CHAPTER 5
EMERGING DUAL SYSTEM AND PRIVATE INTERNATIONAL LAW ISSUES

5.1 Emerging Dual System

Transboundary impacts of globalization, industrialization and scientific and technological developments are blurring lines in the traditionally separated conceptions of domestic and international law and as also public and private law. Most of the international instruments dealing with environmental liability in a specific field like oil pollution, nuclear radiation, hazardous substances and wastes are inclined towards creation of unified rules of substantive law. However the determination and enforcement of liability for environmental damage is usually left to the national courts and authorities. There is now an interesting interplay between international environmental law and national legal regimes wherein private actors liability at national legal regimes has become an important complement to traditional international liability norms of state responsibility and liability.¹ An attempt will be made to study these recent trends. This chapter would inquire whether we are seeing the emergence of a dual system in which civil liability will generally represent the most efficient means of securing redress for transboundary environmental harm, leaving state responsibility as a subsidiary remedy of last resort. The role of transnational private litigation in development of international liability principles for environmental harm will be the focus of this chapter.

Transboundary environmental harm is an occurrence which is bound with the international legal order. Transboundary impact is the

principal conceptual vehicle for ascertaining international rights and responsibilities regarding environment.\(^2\) The hazardous or dangerous activities in one state may have transboundary impact in another state and therefore the issue of transboundary environmental harm lies both in the domain of international law and national laws.\(^3\)

5.2 **Stockholm Principle 21 and Rio Principle 2**

Thus at the Stockholm Conference, States embraced the *sic utere* principle in the first declaration of principles of international environmental law. Principle 21 of the Stockholm Declaration states that: ‘States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction’.\(^4\) The Stockholm Declaration also urged the development of principles of liability for international environmental harm. Principle 22 of the Stockholm Declaration asserts that — ‘[s]tates shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction’.\(^5\) Principle 13 of Rio Declaration is phrased in stronger terms, in particular by requiring that


\(^3\) Ibid.


states shall cooperate “in an expeditious and more determined manner” to develop further international liability law. Principle 13 also makes a distinction between national liability law and international liability law. As seen in previous chapters, this reflects the current direction in which the liability debate is moving\(^6\). Due to the difficulties encountered in developing international liability law, the international community seems to be attaching more weight to national liability than to international liability. However, the emphasis placed on national liability does not, as such, detract from the need to develop international liability law, if the development of international liability law is understood to include the conclusion of conventions which provide for the harmonisation of national liability regimes.\(^7\) That would be a step forward to achieve the universalization of liability laws against transboundary/international environmental harm, which is an important goal to achieve for heading towards sustainable development- which is also one of the Millennium Development Goals, and the aim that international community is desirous of achieving.

Earlier between 1972 and 1992, liability has been the subject of discussion in several international fora and there have been attempts to develop liability regimes. Several groups of legal experts have been given a mandate to develop liability regimes.\(^8\) The emphasis in the 1992 UNCED Declaration on Environment and Development to develop liability law “in an expeditious and more determined manner” illustrates the failure in not being able to achieve the needful. In particular in the field of civil liability there have been more efforts.

\(^6\) *Ibid.*


\(^8\) For example, the IAEA Standing Committee on Liability for Nuclear Damage, the IMO Legal Committee as well as the meetings of legal experts convened under the 1991 Protocol on Environmental Protection of the 1959 Antarctic Treaty and the 1989 UNEP Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.
Clearly, the reluctance of states to develop liability regimes, in particular State liability regimes, is widespread. There is only one treaty under which states have assumed strict liability for damage resulting from acts within their territory, and it deals with spacecraft debris, not environmental damage. While the civil liability regimes, based upon the “equal right to access” custom of international law, ostensibly do not modify or supplant the rules of customary international law regarding state liability, in practice they have the effect of a buffer, allowing states to avoid any determination of their liability by ensuring that compensation is easily obtained through the civil liability regime.

5.3 The Role of National Laws

States implement their international obligations through their national laws and authorities. The national laws are a source of legal and judicial remedies and the claims for transboundary environmental harm are to be addressed through this medium only. Since the states are unwilling to be bound by international law for state liability for environment harm, the national regimes are the required to play a

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9 1966 IAEA Convention on Early Notification of a Nuclear Accidents; 1986 IAEA Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency. On the working group, IAEA/GC(XXXII)/Res.491; the working group has been convened by the Board of Governors in 1989, 31/1 IAEA-Bull, 46 (1989). The work of the Informal Expert Workshop on Article 17 convened by the Helsinki Commission under the 1974 Helsinki Convention on the Protection of Marine Environment of the Baltic Sea Area is also illustrative of the often cumbersome process of development of liability regimes, be it State or civil liability regimes. Only Poland has shown its willingness to consider seriously the matter of State liability. The Informal Expert Workshop, however, proceeded with a comparison of national liability regimes of the Baltic rim states. After years of discussion, it concluded that there were “no major gaps in respect of national and international legislation on liability and compensation for damage to the marine environment. HELCOM, Report of the 3rd Informal Expert Workshop on Article 17 of the Helsinki Commission, 6 (16 June 1986).


12 Supra note 7 at 58.
significant role in implementing these international commitments. The emphasis on transnational litigation under the civil liability regimes recognizes the competence of the national courts to decide cases as per the national laws enacted under the international treaty obligation. In the view of the researcher the domestic implementation of the international civil liability conventions is the most significant component of the environmental liability scenario today. In a situation where an individual or a group of concerned persons seek to establish a transboundary claim for environmental damage the national law should make remedies available in avoiding resort to interstate remedies which are neither feasible nor available.13 But in national substantive laws, except on matters those are specifically addressed under the national implementation of these international treaties, there is not much in common on environmental liability in different legal systems. Thus there is a need for national laws including private international law of states to be harmonized to address transboundary environmental harm in general. This is a major feat which has been limitedly possible through adoption of civil liability conventions. Individuals and NGO, s may be empowered to act as enforcement structure of international environmental law.14

5.4 Transnational Litigation in Environmental Disputes

From the previous chapters on international environmental law it is clear that private parties or companies are not in general bound by public international law and therefore the practice of channeling environmental liability towards private actors in national law is now a widely developed alternative to the international liability of states in cases of pollution damage.15 This enlarged scope for transnational litigation in environmental disputes predicates the significant role

13 Supra note 7 at 32.
15 Supra note 14 at 239.
which public and private international law have to play in securing access to justice by removing some or all of the hurdles and by ensuring that adequate legal remedies are available to plaintiffs in transboundary cases in the national courts. The problems of private international law, particularly jurisdiction and choice of law in transboundary cases are serious issues seeking solutions. Harmonization of national laws dealing with liability for environmental damage is a logical solution which necessitates identification and recognition of certain elements of principles of liability in transboundary environmental harm context. Such harmonization is sought to be achieved through civil liability conventions. Civil liability regimes for environmental damage which have emerged as an alternative system to state responsibility and state liability recognize the competence of national Courts, either in the State where the damage was caused or in the State of nationality of the polluter, to decide cases regarding the liability of the actual parties causing damage outside the State in which they are based. Such decisions thereby become enforceable in other states parties to the agreement. This system has been used to address a number of objectives, largely aimed at remedying shortcomings in the system of State responsibility or state liability and to some extent in harmonizing conflict of laws issues. The second part of this chapter focuses on jurisdiction and choice of law issues of cross-border litigation and brings out its major shortcoming. The present scenario in context of transboundary environmental harm opens several options, not necessarily exclusive of each other: 16

(i) An access to justice approach: i.e. ensuring that states make effective recourse against the relevant private party available through national law for victims of transboundary harm.

(ii) A conflict of laws approach: i.e. facilitating transboundary civil litigation through forum-shopping and other procedural reforms.

(iii) A harmonisation approach: i.e. ensuring that national laws set internationally acceptable standards of liability, jurisdiction, availability of remedies etc.

(iv) A compensation approach: i.e. ensuring that compensation is available to cover situations where liability is limited or inadequate, or to spread the burden equitably between the party liable for the harm or pollution, the industry, and (possibly) the state.

5.5 Principle of Non Discriminatory Access to Justice

In cases of transboundary environmental harm the access to justice is of primary concern. Such access includes the development and confirmation of the principle of equal or non-discriminatory access which has its roots in the 1974 Stockholm Convention on the Protection of the Environment between Denmark, Finland, Norway, and Sweden. Article 3 of the Convention provides equal right of access to justice. This is one of the most advanced forms of international cooperation available among States recognizing comprehensive right to equal access to justice to persons who have been or may be affected by an environmental harmful activity in another State, which includes right of equal access to courts or administrative agencies of that State is provided “to the same extent and on the same terms as a legal entity of the State in which the activity is being carried on”. This was possible because the


18 Ibid.
environmental standards are largely the same among the Nordic countries. The transboundary applicant is allowed to raise questions concerning the permissibility of the activity, appeal against the decisions of the Court or the administrative authority and seek measures necessary to prevent damage.\textsuperscript{19} Similarly the transboundary victim could seek compensation for damage caused on terms no less favourable than the terms under which compensation is available in the State of origin.\textsuperscript{20} The researcher observes that the principle is also recommended by the OECD through implementation of flexible bilateral or multilateral accords on measures for the facilitation at the procedural level of transnational pollution abatement litigation.\textsuperscript{21} This principle is also reflected in international conventions.\textsuperscript{22} This is an aspect which is gaining increasing acceptance in State practice.\textsuperscript{23}

According to the ILC the principle of equal access goes beyond the requirement that States meet a minimum standard of effectiveness in the availability of remedies for transboundary claimants by providing for access to information, and helping appropriate cooperation between the relevant courts and national authorities across national boundaries.\textsuperscript{24} The importance of non-discriminatory principle

\textsuperscript{19} \textit{Ibid.}

\textsuperscript{20} Stephen C. McCaffrey, \textit{Private Remedies for Transfrontier Environmental Disturbances}, 85-87 (1975). The main contribution of the Convention is the creation of a Special Administrative Agency to supervise the transboundary nuisances in each State party for more intensive intergovernmental consultation and cooperation. The Agency is given standing before the courts and administrative bodies of other contracting States. It does not have an express provision for waiver of State immunity. It is also silent on the question of the proper applicable law for the determination of liability and calculation of indemnities, though it is assumed that the proper law for the purposes will be the law of the place where the injury is sustained.

\textsuperscript{21} Philip McNamara, \textit{The Availability of Civil Remedies to Protect Persons and Property from Transfrontier Pollution Injury} (1981), 146-147.

\textsuperscript{22} For example The \textit{Paris Convention of 1960 on Third Party Liability in the Field of Nuclear Energy} lays down first of all the principle that the Court which has jurisdiction is to apply the Convention’s provisions without any discrimination founded upon nationality, domicile or residence (Article 14).


\textsuperscript{24} The ILC in its recent work has most emphatically endorsed the principle of non discrimination. The principle has been codified in Article 15 of the ILC’s 2001
in the determination of claims concerning hazardous activities lies in the need that the State of origin should ensure no less prompt, adequate and effective remedies to victims of transboundary damage than those that are available to victims within its territory for similar damage. This principle could, thus, be seen to be referring to both procedural and substantive requirements. In terms of its procedural aspects it means that the State of origin should grant access to justice to the residents of the affected State on the same basis as it does for its own nationals or residents. Non-discrimination may thus require removal of the some procedural laws of the State of origin like, “the security of costs from foreign plaintiffs, the denial of legal aid and the denial of jurisdiction over actions involving foreign land”. Non-discrimination leaves the host state free to define both the scope and content of the liability, determine applicable law, and afford remedies, provided they are equally available to foreign and domestic claimants. This is the most minimalist solution, and in some cases it will be no solution at all if the state chooses to make no provision for liability, or denies any remedy, or confers immunity on defendants. Such a ‘minimalistic solution’ does not alleviate problems concerning choice of law or choice of forum, which exist, given the diversity and lack of any consensus among States. These may be significant obstacles to the delivery of prompt, adequate and effective judicial recourse and remedies to victims, particularly if they are poor and not assisted by expert counsel in the field. What is required is cooperation

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Articles on Transboundary Harm and in Article 32 of the 1997 UN Watercourses Convention. Draft Principles on the Allocation of Loss in the case of Transboundary Harm Arising out of Hazardous Activities, the text of which was annexed to General Assembly Res. 61/36 of 4 December 2006, Sixty-first Session, Supplement No. 10 (A/61/10) at 163
25 Ibid.
26 Ibid.
28 Ibid.
29 Supra note 1.
amongst the States by harmonization of laws to extend benefit of such access and remedies.

The significant issues which plague transboundary environmental litigation are ascertaining which courts have jurisdiction and in those courts what the applicable law would be. These questions need clear and certain answers before deciding where to litigate. Moreover, even when litigation takes place in the affected country, judgments awarding damages may have to be recognised and enforced in countries where the defendant’s assets are to be found.  

5.6 Private International Law Issues and Transboundary Environmental Harm Cases

Transboundary environmental harm has necessarily the components of transnational civil liability disputes. The recent development in international environmental law is recognition of the reality and necessity of developing private international law to deal with transboundary environmental issues. States recognise the jurisdictional competence of their courts to hear environmental civil claims on the basis of the criteria established in their national laws or international instruments.

In view of the researcher the trend in the civil liability treaties of opening avenues of transnational litigation as a possible solution to address transboundary environmental disputes has necessitated a review of the private international law rules. The encouraging aspect of these conventions are that while addressing the issues of liability and redress they try to unify the substantive rules and simplify the legal mechanism by specifically providing for choice of forum and choice of law to the affected parties, rather than leaving it to be addressed by the national rules of private international law. This

\[30\] \textit{Ibid.}
obliterates the need to resort to private international law for addressing an issue arising under the convention. However, for any question which is not addressed by any Convention, the Court necessarily applies its national law, including the rules of private international law that are not affected by the Convention. The nature, form and extent of reparation, as well as the equitable sharing out of indemnities, are governed, within the limits set out in the Convention, by the national law. The situation which emerges from the application of private international law rules of a domestic Court is complex, uncertain and unpredictable. This can be illustrated through case *Aguinda v. Texaco* case. A group of indigenous people of Ecuador initiated the case in US court, alleging that the oil operations conducted by first Texaco, and from 2001, its successor, Chevron, had polluted the rainforests and rivers in the Oriente region in Ecuador resulting in environmental damage as well as in increased rates of cancer and other serious health problems for the local population.

The discretionary plea of US Court being a *forum non conveniens* was raised which was accepted and the case *Aguinda v. Texaco* was not pleaded before US courts but before Ecuadorian courts. In February 2011, *Chevron* obtained from the US courts a temporary order of anti-suit injunction, restraining the recognition of any judgment against it obtained in Ecuador. The Court while recognising that this was an “unusual order” founded its decision on the fact that the “plaintiffs’

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31 *The London Convention for the Prevention of Pollution from Ships*, adopted on 2 November 1973 within the framework of the IMO, commonly called the MARPOL Article 4, paragraph 1, of the main Convention, “any violation of the requirements of the present Convention shall be prohibited and sanctions shall be established therefore under the law of the Administration of the ship concerned wherever the violation occurs”. However, where the violation is committed “within the jurisdiction of any Party to the Convention”, it “shall be prohibited and sanctions established therefore under the law of that Party” (Article 4, para. 2).


announced strategy to cause as much disruption as possible” and on that they were trying to force a settlement.\textsuperscript{37} At the same time, \textit{Chevron} approached the Permanent Court of Arbitration alleging a violation of the US–Ecuador bilateral investment treaty by unduly influencing the judiciary and compromising its independence.\textsuperscript{38} On 9 February 2011 the Court adopted interim measures ordering Ecuador to “take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment”.\textsuperscript{39} The issues of forum, applicable laws and enforcement and recognition of foreign judgments all come to fore in this case where till date claims are undecided.

The choice of forum determines where an action against the operator will be brought, whereas the choice of law determines which jurisdiction’s legal standard of care will be applied. There are a number of possible forum and choice of law combinations of which are prevalent in different legal systems. This has been a cause of concern for opening doors to transnational litigation as the diversity in private international rules creates uncertainty and complexity in litigation process. We review the trends in transnational civil litigation in the European Union and the U.S.A where it has had an opportunity to evolve and develop.\textsuperscript{40} The trends in these legal systems show an


\textsuperscript{38} PCA Case No 2009-23, available at \url{www.chevron.com/documents/pdf/ecuador/TribunalInterimMeasuresOrder.pdf}.

\textsuperscript{39} \textit{Ibid}.

\textsuperscript{40} The legislative jurisdictions of the European Community in the area of private international law have recently been redefined by the Treaty of Amsterdam, which modifies the \textit{Treaty on the European Union} and the \textit{Treaty establishing the European Community}. In accordance with Article 61 of the European Community treaty, these new jurisdictional powers look towards “establishing progressively an area of freedom, security and justice” and that the Council is to draw up “measures in the field of judicial co-operation in civil matters as provided for in Article 65 i.e. measures intended \textit{inter alia} to promote the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction”. Special
interesting study of the issues involved and the possible solutions courts and legislators resort to.

5.6.1 Choice of Forum in Transnational Environmental Litigation

Private international law generally affords victims of transboundary harm a choice of forum in which to sue. What choices are available in any particular legal system will depend on the jurisdictional rules of that legal system. On a general pattern we find acceptance of jurisdiction (a) in the courts of the place where damage occurs (i.e. the transboundary victim’s own state),\(^41\) or (b) in the place where harmful activity is located,\(^42\) or (c) in the place where defendant is domiciled.\(^43\) Most of the civil liability regimes have sought to address the issue of choice of forum in transboundary litigation on similar lines.\(^44\) These choice of forums are now considered to be presumptions, among these being one that bears expressly on injury to the environment (Article 4, sub-para. c) reads as follows: ”in case of damage or injury to persons or goods, resulting from harm to the environment, [it shall be presumed that a non-contractual obligation is most closely connected] with the country in which the damage or injury occurred or is likely to occur. “Apart from of the linkage to the law of the place of the damage, it can be noted that this proposal also envisages situations in which the damage has not yet occurred, but threatens to occur; this is, in our opinion, a welcome clarification to the benefit of those referred to as potential victims. cited in Carmen Otero Garcia-Castrillon, International Litigation Trends in Environmental Liability: A European Union – United States Comparative Perspective, Journal of Private International Law, Vol. 7 No 3, p551


\(^{42}\)Re Union Carbide Corporation, 634 F Supp 842 (1986).


\(^{44}\)Jurisdictional provisions can be found in Article XI Vienna Convention (where the accident occurs; if not a contracting party or not identifiable, where the operator’s installation is); Article IX CLC; Article 17 of 1999 Basel Protocol(cause, consequence or defendant’s residence or principal place of business); Article 38 of
widely accepted as part of civil liability regimes and national legal systems.\textsuperscript{45} However the availability of different forums under the civil liability regimes or rules of private international law also pose a few issues. These are:

\textbf{5.6.2 Forum shopping in Transnational Environmental Litigation}

The availability of multiple forums provides convenient options to the victims to sue the defendants in either the victim’s own jurisdiction or in the place where the corporations are based thereby making them more amenable to the process of litigation.\textsuperscript{46} However practically such a broad jurisdictional choice creates obvious problems of uncertainty also.\textsuperscript{47} A multiplicity of claims in diverse jurisdictions does not create certainty or efficiency in the judicial processing of claims for compensation.

\textbf{5.6.3 Forum non conveniens in Transnational Environmental Litigation}

The discretionary doctrine of \textit{forum non conveniens} in common law countries which allows the Court to decide whether to stay or

\begin{itemize}
\item HNS Convention (cause, preventive measures, flag or registry of the ship, owners habitual residence or principal place of business and where the fund is constituted);
\item 13 Kiev Protocol (cause, harm or defendant’s domicile, arbitration is also contemplated in Article 18), Article 19 of Lugano Convention (cause, harm or defendant’s domicile).
\end{itemize}


\textsuperscript{47} Two recent cases of sea oil pollution, where civil actions were resolved by criminal courts. The \textit{Erica} case, finally resolved by the \textit{Cour d’Appel de Paris} on 30 March 2010), and the \textit{Prestige case}, where the criminal Court absolved all defendants of criminal liability is in appellate stage before the Spanish Supreme Court.
allow proceedings before it.\textsuperscript{48} A serious consideration is required to harmonise the standard rules for the determination of question whether a Court is an inconvenient forum or not. Whereas in common law jurisdictions \textit{forum non conveniens} is not applied when to do so would amount to a denial of justice yet it has been conveniently used at times to allow the defendants to escape liability. The ECJ has ruled that the \textit{forum non conveniens} motion to dismiss cannot be accepted, be it in intra-EU or extra-EU cases.\textsuperscript{49} The doctrine can be perceived to be inconsistent with contemporary human rights standards for access to justice also.

The \textit{forum non conveniens} motion is a frequent tool in US international civil litigation. The motion is accepted when there is an “adequate alternative” forum.\textsuperscript{50} The assessment of this adequacy “on the whole” introduces considerable discretion in evaluating the situation and has led to controversial decisions. Hence in the Bhopal gas leakage case the motion was accepted.\textsuperscript{51} In \textit{Carijano} case,\textsuperscript{52}

\begin{itemize}
\item Re \textit{Union Carbide Corporation}, 634 F.Supp 842 (1986); \textit{Aguinda v. Texaco Inc}, 142 F.Supp.2d 534 (2001). Also in July 2005 a group of Colombian farmers instituted proceedings in the English High Court against BP Exploration Company (Colombia) alleging that the construction of an oil pipeline by OCENSA (a consortium led by BP) had caused severe environmental damage to their lands. Among other arguments, BP alleged that the suit should be in Colombia (\textit{forum non conveniens}). In June 2006 BP and the farmers met for mediation in Bogotá and in July the parties announced that a settlement had been reached. The parties did not disclose the terms and the amounts paid. However, they did announce that BP, without admitting liability, had agreed to establish an Environmental and Social Improvement Trust Fund for the benefit of the farmers, together with a programme of workshops dealing with environmental management and business development. According to press reports, the amount paid by BP was not thought to be as high as the £15 million originally claimed, but was believed to run to several million pounds.
\item Case C-281/02 \textit{Owusu v. Jackson}, [2005] ECR I-1383. Before this ruling, in the UK it was possible to see parties resorting to this motion and courts accepting it in environmental litigation. The \textit{Cape} lawsuits were finally resolved in 2003 through settlements after five years of litigation were spent in resolving the \textit{forum non conveniens} motion. see \textit{Lubbe v. Cape Plc}, [2000] 1 WLR 1545.
\item Re \textit{Union Carbide Gas Plant Disaster at Bhopal} (India), 634 F Supp 842 (SDNY 1986), affirmed 809 F2d 195 (2d Cir 1987), \textit{Flores v. Southern Peru Cooper Corp}, 441 F3d 233 (2d Cir 2003); \textit{Aguinda v. Texaco}, 142 FSupp 2d 534 (SDNY 2001); 303 F3d 470 (2nd Cir 2002)
\end{itemize}
members and supporters of a group of indigenous people who have long resided along the rivers of the northern Peruvian rainforest sued Occidental Petroleum for environmental damage arising from the use of out-of-date methods for separating crude oil which, allegedly, resulted in millions of gallons of toxic oil byproducts being dumped in waterways. The district Court accepted the motion of forum non conveniens taking into consideration that the defendant (Occidental) would waive any personal jurisdiction defences to appear in the Peruvian courts. The appellate Court, rejected it, arguing that, though the motion may be granted “even though the law applicable in the alternative forum is less favourable to the plaintiff’s chance of recovery”, it has to be rejected when the alternative forum presents a “clearly unsatisfactory remedy”.

5.7 Jurisdictional Choice in the European Union: Challenges and Some Solutions

The choice of jurisdiction in the EU is governed by the Brussels I Regulation in case of the defendant being domiciled in a Member State. Article 2 of the Regulation establishes the precedence of the international conventions on particular matters in which Member States are parties. As discussed before a number of these conventions include jurisdiction rules that, therefore, will apply when the incident or harm takes place in the territory of a state that is party to such a

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52 Carijano et al v. Occidental Petroleum Corp, No 08-56187 (9th Cir, 6 December 2010). The appellate Court was particularly concerned that the district Court did not impose any condition on the dismissal, specifically that Occidental would waive any statute of limitations defence in the Peruvian proceedings. It argued that “dismissal on the basis of forum non conveniens is improper when a lawsuit would be time-barred in the alternative jurisdiction”.

53 Ibid.

Convention. In the absence of an applicable convention, Brussels I recognises a number of fora including one chosen by the parties expressly or impliedly by entering appearance without contesting the jurisdiction, the defendant’s domicile. The recognition of defendant’s domicile as a jurisdictional base, facilitates damage suffered in the territory of non-Member States whose judicial procedures and/or remedies are non-existent or inadequate, to an alternate more beneficial forum. The provision in Article 6 to the Regulation allows for the much needed flexibility in dealing with corporation’s and in combination with the lifting-of-the-veil principle it permits acting against the headquarters of a group of companies. The Regulation also tries to simplify cases of multiple defendants by making the domicile of any of them relevant to establish jurisdiction as long as the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings (Article 6.1). We find two instances of claims for environmental damage from oil pollution being successfully allowed where the national law of member states recognizes the competency of criminal Court to take up civil matters too, i.e. in Spain and France. The Regulation recognizes the jurisdiction of this kind also. In fact in the Erika oil spill case the French criminal Court both sentenced and decided civil claims without even mentioning the convention’s jurisdiction criterion when resolving the civil claims. In Spain the Prestige case was litigated before criminal courts and civil claims are included. An appeal against the

55 Supra note 51.
56 Article 23, where it is enough for the Court chosen to be in a Member State regardless of where the parties are domiciled; ibid.
58 Erika case, supra note 29
59 In accordance with the Criminal Procedural Law, both the public prosecutor and any prejudiced party may appear in criminal proceedings as a private prosecution and bring criminal actions against the defendants. Moreover, in accordance with the law, the public and private prosecutions may bring civil actions within criminal proceedings against the defendants, any legal persons which may have profited from the effects or causes of the criminal offence and their respective insurers. In
verdict of the Court of first instance is pending. It is interesting to note that, with the intervention of Eurojust and, resorting to the European Convention on Mutual Assistance in Criminal Matters, France relinquished its criminal and civil actions in favour of Spanish public action.60 Further Article 5.3, allows the plaintiff to choose to bring the case in the courts of the place where the direct damage occurred (locus damni) or in the courts of the place where the event giving rise to the damage occurred (locus causae).61

A significant addition has been made by the Recast of the Brussels I Regulation reform which through Article 26 provides an exceptional forum necessitatis for cases where none of the already-mentioned jurisdiction criteria lead to establishing the competence of a Member State Court and there is a risk of leaving plaintiffs deprived of their human and fundamental right of access to justice.62

Professor Carmen Otero Garcia-Castrillon after a detailed analysis in a study concludes that the conventions and the EU approaches to establishing jurisdiction look at the nexus between the dispute and the forum which, in any case, preserves the right to justice.63

5.8 Choice of Jurisdiction in the United States of America

accordance with Articles 109 and 116 of the Criminal Code, an individual or company convicted for a criminal offence will also have direct civil liability for the damages caused. Article 117 of the code sets out that insurers will also have direct civil liability when, as a consequence of a criminal offence, an event covered by an insurance policy has occurred. This liability is limited to the amount covered by the corresponding insurance policy. Article 120 of the code sets out the subsidiary civil liability of other individuals or legal persons under certain circumstances. Article 120.4 of the code accounts for the civil liability of natural or legal persons working in any kind of industry or commerce for criminal offences perpetrated by their employees, assistants, representatives or managers when carrying out their obligations or rendering their services. The criminal proceedings are still pending on appeal before the Supreme Court. Process no 960/2002, before the first instance and instruction court of Corcubión.

60 Ministerio Fiscal; N/Ref ST 935/05, Eurojust Caso no 27/FR/03.
61 [2012] OJ L 351
62 Ibid.
63 Supra note 50 at 562.
The focus of the jurisdiction to adjudicate in the US is on the nexus between the defendant and the forum. Beyond international agreements, the US system to establish international civil jurisdiction requires considering personal (general) and material (specific or subject matter) jurisdiction.\footnote{Ibid.} Personal jurisdiction, domicile, service of process are well established and the lifting-of-the-veil theory is also accepted in cases of multinational corporations.\footnote{Restatement of Conflict of Laws, 52 (2nd Edition).} The Restatement Second does not contain a special rule for the law applicable to environmental torts. This category of torts consequently falls under the general framework of Rule 145 which refers to the law of the place that has “the most significant relationship with the event and the parties”. Under paragraph 2 of this Rule, the “contacts” to be taken into consideration are a) the place of the damage, b) the place where the act that gave rise to the damage was committed, the domicile, the residence, the nationality, the place of incorporation or of the principal place of business of the parties, and d) the place where any relationship between the parties is centered.

In the US, either the Aliens Tort Claim Act (ATCA) or the doctrine of “effects” is applied by some courts, to establish jurisdiction in international environmental civil claims.\footnote{Supra note 50 at 563.} ATCA is a jurisdictional statute providing jurisdiction to US courts for hearing actions for torts committed in a violation of international law norms. Reviewing the recent cases in the US, a study shows that in cases under the Alien Torts Act, international law governs the substance of the violation while domestic law (US or foreign) applies to the liability.\footnote{Ibid.} Some courts apply the “effects” criterion, which is a subject matter jurisdiction criterion and is used in the “purposeful direction of
activities at the forum state” which can also lead to the establishment of specific jurisdiction.68

Nevertheless, in any scheme of transboundary civil liability there must be a forum in which to sue and development of the law in this field should ensure that the source state should enable its courts to exercise jurisdiction over activities taking place within its territory or control.69

5.9 Choice of law in Transnational Environmental Litigation

In contrast to the jurisdictional questions, no general principle exists for choice of law rules in transboundary torts. These rules are determined by the law of the forum.

State practice is not uniform in the matter of choice of law. Different jurisdictions have adopted either the law that is most favourable to the victim or the law of the place which has the most significant relationship with the event and the parties.70 National practice has not so far been harmonised by the Hague Conference on Private International Law.71 The European Union makes an interesting study of the issues in context of transnational civil litigation on environmental matters as there are a web of environmental treaties, some general private international law conventions and institutional

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68 The Restatement of Foreign Relations (Third) § 402.1(c), categorises it as a “jurisdiction to prescribe” basis. Applied in Pakootas case.
69 Supra note 50.
70 The “most favourable law principle” is adopted in several jurisdictions in Europe, Venezuela, and Tunisia. However, United States law appears to favour the law of the place which has the “most significant relationship” with the event and the parties, id., at 911-915.
European norms. The choice of law remains important despite the harmonization created by the ELD because the Directive deliberately leaves certain matters to domestic law whilst being minimum harmonization in any event, allowing the application of more protective regimes. This even concerns important defences such as State of the Art and the permit defence. Following are the private international rules prevalent in different national systems relating to choice of law in cases of transboundary torts:

5.9.1 Law that is more favourable for the injured party

The forum applies the law in force at the place of the damage suffered and that where the polluting act was committed. This principle is particularly useful in matters of transfrontier pollution. Indeed, if account is only taken of the law of the place of dangerous activity, there is a risk that polluting countries will unduly limit the liability of their industries to the detriment of the potential victims located in neighbouring States. In other words, a mandatory reference to the law of the polluter would bring a risk of opening a breach in the principle that the “polluter pays”. On the other hand, the

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75 Ibid, The roots of this principle are found in German private international law. Brought out by the case decisions of the Reichsgericht, this principle was taken up in the recent codification of private international law on torts, even if it is not unanimously supported by German legal writers., the principle of the application of the law which is more favourable to the interests of the injured party has been adopted in different forms – in the private international laws of Greece, Hungary, Slovakia and the Czech Republic, the former Yugoslavia and, more recently, in the new codifications of private international law of Estonia, Tunisia, Venezuela.


77 Supra note 74
possibility of the polluting country having adopted severe and strict provisions, which might be found to be advantageous for the victims, should not, in our opinion, be completely excluded. Finally, it should not be forgotten that the advantage conferred on the victims by this principle is doubled by a beneficial effect of prevention of damage to the environment. The fact that the victim may choose the law which ensures him or her maximum recovery should in fact dissuade the operator of a polluting enterprise situated near a frontier from preferring profitability to good maintenance of his or her installations. Under these circumstances, the principle favoring the injured party has thus a completely desirable and welcome corollary: favoring nature.

This choice of law rule presupposes that the injured party has a good knowledge not only of the competing substantive provisions, but also of the interpretations given to them by the Courts.

5.9.2 The law of the place of the damage (lex damni): The forum applies the law of the place of the damage. This is convenient to plaintiff’s interests, it being the place of his or her residence. It is also in consonance with the reparatory function of environmental liability with emphasis on restitution and compensation of environmental damage. It assumes more relevance in context of strict liability for environmental harm or pollution. However, applying law of the place of damage does not help to integrate with the administrative or statutory authorization of the activity by the state where the harmful

78 Ibid.
79 Ibid.
80 The principle of the law of the place of the damage had in particular been expounded by the French Cour de cassation in a first decision of 1983 see the commentaries of Léger, Journal de Droit International, 1054-1055 (1999). As concerns torts committed at a distance, the principle of the lex damni is also applied in Spain, Switzerland, Romania, Turkey and Quebec. Id, at 29-42
activity is located. The Pakootas v. Teck Cominco case (Trail Smelter II) is an example of this problem.

5.9.3 The law of the place of the dangerous activity (lex loci actus): The rule of the law of the place of the dangerous activity is, based on the concept of law with which the litigation or the parties have closer connections. Application of this law gives legal effect to administrative licensing or statutory authorization by that state.

5.9.4 The law of the place which has the “most significant relationship”: This principle found its expression in particular in the United States, in the Restatement 2nd Conflict of Laws issued in 1971. The Restatement 2nd does not contain a special rule for the law applicable to environmental torts. This category of torts consequently falls under the general framework of Rule 145 which refers to the law of the place that has “the most significant relationship with the event and the parties”. Under paragraph 2 of this Rule, the “contacts” to be taken into consideration are a) the place of the damage,

(a) the place where the act that gave rise to the damage was committed, the domicile,

(b) the residence, the nationality, the place of incorporation or of the principal place of business of the parties, and

(c) the place where any relationship between the parties.

82 Supra note 1 at 311.
84 In principle, accepted in Austria, the Netherlands, Denmark, Finland and Sweden. supra note 74.
Moreover, in terms of certain jurisprudential considerations, a lawsuit claiming civil liability may be brought either before a Court of a sister state, or before a federal Court. The federal courts apply in principle the conflict of laws rules of the state in which they sit. Thus there is great diversity among the approaches chosen. It is in fact striking to realize that, despite the different theoretical approaches, the courts end up most of the time applying their own law (lex fori). This realisation was discussed expressly by the Supreme Court of Michigan in the case of *Sutherland v. Kennington Truck Segice Ltd.*, decided in 1997. The Court explains that:

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

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87 Professor Symeonides identified no less than seven different categories: 21 states apply the above-quoted rule of the Restatement 2nd (among these being Florida, Texas, Delaware, Vermont and Washington), 11 states follow the traditional rule of the *lex loci delicti* (among these being the two Carolinas), 3 states apply a test of “significant contacts” (among these being Indiana), 3 other states have adopted the theory of *interest analysis* (this theory is applied in particular in California and New Jersey), 3 states apply the *lex fori* (Kentucky, Michigan, Nevada), 5 states apply the theory of the “better law” (this theory is applied in particular in New Hampshire and Wisconsin), and, finally, 6 states proceed to a combination of the different approaches mentioned above (among these being New York and Massachusetts). Symeon C. Symeonides, Choice of Law in the American Courts in 1997, 46 *Am J. Comp. L.* 223-285 (1998); see in particular the table, 266.
88 562 N.W. 2d 466, 467-470 (Mich. 1997), quoted as in *SIMEONIDES*, Id. at 240.
State’s law, but have to expend considerable time and resources to learn another State’s law.\textsuperscript{89}

5.9.5 Party Autonomy

The question of whether the parties (polluters and victims of the damage) should be given the possibility to choose the applicable law through an agreement subsequent to the occurrence giving rise to the claim was discussed at the Osnabrück colloquium.\textsuperscript{90} Such a possibility was accepted in principle. The participants in the colloquium did not fail however to stress the importance which should be given to the protection of third parties.\textsuperscript{91} The situation becomes more complicated when, for example, oil is spilled on the high seas and the damage occurs on land or in the territorial waters. The parties’ agreement should be subject to the classic rules of validity having to do with defects of consent (mistake, duress, fraud) in order to protect the victim in particular where he or she has made a mistake in the understanding of the rights offered to her by the law which has been set aside.\textsuperscript{92}

5.10 Resolving private International Law Issues through Harmonisation: Some Solutions from the European Union

The Rome II Regulation\textsuperscript{93} is a European Union Regulation regarding the conflict of laws on the law applicable to non-contractual obligations. From 11 January 2009, the Rome II Regulation creates a harmonised set of rules within the European Union to govern choice of law in civil and commercial matters concerning non-contractual

\textsuperscript{89} Ibid.
\textsuperscript{90} Supra note 74; We should further point out that the possibility for the parties to choose, after the occurrence giving rise to the claim, the law applicable to the litigation is expressly provided in Swiss law (but limited only to the law of the forum) and in Austrian law.
\textsuperscript{91} Ibid.
\textsuperscript{92} Ibid.
\textsuperscript{93} (EC) No 864/2007.
obligations, including specific rules for tort or delict and specific

categories of tort or delict. Under Rome II, “non-contractual

obligation” is an autonomous concept that includes actual and

potential environmental damage understood “as meaning adverse

change in a natural resource, such as water, land or air, impairment of

a function performed by that resource for the benefit of another

natural resource or the public, or impairment of the variability among

living organisms”. This includes the so-called purely environmental
damage together with personal and patrimonial environmental harms.
The Regulation does not use the expression “victims” but refers to the
“person seeking compensation for damage” and the “person sustaining
the damage”, which means that the claimant can be an individual or a
juridical, public or private person. Article 14 of Rome II allows for
party autonomy also. The agreement can be express or can be implied
for example, when appearing before the Court parties do not refer to
the otherwise applicable law and base their claim on the lex fori. The
utility of general rules of conflict of laws like Rome II Regulations
lies in providing for member States which are not parties to the civil
liability conventions, also when they are parties in respect of damages
not covered by the material scope of the conventions, or when the
conventions do not have conflict of laws rules and even when they do
have them if they refer back to the private international law rules of
the forum.

5.11 Emerging Uniform Trends

In the USA the CERCLA focuses on the release of substances
with ensuing contamination as the trigger for remediation action so

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94 Rome II Regulation, Article 4 (general rule), Article 5 (product liability), Article 6
(competition), Article 7 (environmental damage), Article 8 (Intellectual Property
infringements), Article 9 (industrial action); (EC) No. 864/2007.
96 However, materially, acta iuri imperii Article 1(1)) and nuclear damage are excluded
98 Supra note 74.
that the relevant connecting factor is the place where that happens rather than the place where the operator initially emitted the substances. There is a clear parallel here with EU civil jurisdiction law under which ‘place of the harmful event’ has been construed, in situations where the impact of the damaging actions are felt in a different state than where the operator had acted, to cover both places with courts having jurisdiction.\textsuperscript{99} The CERCLA itself provides the choice between the two possible places for triggering liability thereby facilitating the Court of Appeals in reaching an acceptable decision. In the \textit{Trail Smelter II} case,\textsuperscript{100} the United States is arguing that it is the appropriate forum in which to adjudicate transboundary harms emanating from Canada and that domestic US law and standards are the appropriate choice of law.

In the European Union, the choice of forum and choice of law questions were addressed in \textit{Handelskwekerij G.J. Bier B.V. and Another v. Mines de Potasse D'Alsace S.A.}\textsuperscript{101} At issue were chloride emissions from a French mining company into the Rhine river. These emissions affected downstream water quality for a Dutch nursery company that used the water to irrigate its seedbeds. In bringing a tort action in District Court in the Netherlands, issues of jurisdiction arose. The defendant argued that the Dutch Court did not have jurisdiction because of a treaty that affects the adjudication of transboundary disputes. The district Court agreed and refused to hear the case. The plaintiffs appealed and because of the jurisdictional issues involved, the Appellate Court in the Hague asked for clarification of the treaty from the European Court of Justice whose job it is to ensure uniform interpretations of European Union law. The European Court ruled that the key phrase at issue: “where the harmful event occurs”, means either where the tort occurred (France) or where

\textsuperscript{99} Supra note 74.
\textsuperscript{100} Supra note 83.
\textsuperscript{101} Case 21/76 (1976), II ECJ Reports 1735.
the damages occur (The Netherlands). This decision resulted in the plaintiff acquiring the right to choose the forum in which an action could be brought and also the law that is to be applied in the case.\textsuperscript{102}

The inclination of states towards private actors being made liable for transboundary pollution and environmental damage for activities or incidents taking place in their jurisdiction and control puts the onus on them to review and reform national laws including their private international laws to make transnational environmental litigation feasible and provides prompt and adequate compensation for environmental remediation and restoration.

5.12 Liability of Multinational Corporations for Transboundary Environmental Harm

Most frequently a corporation engaged in multinational activities will operate in various countries through local subsidiaries incorporated there. Those subsidiaries engaged in dangerous or hazardous activities are clearly primarily responsible for the act or default. This section is not referring to liability of corporations for the acts or omission of its employees or for transactions conducted through branch offices which form part of the corporate entity itself. In that case we are dealing with acts of the corporation itself. Most of the issues of transnational litigation have already been discussed. But there are three good reasons to sue the parent rather than the

\textsuperscript{102} On analyses of the two models of the US and European solutions to transboundary disputes as they apply to choice of forum and choice of law; one view put forward is that ‘if negligence is the basis for liability determination, then it is possible to implement the socially optimal outcome only when liability for the transboundary portion of environmental damages is adjudicated using the law and standards of the jurisdiction in which the transboundary harm occurs. Alternatively, if an action brought in a foreign jurisdiction, is adjudicated according to domestic standards, then a socially suboptimal outcome will occur. This means that our results lend theoretical support to the United States stance regarding the extraterritorial application of domestic law in the Trail Smelter case. Our results also suggest that the European Union’s important decision in Bier is incorrect since it allows a choice in determining which jurisdiction’s law will be used in transboundary harm issues. ’Andrew Eckert, R. Todd Smith and Henry Van Egteren , Environmental liability in Transboundary Harms: Law and Forum Choice , Journal of Law, Economics & Organization, (2008).
subsidiary. First the subsidiary has limited assets and offers little scope for recovery and secondly where the risk of liability is high, such as in the United States, foreign corporations will seek to limit their exposure by operating through local subsidiaries in another state with very few local assets. Thirdly, local law and practice, particularly in developing countries, is far less favourable to plaintiffs, both as regards the substantive law of liability and the quantum of damages recoverable, than the law and practice which prevails at the seat of the parent corporation.

There are several ways of affixing direct liability on the parent corporation. Treating the parent and its subsidiaries as one entity whereby the act of one part is the act of the whole has been a method attributing liability to the parent corporation.\(^{103}\) Alternatively the forum may expand the traditional notion of agency and treating the subsidiary which fulfils the commercial purposes of, and operates at the direction of, the parent corporation as its agent while in other respects respecting its separate existence.\(^{104}\) The ILA report suggests one more method i.e. by affixing a direct liability on the parent, such as a failure to comply with a duty of care to the plaintiff by not exercising a proper control over the activities of the subsidiary.\(^{105}\) There seems to be acceptability of the principle of separate corporate legal personality being questioned, at least as between parent corporation and wholly owned subsidiary in transboundary environmental cases. The question of whether there is any direct duty of care on behalf of the parent corporation is also a concept in its transition stage. At best it may hold some ground again in case of a wholly owned subsidiary. Generally the jurisdiction lies with the court...


\(^{104}\) *Ibid.*

\(^{105}\) *Ibid.*
of the place of domicile/habitual residence of the defendant and the courts of the place of the harmful event (forum delicti). But the issue takes a turn when such jurisdiction is treated as discretionary as in common law. As a matter of progressive development, the courts need to interpret the notion of “civil and commercial matters” so as to include civil law claims by public authorities for the protection of the environment. For the choice of law the party autonomy rule, which has found favour in most states, would help getting redress for transboundary environmental harm. The law on liability of multinational corporations needs to develop both in international law and national laws.

106 Ibid.