

Victims bearing the loss? The
non-discrimination principle in
*Transboundary Offshore Oil
Pollution in the Arctic*

The Norwegian Example

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1 PART I

Introduction

In recent years Norway¹ and Russia² have been procuring licenses for oil and gas exploration in the Arctic region very close to each other's borders. There is an inherent risk³ of oil pollution with the exploration and exploitation of oil reserves. The Montara⁴ oil and gas well blowout⁵ in the Timor Sea off the northern coast of Western Australia demonstrated the present danger of transboundary environmental harm from offshore installations. In addition, there is pending litigation⁶ in Australian courts where Indonesian seaweed farmers seek damages (200 million Australian dollars) for loss suffered as a result of the Montara oil spill. In this paper I will discuss to what extent does Norwegian law allow enforcement of Russian citizens' compensatory claims in case of transboundary pollution from an oil well

¹ Norwegian Petroleum Directorate, 'Thirteen companies are offered ten production licences in the 23rd licensing round' (18.05.2016)

² Isabel Gorst, Charles Clover, and Ed Crooks, 'Exxon and Rosneft Sign Arctic Deal', Financial Times (London 30 November 2011) < <https://www.ft.com/content/ffa9d962-d319-11e0-9aae-00144feab49a>> last accessed 14 May 2017. At the time, Rex Tillerson, now Secretary of State of the United States, was the Exxon Mobil's CEO signing the Arctic exploration and exploitation deal. It is reasonably foreseeable to conclude that the United States sanctions will be lifted in the near future.

³ Glada Lahn and Charles Emmerson, 'Arctic Opening: Opportunity and Risk in the High North' Chatham House, (London 1 April 2012) < <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy%20Environment%20and%20Development/0412arctic.pdf>> last accessed 14 May 2017, p.35 they identify two types of risk, operational and environmental.

⁴ David Borthwick, 'Report of the Montara Commission of Inquiry' Montara Commission of Inquiry (Canberra 17 June 2010) < <https://industry.gov.au/resource/UpstreamPetroleum/MontaraInquiryResponse/Documents/Montara-Report.pdf>> last accessed 14 May 2017. The report states on page 26 that "The evidence before the Inquiry indicated that **hydrocarbons did enter Indonesian and Timor Leste waters** [emphasis added] to a significant degree."

⁵ Jan Hayes, 'A New Policy Direction in Australian Offshore Safety Regulation' in Preben Hempel Lindøe, Michael Baram, and Ortwin Renn (eds), Risk governance of offshore oil and gas operations (Cambridge University Press 2014). The author describes the term in page 189 as loss of control "of the well, resulting in uncontrolled flow of hydrocarbons to the environment."

⁶ Gabrielle Dunlevy, 'Indonesian seaweed farmers to file \$200m class action over Timor Sea oil spill' The Guardian (London 2 August 2016) <<https://www.theguardian.com/world/2016/aug/02/indonesia-seaweed-farmers-class-action-timor-sea-montara-oil-spill-2009-australia>> last accessed 14 May 2017

blowout/offshore platform incident in the Barents Sea (Arctic)⁷ that causes economic damage to Russian private interests.

This Thesis proceeds in three parts. In the introduction I will set the parameters for the issues to be discussed in the following parts. In part II, I will examine whether the international environmental law principle of non-discrimination⁸ has achieved the status of customary law or general principle of international law. International environmental law concerns state rights and responsibilities, consequently, I will examine how the United Nations Convention on the Law of the Sea and other relevant international environmental law instruments (including soft law) regulate state responsibility regarding transboundary offshore oil pollution in the Barents Sea. In part III, I will answer two interrelated questions: Is Norway in compliance of its international obligations vis-a-vis United Nations Convention on the Law of the Sea, Draft articles on Prevention of Transboundary Harm from Hazardous Activities 2001 (hereunder Transboundary Harm articles) and other treaties mentioned in part II? More specifically, does Norwegian law provide effective legal redress (internalization into domestic law of the non-discrimination principle norms of equal access and redress) to Russian victims of transboundary offshore oil pollution?

This paper will not discuss the issues arising as to the type of facility or vessel (FPSO, FSO, oil tankers, or vessel-sourced pollution in general, etc.) either under or above the water and whether in the exploration or exploitation phase because of the unclear and varied

⁷ The “Arctic” defined in Chris Park and Michael Allaby, *A Dictionary of Environment and Conservation* (Second edition. edn, Oxford University Press 2013) as “The area lying above 66.5° North that is dominated by the Arctic Ocean but also includes large land areas in Canada, Russia, Greenland, Scandinavia, Iceland, and Alaska...” However, it must be noted that there is no commonly accepted definition for the Arctic. See Brian J. Van Pay, ‘National Maritime Claims in the Arctic’ in Myron H. Nordquist, John Norton Moore, and Tomas H. Heidar (eds), *Changes in the Arctic Environment and the Law of the Sea* (Brill 2010), p. 63 explaining the political reasons for it.

⁸ According to Principle 10 of the Rio Declaration, which was signed by 176 countries, States must “...facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” A few years later the The Organisation for Economic Co-operation and Development (OECD) created principles which applied Principle 10 on a non-discriminatory basis.

definitions⁹ in regards to what is considered a “vessel” for the purposes of the International Convention on Limitation of Liability for Maritime Claims (LLMC¹⁰) and the International Convention on Civil Liability for Oil Pollution Damage (CLC¹¹). The two international conventions have varying limitations of liability for pollution for which the “vessel” owner may be liable. Instead, I will attempt to map any international law or custom existing in regards to transboundary offshore oil exploration and/or exploitation in the Barents Sea and whether Norwegian law is in compliance with such international norms.

1.1.1 The Arctic

The Arctic is a frozen ocean that due to climatic changes has been reducing in size for decades¹². This trend seems to be irreversible¹³. Seeing the reduction on the size of the Arctic Ice Cap, five Arctic states¹⁴ (Canada, Denmark, Norway, the Russian Federation and the United States of America¹⁵) “remain[ed] committed” to use the law of the sea¹⁶ legal framework because it “provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine

⁹ Paul Dean and Simon Shaddick, ‘The legal and regulatory treatment of FPSOs, with a focus on limitation of liability’, (July 2012) <<http://www.hfw.com/Legal-and-regulatory-treatment>> last accessed 11.03.2017

¹⁰ 1456 UNTS 221;16 ILM 606 (1977)

¹¹ 973 UNTS 3; 9 ILM 45

¹² Clara Deser and Haiyan Teng, ‘Recent Trends in Arctic Sea Ice and the Evolving Role of Atmospheric Circulation Forcing, 1979—2007’ in Eric T. DeWeaver, Cecilia M. Bitz and L.-Bruno Tremblay (eds), *Arctic Sea Ice Decline: Observations, Projections, Mechanisms, and Implications* (American Geophysical Union 2013)

¹³ Eric T. DeWeaver, ‘Arctic Sea Ice Decline: Introduction’ in Eric T. DeWeaver, Cecilia M. Bitz and L.-Bruno Tremblay (eds), *Arctic Sea Ice Decline: Observations, Projections, Mechanisms, and Implications* (American Geophysical Union 2013)

¹⁴ The Arctic Council, established by the Ottawa Declaration in 1996, includes countries such as Iceland, Finland, and Sweden along with observer status for countries not having a direct connection to the Arctic such as China.

¹⁵ The United States has not ratified the UNCLOS 1982 but considers it as part of customary law, see Louis B. Sohn and others, and others, *Cases and Materials on the Law of the Sea* (Second edition, Brill Nijhoff 2014), p. 35. See generally Myron H. Nordquist, *The Law of the Sea Convention: US accession and globalization* (Brill 2012)

¹⁶ The Ilulissat Declaration used the term “law of the sea” instead of UNCLOS 1982 because the United States is not a party to the Convention.

environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea¹⁷.” The protection of the marine environment¹⁸ is of particular importance as it may give clues concerning the rights and obligations (rights and responsibility) of states in case of a transboundary offshore oil pollution incident. The primary source on the law of the sea is the United Nations Law of the Sea Convention¹⁹ (hereunder UNCLOS 1982, Convention) concluded in 1982.

1.1.2 Soft Law Instruments²⁰

In my research I will rely both on treaty and “soft law”. The rights and obligations arising out of a treaty do not usually present difficulty as to the binding force of the said treaty. However, when it comes to soft law instruments, such as declarations and the work of the International Law Commission there is more ambiguity as to the binding nature of such instruments. It is suggested that declarations and resolutions of the General Assembly of the United Nations (UNGA) are not law per se, but rather in relevant cases outlined below they may be “evidence of existing law, or formative of the opinion juris or State practice that generates new customary law²¹”.

1.1.3 Offshore Pollution Liability

¹⁷ Ilulissat Declaration, Arctic Ocean Conference, Greenland, 27-29 May 2008

<http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf> last accessed (03.03.2017) para 3.

¹⁸ Article 1(4) UNCLOS 1982.

¹⁹ 1833 UNTS 3 / [1994] ATS 31 / 21 ILM 1261 (1982) (UNCLOS 1982, Convention).

²⁰ Jürgen Friedrich, *International Environmental Soft Law: The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Heidelberg: Springer 2014), p. 2 stating that “[soft law] lack the specific form of the known and recognised sources of international law but nevertheless have legal and behavioural effects [citation omitted]”.

²¹ Alan Boyle, 'Soft Law in International Law-Making', in Malcolm D. Evans (ed), *International Law*, (Second edition, Oxford: Oxford University Press, 2006), p. 119. Soft law includes the Rio Declarations and other similar instruments, p. 120.

There is no international liability regime governing pollution from offshore activities in the Arctic²². In 1977, the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources (CLEE) was signed by the governments of the Federal Republic of Germany Republic of Ireland, the Netherlands, Norway, Sweden and the United Kingdom regulating civil liability for pollution damage but never came into force²³. Instead, the oil industry operators decided to set up their own private civil liability regime regulating offshore oil pollution incidents with strict liability applicable but there is also limitation on the liability of the operators²⁴.

The Offshore Pollution Liability Association Limited (OPOL) was envisaged to be an interim measure before the CLEE would enter into force. The licensee under UK law is required to be a member of the OPOL in order to receive a license for exploration and/or exploitation of the continental shelf²⁵.

2 Part II

2.1 State Liability and International Environmental Law

2.1.1 State Liability/Responsibility for Lawful Acts?

It is disputed among legal scholars as to if and to what extent States can be held responsible for lawful activities within their jurisdictions that cause transboundary harm²⁶ to

²² Peter Ehlers, 'Origins and Compensation of Marine Pollution — A Survey' in Jürgen Basedow and Ulrich Magnus (eds), *Pollution of the Sea — Prevention and Compensation* (Springer: Berlin, Heidelberg 2007) p.117.

²³ 16 May 1977, 16 I.L.M. 1451.

²⁴ Michael Faure and Hui Wang, 'Compensating Victims of a European Deepwater Horizon Accident: OPOL Revisited' (2015) 62 *Marine Policy* 25, pp. 26-7.

²⁵ Simon Baughen, 'Environmental Damage and UK Offshore Operations: Uncertain Liabilities in Deep Waters' (2016) 28 *Journal of Environmental Law* 497, p. 506.

²⁶ Defined as "harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border" in article 2(c) of the ILC prevention draft articles.

the environment and people of a third state²⁷. I will argue below that though states have not concluded an international convention binding themselves to such a liability, State practice, international treaties, general principles of international environmental law, and judicial decisions point towards a kind of responsibility to either prevent or allocate the loss in case of transboundary harm. Offshore hydrocarbon activities²⁸ have been considered to be hazardous because of their inherent risk for an accident that can have transboundary effects.

2.1.2 Categories of International Environmental Law Agreements

There are three types of international agreements according to De la Fayette, “The first category of agreements relates to the prevention of incidents and of damage to the environment.” Where States are required to make sure that activities which are not unlawful in themselves become a nuisance or cause damage to the environment of a different State or to its citizens. These agreements foresee the damage caused to areas beyond national jurisdiction too. The Espoo convention would fall under the first category of international agreements. “The second category is contingency planning and emergency response.” These agreements are set in order to mitigate, limit, and control the extent of the pollution to the environment. A prime example in the Arctic is the 2013 Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (MOSPA). Norway and Russian have entered into an agreement called the “Joint Norwegian-Russian Contingency Plan for Oil Spill Response in the Barents Sea,” where the two countries have allocated responsibilities and procedures in case a transboundary oil spill occurs. For that purpose Norway and Russia held late last year a joint exercise where a supposed oil spill had taken

²⁷ Philippe Guttinger, ‘Allocation of Responsibility for Harmful Consequences of Acts Not Prohibited by International Law in The Law of International Responsibility’ in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010) p. 503.

²⁸ Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), 2161 UNTS 447; 38 ILM 517 (1999)

place. “Finally, the third category of agreements relates to liability and compensation of the victims of transboundary damage.” Which means that should an incident causing pollution of the environment in a transboundary fashion occur then there needs to be an agreement which could deal with the private and public claims for redress through legal means.

A prime example of such an agreement is the Nordic Environmental Protection Convention 1974, discussed below. The third type of agreements is mostly relevant for transboundary harm victims because for such agreements to be applicable there must have been either because prevention or contingency planning failed to contain the oil spill resulting to damage on people’s property or business.

2.2 Hard Law

Before delving into the legal principles governing the right of private persons seeking redress for transboundary offshore oil pollution in a non-discriminatory manner, it merits discussing state responsibility and liability in protecting the marine environment and giving structure to the non-discrimination principle under relevant international environmental law instruments beginning with UNCLOS 1982.

2.2.1 UNCLOS 1982: A Constitution²⁹ for the Oceans

UNCLOS 1982 is the most authoritative legal instrument regulating to a greater or lesser extent everything that happens under or above the seas³⁰. All Arctic states except the

²⁹ Referred to as such by Tommy TB Koh, President of the Third United Nations Conference on the Law of the Sea, Statement by the President on the 6 and 11 December 1982 at the final session of the Conference at Montego Bay.

³⁰ Robin Churchill, ‘Introduction’ in Donald R and others (eds), *The 1982 United Nations Convention on the Law of the Sea* (Oxford University Press 2015) p. 24.

United States³¹ have ratified the UNCLOS 1982. The Arctic is to be governed by the UNCLOS 1982 framework as agreed in the Ilulissat Declaration in 2008. As far as other members of the Arctic Council, they are all parties to the UNCLOS 1982. More specifically, both Norway and Russia have ratified the Convention.

The Convention takes a zonal approach in regard to the rights and obligations of states over the seas and continental shelf. State parties to the Convention can have sovereign rights over an area known as the Exclusive Economic Zone (EEZ) extending up to 200 nautical miles outward from the baseline and more than that when it comes to the continental shelf which shall not exceed 350 nautical miles from the baseline³². Article 235 UNCLOS 1982 is the most pertinent³³ article from the Convention in regards to the question which this paper seeks to answer and deserves to be quoted in full:

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.
3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

³¹ T.L. McDorman, 'Canada, the United States and International Law of the Sea in the Arctic Ocean' in Tim Stephens and David L VanderZwaag (eds), *Polar Oceans Governance in an Era of Environmental Change* (Cheltenham, UK: Edward Elgar Publishing 2014) p. 254.

³² Article 76(5), UNCLOS 1982.

³³ See generally, Proelss A and others (eds), 'Article 235' in *United Nations Convention on the Law of the Sea: A commentary* (Hart Publishing 2017) p.1.

Article 235 has been characterized as having merely a declaratory or aspirational³⁴ character but the travaux préparatoires³⁵ show otherwise. The preparatory works indicate that states were contemplating transboundary oil pollution remedies for *all* affected victims without discrimination in regards to nationality of the victim or location of the damage. For example, the United States and Kenya presented similar proposals to the Sea-Bed Committee indicating that “In the absence of other adequate remedies with respect to damage to the [marine] environment of other States (*State affected, added*) caused by the activities under the jurisdiction or control of a State(*State of origin, added*), that State has the responsibility to provide recourse for foreign States or nationals to a domestic forum empowered: (a) to require the abatement of a continuing source of pollution of the marine environment, and (b) to award compensation for damages³⁶”. As far as marine pollution resulting in areas beyond national jurisdictions from activities undertaken under the jurisdiction of a State there still seem to be issues which need to be resolved. For example, “how and by whom claim for damage is to be made, what is the measure for compensation, to whom are damages to be paid³⁷.”

The first paragraph of article 235(1) may be authoritatively said to confirm³⁸ article 22 of the Stockholm Declaration³⁹. Article 22 is preceded by article 21 of the same Declaration stating that “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national

³⁴ Jan Albers, *Responsibility and Liability in the Context of Transboundary Movements of Hazardous Wastes by Sea: Existing Rules and the 1999 Liability Protocol to the Basel Convention* (Springer Berlin Heidelberg 2015) p. 71. The claim was partly based on, among others, the article by Boyle A, ‘Marine Pollution Under the Law of the Sea Convention’ (1985) 79(2) *American Journal of International Law* 347 pages 367-8.

³⁵ Shabtai Rosenne and Alexander Yankov (eds), ‘Third Committee: Articles 192 to 278, and Final Act, Annex VI’ in Center for oceans law and policy (Charlottesville, Va.), Myron H Nordquist, and others (eds) *United Nations Convention on the Law of the Sea: 1982 : A Commentary* (Dordrecht: M. Nijhoff 1991), pp.401-15.

³⁶ Supra note 36, p.403, partially quoting from the United States proposal, A/AC.138/SC.III/L.40 (1973, mimeo.), article XXII (U.S.A.).

³⁷ Supra note 36, p.402, quoting from Australia’s 1973 Sea-Bed Committee, principle (e) explanatory comment, A/AC.138/SC.III/L.27 (1973, mimeo.), principle (e) (Australia).

³⁸ Supra note 36, p.401

³⁹ UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994

jurisdiction". These two principles and other related matters will be discussed further below when looking at soft law instruments on State responsibility and liability. In addition, the article 235(1) says that States "shall be liable" according to international law on state responsibility. However, a distinction has been made in the ILC Draft Articles on Transboundary Harm concerning only State acts not unlawful in international law⁴⁰. This is, according to the commentary of the same article, due to state responsibility for wrongful (unlawful) acts is well developed by the ILC in its articles on State responsibility. To that point, the ILC Draft Articles regarding State responsibility for wrongful acts is said to codify customary law on many of its articles⁴¹ for acts which are unlawful in international law.

In addition, the phrase "in accordance with international law" in 235(1) could be that States may be held liable even if bearing no fault⁴². It follows from the above that State licensing of oil exploration and exploitation is not regarded as an unlawful act but States may nevertheless be in breach of their obligations to protect⁴³ the marine environment.

The second paragraph of article 235 requires the signatories to UNCLOS 1982 to guarantee legal recourse for damage caused to the environment by oil pollution by persons or companies within their jurisdiction. It is interesting to see that the paragraph does specify the persons(s) or legal persons that cause damage to the marine environment but does not specify which are the victims. Could the victims be only nationals of the State of origin or could "prompt and adequate" compensation should be available to citizens of the affected State? The Convention is unclear on this point but of help can be found in article 229 which states

⁴⁰ Article 1, 2001 Prevention of Transboundary Harm from Hazardous Activities, with commentaries. Under the heading "Scope" article 1 states that "The present articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences."

⁴¹ See e.g. James Crawford, *The Law of International Responsibility* (Oxford University Press 2010) p. 43 quoting Kaj Hober, 'State Responsibility and Attribution' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) pp. 549, 553.

⁴² Supra note 36, p. 412.

⁴³ Article 192-5, UNCLOS 1982.

that nothing in the treaty will affect civil proceedings between the person or juridical entity causing the pollution of the marine environment and the victim suffering damage⁴⁴.

Article 235(3) seeks to encourage States to work together in giving regulatory standing to the principle of prompt and adequate compensation. The paragraph offers a solution for adequate compensation by setting up insurance or funds in order for the victims to have their claims satisfied in a quick and complete manner. Most importantly, for the purposes of this paper, the clause “further development of international law relating to responsibility and liability” makes it plain that States should cooperate and create concrete rules and regulations in giving meaning to the above mentioned paragraphs in article 235.

The UNCLOS1982 does seek to protect the marine environment in parts XI and XII and I argue that it goes further than espousing general principles when it seeks from signatory States to not only develop a system where victims of pollution could seek redress but also requires that redress be prompt and adequate. Article 235 leaves it up to the States to negotiate the exact terms in which they will offer legal redress to victims of transboundary pollution. If the notion of “victims” is construed to include foreign nationals then the States have a positive obligation under article 235(2) not only to protect the environment but to enact anticipatory legislation for the event which an offshore oil pollution incident occurs under Norwegian jurisdiction and causes pollution damage to the environment, people, and people’s property. In part three, I will discuss whether Norwegian law complies with its international obligations under international law.

2.2.2 The Nordic Environmental Protection Convention 1974⁴⁵

⁴⁴ Supra note 36, p. 414.

⁴⁵ "Denmark, Finland, Norway, and Sweden: Convention of the Protection of the Environment." *International Legal Materials* 13, no. 3 (1974): 591-97. Available online at <http://www.jstor.org/stable/20691269>. (last accessed 15.04.2017)

The Nordic Environmental Protection Convention (NEPC) is a model⁴⁶ of multilateral environmental protection agreement because not only it incorporates the principle of non-discrimination⁴⁷ among the citizens of each of the four signatories to the treaty but it also provides for environmental impact assessment (EIA). It is worth mentioning that the ILC Draft Articles on Prevention of Transboundary Harm article 15 commentary on the principle of non-discrimination cites as precedent article 3 of the NEPC which states that:

Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities including the question of measures to prevent damage, and to appeal against the decision of the Court or the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.

The provisions of the first paragraph of this Article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured party than the rules of compensation of the State in which the activities are being carried out.

⁴⁶ Timo Koivurova, 'Transboundary Environmental Impact Assessment: the Nordic Environmental Protection Convention' in Kees Bastmeijer and Timo Koivurova (eds), *Theory and Practice of Transboundary Environmental Impact Assessment* (Brill 2007) p. 71.

⁴⁷ The principle of non-discrimination in a transboundary environmental harm context was first enunciated in the *OECD Recommendation of the Council on Principles concerning Transfrontier Pollution*, 14 November 1974 - C(74) 224; And later the principle was elaborated to include procedural elements in the *Recommendation of the Council for the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution*, 17 May 1977 - C(77)28/FINAL; For an earlier account of the non-discrimination principle for access to justice in a multilateral treaty see Noah Hall, 'Transboundary Pollution: Harmonizing International and Domestic Law' (2007) 40(4) *University of Michigan Journal of Law Reform* 681, p. 743.

Harmful activities are defined in article 1 NEPC and include among many others, pollution of the marine environment from offshore installations and oil wells⁴⁸. In part three there will be a more detailed discussion on the NEPC and the challenges of translating it to national law. In addition, article 15 of ILC Draft Articles on Prevention of Transboundary Harm will be discussed later under the soft law international instruments along with the ILC Draft Principles on the Allocation of Loss from Hazardous Activities. Two relevant conventions that are related to the non-discrimination principle are the Convention on the Law of the Non-navigational Uses of International Watercourses 1997 (entered into force in 2014) and the Convention on Environmental Impact Assessment in a Transboundary Context 1997 (entered into force in 1997).

2.2.3 Convention on the Law of the Non-navigational Uses of International Watercourses⁴⁹

In article 32 of the Convention on the Law of the Non-navigational Uses of International Watercourses (hereinafter Watercourses Convention) also refers to the non-discrimination principle which is adopted in article 15 of the ILC Draft Articles on Prevention of Transboundary Harm. The commentary of article 15 states unequivocally in paragraph 1 that the basis of article 15 is based on article 32 of the Watercourses Convention states that “...a watercourse state shall not discriminate on the basis of nationality or residence or place where the injury occurred, ... [and offer] access to judicial or other procedures, or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on in its territory.” The significance of this article is not in the topic that it seeks to

⁴⁸ Charles Phillips, ‘Nordic Co-operation for the Protection of the Environment against Air Pollution and the Possibility of Transboundary Private Litigation in Transboundary Air Pollution’ in Cees Flinterman and others (eds), *Transboundary Air Pollution: International Legal Aspects of the Co-operation of States* (Dordrecht: M. Nijhoff 1987), footnote 20.

⁴⁹ Watercourses Convention, UN Doc A/RES/51/229 (1997).

regulate⁵⁰ but in the acceptance of the non-discrimination principle as one contemplated by State actors and receives wide acceptance. Or, at least, the trend in international law seems to be one that favours the implementation of the non-discrimination principle in the national legislations of concerned states⁵¹. Norway has signed and ratified this convention.

2.2.4 Convention on Environmental Impact Assessment in a Transboundary Context⁵² (Espoo Convention)

Norway has signed and ratified the convention but Russia has only signed it. The importance of the Espoo Convention lies on the fact that it is one⁵³ of only two conventions in the world that treat the issue of transboundary harm by providing for transboundary environmental impact assessment (TEIA) to be carried out before a project has been licensed or allowed to begin. The Espoo Convention has used the non-discrimination principle in the form of providing the same public participation rights to citizens of the source state and to the citizens of the potentially affected state to participate in the environmental impact procedures of the proposed project⁵⁴.

The primary purpose of the Espoo Convention is to “take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities” according to article 2. Appendix I in paragraph 15 includes

⁵⁰ Ibid, article 1, regulating the scope of the convention states “The present Convention applies to uses of international watercourses and of their waters for purposes other than navigation and to measures of protection, preservation and management related to the uses of those watercourses and their waters.” [and] “other uses [that] affect navigation or are affected by navigation.”

⁵¹ Stephen C. McCaffrey, *The Law of International Watercourses* (2nd edn, Oxford University Press 2007), p. 510.

⁵² 2161 UNTS 447; 38 ILM 517 (1999); The principle of non-discrimination is espoused by the Espoo Convention by providing for signatories to carry out their domestic environmental impact assessments in a non-discriminatory fashion. For more detailed discussion on the principle of non-discrimination in the Espoo Convention see John H. Knox, ‘The Myth and Reality of Transboundary Environmental Impact Assessment’ (2002) 96(2) *American Journal of International Law* 291

⁵³ Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press 2008) p.101.

⁵⁴ Timo Koivurova, ‘Transnational EIA Procedure of the Espoo Convention’ (1997) 8 *The Finnish Yearbook of International Law* 161, p. 172 referring to article 2 (6).

“offshore hydrocarbon production” as one of the “proposed activities” which states have to take all “necessary legal, administrative or other measures to implement the provisions” of the Espoo Convention. More importantly, the States should ensure “environmental impact assessment is undertaken prior to a decision to authorize or undertake a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.” In addition, the State of origin has an obligation to notify (article 3) and consult (article 5) with the State potentially affected and its people before a decision is made for a project to be approved.

The State Parties to the Espoo Convention are required to “ensure that the public in the areas likely to be affected is informed of, and provided with possibilities for making comments on or objections to the proposed activity and for these to be referred to the competent authority of the Party of origin⁵⁵.”

2.3 Customary Law/Progressive Development of International Environmental Law

According to article 38 of the Statute of the International Court of Justice (ICJ), there are four sources of international law: treaties, customary law, general principles of international law, and “judicial decisions and the teachings of the most highly qualified publicists”. The work of the International Law Commission is regarded to be just as authoritative⁵⁶ as the teachings of the most qualified publicists (namely the fourth source of international law). The ILC was mandated⁵⁷ by the General Assembly of the United Nations to carry out the functions of the latter in regards to the “progressive development of

⁵⁵ Wiecher Schrage, ‘The Convention on Environmental Impact Assessment in a Transboundary Context’ in Kees Bastmeijer and Timo Koivurova (eds), *Theory and Practice of Transboundary Environmental Impact Assessment* (Brill 2007) , p. 41.

⁵⁶ James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012), p. 43.

⁵⁷ General Assembly Resolution 174 (II) of 21 November 1947 (as amended).

international law and its codification⁵⁸”. As such, the work of the ILC is considered important because of its ability to produce treaties but also to act as evidence of customary law or may contribute in the creation of new customary law⁵⁹.

The principle of non-discrimination has been codified in the work of the International Law Commission in the ILC Draft Articles on Prevention of Transboundary Harm of 2001⁶⁰ (first category of agreement) and further elaborated by the ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities of 2006⁶¹ (third category of agreement).

2.3.1 ILC Draft Articles on Prevention of Transboundary Harm

The International Law Commission began its work on the topic in 1978 by focusing on the “International liability for injurious consequences arising out of acts not prohibited by international law.⁶²” The Law Commission preferred dealing with the prevention of transboundary harm from hazardous activities because it was thought to be a favored against the option to remedy or compensate for damage caused.

As such, the ILC Prevention Articles begin in article 1 by identifying the scope of the articles which cover only activities by States or any activities within their territory which are lawful in international law but risk “causing significant transboundary harm through their physical consequences”. The States under the ILC Prevention Articles are required to take preventative measures, cooperate, and notify the potentially affected State for any

⁵⁸ United Nations Charter article 13(1)(a).

⁵⁹ John O'Brien, *International Law* (Cavendish 2001), p. 101 quoting Graefrath B, ‘The International Law Commission Tomorrow: Improving Its Organization and Methods of Work’ (1991) 85(4) *American Journal of International Law* 595. Graefrath also states in page 595 that the “success [of the ILC] in codifying general international law is well-known and widely acknowledged.”

⁶⁰ Yearbook of the International Law Commission, 2001, vol. II, Part Two

⁶¹ Yearbook of the International Law Commission, 2006, vol. II, Part Two.

⁶² Yearbook of the International Law Commission, 2001, vol. II (Part Two), p.144; A/CN.4/SER.A/2001/Add.1 (Part2).

infrastructure projects that may pose danger with a high probability for significant transboundary harm but low probability for catastrophic harm⁶³. In articles 9, 12, and 13, States are required to consult each other on preventative measures and exchange information with the public and states alike with regard to an activity that is being carried out or will be in the future that may have a transboundary harm element.

In article 15 the ILC Prevention Articles set out the non-discrimination principle which, arguably, has received the status of *jus cogens* norm⁶⁴ or at least a principle of international law. However, state practice in multilateral treaties does not seem to support this view with the notable exceptions of the NEPC and Antarctic Treaty⁶⁵.

The text of article 15 states that unless two or more states have agreed otherwise in espousing the non-discrimination⁶⁶ principle,

“..., a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, In granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.”

The language used above may not be as elaborated as in the NEPC but the principle of non-discrimination is equally secured. Yet, the Netherlands⁶⁷ would have liked the principle take a more prominent place in the articles and that the draft articles included in their final

⁶³ Ibid, p.151-2

⁶⁴ Patricia Birnie, Alan Boyle, and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009), p. 306, quoting *Juridical Situation and Rights of Undocumented Migrants* (17 September 2003) I/A Court HR, OC-18/03, para 83. Though the Inter-American court refers to the non-discrimination principle in international human rights law sphere. See part III on the status of the non-discrimination principle in international law.

⁶⁵ Miscellaneous No.6 (1989), Cm.634; (1988) 27 I.L.M. 859, 868.

⁶⁶ Also expressed in article 3(9) of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), 2161 UNTS 447; 38 ILM 517 (1999)

⁶⁷ A/CN.4/509, Comments and observations received from Governments: report of the Secretary-General, p. 17.

form what was in the 1996 draft article 21⁶⁸ placed right after article 15. The 1996 draft article 21 complements the now article 15 because it offers the States the ability to negotiate and eventually settle disputes regarding transboundary pollution in a manner which would not involve the local courts of each and avoid the potential hardship faced by the participants and/or local courts.

However, France, viewed the non-discrimination principle merely as “one procedural aspect among others concerning access to such courts⁶⁹.” The opinion of the Netherlands as expressed above seems to be more attractive because it places the requisite importance to legal redress for transboundary pollution but note should be taken on the procedural element of the non-discrimination principle for the principle itself requires operationalization by procedural means. Having legal or natural persons bearing the cost of transboundary pollution would create a moral hazard scenario and would make individuals/legal persons to bear the loss. Such a result would be inequitable⁷⁰.

2.3.2 ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities of 2006

The Law Commission is entrusted with the “promotion of the progressive development of international law and its codification⁷¹”. The 2006 draft Principles were separated from the work done in regards to the Prevention Articles because of the vexing

⁶⁸ DOCUMENT A/51/10* Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July 1996) Article 21 stated: “The State of origin and the affected State shall negotiate at the request of either party on the nature and extent of compensation or other relief for significant transboundary harm caused by an activity referred to in article 1, having regard to the factors set out in article 22 and in accordance with the principle that the victim of harm should not be left to bear the entire loss.”

⁶⁹ Supra note 68.

⁷⁰ Yearbook of the International Law Commission, 1982, vol. II, Part One, p.63 section 5 (3)

⁷¹ Statute of the International Law Commission, G.A. Res. 174(II) (UN Doc. A/519, 21 November 1947), Article 1.

issue of liability which caused concern among States⁷² and it was pushed for a later date. In addition, the draft Principles clearly state that the operators are to be strictly liable for transboundary harm⁷³.

According to the General Commentary to the draft Principles, the draft Principles are intended as an “essential” background to the Prevention Articles because the Articles are concerned with the primary obligations in international law to prevent the neighbor States and their nationals from suffering significant incidents of transboundary environmental harm. Activities such as oil exploration and exploitation, the activity in itself poses risk which is not possible, so far, to guarantee zero risk of an oil well blow out.

Furthermore, the draft Principles are “intended to contribute to the process of development of international law in this field⁷⁴” by giving the requisite guidance to States in regards to the necessary issues to be addressed in future bilateral or multilateral treaties handling the allocation of loss from incidents arising from hazardous activities. As such, the draft Principles are evidence of a trend in international law, coupled with state practice mentioned above, whereby the non-discrimination principle is accepted as a tool in achieving the maxim that no innocent victim shall be the bearer of loss in case of transboundary pollution⁷⁵.

Draft Principle 6, one of eight in total, is the most pertinent to the non-discrimination principle as expressed in article 15 of the Prevention Articles. Principle 6 (1) states that,

⁷² Julio Barboza, *The Environment Risk and Liability in International Law* (Brill 2010) p. 73. Though scholars like Handl contend that failure to introduce a subsidiary state liability regime in the Draft principles, the Commission has not fulfilled its mandate to progressively develop international law. For a more thorough discussion of state liability, if any, see Günther Handl, ‘International Accountability for Transboundary Environmental Harm Revisited: What Role for State Liability’ (2007) 37(2-3) *Environmental Policy and Law* 117, p. 122.

⁷³ Supra note 62, p. 60 para. 8.

⁷⁴ General Commentary point 5, *Yearbook of the International Law Commission, 2006*, vol. II, Part Two, p. 111.

⁷⁵ L.A. de La Fayette, ‘International Liability for Damage to the Environment’ in Malgosia Fitzmaurice, David M. Ong, and Panos Merkouris eds), *Research Handbook on International Environmental Law* (Edward Elgar Publishing, Inc. 2010) p. 327.

“States shall provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control.”

However, Principle 6 should be viewed in light of Principles 3 and 4 which offer a fuller explanation of what “prompt and adequate” means. According to Principle 3, one of the two purposes of the draft Principles is to “to ensure prompt and adequate compensation to victims of transboundary damage” and the other “to preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement.” The first purpose is more relevant for the topic of this paper since it gives States an idea of what kind of procedural and substantive rules they may translate into domestic law. Principle 6(1) could be understood as “to encompass a responsibility to negotiate claims, in good faith, with a view to making an appropriate offer to settle the claim where necessary to achieve the outcome envisaged in draft Principles 4(1)⁷⁶.”

2.3.2.1 The Meaning of Prompt and Adequate

The “prompt” and “adequate” terms are scattered throughout the Principles and the commentary makes it difficult to locate and to deduce meaning from them. That said, there is no clear definition in the commentaries of the draft Principles for the terms “prompt” and “adequate”. Instead, the Commission relies on the seminal arbitration decision, *Trail Smelter*⁷⁷, regarding transboundary pollution between Canada and the United States and *Corfu*

⁷⁶ Caroline Foster, ‘The ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities: Privatizing Risk?’ (2005) 14 *Review of European Community & International Environmental Law* 265, p. 279.

⁷⁷ *Arbitral Trib.*, 3 U.N. Rep. Int’l Arb. Awards 1905 (1941)

*Channe*⁷⁸ decision of the International Court of Justice (ICJ)⁷⁹. Yet the two aforementioned decisions are authorities for the no harm⁸⁰ principle in international environmental law and only tangentially may be said to be referring to liability and compensation.

A more relevant reference is that to the Principle 22 of the Stockholm Declaration requiring States to work together and set up a liability and compensation scheme whether bilateral or multilateral for cases of transboundary harm. Further into the Commentary, reference is made to Principle 13 of the Rio Declaration which among other things, requires states to be working in an “expeditious and more determined manner” in setting up a liability and compensation regime. However, there is no precise definition of what exactly the terms mean but an unconvincing⁸¹ attempt to link the “polluter pays⁸²” principle with prompt and adequate compensation of Principle 3. On the commentary of Principle 3, paragraph 17, however, it is stated that compensation should not be punitive and that the victim cannot recover more than the damage suffered.

Adequacy seems to be explained in the commentary of Principle 4, paragraph 8, that “It [compensation] is ipso facto adequate as long as the due process of the law requirements are met. As long as compensation given is not arbitrary, and grossly disproportionate to the damage actually suffered, even if it is less than full, it can be regarded as adequate. In other words, adequacy is not intended to denote “sufficiency.”” While “promptness” has been merely said to refer to the procedures imposed for the rendering of a decision on a pollution

⁷⁸ [1949] ICJ Rep 4.

⁷⁹ Supra note 62, p. 141.

⁸⁰ For a detailed look at the “responsibility not to cause environmental damage” incumbent on states, see Sands P, *Principles of International Environmental Law* (2nd edn, Cambridge University Press 2003), pp. 235-46.

⁸¹ Boyle does not seem to be convinced by the reasoning of the Commission in, Alan E. Boyle, ‘Globalising Environmental Liability: The Interplay of National and International Law’ (2005) 17 *Journal of Environmental Law* 3, p.18 and argues that for the draft Principles to have a progressive effect on the law should have made Principles 4(1), 6(1) and 6(3) obligatory and the others optional. Boyle would like to see the Principles to have held States responsible for failure to provide prompt and adequate legal procedures for compensation of victims of transboundary harm.

⁸² Refers to the idea that the polluter should bear the cost of clean-up and be liable for damages to the environment and people. For more environmental law principles and their origin see Ole W Pedersen, ‘Environmental Principles and Environmental Justice’ (2010) 12(1) *Environmental Law Review* 26.

case which could influence the amount of time required for said decision (paragraph 7). It is worth mentioning that the Commentary on Principle 6 given the procedural nature of the terms does not elaborate further allowing states room to maneuver.

2.4 Principles⁸³ of International Environmental Law

The environmental law principles discussed below, briefly, provide for the background and to an extent have direct connection to the non-discrimination principle, like the polluter pays principle, without which the non-discrimination principle would be almost meaningless. Principles of international environmental law are also very important because of their anticipatory qualities to environmental issues and due to the complex environmental problems principles are best suited to set a general approach to respond to those problems⁸⁴. As will be seen below, the general principles of international environmental law have been codified in treaties, and accepted in international tribunals and depending on their status in international law provide a roadmap for states' obligations. James Crawford has identified "the more important principles" to be six, namely: the preventive principle, the precautionary principle, the concept of sustainable development, the polluter pays principle, the sic utere tuo principle, and the obligation of impact assessment⁸⁵. I will now turn to them briefly except the sic utere tuo since it is a maxim attained⁸⁶ by the fulfillment of the prevention principle.

2.4.1 The prevention principle.

⁸³ Nicolas Sadeleer refers to principles of international environmental law as "indefinite principles that can progressively be given more concrete form." in Nicholas Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2002) p. 1.

⁸⁴ Alexandre C. Kiss and Dinah Shelton, *Guide to International Environmental Law* (Brill 2007) pp. 89-90.

⁸⁵ Supra note 57, pp. 356-60.

⁸⁶ Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility*. (Leiden: Martinus Nijhoff 2006) p. 149.

The *Trail Smelter* arbitration case occupies a central place in international environmental law, and in the words of Alfred P. Rubin⁸⁷, “Every discussion of the general international law relating to pollution starts, and most end, with a mention of the Trail Smelter arbitration⁸⁸.”

The decision of the Tribunal is considered to be the precursor to the Principle 21 of the Stockholm Declaration. In the tribunal’s words: “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence⁸⁹.” In simple terms, both the Tribunal and Principle 21 state that States have sovereignty over their natural resources but on the other hand they are obliged not to cause environmental harm to other states. Principle 21 is further established in Principle 2 of the Rio Declaration.

Principle 2 states that “...the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” The state obligation not to cause transboundary harm has been found by the ICJ constitute a customary law principle⁹⁰. This principle encumbers states with a due diligence obligation to prevent transboundary pollution.

⁸⁷ Cited in Jaye Ellis, ‘Has International Law Outgrown Trail Smelter?’ in Rebecca M Bratspies and Russell A Miller, *Transboundary Harm in International Law: Lessons From the Trail Smelter Arbitration* (Cambridge University Press 2006) p. 56.

⁸⁸ Alfred P. Rubin, *Pollution by Analogy: The Trail Smelter Arbitration* (Eugene, Oregon: University of Oregon Press 1971).

⁸⁹ United States v. Canada, 3 R.I.A.A. 1907 (1941).

⁹⁰ Confirmed once again in the most recent case of *Costa Rica v. Nicaragua*, [2013] ICJ Rep 354, paragraph 104: “the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’ (*Corfu Channel (United Kingdom v. Albania)*), Merits, Judgment, I.C.J. Reports 1949, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.” Furthermore, the Court concluded in that case that “**it may now be considered a requirement under general international law to undertake an environmental impact assessment** where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource” (I.C.J. Reports 2010 (I), p. 83, para. 204).;

As to what the due diligence obligation may entail, the ILC Prevention Article 3, which in effect requires the same of States as does the Principles 21/2, may give some clues. In the commentary of the ILC Prevention Article 3, which states that the degree of care is that of a “good government” and that the more “advanced” the relevant State is the higher the duty of care. The ILC Allocation of Loss Principles also elaborate on the meaning of due diligence as including prior notification⁹¹ from the State of origin.

2.4.2 The precautionary principle.

The precautionary principle came to prominence through Principle 15 of the Rio Declaration which states that “in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” and has achieved wide recognition in many consequent international environmental agreements⁹².

The International tribunal for the law of the Sea (ITLOS) Seabed Disputes Chamber has endorsed the precautionary principle in its advisory opinion regarding “responsibilities and obligations of states with respect to the activities in the Area⁹³.” The precautionary principle has been controversial⁹⁴ due to requiring measures to be taken without there being scientific proof for their imposition, namely erring on the side of precaution if there is not conclusive

(I.C.J. Reports 2010 (I), pp. 55-56, para. 101.) *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Rep [1996] para. 29; Order of 22 September 1995, *New-Zealand v. France*, para. 64; *Gabcikovo-Nagymaros (Hungary v. Slovakia)*, Judgment ICJ Rep [1997], para. 53.

⁹¹ Principle 5 commentary, paragraph 2 citing Phoebe N. Okowa, ‘Procedural Obligations in International Environmental Agreements’ (1997) 67 *British Yearbook of International Law* 275 at p. 330.

⁹² Joakim Zander, *The Application of the Precautionary Principle in Practice: Comparative Dimensions* (Cambridge University Press 2010) pp. 35-6.

⁹³ Advisory Opinion of the Seabed Disputes Chamber of International Tribunal for the Law of the Sea on “Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect To Activities in the Area” para.125–35.

⁹⁴ Elli Louka, *International Environmental Law Fairness, Effectiveness, and World Order* (Cambridge University Press, 2006) p. 51.

evidence that an activity will not cause harm. Some States may be hesitant to accept the precautionary principle because “It would appear that the Trail Smelter Arbitration standard of proof for transboundary harms of “clear and convincing evidence,” is being replaced (at least in this anticipatory context of significant harms) by the precautionary principle⁹⁵.” Despite the uncertainties⁹⁶ surrounding the precautionary principle, commentators and governments maintain that the principle has achieved customary law status⁹⁷.

2.4.3 The concept of sustainable development.

The concept of sustainable development is seen as an overarching and inclusive concept which integrates different considerations (legal, economic, technological) into the processes of international law⁹⁸. Sustainable development as a notion has its origin to the Brundtland report which defined it as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁹⁹ Yet, it is unclear as to what is the status of sustainable development in international environmental law and whether it holds a normative character¹⁰⁰. The concept has been incorporated in many binding and non-binding agreements in different areas¹⁰¹. Lastly, the concept of sustainable

⁹⁵ Ved P. Nanda and George (Rock) Pring, *International Environmental Law and Policy for the 21st Century* (2nd edn, Martinus Nijhoff 2013), p.64. See page 20 where quoting the relevant Trail Smelter award requiring the “injury is established by clear and convincing evidence.”

⁹⁶ Samudu Atapattu, *Emerging Principles of International Environmental Law* (Ardsley, N.Y: Transnational Publishers 2006) pp. 282-3.

⁹⁷ Supra note 65, p. 160.

⁹⁸ Vaughan Lowe, ‘Sustainable Development and Unsustainable Arguments’ in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999) p.37.

⁹⁹ United Nations World Commission on Environment and Development (WCED), *Report of the World Commission on Environment and Development: Our Common Future*, p.41.

¹⁰⁰ José Juste-Ruiz, ‘The Implications of the Principle of Sustainable Development in International Environmental Law’ in Aristotle Constantinides and Nikos Zaikos (eds), *The Diversity of International Law: Essays in Honour of Professor Kalliopi K. Koufa* (Brill 2009), pp. 639-42.

¹⁰¹ For a good overview of the most important international and national instruments see Christina Voigt, *Sustainable Development as a Principle of International Law* (Brill 2008), pp. 19-31

development stated in Principles 3 and 4 of the Rio Declaration were recognized as a “new norm or standard¹⁰²” in the ICJ decision, *Gabcikovo-Nagymaros (Hungary v. Slovakia)*.

2.4.4 The polluter pays principle.

The polluter pays principle is based on Principle 16 of the Rio Declaration which states that States should internalize pollution costs so that "in principle, [the polluter] bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.” This principle attempts to bring the polluter closer to the victims of environmental harm. By requiring the polluter pay, whether that would be the State or a private individual or enterprise, the victims could, in principle, seek redress against the party who polluted. It is worth mentioning that the article 3 of NEPC has made the polluter pays principle into a binding multilateral agreement . In addition, the polluter pays principle has achieved a prominent place in EU law as “one of the pillars of the EU’s environment policy.”

2.4.5 The obligation of impact assessment.

The obligation to conduct an environmental impact assessment stems from the fact, as stated in the ICJ decision in *Costa Rica v. Nicaragua*, that the conduct of environmental impact assessment is part of the states’ obligation under general international law¹⁰³ . In case of transboundary effects of a proposed activity, then the state of origin is “... to undertake the activity [omitted] required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk¹⁰⁴ .”

¹⁰² *Gabcikovo-Nagymaros (Hungary v. Slovakia)*, Judgment ICJ Rep [1997], para. 104.

¹⁰³ The Court quoted with approval in para. 104 the statement in the *Pulp Mills* case, (I.C.J. Reports 2010 (I), p. 83, para. 204).

¹⁰⁴ *Ibid*, par 104.

The obligation for states to conduct an environmental impact assessment goes back even before¹⁰⁵ the Rio Declaration which states in its principle 17 that “Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.” The Espoo Convention defines environmental impact assessment in article 1 as “a national procedure for evaluating the likely impact of a proposed activity on the environment” of the affected state if the activity could cause significant environmental harm¹⁰⁶.

In conclusion, the principles and concepts identified above have, to a greater or lesser degree, either achieved the status of customary law or a rule of general international law. As a result, they serve as guiding principles to national legislatures when considering issues of transboundary environmental harm.

3 Part III

In this part, I will attempt to answer the question does Norwegian law embody the equal access to courts¹⁰⁷ element of the non-discrimination principle when applying the polluter pays principle? In answering this question, I will give a brief overview of the position of the non-discrimination principle in international law and later examine the relevant transboundary pollution liability and venue rules under Norwegian law. It would be helpful to discuss the procedural steps a Russian citizen would take in making a tortious in Norwegian

¹⁰⁵ Supra note 54, p. 23.

¹⁰⁶ Supra note 41, see article 2 requiring “significant impact” from the proposed activities. The term “significant” is not defined in the Espoo Convention.

¹⁰⁷ C(76)55/FINAL, Recommendation of the Council on Equal Right of Access in Relation to Transfrontier Pollution, stating that “CONSIDERING that *equal right of access* [emphasis added] should facilitate the prevention and the solution of many transfrontier pollution problems, without prejudice to other means available, and that *it constitutes one of the suitable channels for giving effect to the principle of non-discrimination*.[emphasis added]”; Birnie and Boyle, page 303, also agree that direct recourse facilitates the polluter pays principle. I contend that the manner in which the recourse action proceeds must be in a non-discriminatory.

courts as it will provide a practical example of combining legal principles with their practical effects.

The road to compensation for a Russian claimant is arduous and complicated meriting a discussion the possible alternatives, tort law or bilateral treaties concerning liability. Such discussion would illuminate our understanding of whether suing in tort is appropriate at all in our scenario; then will continue with the state practice from North America and the EU. The United States and Canada have had some success with providing each other's citizens the right to sue in either's courts for transboundary environmental pollution; The European Union and consequently EEA countries having ratified the Lugano Convention on jurisdiction and enforcement of judgements makes compensation of victims much easier for their nationals. However, that is not the case for Russian victims. If there is no bilateral treaty covering the environmental loss suffered or the claim in tort against the polluter is not practical, victims could, possibly, claim a violation of their human rights¹⁰⁸.

3.1 The non-discrimination principle¹⁰⁹

The polluter pays principle is implemented¹¹⁰ in the Norwegian law which makes certain in section 7-3 of the Petroleum Act to channel liability on a strict basis (requiring no proof of fault) on the licensee. The non-discrimination principle provides the procedural basis for the licensee to “pay” (polluter pays principle or ppp) for the pollution it has caused. Failure of the victim, which in our scenario is Russian, to be compensated by the polluter may

¹⁰⁸ See generally Dinah Shelton, 'Human Rights and the Environment: Problems and Possibilities' (2008) 38(1-2) Environmental Policy and Law 41

¹⁰⁹ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978), pp. 24-5. The author states that legal consequences do not follow automatically from breach of principles but they do in the case of rules. Thus, in our discussion, the principles stated must be accompanied by procedural steps “rules” for there to be a breach of the rules and as a consequence breach of the principle.

¹¹⁰ For the opposite conclusion, see Norwegian Nature Diversity Act, 2009, section 2(3) & 11.

raise questions of state liability¹¹¹ for non-implementation of the polluter pays principle. A corollary example of a principle having acquired customary law status and requiring procedural measures to enforce it is the principle of prevention which the ICJ in the *Pulp Mills* case stated in paragraph 102 that “[in] the view of the Court, the obligation to inform CARU [Administrative Commission of the River Uruguay] allows for the initiation of co-operation between the Parties which is necessary in order to fulfill the obligation of prevention.”

The non-discrimination¹¹² principle in the transboundary environmental law context was recognized to have become a principle of international law about three decades ago¹¹³. It could be argued that the principle¹¹⁴ has achieved a customary law¹¹⁵ status given its application in environmental matters and other areas of law. Treaty law between the United States and Canada extends back to the early 20th century¹¹⁶ and case law from the United

¹¹¹ For unequivocal assumption of state liability see article VII of the Outer Space Convention; article IV of the Vienna Convention on Civil Liability for Nuclear Damage; article 8 The Convention on the Regulation of Antarctic mineral Resource Activities.

¹¹² See generally a commentary on the OECD principles regarding transboundary pollution in Stephen McCaffrey, ‘The OECD Principles Concerning Transfrontier Pollution: Commentary’ (1975) 1(1) Environmental Policy and Law 2 and in particular page 3, “Title C.”

¹¹³ Rüdiger Wolfrum, ‘Purposes and Principles of International Environmental Law’ (1990) 33 German Yearbook of International Law 308, p.315. Along with the right of equal treatment of citizens stating that “accordingly, the emitting States are obliged to make sure that every person who is harmed by negative transboundary environmental impacts or is in such danger must be treated in the emitting State in the same way as injured or endangered nationals of the emitting State.[quotation omitted] This obligation encompasses the equal treatment of foreign citizens in administrative procedures and proceedings before national courts.”; Supra note 63; See also Henri Smets, ‘Le principe de non-discrimination en matière de protection de l’environnement’ (2000) 4, 1 Revue Européenne De Droit De L’environnement 33, p. 33.

¹¹⁴ Brian D Lepard, *Customary International Law: a New Theory with Practical Applications* (Cambridge University Press 2010) in p. 166 stating that general principles of international law could be considered as customary law if there is consistent state practice.

¹¹⁵ Svitlana Kravchenko, Tareq M.R. Chowdhury and Md. Jahid Hossain Bhuiyan, ‘Principles of International Environmental Law’ in Alam Shawkat and others (eds), *Routledge Handbook of International Environmental Law* (Routledge 2013), p. 53, stating that the polluter pays principle has “perhaps” emerged as a customary law rule. So does Margaret Grossman, ‘Agriculture and the Polluter Pays Principle’ (2007) Netherlands Comparative Law Association available online at <https://www.ejcl.org/113/article113-15.pdf> (last accessed 27.04.2017); Lada Soljan, ‘General Obligation to Prevent Transboundary Harm and Its Relation to Four Key Environmental Principles’ (1998) 3(2) The Austrian Review of International and European Law 209; Considered a “a general principle of international environmental law” by the OECD in OCDE/GD(92)81 entitled “*The polluter pays principle analyses and recommendation.*”

¹¹⁶ Boundary Waters Treaty from 1909 in article II states that “it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other

States, Canada, and the EU lead to a conclusion of such a conclusion. Looking at the state practice in allowing access to foreign citizens in cases of transboundary harm would be beneficial to ascertain if custom has developed.

The protection of the environment in the recent years has been said to include the human right to a “general satisfactory environment favourable to their [human] development¹¹⁷.” The non-discrimination principle does entail the right of equal access not only to administrative but judicial procedures also¹¹⁸. Article 10 of the Rio Declaration enunciated the public participation principle which includes the right of citizens to participate in decision making in environmental matters, the right to information, and the right to access to justice¹¹⁹. Access to justice makes provision for the right of non-nationals to sue in national courts¹²⁰ according to Aarhus Convention. This extension of citizenship rights to non-nationals is a de facto application of the non-discrimination principle¹²¹.

side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs”.

¹¹⁷ Article 24 of the African Charter on Human and Peoples' Rights ("Banjul Charter"); CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); European Court on Human Rights does not mention the environment explicitly in its statute but has developed case law on the breach of Convention rights from the risk and/or harm to the environment. For an overview of the environmental dimension of human rights see Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press 2015).

¹¹⁸ John H. Knox, 'The Myth and Reality of Transboundary Environmental Impact Assessment' (2002) 96(2) *American Journal of International Law* 291, p. 300 in quoting OECD, *LEGAL ASPECTS OF TRANSFRONTIER POLLUTION* 23, 28 (1977). Paragraph 14 states that “It would serve no purpose if “foreign persons” are given equal treatment in substantive law if they are not also given equal right of access. And vice versa, it would serve no purpose if “foreign persons” had the benefit of the same legal channels as “nationals” if the actual treatment in substantive law which they subsequently received remained discriminatory in character.”

¹¹⁹ The Aarhus Convention being the “clearest and most important expression of the three pillars” according to Jorge E. Viñuales (ed), *The Rio Declaration on Environment and Development: a Commentary* (First Edition. edn, Oxford University Press, 2015), p. 33.

¹²⁰ Aarhus Convention article 3(9).

¹²¹ Michael Mason, 'Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Publics in International Environmental Law' (2006) 12(3) *Global Governance* 283, p. 293.

Norway is a signatory and has ratified the NEPC, Aarhus Convention¹²², Espoo Convention, and Watercourses Convention, as seen in Part II, all of which explicitly embody the non-discrimination principle. Russia has not ratified any of them depriving its citizens from their benefit. The non-discrimination principle, as seen in Part II, has been applied to the right of equal access to the judicial organs of the signatory states in the NEPC and the Espoo convention in applying the principle of non-discrimination in, among other things, conducting a transboundary environmental impact assessment. The Aarhus Convention in article 3(9) allows for the public¹²³ to “have access to justice in environmental matters” without regard to citizenship or nationality and article 9(3) provides that “members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.” However it is doubtful if these provisions give rise to a right of suit in civil law against a private person or firms¹²⁴. Yet, the Aarhus Convention is the latest multilateral treaty which continues the trend of application of the non-discrimination principle and thus indicative of the state practice in environmental issues of a transboundary fashion.

Norway has signed and ratified the Aarhus Convention and according to the *pacta sunt servanda* principle enshrined in article 26 of the Vienna Convention on the law of Treaties, requiring Norway to perform the Aarhus convention in good faith. More specifically, article 3(9) of the Aarhus Convention requires Parties to allow the public to “have access to information, have the possibility to participate in decision-making and have *access to justice in environmental matters without discrimination as to citizenship, nationality or domicile* [italics added] and, in the case of a legal person, without discrimination as to where it has its

¹²² Is considered a fairly “weak” legal instrument but could play a more influential role in the years to come according to Maria Lee and Carolyn Abbot, ‘The Usual Suspects Public Participation Under the Aarhus Convention’ (2003) 66(1) *Modern Law Review* 80, pp. 80-81.

¹²³ Is defined as one or more natural or legal persons in article 2.

¹²⁴ *Supra* note 6, p. 105.

registered seat or an effective centre of its activities.” The non-discrimination provision in 3(9) may apply regardless of the compliance mechanisms in the Aarhus Convention itself because of the customary law nature of the obligation as I have argued.

The compliance mechanism of the Aarhus Convention on article 15 to provides for, the Meeting of the Parties to establish "optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of the Convention".

3.2 Relationship Between Norwegian Law and International Law

The relationship between the two legal orders (national and international) can be described to belong to either monist or dualist or something in between approaches¹²⁵. In simple terms the monist approach refers to idea that international law applies domestically without requiring national legislation to become part of the domestic law; the dualist approach requires such implementation¹²⁶. Regardless of the legal philosophical debates, Norway is said to espouse the dualist¹²⁷ approach. This means that Norwegian courts can only review the national law which means that an Act of *Stortinget* (Parliament) must have incorporated the international convention or rule in the domestic legislation¹²⁸. In case of conflict between

¹²⁵ Anthony Aust, *Handbook of International Law* (2nd edn, Cambridge University Press 2010) p. 75. For the view that the distinctions do not apply at all or they are “unreal”, see Ademola Abass, *Complete International Law: Text, Cases, and Materials* (2nd edition. edn, Oxford University Press 2014) p. 306, quoting Gerald Fitzmaurice, ‘The general principles of international law considered from the standpoint of the rule of law’ (1958) 92 *Recueil Des Cours* 1, p. 71.

¹²⁶ For a deeper discussion on the philosophy, development, and emerging trends on the relationship and implementation of international law into domestic law see Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005) ch.12.

¹²⁷ See NOU 1972: Gjennomføring av Konvensjoner i Norsk Rett (Oslo: Universitetsforlaget 1972)

¹²⁸ Erik Røsæg, ‘Implementing Conventions-Scandinavian Style’ in Alla Pozdnakova (ed) *SIMPLY 2009* (Scandinavian Institute of Maritime Law Yearbook) pp. 169-70.

national and international law, then the Norwegian Courts are bound to follow national unless the “King or Parliament” change the national law¹²⁹.

3.3 Norwegian Law

The two relevant statutes for the purposes of discussing State or private liability are the Act of 29 November 1996 No. 72 relating to petroleum activities, as amended, (Petroleum Act) and the Act of 13 March 1981 No.6 Concerning Protection Against Pollution and Concerning Waste, as amended, (Pollution Control Act). The Petroleum Act’s scope of application extends to all petroleum activities connected to the continental shelf in Norway’s jurisdiction. In addition, the Petroleum Act would apply to areas beyond Norway’s jurisdiction when international law or bilateral agreements allow it¹³⁰. The Petroleum Act although intends to regulate all activities in the petroleum industry does allow¹³¹ the application of other Norwegian law, for example, the Pollution Control Act.

The two statutes regulate the same geographical area¹³² despite using different articulation. Yet, other scholars contend¹³³ that there is a need for harmonization of the two instruments as far as the scope of application and choice of law provisions are concerned. In general, the PA is the *lex specialis* applying to pollution from petroleum activities while the pollution Control Act cover tort issues of all pollution incidents¹³⁴.

¹²⁹ Carl August Fleischer, *Folkerett* (Oslo: Universitetsforlaget 1994) p. 259.

¹³⁰ Petroleum Act section 1-4 para. 1. The English translation of the statute used is found in the Norwegian Petroleum Directorate’s website at <http://www.npd.no/en/Regulations/Acts/Petroleum-activities-act/> last accessed on 08.04.2017.

¹³¹ *Ibid*, section 1-5.

¹³² Hans Christian Bugge, *Environmental Law in Norway* (Kluwer Law International 2011) p. 307.

¹³³ Kristoffer Svendsen, ‘Compensable damage ex delicto as a result of harm in the Barents Sea caused by petroleum spills from offshore installations. A Norwegian and Russian comparative legal analysis of conflict of laws, the concept of harm, losses suffered by third parties, and environmental damage and its valuation and calculation, caused by petroleum spills from offshore oil rigs and installations in the Barents Sea’ (PhD Dissertation, University of Tromsø 2015) pp. 118-119.

¹³⁴ Patricia Park, *International Law for Energy and the Environment* (Second edition. edn, CRC Press 2013), p. 281.

The Pollution Control Act has for its purpose to “protect the outdoor environment and reduce existing pollution...” and ensure the quality and productivity of the natural environment while providing for an environment safe to human health and free from adverse effects to its welfare¹³⁵. The scope of the Pollution Control Act extends to pollution damage that occurs in “Norway” and the exclusive economic zone.¹³⁶ Damage that occurs outside the area mentioned previously, then the provisions of Chapter 8 of the Pollution Control Act if the “damage is caused by an incident or activity within Norwegian sea or land territory¹³⁷.”

Chapter 7 of the Petroleum Act (PA) regulates liability for pollution damage. Pollution damage is defined in the PA section 7-1 as “damage or loss caused by pollution¹³⁸ as a consequence of effluence or discharge of petroleum from a facility, including a well,....” The PA holds the licensee strictly liable¹³⁹ (without fault) for pollution damage. Oil exploitation is carried out by operators. Thus, the PA will hold the operator who is not one of the licensees as strictly liable. However, the PA allows for the extent of liability to be reduced if there is a force majeure incident like an act of war or an “inevitable act of nature”. The liability may be reduced if the circumstances or the damage occurring was beyond the control of the licensee¹⁴⁰.

Most relevant to the question of legal redress open to Russian citizens victims of transboundary offshore oil pollution are the sections 7-2 (scope and applicable law) and 7-8

¹³⁵ Pollution Control Act section 1. The English translation of the statute used is found in the Norwegian government’s website at <https://www.regjeringen.no/en/dokumenter/pollution-control-act/id171893/> last accessed 09.04.2017.

¹³⁶ Pollution Control Act sections 4 and 54.

¹³⁷ Ibid, section 54(1) number 2.

¹³⁸ Pollution damage is defined in the Pollution Control Act section 53(2) as “nuisance or loss caused by pollution”. While the term pollution is defined in section 6 of the Pollution Control Act as “1. the introduction of solids, liquids or gases to air, water or ground, 2. noise and vibrations, 3. light and other radiation to the extent decided by the pollution control authority, 4. effects on temperature which cause or may cause damage or nuisance to the environment.”

¹³⁹ In addition, vicariously liable according to section 10-9 such that “If liability in respect of a third party is incurred by anyone undertaking tasks for a licensee, the licensee shall be liable for damages to the same extent as, and jointly and severally with, the perpetrator and, if applicable, his employer.”

¹⁴⁰ Pollution Act section 7-3.

(legal venue). To those I will now turn to. The scope and applicable law section states that the provisions of the PA including liability “are applicable to liability for pollution damage from a facility when such damage occurs in Norway or inside the outer limits of the Norwegian continental shelf...” The PA is clear in that it covers only damage occurring in Norway or the outer limits of the Norwegian Continental Shelf (NCS). The Exclusive Economic Zone (EEZ) and NCS were delimited by the Murmansk Treaty¹⁴¹ signed by Russia and Norway. As a result of the delimitation of the NCS does not extend much further than the previous disputed (now resolved) jurisdictional border between Norway and Russia. As a result, damage occurring outside the NCS area would not be covered by section 7-2. In reading section 7-2 along with section 7-4, which states that the licensees can only be held liable under the PA provisions, it is only natural to conclude¹⁴² that in the case of Russian victims of transboundary offshore pollution, the claimants do not have a right to sue the licensee since the pollution damaged area is outside the 7-2 area of application of the PA. If no remedy available in the PA then the victims could be left to bear the cost of the pollution damage. As shown above, the polluter-pays principle is central in international environmental law¹⁴³ and its violation could raise questions of Norwegian state responsibility. Yet other rules, such as ordinary tort rules¹⁴⁴ may apply in case Russian coasts and fishing grounds were polluted from an offshore facility in the NCS. The scope of the liability under the PA may not be the only obstacle to a Russian victim.

¹⁴¹ For further elaboration on the treaty see the discussion in Henriksen T and Ulfstein G, ‘Maritime Delimitation in the Arctic: The Barents Sea Treaty’ (2011) 42(1-2) *Ocean Development and International Law* 1.

¹⁴² Erik Røsæg, ‘The Norwegian Perspective with Regard to Liability Regimes Concerning Oil Rigs and Installations’ in Baris Soyer and Andrew Tettenborn, *Offshore Contracts and Liabilities* (Informa Law from Routledge 2015)

¹⁴³ Hanqin Xue, *Transboundary Damage in International Law* (Cambridge University Press 2003) p. 324 footnote 13 quoting numerous treaties where the principle has been adopted and the claim of legal scholars that the polluter pays principle has become “a general principle of international environmental law”.

¹⁴⁴ Will return to this part later in the paper when discussing whether it is feasible or even desirable for a Russian citizen to sue in Norwegian courts.

Section 7-8 of the PA in regards to the legal venue for a claim to be filed in “for compensation for pollution damage shall be brought before the courts in the court district where the effluence or discharge of petroleum has taken place or where damage has been caused.” The section goes further in paragraph 2(a) to state that should the “the effluence or discharge has taken place or the damage has been caused outside the area of any court district” the “Ministry¹⁴⁵” will decide where the legal claim for compensation may be brought. The question arises as to under what authority would the Norwegian Ministry be able to rule on pollution damage which occurred extraterritorially¹⁴⁶.

3.3.1 Ordinary Principles of Norwegian Tort Law¹⁴⁷

Section 54(4) of the Pollution Control Act (PCA) contains the choice of law clause which allows the victim to sue in the country where the incident causing harm originated, namely, Norway in our case. However, section 7-2 of the PA has a narrower geographical scope and no choice of law clause. As mentioned above, the PA is the *lex specialis* applying to offshore oil pollution and would take precedence in such a case. As a result, the Russian victim would be would have no cause of action under the PA. Yet, Norwegian background tort law may be applicable¹⁴⁸.

¹⁴⁵ Refers to the Ministry of Petroleum and Energy (MPE).

¹⁴⁶ Yet, in a decision of the 9th Circuit court of the United States of America, the Environmental Protection Agency (EPA) was held to be within US law when it issued an order to a Canadian private company requesting the halting of pollution of US rivers. For more on the extraterritorial jurisdiction issues in international environmental law see Jaye Ellis, ‘Extraterritorial Exercise of Jurisdiction for Environmental Protection: Addressing Fairness Concerns’ [Cambridge University Press] 25 *Leiden Journal of International Law* 397

¹⁴⁷ Hammer U and others, ‘Articles in Petroleum Law’, *Marlus* 404, (Scandinavian Institute of Maritime Law, Oslo: Sjørettsfondet 2011), p. 214 stating that “the liability regimes are supplemented by the general rules of Norwegian tort law.” Those tort law rules developed by case law include the principles that hazardous and dangerous activities have are governed by strict liability and that liability is incurred when acting negligently (main non-statutory rule).

¹⁴⁸ Finn Arnesen and others, ‘Energy Law in Norway’ in Martha Roggenkamp and others (eds), *Energy Law in Europe: National, EU and International Law and Institutions* (Oxford University Press 2001), p. 782.

Norwegian law would apply strict liability to incidents arising out of hazardous activities and oil exploitation is such an activity. It is contended¹⁴⁹ that Norwegian background law may apply in such a situation because 7-2 does not offer a choice of law, namely a choice to sue in Norway or Russia, and offering the Russian victim a the right to sue either in the state where the pollution damage occurred or the place where it originated will be in compliance with the Rome II regulation¹⁵⁰. In support of the claim that Norwegian background law will apply is the section 38(3) of the previous PA of 1985 which states that “for pollution damage that occurs outside the areas mentioned in the first and second paragraphs the rules on tort liability of the state where the damage has occurred apply.”¹⁵¹

The attempt to rely on the Norwegian background law may be a solution for a Russian citizen but the issues of quantifying damages and relationship between the ordinary tort law principles and standing legislation may be too difficult to reconcile. It must be noted that there has never been a transboundary offshore oil pollution incident originating in Norway which was later reviewed by the courts. Furthermore, there has been only one case of transboundary private litigation in the NEPC countries¹⁵².

3.4 Transboundary Private Litigation in Norway

Charles Phillips has identified the issues¹⁵³ of standing, jurisdiction, financial costs¹⁵⁴ of the litigation, substantive grounds for relief, choice of law, and enforcement of the

¹⁴⁹ Giuditta Cordero-Moss, *Internasjonal Privatrett: På Formuerettens Område* (Oslo: Universitetsforlaget 2013), p. 358.

¹⁵⁰ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

¹⁵¹ Translated by the author from the Norwegian original article 38(3) of the Lov om petroleumsvirksomhet. 22.03.1985 (now repealed with the PA 1996).

¹⁵² Timo Koivurova, ‘The Future of the Nordic Environment Protection Convention’ (1997) 66(4) *Nordic Journal of International Law* 505, p. 526.

¹⁵³ See Robin R Churchill, ‘Facilitating (Transnational) Civil Liability Litigation for Environmental Damage by Means of Treaties: Progress, Problems, and Prospects’ 12 *Yearbook of International Environmental Law* 3,

judgment in attempting to show that it is possible for Nordic¹⁵⁵ citizens to seek compensation and prevent environmental harm by litigation¹⁵⁶. However, seen from the perspective of a Russian claimant, Russia is not a member of the NEPC, they are not beneficiaries of the equal access and remedy provision in article 3 NEPC discussed in Part I.

3.4.1 Standing

Standing is very important in regards to environmental damage because the claimant has to show a legal interest in the proceedings and the “core question to ask is whether the person has reasonable grounds for having the issue tried by a court.¹⁵⁷” In asking this question, the Norwegian court would have to grant standing to Russian citizen because of the damage suffered as a result of the oil pollution emanating from an incident in Norway. It would be reasonable for a claimant to sue a defendant in the country where the defendant has acquired the license to explore and/or exploit the hydrocarbons. As mentioned above, Norwegian legislation assign strict liability to oil pollution incidents and thus for the Russian claimant proof of having suffered damage will be enough. Causation issues are said to be difficult in cases of transboundary air pollution¹⁵⁸ but for oil pollution emanating from an oil well or platform in the Barents Sea polluting Russian waters and beaches is easier to establish.

p.5-6 for general issues emerging absent a bilateral treaty regulating civil liability claims arising from transboundary pollution harm from an offshore facility that need to be addressed.

¹⁵⁴ This element will not be discussed further in the text due to the issues of public policy and international law allowing some form of inequality between nationals and foreigners, such as non-availability of legal aid and provision of security if the claimant were to lose the case according James Crawford in note 57 and further onto pp. 612-3.

¹⁵⁵ Citizens of the NEPC signatory states.

¹⁵⁶ Supra note 49, p. 165.

¹⁵⁷ Supra note 135, p. 323.

¹⁵⁸ Phoebe Okowa, ‘The Legacy of Trail Smelter in the Field of Transboundary Air Pollution’ in Rebecca M Bratspies and Russell A Miller, *Transboundary Harm in International Law: Lessons From the Trail Smelter Arbitration* (Cambridge University Press 2006) p.198.

3.4.2 Jurisdiction

The PCA states in section 54 states that:

The provisions of this chapter [Compensation for Pollution Damage] apply to pollution damage that:

- (a) occurs in Norway or the Economic Zone of Norway,
- (b) occurs outside the areas mentioned in litra (a), if the damage is caused by an incident or activity within Norwegian sea or land territory.

Damage that does not come within the geographical scope set out in the first paragraph nevertheless comes within the scope of this chapter to the extent that the Norwegian law of damages shall be applied pursuant to the choice-of-law rules otherwise applicable.

It is clear that pollution damage suffered outside the Norwegian jurisdiction would be compensable through the Chapter 8 of the PCA. The jurisdictional issue may be solved for the Russian claimant but the provision in 53(1) may present an insurmountable obstacle because it states that should liability be regulated in another statute the provisions in the PCA do not apply. Unfortunately for the Russian claimant, the PA does regulate such liability for the license, and as discussed earlier, the rules on the scope of Chapter 7 of PA may exclude a claim Russia.

3.4.3 Substantive Grounds for relief and Choice of Law

The claims covered under the PCA section 57 are as follows: financial losses suffered as a result of the pollution damage; economic loss from a commercial activity that has been impeded or stopped altogether; mitigating measures to avert or minimize the pollution damage; and “pure environmental damage can be compensated... [when] volunteers are able

to clean up birds or a municipality makes arrangements for an alternative beach for its population while its own beach is being cleaned¹⁵⁹.” Lastly, the loss must be able to be translated in monetary terms in order to be compensable in tort¹⁶⁰.

As far as the choice of law¹⁶¹ rules are concerned, the DA under Chapter 4(II) titled Territorial Jurisdiction (venue) provides in section 4-3 and 4-4 choice of law rules applicable in the Norwegian jurisdiction. Section 4-3 states that if there is an international dispute with “a sufficiently strong connection to Norway” and if no venue can be established by the rules found in sections 4-4 and 4-5 then the venue would be either the City of Oslo Court or the location where the defendant has an asset capable to redeem the claim of the applicant.

Section 4-4 makes provision for the ordinary venue of the defendant where a claimant may lodge a claim with the court of that venue. Paragraph 3 of section 4-4 allows for a branch office or subsidiary to be sued in the venue of that office and not the international headquarters of the business undertaking. This makes it easier of a Russian claimant to sue, for example, BP at the venue of where the BP subsidiary or branch has been registered in the Register of Business Enterprises as having its offices.

It must be noted that there exists the propensity of choice of law or forum which may produce unjust results. A case in point is the Bhopal¹⁶² disaster; considered as the worst

¹⁵⁹ Supra note 145, p. 280.

¹⁶⁰ Marie-Louise Larsson, *The Law of Environmental Damage: Liability and Reparation* (Kluwer Law International, Norstedts Juridik 1999). p. 320.; Peter Wetterstein, ‘Environmental Damage in the Legal Systems of the Nordic Countries and Germany’ in Michael Bowman and Alan Boyle (eds), *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation* (Oxford University Press 2002) p. 237.

¹⁶¹ See Supra note 136, chapter 5, page 104 onwards for a more thorough discussion of the choice of law rules relating to claims made both from an Norwegian citizen in Russia and a claim of a Russian citizen in Norway; Norway is party to the Lugano Convention (Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Lugano (30 October 2007)). The Lugano and Brussels I conventions are said to be “more or less one single scheme of rules for international civil litigation for the European Economic Area formed of the EU and the remaining EFTA Member States” according to Ulrich Magnus and P. Mankowski, *Brussels I Regulation* (Sellier European Law Publishers 2007) p.12.

¹⁶² Shyami Puvimanasinghe, ‘From a Divided Heritage to a Common Future? International Investment Law, Human Rights, and Sustainable Development’ in Alam Shawkat and others (eds), *International Environmental Law and the Global South* (Cambridge University Press 2016) p. 318.

industrial accident ever. The doctrine of *forum non conveniens*¹⁶³, simply, entails the ability of courts to stay the proceedings before them because a more “convenient” forum (court) can hear the case. The test required to establish a more appropriate forum exists, as far as US law is concerned, is “application of a foreign law, inaccessibility to sources of evidence abroad and a foreign forum’s interest in the dispute¹⁶⁴.”

However, the US Supreme Court held in *Piper Aircraft Co. v. Reyno*¹⁶⁵ that refusal to hear a case on the basis of the *forum non conveniens* principle then the court must be satisfied that such application would be just in the circumstances before it. However, the United States Court of Appeals in *re Union Carbide Corporation Gas Plant Disaster at Bhopal India*¹⁶⁶ upheld the *forum non conveniens* principle even though there were claims made in the proceedings that India’s “legal system was too inefficient and incapable of handling mass tort litigation¹⁶⁷.” In the end, court case after court case, the Indian government and Union Carbide settled for 470 million dollars, much less than the amount claimed earlier, 3.1 billion dollars¹⁶⁸.

For the purposes of our scenario, it is clear that the of the *forum non conveniens* principle will not apply given the DA provisions mentioned earlier and case law from the

¹⁶³ Ronald Brand and Scott Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* (Oxford University Press 2007) p.121.

¹⁶⁴ Peter Schlosser, ‘Product liability’ in Campbell C MacLachlan, Peter Edward Nygh (eds), *Transnational Tort Litigation: Jurisdictional Principles* (Oxford University Press 1996), p. 70.

¹⁶⁵ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), p. 254. (Appeals Court)

¹⁶⁶ 89 A.L.R.Fed. 217, 55 USLW 2401, 17.

¹⁶⁷ Lawrence Hill-Cawthorne, ‘Dispute Settlement in the Aftermath of Disasters’ in Susan C. Breau and Katja L.H. Samuel (eds), *Research Handbook on Disasters and International Law* (Edward Elgar Publishing 2016) p. 517; For a deeper understanding of the Bhopal case see Sushila Abraham and C M Abraham, ‘The Bhopal Case and the Development of Environmental Law in India’ (1991) 40(2) *The International and Comparative Law Quarterly* 334

¹⁶⁸ Marc Galanter, ‘The Elusive Promise of Effective Legal Remedy’ (2014) 5(2) *Journal of Indian Law and Society* 139 p.143. As to the reason why the Indian government settled so low, it is put forth that economical reasons may have played a role.

European Court of Justice (ECJ) on the matter of the applicability¹⁶⁹ of the of the *forum non conveniens* principle in civil litigation matters.

3.4.4 Enforcement of the Judgement

The issue of recognition of court judgments regarding civil matters has been resolved in the Nordic countries¹⁷⁰. Regrettably, there is no bilateral agreement between Norway and Russia covering recognition of court judgments. However, if seen only from the perspective of the Russian citizen seeking compensation in a Norwegian court this becomes less of an issue unless the claimant wants to enforce the court judgment in Russia. Given the other procedural issues such as the costs of litigation and substantive regulatory issues outlined above, inability to enforce the Norwegian court judgment in Russia is the least of the issues facing the claimant.

3.5 Part III Conclusion

Given the issues discussed above and the cumbersome structures and requirements to bring a claim in a foreign jurisdiction it is reasonable to ask whether civil litigation in a foreign jurisdiction is the best solution to providing equal access and remedies to victims of transboundary pollution from offshore oil installations. In answering that question I will look to the merits of transboundary private litigation, reasonably successful¹⁷¹ state practice in

¹⁶⁹ Pascal Vareilles-Sommières, ‘The Mandatory Nature of Article 2 of the Brussels Convention and Derogation from the Rule it Lays Down’ in Pascal de Vareilles-Sommières (ed), *Forum Shopping in the European Judicial Area* (Hart 2007), p. 101. The relevant quote for our purposes is “the *Owusu* case will remain famous for ruling out [making it inapplicable] *forum non conveniens* under the Brussels Convention” and citing several sources for that conclusion. Norway is party to the Lugano Convention which is a parallel convention to the Brussels I Regulation for the EFTA states.

¹⁷⁰ Norway, Sweden, Finland, Denmark, and Iceland have signed the *Nordic Convention on the Recognition and Enforcement of the Civil Judgments (11 October 1977)* and applies when the Lugano Convention does not.

¹⁷¹ *Supra* note 146, p. 106.

North America, and whether or to what extent the application of human rights through case law may provide a different avenue to achieving the same result.

3.5.1 Merits of Transboundary Private Litigation

Generally speaking, tort law litigation has three major benefits: first, tort law is a compensatory mechanism that provides a quick remedy to victims of transboundary pollution while governmental regulation may be slow and not address the acute issues of the victims¹⁷²; second, it has a deterrent effect on the companies involved; and provides a mechanism to fill in the gaps in any bilateral or multilateral treaties governing the pollution¹⁷³.

The Rhine case¹⁷⁴ involving the salinity of the Rhine river which was attributable to the actions of a private enterprise (Mines de Potasse d'Alsace, located in France) damaged the seed beds of another private business (located in the Netherlands) involved in the nursery gardening. The ECJ was asked by the local court in the Netherlands as to the meaning of clause 5(3) of the Brussels Convention¹⁷⁵ about the meaning of “where the harmful event occurred”. The ECJ decided that “the meaning of the expression 'place where the harmful event occurred' in Article 5 (3) must be established in such a way as to acknowledge that the plaintiff has an option to commence proceedings either at the place where the damage

¹⁷² For example, the Indian government settled with Union Carbide for a lesser amount than initially asked. Did the settlement achieve the goals of tort to compensation, corrective justice, and deterrence see Shyam Divan Armin Rosencranz, ‘The Bhopal Settlement’ (1989) 19(5) Environmental Policy and Law 166. As to where the money of the settlement ended up see Jeremy Main, ‘Where Bhopal’s Money Went’ Fortune Magazine (New York 3 June 1991) <http://archive.fortune.com/magazines/fortune/fortune_archive/1991/06/03/75101/index.htm> last accessed 14 May 2017 footnote in *Recueil des cours: Collected courses of the Hague Academy of International Law 1996*. (1997). Martinus Nijhoff, p. 156. Compare with the 20 billion dollar plus escrow account set up by BP for the compensation of claims in the Deepwater Horizon incident in the Gulf of Mexico. For an excellent review of the incident and litigation matters on the issue see Issacharoff S and Rave D, ‘The BP Oil Spill Settlement and the Paradox of Public Litigation’ (2014) 74(2) Louisiana Law Review 397

¹⁷³ Noah Sachs, ‘Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law’ (2008) 55(4) UCLA Law Review 837 p. 845. Though the author recognizes in page 846 that “Liability rules should play a secondary, backup role to the primary treaties.”

¹⁷⁴ C-21/76 - Handelskwekerij Bier v Mines de Potasse d'Alsace, ECJ.

¹⁷⁵ 1262 UNTS 153; 8 ILM 229 (1969); Precursor to the Brussels I Regulation.

occurred or the place of the event giving rise to it.¹⁷⁶” In a sense, allowing the claimant to forum shop should the other procedural requirements are in place¹⁷⁷. This case is viewed as an example where there was no international or inter-governmental involvement in resolving this transboundary environmental dispute¹⁷⁸.

Lastly, private individuals may be at a better position to have information and given the potential regulatory gaps in the home state and the affected state private litigation may be a way to ensure both private and public interests¹⁷⁹.

3.5.2 North American Private Litigation/Cooperation

The most well-known case involving a transboundary environmental dispute is the *Trail Smelter* arbitration case involving the United States and Canada¹⁸⁰. The US-Canadian relationship resolving common environmental issues goes back to the Boundary Waters Treaty¹⁸¹ which offered the right of suit in a non-discriminatory manner matters relating to the use of waterways, lakes, etc. In addition, agreements like The Great Lakes Water Quality Agreement (GLWQA), the Air Quality Agreement (AQA), and the North American Agreement on Environmental Cooperation (NAAEC) provide for citizen compliance and enforcement¹⁸².

¹⁷⁶ Supra note 177, para. 19.

¹⁷⁷ Philippe Sands, ‘European Community Environmental Law: Legislation, the European Court of Justice and Common-Interest Groups’ (1990) 53(5) *Modern Law Review* 685, p.695.

¹⁷⁸ For example the Sandoz spillage in the Rhine litigation. See Supra note 65, p. 308.

¹⁷⁹ Michael Anderson, ‘Transnational Corporations and Environmental Damage: Is Tort Law the Answer’ (2002) 41(3) *Washburn Law Journal* 399, p. 409.

¹⁸⁰ Supra note 128, p. 305, claiming that international environmental law “could be said to have begun in a small way with the Trail Smelter arbitral award in 1938.”

¹⁸¹ Treaty Relating to Boundary Waters and Questions Arising with Canada, United States and United Kingdom, 11 January 1909, 36 U.S. Stat. 2448, U.K.T.S. 1910 No. 23

¹⁸² Noah D Hall, ‘Introduction: Canada-United States Transboundary Environmental Protection’ (2009) 26(1) *Windsor Review of Legal and Social Issues* 1, pp.4-5. In 2008 Canada and the US signed the Great Lakes-St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110-342, 122 Stat. 3739.

Recent US case law shows¹⁸³ that the courts are willing to entertain claims¹⁸⁴ with a transboundary environmental pollution element. However, a case was lodged¹⁸⁵ in the Ontario Superior Court of Justice against an American firm for violation of the Fisheries Act in Canada and the court summoned the defendant to face charges. The case was later dropped when the defendant agreed to address the mercury polluting activities.

3.5.3 European Union State Practice

European Union law has environmental protection firmly established in its fundamental treaties leaving no question as to their importance within EU law. Though there is plenty of case law relating to the environment, transboundary environmental damage is seldom in dispute, save from the famous case of *Handelskwekerij Bier v Mines de Potasse d'Alsace* described earlier. Though there is no general standing to sue for breach of environmental law, the national courts in the Union are left to enforce EU and domestic law in respect to the environment. Yet, EU private international law allows for the recognition of foreign judgements within the EU to be enforceable through the Brussels I Regulation. Rome II Regulation applies to all EU member states as to the choice of law questions. In short, in case of a transboundary incident, the claimant would be subjected to the procedural requirements of the EU State he/she lodges the suit but the case would proceed with no issues regarding recognition or jurisdiction. The integration of the EU States in environmental issues *is unparalleled, something which cannot be said between Norway and Russia.*

¹⁸³ *Manitoba v. Norton*, 398 F. Supp. 2d 41, 60 E.R.C. 1237 (D.D.C. 2005); *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 62 E.R.C. 1705 (9th Cir. 2006)

¹⁸⁴ See generally Jeffrey Gracer, Dennis Mahony, and Tyson Dyck, 'Cross-Border Litigation Gains Traction in U.S. and Canadian Courts' [Routledge] 20 *Environmental Claims Journal* 181

¹⁸⁵ Marc McAree and Joanna Vince, 'When Complying with the Law in Your Own Backyard is Not Enough: Cross-Border United States and Canada Environmental Litigation' (ABA) (2013) 42(2) *Brief* 57, p. 58.

3.5.4 The Human Rights Dimension of Transboundary Environmental Law

The protection of the environment as corollary to basic human rights has been recognized for many decades tracing it back to a 1968 UNGA resolution¹⁸⁶. Numerous¹⁸⁷ treaties and soft law instruments have developed further the protection of the environment as part of international human rights. It is contended that there is an inherent friction between international environmental law protection and human rights but the better view seems to be that they are complementary to each other¹⁸⁸. However, the linkage of human rights and transboundary environmental pollution is more tenuous. Scholars like Alan Boyle make an unconvincing claim, but nevertheless well reasoned, in applying human rights case law from the European Convention on Human Rights (ECHR) and other human rights courts to extend the notion of “jurisdiction” to include transboundary pollution while relying on cases like *Al Skeini* which in itself was not an environmental case let alone a transboundary one¹⁸⁹. The ECHR court has been very active in extending the extraterritorial application of human rights

¹⁸⁶UNGA Res. 2398 (XXII) (1968), noting in paragraph 3 the “continuing and accelerating impairment of the quality of the human environment caused by such factors as air and water pollution”. Followed by the wording in the preamble and article 1 of the Stockholm Declaration that its purpose was to inspire and “guide the peoples of the world in the preservation and enhancement of the human environment” and that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being” respectively.

¹⁸⁷ Philippe Sands, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012), pp. 777-89.

¹⁸⁸ Donald K. Anton and Dinah L. Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2011), p. 119, quoting Judge Weeramantry’s separate opinion in the *Case Concerning the Gabč’ikovo-Nagymaros Project*, pp. 91-92 that “The protection of the environment is . . . a vital part of contemporary human rights doctrine” and that “damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.”

¹⁸⁹ Alan Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23 *European Journal of International Law* 613. In page 625 the author admits that “There are no precedents directly in point” to include victims of transboundary harm under the human rights cloak. However, the author refers to many cases where environmental harm of citizens has been held to be in violation of ECHR (*Hatton v. UK* [2003] ECtHR (Grand Chamber); *Lopez Ostra v. Spain*, 20 EHRR (1994) 277; *Guerra v. Italy*, 26 EHRR (1998) 357).

in areas such as prisoner custody¹⁹⁰ and on board vessels¹⁹¹. However, no human rights court has been willing to extend the extraterritorial jurisdiction to transboundary pollution cases.

An opportunity for the ICJ to decide on the matter was presented in the *Aerial Herbicide Spraying* case. Ecuador claimed in its memorial that Colombia by spraying herbicides near Ecuador's border has caused "serious damage to people, crops, animals and the natural environment on the Ecuadorian side of the frontier¹⁹²". Unfortunately, in September 2013 Ecuador requested the removal of its claim from the Court's List¹⁹³ depriving us¹⁹⁴ some needed clarity on the matter.

As international human rights law¹⁹⁵ stands at the moment, the possibility to seek redress on a non-discriminatory basis for pollution damage emanating from another state is highly improbable. It is expected though that this field of legal inquiry will further develop¹⁹⁶ in the coming years. However, this development will be hampered by the fact that states are hesitant to accept responsibility for transboundary pollution not committed by state agents¹⁹⁷

¹⁹⁰ *Al-Skeini and Others v United Kingdom*, App No 55721/07 (ECtHR 2011); See generally on the topic of extraterritorial application of human rights Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011)

¹⁹¹ *Medvedyev and Others v France*, App No 3394/03 (ECtHR 2010).

¹⁹² Malgosia Fitzmaurice, 'The International Court of Justice and Environmental Disputes' in Duncan French, Matthew Saul and Nigel D White (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Hart Publishing, 2010) p.49.

¹⁹³ International Court of Justice Press Release on 17.09.2013, No. 2013/20

¹⁹⁴ And possibly disappointing some from witnessing an "epic" battle; Rutledge, J. (2011). *Wait a Second Is That Rain or Herbicide? The ICJ's Potential Analysis in Aerial Herbicide Spraying and an Epic Choice between the Environment and Human Rights*. *Wake Forest Law Review* 46(5), 1079-1113.

¹⁹⁵ For admission on the limits of international human rights law and the need for "advocacy displayed by UN Special Rapporteurs, human rights treaty bodies and, perhaps, in the near future, a lucid and progressive court" see Jorge E Viñuales, 'A Human Rights Approach to Extraterritorial Environmental Protection?: An Assessment' in Nehal Bhuta (ed), *The Frontiers of Human Rights* (First edition. edn, Oxford University Press, 2016).

¹⁹⁶ If we are to look on the efforts of scholars in the field advocating the progressive development of international environmental law, for more see Dinah Shelton's 'Draft Paper on Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration' (2009) available at <<https://jak.ppke.hu/uploads/articles/11831/file/Shelton%20paper.PDF>>

¹⁹⁷ Which is precisely the reason why the ILC's work on the Draft Articles and Draft Principles on transboundary harm were split into two.

and in the case of the ECHR the exhaustion of domestic remedies¹⁹⁸ requirement would present a challenge.

3.6 Final Thoughts

The issue of whether public regulation (arising out of treaties, agreements, and domestic law) is preferable to private litigation (tort law) has been heavily debated¹⁹⁹. I briefly touched upon the benefits of tort law as a tool of environmental protection. Whether a bilateral agreement between Norway and Russia is a more appropriate²⁰⁰ tool ensuring equal access and remedy to nationals of both states involved will require further research. This research may come in handy as Statoil, the Norwegian state-owned oil company plans to drill for oil in an oil field with vast expected reserves only 35 kilometers away from the border with Russia in the Barents Sea²⁰¹. The principle of non-discrimination in access to justice seems well established and the trend is set to continue with the evermore creeping²⁰² of international human rights in international environmental law in pursuing the same objective. Yet, as things stand at the time of writing this paper, absent of a bilateral compensatory agreement between Norway and Russia or setting up of a pollution fund by the oil well licensee, Russian victims would bear the loss from transboundary offshore oil pollution emanating from the Norwegian continental shelf.

¹⁹⁸ ECHR article 35 (1).

¹⁹⁹ Steven Shavell, 'Liability for Harm versus Regulation of Safety' (1984) 13(2) *Journal of Legal Studies* 357; Keith Hylton, 'When Should We Prefer Tort Law to Environmental Regulation' (2002) 41(3) *Washburn Law Journal* 515; Bruce Yandle, 'The Common Law and the Environment in the Courts: Discussion of Code Law and Common Law' (2008) 58(3) *Case Western Reserve Law Review* 647, 647-48; Stewart Buck, 'The Common Law and the Environment in the Courts' (2008) 58(3) *Case Western Reserve Law Review*

²⁰⁰ "There are no solutions; there are only trade-offs" quote from Thomas Sowell, *The Vision of the Anointed: Self-Congratulation as a Basis for Social Policy* (Basic Books 1995). p. 142 in Adam Abelkop, 'Tort Law as an Environmental Policy Instrument' (2013) 92 *Oregon Law Review* 381

²⁰¹ Atle Staalesen, 'Statoil eyes an Arctic «elephant» near border to Russia' *The Independent Barents Observer* (Kirkenes, Norway 4 January 2017) <<https://thebarentsobserver.com/en/industry-and-energy/2017/01/statoil-eyes-arctic-elephant-near-border-russia>> last accessed 14 May 2017

²⁰² Teena G and others, *Environmental Human Rights* (Oxford University Press 2016) p. 333.

4 Bibliography

Books and Book Chapters

Abass A, *Complete International Law: Text, Cases, and Materials* (2nd edition. edn, Oxford University Press 2014)

Albers J, *Responsibility and Liability in the Context of Transboundary Movements of Hazardous Wastes by Sea: Existing Rules and the 1999 Liability Protocol to the Basel Convention* (Springer Berlin Heidelberg 2015)

Anton D K and Shelton D, *Environmental Protection and Human Rights* (Cambridge University Press 2011)

Atapattu SA, *Emerging Principles of International Environmental Law* (Ardsey, N.Y: Transnational Publishers 2006)

Aust A, *Handbook of International Law* (2nd edn, Cambridge University Press 2010)

Barboza J, *The Environment, Risk, and Liability in International Law* (Brill 2010)

Birnie P, Boyle A, and Redgwell C, *International Law and the Environment* (3rd edn, Oxford University Press 2009)

Boer B (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press 2015)

Boyle A, 'Soft Law in International Law-Making', in Malcolm D. Evans (ed), *International Law*, (Second edition, Oxford: Oxford University Press, 2006)

Brand R A and Jablonski S R, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements* (Oxford University Press 2007)

Bugge HC, *Environmental Law in Norway* (Kluwer Law International 2011)

Cassese A, *International Law* (2nd edn, Oxford University Press 2005)

- Churchill R, 'Introduction' in Donald R and others (eds), *The 1982 United Nations Convention on the Law of the Sea* (Oxford University Press 2015)
- Cordero-Moss G, *Internasjonal Privatrett: På Formuerettens Område* (Oslo: Universitetsforlaget 2013)
- Craik N, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge Studies in International and Comparative Law, Cambridge: Cambridge University Press 2008)
- Craik N, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press 2008)
- Crawford J and others (eds), *The Law of International Responsibility* (Oxford University Press 2010)
- Crawford J, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012)
- Deser C and Teng H, 'Recent Trends in Arctic Sea Ice and the Evolving Role of Atmospheric Circulation Forcing, 1979—2007' in Eric T. DeWeaver, Cecilia M. Bitz and L.-Bruno Tremblay (eds), *Arctic Sea Ice Decline: Observations, Projections, Mechanisms, and Implications* (American Geophysical Union 2013)
- Dworkin R, *Taking Rights Seriously* (Harvard University Press 1978)
- Ehlers P, 'Origins and Compensation of Marine Pollution — A Survey' in Jürgen Basedow and Ulrich Magnus (eds), *Pollution of the Sea — Prevention and Compensation* (Springer: Berlin, Heidelberg 2007)
- Ellis J, 'Has International Law Outgrown Trail Smelter?' in Rebecca M Bratspies and Russell A Miller, *Transboundary Harm in International Law: Lessons From the Trail Smelter Arbitration* (Cambridge University Press 2006)

Eric T. DeWeaver, 'Arctic Sea Ice Decline: Introduction' in Eric T. DeWeaver, Cecilia M. Bitz and L.-Bruno Tremblay (eds), *Arctic Sea Ice Decline: Observations, Projections, Mechanisms, and Implications* (American Geophysical Union 2013)

Finn Arnesen and others, 'Energy Law in Norway' in Martha Roggenkamp and others (eds), *Energy Law in Europe: National, EU and International Law and Institutions* (Oxford University Press 2001)

Fitzmaurice M, 'The International Court of Justice and Environmental Disputes' in Duncan French and others (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Hart Publishing, 2010)

Fleischer CA, *Folkerett* (Oslo: Universitetsforlaget 1994)

Friedrich J, *International Environmental Soft Law: The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (Heidelberg: Springer 2014)

Guttinger P, 'Allocation of Responsibility for Harmful Consequences of Acts Not Prohibited by International Law in The Law of International Responsibility' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010)

Hammer U and others, 'Articles in Petroleum Law', *MarIus 404*, (Scandinavian Institute of Maritime Law, Oslo: Sjørettsfondet 2011)

Hayes J, 'A New Policy Direction in Australian Offshore Safety Regulation' in Preben Hempel Lindøe, Michael Baram, and Ortwin Renn (eds), *Risk governance of offshore oil and gas operations* (Cambridge University Press 2014)

Hill-Cawthorne L, 'Dispute Settlement in the Aftermath of Disasters' in Susan C. Breau and Katja L.H. Samuel (eds), *Research Handbook on Disasters and International Law* (Edward Elgar Publishing 2016)

Juste-Ruiz J, 'The Implications of the Principle of Sustainable Development in International Environmental Law' in Aristotle Constantinides and Nikos Zaikos (eds), *The Diversity of International Law: Essays in Honour of Professor Kalliopi K. Koufa* (Brill 2009)

Kiss A and Shelton D, *Guide to International Environmental Law* (Brill 2007)

Koivurova T, 'Transboundary Environmental Impact Assessment: the Nordic Environmental Protection Convention' in Kees Bastmeijer and Timo Koivurova (eds), *Theory and Practice of Transboundary Environmental Impact Assessment* (Brill 2007)

Kravchenko S, Chowdhury TMR and Bhuiyan H, 'Principles of International Environmental Law' In Alam Shawkat and others (eds), *Routledge Handbook of International Environmental Law* (Routledge 2013)

La Fayette L A, 'International Liability for Damage to the Environment' in Malgosia Fitzmaurice and others (eds), *Research Handbook on International Environmental Law* (Edward Elgar Publishing, Inc. 2010)

Larsson M-L, *The Law of Environmental Damage: Liability and Reparation* (Kluwer Law International, Norstedts Juridik 1999)

Lepard BD, *Customary International Law: a New Theory with Practical Applications* (Cambridge University Press 2010)

Louka E, *International Environmental Law Fairness, Effectiveness, and World Order* (Cambridge University Press, 2006)

Lowe V, 'Sustainable Development and Unsustainable Arguments' Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999)

Magnus U and others, *Brussels I Regulation* (Sellier European Law Publishers 2007)

McCaffrey SC, *The Law of International Watercourses* (2nd edn, Oxford University Press 2007)

McDorman T L, 'Canada, the United States and International Law of the Sea in the Arctic Ocean' in Tim Stephens and David L VanderZwaag (eds), *Polar Oceans Governance in an Era of Environmental Change* (Cheltenham, UK: Edward Elgar Publishing 2014)

Milanovic M, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011)

Muchlinski P and others (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008)

Nanda VP and Pring GW, *International Environmental Law and Policy for the 21st Century* (2nd edn, Martinus Nijhoff 2013)

Nordquist MH and others (eds), *The Law of the Sea Convention* (Brill 2012)

NOU 1972: *Gjennomføring av Konvensjoner i Norsk Rett* (Oslo: Universitetsforlaget 1972)

O'Brien J, *International Law* (Cavendish 2001)

Okowa P, 'The Legacy of Trail Smelter in the Field of Transboundary Air Pollution' in Rebecca M Bratspies and Russell A Miller (eds), *Transboundary Harm in International Law: Lessons From the Trail Smelter Arbitration* (Cambridge University Press 2006)

Park CC and Allaby M, *A Dictionary of Environment and Conservation* (Second edition. edn, Oxford University Press 2013)

Park P D, *International Law for Energy and the Environment* (Second edition. edn, CRC Press 2013)

Phillips C, 'Nordic Co-operation for the Protection of the Environment against Air Pollution and the Possibility of Transboundary Private Litigation in Transboundary Air Pollution' in Cees Flinterman and others (eds), *Transboundary Air Pollution: International Legal Aspects of the Co-operation of States* (Dordrecht: M. Nijhoff 1987)

Proelss A and others (eds), 'Article 235' in *United Nations Convention on the Law of the Sea: A commentary* (Hart Publishing 2017)

- Puvimanasinghe S F, 'From a Divided Heritage to a Common Future? International Investment Law, Human Rights, and Sustainable Development' in Alam Shawkat and others (eds), *International Environmental Law and the Global South* (Cambridge University Press 2016)
- Røsæg E, 'Implementing Conventions-Scandinavian Style' in *SIMPLY 2009* (Scandinavian Institute of Maritime Law Yearbook)
- Røsæg E, 'The Norwegian Perspective with Regard to Liability Regimes Concerning Oil Rigs and Installations' in Baris Soyer and Andrew Tettenborn (eds), *Offshore Contracts and Liabilities* (Informa Law from Routledge 2015)
- Rubin AP, *Pollution by Analogy: The Trail Smelter Arbitration* (Eugene, Oregon: University of Oregon Press 1971)
- Sadeleer N, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2002)
- Sands P, *Principles of International Environmental Law* (2nd edn, Cambridge University Press 2003)
- Sands P, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012)
- Schlosser P, 'Product liability' in Campbell C MacLachlan, Peter Edward Nygh (eds), *Transnational Tort Litigation: Jurisdictional Principles* (Oxford University Press 1996)
- Schrage W, 'The Convention on Environmental Impact Assessment in a Transboundary Context' in Kees Bastmeijer and Timo Koivurova (eds), *Theory and Practice of Transboundary Environmental Impact Assessment* (Brill 2007)
- Shabtai R and Yankov A (eds), 'Third Committee: Articles 192 to 278, and Final Act, Annex VI' in Center for oceans law and policy (Charlottesville, Va.), Myron H Nordquist, and

- others (eds), *United Nations Convention on the Law of the Sea: 1982: A Commentary* (Dordrecht: M. Nijhoff 1991)
- Sohn LB and others, *Cases and Materials on the Law of the Sea* (Second edition, Brill Nijhoff 2014)
- Sowell T, *The Vision of the Anointed: Self-Congratulation as a Basis for Social Policy* (Basic Books 1995)
- Van PBJ, 'National Maritime Claims in the Arctic' in Myron H. Nordquist, John Norton Moore, and Tomas H. Heidar (eds), *Changes in the Arctic Environment and the Law of the Sea* (Brill 2010)
- Vareilles-Sommières P, 'The Mandatory Nature of Article 2 of the Brussels Convention and Derogation from the Rule it Lays Down' in Pascal de Vareilles-Sommières (ed), *Forum Shopping in the European Judicial Area* (Hart 2007)
- Verheyen R, *Climate Change Damage and International Law: Prevention Duties and State Responsibility*. (Leiden: Martinus Nijhoff 2006)
- Viñuales J, 'A Human Rights Approach to Extraterritorial Environmental Protection?: An Assessment' in Nehal Bhuta (ed), *The Frontiers of Human Rights* (First edition. edn, Oxford University Press, 2016)
- Viñuales JE (ed), *The Rio Declaration on Environment and Development: a Commentary* (First Edition. edn, Oxford University Press, 2015)
- Voigt C, *Sustainable Development as a Principle of International Law* (Brill 2008)
- Wetterstein P, 'Environmental Damage in the Legal Systems of the Nordic Countries and Germany' in Michael Bowman and Alan Boyle (eds), *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation* (Oxford University Press 2002)
- Xue H, *Transboundary Damage in International Law* (Cambridge University Press 2003)

Zander J, *The Application of the Precautionary Principle in Practice: Comparative Dimensions* (Cambridge University Press 2010)

Journal Articles

Abelkop A, 'Tort Law as an Environmental Policy Instrument' (2013) 92 Oregon Law Review 381

Abraham C and Abraham S, 'The Bhopal Case and the Development of Environmental Law in India' (1991) 40(2) The International and Comparative Law Quarterly 334

Anderson M, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer' (2002) 41(3) Washburn Law Journal 399

Baughen S, 'Environmental Damage and UK Offshore Operations: Uncertain Liabilities in Deep Waters' (2016) 28 Journal of Environmental Law 497

Boyle A E, 'Globalising Environmental Liability: The Interplay of National and International Law' (2005) 17 Journal of Environmental Law 3

Boyle A, 'Human Rights and the Environment: Where Next?' (2012) 23 European Journal of International Law 613

Boyle A, 'Marine Pollution Under the Law of the Sea Convention' (1985) 79(2) American Journal of International Law 347

Buck S, 'The Common Law and the Environment in the Courts' (2008) 58(3) Case Western Reserve Law Review 621

Churchill RR, 'Facilitating (Transnational) Civil Liability Litigation for Environmental Damage by Means of Treaties: Progress, Problems, and Prospects' 12 Yearbook of International Environmental Law 3

Dean P and Shaddick S, 'The Legal and Regulatory Treatment of FPSOs, with a Focus on Limitation of Liability, (2012) Holman Fenwick Willan available online at <http://www.hfw.com/Legal-and-regulatory-treatment> (last accessed 11.03.2017)

Divan S and Rosencranz A, 'The Bhopal Settlement' (1989) 19(5) *Environmental Policy and Law* 166

Ellis J, 'Extraterritorial Exercise of Jurisdiction for Environmental Protection: Addressing Fairness Concerns' [Cambridge University Press] 25 *Leiden Journal of International Law* 397

Faure M and Wang H, 'Compensating Victims of a European Deepwater Horizon Accident: OPOL Revisited' (2015) 62 *Marine Policy* 25

Fitzmaurice G, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*' (1958) 92 1 *Recueil Des Cours* 71

Foster C, 'The ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities: Privatizing Risk?' (2005) 14 *Review of European Community & International Environmental Law* 265

Galanter M, 'The Elusive Promise of Effective Legal Remedy' (2014) 5(2) *Journal of Indian Law and Society* 139

Gracer J and others, 'Cross-Border Litigation Gains Traction in U.S. and Canadian Courts' [Routledge] 20 *Environmental Claims Journal* 181

Graefrath B, *The International Law Commission Tomorrow: Improving Its Organization and Methods of Work*' (1991) 85(4) *American Journal of International Law* 595

Grossman M, 'Agriculture and the Polluter Pays Principle' (2007) *Netherlands Comparative Law Association* available online at <https://www.ejcl.org/113/article113-15.pdf> (last accessed 27.04.2017)

Hall N D, 'Introduction: Canada-United States Transboundary Environmental Protection' (2009) 26(1) Windsor Review of Legal and Social Issues 1

Hall N, 'Transboundary Pollution: Harmonizing International and Domestic Law' (2007) 40(4) University of Michigan Journal of Law Reform 681

Handl G, 'International Accountability for Transboundary Environmental Harm Revisited: What Role for State Liability' (2007) 37(2-3) Environmental Policy and Law 117

Henriksen T and Ulfstein G, 'Maritime Delimitation in the Arctic: The Barents Sea Treaty' (2011) 42(1-2) Ocean Development and International Law 1

Hylton K, 'When Should We Prefer Tort Law to Environmental Regulation' (2002) 41(3) Washburn Law Journal 515

Issacharoff S and Rave D, 'The BP Oil Spill Settlement and the Paradox of Public Litigation' (2014) 74(2) Louisiana Law Review 397

Knox J, 'The Myth and Reality of Transboundary Environmental Impact Assessment' (2002) 96(2) American Journal of International Law 291

Koivurova T, 'The Future of the Nordic Environment Protection Convention' (1997) 66(4) Nordic Journal of International Law 505

Koivurova T, 'Transnational EIA Procedure of the Espoo Convention' (1997) 8 The Finnish Yearbook of International Law 161

Lee M and Abbot C, 'The Usual Suspects Public Participation Under the Aarhus Convention' (2003) 66(1) Modern Law Review 80

Mason M, 'Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Publics in International Environmental Law' (2006) 12(3) Global Governance 283

McAree M and Vince J, 'When Complying with the Law in Your Own Backyard is Not Enough: Cross-Border United States and Canada Environmental Litigation' (ABA) (2013) 42(2) Brief 57

McCaffrey S, 'The OECD Principles Concerning Transfrontier Pollution: Commentary' (1975) 1(1) Environmental Policy and Law 2

Okowa PN, 'Procedural Obligations in International Environmental Agreements' (1997) 67 British Yearbook of International Law 275

Pedersen O, 'Environmental Principles and Environmental Justice' (2010) 12(1) Environmental Law Review 26

Rutledge J, 'Wait Second Is That Rain or Herbicide The ICJ's Potential Analysis in Aerial Herbicide Spraying and an Epic Choice between the Environment and Human Rights' (2011) 46(5) Wake Forest Law Review 1079

Sachs N, 'Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law' (2008) 55(4) UCLA Law Review 837

Sands P, 'European Community Environmental Law: Legislation, the European Court of Justice and Common-Interest Groups' (1990) 53(5) Modern Law Review 685

Shavell S, 'Liability for Harm versus Regulation of Safety' (1984) 13(2) Journal of Legal Studies 357

Shelton D, 'Human Rights and the Environment: Problems and Possibilities' (2008) 38(1-2) Environmental Policy and Law 41

Smets H, 'Le principe de non-discrimination en matière de protection de l'environnement' (2000) 4, 1 Revue Européenne De Droit De L'environnement 33

Soljan L, 'General Obligation to Prevent Transboundary Harm and Its Relation to Four Key Environmental Principles' (1998) 3(2) The Austrian Review of International and European Law 209

Svendsen K, 'Compensable damage ex delicto as a result of harm in the Barents Sea caused by petroleum spills from offshore installations. A Norwegian and Russian comparative legal analysis of conflict of laws, the concept of harm, losses suffered by third parties, and environmental damage and its valuation and calculation, caused by petroleum spills from offshore oil rigs and installations in the Barents Sea' (PhD Dissertation, University of Tromsø 2015)

Wolfrum R, 'Purposes and Principles of International Environmental Law' (1990) 33 German Yearbook of International Law 308

Yandle B, 'The Common Law and the Environment in the Courts: Discussion of Code Law and Common Law' (2008) 58(3) Case Western Reserve Law Review 647

Table of Treaties and Other International Documents

1982 United Nations Convention on the Law of the Sea (adopted 10 December 1982, Montego Bay, Jamaica); 1833 UNTS 3 / [1994] ATS 31 / 21 ILM 1261 (1982)

1992 Rio Declaration on Environment and Development (adopted 14 June 1992, Rio de Janeiro, Brazil); UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992)

52nd session of the International Law Commission (2000) International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law (prevention of transboundary damage from hazardous activities). Comments and observations received by Governments. Report of the Secretary-General; A/CN.4/509

Aarhus Convention/Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 28 June 1998); 2161 UNTS 447; 38 ILM 517 (1999)

African [Banjul] Charter on Human and Peoples' Rights (adopted 27 June 1981) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

Australia's position in the 1973 Sea-Bed Committee, A/AC.138/SC.III/L.27 (1973, mimeo.), Boundary Waters Treaty/Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada (adopted 11 January 1909); 36 U.S. Stat. 2448, U.K.T.S. 1910 No. 23

Brussels Convention/Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels) (adopted 27 September 1968); 1262 UNTS 153; 8 ILM 229 (1969)

Charter of the United Nations (adopted 24 October 1945); 1 UNTS XVI

Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources (Done at London 16 May 1977); 16 I.L.M. 1451

Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, Finland, 25 February 1991); 2161 UNTS 447; 38 ILM 517

Convention on Limitation of Liability for Maritime Claims (adopted 11 November 1976); 1456 UNTS 221; 16 ILM 606 (1977)

Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA), (adopted in Wellington on 2 June 1988); Miscellaneous No.6 (1989), Cm.634; (1988) 27 I.L.M. 859, 868

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950); ETS 5

Declaration on the Establishment of the Arctic Council (adopted 19 September 1996)

Establishment of an International Law Commission, General Assembly Resolution 174 (II) of 21 November 1947 (as amended).

International Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969); 973 UNTS 3; 9 ILM 45

International Law Commission, 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (11 May 2001, Geneva, Switzerland)

International Law Commission: Report of the Commission to the General Assembly on the work of its fifty-third session; A/CN.4/SER.A/2001/Add.1 (Part 2)

Nordic Environmental Protection Convention (adopted 19 February 1974)

Organisation for Economic Co-operation and Development: Recommendation of the Council on Principles concerning Transfrontier Pollution (adopted 14 November 1974); C(74)224

--Recommendation of the Council for the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution (adopted 17 May 1977) C(77)28/FINAL

--Environment Directorate Analyses and Recommendations: The Polluter-Pays Principle (Paris 1992); OCDE/GD(92)81

--Recommendation of the Council on Equal Right of Access in Relation to Transfrontier Pollution (adopted 11 May 1976); C(76)55/FINAL

Outer Space Treaty/Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 27 January 1967); 18 UST 2410, 610 UNTS 205, 6 ILM 386 (1967)

Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No.1; A/51/10

Resolution of the General Assembly on the Twenty-Thirds Session Problems of the Human Environment; UNGA Res. 2398 (XXII) (1968)

Statement by T.T.B. Koh, President of the Third United Nations Conference on the Law of the Sea, Remarks, A Constitution for the Oceans (6 and 11 December 1982)
http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf

The Ilulissat Declaration: Arctic Ocean Conference (adopted in Ilulissat, Greenland, 27-29 May 2008)

The Law Applicable to Non-Contractual Obligations (Rome II) (adopted 11 July 2007); Regulation (EC) No 864/2007

The Nordic Convention on the Recognition and Enforcement of the Civil Judgments (adopted 11 October 1977)

UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994

United Nations General Assembly, United Nations Conference on the Human Environment (adopted 15 December 1972); A/RES/2994

United States' proposal in the 1973 Sea-Bed Committee, A/AC.138/SC.III/L.40 (1973, mimeo.)

Vienna Convention on Civil Liability for Nuclear Damage (adopted 21 May 1963); 1063 UNTS 265 / 2 ILM 727 (1963)

Watercourses Convention/Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted 21 May 1997); 36 ILM 700 (1997); G.A. Res. 51/229, U.N. GAOR, 51st Sess., 99th mtg., UN Doc A/RES/51/229 (1997)

International Law Commission

ILC, 'Report of the International Law Commission on the work of the fifty-eighth session'(1 May—9 June and 3 July—11 August 2006) A/CN.4/SER.A/2006/Add.1 (Part 2)

ILC, 'Report of the International Law Commission on the work of its fifty-third session' (23 April–1 June and 2 July–10 August 2001) A/CN.4/SER.A/2001/Add.1 (Part 2)

ILC, 'Documents of the thirty-fourth session' (3 May—23 July 1982) A/CN.4/SER.A/1982/Add.1 (Part 1)

Reports

Emmerson, C. and Lahn G,' Arctic Opening: Opportunity and Risk in the High North' Chatham House, (London 1 April 2012) < <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy%2C%20Environment%20and%20Development/0412arctic.pdf>> last accessed 14 May 2017

David Borthwick, 'Report of the Montara Commission of Inquiry' Montara Commission of Inquiry (Canberra 17 June 2010) < <https://industry.gov.au/resource/UpstreamPetroleum/MontaraInquiryResponse/Documents/Montara-Report.pdf>> last accessed 14 May 2017

United Nations World Commission on Environment and Development, 'Report of the World Commission on Environment and Development: Our Common Future' Transmitted to the General Assembly as an Annex to document A/42/427 < <http://www.un-documents.net/our-common-future.pdf>> last accessed 14 May 2017

Press releases

Norwegian Petroleum Directorate, 'Thirteen companies are offered ten production licences in the 23rd licensing round' (2016)

International Court of Justice, 'Aerial Herbicide Spraying (Ecuador v. Colombia) Case removed from the Court's List at the request of the Republic of Ecuador' [No. 2013/20] (2013)

Arbitration and Court Cases

International Court of Justice

Advisory Opinions on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ Reports [1996] 66 (WHO) and 226 (UNGA).

Corfu Channel (United Kingdom v. Albania), Merits, Judgment, [1949] I.C.J. Reports 4

Costa Rica v. Nicaragua, [2013] ICJ Rep 354

Gabčíkovo-Nagymaros Dam Case (Hungary v. Slovakia), [1997] ICJ Reports 7

Nuclear Tests (New Zealand v. France) case, [1995] Order of 22 September, ICJ Rep. 1995. 7.

Pulp Mills on the River Uruguay, Argentina v Uruguay, Order, Provisional Measures, ICJ GL No 135 [2006] ICJ Rep 113

United States Case Law

89 A.L.R.Fed. 217, 55 USLW 2401, 17

Manitoba v. Norton, 398 F. Supp. 2d 41, 60 E.R.C. 1237 (D.D.C. 2005);

Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 62 E.R.C. 1705 (9th Cir. 2006)

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)

Arbitration

Trail Smelter Arbitration (United States v. Canada) [1941] 3 R.I.A.A. 1907

European Court on Human Rights

Al-Skeini and Others v United Kingdom, App No 55721/07 (ECtHR 2011);

ECHR (Hatton v. UK [2003] ECtHR (Grand Chamber));

Guerra v. Italy, 26 EHRR (1998) 357).

Lopez Ostra v. Spain, 20 EHRR (1994) 277;

Medvedyev and Others v France, App No 3394/03 (ECtHR 2010).

European Court of Justice

C-21/76 - Handelskwekerij Bier v Mines de Potasse d'Alsace, ECJ.

C-281/02 – Owusu

Inter-American Court of Human Rights

Juridical Situation and Rights of Undocumented Migrants (17 September 2003) I/A Court
HR, OC-18/03

International Tribunal for the Law of the Sea

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to
Activities in the Area, [2011] International Tribunal on the Law of the Sea Advisory
Opinion, ITLOS Case List No.17, 1 February