Reflections on Environmental Responsibility – with an Emphasis on the Nord Stream Pipeline in the Baltic Sea Area

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Abstract

The article examines environmental responsibility and liability and discusses the issue of environmental damage in the context of the Nord Stream gas pipeline case on the Baltic Sea. More specifically, the goal is to analyze who would be held liable for the damage, how this liability would be established, and what would be the criteria to be applied to this particular case.

To answer these questions, the article first lays down the general applicable legal framework. Secondly, the article systemizes and analyzes the relevant responsibility and liability instruments. The relevant instruments for the theme are the UNCLOS, certain civil liability instruments together with the ILC work on state responsibility and liability. The relevant instruments are analyzed from the point of view of their usefulness and relevance in regard to the research questions set for the article.

Keywords: Environmental responsibility, environmental liability, marine environmental damage, Nord Stream pipeline, Baltic Sea

1 Introduction[1]

1.1 Objective and research problem

The overarching context of the article is the concept of transboundary harm. Under customary international environmental law, states should refrain from causing harm to another state.[2] If transboundary harm occurs, the state might have failed in controlling its activities. However, states also carry out activities that are inherently dangerous or harmful to the environment. Even when the states are obliged to control these activities by taking all the necessary measures to minimize the harmful impacts, they are not obliged to cease all environmentally harmful activities. Not all transboundary harm is "illegal", but neither does the "legality" of these activities necessarily abolish the state's responsibility towards the impacts caused by the state to another state. Therefore, the concept of transboundary harm places certain standards of conduct on sovereign states, and states have enacted common rules and general principles to express the content of prevention of transboundary harm.

International rules on transboundary environmental harm were one of the first fields of international law to develop into general principles.[3] Among the first ones were the *principle of harmless use of territory* (*responsibility not to cause damage to the environment of other states*) as well as the *principle of state responsibility*.[4] This article takes the *principle of harmless use of territory*[5] as its point of departure.

The *principle of harmless use of territory* has developed together with another key principle of international environmental law, namely *the sovereignty over natural resources*.[6] The principles are reiterated in the leading international environmental law instruments: in the Declaration of the United Nations Conference on the Human Environment (1972, the Stockholm

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[2] Customary international environmental law refers here to law that derives from *custom*. R. M. M. Wallace: International law, Fifth edition, *Sweet & Maxwell London* 2005, p. 7.

[3] See further for example the Trail Smelter arbitration. Trail smelter case (*United States v. Canada*), 16 April 1938 and 11 March 1941, Vol.III, pp. 1905–1982, 3 R.I.A.A. 1905 (1941), reprinted in 35 AJIL 684 (1941). See also the Corfu Channel Case (*United Kingdom v. Albania*), Judgment of April 9th 1949 (Merits), ICJ Reports 1949, p. 4, on the state's obligation not to allow its territory to be used for acts contrary to the rights of other states, p. 22.

[4] E. Louka: International Environmental Law. Fairness, Effectiveness, and World Order, *Cambridge University Press* 2006, p. 40; M. L. Larsson: The Law of Environmental Damage. Liability and Reparation, *Norstedts Tryckeri, Stockholm* 1999, p. 159.

[5] The *principle of harmless use of territory* has been elaborated and further worked on in the legal literature, and several variations on the definition exist. P. W. Birnie and A. E. Boyle: International Law and the Environment, Second edition, *Oxford New York* 2002, p. 109; E. Louka: *International Environmental Law*, p. 50; P. Sands: Principles of International Environmental Law, Second Edition, *Cambridge University Press* 2003, p. 235.

[6] See discussion on *the Harmon doctrine* (each state has the right to use its natural resources without restriction according to the concept of state sovereignty) from T. Kuokkanen: International law and the Environment. Variations on a Theme, *Kluwer Law International Hague* 2002, pp. 11–14; M. L. Larsson: *The Law of Environmental Damage*, p. 155.

Declaration) as well as in the Rio Declaration on Environment and Development (1992, the Rio Declaration), reaffirming the Stockholm Declaration.[7] These principles are an inseparable part of customary international environmental law and, as such, provide international environmental law its foundations.[8] Obligation of other states to tolerate pollution is not absolute but neither is the sovereignty of states to exploit their natural resources.[9] Both are subject to some limitation, as will be discussed in the article.

The above-mentioned Trail Smelter case has been pointed out by many scholars as one of the first evidence of the establishment of the concept of state responsibility for environmental harm.[10] The case activated the discussion in the field of international law about whether a standard of state responsibility (liability) had been established for environmental polluting activities or not.[11] After the early case law, the International Law Commission (ILC) continued to work on and develop the principles of state responsibility and liability.

It is important to make a difference between *state responsibility* towards environmental damage and *state liability* on the other hand.[12] *Civil liability* also needs to be distinguished from these concepts.[13] Furthermore, the international environmental law uses the concepts somewhat contextually when discussing environmental responsibility and liability in general, and several understandings of the concepts exist.[14] Therefore, this article keeps to a rather general level of definition, although the profound contextualization of these concepts within general international environmental law would unquestionably be a fruitful discussion.

The concepts of state responsibility and state liability are sometimes, according to *Larsson*, used synonymously and they do overlap. Responsibility and liability are activated in somewhat different contexts. *Liability* refers to the duty to pay compensation for damage. Liability can also be viewed as a sanction to be used in cases where there is a breach of valid international rules. Liability is not merely a legal tool; it is also a financial tool in the form of the liable one being responsible for paying compensation.[15] *Responsibility*, on the other hand, more generally encompasses this liability together with the obligation to prevent, reduce and control environmental damage. Responsibility towards environmental damage could also be characterized as the duty to take *particular preventive actions*. Therefore, the damage as such does not need to be realized in order for a party to be held responsible.[16] If a state does not take the necessary preventive actions under the principle of state responsibility[17] and according to the state's international

[7] Declaration of the United Nations Conference on the Human Environment, A/CONF.48/14 and Corr.1 (1972), reprinted in 11ILM 1416 (1972); Rio Declaration on Environment and Development, June 13, 1992, reprinted in 31 ILM 876 (1992). See further article 6 of the Stockholm Declaration, and principle 2 of the Rio Declaration.

[8] P. W. Birnie and A. E. Boyle: *International Law and the Environment*, p.104. See also A. Jóhannsdóttir: The significance of the default: A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law, *Edita Västra Aros, Västerås* 2009, pp. 208–212.

[9] P. Sands: Principles of International Environmental Law, Second Edition, *Cambridge University Press* 2003, pp. 241 and 246.

[10] See e.g. P. Sands*: Principles of International Environmental Law*, p. 241. See also the Corfu Channel Case (*United Kingdom v. Albania*) and Gut Dam Arbitration (*United States v. Canada*), 8 ILM (1969).

[11] E. Louka: *International Environmental Law*, p. 41.

[12] E. M. Basse: Environmental Liability – Functions and Traditions in P. Vihervuori and K. Kuusiniemi and J. Salila: Juhlajulkaisu Erkki Johannes Hollo 1940 – 28/11 – 2000, *Lakimiesliiton Kustannus Helsinki* 2000, p. 14. On customary law and transboundary environmental harm, see also J. Ebbeson: Compatability of International and National Environmental Law, *Iustus Förlag Uppsala* 1996, pp. 103–105.

[13] Civil liability refers here to the potential responsibility for payment of damages, to the right to obtain redress from another person. State liability, on the other hand, refers to liability of one state to another for the non-observance of the obligations imposed by the international legal system. M. M. Wallace: *International law*, p. 187; E. Louka: *International Environmental Law*, p. 448

[14] E. M. Basse: Environmental Liability – Functions and Traditions, pp. 14–15.

[15] E. Louka: International Environmental Law, p.477.

[16] M. L. Larsson: *The Law of Environmental Damage*, pp. 154–155.

[17] State responsibility as enacted in the Rio Declaration: "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of

obligations, state liability can be activated under the general principles of state liability. The state is also responsible for prevention, but triggering of liability requires a certain criteria to be fulfilled.

The question of *what constitutes environmental harm or damage* for the purposes of activating liability is central for this article. However, it is essential to clarify at this point that there are no straightforward answers to the question, and that this article is by no means able to answer this question comprehensively. This article, however, aims at *outlining the problems* attached to the question on *what environmental harm or damage is* in relation to environmental responsibility and liability.

During the last twenty or thirty years states have agreed on a complex network of treaty obligations to protect and preserve our environment and control hazardous impacts on it. Therefore, it is somewhat surprising to note that there are *no generally agreed or overarching principles of international environmental liability that could be applied when these treaty obligations are violated*. States have not been very eager to oblige themselves on liability instruments. It is more tempting to ratify general framework rules on responsibility than specific criteria on the establishment of liability. International environmental law offers solutions for solving environmental disputes, but these solutions mostly employ general international environmental law principles rather than international environmental liability principles.[18]

In line with the above, the principal objective of this article is to discuss international law on environmental responsibility and liability. Furthermore, the above-mentioned issues are analyzed *in the context of the Nord Stream gas pipeline case (the Nord Stream case) in relation to the Baltic Sea*. This approach makes the article more concrete and more to the point. The overarching research questions are: *who is to be held liable for environmental damage in the Baltic Sea area*, caused by the Nord Stream pipeline project, and *how is this liability established, and what are the criteria to be applied in this particular case*? The situations "caused by the Nord Stream pipeline" for the purposes of this article include weaknesses in or damages to the pipeline occurring due to laying and construction errors as well as lack of proper maintenance during the operation phase of the pipeline. However, environmental damage caused by a third party is excluded from the discussion in this article.

In the forthcoming sections, the article first analyzes the relevant elements of environmental responsibility and liability. These elements are the key international environmental law instruments, as well as the relevant concepts included in the application of environmental responsibility (primary obligations and environmental damage). The United Nations Convention on the Law of the Sea (1982, UNCLOS)[19] sets the general legal framework for the article, and Part XII (protection and preservation of the marine environment), in particular, is important for this article. The essential rules of the international environmental responsibility instruments are analyzed from the point of view of the Nord Stream case. Secondly, with this analysis, the article suggests approaches to international environmental responsibility and liability in the context of the Nord Stream pipeline case.

The structure of the article is the following: section two discusses general legal framework towards responsibility and liability. This section discusses the relevant instruments as well as the content of the primary obligations. Section three analyzes the international environmental civil law instruments, their relevance in the Nord Stream case as well as the key concept of environmental damage. Section four focuses on the ILC work on state responsibility and liability.

other States or of areas beyond the limits of national jurisdiction" (latter part of principle 2).

[18] E. H. P. Brans: Liability for damage to public Natural Resources. Standing, damage and damage assessment, *Kluwer Law International Hague* 2001, p. v. See also A. Jóhannsdóttir: *The significance of the default: A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law*, p. 212.

[19] United Nations Convention on Law of the Sea, Dec. 10, 1982, reprinted in 21 ILM 1261 (1982).

1.2 The Baltic challenge

Nord Stream AG is a joint venture owned by four companies[20] that have specialized in natural gas distribution, purchasing and sales of natural gas. Nord Stream AG plans to build a 1220-kilometer-long undersea pipeline from Vyborg (Russia) to Greifswald (Germany). The preparations for the pipeline construction are well underway, and the construction work has been planned to commence in April 2010.[21] The project is to be finished by the year 2012.[22]

Today, the Baltic Sea is one of the most threatened marine ecosystems in the world, and also one of the world's most exploited sea areas. The Baltic is unique in several ways. It forms the second largest body of brackish water in the world, it is very shallow and the water quantity is low compared to other similar small scale sea areas. It is a semi-enclosed sea, which means that the exchange of water with the North Sea is extremely slow.[23] Because of its special geographical, climatological and oceanographic characteristics, the Baltic Sea is highly sensitive to the environmental impacts of human activities in its sea area and its catchment area. The Baltic Sea was listed as a Particularly Sensitive Sea Area (PSSA) by the International Maritime Organization (IMO) in 2005.[24] The Baltic is also a special area under the MARPOL 73/78 regulation.[25] The poor situation of the Baltic Sea is largely due to management failures. To summarize, the Baltic ecosystem is now close to a final collapse.

The Nord Stream project has all the potential to harm the maritime environment of the Baltic during the different phases of the construction or the operation of the pipeline. The potential effects of the pipeline could include, for example, damage to the ecosystem due to munitions clearing or an oil leakage. The *unplanned events* are mostly associated with the construction phase, pipeline failure being the exception. For example, a major oil spill could impact "any number" of the Baltic states.[26] Furthermore, the gas pipelines run through areas that are important for the *commercial fisheries* of several states. Fishing is important to several coastal communities in the countries around the Baltic, and therefore the impacts affecting fisheries along the pipeline route are truly transboundary. There is a particular concern over the ability of bottom trawlers to adapt their approaches and patterns to adjust to the presence of the pipelines in the open seas of the Baltic.[27]

The Nord Stream pipeline case has several legal issues to tend to. The pipeline project is above all a political issue, but its execution has also raised some serious environmental concerns over the environmental impacts on the highly sensitive sea area. One of the discussed issues has been the implementation of the environmental impact assessment (EIA) on the area, particularly its adequacy and scope. The general public, respective national governments and the media have also been concerned about the consolidation between different national legislations, as the pipeline route passes through several national jurisdictions.

[20] The owners and their shares are as follows: the largest Russian company Gazprom (51 %), BASF SE/Wintershall Holding AG (20 %), E.ON Ruhrgas (20 %) and Gasunie (9 %). However, the headquarters of the company is based in Zug, Switzerland.

[21] Information on the Nord Stream pipeline project is available on the Nord Stream website, www.nord-stream.com (15.2.2010).

[22] Nord Stream is only one of several planned or existing energy infrastructure projects in the Baltic Sea area. See more on the other projects from the Nord Stream website on Baltic infrastructure projects, http://www.nord-stream.com/en/the-pipeline/pipeline-route/baltic-infrastructure-projects.html (15.2.2010).

[23] More information on the Baltic Sea ecosystem, please see further e.g. HELCOM (Helsinki Commission, Baltic Marine Environment Protection Commission) website on the marine environment http://www.helcom.fi/environment2/en_GB/cover/ (15.2.2010) and the Baltic Sea Portal website http://www.itameriportaali.fi/en_GB/ (15.2.2010).

[24] Resolution A.927 (22) (PSSA and Special Areas Guidelines), pp. 3–10. IMO website on marine environment, http://www.imo.org/ (15.2.2010).

[25] International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (the MARPOL 73/78). In its annexes I, II, V and IV the MARPOL defines certain sea areas as special areas.

[26] Nord Stream Espoo Report, March 2009, 1608–1609; Nord Stream Espoo Report: Non-Technical Summary, February 2009, pp. 39–40.

[27] Nord Stream Espoo Report, March 2009, pp. 12, 1323–1336.

Certain concerns over the national administrative processes have also been represented concerning the complaints on the national permitting, for example.[28]

This article focuses on environmental responsibility and liability relating to environmental damage. This choice was made simply because, out of all the legal matters related to the case, this issue has not been carefully analyzed. The realization of the project is very likely. When the project is realized, the responsibility and liability issues also become relevant. What if – due to an accident, incident or error in the construction or operation of the pipeline – environmental damage or other potentially harmful environmental impacts do occur?

2 General legal framework towards responsibility and liability

2.1 Main legal jurisdictions and rights on the Baltic Sea

Treaty law is the main source of obligations in international environmental law, containing more defined rules and differentiated obligations for implementation than customary law.[29] Therefore the main rules are presented below.

Since the article analyzes state responsibility, and customary international law is one of the main sources of state responsibility, it is also necessary to discuss customary international law with a few words. Customary international law contains primary rules that in cases of breach give rise to (state) responsibility. The most important rule applicable in the context of this article is the *principle of harmless use of territory* presented earlier (obligation to not cause harm to the environment of other states and to areas beyond any jurisdiction).[30] However, the content of rule of custom ary international law is not as exact as the content of a legal rule. For example, regarding the objective of this article, does *the principle of harmless use of territory* relate to the transboundary harm as such or to specific activities that cause harm? This article accepts the point that harm is *per se* prohibited. Therefore, *the principle of harmless use of territory* should in fact be considered a part of customary law, despite the lack of definite content. [31]

In general, the Baltic Sea area is regulated through several international, EU, regional and national instruments. It does not serve the purpose of the article to go through all of them. The most relevant international treaties from the point of view of the general legal framework are the UNCLOS and the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area (1992, the Helsinki Convention). The UNCLOS and the Helsinki Convention are both *binding* on all of the states surrounding the Baltic Sea.[32]

The Nord Stream pipeline project is also of central importance for the European Union (EU).[33] The Baltic Sea is a basin bordered by as many as eight EU member states and 80% of its shores are EU territory, and the sea as such is under the rule of the EU within the territorial waters of the member states. All contracting parties, *except for Russia*, of the Nord Stream case are members of the EU. The EU member states are obliged to apply and implement environmental and other rules of the EU which are applicable to the

[28] See also T. Koivurova and I.Pölönen: The Baltic gas pipeline – can we manage it sustainably?, *Baltic Rim Economies* 31.8.2009 4/2009, p. 23; E. Karm: Environment and energy: The Baltic Sea gas pipeline, *Journal of Baltic Studies* Vol. 39, No. 2, June 2008, p. 99.

[29] C. Voigt: State Responsibility for Climate Change Damages in *Nordic Journal of International Law* 77 (2008), p. 5.

[30] Trail smelter case (*United States v. Canada*), p. 1965; Gabčikovo-Nagymaros Project (*Hungary v. Slovakia*), Judgment, ICJ Reports 1997, p. 41. See also C. Voigt: State Responsibility for Climate Change Damages, pp. 7–8.

[31] C. Voigt: State Responsibility for Climate Change Damages, pp. 7–9. See also R. Higgins: Problems and Process: International Law and How We Use It, *Clarendon Press Oxford* 1994 (reprinted in 2003), p. 165; Trail smelter case (*United States v. Canada*), p. 1965.

[32] Sweden, Finland, Denmark, Estonia, Latvia, Lithuania, Germany, Poland and Russia.

[33] See also Trans-European Energy (TEN-E) Guidelines in 2006, Decision No 1364/2006/EC of the European Parliament and the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC, OJ L 262, 22.9.2006. The Nord Stream project is listed as one of the projects of common interest.

Baltic area, including the Baltic Sea area.[34] Therefore, the Baltic Sea is covered by national jurisdiction, complemented by EU law[35] and international law.[36]

As a general background, it is necessary to start of with the *principal legal jurisdictions* concerning the Baltic Sea. *Firstly*, rules relating to the *territorial sea* are relevant. In line with articles 2, 3 and 4 of the UNCLOS, each state around the Baltic Sea has 12 nautical miles of territorial waters. On the territorial sea, the coastal state actually enjoys sovereignty, giving the coastal state the power to apply national law. [37]

Secondly, in line with UNCLOS articles from 55 to 57, each coastal state has in addition to that a maximum of 200 nautical miles of exclusive economic zone (EEZ) from the baseline. Due to geographical facts,[38] none of the Baltic states actually has 200 nautical miles of EEZ.[39] The surrounding states have agreed on the delimitation of the maritime boundaries by using bilateral agreements, and the Baltic Sea is fully covered with territorial waters or EEZs. The most significant right for the *coastal state* on the EEZ, in line with article 56 (a), are the sovereign rights for the purpose of exploring and exploiting, conserving and managing the living and non-living natural resources of the waters superjacent to the seabed and of the seabed and its subsoil. According to UNCLOS article 60, a coastal state has the exclusive right to construct and to authorize and regulate the construction, operation and use of installations and structures for the purposes provided in article 56 and other economic purposes.

The coastal state has jurisdiction with regard to the protection and preservation of the marine environment, in line with article 56 (b) sub-paragraph iii). The jurisdiction to protect and preserve can also be viewed as an obligation. Article 56 gives the competence to legislate and to enforce, which is further stipulated in Part XII of the UNCLOS on the protection and preservation of the marine environment. Any obligation as to the *use of the jurisdiction* and *how it shall be used* will have to be deduced from Part XII of the UNCLOS or other international environmental agreements, such as the Helsinki Convention.

The UNCLOS also includes other more specific articles on the protection of the marine environment of the EEZ, namely in Part XII article 210 on dumping, articles 211, 220 and 234 on pollution from vessels and pollution from sea-bed activities, in line with articles 208 and 214. The powers to control pollution *outside territorial sea* are, however, limited. According to *Churchill and Lowe*, the UNCLOS has had a limited impact on the state practice on the matter and the coastal states do not use the entire jurisdiction provided by these articles. [40]

The UNCLOS regulates the rights and duties of

[34] See also P.Graig and G.de Búrca: EU Law. Text, cases, and materials 4th Edition. *Oxford University Press* 2008, pp. 82–88; E. Hollo: The Baltic Sea and the Legal Order on Placing Energy Pipelines in Miljøretlige emner. Festskrift til Ellen Margrethe Basse, *Jurist- og Økonomforbundets Forlag*, København 2008, pp. 180–181. Note also that the EU's common fisheries policy (CFP) extends to the Baltic Sea area (article 3 on common policy in the sphere of agriculture and fisheries, articles 32–38 legislative powers of the Community on fisheries, Treaty Establishing the European Community (EC treaty), Consolidated version, Official Journal of the European Union C 321 29.12.2006. Note that the Lisbon treaty came into force in 1.12.2009, and the title of the Treaty establishing the European Community has been replaced by Treaty on the Functioning of the European Union by the article 2 § 1 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13.12.2007, Official Journal of the European Union C 306 17.12.2007 (Treaty of Lisbon). The corresponding articles to articles 3 and 32 to 38 are articles 3, 4 and 38 to 44.

[35] "EU law" as taking into consideration the Lisbon Treaty that entered into force 1.12.2009.

[36] Particularly on environmental protection, see also European Court of Justice (ECJ) findings on the case C-459/03 between the European Commission and Ireland on the case better known as the "MOX plant case", paragraph 92. The MOX plant case seems to assume that the EEZ is also under the EU competence. The situation on the EU jurisdiction on the EEZ is not, however, clear. See also E. Hollo: T*he Baltic Sea and the Legal Order on Placing Energy Pipelines*, p. 181.

[37] P. W. Birnie and A. E. Boyle: *International Law and the Environment*, p. 370.

[38] "Geographical facts" means here that because the Baltic Sea is very narrow and because the states are within close proximity from each other, it is not possible for the states to have 200 nautical miles of EEZ.

[39] However, article 76 (1) entitles the coastal state to a minimum of 200 miles continental shelf (the seabed and the subsoil of submarine area).

[40] R. R. Churchill and V. Lowe: Law of the Sea, Third edition, *Manchester University Press* 1999, p. 169 and 351.

other states in the EEZ in article 58. The UNCLOS explicitly confers the other states with the right of laying submarine cables and pipelines in article 58. Article 58 (3) also includes an obligation for other states to ensure compliance with legislation adopted by the coastal state according to its rights and jurisdiction under article 56.

Thirdly, the rights on the continental shelf are relevant. In line with article 77 (1), the *coastal state* exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources. Continental shelf is a legal definition given for the stretch of the seabed adjacent to the shores of a particular state to which it belongs.[41] The continental shelf and the EEZ are two distinct legal bases of coastal states that both create rights for the coastal state towards the sea bed. However, the continental shelf exists *ipso facto* and *ab initio*, but the EEZ must always be claimed.[42] In addition, on the *overlap between the two zones*, it needs to be noted that article 56 (3) on EEZ provides that the rights provided to the coastal state shall be exercised in accordance with Part VI rules on continental shelf (article 77). Lastly, from the point of view of the geographical definition, the whole Baltic Sea floor is continental shelf. Regarding the right to lay submarine cables and pipelines according to article 58 (1), the subjection to "relevant provisions" of the UNCLOS involves a reference to the *relevant provisions* of part VI on the continental shelf.

2.2 Right to lay pipelines on the continental shelf

According to article 79 on submarine cables and pipelines on the continental shelf, *all states* have the *general right to lay submarine cables and pipelines on the continental shelf*. As stated in the article 79 (2), the *coastal state* may not impede the laying or maintenance of such cables or pipelines, subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines.

The delineation of the course for the laying of pipelines on the continental shelf is, however, *subject to the consent of the coastal state*, in line with article 79 (3). *It is, however, questioned how far the article 79 (3) is compatible with the freedom to lay pipelines.* Lastly, it might be pointed out that article 79 (4) confers the coastal state the right to establish conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources.

From the point of view of this article, the UNCLOS provisions on cables and pipelines do not tackle the breaking or injury of a submarine cable or pipeline, whereas UNCLOS articles from 112 to 115 on high seas cables and pipelines do regulate the issue.

2.3 Duty to protect, control and prevent

The UNCLOS addresses various aspects of the use of the seas, including marine pollution. The UNCLOS defines marine pollution in its article 1 as substances or energy which are introduced into the marine environment by man and which *result or are likely* to result in *deleterious effects* as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.[43] The Helsinki Convention has a similar approach towards

[41] Article 76 (1) UNCLOS, continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

[42] R. R. Churchill and A. V. Lowe: *Law of the sea*, p. 145; T. H. Heidar: Legal Aspects of Continental Shelf Limits, article for conference, shortened version form the article in Legal and Scientific Aspects of Continental Shelf Limits, *Martinus Nijhoff* 2004, pp. 34–35.

[43] There is no international case law or discussion on the question whether discharge of natural gas qualifies as pollution of marine environment and whether this pollution is of a scope that renders it violation of obligations under law of the sea or international environmental law. The question is, however, discussed later in this article.

the definition of marine pollution, according to its article 2. In fact, the first Helsinki Convention dating from 1974 (as the convention was later, in 1992, amended to its present form) is said to have had an important influence on the formulation of the marine pollution provisions of the UNCLOS treaty.[44]

The obligation to protect the marine environment as regulated in the UNCLOS represents a codification of customary law, and the UNCLOS articles are supported strongly by *opinion juris*.[45] Article 192 of the UNCLOS lays down the general obligation to protect and preserve the marine environment.[46] Although the environmental provisions can be found in several sections of the UNCLOS, Part XII in particular deals with the preservation and protection of the marine environment. Furthermore, in line with article 193, states have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

In line with article 194 (2), states shall take all measures necessary to ensure that *activities under their jurisdiction or control* are conducted in such a manner that they do not cause damage by pollution to other states and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights.

Part XII on protection and preservation of the marine environment deals with *all types* of marine pollution, in line with article 194 (3). However, article 194 (3) is not an exhaustive list of the measures taken to minimize pollution. Therefore, in line with article 194 (c), for example, pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil and pollution from other installations and devices operating in the marine environment, as in article 194 (d), are included. *Therefore pollution from pipelines is also subsumed*. Article 194 does apply to pipelines because although a pipeline might not be seen as an installation or a device used in "exploration or exploitation of the natural resources of the seabed and subsoil", it at least belongs to the category of an "installation" or "device" used in "operating in the marine environment".[47]

According to article 208 of the UNCLOS, coastal states shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction. Regarding the article 208, also articles 60 and 80 on artificial islands, installations and structures in the exclusive economic zone and continental shelf are to be noted. In order for article 208 to be applicable to submarine pipelines, the pipelines must be subjected to the jurisdiction of the coastal state and qualify as seabed activities under article 80 of the UNCLOS. According to judge *Treves*, "the pipelines used in connection with the exploration and exploitation of the resources of the continental shelf or with artificial islands, installations and structures *thereupon are under the jurisdiction of the coastal State*" [italics by the writer].[48] Therefore, for the purposes of this article, pipelines are subjected to the jurisdiction of the coastal state as seabed activities.

There is a need for balance between the freedom to lay pipelines and the recognized rights of the coastal state. According to Treves, it could, for instance, be

[44] P. W. Birnie and A. E. Boyle: International Law and the Environment, Second edition, *Oxford New York* 2002, p. 104.

[45] The obligation to protect the marine environment existed before the UNCLOS framework. UNCLOS is generally accepted as customary law regarding to its essential content, and such customary provisions are binding on states as such. P. W. Birnie and A. E. Boyle: *International Law and the Environment*, p. 352; R. R. Churchill and A. V. Lowe: *Law of the sea*, pp. 24–25.

[46] E. Louka: *International Environmental Law*, p. 148; R. R. Churchill and V. Lowe: *Law of the Sea*, p. 349.

[47] "As far as installations for exploring and exploiting seabed… accidental pollution may result from... or from the breaking of pipelines", R. R. Churchill and V. Lowe: *Law of the Sea*, p. 153–155 and 330.

[48] T. Treves: The International Tribunal for the Law of the Sea and the Oil and Gas Industry, Second International Oil and Gas Conference –Managing Risk –Dispute Avoidance and Resolution London 20-21 September 2007, pp. 9–10, pdf available online at www.itlos.org (8.4.2010).

disputed whether a certain pipeline is used in connection with the operation of artificial islands, installations and structures on the continental shelf. Additionally, other disputes may concern the protection of pipelines and the duties of the state laying the pipeline, such as disputes concerning the breaking or damaging of the pipeline.[49]

The obligation to prevent, control and reduce pollution is required *according to each state's capability*, in line with article 194 (1) of the UNCLOS (*due diligence*).[50] The primary subject of this obligation is the coastal state. The obligation to take "all measures necessary" is moderated allowing the state to use the "best practicable means at their disposal and in accordance with their capabilities". This makes the obligation more flexible to the discretion of the state. However, when it comes to the seabed operations laws, regulations and measures taken by the coastal state to prevent, reduce and control, pollution shall not be less effective than international rules, as is stated in article 208. This could imply a stronger, primary obligation of states to prevent pollution.[51] In general, the UNCLOS can set a legal obligation, although in a form of general framework, to protect the marine environment. According to article 197, states also have the obligation to *cooperate* in the protection of marine environment.[52]

2.4 Responsibility regarding the obligation to protect and preserve

According to article 235 of the UNCLOS, states are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. Article 235 deals with different aspects, including both responsibility and civil liability. The *responsibility* extends to flag states just as it applies to coastal states in respect of the activities *that they permit within their jurisdiction or control*.[53] The *liability* for marine environmental damage goes in accordance with international law. The UNCLOS refers to international law whenever the scope of the liability needs to be identified. Furthermore, according to article 235, states should also 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.

Article 235 therefore assumes, firstly, that states are obliged by it to develop rules on liability and, secondly, that the liability is to be constructed according to international law. This leaves the article rather open for debate.

2.5 National permits

According to the national regulation applicable to the Nord Stream project, the project requires permits from all of the coastal states, which are Finland, Sweden, Germany, Russia and Denmark.[54] *In Finland*, in addition to the permit, the pipeline project needs Government's approval (according to the article 6 and 7 of the Finnish Act on EEZ)[55], for the activity as such, and also for the delineation of the course for the pipe lay. The legal standing of the Government's approval deserves some discussion.

Under article 3 (1) of the Finnish Act on EEZ, the

[49] T. Treves: The International Tribunal for the Law of the Sea and the Oil and Gas Industry, p. 10.

[50] On *due diligence*, see also C. Voigt: State Responsibility for Climate Change Damages, pp.9–10.

[51] This view is, however, not unanimous, see the discussion in P. W. Birnie and A. E. Boyle: *International Law and the Environment*, p. 353.

[52] See further Land reclamation by Singapore in and around the straits of Johor (*Malaysia v. Singapore*), Order, 8 October 2003, paragraph 92 and MOX plant case (*Ireland v. United Kingdom*), Order 3 December 2001. 41 ILM 405, paragraph 82.

[53] P. W. Birnie and A. E. Boyle: *International Law and the Environment*, p. 382.

[54] The project also requires national EAI processes. As of February 2010, the project has received all the necessary permits. All the required national processes and permits are listed at the Nord Steam website on national permitting processes, http://www.nord-stream.com/en/environmental-impact-assessment-permitting/national-permitting-processes.html (22.2.2010).

[55] Finnish Act on EEZ (Laki Suomen talousvyöhykkeestä, 1058/2004).

Finnish Water Act[56] is to be applied on the Finnish EEZ together with other legislation, such as the EIA legislation[57]. The consideration on the *permit* focuses on the permit issuing criteria according to the Water Act. However, when deliberating the *approval*, coastal state is required to take the viewpoint of marine protection (general obligation to protect, control and prevent harm to marine environment) into consideration when deliberating the suitable delineation of the pipeline and to consider other socio-economical viewpoints. Therefore, the Government should, when considering the approval, take a comprehensive approach on the *general permissibility* of the pipeline project (expediency consideration). The Government's approval does not have the status of a permit, but it is appealable. The Government's decision on the approval is binding when considering the permit and permit conditions.[58]

It is rather unclear whether this consideration would make it possible for the coastal state to deny the approval due to marine protection aspects. The criterion for the consideration does not appear in the law. According to the UNCLOS, a coastal state may not prevent other states from placing pipelines and cables on the continental shelf or the EEZ of the coastal state. According to article 79 (2) of the UNCLOS, coastal states are *not allowed to obstruct or hinder the laying or maintenance of cables or pipelines*, unless the restriction is conditioned by its right to take reasonable measures for the exploration of the continental shelf, the exploration of its natural resources and the prevention, reduction and control of pollution from pipelines.

At the outset it does not seem possible to reject an application due to states' freedom to use international waters for the purpose of laying pipelines.[59] However, by allowing an activity that in fact acts against the UNCLOS articles on protection and preservation of the marine environment, the state "allows" polluting activity. Polluting activity refers here to a situation where, for instance, there is a significant oil leakage to the sea due to damage to the pipeline. Therefore, the state might breach its obligations under the UNCLOS, as regulated in articles from 196 to 194 of the UNCLOS and according to article 235 on responsibility and liability. However, this view represents a clear juxtaposition between two obligations: the obligation to protect and preserve on one hand and the obligation to allow the freedom to lay pipelines on the other. Furthermore, it needs also to be noted that article 235 (1) does not include any independent or particular obligations; rather, the article stipulates what is general international law.

2.6 Analysis

The UNCLOS does not provide any specific or concise rules on pollution prevention since it merely sets general framework for its contracting parties. The UNCLOS articles on tackling marine pollution are enacted on a general level and are therefore open for national interpretation as well as balancing of interests.[60] Their application involves a great level of discretion. Even though the UNCLOS rules are relatively clear, they are not precise enough to survive the interpretation towards balancing between, for example, economic needs.

To clarify the nature of the substantive obligation, namely the obligation to protect and preserve, the complex MOX plant case (*Ireland v. United Kingdom*)[61]

[56] Finnish Water Act (Vesilaki, 264/1961, VL).

[57] Finnish act in environmental impact assessment (Laki ympäristövaikutusten arviointimenettelystä 468/1994, YVAL) and Finnish decree on environmental impact assessment (Asetus ympäristövaikutusten arvioin timenettelystä, 713/2006).

[58] There has been one appeal against the consent to the Supreme Administrative Court of Finland (30.12.2009).

[59] The Government's consent comes before the EIA process, and the water permitting process comes last – after the EIA process. The EIA process evaluates the alternatives. According to Hollo, the states do not have the possibility to reject the application for permit either. E. Hollo: *The Baltic Sea and the Legal Order on Placing Energy Pipelines*, pp. 188–192.

[60] See also J. Ebbeson: *Compatability of International and National Environmental Law*, pp. 86–88.

[61] See ITLOS on MOX Plant Case (*Ireland v. United Kingdom*), Orders 13 November 2001 and 3 December 2001; ECJ on MOX Plant case C-459/03; Permanent Court of Arbitration

is here very briefly described. The case was the first case for the ITLOS to be faced with the UNCLOS Part XII obligations, and that is why the case is also of relevance here. The case concerned a dispute over a mixed oxide fuel plant, the MOX plant, in Sellafield, England, on the shores of the Irish Sea.[62]

In 2001, the British government gave a decision on the commissioning and operation of the new MOX plant. The view of Ireland was in short that the MOX plant would pollute the Irish Sea even further by both direct and indirect radioactive discharges into the sea. With regard to the focus of this article, Ireland's claims in the case are interesting. Ireland claimed, among other things, that its rights under the UNCLOS had been violated by the UK that had neglected its obligation to protect the marine environment of the Irish Sea, including the obligation to take all necessary measures to prevent, reduce and control further radioactive pollution of the Irish Sea.[63]

The MOX plant case is fairly well comparable to the Nord Stream case, even though the Nord Stream case, of course, is based only on potentially harmful effects, not to an actual case in any international court. In its reasoning, ITLOS explicitly noted the importance of the UNCLOS Part XII obligations,[64] but the obligation to protect and preserve marine environment was not confirmed as such (i.e. that the other party could have seen to be violating this particular obligation). Even though the MOX plant case was not as such focused on issues of responsibility or liability, it does give an important insight into the *nature of the substantive obligation* in a situation very close to what the Nord Stream case might be. *The obligation needs to be taken into consideration, but it is not, as such, a legal rule that could form the sole base for an international claim.*

The obligation of states not to cause damage to the territory of another state is not only a one-way obligation: according to customary international law, states are also bound to tolerate a certain amount of pollution. Human influence on the environment is inevitable, and harmful effects do follow from legal activities of states. In respect of the maritime environment, these obligations do not mean an absolute prohibition to pollute. They rather represent *due diligence obligations* (standards) with the goal to minimize pollution.[65]

Furthermore, perhaps the most important element of article 235 (2) is the obligation of states to provide for recourse to their legal systems for compensation for pollution caused by persons under their jurisdiction (civil liability).[66] This can be interpreted that states are obliged to develop their national systems on environmental responsibility and liability, so that these national regimes would *primarily cover damage to the marine environment*.[67] Therefore, it cannot be stated that states could incur responsibility on the basis of article 235.

3 Civil liability for marine environmental damage

3.1 No regime

Part XII of the UNCLOS on the protection and

on the dispute between Ireland and United Kingdom ("OSPAR" Arbitration), Final Award on 2 July 2003; Permanent Court of Arbitration on the dispute between Ireland and United Kingdom ("MOX plant case"), Order No. 6 on 6 June 2008.

[62] The MOX plant case (in its proceedings in different international tribunals) does not analyze responsibility or liability as such, even when the case raises some interesting questions of jurisdiction and applicable law for international environmental claims under the UNCLOS. The analysis of the case here concentrates merely on the facts that are relevant form the point of view of the Nord Stream case. See also M. B. Volbeda: The MOX Plant Case: The Question of "Supplemental Jurisdiction" for International Environmental Claims Under UNCLOS in *Texas International Law Journal*, Vol 42, No 1, 2006, pp. 211–212.

[63] 9.11.2001, Request for Provisional Measures, ITLOS proceedings.

[64] See further The MOX plant case (*Ireland v. United Kingdom*), Order, December 3, 2001, paragraphs 82–84 and 1.

[65] See also C. Voigt: State Responsibility for Climate Change Damages, pp.9–10.

[66] Civil liability is discussed further later in the article.

[67] In Finland, for example, the Act on reparation of certain environmental damages, Laki eräiden ympäristölle aiheutuneiden vahinkojen korjaamisesta (383/2009) (translation done by the author), covers such damage on the Finnish EEZ.

preservation of the marine environment addresses several sources of *marine pollution*. However, only the ship-source pollution has an existing operative civil liability regime. Hence, it needs to be pointed out that there is no global convention dealing with environmentally damaging activities on the continental shelf (exploration and exploitation), and that there is no liability regime in force either.[68] IMO has developed the regimes for the liability and compensation for damage to the marine environment, but these regimes cover only a part of the hazardous environmental challenges that the marine environment faces.[69] The civil liability regimes have been developed in relation to specific activities which are considered to be ultra-hazardous. Therefore, regimes such as the CLC (oil pollution damage)[70] and HNS (carriage of hazardous and noxious substances)[71] are not relevant in the Nord Stream case since they only apply to these specified activities.

States have been somewhat careful on what kind of activities they are ready to place under international liability regimes in general, although the EC regulation needs to be of course distinguished from these international environmental law regimes.[72]

3.2 What damage and threshold for liability?

Environmental damage needs to be shown in order for the liable party to compensate for it. The two applicable international treaties that are the most relevant in the Nord Stream case, namely the UNCLOS and the Helsinki Convention, do not give definite answers to what substitutes damage in the marine environment of the Baltic Sea. The definition given to "pollution" in article 4 (1) of the UNCLOS provides some guidance in respect to the standard of damage: "deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities". This definition is not, however, sufficient to define damage when constructing liability.[73] The Helsinki Convention, in its article 2 (1), also gives a definition to pollution, not to damage. The definition is rather similar to the definition in the UNCLOS, and at least as vague.

When it comes to the UNCLOS rules in articles from 192 to 194 and 235 on the protection of the marine environment, the wide discretion allowed in these articles limits their applicability towards responsibility and liability. The lack of clarity in the rules that must be observed might give states the discretion to choose the rules they wish to follow – states can implement these rules according to their own capabilities as reiterated in article 194.[74] Thus, actual *liability* based on breach of UNCLOS articles 192 to 194 and 235 (on the different preventive obligations, relating to the protection and preservation of the marine environment and responsibility and liability) would be impossible to establish. The UNCLOS does not hold any rules for compensation either.

[68] L. A. de La Fayette: *Compensation for Environmental Damage in Maritime Liability regimes*, p. 232.

[69] M. Göransson: Liability for Damage to the Marine Environment in A. Boyle and D. Freestone: International Law and Sustainable Development. Past achievements and future challenges, *Oxford University Press New York* 1999, p. 357; L.A. de La Fayette: *Compensation for Environmental Damage in Maritime Liability regimes*, p. 236.

[70] Convention on Civil Liability for Oil Pollution Damage (1969). 9 ILM 45 (1970).

[71] International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, May 3, 1996, reprinted in 35 ILM 1406 (1996).

[72] M. L. Larsson: *The Law of Environmental Damage*, p. 172; P. Sands: *Principles of International Environmental Law*, pp. 904–905; R. R. Churchill and V. Lowe: *Law of the Sea*, p. 358.

[73] See also The MOX plant case (*Ireland v. United Kingdom*), Order, 3 December 2001.

[74] P. Sands: *Principles of International Environmental Law*, pp. 396 and 900; L. A. de La Fayette: Compensation for Environmental Damage in Maritime Liability regimes in A. Kirchner (ed.): International Marine Environmental Law. Institutions, implementation and innovations, *Kluwer Law International* 2003, pp. 232–232; E. Louka: *International Environmental Law*, p. 167; P. W. Birnie and A. E. Boyle: *International Law and the Environment*, p. 353; R. S. J. Tol and R. Verheyen: State responsibility and compensation for climate change damages – a legal and economic assessment, *Energy Policy* 32 (2004), p. 1117. For further discussion, see also ILC Draft articles on Prevention of Transboundary Harm from Hazardous Activities 2001, with commentaries 2001. Available online at http://untreaty.un.org/ilc/texts/ instruments/english/commentaries/9_7_2001.pdf (8.4.2010).

Polluting human activity might cause environmental damage,[75] but not all environmental damage triggers liability.[76] There are no agreed international standards which *establish a certain threshold* that would always trigger liability and allow claims to be brought. Different criteria are used in different instruments. The Trail Smelter case, for example, referred to an injury of "serious consequence".[77] Outside actual liability claims, ITLOS has referred to "serious harm to the marine environment"[78] as the conduct that is not allowed or as the circumstance justifying the prescribing of provisional measures, in line with article 190 of the UNCLOS.[79]

Therefore, it seems that the correct threshold depends on the facts of each case as well as on regional and local circumstances. A number of civil liability instruments do define damage and establish thresholds for environmental damage or adverse effects, but generally states prefer using more open-ended definitions and analyze the threshold by taking into consideration the case at hand. According to *Sands*, it seems to be undisputed that the threshold requires a relatively high level of environmental damage.[80]

3.3 Relevant civil liability instruments

3.2.1 Environmental liability directive

Directive 2004/35/EC of the European Parliament and of the European Council of April 21, 2004, on environmental liability with regard to the prevention and remedying of environmental damage establishes a framework of environmental liability[81] based on the *polluter pays principle*, in line with article 191 (2) in the Treaty on the Functioning of the European Union (ex article 174 [2] of the EC Treaty)[82] as well as article 1 of the environmental liability directive. The directive concentrates on damages *per se*. The directive was the result of three decades of legislative work for introducing a legal instrument to compensate for environmental or environmental-related damage.[83]

The environmental liability directive provides

[75] The international environmental law instruments contain numerous definitions for the *concept of environmental damage*, but there are no final conclusions on the definition. As *Sands* points out, there is a distinction between (compensable) environmental damage and pollution. Pollution on a "tolerable" level is not compensable. P. Sands: *Principles of International Environmental Law*, p. 877. See also T. Kuokkanen: Defining environmental damage in international and Nordic environmental law in The Legal Status of Individual in Nordic Environmental Law, *Juridica Lapponica Series* 10 1994, p. 56; E. H. P. Brans*: Liability for damage to public Natural Resources*, pp. 9–12; B. Sandvik: Miljöskadeansvar. En skadeståndsrättslig studie med särskild hänsyn till ansvarsmotiv, miljöskadebegrepped och ersättning för skada på miljön, *Åbo Akademi University Press* 2002, p. 123. P. Sands: *Principles of International Environmental Law*, p. 877.

[76] The early environmental cases did not treat environmental damage as a separate issue from other damages to be compensated, and, for example, the arbitral court in the Trail Smelter case did not look into environmental damage as such. Trail smelter case (*United States v. Canada*), p. 1965; P. Sands: *Principles of International Environmental Law*, p. 878. The ICJ case on Gabčíkovo-Nagymaros project was actually the first international court case to treat environmental damage as a separate compensable damage. Gabčikovo-Nagymaros Project (*Hungary v. Slovakia*), Judgment, ICJ Reports 1997, pp. 7–81, paragraph 152.

[77] Trail smelter case (*United States v. Canada*), p. 1965; P. Sands: *Principles of International Environmental Law*, p. 878.

[78] Case concerning Land reclamation by Singapore in and around the straits of Johor (*Malaysia v. Singapore*), Order, 8 October 2003, paragraph 2.

[79] The MOX plant case (*Ireland v. United Kingdom*), Order, December 3, 2001, p. 11, paragraph 63.

[80] The difficulty of agreeing a threshold is illustrated by the Chernobyl accident. The absence of generally accepted standards on safe levels of radioactivity made it very difficult to assess whether these measures were even justified, and therefore resulted confusion. P. Sands: *Principles of International Environmental Law*, pp. 879–880.

[81] The European Parliament has raised concerns on the liability issue related to the Nord Stream case. See further P6_TA(2008)0336, Environmental impact of the planned gas pipeline in the Baltic Sea, European Parliament resolution of 8 July 2008 on the environmental impact of the planned gas pipeline in the Baltic Sea to link up Russia and Germany (Petitions 0614/2007 and 0952/2006) (2007/2118[INI]).

[82] See more on polluter pays principle from N. de Sadeleer: Polluter-pays, Precautionary Principles and Liability in G. Betlem and E.Brans: Environmental Liability in the EU. The 2004 Directive compared with US and Member State Law, *Cameron May* 2006, p. 98.

[83] See also European Commission White Paper on Environmental Liability from 2000 (COM [2000] 66 final). The White Paper was the first outcome of the long years of preparation. The White Paper examines important factors for a functional EU-wide environmental liability regime. E. H. P. Brans: *Liability for damage to public Natural Resources*, p. 177.

compensation for damage to *biodiversity* protected on European and national levels, *to waters* as regulated under the Water Framework Directive (2000/60/EC) and to *contaminated land* posing threat to human health.[84]

At the outset, the directive sounds promising for the Nord Stream case: it has a comprehensive view on the damage, and it is not restricted to special types of environmental damage. Environmental damage is defined by the article as damage to protected species and habitats, damage to water and damage to soil, in line with article 2 of the environmental liability directive. The directive also defines damage as the "a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly" in its article 1 (2).[85]

In line with article 3 (a) of the environmental liability directive, the directive firstly applies to environmental damage caused by any of the occupational activities listed in Annex III and to any imminent threat of such damage occurring by reason of any of those activities. Annex III gives an extensive listing of activities. All activities listed in Annex I of the Council Directive 96/61/EC concerning integrated pollution prevention and control (the IPPC directive), although with a few exceptions, are activities under the environmental liability directive (paragraph 1, Annex III). Annex I to the IPPC directive does not list pipelines as industrial activities under the IPPC directive, and therefore pipelines are not under article 1 and Annex III of the environmental liability directive either. Furthermore, the directive applies to *environmental damage* – the definition of environmental damage *does not include territorial waters or EEZ*, see further article 2 of the environmental liability directive and also article 2 in the Water Framework Directive.

Secondly, the directive applies to damage *to protected species and natural habitats* caused by any occupational activities other than those listed in Annex III and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligence, in line with article 3 (b) of the environmental liability directive. The application refers to damage to protected species and natural habitats that are protected under the EC legislation, namely the Council Directive 79/409/EEC on the conservation of wild birds (the Birds directive) and Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the Habitats directive).[86]

The point here is that since the environmental liability directive covers *all occupational activities* other than those listed in Annex III to the environmental liability where there is damage or imminent threat of damage to species or natural habitats protected by EC legislation, the environmental liability directive seems to be applicable to the Nord Stream pipeline case, although with a limited scope. However, the realization of such liability depends on specified criteria: firstly, on how to prove the causal connection between the possible damage and the Nord Stream project, and secondly, how to proof fault or negligence.[87]

Furthermore, according to article 16 of the environmental liability directive, states are allowed to maintain or adopt provisions in relation to the prevention and remedying of environmental damage, including

[84] See also L. A. de La Fayette: *Compensation for Environmental Damage in Maritime Liability regimes*, p. 260.

[85] See also L. Krämer: Directive 2004/35/EC on Environmental Liability in G. Betlem and E.Brans: Environmental Liability in the EU. The 2004 Directive compared with US and Member State Law, *Cameron May* 2006, pp. 29–31. See also A. Jóhannsdóttir: *The significance of the default: A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law*, pp. 215–217.

[86] See also the website of the EU on environmental liability http://europa.eu/legislation_summaries/enterprise/interaction_with_other_policies/l28120_en.htm (25.2.2010).

[87] The definitions and the scope of the environmental liability directive remain somewhat unclear in relation to damage to Habitats and Birds Directives. This creates legal uncertainty. For example, it is not clear whether liability covers only damages to natural resources (protected in Habitats and Birds Directives) in Natura 2000 areas or if it also expands to the areas outside of the Natura 2000 network. See further discussion in P. Kallio: Luontovahingot EY:n Ympäristövastuu direktiivissä – vastuun ulottuvuus ja merkittävyyskynnys (has an abstract in English, Damages to Protected Habitats and Species Under the 2004 EC Environmental Liability Directive – Scope of the Liability and Significance thresholds) in Ympäristöpolitiikan- ja oikeuden vuosikirja, *Saarijärvi* 2007, pp. 168–176.

the identification of additional activities to be subject to the prevention and remediation requirements and the identification of additional responsible parties.[88]

The environmental liability directive has been implemented *in Finland* with an Act on reparation of certain environmental damages.[89] The Finnish Act on Reparation of Environmental Damage also applies to significant pollution in the water body as regulated in the Finnish Environmental Protection Act, article 84. According to article 3 of the Environmental Protection Act, water body refers to water areas referred to in chapter 1, section 1, subsection 2, and to territorial waters referred to in section 3 of the Water Act. The Water Act regulates that *everything that applies to water body, also applies to the Finnish territorial waters and EEZ*, in line with article 1:3 of the Finnish Water Act. In line with article 84 of the Finnish Environmental Protection Act, significant pollution in the water body applies only to significant pollution due to violation or negligence. The Finnish Environmental Protection Act prohibits any acts which cause or may cause marine pollution, see further article 9.

Finally, since an operation (any operation, also an operation that has been permitted by an environmental permit) against the prohibition to pollute marine environment *would violate* the Finnish Environmental Protection Act, the act also falls under the application of the Finnish Act on reparation of certain environmental damages. The scope of the application is then wider than the scope of the application in the environmental liability directive. The Nord Stream Project is subject to national legislation in each of the countries of whose territorial waters and/or EEZs it crosses. It needs to be noted, however, that the Finnish Act on reparation of certain environmental damages applies only if the damage occurs in the Finnish territorial waters or EEZ.

[88] Minimum harmonization. J. H. Jans and H. H. B. Vedder: European Environmental Law, *Europa Law Publishing* 2008, p. 98.

[89] Laki eräiden ympäristölle aiheutuneiden vahinkojen korjaamisesta (383/2009), (translation done by the author).

3.2.2 Lugano Convention

In 1993, the Council of Europe passed the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (the Lugano Convention).[90] The Lugano Convention of 1993 has not yet entered into force.[91] A strict liability for damage caused by activities dangerous to the environment, including activities conducted by public authorities, is provided by article 1 of the Lugano Convention. It covers the environmental risks of dangerous substances, genetically modified organisms, dangerous micro-organisms and waste, as listed in article 2.[92] The Lugano Convention defines damage to life and personal injury and damage to property, *but also damage to the environment*: damage refers, in line with article 2 (7), to loss or damage by impairment of the environment. The Lugano Convention holds the operator, i.e. the person who exercises the control of a dangerous activity, primarily liable. *Surprisingly*, this liability regime, in its article 4, *explicitly mentions pipelines*: the Lugano Convention does not apply to carriage, but it does apply to "*carriage by pipeline*, as well as to carriage performed entirely in an installation or on a site inaccessible to the public" [italics by the writer]. Hence, this explicit mention limits cables and pipelines *outside* the Lugano Convention.

The Lugano Convention suggests an innovative approach towards environmental damage. It establishes rules of application beyond any particular industrial sector, particular activity or source of environmental damage.[93] The Lugano Convention does not provide specific limitations to liability (see further articles 5 and 6 of the convention). This might also be one of the reasons behind the reluctance of

[90] Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, reprinted in 32 ILM 480 (1993).

[91] Only nine states have signed the Convention, but no state has ratified it yet (three ratifications would be required). Council of Europe Treaty office website http://conventions.coe.int (25.2.2010).

[92] See Annex I, Directive 67/548/EEC.

[93] P. Sands: *Principles of International Environmental Law*, pp. 933–934.

states to sign and ratify the convention. In addition, the Lugano Convention covers a rather wide variety of dangerous activities, which makes the Convention also unappealing for ratification. Even though the Lugano Convention requires a low level of ratification and would, as such, create a very effective liability scheme, it is unlikely that the convention will ever enter into force.[94] Regardless of the steps taken forward, even a progressive convention becomes more or less powerless without any signatures and ratifications. Therefore, the relevance of the Lugano Convention on the field of international environmental law on environmental liability – as well as in the Nord Stream case – is secondary.[95]

4 State liability and the Nord Stream case

4.1 Draft Articles on State Responsibility

On the international environmental field, there are no general rules governing responsibility and liability. There are non-binding instruments that generate rules on environmental liability (such as the Lugano Convention), but, in general, states have not been too keen on binding themselves to overarching liability regimes.[96] *General principles on international liability* have gone through significant developments during the last decades, mainly due to the work of the ILC. When it comes to environmental damage, however, the liability rules are still evolving and the rules require further development regarding the scope and exact content of environmental liability as such.

In 2001, the ILC adopted the Draft Articles on the Responsibility of State for Internationally Wrongful Acts (Draft Articles on State Responsibility). The Draft Articles culminated decades of ILC work on state responsibility, and, most importantly, the articles reflect existing customary law.[97] Therefore, they reflect international law on their essential content. Although the ILC Draft Articles are not specifically aimed at environmental situations,[98] they still create a regime of general international law. The Draft Articles create a standard of strict liability for harm that cannot be predicted or prevented.[99]

The Draft Articles create basic rules of international law on state responsibility for their *internationally wrongful acts*, and therefore they are secondary rules which do not define the actual content of the international obligations. International obligations are the primary rules, the substance. Therefore, the Draft Articles do not give the substantial basis for the breach, but give the general conditions under international law for the state to be considered responsible

[94] E. Louka: *International Environmental Law*, pp. 466–468; P. Sands: *Principles of International Environmental Law*, p. 933.

[95] It needs to be noted, however, that the EC directive on environmental liability is also an instrument with a more general approach.

[96] See also P. Sands: *Principles of International Environmental Law*, pp. 870–871. On the other hand, however, states can also accept responsibility. E. Louka: *International Environmental Law*, p. 469.

[97] Report of the International Law Commission on the work of its fifty-third session (23 April – 1 June and 10 August 2001), Document A/56/10, chapter on State Responsibility (ILC Report on Draft Articles on State Responsibility). The ILC work on state responsibility and liability is still continuing; see further http://untreaty.un.org/ilc/sessions/53/53-sess. htm (24.2.2010).

[98] In this respect, note also ILC work on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law. The relevance of the ILC work on international liability in the Nord Stream case is questionable. They do not offer that much more than what already exists, namely the obligation to prevent transboundary harm and to develop law on environmental liability. Therefore, the regime on prevention of transboundary harm or Draft Principles on International Liability are not of that much relevance in the Nord Stream context even when they do spell out certain concepts (like damage and environment) more clearly than the other regimes. See further Report of the International Law Commission on the work of its fifty-third session (April 23 – June 1 and August 10 2001), Document A/56/10, chapter on International Liability (ILC Report 2001 on International Liability) as well as Prevention of Transboundary Harm from Hazardous Activities and the secondary rules, Draft Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.

[99] ILC has the view that the injured state is in no position to control activities of other states (here the activities of the source state) P. W. Birnie and A. E. Boyle: *International Law and the Environment*, pp. 188–189; See more on state responsibility especially in public international law from A. Cassese: International law, Second edition, *Oxford University Press* 2005, pp. 245 and 262; See also M. B. Volbeda: *The MOX Plant Case: The Question of "Supplemental Jurisdiction" for International Environmental Claims Under UNCLOS*, pp. 211–212.

for violations of environmental obligations and the legal consequences of such act or acts.[100]

So far the discussion in this article has focused on the international obligations of states, on the *primary rules*. In the case of the Nord Stream, the UNCLOS and the Helsinki Convention are the international instruments that regulate on the *substance*, namely on the obligations that are imposed on states by articles from 192 to 194 of the UNCLOS, and article 3 of the Helsinki Convention. Thus, these are the international obligations that set the primary obligations.

The basic rule of the Draft Articles, in line with article 1, is that every internationally wrongful act of a state entails the international responsibility of that state, and that a breach of international law by a state constitutes international responsibility of that state. There are *two essential elements* of an internationally wrongful act of a state. According to article 2, an internationally wrongful act of a state occurs when the conduct consisting of an action or omission is either *attributable* to the state under international law or constitutes a *breach* of an international obligation of the state. An act of a state cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation even if it violates the state's national laws.[101] In international environmental law the basic principle translates that for a state to be held responsible for pollution, such pollution needs to be wrongful under international law. If the pollution is legal, the state (or states) cannot be held responsible.[102]

The following sections of this article aim at analyzing how state responsibility could be established according to the ILC Draft Articles.

4.2 Systematization

4.2.1 Act of state

The conduct of any state organ is considered an act of that state under international law – whether the organ exercises legislative, executive, judicial or any other functions, whatever its position is and whatever its character as an organ is (see further article 4). Articles from 5 to 11 show that the formulation is general, but also very wide-ranging.[103] The articles do not merely stick to the narrow view on state as an actor; the articles do, in fact, cover a variety of actors and their conduct. Therefore, the articles also make it difficult for a state to try to escape responsibility under the fact that the conduct cannot be attributed to a state.

In environmental cases this wide application could be seen as a positive aspect since pointing out the responsible one is usually challenging. There is no specific requirement for fault either; it is only the act of state that matters.

What would constitute an *act of state* in the Nord Stream case is a question that deserves attention, or, put in other words, it could be asked how the state is indentified. Nord Stream AG is building a pipeline through the Baltic Sea. A certain level of marine pollution is due to happen no matter what. The possibility of an unplanned, accidental event causing significant harmful impact on the marine environment cannot be ruled out, and the risk for environmental damage exists.

The state responsibility reflects the responsibility – actions or omissions – of a state. The relevance of different actors in the Nord Stream case is a somewhat tangled issue: Nord Stream AG is the company pursuing the construction of the pipeline since it has acquired the permission to do so by the states. It is the states who have the freedom to lay pipelines, as stated in the article 79 (1) of the UNCLOS. Since the pipeline

[100] See further discussions on the concepts, responsibility and liability as well as discussions on the form of the instrument. ILC Report on Draft Articles on State Responsibility, pp. 24–25 and 31.See also J. Crawford and J. Peel and S. Olleson: The ILC's articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading in *European Journal of International Law*, EJIL (2001), Vol 12, No. 5, pp. 965–670.

[101] The state cannot escape the characterization of that conduct as wrongful by international law by stating that the conduct is not violating its own internal law, as this is regulated by article 3 of the Draft Articles. ILC Report on Draft Articles on State Responsibility, p. 36.

[102] See also E. Louka: *International Environmental Law*, p. 468; ILC Report on Draft Articles on State Responsibility, pp. 33–34.

[103] ILC Report on Draft Articles on State Responsibility, pp. 40 and 53.

passes territories fully or partly under national jurisdiction, the states in command of the national jurisdictions also play a role being the ones to allow the construction.

The MOX plant case (ITLOS proceedings) was a dispute between two states, Ireland and the UK. Ireland accused the UK of breaching its obligations under the UNCLOS (article 194 among others) in relation to the UK *authorizing and commissioning* the MOX plant, and, by doing so, Ireland saw the UK "failing to take the necessary measures to prevent, reduce and control pollution of the marine environment".[104] In the Southern Bluefin Tuna Cases between New Zealand and Japan, and Australia and Japan, New Zealand and Australia claimed that Japan had failed to comply with its obligation to cooperate in the conservation of the southern bluefin tuna stock by, among other things, *authorising* experimental fishing for southern bluefin tuna.[105] In the ICJ case concerning Pulp Mills on the River Uruguay between Argentina and Uruguay, Argentina instituted proceedings against Uruguay for the alleged breach by Uruguay of certain environmental obligations. The breach was said to arise from "the *authorization*, construction and *future commissioning* of two pulp mills on the River Uruguay [italics by the writer]".[106]

The Nord Stream project is subject to national legislation, and the project has received the required environmental permits. In practice, these environmental permits allow marine pollution on a specified level or type, but in order to minimize these impacts, the permits also issue rules. Even though these permits make the pollution *legal* in some sense, the permits cannot be issued in the first place if the rules they include violate relevant international environmental regimes on the Baltic Sea area.

In addition, the Finnish Government, for example, has issued an approval (required by the Finnish internal law) for the project. Hence the countries that have issued permits or approvals to the Nord Stream case have also permitted or approved the conduct of Nord Stream AG when the company is carrying out its project – it is an action the *states have permitted within their jurisdiction or control*. Therefore, this should then be understood, in the light of the Draft Articles, so that these states also become *responsible* for the project when they allow the project to be carried out in an area under their jurisdiction.

On the other hand, however, the basis of the possible liability of the coastal states such as Finland depend on its obligations under the UNCLOS and other international binding obligations, as stated in the Draft Articles 2 and 11. The coastal states also have limited competence to regulate the laying of the pipelines under article 79.

The ILC Report on Draft Articles on State Responsibility states that:

"*The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An 'act of the State' must involve some action or omission by a human being or a group: 'States can act only by and through their agents and representatives.' The question is which persons should be considered as acting on behalf of the State, i.e. what constitutes an 'act of the State' for the purposes of State responsibility. In speaking of attribution to the State what is meant is the State as a subject of international law. - - For the purposes of the international law of State responsibility the position is different. - - In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in chapter II.*"[107]

A state cannot "act of itself". Act of the state must involve some action or omission by a human being or

[104] The MOX plant case (*Ireland v. United Kingdom*), Order, December 3, 2001, paragraph 26.

[105] Southern Bluefin Tuna Cases (*New Zealand v. Japan; Australia v. Japan*), Order 27 August 1999, paragraphs 28–29.

[106] Case Concerning Pulp Mills on the River Uruguay (*Argentina v. Uruguay*). Request for the indication of provisional measures. Order of 13 July 2006, paragraphs 1 and 73.

[107] ILC Report on Draft Articles on State Responsibility, p. 35.

group – here it is Nord Stream AG. Therefore, an action of a private entity authorized, permitted, allowed or otherwise commissioned by the state could be seen as an act of state.[108]

There is one more viewpoint to be added to the previous discussion on the act of state – *the polluter pays principle*. Even though the principle is still under construction, it can be safely stated that *the polluter pays principle* reflects a principle according to which the costs of the pollution should be borne by the one responsible for causing the pollution.[109] Traditional view on *the polluter pays principle* entails that the polluter has the primary responsibility for environmental harm. According to the *principle of state responsibility*, the state is primarily responsible for the violation of international obligations. The regimes on environmental liability actually aim to minimize the resort to the principles of state responsibility by applying *the polluter pays principle* in the private law liability regimes in the national law but not on the international level. The states use this as an alternative for state responsibility in international law.[110]

In the Nord Stream case Nord Stream AG is the operator of the activity causing environmental impacts on the Baltic Sea and to the environment of other states. Nord Stream AG is, however, operating its polluting activity with a permit. The state has not only permitted the activity, but it is also the state that regulates and controls the activity. Who then is the polluter in this case – is it the operator of the polluting activity, or could it be the state regulating, controlling and licensing the activity?

The Trail Smelter case between the USA and Canada was about a Canadian company causing pollution, but the actual case was still about state responsibility, a state v. state case. In the MOX plant case, Ireland invoked proceedings against the UK for commissioning the nuclear plant, and the Pulp Mills on the River Uruguay case was between Argentina and Uruguay for Uruguay authorizing the polluting activities. In these cases, for example, it was an *individual operator* actually causing the environmental damage, but there were still international state v. state claims brought between states. In these cases there was no generally applicable environmental liability regime.

The victim of the pollution cannot claim compensation, or at least not in full, if the liability of the operator cannot be established or if the liability has been limited. Therefore, the status of the victim is rather weak against the operator. For the *polluter pays principle* to apply fully in these situations, the state authorizing the activity should be held liable on a residual basis, *de Sadeleer* argues. The rights of the victim as being justified to receive compensation would be protected. The victim state would receive compensation from the source state and compensate its nationals who have suffered loss due to the damage. The source state on the other hand would then claim the operator for the damages with an interstate claim.[111]

It seems that the "lower threshold" for states to compensate for damage would, at least, secure the rights of the pollution damage victim better. The state being responsible for the activity it allows and controls would also bear the responsibility for the environmental pollution to another state. The national laws on reparation also include other forms of reparation besides compensation; therefore the state could also oblige its national to restore the environmental status before the damage occurred. This is, however, usually not possible due to the nature of the environmental impact. Therefore *the polluter pays principle* seems to enable two different scenarios for application: firstly, one where the operator would be held liable for the

[108] On international personality, see R. M. M. Wallace: *International law*, pp. 60–61.

[109] N. de Sadeleer: *Polluter-pays, Precautionary Principles and Liability*, p. 98. See also N. de Sadeleer: Environmental Principles, *Oxford University Press* 2002, pp. 25–27; J. H. Jans and H. H. B. Vedder: *European Environmental Law*, pp. 35 and 43–45; P. W. Birnie and A. E. Boyle*: International Law and the Environment*, p. 95.

[110] N. de Sadeleer: *Environmental Principles*, p. 24.

[111] "nothing prevents an act of wrongful pollution of being evaluated from the perspective of the requirement for duty of care owed by the liable party - - the granting of an administrative authorization does not automatically absolve its holder from liability." N. de Sadeleer: *Environmental Principles*, pp. 24–25 and 40.

polluting activity, and, secondly, one where the state would be held liable, but residually to the operator (according to internal law, however).

4.2.2 Breach

The second element of the wrongful act is that the action or omission constitutes a breach of an international obligation of a state. According to article 12 of the Draft Articles, there is a breach of an international obligation by a state when an act of that state is not in conformity with what is required of it by that obligation. As already stated, in the Nord Stream case the content of the international obligation comes from the UNCLOS and the Helsinki Convention (articles from 192 to 194 of the UNCLOS and article 3 of the Helsinki Convention).

A breach of an international obligation consists of a disconformity between the conduct required and the conduct actually adopted. In the Nord Stream case the *conduct required* could be translated as the obligation of states to take all measures necessary to ensure that activities are conducted in a way that they do not to cause damage by pollution (as it is regulated by article 194 of the UNCLOS). The conduct actually adopted could be seen as, for example, a polluting incident causing damage by pollution. This can be expressed in different views. In the Gabčíkovo-Nagymaros Project case[112] the ICJ used the expression "[t]he Court infers from all these elements that, in the present case -- Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about". The ICJ also explicitly referred to state responsibility by stating that it is well-established that when a state "has committed an internationally wrongful act" its responsibility is "likely to be involved whatever the nature of the obligation it has failed to respect".[113] The ICJ actually referred to the ILC Draft Articles on State Responsibility, as they were provisionally adopted by the ILC already in 1976.

The final analysis of a breach lies always in the hands of interpretation and application that take the case objective and the facts of the case into account.[114] In the Nord Stream case, therefore, analyzing the breach would be based on the facts of the claimed breach, but also on established customary rules. However, it needs to be noted that the obligations set in the UNCLOS are fairly open for interpretation, so constituting the breach would be a challenging task, as already discovered in the article.

4.2.3 Environmental damage included?

The responsible state is under an obligation to make full reparation of the injury caused by the wrongful act, and includes "any damage, whether material or moral", as in article 31. Furthermore, according to article 31, injury includes any damage, whether material or moral, *caused by the internationally wrongful act of a state*. Therefore, it is *only* an injury caused by the internationally wrongful act of a state for which full reparation must be made. The subject matter of reparation is, globally, the injury resulting from the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.[115] Therefore, there needs to be a causal link between the wrongful act attributed to the state and the damage that has incurred.

According to article 34, the forms of reparation are restitution, compensation and satisfaction. Full restitution is not often possible in environmental damages, so compensation would be the most relevant form of reparation, according to article 36.

The key concept here is, of course, damage.[116] What

[112] Gabčíkovo-Nagymaros Project (*Hungary v. Slovakia*), Judgement, 25 September 1997.

[113] Gabčíkovo-Nagymaros Project (*Hungary v. Slovakia*), Judgement, 25 September 1997, paragraph 57 and 47.

[114] ILC Report on Draft Articles on State Responsibility, p. 54.

[115] ILC Report on Draft Articles on State Responsibility, p. 92.

[116] More discussion on environmental harm, see for example M. Bowman: The Definition and Valuation of Environmental Harm: An Overview in Environmental Damage in International and Comparative Law, *Oxford University Press* 2002, pp. 1–2.

is the material or moral damage for which the state is responsible? Since the article has already opened the discussion on the definition of the concept of damage, this point deserves some attention.

The Draft Articles seem to take environmental damage into consideration. If two or more states have agreed to engage in particular conduct, for example building and operating a pipeline, the failure by one state towards the obligations set for the conduct concerns the other. The Draft Articles mention harm to the environment explicitly: "In many cases, the damage that may follow from a breach (for instance, harm to a fishery from fishing in the closed season, *harm to the environment by emissions exceeding the prescribed limit*, abstraction from a river of more than the permitted amount) may be distant, contingent or uncertain. Nonetheless, states may enter into immediate and unconditional commitments in their mutual long-term interest in such fields [italics by the writer]". The Draft Articles define "injury" in a broad manner, leaving it, again, to the primary obligations to specify what is required in each case.[117]

Since the instruments of international law, particularly on transboundary pollution, are filled with definitions of damage, the Draft Articles needed to be drafted in an open way in order to stay flexible for the primary obligations. Even though the definition is broad, one should not assume that any definition of injury or damage would do – but that it is up to the primary obligation to define the damage.[118]

Compensation clearly also includes damage to the environment. According to the ILC Report, compensation has been awarded to environmental damage as well. Damage to such environmental values, as biodiversity, is "no less real and compensable than damage to property". It is also mentioned that environmental damage is often difficult to measure.[119]

Hence it can be concluded that environmental damage, as defined in the given international environmental law instrument, is included in the Draft Articles formulation.

4.3 Balancing primary obligations for liability

It is now established that environmental damage, and therefore marine pollution damage, could be applicable as "injury" under the ILC Draft Articles. Furthermore, violation of the UNCLOS and the Helsinki Convention obligations could constitute an internationally wrongful act of a state and hence trigger state responsibility. By studying the MOX plant case, this article already observed how the UNCLOS obligations on protecting and preserving the marine environment function in an international dispute. It all boils down to the primary obligations again. What constitutes the obligation against which the violation or breach could be established? The secondary ILC rules are not applicable if the primary rules do not set the substance.

Ebbeson introduces *balancing norms* as a normative approach towards international obligations. Balancing norms are a particular kind of regulatory technique for defining obligations where the balancing as such is required *inside* the norm, not *between* norms. These balancing norms usually create frameworks that need to be complemented by information on interests, facts and other legal considerations before any normative solution can be drawn. As frameworks, they provide for more precise rules. International obligations defined by the balancing norm leave the minimum standard vague.[120]

The UNCLOS article 194 on measures to prevent, reduce and control pollution of the marine environment is an apt example of an article containing a balancing norm: "best practicable means at their disposal and in accordance with their capabilities". What constitutes the balancing norm in this extract?

[117] ILC Report on Draft Articles on State Responsibility, p. 92.

[118] J. Crawford and J. Peel and S. Olleson: *The ILC's articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, pp. 971–972.

[119] ILC Report on Draft Articles on State Responsibility, pp. 101–102.

[120] J. Ebbeson: *Compatability of International and National Environmental Law*, pp. 86–88. See also A. Jóhannsdóttir: *The significance of the default: A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law*, p. 213.

Firstly, what is "best practicable"? In the Nord Stream case, is it the most cost-efficient choice? The most environmentally sound route? Or is it the best cost-efficient choice considering the environmental aspects? Secondly, what does "means at their disposal" actually mean? Thirdly, what are the "means in accordance with their capabilities"? What capabilities are of relevance here? Economic or legislative capabilities? If we look at the Helsinki Convention, the balancing norm can also be recognized there: "take all appropriate legislative, administrative or other relevant measures".

There are plenty of question marks surrounding these issues. The point here, however, is that the obligation for environmental protection can be balanced against other interests – the international instrument is directing legislative norms to states, but with the content lacking definition, defining the content is left to the states themselves. States are allowed to balance environmental protection against other factors.[121]

The Draft Articles on State Responsibility do not define the content of the obligation, so it depends solely on the primary obligation. If the obligation is not sufficiently well-defined and clear, is it then possible to define the violation or breach of that obligation in a way that would establish responsibility due to a wrongful act? Breach of an international obligation of the state is a compulsory prerequisite for establishing a wrongful act of a state.

4.4 Analysis

After systematizing and analyzing the Draft Articles, the next thing to do is to assess their relevance in the Nord Stream case. How relevant are the Draft Articles on State Responsibility in the Nord Stream case? Could state responsibility be established? Furthermore, it is important to ask if the Draft Articles can solve the problem presented earlier in this article: the fact that so far the article has not found any fully applicable liability regime, since the existing liability regimes do not offer a solution for possible liability claims.

The Draft Articles reflect and codify the existing customary international law in the field of state responsibility,[122] and the Draft Articles are the result of decades of work on the matter. When it comes to the actual implementation of these Draft Articles, the first thing to point out is that they are not binding. The Draft Articles are a *soft law* instrument.[123] Albeit soft law instruments do have a fairly good standing in the field of environmental law in particular,[124] they work rather as an element or tool for interpretation than as a binding, decisive tool in the consideration. Even though soft law instruments are not binding *per se*, they are often seen as "informally" establishing acceptable norms of behavior and thereby codifying or even reflecting rules of customary law. This is evidently the case with the ILC Draft Articles on state responsibility as well.

This is not to diminish the value of soft law instruments in the field of environmental law in general since some of the greatest instruments of international environmental law are soft law instruments (Rio Declaration, for example). However, it seems that these soft law instruments or soft law rules require more precise regulation in a more compact instrument in a similar manner to the way the states have dealt with the Rio Declaration principles. In a way, the

[121] J. Ebbeson: *Compatability of International and National Environmental Law*, pp. 89 and 103.

[122] See for instance the discussion on the Trail Smelter case (*United States v. Canada*) from the previous sections. See further discussion from M. Drumbl: Trail Smelter and the International Law Commission's Work on State Responsibility for Internationally Wrongful Acts and State Liability in Transboundary Harms in International law: Lessons from the Trail Smelter Arbitration, Cambridge University Press 2006, pp. 1–19. Pdf available at SSRN http://ssrn.com/abstract_id=411764 (9.4.2010).

[123] This discussion needs to be separated from the binding effect of the primary rules or primary obligations. This discussion here refers only to the Draft Articles as such.

[124] See for example J. Klabbers: "there is widespread agreement that the environment might be better off if actors were being persuaded into compliance instead of being forced to comply with norms: gentle pressure, or carrots rather than sticks". J. Klabbers: Reflections on soft international law in a privatized world, *Lakimies* 7–8/2006, p. 1193. See also T. Määttä: Soft law som rättskälla på nya rättsområden i den nationella rätten, *Juridiska Föreningens Tidskrift* 6/2006, pp. 554–555 and 557.

framework, if given in the Draft Articles on State Responsibility, would need to be further elaborated as workable rules. The same motive is present in the UNCLOS and the Helsinki Convention: the states are expected to regulate further on responsibility and liability, (see again article 235 of the UNCLOS and article 25 of the Helsinki Convention).

The key to the Draft Articles is the establishment of a wrongful act. This can be done by demonstrating that the act is attributable to the state and that a breach against an international obligation has occurred. The establishment of the breach is a more complex issue. In order for there to be a breach, there needs to be an international obligation. The international obligation is the primary rule that defines the content of the obligation. In the Nord Stream case, the obligation is to protect and preserve the marine environment; to eliminate, prevent, reduce and control pollution in accordance with a state's capabilities. States are responsible for the fulfillment of their international obligations and they should ensure recourse for damage caused by pollution. The "damage" is not defined, and "pollution" is defined in a very broad manner.

According to *Jóhannsdóttir*, the absence of treaty provisions that define the state's (preventative) obligation in a given situation, a breach of the *general preventative principle*, may trigger state liability. Furthermore, it is not the legal status of the principle (obligation) that is lacking content, *but the standard of care that is required of states under the principle* "if they are to avoid being held responsible for damage".[125]

If a polluting incident occurred in the Baltic Sea due to the construction or operation of the pipeline (for instance, a damage to the ecosystems due to munitions clearing or pollution by pipeline leakage), how would these obligations respond? Firstly, the exact "pollution" or "damage" would be difficult to define. Secondly, the exact content of the obligation – have the states, according to their capabilities, allowed the construction and operation of the pipeline so that they have taken their duties to prevent marine pollution into consideration in a sufficient manner – would be a challenge. States balance these environmental obligations against other interests.[126] Thirdly, for another state to claim for reparation (including compensation) under the Draft Articles the injury (material or moral damage) needs to be sufficiently clear.

If, due to balancing of interests, the state is found to comply with all the requirements and obligations set in the UNCLOS or the Helsinki Convention (no breach), the state will not be responsible for any harm which, nevertheless, results from the activity in question – no matter how serious that harm may be. *Therefore, reflecting the reasons given above, the Draft Articles cannot be seen as the legal regime that solves the problem set for this article*. The Draft Articles undisputedly create a framework for state responsibility, and a systematized body of secondary rules. In a more concrete scenario such as the Nord Stream case, however, they do not create functional and applicable rules for establishing the responsibility.[127]

5 Conclusion

States are free to use their territory, *their environment*, for the purposes of exploring and exploiting natural resources or otherwise use their environment for their economic benefit and other purposes. The customary international law requires that states take into consideration the environment of other states, so that the actions states carry out within their jurisdiction do not cause damage to the environment of other states. International law does not hold any generally agreed

[125] A. Jóhannsdóttir: *The significance of the default: A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law*, pp. 212–213.

[126] On the balancing norm, see J. Ebbeson: *Compatability of International and National Environmental Law*, pp. 106–107, and also on the other hand, A. Jóhannsdóttir: *The significance of the default: A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law*, p. 213.

[127] Birnie and Boyle also argue that while the Draft Articles offer potentially effective means of resolving environmental disputes, reliance on the Draft Articles do have serious deficiencies (liability standards and the type of environmental damage) P. W. Birnie and A. E. Boyle: *International Law and the Environment*, pp. 199–200.

principles on international environmental liability as such even though there are, of course, options for solving environmental disputes between states as well as special regimes on civil liability over environmental damage. The first finding of this article is that there is neither a generally applicable nor a special regime on environmental liability directly applicable in the Nord Stream case. Since the Baltic Sea is tightly governed by national jurisdictions, an environmental damage could possibly lead to some environmental disagreements, disputes or liability claims. The area as such is prone to environmental damage. Therefore, in order to point out and assess the potentially relevant regime, one must search into the possibly relevant regimes and their systemization. This is what the article aimed to do.

The UNCLOS obligation to protect the marine environment needs to be taken into consideration by the state when permitting operations (pipeline) in an area under its jurisdiction. On the other hand, however, the other states have the right to lay such a pipeline. If a state allows the construction and operation of the pipeline, the state could also be seen as allowing the potential environmental impacts of the pipeline (and these harmful impacts are to be tolerated by other states). However, a state cannot allow an operation or activity against the UNCLOS obligations, and other *states are not obliged to tolerate environmental damage*. The threshold and exact content of the *primary obligation should be sufficiently defined.* The UNCLOS articles on tackling marine pollution are general and created for balancing of interests. When the obligations are balanced against other relevant criteria, it is not possible to define these criteria in order to establish liability. Therefore, environmental liability in the Nord Stream case cannot be established solely based on the UNCLOS articles on obligations, and furthermore responsibility and liability.

In section three the article discussed the civil liability instruments and the concept of environmental damage. The article found out, firstly, that the concept of environmental damage has a key function in establishing environmental liability since it defines extent of the threshold to trigger liability. However, environmental damage is poorly defined in the international environmental law. The determination of the applicable threshold seems to be tied to the facts of each case, and there are no general rules on establishing the threshold or environmental damage.

The European instruments on civil liability, the environmental liability directive as well as the Lugano Convention, were promising at the first sight. The article discovered that the environmental liability directive seems to be applicable to the Nord Stream pipeline case with a limited scope of damage to protected species and natural habitats. This application is, however, limited only to EU member states, and there is also plenty of uncertainty regarding the areal application of the directive. The Lugano Convention is not in force, and furthermore, does not apply to pipelines. However, the Lugano Convention could serve as an example of what the civil liability regime on environmental damage should stand for.

Section four of the article looked at responsibility and liability from a state's point of view, and analyzed the ILC work on state responsibility and liability. What is the relevance of the ILC work, and how is this liability established, what are the criteria to be assessed in Nord Stream case and the Baltic Sea connection? The key to state liability is the establishment of the wrongful act of state. For this purpose, the primary and secondary obligations need to be distinguished. The ILC Draft Articles on State Responsibility create secondary rules; the primary obligation in the Nord Stream case refers to the obligations analyzed in this article. The problems of defining the content of the primary obligation (UNCLOS) was analyzed earlier – the result was that the primary obligation cannot be sufficiently defined for the purposes of establishing wrongful acts. Furthermore, the ILC Draft Articles are a soft law instrument, and therefore not binding upon states. Consequently, the article found out that even though the ILC work on state liability does create a tempting framework of state liability, it is not applicable in practice due to the lack of sufficiently defined primary obligations, and secondly, due to non-binding principles.

The international environmental law on environ-

mental liability is a complex system, and as this article concluded, *it is not possible to directly point out who is to be held liable for the potential damage*. Is the liable party Nord Stream AG or the state or states, is a question that remains unanswered. *Therefore, as this article has hopefully shown, different approaches do exist.* Liability can be established by different criteria, and at last, it always seems to depend on the case facts at hand. The lack of well-defined primary obligations and generally applicable rules on environmental liability seem to be a deficiency that might reduce the efficiency of generally agreed principles of preventing, protecting and controlling marine environmental damage.