Amsterdam Center for International Law
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SHARES
RESEARCH PROJECT ON
SHARED RESPONSIBILITY IN INTERNATIONAL LAW

EXPERT SEMINAR REPORTS

SHARES Expert Seminar Report

Shared Responsibility in International Environmental Law

Nataša Nedeski
Amsterdam Center for International Law

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Foreword

The Amsterdam Center for International Law held a one-day Expert Seminar in Amsterdam on 7 October 2011 devoted to the topic Shared Responsibility[1] in International Environmental Law (IEL).

The seminar was part of the project research project on Shared Responsibility in International Law (SHARES),[2] which seeks to rethink the allocation of international responsibilities in cases where multiple actors through concerted action, a joint enterprise or other forms of interaction contribute to an international wrong.

In order to enhance the understanding of shared responsibility, the SHARES project has launched an Expert Seminar Series to uncover the practice in diverse areas. The seminar on allocation of responsibility in the context of multinational military operations was the first of these seminars, later followed by a seminar on protection of refugees and this seminar on international environmental law.

The overall aim of this Expert Seminar was to map factual situations in which questions of shared responsibility have played a role in IEL, to take into account of the special features of IEL and to assess the relevance of findings related to shared responsibility in IEL for shared responsibility in other areas of international law.

This report summarizes, without any claims of being complete, the presentations made by the experts and the following discussions. The meeting was held under the Chatham House rule; therefore the report does not attribute any point to participants or organizations.

[1] *See* André Nollkaemper & Dov Jacobs, 'Shared Responsibility in International Law: A Concept Paper', *ACIL Research Paper No 2011*-07 (SHARES Series), finalized 2 August 2011 (www.sharesproject.nl). Even though the SHARES concept paper makes a clear distinction between the terms 'shared responsibility', 'international responsibility', 'liability' and 'accountability', the participants in this seminar do not necessarily share the same conceptions and may use these terms with other definitions in mind than those used in the SHARES concept paper.

[2] For more information, see www.sharesproject.nl.

1. The allocation of responsibility in cases of multi-actor transboundary environmental interferences

The first panel of the seminar focused on cases of transboundary environmental interference involving two or more responsible States or other actors. In such cases questions of shared responsibility may arise. The key question in such cases is how responsibility is to be allocated between multiple wrongdoers.

Situations of transboundary environmental interference may be dealt with from both a public international law perspective and from the perspective of international civil liability.

1.1. Public international law

The discussion focussed both on general principles that are relevant to an assessment of primary norms and on principles of responsibility.

1.1.1. Primary norms / general principles

Relevant general principles discussed include the principle not to cause significant harm to other States, the principle of equity and the principle of common but differentiated responsibilities.

While the principle not to cause significant harm to other States plays an important role in different areas of international environmental law, the problem with multi-actor transboundary environmental interferences such as climate change or transboundary long-range air pollution is that the individual emissions of a particular State may not cause significant harm, and that it is only in combination with emissions of other States that such harm is produced. The question then is whether, and if so how, responsibility will be shared between States contributing to the end-result of significant transboundary pollution when each of their emissions individually would not result in such pollution.

Equity has an important role to play in the use of a common resource, most notably in the regime relating to the utilization of international watercourses. Article 6 of the International Watercourses Convention[3] identifies factors relevant to equitable utilization. It was observed that these criteria, and more generally equity, may play a role in situations of multi-actor responsibility for the use of common resources. If a certain amount of discharge is allowed, for example because it does not reach the

[3] Convention on the Law of the Non-navigational Uses of International Watercourses (1997).

threshold of 'significant harm', it may be possible to apply the principle of equity in order to determine the admissible amount of discharge for each individual State contributing to pollution.[4]

The question then may arise on the basis of what criteria entitlements of individual States can be determined. It would seem that the answer differs between particular problems. For instance, with respect to climate change, one participant suggested to operationalize equity by allowing a certain amount of emissions per capita, hereby focusing on the amount of greenhouse gas emissions necessary for the daily life of inhabitants of each individual State. Another participant commented that this may not necessarily be equitable, as it may be difficult to compare emissions in countries situated in colder areas with more favourably situated States, and some States may specialize in certain activities producing a lot of emissions which would also relate to the per capita emissions.

The principle of common but differentiated responsibilities was identified as another general principle with particular relevance for questions of shared responsibility. It is reflected in both the Climate Change Convention[5] and the Kyoto Protocol.[6] The Montréal Protocol[7] embodies the principle by allowing developing States a ten-year delay in compliance.[8] Other treaties, for instance international conventions relating to the protection of the marine environment, do not differentiate between States and their burden to prevent, reduce and control the marine environment. However, in some treaties differentiation is implicit in the nature of the obligations. For instance, the Law of the Sea Convention[9] provides that States must take the necessary measures using the best practicable means at their disposal in accordance with their capabilities.[10]

As to the legal character of the principle of common but differentiated responsibilities, it was observed that its inclusion in several international

[4] In this respect, the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reductions of Sulphur Emissions (1994) follows an equitable approach, as individual percentages for reductions have been agreed upon in Annex II.

[5] United Nations Framework Convention on Climate Change (1992).

[6] Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998).

[7] The Montreal Protocol on Substances that Deplete the Ozone Layer (1987).

[8] *See* article 5 Montréal Protocol on Substances that Deplete the Ozone Layer (1987).

[9] United Nations Convention on the Law of the Sea (1982) (UNCLOS).

[10] Article 194(1) UNCLOS provides that 'States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.'

conventions has given it legal meaning. This, in turn, raised the question as to how the principle of common but differentiated responsibilities relates to general international law and, in particular, the sovereign equality of States.

1.1.2. International responsibility and liability for transboundary environmental interference

It was then discussed to what extent the rules adopted in the Articles on the Responsibility of States for Internationally Wrongful Acts[11] offer guidance for the allocation of responsibility of States in case of a (joint/cumulative) breach of these norms. Article 47 deals with the plurality of responsible States for the same internationally wrongful act, stipulating that the responsibility of each State may be invoked in relation to that act. It does not, however, clarify whether the State that is in fact held responsible will be liable for the entirety of the damage or only for a part of the damage, and on the basis of which criteria allocation of responsibility should be accomplished.

As many instances of transboundary environmental interference are solved in a diplomatic manner, some participants questioned whether the general rules on international responsibility are of any practical relevance in the area of international environmental law.

The possibility of strict inter-state liability outside situations of international responsibility did not offer solutions to the problem of allocation of responsibility in case of multi-actors transboundary environmental interference. The Principles on the Allocation of Loss in the case of Transboundary Harm arising out of Hazardous Activities[12] do not contain any rules dealing with two or more States causing harm. It was asserted that strict inter-state liability in public international law can only be established by *ex ante* arrangements, such as the Space Liability Convention.[13]

1.2. International civil liability

The problem of transboundary environmental interference was then discussed from the perspective of international civil liability. Many

[11] International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts,* 2001 (A/56/10) (ASR).

[12] International Law Commission, *Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities*, 2006 (A/61/10).

[13] Convention on International Liability for Damage Caused by Space Objects (1972).

international civil liability agreements have been concluded,[14] holding the operator or other private persons strictly liable for damage caused by certain activities. These agreements often provide for joint liability in case of a plurality of liable actors, raising the question why States do agree to such arrangements in civil liability regimes but not in regimes for inter-state responsibility.

[14] *See e.g.* International Convention on Civil Liability for Oil Pollution Damage (1969); Vienna Convention on Civil Liability for Nuclear Damage (1963).

2. Shared responsibility in the climate change regime

The second panel focused on shared responsibility in the context of climate change and, more specifically, on the responsibility that the European Union and its Member States share for non-compliance with their obligations under the Kyoto Protocol.

Within the EU legal regime, climate change is a matter of shared competence between the EU and its Member States. Therefore, the UNFCC and the Kyoto Protocol are mixed agreements concluded both by the EU and its Member States.

Within the Kyoto Protocol the EU and its Member States have agreed to a common emission reduction target of 8% spread among the then 15 Member States of the European Union (the so-called 'bubble clause'). While most participants agreed that this establishes a shared responsibility between the EU and its Member States in the implementation of the Protocol they did not agree if and how responsibility for non-compliance should be allocated. Does non-compliance result in individual responsibility, joint and several responsibility or joint and proportionate responsibility?

According to article 24(2) of the Kyoto Protocol, allocation of responsibility will depend upon what the EU and its Member States 'decide'. It was observed that the Declaration of competence made in this respect is rather imprecise, stating little more than that the environment is a shared competence between the EU and its Member States. This may have consequences for the determination of responsibility in both the European and the international legal order.

Non-compliance with the Kyoto Protocol will often be attributable to both the EU and its Member States as co-holders of relevant shared competences. Some intra-European mechanisms exist to designate the competent – and thus accountable – entity, with the aim of appointing the entity which would best be able to represent the interests of the European whole before the Kyoto Compliance Committee and to return to compliance. This determination is guided by the duty of loyalty. Such a procedure may help to avoid that an entity is held accountable whereas the competent entity is another one. However, even in the case that an entity other than the competent entity is held accountable, some intra-European recourses of action may be at the disposal of the EU. In this respect, a participant noted that there is a need for the EU itself to have a more elaborated regulation of accountability within the EU legal order.

Participants discussed both responsibility under general international law for not complying with Kyoto treaty obligations, and accountability within the Kyoto compliance system. It was noted that even though this compliance system establishes more of an accountability regime than a responsibility regime, these special rules may nonetheless be useful in a more general perspective.

A possible approach to deal with shared responsibility in international law is to rely on the principle of joint and several liability. This principle may offer advantages, as it allows the specially affected State to hold any of the internationally responsible States responsible and claim full compensation from them. However, it was argued that in the context of the Kyoto Protocol this principle may not apply to the EU and its Member States.

It was observed that article 4(6) determines that the EU and its Member States can be held jointly responsible for not achieving their common emission reduction target and, in addition, that each Member State is responsible for its own emission level. One participant argued that this provision establishes joint and proportional responsibility. Another participant questioned this assertion, arguing that article 4(6) in fact establishes individual responsibility. In this view, joint and several responsibility would only arise in the case of indivisible damage (not simply based on the fact that the emission target is not reached).

It was then suggested that other Kyoto commitments (besides the 8% emission reduction target agreed on the basis of article 4(6)) should be subjected to the joint *or* individual accountability principle, as this is implied by the mixed nature of the climate change regime. While the EU's declaration of competence is opposable to third parties, its vagueness makes it quite useless for the determination of responsibility. Therefore the EU and its Member States will be perceived by third parties as an undivided whole and accountability may be engaged jointly. It was argued that this joint accountability does not entail joint and several accountability, but rather that the sharing of competences and responsibilities implies that the Kyoto Compliance Committee should take this division into account at the stage of attribution of accountability. Thus, the Compliance Committee should determine a joint accountability if the European whole designates both the EU and its Member States as competent, or if no precision is given at all. Individual accountability should be established if only one competent entity is designated. Indeed, in practice the Committee has identified the

implementing State as the competent and accountable entity when examining and reacting to a case of non-compliance.[15]

In this context, a participant observed that there was an inherent contradiction between aiming to allocate responsibility or accountability according to the division of competences and the purpose of a mixed agreement which is not to fix so strictly the competences of the European whole.

It was discussed that even though the Kyoto enforcement branch is aimed at deterrence and return to compliance rather than reparation, the consequences that follow a determination of non-compliance may look like reparation. This was followed by a discussion on the relevance of the Kyoto Protocol and its compliance system for liability issues, as the system established by Kyoto can be characterized as an administrative compliance system and does not deal with party to party disputes. One participant suggested that the determination of non-compliance can have an impact on liability cases, making it easier to argue that a State has not complied with its obligations under general international law. The due diligence standard inherent to the principle not to cause transboundary harm could then be translated into the achievement of goals under the Kyoto Protocol.

[15] *See* Enforcement Branch of the Compliance Committee, *Question of Implementation – Greece*, Final Decision, CC-2007-1-8/Greece/EB (17 April 2008).

3. Shared responsibility and transboundary movements of hazardous wastes and chemicals

The third panel focused on shared responsibility for transboundary movements of hazardous wastes and chemicals. In practice, the situation that more than one State is legally responsible for transboundary movements of hazardous wastes and chemicals occurs regularly when different States of export, transit and import are involved.

Participants discussed the applicable international legal rules relating to the transboundary movements of hazardous wastes and chemicals as well as the means that are used in practice to address non-compliance with these rules.

3.1. Applicable international legal rules

It was observed that of all multilateral environmental agreements (MEAs) dealing with hazardous wastes and chemicals, only the Basel Convention[16] addresses the question of joint responsibility of States for damage caused by hazardous wastes, and it only addresses joint responsibility in an indirect way in article 9. In case of an illegal transboundary movement of chemicals where it is impossible to determine whose conduct in fact caused the illegality, the States concerned must cooperate to ensure the environmentally sound disposal of the wastes;[17] which may be seen as a joint responsibility (in the sense of primary obligations) of the States concerned.

The Liability Protocol to the Basel Convention[18] addresses the issue of multiple actors being responsible for damage resulting from transboundary movements of hazardous wastes and deals with joint and several liability.[19]

It was discussed how responsibility arising from non-compliance with article 9 of the Basel Convention could be linked to the Liability Protocol, as the latter does not say how to relate the liability of individuals to the

[16] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989).

[17] *See* article 9(4) Basel Convention.

[18] The Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal (1999) has, as of 17 February 2012, not yet entered into force.

[19] Articles 7 and 8 Liability Protocol.

international responsibility of States; article 16 of the Liability Protocol seems to keep these issues deliberately separate.[20]

3.2. Means of addressing non-compliance

The traditional approaches of international law, including State responsibility and formal dispute settlement proceedings, generally have not been effective for ensuring compliance with and enforcement of many MEAs, including those on hazardous wastes and chemicals. Most environmental disputes seem to be settled out of court.

Non-compliance mechanisms have evolved partly in response to the shortcomings of traditional approaches. One participant observed that while they represent a step forward, they too have shortcomings and States often use alternative mechanisms such as diplomatic methods in order to resolve questions of (shared) responsibility for damage resulting from the transboundary movement of hazardous wastes. In the case of the Basel Convention, Parties have been known to ask the Secretariat to assist them in finding a mutually acceptable solution. However, in complicated cases the Secretariat usually is not asked to get involved as States prefer to resolve such cases by diplomatic means. There thus may be a substantial amount of practice relating to shared responsibility that does not become visible though judicial or non-compliance proceedings.

It was suggested that more attention should be paid to alternative mechanisms that can assist States in cases of joint responsibility for illegal transboundary movement of hazardous wastes. In particular mediation was suggested as a mechanism worth exploring.

It was observed that the traditional mechanisms for the settlement of disputes are almost impossible to use as MEAs do not contain compulsory jurisdiction clauses; if there was a will to use these public international law mechanisms such clauses would have been inserted. One participant argued that most obligations included in MEAs are obligations *erga omnes*, which entails that there is often no interest for one specific country unless it wants to act for the good of humanity as a whole; this was pinpointed as one of the reasons why traditional means of dispute settlement, as well as non-compliance mechanisms, often remain underutilized. It was therefore argued that these procedures should be able to be triggered, for example, by civil society or the Secretariat rather than by individual victim States.

[20] Article 16 Liability Protocol states that '[t]he Protocol shall not affect the rights and obligations of the Contracting Parties under the rules of general international law with respect to State responsibility.'

Finally, one participant argued that the fact that the traditional international dispute settlement mechanisms are not being used does not necessarily mean that they do not have any effect. If diplomatic means of dispute settlement are used in a case where ICJ proceedings would have been a possibility, this does not mean that the dispute would have been resolved in the same way if recourse to the ICJ would not have been an (impending) possibility.

4. Shared responsibility and the loss of biological diversity

The fourth panel focused on shared responsibility in the context of the loss of biological diversity. It was observed that the topic of biological diversity is conceptually different from the topics discussed in the other panels as it does not focus on the damage-causing event; rather, it is a manifestation of many of the problems discussed in the other panels.

The biological diversity regime possesses certain characteristics which may be relevant for the topic of shared responsibility in international environmental law. In this context, participants discussed the legal implications of the physical location of biological resources, biological diversity as a common concern of mankind and existing liability regimes dealing with the loss of biological diversity.

4.1. The physical location of biological resources

The physical location of biological resources determines their legal status, which may cause problems for properly addressing the loss of biological diversity and raises questions as to who is responsible for the preservation of biological diversity in these different areas.

First of all, biological resources can be found within the limits of national jurisdiction. States have permanent sovereignty over their natural resources. They are responsible for the conservation of biological diversity within these areas but they may also regulate the access to and use of these resources. This makes it difficult to tackle the loss of biological diversity within the limits of national jurisdiction. However, it was noted that the role of other States in this respect should not be underestimated, illustrated by the example of States convincing Tanzania not to build a paved road through the Serengeti.

Biological resources can also be found in internationalized areas such as the high seas, the deep seabed and Antarctica. States generally have the freedom to use the resources in such areas, but who is responsible for the conservation of biological resources outside the limits of national jurisdiction? Conservation of biological diversity in internationalized areas will require collective action by States. Similarly, the conservation of species migrating between areas within the limits of national jurisdiction

and/or areas beyond the limits of national jurisdiction will require collective action and may raise questions of shared responsibility.

In the area of fisheries in the high seas, organizations have been established for the management of fisheries. The International Commission for the Conservation of Atlantic Tunas is often criticized for recommending catch quotas for the Atlantic Bluefin Tuna which are in fact much higher than should be allowed from a scientific point of view and may eventually lead to their extinction. If this danger materializes, who should then be held liable? In such cases also the responsibility of the international institutions in question, possibility in conjunction with the role of States, could be considered in terms of shared responsibility.

4.2. Biological diversity as a common concern of mankind

A key problem for addressing shared responsibility in relation to biological diversity is the identification of a party that is in fact suffering loss as a result of the loss of biological diversity and that could be entitled to bring a claim. Even though the international community has agreed that the conservation of biological diversity is a common concern of mankind, it will be difficult for one actor to stand up and claim victim status. Therefore, a State wishing to represent mankind is likely to face problems of admissibility. It can be argued that the obligations relating to the preservation of the environment of internationalized areas are of an *erga omnes (partes)* character, but it has not been accepted that activities detrimental to biological diversity which only cause domestic adverse effects involve a legal interest of all States.

4.3. Ex ante liability regimes

Several biological diversity treaties establishing liability regimes were discussed in order to see how they raise or deal with questions of shared responsibility. It was observed that these treaties have developed innovative approaches to liability as traditional concepts do not seem to be working.

The Cartagena Protocol on Biosafety[21] is concerned with the transboundary movement of living modified organisms and the fear that this may result in the loss of biodiversity. This Protocol imposes obligations on both the exporting and importing State, which may result in questions of shared responsibility.

[21] Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000).

The Nagoya-Kuala Lumpur Supplementary Protocol[22] provides a shared approach to liability primarily directed at domestic damage, which cannot be qualified as either traditional civil liability or traditional State responsibility. It establishes regulatory liability, requiring the State to ensure that damage to biodiversity is addressed. To this end, it is under the obligation to require 'the operator'[23] to take response measures in case of damage.[24] If the operator does not take the measures it is required to take, the State may take response measures itself and recover the costs and expenses of the taking of such response measures from the operator.[25]

It was observed that the fact that the Supplementary Protocol requires two entities to act is particularly relevant for shared responsibility.[26] In case of damage, action has to be taken by the operator, but if the operator does not take action the Protocol requires the State to step in by requiring the operator to take response measures. The responsibility of the State and the operator is thereby shared; the duty of the State being based on the control it has over its territory. Failure to comply with these obligations may lead to shared liability. The Supplementary Protocol may also lead to shared liability if the operator takes only limited action, as there is the option for the State to take response measures.

Finally, it was noted that due to the liability regime discussed, States will be exposed to claims of public interest groups if they do not take the necessary measures in the form of requiring the operator to take response measures. Such an approach to liability may in fact force States to take action in the area of loss of biological diversity.

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[22] Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (2010).

[23] Article 2(2)(c) Nagoya-Kuala Lumpur Supplementary Protocol explains that operator 'means any person in direct or indirect control of the living modified organism which could, as appropriate and as determined by domestic law, include, *inter alia*, the permit holder, person who placed the living modified organism on the market, developer, producer, notifier, exporter, importer, carrier or supplier'.

[24] Article 5 Nagoya-Kuala Lumpur Supplementary Protocol.

[25] Article 5(4) and 5(5) Nagoya-Kuala Lumpur Supplementary Protocol. The UNEP guidelines take a similar approach to the obligations of States to require operators to take response measures, *see* Governing Council of the United Nations Environment Programme, *Guidelines for the Development of Domestic Legislation on Liability, Response Action and Compensation for Damage Caused by Activities Dangerous to the Environment*, decision SS.XI/5 (26 February 2010).

[26] In this context – contrary to the SHARES concept paper - shared responsibility is to be understood as shared obligations.

5. Joint and several liability in light of the Seabed Disputes Chamber Advisory Opinion of February 1st 2011

The final panel focused on the Advisory Opinion of the Seabed Disputes Chamber on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*.[27] This Opinion is interesting from the viewpoint of shared responsibility and joint and several liability in particular. Participants identified and discussed several issues relevant for the topic of shared responsibility.

The Opinion recognizes a presumption of joint and several liability in case of multiple sponsorship; it also offers a definition of joint and several liability in case of multiple sponsorship. Moreover, the Opinion discusses who can bring a claim for damage in the Area if there is no directly affected victim, and it comments on the role of general international law in the deep seabed liability regime.

Article 139 UNCLOS deals with responsibilities[28] and liability relating to activities in the Area. The first paragraph determines that sponsoring States have the responsibility to ensure that activities in the area are carried out in conformity with Part XI UNCLOS. The Chamber understands this responsibility to encompass a due diligence obligation.[29] Article 139(2) determines that 'damage caused by the failure of States Parties to carry out their responsibilities (…) shall entail liability. States Parties or international organizations acting together shall bear joint and several liability.' It was observed that this clearly differs from the rule of individual responsibility in general international law.

5.1. A presumption of joint and several liability

The Convention envisages situations requiring the sponsorship of more than one State Party.[30] However, it does not distinguish between single and multiple sponsorship and does not provide for a general rule on how liability for damage caused by one or multiple sponsoring States should be shared as

[27] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber),* 1 February 2011, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Advisory Opinion, Case No. 17.

[28] 'Responsibilities' in this context are to be understood as 'obligations', as observed in ITLOS Advisory Opinion, *supra* note 27, para. 71.

[29] *Ibid.*, para. 110.

[30] *See* article 4(3) Annex III UNCLOS.

a result of a failure to comply with the due diligence obligation incumbent upon sponsoring States. The Chamber has taken the position that 'in the event of multiple sponsorship, liability is joint and several unless otherwise provided in the Regulations issued by the Authority.'[31]

It was argued that joint and several liability in case of multiple sponsorship entails that a sponsoring State's failure to implement its due diligence obligation will result in joint and several liability, even if only one of the sponsoring States in fact failed to comply with this obligation. One participant responded that joint and several liability between two sponsoring States in the case one of them fully complies with its due diligence obligation would be comparable to strict liability, as the damage would simply shift from one innocent actor to another. Another participant found it unclear whether one of the two sponsoring States would in such a case be able to protect itself by relying on the second sentence of article 139(2) UNCLOS.[32]

5.2. A definition of joint and several liability

A definition of joint and several liability is not to be found in the Convention itself. In its Opinion the Chamber understands joint and several liability as arising where different entities have contributed to the same damage,[33] so that full reparation can be claimed from all or any of them.[34] Two aspects in the Chamber's discussion of liability of sponsoring States received special attention during the discussion: the requirement of damage for the establishment of (joint and several) liability and the exclusion of joint and several liability in case of different obligations.

- *The requirement of damage*

It was observed that liability in the UNCLOS regime will be dependent upon the occurrence of damage, as 'the failure of a sponsoring State to carry out its responsibilities entails liability only if there is damage.'[35] This is different from the general regime of international responsibility. A failure of the

[31] ITLOS Advisory Opinion, *supra* note 27, para. 192.

[32] The second sentence of article 139(2) UNCLOS provides that '[a] State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.'

[33] Damage is seen as a necessary factor for the establishment of liability in the regime of the Area, see ITLOS Advisory Opinion, *supra* note 27, para. 178.

[34] *Ibid.*, para. 201.

[35] *Ibid.*, *para*. 178.

sponsoring State(s) to act with due diligence will result in liability only if damage has occurred as a result of this failure.[36]

Several participants disagreed on the question whether the damage required for liability should be divisible or indivisible. One participant argued that the damage would probably have to be indivisible, because if it was divisible it would be a question of individual responsibility rather than joint and several liability. Another participant disagreed and did not believe that divisible damage necessarily entails individual responsibility, and argued that joint and several liability may still arise in the case of divisible damage.

- *The exclusion of joint and several liability in case of different obligations*

Participants observed that the Chamber's definition of joint and several liability excludes joint and several liability in case of different obligations resting on different subjects. This was discussed by the Chamber in the context of the relationship between the liability of the contractor and the sponsoring State. The obligations of the sponsored contractor under the contract on the one hand and the due diligence obligations of the sponsoring State(s) on the other hand are both different types of obligations, which entails that no joint and several liability can occur between these two actors. The liability of the contractor and the liability of the sponsoring State(s) exist in parallel.[37] In this context, one participant argued that there should in any case be a breach of the same obligation for joint and several liability to arise, as article 47 ASR requires participation in the same internationally wrongful act.[38]

In its Opinion, the Chamber acknowledges that there is one point of connection between the two forms of liability related to different obligations, as liability of the sponsoring State is triggered by the actual damage caused by the contractor resulting from the breach of the contractor's obligations. Nonetheless, the occurrence of damage as a result of the contractor's non-compliance does not result in liability of the sponsoring State if it has taken all necessary and appropriate measures. The

[36] Though the issue of causation was discussed by the Chamber in its Advisory Opinion (*see ibid.*, paras. 181-184), it did not receive any specific attention during the discussion.

[37] *Ibid.*, para. 201. In such case there will simply be 'individual responsibility'.

[38] Note that the ILC has not expressed a clear opinion as to whether article 47 ASR deals with cases of joint and several liability. *See* André Nollkaemper & Dov Jacobs, 'Shared Responsibility in International Law: A Concept Paper', *ACIL Research Paper No 2011*-07 (SHARES Series), finalized 2 August 2011 (www.sharesproject.nl), pp. 17-18.

Chamber established that in such a case the sponsoring State will not have a residual liability.[39]

This made one participant wonder about shared liability in the situation in which both the sponsoring State and the contractor had violated their respective obligations. It was suggested that in such a case one would first go to the contractor, and if the contractor does not repair the entire damage one may go to the sponsoring State whom is responsible for the damage resulting from not complying with its due diligence obligation.

Finally, one participant observed that the sponsoring States are connected as they both have a due diligence obligation. This may suggest that sponsoring States have a *common* due diligence obligation, which may, in case of breach resulting in a single injury, lead to joint responsibility, even though it would not necessarily qualify as the same wrongful act in terms of article 47 ASR.

5.3. Claims for damage and compensation

As the deep seabed mining regime concerns activities outside the limits of national jurisdiction one may ask who is the victim of activities in the Area that are detrimental to the Area's environment. UNCLOS recognizes that the Area and its resources are the common heritage of mankind,[40] making mankind as a whole the victim of any adverse effects of activities in the Area. In its Opinion, the Chamber established that mankind may be represented by the Authority, which can bring both the contractor and the sponsoring State(s) before ITLOS. In addition, '[e]ach State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area.'[41]

It was discussed what would happen if the Authority were to approve a work-plan for activities in the Area which is in violation of the provisions of the Convention. The Authority's approval of the application for exploratory contracts by Tonga[42] sparked controversy as Tonga does not have the required legislation necessary to fulfil its due diligence obligation as a sponsoring State. Is the Authority liable if damage should occur resulting from Tonga's failure to implement its due diligence obligation? And if so,

[39] ITLOS Advisory Opinion, *supra* note 27, para. 204.

[40] Article 136 UNCLOS.

[41] ITLOS Advisory Opinion, supra note 27, para. 180.

[42] *See* International Seabed Authority, *Decision of the Council relating to a request for approval of a plan of work for exploration for polymetallic nodules submitted by Tonga Offshore Mining Limited*, ISBA/17/C/15 (19 July 2011).

how should this liability be shared between the Authority, Tonga and the contractor?

5.4. The role of general international law

As a final point, participants discussed the role that general international law may play in the deep seabed liability regime

It was reiterated that the deep seabed liability regime has incorporated damage as a requirement for liability; which is in contrast with the general regime of international responsibility. However, even though States have consented to this specific regime for activities in the Area, if no damage occurs the customary law on international responsibility will still apply. The Convention itself refers to the rules of international law,[43] which entails that even though a sponsoring State's failure to comply with its due diligence obligation does not result in damage, there is still the possibility to hold that State (or indeed multiple States) liable under general international law.[44]

Finally, participants discussed what they felt to be an overarching problem of international environmental law: the fact that States want to avoid their obligation to compensation from being invoked whenever private actors are involved, while activities causing damage to the environment are often activities of private actors under the jurisdiction or control of a State. Only a few activities of States themselves will result in environmental damage, such as nuclear testing. It was observed that this problem sets environmental law aside from other regimes that may be discussed within the SHARES project. The concept of due diligence obligations does offer possibilities for holding States liable for not preventing damage to the environment by private parties, but this will certainly not provide a solution for all situations of environmental damage caused by private actors.

[43] Article 139(2) UNCLOS states that '[*w]ithout prejudice to the rules of international law* and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability' (emphasis added).

[44] This was acknowledged by the Chamber, ITLOS Advisory Opinion, *supra* note 27, para. 210.

6. Plenary discussion

In the plenary discussion participants discussed what specific features of international environmental law identified during this seminar seem to be especially relevant for the SHARES project.

6.1. Mapping factual situations

The seminar was found to have been very useful for the mapping of factual situations in which questions of shared responsibility arise in international environmental law; many examples have been discussed where two or more States or other entities contribute to a single injury. However, whereas a long list of relevant cases has been identified, there is a notable absence of formal claims and a lot more is going on in terms of informal means of addressing these situations. Most of these cases have not been brought before the ICJ or other inter-state dispute settlement bodies, but non-compliance procedures may have a potential role to play. This will in part depend on civil society or an entity comparable to the Seabed Authority in the deep seabed mining regime being able to trigger these proceedings in order to act in the common interest.

6.2. The special features of international environmental law

It was noted that in all MEAs discussed during this seminar, the nature and structure of the obligations easily lend themselves for situations of multiple-party responsibility. In addition, some of the general principles identified may be of particular relevance for SHARES, such as the principle of common but differentiated responsibilities which may be relevant for the ex post facto determination and allocation of responsibility.

One participant observed that within the IEL regime, there are particular cases in which there seems to be a need for clear rules of liability (such as in the deep seabed mining regime discussed in the last panel), while in other circumstances this need does not seem to be present. It was therefore asked why a need for these specific rules is felt in the deep seabed mining regime and not in other areas. One participant suggested that this may relate to the fact that activities take place in areas beyond national jurisdiction relating to the common heritage of mankind.

It was mentioned that this seminar had shed light on the normative bias of the rules adopted within the international environmental law regime, as States generally aim to avoid liability being imposed on them.

The scarcity of practice with regard to inter-state dispute settlement procedures and even compliance procedures within the IEL regime merits consideration for other manners to deal with questions of multiple party responsibility, such as shared accountability. It was suggested that SHARES should therefore explore other ways of dealing with shared responsibility in the area of international environmental law, for example when it comes to responsibility related to the common heritage of mankind. Moreover, it was suggested that in dealing with shared responsibility in this area a distinction should be made between treaties establishing purely bilateral relations on the one hand and interdependent or integral treaties which are not reducible to purely bilateral relations on the other hand.

List of participants

- Christiane Ahlborn, ACIL, University of Amsterdam
- Jean d´Aspremont, ACIL, University of Amsterdam
- Freya Baetens, Leiden University
- Bérénice Boutin, ACIL, University of Amsterdam
- Edward Brans, Pels Rijcken & Droogleever Fortuijn Lawyers
- Aris Constantinides, University of Cyprus
- Nienke van der Have, ACIL, University of Amsterdam
- Maarten den Heijer, ACIL, University of Amsterdam
- Dov Jacobs, Leiden University
- Katinka Jesse, Nias Institute, Wassenaar
- Erik Kok, ACIL, University of Amsterdam
- Katharina Kummer Peiry, Executive Secretary of the Basel Convention
- Hans Lammers, Former Legal Advisor, Ministry of Foreign Affairs of the Netherlands
- Geranne Lautenbach, ACIL, University of Amsterdam
- René Lefeber, Ministry of Foreign Affairs of the Netherlands / University of Amsterdam
- Elisa Morgera, University of Edinburgh
- Nataša Nedeski, ACIL, University of Amsterdam
- Alex Oude Elferink, University of Utrecht
- André Nollkaemper, ACIL, University of Amsterdam
- Marjan Peeters, Maastricht University
- Ilias Plakokefalos, University of Athens
- Marleen van Rijswick, University of Utrecht
- Nadia Sanchez, Leiden University
- Daniel Simons, Greenpeace
- Fred Soons, University of Utrecht
- Isabelle Swerissen, ACIL, University of Amsterdam
- Anne-Sophie Tabau, University Paris-Nord XIII
- Tullio Treves, International Tribunal for the Law of the Sea
- Andrea Varga, Grotius Institute for International Legal Studies, Leiden
- Ingo Venzke, ACIL, University of Amsterdam
- Josephine van Zeben, ACLE, University of Amsterdam