

INTERNATIONAL LAW ASSOCIATION

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TRANSNATIONAL ENFORCEMENT OF ENVIRONMENTAL LAW

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SECOND REPORT*

1 Introduction

1. 1. The Committee's Mandate

The Committee on Transnational Enforcement of Environmental Law (TEEL) was established by the Executive Council in November, 1997. The committee's mandate is:

To consider: All aspects of the transnational enforcement of environmental law (both national and international) through national legal systems. In particular, the committee's mandate would include: (1) jurisdiction of national courts with respect to transboundary environmental damage or risk; choice of law and forum shopping in environmental litigation; (2) transboundary access to justice and public interest litigation in environmental cases; (3) the use of national courts by foreign plaintiffs seeking redress against multinational companies.

1. 2. This Report

* The present report has been drafted by Christophe Bernasconi and Gerrit Betlem in accordance with decisions of the Committee taken at its 4th meeting, held in May 2004. The committee had before it the following working papers: (i) Bernasconi & Betlem: Effect of Licences on Liability: a Private International Law Perspective; (ii) Betlem: Claims by public authorities and the subject matter scope of the EC Jurisdiction and Judgments Convention/Regulation; (iii) Boyle: Globalising Environmental Liability; (iv) MacSkimming: Receptiveness of United States Federal Courts to Foreign Plaintiffs Asserting Claims Under Environmental Laws of the United States and International Environmental Law: A Survey; (v) Nygh: Liability of Multinational Corporations for the Acts or Defaults of their Subsidiaries in Environmental Matters.

In its First Report the Committee defined the topic of transnational enforcement of environmental law, and considered why there is a need for transnational enforcement, the obstacles to transnational enforcement, and some attempts that have been made to overcome those obstacles. It covered issues of a predominantly public law nature, in particular trends in two specific contexts: the use of human rights law in environmental cases and access of NGOs to transboundary environmental litigation. For the present, no conclusions are offered on the ultimate form of the Committee's recommendations. It remains to be determined for the Third (final) Report whether Toronto Principles will be proposed, or what issues might merit an attempt at codification or progressive development of the law.

In this Second Report, the Committee intends to continue to examine obstacles to transnational enforcement and possible solutions. The issues dealt with are of a predominantly private law nature. That is, questions of private international law, notably legal obstacles contained in jurisdictional rules in the context of claims by public authorities, matters of choice of law in non-contractual liability, the role of public law licences in a tort law dispute before a court competent to hear civil and commercial law matters, and, more generally, the increasing trend in both practice and doctrine of civil claims against multinational corporations for the acts of subsidiaries in countries other than that of the head office. The Report also identifies principles, of international jurisdiction relevant to environmental disputes and which are recognised on a virtually global scale (§ 2.1 below).

1.3. Obstacles to Transnational Enforcement under Private International Law

Barriers to transnational enforcement of environmental law can take a variety of forms. As recognised by the Aarhus Convention,¹ financial or other non-legal barriers as well as legal norms may make it difficult for claimants to file suits for the purpose of protecting the environment, particularly in cross-border situations. Transnational litigation is inherently more complex, both factually and legally, than a purely internal case; in addition, its costs are also higher. In this Second Report we limit ourselves to an examination of the “black letter” law most relevant to cross-border litigation in environmental cases: problems caused by the rules on international jurisdiction, the rules on choice of law, and the legal framework dealing with possible liability of parent companies for environmental damage caused by subsidiaries abroad. While the Committee is not focusing on any particular domestic jurisdiction, it is not feasible to provide a comprehensive analysis of numerous domestic laws. More detailed discussion is limited to regionally harmonised private international law of the European Community, as that encompasses 25 jurisdictions in one go, and to some individual domestic jurisdictions where the law can be deemed to be representative of wider trends or contains innovative approaches, such as the U.S.’ Alien Tort Claims Act (ATCA). Finally, we will focus on the procedural and conflict of laws aspects of civil liability claims albeit that the final sections of this Report give some consideration to the harmonisation of substantive, domestic, civil liability law.²

2 Jurisdiction and Recognition Barriers

This section examines the existing legal framework for claims by public authorities and the subject matter scope of the EC Jurisdiction and Judgments Convention/Regulation – referred to as the Brussels I Convention and Regulation respectively.³ They lay down harmonised rules on civil jurisdiction and the recognition and enforcement of judgments in civil cases shared by the Member States of the European Union. Virtually identical rules are laid down in the Lugano Convention, which extends the regime to the EFTA Member States.⁴ This means, inter alia, that countries like Switzerland are to pay due account to the rulings of the ECJ on the Brussels regime. However, in this Report we

¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, (1999) 38 *ILM* 517. In force since 30/10/01, see <http://unece.org/env/pp/>. See in particular Art. 9(5).

² See for a general overview Brunnée, “Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection,” 53 *ICLQ* 351 (2004).

³ Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] *OJ* L12/1; Convention on jurisdiction and the and the recognition and enforcement of judgments in civil and commercial matters, latest consolidated version in [1998] *OJ* C 27/1. See generally Briggs, *The Conflict of Laws* (Oxford: OUP, 2002), 52 *et seq.*

⁴ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988 (88/592/EEC), [1988] *OJ* L 319/9; www.lexmercatoria.org. See also Protocol 2 on the uniform interpretation of the Convention and Justin Newton, *The Uniform Interpretation of the Brussels and Lugano Conventions* (Oxford: Hart 2002).

shall restrict ourselves to the Brussels Convention and its conversion into a Regulation, an instrument of secondary EC law, as it has entered into force on 1 March 2002 and thus replaced the Brussels I Convention rules for all Member States but one (Denmark). With respect to defendants domiciled within a EU Member State both the international jurisdiction of the courts in the EU and the legal effect of judgments from another EU Member State are exhaustively regulated by Brussels I, including for environmental disputes. Before examining this in detail, we would first like to refer to the relevant work undertaken in this field by the Hague Conference on Private International Law (HCCH), in particular in the context of the negotiations relating to a world-wide Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.

2.1 Global Principles of Jurisdiction

The preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters submitted to the First Part of a Diplomatic Conference of the HCCH held in June 2001 contained rules on jurisdiction relating to torts.⁵ Although the project has since been significantly restricted in scope (i.e. focussing on exclusive choice of court agreements only),⁶ mainly due to the inability to merge the European and the U.S. approaches to jurisdiction,⁷ for the purposes of this Report the 2001 draft nonetheless reflects a codification of some principles of international jurisdiction which may be relevant in environmental disputes before the courts of most States.

Following a trend now firmly established in both international Conventions on international jurisdiction and in national systems, the 2001 draft makes provision for a general forum based on the principle that the plaintiff may bring suit in the courts of the defendant (Art. 3). This principle of “actor sequitur forum rei” tends to favour the defendant, but seems to be justified even more on the international level than in national law, since it is much more difficult to defend oneself in the courts of a foreign State than in a (different) court of one’s own State.⁸ The 2001 draft defines the defendant’s forum at its place of habitual residence; where the defendant is not a natural person, the 2001 draft defines the defendant’s forum in the State of its statutory seat, incorporation, formation, central administration or principal place of business. The general forum is accompanied by other grounds of jurisdiction that are presented (except in the case of exclusive jurisdiction) as alternatives to the general forum; one of these alternatives grounds of jurisdiction (most of which are inspired by the Brussels I regime) relates to torts and thus is relevant to cases where harm has been caused to the environment. Under this alternative ground of jurisdiction, in an environmental tort case, a plaintiff is entitled to bring an action either before the courts of the State where an act or omission causing injury took place or before the courts of the State where the damage arose. The latter forum, however, is subject to a foreseeability exception: if the defendant establishes that it was unforeseeable for damage to occur there, that court shall not have jurisdiction. Finally, subject to certain conditions, the parties to a dispute can agree on a chosen court.

It follows that two basic heads of jurisdiction particularly relevant to transfrontier environmental disputes can be deemed to be of global significance: the place of the defendant’s habitual residence (or domicile), and the place of the harmful event, encompassing both the place where the defendant acted and where the impact of the damage occurred.⁹ This regime enables the claimant to select the court he or she deems most appropriate to hear the case.

Insofar as damage to land is concerned, the second limb of the so-called Moçambique Rule may affect the ability of a plaintiff to bring action for damage done to land.¹⁰ It has been interpreted as precluding

⁵ See Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001, Interim Text, prepared by the Permanent Bureau and the Co-reporters, in particular Art. 10; text available at the HCCH Website, URL: <http://www.hcch.net/e/workprog/jdgm.html>.

⁶ See the draft text suggested by the Drafting Committee in May 2004 at http://www.hcch.net/doc/jdgm_wd110_e.pdf.

⁷ See Preliminary Document No 16 - Some reflections on the present state of negotiations on the judgments project in the context of the future work programme of the Conference, available at http://www.hcch.net/doc/gen_pd16e.doc. See also O’Brian, “The Hague Convention on Jurisdiction and Judgments: The Way Forward,” 66 *Modern Law Review* 491 (2003).

⁸ See Preliminary Document No 11, Report of the Special Commission, drawn up by Peter Nygh and Fausto Pocar, p. 38, available at <http://www.hcch.net/doc/jdgm11.doc>

⁹ Albeit that unlike under the EU approach, there is the possibility for such a court to decline to exercise the jurisdiction (see Arts. 21 and 22 of the 2001 draft).

¹⁰ *British South Africa Co v Companhia de Moçambique* [1893] A.C. 602. For a full discussion of the Moçambique Rule, see Christophe Bernasconi, *Civil liability resulting from transfrontier environmental damage: a case for the*

an action in the forum in respect of damage caused by trespass, nuisance or negligence to land situated outside the forum even in cases where the possession of, or title to, that land is not in issue.¹¹ The second limb has been abolished in England in the Civil Jurisdiction and Judgments Act 1982 (UK) s 30(1). The entire Moçambique Rule was abrogated in New South Wales in the Jurisdiction of Courts (Foreign Land) Act 1989 (NSW). But elsewhere in the Commonwealth it remains in force. It was sidestepped in Dagi by treating the damage to downstream land as “economic loss” rather than damage to land. But this has rightly been described as a “convenient fiction”.¹² There seems little doubt that those common law jurisdictions which still retain the rule should be urged to follow the example of the United Kingdom.

Of no global presence but worthy of note as a possible way forward to secure access to justice in transnational environmental disputes is the U.S. ATCA. Foreign plaintiffs bringing environmental claims before United States federal courts have increasingly relied on the Alien Tort Claims Act (“ATCA”) in recent years. The ATCA is a truly unique statute that may provide federal courts with jurisdiction for violations of treaties to which the United States is a party and customary international law. The ATCA may establish jurisdiction even where the claims otherwise have no connection to the United States. Originally enacted in 1789, the ATCA consists of a single sentence:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.¹³

On account of the ATCA’s brevity and lack of recorded legislative history,¹⁴ the federal appellate courts for the various circuits have developed a number of contradictory theories on the fundamental nature of the ATCA. The United States Supreme Court has not yet taken a position on these issues.¹⁵ The ATCA was originally applied to confer jurisdiction on the federal district courts in such matters as offences against ambassadors and the law of prize in maritime law.¹⁶ It was rarely invoked until the Court of Appeals for the Second Circuit’s 1980 decision in *Filartiga v. Pena-Irala*.¹⁷ In *Filartiga*, the Second Circuit held that the ATCA conferred subject matter jurisdiction over the claim of two citizens of Paraguay that a former Paraguayan police inspector-general tortured and killed a family member in Paraguay contrary to the customary international law prohibition against official torture. Since that time, a number of foreign plaintiffs have attempted to expand the scope of the ATCA from human rights to environmental claims. However, the prospect for the use of the ATCA as an instrument for the transboundary enforcement of international environmental law by private parties is severely limited by the fundamental uncertainties surrounding the nature of the ATCA. First, does the Act merely confer (international) jurisdiction or does it, in addition to jurisdiction, also provide for an independent cause of action? Secondly, in the absence of a single applicable uniform liability regime, does ATCA implicitly include a choice of law rule as well or does choice of law depend on the conflict rules of the forum?

Foreign environmental claims have been advanced as violations of international environmental law arising from custom or a treaty to which the United States is a party, as well as violations of human rights connected to the environment, such as the rights to life and health. In these cases brought against defendant multinational corporations, the alleged environmental harms have included intranational pollution, transboundary pollution and pollution of the international environment (e.g. the ocean

Hague Conference? available at http://www.hcch.net/doc/gen_pd8e.doc.

¹¹ See *Dagi v BHP Co Ltd (No 2)* [1997] 1 *Victorian Reports* 428.

¹² Lee, “The Ok Tedi River: Papua New Guinea or the Parish of St Mary Le Bow in the Ward of Cheap?” (1997) 71 *ALJ* 602. See also by the same author: “Jurisdiction over Foreign Land: A Reappraisal” (1997) *Anglo-American Law Review* 273.

¹³ 28 U.S.C.S. § 1350 (2004).

¹⁴ The Senate debates on the *Judiciary Act of 1789*, which included what is now commonly referred to as the ATCA, were not recorded and the House debates did not mention the ATCA provision: see *Ullonoa Flores v. S. Peru Copper Corp.*, 343 F.3d 140 at 148-149 (2d Cir. 2003).

¹⁵ Currently pending before the U.S. Supreme Court are two cases (certiorari was granted on 1/12/03). In issue is the very essence of the scope of ATCA: 03-339 *Sosa v. Alvarez-Machain* and 03-485 *United States v. Alvarez-Machain*. Oral argument took place on 30 March 2004. The UK government filed *amicus curiae* briefs in support of the U.S., arguing to severely restrict the scope of ATCA, see Richard Hermer and Martin Day, “Helping Bush bushwack justice,” *The Guardian*, 27 April 2004.

¹⁶ See *Flores*, *ibid.* at 148-149 and *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 at 105n10 (2d Cir. 2000).

¹⁷ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

environment).¹⁸ Every reported ATCA claim concerning the environment has been subject to a motion to dismiss for failure to state a claim for which relief can be granted by the court.¹⁹ So far, only breaches of international human rights law have given rise to successful claims.²⁰ Nevertheless, elements of the ATCA litigation merit further consideration in the international environmental law context, particularly with respect to corporate social responsibility.

Claims based on the theory that intra-national pollution itself represents a violation of international law have been consistently rejected for failure to state a claim for which relief may be granted. ²¹ Actions framed as violations of human rights, such the rights to life and health and even a ‘right to sustainable development,’ brought about by environmental harm, have also been consistently rejected.²² Only two decisions,²³ both from the District Court for the Southern District of New York, have addressed transboundary pollution and the question of whether or not the transboundary harm principle first articulated by the International Joint Commission in the Trail Smelter Arbitration (*United States v. Canada*)²⁴ (“Trail Smelter”) represents part of the law of nations. The first opinion explicitly rejected the principle as a part of the law of nations enforceable under the ATCA,²⁵ and the latter expressing serious doubts in passing.²⁶ In one instance of litigation, claims have been brought for human rights violations of environmental activists in a developing country, without regard for the international law of the environment.²⁷

In only one case has an environmental claim been found to be properly stated such that relief could be granted under the ATCA. In *Sarei v. Rio Tinto Plc* (“Sarei”),²⁸ the District Court for the Central District of California did accept an environmental claim based on the United Nations Convention on the Law of the Sea (“UNCLOS”).²⁹ Plaintiffs asserted that the defendant corporation’s operation of a mine in Papua New Guinea had polluted a bay and the Pacific Ocean in violation of two UNCLOS provisions.³⁰ While the United States had signed but not ratified UNCLOS, the District Court found that “the document has been ratified by 166 nations and thus appears to represent the law of nations.”³¹ The District Court concluded that “plaintiffs have adequately stated a claim for violation of the customary international law reflected in UNCLOS,”³² the only such holding in an ATCA case concerning the environment. The suit was ultimately dismissed, however, on the basis of the political questions doctrine related to separation of powers principles.³³

We shall discuss ATCA in more detail in the Third Report, taking into account the U.S. Supreme Court’s ruling on it, which is expected around mid 2004.

2.2 The Barrier to Effective Enforcement: the Concept of “Civil and Commercial Matters”

Both the “Brussels I” and “the Hague 2001 draft” delimit their scope by reference to the notion of “civil and commercial matters.” This does not mean that any dispute involving a public authority is

¹⁸ See *Sarei v. Rio Tinto Plc*, 221 F. Supp. 2d 1116 at 1161-2 (C.D. Cal. 2002).

¹⁹ A motion to dismiss for “failure to state a claim upon which relief can be granted” is made under Fed. R. Civ. P. 12(b)(6).

²⁰ Bridgeman, “Human Rights Litigation under the ATCA as a Proxy for Environmental Claims,” 6 *Yale Human Rights and Development Law Journal* 1 (2003).

²¹ See *Beanal v. Freeport-McMoran, Inc.* 197 F.3d 161 (5th Cir. 1999) and *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2000), concerning both intranational and transboundary pollution.

²² With respect to human rights-based environmental claims, see *Flores*, *supra* note 3, and *Sarei*, cited above.

²³ See *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991) and *Aguinda*, cited above, concerning both intranational and transboundary pollution).

²⁴ *Trail Smelter Arbitration (United States v. Canada)* (1931-1941) 3 R.I.A.A. 1905. As stated at 1965: “... under the principles of international law... 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”.

²⁵ *Amlon Metals*, cited above, at 671.

²⁶ *Aguinda*, cited above, at 552.

²⁷ See *Wiwa*, cited above.

²⁸ *Sarei*, cited above.

²⁹ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 3 (entered into force 16 November 1994) [UNCLOS].

³⁰ See *Sarei*, cited above, at 1161-2.

³¹ *Ibid.* at 1161.

³² *Ibid.* at 1162.

³³ *Ibid.* at 1193-1999.

automatically excluded. On the contrary, the regimes apply to disputes between private parties as well as to claims initiated by public authorities (and, subject to a possible State immunity defence, where a public authority is a defendant before a court competent to hear civil and commercial matters).³⁴ Obviously, civil claims by public authorities relating to environmental damage are nothing unusual; most claims resulting from oil spills are by public authorities for the recovery of the costs of clean-up. Although public law may entitle the authorities to recovery, depending on the applicable domestic regime, whenever there are transnational elements, such as a defendant being domiciled abroad, civil law is invoked. An example is the action brought by the French State and various municipalities alongside private parties in the U.S. as a result of the incident with the Amoco Cadiz tanker off the French coast.³⁵ Indeed, the 2004 EC Environmental Liability Directive³⁶ envisages claims by public authorities only; it explicitly states: “this Directive shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage”.³⁷ The State or other competent authorities are the only potential claimants under the Directive. But it does acknowledge potential claims by public authorities against operators based outside their territory (Art. 15(3)).³⁸ In the absence of a comprehensive system of recognition and enforcement of foreign public law acts, it would seem to follow that such claims will have to be brought under a Member State’s private law regime and, if they also constitute a civil and commercial matter, will then benefit from the regime of the Brussels I Regulation to obtain effect throughout the EU. The Directive itself confirms this view because it states not to provide for any additional rules of private international law and that it is without prejudice to the Brussels I Regulation.³⁹

As noted, the primary actors involved with ensuring compliance with environmental law obligations are public authorities, including the State. In practice, private actors, i.e., environmental protection NGOs, have a less prominent role in this context, albeit that their involvement and legal opportunities will vary from country to country. Especially in common law countries, notably the U.S., the use of civil sanctions, by public authorities against private persons is widely accepted, particularly if this regulated by statute.⁴⁰ In civil law countries, such access to private law remedies by public authorities may be restricted, however, as they may be considered as problematic in the light of the available public law sanctions – administrative and/or criminal.⁴¹ Nonetheless, even in the latter context, in cases of cross-border pollution, recourse to civil law by public authorities is useful, indeed necessary, as public authorities generally cannot impose any sanctions under public law on non-domiciliaries. They are dependent upon cooperation with the authorities in the country of the tortfeasor and such cooperation is still rather under-developed or at least problematic.⁴²

In this cross-border context, the use of civil actions by public authorities may concern damages, for example, the right to recovery of clean-up costs after an oil pollution incident, such as the cited example of the Amoco Cadiz. In addition, injunctions may be applied for against defendants based outside the forum State, such as in the action, before Dutch courts, by the Dutch State seeking an order

³⁴ See Art. 1(4) of the Hague 2001 draft, which reads as follows: “A dispute is not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any person acting for the State is a party thereto.”

³⁵ See *Re Amoco Cadiz*, 954 F.2d 1279. See for a comment Nancy Eskenazi, “*Forum non conveniens* and Choice of Law in *Re: Amoco Cadiz*,” 24 *Journal of Maritime Law and Commerce* 371 (1993).

³⁶ Directive 2004/35/EC of the European Parliament and of the Council of 30 March 2004 on environmental liability with regard to the prevention and remedying of environmental damage, O.J. 2004 L 143/56 of 30 April 2004.

³⁷ Art. 3(3).

³⁸ Cf. for a U.S. equivalent involving a unilateral administrative Order by EPA against the Canadian based Teck Cominco: *Trail Smelter II* (2003), URL: <http://yosemite.epa.gov/R10/CLEANUP.NSF/sites/UpperC>.

³⁹ Preamble, recital 10.

⁴⁰ See generally Clarke, “Update Comparative Legal Study on Environmental Liability,” available at the European Commission’s Website, URL: europa.eu.int/comm/environment/liability/legalstudy.htm. Cf. for the rather spectacular suit by the European Community against U.S. tobacco firms before an American court, the Commission Statement, IP/00/1255 and the judgment by the U.S. District Court for the Eastern District of New York, *The European Community v. RJR Nabisco et al.*, 18 July 2001, URL: www.nyed.uscourts.gov.

⁴¹ Van der Zijde, “Private law Enforcement under Dutch Law or: The Conflict of Public and Private Law Enforcement Rules,” in: Vervaele et al. (eds.), *Compliance and Enforcement of European Community Law* (The Hague etc.: Kluwer Law International 1999), p. 211.

⁴² Betlem, “Cross-Border Private Enforcement of Community Law,” in: Vervaele et al. (eds.), *Compliance and Enforcement of European Community Law* (The Hague etc.: Kluwer Law International 1999), p. 391.

against a German based defendant to remove unlawfully deposited waste from the Dutch soil.⁴³ Where this access to civil remedies is based on a specific international convention, that instrument generally contains rules on jurisdiction and enforcement of judgments, accompanying the substantive provisions on civil liability.⁴⁴ It will be remembered that these very issues are at the heart of the ATCA litigation taking place before the U.S. Supreme Court: whether that Act covers jurisdiction, substantive liability law, choice of law or any combination of these.⁴⁵ However, the instrument in hand may also refer these matters to a general Jurisdiction and Judgment Convention (or other form of legislation) if it is applicable as between the relevant States. This is exactly what is happening with respect to the Member States of the European Union as seen above. Although understandable from the point of view of reducing unnecessarily duplication in regulating jurisdiction and cross-border judgment enforcement issues, it also means that any restrictions included in the general instrument will also apply in the specific environmental context. Accordingly, we will examine the main EU rules on these matters of private international law. It will be seen that there is indeed a barrier for use of these rules by public authorities acting in civil suits against operators.

2.3 “Civil and Commercial Matters” under the Brussels I Convention and Regulation

How is the subject matter scope of the Brussels regime delineated? The scope of the Regulation *ratione materiae* is the same as for the Convention. Therefore, any relevant case law under the Convention remains relevant to the interpretation of the Regulation.⁴⁶ Article 1 of the instruments circumscribes it in both positive and negative terms. It says that the Convention applies to “civil and commercial matters whatever the nature of the court or tribunal”.⁴⁷ Apart from the reference to the type of court (in particular, a civil matter can be dealt with by a criminal court), there is no further guidance in the form of a definition. Certain matters are explicitly excluded though: revenue, customs or administrative matters, as well as bankruptcy proceedings, arbitration etc. The delineation of the scope of the Convention in cases involving public authorities has given rise to disputes in which the European Court of Justice (ECJ) has handed down some leading cases.

In the first one, *Eurocontrol*, the ECJ first dealt with the question which legal system should determine the interpretation of “civil and commercial matters”.⁴⁸ It ruled that these terms refer to an autonomous Convention concept not to any legal system of a Member State. The ultimate interpreter is therefore the ECJ itself; where necessary the domestic courts will refer questions on the interpretation of this independent concept to the ECJ for a preliminary ruling. Two reference points inform the construction of autonomous Convention concepts; first the objectives and scheme of the Convention (purposive interpretation), and secondly, the general principles stemming from the national legal systems (comparative interpretation). In addition, the ECJ gave a criterion for fleshing out the notion of “civil and commercial matters” in the context of actions by public authorities. In essence, a case is excluded from the scope of the Convention where a public authority exercises public authority powers (i.e., imposes obligations on private parties which no other private party would be able to do). It has been observed, that this criterion reflects the distinction drawn in the context of the issue of State immunity between *acta iure imperii* and *acta iure gestionis*.⁴⁹ Accordingly, in actions brought before courts by

⁴³ Hoge Raad 14 April 1989 *Nederlandse Jurisprudentie* 1990, 712 (Benckiser); see for a discussion in English: Betlem, *Civil Liability for Transfrontier Pollution* (1993), at 62.

⁴⁴ See inter alia the 1969 International Convention on Civil Liability for Oil Pollution Damage, Brussels, 29 November 1969; 9 *ILM* 45 (1970), as amended; and the International Convention on Liability and Compensation for Damage in connexion with the Carriage of Hazardous and Noxious Substances by Sea, London, 3 May 1996, 35 *ILM* 1406 (1996), not yet in force, see “Status of Conventions per 29 February 2004,” <http://www.imo.org>

⁴⁵ Cf. for an examination of these issues under Dutch law: Betlem, “Transnational Litigation against Multinationals before Dutch Courts,” in: Kamminga & Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (The Hague: Kluwer 2000), at 283.

⁴⁶ Kennet, “The Brussels I Regulation,” 50 *ICLQ* 725 (2001).

⁴⁷ It should be noted that the term “civil or commercial matters” has a very long history in Hague Conventions. The term appeared for the first time in the Convention on Civil Procedure of 14 November 1896. Since then the term has been used in a number of other Hague Conventions, most notably, the 1965 Hague Service Convention and the 1970 Hague Evidence Convention. In a recent Special Commission meeting on the practical operation of these two Conventions (and the Apostille Convention), it was unanimously recommended that the terms “civil and commercial” should be interpreted in both a *liberal* and *autonomous* manner (i.e., without referring exclusively to one State or only to the States involved in the dispute), see http://www.hcch.net/doc/lse_concl_e.pdf.

⁴⁸ Case 29/76 *LTU v. Eurocontrol* [1976] ECR 1541.

⁴⁹ See the Opinion of the Dutch Advocate General Strikwerda in the judgment of the Hoge Raad of 18 May 2001,

public authorities in environmental tort cases based on domestic law, this criterion would not seem to restrict access. However, in subsequent case law the ECJ has significantly extended the notion of “exercising public authority powers,” which accordingly restricts the applicability of the Convention in disputes between public authorities and private persons.

In *Rüffer*, the removal of a wreck from a public waterway formed the basis of a right of recours for reimbursement of the removal costs; the cost recovery claim by the Dutch State constituted a tort action under national law, but as it followed up an act of public authority – the removal of the wreck – it was excluded from the scope of the Brussels I Convention.⁵⁰ First, the ECJ concluded that the State had removed the wreck under an international obligation and under national law which conferred on it the status of public authority in regard to private persons. It went further to rule that it was true that the dispute before the national court did not deal with the actual removal of the wreck but reimbursement of the removal costs, not involving an administrative process but a civil claim. Even so, according to the ECJ, that would not bring the action within the ambit of the Convention. For it held that the fact that the authority sued “pursuant to a debt which arises from an act of public authority is sufficient, whatever the nature of the proceedings” under national law. Apparently, the Court gave great weight to the comparative component in its test as most other countries of the EU used public law for costs recovery rather than emphasising the purpose of the Convention which is to facilitate the enforcement of judgment by national courts; it disregarded the nature of the remedy and looked behind it to the further legal framework. Elsewhere, it has been analysed that there are close analogies between this wreck removal context and environmental disputes such as referred to above (clean-up costs; waste removal).⁵¹ In particular, the ECJ’s linkage of the civil remedy to the legal context of the situation giving rise to the debt would seem to constitute an overall exclusion of any civil claim in the wake of incidents in breach of administrative environmental law. As such, this ruling hampers enforcement of these provisions as an important mechanism for enforcing the judgment outside the forum State is unavailable.

2.4 Remedying the barrier

2.4.1 Distinguishing *Rüffer*

A reconsideration of the cited approach of *Rüffer* is desirable as the approach to “civil and commercial matters” can already be regarded as inconsistent with the ECJ’s inclusion of a civil action for compensation against a civil servant in the subsequent case of *Sonntag*.⁵² However, *Sonntag* may be reconciled with *Rüffer* if one realises that the case was against a teacher in person (not the State) whilst it logically follows from the autonomous nature of the Convention concept that the characterisation under national law can never be conclusive. On the other hand if one regards the exclusion of certain kinds of public authority actions as justified in the light of the State immunity exception, it is hard to see why the ECJ is more inclined to exclude an action of a State as a claimant than in a situation where public authority powers play a role on the side of the defendant: an immunity issue simply cannot arise on the claimant’s side. Possibly, the ECJ may be prepared to focus on the type of action actually in dispute rather than on the ‘background framework’ of the action (as was determinative in *Rüffer*). This it did in *Sonntag* to the extent that it ignored not only that the teacher was regarded to have acted under public authority powers but also that the action was covered by a social security scheme. Such an approach could be a way of distinguishing *Rüffer*, paving the way for allowing environmental claims relevant to enforcing public law.

Some ECJ caselaw subsequent to *Rüffer* and *Sonntag* goes some way to alleviate the problem albeit that uncertainty remains as to how the general approach will impact on environmental disputes.⁵³

2.4.2 “Green” distinguishing

Alternatively, it may be argued that regardless of any possible distinguishing of *Rüffer* at a more general level, civil actions by public authorities involving (directly or indirectly) ensuring compliance

Rechtspraak van de Week 2001, No. 106, *Préservatrice Foncière v. Netherlands State*, at No. 17.

⁵⁰ Case 814/79 *Netherlands State v Rüffer* [1980] ECR 3807.

⁵¹ *Betlem, Civil Liability for Transfrontier Pollution* (London etc.:Graham & Trotman/Martinus Nijhoff 1993) at 62 *et seq.*

⁵² Case C-172/91 *Volker Sonntag* [1993] ECR I-1963.

⁵³ See C-271/00 *Baten* [2002] ECR I-1489; [2003] I.L.Pr. 9; Case C-266/01 *Préservatrice Foncière* [2003] ECR I-4867 and Case C-433/01 *Blijdenstein* [2004] ECR nyr, www.curia.eu.int, [2004] I.L.Pr. 8.

with environmental law should in principle be included within the scope of the Regulation. The key notion here is that this instrument must be construed in the light of the wider environmental law context. If an environmental dispute were to come before the ECJ involving an action by a public authority, the concept of “civil and commercial matters” is to be construed in the light of relevant international and European Community environmental law. As far as EC law is concerned, the Regulation must be interpreted consistently with the EC Treaty, including, therefore, the polluter pays principle of Article 174 EC.⁵⁴ Likewise, a provision of secondary Community law must be interpreted in the light of the objectives of the EC Treaty, including, therefore, environmental protection (Art. 2 EC), which, moreover, is regarded by the ECJ as one of the fundamental objectives.⁵⁵ Accordingly, the Brussels I Regulation must be construed so as to contribute to this fundamental objective. In addition, the Brussels I Regulation will also have to be interpreted consistently with any relevant Directives, including, of course, the 2004 Environmental Liability Directive if and when public authorities seek to recover clean-up or preventive action costs under it. This follows from the 2002 Henkel case.⁵⁶

As for a “green” interpretation of “civil and commercial matters” in the light of international law, it has already been pointed out above that a number of international conventions contain not only substantive liability rules but jurisdiction and judgment enforcement provisions as well. In particular, the cited Civil Liability Convention (oil pollution) explicitly recognises suits by public authorities. They are thus regarded as civil suits in the context of this convention. The ECJ could rely upon such a characterisation in the context of this *lex specialis* whenever it has to deal with similar actions in the context of the *lex generalis*: the Brussels I Convention/Regulation.

3 Obstacles in the Choice of Law Context: Which law applies?

Another series of obstacles to the effective enforcement of transnational environmental law stems from the uncertainties as to substantive law governing a cross-border environmental tort claim. These uncertainties may easily be used by defendants for tactical manoeuvres to delay the action – a clear set of principles to determine the applicable law would thus be of great benefit. With a view to establishing such uniform principles, we shall first provide a comparative law overview of the various approaches used in this respect.

3.1 Overview of connecting factors used in various legislations

3.1.1 The law that is more favourable to the injured party (Günstigkeitsprinzip)

By virtue of the Günstigkeitsprinzip, it is either the law in force at the place where the damage is suffered (State where the emission causes its effects, *Erfolgsort*) or the law in force at the place where the wrongful act was committed (State of the emission, *Handlungsort*) that applies, depending on which law is more favourable to the injured party. Depending on how the principle is put into operation, the choice may be made by the victim or *ex officio* by the court.⁵⁷ In any event, the victim of transfrontier pollution benefits from the law that is more favourable to him or her.

The roots of the Günstigkeitsprinzip are found in German private international law. Brought out by a decision of the Reichsgericht rendered in the late 19th century,⁵⁸ this principle was taken up in the recent German codification of private international law on non-contractual obligations and, although it is not unanimously supported by German legal writers,⁵⁹ is the general rule in tort matters and applies in environmental matters in particular in the form of a choice by the victim.⁶⁰

⁵⁴ See e.g. Case C-135/93 *Spain v. Commission* [1995] ECR I-1651, para. 37. The same applies in the light of the linkage between the Brussels Convention and the EC Treaty, see Case C-398/92 *Mund & Fester v Hatrex Internationaal Transport* [1994] ECR I-467 at para. 11; see also Case C-7/98 *Krombach* [2000] ECR I-1935, [2001] I.L.Pr. 36, para. 24 and *Baten*, para. 43, cited above.

⁵⁵ See Case 240/83 *Procureur de la République v. ADBHU* [1985] ECR 531 at 549.

⁵⁶ Case C-167/00 *Verein für Konsumenteninformation v Henkel* [2002] ECR I-8111; [2003] I.L.Pr 1.

⁵⁷ See on this question in particular Von Bar, “Environmental Damage in Private International Law,” *Collected Courses of the Hague Academy of International Law*, Vol. 268, pp. 373-375.

⁵⁸ Decision of 20 November 1888, RGZ 23, 305; see subsequently in particular OLG Saarbrücken *NJW* 1958, p. 752; OLG Saarbrücken *IPRspr.* 1962-1963 Nr. 38; BGH *NJW* 1974, p. 410; BGH *NJW* 1987, p. 1323.

⁵⁹ On the Günstigkeitsprinzip in general, see Von Hein, *Das Günstigkeitsprinzip im Internationalen Deliktsrecht*, Tübingen 1999, with many other references; see also Bernasconi, above note 10, p. 30 and 32 *et seq.*

⁶⁰ Kegel, *Internationales Privatrecht* (München 2000), p. 628. Art. 40, para. 1 of the EGBGB, as adopted by the “Gesetz vom 21. Mai 1999 zum Internationalen Privatrecht für ausservertragliche Schuldverhältnisse und für

Recently, the principle of the application of the law which is more favourable to the interests of the injured party has also been embodied in Article 7 of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (“Rome II”).⁶¹ In this proposal, Art. 7 reads as follows: “The law applicable to a non-contractual obligation arising out of a violation of the environment shall be the law determined by the application of Article 3(1), unless the person sustaining damage prefers to base his claim on the law of the country in which the event giving rise to the damage occurred.” Under Art. 3(1), “[t]he law applicable to a non-contractual obligation shall be the law of the country in which the damage arises or is likely to arise, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event arise.” It has to be noted, however, that the Draft Report issued by the Rapporteur of the European Parliament’s Committee on Legal Affairs and the Internal Market suggests to delete Art. 7, asserting that “violations of the environment can be dealt with under Article 3, as amended”.⁶² The suggested amendments to Art. 3 are important indeed, as the Rapporteur proposes to delete the reference to the “country in which the damage arises or is likely to arise” and instead to refer to the law of the State in which “the most significant element or elements of the damage occur or are likely to occur.” The reasons presented to justify this significant change are “clarity, consistency and flexibility”. The authors of this Report respectfully disagree with the suggested deletion of Article 7 and the resulting departure from the *Günstigkeitsprinzip*. We refer to the reasons presented in the text below to support the *Günstigkeitsprinzip* and to the comments under 3.1.4. relating to the deficiencies of the test of the “most significant relationship” in environmental tort cases.

The “most favourable law” principle has also been embodied in Article 4(3) of the bilateral agreement of 19 December 1967 between Germany and Austria on nuisances generated by the operation of the Salzburg Airport on the territory of Germany.⁶³ Under a more general instrument, the Nordic Convention of 1974 on the Protection of the Environment, the applicable law is chosen through private international law rules of the forum (which under the Convention is the State from which the pollution emanates), but then the court must compare the result with that which would be obtained under the law of the State where the activity was exercised and if that is more favourable, to apply that law. In addition, the *Günstigkeitsprinzip* has been adopted in several other national codifications of private international law.⁶⁴ To our knowledge, this principle is found – in different forms – in the private international laws of Greece, Hungary, Slovakia and the Czech Republic, Serbia and Montenegro, and, more recently, in the new codifications of private international law of Switzerland (only for claims relating to harmful emissions from an immovable property), Estonia, Italy, Venezuela and Tunisia. Finally, mention can also be made of a very interesting decision handed down by the Supreme Court of China. On 26 January 1988, this Court decided, in plenary session, that “the law of the place of the tort encompasses the law of the place of commission of the wrongful act and the law of the place where the damage occurs. In case these two places are different, the court has the right to choose one of them.”⁶⁵

It is not intended here to proceed to a complete analysis of the validity of the *Günstigkeitsprinzip* for determining the law applicable to cross-border torts in general. But it should be emphasised that the principle of applying the law that is more favourable to the injured party is commonly accepted as particularly useful in matters of transfrontier pollution⁶⁶ and that even authors who are hostile to this principle as a rule for determining the law applicable to cross-border torts in general favour its

Sachen”, which entered into force on 1 June 1999. More precisely, Art. 40, para. 1, which is the general provision on the law applicable to torts, provides in principle for the application of the law of the place of the dangerous activity (*lex loci actus*), but gives the injured party the possibility to opt for the application of the law of the State where the damage was produced. Art. 44, which deals with the law applicable to harmful emissions coming from an immovable property, merely refers to the general principle in Art. 41.

⁶¹ COM (2003)427 final, Brussels, 22 July 2003.

⁶² The revised Report is available at <http://www.dianawallismep.org.uk/files/528672EN.doc>; accessed on 14 June 2004.

⁶³ According to this provision, the applicable law is explicitly stated to be the law most favourable to the injured party (*lex favor laesi*).

⁶⁴ See the references in Bernasconi, above note 10, p. 32 *et seq.*

⁶⁵ Decision reported by Xu Donggen, *Chronique de jurisprudence chinoise, Journal de droit international* 1994, p. 191.

⁶⁶ Droz, ‘Regards sur le droit international privé compare’, *Recueil des cours de l’Académie de droit international*, Tome 229 (1991-IV), no. 300; Jesserun d’Oliveira, ‘Le Bassin du Rhin, sa pollution et le droit international privé’, in *La réparation des dommages catastrophiques – Les risques technologiques majeurs en droit international et en droit communautaire*, Travaux des XIII^{es} Journées d’études juridiques Jean Dabin, Brussels 1990, pp. 165-166, as well as pp. 167-168; Hein, above note 59, pp. 121-126.

application in transfrontier pollution matters.⁶⁷ Indeed, if account is only taken of the law of the place of dangerous activity, there is a risk that States with polluting industries will unduly limit the liability of their industries to the detriment of the potential victims in neighbouring States (“race to the bottom”). In other words, a mandatory reference to the law of the polluter would bring a risk of opening a breach in the principle that the “polluter pays”. This cynicism is pushed even farther if a State looks first for the applicable law to the place of the damage (*lex damni*), but provides an exception for torts committed in the territory of the forum. Under such circumstances, the residents of the forum who are injured by the activity of a foreign polluter could benefit from the application of their own law, while in counterpart, national polluters would be protected from the application of a foreign law less favourable to them.⁶⁸

The possibility of the State from where the pollution originates having adopted severe and strict provisions, which might be found to be advantageous for the victims, should not be completely excluded.⁶⁹ If this were the case, why should the victims in another State not benefit from these same advantageous provisions? Finally, it should not be forgotten that the advantage conferred on the victims by the *Günstigkeitsprinzip* is doubled by a beneficial effect of prevention of injuries to the environment. The fact that the victim may choose the law which ensures him or her maximum recovery should in fact dissuade the operator of a polluting enterprise situated near a frontier from preferring profitability to good maintenance of his or her installations.⁷⁰ Under these circumstances, the principle favouring the injured party (*favor laesi*) has thus a completely desirable and welcome corollary: favouring nature (*favor naturae*).

According to the European Commission, the victim’s option to select the law of the place where the tortfeasor had acted (or to “select” the law of the place of impact/damage by relying on the general rule) contributes to raising the general level of environmental protection. The place of damage rule is “conducive to a policy of prevention obliging operators established in countries with a lower level of protection to abide by the higher levels of protection in neighbouring countries, which removes the incentive for an operator to opt for low-protection countries”.⁷¹ But an exclusive application of the place of damage rule is regarded as an insufficient contribution to the overall objectives of environmental policy; operators established in border regions could then benefit from the lower levels of protection in a victim’s home State. In the Commission’s view, it is justified to offer the victim a choice of selecting the most favourable law as that reflects, at the level of choice of law, the policy to raise the general level of environmental protection in situations where the author of environmental damage, unlike most other torts, usually benefits economically from the harmful activity. We agree with this reasoning and would like to point out that it is similar to consumer protection rules included in Rome I (the Convention on the law applicable to contractual obligations).⁷² The effect of this rule is a general “levelling-up,” going beyond what can be achieved by a non-discrimination approach and can be seen as an application of the integration principle in the field of private international law (Article 6 EC Treaty). An equivalent approach has already been adopted by the Community legislature in the Consumer Injunctions Directive.⁷³ It should be noted that we are here talking about a unilateral choice of law for the victim, which is available in addition to the bilateral choice of law in tort under both Rome II and the various jurisdictions cited above (party autonomy).⁷⁴ Both kinds of choice of law contribute to the predictability and legal certainty of the law selection process as operators will either be able to agree on a chosen law with the victim or predict which legal system the victim is going to choose.

⁶⁷ See in particular Von Bar, *Internationales Privatrecht*, Tome II (1991), No. 668 *et seq.*; Von Bar, above note 57, pp. 371-375; and Paul Beaumont, “Private International Law of the Environment,” *Judicial Law Review* 1995, pp. pp. 35-36. For further references, see Hein, above note 59, p. 121, footnote 159.

⁶⁸ Beaumont, *ibid.*, at p. 32.

⁶⁹ Droz, above note 66, no. 300.

⁷⁰ Bourel, ‘Un nouveau champ d’exploration pour le droit international privé conventionnel: les dommages causés à l’environnement’, in : *L’Internationalisation du droit, Mélanges en l’honneur de Yvon Loussouarn*, Paris 1994, pp. 93-108, at p. 103.

⁷¹ COM(2003) 427 Explanatory Memorandum, p. 19.

⁷² 19 June 1980, O.J. 1998 C 27/34, Arts. 5 and 7.

⁷³ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers’ interests, O.J. 1998 L 166/51, art. 4. See also the Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, Brussels, 24/10/03, COM(2003) 624 final, art. 5.

⁷⁴ See below § 3.1.5 and Kadner Graziano, *Europäisches Internationales Deliktsrecht* (Tübingen 2003), at p. 26.

Admittedly, the *Günstigkeitsprinzip* may be somewhat problematic in its practical application. For approaches where the injured party may choose the more favourable law, the envisaged advantages will only be enjoyed where the injured party has a good knowledge not only of the competing substantive provisions, but also of the interpretations given to them by the courts (e.g., the notion of damage may cover very different realities from one jurisdiction to another). Moreover, it is not unusual for a law to be more favourable on one point, but less on another. One law might, for example, provide for liability based simply on causation, while the other would impose on the injured party the burden of proving fault on the part of the polluter; yet this latter law might provide on the other hand for unlimited liability, contrary to the former which, in this case, would have set a (monetary) ceiling on liability. Thus, even where it is the court which must determine which law is more favourable, difficulties may be involved. With a view to countering these difficulties, the adoption of a system leading to the application of the law more favourable to the injured party should be supported by a system of efficient co-operation between States that guarantees a rapid and precise exchange of information on the content and application of the different laws.

3.1.2 The law of the place of the damage (*lex damni*)

This principle has been adopted in a variety of national law regimes, including France, the United Kingdom, Spain, Romania, Turkey, Quebec and, more recently, the Netherlands.⁷⁵ It is true that like the *Günstigkeitsprinzip*, the *lex damni* can be protective of the plaintiff's interests in that it will often correspond to the place of his or her residence and to the place where any damaged property is located. It may also be justified by the fact that the principal function of liability law is the reparation of an injury and not the punishment of a fault, especially in the case of the environment where strict liability plays a strong role. It also does provide a more simple approach to choosing the applicable law than does the *Günstigkeitsprinzip*. However, the *lex damni* approach means that the victim will not benefit from a more stringent regime over environmental violations in the State from where the pollution originates, unless the victim decides to file the action in that State (subject to jurisdiction regime). This, in turn means that the level of deterrence is not as strong. Finally, the injurious effects of environmental pollution are often felt in several States. Under the *lex damni* approach, victims of the same incident may be subject to different laws, therefore receiving varying degrees of legal protection. This "mosaic" effect may be considerably lessened through the principle of the *Günstigkeitsprinzip*, which, at least in some cases, might lead to the same choice of law for injured parties in various jurisdictions.

3.1.3 The law of the place of the dangerous activity (*lex loci actus*)

The rule of the law of the place of the dangerous activity (State of the emission) is, at least as a general rule, accepted in particular in Austria, Denmark, Finland, Sweden and Japan.⁷⁶ It should, however, be emphasized that these systems permit in general the application of the law of another State, with which the litigation (or the parties) have closer connections. The *lex loci actus* principle is not a sound principle in relation to environmental tort matters. As already indicated, if account is only taken of the law of the place of dangerous activity, there is a severe risk that States where polluting activities take place will unduly limit the liability of their industries to the detriment of the potential victims in neighbouring States; this could potentially even lead to a "race to the bottom", with States trying to attract more industries by implementing lower environmental liability standards – hardly a sound environmental policy.

3.1.4 The law of the place which has the "most significant relationship"

This principle found its expression in particular in the United States, in the Restatement 2nd Conflict of Laws issued in 1971. The Restatement 2nd does not contain a special rule for the law applicable to environmental torts. This category of torts consequently falls under the general framework of Rule 145 which refers to the law of the place that has "the most significant relationship with the event and the parties". Under paragraph 2 of this Rule, the "contacts" to be taken into consideration are a) the place of the damage, b) the place where the act that gave rise to the damage was committed, the domicile, the residence, the nationality, the place of incorporation or of the principal place of business of the parties, and d) the place where any relationship between the parties is centred.

It should be recalled here that in the United States, each sister state of the federation defines its own

⁷⁵ See for references in Bernasconi, above note 10, p. 34 *et seq.*

⁷⁶ *Ibid.*, p. 36.

rules of conflict of laws. As concerns torts, there is great diversity among the approaches chosen. In his most recent study on Choice of Law in the American Courts, which traditionally distinguish no less than seven different categories, Professor Symeonides classifies the practice adopted in the 52 states as follows: 22 states apply the above-quoted rule of the Restatement 2nd (among these being Colorado, Delaware, Florida, Maine, Texas, Vermont and Washington), 10 states follow the traditional rule of the *lex loci delicti* (among these being Georgia, Kansas and the two Carolinas), 3 states apply a test of “significant contacts” (among these being Indiana), 3 other states have adopted the theory of interest analysis (California, the District of Columbia and New Jersey), 3 states apply the *lex fori* (Kentucky, Michigan, Nevada),⁷⁷ 5 states apply the theory of the “better law” (among these being New Hampshire and Wisconsin), and, finally, 6 states proceed to a combination of the different approaches mentioned above (among these being Louisiana, Massachusetts, Pennsylvania, and New York).⁷⁸

This diversity however seems greater than it is in reality. It is in fact striking to realise that, despite the different theoretical approaches, most of the time the courts end up applying their own law (*lex fori*). This realisation was discussed expressly by the Supreme Court of Michigan in the case of *Sutherland v. Kennington Truck Segice Ltd*, decided in 1997. The Court explains that:

“each of the modern approaches tend to favor significantly the application of forum law [...] between approximately fifty-five and seventy-seven percent of the time” and that “courts employing the new theories have a very strong preference for forum law that frequently causes them to manipulate the theories so that they end up applying forum law.” And the Court adds: “This preference for forum law is hardly surprising. The tendency toward forum law promotes judicial economy: judges and attorneys are experts in their State’s law, but have to expend considerable time and resources to learn another State’s law.”⁷⁹

The tendency may be understandable, but it is not a proper policy for a conflict of laws rule in environmental tort matters. Where the *lex fori* coincides with the *lex loci actus* or the *lex damni*, it suffers the same deficiencies as these two principles.

3.1.5 Party autonomy

The possibility for the parties to choose the law applicable to a dispute in tort matters is expressly provided for in the proposed “Rome II” Regulation,⁸⁰ the new Dutch PIL Statute on torts,⁸¹ the German,⁸² Austrian,⁸³ Liechtenstein⁸⁴ and Swiss⁸⁵ PIL rules on non-contractual obligations.⁸⁶ There seems to be no evident reason why parties to litigation in environmental tort matters should not be allowed to choose the applicable law.⁸⁷ In cases in which the injurious effects of environmental pollution are felt in several States, the possibility for the parties (tortfeasor and victims) to agree on one

⁷⁷ The application of the *lex fori* is also provided for by art. 4 of the *Uniform Transboundary Pollution Reciprocal Access Act* of 1982.

⁷⁸ “Choice of law in the American courts in 2002: sixteenth annual survey,” 51 *Am J. Comp. L.* 1-88 (2003).

⁷⁹ 562 N.W. 2d 466, 467-470 (Mich. 1997).

⁸⁰ Art. 10(1) only allows for a choice of law *after* to the occurrence giving rise to the claim (see the reference above note 61).

⁸¹ Art. 6(1) *Wet conflictenrech tonrechtmatige daad*, which also allows for a choice of law *prior* to the occurrence giving rise to the claim. Party autonomy in tort matters had already been accepted by Dutch courts before the entry into force of the new law, see in particular the decision of 8 January 1979 handed down by the Rotterdam Court in the case of the French potash mines, in which the subsequent choice in favour of Dutch law was honoured (*Ned. Jur.*, 1979, No. 113, note by J.C. Schultsz; *Ars Aequi* 1980, pp. 788-794, note by H.U. Jesserun d’Oliveira) and the COVA decision rendered by the Dutch Supreme Court (*Hoge Raad*) on 19 November 1993 (*Stichting Centraal Organ Vooraadvorming Ardolienprodukten tegen Banque générale de Luxembourg [Suisse] SA*, *Ned. Jur.*, 1994 No 622; on the importance of party autonomy under this landmark decision, see Th. M. De Boer, *Internationale milieuverontreiniging*, *Ars Aequi* 1992, p. 521).

⁸² Art. 42 EGBGB, which only allows for a choice of law *after* to the occurrence giving rise to the claim.

⁸³ § 35 of the Austrian PIL Statute, which also allows for a choice of law *prior* to the occurrence giving rise to the claim.

⁸⁴ Art. 39(1) of the PIL Statute of 1996.

⁸⁵ Art. 132 of the PIL Statute, which only allows the parties to choose the *law of the forum after* to the occurrence giving rise to the claim.

⁸⁶ For *French* law, see in particular the decision of the *Cour de Cassation* handed down in *Rohon v. Caron*, *RCDIP* 1989, p. 68, note by H. Batiffol.

⁸⁷ See also Kadner Graziano, above note 74, at p. 57.

and the same applicable law might be particularly useful and appropriate, as this would allow avoiding a situation where the different groups of victims of the same incident are subject to different laws. With a view to avoiding uncertainties, the parties' agreement should either be explicit or emerge clearly and unambiguously from the circumstances of the case. Furthermore, the parties' choice should not affect the rights of third parties, an important and obvious example being the insurer's obligation to reimburse damages payable by the insured.⁸⁸ Finally, consideration should also be given to the question whether victims from within the State in which the polluting activity and the environmental damage occurred may choose the law of a different State.⁸⁹

3.2 Crystallization of practice

Accordingly, on the basis of our comparative examination above, we conclude, for the purposes of environmental protection, that current law supports the following desirable legal solution in the matter of choice of law in cases of cross-border environmental damage:

- 1) bilateral choice of law/party autonomy, at least after the harmful event has occurred (explicit or clear and unambiguous; respecting third party rights);
- 2) unilateral choice of law by victim or *Günstigkeitsprinzip* (most favourable law principle);
- 3) in the absence of a chosen law: *lex damni* (law of the place where the damage occurs).

In order to facilitate legal certainty and to reduce complexity in international disputes, the first port of call should be a bilateral choice of law. The overarching policy objective is considered to be sufficiently taken into account in that no choice can be made against the wishes of the victims. Our second preferred option reflects precisely this overarching policy objective: to further environmental protection by means of private international law rules. Finally, our third preferred option is the generally accepted law of the place where the damage occurred which reflects a State's sovereignty about the level of environmental protection it deems appropriate for its territory.

3.3 Scope of the applicable law

With a view to achieving as much clarity and predictability as possible, the conflict of laws regime should expressly identify the most important issues falling within the scope of the applicable law (*lex causae*).⁹⁰ The catalogue of issues governed by the applicable law should include in particular:

- The conditions and extent of liability, including the determination of whether persons are liable for acts which they commit

The following questions are particularly important: nature of liability (strict or fault-based); the definition of fault, including the question whether an omission can constitute a fault; problems of causation (whether legal or in fact); the persons potentially liable. The expression "extent of liability" refers to the limitations laid down by law on liability, including the maximum extent of that liability (capping), the extent to which interest may be recovered, and the contribution to be made by each of the persons liable for the compensatable loss.

- The grounds for exemption from liability, any limitation of liability and any division of liability

These include force majeure (acts of God); necessity; third-party fault and fault by the victim. The concept also includes the inadmissibility of actions between spouses and the exclusion of the tortfeasor's liability in relation to certain categories of persons.

⁸⁸ On these two points, see Art. 10(1) of the proposed "Rome II" Regulation (cited above).

⁸⁹ On this issue, see Art. 10(2) of the proposed "Rome II" Regulation, which explicitly addresses purely internal situations which become international only because of the parties' choice of a foreign law; in such a case, the parties' choice is upheld but it may not operate to the detriment of the rules of the State where all the events occurred and which cannot be derogated from by contract. These are rules which are mandatory at the national level; they must be distinguished from those rule which are mandatory at the international level and apply irrespective of any choice of law consideration (*lois d'application immédiate*).

⁹⁰ There are several examples which can serve as a basic model in this respect, see in particular Art. 8 of each of the Hague Conventions of 1971 on the law applicable to traffic accidents and of 1973 on the law applicable to products liability, and Art. 11 of the proposed "Rome II" Regulation, with the accompanying comments.

- Heads of damages

This is to determine the damage for which compensation may be due, such as personal injury, damage to property, moral damage and environmental damage, and financial loss, emotional distress, lost of profits (as opposed to recovery for losses) or lost of an opportunity.

- Within the limits of the powers conferred on the court by its procedural law, the measures which the court can take to ensure the prevention or termination of damage or injury, or compensation for damage or injury

This refers to forms of compensation, such as the question whether recovery should take the form of money damages and whether these should be paid in a lump sum or in instalments; it also refers to ways of preventing or halting the damage, such as an interlocutory injunction, though without actually obliging the court to order measures that are unknown in the procedural law of the forum.

- The assessment of damages in so far as it is governed by rules of law

If the applicable law provides for rules on the quantum of damages, the court must apply them.

- The question whether a right to compensation may be assigned or inherited

In assignment cases, the *lex causae* governs the question whether a claim is assignable and the relationship between assignor and debtor. What is involved in succession cases is the question whether the right of the person who directly suffered damage to recover for such damage may be inherited.

- The persons entitled to compensation for damage sustained personally

This refers to the question whether a person other than the “direct victim” can obtain compensation for damage sustained on a “knock-on” basis, following damage sustained by the victim. Such damage might be non-material, as in the pain and suffering caused by bereavement, or financial, as in the loss sustained by the children or spouse of a deceased person.

- Liability for the acts of others

This concept concerns provisions in the law designated for vicarious liability; it should in particular cover the liability of principals for their agents or employer of its employees. It is suggested that such a provision should also apply to the question of the limits within which a legal person, such as a corporation, may be held liable for the acts of its organs (e.g., board members). Thus, the same law would apply to determine the liability of both the person who did the act and the person who is claimed to be vicariously liable for the act. This would put an end to the dispute as to whether the *lex causae* (i.e., the law applicable to the tort) or the *lex societatis* (law governing the company) governs this delicate issue.

- The manners in which an obligation may be extinguished and rules of prescription or limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of this period

The law designated governs the loss of a right following failure to exercise it, on the conditions set by the law.

- The burden of proof and rules which raise presumptions of law.

This recognizes that the rules relating to the burden of proof fall into two categories: those concerned with the conduct of the trial and those designed to affect the outcome of the case. While the former are a matter for the *lex fori*, rules of the latter sort are to be supplied by the *lex causae* (e.g., rules which place upon the manufacturer the burden of establishing the absence of fault).

3.4 Rules of conduct and safety

It is suggested that when determining liability, account should be taken of the rules of conduct and safety that were in force at the place and time of the act giving rise to the liability.⁹¹ This includes rules intended to establish a minimum standard of security through mandatory prescripts in a particular area, e.g. limits on levels of emissions. Normally, these rules are of great importance in the context of

⁹¹ See, for example, Art. 13 of the of the proposed “Rome II” Regulation or Art. 142(2) of the Swiss PIL Statute; similar provisions were already introduced in the Hague Conventions on the law applicable to traffic accidents (Art. 7) and products liability (Art. 9).

establishing the elements of liability for a tort, in particular for questions of illegality and fault. Where the rules in the place of the damage differ from that of the place of the activity, it may be difficult to determine which rules ought to be taken into consideration. This issue arises, for example, when a factory located near a frontier, which stays within the levels for emissions of the State on the territory of which it is situated, but its emissions cause damage in the neighbouring State, which has more restrictive levels.

‘Taking into account’ is not the same as applying it: if rules of conduct and safety of the place of the activity were imposed in an absolute and systematic way, it would lead to the undesirable result that factories would transfer their potentially injurious activities into countries where the standards of security are the lowest. For this reason, the more balanced approach of simply ‘taking these rules into account’ is preferable to more rigid connections provided in some laws.⁹²

3.5 Effect of Licence on Liability

3.5.1 Introduction

In this section, we will examine the impact of an administrative licence on the civil liability of a polluter who is being sued before the courts of not his home State but the State where cross-border environmental damage occurs. In other words, at stake is the possible legal effect of a foreign licence (foreign from the point of view of the court before which the dispute is being litigated). Usually in the context of defences, i.e. possible justification or disculpation grounds, it may be argued that the defendant has been granted a licence of the public authorities from the State of his domicile or the State from where polluting activity takes place, and complies with its terms. For example a chemical plant may be licensed to discharge certain levels of hazardous substances in its waste water by its home State, while being confronted with a liability claim before the courts of another State where the discharges nevertheless, allegedly, harm the environment.

Naturally, possible justificatory effect of compliance with a public law licence on the private law liability of a polluter vis-à-vis a private plaintiff may be pleaded in any purely domestic, similar dispute, but in the context of transnational litigation, additional legal questions must be addressed. It is just because of this eventuality that an explicit exclusion of the compliance with licence defence may be included in an internationally or regionally harmonised statutory environmental liability regime. Alternatively, in the absence of agreement at the supranational level, such an instrument may explicitly leave this matter up to the Member States/State parties to decide.⁹³ But assuming that compliance with a permit would exclude liability (or at least be relevant in the context of an action for an injunction while damages remain possible) in a domestic dispute where both the plaintiff and the defendant are based in the same State, will the same apply where the licence is granted by the State of the defendant as opposed to the home State of the plaintiff?

Before a court can address this issue as a matter of substantive (domestic) liability law, the question which law governs this issue must be answered. We shall see, however, that the problem at stake can be resolved satisfactorily only if the two legal systems involved are not regarded as two separate bodies, and that an amalgam of various interests needs to be addressed.

3.5.2 Effects of administrative authorisation abroad

Let us look at the following example. A dispute involves an injured German, who brings an action in Germany (State B) against a person who is based and pollutes from abroad, and chooses German law (Günstigkeitsprinzip). May the polluter raise the defence that, under the administrative authorisation (concession, permit or licence) issued by the authorities of his or her own country (State A), the polluting activity is permitted and cannot be made the object of a request for an injunction prohibiting it?

The effects of an administrative authorisation in national law

We should note first of all that the effects of an administrative permit for the operation of a potentially polluting installation vary greatly from one state to another. Under German law, for example, an

⁹² See in particular § 33(1) of the Hungarian Decree-Law No. 13/1979 of 31 May 1979.

⁹³ Directive 2004/35/EC of the European Parliament and of the Council of 30 March 2004 on environmental liability with regard to the prevention and remedying of environmental damage, O.J. 2004 L 143/56, Art. 8(4).

administrative authorisation granted to a factory within the framework of the Wasserhaushaltsgesetz (the Law on Supplying Water) excludes any action against the permitholder based on private law; it does not matter whether the complaint bears on the recovery of damages, the cessation of the polluting activity, or even measures of protection – the permitholder may still raise a defence based on the authorisation.⁹⁴ However, a brief comparative law analysis shows that this type of authorisation excluding any action based on private law is unusual.⁹⁵

By contrast, Dutch tort law, for example, recognises as a main rule that whether and to what extent a licence impacts on the assessment of liability of a polluter who complies with it, depends on the nature of the licence and the interests pursued by the instrument on which the licence is based, taking into account the circumstances of the case in hand (weighing of interests). The point of departure under this system is that liability is not limited when damage is caused which the very Act on which the licence was based was intended to prevent (exceptions to this rule may apply as will be seen below).⁹⁶ There are also many other administrative authorisations, which, without excluding them, nonetheless limit claims based on civil law that a person who is injured by the activities of a factory which has a permit to operate may bring against it. The most frequent case is that the permit delivered excludes any suit for an injunction against operation, but leaves intact the possibility of seeking financial compensation.

The court faced with administrative authorisations granted abroad

What impact can such administrative authorisations have within the framework of civil proceedings in the state where the activity giving rise to the litigation causes damage? If the affirmative defence based on the permit granted abroad (State A) is accepted, the injured person will be deprived of the legal protection which his national law (State B: the law of the place where the damage was suffered) might otherwise provide.

On the other hand, if the court rejects the permit granted by the authorities abroad, the injured person might recover damages that the persons injured in the country of the permit would not have the possibility of obtaining from their own courts. In other words, the person injured abroad would be in a better situation than the injured persons of the state that had granted the authorisation. This perhaps undesirable outcome is, however, a result of differences in the substantive laws comparable to the situation where a person who can invoke EU law may be better protected than a fellow citizen in a situation governed solely by national law (so-called reverse discrimination).⁹⁷

Legal commentators seem to be in agreement on two points. First, the validity of such an authorisation is governed by the law of the state that has issued it. Second, in proceedings of an international character, the question of the effect of such an authorisation is problematic only, from a private international law point of view, if the law applied to the substance of the case (the *lex causae*) is not that of the state that granted the authorisation.⁹⁸ For the rest, legal opinion is divided. Several approaches have been proposed.

The principle of territoriality

In the past, several jurisdictions have refused to give any effect whatsoever on their own territory to an administrative authorisation granted abroad: an administrative act is an expression of sovereignty, therefore its reach is limited to the territory of the state that issued it.⁹⁹ This position is being increasingly called into question. In fact, such a rigid application of the principle of territoriality might endanger the very existence of any factory with potentially dangerous activities which is situated near

⁹⁴ Wandt, 'Deliktsstatut und internationales Umwelthaftungsrecht', *Revue suisse de droit international et de droit européen* 1997, at 160. It must be added, however, that following a legislative change in 1976, it is no longer possible to deliver an administrative authorisation for extracting and putting back substances into the water.

⁹⁵ *Ibid.*, with other references.

⁹⁶ Betlem, *Civil Liability for Transfrontier Pollution*, London, 1993, at 427. See for further comparative analysis, particularly for the United Kingdom: Wilde, *Civil Liability for Environmental Damage* (The Hague 2002), at 223.

⁹⁷ See in particular Case C-132/93 Volker Steen [1994] ECR I2715, [1995] CMLR 922 and Joined Cases 225-227/95 Kapasakalis [1998] ECR I-4239.

⁹⁸ See, for example, Von Bar, above note 57, at 384.

⁹⁹ See, for example, the judgment of the German Bundesverwaltungsgericht, 10 March 1978, *Deutsches Verwaltungsblatt* 1979, at 227. In this case, German residents were complaining about the noise caused by the air traffic at the airport of Salzburg in Austria.

an international frontier. Indeed, if the neighbouring state completely ignores the permit issued by the national authorities in question, the factory may lose all legal protection against, for example, suits seeking an injunction against its activities. It is true that a decision ordering cessation of the activity would most likely be very difficult to enforce in the state where the factory is located. Nonetheless, resort to the principle of territoriality in this way seems to us to be misplaced in this context.

Admittedly, the principle of territoriality, at least in its classic conception, forbids a state to extend its sovereign power beyond its territory and to impose the effects of its own acts on another state.¹⁰⁰ On the other hand, the territoriality principle does not in any way prevent a state from taking into account, at least partially, the effects flowing from a foreign administrative act.¹⁰¹ This emerges clearly from two well-known judicial decisions. In the famous case of the Mines de Potasse d'Alsace, the Rotterdam court stated the law as follows: 'in examining the acts of the defendants, the fact that they had the benefit of French permits is not in itself without importance'.¹⁰² It is true that the court in the end did not accept the defence based on the French permits, but this was for the sole reason that the permits expressly preserved the rights of third parties (as do all administrative authorisations issued under French law).¹⁰³

The second decision is an action brought by an Austrian resident against bringing into service the Wackersdorf treatment plant located on German territory. In its decision of 15 January 1987, the Superior Court (Oberlandesgericht) of Linz (Austria) explicitly took into account the operating permit delivered by the German authorities.¹⁰⁴ Apparently, this court did not think that the principle of territoriality prevented it from doing so. Although there might be approval of this initial step, the question still remains as to what law governs the possible exclusion of claims.

3.5.3 The exclusion of claims under the law of the state that issued the authorisation

Two tendencies can be distinguished here. One favours the application of the law of the state that issued the authorisation (State A),¹⁰⁵ while the other favours the law of the place where the injury occurred (State B).¹⁰⁶

Internationally mandatory rules

Initial opinion tends to justify the application of the law of the state that issued the administrative application (State A) by relying on the theory of special linkage with internationally mandatory rules.¹⁰⁷ According to the principal author who favours this approach, the conditions of the mandatory character of the foreign rule and of the link between the situation and the foreign law are met. The author adds that the foreign authorisation should also meet minimum substantive requirements,

¹⁰⁰ Hence, neither the polluting state can effectively decide the level of pollution acceptable in the neighbouring state, nor could the latter's courts, according to the view stated above, close down a polluting plant in the first state.

¹⁰¹ Bornheim, 'Haftung für grenzüberschreitende Umweltbeeinträchtigungen im Völkerrecht und im Internationalen Privatrecht', *Publications Universitaires Européennes*, Série II, Vol. 1803 (Frankfurt 1995), at 235, with further references.

¹⁰² Judgment dated 16 December 1983, *NJ* 1984, No. 341, para. 8.7. For an English translation of the judgment, see *NYIL* 1984, at 471 onward.

¹⁰³ One may add that on appeal and in cassation proceedings before the Dutch Supreme Court another rule affecting a civil court's power to issue injunctions was debated. The Dutch Civil Code lays down that a court has discretion to refuse to grant an injunction on the ground that the unlawful conduct should be tolerated for reasons of weighty *societal interests* (Article 6:168) whilst preserving the plaintiff's right to damages. Accordingly, the expression 'weighty societal interests' is not limited to *Dutch* interests; it encompasses, in an international dispute, *foreign* weighty societal interests. The Dutch courts thus took French interests into account on an equal footing with Dutch ones.

¹⁰⁴ *ÖJBl.* 1987, at 577, judgment confirmed by the Supreme Court of Austria on 20 December 1988, see *ÖJBl.* 1989, at 239. The court set out three conditions for this: first, the emissions coming from the plant should not be contrary to *public international law*; second, the foreign (German) authorisation must be obtained subject to conditions similar to those imposed by (Austrian) law of the forum; third, the foreign authorisation must not have been granted without giving the Austrian real property owners the possibility of being heard.

¹⁰⁵ The solution defended in particular by Wandt, above note 94, at 168 to 169, and, for different reasons, by Hager, 'Zur Berücksichtigung öffentlich-rechtlicher Genehmigungen bei Streitigkeiten wegen grenzüberschreitender Immissionen', *RabelsZ* 1989, at 293 to 319.

¹⁰⁶ Position defended in particular by Von Bar, above note 57, at 390 to 393.

¹⁰⁷ See in particular Hager, *ibid.*, at 293 to 319.

comparable to those provided in the forum state. Thus, the licence-granting state should entitle persons residing abroad to the same possibilities to be heard in the administrative proceedings as its own citizens. The authorisation should in addition respect the principles of environmental protection established by public international law. If and when all the conditions are satisfied, the foreign licence will be given liability-exempting effect.

This view invites two comments. First, it should be emphasised that the mechanism of internationally mandatory rules does not (yet) constitute a principle recognised worldwide. Moreover, use of the theory of laws of internationally mandatory application might turn out to be too fragile to justify total exemption from liability. Second, to establish as a requirement the respect for the principles of environmental protection established by public international law seems perilous. Since these principles do not meet with a consensus this requirement tarnishes the theory with an obvious lack of predictability and legal certainty.

Alternative constructions

To accept the competence of the state that issued the authorisation as the law governing exemption (State A) seems dubious to the extent that persons injured in another state (State B) are subject to the mercy of that – from their perspective foreign – law. Those who nonetheless are in favour of this respond with three observations. First of all, they say, if the law governing the dispute (*lex causae*) were also to govern the question of the quantity of emissions that a foreign plant is allowed to produce, a decision handed down by the court of the place of injury and imposing a reduction of these emissions would not, in all probability, be enforced in the state that had issued the permit. Second, in the event that the law of the state that issued the permit (State A) excluded any action for financial compensation, the public policy exception might come into play (both as a barrier to the application of a foreign law and at enforcement stage).¹⁰⁸ In other words, the foreign permit (from State A) should only be given effect in the forum of the proceedings (State B), if and when its effect was comparable to that provided in the permits issued by the forum's own administrative authorities.¹⁰⁹

Finally, they conclude, if the injured persons have not been given the possibility of being heard during the administrative proceeding, any authorisation that was nonetheless granted would be deprived of effect and could not even be applied by the courts of the state of origin of the permit. In this respect, commentators refer to the 1983 decision of the Administrative Tribunal of Strasbourg, which annulled the authorisation granted to the Mines de Potasse d'Alsace to pour salty water into the Rhine, on the grounds that the initial authorisation had not taken into account the repercussions that this activity could have downstream.¹¹⁰

The *lex causae*

This solution subjects a regulatory compliance defence to the law which governs the dispute as a whole, that is, the *lex causae*. In particular it was adopted by the Superior Court of Linz in the decision mentioned above; it is also favoured by some German legal commentators, at least where the *lex causae* corresponds to the law of the state in which the harmful effects occurred (the law of the injured party).¹¹¹ The principal argument is that the producer of emissions is not to be protected if these emissions cause harmful effects abroad; therefore, the competence of the law of the state where the damage occurred could not be questioned.

However, these commentators also emphasise that a foreign permit cannot simply be ignored. They seek therefore to co-ordinate the two laws in question, if necessary by substitution: it is for the *lex causae* to establish the framework, into which the effects of the foreign permit are to be inserted. In this

¹⁰⁸ Wandt, cited above note 94, at 168.

¹⁰⁹ See in particular Siehr, *Deutsches Haftpflichtrecht für grenzüberschreitende Immissionen – Reaktionsmöglichkeiten auf die Unglücke von Tschernobyl und Schweizerhalle*, in Dutoit, Knoepfler, Schweizer and Siehr, *Pollution transfrontière / Grenzüberschreitende Verschmutzung: Tschernobyl/Schweizerhalle*, *Beihefte zur Zeitschrift für Schweizerisches Recht*, Vol. 9, Basel 1989, at 83.

¹¹⁰ Decision of 27 July 1983 (Ref. 227/81bis 232/81, 700/81 and 1197/81), cited in Wandt, note 94 above, at 169 note 68, with other references.

¹¹¹ See Wandt, *ibid.*, at 164, note 57.

view, the foreign authorisation (from State A) can only deploy its effects if these are comparable to those of an authorisation granted in the forum state (State B).

3.5.4 Concluding remarks on licence and liability

The best approach in dealing with the interplay of licence and liability, in the authors' view, is to apply the principles of equivalence of authorisations and of equality of access. The latter principle requires that persons who reside abroad should be able to avail themselves of the right to be heard in the administrative proceeding that led to the grant of the authorisation. If this fundamental condition is not fulfilled, the foreign licence should not be given any effect. In addition, even where this is the case, a court should only take a foreign licence into account where it would also recognise liability excluding effect of a licence issued by its own public authorities (principle of equivalence). Finally, it should only do so in the context of a rule which distinguishes between injunctions and suits for damages while requiring that foreign weighty societal interests are taken into account on an equal footing with domestic ones.

4 The Liability of Multinational Corporations for the Acts or Defaults of their Subsidiaries in Environmental Matters

The purpose of this section is to examine the liability of multinational corporations for the acts or defaults of their subsidiaries with particular emphasis on environmental issues. Most frequently a corporation engaged in multinational activities will operate in various countries through local subsidiaries incorporated there. Those subsidiaries may be engaged in mining or manufacture, or they may distribute locally the products of the enterprise. Liability may be incurred because of hazards associated with the mining or manufacturing operations or the goods distributed through the subsidiary may cause harm to consumers, workers or users. The subsidiary is clearly primarily responsible for the act or default. The question is when can liability for that act or default be attributed to the parent corporation?

This section of the Report is not concerned with the liability of corporations for the acts or omission of its employees or for transactions conducted through branch offices which form part of the corporate entity itself. In that case we are dealing with acts of the corporation itself.

4.1 Why sue a parent corporation?

There are good reasons to sue the parent rather than the subsidiary. Often the subsidiary has limited assets and offers little scope for recovery. In some markets where the risk of liability is high, such as in the United States, foreign corporations will seek to limit their exposure by operating through local subsidiaries with very few local assets. The proverbial \$2 company may suffice. The English case of *Adams v Cape Industries Plc* illustrates the lengths to which the parent may go to isolate itself from local liability.¹¹² The case involves an English company, Cape Industries plc., controlling various subsidiaries in South-Africa, Liechtenstein and the U.S.. Cape wanted sales of asbestos from its subsidiaries to continue in the United States but intended, by any lawful means which it was entitled to do, to reduce the appearance of itself, or its subsidiaries' involvement there and to reduce the risk of its being subject to the jurisdiction of the U.S. courts. And since it was not a mere façade, piercing the corporate veil was not deemed appropriate. Cape had incorporated a U.S. company to be a marketing agent of the Cape group in the United States, but since a substantial part of its business was its own business, it did not act as an agent of the Cape group, nor did it have general authority to enter into contracts binding Cape. Therefore Cape was considered, by the English courts not to have been present in the United States. Recognition of a U.S. judgment in the United Kingdom was denied.

In other cases, local law and practice, particularly in developing countries, is far less favourable to plaintiffs, both as regards the substantive law of liability and the quantum of damages recoverable, than the law and practice which prevails at the seat of the parent corporation. A good example is found in *Connelly v RTZ Corporation (No 2)*,¹¹³ where the plaintiff brought suit against the parent in England rather than the subsidiary which owned the mine in Namibia where he was injured. Local law may even seek to insulate the local operation from liability as happened in Papua New Guinea when local

¹¹² [1990] Ch 433.

¹¹³ [1998] A.C. 854;

landholders sought to sue the Australian BHP Pty Co despite local legislation restricting their right to do so.¹¹⁴ This has sometimes been described as “forum shopping”, but if the parent itself is liable, it can hardly complain if it is sued at its own home.

There are several ways of affixing direct liability on the parent corporation. One method is by treating the parent and its subsidiaries as one entity whereby the act of one part is the act of the whole. The corporate borders between them are rejected as artificial barriers where the reality is that the concern operates as one economic unit. Alternatively the forum may expand the traditional notion of agency and treating the subsidiary which fulfils the commercial purposes of, and operates at the direction of, the parent corporation as its agent while in other respects respecting its separate existence. The other method is by affixing a direct liability on the parent, such as a failure to comply with a duty of care to the plaintiff by not exercising a proper control over the activities of the subsidiary. Each of these will be considered in turn.

4.2 The Economic Entity Theory: Enterprise liability

It has long been a fundament of corporation law that a corporation has a legal identity which is separate from that of its shareholders, even in the case where there is one dominant individual shareholder. This has been established in Anglo-Commonwealth law since the decision of the House of Lords in *Salomon v A. Salomon & Co Ltd*.¹¹⁵ This principle is of course the corner stone of entrepreneurial liability. Businessmen are encouraged to take risks because they can limit their liability. To this principle there exist a few exceptions, but the “corporate veil” is pierced or lifted in the rarest of circumstances, even in the United States.¹¹⁶ It is not an abuse of the corporate structure to take steps to limit one’s liability for, after all, that is the very purpose of the corporation. Only in the case where the corporate structure is totally ignored by those in control can it be argued that the subsidiary is a sham.

It has, to the best of our knowledge, never been argued seriously that dominant individual shareholders should be liable for the debts of their under-capitalised corporations. Presser has argued that it is difficult then to argue that the position should be different in the case where the dominant shareholder is itself a corporation.¹¹⁷ It is very true to say that the parent and its subsidiaries often form one economic unit and that the parent will exercise overall control over the subsidiary. But an economic unit is not a legal unit. As Robert Goff LJ (as he then was) said: “... we are concerned not with economic but with law. The distinction between the two is fundamental and cannot be bridged”.¹¹⁸ But, the life of the law, as it has been said, is not logic.

One aspect of the economic entity approach to be considered is that of substantive liability. It has been argued that if the “group of companies” is to be treated as one, then the breach of duty towards the plaintiff by a subsidiary can be treated as a breach of duty by the parent. That argument was rejected by the NSW Court of Appeal in *James Hardie & Co Pty Ltd v Hall*, where it was held that in the absence of any evidence that a subsidiary company is a mere facade, the fact that a parent company exercises control and influence over its subsidiary does not of itself justify lifting the corporate veil so as to create a duty of care on the part of the parent company towards an employee of the subsidiary.¹¹⁹

What should the rule be?

As to *de lege ferenda*, Professor Lowenfeld has put forward some interesting propositions.¹²⁰ Summarised briefly, they are as follows:

- The traditional presumption that shareholders are not liable beyond the capital they have contributed should be maintained. It can virtually never be overcome with regard to individual shareholders, but it can be overcome where there is a wholly owned subsidiary arrangement.

¹¹⁴ *Dagi v BHP Co Pty Ltd (No 2)* [1997] 1 *Victorian Reports* 428.

¹¹⁵ [1897] A.C. 22.

¹¹⁶ See Stephen B. Presser, *Piercing the Corporate Veil*, 1991, § 1.05(4).

¹¹⁷ *Ibid.*

¹¹⁸ *Bank of Tokyo Ltd v Karoon* [1987] A.C. 45 at 64.

¹¹⁹ 27 May 1998, (1998) 43 NSWLR 584, 1998 NSW Lexis 1640.

¹²⁰ “National Jurisdiction and the Multinational Enterprise,” in: Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness* (Oxford: Clarendon 1996), 105-6.

- Even in the latter case, the presumption of limited liability should not be overcome with respect to commercial relationships which would normally give rise to claims framed in contract. But the presumption is at its weakest with respect to claims arising out of torts, especially out of mass disasters.

The question therefore is whether in relation to environmental claims framed in tort and raised by or on behalf of members of the public, the liability of a group of companies both as regards jurisdiction, direct and indirect, and as regards substantial liability should be one and indivisible.

4.3 Direct liability of the parent corporation: the duty to supervise

The other method is by affixing a separate liability on the parent directly to the plaintiff in respect of the activities of the subsidiary for failing to exercise a proper supervision. That begs the question, of course, whether the parent owes such a duty. There is some support for such a proposition in English courts, but it is not conclusive. In the cited case *Connelly v RTZ*, the plaintiff alleged that the English parent corporation had failed in its duty of care to him by not directing its subsidiary for which he worked in providing a safe system of work in its uranium mine in Namibia. The issue of liability was never decided in that case which was only concerned with *forum non conveniens*. Apparently, the case was subsequently dismissed as time-barred.¹²¹ However, subsequently, in *Lubbe v Cape*,¹²² the Court of Appeal accepted the argument that the English parent corporation owed a duty to workers and nearby residents of a mine owned by its subsidiary in South Africa to direct it to take steps to prevent harm from asbestos inhalation. But final determination of this substantive issue again did not take place as the case went up to the House of Lords on the matter of jurisdiction only. The case was subsequently settled.¹²³ On the point of the *forum non conveniens* doctrine two aspects merit further examination: access to justice and legal aid, and the requirement of the availability of the other (natural) forum.

In the cited *Connelly* case, an action for compensation for personal injury by a Scots based worker against the parent company, based in England, of his former employer in Namibia (Southern-Africa), where he had worked in a uranium mine, was considered. Namibia was held to be the most closely connected jurisdiction so that *prima facie* a stay was to be granted. Given that Namibia was the clearly more appropriate forum, the plaintiff will have to accept this forum also where the English court would be more advantageous, for instance because of the availability of discovery or higher damages, and, as a general rule, even where financial assistance (legal aid or conditional fee) would be available in England but not abroad. Only in exceptional circumstances will the absence of financial assistance – where it effectively denies access to justice so that substantial justice cannot be done – justify that a stay will not be granted. However, an exception was accepted here mainly because the complex litigation required not only professional legal assistance but also expert scientific witnesses.

As for availability of the other forum, it follows from *Lubbe* (cited above) that it may be based solely on the undertaking of the defendant to submit to that jurisdiction. The plaintiffs are Namibia based former workers at an asbestos mine and those living in the area. They seek compensation for personal injury from the parent company of the subsidiary that operated the facility. Like in *Connelly*, a claim is based on negligence against the holding company based in England on the ground that it failed to supervise the observance of relevant health and safety standards by its subsidiary. Yet contrary to *Connelly*, the defendant had no presence nor assets in South-Africa; courts there were only available as a result of the defendant's submission to their jurisdiction (*prorogation*). According to the House of Lords, "[t]he ground on which the jurisdiction of the courts in the other forum is available to be exercised is of no importance either one way or the other in the application to the case of the *Spiliada* principles".¹²⁴ It is submitted that accepting *prorogation* as a suitable ground for availability amounts to offering the defendant a choice of the more favourable court; as held by the Court of Appeal, this can be seen to amount to "forum shopping in reverse."¹²⁵ It seems to be incompatible with the plaintiff's right to access to justice within the meaning of Article 6 ECHR. The plaintiffs had invoked this provision, but the House of Lords did not rule on it as it already denied the stay of the proceedings in

¹²¹ O'Keeffe, "Environmental Issues in Corporate Transactions in the United Kingdom," [1999] *ICCLR* 344.

¹²² [2000] 1 W.L.R. 1545; [2000] 4 All ER 268; [2001] I.L.Pr. 140; [2001] I.L.Pr. 140. See also Peter Muchlinski, "Corporations in international litigation: problems of jurisdiction and the United Kingdom asbestos cases," 50(1) *ICLQ* 1 (2001).

¹²³ David Black, "Black workers to receive £45m asbestos settlement," *The Guardian*, 14 March 2003.

¹²⁴ Per Lord Hope, concurring opinion.

¹²⁵ [1999] I.L.Pr. 113.

England on the basis of *Spiliada* alone. Although *Lubbe* (and *Connelly*) are important decisions in the context of the accountability of multinational corporations for the actions of their subsidiaries in the developing world,¹²⁶ the unpredictability of the outcome of a *forum non conveniens* plea remains an obstacle for plaintiffs.

On the other hand, the U.S. District Court, Alabama, in *Silicone Gel Breast Implants Products Liability Litigation*,¹²⁷ rejected the proposition that a parent corporation owed a duty to supervise its subsidiaries in a manner akin to that of the natural parent with respect to his or her children. That decision was followed by the NSW Court of Appeal in *James Hardie & Co Pty Ltd v Hall* (cited above).

Should there be a duty of supervision? O’Keeffe cites the case of a first world corporation which relocates its manufacturing activities to a third world country through a subsidiary established under its law and continues there industrial practices which have been condemned in its original location.¹²⁸ There is a stronger argument for direct liability in such a case because it is the result of a conscious choice made by the parent. In other cases, however, some balance may have to be struck between the need to protect local citizens from gross abuse and the fact that many third world countries seek to attract essential industry and investment by offering lower standards of employee protection.

Where is the place of wrong?

If there is a duty of supervision over the activities of the subsidiary, the next question is where a failure to exercise that obligation takes place: in the boardroom of the parent corporation or at the mine or factory operated by the subsidiary. This is, of course, a vital question on which the very existence of the liability depends. If the parent company resides in a well developed country the application of its law is likely to be more favourable to the plaintiff. In the cited case of *Connelly v RTZ*, Lord Goff seems to have assumed that any failure by the parent to provide for a safe system of work at the mine in Namibia occurred in Namibia, but the issue did not arise for decision. Similarly, in *James Hardie & Co v Hall* (cited above), the NSW Court of Appeal took the view that if the parent company was under any duty to warn the employees of its subsidiaries of the risks of handling asbestos or to provide them with a safe system of work at the New Zealand plant that breach occurred in New Zealand. On the other hand, in *Lubbe v Cape Plc* the English Court of Appeal took the view that the breach of duty on the part of the parent had occurred in England. The answer may well depend on how the duty is framed. If the duty is one of exercising supervision over a subsidiary to prevent it from, *inter alia*, causing environmental harm it can be said that that duty must be exercised in the boardroom of the parent. If, on the other hand, it is framed as a duty to warn, then that duty is breached at the last place where that warning could have been given, usually the place where the harm occurs.¹²⁹

4.4 Conclusion

It is obvious that the law is in a stage of transition. The principle of separate corporate legal personality is being questioned, at least as between parent corporation and wholly owned subsidiary. It is clear, on the other hand, that this principle cannot be entirely jettisoned for otherwise it would discourage investment and risk taking. Should there be special categories where separate personality cannot be pleaded either for the purposes of jurisdiction (and recognition of judgments) or for substantive liability? If so, should those categories be confined to torts, especially those not arising in a commercial context, such as environmental claims?

In the second place, do parent corporations have a paternal duty to supervise their offspring? If so, how high should that duty be set? Does it apply only to wholly owned subsidiaries or any entity they have the means to control? Where several corporations share control, should they have a collective responsibility? Should the same standards of providing a safe environment apply to activities in third world countries as are imposed on the parent in its first world base? Or should it only be liable

¹²⁶ See generally Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) and Kamminga and Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (The Hague: Kluwer 2000).

¹²⁷ 837 F Supp 1128 (1993).

¹²⁸ “Environmental Issues in Corporate Transactions in the United Kingdom,” [1999] *ICCLR* 344.

¹²⁹ *Distillers Co (Biochemicals) Ltd v Thompson* [1971] A.C. 458 at 468-9.

according to the standards of safety and environmental protection set at the place of operation? These are all questions that need an answer.

5 Overcoming the obstacles: the way forward

This Report has focused on three legal issues: (i) the international jurisdiction (or competence) of courts in environmental tort cases, (ii) the choice of law rules deciding which tort law regime should govern a transnational dispute and (iii) the substantive law issue of the liability of multinational parent corporations for their subsidiaries. On the third issue, we confine ourselves to raising the questions enumerated above (§ 4).

On the issue of jurisdiction we contend, as a matter of codification of current principles, that both the court of the place of domicile/habitual residence of the defendant and the courts of the place of the harmful event (*forum delicti*) are generally accepted as competent fora. Whether and to what extent this jurisdiction is mandatory or discretionary largely remains a division between the common law and civil law traditions. As a matter of progressive development, we call upon courts to interpret the notion of “civil and commercial matters” so as to include civil law claims by public authorities for the protection of the environment.

Regarding choice of law, as a matter of codification, we observe general acceptance of the notion of party autonomy not just in the field of contractual but with respect to non-contractual liability (tort) as well. That is to say that a bilateral choice of law for a particular domestic liability regime, including any relevant international law harmonising such regimes, is available. We recommend, in addition, the adoption of a unilateral choice of law by the claimant in environmental tort cases based on the “most favourable law principle” or *Günstigkeitsprinzip*. Subject to certain limits, claimants would then be able to select the regime most favourable to their cause. This approach is in line with claimants’ opportunities for limited forum selection under the identified global principles of jurisdiction and the EU proposals for a unified choice of law regime (so-called Rome II), as well as the 2003 UN-ECE Kiev Protocol.

Finally, we think that international law can play a useful role in terms of laying down obligations for States to secure access to effective remedies under domestic administrative and civil law in transnational environmental disputes as a matter of national law, not intra-State liability at the international level. Such rules should cover the liability of private actors *vis-à-vis* private claimants as well as public authorities; in addition, the liability of public authorities should be covered where they are not exercising public authority powers. It is proposed to coordinate our findings with the work being carried out by the International Law Commission. The essential question the ILC has to determine is what means of recompense States are required to make available to victims of transboundary harm. Clearly there are several possibilities here, not necessarily exclusive of each other:

- An access to justice approach: i.e. ensure that States make recourse against the relevant private party available through national law for victims of transboundary harm.
- A harmonisation/standard setting approach: i.e. ensure that national laws set internationally acceptable standards of liability, jurisdiction, availability of remedies, etc in such cases.
- A compensation approach: i.e. ensure that compensation is available to cover situations where liability is limited or inadequate, or to spread the burden equitably between the party liable for the harm or pollution, the industry, and (possibly) the state.
- A state liability approach: i.e. either (a) make the state a guarantor against all transboundary harm emanating from its territory, even if it is not otherwise responsible in international law and even if alternative recourse is available, or (b) make it a guarantor of last resort only when

alternative recourse fails, i.e. residual liability only. The latter requires that local remedies rule be applied to transboundary harm.

It is submitted by this Committee to consider the principles and proposals outlined above in the context of harmonising domestic private international law, access to justice and substantive non-contractual liability law, supplementing the current ILC draft principles.¹³⁰

6 Outlook to Third (final) Report

Taking into account the results of the discussions on the questions raised and propositions made in this Report at the Berlin meeting, the Committee suggest to examine in more detail the following topics:

- the matter of liability of multinational corporations;
- the rule of non-enforcement of foreign public law in the conflict of law rules of many jurisdictions as an obstacle to enforcing environmental law dealing with non-contractual liability;
- the Alien Tort Claims Act, 28 U.S. Code §1350 and other comparable procedures, if any, as possible model for overcoming some of the barriers to transnational enforcement;
- transboundary implementation of procedural obligations under international law, and
- the possible legal relevance of non-binding Codes of Conduct under the applicable non-contractual liability regime.

The Committee therefore anticipates that there will be one further and final (Third) Report at the 2006 Conference, covering these issues and elaborating its overall conclusions, based on the three reports. These conclusions will probably be in the form of draft principles or articles.

¹³⁰ Second report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities by Pemmaraju Sreenivasa Rao, Special Rapporteur, United Nations A/CN.4/540, General Assembly, 15 March 2004, International Law Commission, fifty-sixth session Geneva, 3 May-4 June and 5 July-6 August 2004. Available at the ILC's Website: <http://www.un.org/law/ilc/sessions/56/56docs.htm>.