Article 33. Scope of international obligations set out in this Part

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

Commentary

(1) Article 33 concludes the provisions of chapter I of Part Two by clarifying the scope and effect of the international obligations covered by the Part. In particular, paragraph 1 makes it clear that identifying the State or States towards which the responsible State's obligations in Part Two exist depends both on the primary rule establishing the obligation that was breached and on the circumstances of the breach. For example, pollution of the sea, if it is massive and widespread, may affect the international community as a whole or the coastal States of a region; in other circumstances it might only affect a single neighbouring State. Evidently, the gravity of the breach may also affect the scope of the obligations of cessation and reparation.

(2) In accordance with paragraph 1, the responsible State's obligations in a given case may exist towards another State, several States or the international community as a whole. The reference to several States includes the case in which a breach affects all the other parties to a treaty or to a legal regime established under customary international law. For instance, when an obligation can be defined as an "integral" obligation, the breach by a State necessarily affects all the other parties to the treaty.[1427] 482

(3) When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights.[1428] 483 The range of possibilities is demonstrated from the ICJ judgment in the *LaGrand* case, where the Court held that article 36 of the Vienna Convention on Consular Relations "creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person".[1429] 484

(4) Such possibilities underlie the need for paragraph 2 of article 33. Part Two deals with the secondary obligations of States in relation to cessation and reparation, and those obligations may be owed, *inter alia*, to one or several States or to the international community as a whole. In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its

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[1427] 482 See further article 42 (*b*) (ii) and commentary.

[1428] 483 Cf. *Jurisdiction of the Courts of Danzig* (footnote [141] 82 above), pp. 17–21.

[1429] 484 *LaGrand, Judgment* (footnote [236] 119 above), para. 77. In the circumstances the Court did not find it necessary to decide whether the individual rights had "assumed the character of a human right" (para. 78).

own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. It is also true in the case of rights under bilateral or regional investment protection agreements. Part Three is concerned with the invocation of responsibility by other States, whether they are to be considered "injured States" under article 42, or other interested States under article 48, or whether they may be exercising specific rights to invoke responsibility under some special rule (art. 55). The articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase "which may accrue directly to any person or entity other than a State".

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Additional Facility Rules)

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. *the United Mexican States*

In its 2007 award, the tribunal established to hear the case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc.* v. *Mexico*, after holding that Chapter Eleven of NAFTA enjoys the status of *lex specialis* in relation to the State responsibility articles,[1430] [49] noted that Chapter Eleven includes the possibility of private claimants (who are nationals of a NAFTA member State) invoking in an international arbitration the responsibility of another NAFTA member State. Accordingly, "it is a matter of the particular provisions of Chapter Eleven to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account". In support of this latter assertion the tribunal cited article 33, paragraph 2, of the State responsibility articles, which provides that the customary rules on state responsibility codified therein operate "… without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State". Accordingly, in the view of the tribunal:

> Customary international law—pursuant to which only sovereign States may invoke the responsibility of another State—does not therefore affect the rights of non-State actors under particular treaties to invoke state responsibility. This rule is not only true in the context of investment protection, but also in the human rights and environmental protection arena.[1431] [50]

[A/65/76, para. 33]

Permanent Court of Arbitration (under UNCITRAL Rules)

Hulley Enterprises Limited (Cyprus) v. *The Russian Federation*

The arbitral tribunal in *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation* was

[1430] [49] See article 55 below.

[1431] [50] *Archer Daniels Midland Company* (footnote [3] 4 above), para. 118.

aware that Part II of the ILC Articles on State Responsibility, which sets out the consequences of internationally wrongful acts, is concerned with claims between States and may not directly apply to cases involving persons or entities other than States. That being said, the ILC Articles reflect customary international law in the matter of state responsibility, and to the extent that a matter is not ruled by the ECT and there are no circumstances commanding otherwise, the Tribunal will turn to the ILC Articles on State Responsibility for guidance.[1432] [169]

[A/71/80, para. 119]

[*Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* referred to articles 28 to 39 of the State responsibility articles under, part III, "Principal legal and other texts",[1433] [150] which were relevant with regard to the parties' claims for relief.[1434] [151]

[A/74/83, p. 28]]

International arbitral tribunal (under the ICSID Convention)

Burlington Resources Inc. v. *Republic of Ecuador*

In *Burlington Resources Inc.* v. *Republic of Ecuador*, the arbitral tribunal cited article 33 and the commentary to article 28 of the State responsibility articles when observing that

[w]hile Part Two of the ILC Articles, which sets out the legal consequences of internationally wrongful acts and to which Article 31 belongs, is not applicable to the international responsibility of States *vis-à-vis* non-States, it is generally accepted that the ILC Articles can be transposed to the context of investor-State disputes.[1435] [187]

[A/74/83, p. 33]

ConocoPhillips Petrozuata B.V. et al. v. *Bolivarian Republic of Venezuela*

In addressing the principle of full reparation reflected in article 31, the arbitral tribunal in *ConocoPhillips Petrozuata B.V. et al.* v. *Bolivarian Republic of Venezuela* referred to article 33, indicating that "the provisions on State responsibility are 'without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State' (Art. 33(2))".[1436] [164]

[A/77/74, p. 29]

[1432] [169] See footnote [19] 7 above, footnote 10.

[1433] [[150] PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1434] [[151] *Ibid*., para. 9.9.]

[1435] [187] ICSID, Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 177 and footnote 236.

[1436] [164] ICSID, Case No. ARB/07/30, Award, 8 March 2019, para. 208.