Reflections on environmental responsibility
– with an emphasis on the Nord Stream pipeline in the Baltic Sea area

- LL.M. in Natural Resources Law and International Environmental Law -

Supervisor: Professor Aðalheiður Jóhannsdóttir

Faculty of Law, University of Iceland

January 2010
Abstract

This LL.M thesis study on *Reflections on environmental responsibility – with an emphasis on the Nord Stream pipeline in the Baltic Sea area* systematizes, analyses and answers the research question: In the case of environmental damage on the Baltic Sea, due to the Nord Stream pipeline project, who is to be held liable for the damage and how is this liability established, and what are the criteria to be applied?

To answer this question, the study strives to first to indentify the applicable legal regime for the Nord Stream case scenario. Second, the study looks into the legal regime to find out whether it solves the research problem or not. For these purposes, chapter two systematizes the Nord Stream project case facts, as well as the significance of the case for the Baltic Sea area. The important rights and obligations are as well presented. Chapter three sets the scene for environmental liability by looking deeper into the rights and obligations from responsibility and liability perspective, in the framework of protection and preservation of the marine environment. Chapter four defines responsibility and liability towards environmental damage, as well as looks into the international and environmental civil liability instruments. Chapter five is important for the study; the chapter’s view is state responsibility and liability. Lastly, chapter six looks into the pollute pays principle to find out what does this principle add into the framework set in the earlier chapters.

There is no direct answer to the question set for the study; there is no generally applicable legal regime on environmental responsibility or liability available – for the Baltic Sea area or marine environment in general – that would solve the possible disagreement in the Nord Stream case. The study is therefore required to into the basic concepts like environmental damage, responsibility and liability, as well as into the basic rights and obligations of international marine environmental law. Relevant generally applicable principles of international environmental law are also analyzed. The significance of *interest balancing*, as well as *primary and secondary rules* are pointed out, in line with the research problem of the study.

Therefore establishment of responsibility, or furthermore liability, requires always a case specific viewpoint where the applicable general principles lead the way. Finally, it seems that the importance of sufficiently defined primary obligations is central, for setting up applicable criteria for the establishment of responsibility and liability in the Nord Stream case in the Baltic Sea area.
### 1 INTRODUCTION

1.1 Transboundary harm

1.2 Background: the Baltic energy challenge

1.3 The study’s objectives

<table>
<thead>
<tr>
<th>1.3.1 The problem</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.3.2 Structure</td>
<td>7</td>
</tr>
<tr>
<td>1.3.3 Earlier research – study importance</td>
<td>9</td>
</tr>
<tr>
<td>1.3.4 Sources and method</td>
<td>10</td>
</tr>
</tbody>
</table>

### 2 BALANCING ENERGY NEEDS AND THE PROTECTION OF A SENSITIVE SEA AREA

2.1 The Nord Stream project

2.2 The Baltic Sea area

2.3 The Nord Stream case and Baltic Sea regulatory framework

| 2.3.1 The Baltic – narrow sea, dense regulation | 14 |
| 2.3.2 Assessing transboundary environmental impacts | 17 |
| 2.3.3 Right to lay submarine pipelines | 20 |

### 3 SETTING THE SCENE FOR ENVIRONMENTAL LIABILITY

3.1 Project realization

3.2 Obligation to protect, control and prevent

3.3 Responsibility for marine environmental damage

| 3.3.1 Responsibility and liability under the UNCLOS | 27 |
| 3.3.2 Permitting | 27 |
| 3.3.3 The MOX Plant Case | 29 |
| 3.3.4 Responsibility under the UNCLOS? | 32 |

### 4 ENVIRONMENTAL LIABILITY

4.1 Defining responsibility and liability for environmental damage

| 4.1.1 Liability, responsibility | 35 |
| 4.1.2 Strict and fault based liability | 36 |
| 4.1.3 Environmental damage | 37 |

4.2 Civil liability regimes relevant to the marine environment

4.3 European instruments

| 4.3.1 Environmental Liability Directive | 43 |
| 4.3.2 Liability for environmental damage | 47 |

### 5 STATE LIABILITY AND THE NORD STREAM CASE

5.1 From international law to international environmental law

5.2 ILC on state responsibility

| 5.2.1 Draft Articles on State Responsibility | 51 |
| 5.2.2 The key of the Draft Articles – establishment of the wrongful act of state | 53 |
| 5.2.3 Content of the international responsibility of a state | 59 |

5.3 ILC International Liability

| 5.3.1 Acts not prohibited by international law – view on environment | 66 |

### 6 WHAT ABOUT POLLUTER PAYS PRINCIPLE?

6.1 The principal outlines

6.2 Applicability of the principle

| 6.2.1 Pollution and Polluter | 72 |
| 6.2.2 Residual state responsibility | 74 |

### 7 CONCLUSION

77
SOURCES

Books and articles


Treaties and other instruments

Treaties


**Declarations and Draft Articles**


**Other documents**

*International*


Resolution A.927(22) Particularly Sensitive Sea Areas and Special Areas Guidelines.


**EC Directives**


**EC documents and decisions**


Trans-European Energy (TEN-E) Guidelines in 2006, Decision No 1364/2006/EC.


*National laws (Finland)*

Uhkasakkolaki, 1113/1990.
Laki ympäristövaikutusten arviointimenettelystä, 468/1994.
Laki ympäristövahinkojen korvaamisesta, 1994/737.
Asetus ympäristövaikutusten arviointimenettelystä, 713/2006.
Laki eräiden ympäristölle aiheutuneiden vahinkojen korjaamisesta, 383/2009.

*Table of cases*

*International Court of Justice, ICJ*

Corfu Channel Case (*United Kingdom v. Albania*), Judgment of April 9th 1949 (Merits), ICJ Reports 1949, p. 4.


**International Tribunal for the Law of the Sea, ITLOS**


Land reclamation by Singapore in and around the straits of Johor (*Malaysia v. Singapore*), Order, 8 October 2003.

**European Court of Justice, ECJ**

C-459/03

**Arbitral awards and opinions**


Joint declaration of Judges Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson and Jesus on the MOX Plant Case.

**Miscellaneous Sources**

Websites, all last visited on 30.12.2009
ILC on the internet, www.ilc.org
Helsinki Commission, HELCOM on the internet, www.helcom.fi
IMO on the internet, www.imo.org
EU on the internet, www.europa.eu

Other
Finnish environmental permit for munitions clearing from Western Finland Environmental Permit Authority, LSY-2009-Y-143 (2.10.2009).

Baltic Sea Scorecard 2008, pdf format is available online at


1 INTRODUCTION

1.1 Transboundary harm

The overarching context of the study is the concept of transboundary harm, and the standards of conduct that this concept places on sovereign states. In this study, transboundary harm refers to the harmful transboundary effects of an activity carried out by a state. Transboundary harm therefore occurs in an area under the jurisdiction of another state.

Under customary international environmental law states should refrain from causing harm to another state. If such harm occurs, the state might have failed in controlling its activities. However, states do also carry out activities that are inherently dangerous or harmful to the environment. States are obliged to control these activities by taking all the necessary measures to minimize the harmful impacts. Even so, environmentally harmful impacts might occur – despite all the precautions taken. Actually, this is the most likely scenario on many cases of transboundary harm. States are obliged to prevent and control environmental harm, but they are not obliged to cease all environmentally harmful activities. Not all transboundary harm is “illegal”, but the “legality” of these activities does not necessarily abolish state’s responsibility towards the impacts that the state has caused to another state. For these situations, states have enacted common rules, general principles, on transboundary harm; rules that 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. Among the first ones were for instance the principles on responsibility not to cause damage to the environment of other states, and also the principle of state responsibility. The present study is centered on the very core of international environmental law, and therefore it is important to say a few words on transboundary harm as such.¹

A well-known classic of international environmental law, the Trail Smelter arbitration², holds the origins of one of the most important international environmental law principles, or even rules,


² 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.
namely the principle of harm prevention. The Trail Smelter case was about a dispute between the USA and Canada over damage to the US territory by sulphur dioxide emissions from a smelting plant in Canada. The case was submitted to arbitration in 1935. In Trail Smelter arbitration the arbitral court proclaimed that no state had the right to use, or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another. The principle has been elaborated and further worked on in the legal literature. For example, it is referred to as a preventive principle, including the obligation of states not to cause damage, as well as the responsibility not to cause damage to the environment of other states or to areas beyond national jurisdiction and obligation of harm prevention (no harm principle). This study takes its point of departure in the definition of the no harm principle due to its clear format, and also distinguishes the principle from the principles of state responsibility (liability) later on in this study.

The no harm principle has actually developed together with another key principle of international environmental law – the sovereignty over natural resources. Both of these principles are reiterated in the leading international environmental law instruments, namely the Declaration of the United Nations Conference on the Human Environment (1972, the Stockholm Declaration) and also in the Rio Declaration on Environment and Development (1992, the Rio Declaration) that reaffirms the Stockholm Declaration.

The two fundamental principles are expressed in the Stockholm Declaration and the Rio Declaration. Firstly, according to article 21 of the Stockholm Declaration, states have the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and secondly, according to the principle 2 of the Rio Declaration, states bear the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction. These principles

---

are an inseparable part of customary international environmental law, and, as such, provide international environmental law its foundations.\(^8\)

Furthermore, the 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. What is there to find from this cross-section of obligations and rights? This study distinguishes these rights and duties by arguing that the right needs to be balanced against the duty.

The 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 a discussion in international law about whether a standard of state responsibility (liability) or strict liability had been established for environmental polluting activities.\(^11\) The arbitral tribunal had already set a certain criteria for the situations where the state liability would apply. Firstly, the polluting activities must be of serious consequence. If this is not the case, other states must tolerate a certain amount of pollution originating from other states. Secondly, there must be clear and convincing evidence of harm caused.\(^12\)

These requirements are difficult to meet, since it is challenging to establish the actual damage\(^13\). Therefore setting the criteria for establishing responsibility, and furthermore also liability, in international pollution incidents is difficult, because it is challenging to prove the damage done to the environment and the evidence is often inconclusive. After the early case law, the International Law Commission (ILC) continued to work on and develop the principles of state responsibility.

It is important to make a difference between *responsibility* towards environmental damage, which basically means the duty to take particular preventive actions, and *state liability* on the other hand.


\(^13\) Even more so because of the fact that the international environmental instruments rarely include any exact definition of damage. See e.g. P. Sands: *Principles of International Environmental Law*, p. 876.
If a state does not take the necessary preventive actions under the principle of state responsibility\(^{14}\) and according to the state's international obligations, state liability can be triggered under the general principles of state liability. The state is then in breach of international law that triggers the principles of state liability. Liability can be viewed also 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.\(^{15}\)

These concepts are sometimes, according to Larsson, used synonymously and the concepts do overlap.\(^{16}\) It is, however, good to separate the two, since responsibility and liability are activated in somewhat different contexts. *Liability* refers to the duty to pay compensation for damage, whereas *responsibility* encompasses this liability together with, for example, the obligation to prevent, reduce and control environmental damage. Therefore, the damage as such does not need to be realized in order for a party to be held responsible.\(^{17}\) The state is responsible also for prevention, but the triggering of liability requires a certain criteria to be fulfilled. There are certain international environmental instruments that regulate environmental liability in particular. There are also several international instruments which include general rules or principles on responsibility towards environment.

Whether the responsible state is also liable for the damage caused is a crucial question for this study. Hence, the question on what constitutes environmental harm or damage for the purposes of triggering liability is central. It needs to be admitted already on the first steps of the study that there are no clear answers to the question, and neither is this study able to answer this question comprehensively. The study however seeks out to the problems attached to this definition, especially in relation to environmental responsibility and liability.

---

\(^{14}\) 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 other States or of areas beyond the limits of national jurisdiction” (latter part of principle 2).


The differences between responsibility and liability might seem clear at the first glance, but a deeper look into the relevant international treaty law reveals nonetheless a different view on the matter. States have not been very eager to oblige themselves on liability instrument – it is more tempting to ratify general framework rules on responsibility than specific criteria on the establishment of liability. The reason for this is most likely the fact that there are no treaties available and therefore general principles of international law applies. It is interesting to point out how the international law actually regulates responsibility and liability, and what are the required criteria for establishing responsibility and furthermore, liability. Before working these questions any further, some facts on the background and the Nord Stream project will be outlined.

1.2 Background: the Baltic energy challenge

Nord Stream AG is a joint venture owned by four companies, and operating in the field of energy business in Europe. Nord Stream’s plan is to build a pipeline through the Baltic Sea to carry natural gas from Russia for the growing energy markets in Europe.\(^\text{18}\) The project is to be finished by the year 2012. The construction consisting of two pipelines would be one of the world’s longest underwater pipelines. The total length of the pipeline is 1220 km.\(^\text{19}\) The preparations for the construction of the two pipelines are already well underway.

The cooperation between the European Union (EU) and Russia adds some interesting viewpoints to the Nord Stream case, although they are not too relevant for the study as such. Baltic Sea is a basin bordered by as many as eight EU member states and 80% of its shores are EU territory, but Russian Gazprom is the majority shareholder of Nord Stream. In the EU, there is a growing urgency towards new goals and objectives for an effective and secure energy policy within the EU.\(^\text{20}\) In the next twenty to thirty years around 70 % of the EU’s energy requirements\(^\text{21}\) will be met by imported energy. In 2025, EU countries will have to import roughly 195 billion cubic meters (bcm) more gas than in 2005. To fill this gap, exporters and importers are launching a number of new natural gas

---

18 Europe is dependent of the natural gas supply from Russia. Some of the largest of the known gas reserves on the planet are in Russia and off its coastlines.
supply projects around Europe.\textsuperscript{22} The Nord Stream gas pipeline is one of these projects, and therefore the project holds great importance for the EU’s energy plans for the future.\textsuperscript{23}

The Baltic Sea is today one of the world’s most polluted maritime areas, and also one of the world’s most exploited sea areas. The human impact on the Baltic is immense. Due to years of poor management, the Baltic ecosystem is now close to a final collapse.\textsuperscript{24}

The protection of the vulnerable Baltic ecosystem is balanced with Europe’s growing energy needs. The Nord Stream AG has conducted both national and international environmental impact assessments, and at the time of writing of this study, it has acquired most of the required national permits and approvals to the projects. According to the assessments – the transboundary environmental impact assessment and the national environmental impact assessments – there are only minor impacts expected to occur in the Baltic in the construction or operation phase of the pipeline. However, the general public, national governments and media have raised serious concerns over the environmental impacts of the pipeline project.

\textbf{1.3 The study’s objectives}

\textbf{1.3.1 The problem}

In line with the above, the principal objective of this study is to concentrate on international law on environmental responsibility (liability), with emphasis on the distinction made above between responsibility and liability. This is done in the context of the Nord Stream gas pipeline case (the Nord Stream case) in relation to the Baltic Sea.

The overarching research question for the study on \textit{Reflections on environmental responsibility – with an emphasis on the Nord Stream pipeline in the Baltic Sea area} is:

\begin{flushleft}
\textsuperscript{21} Compared to 50% with the year 2006. COM (2006) 105 final, p. 3.
\textsuperscript{22} COM (2008) 782, p. 4.
\end{flushleft}
In the case of environmental damage on the Baltic Sea, due to the Nord Stream pipeline project, who is to be held liable for the damage and how is this liability established, and what are the criteria to be applied?

International environmental law has gone through a rapid evolution during the last twenty or thirty years. States have agreed on a complex network of treaty obligations to protect, preserve and control hazardous impacts on our environment. 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. There are naturally solutions in the international environmental law to solve environmental disputes, as was shown we already in the early case law practice presented in this study. However, these cases were not studied with any international environmental liability principles – the general international environmental law principles were applied in these cases. This is an issue that needs to be pointed out already in the beginning of this study, and needs to be explained before beginning to explore the issue further.

1.3.2 Structure

To pursue the study’s objective, the research question is divided into smaller sub-themes that can be approached more easily. In order to create a coherent study, the general structure of this study follows these sub-themes. The aim of the study is to build on the findings of the earlier chapters in order to be able to answer the overarching research question in the conclusion section.

Chapter two on the Nord Stream case looks into the Nord Stream project in the Baltic Sea environment to point out the importance of the research problem that is set for this study. This study addresses some specific legal problems which are pointed out to the reader. By systemizing and analyzing the Baltic Sea regulatory framework together with the relevant rights and duties to be considered in the pipe laying activity, the study lays down the essential foundations for the further chapters. In the first chapter the aim is to line out the Nord Stream case in general and point out the relevant case facts.

---

Chapter three sets the scene for environmental responsibility, and hence also for environmental liability, by looking into the *United Nations Convention on the Law of the Sea* (1982, UNCLOS)\(^{26}\) regulation on state responsibilities for the marine environment. The aim of this study is to identify the special aspects of environmental responsibility, and furthermore, of environmental liability regulation that are relevant in the Nord Stream case. Throughout the study, the aim of the discussion is to point out the possible interpretative problems discovered along the chapters. Therefore state obligations towards marine environment as well as the relevant UNCLOS rules on responsibility and liability are systemized. Chapter three analyzes whether state liability could be established by invoking the UNCLOS principles, and what is the interplay between rights and duties that are set in the UNCLOS. Furthermore, the question on how are these rights and duties balanced against each other is questioned in the chapter three.

Chapter four examines environmental liability. The law on environmental responsibility and liability is a complex system of instruments, of which some are relevant on the Baltic Sea and some are not. Therefore it is important to find out the relevant liability instruments for the Nord Stream case in the Baltic Sea environment. Furthermore, it needs to be analyzed whether these instruments solve the problem that is set for the study. The function of this systematization is to point out the content of the regulation that is relevant and interesting for interpretation.

Chapter five is very central for the study. After analyzing the civil liability instruments in chapter four, the study takes a turn to a new direction – towards state responsibility, and state liability. This section of the study will look into the general principle on state responsibility. The question for chapter five is: what does state responsibility entail from the viewpoint of state and international liability? How is this liability established, and how are the criteria to be assessed in Nord Stream case and Baltic Sea connection? Chapter five creates the required counterbalance for the earlier chapters by completing the regulatory search for state liability.

Chapter six adds in one more element: the polluter pays principle. The chapter analyzes the relevance of this principle of international environmental law in the Nord Stream context.

Chapter seven will finalize the study by stating the central findings of the study and therefore concluding the study. The conclusion chapter will give answers to the questions set in this chapter.

1.3.3 Earlier research – study importance

There are several general studies on both responsibility and liability relating to environmental damage available. Environmental responsibility (liability) and compensation for environmental damage as such have been remarkably popular topics during the last ten or fifteen years, and several monographs and numerous articles on these topics are available. These studies usually systemize the international treaty law, case law and customary law related to responsibility and liability over environmental damage.\(^\text{27}\)

The aim of this study is not to produce an overarching presentation to the theory and regulation of international law on environmental responsibility and liability in general, because such items already exist. Instead, this study approaches its theme with a rather narrow material approach. The approach requires coverage of international regulation with the aim of drawing forward the principles relating to the responsibility of states in relation to the marine environment. The study makes use of the Nord Stream case in order to attach the theme to some practical and ongoing issues that are subjects to international environmental law. By combining these three elements, the study aims to produce a fresh, cross-cutting view on environmental responsibility and liability to add to the earlier research on the theme.

The manifold regulatory reality makes the Baltic Sea an interesting subject for legal study, and the Nord Stream case as such offers several options for research – the Nord Stream case has several legal issues to tend to. This study, however, focuses on environmental responsibility (liability) relating to environmental damage. The plain and simple reason for this choice is that out of all of the legal matters related, this issue has not been carefully analyzed.

1.3.4 Sources and method

The present study falls in the scope of international environmental law. The study considers national regulation in contexts where it is required to reflect respective obligations in international law.

The main sources of the study are international treaties. In addition, national laws that regulate the matter under the scope of the study are used to some extent. The relevant treaties and national laws will be analyzed with special focus on the study objectives and questions. The customary international law and international case law are also important sources for the study. In addition, the study employs legal writings – literature and articles – when defining and analyzing the research problems. These sources articulate what the relevant law (on environmental responsibility and environmental liability) is, and where it is found.28

The so called soft law instruments play also an important role in the study. Soft law instruments refer to the non-legally binding international instruments that are becoming more and more common on the arena of international environmental law. Soft law instruments might be named as recommendations, guidelines and standards. Sometimes they codify general principles or rules. One might mention some soft law instruments that are relevant here, such as the texts drafted by the ILC on the field of state responsibility and international liability.29

The legal methodology employed in this study will essentially be normative and the main base for analysis is treaty law. The study applies a legal dogmatic approach. The aim of the study is to focus on particular legal problems and to answer legal questions. The approach is therefore problem oriented; in other words the study seeks to provide answers to the questions presented. The study also strives for a “to-the-point presentation”, and only matters that are relevant for solving the problem are presented, and long descriptions for the sake of the descriptions will be avoided as possible.

2 BALANCING ENERGY NEEDS AND THE PROTECTION OF A SENSITIVE SEA AREA

2.1 The Nord Stream project

Nord Stream AG is a joint venture owned by four companies that have specialized in natural gas distribution, purchasing and sales of natural gas. The headquarters of the company is based in Zug, Switzerland. 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 %). The aim of the Nord Stream AG is to build a new connection between these vast resources allocated in Russia and the markets of the EU, where demand for natural gas is increasing. The Nord Stream pipeline will be 1,220 kilometers long and will consist of two parallel pipelines. The first one, with a transmission capacity of around 27.5 bcm per year, is due to be completed in 2011. The second line is scheduled to be finished in 2012. With the second pipeline the annual capacity will then be doubled to around 55 bcm. This is enough to supply gas to more than 25 million households in Europe.

The picture above shows the planned pipeline from Vyborg (Russia) to Greifswald (Germany). The picture also shows the existing and other planned pipelines in Europe in that area. It needs also to be noted that regards to energy infrastructure projects, Nord Stream is only one of several planned or existing energy infrastructure projects in the Baltic Sea area. In addition to the Nord Stream pipeline, other offshore natural gas pipelines across the Baltic Sea are under consideration. The project has been on the news in all of the coastal states of the Baltic Sea. The project is one of the biggest projects ever carried out in the small sea area of the Baltic that is surrounded by several states. The Nord Stream case has been a much debated issue. It is above all a political issue. However, the execution of the project has also raised serious environmental concerns over the environmental impacts on the highly sensitive sea area. One of the popular issues has been the implementation of the environmental impact assessment (EIA) on the area, and especially its inadequacy and limited scope. The general public, respective national governments and the media have also been concerned about the consolidation between different national legislation when the pipeline route passes through several national jurisdictions.

2.2 The Baltic Sea area

The aim of Nord Stream AG is to fully assess all the environmental impacts and not to cause significant environmental impacts due to the pipeline project. However, the sea area is already under tremendous stress caused by human activities, and the question whether it can handle any more stress is an important one. An overview of the environmental situation at the Baltic Sea is thus relevant in order to comprehend the very fragile situation of the narrow sea area.

The Baltic Sea (the Baltic) is one of the most threatened marine ecosystems in the world, the major threat being marine pollution. 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

---

32 The average depth is only 53 meters, when the average depth of, e.g. the Mediterranean Sea is 1500 meters.
with the North Sea is extremely slow. The same water – with its organic and inorganic matter – stays in the Baltic for around 30 years. The Baltic is connected to the world’s oceans only by the narrow and shallow waters of Sound, Kattegat and Belt Seas. This limits the exchange of water with the North Sea.\footnote{Learn more on the unique Baltic sea ecosystem at HELCOM webpage, http://www.helcom.fi/environment2/nature/en_GB/nature/ (18.11.2009) and from 2008 Baltic Sea Scorecard, p. 2. Pdf.format is available online at www.wwf.fi/wwf/www/uploads/pdf/balticseascorecard2008.pdf (18.11.2009).}

Due to its special geographical, climatological, and oceanographic characteristics, the Baltic is highly sensitive to the environmental impacts of human activities in its sea area and its catchment area. The poor situation of the Baltic is largely due to management failures. Particularly eutrophication, overfishing, hazardous substances, and irresponsible shipping practices threaten the Baltic. The Baltic, with its depleted fish stocks, serious eutrophication, endangered species and habitats, and pollution problems is gradually moving to a point of no return.\footnote{2008 Baltic Sea Scorecard, pp. 1–15; HELCOM webpage on marine environmenthttp://www.helcom.fi/environment2/en_GB/cover/ (19.11.2009).}

The Baltic is listed as a Particularly Sensitive Sea Area (PSSA) by the International Maritime Organization (IMO) in 2005.\footnote{See IMO webpage on marine environment, http://www.imo.org/ (19.11.2009).} In its Resolution A.927 (22) (PSSA and Special Areas Guidelines) IMO has agreed to particular criteria for the PSSA areas. In section one of the guidelines it is stated that a PSSA is an area that needs special protection through action by the IMO because of its significance for recognized ecological, socio-economic, or scientific reasons and because it may be vulnerable to damage by international shipping activities. According to the guidelines, and in order to identify an area as a PSSA, it must meet one of the criteria listed in the guidelines. The criteria in section four of the guidelines include ecological, social, cultural, economic, scientific and educational criteria. The function of the criteria is to provide guidance to the contracting parties to the MARPOL 73/78 regulation\footnote{International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (the MARPOL 73/78).} in the formulation and submission of applications for the designation of the PSSA areas. The Baltic fulfils the criteria to be identified as a PSSA.\footnote{Resolution A.927(22) PSSA and Special Areas Guidelines, pp. 3–10.}

The Baltic is also a special area under the MARPOL 73/78 regulation. In its annexes I, II, V and IV the MARPOL defines certain sea areas as special areas. The Baltic is listed in three of these annexes.
(I Prevention of pollution by oil, V Prevention of pollution by garbage from ships and VI Regulations for the Prevention of Air Pollution from Ships).

The Nord Stream project has all the potential to harm the maritime environment of the Baltic. When considering the construction and placement of the two underwater pipelines, particularly fish stocks, fisheries and discarded munitions (such as chemical weapons and mines)\(^{38}\) from the World War II era are of special concern. In addition, dredging of the sea floor might cause the harmful substances that have settled on the sea floor during the years to rise and mix with the sea water. However, these are only examples of the variety of problems that the Nord Stream project is likely to be troubled with. When it comes to the actual operation of the pipelines, the pipelines are also then prone to damage. For example, the pipelines can be damaged by a ship’s anchor and trawling nets, and are also subject to defective materials and construction, corrosion and tectonic activity. Leakage from damaged pipeline could be extensive, although depending on the cause and nature of the harm. Furthermore, explosive blowouts could occur. These types of accidents involving pipelines have occurred in the North Sea.\(^{39}\)

2.3 The Nord Stream case and Baltic Sea regulatory framework

2.3.1 The Baltic – narrow sea, dense regulation

The Baltic is a densely regulated area. The sea area is regulated through several international, EU, regional and national instruments. The area is therefore governed with several different legal regimes and the political regimes of national governments have also their influence on the area. The regulation forms a complex system of rules governing either specific actions or operations on sea. Instruments such as the MARPOL 73/78, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972, and as amended in 1996) and the Convention on the Protection of the Marine Environment of the Baltic Sea Area (1992, the Helsinki Convention) are included.\(^{40}\) Furthermore, there are general framework conventions such as the UNCLOS. In addition, and due to the cooperation between the Nordic countries, the area is also subject to other

\(^{38}\) Approximately 300,000 tons of chemical munitions is disposed in the Baltic; aerial bombs, mines, artillery shells and drums. These contain toxics like adamsite, mustard gas, viscous mustard gas and nerve gas.


Nordic cooperation treaties such as the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden (1974, The Nordic Environmental Protection Convention)\textsuperscript{41}. The coastal states around the Baltic Sea have conducted sub-regional and national regimes as well as common action plans for the protection of the marine environment of the area, mainly for promoting cooperation.\textsuperscript{42}

International treaties relating to marine pollution are important to the Baltic Sea and the pipeline project. This includes the global framework of the UNCLOS, which addresses various aspects of the use of the seas, and also marine pollution.\textsuperscript{43} 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.

The Helsinki Convention has a similar approach, according to its article 2. Actually, the first Helsinki Convention 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.\textsuperscript{44} The Helsinki Convention also codifies some of the most important environmental principles, such as the polluter pays principle and the precautionary principle (in line with article 3 of the Helsinki Convention). Although the environmental provisions can be found in several sections of the UNCLOS, part XII in particular deals with the preservation and protection of marine environment. Article 192 of the UNCLOS lays down the general obligation to protect and preserve. The UNCLOS also confirms, against this obligation, the strongly established customary rule of state sovereignty over its natural resources, see further article 193.\textsuperscript{45}

\textsuperscript{41} Nordic Environmental Protection Convention, Stockholm, February 19, 1974, 13 ILM 591 (1974).
\textsuperscript{42} E.g. the agreements between the four Nordic countries and Finland's Programme for the Protection of the Baltic Sea (2002) and Action Plan (2005). These programs also implement the UNEP GPA. The internet of the Finnish Environmental Governance, www.environment.fi (23.11.2009).
\textsuperscript{43} All of the present contracting parties to the Helsinki Convention have also parties to UNCLOS. UNCLOS is generally accepted as customary law regarding to its essential content, and such customary provisions are binding on states as such. R. R. Churchill and V. Lowe: Law of the Sea, Third edition, Juris Publishing, Manchester University Press 1999, p. 24.
\textsuperscript{44} P. W. Birnie and A. E. Boyle: International Law and the Environment, p. 357.
It is important to realize the principal legal jurisdictions concerning the Baltic. In line with articles 2–4 of the UNCLOS, each state around the Baltic has 12 nautical miles of territorial waters. In line with the UNCLOS articles 55–57, 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, however, none of the Baltic states have 200 nautical miles of EEZ. The surrounding states have agreed on the delimitation of the maritime boundaries by using bilateral agreements.

The Baltic is fully covered with territorial waters or EEZ. Therefore, there is no open international sea area on the Baltic. In addition, in line with articles 76 and 77 on the continental shelf, the coastal state also has some sovereign rights, although they are somewhat limited. According to article 76 (1), continental shelf consists of 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”. Article 76 also includes complex criteria on how to determine the outer limit of the continental shelf. Since delimiting of the outer limit of the continental shelf is actually not relevant in the Baltic Sea due to the narrow sea area, there is no need to analyze these criteria further.

The rights on the continental shelf are, however, 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. These rights need to be taken into consideration, particularly from the viewpoint of coastal states that are involved as operators in the Nord Stream project (like Germany and Russia for example).

The Baltic Sea as such is under the rule of the EU within the territorial waters of the member states. All contracting parties, except for Russia, to 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 Baltic area, including the Baltic Sea area.46

Therefore the Baltic Sea is covered by national jurisdiction, complemented by EU law \(^{47}\) and international law. \(^{48}\)

### 2.3.2 Assessing transboundary environmental impacts

#### 2.3.2.1 Obligation to conduct an environmental impact assessment

The pipeline passes through the EEZ’s of five states: Russia, Finland, Sweden, Denmark and Germany, and the territorial waters of Russia and Germany, and the Nord Stream project is subject to national legislation in each of these states. Furthermore, according to article 197 of the UNCLOS, building cross-border infrastructure and protecting the environment requires international cooperation in a transboundary context. The UNCLOS also regulates that if states have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they should assess the potential effects of such activities, in line with article 204 of the UNCLOS.

Therefore the project needs to take into account national legislation as well as international regulations. Permits for construction and operation of the pipeline must be obtained from each of these five countries. In addition, national legislation generally requires an EIA to be completed as a prerequisite for a national permit. \(^{49}\) The project needs to obtain all the required permits before the construction of the pipelines can start. \(^{50}\)

---

\(^{47}\) “EU law” as taking into consideration the Lisbon Treaty that entered into force 1.12.2009.

\(^{48}\) 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: “Admittedly, as indicated in Article 176 EC, that external competence of the Community in regard to the protection of the environment, in this case the marine environment, is not exclusive but rather, in principle, shared between the Community and the Member States.” See also E. Hollo: *The Baltic Sea and the Legal Order on Placing Energy Pipelines*, p. 181.


\(^{50}\) The Nord Stream AG has gained almost all required permits by 29.12.2009, and the project is waiting for only one permit more from Finland.
When it comes to the Nord Stream project, the worn-out saying “environmental threats do not respect national borders” is very much true. Convention on Environmental Impact Assessment in a Transboundary Context (1991, the Espoo Convention)\(^{51}\) aims to enhance international cooperation, and strives to incorporate environmental viewpoints into decision making in a transboundary context.\(^{52}\) The Espoo Convention was negotiated under United Nations Economic Commission for Europe (UN ECE).\(^{53}\)

The Espoo Convention sets out the basic obligations to the state parties to assess the environmental impact of certain activities with potential major impacts at an early stage. The scope of the Espoo Convention is tied to particular projects.\(^{54}\) In the area of the UN ECE, transboundary EIA is intended to be legally binding for the members of the Espoo Convention. Hence the members of the convention are required to take the necessary legal, administrative or other measures to implement the provisions of the Espoo Convention. This includes the EIA for the specified activities, as regulated in article 2, together with article 7, which includes the surveillance of the activity and the determination of any adverse transboundary impact upon a request of another state.

In the case of Nord Stream, the question whether the pipeline project would fall under the Espoo Convention has never been disputed. It is clear that an activity of this scale would potentially cause significant adverse environmental impacts in line with article 2 of the Espoo Convention. In line with article 3 Appendix I point 8, large-diameter gas pipelines as an activity under of the Espoo Convention are listed. This requires a notification to affected states of the proposed activity. In line with article 1, ii) five parties of origin include Russia, Finland, Sweden, Denmark and Germany. While construction is taking place in Russia, nearby Finland, for instance, may be an affected party. Thus, in line with article 1, iii) all parties of origin are also affected parties, insofar as they are affected by the project taking place in another (neighboring) country. Estonia, Latvia, Lithuania and Poland are each only affected parties.\(^{55}\)

---


\(^{52}\) See also UNCLOS articles on monitoring and environmental assessment, articles 204 to 206.


2.3.2.2 Potential threats to that might lead to liability claims?

In March 2009, the Nord Stream AG submitted the very extensive *Espoo Report* for international consultations. The Espoo Report covers the *physical, biological and socioeconomic environment* of the Baltic Sea area affected by the project. In the Nord Stream Espoo Report on the transboundary EIA all significant impacts have been considered as potential transboundary impacts. Significant transboundary impacts must be of such a scale that they could extend across a boundary into the territory of another country. In the Nord Stream case, it is the EEZ boundaries which define the transboundary impacts. At the outset, the *Espoo Report* states that the majority of all these impacts – local, regional, national or transboundary – will not have long-term effects to the Baltic environment. 56 The *Espoo Report* scrutinizes the transboundary impacts by each party of origin as well as by each affected party by looking into impacts occurring during the construction phase, during the operation phase and impacts caused by an unplanned (accidental) event. 57

Majority of impacts arising from planned activities associated with construction and operation of the project has been assessed to be *insignificant* – no impacts of major significance as such have been identified. The Espoo Report states that impacts of unplanned events could have potentially significant effects, but that the probability of such events is on a very low degree. The transboundary impacts during construction were assessed as minor, the exceptions being munitions clearance, where the impacts are expected to be of moderate significance, and restriction to navigation of fishing and shipping vessels during construction in the Gulf of Finland (minor to moderate). The main transboundary impact during the operational phase of the pipelines is the impact on fisheries. There is a particular concern over the ability of the bottom trawlers in the open seas of the Baltic to adapt their approaches and patterns in order to adjust to the presence of the pipelines. Unplanned events are mostly associated with the construction phase, pipeline failure being the exception. The significance of the impacts of such an event were regarded as minor to moderate although it was stated that a major *oil spill could impact any number of Baltic states*. 58

57 E.g. release of contaminants that are settled in the seabed through munitions clearing and seabed construction works, disruption of current fishing patterns through pipeline presence or accidental fuel or oil spill and its impacts on fisheries. Nord Stream Espoo Report: Non-Technical Summary, February 2009, pp. 39–40.
The general impression that the Espoo Report gives is very positive – there are no significant or long-term impacts on physical, biological or socioeconomic environment. On the other side of the scale is, however, the fact that this project is a large-scale project taking place on a highly sensitive area. Therefore at the outset, the Espoo Report leaves a number of open questions. However, it needs also to be noted that the EIA has been able to raise relevant concerns over the environmental impacts of the project.\textsuperscript{59}

2.3.3 Right to lay submarine pipelines

With regards to the pipeline project, three sets of rules on rights and duties according to the UNCLOS framework are relevant to the matter: rights and duties on the EEZ, rights and duties on the continental shelf and rights on the territorial sea. In the territorial sea, the coastal state enjoys sovereignty which gives the coastal state the power to apply national law.\textsuperscript{60}

When speaking about “rights and duties” as such, the word pairing refers to both coastal states and other, non-coastal states. The most significant right for the coastal state on the EEZ, in line with the 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.

However, the jurisdiction is restricted when it comes to the construction of artificial islands and installations. In line with the article 56 (b) (i), the jurisdiction applies as provided for in the relevant provisions of the UNCLOS article 60. The UNCLOS regulates the rights and duties of other states in the EEZ in the article 56, and explicitly confers the other states with the right of laying submarine cables and pipelines in article 58.

In addition to the articles on EEZ, article 79 on continental shelf needs to be taken into consideration. Although this article is in the part of the UNCLOS that regulates the continental shelf, it applies to EEZ since the sea bed of the EEZ consists of the continental shelf (due to


\textsuperscript{60} P. W. Birnie and A. E. Boyle: \textit{International Law and the Environment}, p. 370.
geographical facts the whole Baltic Sea floor is continental shelf from the point of view of the geographical definition). In line with article 79 (1) and (3) on submarine cables and pipelines on the continental shelf states that all states are entitled to lay submarine cables and pipelines on the continental shelf, but that the delineation of the course for the laying of pipelines on the continental shelf is subject to the consent of the coastal state. Furthermore, the coastal state is empowered to lay down conditions for cables and pipelines constructed or used in connection with the exploration and exploitation of its continental shelf or the operations of artificial islands and installations under its jurisdiction.\(^{61}\)

Article 56 on EEZ also confers duties on the coastal state: the coastal state has jurisdiction with regard to the protection and preservation of the marine environment, in line with article 56 (b) subparagraph iii). The UNCLOS includes other more specific articles on the protection of the marine environment of the EEZ, namely in Part XII the 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.\(^{62}\)

According to article 210, the jurisdiction to for the pollution control can be seen both as a right and as a duty. For example, article on pollution by dumping regulates the issue by saying that states “shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment by dumping” – the wording implies that this is an obligation of the coastal state, as much as it is a right to exercise jurisdiction.\(^{63}\) According to Churchill and Lowe, the UNCLOS has had limited impact on the state practice on the matter and the coastal states do not use the entire jurisdiction provided by these articles.\(^{64}\) The coastal state is obliged to take due regard to the rights and duties of other states when exercising its own rights and duties on its maritime zones, as for example in line with the article 56 (2).

The UNCLOS provisions on cables and pipelines do not tackle the breaking or injury of a submarine cable or pipeline, whereas the UNCLOS articles 112 to 115 on high seas cables and pipelines do regulate the issue. In line with article 114 of the UNCLOS, states shall adopt necessary laws and regulations to provide that the costs due to breaking or injury to a cable or pipeline caused


by ship or person under the state’s jurisdiction are repaired and the costs covered. In the case of willful or culpable negligence the person or ship under state’s jurisdiction that has caused the breaking or injury should be punished by law of the offence, in line with article 113 of the UNCLOS.
3 SETTING THE SCENE FOR ENVIRONMENTAL LIABILITY

3.1 Project realization

Questions on the effects of the Nord Stream project when in operation have not gained much attention. However, this study focuses on environmental responsibility and liability, and this chapter builds up the framework for tackling the research questions introduced in chapter 1.3 of this study.

As already stated above, the Nord Stream project needs to go through national and transboundary EIA’s as well as permitting processes before the construction can start.\(^{65}\) According to article 79 (3) of the UNCLOS on the delineation of the course for the laying of pipelines on the continental shelf is subject to the consent of the coastal state. Furthermore, different national legislations had to be applied. For example, in Finland the Finnish Act on EEZ is applied to the project.

In Finland, the pipeline requires first an EIA according to the Finnish EIA Act, Government’s approval for the activity and to the delineation of the course for the pipe lay (called the exploitation right) according to the Finnish Act on the EEZ and permit for munitions clearing and construction according to the Water Act. In Sweden, a permit to construct the pipelines is required according to the Act on the Continental Shelf (Act 1966:314), but no EIA is expressly required for the construction – Nord Stream has nevertheless filed an EIA. In Denmark, a permit to construct and operate pipelines is required according to the Act on the Continental Shelf (1101:2005) as specified in Administrative Order (361:2006) on Pipeline Installation on the Danish Continental Shelf for Transport of Hydrocarbons. The EIA is an integrated part of the permitting procedure.

In Germany, a Plan Approval Procedure for construction in territorial waters and the landfall is required according to the Energy Industry Act (EnWG) together with two permits for construction in the EEZ as regulated in the Federal Mining Act (BBergG). The EIA is parallel to and integrated in the permitting procedure. In Russia, Federal laws about Internal Sea Water, Territorial Sea and Nearest Zone of Russian Federation, Continental Shelf of Russian Federation, Exclusive Economic Zone of Russian Federation and Environmental Expertise are relevant. In addition, the decree of the


In December 2009, most of the required permits have been granted. According to the Nord Stream news\footnote{Nord Stream webpage, \url{http://www.nord-stream.com/en/press0.html} (24.11.2009).}, the company is ready to start the laying of the pipeline in the spring of 2010 at the latest. The preparations for the construction have been started as well. The munition clearing, for instance, was scheduled to start before the end of 2009. This was however not possible, due to the weather conditions which made the clearing too dangerous. The munitions clearing shall start as soon as possible.\footnote{During autumn 2009, there have however been several delays with the project due to e.g. poor weather conditions.}

For these reasons, I believe that the realization of the project is likely. When the project is realized, it is time to move further from the questions related to the planning and EIA phase of the project. Responsibility and liability issues become relevant – what if, due to an accident or incident, the environmental damage or other potentially harmful environmental impacts do occur?

### 3.2 Obligation to protect, control and prevent

According to article 192 of the UNCLOS, states have the obligation 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 do not spread beyond the areas where they exercise sovereign rights. In addition, Part XII on protection and preservation of marine environment deals with all types of marine pollution. Therefore in line with the 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.
Particularly in regard to the Nord Stream case, the UNCLOS decrees that the measures taken include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life, in line with article 194 (5).69 According to article 208 (1) and (3), pollution from seabed activities is subject to national jurisdiction – 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. Such laws, regulations and measures shall be no less effective than international rules, standards and recommended practices and procedures.

In addition to these general articles, UNCLOS includes also regulation on special sources of marine pollution (for example land-based sources as in article 207 and pollution by dumping as in article 210). Here the discussion focuses, however, on the general obligation to protect the marine environment as expressed in the UNCLOS articles on protecting and preserving the marine environment, in line with articles 192 to 194 of the UNCLOS.70

According to article 197, states also have the obligation to cooperate in the protection of marine environment. This important obligation has been explicitly pressed by the ITLOS in two of its cases, namely in the case on Land reclamation by Singapore in and around the straits of Johor (Malaysia v. Singapore)71 as well as in the MOX plant case (Ireland v. United Kingdom) where the ITLOS stated that the “duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law”.72 In the Nord Stream case the states in question have in fact cooperated and there have not been any serious conflicts between states.

The obligation to protect the marine environment as regulated in the UNCLOS represents a codification of customary law, and these articles are supported strongly by opinion juris.73 The

---

69 See also the International Tribunal for the Law of the Sea (ITLOS) case Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Order 27 August 1999. 38 ILM 1624, paragraph 70: “conservation of the living resources of the sea is an element in the protection and preservation of the marine environment”.
71 See Land reclamation by Singapore in and around the straits of Johor (Malaysia v. Singapore), Order, 8 October 2003, paragraph 92.
72 MOX plant case (Ireland v. United Kingdom), Order 3 December 2001. 41 ILM 405, paragraph 82.
UNCLOS articles approach the marine environment as a whole, not only to the extent of national jurisdiction. The UNCLOS regulation formulates the obligation so that it tackles all sources of marine pollution.\textsuperscript{74}

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 (\textit{due diligence}). Therefore the obligation to take “all measures necessary” is moderated allowing the state to use “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 it is stated in article 208. This could imply a stronger, primary obligation of states to prevent pollution.\textsuperscript{75} In general, the UNCLOS can be setting a legal obligation, although in a form of general framework, to protect the marine environment.

In the case of Nord Stream pipeline, an incident in the construction phase (for example during munitions clearing) or operation phase (for example pipeline failure causing leakage) would in the worst case scenario constitute a pollution incident or even an emergency at sea. Apart from controlling pollution emergencies, states are required to respond to pollution emergencies both jointly and individually in cases where the event falls within their jurisdiction and control. If failed to do so could amount to a breach of the state’s treaty or customary law obligations.\textsuperscript{76}

\textsuperscript{74} The Helsinki Convention on the Baltic Sea was one of the first regional conventions to cover marine pollution from all sources. Article 12 (1) to the Helsinki Convention regulates that each contracting party shall take all measures in order to prevent pollution of the marine environment resulting from exploration or exploitation of its part of the seabed and the subsoil or from any associated activities as well as to ensure that adequate preparedness is maintained for immediate response actions against pollution incidents caused by such activities. E. Louka: \textit{International Environmental Law}, pp. 162 and 146 and P. W. Birnie and A. E. Boyle: \textit{International Law and the Environment}, pp. 352 and 357.

\textsuperscript{75} This view is however not unanimous, see the discussion at P. W. Birnie and A. E. Boyle: \textit{International Law and the Environment}, p. 353.

\textsuperscript{76} P. W. Birnie and A. E. Boyle: \textit{International Law and the Environment}, p. 378.
3.3 Responsibility for marine environmental damage

3.3.1 Responsibility and liability under the UNCLOS

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. This 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. The liability for marine environmental damage goes in accordance with international law.

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.

3.3.2 Permitting

According to the national and international 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. In Finland, for example, under article 3 (1) of the Finnish Act on EEZ, the Finnish Water Act is to be applied on the Finnish EEZ as well as other legislation, such as the EIA legislation. The UNCLOS as such does require the application of the Water Act. The Water Act requires a permit to be issued for the construction and munitions clearing. In addition to the actual permit, the pipeline project firstly needs Government’s approval for the activity as such and also for the delineation of the course for the pipe lay, called approval for the exploitation in line with articles 6 and 7 of the Finnish Act on EEZ.

The legal standing of the Government’s approval deserves some discussion. When deliberating the approval, the Finnish Government ought to consider the general obligation to protect, control and prevent marine environment and balance this consideration together with social and political issues. The consideration on the permit focuses on the permit issuing criteria, according to the Water Act. Therefore the Government should, when considering the approval, take a comprehensive approach

on the *permissibility* of the pipeline project. The decision-making process and discretion should focus on the protection of existing economic and safety interests within the EEZ. The EEZ consent is mainly aimed at finding a suitable delineation of the course of the pipeline. The consideration should then in fact be seen as an expediency consideration.

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 EEZ of the coastal state. According to article 70 (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. The Government’s approval does not have the status of a permit, but it is appealable. Therefore, according to Hollo, it does not seem possible to reject an application for the pipeline because states have the freedom to use international waters for the purpose of laying pipelines.

The Government’s approval thereby requires the coastal state to take the viewpoint of marine protection into consideration when deliberating the suitable delineation of the pipeline, as well as to consider other socio-economical viewpoints. It was questioned whether the Government’s approval can be denied after balancing of the right to lay pipelines and obligation to protect. However, allowing an activity that acts against the UNCLOS articles on protection and preservation of the marine environment, the state allows polluting activity and therefore breaches its obligations under the UNCLOS, as regulated in articles from 196 to 194 of the UNCLOS. States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment, in line with article 235.

---

78 There has been one appeal against the consent to the Supreme Administrative Court of Finland (30.12.2009).
80 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. 191–192.
3.3.3 The MOX Plant Case

3.3.3.1 Case facts

The MOX plant case (Ireland v. United Kingdom) is a complex case of international environmental law concerning protection and preservation of the marine environment. The case concerned a dispute on a mixed oxide fuel plant (MOX plant) in Sellafield, England, on the shores of the Irish Sea. The plant was operated by public company called the British Nuclear Fuels, plc (“BNFL”). Mixed oxide or “MOX” is a nuclear fuel. In 2001 the British government gave a decision on the commissioning and operation of the new MOX plant. The claim 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 Irish Sea.

The MOX plant case is the closest there is to a situation that might arise on the Baltic Sea as well, and therefore the case is studied a bit further. The MOX plant case has been presented before several Tribunals – ITLOS, arbitral tribunals as well as the ECJ. On June 15, 2001 Ireland first requested an arbitral tribunal to be constituted under the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) in the case concerning access to information in relation to the economic “justification” of the proposed MOX plant. The so-called OSPAR arbitration between Ireland and the UK focused on scrutinizing the right to information as it was enacted in the OSPAR Convention (see further article 9). The OSPAR arbitral court dismissed Ireland’s claim. On October 25, 2001 Ireland notified the UK that it was instituting an arbitral tribunal as provided for in the UNCLOS (see further article 287) and Annex

---

81 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 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.

82 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.


84 Permanent Court of Arbitration on the dispute between Ireland and United Kingdom (“OSPAR” Arbitration), Final Award on July 2, 2003, pp. 50–57.
VII\textsuperscript{85} of the UNCLOS for resolving the dispute concerning the MOX plant, international movements of radioactive materials and the protection of the marine environment of the Irish Sea.\textsuperscript{86}

On November 9, 2001 Ireland submitted a request for Provisional Measures under UNCLOS article 290. Ireland claimed that its rights under the UNCLOS had been violated by the UK. The obligations that Ireland claimed the UK had violated were: 1) the obligation to cooperate with Ireland in taking measures to protect and preserve the Irish Sea, according to articles 123 and 197 of the UNCLOS 2) the obligation to carry out a prior environmental assessment as regulated in the article 206 of the UNCLOS and 3) the obligations to protect the marine environment of the Irish Sea, including taking all necessary measures to prevent, reduce and control further radioactive pollution of the Irish Sea. Therefore Ireland requested provisional measures to preserve Ireland’s rights under the UNCLOS or to prevent serious harm to the marine environment. Ireland saw that \textit{prima facie} the arbitral tribunal to be constituted would have jurisdiction over the dispute and that there was an urgency of the situation that required the provisional measures, in line with article 290 (5).

The ITLOS ruled that since the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the UNCLOS and general international law, and since certain rights arise from this principle, the ITLOS could consider preserving the right to order Provisional Measures. The ITLOS can also prescribe other measures than what was requested, and the ITLOS found that “prudence and caution” required that Ireland and the UK should cooperate. The ITLOS prescribed a provisional measure that Ireland and the United Kingdom should enter into consultations in order to exchange information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant. The parties should also monitor risks or the effects of the operation of the MOX plant and devise measures to prevent pollution of the marine environment.\textsuperscript{87}

\textsuperscript{85} Ireland and the UK did not accept the same procedure for the settlement of disputes (UK chose ICJ), the case was submitted to an arbitration, as in article 287 (5) of the UNCLOS.

\textsuperscript{86} Permanent Court of Arbitration on the dispute between Ireland and the United Kingdom (“MOX plant case”), Order No. 1–6.

\textsuperscript{87} The MOX plant case \textit{(Ireland v. United Kingdom)}, Order, December 3, 2001, paragraphs 82–84 and 1.
3.3.3.2 Relevance

The MOX plant case was the first case for the ITLOS to be faced with the UNCLOS Part XII obligations. Even when Ireland’s claim, particularly the claim over the protection and preservation of the Irish Sea, did not lead to the result Ireland hoped for, ITLOS still explicitly noted the importance of the UNCLOS Part XII obligations. It needs to be noted, however, that 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).

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 courts. The Irish Sea is a semi-enclosed sea like the Baltic Sea, faced with serious environmental pollution. The source of concern came from economical activity carried out by a public company. In both cases the conduct was also permitted by the state. Furthermore, in both cases the marine environmental harm had not yet occurred, but the risk of significant harm occurring if the action was to be commissioned was present.88

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 MOX plant case was later taken also to the ECJ (case C-459/03) in a case where the European Commission claimed that Ireland had failed to respect the exclusive jurisdiction of ECJ, in line with article 292 of the EC treaty (article 344 of the Treaty on the Functioning of the European Union)89, and that it had, in fact, breached EC law by referring to the arbitral tribunal a dispute which requires the interpretation and application of measures of EC law for its resolution. The European Commission also claimed that Ireland had failed to comply with its duty of cooperation. ECJ found that Ireland had failed its obligations.90

88 The precautionary principle (where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation, principle 15 of the Rio Declaration) was also discussed in the MOX plant case. See for example Joint declaration of Judges Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson and Jesus on the MOX Plant Case.

89 There corresponding article to article 292 is article 344 in the Treaty on the Functioning of the European Union.

90 C-459/03, paragraphs 59, 139, 157 and 182.
The Permanent Court of Arbitration terminated the proceedings constituted on October 25, 2008 with an order on termination of the proceedings on June 6, 2008. The request for termination came from Ireland.\(^{91}\)

### 3.3.4 Responsibility under the UNCLOS?

#### 3.3.4.1 The UNCLOS

Under the UNCLOS umbrella, states are provided with some guidance for the control of marine pollution. The UNCLOS does not, however, provide any specific or concise rules on pollution prevention. The UNCLOS articles on tackling marine pollution are too general, and therefore open for balancing of interests.\(^{92}\) Even when the UNCLOS rules are somewhat clear, they are not precise enough to survive the interpretation towards balancing between, for example, economical needs.

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 necessary, and harmful effects do follow from legal activities of states. These obligations in respect of the maritime environment do not mean an absolute prohibition to pollute. They rather represent *due diligence obligations (standards)* with the goal to minimize pollution.

When it comes to the UNCLOS rules in articles from 192 to 194 and 235 on the protection of the marine environment, responsibility and liability, the generality and uncertainty of them limit the usefulness of the “no-harm-principle” towards responsibility and liability. Furthermore, the lack of clarity in the rules that must be observed might give states the discretion to choose the rules they wish to follow.\(^{93}\)

---

\(^{91}\)Permanent Court of Arbitration on the dispute between Ireland and the United Kingdom (“MOX plant case”), Order No. 6.

\(^{92}\)See also J. Ebbeson: *Compatability of International and National Environmental Law*, pp. 86–88.

For example, the UNCLOS does not define the concept of “damage” which would be a crucial prerequisite for liability. The definition given to “pollution” in UNCLOS article 4 (1) 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.94

The UNCLOS does not hold any rules for compensation. Actual liability based on breach of the 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 difficult to establish since states can implement these rules according to their own capabilities.95

The UNCLOS also regulates that states should ensure that recourse is available in accordance with their national 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, in line with article 235 (2). This means that states are obliged to develop their national systems on environmental responsibility and liability so that these national regimes would cover damage to the marine environment.96 States are also expected to cooperate in developing the international law relating to responsibility and liability for the assessment of and compensation for damage, according to article 235 (2).

3.3.4.2 The Helsinki Convention

The Helsinki Convention does not regulate responsibility or liability in an enforceable manner, meaning that there are no concrete rules that set an obligation for responsibility or liability. The primary objective of the Helsinki Convention is to contribute to protecting the marine environment against pollution, not to create a regime for responsibility or liability. According to article 25, the Helsinki Convention merely articulates in this article on responsibility for damage that the

94 See also The MOX plant case (Ireland v. United Kingdom), Order, 3 December 2001.
96 In Finland, for example, the Act on reparation of certain environmental damages, translation done by the author of Laki eräiden ympäristölle aiheutuneiden vahinkojen korjaamisesta (383/2009), does cover such damage on the Finnish EEZ.
contracting parties undertake joint development and acceptance of rules concerning responsibility for damage resulting from acts or omissions including, for example, limits of responsibility, criteria and procedures for the determination of liability and available remedies. The obligation set in the Helsinki Convention article 3 (1) is also very open-ended: “Contracting Parties shall individually or jointly take all appropriate legislative, administrative or other relevant measures to prevent and eliminate pollution”.

Compared with the UNCLOS articles, the article on Helsinki Convention mainly expresses the need for cooperation on the matter. Furthermore, the Helsinki Convention does not elaborate on what are the all appropriate legislative, administrative or other relevant measures to prevent and eliminate. This article allows plenty of room for interpretation for the state parties themselves.

3.3.4.3 The European Union

The European Parliament has also raised concerns on the liability issue related to the Nord Stream case. Among other things, the European Parliament demanded that the EU should out its own independent EIA of the proposed Nord Stream pipeline in the Baltic. The European Parliament criticized the European Commission for failing to act on earlier calls for an independent assessment. In the resolution the European Parliament stressed that economic compensation for any failures or damage must be perfectly clear before work can even begin. A major failure in the pipeline could lead to complications for the states bordering the Baltic Sea and could be devastating for the marine environment. Nord Stream should assume full liability for compensation.


4 ENVIRONMENTAL LIABILITY

4.1 Defining responsibility and liability for environmental damage

4.1.1 Liability, responsibility

Liability for environmental damage is a complex issue of international environmental law. There are several international instruments and numerous other sources available for the research of the theme. Therefore, the context of environmental liability needs to be systemized in order to point out the relevant instruments that have relevance to this study. The following gives the fundamental definitions that are essential for this study.

Liability is a part of the legal responsibility for the environment. State responsibility needs to be viewed separately from state’s responsibility to prevent, reduce and control environmental harm. This no harm principle is also an international environmental law principle, derived from the Stockholm and Rio declarations, among others, as outlined in section 1.1 of this study. The no harm principle is very much connected to the state responsibility principle. All the same, it is necessary to make a distinction between them.\(^{99}\)

Liability refers to the duty to pay compensation for damage (sanction). Responsibility includes this liability together with other responsibilities, such as environmental harm prevention. The absolute majority of the international liability regimes are civil liability regimes. This means that the liability is to be imposed towards an individual. Most international liability regimes channel liability to the person in control of an environmentally damaging activity (usually referred as the operator). In addition, states prefer to channel the liability to individuals. Therefore, the civil liability cases would actually be cases of national courts, when a claim on state responsibility would be a case of an international court.\(^{100}\)


To summarize, state responsibility in international law refers to liability; one state to another state for the violation of obligations imposed by them by international legal system (treaty law). However, the use of these concepts is somewhat misleading. For example, Louka makes clear distinction between state responsibility and international liability, while Birnie and Boyle use the term interchangeably. Sands speaks of state liability, and Cassese of state responsibility when he refers to liability and responsibility. This study notes the normal use of the terms; that is that responsibility refers to obligation of states and liability to the consequences which follow form breach of those obligations.

4.1.2 Strict and fault based liability

Strict liability is commonly used when imposing environmental offences. Strict liability can imply different things: it can, for example, refer to reversal of the burden of proof in order to pass liability to another. It may also show simply that failure of due diligence is not required. Absolute liability can be seen as “stricter” liability which includes even less options for justification.

In environmental cases it might be very challenging to point out the person who was or is responsible for the damage. It is a challenging task to establish the exact causation between the damage and the harm. Therefore a fault liability regime would create more costs, when the fault would need to be shown in order to impose liability. Cassese explains fault as “psychological

105 The term due diligence refers to the principle of due diligence that requires legal subjects to ensure that no damage will occur to the environment of other states, or of areas outside their jurisdiction. Due diligence could be characterized as a standard of conduct, and it does not make the state an absolute guarantor of the prevention of harm. The due diligence principle can also be criticized due to its general formulation – it offers very little guidance as to what legislation or control s are required of states in each case. P. W. Birnie and A. E. Boyle: International Law and the Environment, pp. 112–113. See also J. Ebbeson: Compatability of International and National Environmental Law, pp. 103–112.
attitude of the wrongdoer” that builds either on intent or recklessness. Normally, fault is not required in international liability cases.\textsuperscript{107}

Sands also discusses the standard of care as an indicator of what level of liability should be applicable.\textsuperscript{108} According to international law, states have the obligation to prevent significant environmental harm. With reference to that obligation, one might ask how we should address the standard of this obligation when viewed from the liability perspective. It has been agreed that the obligation needs to distinguish between ultra-hazardous and other activities. Furthermore, ultra-hazardous activities would then require strict or absolute liability to push the states to adopt special precautions.\textsuperscript{109}

\section*{4.1.3 Environmental damage}

4.1.3.1 Complex definition

The concept of environmental damage is crucially important to the study objectives. The environmental damage is the trigger for both responsibility and liability – what is environmental damage and what level of environmental damage gives rise to liability? Environmental damage needs to be shown in order for the liable party to compensate for it.

The international environmental law instruments contain numerous definitions for the concept of environmental damage, and there are no final definitions for the concept. Often the term environmental damage is used in a very non-specific manner, since it is difficult to give a precise classification for different types of environmental damage. Therefore, the term can have different meanings in different contexts.\textsuperscript{110} In some cases, such as in the special liability regimes presented below, the environmental damage determine the scope of the liability regime. A narrow definition of damage refers to damage to natural resources, when the more extensive definition includes also

\begin{flushright}
\textsuperscript{108} On due diligence and level of control, see also J. Ebbeson: \textit{Compatability of International and National Environmental Law}, p. 106.
\textsuperscript{110} E. H. P. Brans: \textit{Liability for damage to public Natural Resources}, pp. 9–12; B. Sandvik: \textit{Miljöskadeansvar}, p. 123.
\end{flushright}
property, or even landscape and environmental amenity (like the ecosystem services). A broad definition tends to imply a broad scope of the liability regime.

Particularly in regard to liability, environmental damage can also been seen as consisting of two elements – environmental and compensation element. An environmental “incident” that does not create any concrete loss or damage does not amount to environmental damage. On the other hand, damage without environmental connection is not environmental damage. Definitions on environmental harm or pollution damage fall into two categories: in the traditional categories of damage in national tort law and in the damage to environment as such. As Sands points out, there is a distinction between (compensable) environmental damage and pollution. Pollution on a “tolerable” level is not compensable, and some treaties may require “adverse effects” before there is a liability to compensate.

It can be pointed out that the UNCLOS uses the term “damage caused by pollution” in its article 235 on responsibility and liability, even when the term damage is not defined anywhere in the convention. Furthermore, according to the same article states should compensate for the damage caused by pollution.

Some of the special regimes on environmental liability do, however, define environmental damage to be used in the application of that particular regime, such as for example the International Convention on Civil Liability for Oil Pollution Damage does in its article 1 (6) on pollution damage (1969, CLC).

---

113 See also especially in tort law, one might separate environment “related” types of damage, and damage to the environment itself. Damage to the environment does not really fit in the traditional legal concepts of tort law. E. H. P. Brans: Liability for damage to public Natural Resources, pp. 14–15.
114 L. A. de La Fayette: Compensation for Environmental Damage in Maritime Liability regimes, p. 262.
The UNCLOS framework does not include a definition of damage, even when the convention mentions “damage” in several articles (for example, article 235 speaks about “damage caused by pollution of the marine environment”). The UNCLOS does give a definition, although very broad, of “pollution of the marine environment”: introduction of substances or energy into the marine environment which results or is likely to result in such 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, in line with article 1 (4) of the UNCLOS. The article does not specify for example what are “such deleterious effects” (damage), and therefore the article leaves room for interpretation.

The Helsinki Convention, in its article 2 (1), also gives a definition to pollution, not damage: introduction of substances or energy into the sea which are liable to create hazards to human health, to harm living resources and marine ecosystems, to cause hindrance to legitimate uses of the sea including fishing, to impair the quality for use of sea water, and to lead to a reduction of amenities. The definition is at least as open as is the definition in the UNCLOS. It leaves open the question of what is the “substances or energy” that are “liable to create hazards”.

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.\textsuperscript{119} The ICJ case on Gabčíkovo-Nagymaros project\textsuperscript{120} was actually the first international court case to treat environmental damage as a separate compensable damage: “Hungary is \textit{entitled to compensation for the damage sustained as a result of the diversion of the Danube}, since Czechoslovakia, by putting into operation Variant C, and Slovakia, in maintaining it in service, deprived Hungary of its rightful part in the shared water resources, and exploited those resources essentially for their own benefit [italics by the writer]”.\textsuperscript{121}

\textsuperscript{119} See also T.Kuokkanen: \textit{Defining environmental damage in international and Nordic environmental law}, p. 56.

\textsuperscript{120} Gabčíkovo-Nagymaros Project (\textit{Hungary v. Slovakia}), Judgment, ICJ Reports 1997, pp. 7–81.

\textsuperscript{121} Gabčíkovo-Nagymaros Project (\textit{Hungary v. Slovakia}), paragraph 152.
4.1.3.2 Threshold

The two applicable international treaties that are the most relevant in the Nord Stream case do not give definite answers to what substitutes damage in the marine environment of the Baltic sea. If we cannot define the damage, how can we then define what the criteria for liability are?

Polluting human activity might cause environmental damage, but not all environmental damage triggers liability. 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”.122 Outside actual liability claims, ITLOS has referred to “serious harm to the marine environment”123 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.124

Therefore it seems that correct threshold depends on the facts of the case, as well as regional and local circumstances. A number of the civil liability instruments 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.125 According to Sands, it seems to be undisputed that the threshold requires a relatively high level of environmental damage.126

The questions on threshold as well as the definition of damage are key factors when building the liability in the Nord Stream case – therefore we need to look further into the matter in order to answer these requirements.

---

123 Case concerning Land reclamation by Singapore in and around the straits of Johor (Malaysia v. Singapore), Order, 8 October 2003, paragraph 2.
124 The MOX plant case (Ireland v. United Kingdom), Order, December 3, 2001, p. 11, paragraph 63.
125 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.
4.2 Civil liability regimes relevant to the marine environment

Part XII of the UNCLOS on the protection and preservation of the marine environment addresses several sources of marine pollution. However, only the ship-source pollution has existing operative liability regime. It needs to be pointed out that there is no global convention dealing with environmentally damaging activities on the continental shells (exploration and exploitation), and there is no liability regime in force either.\textsuperscript{127} This section will introduce only the relevant regimes regarding marine environment, keeping in mind the objectives of the study.

The Helsinki Convention does not regulate on liability with concrete rules, even when article 25 states that parties should undertake jointly to develop and accept rules concerning responsibility.

The purpose of liability regimes is not only to provide compensation claims, the aim is also to encourage (mainly shipowners) to take more care in observing the standards for pollution prevention. 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. The civil liability regimes have been developed in relation to specific activities which are considered to be ultra-hazardous (nuclear activities and oil spills). Furthermore, Larsson distinguishes pollution from immovable sources (nuclear plants) and pollution from movable sources (for example, shipping).\textsuperscript{128}

The main sources of marine pollution are dumping, discharges from ships, land-based pollution and atmospheric pollution. Land-based pollution is the single biggest threat. The regime on oil pollution was developed as a response to major international oil spills that gained also great public attention.\textsuperscript{129}

The CLC on oil pollution damage (as amended in 1992) holds the ship owner liable, and the liability is strict limited liability (art. III). The CLC also includes joint and several liability for cases where there are more than one ship involved (art. IV). In addition to actual oil pollution damage, the

\textsuperscript{127} L. A. de La Fayette: Compensation for Environmental Damage in Maritime Liability regimes, p. 232.
convention applies also grave and imminent threat of causing such damage, in line with article 1 (8). The CLC regime is completed with special fund convention (International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992). Since the CLC applies only to oil pollution damage, it is not relevant in the Nord Stream case.130

The International Convention on Liability and Compensation for Damage in Connection with Connection to the Carriage of Hazardous and Noxious Substances by Sea (1996, HNS)131 adopts similar system of liability than the CLC on oil. In line with article 1 (6) and (3) of the HNS, the HNS applies only to ships carrying hazardous and noxious substances. Furthermore, due to the nature of the Nord Stream project, this treaty is not relevant to the Nord Stream case. Furthermore, the international regimes on liability for radioactive matter (including maritime carriage) are not relevant to the Nord Stream case either.132

In addition to these, the UNCLOS, in its article 235 (3), and the Helsinki Convention, in line with article 25, contain general provisions on committing their parties to develop special liability regimes for all forms of marine pollution. So far, there are no attempts for such special regimes.133

Even though the IMO has developed the regimes for the liability and compensation for damage to the marine environment, these regimes cover only a part of the hazardous environmental challenged that marine environment faces.134 This is mainly due to states unwillingness to be bound by liability instruments, since the compensation within these liability instruments often entail economic investments.

133 See also R. R. Churchill and V. Lowe: Law of the Sea, p. 376.
4.3 European instruments

4.3.1 Environmental Liability Directive

4.3.1.1 Scope and application

Directive 2004/35/EC of the European Parliament and of the Council of April 21, 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD) establishes a framework of environmental liability 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) as well as article 1 of the environmental liability directive. The directive was the result of three decades of legislative work for introducing a legal instrument to compensate for environmental or environmental-related damage. The directive covers a wide range of environmental sectors.

The environmental liability directive provides 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.

According to the environmental liability directive and its preamble, the directive's main objective is to prevent and remedy environmental damage. Environmental damage is actually 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).

---

137 See also L. A. de La Fayette: Compensation for Environmental Damage in Maritime Liability regimes, p. 260.
According to article 1 (6) of the environmental liability directive, the liable party is in principle the operator, natural or legal person, who carries out an occupational activity. The operator, who carries out certain dangerous activities as listed in the directive, is strictly liable (without fault) for the environmental damage he caused, in line with article 3. The operator can, however, benefit from certain exceptions and defenses allowed by the directive (for example *force majeure*, armed conflict, third party intervention as in article 4 of the environmental liability directive). The operator is also obliged to take necessary preventive measures when there is an imminent threat of damage, as required by the article 5 of the directive. According to article 6, once the environmental damage has occurred, the operator is under the obligation to remedy the environmental damage.

At the outset, the directive sounds very 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. In addition, all states involved in the Nord Stream project are member states, except for Russia.

In line with article 3 (a) of the environmental liability directive, the directive 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 (IPPC directive), with the exception of installations or parts of installations used for research, development and testing of new products and processes, 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 to the IPPC directive, and therefore pipelines are not under article 1 and Annex III of the environmental liability directive either. Annex III to the environmental liability does not include pipelines in any of the other activities, even when the Annex III does list a range of activities under “manufacture, use, storage, processing, filling and release into the environment and onsite transportation” of certain substances (and paragraph 7, Annex III).

Furthermore, the directive applies to environmental damage – the definition of environmental damage does not include territorial waters or EEZ (article 2 of the environmental liability directive and also article 2 in the Water Framework Directive).
Therefore the Nord Stream pipeline does not fall under the environmental liability directive, as it is applied according the lists of occupational activities as regulated in the article 3.

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 negligent, 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 (Birds directive) on the conservation of wild birds and Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (Habitats directive).  

The Habitats directive establishes the so called Natura 2000 network (see further article 3 of the Habitats directive). Natura 2000 is an EU-wide network of nature protection areas comprised of Special Areas of Conservation (SAC) designated by member states under the Habitats directive. Article 3 of the Habitats directive also incorporates Special Protection Areas (SPAs) which member states designate under the Birds directive. The environmental liability directive applies, however, to all damage to protected species and natural habitats, and the application is not limited to species and habitats inside the designated Natura 2000 areas.

The Nord Stream EIA report lists all the Natura 2000 areas, designed by the surrounding member states of the Baltic. There are several Natura 2000 areas in coastal as well as in offshore waters in the Baltic Sea. The Nord Stream Report assesses all the impacts, on all of the Natura 2000 areas, as not significant.

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 operator will be held liable only in the case of fault or negligence), the environmental liability directive seems to be applicable to the Nord Stream pipeline case – although a with a limited scope. The

---

140 See also the webpage of the EU on environmental liability http://europa.eu/legislation_summaries/enterprise/interaction_with_other_policies/l28120_en.htm (8.12.2009).


142 See chapter 10 of the Nord Stream Espoo report, pp. 1473–1475.
operator is to be held liable only if there is damage to protected species or natural habitats, and only when there is fault or negligence. Therefore the realization of such liability depends on several criteria: firstly, on how to proof the causal connection between the possible damage and the Nord Stream project and secondly, how to proof fault or negligence.

The environmental liability directive enacts that the directive shall not prevent member states from maintaining or adopting more stringent provisions in relation to the prevention and remediying of environmental damage, including the identification of additional activities to be subject to the prevention and remediation requirements and the identification of additional responsible parties, in line with article 16 of the environmental liability directive.\textsuperscript{143} Since the application of the principles set in the directive is important for this study, it is interesting to look into one of the national legislative acts to find out how the environmental liability directive has been implemented.

4.3.1.2 National implementation – Finland

The environmental liability directive has been implemented in Finland with an Act on reparation of certain environmental damages\textsuperscript{144}. The Act came into force July 1, 2009. The Finnish Act on reparation of environmental damage applies also 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. Firstly then, the Water Act regulates that everything that applies to water body, applies also to the Finnish territorial waters and EEZ, in line with article 1:3 of the Finnish Water Act.

Secondly, in line with article 84 of the Finnish Environmental Protection Act, the 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 (“no action may be taken on Finnish territory, inland waters, territorial waters or the Finnish exclusive economic zone that may cause marine pollution outside the Finnish exclusive economic

\textsuperscript{143} Minimum harmonization. J. H. Jans and H. H. B. Vedder: European Environmental Law, p. 98.

\textsuperscript{144} The translation done by the writer, Laki eräiden ympäristölle aiheutuneiden vahinkojen korjaamisesta.
zone”, in line with article 9 of the Finnish Environmental Protection Act on special prohibitions pertaining to the sea).

Finally, since an act (any act, also a permitted act) 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 Finnish Act on reparation of certain environmental damages holds the operator as the one with primary liability, as stated in articles 6 and 10. The actions under the Finnish Act on reparation of certain environmental damages are decided by the Finnish environmental authorities as regulated in the Finnish Environmental Protection Act, article 3.

The Nord Stream Project is subject to national legislation in each of the countries of whose territorial waters and/or EEZs it crosses. Lastly, it needs to be noted that the Finnish Act on reparation of certain environmental damages applies only if the damage occurs in the Finnish territorial waters or EEZ.

4.3.2 Liability for environmental damage

In 1993, in Lugano, the Council of Europe passed the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (the Lugano Convention). The Lugano Convention of 1993 has not yet entered into force. So far, only nine states have signed the Convention, but no state has yet ratified it – three ratifications would be required.

According to article 1 of the Lugano Convention, the convention provides for strict liability for damage caused by activities dangerous to the environment, including activities conducted by public authorities. It covers the environmental risks of dangerous substances, genetically modified organisms, dangerous micro-organisms and waste, as listed in article 2. “Dangerous substances” are

---

146 Cyprus, Finland, Greece, Iceland, Italy, Liechtenstein, Luxembourg, Portugal and the Netherlands.
defined according to various EC Directives\textsuperscript{148} cited in Annex I to the Convention. Natural gas falls within these categories.\textsuperscript{149}

The Lugano Convention defines damage to life and personal injury and damage to property, but also to environment: damage refers, in line with article 2 (7), to loss or damage by impairment of the environment. According to article 2 (11), an incident means any sudden occurrence or continuous occurrence or any series of occurrences having the same origin, which causes damage or creates a grave and imminent threat of causing damage. The Lugano Convention holds the operator liable (person who exercises the control of a dangerous activity), but the operator is allowed to escape liability under various defenses, as regulated by article 8 of the convention.

Surprisingly, this liability regime, in its article 4, \textit{explicitly mentions pipelines}: the Lugano Convention does not apply to carriage, but it does apply to “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, since this explicit mention limits cables and pipelines outside the Lugano Convention, the convention is not relevant in the Nord Stream case. It is notable, however, that the Lugano Convention explicitly mentions cables and pipelines because international environmental treaties rarely do so.\textsuperscript{150}

The Lugano Convention still offers some guidance about the general international attitude towards the direction where the general international law on civil liability on environmental damage is heading – towards stricter regimes; defined criteria and unlimited liability? The Lugano Convention is suggesting a new approach towards environmental damage. It establishes rules of application beyond any particular industrial sector, particular activity or source of environmental damage.

Therefore the Lugano Convention is innovative when compared with earlier specified regimes on environmental liability.\textsuperscript{151} Regardless of the good effort and steps taken forward, even a progressive


\textsuperscript{149} See Annex I, Directive 67/548/EEC.

\textsuperscript{150} As already discovered, the UNCLOS does mention cables and pipelines. Actually, the UNCLOS also regulates on the breaking or injury of the cables and pipelines on the high sea in its articles 112 and 113 – there are no explicit mention on breaking or injury of a cable or pipeline on the continental shelf however nor there is any mention on the liability over such breaking or injury.

international convention becomes more or less powerless without any international signatures and ratifications. Therefore the relevance of the Lugano Convention on the field of international environmental law on environmental liability is secondary.\textsuperscript{152}

The Lugano Convention does not provide specific limitations to liability, as it is regulated in articles 5 and 6 of the convention. This might also be one of the reasons behind the reluctance of 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 not appealing for ratification. Even when the Lugano Convention would require 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.\textsuperscript{153}

\textsuperscript{152} It needs to be noted tough that the EC directive on environmental liability is also an instrument with a more general approach.

5 STATE LIABILITY AND THE NORD STREAM CASE

5.1 *From international law to international environmental law*

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. In the environmental field, there are no general rules governing responsibility and liability. Therefore, the way how the state responsibility is approached changes how liability can be viewed and this needs to be taken into account when examining the matter.

As already analyzed in this study, there are several factors to assess for environmental liability. Questions include issues, such as how to approach environmental damage as such, what constitutes environmental damage in sense of liability, what is the threshold to trigger liability, what is the standard of care and so on. This chapter takes these aspects further.

There are a number of non-binding instruments adopted in the environmental field, with the aim to generate rules on environmental liability. States have recognized the role of liability for environmental damage, as well as the problems attached to it. The Rio Declaration pronounces that the states shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. In addition, according to principle 13 of the Rio Declaration, states should also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

In addition, article 12 of the UNEP Draft Principles of Conduct in the field of the Environment for the Guidance of States in the Conservation and Harmonious Utilisation of Natural Resources Shared by Two or More States (the UNEP Draft Principles) affirms that states are responsible for the fulfillment of their international environmental obligations.

---


155 Principles of Conduct in the field of the Environment for the Guidance of States in the Conservation and Harmonious Utilisation of Natural Resources Shared by Two or More States, 17 ILM 1097 (1978).
As could be seen from the situation of the Lugano Convention, states have not been too keen in binding themselves to overarching liability regimes. States are unwilling to establish rules that would mean that they would bear the costs – it is mostly an economic decision.156

5.2 ILC on state responsibility

5.2.1 Draft Articles on State Responsibility

In 2001, the ILC adopted the Draft Articles on the Responsibility of State for Internationally Wrongful Acts (Draft Articles on State Responsibility).157 The Draft Articles culminated decades of ILC work on state responsibility, and they reflect existing customary law. The motivation behind ILC was the search for a standard more demanding than due diligence to shift the burden of unavoidable loss back to the polluting state. It needs to be noted, however, that Draft Articles on State Responsibility do not mean the end of ILC work, the work is still continuing. The Draft Articles create a standard of strict liability for harm that cannot be predicted or prevented.158 The ILC view is that the injured state is in no position to control activities of other, the source state. Even when the ILC Draft Articles are not specifically aimed at environmental situations, the Draft Articles still create a regime of general international law.159

This study has previously distinguished between responsibility and liability – also ILC noted these concepts. The ILC chose the concept “responsibility” because the term “liability” might have caused confusion when translated to other languages.160

156 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.
158 On strict liability, see also R. M. M. Wallace: International law, p. 190.
The form of the Draft Articles were not a “self-evident” issue for the ILC. The members discussed between two options, a binding convention and non-binding instrument. The members favoring a convention stated that such a significant matter of international law could only be adopted in a binding convention. Stating the customary rules in a convention would give the rules additional certainty, reliability and force. Others opposing the binding convention stated that such soft law instruments had a decisive impact on international relations and that an ungratified convention would lead only to “reverse codification”. The solution that the ILC took was to take note of the Draft Articles, but that the Assembly would consider the adoption of a convention in the second and later stage of the state responsibility codification process.¹⁶¹

Yet another matter to point out before moving into the Draft Articles as such is that they create basic rules of international law on state responsibility for their internationally wrongful acts. The Draft Articles 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 they do give the general conditions under international law for the state to be considered responsible for wrongful actions or omissions and the legal consequences of such act or acts.¹⁶²

In the case of the Nord Stream, the UNCLOS and the Helsinki Convention are the international instruments that regulated 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.

¹⁶² ILC Report on Draft Articles on State Responsibility, p. 31.
5.2.2 The key of the Draft Articles – establishment of the wrongful act of state

5.2.2.1 Systematization of “act of state”, “attributable” and “breach”

The basic rule\textsuperscript{163} 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; breach of international law by a state constitutes international responsibility of that state. In international environmental law the basic principle translates so 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 cannot be held responsible.\textsuperscript{164} Other states may also be held responsible for the same conduct (chapters II and IV).\textsuperscript{165}

There are \textit{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 \textit{attributable} to the state under international law or constitutes a \textit{breach} of an international obligation of the state. An act of 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. But on the other hand, the state cannot escape the characterization of that conduct as wrongful by international law by stating that the conduct is not violating its internal law, as this is regulated by article 3 of the Draft Articles.\textsuperscript{166}

The conduct of any state organ is considered as an act of that state under international law – whether the organ exercises legislative, executive, judicial or any other functions in whatever position or whatever its character as an organ, see further article 4. It is clear from the Draft Articles, articles from 5 to 11, that the formulation of the article is general, but also very wide-ranging. The attribution of conduct of state is taken further in the following articles on specified

\textsuperscript{163} The ICJ has applied the principle for example in the \textit{Gabčíkovo-Nagymaros Project} case, p. 38, paragraph 47: “Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility - - as those two branches of international law obviously have a scope that is distinct.”

\textsuperscript{164} See also E. Louka: \textit{International Environmental Law}, p. 468.

\textsuperscript{165} ILC Report on Draft Articles on State Responsibility, pp. 33–34.

\textsuperscript{166} ILC Report on Draft Articles on State Responsibility, p. 36.
state conduct, and for example a conduct that is acknowledged and adopted by a state as its own is considered the act of state.\(^{167}\)

The articles do not merely stick to narrow view on state as an actor; the articles do in fact cover a variety of actors and their conduct. The articles make it also 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 not any specific requirement for fault either; it is only the act of state that matters.

The second criterion for the internationally wrongful act is that there needs to be a breach of an obligation – there is a breach when an act of that state is not in conformity with what is required of it by that obligation. In order to come to the conclusion that there is a breach of an international obligation, the rules specifying the content of the breach need to be taken account.\(^{168}\) According to article 13, time is one relevant factor: a state needs to be bound by the specific obligation when the act occurs. In the case of an international convention, the state needs to be a ratified party that convention. In addition, acts having a “continuing character” extend for the whole period during which the act continues and remains not in conformity, as it is stated in article 14 (2). In environmental cases this is noteworthy, since the nature of polluting activities is often of continuing character. According to article 15 (2), a breach that has occurred due to series of actions or omissions are to be assessed as a whole, and the wrongful act or omission can also be formed as a sum of these acts or omissions.\(^ {169}\) In addition to that, states can be held jointly responsible for an act; the Draft Articles also regulate responsibility of a state in connection with the act of another state (chapter IV).

There are also special circumstances specified by the Draft Articles on situations when the wrongfulness could be precluded. The most interesting of these is consent, regulated by the article 20: valid consent by a state to the commission of a given act by another state precludes the

\(^{167}\) ILC Report on Draft Articles on State Responsibility, pp. 40 and 53.

\(^{168}\) ILC Report on Draft Articles on State Responsibility, p. 54.

\(^{169}\) See also Commission’s reference to the Trail Smelter case: “For example, the obligation to prevent transboundary damage by air pollution, dealt with in the Trail Smelter arbitration - - was breached for as long as the pollution continued to be emitted". ILC Report on Draft Articles on State Responsibility, p. 62.
wrongfulness of that act in relation to the former state to the extent that the act remains within the limits of that consent.\footnote{Even when the action carried out by the Nord Stream AG is based on prior authorization by the states, the article on concept as precluding the wrongfulness does not apply here on my view. The article refers to consent between states, not consent given to a private actor. In addition, if the consent would be seen here as a precluding factor, the “within the limits of that consent” needs to be considered also – acts that violate the permit, or “consent” are also wrongful.}

The aim of the following chapter is to answer the question how would the state responsibility be established according to the ILC Draft Articles. Analyzing this question requires examination of three aspects under the theme of wrongful act of state – namely what constitutes act of state, what is meant by attributable under international law and what constitutes a breach.

5.2.2.2 Act of state attributable to the state

What would constitute act of state in the in Nord Stream case is a question that deserves attention from different points of view. A multinational company called Nord Stream AG is building a pipeline through the Baltic Sea, and the project will include actions that have an impact on the environment, also harmful ones. 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 – the risk therefore exists.

The state responsibility reflects the responsibility – actions or omissions – of a state. The true actor in the Nord Stream case is the Nord Stream AG. 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, and it has the legal freedom under the UNCLOS to place cables and pipelines. However, since the project is passing territories fully or partly under national jurisdiction, the states having the national jurisdiction 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 claimed the UK for 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”.  

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.\(^{172}\)

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 breach is said to arise from “the authorization, construction and future commissioning of two pulp mills on the River Uruguay [italics done by the writer]”, with reference in particular “to the effects of such activities on the quality of the waters of the River Uruguay and on the areas affected by the river.” The ICJ, furthermore, ruled that “in the Court’s view, there is however nothing in the record to demonstrate that the very decision by Uruguay to authorize the construction of the mills poses an imminent threat of irreparable damage to the aquatic environment of the River Uruguay”.\(^{173}\)

The Nord Stream project is subject to national legislation, and the project has already received three 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.\(^{174}\) Even when these permits make the pollution legal in some sense, these permits cannot be issued in the first place so that 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 the Nord Steam AG when the company

---


\(^{174}\) See for example the Finnish environmental permit for munitions clearing from Western Finland Environmental Permit Authority, LSY-2009-Y-143 (2.10.2009), p. 62.
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 on an area under their jurisdiction.

The point here is that the state is held responsible for an action the state has allowed – even when the state as such has not done the actual polluting or potential polluting act. As a part of customary international law states are obliged to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states. The UNCLOS article 194 regulates that states shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states and their environment.

Moreover, 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.”

Therefore, an action of a private entity authorized, permitted, allowed or otherwise commissioned by the state can be seen as an act of state. In line with article 4 of the Draft Articles and in the light of the Nord Stream case, a government allowing the project and environmental authorities permitting (conduct of “any State organ”) it, have therefore authorized the actions taken by the Nord Stream AG.

175 ILC Report on Draft Articles on State Responsibility, p. 35.
5.2.2.3 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).

The ILC Report on Draft Articles point out an important fact: the final analysis of a breach lies always in the hands of interpretation and application that take into account case objective and facts of the case.\(^\text{177}\)

The 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 under their jurisdiction or control are conducted in a way that they do not to cause damage by pollution (as it is regulated by the article 194 of the UNCLOS). The conduct actually adopted could be seen as, for example, a polluting incident causing damage by pollution.

This can, however, be expressed in different views. In the Gabčíkovo-Nagymaros Project case\(^\text{178}\) the ICJ used the expression “The 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 [italics done by the writer]”.\(^\text{179}\) 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”.\(^\text{180}\) The ICJ actually referred to the ILC Draft Articles on State Responsibility, as they were provisionally adopted by the ILC already in 1976.

\(^{177}\) ILC Report on Draft Articles on State Responsibility, p. 54.
In the Nord Stream case, therefore, analyzing the breach would be based on the facts of the claimed breach, but also by 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 we already discovered in the chapter 3.3 of this study.

5.2.3 Content of the international responsibility of a state

5.2.3.1 Is environmental damage included?

According to article 28 of the Draft Articles, a wrongful act of state entails legal consequences. The legal consequences do not affect the primary obligation if the obligation as such that was breached – see further article 29. If an internationally wrongful act is established, the state is under an obligation to cease the act if the act is still continuing and offer appropriate assurances and guarantees of non-repetition. In the Nord Stream case the most likely event would be a polluting incident during construction phase or operation phase of the pipeline – therefore the act would not be continuing.

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

The Draft Articles seem to take environmental damage into consideration. If two or more states have agreed to engage in particular conduct, e.g. 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 (e.g. 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.\textsuperscript{181}

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 when the definition is broad, one should not assume that any definition of injury or damage would do – but it is up to the primary obligation to define the damage.\textsuperscript{182}

Compensation clearly also includes damage to environment. According to the ILC Report, compensation has been awarded to environmental damage as well. Damage to such environmental values like biodiversity, amenity are “no less real and compensable than damage to property”. It is also mentioned that environmental damage is often difficult to measure.\textsuperscript{183}

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

5.2.3.2 Balancing obligations

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 state and hence trigger state responsibility. In the MOX plant case it was already studied how the UNCLOS obligations on protecting and preserving the marine environment act in an international dispute. Earlier in the study we also took a look into the UNCLOS responsibility and liability regulation – if liability would be a challenging task for the UNCLOS article 235 to constitute, how would these same obligations behave differently with the Draft Articles? Since also the Helsinki Convention sets

\textsuperscript{181} ILC Report on Draft Articles on State Responsibility, p. 92.


\textsuperscript{183} ILC Report on Draft Articles on State Responsibility, pp. 101–102.
an obligation to the state parties that are relevant here, Helsinki Convention is also included in “obligations” which the wrongful act of state is presumed to breach.

It all boils down to the primary obligations again. What constitutes the obligation, against what could the violation or breach 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.

The norm as such guides how to pursue the balance, but it is still up to states to determine the strictness and application of the norm in detail. Therefore, as Ebbeson states, international obligations defined by the balancing norm leave the minimum standard vague.

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

---

184 See more on the other approaches (fixed norms, goal-oriented norms, approaches relating to domestic procedures as well as based on the non-discriminating principle) from J. Ebbeson: *Compatibility of International and National Environmental Law*.


186 J. Ebbeson: *Compatibility of International and National Environmental Law*, p.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.
There are plenty of question marks. 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.\textsuperscript{187}

It can be doubted whether the UNCLOS or the Helsinki Convention obligations would “win” if balanced from the view of state responsibility. 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 wrongful act? Breach of an international obligation of the state is a compulsory prerequisite for establishing the wrongful act of a state.

5.2.3.3 Several states, one act?

In the Nord Stream case pointing out the “one” responsible state is problematic. Since it is several states that allow the activity, the Draft Articles on responsibility of a state in connection with the act of another state are relevant. Each state has its own range of international obligations and therefore also its own responsibilities. However, internationally wrongful conduct often results from the collaboration of several states rather than of one state alone. The states can either each conduct an individual act, or the states can also act jointly through a common organ.\textsuperscript{188}

In most cases of collaborative conduct by two or more states, the responsibility for the wrongful act will be examined according to the principle of independent responsibility (meaning, each state being responsible for its wrongful acts in general). The Draft Articles do, however, define few exceptional cases where it is appropriate that one state should assume responsibility for the internationally wrongful act of another: aid or assistance, direction or control, or coercion by

\textsuperscript{187} J. Ebbeson: \textit{Compatability of International and National Environmental Law}, pp. 89 and 103.

\textsuperscript{188} ILC Report on Draft Articles on State Responsibility, p. 64. The international liability regimes can also include articles on joint and several liability, see for example CLC: “owners of all the ships concerned - - shall be jointly and severally liable for all such damage which is not reasonably separable”, see further article IV.
another state.\textsuperscript{189} This is an important point for the Nord Stream case as such. In the case of, for example, pipeline failure, it would not be possible to point out the exact state responsible.

5.2.3.4 Relevance

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, do the Draft Articles solve the problem that has existed so far in this study with the existing liability regimes not offering solution for a possible liability claims?

The Draft Articles reflect and codify the existing customary international law in the field of state responsibility, 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. Albeit soft law instrument do have a fairly good standing in the field of environmental law in particular\textsuperscript{190}, 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 \textit{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 that they would be regulated more precisely in a more compact instrument – like the states have done with the Rio Declaration principles. In a way, the framework if given in the Draft Articles on State Responsibility would need to be worked as workable rules.

\textsuperscript{189} ILC Report on Draft Articles on State Responsibility, pp. 64–65.

\textsuperscript{190} 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, \textit{Lakimies} 7–8/2006, p. 1193. See also T. Määttä: Soft law som rättskälla på nya rättsområden i den nationella rätten, \textit{Juridiska Föreningens Tidskrift} 6/2006, pp. 554–555 and 557.
The same motive is present in the UNCLOS and Helsinki Convention – the states are expected to regulate further on responsibility and liability:

Article 235 (3) of the UNCLOS:

“States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability - - development of criteria and procedures for payment of adequate compensation”

Article 25 of the Helsinki Convention:

“The Contracting Parties undertake jointly to develop and accept rules concerning responsibility for damage”

The key to the Draft Articles is the establishment of the wrongful act through the act being attributable to the state and existence of a breach against international obligation. Compared to the establishment of the breach, construction of the attributable act is an easier task. The establishment of the breach is, however, more complex.

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; prevent, reduce and control pollution in accordance with a state’s capabilities or to prevent and eliminate pollution. States are responsible for 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”.

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 the munitions clearing or pollution by pipeline leakage), how would these obligations respond? Firstly, the exact “pollution” or “damage” would

191 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.
be difficult to define. Secondly, the exact content of the obligation – according to their capabilities, have the states allowed the construction and operation of the pipeline so that they have taken into consideration their duties to prevent marine pollution sufficiently – would be a challenge. States balance these environmental obligations against other interests.\footnote{On the balancing norm, see J. Ebbeson: \textit{Compatability of International and National Environmental Law}, pp. 106–107, and also on the other hand, A. Jóhannsdóttir: \textit{The significance of the default: A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law}, p. 213.} 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 does result from the activity in question – no matter how serious that harm may be.

Due to the reasons given above, the Draft Articles cannot be seen as the legal regime that solves the problem. The Draft Articles undisputedly create a framework for state responsibility, and a systematized body of secondary rules. In a more concrete scenario like the Nord Stream case however, they do not create functional and applicable rules for establishing the responsibility.

\textit{Birnie and Boyle}, although commenting the ILC 2000 version\footnote{Report of the International Law Commission on the work of its fifty-second session (1 May-9 June and 10 July-18 August 2000), Document A/55/10.}, also find that while the Draft Articles offer potentially effective means of resolving environmental disputes, reliance on the Draft Articles do have serious deficiencies. There is an uncertainty on the liability standards, the type of environmental damage which is recoverable and the role of equitable balancing. The outcome of possible claims is very unpredictable. Lastly, \textit{Birnie and Boyle} find the state responsibility an “inadequate model for the enforcement of international standards of environmental protection”. In addition, most importantly they state, also to back up the findings of this study: “it complements, but does not displace, the need for a system of environmental regulation”. This partly also explains the failure to develop or reform the law of state responsibility for environmental harm.\footnote{P. W. Birnie and A. E. Boyle: \textit{International Law and the Environment}, pp. 199–200.}
5.3 ILC International Liability

5.3.1 Acts not prohibited by international law – view on environment

5.3.1.1 Work in two parts

Environment has not been the on the focus of ILC work in general, but after the issue of transboundary environmental harm raised its head, the ILC had to turn the view on environment as well. Under the theme of International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law ILC worked to distinguish between responsibility for wrongful acts and liability for acts that had harmful consequences on other states, even when these acts were not prohibited. The ILC found that it was important to deal separately with harm which was caused without a breach. ILC preferred to use the term liability over responsibility to cover such cases, since they believed liability arose as a primary obligation when responsibility referred to a consequence due to a breach of the primary obligation.

The concept of international liability has two distinct requirements – the requirement to pay for the damages but also the requirement to prevent, inform and negotiate. The ILC divided the topic into two parts: prevention of transboundary damage from hazardous activities and international liability in case of loss from transboundary harm arising out of hazardous activities. On these topics, the ILC produces two instruments – Prevention of Transboundary Harm from Hazardous Activities and Draft Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. When compared to the state responsibility regime, the ILC regime on international liability includes both primary rules (Prevention of Transboundary Harm from Hazardous Activities) as well as the secondary rules (Draft Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities).

---

5.3.1.2 Prevention of transboundary harm

The scope of the regime on the Prevention of Transboundary Harm from Hazardous Activities (regime on prevention of transboundary harm) is “activities not prohibited by international law, which involve a risk of causing significant transboundary harm through their physical consequences”, as it is stated in article 1. Any activity which holds the risk of causing significant transboundary harm through the physical consequences is within the scope of the regime – there are no separate annexes with lists of activities under the scope of the regime. The affected state can demand the state of origin to act in compliance with the obligations of prevention, even when the activity itself is not prohibited.\(^{199}\)

In the Nord Stream case the activity as such is not prohibited, since the states have permitted a certain level of pollution, and on the other hand the states are prohibited to act against the set obligations. The required diligence standards left in between are more or less in a grey area.

Article 2 divides risk into two categories; high probability of causing significant transboundary harm and low probability of causing disastrous transboundary harm. The harm needs therefore be seen as “reasonably foreseeable as potentially harmful”.\(^{200}\) The regime includes rules on prevention in article 3, cooperation in article 4 and implementation in article 5. According to article 6, states shall also require prior authorization for activities under the scope of the regime on the prevention of transboundary harm. Interestingly, the regime also includes an article on “equitable balance of interests” – in order to achieve an equitable balance of interest states need to take into account all the relevant factors and circumstances, such as the degree of risk or importance of activity, as in article 10.

5.3.1.3 Allocation of loss

The Draft Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (Draft Principles) are placed in the context of Rio Declaration (principles 13

\(^{199}\) ILC Report 2001 on International Liability, p. 150.

\(^{200}\) A. Boyle: Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited, p. 75.
and 16), and the Draft Principles recall the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities.

The focus of these Draft Principles is the fact that even if the states fully comply with its prevention obligations, under international law *accidents or other incidents* may nonetheless occur and have transboundary consequences that cause harm and serious loss to other states and their nationals.²⁰¹ This is the “scenario” played out in the Nord Stream case: damage through polluting incident.

The ILC Report 2006 on International Liability aims to push forward the development of international law on liability by providing appropriate guidance to states to make specific agreements on the matter. The Draft Principles use the same trigger for liability as the regime on prevention of transboundary harm (“significant”). According to the Draft Principles article 2 (g), *operator* is the liable by the main rule. There is no requirement for fault, but the liability may be limited or subject to special conditions. However, also a person or an entity may be held liable. This is of course a difference compared to the State Responsibility regime, and an important issue to point out, particularly in the light of the Nord Stream case.²⁰²

What is interesting is that the ILC Report explicitly discusses situations where a state has authorized an action. Under international law states have obligations of prevention, and these duties include standards of *due diligence*. States are, although taking these obligations into consideration, obliged to “allow hazardous activities with a risk of significant transboundary harm only upon prior authorization, utilizing environmental and transboundary impact assessments and monitoring those impacts, as appropriate”. Therefore, even when the primary obligation is attached to the operators, states are not free from ignoring their duties of prevention under international law. When allocating the loss, the Draft Principles aim to spread the loss among multiple actors, also state.²⁰³

This is the situation as it was already earlier played out for the Nord Stream case – states as the authorizing institutes do not avoid liability by “shifting” the liability to the operator, nor are the states free from their primary obligations. However, the balancing of these obligations need to be taken into account again.

²⁰² ILC Report 2006 on International Liability, p. 112
The Draft Principles consist of eight articles in total, so it is a very compact instrument. The Draft Principles, according to article 1 again, are applied to transboundary damage caused by hazardous activities not prohibited by international law. Surprisingly, the Draft Articles, in their article 2 (a), contain a definition of damage as well: damage means significant damage caused to persons, property or the environment. The damage includes loss of life or personal injury, loss of or damage to property, loss or damage by impairment of the environment, the costs of reasonable measures of reinstatement of the property or environment and the costs of reasonable response measures. The concept of environment is defined in the article 2 (b) in a very broad manner: natural resources (biotic and abiotic), air, water, soil, fauna and flora and interaction between these actors as well as characteristic aspects of the environment. Transboundary damage is also defined: damage caused to states other than the state of origin. The Draft Principles focus on actual damage instead of the act.

The ILC Report explicitly discusses the importance of defining these central concepts. The ILC finds that the existence and recognition of threshold is important, and refers to Trail Smelter case to show the origin of the “significant” requirement. The ILC Report explains that the significant refers in the Draft Principles to a threshold of “something more than ‘detectable’ but need not be at the level of ‘serious’ or ‘substantial’”. In addition, the significant damage needs to lead to detrimental effects that can be measured with objective and factual standards. No definition is perfect, but this definition is significantly more than what is usually provided in the international environmental law instruments.204

According to article 3, the Draft Principles have two main purposes: to ensure prompt and adequate compensation and to preserve and protect the environment. The Draft Articles vest the states with the obligation to enact measures for prompt and adequate compensation, and international and domestic remedies, see further articles 4, 6 and 7. The implementation of the Draft Principles is left to the states themselves by the article 8, the Draft Principles themselves oblige the states only to adopt “legislative, regulatory and administrative measures to implement” the Draft Principles.

---

204 ILC Report 2006 on International Liability, pp. 123–124. See also E. H. P. Brans: Liability for damage to public Natural Resources, pp. 9–22;
5.3.1.3 Relevance

The work on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law filled a gap that existed due to the situation where states were responsible only for acts that breached obligations under international law. In addition, the ILC work takes environment under a special view. Environment is not at any special position in the Draft Articles on State Responsibility. States are not the “absolute guarantors” of the safety of activities under their jurisdiction or control. The states are “merely” obliged to take the obligations set to them into consideration when balancing interests.205

However, the ILC work for act not prohibited by international law has gained critics. Boyle finds that it is not clear whether the two sets of regimes (on state responsibility and international liability) are necessary, or if the differentiation of the themes is even well-reasoned. What is the usefulness of the codification of international liability for international environmental law?206

The states have persistently avoided the theme of liability for environmental damage, and in that sense the ILC drafts on international liability take a step forward. The regimes on prevention of transboundary harm and Draft Principles on International Liability do not contain anything too surprising for the international community, the rules they carry are pretty much familiar. ILC went on codifying and modestly developing already well-established law, and the value of this work is yet to be discovered.207

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 more clearly than the other regimes.

205 A. Boyle: Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited, p. 76.
6 WHAT ABOUT POLLUTER PAYS PRINCIPLE?

6.1 The principal outlines

The polluter pays principle reflects a principle that the costs of the pollution should be borne by the person responsible for causing the pollution. The principle is closely related to the liability and state responsibility principles analyzed above, since it implicates liability for the damage caused.208 Out of the several environmental principles, the polluter pays principle is one of the most widely acknowledged general environmental principles, especially in the EC environmental law. The principle is also under continuous development, and the principle has not found its true meaning so far. It is for example questioned whether the principle is moving towards of having the status of customary law, and whether the several treaty affirmations of the principle imply that the principle would gradually be shifting from soft law instruments to hard law. 209 It is also reiterated in a number of international environmental law instruments, such as the Rio Declaration (principle 16) and the Helsinki Convention article 3, to mention a few.

The polluter pays principle has different functions210, such as the preventive function, curative and economic function. The polluter pays principle is therefore also a principle of economic policy, or an economic rule for cost-allocation.211 The principle was first promoted by the Organisation for Economic Co-operation and Development (OECD). Sandvik argues, however, that the principle and its true meaning are “blurred”. The principle was originally adopted in the auspices of the OECD,

---

208 The precautionary principle has also been connected to environmental liability, although the connection is not too certain, as de Sadeleer notes: “Consequently, the precautionary principle – which is meant to protect against uncertain risk – is not relevant to civil liability. - - The days of absolute certainty are over; in the future, greater importance will necessarily be attached to doubt and consequently to the precautionary principle within the mechanisms of liability.” 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.


210 On the functions see also N. de Sadeleer: Environmental Principles, pp. 33–37.

but later the polluter pays principle has been attached to environmental liability for environmental harm.  

Even though the polluter pays principle has been explicitly confirmed in several international instruments, there are also instruments that are not so clear on the matter. For example, the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities on the “factors involved in an equitable balance of interests” between polluting and the affected party. The concerned states should take into consideration the degree to which the state of origin and the state likely to be affected are prepared to contribute to the costs of pollution damage, in line with the article 10 (d). This article established rather a rule on balancing between the concerned states than a rule enforcing the polluter pays principle.

States see that the polluter pays principle is applicable at a national level, but that the principle cannot be harnessed for the purposes of governing responsibilities between states. The implementation of the principle at a global level entails serious problems; a principle that appears to be simple is actually poorly defined in practice.

6.2 Applicability of the principle

6.2.1 Pollution and Polluter

There are several questions to answer when the polluter pays principle is applied in practice: what constitutes pollution and who is the polluter are two of these questions, for instance.

*De Sadeleer* introduces two theories on the definition of pollution. Firstly, an emission does not always constitute pollution. Here the definition of pollution is attached to a certain threshold: if the

---


threshold is not exceeded, there is no pollution. Therefore also, exceeding a threshold implies that there is a set norm and when the norm is exceeded, there must also be a violation of that norm.

The second theory focuses on the actual impact on the environment, rather than to a certain set threshold. Pollution must cause damage, or injury, to the environment. Hence this theory places the environmental effect at focus; regardless of the fact if the action is lawful or unlawful. Furthermore, an environmental impact will only give rise to financial compensation to the extent that it generates damage – in order for there to be a polluter, there must be damage. According to de Sadeleer, this is the reasoning that the international environmental law seems to favor.\textsuperscript{216}

As this study has already found out, the definition of pollution damage, injury, environmental harm or suchlike is not an unambiguous matter for the international environmental law. In the field of marine environmental protection these concepts have various definitions, but usually all of the very broad and open for interpretation.

As de Sadeleer puts it: “defining pollution as a function of the environmental impact of an emission does not - - solve all the problems raised - - ”.\textsuperscript{217} But what is really of any relevance here is the fact if the existence of damage is needed in order to apply the polluter pays principle. The application of the polluter pays principle without a sufficiently determined damage, or degradation, is difficult.\textsuperscript{218}

Therefore, applying the polluter pays principle based on the definitions in the UNCLOS or the Helsinki Convention would be complicated – even when the definition, for example, in the UNCLOS has a more restricted approach. According to the UNCLOS article 1, the substances or energy introduced to the marine environment must result or potentially result deleterious effects. Since the principle cannot as such define the level of damage to trigger the principle, it is the task of the legal rules to determine the level of damage.

Polluter is usually the person who causes pollution. The identification of the polluter is difficult, since, for example, the person in charge, the operator, manufacturer or the license-holder could all


\textsuperscript{217} N. de Sadeleer: \textit{Environmental Principles}, p. 40.

\textsuperscript{218} N. de Sadeleer: \textit{Environmental Principles}, p. 41.
be held “polluters”. In the Nord Stream case, how should the polluter be established – what are the options? The Nord Stream AG is the license-holder, and it might also be possible to point out the person in charge. However, the Nord Stream AG is operating on the basis of authorization by the states, the activity is licensed activity. Therefore the threshold for applying the polluter pays principle is high in the sense that there are several interpretative questions to solve, as has been proved by this study in the previous chapters. The problems arising out of open rules, balancing of interests or loose definitions do not disappear when they are viewed from the point of view of the polluter pays principle.

Are there any other possibilities for the polluter pays principle to apply?

6.2.2 Residual state responsibility

According to the traditional view on the polluter pays principle, the polluter can be seen as having the primary responsibility for environmental harm. It is not usual under national law that the polluter is held directly accountable for his actions.219

The international law on state responsibility implies, however, a different approach. According to the principles on state responsibility, the state is primarily responsible for the violating international obligations.220 Several states can be jointly responsible.

However, international environmental liability instruments represent a somewhat diverging view from the state responsibility. 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

219 See for example Finnish Act on reparation of environmental damages (Laki ympäristövahinkojen korvaamisesta, 1994/737) that enacts that the primarily responsible is the one causing the damage by his/her operations, see further article 7. In addition, according to Finnish Environmental Protection Act, article 75, any party whose activities have caused the contamination of soil or groundwater is required to restore said soil or groundwater. Furthermore, the liability is tripartite: if the party that has caused the contamination of soil cannot be established or reached, the holder of the area shall restore the soil or groundwater. Lastly, if the holder of the polluted area cannot be required to treat contaminated soil, the municipality shall establish the need for and carry out soil remediation.

law liability regimes in the national law but not at the international level. The states use this as an alternative for state responsibility in international law.\textsuperscript{221}

In the Nord Stream case the Nord Stream AG is the operator of the activity causing environmental impacts on the Baltic Sea, and to the environment of other states. The Nord Stream AG is however operating its polluting activity with a license. The state has not only licensed 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?

In the Trail Smelter case between the USA and Canada was about a Canadian company causing the 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 de lege ferenda 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. As de Sadeleer puts it: “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.”\textsuperscript{222}

\textsuperscript{221} N. de Sadeleer: Environmental Principles, p. 24.

\textsuperscript{222} See also N. de Sadeleer: Environmental Principles, pp. 24–25 and 40.
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 due to environmental pollution to another state. The national laws on reparation include also other forms of reparation than compensation, therefore the state could oblige its national also to restore the environmental status before the damage occurred. This is, however, usually not possible due to the nature of the environmental impact. There are numerous problems attached to the principles of state responsibility and the first sight of the matter do not prevail all the questions related to this approach.

The polluter pays principle, in connection with the residual state responsibility, also supports the theory of the polluter pays principle being attached to the environmental impact of the actions, rather than to the threshold criteria.

Regarding the close connection between the polluter pays principle and environmental liability, the principle does not actually deal with liability as such. Larsson points out that even when the polluter (would it then be first the state and then the operator, or the operator “directly”) acts as the initial payer of the preventive costs and costs of damage, the polluter may pass these costs to the consumer. However, the polluter pays principle is obviously attached to the environmental liability structure as the responsible one for the environmental damage being also responsible for compensation.

The polluter pays principle seems to enable two different scenarios for application: first, one of holding the operator liable for the polluting activity, and second, by placing the liability to the state and eventually the state and residually the operator according to the internal law. The applicability of the polluter pays principle depends on the international treaty regulating the matter – in the Nord Stream case, only the Helsinki Convention explicitly mentions the polluter pays principle, as it is implemented into national law. Furthermore, it is interesting to ask what the international relation of the principle is.

---

223 See de Sadeleer on the preventive function. N. de Sadeleer: Environmental Principles, p. 36.
225 For example, according to the article 88 (threat of a conditional fine, of having action taken and of suspension) of the Finnish Environmental Protection Act and according to articles 14 and 15 of the Finnish Act on Conditional Fine (Uhkasakkolaki, 1113/1990), the obligation for restitution can be placed upon the polluter with the sanction that if the polluter does not take action, the action shall be taken and the polluter shall bear the costs.

76
7 CONCLUSION

The purpose of this conclusion is to gather up the central findings of this study by reflecting the research questions that were set for this study in the introduction chapter. This is done in the following chapter by chapter. Finally the primary research question is concisely analyzed.

The starting point for the study was the recognition of the *due diligence standards*. 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 economical and other purposes. However, 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. Obligations for transboundary harm lay on the foundations of this study on environmental liability.

International law does not hold any generally agreed 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 study is that there is neither a generally applicable nor a special regime on liability directly applicable in the Nord Stream case. Therefore, in order to point out the potentially relevant regime, one must search into the possibly relevant regimes and their systemization.

The question on the relevance of the Nord Stream case was answered in chapter two. The Nord Stream project is taking place in a highly sensitive sea area that is also governed by several national jurisdictions, complemented with EU and international law. From the point of view of international law, states have the general right to lay submarine pipelines according to the UNCLOS articles 56 and 79. However, considering the sensitivity of the sea area, and the construction and operation of the pipeline project, the situation is, as such, prone to environmental damage. In addition, since the area is tightly governed by national jurisdiction of the surrounding Baltic states, an environmental damage could lead to environmental disagreements, disputes or to liability claims. The relevance of the Nord Stream case therefore is that it is, despite the right to lay pipelines, a potential case scenario for an international case on environmental responsibility and liability.
Secondly, the study questioned the interplay between rights and obligations as set in the UNCLOS framework, and asked if they could form the basis for responsibility and furthermore liability. This question was analyzed in chapter three of the study.

The interplay between rights and obligations refers to the right to lay pipelines and obligations to protect and preserve the marine environment, as referred in the relevant UNCLOS articles 56, 79, 192 and 194. The Nord Stream project requires national permitting, and the study looked into the Finnish approval and permitting to pinpoint the issue. A state needs to take the UNCLOS obligation into consideration when permitting operations (pipeline) on 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 also allows the potential environmental impacts of the pipeline (and these harmful impacts are to the 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. In line with UNCLOS article 235, states are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment.

The study found that in order to establish liability based on the UNCLOS, the threshold and exact content of the obligation as well as environmental damage should be sufficiently defined. The UNCLOS articles on tackling marine pollution are general and 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 the answer to the question on the chapter three is that environmental liability in the Nord Stream case cannot be established based on the UNCLOS articles on obligations, and responsibility and liability.

Since the UNCLOS articles on state responsibility and liability proved to be insufficient to establish liability, the study moved forward to international liability instruments. The question was then about the relevant civil liability instruments for the Nord Stream case, and furthermore if these instruments could solve the problem of finding applicable regime on liability.

The study found out firstly that the concept of environmental damage has a key function in establishing the 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 specific liability regimes do include more precise rules on damage and threshold, but as the study found out, none of the international civil liability regimes in force (relating the marine environment) were relevant in the Nord Stream case.

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

Therefore the answer to the question on civil liability instruments is that the study did not succeed to show that these civil liability instruments would be significantly relevant in the Nord Stream case.

The chapter five of the study took a state’s view on responsibility and liability, and analyzed the ILC work on state responsibility and liability through a set of questions. 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 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 study. 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 the wrongful acts. Furthermore, the ILC Draft Articles are a soft law instrument, and therefore not binding upon states.
Therefore the study found 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 last question for the study is what the relevance of the polluter pays principle is. The study discovered that the polluter pays principle could be harnessed for the purposes of both operator based liability as well as state responsibility. The principle is, however, still under construction, and has not gained an assuring position in the group of well-established international environmental law principles. Therefore the study found out that the polluter pays principle may well serve as a guiding principle, but without any concrete – and sufficiently defined – rules its true meaning and relevance cannot be determined.

Finally, it is time to answer the primary research question: In the case of environmental damage on the Baltic Sea, due to the Nord Stream pipeline project, who is to be held liable for the damage and how is this liability established, and what are the criteria to be applied?

This study has provided an answer for this question. As a general framework for this question, the study discussed the rights and obligations set in the international environmental law – their content and relevance. The principal question on what actually constitutes an environmental damage was analyzed, and furthermore, the question of how this works with the criteria establishing liability was also tackled.

The international environmental law on environmental liability is a complex system, and as this study found, it is not possible to directly point out who is to be held liable for the potential damage. The 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.