions is essential to the rule of law."[12] It demanded that Israel and all United Nations member states comply with their legal obligations, as mentioned in the opinion. The Assembly also took active steps and requested the secretary-general to establish a register of damage caused to all natural or legal persons resulting from Israel's construction of the wall.[13] Such a register was established in a later Assembly resolution, on which the secretary-general reports regularly to the General Assembly.[14] The advisory opinion continues to be referred to in the Assembly's resolutions,[15] and Security Council Resolution 2334 on Israeli settlements recalled "the advisory opinion rendered" by the ICJ.[16]

In contrast, the General Assembly has not taken any concrete action in the aftermath of the *Kosovo* advisory opinion. After "having studied with great care the advisory opinion," it merely acknowledged it and welcomed the EU facilitation process between the parties.[17]

With respect to *Chagos*, the General Assembly welcomed the opinion and demanded that the United Kingdom withdraw from the Archipelago "unconditionally within a period of *no more than six months* from the adoption of the present resolution."[18] The resolution furthermore called on the United Nations and its specialized agencies to recognize the Archipelago as "an integral part of the territory of Mauritius."[19]

The Security Council's only request for an advisory opinion concerned the legal consequences of South African presence in Namibia in 1970.[20] The Court found that that presence was illegal and that South Africa was obliged to withdraw its administration from Namibia immediately. Member states were obligated to refrain from any action that implied recognition of the legality of, or lent assistance to, such presence and administration. A Council resolution took note with appreciation of the opinion, agreed with its operative conclusions, and called upon all states to conduct themselves accordingly. Nevertheless, the United Kingdom, joined at times by France and the United States, continued to veto draft resolutions in the Security Council on the Namibia issue.[21]

[11] R (Hoareau) v. Secretary of State for Foreign and Commonwealth Affairs [2020] EWCA Civ. 1010, para. 116 (Royal Cts. Just. July 30, 2020) (UK).

[12] GA Res. 10/15 (Aug. 2, 2004).

[13]

[14] GA Res. 10/17 (Jan. 24, 2007).

[15] GA Res. 72/14 (Dec. 7, 2017).

[16] SC Res. 2334, pmbl. (Dec. 23, 2016).

[17] GA Res. 64/298 (Sept. 9, 2010).

[18] GA Res. 73/295, para. 3 (May 22, 2019) (emphasis added).

[19] *Id.*, paras. 6–7.

[20] SC Res. 284 (July 29, 1970).

[21] *See, e.g.*, SC Res. 10489 (Dec. 30, 1971) (draft); SC Res. 11716 (June 6, 1975) (draft).

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Id.

Seeking Implementation by Other Legal and Political Means

Beyond the requesting organ, states (and other interested parties) may pursue other avenues, both political and legal—including further litigation—in an attempt to implement an advisory opinion.

A recent example is the *Chagos* opinion, where Mauritius has sought to utilize the opinion in other fora to bring to bear various forms of political pressure on the United Kingdom. In August 2021, the Universal Postal Union, a United Nations specialized agency, decided to no longer recognize stamps issued by the British Indian Ocean Territory, which it would from then on consider to be part of Mauritius.[22] Mauritius has also raised the issue in the Indian Ocean Tuna Commission (IOTC), an intergovernmental organization established under the auspices of the Food and Agriculture Organization (FAO). A 2022 legal opinion from the FAO took the view that the IOTC should treat Chagos as part of Mauritius.[23] The matter is, as of October 2023, still pending: as part of a consultative process with the IOTC, during the 2023 IOTC annual meeting, the United Kingdom committed to clarifying "the status of its [IOTC] membership before the end of the year," and Mauritius raised no objection.

Perhaps most notable, however, has been Mauritius' initiation of legal proceedings against the Maldives for delimitation of the maritime boundary between Maldives and the Chagos Archipelago, heard before a Special Chamber of the International Tribunal for the Law of the Sea (ITLOS). In its judgment on preliminary objections on January 28, 2021, the Special Chamber rejected the Maldives' arguments that the United Kingdom was an indispensable third party to the proceedings due to the sovereignty dispute over Chagos. The Special Chamber held that the ICJ's advisory opinion, while not binding, was "authoritative" and made "determinations" with "legal effect and clear implications for the legal status of the Chagos Archipelago," such that "Mauritius can be regarded as the coastal State in respect of the Chagos Archipelago for the purpose of the delimitation of a maritime boundary even before the process of the decolonization of Mauritius is completed."[24] In contrast to the approach taken by the courts of Israel and the United Kingdom, which stressed the non-binding nature of advisory opinions, the Special Chamber treated the opinion not just as a subsidiary means of determining the law, but as a judgment that essentially settled the sovereignty dispute.

Post-Opinion Negotiations

Notwithstanding their non-binding character, advisory opinions may factor into efforts to settle disputes via negotiations. The recent *Chagos* example is demonstrative. While there has been no change in the United Kingdom's official position, on November 3, 2022, Mauritius and the United Kingdom announced the start of negotiations "on the exercise of sovereignty" over the Archipelago. The Parties stated their intention "to secure an agreement on the basis of international law to resolve all outstanding issues," taking into account "*relevant legal proceedings*."[25]

The statement conveyed the intention to conclude the talks by early 2023, yet no outcome has been made public as of October 2023. Finding an agreed solution on sovereignty is undoubtedly complicated by other factors. These include the UK–U.S. agreement on the continued operation of the U.S. naval base on Diego Garcia in the archipelago, compounded by the fact that the United States is not a party to the negotiations. Mauritius has publicly

[22] Universal Postal Union Press Release, UPU Adopts UN Resolution on Chagos Archipelago (Aug. 27, 2021).

[23] Report of the 27th Session of the Indian Ocean Tuna Commission, IOTC-2023-S27-R, paras. 12–13 (July 26, 2023).

[24] Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Preliminary Objections, Case No. 28, paras. 246–50 (ITLOS Jan. 28, 2021).

[25] British Indian Ocean Territory/Chagos Archipelago, Statement Made on November 3, 2022, UIN HCWS354.

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stated its commitment to retain the base. However, some British parliamentarians, as well as possibly some in the United States and India, are wary of the possibility that Mauritius, which is financially indebted to China, might allow China to erect a base in the Archipelago.[26] Other sensitivities, such as the status of the UK's Sovereign Bases in Cyprus[27] or its dispute with Argentina over the Falklands/Malvinas may be another complicating factor.[28] These demonstrate that the question of Chagos cannot be viewed in isolation from domestic sensitivities concerning other territorial disputes over British Overseas Territories.

A Nuanced Response

States often refer to the non-bindingness of advisory opinions when disagreeing with their content. The *Wall* opinion remains unimplemented almost twenty years later. Almost five years since the *Chagos* opinion, the United Kingdom has not ended its administration of the archipelago. In itself, the expectation that one particular state should comply with an opinion may also give the impression that advisory opinions are used as a guise to bypass the consent necessary for bringing contentious cases before the Court.[29]

At the same time, it should be noted that, despite its views being rejected by the ICJ, the United Kingdom has stated that it will continue to be supportive of the Court as an institution and to engage with international courts generally.[30] The Supreme Court of Israel, despite rejecting the *Wall* opinion, mainly on factual grounds, sought to find common ground with the legal analysis of the ICJ. This has historically not always been the case, as there are examples of states that have shied away completely from engaging with international courts and tribunals in the wake of an unfavorable judicial or arbitral decision.[31]

The decision by Mauritius and the United Kingdom to enter into negotiations over the Archipelago was, furthermore, not taken in a vacuum: it is linked to the Court's opinion and the subsequent events described above. Whatever the results of these negotiations, the opinion has already influenced the decision making of both states. It may be too soon to evaluate the precise effect of the *Chagos* opinion and what contribution it will make toward resolving the dispute, but the mere fact that the parties are negotiating is more than can be said of states' reactions to other advisory opinions.

The Judgment of the ITLOS Special Chamber in *Mauritius/Maldives* has not been free of criticism, especially for the legal conclusions it drew from the *Chagos* opinion and the General Assembly resolution.[32] Nevertheless, it demonstrates the potential of advisory opinions to produce effects similar to that of binding judgments and alter the legal situation of states. The Judgment allowed the case to progress to the merits phase and for the Special Chamber to delimit the maritime boundary of the UK-administered archipelago.

[26] Abhinandan Mishra, *China Looking for Naval Bases Near Diego Garcia*, SUNDAY GUARDIAN (Dec. 10, 2022); Parul Chandra, *India in the*
E.g., the pleadings of Cyprus in Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, CR 2018/23, 48–49, 53–60 (Sept. 4, 2018).

[28] Falkland Islands Government Press Release, Legislative Assembly Reaffirms Islanders Rights to Self-Determination (Nov. 3, 2022).

[29] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 ICJ Rep. 95 (Feb. 25) (dec., Tomka, J.).

[30] Webb, *supra* note 9, at 22–23.

[31] *Id.* at 20–21.

[32] Natalie Klein, *Chagos: A Boundary Dispute Tips Over a Sovereignty Ruling*, INTERPRETER (Feb. 8, 2021); Karen N. Scott, *Legal Acts and Legal Facts: The Mauritius/Maldives Maritime Boundary Dispute in the Chagos Archipelago*, ANZSIL PERSPEC. (Feb 23. 2021).

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Crossfire Over Strategic Chagos Islands, DECCAN HERALD (Nov. 3, 2022).

27

Conclusion

Judge Gros aptly said that "there are no two ways of declaring the law." In keeping with the principle of self-appreciation,[33] whether or not an advisory opinion is considered as correctly reflecting the law—and how or whether to act upon it—is a matter for states' consideration. And as seen above, different opinions have been received differently by states. And while the role advisory opinions play in the decision making of states may be hard to ascertain, the opinion of the World Court can provide support and validation for a particular understanding of the law and may induce states and other actors to adopt the position articulated by the Court.

[33] Prosper Weil, *"The Court Cannot Conclude Definitively . . ."* Non Liquet *Revisited*, 34 COLUM. J. TRANSNAT'L L. 109, 119 (1998).

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