8 Trail Smelter and the International Law Commission’s Work on State Responsibility for Internationally Wrongful Acts and State Liability

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INTRODUCTION

On August 9, 2001, the International Law Commission (ILC) adopted Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles) together with detailed Commentaries.1 The Draft Articles—the product of nearly fifty years’ work—represent an important step in the codification and development of international law. In their preface, the Commentaries describe the Draft Articles as comparable in significance to the 1966 Draft Articles on the Law of Treaties that became, with limited changes, the 1969 Vienna Convention on the Law of Treaties.2

State responsibility involves the consequences to states of their internationally wrongful activities. Draft Article 1 stipulates that every internationally wrongful act of a state entails the international responsibility of that state. Internationally wrongful acts take two forms: (1) breach of an

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international obligation of the state; or (2) a serious breach of an obligation under a peremptory norm of general international law.

Professor James Crawford was Special Rapporteur for State Responsibility of the ILC at the time of the second reading of the Draft Articles. On December 12, 2001, the United Nations General Assembly adopted Resolution 56/83, which "commends the Draft Articles to the attention of governments without prejudice to the question of their future adoption or other appropriate action." Assuredly, the Draft Articles already have exerted considerable impact as a subsidiary means of determining the content of international law: they already have been relied on by the International Court of Justice. Their influence would continue to grow were states to sign onto them in treaty form or otherwise declare them to constitute evidence of customary international law. Thus far, however, there is no consensus to push the Draft Articles toward a formalized convention or treaty and, tellingly, nothing further has been done in this regard.

It is essential to underscore that the Draft Articles do not set forth any particular substantive obligations but, instead, determine when an obligation has been breached and the legal consequences flowing from that breach. The Draft Articles do not establish primary obligations that define acceptable or unacceptable standards of conduct. Instead, they establish secondary obligations that flow from a breach of an independent and pre-existing primary obligation. The breach of a primary obligation therefore gives rise to a new legal regime, that of state responsibility, that contains its own distinctive set of duties and rights.

The primary rule established in the Trail Smelter arbitration is that "no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties of persons therein. when the case is of serious consequence and the

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5 They constitute an example of the teachings of the most highly qualified publicists of the various nations. See Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993 (June 26, 1945), art. 38(1)(d).

6 See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131 (July 9) at para. 140.
injury is established by clear and convincing evidence. Günther Handl documents, in his contribution to this volume, how this primary rule has moved from its evocation in Trail Smelter to a variety of international instruments and decisions, such as Principle 21 (Stockholm Declaration) and the opinion of the International Court of Justice in the Gabčíkovo-Nagymaros dispute. In earlier writings, Handl characterized Trail Smelter as the locus classicus of international environmental law. Although John Knox, in his contribution to this volume, is wise to point out that neither Canada nor the United States intended for Trail Smelter to become such a vital precedent, the fact that it did demonstrates the mysterious, and at times unpredictable, evolution of international environmental law.

Assuredly, Trail Smelter best is remembered for its primary rule. But this is not its only legacy. Although not central to the Trail Smelter arbitration, important aspects of state responsibility do arise insofar as Canada was ordered to pay reparations for its infringement of the newly established primary rule. In this regard, I welcome Steve McCaffrey’s characterization in this volume of Trail Smelter as an important thread that has woven its way into a number of diffuse corners of the tapestry of international law.

The primary goal of this Chapter is to track the relationship between Trail Smelter and the 2001 Draft Articles that codify the secondary obligations of state responsibility. The jurisprudential value of Trail Smelter in terms of the obligation not to cause serious transboundary environmental harm does not specifically relate to the Draft Articles. Instead, germane to the Draft Articles are those elements of Trail Smelter that deal with determining a breach of a preexisting obligation and assessing the legal consequences that flow from such a breach. All things considered, although Trail Smelter has played an important role in influencing the development of international environmental law, its influence on the law of state responsibility—although extant—is less catalytic.

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7 Trail Smelter Arbitral Decision, 35 AMERICAN JOURNAL OF INTERNATIONAL LAW 684 (1941) [hereinafter “Trail Smelter (1941)”). See Annex to this volume.
8 See Handl in this volume.
10 See Knox in this volume. See also D. H. Diwoodie, The Politics of International Pollution Control: The Trail Smelter Case, 27 INTERNATIONAL JOURNAL 219, 224 (1972) (reporting that the Canadian government initially decided to refer the Trail Smelter controversy for investigation of injury and compensation as “a gesture of comity”).
11 See McCaffrey in this volume.
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The secondary goal of this Chapter is to consider the interface between *Trail Smelter* and the ILC’s work in the collateral yet distinct area of state liability, a topic also currently on the agenda of the ILC and for which articles on the subissue of prevention were drafted in 2001 and principles on the sub-issue of allocation were readied in 2004. State liability differs from state responsibility insofar as it covers situations in which no illegal or unlawful conduct has occurred, although the conduct has triggered harm. *Trail Smelter* has exerted greater influence on the preventative aspects of the law of state liability (where *Trail Smelter*’s primary rule has been of guidance) than on the reparative aspects that have very recently crystallized in the principles on allocation.

OVERVIEW OF THE DRAFT ARTICLES ON STATE RESPONSIBILITY

There are fifty-nine Draft Articles. They have general application to all areas of international law and develop a regulatory framework for the obligations states owe to each other. One major innovation of the Draft Articles is that they view state responsibility not just bilaterally — which is the traditional approach and one that informs the *Trail Smelter* arbitration — but also multilaterally. In this sense, they modestly contribute to the construction of some sort of global *ordre public*.

The basic predicate of the Draft Articles is that “conduct not in conformity with an international obligation and attributable to a state equals an internationally wrongful act resulting in state responsibility.” Internationally wrongful acts take two forms: “a breach of an international obligation of the state” or “a serious breach of an obligation under a peremptory

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12 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, together with Commentaries, Report of the International Law Commission on the Work of Its Fifty-third Session, UN CAOR, 53th Sess., Supp. No. 10, at V.E.1, UN Doc. A/56/60 (2001). For the moment, it remains unclear whether the Draft Articles on Prevention will move forward on their own or as part of a broader legal instrument in which liability also is addressed. State liability is connected to state responsibility insofar as failure to perform duties of prevention entails state responsibility.


14 Bodansky and Crook, supra note 1, at 782.
norm of general international law."\textsuperscript{15} The language of this latter category was deliberately chosen over the more controversial term "state crime."\textsuperscript{16} Although it may seem self-evident that a breach of a peremptory norm may be more serious than a general breach of an international obligation, the Draft Articles do not differentiate according to the nature of the obligations breached.\textsuperscript{17} As such, international responsibility of states, even on central matters of the global \textit{ordre public}, is decriminalized.

The Draft Articles explore – in some cases in great detail, in other cases in great generality – many concepts implicated by this basic predicate. The Draft Articles touch on many themes, including: attribution of conduct to a state; determination of breach; responsibility of a state in connection with the acts of another state; circumstances precluding wrongfulness (such as consent, self-defense, or necessity); cessation; assurances of nonrepetition; reparation and compensation: responsibility owed bilaterally and \textit{erga omnes} (to the international community as a whole); which state may invoke a breach of responsibility and the process of invocation; countermeasures: procedure to be followed before initiating countermeasures; and whether states that are not individually injured can implement countermeasures.\textsuperscript{18}

The Draft Articles engage in some progressive development of \textit{inter-state} responsibilities. For example, they give states a right to invoke the responsibility of other states for breaches of obligations owed to the international community as a whole. This could be an important mechanism to cultivate responsibility for state conduct that breaches obligations to protect common concerns of humanity – such as biodiversity and the atmosphere. That said, the Draft Articles do not attempt to "codify, much less progressively develop, [...] the growing importance of non-state actors as holders of international rights and obligations."\textsuperscript{19} Although the rules of attribution reference the potential responsibility of states for the conduct of nonstate actors, they do so only partially. In this sense, the Draft Articles focus on

\textsuperscript{15} Draft Articles, \textit{supra} note 1, arts. 2, 42(1). "Serious" is defined as a "gross or systemic failure." \textit{Id.} art. 42(2).

\textsuperscript{16} As a matter of very general impression, this constitutes an important semantic change, demonstrating the moderation and conservativeness of the Draft Articles.

\textsuperscript{17} \textit{Dupuy, supra} note 2, at 1958.

\textsuperscript{18} The availability of countermeasures must be balanced insofar as too restricted an availability may unduly crimp national sovereignty whereas too generous an availability may entail order in international affairs.

\textsuperscript{19} Bodansky and Crook, \textit{supra} note 1, at 775. In the \textit{Philippine Arbitration}, both governments were willing to step in and assume responsibility for the acts of the non-state corporations or farmers in question. See Millar in this volume.
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states and, as a consequence, work within a traditional view of the international legal system.20

To reiterate for clarification: the Draft Articles do not establish primary obligations that define standards of conduct. Instead, they establish the secondary obligations that flow from a breach of an independent and preexisting primary obligation and, also, that determine when such a breach occurs. These secondary obligations include “the modalities by which states can legitimately claim redress for violations of ‘primary’ international norms [. . .].”21 As James Crawford explains: “[T]he key idea is that a breach of a primary obligation gives rise, immediately by operation of the law of state responsibility, to a secondary obligation or series of such obligations (cessation, reparation . . .).”22 This distinction between primary and secondary obligations had been pushed by Special Rapporteur Ago (1963–1979).23 Ago felt that it would be impossible to formulate Draft Articles in the absence of such a distinction. Although Ago characterizes the Draft Articles as dealing with secondary rules (and this characterization is widely accepted by commentators), others prefer different language. David Caron, for example, terms the subject matter of the Draft Articles as “trans substantive rules.”24 By this he means “a set of rules present in state responsibility independently of the particular substantive obligation in question.”25

As Caron points out, the Draft Articles seek to establish a general law of state responsibility. In an international legal regime where law is subject to increasing specialization that creates individualized systems of dispute resolution and responsibility, this is an important undertaking insofar as it seeks to promulgate some general guidelines. To be sure, this has prompted some commentators to describe the ILC project as “a bit anachronistic.”26 This observation emanates in particular from commonlaw lawyers, for whom even national legal systems have no generalized rules of responsibility. Instead, substantive rules are classified by subject matter (e.g., contract

21 David Bederman, Counterintuiting Countermeasures, 96 American Journal of International Law 817, 823 (2002). See also Dupuy, supra note 2, at 1059.
24 Caron, supra note 23, at 871.
25 Id.
26 Bodansky and Crock, supra note 1, at 774.
law, tort law, constitutional law, family law). "each characterized by its own regime of 'responsibility' with its own remedies, rules of attribution and invocation [...]" For the civiliste, there is more of a natural compatibility with generalized rules of responsibility, although the fragmented nature of the international legal order does make it difficult to conceive of a generalized approach to responsibility, insofar as there may not be an international "legal system" to speak of. The interaction between the Draft Articles and specialized rules of responsibility is clear: the Draft Articles represent only "default or residual rules:"\textsuperscript{28} treaty regimes (for example, the WTO, ICC, NAFTA, or regional human rights systems) or specialized custom can develop their own lex specialis regarding responsibility that supplants the Draft Articles.

TRAIL SMELTER AND THE DRAFT ARTICLES ON STATE RESPONSIBILITY

The Trail Smelter case is referenced four times in the over three hundred pages of Commentaries to the Draft Articles. This is significantly less than many other important international decisions, such as:

- Air Services Agreement (1979, international arbitral award) (referenced eight times);
- Barcelona Traction (1970, ICJ) (fourteen times);
- Corfu Channel (merits and compensation) (1949, ICJ) (seven times);
- Factory at Chorzow (jurisdiction and merits) (1927–1928, PCIJ) (twenty-three times);
- Gabčíkovo-Nagymaros (1997, ICJ) (thirty-four times);
- LaGrand (provisional measures and merits) (2001, ICJ) (twenty times);
- Loizidou v. Turkey (preliminary objections and merits) (1995–1996, ECHR) (6 times);
- Nicaragua v. U.S. (1986, ICJ) (seventeen times);
- Rainbow Warrior (1990, ICJ) (twenty-four times);
- The M/V Saiga (1999, ITLOS) (six times);
- The S.S. Wimbledon (1923, PCIJ) (eleven times); and
- the various awards and decisions of the Iran-United States Claims Tribunal (twenty-eight awards and decisions cited).

\textsuperscript{27} Id. at 780.
\textsuperscript{28} Id. See also Draft Articles, supra note 1, art. 55.
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Many of the sources to which frequent reference is made are ICJ, PCIJ, or ITLOS decisions, which are imbued with considerable international legal authority as subsidiary sources of international law. Within the fairly large peer group of arbitral decisions, Trail Smelter clearly is among the more frequently referenced. In the end, it is fair to say that the influence of the Trail Smelter decision exceeds its rather modest provenance. This phenomenon can be explained in part by the fact that Trail Smelter constitutes one of the first renditions of state responsibility for transboundary environmental harms.39

Trail Smelter influences four aspects of the Draft Articles: the continuation of the obligation to prevent a wrongful act; special measures to guarantee nonrepetition, remoteness of harm, and compensation for reduction in property value. This chapter now considers each of these in turn.

The Continuation of the Obligation to Prevent a Wrongful Act

Draft Article 14 (extension in time of the breach of an international obligation) provides in subsection (3) that: “The breach of an international obligation requiring a state to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.” Draft Article 14(3) thus deals with the temporal dimensions of a subset of international obligations, notably the breach of an obligation to prevent the occurrence of an event. Obligations of prevention usually are construed as best efforts obligations, requiring states to take all reasonable or necessary measures to prevent a given event from occurring. This does not, however, rise to the level of a strict liability warranty that the event in question shall not occur. Trail Smelter is cited in Commentary (14) to Draft Article 14(3) in support of the proposition that the breach of an obligation may well be a continuing wrongful act, although the breach only continues if the state is bound by the obligation for the period during which the event continues and remains not in conformity with what is required by the obligation. "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. Indeed, in such cases the breach may be progressively aggravated by the failure to

suppress it.” Continuation of a wrongful act entails a continuation of responsibility.

Special Measures to Guarantee Nonrepetition

Draft Article 30 (cessation and nonrepetition) provides that: “The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.” Trail Smelter is cited in a footnote to Commentary (13) on Draft Article 30 in support of the proposition that the injured state may require specific conduct to be taken by the injuring state. In Trail Smelter, after all, the Tribunal specified measures to be taken by Canada, including measures designed to “prevent future significant fumigations in the United States.” These requests for specific conduct go to the obligation on the part of the responsible state to avoid repetition. To be sure, this may be an exceptional remedy — “if circumstances so require” — although, as Trail Smelter may well indicate, transboundary environmental harm could present a compelling circumstance to order such an exceptional remedy.

Remoteness of Harm

Draft Article 31 (reparation) states as follows: “31(1). The responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act; (2) Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.” According to the Draft Articles, breaches of an international obligation carry with them in principle a duty to repair harm caused. Trail Smelter is cited in the Commentary (10) in regard to discussion of the allocation of injury or loss to a wrongful act. What link must exist between the wrongful act and the injury in order for the obligation of reparation to arise? The Trail Smelter Tribunal it was held that damage that is “too indirect, remote, and uncertain to be appraised” falls outside the scope of the reparative obligation. To this end, causality-in-fact is one element of the obligation to make reparation but, even assuming causality, the obligation ceases

10 Crawford, supra note 1, at 140.
11 Trail Smelter (1931), supra note 7. See Bratspies, and Miller in this volume.
12 Trail Smelter Arbitral Decision, 33 American Journal of International Law 182, 206 (1939) [hereinafter “Trail Smelter (1939)”]. See Annex to this volume.
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once the injury is too remote or indirect from the initial or ongoing breach. Moreover, even if there is general causality, the obligation ceases when the damage is too uncertain to be appraised.

Compensation for Reduction in Property Value

Draft Article 36 (compensation) stipulates: “36(1) The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby. insofar as such damage is not made good by restitution; (2) The compensation shall not cover any financially assessable damage including loss of profits insofar as it is established.” At this stage, it is important to recall that the Draft Articles, reflecting the famous PCIJ decision in Chorzow Factory, prefer restitution in kind (namely making up for the harm caused) over compensation, but require compensation when restitution is impossible, problematic, or only partially satisfactory.33 There are no punitive or exemplary awards: damages fulfill a purely compensatory purpose.34 Trail Smelter is cited in Commentary (15) to Draft Article 36. It is used to assist in determining the scope of payments when compensation has been awarded or granted following an internationally wrongful act that causes or threatens environmental damage. In particular, Trail Smelter creates precedent for directing payments to provide compensation for a reduction in the value of polluted property. After a thorough, and oft-neglected, discussion of international indemnity principles, the Trail Smelter panel compensated the United States for damage to land and property caused by the sulfur dioxide emissions that crossed the border. Damages were assessed on the basis of the reduction in value of the affected land. Of course, the Trail Smelter principle is narrow, insofar as it does not contemplate environmental damage that cannot be readily quantified in terms of clean-up costs or property devaluation. Commentary (15), by contrast, raises this point. In particular, it focuses on damage to “non-use values,” such as biodiversity, which “as a matter of principle, [is] no less real and compensable than damage to property, though it may be difficult to quantify.”35

33 Chorzow Factory (Germany v. Poland), Indemnity, 1928 P.C.I.J (ser. A) No. 17 (Sept. 15).
35 Crawford, supra note 1, at 225. In this sense, the Draft Articles evade the “visible” and “invisible” injury debate with which the Trail Smelter Tribunal was confronted. See JOHN D. WIRTH, SMELTER SMOKE IN NORTH AMERICA (2000).
TRAIL SMELTER, STATE RESPONSIBILITY, AND INTERNATIONAL ENVIRONMENTAL LAW

No discussion of the relationship between Trail Smelter and the Draft Rules is complete without unpacking the relationship between state responsibility and international environmental law generally. Here, I see an important distinction in terms of the currency of Trail Smelter's primary rule (no state has the right to use or permit the use of its territory in such a manner as to cause serious injury established by clear evidence in or to the territory of another), on the one hand, and the currency of Trail Smelter's secondary obligation of reparation and compensation for violation of that primary rule, on the other hand. This distinction arises from Dinah Shelton's astute observation that there has been a shift in the way the international community responds to interstate breaches of primary obligations. This shift inclines toward facilitating compliance instead of seeking compensation for noncompliance. In fact, Shelton argues, "[i]ntestate issues of compliance and breach are increasingly handled through nonconfrontational procedures within international organizations and treaty bodies. The rise of such nonadversarial compliance procedures seems to have brought a corresponding decline in recourse to the law of state responsibility."\(^{16}\)

Compliance can be facilitated through carrots rather than sticks and often in the context of specialized rules and regimes (for example, the compliance mechanisms envisioned by the Montréal Protocol on Substances that Deplete the Ozone Layer).\(^{37}\)

In addition to movements toward managing compliance through incentives, reporting, capacity-building, and monitoring, another reason the Draft Articles may have limited influence on elevating the profile of Trail Smelter is that the Draft Articles do not address the content of primary rules such as the duty of care, which remain ambiguous. This ambiguity constitutes another factor that dissuades states from bringing claims. Furthermore, even if responsibility is found, providing restitution or compensation is often incredibly expensive and onerous. This is especially so when those responsible are developing nations. Who will pay? If there can be no payment, why sue? This shift from ex post enforcement to ex ante compliance thus may dissuade the flowering of Trail Smelter-style arbitration as a method of dispute resolution.\(^{39}\)

\(^{16}\) Shelton, supra note 34, at 854.
\(^{39}\) See Craik in this volume.
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Secondary rules permitting reparations from states that cause transboundary environmental harm do occupy a vital residual role. They may set the stage for a more effective compliance regime, insofar as the threat of reparations for noncompliance is an important implicit “stick.” This, in turn, helps imbue international law with some predictability and accessibility. Moreover, remedies are relevant to some injured parties. Litigation at times may serve a useful purpose in terms of setting precedent, expressing norms, and vindicating rights, even when its actual effectiveness may be more symbolic than tangible.49

Nonetheless, despite the ILC’s clarification of the rules regarding state responsibility, Trail Smelter may continue to lead a somewhat lonely existence. Shelton observes that “the Trail Smelter arbitration is almost alone today in being cited for state responsibility and reparations in the field of environmental protection, because virtually no interstate cases have been brought in the decades since it was decided.”47 As such, Trail Smelter may have had some influence in terms of defining the content of state responsibility, but may offer little in the way of precedent for “law-in-practice,” namely “the law that counts in world politics.”48 As the international order moves toward “promoting changes in state behavior rather than sanctioning breaches of international obligations,”49 I posit that Trail Smelter may remain somewhat solitary as an example of “law-in-practice.” With these observations in mind, then, is it at all surprising that no interstate responsibility claims were brought regarding, for example, the catastrophic transboundary harms occasioned by the Chernobyl incident?50

TRAIL SMELETER AND THE COLLATERAL TOPIC OF STATE LIABILITY

Trail Smelter may exert greater influence in terms of “law-in-practice” in the area of state liability, in particular prevention, which also remains an important topic for the ILC. In the seventy pages of Commentaries to the 2001 Draft Articles on Prevention of transboundary harm from hazardous activities (Prevention Draft Articles), Trail Smelter is cited four times, and in

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49 For instance, the invocation of the state responsibility principle in the Gabčíkov-Nagymaros litigation arguably furthered each of these goals.
47 Shelton, supra note 34, at 854–55.
48 INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (W. Michael Reisman & Andrew R. Willard eds. 1988).
49 Shelton, supra note 34, at 855.
50 ALEXANDRE KISS AND DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 551–52 (2d ed. 2000).
a more extensive manner than in the Draft Articles and supplemental commentaries on state responsibility. By way of overview, the Prevention Draft Articles apply to activities not prohibited by international law that involve a risk of causing significant transboundary harm.\textsuperscript{45} Central to the Prevention Draft Articles is the obligation of due diligence.\textsuperscript{46} The Prevention Draft Articles also require states to authorize hazardous activity before the initiation of that activity. There is thus an important procedural aspect the Prevention Draft Articles that parallels obligations in domestic law for the undertaking of impact assessments before commencing projects that could have deleterious effects on the environment. The precautionary principle and the polluter-pays principle are noted, although neither is suggested as a strict legal obligation.\textsuperscript{47}

\textit{Trail Smelter} is cited in General Commentary (4) to the Prevention Draft Articles in support of the well-established nature of the principle of prevention, which is viewed as a procedure or duty involving the phase before the situation arises where significant harm or damage might actually occur.\textsuperscript{48} Here the Commentaries reference \textit{Trail Smelter} in the same line as they do Principle 21 of the Stockholm Declaration, Principle 2 of the Rio Declaration, and General Assembly Resolution 2995 (XXVII) (December 15, 1972).\textsuperscript{49}

\textit{Trail Smelter} also is cited in Commentary (6) to Article 2 (use of terms). Article 2 defines a number of terms. One such term is "risk of causing significant transboundary harm," which is defined as including "risks taking the form of a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm."\textsuperscript{50} \textit{Trail Smelter} is cited in the Commentaries in support of the "idea of a

\textsuperscript{45} Draft Articles on Prevention, supra note 12, art. 1.  
\textsuperscript{46} \textit{Id.} art. 3. The scope of due diligence is that which is generally considered appropriate and proportional to the risk of transboundary harm in the case in question. A state must properly inform itself of factual and legal components of the activities contemplated and, moreover, must take appropriate responsive measures in a timely fashion. A contextual analysis – accounting for a state’s economic level – is appropriate in determining whether the obligation of due diligence has been satisfied, although a state’s economic level cannot be used to exempt a state from its obligations. Draft Articles on Prevention, \textit{supra} note 12, art. 10.  
\textsuperscript{47} When this risk assessment suggests the likelihood of significant transboundary harm, the state of origin is to provide notification and information to other states that are likely to be affected. Draft Articles on Prevention, \textit{supra} note 12, arts. 6–13. See Bratspies in this volume.  
\textsuperscript{48} \textit{Id.} commentaries at 378.  
\textsuperscript{49} \textit{Id.}  
\textsuperscript{50} \textit{Id.} at 386.
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threshold." Commentary (6) states that the use of the words "serious consequences" in Trail Smelter indicates that environmental impacts must bear the risk of serious consequences before the threshold of preventative duties arises.\(^5\)

What is more, Trail Smelter is cited in Commentary (2) to Article 6 (authorization), specifically Article 6(1)(a) ("The State of origin shall require its prior authorization for: (a) Any activity within the scope of the present articles carried out in its territory or otherwise under its jurisdiction or control"), as informing the substantive scope of that control.\(^5\)

Commentary (2) reads as follows:

The requirement of authorization [...] obliges a State to ascertain whether activities with a possible risk of significant transboundary harm are taking place in its territory or otherwise under its jurisdiction or control and implies that the State should take the measures indicated in these articles. It also requires the State to take a responsible and active role in regulating such activities. The Tribunal in the Trail Smelter arbitration held that Canada had 'the duty...to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined'. The Tribunal held that, in particular, 'the Trail smelter shall be required to refrain from causing any damage through fumes in the state of Washington'. Article 6(1)(a) is compatible with this requirement.\(^5\)

Finally, Trail Smelter is cited in Commentary (2) to Article 7 (assessment of risk). Article 7 provides that "[a]ny decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment." Commentary (2) mentions the study undertaken in the 'Trail Smelter case. This study was undertaken "by well-established and known scientists" and was, in the words of the Tribunal, "probably the most thorough [one] ever made of any area subject to atmospheric pollution by industrial smoke."\(^5\) Although the Commentaries observe that the assessment of risk in Trail Smelter may not directly relate to liability for risk, Trail Smelter is cited in support of the "importance of an assessment of the consequences of an activity causing significant risk."\(^5\)

\(^{5}\) Id. at 388.  
\(^{51}\) Id. at 399.  
\(^{52}\) Id. at 400.  
\(^{53}\) Id. at 402.
Prevention aligns more closely with managing compliance than does ex post reparative responsibility for internationally wrongful or merely harmful acts. I posit that—looking ahead—this is the area in which *Trail Smelter* may carry greater influence. This should not be surprising, insofar as the approach of the *Trail Smelter* arbitral tribunal was not one of shutting down the smelter to protect the farmers’ property interests but, rather, one of managed compliance, namely permitting the smelting to continue (and thereby recognizing the centrality of the smelter to the economic life of Trail), but only if the emissions could be controlled such that they did not adversely affect the agricultural interests of the Washington farmers. The approach was one of balance, not a zero-sum game.

The law of state liability involves multiple subsets. Prevention is only one of these. It goes without saying that, even if states comply with the duty of prevention, harm still could occur. Preventative measures, even if faithfully implemented, could prove inadequate or the particular risk that causes the harm may not have been identified at the time. Consequently, the ILC has considered what the law of state liability might mandate in the event of harm that occurs when the triggering event falls outside of the law of state responsibility. In 2004, with these considerations in mind, the ILC in its fifty-sixth session finalized eight preliminary draft principles on allocation of loss in the case of transboundary harm arising out of hazardous activities, together with commentaries. The ILC has transmitted these draft principles through the U.N. Secretary-General to governments for comments and observations. The influence of *Trail Smelter* on allocation is more muted than its influence on prevention. In the Draft principles on allocation and commentaries thereto, *Trail Smelter* is referenced only once. This reference occurs in Commentary (i) to Principle (2)(a), which defines “damage” as significant damage to persons, property, or the

56 WIRTH, supra n. 35, at xv. See Jacobson in this volume. For a contrary view, see Allum in this volume.


58 The Working Group conceptualized state liability along the lines of managing compliance, in particular as “allocation of loss among different actors involved in the operations, such as, for instance, those authorizing, managing or benefiting from them.” Id. One possibility is for risk to be shared through specific regimes or insurance mechanisms. The Working Group also posits that in terms of managing the distribution of loss, it may be feasible for the operator to bear primary liability, limited by the ability to pay, with states also playing a role, although that role need to be defined. Id. at paras. 10-15.

59 Draft Principles on Allocation, supra note 13.
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environment. Commentary (1) cites Trail Smelter’s concern with the “serious consequences” of the smelter’s operation and, with this as a baseline, states that “it is important to note that damage to be eligible for compensation should acquire a certain threshold and that in turn would trigger the operation of the present draft principles.”

60 Trail Smelter, along with a number of other treaty and jurisprudential sources, is used to qualify the threshold of harm or damage that would invoke state liability. The fact that Trail Smelter is only referred to once in these Commentaries supports the notion that the primary jurisprudential legacy of Trail Smelter in international environmental law lies in the area of prevention and not reparation or satisfaction of harm.

CONCLUSION

This Chapter tracks the influence that the Trail Smelter arbitration has had on the 2001 Draft Articles on State Responsibility. The Draft Articles establish the secondary obligations that flow from a breach of an independent and preexisting primary obligation. The Draft Articles address a number of issues, including the attribution of conduct to a state, justifications for breach, circumstances precluding wrongfulness, reparation, compensation, bilateral and erga omnes obligations, and countermeasures. Trail Smelter is referenced four times in the Commentaries to the Draft Articles.

It has played some part in the formulation of specific articles regarding continuing breach, non-repetition of breach, remoteness of harm, and compensation. On a more general note, however, this Chapter concludes that Trail Smelter’s influence is limited by shifts in international environmental law toward facilitating compliance with primary rules rather than seeking compensation for breaches of those rules. This explains why Trail Smelter’s evocation of secondary obligations — and the law of state responsibility more generally — lead somewhat of a lonely existence in terms of the “law-in-practice” regarding international environmental protection. Trail Smelter has played a more vivid role in the ILC’s work on state liability, in particular the preventative aspects. Here, the primary rule of Trail Smelter — namely, the obligation not to cause serious environmental harm — has acquired some currency, exceeding that of Trail Smelter’s secondary obligation of reparation and compensation for violation of that primary rule. Moreover, this secondary obligation unsurprisingly plays a limited role in the aspects

60 Id. commentaries at 170.
61 Id. at 170-71.
of the law of state liability that parallel the content of the Draft Articles on State Responsibility, namely allocation, thereby supporting the general thesis that the dominant legacy of Trail Smelter lies in the obligation not to commit serious environmental harm rather than the separate obligations that flow once harm—whether intentional, negligent, or accidental—has been occasioned.