
FROM PREVENTION TO COMPENSATION: WHY PULP MILLS DOES NOT CLOSE THE LIABILITY GAP IN TRANSBOUNDARY ENVIRONMENTAL HARM

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ABSTRACT

This Case Note argues that the case law running from the Trail Smelter Arbitration (1941) through Pulp Mills on the River Uruguay (2010) has consistently hardened States' procedural obligations of prevention, principally the duty to conduct an environmental impact assessment ("EIA"), while leaving the underlying question of substantive compensation for transboundary environmental harm essentially where it stood in 1941: available only where States have consented to a forum empowered to fix an indemnity, or where a sector-specific treaty regime, such as those governing nuclear accidents or oil pollution, has been separately negotiated. Tracing the line of cases from Trail Smelter through Corfu Channel, the Nuclear Weapons Advisory Opinion, Gabčíkovo–Nagymaros, and finally Pulp Mills, this Note shows that each decision has extended the normative reach of the no-harm rule without attaching to it any corresponding remedial mechanism. Pulp Mills is frequently cited as authority for a general and evolving law of State responsibility for environmental harm; this Note contends that such a reading overstates what the International Court of Justice actually decided, which was a procedural EIA obligation grounded partly in general international law and partly in a treaty-specific notification duty, alongside an express finding of no breach of Uruguay's substantive obligation to prevent pollution. The Note concludes that prevention and compensation have developed asymmetrically, and that closing the resulting liability gap requires deliberate treaty-building of the kind that produced the nuclear and oil-pollution regimes, rather than a further extension of the prevention case law by analogy.

Keywords: transboundary harm; State responsibility; environmental impact assessment; Pulp Mills; no-harm rule; compensation gap.

I. INTRODUCTION

International environmental law has developed a strong doctrine of what States must do before they act, and a much weaker one on what happens to victims when prevention fails, or was never triggered because the risk was not foreseeable or assessable in the first place. Transboundary environmental harm, damage caused by activities within one State's jurisdiction that produces significant adverse effects beyond its territory, sits at the intersection of these two problems.¹

Commentary on this subject frequently treats the line of decisions running from the Trail Smelter Arbitration to Pulp Mills on the River Uruguay as evidence of a single, evolving general law of "State responsibility for environmental harm." This Note takes a narrower and more defensible position. It argues that this case law has consistently hardened States' procedural obligations of prevention, principally the duty to conduct an environmental impact assessment, while leaving the underlying question of substantive compensation for transboundary harm essentially where it was in 1941: available only where States have consented to a forum with power to fix an indemnity, or where a sector-specific treaty regime has been separately negotiated. Reading Pulp Mills as authority for a general theory of environmental liability overstates what the case actually decided, in much the same way that a single, narrowly-reasoned domestic judgment is sometimes made to carry doctrinal weight its holding cannot support. This Note traces that asymmetry between prevention and compensation across five decisions, examines why only sector-specific treaties, governing nuclear accidents and oil pollution, have produced a working compensation mechanism, and concludes that closing the liability gap requires deliberate treaty-building rather than a further extension of the prevention case law by analogy.

II. THE NO-HARM RULE'S NARROW ORIGIN: TRAIL SMELTER

The Trail Smelter Arbitration is conventionally cited as the foundational authority for the no-harm principle in international environmental law. The dispute arose from fumes emitted by a smelter in British Columbia that caused damage across the border in the State of Washington, and the tribunal held 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."² That formulation is

¹ Xue Hanqin, *Transboundary Damage in International Law* (Cambridge University Press 2003).

² Trail Smelter Arbitration (United States v. Canada), 3 R.I.A.A. 1905 (Perm. Ct. Arb. 1941).

routinely treated as the origin of a general customary rule against transboundary harm. What is less often stressed is the narrow procedural architecture within which the tribunal reached it: the United States and Canada had already agreed, by a bilateral Convention, to submit the dispute to a three-member tribunal with express authority to determine both the fact of injury and the amount of an indemnity. Trail Smelter was not a general theory of transboundary liability spontaneously applied by an international court; it was a bilateral, treaty-consented arbitration between two States that had specifically agreed, in advance, to a forum empowered to fix compensation. Where such consent to a forum with remedial power exists, international law has always been capable of producing a compensation outcome. The difficulty that later case law exposes is that this precondition, consent to a forum with power to award an indemnity, has rarely been replicated outside the bilateral or treaty-specific context in which Trail Smelter itself arose.

III. EXTENDING THE NORM WITHOUT EXTENDING THE REMEDY: CORFU CHANNEL AND THE NUCLEAR WEAPONS ADVISORY OPINION

The Corfu Channel Case did not concern environmental harm at all; it concerned mines laid in Albanian waters that damaged British warships. Yet the International Court of Justice's holding that a State has a general obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States, its "duty of vigilance", has since been read into the environmental context as a normative extension of the no-harm rule.³ Corfu Channel extended the reach of the underlying obligation of vigilance, but it did so without generating any remedial architecture specific to environmental harm; the compensation the Court there addressed arose from ordinary State responsibility for direct injury to another State's property, not from a freestanding environmental liability rule.

The Court's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons pushed the normative extension further still. The Court observed that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn," and affirmed that States have a general obligation to ensure that activities within their jurisdiction respect the environment of other States or of areas beyond national control.⁴ This is an important statement of principle, but it is exactly that, a

³ Corfu Channel Case (United Kingdom v. Albania), Judgment, 1949 I.C.J. Rep. 4 (Apr. 9).

⁴ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 241–42 (July 8).

statement of principle delivered in an advisory opinion with no litigants, no facts of actual transboundary damage, and consequently no occasion for the Court to say anything about who compensates whom. Corfu Channel and the Nuclear Weapons Advisory Opinion together illustrate the pattern this Note identifies: each decision broadens the class of obligations States owe one another regarding the environment, and neither attaches a remedial mechanism to that broadened obligation.

IV. GABČÍKOVO–NAGYMAROS AND THE TURN TO INTERPRETATION

The Gabčíkovo–Nagymaros Project Case, a dispute between Hungary and Slovakia over a joint hydroelectric scheme on the Danube, marks a further, distinct move: rather than extending the no-harm rule as a freestanding obligation, the Court used environmental concerns, and in particular the concept of sustainable development, as an interpretive lens through which to read the parties' existing treaty. The Court held that "newly developed norms of environmental law are relevant for the implementation of the Treaty" and that the parties should, by agreement, find a solution that takes account of the objectives of the Treaty as well as norms of international environmental law.⁵ This is a doctrinally significant step, but it is a rule of treaty interpretation, not a liability rule. Gabčíkovo–Nagymaros tells two States how to read the treaty that already binds them in light of intervening environmental norms; it says nothing about what a third party harmed by a breach of that treaty could recover, or from whom. The case belongs in this line because it shows the Court reaching for environmental norms without being asked, or without needing, to decide a compensation question, reinforcing rather than qualifying the asymmetry this Note traces.

V. PULP MILLS: A PROCEDURAL DUTY, NOT A COMPENSATION RULE

Pulp Mills on the River Uruguay is the case most often invoked as the culmination of this line, and the case most often overread. The dispute arose when Argentina challenged Uruguay's authorisation of pulp mills on the River Uruguay, the boundary the two States share and jointly administer under the 1975 Statute of the River Uruguay. The judgment contains at least three analytically distinct holdings that are frequently, and wrongly, treated as a single finding of environmental liability.

First, on environmental impact assessment, the Court held that "it may now be considered a

⁵ Gabčíkovo–Nagymaros Project (Hungary v. Slovakia), Judgment, 1997 I.C.J. Rep. 7, 78 (Sept. 25).

requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.”⁶ This is the celebrated holding, and it is genuinely significant: it is the clearest judicial statement that EIA has crystallised into a rule of general international law, independent of any particular treaty. But the Court went out of its way to strip the obligation of any prescriptive content, holding in the same paragraph that “it is for each State to determine in its domestic legislation or in the authorisation process for the project, the specific content of the environmental impact assessment required in each case.”

Second, and separately, the Court found that Uruguay had breached its procedural obligations of notification and consultation, but grounded that breach specifically in Articles 7 to 12 of the 1975 Statute of the River Uruguay, a bilateral treaty establishing the joint commission (“CARU”) through which the two States were obliged to coordinate, not in general international law.⁷ The notification and consultation duty is treaty-specific; it does not travel to States that are not parties to an equivalent bilateral instrument.

Third, and this is the holding most often omitted from summaries of the case, the Court expressly found that Uruguay had not breached its substantive obligations under Articles 35, 36, and 41 of the 1975 Statute to prevent pollution and preserve the aquatic environment; the water-quality evidence before the Court did not establish that Uruguay’s conduct had caused the pollution Argentina alleged.⁸ The Court further held that its own declaration of Uruguay’s procedural breach was, in itself, a sufficient remedy for Argentina’s claim; no compensation was awarded on any branch of the case.

Read together, these three holdings show that Pulp Mills is authority for a procedural EIA duty under general international law, for a treaty-specific notification and consultation duty under the 1975 Statute, and for the proposition that a bare declaration of breach can suffice as a remedy, but it is not authority for a substantive rule of State liability for transboundary pollution, because the Court found no such breach to have occurred. Treating Pulp Mills as if it “held that conducting an environmental impact assessment is a requirement under general international law” full stop, without also stating that the notification and consultation

⁶ Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 2010 I.C.J. Rep. 14, para. 204 (Apr. 20).

⁷ Id. paras. 122, 149 (finding a breach of the procedural obligations under the 1975 Statute); see also Pulp Mills on the River Uruguay: The ICJ Recognizes Environmental Impact Assessment as an Obligation Under Customary International Law, ASIL Insights, vol. 14, issue 9 (2010).

⁸ Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 2010 I.C.J. Rep. 14, para. 265 (Apr. 20).

obligations were grounded in a specific bilateral treaty and that the Court rejected the substantive pollution claim, conflates three holdings of different doctrinal weight into one. It is the same interpretive error as asking a narrowly-reasoned case to answer a question the court was never presented with.

VI. THE LIABILITY GAP, AND WHY ONLY TREATY REGIMES CLOSE IT

The pattern across all five decisions is consistent: each has enlarged what a State must do before undertaking an activity carrying a risk of transboundary harm, and none, Trail Smelter aside, has generated a remedy for harm actually suffered. That asymmetry is not accidental. Customary international law is comparatively well-equipped to state a standard of conduct, due diligence, prevention, prior assessment, because such standards can be articulated in the abstract, without reference to a particular injury or a particular sum. It is comparatively ill-equipped to fix a quantum of compensation, allocate it between multiple contributing States or private actors, or provide victims a forum of general jurisdiction in which to claim it, because doing so requires exactly the kind of specific consent to jurisdiction and to a compensation formula that Trail Smelter had and that customary law, standing alone, does not supply.

The gap has, in two sectors, been closed by treaty rather than by the gradual accretion of customary law. In the nuclear sector, the Paris Convention on Third Party Liability in the Field of Nuclear Energy (1960), the Vienna Convention on Civil Liability for Nuclear Damage (1963), and the subsequent Protocols channel strict liability onto the operator of a nuclear installation and cap or supplement it through State-backed compensation funds, giving victims a defined claim without needing to establish fault. In the maritime oil-pollution sector, the International Convention on Civil Liability for Oil Pollution Damage (1969, as amended by the 1992 Protocol) and the accompanying International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971, as amended) similarly impose strict, channelled liability on shipowners and supplement it with an industry-funded compensation pool. Both regimes work precisely because they do what customary law and the ICJ's case law have not done: they specify who is liable, on what standard, up to what limit, and through what claims procedure.

The UNECE Convention on the Transboundary Effects of Industrial Accidents, adopted at Helsinki on 17 March 1992 and in force since 19 April 2000, is the clearest illustration of a

treaty that addresses prevention comprehensively while leaving compensation to general law.⁹ The Convention obliges parties to identify hazardous activities, notify and consult with potentially affected States, maintain contingency plans, and cooperate on mutual assistance in the event of an accident, an elaborate procedural architecture built directly on the due-diligence and notification duties this Note has traced through the case law. It contains, by contrast, no compensation mechanism of its own; a State harmed by an industrial accident covered by the Convention must still look to general international law, or to a separate instrument, for any claim to an indemnity. A separate, non-binding UNECE explainer document, published in 2017 under the title *Cross-Border Concerns, Shared Strategies: Why Transboundary Cooperation Matters in Preventing Industrial Accidents*, summarises the Convention's practice for a general audience but is not itself the Convention and carries no independent legal force.¹⁰ The Convention illustrates, in miniature, the thesis of this Note: even where States have negotiated a detailed multilateral prevention regime, they have stopped short of negotiating a matching compensation regime, leaving that question to be answered, if at all, by the same patchwork of consent-based fora and sector-specific treaties that governed it in 1941.

The International Law Commission's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities occupy an intermediate position. The Draft Articles restate the due-diligence, notification, consultation, and impact-assessment obligations found across this case law in systematic form, but they remain, on the ILC's own description and the drafters' repeated acknowledgment, a non-binding text; they were commended to States by the General Assembly, not adopted as a treaty, and they do not "codify" a binding rule of compensation any more than they codify a binding rule of prevention.¹¹ Their persuasive value lies precisely in restating, rather than creating, an emerging consensus on prevention; they add no new answer to the compensation question that *Trail Smelter*, *Corfu Channel*, the *Nuclear Weapons Advisory Opinion*, *Gabčíkovo–Nagymaros*, and *Pulp Mills* leave open.

⁹ Convention on the Transboundary Effects of Industrial Accidents, Mar. 17, 1992, 2105 U.N.T.S. 457 (entered into force Apr. 19, 2000); United Nations Treaty Collection, Ch. XXVII.6, Status of the Convention (accessed 2026).

¹⁰ United Nations Economic Commission for Europe, *Cross-Border Concerns, Shared Strategies: Why Transboundary Cooperation Matters in Preventing Industrial Accidents* (2017).

¹¹ International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, with commentaries (2001), in Report of the International Law Commission on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001); G.A. Res. 62/68, U.N. Doc. A/RES/62/68 (Dec. 6, 2007) (commending the Draft Articles to States without adopting them as a convention).

VII. CONCLUSION

Describing the case law running from Trail Smelter to Pulp Mills as a general and evolving “law of State responsibility for environmental harm,” without qualification, overstates what that case law actually delivers. What the cases deliver, consistently and cumulatively, is a hardening doctrine of prevention: an obligation to assess risk, to notify and consult affected States, and to exercise due diligence before undertaking hazardous activity. What they do not deliver, and what Pulp Mills in particular does not deliver despite being routinely cited as though it does, is a matching doctrine of remedy for the harm that prevention fails to stop. Compensation for transboundary environmental harm today remains available essentially on the terms it was available on in 1941: where States have specifically consented to a forum empowered to fix an indemnity, as the United States and Canada did in Trail Smelter, or where a sector-specific treaty regime, nuclear liability, oil pollution, has been separately and deliberately negotiated to supply the missing remedial architecture. Closing the liability gap that remains requires the same kind of deliberate treaty-building that produced those two regimes, not a further extension of the prevention case law by analogy to activities and harms the treaties do not yet cover.