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### Cluster-Litigation in Cases of Transboundary Environmental Harm

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# TRANSBOUNDARY ENVIRONMENTAL HARM – EMERGING LEGAL REGIME

Edited by  
P Mohana Krishna



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## **TRANSBOUNDARY ENVIRONMENTAL HARM – EMERGING LEGAL REGIME**

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**Editor: P Mohana Krishna**

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# 2

## Cluster-Litigation in Cases of Transboundary Environmental Harm

*Andre Nollkaemper\**

*In an increasing number of cases involving transboundary environmental harm, litigants pursue a parallel or serial litigation of overlapping or closely related claims before multiple courts. This phenomenon, that may be labeled ‘cluster-litigation’ is well illustrated by the range of cases brought in international and domestic courts in connection with the planned construction of pulp mills in Uruguay that may lead to pollution of the river Uruguay. This article will discuss the pros and cons of various options at international and domestic level that may be available to plaintiffs in cases of transboundary environmental harm; will identify the limitations of separate options for presenting claims and will explore the way in which, by pursuing multiple options, litigants may overcome such limitations in order to optimize their remedies.*

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## 1. Introduction

In this chapter I will discuss the phenomenon of cluster-litigation in cases of transboundary environmental harm. With the term 'cluster litigation', I refer to a parallel or serial litigation of overlapping or closely related claims before multiple courts.<sup>1</sup>

The phenomenon of cluster-litigation in cases of transboundary environmental harm is a consequence of the fact that in many of such cases, private plaintiffs who are injured by environmental harm originating from across the border may use multiple options to present a claim for reparation.<sup>2</sup> They may bring a claim against private parties that caused such harm, for instance an industrial facility emitting waste water. They also may bring claims against foreign states under whose jurisdiction such harm originated and that have failed to take appropriate measures to prevent the harm. In still other cases, private injured parties may rely on the state of their nationality to bring a claim against the wrongdoing state and to seek reparation on behalf of their nationals. They may also consider claims against international organizations that support (for instance by providing loans) activities resulting in transboundary environmental harm.

A good illustration of cluster litigation in response to transboundary environmental harm is the range of cases brought in connection with the planned construction of pulp mills in Uruguay that may lead to pollution of the river Uruguay.<sup>3</sup> Argentina initiated proceedings against Uruguay in the International Court of Justice – primarily to protect its own rights, but with the potential effect of protecting the interests of persons living in Argentina.<sup>4</sup> A group of (potentially) affected individuals presented a claim with the Inter American Commission on Human Rights.<sup>5</sup> Induced by claims of NGO's, an Argentine Federal Prosecutor initiated criminal investigation into alleged environmental crimes by executives of the Spanish and Finnish companies involved in the operation.<sup>6</sup> A complaint signed by over 39000 people was submitted to the Office of Compliance Advisor/Ombudsman (CAO), an independent recourse mechanism for the International Finance Corporation and the Multilateral Investment Guarantee Agency that would provide financial support for the construction of the mills.<sup>7</sup> NGO's also lodged two so-called Specific Instances against three European based multinationals involved in the project for alleged

breaches of the OECD Guidelines for Multinational Enterprises.<sup>8</sup> NGO's further filed a complaint against two investment banks for supporting the project, alleging that it would violate the so-called Equator principles, an agreement between international banks in which they promise to invest responsibly and respect environmental safeguards.<sup>9</sup>

In many other incidents a comparable set of options may be open. Thus, when a chemical spill in the PetroChina chemical plant in the Chinese city of Harbin caused massive pollution of the Songhua River that resulted in harm to Russian waters across the border,<sup>10</sup> affected persons in Russia could (theoretically) have litigated against the PetroChina chemical plant, against the state of China, or relied on the Russian government to press reparation claims against China.<sup>11</sup>

While the term cluster-litigation has not frequently been used in this context, the phenomenon of multiple procedures in connection to a single set of facts of course is not new and has been subject to scholarly analysis before. It is at the heart of Harold Koh's concept of transnational legal process, a term that refers to the 'the theory and practice of how public and private actors – nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals - interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.'<sup>12</sup>

The phenomenon of cluster-litigation, and of transnational legal process as defined by Koh, is relevant for two main reasons. First, on the macro-level, it has considerable power to secure and explain compliance with rules of international law. Compliance may not be ensured by any particular form of litigation, but in combination the use of domestic and international fora may significantly enhance the prospects that rules of international law are complied with and that their objectives are realized.<sup>13</sup>

Second, from the perspective of prospective claimants, the possibility to use or trigger multiple proceedings is significant because most individual litigation options are limited in terms of access, applicable law, remedies etcetera. By resorting to multiple fora, litigants can attempt to undo these limitations, and to find comprehensive and effective remedies.



It is this latter aspect of cluster-litigation that this article will explore. The article will in particular focus on three issues. First, it will discuss the pros and cons of various options that may be available to plaintiffs in cases of transboundary environmental harm. Second, it will identify the limitations of separate options for presenting claims. Third, it explores the way in which, by pursuing multiple options, litigants may overcome such limitations.

The article is written from the perspective of international law. It considers litigation options that in terms of competence, applicable law or remedies are governed or at least influenced by international law or that, in terms of outcomes, can contribute to the realization of international norms. It follows that questions of domestic law that are relevant to cluster-litigation are only incidentally touched upon.

The article proceeds as follows. It considers first the question to what forums prospective litigants may have access (Section 2). It then will discuss the procedural connections (or lack thereof) between the options (Section 3); the connections (or lack thereof) between the responsibilities of defendants in various fora (Section 4); the limitations of the applicable law (Section 5) and secondary principles of responsibility in various individual procedures (Section 6); and finally the possible complementary effects between various procedures (Section 7). Section 8 contains brief conclusions.

## **2. Access**

In a scenario like that of the pulp mills dispute, litigants may have access to a variety of options to present claims against persons allegedly responsible for the transboundary harm. This section reviews four categories of options for presenting claims: domestic courts, international human rights courts, courts for interstate claims, and a residual set of non-legal forms of accountability. While each of these options will have limiting rules on access, plaintiffs may pursue different options at the same time or back-to-back. Moreover, claims with comparable aims may be pursued by different parties (individuals, NGO's, states) who each satisfy different standards for access to litigation.

### **2.1 Domestic Courts**

Domestic courts may present an option to injured victims in essentially two scenario's: where private injured parties direct a claim either against a private

entity that allegedly is responsible for the harm, or against a state under whose jurisdiction such harm was caused.<sup>14</sup>

In the first scenario (claims by private plaintiffs against private entities allegedly responsible for the pollution), it will depend on the applicable national law whether plaintiffs have access to a domestic court. There may be two options here: they can bring such claim in their own state or in the courts of the place where the responsible party caused the harm. In the European system, at least for civil proceedings based on tort claims, both options are open and the plaintiff can choose the forum. Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provides that a person domiciled in a Member State may be sued in another Member State "in matters relating to tort, delict or *quasi delict*, in the courts for the place where the harmful event occurred or may occur."<sup>15</sup> Following the judgment of the European Court of Justice in *Bier*, it is clear that the defendant may be sued, at the option of the plaintiff, either in the courts of the place where the damage occurred or in the courts of the place where the source of the damage originated.<sup>16</sup>

It may seem most convenient if the injured person(s) choose to litigate in their 'own' courts against a foreign private defendant. Not only will the costs be substantially lower (there is no need to call on a foreign counsel), but the victim may perhaps also expect his own courts to be more sympathetic towards his claim than a foreign court would.

The question of whether injured persons indeed have access to their own courts, of course is not governed by international law but by domestic law.<sup>17</sup> However, at least emerging international law now provides for a right to effective access to judicial and administrative proceedings, including redress and remedy.<sup>18</sup>

The advantages of bringing a case in the own state of injured parties, may be offset by the problems of execution of judgments (in particular if these would provide for injunctions, cessation or compensation) in the defendant state. That problem may induce the plaintiff to litigate in the courts of the state where the person causing the transboundary harm is based. Moreover, the possibility that a plaintiff may sue in his own courts may not be available at all when no specific

treaty or other international instrument like Council Regulation 44/2001 is applicable. In the absence of such a treaty or other international instrument, the victim will often have no other choice than to sue the defendant(s) before the courts of the defendant state, for in many cases the domestic conflict of laws rules will determine that only the courts of the state where the defendant resides or is registered are competent.

If a plaintiff indeed seeks to use a foreign court in the state where the damage is caused, access may be problematic. But here there is at least emerging international law that seeks to alleviate any limitations that may exist. The principle of non-discriminatory access requires access to remedies in the state where the source of the harm is located.<sup>19</sup> It is included in the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, adopted by the International Law Commission in 2006, provide that victims of transboundary damage should have access to remedies in the State of origin that are no less prompt, adequate and effective than those available to victims that suffer damage, from the same incident, within the territory of that State.<sup>20</sup>

The second scenario in which a domestic court may provide a forum, involves claims by a private against the state under whose jurisdiction such harm was caused. This has in practice not been a popular scenario, however. Claims in the courts of the plaintiff usually will be barred by the immunity of the defendant state. The 2004 UN Convention on Jurisdictional Immunities of States and their Property has not changed this. Its exception for extra-territorial torts only applies if the tortfeasor was present in the territory at the time of the act, (for instance, torts caused by traffic accidents). The exception does not seem applicable to transfrontier harm like climate change and a prospective litigant thus will have no effective access to a court.<sup>21</sup>

The only option then is to bring a claim in the courts of the foreign state. Here the same limitations to access apply as in the case of litigation against a private defendant in a foreign state. The ILC Principles in principle are also applicable here.<sup>22</sup> However, it is doubtful whether the principle requiring access to remedies against the state is a principle of customary international law. In many parts of

the world, transboundary litigation against the state is a non-starter. This was also evidenced by events following pollution of the river Songhua River that resulted in harm to Russian waters across the border.<sup>23</sup>

An additional barrier that may arise both in the situation where a claim is brought in the state where the harm is caused or in the state where the harm originates, is caused by the requirement of most legal systems that particular victims should have a sufficient interest to file such a suit. Since the damage caused by environmental harm may be widespread, this may be an important restriction as far as the use of tort law is concerned. It is possible that the individual loss suffered by each individual victim is so small that no particular victim has a sufficient interest to bring a claim. In such cases nongovernmental organization could represent all those who suffer a loss from environmental harm. Two distinct solutions may exist here: either the victims can collectively act together in a so-called class action (provided that national law allows this) or an NGO defending particular public interests may file a claim. Many national and international legal documents now allow the right of NGOs to file those claims, but usually strict conditions apply.<sup>24</sup> For instance, if national law allows NGO claims in civil law at all, the NGO often must demonstrate that it has existed for a substantial number of years and that it clearly stipulated the specific protected interest as a goal in its articles of incorporation.<sup>25</sup> Moreover, most national laws hold that the NGO may make claims for injunctions, but not for damages.<sup>26</sup> Hence, the choice of the victim has relevance for the remedy as well.

The principle of non-discriminatory access is applicable here as well, but complications may arise in view of the question whether the foreign legal system recognizes the legal status and procedural rights that have been accorded by the state in which the NGO was set up.<sup>27</sup>

## 2.2 Human Rights Courts

A second option, complementing resort to domestic courts, is that private persons who are injured by transboundary harm seek redress in an international human rights court. Though no generally accepted right a decent or healthy environment exists as a human right,<sup>28</sup> under now familiar interpretations of the right to private life and perhaps the right to life, international human rights courts may consider that environmental harm constitutes an infringement of an international

human right, in particular the right to life and the right to the private sphere of applicant's.<sup>29</sup> As to the latter, the ECtHR noted that 'in order to fall within the scope of Article 8, complaints relating to environmental nuisances have to show, firstly, that there was an actual interference with the applicant's private sphere, and, secondly, that a level of severity was attained.'<sup>30</sup>

Claims based on human rights treaties are necessarily directed against the state responsible for such pollution, not against private entities. At least before international human rights courts (the situation may be different in domestic law) no 'horizontal claims' against responsible private parties can be made. In those cases where factually the harm was caused by a private party rather than by the state, a claim may however still be possible if it could be shown that the state, by allowing such harm or by not effectively acting against it, violated its own obligations under the treaty in question.<sup>31</sup> Thus, a claim may be directed against a state that would for instance grant a license to a polluting industrial facility, or fail to enforce its laws to seek to prevent pollution.<sup>32</sup>

Access to human right courts generally will be limited to rather specific situations. Apart from the fact that the environmental harm should be of such a nature that it can qualify as an interference with a human right, essentially two limitations apply here.

First, the jurisdiction of human rights courts will be limited to cases involving injury to plaintiffs that were under the jurisdiction of the state causing the harm. Under the generally accepted constructions of the concept of jurisdiction, it is highly doubtful that the causing of pollution by or from state A to a private person in state B would bring that latter person under the jurisdiction of state A.<sup>33</sup> The act of causing pollution in a foreign state cannot be interpreted as an exercise of jurisdiction. This means that foreign victims in principle cannot petition a human rights court for harm caused abroad by a state that did not exercise jurisdiction over the victim. This requirement makes it unlikely that there will be an overlap in party structure with transboundary litigation against a state before a domestic court.

The only option left, then, is that the claim is brought not by the persons in the foreign state, but by persons in the forum state who (also) may be affected by the environmental harm or who have an interest (for instance NGO's) in seeking

redress for such harm. An example of a (failed) attempt to bring a claim to a human rights courts in a case of mixed (partly domestic, partly transboundary) environmental harm is a claim brought by the Inuit Circumpolar Conference, which represents 150,000 people in northern Alaska, Canada, Russia and Greenland, filed a claim against the United States with the Inter-American Human Rights Commission. The claim was based, *inter alia*, on alleged breach of rights of indigenous peoples, the right to a healthy environment, and the rights of people to freely dispose of their natural wealth and resources under the Inter-American Convention on Human Rights (IACHR). However, the claim was not considered by the Commission, because it found that the information submitted did not enable the Commission to determine whether the alleged facts could be characterized as a violation of the IACHR.<sup>34</sup>

The second limitation applies is that in any case in the European system access is limited by the condition that claims can only be brought by or on behalf of individual victims of such environmental harm.<sup>35</sup> However, no similar requirement exists in the African system, which allows for a broad standing, the reason being the practical difficulties that individuals who may wish to bring a complaint face in many African states.<sup>36</sup> The situation is similar in the Inter-American System.<sup>37</sup>

### 2.3 Forums for Interstate Claims

The third option is that claims seeking reparation for transboundary environmental harm are brought by a state where the harm is caused against a state under whose jurisdiction the harm originated. A state can present such claims for direct injury, that is: injury to the state itself, for instance its territory, including its ecosystems, or its infrastructure. However, it can also present such claims for injury caused to its nationals under the fiction that harm to an individual can be qualified as harm to the state of which that individual is a national.<sup>38</sup> In cases of transboundary environmental harm, interstate claims rarely will exclusively concern protection of rights of nationals as it is likely that there will also be direct injury to the state. However, at least in theory the protection of rights of nationals does represent a separate basis of the claim.

Claims based on diplomatic protection are not normally brought in a court, but presented through diplomatic means.<sup>39</sup> However, the possibility that a claim

is present before an international court and tribunal is not excluded and at least in theory there is a large variety of international courts and tribunals where interstate claims can be presented.<sup>40</sup> These include of course the International Court of Justice, if that would have jurisdiction on the basis of a special agreement between the two states involved, on the basis of Article 36(2) of the ICJ Statute or on the basis of a jurisdictional basis in a treaty pertaining to environmental harm that applies to the incident in question. An example of the latter option is the claim brought by Argentina against Uruguay in connection with the pulp mills dispute.<sup>41</sup> An alternative may claims before an arbitral tribunal, illustrated by the claim by Ireland against the United Kingdom in connection with the radio-active pollution of the Irish sea before an arbitral tribunal set up under the Law of the Sea Convention.<sup>42</sup>

While interstate claims may well be an option to provide effective relief and result for instance in termination of a polluting activity or compensation (after all the state may have much more leverage and power to achieve a result than a single private claimant), it is not an option that is at the disposal of private injured parties. Diplomatic protection is not a right of the national but a right of the state. Under international law and under most domestic legal systems, individuals have no right to compel a state to exercise diplomatic protection.<sup>43</sup> The right to bring a claim belongs to the state. Moreover, if the state would be successful in claiming compensation, such compensation would fall to the state and private persons who have suffered loss are not entitled to (part of) that compensation.<sup>44</sup> Nonetheless, there may an overlap and connection with litigation options available to private parties, as a result of the principle of exhaustion of local remedies.<sup>45</sup>

## **2.4 Non-judicial Fora**

Next to the three categories of judicial proceedings discussed above, there may, depending on the circumstances, be a variety of alternative procedures by which private persons can seek some form of reparation. In the pulp mills dispute, these include complaints submitted to the Office of Compliance Advisor/Ombudsman (CAO), an independent recourse mechanism for the International Finance Corporation and the Multilateral Investment Guarantee Agency,<sup>46</sup> so-called Specific Instances against three European based multinationals

involved in the project for alleged breaches of the OECD Guidelines for Multinational Enterprises,<sup>47</sup> and a complaint against two investment banks for supporting the project, alleging that it would violate the so-called Equator principles, an agreement between international banks in which they promise to invest responsibly and respect environmental safeguards.<sup>48</sup> In other instances, resort to supervisory procedures established under international environmental agreements may be an option.<sup>49</sup>

While such options do not result in legally binding outcomes, they may result in forms of accountability that serve the interests of plaintiffs. They may for instance result in an authoritative statement that a particular act resulting in or contributing to transboundary environmental harm was in conflict with an international obligation or that a contested project would result in significant environmental harm - irrespective of the applicability of any particular obligation. Findings under such procedures may, irrespective of their legal status, in part as a result of the impact on public opinion, induce actors to stop with act that may contribute to cases of transboundary environmental harm. An illustration is the decision of the Dutch bank ING to pull out of the funding of the Uruguay pulp mills following reports, triggered by NGO's, of the environmental effects of the pulp mills. In that respect such non-judicial forms may indeed be complementary and even present an alternative to judicial procedures.<sup>50</sup>

### **3. Formal Connections between the Options**

The various procedures described above are relatively, but not fully autonomous. In principle, between domestic procedures as well as between international procedures, no formal connections exist. However, between international and domestic options certain rules of hierarchy may regulate the order in which such options are pursued.

As to domestic options, international law does not establish any form of hierarchy between them. Every court that is entitled to exercise jurisdiction (under domestic law, but always within the limits of international law) is entitled to do so. General international law does not grant priority to either the court where the harm materialized or the court where the harm is caused. No rule of international law would dictate that one procedure would have to wait for the other procedure. It depends on domestic law whether certain allocation rules



apply, for instance the *forum non conveniens*. In this respect, parallel litigation is certainly an option, as was illustrated in the *Potassium Mines* case where litigation simultaneously proceeded in Dutch and French courts.<sup>51</sup>

Also between the international options, under general international law no rules on allocation of competence exists. International law does not dictate that that a procedure before the ICJ should wait for a procedure before the ECHR or vice versa. The procedures are independent, unless, of course, parties have specifically agreed otherwise and notwithstanding the possibility that courts themselves have developed certain principles of allocation or restraint, such as comity.<sup>52</sup>

The situation is different for the relationship between domestic procedures on the one hand and international procedures on the other.<sup>53</sup> International human rights procedures are contingent on a prior exhaustion of local remedies and thus in principle are only available when the litigants have exhausted the claims that may exist under domestic law against the state.<sup>54</sup> This makes it unlikely that there can be parallel litigation of the same human rights claim in domestic and an international court (assuming that there is a case where an injured plaintiff was under the jurisdiction of the responsible state).

In principle the requirement of exhaustion of local remedies also applies in case of interstate claims based on diplomatic protection.<sup>55</sup> However, precisely in cases of transboundary harm an exception may apply. The 2006 Articles on Diplomatic Protection provide that local remedies do not need to be exhausted when there is no relevant connection between the injured person and the State.<sup>56</sup> The Commentary states on this point that it would be 'unreasonable and unfair to require an injured person to exhaust local remedies where his property has suffered environmental harm caused by pollution, radioactive fallout or a fallen space object emanating from a State in which his property is not situated; or where he is on board an aircraft that is shot down while in overflight of another State's territory.'<sup>57</sup> It is somewhat uncertain whether this exception is a part of positive international law. Whereas in several environmental cases, including the *Trail Smelter* case,<sup>58</sup> the defendant state did not insist on exhaustion of local remedies, it may be that this can be explained by the fact that they provide examples of direct injury, in which local remedies do not need to be exhausted.<sup>59</sup>

If we nonetheless assume that Article 15 (c) as adopted by the ILC indeed represents the state of the law, there may not be a barrier against simultaneous proceedings at domestic level in the defendant state and an action based on diplomatic protection.

#### **4. The Separate Responsibility of the Parties**

In case litigation is directed against a multiplicity of responsible parties (e.g.,: a private industrial facility, a state with jurisdiction over that facility, perhaps also an international investment bank), the responsibility of each of these parties in principle will be separate and autonomous.

To the extent that multiple parties may be responsible under international law, each party involved will be responsible for its own acts or omissions. A determination that one party is or is not responsible in principle will be without prejudice to the responsibility of the other parties involved.

Even when two parties may by separate wrongful acts contribute to the same damage, the responsibilities are separate.<sup>60</sup> An example would be a case where two states separate from each other cause pollution of an international waterway. It may also happen that one state would assist another state in causing a situation of transboundary harm (e.g., by building an industrial facility in the latter state that then will cause pollution of a river). Both situation may give rise to the responsibility of both states, but the basis and extent of their responsibility is separate. In the first example both states may have breached an obligation to prevent transboundary pollution, whereas in the latter example on the states may be responsible for assisting another state in breaching that obligation.<sup>61</sup> A similar situation might arise in case of aid given by an international organization to a state. In such cases (which indeed would seem to cover most instances where an organization could be held responsible in cases of transboundary harm) the organization could not be held responsible for the harm as such, but for the aid given.<sup>62</sup> The responsibility of the organization does not formally imply or exclude the responsibility of the state, or vice versa.

This of course is also true if different defendants (industrial facility, state, international organization etcetera) operate within separate legal orders. Responsibility of a state under domestic law is without prejudice to the state's

responsibility in domestic law and vice versa. And obviously the responsibility (or lack thereof) of a private facility under domestic law does not tell us anything on the responsibility of the state that may have condoned its polluting activities under international law.

A further illustration of this principle is the fact that when a state acts in conformity with its obligations under an international agreement and on that basis will not be responsible under international law, the state may well be responsible under domestic (tort) law. Moreover, an industrial facility that acts in accordance with legislation that implements the obligations may well be responsible under domestic law for its role in transboundary environmental harm.

It could be argued that as long as a state under domestic law, or a private facility, follows the standards mandated by a regulation or a permit that gives effect to an international obligation, they should be freed from liability under domestic law. This argument is a variant (distinguishing itself by the fact that here the origin of the regulation is an international obligation) of the often discussed 'regulatory compliance defense.' However, while some argue in favour,<sup>63</sup> there are strong opponents against such a regulatory compliance defense.<sup>64</sup>

In cases not involving international law, domestic legal systems seem to deny such a defence. For instance, the notion that industry would be freed from liability as long as a regulatory standard is followed is firmly rejected in Belgium.<sup>65</sup> The idea is that the administrative authority, when granting a license and setting permit conditions, cannot take into account the possible harm that the licensed activity might cause to all possible third parties. Third party rights to compensation for damages, therefore, may not be impaired simply because the operator of a plant followed the conditions of a license. Meeting the conditions of a permit is just a minimum. A plant owner has to take all possible precautions as required by tort law in order to avoid causing harm to third parties through his licensed activity. Also in the Netherlands, the question of whether following the conditions of a license would have a justificative effect in tort has been answered in the negative<sup>66</sup> An exception would only exist if the interests of the potential victims were clearly taken into account when the conditions of the permit were set.<sup>67</sup> This point is made clear in the decision of the Dutch Supreme Court that

dealt with pollution caused by the French potassium mines in the Alsace region.<sup>68</sup> The potassium mines argued that the emissions were within the limits set by their permit and, therefore, not illegal. The court, however, judged that the license had not taken into account the potential harmful effects of the emissions for third parties and thus could not release the potassium mines from liability.

It seems that the situation is the same in case a domestic regulation is based on international law (or in case an international legal regulation applies directly). Although regulatory compliance may play some role in assessing liability, following regulations is merely a minimum. It might perhaps only play a role in exceptional cases where all the interests have been weighed *ex ante* and the potential victim's damage was taken into account when the administrative conditions were set. But when a domestic regulation is based on and gives effect to an international agreement, this is a rather unlikely scenario. In that respect it indeed seems that the non-responsibility of a state based on the fact that it complied with international law is without prejudice to its liability under domestic law, or to the liability of private actors that may have acted in compliance with standards based on the international agreement.

## 5. The Limited Scope of the Applicable Law

A further feature of the co-existence of multiple options for potential plaintiffs is that generally each option will consider only a part of the normative spectrum that may be applicable to actors who are responsible for transboundary environmental harm. A state that causes transboundary environmental harm may at one and the same time act in breach of its domestic law, of foreign law that may be applicable, of an international human rights treaty, of one or more environmental treaties, and of general international law. However, it is unlikely that all these (potential) causes of action can be considered by a single court.

Domestic courts generally only will be entitled to apply the domestic law that is applicable to a (allegedly) responsible party. Human rights courts only will consider human rights law that may be applicable to the event. Interstate courts only will consider those rules of international law over which they have jurisdiction, and so on. While a defendant state may in fact have breached domestic law, human rights law and interstate obligations pertaining to the environmental harm, the determination of such breaches and the consequences

thereof can only be pursued in various courts and tribunals, each with a limited jurisdiction. However, some courts may be inclined to reach out beyond their narrow confines, and to incorporate bodies of law that really belong to another domain, and to 'undo' the effects of the fragmented organization of the litigation options.

In domestic cases, the applicable law will primarily be domestic law, with the law of the forum determining whether that is the domestic law of the forum state or of the state where the harm originated. International law in principle is neutral on the applicable law in domestic proceedings, though this may be subject to the (emerging) requirement that they should provide for effective redress in cases of transboundary environmental harm.<sup>69</sup>

Domestic courts may consider international human rights law and interstate obligations where that is allowed under the constitutional law of the state in question and in some cases also under judicially invented doctrines that would allow courts to consider rules that are not part of domestic law at all or perhaps not even binding on the state.<sup>70</sup> Also international (environmental) law may then be relevant as a basis for claims.<sup>71</sup> This may allow them to overcome limitations in the applicable law and to consider a wider part of the normative spectrum.

There are obvious barriers against such an approach. International obligations to protect the environment apply between states. Citizens in principle can not bring a claim based on a breach of a treaty obligation by a defendant state, nor could the victim of climate change directly base tort liability of private parties that caused such harm on the violation of treaty obligations since these only bind states.<sup>72</sup>

However, the influence of international law on domestic liability is not to be excluded. International environmental law can be used as elements in the interpretation of the domestic law on which a claim is based. In tort cases, international law arguably may be relevant in giving substance to what 'due care' requires.<sup>73</sup> In cases involving the exercise of administrative discretion, it can also be used as one of the basis to review such exercise. In a number of cases, courts have held that international law should be taken into account in application of the principles of administrative review. Whether a rule of international law has a direct effect or not is immaterial. Thus, it was ruled that the regional executive

authority of the province of Gelderland in the Netherlands had acted "unreasonably" by approving a zoning plan that threatened the habitat of the combed salamander, which was protected by the 1979 Bern Convention.<sup>74</sup> The unreasonableness was partly based on the province's neglect of the convention provisions.<sup>75</sup> This method may enable national courts to assess compliance with the Bern Convention without the courts having to solve the problem that the convention only regulated rights and duties of states.

Relying on international law in cases involving transboundary environmental harm may be easier where environmental harm can be construed as a human rights violation – a situation that in many (but in no means all – China and the United States being notable examples of states where this will not be possible) will allow the claimant to rely on international human rights law to protect their interest.

Also in human rights courts the applicable law is naturally limited – namely to the law contained in the instrument the treaty by which they were established. For instance, Article 32 of the ECHR provides that 'The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto' – not more, but also not less. Nonetheless, human rights courts have been willing, under the doctrine that the conventions should be interpreted in the light of general international law, also consider other rules of international law, for instance those imposing obligations to protect the environment on states.<sup>76</sup> That may be relevant in determining whether certain interferences with individual rights pursue for a legitimate objective.<sup>77</sup> For instance, while a state may argue that a polluting facility is necessary to supply energy to the population and as such would qualify as a legitimate objective that may justify an interference, the fact that the operation of such a facility would violate an international legal obligation, might undermine that argument.

Interstate claims would generally concern an international claim. That is, the claim would be based on an alleged violation of an international obligation, engaging the international responsibility of the wrongdoing state. While there may a variety of international rules that could be relevant as a basis for such a claim, whether such rules can be applicable law depends fully on the jurisdiction of the court or tribunal. It is very rare that an international court would be

allowed, in a case involving transboundary environmental harm, to consider the full spectrum of international (environmental) law that determines the full scope of obligations of the wrongdoing state.

## **6. The Limited Scope of Applicable Secondary Rules of Responsibility**

What has been said on the limitation of the applicable law applies to a certain extent also to the applicable (secondary) principles of responsibility. This holds in any case for the distinction between domestic and international options. Each will apply its own rules on liability or responsibility. To some extent that also may be true between various international courts.<sup>78</sup> It is arguable, though, that the secondary rules of international law, that are applicable to breaches of rules of international law as these may be considered by domestic courts, human rights courts or international courts, should be applicable in all cases involving claims based on international law, irrespective of the forum.

At the domestic level, each state of course will have its own liability regime. International law has created, at least for transboundary claims, some minimum standards. Based on the recognition that access is irrelevant if the state chooses to make no provision for liability, denies any remedy, or confers immunity on defendants, and building upon the 1992 Rio Declaration<sup>79</sup> and work of the International Law Association (ILA),<sup>80</sup> the draft liability principles adopted by the ILC propose a minimum standard of timely and effective redress. Principle 3 sets out that the draft principles 'to ensure prompt and adequate compensation to victims of transboundary damage' and Principle 4 provides that 'Each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control.'<sup>81</sup> However, the requirement to provide timely and effective redress does not apply to claims against the state. The articles envisage primarily that claims are brought against the operator. While the state should, if this is insufficient to provide adequate compensation, also that additional financial resources are made available, no liability of the state is prescribed.<sup>82</sup>

Claims in domestic courts in principle are not subject to principles of international responsibility as these apply in international courts. It was a rare case when the District Court of Rotterdam in the Netherlands, in adjudicating

claims of Dutch farmers who had suffered damage as a result of discharges of chlorides into the river Rhine by French mines near Strasburg, based its conclusion that a tort had been committed directly on the general principle of (international) law that a wrongful act entails responsibility.<sup>83</sup> The normal construction is to provide redress for violations of international law in transboundary civil litigations through the application of domestic law and to give effect to international law in the application of domestic (liability) law.

It can be argued, however, that in their application primary and secondary norms are interdependent and normatively inseparable, and that all courts called upon to adjudicate a claim based on international law, should operate within that framework. This approach is supported by international case-law in which it has been held that if a claim is based on international law, international principles of responsibility are automatically applicable. The Annulment Committee in the *Vivendi* case drew a distinction between claims under domestic law, which were governed by domestic principles of attribution, and claims based on a treaty, to which international secondary principles apply. It said:

“in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.”<sup>84</sup>

It is arguable that the proposition that there is a fundamental connection between a claim based on international law and the applicability of secondary principles of responsibility is applicable not only in courts with jurisdiction over interstate claims, but also in human rights courts and even in domestic courts. For even when the rule of international law on which the claim is based is incorporated in domestic law, it does retain its international character.<sup>85</sup>

## 7. The Complementary Nature of the Different Options

Though, as has been discussed above, the various options that may be open to litigants in principle are independent from each other, they can in several



respects be complementary. First, the options can be complementary since, as discussed in Section 2, injured parties may have access to some procedures but not to others. If the aim is to provide redress for all injured parties (private parties and states), a combination of complementary options will be necessary.

Second, since many procedures are limited to certain defendants, it may be necessary to pursue several procedures to achieve remedies vis-à-vis all relevant actors. For instance, in the pulp mills dispute, action in the ICJ or the IACHR could not result in a remedy for the two multinationals or the investment banks involved, and action under the OECD Guidelines could not reach the state of Uruguay etcetera. Also, for reasons indicated above, it is unlikely (though not excluded) that in domestic courts effective remedies may be found against foreign states. Where more actors are involved, various procedures can be complementary to get the results that the plaintiffs seek, in particular in terms of orders to stop the contribution to the transboundary environmental harm.

Third, and directly related to the previous point: the options can be complementary since some of them can only deliver partial remedies that, moreover, are may not be easily enforceable. International human rights courts may be useful to obtain a declaratory judgment and perhaps a determination that the responsible state should provide compensation or restitution, but it is most unlikely that that compensation is at the same level of what could be obtained in many domestic jurisdictions. The same is true for judgments of the ICJ. Moreover, both type of judgments may encounter great difficulty if an interested party seeks to enforce them at the domestic level. Domestic procedures then may provide an important complementary option.

Whereas for these reasons different litigation options may be complementary and may strengthen each other, it also may be the case that some of them are redundant. That is: one or two options can deliver everything that is aimed for, to which other options have little to add. If a domestic court provide an effective injunction against a polluting industrial facility, a ruling of an international human rights court or the ICJ to the effect that the state should ensure that that facility does no longer pollute may have little additional value – even though formally a judgment in the local court may not affect the procedure in an interstate court.

Another dimension of the co-existence of multiple options is that one particular option can contribute to the mitigation or resolution of disputes between other parties. For instance, domestic proceedings can contribute to mitigating or resolving claims of interstate disputes. Whether this is the case depends primarily on, first, the identity of claims and, second, on the identity of remedies.<sup>86</sup>

An example may illustrate the issue. In the Potassium Mines cases, a parallel set of disputes existed between, first, the Dutch farmers and the French mines and, second, the Netherlands and France. The claims of the Dutch farmers were based on a different (domestic) cause of action than the claim of the Netherlands (based on international law). Assume that a Dutch or the French court would have awarded a remedy that would have resulted in termination of the discharges of chlorides. What effect would such a remedy have had on the dispute between the Netherlands and France? This will in large part depend on what remedies the Netherlands would seek. If the only remedy sought would be termination of the polluting activity, the interstate dispute would be devoid of substance and the domestic litigation indeed would directly effect the continued existence of the interstate dispute. If, on the other hand, the Netherlands would have aimed for a declaration of wrongfulness of international law against France,, that remedy could not possibly have been achieved in the domestic court. And if the aim would be to obtain compensation for direct injury, a domestic award, even if that would have resulted in compensation of the private plaintiffs, would not take away the basis of that litigation.

In cases where the interstate claim is an exercise of diplomatic protection, this effect of domestic proceedings on an interstate dispute is closely related to the effect of the local remedies rule. After all, the intention of that rule is to ensure that a domestic court is allowed to provide a proper remedy so that the interstate dispute is solved.

The general point then is that a domestic court can remove the cause and existence of an international dispute if the injury underlying that dispute is such that it can be remedied by a domestic court.<sup>87</sup> Where a state makes no claim for damages for an injured national, but simply requests a decision on the interpretation and application of a treaty, there is no need for local remedies to

be exhausted.<sup>88</sup> But much depends on the nature of such mixed claims. It seems that local remedies must be exhausted where the request for a declaratory judgment is linked to other relief arising out of injury to a national.<sup>89</sup> It follows that, despite the claim for a declaratory judgment, the domestic avenue could, if effective, result in a resolution of the dispute.

The reverse effect may also occur. In cases where an international court determines that a state is obliged to terminate an activity causing transboundary pollution, and the state secures that aim under domestic law, the basis underlying a claim between a private injured party and the private entity causing the pollution may fall away, at least to the extent that that claim is aimed at termination. However, a claim for compensation in principle will be unaffected.

Similar influences on the continued existence of a claim can arise as a result of non-judicial forms of accountability. For instance, a specific instance review under the OECD may well lead to a change in behavior of a multinational corporation that also is defendant in domestic litigation, thus taking away (part of) the basis of that latter claim.

## 8. Conclusions

Litigation has become more powerful and important part of settlement of transboundary disputes. In recent years, we have seen major improvements, for instance as a result of the willingness of state to use interstate procedures, the active role taken by human rights courts, the adoption of the ILC Principles on allocation of loss etcetera.

Major differences continue to exist, however, between states and regions. The full range of options that was available in the *Potassium Mines Case* was hardly an option in case of pollution of the Songhua River. In current international law (and on worldwide scale), still major hurdles exist for effective access to remedy in transboundary disputes.

The above analysis presents a picture of an unorganized system of overlapping procedures, reflecting decentralized nature of international law and its divide with national law. This unorganized nature may carry some risks (fragmentation) and perhaps also is not fully efficient. It also make be rather

burdensome for defendants who may be confronted with multiple claims. However, on the whole it does provide mostly benefits for persons who are injured by a case of transboundary environmental harm.

In fragmented system with uncertain outcomes, it is likely that we will see more cases of what this article called cluster-litigation, by which limitations of individual procedures may be overcome and by which multiple procedures, in a rather unorganized manner, may eventually enhance the chance that disputes over transboundary environmental harm are resolved and, where appropriate, reparation is provided.

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## Endnotes

- 1 Romano (2007b, p. 796) uses the term in reference to procedures at international level. This article uses the concept in a broader meaning, also encompassing domestic claims.
- 2 The term reparation is understood here in its meaning as a concept of international law, encompassing restitution, compensation and satisfaction, either singly or in combination. *Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on Work of its Fifty- third Session*, UN GAOR, 56th Sess., Supp. No. 10 at art. 33, para. 2, UN Doc. A/56/10 (2001), reprinted in Crawford (2002). Though the Articles do not apply to claims by private persons against states, let alone to claims by private persons against other private persons, this article uses the term as a shorthand for reparation claims that can be presented by private persons in cases of transboundary harm.
- 3 See for the facts and expected environmental impacts of the project: International Finance Corporation, Cumulative Impact Studies of the Uruguay Pulp Mills, [www.ifc.org/ifcext/lac.nsf/AttachmentsByTitle/Uruguay\\_CISOct2006/\\$FILE/Uruguay\\_CIS\\_Oct2006.pdf](http://www.ifc.org/ifcext/lac.nsf/AttachmentsByTitle/Uruguay_CISOct2006/$FILE/Uruguay_CIS_Oct2006.pdf)
- 4 Pulp Mills on the River Uruguay (*Argentina v. Uruguay*); see brief discussion by Bekker (2007).
- 5 The submission to the IACHR is available at [www.cedha.org.ar/en/initiatives/paper\\_pulp\\_mills/peticion-cidh-final.doc](http://www.cedha.org.ar/en/initiatives/paper_pulp_mills/peticion-cidh-final.doc)
- 6 Press Release: Prosecutor Admits Criminal Case and Open Investigations of Company Executives in Uruguayan Cellulose Case, [www.cedha.org.ar/en/more\\_information/papermills-criminal-case-federal-prosecutor.php](http://www.cedha.org.ar/en/more_information/papermills-criminal-case-federal-prosecutor.php)
- 7 Uruguay – Orion and Celulosas de M'Bopicia (CMB), [www.cao-ombudsman.org/html-english/complaintOrionandCMB.htm](http://www.cao-ombudsman.org/html-english/complaintOrionandCMB.htm)
- 8 The procedure is set forth in The OECD Guidelines for Multinational Enterprises REVISION 2000, [www.oecd.org/dataoecd/42/11/38297552.pdf](http://www.oecd.org/dataoecd/42/11/38297552.pdf), pp. 35-37. See for general discussion of this accountability mechanism Human Rights, Alternative Dispute Resolution and the OECD Guidelines for Multinational Enterprises, Briefing

note for the participants at the Workshop on Accountability and Dispute Resolution, Kennedy School of Government, Harvard University 11-12 April, 2007, [www.oecd.org/dataoecd/42/11/38297552.pdf](http://www.oecd.org/dataoecd/42/11/38297552.pdf)

- 9 The "Equator Principles", [www.equator-principles.com/principles.shtml](http://www.equator-principles.com/principles.shtml)
- 10 See e.g., China apologizes to Russia for spill; Harbin reopens taps as Khabarovsk plans emergency response; *International Herald Tribune* November 28, 2005, p. 1.
- 11 See for a discussion of the legal responses to the incident, this volume.
- 12 Koh (1996, pp. 183-184).
- 13 Koh (1979, p. 2599).
- 14 At least under US law, also a third option of universal jurisdiction may be available for bringing claims against private parties that allegedly are responsible for transboundary environmental harm. The Alien Tort Statute gives US courts jurisdiction over civil claims based on violations on the law of nations. However, it seems that cases of transboundary environmental harm do not belong to cases covered by the jurisdictional provisions of the Alien Tort Statute; see US District Court for the Southern District of New York, *Amlon Metals v. FMC Corp.*, 775 F Supp 668 (SDNY 1991).
- 15 Council Regulation 44/2001, art.5, para. 3, 2001 O.J. (L 12) 1.
- 16 Case 21/76, *Bier v. Mines de Potasse d'Alsace*, 1976 E.C.R. 1735, 1748-49, (interpreting the meaning of "the place where the harmful event occurred" in article 4(3) of the Convention of 27 September 1968).
- 17 Perhaps except for the case when transboundary environmental harm can be construed as a human rights violation, triggering the right of access to a court; see *infra* Section 2.2.
- 18 Principle 12 of the Rio Declaration on Environment and Development, Annex 1, UN Doc. A/CONF.151/26 (Vol. 1) (1993), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>. In Europe, of particular relevance is art. 9 of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice, 38 ILM (1999), 517.
- 19 See discussion in Birnie & Boyle (2002, pp. 269-275).
- 20 UN Int'l L. Comm'n, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, Report of the International Law Commission on the Work of its Fifty- Eighth Session, at principle 6, U 2, UN Doc. A/61/10 (2006)); see also UN Watercourses Convention, G.A. Res. 51/229, article 32, UN Doc. A/RES/51/229 (May 21, 1997); Boyle (2006).
- 21 United Convention on Jurisdictional Immunities of States and Their Property art. 12, 44 I.L.M. 803, UN Doc. A/RES/59/38 (2005) (providing: "Unless otherwise agreed

between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission"; See also Hafner and Kohler (2004) (discussing the scope of the extra-territorial tort exception in the UN Convention). See generally Fox (2002) (analysing the extra-territorial tort exception).

- 22 UN Int'l L. Comm'n, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, Report of the International Law Commission on the Work of its Fifty- Eighth Session*, at principle 6, J 2, UN Doc. A/61/10 (2006).
- 23 *Supra* text to note 10.
- 24 McCormick (2005), discussing NGO litigation and monitoring of environmental law implementation.
- 25 For the *locus standi* of environmental organizations, see Betlem (1993 pp. 305-343).
- 26 Betlem (1993), *supra* note 25, at 497 (discussing a few exceptional cases in which NGO's were also awarded damages, for instance with respect to "bird clean-up" costs).
- 27 In Europe some harmonization is now achieved through the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations, Strasbourg, Fr., Apr, 24, 1986, *Explanatory Report*, Doc No. 124 (1986), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/124.htm>
- 28 Birnie & Boyle (2002, pp. 254-259). But this is different at regional level, in particular in Africa: see article 24 of the African Charter on Human and Peoples' Rights, 21 I.L.M. 58. The African Commission noted in Communication 155/96 (*The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*) that ' the right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.' See also article 18 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. (proclaiming that 'Women shall have the right to live in a healthy and sustainable environment'), available at <http://www1.umn.edu/humanrts/africa/protocol-women 2003.html>
- 29 Birnie & Boyle (2002, pp. 259-261).
- 30 ECtHR, *Fadeyeva v. Russia* (A. no. 55723/00), par. 70.



- 31 ECtHR, *Fadeyeva v. Russia* (A. no. 55723/00), par. 89 (noting that 'at the material time, the Severstal steel plant was not owned, controlled, or operated by the State. Consequently, the Court considers that the Russian Federation cannot be said to have directly interfered with the applicant's private life or home. At the same time, the Court points out that the State's responsibility in environmental cases may arise from a failure to regulate private industry'. Accordingly, the applicant's complaints fall to be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under Article 8 § 1 of the Convention').
- 32 In *Fadeyeva v. Russia* (A. F76), the Court formulated the standard as: 'the Court's first task is to assess whether the State could reasonably be expected to act so as to prevent or put an end to the alleged infringement of the applicant's rights' (par. 89).
- 33 Cf ECHR, *Banković and Others v. Belgium and 16 Other Contracting States*, (A. no. 52207/99), Decision of 19 December 2001. *But see* Birnie and Boyle (2002, pp. 265-266) (arguing that 'if states are responsible for their failure to control soldiers and judges abroad, they may likewise be held responsible for their failure to control transboundary pollution and environmental harm caused by activities within their own territory').
- 34 Letter from Ariel Dulitzky, Assistant Executive Secretary, Inter-American Commission of Human rights, to Paul Crowley, Legal Representative, Barrister and Solicitor, Canada (Nov. 16, 2006), <http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf>
- 35 Art. 34 of the ECHR; see discussion in Jacobs and White (2006, pp. 482-484).
- 36 Art. 56 of the African Charter on Human and Peoples' Rights, *supra* note 28; see discussion in Viljoen (2002, pp. 75-76).
- 37 Art. 46 of the American Convention on Human Rights, 1144 U.N.T.S. 123.
- 38 ILC, Commentaries on the Draft Articles on Diplomatic Protection with commentaries 2006, par. 3, available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_8\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf)
- 39 Cf article 1 of the Draft Articles on Diplomatic Protection with commentaries 2006: 'For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.'
- 40 See generally Romano (2007a).
- 41 *Supra* note 5. The jurisdiction was based on Article 60 of the Statute of the River Uruguay (1975), UNTS (1982) nr 21425.

- 42 Dispute concerning access to information under Article 9 of the OSPAR Convention (*Ireland v. United Kingdom of Great Britain and Northern Ireland*), Final Award, available at <http://www.pca-cpa.org/upload/files/OSPAR%20Award.pdf>
- 43 Note though that in several states domestic courts have accepted that they can exercise some form of judicial review over the (discretionary) exercise by a state of its right to bring a claim; see Vermeer-Künzli (2006).
- 44 But see art. 19(c) of the ILC Articles on Diplomatic Protection, recommending that 'A State entitled to exercise diplomatic protection according to the present draft articles, should.... Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.
- 45 *Infra* text to notes 53-54.
- 46 *Supra* note 7.
- 47 *Supra* note 8.
- 48 *Supra* note 9.
- 49 Fitzmaurice and Redgwell (2000).
- 50 Press release: "ING Group of Netherlands Pulls out of controversial papermill while World Bank postpones loans following critical review of environmental impact studies" ; <http://www.cedha.org.ar/en/more information/ing-postpones-loans.php>
- 51 Lammers (1989).
- 52 *MOX Plant*, Annex VII arbitral tribunal Order No. 4 (14 November 2003) (suspending proceedings until the ECJ has given judgment). See for a discussion of various principles of allocation of jurisdiction between international courts, Shany (2003).
- 53 See generally: Shany (2007).
- 54 Art. 35(1) of the ECHR; art. 46(1)(a) IACHR; art. 50 African Charter.
- 55 Art. 14 of the 2006 ILC Draft Articles on Diplomatic Protection.
- 56 Art. 15 (c) of the *Id.*
- 57 [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_8\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf)  
P. 81, Par. 7.
- 58 *Trail Smelter Arbitration (United States v. Canada)*, 3 R. Int'l Arb. Awards 1911 (1938), reprinted in 33 AJIL182 (1939), 3 R. Int'l Arb. Awards 1938 (1941), reprinted in 35 AJIL 684 (1941).
- 59 [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/98\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/98_2006.pdf)  
P. 81, Par. 7.

- 60 Article 47 of the Articles on State Responsibility, Annex of UN Doc A/Res/56/83 of 28 January 2002. The commentary states:
- 61 Art. 16 of the Articles on State Responsibility.
- 62 Draft article 12 of the draft articles on the A/60/10, chap VI, pp. 192-206 at p. 96.
- 63 See Bergkamp (2001, pp.239-258), arguing that if polluters first have to comply with the conditions of a license and subsequently still can be held liable for damages, they have to "pay twice".
- 64 See, e.g., Wenneras (2005).
- 65 For further details see Faure (1999, p. 203).
- 66 *Banketbakker Krul/Joostens*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], Jan. 30. 1914, NJ 497 (Neth.); *Vermeulen/Lekkerkerker*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], Mar. 10, 1972, NJ 278 (ann. G.J. Scholten) (Neth.).
- 67 *Rus -Van der Velde* (1989); *Nieuwenhuis* (1991).
- 68 *Mines de Potasse d'Alsace S.A. (MDPA) v. Onroerend Goed Maatschappij Bier B. V. et al.*, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], Sept. 23, 1988, 21 NETH. Y.B. INT'L L. 434 (1990).
- 69 Principle 6 of the Draft Articles of the Allocation of Loss, *supra* note 20.
- 70 Knop (2000).
- 71 Generally: Anderson and Galizzi (2002).
- 72 Bodansky and Brunnée (1998).
- 73 Nollkaemper (1998).
- 74 Convention on the Conservation of European Wildlife and Natural Habitats, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/104.htm>
- 75 *Afd. G.R. v. S.*, 22 April 1991, AB 1991, 592.
- 76 *Al-Adsani v. the United Kingdom*, (A. no. 35763/97), par 55.
- 77 *Al-Adsani*, *supra* note 76, par 54.
- 78 Gray (1999).
- 79 *Supra* note 18.
- 80 International Law Association London Conference (2000), Committee on Water Resources Law, *Campione Consolidation of the International Law Association Rules on International Water Resources 1966-1999*, art. 51 (2000), available at <http://www.ila-hq.org/pdf/Water%20Resources/Water%20Res%20Report%202000.pdf>

- 81 *Supra* note 20.
- 82 Art. 4(5) of the draft Articles on the allocation of loss.
- 83 See District Court of Rotterdam, 8 January 1979, NJ 1979, nr. 113, *Id.*, 16 December 1983, NJ 1984, nr. 341.
- 84 ICSID, *Vivendi v Argentina*, Decision on Annulment, 2002 ICSID, 41 ILM 1135, J 96 (3 July 2002).. Similarly, a UK court held that when a arbitral tribunal addressed the rights of a private party Occidental Exploration & Production Co., (OEPC) in international law vis-à-vis Ecuador, 'It must follow . . . that if the tribunal concluded that international law rights of OEPC had been violated by Ecuador, or the latter was in breach of its international law obligations, then the tribunal will have to consider *what remedies are available in international law* to repair any damage caused to OEPC by Ecuador's breach of OEPC's international law rights.' (emphasis added); High Court of Justice, Queens Bench Division, Commercial Court, per Mr Justice Aikens, *The Republic of Ecuador v. Occidental Exploration & Production Co.*, 2 February 2006; [2006] EWHC 345 (Comm), U 122.
- 85 This argument is further developed in Nollkaemper (2007).
- 86 See discussion in Schreuer (1981), pp. 327-347).
- 87 Thirlway states: "Obviously if the claim is such that it does not involve injury of a kind which could be remedied by recourse to the local courts, the rule is totally excluded; not however because purely inter- State rights are involved, but because the claim is of such a kind that redress *could* not be obtained in local courts. But if the essence of the matter is injury to nationals, whose claim is being espoused by their State, and redress by the local courts will effectively put an end to the dispute, then the rule will apply to render inadmissible also any subsidiary aspects of the claim which might be regarded as strictly matters of direct inter-State relations." (1995); J Dugard, Second Report on Diplomatic Protection, A/CN.4/514 (2001), par. 26.
- 88 Dugard, *supra* note 87, par. 27.
- 89 Discussed in Dugard, *supra supra* note 87, par. 28.