

**PRIVATE REMEDIES FOR TRANSFRONTIER
ENVIRONMENTAL DISTURBANCES**

STEPHEN C. McCAFFREY



International Union
for Conservation of Nature and Natural Resources
Morges, Switzerland
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FOREWORD

Where environmental disturbances extend across national boundaries, very difficult legal and administrative problems can result, creating further obstacles to the management of what may already be a complicated technical and legal situation. Gaining a legal remedy for environmental harm is a problematic effort even within most national jurisdictions, since pollution cases by their nature raise difficult questions of standing, causation, and so on. When two or more different legal systems are involved, the complexities multiply and injustice may result.

This important problem area is the subject of the present work. Part I is a study closely related to what is traditionally called "Conflicts of Laws", in the special factual context of transfrontier pollution cases. This study seeks to determine what sort of recourse, under what law, is available in the event of various kinds and configurations of transfrontier disturbance. Part II reviews existing international instruments relevant to transnational environmental disturbances, and suggests provisions which might be included in an international agreement on this subject.

These are not purely academic questions but are under active discussion at the international level. Significant initiatives have been taken even during the final stages of preparation of this study.

Thus, at their meeting in Geneva in February 1975, the Senior Advisers on Environmental Problems of the Economic Commission for Europe considered issues relevant to transfrontier pollution. Reports are being prepared for the ECE by appointees of the governments of Norway and the Soviet Union on sulphur dioxide emission sources in Europe. The ECE plans to undertake similar studies on a whole range of problems relevant to transfrontier pollution, with the long-term goals of elaborating legal criteria and an international strategy for the prevention of pollution.

The Environment Committee of the Organization for Economic Cooperation and Development has for some time been studying problems relevant to transfrontier disturbances. In November 1974, the OECD Council adopted a set of Principles Concerning Transfrontier Pollution which it recommended to its member states in the interest of harmonising environmental policies. Among the policies promoted by OECD are the principles of non-discrimination and equal right of hearing, both of which are relevant to private law transnational disputes.

The Scandinavian countries have been particularly concerned with problems of transfrontier disturbances. The Nordic Convention on the Protection of the Environment which was concluded in February 1974, is discussed in the present paper. More recently, the Norwegian government organized an international meeting of experts in Oslo in December 1974, to consider the establishment of a cooperative programme to monitor transfrontier air pollution in Europe.

It is hoped that the present study, which is the outcome of research undertaken by the author as a project carried out under the auspices of IUCN at its Environmental Law Centre, Bonn, Federal Republic of Germany, will make a positive contribution to international discussions in progress and may lead to further initiatives, particularly with a view to protecting individual rights to obtain adequate remedies in cases of transnational environmental disturbances.

THE AUTHOR

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INTRODUCTION

Industrial waste products, including noise, emitted into portions of the biosphere shared by two or more nations have caused increasing damage to foreign states and their citizens in recent years.¹ The adverse effects of these industrial "externalities" upon foreign interests have aroused international concern,² since the mere existence of a national frontier between polluter and victim may create insurmountable difficulties in securing abatement of the offensive activity or compensation for damage which it has caused.

Private parties injured by a use of resources in a neighboring country (e.g., diversion or pollution of boundary waters) have, in practice, resorted to seeking relief through governmental channels when judicial jurisdiction could not be asserted over the offensive activity.³ But invocation of governmental assistance frequently sets a process in motion which results in an inadequate remedy for the individual: Too often the issue is framed in terms of state, rather than private liability for the damage; the rights of each state to the use of the shared resource are then determined on the basis of generally accepted principles of public international law. What often could be treated as a matter of private liability is in this way elevated to the level of state responsibility. The central issue then becomes whether a state's sovereignty was invaded, rather than how best to compensate the injured private interests.⁴ Since nations have been loath to admit responsibility for extraterritorial damage caused by domestic acts, the matter usually results in a compromise, and the injured parties are shortchanged. Moreover, such procedures are notoriously time-consuming,⁵ and are in general needlessly circuitous. It is therefore desirable that governments take steps to facilitate direct recourse by actually or potentially affected private parties against planned or existing activities in neighboring countries. Such measures should at least be designed to ensure the availability of the judicial mechanisms set up by states for the orderly resolution of private disputes, and should ideally provide for access to administrative procedures as well.

In addition to benefiting affected individuals, facilitation of private redress through judicial and administrative channels would appear to foster a more efficient allocation and utilization of governmental resources. Allowing private parties to pursue claims against foreign

polluters through courts and administrative bodies, at least to the extent possible domestically, would free governmental organs to concentrate on those international problems which can only be dealt with at the national level (e.g., coordination of environmental quality standards, regional planning, or grave transfrontier injuries suffered by the public at large). Furthermore, by enabling victims of transfrontier environmental harm to take recourse within the region affected and through authorities responsible for that region, elevation of essentially regional - albeit transnational - problems to the national governmental level would be avoided, with a consequent saving of governmental time and money and a speedy result for the individual. Moreover, such direct recourse would help to ensure that the international character of the injury would not preclude its redress, and would augment governmental efforts to control transfrontier pollution. Seeking redress directly from pollution sources would thus complement governmental resource management programs while avoiding the impediments involved in coordinating two international systems: By encouraging enterprises to internalize pollution costs, direct recourse would assist in producing a more equitable balance between resource deteriorating and non-deteriorating uses on the international level.⁶

An individual threatened or injured by pollution - which will be taken in this study to include noise - from a foreign source might take recourse in a number of ways. He could bring a lawsuit directly against the source or sources of the pollution, petition the foreign administrative agency competent to regulate the pollution source(s), or take his claim up with his government after fulfilling the customary requirement of exhausting locally-available remedies.

The first alternative, that of a suit against the polluter, does not historically seem to have been considered as a real possibility. Despite the magnitude of pollution crossing the Canadian-United States boundary, there do not appear to have been to date any decisions involving injuries caused thereby, and Europe's vast international pollution problems have given rise to but a few cases, only one of which was decided after 1960. Among the possible explanations for this lack of cases in spite of such great resource impairment might be: the expense involved in bringing international actions, especially in view of the uncertainty of recovering; problems of proving that the defendant actually and foreseeably caused the damage - especially in a multiple-emitter situation; and, probably above all, the common assumption that the intervening boundary somehow prevents the victim from taking direct legal recourse against the polluter. The first two of these

considerations in many cases present real problems, and require cooperative governmental solutions. The third, however, is only a seeming obstacle in the great majority of cases as will be demonstrated in Part I, below.

The second alternative, seeking relief through the competent foreign administrative agency, would perhaps be the most appropriate form of action where the remedies sought do not include compensation for damage. In such cases the concerned individual could seek to comment upon permit applications or proposed administrative rule making, intervene into ongoing administrative proceedings, review administrative action, or compel administrative enforcement of existing regulations. Predictably, the dearth of private litigation against foreign polluters is paralleled in the administrative field where only scattered incidents of recourse to foreign administrative procedures may be observed. Unlike private attempts to secure redress through judicial processes, however, individuals' encounters with foreign administrative bodies have often met with failure. The reason for this lack of success is not altogether clear. It may be due to inappropriate application of the "sovereign immunity" or "territorial sovereignty" theories on the one hand, or to institutions which are no longer equipped to deal with modern problems, on the other hand. In any event, the reasons given for denying access to foreigners do not satisfactorily explain the courts' true motivations. Whatever the source of the difficulty, the attention devoted by international bodies to this area⁷ underscores the need to allow actually or potentially affected foreigners the same access to administrative procedures as is available to nationals.

The third alternative, that of the individual's taking his claim up with his government, should probably be resorted to in practice only in cases of grave injury, and indeed, the government would not be likely to actually espouse the individual's claim⁸ unless it were one which involved damage of substantial proportions. The very fact that large amounts of money and probably significant elements of both countries' economies were involved, however, would tend to increase the difficulty of reaching a speedy resolution of the dispute which was satisfactory to both parties. The Trail Smelter Case illustrates this inherent weakness of state-level solutions to private or at best regional problems. In that case, where fumes from a smelter in Canada caused damage to a large number of people, mostly farmers, in the U.S. State of Washington, an arbitration tribunal established pursuant to a special convention between the two nations took thirteen years to resolve the dispute. To be sure, the injured parties did receive compensation and the tribunal was able to formulate an effective regime

for the future regulation of the smelter's activity. But a similar and far more expeditious result could probably have been reached had the individuals in the atmospheric region concerned had access to judicial and/or administrative institutions with the authority to impose a regulatory scheme upon the smelter and to provide for indemnification of the injured parties.

In order to determine what, if any, international action is necessary to facilitate resolution of international environmental disputes of this nature, Part I will examine the availability to injured or threatened individuals of judicial and administrative recourse against foreign sources of pollution under the Continental (Civil) and Anglo-American legal systems. Drawing upon those findings, Part II will suggest areas in which international cooperation might be fruitful.

P A R T I

AVAILABILITY OF JUDICIAL AND ADMINISTRATIVE
RECOURSE AGAINST FOREIGN SOURCES OF POLLUTION

CHAPTER 1

SUITS AT THE PLACE OF THE INJURY : GENERAL

A private party injured or threatened by pollution from a foreign source could seek relief either in this country, the place where the injury is threatened or has occurred, or in the source country, the place where the offending activity is being, or will be carried on. In his country he could pursue his claim against the foreign activity through the appropriate judicial institutions, but usually not through domestic administrative bodies, since they, being creatures of the claimant's state, would lack competence over foreign activities. By suing in his country, however, he would have the advantages of familiarity with the legal procedures and language, proximity to the threatened or damaged legal interest, and freedom from any parochial biases which might be present in the defendant's country.⁹ On the other hand, if he were successful he would probably have to initiate court proceedings in the defendant's country to enforce the judgment.

In the source state the claimant could seek recourse through both judicial and administrative institutions. Suing the polluter at the place of his activity would simplify notice procedures, eliminate possible jurisdictional problems to be discussed below, and alleviate the necessity for a second enforcement proceeding. The plaintiff would, of course, have to cope with unfamiliar legal procedures, perhaps conducted in a foreign language, and might be disadvantaged by local factors favoring the defendant. If the claimant were allowed to appear before the appropriate administrative agency in the source country, he might be able to secure abatement of the offending activity, e.g., by showing that his interests were threatened or harmed thereby. A final factor in plaintiff's selection of a forum is that the law applicable to his claim often depends upon the court chosen.

The availability of recourse will thus be examined as to judicial procedures at the place of the injury (Chapters 1 through 5) and as to judicial and administrative procedures at the place of the act (Chapters 6 and 7). Two of the world's most heavily industrialized regions, North America and Europe, provide the setting for the study. The legal

situation with respect to each particular issue will be treated for both the Anglo-American legal system - based on common law - as represented by the North American countries of Canada and the United States, and the Continental legal system - based on Civil, or Roman Law - as represented by the European countries of Germany and France.

CHAPTER 2

SUITS AT THE PLACE OF THE INJURY : JURISDICTION

Although a variety of topics relating to the competence of courts may be subsumed under the term "jurisdiction," emphasis in this study will be confined to issues which are potentially problematic in a transnational polluter-receptor context. Thus, this section will deal with local venue (the judicial district in which a suit must be brought) only when international jurisdiction is based thereon, and will concentrate upon the competence of a court to adjudicate the parties' rights and obligations with respect to the subject matter at hand.¹⁰

It is likely that in many instances the defendant would neither appear in a proceeding in plaintiff's country, nor have assets there. In examining possible bases of judicial jurisdiction over a transnational pollution action, therefore, the requirements for enforcement of judgments in defendant's country must be born in mind. In order to focus on possible problem areas, the following discussion will generally assume that the foreign defendant has no contact with or assets in the forum country.

A. Europe - Civil Law

Jurisdiction over transfrontier pollution actions between Germany and France is governed by the national law of the forum state in the absence of treaty. On September 27, 1968, seven European states (Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands) signed the Convention on the Jurisdiction of Courts and the Enforcement of Judgments in Civil and Commercial Matters.¹¹ This agreement, which entered into force on February 1, 1973,¹² prescribes rules for the assumption of jurisdiction in civil and commercial cases which, if followed, entitle an ensuing judgment to enforcement in another contracting state.¹³

General rules of jurisdiction are prescribed by Article 2 of the Convention, which provides, subject to subsequent provisions, that persons domiciled in a contracting state are to be sued before the courts of that state, irres-

pective of their nationality. Domiciliaries of a contracting state may be sued in another contracting state under Article 5, which enumerates five "special jurisdictions" based on the subject matter of the dispute. Article 5, paragraph 3 provides that tort actions may be brought in the court at the place where the tort was committed ("des Ortes, an dem das schadigende Ereignis eingetreten ist;" "lieu où le fait dommageable s'est produit ").¹⁴ In formulating this provision the drafters of the Convention consciously left open the question whether in a transboundary situation the place where the tort is committed is the place of the act or that of the injury.¹⁵ This question would thus have to be decided by the court in which suit is brought under its internal law. Both Germany and France have provisions similar to Article 5, paragraph 3. A review of general principles of international jurisdiction followed by a discussion of the interpretation of these provisions, will be undertaken for German and French law in the following sections.

(1) Suits in Germany

The competence of German courts to adjudicate transnational cases is not dependant upon service of summons on the foreign defendant, as in Anglo-American law. In fact, mere service of process upon a non-resident defendant passing through the court's territory cannot establish jurisdiction of a German court over a controversy. Service of process fulfills primarily a notice function and is thus important for purposes of enforcement of a German judgment by a foreign court.¹⁶ The "international jurisdiction" (internationale Zuständigkeit) of German courts is based rather upon the relationship of the parties or controversy to the court's territory. This relationship is defined by considerations similar to those upon which American courts base assertion of extraterritorial jurisdiction under "long-arm" statutes.

Although there are few statutory rules expressly regulating international jurisdiction, it is judicially recognized¹⁷ that a German court has international jurisdiction if it has local jurisdiction under the rules set forth in the Code of Civil Procedure (Zivilprozessordnung (ZPO) secs. 12-19). The general rule for local jurisdiction is that the action must be brought at the court of the defendant's domicile;¹⁸ this is the court of general competence (allgemeiner Gerichtsstand). Alternatively, there are a number of special venues (besondere Gerichtsstände) for particular types of disputes. One of these special rules of local jurisdiction is that a tort action may be brought at the place where the tort was committed (locus delicti commissi).¹⁹ German law considers the tort to

have been committed both at the place of the act and at the place of the effect, since both elements are necessary to constitute a wrong.²⁰ Thus the courts at both places would be competent,²¹ and the Code of Civil Procedure provides that when more than one court is competent, the plaintiff may choose the court in which to bring his action.²² Therefore, the court at the place where plaintiff was injured by defendant's pollution would possess "international jurisdiction" over the action, and plaintiff could choose to bring his action there.²³

It has been suggested that considerations governing conflicts of jurisdiction and choice of law are the same in German law²⁴ and that therefore the concerned court should first determine the applicable law, and then allow the court whose law should be applied to exercise jurisdiction.²⁵ As will be seen below, German courts in such cases have applied French law since it was more favorable to the plaintiff. According to this theory, the German court should then decline to exercise jurisdiction in favor of the appropriate French court. However, as discussed in the next subsection, French jurisprudence indicates that a court in France would interpret Article 5, paragraph 3 of the European Convention on jurisdiction and judgments as designating the court at the place of the injury as the competent court. The French court would then refer the case back to the German court, which would have to decide whether indeed to exercise jurisdiction, but to apply French law, or to decline to exercise jurisdiction, leaving the plaintiff without a forum. Although the unjust result of the latter option makes the former the obvious choice, it is submitted that the problem could be avoided altogether by simply applying the Convention's rules for ascertaining the appropriate jurisdiction without reference to choice of law considerations.

One further possible basis for jurisdiction should be mentioned which would not be available in the majority of transfrontier pollution cases but which is noteworthy because of its exceptional nature. Section 23 of the Code of Civil Procedure allows an action against a non-resident defendant to be brought where such defendant has assets. The action is not limited by the value of the assets and the latter need not be related to the suit nor have any more than symbolic value. Even a claim of the defendant against the plaintiff will suffice, so long as it is not the result of a spurious lawsuit brought by the plaintiff against the defendant in order to establish a claim against plaintiff for expenses.²⁶ It is unlikely that the defendant in a transfrontier pollution case would have assets in plaintiff's country, however, and even if he did this section would be of little use since judgments based thereon are seldom recognized or enforced by foreign courts. In

fact, Article 3 of the European Convention on jurisdiction and judgments discussed above specifically excludes section 23 as a possible jurisdictional basis in actions against domiciliaries of contracting states.

(2) Suits in France

As in Germany, service of summons on the defendant cannot confer jurisdiction upon a French court.²⁷ The basic statutory provisions concerning international jurisdiction, Articles 14 and 15 of the Civil Code, endow French courts with jurisdiction in any case in which either the plaintiff or the defendant is a French citizen.²⁸ They confer a general competence, and do not determine the particular court in which suit is to be brought. These provisions are somewhat controversial since they apply irrespective of the residence or domicile of the parties or of the connection of the suit with France. Where they are applicable, a suit may be brought against a defendant having no contact with French territory at plaintiff's domicile or residence in France. Because of the harshness of these provisions, Article 3 of the European Convention on jurisdiction and judgments prohibits their invocation against domiciliaries of contracting states.

The rules of general competence embodied in Articles 14 and 15 are supplemented by provisions related to the subject matter involved which determine the court competent to try a given case (compétence interne). Thus Article 59 (12) of the Code of Civil Procedure provides that tort actions may be brought at the place where the tort was committed.²⁹ This provision was added to Article 59 by legislative enactment in 1923³⁰ primarily to allow automobile accident cases to be tried where the accident occurred; it was thus not intended to apply to transfrontier fact situations, and does not specify whether the tort is deemed committed at the place of the act or at that of the injury. But the application of this provision to multi-jurisdictional fact situations occurring entirely in France indicates how a similar provision, Article 5 (3) of the European Convention, would be applied in a transfrontier case.

The Cour de Cassation, France's highest court, has been faced twice with the question of whether a tort is "committed" at the place of the act or that of the injury, for the purpose of Article 59 (12) of the Code of Civil Procedure. The Court in both cases held that the phrase "tribunal du lieu du fait dommageable" (freely translated, the court at the place of the harmful occurrence) means "tribunal du lieu où le dommage s'est réalisé" (the court

at the place where the injury occurred),³¹ A commentator has concluded that this solution was justified by the fact that it is the place of injury where the series of events which combine to produce the damage find their culmination.³²

If French courts interpret Article 5 (3) of the European Convention likewise, which they presumably would, a French plaintiff injured by pollution from Germany could bring suit against the German defendant in the court at the place of the injury in France.

B. North America - Anglo-American Law

Competence of a court under Anglo-American law over a given dispute is based upon the court's jurisdiction over both the person of the defendant and the subject matter involved. At common law, personal jurisdiction was governed by the territoriality principle, and thus jurisdiction over the defendant traditionally had to be established by personal service of summons upon him within the territory covered by the court. Service of judicial process has the effect in the Anglo-American legal system of conferring judicial power over the person of the defendant. In the words of the American jurist, Oliver Wendell Holmes, "(t)he foundation of jurisdiction is physical power."³³ Extraterritorial service of process was unknown at common law, but it is now allowable in certain situations in both **the** United States and Canada pursuant to modern "long-arm" statutes.³⁴ Jurisdiction of Canadian and United States courts over the subject matter of a transnational pollution action would generally be present by virtue of the occurrence of an injury in the forum state caused by a wrongful act by the defendant, notwithstanding that the act was committed beyond the forum state's frontier.³⁵ Because establishment of personal jurisdiction would constitute the principal barrier in actions against foreign polluters, the following sections will deal only with the possibility under United States and Canadian law of asserting personal jurisdiction over a foreign polluter.

(1) Suits in the United States

Among countries in the Anglo-American legal orbit, the United States has especially well-developed rules concerning extraterritorial service of judicial process because of the large amount of interstate commerce fostered by the federal system. Accidents caused by out-of-state automobiles led to the adoption early in the century of "non-resident motorist statutes" which were the forerunners of the modern "long-arm" statutes. The former allow the assertion of

personal jurisdiction over an absent defendant involved in an accident in the forum state on the theory that by using that state's roads he impliedly designated the Secretary of State as his agent on whom process could be served.³⁶ But increased interstate commercial activity necessitated an even greater departure from the territoriality principle. Thus in 1945 the United States Supreme Court held that a state court could properly assert jurisdiction over an absent corporate defendant "doing business" in the forum states as long as it had "minimum contacts" with that state which would make it reasonable for defendant to be sued there.³⁷ Subsequent decisions have broadened this doctrine considerably, allowing jurisdiction to be based on, inter alia, one life insurance contract entered into by mail with a domiciliary of the forum state³⁸ and a defective coach body, manufactured in England, which caused an accident in Hawaii.³⁹

Traditionally, the injury in the forum state which led to the assertion of jurisdiction over the absent defendant must have "arisen out" of at least minimal activities by the defendant in the forum state, or have at least been the result of some relationship voluntarily undertaken by the defendant with that state. The degree of purposefulness required of the defendant in order to establish this relationship is eroding concomitantly with, and because of, the constant expansion of interstate economic activity. Thus many new statutes allow assertion of jurisdiction over an absent defendant solely on the basis of harmful consequences within the state caused by an act committed outside the state. Injury to the health or welfare of a state's citizens in the United States foreseeably caused by actions in Canada - such as emitting pollutants into the air or water - would appear to constitute an entirely sufficient basis for the assertion of jurisdiction over the Canadian actor.⁴⁰ The justification for such jurisdiction is especially compelling in view of the strong state interest in protecting the health and general welfare of its citizens. This view is supported by the Second Restatement of Conflict of Laws :

Sec. 37. Causing Effects in State by Acts Done Elsewhere

• • • •

- a. Rationale The state may exercise judicial jurisdiction over the defendant if the effects which should have been anticipated and which actually occurred are of a sort highly dangerous to persons or things. This is so even though the defendant has no other relationship to the state.⁴¹

A new statute designed specifically to allow assertion of jurisdiction over foreign polluters is the Minnesota Environmental Rights Act of 1971.⁴² This law authorizes state courts to

exercise personal jurisdiction over any-
foreign corporation or any nonresident
individual... if... the foreign corporation
or nonresident individual:

. . . .

(b) Commits or threatens to commit any act
outside the state which would impair, pollute
or destroy the air, water, land, or other
natural resources located within the state

. . . .⁴³

The best available example of how a typical long-arm statute might be used in a transnational pollution action between the United States and Canada is afforded by the State of Ohio's litigation against, inter alia, Dow Chemical Company of Canada. Ohio's long-arm statute allows state courts to exercise extraterritorial jurisdiction on the basis of either (1) the commission of a tortious act within the state, or (2) commission of a tortious act outside the state which gives rise to injuries within the state, where the defendant has business contacts with the state. The first part of this statute, basing personal jurisdiction on the commission of a tortious act within the state, has been held sufficient to confer jurisdiction over nonresidents where only the injury occurs in the state.⁴⁴ Ohio first sought to bring its suit against the chemical company in the U.S. Supreme Court. In declining to exercise original jurisdiction over the case, the Court, per Mr. Justice Harlan, delivered the following dictum:

The courts of Ohio, under modern principles of the scope of subject matter and in personam jurisdiction have a claim as compelling as any that can be made out for this Court to exercise jurisdiction, to adjudicate the instant controversy, and they would decide it under the same common law of nuisance upon which our determination would have to rest. In essence, the State has charged Dow Canada and Wyandotte with the commission of acts, albeit beyond Ohio's territorial boundaries, that have produced and, it is said, continue to produce disastrous effects within Ohio's own domain. While this court, and doubtless Canadian courts, if called upon to assess the validity of any decree rendered against

either Dow Canada or Wyandotte, would be alert to ascertain whether the judgment rested upon an even-handed application of justice, it is unlikely that we would totally deny Ohio's competence to act if the allegations made here are proved true.⁴⁵

This statement suggests that, under like circumstances, jurisdiction may properly be exercised over an absent defendant conducting activities unrelated to the forum state if those activities produce harmful effects within the state.

To summarize, it would appear entirely consistent with procedural due process requirements, as interpreted by the Supreme Court, to require a Canadian polluter to defend an action based on the effects of his activity if:

- (1) it was clearly foreseeable that, as a result of his activity, injury could occur within the forum state,⁴⁶ and
- (2) "the effects which could have been anticipated and which actually occurred are of a sort highly dangerous to persons or things."⁴⁷

(2) Suits in Canada

Canada's historical ties with the British Commonwealth have left a distinctive imprint upon the Canadian legal system. This is evident in the Canadian rules concerning extraterritorial service of summons, which are generally set forth in Provincial statutes modeled upon Order 11 of the English Rules of the Supreme Court.⁴⁸

One of the situations in which extraterritorial service is permissible under these statutes is where "the action begun by the writ (of summons) is founded on a tort committed within the jurisdiction" ⁴⁹ Similar provisions in many United States long-arm statutes such as the Ohio law discussed above have been interpreted to allow extraterritorial service where only the injury occurs in the jurisdiction. In Canada, however, there has been some confusion over whether a trans-boundary tort can be considered "committed within the jurisdiction" where plaintiff was injured, for the purpose of allowing service upon an absent defendant. An examination of leading Commonwealth cases on the issue of where the tort is committed in multiple contact situations indicates, however, that in a transfrontier pollution case the tort would indeed be deemed committed at the place where the injury was sustained. Although these cases

reach different results as to where the locus delicti commissi is, strict regard as to the nature of the tort involved reveals a consistent pattern: Torts involving some element of intent are deemed committed at the place of injury⁵⁰ while the tort of negligence is considered to be committed where the duty to plaintiff was breached, which is often the place of the act.⁵¹ Since most transnational pollution injuries would be foreseeable consequences of defendant's activity, actions for compensation would normally be based upon the intentional torts of nuisance and trespass. These torts would probably be considered to be committed at the place of injury, thus allowing extraterritorial service of summons pursuant to the above provision. A review of several cases analogous to a transnational pollution action will help to illustrate this point.

A line of defamation cases involving communications from the United States to Canada demonstrate that Canadian courts, like those in the United States, will allow extraterritorial service of summons upon defendants who could have foreseen that their actions in the United States would have harmful consequences in Canada. All of these cases were decided under provisions worded identically with the portion of the English Order 11 quoted above.

Perhaps representative of these cases is Jenner v. Sun Oil Co., in which an Ontario plaintiff sued to recover for allegedly defamatory statements broadcast by a radio station in the United States and heard in Canada. In challenging an order allowing service of summons outside of Ontario, defendant argued that the tort, if any, was not committed within Ontario. In support of this contention he cited two cases in which negligence outside the jurisdiction caused injury within the jurisdiction. The court dismissed the defendant's objection on the ground that the negligence cases he relied upon were not apposite. Instead, the court regarded the leading English case of Bata v. Bata,⁵³ in which defamatory letters written in Switzerland were published in London, as controlling. The English Court of Appeals in that case held the tort to have been committed in England since the publication, the essence of actionable defamation, occurred in London. The Jenner court followed this reasoning and held that extraterritorial service was proper since radio broadcasts are made to be heard, the hearing or publication - the essence of defamation - occurred in Ontario, and defendant reasonably could have foreseen that the broadcast would be heard there.

Applying the approach articulated in the Bata and Jenner cases to the types of torts normally involved in trans-frontier pollution situations, the locus commissi of nuisance would be where the interference with plaintiff's use and enjoyment of his property occurred, and of trespass, where the invasion of plaintiff's interest in the exclusive possession of his land occurred. This analysis indicates that service of summons upon absent defendants pursuant to Canadian Order 11-type statutes would be proper in trans-boundary pollution cases sounding in trespass or nuisance.

The two leading Canadian and English cases which have sometimes been taken as holding that the tort occurs at the place of the act⁵⁴ may be distinguished on the following grounds: Both were cases involving an allegedly negligent manufacture in one jurisdiction of a product which caused injury in another. Although neither held the tort to have been committed at the place of injury, this is not to say the tort was deemed committed at the place of the act, as such. The better view was expressed by an Australian Court of Appeal which observed that the relevant issue in negligence cases is where the defendant's duty to the plaintiff was breached, since that is the essence of negligence. The Australian court went on to point out that the breach of duty in the Canadian and English cases happened to occur at the place of the act and not at the place of the injury, as in the Australian case. Thus it would seem that even in negligence cases where the duty to plaintiff was breached at the place of the injury, extraterritorial service of process would be proper under Canadian law.

CHAPTER 3

SUITS AT THE PLACE OF THE INJURY : CHOICE OF LAW

Having concluded that, generally speaking, jurisdiction could properly be asserted over a foreign defendant on the basis of the harmful effects in the forum state of his emissions we may turn to a consideration of which country's law would be applied to determine the parties' rights and liabilities.

In the absence of a statutory directive on choice of law, the principle generally applied in both the Civil and Common Law systems in tort cases is that the lex loci delicti (law of the place of wrong) governs liability and other substantive matters.⁵⁵ The formulation of this rule leads to difficulties in a transnational context comparable to those caused by the similar provision for selecting the competent court in the European Convention on jurisdiction and judgments.⁵⁶ Thus different countries take divergent positions on the definition of the place of wrong. The three basic solutions adopted by the countries under consideration are that for choice of law purposes the place of wrong is: (1) the place of the defendant's conduct; (2) the place of the injurious impact; or (3) both the place of the act and that of the injury.

To be sure, the consistency with which these rules are applied by the respective countries and the predictability of the result in trans-jurisdictional tort cases are often uncomfortably low. The situation is further complicated by a plethora of modern theories, especially in the United States. Since it is rarely certain which of these theories a given court will apply - and thus what the result will be - the reasonable expectations of the plaintiff as to his right to redress, and of the defendant as to the rightfulness of his conduct, may well be disappointed.

This section will review the methods used in each of the four countries for selecting the applicable law and will ascertain, insofar as possible, the result each method would produce.

A. Europe - Civil Law(1) Germany

Although there is only implicit statutory authority for the application of the lex loci delicti in transnational tort cases,⁵⁷ German courts and writers generally agree that it is the governing choice of law principle in that area.⁵⁸ Modern German practice does not become entangled in the controversy over whether the tort occurred at the place of the act or that of the injury, but rather, as between those places, applies the law most favorable to the plaintiff.⁵⁹ The court, rather than the plaintiff, makes the determination as to which law is most favorable.⁶⁰

This approach, known as the "Günstigkeitsprinzip", has been applied by German courts in transnational pollution cases.⁶¹ In each of two cases, one involving air pollution and the other involving water pollution, a provision of the French civil code dealing with torts was applied because that provision does not require proof of fault on the part of the defendant. Under the comparable provision of the German civil code, the defendant must have acted culpably in order for liability to attach.

There has been some controversy over the reason for applying the law most favorable to the plaintiff, rather than that most favorable to the defendant.⁶² The rationale offered by one of the foremost authorities in the field, Professor Gerhard Kegel, is that there is generally more sympathy for the victim than for the tortfeasor. The defendant can therefore be held liable for acts which were allowed by the law where he acted but which were not allowed under the law of the place of the injury.⁶³

Application of German choice-of-laws rules is illustrated in the case discussed in Chapter 4 on Remedies, below.

(2) France

Although the lex loci delicti rule is followed in France,⁶⁴ neither decisions nor legal texts are in agreement on the question of whether the place of wrong is that of the act or injury. The lack of a clear pronouncement on this subject by the highest French court, the Cour de Cassation, has led scholarly authorities to draw an analogy between this issue and the related question of which court is competent over such cases.⁶⁵ As pointed out in the above discussion of judicial competence, the Cour de Cassation has indicated that for jurisdictional purposes, the tort is to be localized at the place where the injury occurred. This approach is said to have equal validity no matter whether internal or international law on the one hand, or judicial

or legislative competence, on the other, are concerned. Since torts give rise to liability only when they result in damage, it is reasoned, the place where the legal obligation is incurred is determined definitively by the occurrence of the injury.⁶⁶

Two recent decisions lend support to this analysis. In a case decided in 1955,⁶⁷ the Paris Court of Appeals held that although the wrongful conduct involved had occurred in Portugal, the fact that the resulting injury occurred principally in France justified the application of French law. This holding has generally been taken as authority for the lex injuriae rule, but it has been pointed out⁶⁸ that the facts of the case did not lend themselves to localization of the different elements of the tort in distinct countries.

The second case supporting the place of injury rule is a 1957 decision of the Sarreguemines Civil Court⁶⁹ which explicitly applied the lex injuriae. In that case, the defendant's acts in France resulted in damage in Saarland (Germany), and the court held that compensation should be granted according to the law of the place where the social interest involved was violated, i.e., the place where the damage occurred, since it is there that the interests of the victim were invaded. This appears to be the only French decision which has squarely held that the "place of wrong", for the purpose of determining the applicable law, is the place where the injury occurred. But it is probable that a French court faced with the question of which law to apply in a transfrontier pollution case would follow this decision, for lack of controlling statute, and providing the decision was supported by scholarly authority.

The majority of French writers have favored the place of the injury over that of the act.⁷⁰ This choice is based upon an analysis of the purpose served by civil liability: the law of responsibility has evolved into penal and civil branches, the former being directed toward deterrence of illicit activity and the latter being oriented toward compensation for damage and protection of the victim. Since rules of civil responsibility have primarily a compensatory function, therefore, the injury suffered would appear preferable as a localizing element to the wrongful act.⁷¹ Moreover, Professor Battifol points out that private international law tends to localize legal relationships on the basis of their externally manifested elements, in order to protect the interests of third parties and to achieve certainty of result. Since the law of responsibility adjusts the rights of the parties at the place where the damage occurs, and because civil liability is directed more toward compensation than deterrence, he reasons, it is preferable to apply the lex injuriae.⁷²

The only French writer preferring the place of the act appears to be Professor Bartin.⁷³ He argues that fairness to the defendant demands application of the lex actus since that rule is one which the actor knows or should know. Application of the law of the place where the injury occurred should be avoided according to Bartin, since it would result in imposing liability for an act which was not actionable where committed. This position has been criticized on the ground that the actor should know where his actions will take effect, and thus application of the lex actus cannot be justified solely on the ground of predictability when dealing with delictual responsibility.⁷⁴

B. North America - Anglo-American Law

(1) United States

Explicit statutory directives on choice of law are rare in the United States.⁷⁵ Courts have therefore traditionally followed the lex loci delicti principle and located the place of wrong at the place where the injury occurred.⁷⁶ The lex loci delicti rule has now been largely discredited, however, principally because of the following shortcomings: it often leads to fortuitous results, as where an accident occurred in state A involving parties both residing in state B; it sometimes frustrates the policies of states with closer relationships with the parties than the state where the injury occurred; and it does not allow for situations in which it would be more appropriate to consider the law of the place where the defendant acted, at least as a defense, especially if that law would have entitled him to act as he had.⁷⁷

The trend in the United States has been toward utilization of policy-oriented approaches, designed to achieve a socially desirable result. The two principal modern methods for identifying the applicable law are the "most significant relationship" approach, adopted by the Second Restatement of Conflict of Laws, and "governmental interest analysis" developed most notably by the late Professor Brainerd Currie.

The Second Restatement of Conflict of Laws would have courts apply the law of the state with the most significant relationship to the issue at hand. This state is to be selected in all types of cases in light of the following considerations:

- (a) the needs of the interstate and international systems,

- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.⁷⁸

The Second Restatement also provides specific criteria, or "contacts," for selecting the applicable law in different types of cases. Those to be utilized in tort cases are:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.⁷⁹

A court following this approach would plainly have a great deal of latitude within which to determine the applicable law and could, consistently with the above-quoted factors and principles, apply a different law to substantially identical fact patterns.

In transfrontier pollution cases, the only "relationship" between the parties would usually be the civil obligation created by the tort in question. Since the other factors to be considered in tort cases would also not point to one country or the other, it is difficult to offer a general prediction as to which law a court following this approach would apply. But it is quite possible that in a Canadian-American case it would make no difference which law applied, in view of the similar rules prevailing in the two countries. In this event, the court would simply apply its own law. If, however, Canadian law were more favorable to the defendant, the law applied by the American court might depend to a large extent upon the seriousness of the

injury, on the one hand, and the importance of defendant's activity, on the other. That is, if the damage that defendant's activity caused in the forum state were of a serious nature, and affected other forum citizens as well as the plaintiff, the court would most probably apply its own law in furtherance of its policy of protecting the welfare of its citizens. The plaintiff might be viewed in such a case as a "private attorney general," which is to say, as a representative of that segment of the public which suffered the injury. If, however, the defendant's activity were important to the economy of the foreign state or community, and if the injury within the forum state were relatively minor, the court might apply Canadian law to protect defendant's justified expectations and to promote harmonious relations between the countries involved.

The Second Restatement does state, however, that the law of the place of the injury is generally to be preferred over that of the place of acting for the reason that "persons who cause injury in a state should not ordinarily escape liabilities imposed by the local law of that state on account of the injury."⁸⁰ The lex injuriae is therefore to be applied both in cases of personal injury and injury to land "unless, with respect to the particular issue, some other state has a more significant relationship...to the occurrence and the parties, in which event the local law of the other state will be applied."⁸¹

The second leading modern approach to conflict-of-laws problems, articulated by Professor Currie, would have the court apply the law of the state with the paramount interest in the particular issue involved.⁸² This state is to be selected by examining the relevant policies which underlie the conflicting rules, in order to determine the relative importance of those policies. If the court finds that the forum state and another state have equal interests in effectuating their policies, a "true conflict" arises, which the court is to resolve by applying its own law. In fact, the court is to apply the lex fori whenever the forum has a legitimate governmental interest in giving effect to the policies underlying its law.

Selection of the state with the paramount interest becomes difficult when the states involved all have legitimate interests in the application of their laws; in such a case, while the court would endeavor to accommodate the relevant policies of all interested states, it is probable that, under the Currie approach, the forum would apply its own law. Where the injury occurred in the forum state, the court would consider its own interest in providing a remedy for its residents injured by extrastate acts and the interest of the defendant's state in fostering and protecting the

defendant's activity. The court might well conclude that its interest was paramount and apply its local law.

One writer maintains that this approach was developed for purely interstate cases within the United States, and is not applicable to international conflicts cases.⁸³ However that may be, weighing the relevant policies of the states involved is part of the choice-of-law process which an American court following modern conflicts theory would not be likely to omit.⁸⁴

(2) Canada

As in the United States, there is no one clear choice of law rule which a Canadian court would be certain to apply in a transnational tort case. In a case which has been described as the chief English authority on the law applicable to tort cases with foreign elements,⁸⁵ two justices, in dicta, subscribed to the theory that the law of the place of the defendant's act governs. However, in a subsequent case⁸⁶ involving allegedly defamatory letters written in Switzerland and published in London, the English Court of Appeal gave effect to the law of the place of the injury by holding that defamation is committed where the defamatory statement is published. Approaches advocated by leading English authorities would adjudge the foreign tort according to the "social environment" in which it was committed,⁸⁷ or would regard the tort as having occurred in any country which was "substantially affected" by the defendant's activity and the law of which is likely to have been in the reasonable contemplation of the parties.⁸⁸

Notwithstanding the above case law and scholarly opinion, however, Canadian and other⁸⁹ authorities have taken the position that Commonwealth courts actually apply the law of the forum (lex fori), giving effect to the foreign law only as a defense.⁹⁰ Professor J. Castel maintains that once the Canadian court has satisfied itself that it has proper jurisdiction over the action under the rules articulated in the English case of Phillips v. Eyre,⁹¹ it will apply the lex fori to the question of liability.⁹² In addition to defenses available under the foreign law, the defendant may assert defenses under the lex fori.⁹³

This practice has been criticized by Professor Castel as being "difficult to support . . . from the point of view of principle and justice,"⁹⁴ although it has the advantages of certainty and predictability. Professor J. Falconbridge is of the view that the courts have erroneously taken the statements in Phillips v. Eyre relating to limits on the court's jurisdiction as applying to choice-of-law in

tort conflicts cases.⁹⁵

If the conclusions of the Canadian writers are accepted as to the law actually applied by Canadian courts in transnational tort cases, namely the lex fori, there would appear to be little doubt as to the law which would govern a trans-frontier pollution case.

CHAPTER 4

SUITS AT THE PLACE OF THE INJURY : REMEDIES

The types of remedies which might be sought in a transnational pollution suit fall essentially into two classes: those which will compensate plaintiff monetarily for a legal injury he has suffered ("money damages"); and those which will prevent a threatened injury from occurring or an existing injury from continuing ("injunctive relief"). Generally speaking, the legal norms on which plaintiff might base his claim for relief are defined principally by case law in the Anglo-American legal system and by statute in the Civil Law system. These substantive law bases for relief are often linked to a particular remedy, and they will therefore be treated in conjunction with the discussion of remedies under the law of each country.

A. Money Damages

Courts are well accustomed to granting money damages in transnational actions, and ordering a citizen of a foreign country to pay indemnity is not deemed to constitute an improper interference with that country's sovereign affairs. The same problems generally arise in wholly domestic actions seeking monetary compensation for pollution damage as in those involving transfrontier fact situations. Since the extensive treatment which these issues have received in terms of purely local cases⁹⁶ is equally valid for transfrontier actions, it will suffice for present purposes to review the major substantive elements of a pollution suit, illustrating their application in transnational cases where possible.

One variation on the damages remedy which may be judicially tailored in some countries to fit specific situations is an order that defendant pay plaintiff a sum periodically to indemnify him for a continuing disturbance.⁹⁷ This remedial device poses problems in a transnational context not present in a wholly domestic situation: Once defendant has left the forum state the court will lack machinery to enforce a judgement ordering defendant to make periodic payments to plaintiff. Courts have thus been reluctant to grant such relief in transnational cases.⁹⁸ Apart from enforcement problems, this remedy is undesirable because it allows the defendant to continue his polluting activity while in effect

paying the plaintiff for the right to do so. This may engender difficulties in a transnational suit if defendant's payment of compensation for a permanent interference with plaintiff's interest, e.g., a continuing air pollution disturbance, is deemed to create a servitude over plaintiff's land." As pointed out below, damages would be the only available remedy in such a case if enjoining the defendant's activity were considered an undue interference with the sovereignty of the source state. Nevertheless, a court might be reluctant to create a right in a foreign defendant to pollute the air of the forum state in perpetuity, and may wish instead, in appropriate circumstances,¹⁰⁰ to grant relief only for existing damage, leaving the plaintiff to bring subsequent suits for future damage.¹⁰¹

(1) Europe - Civil Law

An action for damages brought in France or Germany against a foreign polluter would most likely be based, at least in part, on the provisions of the applicable law governing tort, or delictual liability. These provisions will be briefly described and their use in actual cases illustrated.

Civil liability under German law is governed principally by section 823 of the Civil Code (Bürgerliches Gesetzbuch, or BGB). That provision reads as follows:

(1) Whoever unlawfully injures, intentionally or negligently, the life, body, health, freedom, property or other right of another is obligated to compensate him for the damage arising therefrom.

(2) The same obligation applies to anyone who infringes a statute intended for the protection of others. If an infringement of this statute is, by its terms, possible without fault, the duty to compensate arises only in case of fault.

(Author's translation.)

Section 823 (1) thus requires that defendant have unlawfully caused an injury to one of the enumerated rights through either intentional or negligent conduct. Defendant's conduct is deemed unlawful if it is not legally justifiable (e.g., under the rules of self defense) or excusable (e.g., pursuant to an administrative permit). Causation must be established by rules similar to those in Anglo-American law discussed below: the injury must not have occurred but for defendant's conduct (cause in fact); and the injurious consequences must not have resulted in an extraordinary manner from defendant's act (proximate cause or adequacy of causation).¹⁰² "Negligence" (Fahrlässigkeit) is defined as a failure to use ordinary care.¹⁰³ Section 823 (2) BGB imposes

liability for damage caused through infringement of a legal norm (i.e., statutory standards or provisions, regulations, ordinances, etc.)¹⁰⁴ intended to protect not only the public, but also the plaintiff or a definite class of persons against the alleged injury.¹⁰⁵ It is thus analogous in this respect to the doctrine of "negligence per se", discussed below, which allows defendant's violation of a statutory norm to be used to establish a presumption or evidence of negligence. Section 823 (2) requires in its second sentence, however, that fault be proved even if the statute could be violated in the absence of intent or negligence. A final prerequisite to recovery under paragraph (2) is that defendant's conduct be proven wrongful as required by 823 (1).

Civil responsibility under French law¹⁰⁶ is governed in the first instance by Articles 1382 et seq., of the Civil Code. Article 1382 provides that every act of a man which causes damage to another obligates the one through whose fault it occurred to make reparation. Under Article 1383, everyone is responsible for the damage which he has caused not only by his own act, but also by his carelessness or imprudence.

Article 1384 provides, in pertinent part, that one is responsible not only for the damage he causes by his own act, but also for the damage caused by persons for whom he is responsible or by things under his care.

Generally speaking, to establish defendant's liability plaintiff must prove that he sustained damage, that the defendant was at fault, and that the defendant's act caused the damage. Where the damage was not caused intentionally, French law recognizes a liability similar to that for "negligence" in Anglo-American law, based upon defendant's failure to exercise ordinary care and diligence (Article 1383); Article 1383 has been interpreted as imposing a high standard of conduct, so that a slight amount of fault can give rise to delictual responsibility. Liability based upon fault is, however, restricted to damage which is caused directly by the personal acts of the defendant (responsabilité du fait personnel). The increasing number of accidents caused by machines or other intervening agencies led to the interpretation of Article 1384 as allowing imposition of liability without fault under certain circumstances.¹⁰⁷ Instead of totally abandoning the fault requirement in such cases, however, French courts have shifted the burden of proof after a prima facie showing by plaintiff; the presumption against the defendant becomes stronger as the dangerousness of his activity increases.¹⁰⁸

French jurisprudence concerning "neighborhood disturbances" (troubles de voisinage), in some respects analogous to the

Anglo-American law of nuisance, allows imposition of liability without fault upon polluting activities. This liability may be based upon Article 1384, and arises, for example, where disturbances caused by an industry exceed those which could normally be expected in the vicinity.

It should be noted that recovery for a civil wrong in France can be had in criminal, as well as civil proceedings. If an act which causes private injury is contrary to the public good and defined by law as a criminal offense, the injured party may join his civil action to the criminal proceedings. He thus becomes a civil party to the criminal proceedings and both actions are tried by the criminal authorities.¹⁰⁹

Once liability has been established, the court may order reparation in kind (réparation en nature) or in the equivalent (réparation en équivalent). The former - which generally amounts to restoration of the injured interests to their state before the damage - has much in common with injunctive relief, and will accordingly be discussed in the section on injunctions, below. If reparation in kind cannot be effected, the injured party must accept compensation in the equivalent. This consists of monetary compensation measured on the basis of the damage suffered, plus interest.

The principal provisions of German and French law which would be applicable in a transfrontier pollution action for damages are well illustrated by an air pollution case decided in 1957 by the Court of Appeal (Oberlandesgericht) in Saarbrücken, Germany, Poro v. Houillières du Bassin du Lorraine (HBL).¹¹⁰ Although the respective German and French provisions on civil liability are not similar as in the case of the substantive bases available under Anglo-American law, it will be useful to discuss them together in the context of the Saarbrücken case for comparative purposes. Other pertinent cases and fact situations will also be discussed to highlight issues not covered by the principal case.

The action arose out of a fact situation which is in many ways typical of the kinds of transboundary air pollution disturbances which have given rise to disputes in the past.¹¹¹ A power plant on the French side of the Saar River, which commenced operation in 1954 as a subsidiary of the state-owned Lorraine Basin Mining Company, emitted smoke and coal dust which affected the neighboring part of the Saar Valley, including the plaintiff's community of Kleinblittersdorf on the German side of the Saar. Plaintiff owned and operated a resort consisting of several vacation cabins and a restaurant with an adjoining garden. He claimed that effluents from the plant had destroyed various

fruit and garden crops, and had rendered his cabins unrentable and garden terrace unusable. As a result, he claimed money damages for loss of earnings in the amount of 1,521,580 French francs for both the years 1954 and 1955. Plaintiff alleged that before the plant's establishment the region on both sides of the Saar was purely agricultural, that defendant's activity was the only one in the area which emitted pollutants, and that therefore the disturbances caused by the plant were not usual for the locality. It was further contended that the defendant had acted wrongfully in that the plant's emission control devices were insufficient and defective: While modern devices attain 99% efficiency, the defendant had only required an efficiency of 97% and actually achieved a level of 88%. It was therefore alleged that defendant had committed a delict, the constituent elements of which occurred in France and Germany, and that the law of the place of the wrong would be both the law of France and that of Germany. The plaintiff claimed that under the German choice of law rule, referring to the law most favorable to the plaintiff, French law (Art. 1384 Code Civil) should govern the case since it did not require proof of fault. But it was asserted that the result would be the same if German law (sec.823 BGB) were applied since the action was also well founded under its provisions.¹¹²

For its part, the defendant claimed that the suit was inadmissible because it was actually directed against the French government: The power plant was operated for the benefit of the French State and the latter was therefore a necessary party to the action; but a foreign state, the defendant pointed out, cannot be sued before a German court. It was further alleged that the plaintiff's loss of business was due to the unusually bad weather conditions in 1954 and 1955 and to plaintiff's mismanagement. The defendant disputed plaintiff's claim that the use of its property was unusual for the vicinity, arguing that the whole Saarland is an industrial area in which a substantial degree of air pollution is normal. Furthermore, the defendant pointed out that it had been granted a permit to operate its facility by the competent French agency, and therefore maintained that it was entitled to emit the allegedly offensive matter. To the plaintiff's claim that it had acted negligently in failing to provide proper emission control devices, defendant replied that the plant was built after careful study according to the most current state of technology and that the emission control system was constructed by two reliable firms with experience in this area. In short, defendant claimed that no more could be done to prevent its plant from affecting property in its vicinity. With respect to the applicable law, defendant argued that the dispute should be decided according to German law, since the latter refers to the whole law of France, including

French conflict of laws rules, and these rules refer back to the law of the place of injury.¹¹³

The court began by taking up defendant's contention that its status as a quasi-public corporation exempted it from suit before a German court. It held that while foreign states are exempt under section 18 of the Judicature Act (Gerichtsverfassungsgesetz), commercial enterprises of foreign states in the form of legal entities are subject to German legal process.

The court next considered which law to apply to plaintiff's claim, which was based solely on provisions of the respective German and French codes governing delictual liability. Following the German choice of law rule, which refers to the law most favorable to the plaintiff,¹¹⁴ the court determined that Article 1384 of the French Civil Code should be applied since it required no proof of fault in contrast to section 823 of the German Civil Code. The court noted that plaintiff could establish a right to recovery under Article 1384 CC simply by showing that the defendant's power plant unlawfully caused him damage. Under section 823 BGB, on the other hand, plaintiff must not only demonstrate that his property or business was unlawfully injured by defendant, and that he suffered damage thereby, but he also must prove fault on the part of the defendant. Further, plaintiff's claim under French law is not limited to the tangible damage to his property or business, but extends also, in contrast to German law, to compensation for intangible injury. The court's decision to apply French law on the ground that it requires no proof of fault in contrast to German law has been contested in a comment on the case by Dr. Klaus Boisseree.¹¹⁵ Dr. Boisseree agrees that section 823 BGB usually affords little protection to those affected by industrial emissions because it is based on the fault principle. He notes, however, that another possibility afforded by German law would be the application of section 1004 BGB in conjunction with section 26 GewO (Gewerbeordnung - Trade and Industry Act). When administratively licensed industries are involved, the latter provision converts the claim for an injunction under section 1004 BGB into a claim for damages which, unlike a claim under section 823, is not dependent upon proof of fault. To this extent, German Law recognizes strict liability. To be sure, the utility of section 1004 BGB is considerably limited by the obligation under section 906 BGB to tolerate substantial interference with the use of one's property if such interference is usual for the locality and if it cannot be prevented by economically reasonable measures.

Finally, on the choice of law issue, the court dealt with the question whether to apply only the substantive delictual

provision of French law, or whether to look to the "whole law" of France, including its choice of law rules. It concluded that the principle referring to the law most favorable to the plaintiff excluded a reference back to German law. Moreover, the court reasoned, even if the whole French law were applied, the same result would follow since French private international law refers to the law of the place of the act in tort cases, not to that of the place of the injury as contended by defendant. Hence, French law would be applied as the lex actus.¹¹⁶ The court took note of the effect a reference back to German law would have upon the French permit under which the plant was operating. It reasoned that the permit could not be recognized in Germany with the effect that the plaintiff would have the possibility of suing for an injunction under sections 1004 and 903 BGB free of the usual defenses available to licensed facilities under sections 16 and 24 GewO.

Therefore, French private international law would, by referring back to German law, deprive its own administrative acts and their legal bases of their effectiveness and subject French citizens and corporations to foreign legal rules. This, concluded the court, could not be the intention of the French legal order. In his comment on this decision, Dr. Klaus Boisserée took exception to the court's analysis of the effect of the French permit. He argued that section 26 GewO is based on the theory that where protecting the public from dangerous industrial facilities is concerned, precedence is to be accorded public, or administrative law over private law. This priority would, in Boisserée's view, be accorded to the foreign as well as the domestic administrative legal order.¹¹⁷

The court next turned to defendant's contention that it should not be liable for any injury suffered by plaintiff because its emission control devices were constructed in accordance with the latest state of technology. It held that this fact was inconsequential since under Art. 1384 CC the fault of the party causing the injury is irrefutably presumed.¹¹⁸ The only defenses to liability are (1) proof by defendant that the damage was brought about by an act of God, by accident or through the fault of the plaintiff, or (2) that the defendant was entitled to cause the damage.¹¹⁹ The court found that a right of the latter nature was not included in the plant's permit and could not be implied from French "neighborhood law," which obliges a neighboring landowner to bear only such disturbances as would be present in a normal neighborhood relationship.¹²⁰ The court found that the plant's emissions of soot and coal dust considerably exceeded the amount usually present in the locality before the plant's construction. It was further considered evident that an industrial use of property such as defendant's was not usual in that portion of the Saar Valley, in the

contemplation of section 906 BGB, and that plaintiff's community of Kleinblittersdorf had a rural character prior to the establishment of the power plant.¹²¹

Since the trial court had determined that the plaintiff had suffered injury due to the operation of defendant's plant, the court of appeals held that from the standpoint of defendant's liability it was irrelevant that there may have been other reasons (e.g., poor weather conditions or plaintiff's mismanagement) for plaintiff's loss of earnings. So long as these other possible causes would lead only to a reduction in the amount of defendant's liability, and not to an elimination thereof, they could be reserved for consideration in the subsequent proceedings on the amount of damage for which defendant would be liable.¹²²

Finally, the court stated that even if the view were taken that French law would refer back to German law, the action would be well founded under section 823, paragraph 1 BGB. The plaintiff's property and business, "other rights" in the sense of 823 (1), were damaged by the coal dust and ashes emitted by defendant's plant. These effects were unlawful since the activity was not licensed by the competent German agency according to section 16 GewO, and the effects themselves were not "usual" as intended by section 906 BGB. The defendant's conduct was culpable since defendant had intentionally caused injury to the plaintiff. That is, it was reasonably foreseeable that the necessary consequence of defendant's activity would be an injury to plaintiff. In any event, the operation of the plant was continued after it became known to the defendant that the promised degree of effectiveness of the filtering device had not been achieved. Lastly, liability could also be found to exist under paragraph 2 of section 823 since section 1004 BGB may be considered a provision intended for the protection of others in the sense of that paragraph, and the defendant acted culpably as demonstrated above.

The principles of German and French law applicable to a transfrontier water pollution action may be briefly illustrated by reference to two cases in which damage was caused in Germany as a result of acts in a foreign country. In the first case, about 60 tons of heavy heating oil were emptied into Lake Constance from an industrial storage facility in Austria, killing fish and birds and thereby infringing fishing and hunting rights, and also polluting the bathing area on the German shore and endangering the water supply of German communities.¹²³ Although the case was settled before it came to trial, it offers useful insights into the legal effects of this type of fact situation. Assuming suit were brought by an injured party in a German court of competent jurisdiction, the question would arise under the German

choice of law rule, whether to apply Austrian or German law as the law most favorable to the plaintiff. Under the Austrian Civil Code, the defendant would be liable for damage caused through his fault;¹²⁴ the Austrian Water Rights Law absolves licensed facilities of liability when the injury is caused by an act of God or when the injured water right is not entered in the water register. The applicable German provisions, in addition to section 823 BGB, would be Article 37 of the Bavarian Water Law and section 22 of the federal Wasserhaushaltsgesetz (Water Resources Management Act).¹²⁵ The former imposes liability upon one who introduces harmful substances into public waters thereby causing injury to other rightful users of the water; defendant's liability is not dependant upon proof of fault. Section 22 of the federal law guarantees individuals injured by the introduction of foreign substances into ground or surface waters the right to claim monetary compensation. This right is also not conditioned on proof of fault, and strict liability is extended to owners of facilities from which substances are consciously emitted, albeit without the assistance or against the will of the owner, which cause damage. The only defense available is that the injury was caused by an act of God. Since the German provisions, apart from section 823 BGB, do not require proof of fault, they would be more favorable to plaintiff and would be applied under these facts.

The second water pollution case, which was decided by the Saarbrücken district court in 1961,¹²⁶ involved a sawmill on the German part of the Rossel River which was powered by turbines installed in the river pursuant to a registered water right. A French mine upstream on the Rossel dumped 8,000 and more tons of mud into the river each day, which muddied the river considerably and eventually fouled plaintiff's turbines. Plaintiff claimed that defendant had violated French and German water quality provisions, that it could avoid muddying the river through technically and economically reasonable measures, and that it was therefore liable in tort to compensate plaintiff for its damages. Defendant contended that Germany was obligated under a treaty with France to maintain water quality in German territory and that therefore defendant was not liable for the injury to plaintiff. The court held that defendant was liable to plaintiff under Article 1384 of the French Civil Code, the law most favorable to plaintiff. The court noted that Article 1384 imposed liability without proof of fault upon the owner of a thing which causes damage to another and that this presumption of responsibility could be rebutted only by proof that the injury was due to an act of God, accident or causes not attributable to the defendant.¹²⁷ Partial responsibility of the plaintiff would lead to apportionment of liability for the damage. In contrast, section 24 of the

Prussian Water Law - the applicable German provision - would relieve defendant from liability for unlawful pollution upon a showing that the care and diligence normally required to prevent water pollution was observed, i.e., that defendant had not acted negligently.¹²⁸ French law was therefore applied because of the more liberal defense available under the German provision. The court concluded by noting that defendant's liability under Article 1384 CC was not excused by Article 8 of Annex 8 to the Saar Treaty, since Germany had not therein undertaken the obligation to purify the Rossel, but had merely agreed to take the necessary measures to ensure that water quality was maintained, and in particular to encourage formation of cooperatives and associations to that end.

(2) North America - Anglo-American Law

The principal substantive law bases for an action to recover monetary compensation for pollution injury under Anglo-American law are nuisance, trespass, interference with riparian rights, negligence and strict liability.¹²⁹ The first three of these theories define specific legally-protected interests while the remaining two provide rules for determining when liability should attach to defendant's conduct. Thus, a substantial and unreasonable interference with plaintiff's use and enjoyment of his land constitutes an actionable nuisance;¹³⁰ an invasion of plaintiff's interest in the exclusive possession of his land constitutes a trespass;¹³¹ and an interference with the "natural flow" of a stream or with plaintiff's right to its "reasonable use"¹³² constitutes a violation of plaintiff's riparian rights. There are, of course, many situations in which a disturbance will interfere with more than one, or indeed all of these interests;¹³³ in such cases the theory chosen upon which to ground the action may have important procedural consequences, as, for example, where the statutorily designated period of time within which a nuisance action may be brought is shorter than that for a trespass action.¹³⁴ Other advantages of individual theories will be discussed below.

A nuisance may be either private or public: A public nuisance interferes with an interest shared in common by the general public, while a private nuisance affects an interest unique to one or several individuals. While an injured individual may sue to recover for a private nuisance, the right to redress a public nuisance is vested in the appropriate public official.¹³⁵ An injured individual may seek judicial abatement of a public nuisance, however, where he can demonstrate that he has suffered "special damage," i.e., damage different in quality, and not merely in quantity, from that experienced by the public at large. It is often

difficult to make such a showing in pollution cases, since large numbers of people are frequently affected by the activity in question. However, courts have allowed private actions by relatively large numbers of people to abate public nuisances where the plaintiffs' injury was distinguishable from that of the community, e.g., by virtue of the plaintiffs' proximity to the effluent source.¹³⁶

The theories of negligence and strict liability focus on the nature of defendant's conduct and activity, respectively. In order to establish defendant's liability under the negligence theory, it must be shown that defendant breached a duty of care owed to plaintiff and thereby caused the latter damage.¹³⁷ The burden of proving defendant's failure to conform to the appropriate standard of conduct - i.e., that he breached a legally recognized duty to plaintiff - rests upon the plaintiff, or pollution victim. Two devices which may be useful to plaintiff in the regard are the doctrines of res ipsa loquitur¹³⁸ and "negligence per se". Under the former principle, a rebuttable presumption that defendant's behavior was negligent is created if plaintiff can show: that the instrumentality which caused the damage was under defendant's exclusive control; that the event injuring plaintiff would not normally occur in the absence of negligence; and that plaintiff did not cause the damage through his action. Res ipsa loquitur has been applied in pollution cases to raise an inference of negligence after such a showing has been made.¹³⁹

If defendant's conduct is governed by a statute or administrative regulation, the doctrine of "negligence per se" allows the use of that legal norm to establish the standard of care which defendant allegedly failed to observe. A violation by defendant of the provision in question is generally deemed conclusively to establish negligence¹⁴⁰ if the following conditions are met: The provision violated was intended to protect (1) the class of persons to which plaintiff belongs, and (2) the particular interest interfered with, against the type of harm suffered and against the condition responsible for the injury.¹⁴¹

Strict or absolute liability may be imposed upon a defendant whose abnormally dangerous activity causes injury to plaintiff. This liability may attach, irrespective of defendant's fault, upon a showing that defendant's activity involves a risk of serious harm which cannot be eliminated by the exercise of utmost care, and that it is not of common usage in the area involved.¹⁴² A fear of discouraging socially desirable conduct has made courts reluctant to hold polluters absolutely liable, however, even when such hazardous substances as chlorine gas are involved.¹⁴³

The type of conduct required to give rise to liability for a nuisance or trespass may be either intentional, negligent or so ultrahazardous as to create strict liability.¹⁴⁴ Liability without fault was originally imposed for both torts, but the currently prevailing view requires plaintiff to prove that defendant's conduct falls into one of these three categories. Most nuisances are intentionally created, in that the defendant is aware that an interference with plaintiff's interests is substantially certain to follow from his activity. A nuisance may also result from an activity which is proper - even legislatively authorized - but conducted in a negligent manner, or from one which is so abnormally dangerous to its surroundings that strict liability should be imposed.

Liability for an unauthorized intrusion upon plaintiff's land (a trespass) may also be imposed when defendant's conduct is either intentional, negligent or abnormally dangerous. Although a direct, physical invasion was traditionally necessary, it has been recognized that intrusion of particulate matter causes a sufficient interference with plaintiff's interest in exclusive possession to constitute a trespass.¹⁴⁵

Once defendant's liability has been established under one of these substantive law categories, plaintiff may recover compensation for the injury he suffered. The amount of recovery for a nuisance is usually determined by the value of the use and enjoyment of plaintiff's land interfered with by defendant's activity. This can take the form of, inter alia, loss of rental value, permanent reduction of the property's value,¹⁴⁶ or loss of income, together with any personal discomfort, inconvenience or injury which plaintiff has suffered.¹⁴⁷

Whereas actual damage must be shown to entitle plaintiff to monetary compensation for a nuisance, a nominal sum may theoretically be recovered for a trespass without proof of damage, since the essence of a trespass is a mere entry which infringes plaintiff's right to exclusive possession. This principle has been relaxed somewhat, however, and there is thus authority for the proposition that liability without proof of damage should be imposed only when the trespass is intentional.¹⁴⁸

The theories of negligence and strict liability are normally applied to establish liability for specific injuries to the person or property such as nerve damage from breathing polluted air,¹⁴⁹ or damage to plaintiff's land from particulates.¹⁵⁰

A major obstacle to recovery of damages for pollution

injuries has been establishing that defendant's activity was the actual cause of the plaintiff's injury.¹⁵¹ A number of activities may emit pollutants into an atmospheric region or waterway, some or all of which cause injury to plaintiff, as, for instance, where plaintiff's use of a river is impaired by pollution from multiple sources upstream. In general, the defendant's liability extends only to the amount of damage which he has in fact caused. But attribution of the damage to a particular source, or proving what portion of the damage each defendant caused, will often be impossible. The plaintiff's failure to sustain his burden of proof on these points would technically result in a denial of relief. This is so even though it is clear that a wrongdoer caused him some harm, or that each of several wrongdoers was responsible for some damage, as where plaintiff can show the total amount of injury, but not the portion caused by each defendant.

Courts have developed various techniques to avoid the injustice of these results. For example, if plaintiff's injury is caused by only one of two or more defendants, each of whom acted wrongfully, and the probability that each of them caused the harm is equal, the doctrine articulated in the California case of Summers v. Tice¹⁵² places the burden of proof on the defendants to show which one caused the harm. This solution appears just, since the plaintiff would otherwise be without a remedy, and the defendants will normally be in a better position than plaintiff to produce evidence as to the cause of the injury. The doctrine of res ipsa loquitur, discussed above, was used in a similar manner to ascertain which of four defendants attending plaintiff during an operation was responsible for an unrelated injury which occurred while plaintiff was unconscious;¹⁵³ the argument for shifting the burden in this case is not so forceful, however, since all the defendants did not act wrongfully as in Summers.

While these techniques are useful where one actor is responsible for plaintiff's injury, it will perhaps more frequently be the case that the harm to be redressed is the result of multiple causes. If the plaintiff would have suffered no harm but for the conduct of an individual defendant, that party is liable for the entire damage, although his conduct concurred or combined with that of another wrongdoer.¹⁵⁴ Other defendants may also be liable, but the damage will not be apportioned; plaintiff is allowed only one satisfaction of his claim. If each of a number of defendants causes an identifiable part of the injury, each will be liable for the portion he produced. If, on the other hand, the extent caused by each defendant is not ascertainable, traditional common law rules create liability only when the defendants acted "in concert," i.e.,

with a common design or purpose. Modern jurisprudence has eroded this requirement, however, using several devices to allow recovery where the harm attributable to each defendant is not susceptible of identification.

One such technique is to find a single indivisible injury. "There is often room for viewing the matter either way as in a pollution case or. smoke or stench nuisance cases, where the total condition that actually did cause the harm would NOT have existed without the addition of each increment."¹⁵⁵ A second judicial device is to interpret the "concert of action" concept to include independent acts of multiple defendants, each of whom knew of the others' activities.¹⁵⁶ A final, and perhaps most expedient method of allocating responsibility for several injuries is to shift the burden of proving the extent of defendant's contribution upon a showing by plaintiff of the total amount of damage and that defendant wrongfully caused part of it. This solution appears more just than the first two, since the defendant, who generally has greater access to evidence, is allowed an opportunity to limit his liability to the portion of the harm he caused.

Finally, plaintiff's injury may be caused by separate acts which, although harmless alone, combine to produce damage. If the defendants should have known under the circumstances that an otherwise innocent action on their part would interact with actions of others to cause a dangerous condition, a number of courts have found each defendant liable. This technique has found particular application in pollution cases where, for example, the existing polluted condition of a stream makes an otherwise innocent discharge of even a slight amount of additional pollution unreasonable and subjects the actor to liability.¹⁵⁷

The defendant may set up various defenses to actions based upon the above theories. A defense available in the case of a nuisance, trespass or riparian rights claim is that defendant's conduct has been allowed to continue long enough to ripen into a prescriptive right.¹⁵⁸ The adverse use of plaintiff's property rights must have been open and notorious, under a claim of right, constant in quantity and quality and continuous over a period of time set by statute. A showing of fluctuations in the amount and character of the effluent would thus appear sufficient to nullify this defense. The expiration of the statutory time period within which trespass or nuisance actions must be brought operates to bar plaintiff's right of action, thus creating in defendant a prescriptive right to pollute. Such a right was found to exist in a 1911 air pollution case where defendant was allowed "to manufacture the maximum quantity of cement produced annually by (his) factory"

because the limitation period had run.¹⁵⁹ Defendant cannot obtain a prescriptive right to maintain a public nuisance,¹⁶⁰ however, which should reduce the value of the statute-of-limitations defense considerably in view of the increasing likelihood that industrial pollution will affect a large number of people in the area.

Secondly, defendant might argue that his conduct is excused by governmental permission to carry on his activity. Although governmental authority to authorize particular uses of property is subject to constitutional restrictions in the United States,¹⁶¹ there are no similar limitations under English law, and thus compliance with a legislative authorization is a complete defense.¹⁶² United States courts have generally construed such permission to allow only operation of the activity in question in a reasonable manner with due regard for the interests of others.¹⁶³

A third type of defense, applicable to nuisance cases, may exist where defendant's conduct is typical of the type of activity carried on in his locality. In this case, the fact that the vicinity is devoted to a particular use may make defendant's conduct reasonable for that area. However, if the manner in which defendant operates his facility is found to be unreasonable even in such surroundings, or if the locality cannot be said to be devoted to uses of the offending type, the mere fact that others are carrying on activities similar to defendant's will not release defendant from liability.¹⁶⁴

Further defenses to a nuisance maintained by defendant may be the failure of plaintiff to take reasonable measures to avoid harmful consequences, or, in the case of a negligently-produced nuisance, plaintiff's contributory negligence. Similarly, it has often been said that a plaintiff who "comes to the nuisance" will have no right to complain. Unless he has established a prescriptive right, however, the defendant cannot preempt the use of the area surrounding his activity; the "more accurate statement would appear to be that 'coming to the nuisance' is merely one factor, although clearly not the most important one, to be weighed in the scale along with the other elements which bear upon the question of 'reasonable use.' "¹⁶⁵

B. Injunctive Relief

Injunctive relief - as the term is used here, preventing threatened harm or halting an ongoing disturbance - can be far more radical in effect than an award of monetary compensation, since in pollution cases it involves a cessation of the offensive activity. The problems incident to a wholly

domestic injunction suit, most notably comparing the hardship to plaintiff of allowing the disturbance to continue with that to the defendant of stopping it, are magnified and joined by a host of other equally troublesome considerations in a transfrontier context. Perhaps the most obvious of these is the reluctance of courts to make orders which could be viewed as interfering with the sovereignty of a foreign state. This consideration alone has often been the express or implied rationale for refusals to grant injunctive relief on jurisdictional or choice-of-law grounds. A detailed examination of the issues involved in transnational actions for injunctions is beyond the scope of this study; this section will first undertake a comparative discussion of typical responses to the major issues and will then review the bases for injunctive relief in the respective countries.

In the great majority of suits for injunctive relief plaintiff will be seeking to halt an existing, continuing disturbance. This will usually necessitate issuance of a judicial order compelling defendant to take whatever affirmative action is necessary in the foreign country to eliminate the source of plaintiff's injury. Such decrees, ordering the performance of acts outside the territorial limits of the forum state, were viewed as improper by Professor Joseph Beale in his classic work on private international law.¹⁶⁶ Professor Beale was of the opinion that even if it had jurisdiction to do so, a court could not presume to "determine what action should be done in the territory of the foreign sovereign. What shall be done on that territory is purely for the sovereign of the territory to say."¹⁶⁷ Thus Beale concluded that a court could not order the abatement of a foreign nuisance.¹⁶⁸ The Second Restatement of Conflict of Laws, however, has adopted the more modern principle that a state with personal jurisdiction over the defendant may order him to act or refrain from acting in a foreign state. This proposition is qualified by the requirement that the defendant's conduct must also constitute an offense under the law of the source state. Thus, according to the Second Restatement, a court may enjoin a person before it from using his property in a foreign state in a manner which constitutes a nuisance under the law of that state.¹⁶⁹ Furthermore, a valid foreign judgment ordering or enjoining acts could, under proper circumstances, be enforced in the United States to the same extent as a judgment of another U.S. state.¹⁷⁰

Civil Law authorities in effect agree that a court may properly issue an injunction which comports with the law of the foreign state, since it does nothing more than advance that state's own policy.¹⁷¹ Although the Civil Law writers treat the question of whether to grant a foreign

injunction as a choice of law issue (i.e., whether the injunction finds a basis in the foreign law), Anglo-American authorities characterize it as a jurisdictional issue (i.e., whether the court had jurisdiction to grant a foreign injunction). But the common rationale of both systems' requirements is that an injunction issued pursuant to the laws of the foreign state or in accordance therewith will not interfere with that state's sovereignty, but rather, will assist in the enforcement of that state's laws and thereby support the implementation of its policy.

The second reason usually given for refusal to order positive acts in another state is inability to enforce the decree. However, the court will usually have at its disposal at least one of a number of possible methods of avoiding this difficulty. For example, the court could order the act to be done by an agent of defendant, sequester the defendant's property in the forum state or require the defendant to post a bond to secure his performance. By employing such techniques the court could ensure compliance with its order without having to supervise acts in a foreign jurisdiction. And if the acts ordered were consistent with the law of the foreign state there would appear to be no objectionable intrusion into that state's affairs, as pointed out above.

It may be said, then, that under proper circumstances, a court may, consistently with generally accepted principles of private international law, issue an order enjoining the emission of pollution which causes injury within the forum state. This is not to say, however, that the court would actually make such an order. Anglo-American rules governing injunctions, for example, accord courts a wide range of discretion to be exercised in determining whether to grant an injunction. Moreover, even if an injunction were granted it would most likely require enforcement in defendant's country in pollution cases. The court in which enforcement was sought, in deciding whether to enjoin defendant's activity, would consider carefully whether the economic effect upon the community of closing defendant's plant - in terms of lost jobs, taxes, etc. -- would cause greater hardship than allowing the disturbance to plaintiff to continue. If the interest of the general public in the continuation of defendant's activity were found to be greater, plaintiff would have to be content with seeking monetary compensation for the damage. However, it is probable that the first court took these factors into account in deciding upon the appropriateness of injunctive relief (if only because plants located near borders often draw their employees from the adjoining country, and enjoining the activity might unfavorably affect the economy of plaintiff's country as well). If so, the second court would not be bound to

follow the first court's determination, but a decision in favor of an injunction in the first court would at least provide guidance to the second court as to the importance attached by the original forum state to the injury suffered by plaintiff.

(1) Europe - Civil Law

The German law counterpart of injunctive relief is provided for in section 1004 BGB, which reads as follows:

- (1) The owner of real property can demand from the responsible party the elimination (Beseitigung) of any interference to his property not caused by dispossession or withholding. If further interferences are anticipated, the property owner can sue for their cessation (Unterlassung).
- (2) The claim is excluded if the property owner is obligated to tolerate (Duldung) the interferences.

The statutory obligation to tolerate interferences with the use and enjoyment of property (Duldungspflicht) is created by section 906 BGB, which provides that (1) a property owner cannot demand the cessation of disturbances emanating from neighboring property if they do not substantially injure his property; and (2) a property owner cannot complain of a substantial interference resulting from a use of property which is not unusual in the locality, when the interference cannot be prevented by economically reasonable measures. If the disturbance must be tolerated under section 906, the property owner can demand suitable monetary compensation, so long as the disturbance interferes with a use of his property which is not unusual in the vicinity.¹⁷²

A second important qualification to the rights granted by section 1004 BGB is contained in section 26 of the Gewerbeordnung (GewO - Trade and Industry Act). That provision prevents one who would ordinarily be entitled to relief against disturbances emanating from neighboring property from seeking injunctive relief - *i.e.*, cessation of the activity - against a facility which had been administratively licensed pursuant to section 24 GewO. The plaintiff is instead limited to suing to compel the installation of devices to eliminate the disturbance or, if such is impracticable, to seeking indemnification for the injuries suffered.

It should be noted that section 1004 BGB allows actions for two different kinds of remedies. The Unterlassungsanspruch is designed to prevent either threatened or

continued disturbances; the granting of this relief might thus involve no more than restraining the performance of the offensive acts. The Beseitigungsanspruch, on the other hand, is the appropriate form of action for the elimination of the source of an existing disturbance. This claim might thus necessitate ordering the performance of positive acts in order to stop an existing interference at its source.¹⁷³

It is generally held that German courts have jurisdiction over actions against foreigners seeking to prevent¹⁷⁴ or compel¹⁷⁵ the performance of acts in a foreign country. It is considered that there is no interference with the sovereignty of the country in which the injunction is to operate since a German court would apply the foreign state's law, thus respecting the foreign legal order and furthering its operation. Whether such injunctions are enforceable in the foreign country would be governed by that country's law. German courts would, however, have mechanisms similar to those reviewed above at their disposal to encourage compliance with their orders. Thus the court could fine or arrest the defendant in the event of non-compliance with the order.¹⁷⁶

Actions for injunctive relief are characterized under German law as substantive claims, and not merely procedural devices, and thus do not fall within the rule that all procedural matters are governed by the law of the forum.¹⁷⁷ Rather, there is general agreement among German authorities that actions for injunctive relief are governed by the law of the defendant's country.¹⁷⁸ The rationale for this view is that the forum can only make orders enjoining specific foreign actions if the state in which the order is to be adhered to allows such orders through its legal system. There is, however, some authority for the proposition that not all injunction-type actions should be governed by the lex actus. In what is perhaps the most extensive study of injunctions in private international law - at least from the German viewpoint - Dr. Rolf Birk draws the conclusion that whether or not the action is governed by foreign law ought to be determined by the type of action involved: if the suit seeks to restrain the performance of acts in the foreign country (Unterlassungsanspruch) it should be controlled by the lex injuriae whereas if it seeks to compel the performance of acts outside the forum state (Beseitigungsanspruch) the lex actus should govern.¹⁷⁹

The apparent rationale for this position may be summarized as follows: Emissions from a given activity generally affect property in the same country to a greater degree than property in a foreign country. This is so simply because the source property usually has a longer boundary

with the state it is in than with the foreign country; the injury to neighboring property in the same country will therefore often be greater than that to the adjacent foreign area, Birk reasons that when a property owner brings an Unterlassungsklage he seeks only to have further disturbances to his property stopped. If this claim were judged under the lex actus and granted thereunder, it would result in the defendants' being compelled to do more than the plaintiff requested: a decree ordered under the lex actus would have the inevitable consequence, according to Birk, of foreclosing totally the defendant's activity in that area, although the plaintiff merely requested that the disturbances to him be eliminated. The Beseitigungsanspruch is considered to call for a different approach. If forum law were applied to such claims, which are directed toward the total cessation of the offending activity, the defendant might have to shut down his factory, even though it could easily be that the lex actus would not require cessation of operations in that particular case. Applying the lex actus to Beseitigungsansprüche would allow the forum to order cessation of the offending activity only if such were allowable under the lex actus; such an injunction would appear proper where, in addition to the plaintiff's property, other property in the immediate vicinity of the offending factory also suffered injury, so that an elimination of the cause of the disturbance would appear fully justified.¹⁸⁰ At least one authority has responded that the differentiation between the law applicable to the two claims is without foundation and, practically speaking, not implementable.¹⁸¹

Although no German decision has been found which actually ordered the cessation of a foreign activity, the Oberlandsgericht Saarbrücken in the air pollution case discussed in the section on money damages above stated that under German law the German plaintiff could demand an injunction against the French plant under sections 1004 and 903 BGB. The defense normally available under sections 16 and 24 GewO to licensed facilities could not be asserted by the defendant since a French permit would not be recognized under German law.¹⁸² The court applied French law as that most favorable to the plaintiff, since only monetary compensation was sought and the French law did not require proof of fault. The general rule that the lex actus is applied in injunction cases was not discussed; the court said only that if the "whole law" of France were applied, including its conflict of laws rules, the result would be a reference back to German law, which would allow the injunction as stated above. In this rather circuitous manner, then, it would be possible, assuming the court's analysis is correct, for a German court to enjoin a French factory pursuant to German law. It is probable, however,

that this would be an exceptional case, and that the normal suit for an injunction of a foreign activity would be governed by the lex actus.

The French counterpart of injunctive relief is available only under limited circumstances, largely determined by the administrative classification of the activity against which such relief is sought. The Law of December 19, 1917 on établissements classés governs all activities, or establishments, classified as dangerous, noisy or noxious (incommode), or injurious to health. Such establishments are divided into three classes. Those in the first two classes (which may be treated together for present purposes) must be located at a specified distance from residential areas, and cannot operate without authorization by the Prefect of the provincial government. This authorization can be given only after members of the public and private sectors have expressed their views as to the impact of the proposed activity: Members of the public in the vicinity must be informed about the proposal for the establishment and given an opportunity to comment upon it; and the local municipal government, the agency for the inspection of classified establishments and the council of health of the département must each submit statements as to whether the activity should be authorized. Establishments in the third class are those which do not present a possibility of serious danger or disadvantage to the community in which they are located. While such activities must be administratively approved, this is accomplished in a declaratory proceeding; they are not required to go through the authorization procedure provided for establishments of the first two classes.

Injunctive relief in judicial (as opposed to administrative) proceedings is available to parties injured by industrial pollution only when the activity involved is not classified in one of the three categories described above. Even if the offensive activity is not classified but is subject to administrative regulation, a judicial tribunal may only order such relief insofar as it is not inconsistent with administrative standards. These principles derive from the fact that the administrative branch of government is exclusively competent in matters concerning the établissements classés, which operate only on the basis of administrative permits. Judicial tribunals must respect the rule of separation of judicial and administrative authorities and can therefore order only such remedial measures as are consistent with administrative prescriptions. A court may never address an injunction to the administrative branch of government. Since the most environmentally-dangerous activities are the établissements classés, the power of French courts to order

injunctive relief against polluting activities is considerably limited. When the defendant activity is not an établissement classé, a court may grant réparation en nature. Such relief may consist of requiring the installation of devices to eliminate offensive emissions or ordering that the activity close.¹⁸³ A French court might enforce this type of relief against a German defendant with property in France by ordering the defendant to make periodic payments (astreinte¹⁸⁴) for each additional infringement while he failed to comply. This remedial device is not available to German courts.

Administrative tribunals, on the other hand, can order what is in effect injunctive relief for damage caused by établissements classés. Such relief - which is actually a form of réparation en nature - may be accomplished by partial or total modification of administrative regulations and may also include, in exceptional cases, ordering the cessation of the offensive activity.

(2) North America - Anglo-American Law

The injunction was developed by the English courts of equity to provide relief where the remedy in the courts of law (e.g, money damages) would have been inadequate. Thus the plaintiff must demonstrate in a suit for an injunction that the recovery of damages at law would not constitute adequate redress for his injury.¹⁸⁵ "(B)ut since equity regards every tract of land as unique, it considers that damages are not adequate where its usefulness is seriously impaired."¹⁸⁶ The plaintiff may seek injunctive relief in a suit based on either trespass or nuisance, even if the disturbance to be prevented is only threatened. An injunction is the preferable remedy in pollution cases since the offensive activity is likely to be of a continuing nature; the payment of monetary "compensation" for such an interference is tantamount to creating a servitude on behalf of the defendant to continue interfering with plaintiff's property rights.¹⁸⁷

Perhaps the greatest single obstacle to actions seeking injunctive relief is the judicial practice of "balancing the equities"¹⁸⁸ in determining whether the interests of justice would be served by enjoining defendant's activity. Among other factors, the court may consider the relative economic hardship to the parties of granting or denying injunctive relief, the reasonableness of each party's conduct and the value to the public of the defendant's activity.¹⁸⁹ It is often the case that industries emitting harmful pollution are vital to the economic health of the vicinity in which they are located, providing jobs, revenue, and sometimes a necessary service. A court would

often find it difficult to shut down such an enterprise despite the substantial disturbance it caused. This consideration would very likely lead the court to deny injunctive relief, unless possibly other factors tipped the balance in the plaintiff's favor.

As indicated in the introduction to this section, courts of equity have historically been reluctant to order the performance of acts outside the territorial limits of the state in which they sit, but have shown a greater readiness to restrain the performance of such acts.¹⁹⁰ In spite of the maxim that "equity acts upon the person," even courts with personal jurisdiction over the defendant have been said to lack jurisdiction to order affirmative acts abroad.¹⁹¹ The better view is that courts of equity have broad discretion to decide whether an injunction should be issued in a particular case, and will in the exercise of this discretion decline to order affirmative acts abroad if such a decree would be difficult to enforce or might give rise to a conflict with the authorities of the foreign country.¹⁹² Thus courts have been reluctant to order acts which call for continuing supervision or which violate the civil or criminal law of the foreign state.¹⁹³ This problem is normally resolved by enjoining only those actions in a foreign state which are contrary to that state's local law.¹⁹⁴ However, in the case of United States v. Imperial Chem. Indus., Ltd.,¹⁹⁵ an antitrust proceeding against an English company, a United States federal district court ordered the English company to grant immunity under its English patents to certain American imports. The decree contained a saving clause to the effect that any acts required by the foreign law which were inconsistent with the order would not be deemed violative of the order. The United States court's decree was tested in a subsequent action in England,¹⁹⁶ and the English court ordered performance of a contract which would have been violative of the American decree; the English court was, however, of the opinion that the saving clause had prevented a direct conflict between the laws of the two countries. But even so, the Chancellor concluded that the American court had gone "beyond the normally recognized limits of territorial jurisdiction."¹⁹⁷

It may be concluded that courts of equity generally have the power under Anglo-American law to restrain or compel the performance of acts outside the territorial limits of the forum state, so long as the order does not conflict with the laws of the state in which the injunction is to take effect. Furthermore, it may be fairly said that

Where the relief sought calls for the doing of some act in another state, where the court has personal jurisdiction over the parties, it is not a question of jurisdiction at all, but is merely

a question of expediency as to whether or not in the particular case the court will exercise the power which is discretionary in all courts of equity.¹⁹⁸

Enforcement of the injunction may raise more difficult problems, however, where the rendering court is not able to secure compliance through its own procedures. It may be necessary for the plaintiff to bring a second action in the defendant's country, where the court would have to decide whether it was willing to bear the administrative burdens involved in enforcing the decree, or whether the injunction should be denied enforcement on discretionary grounds. The second court might well conclude that implementing the order of the rendering court would be inimical to vital state interests, as where a plant in defendant's country was enjoined to abate emission of pollutants which damaged plaintiff's crops across the border: If this would necessitate closing down the plant, the second court could in its discretion find that the injunction would impose too high a cost to the defendant and the community and therefore decline to enforce the rendering court's decree.¹⁹⁹

CHAPTER 5

SUITS AT THE PLACE OF THE INJURY : ENFORCEMENT OF FOREIGN JUDGMENTS

Although it may be more convenient for the plaintiff to bring an action in his own country at the place of the injury rather than to sue the defendant at the place of the act, it will often be necessary to institute proceedings in defendant's country to enforce the judgment rendered in plaintiff's country. Enforcement proceedings may be necessary for a variety of reasons, such as defendant's not having appeared in the original action, his not having sufficient assets in plaintiff's country from which to satisfy the judgment, or inability of the trial court to compel him to comply with the judgment in plaintiff's country. The following sections will therefore examine the possibility of enforcing a money judgment in defendant's country which was rendered in plaintiff's country. (Actions to enforce foreign judgments are, of course, proceedings at the place of the act, but are treated in connection with suits at the place of the injury since they determine whether the court at the place of the injury had effective competence to grant an enforceable judgment.)

A. Europe - Civil Law (The European Convention on Jurisdiction and Judgments)

In the absence of treaty, enforcement of foreign judgments in the Civil Law system is governed by statutory rules in the country in which enforcement is sought, as modified or interpreted by that country's judicial decisions. The Convention on the Jurisdiction of Courts and the Enforcement of Judgments in Civil and Commercial Matters ²⁰⁰ is now in force in seven European states, including Germany and France, and sets forth requirements for recognition and enforcement of judgments of other contracting states in Title III (Articles 25-49). Since the steps to be followed in seeking enforcement of a judgement pursuant to the Convention would be substantially the same in France and Germany, the procedure need not be discussed separately for each country.

The Convention provides in Article 31 that decisions which are enforceable in the rendering state will be enforced in another contracting state in a proceeding begun by applica-

tion of the interested party (the judgment creditor or petitioner). The enforcement proceeding is to be brought, inter alia, before the court where the defendant in the first action (the judgment debtor) is domiciled (Art. 32). The law of the state in which enforcement is sought governs the manner in which the application for enforcement is to be made; the petitioner must establish a domicile in the place where enforcement is sought if the law of that state so requires (which neither German nor French law does) and if not he must designate a legal representative there (Art. 33). The petitioner may not be required to furnish security because of his status as a foreigner or because of lack of domicile or residence in the state where enforcement is sought. If the initial judgement was rendered by default, the petitioner is required to submit documentary evidence establishing that summons was served on the defaulting party (Art. 46 (2)).

The petitioned court is to give a prompt ruling and may decline to grant enforcement only on specifically enumerated grounds (Art. 34). These grounds are set forth in Articles 27 and 28, which provide in relevant part that a judgment shall not be recognized: if it is contrary to the public policy of the petitioned state (Art. 27); if a defendant who did not appear in the original proceeding was not properly served with judicial summons or was not served in a timely manner (Art. 27); if the judgment contravenes provisions of the Convention setting forth special and exclusive jurisdictional grounds; or if a treaty of the petitioned state prohibits enforcement as allowed by Article 59 (Art. 38). The Convention outlines in some detail the procedure to be followed on appeals from a grant or denial of enforcement (Arts. 36-41).

There is no reason to believe that a judgment rendered by a German or French court for money damages in a transnational pollution action would not be enforceable in the other country on one of these grounds. A judgment ordering the performance, non-performance or cessation of acts in the country where enforcement is sought may encounter difficulty on the public policy ground, unless perhaps the law applied by the rendering court was either that of the country where enforcement is sought or identical therewith.²⁰¹

B. North America - Anglo-American Law

In the Anglo-American legal system, recognition and enforcement of foreign judgments is governed by the rules embodied in decisional precedent, in the absence of applicable treaties or statute. Neither the United States nor Canada is a party to an agreement concerning the effect to be ac-

corded foreign judgments, presumably because such a binding arrangement would amount to a regulation of state or provincial court practice. Some states and provinces have entered into uniform agreements regarding foreign judgments, but most cases would be governed by common law principles in force in defendant's country.

American and Canadian rules governing enforcement of foreign judgments are quite similar, as would be anticipated in two legal systems with common roots and traditions. In examining a final foreign judgment, both countries accord particular attention to whether the rendering court had jurisdiction over both the parties and subject matter. As was seen above, the two countries have parallel statutory criteria for ascertaining whether exercise of personal jurisdiction over an absent defendant would be proper. It would appear, therefore, that where personal jurisdiction was established in accordance with the rendering country's requirements, lack of personal jurisdiction would not be a ground in either country on which to decline to enforce a judgment of the other country.

(1) United States

The "full faith and credit" clause of the United States constitution (Art. IV, section 1), requiring an American court (F1) to give a judgment rendered by a foreign court (F2) the same effect which it would receive in F1, applies only to judgments rendered by courts of other American states, and not to judgments of foreign countries. The United States Supreme Court was held,²⁰² however, that judgments of foreign countries should be voluntarily recognized as a matter of "comity among sovereign nations."

In order that a foreign judgment be entitled to recognition in the United States, it must be final (as determined by the rendering court), on the merits of the controversy, fairly procured, obtained by a procedure complying with the rendering country's requirements, and, above all, based on proper jurisdiction in the international sense.²⁰³ In relation to the latter requirement, the jurisdiction of the rendering court is to be judged by the standards of the court in which enforcement is sought. A United States court would generally deny recognition to a foreign judgment which did not at least substantially comply with constitutional requirements of due process.²⁰⁴ The extent to which state courts will grant recognition to foreign judgments under the principle of comity is determined under state rather than federal law.

The United States Supreme Court in the 1895 case of Hilton

v. Guyot ²⁰⁵ articulated the principle of reciprocity under which American courts could decline to give res judicata effect to judgments of a foreign country if that country refused to give such effect to United States judgments. In such a situation F2 could retry the case on the merits. This doctrine of retaliation has been widely condemned and is not binding on state courts or federal courts where federal jurisdiction is based on diversity of citizenship, as it is in most transnational cases.²⁰⁶

The case of Cherun v. Frishman ²⁰⁷ is illustrative of the treatment United States courts accord to Canadian judgments based on extraterritorial service of process. In that case, an Ontario resident sought to enforce a default judgment granted by the Supreme Court of Ontario in a mortgage foreclosure action against a United States citizen. The defendant had been personally served with process in the District of Columbia pursuant to an Ontario statute.²⁰⁸ The federal district court for the District of Columbia inquired as to whether a Canadian court would give effect to an American judgment rendered under like circumstances and concluded that it would. After finding that the Ontario court had complied with United States standards of due process and that it had personal jurisdiction over the defendant, the federal district court enforced the Ontario judgment. This decision indicates that a United States court could give effect to an Ontario judgment, or that of another province based on a similar jurisdictional statute, which granted damages for a pollution injury caused by an American defendant.

The Uniform Foreign Money Judgments Recognition Act (1962) ,²⁰⁹ in effect in a growing number of states, generally embodies the United States common law rules respecting recognition. In addition to lack of jurisdiction, the following defenses may be asserted in actions under the Act to enforce foreign country judgments: (1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with due process of law; (2) the claim on which the judgment is based is repugnant to the F2's public policy; and (3) the foreign court was a "seriously inconvenient forum" for the trial of the case.

(2) Canada

In Canada as in the United States, effect will be given to foreign judgments as a matter of comity.²¹⁰ Unlike earlier United States practice, however, Canadian courts do not apply the principle of reciprocity to determine whether a foreign judgment should be granted recognition.²¹¹ The

requirements which a foreign judgment must satisfy in order to be entitled to recognition in Canada are generally similar to those looked for by American courts. The foreign judgment must have been based upon proper international jurisdiction, the judgment debtor must have been personally subject to the foreign court's jurisdiction and he must have been accorded procedural due process during the proceedings, all according to the Canadian court's local law.

The courts in the common law provinces of Canada follow the English rules for recognition of foreign judgments which are similar to the criteria applied by American courts. Most importantly, Canadian courts inquire as to whether the rendering court had jurisdiction by Canadian standards.²¹²

It is the opinion of one Canadian authority, Professor Castel, that unless the plaintiff has, inter alia, voluntarily appeared and pleaded in the action, a Canadian court will not recognize an assertion of personal jurisdiction by a foreign court over non-resident individuals based upon a "long-arm" type statute; this position is taken despite the fact that Canadian provincial legislation allows Canadian courts to exercise a virtually identical jurisdiction.

²¹³ While a foreign judgment was not originally assured of recognition by a Commonwealth court simply because that court would have taken jurisdiction under circumstances similar to those present in the original proceeding, an English court has recently said in the case of Travers v. Holley, "surely . . . what entitles an English court to assume jurisdiction must be equally effective in the case of a foreign court."²¹⁴ The plaintiff in that case obtained an ex parte divorce decree from an Australian court, which based personal jurisdiction over the defendant upon a statute which was similar, although not identical, to an English statute which would have been applicable to related facts; there was not, however, sufficient basis for the English court to have entertained jurisdiction at common law. The court stated in one opinion, "(o)n principle it seems to me plain that our courts in this matter should recognize the jurisdiction which they themselves claim".²¹⁵

Furthermore, although reciprocity plays no role in the Canadian recognition process, the fact that American courts have recognized Canadian judgments based upon statutory extraterritorial service of process²¹⁶ would seem highly persuasive to a Canadian court faced with a comparable American judgment. Finally, Professor Castel himself has advocated Canadian recognition of foreign judgments in those cases where the Canadian court would have taken jurisdiction under similar circumstances.²¹⁷

CHAPTER 6

PROCEEDINGS AT THE PLACE OF THE ACT JUDICIAL PROCEEDINGS (JURISDICTION)

Although it appears from the above study of suits at the place of the injury that a concerned party could in most cases bring an action in his country against the foreign source of the disturbance, proceedings at the place of the act also have certain advantages which should be explored. For example, the plaintiff may wish to avoid the necessity of bringing two proceedings, one in his country to obtain a judgment against the defendant and a second in defendant's country to secure enforcement of that judgment; or, since the applicable law often depends upon the court chosen, plaintiff may opt for suing in defendant's country because the law applied there would be more favorable to him.

This section will therefore examine the possibility of obtaining relief from foreign sources of pollution through judicial proceedings at the place from which the disturbance emanates. Perhaps the most significant legal issue raised by such suits is whether the forum can take jurisdiction over an action to recover for damage to foreign land. Since other issues which would arise in suits at the place of the act have been treated in previous chapters, the present discussions will focus upon this problem.

A. Europe - Civil Law

(1) Germany²¹⁸

Rights in property under German law are protected by causes of action based upon ownership, quasi-ownership or possession. There is no form of action similar to the injunction under Anglo-American law, which is directed toward a particular remedy without being based upon specific substantive legal rights. The central issue, then, may be simply stated as follows: Can an owner or occupier of real property demand compensation for, or injunction of, a disturbance emanating from foreign real property?

Certain actions concerning real property can only be brought at the situs of the property (forum rei sitae)²¹⁹ and claims based upon possession and ownership are always

governed by the lex rei sitae. Under the prevailing view, the forum must determine whether the action is based upon a delictual or a property claim.²²⁰ At least one authority has it that German courts would lack "international jurisdiction" over an action seeking to enjoin a domestic activity from injuring foreign property, since the law governing the foreign property would normally assert exclusive jurisdiction over it.²²¹ Since German law is exclusively applicable to, and German courts exclusively competent over, actions concerning real property within Germany, it is generally held to follow that each state has exclusive jurisdiction over actions concerning real property within its territory. This proposition is modified only by the principle that the forum state is competent to decide when an action is "local," or must be brought at the situs of the allegedly injured property. For example, a tort action for monetary compensation by a German property owner (unerlaubte Handlung, sec. 823 BGB) could be brought in Germany when the disturbance emanated from foreign real property,²²² but an action to enjoin the same disturbance (Unterlassungsklage, secs. 862, 1004 BGB) could not be entertained in German courts since that type of suit is deemed based on ownership or occupation of property and not on a tort theory.²²³ Hence the most advantageous course of action would apparently be to bring the action in the proper jurisdiction for the defendant's property, since the full range of remedies - from injunction (including both Unterlassung and Beseitigung) to compensation - would be available.

One writer²²⁴ advocates relaxation of the rule under which all actions based upon possession and ownership are governed by the lex rei sitae. He reasons that it is a recognized principle of international property law that real rights which were validly created under the law of one jurisdiction are to be recognized and treated equally with comparable rights in another jurisdiction;²²⁵ foreign property near the border should therefore receive treatment equal to that accorded domestic property in the same neighborhood, even when reciprocity is not guaranteed. The law of the place of injury (lex injuriae) could also be applied if it were more favorable to the plaintiff, but the court cannot apply foreign property law to defeat a domestic license or to render the defendant's actions, allowable under domestic law, unlawful. The plaintiff can demand that his property be treated equally with domestic property, but cannot ask that he be placed in a better position to the disadvantage of his domestic neighbor.²²⁶

To summarize, the injured property owner or occupier can seek remedies in cases of transfrontier pollution disturbances between neighboring properties under the law most

favorable to him, but only within the remedial forms of the law of the forum. However, the court at the place of the polluting activity must apply exclusively domestic law to the issue of whether the acts in question are allowable; this fundamental principle applies to remedies available under both property and tort law.²²⁷

(2) France

Despite the broad judicial competence conferred by Articles 14 and 15 of the French Civil Code over actions involving Frenchmen, the principle is firmly rooted in French jurisprudence that French courts are never competent over suits involving foreign real property.²²⁸ This rule resulted from a combining of Article 3, paragraph 2 of the Civil Code, which subjects real property in France to French law, with Article 59 of the Code of Civil Procedure, under which jurisdiction over real actions resides in the court at the situs of the property. The logical corollary of these rules is that French courts are not competent over actions concerning foreign real property, even when it is owned by a French citizen.

It has been noted²²⁹ that the applicable choice of law rule in cases involving damage to property caused by a foreign source might be thought to be that governing delicts, since such cases belong to the field of "neighborhood law" (obligations de voisinage). But the solution to the problem of which court is competent over such cases, namely, that at the place where the damage occurred, leaves no doubt that the lex injuriae is the applicable law.

According to French principles of private international law, therefore, a plaintiff seeking recovery for damage to his real property in Germany caused by pollution from a French source would have to bring his action before the competent German tribunal.

B. North America - Anglo-American Law²³⁰

Under an old rule of English common law, an action based upon a tort against real property is a "local action" and must be brought where the land is located.²³¹ This principle has survived strong criticism from all quarters²³² and remains the common law rule in most U.S. states²³³ and Canada.²³⁴

The "local action rule" was originally developed in cases in which the damage was caused by a direct physical invasion of the land by the defendant, e.g., by driving a

wagon over plaintiff's crops as opposed to allowing sparks from a fire on adjoining property to be carried across to plaintiff's land and burn the crops. In cases where the damage was caused directly there was no jurisdictional problem since the act and injury both occurred at the same place. If an act in one jurisdiction caused injury to land in another, however, the plaintiff could be left without a remedy where the local action rule prevented the court at the place of the act from taking jurisdiction, and where defendant could not be subjected to the personal jurisdiction of the court where the damaged land was located. To avoid the injustice of this result, an exception to the local action rule was recognized by the famous English jurist, Lord Coke, in Bulwer's Case.²³⁵ When an act in one jurisdiction causes an injury in a second jurisdiction an action may be brought either at the place of the act or that of the injury. While the rule in Bulwer's Case has found favor with United States courts, it has not enjoyed acceptance in Canada.

(1) United States

A number of American decisions have granted recovery for damage to land in another jurisdiction.²³⁶ The case of Armendiaz v. Stillman²³⁷ is illustrative. In that case, an American plaintiff brought an action in a Texas court seeking compensation for flooding damage to her land in Mexico caused indirectly by acts in Texas. The Texas Supreme Court upheld jurisdiction, applying the rule in Bulwer's Case, and granted plaintiff damages. Two distinctions may be drawn between the Armendiaz case and a Canadian plaintiff's action for pollution damage to his land: Both the citizenship of the plaintiffs and the type of injury are different. But these are inconsequential variations, since (1) a Canadian plaintiff would have free access to American Courts, and (2) in both cases the damage to the foreign land is consequential and is caused through the medium of shared natural resources by an act in another jurisdiction.

There are apparently no recorded decisions involving trans-frontier pollution between the United States and Canada²³⁸ but cases in which an act in one U.S. state caused injury to land in another provide useful analogies to trans-national actions.²³⁹ American courts would presumably apply the same principles of subject matter jurisdiction in actions between citizens of the United States and Canada as in suits between citizens of two quasi-sovereign U.S. states, especially in view of the similarity of the two countries' legal systems.

A leading interstate case involving pollution damage to land outside of the jurisdiction is Duckton Sulphur, Copper & Iron Co. v. Barnes.²⁴⁰ The landowners in that case sought compensation under a nuisance theory for damage to their timber and crops caused by smoke and noxious gases emanating from a smelter located in Tennessee. The smelting company contended, inter alia, that the plaintiffs' claims involved issues of title, right or interest in land and that the actions were therefore local and had to be brought in the state where the land was situated.²⁴¹ The court answered that the landowners' actions

do not involve title to land, nor the assertion of a right to an interest in land. The actions are purely actions for damages sustained by virtue of a nuisance operated by the complainant. The action was personal, and not local; and the appellees, although residents of the state of Georgia, and although the injury was to property in the state of Georgia, had the right to maintain their suits in the courts of Tennessee.²⁴²

After bypassing the jurisdictional obstacle, the court awarded the plaintiffs what amounted to indemnity for the damage to their land.

There is thus ample American precedent for entertaining jurisdiction of actions to recover for damage to foreign land when the injury was caused by an act committed within the court's jurisdiction. Since a court with power over the person of the defendant can grant effective relief, the fact that the injured land was located in Canada would probably make no difference.

(2) Canada

As indicated above, Canadian courts have consistently declined to take jurisdiction over actions to recover for damage to foreign land. This position seems to be due primarily to Canadian judicial unwillingness to depart from, or even to distinguish, an old English case in which the House of Lords refused to entertain an action involving an actual physical trespass upon land in a foreign country. That case, British South Africa Co. v. Companhia de Moçambique,²⁴³ was thus not one in which the act and injury occurred in different jurisdictions, and the claim there was implicated with questions of title to the foreign land (Anglo-American courts are in agreement in declining to try title to foreign real property).

In spite of the fact that Moçambique has little in common with a suit at the place of the act to recover for

consequential—as opposed to direct—damage to foreign land, it has been held by Canadian courts to preclude exercise of jurisdiction over actions in which an act in the forum province injured land in another jurisdiction. Thus in Albert v. Fraser Companies Ltd,²⁴⁴ the New Brunswick Supreme Court held that under the Mozambique case a Canadian court lacked jurisdiction over an action to recover for flooding damage to real and personal property in Quebec caused by defendant's alleged negligence in New Brunswick. The effect of the Mozambique holding was said to be that "(t)he moment it appears that the controversy relates to land in a foreign country our jurisdiction is excluded,"²⁴⁵ whether or not title to the foreign land was in question.²⁴⁶

Thus despite a strong dissenting opinion arguing that Bulwer's Case, and not Mozambique, was the apposite English precedent, Albert remains the leading Canadian authority on actions to recover for injury to foreign land. A number of cases have upheld assertions of jurisdiction over actions to recover for damage to foreign personal property,²⁴⁷ but these decisions have been careful to distinguish suits for injury to foreign realty. It therefore appears that the Mozambique case, as interpreted in Albert, would present a formidable obstacle to an action in Canada to recover for damage to land in the United States caused by pollution emanating from Canada. Plaintiff could probably recover for damage to personal property, however, so long as it was not caused in consequence of damage to real property.²⁴⁸

CHAPTER 7

PROCEEDINGS AT THE PLACE OF THE ACT : ADMINISTRATIVE PROCEEDINGS

Most industrial activities which cause environmental disturbances operate under permits issued by administrative agencies.²⁴⁹ These bodies generally conduct hearings on proposals for new installations or additions to existing facilities and pass regulations governing the activities for which they are competent. Provision is usually made for participation by interested members of the public at some stage of the administrative decision-making process..²⁵⁰ Thus persons whose interests would be adversely affected in some way by the ultimate administrative action are often allowed to comment on planned developments or permit applications during administrative hearings thereon. Potentially affected citizens may also resort to the court in certain cases to seek judicial review of administrative action or to compel administrative enforcement of existing regulations.²⁵¹

The question to be dealt with in this Chapter is whether a similar sort of public participation would be possible in a transnational context. That is, if a planned project (e.g., construction of a cement factory or expansion of an airport) on one side of a border would have a significant environmental impact on the other side, could interested foreign parties - including both governmental agencies and individuals - participate in and challenge administrative action with respect to that project? As noted earlier, few of the recorded attempts at recourse to foreign administrative machinery by individuals or governmental bodies have been successful. The tribunals which denied access to foreign petitioners based such denial on the lack of capacity of the respective foreign parties - or lack of "standing" - to assert their interests in a domestic administrative proceeding. This same problem has arisen in wholly internal cases in at least one of the countries under study, where courts have denied the standing of municipalities and private complainants to contest decisions as to the use of land in an adjoining town made by the latter town's zoning authority.²⁵² Yet courts in that same country have allowed foreigners to participate in and review domestic administrative proceedings.

Because of the lack of authority and precedent in this area, the principles which might be applied to an individual's

attempt to participate in or review foreign administrative proceedings will be illustrated through a discussion of two European and two North American cases. All four cases involved attempted recourse to foreign administrative procedures; two were decided by the Austrian Supreme Administrative Court (Verwaltungsgerichtshof) and two by United States Federal courts of appeals.

The first case was decided by the Verwaltungsgerichtshof in 1913²⁵³ and concerned objections by Hungarian communities and industrial interests to a permit granted by an Austrian water rights agency to an Austrian consortium. The permit allowed the consortium to remove a substantial amount of water from the Leitha river, which then formed the boundary between Austria and Hungary downstream from the point of removal. The Hungarian parties contended that the removal of water by the Austrian consortium adversely affected their rights to the use of the Leitha, and that their interests were protected by Austrian water rights acts.²⁵⁴ The Hungarian communities argued that the provision of the Austrian water rights law²⁵⁵ guaranteeing municipalities the right to safeguard their water supplies applied as well to foreign municipalities which could suffer injury as a result of the action of the Austrian agency concerning waters flowing across the Austrian boundary. The industrial interests, holders of Hungarian water rights, also based their claims on Austrian water law and additionally upon an alleged rule of customary international law obligating states to take existing foreign water rights and legally protected interests into consideration in making dispositions respecting waters flowing across boundaries.

The Verwaltungsgerichtshof denied the Hungarian parties' right to challenge the Austrian administrative order granting the permit on the ground that as foreigners they lacked legal capacity (Parteienlegitimation) to participate in the Austrian administrative proceedings. To the claim based on public international law the Court replied that only states are subjects of international law and entitled to the rights based thereon; a state's citizens merely enjoy the protection afforded them under international law by their mother country, the latter being responsible for safeguarding their interests in foreign countries. Therefore, the court reasoned, only the concerned states - not citizens affected by an alleged injury to a state under international law - are proper parties to a controversy involving an alleged infringement of customary international law. Moreover, the court maintained that as a national tribunal it would not be competent to decide a purely international controversy between two states.

Turning to municipalities' allegations that their interests were protected by Austrian water rights acts, the Verwaltungsgerichtshof denied that Austrian laws constituted an international water law which could create rights in foreign users of a trans-boundary waterway. On the contrary, it held, parties may only assert interests before Austrian water agencies which are created in Austrian territory and are thus subject to the sovereignty of the Austrian state. The position taken by the Hungarian interests would, said the Court, lead to the untenable conclusion that while the Austrian water agencies would be required to protect foreigners' water rights through administrative acts in Austria, there would be no guarantee of a corresponding protection of Austrian interests by the foreign state. Finally, it was noted that there was no binding treaty which gave the Hungarian interests the right to challenge the administrative order.

The foregoing considerations led the Verwaltungsgerichtshof to conclude that the holders of rights in non-Austrian waters had no standing as parties (Parteienrolle) in proceedings concerning rights in Austrian waters.²⁵⁶

The second European case was decided in 1969 and involved the airport at Salzburg, Austria.²⁵⁷ The German municipality of Freilassing, which lies directly across the border from the airport, and a private property owner from Freilassing sought to challenge an order by the Austrian Supreme Civil Aviation Authority (Oberste Zivilluftfahrtbehörde) permitting the expansion of the scope of operation of the Salzburg airport, apparently on the ground that such would cause them increased aircraft noise disturbance. The Supreme Administrative Court of Austria dismissed the claims for the following reasons: The challenged permit was granted pursuant to section 68, paragraph 1 of the Austrian Aviation Act which, the court reasoned, is applicable only in the territory of the Republic of Austria. Section 70, paragraph 2 of this statute grants affected state and local governmental bodies and "statutory interest groups" the opportunity to comment upon proposed modifications of an airport's scope of operation. The court held that because of the essentially territorial character of this administrative legal norm, the right granted extends only to Austrian governmental bodies and interest groups, and not to those in a foreign country. The German municipality therefore had no right, or legal capacity, to challenge the permit under the Aviation Act. It followed that the private citizen complainant, as an owner of foreign property, was likewise accorded no right by the Aviation Act to challenge the Austrian administrative order.

The Verwaltungsgerichtshof pointed out that it had previously held owners of property in Austria in the vicinity of the airport to lack party capacity in such administrative procedures. Specifically, it had been held²⁵⁸ that owners of real property are "affected" by the issuance of an airport permit only insofar as the contemplated project would use the property for takeoffs or landings, whether for the flight itself, or for the required safety zone.

Finally, the Court dealt with the effect of the treaty concluded between the Federal Republic of Germany and Austria on June 16, 1967, which had not been ratified at the time of the decision, concerning the effects of the Salzburg airport in German territory.²⁵⁹ The treaty recognizes in Article 1 that operations under the challenged permit would substantially affect the municipality of Freilassing and its residents. Article 2 of the treaty provides for consultation of German aviation agencies in the event of a change in existing airport facilities. The Verwaltungsgerichtshof held that the treaty, in the absence of ratification, could not alter the strict territorial scope of applicability of the Austrian Aviation Act, and thus did not affect the court's holding.

Thus the Austrian Verwaltungsgerichtshof was not persuaded in either case that grievance mechanisms provided for by domestic law should be made available to interests beyond national frontiers. Both decisions refused to countenance the protestations of foreign interests seeking to air their grievances in an orderly manner within an existing domestic administrative framework.

To be sure, the court in each instance was careful to point out that prophylactic measures has already been taken to guard against undue injury to downstream and neighboring interests, respectively.²⁶⁰ But in neither instance did it take the opportunity to protect the threatened foreign interests by recognizing principles of international neighborhood law, which obligate countries to prevent harm to neighboring states by domestic activities.²⁶¹ The closest it came was its suggestion in the 1913 decision that administrative agencies, within the scope of their discretion, could take into account the possible effect of licensed activities upon neighboring foreign interests.²⁶²

The 1969 decision went so far as to suggest that despite the treaty signed by Austria and Germany governing the precise issue under dispute, it would not take cognizance of the foreign complaints lodged pursuant to the Austrian Aviation Act because the treaty was not yet ratified. This position would appear to ignore the well-recognized principle of international law that the parties to a treaty should do

nothing after its signing but prior to its ratification to frustrate or injure the purpose or clauses of the agreement.²⁶³

The reluctance exhibited in these decisions to allow foreign parties to take recourse to domestic administrative procedures is perhaps indicative of the attitude administrative bodies in Civil Law countries would adopt in transfrontier environmental cases. Such tribunals have exercised great caution in most countries as to which domestic parties they would allow to appear²⁶⁴ and foreign petitioners would certainly enjoy no better rights than nationals.

To be contrasted with the two Austrian decisions are a pair of opinions rendered by American federal appellate courts which allowed access by foreign parties to domestic administrative proceedings. Interestingly, however, neither opinion concerned itself at all with the question of whether the "foreignness" of the petitioner affected his right of access to the proceedings involved. It might be thought that this issue was merely overlooked. But the decisions themselves reveal that the pivotal consideration in determining whether the petitioner was "aggrieved" under the applicable statute, and thus entitled to participate, was whether he might be adversely affected by the administrative action in question; and the fact that the alleged harmful effects of the challenged action would occur in a foreign country was specifically held in one case not to defeat the agency's competence over the petitioner's claim.

Both cases were petitions by Mexican parties under the Natural Gas Act for review of orders of the U.S. Federal Power Commission (FPC). In each instance, the Circuit Court of Appeals found that the foreign petitioners were "aggrieved parties" within the meaning of the Natural Gas Act, and agreed to review the respective FPC orders. The first case, Cia Mexicana de Gas, S.A. v. Federal Power Commission,²⁶⁶ was decided by the Fifth Circuit Court of Appeals in 1948. Cia Mexicana was a Mexican gas company which received natural gas from the holder of an export permit in Texas. It sought review in this case of orders of the Federal Power Commission authorizing the exportation of natural gas from Texas to Mexico by another company and granting a certificate of public convenience and necessity to that company. The effect of these orders was to allow exportation of gas by a company (Reynosa Pipe Line Co.) that was seeking to "invade" the territory served by Cia Mexicana; Reynosa was thus a potential competitor of Cia Mexicana. The latter had intervened into the FPC authorization proceedings its right of intervention apparently having been unchallenged but did not succeed in preventing the authorization and accordingly petitioned the federal court of appeals for,

inter alia, review of the FPC orders.

One of the arguments advanced by Reynosa, the recipient of the authorization, in moving for dismissal of Cia Mexicana's petition for review was that the latter was not an "aggrieved party" as intended by the Natural Gas Act, That Act provides, in pertinent part, that

(a)ny party to a proceeding under this chapter aggrieved by an order of the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States....²⁶⁷

The Court dealt with Reynosa's contention in two brief sentences:

We make short work of Reynosa's motion to dismiss. We think it clear that petitioners are aggrieved parties within the meaning of the Act, and, as such, are rightfully here.²⁶⁸

With that, the court turned to the merits of the petition, which are not here pertinent. The fact that the challenge to Cia Mexicana's status as a proper party was so easily dispensed with demonstrates that the court had no qualms about the fact that petitioner was a foreign entity: Although no rationale for this holding was offered, the court evidently reasoned that Cia Mexicana was aggrieved because the authorized party would be in direct competition with that company. Moreover, in holding that both petitioners were aggrieved parties, the court made no distinction between Cia Mexicana and the State of Texas, the co-petitioner. Finally, it should perhaps be noted that the court, in agreeing to hear the petition for review, allowed a foreign entity to challenge the granting of a permit to a domestic enterprise (Reynosa). Although the court declined to overturn the FPC's orders, it did so strictly on the merits of the controversy, and could not be said to have discriminated against a foreign party in favor of a domestic party, since the State of Texas was Cia Mexicana's co-petitioner and shared equally in the adverse result.

The second case, Juarez Gas Company, S.A. v. Federal Power Commission,²⁶⁹ is a 1967 decision of the District of Columbia Circuit Court of Appeals. Petitioner in that case, Juarez Natural Gas Company, sought to challenge an order of the Federal Power Commission denying petitioner leave to intervene in proceedings concerning applications to supply natural gas to companies in Mexico. The effect of approval of the applications by the FPC would have been to allow an American gas and transportation company to sell and transport natural gas to a company in Mexico which would distribute the gas locally in competition with Juarez Gas, a

Mexican company. A petition to intervene²⁷⁰ was duly-filed by Juarez Gas prior to the hearing on the applications, but permission to Intervene was denied by the Commission. The only question considered by the court was "whether petitioner was erroneously denied intervention. We think," concluded the court, "it was...."²⁷¹ As in the last-discussed case, the court did not address the issue of whether petitioner's foreignness defeated its capacity to be a party to proceedings under the U.S. Natural Gas Act. This indicates at least that the parties did not raise the issue in oral or written argument, and that the court likewise deemed it insignificant. Again as in the previous case, the court ascribed primary importance to the fact that the grant of authorization by the FPC would result in increased competition with petitioner, and that the latter was hence an aggrieved party and as such was entitled to intervene. The court thus treated the petition by the Juarez Company in the same manner that it would have treated a petition by a domestic party.

In overturning the Commission's order denying intervention, the court dealt with the FPC's position that it could not "assume the obligation of determining local franchise rights in Mexico."²⁷² (The Commission was here referring to petitioner's contentions that the applicant was inexperienced in distributing natural gas and that it had not shown that it could dispose of the gas imported from the United States.) The court replied as follows:

We fully agree that it is for the authorities of Mexico, and not for the Commission, to determine what franchise rights are to be granted across the border. But it is for the Commission to determine what it should authorize on this side of the border, and this determination depends to some extent on the situation across the border when the matter involves the exportation of gas.²⁷³

It is submitted that this approach, which contrasts sharply with that taken by the Austrian Verwaltungsgerichtshof, is applicable with equal force to proceedings involving applications to operate a plant which will have potentially harmful effects across the border. For in such cases, as in the gas-exportation cases, the agency involved must "determine what it should authorize on this side of the border, and this determination depends to some extent on the situation across the border...." That is to say, the agency, in making its determination, must consider the effects of its decision upon parties and interests in the other country.

Even a purely private interest, the court pointed out, may be vindicated:

(T)he fact that petitioner would be adversely affected only in its private interests by whatever action the Commission might take does not negative petitioner's standing to advance factors bearing upon the public convenience and necessity.²⁷⁴

The court accordingly held that petitioner was indeed entitled to intervene in the FPC authorization proceedings.

On the basis of the four cases discussed above, it is difficult to reach a general conclusion regarding access by foreign parties to domestic administrative hearings. The two Austrian decisions leave no doubt of the view taken by that country toward foreign would-be intervenors: both decisions dealt specifically with the fact that the parties seeking access to administrative procedures were foreigners, and denied access on that basis. The two American decisions, on the other hand, did not discuss whether foreign parties could take advantage of entitlements under domestic legislation allowing "aggrieved" persons to vindicate their interests: Both decisions apparently assumed the foreign parties had the same rights of access as domestic parties once they were found to be "aggrieved" as that term is applied to domestic petitioners.

The most that can be said, therefore, regarding access by foreigners to administrative proceedings in the polluter's country, is that the only clear European precedent explicitly denies such access, while the two North American cases discussed appear to take for granted the right of affected foreign parties to participate in administrative proceedings on the same terms as domestic parties.

CHAPTER 8

CONCLUSION TO PART I

It may be generally concluded on the basis of the material set forth in the preceding Chapters that, under optimal conditions, it would be possible both in North America and in Europe for a pollution victim to obtain relief through the courts against a foreign polluter. Indeed, courts in both regions have granted redress for injuries relating to boundary natural resources. This is not to say that there are no problem areas, however. While actions seeking monetary compensation for pollution damage would stand good chances under proper circumstances, those seeking injunctive relief are much less certain to succeed. Furthermore, in heavily industrialized border regions where the most intensive trans-frontier air and water pollution occurs, establishing a causal connection between defendant's activity and plaintiff's injury is likely to prove troublesome, if not impossible. Ironically, the more activities there are emptying their wastes into the atmospheric region or watershed used by the plaintiff, the more difficult it will be for him to recover in a private action. And as suggested above, it is, at least in Europe, uncertain that present concepts of foreign parties' standing before administrative bodies would allow injured or threatened parties to assert their interests before the agency competent to regulate the offensive activities.

It must be concluded, therefore, that although the possibility of recovering for transfrontier environmental injuries is not so slight as some would think, the outlook is fraught with uncertainty. The availability in transnational cases of private remedies through courts and administrative bodies would appear to lack the consistency and predictability necessary (1) to ensure redress for victims of transfrontier pollution and, equally important, (2) to make private action effective in helping to achieve a more equitable balance between resource deteriorating and non-deteriorating uses by forcing internalization of pollution costs. Part II will accordingly offer general suggestions designed to alleviate transfrontier pollution through cooperative governmental measures and to allow transfrontier pollution victims the same right to redress as would be available in the source country.

P A R T I I

PROPOSED INTERNATIONAL ACTION

CHAPTER 9

INTRODUCTION

It is the underlying theory of the proposals outlined below that transfrontier pollution problems are best approached through individual agreements concluded between the states bordering the regions involved, rather than by means of a general convention open for accession by any state. Each agreement should be tailored to accommodate the unique features of the geographical and human environment to which it applies; accordingly, the suggestions offered here are not necessarily meant to be directly applicable to all situations. Nor are they intended to provide a comprehensive regime for environmental quality management - this should be dealt with separately in agreements such as those concluded between the United States and Canada under the 1909 Boundary Waters Treaty²⁷⁵ and by the member states of the Council of Europe, e.g., the European Convention on the Protection of International Watercourses Against Pollution.²⁷⁶ While transfrontier pollution problems are usually best dealt with in special agreements, however, when a group of countries in a given region share common administrative and legal institutions, such problems may be more effectively treated in a multilateral convention between those states. The recent Scandinavian Convention on the Protection of the Environment,²⁷⁷ discussed below, is an example of such a regional arrangement.

Special bargaining problems arise when the transfrontier pollution is of a unidirectional nature.²⁷⁸ Applying the widely recognized OECD "Polluter Pays Principle" to transfrontier pollution; the "upstream" or source country should be willing to assume the cost of abating the pollution to a mutually agreed upon level. Under this view, if the level agreed upon is still too high for the "downstream" country, that country should assume the cost of abating the pollution to a tolerable level.²⁷⁹ The "downstream" country would, in any event, bear the cost of damage caused within its country by pollution not in excess of the agreed-upon level.

²⁸⁰

An agreement on transnational environmental disturbances should include provisions on private remedies designed to remove the specific impediments to relief identified above. Wherever possible and appropriate, recourse through the courts should be facilitated by eliminating existing uncertainties, particularly in the areas of jurisdiction and

choice of law. Secondly, access to foreign administrative procedures should be allowed insofar as necessary to enable interested parties to comment upon permit applications or proposed administrative rule making. Ideally all interested parties within the region involved, as well as competent foreign agencies, should also have the right to intervene into ongoing administrative proceedings, review administrative action, or compel administrative enforcement of existing regulations. Finally, to ensure that pollution damage does not go unremedied due to substantive or procedural impediments, because of the plaintiff's failure to establish causation (i.e., to attribute the harmful pollutant to a particular source or sources), or because of the polluter's inability to pay, the agreement could establish a jointly administered compensation fund. The purpose of the fund would be to compensate unrecoverable losses caused by transfrontier or intra-regional pollution.

Clearly, however, an agreement providing only for the redress of environmental harm which has already occurred fails to deal effectively with the problem itself, or to minimize the likelihood of future injury. The victims of environmental insults may receive compensation therefor, but unless money judgments against polluters force them to abate their emissions, which is unlikely,²⁸¹ the devastation of shared natural resources will go on unchecked. What is called for, then, is a scheme which will ensure both redress for victims of transfrontier pollution and, perhaps more importantly, prevention of future environmental harm to neighboring countries. Ideally, this could be accomplished through (1) common regulatory measures (and thus a common administrative framework for the border region) and (2) harmonization of private law rules governing procedure and liability.²⁸² These two objectives, however, have proven difficult of realization even under relatively favorable circumstances. This has been so, as to (1), because of the difficulty and slowness of harmonizing national environmental quality laws and regulations,²⁸³ and due to the reluctance of the countries involved to surrender their "sovereignty" over border regions to a bilateral commission,²⁸⁴ and as to (2), because deeply rooted principles of private law are not easily changed.²⁸⁵ It is submitted that a realistic and expedient solution which would avoid these obstacles would be an agreement providing that the parties ensure equal treatment and consideration of neighboring countries and their inhabitants in planning, administrative and judicial proceedings. Such an approach has been advocated by the Committee of Ministers of the Council of Europe²⁸⁶ and has been implemented by the Scandinavian countries in a recent agreement on transfrontier pollution.²⁸⁷ Part Two will first review existing international instruments from which such an agreement could draw, and will then suggest provisions which the agreement might include.

CHAPTER 10

EXISTING MODELS FOR A TRANSFRONTIER POLLUTION AGREEMENT

A review of selected treaties, conventions, recommendations²⁸⁸ and proposals relating to transfrontier or international pollution problems will serve not only to provide possible models for future agreements on transfrontier environmental problems, but also to identify principles recognized by a substantial number of countries in instruments of positive international law. Indeed, all of these agreements may be said to be based upon a recognition of the principle that one state shall not cause environmental harm in or to the territory of another.²⁸⁹ These measures may be conveniently discussed in two groups, the first including bilateral or regional arrangements aimed at preventing transfrontier environmental harm, and the second comprising conventions and proposals which would create liability for causing adverse effects in a foreign state.

A. Regional Arrangements to Prevent Transfrontier Environmental Harm

(1) The Scandinavian Convention on Transfrontier Pollution

On February 19, 1974, the governments of Denmark, Finland, Norway and Sweden signed the Convention on the Protection of the Environment.²⁹⁰ This agreement, which was based upon a draft convention submitted by the Nordic Environmental Protection Committee,²⁹¹ is grounded upon the principle that in considering the permissibility of an activity which may be environmentally harmful (in the broadest sense), a state will give equal consideration to the interests of neighboring states. Thus, Article 2 provides that when an administrative agency "is considering the permissibility of an environmentally harmful activity, the nuisance such activity entails or may entail in another Contracting State shall be regarded as equivalent to a nuisance caused in the former State." It was considered that such a system could be implemented without great difficulty, "since the environmental standards in the Nordic countries are largely the same."²⁹² The particular value of this provision lies in its preventive nature: It directs agencies to consider the region-wide consequences of an ongoing or proposed activity, not simply those which may be felt in the state in which the activity is conducted. This article alone would thus effectively eliminate much transfrontier pollution damage.

The Convention proceeds, in Article 3, specifically to guarantee to persons (the unofficial translation uses the term "Whoever") who have been or may be affected by an environmentally harmful activity in another state, the right of access to the courts or administrative agencies of that state "to the same extent and on the same terms as a legal entity of the State in which the activity is being carried on." Such affected persons may institute proceedings concerning either the permissibility of the activity in question, or compensation for damage caused thereby. In both cases, the entitlement includes the right to seek prevention of damage (injunction) and the right to appeal decisions of the court or agency. Although it is arguable²⁹³ that this provision would allow private access to administrative proceedings concerning the permissibility of an environmentally harmful activity (cf. Article 4), such an entitlement is by no means clear, and is not to be found in any other article in the convention. In proceedings concerning compensation, the rules applied may not be less favorable to the injured party than those applicable in the state where the activity is conducted. This provision ensures that foreign plaintiffs will not be placed on worse footing than domestic plaintiffs and allows possible application of a rule more favorable to the plaintiff than would be applicable in a wholly-domestic case. A foreign plaintiff could, therefore, (if the choice of law rule pointed to the place of the injury and if that law were more favorable to the plaintiff than the *lex actus*) be better off vis-à-vis the domestic polluter than a domestic plaintiff under this provision. Finally, the Protocol of the Convention provides that the right to institute proceedings for compensation includes, "in principle, . . . the right to demand the compulsory purchase of property." This would appear to sanction an effective private condemnation of foreign land through the maintenance of a polluting activity. While it may be well to allow compensation for property rights rendered useless by a polluting activity, creating "permanent servitudes"²⁹⁴ in favor of such activities or allowing them to purchase "pollution rights" is, in general, counterproductive to the achievement of environmental quality.

Article 4 of the Convention directs each contracting state to appoint a "supervisory authority" responsible for protecting that state's interests against environmentally harmful activity originating outside its borders. These authorities are accorded rights of access to administrative and judicial tribunals in the state where the activity is located commensurate with those enjoyed by similar agencies in the latter state. If an administrative or judicial body of a contracting state determines in a permit proceeding that an activity causes or may cause a nuisance in another

contracting state, the former body is to notify the supervisory authority of the latter state, which may then comment upon the proposed permit (Article 5). The supervisory authority may request further information for the purpose of determining the effect of the activity in its country (Article 6), and the body considering the permit application may request the supervisory authority of the affected state to arrange an on-site inspection to determine the effect of the proposed activity in that state (Article 10).

The Convention also provides for consultation between contracting states (Article 11), for formation of a Commission to report on cases involving permits to carry on environmentally harmful activities (Article 12) and that its provisions apply to "the continental shelf areas of the Contracting states" (Article 13).

This Convention thus goes a long way toward preventing transfrontier pollution injury and facilitating redress by pollution victims against foreign polluters. The philosophy implicit in its provisions is that the mere existence of a political boundary line should prevent neither the "upstream" state from considering the transfrontier effects of an activity, nor the "downstream" state from having an input into the decision-making process concerning the permissibility of that activity. Nor should the boundary line constitute an impediment to victims of transfrontier pollution seeking redress in the source country. By empowering judicial and administrative bodies to deal with environmental problems on a regional basis, largely unconstrained by territorial limits, the Convention comes to grips with the fact that pollution does not respect political boundaries. It addresses, but does not solve, the problem of the applicable law in actions for compensation, but does nothing to ease the burdens of establishing the source or sources of the injurious pollution. Importantly, however, it does guarantee actually or potentially affected individuals in the "downstream" state a right of access to administrative proceedings in the source state concerning activities which give rise to transfrontier environmental harm.

(2) The German-Austrian Salzburg Airport Treaty

The Treaty between the Federal Republic of Germany and the Republic of Austria on the Effects of the Operation of the Salzburg Airport on the Federal Republic of Germany²⁹⁵ was concluded on December 19, 1967. As stated in the memorandum accompanying the agreement,²⁹⁶ the location of the Salzburg Airport immediately adjacent to the German border, and the consequent use of German territory for flight paths on landing and take-off, necessitated the establishment of a security zone in German territory pursuant to the International Civil Aviation Convention of December 7, 1944. The Federal Republic of Germany accordingly agreed to treat the airport as if it were located within German territory insofar as necessary to the fulfilment of its obligations under the treaty. Austria in turn agreed to indemnify any losses which arose out of the resultant burdens on German property in addition to redressing any possible injurious effects in German territory of the operation of the airport.

Since the German community of Freilassing lies directly in the path of arriving and departing flights, one of the primary objects of the treaty was to assure German residents some measure of protection against aircraft noise. Article 2 accordingly provides for consultation between the civil aviation agencies of the respective parties in the event that the permits for operation of the airport are to be changed or modified. In such cases, Austria is specifically directed to take German interests into consideration, particularly those respecting land use, planning and protection against aircraft noise.

Compensation for injurious effects of the airport's operation is regulated by Articles 4 and 5. Paragraph 2 of Article 4 imposes liability upon Austria for damage sustained by Germany, the State of Bavaria or its communities as a result of operation of the airport, as well as for indemnity of expenditures incurred in satisfying claims of third parties arising from such operation. Claims relating to effects of the operation of the airport upon persons, things or rights in German territory are governed by paragraph 3 of Article 4. Such claims may be asserted only in German courts, and the latter may apply either German or Austrian law, depending upon which is more favorable to the plaintiff.²⁹⁷ Another provision of the latter paragraph in effect makes an Austrian permit a defense to a German action, insofar as the airport is operated according to both the applicable Austrian regulations and the treaty. Under Article 5, paragraph 1, Germany is liable for all injuries to persons, things or rights in Germany due to the operation of the airport which are caused wrongfully through

the fault of Austrian agencies. This paragraph was intended to eliminate procedural difficulties which would arise if such an action were brought against the Austrian agency; paragraph 5 of Article 5 obligates Austria to indemnify Germany for expenses incurred in satisfying claims under paragraph 1.

Finally, Article 12 provides that disagreements as to the interpretation or application of the treaty shall be settled by the competent agencies of the contracting states. In the event that this fails, an arbitration tribunal is to be set up, on a case-by-case basis, to resolve the dispute.

While this agreement, being restricted to effects of the operation of the airport, is much narrower in scope than the Scandinavian convention, it does provide for consideration of the transfrontier effects of the activity in question. Austria is bound to consider German interests when contemplating changes in the airport's operation (Article 2, para. 1), and provision is specifically made for claims relating to injury to persons, things and rights in Germany due to activities in Austria related to the operation of the airport (Articles 4 and 5). The treaty attempts to safeguard the rights of individuals by requiring that Austria take transfrontier effects of the airport into account and by allowing German plaintiffs to sue the German state for damage occasioned through the fault of Austrian agencies. Because of the fault requirement and the fact that the Austrian permit is otherwise a defense to a German plaintiff's action, however, it appears that such a plaintiff would be unsuccessful in an action to recover for aircraft noise disturbance which nevertheless did not violate the treaty or the Austrian permit.

(3) Agreements between European States concerning the Protection of Shared Water Resources

By 1945, Germany had already concluded twenty-one agreements with neighboring states concerning utilization of shared water resources, all of which were founded on the principle that "no State may carry out in its territory measures affecting an international river course which produce a marked detrimental effect on the river course flowing through the territory of another State."²⁹⁸ This principle is, of course, closely analogous with the holding in the Trail Smelter Arbitration and with Principle 21 of the Stockholm Declaration on the Human Environment, mentioned above. The agreements and regional arrangements most interesting for present purposes are more recent and include the International Commission for the Protection of

the Rhine against Pollution, originally set up in 1949 by France, Germany, Luxembourg, the Netherlands and Switzerland,²⁹⁹ the Central Commission for the Navigation of the Rhine, established in 1815,³⁰⁰ the International Commission for the Protection of the Moselle Against Pollution, established 20 December, 1961 by France, Germany and Luxembourg,³⁰¹ the Convention for the Protection of the Waters of Lake Constance, concluded in 1960 between Austria, Switzerland and the German states of Baden-Württemberg and Bavaria,³⁰² and the Frontier Treaty between Germany and the Netherlands of 1960.³⁰³ The Rhine Commission was formed to "promote permanent co-operation among the participating States for the protection of the Rhine against pollution" (Article 1). It may recommend protective measures, but action must be approved unanimously by the member states (Article 6). Despite its lack of real power, however, the Commission has achieved some significant results, particularly at the Hague Ministerial Conference in 1972.³⁰⁴ At that conference, the following action was taken: First,

(a) agreement was reached on sharing the cost of storage of a proportion of the waste salts previously dumped into the river from the Alsace potassium mines. Second, the Commission was instructed to draw up, within 6 to 12 months, a "black list" of prohibited substances and a "grey list" of substances requiring special care on the basis of the Oslo Marine Dumping Convention. In the face of French intransigence, little progress was made on a third question, the problem of thermal pollution caused by atomic power reactor cooling systems.³⁰⁵

The latter two agreements mentioned above were, in effect, forerunners of the Scandinavian agreement on transfrontier pollution since they both provide for consultation between parties regarding projects which might cause transfrontier environmental harm. The Convention for the Protection of the Waters of Lake Constance set up the Standing International Commission for the Protection of the Waters of Lake Constance, which may make recommendations to be implemented by the parties to the extent they are consistent with national legislation.³⁰⁶ The parties undertook to inform each other in advance of proposed activities which could be harmful to the other parties' interests in the lake, and agreed not to implement such proposals without first consulting with interested parties.

The Frontier Treaty between Germany and the Netherlands provides in Chapter 4 for protection of boundary water resources, excluding the Rhine. The parties are obligated "to prevent undue pollution of the boundary waters as a

result of which substantial injury may be done to the ordinary use of the water by the neighboring State."

(Article 58, para. 2 (e).) The parties are to notify the Permanent Boundary Waters Commission created under Article 64 of proposed measures which may affect water quality in the neighboring state (Article 60, para. 1), and the other party may object to such measures within a reasonable time (Article 61). If such objections are lodged, implementation of the said measures must be delayed until the matter has been resolved by the Commission or the two governments (Article 62, para. 1). A party who causes damage in the territory of the other party in violation of the obligations of Chapter 4, and after an objection has been lodged, is bound to provide compensation therefor (Article 63). The Permanent Boundary Waters Commission is composed of three experts from each country (Article 65). It is charged with promoting the implementation of Chapter 4 through joint consultations on all problems arising thereunder and through exchange of information (Article 66, para. 1). It is empowered to inspect boundary waters and is given access to "all information necessary" to the performance of its functions. It is also responsible for dealing with objections lodged by a party under Article 61 "against any measures planned or initiated by the other Party or against any omissions of that Party which are likely to cause substantial damage or have already caused such damage", and is to endeavor to settle disputes between the parties concerned (Article 66, para. 3). In the event that the Commission is not able to agree upon a recommendation in response to an objection, the two governments are to endeavour to reach agreement (Article 67, para. 1). If the latter fails, either party may appeal to an arbitral tribunal, set up under Articles 69 to 73. This tribunal is available for the settlement of disputes concerning the interpretation or application of Articles 56 to 73.

(4) The Boundary Waters Treaty between Canada and the United States

The Treaty relating to Boundary Waters and Questions Arising along the Boundary between Canada and the United States³⁰⁷ was concluded by the United States and Great Britain, on behalf of Canada, in 1909. The treaty primarily concerns navigation and diversion of boundary waters but contains an express prohibition against pollution of boundary waters which has harmful transfrontier effects (Article 4). Article 7 of the Treaty established the International Joint Commission (IJC), which was given administrative (Article 6), judicial (Article 8), arbitral (Article 10) and investigative (Article 9) powers to facilitate settlement of questions arising under the treaty. From its inception the IJC has

been active in investigating and reporting on boundary water pollution³⁰⁸ and has even been utilized more recently to deal with air pollution problems.³⁰⁹ The Treaty authorizes the IJC to act only upon the request of one of the parties, however; the Commission thus lacks sufficient power to act as a truly independent body. The 1970 Agreement between the United States and Canada on Great Lakes Water Quality,³⁶⁰ while allowing the IJC to tender advice and recommendations and to undertake coordinating activities, does not significantly increase the Commission's powers. The 1970 Agreement also creates a Great Lakes Water Quality Board to assist the IJC in carrying out its responsibilities under the new Agreement. The Board is to be composed of an equal number of members from each country, including representatives of border states and provinces.

The 1909 treaty provides for settlement of any disputes arising thereunder by the IJC (Article 10); should that body fail to agree upon a solution, the matter is to be referred to an umpire chosen in accordance with the procedure prescribed by The Hague Convention of October 18, 1907.

The 1909 Treaty provides for private remedies in Article 2 as follows:

(I)t is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs

It is probable that this provision was inserted to avoid possible problems created by the "Harmon doctrine,"³¹¹ which was the subject of much controversy at the time the Treaty was drafted, and under which countries could act at will with respect to inland waters, irrespective of transfrontier effects. Article 2 purports to direct a court to apply the law of the place of the allegedly harmful act in cases brought thereunder. It is at least questionable whether this Article applies to pollution, however, in light of the considerations which prompted its inclusion.

(5) The American Clean Air Act of 1967

Although domestic legislation, the United States Clean Air Act of 1967 creates a framework for international consultation concerning transfrontier air pollution problems. The

Act provides for the convening of conferences between local and foreign authorities to deal with air pollution emanating from the United States which endangers the health or welfare of persons in a foreign country.³¹² The Act requires that in order for such a conference to be called, the Administrator of the Environmental Protection Agency must receive "reports, surveys or studies from any duly constituted international agency," indicating that air pollution from a U.S. state endangers the health or welfare of persons in a foreign country; the Administrator may also call a conference at the request of the Secretary of State. The International Joint Commission, referred to in the previous section, would appear to qualify as such an "international agency." The Administrator is directed to notify the competent air pollution control agencies in the municipality where the emissions originate and in the State in which the municipality is located, as well as the competent interstate agency. He is then to call a conference between those agencies, to which "the foreign country which may be adversely affected by the pollution" is invited. The foreign country may participate in the conference, and "shall, for the purpose of the conference and any further proceedings resulting from such conference, have all the rights of a State air pollution control agency."

It should be noted that the rights granted to foreign states by this statute are available only to those countries which have accorded the United States the same rights, and the Administrator is not authorized to act upon information received directly from the foreign country; it must be channeled through the State Department or confirmed by an international agency. Furthermore, under the terms of this section, the harmful pollution must already have occurred before the conference may be called; there is no provision for notification of the foreign country of contemplated action which might have harmful environmental effects across the border. Still, this legislation is noteworthy for its attempt to deal with transfrontier effects of domestic activity, and for its inclusion of the foreign country as an equal party in proceedings to examine the appropriateness of the relevant air pollution standards.

(6) The Council of Europe Resolution on Air Pollution in Frontier Areas

On March 26, 1971, the Committee of Ministers of the Council of Europe passed a resolution³¹³ recommending that member states "ensure for the inhabitants of regions beyond their frontiers the same protection against air pollution in frontier areas as is provided for their own inhabitants." The Committee was of the opinion that the inhabitants of

regions beyond a state's boundary should be entitled to express their views as to a planned or existing polluting activity to the same extent as the inhabitants of the state where the activity is located. The member states were asked in particular to ensure that competent agencies inform each other in advance of proposed activities which could pollute the atmosphere beyond the frontier. Moreover, the Committee recommended that competent foreign authorities be allowed to comment upon such proposals, and that such comments be accorded "the same consideration and treatment as if they had been made by the inhabitants of the country where the plant is situated or proposed."

This resolution, then, reflects a policy similar to that implemented by the Scandinavian agreement on transfrontier pollution. It focuses upon preventing harmful transfrontier pollution, whether existing or foreseeable, taking no position on liability for such pollution. By proposing that the competent agencies of each of the member states have access to administrative procedures in neighboring states, the resolution attempts to ensure that activities whose emissions cross the boundary are accountable for those discharges to the same extent as activities which pollute only domestic resources. Indeed, compliance with the resolution would appear to lead to a harmonization of administrative standards which would prevent, at least in border areas, location of plants in countries with comparatively lower pollution control standards.

B. International Conventions Imposing Liability for Environmental Damage

(1) The Draft European Convention on the Protection of International Freshwaters against Pollution

In 1965, the Consultative Assembly of the Council of Europe called upon its Cultural and Scientific Committee in Recommendation 436 to study the pollution of fresh waters in Europe with a view to formulating a comprehensive approach to water pollution control. Out of this recommendation grew a Draft European Convention on the Protection of Fresh Water against Pollution, adopted unanimously by the Consultative Assembly on 12 May 1969 as Recommendation 555.³¹⁴ This Draft Convention proposed a unique method of compensating victims of transfrontier water pollution. Primarily because of that proposal, however, the Draft proved unacceptable to the member states and was redrafted in 1970³¹⁵ and again in 1973³¹⁶ to exclude the 1969 Draft's provisions on liability. Although the Convention finally approved in 1974 thus does not contain provisions concerning compensation

for water pollution damage, the 1969 Draft will be discussed briefly to illustrate the system it proposed and to demonstrate the fate of that system in the subsequent drafts.

Chapter I of the 1969 Draft calls upon the contracting states, inter alia, to abate existing pollution and prevent new pollution (Article 2, para. 1), to establish, where possible, water quality standards for international drainage basins and joint commissions to regulate the use thereof (Article 2, para. 2 (a) and (b)) and to inform and consult with each other as to the use of such waters (Article 2, para. 2 (d)). Chapter II concerns settlement of disputes between the contracting states. If a dispute cannot be resolved through negotiation, by a joint commission or by an international tribunal, the parties are to refer it to an ad hoc arbitral tribunal which is to be constituted in accordance with Article 5 (Article 4).

Compensation for pollution damage to persons is provided for in Chapter III. The system elaborated therein was deemed necessary because "state-to-state" responsibility for water pollution, covered in Chapter II, was thought inadequate to protect individuals injured by transfrontier pollution. Chapter III was thus designed "to ensure that effective redress can be obtained under municipal law by the person who has suffered damage, without the need for a claim to be brought by his state on his behalf under public international law."³¹⁷ The framers of the 1969 Draft further recognized that in practice it was "difficult, if not impossible" for victims of transfrontier water pollution to establish who had caused the offensive pollution, and to prove that that party was at fault.

Accordingly, Chapter III provided that any person injured by pollution from a contracting state (denoted the "responsible state") could obtain compensation from that state (Article 8) in the latter's courts (Article 11, para. 1). Thus the claimant would only have to prove that the pollution arose, "wholly or in part" (Article 8), in the responsible state and that it caused him damage; he would be freed from the burden of establishing culpability against a particular party in the responsible state. The Draft does, however, place reasonable limits upon the extent of the responsible state's liability, and upon the circumstances under which such liability arises. Thus if water quality standards have been adopted pursuant to Article 2, paragraph 2 (a) for the international drainage basin concerned, liability arises only where the damage was caused by pollution in excess of such standards. (Article 7, para. 1). Secondly, the responsible state may avoid liability by showing that the damage complained of was caused through the negligence of the claimant or of a third party in the claimant's state

(Article 9). The responsible state is also entitled under Article 10 to obtain remedies against anyone who wrongfully causes water pollution, either domestically (para. 1) or in any other contracting state (para.2), under the internal law of that person's state. Finally, such actions may be brought only in the courts of the responsible state, and they must be brought within two years of the occurrence of the damage (Article 11).

Although the responsible state is thus made strictly liable for extraterritorial pollution damage to private interests, it clearly has the best "means of obtaining all relevant evidence about matters occurring within its own boundaries,"³¹⁸ and is free to seek redress against those responsible for the pollution.

The 1969 Draft was transmitted to the Committee of Ministers for further action. The Committee concluded that the Draft did not provide a suitable basis for concerted action, and in particular had "grave objections to the principle of State liability as laid down in the draft Convention."³¹⁹ A new Convention was therefore drafted³²⁰ which provided only for liability of a contracting state from which pollution emanated to the state on whose territory pollution damage was sustained (Article 13). Such liability would arise only in the event that the former state permitted conduct which violated minimum water quality standards defined in the Appendix, or of regulations drawn up by an international commission pursuant to Article 8 (c). The Explanatory Memorandum³²¹ by the Secretariat General notes that in such cases the burden of proof lies upon the plaintiff state, and that private parties may obtain damages from a foreign state through their government.³²² It is noted, however, that the "situation ... would clearly be more satisfactory if the internal law of all the High Contracting Parties were to permit the grant of redress for damages caused by water pollution."³²³ Furthermore, the Secretariat General was of the view that action was necessary to ensure that individual victims of pollution could receive compensation in cases where no one could be held responsible.³²⁴ A recommendation was accordingly drafted proposing the establishment of one or more funds for the compensation of pollution damage in such cases.³²⁵ This recommendation specifically called upon

the Governments of member States interested in a same international drainage basin to study and to bring about the setting up of a common guarantee fund for the indemnification of damage due to water pollution, caused on the territory of one State and suffered on the territory of

another State, when the cause cannot be determined, when no liability exists or, if liability depends on national law, when the amount of damages exceeds the resources of the person or persons liable.

So far as is known, no action has been taken on this proposal. The draft recommendation also urged member states to unify progressively their internal legal rules on civil liability for water pollution.

The liability provision on the 1970 Draft was further diluted in the 1973 Draft.³²⁶ Article 17 of the latter provides merely that the rules of general international law governing liability of states for damage caused by water pollution will not be affected by the provisions of the Convention. Thus the European Draft Convention on Water Pollution has evolved from a position allowing injured parties to bring actions directly against the state from which the harmful pollution emanates, to a position allowing no more and no less in respect of remedies for pollution damage than is available in the Convention's absence. The 1970 Draft scrapped the state-to-individual liability proposed in the 1969 Draft, but substituted state-to-state liability. This was coupled with a specific recommendation that states sharing common drainage basins conclude agreements providing for funds which would guarantee compensation for pollution damage when causation or liability cannot be established or when the defendant lacks sufficient assets to satisfy a judgment. The 1973 Draft abandoned even these proposals, leaving individuals and states concerned to whatever recourse is available in the absence of the Convention.

The evolution of this Draft Convention is thus illustrative of the current disposition of the member countries of the Council of Europe toward the question of liability for transfrontier pollution damage. It is clear that these countries are opposed not only to state liability directly to victims of pollution, but also to a clear articulation of state liability to other states, even when such liability is based upon violation of specific water quality standards. The only door left open through which to attack the problems of establishing causation and fault appears to be the guarantee fund suggested in the proposed resolution submitted with the 1970 Draft. This approach will be discussed further below.

(2) The International Convention on Civil Liability for Oil Pollution Damage³²⁷

This Convention was designed to ensure that persons suffering

damage from oil pollution caused by spills from bulk oil carriers will receive compensation therefor. It applies to oil pollution damage in the territory or territorial sea of contracting states due to oil spills occurring there or on the high seas. An action to recover for such damage may be brought against the ship owner by "any individual or partnership or any public or private body, whether corporate or not, including a state or any of its constituent subdivisions."³²⁸ Such actions are to be brought in the courts of the state in which the damage occurred, and judgments are made enforceable in any contracting state. The owner's liability for oil pollution damage is strict, except under certain circumstances, and unlimited if he is at fault. There is a liability ceiling of 14 million U.S. dollars where the owner is not at fault, and ships subject to the convention must be insured to cover the owner's liability for a single incident.

This convention was a response to the Torrey Canyon disaster and was drafted with that type of event in mind. Proof of causation presents little or no problem in such cases, and the damage is caused by an accident, rather than an ongoing activity as in most transfrontier pollution situations.

(3) The Vienna Convention on Civil Liability for Nuclear Damage³²⁹

The purpose of this convention is to establish "minimum standards to provide financial protection against damage resulting from certain peaceful uses of nuclear energy."³³⁰ The convention provides that operators of nuclear installations shall be absolutely liable for damage caused by nuclear incidents, unless they can demonstrate that the damage was due to the intent or gross negligence of the injured party. Liability is unlimited but the state in which the installation is located may legislate a limitation of not less than 5 million U.S. dollars. Operators are required to carry insurance to cover their liability, and the state where the installation is located must insure payment of claims against the operator (Article VII). Actions under the convention are to be brought in the courts of the state in which the nuclear incident occurred (Article XI) and the nature, form and extent of compensation is governed by the "law of the competent court" (Article VIII), which law includes that court's conflict of law rules (Article 1, para. 1 (e)). That is to say, the plaintiff must sue in the proper court at the place of the act, and that court is to apply its own law. Final judgments rendered by courts competent under Article XI are to be recognized in other contracting states, without

re-examination of the merits, unless such judgments are obtained by fraud, are contrary to the public policy of the state where recognition is sought or unless the judgment debtor was not given a fair opportunity to present his case (Article XIII) .

(4) The Helsinki Rules on the Uses of the Waters of International Rivers ³³¹

The Helsinki Rules, which were adopted by the International Law Association on August 20, 1966, make states liable for damage caused to a state in the same drainage basin in violation of specific obligations (Article XI, para. 1). The latter are set forth in Article X, which provides that states "must prevent any new form of water pollution or any increase in the degree of existing water pollution in an international drainage basin which would cause substantial injury in the territory of a co-basin State" (Article X, para. 1 (a)). If this rule is violated, the responsible state is bound by Article XI to "cease the wrongful conduct and compensate the injured co-basin State for the injury that has been caused to it." States are further required to abate existing pollution to the "extent that no substantial damage is caused in the territory of a co-basin State" (Article X, para. 1 (b)). Failure to comply with this obligation gives rise to a duty to enter promptly into negotiations with the injured state.

(5) The World Peace Through Law Center Draft Environmental Convention

The Draft Convention on Environment Cooperation Among Nations, ³³² prepared for the WPLC by Professor C. Fleischer pursuant to resolutions of the 1969 Bangkok Conference on World Peace Through Law, contains rules governing civil liability for pollution damage in Article 41. Paragraph 1 of that article would give natural or legal persons or governmental entities injured by pollution from another state "a right of compensation in accordance with the law of (that) State." Like the Scandinavian transfrontier pollution convention, paragraph 2 of Article 41 states that the right of compensation is to be at least equal to that enjoyed by a person injured within the state in which the polluting activity is located. The WPLC draft convention provides further, however, that the polluter's state can condition payment of compensation to foreign victims upon its residents and nationals having corresponding rights in the plaintiff's state. Paragraph 3 provides that the foregoing provisions are without prejudice to any other rights or remedies available in the state of the act, in that of the injury or in a third state. The polluter's state is not obligated, however, to recognize or enforce rights acquired in other states in the absence of an

agreement on the enforcement of judgments or of a controlling rule of international law. Article 41, paragraph 4 encourages the parties to establish rules on liability which would encourage reduction of pollution. To this end, legislation is to proceed from "the principle that as far as possible all costs of industrial production and other activities should be borne by the persons undertaking such activities, and that therefore liability should be strict and unlimited" Such measures are to be undertaken with due regard for the "possibilities of insurance." The WPLC Draft Convention takes no position on where actions for civil remedies are to be brought.

CHAPTER 11

PROPOSED ACTION

Introduction

As stated at the outset of the second part of this study, the proposals outlined herein are based upon the postulate that transfrontier environmental problems are best dealt with on a regional basis. It is thus envisaged that these proposals will be incorporated into an agreement (hereinafter referred to generally as "the agreement") or a series of agreements, concluded between states bordering on, or interested in, a particular environmental region. This region might be a drainage basin, an airshed, an airport zone, or an entire border area which the parties undertake to plan and administer in a coordinated fashion through a joint arrangement. With the exception of the proposed fund for compensation of unrecoverable losses, the suggestions offered below are designed to be capable of implementation within existing legal, judicial and administrative frameworks. The object is thus to deal with transfrontier pollution problems in the most expeditious and efficient manner, avoiding wherever possible the necessity of new national legislation or international institutions.

A. Judicial Procedures

(1) Jurisdiction

The agreement should provide that actions for compensation or injunctive relief must be brought before the court at the place of defendant's activity.

The ideal situation would, of course, be to allow injured parties to bring actions anywhere within the region covered by the agreement. But it would be most difficult to ensure uniformity of result without a thorough harmonization of the two legal systems involved, including coordination of rules on jurisdiction and judgments as well as those governing liability and choice of law. Requiring that suit be brought at the place of the offensive activity will doubtless cause plaintiffs some inconvenience, due to such factors as distance, foreign language and increased cost. These burdens appear to be unavoidable, but it is nonetheless regrettable that they must be imposed

upon the plaintiff. The latter should generally be given every possible assistance, since it is his use of natural resources which is being foreclosed by the defendant's activity; the financial burden of bringing the lawsuit will be borne by the injured party in any event, and he will very likely be less able to bear it than the defendant.

Despite the many "non-legal" advantages of suing at the place of the injury, there are significant disadvantages of both legal and non-legal natures which tip the scale in favor of the place of the act. First, plaintiff would eventually experience considerable inconvenience and expense if he brought the action where his injury occurred because of the necessity of seeking enforcement of the ensuing judgment in defendant's country. Second, there would be a wider range of possible remedies (including periodic payments and injunctions) available to plaintiff in a suit at the place of the act. Despite the fact that it would theoretically be possible for a court to enjoin a foreign activity from emitting further pollutants, the case would, in all probability, have to be a compelling one, since courts have been extremely chary of shutting down foreign economic enterprises. Finally, uncertainties remain in the area of establishing the court's competence to adjudicate with respect to the foreign polluter. This is especially true in North America, where it remains to be tested whether a pollution injury would constitute a sufficient contact with the forum on which to base personal jurisdiction over the foreign defendant. And in Europe, even with the new convention on jurisdiction and enforcement of judgments, identification of the proper court depends upon the forum's interpretation of where the delict was "committed."

Even if assertion of extraterritorial jurisdiction over the defendant were found proper under the trial court's rules, however, it remains to be seen whether the court in which enforcement of the judgment is sought would find such an assertion acceptable. And defendant could put this question to the ultimate test simply by ignoring the original proceeding, or by contesting the court's competence to adjudicate his liability without submitting to its jurisdiction. While a strong argument can be made that a court would have jurisdiction over such an absent defendant under Anglo-American law, it is not at all certain that a Canadian or American court would recognize a foreign judgment rendered in the defendant's absence where the only jurisdictional contact was the harmful effect of pollution from the country in which enforcement is sought. It is this uncertainty which the agreement should prevent.

The new European convention on jurisdiction and judgments would appear to remove difficulties in this area, providing the court in which enforcement is sought does not object to the rendering court's assumption of jurisdiction. Since the provision of the convention governing jurisdiction in tort cases does not specify whether the locus delicti is the place of the act or that of the injury, however, that provision would have to be interpreted by the rendering court according to its local authority and jurisprudence. Both Germany and France would appear to allow suits at the place of the injury under this provision of the convention - although authority is scant - so there would seem to be no objection in either country to enforcing a judgment rendered in accordance with the convention. Even so, other non-jurisdictional considerations - such as available remedies, the expense of two proceedings and the problem of the effect to be accorded a foreign permit - weigh heavily in favor of designating the court at the place of the act as the appropriate forum. A method of enforcing foreign judgments rendered according to specified jurisdictional rules - similar to the method followed in the European convention - is discussed in the section on enforcement of judgments, below.

As to jurisdictional problems in suits at the place of the act, the agreement should specify that any existing impediments - such as the "local action rule" under Anglo-American law, and similar principle under Civil law which make courts at the situs of property exclusively competent in actions to recover for injury thereto - are eliminated in suits under the agreement. These rules are largely anachronistic, at least as applied to actions for trans-frontier injury to property, and their removal in suits brought under the agreement to recover for pollution damage would appear to do no violence to the policies, if any, upon which the rules are or were based.

Finally, to allow plaintiffs injured by transfrontier pollution the greatest possible freedom in securing relief, the agreement should explicitly preserve any jurisdictional avenues available in its absence. Thus a plaintiff who wished for some reason to bring an action at the place where he sustained injuries would be able to do so to the extent that such actions would have been possible without the agreement.

(2) Choice of Law

The ideal solution to problems created by conflicts of laws or conflicts of jurisdictions would be a harmonization of the laws of the neighboring countries. As observed above,

however, this is a long process, even when undertaken within an existing intergovernmental framework such as the Council of Europe.

In the absence of harmonization, it is desirable to provide a consistent standard by designating the law to be applied in cases brought under the agreement. But selection of the law to designate as applicable in all cases is difficult at best. Any of the choice of law rules currently in use in the systems under consideration - lex actus, lex injuria or the law most favorable to the plaintiff - would disadvantage inhabitants of one of the contracting states in every case. To illustrate this point, it will be assumed that states A and B have concluded an agreement and that recovery is easier for plaintiffs under A's laws. Application of the law of the place of the act in all cases would make it more advantageous for an inhabitant of B to be injured by pollution from A than from B; further, plaintiffs in B suing defendants in A would be better off than plaintiffs in A suing defendants in B. If the law of the place of the injury were applied in all cases plaintiffs from A would always be better off than plaintiffs from B. If the law most favorable to the plaintiff were applied in all cases a plaintiff from B who was injured by pollution from A would again be in a better position than a plaintiff from B injured by pollution from B.

Where the transfrontier pollution involved flows primarily from one contracting state to the other - i.e., where it is unidirectional, as opposed to reciprocal - residents of the "downstream" country (D) would usually be plaintiffs and parties active in the "upstream" country (U), defendants. Discrimination against parties in D injured by pollution from D may be avoided by designating the law of the place of the injury (D) as applicable in all cases under the agreement. Defenses available under the law of the place of the act (U) should be preserved.

In most situations, however, the transfrontier pollution to be dealt with through the agreement will be reciprocal. The following alternative approaches to the choice of law problem will accordingly assume that to be the case.

One possible solution would be to designate the law most favorable to plaintiffs as applicable to all pollution cases arising within the region covered by the agreement, including suits between inhabitants of the same country. Any defenses available under the law of the defendant's country should be preserved, however. Thus, for example, if in the above illustration the law of country A were designated as applicable to all suits within a shared drainage basin, it would apply to an action between two inhabitants

of country B (where both the act and the injury occurred within the drainage basin) as well as to a suit between a plaintiff from one country and a defendant from the other. This solution would not disadvantage plaintiffs in either country. It would leave plaintiffs in B better off vis-à-vis defendants in B than before the agreement, but this would be consistent with the general policy implicit in the agreement of discouraging activities which adversely affect the human environment. This solution would have the added advantage of certainty and predictability: both potential plaintiffs and defendants would know in advance which law would be applied and could plan their courses of action accordingly.

A second possible solution would be to designate the law most favorable to the plaintiff as applicable to all trans-frontier pollution cases, again preserving defenses under the lex actus. As noted above, this would have the disadvantage of placing plaintiffs in B injured by pollution from A in a better position than plaintiffs from B injured by pollution from B. But this objection is not of great consequence if it is assumed that the number of people in B injured by pollution from A would be far less than the number injured by pollution from B.

A variation of this solution is contained in the Scandinavian convention on transfrontier pollution. That agreement provides in Article 3, paragraph 2 that the law applied in suits to recover for transfrontier pollution injury cannot be less favorable to the plaintiff than the lex actus.³³³ By setting the lex actus as a minimum standard, the convention ensures that foreign plaintiffs will not be in a worse position vis-à-vis a domestic polluter than domestic plaintiffs. The protections accorded by the lex actus to injured parties are thus guaranteed to foreign plaintiffs; the convention does, however, allow for the application of the lex injuriae if it is as, or more favorable to the plaintiff than the lex actus. But it does not preserve defenses available under the lex actus, such as an administrative permit.

Finally, a solution which would perhaps be easier to administer and politically more feasible than those already discussed would be to designate the lex actus as applicable in all transfrontier pollution cases. This alternative would have the disadvantages mentioned above, but would allow the court in which suits under the agreement are to be brought (i.e., the court at the place of the act) to apply its own law, with which it is familiar. Application of the lex actus in all cases would disadvantage plaintiff from countries whose law is more favorable to them than the lex actus. But it would at least enable defendants to operate

under known rules and standards of liability, and would accord the same protection to foreign plaintiffs as that provided to injured parties in defendant's country.

(3) Remedies

(a) Money Damages: Once the applicable law has been agreed upon, the court will grant relief in accordance with the remedies available under that law; the question arises, however, whether the agreement should contain special provisions respecting such matters as proof of fault, recoverable damages, etc. It is submitted that, absent compelling reasons for inclusion of such provisions, they should not be inserted since they would unduly complicate the administration of justice under the agreement. The general policy of the agreement is to make civil remedies more easily obtainable through existing judicial and administrative machinery; an attempt to revamp basic rules under the applicable legal system would only render that law more difficult to administer and necessitate interpretation of the new rules created by the agreement.

As to the fault requirement in particular, both Anglo-American and Civil law usually require proof of fault, although liability without fault is recognized in exceptional circumstances. Since there will usually be a certain amount of social utility involved in the defendant's activity, the parties to the agreement will probably not want to discourage it by imposing strict liability for all damage resulting therefrom. Strict liability is, however, appropriate in certain cases, such as where a chemical factory accidentally emits large quantities of poisonous gas. Agreements providing for strict liability, such as the International Convention on Civil Liability for Oil Pollution Damage and the Vienna Convention on Civil Liability for Nuclear Damage, are designed to deal with this type of catastrophic event; draft agreements proposing such liability for normal pollution damage, such as the Draft European Convention on the Protection of Fresh Water against Pollution of 1969, have not been well received. It would therefore seem advisable not to attempt to engraft a separate provision concerning fault upon the system of law applicable under the agreement. The law of each of the countries under consideration makes adequate provision for strict liability in appropriate cases. Once the applicable law has been designated, therefore, it should be applied by the court in the same manner as before the agreement.

(b) Injunctive Relief: A major question with respect to injunctive relief is whether a special provision guaranteeing such a remedy, even under limited circumstances,

would be acceptable to the parties. That is, would a national legislature be willing expressly to sanction injunction of domestic economic activity on the petition of a foreign plaintiff? The answer will usually be no. The best approach would therefore appear to be to preserve any possibility for injunctive relief already existing and to otherwise handle such cases - i.e. , prevention of irreparable damage - through administrative channels. Free access to foreign administrative procedures, both in the planning and standard-setting stages, would guarantee citizens and administrative authorities in the neighboring country a voice in the siting of polluting activities, and in determining emission standards for those activities. Furthermore, if the agreement requires administrative agencies in one country to give equal consideration to its and the neighboring country's interests in environmental quality, situations will seldom arise in which an injunction will be necessary. Provision might usefully be made, however, for those exceptional instances in which provisional injunctive relief is clearly required, by giving the competent court the power to grant something akin to a "temporary restraining order" or "einstweilige Verfügung." This would allow prevention of impending harm until such time as the actually or potentially affected interests (including both private and public parties) could consult and negotiate with the agencies competent to regulate the planned or existing activity in question to arrive at a mutually satisfactory solution.

(4) Enforcement of Foreign Judgments

If the agreement provides that actions are to be brought at the place of the act, as has already been suggested, there would normally be no necessity for an additional provision on enforcement of judgments rendered in a foreign country in suits under the agreement. In the event that the plaintiff is unable to obtain full satisfaction from defendant in a suit at the place of the act, however, the agreement should provide that judgments rendered pursuant thereto would be enforceable in any contracting state.³³⁴ Thus, if defendant were a subsidiary of a larger entity with its principal place of business in another contracting state, plaintiff could seek satisfaction in the latter state of any portion of the judgment he was unable to collect in defendant's state.

Another possible approach to the problem of jurisdiction and foreign judgments would be to include provisions on the

model of the European convention on jurisdiction and judgments. That is, the agreement could provide that all judgments would be enforceable in a contracting state which were rendered in another contracting state on the basis of jurisdictional rules set forth in the convention. It will be recalled, however, that the provision in the European convention governing jurisdiction in tort cases did not specify whether the locus delicti was the place of the act or that of the injury. This pitfall should be avoided by specifying where the tort is to be deemed committed, or where suits are to be brought. The most desirable approach - in terms of facilitating redress - is that taken by the Federal Republic of Germany, which views the place of commission as being both the place of the act and that of the injury. Under this type of provision, the plaintiff is allowed to choose his forum, and judgments are enforceable in other contracting states if the jurisdictional rules are followed (provided, of course, that the usual objections of fraud, violation of public policy and insufficient opportunity to be heard are not present). Thus, since jurisdiction could be founded either in the state of the act or that of the injury, judgments rendered by courts in the state of the injury would be enforceable in courts in the state of the act.

The major disadvantage of this approach, as noted in the section on jurisdiction above, is that it is doubtful whether it would be acceptable to the parties. That is, the contracting states would not, under normal circumstances, be ready to allow foreign courts to bind domestic activities in proceedings which, if regular, would not be subject to review in domestic courts. Such a procedure would be most likely to succeed between states whose laws and administrative regulations were thoroughly harmonized. On the other hand, such an approach has the advantages of facilitating redress by victims of pollution from foreign sources, and placing the burden upon the party whose activity diminishes the quality of the shared natural resource.

Finally, as with the provision governing jurisdiction, all possibilities for enforcement of foreign judgments which existed prior to the agreement should be preserved. This would ensure that the agreement would not be interpreted to prevent enforcement of judgments enforceable in its absence.

B. Administrative Procedures

Transfrontier pollution problems should ideally be approached through region-wide administrative and regulatory

arrangements, which would set uniform standards for activities throughout the region - normally a drainage basin or atmospheric region - irrespective of national boundaries.³³⁵ Such a system of coordinated environmental quality administration is created, for example, by the United States Air Quality Act of 1967³³⁶ for air quality regions which overlap two or more American states. Similar programs have been undertaken within the United States to combat interstate water pollution.³³⁷ But this type of system is far more difficult to set up on the international level, especially without the benefit of some supra-national or intergovernmental body to act as a counterpart of a federal government in setting guidelines for and supervising the regulatory scheme. The difficulty of establishing such international regulatory structures is amply demonstrated by the European experience, the Council of Europe having worked over a decade to produce an agreement providing for minimum water quality standards for international water-courses which was acceptable to the member states.³³⁸

The suggestions offered here are consequently designed, for the most part, to be capable of implementation without alteration or significant adaption of existing national administrative mechanisms. They are intended in part to serve as interim measures until region-wide regulatory frameworks can be set up, but may also have some utility after such arrangements have been concluded, at least insofar as private access to foreign procedures is concerned. The theory underlying these proposals is that allowing foreign agencies and individuals access to administrative procedures on equal terms with and to the same extent as domestic agencies and individuals would not constitute an unreasonable concession by a contracting state; indeed, such rights of access have already been recognized by American courts in the absence of any agreement, as noted above. Allowing such access would merely extend to persons residing beyond national frontiers the same protections accorded national residents by domestic legislation, and would not leave foreign victims of pollution from a domestic source any better off than domestic victims. The following proposals are to a large extent patterned after the regional arrangements reviewed in Chapter 11 and thus represent measures which have already been taken in a number of bilateral and multilateral agreements. The proposals are directed toward (1) requiring administrative bodies to give environmental considerations in other contracting states equal weight with those in their own in determining the permissibility of environmentally harmful activities, (2) requiring that competent administrative bodies inform each other in advance of any planned or proposed project or activity which might possibly have an adverse environmental impact beyond their borders, and (3)

allowing public and private access to foreign administrative procedures with regard to proposed or ongoing activities.

These three types of measures have two principal objectives. The first is to prevent transfrontier effects of domestic activities which are more harmful than allowed domestically, by requiring administrative bodies to give foreign and domestic environmental quality considerations equal weight in the decision-making process. This would not, of course, entirely alleviate harm to a "downstream" country whose economy was based largely upon pollution-sensitive activities (e.g., agriculture) from an "upstream" country with an industrial economy and lower pollution standards; a solution to this problem would have to await the implementation of a region-wide regulatory system. The second objective of these proposals is to allow private parties and public entities an opportunity to vindicate their interests before foreign administrative bodies with regard to proposed or ongoing activities in foreign countries. Notification of competent foreign agencies regarding proposed activities which may be environmentally harmful should help to secure this opportunity.

Specifically, it is proposed that the agreement include provisions along the lines of the following suggestions:

(1) when considering the permissibility of a project or activity which is potentially environmentally harmful, administrative bodies in each contracting state should give the interests of other contracting states in environmental quality the same consideration as is accorded to domestic interests.³³⁹ (The term "environmentally harmful" may be defined with reference to specific standards, as in the Council of Europe's Convention on the Protection of International Freshwaters Against Pollution, but should preferably be defined broadly, as in the Frontier Treaty between Germany and the Netherlands of 1960 and in Article 1 of the Scandinavian convention on transfrontier pollution.)

(2) The competent governmental agencies of each contracting state (which may be designated in the agreement) should notify and consult with their counterparts in other contracting states when and if the former agencies determine that a proposed project or activity could have an adverse environmental impact in the latter states.³⁴⁰ This procedure should be followed in proceedings concerning new permits as well as those concerning proposed modification of existing permits. The notified agency should have the right to comment upon the proposal on the same terms as domestic agencies and individuals and to participate in the proceeding to the extent allowed under (3) below. The

notified agency should further be allowed to lodge objections within a reasonable time, and if such objections are forthcoming, implementation of the proposal should be delayed until the notified agency has had an opportunity to take recourse in the notifying agency's country as allowed under (3) below.³⁴¹ A provision may also be included requiring the notified agency, under appropriate circumstances, to make a public announcement of the proceedings in the former state, in order to ensure that private parties are afforded an opportunity to comment upon the proposed activity. If the states concerned have legislation requiring submission of "environmental impact statements," such statements could be required to include consideration of the transfrontier effects of proposed activities. They could then be made available to the competent agencies in other contracting states, insofar as the latter states would be potentially affected by the proposed activity.

A slightly different approach might be undertaken along the lines of the arrangement provided for by the United States Clean Air Act of 1967. That law, it will be recalled, allows the Administrator of the federal Environmental Protection Agency to call a conference between the competent foreign and local agencies if pollution from the United States endangers health or welfare of persons in a foreign country. The procedure provided for under the Act should be modified to allow such conferences to be called by the competent domestic or foreign agency when either learns of existing or possible future transfrontier environmental harm. As with the United States Act, the foreign agency should enjoy equal rights with domestic agencies, both at the conference and at any subsequent proceedings resulting therefrom.

(3) The competent governmental agencies of each contracting state, as well as potentially adversely affected ("interested") natural and legal persons, should have a right of access to administrative proceedings in other contracting states regarding the permissibility of environmentally harmful projects or activities - and specifically the rights of intervention into such proceedings and review thereof - and should be allowed to appeal the decision of a court or administrative body pertaining to such permissibility, to the same extent and on the same terms as domestic public bodies and private parties.³⁴²

(4) The competent governmental agencies of each contracting state, as well as natural and legal persons, who are or may be adversely affected (i.e., "interested" parties) by an environmentally harmful project or activity in another contracting state should have a right to initiate proceedings, as well as a right of access to ongoing proceedings, before

courts and administrative bodies in the latter state for the purpose of enforcing pertinent existing regulations or challenging the permissibility of such project or activity, to the same extent and on the same terms as such entities and persons in the state where the project or activity is located.³⁴³ (This provision is intended to be separate from the proposed provisions dealing with private remedies through judicial procedures.)

C. Fund for the Compensation of Unrecoverable Losses

Various national laws and international agreements have recognized the necessity of some arrangement to ensure compensation for those who are for some reason unable to recover for pollution damage from the responsible party. Such an arrangement usually takes the form of a guarantee fund administered by a specially created legal entity. To be sure, this type of fund is usually designed to deal with large-scale damage caused by isolated catastrophic events, such as the Torrey Canyon oil spill. Funds in this category are that created in 1971 in a convention supplementary to the 1969 International Convention on Civil Liability for Oil pollution Damage, and the Coastal Protection Fund established by the American State of Maine, also directed against oil spills. These and other funds will be discussed below.

Such an arrangement may, however, just as appropriately and effectively serve to provide remedies for losses suffered from transfrontier pollution.³⁴⁴ The object of a transfrontier pollution damage fund would be the same as that of an oil pollution damage fund: to guarantee compensation for unrecoverable pollution losses. The only major difference between the two problems is that transfrontier pollution damage is not necessarily massive and catastrophic. Losses occasioned thereby may, however, be equally unrecoverable, and indeed, causation in transfrontier pollution cases will often be more difficult to establish. The Committee of Ministers of the Council of Europe has recognized, in a preliminary draft resolution,³⁴⁵ the value of a "common guarantee fund for the indemnification of damage" due to transfrontier pollution, in dealing with situations in which the victim for some reason cannot obtain compensation for the damage he has sustained. This draft resolution recommended that governments of member states interested in a common drainage basin undertake to set up such funds, but it was apparently never adopted.

It must be recognized that a fund to guarantee compensation for transfrontier pollution damage would be more difficult to implement than the other proposals outlined above, since it would involve the creation of an entirely new, jointly

administered institution, whereas the other proposals are capable of implementation within existing legal and administrative frameworks. For this reason, the parties may desire to deal with such an arrangement in a separate agreement so as not to delay implementation of the other proposed provisions. However, although it is subject to the possible objection that it may be politically infeasible, such a fund should be considered since it offers the only practical means of assuring compensation of unrecoverable losses. Examples of existing and proposed funds will be reviewed briefly before turning to the proposed trans-frontier pollution damage fund.

The International Oil Pollution Compensation Fund was created in 1971 by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.³⁴⁶ This convention was prompted by the need to ensure availability of adequate compensation to victims of oil pollution damage (Preamble). One of its purposes was accordingly to provide compensation for oil pollution damage to the extent that such was not available under the Civil Liability Convention (Article 2, para. 1 (a)). The Compensation Fund is created in the form of a legal person, which is to be recognized in each contracting state and as such is to be "capable under the laws of that State of assuming rights and obligations and of being a party in legal proceedings before the courts of that State" (Article 2, para. 2). The Fund is to be administered by an Assembly, a Secretariat headed by a Director and an Executive Committee (Article 16). The Assembly is composed of all the contracting states (Article 17) and the Director is the chief administrative officer of the Fund (Article 29, para. 1).

The corpus of the Fund is composed of contributions by persons in contracting states who receive oil transported by sea (Article 10). This provision is based upon the principle that those benefiting from the activity responsible for the damage should bear the cost of ensuring compensation for such damage. The amount of the contributions is calculated on the basis of a fixed sum for each ton received (Article 11), but the contracting states may assume the obligations of those liable to contribute to the Fund (Article 14). The Fund is to pay compensation to any person suffering pollution damage if such person is unable to obtain full and adequate compensation for such damage under the Civil Liability Convention because (1) that Convention does not create liability, (2) the liable party is financially unable to meet his obligations in full or (3) the damage exceeds the amount of liability under the Civil Liability Convention (Article 4, para. 1). Actions for compensation under Article 4 are to be brought against the Fund before the competent court in the state where the

damage occurred (Article 7, para. 1); this court is made exclusively competent over any action against the Fund relating to the same damage (Article 7, para. 3). Judgments in actions under Article 4 which are final and enforceable and no longer subject to ordinary review in the state of rendition are made enforceable against the Fund in each contracting state (Article 8). The Fund is further bound by the facts and findings in judgments of national courts rendered in proceedings under the Civil Liability Convention of which the Fund was notified by one of the parties (Article 7, para. 6). Finally, under paragraph 1 of Article 9, the Fund acquires by subrogation whatever rights the compensated party may have against the liable party, in respect of any amount of compensation for pollution damage paid by the Fund.

The Maine Coastal Protection Fund ³⁴⁷ was created in 1970 by the U.S. State of Maine to support research and development with respect to oil pollution problems and to provide for payment of compensation to persons suffering oil pollution damage. It is a nonlapsing, revolving fund limited to the sum of 4 million U.S. dollars and is administered by a state agency, the Environmental Improvement Commission. The corpus of the Fund is composed of "license fees, penalties and other fees and charges" related to the subchapter of the statute concerning Oil Discharge Prevention and Pollution Control. License fees, for example, are determined on the basis of one-half cent per barrel of petroleum transferred by the applicant during the licensing period (sec. 551, para. 4, A). Moneys may be disbursed from the fund for, inter alia, administrative expenses related to the subchapter, oil pollution abatement costs and payment of damage claims (sec. 551, para. 5). Persons suffering personal or property damage or loss of income as a result of an oil discharge prohibited by another section of the statute may apply to the Commission stating the amount of damage suffered (sec. 551, para. 2). The claimant is then compensated for his damage unless he, the Commission and the person causing the discharge are unable to agree upon the damage claim, in which case the claim is to be transmitted to a Board of Arbitration provided for in the statute (sec. 551, para. 2A and B).

Two other funds which would be created on the national level to deal with domestic pollution problems have been proposed in Belgium and the United States. The Draft Law on Toxic Wastes, ³⁴⁸ introduced in the Belgian Senate in 1973, provides in Articles 8 and 9 for the creation of a Guarantee Fund for the Destruction of Toxic Wastes. This Fund is of primary interest for the form it would take, which is that of a corporation (Article 9, para. 6). At least 51 percent of the capital of the Fund is to be held by the state and public financial institutions authorized by the King. The

capital is to be fixed at 20 million Belgian francs represented by 10,000 shares (Annex, Article 5, para. 1), and the Council of Administration is to have the right to offer the shares for public sale on the Brussels stock exchange (Annex, Article 5, para. 5). Thus while the Fund is to be under state control, provision is made for allowing private parties to participate to the extent of 49 percent of the shares. The Fund is to be used primarily for assuring the destruction of toxic wastes; for example, it would intervene when the bankruptcy of a company prevents it from disposing of the toxic wastes it produces.

Finally, proposed legislation in the United States Congress would create a Trans-Alaska Pipeline Liability Fund³⁴⁹ which would maintain a balance of not less than 100 million U.S. dollars, to be drawn from a fee of five cents per barrel collected when oil is loaded on a vessel, and from income from invested funds. The Fund would be liable for the amount by which claims allowed under the legislation exceeded prescribed liability limits.

The specific provisions which should be included in an agreement establishing a fund for the compensation of transfrontier pollution damage may now be considered.

(1) The fund should be established in an agreement between states interested in a common environmental region, such as an atmospheric region or a drainage basin.³⁵⁰

(2) The fund should be created in the form of a legal entity, which would be recognized in each contracting state as being entitled to assume rights and obligations and to be a party in legal proceedings before the courts of that state.³⁵¹

(3) The fund should be administered by a body or commission in which each of the contracting states is equally represented; this body should select an executive officer, or director, who would serve as the principal administrator and legal representative of the fund.³⁵²

(4) Moneys to form the corpus of the fund could be drawn from a number of sources. It is perhaps most appropriate that those who benefit from the activities responsible for the damage bear the cost of ensuring compensation for such damage. Thus, designated polluting activities could be assessed an amount based upon the quantity of pollutants emitted. This assessment could take the form of an effluent charge or a license fee based upon the average monthly quantity of emissions. If such an arrangement were found not suitable, another possibility would be to form a corporation along the lines of that envisaged for the Belgian Guarantee Fund for the Destruction of Toxic Wastes. The

contracting states could share equally in the majority interest and the remaining shares could be offered for public sale. Industries which emitted pollutants into border regions could perhaps be required to purchase a number of shares proportionate to their contribution to the regional pollution problem. Under either arrangement, amounts in the fund not needed to meet current obligations could be invested, with the interest accruing to the benefit of the fund.

If it is decided that polluting activities are to be charged, the question arises whether only those activities should be assessed whose emissions actually or potentially cross the boundary, or whether all activities should be assessed which emit pollutants into the region covered by the agreement. The answer to this question is largely dependant upon who is to be entitled to the benefits of the fund - only those damaged by transfrontier pollution, or all those damaged by pollution emanating from the region covered by the agreement - and will therefore be dealt with under (6), below.

(5) The fund should be liable to pay compensation to persons suffering pollution damage (as to whether such damage must be caused by transfrontier pollution see (6), below) if such persons are unable to recover full and adequate compensation for such damage. Factors which might prevent such recovery include: (a) the inability of the claimant (because of financial or other factors) to bring an action against the responsible party at the place of the act, and the lack of jurisdiction of courts at the place of the injury over the defendant; (b) failure of the plaintiff to prove that the damage was caused through the defendant's fault (where fault must be established under the applicable law), the existence of a permit or other defense under the applicable law, or the lack of liability under the applicable law for some other reason; (c) a limitation on the amount of liability under the applicable law; (d) the inability of the claimant to establish causation; and (e) inability of the responsible party fully to compensate the claimant because of insufficient funds. If the parties so desire, payments from the fund could be restricted to those claimants whose damages were not recoverable because of factors attributable solely to the fact that the responsible party was in a foreign country. Such factors would include, for example, jurisdictional difficulties such as those noted under (a) above; the existence of a fault requirement under the law applicable to the transnational action, where no such requirement would obtain in purely domestic actions; and proof of causation where such is more difficult in transnational cases than in domestic cases. Restriction in this manner of the circumstances under which the fund would be liable would ensure that individuals in

state A injured by pollution from state B would not be favored over those from A injured by pollution from A.

(6) The fund should be liable under the circumstances indicated in (5) above to pay compensation to persons damaged by pollution from specified sources. The question here is whether the fund is to be liable for pollution damage caused by sources anywhere within the region covered by the agreement (including sources in the country where the damage was sustained) or only for damage in one country caused by pollution emanating from another country (i.e., transfrontier pollution damage). The former alternative would be appropriate in regions where it is difficult or impossible to attribute the damage to a particular pollution source or sources, and where it would thus be difficult to determine whether the damage resulted from transfrontier or domestic pollution. This might be the case, for example, in a heavily industrialized border region where a number of similar activities on both sides of the border emit pollutants into the air, or into a border lake or large river which flows along or across the border, and into its tributaries. Establishment of causation in such cases has proven extremely difficult. This alternative would favor parties in both states who were damaged by pollution emanating from the region over those suffering pollution damage from sources outside the region, since the fund would be available to compensate the former's unrecoverable damages. It would not, however, favor a resident of state A damaged by pollution from state B over a resident of A damaged by pollution from A providing both polluters were within the region. The second alternative - making the fund available only to victims of transfrontier pollution - would favor those damaged by transfrontier pollution over those damaged by domestic pollution, unless, as discussed under (5) above, the fund paid only those damages which were unrecoverable because the source was located in a foreign country. This alternative would be appropriate under circumstances in which it could be determined relatively easily whether the harmful pollution emanated from a foreign or a domestic source.

It is thus apparent that the questions of which activities should be assessed and who should be entitled to the benefits of the fund must be answered in light of the particular problems and circumstances to which the agreement is addressed. Where the harmful pollution in question is clearly transfrontier in character, the second alternative would be appropriate; but if sources on both sides of the border combine to pollute the entire region involved, the first alternative should be considered.

(7) Actions to recover compensation should be brought against the fund before the competent court in the contracting

state where the damage occurred;³⁵³ such court would be exclusively competent over any action against the fund to recover for the same damage.³⁵⁴ Requiring that claims against the fund be adjudicated by the courts of the contracting states, rather than by the fund itself or some special tribunal, eliminates the necessity of creating a separate quasi-judicial mechanism to deal with claims under the agreement. Judgments rendered in such actions which are final and enforceable in the state of rendition should be enforceable in all contracting states, provided the fund was afforded a full and fair opportunity to present its case, that the judgment was not obtained by fraud, and that it was not contrary to the public policy of the contracting state in which enforcement is sought. A claimant in such an action should be required to prove: (a) that he suffered damage; (b) that the damage was caused by a source of pollution either across the border or within the region covered by the agreement, as discussed under (6), above; and (c) that he was unable to recover compensation for the damage for one of the reasons allowed under (5), above. With respect to (b), it may be provided that after the claimant has made a prima facie showing that the damage was caused by a source covered by the agreement, a presumption is created to that effect which may be rebutted by the fund. The fund should be released from liability if it is shown that the claimant is himself responsible for the damage because of his own negligent or intentional conduct. Finally, the fund should, in order to prevent double recoveries, acquire by subrogation any rights of the claimant against responsible parties, to the extent of the compensation paid in actions under this paragraph.

CHAPTER 12

CONCLUSION TO PART II

The second Part has attempted to do two things: first, to present material not touched upon in Part One concerning possible models for a transfrontier pollution agreement, and second, to synthesize this material with that presented in Part One to form a set of proposals for joint governmental action. These proposals are designed both to prevent harmful transfrontier pollution and to ensure that in the event that such pollution does occur those affected will have an opportunity for recourse through the appropriate judicial or administrative channels.

As noted above, these proposals are designed primarily to be easily implementable and therefore avoid, wherever possible, establishing new bodies or changing existing laws. For this reason, measures which would perhaps most thoroughly solve the multifarious problems which transfrontier pollution creates, but which would be difficult and/or time consuming to adopt and/or implement, have not been included in the recommendations. Examples of such measures are (1) common, region-wide emission standards, (2) uniform laws establishing substantive rules (standards) of liability, choice of law rules, and procedural rules governing jurisdiction and recognition of foreign judgments, and (3) a joint governmental or supranational commission and/or tribunal to administer the regional environmental quality program and to settle disputes between the neighboring countries.

It is hoped that the suggestions offered in Part Two will at least provide a basis for discussion between governments of neighboring countries wishing to combat transfrontier pollution. The proposals do not, for the most part, represent "ground-breaking" steps, but are rather drawn, at least in principle, from existing agreements or proposals. It is therefore thought that (with the possible exception of the fund proposal) they should encounter little resistance on the ground that they are for some reason politically infeasible.

Transfrontier pollution is but one cause of globally deteriorating environmental quality but, because there is no existing framework within which to deal with it, it is indeed a serious problem which demands immediate attention. As a "loophole" or gap in existing efforts to deal with pollution problems transfrontier pollution will remain a

fruitful source of wrongs without remedies as long as governments fail to combat it effectively. It is hoped that the suggestions offered here will assist in this undertaking.

NOTES*

Introduction

1. A few examples must suffice: The first two involve instances of air pollution in Switzerland. Inhabitants of the Swiss villages of Le Pas de l'Echelle and Veyrier (both near Geneva) have for a number of years been disturbed by smoke from Annemasse, France; the Swiss government has not lodged a protest. See J. Ballenegger, "La Responsabilité en Droit International Pour les Dommages Causes par Pollution" (forthcoming dissertation, Lausanne). The second case is more serious and involves a Swiss owned factory on the German side of the Rhine in the Möhlin district, a few kilometers east of Basel. Emissions of flouride gas from the plant not only pollute the Rhine but have also caused extensive damage on the Swiss side of the river, primarily to trees and cattle. A commission was formed in 1954 to deal with the problem (the Commission to Combat Flouride Damage - Kommission zur Bekämpfung der Fluorschäden) and an agreement was reached in 1958 between the factory and the pollution victims which called for designation of four experts to estimate the annual damage. Failing agreement on the amount of damage, the matter would be submitted to an arbitral tribunal. A new agreement was concluded in 1965 requiring the factory to reduce its emissions and to pay 100,000 Swiss francs annually to an indemnification fund; this amount has since been reduced to 50,000 francs. See "Rapports du Conseil fédéral à l'Assemblée fédérale sur sa gestion", p. 145 (1956), p. 148 (1957) and p. 168 (1958); and J. Ballenegger, supra. The pollution victims are represented by Herr F. Metzger, Kommission zur Bekämpfung der Fluorschäden, CH - 4313 Möhlin, Switzerland.

The government of the Netherlands has expressed concern to the Commission of the European Communities over the possible location of an oil refinery in the Liege (Belgium) area, in city of Lanaye. The community of Dutch Limburg lies immediately to the north of Lanaye, and is located in a valley of the Meuse. The government of the Netherlands wishes to ensure that the

* In these Notes, references to various sections of the present paper are signalled by capitalizing the first letter, viz. Note, Chapter, Section.

Belgian government consults with it before making a decision as to the location of the refinery. See Written Question No 397/73 by Mr. Notenboom to the Commission of the European Communities of 10 Oct. 1973, and Answer of 7 Dec. 1973, in Official Journal of the European Communities No. C 12/43 (9 Feb. 1974).

Finally, see the discussion of the lawsuit by the Attorney General of the U.S. State of Ohio against a chemical plant in Canada in Note 135.

2. See, e.g., Principle 22 of the Declaration on the Human Environment, adopted by the United Nations Conference on the Human Environment on 16 June 1972, U. N. Doc. A/Conf. 48/14 and corr. 1 (this principle was specifically endorsed by the U.N. General Assembly, G.A. Res. 2996, 27th sess., 15 Dec. 1972); and the Resolution of the First International Parliamentary Conference on the Environment, Bonn, Federal Republic of Germany, June 2-4, 1971, in a pamphlet summarizing Conference results, at p. 7, available from the Interparlamentarische Arbeitsgemeinschaft, D-53 Bonn, Adenauerallee 214, FRG.
3. A principle of customary international law requires private parties to exhaust all locally available remedies before taking their claims up with the governments. See 8 M. Whiteman, Digest of International Law 769-76 (1967).
4. The delicacy of such disputes is exacerbated by the importance of safeguarding national domains from damage occasioned through shared natural resources, on which there is international consensus. See the Declaration on Permanent Sovereignty over Natural Resources, G.A. Res. 1803, 17 U.N. GAOR Supp. 17, at 15, U.N. Doc. A/5217 (1962).
5. In the famous Trail Smelter Arbitration (3 U.N.R.I.A.A. 1905 (1941), 35 Am. J. Int'l L. 684 (1941).), citizens of the U.S. State of Washington waited thirteen years before securing relief for damage caused by a smelter in Canada. See Read, "The Trail Smelter Dispute", 1 Can. Y.B. Int'l L. 213 (1963).
6. On the use of litigation to internalize pollution costs, see generally Krier, "The Pollution Problem and Legal Institutions: A Conceptual Overview", 18 U.C.L.A. L. Rev. 429, 444-49 (1971); and Comment, "The Cost Internalization Case for Class Actions", 21 Stan. L. Rev. 383 (1969).
7. See, e.g., the recent Scandinavian convention on trans-

frontier pollution discussed in Chapter 11; and Resolution (71) 5 of the Committee of Ministers of the Council of Europe, 26 March 1971.

8. On governmental espousal and settlement of citizens' claims, see generally 8 M. Whiteman, Note 3, at 1217.

Chapter 1

9. For a discussion of the plaintiff's interest in suing at home, see Smit, "Common and Civil Law Rules of In Personam Adjudicatory Authority: An Analysis of Underlying Policies," 21 Int'l & Comp. L. Q. 335 (1972).

Chapter 2

10. For a general comparative discussion of the subject of jurisdiction, see Smit, Note 9.
11. English translation in CCH Common Market Reported sec. 6003, et seq. (1968) (hereinafter referred to as the "European Convention on jurisdiction and judgments," or as the "Convention").
12. See, e.g., for the Federal Republic of Germany, BGBI. (Bundesgesetzblatt) 1973 II at page 60.
13. These rules are known as "Befolungsregeln". See von Hoffman, "Das EWG-Übereinkommen Über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen," AWD (1973) p. 57, 60. The French term is "competence directe:" see Bartin, Etudes sur les effets internationaux des jugements I (1907), p. 4, et seq.
14. The unofficial English translation of this provision in the CCH Common Market Reporter, sec. 6009, improperly translates this clause as "the place where the injury occurred". See the report of the governmental experts on the Convention: "Bericht (der Regierungssachverständigen) zu dem Übereinkommen Über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen," BT-Drucks. (Bundestag Drucksache) VI/1973, pp. 52-104, at 72.
15. See BT-Drucks., id., at p. 72.
16. Actual service of summons cannot be made by mail from Germany but is, rather, effected by request to the competent foreign authorities or, usually, to the German consul or ambassador in the defendant's country.

It is considered violative of the foreign country's sovereignty for the summons to prescribe penalties for non-compliance, but consequences of non-appearance, such as entry of a default judgment, may be mentioned. See U. Drobni \acute{g} , American-German Private International Law 335 (2d ed. 1972); Smit, Note 9, at 173-75.

17. See BGH (Civil Senate) 14 June 1965, BGHZ 44, 46, 47; RG 14 Feb. 1936, RGZ 150, 265, 268; 14 Nov. 1929, RGZ 126, 196, 199-200.
18. Sec. 13 ZPO.
19. Sec. 32 ZPO.
20. See Rosenberg-Schwab, Zivilprozessordnung 144 (1970)
21. See OLG Hamm, NJW 58, 1831.
22. Sec. 35 ZPO.
23. See OLG Saarbrücken 22 Oct. 1957, 11 NJW 752 (1958); 2 JBl.Saar 69 (1958), discussed in Chapter 4.
24. This proposition is not necessarily applicable to other legal systems. On the parallelism of jurisdictional and choice of law rules, see Neuhaus, 20 RabelsZ 250 (1955); an argument for separate consideration of the interests of the parties and possible fora in choosing the appropriate jurisdiction is made in Smit, Note 9.
25. See von Hoffman, Note 13, at p. 61, sec. cc.
26. See U. Drobni \acute{g} , Note 16, at 323.
27. See P. Herzog, Civil Procedure in France 175 (1967).
28. Code Civil, Arts. 14 and 15.
29. Code de procédure civile, Art. 59, alinéa 12.
30. Loi 26 Nov. 1923.
31. Cass. (Req.) 8 Mar. 1937, D.P. 1938 p.40; Cass. (Req.) 6 Dec. 1939, D.H. 1940 p. 40. See M. Savatier, note on Cass. (Req.) 8 Mar. 1937, D.P. p. 76 (1938).
32. Savatier, id.
33. McDonald v. Mabee, 243 U.S. 90, 91 (1917).

34. U.S.: see, e.g., Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231 (9th Cir. 1969); Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Insurance Co., 355 U.S. 220 (1957); and Hess v. Pawloski, 274 U.S. 352 (1927), all dealing with such statutes. Examples of these statutes are the Minnesota Environmental Rights Act, Minn. Stat. sec. 116B.11, subdiv. 1 (b) (1971); N.Y. Civ. Prac. sec. 302(3) (McKinney 1963); and Fed. R. Civ. P. 4(i). Canada: most Canadian statutes are modeled after England's Order 11 of the Rules of the Supreme Court of Judicature, (1962) 3 Stat. Instr. 2529, 2552 (No. 2145).
35. U.S.: see U.S. v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); Strassheim v. Daily, 221 U.S. 280 (1911); Lamar v. U.S., 240 U.S. 60 (1916); California Dev. Co. v. New Liverpool Salt Co., 172 F. 792 (9th Cir. 1909); and Restatement (Second) of the Foreign Relations Law of the United States sec. 18, comment e, illustration 6, specifically covering a transfrontier pollution situation. Canada: see generally, (1870) 6 Q.B. 1; A. Dicey & J. Morris, Conflict of Laws 919, et seq. (8th ed. 1967).
36. Hess v. Pawloski, 274 U.S. 352 (1927).
37. International Shoe Co. v. State of Washington, 326 U.S. 310 (1945).
38. McGee v. International Life Insurance Co., 355 U.S. 220 (1957).
39. Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231 (9th Cir. 1969). See also Grav v. Am. Rad. & San. Corp. 22 Ill.2d 432, 176 N.E.2d 761 (1961) (jurisdiction assumed over foreign manufacturer under state long-arm statute).
40. See Restatement (Second) of the Foreign Relations Law of the United States sec. 18 (a) (1962).
41. Restatement (Second) of Conflict of Laws sec. 37 at 156, 158 (1971).
42. Minn. Stat. secs. 116B.01 - .14 (1971).
43. Id., sec. 116B.11, subdiv. 1.
44. See, e.g., Gray v. American Radiator & Std. San. Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961); and Johnson v. Equitable Life Assur. Soc., 22 App. Div.2d 138, 254 N.Y.S.2d 258 (1964), aff'd 18 N.Y.2d 933, 277 N.Y.S.2d 136, 223 N.E.2d 562 (1964).

45. Ohio v. Wyandotte Chemical Corp., 401 U.S. 493 at 500-01 (1971), citing International Shoe Co. v. State of Washington, 326 U.S. 310 (1945); United States v. Aluminum Co. America, 148 F.2d 416 (2d Cir. 1945); and Restatement (Second) of the Foreign Relations Law of the United States sec. 18 (1962).
46. Cf., Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231 (9th Cir. 1969).
47. Restatement (Second) of Conflict of Laws sec. 37 at 158 (1971).
48. (1962) 3 Stat. Instr. 2529, 2552 (No. 2145).
49. (1962) 3 Stat. Instr. 2529, 2552, sec. 1. (1) (h) (No. 2145).
50. See Jenner v. Sunn Oil Co., (1952) 2 D.L.R. 526 (Ont. 1952) (defamation); Original Blouse Co. Ltd. v. Bruck Mills Ltd., 42 D.L.R. (2d) 174 (B.C. 1962) (fraud); Composers, Authors and Publishers Assn. of Canada v. Int'l Good Music Inc., 37 D.L.R. (2d) 1 (Can. S. Ct. 1963) (breach of copyright); and Bata v. Bata, (1948) W.N. 366 (Eng. C.A. 1948) (defamation).
51. See Abbot-Smith v. Governors of Univ. of Toronto, 45 D.L.R. (2d) 672 (N.S. 1964) (negligence; place of act); George Monro Ltd. v. American Cyanamid and Chemical Corp., (1944) K.B. 432 (C.A. 1944) (negligence; place of act). But cf. Thompson v. The Distillers Co. (Bio Chemicals), Ltd., 88 W.N. (pt.2) 219 (N.S.W. C.A. 1968) (negligence; place of injury).
52. (1952) 2 D.L.R. 526 (Ont. 1952).
53. (1948) W.N. 366 (Eng. C.A. 1948).
54. (1944) K.B. 432 (C.A. 1944); and 45 D.L.R. (2d) 672 (N.S. 1964).

Chapter 3

55. See 2 E. Rabel, The Conflict of Laws 235 (U. Drobnig, 2d ed. 1960).
56. See Chapter 2, Section A.
57. Art. 12 EGBGB (Einführungsgesetz zum Bürgerlichen Gesetzbuch). See 2 E. Rabel, Note 55, at 235-36, note 20.
58. See, e.g., 138 RGZ 243 (246); judgment of June 23,

- 1964 (BGH), 17 NJW 2021 (1964).
59. See, e.g., RG 54, 198 (205); BGH 64 NJW 2012; G. Kegel, Internationales Privatrecht 266, et seq. (3d ed. 1971).
 60. See G. Kegel, *id.*, at 268.
 61. See OLG Saar., judgment of 22 Oct. 1957, 2 JBI.Saar 69 (1958); and LG Saar., judgment of 4 July 1961, JBI.Saar 80 (1963). These cases are discussed in detail in Chapter 4, Section A.
 62. See, e.g., E. Steindorff, Sachnormen im Internationalen Privatrecht 182 (1958).
 63. See G. Kegel, Note 59, at 268.
 64. See, e.g., Cass. (Req.) 24 Feb. 1936, Revue de Droit International Privé 1936 p. 782; Cass. (Civ.) 25 May 1948, Rev. Crit. 1949 p. 89; and Battifol, Rev. Crit. 1949 p. 9.
 65. See the commentary by A. Weill in Mélanges Maury, Droit International Privé et Public 545 at 561.
 66. *Id.*
 67. Cour d'appel de Paris, judgment of 18 Oct. 1955, Rev. Crit. 1956 p. 484, note, H.B.
 68. See Bourrel, Rev. Crit. 1964 p. 111.
 69. 15 Oct. 1957, J. Cl. droit Int. Fasc. 553 no. 22.
 70. These writers include Battifol (see 2 Battifol (with Lagarde), Droit International Privé 199, et seq. (5th ed. 1971).), Niboyet (see 5 J. Niboyet, Traité de Droit International Privé Français secs. 147, and especially 1434 (1948).), Loussouarn, and Weill (see Note 65). See generally, 1 Mazeaud & Tunc, Responsabilité Civile, sec. 208. Professor G. Kegel, in his highly respected work on private international law, states that the place of injury is preferred in France over that of the act, citing Battifol, *id.* G. Kegel, Note 59, at 266-67. See also Bystricky, "La Pollution des Eaux de Surface du Point de Vue International", 1966 (2) Rev. Droit Contemporain 71, 73-74 (1966).
 71. See Mazeaud & Tunc, id. For an argument in favor of the place of injury in view of the development of responsibility without fault, see Savatier, note, D.P. p. 276 (1938).

72. See Battifol, Note 70.
73. See 2 E. Bartin, Principles de Droit International Privé 416 (1932).
74. See Loussouarn, note, Rev. Crit. 1956 p. 478.
75. One example is the Uniform Commercial Code, which contains provisions on prorogation (sec. 1-105 (1).) and application of the law of a particular state (secs. 2-402, 4-102, 6-102, 8-106 and 9-103.). Another is the Federal Tort Claims Act, discussed in Note 76.
76. See Rundell v. La Compagnie Générale Transatlantique, 100 F. 655 (7th Cir. 1900); Hunter v. Derby Foods, Inc., 110 F.2d 970 (2d Cir. 1940); and the cases collected in Anno., 77 A.L.R.2d 1266, at 1273. See also Restatement of the Law of Conflict of Laws Sec. 377 (1934, Supp. 1948, 1954); 2 J. Beale, Conflict of Laws sec. 377.2, at 1287 (1935). See also R. Leflar, American Conflicts Law 319 n. 14 and accompanying text (1968).

An illustration of the judicial favor which the lex injuria rule enjoys is afforded by the Federal Tort Claims Act, one of the few statutes containing a choice-of-law rule. The Act provides that the government is liable for injuries if a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (28 U.S.C. sec. 1346 (b).) The Supreme Court, however, in effect brought this provision into line with the orthodox rule by holding that in referring to the law of the place of the defendant's conduct, the statute was referring to the whole law of that place, including its choice of law rules. (Richards v. United States, 369 U.S. 1 (1962).) Since the latter will usually refer to the law of the place of the injury, the lex actus rule of the Act is effectively circumvented.

77. See generally, Restatement (Second) of Conflict of Laws sec. 145, comment e (1971).
78. Restatement (Second) of Conflict of Laws, id., sec. 6 (1971).
79. Id., sec. 145 (2). For a case applying this approach, see Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963).
80. Restatement (Second) of Conflict of Laws, sec. 145, comment e (1971).

81. Id., secs. 146, 147.
82. See Currie, "The Constitution and the Choice of Law: Governmental Interests and the Judicial Function", 26 U. Chi. L. Rev. 9 (1958). This approach was applied in Reich v. Purcell, 67 Cal.2d 551, 432 P.2d 727 (1967).
83. 1 A. Ehrenzweig, Private International Law 64 (1967).
84. See, e.g., Restatement (Second) of Conflict of Laws Note 78, sec. 6 (2) (b) & (c).
85. George Monro Ltd. v. American Cyanamid and Chemical Corp., (1944) K.B. 432 (Eng. C.A. 1944). See G. Cheshire, Private International Law 279 (8th ed. 1970).
86. Bata v. Bata, (1948) W.N. 366 (Eng. C.A. 1946).
87. See A. Dicey & J. Morris, Conflict of Laws 914-18 (8th ed. 1967).
88. See G. Cheshire, Note 85 at 281.
89. Canadian authority: J.-G. Castel, Private International Law 215 (1960). Other authorities: A. Ehrenzweig, Conflicts in a Nutshell 213 (1970); and Kahn-Freund, "Dialectical Liability and the Conflict of Laws", 124 Rec. des Cours 1, 13-14 (1968).
90. See Philipps v. Eyre, (1870) 6 Q.B. 1; A. Dicey & J. Morris, Note 87, Rule 157. Eut see Boys v. Chaplin, (1967) 3 W.L.R. 266.
91. (1870) 6 Q.B. 1.
92. See Howells v. Wilson, 69 Que. K.B. 33 (1940).
93. O'Connor v. Wray, 46 Que. K.B. 199 (C.A. 1929).
94. J.-G. Castel, Note 89, at 226.
95. J. Falconbridge, Conflict of Laws 809 (2d ed. 1954).

Chapter 4

- 96 See generally, Landis, "Legal Controls of Pollution in the Great Lakes Basin", 48 Can. B. Rev. 66, 129-32 (1970) (illustrating the difficulty of establishing causation); Comment, "The Application of Res Ipsa Loquitur in Suits Against Multiple Defendants", 34 Albany L. Rev. 106 (1969); Restatement (Second) of

- Torts sec. 433A (1965) (on shifting the burden of proof); Krier, "The Pollution Problem and Legal Institutions: A Conceptual Overview," 18 U.C.L.A. L. Rev. 429, 453-56 (1971); Baxter, "The SST: From Watts to Harlem in Two Hours", 21 Stan. L. Rev. 1, 44-53 (1968); Hines, "Nor Any Drop to Drink: Public Regulation of Water Quality", 52 Iowa L. Rev. 186, 196-200 (1966); and Rheingold, "Civil Cause of Action for Lung Damage Due to Pollution of Urban Atmosphere", 33 Brooklyn L. Rev. 17 (1966).
97. See, e.g., the discussion of "astreinte" in French law in 2 E. Rabel, The Conflict of Laws 280 (1947) and in Stoll, "Consequences of Liability: Remedies", in 11 International Encyclopedia of Comparative Law, Ch. 8, Torts, sec. 177 (1972); and that of periodic payments in A. Ehrenzweig, Conflicts in a Nutshell sec. 77-3 at 221 (1970).
98. See, e.g., Slater v. Mexican Nat. R. Co., 194 U.S. 120, at 128, 24 S.Ct. 581 (1904).
99. See, e.g., Boomer v. Atlantic Cement Co., 309 N.Y.S.2d 312 (1970), where the Court awarded "permanent damages imposing a servitude on the land." Id., at 319.
100. See W. Prosser, Handbook of the Law of Torts 616 (3d ed. 1964).
101. In Boomer v. Atlantic Cement Co., 309 N.Y.S.2d 312 (1970), the court's award of permanent damages denied plaintiffs the right to bring successive actions for future encroachments. The dissent pointed out that allowing this sort of "inverse condemnation" did not encourage eliminating the wrong, and indeed, was not permissible for private gain.
102. Theorie des adäquaten Kausalzusammenhanges. See 158 RGZ 38 (aircraft noise). As to Continental theories of causation in general, see H. Hart & A. Honoré, Causation in the Law, part III (Oxford 1959).
103. Die im Verkehr erforderliche Sorgfalt. See sec. 276 BGB.
104. See Palandt, Kommentar zum Bürgerlichen Gesetzbuch, comment 9 a) to sec. 823 (31 ed. 1972).
105. See id., comment 9 b).
106. See generally, 2 H. & J. Mazeaud, Leçons de Droit Civil; and the excellent comparative study in English

- by Catala & Wier, "Delict and Torts, A Study in Parallel", 37 Tulane L. Rev. 573 (1963), 38 id. 221-78 (1963) and 663-716 (1964), and 39 id. 701 (1965).
107. See Civ. 1, June 16, 1896, Saleilles, note, D.I. 1897 p. 433, Esmein, note, S.I. 1897 p. 17; and Catala & Wier, id., 37 Tulane L. Rev. 573 at 599, et seq., and the authorities there cited.
108. See Catala & Wier, id., at 600, especially the excerpts from and discussion of the Jand'heur decision, Ch. Réunion 13 Feb. 1930, Ripert, note, D.I. 1930, p. 57, Esmein, note, S.I. 1930, p. 121.
109. See Catala & Wier, Note 106, 37 Tulane L. Rev. 573 at 584-85.
110. Poro v. Houillières du Bassin de Lorraine (HBL), Oberlandesgericht Saarbrücken, judgment of 22 Oct. 1957, No. 2 U 45/57, 11 NJW 752 (1958); 2 JBl.Saar 69 (1958); IPRspr. No. 42, p. 151 (1956-57).
111. Compare, e.g., the Trail Smelter Dispute, which involved claims by United States citizens against a smelter in Canada, discussed in Read, "The Trail Smelter Dispute", 1 Can. Y.B. Int'l L. 213 (1963); Protests by Switzerland against emissions from a French plant, 73 Revue Générale de Droit International Public 185 (1969); and the cases discussed in Note 1.
112. 2 JBl.Saar 69.
113. 2 JBl.Saar 69.
114. See the discussion of German choice of law rules in subsection A. (1) of Chapter 3.
115. Boisserée, Anmerkung, 11 NJW 1239, 1240 (1958).
116. 2 JBl.Saar 70.
117. Boisserée, Note 115 at 1240.
118. 2 Voirin, Manuel de Droit Civil secs 214-15 (1954).
119. 2 JBl.Saar at 71, citing 2 Planiel, Traité de Droit Civil sec. 1068.
120. 2 JBl.Saar at 72. See the discussion of "troubles de voisinage", supra.
121. 2 JBl.Saar at 72.

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122. *Id.*
123. See the discussion of this case in Witzel, "Schadensersatzpflicht von Ausländern wegen Verunreinigung von Grenzgewässern", Die Wasserwirtschaft 81 (1958).
124. Secs. 1293, 1295, 1296, 1304, 1306 & 1313 BGB.
125. Gesetz zur Ordnung des Wasserhaushalts of 27 July 1957, BGBI. I p. 1110, with amendments through 23 June 1970, BGBI. I p. 805.
126. Landgericht Saarbrücken, judgment of 4 July 1961, No. 4 O 143/60, JBl.Saar p. 80 (1963), IPRspr. No. 38 p. 125 (1960-61), affirmed by the Oberlandesgericht Saarbrücken, judgment of 5 Mar. 1963, No. 2 U 191/61.
127. IPRspr. at 126, citing Dalloz, Code Civil, comment 2 to Art. 1384 (57 ed.).
128. IPRspr. at 127.
129. See generally Juergensmeyer, "Control of Air Pollution Through the Assertion of Private Rights", 1967 Duke L.J. 1126 (1967); Lucas, "Legal Techniques for Pollution Control: The Role of the Public", 6 U.B.C. L. Rev. 167 (1971); Rheingold, "Civil Cause of Action for Lung Damage Due to Pollution of Urban Atmosphere", 33 Brooklyn L. Rev. 17 (1966); Seamans, "Tort Liability for Pollution of Air and Water", 3 Nat. Res. Law. 146 (1970); and Note, "Private Remedies for Water Pollution", 70 Colum. L. Rev. 734 (1970).
130. W. Prosser, Note 100, sec. 90 at 611.
131. *Id.* at p. 615.
132. United States courts have used both the "natural flow" and "reasonable use" theories to define a landowner's riparian rights in a watercourse adjoining his property, but a majority of courts subscribe to the reasonable use theory. See "Private Remedies for Water Pollution, Note 129, at pp. 735-37.
133. On the distinction between nuisance and trespass, see W. Prosser, Note 100 at 614.
134. With regard to jurisdictional consequences of the theory employed, see Chapter 2, Section B.
135. For example, the Attorney General of the State of Ohio is currently suing, inter alia, Dow Chemical Co. of Canada to require the latter to abate mercury pollution of Lake Erie which is allegedly harmful to Ohio's

- citizens. State of Ohio v. BASF Wyandotte Chemicals Corp., et al., No. 904571 (Cuyahoga County, Ohio, filed March 22, 1972).
136. See, e.g., Karpisek v. Gather & Sons Constr., Inc., 174 Neb. 234, 117 N.W.2d 322 (1962).
137. See W. Prosser, Note 100, sec. 30 at 146
138. Literally, "the thing speaks for itself."
139. See California, by and through its Department of Fish and Game v. S.S. Bournemouth, 318 F.Supp. 839 (CD. Cal. 1970); Reynolds Metals Co. v. Yturbide, 258 F.2d 321 (9th Cir.), cert.denied, 358 U.S. 840 (1958). See generally Comment, "The Application of Res Ipsa Loquitur in Suits Against Multiple Defendants," 34 Albany L. Rev. 106 (1969).
140. Some courts treat a violation as mere evidence of negligence.
141. Restatement (Second) of Torts sec. 286 (1965). On the use of statutes to establish liability in Canada, see Lucas, Note 129 at 170.
142. This type of liability grew out of the rule laid down in the English Case of Rylands v. Fletcher, L.R. 3 H. L. 330 (1868). That principle imposes liability without fault upon one who allows dangerous substances to escape from his property onto adjoining land and cause damage there. For a more recent case applying the doctrine of strict liability, see Lutheringer v. Moore, 31 Cal.2d 489, 190 P.2d 1 (1948).
143. See Fritz v. E.I. du Pont de Nemours & Co., 45 Del. 427, 75 A.2d 256 (1950).
144. W. Prosser, Note 100 at 595 (nuisance) and 65 (trespass).
145. Martin v. Reynolds Metals Co., 221 Ore. 86, 342 P.2d 790 (1959). cert. denied, 362 U.S. 918 (1960).
146. But a diminution in property value in the absence of a nuisance does not generally entitle plaintiff to relief. Welborn v. Page, 247 S.C. 554, 556, 148 S.E.2d 375, 381 (1966).
147. W. Prosser, Note 100 at 623.
148. Restatement of Torts sec. 162.

149. Martin v. Reynolds Metals Co., 135 F.Supp. 379 (D.Ore. 1952), aff'd sub nom. Reynolds Metals Co. v. Yturblde, 258 F.2d 321 (9th Cir.), cert denied, 358 U.S. 840 (1958); Greyhound Corp. v. Blakley, 262 F.2d 401 (9th Cir. 1958) (negligence); Lutheringer v Moore, 31 Cal. 2d 489, 190 P.2d 1 (1948) (strict liability).
150. Renken v. Harvey Aluminum, Inc., 226 F.Supp. 169 (D. Ore. 1963) (trespass and negligence).
151. See generally, H. Hart & A. Honoré, Causation in the Law (Oxford 1959).
152. 33 Cal.2d 80, 199 P.2d 1 (1948). See generally Restatement (Second) of Torts sec. 433A (1965). This holding has been applied to a water pollution fact situation in Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731 (1952).
153. Ybarra v. Spangard, 25 Cal.2d 846, 154 P.2d 687 (1944), 93 Cal.App. 43, 208 P.2d 445 (1949).
154. See 2 F. Harper & F. James, The Law of Torts sec. 20.3 at 1121, 1122 (1956); W. Prosser, Note 100 at 265.
155. F. Harper & F. James, *id.*, at 1129. See Tidal Oil v. Pease, 153 Okla. 137, 5 P.2d 389 (1931) (stream pollution).
156. See Moses v. Town of Morganton, 192 N.C. 102, 133 S.E. 421, 423 (1926) (defendants independently polluted same stream).
157. Woodyear v. Schaeffer, 57 Md. 1, 10, 40 Am.Rep. 419 (1881) (river pollution); United States v. Luce, 141 Fed. 385, 411 (D.Del. 1905) (smoke from two factories); Lambton v. Mellish, (1894) 3 Ch. 163 (noise nuisance).
158. For a discussion of U.S. law on servitudes created by aircraft noise disturbances, see Russell, "Recent Developments in Inverse Condemnation of Airspace," 39 J. Air L. & Com. 81 (1973).
159. Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 P. 928 (1911). See also Anneberg v. Kurtz, 197 Ga. 188, 28 S.E.2d 769, 152 A.L.R. 338 (1944), where pollution of a stream for twenty years was held sufficient to create a prescriptive right.
160. Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878).
161. See Euclid v. Ambler Realty Co. 272 U.S. 365 (1912);

- see generally 1 I. Hayman, Powers: Regulations—Legal Questions (1968).
162. Quebec R. Co. v. Vandry, (1920) A.C. 662, 89 L.J.P.C. 99; Salmond, Law of Torts 47 (8th ed. 1934).
163. See W. Prosser, Note 100 at 628, n. 76 and accompanying text.
164. See Beach v. Sterling Iron & Zinc Co., 54 N.J.Eq. 65, 33 A. 286 (1895) (stream pollution); Fox v. Ewers, 195 Md. 650, 75 A.2d 357 (1949) (noise); Jordan v. United Verde Copper Co., 9 F.2d 144 (D.Ariz. 1925) (air pollution). See generally W. Prosser, Note 100 at 628.
165. W. Prosser, Note 100 at 632 (footnotes omitted).
166. 1 J. Beale, Conflict of Laws sec. 49.2 at 412 (1935).
167. Id.
168. Id. at 413, citing Gilbert v. Moline W.P. & M. Co., 19 Ia. 319 (1886); People of N.Y. v. Central R.R., 42 N.Y. 283 (1870). On the latter case see note, 31 Harv L. Rev. 646 (1918).
169. Restatement (Second) Conflict of Laws sec. 53, comment a, illustration 2 (1971).
170. Id., sec. 102, comment g.
171. See, e.g., L. Raape, Internationales Privatrecht 640 (5th ed. 1961); Nussbaum, Deutsches Internationales Privatrecht 293 (1932); and II Zitelmann, Internationales Privatrecht 233.
172. For a discussion of the judicial interpretation of the latter provision, see O. Kimminich, Das Recht Des Umweltschutzes 179-80 (1972).
173. See generally R. Birk, Schadensersatz Und Sonstige Restitutionsformen Im Internationalen Privatrecht 182 (1969).
174. RGZ 32, 414; BGHZ 22, 1, at 13. See, e.g., Nussbaum, Note 171 at 389; Neuner, Internationale Zuständigkeit 34; Raape, Note 171 at 375.
175. RGZ 126, 199.
176. ZPO sec. 890.

177. See, e.g., 2E. Rabel, Note 55 at 281.
178. See, e.g., Nussbaum, Note 171 at 293; Raape, Note 171 at 640; and R. Birk, Note 173 at 183, et seq.
179. R. Birk, Note 173 at 220. Stoll, Note 97 at 324, agrees as to Unterlassungsansprüche but would also apply the lex injuriae in the case of Besietigungsansprüche.
180. R. Birk, Note 173 at 217-20.
181. See Note 179, noting the position of Stoll.
182. JBl.Saar 2 (1958) 69, at 71.
183. Arts. 1382, 83 and 84 Code Civil. See Gaertner, Verschuldensprinzip und objektive Haftung bei nachbarlichen Störungen (Troubles de Voisinage) nach französischem Recht, verglichen mit dem deutschen Recht 42-49, 141-44 (Diss. Freiburg 1972); Stoll, Note 97 at sec. 177.
184. The power of the judge to order periodic payments was judicially developed but is now codified in Loi no. 72-626 of 5 July 1972, J.O. of 9 July 1972 p. 7181; D. 1972 lég. 361. See generally Stoll, Note 97 sec. 177.
185. Swaine v. Great Northern R. Co., 4 De G.J. & S. 211, 46 Eng. Rep. 899 (1864); Rhodes v. Dunbar, 57 Pa. 274 (1868); Purcell v. Davis, 100 Mont. 480, 50 P.2d 255 (1935).
186. W. Prosser, Note 100 at 624.
187. In the recent case of Boomer v. Atlantic Cement Co., 309 N.Y.S.2d 312 (1970), the court granted just such relief, declining to allow the plaintiffs to bring successive actions for future encroachments. The court explicitly recognized that the award of "permanent damages" amounted to granting a "permanent servitude over the land" to defendant. On injunctions in environmental actions generally see Comment, "Equity and the Eco-System: Can Injunctions Clear the Air?," 68 Mich. L. Rev. 1254 (1970); and Lucas, Note 129 at 173-74.
188. See, e.g., Madison v. Ducktown Sulphur, Copper and Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904), and Boomer v. Atlantic Cement Co., 309 N.Y.S.2d 312 (1970) for cases denying injunctive relief by balancing the

- equities in the defendants' favor. In McKie v. K.V.P. Co., (1948) 3 D.L.R. 201 (Ont. H.C.), aff'd (1949) 1 D.L.R. 39 (Ont. C.A.), aff'd (1949) 4 D.L.R. 497 (S.C. C.) and River Park Enterprises v. Town of Fort St. John, 62 D.L.R.2d 519 (B.C.S.C. 1967), the respective courts granted injunctions but suspended their operation to allow the industries involved to make alternative arrangements for disposal of their wastes. See generally Keeton & Morris, "Notes on 'Balancing the Equities'", 18 Tex. L. Rev. 412 (1940) and Comment, Note 187.
189. See W. Prosser, Note 100 at 624-25, text accompanying Notes 133-136 and authority therein cited.
190. See, e.g., Messner, "The Jurisdiction of a Court of Equity over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State", 14 Minn. L. Rev. 494 (1930), reprinted in part in Selected Readings on Conflict of Laws 291 (Culp ed. 1956) (subsequent citations will refer to the latter printing); Note, "Developments--Injunctions", 78 Harv. L. Rev. 994 (1965); Restatement (Second) Conflict of Laws sec. 53 (1971).
191. See (first) Restatement, Conflict of Laws sec. (1935).
192. See Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 647 (2dCir. 1956), cert. denied, 352 U.S. 871 (1956).
193. See Restatement (Second) Conflict of Laws sec. 53 comment d (1971); Restatement (Second) of the Foreign Relations Law of the United States secs. 39 & 40 (1965).
194. See Restatement (Second) Conflict of Laws sec. 53 comment a illustration 2 (1971).
195. 105 F.Supp. 215 (S.D.N.Y. 1952).
196. British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd., (1954) 1 Ch. 37 (1955). See Annotation, 6 A.L.R.2d 896.
197. 1 Ch. at 37.
198. Messner, Note 190 at 305.
199. See note, Note 190 at 1043-44.

Chapter 5

200. See Notes 11-13.

201. See, e.g., 2 Zitelmann, Note 171, at 328; and the thorough discussion of actions for injunctions in private international law in R. Birk, Note 173, at 181-220, especially 215-220.
202. Hilton v. Guyot, 159 U.S. 113 (1895). See also Harrison v. Triplex Gold Mines, 33 F.2d 667 (1929).
203. See generally, A. Ehrenzweig & D. Louisell, Jurisdiction in a Nutshell 136-38 (3d ed. 1973).
204. See Cherun v. Frishman, 236 F.Supp. 292 (D.C.Cir. 1964); A. Ehrenzweig, Conflict of Laws sec. 59 (1962). But see Grubel v. Nassauer, 210 N.Y. 149, 103 N.E. 1113 (1913), declining to recognize a foreign judgment based on valid service of process under the foreign law, because the method of service was unacceptable to the court in which recognition was sought.
205. 159 U.S. 113 (1895).
206. In "diversity" cases, Erie R. Co. v. Thompkins, 304 U.S. 64 (1938) compels federal courts to apply state law.
207. 236 F.Supp. 292 (D.C. Cir. 1964).
208. Consol. Rules of Prac. of Ontario sec. 25(1) (b).
209. 9B Uniform Laws Ann. 62-69 (1962).
210. Barned's Banking Co., Ltd. v. Reynolds, 36 U.C.Q.B. 256 at 273 (1875).
211. See Kennedy, "Recognition of Judgments in Personam: The Meaning of Reciprocity", 35 Can. B. Rev. 123 (1957).
212. See A. Dicey & J. Morris, Note 87, at 796.
213. See J. -G. Castel, Private International Law 264 (1960).
214. Travers v. Holley, (1953) P. 246, 256 (C.A. 1953).
215. (1953) P. at 250-51
216. See, e.g., Cherun v. Frishman, 236 F.Supp. 292 (D.C. Cir. 1964).
217. J. -G. Castel, Note 213 at 264, citing Kennedy, "Recognition of Foreign Divorces and Nullity Decrees", 35 Can. B. Rev. 628, at 629 (1957).

Chapter 6

218. This section is based in large part upon Stoll, "Der Schutz der Sachenrechte nach internationalem Privatrecht" ("The Protection of Property in Conflicts Law"), 37 RebelsZ 357 (1973), and R. Birk, Note 173.
219. Sec. 24 ZPO.
220. Neuer, Internationale Zuständigkeit 26.
221. See Riezler, Internationales Zivilprozessrecht und Processuales Fremdenrecht 244 (1949).
222. Sec. 32 ZPO.
223. R. Birk, Note 173, at 213.
224. Stoll, Note 218.
225. See, e.g., Dölle, Internationales Privatrecht 127 (1972); G. Kegel, Internationales Privatrecht 285 et seq. (1971); and Raape, Internationales Privatrecht 587 (1961).
226. Stoll, Note 218 at 376.
227. Art. 12 EGBGB. Stoll, Note 218 at 377.
228. See Req. 6 Jan. 1841 S. 1841-1-24.
229. See Encyclopédie Dalloz, Repertoire de Droit International, Ph. Francescakis.
230. For a more thorough discussion of Canadian and American law regarding suits at the place of the act, see McCaffrey, "Trans-Boundary Pollution Injuries: Jurisdictional Considerations in Private Litigation between Canada and the United States", 3 Cal. West. Int'l L. J. 191, 217-239 (1973).
231. See, e.g., Livingston v. Jefferson, 1 Brock. 203, Fed. Cas. No. 8,411 (1811); McKenna v. Fiske, 42 U.S. (1 How.) 241 (1843); Ellenwood v. Marietta Chair Co., 158 U.S. 105 (1895); British South Africa Co. v. Companhia de Moçambique, (1893) A.C. 602; Albert v. Fraser Cos., (1937) 1 D.L.R. 39, 11 M.P.R. 209; and the cases collected in 42 A.L.R. 196, 197.
232. See, e.g., M. Hancock, Torts in the Conflict of Laws 97-98 (1942); Kuhn, "Local and Transitory Actions in Private International Law", 66 U. Pa. L. Rev. 301 (1918); G. Cheshire, Private International Law 481 (8th ed.

- 1970); A. Dicey & J. Morris, Note 87, at 149; A. Ehrenzweig, Note 204, at 140-41; Restatement (Second) of Conflict of Laws sec. 87 (1971); and Willis, "Jurisdiction of Courts--Action to Recover Damages for Injury to Foreign Land", 15 Can. B. Rev. 112 (1937).
233. It appears that only three states allow actions for trespass to foreign land at common law: Reasor-Hill Corp. v. Harrison, 220 Ark. 524, 249 S.W.2d 994 (1952); Little v. Chicago, St. P., M. & O. Ry. Co., 65 Minn. 48, 67 N.W. 846 (1968); Ingram v. Great Lakes Pipe Line Co., 153 S.W.2d 547 (Mo. App. 1941). The rule has been abolished by statute in New York, N.Y. Real Prop. Law sec. 536 (McKinney 1968); Texas, R.S. 1198, as interpreted by Armendiaz v. Stillman, 54 Tex. 627 (1881); and Virginia, 1 Rev. Code 1819, sec. 14, at 450.
234. Albert v. Fraser Companies Ltd., (1937) 1 D.L.R. 39.
235. 7 Coke, 1a, 77 Eng. Reprint 411 (1584).
236. Armendiaz v. Stillman, 54 Tex. 623 (1881); Rundle v. Delaware & R. Canal, 1 Wall.Jr. 275, Fed. Cas. No. 12, 139 (1849), aff'd, 55 U.S. (14 How.) 80 (1852) (applying the Rule in Bulwer's Case); Foot v. Edwards, 3 Blatchf. 310, Fed. Cas. No. 4,908 (1851); and Manville Co. v. Worcester, 138 Mass. 89, 52 Am. Rep. 261 (1884). See also Slack v. Walcott, 3 Mason 508, Fed. Cas. No. 12,932 (1825); Stillman v. White Rock Mfg. Co., 3 Woodb. & M. 538, Fed. Cas. No. 13,446 (1847); and Thayer v. Brooks, 17 Ohio 849, 49 Am. Dec. 474 (1848).
237. 54 Tex. 623 (1881).
238. One case which, as far as the writer has been able to determine, is still ongoing, is State of Ohio v. BASF Wyandotte Chemicals Corporation, et al., No. 90 4571 (Cuyahoga County, Ohio, Filed March 22, 1972). In that case, the State of Ohio sued, among others, the Dow Chemical Company of Canada, for abatement of mercury pollution of Lake Erie on the Canadian side which was allegedly injuring members of the public on the U.S. side, in Ohio.
239. In the Trail Smelter Case (3 U.N.R.I.A.A. 1905 (1941), 35 Am. J. Int'l L. 684, 713 (1941).) the Arbitration Tribunal relied upon interstate controversies which had been decided by the United States Supreme Court to determine the rights and liabilities of the United States and Canada for injuries to American citizens caused by air pollution from a Canadian smelter. Moreover, the court in Armediaz, in awarding damages for injury to land in Mexico, relied upon American inter-

state cases.

240. 60 S.W. 593 (Tenn. 1900). But see Arvldson v. Reynolds Metals Co., 107 F.Supp. 51 at 52 (W.D. Wash. 1952), denying a motion to transfer the case to Oregon on the ground that Oregon courts do not take jurisdiction over actions for trespass to foreign land.
241. 60 S.W. 593 at 599.
242. Id. at 606-07.
243. (1893) A.C. 602 (1893).
244. (1937) 1 D.L.R. 39 (N.B. 1936), criticized in Willis, Note 232.
245. (1937) 1 D.L.R. at 45.
246. Other Canadian courts have, however, taken jurisdiction over cases in which title to foreign land was incidentally involved. See, e.g., McLaren v. Ryan, 36 U.C.Q.B. 307 (C.A. 1875); Stuart v. Baldwin, 41 U.C.Q.B. 466 (C.A. 1877); and Malo and Berthrand v. Clement, (1943) 4 D.L.R. 773 (Ont. 1943).
247. See, e.g., Bosland v. Abbotsford Lumber, Mining & Development Co., Ltd., (1925) 1 D.L.R. 978 (B.C. 1925); Brereton v. Canadian P.R. Co., 29 O.R. 57 (1899); and Winnipeg Oil v. Can. Nov. Ry., 18 W.L.R. 421, 21 Man. R. 274 (C.A. 1911).
248. Albert v. Fraser Companies Ltd., (1937) 1 D.L.R. 39 (N.B. 1936); Boslund v. Abbotsford Lumber, Min. & Devel. Co., Ltd., (1925) 1 D.L.R. 978 (B.C. 1925).

Chapter 7

249. See generally, Caldwell, "Environmental Quality as an Administrative Problem", 400 Annals 103 (1972).
250. As to United States law, for example, see generally Cramton, "The Why, Where and How of Broadened Public Participation in the Administrative Process", 60 Geo. L.J. 525 (1972).
251. As to United States law see Comment, "Mandamus in Administrative Actions: Current Approaches", 1973 Duke L.J. 207 (1973).
252. See, e.g., Town of Huntington v. Town Bd. of Oyster Bay, 57 Misc.2d 821, 293 N.Y.S.2d 558 (Sup. Ct. 1968);

- Clark v. City of Colorado Springs, 162 Colo. 593, 428 P.2d 359 (1967). See generally Ayer, "The Primitive Law of Standing in Land Disputes: Some Notes from a Dark Continent", 55 Iowa L. Rev. 344, 356-360 (1969).
253. Erkenntnis of 1 March 1913, reported in E. Hartig, Internationale Wasserwirtschaft und Internationales Recht 13-18 (Vienna 1955).
254. Reichswasserrechtsgesetze of 30 May 1869, RGBl. No 93; Niederösterreichischen Landeswasserrechtsgesetze of 28 Aug. 1870, LGBl. No. 56.
255. Wasserrechtsgesetz sec. 19, n.-ö.
256. E. Hartig, Note 253, at 16. The Court continued that the most that the Austrian agencies could do, within the scope of their discretion, was to take into consideration the maintenance of friendly relations with third countries, and to pay due regard to the protection of rights in foreign waters when taking action respecting waters within Austrian territory.
257. Entscheidung of 30 May 1969 (No. 233/69 and 314/69), amtliche Sammlung (1969) No. 7528 (A) 1969 p. 264. See the comment on this case by Schreuer, "Zur verwaltungs- und völkerrechtlichen Problematik des Salzburger Flughafenfalles", 26 Österreichische Juristenzeitung 542 (1971).
258. Beschluss of 20 June 1963, Sl. 1225/62.
259. Deutscher Bundestag, Drucksache 7/9 08 p. 7 et seq. (July 17, 1973); German ratification in BGBl. 1974 II p. 13.
260. E. Hartig, Note 253 at 14; Amtl. Slg. (1969) No. 7582 (A) p.2.
261. See generally, Andrassy, "Les relations internationales de voisinage", 79 Recueil des Cours 77 (1951); 1 Berber, Lehrbuch des Völkerrechts 298 (1960); Thalmann, Grundsprinzipien des Modernen Zwischenstaatlichen Nachbarrechts (1951). The classic case in this field is the Trail Smelter Arbitration, decided by a joint Canadian-American arbitration tribunal in 1941. 35 Am. J. Int'l L. 684 (1941)
262. See Note 256.
263. See, e.g., "Reservations to the Genocide Convention Case", ICJ Rep. 28 (1961); E. 2. 3. 1927 Annual Digest

- of Public International Law Cases 4, No. 274 (1927-28); Vienna Convention on the Law of Treaties Art. 18, U.N. Doc. A/CONF. 39/27, 23 May 1969 (adopted May 22, 1969).
264. See, e.g., text accompanying Note 252.
265. 15 U.S.C.A. secs. 717b, 717 (b, c), 717r (1963).
266. Cia Mexicana de Gas, S.A. v. Federal Power Commission (Reynosa Pipe Line Co., Intervener), State of Texas et al. v. Federal Power Commission, 167 F.2d 804 (5th Cir. 1948). The petitions by Cia Mexicana and the state of Texas for review of the FPC orders were joined in one docket; only the petition by Cia Mexicana will be discussed here. Portions of the opinion dealing with the merits of the petition will not be dealt with.
267. 15 U.S.C.A. sec. 717r (b) (1963).
268. 167 F.2d at 805-06.
269. Juarez Gas Company, S.A., Petitioner v. Federal Power Commission, Respondent, Southern Union Gas Company, Del Norte Natural Gas Company, Intervenors, 375 F.2d 595 (D.C. Cir. 1967) .
270. Petitioner sought to intervene in order to show "that grant of the applications would not be consistent with the public convenience and necessity." Id.
271. 375 F.2d at 597.
272. Id. at 598.
273. Id.
274. Id.

Chapter 9

275. 36 Stat. 2448 (1910), T.S. No. 548 (effective 13 May 1910).
276. See Council of Europe Doc. EXP/EAU (73) 32, Strasbourg, 26 Oct. 1973.
277. See the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden, signed 19 Feb. 1974 (unofficial translation in Appendix).
278. See generally Smets, "Alternative Economic Policies of Unidirectional Transfrontier Pollution", in OECD, Problems in Transfrontier Pollution 75 (1974).

279. See *id.* at 83, and Scott and Bramsen, "Draft Guiding Principles Concerning Transfrontier Pollution", in OECD, *id.*, at 299, 303.
280. See Scott and Bramsen, *id.*, at 303.
281. A number of studies have concluded that suits by pollution victims would not be sufficient alone to force internationalization of the social costs of pollution. See, e.g., Comment, "The Cost Internalization Case for Class Actions", 21 *Stan. L. Rev.* 383 (1969); Baxter, "The SST: From Watts to Harlem in Two Hours", 21 *Stan. L. Rev.* 1 (1968); Katz, "The Function of Tort Liability in Technology Assessment", 38 *U. Cin. L. Rev.* 587 (1969); and Krier, "The pollution Problem and Legal Institutions: A Conceptual Overview", 18 *U.C.L.A. L. Rev.* 429, especially 459 (1971).
282. See the useful study by Professor A.C. Kiss, which elaborates a number of types of institutional cooperation between countries in relation to air pollution control. Kiss, "Efforts to Control Air Pollution at the International Level", in Council of Europe, Committee of Experts on Air Pollution, *Legal Aspects of Air Pollution Control 14*, 20-22, Council of Europe Doc. EXP/Air (72) 11, Strasbourg, 20 Oct. 1972.
283. For a discussion of the various methods of harmonizing national environmental laws, see Kiss, *id.*, at 55-58. These techniques include exchange of information (see the proceedings of the European Conference on Air pollution, Council of Europe Doc. CPA/AG 14 (1964).), consultation with experts from international organizations, use by national legislatures of model laws drafted by international bodies (see, e.g., Resolution (68) 4 of the Committee of Ministers of the Council of Europe, Declaration of Principles on Air Pollution Control (1968)), and pursuant to special treaty arrangements, directives to individual states (Article 189 of the Treaty of Rome, establishing the European Economic Community, provides that such directives are binding as to the objective but that national legislatures may determine how it shall be realized).
284. This has been the case with the International Joint Commission of the United States and Canada (IJC), created by the Canadian-U.S. Boundary Waters Treaty of 1909, art. VII, 36 *Stat.* 2448 (1910), T.S. No. 548 (effective May 13, 1910). See generally, Bilder, "Controlling Great Lakes Pollution: A Study in United States-Canadian Environmental Cooperation", 70 *Mich L. Rev.* 469 (1972).

285. On harmonization of private law in Europe, see the Report on the Harmonization of the Rules of Conflict of Private International Law in Europe by Prof. A. von Overbeck, Council of Europe Doc. 3100, Appendix, 31 Jan. 1972. Prof. von Overbeck suggests that the Council of Europe formulate a legislative policy after which member countries could model their national laws. See also Recommendation 673 (1972) of the Consultative Assembly of the Council of Europe, on Harmonization of the Rules of Conflict of Private International Law in Europe (24th Ordinary Sess.).
286. See Resolution (71) 5, entitled "Air Pollution in Frontier Areas", adopted 26 Mar. 1971.
287. See Note 277.

Chapter 10

288. Mention should be made of an OECD Environment Directorate Draft Recommendation on transfrontier pollution of 3 July 1974 which appeared after the completion of this paper. An Annex to this document sets forth principles on transfrontier pollution, which will be referred to in Chapter 12 as appropriate.
289. See, e.g., the Trial Smelter Arbitration, 3 U.N. Rep. Int'l Arb. Awards 1905 (1949), 35 Am. J. Int'l L. 684 (1941) (air pollution); the Lake Lanoux Arbitration, 24 Int'l L. Rep. 101, 123 (1957) (water); and the Stockholm Declaration on the Human Environment, Principle 21, A/CONF. 48/14 and Corr. 1.
290. Preliminary Unofficial Translation into English on file at the IUCN Environmental Law Centre, 53 Bonn, Adenauerallee 214, Federal Republic of Germany. This translation is reprinted in the Appendix..
291. Nordic Council Report of October, 1973 (in Swedish with English Summary). The report, which submits a draft convention, was made pursuant to a recommendation of the Nordic Council (Recommendation No. 4/1972).
292. Id., at 41.
293. The Article states that "(w)hoever . . . may be affected" by pollution from another contracting state "shall have the right to institute proceedings at the appropriate Court or administrative authority of that State concerning the permissibility of that activity" This implies, however, that the activity in question has already received a permit and that the potentially

- affected person's action would be in the nature of a challenge of or appeal against an existing permit. Under this interpretation, the entitlement of Article 3 would not cover participation by potentially affected individuals in proceedings concerning proposed activities. Such participation by "supervisory authorities," to be created pursuant to Article 4, is allowed under the latter Article (" . . . the supervisory authority has the right to . . . be heard by the competent . . . administrative authority in another Contracting State regarding the permissibility of the environmentally harmful activity ") .
294. See Boomer v. Atlantic Cement Co., 309 N.Y.S.2d 312, 319 (1970).
295. Deutscher Bundestag, Drucksache 7/908, p. 7 et seq. (17 July 1973) (in German); German ratification law of 9 Jan. 1974 in BGB1. (Bundesgesetzblatt) 1974 II p. 13 (18 Jan. 1974).
296. Drucksache 7/908, id., at 13-14.
297. See the section on choice of law in Germany, Chapter 3. See also Drucksache 7/908, Note 295 at 13.
298. Decision of the Staatsgerichtshof, 17/18 June 1927, Reichsgesetzblatt II 1927 at p. 1154. See Kolb, "Intergovernmental Agreements Concerning the Protection of Water Resources between Germany and its Neighboring States," in U.N. Economic Commission for Europe, Conference on Water Pollution Problems in Europe, 2 Documents 398 at 401 (1961).
299. The Commission was originally established by an exchange of notes in 1949-50 and now operates under the Convention of 29 Apr. 1963 between the named parties, which entered into force 1 May 1965.
300. This Commission was originally formed by the Congress of Vienna and was subsequently formalized in the Convention of Mannheim of 17 Oct. 1868, 2 EUR. Y.B. 258 (1956), as revised by the Convention of 20 Nov. 1963, 11 EUR. Y.B. 175 (1963). It is competent over matters concerning pollution only when such pollution is related to navigation.
301. Established in a Protocol pursuant to Article 55 of the Agreement on Navigation of the Moselle of 27 Oct. 1956 between France, Germany and Luxembourg, BGB1. 1956 II, p. 1838.

302. Signed 26 Oct. 1960, entered into force 10 Nov. 1961. See Bay.GVBl. p. 237, 15 Nov. 1961.
303. Signed 8 April 1960. Provisional English translation of Chapter 4 on Boundary Waters in 2 Documents, Note 298 at 433-40. Other European water agreements include the Convention between France and Switzerland concerning the Protection of the Waters of Lake Geneva against Pollution, 16 Nov. 1962; Treaty between Belgium and Great Britain, 22 Nov. 1934, Art. 3, 190 L.N.T.S. 103 (1938); Convention regarding the Regime of Navigation on the Danube, 18 Aug. 1948, 33 U.N.T.S. 197; Protocol between France, Belgium and Luxembourg to establish a tripartite Standing Committee on Polluted Waters, 8 Apr. 1950, 66 U.N.T.S. 287; Agreement between Poland and the German Democratic Republic concerning Navigation in Frontier Waters and the Use and Maintenance of Frontier Waters, 6 Feb. 1952, 304 U.N.T.S. 160, Art. 17; the Saar Treaty between France and Germany, 27 Oct. 1956 (Annex 8, Article 8); the Agreement on Navigation of the Moselle between France, Germany and Luxembourg, Oct. 27 1956 (Article 55) and the Protocol between France and Germany establishing the Commission of the Saar and the Moselle, 1 July 1962. See also Manner, Water Pollution in International Law, 2 Documents, Note 298 at 446, 450-51.
304. See The Times (London), 27 Oct. 1972 and 30 Oct. 1972.
305. Brown, "The Conventional Law of the Environment," 13 Nat. Res. J. 203, 213 (1973) (footnotes omitted).
306. Kolb, Note 298 at 407.
307. 36 Stat. 2448 (1910), T.S. No. 548 (effective May 13, 1910). See generally L. Bloomfield & G. Fitzgerald, Boundary Waters Problems of Canada and the United States (1958); and Bilder, Note 284.
308. See, e.g., IJC, Final Report on the Pollution of Boundary Waters (1918); IJC, Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River (1970).
309. See generally Rempe, "International Air Pollution - United States and Canada - A Joint Approach," 10 Ariz. L. Rev. 138 (1968).
310. T.I.A.S. No. 7312 (effective 15 Apr. 1972).
311. See McCaffrey, "Trans-Boundary Pollution Injuries: Jurisdictional Considerations in Private Litigation

- between Canada and the United States," 3 Cal. West. Int'L L.J. 191, 203-217 (1973).
312. Section 108 (d) 1 (D), as amended in 1970, published in title 42 U.S.C.A. sec. 1857d (c) (Supp. 1973).
313. Committee of Ministers of the Council of Europe, Resolution (71) 5, 26 March 1971. See also Boissetée, Internationale Koodinierung der Massnahmen zur Luftreinhaltung. Luftreinhaltung 1971, at 1-9.
314. See also the Report on a Draft European Convention on the Protection of Fresh Waters against Pollution, Council of Europe Doc. 2561 (12 May 1969); including the Draft Convention (pp. 2-11) and the excellent Explanatory Memorandum thereto by the Convention's Rapporteur, Mr. Housiaux (pp. 11-40).
315. See Council of Europe Doc. CM(70)134 (1970).
316. See Council of Europe Dec. EXP/EAU (73)32 (1973).
317. Explanatory Memorandum, Note 314 at 36.
318. Id. at 37.
319. See Council of Europe Doc. CM(70)134, 27 Oct. 1970, at 2.
320. Preliminary Draft European Convention on the Protection of Fresh Waters against Pollution, id. at 13 et seq.
321. Id. at 2-12.
322. Id. at 7.
323. Id.
324. Id. at 8.
325. Id. at 23.
326. European Convention for the Protection of International Watercourses against Pollution, Council of Europe Dec. EXP/Eau (73) 32, 26 Oct. 1973, at p. 3 et seq.
327. Nov. 29, 1969, reprinted in 9 Int'l Legal Mat. 45 (1970). See generally Swan, "International and National Approaches to Oil Pollution Responsibility: An Emerging Regime for a Global Problem," 50 Ore. L.

- Rev. 506, 524 (1971).
328. Id. Article I, para. 2.
329. International Atomic Energy Document CN-12/46 (May 20, 1963).
330. Id., preamble.
331. International Law Association, Helsinki Rules on the Uses of the Waters of International Rivers, adopted at the 52d Conference held in Helsinki on 20 Aug. 1966 (London 1967).
332. World Peace Through Law Center, Pamphlet Series No. 16 (undated), 75 rue de Lyon, CH - 1211 Geneve 13, Switzerland.

Chapter 11.

333. The principle of non-discrimination contained in the draft OECD principles on transfrontier pollution, Note 228 also advocates according foreigners affected by transfrontier pollution at least the same treatment as is accorded to nationals of the source country.
334. See, e.g., Article 12 of the Vienna Convention on Civil Liability for Nuclear Damage.
335. Compare the principles on defining acceptable levels of pollution, joint resource quality management and regional planning outlined by Scott and Bramson, Note 279 at 302-303.
336. See 42 U.S.C.A. secs. 1857 (a) (1), 1857c-2 (c) and 1857d (c) (Supp. 1973).
337. See, e.g., Hines, "Nor Any Drop to Drink: Public Regulation of Water Quality, Part II: Interstate Arrangements for Pollution Control," 52 Iowa L. Rev. 432 (1966).
338. In 1963, the Consultative Assembly of the Council of Europe began work on European water pollution by instructing its Cultural and Scientific Committee to investigate the problem. Lammers, "The Activities of the Council of Europe Concerning the Protection of Fresh Waters Against Pollution," 41 Yearbook of the A.A.A. 55 (1971).
339. See Article 2 of the Scandinavian Convention, in the Appendix. This proposal is also in line with the

- Principle of non-discrimination contained in the draft OECD Principles on transfrontier pollution, Note 333.
340. See Article 5 of the Scandinavian Convention. Cf. the principle of information and consultation of the draft OECD Principles on transfrontier pollution, Note 333.
 341. See Articles 61 and 62, para. 1 of the Frontier Treaty between Germany and the Netherlands.
 342. Cf. Article 4 of the Scandinavian Convention; and the Principle of equal right of hearing of the draft OECD Principles on transfrontier pollution, Note 333.
 343. Cf. Article 3 of the Scandinavian Convention.
 344. The fund mentioned in Note 1, to compensate Swiss victims of pollution from Germany, is an example of a fund for compensation of regularly occurring (non-catastrophic) damage. See also the recommendation of the First Interparliamentary Conference on Pollution in the Mediterranean, calling for the establishment of a "special fund to fight pollution of the Mediterranean Sea, with potential polluters contributing the most". *International Herald Tribune*, 4 April 1974, p. 4, col. 7.
 345. Council of Europe Doc. CM(70)134 at p. 23 (27 Oct. 1970). This resolution is quoted in pertinent part in text following Note 325.
 346. Signed at Brussels, 18 December 1971. Reprinted in *11 Int'l Legal Mat.* 284 (1972). This convention is supplementary to the International Convention on Civil Liability for Oil Pollution Damage of 1969.
 347. *Maine Revised Statutes Annotated Title 38, sec. 551* (1970).
 348. *Projet de Loi sur les déchets toxiques, and Annex, Statute of the Guarantee Fund for the Destruction of Toxic Wastes, sénat de Belgique, Sess. 1973-74* (22 Nov. 1973).
 349. See 4 *Env. Rptr. Curr. Devel.* 1149, 9 Nov. 1973.
 350. See the Preliminary Draft Resolution of the Committee of Ministers of the Council of Europe, Note 345.
 351. See the International Convention of the Establishment of an International Fund for Compensation for Oil

Pollution Damage, Article 2, para. 2 (hereinafter referred to as the International Fund Convention).

352. Cf. id., Articles 17, 18, para. 4 and 28, para. 2.

353. See id., Article 7, para. 1.

354. See id., Article 7, para. 3.

APPENDIX

CONVENTION ON THE PROTECTION OF THE ENVIRONMENT BETWEEN DENMARK, FINLAND, NORWAY AND SWEDEN

(Preliminary Unofficial Translation)

THE GOVERNMENTS of Denmark, Finland, Norway and Sweden,
CONVINCED of the urgent need to protect and improve the
environment,

HAVE AGREED as follows:

Article 1

For the purpose of this Convention, environmentally harmful activity is defined as the discharge into watercourses, lakes or the sea of solid or liquid wastes, gas or any other substance from the soil or from buildings or installation, and also the use of land, the seabed, buildings or installation in any other way which entails, or may entail, an environmental nuisance as a result of the pollution of water or any other effect on water conditions, sand drift, air pollution, noise, vibration, changes in temperature, ionizing radiation, light etc.

The Convention shall not apply in cases where environmentally harmful activity is regulated by means of a special agreement between two or more Signatory States.

Article 2

When an authority in any Contracting State is considering the permissibility of environmentally harmful activity, the nuisance such activity entails or may entail in another Contracting State shall be regarded as equivalent to a nuisance caused in the former State.

Article 3

Whoever is affected or may be affected by a nuisance caused by environmentally harmful activity in another Contracting State shall have the right to institute proceedings at the appropriate Court or administrative authority of that State concerning the permissibility of the activity, including proceedings on measures necessary to prevent damage, and lodge an appeal against the decision of the Court or the administrative authority to the same extent and on the same terms as a legal entity of the State in which the activity is being carried on.

The first paragraph above is correspondingly applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activity. The question of compensation may not be judged according to rules which are less favourable to the injured party than rules on compensation applicable in the State where the activity is being carried on.

Article 4

Each State shall appoint a special authority (supervisory authority) for the purpose of protecting general environmental interests in the country in conjunction with a nuisance due to environmentally harmful activity in another Contracting State.

For the purpose of protecting such interests, the supervisory authority has the right to institute proceedings at or be heard by the competent Court or administrative authority in another Contracting State regarding the permissibility of the environmentally harmful activity, if the authority or other representative for general environmental interests can institute proceedings or be heard in matters of this kind, and also appeal against the decision of the Court or the administrative authority in accordance with the procedural and appeal rules for such cases applicable in the State concerned.

Article 5

Should the Court or the administrative authority examining the question of a permit to carry on environmentally harmful activities (examining authority) find that the activities entail or may entail nuisance of significance in another Contracting State, the examining authority shall, if proclamation of publication procedures are applicable in cases of this nature, send forthwith a copy of the documents of the case to the supervisory authority in the other State, and also provide this authority with an opportunity of stating its opinion. The notification of time and place for the meeting or inspection shall where appropriate be sent to the supervisory authority in good time, and the supervisory authority shall in all other respects be kept informed of developments in the case, insofar as they are of interest to such authority.

Article 6

When so requested by the supervisory authority, the examining authority shall insofar as it is in accordance with the procedural rules of the country in which the activity is being carried on, require that the applicant for a permit to carry

on environmentally harmful activity submits additional particulars, drawings and technical specifications which the examining authority considers necessary for the appraisal of effects in the other country.

Article 7

Insofar as it considers it necessary on account of public or private interest, the supervisory authority shall publish announcements from the examining authority in the local newspaper or in some other suitable manner. The supervisory authority shall also institute such investigation of effects in its own country as it considers necessary.

Article 8

Costs incurred by the supervisory authority shall be defrayed by that authority's own country.

Article 9

If in a particular case the supervisory authority has informed the Court or administrative authority concerned in the country where the activity is being carried on that the duties of the supervisory authority are in that case to be carried out by another authority, the applicable provisions of the Convention concerning a supervisory authority shall apply to that authority.

Article 10

If it is necessary for the investigation in another country of damage caused by environmentally harmful activity, the supervisory authority in that country shall at the request of the examining authority in the country where the activity is being carried on, make arrangements for inspection on the site. The examining authority or an expert appointed by the authority may be present at such an inspection.

Where necessary more detailed instructions concerning inspections of the type referred to in the first paragraph above are to be drawn up in consultation between the countries concerned.

Article 11

If the question of a permit to carry on environmentally harmful activity, which entails or may entail a substantial nuisance in another Contracting State, is to be examined by the Government, the Minister or Ministry concerned in the country where the activity is being carried on, the States concerned shall consult with one another if the Government in the former State so requests.

Article 12

In cases such as those referred to in Article 11, the Government of each State may demand that a Commission shall report on the case. Unless otherwise agreed such a Commission shall consist of a Chairman from another Contracting State jointly appointed by the parties and three members from each of the States concerned. If a Commission has been appointed the case may not be decided until its report has been received.

Each State is to remunerate the members it has appointed. Fees or other reimbursement to the Chairman together with other costs of the activities of the Commission not manifestly the responsibility of one or other State are to be paid in equal parts by the States concerned.

Article 13

The Convention also applies to the continental shelf areas of the Contracting States.

Article 14

This Convention enters into force six months from the day when all the Contracting States have informed the Swedish Ministry for Foreign Affairs that the constitutional measures necessary for the entry into force of the Convention have been implemented. The Swedish Ministry for Foreign Affairs shall inform the other Contracting States that such communications have been received.

Article 15

Actions or cases relevant to this Convention, which are pending at a Court or administrative authority when this Convention enters into force, are to be dealt with and judged according to previously applicable provisions.

Article 16

Any Contracting State wishing to denounce this Convention shall give notice of its intention in writing to the Swedish Government, which shall forthwith inform the other Contracting States of the denunciation and of the date on which notice was received.

The denunciation shall take effect twelve months after the date when the Swedish Government received such notification or at a later date indicated on the notice of denunciation.

The Convention shall be deposited with the Swedish Ministry for Foreign Affairs, and certified copies shall be supplied to each of the Governments of the Contracting States by the Swedish Ministry for Foreign Affairs.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

DONE at Stockholm, this 19th day of February 1974 in a single copy in the Danish, Finnish, Norwegian and Swedish languages, all texts being equally authoritative.

Protocol

At the signing this day of the Nordic Environmental Protection Convention the duly authorized signatories have agreed that the following comments on its applications shall be appended to the Convention.

When applying Article 1 the discharge into watercourses, lakes or the sea of solid or liquid waste, gas or other substances from soil, buildings or installations shall be regarded as environmentally harmful activity only if the discharge entails or may entail a nuisance to the surroundings.

The right established in Article 3 for anyone who suffers injury as result of environmentally harmful activity in a neighbouring country to institute proceedings for compensation at a Court or administrative authority in that country shall, in principle, be regarded as including the right to demand the compulsory purchase of property.

Article 5 shall also be regarded as applying to cases of permits where such cases are referred to certain authorities and organizations for their opinion but not in conjunction with the proclamation or publication procedure.

The Contracting States shall require officials of the supervisory authority to observe professional secrecy as regards trade secrets, operational devices or business conditions of which they have become cognizant in dealing with cases concerning environmentally harmful activity in another country.

Stockholm on the 19th day of February 1974

The International Union for Conservation of Nature and Natural Resources (IUCN) is an independent international body, formed in 1948, which has its headquarters in Morges, Switzerland. It is a Union of sovereign states, government agencies and non-governmental organizations concerned with the initiation and promotion of scientifically-based action that will ensure perpetuation of the living world - man's natural environment - and the natural resources on which all living things depend, not only for their intrinsic cultural or scientific values, but also for the long-term economic and social welfare of mankind.

This objective can be achieved through active conservation programmes for the wise use of natural resources in areas where the flora and fauna are of particular importance and where the landscape is especially beautiful or striking, or of historical, cultural or scientific significance. IUCN believes that its aims can be achieved most effectively by international effort in co-operation with other international agencies, such as Unesco, UNEP and FAO.

The World Wildlife Fund (WWF) is an international charitable organization dedicated to saving the world's wildlife and wild places, carrying out the wide variety of programmes and actions that this entails. WWF was established in 1961 under Swiss law, with headquarters also in Morges.

Since 1961, IUCN has enjoyed a symbiotic relationship with its sister organization, the World Wildlife Fund, with which it works closely throughout the world on projects of mutual interest. IUCN and WWF now jointly operate the various projects originated by, or submitted to them.

The projects cover a very wide range, from education, ecological studies and surveys, to the establishment and management of areas as national parks and reserves and emergency programmes for the safeguarding of animal and plant species threatened with extinction as well as support for certain key international conservation bodies.

WWF fund-raising and publicity activities are mainly carried out by National Appeals in a number of countries, and its international governing body is made up of prominent personalities in many fields.