Assessing the Duty to Prevent Environmental Harm Through Tax Policies

POSTED ON JAN. 8, 2026

PETER HONGLER

GEORGIA-CRISTIANA COZAC

Peter Hongler is a professor of tax law and Georgia-Cristiana Cozac is a PhD candidate at the University of St. Gallen.

In this report, Hongler and Cozac examine whether a country's tax policy decisions can trigger international liability if they encourage harm to the environment.

Table of Contents

Introduction

This report explains the duty to prevent significant harm, and examines whether it can also be applied to matters of taxation policy. Specifically, we will explore whether a state's tax policy decisions, particularly those related to climate issues, can theoretically harm another state in a way that triggers state responsibility.

The interplay between national tax systems and transboundary environmental effects has gained increasing attention in recent years. If a state's tax policies create incentives for activities that contribute to the adverse effects of climate change, such as raising greenhouse gas (GHG) emissions, the question arises whether such effects may constitute harm that triggers state responsibility.

Tax measures may operate as vectors that enable, amplify, or externalize climate harm caused by private actors and permitted by the state. This report will examine how tax exemptions can hypothetically result in fossil fuel subsidies for carbon-intensive sectors and industries.

Hence, there is a need to examine the interaction between international climate law and domestic tax policies that contribute to climate change, given that the former is affected by several recent developments — in particular, binding international legal obligations for states to protect the climate system and other parts of the environment from GHG

emissions. The scope of harmful activities is not limited to conduct that itself directly results in GHG emissions, but rather comprises all actions or omissions of states resulting in the climate system and other parts of the environment being adversely affected.[1]

This report investigates whether, and under what conditions, the duty to prevent significant harm to the environment may impose legal limits on a state's discretion in designing its tax policy, with a focus on tax exemptions that ultimately result in fossil fuel subsidies. In other words, to what extent can a state's fiscal measures that facilitate or incentivize GHG-intensive activities amount to a breach of the duty to prevent significant harm to the environment? To answer this question, the report will explore the recent advisory opinion of the International Court of Justice.

The Duty to Prevent Significant Harm

Evolution in Jurisprudence

In its recent advisory opinion on states' obligations regarding climate change, the ICJ explained that states have a duty to prevent significant environmental harm.[2]

The authors understand this duty as normatively stemming from the general nature of the no-harm principle. The roots of the no-harm principle are found in Roman law, in the principle of *"sic utere tuo ut alienum non laedas"* — i.e., use your own property in a way that does no harm to other properties.[3] Therefore, it is not an equity consideration specifically applicable to interstate disputes, but rather it is derived from interindividual equity considerations. This is important to understand for the following remarks.

In the discourse of international law, the no-harm principle, which later evolved into the environmental duty to prevent transboundary harm,[4] is frequently illustrated through two seminal cases: the Trail Smelter arbitration and the Corfu Channel case.[5] The former case is where this duty "was first recognized as a principle of international law."[6]

The Trail Smelter arbitration case concerned transboundary pollution caused by the emissions from a smelting plant located in Trail, British Columbia, Canada. The fumes emitted by the smelter resulted in damage to property and the environment across the border in the United States. The central issue before the tribunal was whether Canada bore international responsibility for the acts of a private entity operating within its jurisdiction. Canada was forced to pay compensation to the United States for the proven

damage. The case was not the first to address state responsibility but was the anchor decision for later cases. After finding clear evidence that the damage in the United States was caused by the smelter's fumes, the arbitral tribunal articulated what has since become a cornerstone of environmental and transboundary harm jurisprudence:

> Under the principles of international law, as well as of the law of the United States, 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 or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[7]

The tribunal also referred to Professor Clyde Eagleton's formulation that "a state owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction" who, in his analysis, had a strong focus on the above principle of "*sic utere tuo.*"[8] Two limitations were articulated in the decision: (1) the existence of harm must be proven through clear and convincing evidence, and (2) the damage must be of a serious nature. The exact legal value of the Trail Smelter case has been a subject of dispute in international law since its publication.[9]

A similar principle was affirmed by the ICJ in the Corfu Channel case. Mines had been laid in Albanian territorial waters — either by Albania itself, or with its approval — resulting in the loss of two British naval vessels. The ICJ held that a state has an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states."[10] The court also recognized in its nuclear weapons case that the duty to prevent transboundary harm forms "part of the corpus of international law relating to the environment."[11]

Later, the court in the Pulp Mills case confirmed the existence of the principle of prevention, confirming that "a State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."[12]

Nevertheless, before the most recent advisory opinion, the ICJ had not clearly identified the precise legal foundation of this no-harm obligation in its case law. Within the various decisions, it remains uncertain whether the no-harm duty derives from customary international law, the principle of territorial sovereignty, or a general principle of international law.

Regardless of its exact legal source, the no-harm principle is underpinned by strong normative and moral considerations. They reflect the fundamental notion that it is inherently wrong for one state to cause harm to another's territory or to assets situated therein. An important extension of this debate concerns the applicability of the no-harm rule to global commons or areas beyond national jurisdiction — such as the high seas, outer space, or the atmosphere.[13] The prevailing interpretation in contemporary scholarship is that the principle should indeed apply to shared domains, based on the premise that all states enjoy equal rights to their use and benefits.[14] Consequently, the modern understanding of the no-harm principle encompasses not only interstate relations but also the protection of common spaces essential to the international community as a whole.

It has recently been clarified that the duty to prevent significant harm to the environment also "applies to the climate system, which is an integral and vitally important part of the environment and which must be protected for present and future generations."[15] According to the court, it constitutes an obligation of states under customary international law relating to climate change.[16] This means that this duty is based on a general source of international law, as per the ICJ statute, and is legally binding upon states.[17]

In the past, from a tax perspective, the no-harm principle and the duty to prevent transboundary harm had not been addressed in detail — either by tax-related literature or in case law. There has been a brief debate over whether competitive measures by countries can be seen as an infringement upon the no-harm principle.[18] However, we don't find that position persuasive.[19] The no-harm principle aims to protect territorial sovereignty. Harmful tax competition does not cause such territorial harm. Indeed, countries might lose tax revenue due to competitive pressure; however, such losses are not covered by the no-harm principle as it is currently understood under international law.

Since the ICJ has clarified that there is a legal duty to prevent significant harm to the environment in relation to climate change, further examination of its impact on tax policy is warranted. The following section will examine the scope of this duty in further detail to precisely determine its relationship to tax policy.

Content of the Duty

An obligation to prevent significant harm is based on conduct, not results. A state cannot be obligated to succeed in preventing harm; states are obligated to employ all means

reasonably available to it to prevent harm. Tax policy presents such a tool, whereby a state can alter its tax jurisdiction to adopt measures that ensure private actors are not incentivized to cause harm to the environment in another country. The duty consists of the following two elements.

Risk of Harm to the Environment and Climate System

The object of this duty is the climate system, which is defined by the Intergovernmental Panel on Climate Change (IPCC) as "the global system consisting of five major components: the atmosphere, the hydrosphere, the cryosphere, the lithosphere and the biosphere and the interactions between them."[20]

States are subject to the duty to prevent significant harm either where no harm has yet been caused to the climate system, but there is a risk of future significant harm, or where some harm has already been caused, and there is a risk of further significant harm.[21]

A risk of significant damage to the climate system is also present in situations where harm is caused by the cumulative effect of different acts undertaken by various states and private actors subject to their respective jurisdiction, effective control over activities that impact the environment, and tax policies. This is the case even if it is difficult in such situations to identify any particular state's share of responsibility for the harm caused. Hence, states must assess the possible cumulative effects of their acts and the planned activities under their jurisdiction or control.[22]

The question of whether any specific harm, or risk of harm, caused by a state's conduct constitutes relevant harm to the environment must be assessed in each individual situation.[23]

Due Diligence

The determination of what is required by due diligence ultimately calls for an assessment of what is reasonable under the specific circumstances in which a state finds itself.[24] The standard of due diligence for preventing significant harm to the climate system is stringent and entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control.[25]

The following elements are particularly relevant when it comes to determining what due diligence requires from a state, including in its conception of tax policy measures, within

the context of climate change:

- **Appropriate measures**: regulatory mitigation mechanisms that are designed to achieve sustained reductions of GHG emissions, including at a national level (legislation, administrative procedures, and enforcement structures).[26]
- **Scientific and technological information**: for example, reports by the IPCC constitute comprehensive, authoritative restatements of the best available science about climate change at the time of their publication.[27]
- **Relevant international rules and standards**: from binding and nonbinding norms, including customary international law, treaties, and even certain decisions of the Conference of the Parties (COPs).[28]
- **Different capabilities of states**: the determination cannot merely result from a distinction between developed and developing countries, but must also depend on their respective national circumstances.[29]
- **Precautionary approach or principle and respective measures**: lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[30]
- **Risk assessment and environmental impact assessment**: based on the best available science in cases of proposed industrial activities in a transboundary context.[31]
- **Notification and consultation**: made in good faith regarding risks of adverse effects of a state's own conduct.[32]

States bear the full burden of demonstrating that their policies and practices are in conformity with this duty.[33]

Erga Omnes Character of the Duty

Besides the two elements that form the content of the duty, the court further determined that states' obligations pertaining to the protection of the climate system from anthropogenic GHG emissions, in particular the obligation to prevent significant harm under customary international law, are obligations *erga omnes*.[34] Under general international law, obligations that are "*erga omnes*" are owed to the entire international community, not just to a specific state. Therefore, a breach of such an obligation is a concern for all states and not just the injured one, meaning any state can take action against the perpetrator. Therefore, the court concluded that all states share a common

interest in protecting global environmental commons, such as the atmosphere and the high seas.

Prevention becomes a collective task, with states needing to scrutinize one another's climate conduct. Where harmful practices are systemic, such as fossil fuel subsidies or persistent tax exemptions that aggravate emissions, states may legitimately frame such measures as undermining the collective interest in preventing harm. This widens the scope for cooperative, treaty-based, or even domestic unilateral fiscal responses that aim to address the common climate risk.

Intermediate Conclusion

It is evident that GHG emissions enabled through state actions, as manifested through national legislative, administrative, and enforcement structures, may harm the climate system. It is in line with the ICJ opinion to argue that the cumulative effects of both state actions and the actions of private actors under the jurisdiction of a certain state may constitute an infringement of the customary international duty to prevent significant harm to the environment. State action might specifically include tax policy choices. To better understand this interaction, we will further explore the question of state responsibility.

Determining State Responsibility In Case of Breach

Overview

State responsibility is a fundamental institution of international law, stemming from the fact that every state possesses legal personality under international law.[35]

Through the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), the U.N. has developed a very detailed framework to address state responsibilities, including the general concepts of attribution, breach, excuses, and consequences.[36] These provisions, in many respects, reflect customary international law and have been applied as such by tribunals in various international cases.[37] However, and this is key to understanding the issue, ARSIWA does not define the actual international law obligation whose infringement would constitute a breach, thereby triggering international state responsibility due to the commission of an internationally wrongful act. It merely sets out a general framework.

As we will discuss in the following sections, a primary rule of international law needs to be infringed upon to create state responsibility,[38] and the duty to prevent significant harm to the environment, as discussed above, may constitute such a primary rule. Therefore, it is crucial, before assessing the responsibility of a state, to determine whether a state has breached a primary obligation through the adoption of certain domestic tax policies that potentially constitute an internationally wrongful act, thereby triggering specific legal consequences.

Attribution of State Responsibility

General Attribution to a State

Attribution in the context of determining the responsibility of a particular state denotes "the operation of attaching a given action or omission to a State" under international law.[39]

The well-established rule of international law that "the conduct of any organ of a state must be regarded as an act of that State" is also applicable in the context of climate change.[40] A state's failure to take appropriate action to protect the climate system from GHG emissions, including, according to the court, "through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies," may constitute an internationally wrongful act that is attributable to that state.[41]

Hence, the internationally wrongful act in question is not the emission of GHGs directly, but the breach of the duty to prevent significant harm to the environment resulting from anthropogenic emissions of such gases.[42]

Attributing Private Actor Conduct to States

Regarding attribution to states of the conduct of private actors resulting in emissions of GHGs, the court noted that the breach of a state's duty to prevent significant harm to the environment includes the "obligation of states to regulate the activities of private actors as a matter of due diligence."[43] Attribution in this sense involves attaching a state's actions or omissions that constitute a failure to exercise regulatory due diligence, such as "not taking the necessary regulatory and legislative measures to limit the quantity of emissions caused by private actors under its jurisdiction."[44]

It was also submitted by participants during the ICJ procedure that the determination cannot "rest exclusively with consumers and end users, but also include activities such as ongoing production, licensing and subsidizing of fossil fuels."[45] Of course, the latter is key from a tax policy perspective — subsidizing fossil fuels often happens through tax exemptions, as we will outline in the following discussion. In a broader sense, the adoption of tax measures and incentives through legislation that encourages fossil fuel production and consumption would, in the authors' opinion, constitute a failure in exercising regulatory due diligence, which is an element of the duty to prevent significant harm to the environment.

One question that arises is whether the maintenance of fossil fuel subsidies fails to meet the duty of prevention if a country has adopted sufficient compensation instruments, such as carbon-offsetting schemes or other decarbonization projects. At first glance, this is not persuasive since fossil fuel subsidies inherently increase consumption of goods and services from polluting industries, which cheapens GHG-intensive industries on the production side and obstructs measures a state must adopt to protect the climate system.

Causation and Assignment of State Responsibility

Causation is a legal concept that plays a role in determining reparations. Since reparations imply the existence of damage, causation must be established between the wrongful act of one or more states and the particular damage suffered by the injured states or individuals.[46] There are two distinct elements in determining causation in the climate change context:

1. whether a given climatic event or trend can be attributed to anthropogenic climate change (address through recourse to scientific evidence);
2. to what extent damage caused by climate change can be attributed to a particular state or group of states (as established *in concreto*).[47]

The ICJ dismissed the argument that it is difficult to invoke responsibility in the context of climate change, given that the wrongful conduct is cumulative in nature, involving different states that cause injury to other states over a period of time.[48] There are IPCC reports that include data on cumulative net emissions by region, as well as other studies on current and historical emissions that can be attributed to individual states, thereby providing a scientifically and historically informed understanding of current emissions.[49]

In the context of climate change, the court determined that it is possible, on a case-by-case basis, to admit and determine the responsibility of states based on the amount of GHG emitted per state, including where damage is caused by one or more states engaged in wrongful conduct, without invoking the responsibility of all states that may be involved.[50]

Legal Consequences

It is well established that every internationally wrongful act of a state, such as a breach of the duty to prevent significant harm to the environment, may entail an international responsibility of that state. A panoply of legal consequences are provided under ARSIWA. The ICJ, in its advisory opinion, is neither silent nor particularly precise regarding the actual legal consequences. It discusses three consequences:

1. **Duty of performance**: Although countries might shirk their obligations, they still have a duty to perform them[51]
2. **Duty of cessation and guarantees of nonrepetition**: Here, the court is clear that a state has an obligation "to revoke all administrative, legislative and other measures that constitute an internationally wrongful act of that state."[52]
3. **Duty to make reparation**: If an injured state can demonstrate damages (or an injured individual in case of a human rights infringement), different forms of reparations are possible.[53]

Regarding the duty to make reparation, the court discussed: (1) restitution (the reestablishment of the situation that existed before the wrongful act was committed), (2) compensation (can address financial losses when restitution proves to be materially impossible), and (3) satisfaction (such as expressions of regret, formal apologies, public acknowledgments or statements, or education of the society about climate change).[54]

Restitution does not really work in the climate field, as it might be difficult to reverse the harm. There may be specific situations where it is possible — for instance, if a house is destroyed by a flood caused by the effects of climate change, then restitution might be feasible, as the same house could be rebuilt, or an ecosystem that has been damaged can be restored.

Compensation faces the challenge that, in the climate change area, it might be difficult to calculate the "exact extent of the damage."[55] Moreover, satisfaction does not seem to be

very effective in addressing harm to the climate system. The following section will discuss the implications of this for tax policy decisions.

Focus on Fossil Fuel Subsidies in Tax Policy

Overview

We have mentioned that the duty to prevent significant harm to the environment has rarely been applied to countries' tax policy decisions. This is due to the fact that tax policy is generally considered to be part of the sovereignty of each country, and the "damage" a tax policy decision can have is limited to loss in tax revenue of another state due to, for instance, the relocation of individuals or business activities from one country to another. Tax policy typically has no impact on the territorial integrity of another country in the transboundary sense of the Trail Smelter case. However, it is important to understand that taxation does not constitute a common good of the international community; fiscal sovereignty belongs to individual states and their respective populations. Accordingly, the duty to prevent significant harm, stemming from the original no-harm principle, while foundational in environmental and territorial contexts, is not relevant in matters concerning taxation or fiscal jurisdiction in general.

However, as previously explained, the ICJ has argued (at least implicitly) in its recent advisory opinion that fossil fuel subsidies, through the preferential treatment of fossil fuels by tax policies, may create state responsibility, as they incentivize the use of fossil fuels, directly increasing GHG emissions and consequently harming the environment.

Fossil fuel subsidies may occur through different means — direct cash payments or, more often, through exempting the use of fossil fuels from taxation. This is explored below in detail.

Definition of Fossil Fuel Subsidies

The ICJ does not provide a definition of fossil fuel subsidies. There are different ways to define them, and as it may have legal consequences, it will be even more important in the future to have a clear understanding of what a fossil fuel subsidy is.

Subsidies can take a wide array of forms.[56] Consumption subsidies target energy users mainly by pricing fuels below market rates or reducing excise taxes.[57] Production subsidies

take the form of tax breaks, grants, and favorable loans to increase the supply of fossil fuels.[58]

The OECD has developed a taxonomy of government support measures that categorizes different types of subsidies based on a transfer of revenue/funds mechanism from both the production and consumption sides.[59] It includes the following five ways in which transfer of funds can take place in the context of fossil fuels:

1. **Direct transfer of funds**: explicit budgetary transfers to fossil fuel producers or consumers (e.g., through direct grants to producers);
2. **Tax revenue forgone**: arises through preferential tax treatment (e.g., VAT exemptions);
3. **Other government revenue forgone**: fossil fuel producers benefiting from public goods or services at below-market prices (e.g., underpriced access to state-owned natural resources);
4. **Transfers of risk to the government**: governments assuming risks that normally fall on producers or consumers (e.g., public guarantees for fossil fuel investments); and
5. **Induced transfers**: policies that would induce transfers without explicit spending (e.g., energy prices set below the cost of production).[60]

From an economic perspective, full alignment of prices with marginal social cost is a basic condition for efficient pricing and requires removing discrepancies between these costs and prices, as well as other noninternalized external costs.[61] This means that for prices of fossil fuels to be efficient, the price consumers pay should be equivalent to the real cost of producing and consuming that good (i.e., the fossil fuel itself), which includes environmental damage, as well as normal taxes such as VAT or excise taxes. Currently, fossil fuel prices may be too low for several reasons: Some production costs are subsidized, environmental damage is not factored into the price, and taxes on fossil fuels are occasionally lower than those on other similar goods.

For the purposes of this report, we rely on a definition from the IMF[62] that differentiates between explicit and implicit subsidies. Explicit subsidies are present if the retail price is below the production cost.[63] Implicit subsidies occur when the retail price is below the production cost plus external cost (for example, contributions to climate harm) and a standard consumption tax.[64] We would further define the implicit subsidy as the difference between the retail price and the production cost, plus external costs (environmental damage), and the standard tax burden on similar products. The latter also means that

specific energy taxes or excise taxes beyond VAT are also covered. Visually, an implicit subsidy could look something like this:

(Cost of Production + External Cost + Standard Tax Burden) - Retail Price

This raises the next question: which supply is relevant in determining whether it is a fossil fuel subsidy? The retail price, cost of production, and even external costs can manifest at different stages of the fossil fuel value supply chain. Fossil fuels undergo several pricing stages: extraction, processing, wholesale, and final retail.[65] Each of these stages may be subject to distinct fiscal interventions. While the IMF's implicit subsidy price gap approach rests on the retail price being transferred to consumers, significant subsidization can still occur upstream through, for example, tax deductions for exploration costs or reduced taxation of refinery outputs.[66] Determining the relevant supply requires a reference point. Our focus will be on the final retail price, as that is where the duty to prevent significant harm is most directly applicable and noticeable. Any upstream fiscal advantages are treated as complementary elements that lower the retail price, thereby increasing an implicit subsidy.

Enforcement

Overview

As addressed so far, a state might indeed shirk its international law obligation by permitting fossil fuel subsidies through its domestic tax policy choices. However, this leaves open the question of how such an infringement could be punished, since the path from judicial recognition to practical implementation of any climate litigation remains challenging and often uncertain.[67] Any remedies that would be claimed through climate litigation by enforcing the duty to prevent significant harm to the environment would face certain challenges, such as the distinctive nature of climate change (temporal complexity, scientific contingency, and fragmented governance) and implementation barriers due to political resistance (including resource constraints and competing state policy objectives).[68]

Nevertheless, effective remedies in this area have been described as constituting governance catalysts rather than final solutions since remedies grounded in climate science establish benchmarks for ongoing climate action, create accountability mechanisms, and facilitate institutional learning.[69] To further address these issues, the

following sections will distinguish between requests for reparation and requests for cessation as possible means of enforcement.

Reparation

The evolving jurisprudence on climate obligations significantly increases the likelihood that states may seek to enforce the duty to prevent significant harm to the environment through formal legal action. Aggrieved states, particularly small island states from the Global South facing acute climate impacts that threaten their very existence, may increasingly resort to interstate claims before international or regional courts. Countries could therefore claim compensation as a means of reparation.[70]

However, it has been highlighted since the beginning of the debate on climate change and state responsibility that the actual cost allocation and determination will be structurally, scientifically, and legally complex. So far, there is no established case law on how the issue may be resolved in terms of liability apportionment, but it seems like the inspiration will be drawn from domestic civil mechanisms, such as joint and several liability from civil law.[71]

Several questions need to be answered, such as how much do countries that enable fossil fuel production contribute to the harm, and how much do countries that enhance consumption by private actors through fossil fuel subsidies contribute? This will require an exact calculation of the impact of fossil fuel subsidies, which will be very challenging, as we previously discussed. Moreover, besides the question of allocating the costs of potential damage, it is unclear how these claims can be enforced in the case of an interstate dispute without causing a major diplomatic crisis. It may be more likely that domestic remedies seeking cessation find success first.

Cessation

Domestic courts are likely to become an increasingly prominent forum for enforcement. Domestic litigants may challenge the adequacy of national frameworks, including tax policies that perpetuate dependence on fossil fuels. Even aggrieved domestic actors, including civil society, affected communities through class actions, and businesses exposed to climate risk, may argue that maintaining tax policies incompatible with the aforementioned duty is unjustifiable, since such policies may be interpreted through domestic constitutional environmental clauses or domestic human rights laws. Domestic

litigation may therefore operate as a mechanism for the practical implementation of such international duties.

As demonstrated, a state violates the no-harm principle when it adversely affects the climate system by granting fossil fuel subsidies. Regardless of state responsibility, domestic litigants may have recourse to seek a declaration that specific fossil fuel subsidies are invalid because they are contrary to international law.

However, the availability of such remedies depends on domestic legislation, particularly whether national law provides access to judicial review mechanisms of this kind.

Conclusion

Recent developments in climate litigation may have significant implications for tax policy decisions of individual states. We interpret the ICJ's advisory opinion as implying that fossil fuel subsidies are, in principle, incompatible with international law because they constitute a violation of the no-harm principle. However, the legal avenues for addressing such violations remain unclear. We have discussed several possible approaches.

In the short term, domestic proceedings may provide an opportunity to invoke the violation of international law and, where appropriate, to set aside conflicting national legislation (i.e., fossil fuel subsidies within their tax system). At the same time, states will be required to engage in multilateral negotiations to identify pathways for reducing fossil fuel subsidies.[72] In the tax domain, this will likely necessitate negotiations on the taxation of cross-border transport activities, including shipping and aviation. If states must exercise due diligence to avoid contributing to climate risk, cooperation becomes the only functional pathway for cost sharing. Coordination of fiscal measures, such as phasing out harmful fossil fuel subsidies, may operate as collective compliance tools that discharge states from the duty to prevent harm and distribute the economic burden of mitigation in a predictable manner. Such cooperation, particularly in cross-border emissions activities, is required by international law.[73]

As a last resort — and from an international law perspective, the most difficult to enforce — states may seek to assert claims for compensation (such as reparation) in interstate proceedings.

FOOTNOTES

[1] International Court of Justice, "Obligations of States in Respect of Climate Change," at para. 94 (July 23, 2025).

[2] *Id.*

[3] Jutta Brunnée, "Sic utere tuo ut alienum non laedas" in *Max Planck Encyclopedia of Public International Law*, section 10 (2022). *See generally* United Nations Reports of International Arbitral Awards, "Trail Smelter (United States v. Canada)," Vol. III, at 1965 (Mar. 11, 1941).

[4] Sandrine Maljean-Dubois, "The No-Harm Principle as the Foundation of International Climate Law" in *Debating Climate Law* 16 (2021).

[5] International Court of Justice, "Corfu Channel (United Kingdom v. Albania)," ICJ Reports 1949, at 4, 22 (Apr. 9, 1949).

[6] ICJ Climate Advisory Opinion, *supra* note 1, at para. 272.

[7] Trail Smelter, *supra* note 3, at 1965.

[8] Clyde Eagleton, *The Responsibility of States in International Law* 80 (1928).

[9] *See* Russell A. Miller, "Trail Smelter Arbitration" in *Max Planck Encyclopedia of Public International Law*, at section 12 (2008); for a different viewpoint, *see* Sophie Capicchiano Young, "State Responsibility for COVID-19: Does International Contagion Constitute Transboundary Harm?" 11(2) *Asian J. Int'l L.* 337 (2021).

[10] Corfu Channel, *supra* note 5, at 4, 22.

[11] International Court of Justice, "Legality of the Threat or Use of Nuclear Weapons," ICJ Reports, at 272, para. 29 (July 8, 1996). *See also* ICJ Climate Advisory Opinion, *supra* note 1, at para. 272.

[12] International Court of Justice, *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), ICJ Reports 2010, at 14, para. 101 (Apr. 20, 2010). This paragraph is also cited in the most recent ICJ Climate Advisory Opinion, *supra* note 1, at para. 189.

[13] U.N., "Report of the United Nations Conference on the Human Environment," A/Conf.48/14/Rev.1, at Principle 21 (June 16, 1972); U.N., "Report of the United Nations Conference on Environment and Development," A/Conf.151/26 (Vol. I), at Principle 2 (June

14, 1992). The application of the no-harm principle to the global commons is supported by the wording of both the 1972 Stockholm Declaration under Principle 21 and the 1992 Rio Declaration under Principle 2. *See also* Neil Craik, Tara Davenport, and Ruth Mackenzie, *Liability for Environmental Harm to the Global Commons* 40 (2023).

[14] *See* Patricia Birnie, Alan Boyle, and Catherine Redgwell, *International Law and Environment* 143-152 (2009); Peter Gailhofer et al., *Corporate Liability for Transboundary Environmental Harm: An International and Transnational Perspective* 56 (2023).

[15] ICJ Climate Advisory Opinion, *supra* note 1, at paras. 73-74 and 273.

[16] *Id.* at para. 271.

[17] Statute of the International Court of Justice (1945), at art 38(1)(b). *See generally* Michael Wood and Omri Sender, "Customary International Law" in Max Planck Encyclopedia of Public International Law, section 6 and 7 (2024).

[18] *See* Jelena Bäumler, *Das Schädigungsverbot im Völkerrecht: Eine Untersuchung anhand des Umwelt-, Welthandels- und Finanzvölkerrechts* 239 (2017) (in German).

[19] Peter Hongler, *Justice in International Tax Law* 183 (2019).

[20] Intergovernmental Panel on Climate Change, "Climate Change 2023: Synthesis Report," Annex I, at 122 (Mar. 20, 2023).

[21] ICJ Climate Advisory Opinion, *supra* note 1, at para. 274.

[22] *Id. See also* the International Tribunal for the Law of the Sea, "Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law," Advisory Opinion, at 128, 365 (May 21, 2024).

[23] ICJ Climate Advisory Opinion, *supra* note 1, at para. 278.

[24] *Id.* at para. 137.

[25] *Id.* at para. 138.

[26] *Id.* at paras. 281-282.

[27] *Id.* at paras. 283-286.

[28] *Id.* at paras. 287-288.

[29] *Id.* at paras. 290-292.

[30] *See* Rio Declaration on Environment and Development, Principle 15 (1992); United Nations Framework Convention on Climate Change, article 3, para. 3 (1992).

[31] ICJ Climate Advisory Opinion, *supra* note 1, at paras. 293-294.

[32] *Id.* at para. 299.

[33] *Id.* at para. 315.

[34] *Id.* at para. 440.

[35] James Crawford, "State Responsibility" in *Max Planck Encyclopedia of Public International Law*, section 1 (2006).

[36] International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries," U.N. Doc. A/56/10 (2001).

[37] Crawford, *supra* note 35, at section 3.

[38] *See* Crawford, *The ILC's Articles on State Responsibility: Introduction, Text and Commentaries* (2002).

[39] ICJ Climate Advisory Opinion, *supra* note 1, at para. 425.

[40] *Id.* at para. 427.

[41] *Id.*

[42] *Id.*

[43] *Id.* at para. 428.

[44] *Id.*

[45] *Id.* at para. 94.

[46] *Id.* at para. 433.

[47] *Id.* at para. 437.

[48] *Id.* at para. 429.

[49] *See* Intergovernmental Panel on Climate Change, *supra* note 20, at 45. *See also* European Commission Joint Research Centre, "CO_2 Emissions of All World Countries — 2022 Report," at 5 (Sept. 19, 2022).

[50] ICJ Climate Advisory Opinion, *supra* note 1, at paras. 430-432.

[51] *Id.* at para. 446.

[52] *Id.* at paras. 447-448.

[53] *Id.* at paras. 449-455.

[54] *Id.*

[55] *Id.* at para. 454.

[56] OECD, "Subsidies, Competition and Trade" (Nov. 10, 2022).

[57] OECD, "Subsidies, Trade and International Cooperation" (Apr. 22, 2022).

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] OECD, "Taxing Vehicles, Fuels, and Road Use" (2019).

[62] International Monetary Fund, "Climate Change: Fossil Fuel Subsidies" (last accessed Dec. 2025).

[63] *Id.*

[64] *Id.*

[65] Masami Kojima, "Fossil Fuel Subsidy and Pricing Policies: Recent Developing Country Experience," World Bank Policy Research Working Paper No. 7531, at 11 (Jan. 12, 2016).

[66] World Trade Organization, "Classification of Fossil Fuel Subsidies Measures" (2025). *See also* Tax Policy Center, "What Tax Incentives Encourage Energy Production From Fossil Fuels?" (Jan. 2024).

[67] Marcelo Lozada and Başak Çali, "From Litigation to Implementation: Framing Smart Remedies in Rights-Based Climate Litigation," Bonavero Reports 4/2025, at 22 (Nov. 1, 2025).

[68] *Id.*

[69] *Id.*

[70] For a very recent case, see Simon Jessop and Sebastian Rocandio, "Ukraine Plans $44 Billion Claim Against Russia for Wartime Emissions," Reuters, Nov. 18, 2025.

[71] Christina Voigt, "State Responsibility for Climate Change Damages," 77(1-2) *Nordic J. Int'l L.* 13-16 (2008).

[72] ICJ Climate Advisory Opinion, *supra* note 1, at paras. 301-308. The court elaborated on the customary international law duty to cooperate.

[73] *Id.*

END FOOTNOTES